



Jim Lamoureux
General Attorney

AT&T Services, Inc.
1120 20th Street, NW
Suite 1000
Washington, D.C. 20036

202.457.3052 Phone
202.457.3073 Fax

jim.lamoureux@att.com

December 4, 2006

VIA ECFS

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

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

Dear Ms. Dortch:

On behalf of AT&T Inc. ("AT&T"), Tom Hughes, Jim Smith, and Jim Lamoureux of AT&T, and David Lawson of Sidley and Austin met with Donna Gregg, Rosemary Harold, John Norton, Holly Sauer, and Brendan Murray of the Media Bureau, and Susan Aaron and Christopher Killion of the Office of General Counsel on December 1, 2006. At the meeting, consistent with its pleadings and previous *ex partes* in this proceeding, AT&T urged the Commission to exercise its clear authority to adopt a streamlined competitive franchising process to protect core federal video competition and broadband deployment policies.

AT&T discussed the characteristics that are critical to any such streamlined process adopted by the Commission, including the need to delineate, as specifically and completely as possible, the boundaries of the universe of unreasonable conditions—including build-out requirements as conditions of entry for competitive cable operators—with respect to the negotiation and award of franchises to competitive cable operators.

AT&T also urged the Commission to establish a 30 day time period in which franchising authorities must act to approve a streamlined franchise application; and the need for Commission rules granting authority to provide service if a franchising authority fails to grant a streamlined franchise application within 30 days. AT&T's recommendations are further supported by the attached white paper addressing the Commission's authority to grant interim franchises when local authorities fail expeditiously to grant competitive video franchise applications that meet the essential conditions of a franchise set forth in rules adopted by the Commission in this proceeding.

Ms. Dortch
December 4, 2006
Page 2 of 2

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

Sincerely,

/s/

Jim Lamoureux
General Attorney
AT&T Services, Inc.

Attachment

cc: Donna Gregg
Rosemary Harold
John Norton
Holly Sauer
Brendan Murray
Susan Aaron
Christopher Killion

THE COMMISSION HAS CLEAR AUTHORITY TO GRANT INTERIM FEDERAL FRANCHISES WHEN LOCAL AUTHORITIES FAIL EXPEDITIOUSLY TO GRANT COMPETITIVE VIDEO FRANCHISE APPLICATIONS

AT&T Inc. (“AT&T”) and others have made an overwhelming showing in this proceeding that national rules to minimize the harm that today’s franchising process causes to video competition and associated investment in broadband infrastructure are urgently needed and that this relief need not interfere with any legitimate local interests.¹ In the absence of national “reasonableness” rules to guide franchising processes and outcomes, entry and investment are deterred by both unreasonable demands placed on competitive entrants as a condition of obtaining a franchise and the open-ended nature of the franchise-approval process itself. AT&T has set forth a framework for implementation of § 621(a)(1) of the Act that addresses both problems. The Commission has the authority to and must adopt rules that not only outlaw unreasonable franchise conditions, but also assure that the introduction of competitive services cannot be unreasonably delayed or prevented altogether by the inaction or other dilatory conduct of local franchising authorities.²

AT&T has set forth with specificity various demands of franchise authorities that the Commission can and should find patently unreasonable barriers to entry when imposed on competitive entrants. If the Commission’s actions are to yield systemic benefits for competition and broadband deployment, it is imperative that the Commission directly prohibit each of these categories of conditions on competitive video entry.³ But unreasonable franchise delay is as crippling to national policy as unreasonable franchise conditions, and it is thus equally important that the Commission mandate a streamlined competitive franchising process that allows new video entrants actually to begin delivering their services to consumers in the event local franchising authorities fail to take timely action. This is particularly true in today’s environment of competing broadband networks capable of providing the full suite of telecommunications, Internet, video and other services. In this environment, local franchising delay impacts not just video competition, but competition in the provision of interstate broadband services over which local authorities have no cognizable interest or legal authority.

To that end, the Commission can and should adopt rules that authorize competitive cable operators to file streamlined franchise applications that meet the essential conditions of a franchise set forth in rules adopted by the Commission in this proceeding. These Commission rules should provide that a competitive applicant would automatically have authority as a matter of federal law to begin offering service under an interim cable franchise 30 days after the application is filed if the franchising authority fails to grant the application or negotiate a

¹ See, e.g., *Implementation of the Cable Communications Policy Act of 1984 as amended by the Cable Television Protection and Competition Act of 1992*, MB Docket No. 05-331, Comments of AT&T Inc. (filed February 13, 2006)(“AT&T Comments”); *Implementation of the Cable Communications Policy Act of 1984 as amended by the Cable Television Protection and Competition Act of 1992*, MB Docket No. 05-331, Reply Comments of AT&T Inc. (filed March 28, 2006)(“AT&T Reply Comments”).

