

October 31, 2006

**VIA ECFS**

Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
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:

On October 30, 2006, Tom Nathan and Jim Coltharp of Comcast, and Jim Casserly, Jonathan Friedman, and the undersigned, of Willkie Farr & Gallagher LLP, met with Donna Gregg, Rosemary Harold, Mary Beth Murphy, John Norton, Holly Saurer, and Brendan Murray of the Media Bureau, and Matthew Berry, Chris Killion, and Susan Aaron of the Office of General Counsel, to discuss the lack of any evidence in the record of a problem with the franchising process and the Commission's lack of authority to implement Section 621(a)(1). The attached presentations summarize the relevant arguments and facts on the record.

Specifically, Mr. Nathan spoke about his experiences with the franchising process, both as a former representative of a local franchise authority ("LFA") and, for the past 23 years, as senior regulatory counsel at Comcast. He explained that the record reflects his own experience -- LFAs are eager for more competition, but are not willing to abdicate the duties and responsibilities they owe to their constituents. Mr. Nathan noted that the record reflected that LFAs have made generous offers to the Bells to offer cable service in their franchise areas, but they have either been rebuffed or ignored. Mr. Nathan and counsel argued that the Commission should be particularly skeptical of complaints about the franchising process coming from parties who choose not to participate, such as AT&T, Qwest, and BellSouth, or who are so successful that they actually have more franchises than they can serve, such as Verizon.

Regarding his own experience, Mr. Nathan noted that in his tenure Comcast has grown from about 100 franchises to over 6000 franchises, and has very seldom had occasion to pursue litigation against an LFA. Mr. Nathan agreed that not every LFA is necessarily a good actor, and that there have

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even been a handful of extralegal requests by LFAs in his 23 years at Comcast, but emphasized that the overwhelming majority of LFAs are reasonable actors who simply seek the best deal for their constituents.

Kindly direct any questions regarding this matter to my attention.

Respectfully submitted,

/s/ Daniel K. Alvarez  
Daniel K. Alvarez  
*Counsel for Comcast Corporation*

#### Attachments

cc: Donna Gregg  
Rosemary Harold  
Mary Beth Murphy  
John Norton  
Holly Saurer  
Brendan Murray  
Matthew Berry  
Chris Killion  
Susan Aaron

## **THERE IS NO FACTUAL OR LEGAL BASIS FOR FCC INTERFERENCE IN THE LOCAL CABLE FRANCHISING PROCESS**

### **The Bell Companies have failed to establish a need for FCC regulation of local cable franchising.**

- The Commission explicitly solicited “empirical data” and “concrete examples” regarding the state of the local franchise process. The Bells and their allies failed to provide any credible data or examples showing any genuine problem, much less a pervasive one, that requires Commission intervention. The credible evidence comes from over 250 LFAs from across the country, which demonstrated that local governments welcome additional competition and that the franchising process not a “barrier to entry” to those who wish to enter the cable business.
- The record clearly demonstrates that the Bells’ difficulties in obtaining franchises are primarily of their own making. There is no evidence that AT&T, for example, has even applied for a single local cable franchise, despite the fact that some LFAs have been proactively offering AT&T favorable franchises. Those that are seeking franchises are obtaining them *faster* than they can deploy service: Verizon, for example, has acquired over 180 franchise covering approximately 3.5 million households, but it offers its cable TV service to only 1 million households.

### **Reasonable build-out requirements are not an impediment to competitive entry.**

- Build-out cannot be an impediment to entry, because *the Bells have been able to obtain cable franchises with very favorable build-out provisions*. They have even *supported* state-level franchising legislation that imposes build-out requirements, such as in Virginia and New Jersey. The record shows that LFAs typically provide significant flexibility in meeting build-out requirements, and they have demonstrated their willingness to work with franchisees to ensure that the build-out is both attainable *and* meets the needs of the community.
- Further, the record shows that reasonable build-out requirements are critical to effective anti-redlining enforcement. The Bells make no bones about their interest in serving “high-value” customers first. Record evidence of Bell construction patterns provides abundant reason for concern that, in the absence of build-out requirements, they will bypass low-income residents.
- There is no merit to Bell arguments that they should be exempt from build-out because build-out does not apply to phone as well. When Comcast provides voice services, it has taken on the core social obligations associated with that business, including E911, CALEA, and universal service support. Furthermore, Comcast does *not* deny its phone service within any community where it has been rolled out to any group of customers, despite the fact that it does not receive any governmental subsidies to provide service.

