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	)	MB Docket No. 05-311
amended by the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	

REPLY COMMENTS

OF THE

UNITED STATES TELECOM ASSOCIATION

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SUMMARY OF COMMENTS

The initial comments in this docket clearly demonstrate that the core issue in this vital proceeding is whether the Commission will oversee our national broadband policy, or if it will be established by several large cable operators utilizing the local franchising process to erect and maintain what they surely hope will be impregnable barriers to entry. These attempts to constrain entry in video markets by applying burdensome economic regulation to entrants will, if successful, violate the basic economic freedom to which Americans are accustomed. In our market-driven, competitive economy, it is not the role of local government entities to tell people where and when they must open stores or sell their services.

In any event, even if it ever made sense to accommodate the cable industry's insistence that we, as a society, must create and preserve franchise barriers to entry in video markets, it no longer makes any sense at all because those entry barriers are threatening our nation's broadband future. USTelecom commends the Commission, therefore, for initiating this proceeding and we strongly encourage the Commission to exercise its clear authority to adopt rules removing barriers to broadband deployment. In particular, the Commission should:

1. Eliminate build-out requirements for entrants and rely instead on market-driven deployment plans;
2. Rule that it is unreasonable to refuse a franchise simply because the terms and conditions are "more favorable" than those applied to the incumbent;
3. Establish procedural roadmaps for franchise application review, including minimum time periods, that include an expedited process for local exchange carrier (LEC) use of facilities that are covered by pre-existing access to rights of way;
4. Prevent local franchise authorities from requiring in-kind services above and beyond the statutory maximum 5% franchise fee; and
5. Preempt inconsistent state and local statutes, regulations, rules, and practices, particularly "level playing field" laws.

These Commission actions will substantially reduce cable franchise barriers to entry and, thereby, promote the deployment of advanced telecommunications capabilities to all Americans.

In these Reply Comments, USTelecom shows that the record developed in this proceeding overwhelmingly supports swift and certain Commission action (Section I). A vital Federal policy is at issue: the business case for building broadband networks depends on network owners having the ability to provide video services over broadband networks rapidly and in response to market-based competition rather than the choices of local government officials. If entrants seeking to provide video services over broadband networks do not enjoy this basic economic freedom, we will all suffer from the resulting barrier to broadband deployment. The Commission has had a long-standing and admirable policy of removing barriers to broadband deployment; now it should act swiftly to video franchising barriers as well.

As we and other parties showed, the Commission has ample legal authority, including Supreme Court precedent directly on point, to prescribe rules under Section 621 and preempt inconsistent state and local policies, practices and procedures (Section II). The incumbent cable operator parties to this proceeding and many local government parties simply ignore this body of legal authority. Indeed, their arguments are not much more substantive than would be a naked denial that Title VI is part of the Communications Act, over which the Commission has the responsibility and authority to administer. Quite simply, the Commission has the authority, and indeed the obligation, to establish national and preemptive rules for the franchising process, given the important Federal interest in broadband deployment that is at stake.

USTelecom also reiterates the overwhelming factual and legal support for its five action items that other parties expressed in the record (Section III). There is no serious opposition to the substance of many of USTelecom's proposals other than the simple denials by the cable industry that the Commission lacks authority to take these steps.

Finally, USTelecom also urges the Commission to take strong note of the comments by many city parties showing a harsh reality (Section IV): city telecom managers negotiating competitive franchises do their work in fear of being sued by the incumbent cable operators, either under "level playing field" laws or other protectionist roadblocks. USTelecom has no doubt that many city and municipal representatives would like to facilitate market-based competition for their constituents' hard-earned dollars when they consider franchise applications filed by USTelecom's members, but the face the prospect that doing so will subject them and their cities to cable company lawsuits, and the substantial costs associated with such litigation. This litigiousness is yet another reason why the cable franchise regime should be reformed, and quickly.

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REPLY COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTelecom)[1] is pleased to submit these reply comments on the Notice of Proposed Rulemaking.[2] The initial comments in this docket clearly demonstrate that the core issue in this vital proceeding is whether the Commission will oversee our national broadband policy, or if it will be established by several large cable operators utilizing the local franchising process to erect and maintain what they surely hope will be impregnable barriers to entry. These attempts to constrain entry in video markets by applying burdensome economic regulation to entrants will, if successful, violate the basic economic freedom to which Americans are accustomed. In our market-driven, competitive economy, it is not the role of local government entities to tell people where and when they must open stores or sell their services.

In any event, even if it ever made sense to accommodate the cable industry's insistence that we, as a society, must create and preserve franchise barriers to entry in video markets, it no

[1] USTelecom is the nation's leading trade association representing communications service providers and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

[2] *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,* WC Docket, No. 05-311, Notice of Proposed Rulemaking, 20 FCC Rcd 18581 (2005).

longer makes any sense at all because those entry barriers are threatening our nation's broadband future. USTelecom commends the Commission, therefore, for initiating this proceeding and we strongly encourage the Commission to exercise its clear authority "to make such rules and regulations as may be necessary in the public interest to effectuate"[3] the overall purpose and effect of the Communications Act, most notably the directive to remove barriers to broadband deployment. In particular, the Commission should:

1. Eliminate build-out requirements for entrants and rely instead on market-driven deployment plans;
2. Rule that it is unreasonable to refuse a franchise simply because the terms and conditions are "more favorable" than those applied to the incumbent;
3. Establish procedural roadmaps for franchise application review, including minimum time periods, that include an expedited process for local exchange carrier (LEC) use of facilities that are covered by pre-existing access to rights of way;
4. Prevent local franchise authorities from requiring in-kind services above and beyond the statutory maximum 5% franchise fee; and
5. Preempt inconsistent state and local statutes, regulations, rules, and practices, particularly "level playing field" laws.[4]

These Commission actions will substantially reduce cable franchise barriers to entry and, thereby, promote the deployment of advanced telecommunications capabilities to all Americans.

In these Reply Comments, USTelecom shows that the record developed in this proceeding overwhelmingly demonstrates the need for swift and certain Commission action (Section I). A vital Federal policy is at issue: the crucial link between the ability to provide video services over broadband networks and the business case for building these networks means that a barrier to video services is a barrier to broadband deployment. The incumbent cable industry parties, and many local government representatives, seem oblivious to the point that a virtually standard-less and Balkanized, town-by-town application and approval process is right

[3] 47 U.S.C. § 201(a).

[4] This list of five action items combines items three and four from the USTelecom Comments in this docket, and includes as the new item number five the preemption request that we recommended separately on pages 51-57.

now interfering with the deployment of integrated voice, video and data interstate networks. The Commission has had a long-standing and admirable policy of removing barriers to broadband deployment, and it must act swiftly to remove the local franchising barrier as well.

As we and other parties showed, the Commission has ample legal authority to prescribe rules under Section 621 and preempt inconsistent state and local policies, practices and procedures (Section II). The Supreme Court affirmed the Commission's authority under section 201(b) to prescribe rules for *any* provision of the Communications Act, and other courts have ruled that the Commission has the authority to implement the provisions of Title VI pursuant to this statutory mandate. The incumbent cable firms and many local government parties simply ignore this and other sources of Commission legal authority. Indeed, their arguments are not much more substantive than a naked denial that Title VI is part of the Communications Act, over which the Commission has the responsibility and authority to administer. Quite simply, the Commission has the authority, and indeed the obligation, to establish national and preemptive rules for the franchising process, given the important Federal interest in broadband deployment that is at stake.

USTelecom also reiterates the overwhelming factual and legal support for its five action items that other parties expressed in the record (Section III). There is no serious opposition to the substance of many of USTelecom's proposals other than the simple denials by the cable industry that the Commission lacks authority to take these steps. Finally, USTelecom also replies to the incredible assertions by the incumbent cable industry that give a Mayberry-esque spin to its relationship with LFAs. Comments by many city parties show the harsh reality: city telecom managers negotiating competitive franchises live in constant fear of being sued by the incumbent firm, either under "level playing field" laws or other protectionist roadblocks. One group of fifty cities note that "[o]ne of the major impediments to the grant of competitive franchises is the threat of being sued by the incumbent or the subsequent Grantee under the Level Playing Field Statute."[5] Indeed, it is not a stretch to say that the local franchising process is the barrier to entry that it is today substantially because of the cable industry's litigiousness. USTelecom has no doubt that many city and municipal representatives would like to provide their constituents with competition when they consider franchise applications filed by USTelecom's members, but the current legal regime causes many of these representatives to fear a cable company lawsuit. This litigiousness is yet another reason why the regime should be reformed, and quickly.

