THE CITY OF NEW YORK
DEPARTMENT OF INFORMATION TECHNOLOGY &TELECOMMUNICATIONS
Paul J. Cosgrave, Commissioner

December 7, 2006

VIA ECFS

Ms. Marlene 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 December 6, 2006, Representatives of the City of New York ("the City") – Commissioner Paul Cosgrave of the New York City Department of Information Technology and Telecommunications, Mr. Mitchel Ahlbaum, General Counsel and Deputy Commissioner, New York City Department of Information Technology and Telecommunications, Mr. Jay Damashek, Chief of Staff, New York City Department of Information Technology and Telecommunications, Bruce Regal, Senior Counsel, New York City Law Department, and Bernard Fulton, Legislative Representative, New York City, Office of the Mayor - met in connection with MB Docket No. 05-311 with Commissioner Jonathan S. Adelstein and Rudy Brioche, Legal Advisor on Media Issues to Commissioner Adelstein. The City spoke about three major areas of concern that have arisen as a result of press reports regarding possible rules said to be now under consideration.

The first area of concern relates to the role of franchising authorities in assuring the broadest, swiftest possible buildout of competitive broadband facilities, a goal shared by both the Commission and franchising authorities. The City explained that in its experience local franchising authorities are ideally situated to evaluate the broadest buildout that is reasonable and practical to require, within the most appropriate schedule, given local conditions, and that possible attempts by the

Commission to superimpose assumptions about reasonableness on a national basis are supported neither by statute nor by the shared policy goals. The City described in broad outlines its own experience thus far in discussing competitive video service with its local former RBOC, Verizon, noting that earlier this year Verizon had expressed its preparedness to build out its FIOS system to 100% of households in the City within a time period which it specified, with interim milestones and broadly spread geographic coverage for each year after the first. The City noted, however, that in order to assure that Verizon would in fact meet this schedule, it is critical for the City to maintain the authority to condition grant of a franchise on agreement by Verizon to such a schedule, and that any action that would undercut the City's authority to require such a buildout schedule would be counterproductive to the applicable common public policy goals. The City further noted that although it may be true that if the Commission were to cite as an example of "unreasonableness" by a local franchising authority a buildout requirement from a local exchange company that went beyond such LEC's service area such example would not affect the City's buildout authority with respect to Verizon (because Verizon's service area in New York City covers all households in the City), such an example still appears in many respects to be arbitrary and an inappropriate constraint on local authority under Cable Act Section 621(a)(4)(A). For example it is unclear that an entity that seeks a cable television franchise ought to be able to per se escape reasonable local buildout requirements merely by building a tiny and rudimentary local exchange facility and then declaring itself immune from cable buildout except with respect to the scope of that same local exchange facility. It may well be, the City pointed out, that only a very limited buildout requirement is appropriate under certain circumstances for a small LEC, but to artificially and automatically select the boundaries of the existing service facility as always the right answer to that policy question prejudges both community needs and interests and provider capacity in an arbitrary way inconsistent with federal law. It also appears, the City noted, to have no rational relation to the capacity of non-LECs seeking to enter the cable TV market, who would presumably not be protected by such an arbitrary service area limit on buildout requirements but who may be subject (in some but not all cases) to at least as many limits on build capacity.

The second area of concern the City raised is related to institutional networks, which are expressly protected by Cable Act Section 621(b)(3)(D) as a subject franchising authorities may incorporate in the development of franchise conditions, and the 5% of revenue cap on cable TV franchise revenue. The City described its own institutional network as a powerful, resilient facility based on fiber ring architecture that plays a central role in the City's internal data communications infrastructure, carrying many of the City's key day-to-day, operational data transmissions. The City noted that on September 11, 2001, when many parts of the local public telecommunications system were impaired, the City's I-net continued to operate uninterrupted throughout and provided an important resource for the City government's ability to continue to function during the crisis. The City further observed that its I-net as it continues to grow and become more effective is expected to play an important support role for the City's new state of the art broadband

wireless public safety system, now under construction by Northrup Grumman, that will provide City first responders important new resources to respond more effectively to emergencies throughout the City. The City outlined its experience in negotiation of institutional network contributions, which experience has often included a dialogue in which the City seeks contributions of very low marginal cost strands of fiber within cable being installed or upgraded while potential franchisees often propose as an alternative to some portion of such requested fiber contributions provision of in-kind or cash contributions in order to maintain greater franchisee control of installed fiber. The City noted that it is often open to such an in-kind or cash contribution alternative if such can help to effectively expand, maintain and/or operate critical I-net facilities. The City pointed out that FCC rules that purported to require that such in-kind or cash alternatives to fiber contributions would necessarily be counted against the 5% cap would preclude the mutually beneficial negotiation of such alternative contribution approaches by effectively eliminating any practical City benefit to entertaining such alternatives. The City further noted that the City and Verizon had only just recently engaged in just the sort of dialogue described above, in which Verizon itself proposed cash alternatives to fiber contributions as being preferable to Verizon. The City pointed out in its meetings yesterday with Commissioners and their staffs that it would be a shame to preclude these sorts of mutually beneficial negotiations with an ill-considered approach to the 5% cap.

The third area of concern the City raised was in the area of time frames and scope of local franchising review. The City noted that it is not inherently opposed as a policy matter to reasonable time frames for action by local authorities, although it also pointed out that it is strongly opposed on both legal and policy grounds to any approach that would purport to give entities the authority to provide cable service without a franchise actually being granted to the entity by a franchising authority, any such approach being patently inconsistent with Section 621(b)(1) of the Cable Act. The City pointed out that any time frames that might be adopted must be long enough to assure franchising authorities the time and scope of inquiry to prevent, for example, unqualified entities from obtaining franchises, and the City noted as an example its experience with one past applicant for a franchise to install payphones on City sidewalks, the president and sole shareholder of which was eventually discovered to be an organized crime figure who has admitted under oath to a variety of criminal activities.

Lastly, the City discussed an additional proposal that the Commission might wish to consider as part of this proceeding. The City noted that issues are increasingly arising and are likely to continue to proliferate, in the application of the 5% revenue cap, and that a particular alternative might be a viable way of avoiding such issues in the future. The City suggested an alternative in which the actual franchise payments made collectively by the City's incumbent providers during a particular year, say 2006 for example, were tallied. The actual physical occupancy of the City's streets during 2006 (a certain number of miles, or cubic feet, of fiber occupying the streets; a certain number of poles or equipment boxes occupying the

sidewalks; and so on) would also be tallied. The franchising authority would then apply the actual dollars paid during the year in question to the actual physical occupancy during such year to derive a dollar per foot, dollar per pole, etc. formula that would reproduce the actual total dollar result for the given year. That formula could then be used going forward, on a foot by foot and pole by pole basis as an accepted proxy for the maximum franchise compensation permitted under the cap, applied neutrally to all cable providers going forward (with some inflation adjustment to reflect changing values of the dollar) as the Section 622(b) rent for maintenance of a cable system (in lieu of the complexity of an annual revenue calculation). Such rent would be applied to the facilities actually in the street and complex issues of what service to include in the revenue base, revenue auditing, bundling, distinctions between subscriber revenue and advertising revenue, etc. would all be avoided. The City suggested that this alternative, to the extent it is within the authority of the Commission to pursue, might be an appropriate matter to consider in this proceeding in order to promote simplicity and efficiency in the rollout of broadband competition.

Sincerely,

/s/
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cc: Commissioner Jonathan S. Adelstein (by e-mail)
Rudy Brioche (by e-mail)