Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

EX PARTE SUBMISSION OF THE DEPARTMENT OF JUSTICE

The U.S. Department of Justice ("Department") hereby submits the following ex parte filing in connection with the above captioned public notice regarding the 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 ("Cable Act").[1] This Section states in relevant part that a local franchising authority ("LFA") "may not unreasonably refuse to award an additional competitive franchise" for video services. The Department believes that appropriate regulations or guidance promulgated by the FCC concerning what constitutes such an "unreasonable refusal" would reduce entry barriers and encourage additional video and broadband competition to the benefit of consumers.

[1] 47 U.S.C. § 541(a)(1).

I. Introduction

In response to complaints from incumbent local telephone companies ("ILECs")[2] and others claiming that their efforts to provide video distribution services were being thwarted or delayed by the practices of LFAs or by state "level playing field"[3] statutes, the FCC issued a Notice of Proposed Rulemaking ("NPRM") proposing to implement Section 621(a)(1) of the Cable Act, which states that an LFA "may not unreasonably refuse to award an additional competitive franchise" for video services.[4] As one of the agencies responsible for promoting competition,[5] the Department supports the FCC's efforts to ensure that the local franchising process does not unreasonably interfere with the introduction of additional competition in video distribution and broadband.

---

[2] The views of the ILECs were filed in the *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255 (2005) ("Status of Competition Docket").

[3] Level playing field laws generally require that new entrants' franchises not be granted on terms and conditions that are more favorable or less burdensome than the incumbent's.

[4] Notice of Proposed Rulemaking, *In re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311 ("LFA Docket"), ¶ 1 (Nov. 3, 2005) ("NPRM").

[5] The Department has participated in prior Commission proceedings addressing the role of competition in telecommunications and video services. For example, the Department filed comments in *In re Application of MCI Telecommunications Corp and Echostar 110 Corporation*, FCC File No. SAT-ASG-1998 1202-00093. The Department also has gained knowledge of telecommunications and video markets through its investigations of mergers, most recently the acquisition of AT&T by SBC Corp., *see United States v. SBC Communications, Inc. and AT&T Corp.*, 70 Fed. Reg. 74, 334, 2005 WL 3429685, and Verizon's acquisition of MCI, *see United States v. Verizon Communications Inc. and MCI, Inc.*, 70 Fed. Reg. 74, 350, 2005 WL 3429686, and earlier in *United States v. Echostar Communications Corp. and DirecTV Enterprises, Inc.*, Civil No.: 1:02CV02138 (EVH) (filed Oct. 31, 2002).

As the FCC notes, one of the primary goals of federal communications policy is to promote competition in cable communications.[6] The Department believes that consumers generally are best served if market forces determine when and where competitors enter. Regulatory restrictions and conditions on entry tend to shield incumbents from competition, and are associated with a range of economic inefficiencies including higher production costs, reduced innovation, and distorted service choices. They should be avoided except where necessary to protect other important statutory goals and even then be tailored as narrowly as possible.

Although incumbent cable providers are subject to important intermodal competition from direct broadcast satellite ("DBS") providers, evidence in the record suggests that DBS is not fully effective in constraining incumbent cable providers and that additional competition, particularly from wireline providers, has the potential to provide lower prices, better quality services, and more innovation to consumers.[7] ILEC deployment of extensive facilities to compete with the incumbent cable companies may induce not only additional competition in

---

[6] 47 U.S.C. § 521(6), *cited in* NPRM ¶ 1 n.3.

