Before the
Federal Communications Commission
Washington, D.C. 20554

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	))))	MB Docket No. 05-311

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: December 20,2006 **Released: March 5,2007**

Comment Date: [30 days after date of publication in the Federal Register]
Reply Comment Date: [45 days after date of publication in the Federal Register]

By the Commission: Chairman Martin, Commissioners Tate and McDowell issuing separate statements; Commissioners Copps and Adelstein dissenting and issuing separate statements.

TABLE OF CONTENTS

I. INTRODUCTION

1. In this Report and Order (*"Order"*), we adopt rules and provide guidance to implement Section 621(a)(1) of the Communications Act of 1934, as amended (the "Communications Act"), which prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services.[1] We find that the current operation of the local franchising process in many jurisdictions constitutes an unreasonable barrier to entry that impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment.[2] We further find that Commission action to address this problem is both authorized and necessary. Accordingly, we adopt measures to address a variety of means by which local franchising authorities, i.e., county- or municipal-level franchising authorities ("LFAs"), are unreasonably refusing to award competitive franchises. We anticipate that the rules and guidance we adopt today will facilitate and expedite entry of new cable competitors into the market for the delivery of video programming,[3] and accelerate broadband deployment consistent with our statutory responsibilities.

---

[1] 47 U.S.C. § 541(a)(1)

[2] While there is a sufficient record before **us** to generally determine what constitutes an "unreasonable refusal to award an additional competitive franchise" at the local level under Section 621(a)(1), we do not have sufficient information to make such determinations with respect to franchising decisions where a state is involved, either by issuing franchises at the state level or enacting laws governing specific aspects of the franchising process. We therefore expressly limit our findings and regulations in this *Order* to actions or inactions at the local level where a state has not specifically circumscribed the LFA's authority. In light of the differences between the scope of franchises issued at the state level and those issued at the local level, we do not address the reasonableness of demands made by state level franchising authorities, such as Hawaii, which may need to be evaluated by different criteria than those applied to the demands of local franchising authorities. Additionally. what constitutes an unreasonable period of time for a state level franchising authority to take to review an application may differ from uhat constitutes an unreasonable period of time at the local level. Moreover, as discussed *infra*, many states have enacted comprehensive franchise reform laws designed to facilitate competitive entry. Some of these laws allow competitive entrants to obtain statewide franchises while others establish a comprehensive set of statewide parameters that cabin the discretion of **LFAs.** *Compare* TEX. UTIL. CODE ANN. §§ 66.001-66.017 wirh VA. **CODE ANN.** §§ 15.2-2108.19 et seq. **In** light of the fact that many of these laws have only been in effect for a short period of time, and we do not have an adequate record from those relatively few states that have had statewide franchising for a longer period of time to draw general conclusions with respect to the operation of the franchising process where there is state involvement, we lack a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises. As a result, our *Order* today only addresses decisions made hy county- or municipal-level franchising authorities. ***See*** *U.S. Cellular Corp. v. FCC,* 254 F.3d 78, 86 (D.C. Cir. 2001) ("agencies need not address all problems in one fell swoop") (citations and internal quotation marks omitted); *Personal Watercraft Industry Assoc. v. Dept. of* ***Commerce,*** 48 F.3d 540,544 (D.C. Cir. 1995) **("An** agency does not have to **'make** progress on every front before it can make progress on any front.') (quoting *United States v. Edge Broadcasting Co.*. 509 U.S. 418, 434 (1993)); *National Associarion of Broadcasters v. FCC,* 740 **F.2d** 1190, 1207 (D.C. Cir. 1984) ("[A]gencies, while entitled to less deference than Congress, nonetheless need not deal in one fell swoop with the entire breadth of a novel development; instead, 'reform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the [regulatory] mind.'") (citations and internal quotation marks omitted. alteration in original). Moreover, it does not address any aspect of an LFA's decision-making to the extent that such aspect is specifically addressed by state law. For example, the state of Massachusetts provides LFAs with 1? months from the date of their decision to begin the licensing process to approve or deny a franchise application. 207 Mass. Code Regs. 3.02 (2006). These laws are not addressed by this decision. Consequently, unless otherwise stated, references herein to "the franchising process" or "franchising" refer solely to processes controlled by county- or municipal-level franchising authorities, including but not limited to the ultimate decision to award a franchise.

[3] References throughout this *Order* to "video programming" or "video services" are intended to mean cable services.

2. New competitors are entering markets for the delivery of services historically offered by monopolists: traditional phone companies are primed to enter the cable market, while traditional cable companies are competing in the telephony market. Ultimately, both types of companies are projected to offer customers a "triple play" of voice, high-speed Internet access, and video services over their respective networks. We believe this competition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of service offerings. We are concerned, however, that traditional phone companies seeking to enter the video market face unreasonable regulatory obstacles, to the detriment of competition generally and cable subscribers in particular.

3. The Communications Act sets forth the basic rules concerning what franchising authorities may and may not do in evaluating applications for competitive franchises. Despite the parameters established by the Communications Act, however, operation of the franchising process has proven far more complex and time consuming than it should be, particularly with respect to facilities-based telecommunications and broadband providers that already have access to rights-of-way. New entrants have demonstrated that they are willing and able to upgrade their networks to provide video services, but the current operation of the franchising process at the local level unreasonably delays and, in some cases, derails these efforts due to LFAs' unreasonable demands on competitive applicants. These delays discourage investment in the fiber-based infrastructure necessary for the provision of advanced broadhand services, because franchise applicants do not have the promise of revenues from video services to offset the costs of such deployment. Thus, the current operation of the franchising process often not only contravenes the statutory imperative to foster competition in the multichannel video programming distribution ("MVPD") market. but also defeats the congressional goal of encouraging broadband deployment.

4. In light of the problems with the current operation of the franchising process, we believe that it is now appropriate for the Commission to exercise its authority and take steps to prevent LFAs from unreasonably refusing to award competitive franchises. We have broad rulemaking authority to implement the provisions of the Communications Act, including Title VI generally and Section 621(a)(1) in particular. In addition, Section 706 of the Telecommunications Act of 1996 directs the Commission to encourage broadband deployment by removing barriers to infrastructure investment, and the U.S. Court of Appeals for the District of Columbia Circuit has held that the Commission may fashion its rules to fulfill the goals of Section 706.[4]

5. To eliminate the unreasonable barriers to entry into the cable market, and to encourage investment in broadband facilities, we: (1) find that an LFA's failure to issue a decision on a competitive application within the time frames specified herein constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (2) find that an LFA's refusal to grant a competitive franchise because of an applicant's unwillingness to agree to unreasonable build-out mandates constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (3) find that unless certain specified costs, fees, and other compensation required by LFAs are counted toward the statutory 5 percent cap on franchise fees, demanding them could result in an unreasonable refusal to award a competitive franchise; (4) find that it would be an unreasonable refusal to award a competitive franchise if the LFA denied an application based upon a new entrant's refusal to undertake certain obligations relating to public, educational, and government ("PEG") and institutional networks ("I-Nets") and (5) find that it is unreasonable under Section 621(a)(1) for an LFA to refuse to grant a franchise based on issues related to non-cable services or facilities. Furthermore, we preempt local laws, regulations. and requirements, including level-playing-field provisions, to the extent they permit LFAs to impose greater restrictions on market entry than the rules adopted herein. We also adopt

[4] *See USTA v. FCC.* 359 F3d 554, 579-80 (D.C. Cir. 2004)

a Further Notice of Proposed Rulemaking ("FNPRM") seeking comment on how our findings in this *Order* should affect existing franchisees. In addition, the FNPRM asks for comment on local consumer protection and customer service standards as applied to new entrants.

II. BACKGROUND

6. ***Section 621.*** Any new entrant seeking to offer "cable service"[5] as a "cable operator"[6] becomes subject to the requirements of Title VI. Section 621 of Title VI sets forth general cable franchise requirements. Subsection (b)(1) of Section 621 prohibits a cable operator from providing cable service in a particular area without first obtaining a cable franchise[7] and subsection (a)(1) grants to franchising authorities the power to award such franchises.[8]

7. The initial purpose of Section 621(a)(1), which was added to the Communications Act by the Cable Communications Policy Act of 1984 (the "1984 Cable Act"),[9] was to delineate the rrle of LFAs in the franchising process.[10] As originally enacted, Section 621(a)(1) simply stated that "[a] franchising authority inay award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction."[11] A few years later, however, the Commission prepared a report to Congress on the cable industry pursuant to the requirements of the 1984 Cable Act.[12] In that Report, the Commission concluded

---

[5] Section 602(6) of the Communications Act. 47 U.S.C. § 522(6) (defining "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber iiiteraction. if any, which is required for the selection or use of such video programming or other programming service").

[6] Section 602(5) of the Communications Act, 47 U.S.C. § 522(5) (defining "cable operator" as "any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in a cable system, or (B) who otherwise controls or is responsible for. through any arrangement, the management and operation of such a cable system").

[7] 47 U.S.C. § 541(b)(1)("Except to the extent provided in paragraph (2) and subsection (f), a cable operator may not provide cable service without a franchise.").

[8] 47 U.S.C. § 541(a)(1) (stating that "[a] franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction"). A "franchising authority" is defined to mean "any governmental entity empowered by Federal, State. or local law tu grant a franchise." Section 602(10) of the Communications Act. 47 U.S.C. § 522(10). As noted above. references herein to "local franchising authorities" or "LFAs" mean only the count) or municipal governmental entities empowered to grant franchises.

[9] Cahle Communications Policy Act of 1984. Puh. L No. 98-549. 98 Stat. 2779.

[10] See, *e.g.*, H.R. REP. NO. 98-934, at 19 (1984) ("[The 1984 Cable Act] establishes a national policy that clarifies the current system of local, state and federal regulation of cable television. This policy continues reliance on the local franchising process as the primary means of cahle television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process. ... [This legislation] will preserve the critical role of municipal governments in the franchise process, while providing appropriate deregulation in certain respects to the provision of cable service."): *id.* at 24 ("It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cahle operators to tailor the cahle system to meet those needs. However, if that process is to further the purposes of this legislation. the provisions of these franchises, and the authority of the municipal governments to enforce these provisions, must he based on certain important uniform federal standards that are not continually altered by Federal. state and local regulation.").

[11] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, § 621 (1984).

[12] *See generally Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*. 5 FCC Rcd 4962 (1990) ("Report").

that in order "[t]o encourage more robust competition in the local video marketplace, the Congress should ... forbid local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service.""

