USTELECOM
UNITED STATES TELECOM ASSOCIATION

July 28, 2006

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Portals II, Room TW-A325
Washington, DC 20554

***EX PARTE* NOTICE**

Re: *Implementation of Section 621(a)(1) of the Communications Act,* MB Docket No. 05-311

Dear Ms. Dortch:

The Commission is developing a substantial record supporting reform of the cable franchise process for competitors through full implementation of Section 621 of the Communications Act.[1] Many parties, notably USTelecom members AT&T, BellSouth, and Verizon, and also the Fiber to the Home (FTTH) Council, have filed extensive comments, reply comments, and ex parte presentations that make a compelling case for the Commission to reform cable franchising practices as they are applied to competitors.[2] Franchise barriers to entry also hinder smaller and mid-sized local exchange carriers, in many cases as much or more so than is the case with larger local exchange carriers (LECs). Many small and mid-sized members of the United States Telecom Association (USTelecom) have faced and continue to face these barriers.[3]

In this filing, USTelecom explains its proposals for Commission action and how they will help small and mid-size telephone companies enter markets for the distribution of video programming. This filing contains representative evidence for the record of company experiences, together with a legal roadmap demonstrating the clear basis for Commission action. Specifically, USTelecom asks the Commission to reform the local franchise process by (1) eliminating build out requirements and level playing field provisions; (2) prohibiting excessive time periods for franchise application review and approval; and (3) proscribing demands for franchise fees and in-kind payments that are not specifically authorized in the Communications Act and exceed the statutory maximum 5% franchise fee.

The Commission has the unquestionable authority to adopt rules governing the application of Section 621, despite the protestations of cable operators.[4] The Supreme Court has ruled that the Commission's rulemaking authority covers the entire Communications Act, and

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[1] 47 U.S.C. § 541.

[2] *See, e.g.*, AT&T Comments, *passim*, AT&T Reply Comments, *passim*, BellSouth Comments, *passim*, BellSouth Reply Comments, *passim*, Fiber to the Home (FTTH) Council Comments, *passim*, Verizon Comments, *passim*, Verizon Reply Comments, *passim*. *See also*, USTelecom Comments; USTelecom Reply Comments.

[3] *See also* FTTH Council Comments (describing barriers faced by Grande Communications and Knology, among others).

[4] *E.g.*, NCTA Comments, Comcast Comments.

the Commission's authority to rule on the meaning and implementation of Section 621 has also been specifically upheld. The Commission's rulemaking authority is not affected by the fact that local franchise authorities (LFAs) have the primary role in applying, but not interpreting, the section; nor is it affected by the fact that the appeal process goes through federal district courts rather than the Commission. In both cases the Supreme Court decided in *AT&T v. Iowa Utilities Board* that the Commission retains its rulemaking authority.[5]

The Commission also has the ability to interpret Section 621 in a manner that supports the specific rules that USTelecom is seeking in the proceeding. At the outset, it is important to note that the Commission is entitled to deference when it adopts a plausible interpretation of the statute. So long as the statute is not unambiguously inconsistent with the Commission's interpretation, the Commission is to be given deference by courts and other agencies.[6] Here, however, the interpretation urged by USTelecom is not only permissible, but it is the one that best fulfills the intent and language of the statute.

With respect to build-out requirements, the statute plainly limits an LFA's ability to require even an incumbent cable operator to deploy network and offer service. Specifically, the timetable must be reasonable in light of market conditions, and a cable operator cannot be made to provide service where it is not economically feasible. With respect to competitive entrants, therefore, the best approach is to allow market competition to decide build-out schedules as this will establish reasonable build-out schedules more certainly and accurately than any regulator could do. Relying on market competition in this manner is consistent with the Commission's enforcement of reasonableness requirements in other sections of the Act, most notably the reasonable rate requirement in Section 201.[7] Moreover, build-out requirements are economic regulations that simply should not be applied to entrants under the Communications Act. In any event, entrants should have the same right that incumbent cable operators appear to have enjoyed in many cases to define their own franchise areas. Finally, the Commission also has the clear authority to adopt rules governing the franchise application process, including timeframes for action, default outcomes, and permissible franchise fees and in-kind payments.

Cable operator arguments against franchise reform revolve around mistaken or disingenuous notions of "fairness." They argue that cable entrants should have to comply with the same regulations that apply to incumbents. This is wrong because incumbents and entrants face different circumstances and because, in the broadband market, regulatory parity requires that entry be as easy in cable markets as it is in telecommunications markets. Cable operators also argue that entrants will "cherry pick" or "red line" if they are not regulated like incumbents. Entrants do not have the incentive, however, to restrict output and avoid providing service where it can be done economically. Therefore, we see that LEC entrants are serving low-income and rural areas already as part of their early entry efforts. In any event, incumbent cable operators don't appear to be providing service where it is not economically feasible. Therefore, they have no need for cross-subsidies to ensure that they can provide service to high-cost areas.

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[5] 525 U.S. 366 (1999).

[6] *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984).

[7] 47 U.S.C. § 201(b).

I. INTRODUCTION

The central question in this proceeding is this: will the Commission oversee our national broadband policy, or will it 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? Even if it ever made sense to accommodate the cable industry's insistence that the nation should create and preserve franchise barriers to entry in video markets, it no longer makes sense because those entry barriers are threatening our nation's broadband future. In particular, cable operators' insistence that they be able to determine (through litigation and other tactics affecting the local franchise process) where and when competitors offer service violates the basic economic freedom to which Americans are accustomed. In our market-driven, competitive economy, it is not the role of local government entities, much less competitors, to tell people where and when they must open stores or sell their services. 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.

The cable franchise process, as implemented today with respect to new entrants, is inconsistent with national broadband policy. It was designed to address cable operator conduct *in the absence* of competition, having been codified in 1984 when exclusive franchises were both legal and common.[8] The circumstances of today, however, call out for the Commission to adopt rules curbing franchise barriers to entry. The franchise process as it is currently applied inherently favors one class of broadband providers—cable operators—over others by allowing them to enter telecommunications markets freely while subjecting entrants into their cable markets to build-out requirements and legacy regulations. This is contrary to clear statutory intent, sound public policy and, indeed, common sense.

The cable franchise process simply was not designed to manage a national policy intended to foster broadband investment and competition. Video programming services are important to the deployment of such advanced telecommunications networks, however, which is the Commission's primary and statutorily-mandated policy goal. Therefore, the Commission must reform the cable franchise process and remove needless regulatory requirements and barriers to entry that delay and deter wireline video competition. National broadband policy cannot be undermined by the efforts of cable operators or LFAs to control or prevent competition through the franchise process that was designed for a bygone era—one in which there was only a single wireline provider.

