

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY.....	1
II. BUILD-OUT REQUIREMENTS IMPOSED ON NEW ENTRANTS SEEKING TO COMPETE WITH INCUMBENT MONOPOLISTS ARE ANTI-COMPETITIVE AND VIOLATE SECTION 621(a) OF THE ACT	3
III. THE COMMISSION’S JURISDICTION TO INTERPRET SECTION 621(a)’s LANGUAGE IS ON FIRM FOOTING	8
IV. EXAMPLES OF RESPONSIBLE BEHAVIOR BY SOME LFAS ARE IRRELEVANT	13
V. UNREASONABLE DELAY IN ACTING ON A FRANCHISE APPLICATION IS WELL WITHIN THE SECTION 621(a) PROHIBITION	14
VI. THE ACT ITSELF DOES NOT IMPOSE BUILD-OUT REQUIREMENTS ON APPLICANTS FOR A SECOND FRANCHISE TO OPERATE IN COMPETITION WITH AN ENTRENCHED INCUMBENT	18
VII. CONCLUSION	19

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Qwest Communications International Inc. (“Qwest”) hereby files these reply comments in the above-captioned docket.¹

I. INTRODUCTION AND SUMMARY

In Qwest’s initial comments, Qwest demonstrated that there was a significant lack of competition in the provision of wireline cable service to customers, that this absence of competition was detrimental to the public in terms of higher prices and other monopoly public harms, and that elements of the existing local franchising process, primarily efforts by local franchising authorities (“LFAs”) to impose unrealistic and uneconomic “build-out” requirements on new entrants (increasingly at the urging of the entrenched monopoly franchisee), was a prime culprit in keeping existing monopoly franchisees free from wireline competition. Qwest suggested a means by which the Federal Communications Commission (“Commission” or “FCC”) could target the specific identified cable franchise problems in a limited manner without engaging in a broad-sweeping preemption exercise.

¹ *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 20 FCC Rcd 18581 (2005) (“*NPRM*”).

The structure proposed by Qwest focuses simply on the Commission's clear authority to issue binding interpretations of the statutory prohibition against an "unreasonable refus[al]" to grant a competitive franchise imposed by Section 621(a) of the Telecommunications Act. In light of current market and economic conditions -- including the indisputable fact that wireline competition to entrenched incumbent cable franchisees remains practically non-existent -- it has become obvious that LFAs' efforts to impose "build-out" obligations on new entrants seeking to compete with entrenched monopoly franchisees have stifled competitive entry and dramatically diminished the promise of competition foreseen when Congress enacted Section 621(a). Qwest proposed that the Commission take two simple steps in interpreting Section 621(a):

- Establish a binding requirement that the imposition of build-out requirements on a new entrant in competition with an existing cable franchisee constitutes an unreasonable refusal to grant the second franchise.
- Establish a binding requirement that an LFA must act on a franchise application within six months of filing or the application will be "deemed granted" by operation of law.

These principles would be enforced through the normal mechanism applicable to appeal of LFA decisions -- Section 635(a) of the Act.²

Obviously those affected by the Qwest proposal have not had an opportunity to review the proposal or formulate comments on it. Nevertheless, various entities representing the interests of the entrenched monopolies contend basically that everything is fine, that the market is fully competitive, and that obtaining a franchise is simple and inexpensive. They also assert

² 47 U.S.C. § 541.

that it would be unfair and illegal to allow a second entrant to enter a market in competition with the existing monopoly unless the second entrant is obligated to duplicate the entire footprint of the incumbent -- an obligation that concededly makes competition impossible in many if not most markets. In these reply comments Qwest briefly addresses some of these issues. In particular, Qwest reiterates that build-out requirements imposed by LFAs on new competitive franchisees are unnecessary, anti-competitive, and inconsistent with both the language and purpose of the Act. Moreover, the Commission has ample authority to deal with this significant problem, and a lawful federal solution does not entail any additional preemption of LFA jurisdiction. Rather, the Act itself preempts LFA jurisdiction when it prohibits an LFA from unreasonably refusing to grant a competitive cable franchise application. The Commission is comfortably within its jurisdiction when it interprets what this statutory language means. The Commission's interpretations of the Act are binding on LFAs and on courts reviewing LFA determinations when an appropriate challenge is brought pursuant to Section 635(a) of the Act.

