Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)))))	MB Docket No. 05-311

REPLY COMMENTS
OF THE
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION

The National Telecommunications Cooperative Association (NTCA)[1] submits these reply comments in response to the initial comments filed on February 13, 2006, as part of the Federal Communications Commission's (Commission or FCC) Notice of Proposed Rulemaking (NPRM) soliciting comment on how it should implement Section 621(a)(1) of the Communications Act of 1934 as amended.[2] NTCA renews its position that the Commission should issue guidelines that local franchising authorities (LFAs) can follow to implement Section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises.[3] NTCA supports additional suggestions offered by several commenters who advocate: 1) prohibiting build-out requirements for second entrants;

[1] NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents more than 560 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service incumbent local exchange carriers (ILECs) and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA's members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

[2] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1934 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* Notice of Proposed Rulemaking, MB Docket No. 05- 311, FCC 05-189 (rel. Nov. 18, 2005).

[3] NTCA Comment, pp. 1, 3.

2) limiting franchise decision times to no more than 90 days; 3) prohibiting non-franchise fees not related to video services; 4) rejecting cable franchise requirements for telecommunications carriers who already have access to the public right of ways; and 5) prohibiting LFAs from requiring cable franchise agreement before network upgrades occur.[4] NTCA reiterates that these guidelines should apply only to new entrant competitive LFA applications and should not apply to existing incumbent cable television (CATV) local franchise agreements.

I. INTRODUCTION

Several commenters in this proceeding have urged the Commission to issue regulations regarding implementation of Section 621(a)(1),[5] whereas NTCA recommends the Commission adopts guidelines towards the same purpose.[6] Whether by regulation or guideline, the Commission should clearly delineate its stance on whether certain LFA regulations would constitute unreasonable barriers to entry for new entrants such as NTCA's rural telco members who are attempting to bring video to their customers.

II. ARGUMENT

NTCA encourages the Commission to: 1) prohibit build-out requirements for competitive entrants; 2) limit the decision time on video franchise applications to no more than 90 days; 3) not allow LFAs to impose fees unrelated to the 5% franchise fee or to video services; 4) reject cable franchise requirements for telecommunications carriers

---

[4] NTCA silence on any positions raised by parties in this proceeding connotes neither agreement nor disagreement with their positions or proposals. Unless specifically stated below, NTCA reasserts its positions described in its February 13, 2006 initial comments filed in this docket.
[5] *See*, *e.g.*, Verizon Comment, pp. 27-79; AT&T Comment, pp. 43-73.
[6] NTCA Comment, p. 1.

who already have access to the public right of ways; and 5) prohibit LFAs from requiring cable franchise agreement before network upgrades occur.

A. No Build-Out Requirements For Competitive Entrants.

NTCA and other commenters agree that the Commission should not impose build-out requirements on new entrants seeking to compete in the video service markets.[7] The Commission correctly concluded that build-out requirements may be inappropriate because "areas served by [facility-based providers] frequently do not coincide perfectly with the areas under the jurisdiction of the relevant LFAs."[8] LFAs should refrain from requiring a telecommunications provider to build out and serve the entire cable franchise area if the provider's service territory does not include the entire LFA service area. AT&T has accurately portrayed build-out requirements for new entrants as the cable industry's "anticompetitive weapon" that unnecessarily inflates the up-front entry costs.[9] Many LFAs want to impose build-out requirements on new telco entrants but this approach, however, will keep some rural competitors out of rural video markets completely, thus defeating the Commission's goals of video competition.[10] Cavalier succinctly notes that a market-driven economic model will not support build-out requirements in a competitor's video franchise agreement where the new entrant does not need to dig up the public rights of way.[11] Similar to Cavalier's IPTV video product, rural telco providers will or are using their existing copper-based telecommunications