If the Commission reforms the cable franchise process in the way USTelecom and many other parties suggest, consumers will benefit and the public interest will be well served. The recent legislation passed in Texas serves as an example of such pro-competitive franchise reform, and the data from Texas shows consumers are the winners because more entry is occurring. For example, Guadalupe Valley Telephone Cooperative (GVTC) was unable to enter and provide service over its network in Bulverde, Texas because it faced uneconomic build-out requirements. After Texas passed legislation removing such requirements, GVTC was the first company to receive a new state-wide franchise and it is now providing service. Such

[8] The cable franchise process was amended in the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460.

competition is helping consumers in Texas, by creating more choice, better services, and lower prices.[9]

The Commission should take several steps to reform the cable franchise process and promote rather than deter competition. First, the Commission should eliminate build-out requirements and preempt so-called “level playing field” statutes and contractual provisions, which deter broadband investment and deny customers a choice of video providers. Second, the Commission should also adopt a streamlined process with a defined timeline for completion of the franchise process and clearly establish what is unreasonable. Finally, the Commission should explicitly rule that cable operators may not be required to pay local franchise authorities more than the 5% fee and the in-kind services specifically enumerated in the statute. Additional payments or in-kind compensation, and demands for such additional payments, interfere with market competition and the neutral application of the statutory franchise process.

In sum, the Commission has the opportunity and the clear legal authority to extend the benefits of competition to the whole country by reforming the competitive cable franchise process along lines similar to those adopted in Texas. Therefore, the Commission should:

(1) prohibit build-out requirements, and preempt so-called “level playing field” statutes and contractual obligations;

(2) establish clear and limited timelines for franchise application review, with approval as a default at the end of the time period; and

(3) limit franchise fees and in-kind payments to those specifically authorized in the Communications Act.

II. THE COMMISSION HAS UNQUESTIONABLE AUTHORITY TO ADOPT RULES INTERPRETING SECTION 621

As has been documented in this proceeding,[10] the Commission has ample authority under the Communications Act to interpret Section 621, and to ensure that the local cable franchise process encourages rather than deters competitive entry. In addition, the Congressional mandate to promote the deployment of advanced services in section 706 of the Telecommunications Act of 1996 provides the Commission with additional support for adopting rules that clarify Section 621 and ensure that LFA application of the cable franchise provisions does not deter broadband deployment.

[9] Letter dated March 3, 2006 from Stephen B. Pociask, American Consumer Institute, to Marlene H. Dortch, FCC, *Implementation of Section 621(a)(1) of the Communications Act*, MB Docket No. 05-311.

[10] *E.g.*, AT&T Comments; AT&T Reply Comments; BellSouth Comments; BellSouth Reply Comments; USTelecom Comments; USTelecom Reply Comments; Verizon Comments; Verizon Reply Comments.

A. The Communications Act Clearly Authorizes the Commission to Make Rules Governing the Application of the Title VI Franchise Process

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."[11] The Supreme Court in *AT&T v. Iowa Utilities Board*,[12] endorsed a "plain meaning" interpretation of the Commission's authority under Section 201(b), which means the Commission has the authority to prescribe rules for Title VI just like other parts of the Act. Moreover, courts have explicitly affirmed the Commission's authority to implement Title VI because it is part of the Communications Act, relying on Sections 201(b) and 303(r).[13] As the Seventh Circuit stated: "the FCC is charged by Congress with the administration of the Cable Act."[14] In this regard, Section 4(i) also plainly gives the Commission the authority to write rules, in addition to the explicit grant in Section 201(b). Given that the Commission has the power to issue declaratory rulings regarding Title VI, as explained in *City of Chicago*, Section 4(i) gives the Commission the authority to "make such rules and regulations … as may be necessary in the exercise of its functions." [15] The Commission may, therefore, carry out its responsibility to decide questions of statutory intent through rules instead of declaratory rulings, as rules can be a more efficient method for performing the function.

The Commission's Rules Govern the Application of the Communications Act by Courts, States, Localities, and Agencies. The fact that local authorities implement section 621 does not affect the Commission's authority to interpret the Communications Act and ensure consistent national application of federal law. This is also a settled question because the Supreme Court specifically affirmed Commission rulemaking authority over other jurisdictional bodies' applications of the Communications Act in *AT&T v. Iowa Utilities Board*. Just as the state commissions in that case were applying section 252, the LFAs are applying federal law when the review franchise applications under section 621. Therefore, they are bound by Commission rules interpreting the statute.

The Section 621 Judicial Remedy Does Not Affect the Commission's Rulemaking Authority. Opponents of franchise reform 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. These advocates for franchise barriers to entry argue 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).[16] This argument strains

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[11] 47 U.S.C. § 201(b). *Accord* 47 U.S.C. § 4(i), § 152(a), § 303(r), § 706.

[12] 525 U.S. 366, 378 (1999).

[13] *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).

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

[15] 47 U.S.C. § 154(i).

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

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 251 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." In any case, the Commission is wholly within its authority to write and interpret rules that fill in any such gap.[17]

B. Section 706 of the Telecommunications Act of 1996 Provides an Additional Basis for Commission Rules Implementing Section 621 to Promote Competitive Entry.

The Commission was given clear direction in Section 706 of the Telecommunications Act of 1996 to promote broadband deployment using all of its powers. Therefore, the Commission is well within its responsibility and, arguably, compelled by statutory mandate to reevaluate the cable franchising process and remove regulation of entrants to the extent possible given the increasing importance of video competition to broadband deployment.

Now that video services are critical to broadband deployment, the Commission must reassess the Section 621(a) prohibition on unreasonable franchise denials to give full effect to all provisions of the Communications Act and ensure that national broadband policy is not thwarted by anachronistic applications of cable franchising provisions. Section 706(a) of the Act mandates that the Commission shall "encourage the deployment . . . of advanced telecommunications capability to all Americans."[18] This mandate extends to the deployment of video services over advanced networks as the legislative history makes clear that Congress

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[17] "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).

