

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
Implementation of Section 621(a)(1) of)
the Cable Communications Policy Act of 1984)
as amended by the Cable Television Consumer)
Protection and Competition Act of 1992)

MB Docket No. 05-311

**REPLY COMMENTS OF THE GREATER METRO TELECOMMUNICATIONS
CONSORTIUM, THE RAINIER COMMUNICATIONS COMMISSION, HOWARD
COUNTY, MARYLAND, THE CITIES OF BELLEVUE AND OLYMPIA,
WASHINGTON AND THE WASHINGTON ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS**

These Reply Comments are filed by the Greater Metro Telecommunications Consortium (“GMTC”), the Rainier Communications Commission (“RCC”), the Cities of Bellevue and Olympia, Washington, Howard County, Maryland, and the Washington Association of Telecommunications Officers and Advisors (“WATOA”) (collectively referred to as the “Local Governments”).

I. INTRODUCTION

These Reply Comments will address three topics. First, we will respond to specific comments made by others in this docket, relating directly to individual members of the Local Governments. Second, we will address issues raised by other commenters about other local franchising authorities, either specifically or generally. Third, we will explain why the evidence submitted in this docket does not suggest or compel any Commission action other than the adoption of a requirement that any commenter in Commission proceedings alleging that the actions of any entity supports federal preemption of traditional state or local authority, must provide a copy of its filing directly to the entity so named, in order to satisfy the basic tenets of due process.

**II. COMMENTS RELATING TO ACTIONS
OF THESE LOCAL GOVERNMENTS**

In our Comments, the Local Governments provided multiple examples of individual experiences negotiating franchise agreements both with incumbent cable operators and with prospective competitors. It is our position that none of the actions of these Local Governments could support a good faith argument that franchising authorities act inappropriately or create a barrier to competitive entry.

Upon review of the comments filed by industry representatives and consumer groups in this docket, of all the local franchising authorities (“LFAs”) represented in this filing, only the Denver metro region was mentioned by any other commenters as an example where local practices have created hurdles to competitive provision of video services. Problematically, the commenters citing evidence of metro Denver’s alleged bad practices based their “evidence” on false information previously filed with the Commission in another docket.

Qwest’s filing in this docket makes no reference to any problems or bad practices with respect to any metro Denver jurisdiction.¹ However, in a separate docket, Qwest represented to the Commission that it was only able to renegotiate seven Phoenix area franchises and obtain eight new franchise agreements after “intensive effort” undertaken over a three-year period in the Phoenix metropolitan area, the Salt Lake City metropolitan area and the Denver metropolitan area.² Other commenters in this docket have cited the Qwest filing in the video competition docket as evidence supporting the claim that communities in these three metropolitan areas, including Denver, are engaging in anti-competitive practices.³

Problematically, Qwest’s statements in the video competition docket about its “intensive efforts” to obtain franchises in the metro Denver area over a three-year period, and its lack of success were not true.⁴ Moreover, Qwest never provided a copy of its comments in the video competition docket to the local governments that it cited as bad actors. And of course, none of the industry commenters who cited Qwest’s comments in MB 05-255 as evidence of Denver’s anti-competitive practices notified these Denver metro communities that they were being cited as examples of barriers to entry in this docket. Were it not for GMTC’s participation in this docket, we never would have known of these allegations, and would not have had an opportunity to respond with the accurate information. Most importantly, the Commission might have relied upon what it may have believed to be uncontroverted “facts” in making an important public policy decision affecting every local government in this nation.

Once we became aware of the inaccurate portrayal of the practices of metro Denver communities vis-à-vis Qwest’s attempt at obtaining competitive franchises, and brought those concerns to Qwest’s attention, we were assured by Qwest’s Denver area representatives that it would make a supplemental filing in the video competition docket to correct the record. And while Qwest did file an *ex parte* letter in MB Docket No. 05-255⁵, it has not completely corrected the prior misrepresentations. In its *ex parte* filing, Qwest repeated the paragraph in

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*, MB Docket No. 05-311, Comments of Qwest Communications (Qwest Comments).

