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October 18, 2006

**EX PARTE**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311

Dear Ms. Dortch:

BellSouth Corporation (“BellSouth”) submits this letter in response to the recent *ex parte* filed by various municipal associations.<sup>1</sup> Although BellSouth disagrees with most aspects of the *Municipal Association Ex Parte*, particularly its characterization of the record evidence in this proceeding, BellSouth is writing to address the following two issues: (1) build out; and (2) the Commission’s legal authority under section 621(a)(1). The discussion of these issues in the *Municipal Association Ex Parte* is inaccurate, and BellSouth is compelled to set the record straight.

**Build Out**

The *Municipal Association Ex Parte* insists that “build-out requirements are not, and statutorily cannot be, a barrier to competitive franchises.”<sup>2</sup> Citing section 621(a)(4)(A), the municipal associations argue that “build-out requirements are specifically allowed by the Cable Act,” since, according to the municipal associations, “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

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<sup>1</sup> September 19, 2006 letter from Libby Beatty, Executive Director, National Association of Telecommunications Officers and Advisors (“NATOA”), to Marlene Dortch, Secretary, FCC, filed on behalf of NATOA, the National League of Cities, the National Association of Counties, the United States Conference of Mayors, the Alliance for Community Media, and the Alliance for Communications Democracy (hereinafter referred to “*Municipal Association Ex Parte*”).

<sup>2</sup> *Municipal Association Ex Parte* at 7.

LFA allows ‘a reasonable time’ to do so.”<sup>3</sup> This argument is unpersuasive and ignores established case law.

The leading case construing section 621(a)(4)(A) is *Americable International, Inc. v. Department of Navy*,<sup>4</sup> which involved an attempt by an incumbent cable operator to enjoin the Department of Navy from allowing a competing cable television system in four Navy-owned communities previously served by the incumbent.<sup>5</sup> By not requiring the new service to be provided throughout the entire cable franchise area, the incumbent cable operator argued that the Navy’s actions violated section 621(a)(4)(A), which, according to the incumbent, was intended to prevent cable providers from “cherry-picking” only the most lucrative portions of a cable franchise area.<sup>6</sup> In rejecting this argument, the district court held that section 621(a)(4)(A) does not establish a “‘requirement’ that a franchise ‘provide universal service throughout the franchise area.’” According to the district court, section 621(a)(4)(A) contains no universal service mandate, and such a “strained” interpretation would be “at odds with the purpose of the Cable Act, which is to promote competition, and of the amendment in question, which protects the interests of new franchise applicants and not incumbents ....”<sup>7</sup> The Court of Appeals affirmed, finding that section 621(a)(4)(A) “does not, as [the incumbent cable operator] contends, require that cable providers extend service “throughout the franchise area ....”<sup>8</sup> The district court’s and D.C. Circuit’s reasoning is fatal to the argument that section 621(a)(4)(A) expressly authorizes a local franchising authority to require that a cable provider build out to provide cable service throughout a franchise area as a condition to obtaining a cable franchise.<sup>9</sup>

The municipal associations’ argument that a mandatory build-out requirement is not a barrier to competition is misguided.<sup>10</sup> This argument cannot be squared with the Commission’s decision preempting state-law requirements in Texas obligating new entrants in the telecommunications market to serve a minimum area covering at least 27 square miles and submit to the state commission build-out plans demonstrating how the new entrant planned to

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<sup>3</sup> *Id.* (emphasis in original)

<sup>4</sup> 129 F.3d 1271 (D.C. Cir. 1997).

<sup>5</sup> The incumbent had won a competitive bid to build and maintain a cable system serving various naval facilities in the San Diego area, including a number of Navy residential complexes (as well as a nearby Marine recruiting depot). Five years later the Navy solicited bids for the development of a satellite/master antenna television system (“SMATV”) to provide cable service to its enlisted quarters at the Marine recruiting depot. After the new system began service, the incumbent’s group subscriptions at the affected residences were cancelled. *Americable International, Inc.*, 129 F.3d at 1272.

<sup>6</sup> *Americable International, Inc.* 129 F.3d at 1274-75.

