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

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

REPLY COMMENTS OF BELLSOUTH CORPORATION AND BELLSOUTH ENTERTAINMENT, LLC

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BellSouth Corporation and its affiliated multichannel video programming distributor ("MVPD"), BellSouth Entertainment, LLC ("BEI") (hereinafter referred to collectively as "BellSouth"), hereby submit their Reply Comments in response to the Commission's *Notice of Proposed Rulemaking.*[1]

I. INTRODUCTION AND SUMMARY

The evidence in this proceeding is clear that the local cable franchising process is a barrier to entry that impedes both video competition and broadband deployment. The record conclusively demonstrates that the current local franchise process is a costly and time consuming exercise that leaves consumers with fewer competitive choices, while saddling them with higher cable prices.

[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, Notice of Proposed Rulemaking, FCC 05-189 (rel. Nov. 18, 2005) ("*Notice of Proposed Rulemaking*").

In light of the overwhelming evidence of the adverse competitive effects of the local franchising process, it is not surprising that numerous parties have submitted comments urging the Federal Communications Commission ("Commission") to reform that process. The parties advocating local franchising reform represent a wide and diverse spectrum of interests, including consumer groups,[2] public interest organizations,[3] trade associations,[4] equipment vendors,[5] as well as telecommunications carriers seeking to offer competing video services.[6] While the specific

[2] *See, e.g.,* Comments of American Association of Business Persons with Disabilities at 3-4; Comments of American Consumer Institute at 3-8; Comments of American Homeowners Grassroots Alliance at 1-6; Comments of California Alliance for Consumer Protection at 2-4; Comments of Consumer Coalition of California at 1-4; Comments of Consumers First, Inc. at 1-3; Comments of Consumers for Cable Choice at 1-6; Comments of League of United Latin American Citizens of the Northeast Region at 1-3; Comments of the National Hispanic Council on Aging at 1; Comments of TelCo Retirees Association, Inc. at 1-3; and Comments of Valley Voters Organized Toward Empowerment at 1-2.

[3] *See* Comments of Alliance for Public Technology at 2-3; Comments of Democratic Processes Center, Inc. at 2-3; Comments of Discovery Institute's Technology and Democracy Project at 4-8; Comments of Freedom Works at 15-22; Comments of Free Enterprise Fund at 1; Comments of Institute for Policy Innovation at 3-8; Comments of Pacific Research Institute at 2-6; Comments of Progress & Freedom Foundation at 1-4; Comments of The National Grange at 1-3; Comments of Washington State Grange at 1-2; Comments of Women Impacting Public Policy at 1-2; and Comments of World Institute on Disability at 1-2.

[4] *See* Comments of the Ad Hoc Telecom Manufacturer Coalition at 3-6; Comments of the Broadband Services Providers Association at 4-8; Comments of the California Small Business Association at 1-4; Comments of the California Small Business Roundtable at 4-6; Comments of the Fiber-to-the-Home Council at 11-38 (hereinafter "FTTH Council Comments"); Comments of the National Association of Broadcasters at 2-6; Comments of the National Telecommunications Cooperative Association at 12-15; Comments of the Small Business & Entrepreneurship Council at 1-2; Comments of the Telecommunications Industry Association at 3-20; Comments of the United States Internet Industry Association at 3-9; and Comments of the United States Telecom Association at 29-57 (hereinafter "USTelecom Comments").

[5] *See* Comments of Alcatel Corp. at 3-13; Comments of Microsoft Corp. at 4-9.

[6] *See* Comments of AT&T Inc. at 23-73; Comments of Cavalier Telephone LLC and Cavalier IPTV, LLC at 1-3; Comments of Cincinnati Bell, Inc. at 10-14; Comments of Hawaiian Telecom Communications, Inc. at 3-10; Comments of Qwest Communications International, Inc. at 4-28 (hereinafter "Quest Comments"); Comments of South Slope Cooperative Telephone Co. at 5-15 (hereinafter "South Slope Comments"); and Comments of Verizon Telephone Companies at 47-88 (hereinafter "Verizon Comments").

proposals offered by these parties vary to some extent, their central message does not – namely, that the local franchising process can and must be changed.

It is equally unsurprising that the parties opposing such change are those that benefit most from the status quo – the local franchising authorities and the entrenched incumbent cable operators. The local franchising authorities are understandably less than enthusiastic about the prospect of losing the power they historically have exercised over cable franchising, even if doing so would promote video competition and speed broadband deployment, and the entrenched incumbent cable operators are not anxious to face increased competition. To these ends, they argue that: (1) the cable franchising process presents no impediment to competitive entry; (2) any lack of video competition is attributable to telecommunications carriers such as BellSouth; and (3) it is "reasonable" to subject new video entrants to the same regulatory obligations imposed upon incumbent cable operators, such as mandatory build out. Such arguments are belied by the evidence and are inconsistent with positions previously espoused by the cable industry.

The local franchising authorities and the incumbent cable operators also attempt to mischaracterize the scope of this proceeding, along with the actions proposed by the Commission, setting forth a litany of objections to a variety of actions that neither the Commission nor parties such as BellSouth have suggested the agency should take. For example, contrary to their claims, this proceeding is not intended to serve as a rewrite of the Cable Act,[7] to create a national franchising regime,[8] or to gut the effectiveness of the anti-redlining

[7] Comments of Cablevision at 19 (describing the alleged harm to the public interest that would result from the supposed adoption of "a two-tiered franchising regime").

[8] *See, e.g.,* Comments of National Cable & Telecommunications Association at 20 ("Section 621 ... specifies that a franchising authority, not the federal government, may award franchises in accordance with the provisions of Title VI") (hereinafter "NCTA Comments"); Comments of the National Association of Telecommunications Officers and Advisors, the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors,

prohibition.[9] Rather, as embodied in the *Notice of Proposed Rulemaking*, and in the comments of parties such as BellSouth, the purpose of this proceeding is twofold: first, for the Commission to define its role in interpreting and implementing the provisions of section 621, in connection with the Commission's obligations to promote congressional policies of encouraging competitive entry into the video market and speeding broadband deployment; and second, for the Commission to determine whether certain categories of conduct on the part of local franchising authorities fall outside the bounds of the "reasonableness" requirement of section 621.

Notwithstanding claims by the local franchising authorities and the incumbent cable operators, the Commission has the authority to interpret and implement section 621. It is well settled that agencies may interpret and define *any* undefined terms in a statute, as long as those definitions are reasonable and consistent with congressional intent, and Congress has done nothing to divest the Commission of such authority under section 621. Likewise, the local franchising authorities and the incumbent cable operators misconstrue the Commission's authority under sections 4(i) and 706 of the Communications Act ("Act"), both of which empower the Commission to interpret the "reasonableness" requirement of section 621 in a way that promotes, rather than discourages, video competition and broadband deployment.

The Commission can best promote video competition and broadband deployment by adopting rules as proposed by BellSouth and other parties to: (1) prohibit a local franchising

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the Alliance for Community Media, and the Alliance for Communications Democracy at 35 ("Title VI certainly cannot be plausibly construed to grant the FCC authority to become some sort of national franchising authority") (hereinafter "NATOA Comments"). These are points that no one contests.

[9] NATOA Comments at 33-34; Comments of Comcast Corporation at 22 (hereinafter "Comcast Comments"). The anti-redlining provisions of federal law, and the requirements that they impose upon all providers of cable service, would continue to apply no matter what action the Commission takes in this proceeding, and no party has suggested otherwise. Indeed, BellSouth has stated plainly that it "has not engaged in redlining in the past and will not do so in the future." BellSouth Comments at 33.

authority from imposing mandatory build out obligations as a precondition to obtaining a cable franchise; (2) require that a local franchising authority rule upon any cable franchise application within ninety (90) days, or otherwise the application is deemed granted; (3) prohibit any fees (or in-kind requirements) assessed by the local franchising authorities beyond those expressly authorized by the Act; (4) prohibit a local franchising authority from requiring a broadband video provider to dedicate capacity on any "institutional network" for the benefit of the municipality if an institutional network already exists; (5) limit demands for support of "public, educational and governmental" ("PEG") channels by a new entrant to a reasonable contribution to any capital costs for "adequate" PEG facilities as well as an agreement to carry a reasonable number of PEG channels; (6) define with specificity the revenues that should be included in determining the applicable franchise fee to be paid to a local franchising authority; (7) preempt "level playing field" requirements that go beyond the obligations set forth in the Cable Act; and (8) clarify that local franchising authorities cannot lawfully require a telecommunications carrier to obtain a cable franchise as a condition to or before the carrier enhances its broadband network in order to provide video service. Adoption of these rules would bring much needed reform to the local franchise process.

II. THE LOCAL FRANCHISING PROCESS UNDENIABLY IMPEDES COMPETITIVE ENTRY

In its comments, BellSouth provided a detailed account of its experiences with the local cable franchising process, which demonstrate conclusively that this process is an impediment to competitive entry into the video market. BellSouth's experiences are not unique. The record is replete with instances of new entrants that sought to compete against entrenched cable operators falling victim to the local franchising process, which deterred their competitive video entry in California, Iowa, Kentucky, Minnesota, New Hampshire, Texas, and Virginia.[10]

Large would-be competitors are not immune from the anticompetitive effects of the local franchising process. Verizon has produced detailed evidence of the difficulties it has faced in seeking to obtain cable franchises, including demands by local franchising authorities for unreasonable build out requirements, funding for pet projects unrelated to video, excessive application and acceptance fees, and fees on non-cable services.[11] Similarly, Qwest was unable to offer a competing video service in eight communities because of unreasonable demands by local franchising authorities.[12]

Although several entrenched cable operators allege that accounts of difficulties with the franchising process typically lack specificity,[13] there is nothing "vague" or "anecdotal" about the evidence presented in this proceeding. With respect to BellSouth, it presented a comprehensive listing of its franchise applications and the disposition of each application, including the date on which each BellSouth application was filed, the date the franchise was granted and the time that

[10] USTelecom Comments at 22-25 (noting examples of market entry by competing video providers being deterred due to mandatory build out demands of local franchising authorities); South Slope Comments at 6-7 (noting that negotiation of a cable franchise takes as long as 6 months, during which time the incumbent cable operator is able to offer deep discounts and launch targeted marketing campaigns and thereby depress take rates for new entrant's video service); FTTH Council Comments at 19-20 (noting decision by new entrant not to obtain a cable franchise due to "the time and costs associated with obtaining a franchise agreement" and the local franchising authority's demand that the company "meet all the requirements [the local franchising authority] had imposed on the incumbent cable operator") & 21-40 (noting lengthy delays and unreasonable demands imposed by local franchising authorities upon new entrants seeking to provide video service).

[11] Verizon Comments, Declaration of Marilyn O'Connell, ¶¶ 23-55; *see also Ex Parte* Letter from Dee May, Vice President – Federal Regulatory, Verizon, to Marlene Dortch, Secretary, FCC, at 6-8 (March 9, 2006).

[12] *See, e.g.,* Qwest Comments at 8-10.

[13] Comcast Comments at 8; NCTA Comments at 2.

it took each local franchising authority to act upon the application. This evidence reflects that the average length of time that it took a local franchising authority to approve a cable franchise application from BellSouth was approximately ten months.

The delay experienced by BellSouth in obtaining its cable franchises is not unique. It took Grande at least nine months to obtain franchise agreements in major cities, and the process for one new entrant negotiating a cable franchise agreement "went on for well over a year."[14] According to Verizon, it is currently negotiating 301 franchise agreements, 22 of which "have been dragging on for 15 months or more, while 85 have been ongoing for more than a year and 223 for more than six months."[15]

In BellSouth's case, the length of time required to approve a cable franchise – which varied from almost 2 months to 32 months – was tied directly to demands by the local franchising authority for the type of burdensome legacy incumbent cable regulation, such as mandatory build out or other "level playing field" requirements, that BellSouth has requested this Commission to prohibit by rule. Absent such demands, BellSouth's cable applications were granted fairly quickly, as evidenced by Georgia, for example, where half of BellSouth's applications were approved in less than three months.

By contrast, in each instance when BellSouth's application for a cable franchise was delayed, the delay was attributable to attempts by the local franchising authority to impose build out obligations or other "level playing field" requirements. In at least one case, the fact that the local franchising authority had the discretion to impose such obligations provided the opportunity for dilatory litigation waged by entrenched cable operators seeking to avoid

[14] FTTH Council Comments at 26.

[15] *Ex Parte* Letter from Leora Hochstein, Executive Director – Federal Regulatory, Verizon, to Marlene Dortch, Secretary, FCC, at 1 (March 8, 2006).

competition. Specifically, although BellSouth's franchise application was approved by Miami-Dade County, Florida in nine months, a group of incumbent cable operators then filed suit against the County and BellSouth alleging that granting BellSouth's application without imposing a build out requirement violated the state's level playing field statute. Although the incumbent cable operators lost their legal challenge at the federal and state level in both the trial and appellate courts, and BellSouth was allowed to enter the video market without a build out requirement, BellSouth's market entry was delayed for almost three years.

