COMPETITION VERSUS LOCAL CONTROL: FCC STREAMLINES FRANCHISING PROCESS TO INCREASE COMPETITION IN THE CABLE MARKET

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“All market players deserve the certainty and regulatory even-handedness necessary to spark investment, speed competition, and make America a stronger player in the global economy.”

AT&T and Verizon are coming to a television near you. They and other telephone companies are beginning to penetrate the cable market. This development should result in more choice for consumers and lower cable rates. Many telephone companies, however, are frustrated with the time it takes to negotiate a cable franchise in most localities. Some argue that this lengthy process prevents competition in the cable market, while others argue that the telephone companies are just trying to keep up with cable companies that now offer telephone services. Either way, the Federal Communications Commission (“FCC” or “Commission”) has recently put restrictions on local franchis-

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2 Verizon, About FiOSTV, http://www22.verizon.com/content/fiostv/about+fios+tv/about+fios+tv (last visited Nov. 9, 2007).

3 See discussion infra Part IV.A.3.a.


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ing authorities in an effort to spur competition across the country.\textsuperscript{5} These new rules expedite the franchise negotiation process, but limit the authority of local franchising agencies. Some ask whether the FCC went too far in adopting these rules and whether the gains from competition are worth the loss in local autonomy.\textsuperscript{6} This Comment will argue that the FCC has the authority to regulate the franchise process and that these rules reflect sound economic policy.

I. INTRODUCTION

In most localities, the franchise process begins with a Request for Proposal ("RFP"), which is simply a request that cable operators submit applications to transmit cable in that locality.\textsuperscript{7} After receiving the applications, the Local Franchising Authority ("LFA") selects one or more companies to receive a franchise.\textsuperscript{8} A franchise is a government granted right that allows communications carriers to use public rights-of-way to transmit their service.\textsuperscript{9} LFAs often use their franchising power to exact concessions from cable companies. For example, they may require that cable operators provide public access channels or "build-out" cable to every household in a particular geographic area. Other provisions include franchise fees, construction requirements, technological standards, and customer service requirements.\textsuperscript{10} Telephone companies argue that not only are these requirements excessive, but that the entire negotiation process is too lengthy.\textsuperscript{11}

In an effort to expedite the franchising process, on December 20, 2006, the Commission voted three to two, to adopt rules to implement section 621(a)(1) of the Cable Communications Policy Act of 1984 ("1984 Act")\textsuperscript{12} as amended by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act")\textsuperscript{13} (collectively the "Cable Act").\textsuperscript{14} Section 621(a)(1) reads, in

\begin{itemize}
  \item \textsuperscript{8} Id. at 4-28.1.
  \item \textsuperscript{10} GOODALE, supra note 7, at 4-28.2
  \item \textsuperscript{11} See, e.g., discussion \textit{infra} Part IV.A.3a.
  \item \textsuperscript{12} Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779.
  \item \textsuperscript{13} Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No.
relevant part, that "[a] franchising authority . . . may not unreasonably refuse to award an additional competitive franchise." The FCC's new rules clarify the phrase "unreasonably refuse[e]." In doing so, the FCC found that the following behavior by LFAs constitutes an unreasonable refusal: (1) failing to issue a timely decision; (2) requiring unreasonable build-out mandates; and (3) demanding an unreasonable amount of channel capacity be set aside for public, educational, or governmental ("PEG") use. Ultimately, the new rules limit the flexibility of local authorities in negotiating franchise agreements. Whether these limitations are legal or beneficial is hotly debated.

Many commentators, including the Telecommunications Research and Action Center ("TRAC"), have applauded the decision by the FCC. Samuel Simon, TRAC's Chairman, stated that "consumers benefit whenever there is a second cable or wire into the home for cable or video service." Larry Spiwak, President of the Phoenix Center for Advanced Public Policy Studies, called the decision a "no-brainer," and "though not a clean fix, the commission's efforts are at least a constructive step in the right direction and should be commended."

