

authority to act unreasonably and to cause a violation of § 541(a)(4)(A). On the other hand, the current practice of allowing local franchising authorities to tailor build-out requirements<sup>45</sup> to specific circumstances, because a “reasonable period of time” to construct or expand a cable system will vary from provider to provider and community to community, furthers Congress’ complementary objectives of promoting competition, preventing economic redlining, and ensuring that local needs and interests are satisfied.

Although not listed in Section 601 as “purposes” of the Cable Act, the establishment and enforcement of customer service standards have been delineated by Congress as a fundamental role for local franchising authorities. In fact, Section 632(a)(1) of the Cable Act, 47 U.S.C. § 552(a)(1), specifies that a local franchising authority may “establish and enforce . . . customer service requirements of the cable operator . . . .” The enactment of § 552(a)(1) makes clear that Congress recognized local problems should be handled and resolved locally, while at the same time authorizing the FCC to establish uniform “minimum” standards that local franchising authorities and cable operators can utilize. Any other approach would create tremendous administrative burdens for the FCC, since there are thousands of cable systems across the country which generate subscriber complaints. Congress also preserved the ability of state and local governments to adopt customer service requirements consistent with federal law.<sup>46</sup> Such requirements may exceed the FCC’s national “minimum” customer service regulations or address matters not covered by FCC regulations.<sup>47</sup> It is therefore evident that Congress intended to provide local franchising authorities with the ability to protect consumers from inept, unlawful or unscrupulous cable operator behavior.

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<sup>45</sup> These requirements must, of course, be consistent with state law.

<sup>46</sup> See generally § 632(d) of the Cable Act, 47 U.S.C. § 552(d).

<sup>47</sup> See § 632(d)(2) of the Cable Act, 47 U.S.C. § 552(d)(2).

In accordance with § 552 and applicable law, the LFAs negotiated customer service requirements in their franchises.<sup>48</sup> In most cases, these requirements are based on the FCC's "minimum" customer service standards. The customer service requirements are invoked and enforced, as appropriate, when the LFAs receive a complaint. The LFAs typically advertise a telephone number and/or address (*e.g.*, on subscriber bills and/or the Internet) that can be used to file a complaint. An employee is usually charged with investigating and resolving all complaints that are received. In many cases, complaints are filed after a subscriber has been unable to satisfactorily resolve a complaint with their cable operator directly, so the LFAs are frequently a regulator and problem solver of last resort. Because one or more persons are typically responsible for addressing subscriber complaints within a single franchise area, the LFAs are able to respond quickly and thoroughly. That would not likely be the case if cable complaints were to be handled on a national basis by a single federal agency or at the state level. Consumers might therefore be left unprotected if local enforcement of customer service standards is eliminated.

As is evident from the discussion above, all of the LFAs' franchises are the product of a local franchising process which considered local cable-related needs and interests. The resulting franchises are, therefore, tailored to meet the specific needs and interests of each community or group of member cities and their constituents, including (but not limited to) subscribers, local program producers, educational institutions and governmental institutions.<sup>49</sup> Consequently, the LFAs' franchises are not identical (although franchises negotiated by joint powers commissions

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<sup>48</sup> *See, e.g.*, § 5.5 of the North Metro Telecommunications Commission member city franchises, and § 5.5 of the South Washington County Telecommunications Commission franchise.

<sup>49</sup> It should be noted, however, that Minnesota state law does establish certain uniform minimum franchise requirements. *See* Minn. Stat. § 238.084. That said, local cable-related needs and interests must still be met. *See, e.g.*, Minn. Stat. § 238.084, subd. 4.

on behalf of their member cities are virtually identical). The existence of diversity in franchising reflects Congress' goal that "cable systems are responsive to the needs and interests of the local community."<sup>50</sup> While some regional bell operating companies may argue that this diversity is a "barrier" to market entry, the LFAs posit that diversity promotes competition by ensuring the social obligations taken on by cable operators, in return for the use of scarce and valuable public rights-of-way, are commensurate with the needs and interests articulated by a community. A one-size fits all approach to franchising will invariably result in legitimate and lawful local needs and interests going unmet in certain cases (in contravention of Congressional intent and the Cable Act)<sup>51</sup> and in other cases could result a cable operator assuming social obligations (and associated costs) which are unnecessary, in light of existing cable-related needs and interests.

When the Commission queries in ¶ 13 of the NPRM whether cable service requirements should vary greatly from jurisdiction to jurisdiction, it is really asking whether local franchising authorities should be able to require cable system operators to meet local cable-related needs and interests. The answer is emphatically "yes." When Congress enacted the Cable Act, it clearly intended that cable operators would be required to meet local needs and interests<sup>52</sup> and the plain language of the Cable Act implements Congress' manifest intent.<sup>53</sup> The need for local flexibility

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<sup>50</sup> See § 601(2) of the Cable Act, 47 U.S.C. § 521(2).

<sup>51</sup> See, e.g., § 621(a)(4)(B) of the Cable Act, 47 U.S.C. § 541(a)(4)(B) (providing that local franchising authorities "may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support . . .").

<sup>52</sup> See, e.g., H.R. Rep. No. 934 at 24 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4661 (wherein Congress said it intended that: "the franchise process take place at the local level where [local] officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs").

<sup>53</sup> See, e.g., 47 U.S.C. § 531(b) (authorizing local franchising authorities to require channel capacity on a cable system to be dedicated for public, educational and governmental use), 47 U.S.C. § 541(a)(4)(B) (permitting local franchising authorities to require adequate assurance that cable operators seeking a franchise will provide adequate public, educational, and governmental

in franchising and for continued local authority to require and/or negotiate important social obligations in franchise documents is as important, if not more important, today than it was in 1984. As the ownership and control of communications facilities and media content have become more consolidated and centralized in recent years, it is only through customized franchise requirements that local concerns about public safety (*e.g.*, safety issues posed by system construction and extensions and damage to public rights-of-way), economic redlining (local government knows best about what requirements for building out an advanced cable system are most reasonable, given the particular demographic and topographical features of the community and any limitations imposed by state law) and content diversity (*e.g.*, ensuring a diversity of viewpoints on a system by dedicating adequate PEG capacity) can be adequately addressed.