Despite these facts, the National Cable & Telecommunications Association ("NCTA") blithely insists that "there has been no evidence that franchising authorities have been unreasonably refusing to grant additional franchises," particularly when "'anecdotal evidence suggests that new entrants *have* been able to obtain cable franchises.'"[16] But NCTA's position ignores that the lengthy delay routinely experienced by new entrants in obtaining a franchise is tantamount to an unreasonable denial. Even some local franchising authorities have acknowledged that "the protracted period of time for completion of the steps involved in granting a franchise … may deter competitive entry rather than promote and facilitate it."[17]

The Commission itself has recognized the competitive harms caused by the delay associated with "entry and certification requirements." Specifically, in the *Vonage Order*, the Commission determined that new entrants into the IP-enabled services market should be exempt from legacy "entry and certification requirements," which it found could "take months" and

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[16] NCTA Comments at 2 (quoting Commission's *Notice of Proposed Rulemaking,* ¶ 8) (emphasis added).

[17] *Petition of the Town of Clarkstown (Rockland County) for a Waiver of Certain Provisions of 9 NYCRR Part 594 of the Commission's Rules to Provide Cable Television Service,* Case 05-V-0059, Order Granting Waiver, at 3 (N.Y. Pub. Serv. Comm'n May 20, 2005).

could "introduce[] substantial delay in time-to-market."[18] The Commission was especially concerned that new providers – including specifically cable VoIP providers – would be subject to "multiple disparate" regulatory schemes by "more than 50 different jurisdictions," seriously deterring entry.[19]

The Commission's concerns about the "substantial delay" associated with a new entrant having to obtain permission to enter a market and being subjected to "multiple disparate" regulatory schemes are magnified significantly in the video market. As noted in BellSouth's Comments, if each city in BellSouth's region were to function as a local franchising authority, and if counties within BellSouth's region performed the same function in unincorporated areas, BellSouth would have to go through the ten month (on average) application process to obtain each of the more than 1500 franchises necessary to provide cable service throughout its territory.[20] The harm to competitive entry caused by such an arduous process is clear.

The local franchising authorities claim that rules implementing section 621 are unnecessary because municipalities "have embraced the policy" behind section 621 as evidenced by the "remarkable dearth of reported precedent concerning § 621(a)(1) in general, and its 'unreasonable refusal' provision in particular."[21] However, the lack of reported cases interpreting section 621 proves nothing and certainly does not establish that local franchising authorities have not "unreasonably refused" to award franchises to competing providers.

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[18] *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22415-16, ¶ 20 (2004) ("*Vonage Order*").

[19] *Id.* at 22426-27, ¶¶ 35-36; *see also id.* at 22425, ¶ 32 (noting that its preemption ruling extends to cable operators that provide VoIP).

[20] BellSouth Comments at 11.

[21] NATOA Comments at 23.

To the contrary, the record reveals numerous instances when new video entrants simply elected not to compete in a market because of their inability to secure a cable franchise within a reasonable period of time or on reasonable terms and conditions.[22] For example, The Merton Group, LLC withdrew its request for a cable franchise from the Town of Hanover, New Hampshire; it did so only after having to endure a nearly three-year, "inordinately long" process that was marked by the town's attempt to impose "requirements not placed on the incumbent."[23] Similarly, Knology decided not to offer a competing cable service in Louisville, Kentucky due to delays in the franchise process, during which time the incumbent was able to "upgrade its network, improve its operations, and enter into exclusive agreements with owners of multiple development units."[24] The same is true for Qwest, which withdrew its request for a franchise in eight markets because of demands by the local franchising authorities for "build-out requirements that would have made the franchise economically irrational."[25]

In BellSouth's case, as reflected in its initial comments, when confronted with unreasonable demands by local franchising authorities – as was the case in Germantown, Tennessee, and Coral Springs, Florida – BellSouth opted not to serve those markets. In short, many new entrants will simply walk away from a market rather than litigate the lawfulness of the local franchising authority's actions under section 621.[26]

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[22] *See, e.g.,* FTTH Council Comments at 26 (noting GAO report about a competing provider's unsuccessful efforts to enter the market when it was unable to obtain a franchise after more than two years of negotiations with the local franchising authority).

[23] FTTH Council Comments, Declaration of Terrence P. McGarty, ¶¶ 33-44.

[24] FTTH Council Comments, Declaration of Felix Boccucci, Jr., ¶ 20.

[25] Qwest Comments at 9.

[26] *See also* USTelecom Comments at 22-23 (describing the decision by Lakedale Communications to abandon its plan to provide video services in Otsego, Minnesota after the local franchising authority demanded that Lakedale build out its network to match the incumbent's cable service area); *In the Matter of Applications for Consent to the Transfer of*

In an attempt to preserve their market positions, various cable operators argue that the local franchising process works well and presents no impediment to competition. A closer look at their arguments, however, reveals that they are based on a mischaracterization of the cable operators' own experiences, represent a radical reversal of their prior positions, or present false conclusions about the record evidence that undercuts their arguments. The common thread that runs through such comments is an appalling lack of candor.

For example, Charter Communications, Inc. ("Charter") asserts that its "experience as a relatively new entrant in multichannel video programming distribution ("MVPD") marketplace rebuts the ILECs arguments... that the franchising process is so time consuming and expensive that it effectively denies [competitive] franchises."[27] Charter also alleges that "the ILECs say they cannot secure several thousand franchises and upgrade their networks in a competitive environment—yet Charter did."[28] However, as Charter acknowledges, it obtained franchises through the acquisition of existing cable systems that required the transfer approval from 1,417 local franchising authorities during a two-year period, which enabled Charter to acquire millions of subscribers.[29] Tellingly, Charter does not indicate a single instance in which it obtained a cable franchise through the negotiation of an initial franchise agreement.

Control of Licenses, Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee, MD Docket No. 02-70, Petition of RCN Telecom Services, Inc. to Deny Applications or Conditioned Consent, at 15-16 (Apr. 29, 2002) (emphasis added) ("RCN Petition") (noting RCN's decision not to provide competing service in Prince George's County, Maryland and Philadelphia, Pennsylvania).

[27] Charter Comments at 2.

[28] *Id.*

[29] *Id.* at 5; *see also* Corey Grice, "Allen Takes Charter to New Heights," news.com (May 28, 1999) (noting the "unconventional approach to cable consolidation" employed by Charter, after it "gobbled up dozens of cable systems serving millions of subscribers"), *available at* http://news.com.com/Allen+takes+Charter+to+new+heights/2100-1033_3-226501.html.

Given that Charter has little, if any, experience whatsoever in the process of negotiating new cable franchises, it is not surprising that Charter has found the process of "acquiring" franchises to be so straightforward and simple. Section 617 of the Act provides that a transfer application must be approved within 120 days or it will be deemed to be approved.[30] As numerous parties in this proceeding have observed, one of the most serious problems with the current local franchising process is that, in contrast to a transfer application, a local franchising authority may delay acting upon an initial application for months or even years.[31]

Even Charter's complaint that local franchising authorities use the transfer process to exact concessions such as contributions to institutional networks and funding for PEG programming rings hollow.[32] The fact remains that the timeframe for transfer approval (and the fact that if this timeframe is not met, the application is approved) provide the local franchising authority with no real leverage to make unreasonable demands or seek unreasonable concessions from the transferee. In marked contrast, the lack of a rule prescribing the time by which a local franchising authority must act upon an initial cable franchise application emboldens the local franchising authority to make unreasonable demands and to delay the would be competitor's entry into the video market indefinitely, or at least until the applicant capitulates to the unreasonable demands or withdraws its application.[33] The Commission can and should remedy this problem by promulgating a rule requiring that a local franchising authority rule upon any

[30] 47 U.S.C. § 537.

[31] *See, e.g.*, Comments of Ad Hoc Telecom Manufacturer Coalition at 4-5 (noting that it takes approximately one year to obtain a franchise and proposing that the Commission shorten this process); Verizon Comments at 30-34 (noting the "inordinate delay" in the local franchising process).

[32] Charter Comments at 5.

[33] *See* Verizon Comments at 30-31 (noting that delay in the local franchising process "is used by municipalities as a negotiating tactic in an effort to force Verizon to agree to unreasonable, and often unlawful, conditions or concessions").

cable franchise application within a specified period of time, or otherwise the application is deemed granted, as BellSouth and others have proposed.[34]

RCN Telecom Services ("RCN") asserts in this proceeding that the current franchising process "has worked and is working" and has produced "substantial benefits for both consumers and local communities."[35] However, in other proceedings before this Commission, RCN painted a considerably less rosy picture of the local franchising process, lamenting that it required "enormous start-up expenses," "generally takes six months to a year," and is used by local franchising authorities to "attempt to secure as high a price as possible for granting a franchise."[36] In fact, RCN has called the local franchising process a "*very high barrier[] to market entry*," noting that "[n]egotiating such franchises is challenging" and is a mechanism by which the incumbent cable operator seeks "to impose the highest possible burdens on the competitive provider."[37] RCN offers no explanation for its sudden change of heart.

Nor does RCN bother to explain how the local franchising process can be "working" when it is routinely subject to abuse. For example, RCN previously complained to the Commission that Comcast had interfered with RCN's attempts to obtain local franchises in Prince George's County, Maryland and Philadelphia, Pennsylvania. According to RCN,

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[34] *See, e.g.,* BellSouth Comments at 36-37; Comments of National Telecommunications Cooperative Association at 9-11; AT&T Comments at 74-75; Qwest Comments at 26-28; Verizon Comments at 30-31.

[35] Comments of RCN Telecom Services, Inc. at 2-3 (hereinafter "RCN Comments").

[36] April 4, 2001 Testimony of Robert Currey, Vice Chairman, RCN Corporation, before the United States Senate Judiciary Committee, Subcommittee on Antitrust, Business Rights, and Competition, 2001 WL 323752 (F.D.C.H.) at 10 ("Currey Testimony").

[37] RCN Petition at 13 (emphasis added); *see also* Currey Testimony, at 14 ("For any prospective competitor to have a meaningful chance to be commercially successful in introducing competition into a community served by an entrenched cable operator ..., the competitor must have deep pockets, an ability to postpone profits for some years, the most modern technology, and *the patience to negotiate franchise agreements and rights-of-way agreements with local governments*...") (emphasis added).

Comcast's actions "led to the failure of RCN's efforts to negotiate a viable franchise, with the consequence that consumers in those two markets still face a cable monopoly today."[38] Consumers denied competitive video choice in Prince George's County and Philadelphia would likely disagree with RCN's new-found view that the local franchising process is "working."

Finally, Comcast takes the comparatively bolder, if more transparent, tack of denying the existence of the record evidence which demonstrates that the franchise process is a hindrance to competition. As noted above, BellSouth and others have provided extensive detailed evidence of their experiences with the franchise application process, much of which was also provided in the video competition proceeding.[39] While categorizing such evidence as "vague and unsubstantiated,"[40] Comcast then converts this mischaracterization into blatant falsehood, insisting that "*ILECs complain about LFAs without identifying a single LFA by name or providing any specific details about the problems that were allegedly encountered.*"[41] Thus, Comcast responds to the comprehensive, specific evidence provided by BellSouth and others not by rebutting it, or even by ignoring it, but by affirmatively insisting that this evidence *does not exist*. The Commission should not be fooled by Comcast's antics and should not overlook the

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[38] RCN Petition at 15-16; *see also*, *In the Matter of Applications for Consent to the Transfer of Control of Licenses, Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee*, MD Docket No. 02-70, RCN Telecom Services, Inc., Reply to Opposition of AT&T and Comcast to Petition to Deny Applications or Condition Consent, at 6-7 (June 5, 2002) (noting that the County Executive of Prince George's County demanded a payment of an upfront fee of $400,000 to fund high-speed internet services to government offices and schools "only after intense lobbying of the County Executive by Comcast").

[39] *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, *Notice of Inquiry*, 20 FCC Rcd 14117 (2005).

[40] Comcast Comments at 8.

[41] *Id.* n.22.

overwhelming evidence which conclusively demonstrates the significant extent to which the local franchising process has impeded competition.

III. THE LACK OF COMPETITION IN THE VIDEO MARKET CANNOT BE ATTRIBUTED TO ANY LACK OF EFFORT BY BELLSOUTH.

As the comments of numerous parties confirm, there is an appalling lack of competition in the video market, which has led to reduced choices and higher prices for consumers.[42] In its Report on Cable Industry Prices, the Commission concluded that there were less than 1,000 communities in which the statutory test for effective competition has been met, which represent "3 percent of cable communities nationwide, serving an estimated 8 percent of cable subscribers nationwide."[43] Thus, years after passage of the 1992 Cable Act and the Telecommunications Act of 1996, fewer than ten percent of the subscribers to traditional cable service in the nation have an effective alternative to the entrenched incumbent cable operator. The local franchising process is a significant reason for the dearth of effective competition.

Rather than recognizing this market reality, several parties opt to blame BellSouth and the other Regional Bell Operating Companies ("RBOCs") instead. For example, NATOA argues that BellSouth (as well as the other RBOCs) "made no serious effort to enter the multichannel

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[42] *See, e.g.,* Comments of American Homeowners Grassroots Alliance at 1-2 (while pricing for other telecommunications goods and services have been declining, cable rates have been increasing at more than three times the rate of inflation); Comments of American Association of Business Persons with Disabilities at 2 (current franchising rules lead to high prices); Comments of Consumer First, Inc. at 1-2 (cable prices are too high and continuing to grow because the cable industry does not face meaningful competition); Comments of Consumers for Cable Choice at 2-3 (noting that cable rates have risen 56.6% since 1996); Comments of the American Consumer Institute at 4-6 (discussing recent study indicating that consumers are losing billions of dollars from overpriced cable services due to a lack of competition).

