September 13, 2006

VIA ELECTRONIC COMMENT FILING SYSTEM (ECFS)

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

Re: Implementation of Section 621(a)(1) 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; IP-Enabled Services, WC Docket No. 04-36; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, CS Docket No. 02-52; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 05-255; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185

Dear Ms. Dortch:

This *ex parte* notice is filed on behalf of the National Association of Telecommunications Officers and Advisors ("NATOA"), the National League of Cities ("NLC"), the National Association of Counties ("NACo"), the United States Conference of Mayors ("USCM"), the Alliance for Community Media ("ACM"), and the Alliance for Communications Democracy ("ACD"). The associations were represented by Tillman Lay from the law firm of Spiegel and McDiarmid, Ron Thaniel from the U.S. Conference of Mayors, and Steve Traylor and Libby Beaty from NATOA. On September 12, 2006, we met with the following representative of the Commission in order to discuss issues affecting local governments and their constituents as summarized below and as contained in the Attachment to this letter.

- Office of Commissioner Michael J. Copps: Jessica Rosenworcel, Senior Legal Advisor

During the course of the meeting, the participants presented the attached document that reiterated our position taken in the comment and reply comment filed in MB Docket No. 05-311. We indicated that we believe no evidence has been presented indicating that a national problem with the local franchising process exists. Furthermore, even if there is a problem (which there is not), the Commission has no legal authority to act as suggested in the NPRM or by industry commenters. We restated our strong support for competition in the cable video market as evidenced by our historical participation in all related dockets to this proceeding. Further, we emphasized that reasonable build-out requirements would help ensure that all members of the community - not just a select few - would benefit from increased competition.

Pursuant to Commission rules, please include a copy of this notice in the record for the proceedings noted above.

Sincerely,

Libby Beaty

Libby Beaty
Executive Director, NATOA

Attachment

cc: Alex Ponder, NLC
Jeff Arnold, NACo
Ron Thaniel, USCM
Anthony Riddle, ACM
James Horwood, Spiegel and McDiarmid
Barbara Popovich, ACD
Tillman Lay, Spiegel and McDiarmid
Jessica Rosenworcel, Senior Legal Advisor

Ex Parte Presentation
Video Franchising

National League of Cities

National Association of Counties

National Association of Telecommunications Officers and Advisors

The United States Conference of Mayors

Alliance for Communications Democracy

Alliance for Community Media

NATOA’s membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer cable franchising and telecommunications policy for the nation’s local governments.

NLC is the oldest and largest national organization representing municipal governments throughout the United States. It serves as a resource to and an advocate for more than 18,000 cities, villages, and towns in furtherance of its mission to strengthen and promote cities.

NACo is the only national organization that represents county governments in the United States. It serves as a national advocate for counties; acts as a liaison with other levels of government; and provides legislative, research, technical and public affairs assistance to its members.

The USCM is the official nonpartisan organization of the nation’s 1,183 cities with populations of 30,000 or more. Its mission is to promote effective national urban/suburban policy, strengthen federal-city relationships and ensure that federal policy meets urban needs.

ACM is a nonprofit, national membership organization that represents 3,000 public, educational and governmental cable television access organizations and community media centers across the nation. It pursues its mission of assuring access to electronic media for all through its legislative and regulatory agenda, coalition building, public education, and grassroots organizing.

ACD is an advocacy group for public access television, dedicated to preserving and strengthening community access to media through educational programs and participation in court cases involving franchise enforcement and constitutional questions about community television.

<u>**Ex Parte Presentation of NATOA, NLC, NACo, USCM, ACM and ACD**</u>

I. Local Governments Support and Encourage Competition.

- Local governments embrace technological innovation and competition in the video marketplace. Cities and counties across the country want and welcome real competition in a technologically neutral manner and support the deployment of competitive new video services and broadband as rapidly as the market will allow. Indeed, over the years local governments have granted competitive franchises virtually everywhere such a franchise has been sought. Unfortunately, relative to the number of local franchising authorities ("LFAs") nationwide, to date competitive franchises have been sought in relatively few jurisdictions.