I. NATIONAL BROADBAND POLICY MUST BE UNIFORM AND BARRIERS TO ENTRY MUST BE REMOVED

The Commission in paragraph 1 of the NPRM notes that the deployment of video and broadband services are "linked intrinsically," and the Commission has a longstanding record—indeed, the obligation—of removing barriers to entry into communications markets wherever it encounters them. The evidence shows that a barrier to the deployment of one service (video) inextricably creates a barrier to the deployment of another service (broadband). Pursuant to the directive of Section 706 of the Act that it act to remove all "barriers" to broadband infrastructure investment, the Commission has taken a particularly aggressive approach to dismantling entry barriers that impact the deployment of broadband services.

Indeed, the incumbent cable industry has been one of the chief advocates and beneficiaries of this approach. The Commission moved quickly to rule that local franchising authorities (LFAs) could not condition the grant, renewal, or transfer of a franchise based upon a

[5] Comments of Liebowitz and Associates, at 5.

local government's desire to regulate cable Internet service. The Commission also found (in the *Cable Modem Declaratory Ruling*[6] that, while cable modem service was provided over a "cable system," an LFA could not, without intruding on important Federal and interstate interests, regulate cable modem service.

Moreover, the incumbent cable industry benefits substantially from swift Commission action in 1997 to preempt entry barriers for the provision of competitive telephone service[7] and, more recently in 2005, Voice over Internet Protocol (VoIP) services.[8] These actions are particularly relevant because they permit incumbent cable operators to offer voice services over their existing cable plant *without* the build-out requirements, carrier-of-last-resort, and other universal service obligations to which incumbent local exchange carriers *must continue to adhere*. The Commission decided that saddling cable firms, as new entrants, with legacy regulation would not be in the public interest and it preempted inconsistent state and local policies.

The local franchising process is a clear and stark entry barrier for video services: the provision of a particular type of video service (cable service) is barred unless an LFAs gives its approval. It is one thing if a stark entry barrier only has local, intrastate impact, but it is quite

[6] *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4850 ¶ 102 (2002) ("*Cable Modem Order*"), *aff'd, National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, __ U.S. ____, 125 S. Ct. 2688 (2005).

[7] *In the Matter of The Public Utility Commission of Texas*, CCB Dkt. No. 96-13, Memorandum Opinion and Order, 13 FCC Rcd 3460 ¶ 13 (1997) (*Texas Preemption Order*); *see also Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002).

[8] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22416-17 ¶ 20 (2004) ("*Vonage Order*").

another if that entry barrier impacts important Federal interests. As AT&T stated, "[t]he video regulation of thousands of individual local actors plainly cannot be allowed to dismantle the nation's policy of removing barriers to broadband deployment and actively encouraging market-driven investment."[9] Despite efforts by the incumbent cable industry to downplay this proceeding by denigrating only the video rollout strategies of AT&T and Verizon, the link between video and broadband was recognized by a host of other participants, both from within the telecom industry and outside it. Microsoft stated that "IP-based services and products today enable the deliver of voice, data and video in new and innovative ways," and Microsoft urged the commission to adopt "a regulatory model that greatly reduces—or eliminates entirely—local barriers to entry."[10] The Fiber to the Home Council noted that fiber deployments "are significant capital investments that depend in today's marketplace on the providers' ability to sell the entire package of voice, data and video services—with their substantial revenue stream—to achieve a sufficient return on investment."[11] The FTTH Council also attached a study, entitled the "Hidden Cost of Broadband," which indicates that the current franchising process increases the cost of constructing a fiber-to-the-home broadband network by a startling 50%.[12]

The franchising barrier is not only faced by what Comcast calls "enormous companies"[13]: in fact, small telephone companies across the country are trying to upgrade their existing plant (which uses existing rights to public rights-of-way) to support video, and these small telephone companies are running straight into local franchise barriers. For example, Ben Lomand

[9] AT&T Comments, at 4.

[10] Microsoft Comments, at 2-3.

[11] FTTH Council Comments, at 19.

[12] FTTH Council Comments, Attachment C; *accord* AT&T at 13-15 (video is a "competitive necessity" for Project Lightspeed)).

[13] Comcast Comments, at 25.

Telephone, based in McMinnville, Tennessee has upgraded its network and has the technical capability to provide video service to 60 percent of its approximately 42,000 customers. It will be able to offer it to 100 percent of its customers within the next 18 months. But Ben Lomand has the misfortune of serving an area covered by 25 different franchising authorities. In some of these video-franchise jurisdictions, Ben Lomand serves as few as 100-200 telephone customers. It is a regulatory nightmare, and after 18 months of franchise applications, the company has won 15 approvals. This cumbersome, archaic franchising process is a significant barrier to competitive entry into the local video market. We provided several more examples previously where the franchise process has been a substantial barrier to entry in video market in instances involving Lakedale Communications, ShenTel, and SureWest.[14]

Several mid-sized phone companies have also provided examples of franchise barriers to entry. Hawaiian Telecom and Cincinnati Bell are planning to offer video service soon but both argue that the franchising process is impeding their entry.[15] Cincinnati Bell claims that in its relatively-small service territory in southern Ohio, Indiana and northern Kentucky, it would need to obtain over fifty franchises, and that a build-out requirement would be impossible, as its telephone company service territory does not reach throughout all of these franchise territories. Cavalier Telecom is deploying a copper loop/ADSL-2 network architecture that would support 150 video channels but which requires no additional access to rights-of-way.[16] For these firms, the franchising barrier to entry could stand as an absolute bar to offering these new and innovative services to their customers.

[14] USTelecom Comments, at 22-25.

[15] Hawaiian Telecom Comments, at 1-2; Cincinnati Bell Comments, at 2-4.

[16] Cavalier Comments, at 2-4.

The Commission has an obligation to recognize that the independent operations of thousands of individual local governments are having a dramatic impact on its national policy of free and open broadband entry and competition. When faced with a similar situation of LFAs seeking to regulate cable modem services, the Commission was quick to act and preempt, noting:

> Each local government may believe it is simply protecting the interests of its constituents. The telecommunications interests of constituents, however, are not only local. They are statewide, national and international as well…This concern is exacerbated by the potential for multiple, inconsistent obligations imposed on a community-by-community basis. Such a patchwork quilt of differing local regulations may well discourage regional or national strategies by telecommunications providers, and thus adversely affect the economics of their competitive strategies. *TCI Cablevision of Oakland County Inc*, 12 FCC Rcd 2136 ¶ 106 (1997).

NCTA virtually admits that today's environment of converged voice, video and data services is different than the environment when the 1984 Cable Act was first interpreted and implemented by the Commission. NCTA argues that admits that before interstate convergence,

> Few operators could justify incurring the costs of constructing and maintaining what were then simply one-way video facilities if they had to split the limited potential video revenues from the homes they passed with other competing operators. And therefore, few operators *sought* franchises in areas already served by another operator. But partly as a result of digital technology and the convergence of video, voice and data services, . . . more entities are now seeking to compete as landline competitors with existing cable operators in the provision of cable service. NCTA at 6.

NCTA, however, refuses to accept the consequences of that important change—with convergence tying the fate of broadband infrastructure deployment to video, an entry barrier for video amounts to an entry barrier for broadband. And as discussed below, the Commission is fully within its legal authority to take steps to remove those barriers to broadband infrastructure deployment. NCTA startlingly claims that there have been no "unreasonable delays" since 1992 and that "all evidence indicates that franchising authorities are willing and eager to authorize" new franchises.[17] Yet the record, including USTelecom's comments, is replete with examples of delays and unreasonable refusals to grant franchise applications.

