Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1)	)	
of the Cable Communications Policy	)	MB Docket No. 05-311
Act of 1984, as amended by the Cable	)	
Television Consumer Protection and	)	
Competition Act of 1992	)	

COMMENTS OF TIME WARNER CABLE INC.

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Dated: April 20,2007

TABLE OF CONTENTS

Page

SUMMARY

Consistent with its previous presentations in this docket, Time Warner Cable continues to believe that tlie Coimnissioii laclts authority to override Congress' express grant of responsibility for oversight of tlie local franchising process to local franchising authorities under Section 621(a) of tlie Communications Act, and fiu-tlierinore, that the record evidence fails to show that such oversight has created barriers to entry for coinpetitive providers.

Tlie Coimnission does, however, have tlie requisite authority, independent of Section 621, to adopt clarifications and offer regulatory guidance with respect to certain otlier provisioiis of tlie Cable Act addressing specific franchise obligations, including franchise fee payments (Section 622), PEG and I-Net obligatioiis (Section 611) and tlie regulation of mixed-use iietworlts (Section 602(7)). TWC supports tlie Commission's proposal to extend to incumbent cable operators the clarifications and guidance on these matters adopted by tlie Coimnission with respect to new entrants. Moreover, TWC urges tlie Commission to provide additional guidance with regard to the franchise fee limitation by expressly clarifying that Generally Accepted Accounting Principles are tlie applicable standard for calculating an operator's gross revenues under Section 622 of tlie Cable Act.

Tlie clarifications and regulatory guidance adopted by tlie Coimnission with regard to tlie above-described matters not oiily should be applied to all incumbent cable operators, but also should be made effective to them iimnediately. Tlie Coimnissioii's proposal not to apply its clarifications and guidance to incumbent operators until they come up for franchise renewal will distoi-t coinpetition and flies in tlie face of tlie Coimnissioii's goal of developing a consistent regulatory framework across platform by regulating like services in a like manner. In addition, as tlie Commission itself has acluiowledged, tlie relevant statutory provisions do not distinguisli between new entrants and incumbents. Thus, it would be arbitrary, capricious and contrary to

law to delay the application of the Commission’s clarifying interpretations of these provisions to incumbent operators.

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COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. ("TWC"), by its attorneys, hereby submits the following comments in response to the Commission's Report and Order and Further Notice of Proposed Rulemaking ("Order/FNPRM") in the above-captioned proceeding.[1] Pursuant to franchises granted by local (or, in some instances, state) governments, TWC operates cable systems in more than 4,500 communities in **33** states.

INTRODUCTION AND BACKGROUND

Over a year ago, the Commission adopted a Notice of Proposed Rulemaking ("NPRM") seeking comment on whether the local franchising process was creating barriers to entry for providers of competitive multichannel video services and, if so, whether the Commission had the necessary authority to take actions to prevent local franchising authorities ("LFAs") from unreasonably refusing to award competitive franchises.[2] In response to the NPRM, TWC filed

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[1] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180 (rel. Mar. 5,2007) ("Order/FNPRM").

[2] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992,* Notice of Proposed Rulemaking, 20 FCC Rcd 18581 (rel. Nov. 18,2005) ("NPRM").

reply comments and made oral and written ***exparte*** presentations.[3] TWC's position was, and is, that the Commission lacks the authority to override the regulatory framework established by Section 621(a) of the Communications Act wherein Congress expressly determined that LFAs have responsibility for processing applications for competitive cable franchises, subject to review in state or federal court, and that, in any event, the record evidence did not establish that the local franchising process is creating a barrier to additional video competition warranting Commission intervention.[4]

While generally opposing Commission disruption of the local franchising process established by Congress, TWC identified certain actions that the Commission should take that might serve to expedite negotiations between LFAs and providers of multichannel video services and for which the Commission has independent statutory authority. These actions included clarification of the statutory limit on franchise fee payments and the establishment of limitations on public, educational and government ("PEG") and institutional network ("I-Net") obligations. Moreover, TWC made clear that if the Commission took steps to "reform" the local franchising process, any such actions should apply concurrently to incumbent operators as well as to new entrants.