[7] *See, e.g.,* Comments of the United States Telecom Assoc. on the Notice of Inquiry, LFA Docket, at 18 (Feb. 13, 2006) ("USTA LFA Comments") (citing GAO study that demonstrated cable price increases well in excess of the rate of inflation, but significantly lower cable rates in areas where there is a wire-based competitor); Comments of Verizon on Video Franchising, LFA Docket, at ii, 4-5 (Feb. 13, 2006) ("Verizon LFA Comments") (noting that in areas where Verizon's competitive video service is available, "incumbent cable operators have offered price cuts of 28-42 percent"); Comments of Qwest Communications Int'l Inc., LFA Docket, at 5 (Feb. 13, 2006) ("Qwest LFA Comments"). The inability of DBS fully to constrain may be due, in part, to the fact that many subscribers are not able to receive satellite signals, or to the fact that DBS's ability to bundle video service with telephone and broadband Internet services is limited.

video distribution,[8] but also quicker deployment of advanced broadband services to consumers.[9] These potential gains from competition are more likely to be realized if LFA franchising requirements do not impose restrictions or conditions on entry beyond those necessitated by the public interest as reflected in the relevant statute.

The purpose of the current proceeding is "to determine whether, in awarding franchises, LFAs . . . are hindering the federal communications policy objectives of increased competition in the delivery of video programming and accelerated broadband deployment," and the FCC asks "if that is the case, whether and how we can remedy the problem."[10] The Department recommends that the Commission adopt rules or other guidance that would (A) establish standard, enforceable time frames for acting on franchise applications, (B) establish objective criteria for determining what, if any, "concessions" localities may appropriately demand, and (C) clarify that service areas proposed by new entrants should be approved unless there is credible evidence that the proposed service areas are intended to discriminate against low-income residents. By establishing nationwide rules, guidelines, or best practices on what constitutes an "unreasonable" refusal to grant a competitive franchise, the FCC could reduce

---

[8] According to recent news articles, Verizon is expected to invest $8.4 billion this year in its fiber-to-the-premises project and offer service to 6 million homes by the end of the year. Verizon then will pass an estimated three million more homes each year going forward. AT&T expects to begin rolling out its IPTV project this year and to reach 20 markets by year's end at a cost of $1.4 billion. *AT&T, Verizon Investors Concerned on Video Spending with Few Details,* Comm. Daily, Feb. 3, 2006, at 4-5.

[9] Some ILECs plan to use an advanced IP platform offering Internet access speeds potentially as high as 30 Mbps. Comments of Verizon on the Status of Competition in the Video Marketplace, Status of Competition Docket, at 4 (Sept. 19, 2005) ("Verizon Status of Competition Comments").

[10] NPRM ¶ 10.

barriers to entry by quickly resolving some of the outstanding issues facing LFAs and new competitors, and would provide more uniformity[11] in process and substance, which will ease entry particularly for firms seeking to provide service in areas that span multiple franchising authorities. As in most industries, limiting restrictions and conditions on entry and relying substantially on the market to determine what and where services are provided is likely to benefit consumers by reducing entrants' costs, encouraging innovation, and allowing efficient service and technology choices.

II. The NPRM

The NPRM begins by reviewing the history of Section 621. Although subsection (b)(1) prohibits a cable operator from providing cable service without first obtaining a local cable franchise, the 1992 amendment to the Cable Act limits the ability of LFAs to refuse the award of competitive franchises. This amendment was added following an FCC report to Congress that 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.'"[12] The

[11] The Cable Act provides avenues for entrants to challenge inappropriate denials by LFAs. *See* 47 U.S.C. § 555(a) (providing that "[a]ny cable operator adversely affected by any final determination made by a franchising authority under section 621(a)(1) . . . may commence an action within 120 days after receiving notice of such determination" in federal court or a state court of general jurisdiction). However, lengthy litigation in potentially numerous different fora is likely to prevent a speedy, consistent resolution of these issues, and is likely to deter rapid, pro-competitive entry. Action by the FCC could greatly reduce the need for such litigation.

[12] NPRM ¶ 3 (quoting *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 4974 (1990) ("Cable Report")). The NPRM also notes that the FCC Report "recommended that Congress 'prohibit

Commission also cites the legislative history of the amendment that found, "[b]ased on the evidence in the record taken as a whole, it is clear that there are benefits from competition between two cable systems."[13] The NPRM recognizes that an efficient franchising process is especially significant with respect to potential new entrants with existing facilities, i.e., the telephone companies.[14] Although the telephone networks were built to provide other services, with the advent of new technology they could be capable of offering competing video services in a relatively short time if regulatory hurdles can be overcome.

