built to that household."[188] DOJ's Comments underscore that additional video competition will likely speed deployment of advanced broadband services to consumers.[189] Thus, although LFAs only oversee the provirion of wireline-based video services, their regulatory actions can directly affect the provision of voice and data services, not just cable.[190] We find reasonable AT&T's assertion that carriers will not invest billions of dollars in network upgrades unless they are confident that LFAs will grant permission to offer video services quickly and without unreasonable difficulty.'"

52. In sum. the current operation of the franchising process deters entry and thereby denies consumers choices.'"' Delays in the franchising process also hamper accelerated broadband deployment and investment in broadband facilities in direct contravention of the goals of Section 706,[193] the President's competitive broadband objectives,'" and our established broadband goals.[195] In addition, the economic effects of franchising delays can trickle down to manufacturing companies, which in some cases have lost businrrs because potential new entrants would not purchase equipment without certainties that they could deploy their services.[196] We discuss below our authority to address th se problems.

B. The Commission Has Authority to Adopt Rules to Implement Section 621(a)(1)

53. In the *Local Franchising NPRM*, the Commission tentatively concluded that it has the authority to adopt rules implementing Title VI of the Act,[197] including Section 621(a)(1).[198] The Commission sought comment on whether it has the authority to adopt rules or whether it is limited to providing guidance.[199] Based on the record and governing legal principles, we affirm this tentative conclusion and find that the Commission has the authority to adopt rules to Implement Title VI and, more specifically, Section 621(a)(1).

54. Congress delegated to the Commission the task of administering the Communications Act. As the Supreme Court has explained, the Commission serves "as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by

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[188] 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 Center Policy Paper Number 23: The Impact of Video Service Regulation on the Construction of Broadband Networks to Low-Income Ifooseholds.* pg 23 (March 13, 2006)("*Phoenix Center Redlining Paper*").

[189] DOJ *Ex Parte* at 3-4

[190] FTTH Council Comments at 4

[191] AT&T Comments at 15

DOJ *Ex Parte* at 7-X

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

[194] *See* The White House, *A New Generation of American Innovation*, 11-12 (April 2004), *available at* http://www.whitehouse.gov/infocus/technology/economic_policy200404/innovation.pdf.

[195] *See* Federal Communications Commission, *Strategic Plan 2006-2011* at 3 (2005).

[196] AT&T Reply at Y: Alcatcl Comments at 1: Letter from Danielle Jafari, Director and Legal Counsel of Government Affairs, Telecommunications Industry Association, to Marlene Dortch, Secretary, Federal communications Commission (March Y. 2006).

[197] *Local Franchising NPRM*. *20* FCC Rcd a~18589.

[198] 47 U.S.C. § 541(a)(1).

[199] *Local Franchising NPRM, 20* FCC Rcd at 18589.

telephone, telegraph, cable. or radio.'''''''' To that end, "[t]he Act grants the Commission broad responsibility to forge a rapid and efficient communications system, and broad authority to implement that responsibility."[201] Section 201(b) authorizes the Comrnission to "prescribe such tules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[202] "[T]he grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.'"[203] This grant of authority therefore necessarily includes Title VI of the Communications Act in general. and Section 621(a)(1) in particular. Other provisions in the Act reinforce the Commission's general rulemaking authority. Section 303(r), for example, states that "the Commission from time to rime, as public convenience, interest, or necessity requires shall ... make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act...."[204] Section 4(i) states that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.'''''''

55. Section 2 of the Communications Act grants the Commission explicit jurisdiction over "cable services."[206] Moreover, as we explained in the *Local Franchising NPRM*, Congress specifically charged the Commission with the administration of the Cable Act, including Section 621.[207] In addition, federal courts have consistently upheld the Commission's authority in this area.[208]

56. Although several commenters disagreed with our tentative conclusion, none has persuaded us that the Commission lacks the authority to adopt rules to implement Section 621(a)(1). Incumbent cable operators and franchise authorities argue that the judicial review provisions in Sections 621(a)(1) and 635[209] indicate that Congress gave the courts exclusive jurisdiction to interpret and enforce

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[200] *United States v. Southwestern Cable* Co., 392 U.S. 157. 167-68 (1968) (quotation omitted).

[201] *United Telegraph* **Workers.** *AFL-CIO v. FCC*, 436 F.2d 920, 923 (D.C. Cir. 1970) (citations and quotations omitted).

[202] 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.").

[203] *AT&T Corp. v. Iowa Utilities Board*, *525* U.S. 366,378 (1999).

[204] *See also* **47** U.S.C. § 151 (the Commission "shall execute and enforce the provisions of this Act").

[205] 17 U.S.C.§ 154(i).

[206] 47 U.S.C. § 152 ("The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI.").

[207] *Local Franchising NPRM*, 20 FCC Rcd at 18589.

[208] *See City of Chicago v. FCC*. 199 F.3d 424 (7th Cir. 1999) (finding that the FCC is charged by Congress with the administration of the Cable Act, including Section 621). **See** *also City of New* ***York*** *v. FCC*, 486 U.S. 57, 70 n.6 (1988) (explaining that Section 303 gives the FCC rulemaking power with respect to the Cable Act); *Nat'l Cable Television Ass'n v. FCC*, 33 F.3d 66, 70 (D.C. Cir. 1994) (upholding Commission finding that certain services are not subject to the franchise requirement in Section 621(b)(1)); *United Video v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (denying petitions to review the Commission's syndicated exclusivity rules); *ACLU v.* FCC, 823 F.2d 1554 (D.C. Cir. 1987) (upholding the Commission's interpretive rules regarding Section 621(a)(3)).

[209] 47 U.S.C. § 541(a)(1) ("[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 for failure to comply with this subsection"). Section *635* seis forth the specific procedures for such judicial proceedings. 47 U.S.C.§ 555.

Section 621(a)(1), including authority to decide what constitutes an unreasonable refusal to award a competitive cable franchise.[210] We find, however, that this argument reads far too much into the judicial review provisions. The mere existence of a judicial review provision in the Communications Act docs nor, by itself, strip the Commission of its otherwise undeniable rulemaking authority."' As a general matter, the fact that Congress provides a mechanism for judicial review to remedy a violation of a statutory provision d o o not deprive an agency ot the authority to issue rules interpreting that statutory provision. Here, nothing in the statutory language or the legislative history suggests that by providing a judicial remedy, Congress intended to divest the Commission of the authority to adopt and enforce rules 'implementing Section 621.[212] In light of the Commission's broad rulemaking authority under Section 201 and other provision5 in the Act. the absence of a specific grant of rulemaking authority in Section 621 is "not peculiar."[213] Other provisions in the Act demonstrate that when Congress intended to grant exclusive ,jurisdiction, it said so in the legislation."' Here, however, neither Section 621(a)(1) nor Section 635 includes an exclusivity provision. and we decline to read one into either provision.

57. In addition, we note that the judicial review provisions at issue here on their face apply only to a final decision by the franchising authority.[215] They do not provide for review of unreasonable refusals to award an additional franchise hy withholding a final decision or insisting on unreasonable terms that an applicant properly refuses to accept. Nor do the judicial review provisions say anything about the broader range of practice5 governed by Section 621.[216]

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[210] *See* NCTA Reply, at 11-13 (given the courts have concurrent jurisdiction to review many provisions of Title **VI,** Section 635(a) only has meaning **if** it is read to grant exclusive jurisdiction to the courts); Comcast Comments at 27-28 (Congress provided no role for the Commission in the franchising process); Comcast Reply at 27-28 (621(a)(1)'s "unreasonably refuse" language and court review are inextricably linked and thus enforcement authority over the franchising approval process lies with the courts): NATOA Comments at 7-8 (same).

[211] *See* ACLU *v.* Terus. 823 F.2d 1554, 1574 (D.C. Cir 1987) (recognizing that despite a reference to "court action" in Section 622(d), in the ahsence of more explicit guidance from Congress, the Commission has concurrent jurisdiction to take enforcement action with respect to franchise fee disputes).

[212] *See* BellSouth Reply at *35;* USTelecom Reply at 14-16.

[213] *AT&T v. Iowa Utilities Board, 525* U.S. 366, 385 (1999). In *Iowa Utilities* ***Board,*** the Supreme Court reviewed Commission rules implementing provisions of the Telecommunications Act of 1996. **In** particular, states challenged Commission rules implementing Section 252(c)(2), which provides, "a State commission shall ... establish any rates for interconnection, services, or network elements." 47 U.S.C. § 252(c)(2). Although this and other provisions in the 1996 Act entrusted the states with certain **tasks,** the Supreme Court held that "these assignments ... do not logically preclude the Commission's issuance of rules to guide the state-commission judgments." *Iowa Utilities Board*, 525 U.S. at 385. The same reasoning applies to the judicial review provisions in Sections 621(a)(1) and 635.

[214] *See, e.g.*, 47 U.S.C. § 255(f) ("The Commission shall have exclusive jurisdiction with respect to any complaint under this section."). We do not find persuasive commenters' argument that the only way to give Section 635(a) any meaning is to construe it as giving courts exclusive ,jurisdiction with regard to the three Title VI provisions enumerated in Section 635(a), *i.e.*, Sections 621(a)(1), 625, and **626.** *See* NAI'OA Comments at 9. None of the cases cited hy commenters support this proposition. Rather, they suggest that in the absence of an exclusivity provision in the statute, the Commission and courts share .jurisdiction. ***See,*** *e.g.*, NATOA Comments at 9 (citing *ACLU v. FCC,* 823 F.2d 1554, 1573-75 (D.C. Cir. 1987)).

[215] 47 U.S.C. § 541(a)(1) ("An) 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 for failure to comply with this subsection") (emphasis added); 47 U.S.C. §555(a) ("Any cable operator adversely affected hy any *final determination* made hy a franchising authority under section 621(a)(1)" may commence an action in federal district court or State court) (emphasis added).

[216] **See** USTelecom Reply at 14.

