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December 28, 2006

VIA FEDEX

Ms. Marlene H. Dortch
Secretary
Office of the Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, Maryland 20743

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Re: Reply Comments in MB Docket No. 06-189

Dear Ms. Dortch:

Attached for filing *In the Matter of Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, are an original and four (4) copies of the Reply Comments of the Burnsville/Eagan Telecommunications Commission, the North Metro Telecommunications Commission, the North Suburban Communications Commission, the City of Oklahoma City, Oklahoma, the City of Renton, Washington and the South Washington County Telecommunications Commission (the "Comments"). Additional copies of the Comments are being filed with Best Copy and Printing, Marcia Glauberman and Anne Levine via first-class mail.

I have also enclosed an additional copy of the Comments. Please date-stamp that copy and return it to me in the enclosed postage-prepaid envelope.

Very truly yours,
BRADLEY & GUZZETTA, LLC


Stephen J. Guzzetta

Attachments

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† Also admitted in Wisconsin
* Also admitted in Massachusetts and the District of Columbia

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)
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Annual Assessment of the Status of)
Competition in the Market for the)
Delivery of Video Programming)
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MB Docket No. 06-189

REPLY COMMENTS OF THE BURNSVILLE/EAGAN TELECOMMUNICATIONS COMMISSION; THE NORTH METRO TELECOMMUNICATIONS COMMISSION; THE NORTH SUBURBAN COMMUNICATIONS COMMISSION; THE CITY OF OKLAHOMA CITY, OKLAHOMA; THE CITY OF RENTON, WASHINGTON; AND THE SOUTH WASHINGTON COUNTY TELECOMMUNICATIONS COMMISSION

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December 28, 2006

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SUMMARY

AT&T Inc. (“AT&T”) and Verizon Communications, Inc. (“Verizon”) make unsupported and ambiguous claims about how local franchising of cable systems inhibits or prohibits the development of competition in the multichannel video distribution market in an attempt to convince the Federal Communications Commission (the “Commission” or the “FCC”) to preempt or impair local franchising, presumable above and beyond the actions taken by the FCC on December 20, 2006. Because there is no credible factual record of any widespread anticompetitive behavior by local franchising authorities, any regulations issued by the Federal would necessarily be arbitrary and capricious.

Federal, state and local interests and objectives are often embodied in franchise agreements in the form of compensation requirements negotiated for the use of scarce and valuable public rights-of-way. Franchise fees, institutional networks, capital support for public, educational and governmental (“PEG”) access facilities and free cable drops and outlets for PEG entities are all forms of right-of-way compensation countenanced by the Cable Act. Accordingly, such compensation is not inconsistent with federal law, and any elimination or reduction of compensation for right-of-way usage would raise Constitutional issues.

A review of the real facts about local franchising shows there is no problem that needs to be addressed, as neither level playing field provisions nor build-out requirements inhibit or prohibit video competition. Level playing field provisions, for instance, do not require a competitive provider’s franchise terms and conditions to be identical to an incumbent cable service provider’s and thus do not prevent competition or the deployment of advanced broadband networks. Similarly, build-out provisions can be structured in such a way that they take the financial condition of a new entrant into consideration and are not anticompetitive. Any delays

in the franchising process are typically due to a competitive franchise applicant's behavior or internal business decisions, and should not be attributed to local franchising authorities. Indeed, available data show that local governments are authorizing Verizon and AT&T to construct their networks expeditiously, to the point where franchising is outpacing the companies' construction capabilities.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Competition in the Market for the)	MB Docket No. 06-189
Delivery of Video Programming)	
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REPLY COMMENTS OF THE BURNSVILLE/EAGAN TELECOMMUNICATIONS COMMISSION; THE NORTH METRO TELECOMMUNICATIONS COMMISSION; THE NORTH SUBURBAN COMMUNICATIONS COMMISSION; THE CITY OF OKLAHOMA CITY, OKLAHOMA; THE CITY OF RENTON, WASHINGTON; AND THE SOUTH WASHINGTON COUNTY TELECOMMUNICATIONS COMMISSION