II. BUILD-OUT REQUIREMENTS IMPOSED ON NEW ENTRANTS SEEKING TO COMPETE WITH INCUMBENT MONOPOLISTS ARE ANTI-COMPETITIVE AND VIOLATE SECTION 621(a) OF THE ACT

Existing cable franchisees and a number of LFAs proclaim that the existing franchising system does not impede or stifle competitive entry, generally asserting that some LFAs have acted quickly in granting franchises,³ that some competitive franchises have indeed been granted

³ Comcast Corporation ("Comcast") at 10-12; National Association of Telecommunications Officers and Advisors, The National League of Cities, The National Association of Counties, The U.S. Conference of Mayors, The Alliance for Community Media, and The Alliance for Communications Democracy ("NATOA") at 28-30; National Cable & Telecommunications Association ("NCTA") at 5-7; Cablevision Systems Corporation ("Cablevision") at 9-12; Communications Division, Designated Cable Franchise Agency in the City of St. Louis, Missouri at 6-13; League of Minnesota Cities and the Minnesota Association of Community Telecommunications Administrators at 9-11.

(and at times constructed) despite the existing franchising and build-out problems,⁴ and that there have been instances where the current process has not impeded competitive entry in competition with incumbent franchisees.⁵ These assertions are poor anecdotes that fly in the face of the incontrovertible evidence that entrenched cable franchisees operate almost entirely without wireline competition throughout the United States.⁶ It is not Qwest's position that LFAs are dishonest or dysfunctional, or that they operate in bad faith. But the evidence is indisputable that wireline cable competition has not developed, and experience shows that the build-out issue is one of the major reasons for this market failure.⁷ The fact that some franchises have been

⁴ Comcast at 22-23; NATOA at 32-34; NCTA at 12-14; Cablevision at 9-12; Communications Division, Designated Cable Franchise Agency in the City of St. Louis, Missouri at 43-44; ADA Township, Allendale Charter Township, City of Cadillac, Holland Township, City of Hudsonville, Huron Charter Township, City of Livonia, Milton Township, City of Southfield, City of Swartz Creek, Vienna Charter Township, City of Warren, City of Westland, Whitewater Township, and Zeeland Township, and the Pennsylvania State Association of Boroughs ("Pennsylvania and Michigan Municipalities") at 16-17; Greater Metro Telecommunications Consortium, Rainier Communications Commission, Howard County, Maryland, Cities of Bellevue and Olympia, Washington, and Washington Association of Telecommunications Officers and Advisors ("Local Governments") at 16-17.

⁵ Comcast at 12-15; NATOA at 24-25; NCTA at 7-12; City of Hialeah, Florida ("Hialeah") at 17; City of Lake Worth, Florida ("Lake Worth") at 12; City of West Palm Beach, Florida ("West Palm Beach") at 15; Local Governments at 14-15; Southeast Michigan Municipalities ("Michigan Coalition") at 63-66; Certain Florida Municipalities at 22-24.

⁶ Ad Hoc Telecom Manufacturer Coalition ("Ad Hoc") at 4-6; The Pacific Research Institute at 6-7; United States Telecom Association ("USTA") at 17-19; Freedom Works at 11-12.

⁷ Qwest's own experience has been that build-out requirements have in fact prevented Qwest from constructing a number of competitive cable franchises. Comments of other parties confirm that Qwest's experience is part of a more general phenomenon, and is not unique to Qwest. Discovery Institute at 7-8; Fiber-to-the-Home Council ("FTTH Council") at 23-36; Freedom Works at 17-18; Hawaiian Telecom Communications, Inc. at 8-10; National Telecommunications Cooperative Association at 6-9; Alcatel at 10-11; BellSouth Corporation and BellSouth Entertainment, LLC ("BellSouth") at 30-32; AT&T Inc. ("AT&T") at 43-45; Verizon at 39-42; USTA at 22-24; Broadband Services Providers Association at 4-5; Cincinnati Bell at 10-12.

granted, with no or with very limited build-out requirements,⁸ provides no useful information on the real problem -- that competition is not developing in a meaningful manner and the imposition of build-out obligations on potential competitors is a major reason for the lack of competition.

The weakness in the position of those who oppose federal intervention into the franchise process is that the anecdotal “evidence” of these parties does not shed meaningful light on the position that they seek to advocate. For despite the arguments touting the fairness of the existing system, the fact remains that competition in the wireline cable market has not developed. Thus, hypothetical arguments as to why it should have developed are simply meaningless. If the competitive wireline cable marketplace were as the existing franchisees theorize it to be in their comments, then 98% of U.S. consumers would not find themselves with no wireline alternative to the existing entrenched franchises. Competition has not taken hold, and arguments speculating that the market might be competitive do nothing to undermine the undeniable fact that, in practically all markets, the existing franchisees operate without facing wireline competition -- the only competition that historically has acted to constrain the prices of the incumbents.

