BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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 COMCAST CORPORATION

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Comcast Corporation ("Comcast") hereby responds to comments addressing the Commission's Notice of Proposed Rulemaking ("*Notice*") on cable franchising.[1]

I. INTRODUCTION AND SUMMARY

At the outset, it is essential to review what this proceeding is and is not about. It is not about whether the Bell companies and other incumbent telephone companies are allowed to become cable companies (they are, and have been since 1996). It is not about whether local governments are required to negotiate franchise agreements with the Bells or anyone else who wishes to provide cable service (they are, under a law passed in 1992). It is not about whether the local governments welcome additional video competition (they do, as many have shown through their actions in negotiating "additional competitive franchises," and as many more have testified in comments filed here).

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[1] *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*, Notice of Proposed Rulemaking, 20 FCC Rcd. 18581 (2005) ("*Notice*"). Given the volume of comments filed in this proceeding, Comcast uses shorthand references to the relevant commenting party. Also, the term "Bells" is used throughout, even though some other telephone companies (and their trade association) make essentially the same arguments as do AT&T, Verizon, BellSouth, and Qwest.

What this proceeding *is* about is yet another attempt by the Bells to circumvent the law and tilt the playing field in their favor. It is about limiting the powers of local governments in their negotiations with telephone companies over cable franchises. It is about preventing local governments from addressing precisely the kinds of issues they are best equipped to address, and the ones that Congress specifically requires them to address. Most particularly, it is about whether the Bells will be able, contrary to law and the public interest, to implement their explicit plan to pursue what they "high-value" customers while bypassing "low-value" ones.

* * * * *

Taken as a whole, the initial comments demonstrate that neither the facts nor the law support the efforts of the Bells to circumvent the local cable franchising process established by Congress. The comments provide overwhelming evidence that the Bells have no one to blame but themselves for their failure to progress further in entering the cable business. Hundreds of local franchising authorities ("LFAs") have declared that they welcome additional video competition. Virtually all of these LFAs either have worked cooperatively with the Bells to negotiate franchises or are willing to do so if only the Bells would ask.

For their part, the Bells have presented no credible evidence that the franchising process is causing unreasonable delays. The door has been open wide for the Bells to enter the cable business for more than a decade. Most Bells have delayed, for their own business reasons, walking through that door. And SBC (now AT&T) has shuttered video businesses that were fully authorized and operational in Michigan, Illinois, and Connecticut.

More recently, AT&T has been obstinately refusing to apply for cable franchises in states other than Texas, invoking a bogus argument that its planned cable service is not a cable service. In Texas, AT&T has refrained from asking for video franchises in many towns and cities where it could easily obtain them and has chosen -- for reasons known only to AT&T -- not to provide video services in the communities where it is already authorized to do so.

For its part, Verizon has been slow to seek cable franchises but it has been obtaining them at a rapid (and accelerating) pace. The Commission should disregard Verizon's allegations regarding unreasonable demands by LFAs since Verizon has refused to identify the LFAs whose conduct it is complaining about.

BellSouth and Qwest add nothing of consequence to the record. BellSouth dredges up ancient examples of franchise negotiations that occurred years ago. Qwest complains about arguments cable companies presented against its franchise proposals, but neglects to acknowledge that it has enjoyed enormous success in obtaining franchises on extremely favorable terms.

The Commission asked for “empirical data” and “concrete examples,” but it received nothing of the sort from the Bells. Bell claims and allegations are utterly bogus. The record is clear that there is no genuine problem that requires corrective action by the Commission.

At the same time, the record is clear that the Commission lacks authority to interfere in the franchising process, even if there were a problem that required corrective action. The negotiation of franchises is a responsibility that Congress entrusted to local governments, subject to judicial review in the case of an LFA's unreasonable refusal to grant an additional competitive franchise. Congress deliberately gave the Commission no role in the process. Any Commission action to usurp local government powers through preemptive actions would be ultra vires and can be expected to be swiftly reversed by a court of competent jurisdiction. This would do nothing to accelerate the Bells’ entry into the cable business, nor would it enhance the Commission’s credibility.

II. THE RECORD IN THIS PROCEEDING CLEARLY DEMONSTRATES THAT THE LOCAL FRANCHISING PROCESS IS WORKING, AND THE BELLS PROVIDE NO CREDIBLE EVIDENCE TO THE CONTRARY.

Over 250 LFAs answered the Commission's call for "empirical data" and "concrete examples" of how the local franchising process is working.[2] Their comments -- and those of cable commenters and others -- demonstrate that the local franchising process is indeed working well and is not a "barrier to entry" into the cable business. LFAs -- large and small, from all points of the compass -- say they welcome additional competition, and offer evidence to prove they are moving expeditiously on Bell company applications for cable franchises. Bell claims to the contrary are largely unsubstantiated, not credible, or stale.

To the extent that the Bells are encountering difficulties in entering the cable marketplace, they only have themselves to blame. Franchises are the product of negotiations, and it takes two to negotiate. Record evidence shows that the Bells, not the LFAs, are causing delays in the franchising process because of their intransigence in franchise negotiations or their failure to seek franchises in the first place. Furthermore, even in cases where the Bells have obtained franchises, it is taking them months to actually launch their cable services. And AT&T has the special distinction of attempting to bypass the local franchising process entirely *and* failing to launch its cable service beyond a small trial in San Antonio.

In addition, Bell complaints about LFA build-out requirements are unfounded. The Bells assert that build-out obligations will slow or derail their fiber deployments and thereby halt their entry into the cable business. These claims are without merit. The record shows that the Bells are building out their fiber networks and are obtaining franchises wherever they are seeking

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[2] *See Notice* ¶ 13.

them. The real problem that the Bells have with build-out, as a number of them readily admit, is that their objective is to target "high-value" customers in wealthier neighborhoods and communities, while denying the benefits of their fiber networks to other consumers.[3] There is a word for this practice: redlining. LFAs have the clear right under the Cable Act to prohibit such practices. To the extent the Commission finds it necessary to speak to this at all, its clear duty is to affirm the LFAs' ability to do so.

A. The Comments Demonstrate That LFAs Are Committed To Granting Franchises To New Entrants.

The record is clear that LFAs are committed to granting franchises to qualified applicants as expeditiously as possible. Not one of the over 250 LFAs that filed comments in this proceeding says that it is averse to granting franchises to qualified applicants. In fact, quite the opposite is true. The vast majority of LFAs expressly state their interest in granting second, third, and fourth franchises. For example, the San Mateo County Telecommunications Authority in California describes its efforts in working with RCN to grant RCN a competitive franchise, as well as its rebuffed attempts to enter into franchise negotiations with AT&T to bring its citizens "competitive cable TV services beyond those provided to date by RCN" and Comcast.[4] Likewise, the City of Chicago notes that the City "currently enjoys the cable services of Comcast, RCN Cable and Wide Open West [ ] and looks forward to the entry of additional

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[3] *See, e.g.*, AT&T at 56 (noting that AT&T "intends to seek high value customers wherever they are"); USTA at 36 ("Of course, firms in competitive markets always go after the most profitable customers first . . .").

[4] AT&T (and SBC before it became AT&T) has continually rebuffed the Authority's efforts, first telling the Authority that then-SBC was "not interested" in a franchise, then taking nearly a full year to respond to attempts to contact them. San Mateo County Telecommunications Authority (California) at 8-9.

providers."[5] LFAs in other large cities, such as New York City,[6] Los Angeles,[7] Philadelphia,[8] Boston,[9] and San Jose,[10] also expressly affirm their interest in bringing more competition in cable services to the citizens in their communities. LFAs from many other jurisdictions echo these sentiments.[11]

LFAs also underscore their commitment to negotiate franchises in an expeditious manner. To cite just a few examples:

- San Marcos, California: "[t]he Commission can be assured that when AT&T, or any other competitor, submits an application for a franchise agreement, it will be processed as expeditiously as possible."[12]

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5 Chicago (Illinois) at 2.

6 *See* New York City (New York) at 1 ("The City looks forward to greater competition in the multichannel video programming distributor ('MVPD') market.").

7 *See* Los Angeles (California) at 2 ("As Mayor, I firmly support the development of technology and cable competition which may result in less expensive and more accessible services to our residents.").

8 *See* Philadelphia (Pennsylvania) at 9 ("We welcome the opportunity to work with others who may be interested in expanding the range of video services available to our residents.").

9 *See* Boston (Massachusetts) at 2-3 (discussing ongoing contacts with Verizon, and the city's hope that Verizon will enter into formal negotiations for a franchise).

10 *See* San Jose (California) at 1 ("[T]he staff of the City of San Jose stands ready and willing to reasonably and expeditiously negotiate and present to the City Council of the City of San Jose the required local franchise, if requested by a new entrants, for the use of the City's streets in the provision of video services.").

11 *See, e.g.*, Santee (California) at 2 ("Santee's citizens deserve the benefits of competition, and the City has a strong incentive to respond to their needs."); St. Petersburg (Florida) at 1 ("The City of St. Petersburg has historically encouraged competition between and among cable service providers. Our City has never refused to award a cable franchise, nor have we ever been accused of taking such an unreasonable time to negotiate a franchise that we have effectively refused to award a franchise."); Solana Beach (California) at 2 ("Our Community supports and welcomes telecommunications competition. Solana Beach would be willing to work with AT&T to develop a franchise agreement for its proposed television services, pursuant to our current Municipal Code."); Imperial Beach (California) at 2 (same); Glenview (Illinois) at 4 ("Our Village is committed to the provision of competitive cable television to its residents . . . "); Charlotte-Mecklenburg Office of Cable and Franchise Management (North Carolina), at 12 ("The City of Charlotte and Mecklenburg County welcomes cable television competition throughout the community.").

12 San Marcos (California) at 2-3.

- Clinton, Michigan: when Ameritech applied for a franchise, the process of negotiation and granting the franchise took less than 90 days.[13] But when SBC (now AT&T) bought Ameritech, it decided to get out of the video business, and sold the Clinton franchise to WideOpenWest, which is currently providing service.[14]

- Sacramento, California: the local cable ordinance requires that applications for cable franchises be reviewed and the franchise granted within 45 days of request, so long as the applicant meets some simple requirements.[15]

- Lincoln, California: when the city was approached by Surewest Communications in December of 2003, it took merely 3 months to conclude the negotiations over the terms of the franchise.[16]

- San Jose, California: when Pacific Bell approached the city in 1996 for a franchise, the franchise was granted "in the matter of a few months."[17] Pacific Bell began to build-out its network, but, shortly after being acquired by SBC (now AT&T), shut down its cable operations.[18]

Furthermore, the record shows that, in the comparatively small number of place where the Bells have applied for franchises in the past two years, they have obtained timely approvals. The statistics provided by the National Cable & Telecommunications Association ("NCTA") show that multiple communities are routinely negotiating franchises with Verizon to a successful conclusion within no more than six months -- and often far less -- from application to grant.[19] For example, in Fairfax County, Virginia, county officials and Verizon were able to negotiate a

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13 Clinton (Michigan) at 5.