Despite the broad support in the media, many local community organizations have condemned the FCC action. One District of Columbia official feared residents would suffer from a lack of public-access channels. The Center for Digital Democracy ("CDD") argued that the rule is an attack on local values, stating that the new rule limits "the authority of a local government to determine how its community places value on its right of ways in exchange for video service." The CDD added, "[f]or communities either economically challenged or geographically isolated, the loss of meaningful community oversight over vital broadband connections threatens their future." The Alliance

14 See 2006 Franchising Order, supra note 5.
16 See 2006 Franchising Order, supra note 5, ¶ 1.
17 Id. ¶ 5.
19 Id.
21 Alan Sipress, FCC Vote a Victory for Phone Companies, WASH. POST, Dec. 21, 2006, at D1.
23 Id.
for Community Media, a non-profit organization, has already retained counsel to challenge the new rules.24

The FCC decision also sparked a strong reaction from Congressman John Dingell, then-incoming House Commerce Committee Chairman, who sent a letter to FCC Chairman Kevin Martin asking for the legal authority that permitted the Commission to implement Section 621(a)(1).25 Although Chairman Martin responded to every legal challenge made by Congressman Dingell,26 most believe the matter will ultimately be resolved in court.27

This Comment will argue that the FCC has the statutory authority to implement section 621(a)(1), and that the new rules should withstand judicial challenge. The newly-promulgated rules will benefit consumers by increasing competition in the cable market, though it remains unseen as to what price consumers are willing to pay for such competition. While aiding competition, the FCC rules deprive local franchising authorities of some discretion in negotiating, granting, and refusing franchise applications. This loss in flexibility, however, should be marginal, as the rules serve more as an impetus for franchising authorities to increase competition in their localities. If the denial of a franchise is challenged in court, LFAs can continue to rely on the broad discretion granted to them in the Cable Act. Ultimately, these rules serve as a positive step toward the achievement of more competition in the cable market.

Section II of this Comment will discuss the history of the law and the relationship between federal and local agencies in regulating cable. Section III will discuss the FCC’s initial Notice of Proposed Rulemaking regarding section 621(a)(1) and the final Report and Order. Section IV will analyze whether the FCC has the legal authority to implement section 621(a)(1) and whether the course of action the FCC has taken is good policy. It will specifically discuss whether the benefits from competition outweigh the loss in local autonomy. Section V will provide an overall evaluation of the FCC’s rules and will pose

24 Press Release, Alliance for Cmty. Media, Alliance for Cmty. Media and Local Gov’ts Retain Counsel to Challenge FCC Rulings (Jan. 25, 2007), available at http://www.asfc.net/PDFFiles/012507ACDChallengeFCC.pdf (“We do not want to go to court, but we cannot stand silent while giant corporations take away the only voices our communities have—public, education and government access channels.”).


26 See 2006 Franchising Order, supra note 5, at 5203 (statement of Commissioner Jonathan S. Adelstein) (“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.”).
possible legal and political solutions to the problems that stem from these rules.

II. THE RELATIONSHIP BETWEEN THE FCC AND LOCAL FRANCHISING AUTHORITIES

A. The FCC Asserts Authority over Cable

The Communications Act of 1934, as amended (the "Communications Act"), gives the FCC authority to regulate interstate communication by wire or radio.28 Wire communication is defined as "the transmission of . . . pictures, and sounds of all kinds by aid of wire, cable, or other like [apparatus]. . . ."29 In its 1966 Second Report and Order,30 the FCC concluded that community antenna television ("CATV") systems transmit pictures and sounds by aid of wire;32 therefore, "it would appear that under the broad regulatory powers vested in it by the Communications Act, the Commission presently has jurisdiction over all CATV systems . . . ."33 The FCC thus extended the signal carriage requirements already in place over microwave systems to all (microwave and nonmicrowave) CATV systems.34

The Supreme Court cemented the FCC's jurisdiction over cable in United States v. Southwestern Cable Co.35 Southwestern used its CATV systems to transmit the signals of Los Angeles' broadcasting stations into the San Diego

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29 Id. § 153(52).
30 In re Amendment of Subpart L, Part 91, to adopt rules and regulations to govern the grant of authorizations in the business radio service for microwave stations to relay television signals to community antenna systems.; amendment of subpart I, part 21, to adopt rules and regulations to govern the grant of authorizations in the domestic public point-to-point microwave radio service for microwave stations used to relay television broadcast signals to community antenna television systems.; Amendment of parts 21, 74, and 91 to adopt rules and regulations relating to the distribution of television broadcast signals by community antenna television systems, and related matters. Second Report and Order, 2 F.C.C.2d 725 (Mar. 4, 1966) [hereinafter 1966 Order].
31 Community antenna television is "a service through which subscribers pay to have local television stations and additional programs brought into their homes from an antenna via a coaxial cable." FCC, Glossary of Telecommunications Terms, http://www.fcc.gov/glossary.html (last visited Nov. 9, 2007).
32 1966 Order, supra note 30, at 793–94.
33 Id. at 797 app. C.
34 Id. ¶ 4. Television broadcasts can be transmitted by a CATV system via microwaves or through non-microwave systems, like cable. See United States v. Sw. Cable Co., 392 U.S. 157, 161 (1968).
Midwest Television, an operator of a San Diego television station, sought relief from the FCC based on the rules regulating CATV systems. The FCC found Southwestern had violated the signal carriage rules set out in the 1966 Second Report and Order. In appealing the FCC decision, Southwestern challenged the FCC's authority to regulate CATV. Ultimately, the Court held that section 152(a) of the Communications Act granted the FCC jurisdiction to regulate CATV. The Court stopped short of detailing the extent of the FCC's authority, but stated that "the authority which we recognize today under section 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."

