

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

	)	
ALLIANCE FOR COMMUNITY MEDIA, <i>et al.</i> ,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 07-3391
	)	(and consolidated cases)
FEDERAL COMMUNICATIONS	)	
COMMISSION and UNITED STATES	)	
OF AMERICA,	)	
	)	
Respondents.	)	
	)	

**OPPOSITION OF INTERVENORS USTELECOM, VERIZON,  
AND AT&T INC. TO JOINT MOTION FOR STAY**

## INTRODUCTION AND SUMMARY

After careful review of an extensive record, the FCC found that the current “dearth of competition” to incumbent cable systems “is due, at least in part, to the [local] franchising process,” which, as applied by some localities, “impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment.” Order ¶¶ 1, 20. The Order at issue here is the FCC’s reasoned effort, relying upon its well-recognized authority to interpret and enforce section 621 of the Cable Act, 47 U.S.C. § 541, to address this situation and thereby to promote video choice and broadband deployment.

Petitioners’ request to stay the Order fails for at least three reasons.

*First*, despite waiting to act until more than three months after the Order’s release, Petitioners did not seek relief first from the FCC as required by FRAP 18.

*Second*, the balance of harms militates strongly against a stay, given the lack of any immediate irreparable harm to Petitioners and the harm a stay would cause consumers and competitive providers. Petitioners’ primary claim of harm – that the Order will force local franchising authorities (“LFAs”) to award franchises that do not meet the requirements of federal law – is belied by the fact that LFAs remain free under the Order to deny any franchise application and to defend that decision in court. All the Order requires is a timely yes-or-no answer.

By contrast, a stay would cause significant harm to the public interest and competitive providers. Consumers in most of the country still await wireline video competition. Their wait will be longer if the stay request is granted. A stay would also cause economic harm to new video entrants such as Verizon and AT&T, impede their exercise of First Amendment rights, and impair the rights of potential customers to receive the speech that these new entrants wish to provide.

*Third*, Petitioners are unlikely to prevail on the merits. The FCC’s authority to interpret and implement the Communications Act, including section 621 of the Cable Act, is well-established. The particular rules challenged by Petitioners rest on reasonable interpretations that are entitled to judicial deference. And the Order’s requirement that LFAs act on franchise applications within 90 or 180 days (depending on whether the applicant already has access to the rights-of-way), as well as its associated enforcement mechanism (an interim franchise), are within the FCC’s authority and necessary to give the Order practical effect.

## **BACKGROUND**

More than 20 years after Congress first attempted to constrain the local cable franchising process, 15 years after Congress foreclosed LFAs from “unreasonably” refusing to award competitive franchises, and a decade after Congress adopted a policy of across-the-board competition through the Telecommunications Act of

1996 (“1996 Act”), local franchise regulation still thwarts video competition, which impedes broadband deployment as well.

Of the nearly 33,000 communities in which cable incumbents operate, only about 3% have been found by the FCC to enjoy effective competition.<sup>1</sup> From 1995 to 2005, the average price for the most popular tier of cable service nearly doubled. *2006 Pricing Report* ¶¶ 7, 10. In 2005, the average price increased by almost twice the rate of inflation. *Id.* ¶¶ 10, 18. In the few markets where the FCC has found effective wireline competition, prices were lower by an average of 17%. *Id.* ¶ 2.

Traditional telephone companies are uniquely positioned to bring competition to local video markets. They already have permission to use rights-of-way and have existing networks. And many of them, including large companies such as Verizon and AT&T and smaller ones such as SureWest and others, have made massive additional infrastructure investments to upgrade their networks to offer video and faster Internet access.

When a telephone company offers video service, consumers benefit because they can choose a superior service at a lower price. Consumers of the incumbent cable operator benefit even if they do not change providers, as evidenced by the incumbents’ price cuts when they face wireline video competition. Telephone-

---

<sup>1</sup> See Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 21 FCC Rcd 15087, ¶ 3 (2006) (“2006 Pricing Report”).

company provision of video also enables deployment of the broadband facilities necessary to support video, and thereby serves Congress’s goal of encouraging broadband deployment “on a reasonable and timely basis . . . to all Americans.” 1996 Act § 706(a), 110 Stat. 56, 153, *reprinted at* 47 U.S.C. § 157 note.

But telephone-company efforts to compete in local video markets are running up against local franchise overreaching that Congress meant to constrain long ago. In 1984, Congress attempted to bring order to this chaotic process by enacting a new title of the Communications Act to govern local franchising, *see* 47 U.S.C. §§ 521-573 (the “Cable Act”). Congress enacted the Cable Act “to provide a national policy regarding cable television,” with objectives that included “promot[ing] competition in cable communications.” 98 Stat. 2779, 2780. The Cable Act made obtaining a cable franchise a requirement of federal law, *see* 47 U.S.C. § 541(b)(1), while creating a federal framework for franchise regulation, *see, e.g., id.* § 542(b) (capping franchise fees at 5% of a cable operator’s revenues).

The 1984 Act failed to ensure that the franchising process was not used as a barrier to entry. Congress therefore amended the Cable Act in 1992 “to promote increased competition.” 106 Stat. 1460. The 1992 Act required localities to award competitive franchises and prohibited them from granting exclusive franchises, a common practice that had blocked competitive entry: “[A] franchising authority

may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.” 47 U.S.C. § 541(a)(1).

Despite Congress’s efforts, the local franchising process continues to impede competitive entry. *See* Order ¶ 19. The record before the FCC demonstrated that incumbent cable operators, which “originally negotiated franchise agreements as a means of acquiring or maintaining a monopoly position,” *id.* ¶ 26, commonly exploit the franchising process to protect their monopoly. They do so, for example, by invoking “level-playing-field” laws, which purport to prohibit a locality from granting a franchise on more generous terms than the incumbent’s, even when the incumbent obtained its monopoly franchise by agreeing to terms that the LFA could not mandate under the Cable Act. *See id.* ¶¶ 34, 48. Incumbents’ franchise agreements also typically create incentives for LFAs to resist competitive entry, insofar as they, for example, require franchise fees that exceed that which the LFA can demand under federal law. *See id.* ¶ 138.