Some local government advocates are equally oblivious to the link between video services and broadband deployment. While NATOA admits that significant local variations between the requirements of cable franchises occur,[18] it still claims that there is no evidence that Section 621(a)(1) has delayed entry. In so doing, NATOA simply misses two key obstacles posed by these local variations: (1) variations in the local regulation of interstate commerce necessarily make it more complicated and costly to offer a nationwide service (thereby frustrating the purposes of federal law and often leading to preemption); and (2) our national broadband policy should be decided nationally as a matter of democratic process so as to reduce the possibility that national goals might be thwarted by a handful of dissenting LFAs. Broadband deployment is a national public policy goal, with a goal of "universal, affordable" availability by 2007," established by President Bush and being advanced by the Commission. Nonetheless, NATOA asserts that local variation in the availability of broadband is somehow appropriate—asserting that "not only should such [franchising] requirements vary, the Cable Act decrees that they /must /vary."[19] The Commission should not concur.

Most of the comments in opposition to the NPRM flatly deny that this entry barrier exists. NCTA boldly asserts that "[t]here is not a single reported instance of a franchising authority refusing to grant a franchise to a telephone company applicant, and, therefore, no

[17] NCTA Comments, at 6.

[18] NATOA Comments, at 27.

[19] *Id*. (emphasis in original).

instance of a telco appealing any such denial as authorized by Section 621(a)(1)."[20] Comcast claims that the "parade of horribles is largely unfounded." Yet this argument fails to consider that LECs *have* been trying to navigate the franchising maze and have been increasingly frustrated. Verizon—a constant target of *status quo* advocates—has initiated negotiation with over 300 LFAs in a little over a year,[21] and USTelecom highlighted in its comments the problems encountered by several of its smaller members. These delays are not limited to incumbent LECs alone: the Broadband Service Providers Association also urged reform, on behalf of small new entrants like Knology, SureWest and others.[22]

Arguments designed to minimize the cumbersome nature of the franchising process are misdirected. Charter—a cable MSO roll-up—tries to compare its ability to "secure over two thousand franchise transfers with LFAs" during the period when it was acquiring existing cable operators to the start-up challenge that LECs face today.[23] Comcast makes a similar point, noting that it had been successful in securing thousands of franchise transfers during its serial acquisition of cable operators serving millions of households in the 1990s.[24] But comparing the process of transferring or renewing an existing franchise to the process for obtaining a new franchise is like comparing apples and oranges: the Communications Act (at the cable industry's behest) deliberately streamlines franchise transfer and renewal procedures. Timelines and limitations on additional LFA demands are provided for in the renewal and transfer process—

[20] NCTA Comments, at 6.

[21] Verizon Comments, at 27, Attach. A (O'Connell Decl.) ¶ 8.

[22] BSPA Comments, at 1-2.

[23] Charter Comments, at 4-5.

[24] Comcast Comments, at 17-18.

precisely the same type of relief that USTelecom and local telephone companies have requested the Commission implement for the franchise application process.

The franchising barrier has a real impact on broadband deployment plans. The FTTH Council provides several affidavits that demonstrate the delays inherent in the local franchising process.[25] A February 2004 GAO report discusses what the FTTH Council calls "what may be the ultimate horror story," an instance of a new entrant that could not obtain a franchise after 2½ years and was ultimately forced to abandon the project.[26] And while many cable and local commentators point out that Regional Bell Operating Company Ameritech obtained a number of franchises in the 1990s,[27] those commenters do not confront the fact that Ameritech's entry was largely a failure, *in part because of the franchising process.* AT&T describes the "maze" of *ultra vires* obligations that was foisted upon Ameritech's plans, including sales taxes that exceeded franchise fees and other requirements that caused Ameritech to "simply abandon[]" several communities and eventually exit the business entirely.[28]

As AT&T points out, a "single recalcitrant or out-of-step franchising authority can thwart entry not only for that community but over broader contiguous areas."[29] Entry into this industry is difficult: even NCTA asserts that "the absence of head-to-head competition" for wireline

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[25] FTTH Council Comments at 25-26 (citing and discussing Boccucci (Knology), Sarwal (Grande), and McGarty (Telmarc) declarations).

[26] FTTH Council at 27, citing *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets,* Report to the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, U.S. Senate, United States General Accounting Office, GAO-04-241 (Feb. 2004) at 21.

[27] NCTA Comments, at 5-6; NATOA Comments, at 24-26.

[28] AT&T Comments, at 24-25.

[29] *Id*., at 17.

video services is because of “the economies of the capital-intensive cable business.”[30] The Commission has the obligation to remove these barriers to broadband infrastructure deployment and to do so swiftly.

II. THE COMMISSION HAS THE AUTHORITY, INDEED THE OBLIGATION, TO ESTABLISH NATIONAL RULES FOR FRANCHISING

USTelecom and other commenters showed in opening comments that the Commission unquestionably has the full legal authority to write rules that implement and interpret Section 621(a)(1) of the Communications Act. Section 621(a)(1) is part of the Communications Act, and Section 201(b) clearly states that “[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act,” (accord 303(r), 4(i), 152(a), 706). The Supreme Court in *AT&T v. Iowa Utilities Board*,[31] endorsed a “plain meaning” interpretation of the Commission’s authority under Section 201(b). Moreover, courts have explicitly affirmed the Commission’s authority to implement the 1984 Cable Act as being part of the Communications Act, pursuant to Sections 201(b) and 303(r).[32] Indeed, the Seventh Circuit cited these provisions in ruling that “the FCC is charged by Congress with the administration of the Cable Act.”[33]

Parties that seek to retain the franchising barrier to entry choose to ignore Section 201(b) completely and instead offer strained legal interpretations that effectively (and incredibly) deny that Section 621(a)(1) is part of the Communications Act. The legal arguments raised by

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[30] NCTA Comments, at 6.

[31] 525 U.S. 366, 378 (1999)

[32] *City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 2000); *Time Warner v. Doyle*, 66 F.3d 867, 877 (7th Cir. 1995).

[33] *City of Chicago*, 199 F.3d at 428; Verizon Comments at 21-23.

Comcast, NATOA and other parties are wholly without merit. Each of these arguments will be addressed in turn.

A. Section 621(A)(1) Does Not Contemplate Only A "Judicial Remedy."

Opponents spend most of their effort arguing that the sole means of "enforcing" Section 621(a)(1) is through an appeal of a "final determination" to a federal or state court pursuant to Section 635(a).[34] This argument strains credulity because the simple fact that Congress might have provided an expedited court review process cannot, in and of itself, divest the Commission of its Section 201(b) rulemaking authority.

Indeed, the situation of *AT&T v. Iowa* is directly analogous to Section 621(a)(1). At issue in that case was whether the Commission could promulgate rules over the pricing of unbundled network elements in a context in which state governments were *explicitly* given legal authority in Section 252(b) of the Act to arbitrate and resolve "any open issue" (including a requirement to "establish rates") concerning the terms and conditions of the sale of unbundled network elements by an incumbent LEC to a competitive LEC. In *AT&T*, the Supreme Court said that the presence of a state commission arbitration authority and a federal appellate procedure pursuant to Section 252 did not divest the FCC of its general authority under Section 201(b) to write rules interpreting and construing Sections 215 and 252. Justice Scalia, writing for the Court, stated that, "[w]e think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of the Act,' . . . [parties cannot] ignore[] the fact that § 201(b) *explicitly* gives the FCC jurisdiction to make rules."

[34] Comcast Comments, at 27-28; NATOA Comments, at 5-12; Cablevision Comments, at 3-7; NCTA Comments, at 19-23.