---

[7] NTCA Comment, pp. 6-9; AT&T Comment, p. 43; BellSouth Comment, pp. 30-36; Cavalier Comment, p. 4; Cincinnati Bell Comment, pp. 10-11; Qwest Comment, pp. 20-26; TIA Comment, pp. 9-12; USTA Comment, pp. 21-36; and Verizon Comment, pp. 39-53.
[8] NPRM ¶ 23.
[9] AT&T Comment, p. 44.
[10] NTCA Comment, p. 11; Verizon Comment, p. 40.
[11] Cavalier Comment, p. 4.

infrastructure to offer video, which precludes comprehensive build-out throughout the LFA service territory.[12] USTA compares cable and telco services and makes a valid argument in favor of eliminating build-out period requirements for video competitors and relying, instead, on market-based competition to drive the competitive service roll-out.[13] These carriers' views are persuasive, and the Commission should find that build-out franchise requirements for new entrants, especially in the rural areas where NTCA members are attempting to compete against incumbents, are unreasonable barriers to entry into the LFA's video market.

B. The Commission Should Limit The Decision Time On Video Franchise Applications To No More Than 90 Days.

NTCA and others agree that the Commission should restrict the length of time that LFAs have to decide on a video franchise application to no more than 90 days.[14] TIA proposes a 17-business-day period based on the Texas statewide franchise laws, which equates roughly to 23 calendar days,[15] AT&T and Cavalier suggest a 30-day franchising process for established wireline network operators,[16] and NTCA and BellSouth recommend a 90-day period, whereas Verizon suggests a four-month period.[17]

---

[12] Cavalier Comment, p. 5.
[13] USTA Comment, p. 21. "Cable operators are not subject to build-out requirements when they offer telecommunications or other voice communications services in competition with LECs; why shouldn't LECs be afforded the same treatment when they seek to compete with cable companies? In fact, cable operators seldom build out their own video networks to the same extent as LECs build out telecommunications networks (how many cable systems serve homes at densities of less than one or two homes per square mile?)." *Id.* at 22.
[14] NTCA Comment, pp. 9-12; AT&T Comment, pp. 74-79; BellSouth Comment, pp. 36-38; Cavalier Comment, p. 4; TIA Comment, pp. 8-9.
[15] TIA Comment, pp. 8-9.
[16] AT&T Comment, p. 74; Cavalier Comment, p. 4.
[17] NTCA Comment, p. 11; BellSouth Comment, pp. 36-38; Verizon Comment, p. 31. NTCA affirms its believe that 90 days is sufficient for an LFA to accept or reject a new entrant's competitive video franchise application, especially in rural areas.

Qwest and TIA encourage the Commission to deem a franchise agreement automatically granted if the LFA fails to act on a franchise application.[18]

Verizon accurately asserts that delays in acting on franchise applications "frustrate both the express terms and the purposes of Section 621(a)"[19] and should not be allowed. *City of Littleton v. Z-J Gifts D-4, LLC*, 541 U.S. 774, 782 (2004) (City of Littleton could not delay issuing permits within a reasonable period of time).[20] The Commission should also articulate that the negotiation time period limit begins to run when the competitor's video franchise application is initially filed. Otherwise the LFA could effectively delay the "clock" on the application review by repeatedly insisting that the application is incomplete or by not docketing it for review. These two clarifications – time limit on application review and clear delineation of when the time limit begins – will greatly assist the Commission in achieving the goals of competition and avoid unreasonable refusals in granting video franchise applications.

C. LFAs Should Not Be Allowed To Impose Fees Not Related To The Franchise Fee Or To Video Service.

Several commenters agreed with NTCA that the LFAs should not be permitted to require new entrants to pay fees that are not related to the provision of video services.[21] BellSouth advocated against the use by LFAs of a "Christmas wish list" approach where the LFA assess fees or in-kind requirements beyond those expressly authorized by the

[18] Qwest Comment, p. 27; USTA Comment, p. 46.
[19] Verizon Comment, p. 35.
[20] Verizon Comment, p. 35. Verizon supports this assertion by noting that more than half of its 300 current negotiations with municipalities for franchising have lasted more than six months, with some extending for more than one year. *Id.* at 31.
[21] NTCA Comment, pp. 13-14; BellSouth Comment, pp. 38-40; Cavalier Comment, p. 7; USTA Comment, pp. 42-51; and Verizon Comment, pp. 54-63.