² See *AT&T Comments* at 32-42, 74-79; *AT&T Reply Comments* at 25-33, 46-50.

³ See *AT&T Comments* at 43-73; *AT&T Reply Comments* at 33-46; Letter from Jim Lamoureux, General Attorney, AT&T Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-311 at 1-2 (July 28, 2006).

mutually acceptable franchise agreement during that period.⁴ This interim cable franchise would allow the competitive cable operator to commence operations, while it continues to work with the franchising authority to negotiate or litigate any remaining ancillary franchise provisions that are not unreasonable and thus prohibited by the Act or the Commission's rules. Once a valid local franchise is in place, this interim federal franchise would expire. These Commission rules would thus fully protect the interests of municipalities that are genuinely interested in pursuing legitimate franchise terms that are not inconsistent with the Commission's rules or the terms of § 621(a) and that are unable to complete proceedings on these provisions within a 30-day period.

As explained below, the Act gives the Commission clear authority to adopt these proposed rules. The 1984 Cable Act codified the Commission's preexisting authority to grant franchises in conditions where other franchising authorities have failed to act in a timely fashion. And in the 1992 amendments to the Cable Act, Congress expressly sought to eliminate barriers to video competition by specifically prohibiting franchising authorities from "unreasonably refus[ing] to award" competitive cable franchises. 47 U.S.C. § 541(a). Under the terms of the Act, the Commission has clear authority to rule that a franchising authority's failure to grant within a reasonable time an application containing the essential features of a cable franchise as established by the Commission violates this federal requirement. Under its broad statutory grants of authority to assure full implementation of federal statutory objectives, *see* 47 U.S.C. §§ 303r, 201(b), 4(i), the Commission similarly has clear authority to prevent franchising authorities from circumventing those objectives through such devices as failing to act on an application, scheduling endless proceedings to address an array of ancillary provisions that may not have been specifically outlawed by the Commission's rules, or attempting, through various guises, to maintain the equivalent of other conditions that may be prohibited by the Commission's rules. Indeed, a Commission rule providing for interim federal franchises when other franchising authorities fail expeditiously to grant competitive applications would constitute an extremely limited assertion of federal authority that is essential to implementation of the overriding national interest in promoting expeditious competitive video entry and broadband deployment.

The Cable Act And The Broader Communications Act Establish Clear And Paramount Federal Constraints On The Cable Franchising Process.

The Commission has an unmistakable mandate to promote video competition and to enforce the provisions of the Cable Act and the broader Communications Act, as they relate to the cable franchising process. Congress enacted the Cable Act for the express purpose of establishing a "*national* policy concerning cable communications" and to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 521(3) & (6). Congress was particularly concerned that state and local franchise laws and processes were inhibiting entry and competition, and in 1992 it amended Section 621 of the Cable Act, 47 U.S.C. § 541(a), to directly prohibit "unreasonable" treatment of competitive video franchise applicants.⁵ Thus,

⁴ Although the Commission also has the authority to issue permanent franchises (*e.g.*, to deem a franchise granted in the face of local inaction), this memo explicitly discusses the FCC's authority to issue interim federal franchises.

⁵ *See, e.g.*, Cable Television Consumer Protection and Competition Act of 1992, H.Rep. No. 102-862, at 77 (1992) (1992 Amendments Conference Report expressly noting the goal of preventing local franchise regulation from

although Congress recognized the important role that state and local governments have traditionally played in the cable franchising process, it imposed a broad array of *federal* standards. It is well-settled both that state and local franchising processes must adhere to these federal standards,⁶ and that it is the Commission's role to construe and give content to the federal Cable Act requirements and to take all actions it deems necessary to protect and promote video competition.⁷

But the Commission's obligations to take action in this proceeding do not stem solely from the Cable Act and the amendments to it. In the Telecommunications Act of 1996 Congress enacted Section 706(a) (47 U.S.C. § 157 note), which directs the Commission to "encourage the deployment [of advanced telecommunications capabilities] on a reasonable and timely basis" by employing "regulating methods that remove barriers to infrastructure investment." The 1996 Act also added Section 230, which provides that it is the policy of the United States "to promote the continued development of the Internet and other interactive computer services and other interactive media," and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal *or State* regulation." 47 U.S.C. § 230(b)(1) & (2) (emphasis added).

Core Federal Goals Are Being Thwarted By The Legacy Local Franchising Process.