The Commission seeks comment on a number of issues related to the question of what constitutes an unreasonable refusal to award an additional competitive franchise under Section 621(a)(1). This filing addresses some of the most significant issues regarding the fostering of competition raised in the NPRM, including (A) whether the FCC should establish maximum time frames for acting on an application for a competitive franchise,[15] (B) whether there are certain practices of LFAs that the FCC should find unreasonable, providing rules or other

---

franchising rules whose intent or effect is to create unreasonable barriers to the entry of potential competing multichannel video providers,' 'limit local franchising requirements to appropriate governmental interests (e.g., public health and safety, repair and good condition of public rights-of-way, and the posting of an appropriate construction bond),' and 'permit competitors to enter a market pursuant to an initial, time-limited suspension of any "universal service" obligation.' " NPRM ¶ 3 n.20 (citing Cable Report at 4974).

[13] NPRM ¶ 4 (citing S. Rep. No. 102-92, at 47 (1991)).

[14] *Id.* ¶ 6.

[15] *Id.* ¶ 21.

guidelines,[16] and (C) whether build-out requirements are creating unreasonable barriers to entry for facilities-based providers of telephone and/or broadband services.[17]

The Department agrees with the Commission's tentative conclusion 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."[18] The record supports the conclusions that LFAs have in some cases imposed unnecessary delays in the application process, made demands for goods and services that are unrelated to the provision of video services and substantially increase the cost of entry, and imposed build out requirements that have unnecessarily discouraged competitive entry. The Commission should declare that such actions are tantamount to a "refusal" to award an additional competitive franchise.

A. Maximum Time Frames Established for Processing Franchise Applications Would Encourage Competitive Entry

The comments in this proceeding and in the Status of Competition proceeding cite instances of substantial delays in the ability of new entrants to offer service. For some entrants it appears the franchising process has taken more than a year.[19] Such delays in the franchising

---

[16] *Id.*

[17] *Id.* ¶ 23.

[18] *Id.* ¶ 19.

[19] Verizon states that franchise negotiations take "often more than a year." Verizon Status of Competition Comments at 8. In one instance, Verizon was "required to submit multiple rounds of applications over the course of many months" before the negotiation process had even begun. The initial vote on the application was scheduled for more than a year after the application was filed. *Id*. In other areas there are mandatory waiting periods before a franchise may be granted. For example, Verizon states that in Massachusetts, even with an agreement, the time for approval cannot be shorter than six months. *Id*. at 8-9. USTA states that its members

process effectively deny consumers the benefits of additional video competition and advanced services for a significant period of time. Moreover, delays in the franchising process deter entry.[20] Although, as some commenters note, in a number of cases ILECs have succeeded in obtaining franchises in what seems to be a reasonable period of time,[21] that does not change the

---

have experienced delays of as long as three years in obtaining a franchise to provide video service. Comments of the United States Telecom Assoc. on the Notice of Inquiry, Status of Competition Docket, at 15 (Sept. 19, 2005) ("USTA Status of Competition Comments"); USTA LFA Comments at 47. BellSouth has obtained 20 video franchises within its service areas, but "it took BellSouth nearly one year, on average, to obtain a local cable franchise, and in some cases . . . the franchise negotiation process took almost three years to conclude." Comments of BellSouth Corp. & BellSouth Entertainment, LLC, Status of Competition Docket at 3 (Sept. 19, 2005) ("BellSouth Status of Competition Comments"); Comments of BellSouth Corp. and BellSouth Entertainment, LLC, LFA Docket, at 11 (Feb. 13, 2006) ("BellSouth LFA Comments").