In its Order/FNPRM, adopted in December 2006, the Commission concluded that "the current operation of the local franchising process in many jurisdictions constitutes an unreasonable barrier to entry'' that impedes the goals of enhanced cable competition and accelerated broadband deployment.[5] The Commission also found that it had the statutory

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[3] ***See,*** *e.g.*, Reply Comments of Time Warner Cable Inc., MB Docket No. 05-311 (filed Mar. 28,2006); letter from Seth **A.** Davidson, Counsel for Time Warner Cable Inc., to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-311 (dated Nov. 10,2006); letter from Seth **A.** Davidson, Counsel for Time Warner Cable Inc., to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-311 (dated Dec. 1,2006).

[4] 47 U.S.C. § 541(a).

[5] Order/FNPRM at ¶ 1.

authority to adopt rules and provide guidance relating to the local franchising process. Specifically, the Commission took several actions relating to the review by LFAs of applications for "competitive" cable franchises, including:

- Adoption of a "shot clock" requiring LFAs to grant or deny "competitive" franchise applications within a set period of time;
- Establishment of limitations on unreasonable "build-out" requirements imposed by LFAs;
- Clarification that certain LFA-mandated costs, fees and other compensation must be included in calculating the statutory five percent cap on franchise fee payments;
- Clarification of the amount of PEG access and I-Net support that an LFA can require; and
- Clarification of the scope of an LFA's jurisdiction to regulate a "mixed-use" network.

The Commission also expressly preempted local laws, regulations and agreements, including local "level playing field" requirements, to the extent that they conflict with the policies articulated in the Order/FNPRM, *e.g.*, by requiring a new entrant to "match" the obligations imposed on the incumbent provider where such preexisting obligations are now deemed unreasonable.[6]

Finally, the Order/FNPRM acknowledged that the actions that the Commission was taking to improve the franchising process "appear[ed] germane to existing franchises."[7] However, despite having sought and received comment on whether changes also should be made in the franchising procedures and requirements applicable to incumbent operators, the Commission limited the rules and guidance announced in the Order/FNPRM to applicants for competitive franchises. The extension of these rules and guidelines to existing operators was made the subject of the instant proceeding, which seeks comment on the Commission's tentative

[6] *Id.* at ¶ 5. Notably, the Commission expressly declined to preempt state "level playing field" laws or any cable franchising matters handled at the state level. Moreover, franchising matters handled at the local level are not preempted under the Order/FNPRM if they are subject to procedural requirements or oversight at the state level. *Id.* at n. 2; ¶ 126.

[7] *Id.* at ¶ 139.

conclusion that the findings in the Order/FNPRM should not apply to existing franchise agreements until such time as they come up for renewal.

TWC continues to believe that the Commission exceeded its authority in taking certain actions, such as adopting a "shot clock" for review of franchise applications and in restricting local build-out requirements. However, as discussed below, whether or not the Commission has the authority to take all of the actions announced in the Order/FNPRM, it can and should extend a number of those actions to existing operators – particularly the clarification of the franchise fee rules and PEG/I-Net requirements – for which it clearly has statutory authority independent of Section 621.[8] Moreover, there is no justification, as a matter of either law or of policy, for the Commission not to apply these clarifications to all incumbent cable operators immediately.

DISCUSSION

I. CLARIFICATION OF THE STATUTORY FRANCHISE FEE LIMITATION

In the Order/FNPRM, the Commission clarified that, under the franchise fee limitation codified in Section 622 of the Communications Act,[9] (i) cable operators cannot be required to pay franchise fees on revenues from non-cable services, (ii) "incidental" expenses falling outside the franchise fee definition are limited to those expenses expressly identified in Section 622(g)(2)(D) and certain other "minor" expenses described in the Order/FNPRM[10] and (iii) in-kind payments unrelated to the provision of cable service and contributions in support of PEG

[8] 47 U.S.C. § 541. Unlike other provisions of the Act discussed herein and pursuant to which the Commission has authority to modify certain rules that are incidental to the award of local franchises, the Commission does not have any authority, either implicitly or directly, to regulate the local franchising process under Section 621 because it contains an explicit grant of authority for such oversight to other governmental bodies (*i.e.*, LFAs, subject to review by the courts).

