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June 26, 2006

**VIA ECFS**

Matthew Berry, Deputy General Counsel  
Christopher Killion, Deputy Associate General Counsel  
Susan Aaron, Attorney  
Office of General Counsel  
Federal Communications Commission  
The Portals  
445 - 12th Street, SW  
Washington, DC 20554

Re: Notice of Ex Parte Presentation – MB Docket 05-311

Dear Matthew, Chris and Susan:

At your meeting with the Fiber-to-the-Home (FTTH) Council representatives on May 23, 2006, we explained that Section 621(a) of the Communications Act did not entitle local franchising authorities to determine the franchise area of a new wireline cable operator entrant. Specifically, we noted that Section 624(f)(1), 47 U.S.C. § 541, prohibits LFAs from imposing any “requirements regarding the provision or content of cable services, *except as expressly provided in this title,*” *i.e.*, Title VI of the Communications Act of 1934, as amended (emphasis added). Thus, unless the Cable Act expressly provides for LFAs establishing the franchise area of a cable operator within its jurisdiction, the LFA does not have the authority to do so.

LFAs typically look to Sections 621(a)(3) and 621(a)(4)(A) to support their efforts to designate the franchise area (and impose build-out requirements within the franchise area). But neither of these sections expressly provide that an LFA may designate a cable operator’s franchise area or that the franchise area must be coextensive with the area under the jurisdiction of the LFA. Section 621(a)(3) requires an LFA, “when awarding a franchise or franchises,” to “assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.” 47 U.S.C. § 541(a)(3). This clause, on its face, says nothing about

June 26, 2006

Page Two

designating a franchise area and does not even use the term “franchise area.” Furthermore, Section 621(a)(3) is entirely consistent with the franchisee selecting its franchise area itself, provided the LFA, when awarding such franchise, reviews it to ensure that cable service is not denied to any group on the basis of income.<sup>1</sup>

The lack of nexus between the scope of the “franchise area” and the LFA’s area of jurisdiction (other than the franchise area must be *within* the area of the LFA’s jurisdiction) is underscored by reference to the other provision often cited by the LFAs for authority to designate the franchise area, Section 621(a)(4)(A). That section allows the LFA to set “a reasonable period of time [for an applicant] to become capable of providing service to all households in the franchise area.” 47 U.S.C. § 541(a)(4)(A). But this section says nothing about the size of the franchise area or who selects it,<sup>2</sup> only that an LFA may impose a requirement (subject to a reasonable time limit) that a new entrant be capable of providing service to all households within the franchise area however it is sized and whoever selects it.<sup>3</sup>

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<sup>1</sup> As explained in its May 19, 2006 *ex parte* of the FTTH Council, overbuilders and other new cable entrants make decisions on where to build based on the principal factors of “dirt” (cost of construction) and density of households (revenues per dollar of construction), not on the income of potential subscriber groups. This *ex parte* also sets forth a process for LFA’s to employ in implementing section 621(a)(3).

It also should be noted that a prior Commission order and court opinions confirm that section 621(a)(3) cannot be read as imposing a universal service requirement. *See, ACLU v. FCC*, 823 F.2d 1554, 1580 (D.C.Cir. 1987); *Americable International, Inc. v. Department of Navy*, 129 F.3d 1271, 1274-75 (D.C.Cir. 1997) (concluding that Section 621(a) “does not...require...[build-out] throughout the franchise area”); *Implementation of the Provisions of the Cable Communications Policy Act of 1984*, 58 Rad. Reg. 2d (P&F) 1, ¶ 82 (1985) (“1984 Cable Act Implementation Order”) (noting that “redlining” prohibition “does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents in the unwired areas.”)

<sup>2</sup> Other statutory clues make clear that the “franchise area” is distinct from the area of “jurisdiction” of the LFA. In Section 623(a)(1) of the Act, Congress described cable systems as being located “within” the “jurisdiction” of the LFA.

<sup>3</sup> In its May 19, 2006 *ex parte*, the FTTH Council proposed that the Commission use its authority to interpret section 621(a)(4)(A) to deem build-out requirements “reasonable” in the following circumstances: “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 [video service provider] and only following a finding that such requirements are necessary to remedy a proven occurrence of redlining in the VSP’s video serving area.”