The paucity of evidence supporting the notion that the existing franchise process is not a major obstacle to competition is brought into sharp focus by Charter Communications, Inc. (“Charter”). Charter purports to offer “evidence” that build-out requirements are not anti-competitive, claiming, or at least appearing to claim, that it has constructed cable systems in “over 4000 communities” “in the face of fierce competition.”⁹ Charter contends that its cable “acquisitions were also not purchasing existing ‘monopoly’ rights,” the clear implication being

⁸ Qwest’s Salt Lake City, Utah franchise contains build-out obligations that are quite limited in nature and effect, and do not take effect until and unless Qwest is able to establish a meaningful competitive presence in Salt Lake City.

⁹ Charter at 2.

that Charter was in the business of bringing a second wireline presence to those communities that it serves.¹⁰ In other words, Charter argues, or at least seems to argue, it has been able to enter the market as a second franchisee despite the existence of the anticompetitive build-out requirements at issue here, and Charter's experience indicates that the process should be allowed to continue unchecked.

But the facts recited by Charter do not support any such conclusion. In fact, Charter concedes in its comments that it purchased all of its cable systems from existing incumbent franchisees,¹¹ and we are aware of no Charter franchise that is subject to wireline competition. Charter appears to have entered every single market in which it provides service as the monopoly incumbent. The whole point of the economic arguments that support differential treatment of monopoly versus competitive entrants is that build-out requirements that may be acceptable or beneficial in the case of a monopolist are destructive when applied to a putative second entrant. In other words, Charter's comments provide powerful evidence that the conclusion asserted by Charter is wrong. Charter's facts certainly do not support an argument that imposition of build-out requirements on a second entrant are economically acceptable, because Charter has apparently not entered any market as a second competitor. Instead, Charter was able to provide service in the communities where it is now the franchisee only by buying out the existing franchisee -- essentially replacing the existing entrenched monopolist with a new entrenched monopolist -- itself.

The full scope of the problem that faces the Commission is highlighted by the strong support for Commission action by organizations representing consumers. Numerous consumer-oriented organizations commented in favor of the Commission taking some action to address

¹⁰ *Id.* at 6.

¹¹ *Id.* at 5, especially n.6.

franchise requirements so that they are more favorable to competitive entry.¹² Several of those commenters specifically oppose build-out requirements as anti-competitive and harmful to consumer welfare. In explaining why build-out requirements are likely to reduce consumer benefits, the American Consumer Institute recognized that build-out requirements amount to “[f]orcing firms to make ‘uneconomic’ investments in pursuit of other nonmarket objectives” and as such are “an artifact of protected monopoly market environments.”¹³ Similarly, the Pacific Research Institute recommended that build-out requirements be discarded,¹⁴ and the Consumers for Cable Choice and the Discovery Institute both addressed the fallacy in the arguments that build-out requirements are necessary to implement the anti-redlining provisions of Section 621(a)(3).¹⁵ And, as noted in Qwest’s opening comments, the Phoenix Center has determined that build-out requirements are “counter-productive and serve primarily to deter new entry, increase the profits of incumbents, and harm consumers.”¹⁶ The overarching theme of commenters addressing consumer welfare is that the Commission needs to be proactive in

¹² *See, generally, e.g.*, the comments of the following organizations: American Consumer Institute, American Homeowners Grassroots Alliance, National Hispanic Council on Aging, Pacific Research Institute, Small Business & Entrepreneurship Council, The National Grange, Alliance for Public Technology, American Association of Business Persons with Disabilities, California Alliance for Consumer Protection, California Farmers Union, California Small Business Association, California Small Business Roundtable, Consumers First, Inc., Consumers for Cable Choice, Democratic Processes Center, Inc., Discovery Institute, Free Enterprise Fund, TelCo Retirees Association, Inc., Washington State Grange, Women Impacting Public Policy, and World Institute on Disability.

¹³ American Consumer Institute at 7.

¹⁴ *Reforming the Cable Franchise System*, Pacific Research Institute at 6.

¹⁵ Consumers for Cable Choice at 8; Discovery Institute at 8.

