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VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Protection and Competition Act of 1992; MB Docket No. 05-311

Dear Ms. Dortch:

On July 11, 2006, the Greater Metro Telecommunications Consortium (“GMTC”), the Rainier Communications Commission (“RCC”), the city of Tacoma, Washington, and ostensibly the National Association of Telecommunications Officers and Advisors (“NATOA”)(collectively, “the Municipalities”) submitted an *ex parte* letter in this proceeding, arguing, *inter alia*, that the Commission lacks authority to adopt rules implementing § 621(a)(1) of the Act and that the imposition by franchising authorities of buildout requirements on competitive cable service providers is appropriate.¹ As to both arguments, the Municipalities are wrong, as a matter of law and public policy. The Act plainly endows the Commission with ample authority to adopt rules implementing § 621(a)(1). Moreover, in adopting such rules, the Act and sound public policy compel the Commission to prohibit franchising authorities from imposing buildout conditions as a condition of entry for competitive cable operators.

- *The Commission Has Statutory Authority to Adopt Rules Implementing Section 621(a)(1)*

Without providing any legal analysis of its own—indeed, without even referring to a single legal authority—the Municipalities offer their “strong support” for the arguments raised by NATOA in its comments in this proceeding.² Specifically, the Municipalities indicate that they do “not believe that the Commission has the legal authority in Title VI to impose rules, or even suggest guidelines to ‘implement’ Section 621(a).”³ The Municipalities and NATOA are plainly

¹ See Letter from Kenneth S. Fellman, Kissinger & Fellman, P.C., to Marlene H. Dortch, Secretary, Federal Communications Commission, MB docket No. 05-311 (July 11, 2006)(“GMTC Letter”).

² GMTC Letter at 2.

³ *Id.*

incorrect. As it tentatively concluded in the NPRM,⁴ the Commission undoubtedly has the power to adopt rules implementing the statutory prohibition against unreasonable refusals to award additional competitive franchises, just as it has the statutory authority to adopt rules implementing other provisions of the Cable Act specifically and the Communications Act in general.

As AT&T previously informed the Commission,⁵ sections 4(i), 303(r), and 201(b) of the Act all authorize the Commission to adopt rules to carry out the provisions of the Communications Act. Moreover, the Supreme Court has made absolutely clear that the Commission has such rulemaking authority over *all* provisions of the Communications Act.⁶ More specifically, the Supreme Court has held that the Commission plainly has the authority to enact rules implementing the Cable Act.⁷ The courts thus have held that the Commission has authority to implement the Cable Act amendments to the Communications Act, including § 621.⁸ Indeed, the Commission itself has issued orders implementing and enforcing other aspects of § 621 and overruling franchising authority decisions that violate § 621.⁹ Any argument that the Commission lacks authority to adopt rules implementing § 621(a)(1) is thus contrary to clear statutory language delineating the authority of the Commission, Supreme Court and other judicial decisions affirming the breadth of the Commission's rulemaking authority, and Commission precedent based on such authority. The Commission indisputably has authority to adopt rules implementing § 621(a)(1). Moreover, § 706 of the Act affirmatively *requires* the Commission to act on that authority and take "immediate action" to eliminate barriers erected by the current franchising process to the deployment of infrastructure necessary to provide advanced capabilities to all Americans consistent with implementation of the President's, and the Commission's national broadband policy.

⁴ NPRM ¶ 16.

⁵ See *AT&T Comments* at 32-39; *AT&T Reply Comments* at 25-33.

⁶ See *AT&T Corp. v. Iowa Util's Bd.*, 525 U.S. 366, 378 (1999) ("the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act[.]'").

⁷ See *City of New York v. FCC*, 486 U.S. 57, 70 n.6 (1988) ("§ 303 of the Communications Act continues to give the Commission broad rulemaking power 'as may be necessary to carry out the provisions of this chapter,' 47 U.S.C. § 303(r), which includes the body of the Cable Act as one of its subchapters"); accord *United Video v. FCC*, 890 F.2d 1173, 1183 & n.5 (D.C. Cir. 1989); see also *Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (finding authority under §§ 151 & 154(i)); *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1107 (D.C. Cir. 1987).