In addition to ignoring Section 201(b), parties arguing against Commission jurisdiction also fail to understand that while Section 621(a)(1) prohibits a wide range of practices (an "unreasonabl[e] refus[al]"), the appellate process of Section 635(a) is limited only to "a final decision of the franchising authority." As many video entrants have discovered, LFAs routinely attempt to exploit this gap by awarding grants with conditions or amendments that fundamentally alter the franchise agreement, which have the same effect as would explicit denials.[35] These "conditional grants" seem to be deliberate attempts to exploit a perceived gap in Section 621(a)(1) that prohibits "unreasonabl[]e den[ials]" but which only provides for judicial review of "final determinations." In any case, the Commission is wholly within its authority to write and interpret rules that fill in any such gap—in fact, that is precisely the purpose to which administrative agencies are created.[36]

B. The Legislative History Does Not Support The View That The Commission Has No Rulemaking Authority.

Comcast argues that the legislative history of the 1984 Cable Act indicates that "local control" is "a cornerstone of the statutory scheme."[37] However, the fact remains that Congress chose to insert Section 621 into the Communications Act, over which the Commission has general authority to administer and specific authority to promulgate rules. It is not a surprise that

[35] *See*, *e.g.*, USTelecom Comments, at 22 (describing the unilateral alteration of conditions in the franchise "granted" to WH Link).

[36] "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz,* 415 U.S. 199, 231 (1974). As Justice Stevens wrote in *Chevron,* "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron USA, Inc. v. NRDC,* 467 U.S. 837 (1984)

[37] Comcast Comments, at 28.

Congress would choose to regulate cable pursuant to the 1984 Act, because prior to 1984 the Commission had taken an active role in regulating cable franchise agreements (with regard to retransmission consent, signal quality, and in limiting excessive franchise fees, in particular). The 1984 House Report states that the purpose of the Cable Act was to establish a national policy "based on uniform [] Federal standards," and by placing Section 621 in the Communications Act, Congress quite clearly charged the Commission with authority to promulgate those Federal standards.

Comcast tries to argue that the "uniform [] Federal standards" envisioned by Congress only include those written into the statute by Congress.[38] This argument utterly denies the structure of the Act and the Supreme Court's decision in *Iowa Utilities Board*. In short, we agree with Comcast's assertion that "[t]he critical question, then, is whether Congress has ever granted the Commission the authority to preempt state or local franchising laws."[39] But what Comcast fails to mention, is that the statute unquestionably grants the Commission such authority in sections 4(i), 201(b), and 303(r). As the Supreme Court explicitly held in *Iowa Utilities Board*, these provisions give the Commission rulemaking authority, and interpretative deference, over the *entire* Communications Act.

The *City of Dallas* decision does not change the fact that the FCC has authority to write preemptive rules under the Act. The court in *City of Dallas* merely ruled that for OVS systems, Congress had simply *eliminated* the requirements of franchising pursuant to Section 621 and noted its belief that residual state franchising authority remained. The decision says nothing as to whether the FCC has authority to write rules under Section 621, because that case did not

[38] Comcast Comments, at 30-31

[39] *Id.*, at 37.

involve any Commission interpretation of Section 621 of the Act. The Commission is well within its authority to write rules that apply to state and local governments that are acting pursuant to their authority under Section 621 of the Act.

C. Commission Rules Promulgated Under Section 201(B) Can Preempt Inconsistent State And Local Statutes, Rules, And Practices.

Opponents incorrectly assert that the Commission cannot preempt inconsistent state laws, rules, policies and practices without an explicit grant from Congress.[40] This is plainly incorrect and contrary to black-letter law. In fact, if the Commission is acting within its authority to write rules, it may write rules that are preemptive. A validly-implemented Commission rule would be analyzed precisely like a Congressional statute under the Supremacy Clause,[41] which permits preemption in one of four instances (intent, occupy field, direct conflict, or substantial frustration/obstacle).[42]

This preemptive effect applies to Commission interpretations of the provisions of the Cable Act. For example, the Northern District of Illinois ruled that the Commission's interpretation in the *Cable Modem Declaratory Ruling* that cable modem service was not a

[40] *See, e.g.*, Comcast at 36 (indicating that Commission can only preempt when Congress has been "unmistakably clear."); NCTA at 23 ("Congress also did not mean for the Commission to adopt such federal standards.").

[41] *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984) ("if the FCC has resolved to pre-empt an area of cable television regulation and if this determination 'represents a reasonable accommodation of conflicting policies' that are within the agency's domain . . . we must conclude that all conflicting state regulations have been precluded."); *Macmillan v. City of Rock River*, 748 F. Supp. 1241, 1246 (N.D. Ohio 1990) ("federal regulations have no less preemptive effect than federal statutes.").

[42] NCTA admits that "a basic underpinning of our federal system" is that "state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and executing of the full purposes and objectives of Congress." NCTA Comments at 26. But NCTA is wrong in stating that the Commission would not be acting within its delegated authority by promulgating rules under Section 621(a)(1).

"cable service" had preemptive effect on a franchising agreement that would have assessed a franchise fee on cable modem revenues.[43]

As discussed above, Sections 4(i), 201(b), and 303(r) provide plain statutory authority for the Commission to promulgate rules under the Communications Act, of which Title VI and Section 621(a)(1) are quite clearly part. There is no limitation of the Commission's authority in Section 621—the mere fact that Congress provided for an expedited court review of a "final determination" by an LFA does not divest the Commission of rulemaking authority as to what constitutes an "unreasonable refusal." Some parties have argued that this interpretation of Section 201(b) (and, derivatively, Sections 303(r) and 4(i)) conflicts with language in the *Lousiana PSC* decision.[44] As a preliminary matter, *Louisiana PSC* involved an interpretation of the provision in Section 2(b), 47 U.S.C. § 152(b), that allocates responsibilities over communications between the Commission and state commissions, and not the Commission's rulemaking authority over Title IV. Absent Section 2(b)'s specific limits on the Commission's authority, there would be no question that the Commission would possess general rulemaking authority over "charges, classifications practices, services, facilities, or regulations for or in connection with intrastate communications service." Moreover, the Supreme Court's decision in *AT&T v. Iowa* found that Section 2(b) (and *Louisiana PSC*) did not limit the Commission's Section 201(b) authority to write rules to carry out the "provisions of the Act"—Section 201(b), according to the Court, "explicitly gives the FCC jurisdiction to make rules."[45] In effect, according to one set of commentators, the holding of *Louisiana PSC* was limited "to require

[43] *City of Chicago v. AT&T Broadband, Inc.*, No. 02-C-7517, 2003 U.S. Dist. LEXIS 15433, at *6 (N.D. Ill. Sept. 4, 2003); Verizon Comments at 24.

[44] *Louisiana Public Service Commission v. FCC,* 476 U.S. 355 (1986); NCTA Comments at 23-26.

[45] *AT&T v. Iowa*, 525 U.S. at 380.

express and unambiguous preemption authority only in situations where the FCC has not otherwise been given explicit rulemaking authority."[46] As we discuss above, Sections 201(b), 303(r) and 4(i) do, in fact, explicitly provide Commission rulemaking authority over Title VI.

As discussed above, USTelecom and others showed how the video franchising barrier is hindering the deployment of advanced, interstate broadband voice and data networks, contrary to the strong national policy of promoting such deployment.[47] This important Federal interest provides the Commission the ability—and, indeed the obligation—to write preemptive rules that will ensure that these interstate broadband networks are deployed quickly.

III. USTELECOM'S FIVE-PART PROPOSAL WILL BEST SERVE THE PUBLIC INTEREST

USTelecom believes that the Commission could alleviate many of the problems associated with the video franchising barrier by taking five steps:

1. *Eliminate build-out requirements for entrants and rely instead on market-driven deployment plans;*
2. *Rule that it is unreasonable to refuse a franchise simply because the terms and conditions are "more favorable" than those applied to the incumbent;*
3. *Establish procedural roadmaps for franchise application review, including minimum time periods, that include an expedited process for local exchange carrier (LEC) use of facilities that are covered by pre-existing access to rights of way;*
4. *Prevent local franchise authorities from requiring in-kind services above and beyond the statutory maximum 5% franchise fee; and*
5. *Preempt inconsistent state and local statutes, regulations, rules, and practices, particularly "level playing field" laws.*

[46] Stuart Minor Benjamin, Douglas Gary Lichtman, and Howard A. Shelanski, *Telecommunications Law and Policy* (2001) at 732.