The City of Renton, Washington, the City of Oklahoma City, Oklahoma and the following municipal joint powers commissions respectfully submit reply comments in the above-captioned proceeding: the Burnsville/Eagan Telecommunications Commission (a municipal joint powers commission consisting of the cities of Burnsville and Eagan, Minnesota); the North Metro Telecommunications Commission (a municipal joint powers commission consisting of the cities of Blaine, Centerville, Circle Pines, Ham Lake, Lexington, Lino Lakes and Spring Lake Park, Minnesota); the North Suburban Communications Commission (a municipal joint powers commission consisting of the cities of Arden Hills, Falcon Heights, Lauderdale, Little Canada, Mounds View, New Brighton, North Oaks, Roseville, St. Anthony and Shoreview, Minnesota); and the South Washington County Telecommunications Commission (a municipal joint powers commission consisting of the municipalities of Woodbury, Cottage Grove, Newport, Grey Cloud Island Township and St. Paul Park, Minnesota) (collectively, the "LFAs"). Although numerous

telecommunications service providers and industry groups filed comments in response to the Notice of Inquiry issued by the Federal Communications Commission (the "FCC" or the "Commission"),¹ these reply comments will focus on a number of claims made by Verizon Communications Inc. and its wholly-owned subsidiaries ("Verizon"), and AT&T Inc. (AT&T") in their initial comments to the Commission, because they are the entities most aggressively rolling out video services nationwide and most vociferously complaining about local franchising.²

I. INTRODUCTION.

The Verizon Comments and the AT&T Comments are largely comprised of self-serving, unsupported statements alleging that local franchising is a barrier to market entry and, thus, an impediment to the continued development of wireline video competition. Many of these same statements were made in MB Docket No. 05-311,³ which specifically addressed the existing dual federal-state/local franchising structure. There was nothing in the record of Docket No. 05-311 to support AT&T's and Verizon's contentions, and no credible and verifiable evidence has been submitted in this proceeding to prove the proposition that local franchising is in any way anti-competitive. In fact, there is ample data which shows that the existing federal-state/local franchising structure has promoted competition in the delivery of a variety of services (e.g.,

¹ *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, MB Docket No. 06-189 (Rel. Oct. 20, 2006) (the "NOI").

² See Comments of Verizon on the Status of Competition in the Video Marketplace, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, MB Docket No. 06-189 (Nov. 29, 2006) (the "Verizon Comments"), and the Comments of AT&T Inc., *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, MB Docket No. 06-189 (Nov. 29, 2006) (the "AT&T Comments").

³ *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*, Notice of Proposed Rulemaking, MB Docket No. 05-311 (Rel. Nov. 18, 2005).

high-speed Internet access) and encouraged the construction of advanced cable systems that are capable of providing a panoply of state-of-the-art services.⁴ These cable systems now offer significant amounts of digital and high-definition programming services, and true on-demand programming. In addition, cable operators generally provide a high-speed Internet access product that is superior to the Internet access services furnished by local exchange carriers. Local franchising has also directly led to increased diversity in programming (*e.g.*, through the production of a myriad of public, educational and governmental [“PEG”] access programs) which was one of Congress’ primary goals in enacting the Cable Communications Policy Act of 1984, as amended, 47 U.S.C. § 521 *et seq.* (the “Cable Act”).⁵ All of these benefits have been achieved under a longstanding market entry process (*i.e.*, local franchising) that the telephone industry has erroneously couched as arcane, lengthy, unreasonable and antithetical to federal objectives.

More specifically, the Verizon Comments and the AT&T Comments purportedly identify four major problems with the local franchising process currently established by federal, state and local law: (i) local franchising authorities unreasonably delay the review of franchise applications and the award of competitive franchises; (ii) local franchising authorities make unreasonable demands during franchise negotiations; (iii) build-out requirements requested by local franchising authorities impede the development of video competition; and (iv) level playing

⁴ See the Comments of the North Suburban Communications and the Comments of the Burnsville/Eagan Telecommunications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, MB Docket No. 06-189 (Nov. 28, 2006).

⁵ See, *e.g.*, Section 601(2) of the Cable Act, 47 U.S.C. § 521(2) (one of the purposes of Title VI of the Communications Act of 1934, as amended, is to “assure that cable systems are responsive to the needs and interests of the local community”) and Section 601(4) of the Cable Act, 47 U.S.C. § 521(4) (the Cable Act is intended to “assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public.”).

field requirements create entry barriers which cannot be overcome by potential competitive providers of cable service. The LFAs do not believe that the alleged “problems” identified by Verizon and AT&T are problems at all, and that local franchising authorities and the local franchising process that has been in place for decades encourage the development of competition in the video marketplace and foster the deployment of advanced networks.

