KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP

WASHINGTON HARBOUR, SUITE 400
3050 K STREET, NW
WASHINGTON, D.C. 20007-5108

(202) 342-8400

NEW YORK, NY
TYSONS CORNER, VA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES
JAKARTA, INDONESIA
MUMBAI, INDIA

FACSIMILE
(202) 342-8451
www.kelleydrye.com

DIRECT LINE: (202) 342-8518
EMAIL: tcohen@kelleydrye.com

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VIA ECFS

Rosemary Harold
Deputy Chief, Media Bureau
Andrew Long
Associate Chief, Media Bureau
Mary Beth Murphy
Chief, Policy Division, Media Bureau
John Norton
Deputy Chief, Policy Division, Media Burea
Natalie Roisman
Attorney, Policy Division, Media Bureau
Brendan Murray
Attorney, Policy Division, Media Bureau
Holly Saurer
Attorney, Policy Division, Media Bureau
Michael Lance
Deputy Chief, Engineering Division
445 12th Street SW
Washington, DC 20554

Re: Ex Parte Letter – MB Docket 05-311

Dear Media Bureau Staff:

On April 27, 2005, the Fiber-to-the-Home (FTTH) Council met with you to discuss its comments in MB Docket 05-311, the Section 621 Video Franchising proceeding. At that time, you raised a number of questions and asked that the FTTH Council answer those in writing.

1. Model Cable Franchising Agreement

As indicated at the meeting, the FTTH Council believes that the Commission has sufficient legal authority to adopt rules interpreting the requirement in section 621(a)(1) that a franchising authority "may not unreasonably refuse to award an additional competitive franchise." In its comments filed on February 13, 2006, the FTTH Council provided documented evidence of a series of barriers in the franchising process and urged the Commission to adopt new rules:

- Establishing a time limit for franchise application review (optimally 30 days);
- Preempting "Level Playing Field" statutes and provisions;
- Permitting the new video service provider to designate the area in which it will offer video service, defining as "unreasonable" the imposition of any build-out requirements (1) outside of that area or (2) within that area for the first five years of service for new entrants in markets where cable service is already provided, and then permitting such requirements within that area but only if they are economically feasible[1] and necessary to remedy a proven occurrence of redlining (see section 4 of this letter);
- Limiting public, educational, and government (PEG) channel requirements to the carriage of at most the same number of channels as the incumbent[2] and to the payment of a pro rata share for ongoing PEG capital costs for facilities based on the number of subscribers;
- Limiting I-Nets requirements to the provision of the same capacity as the incumbent at actual cost but only in the case of existing I-Nets and only if the provider's facilities have capacity;[3]
- Strictly limiting any other requirements so that they are directly linked to the provisions in the statute;

1 Economic feasibility shall include the success of the new entrant in acquiring customers on the service it offers pursuant to the franchise agreement. A decision by a VSP that deployment is not economically feasible shall be presumed valid, and the burden is on the LFA to provide clear evidence demonstrating otherwise.

2 This obligation is premised on the technical feasibility of the new entrant being able to interconnect with the incumbent cable provider and access the PEG channels.

3 The new entrant shall not be required to build new facilities to meet this requirement.

- Requiring franchise fees to be reasonable and related to purposes permitted under the Act and all payments (except items excluded under section 622(g)) to be subject to the twin constraints of reasonableness and the overall 5% ceiling.

The FTTH Council believes that to achieve the crucial objectives of expediting entry of advanced broadband networks and bringing the benefits of competition to consumers, an essential component is the adoption of a Model Franchise Agreement (MFA) as part of the Commission's rules. Such an agreement would seek to minimize the franchise specific terms, make those as factual as possible, and identify the responsibilities of each party to complete those terms. As such, it would provide certainty by limiting the potential areas of dispute. It is critical that such an agreement be definitive and not permit the addition of other provisions by either party, unless mutually agreed to by the parties. If an open-ended amendment process were to be permitted, the Commission would almost certainly find itself in the administratively difficult position of reviewing thousands of proposed franchise provisions. This would be contrary to the objective of expediting deployment of advanced broadband networks and bringing the benefits of competitive prices and services to consumers.

The FTTH Council proposes that the following serve as the basis for the MFA:

MODEL FRANCHISING AGREEMENT COMPONENTS

To be completed by Applicant:[4]

1. Name of Video Service Provider (VSP)
2. Names of Officers and Directors of VSP
3. Business Address of VSP
4. Name of VSP Contact
5. Description of Designated Video Service Area, which may be entire area within the jurisdiction of the Local Franchising Authority (LFA) or any part of that area as determined by the VSP. If part of the LFA's area of jurisdiction, the VSP can file amendments to the agreement setting forth new areas to be served.
6. Requested term of the Agreement (subject to LFA approval or modification).

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4 Clock for calculating the time periods in which LFA must act should start on the day the LFA receives the Application with items 1-6 complete.

To be completed by Local Franchising Authority:

1. Term of Agreement (not less than 15 years)
2. PEG Programming Channels to be Provided (not to exceed other franchisees)
3. Franchise Fee (5% maximum, consistent with "reasonableness" standard, and inclusive of amounts for PEG facilities and other items requested by LFA)
4. For the video service area selected by the Applicant, the LFA may not provide build-out requirements outside of that area or for the first five years of the franchise term, and, after that, it may impose such a requirement within the designated area so long as it does not apply to any network deployment deemed economically infeasible by the VSP and only following a finding that such requirements are necessary to remedy a proven occurrence of redlining in the VSP's video serving area.
5. Description of applicable ROW requirements – which must reflect an ordinance of general applicability to all users of ROW and must be reasonable, non-discriminatory, competitively neutral, and consistent with State statutory police powers. These requirements may include permitting (direct costs of ROW management only), payment of bonds, security funds, letters of credit, insurance, indemnification, penalties and liquidated damages. Also, it shall include time limits for permitting (which may not exceed 30 days from the date of filing).
6. Name of LFA Contact

2. Economic Feasibility Limitation on Build-Out: Walton County Example

As discussed in the Declaration of Felix Boccucci of Knology attached to the FTTH Council comments, Knology, for example, has found build-out requirements in proposed franchise agreements to be so onerous that it has refused to enter many territories. Recently, as discussed in our meeting, however, Knology encountered an enlightened local franchising authority that understood the economics of build-out by new entrants. The LFA's treatment of build-out requirements resulted in accelerated deployment of advanced broadband plant.