14 *Id.* at 5.

15 Sacramento Metropolitan Cable Television Commission (California) at 4.

16 Lincoln (California) at 1.

17 San Jose at 2.

18 *See id.*

19 *See* NCTA at 9-10.

franchise in a mere seven weeks, easily meeting their mutually-agreed-upon target date of October 1, 2005.[20] Furthermore, since filing its original comments Verizon has announced that it has secured six more franchise agreements.[21] Qwest's complaints about the length and delay in the franchising process also ring hollow after a thorough examination of the facts: in Salt Lake City, for example, Qwest was able to secure a franchise, on extraordinarily favorable terms, in less than three months.[22]

B. The Bells Provide No Credible Marketplace Evidence That Local Governments Are Unreasonably Preventing Them From Providing Cable Services.

The *Notice* directed commenters to provide "empirical data" and "concrete examples" regarding the current franchising process. The LFAs have provided that evidence; the Bells and their supporters, in contrast, have not. AT&T has gone so far as to argue that the Commission does not even need evidence that there is a problem with the franchising process to adopt rules in this proceeding. What little "evidence" the Bells can muster for their case amounts to nothing more than unsubstantiated or decade-old claims.

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20 Verizon surely could have acquired a franchise even earlier than it did. After initially approaching Fairfax County officials in August 2004, Verizon officials apparently spent the better part of the next six months lobbying at the Virginia General Assembly for changes in state franchising laws instead of negotiating a franchise with the County. Only after Verizon finally decided to try to negotiate a franchise did the process speed up. *See* Fairfax County (Virginia) at 4-5. Plus, Verizon could have begun this process in 2000, or 1996, and been providing cable service for years by now.

21 *See Another Mass. Town OKs Verizon*, Multichannel News, March 21, 2006, *available at* http://www.multichannel.com/article/CA6317615.html?display=Breaking+News; *Consumers in Three Delaware Communities Are One Step Closer to Cable TV Choice*, Verizon Press Release, March 14, 2006, *available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93308; *Schwenksville Consumers One Step Closer to Real Choice for Cable TV*, Verizon Press Release, March 10, 2006, *available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93303; *Verizon Obtains Franchise From Chester County Municipality, Opening the Door for Cable Competition, Consumer Choice and Value*, Verizon News Release, March 8, 2006, *available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93300.

22 *See* Salt Lake City (Utah) at 9.

In a vivid demonstration of AT&T's scorn for reality-based policymaking, AT&T makes the remarkable assertion that the case for Commission rules in this area "does not rest on evidence that many LFAs have in the past imposed anticompetitive barriers to entry and failed to allow competitive entry as quickly and effectively as possible or on predictions that LFAs will intentionally abuse the franchising process in the future."[23] Stated another way, the Commission need not act on the basis of facts, or even informed predictive judgments, but should instead act on the basis of AT&T's self-interested and unsupported assertions. Such an approach, of course, would be completely contrary to the Administrative Procedure Act, as commenters have already noted.[24] AT&T's statement is unsurprising, however, since it has made no effort to obtain local cable franchises[25] and has repeatedly rebuffed or sued LFAs that have attempted to negotiate franchises.[26]

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23 AT&T at 2.

24 "If the record reveals that the Commission 'failed to consider an important aspect of the problem or has offered an explanation for its decision that runs counter to the evidence before [it],' the Court must find the Commission in violation of the Administrative Procedures Act ('APA')." Public Cable Television Authority, et al. (California) at 4 (citing *California v. FCC*, 905 F.2d 1217, 1230 (9th Cir. 1990)). In addition, when an administrative agency, such as the Commission, reverses prior long-standing practice (for example, by imposing Commission rules on a process that heretofore has been administered entirely by local governments under congressional guidelines and with judicial, but not Commission, review), the agency must provide a clear, well-founded, and reasonable analysis indicating that prior policies and standards are being deliberately changed and not casually ignored. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43-44 (1983); *People of California v. FCC*, 39 F.3d 919, 925 (9th Cir. 1994).

25 AT&T has negotiated agreements to provide cable service in a handful of communities provided the communities are willing to engage in the pretense that what AT&T will be offering is not cable service. *See AT&T Gets Anaheim Video Deal*, Telco Media News (Mar. 13, 2006) (noting that AT&T has obtained approvals in Anaheim and San Ramon in California, Sparks, Nevada, and San Antonio, Texas). For example, the agreement AT&T negotiated in San Ramon is styled as a "Public Benefits Agreement" even though it includes all the basic elements of a standard cable franchise agreement. *See Public Benefits Agreement between AT&T California and City of San Ramon, California* (Mar. 15, 2006) ("*San Ramon Agreement*") (including franchise fee, PEG, customer service, and other standard cable franchise requirements).

26 *See*, *e.g.*, Walnut Creek (California) at 2 ("The City sent AT&T the Seren franchise agreement and offered to enter into the identical agreement with AT&T, giving AT&T entry into the market virtually overnight . . . AT&T

(footnote continued…)

Furthermore, AT&T continues to insist that it is not subject to local franchising because its service is not a "cable service."[27] As Comcast demonstrated in its initial comments -- and NCTA has shown in filings in the Commission's *IP-Enabled Services* rulemaking -- AT&T's claims are frivolous.[28] The video service AT&T plans to deploy will look *exactly* like digital cable service.[29] The essence of AT&T's legal claim, therefore, is that its use of "switched video" magically transforms its service from cable service to some other as-yet-undefined service. There a few points worth making about switched video which undermine this claim:

- First, the customer's experience will be the same, regardless of whether video is tuned in the TV, set-top box, or headend. When the customer presses channel 7 on the remote, the customer gets channel 7.[30]

- Second, this type of functionality already fits squarely within the definition of "cable service," which since passage of the original Cable Act in 1984 has always included "subscriber interaction . . . required for the selection" of video

(…footnote continued)

indicated it was unwilling to comply with build out requirements, despite the fact that its existing system served the entire city. Instead, AT&T sued the City in federal court and has threatened to sue other cities in the area.").

27 *See* AT&T at 3. *See also* Cincinnati Bell at 4-9.

28 *See* Comcast at 20-21; NCTA *Ex Parte*, filed in WC Dkt. No. 04-36 (Sept. 9, 2005); NCTA *Ex Parte*, filed in WC Dkt. No. 04-36 (Nov. 1, 2005).

29 Both services include a mix of linear and on-demand content as well as certain interactive applications, such as electronic program guides and interactive TV services.

30 The Commission has made plain that this is *the* critical inquiry with respect to regulatory classifications. *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report & Order and NPRM, 20 FCC Rcd. 14853 ¶ 16 (2005) (stating, with respect to classification of wireline broadband Internet access, "what matters is the finished product made available through a service rather than the facilities used to provide it"); *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and NPRM, 17 FCC Rcd. 4798 ¶ 38 (2002) ("[W]e conclude that the classification of cable modem service turns on the nature of the functions that the end user is offered."); *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501 ¶ 75 (1998) (noting, with respect to classification of Internet access service, "[i]t is useful to examine specific Internet applications . . . in order to understand the nature of the functionality that an Internet access provider offers"). If the customer experience is the same, there is no credible basis for the Commission to treat the services differently.

programming even if it is otherwise transmitted to subscribers on a "one-way" basis.[31]

- Third, switched video is already used by cable operators today to deliver video content to customers.[32]
- Fourth, at its core, AT&T's argument is that it can avoid franchising and other cable laws by providing "interactive on-demand services," but this statutory exception is plainly inapplicable, by its terms, to any services that include "video programming prescheduled by the programming provider."[33]

The simple fact is that the product AT&T is developing is a cable service that must be regulated (or deregulated) like a cable service, which means AT&T cannot evade the statutory requirement to acquire franchises before it can offer the service to customers.

Those Bells that have actually sought cable franchises provide no concrete examples of unreasonable LFA activity. For example, Verizon continues its practice of alluding to purportedly unreasonable demands during franchise negotiations with *unnamed* LFAs in *unnamed* communities. Only Verizon knows which is the "one community in Virginia"[34] or the "one county in Florida"[35] or the "one community in California"[36] or the "one Texas

[31] *See* 47 U.S.C. § 522(6)(B). The legislative history accompanying the 1984 Cable Act also makes clear that "simple menu selection" would constitute "cable service." *See also* H.R. Rep. No. 98-934, at 43 (1984) (House Report accompanying the 1984 Cable Act).

[32] *See* Leslie Ellis, *A Guide To Debunking The IPTV Hype*, Multichannel News, Aug. 22, 2005 (noting that Time Warner, Cablevision, and Cox are all testing switched video in certain cable systems). Switched video is invariably used to deliver VOD content. It is beginning to be used by at least one cable operator also to deliver certain channels that have light viewership. *See* Matt Stump, *Time Warner Cable Is Switching Up*, Multichannel News, May 30, 2005 (detailing Time Warner's use of switched video in its Austin, Texas cable system).

[33] 47 U.S.C. § 522(12).

[34] Verizon at 31.

[35] *Id.* at 32.

[36] *Id.*

community"[37] or the "one town in Massachusetts."[38] Verizon's refusal to name names ensures -- and probably deliberately so -- that there is no way to test the veracity of its claims.

Of course, AT&T has no stories of its own to tell. Instead, it tries to tell the stories of *other* cable operators that have allegedly experienced difficulties with LFAs. First, AT&T attempts to cast a cloud on RCN's experiences obtaining franchises. The only problem with this approach is that *RCN filed comments supporting the current franchising process, and AT&T's characterizations are "inconsistent with RCN's experience."*[39] Next, AT&T trots out examples of alleged LFA abuse from the mid-1990s. These accounts do not involve AT&T either, but rather Ameritech. And, even with these stale examples, AT&T follows Verizon's lead in refusing to actually name which communities performed the allegedly "unreasonable" acts.[40] Even these allegations, however, cannot hide the uncomfortable (for AT&T) fact that Ameritech obtained over 100 cable franchises in a relatively short period of time *before AT&T (then SBC) sold them off.*[41]

BellSouth provides the Commission with similarly immaterial and flimsy complaints about the local franchising process. The examples that BellSouth brings up not only are nearly

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37 *Id.* at 41.

38 *Id.* at 57.