58. We also reject the argument by some incumbent cable operators and franchise authorities that Section 621(a)(1) is unambiguous and contains no gaps in the statutory language that would give the Commission authority to regulate the franchising process.'" We strongly disagree. Congress did nor define the term "unreasonably refuse." and it is far from self-explanatory. The United States Court of Appeals for the District of Columbia Circuit has held that the term "unreasonable" is among the "ambiguous statutory terms" in the Communications Act, and that the "court owes substantial deference to the interpretation the Commission accords them."[218] We therefore find that Section 621(a)(1)'s requirement that an LFA "may not unreasonably refuse to award an additional competitive franchise'' creates ambiguity that the Commission has the authority to resolve.[219] The possibility that a court, in reviewing a particular matter, may determine whether an LFA "unreasonably" denied a second franchise does not displace the Commission's authority to adopt rules generally interpreting what constitutes an "unreasonable refusal" under Section 621(a)(1).[220]

59. Some incumbent cable operators and franchise authorities argue that Section 621(a)(1) imposes no general duty of reasonableness on the LFA in connection with procedures for *awarding* a competitive franchise.'" According to these comtnenters, the "unreasonably refuse to award" language in the first sentence in Section 621(a)(1) must be read in conjunction with the second sentence, which relates to the *denial* of a competitive franchise application.'" Based on this, commenters claim that "unreasonably refuse to award' means "unreasonably ***deny"*** and, thus, Section 621(a)(1) is not applicable before a final decision is rendered.[223] We disagree. By concluding that the language "unreasonably refuse to award" means the same thing as "unreasonably deny," commenters violate the long-settled principle of statutory construction that each word in a statutory scheme must be given meaning.[224] We find that the better reading of the phrase "unreasonably refuse to award" is that Congress intended to cover LFA conduct beyond ultimate denials by final decision, such as situations where an LFA has unreasonahly refused to award an additional franchise by withholding **a** final decision or by insisting on unreasonable terms that an applicant refuses to accept."' While the judicial review provisions in Sections

[217] *See* Comcast Reply at 27

[218] *Capital Network System, Inc. v. FCC,* 28 F.3d 201, 204 (D.C. Cir. 1994)("Because 'just,' 'unjust,' 'reasonable.' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them.").

[219] 47 U.S.C. § 541(a)(1) (emphasis added)

[220] *See NCTA v. Brand X Internet Services,* 545 U.S. 967. --, 125 S. Ct. 2688, 2700-02 (2005) (where statute is ambiguous, and implementing agency'sconstruction is reasonable, *Chevron* requires federal court to accept agency's construction of statute, even if agency'sreading differs from prior judicial construction).

[221] *See* NCTA Comments at 28-29; Corncast Reply at 31

[222] *See* NCTA Comments **at** 29; Corncast Reply at 32.

[223] ***See*** NATOA Comments at 30-31; NCTA Comments at 28-29; Burnsville/Eagan Comments at **31-12;** Comcast Reply at 32-33.

[224] See *Bailey v. United States,* 516 U.S. 137, 143-45 (1995) ("We assume that Congress used two terms because it intended each term to have a particular. nonsuperfluous meaning.").

[225] *See, e.g., Tribune Co. v. FCC,* 133 F.3d 61, 66 (D.C. Cir. 1998) (imposing an "intolerable" condition on the grant of a license application may he deemed a *de facto* denial of that license for purposes of the appeal provisions under § 402(b) of the Act. citing ***Mobile*** *Communications Corp. of America v. FCC, 77* F.3d 1399 (D.C. Cir. 1996)). **See** *also* DOJ *Ex Parte* ai 7 (stating that unnccccssary delays, demands Sor goods and services unrelated to the provision of cable services, and imposition of build-out requirements are tantamount to a "refusal" to award an additional competitive franchise).

621(a)(1) and 635 refer to a "final decision" or "final determination,"[226] the Commission's rulemaking authority under Section 621 is not constrained in the same manner. Instead, the Commission has the authority to address what constitutes an unreasonable refusal to award a franchise, and as stated above, a local franchising authority may unreasonably refuse to award a franchise through other routes than issuing a final decision or determination denying a franchise application. For all of these reasons, we conclude that the Commission may exercise its statutory authority to establish federal standards identifying those LFA-imposed terms and conditions that would violate Section 621(a)(1) of the Communications Act.[227]

60. Incumbent cable operators and local franchise authorities also maintain that the legislative history of Section 621(a)(1) demonstrates that Congress reserved to **LFAs** the authority to determine what constitutes "reasonable" grounds for franchise denials, with oversight by the courts, and left no authority under Section 621(a)(1) for the Commission to issue rules or guidelines governing the franchise approval process."" Commenters point to the Conference Committee Report on the 1992 Amendments,[229] which adopted the Senate version of Section 621,[230] rather than the House version, which "contained five examples of circumstances under which it is reasonable for a franchising authority to deny a franchise."[231] We find cornmenters' reliance on the legislative history to be misplaced. While the House may have initially considered adopting a categorical approach for determining what would constitute a "reasonable *denial,"* Congress ultimately decided to forgo that approach and prohibit franchising authorities from unreasonably refusing to *award* an additional competitive franchise.[232] To be sure, commenters are correct to point out that Congress chose not to define in the Act the meaning of the phrase "unreasonably refuse to award." However, commenters' assertion that Congress therefore intended for this gap in the statute to he filled in by only **LFAs** and courts lacks any basis in law or logic. Rather, we believe that it is far more reasonable to assume, consistent with settled principles of administrative law, that Congress intended that the Commission, which is charged by Congress with the administration of Title VI,[233] **to** have the authority to do so. There is nothing in the statute or the

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[226] 17 U.S.C. §§ 541(a), 555. ***See*** *also Puget Sound Energy, Inc. v. U.S.,* 310 F.3d 613, **624-25** (9th Cir. 2002) (for purposes of determining when power administration's rate determination becomes a "final action" under statutory judicial review provision, court will turn for guidance to general doctrine of finality in administrative law, which "is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury").

[227] ***See*** Qwest Reply at 10-11

[228] *See* NCTA Comments at 22-23: Florida Municipalities Comments at 9-10.

[229] H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.). as *reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-1260.

[230] S. REP. No. 102-92, at 185 (1991) (explaining that "[i]t shall not be considered unreasonable for purposes of this provision for local franchising authorities to deny the application of a potential competitor if it is technically infeasible. However. the Committee does not intend technical infeasibility to be the only justification for denying an additional franchise").

[231] H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as* ***reprinted in*** 1992 U.S.C.C.A.N. 1231, 1259-1260 (listing five examples of rcasonahle denials identified in the House amendment to include: (1) technical infeasibility; (2) failure of the applicant to assure that it will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support: (3) failure of the applicant to assure that it will provide service throughout the entire franchise area within a reasonable period of time; (4) the award would interfere with the ability of the franchising authority tn deny renewal of a franchise; and ***(5)*** failure to demonstrate financial, technical, or legal qualifications to provide cable service."); H.R. REP. No. 102-628, at 90 (1992). ***See*** NCTA Comments at 22; Florida Municipalities Comments at 9-10.

[232] H.R. REP. No. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinred in* 1992 U.S.C.C.A.N. 1231, 1259-1260.

[233] *See City of Chicago v. FCC,* 199 F.3d at 428. *See also AT&T Corp. I. Iowa* ***Utilities*** *Board,* 525 U.S. at 377-380.

legislative history to suggest that Congress intended to displace the Commission's explicit authority to interpret and enforce provisions in Title VI, including Section 621(a)(1).

61. The pro-competitive rules and guidance we adopt in this *Order* are consistent with Congressional intent. Section 601 states that Title VI is designed to "promote competition in cable communications."[234] In a report to Congress prepared pursuant to the 1984 Cable Act, the Commission concluded 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."[235] In response, Congress revised Section 621(a)(1) to prohibit a franchising authority from unreasonably refusing to award an additional competitive franchise.'[236] The regulations set forth herein give force to that restriction and vindicate the national policy goal of promoting competition in the video marketplace.

62. Our authority to adopt rules implementing Section 621(a)(1) is further supported by Section 706 of the Telecommunications Act of 1996, which directs the Commission to encourage broadband deployment by utilizing "measures that promote competition ... or other regulating methods that remove barriers to infrastructure investment."[237] The D.C. Circuit has found that the Commission has the authority to consider the goals of Section 706 when formulating regulations under the Act.[238] The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated."[239] Thus, if the franchising process were allowed to slow competition in the video service market, that would decrease broadband infrastructure investment, which would not only affect video but other broadband services as well.[240] As the DOJ points out, potential gains from competition, such as

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[234] 47 U.S.C. § 521(6).

[235] *See Competition, Rate Deregulation and the Commission's Policirs Relating to rhe Provision of Cable Television Service*, 5 FCC Rcd 4962,4974 !1990).

[236] 47 U.S.C. § 541(a)(1). ***See also*** H.R. REP. NO. 102-628, at 47 (1992) (noting the Commission's recommendation that, in order to encourage competition, Congress should prevent LFAs from unreasonably denying a franchise to potential competitors): *Implementation of Section 19 of the Cable Television Consumer Protection arid Comperirion Acr of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 1442, 7469 (1994) (recognizing that "Congress incorporated the Commission's recommendation in the 1992 Cable Act by amending § 621(a)(1) of the Communications Act..."). The legislative history explained that the purpose of this abridgement of local government authority was to promote greater cable competition. S. REP. NO. 102-92, at 47 (1991) (the prohibition on local franchising authorities from unreasonably refusing to grant second franchises is based on evidence in the record that there are benefits from competition between two cable systems and the Committee's belief that LFAs should be encouraged to award second franchises).

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

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

[239] *See* Alcatel Comments at 5-6; USTelecom Comments at 6 (broadband growth is tied to bundled services; firm's perceived need to compete for "triple play" customers is the driving force for broadband investment); AT&T Comments at 39-40 (the local franchising process discourages broadband infrastructure investment that supports video along with other broadband services).

[240] *See* Ad Hoc Telcom Manufacturer Coalition Comments at 1-3 (the franchising process threatens to slow down incumbent LECs' capital expenditures, thereby slowing competition in the video service market and reducing output throughout the high-tech manufacturing industry); AT&T Reply at 31-32 (the lack of clear regulatory guidance is chilling investment because new entrants cannot gauge the cost of entry); BellSouth Comments at 20-22 (the current franchising process impedes the deployment of BellSouth's broadband network).

expedited broadband deployment. arc more likely to be realized without imposed restrictions or conditions on entry in the franchising process.[241]

63. We reject the argument by incumbenf cable operators and LFAs that any rules adopted under Section 621(a)(1) could adversely affect the franchising process.'" In particular. LFAs contend that cable service requirements must vary from jurisdiction to jurisdiction because cable franchises need to be "tailored to the needs and interests of the local community."[243] The Communications Act preserves a role for local jurisdictions in the franchise process. We do not believe that the rules we adopt today will hamper the franchising process. While local franchising authorities and potential new entrants have opposing viewpoints about the reasonableness of certain terms,[244] we received comments from both groups that agree that Commission guidance concerning factors that are "reasonable" will help to expedite the franchising process.[245] Therefore, we anticipate that our implementation of Section 621(a)(1) will aid new entrants, incumbent cable operators, and LFAs in undersfanding the hounds of local authority in considering competitive franchise applications.