[43] *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, 20 FCC Rcd 2718, 2719, n.4 (2005).

video market as a cable operator, a video common carrier or an open video system operator."[44] This argument is both inaccurate and misleading.

BellSouth did in fact enter the video market as a cable operator, obtaining 20 franchises to provide cable "overbuild" service in local markets throughout its telephone service area, representing approximately 1.4 million potential cable households. BellSouth currently provides cable service to approximately 40,000 customers in 14 markets. However, as explained previously, BellSouth's efforts to obtain cable franchises, which begin in 1996, were marred by unreasonable demands by some local franchising authorities, interference by incumbent cable operators seeking to protect their entrenched market position, and protracted negotiations and litigation.[45]

Because of the obstacles created by the local franchising process and the economics of competing in the video market as an overbuilder, BellSouth has pursued other alternatives in order to compete in the video market. In particular, in early 1998, BellSouth began providing video service via fixed wireless transmission using the MMDS/ITFS (now known as BRS/EBS) spectrum. Although the service was offered in a limited number of markets, approximately 120,000 customers subscribed to the service. However, at the time the service was a terrestrial broadcast "line-of-sight" technology, meaning that the ability to get an adequate signal to the home was often blocked by terrain, trees, and buildings, which significantly limited the total addressable market. In many cases, to overcome some line of sight difficulties, BellSouth had to make arrangements to mount antennas in the tops of trees or on tall masts attached to the home to provide sufficient service coverage, which increased the cost of providing service.

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[44] NATOA Comments at 25.

[45] BellSouth Comments at 10-20.

In addition to terrestrial wireless technology, BellSouth spent considerable resources exploring the use of satellite technology as a way to expand coverage of its video offering.[46] However, BellSouth ultimately abandoned this entry option, deciding to focus its entertainment business on its fiber optic-based wireline video operations and to devote its resources to such strategic priorities as broadband deployment.[47]

Finally, with respect to the operation of an open video system ("OVS"), this was a failed business model that BellSouth never seriously considered. While the current cable model (particularly the local franchising process) has serious flaws, the OVS model is even worse because an OVS operator: (i) must follow many of the existing cable rules including obtaining a franchise, while at the same time being subjected to a additional set of nondiscrimination, common carrier like obligations which require that the operator provide up to one third of its network capacity to competitors rather than using that capacity to compete more effectively against the incumbent; (ii) is subject to complex and uncertain nondiscrimination rules that govern the presentation of programming to the customer via electronic guides, which interfere with branding and marketing plans; (iii) is placed at a competitive disadvantage in relation to the incumbent cable operator, which only must make up to 15% of its channel capacity available to nonaffiliated programmers under 47 U.S.C. § 532 and enjoys considerable more flexibility in providing commercial leased access; and (iv) faces significant business risk that a competing video provider would launch a directly competitive substitute video service over the OVS

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[46] *See* Steven Bonisteel, "BellSouth Looks to Sky for TV Service," *ComputerUser.com* (May 10, 2000) *at http://www.computeruser.com/news/00/05/10/news17.html.*

[47] Press Release, BellSouth Updates Plans for Restructuring Video Entertainment Service (Dec. 19, 2000), *available at* http://bellsouth.mediaroom.com/index.php?s=press_releases&item=2560.

operator's own network. Under the circumstances, neither BellSouth nor any other RBOC could be faulted for not pursuing an OVS strategy.[48]

A group of nine municipalities in Florida erroneously claim "that BellSouth has not constructed the necessary facilities to be capable of providing cable service to all but a few thousand subscribers within these areas."[49] In point of fact, BellSouth currently has three active cable franchises in South Florida, which collectively include 1,058 miles of activated cable facilities that pass and thereby provide a competitive choice of cable service provider to well over 50,000 potential subscribers in those areas. While BellSouth may currently have a relatively modest number of cable subscribers in South Florida, the reason is due to a combination of the presence of vigorous video competition where BellSouth overbuilt and the relatively high cost of constructing cable transmission facilities to provide cable services in those areas, not a lack of willingness to deploy facilities to serve communities in general, as the Florida municipalities suggest.

BellSouth's experience in South Florida reflects how drastically the economics of providing traditional cable service have changed. Decades ago the currently entrenched incumbent cable operator entered the market as the provider of a new service to customers who had no other competitive alternatives. By contrast, a new entrant in the video market today must

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[48] Even OVS operators have been critical of this business model. For example, RCN – which operated an OVS in certain markets in Boston, New York City, Washington, D.C., and San Francisco – noted that "the OVS model has not proven as attractive as one might have hoped," primarily because of the Fifth Circuit's decision in *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999), that "struck down the FCC's rule eliminating the need for local franchising of OVS systems, the hesitation and even reluctance of many local franchising bodies to put aside the traditional franchise as a regulatory model and to adopt the new OVS concept, and, in addition, certain regulatory decisions of the FCC which have had the chilling effect on the OVS approach by permitting local cable operators, in certain circumstances, to require the OVS operator to divulge its service and operational plans to a local competitor." Currey Testimony, at 8.

[49] Comments submitted by Certain Florida Municipalities at 23.

compete not only against the incumbent operator but also against Direct Broadcast Satellite ("DBS") providers as well as other cable overbuilders and thus can only hope to serve a fraction of the total number of potential customers. To the extent local franchise authorities are successful in imposing costly and burdensome requirements upon new entrants (such as mandatory build out), entering (and remaining in) the market becomes an even more daunting task.

IV. THERE IS NO JUSTIFICATION FOR IMPOSING MANDATORY BUILD OUT REQUIREMENTS ON NEW ENTRANTS.

Mandatory build out requirements are an example of the type of legacy cable regulation that stifles competitive entry when imposed upon new entrants.[50] Although Comcast insists that "there is no marketplace evidence that build-out requirements are creating barriers to ILEC entry,"[51] the record in this proceeding conclusively proves otherwise.

In BellSouth's case, as reflected in its initial comments, BellSouth declined to provide a competing video service in Germantown, Tennessee, when the local franchising authority demanded that BellSouth overbuild all of Germantown and the geographic areas served by the incumbent cable operator in five years.[52] Similarly, Qwest withdrew its request for a franchise in eight communities because of the burdensome build out requirements the local franchising authorities sought to impose.[53] The same is true for South Slope Cooperative Telephone

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[50] *See, e.g.,* Comments of Broadband Services Providers Association at 4-5 (build out requirements are a significant impediment to competition); Comments of Cincinnati Bell at 10-12 (build out requirements only serve to discourage new entrants from making the investment necessary to bring video services to as many customers as is economically feasible); Comments of Discovery Institute's Technology and Democracy Project at 7-8 (build out requirements are anticompetitive); FTTH Council Comments at 32-36 (build out requirements slow deployment of next generation networks).

[51] Comcast Comments at 24.

[52] BellSouth Comments at 17-18.

[53] Qwest Comments at 9.

Company, Lakedale Communications, Shenandoah Telecommunications Company, SureWest Communications, and Guadalupe Valley Telephone Cooperative, all of which were effectively prevented from offering video service to customers because of burdensome and uneconomical build out requirements.[54]

The Commission has found that build-out requirements are a barrier to entry in the telecommunications market.[55] In *Public Utilities Commission of Texas,* the Commission preempted enforcement of a Texas statute that imposed build-out requirements on competitive local exchange carriers ("LECs") by requiring competitive LECs to serve a specified portion of its service area using facilities that do not belong to the incumbent LEC.[56] According to the Commission, "build-out requirements are of central importance to competitive entry because these requirements impact the threshold question of whether a potential competitor will enter the

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[54] South Slope Comments at 9-10 (noting that customers in Cedar Rapids and Coralville, Iowa franchise areas were denied a competing video service because the expense of building out to serve such areas "presents an unreasonably high barrier to entry"); USTelecom Comments at 22-25 (noting that burdensome and costly build out requirements prevented incumbent telephone companies from providing video service to customers in Ostego, Minnesota, Rockingham County, Virginia, and Roseville, California); FTTH Council Comments, Declaration of Jeff Mnick, ¶¶ 2-5.

[55] *In the Matter of Public Utilities Commission of Texas, et al,* CCB Docket No. 96-13, *et al.*, Memorandum Opinion and Order, 13 FCC Rcd 3460 (1997).

[56] Section 3.2531 of the Texas Public Utility Regulatory Act of 1995 required, inter alia, that applicants for a Certificate of Operating Authority ("COA") in Texas commit to serve a minimum area covering at least 27 square miles and submit to the Texas Commission proposed build-out plans demonstrating how they plan to deploy facilities throughout their proposed service area over a six-year period. By the end of the first year of deployment, the holder of a COA was required to serve ten percent of the service territory through the use of facilities other than those of the incumbent LEC. By the end of the third year, fifty percent of the territory must be served with facilities not provided by the incumbent LEC. By the end of the sixth year, none of the facilities used by a COA holder may be purchased from the incumbent LEC, with the exception of local loops obtained under state tariff from the incumbent LEC at usage sensitive rates, which may be utilized in up to forty percent of the served territory. *Id.* at 3488, ¶ 57.

local exchange market at all."[57] The Commission preempted enforcement of these requirements, in part, "because they impose a financial burden that has the effect of prohibiting certain entities from providing telecommunications services in violation of section 253."[58]

The Commission's reasoning applies with equal force to new entrants in the video market. As Cincinnati Bell correctly notes, mandatory build out requirements only serve to discourage a new entrant "from making the investment necessary to bring video services to as many customers within its operating areas as it is economically feasible to do."[59] Accordingly, the Commission should preempt the imposition of mandatory build-out requirements on new entrants to the video market, as BellSouth and numerous other parties have proposed.[60] By doing so, the Commission would allow new entrants "to make a decision about whether to make the network investments to provide video service to a particular customer in [their] operating area on both operational and economic considerations rather than on a LFA's political boundaries."[61]

That BellSouth and numerous other parties are asking the Commission to preempt the imposition of build out requirements on new video entrants does not mean that BellSouth or

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[57] *Id.* at 3466, ¶ 13.

[58] *Id.*

[59] Cincinnati Bell Comments at 11; *see also* Comments of the American Consumer Institute at 7 ("Requiring entrants to build out faster than financially rational adds a new risk for entrants that will raise the cost of capital and slow down the rate of new capital formation").

[60] BellSouth Comments at 30-35; Alcatel Comments at 10 ("Build-out requirements for competitive entrants should be eliminated"); Comments of Ad Hoc Telecom Manufacturer Coalition at 4 (the Commission should preempt requirements that a new entrant in the video market "expand video service to specific neighborhoods by arbitrary deadlines"); National Telecommunications Cooperative Association Initial Comments at 6 (local franchising authorities should be directed "not [to] impose build-out periods for new entrants in the video market"); AT&T Comments at 44-47 (build-out requirements should be prohibited); Verizon Comments at 39-46.

[61] Cincinnati Bell Comments at 11-12.

anyone else is advocating the "elimination of redlining prohibitions," as Comcast falsely claims.[62] The term "redlining" refers to the practice of denying or increasing the cost of service to residents of certain areas based upon such criteria as race or socioeconomic status. The term originated in the 1930s when banks would actually mark red lines on a map in order to delineate areas to which they did not want to lend because of the race of the residents.[63] BellSouth does not, and will not engage in redlining. BellSouth has 14 cable franchises under which it has been providing cable service for nearly a decade. Yet, in this entire period of time BellSouth has not received a single redlining complaint.

Similarly, when BellSouth deployed its DSL service, it did so without regard to a customer's race or socioeconomic status. Currently, more than 80% of BellSouth's customer locations have access to DSL, and those that do not generally are located in more remote areas that are technically challenging and very expensive to serve – a fact that has nothing to do with race or socioeconomics. The technology BellSouth is considering deploying to support a video offering – IPTV – requires a broadband (DSL) connection; it simply makes no sense to suggest that BellSouth would refuse to provide IPTV to certain customers based on their race or socioeconomic status in areas where BellSouth has provided or plans to provide broadband service. BellSouth did not do that with DSL and would not do it with IPTV.

However, the issue of "redlining" should not be confused with mandatory "build-out," as NCTA attempts to do.[64] Section 621(a)(3) provides that cable services may not be "denied to any group of potential residential cable subscribers because of the income of the residents of the

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[62] Comcast Comments at 26.

[63] *See* http://en.wikipedia.org/wiki/redlining.

[64] NCTA Comments at 15

local area in which such group resides."[65] However, this provision "*prohibits discrimination on the basis of income; it manifestly does not require universal service.*"[66]

Quoting the language from section 621(a)(3) that prohibits the denial of service on the basis of income, Comcast claims that "Congress explicitly anticipated that this language should be used by local franchise authorities to mandate build out."[67] Comcast seeks to support this assertion by citing language from a 1984 House Report that, according to Comcast, mandates complete build out of a franchise area to avoid redlining.[68] However, Comcast neglects to mention that the United States Court of Appeals for the District of Columbia specifically held that section 621(a)(3) does not require build out of an entire franchise area, expressly finding that the House Report should not be read to mean otherwise.[69]

Comcast also argues that "[t]he anti-redlining prohibition was reinforced by the addition of statutory language in 1992 that required franchises to '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.'"[70] However, Comcast again neglects to mention that its statutory interpretation was explicitly rejected in *Americable International Inc. v. United States Department of Navy.*[71] In that case the court held that the above-quoted language contains no requirement to build out the

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[65] 47 U.S.C. § 541(a)(3).