39 *See* RCN at 3 (opposing changes in the current franchising process); RCN *Ex Parte*, filed in MB Dkt. No. 05-311, at 1 (Mar. 3, 2006) ("[The Bells] have told the FCC in comments filed on February 13, 2006, that local franchising authorities are imposing significant impediments to [their] ability to construct and operate [their] proposed cable television networks. This is inconsistent with RCN's experience, but, in addition, . . . it is also inconsistent with what Verizon's management is telling Wall Street.").

40 In the course of one paragraph, AT&T refers to "many local franchise authorities" and "[a] number of communities" and "one city" and "another city" twice and "two LFAs" without giving the Commission any means at all of actually being able to substantiate these allegations. *See* AT&T at 24.

41 *See In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd. 978 ¶ 123 (2000).

10 years old and completely irrelevant in light of the recent success of other Bells in acquiring franchises, but also consist primarily of instances in which BellSouth *was able to acquire franchises.*[42] Indeed, the chief complaint that BellSouth seems to have with the local franchising process is that the LFAs must follow the law and respect the legal and contractual rights of other franchisees.[43] Regardless, it is difficult to understand how BellSouth could possibly have a problem with LFAs since the LFAs bent over backwards to give BellSouth the favorable franchising terms they wanted.[44]

In sum, the Bells simply do not provide the "empirical evidence" and "concrete examples" that the Commission has correctly insisted upon and which would be necessary to justify the sweeping Commission action they seek in this proceeding.

C. The Record Also Shows That Any Delays In The Franchising Process Are The Result Of Bell Intransigence Or Inaction.

While the Bells have been unable to marshal any concrete, or even credible, examples of unreasonable LFA actions or delays, the comments submitted by LFAs contain numerous examples of Bell conduct that resulted in prolonged negotiations, or no negotiations at all.

As an initial matter, the Bells cannot complain about the franchising process if they are not applying for franchises. Indeed, the great majority of LFAs filing comments note that they

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42 *See* BellSouth at 14.

43 For example, BellSouth criticizes the other DeKalb County, Georgia, franchisees because they wanted the LFA to ensure that the MMDS/cable cross-ownership prohibition was not being violated, and for asking the LFA to ensure that the franchise granted to BellSouth was no less burdensome or more favorable than the ones granted to the other franchisees. *Id.* at 14. Likewise, BellSouth complains about the passage of the 1996 Telecommunications Act, noting that it had already built out infrastructure to provide video dial-tone service, and that the passage of the 1996 Act somehow required BellSouth to accede to "onerous franchise terms" with DeKalb County. *Id.* at 15.

44 For example, in both Miami-Dade County and St. John's County, Florida, BellSouth notes that the LFAs had the local cable ordinance amended to allow for BellSouth to get a franchise on BellSouth's terms. *Id.* at 12-13, 16-17.

have never been approached by a Bell company.[45] The record indicates that AT&T, for one, has never applied for a local cable franchise; BellSouth has not applied for a franchise in a decade; and Qwest has only applied for a handful of franchises in recent years.[46] And even in instances where the LFAs have reached out to Bells to encourage them to apply for franchises, the Bells have been unresponsive or hostile. The record is replete with examples of LFAs proactively seeking out AT&T about a franchise, only to be ignored or rebuffed.[47] Clearly, AT&T cannot complain of having problems obtaining franchises while it continues to refuse to actually apply for them.

In addition, the record also demonstrates that it is the Bells, and not the LFAs, that are causing "extensive delays in the [franchising] process."[48] The contrast in negotiating tactics could not be more stark. Many LFAs indicate their willingness to work out mutually-agreeable

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[45] Not a single LFA in North Carolina, Tennessee, and South Carolina, among others, indicated that it had been approached for a franchise by a Bell company.

[46] And in those communities where BellSouth and Qwest obtained cable franchises in the mid-1990s, they have apparently made very little effort to provide cable service broadly in franchised communities. For example, 10 years after getting a franchise in Miami-Dade, BellSouth has a paltry 6,000 subscribers and passes less than 50,000 homes. This hardly indicates a serious interest in aggressively entering the cable business. Miami-Dade County (Florida) at 2. *See also* BellSouth at 4 (noting that BellSouth is currently only "investigating the feasibility of offering video services" using its broadband facilities); John H. Higgins, *Phonezilla!*, Broad. & Cable, Mar. 13, 2006 ("Just a week before cutting the [AT&T] deal, BellSouth Executive VP/CFO Pat Shannon told investors that the telco is actively upgrading its phone network to deliver faster data and voice services. He doesn't see a way to justify the extra capital investment that video would require. 'The reason we are going slow was that we're still looking for the right business model,' he says.").

[47] *See* Lenexa (Kansas) at 4 (noting the Lenexa, KS, City Council actually passed an ordinance granting then-SBC a franchise to serve the town, but SBC failed to accept the franchise and so it expired); San Mateo County (California) at 8 (noting that LFA offered SBC a franchise, only to be told SBC was not interested); Redding (California) at 1 (noting that LFA took initiative to invite SBC to the negotiating table, but received no response); Livermore (California) at 1-2 (describing its attempts to negotiate a franchise with AT&T); Santa Clarita (California) at 1 ("Representatives of AT&T have made it clear to City officials that they are not willing to consider a traditional cable franchise agreement."); St. Charles (Missouri) at 7 ("The option of awarding a cable franchise under our regulatory code, adapted to SBC's specific needs, which could have been done in two or three months, was summarily dismissed by SBC because it was a cable franchise.").

[48] Anne Arundel County et al. (Maryland) at 41.

franchise language to account for differences between operators. The Metropolitan Area Communications Commission ("MACC"), an intergovernmental association of Oregon communities, notes that "[w]e cannot expect Verizon to be exactly comparable to our incumbent cable operator, nor can [Verizon] expect the MACC service area to be exactly like Keller, Texas, Fairfax County, Virginia, or Hermosa Beach, Florida."[49] As noted in Comcast's initial comments, many LFAs have agreed to extraordinary (perhaps even unlawful) measures to accommodate the interests of Verizon and Qwest.[50]

The Bells, in contrast, have taken a bare-knuckles approach in franchising negotiations. As detailed by Manatee County, Florida, Verizon typically demands that the LFA agree to Verizon's proposed national "franchise template."[51] In Fairfax County, Verizon approached County officials with a "franchise template [that] contained provisions that were inconsistent with federal law, state law, and the County's responsibility to ensure the health, safety, and welfare of its citizens."[52] And any LFA that actually tries to "negotiate" in good faith with the Bells is typically met with delaying tactics -- including everything from cutting off discussions altogether[53] to insisting that "even the smallest changes from the company's cookie-cutter Model

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49 Metropolitan Area Communications Commission (Oregon) at 14.

50 *See* Comcast at 23-24 (noting build out requirements for certain franchises involving Verizon and Qwest).

51 *See* Manatee County (Florida) at 6.

52 Fairfax County (Virginia) at 7.

53 This has occurred in Norfolk, Virginia, and in Fairfax County, Virginia. *See* Norfolk (Virginia) at 19; Fairfax County (Virginia) at 7. This is also a tactic that AT&T uses whenever an LFA suggests that AT&T actually has to acquire a cable franchise to offer cable service. *See, e.g.*, Walnut Creek (California) at 2.

Franchise Agreement" are cleared with a cadre of company officials who are completely detached from the negotiation.[54]

Bell arguments that the process is too slow or cumbersome are also undercut by the fact that they have provided no evidence that they can deploy their cable services any faster than they are now obtaining franchises. In fact, the record illustrates that LFAs are approving franchises well in advance of Bell deployment plans in particular franchise areas.[55] For example, in Murrieta, California, Verizon and the LFA began formal discussions for the franchise on February 17, 2005 and finalized an agreement less than seven months later, on September 6, 2005.[56] According to the Murrieta LFA, even though "Verizon viewed the negotiations as urgent, they have yet to begin marketing cable service six months after the franchise's approval."[57] Seven months after obtaining the franchise, Verizon has only recently announced that it will deploy the service in Murrieta.[58] Likewise, in Fairfax County, Verizon told County officials that they could not deploy the service until *October 1, 2005*, so County and Verizon officials worked to ensure that the franchise was granted by that date, which it was. Verizon did

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54 Anne Arundel County et al. (Maryland) at 41.

55 Verizon executives indicated in a recent earnings conference call with Wall Street analysts that Verizon fully expects to meet its FiOS TV deployment targets for this year. The clear implication is that Verizon is obtaining the franchises it needs at the pace it wants. *See* Q42005 Earnings Conference Call, Thomson StreetEvents, Conference Call Transcript at 5 (Jan. 26, 2006) (quoting Verizon CFO Doreen Toben as saying: "From a deployment standpoint, by the end of 2006, we expect to have passed a cumulative total of 6 million premises or about 20% of our households. Going forward, we expect to pass about 3 million per year."). Similarly, AT&T did not tell investors that its provision of video service was being delayed by local governments, a "material fact" that it would have been required to disclose if it were true.

56 Murrieta (California) at 1.

57 *Id.* at 2.

58 *See Verizon FiOS TV Now Available to 80,000 More Californians*, Verizon Press Release, Feb 28, 2006, *available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93278&PROACTIVE_ID=cecdc7c8c7c9cec7cec5cecfcfcfc5cecdcfcacfcfc6c8c6cdc5cf.

not actually announce that it was deploying the service until *November 2005*.[59] Even in Texas, where the Bells obtained the streamlined state-wide franchise process they were seeking and could start securing franchises in September 2005, AT&T has still *only deployed to a handful of homes in San Antonio*.[60]

Claims by the Bells that Comcast or other MSOs have lobbied to delay franchise approvals are misleading and irrelevant. Franchisees are well within their rights to insist that their legal and contractual rights are honored in the grant of another franchise, and the Bells would certainly act the same way if they were concerned that their legal or contractual rights were being violated.[61] When a potential franchise for one party raises legitimate questions about the legal and contractual rights of other franchised operators, it is perfectly reasonable for the incumbent operator to raise objections. This is exactly what happened in Howard County, Maryland, the only situation involving Comcast where any of the Bells found it worthwhile to actually provide some form of "evidence."[62] A few points about that situation are worth making:

- First, for all its complaints, the fact remains that Verizon obtained expeditious approval of its franchise agreement by the Howard County Council. A draft

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59 Fairfax County (Virginia) at 7.

60 Wall Street analysts agree that the Bells cannot provide service any faster than they are acquiring franchises. *See, e.g.*, The Evening Bridge, Mar. 15, 2006 (quoting Tom Eagan of Oppenheimer and Co. as saying: "We do not expect either AT&T or Verizon to significantly accelerate their triple play rollout due to the more favorable regulatory climate. We expect the rollout to be more driven by technical delays, financial considerations (such as increasing pressure on Verizon to buy out Vodafone's 45 percent stake in Verizon Wireless) and integration issues (AT&T buying BellSouth)"); Craig Moffett, Vice President and Senior Analyst, Sanford C. Bernstein and Co., LLC, Testimony before the Senate Commerce Committee, Subcommittee on Communications (Mar. 14, 2006) ("[B]y their own best estimates, [telcos will] be able to reach no more than 40% or so of American households with fiber over the next seven years.").

