

December 13, 2006

VIA ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Dear Ms. Dortch:

I am writing in response to the *ex parte* letter filed by AT&T in this proceeding on December 4, 2006.¹ While Comcast and other parties have consistently maintained that both the record and the law strongly argue against the Federal Communications Commission (“Commission”) imposing any significant changes to the franchising process, those parties in support of changes, most notably the Bells, have put forward a raft of divergent and unsupported proposals for “fixing” the franchising process. Those filings merely reinforce the plain fact that Congress did not empower the Commission to modify the franchising process in any of the ways proposed.

At the 11th hour, undeterred by all of the factual and legal deficiencies of its previous advocacy in this proceeding, AT&T puts forward a truly audacious proposal: that the Commission should promulgate a rule that automatically grants an interim cable franchise to any competitive cable applicant that does not obtain a state or local franchise within 30 days after applying for one. Its primary attraction is that it makes AT&T’s previous outrageous proposals appear reasonable by comparison -- but, like those earlier proposals, this proposal is built on a vaporous legal foundation.

The “white paper” AT&T attached to the December 4 Letter is riddled with errors. Given that AT&T’s arguments are presented in a paper submitted within days of the likely close of an eight-month-old record, we focus here only on the most egregious elements of AT&T’s analysis.

¹ Letter from Jim Lamoureux, AT&T Inc., to Ms. Marlene Dortch, Secretary Federal Communications Commission, MB Dkt. No. 05-311 (filed Dec 4, 2006) (“December 4 Letter”).

First, Congress did not empower the Commission to insert itself into the franchising process. AT&T cobbles together various quotes that confirm the obvious fact that Congress intended, in the 1984 Cable Act, to establish a federal regime for cable regulation. It is beyond dispute that Congress established a national regime for cable regulation, but it is equally clear that Congress did not reserve to the *Commission* any role in the *franchising* process.

As discussed in greater detail in Appendix A, the Commission began regulating cable services in the 1960s, using a broad assertion of ancillary authority, in an effort to protect broadcasters.² However, its assertion of authority, and the manner in which it wielded this authority, led to significant regulatory uncertainty. When Congress finally spoke on the matter in the 1984 Act, it did so to mitigate this uncertainty and establish clear spheres of regulatory control, with local bodies handling some aspects of cable regulation, most notably the franchising process, and the Commission handling *other* aspects, plainly not including the franchising process. Indeed, the most obvious lesson to be learned from reading the legislative history of the 1984 Act is that Congress in 1984 viewed the Commission's involvement in cable franchising as a *problem*.

Congress made it crystal clear that the franchising process should “take place at the local level where city officials have the best understanding of local communications needs.”³ It also wanted to ensure that the franchising process was “not continually altered by Federal, state or local regulation.”⁴ To that end, Congress required that “the provisions of [] franchises, and the authority of the municipal governments to enforce these provisions, ... be based on [] uniform Federal standards” established by Congress.⁵ The Commission was assigned *no role* in issuing franchises, *no role* in spelling out the standards by which franchising authorities would make their decisions, and *no role* in reviewing decisions of franchising authorities with respect to the approval or denial of franchise applications.

Second, AT&T declares that it is “well-settled . . . 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.”⁶ Neither of the cases AT&T cites comes anywhere close to supporting the notion that the Commission has any discretion -- much less unfettered freedom -- to alter the franchising regime established by Congress -- especially in light of Congress's explicit intent that the franchise process “not [be] continually altered by Federal . . . regulation.”⁷

² The attached history reviews the developments in 1984, 1992, and 1996 in some detail. See Appendix A.

³ H. Rep. No. 09-934 at 24 (1984) (“1984 House Report”).

⁴ *Id.*

⁵ *Id.* See also Remarks of Congressman John Dingell, Congressional Record, H10442 (Oct 1, 1984) (noting that “[t]he legislation the House considers today establishes a national policy...[which]...recognizes the crucial role that the local communities must continue to play in assuring that the cable system in their community does, indeed, serve the interests and the needs of the citizens in the community”).

⁶ December 4 Letter, “White Paper” at 3.

⁷ 1984 House Report at 24.