### **The Commission lacks statutory authority to regulate local cable franchising.**

- An assertion of broad rulemaking authority would conflict with both the plain meaning of the statute and the legislative history. Congress unambiguously gave the courts, not the Commission, reviewing authority over LFA franchising decisions. There is *no ambiguity in the statute* regarding the Commission’s authority, or, in this case, lack thereof. Furthermore, neither Section 201(b) nor Section 706 provides a basis for Commission action in this area.
- The Commission also lacks the authority to preempt state and local franchising laws, including “level-playing-field” statutes. The law is clear that, if Congress intends to preempt a power traditionally exercised by a state or local government, it must make its intention “unmistakably clear.” There is no such statement of congressional intent here.
- The legislative history of the relevant provisions reflects a clear congressional intent to preclude the Commission from writing and rewriting the rules governing cable franchising, as the Commission had been prone to do before passage of the 1984 Act.

*Thus, Bell company proposals to change, curtail, or interfere with the local cable franchising process are unsupported by facts and contrary to law. The FCC has no basis for interfering with this process.*

## **THE COMMISSION HAS NO AUTHORITY OVER LOCAL CABLE FRANCHISING.**

**Congress gave the Commission no authority to regulate, constrain, or review LFA franchising decisions.**

- In sharp contrast with numerous other statutory provisions in the Communications Act, Section 621 confers no rulemaking authority whatsoever on the Commission. Section 621 sets forth a detailed *congressional* regime for cable franchising, a regime in which there is no role for the Commission.
- The Commission's assertion of broad rulemaking authority conflicts with the legislative history of Section 621(a)(1). Over the last 22 years, Congress has enacted three laws relating to cable franchising. Each time, Congress unequivocally entrusted administration of the process to local authorities, under congressional guidance and backstopped by judicial review. In none of these enactments did Congress indicate that the Commission should have the authority to revisit these congressional judgments or involve itself in the franchising process.
- Section 635(a) expressly directs that complaints about an LFA's failure to comply with Section 621(a)(1) be adjudicated in state or federal court. There is no role in that process for the Commission.
- The cases cited by the Bells are irrelevant to the question of Commission authority over the franchising process. These cases deal with either narrow definitional questions (*e.g.*, *ECI*, *City of Chicago*, *NCTA*) or entirely different provisions and Titles of the Act (*e.g.*, *Iowa Utilities*). On the other hand, courts have had numerous occasions to interpret and discuss Section 621(a)(1) and the franchise process specifically; each time, the courts followed the framework established by Congress -- *i.e.*, appellate review by a state or federal court without any Commission involvement. *See, e.g.*, *Qwest v. Boulder*, 151 F. Supp. 2d 1236 (D.C. Col. 2001); *Knology v. Insight*, No. 00-00723, 2001 WL 1750839 (W.D. Ky. Mar. 20 2001).

**Even assuming there is ambiguity regarding the enforcement of Section 621(a)(1), the Commission has no authority to adopt the far-reaching rules proposed by the Bells.**

- The plain language and legislative history of Section 621(a)(1) shows that the Commission has no authority to regulate the conditions attached to franchise agreements or the manner in which LFAs conduct their congressionally-mandated duties.
  - Section 621(a)(1) refers to “unreasonably *refusing* to award” competitive franchises and provides for appeal only where a competitive franchise application has been “*denied* by a final decision of the franchising authority.” Construing the statute to encompass franchise conditions or the manner in which the LFA carries out its congressionally-mandated duties would require reading the word “refusing” out of the statute, and render meaningless the phrase “denied by a final decision of the franchising authority.”
  - Courts have consistently held that Congress's reference to “unreasonably refusing to award” should be construed in the plain language sense of “unreasonably denying” a franchise application. *Knology*, 2001 WL 1750839, at \*2; *CableTV Fund 14-A, Ltd. v. City of Naperville*, No. 96 C 5962, 1997 U.S. Dist. LEXIS 7336 (N.D. Ill. May 21, 1997). That interpretation is fully consistent with the legislative history.
- The Commission may not prohibit LFAs from imposing reasonable build-out requirements. Congress has established an unambiguous national policy against redlining, and Section 621(a)(3) requires local governments to enforce that policy. Congress clearly anticipated that

LFAAs would use this provision to “require the wiring of all areas of the franchise area” to avoid redlining. H. Rep. No. 09-934, at 59 (1984).