8. In response.[14] Congress revised Section 621(a)(1) through the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act")" to read as follows: "A franchising authority may award. in accordance with the provisions of this title. 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and ***mav not unreasonably refuse to award an additional competitive franchise***."[16] In the Conference Report on the legislation, Congress found that competition in the cable industry was sorely lacking:

> For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers."

To address this problem, Congress abridged local government authority over the franchising process to promote greater cable competition:

> Based on the evidence in the record taken as a whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be encouraged to award second franchises. Accordingly, [the 1992 Cable Act] as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises.[18]

---

[13] *Id.* at 4974; see *also id.* at 5012 ("This Commission is convinced that the most effective method of promoting the interests of viewers or consumers is through the free play of competitive market forces."). The Report also recommended that Congress "prohibit franchising rules whose intent or effect is to create unreasonable barriers to the entry of potential competing multichannel video providers," "limit local franchising requirements to appropriate governmental interests (*e.g.*, public health and safety, repair and good condition of public rights-of-way, and the posting of an appropriate construction bond)," and "permit competitors to enter a market pursuant to an initial, time-limited suspension of any 'universal [build-out]' obligation." *id.*

[14] *See* H.R. REP. No. 102-628. at 47 (1992) ("The Commission recommended that Congress, in order to encourage more robust competition in the local video marketplace, prevent local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service."). The Commission has previously recognized that "Congress incorporated the Commission's recommendations in the 1992 Cable Act by amending § 621(a)(1) of the Communications Act." *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming)*. 9 FCC Rcd 7442. 7469 (1994).

[15] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

[16] 47 U.S.C. § 541(a)(1) (emphasis added).

[17] H.R. CONF REP. NO. 102-862, at 1231 (1992).

[18] S. REP. NO. 102-92. at 47 (1991).

as revised. Section 621(a)(1) establishes a clear, federal-level limitation on the authority of LFAs in the franchising process in order to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media," and to "rely on the marketplace, to the maximum extent feasible, to achieve that availability."[19] Congress further recognized that increased competition in the video programming industry would curb excessive rate increases and enhance customer service, two areas in particular which Congress found had deteriorated because of the monopoly power of cable operators brought about, at least in part, by the local franchising process.[20]

9. In 1992, Congress also revised Section 621(a)(1) to provide that "[a]ny applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 635."[21] Section 635, in turn, states that "[a]ny cable operator adversely affected by any final determination made by a franchising authority under section 621(a)(1) ... may commence an action within 120 days after receiving notice of such determination" in federal court or a state court of general jurisdiction."[22] Congress did not, however, provide an explicit judicial remedy for other forms of unreasonable refusals to award Competitive franchises. such as an LFA's refusal to act on a pending franchise application within a reasonable time period.

10. ***The Local Franchising NPRM.*** Notwithstanding the limitation imposed on LFAs by Section 621(a)(1), prior to commencement of this proceeding, the Commission had seen indications that the current operation of the franchising process still serves as an unreasonable barrier to entry[23] for potential new cable entrants into the MVPD market.[24] In November 2005, the Commission issued a Notice of Proposed Rulemaking ("*Local Franchising NPRM*") to determine whether LFAs are unreasonably refusing to award competitive franchises and thereby impeding achievement of the statute's goals of increasing competition in the delivery of video programming and accelerating broadband deployment.

11. The Commission sought comment on the current environment in which new cable entrants attempt to obtain competitive cable franchises. For example, the Commission requested input on

---

[19] *Id.*

[20] S. REP. NO. 102-92, at 9 (quoting memhers of the cable industry who acknowledged that "because the franchise limits the customers to a single provider in the market, other 'customer-oriented' intangibles relating to the expectation of future patronage do *not* exist for a cable system. There is a goodwill in a monopoly. Customers return. not because of any sense of satisfaction with the monopolist, hut rather because they have no other choices"); *see also id.* at 3-9, 13-14, 20-21

[21] 47 U.S.C. § 541(a)(1)

[22] 47 U.S.C.§ 555(a)

[23] *See 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*, 20 FCC Rcd 18581, 18584 (2005) ("*Local Franchising NPRM*") (citing comments of Alcatel, BellSouth, Broadcast Service Providers Assoc., and Consumers for Cable Choice, filed in MB Docket No. 05-255).

[24] We refer herein to "new entrants." "new cable entrants." and "new cable competitors" interchangeably. Specifically, we intend these terms to describe entities that opt to offer "cable service" over a "cable system" utilizing public rights-of-way, and thus are defined under the Communications Act as "cable operator[s]" that must obtain a franchise. Although we recognize that there are numerous other ways to enter the MVPD market (*e.g.*, direct broadcast satellite ("DBS"), wireless cable, private cable), our actions in this proceeding relate to our authority under Section 621(a)(1) of the Communications Act, and thus are limited to competitive entrants seeking to obtain cable franchises.

the number of: (a) LFAs in the United States; (b) competitive franchise applications filed to date;[25] and (c) ongoing franchise negotiations.[26] To determine whether the current operation of the franchising process discourages competition and broadband deployment, the Commission also sought information regarding, among other things:

- how much time, on average, elapses between the date a franchise application is filed and the date an LFA acts on the application, and during that period, how much time is spent in active negotiations;”

- whether to establish a maximum time frame for an LFA to act on an application for a competitive franchise?

- whether "level-playing-field" mandates, which impose on new entrants terms and conditions identical to those in the incumbent cable operator's franchise, constitute unreasonable harriers to entry;"'

- whether build-out requirements (*i.e.*, requirements that a franchisee deploy cable service to parts or all of the franchise area within a specified period of time) are creating unreasonable harriers to competitive entry;'"

- specific examples of any monetary or in-kind LFA demands unrelated to cable services that could be adversely affecting new entrants' ability to obtain franchises;" and

- whether current procedures or requirements are appropriate for any cable operator, including incumbent cahle operators.''

12. In the *Local Franchising NPRM*, we tentatively concluded that Section 621(a)(1) empowers the Commission to adopt rules to ensure that the franchising process does not unduly interfere with the ability of potential competitors to provide video programming to consumers.[33] Accordingly, the Commission sought comment on how it could best remedy any problems with the current franchising process.[34]

---

[25] *Local Franchising NPRM, 20* FCC Rcd at 18588.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 18591.

[29] *Id.* at 18588.

[30] *Id.* at 18592.

[31] *Id. See also* Comments or Veriron, MB Docket No. *05-255* at 12 (filed Sept. 19, *2005)* (arguing that "[m]any local franchising authorities unfortunately view the franchising process as an opportunity to garner from a potential new video entrant concessions that are in no **way** related to video services or to the rationales for requiring franchises"). *See* Appendix **A** for a list **of** all commenters and reply commenlers.

[32] *Local Franchising NPRM,* 20 FCC Rcd at 18592.

[33] *Id.* at 18590.

[34] *Id.* at 18581.

13. The Commission also asked whether Section 706 provides a basis for the Commission to address barriers laced by would-be entrants to the video market." Section 706 directs the Commission to encourage broadhand deployment by utilizing "measures that promote competition ... or other regulating methods that remove barriers to infrastructure investment."[36] Competitive entrants in the video market are, in large part. deploying new fiber-based facilities that allow companies to offer the "triple play" of voice, data, and video services. New entrants' video offerings thus directly affect their roll-out of new broadband services. Revenues from cable services are, in fact, a driver for broadband deployment. In light of that relationship, the Commission sought comment on whether it could take remedial action pursuant to Section 706.[37]

14. ***The Franchising Process.*** The record in this proceeding demonstrates that the franchising process differs significantly from locality to locality. In most states, franchising is conducted at the local level, affording counties and municipalities broad discretion in deciding whether to grant a franchise.[38] Some counties and municipalities have cable ordinances that govern the structure of negotiations, while others may proceed on an applicant-by-applicant basis.[39] Where franchising negotiations are focused at the local level, some LFAs create formal or informal consortia to pool their resources and expedite competitive entry.")

15. To provide video services over a geographic area that encompasses more than one LFA, a prospective entrant must become familiar with all applicable regulations. This is a time-consuming and expensive process that has a chilling effect on competitors.[41] Verizon estimates, for example, that it will need 2,500-3,000 franchises in order to provide video services throughout its service area.[42] **AT&T** states

[35] *Id.* at 18590.

[36] Section 706 of the Telecommunications Act of 1996.47 U.S.C. § 157 nt.

[37] *See USTA v. FCC.* 359 F.3d 554, 580, 583 (D.C. Cir. 2004). ***See*** *also* USTelecom Comments at 15; TIA Comments at 16-17.

[38] *See, e.g.*, MD. ANN. CODE art. 23A § 2(b)(13); OR. CONST. ART. I, § 21 (2005); COLO. REV. STAT. ANN. § 30-35-201 (West 2005). We also note that several states have adopted statutes governing the franchising process. For example, some states require public hearings or special elections. ***See*** League of Minnesota Cities ("LMC") Comments at 6-8, South Slope Comments at 6. Other states have laws limiting the range of issues that can be negotiated in a franchise. ***See*** Cablevision Comments at 12, LMC Comments at 15. As we discuss below, certain states have adopted new franchising laws that allow providers to apply for franchises through state franchising authorities ("SFAs"), and we note that lawmakers in those states adopted these new franchising laws to address the needs of the current marketplace. Furthermore, certain states have traditionally considered franchise applications at the state level. ***See,*** *e.g.*, HAW. REV. STAT. § 440G-4 (2006), CONN. GEN. STAT. ANN. § 16-331 (West 2006), VT. STAT. ANN. tit. 30, § 502 (2006). The record indicates that state level franchising may provide a practical solution to the problems that facilities-based entrants face when seeking to provide competitive services on a broader basis than county or municipal boundaries and seck to provide service in a significant number of franchise areas. See. *e.g.*, AT&T Reply at 21. 37. NTCA Comments at 10.

[39] See. *e.g.*, Mobile, Ala. Cornments at 2 (discussing its Mastrr Cable Services Regulatory Ordinance that was created to ensure all potential entrants were treated in a uniform manner); Ontario, **Cal**. Comments at ***5-6*** (discussing draft master ordinance that will ensure a "fair and equitable application process" for all new entrants).

[40] ***See.*** *e.g.*, MO-NATOA Comments at 8 ("some localities work together to franchise and manage rights-of-way"); MHRC Comments at I (MHRC is a consolidated regulatory authority for six Oregon localities).

[41] ***See.*** *e.g.*, Verizon Comments at 27, Att. **A.** para. 10, 59-75; BellSouth Comments at 2, I **I**; Letter from Jeffrey S. Lanning, Associate General Counsel, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission at 17-18 (July 2R. 2006) ("USTelecom *Ex Parte*").