As in MB Docket No. 05-311, the LFAs believe it is important for the FCC to recognize that the telephone industry’s comments in this proceeding largely rely on speculation, anecdotal “evidence” and unsubstantiated claims of anticompetitive behavior by local franchising authorities. In many cases, AT&T and Verizon do not even identify the communities they assert have acted unreasonably or provide any details about the specific situations of which they complain, which makes it impossible to respond meaningfully to or rebut the companies’ claims. This tactic, in effect, deprives local governments of their due process because they do not know they have been “indicted” by the telephone industry and are unable to defend themselves. Because the Commission does not have the benefit of all the facts or any exculpatory evidence that may exist, it should give little or no weight to the telephone industry’s anecdotal stories of alleged local government “misdeeds” when deciding whether any action is warranted based on the record of this NOI.

When the actual facts about local government treatment of potential video competitors are collected and reviewed fairly, they show that local franchising authorities are utilizing the franchising processes established by state and local law, and preserved by Congress through the Cable Act, to facilitate competition and to advance important federal objectives. Thus, action by

the FCC is not needed or required.⁶ Although there is no credible support for altering the dual federal-state/local franchising structure initially recognized by the FCC during the genesis of the cable television industry and codified by Congress, the FCC adopted an order on December 20, 2006, that appears to both preempt and limit local franchising in certain respects. The LFAs believe the FCC's decision in MB Docket No. 05-311 is unlawful, arbitrary and capricious, and will ultimately hinder the development of video competition and the widespread deployment of advanced communications networks around the nation. The LFAs also wish to make clear that any further action the FCC might take to preempt or control local franchising based on the record in this proceeding would be arbitrary and capricious, as no party has proffered concrete evidence that local franchising has inhibited in any meaningful way the ongoing growth of competition in the video marketplace.⁷

II. LOCAL CABLE SYSTEM FRANCHISING HAS NOT AND WILL NOT DELAY WIRELINE VIDEO COMPETITION.

Both Verizon and AT&T claim that the local franchising process is slow and has delayed the widespread development of video competition. Verizon, for instance, states "the local franchising system is plagued by long delays . . . which burden competitive entry."⁸ The company goes on to assert that "[o]f negotiations currently pending (outside of Texas, New Jersey, and California), 74% have been going on for fifteen months or more, and a majority of them (56%) for eighteen months or more. A full 83% of pending negotiations have been under

⁶ See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (a "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.").

⁷ See, e.g., *People of the State of California v. FCC*, 905 F.2d 1217, 1230 (9th Cir. 1990) (agency decision must be overturned if the decision lacks record support) and *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (comments which are themselves speculative require no response).

⁸ See Verizon Comments at 9.

way for one year or more.”⁹ AT&T similarly claims that the “negotiation of a franchise can be protracted, taking at least several months to several years.”¹⁰ None of these statements, however, is supported by the facts in this proceeding or identifies a widespread problem that is endemic to the local franchising process. In fact, Verizon and AT&T have really just begun applying for franchises and other authorizations to provide video service in a few select markets across the country.¹¹ Accordingly, it is impossible to draw any sort of definitive or reliable conclusions about whether local franchising is an actual barrier to competitive market entry based on AT&T’s and Verizon’s limited experiences to date.

When analyzing the AT&T Comments and the Verizon Comments, it is important to place the companies’ unsubstantiated complaints about local franchising in their proper context. When Congress adopted the Telecommunications Act of 1996 approximately ten years ago, it repealed the telephone company/cable company cross-ownership ban¹² and established a variety of means by which the telephone industry could enter the multichannel video program distributor business.¹³ Few local telephone companies, however, availed themselves of the new opportunities afforded by the Telecommunications Act of 1996. Instead, the local telephone industry primarily focused on entering the long distance business that has been eviscerated by the rise of cellular telephone service. Those local exchange carriers that did enter the multichannel video program distribution business exited the market between 1998 and 2001 of

⁹ *Id.* at 11.

¹⁰ *See* AT&T Comments at 9.

¹¹ *See* JON KREUCHER, FORCED FRANCHISING: WHY TELEPHONE INDUSTRY CALLS FOR “SHALL ISSUE” VIDEO FRANCHISING SHOULDN’T BE ANSWERED, Position Paper published by ICMA at 14, 123-27 (October 2006) (the “ICMA Position Paper”) (“telephone companies have applied for traditional video franchises in far fewer than 2 percent of all communities nationwide.”).

¹² *See* Section 302(b) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 118 (1996).

