



OFFICE OF  
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON

December 20, 2006

John D. Dingell, Ranking Member  
U.S. House of Representatives  
Committee on Energy and Commerce  
Washington, D.C. 20515-6115

Dear Representative Dingell:

This letter responds to your inquiry of December 19, 2006, regarding the cable franchising item at the Commission. Each of your questions is addressed below.

**Question 1: For each of the proposals enumerated above as well as for other proposals adopted, please provide the specific statutory and legal authority, including citations, for the Commission to take any of these steps.**

The Commission has broad authority to adopt rules to implement Title VI and, specifically, Section 621(a)(1) of the Communications Act of 1934, as amended (the Act). As the Supreme Court has explained, the Commission serves “as the ‘single Government agency’ with ‘unified jurisdiction’ and ‘regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.’” *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-68 (1968) (citations omitted). To that end, “[t]he Act grants the Commission broad responsibility to forge a rapid and efficient communications system, and broad authority to implement that responsibility.” *United Telegraph Workers, AFL-CIO v. FCC*, 436 F.2d 920, 923 (D.C. Cir. 1970) (citations and quotations omitted). Section 201(b) authorizes the Commission to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.” 47 U.S.C. § 201(b). According to the Supreme Court, “the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act.’” *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999). That grant of authority therefore necessarily includes Title VI of the Communications Act in general, and Section 621(a)(1) in particular. Other provisions in the Act reinforce the Commission’s general rulemaking authority. Section 303(r), for example, states that “the Commission from time to time, as public convenience, interest, or necessity requires shall ... make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act....” See also 47 U.S.C. § 151 (the Commission “shall execute and enforce the provisions of this Act”). Our authority is reinforced by Section 4(i) of the Act which gives us broad power to perform acts necessary to execute our functions as well as the mandate in section 706 of the Act that we encourage the deployment of broadband services to all Americans. See 47 U.S.C. § 154(i) (stating that the Commission “may perform any and all acts, make such rules and regulations, and issue

such orders, not inconsistent with the Act, as may be necessary in the executions of its functions.”); 47 U.S.C. § 157 nt.

More specifically, Section 2 of the Communications Act grants the Commission explicit jurisdiction over “cable services.” 47 U.S.C. § 152 (“The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI.”). Furthermore, Congress specifically charged the Commission with the administration of the Cable Act, including Section 621, and federal courts have consistently upheld the Commission’s authority in this area. *See City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999) (finding the FCC is charged by Congress with the administration of the Cable Act, including Section 621); *see also City of New York v. FCC*, 486 U.S. 57, 70 n.6 (1988) (explaining that section 303 gives the FCC rulemaking power with respect to the Cable Act); *National Cable Television Ass’n. v. FCC*, 33 F.3d 66, 70 (D.C. Cir. 1994) (upholding Commission finding that certain services are not subject to the franchise requirement in Section 621(b)(1)); *United Video v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (denying petitions to review the Commission’s syndicated exclusivity rules); *ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987) (upholding the Commission’s interpretive rules regarding Section 621(a)(3)). Thus, just as the Commission has the authority to interpret other provisions of Title VI, it also has the authority to interpret section 621(a)(1)’s requirement that LFAs not “unreasonably refuse to award an additional competitive franchise.” Indeed, in another context, the D.C. Circuit noted that the term “unreasonable” is among the “ambiguous statutory terms” in the Communications Act, and that the “court owes substantial deference to the interpretation the Commission accords them.” *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994).

In addition to this general authority to implement Title VI, the Commission exercised specific statutory authority with respect to issues (a)-(g) identified in your letter:

- (a) time frames for local franchising authorities to act on franchise applications, specifically, 90 days for entities that are already authorized to access a community’s rights-of-way and 6 months for other applications.**

The order finds that a local franchising authority may unreasonably refuse to award an additional competitive franchise pursuant to section 621(a)(1) through routes other than issuing a final decision denying a franchising application, such as by not issuing any decision in a reasonable period of time. The Commission’s order thus establishes pursuant to Section 621(a)(1) the reasonable period of time in which LFAs should issue such decisions, taking into account the differences between those applicants with access to rights-of-way and those that lack such access. The Commission has wide discretion in setting the time limits, which is an exercise in line drawing. The line drawing authority of the Commission has been soundly affirmed by federal courts. *See, e.g., Nuvio Corp. v. FCC*, No. 05-1248, slip op. at 15 (December 15, 2006); *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000).