[66] *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1580 (D.C. Cir. 1987), *cert. denied, Connecticut v. FCC*, 485 U.S. 959 (1988); *see also In the Matter of Implementation of the Provisions of the Cable Communications Policy Act of 1984*, MM Docket 84-1296, *Report and Order,* 50 Fed. Reg. 18,637, 18, 647 (May 2, 1985).

[67] Comcast Comments at 22.

[68] *Id.*, citing H. Rep. No. 09-934 (1984).

[69] *See American Civil Liberties Union v. FCC*, 823 F.2d at 1580.

[70] Comcast Comments at 23 (quoting section 621(6)(4)(A)).

[71] 931 F. Supp 1 (D.D.C. 1996).

entire local franchising area, noting that the incumbent cable operator's "strained argument is at odds with the purpose of the Cable Act, which is to promote competition, and of the amendment in question, which protects the interests of new franchise applicants and not incumbents."[72] Thus, Comcast not only misinterprets the statutory language of the Cable Act, but continues to do so in blatant disregard of settled case law.

Contrary to the arguments of NCTA and Comcast, the prohibition against "redlining" does not mean that a video provider must deploy new technologies or make available new services to all of its customers on a ubiquitous basis. In fact, cable operators routinely rollout new services and new technologies only in selective areas, as NCTA readily acknowledges. For example, in its 2004 Year-End Industry Overview, NCTA noted that cable's high-speed Internet service was available to 91% of U.S. households passed by cable; however, when the service was first being offered, it was available to less than 35% of U.S. households in 1999 and less than 60% in 2000.[73] Similarly, as of December 31, 1999, Charter made cable modem service available to less than 45% of the homes to which it offered basic cable service; one year later, this percentage had increased only slightly, as less than 55% of basic cable eligible homes could get cable modem service from Charter by December 31, 2000.[74]

There is nothing wrong with the approach taken by the cable companies in deploying new services and technologies. Offering service initially only in selective markets allows a company to determine whether the service will be commercially viable before incurring the expense of making it available on a broader, more ubiquitous basis. Such an approach is prudent and

[72] *Id.* at 3.

[73] NCTA 2004 Year-End Industry Overview at 5, *available at* http://www.ncta.com/pdf_files/NCTAYearEndOverview04.pdf.

[74] Charter Communications, Inc. Form 10K, Annual Report Pursuant to Section 13 of the Securities Exchange Act of 1934, for the Year Ended December 31, 2000, at 10.

certainly does not constitute "redlining." Just as the cable companies have been able to deploy new services and technologies in selective markets, such as Voice over Internet Protocol ("VoIP"), without any requirement to serve all customers on a ubiquitous basis, new entrants should be able to do likewise in rolling out their new video services.

Furthermore, besides being uneconomic for new entrants, mandatory build out requirements are particularly problematic for telephone companies seeking to enter the video market given the differences between the geographic areas served by their existing networks and the jurisdictional boundaries of particular local franchising authorities. Although the local franchising authorities claim that this issue is a "red herring" because "[t]he number of places where that is true is not significant at all,"[75] the problem is very real. For example, BellSouth has a cable franchise to serve unincorporated Cherokee County, Georgia. However, as reflected on the map attached as Appendix 1, the geographic area of this cable franchise is considerably larger than the boundaries of the wire center in which BellSouth provides telephone service.[76] Similarly, in Orange County, Florida, BellSouth provides telephone service from seven wire centers in this county; however, as reflected on the map attached as Appendix 2 these wire centers do not reach various municipalities in the country,[77] and requiring that BellSouth build out to serve those municipalities would undermine any viable business case for providing video service in Orange County.[78]

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[75] NATOA Comments at 34, n.37.

[76] Appendix 1.

[77] Appendix 2.

[78] *See also* South Slope Comments at 9-10 (noting demand by local franchising authorities for build out in areas outside of incumbent telephone company's service territory in Cedar Rapids and Coralville, Iowa franchise areas); USTelecom Comments at 22-25 (noting demand by local franchising authorities for build out in areas outside of incumbent telephone

NCTA asserts that the survival of incumbent cable operators will be threatened unless mandatory build out requirements are imposed on new entrants.[79] In broad strokes, NCTA's assertion is premised upon the notion that providing service to more profitable customers cross subsidizes service to less profitable customers who generate less revenue for the incumbent. According to NCTA, unless new entrants are burdened with comprehensive build out requirements, they will be able to "cream skim" the more lucrative customers, leaving incumbent cable operators with the low revenue customers and undercutting their ability to engage in cross subsidization. There are at least two problems with NCTA's theory: first, it rests on a shaky theoretical foundation, and, second, it suffers from a total absence of factual support.

In support of its "cream skimming" theory, NCTA has submitted an analysis by Michael G. Baumann, who states that "[e]ntry and competition *may* limit the ability of the incumbent operator to use cross-subsidies."[80] If the incumbent charges uniform prices, this "*may* open the door to creme skimming, and *may* threaten the viability of the incumbent operator." Moreover, "entry *may* eliminate the incumbent's ability to offset losses in low revenue areas with revenues from high revenue areas. Going forward, the incumbent *may* not be able to profitably upgrade its system and continue to meet its coverage requirements. High cost, low revenue areas *may* well not be provided with cable service."[81] Based on Mr. Baumann's own words, his analysis is little more than unfounded speculation.

Furthermore, such speculation is absurd on its face, particularly given the cable industry's claim that the video market is "fiercely competitive" because of DBS providers such as

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company's service territory in Ostego, Minnesota, Rockingham County, Virginia, and Roseville, California franchise areas).

[79] NCTA comments at 15-19.

[80] NCTA Comments, Attachment B at 4-5 (emphasis added).

[81] *Id.* at 5-6 (emphasis added).

DIRECTV and Dish Network as well as "internet video and other emerging distribution platforms."[82] None of these competitors responsible for the "fiercely competitive" video market is subject to any build out obligations, and DBS providers and other video platforms are free to, and often do target high revenue customers. Yet, no incumbent cable operator has suffered financial ruin as a result.

Mr. Baumann's analysis also is predicated on the assumption that some cable customers generate insufficient revenue to cover the cost of serving them yet NCTA has failed to supply any data to support this assumption. This is true even in those relatively few areas where cable operators face effective competition, and, as the Commission has noted, cable prices are 27% lower on average than cable prices elsewhere. Yet, in all their filings, no incumbent cable operator has identified a single market in which it has been required to lower prices to a level that endangers the profitability of serving any group of customers. In the absence of such evidence, it is more likely that Mr. Baumann's theoretical construct really applies to situations where the incumbent cable providers enjoy huge profits from some customers, and more modest profits from others, but no discernible losses. In the absence of any concrete cost data to support Mr. Baumann's analysis, it should be given no credence.

V. THE IMPOSITION OF BURDENSOME LEGACY CABLE REGULATIONS ON NEW ENTRANTS CANNOT BE JUSTIFIED ON GROUNDS OF SYMMETRICAL REGULATION.

In addition to build out requirements, there is ample evidence in the record of other onerous obligations that local franchising authorities have sought to impose upon new entrants. For example, Verizon has detailed the demands it has received from local franchising authorities "for large monetary payments or other types of in-kind contributions as a condition of receiving

[82] Comcast Comments at 4.

a franchise."[83] These include: (1) the demand by a local franchising authority in Florida for a fee in excess of $13 million for PEG support and the construction of a communications network; (2) a California community's demand that Verizon pay up-front and revolving charges totaling approximately $1.7 million for PEG access equipment and facilities; (3) attempts by local franchising authorities in one metropolitan area to charge Verizon three percent of its gross revenues for PEG support in addition to the five percent franchise fee; (4) the payment of "application fees" at the time Verizon files a cable franchise application, which are as high as $25,000 in Maryland, $30,000 in California (plus an agreement to pay additional expenses such as attorneys fees of up to an additional $20,000), and $50,000 in Pennsylvania; (5) the payment of "acceptance fees" at the time Verizon is awarded a franchise, ranging from $50,000 to $225,000 in Virginia; and (5) requests by local franchising authorities for free broadband Internet service and other services unrelated to the video franchise, such as the installation of cell phone repeaters at the town hall, wiring of all houses of worship, free parking at a Verizon facility for patrons of the public library, and free dark fiber.[84]

Similarly, the Fiber-To-The-Home Council has noted the "creativity" of local franchising authorities in seeking to impose excessive demands upon new entrants, which only raise the cost of entry. Examples include: (1) Corpus Christi's demand that Grande make an upfront payment of $200,000 for PEG; (2) Louisville, Kentucky's demand that Knology pay approximately $1.9 million for PEG support over the 15 year term of the cable franchise; and (3) San Antonio's insistence that Grande prepay $1 million in franchise fees and fund a $50,000 scholarship with an additional $7,200 to be contributed each year.[85]

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[83] Verizon Comments, Declaration of Marilyn O'Connell, ¶¶ 28-48.

[84] *Id.*

[85] FTTH Comments at 36-38.

These types of demands are inimical to competitive entry and should not be tolerated. Accordingly, the Commission should adopt rules: (i) making clear that a new entrant's PEG obligations are not unlimited and should be comparable to those of the incumbent cable operator;[86] (ii) limiting conditions that a local franchising authority may impose to those reasonably related to the provision of video service;[87] and (iii) prohibiting local franchising authorities from imposing fees beyond those authorized under the Cable Act.[88]

The local franchising authorities and the incumbent cable operators make no attempt to justify the imposition of onerous burdens on a new entrant, except to say that "it is not at all unreasonable for franchising authorities to ask telephone companies to live by the same rules and regulations as their landline competitors in the provision of cable service."[89] Furthermore,

[86] BellSouth Comments at 41-42; Comments of Public Access Television, Inc. at 5; FTTH Council Comments at 66 ("commitments should be related only to services, facilities, and equipment to enable the use and operations of the PEG channel capacity"); Verizon Comments at 71-72 (competitive provider should not be required to pay higher PEG contributions than the incumbent cable operator).

[87] Comments of National Telecommunications Cooperative Association at 13-14; AT&T Comments at 65-67 (services provided in support of PEG channels should be credited against any franchise fee).

[88] Comments of National Telecommunications Cooperative Association at 14 (proposing that franchise application fees charged by local franchising authorities be limited to $100); Alcatel Comments at 10-11 (ancillary obligations unrelated to competitive video entry, such as redundant institutional networks and video studies, should be deemed "unreasonable" under section 621); AT&T Comments at 65-67 (application and other fees and charges that exceed the local franchising authority's reasonable costs should be credited against any franchise fee); Verizon Comments at 57-62 (fees and other charges for applications, acceptance, or "pet projects" should be chargeable against the 5% cap on franchise fees).

[89] NCTA Comments at 19; NATOA Comments at v (predicting that the local franchise process would go more "quickly" "if the new provider were willing to agree to franchise terms comparable to those imposed on the incumbent cable operator"). Importantly, many of the excessive demands made by local franchising authorities of new entrants represent burdens not imposed upon the incumbent cable operator. For example, one community in Massachusetts demanded that Verizon set aside 10 PEG channels, even though the incumbent only provided two channels. Verizon Comments, Declaration of Marilyn O'Connell, ¶ 33. Likewise, the incumbent cable operator in Louisville, Kentucky sought to require Knology to build out its

according to NCTA, when it comes to video services, "regulating like services alike is both reasonable and pro-competitive."[90]

However, NCTA's desire to preach the gospel of symmetrical regulation is ironic given that it has espoused precisely the opposite view when it comes to the telephony market and VoIP services. Specifically, NCTA has argued that "regulations designed for legacy telephone providers operating in a monopoly environment generally should *not* apply to VoIP services" except in limited circumstances.[91] According to NCTA, such legacy telephone regulations were "developed to protect consumers from the monopoly utility in a single-provider environment" and "are unnecessary and inappropriate" in a competitive marketplace.[92] The same is true for legacy cable regulation.

NCTA's justification for subjecting VoIP services offered by new entrants to less regulation than that which applies to voice services offered by the incumbent is telling. First, according to NCTA, such disparate regulation is appropriate because "VoIP service uses nascent technologies that have yet to be deployed on any significant commercial scale, and which could present a host of as-yet-undetermined financial, technical, and operational challenges."[93] Second, NCTA insists that VoIP services should not be encumbered by the application of traditional telephone regulations because otherwise market entry would be deterred:

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network in the entire franchise area within 15 months and to satisfy additional bonding requirements, even though neither of these requirements was in the incumbent's cable franchise. FTTC Comments, Declaration of Felix Boccucci, Jr., ¶ 18.

[90] NCTA Comments at 3.

[91] *In the Matter of IP-Enabled Services*, WC Docket Nos. 05-196 & 04-36, Comments of NCTA, at 15 (May 28, 2004) (emphasis in original).

[92] *Id.* at 19-20.

[93] *Id.* at 15, n.19.