¹³ *See, e.g.*, Section 651 of the Cable Act, 47 U.S.C. § 571.

their own volition after having obtained or inherited local cable television franchises.¹⁴ In other words, incumbent local exchange carriers made the calculated business decision to abandon their cable franchises and other video assets to pursue other lines of business. That turned out to be a disastrous decision, as the cable television industry opted to upgrade its systems over the last ten years and has used these state-of-the-art systems to make inroads into the incumbent local exchange carriers' core local telephone business and to offer a litany of digital video programming and high-speed Internet access services that are generally faster than the telephone industry's DSL product, which is constrained by outdated telephone network facilities. The telephone industry is therefore trying to play "catch-up" and is using local franchising as a convenient "scapegoat" in an attempt to mask its poor business decisions and to force its way into public rights-of-way so that legacy telephone networks can be upgraded to compete with incumbent cable operators more effectively.¹⁵ Thus, it is evident that the telephone industry's own miscalculations and lack of foresight – not local franchising – have delayed the pervasive development of wireline video competition over the last decade.

Available data show that local telephone companies have only recently begun to obtain the authorizations they need to provide video service using public rights-of-way. According to ICMA surveys, "most of Verizon's local franchising requests appear to be recent: 14 percent of the requests were made in the second quarter of 2005; 23 percent in the third quarter of 2005; 8 percent in the fourth quarter of 2005; and nearly 20 percent in the first quarter of 2006."¹⁶ Moreover, according to ICMA, "the majority of the telephone industry's franchise requests

¹⁴ See, e.g., the ICMA Position Paper at 14 and 53-57.

¹⁵ See *id.* at 35 ("[i]n the broadband world, telephone companies can't rely on old POTS networks . . . [T]elephone companies must first build higher bandwidth, digital networks capable of delivering video services . . . More bandwidth means more construction in local rights-of-way – a lot of it.").

¹⁶ ICMA Position Paper at 89.

appear to have been made since the middle of last year, timing which, incidentally, seems to track closely with comments being prepared in FCC dockets addressing local franchising issues.”¹⁷ It is therefore premature to conclude that local franchising is a barrier to entry given that Verizon has applied for relatively few franchises nationwide, and AT&T has consistently refused to seek local franchises.¹⁸ This is particularly true since the telephone industry “set a record pace for fiber-to-the-premises deployments in 2005 and the first quarter of 2006.”¹⁹ Based on this data, it is obvious that competition is developing as quickly as possible.

Contrary to AT&T’s and Verizon’s accusations, the facts just do not support the conclusion that local franchising is impeding or delaying competition, and the telephone industry has admitted as much. Verizon, for instance, has stated that “[franchising] was an area where we had to learn and see if this was going to be an issue for us. Right now, we feel very, very confident that we have [our franchising] moving in the right direction, and this isn’t holding us back in our deployment of video.”²⁰ Verizon has also conceded that “we have been very successful with our franchising lately . . . we will have enough franchising for where we’re building to be able to sell.”²¹ AT&T has likewise admitted “moving . . . faster would be difficult just in terms of the residential requirements and the ability to launch to the number of markets that we plan to launch . . .”²² Accordingly, it is evident that local franchising is not an

¹⁷ *Id.*

¹⁸ AT&T’s unwillingness to obtain local franchises is based upon its untenable claim that its video service is not a service that is subject to state and local franchise requirements.

¹⁹ ICMA Position Paper at 14 and 47-48.

²⁰ ICMA Position Paper at 4 (citing Comment of Virginia Ruesterholz, President of Verizon Telecom, made during *Verizon Communications Inc. FiOS Briefing Session*, on September 27, 2006).

²¹ *Id.* at 44 (citing Comments of Doreen Toben at Bear, Stearns & Co. 19th Annual Media Conference, February 27, 2006).

²² *Id.* at 45 (citing *Exec Sheds Some Light on Lightspeed Trial*, Telco-IP Update, January 16, 2006).

impediment to wireline video competition and that internal construction limitations (*e.g.*, availability of capital, labor and materials) are negatively affecting the widespread development of wireline video competition.²³ In this regard, AT&T has indicated that it can upgrade no more than 50 percent of its network to provide video services over the next 2 ½ years.²⁴ According to Verizon's business plan, the Verizon network will not be completely upgraded until at least 2013.²⁵ Elimination or preemption of local franchising will not alter these construction schedules and hasten the expansion of competitive video networks.²⁶

When evaluating the credibility of Verizon's and AT&T's assertions, it is important to remember that the LFAs and other local government units desire robust video competition between telephone companies and traditional cable operators and have every incentive to award cable franchises rapidly. It is only through effective wireline competition that the price of cable service will significantly decrease²⁷ and the quality of service will increase. Moreover, local

²³ *Id.* at 45 and 33-42

²⁴ *Id.* at 45 (citing Peter Grant, *AT&T Readies Serving Uniting Internet and TV*, WALL STREET JOURNAL, June 19, 2006 at B1).

