Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF AT&T INC.

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AT&T Inc. ("AT&T") respectfully submits these reply comments pursuant to the Commission's November 18, 2005 Notice of Proposed Rulemaking ("NPRM").

INTRODUCTION AND SUMMARY

The opening comments starkly confirm that national "reasonableness" rules to guide processes for the award of competitive cable franchises are urgently needed to protect core *national* broadband and video competition policies. The comments likewise confirm that the Commission is fully empowered to promulgate such rules: as many commenters document (and none seriously disputes), the Commission has both broad statutory authority and a clear mandate to act.

The comments clarify that local government opposition to franchising reform is essentially limited to concerns over physical rights-of-way management, PEG access, franchise fee and related interests that are fully protected by the modest, but critically necessary, franchising reforms proposed here. The only real opposition to the pro-competitive rules that have actually been proposed comes from the cable industry, which recognizes that its members are unlikely to remain insulated from effective wireline competition if "build-out" conditions and other unreasonable regulatory barriers to entry are removed. In short, the record firmly establishes that national rules to minimize the entry-deterring effects of the franchising process are essential and that this relief need not interfere with any legitimate local interests.

The support for this much-needed reform is unusually broad and diverse. Consumer groups, policy analysts, advocates for the disabled, equipment manufacturers, software developers, broadcasters, independent programmers, and large and small wireline video entrants, among others, all agree that the current regime of town-by-town franchising, undisciplined by Commission rules implementing the federal reasonableness requirement, is a major barrier both to broadband infrastructure deployment and to wireline video competition. The comments offer example after example of the disabling effects of the existing regime – a further compendium of illustrative examples is included as Appendix C to these reply comments – and overwhelming evidence of the immediate and substantial increases in entry and investment that will follow appropriate franchise reform. The enormous consumer benefits that will accompany increased wireline video competition – not only lower prices and expanded service offerings, but more rapid deployment of innovative technology, wider outlets for independent programming, and the promotion of more family-friendly programming for consumers – are also well documented.

Although most of the municipalities that filed comments chose to use the National Association of Telecommunications Officers and Advisors ("NATOA") template for comments, which ostensibly opposes *any* Commission role in the franchising process, the actual substance of the local governments' comments confirms both that immediate Commission action is necessary and that it will not interfere with any of the legitimate local interests invoked by the cities. Municipalities candidly admit that local franchising authorities lack experience in dealing with competitive video applications and that, absent Commission rules, existing state and local requirements limit their ability to streamline the approval process or to award competing franchises on terms and conditions that are competitively and commercially appropriate for new entrants, and not merely carbon copies of entry-deterring incumbent franchise terms. As the cities' comments detail, these constraints have repeatedly stymied applicants for competing wireline franchises, and have discouraged most potential wireline competitors from even attempting entry. In the 13-state region where AT&T is the primary incumbent local telephone provider, barely more than a *dozen* towns report having even a *single* active competitive wireline video provider. And, as AT&T demonstrated in its opening comments, the threat to national broadband and video competition policies posed by the existing regulatory regime has never been greater.

Municipalities do express concerns about physical rights-of-way management, PEG access and franchise fees. But the rules proposed by AT&T and others specifically preserve legitimate local interests. AT&T and its peers will continue to comply with the detailed time, place and manner regulations on their use of the public rights-of-way, subject to active local government oversight. They do not contest appropriate PEG access and emergency alert requirements. And they have signaled their willingness to pay reasonable fees to cities under a methodology established by the Commission. Thus, none of the concerns aired by the local governments should bar the adoption of Commission rules ending unnecessary regulatory delays, build-out requirements, and other anticompetitive franchise conditions that are flatly inconsistent with the nation's broadband infrastructure deployment and video competition policies.

The incumbent cable commenters offer two main arguments in defense of the existing regime. Neither has merit. First, with respect to the issue of procedural delay in reviewing franchise applications, the incumbents assert that competitive video entrants could obtain franchises "in the blink of an eye" simply by acquiescing in the full terms and conditions of existing incumbent franchises – including an obligation to deploy facilities and provide service to all of the neighborhoods served by the incumbents, and to match the monetary and in-kind payments to the municipalities that the incumbents pay. The argument is remarkably hypocritical. The cable operators know perfectly well that these terms almost invariably render competitive entry uneconomic. And, for precisely analogous reasons, the cable operators would have rejected out of hand any suggestion that *their* entry into telephony or data markets be conditioned on acceptance of all of the carrier of last resort and dominant carrier regulations that are still borne by the incumbent local telephone carriers. The Commission, at the behest of cable and other telephone entrants, took an active role in ensuring that local telephone newcomers were not burdened with entry-deterring regulations that cannot rationally be applied to new entrants (and which, in many respects, are obsolete even for incumbent providers). National broadband and video policies compel the same outcome in the video context. Thus, the cable industry's insistence that LFAs will "solve" regulatory delay by forcing video entrants to accept the full terms of incumbent video franchises only underscores that the Commission must act now to prevent anticompetitive outcomes that would thwart entry and investment altogether in many areas.

The other main argument offered by the cable commenters – that build-out conditions on entry by competing wireline operators protect the public – is equally unfounded. Allowing competitive entry without build-out conditions, the argument goes, would allow entrants to "cherry-pick" or "cream skim" the most profitable neighborhoods, thereby undermining the ability of incumbents to continue to serve customers in areas that are the most costly and least lucrative to serve. This argument has several obvious and fatal flaws. As an initial matter, the posited regulatory asymmetry of the incumbent carriers and their potential telephone company competitors is entirely illusory. The competition between cable operators and telephone companies is not principally for "video" alone, but for the full suite of services that include broadband Internet access and voice telephony. In this competition across the full range of communications services, the universal service requirements and other obligations of incumbency are very much symmetrical: the cable companies are subject to these obligations for cable service, while the telephone companies (but not the cable companies) are subject to these obligations for telephone service. Nor is there any factual basis to the cherry-picking allegation: AT&T plans – and has powerful marketplace incentives – to offer competitive video services broadly to the vast majority of its customers within its service territory. AT&T seeks only the flexibility embodied in national broadband policy to make *efficient* investment decisions, providing wireline video services where the necessary network upgrades are economically feasible, and serving customers with its innovative HomeZone integrated satellite video/DSL service where that is the most efficient solution, just as the cable companies and every single CLEC were permitted to make efficient entry decisions as to which telephony customers to serve and how best to provide that service.

Moreover, the cable commenters do not even attempt to rebut the overwhelming record that the undeniable entry-deterring effect of forcing video entrants to provide universal wireline service would have an immediate *negative* impact on consumers by denying entire communities wireline video competition. Nor could any rebuttal be made. As BellSouth explains (at 35), the "seemingly irrational decision by the incumbent cable operator to force a new entrant to develop additional service scope can only be explained by one fact: the incumbent fully realizes the extent to which a build-out requirement poses a competitive barrier, which in many instances, the prospective new competitor cannot sustain." The cable incumbents contend that these certain immediate harms may be offset by future harms that would occur if video universal service obligations apply only to incumbents. But this speculation is entirely unsupported and contrary to all available evidence. Cable operators have soldiered on quite well in the face of DBS and other competition, and analysts predict that the cable operators will do just fine in head-to-head competition with AT&T and others for video and other communications services.

In sum, the Commission can and should promptly promulgate the straightforward rules implementing § 621(a)(1) that are detailed in AT&T's opening comments.

I. LOCAL FRANCHISING REQUIREMENTS, UNDISCIPLINED BY UNIFORM NATIONAL RULES, HARM CONSUMERS BY OBSTRUCTING VIDEO AND ADVANCED SERVICES ENTRY AND COMPETITION.

The vast majority of commenters, representing telephone carriers, consumers, small businesses, policy experts, equipment manufacturers and others, all recognize the obvious: forcing today's potential video entrants, who already operate existing local networks and are poised to enter the video market on a regional basis, to run a gauntlet of full-blown legacy franchising proceedings in thousands of towns and cities harms the public interest by thwarting not only video competition, but also broadband deployment. These commenters recognize that today's standardless franchising process, and the anticompetitive substantive conditions demanded of new entrants by many LFAs (including build-out requirements and other "level playing field" obligations and excessive cash and in-kind payments) not only delay entry, but often prevent it altogether.

The cities and the cable industry disagree, but neither makes any serious case for the *status quo*. Ironically, the city commenters confirm that the existing franchising process imposes substantial delays, and that LFAs are often *required* (by state or local laws or the terms of existing franchise agreements) to insist on anticompetitive conditions that ward off entry. The cable incumbents cling to their warped view of "parity" – insisting that all video entrants must abide by all of the requirements that apply to cable incumbents, while ignoring that incumbent telephone regulations were never applied to them when they entered telephony markets. The record makes clear, however, that imposing such burdens on new entrants benefits the incumbent carriers at the expense of the public.

In Appendix C (attached, hereto), AT&T provides a report identifying numerous specific examples of the myriad unreasonable demands that the current local franchising regime has produced. These examples comprise just one symptom of a franchising process that, in both its basic structure and its implementation, is unsustainable in the face of rapid technological and competitive advancements. Section I of the Appendix, addresses the recent experience of potential wireline video entrants. Section II addresses the earlier experience of wireline video entrants. And Section III addresses the experience of incumbent local operators that are now attempting a rosy portrayal of the local franchising process in order to head off regulatory reform, but in the past have expressly recognized many of the problems that justify that reform. The examples collected in the Appendix starkly confirm that if today's potential wireline video entrants are forced to negotiate separately with each of the nation's more than 30,000 individual LFAs, without uniform federal rules to streamline the process and cabin conditions to legitimate local interests appropriately tailored to competitive entry, crippling delay and entry foreclosure are assured.

A. Commission Rules Are Necessary To Impose Standards On The Local Franchising System, To Protect Consumers, And To Promote Federal Broadband And Competition Policies.

Many commenters agree that the Commission should immediately adopt rules setting procedural and substantive limits on local cable franchising. The existing standardless process has become a major barrier to competition, and is thwarting the broad-scale capital investment and competitive entry required to fulfill our national policy of promoting broadband deployment and video competition.

Support for such federal rules comes from almost all quarters. Large carriers, like Verizon, BellSouth, and Qwest, confirm that "[t]he most significant barrier to increased video competition and accelerated broadband deployment is the local cable franchising process."[1] Small business and consumer groups agree that "the number and diversity of local franchising authorities and processes that must be satisfied by potential new entrants into the market for multichannel video program distribution . . . services taken together do in fact constitute a very substantial barrier to entry and

[1] BellSouth, at 2; *see also* Verizon, at i ("there is no question that the current local franchising process generates unwarranted delays and is engrained with overreaching practices"); Qwest, at 2-3 ("actions by these LFAs . . . often have the impact of impeding or prohibiting competitive entry of new cable operators in competition with the incumbent franchises").

impede the development of competition."[2] Policy experts concur that "the only real remaining justification for the franchise system as we know it" is the "awarding [and maintenance] of monopolies."[3] And, industry suppliers demonstrate that the existing franchising process deters broadband deployment. As Fiber to the Home Council ("FTTH Council") explains (at 4), "LFAs oversee only one service on these networks – cable – but their regulatory actions in regard to cable can tilt entry and the overall competitive landscape in favor of incumbent cable operators and non-wireline providers for the provision of voice and data services, not just cable."