- LFAs are responsible for protecting the use of the public rights-of-way ("PROW"), ensuring access to PROW-based video services for all residents, and requiring appropriate support for public, educational and government ("PEG") access channel capacity and facilities and institutional networks ("I-Nets"). In this way, the local franchising process fulfills the long-standing Congressional policy that the cable franchising process must assure that cable systems are "responsive to the needs and interests of the local community."

- The NPRM emphasized that parties should submit "empirical data" and "specific examples" of abuses of the franchising process and the extent to which LFAs "unreasonably" refuse to award competitive franchises. As pointed out in Part III below, telecom industry rule proponents have failed to provide what the NPRM requests.

II. Summary of Position of NATOA, NLC, NACo, the USCM, ACM, and ACD.

A. The Commission Lacks Legal Authority To Construe Or Enforce Section 621(a)(1).

- The Commission has no authority to adopt rules to implement, or enforce, § 621(a)(1). Read together, Sections 621(a)(1) and 635(a) clearly vest the courts, not the FCC, with exclusive jurisdiction over § 621(a)(1).

- Congress' explicit grant of jurisdiction over § 621(a)(1) matters to the courts precludes imputing jurisdiction to the Commission. Courts already have concurrent jurisdiction with the FCC over several Cable Act provisions not listed in § 635(a). If all § 635(a) did was grant concurrent jurisdiction over § 621(a)(1) to the courts, it would be meaningless. *See National Association of State Utility Consumer Advocates v. FCC,* No. 05-11682 (11th Cir., July 31, 2006).

- The Commission cannot rely on § 2(a) of the Communications Act, 47 U.S.C. § 152(a), to exercise "ancillary" jurisdiction. Where Congress has specifically reserved franchising authority to LFAs, and dispute resolution to the courts, as it has in §§ 621(a) and 635(a), there is no need for Congress to also expressly foreclose the possibility of Commission jurisdiction. *See, e.g., Ry. Labor Executives' Ass'n. v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994). The explicit grant of jurisdiction to the courts in §§ 621(a)(1) and 635(a) precludes imputing such jurisdiction to the Commission.

- The cable franchising process is inherently local and fact-specific, and a "one-size-fits-all" approach is antithetical to Congress' intent that cable systems be "responsive to the needs and interests of the local community." Because § 621(a)(1) disputes are inherently fact-specific, courts, rather than the Commission, are particularly well-suited to handle them.

- The Commission is powerless to alter the local, community-based approach to cable franchising that Congress endorsed in the Cable Act. "It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs." H.R. Rep. No. 934, 98th Congress, 2d Sess. at 24.

- The NPRM's reliance on *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999), for the proposition that the Commission's authority to administer Title VI includes the authority to interpret and implement § 621(a)(1) is misplaced. *Chicago* involved definitions set forth in § 621*(b)(1)*, not § 621*(a)(1)* and its prohibition on unreasonable refusal to award additional competitive franchises.

- Even if the Commission has authority to interpret or enforce § 621(a)(1) (which it does not), it would be, at most, concurrent jurisdiction with that of the courts. The Commission's interpretations of § 621(a)(1), therefore, would not be subject to the deferential standard of review as set forth in *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837 (1984). See, e.g., Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994).

- While cable operators are entitled to First Amendment protection, they are not free from government requirements and restrictions that serve important government purposes not related to the suppression of free expression. The Commission does not have the power to find a provision – such as build-out requirements – of its governing Act to be unconstitutional. *See, e.g., Meredith Corp. v. FCC*, 809 F.2 d 863, 872 (D.C. Cir. 1987). The courts are the proper forum for seeking such relief.

B. There Is No Credible Evidence That LFAs Have Unreasonably Refused To Grant Competitive Franchises.

- LFAs welcome competition and are eager to issue additional franchises. Local franchising decisions are made by elected city councils and county commissions that must be responsive to the preferences of their constituents or face adverse consequences at the ballot box -- a far more powerful check on unreasonable refusals to award competitive franchises than any FCC oversight could produce. Indeed, the NPRM recognizes that a large number of competitive franchises have been secured over the past decade.