² *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Comments of Qwest Communications, p.12.

³ *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, AT&T Comments, p. 18, fn. 17; Comments of the Telecommunications Industry Association, p. 8, fn. 22.

⁴ While we do not have first hand knowledge of Qwest’s allegations about Salt Lake City, based upon conversations with Qwest’s local counsel in Denver, we believe that the statements in MB 05-255 were also inaccurate as they related to the Salt Lake City metropolitan area.

⁵ *Ex Parte* letter from Robert B. McKenna of Qwest to Marlene H. Dortch, March 2, 2006, MB Docket No. 05-255.

question, and asserted, “This statement is true...” As it relates to Qwest’s efforts to obtain franchises throughout the entire Denver metro area over the past three years, and the results of those efforts, the statement is most decidedly *false*. Qwest acknowledges in its *ex parte* filing that it did not mean for its allegations to apply to each individual franchising authority within each of the three named metro areas, and that it had actually been pursuing “various franchises in the Phoenix and Denver areas for the last several years with mixed success.” It then noted that it had recently pursued a franchise in Salt Lake City, and that the Salt Lake City process was successful, and was an example of how the process should be conducted. So again, by comparison, Qwest suggests that its unnamed activities in metro Denver have been problematic.

Here are the facts. Over the past three years, Qwest has only applied for one competitive franchise in any metro Denver jurisdiction. That jurisdiction is the City of Lone Tree, Colorado. As we described in our Comments, franchise negotiations took approximately 6 months, and for approximately 2 months, the City was prepared to proceed while it awaited a response from Qwest.⁷ Qwest’s only other attempt during the past three years to obtain franchises in metro Denver began in September of 2005, when it commenced negotiating a model franchise agreement for the region with GMTC. Again as we described in more detail in our Comments, this process has gone smoothly, negotiations have occurred timely, and the timing expectations of both parties have generally been met.⁸

While Qwest has made a supplemental filing in the video competition docket, we do not yet know whether it will seek to correct the record that its inaccurate representations have caused when those statements have been repeated multiple times in this docket. The Local Governments want the record to be clear – the misstatement made in MB Docket No. 05-255 and repeated multiple times in this docket is wrong, and does not support Commission action to restrict local franchising. To the contrary, the facts in metro Denver, and Qwest’s acknowledgment that its recent experience in Salt Lake City has been positive, suggest that the local franchising process is not a barrier to entry.

In its Comments, Verizon states that it commenced franchise “discussions” with Howard County, Maryland on May 5, 2005 and that the franchise was awarded 8 months later on January 3, 2006.⁹ A minor correction is warranted. Howard County received Verizon’s written application on May 13, 2005, and discussions commenced shortly thereafter. Actual time spent in negotiations was approximately four months.

⁷ *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, Comments of the Greater Metro Telecommunications Consortium, the Rainier Communications Commission, Howard County, Maryland, the Cities of Bellevue and Olympia, Washington and the Washington Association of Telecommunications Officers and Advisors; pp. 5, 8 (the “Local Government Comments”).

⁸ *Id.*, p. 9.

⁹ *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, Comments of Verizon, Exhibit 1 to Attachment A, Declaration of Marilyn O’Connell (“Verizon Comments”).

The Local Governments reiterate the foundational position expressed in our Comments – we welcome competition, we encourage it, and we have always been willing and able to facilitate a reasonable process for approval of competitive franchises when a competitive provider seriously wishes to enter our communities.

III. COMMENTS REGARDING OTHER LFAs

A number of competitive providers made both general and specific comments about a handful of LFAs, and alleged that but for these actions, competitive provision of video service would be more prevalent. The Commission should consider all of these comments in light of its request that commenters provide the Commission with a specific, fact-based record.¹⁰

Much of the “evidence” AT&T cites includes allegations made previously by Qwest and BellSouth in the video competition docket¹¹, allegations against unnamed LFAs based upon experiences of the former Ameritech New Media¹², and allegations against both named and unnamed LFAs cited in a Wall Street Journal article about Verizon’s experiences¹³. AT&T cannot, of course, cite any evidence of which it has personal corporate knowledge, because it has yet to apply for a franchise under Title VI. In essence, AT&T asks the Commission to change longstanding federal policy as a result of problems that it read about in the newspaper, or heard about from other telephone companies.