<sup>7</sup> *Americable International, Inc. v. Department of Navy*, 931 F. Supp. 1, 4, (1996), D.D.C (citing S. Rep. 92, 102d Conf. 2<sup>nd</sup> Sess. 1991, reprinted in [1992] 4 U.S. Code Cong. & Admin. News 1133, 1225), *aff’d in relevant part*, *Americable International, Inc. v. Department of Navy*, 129 F.3d 1271 (D.C. Cir. 1997).

<sup>8</sup> *Americable International, Inc.*, 129 F.3d at 1275.

<sup>9</sup> A build out requirement may be an appropriate remedy in the unlikely event that a cable operator were to engage in “redlining” in violation of section 621(a)(3) by refusing to serve a group of potential residential cable subscribers because of their income. However, such targeted relief would be a far cry from a broad, prophylactic mandatory build out requirement of the sort advocated by the municipal associations.

<sup>10</sup> *Municipal Association Ex Parte* at 7.

deploy facilities over a six-year period in order to meet this service commitment.<sup>11</sup> The Commission held that such build-out requirements were “prohibitively expensive and would clearly prevent [new entrants] from competing in a fair and balanced environment,” which, according to the Commission, would have the effect of prohibiting new entrants from competing.<sup>12</sup>

Equally misguided is the municipal associations’ assertion that build-out requirements are necessary to “ensure that cable access is not denied to any group of community residents ....”<sup>13</sup> The suggestion that low-income consumers would not enjoy the benefits of video competition absent a build-out requirement is belied by the broad availability of personal computers and basic Internet access, which was achieved without mandatory build-out requirements, as a recent study by the AEI-Brookings Joint Center noted.<sup>14</sup> According to this study, the soundest course for promoting broad social access to advanced video services such as Internet Protocol Television (“IPTV”) “is to promote competition and continuing technological advance, and not impose build-out or other regulatory requirements on potential competitors.”<sup>15</sup> Competitors in the video market have the financial incentive to provide service to whomever and wherever it is profitable to do so without the overhang of a mandatory build-out obligation.<sup>16</sup>

### Commission’s Legal Authority

The municipal associations continue to cling to an unduly restrictive view of the Commission’s legal authority, insisting that the Commission has “no authority to adopt rules to implement, or enforce, § 621(a)(1).”<sup>17</sup> In its Comments and Reply Comments, BellSouth refuted this view, explaining in great detail the bases for the Commission’s legal authority to adopt rules interpreting section 621(a)(1). BellSouth will only highlight three critical points here.<sup>18</sup>

First, the municipal associations have no real response to the well-established principle that, like other provisions of the Communications Act, Congress charged the Commission “with the administration of the Cable Act”<sup>19</sup> and the Commission’s interpretation of the Cable Act is

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<sup>11</sup> *In re: The Public Utility Commission of Texas, et al., Petitions For Declaratory Ruling And/Or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3498–99, ¶ 79 (1997).

<sup>12</sup> *Id.* 13 FCC Rcd at 3499, ¶ 81.

<sup>13</sup> *Municipal Association Ex Parte* at 5.

<sup>14</sup> Robert J. Shapiro, *Creating Broad Access to New Technologies: Regulation versus Market Competition and Technological Progress*, AEI-Brookings Joint Center Policy Matters 06-20 (Sept. 2006).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (noting that “businesses go where their customers are, and lower-income households should be a highly attractive market for advanced video services”).

<sup>17</sup> *Municipal Association Ex Parte* at 2.

<sup>18</sup> Comments of BellSouth Corporation and BellSouth Entertainment, LLC, MB Docket No. 05-311. at 47-67 (Feb. 13, 2006); Reply Comments of BellSouth Corporation and BellSouth Entertainment, LLC, MB Docket No. 05-311, at 34-55 (March 28, 2006).

