Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

Grant E. Seiffert
Executive Vice President

Derek R. Khlopin
General Counsel
Law and Public Policy

Danielle M. Jafari
Manager
Regulatory and Government Affairs

2500 Wilson Boulevard
Suite 300
Arlington, Virginia 22201
(703) 907-7700

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Comments of the Telecommunications Industry Association

The Telecommunications Industry Association (TIA) respectfully submits its Comments in response to the above-captioned Notice of Proposed Rulemaking.[1] TIA urges the Commission to declare that efforts by local franchise authorities (LFAs) to impose obligations beyond those expressly permitted by Section 621 of the Communications Act, 47 U.S.C. § 541, constitute unreasonable refusals to award a competitive franchise.

I. INTRODUCTION AND SUMMARY

As the leading U.S. trade association representing suppliers of communications and information technology products and services, TIA commends the Commission for initiating this proceeding.[2] Delay and unreasonable demands by many local franchising authorities (LFAs) are undermining Congress's goals of promoting broadband deployment and video competition. By using its authority under Section 621 to establish the bounds of permissible LFA demands, the

[1] FCC 05-189 (released Nov. 18, 2005).

[2] TIA has 600 member companies that manufacture or supply the products and services used in global communications. TIA represents its members on the full range of public policy issues affecting the information and communications technology industry and forges consensus on industry standards. Among their numerous lines of business, TIA member companies design, produce, and deploy network and terminal equipment and software that facilitate the distribution and reception of video programming, across all communications technology platforms.

Commission can help assure that next-generation, competitive video services and high-speed Internet access are available more promptly and pervasively than otherwise would be the case.

In comments to the Commission last fall, TIA cautioned that "[t]he local franchise process is a regulatory barrier to entry that impedes timely investment in new facilities and capabilities, slowing delivery of competitive and innovative services to consumers."[3] Ideally, legislation at the state and/or federal level will eliminate this barrier to entry by providing for statewide or national entry certification for competitive video suppliers; with tens of thousands of local franchise areas, even an optimally streamlined local franchise process would engender undue delay and forestall critical broadband investment. The timing and prospects of legislation are uncertain, however. Accordingly, the Commission must act to the best of its abilities to minimize the adverse effects of the existing local franchise process.

In particular, the Commission can and must consider the detrimental effect of such delay and excessive LFA demands when interpreting the "unreasonable refusal" language in Section 621. Not only does the Commission have unquestioned authority under Supreme Court and appellate court precedent to adopt rules interpreting this language, but it must do so in a manner that advances Congress's core goals of promoting broadband deployment and video competition, as expressed in Section 621 itself and in Section 706 of the 1996 Act. Delay and excessive demands by LFAs undercut those goals, because they unquestionably diminish broadband deployment and video competition. Indeed, by postponing or even eliminating the potential revenue stream from video services, such LFA actions render entry uneconomic in many areas. Consequently, to assure that Congress's objectives are achieved, the Commission should hold that any LFA demand exceeding the obligations in Section 621 is unreasonable.

[3] Comments of TIA, MB Docket No. 05-255, filed Sept. 19, 2005, Attachment ("Policy Proposal on Video Programming Distribution").

Relatedly, the Commission should endorse the recently enacted Texas state franchising law[4] as a "safe harbor" for reasonable LFA action. That statute is consistent with Section 621, and the approach taken in Texas should be presumed workable everywhere. Specifically, the Commission should hold that LFAs modeling their franchise agreements after the Texas law (and acting within the time frames specified therein) are acting reasonably. Conversely, the Commission should state that any LFA that unduly delays action on a competitive franchise application or demands additional concessions has unreasonably refused to grant a competitive franchise. Because such conduct violates Section 621, it is automatically preempted under Section 636 as well as longstanding conflict preemption doctrine.

II. CONGRESS HAS ARTICULATED BINDING NATIONAL POLICIES OF PROMOTING BROADBAND DEPLOYMENT AND FACILITATING VIDEO COMPETITION.

As the NPRM observes (at ¶ 11), Congress has established "interrelated federal goals of enhanced cable competition and rapid broadband deployment." These goals must inform the Commission's interpretation of the phrase "unreasonabl[e] refus[al] to grant a competitive franchise" in Section 621. LFA requirements that are consistent with achievement of these goals are reasonable; requirements that impede their achievement are not.