As explained in detail in prior filings by AT&T and others in this docket, these congressional directives are being thwarted by the legacy franchising process. New entrants like AT&T that contemplate video entry on a national scale are faced with the prospect of obtaining literally thousands of franchises across the country in the absence of meaningful federal reasonableness constraints on the outcomes or timing of these open-ended local processes.⁸ In

"artificially protect[ing] the cable operator from competition"); House Conf. Rep., 4 USCCAN 1259 (1992) (Congress "believed that exclusive franchises are directly contrary to *federal* policy and to the purposes of S.12, which is intended to promote the development of competition" (emphasis added)).

⁶ H.Rep. No. 98-934 at 23-34, reprinted in 5 U.S.C. Code Cong. & Admin. News 4655, 4660-61 (August 1, 1984) (Congress "has determined a need for national standards which clarify the authority of Federal, state and local government to regulate cable through the franchise process." If the local franchise process "is to further the purposes of this legislation, the provision of those franchises must be based on certain important uniform Federal standards").

⁷ See, e.g., *Definition of a Cable Television System*, 5 FCC Rcd. 7638, ¶¶ 8, 29 (1990) (Congress was concerned that "Federal law not provide the cable industry with an unfair advantage in the delivery of video programming," and Congress did not intend to limit the Commission's authority to pre-empt); First Report, *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 7442, ¶ 6 (1994) ("promotion of the emergence of effective competition through the entry of alternative distribution technologies is a critical element of the regulatory framework mandated by Congress" and the Commission may thus take action "to foster the emergence of a competitive market for the delivery of video programming to consumers").

⁸ As AT&T has demonstrated, see e.g., Letter from Jim Lamoureux, General Attorney, AT&T Services, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket 05-311, WC Docket 04-36, as a matter of fact and law, AT&T's U-verse video service is not a cable service under Title VI. However, incumbent cable operators persist in their efforts to persuade franchising authorities to impose legacy cable service requirements on AT&T's provision of its U-verse service. For example, Cox recently took it upon itself to "proactively" inform a franchising authority in Ohio of Cox's position that AT&T must obtain a cable franchise, essentially threatening the community that any failure to demand that AT&T obtain a local cable franchise, and, in

many places, local franchising authorities, pressured by incumbent cable operators, are making patently unreasonable demands on new entrants.⁹ While these anticompetitive conditions can and must be outlawed as *per se* unreasonable, that will not eliminate the enormous barriers to competitive video entry caused by unreasonable delays in the franchising process.

This unreasonable delay harms the public interest and core federal policies in multiple ways. Its immediate and direct effect is to prevent or delay the introduction of much-needed competitive wireline video services. But that is merely the initial consequence of these dilatory behaviors. AT&T is making its Project Lightspeed upgrades in order to provide not just next generation, interactive video services to compete with existing cable services, but also a new generation of converged broadband offerings encompassing voice, data, and video. By myopically focusing on the video portion of these offerings as a basis for inhibiting and delaying video competition, incumbent cable operators and local authorities are severely retarding the deployment of next-generation “advanced” and “interactive computer services” within the meaning of Sections 706 and 230.¹⁰

The Commission Can Assure That Competitive Video Service Will Be Introduced In A Timely Fashion Only By Providing Competitive Cable Applicants With Interim Federal Franchise Authority To Begin Providing Service When Local Franchising Authorities Fail To Grant a Streamlined Franchise Application.

As AT&T has previously shown, it is imperative that the Commission – in addition to promulgating rules that make clear that certain conditions imposed on competitive cable operators are *per se* unreasonable – adopt national rules requiring a streamlined, 30-day process for reviewing simplified competitive cable franchise applications limited to safeguarding legitimate video-related concerns, such as providing PEG channels and franchise fees that do not exceed the statutory cap.¹¹ But these measures, by themselves, are insufficient to assure that competitive video services will be introduced in a timely fashion. While the Commission’s rules will be directly enforced in courts that have jurisdiction to review “final determinations” of franchising authorities, franchising authorities have the ability to delay or perhaps even to prevent altogether the issuance of a reviewable order. Local authorities can do so by failing to act on an application, by scheduling endless proceedings on ancillary provisions that have not been explicitly prohibited, or by imposing conditions that are claimed to be consistent with the

particular a franchise agreement equivalent to Cox’s franchise agreement with the community, “compromises [the community’s] right to protect the interests of its citizens.” *See* Att. A.

⁹ *See, e.g.*, Appendix C to AT&T’s Reply Comments. One dramatic recent example is an ordinance passed by the City of Geneva, Illinois, on October 2, 2006 (Ordinance No. 2006-58, attached). The ordinance requires all new “cable television systems” and “multichannel video communications systems” to build out their networks to 20 percent of the dwelling units within the franchise area within 6 months from the date of the award of the franchise; to 50 percent of the dwelling units within one year; and to 100 percent of the dwelling units within two years. *See* Ordinance § 12(b)(1). The City reserves the right to terminate a franchise upon any failure to satisfy these build-out requirements, *see id.* § 38(a)(1), and to seize ownership or to force the sale or dismantlement of the video network upon termination, *id.* § 33.

