Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the	)	MB Docket No. 05-311
Cable Communication Policy Act of 1984	)	
as amended by the Cable Television	)	
Consumer Protection and Competition	)	
Act of 1992	)	
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COMMENTS OF THE NEW JERSEY
DIVISION OF THE RATEPAYER ADVOCATE

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On the Comments:

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Dated: February 10, 2006

I. INTRODUCTION

On November 3, 2005 (released November 18, 2005), the Federal Communications Commission ("FCC") adopted a Notice of Proposed Rulemaking ("NPRM") (MB Docket No. 05-311), soliciting comments on how it should implement Section 621(a)(1) of the Communications Act of 1934, as amended ("Act").[1] As noted in the NPRM, Section 621(a)(1) states in relevant part that "a franchising authority…may not unreasonably refuse to award an additional competitive franchise."

In the NPRM, the FCC recognizes that increased competition can lead to lower prices and more choices for consumers. The NPRM references comments by potential competitors seeking to enter the multichannel video programming distributor ("MVPD") marketplace that have alleged that the current operation of the local franchising process serves as a barrier to entry. As a result, the FCC issued the NPRM to determine if the franchising process unreasonably impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment and, if so, how the Commission should act to address that problem.

The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") welcomes the opportunity to submit these comments in response to the NPRM.

II. INTEREST OF THE RATEPAYER ADVOCATE IN THE INSTANT PROCEEDING

The Ratepayer Advocate is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Ratepayer Advocate participates actively in relevant Federal and state administrative and judicial proceedings. The above-

[1]/ The pertinent Cable statutes are found in Part VI of the Communications Act of 1934, as amended. The references to the Act refer to the Part VI unless otherwise noted.

captioned proceeding is germane to the Ratepayer Advocate's continued participation and interest in implementation of the Telecommunications Act of 1996.[2] The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will "promote efficiency, reduce regulatory delay, and foster productivity and innovation" and will "produce a wider selection of services at competitive market-based prices."[3] Consumer protection is of great importance to the Ratepayer Advocate as is the objective of ensuring that all consumers have affordable access to cable television services.

III. SUMMARY

Section 621 of the Act requires cable operators to obtain a cable franchise and grants to local franchising authorities ("LFAs") the authority to award such franchises. The Ratepayer Advocate respectfully submits that the FCC lacks jurisdiction over the awarding of initial franchises under the Act.[4] The Act prohibits an LFA from unreasonably refusing to award a franchise and the Act has specific legal remedies that a cable operator can exercise to contest an unreasonable decision to award or renew a franchise by the LFA. The pertinent statutory provisions of the Act do not permit or allow the FCC to regulate the process of awarding initial franchises. Any purported construction of the Act to permit or allow the FCC to regulate the award of initial

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[2]/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

[3]/ *N.J.S.A*. 48:2-21.16(a)(4) and *N.J.S.A*. 48:2-21.16(b)(1) and (3).

[4]/ Section 626 of the Act imposes certain obligations on franchise renewals and the FCC has issued rules implementing those obligations. However the authority to award initial franchises and renewals are reserved to the LFA.

franchises simply conflicts with the plain words of the statute, is inconsistent with applicable case precedent, and would be an impermissible intrusion on the expressed Congressional intent that state LFAs have the authority to award franchises. See *City of Dallas, v. FCC*, 165 F.3d 341, 347-348 (5^{th} Cir. 1999) wherein the Court rejected that local franchising authority is limited to Section 621 of the Act.

The Ratepayer Advocate urges the FCC to focus on and address other important issues that emerge as a result of the entrance of Telecommunications Carriers into the provision of cable service, as well as the entrance of cable operators into the provision of telephone and Internet services. Given the proliferation of services now offered by both cable operators and Telecommunications Carriers, including video, telephone/VoIP, and broadband (Internet Access), the FCC should revisit a host of issues relating to the provision of such competing services so that ratepayers are not subsidizing entry by cable operators or Telecommunications carriers into the core business of one another. For example, there are issues as to whether structural separation, cost allocation and affiliate transaction requirements associated with telecommunication services are also necessary for cable operators who provide telecommunications services and conversely whether such telecommunications requirements should be imposed upon telecommunications companies that want to offer cable services.

IV. THE FRANCHISING PROCESS IS A STATE, NOT A FEDERAL, ISSUE.

In the NPRM, the Commission solicits comments on how it should implement Section 621(a)(1) of the Communications Act of 1934, which states in part that "a franchising authority…may not unreasonably refuse to award an additional competitive franchise." However, the Commission does not contend that competition has been impeded by franchising requirements. In fact, the Commission acknowledges in the NPRM that "[t]oday, almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers."[5] The Commission goes on to state that "greater competition in the market for the delivery of multichannel video programming is one of the primary goals of federal communications policy."[6]

The Ratepayer Advocate agrees that new competitors in any market provide benefits to ratepayers. However, the desire to admit new cable competitors in order to expand competition in cable services must not interfere with or conflict with the expressed authority of states over the awarding and granting of franchises.