**(b) limits on what localities can require new entrants to pay in the form of franchise fees, specifically with respect to non-cable services and in-kind contributions;**

Federal-level limitations on franchise fees are set forth in Sections 622(b) and (g), 47 U.S.C. § 542(b), (g), which the Commission has the authority to interpret based on the principles set forth above. Moreover, in 2002 the Federal Communications Commission concluded that cable-modem service is an information rather than a cable or telecommunication service. *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C. Rcd. 4798 ¶¶ 7, 33-69 (Mar. 15, 2002) (*Cable Modem Order*). That decision was ultimately affirmed in *NCTA v Brand X Internet Services*, 125 S. Ct. 2688 (2005). Specifically, the Commission determined in the Cable Modem Order, that a franchise authority may not assess franchise fees on non-cable services, such as cable modem service, stating that “revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determining.” *Cable Modem Order*, 17 F.C.C. Rcd at 4851. With respect to in kind contributions, Section 622(g)(1) of the Communications Act broadly defines franchise fees to include, with specified exceptions for public educational or government access (PEG) facilities, “any tax, fee, or assessment of any kind.” The legislative history of the 1984 Cable Act, which adopted the franchise fee limit, specifically provides that “lump sum grants not related to PEG access for municipal programs such as libraries, recreation departments, detention centers or other payments not related to PEG access would be subject to the 5 percent limitation.” H.R. Rep No. 98-934 (1984), 1984 U.S.C.C.A.N. 4655, 4702.

**(c) requirements concerning the ability of a local franchising authority to provide that a cable operator, after a reasonable period of time, become capable of providing service to all households in a franchise area;**

As stated above, the Commission’s order concludes that we have authority to interpret and implement the ambiguous phrase “unreasonably refuse” in Section 621(a)(1) of the Act. In so doing, the order finds it to be unreasonable for a LFA to refuse to award a competitive franchise on the grounds that the applicant will not agree to certain build-out requirements. An example of an unreasonable build-out requirement would be if the LFA required the new entrant to service everyone in the franchise area before it has begun providing service to anyone.

Significantly, the Commission’s findings are informed by its conclusion that Section 621(a)(3), which prohibits redlining, and Section 621(a)(4)(A) of the Act, which provides a reasonable period of time for build out, do not require universal build-out. *See* 47 U.S.C. §541(a)(3) & (4)(A); *see also* *ACLU v. FCC*, 823 F.2d 1554, 1580 (D.C. Cir. 1987) (finding that the redlining provision contained in section 621(a)(3) of the Act does not require universal build-out); *Americable International, Inc. v. Department of Navy*, 129 F.3d 1271 (D.C. Cir. 1998) (holding that section 621(a)(4)(A) does not require universal build-out).

**(d) requirements that pertain to consumers living in multiple dwelling units;**

As stated above, the Commission's order concludes that we have authority to interpret and implement the ambiguous phrase "unreasonably refuse" in Section 621(a)(1) of the Act. In so doing, the order suggests that it may be unreasonable for a LFA to require a new entrant to build out and provide service to buildings to which the new entrant cannot obtain access on reasonable terms. The order, however, does not propose to adopt any rules on this issue. Thus, there are no specific requirements that pertain to consumers living in multiple dwelling units.

**(e) requirements that would deem an application granted or confer interim authority for use of a community's public property after the expiration of the Commission-established time frames;**

The Commission's order does not ever confer access to municipal or other public property rights on a permanent basis. The Commission's order could theoretically grant a franchise applicant authority to offer video service on an interim basis, but only in an extremely narrow set of circumstances. This would occur only if: (1) the applicant files an application in accordance with the terms of the Commission's order and any applicable state or local requirements; and (2) a LFA fails to grant or deny the application within the reasonable time frame established by the Commission's order, which is six months in the case of an applicant without access to rights-of-ways. The Commission anticipates that this will occur rarely, if ever, because LFAs will act within the reasonable time frames established by the Commission's order. Indeed, the Commission's order is designed to provide an incentive for LFAs to do so. If the LFA ultimately acts to deny the franchise after the expiration of the deadline, the applicant's interim operating authority is terminated, and the applicant must appeal such denial pursuant to Section 635(a) of the Communications Act.