Based on an extensive record, the FCC found that “LFA requests for unreasonable concessions” in the franchising process “are not isolated, and . . . impose undue burdens upon potential cable providers.” *Id.* ¶ 43. It cited examples of unreasonable build-out requirements, such as demands that telephone companies offer service outside their existing service areas, which “substantially increased” deployment costs and undermined “the business case for market entry.” *Id.* ¶ 38;

*see also id.* ¶ 33 (providing examples). LFAs have also demanded that new entrants pay various fees exceeding the maximum that the Cable Act permits, and have demanded that new entrants provide them with free telecommunications services or other benefits unrelated to cable service. *See id.* ¶¶ 43-46 (giving examples of demands including, *inter alia*, cell-phone towers, free broadband, a new recreation center and pool, and a \$50,000 scholarship).

The FCC also found that “[m]any new entrants have been subjected to lengthy, costly, drawn-out negotiations” with LFAs. *Id.* ¶ 22. “[M]ore than 90% of [Verizon’s franchise] negotiations [from 2005 to 2006] were not completed within one year”; BellSouth’s negotiations took “an average of 10 months” and “in one case . . . took nearly three years”; and “[m]ost of Ameritech’s franchise negotiations . . . took a number of years.” *Id.*

Such delays “are particularly unreasonable when, as is often the case, an applicant already has access to rights-of-way.” *Id.* ¶ 23. Regulating rights-of-way is “[o]ne of the primary justifications for cable franchising.” *Id.*; *see New York State Comm’n on Cable Television v. FCC*, 749 F.2d 804, 809 (D.C. Cir. 1984). Because telephone companies already have the right to run their networks through rights-of-way in their service areas (and to upgrade those networks), an LFA considering a franchise for a telephone company “need not and should not devote substantial attention to issues of rights-of-way management.” Order ¶ 23.

The Order removes some of the barriers that the local franchising process has placed in the way of video competition. The Order clarifies that an LFA “unreasonably refuse[s]” to award a cable franchise, 47 U.S.C. § 541(a)(1), when it conditions the award of a franchise on demands that violate provisions of the Cable Act or obstruct the federal policy of promoting cable competition. Such demands include, for example, unreasonable build-out requirements, *see* Order ¶¶ 87-91, and demands for monetary or in-kind payments in excess of the 5% franchise fee cap set out in section 622 of the Cable Act, 47 U.S.C. § 542, *see* Order ¶¶ 94-109.

The Order also creates an enforcement mechanism to address delay. Upon receipt of an application containing specified information, the LFA must render a decision within 90 or 180 days, depending on whether the applicant has authority to access public rights-of-way in the relevant geographic area. *See id.* App. B, at 79. If the LFA does not timely rule on the application, the competitive entrant is “authorized to offer service pursuant to an interim franchise in accordance with the terms of the application.” *Id.* at 80. Even after an interim franchise takes effect, the LFA may terminate it by granting or denying a franchise. *See id.*

## **LEGAL ARGUMENT**

### **I. THE MOTION IS BARRED BY FRAP 18**

A petitioner that seeks a stay of an order pending judicial review “must ordinarily move first before the agency.” Fed. R. App. P. 18(a)(1). Petitioners

claim that doing so here was “impracticable.” Mot. 1 n.3. The FCC announced the Order on December 20, 2006 and released it on March 5, 2007. Petitioners plainly could have moved before the agency in the more than three months between issuance of the Order and their motion in this Court. Because they did not, their motion must be denied. *Cf. Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 930-31 (6th Cir. 2002) (applying comparable requirement to seek relief in district court before asking court of appeals to stay a district court order).

Petitioners assert that moving before the agency would have been “futil[e],” because the FCC adopted the Order despite objections from a few legislators and interest groups and because, after the Order’s release, the FCC’s Chairman wrote a letter defending it. *See* Mot. 1 n.3. At most, this shows that the agency likely disagrees with Petitioners on the merits, which will be true in any case in which a party asks an agency to stay its own order. Rule 18 nevertheless contemplates that stay applicants give the agency the first opportunity to review the request and to balance the competing claims of harms and the public interest. Because Petitioners could have done so prior to seeking relief in this Court, their motion fails.

## **II. PETITIONERS DO NOT MEET THE REQUIREMENTS FOR A STAY**

Apart from its dispositive procedural flaw, Petitioners’ motion also fails to meet the demanding standards for a stay. To warrant that extraordinary remedy, Petitioners bear the burden of establishing both that the balance of hardships

supports relief and that they are likely to succeed on the merits. *See, e.g., Ohio ex rel. Celebrezze v. NRC*, 812 F.2d 288, 290 (6th Cir. 1987). Petitioners' motion satisfies neither prong of that stringent test.

**A. The Balance of Hardships Overwhelmingly Weighs Against a Stay**

Petitioners claim irreparable injury stemming from the Order's requirement that LFAs act on qualifying franchise applications within a specified period of time. This requirement reflects the FCC's reasoned judgment of how best to break the local franchising logjam and thereby advance competition and broadband deployment. Petitioners' supposed injury is wholly unsupported and, in any event, far outweighed by the harm a stay would cause consumers and new entrants.

1. Petitioners' claim of harm is belied, first, by their unexplained delay in filing the motion. Although Petitioners style their motion as a request to "stay the effective date" of the FCC's new rules, Mot. 20, it is too late to stay the bulk of the Order, which took effect April 20, 2007.<sup>2</sup> Petitioners' inaction – for three months after the Order was released and more than two months after this case was filed – conclusively rebuts their claim that the Order will cause them irreparable harm. *See, e.g., Forry, Inc. v. Neundorfer, Inc.*, 837 F.2d 259, 267 (6th Cir. 1988).

