CITY OF SPRING LAKE PARK
1301 81ST AVENUE N.E.
AGENDA
MONDAY, NOVEMBER 16, 2015
7:00 P.M.

1. CALL TO ORDER
2. ROLL CALL
3. PLEDGE OF ALLEGIANCE
4. ADDITIONS OR CORRECTIONS TO AGENDA
5. CONSENT AGENDA:
   - A. Approval of Minutes – November 2, 2015
   - B. Disbursements:
     1. General Operations Disbursement Claim No. 15-17 – $747,756.82
     2. Liquor Fund Disbursement Claim No. 15-18 - $219,856.31
   - C. Budget to Date/Statement of Fund Balance
   - D. Resolution 15-28, Making Selection Not to Waive the Statutory Tort Limits for Liability Insurance Purposes
   - E. Approval of Contract with Xcel Energy for Collection of Fluorescent Lamps
   - F. Approval of Park Dedication Study
   - G. Contractor's Request for Payment No. 2 – North Valley Paving Inc.
   - H. Contractor's Request for Payment No. 1 – Visu Sewer
   - I. City Administrator Performance Evaluation Statement
   - J. Contractor's Licenses
   - K. Correspondence
6. DISCUSSION FROM THE FLOOR
7. POLICE REPORT
8. PARKS AND RECREATION REPORT
9. PUBLIC HEARING
   - A. CenturyLink Franchise Application
10. ORDINANCES AND RESOLUTIONS
    - A. Resolution 15-26 Resolution Certifying Delinquent Accounts – Anoka County
    - B. Resolution 15-27 Resolution Certifying Delinquent Accounts – Ramsey County
11. NEW BUSINESS
    - A. 2016 Public Utilities Budget
12. ENGINEER'S REPORT
13. ATTORNEY'S REPORT
14. OTHER
    - A. Administrator Reports
15. ADJOURN

SEE REVERSE SIDE FOR RULES FOR PUBLIC HEARING AND DISCUSSION FROM THE FLOOR

RULES FOR PUBLIC HEARINGS AND DISCUSSION FROM THE FLOOR

DISCUSSION FROM THE FLOOR

**Limited to 5 minutes per person to state their concern.

**Action: Council direction to staff for resolution or take this matter under advisement for action at the next regularly scheduled meeting.

PUBLIC HEARINGS

Advise audience that the purpose of the public hearing is to receive citizen input on the proposal to (name of project). (This is not a time to debate the issue.)

The following format will be used to conduct the hearing:

** The presenter will have a maximum of 10 minutes to explain the project as proposed.

** Councilmembers will have an opportunity to ask questions or comment on the proposal.

** Citizens will then have an opportunity to ask questions and/or comment on the project. Those wishing to comment are asked to limit their comments to 3 minutes, except in cases where there is a spokesperson representing a group wishing to have their collective opinions voiced. The spokesperson should identify the audience group her/she is representing and may have a maximum of 10 minutes to express the views of the group.

**People wishing to comment are asked to state any new facts they may have within the 3 minutes allotted. Please be specific and to the point.

** Everyone will be given the opportunity to express their agreement or disagreement even if they have no new points to make. (This is not a time to debate the issue.)

** People wishing to speak twice will be given 2 minutes to comment on any new facts brought forward since the last time they spoke.

Following public input, the Council will have a second opportunity to ask questions of the presenter and/or citizens.

The public hearing will then be adjourned with the Council taking the matter under advisement until the next regularly scheduled Council meeting. At the next regular meeting, the Council will debate the issue, if necessary, state their positions and make a decision. NO further public input will be received at that time.

OFFICIAL PROCEEDINGS

Pursuant to due call and notice thereof, the regularly scheduled meeting of the Spring Lake Park City Council was held on November 2, 2015 at the Spring Lake Park Community Center, 1301 81st Avenue N.E., at 7:00 P.M.

1. Call to Order

Mayor Hansen called the meeting to order at 7:00 P.M.

2. Roll Call

Members Present:	Councilmembers Mason, Nash, Nelson, Wendling and Mayor Hansen
Members Absent:	None
Staff Present:	Police Chief Ebeltoft; Public Works Director Randall; Building Official Brainard; Attorney Carson; Engineer Gravel; Parks and Recreation Director Rygwall; Administrator Buchholtz and Executive Assistant Gooden
Visitors:	Olivia Alveshere, ABC Newspapers Michael Harasyn, 566 78th Avenue NE

3. Pledge of Allegiance

4. Additions or Corrections to Agenda

Administrator Buchholtz requested that item number 7A, Julie Jeppson, Stepping Stone Emergency Housing Presentation, be removed from the agenda due to the presenter not being able to attend.

5. Consent Agenda:

Mayor Hansen reviewed the following Consent Agenda items:

A. Approval of Minutes – October 19, 2015
B. Public Right of Way Application – Minnesota Pollution Control Agency
C. Contractor's Licenses
D. Sign Permit
E. Correspondence

Councilmember Wendling inquired as to what type of business the Soda and Sweet Shop was going to be. Administrator Buchholtz stated that new owners have purchased the building and will be opening a business that will serve over one thousand different sodas and candies.

MOTION BY COUNCILMEMBER NASH APPROVING THE CONSENT AGENDA. ROLL CALL VOTE: ALL AYES. MOTION CARRIED.

6. Discussion From The Floor - None

7. Public Works Report

Public Works Director Randall reported that the Public Works Department continues to rake the leaves in the parks, prepare the sprinkler systems for winter, drain the fire hydrants for winter, work on equipment for the snow season and work on completing the inside of the Public Works building. He reported that street sweeping will start in a week and the warming house at Able Park has been painted and prepared for the season.

8. Code Enforcement Report

Building Official Brainard reported that he attended the Council meetings on October 5th and 19th; a Department Head meeting on October 6th; a Zoning Code Amendment workshop on October 12th; a MN Building Permit Technician Association meeting on October 22nd; a North Suburban Code Officials meeting on October 13th; the North Suburban Building Official's meeting on October 27th and Community Risk Fire Marshall meeting on October 30th.

Mr. Brainard stated that in October 2015, 71 permits were issued. He reported that he conducted 155 inspections in October.

Mr. Brainard reported that the October 2015 vacancy listing shows that there are 20 vacant/foreclosed residential properties currently posted and/or soon posted by the Code Enforcement Department, which remains the same from last month. There are three vacant/foreclosed commercial properties, which remains the same from last month; and 16 residential properties currently occupied and ready for Sheriff sale, which remains the same from last month. He reported that 12 violation notices were issued in October by the Code Enforcement Department. He reported that two administrative offense tickets were issued.

Mr. Brainard provided a copy of the fence handout for residents as well as commercial owners to understand the regulations and process for erecting a fence in the city.

9. New Business

A. Agreement for Local Assessor Services

Administrator Buchholtz reported that the City's assessing services contract expires on January 1, 2016. He stated that City Assessor Ken Tolzmann is proposing a new three-year service contract to provide the City with assessing services.

Administrator Buchholtz stated that the fees under the proposed contract are unchanged from the previous three-year agreement. He reported the proposed fee schedule to be the following:

- $9.00 for each improved parcel of residential, seasonal recreational residential and agricultural type of property.
- $2.50 for each unimproved parcel of residential, seasonal recreational residential and agricultural type of property.
- $55.00 for each improved and unimproved parcel of commercial, industrial, and public utility type of property.
- $55.00 for each improved and unimproved parcel of apartment or mobile/manufactured home park type of property.

Administrator Buchholtz reported that City Attorney Carson has reviewed the proposed assessor contract and found the contract to be in order.

MOTION MADE BY MAYOR HANSEN TO APPROVE ASSESSING SERVICES CONTRACT WITH KEN TOLZMANN. ROLL CALL VOTE: ALL AYES. MOTION CARRIED.

B. Award Bid for Lift Station #1 Replacement Project

Engineer Gravel reported that bids for the Lift Station No. 1 were opened on October 26, 2015. He stated that there were seven bids.

	Contractor	Total Base Bid
Low	Meyer Contracting, Inc.	$650,060.85
#2	Magney Construction, Inc.	$664,405.00
#3	Lametti & Son, Inc.	$669,307.00
#4	Gelslinger & Sons, Inc.	$692,185.00
#5	RL Larson Excavating, Inc.	$700,396.50
#6	Dave Perkins Contracting, Inc.	$726,589.00
#7	Veit & Company, Inc.	$1,353,731.00

Mr. Gravel reported that the low bidder on the project was Meyer Contracting, Inc. with a total base bid of $650,060.85. He stated that this compared to the Engineer's Opinion of Probable Cost of $680,000.00. He reported the bids have been reviewed and are found to be in order.

Mr. Gravel stated that the second round of bids are $80,000 less than the bids received last year. He stated reasons for the lower bid amounts are attributed to the change of season for bidding and some of the work being completed by the Public Works Department.

Councilmember Mason inquired as to where Meyer Contracting is located. Mr. Gravel stated that the company is located in Maple Grove.

MOTION MADE BY COUNCILMEMBER NELSON TO AWARD BID RESULTS FOR LIFT STATION NO. 1 PROJECT TO MEYER CONTRACTING, INC. IN THE AMOUNT OF $650,060.85. ROLL CALL VOTE: ALL AYES. MOTION CARRIED.

C. Schedule Workshop to Discuss 2016 Public Utilities Budget

Administrator Buchholtz requested that a workshop session be scheduled for November 9, 2015 at 6:30 PM at City Hall. He stated the purpose of the workshop would be to review the proposed 2016 Public Utility budget and to receive any Administrator reports.

Councilmember Nelson stated that he would not be available on that date. Administrator Buchholtz stated that he would provide an update to Councilmember Nelson after the workshop. The consensus of the remaining Councilmembers was that they will be able to attend.

10. Engineer's Report

Engineer Gravel reported that the 2015 Sanitary Sewer Lining Project is on schedule and Public Works Director Randall has been performing the inspections so the work can continue.

Mr. Gravel reported that the CSAH 35 Turn Lanes and Sidewalk project is nearly completed. He stated that seeding will be completed as "dormant" seeding due to the time of year.

11. Attorney's Report

Attorney Carson reported that contract negotiations with SunShare Community Solar Garden are continuing and an updated contract should be available at the next Council meeting for approval.

12. Reports - None

13. Other

A. Public Hearing Scheduled for November 16, 2015 to receive feedback on CenturyLink Cable Franchise

Administrator Buchholtz reported that at the November 16, 2015 Council meeting, the Council will hold a Public Hearing for the CenturyLink Cable Franchise Ordinance. He reported that the purpose of the hearing is to hear public comments and that all seven metro area councils need to approve the ordinance before it can go into effect. He reported that action on the ordinance will occur at the December Council meeting.

B. Administrator Reports -None

14. Closed Session

A. Motion to Close Meeting to Discuss Labor Negotiations Strategies

MOTION MADE BY MAYOR HANSEN TO CLOSE REGULAR MEETING TO DISCUSS LABOR NEGOTIATIONS STRATEGIES. ROLL CALL VOTE: ALL AYES. MOTION CARRIED.

The meeting was recessed at 7:20 P.M.

Mayor Hansen reconvened the meeting at 7:56 P.M.

B. Motion to Close Meeting to Conduct Administrator's Performance Evaluation

MOTION MADE BY MASON TO CLOSE REGULAR MEETING TO CONDUCT ADMINISTRATOR'S PERFORMANCE EVALUATION. ROLL CALL VOTE: ALL AYES. MOTION CARRIED.

The meeting was recessed at 7:57 P.M.

Mayor Hansen reconvened the meeting at 8:27 P.M.

15. Adjourn

MOTION BY COUNCILMEMBER MASON TO ADJOURN. VOICE VOTE: ALL AYES. MOTION CARRIED.

The meeting was adjourned at 8:29 P.M.

_____
Cindy Hansen, Mayor

Attest:

_____
Daniel R. Buchholtz, Administrator, Clerk/Treasurer

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VOUCHEI	VENDOR	DESCRIPTION	AMOUNT
59773	DEARBORN NATIONAL	PAYROLL FROM 9/13 & 9/20/15	$ 356.86
59774	DELTA DENTAL	PAYROLL FROM 9/13 & 9/20/15	$ 1,212.86
59775	FIDELITY SECURITY LIFE	PAYROLL FROM 9/13 & 9/20/15	$ 42.24
59776	HEALTH PARTNERS	PAYROLL FROM 9/13 & 9/20/15	$ 9,282.49
59777	L.E.L.S.	PAYROLL FROM 9/20/15	$ 164.50
59778	LOCAL 49	PAYROLL FROM 9/13/15	$ 100.50
59779	NCPERS MINNESOTA-7750811	PAYROLL FROM 9/13 & 9/20/15	$ 48.00
59780	P.E.R.A.	PAYROLL FROM 9/13 & 9/20/15	$ 15,308.50
59781	AID ELECTRIC SERVICE, INC	SERVICE REPAIR	$ 735.01
59782	ALLEGRA PRINT & IMAGING	US BILLS AND ENVELOPES	$ 789.40
59783	ASPEN MILLS	UNIFORM ALLOWANCE	$ 237.90
59784	ANTHONY BENNEK	UNIFORM ALLOWANCE	$ 224.80
59785	BOYER FORD TRUCKS	SWITCH/BAND ASSY	$ 144.86
59786	WANDA BROWN-MCGRECK	MILEAGE	$ 24.42
59787	CITYWIDE BLAINE LOCK & SAFE	LABOR TO REMOVE CORE	$ 75.00
59788	COON RAPIDS CHRYSLER	AUTO SVC	$ 19.95
59789	COORDINATED BUSINESS SYSTEMS LTD	PD	$ 582.03
59790	COTTENS INC	COPIER MAINT PD	$ 92.88
59791	DODGE OF BURNSVILLE	SVC REPAIR SQUAD	$ 505.05
59792	DOUGLAS EBELTOFT	OFF. KING RETIRE CAKE	$ 52.95
59793	ECM PUBLISHERS, INC.	RECYCLING EVENT	$ 246.00
59794	FLEETPRIDE	PARTS	$ 44.85
59795	FURNITURE WORX	EQUIP REPAIR MONOTECH	$ 332.52
59796	JENNY GOODEN	INSTRUCTOR	$ 100.00
59797	HAWKINS WATER TREATMENT	CHEMICALS-CHLORINE	$ 883.85
59798	JOHN HENRY FOSTER MINNESOTA INC	REPAIR AND MAINT	$ 158.62
59799	JONI PERRY	REFUND	$ 100.00
59800	MINNEAPOLIS SAW	BLOWER EQUIP	$ 296.28
59801	MTI DISTRIBUTING INC	V-BELT EQUP/BLADE BOLT	$ 90.50
59802	NYSTROM PUBLISHING CO	SLP NEWS FALL 2015	$ 2,304.25
59803	PERFECT 10 CAR WASH	AUTO SVC SQUADS	$ 36.39
59804	CITY OF SPRING LAKE PARK - PETTY CASH	SCRAP METAL	$ 335.50
59805	POSITIVE ID INC	ID CARD	$ 59.75
59806	TERRY RANDALL	UNIFORM ALLOWANCE	$ 127.95
59807	ROLAINE WRIGHT	REFUND	$ 175.00
59808	CITY OF ROSEVILLE	IT SVC	$ 535.96
59809	SLP FIRE DEPARTMENT	CONTRACT: FIRE PROT SVC	$ 15,559.38
59810	STREICHER'S	UNIFORM ALLOWANCE	$ 142.96
59811	THE HOME DEPOT	SUPPLIES	$ 311.13
59812	WALTERS RECYCLING REFUSE SERV	SEPTEMBER SERVICE	$ 357.77

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VOUCHEI	VENDOR	DESCRIPTION	AMOUNT
59813	XCEL ENERGY	MONTHLY UTILITIES	$ 49.41
59814	AMERICAN LEGAL	CODE OF ORDINANCES	$ 1,328.00
59815	AMSTERDAM PRINTING CO	OFFICE SUPPLIES	$ 58.97
59816	ANOKA COUNTY	2ND HALF 8466 CENTRAL	$ 10,567.07
59817	ASPEN MILLS	UNIFORM ALLOWANCE	$ 114.50
59818	AT & T MOBILITY	MONTHLY SERVICES	$ 411.23
59819	BUREAU OF CRIM APPREHENSION	DATA SERVICES	$ 390.00
59820	CARSON, CLELLAND & SCHREDER	LEGAL SERVICES	$ 5,939.19
59821	CENTERPOINT ENERGY	MONTHLY UTILITIES	$ 126.55
59822	CITY OF ROSEVILLE	IT SERVICES OCT	$ 535.96
59823	COMMERS PRINTING INC	ENVELOPES/ADMINISTRATION	$ 218.00
59824	CONNEXUS ENERGY	MONTHLY SVC STREE LIGHTS	$ 12.93
59825	DODGE OF BURNSVILLE	AUTO SVC/REPAIR	$ 1,701.92
59826	ECM PUBLISHERS, INC.	RECYCLING/ABC NEWSPAPER	$ 349.00
59827	ESS BROTHERS, INC.	REPAIRS/MAINT MANHOLE	$ 248.00
59828	GAMETIME	REPLACEMENT PARTS	$ 228.10
59829	GOPHER STATE ONE-CALL INC	MAINT AGREEMENTS SEPT	$ 85.65
59830	GRAINGER INC	DEHUMIDIFIER & REPAIR HAND TRUCK	$ 722.40
59831	HD SUPPLY WATERWORKS	WTER METER SUPPLIES	$ 1,162.86
59832	INNOVATIVE OFFICE SOLUTIONS LLC	OFFICE SUPPLIES	$ 382.13
59833	MANSFIELD OIL COMPANY	FUEL	$ 1,332.82
59834	JILL MASON	INSTRUCTOR	$ 397.00
59835	METROPOLITAN COUNCIL	NOVEMBER 2015	$ 37,834.92
59836	CITY OF MINNEAPOLIS	AUG LINCOLN PAWN TRANSACTION	$ 253.80
59837	M-R SIGN CO INC	SIGNS	$ 829.30
59838	PARK SUPPLY OF AMERICA INC	REPAIR AND MAINT: PLUMBING & SUPP	$ 78.69
59839	STANTEC	ENGINEERING SERVICES	$ 25,965.80
59840	STREICHER'S	UNIFORM ALLOWANCE	$ 44.99
59841	TASC	NOVEMBER COBRA ADMINISTRATION FI	$ 30.08
59842	TWIN CITY HARDWARE	REPAIR AND MAINT	$ 163.13
59843	WASTE MANAGEMENT OF WI-MN	SEPTEMBER CONTRACTUAL SERVICES	$ 7,949.88
59844	ALPHA VIDEO AND AUDIO INC	SERVICE AGREEMENT	$ 4,565.00
59845	BLAINE LOCK & SAFE INC	LABOR TO REMOVE CORE/REST COMBO	$ 75.00
59846	BRAUN INTERTEC	UNIV. AVE FROM SANBURNOL TO 81ST	$ 1,083.00
59848	ECM PUBLISHERS, INC.	LIFT STATION REPLACEMENT BID	$ 123.63
59849	G & K SERVICES	MATS	$ 83.27
59850	INSTRUMENTAL RESEARCH INC	TOTAL COLIFORM BACTERIA	$ 64.00
59851	NORSAN	CLEANER AND BELTS	$ 20.14
59852	SLP FIRE DEPARTMENT	OCT FIRE STATE AID/SUPP FIRE AID	$ 422,929.30
59853	U.S.T.I.	UTILITIY BILLINGS EBILLS	$ 29.28

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VOUCHE	VENDOR	DESCRIPTION	AMOUNT
59855	DEARBORN NATIONAL	PAYROLL 9/27 & 10/4/15	$ 399.68
59856	DELTA DENTAL	PAYROLL 9/27 & 10/4/15	$ 1,450.78
59857	FIDELITY SECURITY LIFE	PAYROLL 9/27 & 10/4/15	$ 42.24
59858	HEALTH PARTNERS	PAYROLL 9/27 & 10/4/15	$ 10,234.22
59859	L.E.L.S.	PAYROLL 10/4/15	$ 211.50
59860	LOCAL 49	PAYROLL 9/27	$ 100.50
59861	NCPERS MINNESOTA-7750811	PAYROLL 9/27 & 10/4/15	$ 56.00
59862	P.E.R.A.	PAYROLL 9/27 & 10/4/15	$ 15,418.21
59863	JOHN ANGELL	MILEAGE	$ 134.53
59864	CENTERPOINT ENERGY	MONTHLY UTILITIES	$ 169.20
59865	City of Savannah	TRANSPORTATION PERMIT-TOUR	$ 78.00
59866	CLASSIC SOUTHEAST TOURS	HISTORIC SAVANNAH TOUR	$ 225.00
59867	CONNEXUS ENERGY	MONTHLY U	$ 274.29
59868	DARY MASON	REFUND	$ 308.00
59869	DIANE GLYNN	REFUND	$ 19.00
59870	ECM PUBLISHERS, INC.	PUBLISH FALL RECYCLING	$ 304.13
59871	FINANCE AND COMMERCE	PUBLICATION BID/CONST.	$ 202.70
59872	FIRST ADVANTAGE LNS	RANDOM DRUG TESTING	$ 32.00
59873	CITY OF FRIDLEY	MULTI CITY RECYCLING DROP OFF	$ 3,728.77
59874	JUDY SAMMUELL	REFUND	$ 22.00
59876	RILEY BUS SERVICE INC	BUS TRANSPORTATION	$ 10,585.75
59877	SHONDA MOODY	REFUND	$ 16.00
59878	SHRED-IT USA LOS ANGELES	SHREDDING SERVICES	$ 71.73
59879	TOWN AND COUNTRY INN & SUITES	TOUR: HOTEL DEPOSIT	$ 3,570.84
59880	ALABAMA THEATRE	TOUR: TICKETS	$ 2,344.00
59881	ANOKA COUNTY	CJDN MOBILE DIGITAL JULY, AUG, SEPT	$ 450.00
59882	ANOKA COUNTY	C.HANSEN/K. WENDLING 10-29-15 MTG	$ 41.00
59883	ASPEN MILLS	UNIFORM ALLOWANCE	$ 488.79
59884	BAREFOOT PRINCESS	CRUISE	$ 764.00
59885	BATTERIES PLUS BULBS	RANGE SUPPLIES	$ 47.90
59886	BEAVERBROOK TRI-COUNTY	OUTDOOR RANGE RENTAL FALL QUAL.	$ 250.00
59887	BEISSWENGER'S	REPAIR/MAINT NUTS/BOLTS	$ 28.98
59888	BILTMORE ESTATE	EQUIPMENT PARTS	$ 1,951.58
59889	WANDA BROWN-MCGRECK	MILES/DONUTS RECYCLING DAY	$ 20.19
59890	CRYSTEEL DIST INC	EQUIPMENT PARTS	$ 277.62
59891	DELTA DENTAL	M. MALONEY DENTAL	$ 122.00
59892	DODGE OF BURNSVILLE	AUTO SERVICE SQUADS	$ 1,188.22
59893	DRURY INN	GROUP ACCOMODATIONS	$ 3,000.90
59894	FARMERS FOODS	PARTICIPANTS W/ LUNCH	$ 561.75

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VOUCHEI	VENDOR	DESCRIPTION	AMOUNT
59895	FRIENDLY CHEVROLET GEO. INC.	OIL CHANGE 08 CHEV TRUCK	$ 34.42
59896	JENNY GOODEN	MILEAGE	$ 24.75
59897	HOLIDAY INN EXPRESS	HOTEL GROUP ACCOMMODATIONS	$ 3,029.88
59898	LAKE STATE DAIRY	DIARY TOUR	$ 480.00
59899	SHARON LINKE	G. FRIENDS GETAWAY IN OCT	$ 213.40
59900	MAGNOLIA PLANTATION & GARDENS	HOUSE TOUR/TRAIN/ADMISTIONS	$ 984.00
59901	MELONIE SHIPMAN	INSTRUCTOR	$ 75.00
59902	ON SITE SANITATION INC	UNIT RENTALS	$ 90.00
59903	TACTICAL SOLUTIONS INC	SQUADS/LIDAR'S	$ 299.00
59904	THE CAROLINA OPRY THEATER	DINNER/SHOW TICKETS TOUR	$ 2,928.00
59905	TOWN AND COUNTRY INN & SUITES	FINAL PAYMENT HOTEL/MEALS TOUR	$ 5,206.58
59906	WIPERS AND WIPES INC	SUPPLIES	$ 851.08
59907	XCEL ENERGY	MONTHLY UTILITIES	$ 11,086.78
59908	AID ELECTRIC SERVICE, INC	LABOR BREAKROOM BUILDOUT	$ 386.40
59909	ARLENE CARR	REFUND	$ 12.00
59910	BEACH COVE RESORT	HOTELS AND MEALS	$ 4,451.76
59911	CCPRC	ADMISSION TO JAMES ISLAND FESTIVAL	$ 100.00
59912	CHARLESTON 101, LLC	STEP ON GUIDE SERVICES	$ 150.00
59913	CITY OF CHARLESTON	DISTRICT TOURING PERMIT	$ 38.00
59914	DEBORAH YOUNG	REFUND	$ 50.00
59915	DRURY INN	GROUP HOTEL	$ 3,695.05
59916	GREAT GARAGE D0OR CO.	DOOR OPENER BUTTONS	$ 209.70
59917	RICHARD KRAMER	UNIFORM ALLOWANCE	$ 117.68
59918	MORANZ ENTERTAINMENT	TICKETS	$ 1,536.00
59919	OFFICE DEPOT	OFFICE SUPPLIES	$ 20.92
59920	PEGGY DECKER	INSTRUCTOR	$ 50.00
59921	RANDY'S SANITATION & RECYCLING	ENVIROMENT SVS TRIP CHARGE DOC	$ 678.76
59922	RIVERSTREET RIVERBOAT COMPANY	FINAL PAYMENTSAVANNAH	$ 1,798.60
59923	ROBIN WESTLING	REFUND	$ 12.00
59924	MARIAN RYGWALL	INSTRUCTOR	$ 200.00
59925	TASER TRAINING ACADEMY	INSTRUCTOR RE CERT	$ 200.00
59926	THE SAVANNAH THEATRE	TICKETS	$ 1,288.00
59927	WALTERS RECYCLING REFUSE SERV	6 YD FRONT LOAD TRASH	$ 395.32
59928	WATER CONSERVATION SERVICE INC	MCKINLEY	$ 267.25
59929	WELLS FARGO CREDIT CARD	MONTHLY BILL	$ 19,962.23
59930	BILL NEISS	INSTRUCTOR	$ 180.00
59931	CITY OF BLAINE	3RD QTR BLAINE WATER USED	$ 911.20
59932	DIANE GLYNNN	REFUND	$ 19.00
59933	EVERGREEN RECYCLING LLC	RECYCLING DAY EVENT	$ 2,189.00
59934	G & K SERVICES	MATS	$ 83.27
59935	HAMPTON INN SAVVANNAH HISTORIC	HOTEL GROUP ACCOMMODATIONS	$ 8,474.64

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VOUCHE	VENDOR	DESCRIPTION	AMOUNT
59936	KIDCREATE STUDIO	KEEPSAKE HALLOWEEN ART	$ 72.00
59937	Kim Dornbusch	REFUND	$ 45.00
59938	LEAGUE OF MINNESOTA CITIES	MEMBERSHIP DUES	$ 6,464.00
59939	LEE'S HEATING & AIR	FURNACE CLEAN/CHECK/SERVICE	$ 875.00
59940	MACQUEEN EQUIPMENT INC	BRAKE LINE, FOOT CONTROL CABLE	$ 611.16
59941	MANSFIELD OIL COMPANY	FUEL	$ 720.51
59942	MINNESOTA MAYORS ASSOCIATION	SEPT 2015 ANNUAL DUES	$ 30.00
59943	MINNESOTA SAFETY COUNCIL	DEF. DRIVING 8 HR 22 STUDES	$ 396.00
59944	PLUNKETT'S INC	PEST CONTROL	$ 52.87
59945	RICHFIELD BUS CO	GROUP TRAVEL	$ 430.00
59946	RUFFRIDGE JOHNSON EQUIPMENT CO	GROUP TRAVEL	$ 228.05
59947	TAHO SPORTSWEAR	BASKETBALL T-SHIRTS	$ 335.40
59948	TASC	COVRA ADMINISTRATION FEE	$ 30.08
59949	DELTA DENTAL	PAYROLL 10/11/15	$ 118.96
59950	ECM PUBLISHERS, INC.	PUBLISH CURRENCY EXCHANGE LICENSE	$ 37.63
59951	SAM'S CLUB	MEMBERSHIP DUES	$ 270.00
59952	COLE INFORMATION	REVERSE DIRECTORY	$ 469.00
59953	THE HOME DEPOT	SUPPLIES	$ 214.33
59954	MENARDS-CAPITAL ONE COMMERICAL	SUPPLIES	$ 450.50
59955	P.E.R.A.	PAYROLL	$ 15,575.25
59956	NCPERS MINNESOTA-7750811	PAYROLL	$ 8.00
59957	JESSICA HUGHES	REFUND	$ 12.00
59958	KIM WHITWAM	REFUND	$ 12.00
59959	MUNICIPAL PAVING PLANT	ASPHALT MIX	$ 65.51
59960	HEALTH PARTNERS	PAYROLL	$ 971.44
59961	DEARBORN NATIONAL	PAYROLL	$ 4.28
59962	MIKE LYNCH	INSTRUCTOR	$ 300.00
59963	JIFFY-JR PRODUCTS	EAR PLUGS	$ 70.42
59964	DAVE PERKINS CONTRACTING INC	WATER MAIN REPAIR	$ 6,104.00
59965	SERVICE GRINDING &SHARPENING INC	CHIPPER BLADES SHARPENED	$ 128.00
		TOTAL DISBURSEMENTS	**$ 747,756.82**

CITY OF SPRING LAKE PARK
CLAIMS APPROVED AND PAID

DATE: OCTOBER 2015

CLAIMS RES: 15-20

FUND: LIQUOR OPERATIONS

VOUCHER	VENDOR	EXPLANATION	AMOUNT
28390	DEARBORN NATIONAL	PAYROLL 9/20/15-10/3/15	$ 74.75
28391	DELTA DENTAL	PAYROLL 9/20/15-10/3/15	$ 101.06
28392	FIDELITY SECURITY LIFE	PAYROLL 9/20/15-10/3/15	$ 3.13
28393	HEALTH PARTNERS	PAYROLL 9/20/15-10/3/15	$ 743.97
28394	MN TEAMSTER	PAYROLL 9/13/15-9/26/15	$ 54.00
28395	PERA	PAYROLL 9/13/15-9/26/15	$ 695.91
	PERA	PAYROLL 9/20/15-10/3/15	$ 648.43
28407	ARTISAN BEER COMPANY	BEER PURCHASE	$ 41.25
28408	BELLBOY CORPORATION	LIQUOR PURCHASE	$ 193.05
28409	CAPITOL BEVERAGE SALES	BEER PURCHASE	$ 10,919.82
28410	CENTER POINT ENERGY	GAS SERVICE	$ 32.45
28411	CITY OF SPRING LAKE PARK	WATER UTILITY	$ 99.02
28412	CLOCKNINE	CAPITAL OUTLAY	$ 1,400.00
28413	CRYSTAL SPRINGS ICE	ICE PURCHASE	$ 116.86
28414	CULLIGAN	BOTTLED WATER	$ 16.30
28415	HOHENSTEINS	BEER PURCHASE	$ 599.00
28416	JJ TAYLOR COMPANIES	CREDIT - BEER PURCHASE	$ 13,431.60
28417	JOHNSON BROTHERS LIQUOR CO	LIQUOR - WINE PURCHASE	$ 21,460.57
28418	METRO NORTH CHANBER COMMERCE	MEMBERSHIP	$ 423.00
28419	PAUSTIS & SON'S	WINE PURCHASE	$ 487.82
28420	PHILLIPS WINE & SPIRITS CO	LIQUOR - WINE PURCHASE	$ 4,438.95
28421	PLUNKETT'S INC	PEST CONTROL	$ 29.58
28422	REPUBLIC SERVICES	GARBAGE SERVICE	$ 258.69
28423	RITE	MAINTENANCE PLAN	$ 915.71
28424	SAM'S CLUB	MEMBERSHIP	$ 100.00
28425	SILENT WATCHDOG	SECURITY MONITORING	$ 60.00
28426	SOUTHERN WINE & SPIRITS OF MN	LIQUOR PURCHASE	$ 2,246.09
28427	US BANK	ATM REFILL	$ 5,000.00
28428	VARNER TRANSPORTATION	FREIGHT	$ 657.80
28429	WHISKEY ADVOCATE	SUBSCRIPTION RENEWAL	$ 24.00
28430	WINE MERCHANTS	WINE PURCHASE	$ 469.00
28431	WIRTZ BEVERAGE MN BEER	BEER - LIQUOR PURCHASE	$ 7,304.57
28432	DEARBORN NATIONAL	PAYROLL 10/4/15-10/17/15	$ 74.75
28433	DELTA DENTAL	PAYROLL 10/4/15-10/17/15	$ 101.06
28434	FIDELITY SECURITY LIFE	PAYROLL 10/4/15-10/17/15	$ 3.13
28435	HEALTH PARTNERS	PAYROLL 10/4/15-10/17/15	$ 703.49
28436	MN TEAMSTER	PAYROLL 9/27/15-10/10/15	$ 54.00
28437	PERA	PAYROLL 9/27/15-10/10/15	$ 672.44
	PERA	PAYROLL 10/4/15-10/17/15	$ 648.43
28438	ARAMGO CIGAR	CIGAR PURCHASE	$ 257.02
28439	BELLBOY CORPORATION	LIQUOR PURCHASE - OPERATING SUPPLIES	$ 631.20
28440	CAPITOL BEVERAGE SALES	BEER PURCHASE	$ 3,866.25
28441	CITY OF SPRING LAKE PARK	TOBACCO LICENSE	$ 150.00
28442	CRSYTAL SPRINGS IICE	ICE PURCHASE	$ 155.12
28443	G & K SERVICES	CLEANIGN CHEMICALS	$ 95.06
28444	J.B.E. INC	ROOF REPAIR	$ 975.00
28445	J.C. NEWMAN CIGAR	CIGAR PURCHASE	$ 773.23
28446	JJ TAYLOR COMPANIES	BEER PURCHASE	$ 1,775.45

FUND: LIQUOR OPERATIONS

VOUCHER	VENDOR	EXPLANATION	AMOUNT
28447	JOHNSON BROTHERS LIQUOR CO	LIQUOR - WINE PURCHASE	$ 4,661.07
28448	MARCO V CIGARS & CO	CIGAR PURCHASE	$ 354.00
28449	NORTH STAR MAINTENANCE & MANAGEMENT	FLOOR REPAIR	$ 1,071.25
28450	PAUSTIS & SON'S	WINE PURCHASE	$ 448.94
28451	PHILLIPS WINE & SPIRITS CO	WINE PURCHASE	$ 295.45
28452	POPP.COM	TELEPHONE SERVICE	$ 286.04
28453	SOUTHERN WINE & SPIRITS OF MN	LIQUOR - WINE PURCHASE	$ 4,551.99
28454	STAR TRIBUNE	ADVERTISING	$ 848.88
28455	SWANSON, JOYCE	MILEAGE REIMBURSEMENT	$ 161.99
28456	TRIO SUPPLY COMPANY	OPERATING SUPPLIES	$ 431.31
28457	VINOCOPIA INC	LIQUOR PURCHASE	$ 88.00
28458	WINE COMPANY	WINE PURCHASE	$ 85.00
28459	WIRTZ BEVERAGE MN BEER	BEER - LIQUOR PURCHASE	$ 2,431.30
28460	XCEL ENERGY	ELECTRICITY	$ 2,238.92
28461	WELLS FARGO CREDIT CARD	CREDIT CARD PAYMENT	$ 2,457.73
28462	HUTCHIN MSAONARY	BUILDING REPAIR	$ 750.00
28463	PERA	PAYROLL 10/18/15-10/31/15	$ 648.43
	PERA	PAYROLL 10/11/15-10/24/15	$ 760.57
28464	AEM ELECTRIC SERVICES	BUILDING REPAIR	$ 1,140.00
28465	AMARA WINES	LIQUOR PURCHASE	$ 195.00
28466	BELLBOY CORPORATION	LIQUOR PURCHASE - OPERATING SUPPLIES	$ 1,553.98
28467	CAPITAL CITY GLASS INC	BUILDING REPAIR	$ 255.00
28468	CAPITOL BEVERAGE SALES	BEER PURCHASE	$ 14,339.95
28469	CARTRIDGE WORLD	OFFICE SUPPLIES	$ 204.39
28470	CENTRAL PARK WAREHOUSE	PETTY CASH REIMBURSEMENT	$ 43.88
28471	CITYWIDE WINDOW SERVICES	CONTRACTUAL SERVICES	$ 30.00
28472	CRYSTAL SPRINGS ICE	ICE PURCHASE	$ 48.64
28473	DAHLHEIMER BEVERAGE LLC	BEER PURCHASE	$ 1,758.20
28474	EXTREME BEVERAGE	JUICE/MIX/POP PURCHASE	$ 224.90
28475	G & K SERVICES	CLEANING CHEMICALS	$ 95.06
28476	GENERAL CIGAR COMPANY	CIGAR PURCHASE	$ 806.27
28477	HOHENSTEINS INC	BEER PURCHASE	$ 365.50
28478	J.C. NEWMAN CIGAR CO	CIGAR PURCHASE	$ 477.96
28479	JJ TAYLOR COMPANIES	BEER PURCHASE	$ 10,280.95
28480	JOHNSON BROTHERS LIQUOR CO	CREDIT - LIQUOR - WINE PURCHASE	$ 6,307.71
28481	M AMUNDSON LLP	CIGARETTE - JUICE/MIX/POP PURCHASE	$ 3,866.36
28482	MIDWEST COCA-COLA BOTTLING	CREDIT - JUICE/MIX/POP PURCHASE	$ 667.04
28483	MN DEPT OF REVENUE	TOBACCO LICENSE	$ 75.00
28484	MY ALARM CENTER	SECURITY SERVICES	$ 166.74
28485	NARDINI FIRE EQUIPMENT	ANNUAL INSPECTION	$ 285.00
28486	PAUSTIS & SON'S	WINE PURCHASE	$ 1,146.20
28487	PHILLIPS WINE & SPIRITS CO	CREDIT - WINE PURCHASE	$ 1,246.87
28488	PLAYNETWORK	MEDIA SERVICES	$ 32.01
28489	ROYAL SUPPLY LLC	CLEANING SUPPLIES	$ 113.98
28490	SAM'S CLUB	CREDIT CARD PAYMENT	$ 46.10
28491	SILENT WATCHDOG	SECURITY MONITORING	$ 60.00
28492	SOUTHERN WINE & SPIRITS OF MN	LIQUOR PURCHASE	$ 2,990.51
28493	TWIN CITIES E MEDIA	MAINTENNACE AGREEMENT	$ 345.00
28494	VINOCOPIA INC	LIQUOR PURCHASE	$ 439.50

FUND: LIQUOR OPERATIONS

VOUCHER	VENDOR	EXPLANATION	AMOUNT
28495	WIRTZ BEVERAGE MN BEER	CREDIT - BEER - LIQUOR - WINE PURCHASE	$ 12,435.34
28496	Z WINES USA LLC	WINE PURCHASE	$ 160.00

TRANSFER TO PAYROLL	PAYROLL (10/02/15)	9,630.37
TRANSFER TO PAYROLL	PAYROLL (10/16/15)	9,481.10
TRANSFER TO PAYROLL	PAYROLL (10/30/15)	10,180.16
	VAC & HOLIDAY PAY (10/30/15)	5,484.60
	SALES TAX (SEPT.)	15,642.00
	OTP TAX (SEPT.)	682.16
	TOTAL DISBURSEMENTS	**$ 219,856.31**

WHEREAS,
the City Council of the City of Spring Lake Park has considered the foregoing itemized list of disbursements; and

WHEREAS,
the City Council has determined that all disbursements, as listed, with the following exceptions:

are proper.

NOW, THEREFORE BE IT RESOLVED:
that the Council directs and approves the payment of the aforementioned disbursements this _____ day of _____, 20_____.

Signed: _____
Mayor

Councilmembers:

ATTEST:

Daniel Buchholtz, Administrator/Clerk-Treasurer

CITY OF SPRING LAKE PARK
STATEMENT OF FUND BALANCE
OCTOBER 2015

FUND	DESCRIPTION	BALANCE
101	GENERAL	$ 89,140.19
102	ELECTIONS	$ 47,097.90
103	POLICE RESERVES	$ 1,785.58
104	NORTH CENTRAL SUBURBAN CABLE	$ (1,644.72)
108	POLICE FORFEITURES	$ 22,365.97
112	ESCROW TRUST	$ 100,933.70
SPECIAL REVENUE FUNDS		
224	SMALL EQUIPMENT REPLACEMENT	$ 17,020.83
225	PARK ACQUISITION & IMPROVEMENTS	$ 224,209.82
226	PARK EQUIPMENT & IMPROVEMENTS	$ 6,519.89
227	HRA EXCESS	$ 113,339.36
229	SANBURNOL PARK IMPROVEMENTS	$ 9,542.04
230	RECYCLING	$ 51,396.46
234	STREET LIGHTING	$ 31,441.77
235	RIGHT-OF-WAY MAINTENANCE	$ 16,031.67
237	PARK & RECREATION SPECIAL PROJECTS	$ 18,011.54
238	GRANTS & SPECIAL PROJECTS	$ 1,776.23
240	TOWER DAYS	$ 9,666.08
243	PUBLIC SAFETY RADIO REPLACEMENT	$ 25,817.79
244	RECREATION PROGRAMS	$ 401,998.16
248	TRAFFIC EDUCATION	$ 28,082.85
DEBT SERVICE FUNDS		
328	PUBLIC WORKS BUILDING-DEBT SERVICE	$ (6,048.75)
329	2013A EQUIPMENT CERTIFICATE-DEBT SERVICE	$ 81,012.52
330	2014A G.O. IMPRV-DEBT SERVICE (2014-15 STR)	$ 431,307.35
384	2005A FIRE DEPARTMENT-DEBT SERVICE	$ (25,407.39)
CAPITAL PROJECTS FUNDS		
400	REVOLVING CONSTRUCTION	$ 655,168.26
402	MSA MAINTENANCE	$ 64,277.45
403	CAPITAL REPLACEMENT	$ 415,364.97
407	SEALCOATING	$ 85,745.13
410	LAKESIDE/LIONS PARK IMPROVEMENT	$ 6,535.48
416	BUILDING MAINTENANCE & RENEWAL	$ 92,831.80
421	81ST AVE REHAB-MSA	$ 30,724.47
425	STORM SEWER REHAB	$ 43,606.92
427	ABLE ST & TERRACE RD IMPROVEMENTS	$ 33,161.43
428	PUBLIC WORKS BUILDING	$ (339.47)
429	2013 EQUIPMENT CERTIFICATE	$ 186,573.26
430	2014-2015 ST IMPRV PRJ	$ 544,248.24
ENTERPRISE FUNDS		
600	PUBLIC UTILITY RENEWAL & REPLACEMENT	$ 2,692,654.58
601	PUBLIC UTILITY OPERATIONS	$ 1,397,300.05
602	WATER TREATMENT PLANT	$ 199,861.20
609	MUNICIPAL LIQUOR	$ 134,812.65
610	ON-SALE NOTE PROCEEDS	$ 573,696.39
INTERNAL SERVICE FUNDS		
700	SEVERANCE	$ (72,155.40)
	GRAND TOTAL	**$ 8,779,464.25**

M E M O R A N D U M

DATE: November 10, 2015

TO: Mayor, City Council and Dept. Heads

FROM: Peggy K. Anderson, Accountant

RE: Budget to Date (as of October 31, 2015)

Attached is the October, 2015 Budget to Date for revenue and expenditures. A strict adherence to the year-to-date ratio would have each expenditure line item with **18.66% remaining.** The overall General Fund ratio is **22.44%.**

Unbudgeted Items:

101.41940.02200	**Alpha Video & Audio Inc.**	**$4,565.00**

CITY OF SPRING LAKE PARK

Statement of Revenue and Expenditures

Revised Budget

For GENERAL FUND (101)

For the Fiscal Period 2015-10 Ending October 31, 2015

Account Number		Current Budget	Current Actual	Annual Budget	YTD Actual	Remaining Budget %
Revenues						
Revenues						
101.00000.31010	CURRENT TAXES	$ 0.00	$ 0.00	$ 2,681,846.00	$ 1,384,339.78	48.38%
101.00000.31020	DELINQ TAXES	0.00	0.00	0.00	19,182.25	0.00%
101.00000.31910	PENALTIES & INTEREST	0.00	0.00	0.00	3,440.50	0.00%
101.00000.32110	LIQUOR LICENSES	0.00	25.00	23,300.00	650.00	97.21%
101.00000.32179	PAWN SHOP LICENSES	0.00	521.00	6,252.00	5,210.00	16.67%
101.00000.32180	CIGARETTE,DANCE,BINGO,MISC	0.00	1,950.00	5,400.00	2,250.00	58.33%
101.00000.32181	SIGN PERMITS	0.00	0.00	5,500.00	3,771.64	31.42%
101.00000.32208	CONTRACTORS LICENSES	0.00	455.00	6,500.00	6,450.00	0.77%
101.00000.32210	BUILDING PERMIT	0.00	14,203.99	60,000.00	105,411.26	(75.69%)
101.00000.32211	BUILDING PERMIT SURCHARGES	0.00	379.41	2,000.00	3,557.99	(77.90%)
101.00000.32230	PLUMBING PERMIT	0.00	234.00	4,000.00	3,523.00	11.93%
101.00000.32231	PLUMBING PERMIT SURCHARGES	0.00	4.00	350.00	185.00	47.14%
101.00000.32232	HEATING & A/C PERMITS	0.00	606.70	6,000.00	11,775.40	(96.26%)
101.00000.32233	HTG & A/C SURCHARGES	0.00	10.90	400.00	424.62	(6.16%)
101.00000.32240	PET LICENSE	0.00	6.00	550.00	365.00	33.64%
101.00000.32260	CERTIFICATE OF OCCUPANCY	0.00	300.00	5,000.00	1,920.00	61.60%
101.00000.32261	VACANT PROPERTY REGISTRATIO	0.00	200.00	6,000.00	4,600.00	23.33%
101.00000.33401	LOCAL GOVERNMENT AID	0.00	0.00	323,491.00	161,745.50	50.00%
101.00000.33404	PERA INCREASE AID	0.00	0.00	5,775.00	2,887.50	50.00%
101.00000.33407	STATE FIRE AID	422,930.00	0.00	422,930.00	0.00	100.00%
101.00000.33416	POLICE TRAINING REIMB	0.00	0.00	3,600.00	3,664.98	(1.81%)
101.00000.33421	INSURANCE PREMIUM-POLICE	0.00	86,402.40	73,000.00	86,402.40	(18.36%)
101.00000.34103	SPEC USE,ZONING,SUB-DIV	0.00	45.00	1,800.00	3,430.00	(90.56%)
101.00000.34104	PLAN CHECKING FEES	0.00	1,296.80	30,000.00	31,614.99	(5.38%)
101.00000.34105	SALE OF MAPS,COPIES ETC	0.00	90.00	300.00	173.50	42.17%
101.00000.34107	ASSESSMENT SEARCHES	0.00	25.00	200.00	75.00	62.50%
101.00000.34108	ADMINISTRATION SAC CHARGES	0.00	0.00	70.00	60.00	14.29%
101.00000.34111	ADM. GAMBLING EXPENSES	0.00	0.00	31,000.00	0.00	100.00%
101.00000.34115	GUN RANGE FACILITY USE	0.00	0.00	0.00	375.00	0.00%
101.00000.34201	POLICE & FIRE ALARM PERMIT	0.00	0.00	2,000.00	900.00	55.00%
101.00000.34203	ACCIDENT REPORTS	0.00	0.00	0.00	21.75	0.00%
101.00000.34204	RENTAL HOUSING REGISTRATION	0.00	24,255.00	55,000.00	36,095.00	34.37%
101.00000.34205	RIGHT OF WAY APPLICATIONS	0.00	0.00	3,500.00	1,335.00	61.86%
101.00000.34801	INSURANCE DIVIDENDS	0.00	0.00	8,000.00	0.00	100.00%
101.00000.34949	RESTITUTION	0.00	0.00	0.00	157.81	0.00%
101.00000.34950	REFUNDS & REIMB	0.00	100.00	4,000.00	1,451.22	63.72%
101.00000.35101	COURT FINES	0.00	4,690.57	100,000.00	47,462.32	52.54%
101.00000.35102	ADM OFFENSE FINES	0.00	200.00	4,000.00	1,706.98	57.33%
101.00000.35347	TEP-GENERAL FUND PORTION 25	0.00	3,081.10	0.00	7,390.94	0.00%
101.00000.35349	MN DRIVING DIVERSION PROGRA	0.00	200.00	0.00	1,200.00	0.00%
101.00000.35350	DETOX TRANSPORTATION	0.00	0.00	200.00	120.00	40.00%
101.00000.36210	INTEREST EARNINGS	0.00	0.00	20,000.00	(322.47)	101.61%
101.00000.36901	LIAISON OFFICER	0.00	0.00	70,839.00	35,419.50	50.00%
101.00000.39100	CPWL REIM FOR SERVICES	0.00	0.00	4,500.00	1,298.32	71.15%
101.00000.39101	RECYCLE PARK PRGM-REIM FOR	0.00	0.00	0.00	973.00	0.00%
101.00000.39202	TRANSFER FROM PUBLIC UTILITY	0.00	0.00	45,000.00	0.00	100.00%

CITY OF SPRING LAKE PARK

Statement of Revenue and Expenditures

Revised Budget

For GENERAL FUND (101)

For the Fiscal Period 2015-10 Ending October 31, 2015

Account Number		Current Budget	Current Actual	Annual Budget	YTD Actual	Remaining Budget %
101.00000.39203	CONTRIBUTION FROM LIQUOR	0.00	0.00	75,000.00	0.00	100.00%
101.00000.39206	TRANSFER FROM RECYCLING FU	0.00	0.00	2,500.00	0.00	100.00%
101.00000.39207	TRANSFER FROM RECREATION	0.00	0.00	60,000.00	0.00	100.00%
Total Revenues		**422,930.00**	**139,281.87**	**4,159,803.00**	**1,982,694.68**	**52.34%**
Total GENERAL FUND Revenues		**$ 422,930.00**	**$ 139,281.87**	**$ 4,159,803.00**	**$ 1,982,694.68**	**52.34%**
Expenditures						
MAYOR AND COUNCIL Expenditures						
101.41110.01030	PART TIME EMPLOYEES	$ 0.00	$ 2,607.88	$ 36,273.00	$ 30,752.11	15.22%
101.41110.01211	DEFINED CONTR PLAN/PERA	0.00	130.41	1,768.00	1,491.83	15.62%
101.41110.01220	FICA/MC CONTRIBUTIONS-EMPLO	0.00	199.50	2,775.00	2,352.50	15.23%
101.41110.01510	WORKERS COMPENSATION	0.00	0.00	75.00	67.00	10.67%
101.41110.02100	OPERATING SUPPLIES	0.00	44.81	511.00	266.12	47.92%
101.41110.03310	TRAVEL EXPENSE	0.00	0.00	250.00	0.00	100.00%
101.41110.03500	PRINTING & PUBLISHING	0.00	0.00	1,250.00	1,646.15	(31.69%)
101.41110.04300	CONFERENCE & SCHOOLS	0.00	41.00	2,010.00	372.00	81.49%
101.41110.04330	DUES & SUBSCRIPTIONS	0.00	6,494.00	9,065.00	8,994.00	0.78%
101.41110.04955	DISCRETIONARY	0.00	52.95	650.00	542.08	16.60%
Total MAYOR AND COUNCIL Expenditures		**0.00**	**9,570.55**	**54,627.00**	**46,483.79**	**14.91%**
ADMINISTRATION Expenditures						
101.41400.01010	FULL TIME EMPLOYEES	0.00	32,308.09	312,200.00	256,714.78	17.77%
101.41400.01050	VACATION BUY BACK	0.00	0.00	2,450.00	0.00	100.00%
101.41400.01210	PERA CONTRIBUTIONS-EMPLOYE	0.00	2,412.70	23,415.00	19,133.49	18.29%
101.41400.01220	FICA/MC CONTRIBUTIONS-EMPLO	0.00	2,438.93	24,070.00	19,259.22	19.99%
101.41400.01300	HEALTH INSURANCE	0.00	4,741.76	59,500.00	44,469.03	25.26%
101.41400.01313	PRUDENTIAL LIFE INSURANCE	0.00	23.24	270.00	211.85	21.54%
101.41400.01510	WORKERS COMPENSATION	0.00	0.00	2,300.00	1,692.09	26.43%
101.41400.02000	OFFICE SUPPLIES	0.00	1,032.09	3,715.00	3,799.88	(2.28%)
101.41400.02030	PRINTED FORMS	0.00	218.00	1,444.00	1,324.54	8.27%
101.41400.02100	OPERATING SUPPLIES	0.00	469.00	446.00	560.50	(25.67%)
101.41400.02220	POSTAGE	0.00	772.22	3,445.00	2,298.58	33.28%
101.41400.03210	TELEPHONE	0.00	53.81	800.00	432.20	45.98%
101.41400.03310	TRAVEL EXPENSE	0.00	370.89	3,300.00	3,336.11	(1.09%)
101.41400.03410	EMPLOYMENT ADVERTISING	0.00	0.00	0.00	259.20	0.00%
101.41400.03500	PRINTING & PUBLISHING	0.00	0.00	360.00	474.17	(31.71%)
101.41400.03550	COUNTY FEES FOR SERVICE	0.00	0.00	2,500.00	0.00	100.00%
101.41400.04050	MAINTENANCE AGREEMENTS	0.00	0.00	6,519.00	8,174.08	(25.39%)
101.41400.04300	CONFERENCE & SCHOOLS	0.00	41.03	5,935.00	4,583.65	22.77%
101.41400.04330	DUES & SUBSCRIPTIONS	0.00	90.00	560.00	652.00	(16.43%)
101.41400.04500	CONTRACTUAL SERVICES	0.00	1,363.87	4,450.00	2,556.37	42.55%
101.41400.05000	CAPITAL OUTLAY	0.00	0.00	1,944.00	2,026.50	(4.24%)
Total ADMINISTRATION Expenditures		**0.00**	**46,335.63**	**459,623.00**	**371,958.24**	**19.07%**
ASSESSOR Expenditures						
101.41500.04000	CONTRACTUAL SERVICE	0.00	0.00	35,500.00	26,256.00	26.04%
Total ASSESSOR Expenditures		**0.00**	**0.00**	**35,500.00**	**26,256.00**	**26.04%**

CITY OF SPRING LAKE PARK

Statement of Revenue and Expenditures

Revised Budget

For GENERAL FUND (101)

For the Fiscal Period 2015-10 Ending October 31, 2015

Account Number	Current Budget	Current Actual	Annual Budget	YTD Actual	Remaining Budget %
AUDIT & ACCTG SERVICES Expenditures					
101.41540.03010 AUDIT & ACCTG SERVICES	0.00	0.00	9,050.00	9,050.00	0.00%
Total AUDIT & ACCTG SERVICES Expenditures	**0.00**	**0.00**	**9,050.00**	**9,050.00**	**0.00%**
I.T. SERVICES Expenditures					
101.41600.04000 CONTRACTUAL SERVICE	0.00	87.82	22,358.00	13,806.39	38.25%
Total I.T. SERVICES Expenditures	**0.00**	**87.82**	**22,358.00**	**13,806.39**	**38.25%**
LEGAL FEES Expenditures					
101.41610.03040 LEGAL FEES	0.00	5,695.44	127,500.00	78,588.53	38.36%
Total LEGAL FEES Expenditures	**0.00**	**5,695.44**	**127,500.00**	**78,588.53**	**38.36%**
ENGINEERING FEES Expenditures					
101.41710.03030 ENGINEERING FEES	0.00	503.25	10,000.00	6,663.60	33.36%
Total ENGINEERING FEES Expenditures	**0.00**	**503.25**	**10,000.00**	**6,663.60**	**33.36%**
PLANNING & ZONING Expenditures					
101.41720.02100 OPERATING SUPPLIES	0.00	0.00	115.00	43.75	61.96%
101.41720.02220 POSTAGE	0.00	0.00	150.00	180.44	(20.29%)
101.41720.03500 PRINTING & PUBLISHING	0.00	37.63	400.00	185.51	53.62%
Total PLANNING & ZONING Expenditures	**0.00**	**37.63**	**665.00**	**409.70**	**38.39%**
GOVERNMENT BUILDING Expenditures					
101.41940.01010 FULL TIME EMPLOYEES	0.00	1,452.58	14,000.00	10,726.41	23.38%
101.41940.01013 OVERTIME	0.00	62.78	0.00	548.54	0.00%
101.41940.01050 VACATION BUY BACK	0.00	0.00	269.00	0.00	100.00%
101.41940.01210 PERA CONTRIBUTIONS-EMPLOYE	0.00	113.66	1,050.00	843.57	19.66%
101.41940.01220 FICA/MC CONTRIBUTIONS-EMPLO	0.00	118.62	1,092.00	861.03	21.15%
101.41940.01300 HEALTH INSURANCE	0.00	181.21	3,300.00	2,191.20	33.60%
101.41940.01313 PRUDENTIAL LIFE INSURANCE	0.00	1.04	13.00	10.42	19.85%
101.41940.01510 WORKERS COMPENSATION	0.00	0.00	500.00	0.00	100.00%
101.41940.02100 OPERATING SUPPLIES	0.00	1,247.46	7,500.00	7,417.08	1.11%
101.41940.02200 REPAIR & MAINTENANCE	0.00	6,776.43	7,200.00	9,757.97	(35.53%)
101.41940.02225 LANDSCAPING MATERIALS	0.00	0.00	0.00	136.20	0.00%
101.41940.02280 UNIFORMS,SAFETY SHOES	0.00	69.64	250.00	189.08	24.37%
101.41940.03210 TELEPHONE	0.00	552.84	9,000.00	5,549.29	38.34%
101.41940.03810 ELECTRIC UTILITIES	0.00	2,144.69	17,000.00	17,222.90	(1.31%)
101.41940.03830 GAS UTILITIES	0.00	158.97	15,000.00	12,131.38	19.12%
101.41940.03841 RUBBISH REMOVAL	0.00	357.77	4,150.00	3,832.91	7.64%
101.41940.04000 CONTRACTUAL SERVICE	0.00	0.00	940.00	379.66	59.61%
101.41940.05000 CAPITAL OUTLAY	0.00	0.00	30,000.00	511.04	98.30%
101.41940.07000 PERMANENT TRANSFERS OUT	0.00	0.00	8,126.00	0.00	100.00%
Total GOVERNMENT BUILDING Expenditures	**0.00**	**13,237.69**	**119,390.00**	**72,308.68**	**39.43%**
POLICE PROTECTION Expenditures					
101.42100.01010 FULL TIME EMPLOYEES	0.00	107,351.67	961,960.00	808,390.99	15.96%
101.42100.01013 OVERTIME	0.00	5,736.09	97,000.00	39,245.36	59.54%
101.42100.01050 VACATION BUY BACK	0.00	0.00	4,000.00	0.00	100.00%

CITY OF SPRING LAKE PARK

Statement of Revenue and Expenditures

Revised Budget

For GENERAL FUND (101)

For the Fiscal Period 2015-10 Ending October 31, 2015

Account Number		Current Budget	Current Actual	Annual Budget	YTD Actual	Remaining Budget %
101.42100.01210	PERA CONTRIBUTIONS-EMPLOYE	0.00	16,951.50	150,751.00	129,308.52	14.22%
101.42100.01220	FICA/MC CONTRIBUTIONS-EMPLO	0.00	2,579.94	24,619.00	18,968.84	22.95%
101.42100.01300	HEALTH INSURANCE	0.00	10,303.16	148,000.00	116,237.30	21.46%
101.42100.01313	PRUDENTIAL LIFE INSURANCE	0.00	47.60	665.00	541.14	18.63%
101.42100.01510	WORKERS COMPENSATION	0.00	0.00	25,000.00	23,287.95	6.85%
101.42100.02000	OFFICE SUPPLIES	0.00	183.39	3,600.00	3,075.28	14.58%
101.42100.02030	PRINTED FORMS	0.00	0.00	1,000.00	462.52	53.75%
101.42100.02040	RANGE EQUIP & SUPPLIES	0.00	724.67	7,550.00	2,236.66	70.38%
101.42100.02100	OPERATING SUPPLIES	0.00	14.94	3,500.00	539.16	84.60%
101.42100.02120	MOTOR FUELS & LUBRICANTS	0.00	728.15	23,700.00	13,577.47	42.71%
101.42100.02220	POSTAGE	0.00	79.27	1,900.00	596.69	68.60%
101.42100.03050	MEDICAL EXPENSE	0.00	0.00	2,000.00	0.00	100.00%
101.42100.03210	TELEPHONE	0.00	(4.74)	3,000.00	2,532.24	15.59%
101.42100.03211	CJIS DATA SERVICES	0.00	2,165.81	13,380.00	9,578.13	28.41%
101.42100.03300	CLOTHING & PERSONAL EQUIP	0.00	1,371.62	9,270.00	4,181.12	54.90%
101.42100.03310	TRAVEL EXPENSE	0.00	0.00	500.00	229.50	54.10%
101.42100.03421	800 MHZ RADIO	0.00	0.00	4,006.00	1,188.87	70.32%
101.42100.04000	CONTRACTUAL SERVICE	0.00	334.86	16,200.00	7,538.30	53.47%
101.42100.04050	MAINTENANCE AGREEMENTS	0.00	582.03	3,740.00	2,681.90	28.29%
101.42100.04060	AUTO EQUIPMENT REPAIR	0.00	3,460.16	20,000.00	12,612.74	36.94%
101.42100.04070	OTHER EQUIPMENT REPAIR	0.00	332.52	3,500.00	2,852.45	18.50%
101.42100.04300	CONFERENCE & SCHOOLS	0.00	200.00	11,500.00	6,117.90	46.80%
101.42100.04330	DUES & SUBSCRIPTIONS	0.00	45.00	825.00	585.00	29.09%
101.42100.05000	CAPITAL OUTLAY	0.00	0.00	33,075.00	33,764.39	(2.08%)
Total POLICE PROTECTION Expenditures		**0.00**	**153,187.64**	**1,574,241.00**	**1,240,330.42**	**21.21%**
FIRE PROTECTION Expenditures						
101.42200.04000	CONTRACTUAL SERVICE	0.00	15,559.38	186,712.00	155,593.80	16.67%
101.42200.04935	STATE FIRE AID	422,930.00	422,929.30	422,930.00	422,929.30	0.00%
101.42200.05000	CAPITAL OUTLAY	0.00	0.00	20,904.00	20,412.81	2.35%
Total FIRE PROTECTION Expenditures		**422,930.00**	**438,488.68**	**630,546.00**	**598,935.91**	**5.01%**
CODE ENFORCEMENT Expenditures						
101.42300.01010	FULL TIME EMPLOYEES	0.00	8,769.63	76,100.00	64,293.40	15.51%
101.42300.01040	TEMPORARY EMPLOYEES	0.00	0.00	10,080.00	0.00	100.00%
101.42300.01050	VACATION BUY BACK	0.00	0.00	1,461.00	0.00	100.00%
101.42300.01210	PERA CONTRIBUTIONS-EMPLOYE	0.00	657.72	5,709.00	4,821.99	15.54%
101.42300.01220	FICA/MC CONTRIBUTIONS-EMPLO	0.00	664.77	6,705.00	4,854.28	27.60%
101.42300.01300	HEALTH INSURANCE	0.00	804.50	9,850.00	7,989.61	18.89%
101.42300.01313	PRUDENTIAL LIFE INSURANCE	0.00	4.28	51.00	42.80	16.08%
101.42300.01510	WORKERS COMPENSATION	0.00	0.00	1,450.00	435.26	69.98%
101.42300.02000	OFFICE SUPPLIES	0.00	0.00	500.00	153.55	69.29%
101.42300.02100	OPERATING SUPPLIES	0.00	16.06	1,300.00	870.97	33.00%
101.42300.02120	MOTOR FUELS & LUBRICANTS	0.00	48.55	1,400.00	905.19	35.34%
101.42300.02200	REPAIR & MAINTENANCE	0.00	0.00	750.00	1,518.46	(102.46%)
101.42300.03210	TELEPHONE	0.00	53.81	1,000.00	635.67	36.43%
101.42300.03310	TRAVEL EXPENSE	0.00	0.00	150.00	0.00	100.00%
101.42300.04300	CONFERENCE & SCHOOLS	0.00	0.00	900.00	535.59	40.49%
101.42300.04330	DUES & SUBSCRIPTIONS	0.00	565.00	2,000.00	2,588.48	(29.42%)

Account Number		Current Budget	Current Actual	Annual Budget	YTD Actual	Remaining Budget %
Total CODE ENFORCEMENT Expenditures		**0.00**	**11,584.32**	**119,406.00**	**89,645.25**	**24.92%**
EMERGENCY MANAGEMENT Expenditures						
101.42500.02200	REPAIR & MAINTENANCE	0.00	0.00	750.00	1,149.50	(53.27%)
101.42500.03810	ELECTRIC UTILITIES	0.00	7.75	100.00	68.11	31.89%
101.42500.04050	MAINTENANCE AGREEMENTS	0.00	0.00	1,055.00	1,054.32	0.06%
101.42500.05000	CAPITAL OUTLAY	0.00	0.00	500.00	0.00	100.00%
Total EMERGENCY MANAGEMENT Expenditures		**0.00**	**7.75**	**2,405.00**	**2,271.93**	**5.53%**
ANIMAL CONTROL Expenditures						
101.42700.04000	CONTRACTUAL SERVICE	0.00	0.00	1,000.00	0.00	100.00%
Total ANIMAL CONTROL Expenditures		**0.00**	**0.00**	**1,000.00**	**0.00**	**100.00%**
STREET DEPARTMENT Expenditures						
101.43000.01010	FULL TIME EMPLOYEES	0.00	14,363.74	126,000.00	102,360.26	18.76%
101.43000.01013	OVERTIME	0.00	105.68	7,061.00	2,137.00	69.74%
101.43000.01020	ON CALL SALARIES	0.00	137.84	2,018.00	853.18	57.72%
101.43000.01050	VACATION BUY BACK	0.00	0.00	810.00	0.00	100.00%
101.43000.01210	PERA CONTRIBUTIONS-EMPLOYE	0.00	1,095.58	10,131.00	8,064.78	20.40%
101.43000.01220	FICA/MC CONTRIBUTIONS-EMPLO	0.00	1,101.36	10,395.00	8,132.09	21.77%
101.43000.01300	HEALTH INSURANCE	0.00	1,829.22	20,950.00	19,053.86	9.05%
101.43000.01313	PRUDENTIAL LIFE INSURANCE	0.00	8.86	107.00	87.36	18.36%
101.43000.01510	WORKERS COMPENSATION	0.00	0.00	8,000.00	8,731.89	(9.15%)
101.43000.02120	MOTOR FUELS & LUBRICANTS	0.00	557.42	18,000.00	9,493.57	47.26%
101.43000.02150	SHOP MATERIALS	0.00	0.00	2,000.00	700.96	64.95%
101.43000.02200	REPAIR & MAINTENANCE	0.00	349.13	7,500.00	3,670.75	51.06%
101.43000.02210	EQUIPMENT PARTS	0.00	1,287.85	5,500.00	6,532.99	(18.78%)
101.43000.02221	TIRES	0.00	0.00	750.00	759.00	(1.20%)
101.43000.02224	STREET MAINT SUPPLIES	0.00	0.00	1,393.00	0.00	100.00%
101.43000.02226	SIGNS & STRIPING	0.00	829.30	6,000.00	3,279.75	45.34%
101.43000.02280	UNIFORMS,SAFETY SHOES	0.00	87.57	750.00	875.32	(16.71%)
101.43000.03210	TELEPHONE	0.00	(36.67)	370.00	135.78	63.30%
101.43000.04000	CONTRACTUAL SERVICE	0.00	8.00	840.00	285.05	66.07%
101.43000.04300	CONFERENCE & SCHOOLS	0.00	0.00	400.00	150.00	62.50%
101.43000.04330	DUES & SUBSCRIPTIONS	0.00	45.00	100.00	45.00	55.00%
Total STREET DEPARTMENT Expenditures		**0.00**	**21,769.88**	**229,075.00**	**175,348.59**	**23.45%**
RECREATION DEPARTMENT Expenditures						
101.45100.01010	FULL TIME EMPLOYEES	0.00	22,447.48	183,200.00	156,085.74	14.80%
101.45100.01030	PART TIME EMPLOYEES	0.00	167.20	10,875.00	5,371.32	50.61%
101.45100.01040	TEMPORARY EMPLOYEES	0.00	0.00	13,000.00	10,182.13	21.68%
101.45100.01050	VACATION BUY BACK	0.00	0.00	2,600.00	0.00	100.00%
101.45100.01210	PERA CONTRIBUTIONS-EMPLOYE	0.00	1,683.58	13,740.00	11,706.44	14.80%
101.45100.01220	FICA/MC CONTRIBUTIONS-EMPLO	0.00	1,708.71	16,040.00	12,920.07	19.45%
101.45100.01300	HEALTH INSURANCE	0.00	3,025.14	28,000.00	23,281.51	16.85%
101.45100.01313	PRUDENTIAL LIFE INSURANCE	0.00	16.24	155.00	125.21	19.22%
101.45100.01510	WORKERS COMPENSATION	0.00	0.00	2,000.00	695.59	65.22%
101.45100.02000	OFFICE SUPPLIES	0.00	0.00	1,625.00	1,089.30	32.97%
101.45100.02220	POSTAGE	0.00	27.39	2,350.00	2,037.19	13.31%

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101.45100.02290	RECREATION EQUIP SUPPLIES	0.00	0.00	2,200.00	1,719.50	21.84%
101.45100.03310	TRAVEL EXPENSE	0.00	134.53	1,000.00	625.80	37.42%
101.45100.03500	PRINTING & PUBLISHING	0.00	0.00	8,857.00	7,604.27	14.14%
101.45100.04300	CONFERENCE & SCHOOLS	0.00	0.00	1,400.00	360.00	74.29%
101.45100.04330	DUES & SUBSCRIPTIONS	0.00	90.00	435.00	392.00	9.89%
Total RECREATION DEPARTMENT Expenditures		**0.00**	**29,300.27**	**287,477.00**	**234,196.07**	**18.53%**
PARKS DEPARTMENT Expenditures						
101.45200.01010	FULL TIME EMPLOYEES	0.00	16,904.13	132,100.00	104,519.00	20.88%
101.45200.01013	OVERTIME	0.00	272.35	7,061.00	4,250.26	39.81%
101.45200.01020	ON CALL SALARIES	0.00	336.16	2,018.00	1,233.40	38.88%
101.45200.01050	VACATION BUY BACK	0.00	0.00	2,000.00	0.00	100.00%
101.45200.01210	PERA CONTRIBUTIONS-EMPLOYE	0.00	1,313.45	10,588.00	8,360.79	21.04%
101.45200.01220	FICA/MC CONTRIBUTIONS-EMPLO	0.00	1,328.41	10,953.00	8,469.61	22.67%
101.45200.01300	HEALTH INSURANCE	0.00	1,829.24	20,500.00	16,486.72	19.58%
101.45200.01313	PRUDENTIAL LIFE INSURANCE	0.00	8.92	107.00	83.67	21.80%
101.45200.01510	WORKERS COMPENSATION	0.00	0.00	10,000.00	9,238.94	7.61%
101.45200.02100	OPERATING SUPPLIES	0.00	0.00	930.00	392.74	57.77%
101.45200.02120	MOTOR FUELS & LUBRICANTS	0.00	525.05	17,000.00	8,890.08	47.71%
101.45200.02200	REPAIR & MAINTENANCE	0.00	988.22	7,000.00	6,622.79	5.39%
101.45200.02205	LAKESIDE PK EXP TO BE REIM	0.00	228.10	0.00	8,331.53	0.00%
101.45200.02210	EQUIPMENT PARTS	0.00	90.50	3,000.00	943.97	68.53%
101.45200.02221	TIRES	0.00	0.00	600.00	157.70	73.72%
101.45200.02225	LANDSCAPING MATERIALS	0.00	0.00	8,600.00	5,901.82	31.37%
101.45200.02280	UNIFORMS,SAFETY SHOES	0.00	87.57	700.00	875.32	(25.05%)
101.45200.02290	RECREATION EQUIP SUPPLIES	0.00	0.00	930.00	775.09	16.66%
101.45200.03210	TELEPHONE	0.00	53.81	232.00	348.36	(50.16%)
101.45200.03810	ELECTRIC UTILITIES	0.00	367.27	3,725.00	3,412.97	8.38%
101.45200.03830	GAS UTILITIES	0.00	80.99	4,000.00	2,390.63	40.23%
101.45200.03841	RUBBISH REMOVAL	0.00	0.00	300.00	63.87	78.71%
101.45200.04190	SATELLITE RENTAL	0.00	90.00	1,300.00	1,299.99	0.00%
101.45200.04300	CONFERENCE & SCHOOLS	0.00	0.00	800.00	770.09	3.74%
101.45200.04500	CONTRACTUAL SERVICES	0.00	8.00	760.00	285.05	62.49%
101.45200.04901	LAKESIDE PARK EXPENSE	0.00	0.00	11,500.00	11,500.00	0.00%
Total PARKS DEPARTMENT Expenditures		**0.00**	**24,512.17**	**256,704.00**	**205,604.39**	**19.91%**
FORESTRY Expenditures						
101.45300.02100	OPERATING SUPPLIES	0.00	0.00	46.00	0.00	100.00%
101.45300.04000	CONTRACTUAL SERVICE	0.00	0.00	1,000.00	0.00	100.00%
101.45300.04300	CONFERENCE & SCHOOLS	0.00	0.00	540.00	555.00	(2.78%)
Total FORESTRY Expenditures		**0.00**	**0.00**	**1,586.00**	**555.00**	**65.01%**
MISCELLANEOUS Expenditures						
101.49000.01313	PRUDENTIAL LIFE INSURANCE	0.00	0.00	50.00	0.00	100.00%
101.49000.03600	INSURANCE	0.00	0.00	45,000.00	41,018.14	8.85%
101.49000.04390	MISCELLANEOUS	0.00	60.16	1,000.00	5,786.18	(478.62%)
101.49000.04420	SURCHARGES-PLMG	0.00	0.00	200.00	0.00	100.00%
101.49000.04430	SURCHARGES-HTG	0.00	0.00	400.00	0.00	100.00%
101.49000.04440	SURCHARGES-BLDG	0.00	0.00	2,000.00	0.00	100.00%

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101.49000.07000 PERMANENT TRANSFERS OUT	0.00	6,035.00	170,000.00	7,035.00	95.86%
Total MISCELLANEOUS Expenditures	**0.00**	**6,095.16**	**218,650.00**	**53,839.32**	**75.38%**
Total GENERAL FUND Expenditures	**$ 422,930.00**	**$ 760,413.88**	**$ 4,159,803.00**	**$ 3,226,251.81**	**22.44%**
GENERAL FUND Excess of Revenues Over Expenditures	**$ 0.00**	**$ (621,132.01)**	**$ 0.00**	**$ (1,243,557.13)**	**0.00%**

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Account Number	Current Budget	Current Actual	Annual Budget	YTD Actual	Remaining Budget %
Total Revenues	$ 422,930.00	$ 139,281.87	$ 4,159,803.00	$ 1,982,694.68	52.34%
Total Expenditures	$ 422,930.00	$ 760,413.88	$ 4,159,803.00	$ 3,226,251.81	22.44%
Total Excess of Revenues Over Expenditures	$ 0.00	$ (621,132.01)	$ 0.00	$ (1,243,557.13)	0.00%

CITY OF SPRING LAKE PARK

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For PUBLIC UTILITIES OPERATIONS (601)

For the Fiscal Period 2015-10 Ending October 31, 2015

Account Number		Current Budget	Current Actual	Annual Budget	YTD Actual	Remaining Budget %
Revenues						
Revenues						
601.00000.34950	MISC REVENUE-NSF CHRGS	$ 0.00	$ 70.00	$ 0.00	$ 449.81	0.00%
601.00000.36210	INTEREST EARNINGS	0.00	0.00	45,000.00	0.00	100.00%
601.00000.37101	WATER COLLECTIONS	0.00	147,636.17	480,000.00	420,973.09	12.30%
601.00000.37103	SALES TAX COLLECTED	0.00	1,811.27	5,000.00	5,225.02	(4.50%)
601.00000.37104	PENALTIES/WATER	0.00	(3.36)	6,000.00	4,313.30	28.11%
601.00000.37109	SAFE DRINKING WATER FEE	0.00	3,457.96	13,844.00	13,989.87	(1.05%)
601.00000.37111	ADMINISTRATIVE CHARGE	0.00	16,916.76	64,000.00	69,514.89	(8.62%)
601.00000.37115	ESTIMATE READING CHRG	0.00	0.00	10.00	81.00	(710.00%)
601.00000.37151	WATER RECONNECT-CALL OUT F	0.00	500.00	1,200.00	1,551.00	(29.25%)
601.00000.37170	WATER PERMITS	0.00	0.00	100.00	0.00	100.00%
601.00000.37171	WATER PERMIT SURCHARGES	0.00	0.00	10.00	0.00	100.00%
601.00000.37172	WATER METER SALES & INSTALLA	0.00	165.82	850.00	1,486.86	(74.92%)
601.00000.37201	SEWER COLLECTIONS	0.00	188,336.15	735,000.00	737,731.00	(0.37%)
601.00000.37204	PENALTIES-SEWER	0.00	(5.90)	11,000.00	11,364.52	(3.31%)
601.00000.37250	SEWER CONNECTION CHARGES	0.00	0.00	2,700.00	2,485.00	7.96%
601.00000.37270	SEWER PERMITS	0.00	0.00	100.00	0.00	100.00%
601.00000.37271	SEWER PERMIT SURCHARGES	0.00	0.00	10.00	0.00	100.00%
601.00000.37273	SEWER HOOK-UP CHARGES	0.00	0.00	150.00	0.00	100.00%
601.00000.39206	TRANSFER FROM RECYCLING FU	0.00	0.00	1,000.00	0.00	100.00%
Total Revenues		**0.00**	**358,884.87**	**1,365,974.00**	**1,269,165.36**	**7.09%**
Total PUBLIC UTILITIES OPERATIONS Revenues		**$ 0.00**	**$ 358,884.87**	**$ 1,365,974.00**	**$ 1,269,165.36**	**7.09%**
Expenditures						
WATER DEPARTMENT Expenditures						
601.49400.01010	FULL TIME EMPLOYEES	$ 0.00	$ 11,563.34	$ 100,916.00	$ 82,478.84	18.27%
601.49400.01013	OVERTIME	0.00	223.90	7,061.00	3,222.45	54.36%
601.49400.01020	ON CALL SALARIES	0.00	198.39	2,421.00	1,714.00	29.20%
601.49400.01040	TEMPORARY EMPLOYEES	0.00	1,588.12	19,100.00	17,067.06	10.64%
601.49400.01050	VACATION BUY BACK	0.00	0.00	950.00	0.00	100.00%
601.49400.01210	PERA CONTRIBUTIONS-EMPLOYE	0.00	898.88	8,280.00	6,713.59	18.92%
601.49400.01220	FICA/MC CONTRIBUTIONS-EMPLO	0.00	1,024.58	9,979.00	8,072.79	19.10%
601.49400.01300	HEALTH & DENTAL INSURANCE	0.00	1,365.63	17,220.00	13,733.86	20.24%
601.49400.01313	LIFE INSURANCE	0.00	7.68	95.00	73.77	22.35%
601.49400.01510	WORKERS COMPENSATION	0.00	0.00	6,500.00	6,653.12	(2.36%)
601.49400.02000	OFFICE SUPPLIES	0.00	0.00	800.00	715.33	10.58%
601.49400.02030	PRINTED FORMS	0.00	394.70	2,000.00	1,340.74	32.96%
601.49400.02100	OPERATING SUPPLIES	0.00	14.64	800.00	149.86	81.27%
601.49400.02120	MOTOR FUELS & LUBRICANTS	0.00	97.09	4,000.00	1,810.29	54.74%
601.49400.02200	REPAIR & MAINTENANCE	0.00	6,943.32	38,000.00	70,626.26	(85.86%)
601.49400.02210	EQUIPMENT PARTS	0.00	0.00	900.00	954.46	(6.05%)
601.49400.02220	POSTAGE	0.00	9.48	2,500.00	2,370.46	5.18%
601.49400.02221	TIRES	0.00	0.00	1,000.00	0.00	100.00%
601.49400.02222	STREET REPAIRS	0.00	0.00	6,000.00	1,140.00	81.00%
601.49400.02261	WATER TESTING	0.00	64.00	800.00	576.00	28.00%
601.49400.02262	WATER METER & SUPPLIES	0.00	581.43	5,000.00	6,017.53	(20.35%)

Revised Budget

For PUBLIC UTILITIES OPERATIONS (601)

For the Fiscal Period 2015-10 Ending October 31, 2015

Account Number		Current Budget	Current Actual	Annual Budget	YTD Actual	Remaining Budget %
601.49400.02264	SAFE DRINKING WATER FEE	0.00	0.00	13,844.00	10,446.00	24.54%
601.49400.02280	UNIFORM ALLOWANCE	0.00	65.54	950.00	603.06	36.52%
601.49400.03010	AUDIT & ACCTG SERVICES	0.00	0.00	2,406.00	2,406.00	0.00%
601.49400.03030	ENGINEERING FEES	0.00	0.00	1,000.00	0.00	100.00%
601.49400.03040	LEGAL FEES	0.00	0.00	300.00	0.00	100.00%
601.49400.03210	TELEPHONE	0.00	(9.76)	900.00	345.40	61.62%
601.49400.03310	TRAVEL EXPENSE	0.00	641.75	1,200.00	963.23	19.73%
601.49400.03500	PRINTING & PUBLISHING	0.00	2,304.25	7,000.00	7,629.42	(8.99%)
601.49400.03600	INSURANCE	0.00	0.00	9,500.00	8,457.55	10.97%
601.49400.03870	WATER USAGE-CITY OF BLAINE	0.00	911.20	4,000.00	2,527.47	36.81%
601.49400.04000	CONTRACTUAL SERVICE	0.00	8.00	5,850.00	3,285.05	43.85%
601.49400.04050	MAINTENANCE AGREEMENTS	0.00	42.82	13,775.00	3,632.24	73.63%
601.49400.04300	CONFERENCE & SCHOOLS	0.00	300.00	2,050.00	1,940.25	5.35%
601.49400.04330	DUES & SUBSCRIPTIONS	0.00	0.00	500.00	511.59	(2.32%)
601.49400.04370	PERMITS AND TAXES	0.00	1,816.00	8,200.00	5,359.00	34.65%
601.49400.04470	SURCHARGES-WATER	0.00	0.00	10.00	0.00	100.00%
601.49400.05000	CAPITAL OUTLAY	0.00	0.00	0.00	311.25	0.00%
601.49400.07000	PERMANENT TRANSFERS OUT	0.00	0.00	95,602.00	0.00	100.00%
Total WATER DEPARTMENT Expenditures		**0.00**	**31,054.98**	**401,409.00**	**273,847.92**	**31.78%**
WATER TREATMENT PLANT Expenditures						
601.49402.02100	OPERATING SUPPLIES	0.00	0.00	100.00	0.00	100.00%
601.49402.02120	MOTOR FUELS & LUBRICANTS	0.00	0.00	2,000.00	0.00	100.00%
601.49402.02160	CHEMICALS & CHEMICAL PROD	0.00	883.85	23,000.00	14,207.53	38.23%
601.49402.02200	REPAIR & MAINTENANCE	0.00	158.62	13,000.00	3,114.41	76.04%
601.49402.02210	EQUIPMENT PARTS	0.00	0.00	5,000.00	2,705.26	45.89%
601.49402.03030	ENGINEERING FEES	0.00	0.00	1,000.00	0.00	100.00%
601.49402.03600	INSURANCE	0.00	0.00	11,300.00	11,000.60	2.65%
601.49402.03810	ELECTRIC UTILITIES	0.00	5,651.45	82,000.00	58,479.52	28.68%
601.49402.03830	GAS UTILITIES	0.00	55.79	3,500.00	1,933.43	44.76%
601.49402.04000	CONTRACTUAL SERVICE	0.00	0.00	1,000.00	0.00	100.00%
601.49402.04370	PERMITS,DUES,SUBSCRIPTIONS	0.00	0.00	2,850.00	2,048.34	28.13%
601.49402.07000	PERMANENT TRANSFERS OUT	0.00	0.00	43,635.00	0.00	100.00%
Total WATER TREATMENT PLANT Expenditures		**0.00**	**6,749.71**	**188,385.00**	**93,489.09**	**50.37%**
SEWER DEPARTMENT Expenditures						
601.49450.01010	FULL TIME EMPLOYEES	0.00	11,563.38	100,916.00	82,479.11	18.27%
601.49450.01013	OVERTIME	0.00	223.90	7,061.00	3,222.52	54.36%
601.49450.01020	ON CALL SALARIES	0.00	198.40	2,421.00	1,714.04	29.20%
601.49450.01040	TEMPORARY EMPLOYEES	0.00	1,588.13	19,100.00	17,067.16	10.64%
601.49450.01050	VACATION BUY BACK	0.00	0.00	950.00	0.00	100.00%
601.49450.01210	PERA CONTRIBUTIONS-EMPLOYE	0.00	898.92	8,280.00	6,714.01	18.91%
601.49450.01220	FICA/MC CONTRIBUTIONS-EMPLO	0.00	1,024.66	9,979.00	8,073.46	19.10%
601.49450.01300	HEALTH & DENTAL INSURANCE	0.00	1,365.67	17,220.00	13,734.16	20.24%
601.49450.01313	LIFE INSURANCE	0.00	7.70	95.00	73.96	22.15%
601.49450.01510	WORKERS COMPENSATION	0.00	0.00	6,500.00	6,653.12	(2.36%)
601.49450.02000	OFFICE SUPPLIES	0.00	0.00	800.00	715.24	10.60%
601.49450.02030	PRINTED FORMS	0.00	394.70	1,800.00	1,340.73	25.52%
601.49450.02100	OPERATING SUPPLIES	0.00	14.64	500.00	149.83	70.03%

CITY OF SPRING LAKE PARK

Statement of Revenue and Expenditures

Revised Budget

For PUBLIC UTILITIES OPERATIONS (601)

For the Fiscal Period 2015-10 Ending October 31, 2015

Account Number		Current Budget	Current Actual	Annual Budget	YTD Actual	Remaining Budget %
601.49450.02120	MOTOR FUELS & LUBRICANTS	0.00	97.07	4,000.00	1,810.26	54.74%
601.49450.02200	REPAIR & MAINTENANCE	0.00	637.40	7,500.00	16,085.87	(114.48%)
601.49450.02210	EQUIPMENT PARTS	0.00	0.00	2,000.00	61.40	96.93%
601.49450.02220	POSTAGE	0.00	9.47	2,500.00	1,720.44	31.18%
601.49450.02221	TIRES	0.00	0.00	1,000.00	0.00	100.00%
601.49450.02222	STREET REPAIRS	0.00	0.00	1,500.00	9,533.00	(535.53%)
601.49450.02262	WATER METER & SUPPLIES	0.00	581.43	4,000.00	6,017.52	(50.44%)
601.49450.02280	UNIFORM ALLOWANCE	0.00	65.53	950.00	603.05	36.52%
601.49450.03010	AUDIT & ACCTG SERVICES	0.00	0.00	2,406.00	2,406.00	0.00%
601.49450.03030	ENGINEERING FEES	0.00	0.00	1,000.00	0.00	100.00%
601.49450.03040	LEGAL FEES	0.00	0.00	300.00	0.00	100.00%
601.49450.03210	TELEPHONE	0.00	(9.75)	700.00	350.10	49.99%
601.49450.03310	TRAVEL EXPENSE	0.00	641.75	1,000.00	800.50	19.95%
601.49450.03500	PRINTING & PUBLISHING	0.00	123.63	300.00	123.63	58.79%
601.49450.03600	INSURANCE	0.00	0.00	9,100.00	8,104.48	10.94%
601.49450.03810	ELECTRIC UTILITIES	0.00	266.56	3,200.00	2,353.70	26.45%
601.49450.03840	METRO WASTE CONTROL	0.00	37,834.92	454,020.00	416,184.12	8.33%
601.49450.04000	CONTRACTUAL SERVICE	0.00	8.00	11,850.00	7,065.06	40.38%
601.49450.04050	MAINTENANCE AGREEMENTS	0.00	42.83	11,460.00	2,192.19	80.87%
601.49450.04300	CONFERENCE & SCHOOLS	0.00	300.00	2,450.00	1,695.23	30.81%
601.49450.04330	DUES & SUBSCRIPTIONS	0.00	0.00	300.00	74.57	75.14%
601.49450.04390	MISCELLANEOUS	0.00	0.00	100.00	0.00	100.00%
601.49450.04450	RESERVE CAPACITY CHARGES	0.00	0.00	2,700.00	2,460.15	8.88%
601.49450.04460	SURCHARGES-SEWER	0.00	0.00	10.00	0.00	100.00%
601.49450.07000	PERMANENT TRANSFERS OUT	0.00	0.00	76,212.00	0.00	100.00%
Total SEWER DEPARTMENT Expenditures		**0.00**	**57,878.94**	**776,180.00**	**621,578.61**	**19.92%**
Total PUBLIC UTILITIES OPERATIONS Expenditures		**$ 0.00**	**$ 95,683.63**	**$ 1,365,974.00**	**$ 988,915.62**	**27.60%**
PUBLIC UTILITIES OPERATIONS Excess of Revenues Over		**$ 0.00**	**$ 263,201.24**	**$ 0.00**	**$ 280,249.74**	**0.00%**

CITY OF SPRING LAKE PARK

Statement of Revenue and Expenditures

Revised Budget

For the Fiscal Period 2015-10 Ending October 31, 2015

Account Number	Current Budget	Current Actual	Annual Budget	YTD Actual	Remaining Budget %
Total Revenues	$ 0.00	$ 358,884.87	$ 1,365,974.00	$ 1,269,165.36	7.09%
Total Expenditures	$ 0.00	$ 95,683.63	$ 1,365,974.00	$ 988,915.62	27.60%
Total Excess of Revenues Over Expenditures	$ 0.00	$ 263,201.24	$ 0.00	$ 280,249.74	0.00%

RESOLUTION NO. 15-28

A RESOLUTION MAKING A SELECTION NOT TO WAIVE THE STATUTORY TORT LIMITS FOR LIABILITY INSURANCE PURPOSES

WHEREAS, pursuant to previous action taken, the League of Minnesota Cities Insurance Trust has asked the City to make an election with regards to waiving or not waiving its tort liability established by Minnesota Statutes 466.04; and

WHEREAS, the choices available are as follows: to not waive the statutory tort limit, to waive the limit but to keep insurance coverage at the statutory limit and to waive the limit and to add insurance to a new level.

NOW, THEREFORE, BE IT RESOLVED that the Spring Lake Park City Council does hereby elect not to waive the statutory tort liability limit established by Minnesota Statutes 466.04.

APPROVED BY:

_____
Cindy Hansen, Mayor

ATTEST:

_____
Daniel R. Buchholtz, City Administrator

The foregoing Resolution was moved for adoption by Councilmember .

Upon Vote being taken thereon, the following voted in favor thereof:

And the following voted against the same:

Whereon the Mayor declared said Resolution duly passed and adopted the 16th day of November, 2015.

LEAGUE OF MINNESOTA CITIES

CONNECTING & INNOVATING
SINCE 1913

LIABILITY COVERAGE – WAIVER FORM

LMCIT members purchasing coverage must complete and return this form to LMCIT before the effective date of the coverage. Please return the completed form to your underwriter or email to pstech@lmc.org

This decision must be made by the member's governing body every year. You may also wish to discuss these issues with your attorney.

League of Minnesota Cities Insurance Trust (LMCIT) members that obtain liability coverage from LMCIT must decide whether to waive the statutory tort liability limits to the extent of the coverage purchased. The decision has the following effects:

- *If the member does not waive the statutory tort limits*, an individual claimant would be able to recover no more than $500,000 on any claim to which the statutory tort limits apply. The total all claimants would be able to recover for a single occurrence to which the statutory tort limits apply would be limited to $1,500,000. These statutory tort limits apply regardless of whether the city purchases the optional excess liability coverage.

- *If the member waives the statutory tort limits and does not purchase excess liability coverage*, a single claimant could potentially recover up to $2,000,000 for a single occurrence. (Under this option, the tort cap liability limits are waived to the extent of the member's liability coverage limits, and the LMCIT per occurrence limit is $2 million.) The total all claimants would be able to recover for a single occurrence to which the statutory tort limits apply would also be limited to $2,000,000, regardless of the number of claimants.

- *If the member waives the statutory tort limits and purchases excess liability coverage*, a single claimant could potentially recover an amount up to the limit of the coverage purchased. The total all claimants would be able to recover for a single occurrence to which the statutory tort limits apply would also be limited to the amount of coverage purchased, regardless of the number of claimants.

Claims to which the statutory municipal tort limits do not apply are not affected by this decision.

CITY OF SPRING LAKE PARK selects liability coverage limits of $1,000,000 from the League of Minnesota Cities Insurance Trust (LMCIT).

Check one:

☐ The member **DOES NOT WAIVE** the monetary limits on municipal tort liability established by Minnesota Statutes, Section 466.04.

☐ The member **WAIVES** the monetary limits on municipal tort liability established by Minnesota Statutes, Section 466.04 to the extent of the limits of the liability coverage obtained from LMCIT.

Date of city council/governing body meeting _____

Signature_____ Position_____

145 UNIVERSITY AVE. WEST
ST. PAUL, MN 55103-2044

PHONE: (651) 281-1200 FAX: (651) 281-1299
TOLL FREE: (800) 925-1122 WEB: WWW.LMC.ORG

M E M O R A N D U M

October 30, 2015

To: Mayor and Council

Cc: Dan Buchholtz, City Administrator

From: Wanda Brown

Re: Contract with Xcel Energy for Collection of Fluorescent Lamps

Xcel Energy has agreed to work with the City of Spring Lake Park on its April and October fluorescent bulb collection. The Recycling Division and Xcel Energy agreed that the City would arrange the collection of the bulbs. Staffing for the event will be the responsibility of the City. Xcel Energy will reimburse the City 100% of the costs of the collection and the costs of recycling which shall include the costs of transportation, hauling, supplies, administrative expenses and labor costs directly associated with lamp recycling for Xcel residential and small business customers who can prove they have an Xcel account.

Please find attached to this memo a copy of the contract. I am seeking the Council's permission to enter into said contract (2016), with Xcel Energy.

Thank you

Attachment

Wisconsin Energy
Conservation Corporation

Xcel Energy®

Agreement for Collections of Lamps

Issued To

City of Spring Lake Park

Lamp Recycling

Effective as of January 1, 2016

AGREEMENT FOR COLLECTIONS
OF FLUORESCENT AND HIGH INTENSITY DISCHARGE LAMPS
BETWEEN
WISCONSIN ENERGY CONSERVATION CORPORATION
AND CITY OF SPRING LAKE PARK

THIS AGREEMENT ("Agreement") is between Wisconsin Energy Conservation Corporation ("WECC") and City of Spring Lake Park (the "Recycler"), a CITY of the State of Minnesota.

WHEREAS, WECC has contracted with Xcel Energy Services Inc. ("Xcel Energy") to administer a lamp recycling program; and

WHEREAS, the Minnesota Legislature has enacted Minn. Stat. § 115A.932, which prohibits the disposal of fluorescent and high intensity discharge (HID) lamps in solid waste, and Minn. Stat. § 216B.241, subd. 5(b), requires Xcel Energy, as a public utility that provides electric service to 200,000 or more customers, to establish, either directly or by contracting with another, a system to collect and recycle lamps from its residential customers and its small business customers that generate an average of fewer than ten spent lamps per year; and

WHEREAS, the Recycler has established and currently operates a program for the collection and management of household hazardous waste (HHW program), including the collection of fluorescent and HID lamps from Xcel Energy's residential household customers located in the Recycler's area; and

WHEREAS, Recycler's area consists of City of Spring Lake Park; and

WHEREAS, WECC and the Recycler desire to enter into an Agreement whereby WECC will pay costs incurred by the Recycler for the collection and recycling of fluorescent and HID lamps (lamps) from Xcel Energy's residential customers as part of Xcel Energy's system to meet its statutory obligations.

NOW, THEREFORE, in consideration of the terms and conditions stated in the Agreement, WECC and the Recycler agree as follows:

1. Lamp collection and recycling. On behalf of WECC and Xcel Energy and as part of the Recycler's HHW program, the Recycler shall collect and recycle lamps in the Recycler's area. Collection and recycling services will be provided at no cost to Xcel Energy residential customers generating an average of fewer than ten spent lamps per year. The Recycler shall offer lamp collection services to such Xcel Energy customers at Recycler's household hazardous waste collection site(s), and may arrange with local units of government to provide additional sites for collecting lamps. The Recycler shall be responsible for:

   a. Providing to WECC on a monthly basis throughout the program year a description and schedule of lamp collection events in the Recycler's area for the program year and updated schedule information throughout the year;

   b. Operating and maintaining HHW collection sites;

   c. Arranging collection, storage, transportation, and recycling of lamps; and

d. Completion and prompt submittal to WECC on at least a quarterly basis of a CFL Recycling Report, an example of which is attached hereto as Exhibit A.

2. Reimbursement Request for Lamp Collection Activities. At the same time that the Recycler submits its CFL Recycling Report, the Recycler shall also provide on at least a quarterly basis and in a form acceptable to WECC (Exhibit B – Lamp Recycling Reporting Invoice) the following documentation regarding the Recycler's lamp collection and recycling activities:

a. A description of the number and types of lamps collected;

b. Costs of administration, labor, supplies, storage, transportation, and recycling of lamps from residential households;

c. Proof that collected lamps were recycled;

d. The percentage of the Recycler's lamp collection and reimbursement costs that WECC will pay is 100%.

e. The total amount to be reimbursed to the Recycler.

This documentation shall be provided to the WECC designated representative on at least a quarterly basis, or as available.

WECC shall pay to the Recycler the costs incurred by the Recycler for the collection and recycling of lamps from residents at the percentage defined in 2d.

WECC shall pay to the Recycler the costs incurred by the Recycler for the collecting and recycling of the following type of lamps: fluorescent tubes, circular, u-bend, compact fluorescents and high intensity discharge. Ballasts that are not attached to the bulb will not be reimbursed.

f. The Recycler shall be responsible for its own expenses, including but not limited to operation and maintenance of collection site(s), and promotional expenses above and beyond WECC's planned and coordinated promotions.

g. This Agreement is expressly contingent upon Minnesota Department of Commerce's (DOC) approval of Xcel Energy's request to implement the Program in Xcel Energy's Minnesota service area as a Conservation Improvement Program (CIP). If such approval is not given initially, or is subsequently withdrawn, or recovery of program costs through electrical rates is disallowed by the Minnesota Public Utilities Commission (MPUC), this Agreement shall be null and void upon notification to the Recycler. WECC shall make no further payments to the Recycler, except that WECC shall make such payments for which services have been rendered through the date of the notification.

Prior year invoices shall be submitted on or before April 1, 2016. Invoices received after this date will not be eligible for reimbursement.

3. Reimbursement Payments by WECC. WECC shall reimburse the Recycler for costs associated with the collection and recycling of lamps as follows:

a. Within thirty (30) days following receipt of complete, timely and accurate documentation listed in Section 2 of this Agreement, WECC shall reimburse the Recycler the percentage of the costs incurred by the Recycler for the collection and recycling of lamps as calculated by Section 2 of this Agreement. For lamps from residential customers, this shall include reimbursement for costs including administration, labor, supplies, storage, transportation, and recycling of lamps and costs associated with the Recycler coordination with local units of government for establishment of additional lamp collection events in the Recycler's area.

b. WECC shall not reimburse the Recycler for promotional expense above and beyond WECC's planned and coordinated promotions.

c. To be considered for reimbursement, all prior year invoices must be submitted on or before April 1, 2016. Invoices received after this date will not be eligible for reimbursement.

4. Auditing. Within sixty (60) days of receipt of documentation listed in Section 2, WECC shall have the right to audit said documentation and request additional information. Further, the Recycler shall maintain adequate supporting records for verification of actual costs paid by the Recycler. The records shall be in a form that is consistent with generally accepted accounting principles, consistently applied. During the term of this Agreement and six (6) years following final payment hereunder, the Recycler shall preserve such records and allow access to them, by WECC auditors, during normal business hours. The WECC and Xcel Energy records and documents that are relevant to this Agreement or transaction shall be subject to examination by WECC, the legislative auditor or the State auditor, during the term of this Agreement and for a period of at least six years following termination or cancellation of this Agreement, pursuant to the requirements of Minn. Stat. Section 16C.05 Subd. 5, as it may be amended.

5. Reserved

6. Recycler's Obligation Defined by Agreement. WECC and the Recycler acknowledge and agree that the Recycler's obligations to collect and recycle lamps are solely defined by this Agreement and any applicable law.

Recycler will conduct all lamp collection activities under the Agreement in an economically, socially and environmentally responsible manner. Recycler further agrees to ensure that its employees, agents and representatives perform the lamp collection activities in accordance with Xcel Energy's Code of Conduct, as in effect from time-to-time, which is available upon request.

7. Term. The term of this Agreement is from January 1, 2016, until December 31, 2016, regardless of the date of signatures. At the option of WECC and the Recycler, this Agreement may be renewed on an annual or biannual basis concurrent with Xcel Energy's statutory obligation to establish a system to collect and recycle lamps from residential and small business customers or otherwise.

8. Termination. Notwithstanding the terms of this Agreement, WECC may, at its option, terminate the Agreement in whole or in part at any time by written notice thereof to Recycler, whether or not Recycler is in default. Recycler may terminate this Agreement, in whole or in part, upon sixty (60) days prior notification to WECC.

9. Notice. All information shall be sent by United States mail, postage prepaid, to the following representatives of WECC and Recycler, or may be submitted by email:

To WECC	To the Recycler:
Rhonda Pittman Wisconsin Energy Conservation Corporation 431 Charmany Drive Madison, WI 53719	

10. Indemnification. Each party agrees that it will be responsible for its own acts and the results thereof to the extent authorized by law and shall not be responsible for the acts of the other party and the results thereof. The liability of the Recycler shall be governed by the provisions of Minnesota Statutes, Chapter 466 and other applicable law.

11. Compliance with Laws. The parties agree to abide by all applicable Federal, State or local laws, statutes, ordinances, rules and regulations now in effect of hereafter adopted pertaining to this Agreement or the facilities, programs and staff for which each party is responsible. This Agreement shall be governed by and construed in accordance with the substantive and procedural laws of the State of Minnesota, without giving effect to the principles of conflict of laws. All proceedings related to this Agreement shall be venued in courts located within the State of Minnesota.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates indicated below.

ACCEPTED:	ACCEPTED:
RECYCLER	**WECC**
City of Spring Lake Park	**Wisconsin Energy Conservation Corporation**
By:_____	By _____
Name: _____	Name: Mary Woolsey Schlaefer
Title: _____	Title: President and CEO
Date:_____	Date:_____

Exhibit "A"

2016 Xcel Energy Minnesota County CFL Recycling Report

Date of submitted report:

County Name:

% of total reimbursed by Xcel Energy: 0% *(insert % approved to be paid by Xcel Energy per 2015 contract)*

County Name:

County Address:

County Contact:

Time Period	Invoice #	under 4ft	over 4ft	CFLS	Circular	U-bent tubes	HID	Other	Broken (lbs)	Total Bulbs	Admin	Labor	Storage/ Transportation	Supplies	Disposal	Business Bulb Costs	Total Costs	Xcel Energy Reimbursement Total
										-	$ -	$ -	$ -		$ -	$ -	$ -	$ -
										-							$ -	$ -
										-							$ -	$ -
										-							$ -	$ -
Totals		-	-	-	-	-	-	-	-	-	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -

Disposal Company :

Description of recycling offering(s):

Please ensure that all receipts, invoices and certificates of recycling are attached to this report along with an actual INVOICE from your county

Any questions please contact Becky Jones at WECC

608-729-6815

beckyj@weccusa.org

Exhibit "B"

City of Spring Lake Park Lamp Recycling Invoice

Invoice date:
Invoice #:
Recycle Time Date/Period:

To: Wisconsin Energy Conservation Corp.
Attn: Xcel Energy MN Recycling Program
431 Charmany Drive
Madison WI 53719

DISPOSAL COSTS:	**Quantity**	**Price each**	**Total Cost**
4 ft or less Fluorescent Lamps			$
Over 4 ft Fluorescent Lamps			
CFLs			
Circular			
U-Bent Fluorescent Lamps			
HID			
Other			
Broken			
Total Disposal Costs			$
OTHER COSTS:			
Administration			
Labor			
Storage			
Supplies			
Total Expenses			$
Amount due (%)			**$**

Remit Payment to: *City Name*
City Address

Memorandum

To: Mayor and City Council

From: Marian Rygwall, Parks & Recreation Director

Date: November 12, 2015

Re: Park Dedication Study

The Parks and Recreation Commission reviewed the Park Dedication Study on November 10th and unanimously approved the proposed fee increase to $1,897 per new housing unit. The commission feels strongly that the park dedication fee is currently too low. With previous budget cuts, the funding to keep our parks in ADA compliance and playground equipment safety compliant are a concern of the commission. Then, when looking to the future, park improvement projects which keep the parks relevant also need to be considered.

In the study you will see a wish list of park improvement projects that the commission feels are worth investigating for future consideration. In 2016, they plan to visit facilities in the metro area to study how other cities are re-designing their parks and how these amenities impact their communities.

The Parks and Recreation Commission remains dedicated to serving their community and to providing parks that meet the needs and desires of the residents.

City of Spring Lake Park
Park Dedication Study
October 15, 2015

The purpose of this park dedication fee study is to ascertain the park improvements necessary as a result of new development as opposed to those improvements that are required for existing dwelling units.

The City of Spring Lake Park comprises of 2.2 square miles of land, located in Anoka and Ramsey Counties. The City is 98% developed. However, with the undeveloped land remaining and future redevelopment opportunities, the Metropolitan Council anticipates the City's population to grow by 987 persons between 2015 and 2040. This would represent an increase in the City's population of 15.2% over the next twenty-five years.

The City's Park and Recreation Commission has identified a number of proposed improvements between 2015 and 2040 to enhance the City's park and recreation facilities. The total value of the improvements total $5,906,650. The improvements range from park landscaping and lighting projects to a new community center facility. A list of the proposed improvement projects are listed in Appendix A.

It is the policy of the City that any new growth should contribute to the park needs of the community in an equitable manner. State Law requires the City to develop a formula to equitably allocate the portion of the identified community park improvements between existing residents and new development.

Based on the City's review of "Thrive MSP 2040" forecasts, the City has developed the following projections to determine the extent new development will contribute to the City's long-term park system capital needs.

Users	**Total Potential Users**	**% of Park System**
Existing Development		
Existing Residents	6,513	86.8%
Future Development		
Residents from New Development	987	13.2%
Total All Development	7,500	100.0%

The formula for allocating the total value of potential improvements between 2015 and 2040 is as follows:

Community Park Improvements to be funded through Park Dedication	$5,906,650	
New Development Contribution (15.2% of total)	$779,678	
New Housing Units		411
Community Park Funding Per New Housing Unit	$1,897	

The portion of the community park improvements benefits existing development in the City. Regular transfer contributions to park capital funds from the general fund should be planned and budgeted for in future years to ensure that this funding component is met. A small portion of the funds needed to allocate toward existing development is available for community park improvements. The table below identifies the annual transfer funding to fully fund the needs of existing development towards the future community park component of the system in the next twenty five years.

Community Park Improvements to be funded through Existing Development	$5,126,972	
Park Dedication Fund (Fund 225)	$ 224,209	
Remaining Gap to be Funded	$4,902,763	
Funding Time Frame (years) – 2016-2040		25
Amount per year (2015 dollars)	$196,110	

This annual general fund transfer could be satisfied through issuance of debt, grants or other outside sources of funding associated with one or more of the identified 2015-2040 community park improvements.

Staff recommends that the City Council increase the residential park dedication fee rate from $1,000 per unit to $1,897 per unit to reflect the role new development has in contributing to the 2015-2040 community park improvements.

If you have any questions, please don't hesitate to contact me at 763-784-6491.