¹⁶ *Phoenix Center Policy Paper Number 22: The Consumer Welfare Cost of Cable “Build-out” Rules*, at 1, by George S. Ford, PhD, Thomas M. Koutsky, Esq. & Lawrence J. Spiwak, Esq. rel July 2005 (Second Release).

stimulating competitive wireline entry into the video market by addressing the harmful affects on competition of the current local franchising process.

The bottom line is that the entrenched incumbents seek protection from competition by the device of a regulatory scheme that is demonstrably anticompetitive. Indeed, it is a regulatory structure that the entrenched incumbents have long, and successfully, resisted being applied to their own entry into the telecommunications marketplace, where they are excused not only from the types of build-out obligations applied to their local exchange carrier (“LEC”) competitors, but are also absolved from complying with the universal service obligations that govern the operation of their incumbent LEC competitors.¹⁷

III. THE COMMISSION’S JURISDICTION TO INTERPRET SECTION 621(a)’s LANGUAGE IS ON FIRM FOOTING

A variety of commenting parties view the Commission’s interpretation of key provisions of federal law encoded in the Communications Act as if such interpretative action constituted a massive intrusion into congressionally protected rights vested in the LFAs by statute. For example, NATOA states that the “*NPRM* improperly ascribes to the Commission an authority that Congress specifically gave to the courts, not the FCC. Despite plentiful indications of a contrary legislative intent, the *NPRM* tentatively concludes that the FCC has authority to adopt rules concerning, and to enforce, Section 621(a)(1) . . . The *NPRM*’s tentative conclusion is wrong.” NATOA continues stating that the “*NPRM*’s tentative conclusion that the Commission has ‘authority to implement Section 621(a)(1)’s directive that LFAs not unreasonably refuse to

¹⁷ See *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, 4825-26 ¶¶ 43-46 (2002), *aff’d sub nom. National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S. Ct. 2688 (2005) (“*Brand X Decision*”).

award competitive franchises’ is based on the view that the FCC is specifically ‘charged by Congress with the administration of Title VI, which, as courts have held, necessarily includes the authority to interpret and implement Section 621.’ . . . But the *NPRM* has misread Title VI and more specifically, §§ 621(a)(1) and 635(a). Although the Commission may have authority to interpret certain provisions of Title VI, it does not have such blanket authority over all of Title VI, and it most certainly does *not* have such authority with respect to § 621(a)(1), because § 635(a) explicitly gives that authority to the courts, *not* the FCC.”¹⁸

These complaints completely miss the mark. LFA’s are prohibited by federal law from unreasonably refusing to grant a competitive franchise, a prohibition that is enforceable in federal court. LFAs have no right to unreasonably refuse to grant a competitive franchise application. The sole question is whether the authority to develop a uniform national policy implementing this federal statutory prohibition is vested with the Commission, the agency that concededly has jurisdiction to enforce and interpret the Act, or elsewhere. For example, some commentators, while not denying the federal nature of the prohibition, seek to avoid Commission jurisdiction by arguing that Congress intended to have this federal requirement interpreted and implemented on a piecemeal basis by federal and state courts via lawsuits under Section 635(a) of the Act.¹⁹ But whether this authority is vested in the Commission or a court (or both), LFAs do not have the authority that seems to be claimed for them (to a large extent by incumbent cable franchisees) to unreasonably deny the grant of a competitive franchise. They have already been

¹⁸ NATOA at 4-5.

¹⁹ Comcast at 29-32; NATOA at 9; Public Cable Television Authority, Cities of Canyon Lake, Chino, Duarte, Encinitas, Glendale, Hawthorne, Irvine, Laguna Beach, Laguna Niguel, La Palma, La Quinta, Moreno Valley, San Clemente, Santa Cruz, Torrance, Twentynine Palms, Count of San Diego, and the County of Santa Cruz (“California Franchising Authorities”) at 9-10, 15-16; Pennsylvania and Michigan Municipalities at 4-6; Certain Florida Municipalities at 8-9.

deprived of this ability by the 1992 Cable Act.²⁰ Qwest submits that the authority to interpret this statutory provision is vested in the FCC itself, subject to implementation via Section 635(a) judicial actions.