<sup>19</sup> *City of Chicago v. FCC*, 199 F.3d 424, 428 (7<sup>th</sup> Cir. 1999) (citing *Time Warner Cable v. Doyle*, 66 F.3d 867 (7<sup>th</sup> Cir. 1995)).

afforded “substantial deference.”<sup>20</sup> In *City of Chicago* the Seventh Circuit considered and rejected the argument that the Commission was not granted interpretive authority over section 621 of the Act, holding that “the FCC is charged by Congress with the administration of the Cable Act,” and there is no reason to believe that this “well-accepted” authority did not apply to section 621.<sup>21</sup> The municipal associations’ argument that *City of Chicago* “involved definitions set forth in § 621(b)(1), not § 621(a)(1) and its prohibition on a reasonable refusal to award additional competitive franchises” cannot be squared with the plain language of the Seventh Circuit’s opinion, and in any event, makes no sense.<sup>22</sup>

In *City of Chicago* the Seventh Circuit stated the threshold issue in the case as follows: “Some parties contend that the FCC was not granted regulatory authority over 47 U.S.C. § 541 [section 621 of the Act], the statute setting out general franchise requirements. We disagree. ... We are not convinced that for some reason the FCC has well-accepted authority under the Act but lacks authority to interpret section 541 [section 621 of the Act] and to determine what systems are exempt from franchise requirements.”<sup>23</sup> Thus, the *City of Chicago* decision makes plain that the court’s holding is not nearly as limited in scope as the municipal associations would like to believe.

Furthermore, there is no legal authority, and the municipal associations cite none, for the proposition that, although administrative agencies have the power to interpret any undefined statutory terms in a reasonable manner consistent with congressional intent, the Commission was somehow divested of such power under section 621(a)(1).<sup>24</sup> The illogical consequence of the municipal associations’ position is that, while the Commission is free to interpret terms that are defined in the Cable Act (such as what constitutes a “cable system” or “cable operator,” and thus when a franchise is required), the Commission would somehow be precluded from determining whether certain practices that contravene federal communications policy are inherently “unreasonable” in the context of the cable franchising process. Such an approach would run counter to common sense because defined terms in a statute are less likely to contain ambiguity (since Congress defined them explicitly) in contrast to undefined statutory terms that are more in need of Commission interpretation – a critical point that the municipal associations overlook.

Second, the municipal associations’ argument that “Congress’ [sic] explicit grant of jurisdiction over § 621(a)(1) matters to the courts” somehow divests the Commission of authority to adopt rules interpreting section 621(a)(1) is wrong.<sup>25</sup> The case cited by the municipal associations – *National Ass’n of State Utility Consumer Advocates v. FCC* – does not

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<sup>20</sup> *National Cable Television Association, Inc. v. FCC*, 33 F.3d 66, 70 (D.C. Cir. 1994).

<sup>21</sup> *City of Chicago* 199 F.3d at 428 (citing *National Cable Television Association, Inc. v. FCC*, 33 F.3d at 70).

<sup>22</sup> *Municipal Association Ex Parte* at 3 (emphasis in original).

<sup>23</sup> 199 F.3d at 428 (citing *National Cable Television Association, Inc. v. FCC*, 33 F.3d at 70).

<sup>24</sup> See, e.g., *National Cable and Telecommunications Association v. FCC*, 33 F.3d at 71 (“the Cable Act does not define the term ‘transmission;’ hence we uphold the agency’s definition of that term if it is reasonable”) (citation omitted).

<sup>25</sup> *Municipal Association Ex Parte* at 2.

support this argument and, in any event is readily distinguishable. That case involved whether the Commission exceeded its authority in preempting the states from requiring or prohibiting the use of line items in customer billing for cellular services. In holding that the Commission had exceeded its authority, the Eleventh Circuit relied upon the plain language of 47 U.S.C. § 332(c)(3)(A), which, according to the court, “unambiguously preserved the ability of the States to regulate the use of line items in cellular wireless bills.”<sup>26</sup> Here, by contrast, section 621(a)(1)’s prohibition against a local franchising authority “unreasonably refus[ing] to award an additional competitive franchise” is ambiguous, and thus the Commission is fully empowered to adopt rules interpreting this prohibition and spelling out the circumstances when it has been violated. Nothing in *National Ass’n of State Utility Consumer Advocates v. FCC* can reasonably be read to hold otherwise.