[9] 47 U.S.C. § 542.

[10] 47 U.S.C. § 542(g)(2)(D). Among the non-incidental expenses imposed by LFAs and identified by the Commission as counting toward the franchise fee cap are attorneys' fees, consultant fees, application processing fees that exceed reasonable administrative costs, acceptance fees, free or discounted services provided to an LFA, and any requirements to lease or purchase equipment or property from an LFA at prices in excess of market value.

services and equipment count against the statutory five percent .franchise fee limit.[11] As a matter of both law and policy, the Commission should acknowledge that each of these clarifications applies immediately to all existing cable operators. Furthermore, the Commission should adopt an additional clarification specifying that the gross revenues from the provision of cable service upon which the five percent franchise fee limit is based must be determined consistent with Generally Accepted Accounting Principles ("GAAP").

A. The Commission Has the Authority to Clarify Section 622.

It is well-settled that the Commission has the requisite statutory authority to interpret and clarify the scope and application of the .franchise fee limitation in Section 622 and that this authority exists independent of Section 621. Specifically, in *ACLU v. FCC*, the United States Court of Appeals for the District of Columbia Circuit held that while Section 622 does not contain an explicit delegation of regulatory authority, Congress clearly sought to establish a uniform federal standard for franchise fees, finding that "it 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."[12] Indeed, the court's affirmance of the Commission's decision to adopt a discretionary policy of "partial forbearance" with respect to the enforcement of the franchise fee limit was predicated on the Commission's implicit acknowledgment of its responsibility to assert its jurisdiction in order to ensure the national uniformity Congress sought to achieve in Section 622.[13]

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[11] Order/FNPRM at ¶¶ 103-109.

[12] *ACLU v. FCC,* **823** F.2d 1554 (D.C. Cir. 1987).

[13] *Id.* at **1574.**

B. **<u>There is No Basis in Law or Policy for Limiting or Delaying the Immediate Application of the Clarifications of Section 622 to Incumbent Operators</u>.**

The Order/FNPRM proposes to apply to existing operators the same clarifications of the five percent franchise fee limit that the Commission adopted with respect to new entrants. However, while the Order/FNPRM made these clarifications immediately effective with regard to a franchise awarded to a new entrant, the Commission has proposed that, in the case of an incumbent operator, the implementation of these identical clarifications of the same rules be delayed until the operator renews its franchise. The Commission has correctly recognized that the statutory provisions clarified in the Order/FNPRM "do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants."[14] Particularly in light of this fact, the Commission's proposal to delay the application of those clarifications to existing operators for what could be a decade or more is completely unwarranted as a matter of both law and policy. Rather, the clarifications to Section 622 announced in the Order/FNPRM should be deemed immediately applicable and enforceable with respect to <u>all</u> cable operators."

As noted above, the Commission's authority to clarify the five percent franchise fee limit is inherent in Section 622 itself and is not dependent on or related to any authority the Commission claims to have with regard to the award of competitive franchises under Section 621. Moreover, because Section 622 draws no distinctions between incumbent cable operators and new entrants, it would be arbitrary, capricious and contrary to law for the Commission to give different meanings to the terms in Section 622 based on whether the terms were being applied to an incumbent or a new entrant.

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[14] Order/FNPRM at ¶ 140,

[15] As explained in the following sections, the clarifications regarding PEG and I-Net obligations imposed under Section 611(a) and regarding mixed-use facilities under 602(7) are similarly immediately applicable to all cable operators.

There plainly is no rational basis not to immediately apply the clarifications of Section 622 adopted in the Order/FNPRM to all incumbent operators, regardless of when their franchises are scheduled to expire. Franchises are typically granted for terms of ten to fifteen years and, thus, the Commission's proposed phased-in approach could saddle incumbent operators for years into the future with greater franchise fee burdens than the new entrants with which they compete. Such a result not only would arbitrarily distort competition, but also would be at odds with Congress' stated goal of establishing "uniform" federal standards for franchise fee payments.