The comments are full of examples of how procedural delay, build-out requirements, and other anticompetitive barriers have stifled competitive entry. For example, Qwest has pursued over 30 franchises, but it "has withdrawn its request for a franchise in eight communities . . . because the LFA sought to impose build-out requirements that would have made the franchise economically irrational." Qwest, at 9. BellSouth explains that "of the 20 cable franchises that [BellSouth Entertainment LLC] has secured to date, it took an average of 10 months to negotiate each franchise agreement," and that in many instances "BellSouth was [often] left with no reasonable alternative but to withdraw its application for a cable franchise." BellSouth, at 2, 12. Verizon has conducted negotiations with approximately 320 LFAs, but it "obtained only 44 franchises as of year-end 2005," with the process taking "between 6 and 12 months," and sometimes more. Verizon, Att. B,

[2] American Consumer Institute, at 2; *see also* American Association of Business Persons with Disabilities, at 2-3 ("Today, the cable franchise process is slow and cumbersome, making it very difficult for competitive providers to offer new and innovative services" so that "[c]onsumers are faced with high cable prices and very little choice"); American Homeowners Grassroots Alliance ("AHGA"), at 3 ("The franchising process is one of the largest barriers to new competitors in the video marketplace" and "[c]able monopolists pull out every trick in their arsenal to delay or subvert the franchise process, which can take months or even years to negotiate . . . even without their interference"); California Small Business Roundtable, at 4 ("[c]umbersome local franchising regulations function as a barrier to rapid growth in the video service market"); California Small Business Association, at 5 ("the Commission can best serve municipalities by removing onerous local franchising regulatory barriers").

[3] Institute for Policy Innovation, at 3; *see also, e.g.*, Mercatus Center, at 2 ("In practice, franchise regulation has fostered monopoly and raised cable rates, with local governments sharing in the monopoly profits"); *id.* at 7 (explaining that the "[k]ey barriers" to entry include "lengthy processing times for franchise applications, franchise fees, the cost of construction permits, and state 'level playing field' laws").

Declaration of Thomas W. Hazlett, ¶ 10 ("Hazlett Decl."); *see also* Att. C (compiling examples of anticompetitive franchising requirements). And, more than 25 of the 44 franchises obtained by Verizon were in Texas where there is state legislation that streamlines the franchising process. Verizon, Att. A, Declaration of Marilyn O'Connell, Exhibit 1 ("O'Connell Decl.").

The competitive harms have also produced ripple effects elsewhere in the economy. For example, Ad Hoc Telecom Manufacturer Coalition reports that the current "cable TV franchising process" is "slowing competition in the video service market and reducing output throughout the high tech manufacturing industry."[4] These delays have resulted in real harms to the manufacturing industry: "[l]ast October . . . ADC Telecom reported that . . . it would eliminate 400 jobs in the final quarter of its fiscal year because telephone company customers had been unable to deploy FTTx infrastructure as rapidly as had been anticipated due in part to roadblocks in the franchising process."[5] Broadcasters and programmers also support federal rules because the entry of additional MVPDs will expand opportunities for providers of video programming as well. National Association of Broadcasters ("NAB"), at 3, 4 (video entry would provide "additional outlet[s] for reaching viewers and therefore with greater opportunities for success in the marketplace," with benefits for consumers). And the absence of effective wireline competition in video program distribution is a major reason why the United States has fallen behind other nations in both broadband penetration and the deployment of next-generation broadband technology. FTTH Council, at 18-19.

The comments thus demonstrate that streamlining the process by adopting pro-competitive federal rules will produce substantial public interest benefits. A recent empirical survey submitted

[4] Ad Hoc Telecom Manufacturer Coalition, at 3.

[5] *Id.* at 3; *see also id.* ("Corning reported that its sales declined in the July-September 2005 quarter for the same reason").

by the American Consumer Institute ("ACI") confirms this point.[6] The survey was conducted in Texas, where the state legislature has adopted uniform state-wide streamlined cable franchising rules that have spurred competitive entry by competing wireline television providers.[7] The study found that half of the cable customers who switched to a competitor reported "significant savings off their cable bills, averaging $22.30 per month;" customers who stayed with the incumbent provider "reported to have saved, on average, $26.83 per month off their average cable TV bills as a direct result of competition."[8] Commenters thus agree that federal rules will spur entry, which in turn will lead to lower prices,[9] and that entry will also lead to increased service quality and innovation.[10]

B. The Cities' Comments Further Confirm That Immediate Commission Action Is Needed And That AT&T's Proposed Rules Are Consistent With Legitimate Local Interests.

Although most of the comments filed by cities are based on a NATOA form pleading that disputes the need for any Commission franchising rules, the actual substance of the cities'

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[6] *See* Letter from Stephen B. Pociask, President, ACI to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 (Mar. 3, 2006), attaching ACI, *Does Cable Competition Really Work? A Survey of Cable TV Subscribers in Texas* (Mar. 2, 2006) ("ACI Study").

[7] *Id.* at 8.

[8] *Id.* at 8-9.

[9] *See* AT&T, at 6 n.7 (citing studies showing that the markets with a second wire-based competitor have rates at least 15 percent lower than markets without a second competitor); ACI, at 2, 6-7 (citing evidence that "the absence of wireline cable TV competition costs consumers billions of dollars annually and, over the next five years, in excess of $1,100 per household for seniors); AHGA, at 1-2 (according to recent Bank of America study of three markets, telephone company entry into cable TV markets caused the annual TV services subscription price to fall by $242.23, or 36 percent); Consumers First, at 3 (main package of digital video service offered by Verizon in Keller, Texas, would save a typical consumer $18.50 per month, or $222 per year, compared with prices charged by incumbent cable operator); FTTH Council, at 13-17 (citing estimate that barriers to entry of competitors in video markets costs consumers about $8 billion annually); Mercatus Center, at 15-21 (same).

[10] Discovery Institute's Technology & Democracy Project, at 3 (identifying markets where Cablevision and Cox increased broadband speed in response to competitive entry); Mercatus Center, at 11-13 (summarizing numerous empirical studies).

comments confirms the opposite: there is a pressing need for immediate Commission action, a need that the modest rules proposed by AT&T will address and that will protect legitimate local interests.

All cities agree that wireline video competition will bring great benefits to consumers.[11] Indeed, in the few communities where competitive video providers have successfully entered the market, the cities themselves have identified substantial benefits from such entry. For example, "[i]n the Kansas City metropolitan area the incumbent, Time Warner Cable, has taken steps to dramatically cut prices of services where the overbuilder, Everest, also offers service." Kansas City, at 8. Concord, California notes that when Comcast, the incumbent cable operator, increased prices in "65 of the 66 cable systems it operates in the San Francisco Bay Area," the only cable system where it did not raise prices was in Concord, which has a competitive video provider. Concord, at 2 (emphasis omitted).

But the cities' comments also confirm that actual wireline video competition is sorely lacking in most areas. Indeed, the majority of cities report that they have never even been approached by a competitive carrier or that they have never successfully negotiated a competitive franchise for video services.[12] City after city reports that viable potential competitors, after initial discussions with the city, ultimately chose not to pursue competitive cable franchises.[13] In the few

[11] Delray Beach, FL, at 3 ("Local government officials encourage competition and new technologies since competing technologies and companies result in tangible benefits to the City and its residents"); San Marcos, CA, at 2 ("San Marcos believes that having advanced telecommunications services available to our citizens and businesses is a quality of life issue to which we are fully committed. Our community supports and welcomes telecommunications competition."); Lincoln, CA, at 2 ("It is our hope that this competition will reduce the rapid increase in cable rates").

[12] *See, e.g.*, Albuquerque, NM, at 4 ("Our community has not been approached by a competitive provider to provide service"); *see also* Champaign, IL, at 6; Cypress, CA, at 1; Escondido, CA, at 1; Fargo, ND, at 2; Franklin, KY, at 8; Greenville, NC, at 4; Irvine, CA, at 1; La Verne, CA, at 1; Mobile, AL, at 2; Monterey Park, CA, at 1; Norwalk, CA, at 3; Perris, CA, at 1; Pocatello, ID, at 4; Reidsville, NC, at 4; San Dimas, CA, at 2; Santa Rosa, CA, at 1; Susanville, CA, at 1; Tabor City, NC, at 4; Yanceyville, NC, at 3; Yuma, AZ, at 4.

[13] *See, e.g.*, Elk Grove, at 4 (three potential overbuilders approached the city, but none chose to deploy facilities); Evanston, IL at 4 (community was approached, but the provider chose not to enter); Las Vegas, NV, at 3 ("Las Vegas has been approached by potential competitive cable providers in the past, but such

instances where a competitor did manage to obtain a franchise, it usually either abandoned efforts to offer service or entered bankruptcy.[14] The record in AT&T's local service area is illustrative: in the 13 states where AT&T has a significant footprint as a facilities-based local exchange carrier, only about a dozen city commenters (out of more than 130) report having even a single active franchised competitive cable operator.[15]

The cities' comments also make clear that the current system of local regulation, undisciplined by any Commission rules implementing the federal reasonableness requirement, is largely responsible for this dearth of competition. Indianapolis, for example, acknowledges that "most communities don't [even] have the resources to engage in [competitive] franchising on their own."[16] As a result, LFAs typically fall back on franchise approval procedures that were designed for the first cable operators in the community – procedures that are intolerably protracted for potential competing entrants.[17] Thus, Indianapolis candidly admits that it intends to continue with its "parliamentary processes . . . for document preparation and voting purposes," and that this has in

providers chose not to proceed with obtaining cable franchises"); Milpitas, CA, at 4 ("approached once in 2002 by a competitive provider, but the provider chose not to enter into any formal discussions").

[14] *See, e.g.,* Iowa City, IA, at 3 ("A competitive franchise was granted" containing terms "identical to those of the incumbent," but the carrier "chose to not pursue offering cable TV service to Iowa City"); Madison, WI, at 8-9 (after forcing overbuilder to obtain city wide franchise – rather than requested university-wide franchise – the overbuilder chose not to provide competitive video services); Northbrook, IL, at 4 (granted franchise to RCN, but RCN chose not to initiate service); San Diego, CA, at 4 (carrier went bankrupt after attempting to build-out under the competitive franchise agreement).

[15] *See also* Michigan Municipal League, at 47 (providing an "informal survey" showing that *only* 14 percent of communities in Michigan have competing video providers). Even in localities where multiple companies "are franchised to serve the entire community," the comments suggest that such companies may not actually provide competing services because they "declin[e] to overbuild in the other's turf and compete for subscribers." Murrieta, CA, at 1. *See also* Poway, CA, at 1 ("Poway is currently served by two franchised cable providers. . . . Though each franchise is non-exclusive, neither operator provides service where the other operator is so providing").

[16] Indianapolis, IN, at 9.

[17] *See, e.g.,* Albuquerque, NM, at 4 ("The master ordinance applicable to all operators is the mechanism by which a competitor would be offered a comparable franchise.").

the past led to a "three year [franchising] process."[18] Although Indianapolis suggests that it might be able to streamline its process, it admits that it would still take "six- to nine-month[s]" even for telephone companies with existing rights-of-way that agree to accept the outdated and inappropriate terms of the "existing [incumbent] franchise agreements [as] the starting point."[19]

Even cities with purported streamlined processes concede that these processes in fact can take a long time. For example, North Liberty, Iowa's "speedy" approval process takes five months.[20] Chicago admits that it has taken about a year to grant competitive franchises.[21] Thus, some cities even concede that a critical first step to ensuring successful competitive video entry is addressing the "unreasonable barriers to entry" caused by "the [slow] speed with which a cable provider can obtain a franchise from a LFA."[22]

In some instances, these protracted franchise requirements are preventing AT&T from even upgrading its network to be capable of providing video and other broadband services. For example, the Village of Carpentersville recently sent a letter to AT&T stating: "It is the understanding of the Village of Carpentersville (Village) that Project Lightspeed will enable residents to receive television services. Based on that understanding, AT&T is subject to local franchising authority by providing video services to residents of the Village. A franchise agreement between AT&T and the Village must be in place prior to permission being granted for the use of public right-of-way for the

[18] Indianapolis, IN, at 8.

[19] *Id.* *See also, e.g.,* Albuquerque, NM, at 4 ("While a franchise is negotiated by the local government as a contract, since the agreements become ordinances, the process provides . . . additional obligations on the local government. . . . the requirements for passage of laws by the City Council including publication notice and public hearings are exercised."); Cape Coral, FL, at 4 ("no local government may grant a cable franchise unless it does so after holding a public hearing").