A. Broadband Deployment

Even before the 1996 Act, Congress emphasized that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public," and stipulated that "[a]ny person … who opposes a new technology or service … shall have the burden to demonstrate that such proposal is inconsistent with the public interest."[5] Congress

[4] *See* Texas Utilities Code, Chapter 66 ("State-Issued Cable and Video Franchise").

[5] 47 U.S.C. § 157(a).

expanded upon this requirement in Section 706 of the 1996 Act, which directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" through "regulating methods that remove barriers to infrastructure investment."[6] More recently, the President established a "Broadband Initiative" aimed at achieving "universal, affordable access for broadband technology by the year 2007"; in introducing the Broadband Initiative, the President explained that "[d]eregulating new ultra-fast broadband infrastructure to the home removes a significant barrier to new capital investments."[7]

The Commission has taken these policies to heart. In the *Triennial Review Order*, for example, the Commission held that fiber to the premise loops and the packetized capabilities of hybrid loops should not be subject to unbundling under Section 251(c)(3), explaining that, "with the certainty that their fiber optic and packet-based networks will remain free of unbundling requirements, incumbent LECs will have the opportunity to expand their deployment of these networks, enter new lines of business, and reap the rewards of delivering broadband services to the mass market."[8] The policies underlying Section 706 expressly informed the Commission's decision: "promoting the deployment of FTTH loops is particularly important in light of our Section 706 mandate."[9]

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[6] 1996 Act, § 706(a), codified at 47 U.S.C. § 157 nt.

[7] *See* http://www.whitehouse.gov/infocus/technology/economic_policy200404/chap4.html.

[8] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 272 (2003), *subsequent history omitted* ("*Triennial Review Order*"). The Commission later extended unbundling relief to fiber to the curb loops and fiber loops serving predominantly residential multiple dwelling units. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 20293 (2004); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 15856 (2004).

[9] *Id.* ¶ 278. On review, the D.C. Circuit upheld the Commission's reliance on Section 706 to eliminate unbundling even in the face of some impairment. *United States Tel. Ass'n v. FCC*, 359 F.3d 554, 580-82 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313 (2004).

Upon assuming leadership of the Commission, Chairman Martin indicated his intent to redouble efforts to promote broadband investment: "Creating a policy environment that speeds the deployment of broadband throughout the U.S. is my highest priority as the new chairman of the FCC."[10] Chairman Martin also noted that, while there have been "billions of dollars of new investment in broadband networks, there is still more the government must do to spur broadband deployment."[11] Almost immediately thereafter, the Commission determined that wireline broadband Internet access services should be treated as unregulated information services and eliminated *Computer Inquiry* unbundling and access requirements. In doing so, the Commission sought "to adopt a comprehensive policy that ensures, consistent with the Act in general terms and section 706 specifically, that broadband Internet access services are available to all Americans and that undue regulation does not constrain incentives to invest in and deploy the infrastructure needed to deliver broadband Internet access services."[12] Granting new video entrants relief from onerous local franchising obligations will directly advance that critical policy goal.

B. Video Competition

Congress's goal of promoting video competition pre-dates, and is furthered by, its goal of fostering broadband deployment. The 1984 Cable Act establishes "a national policy concerning cable communications" as well as "franchise procedures and standards which encourage the growth and development of cable systems" and explicitly seeks to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic

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[10] Kevin J. Martin, "United States of Broadband," *Wall St. J.*, July 7, 2005, at A12.

[11] *Id.*

[12] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33 *et al.*, FCC 05-150, Report and Order and Notice of Proposed Rulemaking, rel. Sept. 23, 2005, at ¶ 45.

burden on cable systems."[13] These provisions embody Congress's understanding that "free and open competition in the marketplace" and the "elimination and prevention of artificial barriers to entry" are essential to the growth and development of the cable industry.[14]

In 1992, Congress further emphasized the importance of video competition by amending Section 621(a)(1) of the Cable Act to state that LFAs "may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise."[15] Concurrently, in order further to promote entry, Congress added a new subsection to Section 621 that expressly limits the demands that an LFA can make on a prospective video competitor.[16] The new provision, Section 621(a)(4), only authorizes LFAs to ensure that the cable operator is given "a reasonable time to become capable of providing cable service to all households in the franchise area," provides adequate public, educational, and governmental access (PEG) channels or financial support, and supplies adequate assurance that it has the financial, technical, and legal qualifications to provide cable service." The revisions to Section 621, which were added at the request of the Commission,[17] "established a clear, federal level limitation on the authority of LFAs in the franchising process."[18]

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[13] 47 U.S.C. § 521(1), (2), (6).