The Commission’s authority to adopt rules interpreting section 621(a)(1) is not impacted by the fact that section 635(a) vests the courts with jurisdiction over actions brought by a “cable operator adversely affected by any financial determination made by a franchising authority under section 621(a)(1) ....” The judicial review provisions of the Cable Act are similar to those governing interconnection disputes under Title II – that is, any party to an interconnection agreement “aggrieved” by a determination made by a state commission under section 252 “may bring an action in an appropriate Federal district court” to determine whether the agreement meets the requirements of sections 251 and 252.<sup>27</sup> However, the fact that a party can bring an action in federal court under section 252 does not divest the Commission of authority to adopt rules interpreting and implementing sections 251 and 252.<sup>28</sup> The same reasoning applies to the Commission’s authority to interpret and implement Title VI.

Third, there is no merit to the municipal associations’ claim that, even if the Commission had the authority to interpret section 621(a)(1), such authority “would be, at most, concurrent jurisdiction with that of the courts” and the Commission’s interpretations would not be subject to *Chevron* deference.<sup>29</sup> The case upon which the municipal associations rely – *Kelley v. EPA* – involved the unique legal framework established by the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), and has no bearing on the issues before the Commission.<sup>30</sup> CERCLA “authorizes private parties *and the EPA* to bring civil actions independently to recover costs,” and the court in *Kelley v. EPA* held that when Congress “gives the agency authority only to bring the question to a federal court as ‘prosecutor,’

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<sup>26</sup> *National Ass’n of State Utility Consumer Advocates v. FCC*, 2006 U.S. App. LEXIS 19173, \*39 (11<sup>th</sup> Cir. July 31, 2006).

<sup>27</sup> 47 U.S.C. § 252(e)(6).

<sup>28</sup> *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) (upholding the Commission’s authority to adopt rules interpreting and implementing the Telecommunications Act of 1996, given the Commission’s authority under section 201(b) to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act”).

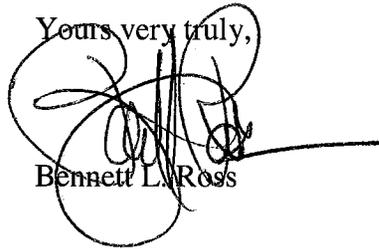
<sup>29</sup> *Municipal Association Ex Parte* at 3.

<sup>30</sup> *Kelley*, 15 F.3d at 1103.

deference to the agency's interpretation is inappropriate."<sup>31</sup> Thus, *Kelley v EPA* stands for the relatively unremarkable proposition that when a federal agency is tasked with bringing enforcement actions in federal court, as is the case under CERCLA, the agency's rulemaking and policymaking authority are constrained.<sup>32</sup>

Unlike CERCLA, however, the Cable Act does not make the Commission a "prosecutor" that is tasked with bringing actions against local franchising authorities in federal court. Rather, with this rulemaking proceeding, the Commission would be acting in its well recognized *administrative* capacity, by interpreting the meaning of a statutory section that is within its general grant of authority and by issuing regulations that effectuate the goals of the Act. Such actions would be entitled to full *Chevron* deference, notwithstanding the municipal associations' claim to the contrary.

Please include a copy of this letter in the record in the above-referenced proceeding. Thank you for your attention to this matter.

Yours very truly,  
  
Bennett L. Ross

BLR:dlr

cc: Heather Dixon  
Jessica Rosenworcel  
Rudy Brioche  
Christina Chou Pauze  
Rosemary Harold  
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<sup>31</sup> *Id.* at 1103 (emphasis added) & 1109.

<sup>32</sup> See, e.g., *Paralyzed Veterans v. D.C. Arena, L.P.*, 117 F.3d 579, 585 (D.C. Cir. 1997) ("[T]he Department has a good deal more legal/policymaking authority than would be true if it had merely a prosecuting role"); see also *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1507 n.24 (11th Cir. 1997) ("[T]he EPA is acting in its role as prosecutor in enforcing a federal environmental statute. Any findings made in such orders are therefore not entitled to deference under the reasoning of *Chevron*").