Presumably recognizing the weakness of its argument, AT&T seeks additional support in sections of the Communications Act that bear no relationship whatsoever to the question of whether Congress intended the Commission to play a role in cable franchising. AT&T says “the Commission’s obligations to take action in this proceeding do not stem solely from the Cable Act and the amendments to it,” but can also be found in Section 706 of the Telecommunications Act of 1996 and in Section 230 of the Communications Act (also part of the 1996 Act).⁸ As for Section 706, that provision deals with the deployment of “advanced telecommunications capability” -- that is, broadband *transmission* services, devoid of content.⁹ There is no indication whatsoever that Congress intended for Section 706 to modify or override its previous explicit grants of authority on franchising. In fact, the Commission has already definitively ruled that Section 706 is not an independent source of rulemaking authority.¹⁰ As for Section 230, a statement of policy concerning the Internet has nothing to do with cable services, is not a source of rulemaking authority, and falls far short of giving the Commission the power to disregard the statutory scheme set forth in Section 621. AT&T’s effort to conflate Congressional policy on the deployment of “advanced telecommunications capability” with explicit Congressional policy on cable franchising is unavailing.

Third, AT&T’s notion that the Cable Act should be read to empower the Commission to act as a “franchising authority” merely demonstrates how little AT&T has bothered to learn about the franchising process. AT&T’s discussion of the Commission’s 1970s-era regulation is utterly irrelevant, because, as noted above, the 1984 Cable Act repudiated the Commission’s involvement in cable franchising. The Commission’s broad assertion of ancillary authority, reasonably necessary in a situation where Congressional direction was lacking, was superseded when, in the 1984 Cable Act, Congress actually spoke to the question of how to regulate cable services, and apportioned responsibilities among franchising authorities, the Commission, and the courts. The language,

⁸ See Telecommunications Act of 1996, Pub. L. 104-104, §706(c), 110 Stat. 56, 153 (1996) (“1996 Act”) (defining “advanced telecommunications capability” as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology”). The Commission has in turn defined “advanced telecommunications capability” as “infrastructure capable of delivering a speed in excess of 200 kbps in each direction.” See *In the Matter of Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd. 20540, at 10 (2004).

⁹ See Telecommunications Act of 1996, Pub. L. 104-104, §706(c), 110 Stat. 56, 153 (1996) (“1996 Act”) (defining “advanced telecommunications capability” as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology”). The Commission has in turn defined “advanced telecommunications capability” as “infrastructure capable of delivering a speed in excess of 200 kbps in each direction.” See *In the Matter of Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd. 20540, at 10 (2004).

¹⁰ See *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Mem. Opin. & Order, 13 FCC Rcd. 24011 ¶ 77 (1998) (“For the foregoing reasons, we conclude that, in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress’ policy objectives, the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority.”); *id.* ¶ 74 (“[W]e conclude that section 706(a) gives the Commission an affirmative obligation to encourage the deployment of advanced services, *relying on our authority established elsewhere in the Act.*” (emphasis added)); see also *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration, 15 FCC Rcd. 17044 ¶ 5 (2000) (affirming that Section 706 does not constitute an independent grant of authority).

purpose, structure, and history of the statute are all consistent with the notion that Congress intended for cable franchising to “take place at the local level where city officials have the best understanding of local communications needs.”¹¹ Thus, any insertion of ancillary authority in this case would be void, because even ancillary authority must rest on some statutory foundation, and cannot be “ancillary to nothing.”¹²

AT&T is simply wrong that the 1984 Cable Act preserved a Commission role in cable franchising. AT&T hangs this argument on the fact that the definition of “franchising authority” in Section 602 includes “any governmental entity empowered by Federal, State, or local law to grant a franchise.” AT&T asserts that this, “by its plain terms,” encompasses the Commission.¹³ It does no such thing. There is nothing in the Act or its residual powers that confers the authority to be a franchising authority on the Commission, and there has never been any suggestion by the Commission in the 22 years since the Act’s adoption that it was or could be a local franchising authority. The *sine qua non* of being a local franchising authority is having jurisdiction over the real estate which is being traversed. As Comcast has previously noted in this proceeding, the definition of “franchising authority” includes federal agencies because some federal agencies, most notably military installations, maintain and control rights-of-way. AT&T’s insistence that this definition somehow allows the Commission -- which controls no rights-of-way -- to disregard local and state control of their own rights-of-way is plainly wrong.

The only piece of federal law AT&T can cite that purportedly empowers the Commission to grant a franchise is Section 303(r). One will read that subsection in vain for anything other than the most general authority -- akin to that in Section 4(i) of the Communications Act. The Commission has historically -- and rightfully -- been extremely cautious about using its most vague elements of statutory authority, and that authority can, in any event, never be used to countermand specific provisions of the Communications Act like Section 621.

¹¹ 1984 House Report at 24.

¹² *See Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005).

¹³ December 4 Letter, “White Paper” at 8.

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Kindly direct any questions regarding this matter to my attention.