Some of AT&T’s other comments should also be addressed. Citing no specific examples, and no evidence whatsoever, AT&T claims that when LFAs combine resources and work together as coalitions, the franchising process is even worse.¹⁴ This claim is without merit, and in direct contrast to the evidence we provided in our Comments about the effectiveness of communities working together, which specifically lessens the time and reduces the costs of completing multiple franchises. GMTC and RCC representatives speak with specific knowledge of these benefits. We believe that the video providers with whom we have worked (for example, Comcast, Champion Broadband, Qwest) would agree with our position on this point.

BellSouth cites its experiences in franchise negotiations, indicating that the average time to gain franchise approval is ten months.¹⁵ To its credit, BellSouth identifies multiple LFAs in Georgia, Florida and Tennessee in which franchise negotiations took between 1½ and 3½ months.¹⁶ BellSouth also names multiple jurisdictions in those same states (and Alabama) alleging delays and inappropriate requests causing barriers to deployment of competitive

¹⁰ NPRM, para. 13; Statement of Commissioner Kathleen Q. Abernathy; Statement of Commissioner Michael J. Copps; Statement of Commissioner Jonathan S. Adelstein.

¹¹ *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, Comments of AT&T, p. 18, fn. 17 (“AT&T Comments”).

¹² *Id.*, at p. 24.

¹³ *Id.*, at 26-27.

¹⁴ *Id.*, at 29.

¹⁵ *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, Comments of BellSouth, pp. 2, 11 (“BellSouth Comments”).

¹⁶ *Id.*, Rawls Declaration, Exhibit A.

services.¹⁷ While BellSouth names 20 separate LFAs as bad actors, it provides specifics for 5 communities – Miami-Dade, St. John’s County and Coral Springs, Florida; DeKalb County, Georgia and Germantown, Tennessee.¹⁸ BellSouth does not indicate that it gave notice of its allegations to any of the named communities, and the Commission would be wise not to rely on the allegations as fact, unless and until it hears the other side of the story.

Verizon makes a number of claims that cannot pass without a response. For a company of Verizon’s size that purportedly is devoting considerable resources to deploying competitive video services in the thousands of communities it serves, it is laughable for Verizon to support its claim by saying there “are more than 50 Verizon employees or contractors that are dedicated to obtaining local franchises, and many more Verizon employees who also support this effort.”¹⁹ If Verizon had spent the past two years with as many employees “dedicated to obtaining local franchises” as it has lawyers and lobbyists dedicated to eliminating local franchising in multiple states, in Congress and at the Commission, it would have many more franchise agreements in place and would be in a position to offer competitive services in many more locations than it presently serves.

There is an additional experience from Bellevue, Washington that merits consideration, for it shows that often it is the LFA seeking to expedite the process, and sheds light on Verizon’s claim that it has dedicated necessary resources to obtain franchises. Verizon met with Bellevue on November 11, 2005 to announce that it was going to be bringing its FiOS project to those portions of Bellevue serviced by Verizon. At that meeting, the City’s representative offered to begin negotiating a cable franchise with Verizon to insure that the franchise process would be completed when the company was ready to roll out the new services. Verizon responded that it was proceeding with system upgrades under its Title II authority, but would be seeking a cable franchise before they offered video services.

The City met again with Verizon on January 18, 2006 and again offered to begin the cable franchise negotiations. Verizon declined. A copy of the January 2006 email correspondence from David Kerr in Bellevue to John Gustafson of Verizon, and Mr. Gustafson’s response, is attached as Exhibit A. As of the date of this filing (March 28, 2006), Verizon is proceeding with permitting for the FiOS project, and Bellevue is frustrated that Verizon has wasted over four months that could have been used for franchise negotiations.