- Since its enactment nearly fourteen years ago, there is a dearth of reported precedent regarding § 621(a)(1), and especially its "unreasonable refusal" provision, a fact that, in and of itself, suggests "unreasonable refusals" by LFAs rarely, if ever, occur. There have been only five reported cases involving claims that an LFA violated § 621(a)(1)'s "unreasonable refusal" provision. And while a violation was found in two cases, the franchise application was not denied in either case. *See NEPSK, Inc. v. Town of Houston*, 167 F.Supp.2d 98 (D. Maine 2001), *aff'd*, 283 F.3d 1 (1st Cir. 2002); *Qwest Broadband Services v. City of Boulder*, 151 F.Supp. 2d 1236 (D. Colo. 2001); *Knology, Inc. v. Insight Communications Co., L.P.*, 2001 WL 1750839 (W.D. Ky. March 20, 2001); *Classic Communications, Inc. v. Rural Telephone Service Co., Inc.*, 956 F.Supp. 896 (D. Kan. 1996); and *Liberty Cable v. City of New York,* 893 F.Supp. 191 (S.D.N.Y. 1995).

- The NPRM appears to be triggered in large part by RBOC complaints regarding supposed difficulties they have encountered in the local franchising process. However, these complaints of delay of entry to the video marketplace are built on mischaracterizations. While the 1996 Act repealed the telephone-cable cross-ownership prohibition and gave the RBOCs four different means to enter the multichannel video market, the RBOCs made no serious effort to enter the market. Rather, RBOCs, such as Verizon and AT&T, did not enter the cable market for nearly a decade because of their own business decisions, not because of any delays allegedly caused by the LFAs. Section 621(a)(1) is not, and should not be, a means for ameliorating the consequences of the RBOCs' own business decisions.

- Industry complaints about the local franchising process essentially fall into two categories: namely, the process supposedly "takes too long," and some LFAs allegedly make "outrageous demands." Among the "outrageous demands" cited by the industry are those involving build-out requirements, and PEG access channel and institutional network (I-Net) support – all requirements specifically sanctioned by the Cable Act.

- Build-out requirements, which vary from community to community, are essential if the Cable Act's goals are to be observed. They contain density limitations and a reasonable period of time for system build-out. The NRPM acknowledges that it is "not unreasonable" for an LFA, when awarding a competitive franchise, to assure that cable access is not denied to any group of community residents, and to permit a reasonable period of time during which the cable system may become capable of providing service to all households in the franchise area. That is all build-out requirements do.

- PEG and I-Net requirements are among the most vital local community cable-related needs and interests that the Cable Act was designed to preserve and protect and are, by their nature, community-specific. Like build-out, the NPRM states that it is "not unreasonable" for an LFA, when awarding a competitive franchise, to require that the operator provide adequate capacity, facilities, or financial support for PEG and I-Net services. Again, that is precisely what the PEG and I-Net requirements do.

C. IPTV Is A "Cable Service."

- AT&T and Cincinnati Bell assert that their Internet Protocol-based video service ("IPTV") is not a "cable service" within the meaning of § 622(6). But these arguments should be disregarded by the Commission. To provide adequate notice of a ruling on this topic, the Commission would have to initiate another proceeding with proper notification to permit interested parties to file comments to help ensure meaningful public participation. But in any event, AT&T's and Cincinnati Bell's "IPTV" argument is simply wrong. IPTV services are a "cable service" under the current Cable Act and are fully subject to Title VI requirements. *See, e.g.*, NCTA *ex parte* letter and memorandum, WC Docket No. 04-36 (filed July 29, 2005) ("NCTA Filing #1"); NCTA *ex parte* response to SBC paper, WC Docket No. 04-36 (filed November 1, 2005) ("NCTA Filing #2"); and NCTA *ex parte* response to AT&T *ex parte* filings, WC Docket No. 04-36 and MB Docket No. 05-311 (filed July 31, 2006). Furthermore, any additional argument that IPTV is not subject to Title VI is directly contrary to the Act's and the

Commission's guiding principles of competitive neutrality and non-discrimination. House Energy and Commerce Chairman Joe Barton (R-Texas) has characterized AT&T's argument as "stupido."