Act.[22] BellSouth, USTA and Verizon join NTCA in suggesting that cable franchise fees be limited to five percent of the cable operator's gross revenues derived from operating the cable system to provide cable service.[23] LFA demands can "effectively tax new entrants to death,"[24] and this limitation will correctly restrict the LFAs from seeking excessive franchise and application fees. Cavalier also called for preemption of non-franchise fees, characterizing them as "largess" that providers and customers should not have to pay.[25] NTCA also noted several instances where the LFA sought thousands and tens of thousands of dollars in "application fees" that had no bearing on the franchise fee or provision of video service.[26] Montgomery County, Maryland, in a recent ex parte filed in this docket, admitted that it has charged four cable franchise applicants a total of over $400,000 and regularly assesses a $25,000 filing fee, regardless of the actual costs involved in the application process.[27] These types of non-franchise fees and franchise fees that exceed the statutorily capped 5% create a heavy, unreasonable burden for rural telco service providers who seek entry into the competitive video market. The Commission should restrict LFAs from imposing franchise fees that exceed the 5% cap.

[22] BellSouth Comment, p. 7.
[23] *Id.* at 38-42; USTA Comment, pp. 50-51; Verizon Comment, pp. 54-55.
[24] USTA Comment, p. 48.
[25] Cavalier Comment, p. 7.
[26] NTCA Comment, p. 14.
[27] Montgomery County, Maryland Reply Comment, filed Mar. 21, 2006, p. 3. The County asserts that these fees are refundable, but that does not eliminate the up-front cost burden a new entrant will experience in applying for a franchise agreement.

D. The Commission Should Reject Cable Franchise Requirements for Telecommunications Carriers Who Already Have Access To The Public Right Of Ways.

LFAs should grant competitive providers an exemption from a public rights of way review if the provider already has permission to access public rights of way.[28] Other commenters agree.[29] USTA, for example, contends that the Commission should require approval where the LEC entrant has pre-existing access to the rights of way.[30] South Slope Cooperative encourages the Commission to exempt any video service provider who agrees to provide video service over its own facilities "for which it already directly possesses, under applicable state laws or regulations, independent authority to use and occupy the public rights of way."[31] Cincinnati Bell agrees with NTCA that the Commission should preempt state franchising requirements where the LEC entrant already has access to rights of way.[32] Franchise requirements lose their basis in public policy (i.e., paying the LFA fair compensation for use of the public rights-of-way) where the LEC already retains rights to the public rights of way under a pre-exiting agreement with the LFA. The Commission should prohibit LFAs from requiring franchise agreements where the LEC already has access to the public rights of way.

E. LFAs Should Not Be Allowed To Require Cable Franchise Agreements Before Network Upgrades Occur.

NTCA agrees with those commenters who assert that the Commission should not allow LFAs to require new video entrants to first obtain a cable franchise agreement from

---

[28] NTCA Comment, p. 12.
[29] *See, e.g.,* BellSouth Comment, p. 46.
[30] USTA Comment, p. 41.
[31] South Slope Cooperative Comment, p. 13.
[32] Cincinnati Bell Comment, pp. 12-14; NTCA Comment, p. 12.

the LFA before upgrading their network to offer IPTV video services.[33] AT&T urged the Commission to prohibit LFA requirements that demanded broadband providers obtain a cable franchise even before upgrading their networks.[34] BellSouth sought clarification of the LFA's authority to require a cable franchise as a condition of enhancing its network, and Cincinnati Bell asserts that its IPTV service offering over existing DSL facilities is not subject to franchise requirements.[35] TIA urges the Commission to follow the Texas statewide franchising legislation, which limits LFA regulation.[36] The Commission should recognize that new entrants to the video market must upgrade their facilities and that requiring a cable franchise agreement prior to upgrade imposes an uneconomical and unreasonable barrier to entry, especially for rural telco providers.

III. CONCLUSION

For all the reasons set forth in NTCA's initial comments, the Commission should adopt the foregoing guidelines to assist the LFAs in avoiding unreasonable franchise agreement provisions.