Respectfully submitted,

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Appendix A

History of Cable Franchising

- Prior to the 1984 Cable Act, the lack of clear national standards led to persistent jockeying by local, state, and Federal authorities over which bodies could address which issues. This created an unstable regulatory environment which impeded cable's growth.¹⁴
 - Initially, because cable was little more than a means for rural and mid-sized communities to receive broadcast signals, cable regulation arose at the local level, as municipalities stepped into the role of “authorizing use of local streets and rights of way and adopting regulations to protect the safety of life and property.”¹⁵ These issues were dealt with through “franchises” or “licenses,” which generally focused on right-of-way issues, often were granted on an exclusive basis, sometimes for as long as 30 years, and generally required payments to the local authority.¹⁶ Eventually, franchises evolved into much more extensive agreements, whose provisions, as well as application processes, varied greatly from city to city.¹⁷
 - It was not until the early 1960s that the Commission began to insert itself into the equation, asserting “ancillary jurisdiction” over cable, driven mainly by a desire to protect broadcast stations from the threat posed by the importation into local markets of broadcast signals from other markets (“distant signals”).¹⁸
 - Thereafter, jurisdictional tensions grew, as some franchises began to address issues that the Commission perceived to be beyond the reach of local authorities (e.g., technical standards for cable systems) and in turn the Commission strayed more into local issues (e.g., prescribing limits on franchise fees and specifying requirements for system capacity and public, educational, and governmental channels). In 1972, the Commission specified detailed rules governing the award and duration of franchises, system construction

¹⁴ See S. Rep. No. 98-67, at 9-11 (1983) (“1984 Senate Report”); H. Rep. No. 09-934 at 23 (1984) (“1984 House Report”).

¹⁵ 1984 Senate Report at 6.

¹⁶ See *id.*

¹⁷ For example, a 1979 decision by the Houston City Council to award 5 franchises was decided upon in 15 minutes, even though the 5 groups awarded the franchises had no cable experience and there were no provisions for public access. Almost contemporaneously, Atlanta spent months on the franchising process, forming a citizens’ committee called Access Atlanta which informed the public about cable, provided suggestions for franchise provisions, and worked with the winning cable company to plan for public-access channels.

¹⁸ The Commission’s exercise of “ancillary jurisdiction” was upheld by the Supreme Court in 1968. See *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968). Importantly, the Court sanctioned the regulation at issue in that case only because it was reasonably ancillary to the Commission’s responsibilities over broadcasting and because it was “not inconsistent with law.” *Id.* at 178.

schedules, and customer service standards,¹⁹ but in 1977 it largely abandoned these requirements and replaced them with voluntary guidelines.²⁰

- In addition, during the 1970s, an additional layer of regulation began to be applied by the states, some with a more intrusive regulatory approach and some with a much more deregulatory approach.²¹
- Congress enacted the 1984 Cable Act to provide clarity and certainty to cable regulation and to delineate the respective roles for federal, state, and local governments on franchising and other cable-related matters.
 - Congress intended the 1984 Act to achieve an “appropriate balance” that would give local governments authority “over areas of local concern and...to protect local needs” while maintaining the FCC’s ability to “protect the Federal interest...in a competitive marketplace.”²²
 - Congress intended that “the franchise process take place at the local level where city officials have the best understanding of local communications needs.” However, it wanted to ensure that the franchise process was “not continually altered by Federal, state or local regulation.” To that end, Congress required that “the provisions of [] franchises, and the authority of the municipal governments to enforce these provisions, ... be based on [] uniform Federal standards” that were established by Congress.²³
 - Among other things, Congress included language in Section 621(a)(3) of the Communications Act that gave local franchise authorities the authority, and the duty, to prohibit redlining: “In awarding a franchise or franchises, a franchising authority shall

¹⁹ *Amendment of Part 74, Subpart K, of the Commission’s Rules and Regulations Relative to Community Antenna Television Systems*, 36 FCC 2d 143 (1972).

²⁰ *Amendment of Subparts B and C of Part 76 of the Commission’s Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships*, 66 FCC 2d 380 (1977), *recon. denied*, 71 FCC 2d 569 (1979). *See also* Ferris/Lloyd Treatise ¶ 5.05[8].

²¹ 1984 Senate Report at 7. Some states, such as California and Massachusetts, took a deregulatory approach, while a state like New York had such extensive regulation that its cable commission had as many employees as the entire cable division of the Commission’s Mass Media Bureau. *Id.*

²² *Id.* at 11. *See also* Remarks of Senator Bob Packwood, Congressional Record, S14283 (Oct. 11, 1984) (noting that comprehensive cable legislation is “needed to preserve the legitimate regulatory role of local and State authorities”).