- Further, both Sections 621(a)(4) and 632(a)(2) plainly authorize LFAs to require build-out, and there is nothing to the contrary in the statute or legislative history of Section 621(a)(1). Importantly, Section 621(a)(4) was added in 1992, at the same time that Congress added language regarding “additional competitive franchise[s],” and after most incumbent cable operators already built-out their systems. So, it is clear that Congress intended to give franchise authorities the power to impose reasonable build-out requirements on additional franchisees.
- The Commission has no statutory basis upon which to adopt a “shot-clock” or any of the more far-reaching rules proposed by the Bells. Relying on the congressionally-mandated “shot clock” for transfer applications is inapt; the process for transferring a franchise is completely different from the initial grant of a franchise, and Congress’s decision to impose a shot-clock on transfers but not on initial applications is not subject to second-guessing by the Commission.

**Neither Section 201(b) nor Section 706 gives the Commission the necessary authority to alter the local franchising process.**

- Congress was clear in 1984 that it wished to establish a scheme that could *not* be altered by the Commission. Nothing in the 1992 Cable Act or 1996 Act did anything to suggest that the Commission now has such authority.
- The Bells’ reliance on Section 201(b) is misplaced. The Commission’s rulemaking authority under Section 201(b) is limited to providers of *telecommunications services*. See *2002 Biennial Review*, 18 FCC Rcd. 4726 ¶ 18 n.31 (2003). Likewise, the Supreme Court’s statements in *Iowa Utilities* were made in the context of the local telephone competition provisions that the 1996 Act added to Title II, and cannot be construed to apply beyond Title II of the Act.
- Section 706 of the 1996 Act cannot be invoked to wholly remake the local franchising process. Section 706, by its plain terms, deals with the deployment of “advanced telecommunications capability” (i.e., transmission services, devoid of content), not *cable* services. Attempts to draw a connection between the two fall flat, both as a matter of fact and as a matter of law.
- Section 706 requires the Commission to take action *if* it determines that broadband capability is not being deployed to all Americans in a reasonable and timely manner. The Commission has made no such determination, and cannot in this proceeding because there is no record evidence to make that finding. In fact, in each of the Commission’s Section 706 Reports, it has found precisely the opposite -- that broadband “*is indeed being deployed in a reasonable and timely basis to all Americans.*” *Availability of Advanced Telecommunications Capability in the United States, Fourth Report to Congress*, at 8 (2004) (emphasis added).
- Furthermore, the Commission has already definitively ruled that Section 706 is *not* an independent source of rulemaking authority. See *Wireline Broadband Order*, 13 FCC Rcd. 24011 ¶ 77 (1998).
- Even if Section 706 did confer the necessary authority upon the Commission, it is ludicrous to suggest that local franchising rules are holding up the Bells’ broadband

investment decisions. The Bells are free to deploy broadband networks without obtaining cable franchises, and they are in fact doing so.

- The Bells also lack credibility on their broadband-related claims. Time and time again, whether in the context of price cap regulation, unbundling relief, or broadband reclassification, the Bells have demanded -- and received -- regulatory relief to spur investment in their broadband facilities and services -- and time and again they come back to the Commission making new demands for yet more regulatory concessions.

**The Commission lacks the authority to preempt state and local franchising laws, particularly “level-playing-field” statutes.**

- The law is clear that if Congress wishes to preempt a power traditionally exercised by a state or local government, it must make its intention to do so “unmistakably clear.” *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *City of Dallas v. FCC*, 165 F.3d 341 (5<sup>th</sup> Cir. 1999). There is no such statement here; if anything, Congress has expressed the contrary intent.
- Preempting state and local franchising laws would be inconsistent with longstanding Commission practice. In the past, when the Commission has exercised preemption authority, it has done so pursuant to clear congressional authority, such as Section 253. Even in those cases, the Commission has been very careful to tread lightly on state and local authority. *See In Re California Payphone Association*, 12 FCC Rcd. 14,191 (1997); *In Re Classic Telephone, Inc.*, 11 FCC Rcd. 13,082 (1996).
- Proposals to preempt state level-playing field statutes as unreasonable are inconsistent with existing law. Courts have concluded that these statutes are not unreasonable under Section 621(a)(1). *See, e.g., Cable TV Fund*, 1997 U.S. Dist. LEXIS 7336, at \*13.

**Bell arguments that local franchising requirements violate the First Amendment are unfounded.**

- Franchising requirements within the bounds of the statute impose no genuine impediment to the Bells’ ability to speak or to publish. Courts have recognized that local governments have substantial governmental interests, including, among other things, preventing redlining and managing construction in rights-of-way in requiring reasonable build out of the franchise area.
- Reasonable build-out has routinely been found to be consistent with the First Amendment. *See, e.g., Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 406 (S.D. Fla. 1991). The Bells’ reliance on the *Preferred Communications* decision -- which involved the *denial of a franchise*, not build-out requirements imposed as a condition of granting the franchise -- completely misses the point the Supreme Court’s analysis.