64. In sum, we conclude that we have clear authority to interpret and implement the Cable Act. including the ambiguous phrase "unreasonably refuse to award in Section 621(a)(1), to further the congressional imperatives to promote Competition and broadband deployment. As discussed above, this authority is reinforced by Section 4(i) of the Communications Act, which gives us broad power to perform acts necessary to execute our functions, and the mandate in Section 706 of the Telecommunications Act of 1996 that we encourage broadband deployment through measures that promote competition.[246] We adopt the rules and regulations in this ***Order*** pursuant to that authority. We find that Section 621(a)(1) prohibits not only an LFA's ultimate unreasonable denial of a competitive franchise application, but also LFA procedures and conduct that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise, whether by (1) creating unreasonable delays in the process, or (2) imposing unreasonable regulatory roadblocks, such that they effectively constitute an "unreasonable refusal to award an additional competitive franchise" within the meaning of Section 621(a)(1).[247]

C. Steps to Ensure that the Local Franchising Process Does Not Unreasonably Interfere with Competitive Cable Entry and Rapid Broadband Deployment

65. Commenters in this proceeding identified several specific issues regarding problems with the current operation of the franchising process. These include: (1) failure by LFAs to grant or deny franchises within reasonable time frames; (2) LFA requirements that a facilities-based new entrant build out its cable facilities beyond a reasonable service area; (3) certain LFA-mandated costs, fees, and other compensation and whether they must be counted toward the statutory 5 percent cap on franchise fees; (4)

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[241] DOJ *Ex Parte* at 4.

[242] *See, e.g.*, Anne Arundel County *Pl ai.* Comments at 15 (federal regulation would not allow each locality to tailor franchise terms to its specific needs); NCTA Comments at 23 (universal rules and standards cannot be tailored well enough to define what is reasonable: reasonableness must he reviewed on a case-by-case basis).

[243] NATOA Comments at 27 (quoting Section 601(2) of the Communications Act, 47 U.S.C. § 521(2)).

[244] *See, e.g.*, NATOA Reply at 43; Verizon Comments at 76-77 (disagreeing about the reasonableness of level playing fields).

[245] *See* Manatee County Comments at 15; Verizon Reply at 35

[246] 47 U.S.C. § 154(i), Section 706 olthe Telecommunications Act of 1996.47 U.S.C. § 157 nt

[247] *Id.*

new entrants' obligations *to* provide support mandated by LFAs for PEG and I-Nets; and (5) facilities-hased neu entrants' obligations to comply with local consumer protection and customer service standards when the same facilities are used to provide other regulated services, such as telephony. We discuss each measure below.

1. Maximum Time Frame for Franchise Negotiations

66. As explained above,[248] the record demonstrates that, although the average time that elapses between application and grant of a franchise varies from locality to locality, unreasonable delays in the franchising process are commonplace and have hindered, and in some cases thwarted entirely, attempts to deploy competitive video services. The record is replete with examples of unreasonable delays in the franchising process.'"' which can indefinitely delay competitive entry and leave an applicant without recourse in violation of Section 621(a)(1)'s prohibition on unreasonable refusals to award a competitive franchise.[250]

67. We find that unreasonable delays in the franchising process deprive consumers of competitive video services, hamper accelerated broadband deployment, and can result in unreasonable refusals to award competitive franchises. Thus, it is necessary to establish reasonable time limits for LFAs to render a decision on a competitive applicant's franchise application.[251] We define below the boundaries of a reasonable time period in which an LFA must render a decision, and we establish a remedy for applicants that do not receive a decision within the applicable time frame. We establish a maximum time frame of 90 days for entities with existing authority to access public rights-of-way, and six months for entities that do not have authority to access public rights-of-way. The deadline will be calculated from the date that the applicant files an application or other writing that includes the information described below. Failure of an LFA to act within the allotted time constitutes an unreasonable refusal to award the franchise under Section 621(a)(1), and the LFA at that time is deemed to have granted the entity's application on an interim basis, pursuant to which the applicant may begin providing service. Thereafter, the LFA and applicant may continue to negotiate the terms of the franchise, consistent with the guidance and rulings in this ***Order.***

a. Time Limit

68. The record shows that the franchising process in some localities can drag on for years. We are concerned that without a defined time limit, the extended delays will continue, depriving consumers of cable competition and applicants of franchises. We thus consider the appropriate length of time that should be afforded LFAs in reaching a final decision on a competitive franchise application. Commenters suggest a wide range of time frames that may be reasonable for an LFA's consideration of a competitive franchise application. TIA proposes that we adopt the time limit used in the Texas franchising legislation, which would allow a new entrant to obtain a franchise within 17 days of submitting an application."' Other commenters propose time limits ranging from 30 days to six

[248] *See supra* paras. 14-17,22.

[249] *See Local Franchising NPRM,* 20 FCC Rcd at 18590 (quoting 47 U.S.C. § 541(a)(1)), FTTH Council Comments at 27, South Slope Comments at 13. Veriron Reply at **34-35.**

[250] *See supra* paras. 22-30

[251] 47 U.S.C. §§ 541(a)(1), **555**

[252] *See* **TIA** Comments at 8, 18

months.[253] While NATOA in its comments opposes any time limit,[254] in February 2006 a NATOA representative told the Commission that the six-month time limit that California law imposes is reasonable.[255] Some commenters have suggested that a franchise applicant that holds an existing authorization to access rights-of-way (*e.g.*, a LEC) should be subject to a shorter time frame than other applicants. These commenters reason that deployment of video services requires an upgrade to existing facilities in the rights-of-way rather than construction of new facilities, and such applicants generally have demonstrated their fitness as a provider of communications services.[256]

69. In certain states, an SFA is responsible for all franchising decisions (*e.g.*, Hawaii, Connecticut, Vermont, Texas, Indiana, Kansas, South Carolina, and beginning January 1, 2007, California and North Carolina), and the majority of these states have established time frames within which those SFAs must make franchising decisions.[257] We are mindful, however, that states in which an LFA is the franchising authority, the LFA may be a small municipal entity with extremely limited resources.[258] Thus, it may not always be feasible for an LFA to carry out legitimate local policy objectives permitted by the Act and appropriate state or local law within an extremely short time frame. We therefore seek to establish a time limit that balances the reasonable needs of the LFA with the needs of the public for greater video service competition and broadband deployment. As set out in detail below, we believe that it is appropriate to provide rules to guide LFAs that retain ultimate decision-making power over franchise decisions.

70. As a preliminary matter, we find that a franchise applicant that holds an existing authorization to access rights-of-way should be subject to a shorter time frame for review than other applicants. First, one of the primary justifications for cable franchising is the locality's need to regulate and receive compensation for the use of public rights-of-way.[259] In considering an application for a cable franchise by an entity that already has rights-of-way access, however, an LFA need not devote substantial attention to issues of rights-of-way management.[260] Second, in obtaining a certificate for public

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[253] *See* AT&T Comments at 77, Cavalier Telephone Comments at 4 (suggesting a 30-day time limit]; BellSouth Comments at 36, NTCA Comments at 9, OPASTCO Reply at 4 (suggesting a 90-day time limit); Consumers for Cable Choice Comments at 9, Verizon Comments at 38, FTTH Council Comments at 60, State of Hawaii Reply at 3 (suggesting a 120-day time limit): Alliance for Public Technology Comments at 3 (suggesting a 180-day time limit); Qwest Comments at 26-27.

[254] NATOA Comments at 36-37, NATOA Reply at 21-23

[255] Transcript of FCC Agenda Meeting and Panel Discussion at 38 (Feh. 10,2006)

[256] ***See*** *Local Franchising NPRM*, 20 FCC Rcd at 18591

[257] *See* HAM. REV. STAT. § 440G-4 (2006);CONN. GEN. STAT. ANN, § 16-331 (West 2006): VT. STAT. ANN. tit. 30, § 502 (2006); TEX. UTIL. CODE ANN. § 66.003 (West 2006): IND. CODE § 8-1-34-16 (2006); 2006 KAN. SESS. LAWS Ch. 93 (West 2006); S.C. CODE ANN. § 58-12-05 (2006); N.C. GEN STAT. ANN. § 66-351; CAL. PUB. UTIL. CODE § 401, et seq. We note that our *Order* does not affect these franchising decisions.

[258] We note that a number of other states in addition to Texas have adopted or are considering statewide franchising in order to speed competitive entry. *See, e.g.*, *IND. CODE* § 8-1-34-16 (2006); VA. CODE ANN. § 15.2-2108.1:1 et seq. (2006); SB-816, 2006 Sess. (Mo. 2006). Nothing in our discussion here is intended to preempt the actions of any states. The time limit we adopt herein is a ceiling beyond which LFA delay in processing a franchise application becomes unreasonable. To the extent that states and/or municipalities wish to adopt shorter time limits, they remain free to do so.

[259] NATOA Comments at 38-39; Ada Township Comments at 11-14; TCCFUl Reply Comments at 18.

[260] Recognizing this distinction. some states have created 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-2647, 2006 Sess. (Iowa 2006) (this proposed legislation would grant franchises to all telephone providers authorized

(continued...)