According to the NPRM, potential competitors seeking to enter the MVPD marketplace have alleged that in many areas the current operation of the local franchise process serves as a barrier to entry. Accordingly, the NPRM is designed "to solicit comment on implementation of Section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises, and whether the franchising process unreasonably impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment, and if so, how the Commission should act to address that problem."

The Ratepayer Advocate notes that these two questions implicitly seem directed at improperly expanding FCC jurisdiction at the expense of state authority. Congress has not expressly or implicitly given the FCC authority to control or regulate the award of initial franchises. While the Act prohibits an LFA from unreasonably refusing to award competitive franchises, there is already a process whereby an entity can appeal a

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5/ *NPRM* at paragraph 1.

6/ *Id*.

franchising decision of the LFA. Specifically, Section 621(a)(1) of the Act provides that "[a]ny applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 635 for failure to comply with this subsection." Section 635 provides that "[a]ny cable operator adversely affected by any final determination made by a franchising authority under section 621(a)(1), 625 or 626 may commence an action within 120 days after receiving notice of such determination, which may be brought in -- (1) the district court of the United States for any judicial district in which the cable system is located; or (2) in any State court of general jurisdiction having jurisdiction over the parties." Thus, a remedy already exists for a franchise applicant that believes that an LFA has unreasonably refused to award a franchise. Congress has not given the FCC authority to preempt or override state authority in this area. See *City of Dallas v. FCC*, *Supra*.

As a result, the Ratepayer Advocate finds no basis in the law for the FCC to assert jurisdiction over the award of initial franchises even where the franchising process unreasonably impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment. This issue, and the related issue of how the Commission should address the problem assuming that one is found, cannot be resolved by an FCC rulemaking proceeding, but would require amendment of the Act by Congress.

The fact is that the Act expressly provides that issuance of franchises resides in the LFA and not the FCC. The NPRM questions whether this franchising authority impedes certain other federal goals. However, the FCC has no authority to take any action that would override the authority granted to LFAs in the Communications Act of 1934. Pursuant to that Act, "[a] franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction." [7] This authority cannot be preempted, limited, or removed by the FCC. It can only be changed by an act of Congress.[8] Therefore, the FCC does not have the authority or jurisdiction in this area.

Therefore, the primary focus underpinning the FCC's NPRM is flawed, in that it is based upon an assumption that the FCC has the legal authority to change, restrict, or usurp the current franchise process. This process rests with the States through the designated LFA, and not with the FCC. The franchising process is inherently an intrastate process. Accordingly, any attempt to shift authority for the awarding of franchises from the State to the Federal arena would be a serious misreading of the Act and an unwarranted intrusion on state authority that lies at the core of the federal and state roles under the U.S. Constitution.

V. THE FRANCHISE REQUIREMENT DOES NOT IMPEDE COMPETITION, IT PROTECTS THE PUBLIC INTEREST

The franchising requirements have worked well and the record is devoid of any showing that the franchise process has impeded competition. The Act is a reflection, an affirmation and otherwise preserves the appropriate role of states in our democratic form of Government. The FCC states in the NPRM that "there have been indications in many areas the current operation of the local franchising process is serving as an unreasonable

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7/ Section 621(a)(1) of the Act.

8/ Even Congressional action to change the law would be susceptible to challenge based upon the defined role of states and the federal Government under the U.S. Constitution.

barrier to entry."[9] However, many of the concerns expressed in the NPRM, which are attributed primarily to arguments raised by Telecommunication Carriers, are not directed at the decisions made by LFAs but by the process itself, a process that is mandated by the Act and which the FCC is not free to change or ignore.

While there may be instances where LFAs make demands on potential franchisees that are unreasonable and which are unrelated to the provision of cable services, as previously noted there are already adequate remedies available to address claims of unreasonable action by LFAs. The FCC cannot and should not interfere with the process established by Congress by which LFAs have been given the responsibility to award local franchises within their State.

In New Jersey, the New Jersey Board of Public Utilities ("Board") is the franchising authority. The ultimate decision to award or deny a franchise rests with the Board. Municipalities are responsible for adopting a "municipal consent ordinance" and can also issue a resolution of denial. Pursuant to P.L. 2003, Chapter 38, which became law August 12, 2003, local governments may collectively negotiate cable television franchises with cable television operators directly or through the use of a consultant or aggregator. The Board has rules governing the registration of private aggregators, who would represent groups of municipalities in the franchise process.

The Act provides the LFA is responsible for assuring "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."[10] In addition, the Act

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[9]/ *NPRM* at paragraph 1.