D. Build-out Requirements Are Necessary To Ensure Competition And Lower Consumer Prices.

- It has been reported that cable prices are approximately 15% lower in areas with wireline video competition. But competition occurs only when two or more companies compete for the same business. Without reasonable build-out requirements, many consumers will never see cable video service competition in their communities. New entrants will simply "cherry pick" those communities that promise the highest return on investment. In fact, AT&T has publicly stated that Project Lightspeed will be available to 90% of its "high-value" customers, but to less than 5% of its "low-value" neighborhoods.

  Further, without reasonable build-out requirements, predictions of lower consumer prices by the RBOCs and others, such as the Phoenix Center, are simply wrong. Their calculations assume universal build-out. In addition, according to Thomas Hazlett, who submitted a declaration in support of Verizon's comments in this proceeding, it is not the intent of the RBOCs to cut prices. Rather, "their intent is to make money on the deal."

E. The Telecom Industry's Proposed Rules Are Beyond The FCC's Authority To Adopt And Would Be Arbitrary And Capricious.

1. Section 621(a)(1) is limited to final LFA orders denying a franchise.

   - Title VI does not grant the Commission authority to become a "national franchising authority" or a national LFA "oversight board." Section 621(a)(1) provides that "any applicant whose application for a second franchise *has been denied by a final decision of the franchising authority may appeal such final decision* pursuant to Section 635 for failure to comply with this subsection." 47 U.S.C. § 541(a)(1) (emphasis added). Section 621(a)(1) cannot be construed by a disgruntled applicant to permit the challenge – either in court or at the Commission – of a "non-final" decision of an LFA.

2. Build-out requirements are specifically allowed by the Cable Act.

- Build-out requirements are not, and statutorily cannot be, a barrier to competitive franchises. As long as an LFA gives a competitive provider "a reasonable period of time to become capable of providing cable service to all households in the franchise area," § 621(a)(4)(A), the Cable Act shields build-out requirements from constituting an "unreasonable refusal" to grant a competitive franchise. Section 621(a)(4)(A) cannot plausibly be construed to *forbid* LFAs from requiring a build-out "to all households in the franchise area" if an LFA allows "a reasonable period of time" to do so.

- Verizon's assertion that a provider may define its own franchise area is contrary to the Cable Act and FCC precedent. To allow a provider to do so would undermine the entire local franchising process and, among other things, render meaningless the Act's anti-redlining, uniform rate and build-out provisions.

3. The FCC has no authority under the Cable Act to set deadlines on LFA franchising actions.

- Section 621(a)(1) does not provide the Commission with authority to set a timeframe within which an LFA must act on a competitive franchise application. Congress knows how to set an inflexible deadline when it wants one, as it did in § 617, where it imposed a statutory deadline of 120 days to act on a franchise transfer application. Section 621(a)(1) contains no such deadline. The absence of a similar deadline in § 621(a)(1) confirms that the Commission has no authority to set such a deadline.

- Given that a franchise transfer requires no negotiation of franchise terms, but rather simply the approval of a new franchise holder, it is not plausible to suggest that Congress contemplated that LFAs could negotiate new franchises in a shorter time than § 617's 120-day deadline for transfers.

- Furthermore, the establishment of an arbitrary deadline would create perverse incentives for both applicants and LFAs. A "deemed granted" provision would discourage good faith bargaining and encourage stonewalling by the applicant. Moreover, § 621(a)(1) clearly allows for a "reasonable" refusal. Yet, a "deemed granted" provision would require the granting of any franchise after the deadline, no matter how reasonable a denial might be. Moreover, if this deadline had a "deemed granted" effect, it would force LFAs to cease negotiations and act unilaterally to meet the deadline; that, in turn, would only promote litigation. Imposing an artificial deadline on LFA decisions would also improperly transform the Commission into a national franchising authority, contrary to the Cable Act.

4. RBOC attacks on franchise application fees, cost reimbursement and PEG/I-NET requirements are contrary to the Cable Act.

- RBOC arguments that the Commission should either prohibit or severely limit the ability of an LFA to assess a franchise application fee, acceptance fee, and application processing cost reimbursement requirements over and above the 5% percent franchise fee are contrary to the Cable Act, which exempts costs "incidental to the awarding or enforcing of the franchise" from the 5% fee cap.

- RBOC attacks on PEG funding requirements are misguided. Section 622(g)(2)(C) exempts PEG capital support from the "franchise fee" definition.