[20] North Liberty, IA, at 5-6; *see also* Concord, CA, at 1-2 (6 months); Walnut Creek, CA, at 2 (5 months).

[21] Chicago, at 2-3. These long delays are not surprising given that even the current processes used by cities to *renew existing* franchise agreements can take many years. *See, e.g.,* Cypress, CA, at 2 (still has not completed franchise renewal process that began in 1999); Foster City, CA, at 1 ("just completed franchise [renewal] negotiations" after previous "agreement expired in October 2003").

[22] Pennsylvania and Michigan Municipalities, at 16.

physical plant associated with Project Lightspeed. Therefore, permission for the work associated with the above referenced projects is denied."[23]

The cities' comments also confirm that, absent Commission intervention, they will continue to condition the award of competing franchises on *substantive* conditions that are unreasonable and unnecessary, solely on the ground that existing incumbent franchise agreements contain such conditions. In this regard, many cities contend that their hands are tied by state and local laws and by existing incumbent franchise agreements, which they claim prevent them from tailoring franchise agreements to the very different circumstances of competitive entrants such as AT&T and other wireline providers with existing rights-of-way.[24] And even cities whose hands may not be tied say they will impose similar "level playing field" requirements on competitors.[25]

Many cities also admit that they intend to impose build-out requirements on new entrants. Indeed, some intend to adopt onerous build-out conditions that will require competitors to serve

[23] *See* Letter from Bob Cole, Public Works Director, Village of Carpentersville, IL to Pam Summers, Project Manager-Project Lightspeed, AT&T Illinois (Mar. 23, 2006), at 1. Other cities have taken a similar position. *See, e.g.,* Memorandum from Robin Weaver, Chair, Northwest Municipal Conference Utilities Regulation Committee to Mayors/Presidents and Managers/Administrators (Mar. 24, 2006), at 2 (urging denial of right-of-way permits for AT&T's Project Lightspeed without existing franchise agreement for video services).

[24] *See, e.g.,* Lee County, FL, at 5 ("The public policy of State of Florida is that cable television LFAs should grant overlapping franchises under terms and conditions which are not more favorable or less burdensome than those of other franchises."); Greater Metro Telecommunications Consortium, et al., at 15 ("Regarding state law, level playing field statutes do not exist in Colorado, Washington, or Maryland. However, all of the Local Governments do have variations of level playing field language in their franchise agreements, which require that the overall terms of the agreements, taken as a whole, should be no more favorable or less burdensome on the new entrant than they are on the incumbent."); 65 ILL. COMP. STAT. 5/11-42-11(e)(4) (level playing field requirements); Evanston, IL, at 2-3; CAL. GOV. CODE § 53066 (level playing field requirement); Pasadena, CA, at 12 ("We have faced challenges, however, in crafting competitive franchises that address new providers' barrier to entry concerns, but that also meet the requirement of California's somewhat nebulous level playing field statute.").

[25] *See, e.g.,* Central St. Croix Valley Joint Cable Communications Comm'n, at 4 ("With regards to a level playing field for possible competitive providers, . . . [w]e would welcome competitive providers but need for them to go through our local governments and cable commission and follow the same procedures as the current cable company if our rights-of-ways are used to deliver their services."); Richmond, KY, at 9 (stating that it has "mechanisms in place to offer the same or a comparable franchise"); Community Programming Board of Forest Park, Greenhills, and Springfield Township, OH, at 6 (same); Lewisville, NC, at 4 (same).

"every residence in the franchise area,"[26] with the exception only of areas with very low densities.[27] Some cities admit that they may require new entrants to provide free service to "all public buildings."[28] Others assert that they may also force competitors to deploy services to *commercial buildings* as well as residential buildings.[29] And cities state that such build-out conditions will have to be satisfied by new entrants within a few years of entry.[30]

Critically, the cities' comments confirm that the rules proposed by AT&T will not interfere with *legitimate* local interests. Virtually without exception, the cities express the most concern over their interests regarding physical management of rights-of-way, public safety, PEG access, emergency alert capabilities, customer service standards, and franchise fees. But the recent study by ACI confirms that "wireline competition expands the total size of the cable TV and video market," which "means that competition should not adversely affect the local franchising fees that local governments collect from wireline providers and use to support public access channels and other community services."[31] And no party in this proceeding has proposed to strip the cities of their authority to regulate the use of public rights-of-way or to protect public safety. AT&T and its predecessors have used public rights-of-way responsibly for nearly a century, subject to active local government oversight, and will continue to do so after adding video to AT&T's suite of services. And AT&T has fully committed to providing appropriate PEG access, customer service, and emergency alert capabilities and to paying reasonable and appropriate franchise fees to cities. As

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[26] Alhambra, CA, at 2; *see also, e.g.*, Beverly Hills, CA, at 2 (requiring cable service [to be] provided to the entire city); Dublin, CA, at 3 (build out to entire city of Dublin).

[27] *See, e.g.*, Concord, CA, at 3 (all areas with density greater than 36 dwellings per mile); Pasadena, CA, at 4-5 (all residences with density greater than 40 units per mile); Iowa City, IA, at 2 (all areas with density greater than 20 dwellings per mile); Springfield, IL, at 2-3 (all areas with at least 7.5 homes per quarter mile).

[28] *See, e.g.*, *id*.

[29] *See, e.g.*, Alhambra, CA, at 2.

[30] *See, e.g.*, Concord, CA, at 3 (18 months); Springfield, IL, at 2 (20 months); Champaign, IL, at 3 (25% of franchise area each year for 4 years).

[31] ACI Study at 9.

discussed in more detail in Section III, *infra*, the specific reforms proposed by AT&T concerning local requirements for PEG, franchise fee, emergency alerts, and public safety will not jeopardize these legitimate local interests.

Rather, the PEG and franchise fee rules proposed by AT&T are designed only to preclude patently unreasonable franchise conditions and the most obvious abuses, and the cities' comments provide further confirmation that such rules are urgently needed. In particular, these comments confirm that a federal formula for calculating franchise fees is needed. Concord, California, for example, admits that it requires cable operators to pay 8% of gross revenues (although it labels the payments associated with 3% of those revenues as "PEG" related charges).[32] Other cities admit that in addition to a 5% franchise fee, they require carriers to build massive broadband data and video networks for the sole use of the city – a clear in-kind payment that makes the effective franchise fee much higher than 5%, particularly for new entrants that have much smaller customer bases over which to spread these in-kind costs.[33] As AT&T explained in its opening comments (at 64), it is willing to make reasonable and lawful payments to cities, but federal guidance in this area is sorely needed.

Finally, the cities' comments confirm that Commission rules are needed to address unreasonable demands for duplicate institutional networks and infeasible city-specific customer service data disclosure requirements. Many cities report that they already used the franchising process to obtain from incumbent cable operators vast institutional networks (providing not only

[32] Concord, CA, at 2.

[33] *See, e.g.*, Murfreesboro, TN, at 2 ("Comcast shall construct at no cost to the City an Institutional Network . . . connecting . . . a minimum of 41 institutions and 16 schools."); Brunswick, ME, at 2 (requiring a "complete, dedicated fiber system for the Town network between all Town buildings"); Central St. Croix Valley Joint Cable Communications Comm'n, at App. A, 15-22 (ordinance requiring Institutional Network connection to at least 13 public buildings). Also, Fairfax County, Virginia's franchise agreement with Verizon Virginia requires the company to provide video programming service without charge to the public buildings listed in the agreement's Exhibit C – a total of 427 buildings. *See* Fairfax County, at 10 & Att. III, Ex. C.

video, but also voice and data services), lavishly equipped production studios and a host of other assets.[34] Yet some cities now unabashedly assert that they intend to require competitive carriers to provide these *exact same* goods and services to the city as a pre-condition to entry.[35] Many cities likewise confirm that they intend to require competitive franchisees to collect, track, and report data relating to customer service requests on a "city specific" basis,[36] notwithstanding that the call centers and systems that AT&T uses to respond to customer service requests are not city specific and do not track data in this fashion.[37]

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[34] *See, e.g.,* St. Charles, IL, at Att. 1, p. 42 ("The Franchisee shall maintain a major production studio in the City which . . . shall be equipped with at least the following equipment: [listing approximately 70 items by name brand and model number]"); Greensville, NC, at 2 (requiring incumbent to "purchase, for the City's use, of studio, portable, and post production equipment for governmental and public access production in the amount of one hundred thousand dollars"); Richmond, KY, at 2 (Section 18 of current franchise agreement provides that "[t]he Grantee shall replace and repair its access studio facilities and equipment as necessary" and that the "studio facility available for public access use shall be capable of live and taped program origination on the local public access channel."); Clay County, FL, at 11 (requiring incumbent Comcast to "provide all necessary headend and system electronic and distribution equipment so that any programming transmitted from County Administration Complex and any other origination location hereof may be transmitted to all subscribers on any of the County's PEG access channels"); Fairfax County, VA, Att. III, at 17 (requiring current Franchisee to "provide without charge links between its headend and the PEG Interconnection Site specified . . . so that signals can be routed onto an appropriate PEG Channel").

[35] *See, e.g.,* Los Angeles, at 14-15 ("Any additional franchise granted to provide cable television service in an area in which a franchise has already been granted . . . shall contain the same public, educational, and government access requirements that are set forth in the existing franchise."); Redding, CA, at 2 ("[O]ur City is bound by the terms of its existing franchise with Charter Communications to ensure other video service providers are required to fulfill substantially equivalent terms," including "the provision of an institutional network and significant PEG support.").

[36] *See, e.g.,* Cape Coral, FL, Att. at 33 (requiring franchisee to maintain a complete list of all complaints by subscribers or City residents that are not resolved within seven days of receipt as well as the measures taken to resolve those complaints); Fairfax County, VA, at 26 (requiring, "[o]nce the Franchisee reaches a level of fifty thousand (50,000) Subscribers," quarterly reports listing the number of outages, the time they occurred, their cause, duration, "and the impacted streets and a range of affected addresses in the Franchise Area"); Clay County, FL, at 27 (providing that the Franchisee shall provide a written report to the County within seven days regarding investigation and resolution of each Subscriber service request).

[37] In its comments, Walnut Creek contends that it awarded a competitive franchise to a competitor that "gain[ed] an approximate 40% market share in competition against the incumbent." Walnut Creek, CA, at 2. But the competitor's "success" was due largely to refusal of the city to permit the incumbent to upgrade its system for years, thus enabling the entrant a years-long video, Internet and telephony "triple play" head start against an incumbent competitor that lacked the bandwidth to provide the full suite of services. Far from being a "success," therefore, Walnut Creek's unreasonable approach – which continues today, as evidenced by AT&T's need to take Walnut Creek to court so that AT&T can upgrade its own network – only

C. The Cable Industry's Attempts To Justify The Current Standardless System of Cable Franchising Are Meritless.

Although the cable industry predictably opposes any federal rules to streamline the franchising process or to reform franchising standards, the cable operators offer no credible defense of the current system. Indeed, the cable incumbents do not identify any affirmative consumer benefit that can be attributed to today's standardless franchising process. Rather than defend the delays, inefficiencies, and anticompetitive conditions that are the inevitable by-product of today's lack of Commission rules, the cable incumbents retreat behind glittering generalities such as "parity" and "symmetry." These defenses are without merit.

The cable incumbents make essentially three arguments: (1) "symmetry" requires imposing on new entrants in the video market all of the same terms and conditions to which the incumbent cable operator is subject; (2) today's standardless system does not deter broadband deployment or video, voice and data competition; and (3) the success of some entities in obtaining some franchises confirms this supposed fact. As AT&T has previously shown, all three propositions are incorrect.

