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

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

REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.

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I. INTRODUCTION AND SUMMARY

In its Notice of Proposed Rulemaking ("NPRM") in this Docket, the Commission stated that it sought "record evidence of both concrete examples and broader information that demonstrate the extent to which any problems exist."[1] What it received, instead, from the incumbent local exchange carriers ("ILECs"), who seek unprecedented relief from long-established local cable franchising, was hundreds of pages of repeated rhetoric and unsupported, vague and generalized allegations. Indeed, the concrete record evidence that the Commission received demonstrated that the ILECs' complaints and allegations are groundless. The Commission learned from Cablevision, for example, that contrary to its claims about urgently needing hundreds or thousands of franchises, Verizon has only actually applied for a small handful in Cablevision's territories. The Commission obtained expert testimony from the National Cable Telecommunications Association ("NCTA") demonstrating the public harm to consumers that would result from allowing ILECs to cherry pick only the wealthiest portions of their existing service territories. The Commission learned from non-ILEC cable competitive entrants, like RCN, that they were able to enter the cable market as competitive new entrants without being subject to unreasonable franchise denials, delays, or conditions. And the Commission learned from Charter that, in fact, a motivated entity can obtain thousands of franchises within a very short time frame, under heavily competitive conditions.

The record before the Commission does not expose concrete evidence that local franchising authorities ("LFAs") are unreasonably refusing to grant ILECs cable franchises. The record contains little or no concrete evidence of specific demands, made by specifically-

[1] *In the matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection And Competition Act of 1992*, Notice of Proposed Rulemaking, FCC 05-189, ¶ 13 (rel. Nov. 18, 2005) ("NPRM").

identified LFAs, as absolute conditions of a franchise grant that in any given case constitute an unreasonable refusal to grant a franchise. The ILECs don't identify LFAs that have allegedly refused to grant franchises. Nor do the ILECs give any details to support their allegations of supposedly anticompetitive behavior by cable operators, like Charter. The ILECs simply repeat the rhetoric and generalizations they have previously provided to the Commission in support of their quest. Rather than concrete evidence of unreasonable denials, the record exposes simply that the ILECs, again, want to enter the market without being subject to any of the rules applied to other market competitors.

Charter's opening comments clearly demonstrated the fundamental factual faults in the most basic assumptions underlying the ILECs' arguments. Existing cable operators have not had decades of green field opportunities to reap unfettered profit from exclusive market access. Current cable franchise obligations were imposed recently, not decades ago; they were imposed during a time when cable operators faced aggressive competition from large, well-funded competitors, like DirecTV and Echostar. As Charter's comments demonstrated, if Charter was able in short order to obtain thousands of franchises and invest millions of dollars to upgrade its facilities while subject to aggressive competition from DBS, then so can multi-billion dollar, established companies like the ILECs.

In these reply comments, Charter addresses several key issues that were raised in the ILECs' opening comments. First, Charter addresses the ILECs assertions regarding demands that they upgrade their entire footprint within a community. Charter demonstrates that it is not appropriate to compare the ILECs' upgrade of their existing plant footprint with the original construction of cable systems thirty or forty years ago. Rather, the appropriate comparison is between the ILECs' upgrade and recent upgrades by Charter and others to their existing plant footprints in a community. When Charter upgraded its plant, it upgraded the entire community in its franchise area, and frequently accomplished the upgrade within as little as 24 months. When viewed in the appropriate time frame, it is entirely reasonable to expect and require ILECs to upgrade their plant throughout their entire existing footprint in a community in short order. Moreover, Charter responds to the ILECs' red herring assertions about cable operator entry into the telecommunications market. When Charter rolls out VoIP service in a franchise area, it rolls it out to all areas of its existing footprint, not just chosen enclaves of allegedly "high value" customers. And when Charter enters the telecommunications market, it abides by the social contract to live by the various rules and regulations governing service, even some that may arguably not apply and even those that subsidize the ILECs.

Second, Charter rebuts Verizon's assertion that Charter has acted anticompetitively by simply preserving its rights under the Cable Act. Finally, Charter reiterates that while it does not believe either that there is a record supporting change or that the Commission has jurisdiction to adopt the rules requested by the ILECs, to the extent that the Commission does move forward with rule changes to eliminate franchising burdens on ILECs, it should simultaneously recognize the need to modify existing franchise obligations.