²⁵ *Id.* at 36 (citing Seeking Alpha Transcript, *Verizon Communications, Inc. Q4 2005 Earnings Conference Call Transcript*, January 26, 2006), available at www.seekingalpha.com.

²⁶ The elimination of local franchising in Texas, for example, has not appreciably increased video competition. According to ICMA, Verizon and AT&T "will provide video competition in portions of just 42 of Texas' 1,210 incorporated communities by the end of 2006 – fewer than 4 percent of all cities in Texas." See the ICMA Position Paper at 48-50 (citing Texas Almanac, 2006-2007 ed., available at www.texasalmanac.com/facts).

²⁷ In this regard, the United States Government Accounting Office has observed that:

[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 . . .

governments recognize that the widespread deployment of broadband networks will encourage economic development. For instance:

- The City of Eagan, Minnesota “will continue to work with public utilities to facilitate appropriate support for communications technology infrastructure” and “ensure that all businesses have access to the appropriate physical infrastructure to meet their business needs”,²⁸
- Burnsville, Minnesota has “adopted an ordinance to facilitate the development of fiber optics technology within the City’s rights-of-way, while maintaining the integrity of existing utilities”;²⁹
- Renton, Washington has a stated objective of promoting “the timely and orderly expansion of all forms of telecommunications services within the City and the remainder of its Planning Area”;³⁰ and
- The City of Woodbury, Minnesota wishes to “[e]ncourage and promote the development of advanced, state of the art telecommunication technology to and within” the City.³¹

It is therefore in the interest of the LFAs other local government units to act expeditiously on cable franchise applications and to negotiate franchise agreements as quickly as possible. In this regard, Verizon itself has commented that “[c]ities [are] eager to bring competition to [their] market[s].”³² Because it is in their own self-interest to do so, local franchising authorities have “generally responded promptly” to franchise requests.³³ In Minnesota, for example, most

Competition from DBS operators has induced cable operators to lower cable rates slightly . . .

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

²⁸ City of Eagan, Minnesota, Comprehensive Guide Plan 2000, § 10 Economic Development, at 4-5 (Feb. 20, 2001), available at <http://www.ci.eagan.mn.us/live/page.asp?menu=2085>.

²⁹ City of Burnsville, Minnesota, Comprehensive Plan 2000 Update, at 7-21 (2000), available at <http://www.ci.burnsville.mn.us/government/Departments/planningmain.htm>.

³⁰ City of Renton, Washington, Comprehensive Plan, at II-39 (December 12, 2005), available at <http://209.196.175.64/ednsp/compplan.htm>.

³¹ City of Woodbury, Minnesota, Comprehensive Plan, at 7-4 (May 10, 2000), available at <http://www.ci.woodbury.mn.us/planning/cpbychapter.html>.

³² ICMA Position Paper at 8 (citing to *Verizon Communications Inc. FiOS Briefing Session*, September 27, 2006, at slide 14).

³³ *Id.* at 92.

competitive franchises were awarded within four to six months of the receipt of a franchise application (and in some cases, as quickly as one month).³⁴ However, it is important to recognize that telephone companies have frequently made unreasonable demands during the franchising process and have failed to diligently prosecute their franchise applications.³⁵ Thus, it is frequently franchise applicants – not local franchising authorities – that are responsible for any delays in the franchising process.

It is also important to recognize that it is not in the public interest to provide telephone companies with unfettered and completely unsupervised access to public rights-of-way for purposes of allowing them to upgrade their networks and to provide video services. This is because the operation and maintenance of video systems raise serious safety concerns. The importance of preserving local authority to impose public safety requirements on video system operators and to supervise system construction and maintenance is highlighted by the violent explosion of a portion of AT&T's network in the Houston, Texas area.³⁶ In light of the risks posed to the public by advanced networks and their high-voltage equipment, reviewing a franchise applicant's technical qualifications and construction techniques and including safety precautions in franchise agreements cannot be considered unreasonable or a delaying tactic on the part of the LFAs and other local franchising authorities.

³⁴ See Exhibit B of the Comments of the League of Minnesota Cities and the Minnesota Association of Community Telecommunications Administrators, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, MB Docket No. 06-189 (Nov. 29, 2006).

³⁵ *Id.* at 92-96.

³⁶ See Phil Harvey & Andrea Quezada, *AT&T Investigates DSLAM Explosion*, Light Reading (November 7, 2006), available at www.lightreading.com/document.asp?doc_id=109923.

III. APPLICABLE LAW PERMITS LOCAL GOVERNMENTS TO REQUIRE COMPENSATION FROM CABLE SYSTEM OPERATORS FOR THE USE OF VALUABLE AND SCARCE PUBLIC RIGHTS-OF-WAY.