Appendix A

City of Spring Lake Park
Community Park Improvements -- 2015-2040

Able Park Hockey Rink Hard Surface	$55,000.00
Able Park Recreation Building	$425,000.00
Able Park Ballfield Lighting	$60,000.00
Triangle Park Gazebo	$35,000.00
Triangle Park Walking Path Lighting	$25,000.00
Triangle Park Irrigation	$30,000.00
Triangle Park Landscaping	$8,000.00
Terrace Park Ballfield Lighting	$25,000.00
Lakeside Park Ballfield Lighting	$60,000.00
Lakeside Park Irrigation	$10,000.00
Lakeside Park Splash Pad	$300,000.00
Lakeside Park Playground Rick Misters	$17,000.00
Lakeside Park Musical Instrument/Sculpture	$30,000.00
Terrace Pre-School Equipment	$50,000.00
Terrace Park Recreation Building	$350,000.00
Community Center Facility	$3,400,650.00
Westwood Park Improvement	$20,000.00
Sanburnol Park Picnic Shelter	$45,000.00
Sanburnol Playground Equipment	$100,000.00
Sanburnol Park Landscaping/Lighting	$46,000.00
Sanburnol Park Splash Pad	$300,000.00
Sanburnol Park Ballfield Lighting	$60,000.00
Rock Misters Athletic Fields	$49,000.00
Sunscreens for Player Benches	$126,000.00
Fitness Course	$30,000.00
Challenge Course	$250,000.00
Total Cost of Improvements	**$5,906,650.00**

Stantec Consulting Services Inc.
2335 Highway 36 West
St. Paul MN 55113
Tel: (651) 636-4600
Fax: (651) 636-1311

November 10, 2015

Honorable Mayor and City Council
City of Spring Lake Park
1301 81st Avenue NE
Spring Lake Park, MN 55432

Re: CSAH 35 / Central Ave. NE Street Improvements
Project No. 193802914
Contractor's Request for Payment No. 2

Dear Mayor and Councilmembers:

Attached for your approval is Contractor's Request for Payment No. 2 for the CSAH 35 / Central Ave. NE Street Improvement Project. The prime Contractor on this project is North Valley Inc.

This request covers work complete through the end of October. Some of the payment items are based on estimated quantities as final documentation from the general contractor has yet to be submitted. With this payment, the total value completed to date is about 85% of the original contract amount.

We have reviewed the contractor's payment request and found it to be in order. We recommend approval. **If the City wishes to approve this request, then payment should be made to North Valley Inc. in the amount of $36,302.43.** The costs associated with this contractor's payment should be covered by the city's development agreement with the property owner at 8299 Central Avenue NE.

Please execute the payment request documents. Keep one copy for your records, forward two copies to Valley Paving (one for them and one for their bond company), and return one copy to me.

Feel free to contact Harlan Olson or me if you have any questions.

Regards,
STANTEC

Phil Gravel
City Engineer

Enclosures

Stantec

Owner:	City of Spring Lake Park, 1301 81st Ave. NE, Spring Lake Park, MN 55432	Date:	November 9, 2015
For Period:	10/14/2015 to 11/9/2015	Request No:	2
Contractor:	North Valley, Inc., 20015 Iguana St. NW, Ste. 100, Nowthen, MN 55330		

CONTRACTOR'S REQUEST FOR PAYMENT
CSAH 35/CENTRAL AVENUE NE STREET IMPROVEMENTS
STANTEC PROJECT NO. 193802914

SUMMARY

1	Original Contract Amount			$ 198,241.57
2	Change Order - Addition		$ 0.00	
3	Change Order - Deduction		$ 0.00	
4	Revised Contract Amount			$ 198,241.57
5	Value Completed to Date			$ 168,640.55
6	Material on Hand			$ 0.00
7	Amount Earned			$ 168,640.55
8	Less Retainage 5%			$ 8,432.03
9	Subtotal			$ 160,208.52
10	Less Amount Paid Previously			$ 124,006.09
11	Liquidated damages -			$ 0.00
12	AMOUNT DUE THIS REQUEST FOR PAYMENT NO.	2		$ 36,202.43

Recommended for Approval by:
STANTEC

Phil Strand 11/10/15

Approved by Contractor:
NORTH VALLEY, INC.

Approved by Owner:
CITY OF SPRING LAKE PARK

Specified Contract Completion Date:

Date:

No.	Item	Unit	Contract Quantity	Unit Price	Current Quantity	Quantity to Date	Amount to Date
	BASE QUOTE:						
1	MOBILIZATION	LS	1	4860.38	0.2	0.9	$4,374.34
2	CLEARING AND GRUBBING	LS	1	1354.62		1	$1,354.62
3	REMOVE CONCRETE CURB AND GUTTER	LF	10	27.09		10	$270.90
4	REMOVE BITUMINOUS	SY	475	7.80		400	$3,120.00
5	SAWING BITUMINOUS PAVEMENT (FULL DEPTH)	LF	1410	2.17		240	$520.80
6	SALVAGE AND REINSTALL SIGN AND POST	EA	7	146.30		5	$731.50
7	ADJUST SANITARY MANHOLE AT 18+25 WEST	LS	1	1625.54		1	$1,625.54
8	COMMON EXCAVATION (P)	CY	1250	24.62		1250	$30,775.00
9	SUBGRADE EXCAVATION	CY	125	24.61	90	90	$2,214.90
10	GRANULAR BORROW (CV)	CY	125	37.57	90	90	$3,381.30
11	AGGREGATE BASE, CLASS 2 (SHOULDERING)	TN	175	31.40	100	100	$3,140.00
12	AGGREGATE BASE, CLASS 5 FOR TURNLANES	TN	750	20.04		700	$14,028.00
13	AGGREGATE BASE, CLASS 5 FOR SIDEWALK	TN	250	24.01		220	$5,282.20
14	BITUMINOUS MATERIAL FOR TACK COAT	GAL	180	3.79		100	$379.00
15	TYPE SP 9.5 WEARING COURSE MIXTURE (2,C)	TN	200	85.77	160	160	$13,723.20
16	TYPE SP 12.5 NON-WEARING COURSE MIXTURE (2,C)	TN	300	83.12		270	$22,442.40
17	SUBGRADE PREPARATION	SY	2580	3.30		2580	$8,514.00
18	B618 CONCRETE CURB AND GUTTER	LF	68	35.17		65	$2,286.05
19	4" CONCRETE WALK	SF	4740	5.85		4500	$26,325.00
20	6" CONCRETE WALK	SF	900	7.53		800	$6,024.00
21	TRUNCATED DOME PANEL	SF	8	43.35		8	$346.80
22	TRAFFIC CONTROL	LS	1	1083.69	0.5	1	$1,083.69
23	SILT FENCE, TYPE MS	LF	1380	2.98		800	$2,384.00
24	CB INLET PROTECTION	EA	4	178.81		1	$178.81
25	TOPSOIL BORROW (LV)	CY	250	36.02	200	200	$7,204.00
26	APPLICATION OF WATER FOR TURF ESTABLISHMENT	MG	100	21.67			$0.00
27	SEED AND FERTILIZER. WITH WOOD FIBER BLANKET	SY	2400	3.14	1200	1200	$3,768.00
28	SIGN PANELS, TYPE C	SF	6.3	37.93			$0.00
29	4" SOLID LINE, WHITE PAINT	LF	2912	0.39	2400	2400	$936.00
30	12" SOLID WHITE STOP BAR	LF	32	7.83	25	25	$195.75
31	4" DOUBLE SOLID LINE, YELLOW PAINT	LF	1300	0.82	1050	1050	$861.00
32	CROSSWALK MARKING	SF	144	8.81	115	115	$1,013.15
33	PAVEMENT MESSAGE, RIGHT ARROW	EA	1	156.60	1	1	$156.60
	TOTAL BASE QUOTE:						$168,640.55

TOTAL BASE QUOTE:	$168,640.55
TOTAL WORK COMPLETED TO DATE	**$168,640.55**

PROJECT PAYMENT STATUS

OWNER CITY OF SPRING LAKE PARK

STANTEC PROJECT NO. 193802914

CONTRACTOR NORTH VALLEY, INC.

CHANGE ORDERS

No.	Date	Description	Amount
Total Change Orders			

PAYMENT SUMMARY

No.	From	To	Payment	Retainage	Completed
1	09/01/2015	10/13/2015	124,006.09	6,526.64	130,532.73
2	10/14/2015	11/09/2015	36,202.43	8,432.03	168,640.55

Material on Hand

Total Payment to Date	$160,208.52	Original Contract	$198,241.57
Retainage Pay No. 2	8,432.03	Change Orders	
Total Amount Earned	$168,640.55	Revised Contract	$198,241.57

Stantec Consulting Services Inc.
2335 Highway 36 West
St. Paul MN 55113
Tel: (651) 636-4600
Fax: (651) 636-1311

November 10, 2015

Honorable Mayor and City Council
City of Spring Lake Park
1301 81st Avenue NE
Spring Lake Park, MN 55432

Re: 2015 Sanitary Sewer Lining Project
Project No. 193803135
Contractor's Request for Payment No. 1

Dear Mayor and Councilmembers:

Attached for your approval is Contractor's Request for Payment No. 1 for the 2015 Sanitary Sewer Lining Project. The prime Contractor on this project is Visu-Sewer Inc.

This request covers work complete through the end of October as noted in Visu-Sewer Invoice Number 27154. Terry Randall has been overseeing the construction.

We have reviewed the contractor's payment request and found it to be in order. We recommend approval. **If the City wishes to approve this request, then payment should be made to Visu-Sewer, Inc. in the amount of $43,838.89.**

Please execute the payment request documents. Keep one copy for your records, forward two copies to Valley Paving (one for them and one for their bond company), and return one copy to me.

Feel free to contact Harlan Olson or me if you have any questions.

Regards,
STANTEC

Phil Gravel
City Engineer

Enclosures

Stantec

Owner:	City of Spring Lake Park, 1301 81st Ave. NE, Spring Lake Park, Mn 55432	Date:	November 10, 2015
For Period:	11/1/2015 to 11/10/2015	Request No:	1
Contractor:	Visu-Sewer, Inc., W230 N4855 Betker Dr., Pewaukee, WI 53072		

CONTRACTOR'S REQUEST FOR PAYMENT
2105 SANITARY SEWER LINING
STANTEC PROJECT NO. 193803135

SUMMARY

1	Original Contract Amount			$ 152,976.60
2	Change Order - Addition		$ 0.00	
3	Change Order - Deduction		$ 0.00	
4	Revised Contract Amount			$ 152,976.60
5	Value Completed to Date			$ 46,146.20
6	Material on Hand			$ 0.00
7	Amount Earned			$ 46,146.20
8	Less Retainage 5%			$ 2,307.31
9	Subtotal			$ 43,838.89
10	Less Amount Paid Previously			$ 0.00
11	Liquidated damages -			$ 0.00
12	AMOUNT DUE THIS REQUEST FOR PAYMENT NO.	1		$ 43,838.89

Recommended for Approval by:
STANTEC

Phil Howard 11/10/15

Approved by Contractor:
VISU-SEWER INC.

See attached invoice #27154

Approved by Owner:
CITY OF SPRING LAKE PARK

Specified Contract Completion Date:

Date:

No.	Item	Unit	Contract Quantity	Unit Price	Current Quantity	Quantity to Date	Amount to Date
	BASE BID:						
1	MOBILIZATION	LS	1	4350.00	0.5	0.5	$2,175.00
2	TRAFFIC CONTROL	LS	1	1500.00	0.5	0.5	$750.00
3	SEWER REHABILITATION, 8-INCH OR 9-INCH CIPP	LF	5165	24.20	1786	1786	$43,221.20
4	SEWER REHABILITATION, 10-INCH CIPP	LS	198	53.20			$0.00
5	GROUT SERVICE LATERAL CONNECTION	EA	58	200.00			$0.00
	TOTAL BASE QUOTE:						$46,146.20
	TOTAL BASE BID:						$46,146.20
	TOTAL WORK COMPLETED TO DATE						**$46,146.20**

PROJECT PAYMENT STATUS

OWNER CITY OF SPRING LAKE PARK

STANTEC PROJECT NO. 193803135

CONTRACTOR VISU-SEWER INC.

CHANGE ORDERS

No.	Date	Description	Amount
		Total Change Orders	

PAYMENT SUMMARY

No.	From	To	Payment	Retainage	Completed
1	11/01/2015	11/10/2015	43,838.89	2,307.31	46,146.20

Material on Hand

Total Payment to Date	$43,838.89	Original Contract	$152,976.60
Retainage Pay No. 1	2,307.31	Change Orders	
Total Amount Earned	$46,146.20	Revised Contract	$152,976.60

Visu-Sewer
Inspect. Maintain. Rehabilitate.

www.visu-sewer.com

SPRING LAKE PARK
C/O PHIL GRAVEL/STANTEC
2335 W. HWY 36
ST PAUL, MN 55113

INVOICE NUMBER: 27154
INVOICE DATE: 11/2/2015

ATTN: ACCOUNTS PAYABLE
RE: 2015 SEWER LINING PROJECT/
STANTEK PROJ# 193803135
PAY ESTIMATE # 1

CUSTOMER NO.
JOB NO. 15177M

ITEM	DESCRIPTION	EST. QTY	U/M	PRICE	COMPLETED THIS PERIOD	COMPLETED TO DATE	AMOUNT
1	MOB	1	LS	4,350.00	0.50	0.50	2,175.00
2	TRAFFIC CONTROL	1	LS	1,500.00	0.50	0.50	750.00
3	CIPP 8"-9"	5,165	LF	24.20	1,786.00	1,786.00	43,221.20
4	CIPP 10"	198	LF	53.00			-
5	GROUT LATERAL	58	EA	200.00			-
							-
							-
							-
							-
							-

TOTAL WORK COMPLETED	46,146.20
LESS 5% RETAINAGE	2,307.31
LESS PREVIOUS INVOICES	-
TOTAL AMOUNT DUE	43,838.89

PLEASE REMIT TO:

VISU-SEWER, INC.
P.O. BOX 804
PEWAUKEE, WI 53072-0804

DUE UPON RECEIPT OF INVOICE.
A SERVICE CHARGE OF 1 1/2 % PER MONTH MAY

MEMORANDUM

TO: MAYOR HANSEN AND MEMBERS OF THE CITY COUNCIL

FROM: DANIEL R. BUCHHOLTZ, CITY ADMINISTRATOR

SUBJECT: PERFORMANCE EVALUATION PUBLIC STATEMENT

DATE: NOVEMBER 10, 2015

Here is the public statement that is required to be read the meeting after which a closed session is held to conduct a performance evaluation.

> The City Council went into closed session to conduct a performance evaluation on the City Administrator's job performance. An evaluation was given by the Council. The City Council believed the City Administrator's job performance generally exceeded the job requirements of the position.

City of Spring Lake Park
1301 81st Avenue NE
Spring Lake Park, MN 55432

Contractor's Licenses

November 16, 2015

Mechanical Contractor

Assured Heating, A/C & Refrigeration

Plumbing Contractor

Benjamin Franklin Plumbing

Sign Contractor

Ne-Art Custom Neon, Inc.

Police Report

October 2015

Submitted for Council Meeting – November 16, 2015

The Spring Lake Park Police Department responded to three hundred and sixty-seven calls for service for the month of October 2015. This is compared to responding to four hundred and twenty-nine calls for service in October of 2014.

The police department for the month of October 2015 issued one hundred and sixty-nine citations. This is compared to issuing one hundred and eighty-four citations in October of 2014. The police department continues to proactively inform our residents and those traveling the roadways of our city, of their speeds by placing our speed trailer at different locations within our community. This month the speed trailer was deployed at four different locations.

Our School Resource Officer, Officer Fiske reports that the month of October 2015 has been a busy month, although school was not in session October 12th- 16th due to parent/teacher conferences and MEA break. There has been three home football games, which included "Home Coming" with tailgating and a street dance. Officer Fiske notes handling four calls for service at our schools for the month of October 2015, along with conducting thirty-one student contacts, ten escorts and thirteen follow up investigations into school related incidents. On behalf of the Spring Lake Park Police Department, Officer Fiske was able to deliver free "Halloween Trick or Treat" bags obtained from donations to the National Child Safety Council by local businesses to twelve to sixteen licensed day cares in our city to help promote safety for Halloween. For further details please see Officer Fiske's attached report.

Investigator Baker reports handling fifty-eight cases for the month of October 2015, thirty-eight of these cases were felony in nature, nine of these cases were gross misdemeanor in nature and eleven of these cases were misdemeanor in nature. Investigator Baker also indicated that he is currently following six active forfeiture cases. For further details see Investigator Baker's attached report.

The Spring Lake Park Police Department Office Staff remain steadfast in their duties, typing and imaging reports, filing, answering and dispensing phone calls for service and information, while continuing to address citizen concerns at the "Police Public Walk up Window", along with other duties that may be

assigned on a daily basis. The police department office staff also continue on a daily basis to prepare for the implementation of the new Public Safety Data System scheduled for the beginning of November 2015.

The month of October 2015 has been a busy month for myself as well. Besides handling the day to day operations of the police department, I have attended numerous meetings to include but not limited to;

- Department Head Meeting held here at City Hall

- Meeting with the National Child Safety Council Representative and Officer Fiske regarding safety literature to hand out to our community youth and seniors.

- Meeting with "Computer Integration Technologies" regarding potential IT services for the police department.

- Meeting here at City Hall with an AT&T Representative "Robin Weber" regarding the transition of the City of Spring Lake Park from Sprint to AT&T for cellular phone service.

- Meeting of the "Beyond the Yellow Ribbon Committee" held at our local VFW Kraus-Hartig.

- Meeting of the Public Safety Data System Governance Committee

- Meeting of the Anoka County Chiefs of Police, held in Coon Rapids, MN.

- Meeting with Mayor Hanson for the "Anoka County Joint Law Enforcement Council" held at Blaine City Hall.

- I concluded the month by attending the "International Association of Chiefs of Police Conference" held in Chicago, Illinois.

This will conclude my report for the month of October 2015.

Are there any questions?

Spring Lake Park Police Department
Investigations Monthly Report

Investigator
Brad Baker

October 2015

Total Case Load

Case Load by Level of Offense: 58

Felony	**38**
Gross Misdemeanor	**9**
Misdemeanor	**11**

Case Dispositions:

County Attorney	**4**
Juvenile County Attorney	**0**
City Attorney	**2**
Forward to Other Agency	**0**
SLP Liaison	**0**
Carried Over	**42**
Unfounded	**0**
Exceptionally Cleared	**1**
Closed/Inactive	**9**

Forfeitures:

Active Forfeitures	**6**
Forfeitures Closed	**0**

Notes:

Spring Lake Park Police / School Resource Officer Report

October 1, 2015

Incidents by School Location	Reports (ICRs)	Student Contacts*	Escorts/Other	Follow Up Inv.
Spring Lake Park High School	4	16	8	11
Discovery Days (pre-school)		3	1	
Lighthouse School				
Park Terrace Elementary School				
District Office				
Able and Terrace Parks (School Related)				1
School Related				
Miscellaneous Locations		12	1	1
Totals:	4	31	10	13

Breakdown of Reports (ICRs)	
Theft reports (cellphones, iPods, bikes, etc…)	
Students charged with Assault or Disorderly Conduct	1
Students charged with other crimes	
Non-students Charged	
Warrant Arrests	
Miscellaneous reports	3

CenturyLink Franchise

Michael R. Bradley
Bradley Hagen & Gullikson, LLC
www.BradleyLawMN.com
November, 2015

CenturyLink Franchise Process

- Notice of Intent to Franchise
- CenturyLink Cable Franchise Application
- Public Hearing
- Staff Report
- NSCC Receives and Files Report and Authorizes Staff to Negotiate Cable Franchise with CenturyLink
  - Consistent with Staff Report

CenturyLink Franchise Process

- Cable Franchise Considerations
  - Reasonable Build-Out of Each Member City
  - Prohibiting Cherry Picking
  - Level Playing Field
    - Franchise Fees
    - PEG Requirements
    - Area Served
  - Comcast Franchise

Build-Out Issue

- Federal Preemption of Minnesota's 5-Year Build Statute
  - Good Faith Basis
  - Indemnification
- Reasonable Build-Out of Each Member City
  - Required by Federal Cable Act

Reasonable Build-Out of the City

- **Complete Equitable Build-Out**
  - Goal is to Build-Out each entire Member City over 5-year term
  - Reasonable Build-Out Based on market success
  - Significant investment targeted to areas below the median income in each Member City.

Reasonable Build-Out

- **Initial Minimum Build-Out Commitment**
- 15% of Each Member City over 2 years.
  - CenturyLink must make its best effort to complete the initial deployment in a shorter period of time.
  - Equitable deployment to households in each Member City.
  - Must include a significant number of households below the medium income of each Member City.
  - CenturyLink permitted to serve more households.

Reasonable Build-Out

- **Quarterly Meetings**
  - Starting January 1, 2016, CenturyLink must meet with Cable Officer and show to the City's satisfaction:
  - Number of households capable of being served and actually served.
  - Compliance with anti-redlining requirements.
  - Maps and documentation "showing exactly where within the City the Grantee is currently providing cable service."

Reasonable Build-Out

- **Additional Build-Out Based on Market Success**.
  - Starting January 1, 2016, CenturyLink Build-Out Commitment will increase if its penetration rate is at least 27.5% in the areas that it is offering service.
    - Example: If offering service to 60% of the City and CenturyLink has penetration of 30% in that area, then the Build-Out commitment will increase 15% to 75% of the City.
  - Additional Build-Out commitment continues until all households are served.

Reasonable Build-Out

- **Line Extension**
  - No initial mandatory line extension, unless CenturyLink becomes the dominant cable provider.
  - The City will determine a line extension obligation similar to Comcast's line extension if CenturyLink obtains a 50% penetration level in the City.

Economic Redlining or "Cherry Picking" Prohibited

- Cherry Picking is prohibited by the Federal Cable Act. *See* 47 U.S.C. § 541(a)(3).
- Franchise prohibits Cherry Picking.
- CenturyLink has additional $500 per day penalty/liquidated damage for violating Build-Out and Economic Redlining provisions. .

Level Playing Field

- **Franchise Fees**
  - CenturyLink required to pay a franchise fee of 5% of its Gross Revenues
    - Identical to Comcast Franchise/Settlement Agreement
- **Area Served**
  - The Franchise Area is the entire City
    - Comparable to Comcast Franchise

Level Playing Field

- **PEG Access Requirements**
  - Number of Access Channels. CenturyLink will provide 12 Access Channels.
    - Greater actual number of Access Channels than Comcast
  - Format of Access Channels. CenturyLink will provide all 12 Access Channels in HD if the City sends them in HD format.
    - Comcast will provide 2 Access Channels in HD over time.
  - Electronic Programming Guide. CenturyLink will provide EPG capability.
    - Similar to Comcast.
  - Channel Placement. CenturyLink will make all Access Channels accessible at Channel 16 through the "North Metro Mosaic." The Access Channels will be physically located in the 8000s
    - Comcast has no mosaic and is required to have all the HD Access Channels located near the broadcast channels

Level Playing Field

- **PEG Access Requirements**
  - Public Service Announcements. CenturyLink will allow the City to air PSA on non-Access channels during periods of unsold/unused air time.
    - Comcast does not provide.
  - Video On-Demand. CenturyLink will provide 25 hours of VOD per Member City for a total of 175 VOD hours.
    - *Comcast does not provide*.
  - PEG Support. CenturyLink will pay a PEG Fee in support of the Access Channels of $3.16.
    - Same per subscriber fee as Comcast.

Twin Cities Metro PEG Interconnect

- CenturyLink will construct an Interconnection Network.
- Network will allow PEG Centers throughout the Twin Cities to share live programming.
  - E.g. Local Sports programming
- Other Cities Must Have Agreement with CenturyLink to Access to Network
  - Minneapolis and Roseville areas are included.
- Unique to the Twin Cities

Complimentary Broadband

- CenturyLink will provide complimentary broadband to one location within each Member City
  - Preferably a Community Center
- Each City has Choice of Location
  - In consultation with CenturyLink
- Commercial Grade Internet
- Wi-Fi Enabled
  - Equipment provided by CenturyLink
- Highest Available Speed at Designated Location
  - Possibly 1 GIG

Comparison to Comcast Franchise

- Substantially Similar. CenturyLink Franchise and Comcast Franchise are identical in most respects.
- Term. CenturyLink's Franchise term is 5 years. Comcast's term was 15 + Extensions.
- Customer Service. Similar to Comcast Franchise.
- Indemnification of the City. CenturyLink has an additional indemnification commitment that Comcast does not have.

Comparison to Comcast Franchise

- Access Channel Commitments.
  - Will provide all PEG Channels in HD
    - Provided NMTC sends it in HD
  - CenturyLink will Provide 175 hours of VOD programming, Comcast will not.
  - PEG support may be used for capital and operational support under the CenturyLink Franchise

- Cable Service to Public Buildings.
  - CenturyLink will provide service and equipment to all government buildings.
    - Basic and Expanded Basic – Prism Essentials
    - If within service territory
    - Includes all City Halls

Comparison to Comcast Franchise

- Penalties/Liquidated Damages.
  - Additional damages for violating the Build-Out and Economic Redlining provisions of the Franchise
  - Not in the Comcast Franchise.

- Build-Out.
  - CenturyLink Franchise has a reasonable build-out commitment based on market success.
  - Comcast does not have a build-out provision,
    - It built-out the City many years ago.

Comparison to Comcast Franchise

- Line Extension.
  - No immediate line extension requirement.
  - The City will determine a line extension obligation similar to Comcast's line extension if CenturyLink obtains a 50% penetration level in the City.
  - Comcast does have a line extension requirement.

- Twin Cities PEG Interconnect.
  - Unique to Twin Cities Market
  - Allows program sharing throughout the Twin Cities
  - Other Cities must reach agreement with CTL

Next Steps

- Hold a Public Hearing on the Cable Franchise Ordinance

- Act on Franchise with Findings
  - Proposed Findings in Packet

STAFF MEMO
CenturyLink Cable Franchise

INTRODUCTION

The City is one of seven member cities of the North Metro Telecommunications Commission (the "NMTC"). Following the submission of an application for a cable television franchise for each member city of the NMTC, the above-entitled matter initially came before the NMTC for a public hearing on February 18, 2015, at Spring Lake Park City Hall. Said public hearing was held open through February 27, 2015, for the purpose of allowing additional written public comments. Following the public hearing, the NMTC's Executive Director prepared a detailed report entitled "Staff Report on CenturyLink Cable Franchise Application" (the "Report"). The NMTC received and filed the Report and directed NMTC staff to a negotiate cable television franchise with CenturyLink. NMTC staff negotiated a cable television franchise with CenturyLink and presented it to the NMTC on October 21, 2015. The NMTC adopted a Findings of Fact and Recommendation on October 21, 2015, which recommended approval of the negotiated cable television franchise with CenturyLink by each member city. The CenturyLink Cable Television Franchise is now before the City Council for consideration.

DISCUSSION

Supporting information

On February 12, 2015, the NMTC received a cable franchise application covering each member city from CenturyLink. Comcast Cable currently has a non-exclusive franchise agreement with the City, which means the City Council may grant additional franchises to provide cable service in the City.

A public hearing on the application was held on February 18, 2015, and additional written comments from the public were accepted through February 27, 2015. Following the public hearing, staff prepared a Staff Report ("Report"), which recommended that the NMTC receive and file the Report and direct staff to negotiate a cable franchise with CenturyLink, consistent with the Report. On April 15, 2015, the NMTC adopted the recommendation. This action did not approve a franchise.

The NMTC's outside attorney, Mike Bradley, Bradley Hagen & Gullikson, LLC, in consultation with NMTC Executive Director, Heidi Arnson, engaged in cable franchise negotiations with CenturyLink. The attached cable franchise is the product of those negotiations.

In reviewing the CenturyLink cable franchise, there are two primary issues to consider. The first is whether federal law preempts Minnesota's 5-Year Build Statute. Minnesota Statues Section 238.084, subdivision 1(m) requires all initial franchises to have a provision that requires a cable operator build out its cable system at a rate of 50 plant miles per year and that its cable system be substantially complete within 5 years. As the Report indicated, CenturyLink claims that this 5-Year Build Statute is an unlawful barrier to entry and is preempted by federal law and an FCC

decision referred to as the 621 Order. The Report also indicated that there is no case law in Minnesota directly addressing preemption of the 5-Year Build Statute. The Report concluded that CenturyLink has a good faith basis on its preemption claim and is willing to indemnify the City related to any litigation surrounding the grant of a franchise to CenturyLink. CenturyLink refused to incorporate the language of the 5-Year Build Statute in the proposed franchise, based on its preemption argument. As described below, the proposed CenturyLink franchise ordinance has provisions for a reasonable build-out of the city. The proposed franchise ordinance also has provision for defense and indemnification of the City and the NMTC regarding this issue.

The next issue is whether the CenturyLink franchise contains a reasonable build-out schedule. The franchise ordinance recognizes that CenturyLink has already constructed a legacy communications system throughout the City, which is capable of providing telephone and internet service. The build-out provisions in the franchise are related to upgrades of the legacy system to make it capable of providing cable service to all city residents. The proposed CenturyLink Franchise addresses build-out as follows:

- Complete Equitable Build-Out. Goal is to build-out the entire city over 5-year term, based on market success, with a significant investment targeted to areas below the median income in the city.
- Initial Minimum Build-Out Commitment. 15% of the city over two years.
    - CenturyLink must make its best effort to complete the initial deployment in a shorter period of time.
    - Equitable Deployment to households in the City.
    - Must include a significant number of households below the medium income of the City.
    - CenturyLink permitted to serve more households than the initial commitment.
- Quarterly Meetings. Starting January 1, 2016, CenturyLink must meet with the City [and/or City designee at NMTC] and show to the City's satisfaction:
    - Number of households capable of being served and actually served.
    - Compliance with anti-redlining requirements.
    - Maps and documentation "showing exactly where within the City the Grantee is currently providing cable service."
- Additional Build-Out Based on Market Success. Starting January 1, 2016, the CenturyLink build-out commitment will increase if its penetration rate is at least 27.5% in the areas that it is offering service.
    - Example: If CenturyLink is offering service to 60% of the City and CenturyLink has penetration of 30% in that area, then the build-out commitment will increase by 15%, to cover 75% of the city.
    - Additional build-out commitment continues until all households are served.
- Line Extension. No initial mandatory line extension, unless CenturyLink becomes

the dominate cable provider. Then the City decides CenturyLink's build-out schedule, including a density requirement that is the same or similar to Comcast's density requirement.

The City may consider whether the Initial Minimum Build-Out Commitment of 15% of the City over two years is reasonable. CenturyLink claimed in its application that it initially would be providing service to a greater portion of the City. During negotiations however, CenturyLink was concerned about having too high a commitment in the franchise ordinance and that cities in Minnesota and elsewhere would use a greater commitment as a new standard. CenturyLink refused to increase the Initial Minimum Build-Out Commitment above 15%. However, the provisions related to Quarterly Meetings and Additional Build-Out Based on Market Success are designed to quicken and increase CenturyLink's initial Build-Out Commitment. The franchise also has provisions requiring that residents of the City be included in an equitable initial build commitment and that a significant number of households below the medium income of the city also be included in the initial build-out. CenturyLink must also use its best efforts to complete its initial build faster than two years.

Another issue related to the reasonable build-out is whether the penetration rate triggering additional build-out is reasonable. CenturyLink claims that it needs a penetration rate of 27.5% in order to commit to an additional mandatory build in the city. This penetration number is based on internal CenturyLink return on investment models. Given Comcast's penetration rate in the City is around 40-50**%,** a penetration rate of 27.5% may be difficult to obtain and, therefore, it is possible that CenturyLink may not be required to build-out more than its initial commitment.

Economic redlining or "cherry picking" was identified as a concern through the public hearing process. As the Report noted, cherry picking is prohibited by the Federal Cable Act. *See* 47 U.S.C. § 541(a)(3). The proposed CenturyLink franchise prohibits cherry picking, identical to the Comcast franchise. To ensure compliance, CenturyLink has an additional $500 per day penalty/liquidated damage for violating the build-out and economic redlining provisions of the Franchise.

The Report also described the State's level playing field statute, which requires competitive cable franchises not to be more favorable or less burdensome than an incumbent's franchise as it relates to franchise fees, support of public, educational, and governmental access television and the area served.

CenturyLink is required to pay a franchise fee of 5% of its Gross Revenues (Identical to Comcast Franchise). The Franchise Area is the entire city (Identical to Comcast Franchise). The Public, Educational, and Governmental ("PEG") Access Requirements of the CenturyLink franchise meet, and in places exceed, Comcast's franchise commitments. The CenturyLink PEG commitments are summarized as follows:

- Number of Access Channels. CenturyLink will provide 12 Access Channels

(greater overall number of Access Channels as Comcast).

- Format of Access Channels. CenturyLink will provide all 12 Access Channels in HD if the City sends them in HD format (Comcast will provide up to 2 Access Channels in HD over time).
- Electronic Programming Guide. CenturyLink will have similar requirement as Comcast.
- Channel Placement. CenturyLink will make all Access Channels accessible at Channel 16 through the "North Metro Mosaic." The Access Channels will be physically located in the 8000s (Comcast has no mosaic and is required to have all the HD Access Channels located near the broadcast channels).
- Public Service Announcements. CenturyLink will allow the NMTC to air PSAs on non-Access channels during periods of unsold/unused air time (Exceeds Comcast's commitment).
- Video On-Demand. CenturyLink will provide 25 hours of VOD per member city (Exceeds Comcast's PEG commitment).
- PEG Support. CenturyLink will pay a PEG Fee in support of the Access Channels of $3.16 adjusted by CPI starting in 2016. (Amount of funding identical to Comcast).

Overall, the CenturyLink cable franchise is substantially similar to the Comcast cable franchise in most respects. The following highlights the differences between the two cable franchises:

- Term. CenturyLink's Franchise term is 5 years. Comcast's term is 15+ years.

- Indemnification of the City. CenturyLink has an additional indemnification commitment that Comcast does not have.

- Access Channel Commitments. CenturyLink may provide more channels in HD than Comcast. CenturyLink is providing 175 hours of VOD programming than Comcast, while Comcast is not providing any. PEG support may be used for capital and operational support under the CenturyLink franchise.

- Twin Cities Metro PEG Interconnect Network. CenturyLink will provide a network to allow cities throughout the metro area to share live programming with one another. We believe this will be the only such network in the country.

- Penalties/Liquidated Damages. CenturyLink franchise has additional damages for violating the Build-Out and Economic Redlining provisions of the franchise that is not in the Comcast franchise.

- Build-Out. CenturyLink Franchise has a reasonable build-out commitment based on market success. Comcast does not have a build-out provision, as it built-out the City many years ago.

- Line Extension. The CenturyLink franchise does not have an immediate line extension requirement. The City will determine a line extension obligation similar to Comcast's line extension if CenturyLink obtains a 50% penetration level in the City. Comcast has a line extension requirement.

Since a cable franchise is granted by ordinance, the City must hold a public hearing on the cable franchise ordinance. At a following meeting, the City should take action to approve or deny the proposed franchise ordinance and direct staff to draft findings consistent with its decision.

RECOMMENDATION

That the City (1) Hold a public hearing on the CenturyLink Cable Franchise Ordinance; (2) at a following Council Meeting, take action on the CenturyLink Cable Franchise Ordinance; and (3) adopt written findings of fact to support the action taken.

ORDINANCE NO. _____
CITY OF SPRING LAKE PARK, MINNESOTA

CABLE TELEVISION FRANCHISE ORDINANCE

Date: _____, 2015

Prepared by:

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ORDINANCE NO.

AN ORDINANCE GRANTING A FRANCHISE TO QWEST BROADBAND SERVICES, INC., D/B/A CENTURYLINK, TO CONSTRUCT, OPERATE AND MAINTAIN A CABLE SYSTEM IN THE CITY OF SPRING LAKE PARK, MINNESOTA, FOR THE PURPOSE OF PROVIDING CABLE SERVICE; SETTING FORTH CONDITIONS ACCOMPANYING THE GRANT OF THE FRANCHISE; PROVIDING FOR REGULATION AND USE OF THE SYSTEM AND THE PUBLIC RIGHTS-OF-WAY IN CONJUNCTION WITH THE CITY'S RIGHT-OF-WAY ORDINANCE, IF ANY; AND PRESCRIBING PENALTIES FOR THE VIOLATION OF THE PROVISIONS HEREIN.

The City Council of the City of Spring Lake Park, Minnesota ordains:

STATEMENT OF INTENT AND PURPOSE

Qwest Broadband Services, Inc., d/b/a CenturyLink ("Grantee"), applied for a cable franchise to serve the City. The City will adopt separate findings related to the application and the decision to grant a cable franchise to Grantee, which shall be incorporated herewith by reference. The City intends, by the adoption of this Franchise, to bring about competition in the delivery of cable services in the City.

Adoption of this Franchise is, in the judgment of the Council, in the best interests of the City and its residents.

SECTION 1. SHORT TITLE AND DEFINITIONS

1.1 Short Title.

This Franchise Ordinance shall be known and cited as the "CenturyLink Cable Franchise Ordinance."

1.2 Definitions.

For purposes of this Franchise, the following terms, phrases, words, abbreviations and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future tense; words in the plural number include the singular number; words in the singular number include the plural; and the masculine gender includes the feminine gender. Unless otherwise expressly stated, words not defined herein or in the City Code shall be given the meaning set forth in applicable law and, if not defined therein, the words shall be given their common and ordinary meaning. The word "shall" is always mandatory and not merely directory. The word "may" is directory and discretionary and not mandatory.

1.2.1 "Actual Cost" means the incremental cost to the Grantee of materials, capitalized labor and borrowing necessary to install and construct fiber-optic lines, coaxial cable and/or equipment.

1.2.2 **"Affiliate"** means any Person who owns or controls, is owned or controlled by, or is under common ownership or control with the Grantee.

1.2.3 **"Basic Cable Service"** means the lowest priced tier of Cable Service that includes the lawful retransmission of local television broadcast signals and any public, educational and governmental access programming required by this Franchise to be carried on the basic tier. Basic Cable Service as defined herein shall not be inconsistent with 47 U.S.C. § 543(b)(7).

1.2.4 **"Cable Service"** or **"Service"** means (1) the one-way transmission to Subscribers of (a) video programming or (b) other programming services; and (2) Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming services. Cable Service shall also include any video programming service for which a franchise from a local government is permitted under state law.

1.2.5 **"Cable System"** or **"System"** means the facility of the Grantee consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide Cable Service, which includes video programming and which is provided to multiple Subscribers within the City, but such term does not include: (1) a facility that only serves to retransmit the television signals of one or more television broadcast stations; (2) a facility that serves Subscribers without using any Rights-of-Way; (3) a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Communications Act, except that such facility shall be considered a System (other than for purposes of 47 U.S.C. § 541(c)) if such facility is used in the transmission of video programming directly to Subscribers, unless the extent of such use is solely to provide interactive on-demand services; (4) an open video system that complies with 47 U.S.C. § 573; (5) any facilities of any electric utility used solely for operating its electric utility system; or (6) a translator system which receives and rebroadcasts over-the-air signals. A reference to the System in this Franchise refers to any part of such System including, without limitation, Set Top Boxes. The foregoing definition of "System" shall not be deemed to circumscribe or limit the valid authority of the City to regulate or franchise the activities of any other communications system or provider of communications service to the full extent permitted by law. "Cable System" or "System" as defined herein shall not be inconsistent with the definitions set forth in applicable law. Any reference to "Cable System" or "System" herein, which system is owned or operated by a Person or governmental body other than the Grantee, shall be defined the same as this Section 1.2.5. This definition shall include any facility that is a "cable system" under federal law or a "cable communications system" under state law.

1.2.6 **"City"** means the City of Spring Lake Park, Minnesota, a municipal corporation, in the State of Minnesota, acting by and through its City Council, or its lawfully appointed designee.

1.2.7 **"City Code"** means the Spring Lake Park City Code, as amended from time to time.

1.2.8 **"Commission"** means the North Metro Telecommunications Commission, a municipal joint powers consortium comprised of the municipalities of Blaine, Centerville, Circle Pines, Ham Lake, Lexington, Lino Lakes and Spring Lake Park, Minnesota. In the event the City lawfully withdraws from the Commission, any reference to the Commission in this Franchise shall thereafter be deemed a reference to the City, and the rights and obligations related thereto shall, where possible, accrue pro rata to the City, pursuant to a transition agreement to be negotiated at such time by and between the City, the Commission and the Grantee. The total burden of Grantee's obligations under this Franchise and the Grantee's Franchise with the other member cities of the Commission shall not be increased as a result of any such withdrawal.

1.2.9 **"CPI"** means the annual average of the Consumer Price Index for all Urban Consumers (CPI-U) for the Minneapolis-St. Paul CMSA, as published by the Bureau of Labor Statistics.

1.2.10 **"Drop""** means the cable that connects the ground block on the Subscriber's residence or institution to the nearest feeder cable of the System.

1.2.11 **"Educational Access Channel"** or **"Educational Channel"** means any channel on the System set aside by the Grantee for Noncommercial educational use by educational institutions, as contemplated by applicable law.

1.2.12 **"FCC"** means the Federal Communications Commission, its designee, and any legally appointed, designated or elected agent or successor.

1.2.13 **"Franchise"** or "**Cable Franchise"** means this ordinance, as may be amended from time to time, any exhibits attached hereto and made a part hereof, and the regulatory and contractual relationship established hereby.

1.2.14 **"Governmental Access Channel"** or **"Governmental Channel"** means any channel on the System set aside by the Grantee for Noncommercial use by the City or its delegatee.

1.2.15 **"Grantee"** is Qwest Broadband Services, Inc., d/b/a CenturyLink, and its lawful successors, transferees or assignees.

1.2.16 **"Gross Revenues"** means any and all revenues arising from or attributable to, or in any way derived directly or indirectly by the Grantee or its Affiliates, subsidiaries, or parent, or by any other entity that is a cable operator of the System, from the operation of the Grantee's System to provide Cable Services (including cash, credits, property or other consideration of any kind or nature). Gross Revenues include, by way of illustration and not limitation, monthly fees

charged to Subscribers for any basic, optional, premium, per-channel, or per-program service, or other Cable Service including, without limitation, Installation, disconnection, reconnection, and change-in-service fees; Lockout Device fees; Leased Access Channel fees; late fees and administrative fees; fees, payments or other consideration received from programmers for carriage of programming on the System and accounted for as revenue under GAAP; revenues from rentals or sales of Set Top Boxes or other equipment; fees related to commercial and institutional usage of the System; advertising revenues; interest; barter; revenues from program guides; franchise fees; and revenues to the System from home shopping, bank-at-home channels and other revenue sharing arrangements. Gross Revenues shall include revenues received by an entity other than the Grantee, an Affiliate or another entity that operates the System where necessary to prevent evasion or avoidance of the Grantee's obligation under this Franchise to pay the franchise fee. Gross Revenues shall not include: (i) to the extent consistent with generally accepted accounting principles, actual bad debt write-offs, provided, however, that all or part of any such actual bad debt that is written off but subsequently collected shall be included in Gross Revenues in the period collected; (ii) any taxes on services furnished by the Grantee imposed by any municipality, state or other governmental unit, provided that franchise fees shall not be regarded as such a tax; (iii) FCC regulatory fees; (iv) Subscriber credits, adjustments or refunds; (v) PEG Fees; or (vi) refundable Subscriber deposits.

1.2.17 "Household" means a distinct address in the Qwest Corporation ("QC") network database, whether a residence or small business, subscribing to or being offered cable service. Grantee represents and warrants that it has access to the QC network database and shall demonstrate to the City's reasonable satisfaction how the data required in Section 2 are calculated and reported using the QC network database.

1.2.18 "Installation" means the connection of the System from feeder cable to the point of connection with the Subscriber Set Top Boxes or other terminal equipment.

1.2.19 "Leased Access Channel" means channels on the System which are designated or dedicated for use by a Person unaffiliated with the Grantee pursuant to 47 U.S.C. § 532.

1.2.20 "Lockout Device" means an optional mechanical or electrical accessory to a Subscriber's terminal, which inhibits the viewing of a certain program, certain channel or certain channels provided by way of the Cable System.

1.2.21 "Node" means the transition point between optical light transmission (fiber-optic cable) and the transmission of video and data signals being delivered to and received from the Subscriber's home.

1.2.22 "Noncommercial" means, in the context of PEG channels, that particular products and services are not promoted or sold. This term shall not be interpreted

to prohibit a PEG channel operator or programmer from soliciting and receiving voluntary financial support to produce and transmit video programming on a PEG channel, or from acknowledging a contribution.

1.2.23 "Normal Operating Conditions" means those service conditions that are within the control of the Grantee. Conditions that are ordinarily within the control of the Grantee include, but are not limited to, special promotions, pay-per-view events, rate increases, regular peak or seasonal demand periods, and maintenance or upgrade of the System . Conditions that are not within the control of the Grantee include, but are not limited to, natural disasters, civil disturbances, power outages, telephone network outages, and severe or unusual weather conditions.

1.2.24 "North Metro Franchise Area" means the geographic area consisting of the Minnesota cities of Blaine, Centerville, Circle Pines, Ham Lake, Lexington, Lino Lakes and Spring Lake Park.

1.2.25 "North Metro System" means the Cable System operated pursuant to this Franchise and located in the member municipalities of the Commission.

1.2.26 "PEG" means public, educational, religious and governmental.

1.2.27 "Person" means any individual, partnership, association, joint stock company, joint venture, domestic or foreign corporation, stock or non-stock corporation, limited liability company, professional limited liability corporation, or other organization of any kind, or any lawful successor or transferee thereof, but such term does not include the City or the Commission.

1.2.28 "Public Access Channel(s)" means any channels on the System set aside by the Grantee for Noncommercial use by the general public, as contemplated by applicable law.

1.2.29 "Right-of-Way" or **"Rights-of-Way"** means the surface, air space above the surface and the area below the surface of any public street, highway, lane, path, alley, sidewalk, avenue, boulevard, drive, court, concourse, bridge, tunnel, park, parkway, skyway, waterway, dock, bulkhead, wharf, pier, easement or similar property or waters within the City owned by or under control of the City, or dedicated for general public use by the City, including, but not limited to, any riparian right, which, consistent with the purposes for which it was created, obtained or dedicated, may be used for the purpose of installing, operating and maintaining a System. No reference herein to a "Right-of-Way" shall be deemed to be a representation or guarantee by the City that its interest or other right to control or use such property is sufficient to permit its use for the purpose of installing, operating and maintaining the System.

1.2.30 "Right-of-Way Ordinance" means any ordinance of the City codifying requirements regarding regulation, management and use of Rights-of-Way in the City, including registration, fees, and permitting requirements.

1.2.31 "Set Top Box" means an electronic device (sometimes referred to as a receiver) which may serve as an interface between a System and a Subscriber's television monitor, and which may convert signals to a frequency acceptable to a television monitor of a Subscriber and may, by an appropriate selector, permit a Subscriber to view all signals of a particular service.

1.2.32 "State" means the State of Minnesota, its agencies and departments.

1.2.33 "Subscriber" means any Person that lawfully receives service via the System with the Grantee's express permission. In the case of multiple office buildings or multiple dwelling units, the term "Subscriber" means the lessee, tenant or occupant.

1.2.34 "System Upgrade" means the improvement or enhancement in the technology or service capabilities made by the Grantee to the System as more fully described in Section 4.

SECTION 2. GRANT OF AUTHORITY AND GENERAL PROVISIONS

2.1 Grant of Franchise.

This Franchise is granted pursuant to the terms and conditions contained herein and in applicable law. The Grantee, the City and the Commission shall comply with all provisions of this Franchise and applicable law, regulations and codes. Failure of the Grantee to construct, operate and maintain a System as described in this Franchise, or to meet obligations and comply with all provisions herein, may be deemed a violation of this Franchise.

2.1.1 Nothing in this Franchise shall be deemed to waive the lawful requirements of any generally applicable City ordinance existing as of the Effective Date.

2.1.2 Each and every term, provision or condition herein is subject to the provisions of state law, federal law, and local ordinances and regulations. The Municipal Code of the City, as the same may be amended from time to time, is hereby expressly incorporated into this Franchise as if fully set out herein by this reference. Notwithstanding the foregoing, the City may not unilaterally alter the material rights and obligations of Grantee under this Franchise.

2.1.3 This Franchise shall not be interpreted to prevent the City from imposing additional lawful conditions, including additional compensation conditions for use of the Rights-of-Way, should Grantee provide service other than cable service.

2.1.4 The parties acknowledge that Grantee intends that Qwest Corporation ("QC"), an affiliate of Grantee, will be primarily responsible for the construction and installation of the facilities in the Rights-of-Way, constituting the cable communications system, which will be utilized by Grantee to provide cable service. Grantee promises, as a condition of exercising the privileges granted by this Franchise, that any affiliate of the Grantee, including QC, directly or indirectly involved in the construction, management, or operation of the cable communications system will comply with all applicable federal, state and local laws, rules and regulations regarding the use of the City's rights of way. The City agrees that to the extent QC violates any applicable laws, rules and regulations, the City shall first seek compliance directly from QC. In the event, the City cannot resolve these violations or disputes with QC, or any other affiliate of Grantee, then the City may look to Grantee to ensure such compliance. Failure by Grantee to ensure QC's or any other affiliate's compliance with applicable laws, rules and regulations shall be deemed a material breach of this Franchise by Grantee. To the extent Grantee constructs and installs facilities in the rights-of-way, such installation will be subject to the terms and conditions contained herein.

2.1.5 No rights shall pass to Grantee by implication. Without limiting the foregoing, by way of example and not limitation, this Franchise shall not include or be a substitute for:

(1) Any other permit or authorization required for the privilege of transacting and carrying on a business within the City that may be required by the ordinances and laws of the City;

(2) Any permit, agreement, or authorization required by the City for Right-of-Way users in connection with operations on or in Rights-of-Way or public property including, by way of example and not limitation, street cut permits; or

(3) Any permits or agreements for occupying any other property of the City or private entities to which access is not specifically granted by this Franchise including, without limitation, permits and agreements for placing devices on poles, in conduits or in or on other structures.

2.1.6 This Franchise is intended to convey limited rights and interests only as to those Rights-of-Way in which the City has an actual interest. It is not a warranty of title or interest in any Right-of-Way; it does not provide the Grantee with any interest in any particular location within the Right-of-Way; and it does not confer rights other than as expressly provided in the grant hereof.

2.1.7 This Franchise does not authorize Grantee to provide telecommunications service, or to construct, operate or maintain telecommunications facilities. This Franchise is not a bar to imposition of any lawful conditions on Grantee with respect to telecommunications, whether similar, different or the same as the conditions specified herein. This Franchise does not relieve Grantee of any obligation it may have to obtain from the City an authorization to provide telecommunications services, or to construct,

operate or maintain telecommunications facilities, or relieve Grantee of its obligation to comply with any such authorizations that may be lawfully required.

2.2 Grant of Nonexclusive Authority.

2.2.1 Subject to the terms of this Franchise, the City hereby grants the Grantee the right to own, construct, operate and maintain a System in, along, among, upon, across, above, over, or under the Rights-of-Way. The grant of authority set forth in this Franchise applies only to the Grantee's provision of Cable Service; provided, however, that nothing herein shall limit the Grantee's ability to use the System for other purposes not inconsistent with applicable law or with the provision of Cable Service; and provided further, that any local, State and federal authorizations necessary for the Grantee's use of the System for other purposes are obtained by the Grantee. This Franchise does not confer any rights other than as expressly provided herein, or as provided by federal, State or local law. No privilege or power of eminent domain is bestowed by this Franchise or grant. The System constructed and maintained by Grantee or its agents pursuant to this Franchise shall not interfere with other uses of the Rights-of-Way. The Grantee shall make use of existing poles and other aerial and underground facilities available to the Grantee to the extent it is technically and economically feasible to do so.

2.2.2 Notwithstanding the above grant to use Rights-of-Way, no Right-of-Way shall be used by the Grantee if the City determines that such use is inconsistent with the terms, conditions, or provisions by which such Right-of-Way was created or dedicated, or with the present use of the Right-of-Way.

2.2.3 This Franchise and the right it grants to use and occupy the Rights-of-Way shall not be exclusive and this Franchise does not, explicitly or implicitly, preclude the issuance of other franchises or similar authorizations to operate Cable Systems within the City. Provided, however, that the City shall not authorize or permit itself or another Person or governmental body to construct, operate or maintain a Cable System on material terms and conditions which are, taken as a whole, more favorable or less burdensome than those applied to the Grantee.

2.2.4 This Franchise authorizes only the use of Rights-of-Way for the provision of Cable Service. Therefore, the grant of this Franchise and the payment of franchise fees hereunder shall not exempt the Grantee from the obligation to pay compensation or fees for the use of City property, both real and personal, other than the Rights-of-Way; provided, however, that such compensation or fees are required by City ordinance, regulation or policy and are nondiscriminatory.

2.3 Lease or Assignment Prohibited.

No Person or governmental body may lease Grantee's System for the purpose of providing Cable Service until and unless such Person shall have first obtained and shall currently hold a valid Franchise or other lawful authorization containing substantially similar burdens and obligations to this Franchise, including, without limitation, a requirement on such Person to pay franchise fees on such Person's or governmental body's use of the System to provide Cable Services, to the extent there would be such a

requirement under this Franchise if the Grantee itself were to use the System to provide such Cable Service. Any assignment of rights under this Franchise shall be subject to and in accordance with the requirements of Section 10.5.

2.4 Franchise Term.

This Franchise shall be in effect for a period of five (5) years, such term commencing on the Effective Date specified in Section 2.10, unless sooner renewed, extended, revoked or terminated as herein provided.

2.5 Compliance with Applicable Laws, Resolutions and Ordinances.

2.5.1 The terms of this Franchise shall define the contractual rights and obligations of the Grantee with respect to the provision of Cable Service and operation of the System in the City. However, the Grantee shall at all times during the term of this Franchise be subject to the lawful exercise of the police powers of the City, the City's right to adopt and enforce additional generally applicable ordinances and regulations, and lawful and applicable zoning, building, permitting and safety ordinances and regulations. The grant of this Franchise does not relieve the Grantee of its obligations to obtain any generally applicable licenses, permits or other authority as may be required by the City Code, as it may be amended, for the privilege of operating a business within the City or for performing work on City property or within the Rights-of-Way, to the extent not inconsistent with this Franchise. Except as provided below, any modification or amendment to this Franchise, or the rights or obligations contained herein, must be within the lawful exercise of the City's police powers, as enumerated above, in which case the provision(s) modified or amended herein shall be specifically referenced in an ordinance of the City authorizing such amendment or modification. This Franchise may also be modified or amended with the written consent of the Grantee as provided in Section 13.3 herein.

2.5.2 The Grantee shall comply with the terms of any City ordinance or regulation of general applicability which addresses usage of the Rights-of-Way within the City which may have the effect of superseding, modifying or amending the terms of Section 3 and/or Section 8.5.3 herein; except that the Grantee shall not, through application of such City ordinance or regulation of Rights-of-Way, be subject to additional burdens with respect to usage of Rights-of-Way that exceed burdens on similarly situated Right-of-Way users.

2.5.3 In the event of any conflict between Section 3 and/or Section 8.5.3 of this Franchise and any lawfully applicable City ordinance or regulation which addresses usage of the Rights-of-Way, the conflicting terms in Section 3 and/or Section 8.5.3 of this Franchise shall be superseded by such City ordinance or regulation; except that the Grantee shall not, through application of such City ordinance or regulation of Rights-of-Way, be subject to additional burdens with respect to usage of Public Rights-of-Way that exceed burdens on similarly situated Right-of-Way users.

2.5.4 In the event any lawfully applicable City ordinance or regulation which addresses usage of the Rights-of-Way adds to, modifies, amends, or otherwise differently addresses issues addressed in Section 3 and/or Section 8.5.3 of this Franchise, the Grantee shall comply with such ordinance or regulation of general applicability, regardless of which requirement was first adopted; except that the Grantee shall not, through application of such City ordinance or regulation of Rights-of-Way, be subject to additional burdens with respect to usage of Rights-of-Way that exceed burdens on similarly situated Rights-of-Way users.

2.5.5 In the event the Grantee cannot determine how to comply with any Right-of-Way requirement of the City, whether pursuant to this Franchise or other requirement, the Grantee shall immediately provide written notice of such question, including the Grantee's proposed interpretation, to the City. The City shall provide a written response within ten (10) business days of receipt indicating how the requirements cited by the Grantee apply. The Grantee may proceed in accordance with its proposed interpretation in the event a written response is not received within thirteen (13) business days of mailing or delivering such written question.

2.6 Rules of Grantee.

The Grantee shall have the authority to promulgate such rules, regulations, terms and conditions governing the conduct of its business as shall be reasonably necessary to enable said Grantee to exercise its rights and perform its obligations under this Franchise and applicable law, and to assure uninterrupted service to each and all of its Subscribers; provided that such rules, regulations, terms and conditions shall not be in conflict with provisions hereto, the rules of the FCC, the laws of the State of Minnesota, the City, or any other body having lawful jurisdiction.

2.7 Territorial Area Involved.

This Franchise is granted for the corporate boundaries of the City, as they exist from time to time.

2.7.1 Reasonable Build-Out of the Entire City. The Parties recognize that Grantee, or its affiliate, has constructed a legacy communications system throughout the City that is capable of providing voice grade service. The Parties further recognize that Grantee or its affiliate must expend a significant amount of capital to upgrade its existing legacy communications system and to construct new facilities to make it capable of providing cable service. Further, there is no promise of revenues from cable service to offset these capital costs. The Parties agree that the following is a reasonable build-out schedule taking into consideration Grantee's market success and the requirements of Minnesota state law.

(i) Complete Equitable Build-Out. Grantee aspires to provide cable service to all households within the City by the end of the initial term of this Franchise. In

addition, Grantee commits that a significant portion of its investment will be targeted to areas below the median income in the City.

(ii) Initial Minimum Build-Out Commitment. Grantee agrees to be capable of serving a minimum of fifteen percent (15%) of the City's households with cable service during the first two (2) years of the initial Franchise term, provided, however that Grantee will make its best efforts to complete such deployment within a shorter period of time. This initial minimum build-out commitment shall include deployment equitably throughout the City and to a significant number of households below the medium income in the City. Nothing in this Franchise shall restrict Grantee from serving additional households in the City with cable service;

(iii) Quarterly Meetings. Commencing January 1, 2016, and continuing throughout the term of this Franchise, Grantee shall meet quarterly with the Executive Director of the Commission. At each quarterly meeting, Grantee shall present information acceptable to the City/Commission (to the reasonable satisfaction of the City/Commission) showing the number of Households Grantee is presently capable of serving with cable service and the number of Households that Grantee is actually serving with cable service. Grantee shall also present information acceptable to the City/Commission (to the reasonable satisfaction of the City/Commission) that Grantee is equitably serving all portions of the City in compliance with this subsection 2.8.1. In order to permit the City/Commission to monitor and enforce the provisions of this section and other provisions of this Franchise, the Grantee shall promptly, upon reasonable demand, show to the City/Commission (to the City/Commission's reasonable satisfaction) maps and provide other documentation showing exactly where within the City the Grantee is currently providing cable service;

(iv) Additional Build-Out Based on Market Success. If, at any quarterly meeting, Grantee is actually serving twenty seven and one-half percent (27.5%) of the Households capable of receiving cable service, then Grantee agrees the minimum build-out commitment shall increase to include all of the Households then capable of receiving cable service plus an additional fifteen (15%) of the total households in the City, which Grantee agrees to serve within two (2) years from the quarterly meeting; provided, however, the Grantee shall make its best efforts to complete such deployment within a shorter period of time. For example, if, at a quarterly meeting with the Commission's Executive Director, Grantee shows that it is capable of serving sixty percent of the households in the City with cable service and is actually serving thirty percent of those Households with cable service, then Grantee will agree to serve an additional fifteen percent of the total households in the City no later than 2 years after that quarterly meeting (a total of 75% of the total households). This additional build-out based on market success shall continue until every household in the City is served;

(v) Line Extension. Grantee shall not have a line extension obligation until the first date by which Grantee is providing Cable Service to more than fifty percent

(50%) of all subscribers receiving facilities based cable service from both the Grantee and any other provider(s) of cable service within the City. At that time, the City/Commission, in its reasonable discretion and after meeting with Grantee, shall determine the timeframe to complete deployment to the remaining households in the City, including a density requirement that is the same or similar to the requirement of the incumbent franchised cable operator.

2.8 Written Notice.

All notices, reports or demands required to be given in writing under this Franchise shall be deemed to be given when delivered personally to any officer of the Grantee or the City's designated Franchise administrator, or forty-eight (48) hours after it is deposited in the United States mail in a sealed envelope, with registered or certified mail postage prepaid thereon, addressed to the party to whom notice is being given, as follows:

If to City:
City of Spring Lake Park
1301 81st Avenue NE
Spring Lake Park, Minnesota 55432
Attention: City Manager/Administrator

With copies to:
Executive Director
North Metro Telecommunications Commission
12520 Polk Street N.E.
Blaine, MN 55434

And to:
Michael R. Bradley
Bradley Hagen & Gullikson, LLC
1976 Wooddale Drive, Suite 3A
Woodbury, MN 55125

If to Grantee:
Qwest Broadband Services, Inc. d/b/a CenturyLink
1801 California St., 10th Flr.
Denver, CO 80202
Attn: Public Policy

With copies to:
Qwest Broadband Services Inc., d/b/a CenturyLink
200 S. 5th Street, 21st Flr.
Minneapolis, MN 55402
Attn: Public Policy

Such addresses may be changed by either party upon notice to the other party given as provided in this Section.

2.9 Effective Date.

This Franchise shall become effective after: (i) all conditions precedent to its effectiveness as an ordinance of the City have occurred; (ii) all conditions precedent to its execution are satisfied; (iii) it has been approved by the City Council in accordance with applicable law; and (iv) it has been accepted and signed by the Grantee and the City in accordance with Section 14 (the "Effective Date").

SECTION 3. CONSTRUCTION STANDARDS

3.1 Registration, Permits and Construction Codes.

3.1.1 The Grantee shall strictly adhere to all State and local laws, regulations and policies adopted by the City Council applicable to the location, construction, installation, operation or maintenance of the System in the City. The City and/or its delegatee has the right to supervise all construction or installation work performed in the Rights-of-Way as it shall find necessary to ensure compliance with the terms of this Franchise and other applicable provisions of law and regulations.

3.1.2 Failure to obtain permits or to comply with permit requirements shall be grounds for revocation of this Franchise, or any lesser sanctions provided herein or in any other applicable law, code or regulation.

3.2 Restoration of Rights-of-Way and Property.

Any Rights-of-Way, or any sewer, gas or water main or pipe, drainage facility, electric, fire alarm, police communication or traffic control facility of the City, or any other public or private property, which is disturbed, damaged or destroyed during the construction, repair, replacement, relocation, operation, maintenance, expansion, extension or reconstruction of the System shall be promptly and fully restored, replaced, reconstructed or repaired by the Grantee, at its expense, to the same condition as that prevailing prior to the Grantee's work, to the extent consistent with applicable statutes and rules. It is agreed that in the normal course, with respect to fire and police department facilities and equipment, and water and sewer facilities, and other essential utilities and services, as determined by the City, such restoration, reconstruction, replacement or repairs shall be commenced immediately after the damage, disturbance or destruction is incurred, and the Grantee shall take diligent steps to complete the same, unless an extension of time is obtained from the appropriate City agency or department. In all other cases, reconstruction, replacement, restoration or repairs shall be commenced within no more than three (3) days after the damage, disturbance or destruction is incurred, and shall be completed as soon as reasonably possible thereafter. If the Grantee shall fail to perform the repairs, replacement, reconstruction or restoration required herein, the City shall have the right to put the Rights-of-Way, public or private property back into good condition. In the event City determines that the Grantee is responsible for such disturbance or

damage, the Grantee shall be obligated to fully reimburse the City for required repairs, reconstruction and restoration.

3.3 Conditions on Right-of-Way Use.

3.3.1 Nothing in this Franchise shall be construed to prevent the City from constructing, maintaining, repairing or relocating sewers; grading, paving, maintaining, repairing, relocating and/or altering any Right-of-Way; constructing, laying down, repairing, maintaining or relocating any water mains; or constructing, maintaining, relocating or repairing any sidewalk or other public work.

3.3.2 All System transmission and distribution structures, lines and equipment erected by the Grantee within the City shall be located so as not to obstruct or interfere with the use of Rights-of-Way except for normal and reasonable obstruction and interference which might occur during construction and to cause minimum interference with the rights of property owners who abut any of said Rights-of-Way and not to interfere with existing public utility installations.

3.3.3 The Grantee shall, at its sole expense, by a reasonable time specified by the City, protect, support, temporarily disconnect, relocate or remove any of its property when required by the City by reason of traffic conditions; public safety; Rights-of-Way construction; street maintenance or repair (including resurfacing or widening); change in Right-of-Way grade; construction, installation or repair of sewers, drains, water pipes, power lines, signal lines, tracks or any other type of government-owned communications or traffic control system, public work or improvement of government-owned utility; Right-of-Way vacation; or for any other purpose where the convenience of the City would be served thereby. If the Grantee fails, neglects or refuses to comply with the City's request, the City may protect, support, temporarily disconnect, relocate or remove the appropriate portions of the System at the Grantee's expense for any of the City's incremental costs incurred as a result of the Grantee's failure to comply. Except for the City's gross negligence, the City shall not be liable to the Grantee for damages resulting from the City's protection, support, disconnection, relocation or removal, as contemplated in the preceding sentence.

3.3.4 The Grantee shall not place poles, conduits or other fixtures of the System above or below ground where the same will interfere with any gas, electric, telephone, water or other utility fixtures and all such poles, conduits or other fixtures placed in any Right-of-Way shall be so placed as to comply with all lawful requirements of the City.

3.3.5 The Grantee shall, upon request of any Person holding a moving permit issued by the City, temporarily move its wires or fixtures to permit the moving of buildings with the expense of such temporary removal to be paid by the Person requesting the same. The Grantee shall be given not less than ten (10) days' advance written notice to arrange for such temporary wire changes.

3.3.6 To the extent consistent with generally applicable City Code provisions, rules and regulations, the Grantee shall have the right to remove, cut, trim and keep clear of its System trees or other vegetation in and along or overhanging the Rights-of-Way. However, in the exercise of this right, the Grantee agrees not to cut or otherwise injure said trees to any greater extent than is reasonably necessary. All trimming shall be performed at no cost to the City, the Commission or a homeowner.

3.3.7 The Grantee shall use its best efforts to give prior notice to any adjacent private property owners who will be negatively affected or impacted by Grantee's work in the Rights-of-Way.

3.3.8 If any removal, relaying or relocation is required to accommodate the construction, operation or repair of the facilities of a Person that is authorized to use the Rights-of-Way, the Grantee shall, after thirty (30) days' advance written notice and payment of all costs by such Person, commence action to effect the necessary changes requested by the responsible entity. If multiple responsible parties are involved, the City may resolve disputes as to the responsibility for costs associated with the removal, relaying or relocation of facilities among entities authorized to install facilities in the Rights-of-Way if the parties are unable to do so themselves, and if the matter is not governed by a valid contract between the parties or any State or federal law or regulation.

3.3.9 In the event the System is contributing to an imminent danger to health, safety or property, as reasonably determined by the City, after providing actual notice to the Grantee, if it is reasonably feasible to do so, the City may remove or relocate any or all parts of the System at no expense to the City or the Commission other than the City's cost to act on such determination.

3.4 Use of Existing Poles and Undergrounding of Cable.

3.4.1 Where existing poles, underground conduits, ducts or wire holding structures are available for use by the Grantee, but it does not make arrangements for such use, the City may require, through the established permit, or any other applicable procedure, the Grantee to use such existing poles and wire holding structures if the City determines that the public convenience would be enhanced thereby and the terms available to the Grantee for the use of such poles and structures are just and reasonable.

3.4.2 The Grantee agrees to place its cables, wires or other like facilities underground, in the manner as may be required by the provisions of the City Code and City policies, procedures, rules and regulations, as amended from time to time, where all utility facilities are placed underground. The Grantee shall not place facilities, equipment or fixtures where they will interfere with any existing gas, electric, telephone, water, sewer or other utility facilities or with any existing installations

of the City, or obstruct or hinder in any manner the various existing utilities serving the residents of the City. To the extent consistent with the City Code, City policies, procedures, rules and regulations, System cable and facilities may be constructed overhead where poles exist and electric or telephone lines or both are now overhead. However, in no case may the Grantee install poles in areas of the City where underground facilities are generally used by the utilities already operating. If the City, at a future date, requires all electric and telephone lines to be placed underground in all or part of the City, the Grantee shall, within a reasonable time, similarly move its cables and lines. If the City reimburses or otherwise compensates any Person using the Rights-of-Way for the purpose of defraying the cost of any of the foregoing, the City shall also reimburse the Grantee in the same manner in which other Persons affected by the requirement are reimbursed. If the funds are controlled by another governmental entity, the City shall not oppose or otherwise hinder any application for or receipt of such funds on behalf of the Grantee.

3.5 Installation of Facilities.

3.5.1 No poles, towers, conduits, amplifier boxes, pedestal mounted terminal boxes, similar structures or other wire-holding structures shall be erected or installed by the Grantee without obtaining any required permit or other authorization from the City.

3.5.2 No placement of any pole or wire holding structure of the Grantee is to be considered a vested fee interest in the Rights-of-Way or in City property. Whenever feasible, all transmission and distribution structures, lines, wires, cables, equipment and poles or other fixtures erected by the Grantee within the City are to be so located and installed as to cause minimum interference with the rights and convenience of property owners.

3.6 Safety Requirements.

3.6.1 All applicable safety practices required by law shall be used during construction, maintenance and repair of the System. The Grantee agrees, at all times, to employ ordinary and reasonable care and to install and maintain in use commonly accepted methods and devices for preventing failures and accidents that are likely to cause damage or injuries to the public or to property. All structures and all lines, equipment and connections in the Rights-of-Way shall at all times be kept and maintained in a safe condition, consistent with applicable safety codes.

3.6.2 The Grantee's construction, operation or maintenance of the System shall be conducted in such a manner as not to interfere with City communications technologies related to the health, safety and welfare of City residents.

3.6.3 The Grantee shall install and maintain such devices as will apprise or warn Persons and governmental entities using the Rights-of-Way of the existence of work being performed on the System in Rights-of-Way.

3.6.4 The Grantee shall be a member of the One Call Notification System (otherwise known as "Gopher State One Call") or its successor, and shall field mark the locations of its underground facilities upon request. Throughout the term of this Franchise, the Grantee shall identify the location of its facilities for the City or the Commission at no charge to the City or the Commission.

3.7 Removal of Facilities at Expiration of Franchise.

At the expiration of the term for which this Franchise is granted, or upon the expiration of any renewal or extension period which may be granted, the City shall have the right to require the Grantee, at the Grantee's sole expense: (i) to remove all portions of the System from all Rights-of-Way within the City; and (ii) to restore affected sites to their original condition, unless Grantee, or its affiliate, has a separate authorization from the City to occupy the City's Rights-of-Way. Should the Grantee fail, refuse or neglect to comply with the City's directive, all portions of the System, or any part thereof, may at the option of the City become the sole property of the City, at no expense to the City, or be removed, altered or relocated by the City at the cost of the Grantee. The City shall not be liable to the Grantee for damages resulting from such removal, alteration or relocation.

SECTION 4. DESIGN PROVISIONS

4.1 System Facilities and Equipment.

4.1.1 Grantee shall develop, construct and operate a state-of-the-art cable communications system, constructed in accordance with Section 2.8.1, which shall have at least the following characteristics:

4.1.1.1 A modern design when built, utilizing an architecture that will permit additional improvements necessary for high-quality and reliable service throughout the Franchise term, and the capability to operate continuously on a twenty-four (24) hour a day basis without severe material degradation during operating conditions typical to the Minneapolis/St. Paul metropolitan area;

4.1.1.2 Standby power generating capacity at the headend. The Grantee shall maintain standby power generators capable of powering all headend equipment for at least twenty-four (24) hours. The back-up power supplies serving the System shall be capable of providing power to the System for not less than three (3) hours per occurrence measured on an annual basis according to manufacturer specifications in the event of an electrical outage. The Grantee shall maintain sufficient portable generators to be deployed in the

event that the duration of a power disruption is expected to exceed three (3) hours;

4.1.1.3 Facilities of good and durable quality, generally used in high-quality, reliable systems of similar design;

4.1.1.4 A System that conforms to or exceeds all applicable FCC technical performance standards, as amended from time to time, which standards are incorporated herein by reference, and any other applicable technical performance standards. Upstream signals shall at all times meet or exceed manufacturers' specifications for successful operation of upstream equipment provided by the Grantee or approved for use by the Grantee at any Subscriber's premises. End of the line performance must meet or exceed FCC specifications at the end of the Subscriber Drop;

4.1.1.5 A System shall, at all times, comply with applicable federal, State and local rules, regulations, practices and guidelines pertaining to the construction, upgrade, operation, extension and maintenance of Cable Systems, including, by way of example (but not limitation):

(A) National Electrical Code, as amended from time to time; and

(B) National Electrical Safety Code (NESC), as amended from time to time;

4.1.1.6 Facilities and equipment sufficient to cure violations of FCC technical standards and to ensure that Grantee's System remains in compliance with the standards specified in subsection 4.1.1.5;

4.1.1.7 Such facilities and equipment as necessary to maintain, operate and evaluate the Grantee's System for compliance with FCC technical and customer service standards, as such standards may hereafter be amended;

4.1.1.8 Status monitoring equipment to alert the Grantee when and where back-up power supplies are being used, which capability shall be activated and used on or before the completion of the System Upgrade;

4.1.1.9 All facilities and equipment required to properly test the System and conduct an ongoing and active program of preventative and demand maintenance and quality control, and to be able to quickly respond to customer complaints and resolve System problems;

4.1.1.10 Antenna supporting structures designed in accordance with any applicable governmental building codes, as amended, and painted, lighted and erected and maintained in accordance with all applicable rules and regulations of the Federal Aviation Administration, the Federal Communications Commission and all other applicable codes and regulations;

4.1.1.11 Facilities and equipment at the headend allowing the Grantee to transmit or cablecast signals in substantially the form received, without substantial alteration or deterioration;

4.1.1.12 The Grantee shall provide adequate security provisions in its Subscriber site equipment to permit parental control over the use of Grantee's Cable Service. The Grantee, however, shall bear no responsibility for the exercise of parental controls and shall incur no liability for any Subscriber's or viewer's exercise or failure to exercise such controls;

4.1.1.13 Facilities and equipment capable of operating within the temperature ranges typical to the climate of the North Metro Franchise Area over the calendar year;

4.1.1.14 The System shall be so constructed and operated that there is no perceptible deterioration in the quality of Public, Educational, Governmental or religious Access Channel signals after delivery of such signals to the first interface point with Grantee's bi-directional fiber PEG transport line, Grantee's headend or the subscriber network, whichever is applicable, as compared with the quality of any other channel on the System. As used in this paragraph, "deterioration" refers to delivery that is within the control of the Grantee; and

4.1.1.15 The Grantee must have TDD/TYY (or equivalent) equipment at the company office, and a publicly listed telephone number for such equipment, that will allow hearing impaired customers to contact the company.

4.1.2 Emergency Alert System. At all times during the term of this Franchise, Grantee shall provide and maintain an Emergency Alert System ("EAS"), consistent with applicable federal law and regulations including 47 C.F.R., Part 11, and any State of Minnesota Emergency Alert System Plan requirements. The EAS shall allow authorized officials to override the audio and video signals on all Channels to transmit and report emergency information. In the case of any sudden, unforeseen event that has the potential to cause significant damage, destruction, or loss of life, Grantee shall make the EAS available without charge and in a manner consistent with any State of Minnesota

Emergency Alert System Plan ("Plan") for the duration of such sudden, unforeseen event. Grantee shall cooperate with designated state officials to test the emergency override system, for periods not to exceed one minute in duration and not more than once every six months, and upon request by the City, provide verification of compliance with any State Plan. The City may identify authorized emergency officials for activating Grantee's EAS consistent with the State's Plan, and the City may also develop a local plan containing methods of EAS message distribution, subject to applicable laws.

4.1.3 During construction activities related to the System, the Grantee shall attempt to identify and take into account the Cable Service interests of the business community within the City. The Grantee shall, in connection with System construction, install conduit adequately sized to address future System rebuilds or System additions, with the intent to obviate the need to reopen the Rights-of-Way for construction and installation work.

4.1.4. The City may request, as part of the System construction, that the Grantee remove from the Rights-of-Way, at its own expense, its existing equipment, plant and facilities that will not be used in the future, whether activated or not. If any unused or deactivated equipment remains in Rights-of-Way after such City request and the Grantee's reasonable opportunity to remove, the City may remove such plant, facilities and equipment at the Grantee's expense. The Grantee may appeal any request to remove existing equipment, plant and facilities to the City Council and thereby stay City action until a final decision is issued by the City Council. In the event existing facilities, plant and equipment are left underground in the Rights-of-Way, the City or the Commission may require the Grantee to provide accurate maps showing the location and the nature of the deactivated or unused facilities, plant and equipment, if such information has not already been provided to the City or the Commission.

4.1.5. The Grantee shall not assert or otherwise raise any claim before a court of competent jurisdiction or any administrative agency alleging that, as of the Effective Date of this Franchise, the System design and performance requirements set forth in this Franchise are unenforceable under or inconsistent with then current applicable laws or regulations, or any orders, rules or decisions of the FCC.

4.2 Periodic Progress Reporting.

Following commencement of construction, the Grantee shall, upon request of the Commission, meet with the Commission and provide an update on the progress of the construction.

4.2.1 Public Notification. Prior to the beginning of the System construction, and periodically during each phase of construction, the Grantee shall inform the public and its Subscribers, through various means, about: (i) the progress of

construction; (ii) areas where construction crews will be working; and (iii) any expected temporary interruptions to existing services which may occur.

4.3 System Maintenance.

4.3.1 The Grantee shall interrupt Cable Service only for good cause and for the shortest time possible. Such interruption shall occur during periods of minimum use of the System. The Grantee shall use its best efforts to provide the Commission with at least twenty-four (24) hours prior notice of a planned service interruption, except for a planned service interruption which will have a minimal impact on Subscribers, usually meaning affecting less than one hundred (100) Subscribers or less than a fifteen (15) minute interruption.

4.3.2 Maintenance of the System shall be performed in accordance with the applicable technical performance and operating standards established by FCC rules and regulations. Should the FCC choose to abandon this field and does not preempt the City's entry into this field, the City may adopt such technical performance and operating standards as its own, and the Grantee shall comply with them at all times.

4.4 System Tests and Inspections; Special Testing.

4.4.1 Grantee shall perform all tests necessary to demonstrate compliance with the requirements of the Franchise and other performance standards established by applicable law or regulation.

4.4.2 The City and the Commission shall have the right to inspect all construction or installation work performed pursuant to the provisions of the Franchise. In addition, the City and/or the Commission may require special testing of a location or locations within the System if there is a particular matter of controversy or unresolved complaints regarding System construction, operations or installation work pertaining to such location(s). Such tests shall be limited to the particular matter in controversy. The City and/or the Commission shall endeavor to so arrange its request for such special testing so as to minimize hardship or inconvenience to the Grantee or to the Subscribers of such testing.

4.4.3 Before ordering such tests, the Grantee shall be afforded thirty (30) days following receipt of written notice to investigate and, if necessary, correct problems or complaints upon which tests were ordered. The City and/or the Commission, as applicable, shall meet with the Grantee prior to requiring special tests to discuss the need for such and, if possible, visually inspect those locations which are the focus of concern. If, after such meetings and inspections, the City and/or the Commission wishes to commence special tests and the thirty (30) days have elapsed without correction of the matter in controversy or resolution of complaints, the tests shall be conducted at the Grantee's expense by a qualified

engineer selected by the City and/or the Commission, as applicable, and the Grantee shall cooperate in such testing.

4.4.4 Unless otherwise provided in this Franchise, tests shall be supervised by the Grantee's chief technical authority, or designee, who shall certify all records of tests provided to the City and the Commission.

4.4.5 The Grantee shall provide the City and the Commission with at least two (2) business days' prior written notice of, and opportunity to observe, any tests performed on the System as it specifically relates to cable service.

4.4.5.1 Test results shall be filed with the City and the Commission within fourteen (14) days of a written request by the City and/or the Commission.

4.4.5.2 If any test indicates that any part or component of the System fails to meet applicable requirements, the Grantee, without requirement of additional notice or request from the City or the Commission, shall take corrective action, retest the locations and advise the City and the Commission of the action taken and the results achieved by filing a written report certified by the Grantee's chief technical authority, or designee.

4.5 Drop Testing and Replacement.

The Grantee shall replace, at no separate charge to an individual Subscriber, all Drops and/or associated passive equipment incapable of passing the full System capacity at the time a Subscriber upgrades.

4.6 FCC Reports.

Unless otherwise required by the terms of this Franchise, the results of any tests required to be filed by Grantee with the FCC or in the Grantee's public file, as it relates to cable service pursuant to this Franchise, shall upon request of the City or the Commission also be filed with the City or the Commission, as applicable, within ten (10) days of the request.

4.7 Lockout Capability.

Upon the request of a Subscriber, the Grantee shall make lockout capability available at no additional charge, other than a charge for a Set Top Box.

4.8 Types of Service.

Any change in programs or services offered shall comply with all lawful conditions and procedures contained in this Franchise and in applicable law or regulations.

4.9 Uses of System.

The Grantee shall, upon request of the Commission, advise the Commission of all active uses of the System, for both entertainment and other purposes, and the Commission shall have the right to conduct unannounced audits of such usage.

4.10 Additional Capacity.

The Grantee shall notify the City and the Commission in writing, in advance of the installation of any fiber optic capacity not contemplated by the initial System design, so that additional fibers may be installed on an Actual Cost basis for government and institutional use. If the City wishes to request additional fiber, it may notify the Grantee within fifteen (15) days of receipt of the Grantee's notification; provided, however, Grantee shall not be required to violate its telecommunications federal or state tariff.

SECTION 5. SERVICE PROVISIONS

5.1 Customer Service Standards.

The Grantee shall at all times comply with FCC customer service standards. In addition, the Grantee shall at all times satisfy all additional or stricter customer service requirements included in this Franchise and any customer service requirements set forth in any ordinance or regulation lawfully enacted by the City, upon 90 days' notice.

5.2 Video Programming.

Except as otherwise provided in this Franchise or in applicable law, all programming decisions remain the discretion of the Grantee, provided that the Grantee notifies the City, the Commission and Subscribers in writing thirty (30) days prior to any channel additions, deletions or realignments unless otherwise permitted under applicable federal, State and local laws and regulations. Grantee shall cooperate with the City, and use best efforts to provide all Subscriber notices to the Commission prior to delivery to Subscribers. Location and relocation of the PEG channels shall be governed by Sections 6.1.3-6.1.4.

5.3 Regulation of Service Rates.

5.3.1 The City and/or its delegatee may regulate rates for the provision of Cable Service, equipment or any other communications service provided over the System to the extent allowed under federal or State law(s). The City reserves the right to regulate rates for any future services to the extent permitted by law.

5.3.2 The Grantee shall provide at least 30 days' prior written notice (or such longer period as may be specified in FCC regulations) to Subscribers and to the City of any changes in rates, regardless of whether or not the Grantee believes the affected rates are subject to regulation, except to the extent such notice

requirement is specifically waived by governing law. Bills must be clear, concise and understandable, with itemization of all charges.

5.4 Sales Procedures.

The Grantee shall not exercise deceptive sales procedures when marketing Services within the City. In its initial communication or contact with a Subscriber or a non-Subscriber, and in all general solicitation materials marketing the Grantee or its Services as a whole, the Grantee shall inform the non-Subscriber of all levels of Service available, including the lowest priced and free service tiers. The Grantee shall have the right to market door-to-door during reasonable hours consistent with local ordinances and regulations.

5.5 Subscriber Inquiry and Complaint Procedures.

5.5.1 The Grantee shall have a publicly listed toll-free telephone number which shall be operated so as to receive general public and Subscriber complaints, questions and requests on a twenty-four (24) hour-a-day, seven (7) days-a-week, 365 days-a-year basis. Trained representatives of the Grantee shall be available to respond by telephone to Subscriber and service inquiries.

5.5.2 The Grantee shall maintain adequate numbers of telephone lines and personnel to respond in a timely manner to schedule service calls and answer Subscriber complaints or inquiries in a manner consistent with regulations adopted by the FCC and the City where applicable and lawful. Under Normal Operating Conditions, telephone answer time by a customer representative, including wait time, shall not exceed thirty (30) seconds when the connection is made. If the call needs to be transferred, transfer time shall not exceed thirty (30) seconds. These standards shall be met no less than ninety (90) percent of the time under Normal Operating Conditions, measured on a quarterly basis. Under Normal Operating Conditions, the customer will receive a busy signal less than three (3) percent of the time.

5.5.3 Subject to the Grantee's obligations pursuant to law regarding privacy of certain information, the Grantee shall prepare and maintain written records of all complaints received from the City and the Commission and the resolution of such complaints, including the date of such resolution. Such written records shall be on file at the office of the Grantee. The Grantee shall provide the City and/or the Commission with a written summary of such complaints, upon request. As to Subscriber complaints, Grantee shall comply with FCC record-keeping regulations, and make the results of such record-keeping available to the City and/or the Commission, upon request.

5.5.4 Excluding conditions beyond the control of the Grantee, the Grantee shall commence working on a service interruption within twenty-four (24) hours after the service interruption becomes known and pursue to conclusion all steps

reasonably necessary to correct the interruption. The Grantee must begin actions to correct other service problems the next business day after notification of the service problem, and pursue to conclusion all steps reasonably necessary to correct the problem.

5.5.5 The Grantee may schedule appointments for Installations and other service calls either at a specific time or, at a maximum, during a four-hour time block during the hours of 9:00 a.m. to 8:00 p.m., Monday through Friday, and 9:00 a.m. to 5:00 p.m. on Saturdays. The Grantee may also schedule service calls outside such hours for the convenience of customers. The Grantee shall use its best efforts to not cancel an appointment with a customer after the close of business on the business day prior to the scheduled appointment. If the installer or technician is late and will not meet the specified appointment time, he/she must use his/her best efforts to contact the customer and reschedule the appointment at the sole convenience of the customer. Service call appointments must be met in a manner consistent with FCC standards.

5.5.6 The Grantee shall respond to written complaints from the City and the Commission in a timely manner, and provide a copy of each response to the City and the Commission within thirty (30) days. In addition, the Grantee shall respond to all written complaints from Subscribers within (30) days of receipt of the complaint.

5.6 Subscriber Contracts.

The Grantee shall file with the Commission any standard form Subscriber contract utilized by Grantee. If no such written contract exists, the Grantee shall file with the Commission a document completely and concisely stating the length and terms of the Subscriber contract offered to customers. The length and terms of any Subscriber contract(s) shall be available for public inspection during the hours of 9:00 a.m. to 5:00 p.m., Monday through Friday.

5.7 Service Credit.

5.7.1 In the event a Subscriber establishes or terminates service and receives less than a full month's service, Grantee shall prorate the monthly rate on the basis of the number of days in the period for which service was rendered to the number of days in the billing cycle.

5.7.2 If, for any reason, Service is interrupted for a total period of more than twenty-four (24) hours in any thirty (30) day period, Subscribers that had interrupted service shall, upon request, be credited pro rata for such interruption.

5.8 Refunds or Credits.

5.8.1 Any refund checks shall be issued promptly, but not later than either:

5.8.1.1 The Subscriber's next billing cycle following resolution of the request or thirty (30) days, whichever is earlier; or

5.8.1.2 The return of the equipment supplied by the Grantee if Service is terminated.

5.8.2 Any credits for Service shall be issued no later than the Subscriber's next billing cycle following the determination that a credit is warranted.

5.9 Late Fees.

Fees for the late payment of bills shall not be assessed until after the Service has been fully provided. Late fee amounts on file with the Commission shall not be adjusted by the Grantee without the Commission's prior approval.

5.10 Notice to Subscribers.

5.10.1 The Grantee shall provide each Subscriber at the time Cable Service is installed, and at least every twelve (12) months thereafter, the following materials:

5.10.1.1 Instructions on how to use the Cable Service;

5.10.1.2 Billing and complaint procedures, and written instructions for placing a service call, filing a complaint or requesting an adjustment (including when a Subscriber is entitled to refunds for outages and how to obtain them);

5.10.1.3 A schedule of rates and charges, channel positions and a description of products and services offered;

5.10.1.4 Prices and options for programming services and conditions of subscription to programming and other services; and

5.10.1.5 A description of the Grantee's installation and service maintenance policies, Subscriber privacy rights, delinquent Subscriber disconnect and reconnect procedures and any other of its policies applicable to Subscribers.

5.10.2 Copies of materials specified in the preceding subsection shall be provided to the City and the Commission upon request.

5.10.3 All Grantee promotional materials, announcements and advertising of Cable Service to Subscribers and the general public, where price information is listed in any manner, shall be clear, concise, accurate and understandable.

5.11 Exclusive Contracts and Anticompetitive Acts Prohibited.

5.11.1 The Grantee may not require a residential Subscriber to enter into an exclusive contract as a condition of providing or continuing Cable Service.

5.11.2 The Grantee shall not engage in acts prohibited by federal or State law that have the purpose or effect of limiting competition for the provision of Cable Service in the City.

5.12 Office Availability and Payment Centers.

5.12.1 The Grantee shall install, maintain and operate, throughout the term of this Franchise, a single staffed payment center with regular business hours in the North Metro Franchise Area at a location agreed upon by the Commission and the Grantee. Additional payment centers may be installed at other locations. The purpose of the payment center(s) shall be to receive Subscriber payments. All subscriber remittances at a payment center shall be posted to Subscribers' accounts within forty-eight (48) hours of remittance. Subscribers shall not be charged a late fee or otherwise penalized for any failure by the Grantee to properly credit a Subscriber for a payment timely made.

5.12.2 The Grantee shall, at the request of and at no delivery or retrieval charge to a Subscriber, deliver or retrieve electronic equipment (*e.g.*, Set Top Boxes and remote controls).

5.12.3 After consultation with the Commission, the Grantee shall provide Subscribers with at least sixty (60) days' prior notice of any change in the location of the customer service center serving the North Metro System, which notice shall apprise Subscribers of the customer service center's new address, and the date the changeover will take place.

SECTION 6. ACCESS CHANNEL(S) PROVISIONS

6.1 Public, Educational and Government Access.

6.1.1 The Commission is hereby designated to operate, administer, promote, and manage PEG access programming on the Cable System.

6.1.2 Within one hundred twenty (120) days from the Effective Date, The Grantee shall provide twelve (12) channels (the "Access Channels") to be used for PEG access programming on the basic service tier. The City and Commission have the sole discretion to designate the use of each Access Channel. Grantee shall provide a technically reliable path for upstream and downstream transmission of the Access Channels, which will in no way degrade the technical quality of the Access Channels, from an agreed upon demarcation point at the Commission's Master Control Center at the Commission's office, and from any other designated Access

providers' locations, to Grantee's headend, on which all Access Channels shall be transported for distribution on Grantee's subscriber network. The Access Channels shall be delivered without degradation to subscribers in the technical format (e.g. HD or SD) as delivered by the Commission and any designated Access provider to Grantee at each demarcation point at the Commission Office and at the designated Access providers' locations.

6.1.2.1 All of the Access Channels will be made available through a multi-channel display (i.e. a picture in picture feed) on a single TV screen called a "mosaic" (the "North Metro Mosaic"), where a cable subscriber can access via an interactive video menu one of any of the 12 Access Channels. The North Metro Mosaic will be located on Channel 16. The 12 Access Channels will be located at Channels 8026-8037. The North Metro Mosaic will contain only Access Channels authorized by the Commission.

6.1.2.2 Grantee will make available to the Commission the ability to place detailed scheduled Access Channel programming information on the interactive channel guide by putting the Commission in contact with the electronic programming guide vendor ("EPG provider") that provides the guide service (currently Gracenote). Grantee will be responsible for providing the designations and instructions necessary to ensure the Access Channels will appear on the programming guide throughout the City and any necessary headend costs associated therewith. The Commission shall be responsible for providing programming information to the EPG provider.

6.1.2.3 For purposes of this Franchise, the term channel shall be as commonly understood and is not any specific bandwidth amount. The signal quality of the Access Channels shall be the same as the local broadcast channels, provided such signal quality is delivered to Grantee at the Access Channels' respective demarcation points.

6.1.2.4 Grantee will provide, at no cost to the Commission, air time on non-Access channels during periods in which ample unsold/unused air time on such channels exists for City public service announcements (PSAs). The Commission will provide a 30-second PSA prior to the start of each month on a mutually agreed-upon schedule.

6.1.2.5 In the event Grantee makes any change in the Cable System and related equipment and facilities or in its signal delivery technology, which requires the City or Commission to obtain new equipment in order to be compatible with such change for purposes of transport and delivery of the Access Channels to the Grantee's headend,

Grantee shall, at its own expense and free of charge to the City, the Commission, or its designated entities, purchase such equipment as may be necessary to facilitate the cablecasting of the Access Channels in accordance with the requirements of the Franchise.

6.1.2.6 Neither the Grantee nor the officers, directors, or employees of the Grantee is liable for any penalties or damages arising from programming content not originating from or produced by the Grantee and shown on any public access channel, education access channel, government access channel, leased access channel, or regional channel.

6.1.2.7 Within one hundred twenty (120) days of a written request from the Commission, Grantee shall make available as part of Basic Service to all Subscribers a PEG Access Video-on Demand (PEG-VOD) Service and maintain a PEG-VOD system. The PEG-VOD system shall be connected by the Grantee such that:

6.1.2.7.1 Twenty-five (25) hours of programming per member city of Commission, or such greater amount as may be mutually agreed to by the parties, as designated and supplied by the City, Commission, or its Designated Access Provider to the Grantee may be electronically transmitted and/or transferred and stored on the PEG-VOD system; and

6.1.2.7.2 A database of that programming may be efficiently searched and a program requested and viewed over the PEG-VOD system by any Subscriber in the City; and

6.1.2.7.3 Programming submitted for placement on the PEG-VOD system, shall be placed on and available for viewing from the PEG-VOD system within forty-eight (48) hours of receipt of said programming;

6.1.2.7.4 The hardware and software described in Subsection (8) below, shall be in all respects of the same or better technical quality as the hardware and software utilized by Grantee in the provision of any other video on demand services offered over the Cable System, and shall be upgraded at Grantee's cost, when new hardware or software is utilized on Grantee's Cable System for other video on demand services. Grantee shall provide reasonable technical assistance to allow for proper use and operation when encoding hardware or software is installed and/or upgraded at City's facilities.

6.1.2.8 To ensure compatibility and interoperability, the Grantee shall supply and maintain all necessary hardware and software to encode, transmit and/or transfer Government Access programming from the City to the PEG-VOD system. The City shall be responsible for all monitoring of any equipment provided under this Section, and notifying Grantee of any problems. Grantee shall provide all technical support and maintenance for the equipment provided to the City by Grantee under this Section. After notification of any equipment problems, Grantee shall diagnose and resolve the problem within forty eight (48) hours. Major repairs which cannot be repaired within the forty eight (48) hour timeframe shall be completed within seven (7) days of notice, unless, due to Force Majeure conditions, a longer time is required. "Major repairs" are those that require equipment to be specially obtained in order to facilitate the repairs. The quality of signal and the quality of service obtained by a Subscriber utilizing the PEG-VOD service shall meet or exceed the quality standards established for all other programming provided by the Grantee and as established elsewhere in this Franchise Agreement.

The Commission shall have the right to rename, reprogram or otherwise change the use of these channels at any time, in its sole discretion, provided such use is Noncommercial and public, educational, governmental or religious in nature. Nothing herein shall diminish any rights of the City and the Commission to secure additional PEG channels pursuant to Minn. Stat. § 238.084, which is expressly incorporated herein by reference.

6.1.3 The Access Channels, including the North Metro Mosaic channel, shall not be relocated without the consent of the Commission. If the Commission agrees to change the channel designation for Access Channels , the Grantee must provide at least three (3) months' notice to the City and the Commission prior to implementing the change, and shall reimburse the Commission and/or PEG entity for any reasonable costs incurred for: (i) purchasing or modifying equipment, business cards and signage; (ii) any marketing and notice of the channel change that the Commission reasonably determines is necessary; (iii) logo changes; and (iv) promoting, marketing and advertising the channel location of the affected Access Channels during the twelve-month period preceding the effective date of the channel change. Alternatively, the Grantee may choose to supply necessary equipment itself, provided such equipment is satisfactory to the Commission or PEG entity.

6.1.4 In the event the Grantee makes any change in the System and related equipment and facilities or in signal delivery technology, which change directly or indirectly causes the signal quality or transmission of PEG channel programming or PEG services to fall below technical standards under applicable law, the Grantee shall, at its own expense, provide any necessary technical assistance, transmission

equipment and training of PEG personnel, and in addition, provide necessary assistance so that PEG facilities may be used as intended, including, among other things, so that live and taped programming can be cablecasted efficiently to Subscribers.

6.1.5 Subject to Section 6.1.2.1, all PEG channels shall be transmitted in the same format as all other Basic Cable Service channels and shall be carried on the Basic Service tier and shall be provided to all cable subscribers regardless of the tier or package of cable service subscribed to by the subscriber.

6.1.6 Except as otherwise provided in this Franchise, the Commission shall be responsible for any necessary master control switching of PEG signals and Institutional Network.

6.2 PEG Support Obligations.

6.2.1 Grantee shall pay a PEG Fee of $3.16/subscriber/month from the effective date until the franchise renews. Starting with the 2016 calendar year, the City may elect to increase this fee based on the incumbent's cable franchise PEG support obligation, or the Consumer Price Index. Any such election must be made in writing to the Franchisee no later than September 1st prior to the year in which the increase shall apply. In no event shall the monthly per subscriber fee be in an amount different from the incumbent cable provider. The PEG fee may be used for operational or capital support of PEG programming. The PEG Fee may be itemized on the Subscriber billing statements per applicable law. The Grantee shall apply one PEG Fee on the master account for services to non-dwelling bulk accounts (such as hotels, motels, prisons and hospitals). The Grantee shall calculate PEG Fees on a pro rata basis for bulk accounts in residential multiple dwelling unit ("MDU") buildings in the following manner: if the bulk rate for Basic Cable Service is one third (1/3) of the current residential rate, then a pro-rated PEG Fee shall be added to the bulk bill for an MDU building in an amount equal to one third (1/3) of the current PEG Fee. If the bulk rate for Basic Cable Service is raised in any MDU building, the pro-rated PEG Fee in that building shall be recalculated and set based on the foregoing formula, regardless of any cap on per Subscriber PEG Fee amounts. Payments for the PEG Fee pursuant to this subsection shall be made quarterly based on actual receipts from the prior quarter on the same schedule as franchise fee payments.

6.2.2 The Grantee shall provide the fiber-optic or other cabling and other electronics, equipment, software and other materials necessary to transport all PEG signals from their origination point to and from the Commission's master control to the appropriate subscriber network channel, including channels provided discretely. Grantee shall provide the aforementioned cabling, electronics, equipment, software and other materials at no cost to the City, the Commission, and the North Metro Media Center. This equipment shall include one (1) encoder for each Access Channel.

6.3 Regional Channel 6.

The Grantee shall designate standard VHF Channel 6 for uniform regional channel usage to the extent required by State law.

6.4 Leased Access Channels.

The Grantee shall provide Leased Access Channels as required by federal and State law.

6.5 PEG Obligations.

Except as expressly provided in this Franchise, the Grantee shall not make any changes in PEG support or in the transmission, reception and carriage of PEG channels and equipment associated therewith, without the consent of the City and/or the Commission.

6.6 Costs and Payments not Franchise Fees.

The parties agree that any costs to the Grantee and payments from the Grantee associated with the provision of support for PEG access, pursuant to Sections 6 and 7 of this Franchise do not constitute and are not part of a franchise fee and fall within one or more of the exceptions to 47 U.S.C. § 542. If the incumbent franchised cable operator agrees to provide any support of the Access Channels in excess of the amount identified above or to any payment in support of any other PEG-related commitment after the Effective Date of this Franchise, the Commission, in its reasonable discretion, after meeting with the Grantee, will determine whether Grantee's PEG Fee should be changed. If Grantee is required to pay any additional PEG Fee, such amount must be based upon a per subscriber/per month fee.

SECTION 7. INSTITUTIONAL NETWORK (I-NET) PROVISIONS AND RELATED COMMITMENTS

7.1 Twin Cities Metro PEG Interconnect Network.

Grantee shall provide a discrete, non-public, video interconnect network, from an agreed upon demarcation point at the Commission's Master Control Center at the Commission's office, to Grantee's headend. The video interconnect network shall not exceed 50 Mbps of allocated bandwidth, allowing PEG operators that have agreed with Grantee to share (send and receive) live and recorded programming for playback on their respective systems. Where available the Grantee shall provide the video interconnect network and the network equipment necessary, for the high-priority transport of live multicast HD/SD video streams as well as lower-priority file-sharing. Grantee shall provide 50 Mbps bandwidth for each participating PEG entity to send its original programming, receive at least two additional multicast HD/SD streams from any other participating PEG entity,

and allow the transfer of files. Each participating PEG entity is responsible for encoding its own SD/HD content in suitable bit rates to be transported by the video interconnect network without exceeding the 50 Mbps of allocated bandwidth.

7.2 Cable Service to Public Buildings.

Grantee shall, at no cost to the City or Commission, provide Basic Service and Expanded Basic Service (currently Prism Essentials) or equivalent package of Cable Service and necessary reception equipment to up to seven (7) outlets at the Commission Office and at each Member City City Hall and to each Independent School District, except Blaine High School, at the current locations located in the Commission area that originates PEG programming. Grantee shall, at no cost to the City, provide Basic Service and Expanded Basic Service (currently Prism Essentials) or equivalent package of Cable Service and necessary reception equipment to up to three (3) outlets at all other government buildings, schools and public libraries located in the City where Grantee provides Cable Service, so long as these government addresses are designated as a Household and no other cable communications provider is providing complementary service at such location. For purposes of this subsection, "school" means all State-accredited K-12 public, and private schools. Outlets of Basic and Expanded Basic Service provided in accordance with this subsection may be used to distribute Cable Services throughout such buildings; provided such distribution can be accomplished without causing Cable System disruption and general technical standards are maintained. Such outlets may only be used for lawful purposes. Blaine High School will be provided the functionality to monitor PEG signals through a mutually agreeable alternate technology at the expense of the Grantee.

SECTION 8. OPERATION AND ADMINISTRATION PROVISIONS

8.1 Administration of Franchise.

The City's designated cable television administrator, or his/her designee, shall have continuing regulatory jurisdiction and supervision over the System and the Grantee's operation under the Franchise. The City may issue such reasonable rules and regulations concerning the construction, operation and maintenance of the System, as are consistent with the provisions of this Franchise and law.

8.2 Delegated Authority.

The City may appoint a citizen advisory body or a joint powers commission, or may delegate to any other body or Person authority to administer the Franchise and to monitor the performance of the Grantee pursuant to the Franchise. The Grantee shall cooperate with any such delegatee of the City.

8.3 Franchise Fee.

8.3.1 During the term of the Franchise, the Grantee shall pay quarterly to the City or its delegatee a Franchise fee in an amount equal to five percent (5%) of its Gross Revenues.

8.3.2 Any payments due under this provision shall be payable quarterly. The payment shall be made within thirty (30) days of the end of each of Grantee's fiscal quarters together with a report showing the basis for the computation. The City or the Commission shall have the right to require further supporting information for each franchise fee payment.

8.3.3 All amounts paid shall be subject to audit and recomputation by City and/or the Commission, and acceptance of any payment shall not be construed as an accord that the amount paid is in fact the correct amount. The Grantee shall be responsible for providing the City and/or the Commission all records necessary to confirm the accurate payment of franchise fees. The Grantee shall maintain such records for five (5) years, unless in the Grantee's ordinary course of business specific records are retained for a shorter period, but in no event less than three (3) years. If an audit discloses an overpayment or underpayment of franchise fees, the City and/or the Commission shall notify the Grantee of such overpayment or underpayment. The City's/Commission's audit expenses shall be borne by the City/Commission unless the audit determines that the payment to the City should be increased by more than five percent (5%) in the audited period, in which case the reasonable costs of the audit shall be borne by the Grantee as a cost incidental to the enforcement of the Franchise. Any additional amounts due to the City as a result of the audit shall be paid to the City within thirty (30) days following written notice to the Grantee by the City/Commission of the underpayment, which notice shall include a copy of the audit report. If the recomputation results in additional revenue to be paid to the City, such amount shall be subject to a ten percent (10%) annual interest charge. If the audit determines that there has been an overpayment by the Grantee, the Grantee may credit any overpayment against its next quarterly payment.

8.3.4 In the event any franchise fee payment or recomputation amount is not made on or before the required date, the Grantee shall pay, during the period such unpaid amount is owed, the additional compensation and interest charges computed from such due date, at an annual rate of ten percent (10%).

8.3.5 Nothing in this Franchise shall be construed to limit any authority of the City to impose any tax, fee or assessment of general applicability.

8.3.6 The franchise fee payments required by this Franchise shall be in addition to any and all taxes or fees of general applicability. The Grantee shall not have or make any claim for any deduction or other credit of all or any part of the amount of said franchise fee payments from or against any of said taxes or fees of general

applicability, except as expressly permitted by law. The Grantee shall not apply nor seek to apply all or any part of the amount of said franchise fee payments as a deduction or other credit from or against any of said taxes or fees of general applicability, except as expressly permitted by law. Nor shall the Grantee apply or seek to apply all or any part of the amount of any of said taxes or fees of general applicability as a deduction or other credit from or against any of its franchise fee obligations, except as expressly permitted by law.

8.4 Access to Records.

To the extent such documents are related to Grantee's compliance with this Franchise or applicable law (the burden to allege and, if so alleged, the initial burden to demonstrate that such requested documents are not related to Grantee's compliance with this Franchise or applicable law shall be the Grantee's), the City/Commission shall have the right to inspect or copy any records or documents maintained by Grantee (or maintained by an Affiliate on behalf of the Grantee, to the extent that review of such record or document maintained by the Affiliate on behalf of the Grantee is necessary in order for the City/Commission to enforce compliance with this Franchise) upon reasonable notice and during Grantee's administrative office hours, or require Grantee to provide copies of records and documents within a reasonable time, on a confidential and proprietary basis, to the extent such records and documents otherwise qualify as nonpublic, confidential, trade secret or proprietary pursuant to applicable law. Upon the City's/Commission's request, the Grantee shall provide to the City and/or the Commission copies of any records or documents that cannot be reasonably argued pursuant to applicable law to be nonpublic, confidential, trade secret or proprietary.

8.5 Reports and Maps to be Filed with City.

8.5.1 The Grantee shall file with the City, at the time of payment of the Franchise Fee, a report of all Gross Revenues in a form and substance as required by the City or the Commission.

8.5.2 The Grantee shall prepare and furnish to the City or the Commission, at the times and in the form prescribed, such other reports with respect to Grantee's operations pursuant to this Franchise as the City or the Commission may require. The City and the Commission shall use their best efforts to protect proprietary or trade secret information all consistent with State and federal law.

8.5.3 If required by the City and/or the Commission, the Grantee shall make available to the City and/or the Commission the maps, plats and permanent records of the location and character of all facilities constructed, including underground facilities, and Grantee shall upon request make available to the City and the Commission updates of such maps, plats and permanent records annually if changes have been made in the System.

8.6 Periodic Evaluation.

8.6.1 The City may require evaluation sessions at any time during the term of this Franchise, upon fifteen (15) days written notice to the Grantee.

8.6.2 Topics which may be discussed at any evaluation session may include, but are not limited to, application of new technologies, System, programming offered, access channels, facilities and support, municipal uses of cable, Subscriber rates, customer complaints, amendments to this Franchise, judicial rulings, FCC rulings, line extension policies and any other topics the City deems relevant.

8.6.3 As a result of a periodic review or evaluation session, upon notification from City, Grantee shall meet with City and undertake good faith efforts to reach agreement on changes and modifications to the terms and conditions of the Franchise which are legally, economically, and technically feasible.

SECTION 9. GENERAL FINANCIAL AND INSURANCE PROVISIONS

9.1 Performance Bond.

9.1.1 At the time the Franchise becomes effective and until such time as the construction of the System the Grantee shall furnish a bond to the Commission, in a form and with such sureties as are reasonably acceptable to the Commission, in the amount of $500,000. Upon such completion of all System the bond shall be reduced to $50,000. This bond will be conditioned upon the faithful performance by the Grantee of its Franchise obligations and upon the further condition that in the event the Grantee shall fail to comply with any law, ordinance or regulation governing the Franchise, there shall be recoverable jointly and severally from the principal and surety of the bond any damages or loss suffered by the City or the Commission as a result, including the full amount of any compensation, indemnification or cost of removal or abandonment of any property of the Grantee, plus a reasonable allowance for attorneys' fees and costs, up to the full amount of the bond, and further guaranteeing payment by the Grantee of claims, liens and taxes due the City or the Commission which arise by reason of the construction, operation, or maintenance of the System,. The rights reserved by the City and the Commission with respect to the bond are in addition to all other rights the City and the Commission may have under the Franchise or any other law. The Commission may, from year to year, in its sole discretion, reduce the amount of the bond.