⁸ See *City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999) ("[w]e are not convinced that for some reason the FCC has well-accepted authority under the Act but lacks authority to interpret [47 U.S.C.] § 541 [*i.e.*, § 621 of the Act] and to determine what systems are exempt from franchising requirements"); *Time Warner v. Doyle*, 66 F.3d 867, 877 (7th Cir. 1995) (Congress has charged FCC with administration of the Cable Act).

⁹ See, e.g., *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd. 21396 (1997), *recon. den.*, 13 FCC Rcd. 16400, ¶¶ 78, 106 (1998); *Entertainment Connections, Inc.*, 13 FCC Rcd. 14277, ¶¶ 61, 66 (1998) ("The Commission is charged with administering and enforcing the Communications Act. Incumbent in such jurisdiction is interpreting the applicability of the provisions of the Communications Act such as the definition of cable operator and cable system . . . as those terms relate to the franchising requirements of Section 621(b)(1) of the Communications Act.").

- *The Commission Should Prohibit as Per Se Unreasonable the Imposition of Build Out Requirements by Franchising Authorities as Conditions of Entry for Competitive Cable Operators*

In their *ex parte* letter, the Municipalities also assert “strong agreement with the Commission’s tentative conclusion that buildout requirements are both appropriate, and subject to local franchising authority determinations as to how local needs should best be met.”¹⁰ The Municipalities are once again plainly incorrect. The imposition of buildout requirements as a condition of entry for competitive cable operators is anathema to the development of competition. Accordingly, in order to fulfill its statutory mandate under § 706 of the 1996 Act to “remove barriers to infrastructure development” in order to “encourage the deployment of broadband networks on a reasonable and timely basis of advanced telecommunications capability to all Americans,” and also to fulfill the goal of Title VI to “promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems,”¹¹ the Commission must adopt rules prohibiting franchising authorities from imposing build out requirements as conditions of entry for competitive cable operators.

As an initial matter, the Municipalities are simply wrong that the Commission has affirmatively endorsed buildout requirements in any sort of tentative conclusion. In particular, the NPRM in this proceeding contains no such tentative conclusion. To the contrary, in the NPRM, the Commission inquires, “whether buildout requirements are creating unreasonable barriers to entry for facilities-based providers of telephone and/or broadband service.”¹² As AT&T and others demonstrated in their comments in this proceeding, the answer to the Commission’s question is a resounding “yes.”

Buildout requirements imposed as conditions of entry on competitive cable operators serve no purpose other than to create barriers to entry and thus protect the market share of incumbent cable operators. To manage the financial risk of entry, second and subsequent firms in competitive markets typically compete, at least initially, on an incremental basis of the market served by the incumbent. Build out requirements increase the cost of entry to competitive cable operators and thus harm both competition and consumers by deterring beneficial entry that would occur without such requirements.

The efforts of incumbent cable operators to persuade franchising authorities to impose build out requirements on new entrants are intended to have precisely the opposite effect: to *increase* the financial risk of subsequent entry by increasing the minimum scale of entry required. That strategy is a classic entry-detering strategy. For these reasons, the predictable effect of build-out conditions or other so-called “level playing field” requirements is not to increase the percentage of households in a municipality that enjoy competitive service alternatives, but to deter firms from competing in the franchise territory at all. Indeed, the comments in this proceeding provide

¹⁰ *GMTC Letter* at 3.

¹¹ 47 U.S.C. § 601(6).