[14] S. Rep. No. 97-518, 97th Cong., 2d. Sess., at 14 (1982).

[15] 47 U.S.C. § 541(a)(1).

[16] As the Conference Report on the 1992 Act explains, the language in Section 621(a)(4) came from Section 21 of the predecessor Senate bill, which was "a new provision requiring franchising authorities to give a *competing cable operator* a reasonable amount of time to build its system and provide service.

[17] *See* NPRM, ¶¶ 3-4 & nn. 20, 21.

[18] *Id.*, ¶ 4.

Finally, in 1996, Congress revised the Communications Act to authorize telephone companies to provide video services in their telephone service areas.[19] Recognizing "that there can be different strategies, services, and technologies for entering video markets," Congress endeavored to eliminate barriers to entry in those markets in order to "encourage investment in new technologies," "maximize consumer choice of services," and "introduce vigorous competition in entertainment and information markets."[20]

III. FRANCHISE REQUIREMENTS THAT EXCEED THE CRITERIA IN SECTION 621 DIMINISH DEPLOYMENT OF BROADBAND TECHNOLOGY AND RESTRAIN VIDEO COMPETITION, UNDERMINING CONGRESS'S CORE GOALS.

A. Many LFAs Unreasonably Delay the Grant of Competitive Franchises and Demand Excessive Concessions from Potential Entrants.

The NPRM (at ¶ 10) seeks "to determine whether, in awarding franchises, LFAs are carrying out legitimate policy objectives allowed by the Act or are hindering the federal communications policy objectives of increased competition in the delivery of video programming and accelerated broadband deployment …." The answer is that many LFAs unduly delay grant of competitive franchises and demand conditions and concessions that can render competitive entry uneconomic.

Delay. Even under the best of circumstances, the local franchise process impedes rapid competitive entry into the video market. There are tens of thousands of local franchise authorities nationwide, each with its own processes and requirements. Accordingly, even if the franchise negotiation process were ideally streamlined, securing permission to compete over a broad geographic area could take years.

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[19] 47 U.S.C. §§ 571-573.

[20] H.R. Rep. No. 104-458, 104th Cong., 2d Sess., at 172, 178 (1996).

Unfortunately, comments submitted in the 2005 Video Competition Inquiry show that the franchise negotiation process is far from ideally streamlined, with many LFAs taking a year or even longer to negotiate and approve competitive franchise agreements. For example, BellSouth provided a sworn declaration explaining that, on average, obtaining a competitive franchise takes almost a year from the time an application is submitted, and in several franchise areas the process has taken two to three years.[21] Similarly, Qwest explained that it took three years to negotiate seven existing franchises in the Phoenix area and eight additional agreements in Phoenix, Denver, and Salt Lake City.[22] And Verizon reported that negotiating a competitive franchise agreement "routinely takes many months, and often more than a year."[23]

In contrast, the recent Texas statewide franchise legislation provides that a certification granting entry authority must be issued no more than 17 business days after receipt of a complete application.[24] Such a time frame is far more reasonable than standard LFA practice, particularly because the most likely new entrants, telephone companies, already have municipal authority to use public rights-of-way, and providing video services over next-generation networks that are also used for voice and data imposes no additional burden on those rights-of-way. Because the principle historical reason for municipal involvement in the franchise process – managing public

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[21] Comments of BellSouth Corporation and BellSouth Entertainment LLC, MB Docket No. 05-255, filed Sept. 19, 2005, at 3 and Declaration of Thompson T. Rawls II at ¶¶ 3-4 & Exhibit A ("BellSouth 02-255 Comments").

[22] Comments of Qwest Communications International Inc., MB Docket No. 05-255, filed Sept. 19, 2005, at 12-14.