Respectfully submitted,

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

By: /s/ Daniel Mitchell
Daniel Mitchell
Karlen Reed
Its Attorneys

4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
703 351-2000

[33] AT&T Comment, pp. 71-72; BellSouth Comment, p. 45; Cincinnati Bell Comment, p. 12.
[34] AT&T Comment, p. 71.
[35] Cincinnati Bell Comment, p. 5.
[36] TIA Comment, p. 13.

CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Reply Comments of the National Telecommunications Cooperative Association in MB Docket No. 05-311, FCC 05-189 was served on this 28th day of March 2006 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons.

/s/ Gail Malloy
Gail Malloy

Chairman Kevin J. Martin
Federal Communications Commission
445 12th Street, SW, Room 8-A201
Washington, D.C. 20554
Kevin.Martin@fcc.gov

Commissioner Deborah Taylor Tate
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, D.C. 20554
Deborah.Tate@fcc.gov

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, D.C. 20554
Michael.Copps@fcc.gov

Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554
Jonathan.Adelstein@fcc.gov

Best Copy and Printing, Inc.
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com

Michael E. Glover, Of Counsel
Edward Shakin, Esq.
William H. Johnson, Esq.
Verizon
1515 North Courthouse Road
Suite 500
Arlington, VA 22201

Henry Weissmann, Esq.
Aimee Feinberg, Esq.
Munger, Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071

Evan T. Leo, Esq.
Kellogg, Huber, Hansen,
Todd, Evans & Figel PLLC
1615 M Street NW, Suite 400
Washington, D.C. 20036

David W. Carpenter, Esq.
Sidley Austin LLP
One South Dearborn Street
Chicago, Illinois 60603

David L. Lawson, Esq.
David M. Levy, Esq.
James Young, Esq.
C. Frederick Beckner III, Esq.
Christopher T. Shenk, Esq.
Sidley Austin LLP
1501 K Street, NW
Washington, D.C. 20005

Jim Lamoureux, Esq.
Bruce R. Byrd, Esq.
Gary L. Phillips, Esq.
Paul K. Mancini, Esq.
AT&T Inc.
1401 Eye Street, NW
Suite 1100
Washington, D.C. 20005

John K. Shumate, Jr.
Cavalier Telephone, LLC
Cavalier IP TV, LLC
2134 West Laburnum Avenue
Richmond, VA 23227-4342

Christopher J. Wilson, Esq.
Ann Jouett Kinney, Esq.
Cincinnati Bell Inc.
201 East Fourth Street
Room 102-890
Cincinnati, OH 45202

Craig J. Brown, Esq.
Robert B. McKenna, Esq.
Tiffany W. Smink, Esq.
Qwest Communications International Inc.
607 14th Street, NW
Washington, D.C 20005

Grant E. Seiffert, Executive Vice President
Derek R. Khlopin, General Counsel
Law and Public Policy
Danielle M. Jafari, Manager
Regulatory and Government Affairs
Telecommunications Industry Association
2500 Wilson Boulevard Suite 300
Arlington, VA 22201

James W. Olson, Esq.
Indra Sehdev Chalk, Esq.
Jeffrey S. Lanning, Esq.
Robin E. Tuttle, Esq.
United States Telecom Association
607 14th Street, NW, Suite 400
Washington, D.C. 20005-2164

Richard M. Sbaratta, Esq.
J. Phillip Carver, Esq.
BellSouth Corporation
675 West Peachtree Street, NE
Suite 4300
Atlanta, GA 30375-0001

Bennett L. Ross
BellSouth Corporation
1133 21st Street, NE
Suite 900
Washington, D.C. 20036

Gerard Lavery Lederer, Esq.
Miller & Van Eaton, PLLC
1155 Connecticut Avenue, NW
Suite 1000
Washington, D.C. 20036

John C. Pietila, Esq.
Davis, Brown, Koehn, Shors & Roberts, P.C.
The Financial Center
666 Walnut Street, Suite 2500
Des Moines, IA 50309-3993