9.1.2 The time for Grantee to correct any violation or liability shall be extended by Commission if the necessary action to correct such violation or liability is, in the sole determination of Commission, of such a nature or character as to require more than thirty (30) days within which to perform, provided Grantee provides written notice that it requires more than thirty (30) days to correct such violations

or liability, commences the corrective action within the thirty (30)-day cure period and thereafter uses reasonable diligence to correct the violation or liability.

9.1.3 In the event this Franchise is revoked by reason of default of Grantee, City shall be entitled to collect from the performance bond that amount which is attributable to any damages sustained by City as a result of said default or revocation.

9.1.4 Grantee shall be entitled to the return of the performance bond, or portion thereof, as remains sixty (60) days after the expiration of the term of the Franchise or revocation for default thereof, provided the City or the Commission has not notified Grantee of any actual or potential damages incurred as a result of Grantee's operations pursuant to the Franchise or as a result of said default.

9.1.5 The rights reserved to the City or the Commission with respect to the performance bond are in addition to all other rights of the City and the Commission whether reserved by this Franchise or authorized by law, and no action, proceeding or exercise of a right with respect to the performance bond shall affect any other right the City and the Commission may have.

9.2 Letter of Credit.

9.2.1 Within 30 days of the Effective Date of this Franchise, the Grantee shall deliver to the Commission an irrevocable and unconditional Letter of Credit, that is effective as of the Effective Date, in a form and substance acceptable to the Commission, from a National or State bank approved by the Commission, in the amount of $25,000.00.

9.2.2 The Letter of Credit shall provide that funds will be paid to the City upon written demand of the City, and in an amount solely determined by the City in payment for penalties charged pursuant to this Section, in payment for any monies deemed by the City to be owed by the Grantee to the City and/or the Commission, as applicable, after notice and opportunity to pay any such monies, pursuant to its obligations under this Franchise, or in payment for any damage incurred by the City or the Commission as a result of any acts or omissions by the Grantee pursuant to this Franchise.

9.2.3 In addition to recovery of any monies owed by the Grantee to the City, or the Commission or damages to the City, the Commission or any Person as a result of any acts or omissions by the Grantee pursuant to the Franchise, the City and/or the Commission in its sole discretion may charge to and collect from the Letter of Credit the following penalties:

9.2.3.1 For failure to timely construction pursuant to Section 2.8 provided in this Franchise, unless the City or the Commission approves the delay, the penalty shall be $500.00 per day for each day, or part thereof, such failure occurs or continues.

9.2.3.2 For failure to provide data, documents, reports or information or to cooperate with City or the Commission during an application process or system review or as otherwise provided herein, the penalty shall be $250.00 per day for each day, or part thereof, such failure occurs or continues.

9.2.3.3 Fifteen (15) days following notice from the City or the Commission of a failure of Grantee to comply with construction, operation or maintenance standards, the penalty shall be $250.00 per day for each day, or part thereof, such failure occurs or continues.

9.2.3.4 For failure to provide the services and the payments required by this Franchise, including, but not limited to, the implementation and the utilization of the PEG Access Channels, the penalty shall be $250.00 per day for each day, or part thereof, such failure occurs or continues.

9.2.3.5 For Grantee's breach of any written contract or agreement with or to the City or the Commission, the penalty shall be $250.00 per day for each day, or part thereof, such breach occurs or continues.

9.2.3.6 For failure to comply with the reasonable build-out provisions and for economic redlining in violation of Section 2.8 and 11.1 and 47 U.S.C. § 541(a)(3): Five Hundred dollars ($500) per day for each day or part thereof that such violation continues.

9.2.3.7 For failure to comply with any of the provisions of this Franchise, or other City ordinance or regulation for which a penalty is not otherwise specifically provided pursuant to this subsection 9.2.3, the penalty shall be $250.00 per day for each day, or part thereof, such failure occurs or continues.

9.2.4 Each violation of any provision of this Franchise shall be considered a separate violation for which a separate penalty can be imposed; provided, however, that Grantee will not be charged under more than one penalty provision for each separate violation.

9.2.5 Whenever the City or the Commission determines that the Grantee has violated one or more terms, conditions or provisions of this Franchise, or for any other violation contemplated in subsection 9.2.3 above, a written notice shall be given to Grantee informing it of such violation. At any time after thirty (30) days (or such longer reasonable time which, in the determination of the City or the Commission, is necessary to cure the alleged violation) following local receipt of notice, provided the City or its designee finds that the Grantee remains in violation of one or more terms, conditions or provisions of this Franchise, in the sole opinion of the City or the Commission, the City or the Commission may

draw from the Letter of Credit all penalties and other monies due the City or the Commission from the date of the local receipt of notice.

9.2.6 Prior to drawing on the Letter of Credit, the City or the Commission shall give Grantee written notice that it intends to draw, and the Grantee may, within seven (7) days thereafter, notify the City or the Commission in writing that there is a dispute as to whether a violation or failure has in fact occurred. Such written notice by the Grantee to the City or the Commission shall specify with particularity the matters disputed by Grantee. Any penalties shall continue to accrue, but the City or the Commission may not draw from the Letter of Credit during any appeal pursuant to this subparagraph 9.2.6. The City or the Commission shall hear Grantee's dispute within sixty (60) days and the City or the Commission, as appropriate, shall render a final decision within sixty (60) days thereafter. Withdrawal from the Letter of Credit may occur only upon a final decision.

9.2.7 If said Letter of Credit or any subsequent Letter of Credit delivered pursuant thereto expires prior to thirty (30) months after the expiration of the term of this Franchise, it shall be renewed or replaced during the term of this Franchise to provide that it will not expire earlier than thirty (30) months after the expiration of this Franchise. The renewed or replaced Letter of Credit shall be of the same form and with a bank authorized herein and for the full amount stated in subsection 9.2.1 of this Section.

9.2.8 If the City or the Commission draws upon the Letter of Credit or any subsequent Letter of Credit delivered pursuant hereto, in whole or in part, the Grantee shall replace or replenish to its full amount the same within ten (10) days and shall deliver to the Commission a like replacement Letter of Credit or certification of replenishment for the full amount stated in Section 9.2.1 as a substitution of the previous Letter of Credit. This shall be a continuing obligation for any withdrawals from the Letter of Credit.

9.2.9 If any Letter of Credit is not so replaced or replenished, the City or the Commission may draw on said Letter of Credit for the whole amount thereof and use the proceeds as the City or the Commission determines in its sole discretion. The failure to replace or replenish any Letter of Credit may also, at the option of the City or the Commission, be deemed a default by the Grantee under this Franchise. The drawing on the Letter of Credit by the City or the Commission, and use of the money so obtained for payment or performance of the obligations, duties and responsibilities of the Grantee which are in default, shall not be a waiver or release of such default.

9.2.10 The collection by the City or the Commission of any damages, monies or penalties from the Letter of Credit shall not affect any other right or remedy available to it, nor shall any act, or failure to act, by the City or the Commission

pursuant to the Letter of Credit, be deemed a waiver of any right of the City or the Commission pursuant to this Franchise or otherwise.

9.3 Indemnification of City.

9.3.1 The City and its officers, boards, committees, commissions, elected and appointed officials, employees, volunteers and agents shall not be liable for any loss or damage to any real or personal property of any Person, or for any injury to or death of any Person, arising out of or in connection with Grantee's construction, operation, maintenance, repair or removal of the System, or as to any other action of Grantee with respect to this Franchise.

9.3.2 Grantee shall indemnify, defend, and hold harmless the City and its officers, boards, committees, commissions, elected and appointed officials, employees, volunteers and agents from and against all liability, damages and penalties which they may legally be required to pay as a result of the City's or the Commission's exercise, administration or enforcement of the Franchise.

9.3.3 Nothing in this Franchise relieves a Person from liability arising out of the failure to exercise reasonable care to avoid injuring the Grantee's facilities while performing work connected with grading, regarding or changing the line of a Right-of-Way or public place or with the construction or reconstruction of a sewer or water system.

9.3.4 The Grantee shall not be required to indemnify the City for negligence or misconduct on the part of the City or its officers, boards, committees, commissions, elected or appointed officials, employees, volunteers or agents, including any loss or claims.

9.3.5 Grantee shall contemporaneously with this Franchise execute an Indemnity Agreement in the form of **Exhibit A**, which shall indemnify, defend and hold the City and Commission harmless for any claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and reasonable attorneys' fees or reasonable expenses arising out of the actions of the City and/or Commission in granting this Franchise. This obligation includes any claims by another franchised cable operator against the City and/or Commission that the terms and conditions of this Franchise are less burdensome than another franchise granted by the city or that this Franchise does not satisfy the requirements of applicable state law(s).

9.4 Insurance.

9.4.1 As a part of the indemnification provided in Section 9.3, but without limiting the foregoing, Grantee shall file with the Commission at the time of its acceptance of this Franchise, and at all times thereafter maintain in full force and effect at its sole expense, a comprehensive general liability insurance policy, including

broadcaster's/cablecaster's liability and contractual liability coverage, in protection of the Grantee, the Commission, the City and its officers, elected and appointed officials, boards, commissions, commissioners, agents, employees and volunteers for any and all damages and penalties which may arise as a result of this Franchise. The policy or policies shall name the City and the Commission as an additional insured, and in their capacity as such, City and Commission officers, elected and appointed officials, boards, commissions, commissioners, agents, employees and volunteers. The broadcaster's/cablecaster's liability coverage specified in this provision shall be subject to Section 9.3 above regarding indemnification of the City.

9.4.2 The policies of insurance shall be in the sum of not less than $1,000,000.00 for personal injury or death of any one Person, and $2,000,000.00 for personal injury or death of two or more Persons in any one occurrence, $1,000,000.00 for property damage to any one Person and $2,000,000.00 for property damage resulting from any one act or occurrence.

9.4.3 The policy or policies of insurance shall be maintained by Grantee in full force and effect during the entire term of the Franchise. Each policy of insurance shall contain a statement on its face that the insurer will not cancel the policy or fail to renew the policy, whether for nonpayment of premium, or otherwise, and whether at the request of Grantee or for other reasons, except after sixty (60) days advance written notice have been provided to the Commission. The Grantee shall not cancel any required insurance policy without submission of proof that the Grantee has obtained alternative insurance satisfactory to the City which complies with this Franchise.

9.4.4 All insurance policies shall be with sureties qualified to do business in the State of Minnesota, with an A-1 or better rating of insurance by Best's Key Rating Guide, Property/Casualty Edition, and in a form approved by the City.

9.4.5 All insurance policies shall be available for review by the City and the Commission, and the Grantee shall keep on file with the Commission certificates of insurance.

9.4.6 Failure to comply with the insurance requirements of this Section shall constitute a material violation of this Franchise.

SECTION 10. SALE, ABANDONMENT, TRANSFER AND REVOCATION OF FRANCHISE

10.1 <u>City's Right to Revoke</u>.

10.1.1 In addition to all other rights which City has pursuant to law or equity, City reserves the right to commence proceedings to revoke, terminate or cancel this

Franchise, and all rights and privileges pertaining thereto, if it is determined by City that:

10.1.1.1 Grantee has violated material provisions(s) of this Franchise; or

10.1.1.2 Grantee has attempted to evade any of the provisions of the Franchise; or

10.1.1.3 Grantee has practiced fraud or deceit upon the City or the Commission.

City may revoke this Franchise without the hearing required by Section 10.2.2 herein if Grantee is adjudged a bankrupt.

10.2 Procedures for Revocation.

10.2.1 The City shall provide the Grantee with written notice of a cause for revocation and the intent to revoke and shall allow Grantee thirty (30) days subsequent to receipt of the notice in which to correct the violation or to provide adequate assurance of performance in compliance with the Franchise. In the notice required herein, the City shall provide the Grantee with the basis for revocation.

10.2.2 The Grantee shall be provided the right to a public hearing affording due process before the City Council prior to the effective date of revocation, which public hearing shall follow the thirty (30) day notice provided in subsection 10.2.1 above. The City shall provide the Grantee with written notice of its decision together with written findings of fact supplementing said decision.

10.2.3 Only after the public hearing and upon written notice of the determination by the City to revoke the Franchise may the Grantee appeal said decision with an appropriate state or federal court or agency.

10.2.4 During the appeal period, the Franchise shall remain in full force and effect unless the term thereof sooner expires or unless continuation of the Franchise would endanger the health, safety and welfare of any Person or the public.

10.3 Continuity of Service.

Grantee may not abandon the System or any portion thereof without having first given three (3) months written notice to the City. The Grantee may not abandon the System or any portion thereof without compensating the City for all costs incident to removal of the System if required by the City pursuant to section 10.4.

10.4 Removal After Abandonment, Termination or Forfeiture.

10.4.1 In the event of termination or forfeiture of the Franchise or abandonment of the System, the City shall have the right to require the Grantee to remove all or any

portion of the System from all Rights-of-Way and public property within the City, consistent with Section 3.8 (Removal of Facilities at Expiration of Franchise) herein.

10.4.2 If the Grantee has failed to commence removal of the System, or such part thereof as was designated by the City, within thirty (30) days after written notice of the City's demand for removal is given, or if the Grantee has failed to complete such removal within twelve (12) months after written notice of the City's demand for removal is given, the City shall have the right to apply funds secured by the Letter of Credit and Performance Bond toward removal and/or declare all right, title and interest to the System to be in the City with all rights of ownership including, but not limited to, the right to operate the System or transfer the System to another for operation by it.

10.5 <u>Sale or Transfer of Franchise</u>.

10.5.1 No sale or transfer of the Franchise, or sale, transfer or fundamental corporate change of or in Grantee, including, but not limited to, a fundamental corporate change in Grantee's parent corporation or any entity having a controlling interest in Grantee, the sale of a controlling interest in the Grantee's assets, a merger, including the merger of a subsidiary and parent entity, consolidation or the creation of a subsidiary or affiliate entity, shall take place until a written request has been filed with the City requesting approval of the sale, transfer or corporate change and such approval has been granted or deemed granted, provided, however, that said approval shall not be required where Grantee grants a security interest in its Franchise and/or assets to secure an indebtedness. Upon notice to the City, Grantee may undertake legal changes necessary to consolidate the corporate or partnership structures of its System provided there is no change in the controlling interests which could materially alter the financial responsibilities for the Grantee; provided however, Grantee must seek approval of any transaction constituting a transfer under state law.

10.5.2 Any sale, transfer, exchange or assignment of stock in Grantee, or Grantee's parent corporation or any other entity having a controlling interest in Grantee, so as to create a new controlling interest therein, shall be subject to the requirements of this Section 10.5. The term "controlling interest" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

10.5.3 The Grantee shall file, in addition to all documents, forms and information required to be filed by applicable law, the following:

10.5.3.1 All contracts, agreements or other documents that constitute the proposed transaction and all exhibits, attachments or other documents referred to therein which are necessary in order to understand the terms thereof.

10.5.3.2 A list detailing all documents filed with any state or federal agency related to the transaction including, but not limited to, the MPUC, the FCC, the FTC, the FEC, the SEC or MnDOT. Upon request, Grantee shall provide City with a complete copy of any such document; and

10.5.3.3 Any other documents or information related to the transaction as may be specifically requested by the City

10.5.4 The City shall have such time as is permitted by federal law in which to review a transfer request.

10.5.5 The Grantee shall reimburse the City and/or the Commission for all the reasonable legal, administrative, and consulting costs and fees associated with the City's/Commission's review of any request to transfer. Nothing herein shall prevent the Grantee from negotiating partial or complete payment of such costs and fees by the transferee. Grantee may not itemize any such reimbursement on Subscriber bills, but may recover such expenses in its Subscriber rates.

10.5.6 In no event shall a sale, transfer, corporate change or assignment of ownership or control pursuant to subsections 10.5.1 or 10.5.2 of this Section be approved without the Grantee remaining, or (if other than the current Grantee) transferee becoming a signatory to this Franchise and assuming or continuing to have all rights and obligations hereunder.

10.5.7 In the event of any proposed sale, transfer, corporate change or assignment pursuant to subsection 10.5.1 or 10.5.2, the City shall have the right to purchase the System for the value of the consideration proposed in such transaction. The City's right to purchase shall arise upon City's receipt of notice of the material terms of an offer or proposal for sale, transfer, corporate change or assignment, which Grantee has accepted. Notice of such offer or proposal must be conveyed to City in writing and separate from any general announcement of the transaction.

10.5.8 The City shall be deemed to have waived its right to purchase the System pursuant to this Section only in the following circumstances:

10.5.8.1 If City does not indicate to Grantee in writing, within sixty (60) days of receipt of written notice of a proposed sale, transfer, corporate change or assignment as contemplated in Section 10.5.7 above, its intention to exercise its right of purchase; or

10.5.8.2 It approves the assignment or sale of the Franchise as provided within this Section.

10.5.9 No Franchise may be transferred if the City and/or the Commission determine the Grantee is in noncompliance of the Franchise unless an acceptable compliance

program has been approved by City or the Commission. The approval of any transfer of ownership pursuant to this Section shall not be deemed to waive any rights of the City or the Commission to subsequently enforce noncompliance issues relating to this Franchise.

10.5.10 Any transfer or sale of the Franchise without the prior written consent of the City shall be considered to impair the City's assurance of due performance. The granting of approval for a transfer or sale in one instance shall not render unnecessary approval of any subsequent transfer or sale for which approval would otherwise be required.

SECTION 11. PROTECTION OF INDIVIDUAL RIGHTS

11.1 Discriminatory Practices Prohibited.

Grantee shall not deny service, deny access, or otherwise discriminate against Subscribers (or group of potential subscribers) or general citizens on the basis of income, race, color, religion, national origin, sex, age, status as to public assistance, affectional preference or disability. Grantee shall comply at all times with all other applicable federal, State and City laws.

11.2. Subscriber Privacy.

11.2.1 No signals, including signals of a Class IV Channel, may be transmitted from a Subscriber terminal for purposes of monitoring individual viewing patterns or practices without the express written permission of the Subscriber. Such written permission shall be for a limited period of time not to exceed one (1) year which may be renewed at the option of the Subscriber. No penalty shall be invoked for a Subscriber's failure to provide or renew such authorization. The authorization shall be revocable at any time by the Subscriber without penalty of any kind whatsoever. Such permission shall be required for each type or classification of Class IV Channel activity planned for the purpose of monitoring individual viewing patterns or practices.

11.2.2 No lists of the names and addresses of Subscribers or any lists that identify the viewing habits of Subscribers shall be sold or otherwise made available to any party other than to Grantee or its agents for Grantee's service business use or to City for the purpose of Franchise administration, and also to the Subscriber subject of that information, unless Grantee has received specific written authorization from the Subscriber to make such data available. Such written permission shall be for a limited period of time not to exceed one (1) year which may be renewed at the option of the Subscriber. No penalty shall be invoked for a Subscriber's failure to provide or renew such authorization. The authorization shall be revocable at any time by the Subscriber without penalty of any kind whatsoever.

11.2.3 Written permission from the Subscriber shall not be required for the conducting of System wide or individually addressed electronic sweeps for the purpose of verifying System integrity or monitoring for the purpose of billing. Confidentiality of such information shall be subject to the provision set forth in subsection 11.2.2.

SECTION 12. UNAUTHORIZED CONNECTIONS AND MODIFICATIONS

12.1 Unauthorized Connections or Modifications Prohibited.

It shall be unlawful for any firm, Person, group, company, corporation or governmental body or agency, without the express consent of the Grantee, to make or possess, or assist anybody in making or possessing, any unauthorized connection, extension or division, whether physically, acoustically, inductively, electronically or otherwise, with or to any segment of the System or to receive services of the System without Grantee's authorization.

12.2 Removal or Destruction Prohibited.

It shall be unlawful for any firm, Person, group, company or corporation to willfully interfere, tamper with, remove, obstruct, or damage, or assist thereof, any part or segment of the System for any purpose whatsoever, except for any rights the City may have pursuant to this Franchise or its police powers.

12.3 Penalty.

Any firm, Person, group, company or corporation found guilty of violating this section may be fined not less than Twenty Dollars ($20.00) and the costs of the action nor more than Five Hundred Dollars ($500.00) and the costs of the action for each and every subsequent offense. Each continuing day of the violation shall be considered a separate occurrence.

SECTION 13. MISCELLANEOUS PROVISIONS

13.1 Franchise Renewal.

Any renewal of this Franchise shall be performed in accordance with applicable federal, State and local laws and regulations.

13.2 Work Performed by Others.

All applicable obligations of this Franchise shall apply to any subcontractor or others performing any work or services pursuant to the provisions of this Franchise, however, in no event shall any such subcontractor or other performing work obtain any rights to maintain and operate the System or provide Cable Service. The Grantee shall provide

notice to the City of the name(s) and address(es) of any entity, other than Grantee, which performs substantial services pursuant to this Franchise.

13.3 Amendment of Franchise Ordinance.

The Grantee and the City may agree, from time to time, to amend this Franchise. Such written amendments may be made subsequent to a review session pursuant to Section 8.6 or at any other time if the City and the Grantee agree that such an amendment will be in the public interest or if such an amendment is required due to changes in federal, State or local laws. Provided, however, nothing herein shall restrict the City's exercise of its police powers or the City's authority to unilaterally amend Franchise provisions to the extent permitted by law.

13.4 Compliance with Federal, State and Local Laws.

13.4.1 If any federal or State law or regulation shall require or permit City or Grantee to perform any service or act or shall prohibit City or Grantee from performing any service or act which may be in conflict with the terms of this Franchise, then as soon as possible following knowledge thereof, either party shall notify the other of the point in conflict believed to exist between such law or regulation. Grantee and City shall conform to State laws and rules regarding cable communications not later than one (1) year after they become effective, unless otherwise stated, and to conform to federal laws and regulations regarding cable as they become effective.

13.4.2 In the event that federal or State laws, rules or regulations preempt a provision or limit the enforceability of a provision of this Franchise, the provision shall be read to be preempted to the extent and for the time, but only to the extent and for the time, required or necessitated by law. In the event such federal or State law, rule or regulation is subsequently repealed, rescinded, amended or otherwise changed so that the provision hereof that had been preempted is no longer preempted, such provision shall thereupon return to full force and effect, and shall thereafter be binding on the parties hereto, without the requirement of further action on the part of the City or the Commission.

13.4.3 If any term, condition or provision of this Franchise or the application thereof to any Person or circumstance (including the City, the Grantee and the Commission) shall, to any extent, be held to be invalid or unenforceable, the remainder hereof and the application of such term, condition or provision to Persons or circumstances (including the City, the Grantee and the Commission) other than those as to whom it shall be held invalid or unenforceable shall not be affected thereby, and this Franchise and all the terms, provisions and conditions hereof shall, in all other respects, continue to be effective and complied with provided the loss of the invalid or unenforceable clause does not substantially alter the agreement between the parties. In the event such law, rule or regulation is subsequently repealed, rescinded, amended or otherwise changed so that the

provision which had been held invalid or modified is no longer in conflict with the law, rules and regulations then in effect, said provision shall thereupon return to full force and effect and shall thereafter be binding on Grantee and City without further action by the City.

13.4.4 The City and the Grantee shall, at all times during the term of this Franchise, including all extensions and renewals hereof, comply with applicable federal, State and local laws and regulations.

13.5 Nonenforcement by City.

Grantee shall not be relieved of its obligations to comply with any of the provisions of this Franchise by reason of any failure or delay of City to enforce prompt compliance. City may only waive its rights hereunder by expressly so stating in writing. Any such written waiver by City of a breach or violation of any provision of this Franchise shall not operate as or be construed to be a waiver of any subsequent breach or violation.

13.6 Rights Cumulative.

All rights and remedies given to City and the Commission by this Franchise or retained by City or the Commission herein shall be in addition to and cumulative with any and all other rights and remedies, existing or implied, now or hereafter available to the City and the Commission, at law or in equity, and such rights and remedies shall not be exclusive, but each and every right and remedy specifically given by this Franchise or otherwise existing or given may be exercised from time to time and as often and in such order as may be deemed expedient by the City and the Commission and the exercise of one or more rights or remedies shall not be deemed a waiver of the right to exercise at the same time or thereafter any other right or remedy.

13.7 Grantee Acknowledgment of Validity of Franchise.

The Grantee acknowledges that it has had an opportunity to review the terms and conditions of this Franchise and that under current law Grantee believes that said terms and conditions are not unreasonable or arbitrary, and that Grantee believes City has the power to make the terms and conditions contained in this Franchise.

13.8 Force Majeure.

The Grantee shall not be deemed in default of provisions of this Franchise or the City Code where performance was rendered impossible by war or riots, labor strikes or civil disturbances, floods or other causes beyond the Grantee's control, and the Franchise shall not be revoked or the Grantee penalized for such noncompliance, provided that the Grantee, when possible, takes immediate and diligent steps to bring itself back into compliance and to comply as soon as possible, under the circumstances, with the Franchise without unduly endangering the health, safety and integrity of the Grantee's

employees or property, or the health, safety and integrity of the public, the Rights-of-Way, public property or private property.

13.9 Governing Law.

This Franchise shall be governed in all respects by the laws of the State of Minnesota.

13.10 Captions and References.

13.10.1 The captions and headings of sections throughout this Franchise are intended solely to facilitate reading and reference to the sections and provisions of this Franchise. Such captions shall not affect the meaning or interpretation of this Franchise.

13.10.2 When any provision of the City Code is expressly mentioned herein, such reference shall not be construed to limit the applicability of any other provision of the City Code that may also govern the particular matter in question.

13.11 Rights of Third Parties.

This Franchise is not intended to, and shall not be construed to, grant any rights to or vest any rights in third parties, unless expressly provided herein.

13.12 Merger of Documents.

This Franchise, and the attachments hereto, constitute the entire Franchise agreement between the City and the Grantee, and supersede all prior oral or written franchises, drafts and understandings.

SECTION 14. PUBLICATION EFFECTIVE DATE; ACCEPTANCE AND EXHIBITS

14.1 Publication.

This Franchise shall be published in accordance with applicable local and Minnesota law.

14.2 Acceptance.

14.2.1 Grantee shall accept this Franchise within sixty (60) days of its enactment by the City Council and the enactment of a Franchise on substantially similar terms by the other member municipalities of the Commission, unless the time for acceptance is extended by the City. Such acceptance by the Grantee shall be deemed the grant of this Franchise for all purposes; provided, however, this Franchise shall not be effective until all City ordinance adoption procedures are complied with and all applicable timelines have run for the adoption of a City ordinance. In the event acceptance does not take place, or should all ordinance

adoption procedures and timelines not be completed, this Franchise and any and all rights granted hereunder to the Grantee shall be null and void.

14.2.2 Upon acceptance of this Franchise, the Grantee and the City shall be bound by all the terms and conditions contained herein. The Grantee agrees that this Franchise is not inconsistent with applicable law or regulations at the time it is executed.

14.2.3 Grantee shall accept this Franchise in the following manner:

14.2.3.1 This Franchise will be properly executed and acknowledged by Grantee and delivered to City.

14.2.3.2 With its acceptance, Grantee shall also deliver any performance bond and insurance certificates required herein that are due but have not previously been delivered.

14.3 Binding Acceptance.

This Franchise shall bind and benefit the parties hereto and their respective authorized heirs, beneficiaries, administrators, executors, receivers, trustees, successors and assigns.

Passed and adopted this _____ day of _____, 2015.

Attest:
MINNESOTA

CITY OF SPRING LAKE PARK,

By: _____
Its: _____

By: _____
Its: _____

ACCEPTED: This Franchise is accepted and we agree to be bound by its terms and conditions.

QWEST BROADBAND SERVICES, INC.,
DBA CENTURYLINK

Dated: _____

By: _____
Its: _____

EXHIBIT A INDEMNITY AGREEMENT

INDEMNITY AGREEMENT made this ____ day of _____, 2015, by and between Qwest Broadband Services, Inc., a Delaware Corporation, party of the first part, hereinafter called "CenturyLink," and the City of Spring Lake Park, a Minnesota Municipal Corporation, party of the second part, hereinafter called "City" and the North Metro Telecommunications Commission, a Minnesota Municipal Joint Powers entity, hereinafter called "Commission."

WITNESSETH:

WHEREAS, the City of Spring Lake Park has awarded to Qwest Broadband Services, Inc. a franchise for the operation of a cable communications system in the City; and

WHEREAS, the City has required, as a condition of its award of a cable communications franchise, that it and the Commission be indemnified with respect to all claims and actions arising from the award of said franchise.

NOW THEREFORE, in consideration of the foregoing promises and the mutual promises contained in this agreement and in consideration of entering into a cable television franchise agreement and other good and valuable consideration, receipt of which is hereby acknowledged, CenturyLink hereby agrees, at its sole cost and expense, to fully indemnify, defend and hold harmless the City and the Commission, its officers, boards, commissions, employees and agents against any and all claims, suits, actions, liabilities and judgments for damages, cost or expense (including, but not limited to, court and appeal costs and reasonable attorneys' fees and disbursements assumed or incurred by the City in connection therewith) arising out of the actions of the City and Commission in granting a franchise to CenturyLink. This includes any claims by another franchised cable operator against the City that the terms and conditions of the CenturyLink franchise are less burdensome than another franchise granted by the City or that the CenturyLink Franchise does not satisfy the requirements of applicable federal, state, or local law(s). The indemnification provided for herein shall not extend or apply to any acts of the City or Commission constituting a violation or breach by the City or Commission of the contractual provisions of the franchise ordinance, unless such acts are the result of a change in applicable law, the order of a court or administrative agency, or are caused by the acts of CenturyLink.

The City or Commission shall give CenturyLink reasonable notice of the making of any claim or the commencement of any action, suit or other proceeding covered by this agreement. The City and Commission shall cooperate with CenturyLink in the defense of any such action, suit or other proceeding at the request of CenturyLink. The City and Commission may participate in the defense of a claim, but if CenturyLink provides a defense at CenturyLink's expense then CenturyLink shall not be liable for any attorneys' fees, expenses or other costs that City or Commission may incur if it chooses to participate in the defense of a claim, unless and until separate representation is required. If separate representation to fully protect the interests of both parties is or becomes necessary, such as a conflict of interest, in accordance with the Minnesota Rules of Professional Conduct, between the City or the Commission and the counsel

selected by CenturyLink to represent the City and/or the Commission, Century Link shall pay, from the date such separate representation is required forward, all reasonable expenses incurred by the City or the Commission in defending itself with regard to any action, suit or proceeding indemnified by CenturyLink. Provided, however, that in the event that such separate representation is or becomes necessary, and City or the Commission desires to hire a counselor any other outside experts or consultants and desires CenturyLink to pay those expenses, then City and/or the Commission shall be required to obtain CenturyLink's consent to the engagement of such counsel, experts or consultants, such consent not to be unreasonably withheld. Notwithstanding the foregoing, the parties agree that the City or Commission may utilize at any time, at its own cost and expense, its own attorney or outside counsel with respect to any claim brought by another franchised cable operator as described in this agreement.

The provisions of this agreement shall not be construed to constitute an amendment of the cable communications franchise ordinance or any portion thereof but shall be in addition to and independent of any other similar provisions contained in the cable communications franchise ordinance or any other agreement of the parties hereto. The provisions of this agreement shall not be dependent or conditioned upon the validity of the cable communications franchise ordinance or the validity of any of the procedures or agreements involved in the award or acceptance of the franchise, but shall be and remain a binding obligation of the parties hereto even if the cable communications franchise ordinance or the grant of the franchise is declared null and void in a legal or administrative proceeding.

It is the purpose of this agreement to provide maximum indemnification to the City and the Commission under the terms set out herein and, in the event of a dispute as to the meaning of this Indemnity Agreement, it shall be construed, to the greatest extent permitted by law, to provide for the indemnification of the City and the Commission by CenturyLink. This agreement shall be a binding obligation of and shall inure to the benefit of, the parties hereto and their successor's and assigns, if any.

QWEST BROADBAND SERVICES, INC.

Dated: _____, 2015

By: _____

Its: _____

STATE OF LOUISIANA

PARISH OF OUACHITA

The foregoing instrument was acknowledged before me this _____ day of 2015, by _____, the _____ of Qwest Broadband Services, Inc., a Delaware Corporation, on behalf of the corporation.

_____
NOTARY PUBLIC

Print Name: _____
Bar Roll #/Notary ID #: _____
My Commission Expires: _____

CITY OF SPRING LAKE PARK

By _____
Its: _____

Department Head Responsible
For Monitoring Contract

_____

Approved as to form:

_____
Assistant City Attorney

NORTH METRO TELECOMMUNICATIONS COMMISSION

By: _____
Its: _____

(To appear on CenturyLink letterhead)

September 25, 2015

Mr. Michael R. Bradley
Bradley Hagen & Gullikson, LLC
1976 Wooddale Drive, Suite 3A
Woodbury, MN 55125

Re: Voluntary Commitments

Dear Mr. Bradley:

The purpose of this Letter is to set forth voluntary commitments by Qwest Broadband Services, Inc. d/b/a CenturyLink ("QBSI") to the North Metro Telecommunications Commission (the "Commission") and its Member Cities (the "Member Cities") that are in addition to the obligations contained in the Franchise Agreement, to be adopted by each Member City and executed by QBSI (hereinafter the "Franchise"). The items set forth below have been negotiated in good faith and mutually agreed to by the parties. QBSI agrees that at no time shall it be permitted to in any way offset from franchise fee payments owed the City or pass through as a separate line item on Subscriber bills any costs associated with the voluntary commitments set forth within.

1. **Complimentary Prism Cable Service**. This letter will confirm that any City/Member City/Commission will not need to purchase separate internet service or any equipment in order to receive complimentary cable service from QBSI as set forth in the Franchise. The City/Member City/Commission will be allowed to choose any QBSI converter equipment for its complimentary equipment.

2. **Simulcasting PEG Channels**. This letter will confirm that QBSI may simulcast the City/Member City's PEG channels in high definition (HD) and standard definition (SD). QBSI may simulcast the PEG channels in other formats provided from the City/Member City to QBSI. Simulcasting does not change the number of PEG channels being provided under each Franchise. For example, if the City is provided nine (9) PEG channels in the Franchise, QBSI may simulcast each of the 9 PEG channels in HD, and SD.

3. **Cost Reimbursement**. To the extent the Commission's expenses exceeded the franchise application fee, QBSI will fully reimburse the City for all of its reasonable costs and expenses within 60 days of granting the Franchise.

4. **Twin Cities Metro PEG Interconnect.** The Commission and each Member City shall have the right to fully participate in the Twin Cities Metro PEG Interconnect, which will allow participants to share (send and receive) live PEG programming with one another provided the other City has agreed with QBSI to share its PEG programming.

5. **Complimentary broadband service to a City facility location.** Within 90 days of executing the Franchise, QBSI shall make available complimentary commercial grade Wi-Fi enabled internet service and associated equipment at the highest speed available by Grantee to one public location (such as a community center) within each Member City. The Member City and/or the Commission shall determine the location in consultation with QBSI. QBSI shall have the option of co-branding the free public Wi-Fi with the City at said location. The Wi-Fi equipment shall be capable of providing Wi-Fi to the the primary community meeting area of the Member City location. The service level quality shall be as provided to commercial customers and this commitment shall remain in place throughout the term of the Franchise.

The parties understand that voluntary commitments listed above supplement other obligations contained in the Franchise.

Enforcement of the terms of this Letter of Agreement shall be consistent with the enforcement procedures set forth in the Franchise. CenturyLink stipulates that a violation of these terms by CenturyLink may be considered by the City as a violation of the Franchise and shall subject CenturyLink to all remedies available to the City under the Franchise and pursuant to applicable law.

Acknowledged and agreed to this ___ day of September, 2015.

Qwest Broadband Services, Inc.

By: _____

Its: _____

CITY OF SPRING LAKE PARK, MINNESOTA

In Re: CenturyLink Cable Franchise Application

FINDINGS OF FACT

The City is one of seven member cities of the North Metro Telecommunications Commission (the "NMTC"). Following the submission of an application for a cable television franchise for each member city of the NMTC, the above-entitled matter initially came before the NMTC for a public hearing on February 18, 2015, at Spring Lake Park City Hall, located at 1301 81st Avenue N.E., Spring Lake Park, MN 55432. Said public hearing was held open through February 27, 2015, for the purpose of allowing additional written public comments. Following the public hearing, the NMTC's Executive Director prepared a detailed report entitled "Staff Report on CenturyLink Cable Franchise Application" (the "Staff Report"). The NMTC received and filed the Staff Report and directed NMTC staff to negotiate a cable television franchise with CenturyLink.

The City, in furtherance of its obligations as a steward on behalf of consumers in the City, desires to promote competition in the delivery of cable services and to encourage the deployment of state-of-the-art broadband networks in the hope that true and effective competition between cable service providers will increase the availability and quality of cable services, spur the development of new technologies, improve customer service, minimize rate increases and generally benefit consumers of the City.

The City also recognizes that any facilities based, second cable entrant is in a different position than the incumbent cable provider because the second entrant faces a significant, up front capital investment prior to having the opportunity to compete for its first customer. It is beneficial to attract and retain second entrants because of the investment made in the community

and the creation of new jobs, as well as the benefits to consumers by having a cable service competitor in the City. Adoption of this Franchise is, in the judgment of the City Council, in the best interests of the City and its residents.

Having held a public hearing (via the NMTC) on the cable franchise application and having reviewed the negotiated cable franchise with CenturyLink, the City now makes the following findings:

FINDINGS OF FACT

1. The City has the authority to grant cable television franchises to cable service providers, pursuant to applicable law. *See* Minn. Stat. § 238.08, Subd. 1(a); and Cable Office Report, § 4.
2. In January, 2015, the NMTC published a Notice of Intent to Franchise once a week for two successive weeks in a newspaper of general circulation of the City. *See* Staff Report, § 1.
3. CenturyLink submitted a cable franchise application (the "Application") on February 12, 2015. *See* Staff Report, § 1.
4. The NMTC held a public hearing on the Application on February 18, 2015, and left the public hearing open until February 27, 2015, for the purpose of receiving additional written comments from the public. *See* Staff Report, Executive Summary and § 1.
5. Following the public hearing, the NMTC's Executive Director prepared a "Staff Report on CenturyLink Cable Franchise Application" (the "Staff Report) dated March 30, 2015. The Staff Report is incorporated herein by Reference.

6. The Staff Report was received and filed by the NMTC on or about April 15, 2015, and the NMTC directed NMTC staff to negotiate a cable television franchise with CenturyLink.

7. NMTC staff negotiated a cable television franchise with CenturyLink and presented it to the NMTC on October 21, 2015.

8. The NMTC adopted a Findings of Fact and Recommendation on October 21, 2015, which recommended approval of the negotiated cable television franchise with CenturyLink by each member city.

9. The City held a public hearing on the CenturyLink Cable Television Franchise Ordinance on _____, 2015.

10. The impact of competition and the challenges to a new cable operator, like CenturyLink, are identified in the Staff Report. *See* Staff Report, § 2.

11. The applicable federal, state and local legal cable franchising requirements, including the application requirements, are identified in the Staff Report. *See* Staff Report, §§ 5 - 8.

12. The Staff Report identified the issues raised by the public, including the incumbent franchised cable operator, Comcast. *See* Staff Report, § 9.

13. The NMTC has substantially complied with the state and local cable franchise application requirements identified in the Staff Report.

14. CenturyLink's application substantially complied with state and local cable franchise application requirements identified in the Staff Report.

15. In the cable television franchise, CenturyLink agrees it has constructed a legacy communications system throughout the City that is capable of providing

telephone and internet services. CenturyLink represents that it desires to upgrade its existing legacy communications system and to install certain new facilities and equipment in the City and intends to operate a cable communications system in the City. *See* Staff Report, Exhibits 2 and 3.

16. CenturyLink further represents that upon completion of its cable service headend, it will be capable of providing cable communications service to a portion of the City over its existing facilities, but currently has no market penetration in the cable communications service market in the City. *See* Staff Report, Exhibits 2 and 3.

17. The NMTC reviewed CenturyLink's franchise application, published a notice of intent to franchise and held a public hearing all in compliance with applicable law. *See* Staff Report, § 1.

18. Comcast of Minnesota, Inc. ("Comcast"), currently holds a non-exclusive franchise with the City, and, Comcast, through its predecessors in interest, has continuously held a franchise with the City since 1983. *See* Staff Report, § 3

19. CenturyLink will be the first facilities based franchised cable operator to compete against the incumbent provider in the City since the initial cable television franchise was granted in 1983. *See* Staff Report, § 3.

20. Section 621(a)(1) of the Cable Television Consumer Protection and Competition Act of 1992 was amended to provide that ". . .a franchising authority may not unreasonably refuse to award an additional competitive franchise." In support of its mandate, the Conference Report noted that "[W]ithout the presence of another multichannel video programming distributor, a cable system faces no local

competition. The result is undue market power for the cable operator as compared to that of consumers . . . ." *See* H.R. Conf. Rep. No. 102-862, at 1231 (1992); and 621 Order at ¶ 8.

21. *In the Matter of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311 (Rel. March 5, 2007) (the "621 Order"), the FCC determined, based on Section 621(a)(1), that it is unlawful for a local franchising authority to refuse to grant a competitive franchise on the basis of unreasonable build-out mandates and that such mandates "can have the effect of granting de facto exclusive franchises, in direct contravention of Section 621(a)(1)'s prohibition of exclusive cable franchises." *See* 621 Order, at ¶ 40; *see also*, Staff Report, § 7(E).

22. According to the FCC, "[b]ecause a second provider realistically cannot count on acquiring a share of the market similar to the incumbent's share, the second entrant cannot justify a large initial deployment. Rather a new entrant must begin offering service within a smaller area to determine whether it can reasonably ensure a return on its investment before expanding." *See* Staff Report, § 7(D).

23. In the 621 Order, the FCC found that "new cable competition reduced rates far more than competition from DBS [Direct Broadcast Satellite]. Specifically, the presence of a second cable operator in a market results in rates approximately 15 percent lower than in areas without competition." *See also*, Staff Report, § 2.

24. The FCC also found that "competition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of service offerings." *See* Staff Report, § 2.

25. The FCC has concluded in the 621 Order that "broadband deployment and video entry are 'inextricably linked' and that broadband deployment is not profitable without the ability to compete with the bundled services that cable companies provide." *See* 621 Order at ¶ 51; s*ee also*, Staff Report, §§ 2 and 7.

26. The City must, pursuant to the Federal Cable Act, "allow the applicant's cable system a reasonable period of time to become capable of providing service to all households in the franchise area." *See* Staff Report, § 7(A).

27. Minnesota Statutes, Chapter 238, among other things, requires a level playing field with the incumbent relating to area served (Minn. Stat. § 238.08, Subd. 1(b)) and a mandatory build out requirement within five years in initial cable franchises (Minn. Stat. § 238.084 Subd. 1(m)(3)). *See* Staff Report, § 8(A)-(B), and 11(c). CenturyLink has demonstrated a good faith basis for its position that applicable federal law preempts these provisions of Chapter 238 because they constitute an unreasonable barrier to entry. *See* Staff Report, § 11(c), and Exhibit 3 at ¶¶ 18-23.

28. CenturyLink claims the fact that these two provisions of the Minnesota Statutes constitute an unreasonable barrier to entry in the City is evidenced in part by the fact that there has been no facilities-based competitor since the initial cable communications franchise was granted. *See* Staff Report, Exhibit 3 at ¶¶ 18-23. CenturyLink has agreed to fully defend, indemnify and hold the City and the

NMTC harmless in the event this cable television franchise agreement is legally challenged. *See* Staff Report, § 11(c).

29. The cable television franchise ordinance is substantially similar to the Comcast cable television franchise, but also addresses a reasonable build-out of the City, and economic redlining.

30. The reasonable build-out provisions in the cable television franchise satisfy the state franchise requirement of requiring the cable system to be substantially complete within five (5) years and the federal franchise requirement of allowing a new cable service provider a reasonable period of time to become capable of providing cable service to all households in the franchise area. *See* Minn. Stat. § 238.084, Subd. 1(m); 47 U.S.C. § 541(a)(4)(A); and Staff Report, §§ 7(A), 7(D)-7(E), 8(B), and 11(c).

31. The 5-year cable television franchise requires CenturyLink to initially construct its system to serve fifteen percent (15%) of the City over 2 years. CenturyLink is required to make its best efforts to complete its initial deployment in less than 2 years and is required to equitably serve households throughout the City, including a significant number of households below the minimum income of the City. Quarterly meetings will allow the City and the NMTC to monitor CenturyLink's progress and compliance with the cable franchise and, if CenturyLink has market success, the cable television franchise has provisions to accelerate the construction of the cable communications system with the goal being complete coverage of the City by the end of the franchise term.

32. The state's cable franchising level playing field statute is satisfied because the cable television franchise requires (1) CenturyLink to pay the same franchise fee as Comcast; (2) the same area of coverage as Comcast; and (3) similar, and in some instances greater, public educational and governmental access requirements. *See* Minn. Stat. § 238.08, subd. 1(b); Staff Report, §§ 7(G), 8(A), and 11(d).

33. CenturyLink submitted an application that included a design for a state-of-the-art cable system that is capable or reliably providing a panoply of cable services to subscribers as required by the NMTC's Competitive Franchising Policies and Procedures. *See* Staff Report, § 10(3)(b).

34. The City has considered the financial, technical, and legal qualifications of CenturyLink. *See, e.g.,* Staff Report, § 10(3).

35. CenturyLink has the financial, technical, and legal qualifications to operate a cable communication system in the City.

36. A CenturyLink cable television franchise will provide a meaningful, distinct alternative to existing multichannel video programming distributors (including existing cable, direct broadcast satellite and other companies), will result in greater consumer choice, is in the public interest for economic development in the City. *See* Staff Report, Exhibits 2 and 3. CenturyLink has also promised to provide additional enhancements to PEG offerings to the City. For example, it has agreed in the franchise to provide every PEG channel in HD and to allow the City to share live programming with other cities in the Twin Cities by providing a Twin Cities Metro PEG Interconnect Network.

37. Consumers and residents of the City will also benefit from CenturyLink's competitive presence because it will drive broader deployment of higher broadband speeds. *See* Staff Report, Exhibits 2 and 3

38. CenturyLink has agreed to an initial deployment area, and it will serve additional areas based upon its market success, as defined in the franchise agreement, which the FCC has deemed to be a reasonable deployment model. *See* Staff Report, § 7(E)(b).

39. The City and its citizens will benefit from facilities based competition in the cable television market. *See* Staff Report, § 2.

40. All prior actions of the NMTC related to the CenturyLink Cable Franchise Application are hereby ratified and approved.

Therefore, based on the foregoing, the City Council has determined that it is in the best interests of the City and its residents to enter in to a cable television franchise ordinance/agreement with CenturyLink, in the form negotiated by the NMTC and that these Findings of Fact be incorporated therewith.

NORTH METRO TELECOMMUNICATIONS COMMISSION

Staff Report
On
CenturyLink Cable Franchise Application

By

Heidi Arnson, Executive Director
Michael R. Bradley, Bradley Hagen & Gullikson, LLC

March 30, 2015

Executive Summary

This Report addresses the application for a cable television franchise to Qwest Broadband Services, Inc., doing business as CenturyLink ("CenturyLink"), a wholly owned subsidiary of CenturyLink, Inc. and its subsidiaries. CenturyLink filed a franchise application with the North Metro Telecommunications Commission (the "NMTC") on February 12, 2015, requesting a franchise to provide cable services with each of the member cities of the NMTC.

The NMTC held a public hearing on February 18, 2015. The public hearing remained open until February 27, 2015, to allow the public additional time to comment on the application, at which time the public hearing closed. Following the close of the public hearing, the NMTC Executive Director commenced review of the application. Mike Bradley of Bradley Hagen & Gullikson, LLC, long-time outside counsel to the NMTC on cable franchising matters, assisted in the review and drafting of this Report.

Upon review of the public record on CenturyLink's application materials, it is the NMTC Executive Director's recommendation that staff now be directed to negotiate a cable franchise with CenturyLink, consistent with this Report. The Executive Director anticipates that the resulting competition between CenturyLink and Comcast will benefit cable subscribers through better service, lower rates, and improved programming choices.

It is recommended that any CenturyLink cable franchise contain commitments that taken as a whole are comparable (but not necessarily identical) to those in the existing cable franchise. This approach should permit the NMTC to promote its interest in developing competition for cable service, while preventing CenturyLink or the incumbent cable franchise holder, Comcast, from obtaining an unfair competitive advantage. A cable franchise is a valuable privilege to use the public rights-of-way to provide residents cable service. Any franchise, while recognizing that CenturyLink would be the second wire-line franchised cable operator, must adequately address the following issues:

- Adequate protections to the public to prevent economic redlining or "cherry picking."
- Fair and Reasonable build-out requirements with the goal of CenturyLink providing competitive cable services throughout the entire NMTC within a reasonable time and in an equitable manner.
- Provisions consistent with Level Playing Field requirements under applicable law addressing:
    - Area to be served
    - Public, Educational, and Governmental ("PEG") Television
    - Payment of a Franchise Fee
- Indemnification from any litigation resulting from the grant of a franchise.

If the NMTC Executive Director's recommendation is adopted by the NMTC, NMTC staff should be directed to commence negotiating a cable franchise with CenturyLink immediately. Following negotiations, the NMTC will make a recommendation to its member cities for final action. If a franchise ordinance is recommended, the member cities should schedule a public hearing on the proposed cable franchise ordinance. The NMTC member cities

may act on the cable franchise ordinance any time seven days following the public hearing on the cable franchise ordinance. At the time of any NMTC member city decision to award a cable franchise by ordinance or to deny the award of a cable franchise, it will need to make findings of fact in support of its decision.

Section 1
The CenturyLink Application and Public Record

In the summer of 2014, CenturyLink publically announced that it would begin offering 1 Gig internet service in the Twin Cities area. Shortly afterwards, CenturyLink approached the North Metro Telecommunications Commission ("NMTC") about obtaining a cable franchise. In January, 2015, CenturyLink informed NMTC staff that it was prepared to apply for a cable franchise with the NMTC's member cities. The NMTC then published a Notice of Intent to Franchise in compliance with the Minnesota Cable Act.[1] *See* **Exhibit 1**.

CenturyLink submitted a timely franchise application on February 12, 2015, to the NMTC. *See* **Exhibit 2**. The NMTC then issued a request of information, to which CenturyLink responded. *See* **Exhibits 3 and 4**. A public hearing was held before the NMTC on February 18, 2015, where additional public testimony and comments were received by the NMTC. *See* **Exhibit 5**.[2] The purpose of this report is to review the CenturyLink application in light of the public record and recommend whether NMTC staff should be directed to negotiate a cable franchise with the company.

Section 2
Impact of Competition on Consumers and Challenges to New Entrant

The Federal Communications Commission ("FCC") is the expert agency in the country on communications issues. It has addressed the impact of competitive cable franchises on consumers. The FCC recognized that, "[n]ew competitors are entering markets for the delivery of services historically offered by monopolists: traditional phone companies are primed to enter the cable market, while traditional cable companies are competing in the telephony market."[3] According to the FCC, both traditional cable and traditional phone companies are projected to offer customers a "triple play" of voice, high-speed Internet access, and video services over their respective networks. *Id*. When a traditional phone company enters into the marketplace the FCC has found,

> ***[C]ompetition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of service offerings.***

Id. at para. 2 (emphasis added). Last year, the FCC found that average prices in communities with effective competition increased less than in communities without effective competition. *See Report on Cable Industry Prices*, DA 14-672, at ¶ 4 (Rel. May 16, 2014). The *Report on Cable*

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1 *See* Minnesota Statutes Chapter 238.

2 The Public Hearing can be found at: http://173.165.231.193/Cablecast/Public/Show.aspx?ChannelID=1&ShowID=19236

3 *See In the Matter of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, at ¶ 2 (Rel. March 5, 2007) (the "621" Order) (the "*621 Order*"). The *621 Order* is attached as **Exhibit 6**. The *621 Order* was upheld on appeal. *See Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), attached as **Exhibit 7**.

Industry Prices found the price per channel for expanded basic service is 13.5 percent lower in effective competition areas. *Id*. at ¶ 16.

The FCC has also recognized some of the challenges of being the second cable operator in the marketplace. In its *621 Order*, the FCC found,

> [T]he circumstances surrounding competitive entry are considerably different than those in existence at the time incumbent cable operators obtained their franchises. Incumbent cable operators originally negotiated franchise agreements as a means of acquiring or maintaining a monopoly position.
> …
> ***[A second] entrant cannot assume that it will quickly -- or ever -- amass the same number or percentage of subscribers that the incumbent cable operator captured.***

621 Order at ¶ 26 (emphasis added, footnotes omitted). Applicants for competitive cable franchises, unlike an incumbent cable provider, "do not have the promise of revenues from video services to offset the costs of such deployment." *621 Order* at ¶ 3. The competitor faces "financial risk" and "uncertainty" when entering the market. *Id*. at ¶ 28.

Section 3
The Incumbent Franchised Cable Operator – Comcast

The history of cable franchising within the NMTC goes back to the 1980s. Each member city of the NMTC initially granted a cable communications franchise to Meredith Cable in 1983, by enacting a cable franchise ordinance. *See e.g.* Blaine Ord. No. 83-786. Several changes in ownership, structure and name took place after 1983. Eventually, the franchise was transferred to Comcast in 2002. *See e.g* NMTC Res. No. 2002-04. In 2002, the franchise was renewed. *See e.g.* Blaine Ord. No. 02-1957. Late last year, the NMTC member cities conditionally approved the transfer of the franchise to GreatLand Connections. *See e.g.* Blaine Res. No. 15-016. If the conditions in the resolution are met, the Comcast franchise will be transferred to a new company called GreatLand Connections. Since the franchise was granted in 1983, no other cable franchise has been granted in any of the member cities.

Section 4
The NMTC's Authority to Franchise

State law requires that "[a] municipality shall require a franchise or extension permit of any cable communications system providing service within the municipality." Minn. Stat. § 238.08, Subd. 1(a). The member cities, through a joint powers agreement have delegated certain cable franchising responsibilities to the NMTC, such as commencing the franchising process and recommending cable franchises to the member cities. Each member city retains the authority to franchise. Prior to providing cable service, a cable service provider is required by federal law to obtain a cable franchise from the local franchising authority, in this case each member city of the NMTC. *See* 47 U.S.C. § 541(b)(1).

Section 5
Applicable Federal, State and Local Legal Requirements

The applicable legal requirements for examining an initial franchise application are contained in the Cable Communications Policy Act of 1984, as amended (the "Federal Cable Act"), Chapter 238 of Minnesota Statues (the "Minnesota Cable Act"), and the City's Policies and Procedures Governing Application, Review and Recommendations Regarding Grant of Competitive Cable Franchises (the "Competitive Franchising Policies and Procedures"). The specific procedures to be followed in soliciting and reviewing cable franchise applications are contained in the Minnesota Statutes[4] and the Competitive Franchising Policies and Procedures. Substantive criteria the City may use in evaluating applications are set forth in the Competitive Franchising Policies and Procedures and the Federal Cable Act.

Section 6
State Cable Franchise Application Requirements

A. The State Cable Franchise Application Process

The Minnesota Cable Act, found in Minnesota Statutes Chapter 238, lays out the process for granting an additional cable franchise. The following is a summary of the franchising process found in Section 238.081:

- **Publication of Notice**. A notice of intent to franchise must be published once a week for two successive weeks in a newspaper of general circulation. The statute identifies the information required in the notice, such as (1) the name of the municipality making the request; (2) the closing date for submission of applications; (3) a statement of the application fee, if any, and the method for its submission; (4) a statement by the franchising authority of the services to be offered; (5) a statement by the franchising authority of criteria and priorities against which the applicants for the franchise must be evaluated; (6) a statement that applications for the franchise must contain at least the information required by state law; (7) the date, time, and place for the public hearing, to hear proposals from franchise applicants; and (8) the name, address, and telephone number of the individuals who may be contacted for further information.

- **Written Notice**. In addition to publishing the notice of intent to franchise in one or more newspapers, a franchising authority must mail copies of the notice of intent to franchise to any person it has identified as being a potential candidate for a franchise.

- **Deadline for Application Submission**. A franchising authority must allow at least 20 days from the first date of published notice for the submission of franchise proposals. In other words, the deadline for submitting franchise proposals cannot be earlier than 20 days after the date that a jurisdiction's notice of intent to franchise was first published in a newspaper of general circulation.

[4] *See* Minn. Stat. § 238.081, Subd. 1-7.

- **Contents of franchising proposal**. The Minnesota Cable Act requires all franchise applications be signed in front of a notary and that certain information also be included in all franchise applications. Generally, the information includes:

    - Plans for channel capacity;
    - A statement of the television and radio broadcast signals for which permission to carry will be requested from the Federal Communications Commission;
    - A description of the proposed system design and planned operation;
    - Terms and conditions under which particular service is to be provided to governmental and educational entities;
    - A schedule of proposed rates in relation to the services to be provided, and a proposed policy regarding unusual or difficult connection of services;
    - A time schedule for construction of the entire system with the time sequence for wiring the various parts of the area requested to be served in the request for proposals;
    - A statement indicating the applicant's qualifications and experience in the cable communications field, if any;
    - An identification of the municipalities in which the applicant either owns or operates a cable communications system, directly or indirectly, or has outstanding franchises for which no system has been built;
    - Plans for financing the proposed system;
    - A statement of ownership detailing the corporate organization of the applicant; and
    - A notation and explanation of omissions or other variations with respect to the requirements of the proposal.

- **Public hearing on franchise**. Each franchising authority must hold a public hearing before the franchising authority affording reasonable notice and a reasonable opportunity to be heard with respect to all applications for a franchise.

- **Award of franchise**. Cable franchises may be awarded only by ordinance, after holding any necessary public hearings. A franchise may not be awarded until at least seven days after the public hearing.

B. NMTC's Competitive Franchising Policies and Procedures

The NMTC adopted its "Policies and Procedures Governing Application, Review and Recommendations Regarding Grant of Competitive Cable Franchises," on December 20, 2006 ("Competitive Franchising Policies and Procedures"). *See* NMTC Resolution 12-20-2006. The Competitive Franchising Policies and Procedures adopted by the NMTC supplement state and federal law.

1. NMTC's Application Requirements

To obtain an initial cable franchise, a written application containing all information required by the Competitive Franchising Policies and Procedures must be filed with the NMTC. Under Section 2, Subd. 3 of the Competitive Franchising Policies and Procedures and state law, the NMTC is required to publish of a Notice of Intent to Franchise that contains the specific requirements governing the submission cable franchise applications. According to the Notice of Intent to Franchise first published by the NMTC on January 16 and 20, 2015 (in 3 different newspapers to cover all of the member cities), all franchise applications were to be filed with the Cable Officer no later than 12:00 p.m. on February 12, 2015.

2. Contents of Application

The NMTC's Competitive Franchising Policies and Procedure largely reflects current State law requirements as listed above. In addition to the provision in State law, the Competitive Franchising Policies and Procedure also require the following:

- A proposed Franchise Agreement;
- Any other information contained in a notice of intent to franchise that may be reasonably necessary to demonstrate compliance with applicable laws and regulations and the requirements of these Policies and Procedures Governing the Receipt and Review of Applications for Additional Cable Franchises; and
- Any additional information that the Commission or its responsible employee(s) may request of the applicant that is relevant to the Commission's and/or a Member City's consideration of the application.

Section 7
Federal Law

A. The Federal Cable Act

As the FCC noted in its *621 Order*, local franchising authorities may not unreasonably deny an additional competitive franchise to potential competitors who are ready and able to provide service in order "[t]o encourage more robust competition in the local video marketplace…" *See 621 Order* at ¶ 7; and 47 U.S.C. § 541(a)(1). In awarding a franchise, a local franchising authority may establish construction schedules and construction requirements,[5] and may require adequate assurances that an applicant:

1. Will provide adequate public, educational and governmental access channel capacity, facilities or financial support; and

[5] *See* 47 U.S.C. § 552(a)(2).

2. Possesses the financial, technical and legal qualifications to provide cable service.

47 U.S.C. § 541(a)(4)(B)-(C).

A local franchising authority must also allow an applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area. 47 U.S.C. § 541(a)(4)(A). Additionally, in awarding a franchise, a local franchising authority must assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides. 47 U.S.C. § 541(a)(3). Stated differently, a local franchising authority cannot allow a cable service provider to engage in economic redlining or "cherry-picking."

B. *621 Order* – Competitive Cable Franchising

In 2007, the Federal Communications Commission (the "FCC" or the "Commission") released a *Report and Order and Further Notice of Proposed Rulemaking* addressing competitive cable franchising.[6] It is sometimes referred to as the "*621 Order*" because it addresses the implementation of Section 621(a)(1) of the Federal Cable Act.[7] Section 621(a)(1), among other things, prohibits franchising authorities from unreasonably refusing to award competitive cable franchises.

C. *621 Order* – Applicability to State Laws

By its terms, the *621 Order* applies only to new entrants.[8] According to the FCC, the *621 Order* does "not preempt state law or state level franchising decisions . . ."[9] Rather, the FCC "expressly limit[ed] . . . [its] findings and regulations in this *Order* to actions or inactions at the local level where a state has not specifically circumscribed the LFA's authority."[10] In this regard, local laws, regulations, practices and agreements are preempted to the extent that they conflict with the FCC's rules or guidance adopted in the *621 Order* and are not "specifically authorized by state law."[11] The FCC recently clarified the *621 Order* in *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Order on Reconsideration (Rel. Jan. 21, 2015) ("We clarify that those rulings were intended to apply only to the local franchising process, and not to franchising laws or decisions at the state level").[12]

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[6] *See* FN 3.
[7] Section 621(a)(1) is codified at 47 U.S.C. § 541(a)(1).
[8] *See, e.g., 621 Order* at ¶¶ 18 and 139.
[9] *Id*. ¶ 126.
[10] *Id*. at ¶ 1, n. 2.
[11] *621 Order* at ¶ 126.
[12] *See* **Exhibit 8**, at ¶ 7.

D. *621 Order* – Impact of Build-out Requirements on Competition and Consumers

The FCC has concluded that in many cases, build-out requirements "deter competition and deny consumers a choice." *621 Order* at ¶ 37. Additionally, build-out mandates may also directly contravene the goals of Section 706 of the Telecommunications Act of 1996, which requires the FCC to "remov[e] barriers to infrastructure investment" to encourage the deployment of broadband services "on a reasonable and timely basis." *Id*. at ¶ 41.

The FCC has recognized that "build-out issues are one of the most contentious between LFAs and prospective new entrants, and that build-out requirements can greatly hinder the deployment of new video and broadband services." *621 Order* at ¶ 31. According to the FCC large incumbent local exchange carriers ("LECs"), "view build-out requirements as the most significant obstacle to their plans to deploy competitive video and broadband services." *Id*. While an incumbent LEC already has telecommunications facilities deployed over large areas, it still must upgrade its existing plant to enable the provision of video service, which often requires a significant investment of capital. *Id*. at ¶ 38.

The FCC also found in its *621 Order* that build-out requirements can substantially reduce competitive entry." *Id*. at ¶ 32. According to the FCC,

> Build-out requirements can deter market entry because a new entrant generally must take customers from the incumbent cable operator, and thus must focus its efforts in areas where the take-rate will be sufficiently high to make economic sense. Because the second provider realistically cannot count on acquiring a share of the market similar to the incumbent's share, the second entrant cannot justify a large initial deployment. Rather, a new entrant must begin offering service within a smaller area to determine whether it can reasonably ensure a return on its investment before expanding.

621 Order at ¶ 35 (Footnotes omitted). Therefore,

> ***Due to the risk associated with entering the video market, forcing new entrants to agree up front to build out an entire franchise area too quickly may be tantamount to forcing them out of -- or precluding their entry into -- the business.***

621 Order at ¶ 35 (Footnotes omitted). In analyzing the impact of build-out requirements on consumers, the FCC found that in many cases it adversely affects consumer welfare. *621 Order* at ¶ 36. The Department of Justice commented that "imposing uneconomical build-out requirements results in less efficient competition and the potential for higher prices. *Id*. Non-profit research organizations the Mercatus Center and the Phoenix Center each concluded that ***build-out requirements imposed on competitive cable entrants only benefit an incumbent cable operator.*** *Id*. Historically, the greatest difference in pricing occurred where there was wireline

overbuild competition. In those situations, average monthly cable rates were 20.6 percent lower than the average for markets deemed noncompetitive. *Id*.

E. FCC *621 Order* - Federal Preemption of Unreasonable Build-Out Mandates

In the *621 Order*, the FCC declared "it is unlawful for LFAs to refuse to grant a competitive franchise on the basis of unreasonable build-out mandates."[13] The *621 Order* does not expressly prohibit full municipal build-out requirements, if they are reasonable (which will depend on local circumstances). Although the FCC did not definitively define what constitutes an "unreasonable build-out" mandate, it did list examples of both reasonable and unreasonable build-out requirements.

a. *Examples of Unreasonable Build-Out Requirements*.

The FCC's examples of unreasonable build-out mandates include:

- requiring a new entrant to serve everyone in a franchise area before it has begun to serve anyone;
- requiring facilities-based entrants, such as incumbent LECs, to build out beyond the footprint of their existing facilities before they have even begun to provide cable service;
- requiring more of a new entrant than an incumbent cable operator by, for instance, requiring the new entrant to build out its facilities in a shorter period of time than that afforded to the incumbent;
- requiring the new entrant to build out and provide service to areas of lower density than those that the incumbent cable operator is required to build out to and serve;
- requiring a new entrant to build out to and service buildings or developments to which the entrant cannot obtain access on reasonable terms or which cannot be reached using standard technologies; and
- requiring a new entrant to build out to and provide service to areas where it cannot obtain reasonable access to and use of public rights-of-way.[14]

b. *Examples of Reasonable Build-Out Requirements*.

The FCC notes that it would seem reasonable for a local franchising authority to consider benchmarks requiring the new entrant to increase its build-out after a reasonable time, taking into account the new entrant's market success.[15] The FCC also opined that it would seem reasonable to establish build-out requirements based on a new entrant's market penetration.[16]

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[13] *621 Order* at ¶ 89.
[14] *Id*. at ¶¶ 89-90.
[15] *Id*. at ¶ 89.
[16] *Id*.

F. *621 Order* - PEG and Institutional Networks

The *621 Order* concludes that "LFAs may not make unreasonable demands of competitive applicants for PEG and I-Net" and that doing so constitutes an unreasonable refusal to award a franchise.[17] With regard to PEG channel capacity, the FCC determined that it would be unreasonable "to impose on a new entrant more burdensome PEG carriage obligations that it has imposed on the incumbent cable operator."[18] Overall, the FCC found that PEG support must be both "adequate and reasonable."[19] Adequacy is defined by the FCC as "satisfactory or sufficient."[20] The *621 Order* does provide some examples of unreasonable PEG and Institutional Network support obligations,[21] including:

- Completely duplicative PEG and I-Net requirements;[22]
- Payment of the face value of an I-Net that will not be constructed; and
- Requirements that are in excess of the incumbent cable operator's obligations.

According to the FCC, *pro rata* cost sharing of current (as opposed to future) PEG access obligations is *per se* reasonable.[23] In the event that *pro rata* cost sharing is utilized, PEG programming providers must permit a new entrant to interconnect with existing PEG video feeds.[24] The new entrant must bear the cost of interconnection.

G. *621 Order* – Local Level Playing Field Requirements

Local level playing field requirements are generally preempted by the *621 Order*.[25] This could mean that level playing field provisions (commonly called "Competitive Equity" in local Comcast franchises) included in existing cable franchise ordinances are preempted.

Section 8
State and Local Law

A. State Level Playing Field Statute

While under federal law, a franchising authority may not unreasonably refuse to award an additional competitive franchise, Minnesota state law further restricts a franchising authority's ability to franchise with a level playing field provision that reads as follows:

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[17] *Id*. at ¶ 110.
[18] *Id*. at ¶ 114.
[19] *Id*. at ¶ 115.
[20] *Id*. at ¶ 112.
[21] *Id*. at ¶ 119.
[22] The *621 Order* does appear to say that duplication is permissible if required for public safety purposes. *Id*. In addition, the FCC clarified that "an I-Net requirement is not duplicative if it would provide additional capability or functionality, beyond that provided by existing I-Net facilities." *Id*.
[23] *621 Order* at ¶ 120.
[24] *Id*.
[25] *Id*. at ¶138.

> No municipality shall grant an additional franchise for cable service for an area included in an existing franchise *on terms and conditions more favorable or less burdensome than those in the existing franchise pertaining to:*
>
> *(1) the area served;*
>
> (2) *public, educational, or governmental access requirements; or*
>
> (3) *franchise fees.*
>
> Nothing in this paragraph prevents a municipality from imposing additional terms and conditions on any additional franchises.

Minn. Stat. § 238.08, subd. 1(b) (emphasis added). This language does not mean that the language or terms of a franchise must be the same between competitors. *See WH Link, LLC v. City of Otsego*, 664 N.W.2d 390, 396 (Minn. Ct. App. 2003) (more favorable or less burdensome interpreted as "substantially similar").

B. The 5-Year Build Statute

The Minnesota Cable Act also has a section that addresses franchise requirements for all local franchises. One of those provisions requires:

> (m) a provision in initial franchises identifying the system capacity and technical design and a schedule showing:
> (1) that construction of the cable communications system must commence no later than 240 days after the granting of the franchise;
> (2) that construction of the cable communications system must proceed at a reasonable rate of not less than 50 plant miles constructed per year of the franchise term;
> (3) that ***construction throughout the authorized franchise area must be substantially completed within five years*** of the granting of the franchise; and
> (4) that the requirement of this section be waived by the franchising authority only upon occurrence of unforeseen events or acts of God;

See 238.084, Subd. 1(m) (emphasis added). It is the position of CenturyLink that the 5-Year Build Statue is a barrier to entry and is preempted by the Federal Cable Act. *See* Exhibit 3 at ¶¶ 28-31 and Section 11(C) below.

C. Comcast Cable Franchise

In addition to federal and state law, local law also must be considered. The local law applicable to the application for an additional franchise is the current franchise with the incumbent franchised cable operator, Comcast.

The Comcast cable franchise addresses competitive franchises in section 2.2.3, which states:

> 2.2.3 This Franchise and the right it grants to use and occupy the Rights-of-Way shall not be exclusive and this Franchise does not, explicitly or implicitly, preclude the issuance of other franchises or similar authorizations to operate Cable Systems within the City. Provided, however, that the City shall not authorize or permit itself or another Person or governmental body to construct, operate or maintain a Cable System on material terms and conditions which are, taken as a whole, more favorable or less burdensome than those applied to the Grantee.

Section 9
Issues Raised by the Public

The public was allowed to testify at the public hearing and the NMTC left the public hearing open for over one week for the purpose of allowing the public to submit written comments. There was testimony from a citizen and Comcast at the public hearing. Other than a letter from Comcast, no additional written comments were submitted.

A. Economic Redlining or Cherry Picking.

One member of the public testified at the public hearing that it would be unfair for the incumbent cable operator to be required to build out an entire franchise area, but not a new company like CenturyLink.[26]

B. Issues Raised By the Incumbent Franchised Cable Operator - Comcast

The letter from Comcast submitted into the record at the public hearing raised the following issues:

- Concern about whether CenturyLink will have similar franchise commitments as Comcast. Exhibit 5 at pp. 1-2.
- An expectation that "the same level of due diligence and scrutiny that the NMTC would and has applied to Comcast and its predecessors' will also be applied to CenturyLink." *Id*. at p. 2.

[26] Public Hearing at 27:50. *See* FN 2 above.

- Concern with "CenturyLink's build-out commitment that appears to stand in direct conflict with state law." *Id*. at 3.

Comcast also indicated that CenturyLink's record in other markets raised a concern that CenturyLink's build-out will be based upon income considerations of the selected areas. Exhibit 5 at p. 3. However, no additional proof of that statement was submitted.

In raising one of the issues above, Comcast suggested that the competitive franchise application process should essentially be the same as prior Comcast renewals and transfers. *See* Exhibit 5 at p. 2. However, the FCC in its *621 Order* found,

> [I]ncumbent cable operators' purported success in the franchising process is not a useful comparison in this case. Today's large MSOs obtained their current franchises by either renewing their preexisting agreements or by merging with and purchasing other incumbent cable franchisees with preexisting agreements. For two key reasons, their experiences in franchise transfers and renewals are not equivalent to those of new entrants seeking to obtain new franchises. First, ***in the transfer or renewal context, delays in LFA consideration do not result in a bar to market entry***. Second, in the transfer or renewal context, the LFA has a vested interest in preserving continuity of service for subscribers, and will act accordingly.

621 Order at ¶ 29 (Footnotes omitted). The NMTC is following the process set forth in Minnesota Statutes Section 238.081. The statute does not include considering an incumbent's prior renewals and transfers.

Section 10
Review of CenturyLink Cable Franchise Application

The NMTC Executive Director is responsible for reviewing cable franchise applications. The Executive Director has reviewed the application and the entire public record, as well as all relevant factors and applicable federal, state and local standards for reviewing a cable franchise application.

1. The NMTC has substantially complied with state and local cable franchising application requirements.

Publication of Notice. The NMTC fully complied with the state requirements (listed above) for publishing a notice of intent to franchise. *See* **Exhibit 1**. There were no objections to the NMTC's publication of the notice of intent to franchise. The local Competitive Franchising Policies and Procedures call for a notice of intent to franchise be published after receipt of an application. The state law anticipates publishing a notice of intent to franchise before receiving an application. For example, the notice of intent to franchise must indicate a deadline for receiving applications. Therefore, it was reasonable for the NMTC to publish a notice of intent

to franchise once CenturyLink informed the NMTC that it was prepared to submit and application. The publication of the notice of intent to franchise substantially complies with both state and local requirements.

Written Notice. The NMTC was not aware of any other companies that were interested in applying for a cable franchise. Therefore, no companies, other than CenturyLink, received written notice of the NMTC's notice of intent to franchise. There were no objections to the NMTC's provision of written notice to potential candidates for a cable franchise.

Deadline for Application Submission. The NMTC allowed more than 20 days from the first date of published notice for the submission of franchise applications. *See* **Exhibit 1**. There were no objections to the cable franchise application deadline set by the NMTC.

Public hearing on franchise. The NMTC held a public hearing on February 18, 2015, which afforded reasonable notice and a reasonable opportunity to be heard with respect to the CenturyLink cable franchise application. No objections were made concerning the manner in which the NMTC held the public hearing.

Award of franchise. In the event a NMTC member city decides to enter into a franchise agreement with CenturyLink in the future, a NMTC member city must award the cable franchise by ordinance. In that event, while the NMTC has held a public hearing on the cable franchise application, it is recommended that there be a subsequent public hearing if a cable franchise agreement is agreed upon and a cable ordinance is introduced. A cable franchise may not be awarded until at least seven days after the public hearing on the cable franchise ordinance.

2. CenturyLink's application substantially complies with state and local application requirements.

Contents of franchising proposal. It was CenturyLink's responsibility to comply with all of the application requirements in State Law. The application was submitted timely, included the applicable application fee, and signed before a notary. *See* **Exhibit 2** (CenturyLink Cable Franchise Application). Upon review of the CenturyLink cable franchise application, CenturyLink has substantially complied with the following State application requirements without objection:

- Plans for channel capacity. *See* Exhibit 2 at p. 1.
- A statement of the television and radio broadcast signals for which permission to carry will be requested from the Federal Communications Commission. *See* Exhibit 2 at p. 2 and Exhibit 3 at ¶ 8.
- A description of the proposed system design and planned operation. *See* Exhibit 2 at pp. 2-3 and Exhibit 3 at ¶¶ 11-16.
- Terms and conditions under which particular service is to be provided to governmental and educational entities. *See* Exhibit 2 at pp. 3-4 and Exhibit 3 at ¶¶ 17-22.

- A schedule of proposed rates in relation to the services to be provided, and a proposed policy regarding unusual or difficult connection of services. *See* Exhibit 2 at p. 4 and Exhibit 3 at ¶¶ 23-27.
- A statement indicating the applicant's qualifications and experience in the cable communications field, if any. *See* Exhibit 2 at pp. 4-5 and Exhibit 3 at ¶¶ 6, and 35-36.
- An identification of the municipalities in which the applicant either owns or operates a cable communications system, directly or indirectly, or has outstanding franchises for which no system has been built. *See* Exhibit 2 at p. 4 and Exhibit 3 at ¶ 37.
- Plans for financing the proposed system. *See* Exhibit 6 at p. 5 and Exhibit 3 at ¶ 38.
- A statement of ownership detailing the corporate organization of the applicant. *See* Exhibit 2 at p. 5 and Exhibit 3 at ¶¶ 1-6.

As required by the Minnesota Cable Act, CenturyLink provided a notation and explanation of omissions or other variations with respect to the requirements of the proposal. In particular, CenturyLink indicated that it would not provide information relating to the area-served application requirement because it believes Federal law preempts the State law 5-year build out requirement. *See* Exhibit 3 at ¶¶ 28-31 and Testimony of Jim Campbell of CenturyLink.[27] There was documentary and testimonial evidence received into the record concerning CenturyLink's build-out of the NMTC. *See* Exhibit 5. While Comcast expressed concern over the build-out commitment of CenturyLink if awarded a cable franchise by the NMTC, there was no objection to CenturyLink explaining why it omitted build-out information in its cable franchise application.

For purposes of complying with the state's application requirements only, CenturyLink has adequately explained why it omitted a time schedule for construction of the entire system with the time sequence for wiring the various parts of the area requested to be served in. Therefore, it has substantially complied with the application filing requirements in state law. This should not be interpreted to mean the NMTC accepts CenturyLink's position. In the event that the NMTC authorizes staff to negotiate a franchise with CenturyLink, acceptable build-out provisions will need to be negotiated consistent with this Report.

Finally, the NMTC Competitive Franchising Policies and Procedures indicate that a proposed franchise must be included in a cable franchise application. A proposed franchise was not included in the application. The absence of a proposed franchise does not render the application as substantially incomplete. Since the Parties must negotiate a cable franchise if the NMTC authorizes its staff to negotiate a franchise with the applicant, the inclusion of a proposed franchise was unnecessary. In addition, it was unnecessary for assessing the qualifications of the applicant.

[27] Mr. Campbell's testimony on the 5-Year Build Statute can be found at the 20:30 mark of the Public Hearing. *See* FN 2 above.

3. CenturyLink appears to have the Financial, Technical and Legal Qualifications to Provide Cable Service.

While the NMTC may review the financial, legal and technical qualifications of a franchise applicant, the FCC has indicated that in cases of the application by a LEC that already has a certificate for public convenience and necessity from the state, an LFA need not spend a significant amount of time considering the fitness of such applicants to access public rights-of-way. *See* 621 Order at ¶ 23. This is because the LEC has already demonstrated its legal, technical, and financial fitness to be a provider of telecommunications services. *Id*.

a. Financial Evaluation. As shown above, under 47 U.S.C. § 541(a)(4) the NMTC may consider a franchise applicant's financial qualifications in determining whether to grant a franchise. The parent company of the proposed franchisee appears financially qualified. CenturyLink, Inc. is the third largest telecommunications company in the United States with $18.0 Billion in annual operating revenue and free cash flow of $2.7 Billion. *See* Exhibit 2 at page 5-6; and Exhibit 3 at ¶ 38. CenturyLink has further committed to making a $125 Million investment to bring cable television service to the Twin Cities. *See* Exhibit 2 at page 6. Provided that CenturyLink, Inc. can provide adequate assurances for the performance of the proposed franchisee, it appears that CenturyLink has the financial qualifications to operate a cable communications system in the NMTC. Recently, the NMTC member cities required certain parent guarantees of GreatLand Connections in connection with the recent conditional approval of the cable franchise transfer from Comcast to GreatLand Connections. *See e.g.* Blaine Res. No. 15-016.

b. Technical Evaluation. As shown above, under 47 U.S.C. § 541(a)(4), the Commission may consider whether CenturyLink has the necessary technical qualifications to construct, operate and maintain a cable system. CenturyLink has a demonstrated history of operating cable systems in 13 markets in the United Sates. See Exhibit 2 at p. 4. CenturyLink has approximately 300,000 cable television subscribers and is capable of delivering it to approximately 2.3 Million homes. *Id*. CenturyLink's management team displays a wealth of experience in the cable and telecommunications industry. *See* Exhibit 3 at ¶¶ 6, 11-16, and 35-36. The application described a state-of-the-art cable system capable of reliably providing a panoply of cable services to subscribers. *See* Exhibit 2 at pp. 2-3. According to CenturyLink, it "offers more channels in HD than any other MVPD nationally." *Id*. at p. 1. Based on the information contained in CenturyLink's application and its response to the request for information, it appears that CenturyLink has the technical qualifications to operate a cable communications system in the NMTC.

c. Legal Evaluation. Both federal law and the Competitive Franchising Policies and Procedures permit the Commission to consider a cable franchise applicant's legal qualifications in the process of determining whether to grant a cable television franchise.[28] The applicant appears legally qualified to hold a cable franchise in the NMTC. The company is properly formed and authorized to do business in the state of Minnesota. *See* Exhibit 3 at ¶¶ 1-2. The company agrees to make all appropriate filings and preparations prior to offering cable

[28] *See* 47 U.S.C. § 541(a)(4)(C) and Section 4, Subd. 2 of the Competitive Franchising Policies and Procedures.

service. *Id*. at ¶ 8. No adverse administrative, civil or criminal action has been taken against the applicant over the past five years. *Id*. at ¶ 9.

While the applicant will operate the cable system, the facilities in the public rights-of-way will be owned by Qwest Corporation ("QC"). *Id*. at 10. Any cable franchise to applicant must contain adequate provisions ensuring compliance by QC of any franchise provisions related to the location, removal, relocation, testing, performance, and any other franchise requirement or applicable cable regulation relating to any portion of the cable communications system. Based on the information contained in CenturyLink's application and responses to the NMTC's request for information, it appears that CenturyLink has the legal qualifications to operate a cable communications system in the NMTC. Any franchise that is ultimately negotiated is subject to all restrictions under federal, state and local laws.

d. Cable-Related Community Needs and Interests.

No formal needs assessment is legally required in connection with an application for a competitive franchise. The NMTC's cable-related needs and interests were addressed in the 2002 Comcast cable franchise and recently updated through a 2014 Settlement Agreement. *See e.g.* Blaine Ord. No. 02-1957; and NMTC Res. No. 12-17-2014. Any franchise negotiated with CenturyLink should be substantially similar (but need not be identical) to the 2002 Comcast cable franchise, as amended, and consistent with this Report.

Section 11
Cable Franchise Considerations

In the event that the NMTC directs NMTC staff to negotiate a cable franchise with CenturyLink, the Administrator recommends that any franchise include, but certainly not be limited to, addressing the following issues.

a. Economic Redlining or "Cherry Picking." Comcast raised a concern that CenturyLink will discriminate based on the income of residents in the NMTC member city area. *See* Exhibit 5 and Public Hearing Testimony. There is nothing in the record to indicate that CenturyLink will do so. However, the application does not provide clarity as to where CenturyLink will provide cable service. The CenturyLink application only indicates that its cable service "will be available to over thirty percent of the households in the [NMTC] member cities." *See* Exhibit 2 at p. 4. The Federal Cable Act does prohibit economic redlining. *See* 47 U.S.C. § 541(a)(3). While economic redlining is illegal, it should be addressed in any negotiated cable franchise with CenturyLink.

c. Franchise Area - Reasonable Build-Out of the NMTC.

As discussed in Section 8 above, the state of Minnesota has a statute that requires that all initial cable franchises contain a franchise provision requiring a 5-year build. It is CenturyLink's position that the 5-year Build Statute is preempted by the Federal Cable Act. *See* Exhibit 3 at ¶¶ 28-31. While there is no court decision directly addressing whether the Federal Cable Act preempts the state 5-Year Build Statute, CenturyLink does provide a good faith basis for its

position. *Id*. CenturyLink is also willing to completely indemnify the NMTC for any litigation concerning the grant of a cable franchise to CenturyLink. *See* Exhibit 2 at 6.

With the 5-Year Build Statute on one hand and federal preemption on the other, the NMTC is left with a difficult choice. Does the NMTC err on the side of caution and require a 5-year build-out commitment from CenturyLink and risk thwarting a competing cable operator that will bring benefits to consumers of the NMTC member cities? Or, does the NMTC err on the side of competition and risk litigation with Comcast? Litigation may be inevitable with either choice.

Should the NMTC direct staff to negotiate a cable franchise with CenturyLink, the cable franchise should contain fair and reasonable build-out requirements with the goal of CenturyLink providing competitive cable services throughout the entire NMTC member city area within a reasonable time and in an equitable manner. In doing so, the Federal Cable Act, the 5-Year Build Statute, the FCC *621 Order*, and any other applicable law should be considered.

d. Level Playing Field Considerations.

Comcast is the only commenter to specifically raise the state level playing field statute, Minnesota Statutes Section 238.08, as a concern. In the FCC's *621 Order*, the FCC found:

> In many instances, level-playing-field provisions in local laws or franchise agreements compel LFAs to impose on competitors the same build-out requirements that apply to the incumbent cable operator. ***Cable operators use threatened or actual litigation against LFAs to enforce level-playing-field requirements and have successfully delayed entry or driven would-be competitors out of town.*** Even in the absence of level-playing-field requirements, incumbent cable operators demand that LFAs impose comparable build-out requirements on competitors to increase the financial burden and risk for the new entrant.

621 Order at ¶ 34 (Footnotes omitted). Regardless of the reason for raising the issue, any franchise should contain adequate provisions addressing the state level playing field statute. This should include provisions to provide cable service to all NMTC member city residents over a reasonable time and reasonable circumstances (consistent with the build-out discussion above), similar public, educational, and governmental access requirements as Comcast, and the same franchise fee requirement as Comcast. *See e.g.* Blaine Ord. 02-1957.

e. Compliance with Comcast Cable Franchise

In the event the NMTC determines to grant a cable franchise to CenturyLink, the cable franchise must be granted by an ordinance. The local level playing field provision in the cable franchise with Comcast requires that the NMTC not authorize or permit itself or another Person or governmental body to construct, operate or maintain a cable system on terms and conditions which are, taken as a whole, more favorable or less burdensome than those applied to the

Grantee. *See* Section 8(C) above. However, local level playing field provisions may also be subject to federal preemption. *See* Section 7(G) above. Any negotiated franchise should address the local level playing field provision in the Comcast franchise consistent with this Report.

Section 12
Recommendation

Based on the record developed by the NMTC, including this Report, it is the Administrator's recommendation that the NMTC (1) receive and file this Report; and (2) direct NMTC staff to negotiate a cable communications franchise with CenturyLink consistent with this report.

If the NMTC accepts this recommendation, NMTC staff will negotiate a cable franchise with CenturyLink. Following negotiations, the NMTC will recommend final action to be taken by its member cities. In the event that a franchise ordinance is recommended to the member cities, each member city will hold a public hearing on the proposed cable franchise ordinance. Each member city may act on the cable franchise ordinance any time seven days following the public hearing. After the public hearing, each member city will need to decide whether to award a cable franchise by ordinance or to deny the award of a cable franchise. Additionally, each member city will need to make findings of fact in support of its decision.

Staff Report
On
CenturyLink Cable Franchise Application

Exhibit List

Exhibit 1	Affidavits of Publication of Notice of Intent to Franchise
Exhibit 2	CenturyLink Franchise Application
Exhibit 3	CenturyLink Response to Request for Information (PUBLIC)
Exhibit 4	CenturyLink Response to Request for Information (NON-PUBLIC)
Exhibit 5	Letter from Comcast
Exhibit 6	FCC *621 Order* (Rel. 2007)
Exhibit 7	*Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008)
Exhibit 8	FCC *Order on Reconsideration* (Rel. 2015)

Exhibit 1

Affidavits of Publication of Notice of Intent to Franchise

NOTICE OF INTENT TO FRANCHISE

NORTH METRO TELECOMMUNICATIONS COMMISSION

The North Metro Telecommunications Commission (the "Commission"), a Minnesota municipal joint powers commission consisting of the municipalities of Blaine, Centerville, Circle Pines, Ham Lake, Lexington, Lino Lakes and Spring Lake Park, Minnesota (the "Member Cities"), hereby gives notice of intent to consider an application for a franchise from qualified entities that are interested in constructing a cable system and providing cable service within the territorial limits of the Member Cities. Notarized applications that contain all of the information required by Minn. Stat. § 238.081, Subd. 4 and that comply with all state and local requirements must be received by 12:00 p.m. on Thursday, February 12, 2015 at 12520 Polk Street N.E., Blaine, MN 55434. Each franchise application must be accompanied by an application fee in the amount of $10,000.00. This fee shall be made payable to the North Metro Telecommunications Commission.

Every franchise proposal submitted by an applicant must include a design for a state-of-the-art cable system that is capable of reliably providing a panoply of cable services to subscribers of the Member Cities. In reviewing each applicant's franchise application, the Commission will consider all relevant factors, including, but not limited to: (i) comparisons of the level, quality and nature of cable services proposed by the applicant to that provided by the incumbent cable system operator; (ii) the cable-related needs and interests of the community, as identified solely by the Member Cities and the Commission; and (iii) information regarding industry trends, state-of-the-art technologies, modern cable services and other related information.

The Commission will hold a public hearing to consider any franchise applications it receives at 6:00 p.m. on Wednesday, February 18, 2015, at 1301 81st Ave. NE, Spring Lake Park, MN 55432. All questions concerning the franchising process and any requests for information should be directed to Ms. Heidi Arnson, Executive Director, North Metro Telecommunications Commission, 12520 Polk Street N.E., Blaine, MN 55434.

ISSUED BY THE NORTH METRO TELECOMMUNICATIONS COMMISSION.

(Published Jan. 16 & 23, 2015
Anoka County Record)

AFFIDAVIT OF PUBLICATION

State of Minnesota, County of Ramsey

John M. Kysylyczyn, being duly sworn on oath says that he is the owner and publisher of the newspaper known as the Anoka County Record, and has full knowledge of the facts which are stated below:

(A) The newspaper has complied with all the requirements constituting qualifications as a qualified newspaper, as provided by Minnesota Statutes 331A and other applicable laws.

(B) The printed statement(s) attached was(were) printed and published on the following day(s) and date(s):

Friday, January 16, 2015

Friday, January 23, 2015

John M. Kysylyczyn,
Owner & Publisher

Subscribed and sworn to before me on this 23rd day of January, 2015

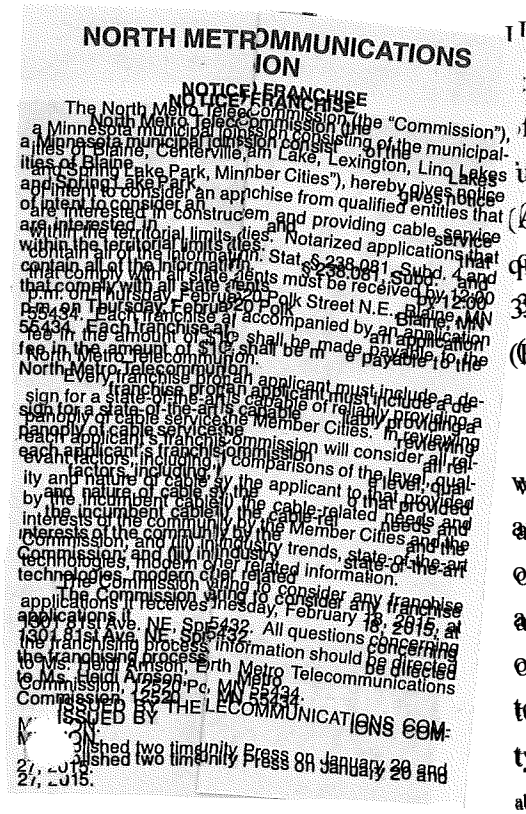
Notary Public

JESSICA YANG
NOTARY PUBLIC - MINNESOTA
MY COMMISSION EXPIRES 01/31/17

Lowest classified rate paid by commercial users:

Per column inch: $5

PRINTER'S AFFIDAVIT OF PUBLICATION



NORTH METRO COMMUNICATIONS ION

NOTICE FRANCHISE

NOTICE FRANCHISE

The North Metro Telec Commission (the "Commission"), a Minnesota municipal ission consisting of the municipalities of Blaine, Centerville, am Lake, Lexington, Lino Lakes and Spring Lake Park, Minnber Cities"), hereby gives notice of intent to consider an ap chise from qualified entities that are interested in construc em and providing cable service within the territorial limits ities. Notarized applications that contain all of the information Stat. § 238.081, Subd. 4 and that comply with all state ments must be received by 12:00 p.m. on Thursday, Febru 20 Polk Street N.E., P.O. Box 12 Blaine, MN 55434. Each franchise ap accompanied by an application fee in the amount of $10 shall be m a payable to the North Metro Telecommun

Every franchise proan applicant must include a design for a state-of-the-arts capable of reliably providing a panoply of cable service the Member Cities. In reviewing each applicant's franchis commission will consider all relevant factors, including,) comparisons of the level, quality and nature of cable sy the applicant to that provided by the incumbent cable), the cable-related needs and interests of the community by the Member Cities and the Commission, and (iii) industry trends, state-of-the-art technologies, modern cial related information.

The Commission wing to consider any franchise applications ll receive Tuesday, February 18, 2015, at 1301 81st Ave. NE, Spc 5432. All questions concerning the franchising process information should be directed to Ms. Heidi Arnson, Brth Metro Telecommunications Commission, 12520 Pc, MN 55434.

ISSUED BY THE LECOMMUNICATIONS COMM-

M ION.

ished two timunity Press on January 20 and 27, 2015.

ished two timunity Press on January 20 and 27, 2015.

AFFIDAVIT OF PUBLICATION

STATE OF MINNESOTA)
County of Ramsey)

I the publisher, or the publisher's designated agent, being duly sworn, on oath state that I am the publisher, or the publisher's designated agent and an employee of the newspaper known as the ***QUAD COMMUNITY PRESS***, and that I have full knowledge of the facts which are stated below:

(A) The newspaper has complied with all of the requirements constituting qualification as a qualified newspaper, as provided by Minnesota Statute 331A.02, 331A.07, and other applicable laws, as amended.

(B) The printed:

NORTH METRO
TELECOMMUNICATIONS COMMISSION
NOTICE OF INTENT TO FRANCHISE

which is attached was cut from the columns of said newspaper and was printed and published once each week for **TWO** successive weeks; it was first published on **TUESDAY**, the **20TH** day of **JANUARY**, **2015**, and was thereafter printed and published on every **TUESDAY** to and including **TUESDAY**, the **27TH** day of **JANUARY**, **2015**. Printed below is a copy of the lower case alphabet from A to Z, both inclusive, which is hereby acknowledged as being the size and kind of type used in the composition and publication of the notice:

abcdefghijklmnopqrstuvwxyz

BY:
TITLE: Publisher

Subscribed and sworn to before me on this **27TH** day of **JANUARY**, **2015**.

CHRISTINE M CHRISTY
NOTARY PUBLIC-MINNESOTA
MY COMMISSION
EXPIRES 01/31/2019

Notary Public, Minnesota

RATE INFORMATION

(1) Lowest classified rate paid by commercial users for comparable space. $ _____ (Line, word or inch rate)

(2) Maximum rate allowed by law for the above matter. $ _____ (Line, word or inch rate)

(3) Rate actually charged for the above matter. $ **8.44/INCH** (Line, word or inch rate)

AFFIDAVIT OF PUBLICATION

STATE OF MINNESOTA)
COUNTY OF ANOKA) ss

Charlene Vold being duly sworn on an oath, states or affirms that they are the Authorized Agent of the newspaper(s) known as:

Blaine Spring Lake Park Life

and has full knowledge of the facts stated below:

(A) The newspaper has complied with all of the requirements constituting qualification as a qualified newspaper as provided by Minn. Stat. §331A.02, §331A.07, and other applicable laws as amended.

(B) This Public Notice was printed and published in said newspaper(s) for 2 successive issues; the first insertion being on 01/16/2015 and the last insertion being on 01/23/2015.

By: Charlene Vold
Authorized Agent

Subscribed and sworn to or affirmed before me on 01/23/2015.

Darlene M MacPherson
Notary Public

DARLENE MARIE MACPHERSON
Notary Public-Minnesota
My Commission Expires Jan 31, 2019

Rate Information:
(1) Lowest classified rate paid by commercial users for comparable space:
$22.00 per column inch

Ad ID 337557

PUBLIC NOTICE
NOTICE OF INTENT
TO FRANCHISE
NORTH METRO
TELECOMMUNICATIONS
COMMISSION

The North Metro Telecommunications Commission (the "Commission"), a Minnesota municipal joint powers commission consisting of the municipalities of Blaine, Centerville, Circle Pines, Ham Lake, Lexington, Lino Lakes and Spring Lake Park, Minnesota (the "Member Cities"), hereby gives notice of intent to consider an application for a franchise from qualified entities that are interested in constructing a cable system and providing cable service within the territorial limits of the Member Cities. Notarized applications that contain all of the information required by Minn. Stat. § 238.081, Subd. 4 and that comply with all state and local requirements must be received by 12:00 p.m. on Thursday, February 12, 2015 at 12520 Polk Street N.E., Blaine, MN 55434. Each franchise application must be accompanied by an application fee in the amount of $10,000.00. This fee shall be made payable to the North Metro Telecommunications Commission.

Every franchise proposal submitted by an applicant must include a design for a state-of-the-art cable system that is capable of reliably providing a panoply of cable services to subscribers of the Member Cities. In reviewing each applicant's franchise application, the Commission will consider all relevant factors, including, but not limited to: (i) comparisons of the level, quality and nature of cable services proposed by the applicant to that provided by the incumbent cable system operator; (ii) the cable-related needs and interests of the community, as identified solely by the Member Cities and the Commission; and (iii) information regarding industry trends, state-of-the-art technologies, modern cable services and other related information.

The Commission will hold a public hearing to consider any franchise applications it receives at 6:00 p.m. on Wednesday, February 18, 2015, at 1301 81st Ave. NE, Spring Lake Park, MN 55432. All questions concerning the franchising process and any requests for information should be directed to Ms. Heidi Arnson, Executive Director, North Metro Telecommunications Commission, 12520 Polk Street N.E., Blaine, MN 55434.
ISSUED BY THE NORTH METRO TELECOMMUNICATIONS COMMISSION.

Published in the
Blaine/Spring Lake Park Life
January 16, 23, 2015
337557

Exhibit 2

CenturyLink Franchise Application

CenturyLink®

Mary Ferguson LaFave
Director Public Policy
Phone 612-663-6913

DELIVERED VIA OVERNIGHT MAIL

February 11, 2015

Jeanne Mason
Chair of the North Metro Telecommunications Commission
12520 Polk St. NE
Blaine, MN 55434

Re: Response of Qwest Broadband Services, Inc. d/b/a CenturyLink to the Notice of Intent to Franchise Published by the North Metro Telecommunications Commission

Dear Ms. Mason:

In response to the North Metro Telecommunications Commission's published notice of Intent to Franchise, enclosed please find Qwest Broadband Services, Inc., d/b/a CenturyLink's notarized application for a cable communications franchise with the member cities of the North Metro Telecommunications Commission. Also enclosed please find a check in the amount of $10,000.00 payable to the North Metro Telecommunications Commission in full payment of the requisite franchise application filing fee.

Please do not hesitate to contact me or any other designated representative of the Company is you have any questions. CenturyLink looks forward to working with the Commission and bringing facilities based video competition to the citizens of the member cities of North Metro Telecommunications Commission.

Very truly yours,

Mary Ferguson LaFave

Cc: Mike Bradley, Esq. (sent via e-mail)

200 South 5th Street, Room 2200
Minneapolis, MN 55402
www.centurylink.com

QWEST BROADBAND SERVICES, INC., D/B/A CENTURYLINK
APPLICATION FOR A COMPETITIVE CABLE COMMUNICATIONS FRANCHISE
IN THE MEMBER CITIES OF THE NORTH METRO TELECOMMUNICATIONS COMMISSION

Qwest Broadband Services, Inc., d/b/a CenturyLink ("CenturyLink") respectfully files this application for a competitive cable communications franchise to provide cable communications services in the member cities of the North Metro Telecommunications Commission (the "Commission"). The following sets forth the information required to be submitted in an application in accordance with Minn. Stat. §238.081, Subd. 4.

Franchise Applicant: Qwest Broadband Services, Inc. d/b/a CenturyLink ("CenturyLink"), a Delaware corporation, seeks a competitive cable communications franchise to offer cable communications services in the member cities of the North Metro Telecommunications Commission.

Applicant's Representatives: The following individuals may be contacted for further information about this application:

(a) Mary Ferguson LaFave, 200 S. 5th St., 21st Floor, Minneapolis, MN 55402; Tel: 612-663-6913
(b) James P. Campbell, 1801 California Street, 10th Floor, Denver, CO 80202; Tel: 303-992-5811
(c) Kirstin Sersland, 200 S. 5th St., 23rd Floor, Minneapolis, MN 55402; Tel: 612-663-7911

Channels: CenturyLink's cable communications system will be fully digital. While the ultimate channel lineup has not been finalized at this time, attached hereto as Exhibit 1 is a sample channel line up from another jurisdiction (Phoenix, Arizona) in which CenturyLink offers its cable communications service, Prism™. CenturyLink will provide the Commission with a copy of the actual channel lineup prior to launching service in the member cities of the North Metro Telecommunications Commission. It should be noted that currently CenturyLink offers more channels in HD than any other MVPD nationally. It also provides a robust library of Video on Demand content. Lastly, it will carry all of the Public Educational and Government access channels in HD if the Commission so elects.

FCC Authorization: In accordance with 47 C.F.R. §76.1801, CenturyLink will file a Form 322 with the FCC to obtain a Community Identification Number (CUID) prior to offering service in the member cities of the North Metro Cable Commission.

Cable Communications System and Operation

CenturyLink has two "super head ends", one located in Columbia, Missouri and one in Littleton, Colorado and each super head end has a satellite "farm" used to download national content. These two super head ends provide redundancy, i.e., should an emergency interrupt service at one super head end, and then the other head end will be used to provide the national content. The national content is encoded and then deployed over diverse 10 Gig fiber circuits to the local head where the local content, including public, educational and government access channels, is inserted for ultimate delivery to end users. The primary super head end serving the Twin Cities metropolitan area, including the member cities of the North Metro Telecommunications Commission, is in Columbia, Missouri and the local head end will be located in Golden Valley, Minnesota. CenturyLink will pick up the local broadcast signals via fiber circuits and will also capture those signals by antennae located at the local head end as a back-up, precautionary measure.

CenturyLink will deploy its cable communications service, Prism, over facilities owned by an affiliated company, Qwest Corporation, d/b/a CenturyLink (QC). Prism is a switched digital service and is Ethernet based (it is not a QAM based, broadcast service). The fact that the service is switched digital and Ethernet based enables CenturyLink to offer unique features and functions, e.g., warp channel change, not generally available over more traditional cable systems, as more fully detailed below.

Currently, two network architectural designs are used to deliver Prism to subscribers: fiber to the node (FTTN) and fiber to the premises (FTTP), but the quality of the cable communications service is of the same high, technical quality regardless of the underlying network architecture. For FTTN, CenturyLink deploys fiber from a serving central office to a remote terminal in a neighborhood. The remote terminal houses the electronics (currently VDSL2) and such electronics create a broadband stream to individual addresses of up to 40Mpbs (80Mpbs if using pair bonding) over a copper subloop. For FTTP, there is fiber connectivity from the serving central office to a distinct address/location via an optical loop terminal (OLT) and this fiber connection will support broadband speeds of up to One Gbps. A set-top box is required for each television in a home to receive Prism. CenturyLink recently introduced a wireless set top box which enables the end user to move Prism to any location such as the patio or garage.

QC is the traditional telecommunications provider in the member cities of the North Metro Cable Commission. It has and will continue to pull all necessary permits and comply with all the member cities of the North Metro Telecommunications Commission rules, codes and ordinances associated with access to and presence in the public rights of way.

CenturyLink is targeting an initial service launch in the second or third quarter 2015. CenturyLink will notify the Commission and its member cities prior to commercially launching Prism in the member cities of the North Metro Telecommunications Commission.

Prism Features and Functions:

As noted above, we have attached a sample channel line up from another market. This illustrates the vast selection of content available to subscribers. Because our system is IP based, we offer unique applications available via the television set such as access to Facebook and Picasa. In addition, search and streaming services are available which enable viewers to search for the cheapest gasoline within a specified area or to stream selected stock market quotes. We also have an ever increasing video on demand library. Prism is a state of the art offering and its features and functions also include, but are not limited to: (1) whole home DVR; (2) warp speed channel change; (3) find-it fast navigation, (4) multi-view (4 shows on one screen); (5) personal media sharing; (6) interactive news and information dashboard; (7) Prism on the Go (select content available over mobile devices such as smart phones and tablets); and (8) advanced parental controls. By going to the following URL, you can "experience" the features and functions of Prism through a short demonstration: http://www.centurylink.com/prismtv/#index.html.

Access Channels:

We will provide the same number of Access Channels as the incumbent cable communications provider and we will collect and remit the same amount of Access Channel monetary support from our subscribers as the incumbent cable communications provider. Because of the difference in technology between our system and the incumbent's, we cannot interconnect with the incumbent for purposes of

providing Access Channels. Rather, we will deploy fiber facilities between our head end and the Commission's point(s) of origination to acquire the Access Channel content and insert it into our line-up. We will provide the Access Channels standard definition and will also provide them in high definition if the Commission so chooses. In addition to all the above, CenturyLink will make up to 25 hours of Access Channel content available on a server so that subscribers can access and watch Access Channel content, selected by the Commission, on our video on demand service.

Pricing and Standard Installation:

The attached Exhibit 2 is a sample of the pricing for Prism packages in another market. In advance of commercial launch in the member cities of the North Metro Telecommunications Commission, CenturyLink will provide the Commission the pricing for various Prism packages that will be offered in the member cities of the Commission.

CenturyLink will provide Prism service to all qualified households within seven days. CenturyLink does not have "non-standard" installation, i.e., the provision of service at an additional construction cost to the subscriber. Qualification for Prism service is purely a technical issue – it is not possible to pay an additional amount to qualify for the service.

Service to Government and Educational Facilities

CenturyLink will provide expanded basic service to all government buildings, schools and public libraries located in each member city so long as these government addresses are within the footprint of locations capable of receiving cable communications service from CenturyLink and no other cable communications provider is providing service at such location.

Initial Deployment and Availability of Prism

When CenturyLink begins to offer Prism commercially, Prism will be available to over thirty percent of the households in the member cities of the Commission. Turning up service in the area covered by the Commission represents a very significant capital investment by the Company even though it has zero revenue-generating customers and its direct competitor has one hundred percent of the facilities based cable subscribers in the member cities of the Commission. Further deployment will be driven by success in the market, i.e., as we win customers we will use that new revenue stream to invest in further deployment and broader availability of Prism throughout the member cities of the Commission. As set forth in the franchise, CenturyLink will meet periodically with the Commission to review its current deployment footprint and to outline its plans in the upcoming quarter(s) for additional deployment. This market success deployment model is expressly supported by the FCC and has been adopted by other cities in the State of Minnesota.

CenturyLink's Managerial and Technical Expertise in the Provision of Cable Communications Services to Consumers

CenturyLink has been offering Prism since 2008 when it initially launched its service in Lacrosse, Wisconsin and has continued to expand to its Prism footprint since that time. Prism is currently available in 13 markets. The attached Exhibit 3 is a list of the markets in which CenturyLink offers Prism pursuant to either statewide franchise statutes or locally negotiated, competitive franchises. In addition, the Company offers an analog product in smaller markets in Wisconsin and Iowa.

CenturyLink has upgraded and/or deployed new facilities, including fiber to the premises, so that it is capable of offering service to over 2.3 million homes. CenturyLink has approximately 300,000 Prism customers and continues to bring on new subscribers daily.

As it relates to content acquisition, CenturyLink is a member of the NCTC and obtains some of its content through that cooperative. In addition, it negotiates directly for access to about forty percent of its content.

The two super head ends as well as the local head ends all contain state of the art facilities for purposes of acquiring, processing and distribution of content to its end users whether through its Prism product or its Prism Everywhere offering.

Organizational Structure:

Applicant's ultimate parent company is CenturyLink, Inc., a Louisiana corporation headquartered in Monroe, Louisiana and through its subsidiaries owns 100% of Qwest Broadband Services, Inc. d/b/a CenturyLink.