[10]/ Section 621(a)(3) of the Act.

requires the LFA to "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."[11] Thus, the Act already provides certain protections to cable operators, in addition to the requirement that approval of a franchise cannot be unreasonably withheld.

The Act also provides certain protections to consumers through the franchising process. For example, the Act provides the that LFAs "may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support...".[12] The Act also provides that the LFA may "require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service."[13] Thus, the Act recognizes that there are important issues that should be evaluated by the LFA prior to awarding a cable franchise. The LFAs are in a much better position to evaluate these issues than is the FCC or any Federal agency. The LFAs are in the best position to evaluate the needs of their respective citizenry, and to evaluate the potential of each cable entrant to meet those needs. Moreover, local and State control can better ensure that cable operators who are awarded franchises have the requisite financial and technical capabilities to meet the needs of the cable customers. Thus, there are practical reasons why the authority to award cable franchises rests within the control of States. These practical reasons provide an independent basis for staying out of the awarding of state franchises and these reasons are embedded in the choices made by Congress, as expressed in the Act and these choices are binding upon the FCC.

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[11]/ Section 621(a)(4)(A) of the Act.

[12]/ Section 621(a)(4)(B) of the Act.

[13]/ Section 621(a)(4)(C) of the Act.

VI. THE STATE OF NEW JERSEY IS EXAMINING ISSUES RELATING TO FRANCHISING

Consistent with the Act, which provides for franchising by state franchising authorities, the State of New Jersey is examining whether statewide franchises should be awarded. Legislation has been introduced that would authorize the Board to provide the guidelines, the mechanisms and ultimately issue approval of statewide franchises for cable television companies.

The Ratepayer Advocate supports the legislation to the extent that it will:

1) promote adequate, economical and efficient cable television service to New Jersey consumers;

2) encourage the optimum development of the educational and community service potentials of the cable television medium;

3) provide just and reasonable rates and charges for cable television system services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices;

4) promote and encourage harmony between cable television companies and their subsidiaries and customers; and

5) adequately protect the interests of municipalities of the state in regard to the award of franchises.

Clearly, the proposed legislation is directed at promoting competition. Technological advancements in the market enable other entities, such as telephone common carriers, to offer MVPD programming throughout the State, thus ensuring more direct competition with hopefully better service quality for customers at reasonable and lower rates.

The Ratepayer Advocate supports the introduction and expansion of competition in the New Jersey cable market because competition encourages lower prices and technological development and deployment, and provides consumers with a greater number of alternatives.

The Ratepayer Advocate will be making recommendations on the proposed legislation to ensure that the public interest is furthered. It is important to recognize that the State of New Jersey is already examining ways that it can promote competition within the current framework that provides for the state to determine the appropriate LFA arrangement. This legislation demonstrates that States can be creative in determining ways to facilitate competition in the cable television arena while preserving their rights to award cable franchises.

VII. THERE ARE OTHER IMPORTANT POLICY ISSUES WITH REGARD TO NEW ENTRANTS

The entrance of traditional telephone companies into cable television markets, as well as entry of cable companies into telecommunications services raises questions that need to be addressed within the framework of what regulations are appropriate and necessary and how consumers are to be protected. The FCC is looking at consumer issues with respect to broadband at this time.[14]

[14]/ *In the Matter of Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking, rel. September 23, 2005 ("NPRM").

The Ratepayer Advocate also notes that in 2002, the FCC issued a NPRM seeking comment on revisions to cable rate regulation.[15] The Ratepayer Advocate submitted comments and reply comments in that proceeding and incorporates those comments into this filing. The Ratepayer Advocate supported the establishment of new benchmarks for Basic Service Tier ("BST") rates and the need to adjust those benchmarks for unregulated services, such as information services, by imposing allocation requirements.[16]

The elimination of price regulation over the Cable Programming Service Tier ("CPST") has lead many cable operators to omit filing FCC Form 1235 filings premised on the argument that any price increase is limited to the CPST, which is no longer regulated. This as a practical matter means that common upgraded facilities that are used to provide cable, Internet, and telephone service (VoIP) evade regulatory review to assess whether the allocations required under Form 1235 are fair and reasonable. Misallocations can lead to captive cable ratepayers subsidizing non-cable service like cable modem, telephone service and VoIP. The FCC should adopt rule changes that require cable operators to file Form 1235, even if the upgrade costs are only recovered through the CPST and permit LFAs to review and approve such filings. The Ratepayer Advocate urges the FCC to considering permitting LFAs to review and regulate CPST rates or in the alternative, to re-impose CPST regulation by the FCC. The Ratepayer Advocate also urges that the FCC take steps to have Congress revise Section 623 of the

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[15]/ *In the Matter of Revision to Cable Television Rate Regulation* (MB Docket No. 01-1440; *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation* (MM Docket No. 92-266); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation* (MM Docket No. 93-215); *Adoption of a Uniform Accounting System for the Provision of Regulated Cable Service* (CS Docket No. 94-28); *Cable Pricing Flexibility* (CS Docket No. 96-157), FCC 02-177, Notice of Proposed Rulemaking (*Cable Pricing NPRM*), released June 19, 2002.