Before usurping municipal franchising policies, procedures and requirements, and upsetting the longstanding dual regulatory scheme that has permitted the cable industry to thrive, while at the same time supporting localism, the FCC must be certain that a concrete and intractable problem exists. The basis for the NPRM seems to be based primarily on complaints from Verizon and AT&T (formerly SBC) and other regional bell operating companies.<sup>54</sup> However, the accusations made by those companies are generally speculative, ambiguous and unsupported. The facts show that local franchising has encouraged the widespread deployment of advanced cable systems around the nation. Nationally, 105 million households were passed

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access channel capacity, facilities, or financial support), 47 U.S.C. § 541(a)(4)(C) (permitting local franchising authorities to require adequate assurance that cable operators seeking a franchise have the financial, technical, or legal qualifications to provide cable service), 47 U.S.C. § 544(b) (authorizing local franchising authorities to establish facilities and equipment requirements in requests for proposals for franchises), and 47 U.S.C. § 546(a)(1) (permitting local franchising authorities to identify the community's future cable-related needs and interests).

<sup>54</sup> See, *e.g.*, NPRM at ¶¶5-6.

by bidirectional cable plant as of year-end 2004, and approximately 99 million households were passed by cable systems with an upper frequency limit of 750 MHz or higher.<sup>55</sup> Further, more than one million miles of cable plant have been upgraded to fiber-optics.<sup>56</sup> Overall, cable operators invested approximately \$100 billion in their networks during the period from 1996-2005 – all while being franchised.<sup>57</sup> As a result, advanced services are now available to 93 percent of the households passed by cable systems (approximately 103 million households).<sup>58</sup> It is therefore evident that local franchising does not stifle investment in network upgrades or the deployment of advanced networks.

**B. Local Franchising Procedures Do Not Frustrate Federal Policy Goals.**

In ¶ 12 of the NPRM, the FCC asks whether the “regulatory process involved in obtaining franchises” impedes the realization of federal policy goals. The LFAs assume that the goals being referred to by the Commission here are (i) increased competition in the delivery of video programming and (ii) accelerated broadband deployment.<sup>59</sup> Based on available evidence and existing franchising procedures, the LFAs believe the answer to the Commission’s question is “no” for a number of reasons.

First, the LFAs and other local franchising authorities support fair competition. Indeed, it is evident that wireline competition in the delivery of multichannel video programming is the only way to discipline rates effectively. In this regard, the United States Government Accounting Office has observed that:

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<sup>55</sup> National Cable & Telecommunications Association, *2004 Year-End Industry Overview 4* (2004), available at [www.ncta.com](http://www.ncta.com).

<sup>56</sup> National Cable & Telecommunications Association, *2005 Mid-Year Industry Overview 7* (2005), available at [www.ncta.com](http://www.ncta.com).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 8-9.

<sup>59</sup> As discussed above, Congress delineated other important policy goals when it enacted the Cable Act, as amended.

[t]oday, wire-based competition – that is, competition from a provider using a *wire* technology, such as a local telephone company or an electric utility – is limited to very few markets, with cable subscribers in about 2 percent of markets having the opportunity to choose between two or more wire-based video operators. However, in those markets where this competition is present, cable rates are significantly lower – by about 15 percent – than cable rates in similar markets without wire-based competition, according to our analysis of rates in 2001 . . . . Competition from DBS operators has induced cable operators to lower cable rates slightly . . . .<sup>60</sup>

The FCC has also concluded that competition between multiple wireline networks is critical to true price competition.<sup>61</sup> Consequently, given the correlation between wireline competition and reduced cable rates, the LFAs have no incentive to impede the market entry of beneficial wireline competitors. To the contrary, the LFAs have every incentive to encourage fair competition, to process competitive franchise applications in a timely manner, and to negotiate reasonable franchise terms, since it is wireline competitors who will help discipline the cost of broadband services and improve the overall quality of service delivered to consumers.

Second, the franchising procedure set forth in Minnesota law is very efficient.<sup>62</sup> Once a cable system applicant has been identified, a local franchising authority must publish a public notice of its intent to consider an initial franchise application in a newspaper of general

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<sup>60</sup> United States Government Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry* 9 (October 2003).

<sup>61</sup> See *Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd 20540 at \*5 (2004) (“Having multiple advanced networks will also promote competition in price, features, and quality-of-service among broadband-access providers. This price-and-service competition, in turn, will have a symbiotic, positive effect on the overall adoption of broadband: as consumers discover new uses for broadband access at affordable prices, subscribership will grow; and as subscribership grows, competition will constrain prices . . .”).

<sup>62</sup> Paragraph 14 of the NPRM requests comments on the impact that state laws have on the ability of new entrants to obtain franchises.

circulation once each week for two successive weeks.<sup>63</sup> The contents of the notice are spelled out in Chapter 238 of Minnesota Statutes, so there should be little or no confusion or delay.<sup>64</sup> At least twenty (20) days from the first date of publication must be provided for the submission of applications.<sup>65</sup> The minimum contents of a cable system franchise application are set forth in Minn. Stat. § 238.081, subd. 4. A cable franchise applicant therefore has a good idea of what information must be included in its application even before it applies. Upon the submission of a proposal, an applicant and a local franchising authority may negotiate franchise terms.<sup>66</sup> The required minimum contents<sup>67</sup> of a franchise are delineated in Minn. Stat. § 238.084.<sup>68</sup> Accordingly, there is no need for significant negotiations, especially if a cable franchise applicant is cooperative and reasonable, and is clearly qualified from a financial, technical and legal standpoint.

Before awarding a franchise, a local franchising authority must hold a public hearing, at least seven days before the adoption of a franchise, after providing reasonable notice.<sup>69</sup> A cable franchise must be awarded by ordinance or other official action,<sup>70</sup> which means that one or more readings are usually necessary. Multiple readings, however, can typically be waived by local franchising authorities.<sup>71</sup> Accordingly, by following state procedures, there is no reason that a

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<sup>63</sup> See Minn. Stat. § 238.081, subd. 1.

<sup>64</sup> See Minn. Stat. § 238.081, subd. 2.

<sup>65</sup> See Minn. Stat. § 238.081, subd. 5.

<sup>66</sup> See Minn. Stat. § 238.081, subd. 4(b).

<sup>67</sup> Additional terms and conditions may be included in a franchise, provided they are consistent with state and federal law. See Minn. Stat. § 238.084, subd. 4.