The statutory structure is simple. There has already been express statutory preemption of LFA authority to refuse to grant a franchise in a variety of areas, including the statutory limitation in Section 621(a) against unreasonable refusals to grant competitive franchise applications. Imposition of unreasonable requirements as a precondition to grant of a competitive franchise violates federal law.²¹ But the term “unreasonable” is not completely self-explanatory, and determinations need to be made as to just what LFA conduct violates this section of the Act. Clearly a court, in the absence of Commission interpretative action, has the right and the authority to vacate any LFA denial that violates this provision of the Act -- not even the strongest supporter of LFA discretion claims that an LFA has the right to ignore the federal command in Section 621(a) in evaluating a franchise application.²² The question is whether the Commission has the authority to exercise its own statutory jurisdiction and definitively interpret this statutory language in a manner that takes account of the actual policies that underlie Section

²⁰ FTTH Council at 62-63; Alcatel at 10-11; AT&T at 32-34; BellSouth at 52-55; USTA at 37-39; Verizon at 10-13.

²¹ LFAs are required in all events to give all franchise applicants, both those seeking the first wireline franchise or a subsequent competitor, a reasonable time to comply with whatever build-out requirements are agreed to. 47 C.F.R. § 541(a)(4)(A).

²² The authority of a court to act to interpret a provision of the Communications Act in a particular lawsuit when the Commission has not acted to make such a determination is well settled. When the court decision was based on interpretation of an ambiguous provision in the Act, the Commission can act to modify that interpretation through the administrative process even in cases where the same court is ultimately called on to review the Commission’s own interpretation. *See Brand X Decision*, 125 S. Ct. at 2699-700.

621(a). Given the Commission's plenary authority to interpret the Communications Act,²³ Qwest suggests that the Commission's authority in this regard is patent.

On the other hand, Comcast and others who oppose the Commission's authority to interpret Section 621(a) are seeking nothing less startling than to deprive the Commission of the authority to interpret critical components of the Communications Act itself. The Commission does not need to preempt any LFA rights when it interprets Section 621(a). The preemption that they oppose happened in 1992 when Section 621(a) was initially adopted. The Communications Act is a federal statute, and an LFA would violate that federal statute if it were to unreasonably refuse to grant a competitive franchise. The claim that the Commission has no authority to establish binding interpretations of the Communications Act is unprecedented and unsupportable.

The legal structure that governs this action can be viewed as analogous to a primary jurisdiction referral by a court to the Commission to seek its interpretation of an ambiguous statutory provision. Courts routinely refer cases where the Commission has particular expertise, including cases involving interpretation of a statutory provision requiring further agency explication, to the Agency for a determination of questions within the expertise of the Commission.²⁴ A Commission decision under such a referral is appealable under Section 402 of the Act, but is binding on the referring court (which may not choose to overrule the

²³ See 47 U.S.C. § 201(b).

²⁴ Interpretation of an unambiguous provision in the Act would presumably not be subject to referral, because all entities interpreting unambiguous language would presumably reach the same conclusion.

Commission's decision).²⁵ Such referrals raise no significant issues with Commission jurisdiction.

Indeed, in the absence of Commission action at this time, it can easily be foreseen that a court reviewing an LFA refusal to grant a competitive franchise could refer the question of whether the insistence of the LFA on acceptance of build-out requirements constituted a violation of Section 621(a). The Commission could in such an event, after an appropriate proceeding, reach exactly the position urged by Qwest herein through a primary jurisdiction referral -- that insistence on build-out obligations as a condition of grant of a second franchise is anticompetitive and a violation of law. In other words, under the statutory structure which exists today, the Commission could reach exactly the result urged by Qwest through a completely different process -- the referral of federal regulatory issues to the Commission for resolution under the doctrine of primary jurisdiction. As far as we can determine, none of the commentators opposing Commission action in this docket would object to this exercise of Commission jurisdiction in response to a court referral order.

We point out this alternate jurisdictional route because it highlights the fundamental fact that the Commission's exercise of jurisdiction in this area is not a radical or even unusual application of its long-standing jurisdiction to interpret and enforce the federal provisions of the Federal Communications Act. The Commission clearly has the authority to choose the

²⁵ Decisions of the Commission are appealable only under Section 402 of the Act. *See, e.g., AT&T Corp. v. FCC*, 317 F.3d 227, 238 (D.C. Cir. 2003). *And see, United States v. General Dynamics Corp.*, 828 F.2d 1356, 1360 (9th Cir. 1987) ("Where . . . a district court refers a case to an agency under the primary jurisdiction doctrine, and exclusive authority to review the agency's determination is granted to a court other than the referring district court, the district court is bound by determinations made in the collateral administrative proceedings and may not itself review the merits of the agency's decision").

appropriate procedural vehicle through which to exercise its statutory authority.²⁶ The interpretation called for in Qwest's initial comments is clearly within the jurisdiction of the Commission. Whether it is a permissible interpretation of the Act or not is a matter for review under Section 402 of the Act -- but the authority of the Commission to issue definitive and binding interpretations of the Act should be, by now, indisputable and non-controversial.