¹⁰ *See, e.g.*, Letter from Jim Lamoureux, General Attorney, AT&T Services, Inc. to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket 05-311 (May 24, 2006).

¹¹ *AT&T Comments* at 43-80; *AT&T Reply Comments* at 33-49.

prohibitions of the Commission's rules, but that have the same impermissible effects as the patently anticompetitive conditions that the Commission should prohibit. Thus, the Commission must also declare it to be an unreasonable practice that violates § 621(a) for a franchising authority to fail to act on a simplified competitive cable operator franchise application that complies with federally specified criteria within 30 days.

As AT&T also has shown, a streamlined franchising process is meaningful only if there are automatic consequences in the event a local or state franchising authority fails to timely act on a competitive provider's application to provide video services.¹² Thus, the Commission also should promulgate a rule that automatically grants a competitive cable applicant an interim federal franchise that allows the competitive provider to begin offering video services over its networks in the event a franchising authority fails either to grant the short-form franchise or to complete negotiations for a mutually acceptable alternative franchise agreement within 30 days after the filing of a short-form application.

This limited assertion of the Commission's authority would in no way displace franchising authorities' ultimate authority over franchising, but rather would merely provide temporary authority to begin offering competing service while the parties complete any outstanding negotiations or litigation over open issues. The process would work as follows. A new entrant would file a short-form application for a cable franchise, based on Commission rules and guidelines, and that filing would start the 30-day clock. While any requirements that the Commission deems *per se* unreasonable would be pre-empted and thus off the table, the franchising authority would be free to seek additional reasonable conditions not foreclosed by federal rules. If the franchising authority fails to grant a mutually acceptable franchise within 30 days, however, the Commission (by rule) would grant the new entrant an interim federal franchise to begin providing service. The Commission could provide, as a condition of this provisional federal franchise, that the franchisee is obligated, upon receipt of a "final decision" by the local franchising authority denying its franchise application, see § 621(a), expeditiously to pursue its remedy under § 635 to obtain a judicial determination of lawful franchise terms. The interim federal franchise would expire once a final negotiated or litigated local franchise is in place, and the franchisee would thereafter operate under the terms of the lawful local franchise.

The Commission Has Clear Authority To Provide Competitive Cable Entrants With An Interim Franchise In The Event A Local Franchising Authority Fails To Grant A Competitive Application In A Timely Fashion.

The Commission has clear authority to adopt rules to provide interim federal franchises to assure that local franchising authorities' conduct does not defeat federal objectives. The Commission historically asserted jurisdiction over the franchising of cable services, and routinely exercised this authority in the past in conditions in which franchising authorities did not exist or failed to act in a timely fashion. This authority was expressly preserved in the Cable Act. And the Commission has multiple explicit grants of rulemaking authority that give it ample

¹² It is important to recognize that rules designed merely to expedite the initiation of judicial review under § 635 without providing the competitive cable applicant with federal operating authority during the litigation would do little or nothing to address the harms to federal policy caused by local franchising delay. Section 635 imposes no deadlines on court action, and in many jurisdictions civil actions typically take years to conclude.

power to issue interim franchises that guarantee that federal policy is not circumvented by unreasonable local delay.

As early as 1968, the Supreme Court held unanimously that cable television services are “interstate” “communications” within the meaning of § 2(a) of the Act. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-68 (1968).¹³ The Court thus held that § 303(r) of the Act provides express statutory authority to “issue ‘such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,’ as ‘public convenience, interest, or necessity requires.’” *Id.* (quoting 47 U.S.C. § 303(r)). The Court thus agreed with the Commission that federal regulation of cable systems was necessary to carry out its statutory responsibilities, and therefore that any regulatory measure “reasonably ancillary” to the performance of these express statutory duties – which, at the time, did not expressly address cable services at all – would be permissible. *Id.* at 178; *see also Capital Cities Cable*, 467 U.S. at 700 (Commission’s cable regulation authority “extends to all regulatory actions necessary to ensure the achievement of the Commission’s statutory responsibilities”). In practice, the courts routinely upheld comprehensive Commission regulation of cable service,¹⁴ and vacated Commission action only where it was expressly prohibited by the Communications Act.¹⁵