II. CHARTER'S UPGRADE OF ITS EXISTING FOOTPRINT DEMONSTRATES THAT IT IS NOT UNREASONABLE TO REQUIRE ILECS TO PROMPTLY UPGRADE THEIR ENTIRE FOOTPRINT IN A COMMUNITY AS A CONDITION OF RECEIVING A FRANCHISE

The ILECs focus the bulk of their attention on fighting requirements that they upgrade their networks to offer cable service throughout an entire community – the so-called "build-out" requirement. The ILECs advance assorted rhetoric in support of their fairly unabashed desire to engage in socio-economic redlining. However, NCTA's opening comments introduced strong expert evidence demonstrating the harm to consumers and the public interest that would result from allowing the ILECs to avoid serving all consumers in a community, and NCTA is submitting additional expert evidence rebutting the ILECs' submissions, which Charter supports.[2] In addition to the economic flaws in the ILECs' assertions, there are fundamental factual flaws that underlie their arguments. For example, the ILECs focus their arguments on the wrong time frame – in terms of comparing their current upgrades with the original construction of cable systems decades ago, and in evaluating what is a reasonable time in which to upgrade their networks throughout a community.

A. The ILECs Are Not Building Virgin Networks From Scratch, So The Timeframe For Construction Of Initial Cable Systems Decades Ago Is Not A Relevant Comparison

To no small extent, the ILECs' arguments – all of them really, but in particular their arguments about build-out requirements – are based on the wrong time frame. The ILECs assert that they should be exempt from current franchise requirements because cable operators had decades, supposedly, to construct their systems and obtain a return on investment under "monopoly" conditions. Those arguments, however, are factually flawed and focus on the wrong time frame.

For example, the ILECs argue that cable operators had many years – even a decade or longer – to complete construction of their cable systems.[3] But what the ILECs are talking about was the initial construction of completely new cable systems decades ago. The construction of virgin cable networks in the 1960s or 1970s is not a relevant comparison. The proper analogy is

[2] NCTA Comments at 12-19 and Attachment B; NCTA Reply Comments at 47-57.

[3] AT&T Comments at 59 n. 74 ("Existing cable franchises often took decades to build.").

to the timing and conditions under which Charter and other operators completed their plant upgrades recently.

The ILECs are not building virgin networks. Like Charter and other cable operators, the ILECs have existing networks, in long-standing footprints. They also already have many miles of fiber imbedded in those networks.[4] Accordingly, the ILECs' upgrade of their existing networks is more comparable to when cable operators, like Charter, recently undertook upgrades of their existing plant to hybrid fiber coaxial cable networks.[5] It is misleading and irrelevant to talk about how long it took start up cable operators to construct the very first cable systems from scratch 30 or 40 years ago.

B. Charter Upgraded Its Networks Throughout Entire Communities In Reasonable Timeframes, It Is Appropriate To Expect The Same From The ILECs

The distinction between upgrading and virgin build is critical in evaluating the merits of the ILECs' build out arguments. In its argument that build out requirements are unreasonable, Verizon asserts, for example, that "new entrants must be given at least as much time as the incumbents had to build out their designated franchise area."[6] Verizon, of course, wants the Commission to consider the original construction of cable systems, in the 1970s or earlier. But

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[4] As of 2004, the Bell Companies reported fiber capacity of over 760,000 sheath kilometers, or 472,242 sheath miles. Universal Service Monitoring Report, Prepared by Federal and State Staff for the Federal-State Joint Board on Universal Service in CC Docket No. 98-202, Table 10.2 at 10-14 (2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-262986A1.pdf.

[5] Charter invested $10.5 billion on capital expenditures since 2000, with most of that investment going toward system upgrades. *See* Charter Comments at 6 n. 10 (referring to Charter Communications, Inc. Form 10-K, filed Apr. 15, 2003 (for period ending Dec. 31, 2002) at 55-56 (reporting $2.2 billion, $2.9 billion and $2.8 billion in capital expenditures just for the years ending 2002, 2001, and 2000, respectively, with the majority of capital expenditures in those years relating to rebuild and upgrades and new set-top boxes and cable modems).

[6] Verizon Comments at 46.

the correct analogy is to the time period in which Charter and others upgraded their existing plant, just as Verizon and the other ILECs are upgrading their existing footprint.