[18] *See* 47 U.S.C. § 157(a) nt.

wanted the Commission to encourage the deployment of video services under the Commission's Section 706 authority.[19]

The Section 706 mandate must be seen, at a minimum, as a clear statement of how the Commission must interpret the Communications Act—where a provision of the Act requires elaboration, implementation, or explanation, the Commission "shall encourage the deployment" of broadband by removing "barriers to infrastructure investment." The D.C. Circuit found that the Commission has the authority to consider Section 706's goals when the Commission balances other non-exclusive principles in the Act.[20] Likewise, the D.C. Circuit upheld the Commission's findings that the interests of Section 706 outweighed countervailing factors that were expressly enumerated in other sections of the Act.[21] The Commission therefore not only has the authority to interpret Section 621(a)(1), but also must do so in a manner that encourages broadband deployment.

The Commission already has recognized that the public interest, and the pro-competitive mandates of Section 706, require it to remove regulatory constraints in order to "give incumbent LECs incentives to deploy advanced facilities allowing them to roll out their own triple play of services as cable competitors roll out theirs."[22] This conclusion applies just as strongly to entry in video markets as it did for entry in data markets. Moreover, it is also consistent with the conclusions of investment analysts, who have recognized that the economic lynchpin for broadband fiber deployment is the ability to earn video revenues. Without that, LECs cannot justify the cost of broadband deployment.[23]

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[19] Indeed, Congress explained that Section 706:

> is intended to establish a national policy framework designed to accelerate the rapidly the private sector deployment of advanced telecommunications. . . . The goal is to accelerate deployment of advanced capability that will enable subscribers in all parts of the United States to send and receive information in all its forms – voice, data, graphics, and *video* - over a high-speed switched, interactive, broadband, transmission capability.

S. Rep. No. 104-23, at 50-51 (1995) (emphasis added).

[20] *United States Teleocm Association v. FCC,* 359 F.3d at 580, 583 (allowing FCC to include section 706 among the principles it weighed for purposes of applying § 251(d)(2) factors because those factors were not exclusive).

[21] *Id*. ("[T]he Commission reasonably interpreted § 251(c)(3) to allow it to withhold unbundling orders, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment.").

[22] *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) ("*BellSouth Order*").

[23] *See, e.g.,* USTelecom Comments, at 6-8.

III. THE COMMISSION CAN AND SHOULD LIMIT THE USE OF BUILD OUT REQUIREMENTS TO DELAY AND PREVENT ENTRY AS THIS IS INCONSISTENT WITH SECTION 621

Cable operators are using incorrect interpretations of one passage in Section 621, specious arguments about alleged "cherry picking" and "red lining," and threats of litigation against LFAs to make build-out requirements a major barrier to entry for cable competitors. In practice, cable operators are using build-out requirements to define the service territories and network contours of their competitors. This is outrageous; in no other industry is one competitor given the right to dictate where other competitors will or will not offer service. Simply put, build out requirements are an unreasonable barrier to entry when applied to entrants, as explained by the Antitrust Division of the United States Department of Justice.[24]

Not only is it unreasonable for cable operators to define competitors' service areas, but it is inherently unequal. Cable operators were participants in the initial definition of their franchise areas, typically refusing in the negotiation process to become capable of serving hundreds or even thousands of households per franchise area. Instead, it is typical for franchise agreements to leave it to the market (or, alternatively, the cable operator's discretion) to build out in less-densely populated areas and competitive overbuilding circumstances. This state of affairs appears to be premised on the idea that it would not be reasonable to require a cable operator to provide service where it does not make economic sense. USTelecom agrees with this proposition—cable operators should not be required to provide service uneconomically.

Subsequent cable providers, which come to the market as new entrants, should have the same right to provide service only where it makes sense economically. Entrants face dramatically different economic conditions than did incumbents. Notably, penetration rates will be lower in nearly every instance and there will be far more unpredictability, particularly given that cable incumbents will be able to take actions that alter the economics of entry for competitors (and this problem will be exacerbated by the imposition of build-out schedules). Therefore, the only practical way that entrants can be given a reasonable opportunity to build-out their networks economically is by relying on market forces rather than LFA-mandated schedules. Moreover, public policy would be best served by resorting to market behavior to define the build-out schedules and locations for competitive entrants even in the absence of anticompetitive behavior, as entrants do not have the same incentive to restrict output as did the incumbents.

A. Specific Company Experiences with Build-Out Barriers to Entry

The following paragraphs explain a number of situations where build-out requirements have been a substantial barrier to entry.

HickoryTech Corporation. Many LECs serving rural areas have multiple, often unconnected, service territories of several thousand lines apiece. While these rural LECs typically serve all of the households within their service areas, including those in sparsely populated areas that are not served by cable operators, their service territories often do not match

[24] Letter dated May 10, 2006 from Luin P. Fitch, United States Department of Justice, to Marlene H. Dortch, *Implementation of Section 621(a)(1) of the Communications Act*, MB Docket No. 05-311.

LFA boundaries. The barrier to entry posed by build-out requirements is particularly acute for these companies, therefore, as they face the prospect of substantial network construction outside their service area in more than one location. Moreover, these are typically relatively small companies that do not have the resources or the access to capital to engage in massive new investment and marketing to new customers just so that they can offer video service to their existing customers. One good example of the effect of the barrier to entry posed by build-out requirements in rural areas is HickoryTech Corporation.

HickoryTech is based in Mankato, Minnesota, which is about 75 miles from Minneapolis, Minnesota. HickoryTech was founded in 1898, and serves approximately 71,000 telecommunications access lines in Minnesota and Iowa. HickoryTech has been offering digital television since 2001, and it now has franchises in eight communities (after much effort and expense, as detailed below). HickoryTech has been unable economically to add video service in a number of its core communities, however, because build-out requirements and Minnesota's 'level playing field" statute would require HickoryTech to match cable incumbent network contours that extend far beyond Hickory Tech's network and service territory. Accordingly, build-out requirements and level-playing field statutes as they are typically interpreted today (to require entrants to duplicate cable networks) would force HickoryTech to enter new markets as a cable, broadband, and telephone provider just to gain the right to add video services over its existing network. HickoryTech cannot justify this investment economically, so it has not sought to add video service on its networks in those communities. Moreover, HickoryTech is forced to forego the opportunity to serve customers on the edges of its other networks because they are just over the line of demarcation for neighboring franchise territories. In the end, therefore, the effect of misguided interpretations of build-out requirements is to deny competitive cable service to thousands of households without helping any households to get cable service that Hickory Tech would not have provided in any event.