<sup>68</sup> For instance, Minn. Stat. § 238.084, subd 1(m) specifies that an initial franchise must show that system construction throughout the franchise area must be substantially completed within five years. To the extent this timeframe is not reasonable in a given case, it would possibly be preempted by 47 U.S.C. § 541(a)(4)(A).

<sup>69</sup> See Minn. Stat. § 238.081, subd. 6.

<sup>70</sup> See Minn. Stat. § 238.081, subd. 7.

<sup>71</sup> See, e.g., Affidavit of Coralie A. Wilson at 4.

cable franchise cannot be awarded by Minnesota local franchising authorities in a relatively short period of time. There is therefore no state regulatory “barrier” that impedes the deployment of advanced networks or the development of increased competition in the multichannel video program distribution market. On the other hand, cable franchise applicants can and do delay the franchising process through unreasonable behavior.<sup>72</sup>

Third, under Minnesota law, local franchising authorities cannot “franchise” telecommunications systems.<sup>73</sup> More specifically, state law provides that “no local government unit may . . . require a telecommunications right-of-way user to obtain a franchise or pay for the use of the right-of-way”<sup>74</sup> and that, with certain limitations, a “telecommunications right-of-way user . . . may construct, maintain, and operate conduit, cable, switches, and related appurtenances and facilities along, across, upon, above, and under any public right-of-way.”<sup>75</sup> Local governments can manage their public rights-of-way with respect to telecommunications right-of-way users, but permissible management is limited to: (i) requiring registration; (ii) requiring

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<sup>72</sup> See, e.g., Statement of the Honorable Ken Fellman to the United States House of Representatives Committee on Energy and Commerce and the Subcommittee on Telecommunications and the Internet at 14-15 (April 27, 2005), attached hereto as Exhibit C (“Verizon is seeking unilaterally to impose its own very aggressive nationwide franchise on all local communities. While Verizon may have the right to attempt such an approach, it can’t fairly complain about delays resulting from its own, self-interested negotiating strategy.”), and Comments of Manatee County, Florida, *In the Matter of 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 05-311 at 6 (Jan. 3, 2006) (“While the County was able to work with Verizon’s draft, after significant modifications, this issue caused the process to be somewhat longer than otherwise would have been needed.”).

<sup>73</sup> See generally Minn. Stat. §§ 237.162 and 237.163.

<sup>74</sup> See Minn. Stat. § 237.163, subd. 7(a)(4). The definition of a “telecommunications right-of-way user” explicitly excludes cable systems. Minn. Stat. § 237.162, subd. 4. Accordingly, the LFAs do not agree that telecommunications service providers may use §§ 237.162 and 237.163 to construct facilities and/or to install equipment that is to be used solely for the transmission of video services prior to obtaining a cable franchise pursuant to Chapter 238 of Minnesota Statutes and the Cable Act. See Minn. Stat. § 238.03.

<sup>75</sup> See Minn. Stat. § 237.163, subd. 2(a).

construction performance bonds and insurance coverage; (iii) establishing installation and construction standards; (iv) establishing and defining location and relocation requirements for equipment and facilities; (v) establishing coordination and timing requirements; (vi) requiring the submission of project data; (vii) requiring the submission of data on the location of facilities; (viii) establishing permitting requirements for street excavation and construction; (ix) establishing removal requirements for abandoned facilities; and (x) imposing penalties for unreasonable delays in construction.<sup>76</sup> Local governments may also recover their actual right-of-way management costs from telecommunications right-of-way users,<sup>77</sup> but “costs” are narrowly defined by statute.<sup>78</sup> Minnesota law has therefore established the market entry process for telecommunications service providers,<sup>79</sup> and has limited local authority to control access to public rights-of-way by telecommunications right-of-way users.<sup>80</sup> Accordingly, advanced broadband networks can be constructed and operated in Minnesota with minimal government oversight and without invoking the local cable franchising process (provided video service is not offered and cable television-specific equipment and facilities are not installed). Thus, local cable franchising does not impede the deployment of advanced broadband networks in Minnesota.

Fourth, from a practical standpoint, local franchising requirements are similar to zoning and local business regulation requirements. It cannot seriously be said that those types of requirements impede the development of business on a local or a national scale. If that was the

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<sup>76</sup> See Minn. Stat. § 237.162, subd. 8; *see also* Minn. Stat. § 237.163, subd. 2(b) for a description of permitted activities.

<sup>77</sup> See Minn. Stat. §§ 237.163, subd. 2(b) and 237.163, subd. 6.

<sup>78</sup> See Minn. Stat. § 237.162, subd. 9.

<sup>79</sup> Telecommunications right-of-way users must be authorized to conduct business in the State of Minnesota or be licensed by the FCC. Those matters are beyond the control of local franchising authorities.

<sup>80</sup> By referencing Minn. Stat. §§ 237.162 and 237.163, as current law, the LFAs are not necessarily agreeing with all the terms of those particular sections.

case, all commerce in the United States would come to a screeching halt. National, regional and local companies have historically been able to expand and to flourish while complying with state and local rights-of-way, licensing, land use and zoning requirements and other police power mandates. Wal-Mart, for example, has been able to comply with local procedures and requirements, while quickly expanding its footprint across the country. If local requirements were a *de facto* or *de jure* barrier to entry, Wal-Mart would not have been able to construct and to continue to operate the thousands of stores<sup>81</sup> it now owns and operates in thousands of municipalities across the United States.

Fifth, video competition is developing, consistent with Congressional and FCC goals. Indeed, additional cable franchises are being granted to new entrants around the country.<sup>82</sup> The FCC itself acknowledges this fact when it states “[a]necdotal evidence suggests that new entrants have been able to obtain cable franchises. In that regard, we note that SNET and Ameritech both obtained cable franchises before being acquired by SBC. Bell South and Qwest have obtained franchises, as have many cable overbuilders – RCN has acquired over 100.”<sup>83</sup> In Minnesota, forty-seven (47) communities have awarded competitive cable franchises.<sup>84</sup> This is concrete evidence that state and local franchising policies and procedures do not inhibit multichannel

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<sup>81</sup> See <http://investor.walmartstores.com/phoenix.zhtml?c=112761&p=irol-irhome>.