- I-Nets are provided by cable operators and are used by LFAs for a variety of communication purposes. They perform vital public safety and homeland security communications functions. Industry arguments that the Cable Act or the decision in *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999), prevents LFAs from requiring access to their "communications networks" for I-Net use as a condition for granting a cable franchise are wrong. *See* § 621(b)(3)(D), which exempts I-Nets from its general prohibition on LFAs requiring telecommunications services in a franchise.

5. RBOC pleas to nationalize customer service standards cannot be squared with the Cable Act.

- The Cable Act and FCC rules specifically permit LFAs to establish and enforce customer service requirements that either exceed the FCC's standards or concern matters not addressed by those standards. The Cable Act gives the FCC no authority to impose uniform preemptive federal standards.

6. RBOC criticisms of level playing field requirements are unwarranted.

   - Because only courts, not the Commission, can construe and enforce § 621(a)(1)'s "unreasonable refusal" requirement, the Commission has no authority to preempt level playing field requirements, many of which are state laws. Generally, these laws do not require identical treatment, but merely an assessment of whether a competitive franchise, taken as a whole, is more favorable or less burdensome than the incumbent's. *See, e.g., New England Cable Television Assn. v. Dept. of Public Utility Control,* 247 Conn. 95, 717 A.2d 1276 (1998). Little or no evidence has been provided to suggest that these laws have the draconian effect on new entrants RBOCs would have the Commission believe. Moreover, both Congress (in § 653) and the FCC (in its OVS rules) have accepted the need for comparability and competitive neutrality among landline video service providers.

7. Industry's proposed new rules are procedurally defective.

   - Most of the various rules proposed by the telephone industry suffer from a procedural defect that must first be addressed and cured before the FCC can even consider, let alone take action on, them: None of RBOCs' detailed proposed preemptive rules are found anywhere in the NRPM. Therefore, the NPRM provides no public notice and opportunity for comment. Even if the Commission were inclined to adopt any of these RBOC proposals (and it should not be), the Commission would have to propose specific rules on these various topics in a further rulemaking and provide an opportunity for comment.

III. Rule Proponents Have Failed to Provide the "Empirical Data" and "Specific Examples" the NPRM Directed, and the Record in Fact Belies Their Assertion that the Local Franchising Process Slows or Deters Competitive Entry.

A. RBOC Criticisms Are Directed More At The Cable Act Itself, Which The FCC Cannot Change, Than At Specific LFA Actions Or Inactions.

- AT&T concedes as much (Comments at 2), arguing that new § 621(a)(1) rules are necessary even if "each of the nation's thousands of LFAs" acted "as quickly and reasonably as state and local laws allowed."

- This is an admission that what the RBOCs really seek is to amend the Cable Act – something the FCC cannot do in this proceeding. Their remedy, if any, lies with Congress, not the FCC.

B. RBOCs' And Their Allies' Examples Of Supposedly Unreasonable LFA Actions Or Requirements Are Miniscule Relative To The Number Of LFAs And Franchises, And Those Examples Are Anonymous, Hearsay-Based, And Inaccurate.

Even assuming that the FCC has any legal authority to adopt rules interpreting or implementing § 621(a)(1) (and the text, history, structure, and purpose of the relevant statutory provision are all inconsistent with the notion that the FCC possesses any such authority), the record shows that there is no evidentiary basis for FCC action.

1. The NPRM explicitly solicited "empirical data" and "concrete examples" regarding LFAs "unreasonably refusing" to award competitive franchises. But the RBOCs and their allies have provided no credible evidence of any genuine problem in the franchising process -- much less of a pervasive problem that requires the FCC's intervention. Considering the fact that the FCC estimates there are more than 30,000 LFAs in the United States, this lack of evidence of "unreasonable refusals" is striking, but not surprising. Indeed, rather than supporting the industry's position that there are problems with the current video franchising process, the evidence shows that providers are having great success in entering the marketplace.