New Entrants Should Not Be Forced to Accept the Same Obligations as the Cable Incumbents. Cable incumbents insist that the obstacles posed by the franchising process are of the new entrants' "own making." Comcast, at 18. Telephone companies could obtain franchises in "the blink of an eye," NCTA, at 12, they say, if the LECs would simply accept all of the terms applicable to the cable incumbents under their existing franchises. Although this red carpet has been rolled out and the path to market entry is clear, telephone companies mysteriously do not take it, say the cable companies, but instead "unreasonably" ask for "preferential treatment."

underscores the need for Commission action. *See Comcast Sues Calif. City Over Impasse*, MULTICHANNEL NEWS, March 7, 2005, http://www.multichannel.com/article/CA508771.html?display= Top+Stories.

[38] Bernstein Research Call, *Quarterly VoIP Monitor: VoIP Gathering Momentum, Expecting 20M Cable VoIP Subs by 2010* (Jan. 17, 2006), at 1.

These claims are preposterous and represent the height of hypocrisy. When the cable companies were seeking to enter telephony markets, the Commission never seriously considered requiring them to abide by the full panoply of requirements applicable to incumbent LECs. The cable incumbents are benefiting greatly today from regulators' consistent refusal to apply incumbent obligations to new entrants in telephony markets. All of the major cable companies now offer VoIP services over their existing networks, largely free of any significant federal, state, or local oversight. Today, cable companies have approximately 5.5 million telephony subscribers, compared with 3.6 million at the end of 2004.[38] No one is suggesting that cable incumbents should be prohibited from offering phone service until they build-out their local cable networks to make them coterminous with the incumbent LECs' networks, or should be forced to comply with all of the other rules applicable to incumbents such as carrier of last resort obligations or unbundling requirements – and yet that is exactly the outcome they are attempting to defend here with respect to video competition.

Because of the fundamental differences between new video entrants and cable incumbents, applying legacy cable requirements like build-out obligations to incumbent LECs would vastly increase the costs and risks of entry, with the result that entry would be thwarted altogether in many areas. Thus, while forcing AT&T to accept the full terms of existing franchises might solve the problem of *delay*, it would not solve the problem that today's standardless franchising process leads to anticompetitive *outcomes*. *See, e.g., Texas Preemption Order*, 13 FCC Rcd. 3460, ¶ 13 (1997) (build-out conditions, even if appropriately applied to applicants for an initial franchise to provide service, impose on subsequent entrants an unreasonable "financial burden that has the effect of prohibiting" beneficial entry).

In short, although the cable companies plead for "parity," their version of parity is not parity at all. In their view, entities entering the video market must conform to all of the requirements applicable to the cable incumbent, but cable incumbents are exempt from incumbent obligations when *they* seek to enter other markets, such as voice telephony. These arguments would be comical if they did not represent current law as it has emerged in today's environment of standardless cable franchising ungoverned by any federal rules. If parity is to be the principle, AT&T's approach is the only one that guarantees true parity and consistency: incumbency obligations fall only upon incumbent providers of each service.

Parity for Parity's Sake Will Also Defeat Critically Important Federal Policies Promoting Broadband Deployment and Video Competition. For the same reasons, the cable industry's brand of "parity" would also severely retard broadband deployment. As the commenters recognize, the paramount federal objective today in communications policy is to promote the rapid deployment of broadband facilities. Congress has embodied this policy in the statute (47 U.S.C. § 706), the President has specifically established an aggressive policy of encouraging widespread deployment of broadband networks by 2007,[39] and the Commission has repeatedly reiterated that its priority is eliminating regulatory impediments to broadband infrastructure deployment.[40] The cable incumbents have offered no evidence to rebut AT&T's showing that forcing new entrants to abide by legacy requirements like build-out requirements and other "level playing field" requirements

[39] *See* Speech of President Bush, March 26, 2004, available at http://www.whitehouse.gov/infocus/technology/economic_policy200404/chap4.html ("We ought to have . . . universal, affordable access for broadband technology by the year 2007, and then we ought to make sure as soon as possible thereafter, consumers have got plenty of choices when it comes to [their] broadband carrier").

[40] *See, e.g., IP-Enabled Services*, 19 FCC Rcd. 4863, ¶ 3 (2004) ("*IP-Enabled Services NPRM*") ("we have recognized the paramount importance of encouraging deployment of broadband infrastructure to the American people"); *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems*, 19 FCC Rcd. 21265, ¶ 12 (2004) ("The deployment of broadband delivery capabilities to provide all Americans with access to affordable high speed Internet and data services is one of the most important challenges currently facing the Commission and the communications industry"); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd. 14853, ¶ 89 (2005) ("[o]ur primary goal in this proceeding is to facilitate broadband deployment in the manner that best promotes wireline broadband investment and innovation, and maximizes the incentives of all providers to deploy broadband").

would render entry into the video market uneconomic, thereby frustrating these important federal policies. *See also* Section III, *infra*.

Real-world evidence confirms that there is a tight correlation between policies on entry and investment in broadband deployment. For example, after the Texas legislature passed pro-competitive cable franchising legislation, AT&T immediately committed to spend $1 billion on deployment of broadband and video deployment in that state, has been implementing those upgrades, and has now begun providing video service. Similarly, AT&T's predecessor SBC announced new broadband investment initiatives after the Triennial Review orders, but when Illinois ordered SBC's Project Pronto facilities to be made available to competitors on an unbundled basis and other states were considering similar measures, SBC was forced to curtail those investments. *See also* Section II, *infra*. As these examples show, deregulatory policies on entry have a direct and undeniable impact on investment incentives and facilities deployment.

The potential benefits of removing regulatory obstacles to entry are huge, because the evidence also confirms that where new entrants have offered service, the cable incumbents have responded with lower prices and better offerings. As noted, a recent ACI Study found that entry resulted in reductions to incumbent cable bills of $20 per month on average, and increased wireline video subscriptions overall. ACI Study at 8-9. Further, Comcast has been increasing broadband speeds for its customers in Reston, Virginia, in response to Verizon's introduction of its video offering over its FiOS fiber-optic network. Arshad Mohammed, *Comcast Boosts Modem Speed for Subscribers in Reston*, Washington Post, Feb. 21, 2006, at D3. And the Commission staff found in its most recent report on "a la carte" cable pricing that increased MVPD competition "continues to provide consumers with increased choice, better picture quality, and greater technological innovation," and that the pending entry of telephone companies' IP video services would strengthen that trend. *Further Report On the Packaging and Sale of Video Programming Services To the*

Public ¶¶ 105-08 (FCC Media Bureau, Feb. 9, 2006); *see also* RCN Comments, at 3 & n.4 (emphasizing that the Commission has "recognized that the presence of a broadband overbuilder in the local cable market provides a powerful check on cable rate increases, and drives improvements in service scope and quality").

Other Companies' Past Experiences Confirm The Need For National Rules in Today's Converged World. Finally, cable incumbents point to their own past experience in mergers and the fact that some companies were able to obtain a smattering of franchises in a small number of cities as proof that federal rules to streamline the process are unnecessary. As AT&T has demonstrated, however, those past experiences only *confirm* the need for federal rules. Today's new entrants contemplate entry on a massive scale, in thousands of cities at once; indeed, the technology and economics of these offerings require broad-scale entry. The severe difficulties that previous carriers had in obtaining even a small number of franchises simply underscores the urgent need for federal rules to streamline the process for today's much broader potential entry.

The cable incumbents claim that their own experience in "apply[ing] for" franchises demonstrates that LFAs can grant franchises "in a reasonable manner" when an applicant "need[s] to work with a large number of LFAs in a relatively tight timeframe." Comcast, at 17. For example, Comcast claims that when it "acquired AT&T Broadband, the companies received timely approval from nearly 1,800 LFAs within merely eight months." *Id.* Similarly, Charter claims that it "secured franchise transfer approval from 1,417 LFAs" between 1998 and 2000, and has "negotiated over 723 franchise renewals" in the past two years. Charter, at 5. These claims are highly misleading, because these companies were not applying for *new* cable franchises, but were simply obtaining approval for the transfer of *existing* franchises in the context of a merger or acquisition. The simple transfer of existing franchises does not remotely pose the complexities of attempting to obtain thousands of new competitive franchises from scratch. Further, the incumbents' reliance on franchise *transfers* is particularly inapt because, unlike the standardless system for *new* franchise applications, federal law requires LFAs to promptly grant or deny franchise transfer applications, and if the LFA fails to do so, the application is "deemed granted" by operation of law. 47 U.S.C. § 537.[41]

The cable incumbents predictably point to RCN as a new entrant that managed to obtain about 100 franchises nationwide, but RCN's experience is, in fact, a powerful case study for why federal rules are urgently needed today. *See, e.g.*, RCN, at 2 (RCN today operates under "dozens" of cable franchises and has "over 100 active local cable franchise and [OVS] agreements"); Comcast, at 5. As AT&T explained in detail in its comments (at 25-26), RCN faced enormous difficulties and delays obtaining even that small number of franchises. Many LFAs insisted on conditions that were unreasonable, such as demands for cash or services unrelated to the provision of cable service, and RCN also faced wide variations in local practice that it has conceded were "so substantial that it [became] a significant barrier to the rapid and effective deployment of facilities and development of competition."[42] Some of these variations forced RCN to scuttle its deployment plans, not only in the relevant municipality but in neighboring ones as well. The cumulative effect of these difficulties eventually forced RCN into bankruptcy. RCN itself has eloquently described these experiences in previous proceedings. *See* AT&T, at 25-26 & n.16.[43] And, it must be remembered that RCN targeted its entry plans to a relatively small number of franchising authorities and still encountered enormous difficulties; AT&T's entry plans require as many as two thousand

[41] There are also federal rules setting time limits and other procedural safeguards for franchise renewals. 47 U.S.C. § 546.

[42] Letter from Scott Burnside, Senior Vice President Regulatory & Government Affairs, RCN to Josephine Scarlett, Office of the Chief Counsel, NTIA (Dec. 19, 2001), *available at* http://www.ntia.doc.gov/ntiahome/broadband/comments4/rcn/RCN.htm.

[43] RCN opposes federal rules implementing § 621, but that is understandable given that it no longer seeks new cable franchises and has every incentive to discourage further competitive entry.

franchises, and therefore in the absence of strong federal rules AT&T and its peers face franchising difficulties an order of magnitude greater than that faced by RCN.

The cable incumbents also cite Ameritech's experience in gaining a small number of franchises in the late 1990's, but again, that experience strongly supports the need for national rules. AT&T at 24-25. Although Ameritech eventually obtained about 100 franchises, it faced enormous costs and delays just to obtain that small number of franchises. Moreover, as AT&T explained, LFAs imposed countless unreasonable conditions – *e.g.*, voluminous application and information requirements, free service to public buildings, charges for institutional networks that were patently unreasonable, additional taxes and other cash payments, and even in one instance a new recreation center and pool. The cable incumbents quote Ameritech officials at the time as indicating that it had obtained a new franchise at the rate of one every two weeks, *see, e.g.*, National Cable & Telecommunications Association ("NCTA"), at 7, but the reality is that Ameritech obtained those franchises during a brief, compressed period of time that followed *years* of negotiations and costs with hundreds of LFAs. Indeed, in many other jurisdictions Ameritech had been forced to abandon the application process in the face of patently unreasonable demands.[44] *See also* Appendix C (providing many additional examples of anticompetitive franchising requirements).

Given these debilitating obstacles, it is no surprise that the major incumbent LECs exited the video market. The cable incumbents accuse AT&T's predecessor SBC of "deserting the video marketplace" even though it had obtained franchises, but in fact the burdens of the franchising process, as well as the substantive demands imposed by the LFAs, led directly to SBC's decision to end these video entry initiatives. Contrary to the cable incumbents' implication, even the small

[44] Even obtaining a new franchise at the rate of one every two weeks would be patently inadequate for AT&T's IP video service, which is a national architecture in which the technology and economics require broad-scale entry. Given that AT&T must obtain as many as two thousand franchises to offer the service, at that rate it would take four thousand weeks – or about 77 years – to obtain the necessary approvals.

number of franchises SBC had were loaded down with uneconomic conditions, including build-out and other unreasonable terms, and SBC had little prospect of obtaining franchises in contiguous areas on reasonable terms. SBC therefore made the only financially reasonable calculation: it had to cut its losses and end video entry altogether. *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 04-227, ¶¶ 12, 125 (Feb. 4, 2005) ("*Eleventh Annual Cable Competition Report*"); GAO Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, at 10 (October 2003) (after initial entry attempts were foiled, "the four largest local telephone companies . . . largely exited the cable market" by 2002); *see also* Qwest, at 7 ("In both Salt Lake City and the Denver greater metropolitan area Comcast has been very vocal in its demands to LFAs that Qwest be subject to build-out requirements").