<sup>82</sup> See, e.g., *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd. 2755, 2760 and 2823 at ¶¶ 14 and 126 (2005). See also Reply Comments of the National Cable & Telecommunications Association, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255 at 10-11 (October 11, 2005) (stating that Ameritech obtained 11 cable franchises, BellSouth obtained 20 cable franchises, and Verizon has been awarded 11 cable franchises).

<sup>83</sup> See NPRM at ¶ 8 (footnotes omitted).

<sup>84</sup> “Minnesota Cities With Competitive Cable Service,” attached hereto as Exhibit D.

video competition or the construction and deployment of advanced networks.<sup>85</sup> If local franchising procedures truly contained onerous requirements or resulted in significant delays, or if local governments were making unreasonable requests, the extensive roll-out of competitive wireline cable systems in Minnesota would never have occurred. Moreover, it is important to recognize that many of the communities listed in Exhibit D are in rural parts of the State of Minnesota. Thus, municipal franchising is furthering the federal goal of improving access to advanced services in rural areas of the nation, as part of the overall objective of making advanced telecommunications capability available to all Americans.<sup>86</sup>

Sixth, the existing statutory scheme effectively prevents the local franchising process from becoming an unreasonable barrier to entry. Section 621(a)(1) of the Cable Act, 47 U.S.C. § 541(a)(1), as the Commission notes in the NPRM, prevents local franchising authorities from unreasonably refusing to award additional cable franchises. In addition, § 621(a)(4)(A) of the Cable Act, 47 U.S.C. § 541(a)(4)(A), requires local franchising authorities to permit a

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<sup>85</sup> Indeed, the FCC itself did not identify local franchise requirements, processes and procedures as barriers to competition in the multichannel video distribution market in its Eleventh Annual Report on the status of competition in the video delivery market. *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd. 2755, 2803-04 at ¶ 75 (2005). In comments submitted to the Commission *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Verizon concedes that there are only a “handful” of reported decisions addressing purported “unreasonable behavior” by local franchising authorities under § 541(a)(1). *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255 at 20 (Sept. 19, 2005). Verizon assumes this means that municipal misdeeds are going unchecked by the current statutory scheme, but provides no real support. The LFAs would argue that the lack of litigation under § 541(a)(1) shows that local franchising authorities are acting reasonably in their dealings with competitive franchise applicants, and that there is no problem in need of resolution by the Commission, even assuming it possesses the power to intercede (which it does not).

<sup>86</sup> *See* Section 706 of the Telecommunications Act of 1996, § 706, Pub.L. 104-104, Title VII, Feb. 8, 1996, 110 Stat. 53, reproduced in the notes under 47 U.S.C. § 157 (The “Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . .”).

competitive franchise applicant's cable system a reasonable period of time to become capable of providing service to all households in the franchise area. A competitive franchise applicant whose application has been denied by a final decision of a local franchising authority may seek judicial relief.<sup>87</sup> These are the tools Congress crafted to further the pro-competitive intent of the Cable Act, as amended. The Commission was not given a role. Rather, Congress chose to allow local franchising authorities to carry out the pro-competitive purposes of the Cable Act, with guidance from the courts when necessary. It is important to note that the Cable Act balances the desire for multichannel video competition against local government authority over who may access the public rights-of-way for private profit, and in this regard, § 621(a) does not bar *reasonable* denials of competitive franchise applications. At least one court has acknowledged this fact, stating "Congress intended to leave states [and their political subdivisions] with the power to determine the bases on which to grant or deny additional franchises, with the only caveat being that the basis for denial must be 'reasonable.'"<sup>88</sup> Thus, reasonable franchising decisions, even if they can legitimately be considered "barriers to entry," are consistent with the competitive goals of the Cable Act.<sup>89</sup>

Finally, it is important to recognize that there are several joint powers commissions in the Minneapolis/St. Paul metropolitan area. While most of these commissions do not grant franchises,<sup>90</sup> they do review franchise applications, negotiate franchise agreements and make

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<sup>87</sup> 47 U.S.C. § 541(a)(1). *See, e.g., Qwest Broadband Services, Inc. v. City of Boulder*, 151 F.Supp. 2d 1236 (wherein a federal district court struck down a local requirement that voters must approve a cable franchise before it is granted by the city).

<sup>88</sup> *Cable TV Fund 14-A Ltd. v. City of Naperville*, 1997 WL 280692 at \*16 (N.D. Ill. 1997).

<sup>89</sup> The United States District Court in *City of Naperville* concluded that "it is certainly reasonable for the state to mandate denial of an additional franchise when the potential competitor is only willing to compete unfairly . . . ." *City of Naperville*, 1997 WL 280692 at \*16.

<sup>90</sup> It should be noted that the South Washington County Telecommunications Commission does in fact award cable franchises on behalf of its five member municipalities.

recommendations on behalf of their member municipalities, which municipalities represent a significant number of Twin Cities suburbs. The Burnsville/Eagan Telecommunications Commission, the North Metro Telecommunications Commission, the North Suburban Communications Commission, and the South Washington County Telecommunications Commission alone represent twenty-five (24) municipalities and townships.<sup>91</sup> The establishment of joint powers commissions creates numerous economies for cable franchise applicants, because they can submit a single franchise application that covers multiple municipalities, and negotiate several franchises with a single entity. This capability reduces application and negotiation costs and the time needed to prosecute an application. Thus, joint powers commissions established in Minnesota actually promote competitive entry, rather than deter competition.