[23] Comments of Verizon, MB Docket No. 05-255, filed Sept. 19, 2005, at 8 ("Verizon 05-255 Comments").

[24] Texas Util. Code § 66.003(b).

rights of way – does not apply when a telephone company seeks to provide video services,[25] the time frame set forth in the Texas statute provides ample time to negotiate an agreement reflecting the requirements of Section 621.

Excessive demands. In addition to unreasonably delaying grants of competitive franchises, many LFAs insist on conditions that go well beyond the requirements of Section 621:

- Scope of build-out. LFAs often demand the telephone companies build out competitive video networks throughout the incumbent cable company's franchise area, even though the telephone company's telephone service area may cover only a portion of the cable company's franchise area.[26] This is not an economic redlining issue, notwithstanding the claims of some LFAs and incumbent cable operators. Telephone companies have indicated an intention to deploy competitive video widely throughout their telephone service areas, in general beginning with the most dense locations and ultimately extending service to less dense (and thus more costly) areas.[27] Rather, it is a matter of simple economics: Given the market risk and expense of building out next-generation networks, competitive entry into the video market makes sense only where the entrant can provide the full range of communications services – voice, data, and video.[28] Relatedly, the entrant has every incentive to deploy its video services as widely as possible in order to generate sufficient revenues to justify broad deployment of a future-proof advanced network infrastructure.

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[25] *See* NPRM, ¶ 22 ("it is not clear how the primary justification for a cable franchise – *i.e.*, the locality's need to regulate and receive compensation for the use of public rights of way – applies to entities that already have franchises that authorize their use of those rights of way").

[26] *See, e.g.*, BellSouth 05-255 Comments at 10; Verizon 05-255 Comments at 9, 11.

[27] *See* BellSouth 05-255 Comments at 18 n.12 ("Few of the 14 cable franchises under which BellSouth currently operates contain a build-out requirement, and yet BellSouth has not been the subject of a single 'red-lining' complaint in almost a decade of operation.").

[28] *See* Section III.B, *infra*.

Build-out requirements, however well-intended, "are, on average counterproductive and serve to *slow down* deployment of communications networks."[29] This is so because they present entrants with a choice between building out an entire service area and incurring losses associated with providing service where it is not economic to do so, or not building out at all and shifting scarce resources to communities that do not have build-out requirements. The result is that "a build-out rule designed to prevent 'economic redlining' *within a community* essentially imposes a different form of 'economic red-lining' *between communities*,"[30] causing "*more marginal communities to be bypassed entirely*."[31] In fact, the Commission already has preempted build-out requirements applicable to new entrants in the local telephone market for just these reasons: "these requirements impact the threshold question of whether a potential competitor will enter the local exchange market at all."[32]

Recognizing the deleterious impact of build-out obligations, the Texas legislation does not compel entrants to serve the entirety of a local franchise area where they do not provide telephone service throughout that area. Instead, entrants file maps with their applications showing the service area within which they intend to provide service, and they may amend their applications to include additional areas upon notice to the Texas Public Utility Commission.[33] This approach is consistent with Section 621, which merely prohibits income-based

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[29] George S. Ford, Thomas M. Koutsky, and Lawrence J. Spiwak, *Phoenix Center Policy Paper Number 22: The Consumer Welfare Cost of Cable "Build-Out" Rules* (July 2005, Second Release), at 2.

[30] *Id.* at 21 (emphasis in original).

[31] *Id.* at 15 (emphasis in original).

[32] *Public Utility Commission of Texas*, Memorandum Opinion and Order, CC Policy Docket Nos. 96-13 *et al.*, FCC No. 97-346, ¶ 13 (rel. Oct. 1, 1997).