[20] *See, e.g.*, Verizon Status of Competition Comments at 8-9 (delay coupled with other burdensome aspects of the process can lead to the "provider decid[ing not] to go ahead at all"); Verizon LFA Comments at 32; BellSouth Status of Competition Comments at 5-7 (observing that franchising agreements can take years to complete and concluding that "[s]uch delays can be fatal" for a new entrant); USTA Status of Competition Comments at 15 (noting that franchising agreements which take an excessive amount of time to negotiate can "prove to be a fatal delay" to entry); USTA LFA Comments at 47 (expressing concern "that franchising authorities could simply string out the process and deter entry by not acting in a reasonable period of time on a franchise application"). Verizon, for example, has advised the Commission that although it "has plans to deploy [its competitive video service of] FiOS to a very large portion of its local telephone service territory," its ability to do so has "remain[ed] limited . . . largely as a result of local franchising requirements," including those advocated by the incumbents simply to "prolong the franchise process and delay the onset of competition." Declaration of Marilyn O'Connell on Behalf of Verizon at ¶¶ 23-24, *attached to* Verizon LFA Comments; *see also* Verizon LFA Comments at 5-6.

[21] NCTA notes that the "telcos can and do obtain franchises." Reply Comments of Nat'l Cable & Telecomm. Assoc. ("NCTA"), Status of Competition Docket, at 10 (Oct. 11, 2005); Comments of NCTA, LFA Docket, at 2 (Feb. 13, 2006) ("NCTA LFA Comments"). NCTA points out that BellSouth obtained 20 franchises in the 1990s, representing 1.4 million potential subscribers, and that Verizon has franchises for 11 communities in 5 states covering a population of nearly 500,000 and is negotiating with an additional 250 cities. *Id*. at 10-11. Comcast stresses recent evidence that video competition is rapidly increasing, noting the expansion of Qwest's Choice TV product and developments in video via the Internet and mobile telephones. Reply Comments of Comcast Corp., Status of Competition Docket, at 4 (Oct. 11, 2005).

fact that in a significant number of other cases there have been lengthy delays, which have harmed the interest of consumers in those franchise areas, nor does it negate the value of rules that would prevent unreasonable delays. Indeed, because the process has been demonstrated to be workable in some instances, the FCC now has benchmarks to help it determine what constitutes unreasonable delay.

Some instances of delay may result from an LFA that is reluctant to make a final decision because it is, e.g., caught between an applicant that will not commit to the exact requirements accepted by the incumbent and an incumbent threatening litigation under a "level playing field" law or agreement. Faced with such a dilemma, the LFA may be inclined to avoid either approving or denying the application. However, postponing a decision for a lengthy period of time, or using the threat of indefinite delay as leverage against the applicant are not legitimate ways to resolve the dilemma, and only serve to deny consumers the benefits of new entry and deny the new entrant a decision that can be judicially reviewed. The establishment of maximum time limits should at least force a decision that can be judicially reviewed pursuant to the Act.

The Department believes that it would be in the public interest for the Commission to set "maximum time frames for considering an application for a competitive franchise"[22] after which

---

Comcast argues that franchise requirements have not been shown to be a barrier to entry, citing Verizon's recent agreement with Fairfax, VA. *Id*. at 5. Comcast argues that the new entrants are aware that the franchising process can take up to a year and thus should get started early. *Id*. at 18; *see also* Comments of Comcast Corp., LFA Docket, at 4-7 (Feb. 13, 2006). Yet these arguments do not undercut the significance of the fact that in other instances applications have been delayed or approved only with burdensome conditions.

[22] NPRM ¶ 21. The principal potential drawback to maximum time frames is that parties might be able to use them strategically. However, the Department believes that such maximum time frames can and should be instituted in a way that does not limit the LFA's ability to obtain information necessary to a complete review of the application and to discourage strategic

an applicant could seek review based on a constructive refusal to grant its application. In comments in this proceeding some municipalities have indicated that maximum time frames would be acceptable.[23] The FCC can examine the history of proceedings across the country and synthesize that experience into guidance on how long is too long.