[42] Verizon Comments at 27, Att. A, para. 10.

that its Project Lightspeed deployment is projected to cover a geographic area that would encompass as many as 2.000 local franchise areas." BellSouth estimates that there are approximately 1,500 LFAs within its service area.[44] Qwest's in-region territory covers a potential *5,389* LFAs.[45] While other companies are also considering competitive entry,[46] these estimates amply demonstrate the regulatory burden faced by competitors that seek to enter the market on a wide scale, a burden that is amplified when individual LFAs unreasonably refuse to grant competitive franchises.

16. A few states and municipalities recently have recognized the need for reform and have established expedited franchising processes for new entrants. Although these processes also vary greatly and thus arc of limited help to new cable providers seeking to quickly enter the marketplace on a regional basis, they do provide more *uniformity in* the franchising process on an intrastate basis. These state level reforms appear to offer promise in assisting new entrants to more quickly begin offering consumers a competitive choice among cable providers. In 2005, the Texas legislature designated the Texas Public Utility Commission ("PUC") as the franchising authority for state-issued franchises, and required the PUC to issue a franchise within 17 business days after receipt of a completed application from an eligible applicant.[47] In 2006, Indiana, Kansas, South Carolina, New Jersey, North Carolina, and California also passed legislation to streamline the franchising process by providing for expedited, state level grants of franchises.[48] Virginia, by contrast, did not establish statewide franchises hut mandated uniform time frames for negotiations, public hearings, and ultimate franchise approval at the local level. In particular, a "certificated provider of telecommunications service" with existing authority to use public rights-of-way is authorized to provide video service within *75* days of filing a request to negotiate with each individual LFA.[49] Similarly, Michigan recently enacted legislation that streamlines the franchise application process, establishes a 30-day timeframe within which an LFA must make a decision, and eliminates build-out requirements."

17. In some states, however, franchise reform efforts launched in recent months have failed. For example, in Florida, bills that would have allowed competitive providers to enter the market with a permit from the Office of the Secretary of State, and contained no build-out or service delivery schedules, died in committee." In Louisiana, the Governor vetoed a bill that would have created a state franchise

---

[43] AT&T Comments at 17.

[44] BellSouth Comments at I I

[45] Qwest Comments at 14.

[46] ***Srr* BSPA** Coinments at 1-2; Cavalier Telephone Comments **at** 2; South Slope Comments at ***2;*** Cincinnati Bell Comments at 1; Hawaiian Telcom Comnients at 1; Minnesota Telecom Alliance Comments at 2. In addition to video services, many of these new entrants also intend to provide broadband services. **See,** *e.g.*, Verizon Comments at i; BSPA Comments at 1; Cavalier Telephone Cominents at 2.

[47] TEX. UTIL. CODE ANN. §§ 66.001, 66.003. Holders of these franchises are required to **pay** franchise fees, comply with customer service standards. and provide the capacity for PEG access channels that a municipality has activated under the incumbent cable operator's franchise agreement. ***Id.* at** §§ 66.005, 66.006, 66.008, 66.009, 66.014. Franchisees are not required to comply with any build-vut requirements, but they are prohibited from denying service to any area based on the income level of that area. *Id.* at § 66.007.

[48] IND. CODE § 8-1-34-16 (2006); 2006 Kan. Sess. Laws 93 (codified at KAN STAT. ANN. § 17-1902); S.C. CODE ANN. § 58-12-310 et seq. (2006); Assemb.. No. 804. 212th Leg. (N.I. 2006); 2006 N.C. Sessions Laws 151 (to he codified 1/1/2007 at N.C. GEN STAT. ANN. § 66-351 (West 2006); **CAL.** PUB. UTIL. COLE § 401, et seq.;.

[49] VA. CODE ANN. § 15.2-2108.1:1 et seq.

[50] 2006 Mich. Pub. Acts 480.

[51] S 1984, 2006 Sess. (Fla. 2006), HB 1199, 2006 Sess. (Fla. 2006)

structure, provided for automatic grant of an application 45 days after filing, and contained no build-out requirements.[52] In Maine, a bill that would have replaced municipal franchises with state franchises was withdrawn.[53] Finally, a Missouri bill that would have given the Public Service Commission the authority to grant franchises and would have prohibited local franchising died in committee.[54]

III. DISCUSSION

18. Based on the voluminous record in this proceeding, which includes comments filed by new entrants, incumbent cable operators, LFAs, consumer groups. and others, we conclude that the current operation of the franchising process can constitute an unreasonable barrier to entry for potential cable competitors, and thus justifies Commission action. We find that we have authority under Section 621(a)(1) to address this problem by establishing limits on LFAs' ability to delay, condition, or otherwise "unreasonably refuse to award" competitive franchises. We find that we also have the authority to consider the goals of Section 706 in addressing this problem under Section 621(a)(1). We believe that, absent Commission action, deployment of competitive video services by new cable entrants will continue to he unreasonably delayed or, at worst, derailed. Accordingly, we adopt incremental measures directed to LFA-controlled franchising processes, as described in detail below. We anticipate that the rules and guidance we adopt today will facilitate and expedite entry of new cable competitors into the market for the delivery of multichannel video programming and thus encourage broadband deployment.

A. The Current Operation of the Franchising Process Unreasonably Interferes With Competitive Entry

19. Most communities in the United States lack cable competition, which would reduce cable rates and increase innovation and quality of service.[55] Although LFAs adduced evidence that they have granted some competitive franchises,[56] and competitors acknowledge that they have obtained some franchises,[57] the record includes only a few hundred examples of competitive franchises, many of which were obtained after months of unnecessary delay. In the vast majority of communities, cable competition simply does not exist.

[52] HB 699, 2006 Reg. Sess. (La. 2006).

[53] LR 2800, 2006 Leg., 2d. Reg. Sess. (Me. 2005)

[54] SB 816. 2006 Sess. (Mo. 2006)

[55] *See Local Franchising NPRM*, 20 FCC Rcd at 18588

[56] For example, in Michigan. a number of LFAs have granted competitive franchises to local telecommunications companies. *See* Ada Township, *et al.*, Comments at 18-26. Vermont has granted franchises to competitive operators in Burlington, Newport, Berlin. Duxbury, Stowe, and Moretown. VPSB Comments at 5. Mt. Hood Cable Regulatory Commission ("MHRC"), a consolidated regulatory authority for six Oregon localities, has negotiated franchises with cable overbuilders, although those companies ultimately were unable to deploy service. MHRC Comments at 20-21. Similarly. the City of Los Angeles has granted two competitive franchises, but each of the competitors went out of business shortly after negotiating the franchise. City of Los Angeles Comments at 15; *see also* San Diego County. Cal. Comments at 3. Miami-Dade has granted 11 franchises to six providers, and currently is considering the application of another potential entrant. Miami-Dade Comments at 1-2. New Jersey has granted five competitive franchises, hut only two ultimately provided service to customers. NJBPU Comments at 3. *See also, e.g.*, AT&T Reply Comments at 11-13; Chicago, Ill. Comments at 2-3; City of Charlotte and Mecklenburg County. N.C. Comments at 12-13: Henderson, Nev. Comments at 5.

[57] For example, Veriron has ohtained franchises covering approximately ZOO franchise areas. See http://newscenter.verizon.com/press-releases/verizon/2006/verizon-to-bring-western.html.

20. The dearth of competition is due, at least in part, to the franchising process.[58] The record demonstrates that the current operation of the franchising process unreasonably prevents or, at a minimum, unduly delays potential cable competitors from entering the MVPD market.[59] Numerous commenters have adduced evidence that the current operation of the franchising process constitutes an unreasonable barrier to entry. Regulatory restrictions and conditions on entry shield incumbents from competition and are associated with various economic inefficiencies, such as reduced innovation and distorted consumer choices.[60] We recognize that some LFAs have made reasonable efforts to facilitate competitive entry into the video programming market. We also recognize that recent state level reforms have the potential to streamline the process to a noteworthy degree. We find, though, that the current operation of the local franchising process often is a roadblock to achievement of the statutory goals of enhancing cable competition and broadband deployment.

71. Commenters have identified six factors that stand in the way of competitive entry. They are: (1) unreasonable delays by LFAs in acting on franchise applications; *(2)* unreasonable build-out rcquircmcnts imposed by LFAs; (3) LFA demands unrelated to the franchising process; (4) confusion concerning the meaning and scope of franchise fee obligations; (5) unreasonable LFA demands for PEG channel capacity and construction of I-Nets; and (6) level-playing-field requirements set by LFAs. We address each factor below.

72. ***LFA Delays in Acting on Franchise Applications.*** The record demonstrates that unreasonable delays in the franchising process have obstructed and, in some cases, completely derailed attempts to deploy competitive video services. Many new entrants have been subjected to lengthy, costly, drawn-out negotiations that, in many cases, are still ongoing. The FTTH Council cited a report by an investment firm that, on average, the franchising process, as it currently operates, delays entry by 8-16 months.[61] The record generally supports that estimate. For example, Verizon had 113 franchise negotiations underway as of the end of March 2005. By the end of March 2006, **LFAs** had granted only 10 of those franchises. In other words, more than 90% of the negotiations were not completed within one year.[62] Verizon noted that delays are often caused by mandatory waiting periods.[63] BellSouth explained that negotiations took an average of 10 months for each of its 20 cable franchise agreements,[64] and that in one case, the negotiations took nearly three years.[65] AT&T claims that anti-competitive conditions, such as level-playing-field constraints and LFA demands regarding build-out, not only delay entry but can prevent it altogether.[66] BellSouth notes that absent such demands (in Georgia, for example), the

58 Qwest Reply **at** 13-14; USTelecom *Ex Parte* at 17-18.

59 Veriron Comments **at** 11-34; AT&T Reply at **22-21:** BellSouth Comments at 10; Cavalier Telephone Comments at 1. ***See also*** Mercatus Center Comments at 39-43.

60 *See, e.g.*, DOJ *Ex Parte* at 3

61 FTTH Council Comments at **26**

62 Verizon Reply Comments at 35. These figures do not include Veriron's franchise applications in Texas, which now authorizes statewide franchises. *See supra* para. 16.

63 Verizon Comments at **1**1-12

64 BellSouth Comments at 2.

65 BellSouth Comments at 11. BellSouth's franchise in Cobb County, Ga. took approximately **12** months to obtain; its franchises in Davie, Fla. and Orange County. Fla. took 29 and **28** months, respectively. BellSouth Comments Decl. of Thompson T. Rawls, II. Exh. A.