---

<sup>2</sup> Most of the Order was effective 30 days after publication in the Federal Register, which occurred March 21, 2007, *see* 72 Fed. Reg. 13189-215. The remainder will take effect upon announcement in the Federal Register of OMB approval under the Paperwork Reduction Act. *See* Order ¶ 155.

Apart from delay, Petitioners' claim of injury – that the Order's 90- or 180-day deadline, together with the interim franchise rule, will “force[]” LFAs to grant franchise applications that they would otherwise deny, *see* Mot. 17-18 – rests on a mischaracterization of the Order. All the Order requires is that an LFA *make a decision*. If an LFA has a valid reason for denying an application, it can do so within the relevant period, and the interim franchise provision will have no effect. Petitioners' contention (at 19) that the Order will force LFAs to enter “long-term agreements” involving “onerous concessions” fails for the same reason: An LFA can avoid any such harm simply by denying the application if it has lawful grounds. Alternatively, an LFA may continue to negotiate terms of a final franchise to replace the interim authority, but in the meantime consumers will begin to benefit from added competition.

Petitioners speculate that requiring LFAs to act on applications on a timely basis will lead to a “multiplicity of lawsuits.” Mot. 17. If an LFA has a valid reason for denying an application, denial is likely to lead, not to litigation, but rather to a new application that cures the defect. If the LFA does *not* have a valid reason yet denies the application anyway, the obligation to defend that decision in court does not constitute irreparable harm. *See Renegotiation Bd. v. Bannercraft*

*Clothing Co.*, 415 U.S. 1, 24 (1974) (“[L]itigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.”).<sup>3</sup>

Nor is there any merit to Petitioners’ suggestion that the 90-day period adopted by the FCC (where the applicant already has access to rights-of-way) is too short to permit LFA action. Even apart from the fact that this time period reflects the FCC’s reasoned effort to balance LFAs’ interests against the public interest in expeditious entry, *see infra* p. 17, numerous commenting parties – including some representing franchising authorities – proposed time limits comparable to (or even shorter than) what the agency adopted. *See* Order ¶ 68 & n.253. Moreover, the record revealed that certain LFAs have been able to act on franchise applications faster than required by the Order, *see id.* ¶¶ 16, 25 & n.82, and that several states have enacted laws requiring faster action, *see id.* ¶ 69.

Petitioners claim that LFAs will be unable to meet the FCC’s deadline because “[m]any” state laws “specify the processes LFAs must follow” and, potentially, take more than 90 (or 180) days to complete. Mot. 18. But Petitioners fail to provide even a single concrete example of a state law that falls into this

---

<sup>3</sup> Petitioners assert that LFAs “will have to repeal existing laws and enact new laws” to comply with the shot clock. Mot. 17-18. But any local laws that would prevent an LFA from complying with the Order are preempted, *see* Order ¶ 125, and it is therefore unnecessary for LFAs to repeal them. And Petitioners fail to substantiate their assertion that LFAs will be unable to act at all until they pass new laws, much less explain why any such LFAs have been unable to address this concern in the more than three months since the Order was issued.

category, let alone demonstrate that the LFA could not comply with the process in the allotted time. Petitioners' speculation that such conflicts exist is on its face insufficient to warrant a stay. *See Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) (“a movant must provide some evidence that the harm has occurred in the past and is likely to occur again”).

Finally, Petitioners contend that, in response to LFA action on new entrants' applications, incumbent providers may seek to alter their existing agreements, pursuant to “level-playing-field” provisions in those agreements. *See* Mot. 19-20. Even assuming such provisions survive the Order, any harm they cause LFAs results not from the requirement that LFAs timely act on franchise applications, but rather “from the express terms of a contract [the LFA] negotiated,” coupled with the LFA's decision to adopt the new entrant's application. *Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003). It therefore does not constitute irreparable harm. *See id.*

**2.** On the other side of the ledger, a stay would cause substantial hardship to consumers and competitive providers.

The record before the FCC shows that delaying competitive entry into video markets – which is the essence of the harm the Order seeks to remedy – could cost consumers between \$16 and \$28 billion, mostly within the next ten years. *See* Attachment A. A stay of the Order could set back video competition and thus cost

consumers hundreds of millions of dollars. Those consumer costs (which would be paid largely in the form of higher prices for incumbents' services) would not be recoverable after this Court sustains the Order. Consumers' First Amendment rights as viewers are also at stake. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1453 (D.C. Cir. 1985) ("the interests of viewers [are] . . . 'paramount' in the First Amendment calculus").

A stay would also irreparably injure new entrants that are seeking to compete in video. These competitors seek to exercise rights protected by the First Amendment, *see Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994), and interference with those rights, "for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Furthermore, delay stemming from the local franchise process denies new entrants the opportunity to sell video services and build customer goodwill, which likewise creates irreparable harm. *See, e.g., BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., LLC*, 425 F.3d 964, 970 (11th Cir. 2005).

In short, the injuries to new entrants that would result from a stay, together with the harms to consumers, far outweigh the purported hardships that Petitioners attempt to show from the Order.

## **B. The Order Will Be Upheld on the Merits**

Petitioners have also failed to establish, as they must, “a strong or substantial likelihood of success” on the merits. *Celebrezze*, 812 F.2d at 290.

1. Petitioners claim (at 3-8) that the FCC lacks authority to interpret the Communication Act’s prohibition, set out in section 621 of the Cable Act, on “unreasonabl[e] refus[als] to award . . . competitive franchise[s],” 47 U.S.C. § 541(a)(1). But the FCC’s conclusion to the contrary is supported not only by the FCC’s authority “to promulgate binding legal rules” interpreting and enforcing the Communications Act generally, *see NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005), but also by numerous cases establishing the FCC’s authority to interpret and enforce the Cable Act specifically, including the provisions set out in section 621, *see City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999) (“[w]e are not convinced that for some reason the FCC has well-accepted authority under the [Cable] Act but lacks authority to interpret [section 621]”); *NCTA v. FCC*, 33 F.3d 66, 70 (D.C. Cir. 1994); *see also ACLU v. FCC*, 823 F.2d 1554, 1563-65 (D.C. Cir. 1987).