B. LFA Requests for Concessions, Beyond Those Authorized by the Cable Act, May Delay and Deter Entry

In this NPRM, the FCC asks to what extent LFAs are demanding concessions that are not relevant to providing cable services and whether such practices should be found to constitute an unreasonable refusal to grant a competitive franchise.[24] The records in this proceeding and in the Status of Competition proceeding include examples of LFAs demanding that new entrants provide telecommunication services and other benefits to the municipality that are not related to the provision of video services.[25] Verizon reports instances in which LFAs requested wireline

---

maneuvering. For example, the FCC could set one deadline for the LFA to review an application and indicate what additional information it requires and a second one for the LFA to act once it receives all needed information.

[23] One municipality has stated that "shortening the franchise process time to address the concerns reflected by Verizon" would be an acceptable approach, and recommends "that the process be limited to six to nine months versus what has been a three-year process." Comments of The City of Indianapolis, LFA Docket, at 10, 8, (Jan. 24, 2006); *see also* Comments of the Georgia Municipal Association, LFA Docket, at 5 (Jan. 24, 2006) (recommending development of "a timeline that would allow franchise negotiations to be completed in a reasonable period of time").

[24] NPRM ¶ 13.

[25] BellSouth asserts that one LFA in Georgia required that it provide space in its conduits for county use. BellSouth Status of Competition Comments at 15. AT&T cites several examples of LFAs requesting funding for projects unrelated to cable service including the planting of flowers and trees. Reply Comments of AT&T, Inc., Status of Competition Docket, at App. C at ¶¶ 151-164 (Oct. 11, 2005). Even staunch supporters of the local franchising process "readily concede that there can be some communities who still try to view cable franchising as a means to

and mobile telephone services for municipalities as a condition for approval of a video franchise. One county demanded that Verizon connect all of the traffic signals in the county with fiber, and another LFA demanded that it provide parking for a library, mobile phone service for city employees, and funding to purchase street lights.[26]

LFA efforts to secure inappropriate concessions can serve to delay the franchising process and/or impose additional costs sufficient to undermine the business case for entry into a particular geographic area. The FCC recognized that these types of requirements limited competition to the detriment of consumers in its report to Congress that preceded the amendments to the Cable Act in 1992. The FCC report recommended that Congress " 'limit local franchising requirements to appropriate governmental interests (e.g., public health and safety, repair and good condition of public rights-of-way and the posting of an appropriate construction bond).' "[27] Congress did not specifically establish the criteria that an LFA could rely on to deny an application, but it did provide some limitations on the conditions that LFAs could impose, including a five percent limit on franchising fees.[28] The Department believes that it would be beneficial to competition for the FCC to clarify that the franchising process is not intended to be used by LFAs as a means to address local demands unrelated to the provision of

---

extract improper concessions." Comments of Manatee County Florida, LFA Docket, at 19 (Jan. 18, 2006). The County's proposed solution of taking such municipalities to court, however, would not appear to be an expeditious means of increasing competition for the distribution of video programming. *Cf. id*.

[26] Verizon Status of Competition Comments at 7, 12-13.

[27] NPRM ¶ 3 n.20 (citing Cable Report at 4974).

[28] 47 U.S.C. § 542(b).

video services, and specifies that LFA insistence on inappropriate concessions would constitute an unreasonable denial of an application.[29]

C. LFA Build-Out Requirements Create Barriers to Competitive Entry

The FCC requests comments on whether LFA requirements that force a new provider to serve the entire franchise area within a set time frame ("build-out requirements") are creating "unreasonable barriers to entry for facilities-based providers of telephone and/or broadband services."[30] The FCC also requests comments on the related issue of whether state "level playing field statutes" – which may be viewed as imposing certain build-out requirements on new entrants – create unreasonable regulatory barriers to entry.[31] In light of the significant entry-deterring effects of mandated build-out requirements, the Department believes that LFAs should not be allowed to impose any such requirements except where necessary to prevent income discrimination, which the statute prohibits.