Finally, it is imperative that the "clarifications" announced by the Commission with respect to application of the franchise fee cap in Section 622 apply immediately to all incumbent cable operators because such clarifications merely serve to reaffirm preexisting law.[16] Thus, for example, the conclusion that the revenue base for calculating franchise fees must exclude non-cable services is simply an affirmation of the principles articulated in the Cable Modem Declaratory Ruling -- principles that became immediately applicable to incumbent cable operators upon adoption.[17] Similarly, as the Commission noted, the notion that computation of the five percent franchise fee cap must include non-incidental payments made in connection with the grant or renewal of a cable franchise reflects well-established precedent applicable to incumbent cable operators for more than a decade." The Commission also recognized that the 1984 Cable Act, as amended by the 1996 Telecommunications Act, expressly authorizes incumbent cable operators to count in-kind payments imposed by the LFA that are unrelated to

[16] Indeed, the Commission itself has acknowledged that its clarifications with respect to franchise fee matters were intended to "restate the basic propositions" and that such principles "should be relatively well known." Order/FNPRM at ¶ 94.

[17] *In re Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities,* Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 485 1 (2002), *rev'd, BrandX Internet Servs.* v. *FCC,* 345 F.3d 1120 (9th Cir. 2003), *rev'd, Nat'l Cable and Telecomms. Ass'n v. BrandX Internet Servs.,* 545 U.S. 967 (2005); *see also Time Warner Cable–Rochester v. City of Rochester*, 342 F. Supp. 2d 143 (2004); *Parish of Jefferson v. Cox Communications Louisiana, LLC,* 2003 WL 2163440 (E.D. La. July 3, 2003).

[18] *See* Order/FNPRM at ¶ 103, citing *Robin Cable Sys. v. City of Sierra Vista*, 842 F. Supp. 380 (D. Ariz. 1993); *Time Warner Entm't Co. v. Briggs,* 1993 WL 23710 (D. Mass. Jan. 14, 1993); *Birmingham Cable Communications v. City of Birmingham*, 1989 WL 253850 (N.D. Ala. 1989).

the provision of cable service against the five percent franchise fee cap.[19] The 1984 Cable Act also expressly provides that amounts for the support of PEG access facilities (salaries, program production costs, equipment maintenance, etc.) count against the statutory franchise fee cap.[20] Congress clearly specified that this distinction between amounts actually spent for PEG capital facilities (*e.g.*, studio equipment), on the one hand, and PEG support payments, on the other hand, applies to all incumbent cable operators that have renewed their franchises on or after the date of enactment of the 1984 Cable Act.[21]

It would be the height of arbitrary decision-making for the Commission to imply that these well-established principles relating to the application of the franchise fee cap suddenly no longer apply to incumbent cable operators, only to spring back into effect upon franchise renewal. The Commission should avoid the unnecessary confusion and litigation that might otherwise ensue by immediately confirming that the pronouncements in the Order/FNPRM regarding application of the franchise fee cap in Section 622 reflect a restatement of preexisting law, and thus continue to apply to incumbent cable operators and new entrants alike.