> The application of traditional state telephone regulations risks encumbering VoIP services with a web of costly and potentially inconsistent rules that will inevitably deter potential market entrants from offering the services, especially since efficient multi-state rollout of VoIP will depend on new centralized ordering, provisioning, and billing systems. Encumbrances are also possible at the local level, where at least some communities argue that *all* services delivered over cable plant should be subject to separate and duplicative municipal fees, requirements for additional permits, quality standards, privacy rules, and the like.
>
> This local layer of regulation makes no sense when – as here – new services can be offered simply by changing the pattern of signaling sent over an existing physical transmission facility, without imposing any additional burden on rights-of-way. Local regulation of new services such as VoIP delivered over the cable plant would stifle those services, since cable operators today can be subject to dozens or even hundreds of local franchising authorities for their cable systems in a single state. Offering VoIP services would be immensely more difficult with dozens or hundreds of inconsistent locally applied regulations.[94]

Of course, this same logic applies equally to video services that may be offered over an ILEC's broadband network. First, IPTV is a nascent technology, even more so than VoIP, and has not been deployed on nearly the same commercial scale as VoIP. Second, subjecting IPTV to the local franchising process would subject new entrants to even more burdensome local "encumbrances" that would, according to NCTA, "inevitably deter potential market entrants from offering the services...." Finally, like VoIP, IPTV would be just another application on an ILEC's broadband network that would be offered without imposing any additional burdens on the public rights-of-way.

Incumbents and new entrants are routinely subject to different regulatory regimes, and thus, asymmetric regulation is hardly "arbitrary," as NCTA claims.[95] The telecommunications market is the poster child of asymmetric regulation, with incumbents such as BellSouth subject to burdensome and costly regulatory rules that do not apply to new entrants, including cable

[94] *Id.* at 20-21 (emphasis in original) (footnotes omitted).

[95] NCTA Comments at 14 (complaining that "[t]o subject arbitrarily some competitors to obligations and burdens not imposed on others would only serve to distort the competitive marketplace").

operators offering telephony. For example, Section 251(c) of the Telecommunications Act of 1996 saddled incumbent local exchange carriers with duties, including unbundling and resale, to which new entrants are not subject. Likewise, incumbent local exchange carriers are subject to a host of regulations relating to billing, payment, credit and collection, disconnection, and quality of service standards, which, by and large, do not apply to new entrants. Incumbent telephone companies also have carrier of last resort obligations, which preclude them from denying any reasonable request for telephone service in their geographic territory – obligations analogous to cable build out requirements that do not extend to cable operators offering telephony services.

BellSouth does not dispute that there are significant costs associated with legacy regulations that apply only to incumbents. BellSouth bears these costs on a daily basis in providing telecommunications services. However, the solution to this problem is to eliminate those legacy regulations where appropriate; the solution is not to impose those same regulations on new entrants, as NCTA and others seek to do.[96]

The local franchising authorities also seek to justify their conduct by arguing that the Cable Act was "built on the principle that cable systems must be 'responsive to the needs and

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[96] *See* NCTA Comments at 19 (claiming "that it is not at all unreasonable for franchising authorities to ask telephone companies to live by the same rules and regulations as their landline competitors in the provision of cable service"). While its comments in this proceeding extol the virtues of requiring new entrants to "compete on equivalent terms with existing competitors" through the local franchise process, RCN Comments at 6, RCN previously sang an entirely different tune when it was a new entrant. For example, RCN Corporation Chairman Michael Mahoney gave a speech on September 17, 1999 in which he urged local governments to "streamline the franchising process if they want competition." *See* NATOA Notebook, Warren's Cable Regulation Monitor at 3 (Sept. 27, 1999). According to Mr. Mahoney, "cities shouldn't fall for incumbent's rhetoric of need for 'level playing field' because incumbent cable and phone companies have had decades to build their businesses." Mr. Mahoney also questioned whether the current local franchising process "was designed for today's competitive environment," noting that the lengthy franchising and renewal process, which generally takes 2-3 years, also is a boon for incumbents because status quo is unchanged in the meantime." *Id.*

interests of the *local* community.'"[97] However, this argument misrepresents both the nature of the Cable Act and its impact on this proceeding. As NCTA admits, one of the purposes of the Cable Act was to address a "need for *national* standards"[98] and, as a result, Congress "imposed a uniform, federal standard."[99] Congress also sought to encourage competition in the market for cable and video services by eliminating barriers to entry (and with subsequent amendments, even sought to *encourage* entry by telecommunications providers). In so doing, Congress recognized that, while state and local governments have a role in granting franchises for cable service, this role is limited by a set of overarching national policies, including the promotion of competition, that are embodied in the Cable Act.

The Cable Act effectuates these goals by ensuring that the state and local governments' role in implementing franchising standards is consistent with Title VI, and prohibiting actions that are inconsistent with Title VI.[100] In the 1992 amendments to section 621(a)(1), Congress further curtailed the authority of local franchising authorities in the franchising process by barring them from granting exclusive franchises or "unreasonably refus[ing] to award" competitive franchises.[101] Even NCTA admits that "Congress amended Section 621 to conform to federal law by *expressly limiting* local franchising authorities' discretion" in certain

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[97] NATOA Comments at 27 (quoting 47 U.S.C. § 521(c)(2) (emphasis added)); *see also id.* at 10 (claiming that Congress intended that "LFAs, not the Commission, would be the sole authority on franchising"); NCTA Comments at 18-23; Comcast Comments at 28-33.

[98] *See* NCTA Comments at 19 (quoting 1984 House Report at 23) (emphasis added).

[99] *Id.* at 20. Congress first established a "national policy concerning cable communications" by passing the 1984 Cable Act, which added a new Title VI to the Communications Act of 1934. 47 U.S.C. § 521(1).

[100] 47 U.S.C. § 556(c).

[101] 47 U.S.C. § 541(a)(1).

circumstances.[102] In particular, local franchising authorities may not "unreasonably" deny a competitive franchise, and the Commission correctly initiated this proceeding to determine and define the circumstances when a local franchising authority has done so.

VI. THE COMMISSION'S AUTHORITY TO INTERPRET AND IMPLEMENT THE TERMS OF THE CABLE ACT IS BEYOND DISPUTE.

A. Courts Have Upheld Commission Authority To Interpret and Implement the Cable Act, Including Section 621.

In its opening comments, BellSouth demonstrated that Congress delegated broad authority to the Commission to fill gaps in the Communications Act, and that this broad delegation of authority is consistent with the general role of administrative agencies under federal law.[103] BellSouth's initial comments went on to show that this sweeping delegation of interpretive authority explicitly includes the Cable Act and that federal courts have widely recognized the agency's power to determine the scope of the various provisions of the Cable Act, including section 621.[104]

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[102] NCTA at 21 (emphasis added). Comcast, quoting Senators Burn and Inouye, likewise notes that state and local franchising authorities' actions are restrained by "certain federal limits." Comcast Comments at 28, n.93 (quoting John Eggerton, Burns, Inouye Team on Video Franchise Principles, Broad. & Cable, Feb. 2, 2006). There are a plethora of other examples in Title VI of the Cable Act when Congress expressly limited the authority and discretion of local franchising authorities. *See, e.g.,* Section 621(b)(3) (prohibiting local franchising authorities from regulating telecommunications service); Section 621(b)(3)(D) (restricting the ability of local franchising authorities to impose institutional networks); Section 611 (limiting authority of local franchising authorities to include PEG channel capacity or use "only to the extent provided" in the Act); and Section 622 (restricting the scope and amount of franchise fees that local franchising authorities are permitted to collect).

[103] BellSouth Comments at 47-52.

[104] *Id.* at 52-58.

It is thus beyond dispute that the Commission is the "authoritative interpreter" of the Communications Act.[105] Courts will "defer to the Commission's interpretation of the Communications Act so long as the Congress has not unambiguously forbidden it and it is otherwise permissible."[106] As the Supreme Court has explained, "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps... involves difficult policy choices that agencies are better equipped to make than courts."[107]

The Seventh Circuit has specifically determined that the Commission's regulatory authority extends to section 621, noting that while "[s]ome parties contend that the FCC was not granted regulatory authority over 47 U.S.C. § 541, the statute setting out general franchise agreements... [w]e disagree."[108] The court was "not convinced that for some reason the FCC has well-accepted authority under the Act but lacks authority to interpret Section [621]."[109] Thus, the Commission's authority to adopt rules interpreting and implementing the "reasonableness" requirement of section 621 is beyond question.

No party seriously disputes the scope of the Commission's general authority under the Communications Act, but a number of parties allege that, although the Commission has the authority to interpret *some* provisions of the Cable Act, Congress silently divested the Commission of such authority under section 621(a)(1).[110] This argument is without merit.

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105 *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2701 (2005).

106 *Cal. Metro Mobile Communs., Inc. v. FCC*, 365 F.3d 38, 43 (D.C. Cir. 2004).

107 *Brand X*, 125 S. Ct. at 2699.

108 *City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 2000).

109 *Id.*

110 *See, e.g.*, NATOA Comments at 14.

In their attempt to cabin the Commission's authority to interpret and implement section 621(a)(1), the local franchising authorities and incumbent cable operators misconstrue applicable appellate precedent, propose unworkable and unprecedented limits on administrative authority, and incorrectly interpret legislative history accompanying section 621. As BellSouth has shown,[111] the Commission has general authority to interpret and implement the Communications Act.[112] That authority to interpret ambiguous terms generally and naturally includes phrases from *all* of the Act's sections, including section 621.

NATOA suggests that the absence of any mention of the Commission's role under section 621 in the legislative history of the Cable Act should be interpreted to mean that Congress intended to take the dramatic step of divesting the Commission of authority.[113] However, the suggestion that congressional silence somehow divests an administrative agency of its authority is flawed because, when an agency possesses broad authority to interpret the terms of its organic statute,[114] congressional silence does not divest the expert agency of its power as to specific sections of the statute. As one court explained, when "the statute is silent on the issue, Congress has left a gap in the statutory scheme. From that gap springs executive discretion. As a matter of law, it is not for the courts, but for the executive agency charged with enforcing the statute... to choose how to fill such gaps."[115] The Supreme Court's landmark *Chevron* decision

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111 BellSouth Comments at 47-58.

112 *See, e.g., Capital Network Sys. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) ("Congress entrusted administration of the Communications Act to the FCC") (internal citation omitted).

113 NATOA Comments at 14.

114 There is no doubt that the Commission possesses this broad authority. *See* 47 U.S.C. § 154(i); *see also, e.g., Cal. Metro Mobile Communs., Inc.*, 365 F.3d at 43.

115 *Gonzalez v. Reno*, 212 F.3d 1338, 1348-1349 (11th Cir. 2000) (citations omitted). Whenever Congress has left a gap for an agency to fill, the agency's regulation is given controlling weight unless it is arbitrary, capricious or manifestly contrary to statute. *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238-39 (2004). Even in the event that a statute's

made clear that where "legislative delegation to an agency on a particular question is implicit rather than explicit," a court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[116]

Had Congress intended such a radical curtailment of the Commission authority to interpret section 621, it would certainly have done so explicitly.[117] However, nothing in section 621 or any other provision of the Cable Act suggests that Congress has forbidden the Commission from interpreting or enforcing section 621's mandates. In fact, in *City of Chicago* the Seventh Circuit confronted a similar argument by parties in that case that the Commission was not granted interpretative authority over section 621 of the Act. The Circuit court rejected this argument, noting that "the FCC is charged by Congress with the administration of the Cable Act" and that there was no reason to believe that this "well-accepted" authority did not apply to section 621.[118]

NATOA offers a variation on the argument that the Seventh Circuit rejected by attempting to draw a facile distinction between the "Definitions" section of the Cable Act[119] and

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language is clear and specific, a court must reject an agency interpretation only when that interpretation is contrary to the language of the statute. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. at 842-43.

[116] *Chevron*, 467 U.S. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer and the principle of deference to administrative interpretations").

[117] *See, e.g.,* 143 U.S.C. § 1714(j) (expressly prohibiting the Department of the Interior from modifying three types of Federal land withdrawals); *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (discussing how 42 U.S.C. § 2000d-1 limits agencies to "effectuating" rights already enumerated under 42 U.S.C. § 2000d); *Sierra Club v. Costle*, 657 F.2d 298, 347 (D.C. Cir. 1981) (discussing how 42 U.S.C. § 7411(b)(5) restricts the EPA's discretion to impose certain design, equipment, or work practice standards pursuant to § 7411(a)).

[118] *City of Chicago*, 199 F.3d at 428 (citing *Nat'l Cable Television Ass'n, Inc. v. FCC*, 33 F.3d 66, 70 (D.C. Cir. 1994)).

[119] 47 U.S.C. § 522.

section 621, claiming that "*Chicago* is more appropriately characterized not as a § 621 case, but as a case construing the definitions set forth in § 602 of the Act."[120] Other than simply pointing to the different code locations, NATOA offers no principled argument for why the Commission has the authority to interpret and construe terms contained in the "Definitions" section of the Cable Act, but allegedly does not have the authority to interpret and construe the term "unreasonable" in section 621(a)(1).[121] Similarly, NCTA concedes that "[t]he FCC *unquestionably* has authority to interpret the definitions of the Act,"[122] but contends that the interpretation of "the definitions of the Cable Act" should somehow be distinguishable from the interpretation of the term "unreasonable" as it pertains to franchise denials.

These proposed limitations on Commission authority contradict the general (and logical) rule which holds that agencies may interpret *any* undefined terms, as long as those interpretations are reasonable and consistent with Congress's intent in passing the statute.[123] NATOA's and

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[120] *See* NATOA Comments at 16-17. In addition to inventing an unpersuasive distinction, NATOA's characterization of the *City of Chicago* case ignores the court's specific declaration that the Commission has the authority to interpret Section 621. *City of Chicago*, 199 F.3d at 428.