**III. THE FCC DOES NOT HAVE THE AUTHORITY UNDER THE COMMUNICATIONS ACT TO PREEMPT OR INTERFERE WITH LOCAL FRANCHISING REQUIREMENTS AND PROCEDURES.**

In ¶¶ 15-17 and ¶ 19 of the NPRM, the Commission tentatively concludes that §§ 621(a) and 636 of the Cable Act, 47 U.S.C. §§ 541(a) and 556, and §§ 1 and 4(i) of the

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<sup>91</sup> In addition to these joint powers commissions, other joint powers commissions in the metropolitan Twin Cities area include: the Ramsey/Washington Counties Suburban Cable Communications Commission (consisting of the municipalities of Birchwood, Dellwood, Grant, Lake Elmo, Mahtomedi, Maplewood, North St. Paul, Oakdale, Vadnais Heights, White Bear Lake, White Bear Township and Willernie, Minnesota); the Lake Minnetonka Communications Commission (consisting of the municipalities of Deephaven, Excelsior, Greenwood, Independence, Long Lake, Medina, Minnetonka Beach, Orono, Minnetrista, Loretta, St. Bonifacius, Shorewood, Spring Park, Tonka Bay, Victoria, and Woodland, Minnesota); the Northern Dakota County Cable Communications Commission (consisting of the municipalities of Inver Grove Heights, Lilydale, Mendota Heights, South St. Paul, Sunfish Lake and West St. Paul, Minnesota); the Northwest Suburbs Cable Communications Commission (consisting of the municipalities of Brooklyn Center, Brooklyn Park, Crystal, Golden Valley, Maple Grove, New Hope, Osseo, Plymouth and Robbinsdale, Minnesota); the Quad Cities Cable Communications Commission (consisting of the municipalities of Anoka, Andover, Champlin and Ramsey, Minnesota); and the Sherburne/Wright County Cable Communications Commission (consisting of the municipalities of Big Lake, Buffalo, Cokato, Dassel, Delano, Elk River, Maple Lake, Monticello, Rockford and Watertown, Minnesota).

Communications Act, 47 U.S.C. §§ 151 and 154(i), empower it to preempt state and local laws, regulations and franchising processes that “cause an unreasonable refusal to award a competitive franchise” or “unreasonably interfere with the ability of any new potential entrant to provide video programming to consumers.”

A. **Section 621(a) of the Cable Act, 47 U.S.C. § 541(a), Does Not Provide the FCC with Any Preemptive Power Over Local Franchising Requirements and Procedures.**

Section 621(a)(1) of the Cable Act, 47 U.S.C. § 541(a)(1), states that a local franchising authority “may not unreasonably refuse to award an additional competitive franchise” and that “[a]ny applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision” to federal district court or a state court of competent jurisdiction. The Commission apparently believes this limitation of local authority and the designation of a judicial remedy for unreasonable denials of franchise applications empowers it to preempt or supersede local franchising requirements and procedures. There is, however, no language in Section 621 expressly conferring upon the FCC jurisdiction over local franchising processes. In fact, the legislative history of the Cable Act makes clear that Congress was preserving the pre-existing local role over the cable system franchising process. For instance, H.R. Rep. 934 underscores the fact that Congress intended to “preserve the critical role of municipal governments in the franchise process . . . .”<sup>92</sup> Accordingly, it is evident that Congress has not explicitly or implicitly authorized the Commission to preempt local franchising authority, processes and procedures pursuant to Section 621(a)(1). Indeed, Congress rejected the

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<sup>92</sup> H.R. Rep. No. 934, 98<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 1984, 1984 U.S.C.C.A.N. 4655, 4656 (1984). See also *National Cable Television Ass'n v. FCC*, 33 F.3d 66, 69 (D.C. Cir. 1994) (noting that one of the fundamental purposes of the Cable Act is to “preserve the local franchising system”).

extension of plenary FCC authority over local franchising processes when it established the current dual regulatory scheme that recognized municipal cable system franchising authority.

The Commission can only preempt local franchising requirements and procedures if Congress has clearly authorized it to do so. As the Supreme Court has pointed out in *Louisiana Public Service Comm'n v. FCC*:<sup>93</sup>

a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority . . . . First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign state [and by implication its political subdivisions], unless and until Congress confers power on it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of authority granted by Congress to the agency.<sup>94</sup>

Section 621(a) grants the FCC absolutely no power to preempt or otherwise interfere with local franchising processes.<sup>95</sup> Consequently, the FCC has no power under Section 621(a) to enforce Congress' directive that local franchising authorities not unreasonably refuse to award competitive cable franchises. This means the Commission may not lawfully promulgate regulations which preempt or have the effect of preempting local franchising authority, processes and procedures. If the Commission was to adopt such regulations, they would be arbitrary and capricious.<sup>96</sup>

Because there is no express authority for preempting local franchising processes in § 621(a)(1), the Commission must be interpreting that provision in a way which provides it with

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<sup>93</sup> 476 U.S. 355 (1986).

<sup>94</sup> *Id.* at 375.

<sup>95</sup> The LFAs are not commenting on whether the FCC has the authority to preempt particular franchise agreement provisions which may be inconsistent with Commission regulations or statutory provisions which the FCC is expressly empowered to enforce.

<sup>96</sup> See *Motion Picture Ass'n of America v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (holding that an agency's interpretation of a statute is not entitled to deference absent a delegation of authority from Congress).

implied preemption authority. Such an interpretation, however, is not supportable. First, it is a fundamental tenet of statutory construction that the presence of an express preemption provision in one section of a statute is a reason not to imply preemption authority in a section of the same statute lacking an express preemption provision because “Congress knew how to pre-empt in this very statute when it wanted to.”<sup>97</sup> The Communications Act is replete with statutory provisions which provide the Commission with preemptive power.<sup>98</sup> Section 621(a) just is not one of those provisions. Thus, implying preemptive authority from § 621(a) is inappropriate.

Moreover, given the legislative history of the Cable Act and the plain language of Section 621(a)(1), which recognizes and ratifies local franchising authority and expressly establishes a judicial remedy for any unreasonable final denial of a franchise application, Congress could not have intended to authorize the FCC to preempt or interfere with local franchising processes.<sup>99</sup> Indeed, any Congressional intent to displace traditional areas of local authority through the enactment of the Cable Act would need to be “clear and manifest” and

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<sup>97</sup> *Cable Television Ass'n of New York, Inc. v. Finneran*, 954 F.2d 91, 102 (2<sup>nd</sup> Cir. 1992) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Abrams*, 899 F.2d 1315, 1319 (2<sup>nd</sup> Cir.1990)).

<sup>98</sup> See, e.g., 47 U.S.C. § 253, which provides that, “[i]f, after notice and an opportunity for comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.” See, e.g., 47 U.S.C. § 332(c)(7)(B)(v) (providing that any “person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief”), 47 U.S.C. § 252(e)(5) (“If a State commission fails to act to carry out its responsibility under this section, then the Commission shall issue an order preempting the State commission’s jurisdiction . . .”) and 47 U.S.C. § 276(c) (“To the extent that any State requirements are inconsistent with the Commission’s regulation the Commission’s regulations on such matters shall preempt such State requirements.”).