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[19] Order/FNPRM at ¶ 105. In this regard, it is important for the Commission to acknowledge that any amounts expended under a franchise requirement to construct, maintain or operate an I-Net are in-kind payments unrelated to the provision of cable service that count toward the franchise fee cap. The Communications Act defines an I-Net as "a communications network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential customers." 47 U.S.C. § 531(f). In particular, I-Nets are private telecommunications networks used to connect specific locations designated by the LFA for the transmission of information selected and controlled by the affected local governmental agencies. Notably, while I-Net communications might include data, voice or video content, such content is not available to cable subscribers generally and does not include the retransmission of broadcast signals, and thus does not meet the definition of "cable service." *See* 47 U.S.C. ¶ 522(6) (defining "cable service"); 47 U.S.C. § 534(b)(7) (requiring local commercial television stations carried by a cable operator to "be provided to every subscriber of a cable system."). The statute itself recognizes that I-Nets are not intended to deliver cable service, but rather are telecommunications facilities. 47 U.S.C. § 541(b)(3)(D). The Commission has also acknowledged that I-Nets provide "communications services other than cable service." *Heritage Cablevision Associates of Dallas, L.P., et al. v. Texas Utils. Elec. Co.*, Memorandum Opinion and Order, 69 RR 2d 1749 (1991) at n. 38. Thus, because I-Nets are not used to provide cable service, any costs associated with I-Net obligations under a franchise count toward the five percent franchise fee cap.

[20] *See* Order/FNPRM at ¶ 109.

[21] *See* 47 U.S.C. § 542(g)(2)(C).

C. The Commission Should Clarify That for Purposes of Calculating the Five Percent Franchise Fee Limit, an Operator's Gross Revenues Should Be Determined in Accordance with GAAP.

As the Commission has recognized, franchise fee disputes can involve not only determining which fianchise-related costs imposed on providers should be included within the five percent statutory cap, but also the proper calculation of "the revenue base from which the five percent is calculated."[22] The Order/FNPRM provides useful reaffirmation that revenue fiom non-cable (*e.g.*, cable modem, voice or data) services may not be included in the revenue base for franchise fee calculations. However, on occasion, disputes also arise between cable operators and LFAs over the financial accounting standards applicable to the calculation of the operator's "revenue" for franchise fee payment purposes. For example, some LFAs seek to include gross amounts as part of the franchise fee base that, under *GAAP*, cannot be recognized by the operator as revenue.[23]

GAAP governs the presentment of information in financial reporting.[24] Cable operators with publicly traded debt or equity are required by law to comply with GAAP in their financial reporting.[25] Privately owned and financed cable operators are typically required by lenders to comply with *GAAP* as well. All levels of government – including the FCC and the courts – also typically look to *GAAP* as the basis for uniform accounting standards for financial reporting purposes and to resolve financial accounting disputes.[26]

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[22] Order/FNPRM at ¶¶ 44, 94.

[23] *GAAP* precedent directly governs amounts properly recognized as "revenue." *See, e.g.*, Financial Accounting Standards Board ("FASB"), *Reporting Revenue Gross as a Principal versus Net as an Agent*, EITF Abstracts, Issue No. 99-19, *available at:* http://www.fasb.org/pdf/abs99-19.pdf, effective for fiscal years beginning after December 15, 1999 (determinations as to whether gross or net amounts are properly recognized as "revenue").

[24] *See* American Institute of Certified Public Accountants, *Code of Professional Conduct*, Rule 203.

[25] 17 C.F.R. § 210.4-01(a)(1) (application of Regulation **S-X).**

[26] *See, e.g.,* 47 C.F.R. § 76.924 (a)-(b) (cost-of-service rate regulation methodology requiring cable operator to maintain its financial accounting records in accordance with *GAAP*); *see also Cont'l WebPress, Inc. v. NLRB*, 767 F.2d 321, 323 (7th Cir. 1985), *abrogated on other grounds, I.N.S. v. Jean, 496 US*. 154 (1990) (noting that where Congress did not define a particular term in reference to *GAAP* "it seems a fair guess that if it had thought about the

Utilization of *GAAP* ensures consistent application of accounting principles by an individual company from year to year. The determination of what accounting principle to apply to a given situation is governed by a carefully constructed "Hierarchy of GAAP."[27] This hierarchy specifies which accounting pronouncements have precedent in the case of conflicting requirements and what standards or practices to apply in the absence of an official pronouncement promulgated following a due process proceeding.[28] Moreover, once adopted, an accounting principle cannot be changed by a company absent extraordinary circumstances, thereby ensuring consistent accounting practices among periods.[29] Application of *GAAP* gives those outside an organization the best assurance that the information received fairly reflects the financial attributes recorded and that the organization is not gaming the system by changing accounting treatment from period to period.[30]