[16]/ See Ratepayer Advocate comments dated November 4, 2002 at page 6 in *Cable Pricing NPRM*.

Act to eliminate the ability of cable operators to avoid rate regulation of the BST through the filing of effective competition petitions. The various tests for determining effective competition should be eliminated. Cable rates have exhibited a steady increase over inflation which undercuts claims that the standards for effective competition determinations are working.

In addition, the Ratepayer Advocate notes that the proliferation of services by both traditional cable operators and by traditional telephone companies raises serious and important issues of cross-subsidization of services, often to the detriment of basic and CPST subscribers. Thus, the Ratepayer Advocate recommends that the FCC focus on protecting all ratepayers and impose appropriate new safeguards, such as structural separation, cost allocation rules and affiliate transactions requirements.

In order to avoid cross subsidization, there needs to be uniform rules applied to traditional cable operators and to traditional telephone providers that seek to offer competing services. Structural separation is the best safeguard against cross-subsidization of services. The Ratepayer Advocate believes measures must be adopted that provide for true structural separation, when for example a non-traditional service provider, such as a telephone common carrier, enters the cable market or cable companies offer telephone service. Recommended structural separations would include but should not be limited to the:

1) creation of a subsidiary company, which will operate independently as the service provider for cable television service, internet service, and/or telephone service ;

2) maintenance of separate records and accounting books, maintained pursuant to the Uniform System of Accounts; and

3) maintenance of separate officers, directors and employees.

In addition, any sharing of any personnel, buildings, equipment, and networks, should be duly noted in the affiliates records and accounts. The FCC by rule should seek to impose the safeguards identified in Section 272 of the Act and apply them to cable operators and telephone companies that offer competing services. Moreover, any business conducted between the parent company and its cable affiliates, internet affiliates, and/or telephone affiliates must be on an "arm's length" basis, in writing and made available for public inspection.

The Ratepayer Advocate recommends that all cable, internet, and telephone affiliates should be required to file Cost Allocation Manuals ("CAMs"), consistent with sections of 47 C.F.R. § 64.903 and Part 32 affiliate transaction rules. Moreover, these CAMs should address not only the allocation of costs among various services, e.g. cable, internet, and telephony, but they should also address the allocation of cable costs between the BST and CPS tiers. Appropriate allocation methods should also be developed and approved to ensure that costs related to network upgrades are appropriately allocated among the various services benefiting from the upgrade.

Regularly mandated reviews of accounting books and records should be required to ensure that revenues and expenses from one entity are not being credited or charged to others, as such cross-subsidization would for all intent and purposes eliminate the benefits and frustrate effective competition. The Ratepayer Advocate also urges the FCC to end the separation freeze and re-initialize rate caps for all interstate services. With the substantial changes like 271 entry, classification of cable modem and DSL as information services, and the classification of VoIP as an interstate service, the federal rate caps based upon the frozen 75/25 split and distort rate caps do not ensure just and reasonable rates. The interstate price cap system that governs special access for the Bell Operating Companies are under investigation by the FCC.[17] The freeze also distorts state rate caps in that the state rate caps are over stated. The portion of cost associated with the local loop that is allocated to states should be substantially lower and most likely be in the range of 25% versus 75% that is assigned today. As a practical matter, this means that state rates are subsidizing interstate rates by keeping state rate caps artificially high. The FCC should not ignore this situation any longer and fulfill its public interest obligations by aligning cost allocations with its reclassification decisions on various services.

In view of the above, the issues surrounding the role of regulation in promoting effective competition is much broader than simply examining the role played by franchising requirements.

VIII. CONCLUSION

In conclusion, the Ratepayer Advocate respectfully submits that the FCC lacks the authority and jurisdiction to alter LFAs rights with respect to franchising. The current scheme comports with the proper federal and state roles envisioned in the U.S. Constitution. There are adequate remedies to ensure that franchise awards are not unreasonably withheld. Accordingly, the FCC should conclude that it has no authority or jurisdiction to regulate the award of initial franchises, contrary to its preliminary finding in the NPRM.

The Ratepayer Advocate also asserts that the proliferation of new entrants requires greater safeguards to ensure against cross-subsidization of services.

[17]/ *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25.

Accordingly, the Ratepayer Advocate recommends that the FCC focus its effort and attention on the broader issues identified by the Ratepayer Advocate.

Respectfully submitted,

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