66 AT&T Reply at 6.

company's applications were granted quickly." Most of Ameritech's franchise negotiations likewise took a number of years." New entrants other than the large incumbent local exchangz carriers ("LECs")[69] also have experienced delays in the franchising process. NTCA provided an example of a small, competitive IPTV provider that is in ongoing negotiations that began more than one year ago.'"

23. These delays are particularly unreasonable when, as is often the case, the applicant already has access to rights-of-way. One of the primary justifications for cable franchising is the LFA's need to regulate and receive compensation for the use of public rights-of-way." However, when considering a franchise application from an entity that already has rights-of-way access, such as an incumbent LEC, an LFA need not and should not devote substantial attention to issues of rights-of-way management." Moreover, in obtaining a certificate for public convenience and necessity from a state, a facilities-based provider generally has demonstrated its legal, technical, and financial fitness to be a provider of telecommunications services. Thus, an LFA need not spend a significant amount of time considering the fitness of such applicants to access public rights-of-way.

24. Delays in acting on franchise applications are especially onerous because franchise applications are rarely denied outright," which would enable applicants to seek judicial review under Section 635.[74] Rather, negotiations are often drawn out over an extended period of time.[75] As a result,

---

[67] BellSouth Reply at 7

[68] AT&T Reply at 24

[69] The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access. 47 U.S.C. § 153(26). For the purposes of Section 251 of the Communications Act, "the term 'incumbent local exchange carrier' means, with respect to an area. the local exchange carrier that **(A)** on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and (B)(i) on such date of enactment. was deemed to he **a** member of the exchange carrier association ...; or (B)(ii) is **a** person or entity that, on or after such date of enactment, became **a** successor or assign of **a** member [of the exchange carrier association]." 47 U.S.C. § 251(h)(1). **A** competitive LEC is any LEC other than an incumbent LEC. **A** LEC **will** be treated **as** an ILEC if **"(A)** such carrier occupies **a** position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph [251(h)](1); (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph [251(h)](1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section." 47 **U.S.C.** § 251(h)(2).

[70] NTCA Comments at 4, 10

[71] We note that certain franchising authorities may have existing authority to regulate LECs through state and local rights-of-way statutes and ordinancea.

[72] Recognizing this distinction. some states have enacted or proposed streamlined franchising procedures specifically tailored to entities with existing access to public rights-of-way. *See, e.g.*, VIRGINIA CODE ANN. § 15.2-2108.1:1 et seq.); HF-2637. 2006 Sess. (Iowa 2006) (this proposed legislation would grant franchises to all telephone providers authorized to use the right-of-way without any application or negotiation requirement). *Sue also* South Slope Comments at 11 (duplicative local franchising requirements imposed on a competitor with existing authority to occupy the rights-of-way arc unjustified and constitute an unreasonable barrier to competitive video entry).

[73] *See* Northwest Suburbs Cable Communications Commission Comments at 5-6 (rare instance of competitive franchise denial).

[74] *See* 47 U.S.C. §§ 541(a)(1), 555(a)

[75] *See* Verizon Comments at 30-34; Verizon Reply Comments at 2. *34-37;* AT&T Reply Comments at 24; NTCA Comments at 4. 10.

the record shows that numerous new entrants have accepted franchise terms they considered unreasonable in order to avoid further delay.[76] Others have filed lawsuits seeking a court order compelling the LFA to act, which entails additional delay. legal uncertainty, and great expense.[77] Alternatively, some prospective entrants have walked away from unduly prolonged negotiations.[78] Moreover, delays provide the incumbent cable operator the opportunity to launch targeted marketing campaigns before the competitor's rollout. thus undermining a competitor's prospects for success.[79]

25. Despite this evidence. incumbent cable operators and LFAs nevertheless assert that new entrants can obtain and are obtaining franchises in a timely fashion[80] and that delays are largely due to unreasonable behavior on the part of franchise applicants, not LFAs.[81] For example, Minnesota LFAs claim that they can grant a franchise in as little a5 eight weeks.[82] The record, however, shows that expeditious grants of competitive franchises are atypical. Most LFAs lack any temporal limits for

---

[76] *See, e.g.*, USTelecom *Ex Parte* at 20 (Grand Rapids, Minnesota insisted that Paul Bunyan Telephone Cooperative provide fiber connections io every municipal building in the City, including a water treatment plant); Qwest *Ex Parte* at 7 (initially agreed to mandatory build-out provisions in certain situations); BellSouth Comments at 15-16 (in Dekalb Count), Georgia, BellSouth makes PEG payments and I-Net support payments that drive total fees significantly above 5 percent of gross revenue).

[77] For example, in Maryland. Verizon filed suit against Montgomery County, seeking to invalidate some of the County's franchise rules. and requesting that the County be required tu negotiate a franchise agreement, after the parties unsuccessfully attempted to negotiate a franchise beginning in May 2005. *See* Complaint, *Verizon Maryland, Inc. v. Montgomery County, Md.*, No. 06-01663-MJG (N.D. Md. June 29. 2006). The court denied Verizon's Motion for Preliminary Injunction in August, and ordered the parties to mediation. *See Verizon Maryland, Inc. v. Montgomery County. Md.*, Order, No. 06-01663-MJC (N.D. Md. August 8. 2006). Since then, the parties have negotiated a franchise agreement and the County held a public hearing on the draft franchise agreement. *See* Press Release, Montgomery County, Md., County Negotiates Cable Franchise Agreement with Verizon; Agreement Resolves Litigation, Provides Increased Competition for Cable Service (Sept. 13, 2006) *available at* http://www.montgomerycountymd.gov/apps/News/press/PR_details.asp?PrID=2582. The County Council granted the negotiated franchise on November 28. 2006. Neil Adler, *Montgomery officials approve Verizon cable franchise*, WASHINGTON BUSINESS JOURNAL, NOV. 28, 2006, *available at* http://washington.birjournals.comi washington/stories/2006/11/27/daily23.html. Qwest's experience with the City of Colorado Springs, Colorado is a particularly onerous example. *See* Letter from Melissa E. Newman, Vice President, Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 13, 2006). Letter from Kenneth L. Fellman, Counsel io Colorado Springs. Colorado, to Marlene H. Dortch, Secretary. Federal Communications Commission (July 26. 2006). The city charter in Colorado Springs requires that a franchise agreement be approved by voters rather than a franchising authority. Despite the fact that the Communications Act and federal case law deem this approach unlawful, the Colorado Springs City Counsel would not grant a franchise absent a vote, and invited Qwest to file a "friendly lawsuit" (presumably at Qwest's expense) to invalidate that provision of the city charier. 47 U.S.C. §§ 522(10), 541, *Qwest Broadband Services, Inc. v. City of Boulder*, 151 F.Supp.2d 1236 (D. Colo. 2001). Letter from Melissa E. Newman, Vice President, Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary. Federal Communications Commission at 2 (June 13, 2006).

[78] *See* Qwest Comments at 9.

[79] *See, e.g.*, South Slope Comments at 7.

[80] Cablevision Reply at 5: Orange County Comments a1 5; Palm Beach County Comments at 3. *See* Comcast Comments ai 8-9.

[81] Comcast Comments at 16; Cablevision Reply at 2. The incumbent cable operators accuse Verizon of making unreasonable demands through its model franchise. Verizon asserts that it submits a model franchise to begin negotiations because uniformity is necessary tor its nationwide service deployment. Verizon Reply at 40. Verizon states that it is willing to negotiate and tailor the model franchise to each locality's needs. *Id.*

[82] LMC Comments at 18.

cunrideration of franchise applications, and of those that have such limits, many set forth lengthy time frames. In localities without a time limit or with an unreasonable time limit, the delays caused by the current operation of the franchising process present a significant barrier to entry.” For example, the cities of Chicago and Indianapolis acknowledged that, as currently operated, their franchising processes take one to three years, respectively.[84] Miami-Dade’s cable ordinance permits the county to make a final decision on a cable franchise up to eight months after receiving a completed application, and the process may take longer if an applicant submits an incomplete application or amends its application.[85]

26. Incumbent cable operators and LFAs state that new entrants could gain rapid entry if the new entrants simply agreed to the same terms applied to incumbent cable franchisees.“ However, this is not a reasonable expectation generally, given that the circumstances surrounding competitive entry are considerably different than those in existence at the time incumbent cable operators obtained their franchises. Incumbent cable operators originally negotiated franchise agreements as a means of acquiring or maintaining a monopoly position.” In most instances, imposing the incumbent cable operator’s terms and conditions on a new entrant would make entry prohibitively costly because the entrant cannot assume that it will quickly – or ever – amass the same number or percentage of subscribers that the incumbent cable operator captured.[88] The record demonstrates that requiring entry on the same terms as incumbent cable operators may thwart entry entirely or may threaten new entrants’ chances of success once in the market.

27. Incumbent cable operators also suggest that delay is attributable to competitors that are not really serious about entering the market, as demonstrated by their failure to file the thousands of franchise applications required for broad competitive entry.” We reject this explanation as inconsistent with both the record as well as common sense. Given the complexity and time-consuming nature of the current franchising process, it is patently unreasonable to expect any competitive entrant to tile several thousand applications and negotiate several thousand franchising processes at once. Moreover, the incumbent LECs have made their plans to enter the video services market abundantly clear, and the evidence in the record demonstates their seriousness about doing so. For instance, they are investing billions of dollars to upgrade their networks to enable the provision of video services, expenditures that

[83] We recognize that some franchising authorities move quickly, as a matter of law or policy. The record indicates that some LFAs have stated that they welcome competition to the incumbent cable operator, and actively facilitate such competition. ***See, e.g.***, Manatee County, Fla. Comments at 4, Ada Township, *et al.* Comments at 16-27. For example, a consolidated franchising authority in Oregon negotiated and approved competitive franchises within 90 days. *See* Mt. Hood Cable Regulatory Commission Comments at 20. **An** advisory committee in Minnesota granted two competitive franchises in six months, after a statutorily imposed eight-week notice and hearing period. ***See*** Southwest Suhurhan Cable Commission Comments at **5**, 7. While we laud the prompt disposition of franchise applications in these particular areas, the record shows that these examples are atypical.

[84] *See* Chicago Comments at 4: Indianapolis Comments ai 8

[85] Miami-Dade Comments at 3.

[86] ***See.*** *e.g.*, ANC Reply at 5-6. Commenters assert that Verizon’s model agreement prevents **LFAs** from exercising control over righis-of-way, does not require Verizon to repair damage to municipal property due to construction, does not require service to all residents, and contains an “opt-out” provision that allows Veriron to abandon an area it docs not find prolitable. **ANC** Reply at 8-10.