   For example:

   According to a March 20, 2006 press release, Verizon has obtained video franchises covering approximately 1.3 million homes in California, Delaware, Florida, Maryland, Massachusetts, New York, Pennsylvania, Texas and Virginia. Furthermore, the company is currently negotiating for approximately 300 more franchises around the country. Indeed, since the end of March 2006, Verizon has obtained local video franchises in 42 communities – including 14 new franchises in the month of June 2006 alone. *See* NCTA *ex parte* letter, MB Docket No. 05-311 (filed July 27, 2006).

2. Over 250 LFAs from across the country filed comments demonstrating that the local franchising process is working well and is not a "barrier to entry" to those who wish to enter the cable business. LFAs made clear that they welcome additional competition and are committed to granting franchises to new entrants. Indeed, where applicants have sought competitive

franchises and negotiated in good faith with LFAs, they have received expeditious approval on very favorable terms.

For example:

In early 2006, more than 600 invitations and resolutions were sent by Michigan communities asking AT&T to sign local franchise agreements and compete fairly for cable television customers. The communities involved represented approximately 60% of the state's population.

Numerous LFAs – including Cincinnati, Ohio, Santa Rosa, California, Wilson, North Carolina, and St. Petersburg, Florida - have never been approached by anyone for a competitive franchise, and those that have solicited RBOCs for competitive franchises have been rebuffed. And many jurisdictions, including El Cerrito, California, Cincinnati, Lincoln, Nebraska, and Durham, North Carolina have mechanisms in place that offer the same or comparable terms to a competitor upon request.

In 1996, the City of San Jose, California was approached by Pacific Bell, which requested a competitive video franchise. The franchise, the terms of which were very similar to the incumbent's, was granted in a matter of months. Unfortunately, Pacific Bell abandoned their franchise prior to completion due to a change in the company's business plan.

In 1998, the cities of Henderson, Las Vegas, North Las Vegas and Boulder City, along with Clark County, Nevada, worked with their cable operator to simultaneously issue franchises. This permitted the operator to quickly obtain nearly identical franchises, covering a large region, while allowing each community to individually tailor its franchise to its own unique needs.

Due to subscriber complaints, the City of Saint Charles, Missouri actively sought out competitors who could provide an alternative to the city's incumbent video providers. Despite repeated attempts by city staff and elected officials over a 12-month period, there was no positive response.

3. Claims by RBOCs and their allies of unreasonable treatment at the hands of LFAs are vague, unsubstantiated, not credible, or stale. The RBOCs present numerous claims regarding the unreasonable demands allegedly made by *unnamed* LFAs in *unnamed* communities, thereby making it impossible to test the veracity of those claims. In the relatively few instances where the RBOCs do identify specific LFAs, they mainly discuss situations that occurred

years ago, or claims that are contrary to *current* evidence of the telcos' widespread success in acquiring franchises. (And, even in those decade-old examples the telcos do cite, they generally were able to acquire franchises, including many which they, for their own reasons, chose not to use.

For example:

Qwest complained of its difficulties in obtaining franchises in the Denver metropolitan area during 2002-2004, stating that at the current rate of negotiations, it would take "at least six more years to cover the complete footprint" of the Denver market. In a subsequent *ex parte* notice, the company acknowledged that it "did not aggressively pursue franchises" in the Denver metropolitan area during that time period.

Verizon stated in its comments that the City of Tampa demanded $13.5 million as a condition for the granting of a cable television franchise. This same allegation was subsequently raised by the Fiber-to-the-Home Council in its *ex parte* meeting with Commission staff. However, the FTTH Council failed to acknowledge that Verizon's allegation was refuted by the City of Tampa and was the subject of Errata filed by Verizon on March 6, 2006. *See* Verizon Comments, at 65; City of Tampa Reply Comments, at 1; Verizon *Errata*, MB Docket 05-311 (Mar. 6, 2006).

4. The record clearly demonstrates that the RBOCs' difficulties in obtaining franchises are primarily of their own making. AT&T, for example, has not applied for a single cable franchise, while BellSouth has not applied for one since the mid-1990s; obviously, neither has been "unreasonably refused" by a single LFA.

5. Where the RBOCs have, in fact, applied for cable franchises, LFAs have generally approved those applications in a timely fashion. To the extent there have been any delays in the approval process, such delays have been caused by the RBOCs' own behavior: making unreasonable demands, refusing to negotiate in good faith, unilaterally insisting on the RBOC's own "form" franchise, and generally refusing to satisfy *local* community cable-related needs and interests, as the Cable Act requires.