CenturyLink, Inc. is the third largest telecommunications company in the United States and is recognized as a leader in the network services market by technology industry analyst firms. The Company is a global leader in cloud infrastructure and hosted IT solutions for enterprise customers. CenturyLink provides data, voice and managed services in local, national and select international markets through its high-quality advanced fiber optic network and multiple data centers for businesses and consumers. The company also offers advanced entertainment services under the CenturyLink® Prism™ TV and DIRECTV brands. Headquartered in Monroe, La., CenturyLink is an S&P 500 company and is included among the Fortune 500 list of America's largest corporations. A copy of CenturyLink's most recent 10-K can be obtained by clicking on the following URL:
http://www.sec.gov/Archives/edgar/data/18926/000144530514000656/ctl-2013123110k.htm

The following sets forth the corporate leadership of Qwest Broadband Services, Inc., d/b/a CenturyLink:

Qwest Broadband Services, Inc. - (Delaware Domestic)

Directors: R. Stewart Ewing, Jr.
Stacey W. Goff

Officers:

Chief Executive Officer and President	Glen F. Post, III
President Global Markets	Karen A. Puckett
Executive Vice President and Chief Financial Officer	R. Stewart Ewing, Jr.
Executive Vice President, General Counsel	Stacey W. Goff
President IT Services and New Market Development	Girish Varma
Executive Vice President – Public Policy and Government Relations	R. Steven Davis
President – Wholesale Operations	William E. Cheek
Executive Vice President – Controller and Operations Support	David D. Cole
Executive Vice President – Network Services	Maxine Moreau
Vice President and Treasurer	Glynn E. Williams, Jr.
Vice President	Jonathan J. Robinson
Secretary	Kay Buchart
Assistant Secretary	Joan E. Randazzo
Assistant Secretary	Meagan E. Messina

Financial Capability:

CenturyLink will make an initial capital investment of well over $125 million to bring Prism to the Twin Cities. This investment includes, but is not limited to, a new head end, deployment of new facilities and upgrade of existing facilities.

Indemnification:

CenturyLink will include the following provision in its franchise with the member cities of the North Metro Cable Commission:

Grantee shall contemporaneously with this Franchise execute an Indemnity Agreement in a form acceptable to the Commission, which shall indemnify, defend and hold the Commission harmless for any claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and reasonable attorneys' fees or reasonable expenses arising out of the actions of the Commission in granting this Franchise.

This obligation includes any claims by another franchised cable operator against the City that the terms and conditions of this Franchise are less burdensome than another franchise granted by the city or that this Franchise does not satisfy the requirements of applicable state law(s).

Respectfully Submitted,

Qwest Broadband Services, Inc. d/b/a CenturyLink
By: Mary Ferguson LaFave

Subscribed and sworn to before me

This 10th day of February, 2015

Notary Public
My Commission Expires: Jan 31, 2020

DIANNE M. BARTHEL
Notary Public-Minnesota
My Commission Expires Jan 31, 2020

CenturyLink prism

Phoenix Channel Lineup

Contact CenturyLink
Sales: 877-299-0172
Support: 866-314-4148

Prism™ Essential

3	3TV (KTVK)
1003	3TV HD (KTVKDT)
1167	A&E HD
167	A&E
15	ABC (KNXV)
1179	ABC Family HD
179	ABC Family
1015	ABC HD (KNXVDT)
1796	AMC HD
796	AMC
16	Antenna TV (KNXVDT2)
1105	AXS TV
13	AZ-TV (KAZT)
1013	AZ-TV HD (KAZTDT)
41	Azteca America (KPDFCA)
310	Baby First TV
1156	BET HD
156	BET
1222	Bloomberg HD
222	Bloomberg
327	Boomerang
1182	Bravo HD
182	Bravo
1650	BTN HD
650	BTN
1651	BTN2 HD
651	BTN2
1652	BTN3 HD
652	BTN3
1230	C-SPAN HD
230	C-SPAN
1231	C-SPAN2 HD
231	C-SPAN2
1327	Cartoon Network HD
326	Cartoon Network
5	CBS (KPHO)
1005	CBS HD (KPHODT)
411	CenturyLink Information
1411	CenturyLink Information
8015	City of Casa Grande
8003	City of Chandler Educational Access
8002	City of Chandler Government Access
8004	City of Gilbert Government Access
8007	City of Glendale Government Access
8008	City of Maricopa Government Access
8010	City of Mesa Educational Access
8011	City of Mesa Government Access
8009	City of Peoria Government Access
8001	City of Scottsdale Government Access
8013	City of Surprise Government Access
8012	City of Tempe Government Access
1526	CMT HD
526	CMT
1216	CNBC HD
216	CNBC
1202	CNN HD
202	CNN
1141	Comedy Central HD
141	Comedy Central
48	Daystar (KDTP)
1121	Discovery Channel HD
121	Discovery Channel
1303	Disney Channel HD
303	Disney Channel
9999	DVR
8016	Dysart Schools Educational Access
1134	EI HD
135	EI
9	Eight Life (KAETDT2)
7	Eight World (KAETDT3)
603	ESPN Classic
1602	ESPN HD
27	ESPN
602	ESPN
1606	ESPN2 HD
28	ESPN2
606	ESPN2
1562	EWTN HD
562	EWTN
40	Exitos (KTAZDT2)
1453	Food Network HD
453	Food Network
10	FOX (KSAZ)
1010	FOX HD (KSAZDT)
1210	FOX News Channel HD
210	FOX News Channel
1620	FOX Sports 1 HD
620	FOX Sports 1
9002	FOX Sports Pay Per View HD
9001	FOX Sports Pay Per View
1762	FS Arizona HD
1763	FS Arizona Plus HD
763	FS Arizona Plus
762	FS Arizona
1129	FX HD
129	FX
1131	FXX HD
131	FXX
4004	Galavision HD
3004	Galavision
36	GetTV (KFPHDT2)
1641	Golf Channel HD
641	Golf Channel
1176	Hallmark Channel HD
176	Hallmark Channel
1106	HDNet Movies
1451	HGTV HD
451	HGTV
271	History
1203	HLN HD
203	HLN
1422	Home Shopping Network HD
19	Home Shopping Network
422	Home Shopping Network
1261	ID HD
261	ID
51	ION (KPPX)
1051	ION HD (KPPXDT)
1428	Jewelry Television HD
17	Jewelry Television
428	Jewelry Television
1168	Justice Central HD
168	Justice Central
4	KPHO Weather Now (KPHODT2)
1361	Lifetime HD
361	Lifetime
364	Lifetime Real Women
1362	LMN HD
362	LMN
5129	MC ?70s
5128	MC ?80s
5127	MC ?90s
5116	MC Adult Alternative
5115	MC Alternative
5146	MC Blues
5134	MC Classic Country
5118	MC Classic Rock
5149	MC Classical Masterpieces
5135	MC Contemporary Christian
5133	MC Country Hits
5103	MC Dance
5148	MC Easy Listening
5111	MC Gospel
5105	MC Hip-Hop and R&B
5107	MC Hip-Hop Classics
5101	MC Hit List
5104	MC Indie
5145	MC Jazz
5124	MC Kidz Only!
5150	MC Light Classical
5120	MC Love Songs
5114	MC Metal
5138	MC Mexicana
5137	MC Musica Urbana
5122	MC Party Favorites
5131	MC Pop Country
5121	MC Pop Hits
5136	MC Pop Latino
5102	MC Pop Rhythmic
5109	MC R&B Classics
5110	MC R&B Soul
5106	MC Rap
5112	MC Reggae
5117	MC Rock Hits
5113	MC Rock
5140	MC Romances
5147	MC Singers & Swing
5144	MC Smooth Jazz
5119	MC Soft Rock
5130	MC Solid Gold Oldies
5141	MC Sounds of the Seasons
5143	MC Soundscapes
5142	MC Stage & Screen
5108	MC Throwback Jams
5132	MC Today?s Country
5125	MC Toddler Tunes
5139	MC Tropicales
5126	MC Y2K
14	Me-TV (KAZTDT2)
1634	MLB Network HD
634	MLB Network
46	Movies! (KUTPDT2)
1215	MSNBC HD
215	MSNBC
1503	MTV HD
503	MTV
193	Mun2
45	My Network TV (KUTP)
1045	My Network TV HD (KUTPDT)
1266	National Geographic Channel HD
266	National Geographic Channel
12	NBC (KPNX)
1012	NBC HD (KPNXDT)
1640	NBC SN HD
640	NBC SN
20	NBC Weather Plus (KPNXDT2)
1630	NFL Network HD
630	NFL Network
629	NFL RedZone (Pay Per View)
1629	NFL RedZone HD (Pay Per View)
1638	NHL Network HD
638	NHL Network
1314	Nickelodeon HD
314	Nickelodeon
1368	Oxygen HD
368	Oxygen
1683	PAC 12 Arizona HD
683	PAC 12 Arizona
106	Pay Per View Events HD
1101	Pay Per View Events HD
101	Pay Per View Events
8	PBS Eight (KAET)
1008	PBS Eight HD (KAETDT)
8006	Phoenix Educational Access
8005	Phoenix Government Access
8014	Pinal County Government Access
9161	Premier League Extra Time 1 HD
9151	Premier League Extra Time 1
9162	Premier League Extra Time 2 HD
9152	Premier League Extra Time 2
9163	Premier League Extra Time 3 HD
9153	Premier League Extra Time 3
9164	Premier League Extra Time 4 HD
9154	Premier League Extra Time 4
9165	Premier League Extra Time 5 HD
9155	Premier League Extra Time 5
90	Prism Applications
92	Prism Games
301	Prism Kids
201	Prism News
11	Prism PEG Channels
601	Prism Sports
1420	QVC HD
18	QVC
420	QVC
1799	Reelz Channel HD
799	Reelz Channel
1424	ShopHQHD
424	ShopHQ
1146	Spike TV HD
146	Spike TV
1337	Sprout HD
337	Sprout
1152	Syfy HD
152	Syfy
21	TBN (KPAZ)
1560	TBN HD
560	TBN
1113	TBS HD
113	TBS
5123	Teen MC
39	Telemundo (KTAZ)
3007	Telemundo (KTAZ)
1039	Telemundo HD (KTAZDT)
6	The CW (KASW)
1006	The CW HD (KASWDT)
1225	The Weather Channel HD
225	The Weather Channel
2	This TV (KTVKDT2)
1251	TLC HD
251	TLC
1109	TNT HD
109	TNT
1255	Travel Channel HD
255	Travel Channel
1164	truTV HD
165	truTV
1139	TV Land HD
139	TV Land
44	TV44 (KPHELD)
35	UniMas (KFPH)
4005	UniMas HD
33	Univision (KTVW)
1033	Univision HD (KTVWDT)
1125	USA Network HD
125	USA Network
1102	Velocity HD
1519	VH1 HD
519	VH1
1	Video On Demand
1180	WGN HD
180	WGN

Prism™ Complete

Includes Prism™ Essential Plan channels.

1259	American Heroes Channel HD	381	Esquire TV	505	MTV2
259	American Heroes Channel	1211	FOX Business Network HD	315	Nick 2
1253	Animal Planet HD	211	FOX Business Network	1320	Nick Jr HD
253	Animal Planet	647	FOX College Sports Atlantic	320	Nick Jr
1188	BBC America HD	648	FOX College Sports Central	1316	Nicktoons HD
188	BBC America	649	FOX College Sports Pacific	316	Nicktoons
567	BYU TV	1621	FOX Sports 2 HD	1185	NUVOtv HD
1643	CBS Sports HD	621	FOX Sports 2	185	NUVOtv
643	CBS Sports	1535	Fuse HD	1256	Oprah Winfrey Network HD
515	Centric	535	Fuse	257	Oprah Winfrey Network
153	Chiller	1792	FX Movie Channel HD	1680	Outdoor Channel HD
161	Cloo	792	FX Movie Channel	680	Outdoor Channel
527	CMT Pure Country	1272	FYI HD	1531	Ovation HD
1456	Cooking Channel HD	272	FYI	531	Ovation
456	Cooking Channel	1529	Great American Country HD	1258	SCIENCE HD
1465	Destination America HD	529	Great American Country	258	SCIENCE
465	Destination America	1174	GSN HD	1642	Sportsman Channel HD
1335	Discovery Family HD	174	GSN	642	Sportsman Channel
335	Discovery Family	1274	H2 HD	322	Teen Nick
1307	Disney Junior HD	274	H2	507	Tr3s
307	Disney Junior	1794	Hallmark Movies & Mysteries HD	1790	Turner Classic Movies HD
1305	Disney XD HD	794	Hallmark Movies & Mysteries	790	Turner Classic Movies
305	Disney XD	1797	IFC HD	1157	TV One HD
1454	DIY Network HD	798	IFC	157	TV One
454	DIY Network	564	Inspiration Network	1104	Universal HD
1604	ESPN News HD	466	Life	521	VH1 Classic
604	ESPN News	184	Logo	522	VH1 Soul
1605	ESPNU HD	509	MTV Hits	1372	WE tv HD
605	ESPNU	510	MTV U	373	WE tv
1380	Esquire TV HD	1505	MTV2 HD	132	Youtoo America

Prism™ Preferred

Includes Prism™ Complete Plan channels.

220	Al Jazeera America	1172	MyDestination.TV HD	1852	Showtime HD (E)
159	ASPiRE	172	MyDestination.TV	1853	Showtime HD (W)
1470	AWE HD	1264	NASA TV HD	864	Showtime Next (E)
470	AWE	264	NASA TV	865	Showtime Next (W)
1219	BBC World News HD	1267	Nat Geo Wild HD	1864	Showtime Next HD (E)
219	BBC World News	267	Nat Geo Wild	1865	Showtime Next HD (W)
1540	Blue Highways TV HD	1209	One America News Network HD	880	Showtime On Demand
540	Blue Highways TV	209	One America News Network	1880	Showtime On Demand
1232	C-SPAN3 HD	1678	Outside TV HD	856	Showtime Showcase (E)
232	C-SPAN3	678	Outside TV	857	Showtime Showcase (W)
1169	Cars.TV HD	1684	PAC 12 Bay Area HD	1856	Showtime Showcase HD (E)
169	Cars.TV	684	PAC 12 Bay Area	1857	Showtime Showcase HD (W)
217	CNBC World	1685	PAC 12 Los Angeles HD	866	Showtime Women (E)
205	CNNI	685	PAC 12 Los Angeles	867	Showtime Women (W)
1142	Comedy.TV HD	1686	PAC 12 Mountain HD	1866	Showtime Women HD (E)
142	Comedy.TV	686	PAC 12 Mountain	1867	Showtime Women HD (W)
1163	Crime & Investigation HD	1687	PAC 12 Oregon HD	118	Smithsonian Channel (E)
163	Crime & Investigation	687	PAC 12 Oregon	119	Smithsonian Channel (W)
263	DoD News	1688	PAC 12 Washington HD	1118	Smithsonian Channel HD (E)
932	ENCORE (E)	688	PAC 12 Washington	1119	Smithsonian Channel HD (W)
933	ENCORE (W)	1682	PAC12 Network HD	1791	Sony Movie Channel HD
938	ENCORE Action (E)	682	PAC12 Network	791	Sony Movie Channel
939	ENCORE Action (W)	1170	Pets.TV HD	902	Starz! (E)
1938	Encore Action HD (E)	170	Pets.TV	903	Starz! (W)
942	ENCORE Black (E)	1492	Pivot HD	908	Starz! Cinema (E)
943	ENCORE Black (W)	492	Pivot	909	Starz! Cinema (W)
1942	Encore Black HD (E)	1787	PixL HD	1908	Starz! Cinema HD (E)
934	ENCORE Classic (E)	787	PixL	910	Starz! Comedy (E)
935	ENCORE Classic (W)	1458	Recipe.TV HD	911	Starz! Comedy (W)
1934	ENCORE Classic HD (E)	458	Recipe.TV	1910	Starz! Comedy HD (E)
946	ENCORE Espanol	1916	Retroplex HD	904	Starz! Edge (E)
944	ENCORE Family (E)	916	Retroplex	905	Starz! Edge (W)
945	ENCORE Family (W)	1538	Revolt HD	1904	Starz! Edge HD
1932	Encore HD (E)	538	Revolt	1902	Starz! HD (E)
1933	Encore HD (W)	1476	RFD TV HD	1903	Starz! HD (W)
951	ENCORE On Demand	476	RFD TV	906	Starz! In Black (E)
1951	Encore On Demand	474	RLTV	907	Starz! In Black (W)
936	ENCORE Suspense (E)	1607	SEC Network HD	1906	Starz! In Black HD
937	ENCORE Suspense (W)	1608	SEC Network Overflow 1 HD	912	Starz! Kids and Family (E)
1936	ENCORE Suspense HD (E)	608	SEC Network Overflow 1	913	Starz! Kids and Family (W)
940	ENCORE Westerns (E)	1609	SEC Network Overflow 2 HD	1912	Starz! Kids and Family HD
941	ENCORE Westerns (W)	609	SEC Network Overflow 2	931	Starz! On Demand
1133	ES.TV HD	607	SEC Network	1931	Starz! On Demand
133	ES.TV	1789	Shorts HD	575	The Word Network
890	Flix (E)	789	Shorts	882	TMC (E)
892	Flix On Demand	852	Showtime (E)	883	TMC (W)
1892	Flix On Demand	853	Showtime (W)	1882	TMC HD (E)
1656	GolTV HD	854	Showtime 2 (E)	1883	TMC HD (W)
656	GolTV (English)	855	Showtime 2 (W)	888	TMC On Demand
672	HRTV	1854	Showtime 2 HD (E)	1888	TMC On Demand
1914	Indieplex HD	1855	Showtime 2 HD (W)	884	TMC Xtra (E)
914	Indieplex	860	Showtime Beyond (E)	885	TMC Xtra (W)
1590	Jewish Broadcasting Service HD	861	Showtime Beyond (W)	1884	TMC Xtra HD (E)
590	Jewish Broadcasting Service	1860	Showtime Beyond HD (E)	1885	TMC Xtra HD (W)
1147	MAVTV HD	1861	Showtime Beyond HD (W)	670	TVG
147	MAVTV	858	Showtime Extreme (E)	644	Universal Sports
1116	MGM HD	859	Showtime Extreme (W)	1644	Universal Sports HD
116	MGM	1858	Showtime Extreme HD (E)	1559	UP HD
276	Military History	1859	Showtime Extreme HD (W)	559	UP
1788	MOVIEPLEX HD	862	Showtime Family (E)	1679	World Fishing Network HD
788	MOVIEPLEX	863	Showtime Family (W)	679	World Fishing Network

Prism™ Premium

Includes Prism™ Preferred Plan channels.

1840	5 Star Max HD	811	HBO Comedy (W)	812	HBO Zone (E)
840	5 Star Max	1810	HBO Comedy HD (E)	813	HBO Zone (W)
836	ActionMAX (E)	1811	HBO Comedy HD (W)	1812	HBO Zone HD (E)
837	ActionMAX (W)	806	HBO Family (E)	1813	HBO Zone HD (W)
1836	ActionMAX HD (E)	807	HBO Family (W)	1804	HBO2 HD (E)

1837 ActionMAX HD (W)
1846 Cinem?x HD
846 Cinem?x
832 Cinemax (E)
833 Cinemax (W)
1832 Cinemax HD (E)
1833 Cinemax HD (W)
850 Cinemax On Demand
1850 Cinemax On Demand
802 HBO (E)
803 HBO (W)
804 HBO 2 (E)
805 HBO 2 (W)
810 HBO Comedy (E)
1806 HBO Family HD (E)
1807 HBO Family HD (W)
1802 HBO HD (E)
1803 HBO HD (W)
814 HBO Latino (E)
815 HBO Latino (W)
1814 HBO Latino HD (E)
1815 HBO Latino HD (W)
830 HBO On Demand
1830 HBO On Demand
808 HBO Signature (E)
809 HBO Signature (W)
1808 HBO Signature HD (E)
1809 HBO Signature HD (W)
1805 HBO2 HD (W)
834 MoreMAX (E)
835 MoreMAX (W)
1834 MoreMax HD (E)
1835 MoreMax HD (W)
1842 Movie MAX HD
842 MovieMAX
1844 Outer Max HD
844 OuterMAX
838 ThrillerMAX (E)
839 ThrillerMAX (W)
1838 ThrillerMax HD (E)
1839 ThrillerMax HD (W)

Premium Packages Available as Add-ons:

Preferred and Premium plans include select Add-on Channels.

Cinemax Add-on Package

1840 5 Star Max HD
840 5 Star Max
836 ActionMAX (E)
837 ActionMAX (W)
1836 ActionMAX HD (E)
1837 ActionMAX HD (W)
1846 Cinem?x HD
846 Cinem?x
832 Cinemax (E)
833 Cinemax (W)
1832 Cinemax HD (E)
1833 Cinemax HD (W)
850 Cinemax On Demand
1850 Cinemax On Demand
834 MoreMAX (E)
835 MoreMAX (W)
1834 MoreMax HD (E)
1835 MoreMax HD (W)
1842 Movie MAX HD
842 MovieMAX
1844 Outer Max HD
844 OuterMAX
838 ThrillerMAX (E)
839 ThrillerMAX (W)
1838 ThrillerMax HD (E)
1839 ThrillerMax HD (W)

International-Al-Carte Add-on Package

3740 Al Jazeera America
3710 Bollywood Hits on Demand
3882 Channel One Russia
3603 China Central TV
3604 CTI-Zhong Tian Channel
3682 Filipino on Demand
3802 Rai Italia
3704 Sony Entertainment Television Asia (SET Asia)
3706 STAR India PLUS
3681 The Filipino Channel
3703 TV Asia
3680 TV Japan
3832 TV5 Monde
3702 Zee TV

Paquete Latino Add-on Package

3146 Bandamax
3053 Boomerang en Espanol
3022 Cable Noticias
3054 Cartoon Network en Espanol
3025 Cine Mexicano
3127 Cine Sony
3202 CNN en Espanol
3128 De Pelicula
3129 De Pelicula Clasico
3102 Discovery en Espanol
3103 Discovery Familia
3051 Disney en Espanol
3052 Disney XD Espanol
3302 ESPN Deportes
3077 EWTN en Espanol
3303 FOX Deportes
3304 GolTV
3104 History en Espanol
3056 La Familia Cosmovision
3017 Latele Novela
3149 Ritmoson Latino
3078 TBN Enlace
3143 Telehit
3024 TV Chile
3013 WAPA America

Starz/Encore Add-on Package

932 ENCORE (E)
933 ENCORE (W)
938 ENCORE Action (E)
939 ENCORE Action (W)
1938 Encore Action HD (E)
942 ENCORE Black (E)
943 ENCORE Black (W)
1942 Encore Black HD (E)
934 ENCORE Classic (E)
935 ENCORE Classic (W)
1934 ENCORE Classic HD (E)
946 ENCORE Espanol
944 ENCORE Family (E)
945 ENCORE Family (W)
1932 Encore HD (E)
1933 Encore HD (W)
951 ENCORE On Demand
1951 Encore On Demand
936 ENCORE Suspense (E)
937 ENCORE Suspense (W)
1936 ENCORE Suspense HD (E)
940 ENCORE Westerns (E)
941 ENCORE Westerns (W)
1914 Indieplex HD
914 Indieplex
1788 MOVIEPLEX HD
788 MOVIEPLEX
1916 Retroplex HD
916 Retroplex
902 Starz! (E)
903 Starz! (W)
908 Starz! Cinema (E)
909 Starz! Cinema (W)
1908 Starz! Cinema HD (E)
910 Starz! Comedy (E)
911 Starz! Comedy (W)
1910 Starz! Comedy HD (E)
904 Starz! Edge (E)
905 Starz! Edge (W)
1904 Starz! Edge HD
1902 Starz! HD (E)
1903 Starz! HD (W)
906 Starz! In Black (E)
907 Starz! In Black (W)
1906 Starz! In Black HD
912 Starz! Kids and Family (E)
913 Starz! Kids and Family (W)
1912 Starz! Kids and Family HD
931 Starz! On Demand
1931 Starz! On Demand

Showtime Add-on Package

890 Flix (E)
892 Flix On Demand
1892 Flix On Demand
852 Showtime (E)
853 Showtime (W)
854 Showtime 2 (E)
855 Showtime 2 (W)
1854 Showtime 2 HD (E)
1855 Showtime 2 HD (W)
860 Showtime Beyond (E)
861 Showtime Beyond (W)
1860 Showtime Beyond HD (E)
1861 Showtime Beyond HD (W)
858 Showtime Extreme (E)
859 Showtime Extreme (W)
1858 Showtime Extreme HD (E)
1859 Showtime Extreme HD (W)
862 Showtime Family (E)
863 Showtime Family (W)
1852 Showtime HD (E)
1853 Showtime HD (W)
864 Showtime Next (E)
865 Showtime Next (W)
1864 Showtime Next HD (E)
1865 Showtime Next HD (W)
880 Showtime On Demand
1880 Showtime On Demand
856 Showtime Showcase (E)
857 Showtime Showcase (W)
1856 Showtime Showcase HD (E)
1857 Showtime Showcase HD (W)
866 Showtime Women (E)
867 Showtime Women (W)
1866 Showtime Women HD (E)
1867 Showtime Women HD (W)
882 TMC (E)
883 TMC (W)
1882 TMC HD (E)
1883 TMC HD (W)
888 TMC On Demand
1888 TMC On Demand
884 TMC Xtra (E)
885 TMC Xtra (W)
1884 TMC Xtra HD (E)
1885 TMC Xtra HD (W)

HBO Add-on Package

802 HBO (E)
803 HBO (W)
804 HBO 2 (E)
805 HBO 2 (W)
810 HBO Comedy (E)
811 HBO Comedy (W)
1810 HBO Comedy HD (E)
1811 HBO Comedy HD (W)
806 HBO Family (E)
1806 HBO Family HD (E)
1807 HBO Family HD (W)
1802 HBO HD (E)
1803 HBO HD (W)
814 HBO Latino (E)
815 HBO Latino (W)
1814 HBO Latino HD (E)
1815 HBO Latino HD (W)
830 HBO On Demand
808 HBO Signature (E)
809 HBO Signature (W)
1808 HBO Signature HD (E)
1809 HBO Signature HD (W)
812 HBO Zone (E)
813 HBO Zone (W)
1812 HBO Zone HD (E)
1813 HBO Zone HD (W)
1804 HBO2 HD (E)

807 HBO Family (W)

1830 HBO On Demand

1805 HBO2 HD (W)

Prism Rates

	Prism Essential	Prism Complete	Prism Preferred	Prism Premium
Promotional Rate	$54.99	$69.99	$ 84.99	$114.99
Rack Rate	$74.99	$89.00	$104.99	$134.99

CenturyLink®

PRISM OFFERED IN THE FOLLOWING MARKETS

PURSUANT TO STATE OR LOCAL FRANCHISES

Locally Negotiated Franchises

Gulf Shores, AL
Orange Beach, AL
Baldwin County, AL

Phoenix, AZ
Chandler, AZ
Mesa, AZ
Queen Creek, AZ
Glendale, AZ
Peoria, AZ
Scottsdale, AZ
Surprise, AZ
Goodyear, AZ
Maricopa County, AZ
Pinal County, AZ
Buckeye, AZ
Florence, AZ
Gilbert, AZ
Casa Grande, AZ
Tempe, AZ
Paradise Valley, AZ
Apache Junction, AZ

Colorado Springs, CO
Monument, CO
Fountain, CO
El Paso County, CO
Gypsum, CO
Eagle, CO
Eagle County, CO
Centennial, CO
Littleton, CO
Castle Rock, CO
Parker, CO
Jefferson County, CO
Lone Tree, CO
Douglas County, CO

Locally Negotiated Franchises

Papillion, NE
Springfield, NE
Gretna, NE
Ralston, NE
La Vista, NE
Bellevue, NE
Omaha, NE
Douglas County, NE
Sarpy County, NE

Statewide Franchises

Las Vegas, NV
North Las Vegas, NV
Clark County, NV
Henderson, NV

Tallahassee, FL
Fort Myers, FL
Orlando, FL

Columbia, MO

Raleigh/Durham DMA, NC

LaCrosse DMA, WI

Council Bluffs, IA
Pottawattamie County, IA
Carter Lakes, IA

CenturyLink

CENTURYTEL, INC.
ATTN: Controller's Group
P.O. BOX 4065
MONROE, LA 71211
1-877-386-7151

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12520 POLK ST NE
BLAINE MN 55434

D Lynn Williams

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Exhibit 3

CenturyLink Response to Request for Information (PUBLIC)

CenturyLink™
200 South 5th Street, Room 2100
Minneapolis, MN 55402
(612) 663-6913

Mary Ferguson LaFave
Director Public Policy

February 18, 2015

HAND DELIVERED

Mr. Michael R. Bradley
Bradley, Hagen & Gullikson, LLC
1976 Wooddale Drive, Suite 3A
Woodbury, MN 55125

Re: Request for Information in Connection with Qwest Broadband Service, Inc. d/b/a CenturyLink Application for a Competitive Cable Communications Franchise

Dear Mr. Bradley:

Enclosed please find two copies of CenturyLink's response to the North Metro Telecommunications Commission's Request for Information dated February 13, 2015. One copy contains trade secret information and the other is a public copy from which trade secret data has been redacted. I served via e-mail a public, redacted version on Heidi Arnson, Executive Director.

Please let me know if you have any questions.

Very truly yours,

Mary Ferguson LaFave

Enclosures

cc: Ms. Heidi Arnson (via email)

PUBLIC DOCUMENT

TRADE SECRET DATA
HAS BEEN EXCISED

Re: Request for Information in Connection with Qwest Broadband Service, Inc. d/b/a CenturyLink Application for a Competitive Cable Communications Franchise

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

Dianne Barthel, being first duly sworn, deposes and says:

That on the 18th day of February, 2015, at the City of Minneapolis, State of Minnesota, she served the attached annexed filing on the parties on the attached list, by either electronic delivery, delivery in person or mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Minneapolis, Minnesota, directed to said addressees at their last known addresses.

April L. Harayda
Notary Public-Minnesota
My Commission Expires Jan 31, 2016

Dianne Barthel
Dianne Barthel

Subscribed and sworn to before me
this 18th day of February, 2015.

April Harayda
Notary Public

TRADE SECRET/PRIVILEGED INFORMATION
CLASSIFICATION RATIONALE

State: Minnesota

Description/Title of Information: CenturyLink Application for a Competitive Cable Communications Franchise with North Metro Telecommunications Commission

Trade Secret/Privileged Designation Rationale:

CenturyLink's Responses to the North Metro Telecommunications Commission's Request for Information contains information that is considered Trade Secret because the information is not generally known to, and not being readily ascertainable by proper means by, other persons who can obtain value from its disclosure or use. For this reason, CenturyLink's Responses to the North Metro Telecommunications Commission's Request for Information should be protected from public disclosure.

Qwest Broadband Services, Inc., d/b/a CenturyLink respectfully submits the following overview of CenturyLink followed by responses to the North Metro Telecommunications Commission's ("NMTC") Request for Information dated February 13, 2015.

Overview of CenturyLink

CenturyLink Improves Lives

At CenturyLink, our vision is to improve the lives of our customers. Through our products and services, we help strengthen businesses and connect communities to each other and the world.

CenturyLink's Unifying Principles

We have established certain fundamental values that are the foundation for how we interact with our partners, our customers and with one another. We call these values our Unifying Principles, and they bring together our beliefs into a cohesive philosophy that guides our actions in all matters, including our greater social responsibility in the communities where we live and work. The Unifying Principles are Fairness, Honesty and Integrity, Commitment to Excellence, Positive Attitude, Respect, Faith and Perseverance.

CenturyLink in Minnesota

CenturyLink in Minnesota employs approximately 3,000 people with the majority of those jobs located in the Twin Cities metropolitan area. More than half of CenturyLink employees in the Twin Cities are represented by the Communications Workers of America Union. This includes approximately 500 network technicians, 200 of whom are being cross-trained to support Prism. Success in the market will trigger hiring more skilled technicians in the future to support Prism CenturyLink also employs approximately 100 network engineers in the Twin Cities who work in partnership with the network operations team to plan, build and deploy service. CenturyLink's network operations team supports the new headend facility, located in Golden Valley.

Employees in the Twin Cities also include business sales, marketing, regulatory affairs, public policy, customer service and administrative support. Employees are located across the Twin Cities in central office neighborhood locations and at three main corporate campus locations:

- CenturyLink, 200 S. 5th Street, downtown Minneapolis
- CenturyLink, 2800 Wayzata Blvd, Bryn Mawr, Minneapolis
- CenturyLink, 70 W. 4th Street, downtown St. Paul

Many CenturyLink employees have worked with the company for decades experiencing early innovations as a telephone company and the current day...

PUBLIC DOCUMENT

TRADE SECRET DATA HAS BEEN EXCISED

transformation into a technologically-sophisticated service provider to local communities and Minnesota's largest companies.

With a statewide payroll that exceeds $195 million each year, CenturyLink is a proud contributor to jobs and the economy in the state.

CenturyLink in the Community, Sustainability and Commitment to Diversity

CenturyLink is committed to strengthening and improving the communities it serves, not only through jobs, products and services, but also through philanthropic support of local community agencies, events and initiatives. We focus our philanthropic and volunteer efforts on K-12 education and programs that support youth; technology-focused initiatives; and locally-driven efforts that strengthen communities and make them better places to live.

Through our involvement in efforts ranging from environmental stewardship to community investment, we further our commitment to improve lives by being a good citizen and neighbor in the communities where we work and live.

- Since 2007, the CenturyLink Clark M. Williams Foundation (previously Qwest Foundation) has awarded $800,000 to innovative Minnesota teachers working to improve STEM learning and access to technology in schools statewide. The Minnesota Business Partnership assists CenturyLink by administering the program. Together, we are helping to build awareness around STEM education and preparing Minnesota's future workforce for STEM careers.
- CenturyLink awards scholarships in partnership with local organizations to advance the opportunities of their stakeholders. Scholarships recipient organizations include:
  - CenturyLink STEM scholarship via Minnesota High Tech association.
  - Pacer Center Excite Technology Camp for Girls scholarship.
  - Minneapolis Urban League general education scholarships.
  - University of St. Thomas, ThreeSixty program scholarship.
- CenturyLink helps provide a state-of-the-art fan experience at Target Field as the Official Communications Provider for the Minnesota Twins and Target Field. CenturyLink's sponsorship also includes working with the Twins and the Metro Area Library Association to support the summer reading program.
- Through our Matching Time Grant program, Minnesota employees volunteering time to a non-profit agency can earn a CenturyLink Foundation grant for that organization.
- Our employees can further their community support through our annual CenturyLink All Employee Volunteer Day, Employee Giving Campaign supporting the Greater Twin Cities United Way and our Annual Food Drive supporting Second Harvest Heartland.
- We are committed to environmental sustainability through programs that include waste recycling, green information technology, and procurement policies and practices.

- CenturyLink provides incentives for employees in certain communities to make use of public transit or green commuter programs.
- Our Ethics and Compliance Program provides employees with guidance in making ethical business decisions and provides mechanisms for employees to report concerns.
- We have a Supplier Code of Conduct that establishes expectations for our contractors and vendors regarding ethical business practices.
- CenturyLink's Privacy Policy protects our customers' information and keeps our customers informed about the information we collect and the choices they have regarding that information.
- Diversity is celebrated and promoted through our Employee Resource Groups, recruiting, global supply chain and community outreach.

CenturyLink Lifeline & Internet Basics

CenturyLink participates in Lifeline, which provides certain discounts to qualified subscribers on monthly service. The program is designed to help low income households with needed phone services. Lifeline is available to qualifying customers in every U.S. state. Qualifications vary by state. Residents of American Indian and Alaskan Native tribal lands may qualify for up to an additional $25 of enhanced Lifeline support monthly. They may also qualify for the Link-Up program, which helps consumers pay the initial installation costs of getting telephone service. Link-Up provides a credit of up to $100 of the initial installation charges for tribal customers.

CenturyLink supports the Federal Communications Commission's goal of bringing high-speed Internet to economically-disadvantaged households. We work with nonprofit partners throughout our state to engage communities in the CenturyLink Internet Basics program which provides qualifying low-income Minnesotans service at a reduced rate. CenturyLink has conducted training programs and awareness building around Internet Basics through the Minneapolis Urban League. We have created partnerships with the Minneapolis Public Schools and PC's for People to distribute hundreds of computers to low-income families and provide information to families on the opportunities offered through CenturyLink Internet Basics.

Identification of Franchisee

1. Please confirm the proposed franchisee is Qwest Broadband Services, Inc. d/b/a CenturyLink (the "Franchisee").

The entity seeking a cable communications franchise from the member cities of the North Metro Telecommunications Commission ("NMTC") is Qwest Broadband Services, Inc. d/b/a CenturyLink ("Franchisee").

2. Please confirm that the Franchisee is a foreign corporation in good standing authorized to do business in the State of Minnesota.

The Franchisee is a Delaware corporation, a foreign corporation under Minnesota law and in good standing and authorized to conduct business in the State of Minnesota.

Ownership and Management Structure – Statement of Ownership

3. Please provide a statement of ownership detailing the corporate organization of Franchisee, including the names and addresses of officers and directors and the number of shares hold by each officer or director, and intracompany relationship including a parent, subsidiary, or affiliated company.

Applicant's ultimate parent company is CenturyLink, Inc., a Louisiana corporation headquartered in Monroe, Louisiana, and, through its subsidiaries, owns 100% of Qwest Broadband Services, Inc. d/b/a CenturyLink. A more detailed corporate structure is depicted on the attached Exhibit A. On April 21, 2010, CenturyLink, Inc. reached an agreement to purchase Qwest Communications International, Inc. ("QCII") through a tax-free, stock-for-stock transaction. Under the terms of the parties' merger agreement, CenturyLink, Inc. is the ultimate parent of QCII and the subsidiaries that were under QCII. At the time of the merger between CenturyLink and Qwest Communications International, Inc., Franchisee was a wholly-owned subsidiary of Qwest Services Corporation, Inc. as was Qwest Corporation, the entity which places facilities in NMTC's public rights of way pursuant to the ordinances and associated rules of the member cities of NMTC. Further, at merger, Franchisee was a member of the National Cable Television Cooperative ("NCTC") as was the CenturyLink entity which offers Prism in legacy CenturyLink markets, e.g., Florida. Because the NCTC expressly forbids more than one entity within a corporate family to belong to and directly obtain content from the NCTC and because any affiliated entity receiving content from the NCTC must be a wholly-owned subsidiary of the NCTC member, CenturyLink, Inc. moved Franchisee from being a subsidiary of Qwest Services Corporation to being a subsidiary of CenturyTel Broadband Services, LLC. As provided in the original application filed with the NMTC, the following sets forth the officers and directors of Franchisee. This group of officers and directors do not own any shares of the franchisee.

Qwest Broadband Services, Inc. (Delaware Domestic)

Directors: R. Stewart Ewing, Jr.
Stacey W. Goff

Officers:

Chief Executive Officer and President	Glen F. Post, III
President Global Markets	Karen A. Puckett
Executive Vice President and Chief Financial Officer	R. Stewart Ewing, Jr.
Executive Vice President, General Counsel	Stacey W. Goff
President IT Services and New Market Development	Girish Varma
Executive Vice President – Public Policy and Government Relations	R. Steven Davis

President – Wholesale Operations	William E. Cheek
Executive Vice President – Controller and Operations Support	David D. Cole
Executive Vice President – Network Services	Maxine Moreau
Vice President and Treasurer	Glynn E. Williams, Jr.
Vice President	Jonathan J. Robinson
Secretary	Kay Buchart
Assistant Secretary	Joan E. Randazzo
Assistant Secretary	Meagan E. Messina

4. The application indicates that CenturyLink, Inc. "through its subsidiaries owns 100% of" Franchisee. Please provide a corporate organization chart showing the complete ownership structure of Franchisee.

See response to question 3 above.

5. What portions of the cable system will be owned or controlled by: (i) Franchisee; or (ii) its parent corporation or affiliates? If the cable communications system will be owned by an entity other than Franchisee, please describe the reasons why the NMTC member cities should franchise Franchisee, rather than the entity that owns the facilities in the public rights-of-way.

Attached as Trade Secret Exhibit B is a diagram setting forth the end to end architecture for the delivery of Prism to end users. **[TRADE SECRET DATA BEGINS**

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Franchisee and not its affiliates owns the essential infrastructure for the provision of cable communications services and has the agreements to enable access to content over the cable communications system. It cannot offer its service without being granted a franchise by the NMTC.

6. Describe the proposed management structure, organizational structure and operations for Franchisee. Include a description of the proposed relationship between local management and the head office or parent company.

Minneapolis is the headquarters for the Midwest region of CenturyLink. Duane Ring leads the business as the President of the Midwest Region. Under his leadership, Prism was successfully deployed in Omaha, Nebraska in 2013 and LaCrosse, Wisconsin in 2008.

Tyler Middleton is the Vice President of Operations for Minnesota. His team includes more than 500 technicians, 200 of whom are being cross-trained to install and support Prism. There is a wide array of employees performing various functions in support of Prism in the Twin Cities, including approximately 100 engineers who will be working under Mr. Middleton's leadership to design and support the infrastructure that enables Prism.

Trent Clausen is the Vice President of Construction for the Midwest Region. He has held a variety of leadership positions in the network organization over the past 16 years, including positions managing and leading capital planning, field construction, local engineering, dispatch operations, and installation and maintenance operations. His team successfully upgraded the network in Omaha to support the launch of Prism there in 2013 and will be responsible, working closely with Mr. Middleton's team, to construct the network to support Prism in the Twin Cities metropolitan area, including the member cities of NMTC.

There are three essential corporate divisions which support the provision of Prism to end users: Global Operations and Shared Services, Global Markets and Product Development and Technology.

A. The Global Operations and Shared Services organization is led by Executive Vice President Maxine Moreau. A 30-year veteran of telecommunications, Maxine Moreau brings a depth of knowledge and experience in network services, operations, IT and process improvement to her role as Executive Vice President of Global Operations and Shared Services. She is responsible for operational excellence through the end-to-end planning, engineering, construction, operation and maintenance of CenturyLink's global network, as well as regional operations and hosting data centers. Moreau oversees network enablement that currently provides commercial 100Gbps services to businesses for high-bandwidth needs as well as the deployment of

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1Gbps fiber networks in certain markets, including Minneapolis for both consumer and business customers. Members of her team will staff the VSO in Golden Valley.

Maxine Moreau's team is responsible for the engineering, planning and deployment of all network infrastructure, including the infrastructure on a national and local basis for the delivery of Prism. In addition, organizations responsible for data and video operations report up to Maxine. These centers, from an operational perspective, constantly monitor and repair, if necessary, the entire network including the facilities used in the provision of Prism.

B. The Global Markets organization is led by President Karen Puckett. With 30 years of telecommunications experience, Karen Puckett is an industry veteran with proven success in the integration of complex operations, the achievement of industry-leading financial and operational performance, and the creation of a company culture that is focused on accountability, innovation and growth. As CenturyLink's Chief Operating Officer, Puckett is responsible for the company's financial and operational performance in the business and consumer segments. She leads marketing, sales, service delivery, care and customer experience initiatives for all business and consumer customers and the implementation of the local operating model in the company's local service areas in 37 states. Puckett has been at the forefront of CenturyLink's transformation from a local telephone exchange company serving rural and mid-sized markets to an industry leader in advanced communications services with customers throughout the United States and overseas. Her visionary leadership has been instrumental in the company's ability to thrive in the new arenas of cloud, data hosting and managed services, as well as facilities based switched digital video service while maintaining its focus on operational excellence and financial strength. Puckett led the 2001 companywide realignment to the local operating model, placing decision making closer to the customer and making the company more responsive to the marketplace. The model has consistently resulted in financial and operational improvements as CenturyLink has acquired new markets.

As it relates to Prism, Karen Puckett's organization owns the customer experience in terms of sales and repairs. There are five call centers which provide support for consumer sales, including Prism. These centers are located in Sioux City, Iowa; Idaho Falls, Idaho; Boise, Idaho; Midvale, Utah; and Phoenix, Arizona.

C. The Product Development and Technology organization is led by Executive Vice President and Chief Technology Officer, Aamir Hussain. Hussain is an experienced senior technology executive with more than 23 years of proven success in the implementation of global technology operations, operationalization of complex technology, infrastructures, and business solutions while driving capital cost efficiencies in the business. Hussain and his team are responsible for the design and delivery of next generation products, services and technologies critical to achieving CenturyLink's strategic growth priorities, including Prism. Hussain has a diverse background in data, security, voice, video and wireless technologies. Prior to joining CenturyLink, he held senior leadership roles at Liberty Global, Covad, TELUS and Qwest. Hussain sits on several startup and non-profit boards, is technical advisor to technology companies and

holds 11 patents in Telecommunications. In addition, he has completed leadership, innovation and strategy training from Harvard, the INSEAD institute in France and the International School of Business Management in Switzerland.

Aamir's team is charged with constantly working to implement new technologies and innovations to enhance the customer experience across the entire suite of CenturyLink products, including Prism.

As noted above, Applicant's ultimate parent company, CenturyLink, Inc., is headquartered in Monroe, Louisiana. A fundamental tenet and operating creed of the Company is to drive decision making to the local level, where the employees best understand the needs of each community in which they work and deliver service. Capital allocation are made based on information from the local markets and it is entirely up to the local team to manage the budget and to make capital and expense allocation decisions based on the local needs. In the Twin Cities, the two leaders responsible for making such decisions, including, e.g., deployment of Prism, are Duane Ring and Tyler Middleton.

Legal Qualifications of Franchisee to Operate a Cable System

7. Please explain whether the Franchisee has the authority to hold a cable television franchise in the NMTC member cities under 47 U.S.C. § 533, and all other applicable provisions of federal law and applicable federal regulations.

To CenturyLink's knowledge, neither Section 533 of Title 47 of the United States Code nor any other federal law or regulation bars CenturyLink from seeking and obtaining a franchise to provide video service in the member cities of the NMTC.

8. Has Franchisee applied for all necessary licenses, authorizations, approvals and waivers (e.g., CARS licenses, copyright approvals, etc.) to operate a cable communications system in the NMTC member cities? Please indicate whether all of said approvals have been obtained, and, if not, a reasonable estimate of when approvals will be received.

Franchisee will make all appropriate filings and preparations prior to the turn up of its video service including (1) filing a community registration with the FCC via FCC Form 322; (2) providing notice to local broadcasters and requesting either must-carry or retransmission consent election; and (3) registration of any antennas required to provide service.

In its existing markets, Franchisee complies with many additional federal requirements in providing its Prism service, including all of the FCC requirements applicable to multichannel video programming distributors (such as equal employment opportunity and set-top box requirements), the FCC requirements applicable to EAS participants that are wireline video service providers, other FCC requirements applicable to provision of Prism (such as receive-only earth station license requirements and annual regulatory fees for IPTV providers), and the Copyright Office requirements

for cable systems filing semi-annual copyright statements of accounts and paying statutory license fees. Franchisee does not file an FCC Form 327 relating to CARS microwave facilities because Franchisee does not use such facilities in connection with the provision of Prism. Similarly, Franchisee does not file FCC Form 320 and FCC Form 321 as they relate to the use of aeronautical frequencies that are not applicable to the IPTV technology."

9. In the past five years, has Franchisee ever had any adverse administrative, civil or criminal action taken against it? If yes, please explain.

No.

10. Please indicate whether the Franchisee will agree to ensure that its direct and/or indirect subsidiaries will at all times comply with existing franchise requirements and applicable laws, regulations, standards and decisions

The only party to the franchise agreement is the Franchisee, and Franchisee will comply with all terms of the negotiated franchise with the NMTC. Franchisee's affiliates will not be bound by the terms of the franchise; they have separate and distinct operating authority and obligations pursuant to the ordinances of the member cities of the NMTC regarding public rights of way. Franchisee will, however, promise and guarantee, as a condition of exercising the privileges granted by any agreement with the member cities of the NMTC, that any affiliate of Franchisee, directly involved in the offering of Cable Service in the Franchise Area, or directly involved in the management or operation of the Cable System in the Franchise Area, will also comply with the obligations of this Franchise subject to the following proviso, that Qwest Corporation ("QC"), an affiliate of the Franchisee, will be primarily responsible for the construction and installation of the facilities in the Rights-of-Way which will be utilized by Franchisee to provide Cable Communications Services. So long as QC does not provide Cable Service to Subscribers in the member cities of the NMTC, QC will not be subject to the terms and conditions contained in this Franchise. QC's installation and maintenance of facilities in the Rights-of-Way is governed by Applicable Law. To the extent Grantee constructs and installs facilities in the Rights-of-Way, such installation will be subject to the terms and conditions contained in the franchise.

Technical Qualifications – System Design

11. Please fully describe the technical qualifications of Franchisee to operate a cable communications system in the NMTC member cities. Please identify Franchisee's key personnel and their experiences in the cable industry. Your response should cover areas such as construction and maintenance, and customer service.

See response to question 6 above.

12. Please describe the signal quality that Franchisee promises to deliver to each cable communications subscriber in the NMTC member cities. If the signal

quality will differ between cable channels on the cable communications system, please indicate the reasons for the difference.

Franchisee will provide the same signal quality to all customers that qualify for service. Two types of video resolutions will be available to Prism customers: Standard Definition and High Definition.

13. Please describe Franchisee's procedures for the provision of continuous, uninterrupted service to subscribers during the term of any franchise, for restoration of service should circumstances cause a service interruption, and for coordination with other utilities to restore service.

Franchisee's network has been designed to meet high-availablity standards. Critical video elements, such as encoders, servers, databases, switches and routers, have been deployed using redundant schemes using either hot-standby or active/active configurations to support automatic failover. All Franchisee's Head Ends are equipped with uninterruptable power supply (UPS) and back up generators.

14. Please describe more fully the system design and system components from the headend locations to a subscriber's residence that will be implemented to provide cable communications service delivered over the system. Please identify the current status of construction and a schedule for when Franchisee will be prepared to provide service to NMTC residents.

Please see attached Trade Secret Exhibit B. **[TRADE SECRET DATA BEGINS**

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15. Will a subscriber be able to receive cable service from Franchisee regardless of the type of television in the subscriber's home? Please describe the different formats in which subscriber's may receive cable service. Please describe the end-user equipment each subscriber will need to receive Franchisee's Prism service.

Yes. Franchisee will make content available in two video formats, Standard Definition and High Definition. There are specific customer premises equipment (CPE) a subscriber must have to be able to receive and view Prism. If served by a DSL/FTTN architecture, the end user needs an xdsl modem and a set top box for each television.

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If served by a GPON/FTTP architecture, the end user needs an optical network termination (ONT) and router in addition to the set top box for each television.

16. Will any portions of the proposed cable system be leased from affiliated or unaffiliated entities? If so, who will be responsible for maintaining and repairing any parts of the proposed system that are leased? Who will be responsible for ensuring that leased portions of the proposed cable system comply with applicable technical and customer service requirements?

No. As described more fully in response to question 5, above all components necessary to provide Prism to end users and for end users to enjoy the product will be provided by one of three CenturyLink entities, Franchisee, QCC or QC.

Access Television

17. State law requires a schedule of charges for facilities and staff assistance for access cable broadcasting. It is my understanding that Franchisee will provide the necessary facilities and staff necessary to playback the all of the NMTC's Access Channels at no charge to the NMTC, including the narrowcasting channels. Please confirm.

Franchisee will make all of NMTC's channels available to its subscribers, including those that the incumbent only provides via narrowcasting. For purposes of acquiring the signal, Franchisee will pick up the NMTC's Access Channel signals at the point(s) of origination via a fiber facility and transport such content back to the local VSO for insertion in the channel line up. At the point(s) of origination, Franchisee will need rack space and power for its equipment to receive the signal(s) handed off by the NMTC to Franchisee. Franchisee will pay for all facilities and equipment located on its side of the demarcation point where the NMTC will hand off its content to Franchisee and as is industry practice, the NMTC will be responsible for all equipment on its side of the demarcation point.

One of the features available on Prism is "multi-view" -- we create a single channel/landing page for a category of shows, e.g., news, and make all the news channels available using picture in a picture technology. The end user can then click on the channel he or she wants to watch or watch four simultaneously. You can see a quick demonstration of this feature by clicking on the following URL: http://www.centurylink.com/prismtv/#prism-tv-virtual-test-drive.html.

We will use this same technology to create a "multi-view" (also referred to as "mosaic") for the NMTC's Access Channels. In other words, we will work with the NMTC to assign a channel placement/number for the Access Channel mosaic so that all of NMTC's Access Channels will be available on the "landing page" and an end user merely needs to click on the specific channel/picture in a picture to be seamlessly taken to the selected Access Channel in full screen view. Because each of the Access Channels has its own dedicated channel assignment, the channels are offered in the same video and audio quality as all other channels and can be recorded if so desired by

an end user. Further, access to NMTC's Access Channels will not be limited to residents of the member cities of the NMTC. Rather, Prism subscribers throughout the metropolitan area will have access to the NMTC's Access Channels and residents of the member cities of NMTC will have access to other Cities' or Cable Commissions 'Access Channels. This opens a vast array of viewing options for citizens of NMTC's member cities given the robust choice of content and access channels in the Twin Cities.

Franchisee is willing to make all the NMTC's access channels available in high definition if the NMTC hands them to Franchisee in that format. If so, Franchisee will down convert all such HD Access Channels to SD so they can be viewed by any end user not capable of receiving HD signals. As this relates to the multi-view screen for the Access Channels, Applicant's middleware will automatically know if a subscriber needs to see the channel in SD or HD and will automatically route the end user to the channel with the proper format.

18. Please describe how subscribers in the NMTC area will be able to view the Access Channels in the NMTC area. Please include channel location, electronic programming guide features, video-on-demand capabilities and any "mosaic" features.

See response to question 17 above. Further responding to this question, while all the NMTC's access channels will be available via a single landing page, the precise channel location of which will be negotiated during the franchise negotiation, each access channel will be assigned a discrete channel (generally on the upper tiers) for both the SD and HD versions of the channel. Franchisee contracts with a third party to provide its electronic channel guide. Franchisee will provide the NMTC the same level of listings and functionality in its electronic channel guide as the incumbent cable communications provider offers.

With respect to video on demand, Franchisee will offer the NMTC a specified amount of space on its VOD servers, as will be specified in the franchise. This will enable viewers to go into the VOD library and to view, on an on-demand basis, any Access Channel content that the NMTC has handed to Franchisee for storage on its VOD servers. Such VOD content hand off has a common industry standard which will be shared with the NMTC when the terms of the franchise are negotiated and finalized.

19. Please describe all available interconnection opportunities of the NMTC's Access Channels with other Twin Cities area Access Channels, including specific methods and capacities of such interconnections.

Because Franchisee service is switched digital, an entirely different technology from the incumbent, Franchisee cannot interconnect with the incumbents' system for the purpose of accessing Access Channel content. As noted above, however, all of Franchisee's subscribers will have the ability to view all Access Channel content from any city or cable commission with which Franchisee has a franchise agreement in the Twin Cities metropolitan area.

20. Please describe how Franchisee will provide adequate public, educational, and governmental access channel capacity, facilities and financial support to the NMTC member cities.

While this will be confirmed in a franchise, Franchisee will collect from its end users and remit quarterly to the NMTC or its member cities, as appropriate, a monthly line item in support of the NMTC PEG capital costs in the same amount as the incumbent cable communications provider.

21. Please identify the signal quality that Franchisee proposes for the Access Channels. What equipment and facilities will Franchisee provide to the NMTC to allow the NMTC to transmit its Access Channels to Franchisee?

As noted above, Franchisee will provide all Access Channels in the same video and audio quality as commercial channels it airs. If the NMTC hands Franchisee the content in HD, all such content will be available in both HD and SD. With respect to equipment and facilities, please see response to question 17.

Service to Governmental and Educational Entities

22. Please indicate whether the Franchisee is willing to provide complimentary cable service to municipal buildings, school buildings, and public library buildings throughout the NMTC area.

This again is a term that must be negotiated and addressed in the franchise. Nonetheless, Franchisee is absolutely willing and able to provide complimentary basic cable service to any municipal building, school building and public library in the member cities of the NMTC provided that such buildings are within the Applicant's footprint of cable communications availability and no other provider is already providing cable communication services at that location.

Proposed Rates and Customer Service

23. Does Franchisee, and any entity that will control or manage the Franchisee, agree to comply with all existing incumbent's franchise customer service and rate requirements?

Franchisee will comply will all federal, state and local requirements relating to customer service requirements. To the extent the incumbent cable communications provider has agreed to additional customer service requirements, Franchisee is more than willing to consider any such additional requirements during its negotiations with the NMTC over the franchise terms. With respect to rate requirements, under 47 U.S.C. § 543, a local franchising authority can only regulate the rates of the incumbent cable provider in an area that has not been deemed to be subject to "effective competition." See, *Media Bureau Clarifies Issues Concerning Franchise Authority Certification to Regulate Rates*, FCC Public Notice, DA 09-68 (rel. Jan. 16, 2009).

24. Please describe how the application, if granted, will impact subscriber rates in the NMTC area.

Franchisee cannot predict how the incumbent cable communications provider in the NMTC area will respond, if at all, to a real competitor in the market. Franchisee can, however, point to several observations made by the FCC with respect to the presence of a facilities based competitor and the resulting impact on video pricing:

- The FCC determined that cable rates fall approximately 10% (2008) when a facilities based competitor enters a market.
- A subsequent FCC study determined that the cost per channel decreased by up to 31% when second facilities based competitor enters the market.

To the extent the incumbent does respond to Franchisee's market entry through promotional offers or other pricing changes, all citizens of the member cities of NMTC will benefit from such competitive response, whether or not Prism is immediately available to each citizen because the incumbent cannot target its offers solely to those areas in which Prism is available.

While Franchisee has not finalized its pricing for Prism in the Twin Cities, attached as Exhibit C is a chart showing the promotional rates for Prism in another market.

25. Please identify the call center(s) that will serve the NMTC. In addition, please explain whether the Franchisee plans to use vendors for customer service functions.

As noted earlier, there are five consumer call centers, and they are located in Sioux City, Iowa; Idaho Falls, Idaho; Boise, Idaho; and Phoenix, Arizona. These centers are staffed from 8:00 a.m. to 6 p.m. (local time Monday through Friday). In addition, calls are handled by agents on Saturday and Sunday. CenturyLink uses outside vendors to handle overflow for calls as needed. CenturyLink schedules its agents on a daily basis to meet service level targets. Call activity is monitored throughout the day and call routing is updated throughout the day to help insure calls are answered within appropriate timeframes.

26. Please describe in detail all steps that the Franchisee will take to comply with applicable telephone answering and transfer requirements/standards.

See response to 25, above.

27. Please describe the process Franchisee will implement to resolve NMTC resident inquiries/comments/complaints.

See response to 25, above. In addition, the local team, particularly the Public Policy staff located in downtown Minneapolis, is always available to work with NMTC

customers or staff to answer any questions or resolve any issues relating to the provision of Prism. In addition, in the event that the call center personnel or members of Public Policy working across business segments are unable to successfully resolve an issue, then the issue may be referred to the Customer Advocacy Group ("CAG"). The CAG handles any issues or complaints received from Senior Company Officers, Regulatory Agencies, Attorney General's offices, Legal, Security, Corp Compliance, etc., and each such issue is assigned, investigated and resolved by the a CAG manager. The manager is responsible for documenting the issue, the findings of the investigation, conversations or interactions with the customer and/or company employees, the resolution and associated action taken.

Time Schedule for Construction

28. The application did not provide information on how the Franchisee would build-out its system throughout the NMTC area. Please provide a written description detailing Franchisee's proposed franchise area and construction time schedule.

Franchisee will initially invest more than **[TRADE SECRET DATA BEGINS TRADE SECRET DATA ENDS]** to bring Prism to the Twin Cities metropolitan area, including the member cities of NMTC, before it has a single customer. Not only will this investment bring consumers a viable choice in a facilities based video competitor and the benefits of direct competition, but also this will result in significantly upgrading the broadband speeds available to many locations. For example, wherever Franchisee deploys FTTP infrastructure, the end users will qualify for speeds up to and including one Gigabit. Most such locations today can receive no higher than 12Mpbs.

This initial deployment in the member cities of NMTC will make Prism available to over 30 percent of the households in the NMTC area. Further enablement of Prism in the NMTC area will be driven by our success in the market, i.e., as we create a revenue stream from the sale of Prism to end users, we will use such revenues to invest in the network and to increase our Prism-enabled footprint. We are more than willing to meet with the NMTC on a periodic basis to review the Prism-enabled footprint in the NMTC area and based on success market, newly targeted areas for deployment.

29. Minnesota State law requires a City not to grant an additional franchise that is more favorable or less burdensome compared to the incumbent's franchise related to the area served and further requires that all initial franchises have provisions requiring a complete build out of the cable communications system over a period of five years. In prior discussions, you have indicated that you believed these provisions in state law are preempted. Please provide a detailed factual basis and description of the legal reasons supporting Franchisee's conclusion that these Minnesota State law provisions are preempted. This could be in the form of a legal opinion. Please address the *Order on Reconsideration* released by the FCC on January 21, 2015.

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Before addressing the state statute, the following sets forth some critical background with respect to deployment of both telecommunications and cable infrastructure. Initially, local telephone companies were granted monopolies over local exchange service in exchange for taking on a provider of last resort obligation– a duty to provide service – to customers in its service territory. Similarly, with respect to video services, the member cities of the NMTC have given the incumbent video provider (and its predecessors) a monopoly over facilities based video. In exchange for making the capital investment to deploy facilities, the incumbent cable company got 100 percent of the customers who wanted cable television.

Subsequently, with respect to telephone services, the federal and local governments effectively eliminated the local telephone monopolies and fostered robust competition. It should be noted that in doing so, the telecom second entrant had absolutely no obligation to build any facilities or to serve any particular location(s) at all. As the FCC noted, imposing build-out requirements on new entrants in the telecommunications industry would constitute a barrier to entry (13 FCC Rcd 3460, 1997). Cable companies were free to enter the telecom market on terms that made business and economic sense to them. This very environment was the catalyst for robust wireless and wireline competition and the proliferation of higher broadband speeds.

Congress became concerned about the lack of competition in the video world and in 1992 amended federal law to prohibit a local franchising authority from "unreasonably[y] refus[ing] to award an additional competitive franchise." 47 U.S.C. § 541(a)(1) provides a direct avenue for federal court relief in the event of such an unreasonable refusal. 47 U.S.C. § 555(a) and (b). Until the advent, however, of state statutes granting statewide cable franchises without a mandatory build requirement (e.g., Florida) or progressive cities willing to grant competitive franchises, cable monopolies continued to the detriment of consumers and competition. Level playing field requirements are just one example of barriers to competitive entry erected by cities at the behest of the cable monopolies.

Courts have ruled, however, that "level playing field" provisions do not require identical terms for new entrants. See, for example, *Insight Communications v. City of Louisville,* 2003 WL 21473455 (Ky. Ct. App. 2003), where the court found:

> There will never be an apple-to-apple comparison for Insight and other franchisee simply because Insight is the incumbent which in its own right and through its predecessors has been the exclusive provider of cable services in the City of Louisville for almost thirty years. No new cable franchisee can ever be in the same position as a thirty-year veteran.

See also, In Cable TV Fund 14-A, Ltd. v. City of Naperville (1997 WL 209692 (N.D. Ill); and *New England Cable Television Ass'n, Inc. v. Connecticut DPUC* 717 A.2d 1276 (1998).

In sharp contrast to the monopoly provider, a second entrant faces a significant capital outlay with absolutely no assurance of acquiring customers; rather, it must compete with the monopoly incumbent and win each and every customer over. As Professor Thomas Hazlett of George Mason University has explained, "[i]ncumbents advocate build-out requirements precisely because such rules tend to limit, rather than expand, competition." The federal Department of Justice has also noted that "...consumers generally are best served if market forces determine when and where competitors enter. Regulatory restrictions and conditions on entry tend to shield incumbents from competition and are associated with a range of economic inefficiencies including higher production costs, reduced innovation, and distorted service choices." (Department of Justice Ex Parte, May 10, 2006, FCC MB Dkt. 05-311).

The fact is that the incumbent cable provider has (1) an established market position; (2) all of the cable customers; and (3) an existing, in-place infrastructure. These disparate market positions make imposing a build-out requirement on a competitive entrant bad public policy. Under the guise of "level playing field" claims, incumbent cable operators seek to require new entrants to duplicate the networks the incumbents built as monopolies, knowing that such a requirement will greatly reduce, if not eliminate, the risk of competitive entry.

In 2007, the FCC issued its findings with respect to facilities based video competition and held as follows: (1) with respect to level playing field requirements, the FCC stated that such mandates "unreasonably impede competitive entry into the multichannel video marketplace by requiring local franchising authorities to grant franchises to competitors on substantially the same terms imposed on the incumbent cable operators (Para. 138); and (2) with respect to mandatory build out, the FCC held that "an LFA's refusal to grant a competitive franchise because of an applicant's unwillingness to agree to unreasonable build out mandates constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1) [47 U.S.C. § 541(a)(1)]."

Those two FCC holdings alone should put this entire matter to rest – level playing field requirements and unreasonable mandatory build requirements are barriers to competitive entry in the cable market and violate the federal Cable Act and the FCC's order. Minnesota, however, codified its requirements in a state law and the FCC expressly declined to "preempt" state laws addressing the cable franchising process.

It is clear, however, that the FCC did not intend to protect the Minnesota statute which mandates the imposition of barriers to entry on each and every local franchising authority. As various providers were trying to enter the competitive cable market and encountering barriers such as level playing field requirements and mandatory build out provisions, many states passed statutes to facilitate competitive entry and to prevent local franchising authorities from erecting barriers to entry. Such laws were passed in 26 states including Florida, Missouri and North Carolina, where CenturyLink has taken advantage of the streamlined process to enter a market without a mandatory build obligation. These laws have facilitated competitive entry as evidenced, for example, by the presence of four facilities based competitors in the Orlando, Florida market,

including CenturyLink and Comcast. As such, these state laws are aligned and not in conflict with the FCC's and Congress' policies for promoting competition in the video distribution market.

Minnesota's cable law, however, is quite the opposite. Minnesota's cable act dates back to the 1970s and directs each local franchising authority to impose not only a level playing field across a broad range of issues (many of which Franchisee does not oppose), but also a five year mandatory build out requirement. Both of these provisions have been deemed to be barriers to entry by the FCC. The incontrovertible fact is that the law has been extremely successful in barring cable communications competition in Minneapolis: Minneapolis has not experienced any facilities based competition because of the barriers to entry Minnesota codified in Chapter 238.

In support of this position, that the FCC's 2007 Order preempts Minn. Stat. Chapter 238, Franchisee notes the following:

- Conflict preemption: State law may be preempted without express Congressional authorization to the extent it actually conflicts with federal law where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" *English v. General Elec. Co.*, 496 U.S. 72,79 (1990).
- Whether state law constitutes a sufficient obstacle is a matter of judgment to be informed by examining the federal statute as a whole and identifying its purpose and intended effects. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363,372 (2000).
- Minn. Stat. § 238.08 mandates terms that each municipality must implement in granting a new or renewed cable franchise.
- Minn. Stat. § 238.084 sets forth the required contents of a franchise ordinance and sets forth very precise requirements in an initial franchise about the build: commence build within 240 days; must construct at least 50 plant miles per year; construction throughout the franchise area must be substantially completed within 5 years of granting the franchise; and these requirements can be waived by the franchising authority only upon occurrence of unforeseen events or acts of God.
- Section 621(a)(1) initially gave local authorities the authority to grant franchises, but this broad grant resulted in exclusive franchises/monopolies. Congress "believe[d] that exclusive franchises are contrary to federal policy . . . which is intended to promote the development of competition. H.R. Conf. Rep. No. 102-862, at 77 (1992)
- Legislative history clearly supports that Congress was focused on fostering competition when it passed the 1992 Act. *Qwest Broadband Servs. Inc. v. City of Boulder*, 151 F. Supp. 1236, 1244 (D. Colo. 2001).
- In its 2007 order, the FCC found that "an LFA's refusal to grant a competitive franchise because of an applicant's unwillingness to agree to unreasonable build out mandates constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1)." The FCC order, however, targeted local and not state laws.

- Arguably, the Minnesota build requirements set forth in Section 238.084(m) are in conflict with Section 621(a)(1) and are, therefore, preempted.
    - In the Boulder case, the court applied Section 621's prohibition on unreasonable refusals to grant franchises to find conflict preemption where local rules required voter approval for any new franchises.
- The mandatory build out in the Minnesota statute could be considered a de facto "unreasonable refusal" to grant a franchise and thus conflict with the pro-competition purpose set forth in 621(a)(1).
- In upholding the FCC's ruling, the Sixth Circuit stated that "while the [FCC] characterized build out requirements as 'eminently sensible' under the prior regime in which cable providers were granted community-wide monopolies, under the current, competitive regime, these requirements 'make entry so expensive that the prospective . . . provider withdraws its application and simply declines to serve any portion of the community." *Alliance for Cmty Media v. FCC*, 529 F.3d 763, 771 (6th Cir. 2008).
- The FCC ruling targeted local rules and actions and the FCC refrained from preempting state regulation because it lacked "a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises." FCC Cable Franchising Order (FCC 06-180, at n.2 & ¶ 126). That is not to say, however, that upon full consideration, the FCC would not find the Minnesota mandatory build requirements to constitute an unreasonable refusal under Section 621.
    - The franchising laws which were being enacted about the time of the FCC order facilitated competitive entrants into the facilities based video market.
    - In sharp contrast, the Minnesota statutes mandates individual cities and commissions to include onerous build out schedules which, standing alone, would run afoul of the FCC's order.

It should also be noted that at least two cities in Minnesota have chosen to award competitive franchises to second entrants without satisfying all the mandates of Chapter 238. *See Mediacom Minnesota, LLC v. City of Prior Lake*, Minn. Ct. of Appeals, A09-1379 (Unpublished decision, Filed June 22, 2010), a copy of which is attached as Exhibit D in accordance with Minn. Stat. § 480A.09, subd. 3 (2008). In October 2014, the City of Owatonna awarded a competitive franchise to a second provider, and the franchise did not contain the five year build requirement set forth in Chapter 238. Rather, it contained a market success model expressly endorsed by the FCC. The competitor will provide service to 25 percent of the City of Owatonna and will have no further obligation to enable the provision of cable communications services until 48 percent of households in the footprint subscribe to its service.

Finally, nothing in the FCC's Order on Reconsideration released in January of this year alters the above analysis.

30. Assuming that Franchisee believes that the state law build out requirements are preempted by federal law, please indicate the factual basis describing why constructing Franchisee's cable communications system consistent with existing

Minnesota State law would be an unreasonable barrier to entry. If such language were required of Franchisee by NMTC, would it be acceptable to Franchisee?

When the incumbent built its cable networks as a monopoly under an exclusive franchise agreement over 30 years ago, they were guaranteed that 100 percent of all Minneapolis residents would subscribe from them. As a second entrant, every subscriber CenturyLink acquires currently has a relationship with another provider or has already "cut the cable cord." For this reason, no responsible second entrant would ever contractually commit to the extensive capital investment required to complete ubiquitous coverage without obtaining a single subscriber. As a result of years of advocacy at the local level by the incumbent monopolies, the cable industry remains the **only** industry where contractual ubiquitous coverage is required of new entrants. Other industries (e.g., telecommunications, wireless, and grocery stores) have flourished with robust competition without imposing any coverage requirements on second, and in some cases (Internet), any provider. Prices have plummeted, service quality has improved, and the market has seen investment, innovation, and competition. Unfortunately for residents of the member cities of NMTC, we sit here in 2015, 23 years after the FCC abolished the idea of exclusive cable franchises, and not one provider has yet to successfully apply for and receive a franchise to compete with the incumbent. As demonstrated in answer to 29 above, that is the very barrier the FCC was trying to eliminate in its 2007 Order. That is why CenturyLink is so confident in its position that Section 238 .081 is pre-empted.

31. If Franchisee believes that a five year build of the NMTC member cities is unreasonable, please describe a reasonable time to construct the cable communications system capable of providing cable communications service to all residents in the NMTC member cities.

Franchisee understands the NMTC's desire for a robust deployment of a facilities based cable communications provider in its member cities' boundaries because of all benefits that will be realized by consumers. Accordingly, Franchisee has negotiated several different terms to address the NMTC's concerns while insuring that the Franchisee does not commit itself to obligations that could trigger financial penalties. Franchisee would be happy to consider any of the following models to address this issue:

a. A short term agreement. In this model, Franchisee and the NMTC would agree to an initial term of six years so that the "renewal window" under federal law opens three years after the effective date of the franchise. The term of the franchise, however, can be automatically extended if Franchisee reaches certain, defined goals of coverage, i.e., the term is extended an additional two years if we can cover XX percent of the living units by year three and can be extended an additional three years if, by the end of year five, we enable Prism to an additional XX percent of the living units in the member cities of the NMTC. This model has been used throughout the Phoenix metropolitan area.

b. Dominant Provider. If Franchisee has 50 percent or more of the facilities based cable communications subscribers in the NMTC area, then it will take on a mandatory build out requirement and meet with the NMTC to develop the appropriate timeframe for such mandatory deployment. This has been used in several markets in the Phoenix metropolitan area as well as Salt Lake City.

c. Market Success. Franchisee will agree to build to a defined percent (usually 15 percent) of the member cities of the NMTC within three years of the franchise effective date. This establishes the minimum requirement, but Franchisee is free to expand its service footprint voluntarily. When the take rate (penetration) within the enabled footprint exceeds a defined percentage (generally 27.5 percent), then Franchisee has an obligation to build and extend its service to an additional 15 percent of the living units in the member cities of the NMTC. This model has been used in Omaha, the Denver metropolitan area and Colorado Springs.

32. Describe in detail the line extension policy Franchisee would propose for access to the cable system within the NMTC.

A line extension policy is generally an obligation imposed on the incumbent monopoly provider to deliver service to anyone requesting service, subject only to some density requirements. Consequently, Franchisee would not envision having a mandatory line extension policy. Rather, as stated above, when it is the dominant facilities based cable communications services provider in the NMTC area, it will negotiate with the NMTC over a reasonable build and line extension obligation.

Like the incumbent, Franchisee will provide a standard installation of its service to anyone within its Prism-enabled footprint within seven business days.

33. It is my understanding that Franchisee will be prepared to offer cable service to a portion of the NMTC member cities' residents once Franchisee completes its local headend and initial testing, and receives a cable communications franchise. Please provide a public map showing the areas of the NMTC member cities that will be eligible to receive cable communications service.

Franchisee's map depicting its initial deployment of cable communications services in the member cities of NMTC is extremely competitively sensitive and highly confidential, and Franchisee is not confident that it could be adequately protected even under the designation of a "Trade Secret." Accordingly, Franchisee respectfully declines to produce any such map in response to this inquiry.

34. Does Franchisee agree to comply with all federal and state law requirements prohibiting economic redlining or "cherry picking?" Please describe how Franchisee can ensure the NMTC, its member cities and its residents that it will not engage in economic redlining.

The cable incumbent operator has stooped to new lows (here and in other markets) by claiming that competitors, like Franchisee, will redline certain communities

unless burdensome build-out requirements are forced upon them. This claim flies in the face of studies and economic data that show that minority and low-income citizens – the very people the cable incumbent claims will be denied TV services by competitors – are the some of the biggest consumers of TV and communications services. Moreover, the cable industry's own market research shows that minority and urban neighborhoods offer some of the best growth potential for TV services of any markets in the country.

What the studies say:

- *Public Broadcasting's Services to Minorities and Diverse Audiences* report indicates that "African-Americans have the highest cable penetration at 83 percent vs. the U.S. average of 79 percent."
- A *Pew Internet and Family Life Project* report found that both Hispanics and African Americans have higher average monthly spending on information goods (cable TV, premium channels, phone, cell phone, online content) than Caucasians – $131 compared to $124 per month.
- A study by *Rutgers University* found that "minority, low-income urban areas consume a disproportionately high amount of advanced telecommunications and premium cable TV services." Additionally, the study found that "many inner-city households prefer cable TV service to telephone service. These households believe, a) cable TV offers inexpensive entertainment; b) the many hours and large variety of entertainment provides more satisfaction to more members of the household than telephone conversations; c) cable may keep children at home and away from dangerous streets; and d) cable offers a visible sign of well-being in households with few material comforts."
- In a study about why people subscribe to cable TV services, Robert Kieschnick of the Federal Communications Commission states: "Household income is not a significant influence on a household's decision to subscribe to cable television."
- Horowitz Associates, a market research firm that conducts studies for cable industry clients, determined that the highest growth areas for cable TV and broadband services are in minority neighborhoods. The study states, "Importantly, the data show strong growth potential for many new cable and broadband services among multicultural, urban consumers. For example, market potential for digital cable in urban markets is on par with the national average, hovering at around 45%. Potential is highest among African-Americans, Latinos and Asians. Consumers interviewed for our urban markets study are also more likely to be willing to pay for many of the premium digital features like VOD, PVR capability, and home networking than are consumers in our national *State of Cable and Broadband 2003* study. This translates to even more opportunities for incremental revenue in this key, urban marketplace."

As these studies indicate, not offering services to minority, urban or low-income communities doesn't make economic or business sense. The cable TV market is not like the banking and insurance industries where redlining practices have been issues in the past. These markets will be coveted by new entrants to the TV market. The cable incumbent knows this, but raises the specter of redlining and discrimination regardless because it is desperate to stop competitors from entering the market.

As Virginia Jarrow of the Consumers Coalition and others have stated, redlining claims are simply an effort to erect barriers to competitive entry.

Notwithstanding the foregoing, Franchisee represents that it will comply with all federal and state law requirements prohibiting economic redlining or "cherry picking" and will agree to include specific provisions in the franchise to that effect. Further, Franchisee is more than willing to meet periodically with the NMTC to show it the existing Prism footprint overlaid on a map.

Qualifications and Experience in the Cable Communications Field

35. Please describe the experience each key person employed by Franchisee has with the construction and operation of a cable system (as opposed to telephone systems, wireless systems and utility systems). Your response for each key person should, at a minimum, include his/her knowledge and understanding of: (1) provision of digital cable communications service; (2) system maintenance; (3) industry construction practices; (4) network design; (5) applicable technical standards and codes; (6) subscriber drop installations; (7) billing; (8) customer service issues common to cable communications systems; (9) cable communications service marketing; (10) calculation and payment of franchise fees and PEG Fees; (11) programming selection and channel line-ups; and (12) provision of PEG channels.

See response to question 6 above. Further responding to this question:

The following are four key personnel responsible for video operations:

Glenn Garbelman serves as the Vice President of the Video Operations at CenturyLink since 2010, and is based in Monroe, Louisiana. He currently has day-to-day operational responsibility for all video services, which is currently serving 240,000 Prism customers with more than 150 employees. Prior to Glenn joining CenturyLink, he was part of a large communications company that successfully launched and supported IPTV video in over 70 markets throughout the United States. He has more than 25 years technical experience with the last 10 focused on video products and services on an IP network.

Sandeep Bhalla is the Director of Video Technical Operations. Responsible for the daily operations of CenturyLink Video Services, Sandeep oversees the video ops engineering staff and ensures the integrity of engineering operations and processes. With 19 years of technical experience and 10 years of video, Sandeep has served as a CenturyLink representative to national and international forums related to next generation video services. Prior to joining CenturyLink, Sandeep was a Manager of Head End Implementation for AT&T's Uverse. Sandeep holds a BA from the University of California Berkley.

Charles Becker is the Manager Video Operations IPTV responsible for all headends based out of Denver, Colorado and Columbia, Missouri. The Video Headend

Team is responsible for the operation and acquisition of all video content served by the Prism platform both local and national. The team maintains and operates 17 headends located in 13 states across the country. This team supports new market builds, preventative maintenance, outage resolution and proactively supports the video monitoring teams in outage resolution. Charles is a 35 year veteran of the video industry and 9 year employee of CenturyLink.

Steve Epstein is a Senior Lead Engineer –Managing for CenturyLink. Steve was the initial member of the CenturyLink Video team and brings 35 years of broadcast experience to CenturyLink. In addition to being Chief Engineer at several television stations, Steve was the technical editor of Broadcast Engineering magazine. Steve is an SBE certified professional broadcast engineer and holds a BS in Broadcasting.

The local team (Messrs. Ring, Middleton and Clausen), whose experience has been noted above, has responsibility for the facilities deployment, repair and maintenance in Minneapolis as well as provisioning the service to end users.

Steve Sklar, VP Video Strategy and Development has over 20 years experience in the cable industry and has led efforts to continually add new features and functions to Prism, e.g., Prism on the Go. His team is responsible for Prism design, innovation and implementation.

Chris Lanasa is the Vice President Consumer Product Strategy and Operations. In this role, he and his team are responsible for the product strategy and management of CenturyLink's consumer growth products, including Prism. The content acquisition team reports to Mr. Lanasa.

CenturyLink's Executive Vice President and Chief Financial Officer is R. Stewart Ewing. He has played a key role in CenturyLink's acquisition strategy by negotiating all stages of purchase agreements from legal and regulatory to folding new companies into our corporate structure and philosophy. His responsibilities include managing CenturyLink's Accounting, Treasury, Supply Chain, Real Estate and Internal Audit functions. His extensive experience includes management of the Regulatory, Information Systems and Corporate Planning and Development areas. He has been a contributor to the company's growth over the years. Mr. Ewing's team's responsibility includes the accurate calculation of franchise fees as well as the timely collection and remittance of both franchise fees and monthly subscriber line fees in support of Access Channels.

36. Please produce a management structure commencing with the local manager and continuing up to the central offices/CEO of the Franchisee or its ultimate management. Please explain in detail Franchisee's policies regarding local management authority, being specific regarding the types of agreements local management can enter into with local franchising authorities, and those agreements which will require regional or corporate prior approval. How many

systems and which systems will be in any particular region? Which level of management will head that region?

As noted above, CenturyLink has a very strong team in place to support all aspects of the provision of Prism to end users. Minneapolis is the headquarters for the Midwest region of CenturyLink. Duane Ring leads the business as the President of the Midwest Region. Under his leadership, Prism was successfully deployed in Omaha, Nebraska in 2013 and LaCrosse, Wisconsin in 2008.

Tyler Middleton is the Vice President of Operations for Minnesota. His team includes more than 500 technicians, 200 of whom are being cross-trained to install and support Prism. There is a wide array of employees performing various functions in support of Prism in the Twin Cities, including approximately 100 engineers who will be working under Mr. Middleton's leadership to design and support the infrastructure that enables Prism. The VSO will also be staffed locally with three engineers.

Trent Clausen is responsible for all local network engineering and construction activities for CenturyLink across the 10 state Midwest Region The functions performed by Trent and his team include the operations and control of engineering and construction functions for all local loop copper and fiber deployments, inter-office facilities, and transport systems. He also was instrumental in the launch of Prism in Omaha, Nebraska.

Identification of Franchises

37. Please provide an update (if any) to the list of franchises currently held.

Attached as Exhibit E is a list of markets in which Franchisee or its affiliates offer Prism pursuant to statewide or local authority.

Financing Plans and Qualifications

38. Please identify the sources and amounts of financing available to the Franchisee for construction/line extension, system operation and maintenance, and system upgrades for the City, including lines and availability of credit.

The Franchisee is Qwest Broadband Services, Inc. d/b/a CenturyLink, an indirect subsidiary of CenturyLink, Inc., a Fortune 150 Company and the third largest telecommunications company in the United States. CenturyLink was founded in 1930 and grew through acquisition of other companies. In April 2010, it announced it was merging with Qwest Communications International, Inc., the parent company of Qwest Corporation and Applicant. In 2008, it launched Prism in LaCrosse, Wisconsin and now offers Prism in 14 markets, passing nearly 2.4 million households. In addition to its cable experience, CenturyLink is a leader having unparalleled experience and expertise in advanced technology, maintenance, and operation – the very facilities over which it provides Prism. As publicly filed documents show, CenturyLink is financially sound. In earnings announcement for 2014, CenturyLink reported operating revenues of $18.0B

and free cash flow of $2.7B. Its market cap is $22.52B. These numbers clearly demonstrate that Franchisee has access to all the financial resources necessary to meet its franchise obligations in the NMTC member cities, with the backing of CenturyLink, Inc.

39. Please indicate whether CenturyLink, Inc. will guarantee the performance of the Franchisee.

See response to question 38 above.

Company Structure

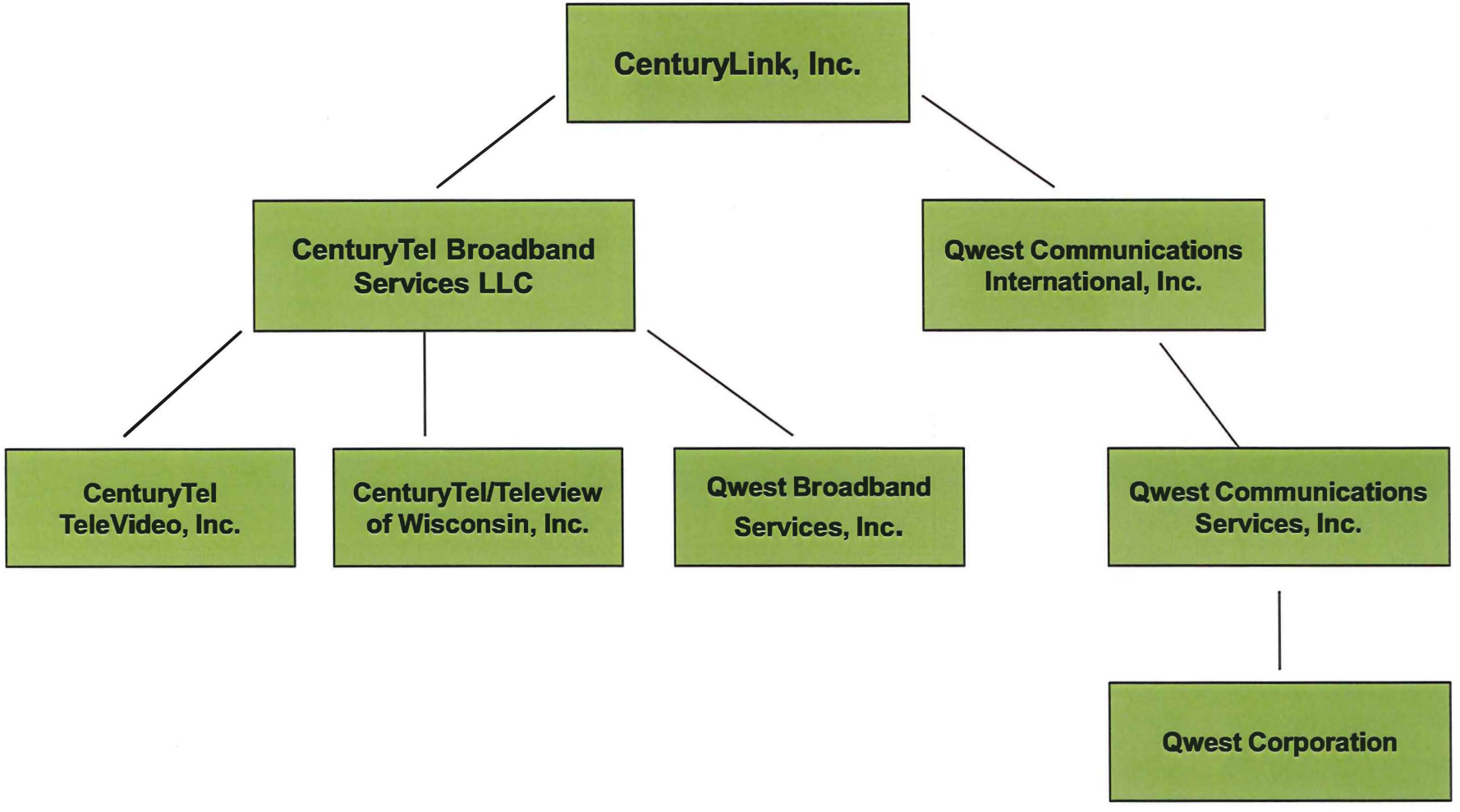

Exhibit A

Exhibit B

Has Been Redacted

In Its Entirety

Prism Rates

	Prism Essential	Prism Complete	Prism Preferred	Prism Premium
Promotional Rate	$54.99	$69.99	$ 84.99	$114.99
Rack Rate	$74.99	$89.00	$104.99	$134.99

Exhibit C

CenturyLink™

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2008).

STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1379

Mediacom Minnesota, LLC,
Relator,

vs.

City of Prior Lake,
Respondent.

Filed June 22, 2010
Affirmed
Toussaint, Chief Judge

City of Prior Lake
Resolution 09-093

Edward W. Gale, Jr., Thomas C. Atmore, Andrew J. Budish, Leonard, O'Brien, Spencer Gale & Sayre, Ltd., Minneapolis, Minnesota (for relator)

John M. Baker, Robin M. Wolpert, Greene Espel, P.L.L.P., Minneapolis, Minnesota (for respondent)

Brian T. Grogan, Moss & Barnett, P.A., Minneapolis, Minnesota (for amicus curiae Scott Rice Telephone Company d/b/a Integra Telecommunications)

Susan L. Naughton, League of Minnesota Cities, St. Paul, Minnesota (for amicus curiae League of Minnesota Cities)

Anthony S. Mendoza, Law Offices of Anthony S. Mendoza, LLC, St. Paul, Minnesota (for amicus curiae Minnesota Cable Communications Association)

Exhibit D

Considered and decided by Klaphake, Presiding Judge; Toussaint, Chief Judge; and Crippen, Judge.*

UNPUBLISHED OPINION

TOUSSAINT, Chief Judge

Relator Mediacom Minnesota, LLC, the existing nonexclusive cable television franchiseholder in the City of Prior Lake, challenges the decision by respondent City of Prior Lake to enter into a franchise agreement with a second cable communications provider, Scott Rice Telephone Company (Integra), the proposed service area of which a portion overlaps relator's service area. Because we conclude that respondent was not unreasonable, arbitrary, or capricious in its application of the law to the facts, we affirm.

DECISION

When a city council performs a quasi-judicial action, it is subject to certiorari review by this court. *Pierce v. Otter Tail County*, 524 N.W.2d 308, 309 (Minn. App. 1994), *review denied* (Minn. Feb. 3, 1995). "Quasi-judicial proceedings involve an investigation into a disputed claim that weighs evidentiary facts, applies those facts to a prescribed standard, and results in a binding decision." *In re Dakota Telecomm. Group*, 590 N.W.2d 644, 646 (Minn. App. 1999). Decisions involving the grant of a cable television franchise are guided by Chapter 238 of the Minnesota statutes. Minn. Stat. §§ 238.02-.43 (2008); *see also* 47 U.S.C. §§ 521-573 (2006) (directing states in adoption of cable television franchises). In order to grant a cable television franchise, Section

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

238.081 prescribes a procedure for notice, time limit, contents of the franchise proposal, public hearing, and awarding of the franchise. Minn. Stat. § 238.081. The procedure requires documentary evidence in the proposal and allows for testimonial evidence at the public hearing and results in a binding decision. *Id.*, subds. 4, 6; *see Minnesota Ctr. For Envtl. Advocacy v. Metro Council*, 587 N.W.2d 838, 844 (Minn. 1999) (noting that quasi-judicial proceeding is marked by binding decision); *Senior v. City of Edina*, 547 N.W.2d 411, 416 (Minn. App. 1996) (finding proceedings quasi-judicial because they involved testimonial and documentary evidence). A city council's grant of a cable television franchise is a quasi-judicial proceeding if it complies with the requirements of Minn. Stat. § 238.081. *Dakota Telecommun.*, 590 N.W.2d at 647. Here, because the city council complied with the cable act by properly publishing notice, requiring and reviewing the franchise proposal, and issuing a binding decision, the decision to grant Integra a cable franchise was a quasi-judicial decision subject to certiorari review by this court.

Certiorari review of quasi-judicial proceedings is limited to "questions affecting the jurisdiction of the board, the regularity of its proceedings, and, as to merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992) (quotation omitted).

Generally, decisions of municipalities "enjoy a presumption of correctness" and, as long as the municipality "engaged in reasoned decision-making, a reviewing court will affirm its decision even though the court may have reached another conclusion." *CUP*

Foods, Inc. v. City of Minneapolis, 633 N.W.2d 557, 562 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001). As a reviewing body, we will not retry facts or make credibility determinations; rather, we will uphold the decision "if the lower tribunal furnished any legal and substantial basis for the action taken." *Senior*, 547 N.W.2d at 416 (quotation omitted).

In order for cable communications systems to operate within a city, they must enter into a franchise agreement with the city. Minn. Stat. § 238.08, subd. 1(a). Prior to entering into a franchise agreement, a city must solicit bids for a cable franchise by publishing notice of intent to consider an application for a franchise fulfilling the requirements of Minn. Stat. § 238.081, subds. 1,2. A party that wishes to apply for a franchise must submit a franchise proposal in accord with Minn. Stat. § 238.081, subd. 4. In order to satisfy the statutory requirements, a franchise proposal must include, inter alia, a statement indicating the applicant's qualifications and experience in the cable communications field, and plans for financing the proposed system, indicating every significant anticipated source of capital and significant limitations or conditions with respect to the availability of the indicated sources of capital. Minn. Stat. § 238.081, subd. 4 (7) (9).

In cases where the city has an incumbent franchise-holder, no additional cable-television franchise may be granted on terms and conditions more favorable or less burdensome than the existing franchise agreement with regard to (1) the area served, (2) public, educational, and government access requirements, or (3) franchise fees. Minn. Stat. § 238.08, subd. 1(b). After receiving the franchise proposal and prior to granting a

franchise, a public hearing must be held before the franchising authority affording reasonable notice and reasonable opportunity to be heard. Minn. Stat. § 238.081, subd. 6. A city may then award a cable communication franchise at its discretion. *See id.* at subd. 7 ("Franchises may be awarded by ordinance or other official action by the franchising authority.").

Here, respondent complied with its statutory notice requirements by soliciting bids for a cable television franchise in the local newspaper. Integra was the only party to submit a franchise proposal. The written proposal provided information required by Minn. Stat. § 238.081, subd. 4. Specifically, regarding Integra's qualifications and experience in the cable communications field, the proposal stated:

> Integra Telecom currently operates and maintains a fiber optic and copper communications system which provides telecommunications and information services to residents and businesses within the City of Prior Lake pursuant to authority prescribed in the Certificate of Need issued by the Minnesota Public Utilities Commission. We have maintained this system for over 60 years with a technologically proficient staff of over 40 individuals. The City of Prior Lake will be the first City in which Integra provides cable services. Integra will be augmenting its experienced telecommunications staff with video expertise and personnel from CISCO, DASCOM and JACI.

Regarding Integra's plans to finance the system, the proposal stated: "Because the Integra telecom video product will be implemented utilizing our existing infrastructure, the investment will be minimal and will be internally funded from Integra Telecom corporate operating cash."

The Prior Lake City Council considered the Integra proposal during a series of public hearings from April through June 2009, during which reasonable opportunity to be

heard was given to both Integra and relator, which opposed Integra's proposal. The city council's consideration of the Integra proposal involved dialogue with Integra employees and the city attorney throughout the public hearings. Upon making findings regarding the statutory requirements for a cable television franchise, respondent ultimately chose to enter into a franchise agreement with Integra.

Relator challenges the grant of the Integra franchise by respondent. Specifically, relator argues: (1) that the Integra franchise agreement was granted with more favorable terms regarding public, educational, and government access requirements funding and coverage area than are contained in relator's franchise agreement, and (2) Integra was not required to establish its qualifications for operating and ability to finance the system prior to entering into the franchise agreement. We find these challenges to be without merit.

In order to reach its decision, the city council relied on information from Integra, relator, the city attorney, and FCC Report and Order and Further Notice of Rulemaking No. FCC 06-180, which discusses the local franchising process under the Cable Communications Policy Act of 1984. With regard to public, educational, and government access requirements funding, the city council concluded that, while the Integra agreement called for a different total amount of money paid in a different format from relator's agreement, Integra would end up paying a proportionately comparable amount as relator over a shorter period of time. The city council concluded that, given the economic situation of the city at the time, the Integra plan would be financially beneficial to the city. With regard to coverage area, the city council found that a level playing field would be created by this plan, taking into account build-out costs and the

fact that relator already had full control of the market for the area in which Integra would be offering its services. Finally, regarding Integra's qualifications for operating and ability to finance a cable television franchise, the record demonstrates that Integra's franchise proposal adequately addressed these issues.

We conclude that respondent supported its grant of the Integra franchise with substantial evidence and therefore did not act arbitrarily or capriciously in reaching its decision. *See Dakota Telecomm.*, 590 N.W.2d at 648 (noting that decision of city to grant cable franchise may be reversed if unsupported by substantial evidence or if arbitrary and capricious). Additionally, we conclude that respondent's decision was not oppressive, unreasonable, fraudulent, or made under an erroneous theory of law.

Affirmed.

Prism offered in the following markets pursuant to state or local franchises

Locally Negotiated Franchises	Locally Negotiated Franchises	Statewide Franchises
Gulf Shores, AL	Colorado Springs, CO	Las Vegas, NV
Orange Beach, AL	Monument, CO	North Las Vegas, NV
Baldwin County, AL	Fountain, CO	Clark County, NV
	El Paso County, CO	Henderson, NV
Phoenix, AZ	Gypsum, CO	
Chandler, AZ	Eagle, CO	Tallahassee, FL
Mesa, AZ	Eagle County, CO	Fort Myers, FL
Queen Creek, AZ	Centennial, CO	Orlando, FL
Glendale, AZ	Littleton, CO	
Peoria, AZ	Castle Rock, CO	Columbia, MO
Scottsdale, AZ	Parker, CO	
Surprise, AZ	Jefferson County, CO	Raleigh/Durham DMA, NC
Goodyear, AZ	Lone Tree, CO	
Maricopa County, AZ	Douglas County, CO	LaCrosse DMA, WI
Pinal County, AZ		
Buckeye, AZ	Papillion, NE	Council Bluffs, IA
Florence, AZ	Springfield, NE	Pottawattamie County, IA
Gilbert, AZ	Gretna, NE	Carter Lakes, IA
Casa Grande, AZ	Ralston, NE	
Tempe, AZ	La Vista, NE	
Paradise Valley, AZ	Bellevue, NE	
Apache Junction, AZ	Omaha, NE	
	Douglas County, NE	
	Sarpy County, NE	

Exhibit E

CenturyLink™

Exhibit 4

CenturyLink Response to Request for Information (NON-PUBLIC)

[REDACTED FROM PUBLIC VERSION]

Exhibit 5

Letter from Comcast

COMCAST

VIA ELECTRONIC AND U.S. MAIL

February 17, 2015

Ms. Heidi Arnson
Executive Director
North Metro Telecommunications Commission
12520 Polk St. NE
Blaine, MN 55434

Re: CenturyLink Video Franchise Application

Dear Ms. Arnson:

The North Metro Telecommunications Commission (NMTC) issued a Notice of Intent to Franchise (herein the "Notice") an additional cable system operator last month. The Notice states that the NMTC will hold a public hearing tonight, February 18, 2015, at 6:00pm "to consider any franchise applications it receives. . . ." I am writing to provide you with Comcast's position in regard to the process and limited record in front of you today.

At the outset, let me state clearly that Comcast welcomes a fair and robust competitive marketplace made up of responsible competitors, and we do not oppose the granting of an equitable cable franchise to Centurylink. Consumers can choose from numerous video options today, including Comcast, DirectTV, DISH Network, and "over the top" – services like Netflix, Amazon, Apple TV and Hulu. This fiercely competitive landscape is challenging, but it brings out the best in each company – at least when competitors face a level playing field that treats similar providers in a similar manner.

I. Comcast's Interest in This Proceeding.

Comcast of Minnesota, Inc. (Comcast) has made substantial financial investments in its cable system over the years to serve the NMTC member cities with a state-of-the art network. In order to provide cable services and locate its cable system within public rights-of-way, Comcast has operated under cable franchises issued by each of the NMTC member cities since 2002. The shared franchise model has required much of Comcast, including notably:

- A requirement that Comcast build-out and offer cable service to customers throughout the municipal boundaries of every NMTC member city. (Comcast Franchise, section 4.4);

- Line extension requirements, requiring Comcast to extend its cable system plant to any area with a density of 35 dwelling units per mile of feeder cable (Comcast Franchise, section 4.4.3.2);
- A franchise fee equal to 5% of Comcast's gross revenue from cable services;
- A requirement to provide courtesy cable services to a number of sites in each NMTC member city.

CenturyLink's franchise application either rejects or is silent regarding whether and to what extent it will agree to many of the franchise obligations that have been required of Comcast.

II. Due Process.

The process by which the NMTC and its member cities consider the award of an additional franchise to CenturyLink must be transparent, adequate, thorough, and fair. Comcast fully expects that the same level of due diligence and scrutiny that the NMTC would and has applied to Comcast and its predecessors' will also be applied to CenturyLink.

By way of example, with respect to the renewal of a cable franchise, Comcast has come to expect extensive needs assessment studies, consisting of surveys and focus groups, technical reports, and examinations of Comcast's financial, legal and technical qualifications. Just recently, with respect to Comcast's proposed transfer of ownership to GreatLand Connections, the NMTC participated in an extensive study of the financial qualifications of GreatLand Connections.

Minn. Stat. § 238.081, governing cable communications franchise procedure, provides for exactly this sort of basic procedural due process. If indeed cable franchise proceedings in accordance with Minn. Stat. § 238.081 are quasi-judicial in nature, then they must "involve an investigation into a disputed claim that weighs evidentiary facts, applies those facts to a prescribed standard, and results in a binding decision." *In re Dakota Telecomm. Group*, 590 N.W.2d 644, 647 (Minn. Ct. App. 1999). At this point, CenturyLink's franchise application features several disputed questions. We thus urge the NMTC and Member Cities to engage in the kind of proceeding described in *Barton, Dakota Telecom Group* and section 238.08 in order to answer those questions.

III. LEVEL PLAYING FIELD REQUIREMENTS AND THE FCC 621 ORDER.

Minnesota's extensive cable franchising statutory scheme provides, among other things, that "No municipality shall grant an additional franchise for cable service for an area included in an existing franchise on terms and conditions more favorable or less burdensome than those in the existing franchise pertaining to: (1) the area served; (2) public, educational, or governmental access requirements; or (3) franchise fees."

Of particular concern is CenturyLink's build-out commitment that appears to stand in direct conflict with state law. While CenturyLink says its service will be "available" to over thirty (30%) of households within the member cities of the Commission, it gives no indication of

where within the NMTC it will offer cable service. Will CenturyLink offer service to areas within every member city? Or will CenturyLink offer service only to residents of one member city?

While we have not yet seen an actual Draft CenturyLink Franchise submitted to any of the North Metro communities, we expect it to contain a reasonable full city service requirement for each and every city CenturyLink intends to serve – consistent with Minnesota law and the FCC's 621 Order – so that eventually, all neighborhoods in the North Metro would have the same availability of service and access to cable competition, and so that all providers bare similar obligations.

The 621 Order only applies to actions or inactions at the local level where a state has not specifically circumscribed the LFAs authority. This is not the case in Minnesota, where the law specifically requires non-discriminatory treatment on conditions such as build-out requirements. We have observed CenturyLink's entry into other markets, such as Phoenix, Arizona, and their record raises concerns that build-out will be based upon income considerations of the selected areas. Only a thorough, open process, including meaningful hearings, can properly address these concerns, CenturyLink's real intentions and the expectations of the communities.

IV. CONCLUSION.

As stated above, Comcast does not oppose CenturyLink's entry into the local market. But we are concerned that competitive providers who make use of the same rights of way as Comcast, and who are subject to the same federal law, the same state law and the same local regulatory authority, should be held to the same reasonable level of due diligence and procedure, as well as city-wide service requirement standards, similar to what we have been held to.

There are many factual and legal questions raised by CenturyLink's franchise application. Comcast has important interests at stake in this proceeding and requests that the NMTC establish a fair, orderly, and open process that allows for meaningful public review and input.

Again, thank you for the opportunity to share our views with you on this important issue. Please do not hesitate to contact me if you have any questions, or if you need any additional information.

Sincerely,

Emmett V. Coleman
Vice President Government Affairs

Exhibit 6

FCC *621 Order* (Rel. 2007)

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

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

REPORT AND ORDER AND
FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: December 20, 2006 **Released: March 5, 2007**

Comment Date: [30 days after date of publication in the Federal Register]
Reply Comment Date: [45 days after date of publication in the Federal Register]

By the Commission: Chairman Martin, Commissioners Tate and McDowell issuing separate statements; Commissioners Copps and Adelstein dissenting and issuing separate statements.

TABLE OF CONTENTS

I. INTRODUCTION

1. In this Report and Order ("*Order*"), we adopt rules and provide guidance to implement Section 621(a)(1) of the Communications Act of 1934, as amended (the "Communications Act"), which prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services.[1] We find that the current operation of the local franchising process in many jurisdictions constitutes an unreasonable barrier to entry that impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment.[2] We further find that Commission action to address this problem is both authorized and necessary. Accordingly, we adopt measures to address a variety of means by which local franchising authorities, i.e., county- or municipal-level franchising authorities ("LFAs"), are unreasonably refusing to award competitive franchises. We anticipate that the rules and guidance we adopt today will facilitate and expedite entry of new cable competitors into the market for the delivery of video programming,[3] and accelerate broadband deployment consistent with our statutory responsibilities.

[1] 47 U.S.C. § 541(a)(1).

[2] While there is a sufficient record before us to generally determine what constitutes an "unreasonable refusal to award an additional competitive franchise" at the local level under Section 621(a)(1), we do not have sufficient information to make such determinations with respect to franchising decisions where a state is involved, either by issuing franchises at the state level or enacting laws governing specific aspects of the franchising process. We therefore expressly limit our findings and regulations in this *Order* to actions or inactions at the local level where a state has not specifically circumscribed the LFA's authority. In light of the differences between the scope of franchises issued at the state level and those issued at the local level, we do not address the reasonableness of demands made by state level franchising authorities, such as Hawaii, which may need to be evaluated by different criteria than those applied to the demands of local franchising authorities. Additionally, what constitutes an unreasonable period of time for a state level franchising authority to take to review an application may differ from what constitutes an unreasonable period of time at the local level. Moreover, as discussed *infra*, many states have enacted comprehensive franchise reform laws designed to facilitate competitive entry. Some of these laws allow competitive entrants to obtain statewide franchises while others establish a comprehensive set of statewide parameters that cabin the discretion of LFAs. *Compare* TEX. UTIL. CODE ANN. §§ 66.001-66.017 *with* VA. CODE ANN. §§ 15.2-2108.19 et seq. In light of the fact that many of these laws have only been in effect for a short period of time, and we do not have an adequate record from those relatively few states that have had statewide franchising for a longer period of time to draw general conclusions with respect to the operation of the franchising process where there is state involvement, we lack a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises. As a result, our *Order* today only addresses decisions made by county- or municipal-level franchising authorities. *See U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 86 (D.C. Cir. 2001) ("agencies need not address all problems in one fell swoop") (citations and internal quotation marks omitted); *Personal Watercraft Industry Assoc. v. Dept. of Commerce,* 48 F.3d 540, 544 (D.C. Cir. 1995) ("An agency does not have to 'make progress on every front before it can make progress on any front.') (quoting *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993)); *National Association of Broadcasters v. FCC,* 740 F.2d 1190, 1207 (D.C. Cir. 1984) ("[A]gencies, while entitled to less deference than Congress, nonetheless need not deal in one fell swoop with the entire breadth of a novel development; instead, 'reform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the [regulatory] mind.'") (citations and internal quotation marks omitted, alteration in original). Moreover, it does not address any aspect of an LFA's decision-making to the extent that such aspect is specifically addressed by state law. For example, the state of Massachusetts provides LFAs with 12 months from the date of their decision to begin the licensing process to approve or deny a franchise application. 207 Mass. Code Regs. 3.02 (2006). These laws are not addressed by this decision. Consequently, unless otherwise stated, references herein to "the franchising process" or "franchising" refer solely to processes controlled by county- or municipal-level franchising authorities, including but not limited to the ultimate decision to award a franchise.

[3] References throughout this *Order* to "video programming" or "video services" are intended to mean cable services.

2. New competitors are entering markets for the delivery of services historically offered by monopolists: traditional phone companies are primed to enter the cable market, while traditional cable companies are competing in the telephony market. Ultimately, both types of companies are projected to offer customers a "triple play" of voice, high-speed Internet access, and video services over their respective networks. We believe this competition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of service offerings. We are concerned, however, that traditional phone companies seeking to enter the video market face unreasonable regulatory obstacles, to the detriment of competition generally and cable subscribers in particular.

3. The Communications Act sets forth the basic rules concerning what franchising authorities may and may not do in evaluating applications for competitive franchises. Despite the parameters established by the Communications Act, however, operation of the franchising process has proven far more complex and time consuming than it should be, particularly with respect to facilities-based telecommunications and broadband providers that already have access to rights-of-way. New entrants have demonstrated that they are willing and able to upgrade their networks to provide video services, but the current operation of the franchising process at the local level unreasonably delays and, in some cases, derails these efforts due to LFAs' unreasonable demands on competitive applicants. These delays discourage investment in the fiber-based infrastructure necessary for the provision of advanced broadband services, because franchise applicants do not have the promise of revenues from video services to offset the costs of such deployment. Thus, the current operation of the franchising process often not only contravenes the statutory imperative to foster competition in the multichannel video programming distribution ("MVPD") market, but also defeats the congressional goal of encouraging broadband deployment.