Verizon and AT&T allege that local franchising authorities attempt to include unreasonable and expensive compensation demands in franchise documents.³⁷ By way of example, Verizon asserts local franchising authorities should be proscribed from “impos[ing] expensive demands on new entrants in excess of the Cable Act’s 5% franchise fee cap.”³⁸ Verizon also claims that financial and in-kind support for public, educational and governmental access channels and institutional networks are “demands” which are “unlawful under the Cable Act”³⁹ and that the “Cable Act denies localities the power to require operators to provide any PEG support beyond a reasonable amount of channel capacity.”⁴⁰ AT&T similarly claims that the “record is replete with patently egregious demands made by franchising authorities as a condition of entry” such as the provision of fiber optic links to City facilities and free cable drops to fire stations and recreation centers.⁴¹

Both companies, however, conveniently ignore the fact that the receipt of these types of compensation for the use of public property is a longstanding principle of law. This settled principle was recognized and incorporated into the Cable Act, which (among other things) permits local franchising authorities to establish requirements:

- “that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use . . .”;⁴²
- for cable-related “facilities and equipment”;⁴³

³⁷ See, e.g., the Verizon Comments at 10-11 and 13-14 and the AT&T Comments at 9.

³⁸ Verizon Comments at 10.

³⁹ *Id.* at 13-14.

⁴⁰ *Id.*

⁴¹ AT&T Comments at 9.

⁴² 47 U.S.C. § 531(a) and (b).

- for a franchise fee up to five (5) percent of a cable operator's gross revenues derived from the operation of the cable system to provide cable services;⁴⁴ and
- for capital support for PEG facilities and equipment over and above the federal 5 percent franchise fee ceiling.⁴⁵

Minnesota law also contains valid compensation requirements that are to be included in all franchises.⁴⁶ Despite this clear authority to require cable-related facilities and equipment, PEG channel capacity, franchise fees and financial and in-kind PEG support, the telephone industry and its supporters continue to claim that such compensation for the use of public rights-of-way is impermissible.⁴⁷ These claims must be rejected because they are not supported by federal and state law. Moreover, to the extent compensation requirements have an anticompetitive effect on video competition (which the evidence does not show), the FCC does not have the power to craft an appropriate remedy, because it cannot re-write the provisions of the Cable Act which authorize the compensation about which the telephone industry and its supporters are

⁴³ 47 U.S.C. § 544. The legislative history of the Cable Act explains that this includes requirements for institutional networks, studios, equipment for public, educational and government use, two-way networks, and so on. In particular:

Facility and equipment requirements may include requirements which relate to channel capacity; system configuration and capacity, including institutional and subscriber networks; headends and hubs; two-way capability; addressability; trunk and feeder cable; and any other facility or equipment requirement, which is related to the establishment and operation of a cable system, including microwave facilities, antennae, satellite earth stations, uplinks, studios and production facilities, vans and cameras for PEG use.

1984 House Report at 68, *reprinted in* 1984 U.S.C.C.A.N. at 4705.

⁴⁴ 47 U.S.C. § 542(a) and (b). For the record, the LFAs do not believe that this provision can be lawfully interpreted to proscribe the collection of franchise fees on revenues derived from information and other services offered over a cable system.

⁴⁵ *See, e.g.*, 47 U.S.C. § 542(a)(4)(B) and 47 U.S.C. § 542(g)(2)(C).

⁴⁶ *See, e.g.*, Minn. Stat. §§ 238.084, subd. 1(z) (a franchise must contain a provision establishing the minimum number of access channels on the cable system).

⁴⁷ *See, e.g.*, the Verizon Comments at 13-14.

complaining. In other words, the FCC cannot prohibit what Congress has explicitly sanctioned in the Cable Act.

IV. LEVEL PLAYING FIELD PROVISIONS DO NOT NECESSARILY INHIBIT COMPETITION OR THE DEPLOYMENT OF ADVANCED BROADBAND NETWORKS.

AT&T attacks level playing field requirements on the ground that they are anticompetitive. AT&T, however, provides no compelling evidence that this is truly the case. The company merely makes unsupported conclusory statements that the “imposition of any . . . ‘level playing field’ requirements as a condition of entry for competitive video service providers is anathema to the development of competition. ‘Level playing field’ in this instance is merely code for entry barriers designed to protect the incumbent market.”⁴⁸

Level playing field requirements, however, are actually designed to promote competition between video service providers by ensuring that one provider is not able to obtain an unfair competitive advantage over another by negotiating more favorable market entry terms. Contrary to what the telephone industry claims, level playing field requirements do not typically require a competitive provider’s franchise terms and conditions to be identical to an incumbent cable service provider’s.⁴⁹ Rather, level playing field provisions have almost universally been interpreted to require a competitive cable franchise to be no more favorable or less burdensome, *taken as whole*, than the cable franchise granted to the incumbent cable operator.⁵⁰ Level playing field requirements have also been construed to require incumbent and competitive cable

⁴⁸ AT&T Comments at 9.