II. THE COMMISSION HAS THE AUTHORITY AND THE DUTY TO ADOPT BINDING FEDERAL RULES TO SAFEGUARD NATIONAL BROADBAND DEPLOYMENT AND VIDEO COMPETITION POLICY FROM UNREASONABLE LOCAL FRANCHISING CONDITIONS.

As AT&T explained and the other comments confirm,[45] the Commission has not only the statutory authority to adopt rules that define what constitutes an "unreasonabl[e] refus[al] to award an additional competitive franchise" within the meaning of Section 621(a), but also the *duty* to adopt such rules under both the Cable Act and Section 706. These rules will bind local franchising authorities when they act on applications for additional franchises, and they will further bind state and federal courts when they review final decisions of local franchising authorities.

The controlling legal principles are straightforward and well settled. In Section 621(a) of the Communications Act, Congress sought to promote video competition by barring local franchising bodies from "unreasonably refusing to grant additional cable franchises" and by

[45] *See, e.g.*, BellSouth, at 47-59; Hawaiian Telecom, at 5; Microsoft, at 7; Qwest, at 14-20; South Slope Coop. Tel. Co., at 11-12; Verizon, at 21-27.

providing for judicial review of final decisions of cable authorities. Under the terms of § 201(b) and § 303(r) of the Communications Act and numerous Supreme Court and other decisions, the Commission has express statutory authority to adopt rules implementing all the requirements and prohibitions of the Communications Act, including the prohibitions and requirements of § 621(a).[46] Further, because unreasonable refusals to grant additional cable franchises inherently act as barriers to deployment of advanced telecommunications capabilities, § 706 of the Telecommunications Act of 1996 requires the Commission to exercise its rulemaking authority to adopt such regulations here.

The incumbent cable operators acknowledge some of the judicial decisions that have upheld the Commission's authority to adopt rules implementing § 621 and other requirements of the Communications Act. *See* NCTA, at 22 n.45. But they contend that because Congress authorized judicial review of final decisions that refuse to grant a competitive franchise, Congress intended that proceedings before LFAs and judicial review in state and federal courts would be the *exclusive* means of determining what constitutes an "unreasonable" refusal to award a franchise. NCTA, at 19-23; Comcast, at 27-33. In their view, the determinations of what constitutes "unreasonable" entry barriers must be made on a "case-by-case" basis in thousands of lawsuits, not in a single Commission proceeding that addresses generic conditions in the nation as a whole. NCTA, at 19-22.

The short (and complete) answer to this argument is that the Supreme Court rejected it in *AT&T* v. *Iowa Utilities Bd.*, 525 U.S. 366 (1999). That case, like this one, involved a federal statute that granted state authorities jurisdiction to make certain determinations affecting the offering of

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[46] *See e.g.*, *City of New York* v. *FCC*, 486 U.S. 57, 70 n.6 (1988) (§ 303 gives FCC rulemaking power over all provisions of Cable Act); *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (§ 201(b) gives the FCC rulemaking authority over all provisions of the Communications Act); *City of Chicago* v. *FCC*, 199 F.3d 424, 428 (7th Cir. 1999) (the FCC has authority to adopt rules interpreting § 621 of the Act).

competitive services, subject to judicial review in federal courts to assure their consistency with federal standards codified in the Communications Act. Because § 201(b) gives the Commission authority to adopt rules to carry out all the requirements of the Act, the Supreme Court flatly dismissed the claim that the Commission lacked rulemaking authority over the Act's local competition provisions. The Supreme Court held that state commissions and reviewing courts are bound by the Commission's rules and must apply them to "determine[e] the concrete result in particular circumstances." *Id.* at 384. The Court explained that "we are aware of no similar instances in which federal policymaking has been turned over to state administrative agencies" and reviewing courts. *Id.* at 385 n.10. It would be "surpassing strange" to do so where, as here, Congress "unquestionably" has adopted federal requirements that limit local authority exercised by multiple "independent state agencies." *Id.* at 378 n.6.[47]

Contrary to the cable incumbents' assertions, it is irrelevant that § 621 *itself* does not specifically state that the Commission has authority to promulgate rules under that section. That was true as well with the provision of § 252(d) at issue in *Iowa Utilities Bd.* Nor is it relevant that other provisions of the Act require or authorize the Commission's exercise of jurisdiction over specific subject matters. *Compare* Comcast, at 28 & n.91. That, too, was true of the local competition provisions at issue in *AT&T* v. *Iowa Utilities Bd.* As courts have uniformly held, the general grants of rulemaking authority in §§ 201(b) and § 303 themselves give the Commission authority to implement any of the substantive provisions of the Act, including § 621(a). *See supra*, n. 46 (and cases cited); *see also United Video*, 890 F.2d 1173, 1183 & n.5 (D.C. Cir. 1989); *ACLU* v. *FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987).

[47] The Commission's authority to adopt rules to govern local franchising authorities' determinations is even more clear here than in Iowa. In Iowa, the main objection was that § 2(b) of the Act expressly preserved exclusive state commission jurisdiction over intrastate telecommunications; here, § 2(a) expressly gives the Commission jurisdiction and authority over all cable service. See 47 U.S.C. § 152(a) & (b).

The cable incumbents' reliance on the legislative history of § 621 is equally misplaced. Although Congress initially had considered identifying and prohibiting specific local franchising conditions, it ultimately decided to *expand* the scope of § 621 by prohibiting *all* "unreasonabl[e]" LFA refusals to grant licenses, thereby creating a clear need for Commission rules. *See* H.R. Rep. No. 102-862, at 77 (Sept. 14, 1992) (Conf. Rep.). And because the Act already gives the Commission authority to issue rules to implement whatever substantive provisions Congress included in § 621, the issuance of rules implementing the amendment to § 621 was within the Commission's express rulemaking authority.[48]

NCTA claims that even if the Commission had some rulemaking authority under § 621, it would extend only to unreasonable "denials," not to unreasonable conditions. NCTA, at 28-29 (emphasis omitted). As AT&T has already shown, this is a distinction without a difference. An LFA's imposition of an unreasonable condition is tantamount to denial of the franchise request without that condition. An LFA's ability to impose unreasonable conditions is thus dependent on its ability to deny the franchise for failure to accept the condition. Accordingly, a Commission rule prohibiting an LFA from denying a franchise on a particular ground – *e.g.*, failure to agree to anticompetitive build-out conditions – is functionally equivalent to barring an LFA from imposing the condition directly. For this reason, courts do not distinguish between unlawful conditions on a license and denial of the license. *See, e.g., Tribune Co.* v. *FCC*, 133 F.3d 61, 66 (D.C. Cir. 1998) (recognizing that imposing an unreasonable condition on the grant of a license application may be deemed an effective denial of that license for purposes of § 402(b) of the Act, *citing Mobile Communications Corp. of America* v. *FCC*, 77 F.3d 1399 (D.C. Cir. 1996)). Likewise, courts

[48] *See also Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 7442, ¶¶ 55-56 (1994) (Congress' intent in amending § 621 was to "prohibit franchising rules whose intent or effect is to create unreasonable barriers to the entry of potential competing multichannel video providers" and to "limit local franchising requirements to appropriate governmental interests (*e.g.*, public health and safety, repair and good condition of public rights-of-way, and the posting of an appropriate construction bond)").

would defer to any Commission determination that LFA insistence upon particular conditions constitutes an unreasonable refusal to award a competitive franchise.[49]

Comcast claims that the Commission lacks authority to preempt anticompetitive state and local requirements such as level playing field laws because there is no "clear statement of congressional intent" to preempt. Comcast at 36-38 (citing *City of Dallas*, 165 F.3d at 348). Comcast is confused. Section 621(a) expressly prohibits LFA from "unreasonably refus[ing] to award an additional competitive franchise." Because § 636(c) of the Act expressly preempts actions of LFAs that are "inconsistent" with any provision of Title VI, LFA violations of the prohibition of § 621(a) are expressly preempted by the Act. Thus, any "clear statement" requirement is abundantly satisfied.

Further, it is elementary that, if the Commission acts within its "delegated authority" in adopting rules that implement the prohibition of § 621(a), its rules too have preemptive effect. *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988); *see Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) ("[f]ederal regulations have no less pre-emptive effect than federal statutes"). Comcast's focus on Congressional "intent" to preempt is thus completely misplaced. As the Supreme Court has explained, "in a situation where state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' for '[a] preemptive regulation's force does not depend on express congressional authorization to displace state law.'" *Id.* (*quoting de la Cuesta*, 458 U.S. at 154).[50]

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[49] *See Capital Network Sys., Inc.* v. *FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) ("Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them").

[50] Comcast's reliance on *City of Dallas* is otherwise misplaced. The Fifth Circuit there concluded that there is no provision of the Cable Act that directly or by necessary implication prevented LFAs from requiring full-blown "cable-like" franchises before Open Video Systems could be operated. Whether or not the Fifth Circuit was correct as to that question, the Act is *not* silent on the matters at issue here: Congress has expressly prohibited LFAs from unreasonably denying a competitive franchise, and the terms and the legislative history confirm that Congress intended this provision as a new federal policy that would pre-empt

In addition, although §§ 201(b) & 303(r) each suffice to establish the Commission's authority to adopt rules implementing § 621(a), § 4(i) of the Act provides another independent source of authority.[51] There is no basis for the contrary claim that NCTA bases on *MPAA* v. *FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002). In *MPAA*, the D.C. Circuit merely held that the Commission's general rulemaking authority is limited to the requirements and prohibitions contained in the Act and that § 4(i) is not a *stand-alone* source of rulemaking authority when there is no substantive provision of the Act that addresses a particular matter. That is not an issue here, however, because § 621 expressly prohibits unreasonable denials of a franchise. Accordingly, § 4(i) provides yet another source of authority for the Commission to interpret and implement the substantive provisions of that section. *See, e.g., United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 181 (1968); *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 706 (1979); *Mobile Communications Corp.* v. *FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (finding authority under § 4(i)).

The foregoing discussion establishes that the Commission has the clear authority to adopt rules implementing § 621(a). And, as AT&T explained in its opening comments, § 706 of the Telecommunications Act of 1996 imposes a clear *duty* on the Commission to exercise this rulemaking authority here. That is because the investments in increased broadband capacity that AT&T and its peers are contemplating involve multi-service platforms that go far beyond just video. To be sure, some customers will take advantage of these increased capabilities to subscribe to AT&T's IP video services, but some will use them only for high-speed Internet access or other advanced telecommunications services. LFAs and the cable industry, by myopically zeroing in on the video aspect of these investments for onerous franchising requirements, are losing sight of the

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contrary local laws and provide national uniformity to the franchising process. To the extent that the Commission has authority to implement that provision through rules – and as shown above, it unquestionably does – then the pre-emptive effect of those rules would directly further that Congressional policy.

[51] *See* 47 U.S.C. § 154(i) (authorizing the Commission to "make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions").

burdens they are placing on the deployment and provision of interstate telecommunications and information services that are within the exclusive jurisdiction of this Commission. Congress has unambiguously mandated that the Commission (and the states) eliminate obstacles to the deployment of broadband facilities and advanced telecommunications services, and if the Commission does not adopt strong federal rules to govern the franchising process, it will be ceding federal broadband policy to thousands of local franchising authorities – contrary to the clear intent of Congress.