[121] There is ample support for the proposition that the Commission has the power to interpret the term "unreasonable." In *Capital Network Sys.*, the District of Columbia Circuit accorded substantial *Chevron* deference to the Commission's interpretation of words such as "just," "unjust," "*reasonable*," and "*unreasonable*." *Capital Network Sys.*, 28 F.3d at 204 ("Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them"). Just as the *Capital Network* court deferred to the Commission's interpretation and application of a statute forbidding common carriers from charging "unjust or unreasonable" rates, 47 U.S.C. § 201(b), a court would similarly defer to the Commission's interpretation and application of Section 621's prohibition on "unreasonabl[e] refus[als]." 47 U.S.C. § 541(a)(1).

[122] NCTA Comments at 22 (emphasis added).

[123] *See, e.g., NCTA v. FCC*, 33 F.3d 66, 71 (D.C. Cir. 1994) ("The Cable Act does not define the term 'transmission;' hence we uphold the agency's definition of that term if it is reasonable") (citation omitted)); *ACLU*, 823 F.2d at 1563-64 (affirming the Commission's definition of "effective competition," a term that did not appear in any definitions section and was not otherwise defined at the time, after determining that the agency "carefully considered

NCTA's preferred result would ironically deprive courts of the agency's expertise at a time when such expertise would provide the *most* help to a court – that is, when it construes an undefined term. "*Chevron* presumes that Congress delegated primarily to executive branch agencies the interpretation of ambiguous terms... in part because of an agency's expertise, and in part because of the policy role inherent in that function – which the Court thought Congress prefers the agencies rather than the nonelected judiciary to perform."[124]

Indeed, the distinction that NATOA and NCTA attempt to draw works against them. In *City of Chicago* the court was asked to review a Commission determination concerning the entities that did and did not have to obtain a franchise *at all*. Here, the Commission is only seeking to interpret a term to determine the contours of practices employed by local franchising authorities in awarding cable franchises.[125] Prohibiting the Commission from interpreting one particular (undefined) phrase in the Communications Act, as proposed by NATOA,[126] would thus produce a uniquely absurd result. While the Commission would be free to interpret terms contained in the "Definitions" section of the Cable Act to determine what constitutes a "cable system" or "cable operator," and thus when a franchise is required, the Commission would

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proposed alternatives, explained the reasons underlying its decision, and reached a rational conclusion"); *see also Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1196 (D.C. Cir. 2000) (favorably referring to the agency's definition of "gathering," which was not defined in the Natural Gas Act); *Brotherhood of Locomotive Eng'rs v. United States*, 101 F.3d 718, 726 (D.C. Cir. 1996) (affirming, based on *Chevron* deference, the Interstate Commerce Commission's interpretation of "switching track," which was undefined in the Interstate Commerce Act).

[124] *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 76 n.1 (D.C. Cir. 1990); *see also Trans Union, LLC v. FTC*, 295 F.3d 42, 50 (D.C. Cir. 2002) ("'Where ... Congress enacts an ambiguous provision within a statute entrusted to the agency's expertise, it has implicitly delegated to the agency the power to fill those gaps'") (quoting *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1016 (D.C. Cir. 1999)) (alteration in original).

[125] *See, e.g.*, *ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987) (largely affirming Commission regulations concerning the locality's power to regulate the rates of basic cable services).

[126] NATOA Comments at 16.

somehow be precluded from determining whether certain practices that contravene federal communications policy are inherently "unreasonable" in the context of the franchising process.

Indeed, NATOA's approach runs counter to the common sense interaction between ambiguity and definitions. Those words in the "Definitions" section of a statute are *less* likely to contain ambiguity (since Congress defined them explicitly) than words contained elsewhere in a statute that lack a formal definition. Consequently, terms not found in the "Definitions" section are likely to be *more* ambiguous, and thus more in need of Commission interpretation.

The limited legislative history accompanying section 621 also does not restrict the Commission's discretion in this proceeding, notwithstanding claims to the contrary.[127] The fact that the House version of the bill, as enacted, did not itself contain a list of reasonable or unreasonable grounds for denial does not preclude the *Commission* from using its expertise and experience to determine that some local franchising authority activities are simply "unreasonable" under section 621(a)(1). In fact, the absence of such a list further *confirms* the ambiguity of the reasonableness requirement in the statute and the need for the Commission to provide some contours and certainty to this area of the Act.

The Commission's interpretive power also is not limited to simply defining a term set forth in the statute. As part of its authority under the terms of section 621, the Commission is free to adopt implementing rules that impose specific obligations upon regulated entities.[128] Indeed, even if section 621 did not constitute a specific congressional authorization to enact rules, section 621 provides the Commission with subject matter jurisdiction to ensure that local franchising authorities do not unreasonably refuse to grant cable franchises. When the Commission has subject matter jurisdiction, its ancillary powers give it the authority to enact the

[127] *See* NATOA Comments at 15; NCTA Comments at 22.

[128] *See* 47 U.S.C. § 151.

rules reasonably necessary to carry out Congress's goals, provided that such rules are not inconsistent with an express provision of the Act. As the Commission stated recently, "[a]ncillary jurisdiction may be employed, in the Commission's discretion, where the Commission has subject matter jurisdiction over the communications at issue and the assertion of jurisdiction is reasonably required to perform an express statutory obligation."[129]

In this proceeding, both the text and legislative history of the Act reflect a congressional desire to remove obstacles for new cable providers, to offer consumers a competitive video marketplace, and to promote the deployment of broadband.[130] Thus, even if, for the sake of argument, the Act does not explicitly and specifically empower the Commission to implement its directives, the Commission may exercise its ancillary jurisdiction to implement Congress's desired outcomes.

Thus, despite the best efforts of certain parties to argue otherwise, the Commission has authority to interpret section 621 and adopt rules prescribing the circumstances when a local franchising authority has "unreasonably refused to award a cable franchise." The Commission may take such action based on existing appellate court precedent regarding the scope of the agency's authority in interpreting the Act, the ambiguities contained in section 621, and the absence of any explicit congressional limitations.

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[129] *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863, 4895, ¶ 46 (2004).

[130] BellSouth Comments at 1 (quoting, *e.g.*, 47 U.S.C. § 548(a); S. Rep. No. 102-92, 14 (1991); *Notice of Proposed Rulemaking*, ¶ 1).

B. The Commission Has Authority Under Sections 4(i) And 706 Of The Act To Interpret And Implement Section 621, Notwithstanding Claims To The Contrary.

Some parties also challenge the Commission's ability to rely on its authority under section 4(i) or section 706 to interpret and implement section 621(a)(1).[131] In particular, these parties argue that the Commission's "general ratemaking power do[es] not empower it to do what specific provisions of [sic] Act cannot be read to permit."[132] These unremarkable arguments are inapposite because, as explained above, the Commission plainly has the authority to interpret a term in section 621(a)(1), and doing so is not contrary to the Act.[133]

As explained in BellSouth's Comments,[134] the Commission here merely is interpreting and implementing the language of the statute, something that is well within the bounds of its jurisdiction under Section 4(i). The Commission's ancillary jurisdiction under Section 4(i) includes actions that are "necessary to the Commission's *execution* of its statutorily prescribed functions."[135] The Commission has stated that it may base its actions on ancillary jurisdiction when "implementation of the statute will be thwarted absent [its] use."[136]

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[131] NATOA Comments at 18-20; NCTA Comments at 23-26; Comcast Comments at 33-36.

[132] NATOA Comments at 18.

[133] In circumstances when "[t]he Cable Act does not define the term ... [courts] will uphold the agency's definition of that term if it is reasonable." *Nat'l Cable Television Ass'n, Inc. v. FCC*, 33 F.3d 66, 71 (D.C. Cir. 1994).

[134] BellSouth Comments at 48-52 & 59-63.

[135] *Id.* (emphasis added).

[136] *In the Matter of Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6461, ¶ 106 (1999). For example, the Supreme Court affirmed the Commission's authority to *regulate* emerging technologies such as CATV even when Congress had not extensively legislated on the subject. *See United States v. Midwest Video Corp.*, 406 U.S. 649, 650-51 (1972) (affirming "the jurisdiction of the ... Commission to regulate the new industry, at least to the extent 'reasonably ancillary to the effective performance of the Commission's various

Critically, the Commission may exercise this power to implement Congress's goals even when the statute does not specifically list an enforcement power. "Thus, even where Congress has enacted legislation addressing a subject, that does not bar the Commission from using its ancillary jurisdiction where reasonably required to further a valid statutory goal – in this case, the effective implementation" of portions of the Act.[137] Just as with most other rulemakings or final administrative actions, courts apply *Chevron* deference when evaluating the "'the Commission's *choice of regulatory tools*'" in carrying out Congress's mandate.[138]

Parties who suggest that the Commission cannot rely on its general authority or the mandate of section 706 also are missing the point. BellSouth is not suggesting that this provision empowers the Commission to do something otherwise forbidden by the Act. However, section 706 forcefully states the intent of Congress to make the deployment of broadband services a national priority. In light of the importance of encouraging broadband deployment, as announced in section 706, it is perfectly appropriate for the Commission to adopt rules interpreting and implementing section 621 in a way that promotes, rather than discourages, such deployment.

Here, the record is clear that the current local franchising process impedes the timely deployment of broadband facilities and services. A good example is the experience of Guadeloupe Valley Telephone Cooperative, Inc. ("GTVC"), which serves 11 counties north of

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responsibilities for the regulation of television broadcasting'") (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)).

137 *In the Matter of Implementation of Sections 255 and 251(a)(2)*, 16 FCC Rcd at 6461, ¶ 106 n.247; *see also id.* ("In *United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989), the court also sustained our ancillary jurisdiction in the face of an argument akin to expressio unius").

138 *In the Matter of IP-Enabled Services*, 19 FCC Rcd at 4895, ¶ 46 (emphasis added) (quoting *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982)).

San Antonio, Texas. In 2004 GVTC and its cable affiliate began to deploy a fiber-to-the-premises network in order to provide voice, data, and video in the cities of Boerne and Fair Oaks, Texas. GTVC also planned to expand its fiber network in order to serve the City of Bulverde. However, because of the length of time and cost associated with obtaining a franchise agreement and because of the build out requirements that the local franchising authority intended to impose, GVTC decided not to expand its fiber network in Bulverde.[139]

Similarly, according to Verizon, local franchising authorities have threatened to exercise regulatory control over Verizon's broadband network after a cable franchise has been granted. In particular, some local franchising authorities and cable companies have insisted that once Verizon begins to over video over its broadband network, the entirety of the network should be regulated as a "cable system," which, according to these parties, would give a municipality local control over the construction, operation, and placement of broadband networks.[140] Such threats deter broadband deployment and should not be tolerated by the Commission.

In addition, the lengthy delay associated with the local franchising process also undermines Congress's broadband goals embodied in section 706. As the record in this proceeding indicates, it routinely takes months if not years for a telecommunications carrier to obtain a cable franchise. Such delay can be devastating to broadband deployment because it forestalls an important revenue stream from the carrier's existing voice customers anxious to purchase a competing video service and limits the number of potential new customers who have

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[139] FTTH Council Comments, Declaration of Jeff Mnick, ¶¶ 2-5. After enactment of the state-issued franchising law in Texas in 2005, GVTC applied for and was awarded a state franchise, which allowed it to serve the city of Bulverde utilizing its fiber-to-the-premises architecture. Construction began in October 2005, and GVTC launched service in Bulverde one month later. *Id.* ¶ 7

[140] Verizon Comments at 80-82.

not already signed up for cable's "triple play" and thus may be reluctant to change providers.[141] The Commission must act to reform the local franchising process if the goals embodied in section 706 are to be realized.

C. The Commission Correctly Concluded That Unreasonable Practices By Local Franchising Authorities Constitute A *De Facto* Denial For Purposes Of Section 621(a)(1).

In its *Notice of Proposed Rulemaking*, the Commission properly found that:

> Section 621(a)(1) prohibits not only the ultimate refusal to award a competitive franchise, but also the establishment of procedures and other requirements that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise, either by (1) creating unreasonable delays in the process, or (2) imposing unreasonable regulatory roadblocks, such that they effectively constitute a *de facto* "unreasonable refusal to award an additional competitive franchise" within the meaning of Section 621(a)(1).[142]

While BellSouth and other parties demonstrated that the Commission's tentative conclusion was "unquestionabl[y]" correct,[143] NCTA and the local franchising authorities challenge this conclusion as being "at odds with the words of Section 621(a)(1) and the structure of the Cable Act,"[144] which they argue requires a final decision by a local franchising authority denying a franchise.[145] However, their argument fails to address Commission precedent, which

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[141] FTTH Council Comments at 42-43; Comments of the Telecommunications Industry Association at 14 ("Prompt entry into the video market is a key predicate to justifying construction of new broadband markets..."); Comments of Broadband Service Providers Association at 7 (noting that "[v]ideo-based revenues are necessary for new networks to be profitable...," without which "the investment in new networks will be impaired").

[142] *Notice of Proposed Rulemaking,* ¶ 19.

[143] *See e.g.,* Qwest Comments at 26; USTelecom Comments at 45; BellSouth Comments at 7, 36-37.

[144] *See* NCTA Comments at 28; NATOA Comments at 31-32; Burnsville *et al.* Comments at 31-32.