Lakedale Communications. Another example of the irrationality of applying build-out requirements to LEC entrants comes from a small LEC in Minnesota that, in effect, served the "hole in the donut" of a larger franchise area. In response to the Commission's Notice of Inquiry for the 2005 Report to Congress, USTelecom provided the Commission with a clear illustration of how build-out requirements inhibit entry, using the experience of Lakedale Communications, a small LEC in Minnesota with 11,000 lines. Seeing an opportunity to enter additional markets and deploy broadband facilities, Lakedale joined with the Wright-Hennepin Cooperative Electric Association in 1999 to form WH LINK LLC, to build a system capable of providing video services as well as broadband Internet and voice services to portions of Otsego. On March 25, 2002 Otsego initiated its statutory franchise application process and both WH LINK and the cable incumbent, Charter Communications, which had been operating under an extension permit, applied for franchises. Charter proposed to serve all areas of Otsego with a density of nine homes or more per quarter mile, and WH LINK proposed to serve a smaller area—five residential subdivisions where it was already providing telephone and Internet service—and to expand its network in the future if the system was successful.

Otsego approved Charter's franchise with a seven-year build-out requirement for all areas with a density of nine homes or more per quarter mile. The City approved WH LINK's application conditionally, as well, subject to its acceptance of the same build-out requirement, which it stated was required by Minnesota's "level playing field" statute. WH LINK rejected this requirement as impractical, but its appeal was denied. Consequently, WH LINK did not enter the market and Charter faces no wireline video competition in Otsego. Thus, the "level playing field" statute so assiduously defended by the incumbent cable industry has not helped customers but, rather, it has deprived many Otsego citizens of the benefits of video competition.

PrairieWave Communications. PrairieWave Communications, a LEC and competitive overbuilder in South Dakota, Minnesota and Iowa has been precluded economically, due to the franchise process, from offering video services over its network in its largest potential market. In particular, after Sioux Falls began annexing rural areas where PrairieWave provided service, it was no longer feasible for the company to offer video because the monopoly incumbent cable ordinance contained a "level playing field" provision that required the city to insure PrairieWave built a new network throughout the city if it had a Sioux Falls franchise. To protect its existing customers and facilities, PrairieWave entered negotiations with the city in 2004. However, the city insisted, under threat of suit from the incumbent, that the license include the same provisions as the incumbent's franchise. Therefore, PrairieWave still found it could not obtain financing.

Based on this experience, South Dakota modified its franchising statutes in 2005, and now cities in that state have the authority to adopt franchise agreements with terms that do not match those applied to the incumbent cable operator with respect to build out, franchise term, construction deadlines, and other issues.[25] Bruce Herman, the President and CEO of PrairieWave calls the 2005 legislation "a good first step, but it doesn't solve all the issues." In particular, the statute does not affect PrairieWave's situation in Sioux Falls because that build-out requirement is contained in an agreement that predated the 2005 legislation. The Commission can, however, remedy the situation.

Shenandoah Telephone Company. Another revealing example comes from Shenandoah Telecommunications Company ("Shentel"), which currently provides telephone service to Shenandoah County and a small portion of Rockingham County, Virginia. Within Rockingham County, Shentel serves approximately 450 residential customers (primarily in and around Bergton, VA). Through its cable subsidiary, Shentel currently holds a franchise to provide cable service within Shenandoah County (and it does provide such service), but it does not have a franchise to provide cable service within Rockingham County.

Shentel has upgraded its telephone network so as to have the capability to provide broadband Internet service (using DSL) to all of its customers, including those living in Rockingham County, and Shentel has been investigating ways to provide video programming to its customers using this broadband network. However, without a franchise from Rockingham County, Shentel will not be able to offer cable video service to any of its approximately 450 residential telephone customers living in Rockingham County. Shentel understands that it cannot obtain such a franchise without committing to provide service to much of the remainder of Rockingham County as well, which is not economically feasible.

Not only is Shentel unable, therefore, to offer video programming to the approximately 450 customers on its network that happen to live in Rockingham County, but it appears that those customers may not be able to receive cable service from the incumbent cable operator either. It is Shentel's understanding that most (if not all) of these approximately 450 customers are not currently served by the current franchised cable operator in Rockingham County

[25] Linda Haugsted**,** South Dakota Redefines "Level," *Multichannel News***,** 4/4/2005

(Adelphia), and that the cable operator is under no obligation to become capable of providing service to those customers because the household density in that area falls below the build-out requirement threshold. Therefore, not only do irrational build-out requirements prevent these customers from receiving video programming services from Shentel, but the same regulations also fail to provide those customers with cable service from any other provider.

United Telephone Company. The United Telephone Company is a small LEC based in Chapel Hill, Tennessee that serves 17,000 access lines in several communities in the state. United serves a handful of communities in central Tennessee and it sought to add video programming to the services it provided over its network in response to impending competition. United successfully obtained franchises in some of its more remote areas, and the town of Chapel Hill, where it is based. On those systems, United build up a video customer base of hundreds of customers. The financial viability of the exercise, however, was dependent on United being able to offer service to all of its customers. One of its communities is Brentwood, Tennessee, which is outside of Nashville, where United has approximately 1800 customers. United sought to offer video programming to all of those customers but the cable incumbent—Comcast—objected, arguing that United was somehow “cherry picking” and that United should have to build new network far beyond United’s historical service territory just to gain the right to offer video programming to its own customers.

The situation in Brentwood would not have even arisen except that Brentwood annexed part of United's existing territory in the 1990s, extending the LFA’s authority into United’s territory, where it had not been before. While United continues to serve its customers with phone service, it has been thwarted in its efforts to offer video programming by an LFA that didn’t even have authority in the area until recently (and long after United first deployed its network). United sought to offer cable service to those 1,800 customers, including many that didn’t even have the opportunity to receive service from Comcast because they lived in less densely-populated areas.

United filed an application in October 2004 to offer video service, and after eight months, Brentwood's board of commissioners voted preliminarily in United's favor in June, 2005. After substantial advocacy focused on a state “level playing field” statute, the cable industry persuaded the town not to grant United the right to offer service, however. Instead, the issue was moved from meeting to meeting without resolution. During this time, United had three of its employees working extensively on the franchise process, and the company was running up substantial legal fees. Finally, United was given the indication that its continued pursuit of a franchise would be in vain unless it agreed to build a new network throughout the rest of the town of Brentwood. This additional build-out was not economically feasible, so United withdrew its application and also ceased video service to all of its customers in other communities as of March 1, 2006.

B. Legal Analysis

Build-out requirements such as those cited in the preceding examples are antithetical to market-based competition. Consumers, acting through market processes, should determine where and when firms in competitive markets deploy networks and offer services; government should not make such decisions. This market-based competition will inevitably produce better results and serve consumers better than regulators can hope to do (through no fault of their own … markets simply work better). 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.