B. Federalism in Cable Regulation

The rapid expansion of cable television resulted in a "patchwork" of local, state, and federal regulation. The FCC attempted to promote a uniform national policy, while states and localities regulated according to local needs. In 1972, the FCC adopted a system of "dual jurisdiction" with some federal regulation and some local regulation for which the FCC would prescribe minimum standards. In describing its regulatory program, the FCC stated:

The comments advance persuasive arguments against federal [CATV] licensing. We agree that conventional licensing would place an unmanageable burden on the Com-

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36 Id. at 160.
37 Id. at 159–60.
38 See id; see also 1966 Order, supra note 30, ¶ 141 (noting that signal carriage rules were adopted to restrict CATV stations' ability to transmit content from one locality into another without first demonstrating before the FCC the public benefits of doing so).
39 Sw. Cable, 392 U.S. at 169.
40 Id. at 178 ("[T]he Commission's authority over 'all interstate... communication by wire or radio' permits the regulation of CATV systems.").
41 Id.
42 In re Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry Into the Development of Communications Technology and Services To Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals; Amendment of Section 74.1107 of the Commission's Rules and Regulations To Avoid Filing of Repetitious Requests; Amendment of Section 74.1031(c) and 74.1105(a) and (b) of the Commission's Rules and Regulations as They Relate to Addition of New Television Signals; Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Federal-State or Local Relationships in the Community Antenna Television System Field; and/or Formulation of Legislative Proposals in This Respect; Amendment of Subpart K of Part 74 of the Commission's Rules and Regulations With Respect to Technical Standards for Community Antenna Television Systems, Report and Order, 36 F.C.C.2d 143, ¶ 171 (Feb. 2, 1972).
43 Id.
44 Id. ¶ 177.
mission. Moreover, local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for example, as how best to parcel large urban areas into cable districts.

Although the FCC left the licensing to state and local authorities, it provided minimum standards in such areas as signal carriage, the franchise selection process, franchise duration, subscription rates, and franchise fees. The FCC, however, could not keep up with the rapidly growing franchise process or the lack of uniformity across the country. Two years later, the FCC attempted to further nationalize the franchising process by preempting the field of technical standards.

One of the first challenges to the FCC's preemptive authority occurred in Capital Cities Cable Inc. v. Crisp. Oklahoma enacted a law that required the removal of all alcohol advertisements in out-of-state cable transmissions that entered the state. Oklahoma claimed that while its law conflicted with current FCC regulations, the Twenty-First Amendment granted the states the right to regulate alcohol. The Supreme Court ultimately concluded that federal concerns in regulating cable outweighed the constitutional issues. In doing so, the Court acknowledged that the 1972 regulation granted some power to state and local authorities, but ultimately "the Commission retained exclusive jurisdiction over all operational aspects of cable communication, including signal carriage and technical standards."
C. Cable Communications Policy Act of 1984

The 98th Congress finally clarified the respective roles of the federal and local authorities by enacting the Cable Communications Policy Act of 1984.\(^{54}\) The Act had three primary purposes: (1) to establish a national policy concerning cable; (2) to establish franchise procedures; and (3) to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems."\(^{55}\) Congress recognized that local authorities were best equipped to tailor franchise agreements to local needs.\(^{56}\) As a result, the 1984 Cable Act gave LFAs the authority to grant franchises\(^{57}\) and to require that cable companies, as part of the franchise agreements, designate part of their channel capacity for PEG use.\(^{58}\) LFAs were also given the authority to establish facilities and equipment requirements.\(^{59}\)

Despite recognizing the need to tailor franchise agreements to local needs, the 1984 Cable Act limited local authority in several ways. The Act capped franchise fees to five percent of gross revenues\(^{60}\) and created procedures for a franchise renewal process, ensuring that any current cable operator would have a fair opportunity to have its franchise renewed.\(^{61}\) It also allowed modification requests, whereby a cable operator could request a modification of the franchise agreement if any of the conditions became impracticable.\(^{62}\) A judicial remedy was included for any cable operator who was wrongfully denied a modification or renewal.\(^{63}\) While the regulation of cable rates was restricted,\(^{64}\) the FCC was granted the authority to "establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise."\(^{65}\) That provision created the next battleground for franchising power between the FCC and LFAs.