²³ 1984 House Report at 24. *See also* 1984 Senate Report at 7 (“It is not in the public interest for the States to replace the regulation that has been consciously abandoned at the Federal level with their own regulatory scheme.”). *See also* Remarks of Congressman John Dingell, Congressional Record, H10442 (Oct 1, 1984) (noting that “[t]he legislation the House considers today establishes a national policy...[which]...recognizes the crucial role that the local communities must continue to play in assuring that the cable system in their community does, indeed, serve the interests and the needs of the citizens in the community”).

assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.”²⁴ Congress explicitly anticipated that this language would be used by local franchise authorities to mandate build-out: “Under this provision, a franchising authority in the franchise process shall require the wiring of all areas of the franchise area to avoid this type of practice.”²⁵

- Significantly, the 1984 Cable Act also codified the Commission’s telco/cable cross-ownership ban.²⁶ This provision arose out of concern that telcos would have the ability and incentive to leverage their local phone monopolies to harm competition.
- The 1992 Cable Act slightly modified the franchising rules to facilitate competitive entry and strengthen the role of the LFAs.
 - The 1992 Act aimed to ease competitive entry into the cable business. Most notably, Congress added a provision, Section 621(a)(1), forbidding LFAs from awarding exclusive franchises and ordering them not to unreasonably refuse to grant an additional competitive franchise.²⁷ Likewise, Section 621(a)(4)(A) directed LFAs to “allow the applicant’s cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area.”²⁸
 - By amending the statute in this way, Congress made plain that new entrants would be subject to the same local franchising process it had previously established, including anti-redlining requirements. Congress provided an avenue for relief by allowing applicants that believe their applications for franchises have been unreasonably denied to seek remedy through an appeal to state or federal court.²⁹
 - At the same time, Congress amended certain provisions of the Act “to give franchising authorities more control over the franchise renewal process” by allowing LFAs to consider factors such as the franchisee’s level of compliance with the existing franchise agreement and the level of service provided during the franchise term.³⁰

²⁴ 47 U.S.C. § 541(a)(3).

²⁵ 1984 House Report at 59.

²⁶ *Id.* at 27.

²⁷ *Id.* § 541(a)(1). In the 1984 Act, the LFAs were permitted, but not required, to grant multiple franchises.

²⁸ *Id.* § 541(a)(4)(A).

²⁹ *See id.* §§ 541(a)(1), 555(a).

³⁰ S. Rep. No. 102-92, at 47, 82 (1992). *See also* 47 U.S.C. § 546(c)(1) (provisions relating to LFA renewal process).

- The Telecommunications Act of 1996 focused on a wide range of subjects, including promoting local telephone competition and changing broadcast rules, but it also sought to promote additional video competition by allowing telcos to provide video programming in their telephone service areas.
 - The 1996 Act repealed the telco/cable cross-ownership prohibition, the Video Dialtone framework (which was an attempt by the FCC to let telcos part-way into the video business via a common carrier platform capable of accommodating multiple video programmers), and the requirement that phone companies obtain authority under Section 214 prior to constructing cable facilities.
 - Congress gave telcos four options for entering the video business: (1) a radio-based system subject to Title III of the Communications Act, (2) a common carrier subject to Title II, (3) a cable operator subject to Title VI, or (4) an open video system (“OVS”) subject to portions of Title VI.³¹ OVS was a newly-created construct that offered telcos a “reduced regulatory burden” in exchange for relinquishing control of two-thirds of their channel capacity.³²
 - Congress thereby created multiple routes for telcos to enter the video market, each with its own trade-offs and benefits.³³ To the extent a telco elected to enter the business as a cable operator, it is subject to franchising and other Title VI cable rules, which Congress did not amend. Nor did it create a pathway through which a telco could provide wireline video service and, based on its choice of technology, avoid the responsibilities associated with either OVS or cable service.

³¹ See 47 U.S.C. § 571(a).

³² S. Conf Rep. No. 104-230, at 177 (1996) (“1996 Conference Report”). Among the burdens Congress eliminated for OVS was the requirement to obtain a local franchise. On judicial review, however, the 5th Circuit held that this merely eliminated a *federal* law requirement for a franchise and did not preempt the inherent power of the *states* and their political subdivisions to require franchises under state law. *City of Dallas v. FCC*, 118 F.3d 393, 397-99 (5th Cir. 1997)

³³ 1996 Conference Report at 176-179. Indeed, after passage of the 1996 Act, the Bell's own lawyers wrote a book that explained the statute. They expressly acknowledged that the 1996 Act gave the Bells four ways to enter the video business. They explained: “Henceforth, common carriers providing ordinary, wireline ‘cable service’ rather than pure common carriage or [OVS] are regulated in the same manner as other cable operators, so far as their cable-like operations are concerned.” Peter W. Huber, Michael K. Kellogg, & John Thorne, *The Telecommunications Act of 1996 Special Report*, at 85 (1996)(footnotes omitted).