<sup>99</sup> See, e.g., *Nashoba Communications, L.P. v. Town of Danvers*, 893 F.2d 435, 440 (1<sup>st</sup> Cir. 1990) (stating “[i]t would be inconsistent with the legislative scheme to imply additional federal remedies which Congress apparently did not intend to supply”).

unmistakable.<sup>100</sup> There is no clear and unmistakable language in § 621(a)(1) which suggests that Congress intended to imbue the Commission with any power to preempt or supersede local franchising authority, processes and procedures. Thus, the FCC cannot lawfully rely on Section 621(a)(1) for preemptive authority and may not utilize that provision to confer power upon itself.<sup>101</sup>

It should also be pointed out that § 621(a)(1) does not authorize interlocutory relief by the FCC. In other words, Section 621(a)(1) does not expressly empower the Commission to interfere in the franchising process before it is completed, contrary to what the FCC suggests in ¶¶ 15-17 and 19 of the NPRM. Rather, it specifically permits aggrieved cable franchise applicants to appeal to federal district court or an appropriate state court if their applications have been denied by the final decision of a local franchising authority.<sup>102</sup> This approach is logical and appropriate, because Congress did not intend to allow for FCC micromanagement of the local franchising process.<sup>103</sup>

If Congress had intended § 621(a)(1) to provide cable franchise applicants with FCC relief prior to the final denial of an application, it would have so stated.<sup>104</sup> In 47 U.S.C. § 546,

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<sup>100</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). See also *Cable Television Ass'n of New York, Inc. v. Finneran*, 954 F.2d 91, 100 (2<sup>nd</sup> Cir. 1992) and *City of Dallas v. FCC*, 165 F.3d 341 (5<sup>th</sup> Cir. 1999) (stating that *Gregory vs. Ashcroft* prohibits implied preemption, and that a clear statement of preemptive intent is necessary to displace traditional state and local powers).

<sup>101</sup> *Louisiana Public Service Comm'n*, 476 U.S. at 375.

<sup>102</sup> See *I-Star Communications Corp. v. City of East Cleveland*, 885 F. Supp. 1035, 1042 (N.D. Ohio 1995) (holding that a franchise application must be denied before there is an actionable claim under 47 U.S.C. § 541(a)(1)).

<sup>103</sup> See, e.g., H.R. Rep. No. 934 at 26, reprinted in 1984 U.S.C.C.A.N. 4655, 4663 (1984) (Congress intended that "the franchise process take place at the local level where [local] officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs.").

<sup>104</sup> As indicated elsewhere in these comments, the LFAs do not believe the FCC possesses any authority under § 621(a)(1) to interfere in local franchising processes, let alone before a final decision is made.

for example, Congress provided that judicial relief may be predicated on either “a failure of the franchising authority to act in accordance with the procedural requirements of this section” or a “final decision of a franchising authority.”<sup>105</sup> The absence of similar language in § 541(a)(1) means interlocutory relief from the FCC cannot be implied.<sup>106</sup> Accordingly, any FCC intrusion into the franchising process prior to the final denial of a franchise application, under the rubric of enforcing § 621(a)(1), would be inconsistent with the statutory scheme established by Congress, and an *ultra vires* exercise of authority for the reasons stated above.

It is also important to point out that the Commission impermissibly attempts to modify and expand the plain language and meaning of Section 621(a)(1) in ¶¶ 16, 17 and 19 of the NPRM. In those paragraphs, the FCC states that § 621(a)(1): (i) bars local franchising requirements which “undermine the well-established goal of increased MVPD competition and, in particular, greater cable competition within a given franchise territory;” and (ii) “prohibits not only the ultimate refusal to award a competitive franchise, but also the establishment of procedures and other requirements which have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a franchise . . . .” Section 621(a)(1), however, makes no mention of local franchising authority processes that “undermine” competition or unreasonably interfere with a franchise applicant’s ability to obtain a competitive franchise. Rather, the specific limitation on local action laid out by Congress in Section 621(a)(1) is that local franchising authorities cannot unreasonably refuse to award an additional competitive franchise. In other words, Congress was worried about the end result of the franchising process, not intermediate steps, and provided a judicial remedy for final denials of competitive franchise applications. The Commission’s interpretation of § 621(a)(1) is therefore flawed and

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<sup>105</sup> See Section 626(e)(1) of the Cable Act, 47 U.S.C. § 546(e)(1).

<sup>106</sup> See *Nashoba Communications, L.P. v. Town of Danvers*, 893 F.2d 435 (1<sup>st</sup> Cir. 1990).

unsupportable. Moreover, such an interpretation would likely create a significant administrative burden for the Commission, because it would be responsible for reviewing thousands of franchise application disputes.

Aside from creating administrative burdens, the FCC's view of Section 621(a)(1) would generate evidentiary problems (*e.g.*, how is it possible to divine the difference between a legitimate police power requirement and a franchising requirement that unreasonably interferes with an applicant's ability to obtain a franchise) and potential Constitutional problems, if the FCC acts to require a local franchising authority to provide access to its public property and public rights-of-way without fair compensation. Further, the FCC's approach to § 621(a)(1) appears to suggest that there is some sort of presumption that competitive cable franchise applicants are entitled to a franchise, and that local franchising authorities must overcome that presumption. The Commission should be reminded, however, that "Congress intended to leave the States with the power to determine the bases on which to grant or deny additional franchises, with the only caveat being that the basis for denial must be 'reasonable.'"<sup>107</sup>

**B. Section 1 of the Communications Act, 47 U.S.C. § 151, and Section 4(i) of the Communications Act, 47 U.S.C. § 154(i) Do Not Provide the FCC with Any Preemptive Power Over Local Franchising Requirements and Procedures.**

At the outset, the LFAs wish to make clear that Title I of the Communications Act, as amended, 47 U.S.C. § 151, *et seq.* does not give the FCC unlimited preemptive power. In fact, Title I gives the FCC only very limited powers, which can only be exercised as a function of the authority that is provided in the substantive provisions of the Communications Act. Overall, Title I only (i) details the purposes of the Communications Act, (ii) lists defined terms, (iii) establishes the FCC and (iv) defines the FCC's jurisdiction (*e.g.*, interstate communication by

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<sup>107</sup> See *Cable TV Fund 14-A, Ltd. V. City of Naperville*, 1997 WL 280692 at \*16 (N.D. Ill. 1997).

wire and radio). There is no *specific* grant of authority over cable franchising in Title I. This is because Title I pertains to communication by wire or radio.<sup>108</sup> Local cable system franchising, however, is not communication by wire or radio. Rather, it is the sovereign exercise of power over how, when and where, and under what terms and conditions, public rights-of-way may be utilized by private entities.