[47] *See, e.g., Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Order on Reconsideration, 19 FCC Rcd 20,293, 20,298 ¶13 & n.45 (2004) (noting Commission's priority for "giv[ing] incumbent LECs incentives to deploy advanced facilities allowing them to roll out their own triple play of services as cable competitors roll out theirs.").

In opening comments, several parties expressed support for these action items. AT&T noted that entrants need "a handful of simple, easily administered rules to guide the franchising process."[48] Parties that seek to continue to delay video competition for consumers have not raised strong arguments against USTelecom's proposals and instead offer only shallow justifications for maintaining the *status quo.*

A. The Commission Should Eliminate Build-Out Requirements For Entrants, And Rely Instead On Market-Driven Construction Schedules.

Whenever the Commission has confronted "build-out" requirements for new wireline entrants, be it in the long-distance industry and *Competitive Carrier* contexts, or in the local telephony context, it has chosen to forbear from or preempt regulation-driven construction schedules or "build-out" requirements. The economic demands on a competitive new entrant, who may be competing against an entrenched, ubiquitous incumbent, support reliance upon market forces to drive its network construction decisions. The Commission consistently has removed build-out requirements for competitors in other markets, and it should do the same for wireline video competitors to incumbent cable systems, allowing entrants the freedom to deploy broadband video as business conditions dictate.[49]

Build-out requirements are antithetical to market-based competition where consumers, acting through market processes, determine where and when firms in competitive markets deploy networks and offer services. In particular, just as the Section 201 mandate for "just and reasonable" rates is fulfilled by the operation of competitive markets, so too should the

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[48] AT&T Comments, at 2.

[49] *See, e.g.*, Qwest Comments at 25-26.

"reasonable period of time" in Section 621 be determined by market-based competition rather than regulatory prescription.

Interestingly, the comments in this docket reveal that many cable operators themselves do not face build-out requirements when competing with other wireline providers. For example, the City of West Palm Beach's franchising Ordinance requires a cable operator to build-out to areas annexed by the city, but states that "a Franchisee shall not be required to provide Cable Service to any area already served by a franchised cable operator."[50] By this logic, no competitive entrant should ever have to comply with build-out requirements; in fact, the "level playing field" that the cable industry argues for here would *remove* build-out requirements for entrants, including local telephone companies. Moreover, the fact that franchise agreements carve out overbuild situations from build-out requirements is powerful evidence that cable operators and LFAs actually do understand that build-out requirements are illogical when applied to competitive entrants, contrary to their protests in this docket.

The incumbent cable industry and several local government advocates devote a considerable portion of their arguments to the assertion that a "build-out" rule promotes the public interest because video service is something of a "universal service" program.[51] This argument has been squarely rejected by the D.C. Circuit, which ruled that Title VI is not a universal service program.[52] Moreover, despite claims that revenues in low-cost neighborhoods "subsidize other neighborhoods,"[53] the incumbent cable industry has presented absolutely *no*

[50] City of West Palm Beach Comments at 15 (attaching City of West Palm Beach Cable Television Ordinance, Section 78-294(b) (West Palm Beach, Fla.)).

[51] NCTA Comments, Attachment A (Baumann).

[52] "The statute on its face prohibits discrimination based on income; it manifestly does not require universal service." *ACLU*, 823 F.2d 1580 (D.C. Cir. 1987).

[53] NCTA Comments, Baumann Attachment.

evidence that they actually *lose* money in "high-cost" neighborhoods. In fact, the "universal service" argument advanced by NCTA and Cablevision, among others, deserves no consideration without proof that it would be impossible to profitably serve high-cost/low-value neighborhoods absent subsidies from low-cost/high-value neighborhoods (that would be threatened by competition). We doubt they could make that showing. In particular, if the incumbent cable industry is indeed as "competitive" as NCTA and others claim all such cross-subsidies would have been impossible to maintain in the face of DBS competition.[54]

Opponents of reform oftentimes equate a "build-out" requirement to an "anti-redlining" measure,[55] but this is incorrect. The anti-redlining provision of Section 621(a)(3) imposes a requirement on *LFAs* rather than cable systems, and it does not impose any build-out requirements. The D.C. Circuit drew this distinction in 1997, stating that Section 621(a)(4) "does not … require" cable operators to serve every home "throughout the franchise area."[56] In fact, Section 621(a)(3) plainly is *not* violated by the absence of a build-out requirement[57] so, logically, that section cannot impose such a build-out requirement.

It is also factually inappropriate to equate a "build-out" to reasonable "anti-redlining" measures. Section 621(a)(3) is directed at ensuring that a cable operator does not refuse to provide service to consumers on the basis of income. But a number of studies have shown that

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[54] As Joseph Farrell, wrote while at the Commission, "cross-subsidy is the enemy of competition because competition is the enemy of cross-subsidy."

[55] *See, e.g.,* Comcast Comments, at 25.

[56] *Americable International, Inc. v. Dep't of the Navy,* 129 F.3d 1271, 1274-75 (D.C. Cir. 1997).

[57] *Id.*; *Southeast Florida Cable v. Martin County*, Case No. 94-14209-CIV-PAINE, 1995 U.S. Dist LEXIS 22413 (S.D. Fl. Oct. 24, 1995).

multichannel video service consumption is not heavily influenced by family income at all.[58] There is, quite simply, little economic incentive for a new video entrant to "redline" on the basis of household income *precisely* because video consumption does not vary substantially by income.

Build-out requirements are also implemented on a scatter-shot basis that directly undermines the Federal interest in broadband deployment. The Michigan Coalition documents how build-out requirements in Michigan range from a density of 6 homes per mile in small Michigan communities to 20 homes per mile in the city of Grand Rapids.[59] As described above, these kinds of variations complicate and increase the cost of a nationwide broadband service offering. Moreover, they illustrate how our national broadband policy will be applied unequally and inconsistently across the nation if left to the (admittedly well-intentioned) LFAs. It is difficult to comprehend, therefore, how such a lack of uniformity advances the Commission's goal of promoting broadband deployment.

Build-out requirements also make little sense based on particular technologies that a new entrant might be utilizing. Cavalier describes how it is planning on delivering access to 150 channels of video services over copper-wire, ADSL-2 loops, and Cincinnati Bell has similar plans.[60] But this service will, by definition, be limited by the length of the copper loop: for

[58] R. Kieschnick and B. D. McCullough, *Why Do People Not Subscribe to Cable Television: A Review of the Evidence*, presented at the Telecommunications Policy Research Conference (1998), available at http://www.tprc.org/abstracts98/kieschnick.pdf (summarizing research); G. S. Ford, T. M. Koutsky and L. J. Spiwak, *The Impact of Video Service Regulation on the Construction of Broadband Networks to Low-Income Households*, Phoenix Center Public Policy Paper No. 23 (September 2005), available at http://www.phoenix-center.org/pcpp/PCPP23Final.pdf.

[59] MI Coalition Comments, at 13.

[60] Cavalier Comments, at 4-5; Cincinnati Bell Comments, at 10-11.

firms like Cavalier and Cincinnati Bell, a universal service requirement effectively tells it that it cannot provide service at all.

Abraham Maslow is reported to have said, "If the only tool you have is a hammer, you tend to see every problem as a nail." Local franchising authorities appear to believe that the only tool they have is the hammer of a build-out requirement, and they view the simple application of build-out rules as addressing red-lining and social equity concerns that they might have with regard to the development of competition. But simply because it is a "simple" tool[61] does not make it an appropriate or even correct one. The Commission has removed build-out requirements wherever it has faced them in wireline communications services; it needs to act swiftly to remove this barrier.

B. The Commission Should Rule That It Is Unreasonable To Refuse A Franchise Simply Because The Terms And Conditions Are "More Favorable" Than Those Applied To The Incumbent.