[87] Verizon Reply at 38-40.

[88] Verizon Comments at 53.

[89] Cahlevision Comments at 3

would make little sense if they were not planning to enter the video market.[90] Finally, the record also demonstrates that the obstacles posed by the current operation of the franchising process are so great that some prospective entrants have shied away from the franchise process altogether.[91]

28. We also reject the argument by incumbent cable operators that delays in the franchising process are immaterial because competitive applicants are not ready to enter the market and frequently delay initiating service once they secure a franchise,[92] We find that lack of competition in the video market is not attributable to inertia on the pan of competitors. Given the financial risk, uncertainty, and delay new entrants face when they apply for a competitive franchise, it is not surprising that they wait until they get franchise approval before taking all steps necessary to provide service.[93] The sooner a franchise is granted. the sooner an applicant can begin completing those steps. Consequently, shortening the franchising process will accelerate market entry. Moreover, the record shows that streamlining the franchising process can expedite market entry. For example, less than 30 days after Texas authorized statewide franchises, Verizon filed an application for a franchise with respect to 21 Texas communities and was able to launch services in most of those communities within **45** days.[94]

29. Incumbent cable operators offer evidence from their experience in the renewal and transfer processes as support for their contention that the vast majority *of* LFAs operate in a reasonable and timely manner.[95] We find that incumbent cable operators' purported success in the franchising process is not a useful comparison in this case. Today's large MSOs obtained their current franchises by either renewing their preexisting agreements or by merging with and purchasing other incumbent cable franchisees with preexisting agreements. For two key reasons, their experiences in franchise transfers and renewals are not equivalent to those of new entrants seeking to obtain new franchises.[96] First, in the transfer or renewal context, delays in LFA consideration do not result in a bar to market entry. Second, in the transfer or renewal context, the LFA has a vested interest in preserving continuity of service for subscribers, and will act accordingly.

30. We also reject the claims by incumbent cable operators that the experiences of Ameritech. RCN, and other overbuilders[97] demonstrate that new entrants can and do obtain competitive

[90] *See* AT&T Comments at 14; Verizon Comments at *27.* In addition to negotiating with LFAs, competitors also have lobbied for broad franchising reform. To he sure. when prospective entrants anticipate franchise reform may occur at the state level. there is evidence in the record they often have not sought franchises at the local level. *See* Fairfax County. Va. Comments at 4. Such tactics, however, do not indicate that prospeclive entrants are not serious about entering the market hut rather represent a strategic judgment as to the best method of accomplishing that goal.

[91] Quest Comments at 9

[92] NCTA Comments at 11: Comcast Reply at 16; Cablevision Reply at 9; City of Murrieta. Ca. Comments at 2.

[93] *See* Veriron Reply Comments at 37

[94] Verizon Reply Comments at 37-38. ***See also*** NTCA Comments at 10-11 (citing Texas PUC testimony at February Commission Meeting held in Keller, Texas, which revcaled that 15 companies have filed applications to serve 153 discrete communities in Tcxas since adoption of the new statewide franchising scheme).

[95] Comcast Comments at 17. For example. Comcast reports that when it acquired AT&T Broadband, it received timely approval from more than 1,800 LFAs within eight months. The company also states that it was well along in the process of receiving approvals from more than 1,500 LFAs for the Adelphia transaction.

[96] AT&T Reply at 22.

[97] The term "overbuild" describes the situation in which a second cable operator enters a local market in direct competition with an incumbent cable operator. In these markets, the second operator, or "overbuilder," lays wires in the same area as the incumbent, "overbuilding" the incumbent's plant, thereby giving consumers a choice between cable service providers. *See Implementation of Section 3 of rke Cable Television Consumer Protection and*

(continued...)

franchiser in a timely manner.[98] Charter claims that it secured franchises and upgraded its systems in a highly competitive market and that the incumbent LECs possess sufficient resources to do the same." BellSouth notes, however, that Charter does not indicate a single instance in which it obtained a franchise through an initial negotiation, rather than a transfer.[100] Comcast argues that it faces competition from cable overbuilders in several markets.[101] The record is scant and inconsistent, however, with respect to overbuilder experiences in obtaining franchises, and thus does not provide reliable evidence. BellSouth also claims that, despite RCN's claims that the franchising process has worked in other proceedings, RCN previously has painted a less positive picture of the process and has called it a high barrier to entry.[102] Given these facts, we do not believe that the experiences cited by incumbent cable operators shed any significant light on the current operation of the franchising process with respect to competitive entrants.

31. ***Impact of Build-Out Requirements.*** The record shows that build-out issues are one of the most contentious between LFAs and prospective new entrants, and that build-out requirements can greatly hinder the deployment of new video and broadband services. New and potential entrants commented extensively on the adverse impact of build-out requirements on their deployment plans.[103] Large incumbent LECs,[104] small and mid-sized incumbent LECs,[105] competitive LECs[106] and others view build-out requirements as the most significant obstacle to their plans to deploy competitive video and broadband services. Similarly, consumer groups and the U.S. Department of Justice, Antitrust Division,

(Continued from previous page)
Competition Act of 1992. Statisrical Reporr on Average Prices for Basic Service. Cable Programming Services, and Equipment, 20 FCC Rcd 2718, 2719 n.6 (2005).

[98] Cahlrvision Reply at 6. Comcast states that the overbuilder industry as a whole has more than 16 million households under active franchise and two million households under franchise in anticipation of future network build-outs. Comcast Comments at S-6 (citing Broadband Service Providers Association Comments, MB Docket No. 05-255, at 7 (filed Sept. 19, 2005)).

[44] Charter Comments at 4. Specifically. Charter states that it entered the cable market in earnest in the late 1990s and has spent the last five years investing billions of dollars to upgrade its cable systems and deploy advanced broadband services in more than 4,000 communities. Charter Comments at 2. During Charter's peak period of growth. it secured over 2,000 franchise transfers with LFAs and invested several billion dollars to upgrade systems, all while subject to significant competition from DBS. Charter Comments at **5.**

[100] BellSouth Reply at 11

[101] Comcast Comments at 4-5.

[102] BellSouth Reply at 13 (citing RCN's petition to deny the AT&T/Comcast merger application).

[103] *See, e.g.*, Qwest Comments at 2: Cincinnati Bell Comments at 10-11; South Slope Comments at 7-9; NTCA Comments at 6-7; Cavalier Telephone Comments at *5:* BSPA Comments at 6. **See** *also* Letter from Lawrence Spiwak. President, Phoenix Ctr. for Advanced Legal and Econ. Pub. Policy Studies, to Marlene Dortch, Secretary, Federal Communications Commission. at Att., *Phoenix Cenrer Policy Paper Number 22: **The** Consumer Welfare Cost of Cable "Build-our" Rules.* at *3* ("build-out requirements are, on average, counterproductive and serve to *slow down* deployment of communications networks") (March 13, 2006) ("*Phoenix Cenrer Build-Our Paper").*

[104] Qwest Comments at 2.

[105] Cincinnati Hell Comments at 10-11; South Slope Comments at 7-9; NTCA Comments at 6-7 (because the risk is great. the service provided by the new entrants must be guided by sound business principles; forcing a new entrant tu build out an entire area before such action is financially justified is tantamount to forcing that entrant out of the video business); USTelecom *Ex Parte* at 8-11

[106] Cavalier Telephone Comments at 5; BSPA Comments at *6* (a number of competitive franchises have been renegotiated or converted to OVS because the operator could not comply with unreasonable and uneconomic build-out requirements).

urge the Commission to address this aspect of the current franchising process in order to speed competitive entry.[107]

32. The record demonstrates that build-out requirements can substantially reduce competitive entry.[108] Numerous commenters urge the Commission to prohibit LFAs from imposing any build-out requirements. and particularly universal build-out requirements.[109] They argue that imposition of such mandates, rather than resulting in the increased service throughout the franchise area that LFAs desire, will cause potential new entrants to simply refrain from entering the market at all.[110] They argue that even build-out provisions that do not require deployment throughout an entire franchise area may prevent a prospective new entrant from offering service.[111]

33. The record contains numerous examples of build-out requirements at the local level that resulted in delayed entry, no entry, or failed entry. A consortium of California communities demanded that Verizon build out to every household in each community before Veriron would be allowed to offer service to any community, even though large parts of the communities fell outside of Verizon's telephone service area.[112] Furthermore, Qwest has withdrawn franchise applications in eight communities due to build-out requirements.[113] In each case, Qwest determined that entering into a franchise agreement that mandates universal build-out would not he economically feasible.[114]

---

107 *See* MMTC Comments at 13-24; Consumers for Cable Choice Comments at 8; DOJ ***Ex Parte*** at 12-13, 15 (,stating that build-out requirements lead to abandonment of entry, less efficient competition, or higher prices).

108 **See.** *e.g.*, USTelecom Comments at 24 (citing example of Shenandoah Telecommunications, which cannot provide service to an entire county. and thus cannot provide service at all). ***See also Phoenix Center*** *Build-Our Paper* at 1, 3; DOJ *Ex Parte* at 12-13. 15.

109 *See, e.g.*, Alcatcl Comments at 10-11; AT&T Comments at 44; BellSouth Reply at 6; NTCA Comments at 6.

110 *See, e.g.*, AT&T Comments at 44: Qwest Comments at 2; Ad Hoc Telecom Manufacturer Coalition Comments at 5; DOJ *Ex Parte* at 12-13, 15.

111 Not all new entrants to the video market with existing telecommunications facilities are engaging in the upgrades to which Verizon and AT&T have committed. Cavalier Telephone, for example, is delivering IPTV over copper lines. Such delivery is limited, however, by ADSL-2 technology. Cavalier Telephone argues that it is unreasonable io require that it become capable of providing service to all households in a franchise area, which would require Cavalier Telephone to dig up rights-of-way and install duplicative facilities, which it has specifically sought to avoid doing by virtue of relying on the unbundled local loop. Cavalier Telephone Comments at **5.** Similarly, Guadalupe Valley Telephone Cooperative (GVTC) could not deploy service in the face of differing build-out requiremenls across jurisdictions. ***See*** AT&T Reply at 37. Once Texas's new statewide franchising law went into effect, however, deployment became economically feasible for GVTC. ***See*** *id.* ***See also Phoenix Center*** *Build-out* ***Paper*** *at* 1, 3, ***3*** (build-out rules can significantly increase the costs of a new video entrant, and are actually counter-productive, serving primarily to deter new video entry and slow down deployment of communications networks); *Phoenix Center Redlining Paper* at 3 (even when build-out requirements are applied to new entrants altruistically, the requirements can he self-defeating and often erect insurmountable barriers to entry for new firms); BSPA at 4 (When a new network operator is forced to comply with **a** build-out that is equal to the existing incumbent cable footprint, it is forced to **a** build on a timeframe and in geographic areas where the cost to build and customer density will likely produce an economic loss for both network operators.). DOJ ***Ex Parte*** at 12-13,15.

