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December 12, 2006

EX PARTE

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

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

Dear Ms. Dortch:

On December 12, 2006, Susanne Guyer provided Cristina Chou Pauze, Legal Advisor to Commissioner McDowell, the attached document, which describes the Commission's legal authority to adopt rules interpreting provisions of the Cable Act. Please include this document in the above-referenced proceeding.

Sincerely,

A handwritten signature in black ink, appearing to read "Leora Hochstein".

Attachment

The Commission Has Authority to Interpret, and Effectuate the Purposes of, the Cable Act, and There Is Nothing Unique about the Franchising Rules That Deprives the Commission of That Authority.

- The Commission has well-recognized authority to adopt binding and preemptive rules enforcing all parts of the Communications Act, including the Cable Act.
 - *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 380 (1999) (“‘Commission jurisdiction’ always follows where the Act ‘applies,’” and the Commission has general rulemaking authority to prescribe rules governing such matters.); *City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999) (“the FCC is charged by Congress with the administration of the Cable Act”).
 - Section 621(a) was added as part of the 1992 Cable Act. The Commission has undertaken literally scores of rulemakings interpreting and applying various provisions of the 1992 Cable Act as well video-related provisions of the 1996 Act, including numerous proceedings not specifically required by those Acts.¹
- The Commission’s exercise of jurisdiction specifically to enforce or interpret Section 621 also has been upheld on numerous occasions.
 - The Seventh Circuit concluded that it was “not convinced that for some reason the FCC has well-accepted authority under the Act but lacks authority to interpret § [621].” *City of Chicago*, 199 F.3d at 428; *see also NCTA v. FCC*, 33 F.3d 66, 70 (D.C. Cir. 1994) (upholding Commission order interpreting application of Section 621’s franchise requirements); *ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987) (affirming Commission’s “interpretative rules” concerning Section 621).
 - And there is nothing special about the “unreasonable refusal” requirement that makes Commission action inappropriate. The Commission routinely decides – both in the context of adjudications and rulemakings – the content of statutory provisions that hinge on whether particular actions are “reasonable” or “unreasonable.”²

¹ *See, e.g., Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 98-82; *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, MM Docket No. 93-215; *Implementation of Section 304 of the Telecommunications Act of 1996, Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67; *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, MM Docket No. 95-176; *Implementation of Section 203 of The Telecommunications Act of 1996 (Broadcast License Terms)*, MM Docket No. 96-90.

² *See, e.g., Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, 8 FCC Rcd 5631, ¶ 1 (1993) (setting rules to ensure reasonable rates for basic cable service tier); *Star Lambert and Satellite Broadcasting and Communications Association of America*, 12 FCC Rcd 10455, ¶¶ 2-3 (1997) (determining that local ordinances violated Commission rules prohibiting unreasonable delays and unreasonable increases in costs for satellite providers); *Local Exchange Carriers’ Rates, Terms, And Conditions For Expanded Interconnection Through Physical Collocation For Special Access And Switched Transport*, 12 FCC Rcd 18730, ¶ 2 (1997) (“Pursuant to Sections 201 through 205 of the Communications Act of 1934, as amended (Act), we are using the tariff review process to ensure that LECs provide interstate expanded interconnection service at rates, terms and conditions that are just, reasonable, and nondiscriminatory.”); *IT&E Overseas, Inc., v. Micronesian*

- In addition to rules enforcing Section 621(a), the Commission has authority to adopt complementary rules and interpretations of other provisions of the Cable Act that bear on the problem areas with the franchising process.
 - *City of Chicago*, 199 F.3d at 427-28 (upholding Commission’s interpretation of the term “cable system”); *NCTA*, 33 F.3d at 70 (upholding Commission order interpreting Section 621’s franchise requirements and interpreting statutory definitions of “cable service,” “cable operator,” and “cable system”); *ACLU*, 823 F.2d at 1554 (affirming Commission’s “interpretative rules” concerning the anti-discrimination provision of Section 621(a)(3)); *City of Dallas*, 165 F.3d at 351 (upholding Commission’s conclusion that Section 611 does not authorize LFAs to require construction of I-Net).
 - “It is for agencies, not courts, to fill statutory gaps.” *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, -- U.S. --, 125 S.Ct. 2688, 2700 (2005).
 - Even NATOA conceded in this proceeding that the Commission has authority to “constru[e] the definitions set forth” in the Cable Act. *NATOA Comments* at 16.
- In fact, the Commission has previously exercised its jurisdiction to address several issues that are relevant to this proceeding, and its authority to do so has been upheld each time.
 - Build-Out Requirements
 - *Implementation of the Provisions of the Cable Communications Policy Act of 1984*, 58 Rad. Reg. 2d (P&F) 1, ¶ 82 (1985) (noting that “redlining” prohibition “does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents in the unwired areas.”), *affirmed by ACLU v. FCC*, 823 F.2d 1554, 1580 (D.C. Cir. 1987).
 - Franchise Fee Requirements
 - *United Artists Cable of Baltimore*, 11 FCC Rcd 18158, ¶ 17 (1996) (interpreting § 622 and concluding that this provision prohibited the collection of a fee on a fee); *vacated by City of Dallas v. FCC*, 118 F.3d 393 (5th Cir. 1997) (court found that the Commission misinterpreted statute, but did not question FCC’s authority to interpret the Cable Act’s franchise fee provision).
 - PEG and I-Net Requirements
 - *City of Dallas v. FCC*, 165 F.3d 341, 350-51 (5th Cir. 1999) (affirming Commission’s conclusion that “§ 611 does not permit localities to require cable operators to build institutional networks”)
 - Internet Access Not Subject to Franchise Fees

Telecommunications Corporation, 13 FCC Rcd 16058, ¶ 21 (1998) (evaluating claims of unreasonable preferences given in violation of § 202(a)).

- *Cable Modem Ruling*, 17 FCC Rcd 4798, ¶ 105 (2002) (revenue from cable modem service may “not be included in the calculation of gross revenues from which the franchise fee ceiling is determined”)
 - *City of Chicago v. AT&T Broadband*, 2003 U.S. Dist. LEXIS, at *16 (N.D. Ill. 2003) (holding that franchise fees on cable modem revenue were impermissible following FCC’s *Cable Modem Ruling*); *City of Minneapolis v. Time Warner Cable*, No. 05-994 ADM/AJB, 2005 U.S. Dist. LEXIS 27743, * 17-20 (D. Minn. Nov. 10, 2005) (“The FCC and numerous courts have found that under the Telecommunications Act, Congress intended that cable modem service revenues are not to be included in the assessment of franchise fees.”).
- Neither the fact that the statute’s franchising provisions provide a role for local authorities, nor its judicial review provision, deprives the Commission of authority to adopt binding and preemptive federal rules to effectuate Section 621(a).
 - The courts have already upheld the Commission’s authority to preemptively interpret the application of Section 621’s franchising requirements. *See City of Chicago*, 199 F.3d at 428; *NCTA*, 33 F.3d at 70; *ACLU*, 823 F.2d at 1580.
 - More generally, the Supreme Court has recognized in other contexts that even if the Act “entrusts” a state or local agency with a particular responsibility, that “do[es] not logically preclude the Commission’s issuance of rules to guide the state-[authority] judgments.” *Iowa Utilities Board*, 525 U.S. at 385. The Supreme Court has expressed “no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel.” *Id.* at 379 n.6. The debate, then, is “not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew.” *Id.* And the Court concluded, in discussing the roles assigned to state commissions and courts, that “[n]one of the statutory provisions that these rules interpret displace the Commission’s general rulemaking authority.” *Id.* at 385.