After the Supreme Court affirmed the Commission’s jurisdiction over cable services in *Southwestern Cable*, the Commission did in fact exercise franchising authority over cable services for much of the 1970’s. Indeed, in the early 1970’s the Commission even sought comment on whether it should establish “Federal licensing of all cable television systems” or whether such responsibility should be split between the Commission and the states. *Amendment of Part 74, Subpart K, of the Commission’s Rules and Regulations Relative to Community Antenna Television Systems*, 36 F.C.C.2d 143, ¶ 171 (1972) (“*Cable Television Report and Order*”). Ironically, incumbent cable operators argued for complete pre-emption and federal licensing. *Id.* ¶ 173-74 (“Cable interests were clearly opposed to state regulation. They noted in particular that regulation by public utility commissions results in unconscionable delay and confusion”). The Commission decided against creating an entirely federal licensing system at that time on pragmatic grounds, and opted instead for a “deliberately structured dualism” in

¹³ The Court had no “doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located in the same State in which the CATV system operates.” *Southwestern Cable*, 392 U.S. at 168-69. The Court found that cable services consist of “retransmission of communications that have very often originated in other States” and were intended for national audiences, and that these transmissions are “essentially uninterrupted and properly indivisible.” *Id.* at 169. “To categorize [cable services] as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that ‘is not only appropriate but essential to the efficient use of radio facilities.’” *Id.* (quoting *FRC v. Nelson Bros. Co.*, 289 U.S. 266, 279 (1933)); *see also id.* at 168 (“communications by wire or radio” includes “‘the transmission of . . . signals, pictures, and sounds of all kinds,’ whether by radio or cable,” and thus certainly includes cable television).

¹⁴ *See, e.g., United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *ACLU v. FCC*, 523 F.2d 1344, 1350-51 (9th Cir. 1975) (upholding *Cable Television Report and Order*); *see also New York State Comm’n on Cable Television v. FCC*, 669 F.2d 58, 63 (2d Cir. 1982); *New York State Comm’n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984).

¹⁵ *See FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (striking down leased access requirements because § 3(h) of the Act expressly prohibited the Commission from imposing common carrier obligations on broadcasters).

which local governments would grant franchises pursuant to detailed FCC guidelines.¹⁶

Nonetheless, the Commission also required every cable operator to obtain a federal certificate of compliance from the Commission before it could “commence operations.” *Id.* ¶ 178. Thus, in effect, the Commission acted as a co-franchising authority – requiring both an FCC certificate and a local franchise (granted pursuant to detailed Commission guidance and oversight) prior to the provision of services.¹⁷ As the Commission noted, “[a]lthough we have determined that local authorities ought to have the widest scope in franchising cable operators, *the final responsibility is ours.*”¹⁸ And the Commission acted as the *sole* franchising authority for cable services in areas where there was no other legally constituted franchising authority.¹⁹ The Commission stressed that it would administer its rules so that “cable operations need not be indefinitely” and that, if necessary, it could “issue certificates on a conditional basis, subject to review when the local issues have been finally resolved.”²⁰ The Supreme Court later acknowledged these assertions of Commission authority.²¹

¹⁶ See *City of Chicago v. FCC*, 199 F.3d 424, 429 (7th Cir. 1999) (“the FCC declined to preempt the role of local governments in franchising cable systems because of the burden that would have put on the agency”). The Commission adopted extensive standards to govern these franchising proceedings, which “relate[d] to such matters as the franchise selection process, construction deadlines, duration of the franchise, rates and rate changes, the handling of service complaints, and the reasonableness of franchise fees.” *Id.* ¶ 177. See also James A. Albert, *The Federal and Local Regulation of Cable Television*, 48 U. COLO. L. REV. 501, 515 (1977) (“in th[is] way, the strong hand of the FCC could be seen ghostwriting local ordinances at countless city council chambers, boards of supervisors meeting rooms, and town halls” and the “preeminence of the FCC in the franchise arena was an accepted fact of cable life”).

¹⁷ The Commission ended the certificate requirement and ceded additional authority to state and local governments in the late 1970’s, but again only for pragmatic reasons. See, e.g., Report and Order, 66 F.C.C.2d 380 ¶¶ 33, 37 (1977); Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 71 F.C.C.2d 569 ¶ 7 (1979) (withdrawing aspects of Commission franchising participation, but only “as long as the actions taken at the local level will not undermine important and overriding federal interests”).

¹⁸ *Teleprompter Cable Sys.*, 52 F.C.C.2d 1263, ¶ 9 (1975) (emphasis added).

¹⁹ See, e.g., *Cable Television Reconsideration Order*, 36 F.C.C.2d 326, ¶ 116 (1972); *Sun Valley Cable Communications (Sun City, Arizona)*, 39 FCC 2d 105 (1973); *Mahoning Valley Cablevision, Inc. (Liberty Township, Ohio)*, 39 FCC 2d 939 (1973).