Section 621(a)(1) states that a local franchise authority (LFA) shall not "unreasonably refuse to award a competitive franchise." Given that entrants do not pose the kinds of risks to consumers that LFAs feared with cable incumbents, it is not reasonable to burden entrants with the same restrictions imposed on incumbents, as the Commission has repeatedly concluded. In fact, it is *unreasonable* to refuse to award competitive franchises unless competitors meet substantially the same terms and conditions imposed on incumbents. The Commission should end this practice.

Incumbent cable operators and cities argue that it is appropriate to require new entrants to meet the same comprehensive obligations that incumbent cable providers have committed to

[61] *See* Liebowitz Associates Comments, at 14 (build-out rules are "simple, objective" and "easily administered").

fulfill. NCTA asserts that "imposing franchising requirements that are similar to those imposed on existing cable operators promotes rather than thwarts competition."[62] Comcast even argues that "the approval of cable franchises today is a relatively simple and straightforward process" so long as the applicant agrees to the same terms the incumbent has already committed to meet.[63] NATOA states that "[t]he touchstone for a particular LFA's current local cable-related needs and interests is its franchise with the incumbent cable operator . . . [A]n LFA will look to the current incumbent's franchise as a measuring stick for the new entrant's franchise."[64] A witness for NATOA even testified that if a new entrant "would simply work from the community's existing franchises . . . they'd find it much faster and easier to obtain a franchise agreement."[65]

This argument, however, ignores the steep economic challenges that new entrants face in an industry characterized by large fixed and sunk costs. Entrants view costs associated with fulfilling and implementing a franchise agreement much differently than will an incumbent firm because they face markedly different economic conditions.[66] For the first wireline cable entrant, the costs and obligations of a franchise agreement (such as I-NET or PEG) will be viewed as *sunk*, essentially a "cost of entering the market" that once incurred will have little impact on that firm's behavior. An entrant has no choice but to treat those "entry fees" differently—with no

[62] NCTA Comments, at 12.

[63] Comcast Comments, at 13.

[64] NATOA Comments, at 29-30.

[65] The Hon. Kenneth Fellman, on behalf of NATOA *et al.*, Testimony before the House Energy and Commerce Committee and Subcommittee on Telecommunications at the Internet, 15 (Apr. 27, 2005). Another witness stated that "when a new provider comes in and seeks a competitive cable franchise, there is not much to negotiate about. If the new competitor is seriously committed to providing as high a quality of service as the incumbent, the franchise negotiations will be neither complicated nor unreasonably time consuming." The Hon. Marilyn Praisner, on behalf of NATOA *et al.*, Testimony before the House Energy and Commerce Committee, 2 n.4 (Nov. 9, 2005).

[66] *See, e.g.*¸ Phoenix Center Policy Paper 21.

market share, those costs will be viewed as incremental to entry and will have a commensurately disproportionate impact on the decision whether to enter.[67]

For this reason, the Commission has *frequently* treated entrants differently than incumbents. Competitive local telephone entrants (like the cable companies) have not been saddled with the same universal service, carrier-of-last-resort, and tariffing obligations as have incumbent LECs.[68] It must be noted that the cable industry itself has benefited substantially from this approach: it can roll out voice and VoIP services to any class of customers of its choosing, without tariff requirements and without universal service obligations. The Commission should follow through by removing legacy regulations for video entrants, which will promote fundamental fairness and competitive neutrality in broadband markets

Ironically, while the cable industry likes to boast about the competitive success of DBS operators DirecTV and Dish Network,[69] it is important to note that those two non-incumbent cable MVPD providers *are exempt* from the local franchising process and the payment of franchise fees. Success stories of wireline cable entrants, which have run squarely into the franchising barrier are, unfortunately much more rare.[70] The Commission must consider the role the local franchising barriers play in dictating the relative success of DBS operators compared to local cable overbuilders.

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[67] *See, e.g.*, Phoenix Center Policy Paper 22; Hazlett & Ford, 3 Business & Politics 24.

[68] *Texas Preemption Order*, 13 FCC Rcd 3460 ¶ 13 (1997); *Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, CCB/CPD No. 96-3, Memorandum Opinion & Order, 12 FCC Rcd 8596, 8608-8611, ¶¶ 23-29 (1997).

[69] *See, e.g.*, Comcast Comments at 5 (noting that "DIRECTV and Dish Network offer MVPD service in every Comcast market").

[70] And, this rarity imposes considerable costs on consumers. As USTelecom and others pointed out in opening comments, in markets with direct wireline competition, prices are approximately 15% lower than in market where the only choice is cable or DBS service.

A hallmark of the Commission's competition policy over the last twenty years has been to recognize that new entrants and entrenched incumbents *should* be treated differently. Entry into an industry like the integrated wireline voice, video and broadband services market is costly and difficult, and it is more costly and more difficult for a firm with zero market share that must compete against an incumbent with a completed network and dominant market share. The Fiber-to-the-Home Council affirms this view, noting that policies in which an LFA treats an entrant the same as an incumbent "is actually a death knell for competition because the second and any later cable operator faces a far more risky capital investment than did the incumbent cable operators one or two decades ago."[71] Treating the existing incumbent cable franchise as the "starting point" for negotiations with a new entrant is, therefore, inherently unreasonable because it fails to take into account the different economic positions that the entrant faces *vis-a-vis* the incumbent. As a result, the Commission should determine that LFA policies that grant preference to applicants that parrot the incumbent cable franchise agreement or which deny franchise applications on the basis that they contain "more favorable" terms than the existing incumbent agreement are also "unreasonable" under Section 621(a)(1), because such policies manifestly miscomprehend the different position of entrenched incumbents and new entrants.

C. The Commission Should Establish Minimum Time Periods And Procedural Limits On Franchise Application Review, And Require Franchise Approval As A Matter Of Course For LECs With Pre-Existing Access To Rights Of Way.

Competitors subject to Commission jurisdiction typically do not have to go through the same burdensome licensing procedures that were applied to incumbents. For example, competitive LECs (CLECs) file "blanket" authorizations rather than endure the time and expense

[71] FTTH Council Comments, at 29.

of the traditional Section 214 applications process, and they obtain state-wide licenses with a minimum of time and effort. The Commission should follow these precedents and similarly minimize the time and expense involved in obtaining a competitive cable franchise by making approval a matter of course in the usual case, with short time periods for LFA review. This is particularly true for LEC entrants, as they typically have authorization to use public rights of way *before* applying for a cable franchise, thereby removing the primary justification for cable franchise regulation.

The record supports procedural time limits on LFA review. A number of commenters support USTelecom's approach and support timelines for LFA review. Verizon supports "reasonable time limits" on the process,[72] as does Hawaiian Telecom.[73] No party seriously opposes procedural reform beyond their (unfounded) belief that the Commission has no authority to promulgate such procedural reforms. Even Comcast supports "specific time limits on LFA consideration of franchise applications for new entrants."[74] The Michigan Coalition of Cities admits that some delays are unreasonable but flatly objects to any Commission rules curing the problem. NATOA argues that Congress chose to enact specific timelines in the franchise renewal and court review process, and that this somehow means that the Commission has no authority to promulgate similar timelines for Section 621(a)(1).[75] But that argument, of course, ignores the Commission's explicit statutory authority to administer the Cable Act pursuant to its Section 4(i), 201(b), and 303(r) authority. NATOA's strident opposition to any oversight

[72] Verizon Comments, at 35-38.

[73] Hawaiian Telecom Comments, at 7-8.

[74] Comcast Comments, at 41-42.

[75] NATOA Comments, at 35.

includes an unwarranted assumption that the Commission will write an unreasonable time limit, noting that "it will be impossible for the LFA to act within the prescribed FCC guidelines."[76]

A number of commenters express concern that procedural rules, including a time line, will create a more-hostile LFA-applicant negotiating environment. These commenters reason that a deadline might actually result in more denials of applications by LFAs, as those LFAs may simply run out of time to review an application.[77] USTelecom understands this concern and it is, of course, not our desire to see more denials of franchise applications directed at our members. But on the other hand, the current system, with no effective timeline, encourages LFAs to sit on applications indefinitely or issue "grants with conditions", and those conditions might materially change the terms of the franchise. Such activity could be construed effectively as attempts by the LFA to evade court review, as a court only has jurisdiction to review a "final determination". Indefinite delays or ambiguous "non-denials" contribute to the interminable delay and frustration of entry plans of USTelecom members. Any timeline, naturally, must contemplate a balance of interests among the negotiating parties; but the current absence of any timeline puts all the negotiating power in the hands of the LFAs and the incumbent cable industry, which can use the threat of litigation under a level-playing-field statute to force the LFAs to delay consideration. Every day of delay costs consumers money,[78] and procedural limitations can play an important role in minimizing that period of delay.