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. NATOA and its members concede that the authority to occupy the right-of-way has an effect on the review of the financial, technical, and legal merits of the application, and eases right-of-way management burdens."' We thus find that a time limit is particularly appropriate for an applicant that already possesses authority to deploy telecommunications infrastructure in the public rights-of-way.[262] We further agree with AT&T that entities with existing authority to access rights-of-way should be entitled to an expedited process, and that lengthy consideration of franchise applications made by such entities would be unreasonable."' Specifically. we find that 90 days provides LFAs ample time to review and negotiate a franchise agreement with applicants that have access to rights-of-way.[264]

71. Based on our examination of the record, we believe that a time limit of 90 days for those applicants that have access to rights-of-way strikes the appropriate balance between the goals of facilitating competitive entry into the video marketplace and ensuring that franchising authorities have sufficient time to fulfill their responsibilities. In this vein, we note that 90 days is a considerably longer time frame than that suggested by some commenters, such as TIA.[265] Additionally, we recognize that the Communications Act gives an LFA 120 days to make a final decision on a cable operator's request to modify a franchise.?" We believe that the record supports an even shorter time here because the costs associated with delay are much greater with respect to entry. When an incumbent cable franchisee requests a modification, consumers are not deprived of service while an LFA deliberates. Here, delay by an individual LFA deprives consumers of the benefits of cable competition.[267] An LFA should be able to

(Continued from previous page)
to use the right-of-way without any application or negotiation requirement). **See** *also* South Slope Comments at 1 I (duplicative local franchising requirements imposed on a competitor with existing authority lo occupy the rights-of-way are unjustified and constitute an unrcasonahle harrier to competitive video entry).

[261] ***See*** **NATOA** Comments **at** 38-39. Although NATOA contends that an applicant's authority to occupy the rights-of-way would not affect the length of the negotiations regarding PEG requirements, franchise fees, or build-out, we clarify the law concerning those issues below to minimize further disputes and delays.

[262] **Ad** Hoc Tclecom Manufacturers Comments at 6

[263] AT&T argues that an entity authorired to occupy **a** right-of-way should simply complete **a** short-Corm application and agree to general cable franchise requirements such as franchise fees and PEG capacity, and that the right-of-way holder should receive a franchise within one month of filing the short-form application. ***See*** AT&T Comments at 74.

[264] ***See*** BellSouth Comments at 36; Ada Township, *et al.* Comments at 23; LMC Comments at 18; Hawaiian Telecom Comments **ai** 7-8 (recommending **a** time frame of 90 days from the filing of the application). Several state legislators agree that an applicant's existing authority to occupy the right-of-way lightens the administrative load, and enacted or proposed similar measures tu streamline the franchising process for entities that hold the authority. ***See*** VIRGINIA COOT **ANN.** § 15.2-2108.21; HF-2647, 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). We assume generally that state and local regulators are sufficiently empowered to deal with any public safety or aesthetic issues that may arise by virtue of deployment of new video-related equipment by applicants already authorized *to* use the rights-of way.

[265] *See* TIA Comments at 8-9 (a time frame of 17 business days, as set forth in the Texas statute, "provides ample time to negotiate an agreement reflecting the requirements of Section 621"); AT&T Comments at 75, 78-79. ***See*** *also supra* paras. 17, 27.

[266] *See* 47 U.S.C. § 54s.

[267] Verizon Comments at 36-37.

negotiate a franchise with a familiar applicant that is already authorized to occupy the right-of-way in less than 120 days. The list of legitimate issues to be negotiated is short.''' and we narrow those issues considerably in this *Order*. We therefore impose a deadline of 90 days for an LFA to reach a final decision on a competitive franchise application submitted by those applicants authorized to occupy rights-of-way within the franchise area.

72. For other applicants, we believe that six months affords a reasonable amount of time to negotiate with an entity that is not already authorized to occupy the right-of-way, as an LFA will need to evaluate the entity's legal, financial, and technical capabilities in addition to generally considering the applicant's fitness to be a communications provider over the rights-of-way. Commenters have presented substantial evidence that six months provides LFAs sufficient time to review an applicant's proposal, negotiate acceptable terms, and award or deny a competitive franchise.''' We are persuaded by the record that a six-month period will allow sufficient time for review. Given that LFAs must act on modification applications within the 120-day limit set by the Communications Act, we believe affording an additional two months – *i.e.*, a six-month review period – will provide LFAs ample time to conduct negotiations with an entity new to the franchise area.

73. Failure of an LFA to act within these time frames is unreasonable and constitutes a refusal to award a competitive franchise. Consistent with other time limits that the Communications Act and our rules impose,''" a franchising authority and a competitive applicant may extend these limits if both parties agree to an extension of time. We further note that an LFA may engage in franchise review activities that are not prohibited by the Communications Act or our rules, such as multiple levels of review or holding a public hearing,''' provided that a final decision is made within the time period established under this ***Order.***

b. Commencement **of** the Time Period **for** Negotiations

14. The record demonstrates that there is no universally accepted event that "starts the clock" for purposes of calculating the length of franchise negotiations between LFAs and new entrants.[272] Accordingly, we find it necessary to delineate the point at which such calculation should begin. Few commenters offer specific suggestions on what event should open the time period for franchise negotiations. Qwest contends that the period for negotiations should commence once an applicant files an application.''' On the other hand, Verizon argues that the clock must start before an applicant files a formal application because significant negotiations often take place before a formal filing.[274] Specifically,

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[268] Verizon Reply Comments at 43 n.69.

[269] *See* Cablevision Comments at 10-12; GMTC Comments at 3, 6-8; State of Hawaii Reply at 3; Mt. Hood Cable Regulatory Commission Comments at 20; NJBPU Comments at 5; Southwest Suburban Cable Commission Comments at 7. ***See*** *also* Fairfax County, Va. Comments at 4-7 (formal negotiations began April 1, 2005, franchise granted Oct. 1, 2005).

'' "***See,*** *e.g.*, 47 U.S.C. § 537.47 C.F.R. § 76.502(c).

[271] *See* Southwest Suburban Cable Commission Comments at 7

[272] *See supra* paras. 14-17

[273] *See* Qwest Reply at 2 (establish a requirement that an LFA "must **act** on a franchise application within **six** months of filing").

[274] *See* Verizon Reply at **37;** Letter from Leora Hochstein, Executive Director, Federal Regulatory. Verizon. to Marlene Dortch. Secretary, Federal Communications Commission at 1 (April 21, 2006).

the company advocates starting the clock when the applicant initiates negotiations with the LFA,[275] which could he documented informally between the applicant and the LFA or with a formal Commission filing for evidentiary purposes.

75. We will calculate the deadline from the date that the applicant first files certain requisite information in writing with the LFA. This filing must meet any applicable state or local requirements, including any state or local laws that specify the contents of a franchise application and payment of a reasonable application fee in jurisdictions where such fee is required.[276] This application, whether formal or informal, must at a minimum contain: (1) the applicant's name; *(2)* the names of the applicant's officers and directors: (3) the applicant's business address; (4) the name and contact information of the applicant's contact: (5) a description of the geographic area that the applicant proposes to serve: (6) the applicant's proposed PEG channel capacity and capital support; (7) the requested term of the agreement; (8) whether the applicant holds an existing authorization to access the community's public rights-of-way; and (9) the amount of the franchise lee the applicant agrees to pay (consistent with the Communications Act and the standards set forth herein). Any requirement the LFA imposes on the applicant to negotiate or engage in any regulatory or administrative processes before the applicant files the requisite information is *per se* unreasonable and preempted by this ***Order.*** Such a requirement would delay competitive entry by undermining the efficacy of the time limits adopted in this ***Order*** and would not serve any legitimate purpose. At their discretion, applicants may choose to engage in informal negotiations before filing an application. These informal negotiations do not apply to the deadline, however; we will calculate the deadline from the date that the applicant first files its application with an LFA. For purposes of any disputes that may arise, the applicant will have the burden of proving that it filed the requisite information or, where required, the application with the LFA, by producing either a receipt-stamped copy of the filing or a certified mail return receipt indicating receipt of the required documentation. We believe that adoption of a time limit with a specific starting point will ensure that the franchising process will not be unduly delayed by pre-filing requirements, will increase applicants' incentive to begin negotiating in earnest at an earlier stage of the process, and will encourage both LFAs and applicants to reach agreement within the specified time frame. We note that an LFA may toll the running of the 90-day or six-month time period if it has requested information from the franchise applicant and is waiting for such information. Once the information is received by the LFA, the time period would automatically begin to run again.

c. Remedy for Failure to Negotiate a Franchise Within the Time Limit

76. Finally, we consider what remedy or remedies may be appropriate in the event that an LF.4 and franchise applicant are unable to reach agreement within the 90-day or six-month time frame. Section 635 of the Communications Act provides a specific remedy for an applicant who believes that an LFA unreasonably denied its application containing the requisite information within the applicable time frame. Here, we establish a remedy in the event an LFA does not grant or deny a franchise application by the deadline. In selecting this remedy, we seek to provide a meaningful incentive for local franchising authorities to abide by the deadlines contained in this ***Order*** while at the same time maintaining LFAs' authority to manage rights-of-way, collect franchise fees, and address other legitimate franchise concerns.

77. In the event that an LFA fails to grant or deny an application by the deadline set by the Commission, Verizon urges the Commission to temporarily authorize the applicant to provide video

[275] *Id.*

[276] *See infra* paras. 99-104

service.[277] In general, we agree with this proposed remedy. In order to encourage franchising authorities to reach a final decision on a competitive application within the applicable time frame set forth in this *Order*, a failure to abide by the Commission's deadline must bring with it meaningful consequences. Additionally, we do not believe that a sufficient remedy for an LFA's inaction on an application is the creation of a remedial process, such as arbitration, that will result in even further delay. We also decline to agree to NATOA's suggestion that an applicant should be awarded a franchise identical to that held by the incumbent cable operator. This suggestion is impractical for the same reasons that we find local level-playing-field requirements are preempted."' Therefore, if an LFA has not made a final decision within the time limits we adopt in this *Order*, the LFA will be deemed to have granted the applicant an interim franchise based on the terms proposed in the application. This interim franchise will remain in effect only until the LFA takes final action on the application. We believe this approach is preferable to having the Cornmission itself provide interim franchises to applicants because a "deemed grant" will begin the process of developing a working relationship between the competitive applicant and the franchising authority, which will be helpful in the e /ent that a negotiated franchise is ultimately approved.

78. The Commission has authority to deem a franchise application "granted" on an interim basis. As noted above, the Commission has broad authority to adopt rules to implement Title VI and, specifically, Section 621(a)(1) o l the Communications Act."" As the Supreme Court has explained, the Commission serves "as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.'"[280] Section 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[281] "[T]he grant in § 201(b) means what it says: The FCC has rulemaking authority *to* carry out the 'provisions of this Act.'"[282] Section 2 of the Communications Act grants the Commission explicit jurisdiction over "cable services."[283] Moreover, Congress specifically charged the Commission with the administration of the Cable Act, including Section 621. and federal courts have consistently upheld the Commission's authority in this area.[284]

79. The Commission has previously granted franchise applicants temporary authority to operate in local areas. In the early 1970s, the Commission required every cable operator to obtain a federal certificate of compliance from the Commission before it could "commence operations."[285] In eflect, the Commission acted as a co-franchising authority – requiring both an FCC certificate and a local franchise (granted pursuant to detailed Commission guidance and oversight) prior to the provision of

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[277] *See* Letter from Leora Hochstein. Executive Director, Federal Regulatory, Verizon, to Marlene Dortch, Secretary, Federal Communications Commission at 1 (May 3, 2006).