61 It is hypocritical for the Bells to wrap themselves in the First Amendment when complaining about the local franchising process, *see, e.g.*, Verizon at 16, while at the same time castigating incumbent operators for exercising those rights in the LFA review process.

62 *See* Verizon, Att. A, O'Connell Decl. ¶ 63.

agreement was submitted to the Council on November 23, 2005 and approved by the Council on January 3, 2006.[63]

- Second, Verizon completely mischaracterizes Comcast's involvement in the franchising review process. Contrary to Verizon's claims, Comcast did not become involved in the process at the "eleventh hour." Rather, Comcast participated in the review process from the very first hearing on the Verizon application in July 2005.[64]

- Third, Comcast made clear in its testimony to the Howard County Council that it did not oppose Verizon's application to provide cable service in Howard County. Furthermore, Comcast worked constructively with the Council in the review process, and the Council made a number of pro-consumer changes to the draft agreement based in part on recommendations from Comcast, such as requiring Verizon to start providing service by a date certain and requiring Verizon to include contact information on its bills to customers and designate a point-of-contact for all cable-related issues.[65]

- Fourth, the County Council approved a franchise agreement that includes numerous preferential terms for Verizon. For example, Verizon has very modest initial build-out obligations (only half of the county); has no duty to establish a local office in the County until it has 30,000 subscribers; and has broad access rights with respect to the PEG channels carried by Comcast.[66] Nothing that Comcast did during the County's deliberations in any way impeded Verizon's ability to obtain a very favorable agreement.

In contrast, when the Bells have observed regular procedures in the franchising process, the incumbent operators have raised no objections.[67] It is also important to remember that, regardless of how incumbent operators have lobbied on particular franchise applications, *the*

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63 *See* Declaration of Brian A. Lynch, Area Vice President & General Manager, Comcast Baltimore Metro Counties, ¶ 6, 11 ("Lynch Decl.") (attached hereto at Exhibit A).

64 *See id.* ¶ 4.

65 *See id.* ¶ 11.

66 *See id.* ¶ 12.

67 Fairfax County at 6 (noting that "the incumbent cable service providers, Cox and Comcast, both testified at the public hearing that the franchise meets the state level-playing field standard and that they welcomed the competition it would bring to Fairfax County").

Bells have been able to acquire franchises with favorable conditions, such as the sham build-out requirements Qwest was able to secure in Salt Lake City, or the amendment of the local cable ordinance BellSouth secured in Miami-Dade County.

D. Bell Claims That Local Governments' Authority To Establish And Enforce Reasonable Construction Timetables Is A "Barrier To Entry" Are Baseless.

The Commission was absolutely correct in its tentative conclusion that the LFAs have the right to establish and enforce reasonable construction timetables.[68] Despite that, the Bells continue to complain that build-out requirements are delaying or discouraging their entry into the cable business. As the record clearly demonstrates, however, Bell complaints are completely without merit as a matter of law, as a matter of policy, and as a matter of fact.[69]

Bell complaints about build-out might be more credible if they could point to situations where they did not get a franchise because of an LFA insisting on an unreasonable build-out requirement. *But their comments contain no proof of a single such instance.* Notwithstanding its protests about build-outs, the plain fact is that Verizon is agreeing to franchises that require them. Common-sense says that, if build-out was a deterrent, Verizon would not be agreeing to these franchises.[70] Likewise, BellSouth's complaints do not bear up under scrutiny. BellSouth

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68 *Notice* ¶ 20.

69 For more on the legal question, *see infra* Section III.B.2.

70 Of course, perhaps Verizon is not opposed to building out in the areas where it already has franchises because those franchise areas tend to be populated with "high-value" customers. As detailed in Comcast's comments in this proceeding, and in various other places, Verizon has shown a remarkable penchant for seeking franchises in areas that are predominately wealthy. *See* Comcast at 24 n. 81. *See also* CableFAX Daily at 2 (Mar. 22, 2006) (noting that Lynnfield, Massachusetts, which just granted Verizon a cable franchise, is one of Massachusetts' most affluent communities, boasting a median household income almost double the national average). Although Verizon has not been as candid as AT&T in divulging its discriminatory intent, one could reasonably infer that Verizon's real grievance with build-out is that an LFA with a more diverse population might actually require it to build-out to "low value" customers.

does argue that it was unable to pursue franchise agreements in Shelby County, Tennessee, and Coral Springs, Florida, but it provides no explanation or evidence as to why those LFAs' actions were unreasonable.[71]

Furthermore, as NATOA and others point out, LFAs almost always provide significant flexibility to new entrants in meeting build-out requirements. For example, LFAs typically do not require build-out in low-density areas and generally provide a significant period of years to complete the build-out.[72] Additionally, LFAs have always been willing to work with franchisees to ensure that the build-out is something that is both attainable *and* meets the needs of the community. For example, in St. Petersburg, Florida, the incumbent cable operator was given 28 months to build out the entire franchise area in three phases, whereas the competitive provider -- GTE (Verizon's predecessor) -- was allowed "to build out the franchise area in [seven] phases over 42 months."[73] BellSouth notes that, in both Miami-Dade County and St. John's County, Florida, the LFA amended the local cable ordinance that allowed BellSouth to acquire a

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[71] *See* BellSouth at 17-18. BellSouth may or may not have reason to think that the relevant legal guidelines did not require them to build out in either circumstance, but merely asserting that the LFAs' actions were unreasonable does not necessarily make them so, and certainly does not meet the Commission's stated desire for "empirical data" and "concrete examples."

[72] *See, e.g.*, NATOA at 33-34; Pikeville (Kentucky) at 2 (describing its franchise's "reasonable build schedule for cable operators"); Rosemount (Minnesota) at 5 (noting that the franchisee would "not be required to extend Service . . . unless there is a minimum of thirty (30) home per cable mile"); Kernersville (North Carolina) at 2 (noting that their franchise agreement requires the franchisee to "[b]uild to 20 homes per mile with a cost share provision should there be less than 20 homes per mile"); Springfield (Missouri) at 3 (noting that new build out requirements only attach "if the density of homes meets or exceeds 7.5 homes per quarter cable mile"); Norfolk (Virginia) at 8 (asserting that the build out requirements only attach to areas having "a density equivalent of seven (7) residential units per one-quarter (1/4) of cable mile of System").

[73] St. Petersburg (Florida) at 5.

franchise without *any* build-out.[74] In Montgomery County, Maryland, the LFA took account of RCN's limited supply of capital and adjusted the build-out timeframe accordingly.[75]

The Bells' claim that build-outs are uneconomic because franchise areas and Bell service areas do not overlap is a red herring.[76] As NATOA notes, the overlap issue has arisen in a very small number of cases,[77] and only one of the over 250 commenting LFAs noted that was a problem for its franchise area.[78] Additionally, as pointed out above, LFAs are willing to work with cable providers to develop a mutually acceptable build-out plan. The simple fact is that the limited number of situations where this is a problem does not justify the wholesale changes being proposed by the Bells. When and if the Bells abandon their sweeping attack on the franchising procedures that Congress has established, and agree to concentrate instead on focused, specific problems, there is no reason to believe that LFAs -- or the cable industry -- will not cooperate in developing mutually agreeable solutions.[79]

In addition, the Bells cannot credibly assert that their video deployment plans turn on whether or not the LFA requires build-out. As an initial matter, *Verizon is deploying FiOS TV pursuant to build-out requirements throughout the country*. Moreover, even assuming that a new

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[74] *See* BellSouth at 12-13, 16-17.

[75] *See* Anne Arundel County *et al.* (Maryland) at 12.

[76] *See, e.g.*, USTA at 33.

[77] *See* NATOA at 34 n.37.

[78] *See* Torrance (California) at 5.

[79] For example, there is no reason why an LFA that happens to be served by more than one Bell cannot work with the interested parties to segment the franchise in a way that will be acceptable to all the parties. *See, e.g.*, Testimony of Daniel L. Brenner, Senior Vice President, Law & Regulatory Policy, NCTA, at FCC Open Meeting in Keller, Texas (Feb. 10, 2006) (noting, with respect to West Los Angeles where the market is divided between Verizon and SBC, "it seems perfectly reasonable to not require SBC to go into Verizon's territory" when providing video service).

entrant might have a difficult time financing the build-out of a large franchise, the fact is that the *Bells are in no sense "new entrants" in the provision of networks*.[80] When the cable operators originally built their systems, they had no other revenue streams. Verizon, AT&T, BellSouth, and Qwest all have existing networks (as they are so keen to point out),[81] massive numbers of existing customer relationships, and immense revenues.[82] They still face little or no facilities-based competition in local telephony (although cable companies are working extremely hard to change that), and even the little competition that they do face usually has to *pay the Bell anyway* for special access, resale, or other use of Bell networks. If anybody has a right to argue about how "uneconomic" build-out may be, it is certainly not the Bells.

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80 The LFAs recognize this and, reasonably, take this into account: "What Verizon fails to mention is that they are already universal providers of telephony service under Title II in these very same communities. Therefore, they already have an infrastructure, as well as service and administrative support capable of meeting any perceived obstacle. This was something that the cable companies have had to build over the last 23 years in our City. Verizon has had 100 years." Boston (Massachusetts) at 3.

81 Verizon, for example, has taken the position in its franchise negotiations that it is merely providing cable service over legacy Title II telephone networks. *See, e.g.*, Lynch Decl. ¶ 9 (noting that Verizon's franchise agreement in Howard County, Maryland "defined 'cable system' to include only the bandwidth used to deliver cable service, but not the plant itself"); Montgomery County (Maryland) *Ex Parte*, filed in MB Dkt. No. 05-311 (Mar. 17, 2006) (noting the same definitional issue in negotiations with Verizon in Montgomery County, Maryland). Likewise, AT&T has insisted in franchising-related lawsuits it has brought against communities in California that it "is not building a new or separate network . . . but is merely upgrading or modifying its network" to deliver cable service. Complaint for Declaratory Judgment and Injunction; Petition for Writ of Mandamus ¶ 58, *Pacific Bell Tel. Co. v. City of Walnut Creek*, No. C-05-4723 (N.D. Cal. filed Nov. 17, 2005). *See also* Verified Petition for Writ of Mandamus; Complaint for Declaratory Judgment ¶ 41, *Pacific Bell Tel. Co. v. City of Lodi*, No. CV028523 (Cal. Super. Ct. (San Joaquin County) filed Feb. 3, 2006) ("AT&T's planned upgrades will not create a new network, but will merely increase the speed and efficiency of the communications network that AT&T has been operating within the City.").