[33] Texas Util. Code § 66.003(b)(4).

discrimination and imposes no obligation that a new entrant serve the entire area within the jurisdiction of an LFA.[34]

- Build-out timing requirements. Similarly, many LFAs impose unreasonable build-out timing requirements. That is, even if the video franchise is limited to the telephone company's telephone service area, LFAs often demand that a new entrant make video services available throughout that area within an unreasonably short period of time.[35] Such demands serve no purpose other than protecting the incumbent cable operator by making entry uneconomic. As the Commission explained more than 15 years ago in recommending that Congress act to promote video competition, entry should be permitted on an "incremental" basis because "the nature of the broad-based demand for cable services should minimize the prospect that in the long term new entrants would find it profitable to only serve limited groups of homes within a metropolitan area."[36]

Put another way, when a new entrant is deploying a multi-function, next-generation network, it gains the ability to offer a wider variety of more innovative services (and thus generate more revenues), and it also enjoys significant improvements in reliability and reduced maintenance. In addition, "in light of the fact that a new entrant generally faces competition from at least one incumbent cable operator and two direct broadcast satellite ('DBS') providers,"[37] the market provides ample incentive for telephone companies to build out their

[34] *See* 47 U.S.C. § 541(a)(3). The Texas legislation likewise prohibits franchisees from "denying access to service to any group of potential residential subscribers because of the income of the residents in the local area in which such group resides." Texas Util. Code § 66.014(b).

[35] *See, e.g.*, BellSouth 05-255 Comments at 5-6.

[36] *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, MM Docket No. 89-600, 67 Rad. Reg. 2d (P&F) 1771, ¶¶ 141, 139 n.198 (1990).

[37] NPRM, ¶ 23.

broadband networks as rapidly as possible in order to begin taking video market share, rendering regulatory build-out mandates unnecessary. Even with these benefits and incentives, however, the expense involved in deploying broadband networks precludes universal build-out in a few short years. Being forced to acquiesce to the LFA's timing expectations in order to obtain a franchise thus can render *any* entry uneconomic.[38]

Given the barrier to entry posed by build-out requirements and the incentive of new entrants to expand their footprints as rapidly as feasible, the Texas legislation states that the "holder of a state-issued certificate of franchise authority shall not be required to comply with mandatory build-out requirements."[39] Instead, the Texas law provides that a state franchisee "shall have a reasonable period of time to become capable of providing cable service or video service to all households within the designated franchise area … and may satisfy the requirements of this section through the use of an alternative technology that provides comparable content, service, and functionality."[40] The flexible approach in Texas is consistent with Section 621(b)(4)(A) and serves as a workable model for competitive entry nationwide.

- <u>Modifications to outside plant and other extraneous requirements</u>. LFAs also frequently seek to compel telephone companies to make modifications to their outside plant, including, but not limited to, burying that plant rather than allowing it to be strung along the same aerial wires that provide legacy telephone service. And LFAs regularly demand additional concessions, including financial consideration above and beyond the franchise fee, municipal

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[38] For example, BellSouth has explained that it had no choice but to withdraw its franchise application for Germantown, Tennessee because the LFA insisted that BellSouth agree to overbuild the entire franchise area in five years. BellSouth 05-255 Comments, at 5-6.

[39] Texas Util. Code § 66.007.

[40] *Id.* § 66.014(d).

beautification, and other extraneous conditions.[41] As Verizon recently explained, "some LFAs view a franchise application by a new entrant as an opportunity to obtain a variety of goodies, without concern for the resulting decrease in video competition and/or increase in cable prices."[42]

Once again, the Texas legislation takes a more reasonable approach, which is consistent with Section 621 and will promote rather than deter broadband deployment. Specifically, the Texas law limits municipal authority to manage the activities of a franchise holder only "to the extent … reasonably necessary to protect the health, safety, and welfare of the public" and mandates that municipal rights-of-way regulation "must be competitively neutral and may not be unreasonable or discriminatory."[43] The law also establishes a limited in-kind contribution from new entrants to support municipal use of public, educational and governmental ("PEG") channels, which is "paid in accordance with 47 U.S.C. §§ 531 and 541(a)(4)(B) and may be used by the municipality as allowed by federal law"[44] and is in lieu of an obligation to deploy an institutional network ("I-Net").

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[41] *See, e.g.*, Verizon 05-255 Comments at 12-13 (cataloguing excessive demands, including requirements to connect all traffic signals in a county with fiber, fund the municipality's purchase of street lights from the power company, provide city employees with free mobile phone service, permit free use of conduits, connect all city or county buildings with fiber and provide free data, and provide free video to houses of worship).

[42] *Id.* at 13.