The Communications Act Does Not Compel Build-Out Requirements. At the outset, it is important to recognize that the Act does not require cable system build-out. In particular, Section 621(a)(4)(A),[26] does not mandate build-out requirements but, rather, places limits on an LFA's ability to require build out. This is seen as tacit permission to have a build out requirement, but such permission is clearly different from a mandate for build-out requirements. In fact, the D.C. Circuit squarely rejected the argument that there is such a requirement, finding that § 621(a)(4)(A) "does not . . . require" that cable operators extend service "throughout the franchise area" – or, indeed, that cable operators do anything – but instead was a limit on franchising authorities that sought under state law to impose such obligations.[27] Moreover, since any authority LFAs may have to require build-out is permissive, that authority is necessarily constrained by the reasonableness requirement applicable to competitive franchises through section 621(a)(1). As explained below, applying build-out requirements to competitive entrants in cable markets is unreasonable.

Incumbent Cable Operator Build-Out Requirements Are Limited to What Was Reasonable Given Their Economic Circumstances. The build-out requirements to which many cable operators have agreed in their franchise agreements are limited—it appears that few cable operators are "capable of offering service to all the homes" in the area subject to the LFA's jurisdiction. Therefore, the limitation on build-out requirements in Section 621(a)(4) cannot logically be interpreted to authorize unreasonable build-out conditions. Rather than offering service to all of the homes in a franchise area, it appears that cable operators typically negotiate limits (usually based on homes per square mile) to the areas that they must serve. From this, it appears that it is unreasonable to require a cable operator to serve areas where it does not make economic sense. It also seems clear that the reasonable time period given to cable operators to become capable of serving all of the homes in a franchise area is defined, not by the LFA but, rather, by economic conditions such as technology and competition. Moreover, it appears that a cable operator typically is not required to overbuild another cable system within the same franchise area. During the 1990s, in fact, the Commission was presented with several situations where cable operators had not built out entire franchise areas because they did not want to overbuild another cable operator, and the Commission used the smaller franchise area for the purpose of "effective competition" calculations.[28]

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[26] 47 U.S.C. § 541(a)(4)(A) ("[i]n awarding a franchise or franchises, a franchising authority shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area.").

[27] *Americable Intern., Inc.* v. *Department of Navy*, 129 F.3d 1271, 1274-75 (D.C. Cir. 1997).

[28] *See Daniels Cablevision*, Order on Recon., 12 FCC Rcd 17,410 (1997); *American Cable Co. v. Telecable of Columbus*, Memorandum Opinion and Order, 11 FCC Rcd 10,090 (1996); *Florida Cablevision Management*, Order on Recon., 11 FCC Rcd 6876 (1996); *Cecilton CATV*, Memorandum Opinion and Order, 10 FCC Rcd 2807 (1995); *Telesat Cablevision*, Memorandum Opinion and Order, 10 FCC Rcd 2807 (1995).

Unlike with cable incumbents, neither LFAs nor competitive entrants can reasonably estimate where it will or will not make sense economically for the entrant to build out and offer cable service. Penetration rates are often going to be much lower than those realized by the incumbent (which had the market to itself) and, importantly, penetration rates are inherently much less predictable because they will be affected by competition from the incumbent. Similarly, the ultimate price at which service will be provided is unpredictable because prices will be determined by the market instead of the cable provider. Therefore, what was reasonable for the incumbent is not reasonable for an entrant, and an LFA cannot realistically determine what would be reasonable for an entrant. The market, however, will ensure that cable overbuilders do build out within a reasonable time.

The Communications Act Requires that Competitive Entrants Be Given a Reasonable Time to Build Their Networks, Which Can Only Be Determined by Business Judgment Based on Market Experience. Section 621 also contains a provision that clearly gives the Commission authority to prohibit build out conditions: the requirement that a franchise authority afford a cable system "a reasonable period of time to become capable of providing cable service to all households in the franchise area."[29] This is, in fact, the same provision in which cable operators erroneously attempt to find a build-out requirement. The better reading, however, is that it is a limit on build-out requirements, and one that fits within the overall Communications Act's support for deregulation of competitive entrants. In fact, "reasonableness" is routinely interpreted by the Commission[30] and, where possible, the Commission generally chooses to rely on market-based competition to establish what is reasonable.

Therefore, USTelecom submits that the most natural interpretation of Section 621 in light of Commission precedent and the overall purposes of the Communications Act is that an LFA should rely on market forces to determine the "reasonable period of time" by which an entrant should become capable of providing service. In particular, competitive entrants should not be required to "become capable of providing service to all of the households in a franchise area" any more slowly or quickly than market conditions dictate. Competitive wireline video entry should not be dictated by, and limited to, the geographic contours of current franchised cable networks, as such constraints inevitably will delay and deter broadband deployment. Instead, new entrant network owners should be free to deploy broadband video wherever they have networks, and as business conditions dictate. Not only is this the best policy for consumers, it is also the most fair outcome because entrants, like incumbents, will not face unreasonable build-out requirements.

Relying on Market Forces to Determine the Reasonable Period of Time in Section 621(a)(4) is Consistent with the Commission's Treatment of Reasonableness Requirements in Other Sections of the Act. If the Commission determines that an LFA must rely on market forces to establish the "reasonable time" for competitors to build-out networks, it will

[29] 47 U.S.C. § 541(a)(4)(A).

[30] *See, e.g., Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631 ¶ 1 (1993) (setting rules to ensure reasonable rates for basic cable service tier); *Local Exchange Carriers' Rates, Terms, And Conditions For Expanded Interconnection Through Physical Collocation For Special Access And Switched Transport,* 12 FCC Rcd 18730 ¶ 2 (1997).

be acting consistently with a long history of precedent regarding reasonableness requirements in the Communications Act. For example, section 201(b) requires *all* telecommunications carriers to offer service at "reasonable" rates.[31] When there is only one provider, the Commission uses rate regulation to ensure that rates are reasonable. In competitive markets, however, the Commission relies on the market to enforce the reasonableness requirement.[32]