Indeed, as the Supreme Court has held, the Communications Act gives the FCC rulemaking authority over all provisions expressly addressed by the statute.<sup>4</sup>

---

<sup>4</sup> *See* 47 U.S.C. § 154(i) (“The [FCC] may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter,

In *AT&T Corp. v. Iowa Utilities Board*, the Supreme Court explained that “[t]he FCC has rulemaking authority to carry out the provisions of [the Communications] Act,” and “[FCC] jurisdiction always follows where the Act applies.” 525 U.S. 366, 378, 380 (1999) (internal quotation marks omitted). The provisions that the FCC may enforce through rulemaking thus include the Cable Act, which Congress incorporated into the Communications Act. *See supra* p. 4.

Petitioners argue that the statute’s provision for judicial review of “final determination[s]” by an LFA, 47 U.S.C. § 555(a), deprives the FCC of its authority to promulgate standards to govern those determinations. Mot. 4 & n.14. But Congress’s creation of an adjudicatory remedy in another forum “do[es] not logically preclude the [FCC’s] issuance of rules to guide” the judgments made in that forum. *Iowa Utils. Bd.*, 525 U.S. at 385. Rather, in this context as in others, the FCC is authorized to promulgate rules interpreting federal law that apply to LFAs and that the courts enforce in their review of LFAs’ “final determination[s].” *See id.*; Order ¶ 56.

---

as may be necessary in the execution of its functions.”); *id.* § 303(r) (the FCC may “[m]ake 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 chapter”); *see also* Order ¶ 54. The “chapter” referenced in §§ 154(i) and 303(r) is Chapter 5 of Title 47 of the United States Code, which includes “the body of the Cable Act as one of its subchapters.” *City of New York v. FCC*, 486 U.S. 57, 70 n.6 (1988).

Moreover, section 706 of the 1996 Act provides additional authorization for the Order. As noted above, section 706 directs the FCC to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability . . . by utilizing . . . measures that promote competition . . . or other regulating methods that remove barriers to infrastructure investment.” 1996 Act § 706(a), 110 Stat. 153, *reprinted at* 47 U.S.C. § 157 note. “Revenues from cable services are . . . a driver for broadband deployment,” Order ¶ 13, and delays and unreasonable conditions in local franchising processes are “barriers to [broadband] infrastructure investment,” *see id.* ¶¶ 41, 52, 62, 64. The FCC’s removal of those barriers was thus supported by its mandate under section 706.

**2.** Petitioners challenge the FCC’s decision to require a decision on a competitive franchise application within 90 days, where the applicant has pre-existing authorization to use the rights-of-way. *See* Mot. 9-12.

This challenge faces a steep uphill battle. The FCC has authority to adopt “prophylactic rule[s] designed to curb abuses.” *Southwestern Bell Corp. v. FCC*, 896 F.2d 1378, 1382 (D.C. Cir. 1990). The FCC’s exercise of that authority here is based on a substantial record, *see* Order ¶¶ 22, 25, and is entitled to “considerable deference.” *WorldCom, Inc. v. FCC*, 238 F.3d 449, 458 (D.C. Cir. 2001).

Petitioners contend that LFAs will not be able to meet the 90-day deadline while still complying with state requirements to hold public hearings and/or to

obtain consent from its elected body. *See* Mot. 10. But, even assuming Petitioners had substantiated this assertion – which they have not, *see supra* p. 11 – if the LFA has difficulty meeting procedural requirements, it either will be freed of those requirements by the Order’s preemptive effect, or it can allow an interim franchise to take effect while it completes its process. As for Petitioners’ claim (at 9-10) that applicants may delay negotiations, an LFA is free to deny an application if it has grounds to insist on more than an applicant has offered as of the FCC’s deadline.

Petitioners claim that the 90-day period is arbitrary by comparison to other periods in the statute. *See* Mot. 10-12. But, again, the 90-day period applies only where the applicant already has access to rights-of-way, in which case LFA review should not require “a significant amount of time.” Order ¶ 70. Beyond that, the period only applies where an applicant seeks an *initial* franchise so that it can *begin* service, and is thus by definition being prevented from competing and from engaging in protected speech. The public interest in prompt action in that circumstance far outweighs the interest in prompt action in the other circumstances (such as renewals or transfers) on which Petitioners rely. *See id.* ¶ 71.<sup>5</sup>

---

<sup>5</sup> Petitioners’ complaint (at 12, 16) that the Order addresses local requirements while leaving state laws for another day ignores the fact that “agencies are not required to deal with every aspect of a problem in one proceeding,” but “ordinarily may proceed one step at a time.” *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995); *see Brand X*, 545 U.S. at 1002.

Finally, Petitioners claim that the FCC lacks authority to provide for interim franchises deemed granted by an LFA. *See* Mot. 13. But the statute does not preclude the granting of franchises under federal authority; on the contrary, it defines a “franchising authority” as “any governmental entity empowered by Federal, State, or local law to grant a franchise.” 47 U.S.C. § 522(10). Further, as the FCC observes, there was a history of the FCC “act[ing] as a co-franchising authority” and granting interim franchises even prior to enactment of the Cable Act, through which Congress expanded the federal role in franchising. Order ¶ 79. In any event, any intrusion on LFAs’ authority here is minimal at most, as an LFA can override interim authorization simply by acting on the underlying application.

**3.** Petitioners’ challenges to the FCC’s rules interpreting the Cable Act’s substantive limitations on LFA franchising demands are misplaced.