82 The recent announcement by AT&T that it will be acquiring BellSouth underscores this point. The combined company, according to reports, will have over 250,000 employees, almost 70 million phone lines, over 30 million long-distance customers, revenues of almost $100 billion, and a market capitalization of almost $170 billion. In revenues and market capitalization, it will be bigger than the entire cable industry. For its part, Verizon has 217,000 employees, just under 50 million phone lines and almost 20 million long-distance customers, over $75 billion in revenues, and a market capitalization of just under $100 billion. "Telecom Titans", *Wall St. J. Online, available at* http://online.wsj.com/documents/info-attbell06.html (Mar. 6, 2006) (subscription required).

The record in this proceeding also makes abundantly clear that reasonable build-out requirements are critical to effective anti-redlining enforcement. *The Bells make no bones about their interest in serving "high-value" customers first*.[83] They talk about providing video services more generally over time, but insist that it be on their own timetable.[84] In short, in the absence of build-out requirements, there is absolutely no certainty that the Bells will deploy to low-income neighborhoods, particularly given their lackluster record on redlining issues in the telephone business.[85] Many LFAs, such as the LFA from St. Charles, Missouri, make this very point: "Without realistic local franchising authority the public interest, especially the interests of the economically disadvantaged, will be suppressed."[86]

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[83] *See, e.g.*, AT&T at 56; USTA at 36.

[84] AT&T's idea of "building out" service to lower value customers appears to entail signing those customers up for satellite service through AT&T's partnership with Dish Network. *See, e.g.*, *San Ramon Agreement* § 5(a) (stating that AT&T may "satisfy its nondiscrimination and service area obligations through the use of direct-to-home satellite service"). Hypocritically, while AT&T refuses to recognize that DBS is a substitutable or competitive product when making its case for special regulatory treatment, it demands that local governments deem those services competitive and substitutable for purposes of meeting "build-out" requirements.

[85] *See* Minority Media and Telecommunications Council et al. at 7 ("marketplace barriers still exist today. . . [and] . . . history has shown that these barriers will persist unless policy makers act to prevent redlining and other practices with the discriminatory effect of denying or diminishing the availability of service to [low-income and minority] groups."). AT&T time and again invokes this Administration's goal of promoting universal broadband deployment, *see* AT&T at 13, but fails to see the irony in its arguments. Enforcing build-out requirements, not eliminating them, is the best way to promote *universal* broadband deployment.

[86] *See, e.g.*, St. Charles (Missouri) at 6; Santee (California) at 2 ("it should be recognized that competition for the sake of competition does not supersede all other community values"). *See also* Karen Brown, *Civic Groups Protest FiOS TV Franchise*, Multichannel News, Mar. 27, 2006, *available at* http://www.multichannel.com/article/CA6318879.html (quoting Gil Bernardino, executive director of Circulo de la Hispanidad Inc., as saying with respect to Verizon's franchise application in Hempstead, New York: "Verizon's exclusive proposal will undoubtedly result in either selective or no service at all for members of our community . . . Verizon must offer equal service to every resident in the town of Hempstead. No one should be excluded based on their financial or geographic status.").

In addition, the Bells like to argue that, because new telco entrants do not have to commit to build-out throughout local communities, neither should new video entrants.[87] But such arguments are inapposite. Everywhere Comcast is offering digital voice service, it is deploying or will deploy the service throughout the service area (and this is happening over a matter of months, not years). Contrast this with the Bells, who are not even deploying new network upgrades, let alone video service, to their "low-value" customers.[88] Furthermore, when Comcast provides voice phone services, it has taken on the core social obligations that are associated with that business, including E-911, CALEA, and other requirements.[89] By the same token, when the Bells enter the cable business, they should expect to comply with the core social obligations that go with that business.

Finally, the Bells assert that build-out and other franchise-related requirements create a barrier to broadband deployment.[90] As Comcast and others detailed in their initial comments, there is simply no basis for the Bells' broadband-related claims.[91] There is also tremendous

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87 *See, e.g.*, USTA, at 22.

88 *See* NCTA Paper, "The Bell Monopolies Want a Special Break to Enter the Video Business" (Mar. 6, 2006), *available at* http://www.ncta.com/pdf_files/Bell_Myths_FINAL_03.06.06.pdf.

89 Cable companies do so even though the Commission has not provided much clarity regarding the regulatory classification or rights and responsibilities of VoIP services, whether provided by the Bells, cable companies, or others. *See* Comcast Reply, filed in WC Dkt. No. 04-36 (July 14, 2004) (citing years of delay in resolving these issues).

90 *See, e.g.*, AT&T at 39-40; Verizon at 27.

91 *See, e.g.*, Comcast at 33-36; NCTA at 26. A number of equipment suppliers to the Bells have also filed comments contending that the Bells will not deploy broadband facilities without franchising relief. *See, e.g.*, Telecommunications Industry Association at 14-15; Alcatel at 5-7; FTTH Council at 40-43. This is a familiar refrain from the Bells and their equipment vendors; they have been making -- and breaking -- similar promises for twenty years. They argued in the Commission's recent unbundling proceedings that further weakening of unbundling rules was the *sine qua non* to Bell fiber investment. *See, e.g.*, Alcatel Comments, filed in WC Dkt. No. 04-242 (July 22, 2004); Ad Hoc Telecom Manufacturer Coalition Comments, filed in WC Dkt. No. 04-242 (July 22, 2004); FTTH Council *Ex Parte*, filed in WC Dkt. No. 01-338 (Feb. 13, 2004); Telecommunications Industry

(footnote continued…)

irony in the Bells' attempts to portray themselves as the "saviors" to the "problem" of broadband deployment. They are the ones who had DSL technology but withheld it from the marketplace for a decade because of their desire not to undercut the artificially inflated prices for their "high-capacity" business services; the technology was introduced only when competitive pressures from high-speed *cable* Internet forced their hand.[92] They are the ones who sent their industry's chief technologist to testify before the Commission in 1997 that Bell-provided ISDN services -- operating at speeds of 128 or 150 *kilobits* per second -- were all that could reasonably be expected "particularly over the next five to ten years" and that these transmission speeds would be "adequate for most of the services people envision over the next five years." [93] In earlier

(…footnote continued)

Association *Ex Parte*, filed in CC Dkt. No. 01-338 (Nov. 25, 2002). The ink is barely dry on the Commission's orders granting those demands and the Bells and certain vendors are back making new demands for yet more regulatory concessions, all in the name of promoting the same broadband investment that was previously pledged in exchange for regulatory accommodations the Bells have already received. One would hope the Commission will remind the Bells and those vendors that they have already received regulatory relief again and again on the basis of the same promises and that further entreaties along the same lines simply lack any credibility.

92 "Although the ILECs have possessed DSL technology since the late [*sic*] 1980s, they did not offer the service, for concern that it would negatively impact their other lines of business. The deployment of cable modem service, however, spurred the ILECs to offer DSL or risk losing potential subscribers to cable. In various communities where cable modem service becomes available, the ILECs would soon deploy DSL service that was comparable in price and performance to the cable modem offering. Thus, prior to cable modem deployment, the ILECs had little incentive to deploy DSL and the consumer had no choice for high speed Internet access." Federal Communications Commission, Cable Service Bureau, *Broadband Today: A Staff Report to William E Kennard, Chairman, Federal Communications Commission, On Industry Monitoring Sessions Convened by the Cable Services Bureau* at 27, Oct. 13, 1999, *at* http://www.fcc.gov/Bureaus/Cable/Reports/broadbandtoday.pdf. *See also* Intelligent Network News, *Citizens Group Breaks ISDN Catch*, Apr. 15, 1992, *available at* LEXIS, News Library (describing the enormous cost of ISDN: "subscribers will have to shell out between $500 and $1,000 for the ISDN board that will go into their personal computers, in the neighborhood of $100 for a one-time ISDN installation charge…."); Jennifer Jones, *DSL In Distress*, Info World, Dec. 4, 2000, *available at* http://www.networkworld.com/net.worker/news/2000/1204distress.html (noting that it cost about $1,000 per month per line as late as the year 2000 to outfit an operation with T1 Internet access).

93 *See* Testimony of Stagg Newman, Vice President, Network Technology and Architecture, Applied Research, Bell Communications Research, Bandwidth Forum, Federal Communications Commission, Jan. 23, 1997, *at* http://www.fcc.gov/Reports/970123.txt ("ISDN I think has a real role, particularly over the next five to ten years. Because as you'll see later, getting a broadband mass network out there quickly is a tremendous challenge. And today almost all Internet services are much better over -- well, they're all better over ISDN than over POTS modem.

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days, they were the ones who labored to prevent telecommunications customers from using modems that increased data transmission rates (and reduced telephone bills).[94] On this issue, too, the Bells lack credibility.

III. THE COMMISSION LACKS STATUTORY AUTHORITY TO MODIFY THE LOCAL CABLE FRANCHISING PROCESS.

As the LFAs, cable commenters, and others demonstrated in the initial round of comments, the Commission does not have the authority to implement Section 621(a)(1). Bell claims to the contrary ignore the plain language of the statute and the accompanying legislative history. Furthermore, the Commission and court cases cited by the Bells and their allies do not support their claims of Commission jurisdiction here. None of those cases bears on the question of whether the Commission may enforce the provisions of Section 621(a)(1). In addition, claims by Verizon and others that LFA regulation of the local franchising process constitutes a prior restraint of their First Amendment rights are plainly wrong as a matter of law. The courts have not taken such a broad view of the First Amendment. Indeed, taken to its logical conclusion, the Bell view would mean that *any* governmental regulation of *any* aspect of the Bells' cable business -- from permitting of central office facilities to the construction of poles -- would potentially run afoul of the First Amendment.

(…footnote continued)

And actually at ISDN speeds of 150 [kbps]. That will be adequate for most of the services people envision over the next five years. Apparently that's the view when we talk to people like Microsoft and others…. I believe 128 [kbps] today would be a tremendous step forward and that's what ISDN gives us.").

[94] *See* Plaintiff's First Statement of Contentions and Proof at 411-424, *U.S. v. AT&T*, No. 74-1698 (D.D.C. Nov. 1, 1978).