[278] *See infra* para. 138. If new entrants were required to adopt the same franchises as incumbents. the new entrants would he forced to accept terms that violate Section 621(a)(1)'s prohibition on unreasonable refusals to grant franchises. *See* Mercatus Center at 39-40: Phoenix Center Competition Paper at 7.

[279] *See supra* Section III.B.

[280] *United States v. Southwestern Cable Co.*, 192 U.S. 157, 167-68 (1968) (citations omitted).

[281] 47 U.S.C.§ 201(b). *See also* 47 U.S.C.§§ 151, 154(i), 303(r)

[282] *AT&T Corp. v. Iowa Utilites Board,* 525 U.S. 366, 378 (1999).

[283] 47 U.S.C. § 152.

[284] *See supra* note 208.

[285] *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, 36 F.C.C.2d 143, ¶ 178 (1972).

services.[286] As the Commission noted. "[a]lthough we have determined that local authorities ought to have the widest scope in franchising cable operators, *the filial responsibility is ours.*"[287] And the Commission granted interim franchises for cable services in areas where there was no other franchising authority.[288]

80. We note that the deemed grant approach is consistent with other federal regulations designed to address inaction on the part of a State decision maker."' In addition, this approach does not raise any special legal concerns about impinging on state or local authority. The Act plainly gives federal courts authority to review decisions made pursuant to Section 621(a)(1).[290] As the Supreme Court observed in *Iowa Utilities Board.* "This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. To be sure, the FCC's lines can be even more restrictive than those drawn by the courts – but it is hard to spark a passionate 'States' rights' debate over that detail."[291]

81. We anticipate that a deemed grant will be the exception rather than the rule because LFAs will generally comply with the Commission's tules and either accept or reject applications within the applicable time frame. However, in the rare instance that a local franchising authority unreasonably delays acting on an application and a deemed grant therefore occurs, we encourage the parties to continue to negotiate and attempt to reach a franchise agreement following expiration of the formal time limit. Each party will have a strong incentive to negotiate sincerely: LFAs will want to ensure that their constituents continue to receive the benefits of competition and cable providers will want to protect the investments they have made in deploying their systems. **If** the LFA ultimately acts to deny the franchise after the deadline, the applicant may appeal such denial pursuant to Section 635(a) of the Communications Act. **If,** on the other hand, the LFA ultimately grants the franchise, the applicant's operations will continue pursuant to the negotiated franchise, rather than the interim franchise.

2. Build-Out

82. As discussed above, build-out requirements in many cases may constitute unreasonable barriers to entry into the MVPD market for facilities-based competitors.[292] Accordingly, we limit LFAs' ability to impose certain build-out requirements pursuant to Section 621(a)(1).

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[286] The Commission ended the certificate requirement and ceded additional authority to state and local governments in the late 1970s. but only for pragmatic reasons. *See, e.g.*, Report and Order, 66 F.C.C.2d 380, ¶¶ 33, 37 (1977); Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 71 F.C.C.2d 569, ¶ 7 (1979) (withdrawing aspects of Commission franchising participation, but only "as long as the actions taken at the local level will not undermine important and overriding federal interests").

[287] *Teleprompter Cable Sys.*. 52 F.C.C.2d 1263, ¶ Y (1975) (emphasis added).

[288] *See, e.g., Cable Television Reconsideration Order*, 36 F.C.C.2d 326, ¶ 116 (1972); *Sun Valley Cable Communications (Sun City, Arizona)*, 39 F.C.C.2d 105 (1973); *Mahoning Valley Cablevision, Inc. (Liberty Township, Ohio,)*,39 F.C.C.2d 939 (1971).

[289] ***See.*** *e.g.*, 40 C.F.R. 141.716(a) (uatershed control plans that are submitted to a state and not acted upon hy the regulatory deadline are "considered approved" until the state subsequently withdraws such approval.); **42** C.F.R. 438.56(e)(2) (an application to disenroll from **a** Medicaid managed care plan shall be "considered approved" if not acted **on** hy a state agency within the regulatory deadline). ***See also*** 47 U.S.C. § 160(c) (petition for forbearance "deemed granted" if Commission fails to deny within the regulatory deadline).

[290] *See* 47 U.S.C. § *555*

[291] *AT&T Corp. v. Iowa Utils. Bd.*. 525 U.S. 366, 378 n.6 (1999).

[292] *See* Section III.A., *supra*, at paras. 31-42

a. Authority

83. Proponents of build-out requirements do not offer any persuasive legal argument that the Commission lacks authority to address this significant problem and conclude that certain build-out requirements for competitive entrants are unreasonable. Nothing in the Communications Act requires competitive franchise applicants to agree to build-out their networks in any particular fashion. Nevertheless, incumbent cable operators and LFAs contend that it is both lawful and appropriate, in all circumstances, to impose the same build-out requirements on competitive applicants that apply to incumbents.[293] We reject these arguments and find that Section 621(a)(1) prohibits LFAs from refusing to award a new franchise on the ground that the applicant will not agree to unreasonable build-out requirements.

84. The only provision in the Communications Act that even alludes to build-out is Section 621(a)(4)(A), which provides that "a franchising authority . . . shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area."[294] Far from a grant of authority. however, Section 621(a)(4)(A) is actually a limitation on LFAs' authority. In circumstances when it is reasonable for LFAs to require cable operators to build out their networks in accordance with a specific plan, LFAs must give franchisees a reasonable period of time to comply with those requirements. However, Section 621(a)(4)(A) does not address the central question here: whether it may be unreasonable for LFAs to impose certain build-out requirements on competitive cable applicants. To answer that question, Section 621(a)(4)(A) must be read in conjunction with Section 621(a)(1)'s prohibition on unreasonable refusals to award competitive franchises, and in light of the Act's twin goals of promoting competition and broadband deployment.[295]

85. Our interpretation of Section 621(a)(4)(A) is consistent with relevant jurisprudence and the legislative history. The D.C. Circuit has squarely rejected the notion that Section 621(a)(4)(A) authorizes LFAs to impose universal build-out requirements on all cable providers. The court has held that Section 621(a)(4)(A) does not require that cable operators extend service "throughout the franchise area.," but instead is a limit on franchising authorities that seek to impose such obligations.[296] That decision comports with the legislative history, which indicates that Congress explicitly rejected an approach that would have imposed affirmative build-out obligations on all cable providers. The House version of the bill provided that an LFA's "refusal to award a franchise shall not be unreasonable if, for example, such refusal is on the ground . . . of inadequate assurance that the cable operator will, within a reasonable period of time, provide universal service throughout the entire franchise area under the

[293] *See, e.g.*, Comcast Reply Comments at 34; NCTA Reply Comments at 25-26; NATOA Reply Comments at **24:** Southeast Michigan Municipalities Reply Comments at 44-45.

[294] 47 U.S.C. § 541(a)(4)(A).

[295] *Americable* **Intern.,** *Inc. v. Dep't of Navy*, 129 F.3d 1271,1274-75 (D.C. Cir. 1997).

[296] *Id.* ***See*** *also Americable Intern.,* ***Inc.*** *v. U.S.* ***Depf.*** *of Navy*, **931** F. Supp. 1, **2-3** (D.D.C. 1996) ("Americable argues first that the Cable Act establishes a 'requirement' that a franchise 'provide universal service throughout the franchise area.' Its authority for that position is 47 U.S.C. § 541(a)(4)(A), which requires that a franchising authority (here the Navy) allow an applicant's system 'a reasonable period of time to become capable of providing cable service to all households in the franchise area. . . .' That language contains no requirement of universal service, of course. Americable's strained argument is at odds with the purpose of the Cable Act, which is to promote competition, and of the amendment in question. which protects the interests of new franchise applicants and not incumbents like Americable").

jurisdiction of the franchising authority."[297] By declining to adopt this language, Congress made clear that it did not intend to impose uniform build-out requirements on all franchise applicants.[298]

86. LFAs and incumbent cable operators also rely on Section 621(a)(3) to support compulsory build-out. That Section provides: "In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides."[299] We therefore address below some commenters' concerns that limitations on build-out requirements will contravene or render ineffective the statutory prohibition against discrimination on the basis of income ("redlining.")[300] But for present purposes, it has already been established that Section 621(a)(3) does not mandate universal build-out. As the Commission previously has stated, "the intent of [Section 621(a)(3)] was to prevent the exclusion of cable service based on income" and "this section does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents of the unwired area."[301] The U.S. Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") has upheld this interpretation in the face of an argument that universal build-out was required by Section 621(a)(3):

> The statute on its face prohibits discrimination on the basis of income; it manifestly does not require universal [build-out]. . . . [The provision requires] "wiring of all areas of the franchise" *tu prevent redlining.* However, if no redlining is in evidence, it is likewise clear that wiring within the franchise area can be limited.[302]

b. Discussion

87. Given the current state of the MVPD marketplace. we find that an LFA's refusal to award a competitive franchise because the applicant will not agree to specified build-out requirements can be unreasonable. Market conditions today are far different from when incumbent cable operators obtained their franchises. Incumbent cable providers were frequently awarded community-wide monopolies."[303] In that context. a requirement that the provider build out facilities to the entire community was eminently sensible. The essential bargain was that the cable operator would provide service to an entire community in exchange for its status as the only franchisee from whom customers in the community could purchase

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[297] H.R. REP. NO. 102-628, at Y (1992)

[298] *See Doe v. Chao.* **540** U.S. 614, 622-23 (2004) (finding relevance in the fact that Congress had cut out the very language in the bill that would have achieved the result claimant urged).

[299] 47 U.S.C. § 541(a)(3)

[300] *See, e.g.*, Comcast Reply at 2 (arguing that incumbent LECs are seeking Commission action on build-out requirements in order to pursue their "high-value" customers while bypassing "low-value" ones).