⁴⁹ See, e.g., *Cable TV Fund 14-A, Ltd. V. City of Naperville*, 1997 WL 280692 at * 12 (N.D. Ill. 1997), *United Cable Television Service Corp. v. Connecticut Dept. of Public Utility Control*, 1994 WL 495402 at *5-*6 (Conn. Super. 1994) and *Knology, Inc. v. Insight Communications Co.*, 2001 WL 1750839 at *2 (W.D. Ky. 2001).

⁵⁰ *Id.*

franchises merely to be similar.⁵¹ Thus, the LFAs and other local franchising authorities have the flexibility to craft franchise provisions that work for all parties and take into consideration the marketplace, state requirements, local demographics and topology, population density and current needs and interests. In some cases, for instance, it may be possible to convert the dollar value of an incumbent provider's franchise commitments into a per subscriber fee that can be paid by a competitive cable service provider. This approach would eliminate significant up-front capital expenditures that could possibly make it difficult for a particular provider to deploy its cable system. Consequently, it is possible for local franchising authorities to work with a competitive cable operator to establish social obligations that satisfy the community's needs and interests and applicable level playing field requirements, while structuring financial and in-kind compensation and build-out requirements in such a way as to ease market entry. Competitive providers, however, must be willing to cooperate with local governments and to be creative – in many cases they are not.⁵²

The Commission should also be aware that courts have previously considered level playing field requirements and concluded that they are not anti-competitive. For instance, the *City of Naperville* court found that:

the [Illinois] Overbuild Act's requirement that additional franchises be granted on terms no more favorable or less burdensome than those in the incumbent's franchise area does not inhibit competition by excluding potential competitors. Rather, the Overbuild Act is designed to ensure fair competition, a goal that certainly does not conflict with the pro-competitive purpose of the Cable Act.⁵³

⁵¹ See, e.g., *WH Link, LLC v. City of Otsego*, 664 N.W.2d 390, 396 (Minn. Ct. App. 2003).

⁵² See, e.g., the ICMA Position Paper at 94 (“68 percent of [surveyed member] communities currently negotiating the franchise note that the negotiation has been slowed because the telephone company has been reluctant to modify its standard boiler-plate franchise.”).

⁵³ *City of Naperville*, 1997 WL 280692 at *16.

Similarly, the United States District Court in the *Knology* case determined that “[t]he ordinance here requires that additional franchises be granted on terms no more favorable or less burdensome than those in the incumbent’s franchise. Such a requirement does not inhibit competition by excluding potential competitors. Rather, it ensures fair competition.”⁵⁴

Finally, it is important to note that several playing field statutes were in effect at the time Congress enacted the 1992 amendments to the Cable Act promoting competition.⁵⁵ Congress chose not to preempt those statutes. Accordingly, it is appears that Congress did not consider level playing field requirements to be an insurmountable obstacle to the pro-competitive objectives of the Cable Act.

V. BUILD-OUT REQUIREMENTS IN FRANCHISES ARE NOT ANTICOMPETITIVE.

Verizon and AT&T assert that build-out requirements for a franchise area impair competition by rendering the construction of new cable systems economically impossible. AT&T, for instance, claims that “[e]conomic analysis fully supports the conclusion that ubiquitous build out requirements imposed on competitive video service providers are, as a matter of basic economic theory, manifestly anticompetitive.”⁵⁶ Verizon likewise argues that build-out requirements have an “entry-deterring effect.”⁵⁷ None of these accusations, however, is supported or proven by objective, verifiable and irrefutable data. Rather, the industry makes self-serving, unsubstantiated statements based, in part, on flawed or biased economic theories

⁵⁴ *Knology, Inc.*, 2001 WL 1750830 at *2. See also *Comcast Cablevision of New Haven, Inc., v. Connecticut Dept. of Public Utility Control*, 1996 WL 661805 at *3 (Conn. Super. 1996) (stating that a state level playing field statute “envisions a level playing field so that an applicant for a new franchise does not enter the market at a competitive advantage”).

⁵⁵ *City of Naperville*, 1997 WL 280692 at *16.