A. Congress Unambiguously Gave The Courts, Not The Commission, Reviewing Authority Over LFA Franchising Decisions.

The entire predicate for the Bells' legal arguments is that there is some ambiguity in Section 621(a)(1) regarding the Commission's authority to regulate the local franchising process. The Bells themselves acknowledge that the statute does not expressly grant the Commission such rulemaking authority.[95] The best they can do in such circumstances is make a general *Chevron* argument that there are gaps to be filled in the statutory language (*i.e.*, what is the meaning of the phrase "unreasonably refuse") and that the Commission's general rulemaking authority under Title VI or other provisions of the Communications Act gives the Commission the authority to act.[96]

The chief defect with this line of argument is that *there is no ambiguity in the statute*. The *Chevron* question at issue is *not* the definitional one raised by the Bells. Rather, it is a procedural one: has Congress assigned responsibility for interpreting and enforcing Section 621(a)(1) to another governmental entity? The simple and straightforward answer is that it has. Any complaints about an LFA's failure to comply with the commands of Section 621(a)(1) are to be adjudicated in state or federal court pursuant to Section 635(a). There is no role for the Commission to play in this process.[97]

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[95] *See, e.g.*, AT&T at 35.

[96] *See, e.g.*, BellSouth at 57; USTA at 13.

[97] The Commission has always taken this view of Section 621(a)(1). It adopted no rules to implement these provisions of the 1992 Cable Act and, as NCTA has pointed out, considered them to be "self-effectuating" provisions of the Act. *See* NCTA at 23 & n. 50 (citing Commission's 1992 Public Notice on "Self-Effectuating Provisions of the Cable Television Consumer Protection and Competition Act of 1992").

As NATOA and other commenters point out, Congress made plain in the legislative history that it viewed the "unreasonably refuse" language and court review as being inextricably linked.[98] The amendments to Section 621(a)(1) and Section 635(a) were contained in the same provision of the 1992 Cable Act.[99] Section 7(a) of the Cable Act stated, first, that the LFA may not grant an exclusive franchise and may not "unreasonably refuse" to award a competitive franchise, and, second, that appeals of franchising decisions may be brought in *federal or state court* pursuant to Section 635. Section 7(b) of the Act then stated that Section 635(a) was amended to provide for judicial review of LFA decisions under Section 621(a)(1). The Bells provide no evidence that Congress intended a different result.[100]

The Bells point to a few Commission and court decisions in an attempt to support their claims of Commission jurisdiction. The cases cited, however, are irrelevant to the question of Commission authority to interpret and enforce Section 621(a)(1). Most of the cases deal with narrow definitional questions as to whether certain entities qualified as cable operators under the Communications Act. For example, the Commission's declaratory ruling in *ECI* and the related

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98 *See* NATOA at 7; NCTA at 22.

99 *See* NATOA at 6-7 (noting that the amendments to Section 621(a)(1) and Section 635(a) were both included in Section 7 of the 1992 Cable Act).

100 The Bells appear to make two basic arguments regarding the legislative history. First, the 1984 Act and subsequent legislation "defined and expanded" Commission rulemaking authority in this area predating the 1984 Act; and, second, that Commission rulemaking authority can be inferred from Congress' general interest in promoting competition in the MVPD marketplace. *See, e.g.*, AT&T at 33-37; BellSouth at 48-49. Both assertions are off the mark. With respect to the first claim, Congress made plain that it was working from a clean slate in adopting federal guidelines for cable regulation. As Comcast pointed out in its initial comments, Congress plainly viewed prior Commission activity in this area as a failure (indeed, the Commission took the same view when it eliminated most franchising-related rules in the mid-1970s) and established a federal statutory framework that gave primary responsibility for franchising regulation to LFAs. *See* Comcast at 29-31. With respect to the second claim, it is of course true that Congress enacted the 1992 and 1996 Acts to encourage further competition in the MVPD marketplace, but it did not do so in derogation of the LFA's longstanding authority over the local franchising process. *See id.* at 31-32; NATOA at 14.

7th Circuit decision in *City of Chicago* considered whether a SMATV system using the wireline facilities of a common carrier qualified as a cable operator.[101] Likewise, the Commission's video dialtone decisions and the related *NCTA* decision of the D.C. Circuit addressed the proper regulatory classification of a video dialtone distributor.[102] None of the cases, however, demonstrates that the Commission may regulate the franchise approval process set forth in Section 621(a)(1).[103] Indeed, to the extent that courts have considered the reasonableness of LFA franchising decisions, those cases have followed the statutory framework established by Congress -- *i.e.*, LFA decisions are appealed to state or federal court without any involvement from the Commission.[104]

In sum, Congress unambiguously gave enforcement authority over the franchising approval process to the courts. Consequently, under *Chevron*, there is no basis for Commission action to implement Section 621(a)(1) -- under Title VI, Section 201(b),[105] Section 706,[106] or any

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101 *See In re Entm't Connection, Inc. Motion for Declaratory Ruling*, 13 FCC Rcd. 14,277 (1998); *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999).

102 *See In the Matter of Telephone Company-Cable Television Cross-Ownership Rules*, 7 FCC Rcd. 5069 (1992); *NCTA v. FCC*, 33 F.3d 66 (D.C. Cir. 1994).

103 The Bells also reference the Commission's 1985 order interpreting the anti-redlining provisions of the 1984 Cable Act and the court decision affirming the Commission's decision. Comcast provided a detailed explanation in its original comments as to why that Commission decision was irrelevant to the jurisdictional issue raised in this proceeding. *See* Comcast at 29 n.94.

104 *See id.* at 15 n.49 (reviewing state and federal court cases pursuant to Section 636 review process); NATOA at 23 n.16 (same). Indeed, one district court case referenced by the Bells, *Knology v. Insight*, proves this very point. The federal court in Kentucky, not the Commission, decided the question of whether the City of Louisville's franchising ordinance violated the requirements of Section 621(a)(1). *See Knology, Inc. v. Insight Communications Co.*, No. 3:00CV-723-R, 2001 WL 1750839 (W.D. Ky. 2001).

105 The Bells and their supporters make the novel argument that the Commission may adopt cable-related rules pursuant to its Section 201(b) authority. *See, e.g.*, AT&T at 35; FTTH Council at 47-49. This assertion is plainly wrong. The Commission and the courts have both stated that the Commission's rulemaking authority under Section 201(b) is limited to providers of *telecommunications services*. *See In the Matter of the 2002 Biennial Regulatory Review*, Report, 18 FCC Rcd. 4726 ¶ 18 n.31 (2003) ("Section 201(b) is a 1938 amendment to the Communications Act of 1934 which establishes the Commission's basic rulemaking authority over services and charges of

(footnote continued…)

other provision of the Act.[107] The Commission has the authority to do many things under the Act, but ignoring an express directive of Congress is not one of them.[108] It is unfortunate that the Bells would urge the Commission to usurp congressional authority in this way.[109]

B. Even Assuming There Were Ambiguity Regarding The Enforcement Of Section 621(a)(1), The Commission Has No Authority To Adopt The Far-Reaching Rules Proposed By The Bells.

As demonstrated above, the Commission does not have the authority to adopt rules in this proceeding. Even assuming *arguendo* there were some ambiguity surrounding the proper enforcement of Section 621(a)(1), the Commission would have no authority to adopt the rules proposed by the Bells and their supporters. A careful review of the plain language of Section

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communications common carriers[.]" (emphasis added)); *id.* (Separate Statement of Commissioner Kevin J. Martin) ("Section 201(b) was enacted in 1938, a time when there was no competition in telecommunications. The entire purpose of this provision, as well as the 1934 Communications Act, was to *grant* the Commission regulatory authority." (emphasis in original)). *See also GTE Services Corp. v. FCC*, 474 F.2d 724, 734 n.15 (2d Cir. 1973) (emphasizing that jurisdictional grant under Section 201(b) is limited to "telecommunications services"). The Supreme Court's decision in *Iowa Utilities* is not to the contrary. The issue in *Iowa Utilities*, as the Bells well know, was whether the Commission had the authority to enforce the local telephone competition provisions of the 1996 Act. The Court's statements regarding the Commission's authority under Section 201(b) were clearly made in that context and cannot be construed as applying beyond Title II of the Act. *See AT&T v. Iowa Utilities*, 525 U.S. 366 (1999).

[106] Comcast and other commenters have already explained why Section 706 is irrelevant to this proceeding. *See, e.g.*, Comcast at 33-36; NCTA at 26.

[107] *See, e.g.*, NCTA at 25 (rebutting claim that the Commission may adopt rules pursuant to its ancillary authority); NATOA at 18 (same).

[108] *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-448 (1987) (concluding that INS' interpretation of the Immigration and Nationality Act is inconsistent with plain meaning of statute under Chevron Step-One analysis).

[109] As Comcast noted in its comments, the better course would be for the Commission to make recommendations to Congress regarding possible changes to the statute. *See* Comcast at 40-43. Of course, any such recommendations will be useful to Congress only if based on a fair-minded assessment of the record.

621(a)(1) and legislative history surrounding this provision show that the Commission has no authority to regulate franchising procedures that do not constitute a denial of a competitive franchise.

1. Bell claims that the "unreasonably refusing to award" language encompasses all phases of the franchising application process, rather than just denials, are not supported by the plain language of the statute or the legislative history.

The Bells suggest that the plain language of Section 621(a)(1) gives the Commission the authority to regulate *all* aspects of the franchising process, from the time it takes an LFA to review a franchise application, to conditions imposed on franchise awards, to decisions to deny franchise applications.[110] This view conflicts with the plain language of the statute and fundamental rules of statutory construction.

First, by its terms, Section 621(a)(1) imposes no *general* duty of reasonableness on the LFA, nor can it be construed as applying to conditions on *awards* of competitive franchises. Rather, the provision only refers to "unreasonably *refusing* to award" competitive franchises and only provides for court appeal where a competitive franchise application has been "denied by a final decision of the franchising authority."[111] Construing the statute to encompass conditions on an award of a franchise or the manner in which the LFA carries out its congressionally-mandated duties would require reading the word "refusing" out of the statute, and render the phrase

110 *See, e.g.*, AT&T at 5-6; Verizon at 31-38; Qwest at 2; BellSouth at 6-7.

111 47 U.S.C. § 541(a)(1). *See, e.g.*, *NEPSK, Inc. v. Town of Houlton*, 283 F.3d 1 (1st Cir. 2002) (holding that LFA must act upon franchise application before the court will review the LFA's determination).

"denied by a final decision of the franchising authority" meaningless. Basic rules of statutory construction prohibit such an approach.[112]

Second, the structure of Section 621(a)(1) demonstrates that Congress meant "unreasonably refusing to award" in the plain language sense of "unreasonably denying" a franchise application. The 1992 Act included two sentences on the issue of LFA denials of competitive franchise applications. The first says that LFAs shall not unreasonably refuse to award competitive franchises; the second and immediately following sentence says that complaints regarding such denials be adjudicated in state or federal court. The two sentences, read together, clearly demonstrate the Congress was referring to denials of franchise applications, and that is how courts have construed the language.[113] The Bells, in contrast, would have the Commission read the first sentence without reference to the second sentence, even thought both sentences were adopted in the same provision of the 1992 Act. Again, this is contrary to fundamental principles of statutory construction.[114]

The legislative history also confirms congressional intent to limit the provisions amending Section 621(a)(1) to denials of franchise applications. When Congress enacted amendments to the local franchising provisions, it bifurcated the provisions relating to the franchising review process. Those provisions relating to the *denial* of competitive franchise

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112 It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. *U.S. v. Menasche*, 348 U.S. 528, 538-39 (1955).