As noted in its opening comments, Charter spent nearly $8 billion in capital expenditures just between 2000 and 2002, with most of it going to upgrading and rebuilding the vast majority of its cable systems.[7] The key is that in many instances, those upgrades were accomplished in 24 months or less. For example, Charter completed the upgrade of its Long Beach, California system – one of its larger cable systems – in 17 months. Similarly, Charter upgraded its network in 218 cable systems in Tennessee within 24 months, between 2000 and 2002. And Charter's cable systems in Tennessee are noteworthy because they are not in major urban areas, like Nashville or Knoxville. Rather, Charter's Tennessee systems serve smaller communities, ranging from only 25 to 25,000 subscribers, and averaging only approximately 1,900 subscribers per community. The time frame for Charter's upgrade of its other systems is similar. There were a number of communities that took as little as four months to upgrade. On the whole, when Charter undertook an upgrade, in the vast majority of communities, completion of the upgrade took less than 24 months.

Charter's upgrades were also completed in the face of significant competition, and frequently under the strict supervision of local franchising authorities. Charter's construction time tables were frequently subject to input from and oversight by local franchising authorities. Through the franchise renewal or transfer processes, LFAs frequently sought to regulate many details of Charter's network construction, like construction timetables for particular parts of town, the number of nodes, the number of homes served per node, and scalability of equipment and design. Indeed, the ILECs conveniently ignore Section 632(a)(2) of the Cable Act, which

[7] *See supra* n. 5.

appears to contemplate and authorize LFA imposition of build-out time frames and construction schedules: "[a] franchising authority may establish and enforce . . . construction schedules and other construction-related requirements, including construction-related performance requirements, of the cable operator."[8]

Charter's ability to undertake its upgrades in a timely manner, within the framework of the existing cable franchising regime, and all under the shadow of aggressive competition from DBS demonstrates that the ILECs' assertions about their inability to do the same are simply wrong.

The ILECs' focus on the wrong time period is also exposed in their inaccurate arguments regarding the imposition of PEG support. For example, Verizon repeatedly asserts that Section 622(g)(2)(B) allows existing cable operators to be subject to more burdensome PEG support requirements.[9] Verizon's argument exposes either its misunderstanding of the cable industry or of the Cable Act. Section 622(g)(2)(B) provides that the term franchise fee does not include "in the case of any *franchise in effect on the date of the enactment of this title [October 30, 1984]*, payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, public, educational, or governmental access facilities."[10] If there are any franchises currently still in effect that were in effect on October 30, 1984, they are few and far between. Charter is not currently operating under any franchise that was in effect in 1984. For Verizon to repeatedly assert that Section 622(g)(2)(B) expressly

[8] 47 U.S.C. § 552(a)(2).

[9] *See, e.g.*, Verizon Comments at 67, 69, 71.

[10] 47 U.S.C. § 542(g)(2)(B)(emphasis added).

authorizes a new entrant, today, to be subject to lesser PEG obligations is either disingenuous or grossly in error regarding existing cable franchises.[11]

C. Build-Out Requirements Are Not Unreasonable

1. When Charter Upgrades Its Network And Rolls Out VoIP Service, It Does So For The Entire Footprint Within A Community; It Is Not Unreasonable To Expect And Require The Same From The ILECs

The ILECs assert that new entrants to the telecommunications market are not subject to build-out requirements, and therefore it is unreasonable to require the ILECs to build out their entire footprint in a community.[12] However, when Charter upgrades its network in a community and introduces VoIP in competition with the ILECs, it does so throughout its entire footprint in the community, not just to areas of allegedly "high value"[13] customers. Accordingly, it is completely reasonable to require the same of the ILECs.[14]

While they make much of the issue of how their service territories do not correspond with municipal boundaries, in reality, the ILECs' existing network footprint will cover the entirety of a community in the overwhelming majority of communities. Although much-cited, Keller, Texas is the rarity, where existing ILEC territories split the town. In the vast majority of communities, to say that the ILEC must "build out" its entire existing service territory means that it will cover the entire community. This is not an outrageous requirement.

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[11] Section 622(g)(2)(B) and 622(g)(2)(C) differentiated between franchises in effect pre and post 1984 Cable Act to protect, to some extent, pre-Act franchises. It was an attempt to provide a transition mechanism in the face of sweeping new legislation. It was not a generalized authorization to impose more burdensome obligations on existing cable operators.