⁵⁶ AT&T Comments at 10.

⁵⁷ Verizon Comments at 15-16.

propounded by astroturf organizations. AT&T and Verizon expect the Commission to treat their statements as facts and to preempt or regulate local franchising based on these “facts.” The FCC should reject such requests, as any rules or preemptive actions predicated on unreliable, flawed or unsubstantiated data would be arbitrary and capricious.

Contrary to the telephone industry’s claims, build-out requirements do not necessarily prohibit the development of video competition. The fact that there are forty-six competitive franchises in Minnesota proves this is the case.⁵⁸ Moreover, it is important to recognize that new entrants will not always be asked to agree to the “same” system build-out requirements as the incumbent cable service provider. Indeed, build-out requirements will generally be tailored, on a case by case basis, to reflect the economic capacity of a franchise applicant, an applicant’s existing facilities and the housing density, demographics and geography of the franchise area. In Minnesota, there is a level playing field provision pertaining to “area served.”⁵⁹ This provision does not, however, mandate identical build-out requirements for new entrants and incumbents.⁶⁰ There is still flexibility in determining how to build out the area to be served. In addition, federal law specifies that a franchising authority “shall 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 . . .”⁶¹ This “reasonable” build-out standard in the Cable Act, coupled with judicial enforcement, could very well operate to prevent the LFAs and other franchising

⁵⁸ See Exhibit C of the Comments of the Comments of the League of Minnesota Cities and the Minnesota Association of Community Telecommunications Administrators, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, MB Docket No. 06-189 (Nov. 29, 2006).

⁵⁹ Minn. Stat. § 238.08, subd. 1(b).

⁶⁰ See, e.g., *WH Link, LLC v. City of Otsego*, 664 N.W.2d 390, 396 (Minn. Ct. App. 2003).

⁶¹ 47 U.S.C. § 541(a)(4)(A).

authorities from imposing build-out requirements that would destroy the economic viability of a new cable system.

It is also important to understand that build-out requirements encourage competition by ensuring that as many consumers as possible have access to multiple providers' networks and services, regardless of income. The laudable objective of ubiquitous network coverage (taking into consideration housing densities and other economic factors) certainly advances Congress' goal of ensuring that all Americans have access to state-of-the-art services⁶² and that the existing digital divide is narrowed.⁶³ The need for effective build-out requirements is underscored by the fact that SBC Communications (now AT&T) will focus its network deployment on "high-value" customers, while largely ignoring "low-value" customers in its franchise areas. Absent reasonable build-out requirements, the United States may very well become a nation of information "haves" and "have nots," which is what the Communications Act of 1934 was, in part, designed to prevent.⁶⁴

⁶² See, e.g., the Telecommunications Act of 1996, § 706, Pub. L. 104-104, 110 Stat. 118 (1996).

⁶³ In many cases, a local government's interest in ubiquitous network coverage within its boundaries may be consistent with a competitive video service provider's economic interests and objectives because universal network availability will provide access to the maximum number of consumers possible. Such access will likely lead to new revenue streams.

⁶⁴ See, e.g., 47 U.S.C. § 151 (purpose of the Communications Act of 1934 is to "make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges . . .").

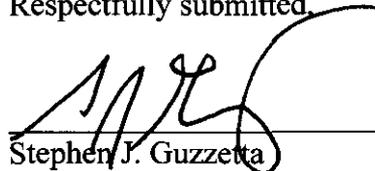
VI. CONCLUSION.

For the foregoing reasons, the Commission should refrain from adopting any rules and/or guidelines preempting, limiting and/or managing local cable system franchising based on the record in this proceeding.

CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)

The undersigned signatory has read the foregoing Reply Comments of the Burnsville/Eagan Telecommunications Commission; the North Metro Telecommunications Commission; the North Suburban Communications Commission; the City of Oklahoma City, Oklahoma; the City of Renton, Washington; and the South Washington County Telecommunications Commission and to the best of my knowledge, information and belief formed after reasonable inquiry, they are well grounded in fact and are warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and are not interposed for any improper purpose.

Respectfully submitted,



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December 28, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Reply Comments of the Burnsville/Eagan Telecommunications Commission, the North Metro Telecommunications Commission, the North Suburban Communications Commission, the City of Oklahoma City, Oklahoma, the City of Renton, Washington and the South Washington County Telecommunications Commission to be mailed this 28th day of December, 2006, by Federal Express or first-class mail, postage prepaid, to the following persons:

Ms. Marlene H. Dortch (via FedEx)
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Brian F. Laule

St. Paul, Minnesota
December 28, 2006