112 Verizon Comments at 41-42. Before the new statewide legislation, a Texas community had made the same request.

113 *See* Qwest Comments at 9.

114 *Id.* at 10.

34. In many instances. level-playing-field provisions in local laws or franchise agreements compel LFAs to impose on competitors the same build-out requirements that apply to the incumbent cable operator.[115] Cable operator3 use threatened or actual litigation against LFAs to enforce level-playing-field requirements and have successfully delayed entry or driven would-be competitors out of town.[116] Even in the absence of level-playing-field requirements, incumbent cable operators demand that LFAs impose comparable build-out requirements on competitors to increase the financial burden and risk for the new entrant.[117]

35. Build-out requirements can deter market entry because a new entrant generally must take customers from the incumbent cable operator, and thus must focus its efforts in areas where the take-rate will be sufficiently high to make economic sense. Because the second provider realistically cannot count on acquiring a share of the market similar to the incumbent's share, the second entrant cannot justify a large initial deployment.[118] Rather, a new entrant must begin offering service within a smaller area to determine whether it can reasonably ensure a return on its investment before expanding.[119] For example Verizon has expressed significant concerns about deploying service in areas heavily populated with MDUs already under exclusive contract with another MVPD.[120] Due to the risk associated with entering the video market. forcing new entrants to agree up front to build out an entire franchise area too quickly may be tantamount to forcing them out of – or precluding their entry into – the business.[121]

36. In many cases, build-out requirements also adversely affect consumer welfare. DOJ noted that imposing unecononiical build-out requirements results in less efficient competition and the potential for higher prices.[122] Non-profit research organizations the Mercatus Center and the Phoenix Center argue that build-out requirements reduce consumer welfare.[123] Each conclude that build-out

[115] *See, e.g.*, GMTC Comments ar 15; Philadelphia Reply at 2; FTTH Council at 33-34; US Telecom at 30-31; TCCFUI Comments at 11, IS.

[116] BSPA Cornments at 5-6; BellSouth Comments at 44; Veriron Comments at 33-34 (noting that some LFAs are requesting indemnification from competitive applicants). For example, Insight Communications filed suit against the City of Louisville and Knology. Although the LFA and Knology ultimately won, the delay resulted in Knology declining to enter that market. BSPA Comments at 5-6.

[117] *See* AT&T Comments at 51

[118] Qwest Comments at X

[119] FTTH Council Comments at 33-14

[120] Verizon Reply at 70-71

[121] NTCA Comments at 7. *See also* DOJ *Ex Parte* at 12-13, 15; FTTH Council Comments at 29 (competitive entrants lace a riskier investment than incumbents faced when they entered; moreover, incumbent firms have market power in the video market, their customers have little choice, and their costs can be spread over **a** large base, whereas new entrants do not have this same advantage). Although it **is** sometimes possible to renegotiate a build-out requirement if the new entrant cannot meet it. in many cases the LFA imposes substantial penalties for failure to meet a build-out requirement. *See* Anne Arundel County *er al.* Comments at 4, FTTH Council Comments at 34 (citing Crande Communications franchise agreement establishing penalty of $2,000 per day); Letter from Melissa E. Ncwman. Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch. Secretary, Federal Communications Commission, (Apr. 26. 2006), Attachment ai 7 ("Qwest *Ex Pur-re"*).

[122] *Id.* at 13.

[123] Mercatus Center Comments at 39-41; *Phoenix Center Build-Out Paper* **at** 1; Letter from Stephen Pociask, President, American Consumer Institute. to Marlene Dortch, Secretary, Federal Communications Commission (March 3, 2006).

requirements imposed on competitive cable entrants only benefit an incumbent cable operator.[124] The Mercatus Center, citing data from the FCC and GAO indicating that customers with a choice of cable providers enjoy lower rates, argues that, to the extent that build-out requirements deter entry, they result in fewer customers having a choice of providers and a resulting reduction in rates.[125] The Phoenix Center study contends that build-out requirements deter entry and conflict with federal, state, and local government goals of rapid broadband deployment.[126] Another research organization, the American Consumer Institute (ACI), concluded that build-out requirements are inefficient: if a cable competitor initially serves only one neighborhood in a community, and a few consumers in this neighborhood benefit from the competition, total welfare in the community improves because no consumer was made worse and some consumers (those who can subscribe to the competitive service) were made better.[127] In comparison, requirements that deter competitive entry may make some consumers (those who would have been able to subscribe to the competitive service) worse off.[128] In many instances, placing build-out conditions on competitive entrants harms consumers and competition because it increases the cost of cable service.[129] Qwest commented that, in those communities it has not entered due to build-out requirements. consumers have been deprived of the likely benefit of lower prices as the result of competition from a second cable provider.[130] This claim is supported by the Commission's 2005 annual cable price survey, in which the Commission observed that average monthly cable rates varied markedly depending on the presence – and type – of MVPD competition in the local market. The greatest difference occurred where there was wireline overbuild competition, where average monthly cable rates were 20.6 percent lower than the average for markets deemed noncompetitive.[131]

37. For these reasons, we disagree with LFAs and incumbent cable operators who argue that unlimited local flexibility to impose build-out requirements, including universal build-out of a franchise area. is essential to promote competition in the delivery of video programming and ensure a choice in

---

[124] *See id*

[125] Mercatus Center Comments at 41. The Mercatus Center bases this assertion on the evidence that cable rate regulation does not affect cable rates significantly, which suggests that cable providers are not subsidizing less-profitable areas with the returns from more-profitable areas. *Id.*

[126] *Phoenix Center Build-Out Paper* at 1

[127] ACI Comments at 7

[128] AT&T Comments at 48 (citing Thomas Hazlett & George Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the "Level Playing Field" in Cable TV Franchising Statutes*, 3 BUSINESS AND POLITICS issue 1, at 25-26 (2001)).

[129] AT&T Comments at 48 (citing Thomas Hazlett & George Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the "Level Playing Field" in Cable TV Franchising Statutes*, 3 BUSINESS AND POLITICS issue 1, at 25-26 (2001)).

[130] Qwest Comments at 10

[131] *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket. No. 92-266, FCC 06-179, para, 12 (rel. Dec. 27. 2006) ("2005 Cable Price Survey"). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2772-73 (2005) ("*2005 Video Competition Report*").

providers for every household.'[132] In many cases, build-out requirements may have precisely the opposite effects – they deter competition and deny consumers a choice.

38. Although incumbent LECs already have telecommunications facilities deployed over large areas, build-out requirements may nonetheless be a formidable barrier to entry for them for two reasons. First, incumbent LECs must upgrade their existing plant to enable the provision of video service, which often costs billions of dollars. Second, as the Commission stated in the *Local Franchising NPRM,* the boundaries of the areas served by facilities-based providers of telephone and/or broadband services frequently do not coincide with the boundaries of the areas under the jurisdiction of the relevant LFAs.[133] In some cases, a potential new entrant's service area comprises only a portion of the area under the LFA's jurisdiction.[134] When LECs are required to build out where they have no existing plant, the business case for market entry is significantly weakened because their deployment costs are substantially increased.[135] In other cases, a potential new entrant's facilities may already cover most or all of the franchise area, but certain economic realities prevent or deter the provider from upgrading certain "wire center service areas" within its overall service area."[136] For example, some wire center service areas may encompass a disproportionate level of business locations or multi-dwelling units ("MDUs") with MVPD exclusive contracts.[137] New entrants argue that the imposition of build-out requirements in either circumstance creates a disincentive for them to enter the marketplace.[138]

---

[132] State of Hawaii Reply Comments at 4-5; Ada Township, *et al* Comments at 8-9; Manatee County, Fla. Comments at 19; Burnsville/Eagan Reply Comments at 19-20; New Jersey Board of Public Utilities Comments at 11-12.

[133] *Local Franchising NPRM.* 20 FCC Rcd at para. 618595.

[134] ***See*** NTCA Comments at 15; South Slope Comments at 8-9 (mandatory build-out of entire franchise areas unreasonably impedes competitive entry where entrants' proposed service area is not located entirely within an LFA-defined local franchise area).

[135] ***See, e.g.***, FTTH Council Comments **at *33-34;*** South Slope Comments at 8-9; NTCA Comments at 15; BellSouth Reply at 25. BellSouth has a franchise to serve unincorporated Cherokee County, Ga.. but the geographic area of this franchise is much larger than the boundaries of BellSouth's wire center. ***Id.*** BellSouth faces a similar issue in Orange County. Fla. *Id.* ***See*** *also* Linda Haugsted, ***Franchise War in Texas,*** MULTICHANNEL NEWS, May ***2,*** 2005 (noting that, although Verizon had negotiated successfully a cable franchise with the City of Keller, Texas, "it will not build out all of Keller: It only has telephone plant in 80% of the community. SBC serves the rest of the locality:'). NTCA states that theoretically the incumbent LEC could extend its facilities, but to do so within another provider's incumbent LEC territory would require an incumbent LEC to make a financially significant business decision. solely for purposes of providing video programming. *See* NTCA Comments at 15.

[136] *See* Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC. MB Docket No. 05-311 at 3 (tiled May 3, 2006). In this ***Order*** we use "wire center service area" to mean the geographic area served by a wire center as defined in Part 51 of the Commission's rules, except wire centers that have no line-side functionality, such as switching units that exclusively interconnect trunks. See 47 C.F.R. § **51.5.** ***See*** *also Unbundled* ***Access*** *to Network* ***Elements: Review*** *of* ***the Section*** *251* ***Unbundling*** *Obligations* of ***Incumbent*** *Local* ***Exchange Carriers.*** 20 FCC Rcd 2533, 2586 (2005), para. 87 n.251 ***("Triennial*** *Review Remand* ***Order'')*** ("By 'wire center.' we mean any incumbent LEC switching office that terminates and aggregates loop facilities"). The Commission's rules define "wire center" to mean "the location of an incumbent LEC local switching facility containing one or more central offices as defined in Part 36 [of the Commission's rules]. The wire center houndaries define the area in which all customers served by a given wire center are located." 47 C.F.R. § 51.5. The term "wire center" is often used interchangeably with the term "central office." Technically, the wire center is the location where a LEC terminates subscriber local loops, along with the facilities necessary to maintain them.