²⁰ *Amendment of Part 74, Subpart K, of the Commission’s Rules and Regulations Relative to Community Antenna Television Systems*, 36 F.C.C. 2d 326 ¶ 117 (1972), *aff’d*, *ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975). “After three years of experience” of “significant delays” caused by local franchising authority attempts to impose franchise terms inconsistent with the Commission’s federal franchising certificates, the Commission modified its processes to provide that “violative [local] rules will be considered null and void, having been preempted by federal regulation,” while the inconsistencies were resolved by modification or waiver. *Amendment of Part 74, Subpart K, of the Commission’s Rules and Regulations Relative to Community Antenna Television Systems*, 54 F.C.C. 2d 855 ¶ 15 (1975).

²¹ *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 702 (1984) (acknowledging that the Commission had “general authority under the Communications Act to regulate cable television,” and noting that “the FCC determined that, in contrast to its regulatory scheme for television broadcasting stations, it would not adopt a system of direct federal licensing for cable systems”; the Commission “announced a program of ‘deliberately structured dualism,’ in which state and local authorities were *given* responsibility for granting franchises to cable operators,” but in which the FCC “*retained* exclusive jurisdiction over all operational aspects of cable communication” (emphasis added)). See also *Department of Defense Cable Television Franchise Agreements*, 36 Fed. Cl. 171 (Ct. Cl. 1996) (recognizing federal franchising power derived from “organic government statutes”).

The Cable Act did nothing to impair the Commission’s pre-existing franchise authority; indeed, these legislative changes were carefully crafted to *preserve* that authority. Congress amended § 2(a) to make explicit that the Commission’s core jurisdiction extends to “cable services,”²² removing any further need for the Commission to justify its regulation of cable services as ancillary to the broadcast or other interstate services over which it was previously given express jurisdiction. The Cable Act further provided that “a cable operator may not provide cable service without a franchise,” 47 U.S.C. § 541(b), which the cable operator must obtain from a “franchising authority.” 47 U.S.C. § 522(10). And Congress defined a “franchising authority” as “*any* governmental entity empowered by *Federal*, State, or local law to grant a franchise.” 47 U.S.C. § 522(10). This definition, by its plain terms, includes the Commission, which is a governmental entity empowered by federal law (*e.g.*, section 303(r) of the Communications Act) to exercise franchising authority. These provisions leave the Commission’s pre-existing authority to oversee the granting of franchises intact and remove any requirement to justify the exercise of that authority as ancillary to the regulation of broadcast or other services. And not a single provision in the Cable Act limits the Commission’s franchising authority or suggests that a cable operator must obtain a franchise exclusively from a *local* franchising authority.²³

The foregoing provisions give the Commission clear authority to adopt rules that grant interim franchises upon an applicant’s agreement to essential franchise conditions, pending actions by franchising authorities that will result in permanent locally-granted franchises. That is particularly so here, because, as AT&T and others have previously demonstrated, this rule is necessary to implement the requirements of § 621 of the Cable Act and of other provisions of the Communications Act, and falls well within the Commission’s broad authority to adopt rules that assure that federal video and broadband policies are fully implemented and not undercut by dilatory or obstructionist conduct.

Indeed, the Commission has *multiple* explicit grants of authority that give it ample authority to take whatever measures – including the grant of interim franchising authority – are necessary to prevent other franchising authorities from defeating important federal policies. The Supreme Court has repeatedly held that cable services are squarely within the Commission’s jurisdiction under § 2(a) of the Act,²⁴ that “§ 303 of the Communications Act” gives “the Commission broad rulemaking power ‘as may be necessary to carry out the provisions of this chapter,’ 47 U.S.C. § 303(r),” and that § 303(r) authorizes the Commission to adopt whatever measures are necessary to implement the provisions of the Cable Act and that are otherwise

²² See 47 U.S.C. § 152(a) (“The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service”).

²³ Parties in this proceeding often casually assert that the statute requires “LFAs” – “local franchising authorities” – to do one thing or another, but it should be emphasized that the term “local franchising authority” never appears in the statute. The statute’s requirements speak only of “franchising authorities,” which, by definition include the Commission. See 47 U.S.C. § 522(10) (“The term franchising authority means any governmental entity empowered by Federal, State, or local law to grant a franchise.”)