6. RBOCs' claims that the franchising process is too slow or cumbersome are further weakened by evidence that they are obtaining franchises faster than they can deploy service. The record reflects numerous situations where the telcos have all the

legal authority necessary to provide cable service, but nonetheless are failing to do so.

For example:

According to a March 20, 2006 press release, Verizon has obtained video franchises covering approximately 1.3 million homes in California, Delaware, Florida, Maryland, Massachusetts, New York, Pennsylvania, Texas and Virginia. In addition, the company has stated that 300,000 Virginia households will be capable of receiving FiOS TV under its build-out plan. The company also recently announced new franchise agreements in Montgomery, Hatfield, Collegeville, Skippack, and Lower Gwynedd, Pennsylvania. All of the communities are part of consortium of 30 Montgomery County communities that is recommending that each community approve a cable franchise with Verizon. There are approximately 225,000 households in the municipalities making up the consortium.

Verizon is currently negotiating approximately 300 more franchises around the country. It has reached penetration levels of 9 to 12 percent in Florida, Texas and Virginia, representing nearly half its goal of 20 to 25 percent penetration in five years.

In April 2000, representatives of Wide Open West ("WOW") contacted Kansas City, Missouri to discuss overbuilding the Time Warner Cable system. WOW was offered a franchise on the same terms and conditions as a recently awarded franchise. On May 10, 2000, after receiving written confirmation of the company's intent to enter the market, WOW sent the city another letter in which it stated that it would not enter into an agreement because the company had decided that it would not enter a market where it could not be the first or only overbuilder. Thus, while the franchising process could have been completed in two weeks, WOW made a business decision not to enter the Kansas City market.

7. RBOCs and their allies have also failed to prove that build-out requirements are an impediment to entry. Indeed, Verizon admits that it is agreeing to build-out requirements. Moreover, LFAs are bending over backwards to make build-out as telco-friendly as possible, such as by relieving the telcos of build-out obligations in low-density areas and providing the telcos a significant period of years to complete build-out.

For example:

In May 2006, a Denver area advisory group – the Greater Metro Telecommunications Consortium – approved Qwest's model franchise agreement, eliminating many of the issues that arise during the negotiation process. The agreement does not mandate a build-out provision.

Salt Lake City recently granted a video franchise to Qwest over the objections of the incumbent provider, Comcast. Comcast had wanted the city to impose a build-out period of three to five years. However, the city agreed not to compel a complete build-out of the community unless and until Qwest penetrates 51% of the market.

In 2000, the City of Fort Worth, Texas granted a citywide franchise to WOW. However, construction was delayed due to the stock market turndown in the early 2000's. In an effort to promote citywide video competition, the city granted WOW a five-year extension on the construction timeframe. The franchise was terminated in 2005 for failure to begin construction.

In Wheaton, Illinois, the city's franchise requires the cable system to pass and be capable of serving all residents and institutions existing on the effective date of the agreement. However, the city added a provision limiting build-out where there are 25 or less potential subscribers per linear mile.

Finally, it is difficult to see how build-out requirements could negatively impact AT&T since the company has publicly stated that it does not intend to offer its Project Lightspeed service to all potential customers. As reported by USA Today, "SBC (now AT&T) said it planned to focus almost exclusively on affluent neighborhoods. SBC broke out its deployment plans by customer spending levels: It boasted that Lightspeed would be available to 90% of its 'high-value' customers – those who spend $160 to $200 a month on telecom and entertainment services – and 70% of its 'medium-value' customers, who spend $110 to $160 a month. SBC noted that less than 5% of Lightspeed's deployment would be in 'low-value' neighborhoods – places where people spend less than $110 a month."

IV. Conclusion

The Commission should acknowledge that there is no credible evidence that LFAs have unreasonably refused to grant additional competitive franchises. Further, the Commission should disregard and ignore any industry comments that do not set forth empirical data or specific examples of abuses of the local franchising process. Because the Commission does not have the authority to construe or enforce § 621(a)(1), it should reject calls to adopt franchising "rules" and leave that task to Congress.