Expedited Approvals for Parties Already with Rights-of-Way Access is Appropriate. Entrants that *already* have legal rights to use rights of way (like incumbent LECs and competitive entrants like Cavalier) for one service should not have to go through an arduous

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[76] *Id.*, at 35.

[77] *Id.*, at 37.

[78] Phoenix Center Policy Bulletin 13.

process to be able to use those same rights-of-way for a different purpose. Opponents of reform provide no valid policy justification for imposing substantial delays on firms that have already demonstrated their ability and competence with regard to rights-of-way and which might already be paying significant sums for those rights. Even NATOA admits that "[i]n the case of a local ILEC applicant, for instance, inquiry into the applicant's financial, technical and legal qualifications can usually be dispensed with."[79] In other words, it would be "unreasonable" for a city to require such a showing from a LEC applicant, and USTelecom requests that the Commission write such a rule.

The Michigan Coalition makes the legal point that "a right to use someone's property *for defined purposes* . . . cannot bootstrap that right into an expanded right to use someone else's property for *all* purposes."[80] However, the Michigan Coalition assumes that the purpose to which new entrants seek to use their existing rights-of-way will be entirely different than the current purpose. This is not an example of a LEC that wants to use its existing access to rights-of-way to build a new bike path; instead of stringing wires to support only voice and data services, the LEC now wants to string wires to support voice, data and video services. In an environment in which all data communications is digital, the distinction between a "voice and data communications network" and a "voice, data and video communications network" is one of semantics.

This is a very real and important policy issue. Indeed, firms like LECs that already depend on public rights of way to operate and manage their existing voice and data networks are particularly vulnerable to municipal gamesmanship. Cities and towns have monopolies over the

[79] NATOA Comments, at 38.

[80] MI Coalition Comments, at 18.

public rights of way and are leveraging this monopoly to advance their own policy agenda. For example, as of this writing, Walnut Creek, California has chosen to encumber AT&T's current rights-of-way permits with a demand that AT&T concede that its IPTV service is a "cable service" and with a requirement that AT&T file for a franchise. This action is hampering the availability of interstate broadband services to the citizens of Walnut Creek *today* and is but one example of the power municipalities can lord over new entrants.

Some cities have shown a "parade of horribles" that include instances where wires had been constructed inappropriately or in violation of some building code.[81] But opponents of reform provide no example showing that they have *less* control over incumbent LEC permitees than incumbent cable permitees. Under USTelecom's proposal, state and local governments would retain their Police Power to investigate and remedy health and building code violations. There is simply no evidence which shows that current LEC rights-of-way agreements are somehow insufficient in this regard and that cable franchises are somehow far superior.

D. The Commission Should Prevent Local Franchise Authorities From Requiring In-Kind Services Above And Beyond The Statutory Maximum 5% Franchise Fee.

The Commission should also take this opportunity to address another significant problem facing cable system competitors, namely local franchise authority (LFA) demands for payments or discounted services and equipment over and above franchise fees. These demands amount to taxation; they deter entry and competition; and they are prohibited by the Communications Act. The Commission should, therefore, put an end to this behavior by adopting a clear rule that all forms of consideration required by LFAs count against the franchise fee cap unless they are specifically authorized in the Act.

[81] *See, e.g.*, Liebowitz Associates Comments, at 4-5; MI Coalition Comments.

Section 622(g) defines a "franchise fee" as "any tax, fee, or assessment *of any kind* imposed by a franchising authority or other governmental entity on a cable operator." The Commission has authority to promulgate rules that interpret the definition of "franchise fee". A rule defining "franchise fee" would not "regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section." Section 622(i).[82]

The record is rife with examples of "in-kind" and additional payment requests that LFAs have tried to impose on new entrants. NATOA admits that "PEG, I-Net, franchise fee, build-out, and customer services are, in an economic sense, a form of compensation for use of the rights of way."[83] The Michigan Coalition—a defender of LFAs in this proceeding—provided a list of a number of in-kind contributions that USTelecom believes should be considered part of the 5% franchise fee cap:

- Hudsonville, Michigan requires "help with Christmas decorations and banners"
- Grove Land Township requires "scholarship grants to 2 children per year"
- Detroit requires "$3000 toward the purchase of GED workbooks"
- Livonia, Michigan's franchise agreement includes "bike helmet giveaways" and "giving $30,000 for the Christmas Lighting Ceremony, donating to a verteran's memorial, sponsoring a high school all night party."[84]

[82] Indeed, the fact that Congress chose to limit the Commission's authority under Section 622 in this way is evidence that the Commission has general rulemaking authority under Title VI of the Act. Congress would not have needed to limit the Commission's rulemaking authority as it did in Section 622(i) unless the Commission had general rulemaking authority.

[83] NATOA Comments, at 38.

[84] Michigan Coalition Appendix A.

The FTTH Council lists a number of more-burdensome requirements, such as $200,000 from cable overbuilder Grande to Corpus Christi to support PEG channels, and $100,000 sought by the small town of Sudbury, MA from Verizon in excess of the franchise fee. Sometimes these extra fees are passed off as a form of "application fee." For example, Verizon explained to the Commission in its comments on the 2005 NOI that it had to pay a $50,000 "application fee," followed by a $250,000 "acceptance fee."[85] This process is similar to a university charging new students a $15,000 "acceptance fee" while later boasting that it has frozen its tuition.

USTelecom does not mean to denigrate the uses to which towns and cities wish to use these funds. But the Commission has the authority to speak bluntly: these additional assessments are significant and amount to a form of taxation imposed on cable providers for the provision of cable services and, ultimately, on consumers. As such, they are subject to the 5% franchise fee cap.

E. The Commission Should Preempt Inconsistent State And Local Statutes, Regulations, Rules, And Practices, Particularly "Level Playing Field" Laws.

As discussed above, the Commission should ensure that its decisions are given full effect by preempting inconsistent state and local action. In particular, the Commission should preempt so-called level playing field statutes, which generally require LFAs to grant franchises to competitors on terms comparable to those imposed on the incumbent cable operators. By contrast, the Commission and the states have never required cable companies and CLECs to match all of the obligations imposed on the incumbent LECs (ILECs), so as to eliminate barriers to entry. In fact, state level playing field laws are facially inconsistent with the Communications Act because they intrinsically limit the ability of LFAs to award franchises, substituting state

[85] Verizon 2005 NOI Comments, at 12.

judgments about video markets for those established in the Communications Act (including the possibility that it may be reasonable to offer more favorable franchise terms to competitors). Moreover, level playing field statutes may also violate the First Amendment. Such state usurpation of federal authority and Constitutional guarantees cannot be sustained.

We have discussed several times throughout these Replies that arguments against preemption are unfounded. In particular, level-playing-field statutes, discussed in Section III.B above, "affirmatively discourage competitive entry by making it even more difficult to negotiate."[86] The principal argument against preemption centers on the unfounded belief that the Commission may only preempt where Congress has given "express" authority and that federal policy is "not in conflict" with a level-playing-field law.[87] But the Commission does have the authority to write prescriptive rules under the Cable Act.

Comcast tries to argue that "[n]ot once has Congress so much as hinted that the Commission has preemptive power in this area."[88] However, Section 636 specifically preempts State and local laws that are contrary to the Act,[89] and the Commission has the authority to interpret the Act, such as the definition of "unreasonable" in Section 621(a)(1). Thus, the Commission's interpretations have the force of federal law and preemptive effect.[90] Moreover, as USTelecom discussed in its opening comments, preemption is also appropriate if a state or

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[86] AT&T Comments, at 30.