²⁴ See 47 U.S.C. § 152(a) (“The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service”).

consistent with its provisions.²⁵ “The Commission’s power under § 303(r) is broad” and extends to all cable “rules that the Commission has found necessary to carry out its mandate under the Communications Act” and are “reasonably adopted in furtherance of a valid communications policy goal.”²⁶

Thus, the D.C. Circuit held that the Commission had authority to establish a syndicated exclusivity rule even though Title VI lacked any specific authorization to promulgate the rule,²⁷ and it has also held that the Commission could establish rules interpreting the franchise fee provisions of the Act (§ 622) even though the relevant provision did not itself “contain an explicit delegation of regulatory authority.” *ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) (“[b]ecause the provision establishes a uniform federal standard for franchise fees, and because the provision has been incorporated into the Communications Act, it is clear . . . that the ultimate responsibility for ensuring a ‘national policy’ with respect to franchise fees lies with the federal agency responsible for administering the Communications Act”).²⁸

In addition, Section 4(i) of the Act (47 U.S.C. § 154(i)) authorizes the Commission “to make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions” and has also been held to supply authority for measures necessary to implement the Act. *See, e.g., Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (finding authority under §§ 151 & 154(i)); *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1107 (D.C. Cir. 1987) (same).²⁹ It is utterly irrelevant that no provision of the Communications Act grants the Commission *specific* authority to issue

²⁵ *See, e.g., City of New York v. FCC*, 486 U.S. 57, 70 n.6 (1988); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-78 (1968); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984) (“the Commission’s authority extends to all regulatory actions necessary to ensure the achievement of the Commission’s statutory responsibilities”).

²⁶ *United Video v. FCC*, 890 F.2d 1173, 1183 & n.4 (D.C. Cir. 1989).

²⁷ *Id.*

²⁸ Comcast (and NATOA, *see* Letter from Libby Beaty (NATOA) to Marlene Dortch (FCC), dated November 17, 2006) also repeat their argument that by providing a judicial remedy for violations of section 621(a), Congress somehow rendered inoperative as to that section alone the broad rulemaking authority it granted the Commission under 303(r) and 201(b). But the Communications Act provides judicial remedies for violations of many of its provisions, *see* 47 U.S.C. §§ 208, 252(e), and the existence of such judicial remedies has never been thought to deprive the Commission of its authority to adopt rules that construe and implement the Act. Rather, the Supreme Court has expressly rejected that argument: *Iowa* makes clear that the Commission retains the authority to interpret the Act and establish rules of general applicability that are binding and preemptive, notwithstanding the existence of a judicial remedy. *See Iowa*, 525 U.S. at 384. And, by providing an additional source of binding federal law to guide the decisions of both local franchising authorities and courts, the Commission would in no way undermine or write “out of the statute,” NATOA at 2, the judicial remedy provision.

²⁹ *See also Rural Tel. Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988) (upholding Commission’s pre-statutory version of the universal service fund established; because the rules were established “to further the objective of making communications services available to all Americans at reasonable charges, the proposal was within the Commission’s statutory authority”). For the same reasons, the Commission has ample authority to make the issuance of interim franchises automatic after a thirty-day waiting period, under its own franchising authority derived from §§ 2(a), 541, 303(r), 4(i), 201(b), and related sections. Comcast’s only counterargument is that reliance on 47 U.S.C. § 537, which governs the sale or transfer of a cable system, would be “inapt,” *see* Comcast 10/31/06 *Ex Parte* at 2, but the Commission need not rely upon that provision to establish the automatic grant of an interim, initial franchise after 30 days.

cable franchises. As the Commission recently recognized, “[f]ederal Courts have consistently recognized” that §§ 303(r), 154(i), and 201(b) “give the Commission broad authority to take actions that are not specifically encompassed within any statutory provisions but that are reasonably necessary to advance the purposes of the Act.”³⁰ That the Commission has traditionally allowed local authorities wide discretion in franchising matters is likewise irrelevant – where federal action is necessary to protect core federal interests, “the focus must be the effect on the federal interest and the appropriate accommodation of the local interests involved.”³¹

The Commission’s authority to issue such interim franchises is especially clear in these circumstances, where new entrants like AT&T already have authority to operate wireline networks in the public rights of way. The Commission has repeatedly recognized that municipalities’ principal interest in cable franchising relates to management of their rights of way. *See, e.g., Cable Television Report and Order* ¶ 177; *Entertainment Connections Inc.*, 13 FCC Rcd. 14277, ¶ 62 (key premise for local franchising is “public safety and convenience and management of public rights-of-way”). Those interests are not implicated here, where the new entrant already has such authority to operate in the public rights of way and is already subject to rules and regulations concerning the responsible execution of such authority.³² In such