That the calculation of an operator's gross revenues under Section 622 should be determined in accordance with GAAP flows directly from Congress' mandate that uniform federal standards govern the franchise fee calculation. "[I]f [the franchise] process is to further the purposes of this legislation, the provision of these franchises, and the authority of municipal governments to enforce these provisions, must be based on certain <u>important uniform federal standards that are not continually altered by federal, state and local regulation</u>."[31] Allowing each

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question, it would have wanted the courts to refer to generally accepted accounting principles....Congress would not have wanted us to create a whole new set of accounting principles just for use" under the law in question). ***See,*** *e.g., Sanders v. Jackson,* 209 F.3d 998, 1001 n. 3 (7th Cir. 2000); *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1200 n. 3 (11th Cir. 2001).

[27] FASB , Statement of Financial Accounting Standards No. 1XX, *available at:* http://www.fasb.org/project/gaap_near-final.pdf, "near-final draft" released September 2006 ("Hierarchy of GAAP").

[28] *Id.* at pp. 1-2.

[29] FASB, Statement of Financial Accounting Standards No. 154, Accounting Changes and Error Corrections, May 2005, ¶¶ 12-14.

[30] FASB, Statement of Financial Accounting Concepts No. 1, Nov. 1978 at pp. 9 and 13-14.

[31] H. R. Report No. 98-934, *reprinted in* 1984 U.S.C.C.A.N. 4665,4661 (emphasis added); *see also* S. Rep. No. 98-67 at 25, 98th Cong., 2d Sess. (1983) (Congress felt that it was necessary to impose a "franchise fee ceiling" because

LFA to adopt and enforce its own interpretation of "gross revenues" would eviscerate the desired uniformity, particularly in light of the well-established standards under *GAAP*. Recognizing *GAAP* as the appropriate standard for calculating "gross revenues" in the franchise fee context also is consistent with the Fifth Circuit's holding in the *City of Dallas* case that Congress did not intend the term gross revenues as used in Section 622 to have a "specialized" meaning, but rather for it to have "the meaning ascribed to it by the industry under regulation."[32] Under both "industry accounting practices"[33] and the regulatory guidance referred to by the court in *City of Dallas,* the "revenues" for calculatiiig franchise fee payments are properly determined under *GAAP*.

Disputes over the appropriate methodology to be employed in calculating franchise fees not only can undermine the uniformity sought by Congress with respect to the application of Section 622, but it also can delay franchise grants and renewals and create uncertainty. Under the circumstances, clarifying that *GAAF*' is the applicable measure by which gross revenues are to be calculated under Section 622 is entirely appropriate and wholly consistent with the policies underlying the other clarifications of Section 622 that the Commission adopted in the Order/FNPRM.

II. LIMITATIONS ON PEG/I-NET OBLIGATIONS

The Commission has tentatively concluded that the findings in the Order/FNPRM relating to PEG and I-Net obligations should be extended to incumbent cable operators at the time that they negotiate franchise renewal agreements with LFAs. These findings include the

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it was "concerned that, without a check on such fees, local governments may be tempted to solve their fiscal problems by what would amount to a discriminatory tax not levied on cable's conipetitors.").

[32] *City of Dallas v. FCC*, 118 F. 3d 393 (5th Cir. 1997). Following the admonition of the Supreme Court "that when a statute uses a teclmical term, [courts] must assume that Congress intended it to have the meaning ascribed to it by the industry under regulation," the court in *City of Dallas* referred specifically to the FASB, the standard-setting body for *GAAP*. *Id.* at 395.

[33] In fact, industry accounting practices are incorporated by *GAAP*, which pursuant to the Hierarchy of GAAP at ¶ 3(d), ranks just below those pronouncements promulgated by the FASB in due process proceedings.