[87] Comcast Comments, at 38-39.

[88] *Id.*, at 37.

[89] 47 U.S.C. § 556 ("any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded.").

[90] *Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216 (1st Cir. 2005) (preemptive effect of section 636(c) is "unmistakable"); *City of Chicago v. AT&T Broadband, Inc.*, 2003 U.S. Dist. LEXIS 15453.

local law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[91] As the United States Court of Appeals for the Tenth Circuit pointed out in *SCC of Kansas v. FCC,* "[w]henever state regulation would frustrate achievement of a federal regulatory objective, FCC jurisdiction is paramount and conflicting state enactments must yield."[92]

We and other parties have described the critical Federal purpose and goal that is being frustrated by the video franchising barrier to entry: the deployment and construction of new, advanced broadband networks. Section 706 of the Act is a clear articulation by Congress that the Commission must seek out and "eliminate" all barriers to broadband infrastructure deployment, and video franchising is perhaps the most critical such barrier in existence today. The Commission regulated and preempted portions of the franchising process even before the 1984 Act to effectuate a similar Federal purpose—the proliferation and availability of broadcast television, and the result was a host of federal rules governing signal quality, franchise fees, and retransmission consent.[93] Broadband is currently one of the Commission's top priority, and the Commission has a long record of promoting open-entry policies for this service. To meet this important Federal interest, video barriers to entry must be removed quickly.

IV. THE NATION'S BROADBAND FUTURE SHOULD NOT BE HELD HOSTAGE TO CABLE-LFA LITIGATION

The reader without any background in the cable industry would be led to believe by many of the commenting parties that the cable company-LFA relationship has a genial, almost

[91] USTelecom Comments, at 54-57, *citing and discussing City of New York v. FCC,* 486 U.S. 57 (1988).

[92] *SCC of Kansas v. FCC* , 787 F.2d 1421, 1426 (10th Cir. 1986).

[93] *See Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 700 (1984).

Mayberry-like quality. NATOA argues that "LFAs have embraced the policy" of competition, and Liebowitz notes that "[m]ost if not all Cities and Counties have a rapport with the cable operator to ensure that issues are resolved informally and quickly, without resorting to enforcement proceedings. Typically, Commissioners and City staff know their cable representative on a first name basis."[94]

But, if one digs beneath the surface, he or she will find that the reality is far different. Incumbent cable operators have gotten to where they are today by dragging cities and LFAs to court continuously. During the "network construction" phase of the 1970s and 1980s (the situation that new entrants find themselves in today), it was common in the industry to refer to the "franchise wars," in which "[c]able companies battled head-to-head before city councils and aldermen, spending millions on lawyers, studies, and elaborate presentations to win them over."[95] Once incumbent cable networks were built, the cable industry lobbied for "level-playing-field" laws that increase the cost of entry and threaten lawsuits against LFAs that choose to award second competitive franchises on more-favorable terms. As one set of LFA commentators states: "One of the major impediments to the grant of competitive franchises is the threat of being sued by the incumbent or the subsequent Grantee under the Level Playing Field Statute."[96]

There are many examples of cable litigation slowing or preventing competitive entry. For example, Comcast recently threatened to withdraw its support for a public access studio facility in Howard County, Maryland rather than share the obligation with Verizon. Comcast

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[94] Liebowitz Associates Comments, at 2.

[95] Mark Robichaux, *Cable Cowboy: John Malone and the Rise of the Modern Cable Business* (2002) at 64-66.

[96] Liebowitz Associates Comments, at 5.

took this action despite the fact that support for the facility was required by Comcast's franchise agreement. In negotiations with Verizon:

> "[t]he County policy makers decided they did not need another studio facility. Verizon agreed to provide the same level of annual financial support as the incumbent based upon a per subscriber per month formula. The County determined this was reasonable. As a result, Comcast insists that it does not have to provide the studio facilities, because the exact same obligations are not imposed upon Verizon. An LFA should have the right to determine what is in the community's best interest without being held hostage by an incumbent that insists that any competitive agreement needs to be identical to constitute a level playing field."[97]

Level-playing field statutes typically give cable operators a private right of action, which affords them a particularly useful litigation vehicle by which they can delay, and even prevent, competitive entry. One example is *Cable TV Fund v. City of Naperville and Ameritech New Media, Inc.*,[98] where the incumbent sued the city claiming that the statute had been violated. Cable operators also sued over the Florida level playing field law. Miami-Dade County attempted to eliminate its build-out requirement after passage of the 1996 Act but it was sued by seven incumbent cable operators in federal and state court. The county eventually won.[99] It is particularly noteworthy that, for a time, there were competing cable operators with different service territories but no build-out requirements.

Well after the Communications Act was amended to eliminate exclusive franchises, TCI nonetheless brought a legal action to delay the grant of a competitive franchise to Fibervision in Connecticut, arguing that the grant would adversely impact TCI's business operations.[100] The

[97] Comments of the Greater Metro Telecommunications Consortium, *et al.* at 14.

[98] 1997 WL 280692 (N.D. Ill. 1997)

[99] Comments Submitted by Certain Florida Municipalities at 4-5.

[100] *United Cable Television Service Corp., v. Connecticut Department of Public Utility Control*, 1994 WESTLAW 495402 (Conn. Super. 1994), *aff'd* 235 Conn. 334 (1995).

court found, thought that, TCI "presented no testimony, affidavits, or other evidence" and could not refer "the court to any particular document or testimony within the portion of the administrative record placed under seal" that provided support for business harm.[101] The court stated that while TCI was challenging the FiberVision grant under the level-playing-field law, "TCI conceded that the terms and conditions of the certificate [it now holds] are not contained in the record."[102] Startlingly, "[w]hen invited by this court to produce any evidence to support its claim that the terms imposed on Fibervision were more favorable, TCI, through counsel, declined to supplement the record with the documents which would have allowed this court to make the comparison."[103] The court dismissed TCI's challenge.

The Commission can only realize its objectives of full-fledged broadband competition, and truly efficient market performance for video consumers by ending this cable system practice of defending market power and delaying entry through the trench warfare of endless litigation. USTelecom is not suggesting that the Commission deprive cable systems of their Constitutional rights, of course. Rather, the Commission should promptly issue an order in this proceeding clearly and fully adopting each and every part of USTelecom's franchise reform proposal. By taking these steps, the Commission will establish beyond question entrants' rights to enter and compete in broadband and video markets without having to overcome regulatory barriers to entry. This will, in turn, reduce the opportunities for cable industry litigation over the terms of competitive franchise approvals that would otherwise increase the cost of entry and substantially delay the timing of such entry.

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[101] *Id.* at *3.

[102] *Id.* at *7.

[103] *Id.*

It was one thing when the "franchise wars" involved only the distribution of the spoils of a particular local television market. It is quite another thing when the cable industry's "scorched earth" policies now impact the deployment of integrated and interstate voice, video and data networks. The Commission cannot stand by idly and let the cable industry's trial lawyers dictate the pace and scale of broadband deployment in this country.

V. CONCLUSION

As explained in USTelecom's Comments, and reinforced in these Reply Comments, the Commission should take and, indeed, must take action consistent with Section 706 of the Telecommunications Act of 1996, to implement Section 621 in such a way as to remove barriers to entry for broadband entrants who plan to bring much needed video choice to consumers and, thereby, accelerate and expand their broadband deployments. In particular, the Commission should: (1) Eliminate build-out requirements for entrants, relying instead on market competition; (2) Rule that it is unreasonable to refuse a franchise simply because the terms and conditions are "more favorable" than those applied to the incumbent; (3) Establish minimum time periods and procedural limits on franchise application review and require franchise approval as a matter of course for LEC use of facilities that are covered by pre-existing access to rights of way; (4) Prevent local franchise authorities from requiring in-kind services above and beyond the statutory maximum 5% franchise fee; and (5) Preempt inconsistent state and local action, particularly so-called level playing field statutes.

Respectfully submitted,

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