³⁰ *Continental Airlines; Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices*, 2006 FCC LEXIS 5793 at n. 112 (Released November 1, 2006). Comcast, in its recent *ex parte* filing (and previous pleadings), ignores and has no answer to AT&T’s showing that § 303(r) alone provides ample rulemaking authority for the franchising rules AT&T has proposed. *See* Letter from Daniel K. Alvarez (Comcast) to Marlene Dortch (FCC), dated October 31, 2006 (“Comcast 10/31/06 *Ex Parte*”). Comcast attacks AT&T’s alternative reliance on § 201(b), but the Supreme Court has held that § 201(b) of the Act explicitly gives the Commission “rulemaking authority to carry out the ‘provisions of this Act,’ and because the § 621 and other provisions of the Cable Act were amendments to, and are codified in, the Communications Act, this rulemaking authority extends to the Cable Act provisions. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999). Both the plain language and judicial interpretations of § 201(b) refute Comcast’s contention (10/31/06 *Ex Parte* at 2) that the Commission’s § 201(b) rulemaking authority is somehow limited to “providers of telecommunications services.” *See City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 2000) (parties “contend[ed] that the FCC was not granted regulatory authority over 47 U.S.C. § 541, the statute setting out general franchise requirements,” but the court rejected that argument, holding that “[w]e are not convinced that for some reason the FCC has well-accepted authority under the Act [under § 201(b)] but lacks the authority to interpret § 541”); *NCTA v. Brand X Internet Services*, 125 S.Ct. 2688, 2699 (2005) (“Congress has delegated to the Commission the authority to execute and enforce the Communications Act and to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act”). Comcast asserts that these cases dealt only with “narrow definitional issues” (10/31/06 *Ex Parte* at 2), but nothing in the language of § 201(b) or the reasoning of these opinions limits the Commission’s rulemaking authority to “definitional” issues, and these cases squarely hold that the Commission’s interpretation of the Cable Act required pre-emption of state and local franchising authority.

³¹ *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 11 FCC Rcd 5809 ¶ 13 (1996); *see also Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations*, 51 Fed. Reg. 5519 (1986) (“the relative importance to states or local jurisdictions of their own laws is not the proper focus in a decision to preempt. . . . It cannot be argued that preemption is automatically precluded merely because zoning has been called a traditionally local matter”).

³² The Commission should make clear, however, that municipalities may not use their processes for regulating the use of public rights of way as a means to circumvent Commission rules adopted in this proceeding governing competitive cable franchises. As AT&T has detailed in prior filings, some local authorities are using the rights-of-way process as a means to slow or even halt the deployment of the next generation equipment that will be used to build the advanced telecommunications networks necessary for the provisioning of next generation broadband as well as video services is unreasonable. *See* Letter from Jim Lamoureux, General Attorney, AT&T Services, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-311 (May 24, 2006).

circumstances, the Commission's interest in implementing Congress's competition, broadband, and Internet policies becomes paramount, and the Commission thus has an unassailable mandate for a limited reassertion of its own inherent authority to authorize the provision of interstate communications services. *See also Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 7442, ¶¶ 55-56 (1994) (Congress' intent in amending § 621 was to "prohibit franchising rules whose intent or effect is to create unreasonable barriers to the entry of potential competing multichannel video providers" and to "limit local franchising requirements to appropriate governmental interests (e.g., public health and safety, repair and good condition of public rights-of-way, and the posting of an appropriate construction bond)").

There is also no question that the Commission has authority to pre-empt the states in issuing interim federal authority to provide cable services. Whenever the Commission is affirmatively acting pursuant to its own statutory authority, it is well-settled that such actions pre-empt conflicting state or local actions. *See, e.g., City of New York*, 486 U.S. at 64; *Fidelity Federal Savings & Loan v. de la Cuesta*, 458 U.S. 141, 153 (1982). Indeed, Congress made that doubly explicit here by adding § 636(c), which provides that "any provision of law of any State, political subdivision, or agency thereof . . . which is inconsistent with [the Cable Act] shall be deemed to be pre-empted and superseded." 47 U.S.C. § 566(c).³³

In sum, the Commission clearly can and should rule that a competitive video provider will automatically obtain interim federal franchise authority to offer cable service in the event a local franchising authority refuses within 30 days to grant its application containing the essential features of a cable franchise as established by the Commission (or to negotiate a mutually agreeable alternative franchise agreement). This temporary federal authority to operate would continue only until the applicant and the local franchising authority enter a local franchise agreement on negotiated or litigated terms. And conditioning the grant of the interim federal franchise on the applicant's diligent pursuit of its judicial remedy under § 635 in the event the local authority issues the "final determination" that triggers that remedy would give both parties strong incentives to conclude the local franchise agreement as expeditiously as possible. By taking such steps the Commission can both fulfill its responsibilities to protect the core federal interests in promoting video competition and broadband deployment and provide appropriate accommodation of the local interests involved.

³³ For these reasons, Comcast's argument that Congress has not provided the necessary "clear statement" for pre-emption is meritless. Comcast 10/31/06 *Ex Parte* at 3 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460-61). Comcast does even mention either § 636 or the numerous other express grants of Commission rulemaking authority discussed above. *Cf. ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987).