AT&T is Correct in its Argument that Build-Out Requirements Are Economic Regulations that Should Not Be Applied to Entrants Under the Communications Act. AT&T has presented the Commission with an additional, and persuasive, formulation of the principle that competition, and not a regulatory body (much less an incumbent cable operator), should determine when and where an entrant deploys network and offers service. AT&T argues that the Commission should "adopt rules prohibiting franchising authorities from imposing build out requirements as conditions of entry for competitive cable operators."[33] AT&T points out that this is consistent with the Commission's mandate under Section 706 of the 1996 Act, and the specific purpose of Title VI to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."[34] USTelecom agrees with AT&T on this point—applying build-out requirements to competitive entrants is so fundamentally inconsistent with the overall purpose and provisions of the Communications Act that the Commission is well within its authority to prevent LFAs from erecting these barriers to entry. Indeed, this is the same treatment afforded cable operators in broadband markets, which cannot be subjected to build-out requirements requiring them to provide telephone service throughout a LEC study area, or to all types of customers.[35]

Verizon is Correct in its Argument that Section 621 Permits Cable Operators to Define Their Own Franchise Areas. If the Commission does not find that the market should determine when and where cable entrants build network and deploy service, then it must accept the alternative argument that a cable operator is free to determine its franchise area for the purpose of Section 621. Verizon argues in its Comments and Reply Comments that the statutory definition of a "franchise area" is not equivalent to the area under the jurisdiction of an LFA and, instead, that a cable operator may define its own "franchise area."[36] As Verizon and FTTH

[31] 47 U.S.C. § 201(b).

[32] *E.g., Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995).

[33] Letter dated July 28, 2006 from Jim Lamoureux, AT&T, to Marlene H. Dortch, FCC, *Implementation of Section 621(a)(1) of the Communications Act*, MB Docket No. 05-311, at 3.

[34] 47 U.S.C. § 521(6).

[35] *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); *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).

[36] Verizon Comments, at 42-46; Verizon Reply Comments, at 44-45. *See also* FTTH Council Comments; Letter dated June 26, 2006 from Thomas Cohen, on behalf of the FTTH Council, to Marlene H. Dortch, FCC, *Implementation of Section 621(a)(1) of the Communications Act*, MB Docket No. 05-311.

Council point out, this is consistent with the use of the term in Title VI because Congress also refers to the "jurisdiction" of a franchise authority in other places,[37] indicating that Congress intended that the terms have different meanings. Notably, incumbent cable operators have largely defined their own franchise areas, albeit through negotiation with LFAs. In those negotiations, cable operators appear to have largely ensured they do not have to provide service where it is not economically reasonable, for example through limitations related to population density and overbuilding. Commission precedent is also instructive on the issue of franchise area definition because it appears that cable operators have been allowed to "redefine" their franchise areas based on their actions, and without obtaining permission from the relevant LFA.[38] Competitive entrants should be afforded the same rights.

Cable Incumbents Seek to Impose Build-Out Requirements on Entrants for the Sole Purpose of Preventing Competition, Which the Commission Cannot Countenance. Cable operator insistence on full overbuilding of their networks only makes sense if it keeps out competitors. No business intentionally seeks to lose more customers, which presumably would happen with full build-out. Indeed, cable operators presumably will lose market share if competitors are required to match the current cable service territories. Therefore, so long as entry is going to occur, the cable operator is better off when competitors don't build out than when they do; stated another way, the cable operator only benefits from build-out requirements where they deter entry and preserve market power. The public interest is not served, however, by deterring entry and preserving monopoly. Therefore, build-out requirements are not in the public interest.

CT Communications Demonstrates that "Red Lining" Fears are Just a "Red Herring." Finally, there is no good reason to believe that entrants will "red-line" to avoid low-income areas. For example, CT Communications, based in Concord, North Carolina does not yet offer video programming to its subscribers, but it is "working internally and with consultants to develop the next evolution of its network architecture and the services that will be delivered over its network. The plan will define the voice, data, video and entertainment products and services to be delivered to the Company's customers, as well as the network design and bandwidth necessary to provide those products and services."[39] A key component in any future product offerings will be cost of service. In fact, the cost of network deployment may well matter more than the income level of the potential subscribers because take rates are similar for low-income and high-income households and market prices do not vary between low-income and high-income areas over a limited geographic region like Concord's service territory.

In CT Communications' case, therefore, it appears that many low-income areas are cheaper to serve from a network investment perspective and, thus, more attractive for rapid

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[37] *E.g.*, 47 U.S.C. §543(a).

[38] *See Daniels Cablevision*, Order on Recon., 12 FCC Rcd 17,410 (1997); *American Cable Co. v. Telecable of Columbus*, Memorandum Opinion and Order, 11 FCC Rcd 10,090 (1996); *Florida Cablevision Management*, Order on Recon., 11 FCC Rcd 6876 (1996); *Cecilton CATV*, Memorandum Opinion and Order, 10 FCC Rcd 2807 (1995); *Telesat Cablevision*, Memorandum Opinion and Order, 10 FCC Rcd 2807 (1995).

[39] CT Communications, *Form 10-Q*, at 18 (Mar. 31, 2006).

competitive entry. This is significant for the Commission because it demonstrates how, in reality the feared problem of "red lining" is really just a "red herring." In sum, there is no reason to deny beneficial competition to some customers simply because other competitors are not yet receiving such competition. Therefore, LFAs should not be permitted to use build-out requirements on competitors as a purported tool to prevent fears of "red-lining," which isn't likely to occur in any event.

Guadalupe Valley Telephone Cooperative's Experience Shows the Benefits of Pro-Entry Policies. The Commission will truly help consumers and the American economy by reducing and eliminating cable franchise barriers to entry. The experience of one USTelecom member, Guadalupe Valley Telephone Cooperative (GVTC) demonstrates how national cable franchise reform will produce substantial public interest benefits. GVTC provides cable service through an affiliate to approximately 8000 customers in incorporated and unincorporated areas north of San Antonio, Texas. GVTC sought to expand its cable service to the incorporated area of Bulverde as well as the surrounding unincorporated area, but was faced with the prospect of a franchise agreement to build out all parts of the city of Bulverde with at least forty homes per square mile. The streamlined franchise process just established in Texas removed such barriers to entry, however, and enabled GVTC to begin providing competitive cable service beyond its original footprint. GVTC received the first State Issued Certificate of Franchise Authority for video granted in Texas under its new cable franchise law. It can now offer service on its existing network where it makes business sense—where customer demand justifies the expense of upgrading the network to offer service. Importantly, GVTC no longer faces the prospect of having to build out its network and offer service throughout an entire city, which would have been daunting, if not impossible. GVTC obtained regulatory approval to offer video services in a matter of days, rather than months or years, and without expending hundreds of hours of staff time, and tens or hundreds of thousands of dollars of professional services. In sum, the state issued franchise process in Texas is fair and efficient, and has made it possible for GVTC to expand its video service to customers, both inside and outside the city limits of Bulverde, who have never had a cable alternative. The Commission should follow this example and adopt similar rules for the nation as a whole.