Accordingly, the Commission's conclusion in the NPRM (¶ 1) that build-out requirements and other unreasonable franchising conditions "intrinsically" operate not only to prevent video entry, but also to erect barriers to the deployment of advanced telecommunications capabilities, is correct. The contrary assertions of the cable incumbents simply ignore that the economic ability to make the Project Lightspeed and comparable upgrades to local exchange facilities absolutely depends on the ability to provide video programming services over these facilities. Equally important, the mere fact that the Commission has not yet enacted federal rules is chilling investment, because new entrants have no ability in this standardless environment to gauge the costs of entry.

This chilling effect on investment was dramatically illustrated a few years ago in the context of Project Pronto. SBC was ready to invest billions of dollars in packet-switched facilities and equipment, but once competitors and state regulators learned of it, ten out of thirteen state commissions in SBC's territory initiated proceedings to consider whether SBC should be required to unbundle these facilities (and several states actually adopted requirements). Many of these requirements would have necessitated costly modifications to SBC's Project Pronto architecture that would have had a material impact on the business case for investment at all. SBC had no choice but to keep these Project Pronto investments on hold while the fundamental costs of the project remained subject to such wildly fluctuating uncertainty.[52] But strong federal rules can remove uncertainty and clear the way for investment. With respect to Project Pronto, when the FCC finally issued strong federal unbundling rules with clear pre-emptive effect, SBC and other ILECs moved forward vigorously with broadband investments.[53]

The whole purpose of Section 706 is to eliminate exactly that sort of regulatory uncertainty. The financial exposure attributable to one aspect of AT&T's planned investments (video service) is so great that it is forestalling investment supporting myriad other services. National rules are urgently required to remove this uncertainty if there is to be timely and robust broadband deployment. Just as the Commission's unbundling rules implemented Section 706 by preempting obstacles to investment and removing regulatory uncertainty, similar action is required here to remove local regulatory uncertainty that is hindering the fundamental economic decision as to whether or not to invest in advanced broadband capabilities for interstate services, many of which are unquestionably outside of Title VI. While the cable incumbents are correct that Section 706 of the Act is not an independent grant of substantive authority to the Commission, Section 706(a) does direct the Commission to use its regulatory authority to "remove barriers to infrastructure investment" that will create advanced telecommunications capabilities. Because the record clearly establishes that build-out and other franchising conditions operate as barriers to broadband

[52] *See, e.g.,* Press Release, Ameritech, Ameritech Requests ICC Rehearing to Expand Broadband Access in Illinois (April 13, 2001) ("Complying with the ICC's decisions could cost SBC more than one-half billion dollars, making the DSL product uneconomical for both Ameritech and its competitors. In addition, the decisions are technologically infeasible, as they exceed the space capacity and technical requirements of broadband remote terminals. As a result of these decisions, the company ceased all broadband deployment through remote terminals in Illinois.").

[53] *See* Press Release, SBC Communications, Inc., SBC Communications To Rapidly Accelerate Fiber Network Deployment In Wake Of Possible Broadband Rulings (Oct. 14, 2004), http://att.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21427.

investment, Section 706(a) mandates that the Commission exercise its rulemaking jurisdiction to eliminate these barriers.[54]

III. THE COMMISSION SHOULD SPECIFICALLY PROHIBIT "BUILD-OUT" AND OTHER FACIALLY UNREASONABLE CONDITIONS TO ENTRY.

As AT&T demonstrated in its initial comments, several conditions commonly imposed in the local franchising process pose such obvious barriers to competitive entry that the Commission should find that they are *per se* unreasonable and thereby preempt the application of any contrary local or state law requirement. Specifically, AT&T demonstrated that the Commission should issue rules pursuant to § 621(a)(1) that: (1) prohibit anticompetitive and technology-specific wireline "build-out" conditions that foreclose entry and allow individual LFAs to dictate the pace and manner of broadband technology and infrastructure deployment; (2) establish a single, consistent, national formula for the calculation of franchise fees; (3) prohibit public studio space and similar requirements that are inconsistent with a competitive video applicant's technology and network architecture; (4) prohibit unreasonable city-specific customer service data collection requirements and reaffirm that LFAs cannot condition franchises on local customer service quality demands that go beyond the requirements of generally applicable laws and ordinances; and (5) prohibit requirements that broadband providers obtain a cable franchise before even upgrading their networks. AT&T, at 43-73. The other commenters in this proceeding seeking to expand consumer choice of video service programming suppliers broadly support such pro-competitive rules.[55]

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[54] Contrary to NCTA's arguments (NCTA, at 26), it is irrelevant that the Commission has found that advanced telecommunications capability is being deployed in a reasonable and timely manner. Even if that generic statement had application to the specific problems associated with undisciplined local franchising authority, that would mean only that Section 706(b) does not obligate the Commission to "take immediate action to accelerate deployment of such capability." Regardless of the pace of broadband deployment, however, Section 706(a) imposes a separate duty on the Commission to "encourage" this deployment by using existing "regulatory methods" to "remove barriers to infrastructure investment."

[55] *Accord*, Ad Hoc Telecom Manufacturer Coalition, at 5 & n.7; ACI, at 7; BellSouth, at 34-35; Broadband Service Providers Association, at 4-5; Cavalier, at 4-5; FTTH Council, at 32-36, 42-43, 64-65; Hawaiian

Tellingly, the local government commenters offer little defense of the unreasonable franchise conditions that these proposed rules are designed to address. Rather, the LFAs principally defend their authority to require PEG access and to collect franchise fees. *See, e.g.*, Part I.B, *supra.* But no one is asking the Commission to forbid LFAs from requiring PEG access or collecting appropriate franchise fees. To the contrary, as AT&T explained in its opening comments (at 64-70), AT&T is fully committed to providing appropriate PEG access and reasonable, nondiscriminatory franchise fees. So too are other new entrants. *See, e.g.*, BellSouth, at 38-40; Verizon, at 54-57.

The cable companies, on the other hand, focus almost exclusively on defending build-out requirements. This is because the cable companies know that such requirements foreclose entry and shield them from competition in many areas. As demonstrated below, and in the attached declaration of Kevin Hassett and William Lehr (Appendix A, hereto, "Hassett & Lehr Decl."), none of their justifications for these patently anticompetitive conditions has merit.

A. The Commission Should Prohibit "Build-Out" Conditions To Competitive Entry.

In its comments, AT&T showed that build-out requirements are, as a matter of basic economic theory, manifestly anticompetitive. This stems from three structural characteristics of wireline distribution of broadband services: (1) the enormous variations in the costs per household of the investments necessary to provide wireline video programming; (2) the smaller potential revenue stream available to subsequent video entrants than to the incumbent cable operators; and (3) the greater vulnerability of subsequent video entrants to loss of up-front investment as a result of retaliatory price cuts by the incumbent. AT&T, at 48-53; *see also* Hassett & Lehr Decl. at 10-13.

Telecom, at 9-10; Qwest, at 2, 8-13; *id.*, Verizon, Att. B, Hazlett Decl. ¶¶ 13-17; *id.*, Att. A, Declaration of Marilyn O'Connell ¶ 24 ("O'Connell Decl."); Verizon, at 40.

The comments of other new entrants support these basic economic conclusions. As Verizon explains, build-out "regulation is anticompetitive, both because it announces to the incumbent where it will first face competition and the type of system with which it will compete, and because it substantially raises the costs of the entrant." Verizon, Att. B, Hazlett Decl. ¶ 13. As an initial matter, there are fundamental differences in network architecture and technology that make build-out requirements far more costly for AT&T and similar IP-based wireline video service providers than for traditional cable operators.[56] Further, whereas incumbent cable systems were built with the anticipation of capturing 100% of cable TV subscribers, a new entrant now must be prepared to offer lower prices than the incumbent and expect a lower share. *Id.* ¶ 17; *see also* Qwest, at 8 ("the second provider in the market can count on a far smaller share of the addressable market than was available to the initial franchisee (especially because of the monopoly conditions that surrounded the entrance of the initial franchisee)"). The obligation to serve a specific area thus "is relatively more expensive per mile for a competitive entrant than for an exclusive franchisee." Verizon, Att. B, Hazlett Decl. ¶ 17; *see also* BellSouth, at 34 ("a municipality-wide build-out requirement would impose on the competitor a fundamentally inequitable arrangement whereby it would have to incur tremendous construction costs to develop the ability to serve every customer in exchange for capturing some (probably small) percentage of the market.").[57] For these reasons, "municipality-

[56] As explained in AT&T's initial comments (at 49-50), for example, incumbent cable networks have been sized and designed so that head-ends are located within maximum feasible cable distances to the households within the service area. Existing telephone networks, however, were typically designed in size to meet only the lower bandwidth requirements of narrowband service, which typically allowed much longer feeder and distribution lines. Accordingly, some households that currently receive narrowband phone service over existing distribution networks are simply too far away from the fiber portion of the network to receive broadband service without enormously costly upgrades. AT&T's innovative IP-enabled video service, for example, requires extending the fiber portion of the network within 3,000 feet or so of the homes served. Until advances in technology generate substantial further reductions in cost per household, it is simply a fact of life that entry is not currently economic in all areas even where AT&T already has existing facilities.

[57] In this regard, Verizon further demonstrated that the costs of deployment of video programming service facilities can vary substantially with geographic density of homes. Verizon, Att. A, O'Connell Decl. ¶ 25.

wide build out requirement[s] . . . . make entry so uneconomic that the prospective competitive provider would simply decline to serve any portion of the community."[58]

Indeed, as BellSouth explains (at 35), the cable companies' very advocacy of build-out requirements can only be economically rational to the extent these requirements in fact deter entry. In effect, the cable companies are endorsing a rule that would require entrants to build networks that could provide video services to *every* incumbent cable customer, as opposed to allowing entrants to build more limited networks. "This seemingly irrational decision by the incumbent cable operator to force the new entrant to develop additional service scope can only be explained by one fact: the incumbent fully realizes the extent to which a build-out requirement poses a competitive barrier, which in many instances, the prospective new competitor cannot sustain." *Id.*

The comments also provide hard evidence confirming this economic common sense. *See* AT&T, at 52-53 (providing case histories). For example, BellSouth shows that a five-year build-out requirement caused BellSouth to abandon its efforts to obtain a video franchise in Germantown, Tennessee, in 1996. No competing wireline provider has attempted to obtain a franchise in the municipality since then. BellSouth, at 17-18, 35. Qwest shows that build-out requirements have caused Qwest to withdraw franchise applications in eight municipalities. Qwest, at 9. Litigation brought by an incumbent cable operator to impose a build-out requirement on Knology (a would-be overbuilder) and the City of Louisville, Kentucky (the local franchise authority), while ultimately unsuccessful in court, was sufficiently protracted to caused Knology to abandon its entry plans in Louisville. Broadband Serv. Providers Ass'n, at 5-6. And build-out requirements scuttled the competitive entry of WH LINK in Otsego, Minnesota; Shenandoah Telecommunications Company

[58] BellSouth, at 34; *see also* Hassett & Lehr Decl. at 8-13; Ad Hoc Telecom Manufacturer Coalition, at 5 & n.7; ACI, at 7; Broadband Serv. Providers Ass'n, at 4-5; Cavalier, at 4-5; FTTH Council, at 32-36, 42-43, 64-65; Hawaiian Telecom, at 9-10; Qwest, at 2, 8-13.

in Rockingham County, Virginia; and SureWest Communications in Roseville, California. United States Telecom Association ("USTA"), at 22-25.

Perhaps most instructive is the experience of Guadalupe Value Telecommunications Cooperative. That entity sought to upgrade its network in Bulverde, Texas, to provide video and other broadband services, but determined that entry was uneconomical because of a build-out condition that would have required the Cooperative to serve all homes in subdivisions with at least 40 homes per mile. When Texas the legislature passed its state franchise reform, GVTC obtained a franchise, immediately began constructing its network, and has now launched its service. FTTH Council, at 19-20 & Att. B, Declaration of Jeff Mnick ¶¶ 5-7 ("Mnick Decl.").