[145] The only case cited by commenters (Burnsville *et. al.* at n. 102), *I-Star Commc'ns. Corp. v. City of E. Cleveland*, 885 F. Supp. 1045 (N.D. Ohio 1995) is wholly inapposite. In that case, I-Star had a franchise that was not yet up for renewal nor had I-Star requested any modification to its franchise agreement. *Id.* at 1042 ("I-Star also admits in its complaint that its

"emphasized that the purpose of Section 621(a)(1) is broader than simply providing would-be entrants with a civil remedy upon the ultimate denial of a request for a competitive franchise."[146]

The local franchising authorities and the incumbent cable operators further attempt to blur the scope of this proceeding by implying that the Commission is seeking to usurp judicial authority and take jurisdiction over parties' remedies under the Cable Act.[147] However, those parties are responding to an argument that has not been made. The agency has not proposed stepping in to adjudicate individual disputes over specific cable franchises, nor is the Commission being urged to do so. On the contrary, the *Notice of Proposed Rulemaking* makes clear that the Commission seeks to interpret "Section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises."[148] Thus, the *Notice of Proposed Rulemaking* merely recognizes that, as the "agency possessing the institutional expertise,"[149] the Commission is charged with interpreting and implementing the Cable Act. Thus, the Commission has merely indicated its tentative (and completely correct) conclusion that it is

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[franchise] agreement is not due for renewal until fifteen years after its inception" which was not for another 10 years). Thus, I-Star's attempt to seek judicial review under the theory of an unreasonable refusal of a competitive franchise under Section 621 was inappropriate and dismissed. *Id.* ("I-Star has *not* alleged that it has applied for a second competitive franchise, and that such an application has been denied") (emphasis added).

[146] *Notice of Proposed Rulemaking,* n.76 (citing *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming)*, 9 FCC Rcd 7442, 7469 n.127 (1994)).

[147] *See, e.g.,* Comcast Comments at 27-28; NATOA Comments at 3-10, 18; NCTA 7-8. NATOA argues that Congress delegated the "remedy" for a Section 621(a)(1) violation to the courts and that the Commission should not "adjudicate disputes arising under § 621(a)(1)." NATOA Comments at iii. Likewise, NCTA argues that "[t]here is already a remedy for an unreasonable refusal to grant a franchise." NCTA Comments at 7.

[148] *Notice of Proposed Rulemaking,* ¶ 15.

[149] *Hoosier Home Theater, Inc. v. Adkins*, 595 F. Supp. 389, 397 (D.C. Ind. 1984); *see also Nat'l Cable & Telecomm. Ass'n, Inc. v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005).

appropriate for the Commission to issue prospective guidance about the meaning and implementation of the terms of the Cable Act. Accordingly, the Commission should reject attempts by some parties to conflate the Act's provision for judicial review with the Commission's fundamental role of interpreting and implementing a term in the Act.

NATOA and other local franchising authorities make an additional mistake by arguing that providing franchise applicants with the right to *enforce* their rights under the Act by filing an action in state or federal court[150] precludes the Commission from *interpreting* anything in conjunction with section 621.[151] Simply allowing parties to challenge in court a decision by a local franchise authority to reject a franchise application does not preclude the Commission from interpreting and implementing – subject to the constraints of the statute and *Chevron* review – the "reasonableness" requirement of section 621(a)(1). If the Commission's resulting

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[150] 47 U.S.C. § 555(a).

[151] *See* NATOA Comments at 5; Cablevision Comments at 7; Burnsville/Eagan Telecommunications Commission *et al.* Comments at 31. NATOA cites the unreported case *Knology v. Insight Communications Co., LP*, 2001 WL 1750839, at *2 (W.D. Ky. 2001), for the proposition that states are the sole franchising authority, NATOA Comments at 15, but NATOA reads far more into this case than it can bear. There is no merit to NATOA's suggestion that the court's reference to "leav[ing] the states with the power to determine the bases for granting or denying franchises" was a deliberate statement by the court that the states were the *sole* entity involved in this process. *Id.* The *Knology* court did not intend this off-handed reference to be a comprehensive list of *all* entities that may have a role in cable franchising, particularly when, as NATOA repeatedly stresses, the Cable Act also provides for federal judicial review of franchising decisions, which the *Knology* court did not mention. Moreover, *Knology* made clear that "a denial must be 'reasonable.'" *Id.* Both the Communications Act and court precedents demonstrate that the Commission may interpret the meaning of a "reasonable" denial, as discussed above. NCTA's citation to another unreported decision in making the same argument suffers from the same flaw. NCTA Comments at 22 (citing *Cable TV Fund 14-A v. City of Naperville*, 1997 WL 280692 (N.D. Ill. 1997)). As in *Knology*, the court in *Naperville* noted that while the Cable Act left local franchising authorities with some power to determine the bases on which to grant or deny franchises, that power was explicitly limited to those denials that are "reasonable." *Naperville*, 1997 WL 280692 at *16. Neither *Knology* nor *Naperville* can be read to suggest that the Commission lacks the authority to interpret and implement the "reasonableness" requirement of section 621(a)(1).

interpretation somehow contravenes statutory language or Congressional intent, a court is free to disregard that interpretation.

D. <u>The Commission Is Empowered To Adopt Specific Rules That Local Franchising Authorities Must Follow And Those Rules Would Have Preemptive Effect.</u>

As demonstrated above, the Commission has clear authority to interpret section 621 and the Cable Act generally. The Commission should exercise that authority by adopting rules interpreting and implementing the "reasonableness" requirement of section 621(a)(1), as numerous parties, including BellSouth, have proposed.

For example, the Commission should establish specific timeframes by which a local franchising authority must act upon an application for a cable franchise.[152] In particular, BellSouth has proposed that the Commission require that a local franchising authority rule upon any cable franchise application from a broadband video provider within ninety (90) days, or otherwise the application is deemed granted.[153]

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[152] *See, e.g.,* Comments of Discovery Institute's Technology and Democracy Project at 6-7 (recommending that the Commission, at a minimum, should establish maximum timeframes to ensure that franchise approvals occur within a matter of months); FTTH Council Comments at 59-62 (advocating that the Commission adopt regulations which specify that the failure of a local franchise authority to act on an application for a cable franchise within at most four months constitutes an unreasonable refusal to award a franchise); Comments of the Alliance for Public Technology at 3 (suggesting six months "to be a reasonable time period for franchise review of competitive applications although the Commission may want to establish a shorter period in the case of franchise applications by local network operators [with right-of-way authorization]").

[153] BellSouth Comments at 36-37; *see also* Comments of National Telecommunications Cooperative Association at 9-11 (recommending that the maximum timeframe that a local franchising authority should take to review, consider, and rule on a new entrant's video franchise application be no longer than 90 days); *cf* AT&T Comments at 74-75 (advocating the adoption of a streamlined short-form application for authority to provide video service over existing rights of way and a rule stating that a local franchising authority's failure to act on such an application within 30 days triggers an immediate right to begin offering service); Qwest Comments at 26-28 (recommending that the FCC adopt rules providing that any application for a cable franchise that is not denied within six months of filing shall be "deemed granted" as a matter of law); Verizon

Contrary to the suggestions of some commenters,[154] there is also ample precedent for the Commission to adopt specific schedules that local franchising authorities must follow when considering competitive franchise applications. For example, in implementing section 623 of the Act,[155] the Commission imposed a 180-day limitation period in which local franchising authorities could file complaints regarding rate increases in cable programming service tiers.[156] Even though section 623 of the Act does not spell out or even reference a deadline to which local franchising authorities must adhere, the Commission held that such an express limitation "[wa]s required if the ratemaking process [wa]s to have any closure or finality."[157] The Commission utilized the limitation period in order to reduce uncertainty on the part of all of the participants in the rate-making process.[158]

Similarly, in implementing a portion of the Cable Act that addresses retransmission of broadcast signals on cable networks and that directs the Commission to promulgate rules that "prohibit a television broadcast station that provides retransmission consent from... failing to negotiate in good faith,"[159] the Commission imposed a time limitation on filing complaints

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Comments at 30-31 (advocating that the Commission require that local franchising authorities must accept or deny a cable franchise application within four months).

[154] *See, e.g.*, NATOA Comments at 36-37; Comcast Comments at 41; Anne Arundel County *et al.* Comments at 41-42.

[155] 47 U.S.C. § 543(c)(3),

[156] *In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, CS Docket No. 96-85, Report and Order, 14 FCC Rcd 5296, 5317-18, ¶¶ 42-43 (1999).

[157] *Id.* ¶ 43.

[158] *Id.* ("[W]e will not subject cable operators to potential liability indefinitely under the revised CPST rate complaint procedure.").

[159] 47 U.S.C. § 325(b)(3)(C)(ii).

alleging a violation of good faith.[160] Once again, although the statute did not impose or even reference a particular limitations period, the Commission adopted this regulation "to ensure that complainants do not sit on grievances and that they bring good faith complaints in a timely manner."[161]

The same interests in promoting certainty and finality should lead the Commission to impose limits on the time that a local franchising authority has to act on franchise applications. Without a reasonable deadline, a general admonition to "avoid unreasonable denials" may not prompt local franchising authorities to consider applications in the manner necessary to effectuate Congress's intent to encourage competition and broadband deployment. Consequently, in order to give effect to Congress's mandate in section 621, as well as the mandate to promote the rapid deployment of advanced telecommunications services in section 706, the Commission should establish a specific timeframe by which a local franchising authority must act once it receives a cable franchise application.

The Commission also should preempt state and local "level playing field" requirements, which only exacerbate the abuses that new entrants are made to suffer under the local franchise process.[162] For example, according to Knology, its efforts to negotiate a franchise agreement with the City of Louisville, Kentucky were made "much more complicated" because the

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[160] 47 C.F.R. § 76.65(e) (requiring parties to file complaints alleging a violation of good faith within a year of certain triggering events).

[161] *In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999*, CS Docket No. 99-363, Order on Reconsideration, 16 FCC Rcd 15599, 15603, ¶ 10 (2001).

[162] BellSouth Comments at 43-45; Alcatel Comments at 10-11 ("Application of unnecessary regulation to a competitive provider because of a level-playing-field requirement is not consistent with Title VI and is unreasonable"); FTTH Council Comments at 63-64 (level playing field requirements deter competitive entry and should be preempted); Comments of Discovery Institute's Technology and Democracy Project at 7-8.

incumbent cable operator's franchise agreement had a "level playing field" provision. The incumbent cable operator – Insight – used this provision to: (1) obtain drafts of the city's franchise agreement with Knology: (2) demand that Knology pay the city $500,000, which was the amount Insight had to pay as part of a settlement arising out of its overcharging of cable customers in the 1980s; and (3) insist that Knology only be granted a ten year franchise, which was the same term as Insight's renewed franchise agreement, even though the initial franchise of the cable operator acquired by Insight had been 15 years. Under such circumstances, Knology decided not to enter the Louisville market.[163] As Verizon correctly notes, incumbent cable operators routinely use "level playing field" requirements to delay the local franchise process by threatening litigation and demanding access to proprietary information concerning the new entrant's cable plans.[164]

Because the Commission has the power and authority to preempt state laws,[165] rules adopted by the Commission in this proceeding would have preemptive effect under two separate theories. First, section 636(c) of the Act expressly preempts "any inconsistent state or local

[163] FTTH Council Comments, Declaration of Felix Boccucci, Jr., ¶¶ 16-20; *see also* FTTH Council Comments, Declaration of Andy Sarwal, ¶ 9 (noting demands imposed on Grande by local franchising authorities under "level playing field" provisions – including $1 million prepayment of franchise fees and $50,000 scholarship funding required by San Antonio and $200,000 upfront payment for PEG channels required by Corpus Christi – as a result of which Grande's "speed of [] entry was slowed, and [its] financial viability was threatened"); South Slope Comments at 7 (noting that Iowa's "level playing field statute presents a significant and onerous barrier to competitive video entry ...").

[164] Verizon Comments, Declaration of Marilyn O'Connell, ¶¶ 59-63 (noting Cablevision's lawsuit challenging the decision of the Village of Massapequa Park, New York to issue a cable franchise to Verizon as well as litigation threats by Charter in Keller, Texas and by Adelphia in Leesburg, Virginia, which "appear to be having a chilling effect on other local franchise authorities, whose representatives have expressed concern about commencing the franchise process out of fear of having to engage in costly litigation down the road").

[165] BellSouth Comments at 63-67.

law,"[166] and the Commission's interpretation of the Act would therefore have preemptive effect.[167] Second, the agency has an independent power to preempt state laws that touch on a subject matter over which Congress has delegated regulatory authority to that agency.[168] Thus, the Commission may "resolve[] to preempt an area of cable television regulation, and if this determination represents a reasonable accommodation of conflicting policies that are within the agency's domain we must conclude that all conflicting state regulations are preempted."[169]

Commenters generally do not attempt to challenge these well-established principles regarding the preemptive force of Commission interpretation and regulation;[170] any such challenge would be futile. Instead, certain commenters attempt to call into question the preemptive authority of the agency in this proceeding by simply reiterating their claim that the Commission lacks the authority to adopt rules relating to section 621, or even to interpret that section.[171] As explained above, there is no support for these claims as the Commission's authority to adopt the regulations contemplated in this proceeding is well established.

[166] 47 U.S.C. § 556(c).

[167] *See* BellSouth Comments at 64.

[168] *Id.* at 66.

[169] *Capital Cities Cable, Inc.*, 467 U.S. at 700.