In seeking federal preemption over the Cable Act’s provisions allowing LFAs to seek PEG support to meet local needs, Verizon claims “[I]n *the vast majority of cases*, the facilities and equipment needed to develop and transmit PEG programming have already been deployed, and are not even being used to their capacity.”²⁰ Not in a few cases; not in some cases; but in “the vast majority of cases.” Verizon provides no evidence of this allegation, so the Commission should disregard it completely. In the experience of these Local Governments, access channel operations often run on a shoestring budget. Equipment is often kept in use long after its useful life has expired. Rapid changes in technology affect access programming operations as well as

¹⁷ *Id.*, Rawls Declaration, para. 4.

¹⁸ *Id.*, at 12-19, 35, 37 44, fn. 75 and Rawls Declaration, paras. 12-27.

¹⁹ Verizon Comments, Attachment A, Declaration of Marilyn O’Connell, p. 5, para. 12.

²⁰ *Id.*, at p. 12, para. 29; Emphasis added.

other segments of the video programming industry. Access channel operators are, in our experience, usually behind the curve in being able to keep up with technology in their capital budgets. While these Local Governments have popular, effective, and in many cases, award winning government access operations, we never have all of the financial resources we would like to have in order to keep up with changing technology in the production and delivery of access programming.

In its recent negotiations with Howard County, Verizon was asked to provide an up front payment to support access capital needs, similar to that paid by the incumbent cable operator. Verizon indicated that it would prefer not to do so, in that it was coming into the County with no customers. Verizon requested the ability to make access capital support payments in increments of an amount per subscriber, per month. The County agreed. Verizon neglected to describe this example of the franchising process when it asserted that access capital demands are a barrier to entry.

Verizon creatively argues that local franchising is a barrier to entry, by placing the blame for improper actions not just on the local governments themselves, but also on their lawyers.²¹ Without naming names, or providing even one specific example, Verizon suggests that the Commission should preempt traditional local authority because local government lawyers are *routinely* and *intentionally* seeking to “extract” as much as they can from competitive entrants, with no regard for their clients’ ability to gain the benefits of real video competition. While it is always convenient to blame the legal profession for society’s problems, the Commission should reject Verizon’s attempt to use this docket for that purpose.

IV. THE COMMISSION SHOULD ADOPT A RULE MANDATING THAT THOSE WHO ALLEGE ANOTHER ENTITY’S ACTIONS SUPPORT THE FEDERAL PREEMPTION OF TRADITIONAL STATE OR LOCAL AUTHORITY MUST PROVIDE NOTICE OF THOSE ALLEGATIONS TO THE PARTY NAMED

A review of the Comments filed in this docket discloses many supporters of the benefits that local franchising has brought to communities throughout this nation. It discloses numerous specific examples from LFAs of all sizes, indicating that local governments exercise their authority reasonably, and while that sometimes takes time, the time spent is generally reasonable, and does not create a barrier to the deployment of competitive video services. The record further indicates that in many communities, the local process, whatever it may be, makes no difference. For most of this nation’s local governments, competitive providers have shown no interest in offering the benefits of competitive services. And admittedly, the record also discloses industry allegations of a handful of communities where the attempt to gain a local franchise to provide competitive services has not been successful. In many cases, commenters simply repeated the same examples about the same communities. With specific respect to the comments filed by those who suggest that the Commission adopt rules to eliminate local authority, this is not the kind of record that the Commission asked for and it cannot be the foundation of preemptory rules. As Commissioner Copps stated, the Commission’s actions “will be significantly

²¹ “Other LFAs, however, have brought in outside firms whose main purpose and expertise is to extract as much value from the franchise applicant as possible, without regard to the costs such practices have on the viability of competitive entry or the delays that result.” *Id.*, at p. 15, para. 37.

influenced by the record this notice elicits...”²² The “evidence” in the record from those seeking to eliminate local franchising is not anywhere near sufficient to base federal preemptory rules.