IV. EXAMPLES OF RESPONSIBLE BEHAVIOR BY SOME LFAS ARE IRRELEVANT

A number of commentors opposing Commission action in this docket point to what they claim are examples of responsible LFA conduct in processing, evaluating and approving competitive wireline cable franchises.²⁷ While the continuing absence of wireline cable television competition demonstrates that these responsible authorities are not sufficient to bring true competition to consumers, the examples are also irrelevant. Qwest is not seeking to have the Commission preempt or disrupt the cable franchising process. Qwest is seeking simply to have the Commission interpret the language of Section 621(a) of the Act. LFAs are already bound by the Act, and will be bound by any lawful interpretation of its provisions by the Commission. Qwest seeks only an interpretation of the pre-existing federal strictures on the LFA's franchising authority by the Commission of what constitutes an "unreasonable" refusal to grant a franchise. Accordingly, LFAs that are in fact acting in a manner that does not contravene the Act as interpreted by the Commission will not be affected (or will be only marginally affected) by the ruling that Qwest submits should be issued in this proceeding. The fact that some LFAs are behaving responsibly does not mitigate the need for Commission action in an overall market

²⁶ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 548 (1978).

²⁷ Comcast at 7-9; NATOA at 21-24; NCTA at 26; Pennsylvania and Michigan Municipalities at 7-9; Certain Florida Municipalities at 19-21.

where competition has not taken hold, and in which the actions of LFAs can be held to account to a large degree for this absence of competition.

V. UNREASONABLE DELAY IN ACTING ON A FRANCHISE APPLICATION IS WELL WITHIN THE SECTION 621(a) PROHIBITION

A number of commenting parties claim that Section 621(a) applies only to actual denials of franchise applications, and that the Act does not prohibit delays that have the effect of denying a competing franchise application so long as an actual denial is not forthcoming.²⁸ To a large extent they base this on the language of Section 635(a) of the Act that limits appeals under that section to “final decisions” of the LFA.²⁹ This argument is completely out of synch with the statutory structure. The Act very explicitly includes unreasonable failures to act within the prohibition of Section 621(a), which does not require a final decision. The fact that Section 635(a) applies to “final decisions” does not mean that the Commission has lost jurisdiction to interpret Section 621(a) by defining the nature of an unreasonable delay. It merely requires analysis as to whether Section 635(a) applies to challenges to such inaction, or whether franchise applicants are required instead to bring actions against LFAs that do not act in a timely fashion via more general federal jurisdictional statutes. While we submit, as is discussed below, that the best locus for jurisdiction to appeal an unreasonable refusal of an LFA to act on a competitive franchise application is with courts under Section 635(a) of the Act, questions about enforcement of a valid law are totally separate from the fundamental jurisdiction of the Commission to issue binding interpretations of a statute entrusted to its authority by statute.

It must be observed that Section 621(a) provides that an LFA “may not unreasonably refuse to award a competitive franchise,” language which clearly encompasses a simple refusal

²⁸ NCTA at 28-29; NATOA at 36-37; Comcast at 27-28.

²⁹ 47 U.S.C. § 541.

to act on a franchise application as well as an affirmative denial of an application. The statute does not merely state that an LFA may not “unreasonably deny” a competitive application. It makes it illegal to “refuse to award” a franchise to a competitive applicant. The prohibition in Section 621(a) is thus affirmative in nature -- “refusal to award” refers to failure to act at all as well as to negative action. Thus, failure to grant a competitive franchise application within a reasonable time violates the Act as assuredly as does negative action denying such an application. Thus, no matter what conclusion one draws about whether a refusal to grant a competitive franchise application through inaction is a “final decision” subject to immediate judicial review under Section 635(a) of the Act, there can be no dispute that such a refusal, if legally “unreasonable,” is a violation of the Act.

This leaves open the question of whether an unreasonable refusal to comply with the Act through inaction is enforceable via Section 635(a) or through some other means. A position that a federal law created federal rights that could not be enforced would be difficult to comprehend in the context of the overall federal purpose of the Act.³⁰ But the enforcement question raises only the issue of whether Congress, having enacted a statute in which a specific enforcement mechanism is established to enforce the federal law in those cases where the law has been violated, would leave one critical piece of the statute out of that enforcement scheme – it does not raise the issue of an unenforceable right.