June 26, 2006

Page Three

As part of our discussion, you asked how to reconcile the argument that “franchise area,” namely the area in which a cable franchisee is authorized to provide service by an LFA, could be something less than the area within the jurisdiction of the LFA with the use of the term “franchise area” in Section 623(l)(1)(B) of the Act. As an initial matter, Section 623(l)(1)(b) does not define the term “franchise area.” Rather, the phrase “franchise area” is merely used in language defining another phrase: “effective competition.” Under Section 623(a)(2), a cable system is *not* subject to rate regulation if the system is subject to “effective competition.” 47 U.S.C. § 543(a)(2), and Section 623(l)(1)(B) merely enumerates certain criteria that must be satisfied in the “franchise area,” whatever that franchise area may be, for the Commission to conclude that a cable system is subject to “effective competition” in that “franchise area.” As with Sections 621(a)(3) and 621(a)(4)(A), however, nothing in Section 623(l)(1)(B) requires that the “franchise area” be contiguous with the jurisdiction of the franchising authority.

The statutory criteria for “effective competition,” as written, would allow for two cable operators within the jurisdiction of an LFA with overlapping but non-contiguous franchise areas. Each franchise area may be taken separately, and the Commission would determine *for each one* if (a) fewer than 30 percent of the households in the franchise area subscribe to cable service (47 U.S.C. § 543(l)(1)), (b) the franchise area is served by two or more unaffiliated multi-channel video programming distributors offering comparable programming and reaching 50% of households in the franchise area (47 U.S.C. § 543(l)(2)), (c) if the LFA operates a multi-channel video programming distributor that serves at least 50% of households in the franchise area (47 U.S.C. § 543(l)(3)), *or* (d) an unaffiliated local exchange carrier, its affiliate, or an unaffiliated multi-channel video programming distributor using the facilities of the carrier or affiliate provides video programming services in the franchise area. 47 U.S.C. § 543(l)(4). For each cable operator, the criterion may be applied focusing solely on the franchise area selected by that cable operator consistent with the other statutory provisions. Consistent with the language of Section 623(a)(2), requiring a finding that a cable system is subject to effective competition, the FCC has concluded that where there are two or more cable systems authorized within a franchise area, the determination as to whether there is effective competition needs to be made for each system separately. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Report and Order*, 8 FCC Rcd 5631, 5672 ¶ 48 (1993). This implies that the criteria must be applied to each cable system in the area served by each such system, and not to the entire geographic area within the jurisdictional boundary of a franchising authority. In short, nothing about Section 623(l) requires the LFA to have selected the franchise area for either cable operator nor requires the franchise area to be coextensive with the area falling under the jurisdiction of the LFA. Rather, the franchise simply needs to be “within” that jurisdiction.

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June 26, 2006

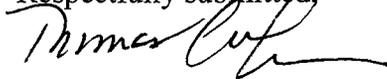
Page Four

In conclusion, the FTTH Council submits that the Act does not authorize the LFAs to select the franchise areas of new cable entrants.<sup>4</sup> Rather, the Commission should adopt regulations making it clear, among other things, that the cable entrants themselves may select the franchise area, consistent with the other provisions of the Act. As the FTTH Council advocated in its *ex parte* letter of May 19, 2006, the Commission should adopt Model Franchise Agreement regulations, which expressly provide for the franchise applicant to select the franchise area.

If there are any questions regarding this letter, please do not hesitate to contact the undersigned.

This letter is being filed with the Secretary's office as required by the Commission's *ex parte* rules.

Respectfully submitted,



Thomas Cohen  
Edward A. Yorkgitis, Jr.  
Counsel for the FTTH Council

Cc: Marlene Dortch, Secretary, FCC

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<sup>4</sup> Should the Commission not agree with the FTTH Council's argument that, under section 624, LFAs are prohibited from designating the franchise area, it should, at the very least, conclude that the statute is either silent or ambiguous on this point and that it has "*Chevron*" deference to provide reasoned and expert interpretation consistent with the pro-competitive policies of section 621 to reach the same conclusion.