The proponents of build-out requirements do not offer any serious legal argument that the Commission lacks authority to address this problem and rule that any build-out condition on competitive entry is unreasonable. The cable companies first cite to the non-discrimination requirements of § 621(a)(3).[59] As the courts have recognized, however, § 621(a)(3) "does not mandate that the franchising authority require the complete wiring of the franchise area." *ACLU* v. *FCC*, 823 F.2d 1554, 1579-80 (D.C. Cir. 1987). "The statute on its face prohibits discrimination on the basis of income; it manifestly does not require universal service." *Id*. at 1580.[60]

Equally inapt is the cable companies' reliance on § 621(a)(4)(A). *Cf.* Charter, at 10. That section provides that "[i]n awarding a franchise or franchises, a franchising authority shall allow the

[59] *See, e.g.,* Comcast, at 29.

[60] *See also id*. ("if no redlining is in evidence, it is likewise clear that wiring within the franchise area can be limited"); *Telesat Cablevision, Inc.*, 773 F. Supp. at 400 ("the intent of [§ 621(a)(3)] [is] to prevent the exclusion of cable service based on income and . . . this section does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents of the unwired area"); Report and Order in *Implementation of the Provisions of the Cable Communications Policy Act of 1984,* 50 Fed. Reg. 18637 (1985) (same). *Accord*, BellSouth, at 31-32; Qwest, at 22; USTA, at 26-27; Verizon, at 43-44. Comcast asserts that the Commission's 1985 decision may have been contrary to the "plain language" of the 1984 Act, or may have been superseded by the 1992 amendments to the Act. Comcast, at 29 n.94. Comcast makes no effort to reconcile its position with *ACLU* and *Telesat Cablevision*, however, and the relevant language of Section 621(a)(3) was left unchanged by the 1992 amendments.

applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area." The effect of this language is to bar local franchise authorities from mandating an unreasonably short build-out period in circumstances when at least some build-out requirement is appropriate. Section 621(a)(4)(A) does not constrain the Commission, however, from preempting build-out requirements where those requirements would be unreasonable *regardless of* the duration of the period for compliance. AT&T, at 62-64 (citing *Americable Intern., Inc.* v. *Dep't of Navy*, 129 F.3d 1271, 1274-75 (D.C. Cir. 1997); *accord*, BellSouth, at 32-33; Qwest, at 21-22 (noting rejection by Congress of requirement); USTA, at 27; Verizon, at 44-46.[61]

But even if the Cable Act could be interpreted as authorizing LFAs to require a new entrant to "build out" throughout a "franchise area," the Act does *not* define a "franchise area" to be either the same for each provider or to be coextensive with an LFA's jurisdiction. Verizon, at 42, 45. To the contrary, as Verizon explains, the Commission's precedent recognizes "that the phrase does not refer to the entire LFA jurisdiction." *Id.* at 45. Accordingly, the Commission has authority to issue rules that would permit new entrants to establish their own franchise areas and preempt any attempt by LFAs to require build-out beyond the new entrant's definition of its franchise area.

The incumbents' policy arguments are equally baseless. As they have in other fora, they begin with the unsupported accusations that AT&T and other new entrants will "red line" unless they are required to build-out throughout an LFA's jurisdiction. AT&T fully addressed these claims in its opening comments. AT&T has not engaged in redlining in the past and will not do so going

[61] The cable companies' proposed interpretation of § 621(a)(4)(A) also raises significant First Amendment concerns, because build-out conditions on competitive entry are a restriction on speech that serves no substantial public purpose. *See* Verizon, at 47-57; *accord*, AT&T, at 61 n.78.

forward. AT&T, at 54-56.[62] In all events, redlining on the basis of income is specifically forbidden by 47 U.S.C. § 541(a)(3) and the law of many states. Enforcement of those prohibitions – not entry-deterring build-out conditions – is the appropriate means of dealing with any legitimate redlining concerns.

The incumbents next contend that elimination of build-out requirements would impair universal service policies by allowing new entrants to compete away the profits in higher-density neighborhoods that are needed to subsidize service in lower-density neighborhoods. The argument appears in its most elaborate form in the comments of NCTA and the declaration of its witness, Michael Baumann. According to the incumbents, allowing competitive entry without build-out conditions allow the entrants to cherry-pick the most profitable neighborhoods, thereby "undermin[ing] the ability of existing operators to continue to serve customers in those areas that are the most costly and least lucrative to serve." NCTA, at 3-14, 15-19 & Att., Declaration of Michael Baumann, at 7-9 ("Baumann Decl."); *see also* Cablevision, at 19-20; Charter, at 9. This cherry-picking (or cream-skimming) scenario has several obvious flaws.

[62] AT&T and its peers also have no incentive to redline in the deployment of video programming even if doing so were legal. Subscription rates for video programming correlate little with income. *See* Broadband Service Providers Association, at 6 (cost of construction and residential density, not income, are primary determinants of build-out priority). Moreover, the cable operators' aggressive marketing of discounted bundles of communications and entertainment services throughout the cable operators' service areas places AT&T and its peers under enormous competitive incentive to offer video programming services as quickly and widely as economically feasible. Local telephone carriers that fail to include video programming in their own bundles of service risk a mass defection of telephone subscribers to the competing cable operators. *Value Line Investment Survey*, Part 3 Ratings & Reports, at 719 (Dec. 30, 2005); *Broadband Daily* (Feb. 7, 2006) at 1 ("Following in the footsteps of other top cable operators, Comcast has started offering discounted 'triple-play' packages in its major markets around the country."); UBS Investment Research, *TelMeDaily – US Version* 2 (Feb. 27, 2006) (estimating that total cable telephony subscribers in the United States were 5.1 million at the end of 2005, "up 63% annually and 14% sequentially"). Once lost, these subscribers are difficult to regain, for "bundled subscribers tend to be very loyal and less apt to switch their service provider." *Value Line Investment Survey*, Part 3 Ratings & Reports, at 815 (Dec. 30, 2005); *accord*, USTA, at 35-36 (explaining why telephone companies have no incentive to redline in deploying broadband video capacity). *See also* Hassett & Lehr Decl., at 6, 15-17.

First, the assumed asymmetry in universal service obligations is illusory. As previously noted, the competition between incumbent cable operators and telephone companies is not for "video" alone, but for the full range of communications services, including broadband Internet access and voice telephony. In this competition for all communications services, the universal service requirements and other obligations of incumbency are very much symmetrical: the cable companies are subject to these obligations for cable service, while the telephone companies (but not the cable companies) are subject to these obligations for telephone service. *See* Qwest, at 23 n. 47 (citing authority).

Second, Dr. Baumann erroneously assumes that AT&T and its peers would choose to leave lower density areas served by their local exchange networks unserved absent a build-out requirement. As explained by Drs. Hassett and Lehr (Decl. at 15-17), this assumption is false. As noted above, the enormous competitive threat from bundles of video programming, broadband data service and voice telephony now offered by the incumbent cable operators (none of which are saddled with incumbent regulation of their competitive telephone services) gives AT&T every incentive to deploy video as widely and quickly as possible. *Id.* In fact, AT&T plans to deploy broadband broadly to the vast majority of its telephone subscribers through wireline upgrades where economically feasible, and through innovative HomeZone wireless service (using Dish DBS service as an input) where that is the most efficient solution. AT&T, at 56. In all events, claims that AT&T and its peers are likely to break the law and base their advanced services deployment plans on impermissible factors are soundly refuted by their track records in deploying advanced services broadly in both high and low income areas.[63]

[63] For example, as explained in AT&T's Initial Comments (at 54-55) AT&T has already upgraded its local networks to offer broadband DSL services to nearly 80 percent of the households served by those networks.

Third, while Dr. Baumann concedes that the social value of a universal service requirement "should be balanced against" the "loss in efficiency due to the distortion in prices" (NCTA, Att., Baumann Decl., at 4), he makes no attempt to weigh the putative benefits of build-out requirements against their obvious costs. As explained by Drs. Hassett and Lehr (Decl. at 13-17), this is an enormous omission. The record makes clear that build-out requirements constitute major barriers to entry, and that the absence of competition inflates the subscription prices paid by most consumers, limits the choice of programming offered, and retards the deployment of innovative technology and services. Dr. Baumann does not dispute that build-out requirements have these costs; to the contrary, the proposition that build-out requirements deter competitive entry is a central premise of his entire analysis.[64]

In contrast to the massive and immediate economic costs of build-out requirements, the costs that Dr. Baumann assigns to the elimination of build-out requirements are pure speculation and surmise about future events.[65] Dr. Baumann does not assert—and cannot plausibly assert—that the incumbent carriers would tear out their existing cables and other outside plant and discontinue service in rural areas if competitive entry were unaccompanied by build-out obligations. Instead, he speculates that the entry of a competitor exempt from build-out requirements may lead to a progressive *future* deterioration of service in rural areas through reduced maintenance or upgrading. But even this could occur only if subscription revenue in lower density areas fails to cover the incremental cost of serving those customers.[66] Dr. Bauman has offered no evidence that this is so.[67]

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[64] *See* NCTA, Att., Baumann Decl., at 3-8 (arguing that incumbents require protection to allow them to recover the substantial cost of universal service, *i.e.*, build-out, obligations). *See also* Hassett & Lehr Decl., at 10-13.

[65] Almost every significant prediction offered in Dr. Baumann's testimony is hedged with a qualifier such as "could," "may" or "will potentially."

[66] *See* Mercatus Center, at 40-41.

[67] Nor could he. The earnings of the major cable operators are healthy, to say the least. Cablevision, for example, recently reported that fourth quarter 2005 consolidated net revenue was nearly $1.5 billion over the

Moreover, Bauman has provided no data on the quality of cable service in the rural portions of municipalities where competitive entry has already occurred.[68] This, too, is a striking omission, because the incumbent cable operators already face competition from several forms of MVPD distribution that are exempt from any build-out or universal service obligations, including DBS, master satellite antennas, Internet video and other video distribution platforms.[69] Has this competition caused the quality of the service to decline? Not according to the incumbent cable operators. For example, Comcast asserts that, in response to competitive entry, the company "continues its rapid development and deployment of advanced services, including new digital and high-definition television programming, video-on-demand, digital video recorder service, high-speed Internet service, and digital voice service." Comcast, at 6. And Charter claims that it has "thrived" in the face of competition, even in those communities where DBS serves a greater percentage of the households than Charter itself. Charter, at 7-8.[70]

Finally, the incumbent cable operators' fall back to their shopworn claim that protecting consumers and maximizing broadband deployment and video entry by prohibiting build-out conditions on entry would violate principles of "regulatory parity." *See* Charter, at 10; NCTA, at 12-19 ("as a general matter, treating like services alike *promotes* competition"); RCN, at 6. These appeals to playground justice have it backwards: principles of regulatory parity weigh *against* imposing build-out conditions on AT&T and other competitive entrants.

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same period a year earlier. The company plans to issue a $3 billion special dividend when its board meets in March. *Communications Daily* (Feb. 28, 2006) at 10.

[68] Similarly, Dr. Baumann has failed to offer any empirical evidence on rates in competitive markets to support his hypothesis that open entry without build-out requirements would force up average rates. This omission is unsurprising: the record makes clear that the entry of a second provider typically causes the incumbent to *reduce* its rates. *See also* Mercatus Center, at 13 & n. 17.

[69] *See* FTTH Council, at 68-69; NCTA, at 3; Charter, at 7; Comcast, at 4-8.

[70] *See also* Hassett & Lehr Decl., at 14.

As noted above, the convergence of broadband technologies has transformed the competitive battleground from video programming alone—or telephone service alone—to a full suite of offerings of communications services, including video programming and broadband data and voice telephony. The Commission has never required that cable companies and other telecommunications service competitors, when entering voice telephony markets, match the build-out, universal service, or other carrier of last resort obligations that were imposed on incumbent LECs. Because the cable incumbents are free to enter voice and data markets without any obligation to offer service to the entire customer base of the incumbent voice and data providers, regulatory symmetry requires that telephone carriers be allowed to provide video service without building out to match the entire customer base of the incumbent cable operators. AT&T, at 58-60.