113 *See, e.g.*, *Knology*, 2001 WL 1750839, at *2 (stating that Section 621(a)(1) "provides that a state may not 'unreasonably' *deny* an additional franchise" (emphasis added)); *Cable TV Fund 14-A, Ltd. v. City of Naperville*, 1997 U.S. Dist. LEXIS 7336 (N.D. Ill. 1997) (same).

114 "[I]t is an elementary rule of construction that all sections of an act relating to the same subject matter should be considered together unless to do so would be plainly contrary to the legislative intent." 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:06 (6th ed. 2000).

applications (either through exclusive contracts to incumbent operators or unreasonable refusals to award competitive franchises) were incorporated in Section 621(a)(1). Those provisions relating to conditions on the *award* of cable franchises were included in Section 621(a)(4).[115]

The Bells' interpretation of the statute is also contrary to longstanding congressional policy of giving LFAs the primary role in the local franchising process.[116] The Bells' proposals would, in the aggregate, completely undermine that policy. Among other things, the Bells' proposed rules would place strict time limits on LFA review of franchise applications, enforce the Bells' proposed franchise agreements if those time limits were exceeded, and restrict the types of conditions an LFA could include in the franchise. In short, the Bells, not the LFAs, would control the franchising process.

These proposals would dramatically alter, indeed eviscerate, the process established by Congress. Under their proposals, the Bells, would have no incentive to negotiate with the LFA. Once the LFA review process timed out, the Bells' preferred franchise agreement would be considered adopted. If Congress had intended such a radical restructuring of the franchise process, it would have given some inkling of this in the legislative history. It did not do so.

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115 The House version of the 1992 Cable Act would have contained five examples of circumstances under which it is reasonable for a franchising authority to deny a franchise. *See* H.R. Rep. No. 102-628 at 9, 90 (1992) (proposed amendment to Section 621(a)(1)). The final version of the bill did not include these proposed changes in Section 621(a)(1). Rather, these changes were included, in modified form, in a new Section 621(a)(4) relating to conditions on the award of franchises. *See also* Conference Report on Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 102-862, at 78 (1992) ("The conference agreement adopts Section 21 of the Senate bill on franchise requirements with amendments. The conference agreement adds the provisions from Section 4 of the House amendment that specify that franchising authorities may require applicants for cable franchises to provide adequate assurance that they will provide adequate public access, educational and governmental channels, and may require adequate assurance that the cable operator is financially, technically and legally qualified to operate a cable system.").

116 *See* Comcast at 28-33; NCTA at 19-23; NATOA at 12-16.

2. The Commission may not prohibit LFAs from imposing build-out requirements on new entrants.

The Bells assert that the Commission has the authority to prohibit LFAs from imposing build-out requirements on new entrants.[117] The Bells arrive at this legal conclusion through a three-step process: first, the "unreasonably refusing to award" language in Section 621(a)(1) establishes a general standard of reasonableness on LFA practices; second, the build-out provisions in Section 621(a)(4)(A) are subject to that general standard of reasonableness; and third, imposing build-out requirements on new entrants is unreasonable.

All three predicates are wrong. With respect to the first predicate, Section 621(a)(1) does not impose a general reasonableness requirement on LFA activities. Rather, as noted above, the "unreasonably refusing to award" language refers to unreasonable denials of franchise applications. With respect to the second predicate, the "unreasonably refusing to award" language in Section 621(a)(1) does not trump the build-out provision in Section 621(a)(4). Indeed, also as detailed above, Congress made a conscious choice to separate the provisions during final deliberations on the 1992 Cable Act (*i.e.*, provisions that had been included in the same section of the House bill were included in separate sections of the final bill), and there is no indication in the statute or legislative history that Section 621(a)(1) overrides the provisions in Section 621(a)(4). And, with respect to the third predicate, Congress stated unequivocally that build-out requirements are appropriate so long as franchisees are given a reasonable period of time to complete them.[118]

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[117] *See, e.g.*, AT&T at 9; Verizon at 42; Qwest at 25-26; BellSouth at 30.

[118] *See* 47 U.S.C. § 541(a)(4)(A) ("In awarding a franchise, the franchising authority shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area." *See also Notice* ¶ 20 (tentatively concluding that "it is not unreasonable for an LFA, in

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Furthermore, the Bells' interpretation of the statute is inconsistent with the legislative history. Congress enacted the build-out provisions as part of the 1992 Cable Act. By that time, many cable operators had largely built out their cable systems -- Congress could not have meant for this provision to apply only (or even primarily) to those cable operators. Consequently, in enacting the provision, Congress clearly intended to authorize LFAs to impose build-out requirements on *subsequent* cable operators. Furthermore, in the 1996 Act, when Congress removed the prohibitions on a telephone company owning a cable system in its service area (at the request of the Bells), Congress made no change to this provision. Congress could very easily have made changes, at that point, if it thought that the public interest required additional steps to encourage entry by telephone companies into the cable marketplace. Bell suggestions that, notwithstanding these clear directives from Congress, the Commission can bar build-outs for new franchisees would violate congressional intent. The Commission's tentative conclusion that LFAs have the right to establish and enforce reasonable construction timetables is plainly correct.

3. The Commission has no authority to preempt state or local franchising laws.

The Bells urge the Commission to preempt state and local level-playing-field statutes. The simple fact is that the Commission has no authority to do so here. Court precedent makes plain that the Commission can only preempt where it is given express statutory authority to do

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awarding a franchise,...to allow [a] cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area"). Verizon asserts that the use of the phrase "franchise area" (rather than "jurisdiction") in Section 621(a)(4)(A) somehow implies that Congress intended to let new entrants, rather than LFAs, determine their build-out requirements. *See* Verizon at 45-46. It is, of course, irrelevant whether an LFA segments its jurisdictional territory into multiple franchise areas (as has occurred in New York City, Los Angeles, Philadelphia, and other major cities). Under the express terms of the statute, the LFA is authorized to require build-out over a reasonable period of time in any particular franchise area for which it has awarded a franchise.

so.[119] Congress has unambiguously given the courts, not the Commission, the authority to interpret and enforce Section 621(a)(1). Moreover, even if there were some ambiguity on this point, the Commission still could not preempt under the rigorous standard set by the courts.[120] The Bells cite to no relevant court precedent to the contrary.[121]

Preempting state and local franchising laws in this proceeding would also be inconsistent with longstanding Commission practice. Where the Commission has exercised preemption authority in other contexts, it has done so pursuant to clear congressional authority, such as Section 253,[122] and even in those cases, the Commission has been very careful to tread lightly on

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[119] It bears stressing that the courts have repeatedly emphasized that level-playing-field statutes are not unreasonable under Section 621(a)(1). *See, e.g.*, *Cable TV Fund 14-A, Ltd. v. City of Naperville, No. 96 C 5962*, 1997 U.S. Dist. LEXIS 7336, at *13 (N.D. Ill. 1997) (holding that level-playing-field statute "is designed to ensure *fair* competition, a goal that certainly does not conflict with the pro-competitive purpose of the Cable Act." (emphasis in original)); *Knology*, 2001 WL 1750839 *2 ("[T]he court finds it reasonable for a state or local authority to condition the grant of a new franchise on conditions that, taken as a whole, provide terms no more favorable or less burdensome than those placed on the existing operator. Requiring competitors to compete on a level-playing field is not unreasonable.").

[120] *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). *See also City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999). Qwest's attempts to distinguish *City of Dallas* are unavailing. *See* Qwest at 17 n.33. The issue is not whether Congress established guidelines for the local franchising process in Section 621(a)(1). Clearly, it did. The question is whether it unambiguously gave the Commission the authority to supplant state and local franchising laws pursuant to Section 621(a)(1). Clearly, it did not. *City of Dallas* stands for the proposition that the Commission has no ability to preempt in such circumstances.

[121] *See* Comcast at 36-40. The preemption cases cited by the Bells are easily distinguishable. Neither *Liberty Cablevision of Puerto Rico* nor *TCI Cablevision of Oakland* involves Section 621(a)(1). *Liberty Cablevision of Puerto Rico* involved court preemption of a local ordinance that attempted to impose franchise fees above the five percent statutory limit set in Section 622. *See Liberty Cablevision of Puerto Rico v. Municipality of Caguas*, 417 F.3d 216 (1st Cir. 2005). Likewise, in *TCI Cablevision of Oakland*, the Commission preempted a local ordinance because it placed a telecommunications condition on the grant of a cable permit in violation of Section 621(b)(3)(B) of the Communications Act. *See In the Matter of TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion & Order, 12 FCC Rcd. 21396 (1997); *In the Matter of TCI Cablevision of Oakland County, Inc.*, Order on Reconsideration, 13 FCC Rcd. 16400 (1998). *Knology v. Insight* is a Section 621(a)(1) preemption case, but as noted above, that case fits squarely in the statutory framework (*i.e.*, a court, not the Commission, was enforcing the requirements of Section 621(a)(1)).

[122] The Bells and their supporters also cite to Section 253 as evidence of congressional intent to give the Commission preemption authority of state and local franchising laws. *See, e.g.*, AT&T at 38; USTA at 31; FTTH

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state and local authority.[123] In short, the Commission has historically treated state and local governments with comity and respect. Trampling on their authority here -- in the clear absence of authority -- would be contrary to this practice (and the federalism principles at the heart of the Cable Act).

C. The First Amendment Is Not At Stake In This Proceeding.

Verizon and the other Bells are absolutely correct that cable operators are entitled to First Amendment free speech and free press protections. However, it is absurd for them to suggest that requiring a cable operator to obtain a local franchise constitutes a "prior restraint."[124] Verizon also needs to get local permits to build its headend facilities, dig up streets to run fiber, and mount video-related equipment on telephone poles. By Verizon's logic, these local permitting requirements also infringe on Verizon's free speech rights. Indeed, any permitting

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Council at 35. Of course, Section 253 is a Title II provision and has no bearing on cable regulation. Moreover, as Comcast noted in its comments, the absence of a provision like Section 253 in Title VI evidences congressional intent *not* to give the Commission preemption authority with respect to state and local level-playing-field laws. *See* Comcast at 36 n.121.