[43] Texas Util. Code § 66.011(a). The Texas law also clearly contemplates that franchise holders may either bury transmission facilities or use aerial plant. *See, e.g., id.*§ 66.011(c) ("In the exercise of its lawful regulatory authority, a municipality shall promptly process all avoid and administratively complete applications … for a permit … to excavate [or] set poles ….").

[44] *Id.* § 66.006(a)-(c). The in-kind contribution is equal to the same per-subscriber cash payments required by the incumbent cable provider's franchise agreement or, upon expiration of that agreement, one percent of the entrant's gross revenues.

B. **<u>Unreasonable Actions and Delay by LFAs Sharply Diminish Broadband Investment and Undermine Video Competition.</u>**

That excessive demands and delay by LFAs adversely affect broadband deployment and video competition should be self-evident. Prompt entry into the video market is a key predicate to justifying construction of new broadband markets, regardless of the network architecture, because the extra revenue potential of video (as well as ancillary offerings such as video on demand, HDTV, and personal video recording capability) is necessary to justify the multi-billion dollar investment such networks require. For example, Yankee Group data from 2004 reveal that voice-only customers yield $57 per month in revenue, voice and data customers generate $92 per month, and customers buying voice, video, and data produce $179 per month in revenue.[45] Obviously, the addition of video, which increases per-subscriber revenues by almost 100 percent over voice/data packages and by more than 200 percent over voice-only service, is a critical factor in determining whether the potential economic rewards of broadband deployment outweigh the substantial costs.

For these reasons, as a recent Phoenix Center study explains, "fiber will not be widely deployed solely to provide Internet access. In fact, revenue streams from other types of communications services are critical for the construction of advanced broadband networks."[46] In particular, "policies which ensure that entrants can readily provide video programming services along with voice and data services will contribute substantially to the widespread deployment of

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[45] *See* Comments of Alcatel, MB Docket No. 05-255, filed Sept. 19, 2005, at 5 (chart depicting Yankee Group analysis).

[46] George S. Ford, Thomas M. Koutsky, and Lawrence J. Spiwak, "*Phoenix Center Policy Paper Number 23: The Impact of Video Service Regulation on the Construction of Broadband Networks to Low-Income Households*" (Sept. 2005), at 2.

advanced communications networks, particularly in low-income neighborhoods."[47] Conversely, policies which delay video entry or compel entrants to bear excessive costs will render entry uneconomic on a broad scale, directly undermining Congress's core goals.

IV. THE COMMISSION SHOULD INTERPRET "UNREASONABLE REFUSAL" TO ENCOMPASS ANY LFA DEMANDS THAT GO BEYOND THE REQUIREMENTS OF SECTION 621.

A. The Commission Has Authority To Adopt Rules Implementing Title VI.

The NPRM (at ¶¶ 15, 17) properly reaches the tentative conclusion that the Commission "has authority to implement Section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises" and "to ensure that the local franchising process does not undermine the well-established policy goal of increased MVPD competition …." That authority flows from the Communications Act generally and the Cable Act (Title VI) specifically, and it is further bolstered and shaped by Section 706.

First, the Commission indisputably has authority to interpret the Communications Act. Indeed, the Supreme Court's *Brand X* decision observed that "Congress has delegated to the Commission … the authority to promulgate binding legal rules,"[48] and the appellate courts have explained that the Commission "is entitled to define what constitutes a reasonable policy in terms of the underlying goals of the Communications Act, and to use rulemaking as part of the process of developing and implementing those policies."[49]

[47] *Id.* In fact, "when the network firm can bundle video, the percentage of poverty and minority homes with access to the network rise from nearly zero to about 90%." *Id.* at 20.

[48] *Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005).

[49] *California v. FCC*, 75 F.3d 1350, 1365 (9th Cir. 1996).