Moreover, incumbent cable operators have enjoyed enormous first mover advantages from their years of monopoly, and are far better capable of recouping the costs of build-out obligations and other costly franchise conditions than are later video entrants.[71] By contrast, new entrants face from the outset the likelihood of sharing a local market for video program distribution with two, three or more existing competitors. The revenue potential of such entry – and the ability of the entrant to subsidize costly construction in low-density areas – is much more limited. In these circumstances, the "prior existence" of the incumbent "makes the entry process *intrinsically asymmetric* and this asymmetry exists even if the entry costs borne by the entrant and incumbent are

[71] It is worth noting that the build-out conditions imposed on the incumbents are exaggerated. Existing cable franchises often took decades to build. Many networks were built before the advent of cable franchising, and thus had no build-out conditions at all. *See* Thomas W. Hazlett & George S. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the "Level Playing Field" in Cable TV Franchising Statutes*, 3 Business and Politics 21, 38 & n. 76 (2001) ("Hazlett & Ford"); *Comcast Cablevision of New Haven, Inc.* v. *Connecticut DPUC*, 1996 WL 661805 at *3 (Nov. 4, 1996) (holding that Comcast, the incumbent, had no basis for challenging the new entrant's proposal to build a 737-mile system within 12 years after entry, when Comcast and its predecessors actually took 15 years to build only 525 miles). And, as noted, many incumbents are still exempted to this day from building out in low density areas.

identical."[72] "Labeling nominally symmetric obligations borne by entrants and incumbents as 'equal' burdens ignores the greater likelihood that the residual profits anticipated by the entrant will be insufficient to cover fixed costs, relative to the incumbent that entered without rivals."[73]

B. The Commission Should Set A Uniform, National Franchise Fee That Preserves Important Local Revenue Streams But Also Does Not Foreclose Competition.

AT&T, like other new entrants, has no objection to paying appropriate and reasonable fees in connection with its provision of IP-enabled video services and to providing required PEG access. AT&T, at 64-69; *see also* BellSouth, at 41; Cavalier, at 5; Verizon, at 54-55. However, as the comments confirm, there is a clear need for federal rules to provide content to the statutory cap on franchise fees and prevent franchising abuses.

When new entrants "initiate[] franchise negotiations in an area, [they] frequently receive[] in response a wish list prepared by the LFA or its consultants." Verizon at 57; *see also* Cavalier at 7; South Slope Coop. Tel. Co., at 8-9. Many LFAs have sought "in-kind" contributions not remotely tethered to use of rights-of way. For example, LFAs have demanded in kind-contributions ranging from "seed money for wildflowers" to "free television for every house of worship" to "flower baskets for light poles" to "mak[ing] parking available at a Verizon facility for patrons of the public library." BellSouth, at 38 n.59; Verizon, at 57. Many LFAs have required new entrants to construct or fund substantial "institutional networks" as a condition of obtaining a franchise. BellSouth, at 39; Verizon, at 73-74. And others have sought to circumvent the federal limits on franchise fees by imposing enormous "application fees"[74] or by demanding that franchise fees be assessed as a

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[72] Hazlett & Ford at 24 (emphasis in original).

[73] *Id*.

[74] BellSouth, at 42; South Slope Tel. Co., at 8.

percentage of not just video programming service revenues, but additional services such as broadband Internet access.[75]

Thus, although LFAs have come to rely upon franchise fee revenue, it is critically important that the Commission establish a consistent, national franchise fee formula to implement the federal franchise fee limit. As AT&T explained, to ensure that franchise fees do not competitively disadvantage new wireline competitors,[76] the Commission should promulgate a rule that expressly provides that *any* obligation to make payments, or provide *anything* of value, to an LFA or its designee must be credited – at full market value – toward the provider's revenue-based franchise fee obligation to the LFA. *See* AT&T, at 64-67; BellSouth, at 41-43; Verizon, at 54-62. With respect to the narrow exceptions to the statutory cap on franchise fees – "capital costs" incurred in connection with PEG facilities – the Commission should rule that it is unreasonable for LFAs to require new entrants to construct duplicative new PEG facilities as a condition of a franchise. AT&T, at 67 & n.88; FTTH Council, at 66-67; Verizon, at 67-70.[77]

The Commission should also expressly rule that LFAs cannot require a new entrant to construct a new "institutional network" as a condition of a franchise and that, where an entity has already constructed an "institutional network," an LFA can only require that appropriate channel capacity for governmental and educational video services be provided on that network and, thus, that LFAs cannot require a new entrant to provide for free the types of broadband services that are typically offered to residential and business customers. AT&T, at 67-70; Verizon, at 72-75. Finally, a new entrant should not be required to pay any PEG fees unless the incumbent cable

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[75] BellSouth, at 42; Verizon, at 59-60, 62-63.

[76] Ensuring that AT&T and other wireline IP-enabled video service providers are not subject to unreasonable franchise demands is especially critical to ensuring that such video service providers are not further competitively disadvantaged vis-à-vis wireless, satellite, and other video technologies over which local franchises have not sought to impose franchise fees or other local franchise requirements.

[77] This does not mean that localities could not otherwise expand their PEG operations. They would remain free to purchase additional PEG facilities or services from cable operators, new entrants, and others.

provider is currently paying, and, in any event, should not be required to pay more than *a pro-rata* share of the incumbent's obligation based on market penetration. *See* FTTH Council, at 66-67 ("for example, if the incumbent funds a PEG channel studio, the new entrant should only be required to contribute a *pro rata* share of the incumbent's ongoing financial obligation for that studio, based on the number of subscribers the incumbent and the new entrant (and any other entity with PEG obligations such as open video system operators) have within the incumbent's franchise area. . . . Absent a *pro rata* contribution rule, based on the number of subscribers of each obligated entity, LFAs can burden [competitive] providers with duplicative and inefficient obligations, without increasing the benefit to the public from PEG channels").

IV. THE COMMENTS SUPPORT ADOPTION OF A STREAMLINED SHORT-FORM APPLICATION FOR APPLICANTS SEEKING TO PROVIDE SERVICE OVER EXISTING RIGHTS-OF-WAY.

In its opening comments, AT&T explained that the NPRM correctly recognized (¶ 22) that it was unreasonable to subject those applicants that already have permission to use public rights-of-way to the burdens and delays associated with a traditional franchise application process. AT&T, at 74-75.[78] AT&T further explained that, for such entities, the Commission should adopt a "short-form" franchise application that would greatly streamline the franchise application process. AT&T, at 75, 79-80. The application would contain provisions that would address all of the legitimate local interests associated with a competitive video service offering that used existing rights-of-way –

[78] *See also, e.g.*, Verizon, at iv (the traditional franchising process "makes little sense today when competitive providers who already have access to the rights-of-way seek to offer competitive video services over their broadband networks"); *id.* at 16, 30 & n.28; Qwest at 27 n.51 (for entities "where the ability to use the public rights-of-way is already secured on account of their common carrier operations, there would be no additional burden on streets or other public property . . . . [C]oncerns about massive disruption of the public rights-of-way, to the extent they were ever valid, are out of place"); BellSouth at 4-5 (where the facilities used to provide video "are already in place in the public rights-of-way," the "traditional justification for a cable franchise – that it allows the LFA to determine which cable operator should be permitted to use the public rights-of-way – simply does not apply"); Alliance for Public Technology ("APT"), at 3; South Slope Coop., at 14 (it should be deemed unreasonable to regulate "the use of public rights of way by provider authorized to construct and maintain facilities within the public rights of way pursuant to any independent state-level franchise or similar authority").

including, for example, provisions stating that the applicant will pay a franchise fee in accordance with the Commission's rules established in this docket, will provide reasonable PEG channel capacity that is substantially similar to typical arrangements with incumbents, and will cooperate reasonably to identify a process to provide messages in the event of a public emergency. *See id*. at 80; *see also* South Slope Coop., at 7-13. Because the LFA would only need to verify that the short-form application contains the relevant certifications, the entire process could be completed in 30 days and, if an LFA failed to act in that time frame, the short-form franchise would be deemed to be granted. AT&T, at 75; *see also* Qwest, at 27; BellSouth, at 37 (applications not acted upon should be deemed granted).

Other commenters agreed that a streamlined franchise application process is necessary, and in particular, for applicants that are already authorized to use public rights-of-way, the process should be "extremely short." BellSouth, at 37; *see* South Slope Coop., at 12-13; BellSouth, at 10, 36-37; Qwest, at 4, 27; Verizon, at 36-38; APT, at 3.[79] South Slope, for example, proposes a short-form certification process, similar to AT&T's proposal, by which a competitive video provider with existing access to public rights-of-way could obtain a franchise upon its certification that it "possesses the [requisite] technical, financial, and managerial ability," it will provide service "over its own facilities for which it already directly possesses, under applicable state laws or regulations, independent authority to use and occupy the public rights of way," and it will "participate in an equitable apportionment of PEG channel capacity, facilities and financial support among all wireline video service providers operating within the franchising area, taking into account the size and population of each provider's defined certified service area as compared to the local franchise area as a whole." South Slope Coop., at 12-13; *see also* AT&T, at 79-80. Other commenters,

[79] Although the time frame suggested by other commenters varies somewhat, AT&T's proposal that the Commission require that they be acted on within 30 days is reasonable. In Texas, for example, the 17-day time period permitted for approval of franchise applications has proven to be workable.

including other local telephone companies, manufacturers, consumer and public interest groups, agree that such a streamlined franchise application process is appropriate.[80]

The cable industry nonetheless insists that competitive wireline providers must be subjected to the identical processes and obligations that were applied to cable incumbents, notwithstanding the far different circumstances associated with video entry by the operator of an existing network in the public rights of way. Only NCTA even attempts to link its argument with the right-of-way rationale for local franchise regulation, and its arguments are specious. NCTA claims that the traditional franchising process is designed not merely to vindicate an LFA's economic interests in its rights-of-way, but also to "establish[] the rights and social responsibilities of *all* entities providing cable service." NCTA, at 27. As an initial matter, there is no such consensus view by policymakers that "all" providers of video programming must meet these so-called "social" obligations; in fact, many providers, such as DBS and wireless, are exempt from them today. *See* FTTH Council, at ii, 3. The entire premise of this argument is thus flawed.

In any event, NCTA does not and could not explain how traditional franchise application processes – with protracted public hearings, intolerable delays, and burdensome data requests for proprietary information – are needed to protect LFAs' interests in ensuring PEG access, emergency alert capabilities, public safety and the other limited legitimate municipal interests at issue when a new entrant seeks to offer competitive video services over existing rights-of-way. Those interests are fully vindicated by the certifications and streamlined processes proposed by AT&T and supported by other commenters. The obligations in the short-form franchise application proposed by AT&T, along with the other existing rights-of-way obligations that telephone carriers already responsibly follow, will protect the interests of each municipality, while at the same time ensuring

[80] *See, e.g.*, BellSouth, at 10, 36-37; Qwest, at 4, 27; Verizon, at 36-38; APT, at 3.

that the consumer benefits of added competition are not subject to unreasonable delay and foreclosure.

Thus, at bottom, the NCTA argument reduces to yet another cable industry plea for the build-out conditions on entry that they seek to shield them from competition. Indeed, Charter and Cablevision are explicit about this: they do not even contend that the application of traditional franchising requirements to telephone companies serves any affirmative purpose, but openly insist that they are necessary strictly to ensure "uniformity." Cablevision, at 19-20; Charter, at 8. As explained above, there is no justification for those obligations. *See supra* Part III.A. And, contrary to their claims, prohibiting, not endorsing, those conditions is the way to create a level playing field. *Id.*

CONCLUSION

For the reasons set forth herein and in AT&T's Comments, the Commission should exercise its authority and obligation to promulgate rules consistent with the proposals set forth in these Comments.

Respectfully Submitted,

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