It is settled law that administrative agencies, such as the FCC, may only act pursuant to authority delegated by Congress.<sup>109</sup> Congress, however, has not provided the FCC with specific powers to micromanage the local cable franchising process. It is for this reason that the FCC relies on Sections 1 and 4(i) of the Communications Act for apparent authority to preempt and supersede local franchising requirements that it deems to be barriers to multichannel video competition and the deployment of advanced broadband networks.

1. Section 1 of the Communications Act, 47 U.S.C. § 151.

As noted in ¶ 15 of the NPRM, Section 1 of the Communications Act, 47 U.S.C. § 151, specifies that the Commission will “execute and enforce the provisions of this Act.” This provision, however, “does not give the FCC unlimited authority to act as it sees fit . . . .”<sup>110</sup> In this regard, the FCC itself has held that its mandate to execute and enforce the Communications Act:

must . . . be read in conjunction with the more specific provisions of the Act and with due regard for the divisions of responsibility for enforcement and interpretation that Congress specified in both the specific words of those amendments to the [Communications]

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<sup>108</sup> See 47 U.S.C. § 152(a).

<sup>109</sup> See, e.g., *American Library Ass’n v. FCC*, 406 F.3d, 689, 691 (D.C. Cir. 2005).

<sup>110</sup> See *Motion Picture Ass’n of America v. FCC*, 309 F.3d 796, 798-99 (D.C. Cir. 2002).

Act adopted in the Cable Act and in the legislative history of those amendments.<sup>111</sup>

The Commission has therefore acknowledged that any power it has under § 151 to “execute and enforce” must be derived from other substantive provisions of the Communications Act.<sup>112</sup>

Thus, in the context of the NPRM, there must be independent statutory authority in the Communications Act, presumably in Title VI, that specifically enables the FCC to preempt local franchising processes and procedures as an enforcement tool.<sup>113</sup> Title VI, however, addresses initial franchising in a very limited way, and certainly does not countenance Commission intrusion into local franchise processes. If Congress had intended to enable the FCC to intrude into a fundamental area of state/local sovereignty (like local franchising), it would have had to make its intent clear and unmistakable, as required by *Gregory v. Ashcroft*.<sup>114</sup> The LFAs posit that there is no clear and unmistakable authority in the Communications Act pursuant to which

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<sup>111</sup> See *In the Matter of Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Memorandum Opinion and Order, 104 F.C.C.2d 386, 391 at ¶ 13 (1986).

<sup>112</sup> See, e.g., *California v. FCC*, 905 F.2d 1217, 1240 (9<sup>th</sup> Cir. 1990) (holding that “Title I is not an independent source of regulatory authority . . .”) and *American Library Ass'n v. FCC*, 406 F.3d 689, 701 (D.C. Cir. 2005) (quoting *Federal Communications Comm'n v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979), in which the Supreme Court stated “without reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction [under Title I] would be unbounded.”) Stated differently, FCC authority under Title I must be grounded in and is limited by authority provided elsewhere in the Communications Act. See also *Home Box Office v. FCC*, 567 F.2d 9, 26 (D.C. Cir. 1977) (“Despite the latitude which must be given to the Commission to deal with evolving technology, its regulatory authority over cable television is not a *carte blanche*.”).

<sup>113</sup> *Id.*

<sup>114</sup> See, e.g., *City of Dallas v. FCC*, 165 F.3d 341, 347 (5<sup>th</sup> Cir. 1999) (stating that the “FCC's preemption of local franchising requirements is at odds with the Act's preservation of state and local authority and with the ‘clear statement’ principle the Supreme Court has articulated”). See also, *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999), in which the court stated “[f]ederal law, in short, may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels intrusion.”

the FCC may preempt local franchising processes and procedures.<sup>115</sup> To the contrary, Congress intended the Cable Act to preserve local franchising processes.<sup>116</sup> Thus, any rules adopted by the FCC interfering with or preempting local franchising procedures, or any preemption of local franchising based on 47 U.S.C. § 151, would be arbitrary and capricious.<sup>117</sup>

2. Section 4(i) of the Communications Act, 47 U.S.C. § 154(i).

Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), provides that the FCC may “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”<sup>118</sup> This provision is known as the Communications Act’s “necessary and proper” clause.<sup>119</sup> Authority wielded under § 4(i), however, must be based in specific powers the FCC possesses elsewhere in the Communications Act.<sup>120</sup> The following quote from former FCC Chairman Michael Powell is illustrative of this point:

[i]t is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a “necessary and proper” clause. Section 4(i)’s authority must be “reasonably ancillary” to other express provisions. And, by its express terms, our exercise of that authority cannot be “inconsistent” with other provisions of the Act. The reason for these limitations is plain: Were an agency afforded *carte blanche* under such a broad provision, irrespective of subsequent

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<sup>115</sup> See, e.g., *Cable Television Ass’n of New York v. Finneran*, 954 F.2d 91, 98 (2<sup>nd</sup> Cir. 1992) (The “Act cut back on federal authority in some places – particularly control of franchising.”).

<sup>116</sup> *City of Dallas*, 165 F.3d at 348-49. See also *Cable TV Fund 14-A, Ltd. V. City of Naperville*, 1997 WL 280692 at \*16 (N.D. Ill. 1997).

<sup>117</sup> See, e.g., *Motion Picture Ass’n of America*, 309 F.3d at 801 (“Deference to an agency’s interpretation of a statute is due only when the agency acts pursuant to ‘delegated authority.’”).

<sup>118</sup> 47 U.S.C. § 154(i).

<sup>119</sup> See, e.g., *U.S. West, Inc. v. FCC*, 778 F.2d 23, 26 (D.C. Cir. 1985).