[301] *Implementing the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, MM Docket No. 84-1296, 58 Rad. Reg. 2d (P & F) 1. 62-63 (1985). **BSPA** Comments at 6 ("The most significant factors affecting where a wireline network will be built relate to cost of construction and the density of the population that will he served. These factors have a much more significant impact on the network expansion plans than the specific customer profile in a geographic area").

[302] *ACLU v. FCC.* 823 F.2d 1554. 1580 (D.C. Cir. 1987) (emphasis in original). *See also* Consumers for Cable Choice Comments ai 8: DOJ *Ex Parte* at 4.

[303] *See* H.R. REP. No. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinred in* 1992 U.S.C.C.A.N. 1231, 1259-1260; Mercatus Center Comments at 79-40: *Phoenix Center Competition Paper* at 7.

service. Thus, a financial burden was placed upon the monopoly provider in exchange for the undeniable benefit of being able to operate without competition.'''

88. By contrast, new cable entrants must compete with entrenched cable operators and other video service providers. A competing cable provider that seeks to offer service in a particular community cannot reasonably expect to capture more than a fraction of the total market."" Build-out requirements thus impose significant financial risks on competitive applicants, who must incur substantial construction costs to deploy facilities within the franchise area in exchange for the opportunity to capture a relatively small percentage of the market."" In many instances, build-out requirements make entry so expensive that the prospective competitive provider withdraws its application and simply declines to serve any portion of the community."" Given the entry-deterring effect of build-out conditions, our construction of Section 621(a)(1) best serves the Act's purposes of promoting competition and broadband deployment.[308]

89. Accordingly, vie find that it is unlawful for LFAs to refuse to grant a competitive franchise on the basis of unreasonable build-out mandates. For example, absent other factors, it would seem unreasonable to require a new competitive entrant to serve everyone in a franchise area before it has begun providing service to anyone. It also would seem unreasonable to require facilities-based entrants, such as incumbent LECs, to build out beyond the footprint of their existing facilities before they have even begun providing cable service.[309] It also would seem unreasonable, absent other factors, to require more of a new entrant than an incumbent cable operator by, for instance, requiring the new entrant to build out its facilities in a shorter period of time than that originally afforded to the incumbent cable operator; or requiring the new entrant to build out and provide service to areas of lower density than those that the incumbent cable operator is required to build out to and serve.[310] We note, however, it would seem reasonable for an LFA in establishing build-out requirements to consider the new entrant's market penetration. It would also seem reasonable for an LFA to consider benchmarks requiring the new entrant to increase its build-out after a reasonable period of time had passed after initiating service and taking into account its market success.

YO. Some other practices that seem unreasonable include: requiring the new entrant to build out and provide service to buildings or developments to which the new entrant cannot obtain access on reasonable terms; requiring the new entrant to build out to certain areas or customers that the entrant cannot reach using standard technical solutions; and requiring the new entrant to build out and provide service to areas where it cannot obtain reasonable access to and use of the public rights of way. Subjecting a competitive applicant to more stringent build-out requirements than the LFA placed on the incumbent cable operator is unreasonable in light of the greater economic challenges facing competitive applicants explained above. Moreover, build-out requirements may significantly deter entry and thus

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[304] *Srr* FTTH Council Comments at 32-33: BellSouth Comments at 34

[305] *See, e.g.,* AT&T Comments at 50; FTTH Council Comments at 29-30

[306] *See* FTTH Council Comments ai 32-35; DOJ *Ex Parte* at 12-15 (May 10, 2006); AT&T Reply Comments at 34-36: BellSouth Comments at 34-35; Veriron Comments at 39-40.

[307] *See* FTTH Council Comments at 35; BellSouth Comments ai 17-19, 35; USTA Comments at 22-25; Verizon Comments at 40-42.

[308] AT&T Comments at 62-64; BellSouth Comments at 32-33; Qwest Comments at 21-22; USTA Comments at 27; Verizon Comments at 44-46.

[309] *See supra* paras. 38-40

[310] As we understand these franchising agreements are public documents, we find it reasonable to require the new entrant to produce the incumbent's current agreement.

forestall competition by placing substantial demands on competitive entrants

91. In sum, we find, based on the record as a whole, that build-out requirements imposed by LFAs can operate as unreasonable barriers to competitive entry. The Commission has broad authority under Section 621(a)(1) to determine whether particular LFA conditions on entry are unreasonable. Exercising that authority, we find that Section 621(a)(1) prohibits LFAs from refusing to award a competitive franchise because the applicant will not agree to unreasonable build-out requirements.

c. Redlining

92. The Communications Act forbids access to cable service from being denied to any group of potential residential cable subscribers because of neighborhood income. The statute is thus clear that no provider of cable services may deploy services with the intent to redline and "that access to cable service [may not be] denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides."[311] Nothing in our action today is intended to limit LFAs' authority to appropriately enforce Section 621(a)(3) and to ensure that their constituents are protected against discrimination. This includes an LFA's authority to deny a franchise that would run afoul of Section 621(a)(3).

91. MMTC suggests that the Commission develop anti-redlining "best practices," specifically defining who is responsible for overseeing redlining issues, what constitutes redlining, and developing substantial relief for those affected by redlining."' MMTC suggests that an LFA could afford a new entrant means of obtaining pre-clearance of its build-out plans, establishing a rebuttable presumption that the new entrant will not redline (for example, proposing to replicate a successful anti-redlining program employed in another franchise area)."' Alternatively, an LFA could allow a new entrant to choose among regulatory options, any of which would be sufficient to allow for build-out to commence while the granular details of anti-redlining reporting are finalized.[314] We note these suggestions but do not require them.

3. Franchise Fees

94. In response to questions in the *Local Franchising NPRM* concerning existing practices that may impede cable entry,[315] various parties discussed unreasonable demands relating to franchise fees. Commenters have also indicated that unreasonable demands concerning fees or other consideration by some LFAs have created an unreasonable barrier to entry.[316] Such matters include not only the universe

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[311] 47 C.S.C.§ 541

[312] MMTC Comments at 22, MMTC Reply at 15. MMTC urges that The State Regulators Council of the Advisory Committee on Diversity for Communication in the Digital Age should be the oversight committee for redlining issues. MMTC Comments at 24.

[313] MMTC Reply at I I

[314] MMTC Reply at 11 (providing examples of "rapid buildout plan," "equal service verification plan," and "combined plan").

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

[316] *See, e.g.*, AT&T Reply at Attachment C at 5 ("Lynbrook, N.Y. has asked Verizon to provide cameras to film a holiday visit from Santa Claus. Deputy Mayor Thomas Miccio said, 'They know if they don't get this process done they're going to he in big, big trouble, so we feel we're in a very good position.'") (citing Dionne Searcey, *As Verizon Enters Cable Business*. ir *Faces Local Static*, WALL ST. J., Oct. 28, 2005, at AI), Verizon Comments at Attachment A at 14 ("Two LFAs in California required application fees of $25,000 and $20,000, respectively. (continued...)

of franchise-related costs imposed on providers that should or should not he included within the 5 percent statutory Franchise fee cap established in Section 622(b),[317] but also the calculation of franchise fees (*i.e.*, the revenue base from which the 5 percent is calculated). Accordingly, we will exercise our authority under Section 621(a)(1) to address the unreasonable demands made by some LFAs. In particular, any refusal to award an additional competitive franchise because of an applicant's refusal to accede to demands that are deemed impermissible below shall be considered to be unreasonable. The Commission's jurisdiction over franchise fee policy is well established."' The general law with respect to franchise fees should be relatively well known, but we believe it may be helpful to restate the basic propositions here in effort to avoid misunderstandings that can lead to delay in the franchising process as well as unreasonable refusals to award competitive franchises. To the extent that our determinations are relevant to incumbent cable operators as well, we would expect that discrepancies would he addressed at the next franchise renewal negotiation period, as noted in the FNPRM *infra,* which tentatively concludes that the findings in this *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs.[319]

95. We address below four significant issues relating to franchise fee payments. First, we consider the franchise fee revenue base. Second, we examine the limitations on charges incidental to the awarding or enforcing of a franchise. Third, we discuss the proper classification of in-kind payments unrelated to the provision of cable service. Finally, we consider whether contributions in support of PEG services and equipment should he considered within the franchise fee calculation.

96. The fundamental franchise fee limitation is set forth in Section 622(b), which states that "franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services."[320] Section 622(g)(1) broadly defines the term "franchise fee" to include "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such."[321] Section 622(g)(2)(c), however, excludes from the term "franchise fee" any "capital costs which are required by the franchise to he incurred by the cable operator for public, educational, or governmental access facilities."[322] And Section 622(g)(2)(D) excludes from the term (and therefore from the 5 percent cap) "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages."[323] It has been established that certain types of "in-kind" obligations, in addition to monetary payments, may be subject

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Another community in that state has requested an upfront application fee of $30.000 plus an agreement to pay additional expenses (*i.e.*, attorneys fees) of up to an additional $20,000.").

[317] 47 U.S.C. § 542(b).

[318] *See ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) ("[I]t is clear . . . that the *ultimate* responsibility for ensuring a 'national policy' with respect to franchise fees lies with the federal agency responsible for administering the Communications Act.") (emphasis in original).

[319] *See infra* para. 140.

[320] 47 U.S.C. § 542(b) (emphasis added). FTTH Council supports an alternative cap based on the actual costs of managing the use of public rights-of-way, but we need not address that argument because we do not have the discretion tu adopt a different limit than that set by Congress.

[321] 47 U.S.C. § 542(g)(1).

[322] 47 U.S.C. § 542(g)(2)(C).

[323] 17 U.S.C. § 542(g)(2)(D).

to the cap. The legislative history of the 1984 Cable Act, which adopted the franchise fee limit. specifically provides that "lump sum grants not related to PEG access for municipal programs such as libraries. recreation departments, detention centers or other payments not related to PEG access would be subject to the 5 percent limitation."[324]

97. **Definition of the 5 percent fee cap revenue** base. **As** a preliminary matter, we address the request of several parties to clarify which revenue-generating services should be included in the gross lee figure from which the 5 percent calculation is drawn.[325] The record indicates that in the franchise application process, disputes that arise as to the propriety of particular fees can be a significant cause of delay in the process and that some franchising authorities are making unreasonable demands in this area.[326] This issue is of particular concern where a prospective new entrant for the provision of cable services is a facilities-based incumbent or competitive provider of telecommunications and/or broadband services. A number of controversies regarding which revenues are properly subject to application of the franchise fee were resolved before the Supreme Court's decision in ***NCTA*** .. *Brand X*,[327] which settled issues concerning the proper regulatory classification of cable modem-based Internet access service. Nevertheless, in some quarters, there has been considerable uncertainty over the application of franchise fees to Internet access service revenues and other non-cable revenues. Thus, we believe it may assist the franchise process and prevent unreasonable refusals to award competitive franchises to reiterate certain conclusions that have been reached with respect to the franchise fee base.