[137] New' entrants also point out that some wire center service areas are low in population density (measured by homes per cable plant mile). The record suggests, however, that LFAs generally have not required franchisees to

(continued...)

39. Incumbent cable operators assert that new entrants' claims are exaggerated, and that, in most cases, LEC facilities are coterminous with municipal boundaries.[139] The evidence submitted by new entrants, houcver. convincingly shows that inconsistencies between the geographic boundaries of municipalities and the netuork footprints of telephone companies are commonplace.[140] The cable industry has adduced no contrary evidence. The fact that few LFAs argued that non-coterminous boundaries are a problem[141] is not sufficient to contradict the incumbent LECs' evidence.[142]

40. Based on the record as a whole, we find that build-out requirements imposed by LFAs can constitute unreasonable barriers to entry for competitive applicants. Indeed, the record indicates that because potential competitive entrants to the cable market may not be able to economically justify build-out of an entire local franchising area immediately,[143] these requirements can have the effect of granting *de facto* exclusive franchises, in direct contravention of Section 621(a)(1)'s prohibition of exclusive cable franchises.[144]

41. Besides thwarting potential new entrants' deployment of video services and depriving consumers of reduced prices and increased choice,[145] build-out mandates imposed by LFAs also may directly contravene the goals of Section 706 of the Telecommunications Act of 1996, which requires the Commission to "remov[e] barriers to infrastructure investment" to encourage the deployment of broadband services "on a reasonable and timely basis."[146] We agree with AT&T that Section 706, in

(Continued from previous page)
provide service in low-density areas. ***See**, e.g.*, Madison, WI Comments at 4 (limiting build-out to areas with 40 dwelling units per cable mile); Renton, WA Comments at 3 (limiting build-out to 35 dwelling units per mile); West Palm Beach. Fla. Comments at 11 (limiting build-out to areas with 20 homes per mile). Nevertheless, density is likely to he of greater concern to a new entrant than to an incumbent cable operator, because the new entrant has to lure customers from the incumbent cable operator. and therefore cannot count on serving as many of the customers in a cable plant mile.

138 BSPA Comments at 5 (when the footprint of an existing system does not match the territory of an LFA, build-out requirements restrict the growth of competition that could he created by incremental expansion of existing networks into adjacent territories because the operator must have the financial means to build out the entire adjacent franchise area before commencing any build-out); NTCA Comments at 15 (requiring small, rural incumbent LECs to deploy service beyond their existing telephone service areas would prohibit some carriers from offering video services to any community, thereby preventing competition), ***See** also* DOJ ***Ex Pane*** at 12-13, 15.

139 ***See*** Cablevision Reply at 16-17; Charter Reply at 8.

140 ***See*** BSPA Comments at *5;* South Slope Comments at 8-9; NTCA Comments at 15

141 Comcast Reply at 21 (citing comments of NATOA and Torrance, Cal.).

142 *Compare* Tele Atlas Wire Center Premium v10.1 (April 2006) Maps for Bergen County, NJ and Los Angeles. Ca. and surrounding areas *with* The BRIDGE Data Group CableBounds Maps for Bergen County, NJ and Los Angeles, Ca. and surrounding areas (filed by the Media Bureau). *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518618170, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518618171

143 See FTTH Council Comments at 32; NTCA Comments at 7: Qwest Comments at *2,* 8; Verizon Comments at 39-40.

144 47 U.S.C. § 544(a)(1)

145 ***See*** *Annual **Assessment** of **the** Status of Competition in **rhe** Market for the Delivery of Video Programming,* MB Docket No. 05-255, Twelfth Annual Report. FCC 06-11, at ¶ 41 (rel. Mar. 3, 2006) (noting that overbuild competition, when present, often leads to lower cable rates and higher quality service).

146 Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt

conjunction with Section 621(a)(1), requires us to prevent LFAs from adversely affecting the deployment of broadband services through cable regulation.'"'

42. We do not find perruasivr incumbent cable operators' claims that build-out should necessarily he required lor new entrants into the video market because of certain obligations faced by cable operators in their deployment of voice services. To the extent cable operators believe they face undue regulatory obstacles to providing voice services, they should make that point in other proceedings, not here. In any event, commenters generally agree that the record indicates that the investment that a competitive cable provider must make to deploy video in a particular geographic area far outweighs the cost of the additional facilities that a cable operator must install to deploy voice service.'"

43. ***LFA Demands Unrelated lo the Provision of Video Services.*** Many commenters recounted franchise negotiation experiences in which LFAs made unreasonable demands unrelated to the provision of video services. Verizon, for example, described several communities that made unreasonable requests, such as the purchase of street lights, wiring for all houses of worship, the installation of cell phone towers, cell phone subsidies for town employees, library parking at Verizon's facilities. connection of 220 traffic signals with fiber optics, and provision of free wireless broadband service in an area in which Verizon's subsidiary does not offer such service.[149] In Maryland, some localities conditioned a franchise upon Verizon's agreement to make its data services subject to local customer service regulation.''" AT&T provided examples of impediments that Ameritech New Media faced when it entered the market, including a request for a new recreation center and pool.[151] FTTH

[147] AT&T Comments at 45. *See also infra* pare. 63.

[148] *See* NTCA Comments at 7; Verizon Reply at 54-55; American Consumer Institute Comments at 7; *Review of rhe Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16978, 17142-17143 (2003) *("Triennial Review Order"): See also* High Tech Broadband Coalition Comments at 4-5 (fiber-to-the-home deployment increased 5300 percent since the *Triennial Review Order,* due in large part to the elimination of barriers to entry in that Order).

[149] Verizon Comments at 57 & Attachment A at 16-17. The Wall *Street Journal* reported "[Tampa, Florida] City officials presented [Verizon] with a $13 million wish list, including money for an emergency communications network, digital editing equipment and video cameras to film a math-tutoring program for kids." Another community presented Verizon with "requests for seed money for wildflowers and a video hookup for Christmas celebrations." Dionne Searcey, *As Verizon Enters Cable Business, it Faces Local Static,* WALL ST. J., Oct. 28, 2005, at **AI.** *Bur see* Veriron Comments at 65, filed February 13, 2006 (stating that "one franchising authority in Florida demanded that Verizon meet the incumbent cable operator's cumulative payments for PEG, which would exceed $6 million over 15 years of Vcrizon's proposed franchise term. When Verizon rejected this demand, the LFA doubled its request. asking fur a fee in excess of $13 million that it said would be used for both PEG support and the construction of **a** redundant institutional network."); Verizon Revised Comments, filed March 6, 2006 at 65 (amending the second sentence **of** their comments above, in response to **a** request from the City of Tampa, to stale that "[w]hen Verizon rejected this demand and asked for an explanation, the LFA provided **a** summary 'needs assessment' in excess of $13 million for both PEG support."); Tampa Reply at 3-4 (noting that Verizon's errata "clarified that the City of Tampa has not demanded Verizon provide $13.5 million dollars **as** a condition of granting a cable television franchise." and calling the *Wall Street Journal* article assertions an "urban legend); John Dunhar, *FCC's Cable TV Ruling Criticized,* ASSOCIATED PRESS, Jan. 29, 2007 (stating that "[The Tampa City Attorney] said Tampa gave Verizon a $13 million 'needs assessment' that was required by law in order to obtain contributions for equipment for public access and government channels" and also quoting the City Attorney saying that "it is possible the 'needs assessment' included video cameras to film shows such as the math class, hut that there was never '**a** specific quid pro quo.' Nor was anything like that mentioned in the franchise agreement.").

[150] Verizon Comments at 75.

[151] AT&T Comments at 24.

Council highlighted Grande Communications' experience in San Antonio, which required that Grande Communications make an up-front, $1 million franchise fee payment and fund a $50,000 scholarship with additional annual contributions of $7,200.[152] The record demonstrates that LFA demands unrelated to cable service typically are not counted toward the statutory 5 percent cap on franchise fees, but rather imposed on franchisees in addition to assessed franchise fees.[153] Based on this record evidence, we are convinced that LFA requests for unreasonable concessions arc not isolated, and that these requests impose undue burdens upon potential cable providers.

44. ***Assessment of Franchise Fees.*** The record establishes that unreasonable demands over franchise fee issues also contribute to delay in franchise negotiations at the local level and hinder competitive entry.[154] Fee issues include not only which franchise-related costs imposed on providers should he included within the 5 percent statutory franchise fee cap established in Section 622(b),[155] but also the proper calculation of franchise fees (*i.e.*, the revenue base from which the 5 percent is calculated). In Virginia. municipalities have requested large "acceptance fees" upon grant of a franchise, in addition to franchise lees.[156] Other LFAs have requested consultant and attorneys' fees.[157] Several Pennsylvania localities have requested franchise fees based on cable and non-cable revenues.[158] Some commenters assert that an obligation to provide anything of value, including PEG costs, should apply toward the franchise fee obligation.[159]

45. The parties indicate that the lack of clarity with respect to assessment of franchise fees impedes deployment of new video programming facilities and services for three reasons. First, some LFAs make unreasonable demands regarding franchise fees as a condition of awarding a competitive franchise. Second, new entrants cannot reasonably determine the costs of entry in any particular community. Accordingly, they may delay or refrain from entering a market because the cost of entry is unclear and market viability cannot be projected.[160] Third, a new entrant must negotiate these terms prior to obtaining a franchise, which can take a considerable amount of time. Thus, unreasonable demands by some LFAs effectively creates an unreasonable barrier to entry.

46. ***PEG and 1-Net Requirements.*** Negotiations over PEG and I-Nets also contribute to delays in the franchising process. In response to the *Local Franchising NPRM*, we received numerous comments asking for clarification of what requirements LFAs reasonably may impose on franchisees to

---

152 FTTH Council Comments at **38**

153 BSPA Comments at 8. BSPA argues that under the current franchising process. LFAs are able to bargain for capital payments to use on infrastructure needs when LFAs should use **the** capital to benefit consumers. BSPA claims that **LFAs** use the capital to build and maintain I-Nets. city broadcasting facilities, and traffic light control systems. *Id.*

154 *See, e.g.*, AT&T Coniments at 64-67: BellSouth Comments **at** 38-40; Cavalier Telephone Comments at *7*; FTTH Council Comments at 38-40. ***But* see** NATOA Reply at 27-35.

155 47 U.S.C. § 542(b)

156 Verizon Comments at 59.

157 *Id.* at 59-60.

158 *Id.* at 63.