4. In light of the problems with the current operation of the franchising process, we believe that it is now appropriate for the Commission to exercise its authority and take steps to prevent LFAs from unreasonably refusing to award competitive franchises. We have broad rulemaking authority to implement the provisions of the Communications Act, including Title VI generally and Section 621(a)(1) in particular. In addition, Section 706 of the Telecommunications Act of 1996 directs the Commission to encourage broadband deployment by removing barriers to infrastructure investment, and the U.S. Court of Appeals for the District of Columbia Circuit has held that the Commission may fashion its rules to fulfill the goals of Section 706.[4]

5. To eliminate the unreasonable barriers to entry into the cable market, and to encourage investment in broadband facilities, we: (1) find that an LFA's failure to issue a decision on a competitive application within the time frames specified herein constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (2) find that an LFA's refusal to grant a competitive franchise because of an applicant's unwillingness to agree to unreasonable build-out mandates constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (3) find that unless certain specified costs, fees, and other compensation required by LFAs are counted toward the statutory 5 percent cap on franchise fees, demanding them could result in an unreasonable refusal to award a competitive franchise; (4) find that it would be an unreasonable refusal to award a competitive franchise if the LFA denied an application based upon a new entrant's refusal to undertake certain obligations relating to public, educational, and government ("PEG") and institutional networks ("I-Nets") and (5) find that it is unreasonable under Section 621(a)(1) for an LFA to refuse to grant a franchise based on issues related to non-cable services or facilities. Furthermore, we preempt local laws, regulations, and requirements, including level-playing-field provisions, to the extent they permit LFAs to impose greater restrictions on market entry than the rules adopted herein. We also adopt

[4] *See USTA v. FCC*, 359 F.3d 554, 579-80 (D.C. Cir. 2004).

a Further Notice of Proposed Rulemaking ("FNPRM") seeking comment on how our findings in this *Order* should affect existing franchisees. In addition, the FNPRM asks for comment on local consumer protection and customer service standards as applied to new entrants.

II. BACKGROUND

6. ***Section 621.*** Any new entrant seeking to offer "cable service"[5] as a "cable operator"[6] becomes subject to the requirements of Title VI. Section 621 of Title VI sets forth general cable franchise requirements. Subsection (b)(1) of Section 621 prohibits a cable operator from providing cable service in a particular area without first obtaining a cable franchise,[7] and subsection (a)(1) grants to franchising authorities the power to award such franchises.[8]

7. The initial purpose of Section 621(a)(1), which was added to the Communications Act by the Cable Communications Policy Act of 1984 (the "1984 Cable Act"),[9] was to delineate the role of LFAs in the franchising process.[10] As originally enacted, Section 621(a)(1) simply stated that "[a] franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction."[11] A few years later, however, the Commission prepared a report to Congress on the cable industry pursuant to the requirements of the 1984 Cable Act.[12] In that Report, the Commission concluded

[5] Section 602(6) of the Communications Act, 47 U.S.C. § 522(6) (defining "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service").

[6] Section 602(5) of the Communications Act, 47 U.S.C. § 522(5) (defining "cable operator" as "any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in a cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system").

[7] 47 U.S.C. § 541(b)(1) ("Except to the extent provided in paragraph (2) and subsection (f), a cable operator may not provide cable service without a franchise.").

[8] 47 U.S.C. § 541(a)(1) (stating that "[a] franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction"). A "franchising authority" is defined to mean "any governmental entity empowered by Federal, State, or local law to grant a franchise." Section 602(10) of the Communications Act, 47 U.S.C. § 522(10). As noted above, references herein to "local franchising authorities" or "LFAs" mean only the county or municipal governmental entities empowered to grant franchises.

[9] Cable Communications Policy Act of 1984, Pub. L No. 98-549, 98 Stat. 2779.

[10] *See*, *e.g.*, H.R. REP. NO. 98-934, at 19 (1984) ("[The 1984 Cable Act] establishes a national policy that clarifies the current system of local, state and federal regulation of cable television. This policy continues reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process. … [This legislation] will preserve the critical role of municipal governments in the franchise process, while providing appropriate deregulation in certain respects to the provision of cable service."); *id.* at 24 ("It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs. However, if that process is to further the purposes of this legislation, the provisions of these franchises, and the authority of the municipal governments to enforce these provisions, must be based on certain important uniform federal standards that are not continually altered by Federal, state and local regulation.").

[11] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, § 621 (1984).

[12] *See generally Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962 (1990) ("Report").

that in order "[t]o encourage more robust competition in the local video marketplace, the Congress should … forbid local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service."[13]

8. In response,[14] Congress revised Section 621(a)(1) through the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act")[15] to read as follows: "A franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and *may not unreasonably refuse to award an additional competitive franchise*."[16] In the Conference Report on the legislation, Congress found that competition in the cable industry was sorely lacking:

> For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.[17]

To address this problem, Congress abridged local government authority over the franchising process to promote greater cable competition:

> Based on the evidence in the record taken as a whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be encouraged to award second franchises. Accordingly, [the 1992 Cable Act] as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises.[18]

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[13] *Id*. at 4974; s*ee also id*. at 5012 ("This Commission is convinced that the most effective method of promoting the interests of viewers or consumers is through the free play of competitive market forces."). The Report also recommended that Congress "prohibit franchising rules whose intent or effect is to create unreasonable barriers to the entry of potential competing multichannel video providers," "limit local franchising requirements to appropriate governmental interests (*e.g.*, public health and safety, repair and good condition of public rights-of-way, and the posting of an appropriate construction bond)," and "permit competitors to enter a market pursuant to an initial, time-limited suspension of any 'universal [build-out]' obligation." *Id*.

[14] *See* H.R. REP. NO. 102-628, at 47 (1992) ("The Commission recommended that Congress, in order to encourage more robust competition in the local video marketplace, prevent local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service."). The Commission has previously recognized that "Congress incorporated the Commission's recommendations in the 1992 Cable Act by amending § 621(a)(1) of the Communications Act." *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming)*, 9 FCC Rcd 7442, 7469 (1994).

[15] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

[16] 47 U.S.C. § 541(a)(1) (emphasis added).

[17] H.R. CONF. REP. NO. 102-862, at 1231 (1992).

[18] S. REP. NO. 102-92, at 47 (1991).

As revised, Section 621(a)(1) establishes a clear, federal-level limitation on the authority of LFAs in the franchising process in order to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media," and to "rely on the marketplace, to the maximum extent feasible, to achieve that availability."[19] Congress further recognized that increased competition in the video programming industry would curb excessive rate increases and enhance customer service, two areas in particular which Congress found had deteriorated because of the monopoly power of cable operators brought about, at least in part, by the local franchising process.[20]

9. In 1992, Congress also revised Section 621(a)(1) to provide 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."[21] Section 635, in turn, states that "[a]ny cable operator adversely affected by any final determination made by a franchising authority under section 621(a)(1) … may commence an action within 120 days after receiving notice of such determination" in federal court or a state court of general jurisdiction.[22] Congress did not, however, provide an explicit judicial remedy for other forms of unreasonable refusals to award competitive franchises, such as an LFA's refusal to act on a pending franchise application within a reasonable time period.

10. ***The Local Franchising NPRM.*** Notwithstanding the limitation imposed on LFAs by Section 621(a)(1), prior to commencement of this proceeding, the Commission had seen indications that the current operation of the franchising process still serves as an unreasonable barrier to entry[23] for potential new cable entrants into the MVPD market.[24] In November 2005, the Commission issued a Notice of Proposed Rulemaking ("*Local Franchising NPRM*") to determine whether LFAs are unreasonably refusing to award competitive franchises and thereby impeding achievement of the statute's goals of increasing competition in the delivery of video programming and accelerating broadband deployment.

11. The Commission sought comment on the current environment in which new cable entrants attempt to obtain competitive cable franchises. For example, the Commission requested input on

[19] *Id.*

[20] S. REP. NO. 102-92, at 9 (quoting members of the cable industry who acknowledged that "because the franchise limits the customers to a single provider in the market, other 'customer-oriented' intangibles relating to the expectation of future patronage do not exist for a cable system. There is a goodwill in a monopoly. Customers return, not because of any sense of satisfaction with the monopolist, but rather because they have no other choices"); *see also id.* at 3-9, 13-14, 20-21.

[21] 47 U.S.C. § 541(a)(1).

[22] 47 U.S.C. § 555(a).

[23] *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 20 FCC Rcd 18581, 18584 (2005) ("*Local Franchising NPRM*") (citing comments of Alcatel, BellSouth, Broadcast Service Providers Assoc., and Consumers for Cable Choice, filed in MB Docket No. 05-255).

[24] We refer herein to "new entrants," "new cable entrants," and "new cable competitors" interchangeably. Specifically, we intend these terms to describe entities that opt to offer "cable service" over a "cable system" utilizing public rights-of-way, and thus are defined under the Communications Act as "cable operator[s]" that must obtain a franchise. Although we recognize that there are numerous other ways to enter the MVPD market (*e.g.*, direct broadcast satellite ("DBS"), wireless cable, private cable), our actions in this proceeding relate to our authority under Section 621(a)(1) of the Communications Act, and thus are limited to competitive entrants seeking to obtain cable franchises.

the number of: (a) LFAs in the United States; (b) competitive franchise applications filed to date;[25] and (c) ongoing franchise negotiations.[26] To determine whether the current operation of the franchising process discourages competition and broadband deployment, the Commission also sought information regarding, among other things:

- how much time, on average, elapses between the date a franchise application is filed and the date an LFA acts on the application, and during that period, how much time is spent in active negotiations;[27]
- whether to establish a maximum time frame for an LFA to act on an application for a competitive franchise;[28]
- whether "level-playing-field" mandates, which impose on new entrants terms and conditions identical to those in the incumbent cable operator's franchise, constitute unreasonable barriers to entry;[29]
- whether build-out requirements (*i.e.*, requirements that a franchisee deploy cable service to parts or all of the franchise area within a specified period of time) are creating unreasonable barriers to competitive entry;[30]
- specific examples of any monetary or in-kind LFA demands unrelated to cable services that could be adversely affecting new entrants' ability to obtain franchises;[31] and
- whether current procedures or requirements are appropriate for any cable operator, including incumbent cable operators.[32]

12. In the *Local Franchising NPRM*, we tentatively concluded that Section 621(a)(1) empowers the Commission to adopt rules to ensure that the franchising process does not unduly interfere with the ability of potential competitors to provide video programming to consumers.[33] Accordingly, the Commission sought comment on how it could best remedy any problems with the current franchising process.[34]

[25] *Local Franchising NPRM*, 20 FCC Rcd at 18588.

[26] *Id*.

[27] *Id.*

[28] *Id.* at 18591.

[29] *Id.* at 18588.

[30] *Id.* at 18592.

[31] *Id. See also* Comments of Verizon, MB Docket No. 05-255 at 12 (filed Sept. 19, 2005) (arguing that "[m]any local franchising authorities unfortunately view the franchising process as an opportunity to garner from a potential new video entrant concessions that are in no way related to video services or to the rationales for requiring franchises"). *See* Appendix A for a list of all commenters and reply commenters.

[32] *Local Franchising NPRM*, 20 FCC Rcd at 18592.

[33] *Id.* at 18590.

[34] *Id.* at 18581.

13. The Commission also asked whether Section 706 provides a basis for the Commission to address barriers faced by would-be entrants to the video market.[35] Section 706 directs the Commission to encourage broadband deployment by utilizing "measures that promote competition … or other regulating methods that remove barriers to infrastructure investment."[36] Competitive entrants in the video market are, in large part, deploying new fiber-based facilities that allow companies to offer the "triple play" of voice, data, and video services. New entrants' video offerings thus directly affect their roll-out of new broadband services. Revenues from cable services are, in fact, a driver for broadband deployment. In light of that relationship, the Commission sought comment on whether it could take remedial action pursuant to Section 706.[37]

14. ***The Franchising Process.*** The record in this proceeding demonstrates that the franchising process differs significantly from locality to locality. In most states, franchising is conducted at the local level, affording counties and municipalities broad discretion in deciding whether to grant a franchise.[38] Some counties and municipalities have cable ordinances that govern the structure of negotiations, while others may proceed on an applicant-by-applicant basis.[39] Where franchising negotiations are focused at the local level, some LFAs create formal or informal consortia to pool their resources and expedite competitive entry.[40]

15. To provide video services over a geographic area that encompasses more than one LFA, a prospective entrant must become familiar with all applicable regulations. This is a time-consuming and expensive process that has a chilling effect on competitors.[41] Verizon estimates, for example, that it will need 2,500-3,000 franchises in order to provide video services throughout its service area.[42] AT&T states

[35] *Id.* at 18590.

[36] Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

[37] *See USTA v. FCC*, 359 F.3d 554, 580, 583 (D.C. Cir. 2004). *See also* USTelecom Comments at 15; TIA Comments at 16-17.

[38] *See, e.g.*, MD. ANN. CODE art. 23A § 2(b)(13); OR. CONST. ART. I, § 21 (2005); COLO. REV. STAT. ANN. § 30-35-201 (West 2005). We also note that several states have adopted statutes governing the franchising process. For example, some states require public hearings or special elections. *See* League of Minnesota Cities ("LMC") Comments at 6-8, South Slope Comments at 6. Other states have laws limiting the range of issues that can be negotiated in a franchise. *See* Cablevision Comments at 12, LMC Comments at 15. As we discuss below, certain states have adopted new franchising laws that allow providers to apply for franchises through state franchising authorities ("SFAs"), and we note that lawmakers in those states adopted these new franchising laws to address the needs of the current marketplace. Furthermore, certain states have traditionally considered franchise applications at the state level. *See, e.g.*, HAW. REV. STAT. § 440G-4 (2006), CONN. GEN. STAT. ANN. § 16-331 (West 2006), VT. STAT. ANN. tit. 30, § 502 (2006). The record indicates that state level franchising may provide a practical solution to the problems that facilities-based entrants face when seeking to provide competitive services on a broader basis than county or municipal boundaries and seek to provide service in a significant number of franchise areas. *See, e.g.*, AT&T Reply at 21, 37, NTCA Comments at 10.

[39] *See, e.g.*, Mobile, Ala. Comments at 2 (discussing its Master Cable Services Regulatory Ordinance that was created to ensure all potential entrants were treated in a uniform manner); Ontario, Cal. Comments at 5-6 (discussing draft master ordinance that will ensure a "fair and equitable application process" for all new entrants).

[40] *See, e.g.*, MO-NATOA Comments at 8 ("some localities work together to franchise and manage rights-of-way"); MHRC Comments at 1 (MHRC is a consolidated regulatory authority for six Oregon localities).

[41] *See, e.g.*, Verizon Comments at 27, Att. A, para. 10, 59-75; BellSouth Comments at 2, 11; Letter from Jeffrey S. Lanning, Associate General Counsel, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission at 17-18 (July 28, 2006) ("USTelecom *Ex Parte*").

[42] Verizon Comments at 27, Att. A, para. 10.

that its Project Lightspeed deployment is projected to cover a geographic area that would encompass as many as 2,000 local franchise areas.[43] BellSouth estimates that there are approximately 1,500 LFAs within its service area.[44] Qwest's in-region territory covers a potential 5,389 LFAs.[45] While other companies are also considering competitive entry,[46] these estimates amply demonstrate the regulatory burden faced by competitors that seek to enter the market on a wide scale, a burden that is amplified when individual LFAs unreasonably refuse to grant competitive franchises.

16. A few states and municipalities recently have recognized the need for reform and have established expedited franchising processes for new entrants. Although these processes also vary greatly and thus are of limited help to new cable providers seeking to quickly enter the marketplace on a regional basis, they do provide more uniformity in the franchising process on an intrastate basis. These state level reforms appear to offer promise in assisting new entrants to more quickly begin offering consumers a competitive choice among cable providers. In 2005, the Texas legislature designated the Texas Public Utility Commission ("PUC") as the franchising authority for state-issued franchises, and required the PUC to issue a franchise within 17 business days after receipt of a completed application from an eligible applicant.[47] In 2006, Indiana, Kansas, South Carolina, New Jersey, North Carolina, and California also passed legislation to streamline the franchising process by providing for expedited, state level grants of franchises.[48] Virginia, by contrast, did not establish statewide franchises but mandated uniform time frames for negotiations, public hearings, and ultimate franchise approval at the local level. In particular, a "certificated provider of telecommunications service" with existing authority to use public rights-of-way is authorized to provide video service within 75 days of filing a request to negotiate with each individual LFA.[49] Similarly, Michigan recently enacted legislation that streamlines the franchise application process, establishes a 30-day timeframe within which an LFA must make a decision, and eliminates build-out requirements.[50]

17. In some states, however, franchise reform efforts launched in recent months have failed. For example, in Florida, bills that would have allowed competitive providers to enter the market with a permit from the Office of the Secretary of State, and contained no build-out or service delivery schedules, died in committee.[51] In Louisiana, the Governor vetoed a bill that would have created a state franchise

[43] AT&T Comments at 17.

[44] BellSouth Comments at 11.

[45] Qwest Comments at 14.

[46] *See* BSPA Comments at 1-2; Cavalier Telephone Comments at 2; South Slope Comments at 2; Cincinnati Bell Comments at 1; Hawaiian Telcom Comments at 1; Minnesota Telecom Alliance Comments at 2. In addition to video services, many of these new entrants also intend to provide broadband services. *See, e.g.*, Verizon Comments at i; BSPA Comments at 1; Cavalier Telephone Comments at 2.

[47] TEX. UTIL. CODE ANN. §§ 66.001, 66.003. Holders of these franchises are required to pay franchise fees, comply with customer service standards, and provide the capacity for PEG access channels that a municipality has activated under the incumbent cable operator's franchise agreement. *Id.* at §§ 66.005, 66.006, 66.008, 66.009, 66.014. Franchisees are not required to comply with any build-out requirements, but they are prohibited from denying service to any area based on the income level of that area. *Id.* at § 66.007.

[48] IND. CODE § 8-1-34-16 (2006); 2006 Kan. Sess. Laws 93 (codified at KAN. STAT. ANN. § 17-1902); S.C. CODE ANN. § 58-12-310 et seq. (2006); Assemb., No. 804, 212th Leg. (N.J. 2006); 2006 N.C. Sessions Laws 151 (to be codified 1/1/2007 at N.C. GEN STAT. ANN. § 66-351 (West 2006); CAL. PUB. UTIL. CODE § 401, et seq.;.

[49] VA. CODE ANN. § 15.2-2108.1:1 et seq.

[50] 2006 Mich. Pub. Acts 480.

[51] S 1984, 2006 Sess. (Fla. 2006), HB 1199, 2006 Sess. (Fla. 2006).

structure, provided for automatic grant of an application 45 days after filing, and contained no build-out requirements.[52] In Maine, a bill that would have replaced municipal franchises with state franchises was withdrawn.[53] Finally, a Missouri bill that would have given the Public Service Commission the authority to grant franchises and would have prohibited local franchising died in committee. [54]

III. DISCUSSION

18. Based on the voluminous record in this proceeding, which includes comments filed by new entrants, incumbent cable operators, LFAs, consumer groups, and others, we conclude that the current operation of the franchising process can constitute an unreasonable barrier to entry for potential cable competitors, and thus justifies Commission action. We find that we have authority under Section 621(a)(1) to address this problem by establishing limits on LFAs' ability to delay, condition, or otherwise "unreasonably refuse to award" competitive franchises. We find that we also have the authority to consider the goals of Section 706 in addressing this problem under Section 621(a)(1). We believe that, absent Commission action, deployment of competitive video services by new cable entrants will continue to be unreasonably delayed or, at worst, derailed. Accordingly, we adopt incremental measures directed to LFA-controlled franchising processes, as described in detail below. We anticipate that the rules and guidance we adopt today will facilitate and expedite entry of new cable competitors into the market for the delivery of multichannel video programming and thus encourage broadband deployment.

A. The Current Operation of the Franchising Process Unreasonably Interferes With Competitive Entry

19. Most communities in the United States lack cable competition, which would reduce cable rates and increase innovation and quality of service.[55] Although LFAs adduced evidence that they have granted some competitive franchises,[56] and competitors acknowledge that they have obtained some franchises,[57] the record includes only a few hundred examples of competitive franchises, many of which were obtained after months of unnecessary delay. In the vast majority of communities, cable competition simply does not exist.

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[52] HB 699, 2006 Reg. Sess. (La. 2006).

[53] LR 2800, 2006 Leg., 2d. Reg. Sess. (Me. 2005).

[54] SB 816, 2006 Sess. (Mo. 2006).

[55] *See Local Franchising NPRM*, 20 FCC Rcd at 18588.

[56] For example, in Michigan, a number of LFAs have granted competitive franchises to local telecommunications companies. *See* Ada Township, *et al.*, Comments at 18-26. Vermont has granted franchises to competitive operators in Burlington, Newport, Berlin, Duxbury, Stowe, and Moretown. VPSB Comments at 5. Mt. Hood Cable Regulatory Commission ("MHRC"), a consolidated regulatory authority for six Oregon localities, has negotiated franchises with cable overbuilders, although those companies ultimately were unable to deploy service. MHRC Comments at 20-21. Similarly, the City of Los Angeles has granted two competitive franchises, but each of the competitors went out of business shortly after negotiating the franchise. City of Los Angeles Comments at 15; *see also* San Diego County, Cal. Comments at 4. Miami-Dade has granted 11 franchises to six providers, and currently is considering the application of another potential entrant. Miami-Dade Comments at 1-2. New Jersey has granted five competitive franchises, but only two ultimately provided service to customers. NJBPU Comments at 3. *See also, e.g.*, AT&T Reply Comments at 11-13; Chicago, Ill. Comments at 2-3; City of Charlotte and Mecklenburg County, N.C. Comments at 12-13; Henderson, Nev. Comments at 5.

[57] For example, Verizon has obtained franchises covering approximately 200 franchise areas. *See* http://newscenter.verizon.com/press-releases/verizon/2006/verizon-to-bring-western.html.

20. The dearth of competition is due, at least in part, to the franchising process.[58] The record demonstrates that the current operation of the franchising process unreasonably prevents or, at a minimum, unduly delays potential cable competitors from entering the MVPD market.[59] Numerous commenters have adduced evidence that the current operation of the franchising process constitutes an unreasonable barrier to entry. Regulatory restrictions and conditions on entry shield incumbents from competition and are associated with various economic inefficiencies, such as reduced innovation and distorted consumer choices.[60] We recognize that some LFAs have made reasonable efforts to facilitate competitive entry into the video programming market. We also recognize that recent state level reforms have the potential to streamline the process to a noteworthy degree. We find, though, that the current operation of the local franchising process often is a roadblock to achievement of the statutory goals of enhancing cable competition and broadband deployment.

21. Commenters have identified six factors that stand in the way of competitive entry. They are: (1) unreasonable delays by LFAs in acting on franchise applications; (2) unreasonable build-out requirements imposed by LFAs; (3) LFA demands unrelated to the franchising process; (4) confusion concerning the meaning and scope of franchise fee obligations; (5) unreasonable LFA demands for PEG channel capacity and construction of I-Nets; and (6) level-playing-field requirements set by LFAs. We address each factor below.

22. ***LFA Delays in Acting on Franchise Applications.*** The record demonstrates that unreasonable delays in the franchising process have obstructed and, in some cases, completely derailed attempts to deploy competitive video services. Many new entrants have been subjected to lengthy, costly, drawn-out negotiations that, in many cases, are still ongoing. The FTTH Council cited a report by an investment firm that, on average, the franchising process, as it currently operates, delays entry by 8-16 months.[61] The record generally supports that estimate. For example, Verizon had 113 franchise negotiations underway as of the end of March 2005. By the end of March 2006, LFAs had granted only 10 of those franchises. In other words, more than 90% of the negotiations were not completed within one year.[62] Verizon noted that delays are often caused by mandatory waiting periods.[63] BellSouth explained that negotiations took an average of 10 months for each of its 20 cable franchise agreements,[64] and that in one case, the negotiations took nearly three years.[65] AT&T claims that anti-competitive conditions, such as level-playing-field constraints and LFA demands regarding build-out, not only delay entry but can prevent it altogether.[66] BellSouth notes that absent such demands (in Georgia, for example), the

[58] Qwest Reply at 13-14; USTelecom *Ex Parte* at 17-18.

[59] Verizon Comments at 31-34; AT&T Reply at 22-23; BellSouth Comments at 10; Cavalier Telephone Comments at 1. *See also* Mercatus Center Comments at 39-43.

[60] *See, e.g.,* DOJ *Ex Parte* at 3

[61] FTTH Council Comments at 26.

[62] Verizon Reply Comments at 35. These figures do not include Verizon's franchise applications in Texas, which now authorizes statewide franchises. *See supra* para. 16.

[63] Verizon Comments at 31-32.

[64] BellSouth Comments at 2.

[65] BellSouth Comments at 11. BellSouth's franchise in Cobb County, Ga. took approximately 32 months to obtain; its franchises in Davie, Fla. and Orange County, Fla. took 29 and 28 months, respectively. BellSouth Comments Decl. of Thompson T. Rawls, II, Exh. A.

[66] AT&T Reply at 6.

company's applications were granted quickly.[67] Most of Ameritech's franchise negotiations likewise took a number of years.[68] New entrants other than the large incumbent local exchange carriers ("LECs")[69] also have experienced delays in the franchising process. NTCA provided an example of a small, competitive IPTV provider that is in ongoing negotiations that began more than one year ago.[70]

23. These delays are particularly unreasonable when, as is often the case, the applicant already has access to rights-of-way. One of the primary justifications for cable franchising is the LFA's need to regulate and receive compensation for the use of public rights-of-way.[71] However, when considering a franchise application from an entity that already has rights-of-way access, such as an incumbent LEC, an LFA need not and should not devote substantial attention to issues of rights-of-way management.[72] Moreover, in obtaining a certificate for public convenience and necessity from a state, a facilities-based provider generally has demonstrated its legal, technical, and financial fitness to be a provider of telecommunications services. Thus, an LFA need not spend a significant amount of time considering the fitness of such applicants to access public rights-of-way.

24. Delays in acting on franchise applications are especially onerous because franchise applications are rarely denied outright,[73] which would enable applicants to seek judicial review under Section 635.[74] Rather, negotiations are often drawn out over an extended period of time.[75] As a result,

[67] BellSouth Reply at 7.

[68] AT&T Reply at 24.

[69] The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access. 47 U.S.C. § 153(26). For the purposes of Section 251 of the Communications Act, "the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association …; or (B)(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member [of the exchange carrier association]." 47 U.S.C. § 251(h)(1). A competitive LEC is any LEC other than an incumbent LEC. A LEC will be treated as an ILEC if "(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph [251(h)](1); (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph [251(h)](1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section." 47 U.S.C. § 251(h)(2).

[70] NTCA Comments at 4, 10.

[71] We note that certain franchising authorities may have existing authority to regulate LECs through state and local rights-of-way statutes and ordinances.

[72] Recognizing this distinction, some states have enacted or proposed streamlined franchising procedures specifically tailored to entities with existing access to public rights-of-way. *See, e.g.*, VIRGINIA CODE ANN. § 15.2-2108.1:1 et seq.); HF-2647, 2006 Sess. (Iowa 2006) (this proposed legislation would grant franchises to all telephone providers authorized to use the right-of-way without any application or negotiation requirement). *See also* South Slope Comments at 11 (duplicative local franchising requirements imposed on a competitor with existing authority to occupy the rights-of-way are unjustified and constitute an unreasonable barrier to competitive video entry).

[73] *See* Northwest Suburbs Cable Communications Commission Comments at 5-6 (rare instance of competitive franchise denial).

[74] *See* 47 U.S.C. §§ 541(a)(1), 555(a).

[75] *See* Verizon Comments at 30-34; Verizon Reply Comments at 2, 34-37; AT&T Reply Comments at 24; NTCA Comments at 4, 10.

the record shows that numerous new entrants have accepted franchise terms they considered unreasonable in order to avoid further delay.[76] Others have filed lawsuits seeking a court order compelling the LFA to act, which entails additional delay, legal uncertainty, and great expense.[77] Alternatively, some prospective entrants have walked away from unduly prolonged negotiations.[78] Moreover, delays provide the incumbent cable operator the opportunity to launch targeted marketing campaigns before the competitor's rollout, thus undermining a competitor's prospects for success.[79]

25. Despite this evidence, incumbent cable operators and LFAs nevertheless assert that new entrants can obtain and are obtaining franchises in a timely fashion,[80] and that delays are largely due to unreasonable behavior on the part of franchise applicants, not LFAs.[81] For example, Minnesota LFAs claim that they can grant a franchise in as little as eight weeks.[82] The record, however, shows that expeditious grants of competitive franchises are atypical. Most LFAs lack any temporal limits for

[76] *See, e.g.,* USTelecom *Ex Parte* at 20 (Grand Rapids, Minnesota insisted that Paul Bunyan Telephone Cooperative provide fiber connections to every municipal building in the City, including a water treatment plant); Qwest *Ex Parte* at 7 (initially agreed to mandatory build-out provisions in certain situations); BellSouth Comments at 15-16 (in Dekalb County, Georgia, BellSouth makes PEG payments and I-Net support payments that drive total fees significantly above 5 percent of gross revenue).

[77] For example, in Maryland, Verizon filed suit against Montgomery County, seeking to invalidate some of the County's franchise rules, and requesting that the County be required to negotiate a franchise agreement, after the parties unsuccessfully attempted to negotiate a franchise beginning in May 2005. *See* Complaint, *Verizon Maryland, Inc. v. Montgomery County, Md.*, No. 06-01663-MJG (N.D. Md. June 29, 2006). The court denied Verizon's Motion for Preliminary Injunction in August, and ordered the parties to mediation. *See Verizon Maryland, Inc. v. Montgomery County, Md.*, Order, No. 06-01663-MJG (N.D. Md. August 8, 2006). Since then, the parties have negotiated a franchise agreement and the County held a public hearing on the draft franchise agreement. *See* Press Release, Montgomery County, Md., County Negotiates Cable Franchise Agreement with Verizon; Agreement Resolves Litigation, Provides Increased Competition for Cable Service (Sept. 13, 2006) *available at* http://www.montgomerycountymd.gov/apps/News/press/PR_details.asp?PrID=2582. The County Council granted the negotiated franchise on November 28, 2006. Neil Adler, *Montgomery officials approve Verizon cable franchise*, WASHINGTON BUSINESS JOURNAL, Nov. 28, 2006, *available at* http://washington.bizjournals.com/washington/stories/2006/11/27/daily23.html. Qwest's experience with the City of Colorado Springs, Colorado is a particularly onerous example. *See* Letter from Melissa E. Newman, Vice President, Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 13, 2006), Letter from Kenneth L. Fellman, Counsel to Colorado Springs, Colorado, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 26, 2006). The city charter in Colorado Springs requires that a franchise agreement be approved by voters rather than a franchising authority. Despite the fact that the Communications Act and federal case law deem this approach unlawful, the Colorado Springs City Counsel would not grant a franchise absent a vote, and invited Qwest to file a "friendly lawsuit" (presumably at Qwest's expense) to invalidate that provision of the city charter. 47 U.S.C. §§ 522(10), 541, *Qwest Broadband Services, Inc. v. City of Boulder*, 151 F.Supp.2d 1236 (D. Colo. 2001), Letter from Melissa E. Newman, Vice President, Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission at 2 (June 13, 2006).

[78] *See* Qwest Comments at 9.

[79] *See, e.g.*, South Slope Comments at 7.

[80] Cablevision Reply at 5; Orange County Comments at 5; Palm Beach County Comments at 3. *See* Comcast Comments at 8-9.

[81] Comcast Comments at 16; Cablevision Reply at 2. The incumbent cable operators accuse Verizon of making unreasonable demands through its model franchise. Verizon asserts that it submits a model franchise to begin negotiations because uniformity is necessary for its nationwide service deployment. Verizon Reply at 40. Verizon states that it is willing to negotiate and tailor the model franchise to each locality's needs. *Id.*

[82] LMC Comments at 18.

consideration of franchise applications, and of those that have such limits, many set forth lengthy time frames. In localities without a time limit or with an unreasonable time limit, the delays caused by the current operation of the franchising process present a significant barrier to entry.[83] For example, the cities of Chicago and Indianapolis acknowledged that, as currently operated, their franchising processes take one to three years, respectively.[84] Miami-Dade's cable ordinance permits the county to make a final decision on a cable franchise up to eight months after receiving a completed application, and the process may take longer if an applicant submits an incomplete application or amends its application. [85]

26. Incumbent cable operators and LFAs state that new entrants could gain rapid entry if the new entrants simply agreed to the same terms applied to incumbent cable franchisees.[86] However, this is not a reasonable expectation generally, given that the circumstances surrounding competitive entry are considerably different than those in existence at the time incumbent cable operators obtained their franchises. Incumbent cable operators originally negotiated franchise agreements as a means of acquiring or maintaining a monopoly position.[87] In most instances, imposing the incumbent cable operator's terms and conditions on a new entrant would make entry prohibitively costly because the entrant cannot assume that it will quickly – or ever – amass the same number or percentage of subscribers that the incumbent cable operator captured.[88] The record demonstrates that requiring entry on the same terms as incumbent cable operators may thwart entry entirely or may threaten new entrants' chances of success once in the market.

27. Incumbent cable operators also suggest that delay is attributable to competitors that are not really serious about entering the market, as demonstrated by their failure to file the thousands of franchise applications required for broad competitive entry.[89] We reject this explanation as inconsistent with both the record as well as common sense. Given the complexity and time-consuming nature of the current franchising process, it is patently unreasonable to expect any competitive entrant to file several thousand applications and negotiate several thousand franchising processes at once. Moreover, the incumbent LECs have made their plans to enter the video services market abundantly clear, and the evidence in the record demonstates their seriousness about doing so. For instance, they are investing billions of dollars to upgrade their networks to enable the provision of video services, expenditures that

[83] We recognize that some franchising authorities move quickly, as a matter of law or policy. The record indicates that some LFAs have stated that they welcome competition to the incumbent cable operator, and actively facilitate such competition. *See, e.g.*, Manatee County, Fla. Comments at 4, Ada Township, *et al*. Comments at 16-27. For example, a consolidated franchising authority in Oregon negotiated and approved competitive franchises within 90 days. *See* Mt. Hood Cable Regulatory Commission Comments at 20. An advisory committee in Minnesota granted two competitive franchises in six months, after a statutorily imposed eight-week notice and hearing period. *See* Southwest Suburban Cable Commission Comments at 5, 7. While we laud the prompt disposition of franchise applications in these particular areas, the record shows that these examples are atypical.

[84] *See* Chicago Comments at 4; Indianapolis Comments at 8.

[85] Miami-Dade Comments at 3.

[86] *See, e.g.*, ANC Reply at 5-6. Commenters assert that Verizon's model agreement prevents LFAs from exercising control over rights-of-way, does not require Verizon to repair damage to municipal property due to construction, does not require service to all residents, and contains an "opt-out" provision that allows Verizon to abandon an area it does not find profitable. ANC Reply at 8-10.

[87] Verizon Reply at 38-40.

[88] Verizon Comments at 53.

[89] Cablevision Comments at 3.

would make little sense if they were not planning to enter the video market.[90] Finally, the record also demonstrates that the obstacles posed by the current operation of the franchising process are so great that some prospective entrants have shied away from the franchise process altogether.[91]

28. We also reject the argument by incumbent cable operators that delays in the franchising process are immaterial because competitive applicants are not ready to enter the market and frequently delay initiating service once they secure a franchise.[92] We find that lack of competition in the video market is not attributable to inertia on the part of competitors. Given the financial risk, uncertainty, and delay new entrants face when they apply for a competitive franchise, it is not surprising that they wait until they get franchise approval before taking all steps necessary to provide service.[93] The sooner a franchise is granted, the sooner an applicant can begin completing those steps. Consequently, shortening the franchising process will accelerate market entry. Moreover, the record shows that streamlining the franchising process can expedite market entry. For example, less than 30 days after Texas authorized statewide franchises, Verizon filed an application for a franchise with respect to 21 Texas communities and was able to launch services in most of those communities within 45 days.[94]

29. Incumbent cable operators offer evidence from their experience in the renewal and transfer processes as support for their contention that the vast majority of LFAs operate in a reasonable and timely manner.[95] We find that incumbent cable operators' purported success in the franchising process is not a useful comparison in this case. Today's large MSOs obtained their current franchises by either renewing their preexisting agreements or by merging with and purchasing other incumbent cable franchisees with preexisting agreements. For two key reasons, their experiences in franchise transfers and renewals are not equivalent to those of new entrants seeking to obtain new franchises.[96] First, in the transfer or renewal context, delays in LFA consideration do not result in a bar to market entry. Second, in the transfer or renewal context, the LFA has a vested interest in preserving continuity of service for subscribers, and will act accordingly.

30. We also reject the claims by incumbent cable operators that the experiences of Ameritech, RCN, and other overbuilders[97] demonstrate that new entrants can and do obtain competitive

[90] *See* AT&T Comments at 14; Verizon Comments at 27. In addition to negotiating with LFAs, competitors also have lobbied for broad franchising reform. To be sure, when prospective entrants anticipate franchise reform may occur at the state level, there is evidence in the record they often have not sought franchises at the local level. *See* Fairfax County, Va. Comments at 4. Such tactics, however, do not indicate that prospective entrants are not serious about entering the market but rather represent a strategic judgment as to the best method of accomplishing that goal.

[91] Qwest Comments at 9.

[92] NCTA Comments at 11; Comcast Reply at 16; Cablevision Reply at 9; City of Murrieta, Ca. Comments at 2.

[93] *See* Verizon Reply Comments at 37.

[94] Verizon Reply Comments at 37-38. *See also* NTCA Comments at 10-11 (citing Texas PUC testimony at February Commission Meeting held in Keller, Texas, which revealed that 15 companies have filed applications to serve 153 discrete communities in Texas since adoption of the new statewide franchising scheme).

[95] Comcast Comments at 17. For example, Comcast reports that when it acquired AT&T Broadband, it received timely approval from more than 1,800 LFAs within eight months. The company also states that it was well along in the process of receiving approvals from more than 1,500 LFAs for the Adelphia transaction.

[96] AT&T Reply at 22.

[97] The term "overbuild" describes the situation in which a second cable operator enters a local market in direct competition with an incumbent cable operator. In these markets, the second operator, or "overbuilder," lays wires in the same area as the incumbent, "overbuilding" the incumbent's plant, thereby giving consumers a choice between cable service providers. *See Implementation of Section 3 of the Cable Television Consumer Protection and* (continued…)

franchises in a timely manner.[98] Charter claims that it secured franchises and upgraded its systems in a highly competitive market and that the incumbent LECs possess sufficient resources to do the same.[99] BellSouth notes, however, that Charter does not indicate a single instance in which it obtained a franchise through an initial negotiation, rather than a transfer.[100] Comcast argues that it faces competition from cable overbuilders in several markets.[101] The record is scant and inconsistent, however, with respect to overbuilder experiences in obtaining franchises, and thus does not provide reliable evidence. BellSouth also claims that, despite RCN's claims that the franchising process has worked in other proceedings, RCN previously has painted a less positive picture of the process and has called it a high barrier to entry.[102] Given these facts, we do not believe that the experiences cited by incumbent cable operators shed any significant light on the current operation of the franchising process with respect to competitive entrants.

31. ***Impact of Build-Out Requirements.*** The record shows that build-out issues are one of the most contentious between LFAs and prospective new entrants, and that build-out requirements can greatly hinder the deployment of new video and broadband services. New and potential entrants commented extensively on the adverse impact of build-out requirements on their deployment plans.[103] Large incumbent LECs,[104] small and mid-sized incumbent LECs,[105] competitive LECs[106] and others view build-out requirements as the most significant obstacle to their plans to deploy competitive video and broadband services. Similarly, consumer groups and the U.S. Department of Justice, Antitrust Division,

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Competition Act of 1992, Statistical Report on Average Prices for Basic Service, Cable Programming Services, and Equipment, 20 FCC Rcd 2718, 2719 n.6 (2005).

[98] Cablevision Reply at 6. Comcast states that the overbuilder industry as a whole has more than 16 million households under active franchise and two million households under franchise in anticipation of future network build-outs. Comcast Comments at 5-6 (citing Broadband Service Providers Association Comments, MB Docket No. 05-255, at 7 (filed Sept. 19, 2005)).

[99] Charter Comments at 4. Specifically, Charter states that it entered the cable market in earnest in the late 1990s and has spent the last five years investing billions of dollars to upgrade its cable systems and deploy advanced broadband services in more than 4,000 communities. Charter Comments at 2. During Charter's peak period of growth, it secured over 2,000 franchise transfers with LFAs and invested several billion dollars to upgrade systems, all while subject to significant competition from DBS. Charter Comments at 5.

[100] BellSouth Reply at 11.

[101] Comcast Comments at 4-5.

[102] BellSouth Reply at 13 (citing RCN's petition to deny the AT&T/Comcast merger application).

[103] *See, e.g.*, Qwest Comments at 2; Cincinnati Bell Comments at 10-11; South Slope Comments at 7-9; NTCA Comments at 6-7; Cavalier Telephone Comments at 5; BSPA Comments at 6. *See also* Letter from Lawrence Spiwak, President, Phoenix Ctr. for Advanced Legal and Econ. Pub. Policy Studies, to Marlene Dortch, Secretary, Federal Communications Commission, at Att., *Phoenix Center Policy Paper Number 22: The Consumer Welfare Cost of Cable "Build-out" Rules*, at 3 ("build-out requirements are, on average, counterproductive and serve to *slow down* deployment of communications networks") (March 13, 2006) ("*Phoenix Center Build-Out Paper*").

[104] Qwest Comments at 2.

[105] Cincinnati Bell Comments at 10-11; South Slope Comments at 7-9; NTCA Comments at 6-7 (because the risk is great, the service provided by the new entrants must be guided by sound business principles; forcing a new entrant to build out an entire area before such action is financially justified is tantamount to forcing that entrant out of the video business); USTelecom *Ex Parte* at 8-11.

[106] Cavalier Telephone Comments at 5; BSPA Comments at 6 (a number of competitive franchises have been renegotiated or converted to OVS because the operator could not comply with unreasonable and uneconomic build-out requirements).

urge the Commission to address this aspect of the current franchising process in order to speed competitive entry.[107]

32. The record demonstrates that build-out requirements can substantially reduce competitive entry.[108] Numerous commenters urge the Commission to prohibit LFAs from imposing any build-out requirements, and particularly universal build-out requirements.[109] They argue that imposition of such mandates, rather than resulting in the increased service throughout the franchise area that LFAs desire, will cause potential new entrants to simply refrain from entering the market at all.[110] They argue that even build-out provisions that do not require deployment throughout an entire franchise area may prevent a prospective new entrant from offering service.[111]

33. The record contains numerous examples of build-out requirements at the local level that resulted in delayed entry, no entry, or failed entry. A consortium of California communities demanded that Verizon build out to every household in each community before Verizon would be allowed to offer service to any community, even though large parts of the communities fell outside of Verizon's telephone service area.[112] Furthermore, Qwest has withdrawn franchise applications in eight communities due to build-out requirements.[113] In each case, Qwest determined that entering into a franchise agreement that mandates universal build-out would not be economically feasible.[114]

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[107] *See* MMTC Comments at 13-24; Consumers for Cable Choice Comments at 8; DOJ *Ex Parte* at 12-13, 15 (stating that build-out requirements lead to abandonment of entry, less efficient competition, or higher prices).

[108] *See, e.g.*, USTelecom Comments at 24 (citing example of Shenandoah Telecommunications, which cannot provide service to an entire county, and thus cannot provide service at all). *See also Phoenix Center Build-Out Paper* at 1, 3; DOJ *Ex Parte* at 12-13, 15.

[109] *See, e.g.*, Alcatel Comments at 10-11; AT&T Comments at 44; BellSouth Reply at 6; NTCA Comments at 6.

[110] *See, e.g.*, AT&T Comments at 44; Qwest Comments at 2; Ad Hoc Telecom Manufacturer Coalition Comments at 5; DOJ *Ex Parte* at 12-13, 15.

[111] Not all new entrants to the video market with existing telecommunications facilities are engaging in the upgrades to which Verizon and AT&T have committed. Cavalier Telephone, for example, is delivering IPTV over copper lines. Such delivery is limited, however, by ADSL-2 technology. Cavalier Telephone argues that it is unreasonable to require that it become capable of providing service to all households in a franchise area, which would require Cavalier Telephone to dig up rights-of-way and install duplicative facilities, which it has specifically sought to avoid doing by virtue of relying on the unbundled local loop. Cavalier Telephone Comments at 5. Similarly, Guadalupe Valley Telephone Cooperative (GVTC) could not deploy service in the face of differing build-out requirements across jurisdictions. *See* AT&T Reply at 37. Once Texas's new statewide franchising law went into effect, however, deployment became economically feasible for GVTC. *See id. See also Phoenix Center Build-out Paper at* 1, 3, 4 (build-out rules can significantly increase the costs of a new video entrant, and are actually counter-productive, serving primarily to deter new video entry and slow down deployment of communications networks); *Phoenix Center Redlining Paper* at 3 (even when build-out requirements are applied to new entrants altruistically, the requirements can be self-defeating and often erect insurmountable barriers to entry for new firms); BSPA at 4 (When a new network operator is forced to comply with a build-out that is equal to the existing incumbent cable footprint, it is forced to a build on a timeframe and in geographic areas where the cost to build and customer density will likely produce an economic loss for both network operators.), DOJ *Ex Parte* at 12-13, 15.

[112] Verizon Comments at 41-42. Before the new statewide legislation, a Texas community had made the same request.

[113] *See* Qwest Comments at 9.

[114] *Id*. at 10.

34. In many instances, level-playing-field provisions in local laws or franchise agreements compel LFAs to impose on competitors the same build-out requirements that apply to the incumbent cable operator.[115] Cable operators use threatened or actual litigation against LFAs to enforce level-playing-field requirements and have successfully delayed entry or driven would-be competitors out of town.[116] Even in the absence of level-playing-field requirements, incumbent cable operators demand that LFAs impose comparable build-out requirements on competitors to increase the financial burden and risk for the new entrant.[117]

35. Build-out requirements can deter market entry because a new entrant generally must take customers from the incumbent cable operator, and thus must focus its efforts in areas where the take-rate will be sufficiently high to make economic sense. Because the second provider realistically cannot count on acquiring a share of the market similar to the incumbent's share, the second entrant cannot justify a large initial deployment.[118] Rather, a new entrant must begin offering service within a smaller area to determine whether it can reasonably ensure a return on its investment before expanding.[119] For example, Verizon has expressed significant concerns about deploying service in areas heavily populated with MDUs already under exclusive contract with another MVPD.[120] Due to the risk associated with entering the video market, forcing new entrants to agree up front to build out an entire franchise area too quickly may be tantamount to forcing them out of – or precluding their entry into – the business.[121]

36. In many cases, build-out requirements also adversely affect consumer welfare. DOJ noted that imposing uneconomical build-out requirements results in less efficient competition and the potential for higher prices.[122] Non-profit research organizations the Mercatus Center and the Phoenix Center argue that build-out requirements reduce consumer welfare.[123] Each conclude that build-out

[115] *See, e.g.*, GMTC Comments at 15; Philadelphia Reply at 2; FTTH Council at 33-34; US Telecom at 30-31; TCCFUI Comments at 11, 15.

[116] BSPA Comments at 5-6; BellSouth Comments at 44; Verizon Comments at 33-34 (noting that some LFAs are requesting indemnification from competitive applicants). For example, Insight Communications filed suit against the City of Louisville and Knology. Although the LFA and Knology ultimately won, the delay resulted in Knology declining to enter that market. BSPA Comments at 5-6.

[117] *See* AT&T Comments at 51.

[118] Qwest Comments at 8.

[119] FTTH Council Comments at 33-34.

[120] Verizon Reply at 70-71.

[121] NTCA Comments at 7. *See also* DOJ *Ex Parte* at 12-13, 15; FTTH Council Comments at 29 (competitive entrants face a riskier investment than incumbents faced when they entered; moreover, incumbent firms have market power in the video market, their customers have little choice, and their costs can be spread over a large base, whereas new entrants do not have this same advantage). Although it is sometimes possible to renegotiate a build-out requirement if the new entrant cannot meet it, in many cases the LFA imposes substantial penalties for failure to meet a build-out requirement. *See* Anne Arundel County *et al*. Comments at 4, FTTH Council Comments at 34 (citing Grande Communications franchise agreement establishing penalty of $2,000 per day); Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, (Apr. 26, 2006), Attachment at 7 ("Qwest *Ex Parte*").

[122] *Id.* at 13.

[123] Mercatus Center Comments at 39-41; *Phoenix Center Build-Out Paper* at 1; Letter from Stephen Pociask, President, American Consumer Institute, to Marlene Dortch, Secretary, Federal Communications Commission (March 3, 2006).

requirements imposed on competitive cable entrants only benefit an incumbent cable operator.[124] The Mercatus Center, citing data from the FCC and GAO indicating that customers with a choice of cable providers enjoy lower rates, argues that, to the extent that build-out requirements deter entry, they result in fewer customers having a choice of providers and a resulting reduction in rates.[125] The Phoenix Center study contends that build-out requirements deter entry and conflict with federal, state, and local government goals of rapid broadband deployment.[126] Another research organization, the American Consumer Institute (ACI), concluded that build-out requirements are inefficient: if a cable competitor initially serves only one neighborhood in a community, and a few consumers in this neighborhood benefit from the competition, total welfare in the community improves because no consumer was made worse and some consumers (those who can subscribe to the competitive service) were made better.[127] In comparison, requirements that deter competitive entry may make some consumers (those who would have been able to subscribe to the competitive service) worse off.[128] In many instances, placing build-out conditions on competitive entrants harms consumers and competition because it increases the cost of cable service.[129] Qwest commented that, in those communities it has not entered due to build-out requirements, consumers have been deprived of the likely benefit of lower prices as the result of competition from a second cable provider.[130] This claim is supported by the Commission's 2005 annual cable price survey, in which the Commission observed that average monthly cable rates varied markedly depending on the presence – and type – of MVPD competition in the local market. The greatest difference occurred where there was wireline overbuild competition, where average monthly cable rates were 20.6 percent lower than the average for markets deemed noncompetitive.[131]

37. For these reasons, we disagree with LFAs and incumbent cable operators who argue that unlimited local flexibility to impose build-out requirements, including universal build-out of a franchise area, is essential to promote competition in the delivery of video programming and ensure a choice in

[124] *See id.*

[125] Mercatus Center Comments at 41. The Mercatus Center bases this assertion on the evidence that cable rate regulation does not affect cable rates significantly, which suggests that cable providers are not subsidizing less-profitable areas with the returns from more-profitable areas. *Id.*

[126] *Phoenix Center Build-Out Paper* at 1.

[127] ACI Comments at 7.

[128] AT&T Comments at 48 (citing Thomas Hazlett & George Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the "Level Playing Field" in Cable TV Franchising Statutes*, 3 BUSINESS AND POLITICS issue 1, at 25-26 (2001)).

[129] AT&T Comments at 48 (citing Thomas Hazlett & George Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the "Level Playing Field" in Cable TV Franchising Statutes*, 3 BUSINESS AND POLITICS issue 1, at 25-26 (2001)).

[130] Qwest Comments at 10.

[131] *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket. No. 92-266, FCC 06-179, para. 12 (rel. Dec. 27, 2006) ("2005 Cable Price Survey"). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2772-73 (2005) ("*2005 Video Competition Report*").

providers for every household.[132] In many cases, build-out requirements may have precisely the opposite effects – they deter competition and deny consumers a choice.

38. Although incumbent LECs already have telecommunications facilities deployed over large areas, build-out requirements may nonetheless be a formidable barrier to entry for them for two reasons. First, incumbent LECs must upgrade their existing plant to enable the provision of video service, which often costs billions of dollars. Second, as the Commission stated in the *Local Franchising NPRM*, the boundaries of the areas served by facilities-based providers of telephone and/or broadband services frequently do not coincide with the boundaries of the areas under the jurisdiction of the relevant LFAs.[133] In some cases, a potential new entrant's service area comprises only a portion of the area under the LFA's jurisdiction.[134] When LECs are required to build out where they have no existing plant, the business case for market entry is significantly weakened because their deployment costs are substantially increased. [135] In other cases, a potential new entrant's facilities may already cover most or all of the franchise area, but certain economic realities prevent or deter the provider from upgrading certain "wire center service areas" within its overall service area.[136] For example, some wire center service areas may encompass a disproportionate level of business locations or multi-dwelling units ("MDUs") with MVPD exclusive contracts.[137] New entrants argue that the imposition of build-out requirements in either circumstance creates a disincentive for them to enter the marketplace.[138]

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[132] State of Hawaii Reply Comments at 4-5; Ada Township, *et al* Comments at 8-9; Manatee County, Fla. Comments at 19; Burnsville/Eagan Reply Comments at 19-20; New Jersey Board of Public Utilities Comments at 11-12.

[133] *Local Franchising NPRM,* 20 FCC Rcd at para. 618595.

[134] *See* NTCA Comments at 15; South Slope Comments at 8-9 (mandatory build-out of entire franchise areas unreasonably impedes competitive entry where entrants' proposed service area is not located entirely within an LFA-defined local franchise area).

[135] *See, e.g.*, FTTH Council Comments at 33-34; South Slope Comments at 8-9; NTCA Comments at 15; BellSouth Reply at 25. BellSouth has a franchise to serve unincorporated Cherokee County, Ga., but the geographic area of this franchise is much larger than the boundaries of BellSouth's wire center. *Id.* BellSouth faces a similar issue in Orange County, Fla. *Id. See also* Linda Haugsted, *Franchise War in Texas*, MULTICHANNEL NEWS, May 2, 2005 (noting that, although Verizon had negotiated successfully a cable franchise with the City of Keller, Texas, "it will not build out all of Keller: It only has telephone plant in 80% of the community. SBC serves the rest of the locality."). NTCA states that theoretically the incumbent LEC could extend its facilities, but to do so within another provider's incumbent LEC territory would require an incumbent LEC to make a financially significant business decision, solely for purposes of providing video programming. *See* NTCA Comments at 15.

[136] *See* Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 at 3 (filed May 3, 2006). In this *Order* we use "wire center service area" to mean the geographic area served by a wire center as defined in Part 51 of the Commission's rules, except wire centers that have no line-side functionality, such as switching units that exclusively interconnect trunks. See 47 C.F.R. § 51.5. *See also Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, 2586 (2005), para. 87 n.251 ("*Triennial Review Remand Order*") ("By 'wire center,' we mean any incumbent LEC switching office that terminates and aggregates loop facilities"). The Commission's rules define "wire center" to mean "the location of an incumbent LEC local switching facility containing one or more central offices as defined in Part 36 [of the Commission's rules]. The wire center boundaries define the area in which all customers served by a given wire center are located." 47 C.F.R. § 51.5. The term "wire center" is often used interchangeably with the term "central office." Technically, the wire center is the location where a LEC terminates subscriber local loops, along with the facilities necessary to maintain them.

[137] New entrants also point out that some wire center service areas are low in population density (measured by homes per cable plant mile). The record suggests, however, that LFAs generally have not required franchisees to

(continued…)

39. Incumbent cable operators assert that new entrants' claims are exaggerated, and that, in most cases, LEC facilities are coterminous with municipal boundaries.[139] The evidence submitted by new entrants, however, convincingly shows that inconsistencies between the geographic boundaries of municipalities and the network footprints of telephone companies are commonplace.[140] The cable industry has adduced no contrary evidence. The fact that few LFAs argued that non-coterminous boundaries are a problem[141] is not sufficient to contradict the incumbent LECs' evidence.[142]

40. Based on the record as a whole, we find that build-out requirements imposed by LFAs can constitute unreasonable barriers to entry for competitive applicants. Indeed, the record indicates that because potential competitive entrants to the cable market may not be able to economically justify build-out of an entire local franchising area immediately,[143] these requirements can have the effect of granting *de facto* exclusive franchises, in direct contravention of Section 621(a)(1)'s prohibition of exclusive cable franchises.[144]

41. Besides thwarting potential new entrants' deployment of video services and depriving consumers of reduced prices and increased choice,[145] build-out mandates imposed by LFAs also may directly contravene the goals of Section 706 of the Telecommunications Act of 1996, which requires the Commission to "remov[e] barriers to infrastructure investment" to encourage the deployment of broadband services "on a reasonable and timely basis."[146] We agree with AT&T that Section 706, in

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provide service in low-density areas. *See, e.g.,* Madison, WI Comments at 4 (limiting build-out to areas with 40 dwelling units per cable mile); Renton, WA Comments at 3 (limiting build-out to 35 dwelling units per mile); West Palm Beach, Fla. Comments at 11 (limiting build-out to areas with 20 homes per mile). Nevertheless, density is likely to be of greater concern to a new entrant than to an incumbent cable operator, because the new entrant has to lure customers from the incumbent cable operator, and therefore cannot count on serving as many of the customers in a cable plant mile.

[138] BSPA Comments at 5 (when the footprint of an existing system does not match the territory of an LFA, build-out requirements restrict the growth of competition that could be created by incremental expansion of existing networks into adjacent territories because the operator must have the financial means to build out the entire adjacent franchise area before commencing any build-out); NTCA Comments at 15 (requiring small, rural incumbent LECs to deploy service beyond their existing telephone service areas would prohibit some carriers from offering video services to any community, thereby preventing competition). *See also* DOJ *Ex Parte* at 12-13, 15.

[139] *See* Cablevision Reply at 16-17; Charter Reply at 8.

[140] *See* BSPA Comments at 5; South Slope Comments at 8-9; NTCA Comments at 15.

[141] Comcast Reply at 21 (citing comments of NATOA and Torrance, Cal.).

[142] *Compare* Tele Atlas Wire Center Premium v10.1 (April 2006) Maps for Bergen County, NJ and Los Angeles, Ca. and surrounding areas *with* The BRIDGE Data Group CableBounds Maps for Bergen County, NJ and Los Angeles, Ca. and surrounding areas (filed by the Media Bureau), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518618170, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518618171.

[143] *See* FTTH Council Comments at 32; NTCA Comments at 7; Qwest Comments at 2, 8; Verizon Comments at 39-40.

[144] 47 U.S.C. § 544(a)(1).

[145] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, FCC 06-11, at ¶ 41 (rel. Mar. 3, 2006) (noting that overbuild competition, when present, often leads to lower cable rates and higher quality service).

[146] Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

conjunction with Section 621(a)(1), requires us to prevent LFAs from adversely affecting the deployment of broadband services through cable regulation.[147]

42. We do not find persuasive incumbent cable operators' claims that build-out should necessarily be required for new entrants into the video market because of certain obligations faced by cable operators in their deployment of voice services. To the extent cable operators believe they face undue regulatory obstacles to providing voice services, they should make that point in other proceedings, not here. In any event, commenters generally agree that the record indicates that the investment that a competitive cable provider must make to deploy video in a particular geographic area far outweighs the cost of the additional facilities that a cable operator must install to deploy voice service.[148]

43. ***LFA Demands Unrelated to the Provision of Video Services.*** Many commenters recounted franchise negotiation experiences in which LFAs made unreasonable demands unrelated to the provision of video services. Verizon, for example, described several communities that made unreasonable requests, such as the purchase of street lights, wiring for all houses of worship, the installation of cell phone towers, cell phone subsidies for town employees, library parking at Verizon's facilities, connection of 220 traffic signals with fiber optics, and provision of free wireless broadband service in an area in which Verizon's subsidiary does not offer such service.[149] In Maryland, some localities conditioned a franchise upon Verizon's agreement to make its data services subject to local customer service regulation.[150] AT&T provided examples of impediments that Ameritech New Media faced when it entered the market, including a request for a new recreation center and pool.[151] FTTH

[147] AT&T Comments at 45. *See also infra* para. 63.

[148] *See* NTCA Comments at 7; Verizon Reply at 54-55; American Consumer Institute Comments at 7; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16978, 17142-17143 (2003) ("*Triennial Review Order*"); *See also* High Tech Broadband Coalition Comments at 4-5 (fiber-to-the-home deployment increased 5300 percent since the *Triennial Review Order*, due in large part to the elimination of barriers to entry in that Order).

[149] Verizon Comments at 57 & Attachment A at 16-17. The *Wall Street Journal* reported "[Tampa, Florida] City officials presented [Verizon] with a $13 million wish list, including money for an emergency communications network, digital editing equipment and video cameras to film a math-tutoring program for kids." Another community presented Verizon with "requests for seed money for wildflowers and a video hookup for Christmas celebrations." Dionne Searcey, *As Verizon Enters Cable Business, it Faces Local Static*, WALL ST. J., Oct. 28, 2005, at A1. *But see* Verizon Comments at 65, filed February 13, 2006 (stating that "one franchising authority in Florida demanded that Verizon meet the incumbent cable operator's cumulative payments for PEG, which would exceed $6 million over 15 years of Verizon's proposed franchise term. When Verizon rejected this demand, the LFA doubled its request, asking for a fee in excess of $13 million that it said would be used for both PEG support and the construction of a redundant institutional network."); Verizon Revised Comments, filed March 6, 2006 at 65 (amending the second sentence of their comments above, in response to a request from the City of Tampa, to state that "[w]hen Verizon rejected this demand and asked for an explanation, the LFA provided a summary 'needs assessment' in excess of $13 million for both PEG support."); Tampa Reply at 3-4 (noting that Verizon's errata "clarified that the City of Tampa has not demanded Verizon provide $13.5 million dollars as a condition of granting a cable television franchise," and calling the *Wall Street Journal* article assertions an "urban legend"); John Dunbar, *FCC's Cable TV Ruling Criticized,* ASSOCIATED PRESS, Jan. 29, 2007 (stating that "[The Tampa City Attorney] said Tampa gave Verizon a $13 million 'needs assessment' that was required by law in order to obtain contributions for equipment for public access and government channels" and also quoting the City Attorney saying that "it is possible the 'needs assessment' included video cameras to film shows such as the math class, but that there was never 'a specific quid pro quo.' Nor was anything like that mentioned in the franchise agreement.").

[150] Verizon Comments at 75.

[151] AT&T Comments at 24.

Council highlighted Grande Communications' experience in San Antonio, which required that Grande Communications make an up-front, $1 million franchise fee payment and fund a $50,000 scholarship with additional annual contributions of $7,200.[152] The record demonstrates that LFA demands unrelated to cable service typically are not counted toward the statutory 5 percent cap on franchise fees, but rather imposed on franchisees in addition to assessed franchise fees.[153] Based on this record evidence, we are convinced that LFA requests for unreasonable concessions are not isolated, and that these requests impose undue burdens upon potential cable providers.

44. ***Assessment of Franchise Fees.*** The record establishes that unreasonable demands over franchise fee issues also contribute to delay in franchise negotiations at the local level and hinder competitive entry.[154] Fee issues include not only which franchise-related costs imposed on providers should be included within the 5 percent statutory franchise fee cap established in Section 622(b),[155] but also the proper calculation of franchise fees (*i.e.*, the revenue base from which the 5 percent is calculated). In Virginia, municipalities have requested large "acceptance fees" upon grant of a franchise, in addition to franchise fees.[156] Other LFAs have requested consultant and attorneys' fees.[157] Several Pennsylvania localities have requested franchise fees based on cable and non-cable revenues.[158] Some commenters assert that an obligation to provide anything of value, including PEG costs, should apply toward the franchise fee obligation.[159]

45. The parties indicate that the lack of clarity with respect to assessment of franchise fees impedes deployment of new video programming facilities and services for three reasons. First, some LFAs make unreasonable demands regarding franchise fees as a condition of awarding a competitive franchise. Second, new entrants cannot reasonably determine the costs of entry in any particular community. Accordingly, they may delay or refrain from entering a market because the cost of entry is unclear and market viability cannot be projected.[160] Third, a new entrant must negotiate these terms prior to obtaining a franchise, which can take a considerable amount of time. Thus, unreasonable demands by some LFAs effectively creates an unreasonable barrier to entry.

46. ***PEG and I-Net Requirements.*** Negotiations over PEG and I-Nets also contribute to delays in the franchising process. In response to the *Local Franchising NPRM*, we received numerous comments asking for clarification of what requirements LFAs reasonably may impose on franchisees to

[152] FTTH Council Comments at 38.

[153] BSPA Comments at 8. BSPA argues that under the current franchising process, LFAs are able to bargain for capital payments to use on infrastructure needs when LFAs should use the capital to benefit consumers. BSPA claims that LFAs use the capital to build and maintain I-Nets, city broadcasting facilities, and traffic light control systems. *Id*.

[154] *See, e.g.*, AT&T Comments at 64-67; BellSouth Comments at 38-40; Cavalier Telephone Comments at 7; FTTH Council Comments at 38-40. *But see* NATOA Reply at 27-35.

[155] 47 U.S.C. § 542(b).

[156] Verizon Comments at 59.

[157] *Id*. at 59-60.

[158] *Id*. at 63.

[159] AT&T Comments at 65-67; BellSouth Comments at 39.

[160] AT&T Reply at 31-32.

support PEG and I-Nets.[161] We also received comments suggesting that some LFAs are making unreasonable demands regarding PEG and I-Net support as a condition of awarding competitive franchises.[162] LFAs have demanded funding for PEG programming and facilities that exceeds their needs, and will not provide an accounting of where the money goes.[163] For example, one municipality in Florida requested $6 million for PEG facilities, and a Massachusetts community requested 10 PEG channels, when the incumbent cable operator only provides two.[164] Several commenters argued that it is unreasonable for an LFA to request a number of PEG channels from a new entrant that is greater than the number of channels that the community is using at the time the new entrant submits its franchise application.[165] The record indicates that LFAs also have made what commenters view as unreasonable institutional network requests, such as free cell phones for employees, fiber optic service for traffic signals, and redundant fiber networks for public buildings.[166]

47. ***Level-Playing-Field Provisions.*** The record demonstrates that, in considering franchise applications, some LFAs are constrained by so-called "level-playing-field" provisions in local laws or incumbent cable operator franchise agreements.[167] Such provisions typically impose upon new entrants terms and conditions that are neither "more favorable" nor "less burdensome" than those to which existing franchisees are subject.[168] Some LFAs impose level-playing-field requirements on new entrants even without a statutory, regulatory, or contractual obligation to do so.[169] Minnesota's process allows incumbent cable operators to be active in a competitor's negotiation, and incumbent cable operators have challenged franchise grants when those incumbent cable operators believed that the LFA did not follow correct procedure.[170] According to BellSouth, the length of time for approval of its franchises was tied directly to level-playing-field constraints; absent such demands (in Georgia, for example), the company's applications were granted quickly.[171] NATOA contends, however, that although level-playing-field

[161] *See, e.g.*, AT&T Comments at 67-70; BellSouth Comments at 39; Consumers for Cable Choice Comments at 8; FTTH Council Comments at 36-37, 66-67; Verizon Comments at 65-75. *But see* NATOA Reply at 30-42.

[162] FTTH Council Comments at 36; Verizon Comments at 65-66.

[163] Verizon Comments at 65.

[164] *Id*. at 65-66.

[165] Consumers for Cable Choice Comments at 8; Verizon Comments at 71.

[166] Verizon Comments at 73.

[167] *See, e.g.*, Orange County, Fla. Comments at 3; Northwest Suburbs Cable Communications Commission Comments at 3; Winston-Salem, N.C. Comments at 5; Albuquerque, N.M. Comments at 3; Tulsa, Okla. Comments at 2-4; Enumclaw, Wash. Comments at 2; Madison, Wis. Comments at 5-6.

[168] *See Local Franchising NPRM*, 20 FCC Rcd at 18588. At least 10 states impose level-playing-field requirements upon LFAs, and those laws vary significantly in the subject matters they encompass. For example, compare Minnesota's requirement that a competitive entrant face similar build-out, franchise fee, and PEG requirements to Illinois's requirement that the competitive franchise be no more favorable with respect to the territorial extent of the franchise, system design, technical performance standards, construction schedules, bonds, standards for construction and installation of facilities, service to subscribers, PEG channels and programming, production assistance, liability and indemnification and franchise fees. MINN. STAT. ANN. § 238.08 (West 2006), 55 ILL. COMP. STAT. ANN. 5/5-1095(e)(4) (West 2006), *see also* ALA. CODE § 11-27-2 (2005), CONN. GEN. STAT. § 16-331(g) (2006), FLA. STAT. § 166.046(3) (2006), N.H. REV. STAT. ANN. § 53-C:3-b (2005), OKLA. STAT. ANN. tit. 11, § 22-107.1(B) (West 2006). S.D. CODIFIED LAWS § 9-35-27 (2005), TENN. CODE. ANN. § 7-59-203 (2005).

[169] *See* GMTC *et al.* Comments at 15; Pasadena, Ca. Comments at 10-11; Philadelphia, Pa. Comments at 7. *See also* AT&T Reply at 14.

[170] LMC Comments at 12-15.

provisions sometimes can complicate the franchising process, they do not present unreasonable barriers to entry.[172] NATOA and LFAs argue that level-playing-field provisions serve important policy goals, such as ensuring a competitive environment and providing for an equitable distribution of services and obligations among all operators.[173]

48. The record demonstrates that local level-playing-field mandates can impose unreasonable and unnecessary requirements on competitive applicants.[174] As noted above, level-playing-field provisions enable incumbent cable operators to delay or prevent new entry by threatening to challenge any franchise that an LFA grants.[175] Comcast asserts that MSOs are well within their rights to insist that their legal and contractual rights are honored in the grant of a subsequent franchise.[176] The record demonstrates, however, that local level-playing-field requirements may require LFAs to impose obligations on new entrants that directly contravene Section 621(a)(1)'s prohibition on unreasonable refusals to award a competitive franchise.[177] In most cases, incumbent cable operators entered into their franchise agreements in exchange for a monopoly over the provision of cable service.[178] Build-out requirements and other terms and conditions that may have been sensible under those circumstances can be unreasonable when applied to competitive entrants. NATOA's argument that level-playing-field requirements always serve to ensure a competitive environment and provide for an equitable distribution of services and obligations ignores that incumbent and competitive operators are not on the same footing. LFAs do not afford competitive providers the monopoly power and privileges that incumbents received when they agreed to their franchises, something that investors recognize.[179]

49. Moreover, competitive operators should not bear the consequences of an incumbent cable operator's choice to agree to any unreasonable franchise terms that an LFA may demand. And while the record is mixed as to whether level-playing-field mandates "assure that cable systems are responsive to the needs and interests of the local community,"[180] the more compelling evidence indicates that they do not because they prevent competition. Local level-playing-field provisions impose costs and risks

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(Continued from previous page)

[171] BellSouth Reply at 7.

[172] NATOA Reply at 43.

[173] *See, e.g.*, NATOA Reply at 44; Burnsville/Eagan Comments at 44; City of Philadelphia Reply at 2.

[174] *See, e.g.*, South Slope Comments at 7-8 (build-out); Verizon Comments at 60-61, 71 (PEG requirements); AT&T Comments at 67 (redundant facilities). *See also* FTTH Council Comments at 29-30 (quoting Hazlett & Ford study concluding that the result of level-playing-field laws "is that incumbents and [LFAs] can force entrants to incur sunk costs considerably in excess of what free market conditions would imply"). We note that, as described below, we do not address – and therefore do not preempt – state laws governing the franchising process including state level-playing-field mandates.

[175] *See supra* para. 34; *see also* DOJ *Ex Parte* at 15-16.

[176] Comcast Reply at 17-18 (citing Comcast's involvement in Verizon's Howard County, Maryland, franchise approval process).

[177] Mercatus Center at 39-40; *Phoenix Center Competition Paper* at 7.

[178] *Id.*

[179] *See* BSPA Comments 4; USTelecom Comments at 51-53; Mercatus Comments at 39-40.

[180] 47 U.S.C. § 521(2); *Id.*

sufficient to undermine the business plan for profitable entry in a given community, thereby undercutting the possibility of competition.[181]

50. ***Benefits of Cable Competition.*** We further agree with new entrants that reform of the operation of the franchise process is necessary and appropriate to achieve increased video competition and broadband deployment.[182] The record demonstrates that new cable competition reduces rates far more than competition from DBS. Specifically, the presence of a second cable operator in a market results in rates approximately 15 percent lower than in areas without competition – about $5 per month.[183] The magnitude of the rate decreases caused by wireline cable competition is corroborated by the rates charged in Keller, Texas, where the price for Verizon's "Everything" package is 13 percent below that of the incumbent cable operator, and in Pinellas County, Florida, where Knology is the overbuilder and the incumbent cable operator's rates are $10-15 lower than in neighboring areas where it faces no competition.[184]

51. We also conclude that broadband deployment and video entry are "inextricably linked"[185] and that, because the current operation of the franchising process often presents an unreasonable barrier to entry for the provision of video services, it necessarily hampers deployment of broadband services.[186] The record demonstrates that broadband deployment is not profitable without the ability to compete with the bundled services that cable companies provide.[187] As the Phoenix Center explains, "the more potential revenues that the network can generate in a household, the more likely it is the network will be

[181] Mercatus Comments at 46.

[182] Verizon Reply at 5-8. *See also* DOJ *Ex Parte* at 1, 3.

[183] FTTH Council Comments at 13. *See also* U.S. General Accountability Office, *Subscriber Rates and Competition in the Cable Television Industry*, GAO-04-262T (Mar. 2004) ("[S]ubscribers in areas with a wire-based competitor had monthly cable rates about $5 lower, on average, than subscribers in similar areas without a wire-based competitor. Our interviews with cable operators also revealed that these companies generally lower rates and/or improve customer service where a wire-based competitor is present."); U.S. General Accounting Office, GAO-04-8, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, Report to the Chairman, Committee on Commerce, Science and Transportation, U.S. Senate (2003) ("*2003 GAO Report*") at 3 (noting that cable rates are about 15 percent lower in markets where wireline competition is present), and at 10 (estimating that with an average monthly cable rate of approximately $34 that year, subscribers in areas with a wire-based competitor had monthly cable rates about $5 lower, on average, than subscribers in areas without such a competitor); U.S. General Accounting Office, GAO-03-130, *Issues in Providing Cable and Satellite Television Services*, Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate (2002) ("*2002 GAO Report*") at 9 (noting that in franchise areas with a second cable provider, cable prices are approximately 17 percent lower than in comparable areas without a second cable provider). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, FCC 06-11, at para. 41 (rel. Mar. 3, 2006) and 2005 Cable Price Survey at paras. 2, 14 (noting that cable prices are 17 percent lower and decrease substantially when wireline cable competition is present).

[184] FTTH Council Comments at 15-16, including chart and declaration.

[185] AT&T Comments at 12. *See also* BSPA Comments at 7; Freedomworks Comments at 15; Mercatus Center Comments at 34-35.

[186] Technology and Democracy Project Comments at 4.

[187] AT&T Comments at 12. The Government Accountability Office reached this same conclusion in its review of the video service market. *See Issues in Providing Cable and Satellite Television Services*, GAO 03-130 at 2 (2002).

built to that household."[188] DOJ's comments underscore that additional video competition will likely speed deployment of advanced broadband services to consumers.[189] Thus, although LFAs only oversee the provision of wireline-based video services, their regulatory actions can directly affect the provision of voice and data services, not just cable.[190] We find reasonable AT&T's assertion that carriers will not invest billions of dollars in network upgrades unless they are confident that LFAs will grant permission to offer video services quickly and without unreasonable difficulty.[191]

52. In sum, the current operation of the franchising process deters entry and thereby denies consumers choices.[192] Delays in the franchising process also hamper accelerated broadband deployment and investment in broadband facilities in direct contravention of the goals of Section 706,[193] the President's competitive broadband objectives,[194] and our established broadband goals.[195] In addition, the economic effects of franchising delays can trickle down to manufacturing companies, which in some cases have lost business because potential new entrants would not purchase equipment without certainties that they could deploy their services.[196] We discuss below our authority to address these problems.

B. The Commission Has Authority to Adopt Rules to Implement Section 621(a)(1)

53. In the *Local Franchising NPRM*, the Commission tentatively concluded that it has the authority to adopt rules implementing Title VI of the Act,[197] including Section 621(a)(1).[198] The Commission sought comment on whether it has the authority to adopt rules or whether it is limited to providing guidance.[199] Based on the record and governing legal principles, we affirm this tentative conclusion and find that the Commission has the authority to adopt rules to implement Title VI and, more specifically, Section 621(a)(1).

54. Congress delegated to the Commission the task of administering the Communications 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

[188] Letter from Lawrence Spiwak, President, Phoenix Ctr. for Advanced Legal and Econ. Pub. Policy Studies, to Marlene Dortch, Secretary, Federal Communications Commission, at Att., *Phoenix Center Policy Paper Number 23: The Impact of Video Service Regulation on the Construction of Broadband Networks to Low-Income Households*, pg 23 (March 13, 2006) ("*Phoenix Center Redlining Paper*").

[189] DOJ *Ex Parte* at 3-4.

[190] FTTH Council Comments at 4.

[191] AT&T Comments at 15.

[192] DOJ *Ex Parte* at 7-8.

[193] Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

[194] *See* The White House, *A New Generation of American Innovation*, 11-12 (April 2004), *available at* http://www.whitehouse.gov/infocus/technology/economic_policy200404/innovation.pdf.

[195] *See* Federal Communications Commission, *Strategic Plan 2006-2011* at 3 (2005).

[196] AT&T Reply at 9; Alcatel Comments at 1; Letter from Danielle Jafari, Director and Legal Counsel of Government Affairs, Telecommunications Industry Association, to Marlene Dortch, Secretary, Federal Communications Commission (March 9, 2006).

[197] *Local Franchising NPRM*, 20 FCC Rcd at 18589.

[198] 47 U.S.C. § 541(a)(1).

[199] *Local Franchising NPRM*, 20 FCC Rcd at 18589.

telephone, telegraph, cable, or radio.'"[200] 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."[201] 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."[202] "[T]he grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.'"[203] This 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…."[204] Section 4(i) states that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[205]

55. Section 2 of the Communications Act grants the Commission explicit jurisdiction over "cable services."[206] Moreover, as we explained in the *Local Franchising NPRM,* Congress specifically charged the Commission with the administration of the Cable Act, including Section 621.[207] In addition, federal courts have consistently upheld the Commission's authority in this area.[208]

56. Although several commenters disagreed with our tentative conclusion, none has persuaded us that the Commission lacks the authority to adopt rules to implement Section 621(a)(1). Incumbent cable operators and franchise authorities argue that the judicial review provisions in Sections 621(a)(1) and 635[209] indicate that Congress gave the courts exclusive jurisdiction to interpret and enforce

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[200] *United States v. Southwestern Cable Co*., 392 U.S. 157, 167-68 (1968) (quotation omitted).

[201] *United Telegraph Workers, AFL-CIO v. FCC*, 436 F.2d 920, 923 (D.C. Cir. 1970) (citations and quotations omitted).

[202] 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.").

[203] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999).

[204] *See also* 47 U.S.C. § 151 (the Commission "shall execute and enforce the provisions of this Act").

[205] 47 U.S.C. § 154(i).

[206] 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.").

[207] *Local Franchising NPRM*, 20 FCC Rcd at 18589.

[208] *See City of Chicago v. FCC,* 199 F.3d 424 (7th Cir. 1999) (finding that 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); *Nat'l 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)).

[209] 47 U.S.C. § 541(a)(1) ("[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 sets forth the specific procedures for such judicial proceedings. 47 U.S.C. § 555.

Section 621(a)(1), including authority to decide what constitutes an unreasonable refusal to award a competitive cable franchise.[210] We find, however, that this argument reads far too much into the judicial review provisions. The mere existence of a judicial review provision in the Communications Act does not, by itself, strip the Commission of its otherwise undeniable rulemaking authority.[211] As a general matter, the fact that Congress provides a mechanism for judicial review to remedy a violation of a statutory provision does not deprive an agency of the authority to issue rules interpreting that statutory provision. Here, nothing in the statutory language or the legislative history suggests that by providing a judicial remedy, Congress intended to divest the Commission of the authority to adopt and enforce rules implementing Section 621.[212] In light of the Commission's broad rulemaking authority under Section 201 and other provisions in the Act, the absence of a specific grant of rulemaking authority in Section 621 is "not peculiar."[213] Other provisions in the Act demonstrate that when Congress intended to grant exclusive jurisdiction, it said so in the legislation.[214] Here, however, neither Section 621(a)(1) nor Section 635 includes an exclusivity provision, and we decline to read one into either provision.

57. In addition, we note that the judicial review provisions at issue here on their face apply only to a final decision by the franchising authority.[215] They do not provide for review of unreasonable refusals to award an additional franchise by withholding a final decision or insisting on unreasonable terms that an applicant properly refuses to accept. Nor do the judicial review provisions say anything about the broader range of practices governed by Section 621.[216]

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[210] *See* NCTA Reply, at 11-13 (given the courts have concurrent jurisdiction to review many provisions of Title VI, Section 635(a) only has meaning if it is read to grant exclusive jurisdiction to the courts); Comcast Comments at 27-28 (Congress provided no role for the Commission in the franchising process); Comcast Reply at 27-28 (621(a)(1)'s "unreasonably refuse" language and court review are inextricably linked and thus enforcement authority over the franchising approval process lies with the courts); NATOA Comments at 7-8 (same).

[211] *See ACLU v. Texas*, 823 F.2d 1554, 1574 (D.C. Cir 1987) (recognizing that despite a reference to "court action" in Section 622(d), in the absence of more explicit guidance from Congress, the Commission has concurrent jurisdiction to take enforcement action with respect to franchise fee disputes).

[212] *See* BellSouth Reply at 35; USTelecom Reply at 14-16.

[213] *AT&T v. Iowa Utilities Board,* 525 U.S. 366, 385 (1999). In *Iowa Utilities Board*, the Supreme Court reviewed Commission rules implementing provisions of the Telecommunications Act of 1996. In particular, states challenged Commission rules implementing Section 252(c)(2), which provides, "a State commission shall … establish any rates for interconnection, services, or network elements." 47 U.S.C. § 252(c)(2). Although this and other provisions in the 1996 Act entrusted the states with certain tasks, the Supreme Court held that "these assignments … do not logically preclude the Commission's issuance of rules to guide the state-commission judgments." *Iowa Utilities Board*, 525 U.S. at 385. The same reasoning applies to the judicial review provisions in Sections 621(a)(1) and 635.

[214] *See, e.g.*, 47 U.S.C. § 255(f) ("The Commission shall have exclusive jurisdiction with respect to any complaint under this section."). We do not find persuasive commenters' argument that the only way to give Section 635(a) any meaning is to construe it as giving courts exclusive jurisdiction with regard to the three Title VI provisions enumerated in Section 635(a), *i.e.,* Sections 621(a)(1), 625, and 626. *See* NATOA Comments at 9. None of the cases cited by commenters support this proposition. Rather, they suggest that in the absence of an exclusivity provision in the statute, the Commission and courts share jurisdiction. *See, e.g.,* NATOA Comments at 9 (citing *ACLU v. FCC,* 823 F.2d 1554, 1573-75 (D.C. Cir. 1987)).

[215] 47 U.S.C. § 541(a)(1) ("Any 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") (emphasis added); 47 U.S.C. §555(a) ("Any cable operator adversely affected by any *final determination* made by a franchising authority under section 621(a)(1)" may commence an action in federal district court or State court) (emphasis added).

[216] *See* USTelecom Reply at 14.

58. We also reject the argument by some incumbent cable operators and franchise authorities that Section 621(a)(1) is unambiguous and contains no gaps in the statutory language that would give the Commission authority to regulate the franchising process.[217] We strongly disagree. Congress did not define the term "unreasonably refuse," and it is far from self-explanatory. The United States Court of Appeals for the District of Columbia Circuit has held 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."[218] We therefore find that Section 621(a)(1)'s requirement that an LFA "may not unreasonably refuse to award an additional competitive franchise" creates ambiguity that the Commission has the authority to resolve.[219] The possibility that a court, in reviewing a particular matter, may determine whether an LFA "unreasonably" denied a second franchise does not displace the Commission's authority to adopt rules generally interpreting what constitutes an "unreasonable refusal" under Section 621(a)(1).[220]

59. Some incumbent cable operators and franchise authorities argue that Section 621(a)(1) imposes no general duty of reasonableness on the LFA in connection with procedures for *awarding* a competitive franchise.[221] According to these commenters, the "unreasonably refuse to award" language in the first sentence in Section 621(a)(1) must be read in conjunction with the second sentence, which relates to the *denial* of a competitive franchise application.[222] Based on this, commenters claim that "unreasonably refuse to award" means "unreasonably *deny*" and, thus, Section 621(a)(1) is not applicable before a final decision is rendered.[223] We disagree. By concluding that the language "unreasonably refuse to award" means the same thing as "unreasonably deny," commenters violate the long-settled principle of statutory construction that each word in a statutory scheme must be given meaning.[224] We find that the better reading of the phrase "unreasonably refuse to award" is that Congress intended to cover LFA conduct beyond ultimate denials by final decision, such as situations where an LFA has unreasonably refused to award an additional franchise by withholding a final decision or by insisting on unreasonable terms that an applicant refuses to accept.[225] While the judicial review provisions in Sections

[217] *See* Comcast Reply at 27.

[218] *Capital Network System, Inc. v. FCC,* 28 F.3d 201, 204 (D.C. Cir. 1994) ("Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them.").

[219] 47 U.S.C. § 541(a)(1) (emphasis added).

[220] *See NCTA v. Brand X Internet Services,* 545 U.S. 967, --, 125 S. Ct. 2688, 2700-02 (2005) (where statute is ambiguous, and implementing agency's construction is reasonable, *Chevron* requires federal court to accept agency's construction of statute, even if agency's reading differs from prior judicial construction).

[221] *See* NCTA Comments at 28-29; Comcast Reply at 31.

[222] *See* NCTA Comments at 29; Comcast Reply at 32.

[223] *See* NATOA Comments at 30-31; NCTA Comments at 28-29; Burnsville/Eagan Comments at 31-32; Comcast Reply at 32-33.

[224] *See Bailey v. United States,* 516 U.S. 137, 143-45 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").

[225] *See, e.g., Tribune Co. v. FCC,* 133 F.3d 61, 66 (D.C. Cir. 1998) (imposing an "intolerable" condition on the grant of a license application may be deemed a *de facto* denial of that license for purposes of the appeal provisions under § 402(b) of the Act, citing *Mobile Communications Corp. of America v. FCC,* 77 F.3d 1399 (D.C. Cir. 1996)). *See also* DOJ *Ex Parte* at 7 (stating that unnecessary delays, demands for goods and services unrelated to the provision of cable services, and imposition of build-out requirements are tantamount to a "refusal" to award an additional competitive franchise).

621(a)(1) and 635 refer to a "final decision" or "final determination,"[226] the Commission's rulemaking authority under Section 621 is not constrained in the same manner. Instead, the Commission has the authority to address what constitutes an unreasonable refusal to award a franchise, and as stated above, a local franchising authority may unreasonably refuse to award a franchise through other routes than issuing a final decision or determination denying a franchise application. For all of these reasons, we conclude that the Commission may exercise its statutory authority to establish federal standards identifying those LFA-imposed terms and conditions that would violate Section 621(a)(1) of the Communications Act.[227]

60. Incumbent cable operators and local franchise authorities also maintain that the legislative history of Section 621(a)(1) demonstrates that Congress reserved to LFAs the authority to determine what constitutes "reasonable" grounds for franchise denials, with oversight by the courts, and left no authority under Section 621(a)(1) for the Commission to issue rules or guidelines governing the franchise approval process.[228] Commenters point to the Conference Committee Report on the 1992 Amendments,[229] which adopted the Senate version of Section 621,[230] rather than the House version, which "contained five examples of circumstances under which it is reasonable for a franchising authority to deny a franchise."[231] We find commenters' reliance on the legislative history to be misplaced. While the House may have initially considered adopting a categorical approach for determining what would constitute a "reasonable *denial*," Congress ultimately decided to forgo that approach and prohibit franchising authorities from unreasonably refusing to *award* an additional competitive franchise.[232] To be sure, commenters are correct to point out that Congress chose not to define in the Act the meaning of the phrase "unreasonably refuse to award." However, commenters' assertion that Congress therefore intended for this gap in the statute to be filled in by only LFAs and courts lacks any basis in law or logic. Rather, we believe that it is far more reasonable to assume, consistent with settled principles of administrative law, that Congress intended that the Commission, which is charged by Congress with the administration of Title VI,[233] to have the authority to do so. There is nothing in the statute or the

[226] 47 U.S.C. §§ 541(a), 555. *See also Puget Sound Energy, Inc. v. U.S.,* 310 F.3d 613, 624-25 (9th Cir. 2002) (for purposes of determining when power administration's rate determination becomes a "final action" under statutory judicial review provision, court will turn for guidance to general doctrine of finality in administrative law, which "is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury").

[227] *See* Qwest Reply at 10-11.

[228] *See* NCTA Comments at 22-23; Florida Municipalities Comments at 9-10.

[229] H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-1260.

[230] S. REP. NO. 102-92, at 185 (1991) (explaining that "[i]t shall not be considered unreasonable for purposes of this provision for local franchising authorities to deny the application of a potential competitor if it is technically infeasible. However, the Committee does not intend technical infeasibility to be the only justification for denying an additional franchise").

[231] H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-1260 (listing five examples of reasonable denials identified in the House amendment to include: (1) technical infeasibility; (2) failure of the applicant to assure that it will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; (3) failure of the applicant to assure that it will provide service throughout the entire franchise area within a reasonable period of time; (4) the award would interfere with the ability of the franchising authority to deny renewal of a franchise; and (5) failure to demonstrate financial, technical, or legal qualifications to provide cable service."); H.R. REP. NO. 102-628, at 90 (1992). *See* NCTA Comments at 22; Florida Municipalities Comments at 9-10.

[232] H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-1260.

[233] *See City of Chicago v. FCC,* 199 F.3d at 428. *See also AT&T Corp. v. Iowa Utilities Board,* 525 U.S. at 377-380.

legislative history to suggest that Congress intended to displace the Commission's explicit authority to interpret and enforce provisions in Title VI, including Section 621(a)(1).

61. The pro-competitive rules and guidance we adopt in this *Order* are consistent with Congressional intent. Section 601 states that Title VI is designed to "promote competition in cable communications."[234] In a report to Congress prepared pursuant to the 1984 Cable Act, the Commission concluded that in order "[t]o encourage more robust competition in the local video marketplace, the Congress should … forbid local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service."[235] In response, Congress revised Section 621(a)(1) to prohibit a franchising authority from unreasonably refusing to award an additional competitive franchise.[236] The regulations set forth herein give force to that restriction and vindicate the national policy goal of promoting competition in the video marketplace.

62. Our authority to adopt rules implementing Section 621(a)(1) is further supported by Section 706 of the Telecommunications Act of 1996, which directs the Commission to encourage broadband deployment by utilizing "measures that promote competition … or other regulating methods that remove barriers to infrastructure investment."[237] The D.C. Circuit has found that the Commission has the authority to consider the goals of Section 706 when formulating regulations under the Act.[238] The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.[239] Thus, if the franchising process were allowed to slow competition in the video service market, that would decrease broadband infrastructure investment, which would not only affect video but other broadband services as well.[240] As the DOJ points out, potential gains from competition, such as

[234] 47 U.S.C. § 521(6).

[235] *See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service,* 5 FCC Rcd 4962, 4974 (1990).

[236] 47 U.S.C. § 541(a)(1). *See also* H.R. REP. NO. 102-628, at 47 (1992) (noting the Commission's recommendation that, in order to encourage competition, Congress should prevent LFAs from unreasonably denying a franchise to potential competitors); *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442, 7469 (1994) (recognizing that "Congress incorporated the Commission's recommendation in the 1992 Cable Act by amending § 621(a)(1) of the Communications Act…"). The legislative history explained that the purpose of this abridgement of local government authority was to promote greater cable competition. S. REP. NO. 102-92, at 47 (1991) (the prohibition on local franchising authorities from unreasonably refusing to grant second franchises is based on evidence in the record that there are benefits from competition between two cable systems and the Committee's belief that LFAs should be encouraged to award second franchises).

[237] Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

[238] *See USTA v. FCC*, 359 F.3d 554, 580, 583 (D.C. Cir. 2004); *see also* USTelecom Comments at 15; TIA Comments at 16.

[239] *See* Alcatel Comments at 5-6; USTelecom Comments at 6 (broadband growth is tied to bundled services; firm's perceived need to compete for "triple play" customers is the driving force for broadband investment); AT&T Comments at 39-40 (the local franchising process discourages broadband infrastructure investment that supports video along with other broadband services).

[240] *See* Ad Hoc Telcom Manufacturer Coalition Comments at 1-3 (the franchising process threatens to slow down incumbent LECs' capital expenditures, thereby slowing competition in the video service market and reducing output throughout the high-tech manufacturing industry); AT&T Reply at 31-32 (the lack of clear regulatory guidance is chilling investment because new entrants cannot gauge the cost of entry); BellSouth Comments at 20-22 (the current franchising process impedes the deployment of BellSouth's broadband network).

expedited broadband deployment, are more likely to be realized without imposed restrictions or conditions on entry in the franchising process.[241]

63. We reject the argument by incumbent cable operators and LFAs that any rules adopted under Section 621(a)(1) could adversely affect the franchising process.[242] In particular, LFAs contend that cable service requirements must vary from jurisdiction to jurisdiction because cable franchises need to be "tailored to the needs and interests of the local community."[243] The Communications Act preserves a role for local jurisdictions in the franchise process. We do not believe that the rules we adopt today will hamper the franchising process. While local franchising authorities and potential new entrants have opposing viewpoints about the reasonableness of certain terms,[244] we received comments from both groups that agree that Commission guidance concerning factors that are "reasonable" will help to expedite the franchising process.[245] Therefore, we anticipate that our implementation of Section 621(a)(1) will aid new entrants, incumbent cable operators, and LFAs in understanding the bounds of local authority in considering competitive franchise applications.

64. In sum, we conclude that we have clear authority to interpret and implement the Cable Act, including the ambiguous phrase "unreasonably refuse to award" in Section 621(a)(1), to further the congressional imperatives to promote competition and broadband deployment. As discussed above, this authority is reinforced by Section 4(i) of the Communications Act, which gives us broad power to perform acts necessary to execute our functions, and the mandate in Section 706 of the Telecommunications Act of 1996 that we encourage broadband deployment through measures that promote competition.[246] We adopt the rules and regulations in this *Order* pursuant to that authority. We find that Section 621(a)(1) prohibits not only an LFA's ultimate unreasonable denial of a competitive franchise application, but also LFA procedures and conduct that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise, whether by (1) creating unreasonable delays in the process, or (2) imposing unreasonable regulatory roadblocks, such that they effectively constitute an "unreasonable refusal to award an additional competitive franchise" within the meaning of Section 621(a)(1).[247]

C. Steps to Ensure that the Local Franchising Process Does Not Unreasonably Interfere with Competitive Cable Entry and Rapid Broadband Deployment

65. Commenters in this proceeding identified several specific issues regarding problems with the current operation of the franchising process. These include: (1) failure by LFAs to grant or deny franchises within reasonable time frames; (2) LFA requirements that a facilities-based new entrant build out its cable facilities beyond a reasonable service area; (3) certain LFA-mandated costs, fees, and other compensation and whether they must be counted toward the statutory 5 percent cap on franchise fees; (4)

[241] DOJ *Ex Parte* at 4.

[242] *See, e.g.*, Anne Arundel County *et al.* Comments at 15 (federal regulation would not allow each locality to tailor franchise terms to its specific needs); NCTA Comments at 23 (universal rules and standards cannot be tailored well enough to define what is reasonable; reasonableness must be reviewed on a case-by-case basis).

[243] NATOA Comments at 27 (quoting Section 601(2) of the Communications Act, 47 U.S.C. § 521(2)).

[244] *See, e.g.*, NATOA Reply at 43; Verizon Comments at 76-77 (disagreeing about the reasonableness of level playing fields).

[245] *See* Manatee County Comments at 15; Verizon Reply at 35.

[246] 47 U.S.C. § 154(i), Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

[247] *Id.*

new entrants' obligations to provide support mandated by LFAs for PEG and I-Nets; and (5) facilities-based new entrants' obligations to comply with local consumer protection and customer service standards when the same facilities are used to provide other regulated services, such as telephony. We discuss each measure below.

1. Maximum Time Frame for Franchise Negotiations

66. As explained above,[248] the record demonstrates that, although the average time that elapses between application and grant of a franchise varies from locality to locality, unreasonable delays in the franchising process are commonplace and have hindered, and in some cases thwarted entirely, attempts to deploy competitive video services. The record is replete with examples of unreasonable delays in the franchising process,[249] which can indefinitely delay competitive entry and leave an applicant without recourse in violation of Section 621(a)(1)'s prohibition on unreasonable refusals to award a competitive franchise.[250]

67. We find that unreasonable delays in the franchising process deprive consumers of competitive video services, hamper accelerated broadband deployment, and can result in unreasonable refusals to award competitive franchises. Thus, it is necessary to establish reasonable time limits for LFAs to render a decision on a competitive applicant's franchise application.[251] We define below the boundaries of a reasonable time period in which an LFA must render a decision, and we establish a remedy for applicants that do not receive a decision within the applicable time frame. We establish a maximum time frame of 90 days for entities with existing authority to access public rights-of-way, and six months for entities that do not have authority to access public rights-of-way. The deadline will be calculated from the date that the applicant files an application or other writing that includes the information described below. Failure of an LFA to act within the allotted time constitutes an unreasonable refusal to award the franchise under Section 621(a)(1), and the LFA at that time is deemed to have granted the entity's application on an interim basis, pursuant to which the applicant may begin providing service. Thereafter, the LFA and applicant may continue to negotiate the terms of the franchise, consistent with the guidance and rulings in this *Order*.

a. Time Limit

68. The record shows that the franchising process in some localities can drag on for years. We are concerned that without a defined time limit, the extended delays will continue, depriving consumers of cable competition and applicants of franchises. We thus consider the appropriate length of time that should be afforded LFAs in reaching a final decision on a competitive franchise application. Commenters suggest a wide range of time frames that may be reasonable for an LFA's consideration of a competitive franchise application. TIA proposes that we adopt the time limit used in the Texas franchising legislation, which would allow a new entrant to obtain a franchise within 17 days of submitting an application.[252] Other commenters propose time limits ranging from 30 days to six

[248] *See supra* paras. 14-17, 22.

[249] *See Local Franchising NPRM,* 20 FCC Rcd at 18590 (quoting 47 U.S.C. § 541(a)(1)), FTTH Council Comments at 27, South Slope Comments at 13, Verizon Reply at 34-35.

[250] *See supra* paras. 22-30.

[251] 47 U.S.C. §§ 541(a)(1), 555.

[252] *See* TIA Comments at 8, 18.

months.[253] While NATOA in its comments opposes any time limit,[254] in February 2006 a NATOA representative told the Commission that the six-month time limit that California law imposes is reasonable.[255] Some commenters have suggested that a franchise applicant that holds an existing authorization to access rights-of-way (*e.g.*, a LEC) should be subject to a shorter time frame than other applicants. These commenters reason that deployment of video services requires an upgrade to existing facilities in the rights-of-way rather than construction of new facilities, and such applicants generally have demonstrated their fitness as a provider of communications services.[256]

69. In certain states, an SFA is responsible for all franchising decisions (*e.g.*, Hawaii, Connecticut, Vermont, Texas, Indiana, Kansas, South Carolina, and beginning January 1, 2007, California and North Carolina), and the majority of these states have established time frames within which those SFAs must make franchising decisions.[257] We are mindful, however, that states in which an LFA is the franchising authority, the LFA may be a small municipal entity with extremely limited resources. [258] Thus, it may not always be feasible for an LFA to carry out legitimate local policy objectives permitted by the Act and appropriate state or local law within an extremely short time frame. We therefore seek to establish a time limit that balances the reasonable needs of the LFA with the needs of the public for greater video service competition and broadband deployment. As set out in detail below, we believe that it is appropriate to provide rules to guide LFAs that retain ultimate decision-making power over franchise decisions.

70. As a preliminary matter, we find that a franchise applicant that holds an existing authorization to access rights-of-way should be subject to a shorter time frame for review than other applicants. First, one of the primary justifications for cable franchising is the locality's need to regulate and receive compensation for the use of public rights-of-way.[259] In considering an application for a cable franchise by an entity that already has rights-of-way access, however, an LFA need not devote substantial attention to issues of rights-of-way management.[260] Second, in obtaining a certificate for public

[253] *See* AT&T Comments at 77, Cavalier Telephone Comments at 4 (suggesting a 30-day time limit); BellSouth Comments at 36, NTCA Comments at 9, OPASTCO Reply at 4 (suggesting a 90-day time limit); Consumers for Cable Choice Comments at 9, Verizon Comments at 38, FTTH Council Comments at 60, State of Hawaii Reply at 3 (suggesting a 120-day time limit); Alliance for Public Technology Comments at 3 (suggesting a 180-day time limit); Qwest Comments at 26-27.

[254] NATOA Comments at 36-37, NATOA Reply at 21-23.

[255] Transcript of FCC Agenda Meeting and Panel Discussion at 38 (Feb. 10, 2006).

[256] *See Local Franchising NPRM*, 20 FCC Rcd at 18591.

[257] *See* HAW. REV. STAT. § 440G-4 (2006); CONN. GEN. STAT. ANN. § 16-331 (West 2006); VT. STAT. ANN. tit. 30, § 502 (2006); TEX. UTIL. CODE ANN. § 66.003 (West 2006); IND. CODE § 8-1-34-16 (2006); 2006 KAN. SESS. LAWS Ch. 93 (West 2006); S.C. CODE ANN. § 58-12-05 (2006); N.C. GEN STAT. ANN. § 66-351; CAL. PUB. UTIL. CODE § 401, et seq. We note that our *Order* does not affect these franchising decisions.

[258] We note that a number of other states in addition to Texas have adopted or are considering statewide franchising in order to speed competitive entry. *See, e.g.*, IND. CODE § 8-1-34-16 (2006); VA. CODE ANN. § 15.2-2108.1:1 et seq. (2006); SB-816, 2006 Sess. (Mo. 2006). Nothing in our discussion here is intended to preempt the actions of any states. The time limit we adopt herein is a ceiling beyond which LFA delay in processing a franchise application becomes unreasonable. To the extent that states and/or municipalities wish to adopt shorter time limits, they remain free to do so.

[259] NATOA Comments at 38-39; Ada Township Comments at 11-14; TCCFUI Reply Comments at 18.

[260] Recognizing this distinction, some states have created streamlined franchising procedures specifically tailored to entities with existing access to public rights-of-way. *See, e.g.*, VIRGINIA CODE ANN. § 15.2-2108.1:1 et seq.); HF-2647, 2006 Sess. (Iowa 2006) (this proposed legislation would grant franchises to all telephone providers authorized (continued…)

convenience and necessity from a state, a facilities-based provider generally has demonstrated its legal, technical, and financial fitness to be a provider of telecommunications services. Thus, an LFA need not spend a significant amount of time considering the fitness of such applicants to access public rights-of-way. NATOA and its members concede that the authority to occupy the right-of-way has an effect on the review of the financial, technical, and legal merits of the application, and eases right-of-way management burdens.[261] We thus find that a time limit is particularly appropriate for an applicant that already possesses authority to deploy telecommunications infrastructure in the public rights-of-way.[262] We further agree with AT&T that entities with existing authority to access rights-of-way should be entitled to an expedited process, and that lengthy consideration of franchise applications made by such entities would be unreasonable.[263] Specifically, we find that 90 days provides LFAs ample time to review and negotiate a franchise agreement with applicants that have access to rights-of-way.[264]

71. Based on our examination of the record, we believe that a time limit of 90 days for those applicants that have access to rights-of-way strikes the appropriate balance between the goals of facilitating competitive entry into the video marketplace and ensuring that franchising authorities have sufficient time to fulfill their responsibilities. In this vein, we note that 90 days is a considerably longer time frame than that suggested by some commenters, such as TIA.[265] Additionally, we recognize that the Communications Act gives an LFA 120 days to make a final decision on a cable operator's request to modify a franchise.[266] We believe that the record supports an even shorter time here because the costs associated with delay are much greater with respect to entry. When an incumbent cable franchisee requests a modification, consumers are not deprived of service while an LFA deliberates. Here, delay by an individual LFA deprives consumers of the benefits of cable competition.[267] An LFA should be able to

(Continued from previous page)
to use the right-of-way without any application or negotiation requirement). *See also* South Slope Comments at 11 (duplicative local franchising requirements imposed on a competitor with existing authority to occupy the rights-of-way are unjustified and constitute an unreasonable barrier to competitive video entry).

[261] *See* NATOA Comments at 38-39. Although NATOA contends that an applicant's authority to occupy the rights-of-way would not affect the length of the negotiations regarding PEG requirements, franchise fees, or build-out, we clarify the law concerning those issues below to minimize further disputes and delays.

[262] Ad Hoc Telecom Manufacturers Comments at 6.

[263] AT&T argues that an entity authorized to occupy a right-of-way should simply complete a short-form application and agree to general cable franchise requirements such as franchise fees and PEG capacity, and that the right-of-way holder should receive a franchise within one month of filing the short-form application. *See* AT&T Comments at 74.

[264] *See* BellSouth Comments at 36; Ada Township, *et al*. Comments at 23; LMC Comments at 18; Hawaiian Telecom Comments at 7-8 (recommending a time frame of 90 days from the filing of the application). Several state legislators agree that an applicant's existing authority to occupy the right-of-way lightens the administrative load, and enacted or proposed similar measures to streamline the franchising process for entities that hold the authority. *See* VIRGINIA CODE ANN. § 15.2-2108.21; HF-2647, 2006 Sess. (Iowa 2006) (this proposed legislation would grant franchises to all telephone providers authorized to use the right-of-way without any application or negotiation requirement). We assume generally that state and local regulators are sufficiently empowered to deal with any public safety or aesthetic issues that may arise by virtue of deployment of new video-related equipment by applicants already authorized to use the rights-of way.

[265] *See* TIA Comments at 8-9 (a time frame of 17 business days, as set forth in the Texas statute, "provides ample time to negotiate an agreement reflecting the requirements of Section 621"); AT&T Comments at 75, 78-79. *See also supra* paras. 17, 27.

[266] *See* 47 U.S.C. § 545.

[267] Verizon Comments at 36-37.

negotiate a franchise with a familiar applicant that is already authorized to occupy the right-of-way in less than 120 days. The list of legitimate issues to be negotiated is short,[268] and we narrow those issues considerably in this *Order*. We therefore impose a deadline of 90 days for an LFA to reach a final decision on a competitive franchise application submitted by those applicants authorized to occupy rights-of-way within the franchise area.

72. For other applicants, we believe that six months affords a reasonable amount of time to negotiate with an entity that is not already authorized to occupy the right-of-way, as an LFA will need to evaluate the entity's legal, financial, and technical capabilities in addition to generally considering the applicant's fitness to be a communications provider over the rights-of-way. Commenters have presented substantial evidence that six months provides LFAs sufficient time to review an applicant's proposal, negotiate acceptable terms, and award or deny a competitive franchise.[269] We are persuaded by the record that a six-month period will allow sufficient time for review. Given that LFAs must act on modification applications within the 120-day limit set by the Communications Act, we believe affording an additional two months – *i.e.,* a six-month review period – will provide LFAs ample time to conduct negotiations with an entity new to the franchise area.

73. Failure of an LFA to act within these time frames is unreasonable and constitutes a refusal to award a competitive franchise. Consistent with other time limits that the Communications Act and our rules impose,[270] a franchising authority and a competitive applicant may extend these limits if both parties agree to an extension of time. We further note that an LFA may engage in franchise review activities that are not prohibited by the Communications Act or our rules, such as multiple levels of review or holding a public hearing,[271] provided that a final decision is made within the time period established under this *Order*.

b. Commencement of the Time Period for Negotiations

74. The record demonstrates that there is no universally accepted event that "starts the clock" for purposes of calculating the length of franchise negotiations between LFAs and new entrants.[272] Accordingly, we find it necessary to delineate the point at which such calculation should begin. Few commenters offer specific suggestions on what event should open the time period for franchise negotiations. Qwest contends that the period for negotiations should commence once an applicant files an application.[273] On the other hand, Verizon argues that the clock must start before an applicant files a formal application because significant negotiations often take place before a formal filing.[274] Specifically,

[268] Verizon Reply Comments at 43 n.69.

[269] *See* Cablevision Comments at 10-12; GMTC Comments at 3, 6-8; State of Hawaii Reply at 3; Mt. Hood Cable Regulatory Commission Comments at 20; NJBPU Comments at 5; Southwest Suburban Cable Commission Comments at 7. *See also* Fairfax County, Va. Comments at 4-7 (formal negotiations began April 1, 2005, franchise granted Oct. 1, 2005).

[270] *See, e.g.*, 47 U.S.C. § 537, 47 C.F.R. § 76.502(c).

[271] *See* Southwest Suburban Cable Commission Comments at 7.

[272] *See supra* paras. 14-17.

[273] *See* Qwest Reply at 2 (establish a requirement that an LFA "must act on a franchise application within six months of filing").

[274] *See* Verizon Reply at 37; Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene Dortch, Secretary, Federal Communications Commission at 1 (April 21, 2006).

the company advocates starting the clock when the applicant initiates negotiations with the LFA,[275] which could be documented informally between the applicant and the LFA or with a formal Commission filing for evidentiary purposes.