\(^{55}\) Id. § 601.
\(^{57}\) § 621(a)(1) ("A franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction.").
\(^{58}\) § 611.
\(^{59}\) § 624.
\(^{60}\) § 622(b). A franchise fee is a fee paid by a cable operator to a local authority in order to obtain a franchise. § 622(a).
\(^{61}\) See § 626.
\(^{62}\) § 625(a)(1).
\(^{63}\) See § 635 ("Any cable operator adversely affected by any final determination made by a franchising authority under section 625 or 626 may commence an action [in] . . . (1) the district court of the United States . . . ; or (2) in any State court of general jurisdiction having jurisdiction over the parties.").
\(^{64}\) § 623.
\(^{65}\) § 624(e).
In addition to establishing technical standards for cable, the FCC prohibited LFAs from requiring higher technical standards in its franchise agreements. The FCC found that local control of technical standards inhibited innovation because it required cable companies to negotiate with every locality whenever they wanted to implement new technology. The FCC concluded that these "obstacles burden the delivery of interstate communications service, are not necessary to the fundamental objectives of local cable franchising, and are inconsistent with the congressional intent that competition in cable communications be promoted and that 'unnecessary regulation that would impose an undue economic burden on cable systems' be minimized."

In *City of New York v. FCC*, several cities challenged the FCC’s technical standards, arguing that the Commission was only allowed to prescribe minimum technical standards, while local authorities could require higher quality cable. The FCC argued that the 1984 Cable Act granted it authority to preempt the entire field of technical standards. The Supreme Court, rather than looking to whether Congress explicitly intended to supersede state law, instead stated that "the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action."

In assessing the FCC’s authority, the Court first looked at whether the FCC rule intended to preempt the field of technical standards and found that it undoubtedly did. The FCC had been operating under complete preemption of technical standards since 1974, and these regulations were just a continuation of that policy. Next, the Court determined whether the FCC had been given the legal authority to preempt the field of technical standards. In doing so, the

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66 See *In re Review of the Technical and Operational Requirements of Part 76, Cable Television, Report and Order*, 102 F.C.C.2d 1372, ¶ 1 (Oct. 31, 1985) [hereinafter 1985 Order] ("These standards may be applied but not exceeded by franchise authorities in the regulation of technical quality. . . . ").
67 *Id.* ¶ 16.
68 *Id.* (quoting ¶ 601).
70 *Id.* at 61–62.
71 *Id.* at 64.
72 *Id.* at 65 ("[T]here is no room for doubting that the Commission intended to pre-empt state technical standards governing the quality of cable television signals.").
73 *Id.* The Court noted that the FCC continues "to believe that the policy adopted in 1974 was effective, should remain in force, and is entirely consistent with both the specific provisions and the general policy objectives underlying the 1984 Cable Act." *Id.* (quoting 1985 Order, supra note 66, ¶ 14).
74 *Id.* at 66 ("The second part of the inquiry is whether the Commission is legally authorized to pre-empt state and local regulation that would establish complementary or additional technical standards, where it clearly is possible for a cable operator to comply with these standards in addition to the federal standards.").
Court looked at the prior regulations of the FCC, the statutory language, and the legislative history. In addition to recognizing that the FCC had completely preempted the field of technical standards since 1974, the Court noted that the enactment of the Cable Act, and section 624 in particular, showed no significant change in the FCC's authority to regulate in that area. Rather, the Court understood this to be an affirmation of prior FCC preemption policy. Additionally, the legislative history indicated that the FCC would establish technical standards while local authorities would retain authority to establish standards regarding facilities and equipment. No mention was made of the ability of local franchising authorities to supplement the field of technical standards. This, too, was consistent with prior policy and the statutory language. When evaluating an agency's authority, courts "should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." Ultimately, the Court upheld the FCC rules as a proper exercise of the authority granted to it by Congress.