Second, the Commission's authority to interpret the Communications Act necessarily extends to Title VI.[50] In fact, in *City of Chicago*, the Seventh Circuit expressly upheld both the Commission's authority to interpret Section 621 and its substantive determination that an operator of a satellite master antenna system was not a "cable operator" of a "cable system." In so holding, the court stated that it was "not convinced that the FCC has well-accepted authority under the Act but lacks authority to interpret § 541 [the U.S. code cite for Section 621 of the Cable Act] and to determine what systems are exempt from franchising requirements."[51] The Commission also has interpreted other sections of Title VI on numerous occasions, including establishing standards for determining reasonableness.[52]

Third, Section 706 of the 1996 Act provides further, judicially endorsed,[53] support for the Commission's authority to interpret Section 621 in a manner that advances broadband deployment. As noted above, Section 706 directs the Commission to "encourage the deployment … of advanced telecommunications capability to all Americans." The NPRM recognizes (at ¶ 18) that there is a clear "relationship between the ability to offer video programming and the

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[50] *See City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999) ("the FCC is charged by Congress with administration of the Cable Act."); *SBC Inc. v. FCC*, 414 F.3d 486, 496 (3d Cir. 2005). The Commission also has authority under Title I and Section 4(i) of the Act to regulate cable. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968) (FCC has "broad responsibilities" to regulate all aspects of interstate communication, including cable systems, under 47 U.S.C. § 152(a)); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984) (under Section 4(i), the FCC's authority "extends to all regulatory actions 'necessary to ensure the achievement of the Commission's statutory responsibilities'") (*citing FCC v. Midwest Video Corp.*, 406 U.S. 689, 706 (1979).

[51] *City of Chicago*, 100 F.3d at 429, 432. Moreover, the court afforded the Commission's interpretation *Chevron* deference.

[52] *See, e.g.*, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, ¶ 1 (1993) (establishing rules to ensure that basic cable service rates are reasonable).

[53] *See USTA II*, *supra*, at 584 (where unbundling of fiber to the premise loops and the packetized capabilities of hybrid loops "seems likely to delay infrastructure investment," FCC was justified to take Section 706 into account in denying unbundling, even if there were some impairment).

willingness to invest in broadband facilities." Accordingly, identifying and proscribing LFA conduct that constitutes an "unreasonable refusal" to award a competitive video franchise is a "regulating method[] that remove[s] barriers to infrastructure investment" and thus is not only authorized, but compelled, by Section 706.

B. <u>The Commission Should Declare That Only Those LFA Requirements That Are Authorized by Section 621 Are Reasonable and That Additional Requirements Are Automatically Preempted.</u>

Section 621 must be read consistently with Congress's overarching goals of promoting video competition and broadband deployment. To this end, the Commission must regard the enumerated authority granted to LFAs in Section 621 as defining the universe of permissible LFA demands, which is precisely what Congress intended in revising Section 621 in order to open the video market to further competition.[54] Accordingly, the Commission should hold that an LFA should be presumed to be acting reasonably if it limits its demands to the factors enumerated in Section 621.[55] Conversely, if an LFA insists on concessions beyond those expressly authorized by Section 621 – which inevitably diminish broadband deployment and delay or foreclose competitive entry – those demands constitute an "unreasonable refusal."

The NPRM's tentative conclusion (at ¶ 19) that the phrase, "unreasonable refusal," proscribes more than just an outright refusal to deal with a competitive entrant is undoubtedly correct. Section 621(a)(1) already prohibits LFAs from granting exclusive franchises, so the

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[54] *See* Cable Television Consumer Protection and Competition Act of 1992, H. Rep. No. 102-628 at 90 (1992) (identifying the factors that ultimately were included in Section 621(a)(4) as determinative of the "unreasonable[ness]" of an LFA's refusal to award a competitive franchise; Cable Television Consumer Protection Act of 1991, S. Rep. No. 102-92 at 91 (1991) (indicating that similar factors in the Senate version of the bill were meant to determine the reasonableness of an LFA's actions).

[55] *See* NPRM, ¶ 20 ("we tentatively conclude that it is not unreasonable for an LFA, in awarding a franchise," to assure against economic redlining, provide a reasonable period of time for construction of the cable system, and require adequate assurance of the provision of PEC channels or financial support) (citing 47 U.S.C. §§ 541(a)(3), (a)(4)(A), (a)(4)(B)).

“unreasonable refusal” language must mean more than just refusing to negotiate a competitive franchise. Accordingly, as the Commission explains, “unreasonable refusal” must also encompass “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, either by (1) creating unreasonable delays in the process, or (2) imposing unreasonable regulatory roadblocks ….” Such delays and roadblocks are tantamount to refusal to grant a competitive franchise.