[170] Comcast claims that the Fifth Circuit's decision in *City of Dallas v. FCC* should be read to impose limits on the preemptive scope of the Commission's authority under the Cable Act. Comcast at 37 (citing 165 F.3d 341 (5th Cir. 1999)). *City of Dallas*, however, is readily distinguishable from the current proceeding. There, the Commission implemented rules prohibiting local franchises of Open Video Systems, which the court found was improper because the local authorities had a preexisting ability to require franchises and there was insufficient evidence of Congressional intent to displace this authority. *City of Dallas*, 165 F.3d at 347. In this proceeding, there can be no doubt that Congress intended to preempt "unreasonable" interference by LFAs with the offering of video services. Both Section 621 and Section 636(c) of the Cable Act make this clear. The question here is thus not whether Congress intended to preempt state authority, as it was in *City of Dallas*, but rather how that preemption should be implemented, a question that the FCC is well within its authority to answer.

[171] *See, e.g.,* NCTA at 23-25.

In particular, NCTA's claim that section 636(c) of the Cable Act is inapplicable because "[n]othing about the local process that determines how to grant a second franchise has been shown to be at all inconsistent with the Act"[172] misses the point. The Commission is the federal agency charged with interpreting and implementing the Cable Act, and it is for the agency to determine (a) what the terms of the Act actually require, and (b) whether certain practices by LFAs are inconsistent with those terms, as interpreted.[173]

E. <u>Any Commission Action In This Proceeding Would Be Entitled To *Chevron* Deference.</u>

Relying on cases wholly inapposite to the question here, NATOA argues that if the Commission does have jurisdiction, its actions in this proceeding would not be entitled to *Chevron* deference. However, it is well-settled that when the Commission interprets ambiguous provisions of the Communications Act, including the Cable Act, the agency's views are entitled to the full weight of *Chevron* deference. As the D.C. Circuit has made clear, "[w]e give substantial deference to the FCC's interpretation of *that statute* [referring to the Cable Act]. Where the Congress has not 'directly spoken to the precise question at issue,' we must defer to the agency's interpretation if it is merely 'based upon a permissible construction of the statute.'"[174]

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[172] NCTA at 24.

[173] *See, e.g., Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 95-96 (2d Cir. 2000) (holding that because it is "well settled that [courts] review deferentially an agency's construction of the statute that it is charged with administering," the Commission's interpretation of the Communications Act as preempting local regulation of the operation of cellular facilities was "entitled to deference and, because the FCC's interpretation is reasonable, [the court was] bound to accept it").

[174] *See, e.g., National Cable Television Ass'n v. FCC*, 33 F.3d 66, 70 (D.C. Cir. 1994) (emphasis added, quoting *Chevron*, 467 U.S. at 842)); *see also Time Warner v. Doyle*, 66 F.3d 867, 876 (7th Cir. 1994) ("In determining whether this regulation is a permissible interpretation of [the Cable Act], the Supreme Court's analysis in *Chevron* ... provides the matrix for our analysis," and "we are obliged to defer to the interpretation of an ambiguous statute by the

NATOA claims that when an agency and the federal courts have "concurrent jurisdiction," the views of the agency are not entitled "to the deferential standard of review articulated in *Chevron*."[175] However, the case upon which NATOA relies – *Kelley v. EPA* – involved the unique legal framework established by the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and has no bearing on the issues before the Commission.[176]

CERCLA "authorizes private parties *and the EPA* to bring civil actions independently to recover costs."[177] The court in *Kelley v. EPA* held that when Congress "gives the agency authority only to bring the question to a federal court as 'prosecutor,' deference to the agency's interpretation is inappropriate."[178] Thus, when a federal agency is tasked with bringing enforcement actions in federal court, its rulemaking and policymaking authority are constrained.[179] Unlike CERCLA, however, the Cable Act does not limit the Commission's role to that of a "prosecutor" bringing actions against local franchising authorities in federal court.[180]

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agency charged with the responsibility for administering it as long as the agency's interpretation is based on a reasonable reading of that statute") (citing *Chevron*, 467 U.S. at 842, 843).

175 NATOA Comments at 20 (citing *Kelley v. EPA*, 15 F.3d at 1108).

176 *Kelley*, 15 F.3d at 1103.

177 *Id.* (emphasis added).

178 *Id.* at 1109.

179 *See, e.g., Paralyzed Veterans v. D.C. Arena, L.P.*, 117 F.3d 579, 585 (D.C. Cir. 1997) ("[T]he Department has a good deal more legal/policymaking authority than would be true if it had merely a prosecuting role"); *see also Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1507 n.24 (11th Cir. 1997) ("[T]he EPA is acting in its role as prosecutor in enforcing a federal environmental statute. Any findings made in such orders are therefore not entitled to deference under the reasoning of *Chevron*").

180 Indeed, the inapplicability of *Kelley* to the regime established by the Cable Act is highlighted by the odd reference in NATOA's comments to using Commission action in this proceeding as "a policy statement" that would "'guide [the Commission's] enforcement proceedings across the country.'" NATOA Comment at 21 (quoting *Kelley*, 15 F.3d at 1109 (alteration in NATOA)). While the EPA conducts "enforcement proceedings across the country,"

Rather, with this rulemaking proceeding, the Commission would be acting in its well recognized *administrative* capacity, by interpreting the meaning of a statutory section that is within its general grant of authority and by issuing regulations that effectuate the goals of the act.

VII. CONCLUSION

It is clear that the local franchise process hinders video competition and broadband deployment. Consumers have suffered as a result, and the Commission must act promptly to reform the current process. The Commission can and should do so by adopting the rules proposed by BellSouth.

Respectfully submitted,

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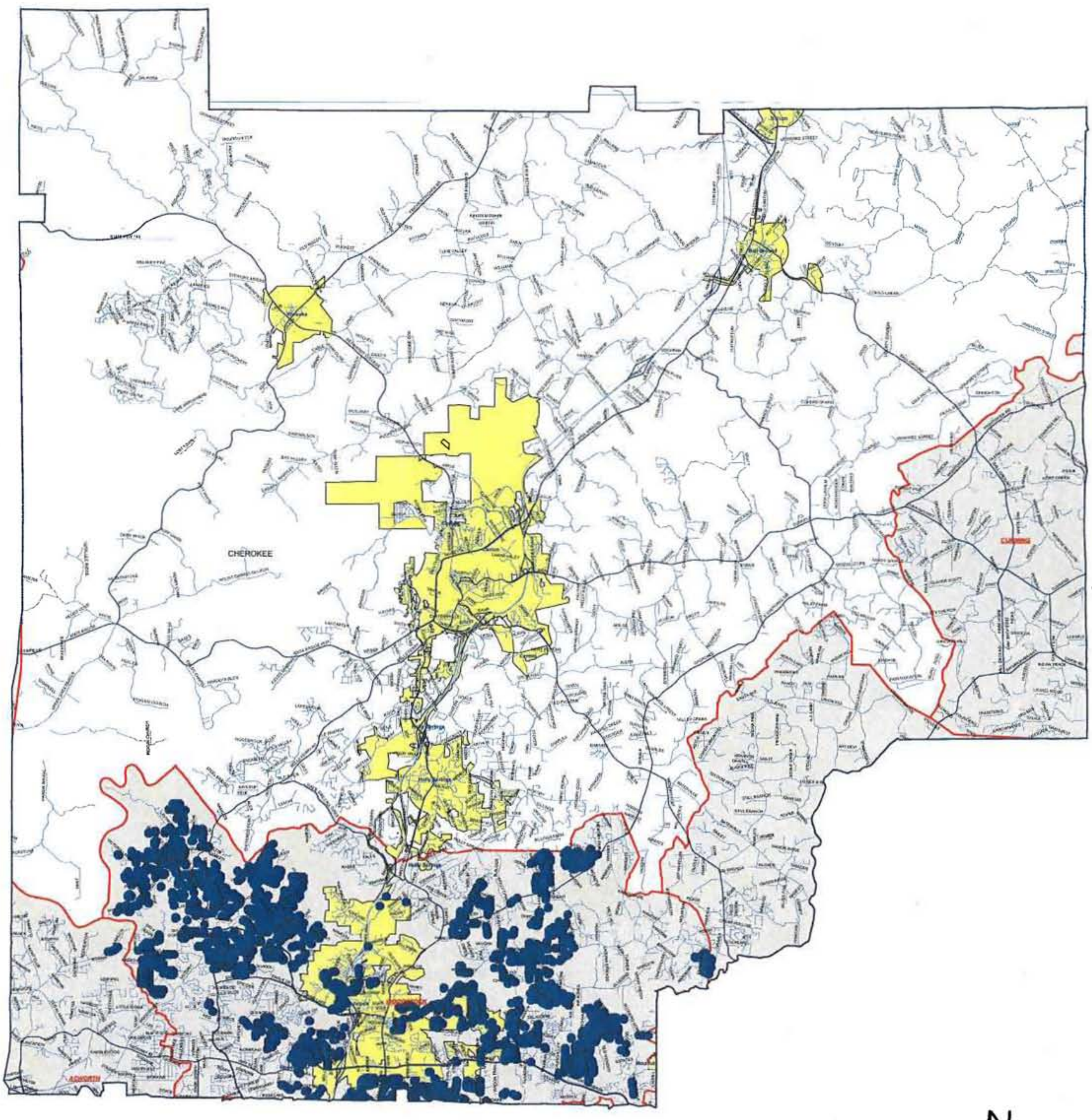
there is no provision in the Cable Act for any such role by the FCC in connection with Section 621(a)(1).

APPENDIX 1

Cherokee Co Service Area



Legend

- Servicable Area
- MAJOR STREETS
- County Border
- City Areas
- WIRE_CENTER

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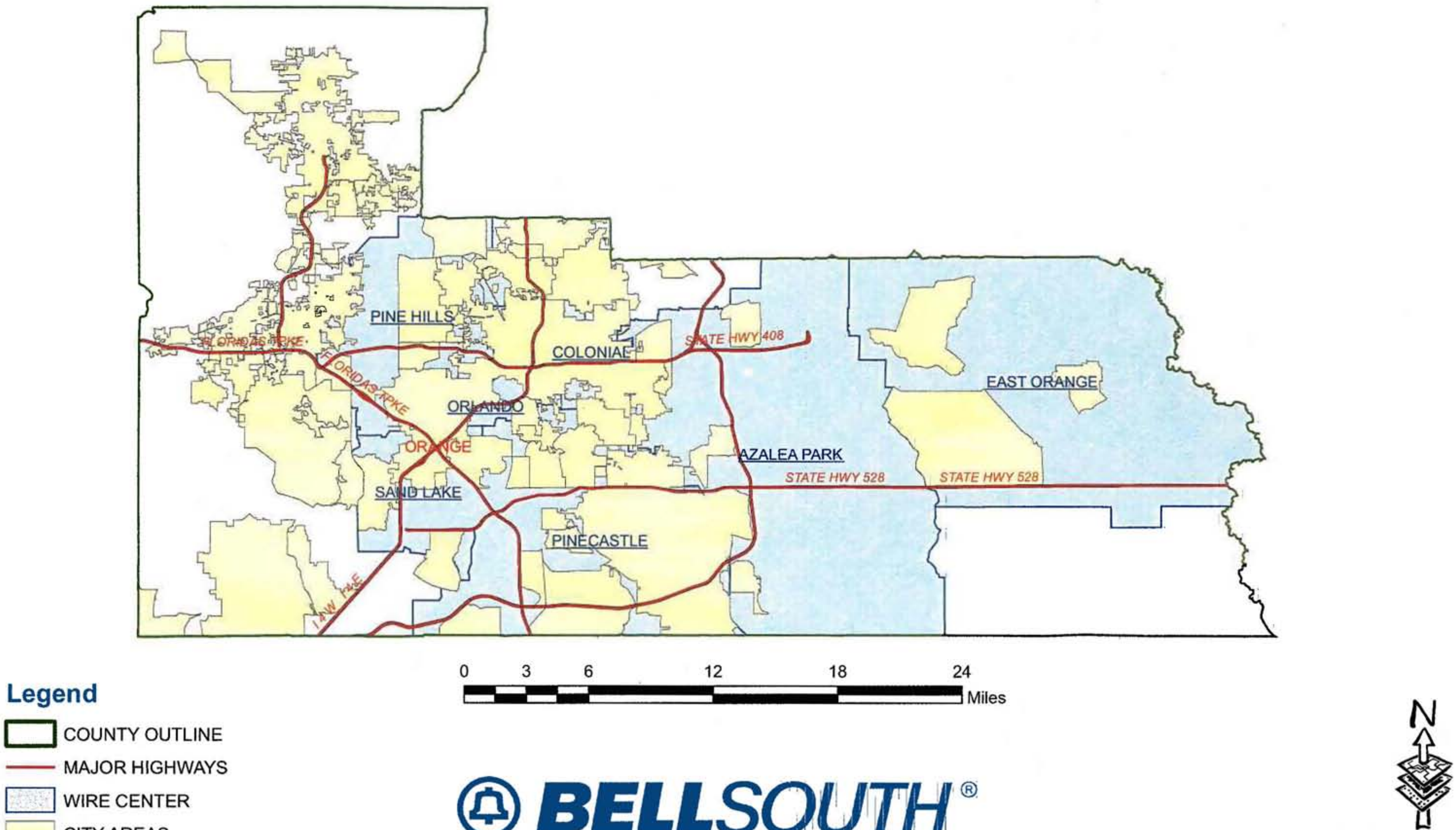
BellSouth Entertainment

N

APPENDIX 2

Orange Co Franchise Area



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