Exacerbating the problem of the shallow record offered by opponents to local franchising is the failure of the Commission’s rules to ensure basic requirements of due process when considering preemptory rules of this nature. The Commission’s rules must require that all interested parties have a fair and equitable opportunity to be heard, before the Commission acts to preempt an area of traditional state or local governmental authority. None of the commenters citing specific local governments as bad actors indicated in their comments that they had sent a copy of their allegations to the LFAs they were naming. Some of those communities named may have heard through others participating in this docket that their actions were claimed to be the basis supporting federal preemption rules, but the Commission can not be sure of this. Unless and until the Commission can be satisfied that basic concepts of due process are in play, the Commission cannot and should not act on these anti-local government allegations.

This is not the first time this defect in the Commission’s rules has been brought to its attention. In 1997, the Commission’s Local and State Government Advisory Committee (LSGAC) recommended that the Commission adopt a rule requiring notification of any governmental entity whose actions were cited as a basis for federal preemption of traditional state or local authority.²³ As noted in our Comments, the Commission addressed part of the problem, adopting a rule requiring such notice in declaratory proceedings.²⁴ It is clear from this rulemaking proceeding that the due process protections the Commission has extended to state and local governments in declaratory proceedings should be extended to *all* proceedings in which preemption is a possible result. Evidence cannot be relied upon as credible when an opposing party does not have a fair opportunity to respond.

V. CONCLUSION

The Local Governments have provided the Commission with solid evidence indicating that we treat all providers of video services in a fair and timely manner. In some cases, competitors have no standing to complain about our communities, because they have never indicated an interest to offer services to our citizens. Through local franchising, we have been able to focus on and address local community needs and interests, providing both benefits to our communities and an opportunity for our video providers to be successful in their business ventures. The franchising process is not perfect. We have suggested some modifications and are willing to consider others, but only to the extent that they recognize the important role local governments must continue to play.

We have not addressed the legal arguments raised by the commenters who have suggested that the Commission has the legal authority to adopt rules to restrict or eliminate a local role in the franchising process. Again, we are aware of and adopt as our own, the legal positions cited by NATOA, the National League of Cities, the National Association of Counties and the United States Conference of Mayors in this regard. In sum, with respect to any

²² NPRM, Statement of Commissioner Michael J. Copps.

²³ LSGAC Advisory Recommendation No. 2, June 27, 1997, www.fcc.gov/statelocal/recommendation2.html

²⁴ Local Government Comments, p. 2.

legislative or regulatory changes in the framework that governs video franchising, we believe that any changes must first be authorized by the Congress.

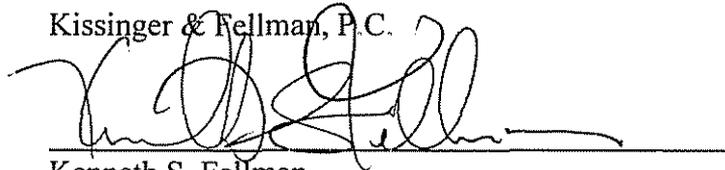
Based upon the record before this Commission, these Local Governments strongly encourage the Commission to take no action that would have the effect of limiting the local role in the video franchising process.

Respectfully submitted this 28th day of March, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March 2006, I served a true and correct copy of the foregoing **REPLY COMMENTS OF THE GREATER METRO TELECOMMUNICATIONS CONSORTIUM, THE RAINIER COMMUNICATIONS COMMISSION, HOWARD COUNTY, MARYLAND, THE CITIES OF BELLEVUE AND OLYMPIA, WASHINGTON AND THE WASHINGTON ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS** addressed to the following and in the manner specified:

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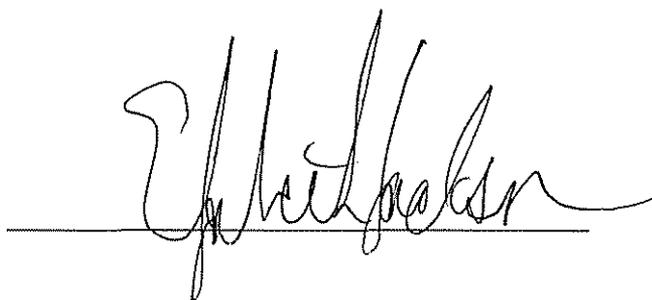
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A handwritten signature in black ink, appearing to read "Dave Haverkate", is written over a horizontal line. The signature is fluid and cursive.