³⁰ The law generally presumes that the creation of a legal right will be accompanied by a concomitant legal remedy. *See, e.g., NAACP v. Medical Center, Inc.*, 599 F.2d 1247, 1255 (3d Cir. 1979) (“As the Supreme Court has noted, when there is a legal right without a legal remedy, the right has little meaning”; *see also Sullivan v. Little Hunting Park*, 396 U.S. 229, 238 (1969)).

In this regard, we emphasize that, whether or not unreasonable refusals to grant a competitive franchise are enforceable through Section 635(a) or some other means,³¹ an LFA that chooses to violate Section 621(a) through inaction can still be held accountable.³² But this question is moot, because the Section 635(a) structure is equally valid in the case of unreasonable refusals to grant a competitive franchise to the same extent that it is available when a franchise is affirmatively denied. It has long been held that unreasonable delay in acting on an application is tantamount to denial of that application, giving the petitioning party the right to invoke either appellate or mandamus rights.³³ There is no reason in law why an unreasonable refusal by an LFA to grant a competitive franchise should not be treated the same for enforcement purposes whether the refusal was the result of an outright denial or a simple refusal to act at all.

³¹ Injunctive relief to prevent state and local violations of federal law is generally available for violations of the Communications Act and the Commission's regulations irrespective of a specific enforcement statute. 47 U.S.C. § 401(a). *And see, e.g., Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n.14 (1983) ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights [citation omitted]. . . . A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve [citations omitted].); *Qwest Communs. Corp. v. City of Berkeley*, 146 F. Supp.2d 1081, 1090 (No. D. Cal. 2001) ("private plaintiffs seeking injunctive or declaratory relief may challenge a state statute or local ordinance pursuant to the Supremacy Clause, regardless whether a federal statute confers a private right of action on the plaintiffs [citation omitted]").

³² *See* discussion of this matter in the *NPRM* and the tentative conclusion of the Commission concerning an "unreasonable refusal to award an additional competitive franchise" by an LFA. 20 FCC Rcd 18581 at ¶ 19; *see also* 47 U.S.C. § 541(a)(1). Obviously a violation of federal law or a federal statute by a municipality can be prevented by the Federal Government whether Section 635(a) applies or not.

³³ *See Sierra Club v. Thomas*, 828 F.2d 783, 796 (D.C. Cir. 1987); *Edmonds v. Federal Bureau of Investigation*, 417 F.3d 1319, 1324 (D.C. Cir. 2005); *Public Citizen Health Research Group v. Commissioner, Food and Drug Admin.*, 740 F.2d 21, 45-46 (D.C. Cir. 1984); *Committee for Open Media v. FCC*, 543 F.2d 861, 866 (D.C. Cir. 1976).

The only difference in the enforcement mechanism proposed by Qwest between denials based on unreasonable grounds (*e.g.*, build-out requirements) and de facto denials based on inaction by the LFA is that in the latter case the LFA's refusal to act in a timely manner is treated as a grant, rather than as a denial. As noted in Qwest's initial comments, this concept is neither novel nor unusual among efforts to ensure that administrative agencies not disrupt the rights of supplicants by inaction.³⁴ It is Qwest's opinion that a delay by an LFA in acting on an application for a competitive franchise of more than six months should be treated as tantamount to a grant of the application. In all events, a delay in excess of six months is indeed an unreasonable refusal to grant the application, is tantamount to an unreasonable denial, and that unreasonable refusal is a federal legal wrong redressible in court under Section 635(a). The best way to address such unreasonable refusal to grant a franchise is with a prescription of grant if action is not taken within a reasonable time. Qwest assumes that very few, if any, franchise applications will be granted under the automatic grant rule suggested by Qwest herein -- instead, as has been the case with forbearance petitions filed under Section 10 of the Act (in which the Commission takes action on the petitions rather than allowing them to be "deemed granted" based on inaction), we anticipate that this ruling by the Commission will do no more than ensure timely action by LFAs. But in all events the public and competition will be properly protected against unreasonable refusals of LFAs to grant competing franchise applications.

³⁴ Qwest Comments at 4, 26-28. *See also Tri-State Bancorporation, Inc. v. Board of Governors of Federal Reserve System*, 524 F.2d 562, 568 (7th Cir. 1975); *Gottlieb v. Pena*, 41 F.3d 730, 734 (D.C. Cir. 1994).