**a.** Petitioners claim (at 13) an “unconditional” right to require applicants to provide service to all households in a given area. In fact, the statute *limits* LFAs by *preventing* them from imposing unreasonable build-out demands. *See* 47 U.S.C. § 541(a)(4)(A) (“the franchising authority . . . shall allow the applicant’s cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area”). Moreover, the FCC has long held that the Cable Act does not require competitive entrants to serve all households in a given area “from the outset,” and that the imposition of such a requirement is

“ill-advised.” *E.g.*, Report, *Competition, Rate Deregulation and the Commission’s Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, ¶ 139 (1990); *see also* Ex Parte Submission of the U.S. Dep’t of Justice, MB No. 05-311, at 12 (FCC filed May 10, 2006) (noting “the significant entry-detering effects of mandated build-out requirements”). In any case, insofar as build-out requirements are concerned, the FCC merely prohibited “unreasonable” demands and gave examples to provide guidance as to what that means in this context. *See* Order ¶ 89. Petitioners’ suggestion (at 14) that this guidance is “impermissibly vague” – because it does not resolve every conceivable scenario – is frivolous.

**b.** The Order’s effort to require LFAs to hew to the statute’s 5% limit on franchise fees does little more than endorse longstanding case law establishing that LFAs may not evade that limit by demanding lump-sum or other payments under the guise of charges “incidental” to the award of a franchise. *See* Order ¶ 103 (collecting cases). Petitioners nevertheless claim (at 14-15) that the plain language of the statute forecloses the FCC from concluding that in-kind assessments count for purposes of the 5% cap on franchise fees. The statutory definition of “franchise fee” encompasses “any . . . assessment of any kind.” 47 U.S.C. § 542(g)(1). The FCC’s rule is, at a minimum, a permissible interpretation of that broad phrasing. *See City of Dallas v. FCC*, 118 F.3d 393, 398 n.12 (5th Cir. 1997) (the 5% cap was intended to “restrain[] [LFAs] from taxing cable operator[s] to death”).

c. Petitioners contend (at 15-16) that, because Congress has not preempted level-playing-field laws, the FCC cannot do so. If that were the rule, federal agencies could never preempt local law, since agency preemption by definition occurs only where Congress has not acted. Petitioners also claim that “FCC policy favors treating providers of like services alike.” *Id.* at 16. But the FCC reasonably concluded that incumbents and new entrants are not alike, because “LFAs do not afford [new entrants] the monopoly power and privileges that incumbents received when they agreed to their franchises.” Order ¶ 48.

d. Finally, Petitioners’ APA claim ignores the breadth of the FCC’s notice, which sought comment on, for example, whether LFA demands were “consistent with the requirements” of the Cable Act (¶ 13) and “what . . . specific rules . . . [the FCC] should adopt to ensure that the local cable franchising process does not unreasonably impede” competition (¶ 21). The “regulation[s] as adopted did not embrace any major subjects that were not described in the notice.” *Chrysler Corp. v. Department of Transp.*, 515 F.2d 1053, 1061 (6th Cir. 1975).

## CONCLUSION

The Court should deny the motion to stay pending judicial review.

Respectfully submitted,

Michael E. Glover  
Edward Shakin  
William H. Johnson  
VERIZON  
1515 North Courthouse Road  
Suite 500  
Arlington, Virginia 22201  
(703) 351-3099

Henry Weissmann  
Aimee Feinberg  
MUNGER, TOLLES & OLSON L.L.P.  
355 South Grand Avenue, 35th Floor  
Los Angeles, California 90071

*Counsel for Verizon*

Paul K. Mancini  
AT&T INC.  
175 East Houston  
San Antonio, Texas 78205  
(210) 351-3500

Gary L. Phillips  
Christopher Heimann  
AT&T INC.  
1120 20th Street, N.W., Suite 1000  
Washington, D.C. 20036  
(202) 457-3055

*Counsel for AT&T Inc.*

June 29, 2007

---

Michael K. Kellogg  
Colin S. Stretch  
Gregory G. Rapawy  
KELLOGG, HUBER, HANSEN, TODD,  
EVANS & FIGEL, P.L.L.C.  
1615 M Street, N.W., Suite 400  
Washington, D.C. 20036  
(202) 326-7900  
(202) 326-7999 (facsimile)

*Counsel for United States Telecom  
Association, Verizon, and AT&T Inc.*

Jonathan B. Banks  
UNITED STATES TELECOM  
ASSOCIATION  
607 14th Street, N.W., Suite 400  
Washington, D.C. 20005-2164  
(202) 326-7300

*Counsel for United States Telecom  
Association*

**ATTACHMENT**

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**DECLARATION OF THOMAS W. HAZLETT**

1. I am Professor of Law & Economics at George Mason University, where I also serve as Director of the Information Economy Project of the National Center for Technology & Law. I previously served as Chief Economist of the Federal Communications Commission in 1991-92, and have also held faculty positions at the University of California, Davis, Columbia University, and the Wharton School. I have written extensively on the economics of cable TV markets, including municipal franchising. I am the co-author of Public Policy Toward Cable Television (MIT Press, 1997), and the author of “Cable Television,” Chapter 6 in Martin Cave, et al., eds., Handbook of Telecommunications Economics, Vol. II (North Holland, 2005). I also serve as Senior Advisor to the Analysis Group, which has assisted me in preparing this declaration. My C.V. is Exhibit 2.

2. I submit this Declaration at the request of Verizon. In particular, I have been asked to discuss how certain practices associated with the cable franchising process affect new entrants and consumers from an economic perspective.

3. I conclude that there are numerous practices associated with the existing cable franchising process that are unreasonable and that impose substantial barriers to entry. These barriers are an obstacle to achieving greater competition in the provision of multi-channel video service. This competition has been shown to lower quality-adjusted prices by 15% or more.<sup>1</sup> By denying consumers the benefits of this competition, these unreasonable franchising practices impose significant costs. These costs are unnecessary, particularly for entrants that already have authority to use public rights-of-way. Given that consumer gains from nationwide video competition are projected to be on the order of \$76 billion to \$134 billion, removing franchising-related roadblocks that resulted in accelerating nationwide wireline competition in video would realize potential consumer benefits of \$16 billion to \$28 billion.<sup>2</sup>

4. This Declaration details this analysis in three parts. Section I outlines the unreasonable franchise practices that act as barriers to competitive entry. Section II describes why these practices are unnecessary and considers alternative rules that would improve efficiency, reducing prices to consumers. Section III then examines the cost of these unreasonable practices on new entrants and consumers and quantifies the cost savings estimated to result from implementation of pro-competitive reforms.