98. We clarify that a cable operator is not required to pay franchise fees on revenues from non-cable services.[328] Section 622(b) provides that the "franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide *cable services*."[329] The term "cable service" is explicitly defined in Section 602(6) to mean (i) "the one-way transmission to subscribers of video programming or other programming service," and (ii) "subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."[330] The Commission determined in the *Cable Modem Declaratory Ruling* that a franchise authority may not assess franchise fees on non-cable services, such as cable modem service, stating that "revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined."[331] Although this decision related specifically to Internet access service revenues, the same

[324] H.R. REP. NO. 98-934, at 65 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655,4702.

[325] Verizon Comments at 63-64: BellSouth Comments at 41-43.

[326] *See supra* paras. 41-45.

[327] 125 S. **Ct.** 2688 (2005). *See infra* note 331.

[328] Advertising revenue and home shopping commissions have been included in an operator's gross revenues for franchise fee calculation purposes. ***See*** *Texas Coalition of Cities for Utility Issues v. FCC,* 354 F.3d *802,* 806 (5th Cir. *2003)* ("A cable operator's **gross** revenue includes revenue from subscriptions and revenue from other sources-e.g., advertising and commissions from home shopping networks."); *City of Pasadena, California* ***The*** *City of Nashville,* ***Tennessee*** *and The City of Virginia Beach. Virginia.* 16 FCC Rcd. 18192. 2001 WL 1167612, par. **15** (2001) ("There is no dispute among the parties to this proceeding, or in relevant precedent, that advertising revenue and home shopping commissions can he considered part of an operator's gross revenues for franchise fer calculation purposes.").

[329] 47 U.S.C. § 542(b) (emphasis added).

[330] 47 U.S.C. § 522(6).

[331] *In* ***re*** *Inquiry Concerning* High *Speed* **Access** *to the Internet* ***Over*** *Cable and Other Facilities,* 17 FCC Rcd 4798, 4851 (2002) ("*Cable Modem Declaratory Ruling*"), *rev'd, Brand X Internet* ***Services*** *v. FCC,* 345 F.3d 1120 (9th Cir.
(continued...)

would be true for other "non-cable" service revenues.[332] Thus, Internet access services, including broadband data services, and any other non-cable services are not subject to "cable services" fees.

99. **Charges incidental to the awarding or enforcing of a franchise.** Section 622(g)(2)(D) excludes from the term "franchise fee" "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages."[333] Such "incidental" requirements or charges may be assessed by a franchising authority without counting toward the 5 percent cap. A number of parties assert. and seek Commission clarification, that certain types of payments being requested in the franchise process are not incidental fees under Section 622(g)(2)(D) but instead must either be prohibited or counted toward the cap."[334] Furthermore, a number of parties report that disputes over such issues as well as unreasonable demands being made by some franchising authorities in this regard may be leading to delays in the franchising process as well as unreasonable refusals to award competitive franchises. We therefore determine that non-incidental franchise-related costs required by LFAs must count toward the 5 percent franchise fee cap and provide guidance as to what constitutes such non-incidental franchise-related costs. Under the Act, these costs combined with other franchise fees cannot exceed 5 percent of gross revenues for cable service.

100. BellSouth urges us to prohibit franchising authorities from assessing fees that the authorities claim are "incidental" if those fees are not specifically allowed under Section 622 of the Cable Act.[335] BellSouth asserts that LFAs often seek fees beyond the 5 percent franchise fee allowed by the statutory provision. The company therefore asks us to clarify that any costs that an LFA requires a cable provider to pay beyond the exceptions listed in Section 622 – including generally applicable taxes, PEG capital costs, and "incidental charges" – count toward the 5 percent cap.[336] OPASTCO asserts that higher fees discourage investment and often will need to be passed on to consumers.[337] Verizon also requests that we clarify that fees that exceed the cap are unreasonable.[338]

101. AT&T argues that we should find unreasonable any fees or contribution requirements that are not credited toward the franchise fee obligation.[339] AT&T also asserts that any financial obligation to the franchising authority that a provider undertakes, such as application or acceptance fees

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2003). *rev'd, NCTA v. Brand X, 545* U.S. 967 (2005). The Commission issued a notice of proposed rulemaking ("*Cable Modem NPRM*") concurrently with the *Cable Modern Declaratory Ruling*. Certain questions from the *Cable Modem NPRM* that are relevant, hut not directly related, to this discussion remain pending before the Commission. *Cable Modern Declaratory Ruling* at 4839-4854.

[332] *See* NATOA Reply ai 29 (agreeing that non-cable services are not subject to franchise fees).

[333] 47 U.S.C. § 542(g)(2)(D).

[334] AT&T Comments at 65-67; BellSouth Comments at 7, 38-39.

[335] BellSouth Comments at 7.

[336] BellSouth Comments at 38-39.

[337] OPASTCO Reply at 5.

[338] Verizon Reply at 59.

[339] AT&T Comments at 64.

that exceed the reasonable cost of processing an application, free or discounted service to an LFA, and LFA attorney or consultant fees, should apply toward the franchise fee obligation.""

102. Conversely, NATOA asserts that costs such as those enumerated above by AT&T fall within Section 622(g)(2)(D)'s definition of charges "incidental" to granting the franchise.[341] NATOA contends that the word "incidental" does not refer to the *amount* of the charge, but rather the fact that a charge is "naturally appertaining" to the grant of a franchise. Thus, NATOA argues, these costs are not part of the franchise fee and therefore do not count toward the cap.[342]

103. There is nothing in the text of the statute or the legislative history to suggest that Congress intended the list of exceptions in Section 622(g)(2)(D) to include the myriad additional expenses that some LFAs argue are "incidental."[343] Given that the lack of clarity on this issue may hinder competitive deployment and lead to unreasonable refusals to award competitive franchises under Section 621, we seek to provide guidance as to what is "incidental" for a new competitive application.[344] We find that the term "incidental" in Section 622(g)(2)(D) should be limited to the list of incidentals in the statutory provision, as well as other minor expenses, as described below. We find instructive a series of federal court decisions relating to this subsection of Section 622. These courts have indicated that (i) there are significant limits on what payments qualify as "incidental" and may be requested outside of the 5 percent fee limitation; and (ii) processing fees, consultant fees, and attorney fees are not necessarily to be regarded as "incidental" to the awarding of a franchise.[345] In *Robin Cable Systems v. City of Sierra Vista*. for example, the United States District Court for the District of **Arizona** held that "processing costs" of up to $30,000 required as part of the award of a franchise were not excluded under subsection (g)(2)(D) because they were not "incidental." but rather "substantial" and therefore "inconsistent with the Cable Act."[346] Additionally, in *Time Warner Entertainment* v. *Briggs*. the United States District Court for the District of Massachusetts decided that attorney fees and consultant fees fall within the definition of franchise Tees, as defined in Section 622. Because the municipality in that case was already collecting 5 percent of the operator's gross revenues, the Court determined that a franchise provision requiring the cable operator to pay such fees above and beyond its 5 percent gross revenues was preempted and therefore unenforceable.[347] Finally, in *Birmingham Cable Comm.* v. *City of Birmingham*, the United States District for the Northern District of Alabama stated that "it would be an aberrant construction of

[340] AT&T Comments ai 65-67

[341] NATOA Reply at 34-75

[342] NATOA Reply at 35 (citing Random House Dictionary olthe English Language at 720)

[343] *See infra* paras. 105-108

[344] **NAT'OA** argues that the Commission is powerless to rewrite the meaning of the statute. **NATOA** Reply at 35. Yet, Section 622(i) states "[a]ny Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees. *except us provided in this section."* Therefore, we are within our Congressionally mandated authority to provide clarifying guidance regarding the meaning of this provision.

[345] *See Robin Cable Systems v. City of Sierra Vista*. 842 F. Supp. 380 (D. Ariz. 1993); *Time Warner Entertainment Co. v. Briggs*, 1993 WL 23710 (D. Mass. Jan. 14, 1993); *Birmingham Cable Comm. v. City of Birmingham*, 1989 WL 253850 (N.D. Ala. 1989).

[346] *Robin Cable* at 381

[347] *Time Warner* at *23710 * 6

the phrase 'incidental to the awarding ... of the franchise,' in this context, to conclude that the phrase embraces consultant fees incurred solely by the City."[348]

104. We find these decisions instructive and emphasize that LFAs must count such non-incidental franchise-related costs toward the cap. We agree with these judicial decisions that non-incidental costs include the items discussed above, such as attorney fees and consultant fees, but may include other items, as well. Examples of other items include application or processing fees that exceed the reasonable cost of processing the application. acceptance fees, free or discounted services provided to an LFA, any requirement to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments as discussed below. Accordingly, if LFAs continue to request the provision of such in-kind services and the reimbursement of franchise-related costs, the value of such costs and services should count towards the provider's franchise fee payments.[349] For future guidance, LFAs and video service providers may look to judicial cases to determine other costs that should be considered "incidental."

105. **In-kind payments unrelated to provision of cable service.** The record indicates that in the context of some franchise negotiations, LFAs have demanded from new entrants payments or in-kind contributions that are unrelated to the provision of cable services. While many parties argue that franchising authority requirements unrelated to the provision of cable services are unreasonable,[350] few parties provided specific details surrounding the in-kind payment demands of LFAs.[351] As discussed further below, most parties generally discussed examples of concessions, but were unwilling to provide details of specific instances, including the identity of the LFA requesting the unrelated services.[352] Even without specific details concerning the LFAs involved, however, the record adequately supports a finding that LFA requests unrelated to the provision of cable services have a negative impact on the entry of new cable competitors in terms of timing and costs and may lead to unreasonable refusals to award competitive franchises. Accordingly, we clarify that any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap.