VI. THE ACT ITSELF DOES NOT IMPOSE BUILD-OUT REQUIREMENTS ON APPLICANTS FOR A SECOND FRANCHISE TO OPERATE IN COMPETITION WITH AN ENTRENCHED INCUMBENT

Finally, several commentors (generally representing the entrenched incumbents) argue that the Commission and LFAs are obligated by the Act to require that a new competitive entrant seeking to compete against the incumbent must commit itself to “build-out” to cover the incumbent’s entire area. Their theory is that complete duplication of facilities is required by Section 621(a)(3) of the Act, which requires that LFAs ensure that no person is deprived of cable service “because of the income of the residents of the local area in which such a group resides.”³⁵

The major defect in this argument is that it countermands the express language of the Act. As was noted in Qwest’s initial comments,³⁶ a “universal service” type obligation for competitive cable franchisees was considered by Congress and rejected. Instead, the Act is quite specific -- a franchising authority has the obligation to ensure that all residents in a given franchise area have an opportunity to receive cable service regardless of income level, but this opportunity does not extend to service from multiple providers. Because the stability of a second franchisee in a market already dominated by the incumbent monopolist is much more fragile than that of the incumbent, extending this universality requirement to the new entrant would serve no purpose at all other than to stifle competition. The statute does not require a universal second build-out and, as noted, the prohibition against unreasonable refusal to grant a franchise actually prohibits such build-out requirements to the extent that they impede competitive entry.

Perhaps the most annoying aspect of the efforts of entrenched incumbents to rely on this argument is that the converse of the argument has already been examined in the context of telecommunications services. In the area of local exchange competition, the argument was

³⁵ See, e.g., Comcast at 22-23; NCTA at 15-19.

³⁶ Qwest Comments at 21.

presented that competitors should be saddled with the same universal service obligations that mark the service of incumbents. The argument was often couched in the same “level playing field” language that highlights the position of the incumbent franchisees. The Commission recognized that such build-out requirements would thwart competition, and no CLEC today has an obligation to duplicate the network of the ILEC.³⁷ Disturbingly, many of these CLECs are the same entrenched cable franchisees that are demanding anti-competitive build-out requirements in their efforts to use the LFA processes to thwart competition with their own monopoly services. The Commission rejected the “build-out” argument when it was advanced against CLEC competition against ILECs, and it should similarly reject the identical argument as it is now being presented to stifle competitive wireline cable service.

In short, the “level playing field” trumpeted by the entrenched incumbents is one where only they would play. It is for a very good reason that the Act does not support the argument that competitive franchisees must duplicate the existing networks of the incumbents.

VII. CONCLUSION

The Commission in this proceeding should recognize both the size of the problem faced by potential wireline cable providers and its own authority to deal with this problem on a

³⁷ See, e.g., a Commission discussion in its 1997 order, wherein portions of a 1995 Texas statute were preempted from enforcement pursuant to Section 253 of the Act, as amended, because the build-out requirements from the state statute would “have the effect of prohibiting entities [for example, CLECs] subject to [the statute’s relevant] requirements from providing competitive local exchange service in Texas.” See *In the Matter of The Public Utility Commission of Texas . . . Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCBPol 96-13, et al., Memorandum Opinion and Order, 13 FCC Rcd 3460, 3500 ¶ 81 (1997); see also *id.* at 3496-3506 ¶¶ 73-95, for the Commission’s extensive discussion on the impact of the statute’s build-out requirements on potential competitive service providers generally in the Texas market, including within the context of facilities available from the incumbent LEC provider.

comprehensive, national basis. The Commission should establish definitive and binding interpretations of the Act to the effect that:

- Imposition of “build-out” obligations on a second wireline cable entrant is *per se* a violation of the federal prohibition against inexcusable refusals to grant a competitive franchise.
- Delay by an LFA in excess of six months in acting on a competitive franchise application is in and of itself an inexcusable refusal to make the appropriate grant. Any application which an LFA does not act upon within six months shall be deemed granted as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed with the FCC via its Electronic Comment Filing System in MB Docket No. 05-311, 2) served, via e-mail on Mr. John Norton at john.norton@fcc.gov and Mr. Andrew Long at andrew.long@fcc.gov, both of the Media Bureau, Policy Division, 3) served via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com, and 4) served via First Class United States Mail, postage prepaid, upon the parties listed on the attached service list.¹

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March 28, 2006

¹ Due to the voluminous number of commentors in this proceeding, Qwest is only serving those parties which it specifically cites to in its Reply Comments.

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