---

<sup>1</sup> See Exhibit 1.

<sup>2</sup> See Exhibit 1.

documentation of its experience – contributed to investors’ financial demise. Moreover, this financial failure allowed the firm to undo the terms and conditions of many of its franchises, obligations that it now recommends for other firms. Clearly, if firms are forced to go into receivership prior to gaining economic franchise terms, there will be under-investment in competitive facilities.

***B. Quantifying Consumer Losses Associated With Entry Barriers***

50. Competitive entry into the video marketplace will significantly increase consumer welfare by reducing prices, improving service, and expanding the number of video subscribers. Delay will diminish or eliminate these potential social welfare gains. And the losses associated with such delay are unrecoverable – higher prices paid by consumers in the near term are not offset by lower prices in the future.

51. It is possible to estimate the consumer benefits from competitive entry into video using an economic model that calculates the losses associated with delayed entry. The model used here focuses on nationwide entry by wireline MVPD providers. The approach calculates the consumer gains from competitive entry under current rules (which result in franchise delays) and then measures the consumer benefits from accelerating that entry (via policies that remedy franchise delays).

52. Exhibit 1 contains a detailed description of the economic model used. To summarize, I developed two different scenarios – one that projected the scope of competitive wireline entry absent regulatory reform, and another that calculated the scope of entry assuming regulatory reform (and reduced franchise barriers) beginning in 2007. I then estimated the consumer benefits of entry using historical data from the GAO and FCC on the effects of wireline rivalry on cable prices. The difference between the

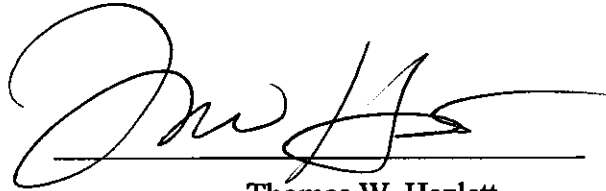
benefits achieved in the second scenario (with regulatory reform) and the first scenario (without such reform) represents the benefits of accelerated entry or, to put it differently, the costs of delayed entry. Using conservative assumptions, I estimate potential consumer benefits of accelerated entry to be in the range of \$16 billion to \$28 billion, in present value terms. This projection assumes that competitive wireline entry occurs nationwide. While it is impossible to know whether this result would obtain, the assumption is made in *both* the baseline and accelerated scenarios. Given that the scope of competitive entry will certainly be greater with lowered regulatory impediments, the analysis produces a conservative projection of the benefits of pro-consumer reforms.

#### CONCLUSION

53. A number of current franchising processes erect substantial barriers to entry. These barriers are uneconomic and alternative regulatory mechanisms would achieve the public purposes of franchising at a much lower social cost. The advantages of streamlining entry for new communications services have been vividly seen in the broadband marketplace, where existing cable operators and telephone carriers have expanded service offerings without being subject to onerous and duplicative franchise regulation. By relaxing municipal franchise barriers in multi-channel video, new competition would no longer be deterred by uneconomic regulation, with extremely large consumer surplus gains – between \$16 billion and \$28 billion – projected to result.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 13, 2006

A handwritten signature in black ink, appearing to read 'Tom Hazlett', written over a horizontal line.

Thomas W. Hazlett

## EXHIBIT 1

This exhibit describes the model used to estimate the consumer benefits that would result from regulatory reform that successfully remedied unreasonable franchising practices.

First, I consider the effect of competitive wireline entry on retail cable prices. The Government Accountability Office (GAO) estimates the price decrease in average consumer bills from wireline entry to be about 15%.<sup>65</sup> The FCC's report on cable prices supports this estimate and further finds that, on a per-channel basis, the price declines were as high as 27%.<sup>66</sup> In both cases, these declines represent the effect of wireline entry after already taking into account the impact of direct broadcast satellite entry into the MVPD marketplace. I use these two estimates of competitive price declines for High and Low scenarios in the analysis here.<sup>67</sup>

Second, I estimate the number of homes to which competitive wireline entrants would be able to provide video services (i.e., homes passed) under two scenarios. The first scenario assumes that there will be no regulatory reform. I start with a January 2006 Lehman Brothers estimate of homes passed by telco competitors, 2004 through 2007.<sup>68</sup> The Lehman Brothers forecast was made with the expectation that the current franchising

---

<sup>65</sup> Government Accountability Office, *Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry* (Oct. 2003), GAO-04-8 ["GAO (2003)"], p. 3.