[12] Verizon Comments at 39; AT&T Comments at 59; Qwest Comments at 12-13.

[13] NPRM at 6 n. 37 (citing May 22, 2005 USA Today article referring to an AT&T (then SBC) slide show for analysts).

[14] As a threshold matter, Charter notes that it is not advocating that ILECs be required to build into areas beyond their existing plant footprints. However, it is entirely reasonable to require the ILECs to upgrade all of their facilities in a community at essentially the same time – *i.e.*, within a tight time window, not over the course of many years.

Just as Charter would upgrade its entire network throughout a community, it is not unreasonable to require the ILECs to upgrade their entire network throughout a community. Verizon's comments, for example, assert that they upgrade their network on a "wire center" basis, and candidly admit that they want to pick and choose which wire centers to upgrade.[15] LFAs impose build-out and construction time frames on all providers, even on penniless start-up companies. But the ILECs are not penniless start-ups. They are highly regulated, highly funded, established entities who are upgrading their existing networks. If it was reasonable for LFAs in the last 5 years to require Charter to upgrade its entire network within the community (and subject to significant LFA oversight), then it is reasonable for LFAs to require Verizon and others to upgrade their existing networks in a prompt fashion as well.

2. The Comparison To Competitive Telecom Entry Is Inapt

The ILECs try to compare their entry into cable with cable operators' entry into the telecommunications market. They argue that new telecommunications providers are not subject to build out requirements, and so, the ILECs should not be subject to build out requirements in their cable entry.[16] As a threshold matter, it goes without saying that as a policy matter, the multi-billion dollar ILECs are not in the same position as a start up CLEC, with limited venture

[15] Verizon Comments at 39 ("Verizon decides where to upgrade to FTTP"); 40 ("[only w]here Verizon upgrades to FTTP … it *typically* builds out an entire wire center") (emphasis added); 42 ("the Commission should confirm that new entrants may define their own franchise areas"); 44 (arguing that the Cable Act "does not authorize an LFA to require a competitive entrant to build out *beyond the franchise area that it selects*.") (emphasis added); 51 ("the Commission must read 'franchise area' as including only the area in which the cable applicant has chosen to provide service.").

[16] AT&T Comments at 59; Verizon Comments at 39; Qwest Comments at 12-13.

capital. They have existing networks, brands, and regulatory infrastructures, and billions of dollars in revenues and capitalization.[17]

More importantly, when Charter rolls out VoIP service in a community in competition with the ILEC, it does so throughout Charter's entire footprint in that community. Even though, like the ILECs, Charter rolls out VoIP on a rate center (aka wire center) basis, it does not cherry pick only allegedly "high value" customers. In addition, Charter is able to undertake its VoIP roll out on a wire center by wire center basis despite the fact that those wire centers cross municipal boundaries – exactly as the ILECs claim they cannot do.

In addition, the comparison to competitive entry into the telecommunications market is misplaced because it ignores the historic and present implicit and explicit institutional subsidies that support universal telecommunications service. When Charter and others enter the telecommunications market, rather than be subject to explicit universal build out requirement, they instead contribute to federal and possibly state administered Universal Service Funds ("USF").[18] Thus, the ILECs' networks and services to higher cost areas and customers are explicitly subsidized.[19]

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[17] *See, e.g.*, Light Reading – Networking the Telecom Industry, *ILECs, CLECs Face Off Over Une-P*, http://www.lightreading.com/document.asp?doc_id=25394 (reporting that as of the end of 2002, the three largest ILECs, Verizon, SBC and BellSouth had a combined market capitalization approaching $260 billion while the market capitalization of 18 public CLECs totaled less than $1.5 billion. While the ILECs have been facing increased competition from cable operators and other VoIP providers since then, ILECs still have a larger market capitalization than the cable industry and more well-known brand recognition. *See, e.g.*, Investopedia Advisor, *AT&T BellSouth Buy No Blunder*, March 9, 2006, http://advisor.investopedia.com/news/06/ATTs_Bellsouth_Buy_No_Blunder.aspx?ad=IA_Blog_030906-2 (reporting that after AT&T's takeover of BellSouth, it will have a market capitalization of more than $150 billion and noting that the Company will benefit from the AT&T brand).