75. We will calculate the deadline from the date that the applicant first files certain requisite information in writing with the LFA. This filing must meet any applicable state or local requirements, including any state or local laws that specify the contents of a franchise application and payment of a reasonable application fee in jurisdictions where such fee is required.[276] This application, whether formal or informal, must at a minimum contain: (1) the applicant's name; (2) the names of the applicant's officers and directors; (3) the applicant's business address; (4) the name and contact information of the applicant's contact; (5) a description of the geographic area that the applicant proposes to serve; (6) the applicant's proposed PEG channel capacity and capital support; (7) the requested term of the agreement; (8) whether the applicant holds an existing authorization to access the community's public rights-of-way; and (9) the amount of the franchise fee the applicant agrees to pay (consistent with the Communications Act and the standards set forth herein). Any requirement the LFA imposes on the applicant to negotiate or engage in any regulatory or administrative processes before the applicant files the requisite information is *per se* unreasonable and preempted by this *Order*. Such a requirement would delay competitive entry by undermining the efficacy of the time limits adopted in this *Order* and would not serve any legitimate purpose. At their discretion, applicants may choose to engage in informal negotiations before filing an application. These informal negotiations do not apply to the deadline, however; we will calculate the deadline from the date that the applicant first files its application with an LFA. For purposes of any disputes that may arise, the applicant will have the burden of proving that it filed the requisite information or, where required, the application with the LFA, by producing either a receipt-stamped copy of the filing or a certified mail return receipt indicating receipt of the required documentation. We believe that adoption of a time limit with a specific starting point will ensure that the franchising process will not be unduly delayed by pre-filing requirements, will increase applicants' incentive to begin negotiating in earnest at an earlier stage of the process, and will encourage both LFAs and applicants to reach agreement within the specified time frame. We note that an LFA may toll the running of the 90-day or six-month time period if it has requested information from the franchise applicant and is waiting for such information. Once the information is received by the LFA, the time period would automatically begin to run again.

c. Remedy for Failure to Negotiate a Franchise Within the Time Limit

76. Finally, we consider what remedy or remedies may be appropriate in the event that an LFA and franchise applicant are unable to reach agreement within the 90-day or six-month time frame. Section 635 of the Communications Act provides a specific remedy for an applicant who believes that an LFA unreasonably denied its application containing the requisite information within the applicable time frame. Here, we establish a remedy in the event an LFA does not grant or deny a franchise application by the deadline. In selecting this remedy, we seek to provide a meaningful incentive for local franchising authorities to abide by the deadlines contained in this *Order* while at the same time maintaining LFAs' authority to manage rights-of-way, collect franchise fees, and address other legitimate franchise concerns.

77. In the event that an LFA fails to grant or deny an application by the deadline set by the Commission, Verizon urges the Commission to temporarily authorize the applicant to provide video

[275] *Id.*

[276] *See infra* paras. 99-104.

service.[277] In general, we agree with this proposed remedy. In order to encourage franchising authorities to reach a final decision on a competitive application within the applicable time frame set forth in this *Order*, a failure to abide by the Commission's deadline must bring with it meaningful consequences. Additionally, we do not believe that a sufficient remedy for an LFA's inaction on an application is the creation of a remedial process, such as arbitration, that will result in even further delay. We also decline to agree to NATOA's suggestion that an applicant should be awarded a franchise identical to that held by the incumbent cable operator. This suggestion is impractical for the same reasons that we find local level-playing-field requirements are preempted.[278] Therefore, if an LFA has not made a final decision within the time limits we adopt in this *Order*, the LFA will be deemed to have granted the applicant an interim franchise based on the terms proposed in the application. This interim franchise will remain in effect only until the LFA takes final action on the application. We believe this approach is preferable to having the Commission itself provide interim franchises to applicants because a "deemed grant" will begin the process of developing a working relationship between the competitive applicant and the franchising authority, which will be helpful in the event that a negotiated franchise is ultimately approved.

78. The Commission has authority to deem a franchise application "granted" on an interim basis. As noted above, the Commission has broad authority to adopt rules to implement Title VI and, specifically, Section 621(a)(1) of the Communications Act.[279] 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.'"[280] 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."[281] "[T]he grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.'"[282] Section 2 of the Communications Act grants the Commission explicit jurisdiction over "cable services."[283] Moreover, 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.[284]

79. The Commission has previously granted franchise applicants temporary authority to operate in local areas. In the early 1970s, the Commission required every cable operator to obtain a federal certificate of compliance from the Commission before it could "commence operations."[285] In effect, the Commission acted as a co-franchising authority – requiring both an FCC certificate and a local franchise (granted pursuant to detailed Commission guidance and oversight) prior to the provision of

[277] *See* Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene Dortch, Secretary, Federal Communications Commission at 1 (May 3, 2006).

[278] *See infra* para. 138. If new entrants were required to adopt the same franchises as incumbents, the new entrants would be forced to accept terms that violate Section 621(a)(1)'s prohibition on unreasonable refusals to grant franchises. *See* Mercatus Center at 39-40; Phoenix Center Competition Paper at 7.

[279] *See supra* Section III.B.

[280] *United States v. Southwestern Cable Co.,* 392 U.S. 157, 167-68 (1968) (citations omitted).

[281] 47 U.S.C. § 201(b). *See also* 47 U.S.C. §§ 151, 154(i), 303(r).

[282] *AT&T Corp. v. Iowa Utilites Board,* 525 U.S. 366, 378 (1999).

[283] 47 U.S.C. § 152.

[284] *See supra* note 208.

[285] *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, 36 F.C.C.2d 143, ¶ 178 (1972).

services.[286] As the Commission noted, "[a]lthough we have determined that local authorities ought to have the widest scope in franchising cable operators, *the final responsibility is ours*."[287] And the Commission granted interim franchises for cable services in areas where there was no other franchising authority.[288]

80. We note that the deemed grant approach is consistent with other federal regulations designed to address inaction on the part of a State decision maker.[289] In addition, this approach does not raise any special legal concerns about impinging on state or local authority. The Act plainly gives federal courts authority to review decisions made pursuant to Section 621(a)(1).[290] As the Supreme Court observed in *Iowa Utilities Board*, "This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. To be sure, the FCC's lines can be even more restrictive than those drawn by the courts – but it is hard to spark a passionate 'States' rights' debate over that detail."[291]

81. We anticipate that a deemed grant will be the exception rather than the rule because LFAs will generally comply with the Commission's rules and either accept or reject applications within the applicable time frame. However, in the rare instance that a local franchising authority unreasonably delays acting on an application and a deemed grant therefore occurs, we encourage the parties to continue to negotiate and attempt to reach a franchise agreement following expiration of the formal time limit. Each party will have a strong incentive to negotiate sincerely: LFAs will want to ensure that their constituents continue to receive the benefits of competition and cable providers will want to protect the investments they have made in deploying their systems. If the LFA ultimately acts to deny the franchise after the deadline, the applicant may appeal such denial pursuant to Section 635(a) of the Communications Act. If, on the other hand, the LFA ultimately grants the franchise, the applicant's operations will continue pursuant to the negotiated franchise, rather than the interim franchise.

2. Build-Out

82. As discussed above, build-out requirements in many cases may constitute unreasonable barriers to entry into the MVPD market for facilities-based competitors.[292] Accordingly, we limit LFAs' ability to impose certain build-out requirements pursuant to Section 621(a)(1).

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[286] The Commission ended the certificate requirement and ceded additional authority to state and local governments in the late 1970s, but only for pragmatic reasons. *See*, *e.g.*, Report and Order, 66 F.C.C.2d 380, ¶¶ 33, 37 (1977); Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 71 F.C.C.2d 569, ¶ 7 (1979) (withdrawing aspects of Commission franchising participation, but only "as long as the actions taken at the local level will not undermine important and overriding federal interests").

[287] *Teleprompter Cable Sys.*, 52 F.C.C.2d 1263, ¶ 9 (1975) (emphasis added).

[288] *See*, *e.g.*, *Cable Television Reconsideration Order*, 36 F.C.C.2d 326, ¶ 116 (1972); *Sun Valley Cable Communications (Sun City, Arizona)*, 39 F.C.C.2d 105 (1973); *Mahoning Valley Cablevision, Inc. (Liberty Township, Ohio)*, 39 F.C.C.2d 939 (1973).

[289] *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). *See also* 47 U.S.C. § 160(c) (petition for forbearance "deemed granted" if Commission fails to deny within the regulatory deadline).

[290] *See* 47 U.S.C. § 555.

[291] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

[292] *See* Section III.A., *supra,* at paras. 31-42.

a. Authority

83. Proponents of build-out requirements do not offer any persuasive legal argument that the Commission lacks authority to address this significant problem and conclude that certain build-out requirements for competitive entrants are unreasonable. Nothing in the Communications Act requires competitive franchise applicants to agree to build-out their networks in any particular fashion. Nevertheless, incumbent cable operators and LFAs contend that it is both lawful and appropriate, in all circumstances, to impose the same build-out requirements on competitive applicants that apply to incumbents.[293] We reject these arguments and find that Section 621(a)(1) prohibits LFAs from refusing to award a new franchise on the ground that the applicant will not agree to unreasonable build-out requirements.

84. The only provision in the Communications Act that even alludes to build-out is Section 621(a)(4)(A), which provides that "a 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."[294] Far from a grant of authority, however, Section 621(a)(4)(A) is actually a limitation on LFAs' authority. In circumstances when it is reasonable for LFAs to require cable operators to build out their networks in accordance with a specific plan, LFAs must give franchisees a reasonable period of time to comply with those requirements. However, Section 621(a)(4)(A) does not address the central question here: whether it may be unreasonable for LFAs to impose certain build-out requirements on competitive cable applicants. To answer that question, Section 621(a)(4)(A) must be read in conjunction with Section 621(a)(1)'s prohibition on unreasonable refusals to award competitive franchises, and in light of the Act's twin goals of promoting competition and broadband deployment.[295]

85. Our interpretation of Section 621(a)(4)(A) is consistent with relevant jurisprudence and the legislative history. The D.C. Circuit has squarely rejected the notion that Section 621(a)(4)(A) authorizes LFAs to impose universal build-out requirements on all cable providers. The court has held that Section 621(a)(4)(A) does not require that cable operators extend service "throughout the franchise area," but instead is a limit on franchising authorities that seek to impose such obligations.[296] That decision comports with the legislative history, which indicates that Congress explicitly rejected an approach that would have imposed affirmative build-out obligations on all cable providers. The House version of the bill provided that an LFA's "refusal to award a franchise shall not be unreasonable if, for example, such refusal is on the ground . . . of inadequate assurance that the cable operator will, within a reasonable period of time, provide universal service throughout the entire franchise area under the

[293] *See, e.g.*, Comcast Reply Comments at 34; NCTA Reply Comments at 25-26; NATOA Reply Comments at 24; Southeast Michigan Municipalities Reply Comments at 44-45.

[294] 47 U.S.C. § 541(a)(4)(A).

[295] *Americable Intern., Inc. v. Dep't of Navy*, 129 F.3d 1271, 1274-75 (D.C. Cir. 1997).

[296] *Id*. *See also Americable Intern., Inc. v. U.S. Dept. of Navy*, 931 F. Supp. 1, 2-3 (D.D.C. 1996) ("Americable argues first that the Cable Act establishes a 'requirement' that a franchise 'provide universal service throughout the franchise area.' Its authority for that position is 47 U.S.C. § 541(a)(4)(A), which requires that a franchising authority (here the Navy) allow an applicant's system 'a reasonable period of time to become capable of providing cable service to all households in the franchise area. . . .' That language contains no requirement of universal service, of course. Americable's strained argument is at odds with the purpose of the Cable Act, which is to promote competition, and of the amendment in question, which protects the interests of new franchise applicants and not incumbents like Americable").

jurisdiction of the franchising authority."[297] By declining to adopt this language, Congress made clear that it did not intend to impose uniform build-out requirements on all franchise applicants.[298]

86. LFAs and incumbent cable operators also rely on Section 621(a)(3) to support compulsory build-out. That Section provides: "In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides."[299] We therefore address below some commenters' concerns that limitations on build-out requirements will contravene or render ineffective the statutory prohibition against discrimination on the basis of income ("redlining.")[300] But for present purposes, it has already been established that Section 621(a)(3) does not mandate universal build-out. As the Commission previously has stated, "the intent of [Section 621(a)(3)] was to prevent the exclusion of cable service based on income" and "this section does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents of the unwired area."[301] The U.S. Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") has upheld this interpretation in the face of an argument that universal build-out was required by Section 621(a)(3):

> The statute on its face prohibits discrimination on the basis of income; it manifestly does not require universal [build-out]. . . . [The provision requires] "wiring of all areas of the franchise" *to prevent redlining.* However, if no redlining is in evidence, it is likewise clear that wiring within the franchise area can be limited.[302]

b. Discussion

87. Given the current state of the MVPD marketplace, we find that an LFA's refusal to award a competitive franchise because the applicant will not agree to specified build-out requirements can be unreasonable. Market conditions today are far different from when incumbent cable operators obtained their franchises. Incumbent cable providers were frequently awarded community-wide monopolies.[303] In that context, a requirement that the provider build out facilities to the entire community was eminently sensible. The essential bargain was that the cable operator would provide service to an entire community in exchange for its status as the only franchisee from whom customers in the community could purchase

[297] H.R. REP. NO. 102-628, at 9 (1992).

[298] *See Doe v. Chao*, 540 U.S. 614, 622-23 (2004) (finding relevance in the fact that Congress had cut out the very language in the bill that would have achieved the result claimant urged).

[299] 47 U.S.C. § 541(a)(3).

[300] *See, e.g.*, Comcast Reply at 2 (arguing that incumbent LECs are seeking Commission action on build-out requirements in order to pursue their "high-value" customers while bypassing "low-value" ones).

[301] *Implementing the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, MM Docket No. 84-1296, 58 Rad. Reg. 2d (P & F) 1, 62-63 (1985). BSPA Comments at 6 ("The most significant factors affecting where a wireline network will be built relate to cost of construction and the density of the population that will be served. These factors have a much more significant impact on the network expansion plans than the specific customer profile in a geographic area").

[302] *ACLU v. FCC*, 823 F.2d 1554, 1580 (D.C. Cir. 1987) (emphasis in original). *See also* Consumers for Cable Choice Comments at 8; DOJ *Ex Parte* at 4.

[303] *See* H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-1260; Mercatus Center Comments at 39-40; *Phoenix Center Competition Paper* at 7.

service. Thus, a financial burden was placed upon the monopoly provider in exchange for the undeniable benefit of being able to operate without competition.[304]

88. By contrast, new cable entrants must compete with entrenched cable operators and other video service providers. A competing cable provider that seeks to offer service in a particular community cannot reasonably expect to capture more than a fraction of the total market.[305] Build-out requirements thus impose significant financial risks on competitive applicants, who must incur substantial construction costs to deploy facilities within the franchise area in exchange for the opportunity to capture a relatively small percentage of the market.[306] In many instances, build-out requirements make entry so expensive that the prospective competitive provider withdraws its application and simply declines to serve any portion of the community.[307] Given the entry-deterring effect of build-out conditions, our construction of Section 621(a)(1) best serves the Act's purposes of promoting competition and broadband deployment.[308]

89. Accordingly, we find that it is unlawful for LFAs to refuse to grant a competitive franchise on the basis of unreasonable build-out mandates. For example, absent other factors, it would seem unreasonable to require a new competitive entrant to serve everyone in a franchise area before it has begun providing service to anyone. It also would seem unreasonable to require facilities-based entrants, such as incumbent LECs, to build out beyond the footprint of their existing facilities before they have even begun providing cable service.[309] It also would seem unreasonable, absent other factors, to require more of a new entrant than an incumbent cable operator by, for instance, requiring the new entrant to build out its facilities in a shorter period of time than that originally afforded to the incumbent cable operator; or requiring the new entrant to build out and provide service to areas of lower density than those that the incumbent cable operator is required to build out to and serve.[310] We note, however, it would seem reasonable for an LFA in establishing build-out requirements to consider the new entrant's market penetration. It would also seem reasonable for an LFA to consider benchmarks requiring the new entrant to increase its build-out after a reasonable period of time had passed after initiating service and taking into account its market success.

90. Some other practices that seem unreasonable include: requiring the new entrant to build out and provide service to buildings or developments to which the new entrant cannot obtain access on reasonable terms; requiring the new entrant to build out to certain areas or customers that the entrant cannot reach using standard technical solutions; and requiring the new entrant to build out and provide service to areas where it cannot obtain reasonable access to and use of the public rights of way. Subjecting a competitive applicant to more stringent build-out requirements than the LFA placed on the incumbent cable operator is unreasonable in light of the greater economic challenges facing competitive applicants explained above. Moreover, build-out requirements may significantly deter entry and thus

[304] *See* FTTH Council Comments at 32-33; BellSouth Comments at 34.

[305] *See, e.g.,* AT&T Comments at 50; FTTH Council Comments at 29-30.

[306] *See* FTTH Council Comments at 32-35; DOJ *Ex Parte* at 12-15 (May 10, 2006); AT&T Reply Comments at 34-36; BellSouth Comments at 34-35; Verizon Comments at 39-40.

[307] *See* FTTH Council Comments at 35; BellSouth Comments at 17-19, 35; USTA Comments at 22-25; Verizon Comments at 40-42.

[308] AT&T Comments at 62-64; BellSouth Comments at 32-33; Qwest Comments at 21-22; USTA Comments at 27; Verizon Comments at 44-46.

[309] *See supra* paras. 38-40.

[310] As we understand these franchising agreements are public documents, we find it reasonable to require the new entrant to produce the incumbent's current agreement.

forestall competition by placing substantial demands on competitive entrants.

91. In sum, we find, based on the record as a whole, that build-out requirements imposed by LFAs can operate as unreasonable barriers to competitive entry. The Commission has broad authority under Section 621(a)(1) to determine whether particular LFA conditions on entry are unreasonable. Exercising that authority, we find that Section 621(a)(1) prohibits LFAs from refusing to award a competitive franchise because the applicant will not agree to unreasonable build-out requirements.

c. Redlining

92. The Communications Act forbids access to cable service from being denied to any group of potential residential cable subscribers because of neighborhood income. The statute is thus clear that no provider of cable services may deploy services with the intent to redline and "that access to cable service [may not be] 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."[311] Nothing in our action today is intended to limit LFAs' authority to appropriately enforce Section 621(a)(3) and to ensure that their constituents are protected against discrimination. This includes an LFA's authority to deny a franchise that would run afoul of Section 621(a)(3).

93. MMTC suggests that the Commission develop anti-redlining "best practices," specifically defining who is responsible for overseeing redlining issues, what constitutes redlining, and developing substantial relief for those affected by redlining.[312] MMTC suggests that an LFA could afford a new entrant means of obtaining pre-clearance of its build-out plans, establishing a rebuttable presumption that the new entrant will not redline (for example, proposing to replicate a successful anti-redlining program employed in another franchise area).[313] Alternatively, an LFA could allow a new entrant to choose among regulatory options, any of which would be sufficient to allow for build-out to commence while the granular details of anti-redlining reporting are finalized.[314] We note these suggestions but do not require them.

3. Franchise Fees

94. In response to questions in the *Local Franchising NPRM* concerning existing practices that may impede cable entry,[315] various parties discussed unreasonable demands relating to franchise fees. Commenters have also indicated that unreasonable demands concerning fees or other consideration by some LFAs have created an unreasonable barrier to entry.[316] Such matters include not only the universe

[311] 47 U.S.C. § 541.

[312] MMTC Comments at 22, MMTC Reply at 15. MMTC urges that The State Regulators Council of the Advisory Committee on Diversity for Communication in the Digital Age should be the oversight committee for redlining issues. MMTC Comments at 24.

[313] MMTC Reply at 11.

[314] MMTC Reply at 11 (providing examples of "rapid buildout plan," "equal service verification plan," and "combined plan").

[315] *Local Franchising NPRM,* 20 FCC Rcd at 18588.

[316] *See, e.g.*, AT&T Reply at Attachment C at 5 ("Lynbrook, N.Y. has asked Verizon to provide cameras to film a holiday visit from Santa Claus. Deputy Mayor Thomas Miccio said, 'They know if they don't get this process done they're going to be in big, big trouble, so we feel we're in a very good position.'") (citing Dionne Searcey, *As Verizon Enters Cable Business, it Faces Local Static*, WALL ST. J., Oct. 28, 2005, at A1), Verizon Comments at Attachment A at 14 ("Two LFAs in California required application fees of $25,000 and $20,000, respectively. (continued…)

of franchise-related costs imposed on providers that should or should not be included within the 5 percent statutory franchise fee cap established in Section 622(b),[317] but also the calculation of franchise fees (*i.e.*, the revenue base from which the 5 percent is calculated). Accordingly, we will exercise our authority under Section 621(a)(1) to address the unreasonable demands made by some LFAs. In particular, any refusal to award an additional competitive franchise because of an applicant's refusal to accede to demands that are deemed impermissible below shall be considered to be unreasonable. The Commission's jurisdiction over franchise fee policy is well established.[318] The general law with respect to franchise fees should be relatively well known, but we believe it may be helpful to restate the basic propositions here in effort to avoid misunderstandings that can lead to delay in the franchising process as well as unreasonable refusals to award competitive franchises. To the extent that our determinations are relevant to incumbent cable operators as well, we would expect that discrepancies would be addressed at the next franchise renewal negotiation period, as noted in the FNPRM *infra,* which tentatively concludes that the findings in this *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs.[319]

95. We address below four significant issues relating to franchise fee payments. First, we consider the franchise fee revenue base. Second, we examine the limitations on charges incidental to the awarding or enforcing of a franchise. Third, we discuss the proper classification of in-kind payments unrelated to the provision of cable service. Finally, we consider whether contributions in support of PEG services and equipment should be considered within the franchise fee calculation.

96. The fundamental franchise fee limitation is set forth in Section 622(b), which states that "franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services."[320] Section 622(g)(1) broadly defines the term "franchise fee" to include "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such."[321] Section 622(g)(2)(c), however, excludes from the term "franchise fee" any "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities."[322] And Section 622(g)(2)(D) excludes from the term (and therefore from the 5 percent cap) "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages."[323] It has been established that certain types of "in-kind" obligations, in addition to monetary payments, may be subject

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Another community in that state has requested an upfront application fee of $30,000 plus an agreement to pay additional expenses (*i.e.,* attorneys fees) of up to an additional $20,000.").

[317] 47 U.S.C. § 542(b).

[318] *See ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) ("[I]t is clear . . . that the *ultimate* responsibility for ensuring a 'national policy' with respect to franchise fees lies with the federal agency responsible for administering the Communications Act.") (emphasis in original).

[319] *See infra* para. 140.

[320] 47 U.S.C. § 542(b) (emphasis added). FTTH Council supports an alternative cap based on the actual costs of managing the use of public rights-of-way, but we need not address that argument because we do not have the discretion to adopt a different limit than that set by Congress.

[321] 47 U.S.C. § 542(g)(1).

[322] 47 U.S.C. § 542(g)(2)(C).

[323] 47 U.S.C. § 542(g)(2)(D).

to the cap. 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."[324]

97. **Definition of the 5 percent fee cap revenue base.** As a preliminary matter, we address the request of several parties to clarify which revenue-generating services should be included in the gross fee figure from which the 5 percent calculation is drawn.[325] The record indicates that in the franchise application process, disputes that arise as to the propriety of particular fees can be a significant cause of delay in the process and that some franchising authorities are making unreasonable demands in this area.[326] This issue is of particular concern where a prospective new entrant for the provision of cable services is a facilities-based incumbent or competitive provider of telecommunications and/or broadband services. A number of controversies regarding which revenues are properly subject to application of the franchise fee were resolved before the Supreme Court's decision in *NCTA v. Brand X*,[327] which settled issues concerning the proper regulatory classification of cable modem-based Internet access service. Nevertheless, in some quarters, there has been considerable uncertainty over the application of franchise fees to Internet access service revenues and other non-cable revenues. Thus, we believe it may assist the franchise process and prevent unreasonable refusals to award competitive franchises to reiterate certain conclusions that have been reached with respect to the franchise fee base.

98. We clarify that a cable operator is not required to pay franchise fees on revenues from non-cable services.[328] Section 622(b) provides that the "franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide *cable services*."[329] The term "cable service" is explicitly defined in Section 602(6) to mean (i) "the one-way transmission to subscribers of video programming or other programming service," and (ii) "subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."[330] The Commission determined in the *Cable Modem Declaratory Ruling* 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 determined."[331] Although this decision related specifically to Internet access service revenues, the same

[324] H.R. REP. NO. 98-934, at 65 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4702.

[325] Verizon Comments at 63-64; BellSouth Comments at 41-43.

[326] *See supra* paras. 43-45.

[327] 125 S. Ct. 2688 (2005). *See infra* note 331.

[328] Advertising revenue and home shopping commissions have been included in an operator's gross revenues for franchise fee calculation purposes. *See Texas Coalition of Cities for Utility Issues v. FCC*, 354 F.3d 802, 806 (5th Cir. 2003) ("A cable operator's gross revenue includes revenue from subscriptions and revenue from other sources-e.g., advertising and commissions from home shopping networks."); *City of Pasadena, California The City of Nashville, Tennessee and The City of Virginia Beach, Virginia*, 16 FCC Rcd. 18192, 2001 WL 1167612, par. 15 (2001) ("There is no dispute among the parties to this proceeding, or in relevant precedent, that advertising revenue and home shopping commissions can be considered part of an operator's gross revenues for franchise fee calculation purposes.").

[329] 47 U.S.C. § 542(b) (emphasis added).

[330] 47 U.S.C. § 522(6).

[331] *In re Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4851 (2002) ("*Cable Modem Declaratory Ruling*"), *rev'd*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. (continued…)

would be true for other "non-cable" service revenues.[332] Thus, Internet access services, including broadband data services, and any other non-cable services are not subject to "cable services" fees.

99. **Charges incidental to the awarding or enforcing of a franchise.** Section 622(g)(2)(D) excludes from the term "franchise fee" "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages."[333] Such "incidental" requirements or charges may be assessed by a franchising authority without counting toward the 5 percent cap. A number of parties assert, and seek Commission clarification, that certain types of payments being requested in the franchise process are not incidental fees under Section 622(g)(2)(D) but instead must either be prohibited or counted toward the cap.[334] Furthermore, a number of parties report that disputes over such issues as well as unreasonable demands being made by some franchising authorities in this regard may be leading to delays in the franchising process as well as unreasonable refusals to award competitive franchises. We therefore determine that non-incidental franchise-related costs required by LFAs must count toward the 5 percent franchise fee cap and provide guidance as to what constitutes such non-incidental franchise-related costs. Under the Act, these costs combined with other franchise fees cannot exceed 5 percent of gross revenues for cable service.

100. BellSouth urges us to prohibit franchising authorities from assessing fees that the authorities claim are "incidental" if those fees are not specifically allowed under Section 622 of the Cable Act.[335] BellSouth asserts that LFAs often seek fees beyond the 5 percent franchise fee allowed by the statutory provision. The company therefore asks us to clarify that any costs that an LFA requires a cable provider to pay beyond the exceptions listed in Section 622 – including generally applicable taxes, PEG capital costs, and "incidental charges" – count toward the 5 percent cap.[336] OPASTCO asserts that higher fees discourage investment and often will need to be passed on to consumers.[337] Verizon also requests that we clarify that fees that exceed the cap are unreasonable.[338]

101. AT&T argues that we should find unreasonable any fees or contribution requirements that are not credited toward the franchise fee obligation.[339] AT&T also asserts that any financial obligation to the franchising authority that a provider undertakes, such as application or acceptance fees

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2003), *rev'd*, *NCTA v. Brand X*, 545 U.S. 967 (2005). The Commission issued a notice of proposed rulemaking ("*Cable Modem NPRM*") concurrently with the *Cable Modem Declaratory Ruling*. Certain questions from the *Cable Modem NPRM* that are relevant, but not directly related, to this discussion remain pending before the Commission. *Cable Modem Declaratory Ruling* at 4839-4854.

[332] *See* NATOA Reply at 29 (agreeing that non-cable services are not subject to franchise fees).

[333] 47 U.S.C. § 542(g)(2)(D).

[334] AT&T Comments at 65-67; BellSouth Comments at 7, 38-39.

[335] BellSouth Comments at 7.

[336] BellSouth Comments at 38-39.

[337] OPASTCO Reply at 5.

[338] Verizon Reply at 59.

[339] AT&T Comments at 64.

that exceed the reasonable cost of processing an application, free or discounted service to an LFA, and LFA attorney or consultant fees, should apply toward the franchise fee obligation.[340]

102. Conversely, NATOA asserts that costs such as those enumerated above by AT&T fall within Section 622(g)(2)(D)'s definition of charges "incidental" to granting the franchise.[341] NATOA contends that the word "incidental" does not refer to the *amount* of the charge, but rather the fact that a charge is "naturally appertaining" to the grant of a franchise. Thus, NATOA argues, these costs are not part of the franchise fee and therefore do not count toward the cap.[342]

103. There is nothing in the text of the statute or the legislative history to suggest that Congress intended the list of exceptions in Section 622(g)(2)(D) to include the myriad additional expenses that some LFAs argue are "incidental."[343] Given that the lack of clarity on this issue may hinder competitive deployment and lead to unreasonable refusals to award competitive franchises under Section 621, we seek to provide guidance as to what is "incidental" for a new competitive application.[344] We find that the term "incidental" in Section 622(g)(2)(D) should be limited to the list of incidentals in the statutory provision, as well as other minor expenses, as described below. We find instructive a series of federal court decisions relating to this subsection of Section 622. These courts have indicated that (i) there are significant limits on what payments qualify as "incidental" and may be requested outside of the 5 percent fee limitation; and (ii) processing fees, consultant fees, and attorney fees are not necessarily to be regarded as "incidental" to the awarding of a franchise.[345] In *Robin Cable Systems v. City of Sierra Vista,* for example, the United States District Court for the District of Arizona held that "processing costs" of up to $30,000 required as part of the award of a franchise were not excluded under subsection (g)(2)(D) because they were not "incidental," but rather "substantial" and therefore "inconsistent with the Cable Act."[346] Additionally, in *Time Warner Entertainment v. Briggs,* the United States District Court for the District of Massachusetts decided that attorney fees and consultant fees fall within the definition of franchise fees, as defined in Section 622. Because the municipality in that case was already collecting 5 percent of the operator's gross revenues, the Court determined that a franchise provision requiring the cable operator to pay such fees above and beyond its 5 percent gross revenues was preempted and therefore unenforceable.[347] Finally, in *Birmingham Cable Comm. v. City of Birmingham,* the United States District for the Northern District of Alabama stated that "it would be an aberrant construction of

[340] AT&T Comments at 65-67.

[341] NATOA Reply at 34-35.

[342] NATOA Reply at 35 (citing Random House Dictionary of the English Language at 720).

[343] *See infra* paras. 105-108.

[344] NATOA argues that the Commission is powerless to rewrite the meaning of the statute. NATOA Reply at 35. Yet, Section 622(i) states "[a]ny Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, *except as provided in this section*." Therefore, we are within our Congressionally mandated authority to provide clarifying guidance regarding the meaning of this provision.

[345] *See Robin Cable Systems v. City of Sierra Vista,* 842 F. Supp. 380 (D. Ariz. 1993); *Time Warner Entertainment Co. v. Briggs,* 1993 WL 23710 (D. Mass. Jan. 14, 1993); *Birmingham Cable Comm. v. City of Birmingham,* 1989 WL 253850 (N.D. Ala. 1989).

[346] *Robin Cable* at 381.

[347] *Time Warner* at 23710 * 6.

the phrase 'incidental to the awarding … of the franchise,' in this context, to conclude that the phrase embraces consultant fees incurred solely by the City."[348]

104. We find these decisions instructive and emphasize that LFAs must count such non-incidental franchise-related costs toward the cap. We agree with these judicial decisions that non-incidental costs include the items discussed above, such as attorney fees and consultant fees, but may include other items, as well. Examples of other items include application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided to an LFA, any requirement to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments as discussed below. Accordingly, if LFAs continue to request the provision of such in-kind services and the reimbursement of franchise-related costs, the value of such costs and services should count towards the provider's franchise fee payments.[349] For future guidance, LFAs and video service providers may look to judicial cases to determine other costs that should be considered "incidental."

105. **In-kind payments unrelated to provision of cable service.** The record indicates that in the context of some franchise negotiations, LFAs have demanded from new entrants payments or in-kind contributions that are unrelated to the provision of cable services. While many parties argue that franchising authority requirements unrelated to the provision of cable services are unreasonable,[350] few parties provided specific details surrounding the in-kind payment demands of LFAs.[351] As discussed further below, most parties generally discussed examples of concessions, but were unwilling to provide details of specific instances, including the identity of the LFA requesting the unrelated services.[352] Even without specific details concerning the LFAs involved, however, the record adequately supports a finding that LFA requests unrelated to the provision of cable services have a negative impact on the entry of new cable competitors in terms of timing and costs and may lead to unreasonable refusals to award competitive franchises. Accordingly, we clarify that any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap.

106. The Broadband Service Providers Association states that an example of a municipal capital requirement can include traffic light control systems.[353] FTTH Council states that non-video requirements raise the cost of entry for new entrants and should be prohibited.[354] As an example, FTTH

[348] *Birmingham* at 253850.

[349] To the extent that an LFA requires franchise fee payments of less than 5 percent an offset may not be necessary. Such LFAs are able to request the reimbursement or provision of such costs up to the 5 percent statutory threshold.

[350] Alcatel Comments at 10; FTTH Council Comments at 36; OPASTCO Reply at 4; USTelecom Comments at 48; BPSA Comments at 8; NTCA Comments at 13; South Slope Comments at 15. *See also* DOJ *Ex Parte* at 11.

[351] Some LFAs argue that commenters' allegations about inappropriate fees fail to identify the LFAs in question. As a consequence, they contend, we should not rely on such unsubstantiated claims unless the particular LFAs in question are given a chance to respond. Communications Support Group Reply at 7; Anne Arundel County Reply at 5. We need not resolve particular disputes between parties, however, in order to address this issue. Our clarification that all LFA requests not related to cable services must be counted toward the 5 percent cap is a matter of statutory construction, and all commenters have had ample opportunity to address this issue.

[352] Broadband Service Providers Association Comments at 8; AT&T Comments at 26; Verizon Comments at 57-58. Parties have indicated that they were unwilling to identify specific instances of unreasonable requests, since in many cases these parties are still trying to negotiate franchise agreements with the communities at issue.

[353] Broadband Service Providers Association Comments at 8.

[354] FTTH Council Comments at 66.

Council asserts that in San Antonio, Grande Communications was required to prepay $1 million in franchise fees (which took the company five years to draw down) and to fund a $50,000 scholarship, with an additional $7,200 to be contributed each year. They assert that new entrants agree to these requirements because they have no alternative.[355] The National Telecommunications Cooperative Association ("NTCA") also asserts that its members have complained that LFAs require them to accept franchise terms unrelated to the provision of video service.[356] NTCA states that any incumbent cable operator that already abides by such a requirement has made the concession in exchange for an exclusive franchise, but that new entrants, in contrast, must fight for every subscriber and will not survive if forced into expensive non-video related projects.[357]

107. AT&T refers to a press article stating that Verizon has faced myriad requests unrelated to the provision of cable service. These include: a $13 million "wish list" in Tampa, Florida; a request for video hookup for a Christmas celebration and money for wildflower seeds in New York; and a request for fiber on traffic lights to monitor traffic in Virginia.[358] Verizon provides little additional information about these examples, but argues that any requests must be considered franchise-related costs subject to the 5 percent franchise fee cap, as discussed above.[359]

108. We clarify that any requests made by LFAs unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap, as discussed above. Municipal projects unrelated to the provision of cable service do not fall within any of the exempted categories in Section 622(g)(2) of the Act and thus should be considered a "franchise fee" under Section 622(g)(1). The legislative history of the 1984 Cable Act supports this finding, providing 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."[360] Accordingly, any such requests for municipal projects will count towards the 5 percent cap.

109. **Contributions in support of PEG services and equipment.** As further discussed in the Section below, we also consider the question of the proper treatment of LFA-mandated contributions in support of PEG services and equipment. The record reflects that disputes regarding such contributions are impeding video deployment and may be leading to unreasonable refusals to award competitive franchises.[361] Section 622(g)(2)(C) excludes from the term "franchise fee" any "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities."[362] Accordingly, payments of this type, if collected only for the cost of building PEG facilities, are not subject to the 5 percent limit. Capital costs refer to those costs incurred in or associated

[355] *Id.* at 38.

[356] NTCA Comments at 4.

[357] NTCA Comments at 13.

[358] AT&T Comments at 26 (citing Dionne Searcey, *As Verizon Enters Cable Business, it Faces Local Static*, WALL ST. J., Oct. 28, 2005, at A1). *See also* City of Tampa Reply Comments at 5.

[359] Verizon Comments at 54. *See also* USTelecom Comments at 48.

[360] H.R. REP. NO. 98-934, at 65 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4702.

[361] *See, e.g.,* FTTH Council Comments at 36 (noting how Knology declined to enter the Louisville market after the Louisville LFA requested a PEG grant of $266,000 at the time of franchise grant, with $1.9 million total due over the 15-year term).

[362] 47 U.S.C. § 542(g)(2)(C).

with the construction of PEG access facilities.[363] These costs are distinct from payments in support of the use of PEG access facilities. PEG support payments may include, but are not limited to, salaries and training. Payments made in support of PEG access facilities are considered franchise fees and are subject to the 5 percent cap.[364] While Section 622(g)(2)(B) excluded from the term franchise fee any such payments made in support of PEG facilities, it only applies to any franchise in effect on the date of enactment.[365] Thus, for any franchise granted after 1984, this exemption from franchise fees no longer applies.

4. PEG/Institutional Networks

110. In the *Local Franchising NPRM*, we tentatively concluded that it is not unreasonable for an LFA, in awarding a franchise, to "require adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support"[366] because this promotes important statutory and public policy goals.[367] However, pursuant to Section 621(a)(1), we conclude that LFAs may not make unreasonable demands of competitive applicants for PEG and I-Net[368] and that conditioning the award of a competitive franchise on applicants agreeing to such unreasonable demands constitutes an unreasonable refusal to award a franchise. This finding is limited to competitive applicants under Section 621(a)(1). Yet, as this issue is also germane to existing franchisees, we ask for further comment on the applicability of this and other findings in the *Further Notice of Proposed Rulemaking* attached hereto. The FNPRM tentatively concludes that the findings in this *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs.

111. As an initial matter, we conclude that we have the authority to address issues relating to PEG and I-Net support.[369] Some commenters argue that Congress explicitly granted the responsibility for PEG and I-Net regulation to state and local governments.[370] For example, NATOA contends that we cannot limit the in-kind or monetary support that LFAs may request for PEG access, because Sections 624(a) and (b) allow an LFA to establish requirements "related to the establishment and operation of a cable system," including facilities and equipment.[371] In response, Verizon claims that PEG requirements should extend only to channel capacity, and that LFAs can obtain other contributions only to the extent

[363] *See* H.R. REP. NO. 98-934, at 19 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4656.

[364] *See Cable TV Fund 14-A v. City of Naperville,* 1997 WL 433628 (N.D. Ill. 1997) at 13; *City of Bowie, Maryland*, 14 FCC Rcd. 7675 (Cable Service Bureau, 1999); *as clarified* 14 FCC Rcd 9596 (Cable Services Bureau, 1999).

[365] 47 U.S.C. § 542(g)(2)(B).

[366] 47 U.S.C. § 541(a)(4)(B).

[367] *Local Franchising NPRM*, 20 FCC Rcd at 18590.

[368] An I-Net is defined as "a communication network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential customers." 47 U.S.C. § 531(f).

[369] *See infra* Section III.B.2.

[370] NATOA Comments at 35; NATOA Reply at 30-31; Hawaii Reply at 2-3; Mercatus Comments at 35; Certain Florida Municipalities Comments at 17-18; Anne Arundel *et al* Comments at 35; City of New York Comments at 3-4.

[371] NATOA Reply at 30 (quoting 47 U.S.C. § 544(b)).

that they are agreed to voluntarily by the cable operator.[372] Verizon also asserts that the record confirms that LFAs often demand PEG support that exceeds statutory limits.[373]

112. Section 611(a) of the Communications Act operates as a restriction on the authority of the franchising authority to establish channel capacity requirements for PEG. This Section provides that "[a] franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section."[374] Section 611(b) allows a franchising authority to require that "channel capacity be designated for public, educational or governmental use," but the extent of such channel capacity is not defined.[375] Section 621(a)(4)(b) provides that a franchising authority may require "adequate assurance" that the cable operator will provide "adequate" PEG access channel capacity, facilities, or financial support."[376] Because the statute does not define the term "adequate," we have the authority to interpret what Congress meant by "adequate PEG access channel capacity, facilities, and financial support," and to prohibit excessive LFA demands in this area, if necessary. We note that the legislative history does not define "adequate," nor does it provide any guidance as to what Congress meant by the term.[377] We therefore conclude that "adequate" should be given its plain meaning: the term does not mean significant but rather "satisfactory or sufficient."[378] As discussed above, we have also accepted the tentative conclusion of the *Local Franchising NPRM* that Section 621(a)(1) prohibits not only the ultimate refusal to award a competitive franchise, but also the establishment of procedures and other requirements that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise. Given this conclusion and our authority to interpret the term "adequate" in Section 621(a)(4), we will provide guidance as to what constitutes "adequate" PEG support under that provision as subject to the constraints of the "reasonableness" requirement in Section 621(a)(1).

113. AT&T asserts that we should shorten the period for franchise negotiations by adopting standard terms for PEG channels.[379] We reject this suggestion and clarify that LFAs are free to establish their own requirements for PEG to the extent discussed herein, provided that the non-capital costs of such requirements are offset from the cable operator's franchise fee payments. This is consistent with the Act and the historic management of PEG requirements by LFAs.[380]

114. Consumers for Cable Choice and Verizon argue that it is unreasonable for an LFA to request a number of PEG channels from a new entrant that is greater than the number of channels that the community is using at the time the new entrant submits its franchise application.[381] We find that it is

[372] Verizon Reply at 60-61.

[373] Verizon Reply at 60 (citing NATOA Comments).

[374] 47 U.S.C. § 531(a).

[375] 47 U.S.C. § 531(b).

[376] 47 U.S.C. § 541(a)(4)(B).

[377] *See See* H.R. REP. NO. 102-862, at 78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1260.

[378] American Heritage Dictionary, Second College Edition (1991).

[379] AT&T Reply at 15.

[380] *See* 47 U.S.C. § 541(a)(4)(B); *Time Warner Cable of New York City v. City of New York*, 943 F.Supp. 1357, 1367 (S.D.N.Y 1996), *aff'd sub nom. Time Warner Cable of New York City v. Bloomberg, L.P.*, 118 F.3d 917 (2nd Cir. 1997).

[381] Consumers for Cable Choice Comments at 8; Verizon Comments at 71.

unreasonable for an LFA to impose on a new entrant more burdensome PEG carriage obligations than it has imposed upon the incumbent cable operator.

115. Some commenters also asked whether certain requirements regarding construction or financial support of PEG facilities and I-Nets are unreasonable under Section 621(a)(1). Several parties indicate that, as a general matter, PEG contributions should be limited to what is "reasonable" to support "adequate" facilities.[382] We agree that PEG support required by an LFA in exchange for granting a new entrant a franchise should be both adequate and reasonable, as discussed above. In addressing each of these concerns below, we seek to strike the necessary balance between the two statutory terms.

116. Ad Hoc Telecom Manufacturers argue that it is unreasonable to require the payment of ongoing costs to operate PEG channels, because a requirement is unrelated to right-of-way management, the fundamental policy rationale for an LFA's franchising authority.[383] In response, Cablevision asserts that exempting incumbent LECs from PEG support requirements would undermine the key localism features of franchise requirements, and could undermine the ability of incumbent cable operators to provide robust community access.[384] We disagree with Ad Hoc Telecom Manufacturers that it is *per se* unreasonable for LFAs to require the payment of ongoing costs to support PEG. Such a ruling would be contrary to Section 621(a)(4)(B) and public policy. We note, however, that any ongoing LFA-required PEG support costs are subject to the franchise fee cap, as discussed above.

117. FTTH Council, Verizon, and AT&T ask us to affirm that PEG or I-Net requirements imposed on a new entrant that are wholly duplicative of existing requirements imposed on the incumbent cable operator are *per se* unreasonable.[385] AT&T and Verizon argue that Section 621(a)(4)(B) requires adequate facilities, not duplicative facilities.[386] FTTH Council contends that if LFAs can require duplicative facilities, they can burden new entrants with inefficient obligations without increasing the benefit to the public.[387] FTTH Council thus suggests that LFAs be precluded from imposing completely duplicative requirements, and that we require new entrants to contribute a *pro rata* share of the incumbent cable operator's PEG obligations. For example, if an incumbent cable operator funds a PEG studio, the new entrant should be required to contribute a *pro rata* share of the ongoing financial obligation for such studio, based on the new entrant's number of subscribers.[388]

118. In addition to advocating a *pro rata* contribution rule, FTTH Council requests that we require incumbents to permit new entrants to connect with the incumbent's pre-existing PEG channel feeds.[389] FTTH Council proposes that the incumbent cable operator and new entrant decide how to accomplish this connection, with LFA involvement if necessary, and that the costs of the connection should be deducted from the new entrant's PEG-related financial obligations to the LFA.[390] Others agree that PEG interconnection is necessary to maximize the value of local access channels when more than one

[382] BellSouth Comments at 8; Verizon Comments at 71.

[383] Ad Hoc Telecom Manufacturer Coalition Comments at 4.

[384] Cablevision Reply at 29-30.

[385] FTTH Council Comments at 66; Verizon Comments at 71; AT&T Comments at 67.

[386] AT&T Comments at 67-68; Verizon Reply at 61.

[387] FTTH Council Comments at 67.

[388] *Id.*

[389] *Id.*

[390] *Id.*

video provider operates in a community.[391] New entrants seek a *pro rata* contribution rule based on practical constraints as well. AT&T asserts that, although incumbent cable operators can provide space for PEG in local headend buildings, LEC new entrants' facilities are not designed to accommodate those needs. Thus, if duplicative facilities are demanded, new entrants would have to build or rent facilities solely for this purpose, which AT&T contends would be unreasonable under the statute.[392] NATOA counters that AT&T's complaint regarding space mischaracterizes PEG studio requirements that exist in some franchises.[393] Specifically, NATOA claims that LFAs generally are not concerned with a PEG studio's location, and that PEG studios are usually located near cable headends simply because those locations reduce the cable operators' costs.[394]

119. We agree with AT&T, FTTH Council, Verizon, and others that completely duplicative PEG and I-Net requirements imposed by LFAs would be unreasonable.[395] Such duplication generally would be inefficient and would provide minimal additional benefits to the public, unless it was required to address an LFA's particular concern regarding redundancy needed for, for example, public safety. We clarify that an I-Net requirement is not duplicative if it would provide additional capability or functionality, beyond that provided by existing I-Net facilities. We note, however, that we would expect an LFA to consider whether a competitive franchisee can provide such additional functionality by providing financial support or actual equipment to supplement existing I-Net facilities, rather than by constructing new I-Net facilities. Finally, we find that it is unreasonable for an LFA to refuse to award a competitive franchise unless the applicant agrees to pay the face value of an I-Net that will not be constructed. Payment for I-Nets that ultimately are not constructed are unreasonable as they do not serve their intended purpose.

120. While we prefer that LFAs and new entrants negotiate reasonable PEG obligations, we find that under Section 621 it is unreasonable for an LFA to require a new entrant to provide PEG support that is in excess of the incumbent cable operator's obligations. We also agree that a *pro rata* cost sharing approach is one reasonable means of meeting the statutory requirement of the provision of adequate PEG facilities. To the extent that a new entrant agrees to share *pro rata* costs with the incumbent cable operator, such an arrangement is *per se* reasonable.[396]

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[391] Communications Support Group, Inc. Reply at 12.

[392] AT&T Comments at 70.

[393] NATOA Reply at 41-42.

[394] NATOA Reply at 42.

[395] If a new entrant, for technical, financial, or other reasons, is unable to interconnect with the incumbent cable operator's facilities, it would not be unreasonable for an LFA to require the new entrant to assume the responsibility of providing comparable facilities, subject to the limitations discussed herein.

[396] To determine a new entrant's *per se* reasonable PEG support payment, the new entrant should determine the incumbent cable operator's per subscriber payment at the time the competitive applicant applies for a franchise or submits its informational filing, and then calculate the proportionate fee based on its subscriber base. A new entrant may agree to provide PEG support over and above the incumbent cable operator's existing obligations, but such support is at the entrant's discretion. If the new entrant agrees to share the *pro rata* costs with the incumbent cable operator, the PEG programming provider, be it the incumbent cable operator, the LFA, or a third-party programmer, must allow the new entrant to interconnect with the existing PEG feeds. The costs of such interconnection should be borne by the new entrant. We note that we previously have required cost-sharing and interconnection for PEG channels and facilities in another context. Section 75.1505(d) of the Commission's rules requires that if an LFA and OVS operator cannot reach an agreement on the OVS operator's PEG obligations, the operator is required to match the incumbent cable operator's PEG obligations and the incumbent cable operator is required to permit the OVS
(continued…)

5. Regulation of Mixed-Use Networks

121. We clarify that LFAs' jurisdiction applies only to the provision of cable services 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 an LFA to refuse to award a franchise based on issues related to such services or facilities. For example, we find it unreasonable for an LFA to refuse to grant a cable franchise to an applicant for resisting an LFA's demands for regulatory control over non-cable services or facilities.[397] Similarly, an LFA has no authority to insist on an entity obtaining a separate cable franchise in order to upgrade non-cable facilities. For example, assuming an entity (*e.g.*, a LEC) already possesses authority to access the public rights-of-way, an LFA may not require the LEC to obtain a franchise solely for the purpose of upgrading its network.[398] So long as there is a non-cable purpose associated with the network upgrade, the LEC is not required to obtain a franchise until and unless it proposes to offer cable services. For example, if a LEC deploys fiber optic cable that can be used for cable and non-cable services, this deployment alone does not trigger the obligation to obtain a cable franchise. The same is true for boxes housing infrastructure to be used for cable and non-cable services.

122. We further clarify that an LFA may not use its video franchising authority to attempt to regulate a LEC's entire network beyond the provision of cable services. We agree with Verizon that the "entirety of a telecommunications/data network is not automatically converted to a 'cable system' once subscribers start receiving video programming."[399] For instance, we find that the provision of video services pursuant to a cable franchise does not provide a basis for customer service regulation by local law or franchise agreement of a cable operator's entire network, or any services beyond cable services.[400] Local regulations that attempt to regulate any non-cable services offered by video providers are preempted because such regulation is beyond the scope of local franchising authority and is inconsistent with the definition of "cable system" in Section 602(7)(C).[401] This provision explicitly states that a common carrier facility subject to Title II is considered a cable system "to the extent such facility is used in the transmission of video programming . . . ."[402] As discussed above, revenues from non-cable services are not included in the base for calculation of franchise fees.

123. In response to requests that we address LFA authority to regulate "interactive on-demand services,"[403] we note that Section 602(7)(C) excludes from the definition of "cable system" a facility of a common carrier that is used solely to provide interactive on-demand services.[404] "Interactive on-demand services" are defined as "service[s] providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming

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(Continued from previous page)
operator to connect with the existing PEG feeds, with such costs borne by the OVS operator. 47 C.F.R. § 76.1505(d).

[397] Verizon Comments at 75.

[398] *See* Verizon Comments at 21. *See also* South Slope Comments at 11; NCTA Comments at 12.

[399] Verizon Comments at 83.

[400] Verizon Comments at 75.

[401] 47 U.S.C. § 522(7)(C). *See also* Verizon Comments at 82-87.

[402] 47 U.S.C. § 522(7)(C).

[403] *See* BellSouth at 42; NATOA Reply at 27-28.

[404] 47 U.S.C. § 522(7)(C).

prescheduled by the programming provider."[405] We do not address at this time what particular services may fall within the definition.

124. We note that this discussion does not address the regulatory classification of any particular video services being offered. We do not address in this *Order* whether video services provided over Internet Protocol are or are not "cable services."[406]

D. Preemption of Local Laws, Regulations and Requirements

125. Having established rules and guidance to implement Section 621(a)(1), we turn now to the question of local laws that may be inconsistent with our decision today. Because the rules we adopt 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, they have preemptive effect pursuant to Section 636(c). Alternatively, local laws are impliedly preempted to the extent that they conflict with this *Order* or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[407]

126. At that outset of this discussion, it is important to reiterate that we do not preempt state law or state level franchising decisions in this *Order*.[408] Instead, we preempt only local laws, regulations, practices, and requirements to the extent that: (1) provisions in those laws, regulations, practices, and agreements conflict with the rules or guidance adopted in this *Order*; and (2) such provisions are not specifically authorized by state law. As noted above,[409] we conclude that the record before us does not provide sufficient information to make determinations with respect to franchising decisions where a state is involved, issuing franchises at the state level or enacting laws governing specific aspects of the franchising process. We expressly limit our findings and regulations in this *Order* to actions or inactions at the local level where a state has not circumscribed the LFA's authority. For example, in light of differences between the scope of franchises issued at the state level and those issued at the local level, it may be necessary to use different criteria for determining what may be unreasonable with respect to the key franchising issues addressed herein. We also recognize that many states only recently have enacted comprehensive franchise reform laws designed to facilitate competitive entry. In light of these facts, we lack a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises.

127. Section 636(c) of the Communications Act 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."[410] In the *Local Franchising NPRM*, the Commission tentatively concluded that, pursuant to the authority granted under Sections 621 and 636(c), and under the Supremacy Clause,[411] the Commission

[405] 47 U.S.C. § 522(12).

[406] *See IP-Enabled Services,* 19 FCC Rcd 4863 (2004); Petition of SBC Communications Inc. for a Declaratory Ruling, WC Docket No. 04-36 (filed Feb. 5, 2004); Letter from James C. Smith, Senior Vice President, SBC Services Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-36 (filed Sept. 14, 2005).

[407] *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963).

[408] *See supra* note 2.

[409] *Id*.

[410] 47 U.S.C. § 556(c).

[411] U.S. Const., Art. VI, cl.2.

may deem to be preempted any state or local law that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Title VI.[412] For example, we may deem preempted any local law that causes an unreasonable refusal to award a competitive franchise in violation of Section 621(a)(1).[413] Accordingly, the Commission sought comment on whether it would be appropriate to preempt state and local legislation to the extent we find that it serves as an unreasonable barrier to the grant of competitive franchises.

128. The doctrine of federal preemption arises from the Supremacy Clause, which provides that federal law is the "supreme Law of the Land."[414] Preemption analysis requires a statute-specific inquiry. There are various avenues by which state law may be superseded by federal law. We focus on the two which are most relevant here. First, preemption can occur where Congress expressly preempts state law.[415] When a federal statute contains an express preemption provision, the preemption analysis consists of identifying the scope of the subject matter expressly preempted and determining if a state's law falls within its scope.[416] Second, preemption can be implied and can occur where federal law conflicts with state law.[417] 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."[418]

129. Applying these principles to this proceeding, we find that local franchising laws, regulations, and agreements are preempted to the extent they conflict with the rules we adopt in this *Order*. Section 636(c) expressly preempts state and local laws that are inconsistent with the Communications Act.[419] This provision precludes states and localities from acting in a manner inconsistent with the Commission's interpretations of Title VI so long as those interpretations are valid.[420] It is the Commission's job, in the first instance, to determine the scope of the subject matter expressly preempted by Section 636.[421] As noted elsewhere, we adopt the rules in this *Order* pursuant to our interpretation of Section 621(a)(1) and other relevant Title VI provisions in light of the twin congressional goals of promoting competition in the multichannel video marketplace and promoting broadband deployment.[422] 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. They therefore have preemptive effect pursuant to Section 636(c).

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[412] *Local Franchising NPRM*, 20 FCC Rcd at 18589.

[413] *Id.*

[414] U.S. Const. Art. VI, cl. 2. *See also Hillsborough County, Florida v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-13 (1985).

[415] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

[416] *Id*. at 517.

[417] *Florida Lime and Avocado Growers*, 373 U.S. at 142-43.

[418] *Id*.

[419] 47 U.S.C. § 556(c).

[420] *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).

[421] *See Cipollone*, 505 U.S. at 517; *Capital Cities Cable*, 467 U.S. 691, 699 (1984).

[422] *See supra* paras. 2-4, 61-64.

130. Alternatively, we find that such local laws, regulations, and agreements are impliedly preempted to the extent that they conflict with this *Order* or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[423] 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."[424] The legislative history to both the 1984 and 1992 Cable Acts identifies a national policy of encouraging competition in the multichannel video marketplace and recognizes the national implications that the local franchising process can have on that policy.[425] The national policy of promoting a competitive multichannel video marketplace has been repeatedly reemphasized by Congress, the Commission, and the courts.[426] The record here shows that the current operation of the franchising process at the local level conflicts with this national multichannel video policy by imposing substantial delays on competitive entry and requiring unduly burdensome conditions that deter entry.[427] And to the extent that local requirements result in LFAs unreasonably refusing to award competitive franchises, such mandates frustrate the policy goals underlying Title VI. The rules we adopt today, *e.g.*, limits on the time period for LFA action on competitive franchise applications,[428] limits on LFA's ability to impose build-out requirements,[429] and limits on LFA collection of franchise fees,[430]

[423] *Florida Lime and Avocado Growers*, 373 U.S. at 142-43.

[424] 47 U.S.C. § 521 (1), (2) & (6).

[425] *See* H.R. REP. NO. 98-934, at 19 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4656; S. REP. NO. 97-518, at 14 (1982) ("free and open competition in the marketplace" and the "elimination and prevention of artificial barriers to entry" are essential to the growth and development of the cable industry); H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-60.

[426] *See, e.g.,* 47 U.S.C. § 521(6) (stating that one of the purposes of Title VI is "to promote competition in cable communications"); *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 309 (1993) (recognizing "[o]ne objective of the Cable Act was to set out '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.'" (citing 47 U.S.C. § 521(2))).

[427] *See, e.g.,* AT&T Reply at 6-7 ("today's standardless franchising process, and the anticompetitive substantive conditions demanded of new entrants by many LFAs … not only delay entry, but often prevent it altogether"); AT&T Comments at 43 (listing several conditions commonly imposed in the local franchising process that raise the cost of entry, deter broadband investment, and deny consumers the benefits of competition and choice); Verizon Comments at iv-vi (the franchising process is often marked by inordinate delay and is often used by many LFAs "as an opportunity to demand all manner of additional concessions, mostly unrelated to the provision of video services or the underlying purposes of franchise requirements, from the would-be competitor"); TIA Comments at 7-15 (many LFAs unreasonably delay the grant of competitive franchises and demand excessive concessions from potential entrants); USTA Comments at 19-20 ("The single biggest obstacle to widespread competition in the video service market is the requirement that a provider obtain an individually negotiated local franchise in each area where it intends to provide service"); FTTH Council Comments at 59-60 ("the franchising process as implemented by numerous LFAs across the country continues to suffer from numerous flaws that frustrate the twin Congressional objectives of promoting cable competition and fostering deployment of advanced services to all Americans"); Alcatel Comments at 19 ("[t]he regulatory obstacle of thousands of local video franchises potentially wielding their authority to adopt unreasonable requirements will invariably impede deployment by competitors and negatively impact investment in advanced technologies and services").

[428] *See supra* Section III.C.1.

[429] *See supra* Section III.C.2.

[430] *See supra* Section III.C.3.

are designed to ensure efficiency and fairness in the local franchising process and to provide certainty to prospective marketplace participants. This, in turn, will allow us to effectuate Congress' twin goals of promoting cable competition and minimizing unnecessary and unduly burdensome regulation on cable systems. 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.[431]

131. We reject the claim by incumbent cable operators and franchising authorities that the Commission lacks authority to preempt local requirements because Congress has not explicitly granted the Commission the authority to preempt.[432] These commenters suggest that because the Commission seeks to preempt a power traditionally exercised by a state or local government (*i.e.*, local franchising), under the Fifth Circuit's decision in *City of Dallas*,[433] the Commission can only preempt where it is given express statutory authority to do so.[434] However, this argument ignores the plain language of Section 636(c), which states that "any provision of law of any State, political subdivision, or agency therefore, or franchising authority … which is inconsistent with this chapter shall be deemed to be preempted and superseded."[435] Moreover, Section 621 expressly limits the authority of franchising authorities by prohibiting exclusive franchises and unreasonable refusals to award additional competitive franchises.[436] Congress could not have stated its intent to limit local franchising authority more clearly. These provisions therefore satisfy any express preemption requirement.[437]

132. Furthermore, as long as the Commission acts within the scope of its delegated authority in adopting rules that implement Title VI, including the prohibition of Section 621(a)(1), its rules have preemptive effect.[438] Courts assess whether an agency acted within the scope of its authority "without any presumption one way or the other"; there is no presumption against preemption in this context.[439] As noted above, Congress charged the Commission with the task of administering the Communications Act,

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[431] *See, e.g., Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 369 (1986).

[432] *See* Comcast Comments at 36-37; Comcast Reply at 35-37; Burnsville/Eagan Comments at 35-36.

[433] *City of Dallas,* 165 F.3d at 341.

[434] *See* Comcast Comments at 37; Comcast Reply at 36; Burnsville/Eagan Comments at 35-36.

[435] 47 U.S.C. § 556(c).

[436] 47 U.S.C. § 541(a)(1).

[437] *See Liberty Cablevision of Puerto Rico v. Municipality of Caguas*, 417 F.3d 216, 221 (1st Cir. 2005) (Section 636(c) makes clear that Congress "unmistakably" intended to preempt state and local franchising decisions that are inconsistent with the Act, including Section 621); *Qwest Broadband Services, Inc. v. City of Boulder*, 151 F. Supp. 2d. 1236, 1243 (D. Colo. 2001) (a franchise provision in the Boulder, Colorado charter was preempted by Section 621(a)(1) because it conflicted directly with that provision's mandate that the "franchising authority" be responsible for granting the franchise).

[438] *See City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof"); *Louisiana Public Serv. Comm.*, 476 U.S. at 369 ("a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation"); *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 699 (1984) (when a federal agency promulgates regulations intended to preempt state law, courts uphold preemption as long as the agency's choice "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute"); *Fidelity Federal Savings & Loan Ass'n,* 458 U.S. at 153 ("Federal regulations have no less pre-emptive effect than federal statutes").

[439] *New York v. FERC*, 535 U.S. 1, 18 (2002).

including Title VI, and the Commission has clear authority to adopt rules implementing provisions such as Section 621.[440] Consequently, our rules preempt any contrary local regulations.[441]

133. We also find no merit in incumbent cable operators' and local franchising authorities' argument that the scope of the Commission's preemption authority under Section 636(c) is limited by the terms of Section 636(a) of the Act.[442] Section 636(a) provides that nothing in Title VI "shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this title."[443] The very reason for preemption in these circumstances is that many local franchising laws and practices are at odds with the express provisions of Title VI, as interpreted in this *Order*. Consequently, Section 636(a) presents no obstacle to preemption here. We therefore need not decide whether the state and local laws at issue relate to "matters of public health, safety, and welfare" within the meaning of Section 636(a).

134. We also reject the franchising authorities' argument that any attempt to preempt lawful local government control of public rights-of-way by interfering with local franchising requirements, procedures and processes could constitute an unconstitutional taking under the Fifth Amendment of the United States Constitution.[444] The "takings" clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."[445] We conclude that our actions here do not run afoul of the Fifth Amendment for several reasons. To begin with, our actions do not result in a Fifth Amendment taking. Courts have held that municipalities generally do not have a compensable "ownership" interest in public rights-of-way,[446] but rather hold the public streets and sidewalks in trust for the public.[447] As one court explained, "municipalities generally possess no rights to profit from their streets unless specifically authorized by the state."[448] Also, we note that

[440] *See supra* paras. 53-64.

[441] *See Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153-58 (1982); *City of New York,* 486 U.S. at 64. *See also* AT&T Comments at 41-42.

[442] *See* Comcast Comments at 39 (citing 47 U.S.C. § 556(a)). *See also* Florida Municipalities Comments at 18-19 (the Cable Act provides for limited preemption of local regulatory efforts in certain specific areas, none of which cover competitive franchises). Commenters further point to the legislative history for Section 636(a), which noted that a state may "exercise authority over the whole range of cable activities, such as negotiations with cable operators; consumer protection; construction requirements; rate regulation or deregulation; the assessment of financial qualifications; the provision of technical assistance with respect to cable; and other franchise-related issues – as long as the exercise of that authority is consistent with Title VI." *See* Comcast Comments at 39-40 (citing H.R. REP. NO. 98-934, at 94 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4731).

[443] 47 U.S.C. § 556(a) (emphasis added).

[444] *See* Texas Coalition of Cities Comments at 29-35; Burnsville/Eagan Comments at 38. Burnsville/Eagan further argues that Fifth Amendment concerns would arise if the Commission were to interfere with the terms under which a competitive franchise is granted, thereby forcing modifications to existing cable franchises, pursuant to state and local level-playing-field requirements, thus depriving LFAs of lawful and reasonable compensation they negotiated with the incumbent cable operators for the use of public rights-of-way.

[445] U.S. Const. Amend. V.

[446] *See Liberty Cablevision,* 417 F.3d at 222.

[447] *See New Jersey Payphone Ass'n, Inc. v. Town of West New York,* 130 F.Supp.2d 631, 638 (D.N.J. 2001); *see also Liberty Cablevision,* 417 F.3d at 222 (recognizing that it is "'a mistake to suppose … [that] the city is constitutionally and necessarily entitled to compensation'" for use of the city streets).

[448] *See Liberty Cablevision,* 417 F.3d at 222.

telecommunications carriers that seek to offer video service already have an independent right under state law to occupy rights-of-way.[449] States have granted franchises to telecommunications carriers, pursuant to which the carriers lawfully occupy public rights-of-way for the purpose of providing telecommunications service.[450] Because all municipal power is derived from the state,[451] courts have held that "a state can take public rights-of-way without compensating the municipality within which they are located."[452] Given the municipality is not entitled to compensation when its interest in the streets are taken pursuant to state law, it is difficult to see how the transmission of additional video signals along those same lines results in any physical occupation of public rights-of-way beyond that already permitted by the states.[453]

135. Moreover, even if there was a taking, Congress provided for "just compensation" to the local franchising authorities.[454] Section 622(h)(2) of the Act provides that a local franchising authority may recover a franchise fee of up to 5 percent of a cable operator's annual gross revenue.[455] Congress enacted the cable franchise fee as the consideration given in exchange for the right to use the public ways.[456] The implementing regulations we adopt today do not eviscerate the ability of local authorities to impose a franchise fee. Rather, our actions here simply ensure that the local franchising authority does not impose an excessive fee or other unreasonable costs in violation of the express statutory provisions and policy goals encompassed in Title VI.[457]

136. Finally, LFAs maintain that the Commission's preemption of local governmental powers offends the Tenth Amendment of the U.S. Constitution.[458] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[459] In support of their position, commenters argue

[449] *See* Verizon Reply at 25.

[450] *See* Verizon Reply at 25; South Slope Comments at 10-11; NCTA Comments at 12.

[451] *See St. Louis v. Western Union Telegraph Co.,* 149 U.S. 465, 467 (1893); *Liberty Cablevision,* 417 F.3d at 221.

[452] *See City & County of Denver,* 18 P.3d 748, 761 (Colo. 2001).

[453] *See* Verizon Reply at 25-26. *See also C/R TV, Inc. v. Shannondale, Inc.,* 27 F.3d 104, 109 (4th Cir. 1994) (reasoning that the transmission of cable television signals "would not impose an additional burden on [a] servient estate" on which telephone poles, power lines, and telephone wires had previously been installed).

[454] *See U.S. v. Riverside Bayview Homes,* 474 U.S. 121, 128 (1985) (the Fifth Amendment does not prohibit takings, only uncompensated ones). Because we find that the statute provides just compensation, we need not address whether the takings clause of the Fifth Amendment encompasses the property interests of state and local governments in the same way that it applies to the property interests of private persons.

[455] 47 U.S.C. § 542(h)(2).

[456] In passing the 1984 Cable Act, Congress recognized local government's entitlement to "assess the cable operator a fee for the operator's use of public ways," and established "the authority of a city to collect a franchise fee of up to 5 percent of an operator's annual gross revenues." H.R. REP. NO. 98-934, at 26 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4663.

[457] For the reasons stated above, we need not reach the issue of whether a "taking" has occurred with respect to a competitive applicant providing cable service over the same network it uses to provide telephone service, for which it is already authorized by the local government to use the public rights-of-way.

[458] *See* Michigan Municipal League Comments at 24 ("[a]ny action by the Commission to mandate the granting of a franchise directly or by means of state actions in favor of any party over the objection of the local franchising authority offends the Tenth Amendment of the U.S. Constitution"); Anne Arundel County Comments at 50 (same).

[459] U.S. Const. Amend. X.

that the Commission is improperly attempting to override local government's duty to "maximize the value of local property for the greater good" by imposing a federal regulatory scheme onto the states and/or local governments.[460] Contrary to the local franchising authorities' claim, however, they have failed to demonstrate any violation of the Tenth Amendment.[461] "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."[462] Thus, when Congress acts within the scope of its authority under the Commerce Clause, no Tenth Amendment issue arises.[463] Regulation of cable services is well within Congress' authority under the Commerce Clause.[464] Thus, because our authority in this area derives from a proper exercise of congressional power, the Tenth Amendment poses no obstacle to our preemption of state and local franchise law or practices.[465] Likewise, there is no merit to LFA commenters' suggestion that Commission regulation of the franchising process would constitute an improper "commandeering" of state governmental power.[466] The Supreme Court has recognized that "where Congress has the authority to regulate private activity under the Commerce Clause," Congress has the "power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation."[467] And here, we are simply requiring local franchising authorities to exercise their regulatory authority according to federal standards, or else local requirements will be preempted. For all of these reasons, our actions today do not offend the Tenth Amendment.

137. We do not purport to identify every local requirement that this *Order* preempts. Rather, in accordance with Section 636(c), we merely find that local laws, regulations and, agreements are preempted to the extent they conflict with this *Order* and the rules adopted herein. For example, local laws would be preempted if they: (1) authorize a local franchising authority to take longer than 90 days to act on a competitive franchise application concerning entities with existing authority to access public rights-of-way, and six months concerning entities that do not have authority to access public rights-of-way;[468] (2) allow an LFA to impose unreasonable build-out requirements on competitive franchise applicants;[469] or (3) authorize or require a local franchising authority to collect franchise fees in excess of the fees authorized by law.[470]

138. One specific example of the type of local laws that this *Order* preempts are so-called "level-playing-field" requirements that have been adopted by a number of local authorities.[471] We find

[460] *See* Michigan Municipal League Comments at 25; Anne Arundel County Comments at 51.

[461] *See* Verizon Reply at 27-29.

[462] *See New York v. U.S.,* 505 U.S. 144, 156 (1992).

[463] *See id.* at 157-58.

[464] *See Crisp,* 467 U.S. at 700-701 (holding that cable services are interstate services).

[465] *See Qwest Broadband Services, Inc. v. City of Boulder*, 151 F.Supp.2d 1236, 1245 ("the inquiries under the Commerce Clause and the Tenth Amendment are mirror images, and a holding that a Congressional enactment does not violate the Commerce Clause is dispositive of a Tenth Amendment challenge) (citing *United States v. Baer,* 235 F.3d 561, 563 n.6 (10th Cir. 2000). *See also* Verizon Reply at 28.

[466] *See* Michigan Municipal League Comments at 25; Anne Arundel County Comments at 51.

[467] *See New York v. U.S.,* 505 U.S. at 167.

[468] *See supra* at Section III.C.1.

[469] *See supra* at Section III.C.2.

[470] *See supra* at Section III.C.3.

[471] *See, e.g.,* GMTC Comments at 15.

that these mandates unreasonably impede competitive entry into the multichannel video marketplace by requiring LFAs to grant franchises to competitors on substantially the same terms imposed on the incumbent cable operators.[472] As an initial matter, just because an incumbent cable operator may agree to franchise terms that are inconsistent with provisions in Title VI, LFAs may not require new entrants to agree to such unlawful terms pursuant to level-playing-field mandates because any such requirement would conflict with Title VI. Moreover, the record demonstrates that aside from this specific scenario, level-playing-field mandates imposed at the local level deter competition in a more fundamental manner. The record indicates that in today's market, new entrants face "steep economic challenges" in an "industry characterized by large fixed and sunk costs," without the resulting benefits incumbent cable operators enjoyed for years as monopolists in the video services marketplace.[473] According to commenters, "a competitive video provider who enters the market today is in a fundamentally different situation" from that of the incumbent cable operator: "[w]hen incumbents installed their systems, they had a captive market," whereas new entrants "have to 'win' every customer from the incumbent" and thus do not have "anywhere near the number of subscribers over which to spread the costs."[474] Commenters explain that "unlike the incumbents who were able to pay for any of the concessions that they grant an LFA out of the supra-competitive revenue from their on-going operations," "new entrants have no assured market position."[475] Based on the record before us, we thus find that an LFAs refusal to award an additional competitive franchise unless the competitive applicant meets substantially all the terms and

[472] *See* FTTH Council Comments at 28-31 ("there is substantial evidence that level playing field requirements have harmed new entrants or simply scared off applicants in the first place"); Verizon Comments at 76-80 (level-playing-field provisions are "protectionist requirements" for the benefit of the incumbent cable operator and are often cited as a basis for imposing all manner of additional costs and obligations, many of which are unreasonable and/or unlawful, on a would-be new entrant into the market); USTA Reply at 23-26, 32-34 (level-playing-field laws intrinsically limit the ability of LFAs to award franchises); *see also,* GAO Report, *Wire-Based Competition Benefited Consumers in Selected Markets* (Feb. 2004), GAO-04-241 Report at 21 (noting that one local official indicated that the level-playing-field law in his state was a factor in an interested competitive cable company's retracting a cable application); BSPA Comments at 4-5 (level-playing-field statutes are a superficial appeal to fairness that masks the real intent to protect the incumbent's market position, and such requirements delay or limit the growth of competition by negatively impacting the availability or use of capital); Letter from Lawrence Spiwak, President, Phoenix Ctr. For Advanced Legal and Econ. Pub. Policy Studies, to Marlene Dortch, Secretary, Federal Communications Commission at Attachment, *Phoenix Center Policy Paper Number 21: Competition After Unbundling: Entry, Industry Structure and Convergence*, 37 ("presence of a 'first mover' advantage means that requiring a new entrant to bear an entry cost simply because the incumbent cable operator has already borne it will have the effect of deterring entry substantially, even if such costs did not deter the incumbent cable operator from offering service") (March 13, 2006) ("*Phoenix Center Competition Paper*"); DOJ *Ex Parte* at 16. *But see* Comcast Comments at 40 (maintaining that state level-playing-field statutes are a legitimate and well-established exercise of state and local regulatory authority and are not inconsistent with the Communications Act); NATOA Reply at 43-44 (maintaining that there is little or no evidence to suggest that state level-playing-field laws have had anywhere near the draconian effect on the granting of competitive franchises as the telephone industry alleges).

[473] *See* USTA Reply at 24. *See also,* Verizon Reply at 65 ("In exchange for the costs they incurred to enter the market, the incumbent cable operators generally received exclusive franchises and enjoyed all of the benefits of being monopoly providers for years, often decades."); Mercatus Comments at 40 ("while a second cable operator will have to make the same unrecoverable investment previously made by the incumbent, it will not have the benefit of a monopoly over which to amortize it"); FTTH Council Comments at 3 ("New entrants are highly unlikely to ever obtain and enjoy the fruits of market power. Consequently, the burdens of the pre-existing franchising process from the perspective of these new entrants are not offset by the benefits that the monopolists enjoyed.").

[474] *See* FTTH Council Comments at 30 (quoting Andy Sarwal Declaration, para. 7); Verizon Comments at 77 (new entrants "[face] ubiquitous competition from strong and entrenched competitors, which in turn leads to lower market share and lower profit margins").

[475] *See* Verizon Reply at 65. *See also* USTA Reply at 24.

conditions imposed on the incumbent cable operator may be unreasonable, and inconsistent with the "unreasonable refusal" prohibition of Section 621(a)(1). Accordingly, to the extent a locally-mandated level-playing-field requirement is inconsistent with the rules, guidance, and findings adopted in this *Order*, such requirement is deemed preempted.[476]

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

139. As discussed above, this proceeding is limited to competitive applicants under Section 621(a)(1).[477] Yet, some of the decisions in this *Order* also appear germane to existing franchisees. We asked in the *Local Franchising NPRM* whether current procedures and requirements were appropriate for any cable operator, including existing operators.[478] NCTA argues that if the Commission establishes franchising relief for new entrants, we should do the same for incumbent cable operators because imposing similar franchising requirements on new entrants and incumbent cable operators promotes competition.[479] Somewhat analogously, the BSPA argues that any new franchise regulatory relief should extend to all current competitive operators and new entrants equally; otherwise, the inequities would effectively penalize existing competitive franchisees simply because they were the first to risk competition with the incumbent cable operator.[480] The record does not indicate any opposition by new entrants to the idea that any relief afforded them also be afforded to incumbent cable operators.[481] Some incumbent cable operators discussed the potential impact of Commission action under Section 621 on incumbent cable operators. For example, Charter argues that granting competitive cable providers entry free from local franchise requirements would affect Charter's ability to satisfy its existing obligations; funds that Charter might use to respond to competition by investing in new facilities and services would instead be tied up in franchise obligations not imposed on Charter's competitors, which would undermine the company's investment and render its franchise obligations commercially impracticable.[482] AT&T

[476] We also find troubling the record evidence that suggests incumbent cable operators use "level-playing-field" requirements to frustrate negotiations between LFAs and competitive providers, causing delay and preventing competitive entry. *See, e.g.,* Letter from John Goodman, Broadband Service Providers Association, to Marlene Dortch, Secretary, Federal Communications Commission (March 3, 2006) (explaining that the incumbent cable operator used level-playing-field requirements to bring litigation against the LFA which delayed the negotiation process and made entry so expensive that it no longer became feasible for the new entrant); Texas Coalition of Cities Comments at 13 ("Most delays in *competitive franchise* negotiations result from the incumbent cable provider's demands that competitive providers' franchises contain virtually identical terms."); Verizon Reply at 65-66 ("incumbents' over-eagerness to support these anticompetitive requirements further evidences the need for the Commission to remove this roadblock to competition").

[477] *See supra* paras. 1, 113.

[478] *Local Franchising NPRM*, 20 FCC Rcd at 18588.

[479] NCTA Comments at 13 (quoting *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* 20 FCC Rcd 14853, 14855-56, 14864-65 (2005) "[T]reating like services alike promotes competition" by allowing the market to determine the better operator rather than providing one operator "artificial regulatory advantages"). *See also* Cox Reply at 2-4.

[480] BSPA Comments at 2-3.

[481] *See, e.g.*, BSPA Comments at 2-3 (any new regulatory relief in franchising should apply to all current competitive operators and potential new entrants). *But see* FTTH Council Comments at 24 (new entrants are not treated more favorably than incumbents when they are burdened with the same requirements as incumbents but do not have the same market power).

[482] Charter Comments at 3-4.

argues that competition will not harm incumbent cable operators: cable has handled the competition that DBS presents, and analysts predict that the new wave of competition will not put them out of business.[483]

140. We tentatively conclude that the findings in this *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs. We note that Section 611(a) states "A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use" and Section 622(a) provides "any cable operator may be required under the terms of any franchise to pay a franchise fee." These statutory provisions do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants. We seek comment on our tentative conclusion. We also seek comment on our authority to implement this finding. We also seek comment on what effect, if any, the findings in this *Order* have on most favored nation clauses that may be included in existing franchises. The Commission will conclude this rulemaking and release an order no later than six months after release of this *Order*.

141. In the *Local Franchising NPRM,* we also sought comment on whether customer service requirements should vary greatly from jurisdiction to jurisdiction.[484] In response, AT&T urges us to adopt rules to prevent LFAs from imposing various data collection and related requirements in exchange for a franchise.[485] AT&T claims that LFAs have imposed obligations that franchisees collect, track, and report customer service performance data for individual franchise areas.[486] AT&T states that it operates its call centers and systems on a region-wide basis, and that it is not currently possible or economically feasible for AT&T to comply with the various local customer service requirements on a franchise by franchise basis.[487] AT&T also asks us to affirm that LFAs may not, absent the franchise applicant's consent, impose any local service quality standards that go beyond the requirements of duly enacted laws and ordinances.[488] Verizon indicates that some localities have conditioned the grant of a franchise upon the submission of Verizon's data services to local customer service regulation.[489]

142. NATOA opposes AT&T's request for relief from local customer service standards, and argues that the Act and the Commission's rules explicitly provide for local customer service regulation.[490] Specifically, NATOA asserts that Section 632(d)(2) of the Cable Act allows for the establishment and enforcement of local customer service laws that go beyond the federal standards.[491] Other parties assert that customer service regulation is necessary to ensure that consumers have regulatory relief.[492]

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[483] AT&T Reply at 5.

[484] *Local Franchising NPRM*, 20 FCC Rcd at 18588.

[485] AT&T Comments at 72-73.

[486] *Id.*

[487] *Id.* As discussed in Section III.C.2 above, AT&T's existing call center regions do not mirror local franchise areas. One region can encompass multiple franchise areas, and impose a multitude of regulations upon a new entrant.

[488] AT&T Comments at 73.

[489] Verizon Comments at 75.

[490] NATOA Reply at 40-41. *See also* New York City Comments at 3 (citing 47 U.S.C. § 552).

[491] 47 U.S.C. § 552(d)(2). *Accord* 47 C.F.R. § 76.309(b)(4).

[492] *See, e.g.,* Alliance for Public Technology Comments at 2-3; American Association of People with Disabilities at 2; Cavalier Comments at 6.

143. Section 632(d)(2) states that:

> [n]othing in this Section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission . . . . Nothing in this Title shall be construed to prevent the establishment and enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.[493]

Given this explicit statutory language, we tentatively conclude that we cannot preempt state or local customer service laws that exceed the Commission's standards, nor can we prevent LFAs and cable operators from agreeing to more stringent standards. We seek comment on this tentative conclusion.

V. PROCEDURAL MATTERS

144. *Ex Parte Rules*. This is a permit-but-disclose notice and comment rulemaking proceeding. Ex Parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

145. *Comment Information*. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on or before 30 days after this *Further Notice of Proposed Rulemaking* is published in the Federal Register, and reply comments on or before 45 days of publication. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.

  - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in

[493] 47 U.S.C. § 552(d)(2). *Accord* 47 C.F.R. § 76.309(b)(4).

receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

146. *Initial Paperwork Reduction Act Analysis*. This *Further Notice of Proposed Rulemaking* does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

147. *Initial Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act,[494] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial *number* of small entities of the proposals addressed in this *Further Notice of Proposed Rulemaking*. The IRFA is set forth in Appendix C. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Second Further Notice*, and they should have a separate and distinct heading designating them as responses to the IRFA.

148. *Paperwork Reduction Act Analysis*. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we will seek specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

149. In this present document, we have assessed the effects of the application filing requirements used to calculate the time frame in which a local franchising authority shall make a decision, and find that those requirements will benefit companies with fewer than 25 employees by providing such companies with specific application requirements of a reasonable length. We anticipate this specificity will streamline this process for companies with fewer than 25 employees, and that these requirements will not burden those companies.

[494] *See* 5 U.S.C. § 603.

150. *Final Regulatory Flexibility Analysis* As required by the Regulatory Flexibility Act,[495] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *Report and Order and Further Notice of Proposed Rulemaking*. The FRFA is set forth in Appendix D.

151. *Congressional Review Act*. The Commission will send a copy of this *Report and Order and Further Notice of Proposed Rulemaking* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

152. *Additional Information*. For additional information on this proceeding, please contact Holly Saurer, Media Bureau at (202) 418-2120, or Brendan Murray, Policy Division, Media Bureau at (202) 418-2120.

VI. ORDERING CLAUSES

153. IT IS ORDERED that, pursuant to the authority contained in Sections 1, 2, 4(i), 303, 303r, 403 and 405 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 303(r), 403 , this *Report and Order and Further Notice of Proposed Rulemaking* IS ADOPTED.

154. IT IS FURTHER ORDERED that pursuant to the authority contained in Sections Sections 1, 2, 4(i), 303, 303a, 303b, and 307 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 303a, 303b, and 307, the Commission's rules ARE HEREBY AMENDED as set forth in Appendix B. It is our intention in adopting these rule changes that, if any provision of the rules is held invalid by any court of competent jurisdiction, the remaining provisions shall remain in effect to the fullest extent permitted by law.

155. IT IS FURTHER ORDERED that the rules contained herein SHALL BE EFFECTIVE 30 days after publication of the *Report and Order and Further Notice of Proposed Rulemaking* in the Federal Register, except for the rules that contain information collection requirements subject to the Paperwork Reduction Act, which shall become effective immediately upon announcement in the Federal Register of OMB approval.

156. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order and Further Notice of Proposed Rulemaking*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

157. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this *Report and Order and Further Notice of Proposed Rulemaking* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[495] *See* 5 U.S.C. § 604.

APPENDIX A

List of Commenters and Reply Commenters

1. Abilene, TX
2. Access Channel 5, NY
3. Access Fort Wayne, IN
4. Access Sacramento, CA
5. Ad Hoc Telecom Manufacturer Coalition
6. Ada Township, et al.
7. Advance/Newhouse Communications
8. AEI-Brookings Joint Center for Regulatory Studies
9. Alamance County, NC
10. Albuquerque, NM
11. Alcatel
12. Alhambra, CA
13. Alliance for Public Technology
14. Alpina, MI
15. American Association of Business Persons with Disabilities
16. American Association of People with Disabilities
17. American Cable Association
18. American Consumer Institute
19. American Corn Growers Association
20. American Homeowners Grassroots Alliance
21. Anaheim, CA
22. Angels Camp, CA
23. Anne Arundel County, Carroll County, Charles County, Howard County and Montgomery County
24. Apex, NC
25. Apple Valley, MN
26. Appleton, WI
27. Archdale, NC
28. Arlington Independent Media, VA
29. Asheboro, NC
30. Ashland, KY
31. Ashokie, NC
32. Association of Independent Programming Networks
33. AT&T Inc.
34. Atascadero, CA
35. Bailey, NC
36. Banning, CA
37. Barrington, IL
38. Bellefonte, PA
39. Bellflower, CA
40. BellSouth
41. Benson, NC
42. Berks Community TV, PA
43. Beverly Hills, CA
44. Biddeford, ME
45. Billerica Access TV, MA
46. Billerica, MA
47. Birmingham Area Cable Board, MI

48. Blue Lake, CA
49. Bonita Springs, FL
50. Boston Community Access and Programming Foundation (BCAPF)
51. Boston, MA
52. Bowie, MD
53. Branford Commun. TV, CT
54. Brea, CA
55. Brisbane, CA
56. Broadband Service Providers Association
57. Brunswick, ME
58. Bucks County Consortium of Communities, PA
59. Burlington, NC
60. Burnsville/Eagan Telecommunications Commission; The City of Minneapolis, MN; The North Metro Telecommunications Commission; The North Suburban Communications Commission; and The South Washington County Telecommunications Commission ("City of Minneapolis")
61. Cable Access St. Paul, MN
62. Cable Advisory Council of South Central CT
63. Cablevision Systems Corporation
64. Cadillac, MI
65. Calabash, NC
66. California Alliance for Consumer Protection
67. California Farmers Union
68. California Small Business Association
69. California Small Business Roundtable
70. Cambridge Public Access Corp, MA
71. Cambridge, MA
72. Campbell County Cable Board, KY
73. Cape Coral, FL
74. Capital Community TV, OR
75. Carlsbad, CA
76. Carrboro, NC
77. Cary, NC
78. Castalia, NC
79. Caswell County, NC
80. Cavalier Telephone, LLC/Cavalier IP TV, LLC
81. Cedar Rapids, Iowa
82. Center for Digital Democracy
83. Central St. Croix Valley Joint Cable Comm, MN
84. Certain Florida Municipalities
85. Champaign, IL
86. Champaign-Urbana Cable TV and Telecomm Commission, IL
87. Chapel Hill, NC
88. Charlotte, NC
89. Charter Communications, Inc.
90. Chicago Access Corp, IL
91. Chicago, IL
92. Cincinnati Bell, Inc.
93. Cincinnati, OH
94. Citizen's Community TV, CO
95. City and County of San Francisco, CA
96. City of Los Angeles

97. City of Philadelphia
98. City of St. Louis, Missouri
99. City of Ventura, California
100. Clackamas County, OR
101. Clark County, NV
102. Clay County, FL
103. Clayton, NC
104. Clinton Township, MI
105. Clovis, CA
106. College Twp, PA
107. Comcast Corporation
108. Communications Support Group, Inc.
109. Community Access TV, IL
110. Community Programming Board of Forest Park et al, OH
111. Concord, CA
112. Concord, NC
113. Consumer Coalition of California
114. Consumer Electronics Association
115. Consumers First
116. Consumers for Cable Choice
117. Coral Springs, Florida
118. Coralville, IA
119. Coronado, CA
120. Cox Communications, Inc.
121. Cypress, CA
122. Daly City, CA
123. Dare County, NC
124. Darlington, SC
125. Davis, CA
126. Del Mar, CA
127. Delray Beach, FL
128. Democratic Processes Center
129. Discovery Institute's Technology & Democracy Project
130. Dortches, NC
131. Dublin, CA
132. Durham, NC
133. Eden, NC
134. El Cerrito, CA
135. Elk Grove, IL
136. Elon, NC*
137. Enumclaw, WA
138. Escondido, CA
139. Esopus, NY
140. Evanston, IL
141. Fairfax Cable Access, VA
142. Fairfax County, Virginia
143. Fairfax, CA
144. Faith, NC
145. Fall River Community TV, MA
146. Fargo, ND
147. Farmington, MN

148. Ferguson, PA
149. Ferndale, CA
150. Fiber-to-the-Home Council
151. Floral Park, NY
152. Florence, Kentucky
153. Florence, KY
154. Fort Worth, TX
155. Fortuna, CA
156. Foster City, CA
157. Foxboro Cable Access, MA
158. Franklin Lakes, NJ
159. Franklin, KY
160. Free Enterprise Fund
161. Free Press (Reply)
162. Free Press, Consumers Union, Consumer Federation of America
163. Freedomworks
164. Ft. Lauderdale, FL
165. Gainesville, FL
166. Garland, TX
167. Garner, NC
168. Geneva, IL
169. Georgia Municipal Association (GMA)
170. Gibsonville, NC
171. Gilroy, CA
172. Glenview, IL
173. Graham, NC
174. Grand Rapids, MI
175. Granite Quarry, NC
176. Great Neck/North Shore Cable Comm'n, NY
177. Greater Metro Telecommunications Consortium, et al. (GMTC)
178. Green Spring, K
179. Greensboro, NC*
180. Greenville, NC
181. Guilford County, NC
182. Harnett County, NC
183. Harris Township, PA
184. Haw River, NC
185. Hawaii Consumers
186. Hawaii Telcom Communications, Inc.
187. Henderson County, NC
188. Henderson, NV
189. Hialeah, FL
190. Hibbing Public Access TV, MN
191. High Point, NC
192. High Tech Broadband Coalition
193. Highlands, NC
194. Hillsborough, NC
195. Holly Springs, NC
196. Huntsville, AL
197. Imperial Beach, CA
198. Independent Multi-Family Communications Council

199. Indianapolis, IN
200. Institute for Policy Innovation
201. Intergovernmental Cable Comm Auth, MI
202. Iowa City, IA
203. Irvine, CA
204. Irwindale, CA
205. Itasca Comm TV, MN
206. Jackson, CA
207. Jamestown, NC
208. Jefferson County League of Cities Cable Comm'n, Kentucky
209. Jenkins, KY
210. Jersey Access Group, NJ
211. Kansas City, Missouri
212. Kernersville, NC
213. Killeen, TX
214. King County, WA
215. Kitty Hawk, NC
216. Knightdale, NC
217. La Puente, CA
218. Lake Forest, CA
219. Lake Lurie, NC
220. Lake Mills, WI
221. Lake Minnetonka Communications Comm, MN
222. Lake Worth, FL
223. Lakewood, CA
224. Las Vegas, NV
225. LaVerne, CA
226. League of Minnesota Cities (LMC)
227. League of United Latin American Citizens of the Northeast Region+
228. Leavenworth, KS
229. Lee County, FL
230. Leibowitz & Associates, P.A.
231. Lenexa, KS
232. Lewisville, NC
233. Lexington, NC
234. Lincoln, CA
235. Lincoln, NE
236. Long Beach, CA
237. Longmont, CO
238. Loomis, CA
239. Los Angeles Cable Televisión Access Corp., CA
240. Los Banos, CA
241. Lynwood, CA
242. Madison Hts, MI
243. Madison, NC
244. Madison, WI
245. Malverne, NY
246. Manatee County, Florida
247. Manhattan Community Access Corp., NY
248. Marin Telecomm Agency, CA
249. Martha's Vineyard Comm TV, MA

250. Maxton, NC
251. Mayodan, NC
252. Mayville, NY
253. Maywood, CA
254. Mecklenburg County, NC
255. Medford, OR
256. Medford, OR
257. Media Action Marin, CA
258. Media Bridges Cincinnati, OH
259. Mercatus Center
260. Metheun Comm TV, MA
261. Metropolitan Area Comm Comm'n, OR
262. Metropolitan Educational Access Corp, TN
263. Miami Valley Comm Council, OH
264. Miami-Dade County, Florida
265. Michigan Municipal League
266. Microsoft Corporation
267. Middlesex, NC
268. Midland, TX
269. Milpitas, CA
270. Minnesota Telecomm Alliance
271. Minority Media and Telecommunications Council, et al.
272. Missouri Chapter – National Association of Telecommunications Officers and Advisors (MO-NATOA)
273. Mobile, AL
274. Momeyer, NC
275. Monrovia, CA
276. Monterey Park, CA
277. Montrose, CO
278. Morrisville, NC
279. Mount Morris, MI
280. Mt. Hood Cable Regulatory Commission (MHCRC)
281. Murfeesboro, TN
282. Murfreesboro, NC
283. Murrieta, CA
284. National Association of Broadcasters
285. National Black Chamber of Commerce
286. National Cable & Telecommunications Association
287. National Caucus and Center on Black Aged
288. National Grange
289. National Hispanic Council on Aging
290. National Taxpayers Union
291. National Telecommunications Cooperative Association
292. NATOA, NLC, NACO, USCM, ACM, and ACD
293. Naval Media Center, US
294. New Jersey Board of Public Utilities (NJBPU)
295. New Jersey Division of the Ratepayer Advocate
296. New York City
297. New York State Conference of Mayors (NYCOM)
298. Newton Comm Access Cntr, MA
299. Norfolk, VA

300. North Kansas City, MO
301. North Liberty, IA
302. North Richland Hills, TX
303. Northbrook, IL
304. Northern Berkshire Comm TV Corp, MA
305. Northern Dakota County Cable Comm Comm'm
306. Northwest Suburbs Cable Commun Comm'n, MN
307. Norwalk, CA
308. Oceanside Comm TV, CA
309. Onslow Cnty, NC
310. Ontario, CA
311. Orange County, FL
312. Organization for the Promotion and Advancement of Small Telecommunications Companies
313. Orion Neighborhood TV, MI
314. Oxford, NC
315. Pacific Research Institute
316. Pac-West Telecomm, Inc.
317. Palmetto, FL
318. Palo Alto, CA (on behalf of Joint Powers)
319. Pasadena, CA
320. Patton, PA
321. Peachtree City, GA
322. Pennsville, NJ
323. Perris, CA
324. Philadelphia, PA
325. Pike County, Kentucky
326. Pike County, KY
327. Pikeville, Kentucky
328. Pikeville, KY
329. Pinetops, NC
330. Pittsboro, NC
331. Plainfield, MI
332. Pleasant Garden, NC
333. Pleasant Hill, CA
334. Plymouth, MA
335. Pocatello, ID
336. Post Falls, ID
337. Poway, CA
338. Prince George's Community TV, Inc.
339. Prince George's County, MD
340. Princeton Community TV, NJ
341. Public Cable Television Authority
342. Public Utility Commission of Texas
343. Public, Educational and Government Access Oversight Comm of Metro Nashville
344. Queen Anne's County, MD
345. Quote Unquote, NM
346. Qwest Communications International Inc.
347. Ramsey/Washington Counties Suburban Cable Commun. Comm'n, MN
348. Rancho Cordova, CA
349. Rancho Santa Margarita, CA
350. Randolph County, NC

351. RCN Telecom Services, Inc.
352. Red Oak, NC
353. Redding, CA
354. Reidsville, NC
355. Renton, WA
356. Richmond, KY
357. River Bend, NC
358. Rockingham County, NC
359. Rockwell, NC
360. Rolling Hills Estates, CA
361. Rowan County, NC
362. Sacramento Metro Cable TV Commission, CA
363. Saint Charles, MO
364. Salem, OR
365. Salt Lake City, UT
366. San Diego, CA
367. San Dimas, CA
368. San Jose, CA
369. San Juan Capistrano, CA
370. San Marcos, CA
371. San Mateo County Telecomm Auth, CA
372. Sanford, NC
373. Santa Clara, CA
374. Santa Clarita, CA
375. Santa Cruz County Community TV
376. Santa Rosa, CA
377. Santee, CA
378. Saratoga Springs, NY
379. Scotts Valley, CA
380. Seattle, WA
381. Sebastopol, CA
382. Self-Advocacy Association of New York State, Inc.
383. Shaler, PA
384. Sierra Madre, CA
385. Signal Hill, CA
386. Siler City, NC
387. Simi Valley, CA
388. Sjoberg's, Inc.
389. Skokie, IL
390. Smithfield, NC
391. Solana Beach, CA
392. South Orange Village, NJ
393. South Portland, ME
394. South San Francisco, CA
395. South Slope Cooperative Telephone Company
396. Southeast Michigan Municipalities
397. Southwest Suburban Cable Commission (SWSCC)
398. Spring Hope, NC
399. Springfield, MO
400. St. Charles, IL
401. St. Paul, MN*

402. St. Petersburg, FL
403. Standish, ME
404. State College Bourough, PA
405. State of Hawaii
406. Statesville, NC
407. Sun Prairie Cable Access TV, WI
408. Sunapee, NH*
409. Sunnyvale, CA
410. Susanville, CA
411. Tabor City, NC
412. Tampa, FL
413. Taylor, MI
414. Telco Retirees Association, Inc.
415. Telecommunications Industry Association
416. Temecula, CA
417. Texas Coalition of Cities for Utility Issues (TCCFUI)
418. Texas Municipal League and the Texas City Attorneys Association
419. The Progress & Freedom Foundation
420. Time Warner Cable
421. Tobaccoville, NC
422. Toppenish, WA
423. Torrance, CA
424. Truckee, CA
425. Tulsa, OK
426. Tuolumne, CA
427. Ukiah, CA
428. United States Internet Industry Association
429. United States Telecom Association
430. United States-Mexico Chamber of Commerce
431. URTV Asheville, NC
432. Valley Voters Organized Toward Empowerment
433. Vancouver Educational Telecommunications Consortium (VETC)
434. Vass, NC
435. Verizon
436. Vermont Public Service Board (VPSB)
437. Video Access Alliance
438. Villages of Larchmont & Mamaroneck, NY
439. Virginia Cable Telecommunications Association (VCTA)
440. Vista, CA
441. Wake Forest, NC
442. Walnut Creek, CA
443. Walnut Creek, California
444. Warrenville, IL
445. Washington State Grange
446. Wayland, MA
447. Wendell, NC
448. West Allis, WI
449. West Palm Beach, FL
450. Westport, WI
451. Wheaton, IL
452. Whitakers, NC

453. White Plains Cable Access TV, NY
454. White, SD
455. Whittier, CA
456. Wilbraham, MA
457. Wilson, NC
458. Winchester, KY & KY Regional Cable Comm.
459. Windham Community TV, NH
460. Winston-Salem, NC
461. Wisconsin Association of Public, Educational and Government Access Channels (WAPC)
462. Women Impacting Public Policy
463. Worchester, MA
464. World Institute on Disability
465. Yanceyville, NC
466. Yuma, AZ
467. Zebulon, NC
468. Zeeland, MI

APPENDIX B

Rule Changes

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76 –MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. Revise Subpart C title to read as follows:

Subpart C – Cable Franchise Applications

2. Insert into new Subpart C the following:

§76.41 Franchise Application Process

(a) Definition. *Competitive Franchise Applicant.* For the purpose of this section, an applicant for a cable franchise in an area currently served by another cable operator or cable operators in accordance with 47 U.S.C. § 541(a)(1).

(b) A competitive franchise applicant must include the following information in writing in its franchise application, in addition to any information required by applicable state and local laws:

(1) the applicant's name;

(2) the names of the applicant's officers and directors;

(3) the business address of the applicant;

(4) the name and contact information of a designated contact for the applicant;

(5) a description of the geographic area that the applicant proposes to serve;

(6) the PEG channel capacity and capital support proposed by the applicant;

(7) the term of the agreement proposed by the applicant;

(8) whether the applicant holds an existing authorization to access the public rights-of-way in the subject franchise service area as described under subsection (b)(5);

(9) the amount of the franchise fee the applicant offers to pay; and

(10) any additional information required by applicable state or local laws.

(c) A franchising authority may not require a competitive franchise applicant to negotiate or engage in any regulatory or administrative processes prior to the filing of the application.

(d) When a competitive franchise applicant files a franchise application with a franchising authority and the applicant has existing authority to access public rights-of-way in the geographic area that the applicant proposes to serve, the franchising authority must grant or deny the application within 90 days of the date the application is received by the franchising authority. If a competitive franchise applicant does not have existing authority to access public rights-of-way in the geographic area that the applicant proposes to serve, the franchising authority must grant or deny the application within 180 days of the date the application is received by the franchising authority. A franchising authority and a competitive franchise applicant may agree in writing to extend the 90-day or 180-day deadline, whichever is applicable.

e) If a franchising authority does not grant or deny an application within the time limit specified in subsection (d), the competitive franchise applicant will be authorized to offer service pursuant to an interim franchise in accordance with the terms of the application submitted under subsection (b).

f) If after expiration of the time limit specified in subsection (d) a franchising authority denies an application, the competitive franchise applicant must discontinue operating under the interim franchise specified in subsection (e) unless the franchising authority provides consent for the interim franchise to continue for a limited period of time, such as during the period when judicial review of the franchising authority's decision is pending. The competitive franchise applicant may seek judicial review of the denial under 47 U.S.C. § 555.

g) If after expiration of the time limit specified in subsection (d) a franchising authority and a competitive franchise applicant agree on the terms of a franchise, upon the effective date of that franchise, that franchise will govern and the interim franchise will expire.

APPENDIX C

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (the "RFA"),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact of the policies and rules proposed in the *Further Notice of Proposed Rulemaking* ("*Further Notice*") on a substantial number of small entities.[2] Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Further Notice* provided in paragraph 145 of the item. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[3] In addition, the *Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.[4]

A. Need for, and Objectives of, the Proposed Rules

2. The *Further Notice* continues a process to implement Section 621(a)(1) of the Communications Act of 1934, as amended, in order to further the interrelated goals of enhanced cable competition and accelerated broadband deployment as discussed in the *Report and Order* ("*Order*"). Specifically, the *Further Notice* solicits comment on whether the Commission should apply the rules and guidelines adopted in the *Order* to cable operators that have existing franchise agreements, and if so, whether the Commission has authority to do so. The *Further Notice* also seeks comment on whether the Commission can preempt state or local customer service laws that exceed Commission standards.

B. Legal Basis

3. The *Further Notice* tentatively concludes that the Commission has authority to apply the findings in the *Order* to cable operators with existing franchise agreements. In that regard, the *Further Notice* finds that neither Section 611(a) nor Section 622(a) distinguishes between incumbents and new entrants or franchises issued to incumbents and franchises issued to new entrants.[5]

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[6] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[7] In addition, the term "small business" has the

[1] The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603. Although we are conducting an IRFA at this stage in the process, it is foreseeable that ultimately we will certify this action pursuant to the RFA, 5 U.S.C. § 605(b), because we anticipate at this time that any rules adopted pursuant to this *Notice* will have no significant economic impact on a substantial number of small entities.

[3] *See* 5 U.S.C. § 603(a).

[4] *See* 5 U.S.C. § 603(a).

[5] *See* 47 U.S.C. §§ 531(a), 542(a).

[6] 5 U.S.C. § 603(b)(3).

[7] 5 U.S.C. § 601(6).

same meaning as the term "small business concern" under the Small Business Act.[8] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[9]

5. *Small Businesses*. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.[10]

6. *Small Organizations*. Nationwide, there are approximately 1.6 million small organizations.[11]

7. The Commission has determined that the group of small entities possibly directly affected by the proposed rules herein, if adopted, consists of small governmental entities. A description of these entities is provided below. In addition the Commission voluntarily provides descriptions of a number of entities that may be merely indirectly affected by any rules that result from the *Further Notice*.

Small Governmental Jurisdictions

8. The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[12] As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.[13] This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2 percent) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

Miscellaneous Entities

9. The entities described in this section are affected merely indirectly by our current action, and therefore are not formally a part of this RFA analysis. We have included them, however, to broaden the record in this proceeding and to alert them to our tentative conclusions.

Cable Operators

10. The "Cable and Other Program Distribution" census category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating $13.0 million or less in revenue annually.[14] According to Census Bureau data for 1997, there were a total of

[8] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[9] 15 U.S.C. § 632.

[10] *See* SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

[11] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[12] 5 U.S.C. § 601(5).

[13] U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299-300, Tables 490 and 492.

[14] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) 517510.

1,311 firms in this category, total, that had operated for the entire year.[15] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

11. *Cable System Operators (Rate Regulation Standard)*. The Commission has developed its own small-business-size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[16] The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.[17] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

12. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[18] The Commission has determined that there are 67,700,000 subscribers in the United States.[19] Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[20] Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450.[21] The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[22] and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

13. *Open Video Services*. Open Video Service ("OVS") systems provide subscription services.[23] As noted above, the SBA has created a small business size standard for Cable and Other

[15] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

[16] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *See Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995).

[17] Paul Kagan Associates, Inc., Cable TV Investor, February 29, 1996 (based on figures for December 30, 1995).

[18] 47 U.S.C. § 543(m)(2).

[19] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01-158 (2001).

[20] 47 C.F.R. § 76.901(f).

[21] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operators, Public Notice, DA 01-0158 (2001).

[22] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[23] *See* 47 U.S.C. § 573.

Program Distribution.[24] This standard provides that a small entity is one with $13.0 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.[25] Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

14. We anticipate that any rules that result from this action would have at most a *de minimis* impact on small governmental jurisdictions (*e.g.*, one-time proceedings to amend existing procedures regarding the method of granting competitive franchises). Local franchising authorities ("LFAs") today must review and decide upon competitive cable franchise applications, and will continue to perform that role upon the conclusion of this proceeding; any rules that might be adopted pursuant to this *Notice* likely would require at most only modifications to that process.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

15. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[26]

16. As discussed in the *Further Notice*, Sections 611(a) and 622(a) do not distinguish between new entrants and cable operators with existing franchises.[27] As discussed in the *Order*, the Commission has the authority to implement the mandate of Section 621(a)(1) to ensure that LFAs do not unreasonably refuse to award competitive franchises to new entrants, and adopts rules designed to ensure that the local franchising process does not create unreasonable barriers to competitive entry for new entrants. Such rules consist of specific guidelines (*e.g.*, maximum timeframes for considering a competitive franchise application) and general principles regarding franchise fees designed to provide LFAs with the guidance necessary to conform their behavior to the directive of Section 621(a)(1). As noted above, applying these rules regarding the franchising process to cable operators with existing franchises likely would have at most a *de minimis* impact on small governmental jurisdictions. Even if that were not the case, however, we believe that the interest of fairness to those cable operators would outweigh any impact on small entities. The alternative (*i.e.*, continuing to allow LFAs to follow procedures that are unreasonable) would be unacceptable, as it would be inconsistent with the Communications Act. We seek comment on the impact that such rules might have on small entities, and on what effect alternative rules would have on those entities. We also invite comment on ways in which

[24] 13 C.F.R. § 121.201, NAICS code 517510.

[25] *See* http://www.fcc.gov/mb/ovs/csovscer.html (visited December 19, 2006), http://www.fcc.gov/mb/ovs/csovsarc.html (visited December 19, 2006).

[26] 5 U.S.C. §§ 603(c)(1)-(4).