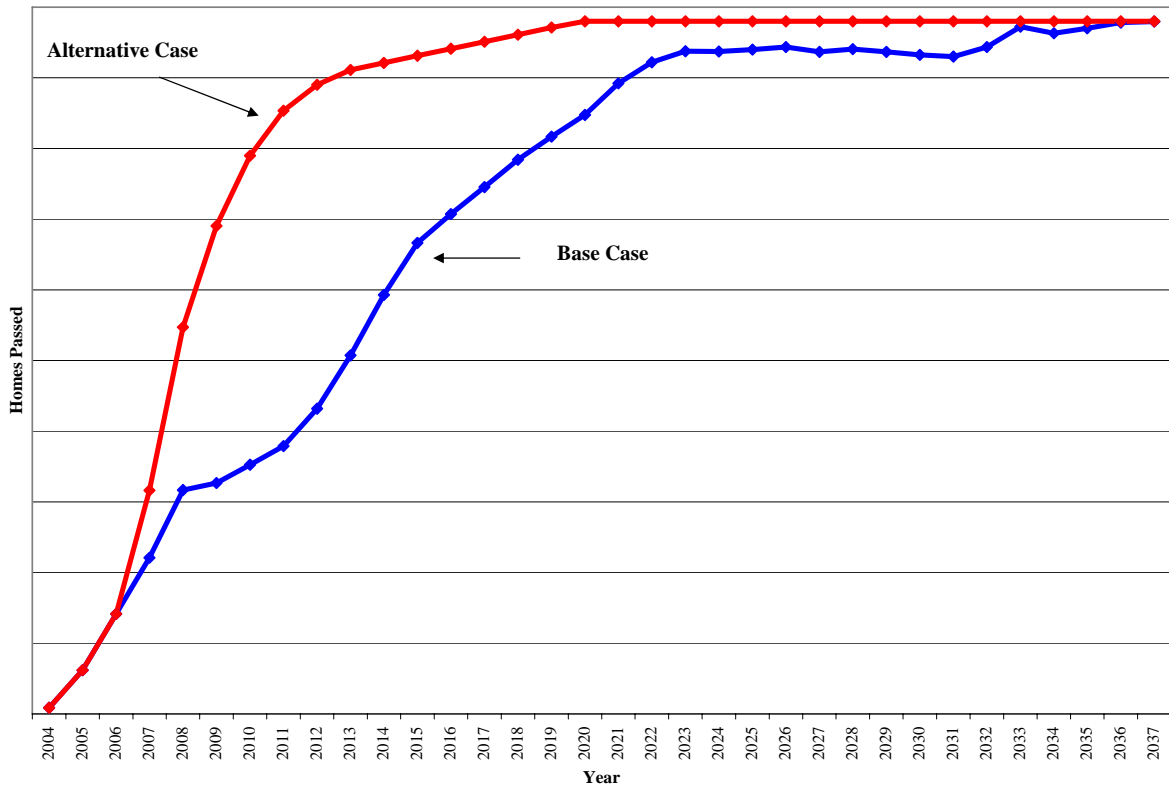
<sup>66</sup> Federal Communications Commission, *In the Matter of Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266 (Rel. Feb. 4, 2005), ¶ 12.

<sup>67</sup> The range used here is supported by various surveys and academic research. William M. Emmons III and Robin A. Prager, *The Effects of Market Structure and Ownership on Prices and Service Offerings in the U.S. Cable Television Industry*, 28 RAND JOURNAL OF ECONOMICS 732-50 (1997) ("Privately owned cable systems facing direct competition from another privately owned cable operator offered basic service at prices that were 20.5% lower in 1983 and 20.1% lower in 1989 than those charged by privately owned monopoly operators." See also, Hazlett & Spitzer (1997), pp. 26-33.

<sup>68</sup> See Lehman Bros. (2006), pp. 4-5.

regime lasts another year or two, but then is reformed.<sup>69</sup> Consequently, I use these estimates only through 2007. From 2008 onward, I assume that subscriber growth will follow the historical path of cable television deployment from 1976 onwards (as shown in Fig. 1). Given that a large majority of cable television systems were built with local franchises, their historical growth pattern incorporates delays from the franchising process. See Fig. 2.

**FIG. 2: COMPETITIVE VIDEO BUILD-OUT**



2004 – 2007 data for the base case are the actual and estimated numbers for homes passed by telco competitors (Lehman Bros. (2006), pp. 4-5) as a percent of total U.S. households. Data for the 2008 – 2037 base case, based on the path of historic cable video build-out, presented in Figure 1. Data for the 2007 – 2013 alternative case, based on the path of historic cable broadband build-out, presented in Figure 1. Data for the 2014 – 2037 alternative case based on Analysis Group projections.

<sup>69</sup> “Capital Hill and FCC sentiment leans toward relaxing or lifting local franchising requirements. However, genuine political interest in altering the rules should not affect them until 2007 or 2008 when serious possibility of passage of broader telecom reform could emerge.” Lehman Bros. (2006), p. 2.

In the second scenario, I model video entry under the assumption that regulatory reform effectively streamlines the local franchising process, and that this takes effect in 2007. In this case, I then assume that competitive build-out will follow the historical path of cable modem (broadband) deployments in the U.S., which is a useful model for unencumbered telco entry into video. Beginning in 2014, I assume that deployments are increased by about 1 million homes passed per year until saturation reaches 98% in 2020 and then saturation is held constant. First, cable provided broadband was deployed without any additional franchising requirements. Second, it was deployed as an upgrade to existing infrastructure. This parallels the position of telephone carriers that will upgrade existing infrastructure to provide video services. Third, cable modem service was deployed in a market that generally featured at least one additional broadband service provider, similar to the non-monopoly position of a telco entering a video market.

Fig. 2 displays the alternative reform scenario based on franchise relief available in 2007. The two distinct paths for competitive video deployments enable a calculation of the consumer welfare gains from franchising reforms. There were approximately 113.1 million households in the U.S. in 2005<sup>70</sup> and the percentage of cable subscribers equaled 57.8% of households.<sup>71</sup> Price decreases from increased competition will increase the number of subscribers to video services, but the exact level of increase is difficult to pinpoint. Economic analysis suggests that every percentage point decrease in the price

---

<sup>70</sup> U.S. Census Bureau, Income, Poverty and Health Insurance Coverage in the United States: 2004, Current Population Reports, Series P60-229 (Aug. 2005), available at <http://www.census.gov/prod/2005pubs/p60-229.pdf>. I hold the total number of households constant throughout the analysis to simplify the calculations. This simplification does not greatly affect the magnitude of the welfare estimates (it marginally undercounts them) and has an even smaller effect on the estimated welfare effects of accelerating the deployment of competitive multi-channel video.