[18] 47 U.S.C. § 254(d).

[19] There are also implicit subsidies built into the telecommunications market. For example, ILECs still impose high access fees and special construction charges. So, ILECs with build-out

In the cable market, there is no USF subsidy. Accordingly, the appropriate requirement is for new entrants to build out to provide service throughout the community. Otherwise, the cable incumbent will be forced to incur the cost of constructing to all areas, and then face competition in lower cost or higher revenue generating areas – a situation the ILECs are protected from through government regulation. The alternative – a universal service fund for cable television, where new entrants pay a percentage of their revenues to support service to high cost areas – is not a prospect that should appeal to anyone.

Finally, when Charter enters the telecommunications marketplace as a competitive entrant, it complies with the social contract that accompanies entry into that market. That is to say, Charter subjects itself to the myriad rules and regulations that govern the provision of the service. For example, Charter complies with USF, CALEA, E911, Telecommunications Relay Service ("TRS"), subscriber change procedures (slamming rules), telephone data privacy (CPNI) obligations, and equal access and dialing parity rules. Charter also complies with miscellaneous federal and state reporting requirements including, *inter alia*, number resource reporting, CPNI compliance, and EEO reporting. Indeed, Charter commits to comply with regulations that are not clearly applicable. It is not unreasonable to require the same commitment from the ILECs. If they want to enter a regulated business, they need to comply with the regulations that apply to all participants – long standing regulations that are not hidden or a surprise.

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obligations (i) receive subsidies from their new competitors to help cover the costs of those build-out requirements, in the form of the USF assessments that competitors must pay and (ii) continue to assess high "access charges" on third parties to help cover their costs.

III. THE ILECS' VAGUE, UNSUPPORTED ALLEGATIONS REGARDING ANTICOMPETITIVE BEHAVIOR BY CHARTER ARE MISLEADING AND FALSE

Various ILECs make vague allegations accusing incumbent cable operators of supposedly anticompetitive behavior.[20] Verizon, in particular, asserts that "cable operators have threatened litigation with several other municipalities, often threatening to file suit over alleged violations of the so-called 'level playing field' requirements. Charter has made such threats to LFAs in Texas. . . ."[21] Verizon's accompanying Declaration of Marilyn O'Connell supports Verizon's allegation with only the bare statement that "Charter made threats to LFAs in Keller, Texas. . . ."[22] Verizon's assertions are misleading and untrue.

Charter's communications to the LFA in Keller, Texas do not make threats. In a January 27, 2005 letter, Charter's Vice President Operations/General Manager Sharan Wilson explained that "While Charter does not object to fair competition in the City of Keller, the Verizon franchise in its present form raises serious legal and economic issues and will provide Verizon with an unfair competitive advantage." The letter explains that if the City grants the franchise in its then current form, Charter would have little choice but to take legal action, in particular "modification of its own franchise under procedures in the federal Communications Act." It is not "threatening" for Charter to inform the City that Charter may be forced to avail itself of rights created by the Cable Act. Indeed, modification of existing franchises in light of unforeseeable changes that render certain franchise conditions commercially impracticable will be critical in the event that ILECs are allowed to enter the market on special terms. The

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[20] AT&T Comments at 31, 44, 46, 53-54; Verizon Comments at 33-35; BellSouth Comments at 12-13, 16-17, 19-20.

[21] Verizon Comments at 33-34.

[22] Verizon Comments, Declaration of Marilyn O'Connell at ¶ 60.

"commercial modification" process under Section 625 has been used previously to adjust franchises after LFAs grant more favorable and less burdensome franchises to new entrants.[23] It is not anticompetitive or inappropriate for Charter to communicate to an LFA that a commercial modification may be necessary if a new franchise is granted on inequitable terms. Indeed, the LFA is exactly who Charter must communicate directly with in the Section 625 process.

Their complaints on this point simply demonstrate that the ILECs want not only relief from existing rules, but to simultaneously deny cable operators the ability to use mechanisms specifically authorized by the Cable Act, like franchise modification.