The Commission also should hold out the Texas franchise legislation as a “safe harbor,” compliance with which will be deemed reasonable action by an LFA. As explained in Section III.A above, the Texas legislation closely tracks Section 621. Accordingly, it serves as a useful model for LFAs throughout the nation. As a corollary to specifying that compliance with the Texas legislation is presumed reasonable, the Commission should state that demanding more onerous terms than those in the Texas legislation will be considered an unreasonable refusal to grant a competitive franchise. Taking such action will promote Congress’s core goals and thus is an eminently sound interpretation of Section 621(a)(1).

Section 621 is silent as to a reasonable time within which an LFA must act on a competitive franchise applications. Nonetheless, once the Commission specifies the proper contours of the franchise agreement, relatively little time should be required for negotiations. As noted above, the Texas franchise legislation permits 17 business days from receipt of a complete franchise application to grant of the certificate to provide competitive video service, and a similar time frame should be ample for LFAs outside Texas once the Commission clarifies the scope of permissible LFA demands. Any delay beyond that time should give rise to a presumption of unreasonableness, which would become conclusive if the application has not been acted upon within 120 days after its submission. Numerous provisions in Title VI require LFAs to act within 120 days,[56] and that time period should serve as an absolute outer bound on LFA delay in this context as well.

Finally, the Commission should affirm its tentative conclusion (NPRM, ¶ 15) that "pursuant to the authority granted under Sections 621(a) and 636(c) of the Act, and under the Supremacy Clause, the Commission may deem to be preempted and superceded any law or regulation of a State or LFA that causes an unreasonable refusal to award a competitive franchise in contravention of section 621(a)." The plain terms of Section 636(c) compel such a result. As explained above, undue delay by LFAs, and demands going beyond Section 621, constitute an unreasonable refusal and thus are "inconsistent with this Act" and "deemed to be preempted and superseded."[57] Consequently, it is "'unmistakably clear' that the Cable Act will preempt any inconsistent state or local law."[58]

The Commission also correctly notes that the Supremacy Clause preempts LFA actions constituting an unreasonable refusal to award a competitive franchise. As the Supreme Court has explained, a federal agency "'acting within the scope of its congressionally delegated authority may preempt state regulation,'" even without an "express congressional authorization to displace state law."[59] Rather, when a state law "stands as an obstacle to the accomplishment and

[56] *See* 47 U.S.C. §§ 537 (an LFA has 120 days to act upon a request for approval of sale or transfer of a franchise or else the request is deemed granted), 545 (LFA has 120 days to act upon a request to modify a franchise unless extended by mutual agreement of the cable operator and the LFA), 546(c)(1) (LFA must act on request for renewal of a franchise within four months from submission of the cable operator's proposal for renewal).

[57] 47 U.S.C. § 556(c).

[58] *Liberty Cablevision of P.R., Inc. v. Municipality of Caguas*, 417 F.3d 216, 220 (1st Cir. 2005) (*quoting Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).

[59] *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) (*quoting Louisiana PSC v. FCC*, 478 U.S. 355, 368-69 (1986).

execution of the full purposes and objectives of Congress,"[60] or "would frustrate achievement of a federal regulatory objective,"[61] as is true of the LFA actions discussed here, that law is preempted.

V. CONCLUSION

For the foregoing reasons, the Commission should state that LFA requirements that respect the limitations contained in Section 621 (as reflected in the Texas statewide franchise legislation) are presumed reasonable and that LFA requirements that exceed those limitations constitute unreasonable refusals to award a competitive franchise. Such action will advance the directives of Sections 621 and 706 by promoting greater and more timely broadband investment and jump-starting video competition.

Respectfully submitted,

TELECOMMUNICATIONS INDUSTRY ASSOCIATION

By: /s/ Grant E. Seiffert

Grant E. Seiffert
Executive Vice President

Derek R. Khlopin
General Counsel
Law and Public Policy

Danielle M. Jafari
Manager
Regulatory and Government Affairs

2500 Wilson Boulevard
Suite 300
Arlington, Virginia 22201
(703) 907-7700

[60] *See Irving v. Mazda Motor Corp.*, 136 F.3d 764, 768 (11th Cir. 1998).

[61] *State Corp. Comm'n of Kansas v. FCC*, 787 F.2d 1421, 1425 (10th Cir. 1986).

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