<sup>71</sup> This is equal to the current number of cable subscribers (65.4 million) divided by total U.S. households (113.1 million). The FCC reports that cable subscribers are 69.4% of the 94.2 million MVPD subscribers. See Federal Communications Commission, *FCC Issues 12<sup>th</sup> Annual Report to Congress on Video Competition* (Feb. 10, 2006), p. 3.

per channel of cable video services will increase the number of subscribers by about 1.5%.<sup>72</sup> Consequently, I assume the number of subscribers will increase by 22.5% with a 15% price decrease and by 40.5% with a 27% price decrease. Many of these new subscribers will come from the current pool of DBS subscribers.<sup>73</sup>

As Table 1 indicates, consumer surplus gains associated with competitive entry into the video marketplace are estimated to be \$76 billion to \$134 billion (in present value terms) under the base case (assuming no reform). Table 1 also reports the model results assuming competitive entry is accelerated beginning in 2007 to equal the deployment path of unregulated cable broadband. The difference between benefits generated *when entry is accelerated* versus the *base case* measures the irretrievable losses from delay. The present value of consumer benefits of accelerated entry therefore range from \$16 billion to \$28 billion, assuming competitive wireline entry nationwide across both scenarios.<sup>74</sup>

---

<sup>72</sup> GAO (2003), p. 59. The 1.5% elasticity relates the change in cable subscribers to a change in the per channel price of cable.

<sup>73</sup> Benefits to satellite subscribers from increased wireline entry are, however, ignored.

<sup>74</sup> This result does not imply that nationwide build-out by additional wireline video systems would obtain. It derives from the *difference* in consumer gains between a nationwide build-out with and without reforms that effectively streamline competitive entry. It is clear that, whatever path we are currently on for competition to emerge in local markets, the extent of that national build-out pattern will expand with lower entry barriers. Hence, an analysis that projected less than nationwide build-outs for competitive entrants would need to reflect the relatively greater scope of competition under the reform scenario.

<b>TABLE 1. Present Value of Consumer Surplus</b>		
	<u>Low Scenario:</u> 15% Price Decrease <sup>A</sup>	<u>High Scenario:</u> 27% Price Decrease <sup>B</sup>
Base Case	\$76.1 billion	\$134.1 billion
Alternative Case I	\$92.0 billion	\$162.3 billion
Gains from Accelerated Entry <sup>C</sup>	\$15.8 billion	\$28.1 billion

Discount rate of five (5) percent used for present value calculations. N, the number of periods for which the Consumer Surplus is discounted, is zero in 2005. Consumer surplus = [(Change in price x Number of subscribers before entry) + (Change in price x Change in subscriber base resulting from entry)/2].

<sup>A</sup> GAO (2003), p. 3.

<sup>B</sup> Federal Communications Commission, *In the Matter of Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266 (Rel. Feb. 4, 2005), ¶ 12.

<sup>C</sup> Difference not exact due to rounding.

The estimates of consumer gains from accelerated entry presented here are likely to be underestimates. The baseline case assumes widespread competitive entry into the video market even absent franchise reform, which is highly optimistic. As noted, expansion by overbuilders such as Telesat and RCN has ended, and a large and important advanced network deployment, SBC's Project Pronto, was essentially abandoned.<sup>75</sup> Absent reform, some telcos may scale back their entry plans. The costs of delay would then encompass much of the welfare gains – on the order of \$100 billion or more, assuming nationwide competitive entry – rather than just the incremental costs associated with delayed entry.

<sup>75</sup> SBC Communications Inc., Securities and Exchange Commission Form 10-K (for year ending Dec. 31, 2003), Item I.

## CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of June 2007, the foregoing Opposition of Intervenors USTelecom, Verizon, and AT&T Inc. to Joint Motion for Stay was served on the parties listed below by first-class U.S. mail, postage prepaid.

---

Emily Albertson

Sam Feder  
Office of General Counsel  
Federal Communications Commission  
445 12th Street, N.W.  
Washington, D.C. 20554

Herbert E. Marks  
Squire, Sanders & Dempsey  
1201 Pennsylvania Avenue, N.W.  
P.O. Box 407  
Washington, D.C. 20004

Laurence N. Bourne  
James M. Carr  
Office of General Counsel  
Federal Communications Commission  
Room 8-A741  
Washington, D.C. 20554

Pierre H. Bergeron  
Squire, Sanders & Dempsey  
312 Walnut, Suite 3500  
Cincinnati, OH 45202-4036

Robert B. Nicholson  
Steven J. Mintz  
U.S. Department of Justice  
Antitrust Division – Appellate Section  
950 Pennsylvania Avenue, N.W.  
Room 3224  
Washington, D.C. 20530

William K. Sanders  
City Attorney's Office  
1 Dr. Carlton B. Goodlett Place  
City Hall Room 234  
San Francisco, CA 94102

Alan G. Fishel  
Jeffrey E. Rummel  
Arent Fox LLP  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036

Tillman Lay  
Spiegel & McDiarmid  
1333 New Hampshire Avenue, N.W.  
Washington, D.C. 20036-4798

Joseph L. Van Eaton  
William Malone  
Miller & Van Eaton  
1155 Connecticut Avenue, N.W.  
Suite 1000  
Washington, D.C. 20036-4306

Rodney L. Joyce  
Joyce & Associates  
10 Laurel Parkway  
Chevy Chase, MD 20815

Robert B. McKenna  
Tiffany West Smink  
Qwest Services Corp.  
1801 California Street, 10th Floor  
Denver, CO 80202

Christopher J. White  
New Jersey Dep't of Public Advocate  
Division of Rate Counsel  
P.O. Box 46005  
31 Clinton Street, 11th Floor  
Newark, NJ 07101

Michael S. Schooler  
Neal M. Goldberg  
National Cable &  
Telecommunications Ass'n  
25 Massachusetts Avenue, N.W.  
Suite 100  
Washington, D.C. 20001

Howard J. Symons  
Mintz, Levin, Cohn, Ferris,  
Glovsky & Popeo  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004

Kenneth S. Fellman  
Kissinger & Fellman  
3773 Cherry Creek N. Drive  
Suite 900  
Denver, CO 80209

Matthew C. Ames  
Frederick E. Ellrod, III  
Miller & Van Eaton  
1155 Connecticut Avenue, N.W.  
Suite 1000  
Washington, D.C. 20036-4306