IV. THE COMMISSION CAN ESTABLISH APPLICATION AND APPROVAL PROCEDURES

The Commission has sought to ensure on many occasions that the burdens of incumbent-oriented regulation are not imposed unnecessarily on new entrants. One notable set of examples concerns the licensing process for competitors in local exchange and long distance telecommunications markets. Competitive LECs (CLECs) are able to obtain state-wide licenses with a minimum of time and effort. Similarly, the Commission has modified the requirements for competitors seeking authorization to provide interstate telecommunications service, pursuant to Section 214. Rather than endure the time and expense of the traditional Section 214 applications process, competitors are licensed pursuant to a "blanket" authorization. The Commission should follow these precedents and similarly minimize the time and expense involved in obtaining a competitive cable franchise, by making authorization 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, which removes the primary justification for cable franchise regulation.

It is important that the Commission establish consequences for LFA failures to act on franchise applications within a reasonable period of time. One obvious consequence could be that an application is deemed granted. This would ensure that an LFA does not deter entry by failing to act within a reasonable time, and it is unlikely to lead to franchise approvals that are not in the public interest. With a default grant as a backstop, any LFA would act promptly if there were evidence that an applicant were not qualified. Moreover, LFAs would retain the ability to take remedial measures should an unqualified applicant receive a franchise which, in any event, is highly unlikely to occur with a LEC because it is already authorized to provide telephone service and use public rights of way.

It is also vital that competitors be able to enter the market as soon as they are granted franchises instead of having to wait while their franchise licenses are appealed. There is no issue of irreparable harm to the cable incumbent or the LFA should the cable entrant begin building its network and offering service while appeals are pending. Conversely, litigation is a very effective stalling tactic and barrier to entry, as demonstrated by Knology's experience described below. In fact, cable operators are so quick to use litigation as a barrier to entry that they occasionally even sue the wrong company.[40]

A. Specific Company Examples

The following paragraphs explain several situations where the franchise process has been a substantial barrier to entry.

Ben Lomand Telephone Cooperative Ben Lomand Telephone Cooperative is based in McMinnville, Tennessee, and it provides telephone services to over 36,000 customers in five counties in rural western Tennessee. Many of the small communities served by Ben Lomand did not receive wireline-based video service before Ben Lomand upgraded its network and deployed service. In the others, Ben Lomand was, or will be, a welcome entrant. Ben Lomand upgraded its network over the past few years, and it now has the technical capability to provide video service to approximately 60 percent of its telephone customers. It will be able to offer it to 100 percent of its customers within the next 12 months.

Ben Lomand's local exchange service area is covered by 25 different franchising authorities. In some of these video-franchise jurisdictions, Ben Lomand serves as few as 100-200 telephone customers. Ben Lomand has had to expend hundreds of hours of effort, and wait many months for approval in each franchise area and, after nearly two years of effort , the company has won 18 approvals. Moreover, the company faces the prospect of substantial recurring costs managing 25 different franchise agreements, each with its own terms that are different from those required by the other 24 LFAs. This cumbersome, archaic franchising process has been a significant barrier to Ben Lomand's competitive entry in local video markets.

Hickory Tech Communications. Over the past few years, Hickory Tech has managed to obtain eight franchises, covering only a part of its service even though it likely could have offered service to all of it customers by now if it hadn't been for the cable franchise process. Hickory Tech estimates that it has taken an average of 6-8 months and over 300 man hours per application. These are severe burdens for a small company and they are disproportionate to any

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[40] Linda Haugsted, Adelphia Wants to Ground a Falcon, *Multichannel News*, Feb. 20, 2006.

governmental interest in making sure that Hickory Tech is a suitable provider of competitive video programming services.

Knology. Knology, whose origins were in two small incumbent LECs, Interstate Telephone Company and Valley Telephone Company (with which it is still affiliated), applied for a competitive cable franchise in Louisville, Kentucky in early 2000. Although the city was initially receptive, it became concerned by the prospect that the incumbent cable operator—Insight Communications—would initiate litigation with the city to enforce an anti-competitive "level playing field" provision. Therefore, the city attempted to craft a franchise agreement for Knology that was identical to Insight's, down to requiring Knology to pay a $500,000 fine for overcharging customers (that it never had) because Insight had to pay such an amount. In fact, the incumbent cable operator reviewed the draft agreements and offered revisions.

The negotiation process dragged on for months before the city finally approved Knology's franchise in September, 2000. Unfortunately, Insight was able to prevent Knology from entering the market by appealing the grant. As time wore on, and the incumbent improved its network and locked up customers, it eventually became economically infeasible for Knology to continue to pursue a franchise in Louisville, and it withdrew its application and stayed out of the market.

United Telephone. United's experience with the build out requirements in Brentwood, Tennessee, which is set out above, also demonstrates the harm from an undefined and sometimes interminable franchise application process. The City of Brentwood repeatedly scheduled United's application for consideration at its meetings but failed to act on it. This went on for nearly two full years, during which time United had to expend greater and greater amounts of staff resources and attorney's fees (of tens of thousands of dollars). Meanwhile, United did not have the opportunity to appeal the constructive denial of its application, and the incumbent cable operator had the opportunity to lock up customers. This demonstrates the need for a time limit on franchise application review.

B. Legal Analysis

Section 621(a)(1) prevents LFAs from unreasonably denying competitive franchise applications. Contrary to the arguments of cable operators and LFAs, this provision applies not only to denials of applications, but also to situations where LFAs attach unacceptable conditions to purported grants of franchise applications, or where LFAs fail to act. Arguments denying the application of section 621(a)(1) are obviously specious. If LFAs were able to attach unacceptable conditions to franchise grants and/or fail to act, section 621(a)(1) would be meaningless in practice. There would be no purpose to a provision that prohibited an unreasonable denial of a franchise but permitted an LFA to accomplish the same result as denying a franchise by granting a different franchise license or failing to act. Instead, the Commission should recognize that statutes are to be interpreted so as to give effect to all of their provisions.[41]

Just as the Commission should streamline the process for cable systems' competitors that already have access to public rights of way, so too should the Commission minimize the time

[41] *E.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

and expense involved in the franchise application process for all competitive applicants. The Commission asks "how we should define what constitutes an unreasonable refusal to award an additional competitive franchise under Section 621(a)(1)." In particular, the Commission requests comments on its tentative conclusion:

> Section 621(a)(1) prohibits not only the ultimate refusal to award a competitive franchise, but also the establishment of procedures and other requirements that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise, either by (1) creating unreasonable delays in the process, or (2) imposing unreasonable regulatory roadblocks, such that they effectively constitute a de facto "unreasonable refusal to award an additional competitive franchise" within the meaning of Section 621(a)(1).