The Commission has the authority to deem franchise applications granted under its general authority to implement the Communications Act, including Section 621(a)(1), which specifically prohibits LFAs from unreasonably refusing to award a competitive franchise. *See* Answer to Question 1 above. The Commission's order appropriately concludes that it is unreasonable for a LFA to refuse to issue a decision on a competitive franchise application after considering it for an appropriate period of time. This approach is consistent with other federal regulations designed to address unreasonable inaction on the part of a State decision maker. *See, e.g.*, 40 C.F.R. § 141.716(a) (watershed control plans that are submitted to a State and not acted upon by the regulatory deadline are "considered approved" until the State subsequently withdraws such approval.); 42 C.F.R. § 438.56(e)(2) (an application to disenroll from a Medicaid managed care plan shall be "considered approved" if not acted on by a State agency within the regulatory deadline).

**(f) a regime that could preempt in whole or part, existing or future State or local laws of franchise requirements;**

Federal preemption of State or local laws arises from the Supremacy Clause, which provides that federal law is the “supreme Law of the Land.” U.S. Const., Art. VI, cl.2. Preemption occurs when Congress expressly preempts state law. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). Section 636(c) of the Communications Act expressly preempts inconsistent State and local laws. It provides that “any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded.” 47 U.S.C. § 556(c). This provision thus precludes localities from acting in a manner inconsistent with the Commission’s interpretations of Title VI, such as Section 621(a)(1), so long as those interpretations are valid. *See, e.g., Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216 (1st Cir. 2005) (finding municipal ordinances that imposed franchise fees on cable operators were preempted under Section 636(c) where inconsistent with Section 622 of the Communications Act). It is the Commission’s job, in the first instance, to determine the scope of the subject matter expressly preempted by Section 636. *See Cipollone*, 505 U.S. at 517; *Capital Cities Cable*, 467 U.S. 691, 699 (1984). As noted above, the Commission adopted the rules in its order pursuant to its interpretation of Section 621(a)(1) and other relevant Title VI provisions. These rules represent a reasonable interpretation of relevant provisions in Title VI as well as a reasonable accommodation of the various policy interests that Congress entrusted to the Commission. Pursuant to Section 636(c), the Commission thus reasonably concluded that these rules preempt inconsistent local laws.

Preemption also can be implied. *See Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963). Courts have found implied “conflict preemption” where compliance with both state and federal law is impossible or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* In the order, the Commission found that certain local laws are preempted to the extent that they stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Among the stated purposes of Title VI is to (1) “establish a national policy concerning cable communications,” (2) “establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community,” and (3) “promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.” 47 U.S.C. § 521 (1), (2) & (6). The record before the Commission showed that the current operation of the franchising process at the local level conflicts with these national multichannel video policies by often imposing substantial delays on competitive entry and requiring unduly burdensome conditions that deter entry. Thus, not only are Section 636(c)’s requirements for preemption satisfied, but preemption in these circumstances is proper pursuant to the Commission’s judicially recognized ability, when acting pursuant to its delegated authority, to preempt local regulations that conflict with or stand as an obstacle to the accomplishment of federal objectives. *See, e.g., Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 369 (1986).

**(g) requirements concerning when providers that are constructing communications networks capable of offering telephone, broadband, and video services are subject to the franchise requirements.**

The order clarifies that a LFA's jurisdiction extends only to the provision of cable service over cable systems. To the extent a cable operator provides non-cable services and/or operates facilities that do not qualify as a cable system, it is unreasonable for a LFA to refuse to award a franchise based on issues related to such services or facilities. For example, the Commission found, and the Supreme Court agreed, that cable modem services are information services and not subject to the requirements of Title VI. *Cable Modem Order* at para. 68. Local regulations that attempt to regulate any non-cable services offered by video providers or facilities that do not qualify as cable systems may be preempted, therefore, because such regulations are beyond the scope of local franchising authority and are inconsistent with the definition of "cable system" in Section 602(7)(C). *See* 47 U.S.C. § 522(7)(C). The order does not propose to adopt any rules on this issue.