Commission's declaration that it is unreasonable for an LFA to impose on a new entrant more burdensome PEG obligations than those imposed on the incumbent cable operator or to require a new entrant to "pay the face value of an I-Net that will not be constructed."[34]

The Order/FNPRM cites, *inter alia,* Sections 611(a) and 621(a)(4)(B) as sources of its authority to promulgate regulatory guidance with regard to a cable operator's PEG and I-Net obligations.[35] Neither of these provisions single out new entrants for different treatment than incumbent operators or otherwise relate to the award of competitive franchises. Thus, once again, the Commission is obligated as a matter of law to apply these findings to all cable operators without distinguishing between new entrants and incumbents. Furthermore, the Commission must apply its findings with regard to PEG and I-Net requirements immediately rather than phase them in at the time of renewal.

Such a result is appropriate because, insofar as the Commission believes that competition is harmed by imposing more burdensome PEG or I-Net obligations than those imposed on the incumbent cable operator, similar competitive harm will occur if incumbents are required to comply with more burdensome obligations than a new entrant. Allowing incumbent operators to be immediately relieved of unreasonable and excessive PEG and I-Net obligations, particularly in light of an affirmative finding by the LFA that lesser obligations are "adequate," would be entirely consistent with the Commission's "goal of developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner."[36] As recognized by Commissioner McDowell, FCC actions should "ensure that no governmental entities, including

[34] 47 U.S.C. §§ 531(a), 541(a)(4)(B); Order/FNPRM at ¶¶ 114, 119, 120.

[35] Order/FNPRM at ¶ 112.

[36] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005).

those of us at the FCC, have any thumb on the scale to give a regulatory advantage to any competitor."[37]

III. REGULATION OF MIXED-USE NETWORKS

The Order/FNPRM addressed the issue of mixed-use networks by clarifying that "LFAs' jurisdiction applies only to the provision of cable services over cable systems," and that "[l]ocal regulations that attempt to regulate any non-cable services offered by video providers are preempted because such regulation is beyond the scope of the local franchising authority" and inconsistent with the statutory definition of a "cable system."[38] Thus, for example, "the provision of video services pursuant to a cable franchise does not provide a basis for customer service regulation by local law or regulation of a cable operator's entire network, or any services beyond cable services."[39] Where a cable operator provides non-cable services and/or operates facilities that do not qualify as a cable system (including any portion of the operator's plant or bandwidth used to provide non-cable service), "it is unreasonable for an LFA to refuse to award a franchise based on issues related to such services or facilities."[40]

The Commission derives its authority to clarify the regulatory status of mixed-use networks from its authority to interpret the definition of a "cable system" in Section 602(7) of the Communications Act. Thus, like the franchise fee clarifications, it is independent of whatever authority the Commission claims to have under Section 621 with respect to the award of competitive franchises. Similarly, unlike Section 621(a)(1), there is nothing in Section 602(7), or in Sections 622 or 611(a) for that matter, to indicate that Congress intended exclusive jurisdiction for review of LFA decisions relating to facilities used for non-cable services,

[37] Order/FNPRM, Statement of Commissioner Robert M. McDowell.

[38] *Id.* at ¶ 121.

[39] *Id.*

[40] *Id.* at ¶ 122.

franchise fees, or PEG and I-Net obligations to reside with the courts. Moreover, because the statutory cable system definition does not differentiate between incumbent operators and new entrants, the Commission has no basis to apply a different interpretation of that definition to incumbent operators than is being applied, pursuant to the Order/FNPRM, to new entrants.

Nor is there any justification for the Commission to wait until an incumbent's -franchise is being renewed to apply the interpretation announced in the Order/FNPRM and the related policy of preemption. The Commission's proposal to phase in the implementation of its policy guidance regarding the regulation of mixed-use networks would create a competitive imbalance and impede the deployment of advanced networks by existing cable operators in response to marketplace developments.

CONCLUSION

For the foregoing reasons, TWC respectfully requests that the Commission adopt its proposed clarifications concerning the franchise fee cap and PEG/I-Net obligations, extending application of these changes as well as certain related clarifications adopted in the Order/FNPRM immediately to all incumbent operators.

Respectfully submitted,

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Dated: April 20,2007
193801_4