This analysis is clearly correct, and the Commission should act on it to adopt rules defining when the failure to rule on an application constitutes an unreasonable denial, and when granting an application with unreasonable conditions constitutes an unreasonable denial. The courts have expressly recognized that imposing an unreasonable condition on the grant of a license application may be deemed an effective denial of that license for purposes of § 402(b) of the Act.

Congress clearly intended for the provisions of Section 621(a) to place meaningful limits on the actions of LFAs in order to encourage competition among video service providers. One of the biggest, inherent problems with the current franchise requirements is that the process simply takes too long. The process – including application, review, negotiation, and approvals – routinely takes many months, and often more than a year. Both Section 621(a) and Section 626 reflect concerns with preventing delay in franchising decisions. Congress' very choice of words – "unreasonably refuse to award" – reflects an intent to ensure that the franchising process moves forward at a reasonable pace. Notably, by its express terms, this provision is not limited to cases where an LFA outright denials an application. Instead, the requirement also applies when a franchising authority unreasonably fails to grant a competitive franchise, as it might do through simple inaction or delay. One of the key concerns underlying the provision is that franchising authorities could simply string out the process and deter entry by not acting in a reasonable period of time on a franchise application. So the provision applies fully when a franchising authority unreasonably withholds action, or simply fails to act within a reasonable period of time.

A streamlined franchise applications process would be fully consistent with Commission precedent and its application of similar Communications Act requirements in other markets. In fact, the Commission noted in the Cable Modem Order, that "a local franchising authority [should not be free] to impose an additional franchise" on a provider that is already — and would continue to be — subject to one set of franchising obligations as a result of its use of those rights of way. The cable incumbents themselves have agreed, arguing against duplicative local rights-of-way regulations of their own facilities, stating that local rights-of-way ordinances would "make[] no sense when . . . new services can be offered simply by changing the pattern of signaling sent over an existing physical transmission facility, without imposing any additional burden on rights-of-way." Indeed, cable operators generally have not been subject to multiple franchise requirements when they deploy new services beyond those within the scope of their original cable franchises. The same should be true for LECs, and "administration of the public rights-of-way should not be used to undermine efforts of either cable or telecommunications providers to upgrade or build new facilities to provide a broad array of new communications services."

V. THE COMMISSION CAN PREVENT EXCESSIVE DEMANDS FOR FRANCHISE FEES AND IN-KIND PAYMENTS

The Commission should also take this opportunity to address another significant problem facing cable system competitors. The Commission has received a substantial body of evidence in this proceeding showing that cable operators frequently face demands for cash and free or discounted services and equipment over and above franchise fees. These demands are particularly hard on entrants, which don't have the same base of customers, or expected market shares as do incumbents. Accordingly, excessive franchise fees and in-kind payments deter competitive entry and competition, and the Commission should promulgate rules to curb this rent-seeking behavior.

In addition to the many examples of franchise authority overreaching submitted by AT&T, BellSouth, the Fiber-to-the-Home Council,[42] small and mid-size LECs also face demands for payments and in-kind services beyond those authorized in the Communications Act.

Paul Bunyan Telephone Cooperative. Paul Bunyan Telephone Cooperative (PBTC) operates in rural communities in the northern part of Minnesota. PBTC has obtained competitive franchises in three communities—Bemidji, Cohasset, and Grand Rapids, Minnesota. In each case, the process has taken a very long time (approximately 5 years in Grand Rapids) and cost the company considerable resources (two of its 60+ employees working nearly full time for six months, a $10,000 application fee, and over $20,000 in legal fees). In each case, the biggest cause for delay has been excessive demands for services. In particular, Grand Rapids demanded that PBTC provide fiber connections to every municipal building, including the power plant and the water filtration facility. Plainly, these requests were unrelated to any legitimate public, educational, or governmental communication authorized in the statute, and PBTC resisted the community's demands. Similarly, Bemidji sought free DSL connections for the use of all of the employees in its City Hall, which also far exceeds any obligation authorized in the statute.

Hickory Tech Communications. Another example of excessive demands comes from the City of Faribault, which asked Hickory Tech in the course of franchise negotiations to build fiber to all of its municipal buildings. After some negotiation, the city settled on a request for discounted telephone services for its general use. Hickory Tech complied and entered into a discounted contract for telephone services, which are used for all city facilities and not just public, educational, or governmental facilities. Therefore, they are outside of the specific exception for in-kind services listed in the statute. Hickory Tech also pays a 5% franchise fee, so these discounts are in addition to fees or services authorized by the Communications Act.

Requests for fees and services above and beyond statutorily-authorized franchise fees are illegal. Section 622(b) of the Cable Act provides that franchise fees imposed on an operator

[42] AT&T Comments; AT&T Reply Comments, BellSouth Comments; BellSouth Reply Comments; FTTH Council Comments; Verizon Comments; Verizon Reply Comments.

"shall not exceed five percent of such cable operator's gross revenues derived … from the operation of the cable system to provide cable services." Section 622(g) defines "franchise fees" to include "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity" on an operator, and further makes specifically clear that "payments which are required by the franchise to be made by the cable operator . . . for, or in support of the use of, public, educational or governmental access facilities" must be included in assessing compliance with the statutory fee cap. There are several, specifically enumerated exceptions to the franchise fee definition, namely, "taxes and fees," "capital costs" for "public, educational, or governmental access facilities," and "incidental" charges like "bonds, security funds, letters of credit, insurance, indemnification, penalties or liquidated damages." The Commission should hold that any obligation or in-kind requirement that is not contained within those explicit exceptions should count toward the statutory 5% franchise fee cap.

Rather than require video entrants to litigate the propriety of individual fees and requests through legal challenges and costly court remedies every time an LFA exceeds the statutory 5% cap, therefore, the Commission should promulgate a rule limiting the demands on franchise applicants to the statutory maximum. In particular, the Commission should expressly provide that any obligation to make payments, or provide anything of value (other than items expressly excluded from the "franchise fee" definition), to an LFA or its designee constitutes the payment of a franchise fee. Therefore, such an obligation must be credited at full market value toward the provider's franchise fee payment.

Sincerely,

Jeffrey S Lanning
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