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December 14, 2006

Ms. 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:

On December 13, 2006, Susanne Guyer and Will Johnson met with Commissioner Tate and her legal advisors, Chris Robbins and Ian Dillner, to discuss Verizon's recommendations for streamlining the video franchising process. Ms. Guyer and Mr. Johnson urged the Commission to adopt Verizon's proposals as set forth in our previous comments and ex partes in this proceeding. Ms. Guyer and Mr. Johnson distributed the attached documents.

Respectfully submitted,

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

Attachments

ATTACHMENT 1

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.

ATTACHMENT 2

The Commission Has Authority To Grant “Temporary Franchises” to Enforce Section 621(a).

- The Commission has authority to, and should, decide that a new entrant, particularly one that already has access to rights-of-way, may start offering its competitive video services subject to a “temporary franchise” when an LFA fails to act within a specified period of time consistent with federal law. This will ensure that consumers are not denied the benefits of competition, while still allowing the new entrant and the LFA to continue negotiations over the terms of a final franchise.
 - As we’ve demonstrated elsewhere, the FCC has well established authority to interpret and implement both the Communications Act, in general, and Section 621 of the Cable Act, in particular. *See, e.g., City of Chicago*, 199 F.3d 428 (7th Cir. 1999) (upholding FCC authority under section 621).
 - In the context of Section 621(a), this includes the authority to determine what constitutes a reasonable period of time for an LFA to award a competitive franchise. This is so because Section 621(a) by its terms extends beyond denials, and applies to “unreasonably refus[ing] to award” a competitive franchise. *See* 47 U.S.C. § 541(a)(1).
 - The Commission routinely decides the content of statutory provisions that hinge on whether particular actions are “reasonable” or “unreasonable.” *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).
- The Commission’s authority to determine what constitutes a reasonable time under Section 621(a) would be meaningless absent some effective means to give effect to that determination.
 - The Act does permit franchise applicants to bring suit in federal court if a franchise application is denied, *see* 47 U.S.C. § 541(a), and the FCC can and should make clear that an LFA’s failure to act in a reasonable time constitutes an effective denial.
 - But judicial review alone cannot give effect to the FCC’s determination of what constitutes a reasonable time, since pursuing district court relief itself can take a significant amount of additional time (potentially months or even a year or more to reach final resolution), during which time LFA inaction would continue to forestall competitive entry and deny consumers the benefit of additional competition.
 - The need to give effect to the FCC’s determination is especially great here, where protected speech is involved. *See Turner Broadcasting Systems v. FCC*, 512 U.S. 622, 636 (1994). The franchising process is a type of licensing scheme that acts as a prior restraint that restricts both the ability of new entrants to speak and the ability of willing consumers to receive that speech, and thus is subject to demanding scrutiny. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 117, 150-51 (1969) (striking down permitting scheme that provided broad

discretion to local officials); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 772 (1988) (same).

- The only way to give effect to the FCC determination is to permit entry, subject to a “temporary franchise.”
- The “temporary franchise” approach is consistent with the Cable Act, and the Commission has authority to take this approach for several reasons.
 - Nothing in the Act gives local authorities the *exclusive* authority to grant a franchise. Instead, the definition of “franchising authority” in the Act specifically recognizes that “the term ‘franchising authority’ means *any* governmental entity empowered by *Federal*, State, or local law to grant a franchise.” 47 U.S.C. § 522(10).
 - Given the requirement in Section 621(b) that a cable operator have a franchise before offering cable service, it would make no sense to limit franchising power to local authorities who could refuse to act consistently with federal law or who could refuse altogether to engage in franchising. The FCC has authority to fill that void.
 - In fact, the FCC did just that in the past and granted permission for cable operators to provide service in several areas where there was no legally-constituted local franchising authority. *See Cable Television Reconsideration Order*, 36 FCC 2d 326, ¶ 116 (1972); *Sun Valley Cable Communications (Sun City, Arizona)*, 39 FCC 2d 105 (1973); *Mahoning Valley Cablevisions, Inc. (Liberty Township, Ohio)*, 39 FCC 2d 939 (1973). Nothing about the subsequent adoption of the 1984 or 1992 Cable Acts divested the FCC of this authority to grant franchises when necessary in order to effectuate the purposes of the Cable Act.
 - Moreover, the Commission has authority to take actions and issue orders necessary to give effect to its determinations of the requirements of federal law.
 - As the Commission recently noted, “[f]ederal Courts have consistently recognized” that various provisions of the Act, including §§ 4(i) and 303(r), “give the Commission broad authority to take actions that are not specifically encompassed within any statutory provisions but that are reasonably necessary to advance the purposes of the Act.” *Continental Airlines; Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices*; 2006 FCC LEXIS 5793 at n. 112 (rel. Nov. 1, 2006).
 - *Section 303(r)*: “Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.” In *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the Supreme Court recognized that § 303(r) provided a statutory basis for FCC regulation of cable services and was “reasonably ancillary” to the Commission’s statutory responsibilities, even

before the Act directly addressed cable services. *Id.* at 167-68, 178; *see also Capital Cities Cable v. Crisp*, 467 U.S. 691, 700 (1984) (Commission’s authority “extends to all regulatory actions necessary to ensure the achievement of the Commission’s statutory responsibilities”).

- *Section 4(i)*: “The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.” This provision gives the FCC authority to take such actions as may be necessary to give effect to its determinations under other, substantive provisions of the Act, such as Section 621(a). *See, e.g., Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (finding Commission authority under § 4(i)).
- Section 706 of the 1996 Act also directs the Commission to take action to encourage the deployment of advanced communications infrastructure and services. Section 706 provides that the “Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience and necessity . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” Section 706 of the 1996 Act, Pub. L. No. 104-104, 110 Stat. 56.
 - The ability to provide video services is a key to the deployment of broadband and the advanced services it can deliver, and providing for a “temporary franchise” would directly respond to the Congressional mandate to promote deployment of advanced networks and services.
- Accordingly, the Commission should provide that a new entrant, particularly one that already has access to rights-of-way, may start offering its competitive video services, subject to a “temporary franchise,” when LFAs fail to act within a specified period of time. Although the provider would be operating pursuant to a temporary franchise granted by operation of the Commission’s rules, the provider could be required to comply with certain, core franchising requirements – such as the payment of lawful franchise fees; the provision of capacity for a reasonable number of PEG channels; or compliance with non-discriminatory, generally applicable right-of-way requirements, such as street opening permits, traffic regulations and the like – while the provider continued to negotiate with the local franchising authority towards a final franchise. This would permit new entrants to begin providing competitive video service over their networks so that consumers could obtain the benefits of competition, without displacing the ultimate role of local franchising authorities.

**Federal Communications Commission**

The FCC Acknowledges Receipt of Comments From ...
Verizon
...and Thank You for Your Comments

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