106. The Broadband Service Providers Association states that an example *of* a municipal capital requirement can include traffic light control systems.[353] FTTH Council states that non-video requirements raise the cost of entry for new entrants and should he prohibited.[354] As an example, FTTH

[348] *Birmingham* at *253850*

[349] 1 o the extent that an LFA requires franchise fee payments of **less** than ***5*** percent an offset may not be necessary. Such LFAs are ahlc to request the reimbursement or provision of such costs up to the *5* percent statutory threshold.

[350] Alcatel Comments at 10; FTTH Council Comments at 36; OPASTCO Reply at 4: USTelecom Comments at 48; BPSA Comments at 8; NTCA Comments at 13; South Slope Comments at 15. ***See*** *also* DOJ *Ex Parte* at 11

[351] Some LFAs argue that commenters' allegations nhout inappropriate fees fail to identify the LFAs **in** question. As a consequence. they contend, we should not rely on such unsubstantiated claims unless the particular LFAs in question are given a chance to respond. Communications Support Group Reply at 7; Anne Arundel County Reply at ***5***. We need not resolve particular disputes between parties. however, in order to address this issue. Our clarification that all IFA requests not related to cable services must be counted toward the ***5*** percent cap **is** a matter of statutory construction. and all commenters have had ample opportunity to address this issue.

[352] Broadhand Service Providers Association Comments at *8:* AT&T Comments at ***26;*** Verizon Comments at 57-58. Parties have indicated that they were unwilling to identify specific instances of unreasonable requests, since in many cases these parties arc still trying to negotiate franchise agreements with the communities at issue.

[353] Broadhand Service Providers Association Comments at 8

[354] FTTH Council Comments at ***66***

Council asserts that in San Antonio, Grande Communications was required to prepay $1 million in franchise fees (which took the company five years to draw down) and to fund a $50,000 scholarship, with an additional $7,200 to be contributed each year. They assert that new entrants agree to these requirements because they have no alternative.'" The National Telecommunications Cooperative Association ("NTCA") also asserts that its members have complained that LFAs require them to accept franchise terms unrelated to the provision of video service.[356] NTCA states that any incumbent cable operator that already abides by such a requirement has made the concession in exchange for an exclusive franchise, but that new entrants, in contrast. must fight for every subscriber and will not survive if forced into expensive non-video related projects."'

107. AT&T refers to a press article stating that Verizon has faced myriad requests unrelated to the provision of cable service. These include: a $13 million "wish list" in Tampa, Florida; a request for video hookup for a Christmas celebration and money for wildflower seeds in New **York;** and a request for fiber on traffic lights tu monitor traffic in Virginia.'" Verizon provider little additional information about these examples, but argues that any requests must be considered franchise-related costs subject to the 5 percent franchise fee cap, as discussed above.""

108. We clarify that any requests made by LFAs unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap, as discussed above. Municipal projects unrelated to the provision of cable service do not fall within any of the exempted categories in Section 622(g)(2) of the Act and thus should be considered a "franchise fee" under Section 622(g)(1). The legislative history of the 1984 Cable Act supports this finding, providing that "lump sum grants not related to PEG access for municipal programs such as libraries, recreation departments, detention centers or other payments not related to PEG access would he subject to the 5 percent limitation."[360] Accordingly, any such requests for municipal projects will count towards the 5 percent cap.

109. **Contributions in support of PEG services and equipment.** As further discussed in the Section below, we also consider the question of the proper treatment of LFA-mandated contributions in support of PEG services and equipment. The record reflects that disputes regarding such contributions are impeding video deployment and may be leading to unreasonable refusals to award competitive franchises.[361] Section 622(g)(2)(C) excludes from the term "franchise fee" any "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities."[362] Accordingly, payments of this type, if collected only for the cost of building PEG facilities, are not subject to the 5 percent limit. Capital costs refer to those costs incurred in or associated

[355] *Id.* at 38.

[356] NTCA Comments at 4

[357] NTCA Comments at 13.

[358] AT&T Comments at **26** (citing Dionne Searcey, *As Verizon Enters* Cable *Business, ir Faces Local Static*, WALL ST. J., Oct. 28, ZOOS, at A1). *See also* City of Tampa Reply Comments at **5**.

[359] Verizon Comments at 54. *See also* USTelecom Comments at 48

[360] H.R. REP. No. 98-934, at 65 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655,4702

[361] **See.** *e.g.*, FTTH Council Comments at 36 (noting how Knology declined to enter the Louisville market after the Louisville LFA requested a PEG grant of *$266,000* at the time of franchise grant, with $1.9 million total due over the 15-year term).

[362] 47 U.S.C. § 542(g)(2)(C)

with the construction of PEG access facilities.''' These costs are distinct from payments in support of the use of PEG access facilities. PEG support payments may include, but are not limited to, salaries and training. Payments made in support of PEG access facilities are considered franchise fees and are subject to the 5 percent cap.[364] While Section 622(g)(2)(B) excluded from the term franchise fee any such payments made in support of PEG facilities, it only applies to any franchise in effect on the date of enactment.[365] Thus. for any franchise granted after 1984, this exemption from franchise fees no longer applies.

4. PEG/Institutional Networks

110. In the *Local Franchising NPRM*, we tentatively concluded that it is not unreasonable for an LFA, in awarding a franchise, to "require adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support''''' because this promotes important statutory and public policy goals:[767] However, pursuant to Section 621(a)(1). we conclude that LFAs may not make unreasonable demands of competitive applicants for PEG and I-Net[368] and that conditioning the award of a competitive franchise on applicants agreeing to such unreasonable demands constitutes an unreasonable refusal to award a franchise. This finding is limited to competitive applicants under Section 621(a)(1). Yet, as this issue is also germane to existing franchisees. we ask for further comment on the applicability of this and other findings in the ***Further Notice of Proposed Rulemaking*** attached hereto. The FNPKM tentatively concludes that the findings in this ***Order*** should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs.

111. As an initial matter, we conclude that we have the authority to address issues relating to PEG and I-Net support.''''' Some commenters argue that Congress explicitly granted the responsibility for PEG and I-Net regulation to state and local governments.[370] For example, NATOA contends that we cannot limit the in-kind or monetary support that LFAs may request for PEG access, because Sections 624(a) and (b) allow an LFA to establish requirements "related to the establishment and operation of a cable system," including facilities and equipment.[371] In response, Verizon claims that PEG requirements should extend only to channel capacity, and that LFAs can obtain other contributions only to the extent

[363] *See* H.R. REP. NO. 98-934, at 19 (1984), *us reprinted in* 1984 U.S.C.C.A.N.4655, 4656.

[364] *See Cable TV Fund 14-A v. City of Naperville,* 1997 WL 433628 (N.D. Ill. 1997) at 13: *City of Bowie, Maryland,* 14 FCC Rcd. 7675 (Cable Service Bureau, 1999); *as clarified* 14 FCC Rcd 9596 (Cable Services Bureau, 1999).

[365] 47 U.S.C. § 542(g)(2)(B).

[366] 47 U.S.C. § 541(a)(4)(B)

[367] *Local Franchising NPRM. 20* FCC Rcd at 18590

[368] An I-Net is defined as "a communication network which is constructed or operated by the cable operator and which is generally available only to subscribers who arc not residential customers." 47 U.S.C.§ 531(f).

[369] *See infra* Section lll.B.2

[370] NATOA Comments at 35; NATOA Reply at 30-31; Hawaii Reply at 2-3; Meroatus Comments at 35; Certain Florida Municipalities Comments at 17-18; Anne Arundel *et al* Comments at 35: City **of** New York Comments **at** 3-4.

[371] NATOA Reply at 30 (quoting 47 U.S.C. § 544(b))

that they arc agreed to voluntarily by the cable operator."' Verizon also asserts that the record confirms that LFAs often demand PEG support that exceeds statutory limits."'

112. Section 611(a) of the Communications Act operates as a restriction on the authority of the franchising authority to establish channel capacity requirements for PEG. This Section provides that "[a] franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public. educational. or governmental use only to the extent provided in this section."[374] Section 611(b) allows a franchising authority to require that "channel capacity be designated lor public, educational or governmental use," but the extent of such channel capacity is not defined.'" Section 621(a)(4)(b) provides that a franchising authority may require "adequate assurance" that the cable operator will provide "adequate" PEG access channel capacity, facilities, or financial support."[376] Because the statute does not define the term "adequate," we have the authority to interpret what Congress meant by "adequate PEG access channel capacity, facilities, and financial support," and to prohibit excessive LFA demands in this area, if necessary. We note that the legislative history does not define "adequate," nor does it provide any guidance as to what Congress meant by the term.'" We therefore conclude that "adequate" should be given its plain meaning: the term does not mean significant but rather "satisfactory or sufficient.""* **As** discussed above, we have also accepted the tentative conclusion of the *Local Franchising NPRM* that Section 621(a)(1) prohibits not only the ultimate refusal to award a competitive franchise, but also the establishment of procedures and other requirements that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise. Given this conclusion and our authority to interpret the term "adequate" in Section 621(a)(4), we will provide guidance as to what constitutes "adequate" PEG support under that provision as subject to the constraints of the "reasonableness" requirement in Section 621(a)(1).

113. AT&T asserts that we should shorten the period for franchise negotiations by adopting standard terms for PEG channels.[379] We reject this suggestion and clarify that LFAs are free to establish their own requirements for PEG to the extent discussed herein, provided that the non-capital costs of such requirements are offset from the cable operator's franchise fee payments. This is consistent with the Act and the historic management of PEG requirements by LFAs.[380]

114. Consumers for Cable Choice and Verizon argue 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.[381] We find that it is

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[372] Verizon Reply at 60-61

[373] Verizon Reply at 60 (citing NATOA Comments).

[374] 47 U.S.C. § 531(a).

[375] 47 U.S.C.§ 531(b).

[376] 47 U.S.C.§ 541(a)(4)(B).

[377] **Tee** *See* H.R. REP. NO. 102-862. at **78** (1992) (Conf. Rep.). *us reprinted in* 1992 U.S.C.C.A.N. **1231,** 1260.

[378] American Heritage Dictionary, Second College Edition (1991).

[379] AT&T Reply at 15.

[380] *See* 47 U.S.C. § 541(a)(4)(B); *Time Warner Cable of New York City v. City of New York,* 941 F.Supp. 1357, 1367 (S.D.N.Y 1996), *aff'd sub nom.* ***Time*** *Warner Cable of New York City v. Bloomberg, L.P.,* 118 F.3d 917 (2nd Cir. 1997).

[381] Consumers for Cahlc Choice Comments at 8; Verizon Comments at 71