The ILECs' attempt to vilify cable operators for "threatening litigation" is particularly ironic given the ILECs' aggressive, multi-year litigation response to new entry in the telecommunications market. The ILECs filed at least seven lawsuits directly challenging the Commission's local telephone competition rules under the Telecommunications Act of 1996, alone.[24] Moreover, the ILECs initiated dozens of other challenges to interconnection, unbundling, and various other issues in courts and before state commissions as well that

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[23] *See, e.g.*, *Cable TV Fund 14-A, Ltd., v. City of Naperville*, Case No. 96 C 5692, 1997 U.S. Dist. LEXIS 7336 (N.D. Ill. 1997).

[24] *See SBC Inc. v. FCC*, 414 F.3d 486 (3rd Cir. 2005) (regarding reciprocal compensation rules); *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied* (regarding challenge to Commission's triennial review of its unbundling rules); *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert denied*, 538 U.S. 940 (2003) (relating to ILEC challenge to Commission's earlier revisions to its unbundling rules); *Verizon Tel. Co. v. FCC*, 292 F.3d 903 (D.C. Cir. 2002) (challenging Commission's revisions to its collocation rules); *GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000) (challenging the Commission's initial collocation rules); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) (involving challenge to Commission's interstate access charges rules); *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), *decision on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir.2000), *aff'd in part, rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002) (relating to ILEC challenge to the FCC's initial unbundling order).

implicated local competition under the Telecommunications Act of 1996 or related rules.[25] Their intransigent and aggressive response to new entry was crushing. They have no credibility to complain about cable operators simply participating in the process to protect their rights under law.

IV. THE CABLE ACT ALREADY PROVIDES THE ILECS WITH RELIEF FROM UNLAWFUL DEMANDS

The ILECs comments include a request that the Commission adopt rules preemptively addressing a number of commitments that the ILECs allege are commonly requested. In addition to the fact that the ILECs do not provide any concrete evidence, just nameless allegations, there are long standing provisions in the Cable Act that already provide the ILECs with ample security against demands that the ILECs claim are a problem. In the event that the Commission agrees with the ILECs, Charter reiterates that existing cable operator obligations may be rendered commercially impracticable, and the Commission should address the need for commercial modifications under Section 625.

A. The Cable Act Provides Mechanisms For Addressing Allegedly Unreasonable I-Net And PEG Demands

In addition to build out requirements, the ILECs focus much of their attention on I-Net and PEG obligations, in general.[26] While Charter recognizes that LFAs sometimes overreach in their PEG and I-Net requests, there is no need for Commission action in this docket. As the ILECs comments point out, the Cable Act already provides standards and protections to address LFA overreaching on issues like PEG and I-Nets. For example, as the ILECs' comments point

[25] *See, e.g.*, *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003); *Bell Atl. Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279 (4th Cir. 2001); *Southwestern Bell Tel. Co. v. PUC*, 208 F.3d 475 (5th Cir. 2000); *U.S. West Communs., Inc. v. AT&T Communs.*, 46 F. Supp. 2d 1068 (D.C.Or. 1999); *U.S. West Communs. v. Hix*, 57 F. Supp.2d 1112 (D.C. Colo. 1999); *S. New Eng. Tel. Co. v. Dep't of Pub. Util. Control*, 261 Conn. 1, 803 A2d 879 (2002).

[26] *See, e.g.*, Verizon Comments at 64-75; AT&T Comments at 43, 66-70.

out, Sections 611, 621(a)(4)(B), 622(b), and 622(g)(2)(C) each impose limits on and define parameters for LFA requirements concerning PEG and I-Nets.[27]

The Cable Act in turn provides enforcement mechanisms that have been in place for years. Section 635(a) expressly grants to the courts the exclusive authority to review claims by cable operators that have been "adversely affected" by any "final determination" made by an LFA regarding an application for a competitive franchise, a request for franchise modification, or a franchise renewal proposal.[28] Court enforcement, rather than FCC enforcement, of final LFA decisions regarding these matters is consistent with Congress' policy in the Cable Act, as reaffirmed in the Cable Television Consumer Protection and Competition Act of 1992 (which amended Section 635(a) to conform with the amendments to Section 621(a) regarding competitive franchises), and the Telecommunications Act of 1996 (which left the enforcement scheme intact), that cable operators be responsive to local community needs and interests. As Congress recognized, courts are in a better position to assess the lawfulness of specific LFA demands in the context of the local needs and interests. Any LFA demands that exceed the substantive limitations on PEG and I-Net obligations can be adequately addressed through judicial review under section 635.