<sup>120</sup> *Id.* See also *California v. FCC*, 905 F.2d 1217, 1240 at n. 35 (9<sup>th</sup> Cir. 1990) (concluding that Title I of the Communications Act “is not an independent source of authority;...it confers on the FCC only such power as is ancillary to the Commission’s specific statutory responsibilities....”) and *North American Telecomms. Assoc. v. FCC*, 772 F.2d 1282, 1292 (7<sup>th</sup> Cir. 1985) (stating that “Section 4(i) is not infinitely elastic”).

congressional acts that did not squarely prohibit action, it would be able to expand greatly its regulatory reach.<sup>121</sup>

The District of Columbia Circuit Court of Appeals agreed with this explanation of the limits on FCC authority under 47 U.S.C. § 154(i).<sup>122</sup> Accordingly, it is clear that the FCC cannot act under § 154(i) without explicit delegated authority from another provision of the Communications Act.<sup>123</sup>

Title VI may furnish the FCC with limited authority over certain franchise terms, but that authority does not reach the local franchising process and local government property rights. Indeed, the FCC has a very limited role to play under the dual federal-state/local regulatory scheme Congress established in Title VI. That scheme preserves municipal authority over public rights-of-way, including the right to require franchises from cable operators,<sup>124</sup> to the extent permitted by state law. There is no language in Title VI or the legislative history of the Cable Act which expressly states otherwise and delegates authority to the Commission to preempt local franchise processes. Consequently, there is no explicit authority in the Cable Act on which the FCC can lawfully base any “ancillary” power to preempt the local franchising requirements and procedures.<sup>125</sup> For this reason, § 4(i) of the Communications Act, 47 U.S.C. § 154(i), cannot

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<sup>121</sup> *Motion Picture Ass'n of America v. FCC*, 309 F.3d at 806.

<sup>122</sup> *Id.*

<sup>123</sup> *See Louisiana Public Service Comm'n*, 476 U.S. at 375 (“[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority.... We simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate federal policy. An agency may not confer power upon itself.”).

<sup>124</sup> *See National Cable Television Ass'n v. FCC*, 33 F.3d 66, 69 (D.C. Cir. 1994) (noting that one of the fundamental purposes of the Cable Act is to “preserve the local franchising system”).

<sup>125</sup> *See, e.g., California*, 905 F.2d at 1240, n. 35 (wherein the court stated, in the context of Title II common carrier regulation, “[t]he system of dual regulation established by Congress cannot be evaded by the talismanic invocation of the Commission’s Title I authority.”). This conclusion is just as relevant to the dual regulatory scheme established by Title VI of the Communications Act.

reasonably be construed to permit the FCC to preempt local franchising schemes or to adopt rules intruding into the franchising process.

If § 154(i) was interpreted to authorize preemption of local franchising requirements and procedures, it would render one of the underlying purposes of Title VI meaningless (*i.e.*, preserving local franchising authority). Such an approach would be inconsistent with the basic precepts of statutory construction, which provide that the courts “should not read one part of a statute so as to deprive another part of meaning.”<sup>126</sup>

C. **Any Attempt by the FCC to Interfere with or to Supersede Local Franchising Authority Could Have Constitutional Implications.**

Any attempt to preempt lawful local government control of public rights-of-way by interfering with or superseding local franchising requirements, procedures and processes could constitute an unconstitutional taking under the Fifth Amendment of the United States Constitution. This principle goes back to the Telegraph Act of 1866. For example, in *Postal Tel. Cable Co. v. City of Newport*, the Kentucky Court of Appeals, citing several United States Supreme Court cases held:

The Congress of the United States has no power to take private property for public purposes without compensation, and it can no more take the property of a state or one of its municipalities than the property of an individual. The acts of Congress...conferred on the [telecommunications company] no right to use the streets and alleys of the city...which belonged to the municipality.<sup>127</sup>

In the same vein, the United States Supreme Court has consistently held that local public rights-of-way cannot be given away to communications companies by Congress without reasonable

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<sup>126</sup> See, e.g., *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 85 (2<sup>nd</sup> Cir. 1995).

<sup>127</sup> See *Postal Tel. Cable Co. v. City of Newport*, 76 S.W. 159, 160 (Ky. 1903) (citing *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893) and *Postal Tel. Co. v. Baltimore*, 156 U.S. 210 (1895)). See also Clarence A. West, *The Information Highway Must Pay Its Way Through Cities: A Discussion of the Authority of State and Local Governments to be Compensated for the Use of Public Rights-of-Way*, 1 Mich. Telecomm. Tech L. Rev. 29 (1995).

compensation for the use of the local public rights-of-way.<sup>128</sup> For instance, in *St. Louis v. Western Union Tel. Co.*, the court rejected Western Union's claim that a City could not impose a pole charge on its use of the local rights-of-way, in light of the Telegraph Act of 1866,<sup>129</sup> which granted rights to telegraph companies to use federal post roads for interstate telegraph operations and prohibited states and local governments from interfering with those operations.<sup>130</sup> In so doing, the Court held that the 1866 Telegraph Act did not grant an unrestricted right to appropriate the public property of a state.<sup>131</sup> Accordingly, the federal government did not have the power to "dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are public property of the state."<sup>132</sup>

In *Western Union Tel. Co. v. City of Richmond*, Justice Holmes held the Telegraph Act of 1866 was "only permissive, not a source of positive rights.... [The statute] gives the appellant [the telegraph company] no right to use the soil of the streets...."<sup>133</sup> Finally, in *Postal Tel.-Cable Co. v. City Richmond*, the last significant Supreme Court Case addressing the Telegraph Act of 1866 and local authority to receive compensation, the Supreme Court succinctly held that "even interstate business must pay its way – in this case for its right-of-way and the expense incident to the use of it."<sup>134</sup>

This line of cases illustrates that there is over one hundred years of legal precedent holding that the federal government cannot take local public rights-of-way without just

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<sup>128</sup> *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893).

<sup>129</sup> *Id.*

<sup>130</sup> 14 Stat. 221 (1866).

<sup>131</sup> *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 100 (1893).

<sup>132</sup> *Id.* at 100-01.

<sup>133</sup> *Western Union Tel. Co. v. City of Richmond*, 224 U.S. 160, 169 (1912).

<sup>134</sup> 249 U.S. 252, 259 (1919).