**Question 2: To the extent that the Commission order affects the existing relationship between the various sections of Title VI of the Communications Act, please provide the statutory and legal citations that provide the Commission with specific authority to do so. In particular, I am interested in an explanation of how your actions comply with long-standing statutory construction principles.**

The Commission's order does not affect the existing relationship between the various sections of Title VI. The Commission is simply exercising its longstanding authority to interpret and implement the terms of the Communications Act, including Section 621(a)(1). Thus, for example, the Commission's order finds that it is unreasonable for a LFA to refuse to award a competitive franchise because the applicant will not agree to franchise terms that violate the franchise fee provisions contained in Section 622 of the Act. 47 U.S.C. § 542.

**Question 3: To the extent that the Commission's order effectively confers access to municipal or other public property right on a permanent or interim basis, please provide the statutory and legal citations granting the Commission specific authority to do so.**

As stated above, the Commission's order does not ever confer access to municipal or other public property rights on a permanent basis. The Commission's order could theoretically grant a franchise applicant authority to offer video service on an interim basis, but only in an extremely narrow set of circumstances. This would occur only if: (1) the applicant files an application in accordance with the terms of the Commission's order and any applicable state or local requirements; and (2) a LFA fails to grant or deny the application within the reasonable time frame established by the Commission's order, which is six months in the case of an applicant without access to rights-of-ways. The Commission anticipates that this will occur rarely, if ever, because LFAs will act within the reasonable time frames established by the Commission's order. Indeed, the

Commission's order is designed to provide an incentive for LFAs to do so. If the LFA ultimately acts to deny the franchise after the expiration of the deadline, the applicant's interim operating authority is terminated, and the applicant must appeal such denial pursuant to Section 635(a) of the Communications Act.

The Commission has the authority to deem franchise applications granted under its general authority to implement the Communications Act, including Section 621(a)(1), which specifically prohibits LFAs from unreasonably refusing to award a competitive franchise. *See* Answer to Question 1 above. The Commission's order appropriately concludes that it is unreasonable for a LFA to refuse to issue a decision on a competitive franchise application after considering it for an appropriate period of time. This approach is consistent with other federal regulations designed to address unreasonable inaction on the part of a State decision maker. *See, e.g.*, 40 C.F.R. § 141.716(a) (watershed control plans that are submitted to a State and not acted upon by the regulatory deadline are "considered approved" until the State subsequently withdraws such approval.); 42 C.F.R. § 438.56(e)(2) (an application to disenroll from a Medicaid managed care plan shall be "considered approved" if not acted on by a State agency within the regulatory deadline).

**Question 4: To the extent that the Commission's order could compel a local government to enter into a contract with a cable service provider, please provide the statutory and legal citations for the Commission's specific authority to do so.**

The Commission's order does not under *any* circumstances compel a local government to enter into a contract with a cable service provider.

**Question 5: To the extent that the Commission's order proposes to treat new entrants on a different basis from incumbents or other competitive cable operators operating under an existing franchise agreement, please provide the statutory and legal citations for the Commission's specific authority to do so.**

The Commission's order treats new entrants on a different basis from existing franchisees. The Commission is interpreting a statutory provision, *i.e.*, Section 621(a)(1), that applies *only* to new, competitive franchise applicants. *See* 47 U.S.C. § 541(a)(1) ("a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise"). Thus, section 621(a)(1) provides a statutory basis for treating new, competitive applicants differently from incumbents. Indeed, section 621(a)(1), by its terms, provides the Commission with no authority with respect to incumbents. The record also demonstrates that competitive video providers that enter the market today are in a fundamentally different situation than incumbent cable operators. In the further notice attached to the order, however, the Commission is seeking comment on its tentative conclusion to extend relief to existing franchisees as well.

**Question 6: To the extent that the Commission's order would affect the existing statutory remedies in Title VI, including burdens of proof, please provide the statutory and legal citations for the Commission's specific authority to do so.**

The Commission's order does not affect the existing statutory remedies in Title VI. Competitive franchise applicants who believe that a franchising authority has improperly denied their applications may still file an action in court pursuant to 47 U.S.C. § 555. At that point, as is the case now, the reviewing court must determine whether, under the particular facts of each case, a franchising authority violated Section 621(a)(1) by unreasonably refusing to award an additional competitive franchise. The Commission's order simply provides guidance with respect to what it means to "unreasonably refuse to award an additional competitive franchise" under Section 621(a)(1) of the Act.

Thank you for your interest in this important matter. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,



Kevin J. Martin