In Walton County, FL, Knology entered into a franchise agreement commencing on August 9, 2005. This agreement's build-out provision obligates Knology to extend its lines to serve all applicants for service in those areas where there are densities of at least thirty dwelling units per cable mile, *but* it contains a critical exception that effectively permits Knology to determine when and where to deploy plant:

> "The installation of extension [of Knology's lines] required hereunder will be at the expense of the GRANTEE except where such extension would

> require...*unreasonable or uneconomical expenses* by the GRANTEE, considering the potential service revenue to be derived there from (emphasis added)."

Because of this provision, Knology builds only where it deems the economics of construction and operation are sufficiently favorable.[5] As a result, it immediately embarked on a major construction project to deploy FTTH infrastructure through large parts of Walton County, bringing competitive cable services to a large number of residents who would have otherwise not have received these benefits.

3. <u>Relative Competitive Benefits of DBS and Overbuilders: A Market Share Comparison</u>

At the meeting with you, the FTTH Council emphasized that competitive wireline networks tend to provide greater competitive benefits to customers than DBS systems because they can offer the complete triple-play of services – voice, data, and multichannel video. This conclusion is supported by the General Accounting Office's reports finding that wireline competition results in greater price competition.[6] This conclusion also is supported by examining empirical evidence of the market shares in areas where all providers – incumbent, wireline competitor, and DBS – are offering service. Knology has these data in many areas where it operates. These data show that, in areas where there is a wireline competitor, the overall share (as a percentage of households) held by DBS is less than 7% – as opposed to the national DBS share of approximately 20% of all households. Thus, consumers are "voting with their feet," favoring wireline competitors, and demonstrating the substantial value of triple-play competition.

4. <u>Build-Out and Reporting Requirements</u>

In discussing the issue of build-out, the Bureau staff inquired if there were ways other than the imposition of a detailed build-out (as are often found in current franchise agreements) to ensure network deployment does not favor any particular income group. First of all, it is important to understand that the build-out issue and the red-lining issue are not synonymous. As Felix Boccucci explained to the staff, network deployment is driven primarily by two factors: density and the cost of construction (e.g. whether plant has to be buried). Knology, for instance, has found that many wealthy areas, in particular, suburbs of metropolitan areas, are characterized by very large lot sizes, often 1 acre or greater, and by aesthetic requirements to place all utilities

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5 Under the franchise agreement, the parties can, of course, dispute the meaning of economic infeasibility, but to date, the LFA has accepted Knology's determinations, and this establishes a course of dealing, if not precedent, for future actions.

6 See, for instance, *Telecommunications: Wire-Based Competition Benefited Consumers in Select Markets*. Report to the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on Judiciary, U.S. Senate, United States General Accounting Office, GAO-04-241 (February 2004) at 13-17.

underground. As a result, building to homes in such areas is much more expensive than in more urban areas where aerial builds are permitted.

Second, the FTTH Council has seen no evidence in the Commission's record indicating that red-lining is an issue in practice. In contrast, there is hard evidence in the record demonstrating that build-out requirements in many franchise agreements are anticompetitive.

That said, the LFA is obligated to uphold the red-lining provision in the statute. The FTTH Council suggests the Commission adopt as part of its rules the following process, which shall begin 3 years after a VSP first enters an area, to ensure this provision is effectively and fully enforced:

1. A LFA that has sufficient, credible evidence of a violation of the red-lining provision should first notify the VSP of its concern and seek to negotiate a resolution.

2. If no resolution is reached within 90 days of the notification, the LFA may begin a formal proceeding, providing the VSP with an opportunity to file its own evidence.

3. If it finds a violation, the LFA may, if it is a first-time violation, require the VSP to adhere to the following reporting requirement (which reflects pending California Assembly Bill 2987):

Twice a year for a period of two years, the VSP shall report the extent to which cable or video service is available to potential subscribers within the holder's service area, including all of the following:

1. The demographics of the service area.
2. The percentage of homes in the service area that have access to service.
3. The demographics of the portion of the service area that has access to service.
4. The technology used by the holder to provide access to service.

(The holder shall not be required to report competitively sensitive information.) The reporting requirement automatically sunsets at the end of the two-year period.

4. If the LFA finds after a formal hearing that the VSP continues to violate the law, it may fine the VSP and impose additional requirements it deems necessary consistent with the Commission's rules.

An original and one copy of this ex parte letter is being filed with the Secretary's office pursuant to 47 C.F.R. 1.1206.

Respectfully submitted,

Thomas Cohen
Edward A. Yorkgitis, Jr.
Kelley Drye & Warren LLP
Suite 400
3050 K Street NW
Washington, DC 20007
Tel. (202) 342-8518
Fax. (202) 342-8451

Counsel for the Fiber-to-the-Home Council

cc: Marlene H. Dortch
Rosemary Harold
Andrew Long
Mary Beth Murphy
Natalie Roisman
Brendan Murray
Holly Saurer
John Norton
Mike Lance
Leslie Marx
Diego Ruiz
Jonathan Levy
Sherille Ismail
Julie Veach
Marcus Maher
Susan Aaron