[27] 47 U.S.C. §§ 531(a), 542(a).

the Commission might implement the tentative conclusions while at the same time imposing lesser burdens on small entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

17. None.

APPENDIX D

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rulemaking* ("*NPRM*") to this proceeding.[2] The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Commission received one comment on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

A. Need for, and Objectives of, the Report and Order

2. This Report and Order ("*Order*") adopts rules and provides guidance to implement Section 621 of the Communications Act of 1934, as amended (the "Communications Act").[4] Section 621 of the Communications Act prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services.[5] The Commission has found that the current franchising process constitutes an unreasonable barrier to entry for competitive entrants that impedes enhanced cable competition and accelerated broadband deployment. The Commission also has determined that it has authority to address this problem. To eliminate the unreasonable barriers to entry into the cable market, and to encourage investment in broadband facilities, in this *Order* the Commission (1) adopts maximum time frames within which local franchising authorities ("LFAs") must grant or deny franchise applications (90 days for new entrants with existing access to rights-of-way and six months for those who do not); (2) prohibits LFAs from imposing unreasonable build-out requirements on new entrants; (3) identifies certain costs, fees, and other compensation which, if required by LFAs, must be counted toward the statutory 5 percent cap on franchise fees; (4) interprets new entrants' obligations to provide support for PEG channels and facilities and institutional networks ("I-Nets"); and (5) clarifies that LFA authority is limited to regulation of cable services, not mixed-use services. The Commission also preempts local laws, regulations, and franchise agreement requirements, including level-playing-field provisions, to the extent they impose greater restrictions on market entry for competitive entrants than what the *Order* allows. The rule and guidelines are adopted in order to further the interrelated goals of enhanced cable competition and accelerated broadband deployment. For the specific language of the rule adopted, see Appendix B.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. Only one commenter, Sjoberg's, Inc. submitted a comment that specifically responded to the IRFA. Sjoberg's, Inc. contends that small cable operators are directly affected by the adoption of rules that treat competitive cable entrants more favorably than incumbents. Sjoberg's Inc. argues that small cable operators are not in a position to compete with large potential competitors. These arguments were considered and rejected as discussed below.

4. We disagree with Sjoberg's Inc. assertion that our rules will treat competitive cable entrants more favorably than incumbents. While the actions we take in the *Order* will serve to increase

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

[2] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 20 FCC Rcd 18581 (2005) ("*NPRM*").

[3] *See* 5 U.S.C. § 604.

[4] 47 U.S.C. § 541(a)(1).

[5] *Id*.

competition in the multichannel video programming ("MVPD") market, we do not believe that the rules we adopt in the *Order* will put any incumbent provider at a competitive disadvantage. In fact, we believe that incumbent cable operators are at a competitive advantage in the MVPD market; incumbent cable operators have the competitive advantage of an existing customer base and significant brand recognition in their existing markets. Furthermore, we ask in the *Further Notice of Proposed Rulemaking* whether the findings adopted in the *Order* should apply to existing cable operators and tentatively conclude that they should.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

Entities Directly Affected By Proposed Rules

5. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.[6] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small government jurisdiction."[7] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[8] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[9]

6. The rules adopted by this *Order* will streamline the local franchising process by adopting rules that provide guidance as to what constitutes an unreasonable refusal to grant a cable franchise. The Commission has determined that the group of small entities directly affected by the rules adopted herein consists of small governmental entities (which, in some cases, may be represented in the local franchising process by not-for-profit enterprises). Therefore, in this FRFA, we consider the impact of the rules on small governmental entities. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

7. *Small governmental jurisdictions.* Small governmental jurisdictions are "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[10] As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.[11] This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2 percent) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

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[6] 5 U.S.C. § 603(b)(3).

[7] *Id*. § 601(6).

[8] *Id*. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[9] 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[10] 5 U.S.C. § 601(5).

[11] U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299-300, Tables 490 and 492.

Miscellaneous Entities

8. The entities described in this section are affected merely indirectly by our current action, and therefore are not formally a part of this RFA analysis. We have included them, however, to broaden the record in this proceeding and to alert them to our conclusions.

Cable Operators

9. The "Cable and Other Program Distribution" census category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating $13.0 million or less in revenue annually.[12] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[13] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

10. Cable System Operators (Rate Regulation Standard). The Commission has developed its own small-business-size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[14] The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.[15] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

11. Cable System Operators (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[16] The Commission has determined that there are 67,700,000 subscribers in the United States.[17] Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[18] Based on available data, the Commission estimates that the

[12] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517510.

[13] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

[14] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *See Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995).

[15] Paul Kagan Associates, Inc., Cable TV Investor, February 29, 1996 (based on figures for December 30, 1995).

[16] 47 U.S.C. § 543(m)(2).

[17] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01-158 (2001).

[18] 47 C.F.R. § 76.901(f).

number of cable operators serving 677,000 subscribers or fewer, totals 1,450.[19] The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[20] and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

12. Open Video Services. Open Video Service ("OVS") systems provide subscription services.[21] As noted above, the SBA has created a small business size standard for Cable and Other Program Distribution.[22] This standard provides that a small entity is one with $13.0 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.[23] Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

Telecommunications Service Entities

13. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[24] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[25] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

14. *Incumbent Local Exchange Carriers ("LECs").* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[26] According to

[19] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operators, Public Notice, DA 01-0158 (2001).

[20] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.909(b).

[21] *See* 47 U.S.C. § 573.

[22] 13 C.F.R. § 121.201, NAICS code 517510.

[23] *See* http://www.fcc.gov/mb/ovs/csovscer.html (visited December 19, 2006), http://www.fcc.gov/mb/ovs/csovsarc.html (visited December 19, 2006).

[24] 15 U.S.C. § 632.

[25] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[26] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

Commission data,[27] 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[28]

15. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[29] According to Commission data,[30] 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees. In addition, 12 carriers have reported that they are "Shared-Tenant Service Providers," and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are "Other Local Service Providers." Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[31]

D. Description of Projected Reporting, Record Keeping and other Compliance Requirements

16. The rule and guidance adopted in the *Order* will require *de minimus* additional reporting, record keeping, and other compliance requirements. The most significant change requires potential franchisees to file an application to mark the beginning of the franchise negotiation process. This filing requires minimal information, and we estimate that the average burden on applicants to complete this application is one hour. The franchising authority will review this application in the normal course of its franchising procedures. The rule will not require any additional special skills beyond any already needed in the cable franchising context.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

17. The RFA requires an agency to describe any significant alternatives that it has considered

[27] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (June 2005) ("Trends in Telephone Service"). This source uses data that are current as of October 1, 2004.

[28] *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513310 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" increased from 20,815 to 27, 891. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

[29] 13 C.F.R. § 121.201, NAICS code 517110.

[30] "Trends in Telephone Service" at Table 5.3.

[31] *See supra* note 28.

in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[32]

18. In the *NPRM*, the Commission sought comment on the impact that rules interpreting Section 621(a)(1) might have on small entities, and on what effect alternative rules would have on those entities. The Commission also invited comment on ways in which the Commission might implement Section 621(a)(1) while at the same time impose lesser burdens on small entities. The Commission tentatively concluded that any rules likely would have at most a *de minimis* impact on small governmental jurisdictions, and that the interrelated, high-priority federal communications policy goals of enhanced cable competition and accelerated broadband deployment necessitated the establishment of specific guidelines for LFAs with respect to the process by which they grant competitive cable franchises. We agree with those tentative conclusions, and we believe that the rules adopted in the *Order* will not impose a significant impact on any small entity.

19. In the *Order*, we provide that LFAs should reasonably review franchise applications within 90 days for entities existing authority to access rights-of way, and within six months for entities that do not have such authority. This will result in decreasing the regulatory burdens on cable operators. We declined to adopt shorter deadlines that commenters proposed (*e.g.*, 17 days, one month) in order to provide small entities more flexibility in scheduling their franchise negotiation sessions. In the *Order*, we also provide guidance on whether an LFA may reasonably refuse to award a competitive franchise based on certain franchise requirements, such as build-out requirements and franchise fees. As an alternative, we considered providing no guidance on any franchising terms. We conclude that the guidance we provide minimizes any adverse impact on small entities because it clarifies the terms within which parties must negotiate, and should prevent small entities from facing costly litigation over those terms.

F. Report to Congress

20. The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the *Small* Business Regulatory Enforcement Fairness Act of 1996.[33] In addition, the Commission will send a copy of the *Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[34]

[32] 5 U.S.C. § 603(c)(1)-(c)(4)

[33] *See* 5 U.S.C. § 801(a)(1)(A).

[34] *See id.* § 604(b).

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

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

Greater competition in the market for the delivery for multichannel video programming is a primary and long-standing goal of federal communications policy. In passing the 1992 Cable Act, Congress recognized that competition between multiple cable systems would be beneficial, would help lower cable rates, and specifically encouraged local franchising authorities to award competitive franchises. Section 621 of the statute reads, "A franchising authority may not grant an exclusive franchise and *may not unreasonably refuse to award an additional competitive franchise*."

Telephone companies are investing billions of dollars to upgrade their networks to provide video. As new providers began actively seeking entry into video markets, we began to hear that some local authorities were making the process of getting franchises unreasonably difficult, despite clear statutory language. The record collected by the Commission in this proceeding cited instances where LFAs sat on applications for more than a year or required extraordinary in kind contributions such as the building of public swimming pools and recreation centers.

Such unreasonable requirements are especially troubling because competition is desperately needed in the video market. As we just found, from 1995 to 2005, cable rates have risen 93%. In 1995 cable cost $22.37 per month. Last year, cable cost $43.04 per month. Today's Communications Daily reports that prices for expanded basic are now about $50 per month. The trend in pricing of cable services is of particular importance to consumers. Since 1996 the prices of every other communications service have declined while cable rates have risen year after year after year.

This item appropriately removes such regulatory barriers by giving meaning to the words Congress wrote in section 621 of the Cable Act. Specifically, the Commission finds that an LFA is unreasonably refusing to grant a competitive franchise when it does not act on an application within a reasonable time period, imposes taxes on non-cable services such as broadband, requires a new entrant to provide unrelated services or imposes unreasonable build-out requirements.

The widespread deployment of broadband remains my top priority as Chairman and a major Commission objective. During my tenure as Chairman, the Commission has worked hard to create a regulatory environment that promotes broadband deployment. We have removed legacy regulations, like tariffs and price controls, that discourage carriers from investing in their broadband networks, and we worked to create a regulatory level playing-field among broadband platforms. And we have begun to see some success as a result of the Commission's policies. High-speed connections to the Internet have grown over 400% since I became Commissioner in July 200.

The ability to deploy broadband networks rapidly however, is intrinsically linked to the ability to offer video to consumers. As the Commission stated in the Notice in this proceeding: "The construction of modern telecommunications facilities requires substantial capital investment and such networks, once completed, are capable of providing not only voice and data, but video as well. As a consequence, the ability to offer video offers the promise of an additional revenue stream from which deployment costs can be recovered."

Similarly, in a 2005 Policy Paper, the Phoenix Center found that video is "is now the key driver for new fiber deployment in the residential market." The Phoenix Center went on to say that: "If a new

entrant cannot readily provide consumers multichannel video over an advanced network, then the prospects for success will be diminished substantially due to a reduction in the entrant's potential revenues. Quite simply, the ability to sell video services over these fiber networks may be a crucial factor in getting those fiber networks deployed." By enhancing the ability of new entrants to provide video services then we are advancing our goal of universal affordable broadband access for Americans, as well as our goal of increased video competition.

I am also committed to seeing that consumers are able to realize the benefits of competition in the forms of better services and lower prices. In recent years however, consumers have had limited choice among video services providers and ever increasing prices for those services. But as was just demonstrated in our annual price survey, cable competition can impact cable bills. Again, it found that only in areas where there was competition from a second cable operator did average price for cable service decrease. I am pleased that the steps taken by the Commission today will expressly further this type of competition and help ensure that lower prices are available to as many Americans as possible as quickly as possible.

Addressing build-out requirements was particularly difficult. This item seeks to strike a balance between encouraging as widespread deployment of broadband as possible while not deterring entry altogether. I believed it would have been appropriate to provide examples of build-out requirements that would be reasonable in addition to illustrating those that could not be.[1]

[1] For example, I would have been willing to find that it would seem reasonable for an LFA to require that, beginning five years after the effective date of a new entrant's franchise and every 3 years thereafter, if in the portion of the franchise area where the new entrant has chosen to offer cable service at least 15 percent of the households subscribe to such service, the new entrant increase by 20 percent the households in the franchise area to which the new entrant offers cable service by the beginning of the next 3-year interval, until the new entrant is capable of providing cable service to all households in the franchise area.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

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

I think that all of my colleagues and I can agree on the central importance of encouraging video competition. It is abundantly clear that cable rates are rising faster than inflation and that wireline cable competition can be helpful in bringing those rates down. Consumers deserve rules that will bring such competition to their doorsteps because consumers are not being well-served by the lack of competition today.

I think my colleagues and I can also agree on the central importance of broadband deployment. As I have often pointed out, our nation is falling behind in the international broadband race. Encouraging new entrants into the video market could at least assist in the challenge of building out broadband infrastructure, although it doesn't represent anything near the totality of what a real broadband strategy would look like.

But agreeing on the many benefits of video competition is hardly the same thing as coming up with rules that will actually encourage honest-to-goodness competition within the framework of the statutes that Congress has given us. The item before us today doesn't get us there and I cannot support it as written.

In recent days we had discussions attempting to craft an item with which I would feel more comfortable. Chairman Martin engaged in those discussions in good faith and I thank him for that. My goal was to encourage an item that preserves a local authority's statutory right to seek specific and far-reaching build-out requirements, protects each community's ability to negotiate for PEG and I-NET facilities, and maintains truly meaningful local ability to deal with the huge companies that are coming into our cities and towns to build important infrastructure.

Throughout the consideration of this item and even as we discussed ways to improve it in recent days, I have been troubled at the lack of a granular record that would demonstrate that the present franchising system is irretrievably broken and that traditional federal-state-local relationships have to be so thoroughly upended. If we are going to preempt and upend the balances inherent in long-standing federal-state-local jurisdictional authorities, we should have a record clearly demonstrating that those local authorities are not up to the task of handling this infrastructure build-out and that competition can be introduced only by preempting and upsetting these long-standing principles of federalism. My colleagues may recall that when we launched the NPRM on this item, I made it very clear how important the compilation of a compelling granular record would be in my consideration of this proceeding. I do not believe that either today's item or the record behind it makes such a showing. The various examples of "unreasonable" franchise requirements that the item enumerates are not closely or carefully supported by the record and often fail to rise beyond isolated episodes or anecdotal evidence.

Many people questioned, and continue to question, the Commission's legal authority to do what it is doing today. It is clear that those questions remain and that the Commission has been asked by those with oversight powers to more conclusively demonstrate our authority to undertake the actions we initiate today. I believe it is the better course of wisdom in so far-reaching a proceeding, in light of the concern being expressed by those with oversight responsibilities of this Commission, to thoroughly answer those questions, to lay out the basis of our claimed legal authority, and to explain what legal risks this action entails before taking action. Under the circumstances, proceeding on such a controversial decision today

does not put an end to this issue. It only invites more delay, more confusion, and more possibility of legal challenge.

As we face the challenge of providing ubiquitous high-speed broadband to all our citizens, we need the certainty of a national strategy to get the job done. Right now this nation is hobbled because it has no such strategy, no plan for the infrastructure build-out our people need to be productive and competitive citizens of the world. The United States is ranked number twenty-one in the International Telecommunications Union's Digital Opportunity Index. It is difficult to take much comfort from being twenty-first in the Twenty-first century. The kind of broadband strategy I am talking about demands a level of consensus and national buy-in by the many diverse interests and entities that would be responsible for implementing it. While I have never equated franchise reform as anything remotely equivalent to a national broadband strategy, I do believe a properly-crafted and legally-certain franchising reform could facilitate some level of broadband build-out. That is what I attempted to work toward here. But if our decision is only going to increase concern, increase the questions and increase the risk, then I think we should pause, take a deep breath, answer the questions and reach out for more consensus. I don't say unanimity, of course, but at least a level of comfort that builds an environment wherein the next few years can see the job actually getting done rather than spent in contentious debate or court challenge because our reasoning was deemed inadequate.

So I thank my colleagues, and especially the Chairman, for the discussions we have had—discussions that were both in good faith and substantive—but in light of the concerns I have just discussed, I cannot support this afternoon's outcome. Unlike so many other proceedings coming before the Commission, I was nowhere near certain as I came to work this morning how the vote on this item would go. I actually thought that perhaps we would take the short time needed, answer the questions that had been posed, and then reassess where we were as to proceeding with an item. That was my preference. Instead it appears a majority will proceed to approve an item that, as drafted right now, is without important enhancements I have been advocating and without sufficient buy-in from the world beyond the FCC to assure its effectiveness. I must therefore respectfully dissent.

DISSENTING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

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

The policy goals of this *Order*, to promote competitive video offerings and broadband deployment, are laudable. But while I support these goals, today's item goes out on a limb in asserting federal authority to preempt local governments, and then saws off the limb with a highly dubious legal scheme. It substitutes our judgment as to what is reasonable – or unreasonable – for that of local officials – all in violation of the franchising framework established in the Communications Act.

Today's *Order* is certain to offend many in Congress, who worked long and hard on this important issue, only to have a Commission decision rushed through with little consultation. The result will be heavy oversight after-the-fact, and a likely rejection by the courts. It will solve nothing, create much confusion, and provide little certainty or progress on our shared goal of promoting real video competition and universal broadband deployment.

This outcome is disappointing because I believe we must do everything we can to encourage competitive video offerings. As I was driving to work this morning, I saw a line of Verizon trucks installing FiOS in my neighborhood. I must admit, I am very excited about this new service, and plan to subscribe. FiOS is now available because our local county officials approved a franchise for Verizon. If they had not, I imagine many of my neighbors would have complained loudly. Maybe that is why Verizon has repeatedly told Wall Street investors, "[e]ven in those states where we don't have the whole state, places like Pennsylvania, we have become very successful now in getting franchising. So we don't see that as an issue going forward."[1] I am pleased with their efforts and their success, and want to encourage their continued investment.

As I said in the underlying *Notice of Proposed Rule Making*, "Congress clearly sought to promote competitive cable offerings and to facilitate the approval of competitive cable franchises in the Cable Act of 1992."[2] I agree the Commission should do what it can within the current legal framework to facilitate increased video competition because it benefits American consumers, promotes U.S. deployment of broadband networks and services, and enhances the free exchange of ideas in our democratic society.

Notwithstanding these worthy goals, I, unfortunately, cannot support this *Order* because the FCC is a regulatory agency, not a legislative body. In my years working on Capitol Hill, I learned enough to know that today's *Order* is legislation disguised as regulation. The courts will likely reverse such action because the Commission cannot act when it "does not really define specific statutory terms, but rather takes off from those terms and devises a comprehensive regulatory regimen…. This extensive quasi-legislative effort to implement the statute does not strike [me] as merely a construction of statutory phrases."[3]

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[1] *Final Transcript,* Thomson StreetEvents, VZ-Verizon at UBS 34th Annual Global Media Conference, Dec. 6, 2006, at page 7, available at, http://investor.verizon.com/news/20061206/20061206_transcript.pdf.

[2] Statement of Commissioner Jonathan S. Adelstein, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Notice of Proposed Rulemaking, FCC 05-180 (rel. Nov. 18, 2005) ("*Local Franchising NPRM"*).

[3] *Kelley v. E.P.A.*, 15 F.3d 1100, 1108 (DC. Cir. 1994). While the Commission contends that "[d]espite the parameters established by the Communications Act, … operation of the franchising process has proven far more (continued…)

Today's *Order* is disappointing because while there is bipartisan agreement that the current video franchising framework should be refined to better reflect marketplace realities, technological advancement, and consumer demands, the decision skips the fine-tuning and performs an extreme makeover. The majority accomplishes today what the elected representatives of the American people have tried to do through the legislative process. In doing so, the Commission not only disregards current law and exceeds its authority, but it also usurps congressional prerogatives and ignores the plain meaning of Title VI, the cannons of statutory construction, and the judicial remedy Congress already provided for unreasonable refusals. In crafting a broadly aggressive and legally tenuous solution, the majority attempts the legal equivalent of triple axels and quadruple toe loops that would only impress an Olympic judge who is willing to overlook slips, stumbles, and falls.

We might keep in mind former President Ronald Reagan's views on federalism and the role of local governments. In his first State of the Union Address, President Reagan exhorted Americans to give power back to local governments:

> Together, after 50 years of taking power away from the hands of the people in their states and local communities we have started returning power and resources to them. … Some will also say our states and local communities are not up to the challenge of a new and creative partnership. Well, that might have been true 20 years ago. … It's no longer true today. This Administration has faith in state and local governments and the constitutional balance envisioned by the Founding Fathers.[4]

More recently, President George W. Bush echoed this trust in local government, asserting that "government closest to the people is more responsive and accountable."[5] While the Commission has long viewed the cable franchising process as "a deliberately structured dualism,"[6] today's decision is a clear rebuke of this storied relationship with local government.

Congressional action in 1984, 1992, and 1996 re-affirmed further that it is Congress' intent that "the franchise process take[s] place at the local level where city officials have the best understanding of local communities' needs and can require cable operators to tailor the cable system to meet those needs."[7] This is clearly set forth in the purposes of Title 6, wherein Congress made clear that Title 6 would establish the proper local, state and federal roles.[8] Congress established a framework whereby state and local authorities, within certain federal limits, are primarily responsible for the administration of the franchising process. That process is inherently local and fact-specific. Indeed, a one-size-fits-all

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complex and time consuming than it *should be*," (Order, ¶ 3), the proper inquiry is whether the franchising process is operating *as Congress intended*. Today's *Order* ignores this important question. In so doing, the Commission disregards the parameters established in the Cable Act and imposes its view of how the franchising process *should be*.

[4] President Ronald Reagan, *State of the Union Address*, January 26, 1982, available at, http://www.reagan.utexas.edu/archives/speeches/1982/12682c.htm.

[5] George W. Bush, "What the Congress Can Do For America," WALL ST. J., January 3, 2007, at A13.

[6] *Cable Television Report and Order,* 36 F.C.C. 2d 143, 207 ¶177, *recon.,* 36 F.C.C. 2d 326 (1972).

[7] H.R. Rep. No. 934, 98th Congress, 2d Sess. at 24.

[8] 47 U.S.C. § 521 (3).

approach is antithetical to clear congressional intent that cable systems be "responsive to needs and interests of local community."[9]

To be sure, the franchising process is not perfect and, by definition, negotiations may result in some delay. But Congress, after much deliberation, created this process to achieve certain stated policy objectives, which are clearly set out in the Act.[10] Regardless of how commenters now feel about this carefully calibrated and negotiated balance, Congress delegated authority to state and local governments to make certain decisions and to determine the merit of granting cable franchises in their respective communities. It then set forth a judicial remedy if a party is aggrieved by a denial of franchising.[11] While Congress has the power to revisit this scheme, and has strongly considered doing so, until then this Commission must adhere to the law as written.

Yet today, the Commission is federalizing the franchising process, taking it upon itself to decide, in every local dispute, what is "unreasonable," without actually looking at specific, local examples to determine the real situation.[12] Instead of acknowledging the vast dispute in the record as to whether there are actually any unreasonable refusals being made today, the majority simply accepts in every case that the phone companies are right and the local governments are wrong, all without bothering to examine the facts behind these competing claims, or conduct any independent fact-finding. This is breathtaking in its disrespect of our local and state government partners and in its utter disregard for agency action based on a sound record.

Today's *Order* also displays a fundamental misunderstanding about the commitment of franchising authorities to bring competition to their citizens. By law, a franchise under Title 6 confers a right of access to people's property.[13] Unlike members of this Commission, many state and local officials are elected and directly accountable to their citizens. Our knee-jerk embrace of everything interested companies say while discounting local elected officials on a matter grounded in local property rights certainly does not inspire a great deal of confidence in the Commission's ability on the federal level to arbitrate every local dispute in the country and fairly decide who is unreasonable and who is not. Even if the Commission had such power, there is no mechanism outlined in this *Order* to establish how that process would work. Consequently, the end result will likely be litigation, confusion, abuse of the process, and a certain amount of chaos. It is sadly ironic that this agency, which has been recently in violation of one of its own 90 day statutory deadlines, is telling localities to do as I say, not as I do.[14]

[9] 47 U.S.C. § 521(2).

[10] One of the principal purposes of Title VI is to "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." 47 U.S.C. § 521(2).

[11] 47 U.S.C. § 555.

[12] See Letter from David L. Smith, City Attorney, City of Tampa , to Kevin Martin, Chairman, FCC, dated January 5, 2007 (stating "[h]ow disappointing it was to learn that … the FCC would embrace as truth an allegation in a rulemaking that has such far-reaching implications to so many, without doing any follow-up with the jurisdiction named to confirm it accuracy.").

[13] *See* 47 U.S.C. § 541 (a)(2).

[14] See, e.g., In the Matter of Comcast Corporation's Request for Waiver of 47 C.F.R. § 76.120(a)(1), CSR-7017-Z, CS Docket No 97-80, DA-06-2543, CS Docket No 97-80, filed 4/19/06 (waiver proceeding placed on public notice 5/17/06 and decided 1/10/2007, well past the statutory "shot clock"); 47 U.S.C. § 549(c) ("the Commission shall grant any such waiver request within 90 days of any application filed under this subsection.").

Over the past two years, Congress held nearly two dozen hearings on franchising, and sought to amend the Cable Act in an effort to reform the current franchising process and "strike the right balance between national standards and local oversight."[15] Yet, the Commission has finalized in the dark of night what Congress was unable to resolve in two years of intensive public deliberations. In contrast to the Senate where I used to work, one might call the FCC the world's least deliberative body. And the final product shows it.

Congress would not have expended effort on a major piece of legislation had its members believed it was not necessary to grant the Commission explicit authority to do what the majority now contends the Commission can do under existing law. The House bill proposed a national cable franchising regime, while the Senate bill proposed an expedited competitive franchise process which would have required local authorities to issue franchises pursuant to a standard application drafted by the Commission. Today's *Order* turns federalism on its head by putting the Commission in the role of sole arbiter of what is a "reasonable" or "unreasonable" LFA practice and short-circuiting the franchising process if an arbitrary shot clock has expired.

While Congress worked to change federal law to create a role for the Commission in the franchising process, there was and continues to be considerable state and local activity to reform the local franchising process. To date, nearly half of all states have adopted state-wide franchise reform or mandatory state franchise terms, or have engaged in a democratic process to enact meaningful franchise reform legislation.[16] Hundreds of other localities have approved new franchises, and many more are in the works.

When we launched this proceeding, the central question was "whether the local franchising process truly is a hindrance to the deployment of alternative video networks, as some new entrants assert[ed]."[17] Indeed, the *Local Franchising NPRM* explicitly solicited "empirical data" and "concrete examples" regarding problems in the franchising process that FCC could resolve. In response, the record evidence provides scant, dated, isolated, and unverified examples that fall far short of demonstrating a systematic failure of state and local governments to negotiate in good faith and in a reasonable fashion.

According to the Telecommunications Industry Association, "some recent examples of overly-burdensome, and … 'unreasonable,' extraneous obligations"[18] included: (1) Merton Group's two year negotiations with Hanover, New Hampshire, which concluded in December, 2004; (2) Knology's negotiations with Louisville, Kentucky in early 2000; (3) Knology's franchise negotiations with the greater Nashville, Tennessee area in March 2000; and (4) Grande Communication's negotiations with San Antonio and Corpus Christi, Texas in 2002. Additionally, Fiber-To-The-Home Council cites the efforts of Guadalupe Valley Telephone Cooperative to seek a franchise in the City of Bulverde, Texas in 2004. The *Order* itself relies on unconfirmed allegations by Verizon and AT&T about unreasonable demands and negotiations being drawn out over an extended period of time; and complaints by U.S. Telecom

[15] H.R. REP. No. 109-470, at 3 (2006).

[16] While the *Order* purportedly refrains from explicitly preempting "statewide franchising decisions" and only addresses "decisions made by [instrumentalities of the state, such as] county – or municipal level franchising authorities," this dubious distinction has a questionable legal basis. Under Title 6, LFAs derive their power by virtue of state law, so such distinctions are not for the FCC to make. Moreover, the Commission's contention that it does not have sufficient information in the record to consider the effect of franchising by states (some of which have had laws in place for a decade), but has sufficient record evidence to preempt 33,000 LFAs, is facially preposterous.

[17] Adelstein Statement, *Local Franchising NPRM.*

[18] Letter from Grant Seiffert, to Jonathan S. Adelstein, Commissioner, FCC, MB Docket No. 05-311 (dated December 11, 2006).

Association, Qwest, and Bell South about new entrants accepting franchise terms that they considered unreasonable in order to avoid further delay in obtaining the franchise, or, in one case, filing a "friendly lawsuit."

These examples, based on my review of the record evidence, represent the extent to which competitive video providers argue that LFAs are delaying in acting on franchise applications. However, considering the current franchising process has been in place nearly 15 years and there are over 30,000 LFAs, I find these sporadic examples, individually and collectively, wholly insufficient to justify the Commission's quasi-legislative attempt to federalize the local franchising process. These sparse allegations and anecdotal evidence do not rise to a level that warrants today's drastic, substantive measures. The Commission's blind acceptance of a few alleged instances as illustrative of a much broader problem is a poor and unfortunate reflection of the disregard for proper agency process. The Commission neither attempted to conduct any independent fact-finding or due diligence, nor verify the allegations made by parties who have a vested interest in the outcome of this proceeding.[19] Even more shocking, the Commission and the commenters fail to cite to a single actual, present day problem pending with any specific LFA.[20]

Notwithstanding the scant record evidence to justify agency preemption and the creation of a national, unified franchising process in contravention of federal law, the Commission conjures its authority to reinterpret and, in certain respects, rewrite section 621 and Title VI of the Communications Act, on just two words in section 621(a)(1)[21] – "unreasonably refuse." The Commission ignores the verb that follows: "to award." A plain reading section 621(a)(1) does not provide a wholesale "unreasonable" test for all LFA action. Rather, the statutory language focuses on the act of awarding a franchise. While I agree that the Commission has authority to interpret and implement the Communications Act, including Title VI,[22] the Commission does not have authority to ignore the plain meaning, structure and legislative history of section 621, and judicial precedent.[23]

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[19] *Local Franchising NPRM*, ¶1 ("potential competitors seeking to enter the multichannel video programming distributor ("MVPD") marketplace have alleged that in many areas the current operation of the local franchising process serves as a barrier to entry. Accordingly, this *Notice* is designed to solicit comment on implementation of Section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises.")

[20] During the Commission's Agenda Meeting in Keller, Texas, on February 10, 2006, one Verizon official identified Montgomery County, Maryland, as an obstinate LFA that was insisting upon unreasonable illegal demand and delaying negotiations. Since that meeting, Verizon has in fact obtained a franchise in Montgomery County. *See* Press Release, Montgomery Country, Md., County Negotiates Cable Franchise Agreement with Verizon; Agreement Resolves Litigation, Provides Increased Competition for Cable Service (Sept. 13, 2006) (available at http://www.montgomerycountymd.gov/apps/News/press/PR_details.asp?PrID=2582). In fact, this *Order* blatantly ignores public statements that significantly undermine representations some proponents of this decision have made to the Commission. For example, AT&T has publicly stated that Project Lightspeed will be available to 90% of its "high-value" customers, but to less than 5% of its "low value" neighborhoods, but today the Commission undermines a locality's ability to ensure all residents are served. Leslie Cauley, *Cable, Phone Companies Duke it out for Customers*, USA Today, May 22, 2005, available at: http://www.usatoday.com/money/media/2005-05-22-telco-tv-cover-usat_x.htm?csp=34 (last viewed 12/20/06). As Verizon's CEO of one major new entrant recently noted, "Any place it's come to a vote, we win." Dionne Searcey, *As Verizon Enters Cable Business, It Faces Local Static Telecom Giant Gets Demands As It Negotiates TV Deals*, Wall St. J., Oct. 28, 2005, at A1. Yet in today's *Order*, the Commission somehow determines that there is widespread bad faith only on the part of the LFAs, not the new entrants, in order to justify this sweeping federal preemption.

[21] 47 U.S.C. §541(a)(1).

[22] Admittedly, however, read together, sections 621(a)(1) and 635(a), clearly vest the courts, not the FCC, with exclusive jurisdiction over the determination of what constitutes "unreasonably refuse." In light of the fact that these two provisions were amended simultaneously in 1992, this is the only rational interpretation. As NATOA pointed out in its Comments, "[i]t is ludicrous to suggest that Congress, having provided that only "final" decisions (continued…)

While the Commission purports to limit its action today to interpreting "unreasonably refuse," the *Order* stretches section 621 well beyond the meaning that the statute can bear and, consequentially, changes the franchising process in fundamental ways. There are certain salient features of today's *Order* that raise serious legal and policy implications, requiring careful scrutiny. Most notably, the *Order*: (1) imposes a 90-day shot clock on LFAs to render a decision on the franchise application of a competitive applicant with existing rights-of-way; (2) deems a competitive entrant's franchise application granted after 90-days; (3) prohibits the denial of a competitive entrant's application based upon the entrant's refusal to comply with any build-out obligations; (4) prohibits the denial of a competitive entrant's application based upon the entrant's refusal to build and support PEG and I-net; and (5) authorizes a new entrant to refrain from obtaining a franchise when it is upgrading "mixed use" facilities that will be used for the delivery of video content.

The *Order* finds that franchising negotiations that extend beyond the time frames created today by the Commission amount to an unreasonable refusal to award a competitive franchise within the meaning of 621(a)(1). This finding ignores the plain reading of the first sentence of section 621(a)(1), which provides that a franchising authority "may not *unreasonably refuse to award* an additional competitive franchise."[24] On its face, Section 621(a)(1) does not impose a time limitation on an LFA's authority to consider, award, or deny a competitive franchise. The second and final sentence of section 621(a)(1) provides judicial relief, with no Commission involvement contemplated, when the competitive franchise has been "denied by *a final decision* of the franchising authority."[25] There is no ambiguity here: Congress simply did not impose a time limit on franchise negotiations, as it did on other parts of Title VI (see discussion *infra*). Hence, whether you read the first sentence alone or in context of the entire statutory provision or title, its plain and unambiguous meaning is contrary to the Commission's interpretation. Section 621(a)(1) provides an expressed limitation on the *nature*, not the timing, of the refusal to award a competitive franchise.[26]

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of the "denial" of a franchise application may be appealed, somehow intended, *sub silentio*, to have its own language gutted by allowing parties to bypass the last sentence of § 621(a)(1) entirely and go directly to the FCC." NATOA Comments at 28.

[23] The Senate Report of the 1992 Cable Act concluded that, "[b]ased on the evidence in the record taken as a whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be *encouraged [not required]* to award second franchises. Accordingly, [the 1992 Cable Act,] as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises." S. Rep. No. 102-92, at 47 (1991)(emphasis supplied). Thus, an LFA's decision to not grant a franchise need only not be unreasonable.

As one federal district court observed:

> The House version contained a specific list of "reasonable" grounds for denial. H. R. Conf. Rep. No. 102-862, at 168-69 (1992). The Senate version, on the other hand, listed "technically infeasible" and left other reasonable grounds undefined. By choosing not to adopt a federally mandated list of reasonable grounds for denial in favor of an open-ended definition, *Congress intended to leave states with the power to determine the bases for granting or denying franchises, with the only caveat being that a denial must be "reasonable.*"

Knology, Inc. v. Insight Communications Co., L.P., 2001 WL 1750839 at * 2 (W.D. Ky. March 20, 2001) (citation omitted) (emphasis supplied).

[24] 47 U.S.C. §541(a)(1) (emphasis added).

[25] *Id.* (emphasis added).

[26] Congressional intent to qualify the nature of an LFA's refusal, not the timing of the refusal, is clear when you consider another provision of Section 621(a). Section 621(a)(4)(A) provides that "franchising authority shall allow (continued…)

Even if I were able to move beyond this *Order*'s facially defective reading of 621(a)(1), the Commission's selection of 90 days as the only reasonable time frame for an LFA to consider the franchise application of a competitive provider that already has rights-of-way access before it is "deemed granted" is demonstrably inconsistent with the overall framework of Title VI, unsupported by the record evidence, and quite arbitrary.

The franchising framework established in Title VI does not support the Commission's decision to select 90 days as the deadline for a default grant – another Commission creation – to become effective.[27] Throughout Part III (Franchising and Regulation) of Title VI, when Congress specifically decided to impose a deadline for LFAs to consider sales of cable systems, modification of franchise obligations, and renewals of existing franchises, in all three instances, Congress chose 120 days.[28] In other sections of the Act, the prevalent time frame Congress imposed on LFAs and the Commission is 180 days.[29] Today, the Commission, without authority, cannot take the place of Congress and impose a tighter time frame than Congress ever contemplated to impose on LFAs in the franchising process. This is well beyond Commission "line-drawing" authority, which requires the Commission to operate within the established framework of the authorizing legislation.

While a 90-day deadline arguably could be considered "reasonable," that is not the statutory standard the Commission is purporting to use as the basis of its authority. We can only define "*unreasonable*" refusal, [30] which could be "foot-dragging" or "stonewalling" that amounts to a *defacto* denial of a franchise application. This is not the same as establishing an arbitrary, inflexible 90-day time frame, which overlooks the fact that 120 or 180 days may be reasonable under certain circumstances. While the Commission has line-drawing authority in some cases, the position taken in the *Order* is untenable on its face, given that Congress set a 120-day deadline for franchise transfers, which tend to be simpler than awarding new franchises, unless one is willing to assert that Congress itself was unreasonable. The aggressive schedule set here, while understandable and even desirable from a policy perspective, is evidence of the legislative nature of the *Order*.

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the applicant's cable system *a reasonable period of time* to become capable of providing cable service to all households in the franchise area." In that case, Congress explicitly qualified timing, not the scope of buildout. As demonstrated in the Order, the Commission's attempt to super-inflate the meaning of "unreasonably refuse" in 621(a)(1), and diminish the significance of "unreasonable period of time" in section 621(a)(4)(A) is transparently inconsistent and blatantly self-serving.

[27] The *Order* imposes a time limit of 90 days on LFAs to decide franchise applications from entities that already have access to public rights-of-way and a time limit of six months for applicants that are not already authorized to occupy the rights-of-way. Such a distinction does not exist in Title 6, notwithstanding the fact that Congress specifically contemplated phone companies – entities that already have access to public rights-of-way – obtaining franchises to provide video service.

[28] 47 U.S.C. § 537 (providing LFAs 120 days to act upon request for approval of sale or transfer on cable systems); 47 U.S.C. § 545 (providing LFAs 120 days to modify franchise obligations); and 47 U.S.C. § 546 (providing LFAs a "4-month period" to "renew the franchise or, issue a preliminary assessment that the franchise should not be renewed").

[29] *See, e.g.*, 47 U.S.C. § 543 (authorizing the Commission to "ensure that the rates for the basic service tier are reasonable" and requiring the Commission to develop regulations in 180 days).

[30] 47 U.S.C. § 541(a)(1). Today's *Order* specifically adopts rules that prohibit franchising authorities from "*unreasonably* refusing" to award competitive franchises. *Order* at ¶ 1.

To make matters worse, the Commission-created 90-day shot clock seems to function more like a waiting period, during which time the new entrant has little incentive to engage in meaningful negotiations. An objective review of the evidence shows that there is sufficient blame on both sides of the negotiation table. Sometimes, there are good reasons for delay; and at other times, one side might stall to gain leverage.[31] While the majority is certainly aware of these tactics, they fail to even mention the need for LFAs and new entrants to abide by, or so much as to have, reciprocal good faith negotiation obligations. The majority also has ignored the apparent need to develop a complaint or grievance mechanism for the parties to ensure compliance. Perhaps Congress might consider imposing on the Commission a binding deadline to resolve complaints, which would inject an incentive for both sides to negotiate, meaningfully and in good faith.[32]

Without anything other than the asserted authority to interpret "unreasonably refuse," the Commission creates a regulatory reprimand for an LFA's failure to render a final decision within the Commission-created time limits. The consequences of the failure to reach agreement within 90 days is that the LFA will be deemed to have granted the competitive entrant an interim franchise based on the terms proposed in the entrant's franchise application. In practicality, this will confer rights-of-way access over local property. In selecting this remedy, the Commission purportedly "seeks to provide a meaningful incentive for local franchising authority to abide by the deadlines contained in the *Order*."[33] While the policy goal is understandable and arguably consistent with congressional intent to encourage the award of competitive cable franchises, we do not have legal authority to establish punitive, one-sided consequences, in order to create an "incentive." Moreover, the Commission ignores that by establishing a default grant of franchise applications effectively confers local property rights unilaterally and without regard for inherent local police powers and public health, safety and welfare.

The Commission cites no credible authority that empowers it to deem a new entrant's franchise application granted by the LFA and thus confer local property rights.[34] When construing a statute, principles of construction caution against any interpretation that may contravene existing law or U.S. Constitution. In this case, I am wary of a federal agency, which purports not to preempt any state-based

[31] As the July 11, 2006, filing of the Greater Metro Telecommunications Consortium, the Rainer Communications Commission and the City of Tacoma, Washington explained: "[I]t is an oversimplification to believe that competitive entry into video programming can be facilitated by requiring a local government to act on a franchise application within a specific period of time. What the Commission may consider a delay is often a reasonable time for consideration, and indeed, the internal bureaucracies within many large companies often times dwarf the internal processes within local government, so that any rule the Commission might deem appropriate to apply regarding time to respond, must also be imposed upon the other party to negotiations."

[32] The Commission purposefully stops short of creating reciprocal good faith obligations because that would authorize the parties to file a complaint with the Commission when negotiations fall apart. Such a complaint process would effectively serve as an enforcement mechanism, which would only increase this *Order*'s litigation exposure as quasi-legislative document. Nevertheless, today's *Order* cannot be reasonably viewed as mere guidance to LFAs or a clarification of the term "unreasonably refuse" in section 621(a)(1). There is a real, punitive consequence if the LFA does not follow the Commission's dictates – a "deemed granted" franchise, which incurably alters the dynamics of franchise negotiations.

[33] *Order* at ¶ 76.

[34] The Commission's reliance on ancillary authority it exercised in the early 1970s, well before congressional enactments in 1984, 1992 and 1996, is unavailing. In fact, such reliance reveals the Commission's need to make too large a reach to justify it actions. *See* Letter from James L. Casserly, Counsel for Comcast Corporation, to Marlene Dortch, Federal Communications Commission , MB Docket No. 05-311 (filed December 13, 2006).

franchising law, but yet is prepared to step into the shoes of an LFA – an instrumentality of the state – to grant a franchise application with all the attendant rights-of-way privileges.[35]

The Commission rejected an approach that would have deemed an application "denied" once the shot clock expired without LFA action. This approach, I maintain, would have expedited the judicial review that was Congress' chosen remedy, and is infinitely more consistent with the letter and spirit of the Communications Act, Title VI, and specifically sections 621(a)(1) and 635. Nowhere in the Act is the Commission granted the authority to force localities to grant franchises. Simply put, the Commission's "deemed granted" approach in the *Order* is not a justifiable choice to fill the perceived gap left open by Congress when it did not provide a specific remedy against LFA action that is short of an outright denial of a franchise application. While it is generally proper for the Commission to exercise its "predictive judgment," that is only when the Commission has the requisite authority to act within a certain area and it stays within its authority. Neither exists in this case.

In terms of build-out, the Commission seems to make a deliberate effort to overlook the plain meaning of the statute and to substitute its policy judgment for that of Congress. The Commission concludes that it is unlawful for LFAs to refuse to grant a competitive franchise on the basis of an applicants' refusal to agree to any build-out obligations. The Commission's analysis in this regard is anemic and facially inadequate.

Section 621(a)(4)(A) provides that "[i]n awarding a franchise *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." Absent express statutory authority, the Commission cannot declare it unreasonable for LFAs to require build-out to all households in the franchise area over a reasonable period of time. The Commission's argument in this regard is particularly spurious in light of the stated objective of this *Order* to promote broadband deployment and our common goal of promoting affordable broadband to all Americans. In the end, this is less about fiber to the home and more about fiber to the McMansion.

The Commission is correct on one point, that section 621(a)(4)(A) is actually a limitation on LFA authority. However, consistent with plain reading of the provision and its legislative history, Section 621(a)(4)(A) surely is not a grant of authority to the Commission and does not impose a limitation on the *scope* of a competitive provider's build-out obligations. Indeed, section 621(a)(4)(A) explicitly limits the "period of time" to build-out, but an LFA is unrestrained to impose full, partial, or no build-out obligations on all cable service providers. As long as an LFA gives a competitive provider "a reasonable period of time to become capable of providing cable service to all households in the franchise area," section 621(a)(4)(A) essentially shields build-out requirement from constituting an "unreasonable refusal" to grant a competitive franchise. While this policy could be changed by Congress to facilitate competitive entry, that is not the current state of the law. An LFA cannot be prohibited from requiring build-out to all households in the franchise area if an LFA allows "a reasonable period of time" to do so. The Commission has not been ordained with a legislative "blue pencil" to rewrite law. Congress specifically directed LFAs – not the FCC – to allow a reasonable period of time for build-out. As much as the Commission would like it be its role, Congress gave the role to LFAs, and it is Congress' purview to modify that explicit delegation of authority.

[35] *See generally*, Charter Communications v. County of Santa Cruz, 304 F.3d 927 (9th Cir. 2002) (holding that deference is accorded to legislative action of local government), especially in light of fact that the Commission does not have clear congressionally delegated authority in this case; and local regulations, in this case, are likely explicitly sanctioned by the Cable Act and consistent with the express provisions of the Act, *see* 47 U.S.C. § 556(a).

Assuredly, Section 621(a)(4)(A) does not impose "universal" or "uniform" build-out requirements on franchise applicants. This may be a reflection of congressional intent to focus on the needs of the locality.[36] However, it does not prohibit LFAs from requiring build-out obligations as a condition of franchise approval, so long as the competitive applicant is given a reasonable period of time.

The rapid deployment of broadband has been a goal of mine since I joined this Commission. Wireline competition in the video market, particularly, is critical as a means to constrain prices, which in itself is a worthy goal after year upon year of price hikes. It is also critical to the future of our democracy that Americans have access to as many forms of video content as possible so they can make up their own minds about the issues of the day and not remain subject to a limited number of gatekeepers who decide what deserves airing based on their own financial or ideological interests. But, in order for the Commission to promote these goals effectively, we must operate within our legal authority.

Perhaps the majority has failed to consider the real life consequences of today's *Order*. For instance, in New York City, competitive entrants could file the Commission-mandated informational filing that proposes to serve only Broadway, Madison, or Park Avenue. Under today's *Order*, the New York City franchising authority would be forbidden from denying the competitive franchise based solely on the fact that the new entrant refuses to certain build-out requirements. The LFA is placed in the difficult position of either denying outright the franchise and absorb the costs and fees for the ensuing litigation, or agree to a franchise that is not responsive to needs and interests of local community.

How can the majority declare build-out to be an impediment to entry when one of the major incumbent phone companies, AT&T, claims that it does not need a franchise to operate its video service, and the other, Verizon, has agreed to different, but favorable, build-out obligations with various states and localities? Under the federalist scheme of the Act, different jurisdictions can choose models that best suit their specific needs. For example, in New Jersey, the state-wide franchise reform law correlates build-out principally to population density, while build-out obligations in Virginia principally track the entrant's existing wireline facilities. And in New York City, Verizon and the LFA were actively negotiating universal build-out over a period of a few years.

The broad pen with which the majority writes today's *Order* does not stop with build-out. The *Order* also uses the Commission's alleged authority under Section 621(a)(1) to determine that any LFA refusal to award a competitive franchise because of a new entrant's refusal to support PEG or I-Net is *per se* unreasonable. Although the *Order* purports to provide clarification with respect to which franchise fees are permissible under the Act, it muddles the regime and leaves communities and new entrants with conflicting views about funding PEG and I-Net. Indeed, Congress provided explicit direction on what constitutes or does not constitute a franchise fee, with a remedy to the courts for aggrieved parties.

Today's Order should make clear that, while any requests made by an LFA unrelated to the provision of cable service *and* unrelated to PEG or I-NET are subject to the statutory five percent franchise fee cap, these are not the type of costs excluded from the term "franchise fee" by section 622(g)(2)(C). That provision excludes from the term "franchise fee" any "capital costs that are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities." The legislative history of the 1984 Cable Act clearly indicates that "any franchise requirement for the provision of services, facilities or equipment is not included as a 'fee.'"[37]

[36] *See* 47 U.S.C. § 521 (2)(stating that the one of the central purposes of Title 6 is to "assure that cable systems are responsive to the needs and interests of the local community.") *See also* 47 U.S.C. § 521(3)(stating that another central purpose of Title 6 is to establish clear federal, state and local roles).

[37] The legislative history of 1984 Cable Act provides "in general, [section 622(g)(2)(C)] defines as a franchise fee only monetary payments made by the cable operator, and does not include as a 'fee' any franchise requirement for (continued…)

PEG facilities and access provide an important resource to thousands of communities across this country. Equally important, redundancy or even duplicative I-Net provides invaluable homeland security and public health, safety and welfare functions in towns, cities, and municipalities across America. It is my hope that today's decision does not undermine these and other important community media resource needs.

While my objections to today's *Order* are numerous and substantial, that should not overlook the real need I believe there is for franchise reform. Indeed, there is bipartisan support for reform in Congress, and most LFAs throughout this country are committed to bring video competition to their jurisdictions. My fundamental concern with this *Order* is that it is based on such paper-thin jurisdiction, but it is truly broad in scope. It ignores the plain reading of the section 621, usurps congressional prerogative and pre-empts LFAs in certain important respects that directly contradict the Act.

The sum total here is an arrogant case of federal power riding roughshod over local governments. It turns federalism on its head. While I can support certain efforts to streamline the process and preclude local authorities from engaging in unreasonable practices, this item blatantly and unnecessarily tempts the federal courts to overturn this clearly excessive exercise of the limited role afforded to us by the law. The likely outcome of being reversed in Federal Court could have pernicious and unintended consequences in limiting our flexibility to exercise our discretion in future worthy endeavors.

Accordingly, I dissent.

(Continued from previous page)
the provision of services, facilities or equipment. As regards PEG access in new franchises, payments for capital costs required by the franchise to be made by the franchise to be made by the cable operator are not defined as fees under this provision." H.R. REP. No. 98-934, at 65 reprinted in 1984 U.S.C.C.A.N. 4702.

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE

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

Today's item, like most we address as an expert agency, is full of sophisticated technical, legal, and policy arguments. At a high level, however, I view this as a continuation down a path of deregulatory policies designed to encourage new market entry, innovation, and investment. Indeed, "encourag[ing] more robust competition in the video marketplace" by limiting franchising requirements has long been a stated goal of the Commission as well as a driving force behind statutory terms we interpret today.

Section 621(a)(1) of the Communications Act of 1934, as amended (the "Act"), states that franchising authorities ("LFAs") may not "unreasonably refuse to award" a competitive franchise to provide cable services. I agree with our conclusion that we have the jurisdictional authority to interpret this section of the Act and adopt rules to implement it. In amending Section 621(a)(1) to include the phrase "unreasonably refuse to award," Congress explicitly limited the authority of LFAs. However, if an LFA does not make a final decision for months on end, or perhaps even years as the record indicates, new entrants are given no recourse. Also, unreasonable demands, similar to long delays, serve as a further barrier to competitive entry. It is nonsensical to contend that, despite the limitation on LFA authority in the Act, LFAs remain the sole arbiters of whether their actions in the franchise approval process are reasonable. Since the section's judicial review provision applies only to final decisions by LFAs, absent Commission action to identify "unreasonable" terms and conditions, franchise applicants would have no avenue for redress. I conclude that our broad and well-recognized authority as the federal agency responsible for administering the Act, including Title VI, permits us to identify such terms and conditions, and I support our exercise of that authority.

As with most orders, we explored numerous ways to achieve our goals. I ultimately support today's item, because I believe that, by streamlining timeframes for action and providing practical guidelines for both LFAs and new entrants, the item encourages the development of competition in the video marketplace and speeds the deployment of broadband across the country in a platform-neutral manner. These beneficial policy results should not be underestimated. Our annual reports to Congress on cable prices, including the report we adopt today, consistently show that prices are lower where wireline competition is present. And, of course, broadband deployment enhances our ability to educate our children for the jobs of tomorrow and ensures that the United States remains competitive in this global communications age.

Additionally, I am pleased that we recognize – and do not preempt – the actions of those states that have reformed their franchise rules. Their efforts to streamline the process for competitive entry are laudable.

Finally, it is critical that as we advance pro-competitive policies, we ensure that our policies do not unreasonably create asymmetry in the marketplace. Accordingly, I am encouraged that we resolve to address open issues regarding existing franchise agreements on an expedited basis. I encourage all interested parties to use your energies toward assisting us as we seek a way to apply more broadly our conclusions across all companies.

STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL

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

I have long advocated the Commission doing all that it can to open new opportunities for entrepreneurs to have the freedom to construct new delivery platforms for innovative new services. More delivery platforms mean more competition. More competition means consumers can choose among more innovative offerings. As consumers become more empowered, prices fall and, as a result, new technologies become more available to help improve the lives of all Americans. In short, creating a de-regulatory environment where competition is given the chance to flourish kicks off a virtuous cycle of hope, investment, growth and opportunity.

Today, the Commission is taking a step forward in what I hope will be a noble quest to spur more competition *across* many delivery platforms and, where appropriate, *within* delivery platforms. While we already have some competition in the video market, American consumers are demanding even more competition. And that's the goal of our action today: more competition through de-regulation. Perhaps President Ronald Reagan foresaw an issue like this one when he said, "We have a healthy skepticism of government, checking its excesses at the same time we're willing to harness its energy when it helps improve the lives of our citizens." That is precisely what we are doing today: checking any government excesses at the local level to unleash free markets which will help improve the lives of all Americans.

This order strikes a careful balance between establishing a de-regulatory national framework to clear unnecessary regulatory underbrush, while also preserving local control over local issues. It guards against localities making unreasonable demands of new entrants, while still allowing those same localities to be able to protect important local interests through meaningful negotiations with aspiring video service providers. Local franchising authorities are still free to deny deficient applications on their own schedule, but we are imposing a "shot clock" to guard against unreasonable delay. After the shot clock runs out, if the locality has not granted or denied the application, an interim or temporary authority will be granted to give the parties more time to reach a consensus. If the LFA feels as though it cannot grant a franchise during this period, they are free to deny the application. And unhappy applicants still have the liberty to go to court, as codified under federal law.

Additionally, should communications companies decide to upgrade their existing non-cable services networks, localities may not require them to obtain a franchise. However, this order does not address whether video service providers can avoid local or federal jurisdiction over those video services because those services are carried over differing protocols, such as Internet protocol. That question is explicitly left for another docket.

In the same spirit of deference to localities, we are not pre-empting recently enacted state laws that make it easier for new video service providers to enter the market. Those important frameworks will remain intact. Similarly, on the important issue of build-out requirements, we preserve local flexibility to implement important public policy objectives, but we don't allow localities to require new entrants to serve everybody before they serve anybody.

Many commenting parties, Members of Congress, and two of my distinguished colleagues, have legitimately raised questions regarding the Commission's authority to implement many of these initiatives. I have raised similar questions. However, as the draft of this item has evolved and, I think, improved, my concerns have been assuaged, for the most part. The Commission has ample general and

specific authority to issue these rules under several sections including, but not limited to, sections: 151, 201, 706, 621, 622, and many others. Furthermore, a careful reading of applicable case law shows that the courts have consistently given the Commission broad discretion in this arena. While I understand the concerns of others, after additional study, I feel as though we are now on safe legal ground. But I know that reasonable minds will differ on this point and that appellate lawyers are already on their way to the court house. That is the American way, I suppose.

This order is not perfect. If it were, it would say that all of the de-regulatory benefits we are providing to new entrants we are also providing to all video providers, be they incumbent cable providers, over-builders or others. I want to ensure that no governmental entities, including those of us at the FCC, have any thumb on the scale to give a regulatory advantage to any competitor. But the record in this proceeding does not allow us to create a regulatory parity framework just yet. That's why I am pleased that today's order and further notice contain the tentative conclusion that the relief we are granting to new entrants will apply to all video service providers once they renew their franchises.

Also, I have consistently maintained during my time here that if shot clocks are good for others then they are good for the FCC itself. Accordingly, I am pleased that the Chairman has agreed to release an order as a result of the further notice no later than six months from the release date of this order, and regardless of the appellate posture of this matter. Resolving these important questions soon will give much-needed regulatory certainty to all market players, spark investment, speed competition on its way, and make America a stronger player in the global economy. By the same token, it is no secret that I would also like to see the Commission act more quickly on petitions filed by any individual or industry group, especially if those petitions may help spur competition in any market, be it video, voice, data, wireless, or countless others. We should never let government inaction create market distortions.

I thank my entire staff, especially Cristina Pauzé, for their long hours, dedication and insight regarding this order. I also thank the tireless Media Bureau and the General Counsel's office for their tremendous efforts on this important matter. Lastly, I would like to thank Chairman Martin for his strong leadership on this issue.

Exhibit 7

***Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008)**

529 F.3d 763

ALLIANCE FOR COMMUNITY MEDIA, et al., Petitioners,
State of Hawaii; City and County of San Francisco; National Cable & Telecommunications Association, Inc.; City of New York; City of Milwaukee, Wisconsin; City of White Plains, New York; City of Wilmington, Delaware, Intervenors,
v.
FEDERAL COMMUNICATIONS COMMISSION; United States of America, Respondents,
Ad Hoc Telecom Manufacturer Coalition; Qwest Communications International, Inc.; USTelecom; Verizon; AT & T, Intervenors.
No. 07-3391.
No. 07-3569.
No. 07-3570.
No. 07-3571.
No. 07-3572.
No. 07-3573.
No. 07-3574.
No. 07-3673.
No. 07-3674.
No. 07-3675.
No. 07-3676.
No. 07-3677.
No. 07-3824.
United States Court of Appeals, Sixth Circuit.
Argued: February 6, 2008.
Decided and Filed: June 27, 2008.
[529 F.3d 766]

ARGUED: Alan G. Fishel, Arent Fox, LLP, Washington, D.C., Joseph L. Van Eaton, Miller & Van Eaton, Washington, D.C., Howard J. Symons, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, Washington, D.C., for Petitioners. James M. Carr, Federal Communications Commission, Washington, D.C., for Respondents. Joseph L. Van Eaton, Miller & Van Eaton, Washington, D.C., Michael K. Kellogg, Kellogg, Huber, Hansen, Todd, Evans & Figel, Washington, D.C., for Intervenors. ON BRIEF: Alan G. Fishel, Jeffrey E. Rummel, Arent Fox, LLP, Washington, D.C., Christopher J. White, Department of Public Advocate, Newark, New Jersey, Michael S. Schooler, National Cable & Telecommunications Association, Washington, D.C., Matthew C. Ames, Joseph L. Van Eaton, Miller & Van Eaton, Washington, D.C., Kenneth S. Fellman, Kissinger & Fellman, Denver, Colorado, for Petitioners. James M. Carr, Laurence N. Bourne, Federal Communications Commission, Washington, D.C., Steven J. Mintz, Robert B. Nicholson, United States Department of Justice, Washington, D.C., for Respondents. William K. Sanders, City Attorney's Office, San Francisco, California, Michael S. Schooler, National Cable & Telecommunications Association, Washington, D.C., Tillman Lay, Spiegel & McDiarmid, Washington, D.C., Joseph L. Van Eaton, Miller & Van Eaton, Washington, D.C., Rodney L. Joyce, Joyce & Associates, Chevy Chase, Maryland, Michael K. Kellogg, Colin S. Stretch, Kellogg, Huber, Hansen, Todd, Evans & Figel, Washington, D.C., for Intervenors. James N. Horwood, Spiegel & McDiarmid, Washington, D.C., Lani L. Williams, Local Government Lawyer's Round Table, Oconomowoc, Wisconsin, for Amici Curiae.

Before: SUHRHEINRICH, COLE, and GIBBONS, Circuit Judges.

OPINION

R. GUY COLE, JR., Circuit Judge.

Following a notice-and-comment rulemaking procedure, the Federal Communications Commission ("FCC," "Commission," or "the agency") released an order ("the Order") adopting rules interpreting and implementing section 621(a)(1) of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 541(a)(1), which prohibits local franchising authorities from "unreasonably refus[ing] to award" competitive cable franchises. The FCC released the Order on March 5, 2007 on the basis of record evidence that the operation of the local franchising process was unreasonably impeding competitive entry into the cable television market. A summary of the Order was subsequently published in the *Federal Register* on March 21, 2007.

Petitioners and intervenors, consisting primarily of various local franchising authorities ("LFAs"), their representative organizations, and the incumbent cable industry's trade association, request us to reverse the FCC's decision and declare the Order void in its entirety, asserting that the FCC lacks the requisite authority to promulgate the Order and, in the alternative, that the FCC's interpretation is not entitled to deference and is arbitrary and capricious. For the following reasons, we find that the FCC acted well within its statutorily delineated authority in enacting the Order and that there exists sufficient record evidence to indicate that the FCC

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did not engage in arbitrary-and-capricious rulemaking activity. Accordingly, we **DENY** the petitions for review.

I. BACKGROUND

A. Factual Background

Given the complexity of the regulatory regime at issue, we begin by tracing the historical evolution of cable regulation and the role of the FCC therein. The public at large first obtained access to cable television in the 1950s. *See generally City of Dallas, Tex. v. FCC*, 165 F.3d 341, 345-46 (5th Cir.1999). During this first decade in which cable television was publicly available, the FCC abstained from regulating in this arena because it believed it lacked the authority to do so under existing statutory provisions. *Id.* at 345. By the mid-1960s, however, cable television had proliferated to such a degree that the FCC determined that it must regulate cable franchises in order to carry out its statutory duty to oversee all forms of broadcasting on behalf of the public interest. *Id.* The Supreme Court subsequently affirmed the FCC's regulatory authority over cable television, holding that the agency was authorized to issue rules that were "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968).

Regulation of cable services did not fall entirely on the shoulders of the FCC, however. Municipalities, or LFAs, also exerted an interest in regulating the cable medium. *See generally American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1558 (D.C.Cir.1987). Specifically, they retained discretion to decide whether to grant cable franchises to applicants in their communities. *Id.* at 1558. As part of this negotiation process, cable operators frequently agreed to perform various activities on behalf of the public interest in exchange for a franchise. *Id.*

Given the overlapping jurisdiction of the FCC and the municipalities, in 1972 the agency issued a report to delineate the contours of its jurisdiction vis-a-vis the LFAs. Cable Television Report and Order, 36 F.C.C.2d 143, on reconsideration, 36 F.C.C.2d 326 (1972), aff'd sub. nom. *American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir.1975). In this report, the agency carved out a system of "deliberately structured dualism." *Id.* Within this binary regulatory regime, "state or local government issued franchises while the FCC exercised exclusive authority over all operational aspects of cable communication,

including technical standards and signal carriage." *National Cable Television Ass'n v. FCC*, 33 F.3d 66, 68-69 (D.C.Cir.1994) (internal quotations omitted).

This was the state of the cable communications market until 1984. At this time, approximately twenty years following the FCC's foray into the cable television market, Congress conveyed its input for the first time through passage of a legislative amendment to the Communications Act[1], entitled the Cable Communications Policy Act of 1984, Pub.L. No. 98-549, 98 Stat. 2779. The 1984 Act was a response to the "illdefined [sic] . . . state of regulatory uncertainty" resulting from the overlapping authority of the FCC and municipalities. *American Civil Liberties Union*, 823 F.2d at 1559. Accordingly, the legislation enlarged the Communications Act by inserting

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Title VI provisions governing the operation of cable providers and franchises. The purpose of these provisions was to "establish[] a national policy that clarifie[d] the current system of local, state and federal regulation of cable television" and to "continue[ ] reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process." H.R.Rep. No. 98-934U.S.Code Cong.& Admin.News 1984 at pp. 4655, 4661. Thus, the regulatory guidelines incorporated into Title VI aimed to "both . . . reliev[e] the cable industry from unnecessary, burdensome regulation and . . . ensur[e] that cable systems remain responsive to the needs of the public." *American Civil Liberties Union*, 823 F.2d at 1559. In so doing, the amendments "balance[d] two conflicting goals: preserv[ing] the critical role of municipal governments in the franchise process . . . while affirming the FCC's exclusive jurisdiction over cable service, and overall facilities which relate to such service." *City of New York v. FCC*, 814 F.2d 720, 723 (D.C.Cir.1987) (internal quotations and citations omitted).

As a result of the amendment, when an entity now chooses to enter the market and offer services as a "cable operator,"[2] it must comply with the dictates of Title VI. Section 621 of Title VI—the provision at issue in the instant case—enumerates various requirements cable operators must follow to acquire cable franchises. Specifically, subsection (b)(1) of Section 621, 47 U.S.C. § 541(b)(1), situates the securing of cable franchises as a mandatory precondition for providing cable services,[3] and subsection (a)(1), 47 U.S.C. § 541(a)(1), authorizes LFAs to award these franchises.[4] By delegating this task to LFAs, the 1984 Act effectively "preserve[d] the role of municipalities in cable regulation." *City of Dallas, Tex.*, 165 F.3d at 345.

Subsequently, in 1992, Congress once again weighed in on the regulation of cable television and clarified the role of LFAs through enactment of the Cable Television Consumer Protection and Competition Act, Pub.L. No. 102-385, 106 Stat. 1460. Specifically, Congress revised section 621(a)(1) to codify restraints on the licensing activities of an LFA such that it may grant "1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and *may not unreasonably refuse to award an additional competitive franchise*." (emphasis added). Through this amendment, Congress further endowed potential entrants with a judicial remedy by entitling them to commence an action in a federal or state court within 120 days after receiving a final, adverse decision from an LFA.[5] It is

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the legitimacy and precise import of these restraints that give rise to the instant controversy.

According to the legislative history, Congress enacted this amendment in part because the local franchising requirements provided most cable subscribers with "no opportunity to select between competing cable systems." H.R. Conf. Rep. No. 102-862, at 55, U.S.Code Cong.& Admin.News 1992 at p. 1231.

Therefore, the purpose of these constraints was to foster heightened competition in the cable market:

> Based on the evidence in the record taken as a whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be encouraged to award second franchises. Accordingly, [the 1992 Cable Act,] as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises.
>
> S. Rep. No. 102-92, at 13, U.S.Code Cong. & Admin.News 1992 at p. 1133.

Overall then, the legislators adopted a revised version of section 621(a)(1) because they "believe[d] that exclusive franchises are directly contrary to federal policy . . . which is intended to promote the development of competition." H.R. Conf. Rep. No. 102-862, at 77 (1992).

B. Procedural Background

Over a decade following the passage of the 1992 amendments to the Communications Act, the FCC compiled data suggesting that competition had yet to materialize as a reality for the cable market. S.Rep. No. 102-92. To investigate the state of the cable market, on November 3, 2005, the FCC adopted a Notice of Proposed Rulemaking ("NPRM") and subsequently released it on November 18, 2005. In the NPRM, the FCC invited comment on approaches to implementing Section 621(a)(1) of the Communications Act of 1934. Responding to charges from potential entrants into the cable marketplace that "the current operation of the local franchising process serves as a barrier to entry[,]" the FCC solicited comment on "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." Specifically, in issuing the NPRM, the FCC sought to determine whether LFAs "are carrying out legitimate policy objectives allowed by the [Communications] Act or are hindering the federal communications policy objectives of increased competition in the delivery of video programming and accelerated broadband deployment."

The FCC further called for comment on formulating a definition of "what constitutes an unreasonable refusal to award an additional competitive franchise under Section 621(a)(1)." In making initial headway toward a definition, the FCC tentatively concluded in the NPRM that "Section 621(a)(1) prohibits not only the ultimate refusal to award a competitive franchise, but also the establishment of procedures and other requirements that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise." (JA 475.) In addition to soliciting comments on the ease of entry into the cable market, the FCC also tentatively concluded that it possesses legitimate authority to implement Section 621(a)(1) "to ensure that the local franchising process does not unreasonably interfere with the ability of any potential new

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entrant to provide video programming to consumers." (JA 474.)

After reviewing the "voluminous record" generated by the rulemaking proceeding, consisting of "comments filed by new entrants, incumbent cable operators, LFAs, consumer groups, and others[,]" the FCC ascertained the need for new rules to ensure that the local franchising process operated in a fully competitive fashion, free of barriers to entry. (JA 500.) Accordingly, on December 20, 2006, by a vote of three to two, the FCC adopted the Order at issue. The Order was released on March 5, 2007 and became final on March 21, 2007, when it was published in the *Federal Register*. (JA 491-599; 72 Fed. Reg. 13230 (2007).) Attached to the Order was the dissenting opinion of Commissioner Jonathan S. Adelstein. The thrust

of Commissioner Adelstein's dissent was that the Order "substitutes [the FCC's] judgment as to what is reasonable—or unreasonable—for that of local officials—all in violation of the franchising framework established in the Communications Act." (JA 586.)

Notwithstanding Commissioner Adelstein's dissent, as a threshold matter, the Order first established the FCC's "broad rulemaking authority to implement the provisions of the Communications Act, including Title VI generally and Section 621(a)(1) in particular." (JA 493.) The FCC derived support for its rulemaking authority from various statutory provisions, including 47 U.S.C. § 303(r), which empowers the agency to implement "such rules and regulations . . ., not inconsistent with law, as may be necessary to carry out the provisions of th[e] [Communications] Act[,]" 47 U.S.C. § 201(b), which authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act[,]" and 47 U.S.C. § 4(i), which states that the FCC "may perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions." (JA 518.) The agency also justified its actions on the basis that "Congress specifically charged [it] with the administration of the Cable Act, including Section 621" and that "federal courts have consistently upheld . . . [its] authority in this area." (*Id.*)

In response to comments from incumbent cable operators that the judicial review provisions of sections 621(a)(1) and 635 of the Communications Act invested the federal courts with exclusive jurisdiction to interpret and enforce section 621(a)(1), the FCC explained that the availability of judicial review did not in any way attenuate its rulemaking authority. (JA 518-19.) The agency insisted that the "mere existence of a judicial review provision in the Communications Act does not, by itself, strip the Commission of its otherwise undeniable rulemaking authority." (JA 519.) "As a general matter," the FCC continued, "the fact that Congress provides a mechanism for judicial review to remedy a violation of a statutory provision does not deprive an agency of the authority to issue rules interpreting the statutory provision." (*Id.*)

Upon establishing its broad rulemaking authority, the FCC then proceeded to address the merits of the most pressing problems it identified in the cable franchising process. Based on the factual record before it, the FCC found that "the current operation of the franchising process can constitute an unreasonable barrier to entry for potential cable competitors, and thus justifies Commission action." (JA 500.) The agency opined that "absent Commission action, deployment of competitive video services by new cable entrants will continue

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to be unreasonably delayed or, at worst, derailed." (*Id.*)

To avoid such ends and to further the goals of reducing barriers to entry into the cable market and facilitating investment in broadband facilities, the Order codified five rules construing the meaning of "unreasonable" within section 621(a)(1). First, the FCC ruled that "an LFA's failure to issue a decision on a competitive application within the time frames specified herein constitutes an unreasonable refusal to award a competitive franchise." (JA 493.) The FCC accordingly delineated two applicable time frames: ninety days for applicants, such as telephone companies, with already existing authorizations for access to rights-of-way, and six months for all other competitive franchise applicants. As a means of enforcement, the FCC declared that if an LFA failed to issue a final decision within the requisite time frame, the applicant's proposal would be deemed granted on an interim basis until the LFA delivered a final decision.

Second, the FCC ruled that "an LFA's refusal to grant a competitive franchise because of an applicant's unwillingness to agree to unreasonable build-out mandates[6] constitutes an unreasonable refusal to award a competitive franchise." (JA 493.) While the agency

characterized build-out requirements as "eminently sensible" under the prior regime, in which incumbent cable providers were granted community-wide monopolies, under the current, competitive regime, these requirements "make entry so expensive that the prospective . . . provider withdraws its application and simply declines to serve any portion of the community." (JA 532-33.) Given the entry-deterring effects of build-out requirements, the agency exercised its rulemaking authority to proscribe LFAs from conditioning franchises on these requirements.

Third, the Order included a ruling regarding franchise fees. The FCC declared that "unless certain specified costs, fees, and other compensation required by LFAs are counted toward the statutory [five] percent cap on franchise fees, demanding them could result in an unreasonable refusal to award a competitive franchise." (JA 493.) The Order went on to explain that "a cable operator is not required to pay franchise fees on revenues from non-cable services." (JA 536.) Similarly, the FCC mandated that "any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory [five] percent franchise fee cap." (JA 539.)

Fourth, the FCC ruled that while LFAs may seek assurances from prospective cable operators that they will provide public, educational, and governmental ("PEG") access channel capacity, "LFAs may not make unreasonable demands of competitive applicants for PEG." (JA 541.) As an example of such an unreasonable demand, the FCC stated that it would be "unreasonable for an LFA to impose on a new entrant more burdensome PEG carriage obligations than it has imposed upon the incumbent cable operator." (JA 543.) In contrast, the agency approved a "*pro rata* cost sharing approach" in which a "new entrant agrees to share *pro rata* costs with

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the incumbent operator" as "*per se* reasonable." (JA 544.)

Lastly, the FCC clarified that "the LFA's jurisdiction applies only to the provision of cable services over cable systems." (JA 545.) Based on this limited jurisdiction, the Order characterizes as "unreasonable" an LFA's refusal to issue a franchise based on issues related to non-cable services or facilities. (*Id.*) For example, the FCC explained that an "LFA may not use its video franchising authority to attempt to regulate a [local exchange carrier's] entire network beyond the provision of cable services." (*Id.*)

Beyond codifying these five rules, the FCC's Order also "preempt[ed] local laws, regulations, practices, and requirements to the extent that: (1) provisions in those laws, regulations, practices, and agreements conflict with the rules or guidance adopted in this *Order;* and (2) such provisions are not specifically authorized by state law." (JA 546.) Despite its preemption of local laws and regulations, however, the Order declined to preempt state laws, state-level franchising decisions, or local franchising decisions "specifically authorized by state law." (*Id.*) The FCC refrained from preemption of state regulations because it lacked "a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises." (*Id.*)

In conjunction with the Order, the FCC issued a Further Notice of Proposed Rulemaking. This Notice underscored that since the Order implemented section 621(a)(1), its immediate applicability was only to applicants seeking "*additional* competitive franchises," not to existing franchisees. (JA 535, 554). Accordingly, the FCC initiated a second round of rulemaking, "seeking comment on how [its] findings in [its] Order should affect existing franchisees" and "on local consumer protection and customer service standards as applied to new entrants." (JA 494, 554-58.)

Following publication of the Order, on April 3, 2007, the Alliance for Community Media ("ACM"), the National Association of Counties ("NAC"), the National Association of

Telecommunications Officers and Advisors ("NATOA"), the National League of Cities ("NLC"), the United States Conference of Mayors ("USCM"), and Alliance for Communications Democracy ("ACD")[7] (collectively, "petitioners") timely filed petitions for review of the Order in courts of proper venue under 28 U.S.C. § 2343. ACM's petition for review typifies the claims of petitioners in challenging the Order "on the grounds that it exceeds the FCC's statutory authority, is arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence, in violation of the United States Constitution . . . and is otherwise contrary to law." (JA 600-01.) On April 10, 2007, the Judicial Panel on Multidistrict Litigation exercised its authority under 28 U.S.C. § 2112(a) to consolidate the petitions for review of the Order and randomly designated this Court to hear the matter. Petitioners thereafter requested this Court to stay the Order's applicability pending judicial review, but this Court denied that request on July 24, 2007.

II. DISCUSSION

A. The FCC's Authority to Issue the Order

At the outset, petitioners contest the FCC's underlying authority to promulgate

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rules implementing section 621(a)(1) of the Communications Act. Petitioners maintain that the FCC exceeded the bounds of its authority when it adopted the Order because Congress never explicitly or implicitly delegated power to the FCC to interpret section 621(a)(1). In contrast, the FCC insists that it undoubtedly possesses the requisite authority to implement the Order and that petitioners' argument "rest[s] on a fundamental misunderstanding of the statutory scheme." (Respondent's Br. 21.)

In support of its jurisdictional argument, petitioners emphasize that nowhere in the plain language of section 621(a)(1) does any reference to the Commission appear. Turning to the text, section 621(a)(1) reads as follows:

> (a) Authority to award franchises; public rights-of-way and easements; equal access to service; time for provision of service; assurances
>
> (1) A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not *unreasonably refuse to award an additional competitive franchise.* Any 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 555 of this title for failure to comply with this subsection.

47 U.S.C. § 541(a)(1) (emphasis added).

Petitioners are thus correct in noting that, while the text expressly references franchising authorities, it is silent as to the agency's role in the process of awarding cable franchises. Where petitioners' argument falls short, however, is in equating the omission of the agency from section 621(a)(1) with an absence of rulemaking authority.

In *AT & T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999), the Supreme Court considered a challenge by state utility commissions and local exchange carriers to local competition rules issued by the FCC pursuant to the Telecommunications Act of 1996. In considering whether the FCC possessed the regulatory authority to interpret the provisions of the Telecommunications Act of 1996 at issue, the Court hinged its analysis on section 201(b), a 1938 amendment to the Communications Act of 1934. *AT & T Corp.*, 525 U.S. at 377, 119 S.Ct. 721. Section 201(b) provides, in relevant part, that "[t]he Commission may 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). The Court reasoned that "[s]ince Congress expressly directed that the

1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934 . . . the Commission's rulemaking authority would seem to extend to implementation of the local competition provisions." *AT & T Corp.*, 525 U.S. at 377-78, 119 S.Ct. 721. In other words, *AT & T Corp.* espoused a plain reading of section 201(b): "We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the `provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996." *Id.* at 378, 119 S.Ct. 721.

We find that the logic of *AT & T Corp.* controls the disposition of the jurisdictional argument petitioners raise here. Just as Congress ratified the Telecommunications Act of 1996 as an amendment to be incorporated into the original Communications Act of 1934, Congress likewise passed the Cable Television Consumer Protection and

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Competition Act of 1992, Pub.L. No. 102-385, 106 Stat. 1460, which revised section 621(a)(1) to include the bar on unreasonable refusals to award additional franchises, as an amendment to the original Communications Act of 1934. Through this process of amendment, Congress incorporated section 621(a)(1) into the Communications Act of 1934, and the statutory language at issue here thus qualifies as a "provision[ ] of this Act" within the meaning of section 201(b). Thus, because "the grant in § 201(b) means what it says[,]" we are bound by this plain meaning and thereby conclude that, pursuant to section 201(b), the FCC possesses clear jurisdictional authority to formulate rules and regulations interpreting the contours of section 621(a)(1). *See AT&T Corp.*, 525 U.S. at 378, 119 S.Ct. 721.

Locating jurisdictional support for the FCC's rulemaking in section 201(b) further explains the absence of any reference to the Commission in the language of section 621(a)(1). Facing a similar argument regarding statutory silence with respect to an agency's rulemaking authority, the Supreme Court underscored that there is an "obvious difference between a statutory *requirement* . . . and a statutory *authorization." Alaska Dept. of Environmental Conservation v. E.P.A.*, 540 U.S. 461, 491, 124 S.Ct. 983, 157 L.Ed.2d 967 (2004) (emphasis in original). In the specific context of the Communications Act, the Court has observed that it is "not peculiar that the [congressionally] mandated regulations should be specifically referenced, whereas regulations permitted pursuant to the Commission's § 201(b) authority are not." *AT & T Corp.*, 525 U.S. at 385, 119 S.Ct. 721. Standing alone then, the statutory silence in section 621(a)(1) regarding the agency's rulemaking power does not divest the agency of its express authority to prescribe rules interpreting that provision.

Cases from our sister circuits interpreting section 621 lend further support to our finding of the agency's jurisdiction here. In *City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir.1999), for example, the Seventh Circuit squarely addressed the issue of whether the "FCC was . . . granted regulatory authority over 47 U.S.C. § 541, the statute setting out general franchise requirements." In answering this question, the court explained that "the FCC is charged by Congress with administration of the Cable Act . . . We are not convinced that for some reason the FCC has well-accepted authority under the Act but lacks authority to interpret § 541 and to determine what systems are exempt from franchising requirements." *City of Chicago*, 199 F.3d at 428 (internal citations omitted).

Likewise, in *National Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C.Cir.1994), the D.C. Circuit confronted the question of whether the FCC's interpretation of the franchise requirements set forth in section 621(b)(1) was a reasonable construction of the statute. Although not addressing the jurisdictional question directly, the court concluded that the regulations at issue represented reasonable constructions of section 621(b)(1) and therefore denied the petitions for review. *Id.* at 75. Implicit in the court's deference to the FCC's interpretations was an acknowledgment that the agency

possessed the underlying regulatory authority to promulgate rules construing section 621. Thus, our jurisdictional holding today reinforces the conclusions of our sister circuits.

As a final jurisdictional challenge, petitioners focus their argument on the availability of judicial review under section 621(a)(1). Immediately after assigning LFAs the task of awarding franchises, the next sentence of section 621(a)(1), by cross-referencing section 635 of Title VI,

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identifies the courts as the forum for aggrieved cable operators to obtain relief. *See* 47 U.S.C. § 555(a)(1),(2) ("Any cable operator adversely affected by any final determination made by a franchising authority under section 541(a)(1) . . . of this title 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."). In light of this judicial review provision, petitioners challenge the Order for "ignor[ing] this basic statutory structure . . . [by] in effect, add[ing] a third clause to Section 635(a) that would allow local franchising matters under Section 621(a)(1) to be ruled upon by the FCC." (Petitioner ACM's Br. 18; *see also* Petitioner NCTA's Br. 24-26; Petitioner Tampa's Br. 16-17; Petitioner New Jersey's Br. 16-17.) Petitioners contend that the FCC's intervention in franchising decisions violates Congressional intent that the courts serve as the only other body with concurrent jurisdiction over section 621(a)(1). By issuing the Order, their argument goes, the FCC has impermissibly encroached on the exclusive role of the courts in providing redress to aggrieved cable operators.

In effect, petitioners' argument calls upon us to determine whether the judicial review provisions in the second part of section 621(a)(1) are exclusive and thereby override the FCC's exertion of rulemaking authority. Our inquiry leads us to a negative answer: the availability of a judicial remedy for unreasonable denials of competitive franchise applications does not foreclose the agency's rulemaking authority over section 621(a)(1). While the Order equips LFAs with guidance on reasonable versus unreasonable distribution of franchises, the courts ultimately retain their Congressionally-granted jurisdiction to hear appeals involving denials of competitive franchises. Although the courts may have to grant deference to the Order, this does not in any way impede the courts' fact-finding or legal analysis during actual judicial proceedings.

Our conclusion today that the FCC possesses jurisdiction over section 621(a)(1) coextensive with that of the courts is buttressed by the Supreme Court's analogous decisions in *AT & T Corp.* and *U.S. v. Haggar Apparel Co.*, 526 U.S. 380, 119 S.Ct. 1392, 143 L.Ed.2d 480 (1999). In the former case, although the Communications Act specifically provides for judicial review of state commission decisions arbitrating interconnection disputes among telephone companies, 47 U.S.C. § 252(e)(6), the Supreme Court upheld the FCC's authority to issue rules governing the states' resolution of such disputes. *AT & T Corp.*, 525 U.S. at 377-85, 119 S.Ct. 721. The Court reasoned that Congress's "assignment[]" of the adjudicatory task to state commissions did not "logically preclude the [FCC]'s issuance of rules to guide the state-commission judgments." *Id.* at 385, 119 S.Ct. 721.

Likewise, in *Haggar Apparel*, a manufacturer of imported clothing brought an action to challenge regulations issued by the United States Customs Service through the notice-and-comment rulemaking process. 526 U.S. at 380, 119 S.Ct. 1392. Specifically, the company contested the applicable scope of the rules, arguing that they applied only to customs officers and not to the Court of International Trade in importers' refund suits. *Id.* at 386-87, 119 S.Ct. 1392. The Court, however, rejected Haggar Apparel's attempt to release the Court of International Trade from adherence to the rules and ultimately held that "[d]eference can be

given to the regulations without impairing the authority

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of the [Court of International Trade] to make factual determinations, and to apply those determinations to the law, *de novo*." *Id.* at 391, 119 S.Ct. 1392. Similarly, in the instant case, we believe that courts can grant deference to the Order while maintaining their Congressionally-granted authority to make factual determinations and provide relief to aggrieved cable operators.

B. *Chevron* Analysis

Because we find that the agency possesses the underlying authority to issue the Order, our subsequent task is to ascertain whether the contents of the Order merit our deference pursuant to *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). In *Chevron*, the Supreme Court observed that, pursuant to the principle of deference to administrative interpretations, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." 467 U.S. at 844, 104 S.Ct. 2778. To determine whether such deference is warranted, the *Chevron* analysis, colloquially referred to as the "*Chevron* two-step," requires the following inquiry: "the court [must] ask `whether the statute is silent or ambiguous with respect to the specific issue before it; if so, the question for the court [is] whether the agency's answer is based on a permissible construction of the statute." *Singh v. Gonzales*, 451 F.3d 400, 403-04 (6th Cir. 2006) (citation and quotation marks omitted). Within this analytical framework, judicial deference to an agency's construction of a statute is justified because the "statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). The Supreme Court has explained that "a very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the process of rulemaking . . . that produces regulations or rulings for which deference is claimed." *United States v. Mead Corporation*, 533 U.S. 218, 229, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001).

Applying the dictates of *Chevron*, we find that the Order is entitled to our deference. At the outset, we note that, as reflected by the NPRM, the sixty-day comment period, and the ninety-day reply comment period, the FCC promulgated the Order through the formal channels of notice-and-comment rulemaking pursuant to section 553 of the APA. According to the Supreme Court's pronouncement in *Mead*, the FCC's conformance with notice-and-comment procedures serves as a "very good indicator of delegation meriting *Chevron* treatment." 533 U.S. at 229, 121 S.Ct. 2164; *see also, Estate of Gerson v. C.I.R.*, 507 F.3d 435, 438 (6th Cir.2007) (finding that a Treasury Regulation adopted by the IRS deserved deference because "the IRS regularly engages in notice and comment procedures for its general-authority regulations; these procedures foster fairness and deliberation."); *Cleveland Nat. Air Show, Inc. v. U.S. Dept. of Transp.*, 430 F.3d 757, 763 (6th Cir.2005) (noting that a "formal process is one signal that an agency deserves *Chevron* deference.").

Turning to the *Chevron* two-step analysis, we are of the view that the language at issue in section 621(a)(1) is indeed ambiguous, and that the FCC's construal of the language in the Order amounts to a permissible construction of this language.

1. *Chevron Step 1: Statutory Ambiguity*

The initial question under step one of the *Chevron* framework is "whether Congress has directly spoken to the precise

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question at issue" by employing precise, unambiguous statutory language. *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. This first step is informed by the recognition that "[t]he judiciary

is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843, n. 9, 104 S.Ct. 2778. When conducting the inquiry required by *Chevron*'s first step, "our primary goal is to effectuate legislative intent using traditional tools of statutory interpretation." *Estate of Gerson,* 507 F.3d at 439. In harnessing these tools, we must construe statutory language "in pertinent context rather than in isolation." *Id.*

In the case at bar, the statutory phrase within section 621(a)(1) which emerges as a candidate for ambiguity is "*unreasonably* refuse to award an additional competitive franchise." 47 U.S.C. § 541(a)(1) (emphasis added). Language is ambiguous when "to give th[e] phrase meaning requires a specific factual scenario that can give rise to two or more different meanings of the phrase." *Beck v. City of Cleveland, Ohio,* 390 F.3d 912, 920 (6th Cir.2004).

While we have not previously interpreted the phrase "unreasonably" under section 621(a)(1), in the context of other provisions of the Communications Act, courts called upon to ascertain the ambiguity of descriptors such as "reasonable" and "unreasonable" have found these words subject to multiple constructions. In *Orloff v. FCC,* 352 F.3d 415 (D.C.Cir.2003), *cert. denied,* 542 U.S. 937, 124 S.Ct. 2907, 159 L.Ed.2d 813 (2004), for example, the petitioner filed a petition for review of an FCC adjudication which found that Verizon's practice of granting sales concessions to certain prospective customers did not rise to "unjust or unreasonable" discrimination in violation of 47 U.S.C. § 202(a). In conducting the requisite *Chevron* analysis, that court stated that "the generality of these terms — unjust, unreasonable—opens a rather large area for the free play of agency discretion, limited of course by familiar arbitrary and capricious standard in the Administrative Procedure Act." *Orloff,* 352 F.3d at 420 (internal quotations omitted).

Similarly, confronting section 201(b) of the Communications Act, which mandates that any interstate communications charge be "just and reasonable" and characterizes as unlawful any communications charge that is "unjust or unreasonable," the panel majority explained that "[b]ecause `just,' `unjust,' `reasonable,' and `unreasonable' are ambiguous statutory terms, this 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).

Of course, the detection of inherent ambiguity in words such as "reasonable" and "unreasonable" by other courts in other sections of the Communications Act does not terminate the analysis here, because such observations are divorced from the specific context of Title VI. *See Bower v. Federal Exp. Corp.,* 96 F.3d 200, 208-09 (6th Cir.1996) ("[E]ven facially ambiguous provisions can have their meanings clarified and rendered unambiguous by reference to the statute's structure or to other unambiguous terms in the statute."). As petitioners argue, while "unreasonable" may generally engender ambiguity and multiplicity of meaning, it is not inconceivable that its particular usage within section 621(a)(1) is perfectly clear. Thus, we must probe the structure and history surrounding the enactment of section 621(a)(1) to establish whether the use of "unreasonable" in this case fosters ambiguity.

Immediately following section 621(a)(1)'s limitation on unreasonable refusals to

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award additional franchises, the provision cross-references section 635 and thereby charges the courts with the task of determining whether there has been a "failure to comply with this subsection." 47 U.S.C. § 541(a)(1). Congress's provision of judicial review as a means to monitor a given LFA's compliance with section 621(a)(1) suggests that it is not instantaneously apparent whether a refusal to grant a prospective franchisee's application is necessarily reasonable or not. The legislative decision to delegate to jurists the task of construing and enforcing section 621(a)(1)'s insistence on reasonableness

suggests that the statutory phrase at issue is capable of multiple meanings. To choose between these several meanings, courts will have to engage in fact-finding and uncover the particularities of the case at hand. Thus, to give meaning to an "unreasonable denial" will depend upon "a specific factual scenario." *Beck*, 390 F.3d at 920. Coupled with case law finding the term "reasonable" generally to engender ambiguity, the fact-sensitive nature of the reasonableness inquiry in the instant context indicates that section 621(a)(1)'s usage of "unreasonably" is ambiguous under *Chevron*'s first step. Accordingly, our next task is to determine whether the FCC's explication of this statutory ambiguity is reasonable.

2. *Chevron Step 2: Reasonableness of the Order*

At this juncture, we must decide whether the FCC's Order constitutes a permissible construction of the pivotal statutory phrase, "unreasonably refuse to award," within section 621(a)(1). In answering this question, we "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading [we] would have reached if the question initially had arisen in a judicial proceeding." *Battle Creek Health System v. Leavitt*, 498 F.3d 401, 408-09 (6th Cir.2007) (internal quotations omitted). A review of the legislative history as well the language of the provision at issue is the chief method by which we approach the second step of *Chevron*. *Difford v. Secretary of Health and Human Services*, 910 F.2d 1316, 1318 (6th Cir.1990). Because the Order encompasses four different rules specifying the meaning of "unreasonably refuse" within section 621(a)(1), we proceed by assessing the reasonableness of each rule in its own right.

a. *Rule 1: Timing Requirements for Awarding New Franchises*

The first rule contained in the Order concerns the time period within which LFAs must address franchise applications to satisfy section 621(a)(1)'s requirement of reasonableness. The FCC selected 90 days and six months as the time frames within which LFAs must respectively rule on the proposals of applicants with existing access to rights-of-way and wholly new applicants. The FCC further prescribed temporary interim franchises as a remedy for an LFA's failure to comply with the applicable time frame.

Urging this Court to reject the timing requirement as an impermissible construction of the statute, petitioners characterize this portion of the Order as "creating an arbitrary shot-clock for new franchise applications" and "spawning unilaterally-imposed interim franchises permitting unauthorized access to public and private property and denying community needs and interests." (Petitioner ACM's Br. 28-29.) The FCC, on the other hand, insists that the time frames are a lawful and reasonable regulatory response to "unreasonable delays in the franchising process." (Respondent's Br. 39-40.)

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To determine whether we should defer to the time limits as a permissible construction of the Act, it is instructive to examine how durational requirements surface in other portions of Title VI. In several other sections of the Act addressing cable franchises, Congress expressly incorporated timing requirements into the statutory language. Section 617, for example, relates to the sale of cable systems and states that, if the issuance of a franchise requires that an LFA approve the sale or transfer of a cable system, the LFA must act within 120 days. 47 U.S.C. § 537. Likewise, section 625 mandates that modifications of franchise terms occur within 120 days of the request. 47 U.S.C. § 545.

While express durational requirements govern these aspects of the franchising process, the statutory scheme is silent with respect to time limits governing the issuance of new franchises under section 621(a)(1). In light of this silence, petitioners urge us to adopt the canon of construction *expressio unius est exclusio alterius* — explicit direction for something in one provision, and its absence in a

parallel provision, implies an intent to negate it in the second. That is, according to petitioners, if Congress had intended that LFAs act within a certain time period in awarding new franchises, it seems logical to assume that it would have followed the course of these other sections by integrating express durational requirements into the statutory language of section 621(a)(1). Thus, under petitioners' view, even if the language of section 621(a)(1) is ambiguous, the agency has formulated an impermissible construction of the statute by reading into the text durational requirements that contravene Congress's intentional decision to forego such requirements. *See Whitman v. American Trucking Ass'n.*, 531 U.S. 457, 467, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (refusing to "find implicit in ambiguous sections of the [Clean Air Act] an authorization to consider costs that has elsewhere, and so often, been expressly granted."); *General Motors Corp. v. United States*, 496 U.S. 530, 538, 110 S.Ct. 2528, 110 L.Ed.2d 480 (1990) (explaining that "[s]ince the statutory language does not expressly impose a 4-month deadline and Congress expressly included other deadlines in the statute, it seems likely that Congress acted intentionally in omitting the 4-month deadline in § 1 10(a)(3)(A)."); *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

While petitioners are correct in identifying the *expressio* tool as one canon of statutory interpretation, their analysis fails to recognize that the utility of the *expressio* canon in the context of the *Chevron* inquiry has been questioned. In *Cheney R.R. Co. v. I.C.C.*, 902 F.2d 66, 69 (D.C.Cir. 1990), for example, the D.C. Circuit explained that, under *Chevron*, Congressional silence is to be construed as creating a presumption of a gap-filling delegation to agencies. Against this presumption, the *expressio* canon emerges as "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Cheney R.R. Co.*, 902 F.2d at 69. Likewise, in *General Motors Corp. v. NHTSA*, 898 F.2d 165, 170 (D.C.Cir.1990), the D.C. Circuit held that, where a statute includes an "express deadline" for one category of decisions but not another, the absence of a statutory deadline for the latter category "could mean either that no deadline was contemplated by Congress, or that Congress left the choice to [the agency] whether

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or not to impose a deadline." We find the reasoning in *General Motors Corp.* to be persuasive. That is, the absence of a statutory deadline in section 621(a)(1) leads us to conclude that Congress authorized, but did not require, the FCC to impose time limits on the issuance of new franchises.

Moreover, the nature of the franchising process counsels in favor the reasonableness of the time limits the FCC selected. We have previously noted that administrative lines "need not be drawn with mathematical precision." *Kirk v. Secretary of Health & Human Serv.*, 667 F.2d 524, 532 (6th Cir.1981). Courts are "generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem." *Covad Comm. Co. v. FCC*, 450 F.3d 528, 541 (D.C.Cir.2006) (internal quotations omitted). We conclude that petitioners have failed to demonstrate the patent unreasonableness of the durational requirements.

First, the reasons mobilizing the FCC to promulgate these time limits appear more than reasonable. Due to protracted franchise negotiations, the agency found that prospective entrants were abandoning attempts to join the cable market and acceding to otherwise unacceptable franchise terms simply to expedite the process. The Commission thus prescribed the time frames as a way to remedy the "excessive

delays result[ing] in unreasonable refusals to award competitive franchises," and reverse the factors "depriv[ing] consumers of competitive video services" and "hamper[ing] broadband deployment." (*Id.*) In furtherance of these ends, the FCC reasonably found that six months would provide LFAs with "a reasonable amount of time to negotiate with an entity that is not already authorized to occupy" rights-of-way. (JA 527.) This determination was predicated on "substantial [record] evidence that six months provides LFAs sufficient time to review an applicant's proposal, negotiate acceptable terms, and award or deny a competitive franchise." (*Id.*)

Similarly, for companies with existing access to rights-of-way, the FCC reasonably found that their cable franchise applications should take less time to review and process because "an LFA need not devote substantial attention to issues of rights-of-way management." (JA 525.) Specifically, the agency explained that since incumbent cable operators already demonstrated their "legal, technical, and financial fitness" to use rights-of-way to provide service, "an LFA need not spend a significant amount of time considering the fitness of such applicants to access public rights-of-way." (JA 526.) That 90 days represents a reasonable time frame for incumbent providers is underscored by the fact that numerous state statutes require decisions on cable franchise applications in fewer than 90 days. (JA 499.) Accordingly, we conclude that the first rule included in the Order represents a permissible construction of the statute.

b. *Rule 2: Limitations on Build-Out Requirements*

The second rule contained in the Order places limits on the use of build-out requirements as a franchise term. Specifically, the Commission explained that "an LFA's refusal to grant a competitive franchise because of an applicant's unwillingness to agree to unreasonable build-out mandates constitutes an unreasonable refusal to award a competitive franchise." (JA 493.) The Order further stipulates types of mandates that would qualify as unreasonable, such as requiring an operator

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to serve everyone in a given area as a precondition for providing service, requiring incumbent operators to "build out beyond the footprint of their existing facilities before they have even begun providing service," and placing more stringent service requirements on new entrants than those facing incumbent operators. (JA 533.) In contrast, the agency described as reasonable an LFA's consideration of "benchmarks requiring the new entrant to increase its build-out after a reasonable period of time had passed after initiating service and taking into account its market success." (*Id.*)

In arguing for the unreasonableness of this second rule, petitioners assert that the agency has effectively "amend[ed] the will of Congress by adding exceptions to a statute that do not otherwise exist." (Petitioner ACM's Br. 33; *see also* Petitioner Tampa's Br. 43; Petitioner New York City's Br. 7). That is, petitioners claim that "[s]everal of the scenarios identified by the FCC as examples of `unreasonable build-out mandates' involve issues that have nothing to do with the one and only condition placed on an LFA by Congress — namely, that an LFA must allow a reasonable period of time for build-out." (Petitioner ACM's Br. 34.)

The agency, in turn, retorts that this second rule is both lawful and reasonable because it sensibly responds to the state of the record evidence. Based on the its extensive fact-finding, the FCC discovered that commanding prospective cable entrants to expand rapidly their networks "greatly hinder[s] the deployment of new video and broadband services." (Respondent's Br. 33; JA 506.) Beyond the entry-deterring effects of build-out requirements, the agency maintains that its limitations on build-out mandates are "in effect timing restrictions" that accordingly fall well within Congress's requirement that LFAs provide a reasonable period of time for build-out. (Respondent's Br. 55.)

Despite their differing interpretations of the provision, petitioners and respondent correctly identify section 621(a)(4)(A) of the Act as the appropriate starting point for establishing the reasonableness of the Order's second rule. Under this section, the only express constraint on an LFA's ability to impose build-out requirements is that it "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." 47 U.S.C. § 541(a)(4)(A). The question before us then is whether the FCC's restrictions on build-out requirements represent a reasonable construction of section 621(a)(4)(A).

At the most fundamental level, petitioners and respondent are enmeshed in a quarrel over whether section 621(a)(4)(A) confers on LFAs the *right* to impose build-out requirements (as petitioners would have it) or amounts to a *limitation* on the authority of LFAs to secure build-out requirements through franchise negotiations (as respondent would have it). In ascertaining the reasonableness of this second rule under *Chevron*, the legislative history of section 621(a)(4)(A) can help to illuminate whether the statutory text is better characterized as a rights-conferring or an authority-limiting provision.

When integrating section 621(a)(4)(A) into the Act through the 1984 Amendments, Congress enacted the current version of the statute from which the following language was excised: an LFA's "refusal to award a franchise shall not be unreasonable if, for example, such refusal is on the ground ... of inadequate assurance that the cable operator will, within a reasonable period of time, provide universal service throughout

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the entire franchise area." H.R.Rep. No. 102-628 at 9 (1992). That is, Congress explicitly considered and rejected the preceding language, which would have situated all build-out requirements as presumptively reasonable. Under this discarded version, the key phrase "shall not be unreasonable" indicates that LFAs would have exercised the affirmative right to impose build-out requirements on prospective entrants.

In contrast, under the existing version of section 621(a)(4)(A), the statutory language fixes a durational requirement on LFAs when attaching build-out mandates to the terms of a franchise. The language, however, does not establish a presumption of reasonableness underlying all build-out requirements. That is, it is quite possible for an LFA to furnish a cable entrant with "a reasonable period of time to become cable of providing cable service to all households in the franchise area" yet still act unreasonably overall in imposing the build-out requirement on the entrant in the first place. Thus, in light of Congress's patent consideration and rejection of statutory language that would have created a presumption of reasonableness surrounding build-out requirements, we find the FCC to have the better argument. Accordingly, section 621(a)(4)(A) is more aptly designated as a limitation on the authority of LFAs, rather than an affirmative bestowal of rights. The FCC's subsequent explication of this limitation on build-out requirements, in the context of section 621(a)(1)'s requirement of reasonableness, thus appears to us a permissible construction of the Act, which warrants judicial deference under *Chevron.*

c. *Rule 3: Franchise Fees*

As part of its third rule addressing franchise fees, the Order construes the scope of the statutory five percent cap on fees located under section 622(b) of the Act. 47 U.S.C. § 542(b). This cap prohibits an LFA from charging a franchise fee in excess of five percent of a cable operator's revenues from the provision of cable services. *Id.* Excluded from the definition of "franchise fee" and thereby from the five percent cap, however, are "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages." 47 U.S.C. § 542(g)(2)(D).

Interpreting sections 622(b) and 622(g)(2)(D) in light of section 621(a)(1)'s reasonableness requirement, the Order enumerates the non-incidental charges that must fall within the purview of the statutory cap, including attorneys' and consultants' fees, "application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided to an LFA, any requirement to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments." (JA 539.) Likewise, "any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap." (JA 539.) The Order further insists that "a cable operator is not required to pay franchise fees on revenues from non-cable services." (JA 536.)

Asserting the unreasonableness of the Commission's fee regulations, petitioners contend that the FCC's interpretation of "incidental to" in section 622(g)(2)(D) violates the plain meaning of "incidental", which is defined as "happening or likely to happen in an unplanned or subordinate conjunction with something else" or "incurred casually and in addition to the regular or main amount." (Petitioner Fairfax

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County's Br. 53.) In other words, petitioners contest the FCC's per se listing of fees that count as non-incidental because such an approach contravenes the "statutory test [which] is whether an item is related to the awarding or enforcing of the franchise." (*Id.*) Rather than prioritizing relatedness to the awarding of a franchise, petitioners insist that the FCC's list prioritizes the substantiality of the charges. They point to application fees and expenses incurred in review of an application as examples of charges that, regardless of their size or relation to market value, undoubtedly arise in connection with the award of a franchise. By confounding "incidental to" with "substantial," petitioners urge this Court to reject the FCC's rules on franchise fees as unreasonable.

The FCC, in contrast, supports its position in the Order by marshaling case law from three district court opinions, *Time Warner Entertainment v. Briggs*, 1993 WL 23710 (D. Mass. Jan. 14, 1993), *Birmingham Cable Comm. v. City of Birmingham*, 1989 WL 253850 (N.D.Ala. 1989), and *Robin Cable Sys. v. City of Sierra Vista*, 842 F.Supp. 380 (D.Ariz. 1993). In *Time Warner Entertainment*, the court found that reimbursements for attorney's and consultant's fees imposed during a franchise award constituted "franchise fees" within the meaning of 47 U.S.C. § 542 and were thus subject to the statutory cap. 1993 WL 23710 at *6. The court in *Birmingham Cable*, addressing the phrase "incidental to," held that "it would be an aberrant construction ... to conclude that the phrase embraces consultant fees incurred solely by the City." 1989 WL 253850 at * 1, n. 2. And in *Robin Cable Systems*, the court explained that exceptions to the franchise fee cap are to be "narrowly tailored." 842 F.Supp. at 381. Taken together, the FCC asserts that these three decisions further cast its interpretation as reasonable.

Considering the foregoing, we grant *Chevron* deference to the FCC's rules regarding fees because they qualify as reasonable constructions of sections 622(b) and 622(g)(2)(D). In circumscribing the boundaries of our role under the *Chevron* doctrine, we have emphasized that we "need not conclude that the agency construction was the only one it permissibly could have adopted ... or even the reading [we] would have reached if the question initially had arisen in a judicial proceeding." *Battle Creek Health System*, 498 F.3d at 408-09 (internal quotations omitted). Thus, the fact that "incidental to" lends itself to multiple readings — the one highlighted by petitioners and the one highlighted by the agency — is alone insufficient to render the Commission's interpretation unreasonable. Moreover, while not binding precedent on us, the fact that three district courts independently arrived at the same interpretation of "incidental to" as the

Commission lends further credence to the rules governing franchise fees in the Order. Since petitioners have provided no evidence to refute the reasonableness of a necessity requirement built into the "incidental to" criterion, we defer to the agency's interpretation as reasonable.

d. *Rule 4: Limitations on PEG Capacity*

The fourth rule the FCC formulated concerns PEG requirements. In conducting the inquiry called for by *Chevron*, the pivotal statutory language appears in section 622(g)(2)(C), which exempts from the definition of "franchise fee" the "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental [PEG] access facilities." 47 U.S.C. § 542(g)(2)(C). Faced with section 622(g)(2)(C), the agency differentiated between "costs incurred in or associated with

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the construction of PEG access facilities," which qualify as capital costs and therefore fall into the franchisee fee exclusion, and "payments in support of the use of PEG access facilities," which do not qualify as capital costs and so are subject to the statutory cap on franchise fees. (JA 540-41.) Salaries and training in support of the use of PEG access facilities fall into the latter category, for example, and so are counted toward the five percent limit.

The agency further concluded that while LFAs may seek assurances from prospective cable operators that they will provide PEG access channel capacity, they "may not make unreasonable demands of competitive applicants for PEG." (JA 541.) For instance, it would be "unreasonable for an LFA to impose on a new entrant more burdensome PEG carriage obligations than it has imposed upon the incumbent cable operator." (JA 543.) On the other hand, the agency classified as "*per se* reasonable" a "*pro rata* cost sharing approach" in which a "new entrant agrees to share *pro rata* costs with the incumbent operator." (JA 544.)

Confronting the agency's interpretation of "capital costs," petitioners maintain that it is unreasonable and contrary to Congress's intent. First, petitioners attack the rule for its supposed distinction between PEG facilities versus PEG equipment. In laying out this argument, petitioners state that the FCC's reading narrows "capital costs" to only the "costs related to the construction of PEG facilities." (Petitioner Fairfax County's Br. 56.) This interpretation overlooks the fact that "[m]any LFAs ... including Fairfax County ... receive payments from cable operators that are used not simply for the construction of PEG access studios, but also for the acquisition of equipment needed to produce PEG access programming such as cameras and editing equipment." (*Id.*) Fairfax County thus asserts that, "to the extent that the FCC apparently meant to exclude equipment from the term `capital costs,' the Order directly contradicts the language of the statute." (*Id.*)

In response, the FCC insists that its interpretation does not signify that the term "capital costs" necessarily excludes equipment. (Respondent's Br. 71.) Instead, the Commission underscores that the central test for determining whether an expense is a capital cost is whether it is "incurred in or associated with the construction of PEG access facilities." (*Id.*) This definition could potentially encompass the cost of purchasing equipment, as long as that equipment relates to the construction of actual facilities.

To determine the permissibility of the Commission's construction of section 622(g)(2)(C), we start by consulting the legislative history. During the enactment of this provision, Congress made clear that it intended section 622(g)(2)(C) to reach "capital costs *associated with the construction* of [PEG] access facilities." H.R.Rep. No. 98-934, at 26 (emphasis added). Against this legislative pronouncement, the FCC's limitation of "capital costs" to those "incurred in or associated with the construction of PEG access facilities" represents an eminently reasonable construction of section 622(g)(2)(C).

The next question that arises is whether the FCC intended to limit its definition of capital costs only to facilities and not to equipment and, if so, whether this is a permissible construction of section 622(g)(2)(C). In clarifying the precise scope of the term "PEG access facilities," Congress explained that it refers to "channel capacity (including any channel or portion of any channel) designated for public, educational, or governmental use, as well as facilities *and equipment* for the use of

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such channel capacity." H.R.Rep. No. 98-934, at 45 (emphasis added). In further detail, Congress specified that "[t]his may include vans, studios, cameras, or other equipment relating to the use of public, educational, or governmental channel capacity." *Id.* Thus, the unambiguous expression of Congress confirms that "PEG access capacity" extends not only to facilities but to related equipment as well. Considering both this clear Congressional statement, coupled with the fact that the agency concedes that its definition of "capital costs" covers the expense of equipment as long as it is "incurred in or associated with the construction of PEG access facilities," we reject Fairfax County's attempt to create an arbitrary distinction between facilities and equipment as baseless.