¹² *NPRM* ¶ 23.

real world demonstrations that the imposition of build out requirements serves to deter competitive entry and thus protect incumbent market share.¹³

Economic analysis fully supports the conclusion that build out requirements imposed on competitive cable operators are, as a matter of basic economic theory, manifestly anticompetitive.¹⁴ In a recent paper, Robert Shapiro indicates that

. . . numerous economic studies have found that applying requirements such as build-out rules to new competitors will only reduce investment and competition, ultimately producing higher prices and more limited and restricted access. The data show that competition and technological advance, not build-out rules, provide the most efficient and effective route to the broad spread of new technologies.¹⁵

Both the GAO¹⁶ and the Department of Justice¹⁷ also agree that the imposition of build out requirements as conditions of entry create economic barriers to entry to competitive cable operators. Indeed, the Commission itself has found that build out requirements can deter competitive entry, and under the 1996 Act it preempted the only effort by a franchising authority to impose such requirements as a condition of entry for CLECs.¹⁸

Indeed, the Commission has *never* required that cable companies and other telecommunications service competitors, when entering voice telephony markets, match the build out, universal service, or other carrier of last resort obligations that were imposed on incumbent LECs. Because the cable incumbents and all other CLECs are free to enter voice and data markets without any obligation to offer service to the entire customer base of the incumbent voice and data providers, regulatory symmetry requires that telephone carriers be allowed to provide competitive cable service without building out to match the entire customer base of the incumbent cable operators. It would be irrational, arbitrary and capricious for the Commission to prohibit the imposition of build out requirements on CLECs—including cable companies—but to

¹³ See, e.g., *BellSouth Comments* at 17-18, 35; *Qwest Comments* at 9; *Broadband Service Providers Comments* at 5-6; *USTelecom Comments* at 22-25; *Fiber to the Home Council Comments* at 19-20.

¹⁴ See George S. Ford, Thomas M. Koutsky and Lawrence J. Spiwak, *The Consumer Welfare Cost of Cable “Build-out” Rules* (Phoenix Center Policy Paper No. 22) (July 2005) (“Ford, Koutsky & Spiwak”); Declaration of Thomas W. Hazlett, attached to *Verizon Comments*; Declaration of Dr. Kevin Hassett and Dr. William Lehr, attached to *AT&T’s Reply Comments*.

¹⁵ Robert J. Shapiro, *Creating Access to New Communications Technologies: Build-Out Requirements versus Market Competition and Technological Progress* April 2006)(copy attached).

¹⁶ United States General Accounting Office, *Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241 at 25 (February 2004).

¹⁷ *Ex Parte Submission of the Department of Justice*, MB Docket No. 05-311 (May 10, 2006).

¹⁸ Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, *Memorandum Opinion and Order*, 13 FCC Rcd. 3460 (rel. Oct. 1, 1997).

endorse or allow the imposition of build out requirements on competitive cable operators. It would defy logic and reason to suggest that a build out requirement constitutes an economic barrier to entry for one market participant and not the other, particularly when both participants are competing for the same package of services.

In today's marketplace of converged networks, build out requirements serve to deter entry not only for the provision of competitive cable service, but also for high speed Internet access and other broadband services. Revenue from video services is now a key driver for new fiber deployment in the residential market. In municipalities where local build out conditions undermine the business model for offering multi-channel video to consumers, there is usually no alternative business model for making the investment needed to deploy advanced broadband services. Build out conditions thus threaten to deny entire communities competitive choice in a range of both video and other broadband services.

Failure to prohibit build out requirements thus would represent a fundamental abdication of the Commission's role in setting national broadband policy. It would abdicate to 30,000 individual franchising authorities the Commission's authority under § 706 to promote broadband infrastructure development. These 30,000 independent local actors lack the national vision necessary to promote the federal policy of rapid broadband deployment, unencumbered by barriers to entry. Equally important, local build out conditions frustrate the broadband policies of the President, the Congress and the Commission by allowing individual franchising authorities to dictate the *manner* of broadband deployment in the guise of cable regulation. Consistent with its leadership role in the promotion of national broadband policies, and in order to fulfill its statutory mandates under §§ 601, 621(a)(1), and 706 of the Act, the Commission must issue rules prohibiting franchise authorities from imposing buildout requirements as conditions of entry for competitive cable operators.

If you have any questions, please do not hesitate to contact me at (202) 457-3052.

Sincerely,

/s/ Jim Lamoureux
General Attorney
AT&T Services, Inc.

Attachment

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