A number of factors inform a potential entrant's decision whether to serve a particular geographic area, such as population density, local construction costs, the characteristics of the technology to be used, the ability to use existing facilities, and potential revenues. And, of course, earnings are affected by the existence of other providers and, for new entrants, the costs of competing to attract customers away from incumbent providers. Build-out requirements that impose on an entrant the obligation to serve a geographic area that the entrant had concluded

---

[29] LFAs have legitimate interests in the integrity of public rights of way and may ensure, among other things, that there will be adequate public, educational, and government access channel capabilities.

[30] NPRM ¶ 23.

[31] *Id.* ¶ 14.

would be uneconomical to reach can lead to the entrant abandoning its plans for the entire area or, if the entrant agrees to the condition, result in competition being less vibrant or efficient. When the entrant agrees to such a build-out requirement, prices may be higher than they would be otherwise, due in part to the entrant's increased construction costs or inability to make optimal technology choices, or because the area actually cannot economically support another competitor.

Under the Cable Act, it is permissible for an LFA awarding a franchise to "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."[32] Incumbents typically claim that the imposition of extensive build-out requirements is necessary to prevent income discrimination.[33] This argument is flawed. The fact that a franchise applicant does not plan to build-out to cover either the LFA's entire jurisdiction or the whole area served by an incumbent does not necessarily evidence income discrimination. As the FCC notes, "construction of modern telecommunications facilities requires substantial capital investment,"[34] and the costs of serving particular geographic areas with a wireline system can vary substantially. As discussed above, whether serving a particular geographic area is economically feasible for an entrant may depend on factors unrelated to residents' income. In the case of an ILEC planning to use its existing telephone network facilities (e.g., existing rights of way, conduit and transport facilities) in entering the video market, its existing service area may be substantially different from the service area of the incumbent cable provider or the area over which the franchising

---

[32] 47 U.S.C. §§ 541(a)(3), 541(a)(4)(A).

[33] NCTA LFA Comments at 14-19.

[34] NPRM ¶ 1 n.4.

entity has jurisdiction, and its construction costs may vary substantially among the areas that are reached by its network and those that are not. A decision on the part of an entrant not to serve, or to delay serving, areas beyond its existing facilities is not in itself a decision to deny service due to income, as the FCC should make clear.

The Department recommends that the FCC establish a presumption that an ILEC that plans to provide video service only within its existing telephone franchise area is not denying service to any group of potential residential cable subscribers outside that area "because of the income of the residents of the local area in which such group resides" in violation of Section 541(a). This presumption could be overcome by credible evidence that the ILEC seeks to avoid providing service to low-income customers in violation of the Act.[35] Similarly, where an ILEC plans to provide video service only within part of its telephone franchise area, or outside its telephone franchise area but not throughout the LFA's jurisdiction, the LFA should be able to consider credible evidence that the ILEC seeks to avoid providing service to low-income customers in violation of the Act, and the ILEC should be able to provide contrary evidence and evidence that its planned video service area reflects cost differences between areas. An LFA would be entitled to deny a franchise if the evidence supported a conclusion that service was

[35] Obviously, an ILEC should be allowed to submit evidence that it does not seek to avoid providing service to customers because of low income, such as evidence that the average income of the households within the proposed service areas is not substantially higher than elsewhere within the LFA's jurisdiction or evidence that the costs of building beyond the proposed service area are substantially higher than within the proposed service area.

being denied to an area due to the low income of its residents.[36] The Department recommends that the FCC provide rules or other guidance to help LFAs make these determinations.

LFA requirements that an entrant serve geographic areas that are uneconomic to serve due to high costs or low density act as a barrier to entry, and can result in a potential new entrant delaying or abandoning its entry plans and a lessening of competition to the detriment of consumers.[37] LFAs should, therefore, be prohibited from placing build-out requirements on a new entrant that are not integral to preventing income discrimination.