To sustain the fourth rule's reasonableness in its entirety, the last question we must address is whether the Order's stipulation regarding unreasonable PEG carriage obligations and pro rata sharing schemes is a permissible construction of sections 611 and 621. Section 611(a) establishes the authority of LFAs to call for franchise terms relating to the "use of channel capacity for public, educational, or governmental use" but "only to the extent provided in this section." 47 U.S.C. § 531(a). Section 621(a)(4)(B), in turn, states that, "in awarding a franchise," an LFA "may require adequate assurance that the cable operator will provide adequate public, educational, or governmental access channel capacity, facilities, or financial support." 47 U.S.C. § 541(a)(4)(B). The FCC claims that its rules regarding PEG carriage obligations and pro rata sharing give concrete meaning to the statutory term "adequate" in section 621(a)(4)(B). That is, the term "adequate" takes shape in relation to section 621(a)(1)'s reasonableness requirement: "LFAs that impose PEG"... commitments on new entrants in excess of what is "adequate" ... violate section 621(a)'s prohibition on `unreasonable refusals' to award competitive franchises." (Respondent's Br. 72.)

Rejecting the guidelines the agency adopted to clarify the meaning of "adequate," petitioners argue that "adequate" does not lend itself to the formulation of per se rules. Furthermore, petitioner ACM insists that the agency's prescription of rigid rules regarding PEG carriage obligations impedes the ability of LFAs to respond to changing community needs. Both sets of arguments, however, are without merit.

First, Congress's use of the word "adequate" in section 621(a)(4)(B) is an example of a statute that is "ambiguous ... for purposes of *Chevron* analysis, without being inartful or deficient." *Haggar Apparel*, 526 U.S. at 392, 119 S.Ct. 1392. Congress's reliance on the term "adequate" "exemplifies the familiar proposition that [it] need not, and likely cannot, anticipate all circumstances in which a general policy must be given specific effect." *Id.* The Commission thus acted well within its discretion when it ruled that "LFAs are free to establish their own requirements for PEG," subject to the limited constraints imposed to prevent violations of section 621(a)(1). (JA 542.) Such rule-making by the agency represents a lawful exercise of its gap-filling authority and thus deserves our deference under *Chevron.*

Likewise, petitioners' charge that the FCC's rules regarding PEG carriage obligations prevent attention to community needs is also tenuous at best. While the FCC's guidelines prohibit LFAs from requiring new entrants to assume "more burdensome" PEG obligations than existing providers, nothing in this standard prevents LFAs from harmonizing the PEG obligations new suppliers do assume with local interests. Moreover, nothing in the

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Order bars LFAs from updating the PEG obligations incumbents face during franchise renewal proceedings, thereby permitting the PEG obligations new entrants shoulder to likewise reflect the most current needs of the community. Overall then, the FCC's construal of PEG access facilities and "capital costs" comport with the legislative history and the overall statutory structure and thereby qualify for deference under *Chevron.*

C. Arbitrary and Capricious Analysis

As their final ground for relief, petitioners challenge the FCC's rule-making activity as arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. Specifically, petitioners insist that the Order is based on a record replete with "allegations against LFAs which are anonymous, hearsay-based, inaccurate, and outdated." (Petitioner ACM's Br. 7.) Notwithstanding petitioners' contention, we conclude that the FCC's rulemaking activity was rooted in a sufficient evidentiary basis. The contours of judicial review for arbitrary and capricious agency behavior are well-established. Courts deem agency action to be arbitrary and capricious if

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

Likewise, agency action is "not in accordance with the law" when "it is in conflict with the language of the statute relied upon by the agency." *City of Cleveland v. Ohio,* 508 F.3d 827, 838 (6th Cir. 2007). Pursuant to arbitrary-and-capricious review, we must canvass the record to determine whether there exists a "rational connection between the facts found and the choice made." *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43, 103 S.Ct. 2856 (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)). Upon conducting this searching inquiry, we are required to grant "controlling weight" to the agency's regulatory activity "unless it is plainly erroneous or inconsistent with" the underlying statute. *Battle Creek Health System,* 498 F.3d at 409.

Turning to the record, it appears that the FCC spearheaded its regulatory activity only after pursuing a more than adequate fact-finding endeavor. That is, there is ample record evidence supporting the Commission's finding that the operation of the franchising process had impeded competitive entry in multiple ways. Prior to promulgating the Order, the FCC obtained a massive record consisting of 465 comments. These 465 comments created a picture of excessive delay in the grant of new franchises. For example, Verizon's comments indicated that, of its 113 franchise negotiations pending as of March 2005, only ten resulted in franchise grants after one year. Likewise, comments from petitioner NTCA reflected that a "common complaint ... is that applications for franchising authority languish, unreasonably delaying the franchise process and the ability of competitors to offer service." (JA 1587.) Similar comments from Bell-South and other service providers make clear that the Order's attempt to remedy the problem of undue delay was consistent with the evidence before the Commission and represents a "rational connection between the facts found and the choice made." *State Farm Mut. Auto. Ins. Co.,* 463 U.S. at 43, 103 S.Ct. 2856 (quoting *Burlington Truck Lines,* 371 U.S. at 168, 83 S.Ct. 239).

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In a similar vein, the 465 comments presented to the Commission contained substantial evidence that build-out requirements were posing significant obstacles to new entrants

in providing video and broadband services. For example, comments submitted by service provider Qwest indicated that it withdrew franchise applications in eight different regions due to economically burdensome build-out requirements. Likewise, the record demonstrated that LFAs were imposing various demands on service providers, including those unrelated to cable service, those involving excessive franchise fees, and those involving excessive PEG requirements, that were significantly escalating prospective entrants' costs and thereby deterring entry. Based on the foregoing, we conclude that the administrative record fully supported the agency's rulemaking and belies any claims of arbitrary or capricious regulatory activity.

III. CONCLUSION

For the reasons articulated above, we DENY the petitions for review.

Notes:

1. "The Communications Act of 1934, Pub.L. No.73-416, 48 Stat. 1064 . . . . grants the FCC broad authority to regulate all aspects of interstate communication by wire or radio." *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1557-58 (D.C.Cir.1987).

2. 47 U.S.C. § 542(5) (defining "cable operator" as "any person or group of persons (A) who provides cable services over a cable system and directly or through one or more affiliates owns a significant interest in a cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.")

3. 47 U.S.C. § 541(b)(1) ("Except to the extent provided in paragraph (2) and subsection (f), a cable operator may not provide cable service without a franchise.")

4. 47 U.S.C. § 541(a)(1) (stating that a "franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction.") A "franchising authority" is defined to encompass "any governmental entity empowered by Federal, State, or local law to grant a franchise." Section 602(10) of the Communications Act, 47 U.S.C. § 522(10).

5. "Any 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 of the Act] for failure to comply with this subsection." 47 U.S.C. § 541(a)(1).

6. Build-out requirements necessitate that a franchisee deploy cable services to all households in a given franchise area within a specified duration. The principal statutory limitation on the right of LFAs to impose build-out requirements is that they allow the applicant a reasonable time period to do so. 47 U.S.C. § 541(a)(4)(A). The build-out provisions are intended to meet community needs and facilitate one of the goals of the Communications Act, that "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," *see id.*, a practice commonly known as "redlining."

7. ACM, NAC, and NATOA filed petitions for review on April 3, 2007 with the United States Courts of Appeals for the Sixth, Third, and Fourth Circuits, respectively. ACD, USCM, and NLC filed petitions for review on May 17, 2007 with the United States Court of Appeals for the D.C. Circuit.

Exhibit 8

FCC *Order on Reconsideration* (Rel. 2015)

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

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

ORDER ON RECONSIDERATION

Adopted: January 20, 2015 **Released: January 21, 2015**

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. In this *Order on Reconsideration*, we respond to several Petitions for Reconsideration.[1] We clarify the applicability of the *Second Report and Order*[2] in states that have state-level franchising, grant the petitions with respect to the request that we reconsider our Final Regulatory Flexibility Analysis, and deny the petitions in all other respects.

2. In the *First Report and Order and Further Notice of Proposed Rulemaking*,[3] the Commission adopted rules and provided guidance to ensure that local franchising authorities ("LFAs") do not unreasonably refuse to award competitive franchises for the provision of cable services, which is prohibited under Section 621(a)(1) of the Communications Act of 1934, as amended (the "Act").[4] The *First Report and Order* found that some franchising practices violated Section 621(a)(1) and also contravened the dual congressional goals of enhancing cable competition and accelerating broadband deployment.[5] Specifically, the Commission found that: (1) an LFA's failure to issue a decision on a competitive application within the timeframes specified in the order constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (2) an LFA's refusal to grant a competitive franchise because of an applicant's unwillingness to agree to unreasonable build-out mandates constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (3) an LFA's refusal to grant a competitive franchise because of an applicant's

[1] We received three petitions for reconsideration of the Second Report and Order in this proceeding: one from the National Association of Telecommunications Officers and Advisors ("NATOA") *et al.*, one from the City of Breckenridge Hills, Missouri, and one from the City of Albuquerque, New Mexico *et al*.

[2] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 22 FCC Rcd 19633 (2007) ("*Second Report and Order"*).

[3] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007) ("*First Report and Order and Further Notice of Proposed Rulemaking*"), *pet for review denied*, *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

[4] 47 U.S.C. § 541(a)(1).

[5] *First Report and Order* at 22 FCC Rcd at 5103.

unwillingness to agree to a variety of franchise fee requirements that are impermissible under Section 622 of the Act constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (4) it would be an unreasonable refusal to award a competitive franchise if an LFA denied an application based on a new entrant's refusal to undertake certain obligations relating to public, educational, and government channels ("PEG") and institutional networks ("I-Nets") under Sections 622 and 611; and (5) it is unreasonable under Section 621(a)(1) for an LFA to refuse to grant a franchise based on issues related to non-cable services or facilities because an LFA's jurisdiction applies only to the provision of cable services over cable systems pursuant to Section 602.[6]

3. Some of the Commission's findings in the *First Report and Order* relied, in part, on statutory provisions that do not distinguish between incumbent providers and new entrants;[7] however, because the initial *NPRM* in the proceeding focused on competitive entrants, the findings were made applicable only to new entrants.[8] The Commission therefore issued a *Further Notice of Proposed Rulemaking* ("*FNPRM*") to provide interested parties with the opportunity to provide comment on which of those findings should be made applicable to incumbent providers and how that should be done.[9]

4. In the *Second Report and Order*, the Commission determined that the prior findings involving franchise fees under Section 622, PEG and I-Net obligations under Sections 622 and 611, and non-cable related services and facilities under Section 602 relied on statutory provisions that did not distinguish between incumbents and new entrants, and therefore should be applicable to incumbent operators.[10] The Commission also determined that most favored nation ("MFN") clauses, by design, would provide some franchisees the option and ability to adjust their existing obligations if and when a competing provider obtains more favorable franchise provisions.[11]

5. Following the release of the *Second Report and Order*, petitioners sought reconsideration of our rulings regarding most favored nation clauses, in-kind payments, mixed-use networks, and the applicability of the *Second Report and Order* to state level franchising. They also brought to our attention an inconsistency between the rules adopted and the rules analyzed in the accompanying Final Regulatory Flexibility Analysis ("FRFA").[12] In response to these petitions, the Commission received a number of filings opposing reconsideration of these issues[13] and subsequent replies.[14] We discuss each of these issues in turn below.

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[6] *Id*.

[7] *Id*. at 5165. Other portions of the *First Report and Order* were based entirely on Section 621(a)(1).

[8] *Id.*

[9] *Id.*

[10] *Second Report and Order,* 22 FCC Rcd at 19633-34.

[11] *Id.* at 19643.

[12] *See* NATOA *et al.* Petition for Reconsideration and Clarification (filed Dec. 21, 2007); City of Breckenridge Hills, Missouri Petition for Reconsideration (filed Dec. 21, 2007); City of Albuquerque, New Mexico *et al.* Petition for Reconsideration (filed Dec. 21, 2007).

[13] *See* Verizon Opposition to Petitions for Reconsideration (filed Feb. 11, 2008); NCTA Opposition to Petitions for Reconsideration (filed Feb. 11, 2008); Comments of the State of Hawaii (filed Feb. 11, 2008).

[14] *See* NATOA *et al.* Reply to Oppositions to Petitions for Reconsideration and Clarification (filed Feb. 21, 2008); City of Breckenridge Hills, Missouri Reply to NCTA's Opposition to Petition for Reconsideration (filed Feb. 26, 2008); City of Albuquerque, New Mexico *et al.* Reply to Oppositions to Petition for Reconsideration (filed Feb. 26, 2008).

II. DISCUSSION

A. State Level Franchising

6. We first address Petitioners' request for clarification regarding whether the *Second Report and Order* applies to state level franchises.[15] In the *First Report and Order,* the Commission determined that it did not have a sufficient record to determine what constitutes an "unreasonable refusal to award an additional competitive franchise" with respect to franchising decisions where a state is involved versus a local franchising authority.[16] It therefore expressly limited the findings and regulations in the *First Report and Order* to actions or inactions at the local level where a state has not specifically circumscribed the LFA's authority.[17] In the *FNPRM,* the Commission tentatively concluded that the findings in the *First Report and Order* "should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs," reasoning that several of the "statutory provisions do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants."[18] The *FNPRM* sought comment on this tentative conclusion.[19] In denying various franchising authorities' petitions for review of the Commission's *First Report and Order,* the United States Court of Appeals for the Sixth Circuit observed that "[d]espite its preemption of local laws and regulations," the Commission, in the *First Report and Order,* "declined to preempt state law, state-level franchising decisions, or local franchising decisions 'specifically authorized by state law … because it lacked 'a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises.'"[20] In the *Second Report and Order,* the Commission "provide[d] further guidance on the operation of the local franchising process," explaining that to "promote the federal goals of enhanced cable competition and accelerated broadband development, we extend a number of the rules promulgated in … [the *First Report and Order*] to incumbents as well as new entrants."[21] The Commission, however, did not explicitly discuss whether its findings in the *Second Report and Order* applied to state franchising decisions. In response to a request for clarification, the State of Hawaii argued that because we did not address this issue in the *Second Report and Order*, we did not intend to apply its findings to state-level franchising.[22] Both NCTA and Verizon argued that the Commission unambiguously applied the *Second Report and Order*'s findings to state level franchising, because it stated that the statutory interpretations at issue in the proceeding are "valid throughout the nation."[23]

7. The different interpretations discussed above indicate a need for the Commission to clarify the *Second Report and Order*'s applicability. Specifically, it is necessary to clarify whether the findings regarding franchise fees under Section 622,[24] PEG and I-Net obligations under Sections 622 and 611,[25] and non-cable related services and facilities under Section 602[26] apply to state level franchising.

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[15] *See* City of Albuquerque, New Mexico *et al.* Petition for Reconsideration at 3-5; NATOA Petition on Reconsideration and Clarification at 10.

[16] *First Report and Order,* 22 FCC Rcd at 5102 n.2.

[17] *Id.*

[18] *Id.* at 5165.

[19] *Id.*

[20] *Alliance for Community Media v. FCC,* 529 F.3d 763, 772 (6th Cir. 2008).

[21] *Second Report and Order,* 22 FCC Rcd at 19633 ¶ 1.

[22] *See* Comments of the State of Hawaii at 3-5.

[23] *See* NCTA Opposition to Petitions for Reconsideration at 6; Verizon Opposition to Petitions for Reconsideration at 2.

[24] *Second Report and Order*, 22 FCC Rcd at 19637-38.

[25] *Second Report and Order*, 22 FCC Rcd at 19638-40.

We clarify that those rulings were intended to apply only to the local franchising process, and not to franchising laws or decisions at the state level. This clarification is consistent with the stated scope of both the *FNPRM* and the *Second Report and Order.* Specifically, the *FNPRM* sought comment on which of the findings made in the *First Report and Order* should extend to incumbent cable operators.[27] In deciding which findings would extend to incumbent cable operators, the Commission made clear in the *Second Report and Order* that it was providing "further guidance on the operation of the *local franchising process"* and that it was extending a number of rules promulgated in the *First Report and Order* to incumbents.[28] As explained above, in the *First Report and Order,* the Commission stated that its rulings were limited to competitive franchises "at the local level."[29] In both the *FNPRM* and the *Second Report and Order,* the Commission expressed its intent to extend the *First Report and Order*'s rulings to incumbent cable operators, but said nothing about extending those rulings to state-level franchising laws. Some commenters argue that language included in the *Second Report and Order*[30] indicates that the Commission intended its findings to be binding on both the local and state level franchising process.[31] We disagree that these statements suggest that those rulings extend beyond local franchising authorities. For the same reason we limited the rulings in the *First Report and Order* to the local franchising level – the lack of sufficient information in the record about the state-level franchising process – we did not extend those rulings in the *Second Report and Order* to state-level franchising laws or decisions.[32] If any interested parties believe that the Commission should revisit this issue in the future, they remain free to present the Commission with evidence that the findings in the *First Report and Order* and/or the *Second Report and Order* are of practical relevance to the franchising process at the state-level and therefore should be applied or extended accordingly.[33]

B. Most Favored Nation Clauses and Disruption of Existing Contracts

8. We decline to modify the conclusions concerning most favored nation ("MFN") clauses and disruption of existing contracts. In the *Second Report and Order*, the Commission concluded that the determinations in the *First Report and Order* may allow competitive providers to enter markets with franchise provisions more favorable than those of the incumbent provider, and expected that MFN clauses, "pursuant to the operation of their own design, will provide some franchisees the option and

(Continued from previous page)

[26] *Second Report and Order*, 22 FCC Rcd at 19640-41.

[27] *First Report and Order,* 22 FCC Rcd at 5165.

[28] *Second Report and Order,* 22 FCC Rcd at 19633 (emphasis added).

[29] *First Report and Order,* 22 FCC Rcd at 5102 n. 2.

[30] *See, e.g., Second Report and Order*, 22 FCC Rcd at 19642 ("The statutory interpretations set forth above represent the Commission's view as to the meaning of various statutory provisions, such as Section 622, and these interpretations are valid immediately"); *id.* at 19642 n. 60 ("because these interpretations do not depend on Section 621(a)(1), they are also valid throughout the nation").

[31] *See, e.g.,* Verizon Opposition, dated February 11, 2008, at 2-4.

[32] *See* Comments of the State of Hawaii at 4-6 (arguing that the Commission cannot apply the *Second Report and Order* to state level franchising because there was not a sufficient record to do so).

[33] Nothing in this *Order on Reconsideration*, of course, changes the fact that in litigation involving a cable operator and a franchising authority, a court anywhere in the nation would be required to apply the FCC's interpretation of any provision of the Communications Act that would be pertinent (e.g., Section 622), including those interpretations set forth in the *First Report and Order* and *Second Report and Order*. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014) (a court must apply the "uniform nationwide interpretation of the federal statute by the centralized expert agency created by Congress"); *Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir. 2013); *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010); *United States v. Dunifer*, 219 F.3d 1004, 1008 (9th Cir. 2000).

ability to change provisions of their existing agreements."[34] The Commission also concluded that these clauses would allow incumbents to change provisions of their existing franchises to conform to the findings of the *First Report and Order* without otherwise modifying the franchise.

9. Petitioners argue that these conclusions are inconsistent with our preemption of level playing field regulations in the *First Report and Order*.[35] Petitioners assert that MFN clauses have the same effect as level playing field regulations, and therefore they should also be preempted. NCTA counters that the decisions on MFN clauses should not be reconsidered because of their pro-competitive and public policy purposes.[36] NATOA disagrees with that assertion, especially since both the Department of Justice and the Federal Trade Commission have labeled MFN clauses as "anti-competitive" in certain instances.[37]

10. We adhere to our previous determinations on these issues for the reasons stated in the *Second Report and Order*. Most favored nation clauses allow franchisees to adjust their franchise obligations if a franchisor grants a competitive provider more favorable franchise provisions than those in existing contracts. With respect to disruption of existing contracts, the *Second Report and Order* did not give incumbent providers a unilateral right to breach their obligations. The *Second Report and Order* directed the incumbent and LFA to work cooperatively to address any issues that may arise.[38] As petitioners have not raised any new arguments, instead relying on perceived inconsistencies with the *First Report and Order*'s findings regarding level playing field regulations,[39] we reaffirm the prior conclusion that MFN clauses are contractual terms that are not affected by any of the Commission's findings in the *First Report and Order*.[40]

C. In-Kind Payments

11. We adhere to our previous conclusions in the *Second Report and Order* regarding in-kind payments. In the *First Report and Order*, the Commission interpreted Section 622, which limits the amount of franchise fees that an LFA may collect from a cable operator to five percent of the cable operator's gross revenues, subject to certain exceptions in subsection (g).[41] We concluded that "in-kind" payments – non-cash payments, such as goods and services – count toward the five percent franchise fee cap.[42] In the *Second Report and Order*, the Commission concluded that its interpretation of Section 622 "applies to both incumbent operators and new entrants."[43] LFAs petitioned for reconsideration of the inclusion of in-kind payments in calculating the franchise fee cap, arguing that the Commission's

[34] *Second Report and Order,* 22 FCC Rcd at 19642-43.

[35] *See* City of Albuquerque, New Mexico *et al.* Petition for Reconsideration at 14-15; NATOA *et al.* Petition for Reconsideration and Clarification at 4-6.

[36] *See* NCTA Opposition to Petitions for Reconsideration at 7-8.

[37] *See* NATOA Reply to Oppositions to Petition for Reconsideration and Clarification at 5.

[38] *Second Report and Order,* 22 FCC Rcd at 19643.

[39] We disagree that MFN clauses have the same effect as level playing field regulations. The *First Report and Order* noted the Commission's concern that level playing field regulations "unreasonably impede competitive entry". *First Report and Order*, 22 FCC Rcd at 5163. Unlike level playing field regulations, MFN provisions have no effect on market entry; they merely allow an incumbent to obtain the same franchise terms that already applied to their new competitors. Thus, MFN clauses don't create the sort of market entry concerns that led the FCC to preempt level playing field regulations in the *First Report and Order.*

[40] We also find that the FTC and DOJ decisions discussed by the Petitioners are not analogous to this situation, and therefore are not applicable here.

[41] *First Report and Order*, 22 FCC Rcd at 5144-50; 47 U.S.C. § 542.

[42] *First Report and Order*, 22 FCC Rcd at 5147-50.

[43] *Second Report and Order,* 22 FCC Rcd at 19637-8.

determinations give an overly expansive scope to Section 622(g)(2)(D), which exempts "charges incidental to the awarding or enforcing of the franchise" from the five percent franchise fee cap and also expand the definition of in-kind payments in the *First Report and Order*.[44] Verizon contends that the Commission's decision in the *Second Report and Order* is consistent with its statutory interpretation in the *First Report and Order*, and that unless all in-kind fees related to the provision of cable services are properly included in the franchise fee cap, the cap would be meaningless.[45] Petitioners respond that the *First Report and Order* includes only in-kind requirements unrelated to cable service in the franchise fee cap, not in-kind requirements that are related to cable service.[46]

12. As an initial matter, we disagree with the Petitioners that the Commission's interpretation of the phrase "incidental to" in Section 622(g)(2)(D) goes beyond or is inconsistent with our interpretation in the *First Report and Order*. The Commission concluded in the *First Report and Order* that the term "incidental" in Section 622(g)(2)(D) should be limited to the list of incidental charges provided in the statute, as well as other minor expenses.[47] The Commission examined the existing case law under Section 622(g)(2)(D) and determined that certain fees - including attorney and consultant fees, application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided to an LFA, any requirement to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments - are not necessarily to be regarded as "incidental" and thus exempt from the five percent franchise fee cap.[48] The Sixth Circuit Court of Appeals upheld this interpretation, noting that "three district courts independently arrived at the same interpretation … as the Commission."[49] In the *Second Report and Order* the Commission explicitly stated that the *First Report and Order's* conclusions regarding application of the term "incidental" in Section 622(g)(2)(D) extend to incumbents, and again stated that only those incidental expenses that are listed in the statutory provision,[50] as well as other minor expenses, may be excluded from the five percent franchise fee cap.[51] The Commission's interpretation of Section 622(g)(2)(D) in the *Second Report and Order* mirrors, and does not expand, the interpretation in the *First Report and Order.* Consistent with the Sixth Circuit's holding, this interpretation of Section 622(g)(2)(D) is reasonable, and we continue to adhere to it.

13. Further, we disagree with petitioners that the *First Report and Order* limited the exemption of in-kind payments only when such in-kind payments are unrelated to cable service. While the *First Report and Order* does specifically state that "any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap,"[52] the *First Report and Order* also stated that not all free or discounted services provided to an LFA and in-kind payments were incidental costs exempt from franchise fees, and that "[a]ccordingly, if LFAs continue to request the provision of such in-kind services and the reimbursement of franchise-related costs, the value of such costs and services should count towards the provider's

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[44] City of Albuquerque, New Mexico Petition for Reconsideration *et al.* at 5-8; 47 U.S.C. § 542(g)(2)(D).

[45] *See* Verizon Opposition to Petitions for Reconsideration at 8-10.

[46] *See* City of Albuquerque, New Mexico *et al.* Reply to Oppositions to Petition for Reconsideration at 2-3.

[47] *First Report and Order*, 22 FCC Rcd at 5145-49. Section 622(g)(2)(D) exempts from franchise fees "requirements or charges incidental to the awarding or enforcing of the franchise, *including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages*." (emphasis added).

[48] *First Report and Order*, 22 FCC Rcd at 5147-49. *See also* City of Albuquerque, New Mexico *et al.* Petition for Reconsideration at 5-8.

[49] *Alliance for Community Media v. FCC*, 529 F.3d 763, 783 (6th Cir. 2008)

[50] *See* 47 U.S.C. § 542(g)(2)(D).

[51] *Second Report and Order*, 22 FCC Rcd at 19638.

[52] *First Report and Order,* 22 FCC Rcd at 5149.

franchise fee payments."[53] In a section entitled "Charges incidental to the awarding or enforcing of a franchise," the *First Report and Order* identified "free or discounted services provided to an LFA" as one type of "non-incidental" cost that counted toward the franchise fee cap.[54] In that context, the Commission was referring to free or discounted cable services. The Commission discussed in-kind payments for non-cable services in a separate section of the *First Report and Order* entitled "In-kind payments unrelated to provision of cable service."[55] The Sixth Circuit also referenced these different types of in-kind payments separately when it upheld the FCC's interpretation of the five percent cap on fees.[56] Thus, in upholding the FCC's interpretation, the Court recognized that the agency was applying the cap to in-kind payments involving both cable and non-cable services. Consistent with the *First Report and Order,* the *Second Report and Order* also notes that non-incidental in-kind fees must count toward the 5 percent franchise fee cap, and does not limit the franchise fee exemption to in-kind payments that are unrelated to cable service.[57]

D. Mixed-Use Networks

14. We decline to modify the conclusions in the *Second Report and Order* regarding mixed-use networks. In the *First Report and Order*, the Commission concluded that LFAs' jurisdiction applies only to the provision of cable services over cable systems.[58] In the *Second Report and Order*, the Commission clarified that this conclusion extends to incumbent cable operators as well.[59] Petitioners argue that the *Second Report and Order*'s findings that LFA jurisdiction is limited to cable service is incorrect, as the Act "recognizes local authority with respect to 'cable systems' or 'cable operators' without restriction to 'cable service.'"[60] Verizon disagrees, stating that a provider is a cable operator only to the extent it provides "cable service" and that any statutory provisions applicable to "cable operators" or "cable systems" do not provide an LFA with authority over non-cable services.[61] LFAs assert in reply that legislative history indicates that they have authority over cable systems in their provision of non-cable services.[62]

15. For the reasons stated in the *Second Report and Order*, we adhere to our previous determination on this issue. The *Second Report and Order* extended the Commission's findings on mixed-use networks to incumbent providers.[63] The Commission provided further clarification that LFAs' jurisdiction is limited to the provision of cable services over cable systems and that LFAs cannot use their

[53] *First Report and Order*, 22 FCC Rcd at 5149.

[54] *Id.*

[55] *First Report and Order*, 22 FCC Rcd at 5149-50.

[56] *See Alliance for Community Media*, 529 F.3d at 782 (discussing "free or discounted services" separately from "any requests made by LFAs that are unrelated to the provision of cable services").

[57] *Compare First Report and Order*, 22 FCC Rcd at 5149 *with Second Report and Order*, 22 FCC Rcd at 19637-38, fn 32.

[58] *First Report and Order*, 22 FCC Rcd at 5155-56.

[59] *Second Report and Order*, 22 FCC Rcd at 19640.

[60] *See* City of Albuquerque, New Mexico *et al.* Petition for Reconsideration at 8, *citing* 47 U.S.C. § 552 (a LFA may establish and enforce "customer service requirements of the cable operator"); 47 U.S.C. § 551 (a cable operator is subject to privacy requirements when it provides "any cable service or other service to a subscriber").

[61] *See* Verizon Opposition to Petitions for Reconsideration at 6, noting that "a provider is only a 'cable operator' to the extent that it is providing 'cable service' over a 'cable system.' 47 U.S.C. § 522(5).

[62] *See* City of Albuquerque, New Mexico *et al.* Reply to Oppositions to Petition for Reconsideration at 6-7, *citing* H.R. No. 98-834, as reprinted in 1984 U.S.C.C.A.N. 4655, 4681.

[63] *Second Report and Order*, 22 FCC Rcd at 19640-41; *First Report and Order,* 22 FCC Rcd at 5155.

franchising authority to regulate non-cable services provided by an incumbent.[64] The Commission's *First Report and Order* and the *Second Report and Order* make clear that LFAs may not use their franchising authority to regulate non-cable services provided by either an incumbent or new entrant. As petitioners have not raised any new arguments, we reaffirm the prior conclusion.[65]

E. Regulatory Flexibility Act

16. We grant Petitioners' request that we depart from our Regulatory Flexibility Analysis and submit a revised FRFA in order to comply with the mandates of the Regulatory Flexibility Act. The Regulatory Flexibility Act requires that an agency prepare a FRFA[66] in conjunction with the promulgation of a final rule in order to assess its impact on small entities and to minimize any undue burdens. Petitioners note that the FRFA attached in the Appendix to the *Second Report and Order* provided an analysis of the tentative conclusions set forth in the Initial Regulatory Flexibility Analysis ("IRFA") rather than the rules adopted.[67] Because of this inconsistency, they urge us to reconsider the FRFA to reflect the rules adopted which, they assert, will reveal significant burdens faced by small jurisdictions that would require a reconsideration of the entire *Second Report and Order*.[68] NATOA further asks that both the initial and final analyses be reissued to examine the economic impact on small jurisdictions and small organizations in more detail.[69] Petitioners argue that making the statutory interpretations of the *Second Report and Order* effective immediately instead of on renewal will unduly disrupt and preempt existing contracts and will impose analysis, negotiation, and/or litigation costs upon LFAs, and that these costs were not taken into account in the RFA analysis.[70]

17. NCTA contends that the petitioners' arguments are without merit. NCTA asserts that, because the *Second Report and Order* merely extends existing requirements to incumbent providers, local franchising authorities ("LFAs") should already be familiar with existing franchising requirements, and implementation with respect to incumbents will not be unduly disruptive.[71] Therefore, NCTA argues, LFAs will be prepared to deal with the issues that arise as a result of the *Second Report and Order* regardless of whether these interpretations are applied at the time of renewal or immediately.[72] They also state that any burdens that arise will come from an LFA's choice to contest the *Second Report and Order*'s conclusion that the Commission's statutory interpretations supersede existing franchises, and that no negotiation and/or litigation costs will be imposed on LFAs if they choose not to contest the Commission's statutory interpretations.[73] In response, petitioners assert that, even if they do not challenge the Commission's statutory interpretations, LFAs must review on a case-by-case basis any

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[64] *Second Report and Order* at 19640-41.

[65] Petitioners do claim that "localities have authority over cable systems, even if those systems are used to provide other services." *See, e.g.,* 1984 House Report at 4678-79, 4681. While this portion of the legislative history discusses what constitutes a cable service, it does not indicate what authority localities have over such services. Nor does it address whether localities may regulate non-cable services provided over cable systems.

[66] *See* 5 U.S.C. § 604.

[67] *See* City of Breckenridge Hills, Missouri Petition for Reconsideration at 2-3; NATOA Petition for Reconsideration and Clarification at 9.

[68] *See* City of Breckenridge Hills, Missouri Petition for Reconsideration at 6-9.

[69] *See* NATOA Petition on Reconsideration and Clarification at 6-10.

[70] *See* City of Breckenridge Hills, Missouri Petition for Reconsideration at 6-8, NATOA Petition on Reconsideration and Clarification at 6-10.

[71] *See* NCTA Opposition to Petitions for Reconsideration at 4.

[72] *Id*.

[73] *See Id.* at 4-5.

incumbent's claims that the *Second Report and Order* preempts or modifies its franchise.[74] Petitioners argue that, as responsible contracting parties, LFAs cannot abandon their contractual rights without careful study.[75] Petitioners also assert that to do otherwise would run afoul of the LFA's fiduciary duties to the public.[76]

18. We agree with the petitioners that, rather than completing an analysis of the rules adopted, the analysis was inadvertently based on the tentative conclusions presented in the Initial Regulatory Flexibility Analysis, set forth in Appendix C of the *First Report and Order and Further Notice of Proposed Rulemaking*.[77] In order to comply with the mandates of the Regulatory Flexibility Act, we hereby submit a Supplemental Final Regulatory Flexibility Analysis, set forth in the Appendix, to reflect the rules adopted in the *Second Report and Order*. Regarding the claim that the Commission failed to analyze the economic impact on small entities, the IRFA, FRFA and Supplemental FRFA all analyze the impacts on small entities, and determine that, because the *Second Report and Order* unifies existing regulations across all market participants and any potential franchise preemption or modification is limited in scope, the impact is *de minimis* and is likely to be over by now, given the passage of time since the *Second Report and Order.* As for consideration of alternatives, we agree with NCTA's contention that, since the findings in the *Second Report and Order* were matters of statutory interpretation, the result was statutorily mandated regardless of the RFA analysis. In addition, the IRFA and FRFA discuss the economic impact on small entities, including small government jurisdictions. NATOA argues that the Commission should also consider PEG channel operations.[78] NATOA's filing does not indicate the extent to which these entities fall outside the small government and small cable operator categories. The Commission does not routinely break out small entities to such a detailed level, and we also note that during the IRFA comment phase no commenter suggested that additional entities should be considered in the analysis. Finally, we disagree with NATOA that it is necessary to begin the Regulatory Flexibility Analysis over again. The outcome of the Supplemental FRFA does not show a substantially greater burden than the initial FRFA. Because the error does not change the outcome of this proceeding, but would merely cause further delay of the proceeding, there is no harm to petitioners. Therefore, we believe that the revised FRFA is sufficient to redress the error.

III. PROCEDURAL MATTERS

19. *Paperwork Reduction Act Analysis*. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 ("PRA"), Public Law 104-13. In addition, we note that there is no new or modified "information burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

20. *Final Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act, [79] the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis ("Supplemental FRFA") relating to this *Order on Reconsideration*. The Supplemental FRFA is set forth in an Appendix.

[74] *See* City of Breckenridge Hills, Missouri Reply to NCTA's Opposition to Petition for Reconsideration at 2; NATOA Reply to Oppositions to Petition for Reconsideration and Clarification at 4.

[75] *See* City of Breckenridge Hills, Missouri Reply to NCTA's Opposition to Petition for Reconsideration at 2.

[76] *See* NATOA Reply to Oppositions to Petition for Reconsideration and Clarification at 4.

[77] *First Report and Order*, 22 FCC Rcd at 5181-85.

[78] *See* NATOA Reply to Oppositions to Petition for Reconsideration and Clarification at 8.

[79] *See id.*

IV. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that pursuant to the Sections 1, 2, 4(i), 303, 405, 602, 611, 621, 622, 625, 626, and 632 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 405, 522, 531, 541, 542, 545, 546, and 552, and Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, this *Order on Reconsideration* IS ADOPTED.

22. IT IS FURTHER ORDERED that the petitions for reconsideration filed by the City of Albuquerque, New Mexico et al, the City of Breckenridge Hills, Missouri and National Association of Telecommunications Officers and Advisors, et al. ARE HEREBY GRANTED IN PART AND DENIED IN PART as described above. This action is taken pursuant to the authority contained in Sections 1, 2, 4(i), 303, 405, 602, 611, 621, 622, 625, 626, and 632 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 405, 522, 531, 541, 542, 545, 546, and 552, and Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429.

23. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Order on Reconsideration*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

24. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this *Order on Reconsideration* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Supplemental Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Further Notice of Proposed Rulemaking* ("*FNPRM*") to this proceeding.[2] The Commission sought written public comment on the proposals in the FNPRM, including comment on the IRFA. The Commission received one comment on the IRFA. Subsequently, the Commission adopted a Final Regulatory Flexibility Analysis ("FRFA") in the *Second Report and Order* in this proceeding.[3] Following the release of the *Second Report and Order*, petitioners sought reconsideration of the FRFA based on an inconsistency between the rules adopted and the rules analyzed in the accompanying FRFA. As explained in this *Order on Reconsideration*, we submit this Supplemental Final Regulatory Flexibility Analysis to reflect the rules adopted in the *Second Report and Order* and to conform to the RFA.[4]

A. Need for, and Objectives of, the Second Report and Order

2. The *Second Report and Order* ("*Order*") extends a number of the rules and findings promulgated in this docket's First Report and Order dealing with Section 611 and Section 622 of the Communications Act of 1934, as amended (the "Communications Act").[5] The *First Report and Order* adopted rules in accordance with Section 621(a) of the Communications Act to prevent Local Franchising Authorities ("LFAs") from creating unreasonable barriers to competitive entry of cable operators into local markets.[6] It also provided clarifications of Section 611, restricting LFAs' authority to establish capacity and support requirements for PEG channels,[7] and Section 622, setting limits on the franchise fees LFAs may charge cable operators.[8] Neither of these sections distinguishes between the treatment of new entrants and incumbent cable operators.[9] The Commission extends these findings to incumbent cable operators to further the interrelated goals of enhanced cable competition and accelerated broadband deployment. The Commission also finds that it cannot preempt state or local customer service rules exceeding Commission standards.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. Only one commenter, the Local Government Lawyer's Roundtable, submitted a comment that specifically responded to the IRFA. The Local Government Lawyer's Roundtable contends that the Commission should issue a revised IRFA because of the erroneous determination that the proposed rules would have a *de minimis* effect on small governments. They argue that the Commission has not given

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101, 5164 (2006) ("*First Report and Order*").

[3] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 22 FCC Rcd 19633 ("*Second Report and Order*").

[4] *See* 5 U.S.C. § 604.

[5] 47 U.S.C. §§ 531, 622.

[6] *First Report and Order*, 22 FCC Rcd at 5103.

[7] 47 U.S.C. § 531.

[8] 47 U.S.C. § 622.

[9] 47 U.S.C. §§ 531(a), 622(a)

weight to the economic impact the rules will have on small governments, including training and hiring concerns.

4. We disagree with the Local Government Lawyer's Roundtable's assertion that our rules will have any more than a *de minimis* effect on small governments. LFAs today must review and decide upon competitive and renewal cable franchise applications, and will continue to perform that role. While the Local Government Lawyer's Roundtable expresses concern about additional training that may be necessary to understand these actions, and potential hiring of additional personnel to accommodate the *Order's* requirements, we disagree that those steps will be necessary. The *Order* simply extends existing, limited requirements to apply to incumbent cable providers. LFAs should be familiar with those existing requirements, and therefore should not need additional training or personnel to implement the *Order's* requirements. Moreover, modifications made to the franchising process that result from this proceeding further streamline the franchising process, ultimately lessening the economic burdens placed upon LFAs.

5. After issuing the FRFA in the *Second Report and Order,* the Commission received a Petition for Reconsideration and Clarification from the National Association of Telecommunications Officers and Advisors ("NATOA") *et al.* regarding the Regulatory Flexibility Analysis. The petition repeated the Local Government Lawyer's Roundtable arguments discussed above, and also argued that the Commission failed to consider actual alternatives, failed to include small organizations in the IRFA, and that the FRFA provided an analysis of the tentative conclusions set forth in the Initial Regulatory Flexibility Analysis ("IRFA") rather than the rules adopted. First, as discussed in the attached Order on Reconsideration, the Commission disagrees that it failed to consider alternatives. The Commission determined that since the findings in the *Second Report and Order* were matters of statutory interpretation, the result was statutorily mandated regardless of the RFA analysis, and that, therefore, no meaningful alternatives existed. Regarding NATOA's argument that the Commission failed to include small organizations in the IRFA, we find that the IRFA and FRFA discuss the economic impact on small entities, including small government jurisdictions. While NATOA argues that the Commission should also consider PEG channel operations,[10] NATOA's filing does not indicate the extent that these entities do not fall within the small government and small cable operator categories. The Commission does not routinely break out small entities to such a detailed level, and during the IRFA comment phase, no commenter suggested that further entities should be additionally considered in the analysis. Finally, we agree with NATOA that, rather than completing an analysis of the rules adopted, the analysis was inadvertently based on the tentative conclusions presented in the Initial Regulatory Flexibility Analysis, set forth in Appendix C of the *First Report and Order and Further Notice of Proposed Rulemaking*, instead of the rules adopted in the *Second Report and Order*.[11] In order to comply with the mandates of the Regulatory Flexibility Act, we are submitting this Supplemental Final Regulatory Flexibility Analysis to correctly reflect the rules adopted in the *Second Report and Order.*

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

6. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.[12] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small government jurisdiction."[13] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[14] A small business

[10] *See* NATOA Reply to Oppositions to Petition for Reconsideration and Clarification at 8.

[11] *See First Report and Order*, 22 FCC Rcd at 5181-85.

[12] 5 U.S.C. § 603(b)(3).

[13] *Id*. § 601(6)

concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[15]

7. The rules adopted by the *Order* will streamline the local franchising process by adopting rules that provide guidance as to the applicability of prior findings in this proceeding to incumbents and the limitations on the Commission's authority regarding customer service regulations. The Commission has determined that the group of small entities directly affected by the rules adopted herein consists of small governmental entities (which, in some cases, may be represented in the local franchising process by not-for-profit enterprises). Therefore, in this SFRFA, we consider the impact of the rules on small governmental entities. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

8. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards that encompass entities that could be directly affected by the proposals under consideration.[16] As of 2009, small businesses represented 99.9% of the 27.5 million businesses in the United States, according to the SBA.[17] Additionally, a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[18] Nationwide, as of 2007, there were approximately 1,621,315 small organizations.[19] Finally, the term "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[20] Census Bureau data for 2007 indicate that there were 89,527 governmental jurisdictions in the United States.[21] We estimate that, of this total, as many as 88,761 entities may qualify as "small governmental jurisdictions."[22] Thus, we estimate that most governmental jurisdictions are small.

(Continued from previous page)

[14] *Id*. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[15] 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[16] *See* 5 U.S.C. § 601(3)–(6).

[17] *See* SBA, Office of Advocacy, Annual Report of the Office of Economic Research, FY 2011 (December 2011).

[18] 5 U.S.C. § 601(4).

[19] INDEPENDENT SECTOR, THE NEW NONPROFIT ALMANAC & DESK REFERENCE (2010).

[20] 5 U.S.C. § 601(5).

[21] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 427 (2007).

[22] The 2007 U.S Census data for small governmental organizations are not presented based on the size of the population in each such organization. There were 89,476 local governmental organizations in 2007. If we assume that county, municipal, township, and school district organizations are more likely than larger governmental organizations to have populations of 50,000 or less, the total of these organizations is 52,095. If we make the same population assumption about special districts, specifically that they are likely to have a population of 50,000 or less, and also assume that special districts are different from county, municipal, township, and school districts, in 2007 there were 37,381 such special districts. Therefore, there are a total of 89,476 local government organizations. As a basis of estimating how many of these 89,476 local government organizations were small, in 2011, we note that there were a total of 715 cities and towns (incorporated places and minor civil divisions) with populations over

(continued....)

9. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis…. These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[23] The SBA has developed a small business size standard for this category, which is: all such businesses having $38.5 million or less in annual revenues.[24] Census data for 2007 shows that there were 396 firms that operated for the entire year.[25] Of that number, 349 operated with annual revenues below $25 million, and 47 operated with annual revenues of $25 million or more.[26] Therefore, under this size standard, the majority of such businesses can be considered small.

10. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rate regulation rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[27] According to SNL Kagan, there are 1,258 cable operators.[28] Of this total, all but 10 incumbent cable companies are small under this size standard.[29] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[30] Current Commission records show 4,584 cable systems

(Continued from previous page)
50,000. CITY AND TOWNS TOTALS: VINTAGE 2011 – U.S. Census Bureau, *available at* http://www.census.gov/popest/data/cities/totals/2011/index.html. If we subtract the 715 cities and towns that meet or exceed the 50,000 population threshold, we conclude that approximately 88,761 are small. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Tables 427, 426 (Data cited therein are from 2007).

[23] U.S. Census Bureau, 2012 NAICS Definitions, "515210 Cable and Other Subscription Programming" at http://www.census.gov/cgi-bin/sssd/naics/naicsrch.

[24] 13 C.F.R. § 121.210; NAICS code 515210.

[25] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Receipts Size of Establishments for the United States: 2007 – 2007 Economic Census;" NAICS code 515210, Table EC0751SSSZ1; available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table.

[26] *Id.*

[27] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* MM Docket No. 92-266, MM Docket No. 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[28] Data provided by SNL Kagan to Commission Staff upon request on March 25, 2014. Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-06, ¶ 24 (2013) ("*15th Annual Competition Report*").

[29] SNL Kagan, U.S. Multichannel Top Cable MSOs, http://www.snl.com/interactivex/TopCableMSOs.aspx (visited June 26, 2014). We note that when this size standard (*i.e.*, 400,000 or fewer subscribers) is applied to all MVPD operators, all but 14 MVPD operators would be considered small. *15th Annual Competition Report*, 28 FCC Rcd at 10507-08, ¶¶ 27-28 (subscriber data for DBS and Telephone MVPDs). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. *See Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, ¶ 37 (2011) ("*CALM Act Report and Order*") (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

[30] 47 C.F.R. § 76.901(c).

nationwide.[31] Of this total, 4,012 cable systems have fewer than 20,000 subscribers, and 572 systems have 20,000 subscribers or more, based on the same records. Thus, under this standard, we estimate that most cable systems are small.

11. *Cable System Operators* (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[32] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[33] Industry data indicate that, of 1,076994 cable operators nationwide, all but 13 are small under this size standard.[34] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[35] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

12. *Open Video Systems ("OVS")*. The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[36] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[37] OVS falls within the SBA small business size standard covering cable services, which is Wired Telecommunications Carriers.[38] The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.[39] Census data for 2007 shows that there were 3,188 firms that operated that year.[40] Of this total, 3,144 firms had fewer than

[31] The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on July 1, 2014. A cable system is a physical system integrated to a principal headend.

[32] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[33] 47 C.F.R. § 76.901(f); *see* Public Notice*, FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[34] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2007*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2006); Warren Communications News, *Television & Cable Factbook 2007*, "Ownership of Cable Systems in the United States," pages D-1737 to D-1786.

[35] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[36] 47 U.S.C. § 571(a)(3)-(4). *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 606, ¶ 135 (2009) ("*Thirteenth Annual Cable Competition Report*").

[37] *See* 47 U.S.C. § 573.

[38] This category of Wired Telecommunications Carriers is defined above. *See also* U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at http://www.census.gov/cgi-bin/sssd/naics/naicsrch.

[39] 13 C.F.R. § 121.201; NAICS code 517110.

[40] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

1,000 employees, and 44 had 1,000 or more employees.[41] Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities. In addition, we note that the Commission has certified some OVS operators, with some now providing service.[42] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[43] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.

13. The rule and guidance adopted in the *Order* imposes no additional reporting or record keeping requirements, and imposes *de minimis* other compliance requirements. Local franchising authorities ("LFAs") will continue to perform their role of reviewing and deciding upon cable franchise applications, as required under the Communications Act. The rules adopted in the *Order* limit the terms that LFAs may impose and negotiate for in those cable franchise agreements. Because the rules limit the terms that an LFA may consider and impose in a franchise agreement, the rules will decrease the procedural burdens faced by LFAs. Therefore, the rules adopted will not require any additional special skills beyond any already needed in the cable franchising context.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternative Considered

14. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[44]

15. In the *FNPRM*, the Commission sought comment on the extension of its findings in the *First Report and Order* to incumbent cable operators, and to comment on the basis for the Commission's authority to do so.[45] The Commission invited comment on the effect, if any, the findings in the *First Report and Order* had on most favored nation clauses in existing franchises.[46] Additionally, the Commission sought comment on its tentative conclusion that it cannot preempt state or local customer service laws exceeding Commission standards, nor can it prevent LFAs and cable operators from agreeing to more stringent standards.[47] The Commission tentatively concluded that the rules adopted in the *Second Report and Order* likely would have at most a *de minimis* impact on small governmental jurisdictions, and that the interrelated, high-priority federal communications policy goals of enhanced cable competition and accelerated broadband deployment necessitated the extension of its rules to incumbent cable providers.

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[41] *Id*.

[42] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

[43] *See Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer businesses that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[44] 5 U.S.C. § 603(c)(1)-(c)(4).

[45] *First Report and Order*, 22 FCC Rcd at 5164.

[46] *Id*. at 5165.

[47] *Id*. at 5166.

16. We agree with those tentative conclusions, and we believe that the rules adopted in the *Second Report and Order* will not impose a significant impact on any small entity, as the Commission did not disturb many portions of the existing franchise requirements, such as MFN clauses, build-out requirements, time limits for franchise negotiations or customer service laws. Furthermore, the decisions made in the *Second Report and Order* are based on a reading of the statute. Where the Commission did act, it provided regulatory relief to all operators in a non-discriminatory fashion. This action was statutorily necessary, because the language of the statutes at issue does not give the Commission authority to adopt significant alternatives, or to distinguish between incumbent providers and new entrants. As an alternative, we considered refraining from providing guidance on any franchising terms, but we determined, and the petitions for reconsideration and clarification confirm, that guidance was necessary in this instance. We conclude that the guidance we provide in the *Second Report and Order* minimizes any adverse impact on small entities because it clarifies the franchising terms and requirements that local franchising authorities and cable operators negotiate, and should prevent small entities from facing costly litigation over contractual terms regarding in-kind payments, mixed-use networks, and franchise fees.

17. *Report to Congress.* The Commission will send a copy of the *Order*, including this SFRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[48] In addition, the Commission will send a copy of the *Order*, including the SFRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and SFRFA (or summaries thereof) will also be published in the Federal Register.[49]

[48] *See* 5 U.S.C. § 801(a)(1)(A).

[49] *See id*. § 604(b).

MEMORANDUM

TO: MAYOR HANSEN, COUNCIL MEMBERS AND DANIEL BUCHHOLTZ

DATE: NOVEMBER 10, 2015

RE: **CERTIFICATION OF DELINQUENT UTILITY AND MOWING CHARGES**

Collection of quarterly utility charges continues to be a major challenge. The following list are properties I would like certified to the County Assessor's Offices for collection with their 2016 property taxes. The total includes several accounts that may only be one quarter past due, but have a long history of delinquent payments or prior certification to the county. Please note, the final total is subject to change.

Sincerely,

Nancy Kelm, Utility Billing Clerk

RESOLUTION NO. 15-26

RESOLUTION CERTIFYING DELINQUENT ACCOUNTS
ANOKA COUNTY

Fund No. 84876 - Delinquent Utilities
Fund No. 84877 – Service, Citation Charges
Fund No. 84878 – Administrative Fees

WHEREAS, the City Council of the City of Spring Lake Park, Minnesota, by Chapter 50.57 of the Municipal Code of the City of Spring Lake Park, has provided that the uncollected citation, service and (or) utility charges of water and sewer furnished its consumers shall become a lien against the property and be certified annually for the collection of said billings.

NOW THEREFORE BE IT RESOLVED, that the following uncollected service and (or) utility bills are deemed to be delinquent and are hereby determined to be liens against the real estate referred to herein, and that the same shall and is hereby certified to the County Auditor pursuant to Minnesota Statute 444.075, Subdivision 3 and Minnesota Statute 429.101 for the collection of said service, citation and or utility charges along with taxes against property as other taxes are collected.

Property ID	Fund No. 84876 Utility Balance	Fund No. 84877 Mowing	Fund No. 84878 Admin Fee
01-30-24-11-0019	841.28		100.00
01-30-24-11-0093	157.10		100.00
01-30-24-11-0100	284.69		100.00
01-30-24-21-0001	400.52		100.00
01-30-24-23-0041	122.00		100.00
01-30-24-23-0057	261.52		100.00
01-30-24-31-0048	288.85		100.00
01-30-24-33-0005	248.25		100.00
01-30-24-33-0010	140.00		100.00
01-30-24-33-0014	140.39		100.00
01-30-24-33-0027	303.39		100.00
01-30-24-33-0042	179.96		100.00
01-30-24-33-0043	152.19		100.00
01-30-24-41-0049	268.97		100.00
01-30-24-42-0074	300.67		100.00
01-30-24-43-0019	305.63		100.00
01-30-24-43-0052	167.02		100.00
01-30-24-43-0155	255.97		100.00
02-30-24-11-0016	497.64		100.00
02-30-24-11-0025	354.89		100.00

02-30-24-11-0087	562.07		100.00
02-30-24-11-0098	130.05		100.00
02-30-24-11-0145	139.82		100.00
02-30-24-11-0149	186.43		100.00
02-30-24-11-0175	277.08		100.00
02-30-24-11-0178	122.23		100.00
02-30-24-12-0009	122.00		100.00
02-30-24-12-0058	260.98		100.00
02-30-24-12-0063	264.25		100.00
02-30-24-12-0077	265.49		100.00
02-30-24-12-0099	309.87		100.00
02-30-24-12-0107	232.18		100.00
02-30-24-12-0115	256.20		100.00
02-30-24-12-0144	107.22		100.00
02-30-24-13-0021	398.99		100.00
02-30-24-13-0036	268.76		100.00
02-30-24-13-0070	276.44		100.00
02-30-24-13-0086	300.13		100.00
02-30-24-13-0090	273.11		100.00
02-30-24-14-0011	211.60		100.00
02-30-24-14-0027	228.22		100.00
02-30-24-14-0032	289.38		100.00
02-30-24-14-0036	254.76		100.00
02-30-24-14-0057	354.83		100.00
02-30-24-14-0076	540.30		100.00
02-30-24-14-0096	303.11		100.00
02-30-24-14-0097	112.44		100.00
02-30-24-21-0020	275.18		100.00
02-30-24-21-0029	297.10		100.00
02-30-24-21-0059	382.77		100.00
02-30-24-21-0078	285.93		100.00
02-30-24-21-0133	152.85		100.00
02-30-24-24-0013	266.70		100.00
02-30-24-24-0020	306.60		100.00
02-30-24-24-0029	297.10		100.00
02-30-24-24-0081	313.30		100.00
02-30-24-31-0052	337.79		100.00
02-30-24-41-0023	287.75		100.00
02-30-24-42-0025	385.11	200.00	100.00
02-30-24-42-0026	1,053.99		100.00
02-30-24-42-0055	256.25		100.00

02-30-24-42-0065	257.64		100.00
02-30-24-42-0067	302.73		100.00
02-30-24-42-0073	300.48		100.00
02-30-24-42-0110	260.07		100.00
02-30-24-42-0114	154.19		100.00
02-30-24-42-0116	270.63		100.00
02-30-24-43-0059	1,872.37		100.00
02-30-24-43-0076	260.08		100.00
02-30-24-43-0102	132.83		100.00
02-30-24-43-0106	281.38		100.00
02-30-24-43-0114	247.89		100.00
02-30-24-44-0018	179.21		100.00
02-30-24-44-0049	306.63		100.00
02-30-24-44-0078	259.94		100.00
02-30-24-44-0080	262.19		100.00
02-30-24-44-0093	304.24		100.00
02-30-24-44-0112	143.53		100.00
Totals	**23,413.32**	**200.00**	**7,800.00**

The foregoing resolution was moved for adoption by Councilmember

Upon roll call, the following voted aye:

And the following voted nay:

Whereupon the Mayor declared said resolution duly passed and adopted this sixteenth day of November 2015.

_____
Cindy Hansen, Mayor

ATTEST:

_____
Daniel Buchholtz, City Administrator

RESOLUTION NO. 15-27

RESOLUTION CERTIFYING DELINQUENT UTILITY ACCOUNTS RAMSEY COUNTY

Fund No. 85160020 - Delinquent Utilities & Administrative Fee

WHEREAS, the City Council of the City of Spring Lake Park, Minnesota, by Chapter 50.57 of the Municipal Code of the City of Spring Lake Park, has provided that the uncollected utility charges of water and sewer furnished its consumers shall become a lien against the property and be certified annually for the collection of said billings.

NOW THEREFORE BE IT RESOLVED, that the following uncollected utility bills are deemed to be delinquent and is hereby determined to be a lien against the real estate referred to herein, and that the same shall and is hereby certified to the County Auditor pursuant to Minnesota Statute 444.075, Subdivision 3 and Minnesota Statute 429.101 for the collection of said utility charges along with taxes against property as other taxes are collected.

Property ID	**Fund No. 85160020** **Utility Balance and Administrative Fee**
06.30.23.32.0018	360.08
06.30.23.32.0070	346.60
Total	**706.68**

The foregoing resolution was moved for adoption by Councilmember

Upon roll call, the following voted aye:

And the following voted nay:

Whereupon the Mayor declared said resolution duly passed and adopted this sixteenth day of November 2015.

_____
Cindy Hansen, Mayor

ATTEST:

_____
Daniel Buchholtz, City Administrator

MEMORANDUM

TO: MAYOR HANSEN AND MEMBERS OF THE CITY COUNCIL

FROM: DANIEL R. BUCHHOLTZ, CITY ADMINISTRATOR

SUBJECT: 2016 PUBLIC UTILITIES BUDGET

DATE: NOVEMBER 10, 2015

Included with this memorandum is the 2016 Public Utilities Budget. This budget covers the City's water system, municipal water treatment plant, and sanitary sewer system.

The proposed Public Utilities Budget is a balanced budget. The proposed 2016 budget is 3.6%, or $49,324 higher than the 2015 budget. The significant cost driver is from Metropolitan Council Environmental Services, which raised the cost of treating the City's wastewater by 8.1%. Other cost drivers include salaries and benefits, insurance and repairs and maintenance.

Additional revenue is needed to address the increase in the 2016 budget. The proposed budget calls for water rates to rise by 4.0% and sanitary sewer rates to rise by 5.5%. The water treatment plant rate will remain unchanged for 2016.

Water rates are scheduled to increase as follows:

	Current	**Proposed**
Administrative Base Rate	$7.57/quarter	$7.87/quarter
Tier 1: 0-9000 gallons	$1.68/1,000 gallons	$1.74/1,000 gallons
Tier 2: 9,001-18,000 gallons	$1.88/1,000 gallons	$1.96/1,000 gallons
Tier 3: 18,001-27,000 gallons	$2.13/1,000 gallons	$2.22/1,000 gallons
Tier 4: 27,001-36,000 gallons	$2.50/1,000 gallons	$2.60/1,000 gallons
Tier 5: 36,001-45,000 gallons	$2.77/1,000 gallons	$2.88/1,000 gallons
Tier 6: 45,001 gallons and over	$3.08/1,000 gallons	$3.20/1,000 gallons

The last time the Administrative Base Rate and Tiers 1-3 were changed was in 2010. Tiers 4-6 were last increased in 2013.

Sanitary sewer rates are proposed to increase as follows:

	Current	**Proposed**
Single Family, Duplex, Townhome and Similar Residential	$59.03/quarter	$62.28/quarter
Apartment, Mobile Home, Institutional, Commercial and Industrial	$59.03/quarter for 18,000 gallons and $3.23/1,000 gallons for all usage over 18,000 gallons	$62.28/quarter for 18,000 gallons and $3.40/1,000 gallons for all usage over 18,000 gallons

The last time sewer rates were increased was in 2013.

For a single family home that uses 18,000 gallons of water per quarter (6,000 gallons per month), the impact of the rate increase is $4.81/quarter, or just over $1.60/month.

The proposed rate for a typical single family home is still below the 2015 median water and sewer bill, according to the 2015 AE2S North Central Utility Rate Survey. The median water/sewer bill in 2015 was $43.72/month, or $131.16/quarter. The water/sewer bill for this same home under the new rate structure will be $118.22/quarter, or approximately $39.41/month.

Staff recommends approval of the 2016 proposed Public Utilities Budget. If you have any questions, please don't hesitate to contact me at 763-784-6491.

PUBLIC UTILITIES

2016 REVENUES

ACCT #	DESCRIPTION	2012 ACTUAL	2013 ACTUAL	2014 ACTUAL	2015 BUDGET	**2016 BUDGET**
601.00000.34950	REFUNDS & REIM	586.70	769.62	423.18	0	**0**
601.00000.36210	INTEREST	(186.83)	(483.00)	57,033.06	45,000	**50,000**
601.00000.37101	WATER COLLECTIONS	483,539.04	464,771.43	439,353.03	480,000	**460,950**
601.00000.37103	SALES TAX COLLECTED	0.83	5,692.99	0.00	5,000	**5,000**
601.00000.37104	WATER PENALTIES	8,278.18	8,887.31	9,339.84	6,000	**6,000**
601.00000.37109	SAFE WATER FEE	13,900.23	13,913.76	13,917.06	13,844	**13,928**
601.00000.37111	ADMINISTRATIVE CHARGE	61,904.44	69,516.20	69,705.39	64,000	**68,000**
601.00000.37115	ESTIMATE READING CHARGE	0.00	26.00	10.00	0	**50**
601.00000.37151	WATER RECONNECTION	3,249.42	2,750.46	1,329.96	1,200	**1,200**
601.00000.37170	WATER PERMITS	110.00	80.00	0.00	100	**100**
601.00000.37171	WATER PERMIT SURCHARGE	6.00	10.00	0.00	10	**10**
601.00000.37172	WATER METER SALES	1,761.38	3,635.06	1,117.98	850	**1,000**
601.00000.37174	INSTALL CHGS-NEW PERMITS	530.60	928.55	135.30	0	**0**
601.00000.37201	SEWER COLLECTIONS	691,222.26	729,697.91	762,732.41	735,000	**790,100**
601.00000.37204	SEWER PENALTIES	13,369.41	12,921.43	18,478.20	11,000	**15,000**
601.00000.37250	SEWER CONNECTIONS -SAC	23.65	45,851.05	4,970.00	2,700	**2,700**
601.00000.37270	SEWER PERMITS	110.00	80.00	0.00	100	**100**
601.00000.37271	SEWER PERMIT SURCHARGE	6.00	10.00	5.00	10	**10**
601.00000.37273	SEWER HOOK-UP CHARGES	290.00	290.00	0.00	150	**150**
601.00000.39206	TRANSFER FROM RECYCLING	1,000.00	1,000.00	1,000.00	1,000	**1,000**
TOTAL OPERATING REVENUES		1,279,701.31	1,360,348.77	1,379,550.41	1,365,964	**1,415,298**

CITY OF SPRING LAKE PARK
BREAKDOWN OF REVENUES FOR 2016 BUDGET
PUBLIC UTILITIES OPERATING FUND

		2014 Actual	2015 Budget	**2016 Budget**
34950	**MISC REVENUE, REFUNDS & REIMBURSEMENTS**	$ 423.18	$ -	**$ -**
36210	**INTEREST EARNED**	$ 57,033.06	$ 45,000	**$ 50,000**
37101	**WATER COLLECTIONS**	$ 439,353.03	$ 480,000	**$ 460,950**
37103	**SALES TAX COLLECTED**	$ -	$ 5,000	**$ 5,000**
37104	**PENALTIES - WATER**	$ 9,339.84	$ 6,000	**$ 6,000**
37109	**SAFE DRINKING WATER FEE (Water Test Fee)**	$ 13,917.06	$ 13,844	**$ 13,928**
37111	**ADMINISTRATIVE CHARGE**	$ 69,705.39	$ 64,000.00	**$ 68,000**
37115	**ESTIMATE READING CHARGE**	$ 10.00	$ 10.00	**$ 50**
37151	**WATER RECONNECTION-CALL OUT FEE**	$ 1,329.96	$ 1,200	**$ 1,200**
37170	**WATER PERMITS**	$ -	$ 100	**$ 100**
37171	**WATER PERMIT SURCHARGES**	$ -	$ 10	**$ 10**
37172	**WATER METER SALES & INSTALLATION**	$ 1,117.98	$ 850	**$ 1,000**
37174	**INSTALL CHARGES-NEW PERMITS**	$ 135.30	$ -	**$ -**
37201	**SEWER COLLECTIONS**	$ 762,732.41	$ 735,000	**$ 790,100**
37204	**PENALTIES - SEWER**	$ 18,478.20	$ 11,000	**$ 15,000**
37250	**SEWER CONNECTION CHARGES (SAC)**	$ 4,970.00	$ 2,700	**$ 2,700**
37270	**SEWER PERMITS**	$ -	$ 100	**$ 100**
37271	**SEWER PERMIT SURCHARGES**	$ 5.00	$ 10	**$ 10**
37273	**SEWER HOOK-UP CHARGES**	$ -	$ 150	**$ 150**
39206	**TRANSFER FROM RECYCLING FUND**	$ 1,000.00	$ 1,000	**$ 1,000**
TOTAL 2016 PUBLIC UTILITY OPERATING REVENUES		$ 1,379,550.41	$ 1,365,974	**$ 1,415,298**

PUBLIC UTILITIES
2016 WATER DEPARTMENT EXPENDITURES

ACCT #	DESCRIPTION	2012 ACTUAL	2013 ACTUAL	2014 ACTUAL	2015 BUDGET	**2016 BUDGET**
601.49400.1010	FULL TIME SALARIES	97,059.46	94,931.43	99,488.82	100,916	**100,916**
601.49400.1013	OVERTIME	3,907.60	5,896.92	9,526.40	7,061	**7,061**
601.49400.1020	ON-CALL SALARIES	976.00	1,962.16	1,782.22	2,421	**2,421**
601.49400.1040	TEMPORARY SALARIES	19,356.37	23,353.39	17,738.68	19,100	**19,100**
601.49400.1050	VACATION BUY BACK	0.00	0.00	0.00	950	**950**
601.49400.1210	P.E.R.A.	7,148.51	7,351.89	8,010.50	8,280	**8,280**
601.49400.1220	FICA/MC	8,746.97	9,334.97	9,773.63	9,979	**9,979**
601.49400.1300	HEALTH & DENTAL INS	17,492.79	18,153.06	17,720.06	17,220	**18,606**
601.49400.1313	LIFE INSURANCE	79.70	86.39	92.18	95	**95**
601.49400.1510	WORKER'S COMPENSATION	5,449.62	8,570.97	6,491.18	6,500	**6,500**
601.49400.2000	OFFICE SUPPLIES	527.58	852.63	1,004.62	800	**800**
601.49400.2030	PRINTED FORMS	1,950.20	1,598.60	1,489.59	2,000	**2,000**
601.49400.2100	OPERATING SUPPLIES	414.73	1,104.82	1,137.07	800	**800**
601.49400.2120	MOTOR FUEL & LUBRICANTS	3,052.39	3,288.32	2,960.44	4,000	**4,000**
601.49400.2200	REPAIR & MAINTENANCE	24,912.14	36,026.28	61,824.55	38,000	**48,500**
601.49400.2210	EQUIPMENT PARTS	696.30	889.42	45.17	900	**1,000**
601.49400.2220	POSTAGE	2,417.59	2,437.26	1,915.12	2,500	**2,500**
601.49400.2221	TIRES	275.26	1,125.73	465.51	1,000	**1,000**
601.49400.2222	STREET REPAIRS	834.91	3,126.77	297.50	6,000	**1,000**
601.49400.2261	WATER TESTING	768.00	800.00	768.00	800	**800**
601.49400.2262	WATER METERS & SUPPLIES	2,696.03	5,901.70	3,984.34	5,000	**5,500**
601.49400.2264	SAFE WATER FEE	13,829.74	13,907.00	13,928.00	13,844	**13,844**
601.49400.2280	UNIFORMS	841.20	733.98	847.35	950	**950**
601.49400.3010	AUDIT SERVICES	3,750.00	3,000.00	2,150.00	2,406	**2,502**
601.49400.3030	ENGINEERING SERVICES	2,240.55	590.50	0.00	1,000	**1,000**
601.49400.3040	LEGAL SERVICES	0.00	0.00	0.00	300	**300**
601.49400.3210	TELEPHONE	280.71	440.98	341.95	900	**900**
601.49400.3310	TRAVEL EXPENSE	1,784.20	823.37	552.14	1,200	**1,200**
601.49400.3500	PRINTING & PUBLISHING	5,262.38	4,958.70	5,651.13	7,000	**7,000**
601.49400.3600	INSURANCE	8,119.55	8,083.45	9,299.90	9,500	**8,900**
601.49400.3870	WATER USAGE-BLAINE ACCT	3,893.54	3,117.30	2,401.52	4,000	**4,000**
601.49400.4000	CONTRACTUAL SERVICES	4,340.50	3,853.44	5,286.00	5,850	**5,850**
601.49400.4050	MAINTENANCE AGREEMENT	3,634.69	3,673.59	2,549.57	13,775	**13,775**
601.49400.4300	CONFERENCES & SCHOOLS	999.01	1,223.79	1,691.09	2,050	**2,000**
601.49400.4330	DUES & SUBSCRIPTIONS	482.33	389.31	490.50	500	**525**
601.49400.4370	LICENSES & SALES TAX	3,143.40	8,682.43	(659.16)	8,200	**7,800**
601.49400.4470	WATER PERMIT SURCHARGE	0.00	0.00	0.00	10	**10**
601.49400.5000	CAPITAL OUTLAY	0.00	10,350.09	0.00	0	**0**
601.49400.7000	TRANSFERS OUT	92,242.00	95,154.00	336,988.00	95,602	**99,801**
TOTAL WATER DEPARTMENT		343,605.95	385,774.64	628,033.57	401,409	**412,165**

CITY OF SPRING LAKE PARK
BREAKDOWN OF EXPENDITURES FOR 2016 BUDGET

	WATER DEPARTMENT-601.49400			2014 Actual	2015 Budget	**2016 Budget**
1010	**SALARIES**			$ 99,488.82	$ 100,916	**$ 100,916**
	a) 1 - 50%	$	27,976			
	b) 2 - 25% (1-steps)	$	27,976			
	c) 50% Admin	$	23,562			
	d) 1 - 12.5%	$	6,994			
	e) 17% of Director	$	14,408			
1013	**OVERTIME**			$ 9,526.40	$ 7,061	**$ 7,061**
	a) 175 OT hrs @ $40.35					
1020	**ON-CALL SALARIES**			$ 1,782.22	$ 2,421	**$ 2,421**
	a) 60 OT hrs x@ $40.35					
1040	**TEMPORARY SALARIES ($10-$12)**			$ 17,738.68	$ 19,100	**$ 19,100**
	a) 3 @ 12 weeks x 40 x $11/hr (1/2 Water)	$	7,920			
	b) 1 @ 16 weeks x 40 x $12/hr (1/2 Water)	$	3,840			
	c) Parks Department (GF Budget Transfer)	$	7,340			
1050	**VACATION BUY BACK**			$ -	$ 950	**$ 950**
1210	**PERA EMPLOYER CONTRIBUTION**			$ 8,010.50	$ 8,280	**$ 8,280**
	a) Coordinated 7.5% $110,398					
1220	**FICA & MEDICARE EMPLOYER CONTRIBUTION**			$ 9,773.63	$ 9,979	**$ 9,979**
	a) FICA 6.2% $ 130,448	$	8,088			
	b) Medicare 1.45% $ 130,448	$	1,891			
1300	**HEALTH & DENTAL INSURANCE**			$ 17,720.06	$ 17,220	**$ 18,606**
1313	**PRUDENTIAL LIFE INSURANCE**			$ 92.18	$ 95	**$ 95**
1510	**WORKER'S COMPENSATION**			$ 6,491.18	$ 6,500	**$ 6,500**
2000	**OFFICE SUPPLIES**			$ 1,004.62	$ 800	**$ 800**
	a) Copy Paper					
	b) Miscellanous					
2030	**PRINTED FORMS**			$ 1,489.59	$ 2,000	**$ 2,000**
	a) Utility Bills & Envelopes	$	1,800			
	b) Special Notices, Radio Install Forms	$	200			
2100	**OPERATING SUPPLIES**			$ 1,137.07	$ 800	**$ 800**
2120	**MOTOR FUELS & LUBRICANTS**			$ 2,960.44	$ 4,000	**$ 4,000**

2016 BUDGET BREAKDOWN OF EXPENDITURES:

WATER DEPARTMENT-601.49400 (CON'T)			2014 Actual	2015 Budget	**2016 Budget**
2200	**REPAIR & MAINTENANCE** a) Hydrant Conversion (5) b) Water Main Breaks c) Water System Maintenance		$ 61,824.55	$ 38,000	**$ 48,500**
2210	**EQUIPMENT PARTS** a) Well house maint, paint		$ 45.17	$ 900	**$ 1,000**
2220	**POSTAGE** a) Utility Billing b) Metered Mail		$ 1,915.12	$ 2,500	**$ 2,500**
2221	**TIRES**		$ 465.51	$ 1,000	**$ 1,000**
2222	**STREET REPAIRS** a) Curb Repairs b) Sod c) Asphalt (water main breaks)		$ 297.50	$ 6,000	**$ 1,000**
2261	**WATER TESTING** a) Bacterial monthly b) Copper & Lead		$ 768.00	$ 800	**$ 800**
2262	**WATER METERS & SUPPLIES**		$ 3,984.34	$ 5,000	**$ 5,500**
2264	**SAFE DRINKING WATER FEE (Water Test Fee-37109)**		$ 13,928.00	$ 13,844	**$ 13,844**
2280	**UNIFORM ALLOWANCE**		$ 847.35	$ 950	**$ 950**
3010	**AUDIT & ACCOUNTING SERVICES (12.5%)**		$ 2,150.00	$ 2,406	**$ 2,502**
3030	**ENGINEERING SERVICES**		$ -	$ 1,000	**$ 1,000**
3040	**LEGAL SERVICES**		$ -	$ 300	**$ 300**
3210	**TELEPHONE** a) Alarm System b) Cell Phone usage c) Pager d) iPad for SCADA	$ 300	$ 341.95	$ 900	**$ 900**
3310	**TRAVEL EXPENSE** a) AWWA Conference b) USTI Conference		$ 552.14	$ 1,200	**$ 1,200**
3500	**PRINTING & PUBLISHING** a) Newsletter b) Special Notices		$ 5,651.13	$ 7,000	**$ 7,000**
3600	**INSURANCE**		$ 9,299.90	$ 9,500	**$ 8,900**

2016 BUDGET BREAKDOWN OF EXPENDITURES:

	WATER DEPARTMENT-601.49400 (CON'T)			2014 Actual	2015 Budget	2016 Budget
3870	**WATER USAGE - BLAINE ACCOUNTS**			$ 2,401.52	$ 4,000	**$ 4,000**
4000	**CONTRACTUAL SERVICES**			$ 5,286.00	$ 5,850	**$ 5,850**
	a) I.T. Services (split 150 hr block)	$	4,500			
	b) Safety Consultant	$	1,200			
	c) Drug Testing	$	150			
4050	**MAINTENANCE AGREEMENTS**			$ 2,549.57	$ 13,775	**$ 13,775**
	a) USTI (software support)	$	1,000			
	b) Gopher State One-Call	$	1,000			
	c) Cathodic Protection Service	$	2,000			
	d) 66% SCADA System	$	765			
	e) Software Support for Meter Program	$	660			
	f) Meter Reading Equipment Support (handhelds)	$	250			
	g) Infraseek GIS	$	1,800			
	h) GPS upgrades	$	300			
	i) Infraseek Software Modules	$	6,000			
4300	**CONFERENCES & SCHOOLS**			$ 1,691.09	$ 2,050	**$ 2,000**
	a) Munici-pals					
	b) MN Rural Water Conference					
	c) AWWA					
	d) Con-Expo	$	500			
	e) Staff Training 1/yr	$	150			
	f) U.S.T. I. Conference	$	1,350			
4330	**DUES & SUBSCRIPTIONS**			$ 490.50	$ 500	**$ 525**
	a) AWWA					
	b) Rural Water Assoc.					
4370	**PERMITS & SALES TAX**			$ (659.16)	$ 8,200	**$ 7,800**
	a) DNR Fees (Well Permits)	$	2,800			
	b) Quarterly Sales Tax (37103)	$	5,000			
4470	**WATER PERMIT SURCHARGES (37171)**			$ -	$ 10	**$ 10**
5000	**CAPITAL OUTLAY**			$ -	$ -	**$ -**
7000	**TRANSFERS OUT**			$ 336,988.00	$ 95,602	**$ 99,801**
	a) Transfer to General Fund	$	31,055			
	b) Transfer to Renewal & Replacement (38.4)	$	65,452			
	c) Contingency	$	3,294			
	TOTAL 2016 WATER DEPARTMENT EXPENDITURES			$ 628,033.57	$ 401,409	**$ 412,165**

2016 WATER TREATMENT PLANT EXPENDITURES

ACCT #	DESCRIPTION	2012 ACTUAL	2013 ACTUAL	2014 ACTUAL	2015 BUDGET	**2016 BUDGET**
601.49402.2100	OPERATING SUPPLIES	0.00	60.04	0.00	100	**100**
601.49402.2120	MOTOR FUEL & LUBRICANTS	2,000.00	2,000.00	2,000.00	2,000	**2,000**
601.49402.2160	CHEMICALS	14,234.08	23,720.27	22,068.56	23,000	**23,000**
601.49402.2200	REPAIR & MAINTENANCE	5,434.95	15,610.29	6,740.22	13,000	**10,000**
601.49402.2210	EQUIPMENT PARTS	1,531.50	11,140.95	1,639.20	5,000	**5,000**
601.49402.3030	ENGINEERING SERVICES	0.00	0.00	0.00	1,000	**1,000**
601.49402.3600	INSURANCE	10,031.60	10,998.40	11,293.80	11,300	**11,300**
601.49402.3810	ELECTRIC UTILITES	85,981.31	94,593.15	76,611.18	82,000	**80,000**
601.49402.3830	GAS UTILITIES	2,404.70	3,472.43	2,664.85	3,500	**3,000**
601.49402.4000	CONTRACTUAL SERVICES	420.00	492.00	0.00	1,000	**1,000**
601.49402.4370	PERMITS,DUES & SUBSCRIPT	0.00	1,931.16	1,282.26	2,850	**2,850**
601.49402.5000	CAPITAL OUTLAY	0.00	0.00	0.00	0	**0**
601.49402.7000	TRANSFERS OUT	42,333.00	43,603.00	38,608.00	43,635	**43,635**
TOTAL WATER TREATMENT PLANT		164,371.14	207,621.69	162,908.07	188,385	**182,885**

CITY OF SPRING LAKE PARK
BREAKDOWN OF EXPENDITURES FOR 2016 BUDGET

	WATER TREATMENT PLANT OPERATIONS-601.49402		2014 Actual	2015 Budget	**2016 Budget**
2100	**OPERATING SUPPLIES**		$ -	$ 100	**$ 100**
2120	**MOTOR FUELS & LUBRICANTS**		$ 2,000.00	$ 2,000	**$ 2,000**
	a) Diesel, Generator				
2160	**CHEMICALS & CHEMICAL PRODUCTS**		$ 22,068.56	$ 23,000	**$ 23,000**
2200	**REPAIR & MAINTENANCE**		$ 6,740.22	$ 13,000	**$ 10,000**
	a) Tools				
	b) RPZ Testing (Backfill testing)				
	c) Load Bank Testing (Generator)	$ 3,000			
2210	**EQUIPMENT PARTS**		$ 1,639.20	$ 5,000	**$ 5,000**
3030	**ENGINEERING FEES**		$ -	$ 1,000	**$ 1,000**
3600	**INSURANCE**		$ 11,293.80	$ 11,300	**$ 11,300**
3810	**ELECTRIC UTILITIES**		$ 76,611.18	$ 82,000	**$ 80,000**
3830	**GAS UTILITIES**		$ 2,664.85	$ 3,500	**$ 3,000**
4000	**CONTRACTUAL SERVICE**		$ -	$ 1,000	**$ 1,000**
	a) Filter Evaluation				
	b) Misc				
4370	**PERMITS, DUES & SUBSCRIPTIONS**		$ 1,282.26	$ 2,850	**$ 2,850**
	a) Hazardous Chemical Inventory Fee & Pressure Vessel Permit (State of MN)	$ 200			
	b) WTP Permit (Metro Council)	$ 650			
	c) Strength Charge (Metro Council)	$ 2,000			
5000	**CAPITAL OUTLAY**		$ -	$ -	**$ -**
7000	**TRANSFERS OUT**		$ 38,608.00	$ 43,635	**$ 43,635**
	a) Transfer to Renewal & Replacement (25.6)				
	TOTAL 2016 WTP EXPENDITURES		$ 162,908.07	$ 188,385	**$ 182,885**

PUBLIC UTILITIES
2016 SEWER DEPARTMENT EXPENDITURES

ACCT #	DESCRIPTION	2012 ACTUAL	2013 ACTUAL	2014 ACTUAL	2015 BUDGET	**2016 BUDGET**
601.49450.1010	FULL TIME SALARIES	97,059.63	94,931.70	99,489.18	100,916	**100,916**
601.49450.1013	OVERTIME	3,907.60	5,681.72	9,526.53	7,061	**7,061**
601.49450.1020	ON-CALL SALARIES	976.00	1,962.17	1,782.24	2,421	**2,421**
601.49450.1040	TEMPORARY SALARIES	19,356.38	23,353.43	17,738.88	19,100	**19,100**
601.49450.1050	VACATION BUY BACK	0.00	0.00	0.00	950	**950**
601.49450.1210	P.E.R.A.	7,148.93	7,336.40	8,011.25	8,280	**8,280**
601.49450.1220	FICA/MC	8,747.58	9,319.19	9,775.00	9,979	**9,979**
601.49450.1300	HEALTH & DENTAL INS	17,493.23	18,153.48	17,720.60	17,220	**18,606**
601.49450.1313	LIFE INSURANCE	79.70	86.55	92.32	95	**95**
601.49450.1510	WORKER'S COMPENSATION	5,449.62	8,570.97	6,491.18	6,500	**6,500**
601.49450.2000	OFFICE SUPPLIES	527.62	852.65	988.59	800	**800**
601.49450.2030	PRINTED FORMS	1,338.48	1,598.60	1,489.56	1,800	**1,500**
601.49450.2100	OPERATING SUPPLIES	414.72	694.46	451.95	500	**500**
601.49450.2120	MOTOR FUEL & LUBRICANTS	3,052.38	3,288.24	2,960.38	4,000	**4,000**
601.49450.2200	REPAIR & MAINTENANCE	9,712.47	669.75	6,230.91	7,500	**10,000**
601.49450.2210	EQUIPMENT PARTS	265.46	1,827.55	1,706.13	2,000	**2,000**
601.49450.2220	POSTAGE	2,408.61	2,424.88	1,915.04	2,500	**2,500**
601.49450.2221	TIRES	275.26	1,125.72	465.51	1,000	**1,000**
601.49450.2222	STREET REPAIRS	3,685.78	0.00	0.00	1,500	**1,000**
601.49450.2262	WATER METERS & SUPPLIES	5,075.99	3,345.94	3,762.23	4,000	**5,000**
601.49450.2280	UNIFORMS	841.20	714.38	847.34	950	**950**
601.49450.3010	AUDIT SERVICES	3,750.00	3,000.00	2,150.00	2,406	**2,502**
601.49450.3030	ENGINEERING SERVICES	2,240.55	74.50	357.00	1,000	**1,000**
601.49450.3040	LEGAL SERVICES	0.00	0.00	0.00	300	**300**
601.49450.3210	TELEPHONE	284.27	408.05	347.87	700	**700**
601.49450.3310	TRAVEL EXPENSE	907.56	219.26	4.80	1,000	**1,000**
601.49450.3500	PRINTING & PUBLISHING	359.58	0.00	0.00	300	**300**
601.49450.3600	INSURANCE	7,831.13	7,839.17	9,061.19	9,100	**8,700**
601.49450.3810	ELECTRIC UTILITIES	3,665.08	3,491.94	3,478.82	3,200	**3,200**
601.49450.3840	METRO WASTE CONTROL	392,060.16	457,194.48	450,517.08	454,020	**490,716**
601.49450.4000	CONTRACTUAL SERVICES	20,668.02	5,203.44	5,286.00	11,850	**11,850**
601.49450.4050	MAINTENANCE AGREEMENT	2,075.63	2,023.27	2,548.07	11,460	**11,460**
601.49450.4300	CONFERENCES & SCHOOLS	1,029.03	978.79	1,746.08	2,450	**2,450**
601.49450.4330	DUES & SUBSCRIPTIONS	303.33	210.32	72.50	300	**150**
601.49450.4390	MISCELLANEOUS	0.00	0.00	0.00	100	**100**
601.49450.4450	RESERVE CAPACITY CHRGS	0.00	4,821.30	4,920.30	2,700	**2,700**
601.49450.4460	SEWER PERMIT SURCHARGES	0.00	0.00	0.00	10	**10**
601.49450.5000	CAPITAL OUTLAY	0.00	11,506.59	0.00	0	**0**
601.49450.7000	TRANSFERS OUT	74,415.00	76,723.00	320,159.00	76,212	**79,952**
TOTAL SEWER DEPARTMENT		697,405.98	759,631.89	992,093.53	776,180	**820,248**

CITY OF SPRING LAKE PARK
BREAKDOWN OF EXPENDITURES FOR 2016 BUDGET

	SEWER DEPARTMENT-601.49450			2014 Actual	2015 Budget	**2016 Budget**
1010	**SALARIES**			$ 99,489.18	$ 100,916	**$ 100,916**
	a) 1 - 50%	$	27,976			
	b) 2 - 25% (1-steps)	$	27,976			
	c) 50% Admin	$	23,562			
	d) 1 - 12.5%	$	6,994			
	e) 17% of Director	$	14,408			
1013	**OVERTIME**			$ 9,526.53	$ 7,061	**$ 7,061**
	a) 175 OT hrs @ $40.35					
1020	**ON-CALL SALARIES**			$ 1,782.24	$ 2,421	**$ 2,421**
	a) 60 OT hrs x@ $40.35					
1040	**TEMPORARY SALARIES ($10-$12)**			$ 17,738.88	$ 19,100	**$ 19,100**
	a) 3 @ 12 weeks x 40 x $11/hr (1/2 Water)	$	7,920			
	b) 1 @ 16 weeks x 40 x $12/hr (1/2 Water)	$	3,840			
	c) Parks Department (GF Budget Transfer)	$	7,340			
				$ -	$ 950	**950**
1050	**VACATION BUY BACK**					
1210	**PERA EMPLOYER CONTRIBUTION**			$ 8,011.25	$ 8,280	**$ 8,280**
	a) Coordinated 7.5% $110,398					
1220	**FICA & MEDICARE EMPLOYER CONTRIBUTION**			$ 9,775.00	$ 9,979	**$ 9,979**
	a) FICA 6.2% $ 130,448	$	8,088			
	b) Medicare 1.45% $ 130,448	$	1,891			
1300	**HEALTH & DENTAL INSURANCE**			$ 17,720.60	$ 17,220	**$ 18,606**
1313	**PRUDENTIAL LIFE INSURANCE**			$ 92.32	$ 95	**$ 95**
1510	**WORKER'S COMPENSATION**			$ 6,491.18	$ 6,500	**$ 6,500**
2000	**OFFICE SUPPLIES**			$ 988.59	$ 800	**$ 800**
	a) Copy Paper					
	b) Miscellanous					
2030	**PRINTED FORMS**			$ 1,489.56	$ 1,800	**$ 1,500**
	a) Utility Bills & Envelopes	$	1,600			
	b) Special Notices, Radio Install Forms	$	200			
2100	**OPERATING SUPPLIES**			$ 451.95	$ 500	**$ 500**
2120	**MOTOR FUELS & LUBRICANTS**			$ 2,960.38	$ 4,000	**$ 4,000**
2200	**REPAIR & MAINTENANCE**			$ 6,230.91	$ 7,500	**$ 10,000**
	a) Chemicals-Sewer System					
	b) Sewer System Maintenance					
	c) Manhole Covers					

2016 BUDGET BREAKDOWN OF EXPENDITURES:

SEWER DEPARTMENT-601.49450 (CON'T)

			2014 Actual	2015 Budget	**2016 Budget**
2210	**EQUIPMENT PARTS**		$ 1,706.13	$ 2,000	**$ 2,000**
2220	**POSTAGE** a) Utility Billing b) Metered Mail		$ 1,915.04	$ 2,500	**$ 2,500**
2221	**TIRES**		$ 465.51	$ 1,000	**$ 1,000**
2222	**STREET REPAIRS** a) Curb Repairs b) Sod c) Asphalt (sewer breaks)		$ -	$ 1,500	**$ 1,000**
2262	**WATER METERS & SUPPLIES**		$ 3,762.23	$ 4,000	**$ 5,000**
2280	**UNIFORM ALLOWANCE**		$ 847.34	$ 950	**$ 950**
3010	**AUDIT & ACCOUNTING SERVICES (12.5%)**		$ 2,150.00	$ 2,406	**$ 2,502**
3030	**ENGINEERING SERVICES**		$ 357.00	$ 1,000	**$ 1,000**
3040	**LEGAL SERVICES**		$ -	$ 300	**$ 300**
3210	**TELEPHONE** a) Alarm System b) Cell Phone usage c) Pager d) iPad for SCADA	$200	$ 347.87	$ 700	**$ 700**
3310	**TRAVEL EXPENSE** a) Sewer Trade Conference b) USTI Conference		$ 4.80	$ 1,000	**$ 1,000**
3500	**PRINTING & PUBLISHING**		$ -	$ 300	**$ 300**
3600	**INSURANCE**		$ 9,061.19	$ 9,100	**$ 8,700**
3810	**ELECTRIC UTILITIES**		$ 3,478.82	$ 3,200	**$ 3,200**
3840	**METRO WASTE CONTROL** ($37,835/month)		$ 450,517.08	$ 454,020	**$ 490,716**
4000	**CONTRACTUAL SERVICES**		$ 5,286.00	$ 11,850	**$ 11,850**
	a) I.T. Services (split 150 hr block)	$ 4,500			
	b) Safety Consultant	$ 1,200			
	c) Drug Testing	$ 150			
	d) Clean & Televise Main Lines	$ 5,000			
	e) Load Bank Testing (Generator)	$ 1,000			

2016 BUDGET BREAKDOWN OF EXPENDITURES:

			2014 Actual	2015 Budget	2016 Budget
SEWER DEPARTMENT-601.49450 (CON'T)					
4050	**MAINTENANCE AGREEMENTS**		$ 2,548.07	$ 11,460	**$ 11,460**
	a) USTI (software support)	$ 1,000			
	b) Gopher State One-Call	$ 1,000			
	c) 33% SCADA System	$ 450			
	d) Software Support for Meter Program	$ 660			
	e) Meter Reading Equipment Support (handhelds)	$ 250			
	f) Infraseek GIS	$ 1,800			
	g) GPS/GIS Software Support	$ 300			
	h) Infraseek Software Modules	$ 6,000			
4300	**CONFERENCES & SCHOOLS**		$ 1,746.08	$ 2,450	**$ 2,450**
	a) Munici-pals				
	b) MN Rural Water Conference				
	c) AWWA				
	d) Sewer Trade Conference	$ 500			
	e) Staff Training 1/yr	$ 150			
	f) U.S.T.I. Conference	$ 1,350			
4330	**DUES & SUBSCRIPTIONS**		$ 72.50	$ 300	**$ 150**
	a) Minnesota Rural	$ 123			
	b) American Water Works Assoc.	$ 137			
	c) A.P.W.A.	$ 40			
4390	**MISCELLANEOUS**		$ -	$ 100	**$ 100**
4450	**RESERVE CAPACITY CHARGES (SAC-37250)**		$ 4,920.30	$ 2,700	**$ 2,700**
4460	**SEWER PERMIT SURCHARGES (37271)**		$ -	$ 10	**$ 10**
5000	**CAPITAL OUTLAY**		$ -	$ -	**$ -**
7000	**TRANSFERS OUT**		$ 320,159.00	$ 76,212	**$ 79,952**
	a) Transfer to General Fund	$ 15,296			
	b) Transfer to Renewal & Replacement (36)	$ 61,362			
	c) Contingency	$ 3,294			
	TOTAL 2016 SEWER DEPARTMENT EXPENDITURES		$ 992,093.53	$ 776,180	**$ 820,248**
TOTAL 2016 PUBLIC UTILITY OPERATING EXPENDITURES			$1,783,035.17	$ 1,365,974	**$ 1,415,298**

PUBLIC UTILITIES
2016 WATER TREATMENT PLANT BOND FUND

#602 REVENUES

ACCT #	DESCRIPTION	2012 ACTUAL	2013 ACTUAL	2014 ACTUAL	2015 BUDGET	**2016 BUDGET**
602.00000.36210	INTEREST	(29.68)	(72.00)	8,833.38	7,000	**7,000**
602.00000.37601	WTP COLLECTIONS	225,250.09	229,365.34	221,437.16	225,000	**220,000**
602.00000.37604	WTP PENALTIES	4,420.06	4,228.51	4,429.55	3,000	**5,000**
TOTAL WTP REVENUES		229,640.47	233,521.85	234,700.09	235,000	**232,000**

#602 EXPENDITURES

		2012 ACTUAL	2013 ACTUAL	2014 ACTUAL	2015 BUDGET	**2016 BUDGET**
602.49402.6010	BOND PRINCIPAL	180,000.00	185,000.00	0.00	196,000	**201,000**
602.49402.6110	BOND INTEREST	71,320.00	66,246.50	59,245.64	55,676	**47,316**
TOTAL WTP EXPENDITURES		251,320.00	251,246.50	59,245.64	251,676	**248,316**

CITY OF SPRING LAKE PARK
BREAKDOWN OF REVENUE & EXPENDITURES FOR 2016 BUDGET
WATER TREATMENT PLANT FUND 602

REVENUES:		2014 Actual	2015 Budget	**2016 Budget**
602.00000.36210	**INTEREST**	$ 8,833.38	**$ 7,000**	**$ 7,000**
602.00000.37601	**WATER TREATMENT PLANT COLLECTIONS**	$ 221,437.16	**$ 225,000**	**$ 220,000**
602.00000.37604	**WATER TREATMENT PLANT PENALTIES**	$ 4,429.55	**$ 3,000**	**$ 5,000**
	TOTAL 2016 WTP BOND FUND REVENUES	$ 234,700.09	**$ 235,000**	**$ 232,000**

EXPENDITURES:		2014 Actual	2015 Budget	**2016 Budget**
602.49402.06010	**BOND PRINCIPAL**	$ -	**$ 196,000**	**$ 201,000**
602.49402.06110	**BOND INTEREST**	$ 59,245.64	**$ 55,676**	**$ 47,316**
	TOTAL 2016 WTP BOND FUND EXPENDITURES	$ 59,245.64	**$ 251,676**	**$ 248,316**

City of Spring Lake Park

Engineer's Project Status Report

To:	Council Members and Staff	Re:	**Status Report for 11.16.15 Meeting**
From:	Phil Gravel	File No.:	R-18GEN

Note: Updated information is shown in *italics.*

2015 Sanitary Sewer Lining Project (193803135).
This project includes lining and wye grouting in the northeast corner of the city. The Contractor, Visu-Sewer, has started construction. Door hangar notices will be given to property owners. Project information is posted on the city web site.

2014-2015 Street Improvement Project (193801577).
The contractor, Valley Paving Inc., has punch-list work including several clean-up and seeding items, and structure adjustments remaining. It's likely that final work will not be completed until 2016.

CSAH 35 Turn Lanes and Sidewalk (193802914).
Construction started on October 2nd and is substantially complete. Seeding has been completed as "dormant" seeding due to the time of the year.

MS4 Permit (193802936).
Ongoing implementation items. *Training has been completed.*

Zoning Code Update (193803266).
Planning Commission has reviewed the code revisions. Some of the recommended changes include a new floodplain ordinance; revising six residential zoning districts to three; increasing the high density residential district to 25 units/acre; renaming the I-1 District to Light Industrial; adding a revised PUD section making it a rezoning vs. special use permit; increased regulation of electronic signs; and improved landscaping and site planning standards.
A Planning Commission Public Hearing has been set for November 23rd. Tentative schedule is for City Council review and adopt on December 7th.

Lift Station No. 1 Equipment (pumps, generator, and control panel) **(193802805).**
Equipment suppliers continue work on their items. Generator has been delivered.

Lift Station No. 1 Reconstruction (193803115).
Council authorized contract award to Meyer Contracting in the amount of $650,060. Construction Contract documents have been sent to Meyer for their signatures.

Other issues/projects.

We are working with the public works director to define project limits for possible 2016 seal coat and sewer lining projects.

Finishing up work on antenna modifications at both water towers.

Feel free to contact Harlan Olson, Phil Carlson, Jim Engfer, Mark Rolfs, Tim Grinstead, Peter Allen, or me if you have any questions or require any additional information.

CORRESPONDENCE

CenterPoint Energy

595 Nicollet Mall
P.O. Box 59038
Minneapolis, MN 55459-0038

November 9, 2015

To whom it may concern:

I am writing to inform you that Administrative Law Judge Eric L. Lipman is holding five public hearings on CenterPoint Energy's rate increase proposal. For more on the public hearings, please see the enclosed copy of our Notice of Public Hearings for CenterPoint Energy Minnesota Customers.

Please contact me if you have any questions or would like additional information about the filing. Additional information about our Rate Case is available at our website at CenterPointEnergy.com/RateCase.

Sincerely,

Christie L. Singleton

Christie Singleton
District Director
612-214-6883

Enc.
Notice of Public Hearings for CenterPoint Energy Minnesota Customers

RATE INCREASE NOTICE

NOTICE OF PUBLIC HEARINGS FOR CENTERPOINT ENERGY MINNESOTA CUSTOMERS

CenterPoint Energy has asked the Minnesota Public Utilities Commission (MPUC) to increase its rates for natural gas distribution service. The requested increase is for $54.1 million, or about 6.4 percent per year. The requested increase would add about $5.15 to a typical residential customer's monthly bill.

CenterPoint Energy requested the rate changes described in this notice. The MPUC may either grant or deny the requested changes, in whole or in part, and may grant a lesser or greater increase than that requested for any class or classes of service.

The MPUC will likely make its decision on our rate request in the summer of 2016. If final rates are lower than interim rates, we will refund customers the difference with interest. If final rates are higher than interim rates, we will not charge customers the difference.

PUBLIC HEARINGS

Administrative Law Judge Eric L. Lipman is holding five public hearings on the company's proposal. Any CenterPoint Energy customer or other person may attend or provide comments at the hearings. You are invited to comment on the adequacy and quality of CenterPoint Energy's service, the level of rates or other related matters. You do not need to be represented by an attorney to provide comments during the public hearings.

Date	Time	Locations
Tuesday Dec. 1	1:00 p.m.	Civic Center, Mankato Room 1 Civic Center Plaza, Mankato, MN 56001
Tuesday Dec. 1	7:00 p.m.	Normandale Community College Kopp Student Center – Room K1450 9700 France Ave. S., Bloomington, MN 55431
Wednesday Dec. 2	1:00 p.m.	Earle Brown Conference Center Morgan Room – Lower Level 6155 Earle Brown Dr., Brooklyn Center, MN 55430
Wednesday Dec. 2	6:00 p.m.	Sabathani Community Center, 3rd floor, Room J 310 E. 38th St., Minneapolis, MN 55409
Thursday Dec. 3	7:00 p.m.	Central Lakes Community College, Room E203 501 W. College Dr., Brainerd, MN 56401

Bad weather? Find out if a meeting is canceled – call (toll-free) 1-800-331-6208 or 651-201-2213 or visit mn.gov/puc

Continued . . .

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SUBMIT WRITTEN COMMENTS

Comment Period

Comments accepted through Jan. 22, 2016 at 4:30 p.m.

Comments must be received by 4:30pm on the close date

Comments received after comment period closes may not be considered

Online

Visit mn.gov/puc, select *Speak Up!*, find this Docket (15-424), and add your comments to the discussion.

If you wish to include an exhibit or other attachment, please send your comments via U.S. Mail.

U.S. Mail

Minnesota Public Utilities Commission
121 7th Place East, Ste. 350, St. Paul, MN 55101

Written comments are most effective when the following items are included:

1. The Docket Numbers in the subject line or heading
   - MPUC Docket Number G-008/GR-15-424
   - MPUC Docket Number G-008/GR-15-424
   - OAH Docket Number 1-8-2500-32829
   - OAH Docket Number 1-8-2500-32829
2. Your name and connection to the Docket
3. The specific issues that concern you
4. Any knowledge you have about the issues
5. Your specific recommendation
6. The reason for your recommendation.

Important: Comments will be made available to the public on the MPUC's website, except in limited circumstances consistent with the Minnesota Government Data Practices Act. The MPUC does not edit or delete personally identifying information from submissions.

The chart below shows the effect of both the interim and proposed rate changes on monthly bills for residential, commercial and industrial customers with average natural gas use.

Customer Type (usage in therms)	Avg monthly usage in therms	Avg monthly bill: current	Avg monthly bill: interim	Avg monthly bill: proposal
Residential	76	$66	$69	$81
	76	$66	$69	$81
Commercial/Industrial				
- up to 1,500/year	64	$52	$55	$61
- up to 1,500/year	64	$52	$55	$61
- 1,500 to 5,000/year	247	$161	$170	$172
- 1,500 to 5,000/year	247	$161	$170	$172
- 5,000 or more/year	1,254	$756	$799	$766
- 5,000 or more/year	1,254	$756	$799	$766
Small Volume Dual Fuel Sales Service				
Small Volume Dual Fuel Sales Service				
- up to 120,000/year	3,707	$1,810	$1,912	$1,833
- up to 120,000/year	3,707	$1,810	$1,912	$1,833
- 120,000 or more/year	12,675	$6,006	$6,345	$6,039
- 120,000 or more/year	12,675	$6,006	$6,345	$6,039
Large Volume Dual Fuel Sales Service				
Large Volume Dual Fuel Sales Service	42,761	$17,570	$18,563	$17,725
	42,761	$17,570	$18,563	$17,725

**Figures above are rounded (to the nearest whole number)*
**Figures above are rounded (to the nearest whole number)*

EVIDENTIARY HEARINGS

Formal evidentiary hearings on CenterPoint Energy's proposal start on Jan. 19, 2016, at the MPUC's offices at 121 7th Place East, St. Paul. The purpose of the evidentiary hearings is to allow CenterPoint Energy, the Minnesota Department of Commerce – Division of Energy Resources, the Minnesota Office of Attorney General – Residential Utilities and Antitrust Division and others to present testimony and to cross-examine each other's witnesses on the proposed rate increase.

If you wish to formally intervene in this case, as a party to the litigation, please contact Administrative Law Judge Eric L. Lipman, P.O. Box 64620, St. Paul, Minnesota, 55164-0620.

HOW TO LEARN MORE

CenterPoint Energy's current and proposed rate schedules are available at:

CenterPoint Energy
505 Nicollet Mall, Minneapolis MN 55402
Phone 612-372-4727 or 1-800-245-2377
Web http://www.CenterPointEnergy.com/RateCase

Minnesota Department of Commerce
85 7th Place East, Suite 500, St. Paul, MN 55101
Phone: 651-539-1534
Web: https://www.edockets.state.mn.us/EFiling/search.jsp
Select *15* in the year field, type 424 in the number field, select *Search*, and the list of documents will appear on the next page.

Questions about the Minnesota Public Utilities Commission's review process?

Minnesota Public Utilities Commission
121 7th Place East, Suite 350, St. Paul, MN 55101
Phone: 651-296-0406 or 1-800-657-3782
Email: consumer.puc@state.mn.us

Citizens with hearing or speech disabilities may call through their preferred Telecommunications Relay Service.

REP. CONNIE BERNARDY BRINGING PEOPLE TOGETHER

Our Environment

Rep. Bernardy stood up against rollbacks on protecting clean water, keeping bees and butterflies safe from toxins, and citizens' oversight of companies that pollute.

Rep. Bernardy continues to be a strong voice in protecting our environment and water.

Commemorating the May 6, 1965 Tornados

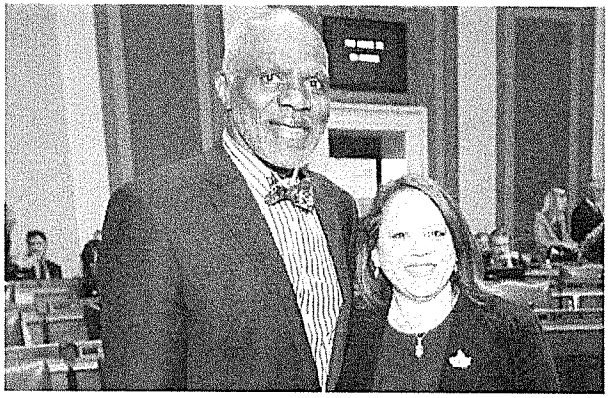
On May 6, Rep. Bernardy authored a resolution commemorating the 50th anniversary of the worst tornado outbreak in Minnesota's history. The 1965 tornadoes killed 13 people, injured 683, and caused $1.2 billion in property damage. Rep. Bernardy's resolution recognized "the sacrifices, suffering, and losses of those affected by the worst tornado outbreak in Minnesota history."

Sign up for my e-updates!

Visit *www.house.mn/41A* and click on "Join my e-mail updates" to get legislative updates.

Our Schools

Rep. Bernardy is a champion for our students. She's pleased her work to prevent larger class sizes and teacher layoffs paid off. She also worked hard to provide additional college opportunities in high schools, and investments in our youngest learners. She believes the legislature missed a historic opportunity to freeze college tuition and further invest in Minnesota Reading Corps, which is narrowing the achievement gap in our community.



Rep. Bernardy with retiring Minnesota Supreme Court Justice Alan Page.

Our Seniors

Rep. Bernardy works hard for our seniors. She's working with other legislators to develop a Silver Alert system designed to protect our vulnerable seniors like the Amber Alert system does for missing children. Much more could have been done for seniors this year. She couldn't support the final House bill that affected seniors because it did not have new investments in home and community-based services on which many of our seniors rely.

Rep. Bernardy joins team of Civil Discourse Facilitators

Rep. Bernardy was one of 13 legislators trained as a Civil Discourse Facilitator. The goal is to create and strengthen relationships between elected officials of different parties through mutual trust based on communication. Rep. Bernardy is now one of 26 facilitators nationwide ready to guide legislators through civil discourse training.

Dear Neighbor,

As a wife, working mom, and lifelong resident of our community, serving you at the State Capitol is an honor. Like many of you, I was frustrated that a bipartisan compromise was not reached sooner. As a result, I didn't take extra pay for the special session. I refused to be paid more for just doing my job.

Though disappointed by the process, I am pleased that the final budget improved upon our investment in Minnesota's kids and future. Education funding will help keep up with inflation, adequately fund classrooms, and provide more opportunities for our earliest learners.

We made a lot of progress in the previous biennium to improve Minnesota for families, students, and seniors. We need to continue to work together to find ways to make college more affordable and reduce student debt, pass a bipartisan transportation compromise that will fix our transportation system for all people, and continue to improve on a world class education system for all children.

Thank you for the honor of being your voice in St. Paul as we move Minnesota forward together.

Your thoughts and ideas are welcome! Please let me know if I can help you in any way.

Warmest regards,

Connie Bernardy

Representative Connie Bernardy
Fridley, New Brighton,
and Spring Lake Park

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State Representative Connie Bernardy

Contact Information:

581 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155
(651) 296-5510
rep.connie.bernardy@house.mn
www.house.mn/41A

T6 P1 **********AUTO**5-DIGIT 55432
DANIEL BUCHHOLTZ
OR CURRENT OCCUPANT
1301 81ST AVE NE
SPRING LAKE PARK MN 55432-2116

2015 LEGISLATIVE REPORT

Connie Bernardy

State Representative

Respect and Community

Dear Chief and Staff,

We would like to extend our heartfelt thanks to you and your staff for all your efforts at keeping our communities safe. We would also like to express our gratitude to your Officers and staff who often times are placed in dangerous situations which we cannot truly comprehend. Two of our core values are Respect and Community, and as such we would like to sincerely thank you all for the risks you take on a daily basis, sometimes just by putting on a uniform. Thank you for your service, dedication to keeping us and the community safe. Please stay safe!

Matthew 5:9 Blessed are the peacemakers: for they shall be called the children of God.

The Public Safety Graduate Team

We would like to extend our heartfelt thanks to you and your staff for all your efforts at keeping our communities safe. We would also like to express our gratitude to your Officers and staff who often times are placed in dangerous situations which we cannot truly comprehend. Two of our core values are Respect and Community, and as such we would like to sincerely thank you all for the risks you take on a daily basis, sometimes just by putting on a uniform. Thank you for your service, dedication to keeping us and the community safe. Please stay safe!

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The Public Safety Graduate Team