159 AT&T Comments at 65-67; BellSouth Comments at 39

160 AT&T Reply at 31-32.

support PEG and I-Nets.[161] We also received comments suggesting that some LFAs are making unreasonable demands regarding PEG and I-Net support as a condition of awarding competitive franchises.[162] LFAs have demanded funding for PEG programming and facilities that exceeds their needs, and will not provide an accounting of where the money goes.[163] For example, one municipality in Florida requested $6 million for PEG facilities, and a Massachusetts community requested 10 PEG channels, when the incumbent cable operator only provides two.[164] Several commenters argued that it is unreasonable for an LFA to request a number of PEG channels from a new entrant that is greater than the number of channels that the community is using at the time the new entrant submits its franchise application.[165] The record indicates that LFAs also have made what commenters view as unreasonable institutional network requests, such as free cell phones for employees, fiber optic service for traffic signals, and redundant fiber networks for public buildings.[166]

47. ***Level-Playing-Field Provisions.*** The record demonstrates that, in considering franchise applications, some LFAs are constrained by so-called "level-playing-field" provisions in local laws or incumbent cable operator franchise agreements.[167] Such provisions typically impose upon new entrants terms and conditions that are neither "more favorable" nor "less burdensome" than those to which existing franchisees are subject.[168] Some LFAs impose level-playing-field requirements on new entrants even without a statutory, regulatory, or contractual obligation to do so.[169] Minnesota's process allows incumbent cable operators to be active in a competitor's negotiation, and incumbent cable operators have challenged franchise grants when those incumbent cable operators believed that the LFA did not follow correct procedure.[170] According to BellSouth, the length of time for approval of its franchises was tied directly to level-playing-field constraints; absent such demands (in Georgia, for example), the company's applications were granted quickly.[171] NATOA contends, however, that although level-playing-field

---

[161] *See, e.g.*, AT&T Comments at 67-70; BellSouth Comments at 39; Consumers for Cable Choice Comments at 8; FTTH Council Comments at 36-37, 66-67; Verizon Comments at 65-75. *But see* NATOA Reply at 30-42.

[162] FTTH Council Comments at 36; Verizon Comments at 65-66.

[163] Verizon Comments at 65.

[164] *Id.* at 65-66.

[165] Consumers for Cable Choice Comments at 8; Verizon Comments at 71.

[166] Verizon Comments at 73.

[167] *See, e.g.*, Orange County, Fla. Comments at 3; Northwest Suburbs Cable Communications Commission Comments at 3; Winston-Salem, N.C. Comments at 5; Albuquerque, N.M. Comments at 3; Tulsa, Okla. Comments at 2-4; Enumclaw, Wash. Comments at 2; Madison, Wis. Comments at 5-6.

[168] *See Local Franchising NPRM*, 20 FCC Rcd at 18588. At least 10 states impose level-playing-field requirements upon LFAs, and those laws vary significantly in the subject matters they encompass. For example, compare Minnesota's requirement that a competitive entrant face similar build-out, franchise fee, and PEG requirements to Illinois's requirement that the competitive franchise be no more favorable with respect to the territorial extent of the franchise, system design, technical performance standards, construction schedules, bonds, standards for construction and installation of facilities, service to subscribers, PEG channels and programming, production assistance, liability and indemnification and franchise fees. MINN. STAT. ANN. § 238.08 (West 2006), 55 ILL. COMP. STAT. ANN. 5/5-1095(e)(4) (West 2006), *see also* ALA. CODE § 11-27-2 (2005), CONN. GEN. STAT. § 16-331(g) (2006), FLA. STAT. § 166.046(3) (2006), N.H. REV. STAT. ANN. § 53-C:3-b (2005), OKLA. STAT. ANN. tit. 11, § 22-107.1(B) (West 2006). S.D. CODIFIED LAWS § 9-35-27 (2005), TENN. CODE. ANN. § 7-59-203 (2005).

[169] *See* GMTC *et al.* Comments at 15; Pasadena, Ca. Comments at 10-11; Philadelphia, Pa. Comments at 7. *See also* AT&T Reply at 14.

[170] LMC Comments at 12-15.

provisions sometimes can complicate the franchising process, they do not present unreasonable barriers to entry.[172] NATOA and LFAs argue that level-playing-field provisions serve important policy goals, such as ensuring a competitive environment and providing for an equitable distribution of services and obligations among all operators.[173]

48. The record demonstrates that local level-playing-field mandates can impose unreasonable and unnecessary requirements on competitive applicants.[174] As noted above, level-playing-field provisions enable incumbent cable operators to delay or prevent new entry by threatening to challenge any franchise that an LFA grants."' Comcast asserts that MSOs are well within their rights to insist that their legal and contractual rights are honored in the grant of a subsequent franchise.[176] The record demonstrates, howevei-, that local level-playing-field requirements may require LFAs to impose obligations on new entrants that directly contravene Section 621(a)(1)'s prohibition on unreasonable refusals to award a competitive franchise.[177] In most cases. incumbent cable operators entered into their franchise agreements in exchange for a monopoly over the provision of cable service.'" Build-out requirements and other terms and conditions that may have been sensible under those circumstances can he unreasonable when applied to competitive entrants. NATOA's argument that level-playing-field requirements always serve to ensure a competitive environment and provide for an equitable distribution of services and obligations ignores that incumbent and competitive operators are not on the same footing. LFAs do not afford competitive providers the monopoly power and privileges that incumbents received when they agreed to their franchises, something that investors recognize.[179]

49. Moreover, competitive operators should not bear the consequences of an incumbent cable operator's choice to agree to any unreasonable franchise terms that an LFA may demand. And while the record is inixed as to whether level-playing-field mandates "assure that cable systems are responsive to the needs and interests of the local community,"[180] the more compelling evidence indicates that they do not because they prevent competition. Local level-playing-field provisions impose costs and risks

(Continued from previous page)
[171] BellSouth Reply at 7.

[172] NATOA Reply at 43.

[173] *See, e.g.*, NATOA Reply at 44: Burnsville/Eagan Comments at 44: City of Philadelphia Reply at 2

[174] ***See.*** *e.g.*, South Slope Comments at 7-8 (build-out); Verizon Comments at 60-61, 71 (PEG requirements); AT&T Comments at 67 (redundant facilities). **See** *also* FTTH Council Comments at 29-30 (quoting Hazlett & Ford study concluding that the result of level-playing-field laws "is that incumbents and [LFAs] can force entrants to incur sunk costs considerably in excess of what free iiiarket conditions would imply"). We note that, as described below, we do not address – and therefore do not preempt – state laws governing the franchising process including state level-playing-field mandates.

[175] ***.See*** *supra* para. 34; *see* ***also DOJ*** *Ex Parte* at 15-16.

[176] Comcast Reply at 17-18 (citing Com:ast's involvement in Verizon's Howard County, Maryland, franchise approval process).

[177] Mercatus Center at 39-40; *Phoenix Center* ***Compeririori Paper*** at *7*

[178] *Id.*

[179] ***See*** BSPA Comments 4; USTelecom Comments at 5 1-53; Mercatus Comments at 39-40.

[180] 47 U.S.C. § 521(2); *Id.*

sufficient to undermine the business plan for profitable entry in a given community, thereby undercutting the possibility of competition.'"

50. ***Benefits of Cable Competition.*** We further agree with new entrants that reform of the operation of the franchise process is necessary and appropriate to achieve increased video competition and broadband deployment.[182] The record demonstrates that new cable competition reduces rates far more than competition from DBS. Specifically, the presence of a second cable operator in a market results in rates approximately 15 percent lower than in areas without competition – about $5 per month.[183] The magnitude of the rate decrease, caused by wireline cable competition is corroborated by the rates charged in Keller. Texas, where the price for Verizon's "Everything" package is 13 percent below that of the incumbent cable operator, and in Pinellas County, Florida, where Knology is the overbuilder and the incumbent cable operator's rates are $10-15 lower than in neighboring areas where it faces no competition.[184]

51. We also conclude that broadband deployment and video entry are "inextricably linked"[185] arid that, because the current operation of the franchising process often presents an unreasonable barrier to entry for the provision of video services, it necessarily hampers deployment of broadband services.[186] The record demonstrates that broadband deployment is not profitable without the ability to compete with the bundled services that cable companies provide.[187] As the Phoenix Center explains. "the more potential revenues that the network can generate in a household, the more likely it is the network will be

---

[181] Mercatus Comments at 46.

[182] Verizon Reply at 5-8. *See also* DOJ *Ex Parte* at 1, **3.**

[183] FTTH Council Comments at 13. *See also* U.S. General Accountability Office, *Subscriber Rates and Competition in the Cable Television Industry*. GAO-04-262T (Mar. 2004) ("[S]ubscribers in areas with **a** wire-based competitor had monthly cable rates about *$5* lower. on average, than subscribers in similar areas without a wire-based competitor. Our interviews with cahle operators also revealed that these companies generally lower rates and/or improve customer service where **a** wire-based competitor **is** present."); U.S. General Accounting Office, GAO-04-8, *Issues Related to Competition arid Subscriber Rares in the Cable Television industry,* Report to the Chairman, Committee on Commerce. Science and Transportation. U.S. Senate (2003) ("2003 **GAO** *Report")* at 3 (noting that cable rates are about 15 percent lower in markets where wireline competition is present), and at 10 (estimating that with an average monthly cable rate of approximately $34 that year, subscribers in areas with **a** wire-based competitor had monthly cable rates about $5 lower, on average, than subscribers in areas without such a competitor); U.S. General Accounting Office. GAO-03-130, *Issues in Providing Cable and Satellite Television Services,* Report to the Subcommittee on Antitrust. Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate (2002) ("2002 *GAO Report*") at *9* (noting that in franchise areas with **a** second cable provider, cable prices are approximately 17 percent lower than **in** comparable areas without **a** second cable provider). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* MB Docket No. 05-255. Twelfth Annual Report, FCC 06-11, at pard. 41 (rel. Mar. 3, 2006) and 2005 Cable Price Survey at paras. 2. I4 (noting that cahle prices are 17 percent lower and decrease substantially when wireline cahle competition is present).

[184] FTTH Council Comments at 15-16, including chart and declaration.

[185] AT&T Comments **at** 12. *See also* BSPA Comments at 7; Freedomworks Comments at 15; Mercatus Center Comments at 34-35.

[186] 'Technology and Democracy Project Comments at 4.

[187] AT&T Comments at 12. The Government Accountability Office reached this same conclusion in its review of the video service market. *See Issues in Providing Cable und Satellite Television Services.* GAO 03- I30 at 2 (2002).