The ILECs assert that they cannot seeks redress through the courts because they must go through the "unreasonable delays that applicants typically experience during the application process itself" before they can reach the point of "final denial" that is actionable under section

[27] *Id.* To the extent the ILECs argue the LFA requirements concerning PEG and I-Nets are different for "new entrants" than for incumbents, their position is without basis in the Cable Act. *See also supra* n. 11 and accompanying text.

[28] 47 U.S.C. § 555(a).

635.[29] However, if an ILEC believes an LFA's PEG, I-Net or other demands are unlawful, it can present its application as a "final non-negotiable offer" thereby inviting an immediate response from the LFA enabling it to bring suit promptly.

B. If It Provides Relief To The ILECs, The Commission Should Also Address The Resulting Need For Relief For Existing Cable Operators

As Charter explained in its initial comments, if the Commission adopts rules that grant ILECs relief from existing cable franchise obligations, that will render commercially impracticable those existing cable franchise obligations as they apply to Charter and other existing operators. Indeed, if the Commission accepts the premise that particular franchise obligations[30] are not appropriate or commercially feasible in a "competitive environment," as the ILECs assert, then it must also recognize that those obligations are not commercially feasible for existing operators as well.

While Charter joins NCTA and others in their comments challenging the Commission's jurisdiction to act under Section 621, to the extent that Section 621 does provide the Commission a mechanism for granting the ILECs' the relief they seek, then the Commission should also use the mechanism of Section 625 to recognize that existing franchise obligations must be modified to reflect the grant of franchises to new entrants free from existing obligations.

V. CONCLUSION

After a decade of ignoring the opportunities created by Congress for their entry into the video business – and at the same time crushing and absorbing telecom new entrants – the ILECs

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[29] AT&T Comments at 29. *See also* Verizon Comments at 35; BellSouth Comments at 36; Qwest Comments at 14.

[30] Charter again notes that the ILECs' comments are generally devoid of detail regarding the specific obligations that they assert are unreasonable, commercially infeasible, and rise to the level of a denial of a franchise. Are all I-Nets objectionable? Is any level of PEG support acceptable? Charter submits that the Commission should be particularly cautious and reluctant to simply accept blanket claims.

now want immediate, unfettered access to the cable market. They claim that the only way they can enter the cable market is if the Commission adopts new rules establishing that I-Net, PEG, build out, and various other traditional local franchising requirements are barriers to entry.

As Charter's comments demonstrate, however, the ILECs' claims are unfounded. There is no concrete evidence demonstrating that they cannot obtain franchises in a timely manner, or that they cannot comply with the same level of requirements that have been imposed on Charter and others. The ILECs' claim that current franchising requirements are legacies of a monopoly market is simply false. Charter's franchise obligations have been imposed recently and in the face of aggressive competition from and double digit penetration by DBS.

There is also no evidence demonstrating that it is unreasonable for the ILECs to be required to upgrade their network footprint throughout a community in the same short timeframe imposed on and achieved by Charter. There is no public benefit that will be gained by allowing the ILECs to cherry pick the most affluent areas. Indeed, the Commission has expert evidence demonstrating that allowing the ILECs to cherry pick will actually harm consumers.

Ultimately, even assuming it has jurisdiction, the Commission has not be presented with a concrete evidentiary record that would support its taking any action under Section 621(a)(1). Section 621(a)(1) prohibits an LFA from "unreasonably refus[ing] to award an additional competitive franchise." 47 U.S.C. § 541(a)(1). By its own language Section 621(a)(1) contemplates that an LFA might refuse to grant an additional franchise. The refusal must simply not be unreasonable. Whether a particular LFA's requirements rise to the level of an "unreasonable" refusal is inherently a case-by-case issue. To justify a blanket rule of the scope requested by the ILECs would require a concrete record of clear and convincing evidence that in every case there could be no reasonable justification for refusing to grant a franchise based on an

ILEC's refusal to accept a particular franchise requirement. The record in this docket is not clear, convincing, or concrete.

The relief the ILECs seek is not supported by the facts or policy. Only fair competition will benefit consumers and the public, and the path to fair competition is not via special treatment for any market participant – particularly not multi-billion dollar phone giants.

Respectfully Submitted,

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