Some LFAs have refused or delayed competitive video franchise applications on the basis that "level playing field" statutes or agreements with incumbents prohibit the LFA from granting a franchise that allows a build-out smaller than the incumbent's service area. There are a number

---

[36] Incumbent providers claim that if build-out requirements are not imposed on entrants, these new competitors will serve only high income and/or low cost customers and that this would undercut the ability of the incumbents to continue to serve and upgrade facilities for lower-income and higher-cost areas. *See* NCTA LFA Comments at 14-19. The record in this proceeding is insufficient to support the suggestion that, if an entrant serves an area smaller than that served by the incumbent, it will significantly reduce the incumbent's ability or incentive to serve certain customers. Even if this is likely, there are solutions less likely to undercut the benefits of competition. If ensuring universal video service is a policy goal, then using tools like explicit and competitively neutral subsidies would be more consistent with promoting competition, for which Congress has expressed its preference in the Cable Act, than imposing full build-out requirements on new competitors.

[37] *See* Verizon LFA Comments at v-vi, 40-42 (noting that imposing unreasonable build out requirements makes "it uneconomical for the provider to enter the cable market at all"); BellSouth LFA Comments at 17-19, 35 (describing BellSouth's abandonment of entry plans in cities in Tennessee and Florida in response to LFA attempts to require additional build-out); Qwest LFA Comments at 9 (Qwest withdrew franchise applications in eight communities due to "economically irrational" build-out requirements); Comments of the Broadband Serv. Providers Ass'n, Status of Competition Docket, at 5-6 (Sept. 19, 2005); USTA LFA Comments at 22-25 (describing how "irrational build-out requirements" have prevented entry in cities in Minnesota and Virginia); Comments of AT&T, Inc., LFA Docket, at 52-53 (Feb. 13, 2006) (detailing previous experiences where providers have abandoned entry plans after "incurring huge losses while attempting to satisfy municipal build-out conditions").

of competitive and economic reasons why a new entrant, especially one utilizing new technology in conjunction with existing facilities, should not be subject to the same requirements that were imposed on or agreed to by the incumbent.[38] Requiring that a new entrant build out to serve the same area as the incumbent, particularly in a short time-frame, could impose costs and risks sufficient to undermine the business plan for profitable entry, thereby undercutting the possibility of new competition in the area.

Therefore, as stated above, the Department believes that LFAs should not be allowed to impose any build-out requirements, except to prevent the income discrimination the statute prohibits. To the extent "level playing field" statutes impose greater requirements, the Department recommends that the FCC preempt such statutes, if it determines it has the authority to do so.

III. CONCLUSIONS

It appears that the current practices of some LFAs may be unreasonably slowing or blocking the deployment of competitive services by allowing unreasonable delays in the franchising process and by imposing unnecessary costs upon new entrants. Absent prompt action

---

[38] For example, the technology being used by new entrants may have capabilities and associated economics that are different from those of incumbent cable providers, so it would be unreasonable to mandate automatically that the same build-out requirements apply to both technologies. More important, when the incumbent video providers accepted their franchise commitments, they often were assured at least a temporary monopoly over the video market; in contrast, a new entrant will enter a mature market where it must compete to attract new customers away from an incumbent, as virtually all potential customers will already have subscribed to either an incumbent cable or DBS provider.

by the Commission to mitigate such unreasonable practices, consumers may be denied the substantial benefits of additional competition.

Respectfully submitted,

/s/ Nancy M. Goodman

Thomas O. Barnett
Assistant Attorney General
Antitrust Division

J. Bruce McDonald
Deputy Assistant Attorney General
Antitrust Division

Nancy M. Goodman
Chief

Laury Bobbish
Assistant Chief

Luin P. Fitch
Lawrence M. Frankel
Shana M. Wallace
Attorneys
Telecommunications & Media
Enforcement Section, Antitrust Division

W. Robert Majure
Chief
John E. Henly
Economist
Competition Policy Section, Antitrust Division

May 10, 2006