[123] Congress carefully crafted the preemption language in Section 253 -- entrusting the Commission to navigate between the competing objectives of removing barriers to CLEC entry, *see* 47 U.S.C. § 253(a), while respecting the legitimate exercise of state and local authority. *See* 47 U.S.C. §§ 253(b), (c). The Commission has handled that responsibility with great care, and it has sidestepped confrontation with other governmental authorities to the extent possible. It has decided preemption petitions only after a thorough review of the individual facts of each case and a careful assessment of the competing considerations set forth in Section 253. *See, e.g.*, *In the Matter of California Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California*, Memorandum Opinion & Order, 12 FCC Rcd. 14191 (1997) (declining to preempt local payphone ordinance after a careful weighing of the facts in the case); *In the Matter of Classic Telephone, Inc. Petition for Preemption*, Memorandum Opinion & Order, 11 FCC Rcd. 13082 (1996) (preempting franchise denials by municipalities after thorough review of the factual record, but, even then, not ordering the municipalities to grant the franchises or to authorize the provision of services but only to reconsider the franchise decisions expeditiously).

[124] *See, e.g.*, Verizon at 16-17. Courts have consistently held that local franchising requirements are not facially unconstitutional. *See, e.g.*, *Beach Communications, Inc. v. FCC,* 959 F.2d 975, 984 (D.C. Cir. 1992) (holding that requiring a cable operator to obtain a cable franchise before offering video service was not facially unconstitutional because, among other things, "the First Amendment analysis depends on the local franchising regime"); *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 973 (D.C. Cir. 1996) ("[A] statute that simply permits franchise authorities to regulate where they had previously done so raises no First Amendment problems unless the localities themselves infringe on the cable operators' speech.").

requirement imposed by any level of government on any media company would arguably constitute a prior restraint. For example, requiring a construction permit, or an occupancy certificate, before a newspaper can build and use a new headquarters building could be viewed as a prior restraint. The same goes for a Commission requirement that a broadcaster obtain a license before transmitting radio or TV signals.

Verizon also states categorically that build-out requirements run afoul of the First Amendment.[125] This statement is incorrect as a matter of law. Indeed, build-out requirements have been found to be consistent with the First Amendment.[126] The Supreme Court's decision in *Preferred Communications* is not to the contrary.[127] LFAs have a substantial government interest in having new entrants provide service throughout the franchise area. Those interests include, among other things, preventing redlining abuse, managing construction in rights-of-way, and providing all consumers, not just those in "high-value neighborhoods," with the benefits of additional competition.[128] Plus, as discussed above, franchising requirements impose no genuine impediment to the Bells' ability to speak or to publish. In light of the substantial governmental

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[125] *See* Verizon at 49. *See also* AT&T at 61.

[126] *See Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 406 (S.D. Fla. 1991) (holding that the LFA's "universal service requirement meets all prongs of the O'Brien test. It is constitutional.").

[127] *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). In *Preferred Communications*, a case predating the 1992 Cable Act, the Supreme Court found potential First Amendment concerns in a situation where the LFA had granted an exclusive franchise and refused to award an additional franchise. Here, in contrast, there is no evidence that the LFAs are refusing to grant franchises to Verizon or any other Bell company. In fact, as detailed above, LFAs are granting franchises to any Bell company that applies for one.

[128] These are the types of governmental interests courts have found to justify build-out requirements. *See, e.g.*, *Telesat*, 773 F. Supp. at 406 ("The City has made a sufficient showing that [a universal service] regulation may tend to further the City's interest in preventing discrimination in the provision of cable television services throughout the City of Riviera Beach, in controlling the timing and extent of any disruption to its streets caused by the construction of cable televisions systems in the City, and in promoting the widest possible dissemination of ideas and cable programming from diverse sources from those who may wish to buy the service.").

interests at stake, and the minimal burdens imposed on the Bells, the Bells cannot legitimately claim build-out requirements violate their First Amendment rights.

IV. CONCLUSION

For the foregoing reasons -- and consistent with the plain language of the statute, legislative history, and marketplace evidence -- Comcast urges the Commission to leave review of the franchising process in the hands of those with whom Congress has placed it.

Respectfully submitted,

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March 28, 2006

EXHIBIT A:

DECLARATION OF BRIAN A. LYNCH
AREA VICE PRESIDENT & GENERAL MANAGER
COMCAST BALTIMORE METRO COUNTIES

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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

DECLARATION OF BRIAN A. LYNCH

1. My name is Brian A. Lynch. My business address is 8031 Corporate Drive, Baltimore, MD 21236.

2. I have served as Area Vice President & General Manager of Comcast Baltimore Metro Counties since Fall 2002. In this position, I manage the operations of Comcast's cable systems in Baltimore, Howard, and Harford Counties, Maryland, and am responsible for Comcast's interactions with the three county governments.

3. I am responding to allegations made in Verizon's comments in this proceeding regarding the franchising process in Howard County, Maryland. As detailed below, Verizon has grossly mischaracterized Comcast's involvement in the County's review of Verizon's application for a franchise. In all respects, Comcast's conduct was fully consistent with the County's franchise review procedures. Furthermore, Comcast's involvement in the franchising process was welcomed by Howard County officials and was instrumental in making numerous, pro-consumer modifications to the Verizon franchise.

4. On July 18, 2005, the Howard County Council held a public hearing to vote on initiating the process for negotiating a franchise with Verizon and establishing a timeline for County action on the franchise. I testified at the hearing on behalf of Comcast and made two

basic points to the Council. First, I underscored that Comcast did not oppose Verizon's application to provide cable service in Howard County. Second, I urged the Council to ensure a fair and level playing field among all cable competitors.

5. With respect to the second point, I expressed concern that Verizon's FiOS deployments were targeting high-income customers and that Verizon should be required (just as Comcast is) to provide its cable service to all residents of Howard County, including those consumers in low-income and rural areas. I also raised concerns about Verizon's mismanagement of its construction projects. For example, I pointed out that in the 25 days that Verizon had been working in Howard County, its contractors cut Comcast's cable more than 260 times, causing service outages to about 2,200 Comcast customers. I asked that Verizon be subject to the same duty of care as Comcast in building out its facilities. Further, I raised concerns about Verizon's CEO's statement that Verizon should not have to pay franchise fees and about the inconsistency of Verizon's franchise application with the Howard County Code requirements pertaining to rates and service tiers.

6. Verizon and County officials spent the next several months negotiating a franchise agreement. Comcast understands that the negotiations were based on a draft agreement that had been developed by Verizon, rather than the agreement the County had negotiated previously with Comcast. A draft Verizon agreement was presented to the County Council on November 23, 2005, the day before Thanksgiving. Comcast was given a copy of the draft agreement on that day. I participated at a public hearing on the draft agreement on December 19, 2005.

7. At the public hearing, I raised a number of contractual and policy concerns that Comcast had with provisions in the draft Verizon agreement. First, I noted that certain

provisions in the draft agreement would trigger the "most favored nations" (or MFN) provision in the Comcast franchise. MFN provisions are a common feature of franchise agreements intended to ensure that the existing operator obtains the benefit of more preferential contract terms that the local government agrees to in its negotiations with a new franchisee. For example, the draft Verizon agreement would have waived the requirement that Verizon establish a local office in the County. I informed the County Council that, if adopted, this provision would release Comcast of any franchise obligation to have an office in the county. In addition, the draft agreement did not include certain basic consumer protection obligations, such as a requirement to include contact information on customer billing statements.

8. Second, I noted Comcast's objections to requirements in the draft agreement that would impose unreasonable obligations on Comcast, for example, with respect to facilitating Verizon's access to public, educational, and government ("PEG") channels. Comcast may be required under its franchise agreement to provide the public access channel to other cable systems since Comcast operates the public access studio, but educational and governmental channels belong to the County and are originated at County-owned facilities, so Comcast quite reasonably requested that Verizon be required to make its own arrangements with the County to obtain this programming rather than saddling Comcast with this burden.

9. Third, I brought up several policy concerns that Comcast had with the draft agreement. For example, the draft agreement included no time frame within which Verizon would have to start providing service, and it included an opt-out clause that would have given Verizon latitude to cease offering service under certain conditions. Likewise, the draft agreement defined "cable system" to include only the bandwidth used to deliver cable service, but not the plant itself. I pointed out that this narrow definition was inconsistent with federal law

and County code (and different than the definition applied to Comcast) and could undermine the County's claim of regulatory authority over Verizon's cable system for purposes of collecting franchise fees, imposing PEG obligations, and the like. The Council Chairman publicly expressed appreciation for Comcast's input on the draft agreement.

10. On December 20, 2005, *one day after the public hearing*, the Council held its one and only work session on the draft agreement. Typically, such work sessions take place one week after the public hearing, but the session was moved up because of the holidays. I was invited to participate at the work session on behalf of Comcast to answer any questions the Council might still have regarding the draft Verizon agreement. At the end of the work session, the Council asked that the draft be amended to account for some of the concerns that had been raised previously by Comcast and others.

11. On January 3, 2006, the final draft franchise agreement was made public. Comcast received a copy of the agreement that morning. Although the County Council had until January 27, 2006 under County-approved resolutions to vote on the final draft agreement, it nonetheless elected to approve the agreement that very evening (*i.e.*, the same day the amended agreement was made publicly available). The final agreement addressed a few of the issues I had raised on behalf of Comcast in testimony before the Council. For example, the Council required Verizon to start providing service by a date certain, and required Verizon to include contact information on its bills to consumers and designate a manager as a point of contact on all cable-related issues.

12. The final agreement, however, also included a number of highly preferential terms for Verizon. For example, the agreement's build-out requirement gives Verizon three years to build out the eastern half of the county, and seven years to build out the western half of

the county, and includes a provision that allows Verizon to opt-out of building out the western half of the county if it demonstrates that doing so would not be financially viable. (In contrast, when Comcast acquired the franchise for the western half of the county, Comcast was required to build out in 24 months, not seven years, and did not have an opt-out provision.) Furthermore, the final agreement retained Verizon's definition of "cable system"; kept the requirement that Comcast act as Verizon's source for all PEG channels; and required Verizon to open a local office only after it had signed up 30,000 customers. The agreement also did not address the issue of Verizon's repeated cutting of Comcast cable in the county.

13. Given these and other deficiencies in the agreement, I reminded the County Council that the negotiating window with Verizon did not close until January 27, 2006, consistent with the timetable previously approved by the Council, so that the Council had additional time to work through the remaining issues in the agreement if it wanted. The Council declined to do so. At no time did Comcast suggest that the County seek to extend negotiations beyond that timeframe previously approved by the Council.

14. The Verizon agreement went into effect on March 12, 2006. Verizon began providing cable service in Howard County on March 15, 2006.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on this 28th day of March, 2006.

Brian A. Lynch
Area Vice President & General Manager
Comcast Baltimore Metro Counties
Comcast of Maryland, L.P.