D. Deregulation

The 1984 Cable Act restricted federal, state, and local regulation of cable rates. One of the purposes was to "minimize unnecessary regulation that would impose an undue economic burden on cable systems." Only localities without effective competition were subject to rate regulations, however, the
FCC’s narrow definition of “effective competition”\textsuperscript{84} essentially deregulated the entire cable industry.\textsuperscript{85}

Deregulation had two negative effects. First, cable rates rose sixty-one percent, which was three times faster than inflation.\textsuperscript{86} Second, consumers expressed frustration with customer service.\textsuperscript{87} These factors were the impetus for Congress’s further revision of the Cable Act in 1992.

E. The Cable Television Consumer Protection & Competition Act of 1992

After two years of congressional debate, lobbying by cable companies, and a presidential veto,\textsuperscript{88} Congress passed the Cable Television Consumer Protection & Competition Act of 1992 (“1992 Cable Act”).\textsuperscript{89} The 1992 Act granted regulatory agencies more authority to regulate cable rates in non-competitive markets by limiting the definition of “effective competition.”\textsuperscript{90} It also imposed “must carry” provisions, which required cable services to offer both local commercial stations and local noncommercial educational television stations.\textsuperscript{91} Further, state and local franchising authorities retained authorization to enact and enforce consumer protection laws and customer service requirements.\textsuperscript{92} The 1992 Cable Act also authorized the FCC to establish minimum technical standards for cable systems.\textsuperscript{93} In a departure from City of New York v. FCC, however, the Act allowed LFAs to petition the FCC for a waiver of those stan-

\textsuperscript{84} See Implementation of the Provisions of the Cable Communications Policy Act of 1984, 50 Fed. Reg. 18,637, § 100 (May 2, 1985) (“[A] cable system will be considered to face effective competition whenever the franchise market receives three or more unduplicated broadcast signals.”).

\textsuperscript{85} See 3 Harvey L. Zuckman et al., Modern Communications Law 20 (Harvey L. Zuckman ed., West Group 1999).


\textsuperscript{87} Leon T. Knauer et al., Telecommunications Act Handbook 80-81 (1996).


\textsuperscript{90} 1992 Cable Act: Law & Legislative History, supra note 88, at 1.


\textsuperscript{92} 1992 Cable Act: Law & Legislative History, supra note 88, at 11 (“The Act preserves state and local authority to enact and enforce any consumer protection laws to the extent not specifically preempted by the Act, and to enact and enforce customer service requirements that are more stringent than, or address matters not addressed by, the standards established by the Commission.”).

\textsuperscript{93} See Cable Television Consumer Protection & Competition Act of 1992 § 16(a) (amending § 624(e) of the Communications Act).
As a direct response to the anti-competitive nature of the cable industry, Congress amended section 621(a)(1) of the Communications Act, codified at 47 U.S.C. § 541, to read:

[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 635 for failure to comply with this subsection.

In addition to the limitations placed on the franchising authorities, the 1992 Cable Act provided guidelines for what steps LFAs may take in making franchise decisions. It stated that “[i]n awarding a franchise, the franchise authority . . . may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access . . . [and] may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.” Responding to the problems created by deregulation, the 1992 Cable Act increased regulation in non-competitive markets and put pressure on cable operators to provide adequate customer service. Specifically, section 621 pressured franchising authorities to increase the number of franchises awarded in order to foster more competition.

The most prominent case validating the FCC’s authority under section 621 is City of Chicago v. FCC. Several other localities, including the city of Chicago, challenged an FCC declaratory ruling that found Entertainment Connections, Inc. (“ECI”) was not a cable operator of a cable system as it operated a satellite master antenna television system (“SMATV”). Consequently, ECI did not require a franchise to transmit video under the 1992 Cable Act. Chicago challenged the FCC’s declaratory ruling on two main grounds: (1) the FCC did not have authority to interpret the statute; and (2) the FCC’s interpre-

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94 Id.
95 H.R. REP. NO. 102-628, at 46 (“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 the service.”).
96 § 7(a) (amending § 621(a)(1) of the Communications Act).
97 § 7(b) (amending § 621(a) of the Communications Act)
99 City of Chicago v. FCC, 199 F.3d 424 (7th Cir. 1999).
100 Id. at 426. SMATV is a “satellite dish system used to deliver signals to multiple dwelling units.” FCC, Glossary of Telecommunications Terms, http://www.fcc.gov/glossary.html (last visited Nov. 9, 2007).
101 City of Chicago, 199 F.3d at 426.
tation was not entitled *Chevron* deference.\textsuperscript{102} The court quickly dismissed the first challenge stating:

Some parties contend that the FCC was not granted regulatory authority over 47 U.S.C. § 541, the statute setting out general franchise requirements. We disagree. The FCC’s regulatory authority was first set out in *United States v. Southwestern Cable Co.*, and its authority continues to be recognized. We are not convinced that for some reason the FCC has well-accepted authority under the [1992] Act but lacks authority to interpret § 541 and to determine what systems are exempt from franchising requirements.\textsuperscript{103}

As to the second challenge, the court held that the FCC’s interpretation was entitled to *Chevron* deference.\textsuperscript{104} The statute was ambiguous and the FCC’s interpretation of “cable system” and “cable operator” was reasonable in light of the statute.\textsuperscript{105} Thus, the declaratory ruling was upheld.

\section*{F. Telecommunications Act of 1996}

The Telecommunications Act of 1996 (“1996 Act”)\textsuperscript{106} is responsible for creating competition in the cable market between existing cable companies and telephone companies. It was enacted “[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”\textsuperscript{107} In particular, section 302 made it lawful for telephone companies to operate a cable system, which they previously were not permitted to do.\textsuperscript{108} The competition between cable and telephone companies is the source of the debate over cable franchising.

\section*{III. THE FCC’S DECISION TO IMPLEMENT SECTION 621(A)(1)}

\subsection*{A. The Notice of Proposed Rulemaking on Enforcement of Section 621(a)(1)}

In November 2005, the FCC began exploring how it could implement section 621(a)(1) of the Communications Act, particularly the portion stating that

\begin{itemize}
\item\textsuperscript{102} Id. at 428. For a discussion regarding *Chevron* deference, see infra Part IV.A.2.
\item\textsuperscript{103} Id.
\item\textsuperscript{104} Id. at 429 (“Others contend that *Chevron* deference is due regulations, but not declaratory rulings. Our cases show otherwise. . . . An agency’s interpretation of a statute it administers commands deference, regardless of whether it emerges as a result of an adjudicative proceedings [sic] or a rulemaking process.”).
\item\textsuperscript{105} See id. at 429–33.
\item\textsuperscript{107} Id.
\item\textsuperscript{108} See id. § 302.
\end{itemize}
"a franchising authority . . . may not unreasonably refuse to award an additional competitive franchise." The FCC noted that "the current operation of the local franchising process [is] . . . an unreasonable barrier to entry." In its comments to the FCC, Verizon characterized the franchising process as "arcane," "inattentive," and "unresponsive." In its Notice of Proposed Rulemaking, the FCC sought comment on three principle issues: (1) whether LFAs are using unreasonable franchising practices that prevent competition; (2) whether the FCC has the authority to implement section 621(a)(1); and (3) how the FCC should implement section 621(a)(1).

The Commission made several tentative conclusions regarding its authority to implement section 621(a)(1). First, the Commission acknowledged the authority of states and localities to award franchises; however, any laws or provisions that constitute an unreasonable denial of a franchise would be deemed preempted by federal law. Second, Congress authorized the FCC to implement rules "to ensure that the local franchising process does not unreasonably interfere with the ability of any potential new entrant to provide video programming to consumers." Third, while section 635 created a judicial remedy for any unreasonable denials, the Commission had the authority to

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110 Id. ¶ 5.

111 In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Comments of Verizon on the Status of Competition in the Video Marketplace, MB Docket No. 05-255, at 8 (Sept. 19, 2005) (accessible via FCC Electronic Comment Filing System). Verizon further noted 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." Id. at 12.

112 See 2005 NPRM, supra note 109, ¶¶ 12–14 (soliciting comment on the "current environment in which would-be new entrants attempt to obtain competitive cable franchises"); see also id. ¶ 1 (soliciting comment on the "implementation of Section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises, and whether the franchising process unreasonably impedes the achievement of the interrelated federal goals of enhanced cable competition . . . and, if so, how the Commission should act to address that problem").

113 See id. ¶ 15. (soliciting comment on the "tentative conclusion that the Commission is authorized to implement Section 621(a)(1) as amended").

114 See id. ¶¶ 19–24.

115 See id. ¶ 15 ("[W]e recognize that Section 636(a) states that '[n]othing in this title 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.").

116 Id.

117 Id. ¶ 16.
provide aggrieved parties with administrative remedies outside of federal courts. 118

The Commission next sought comment on how best to enforce section 621(a)(1). It "tentatively concluded 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."119 The Commission proposed several types of rules to enforce section 621(a)(1), including rules governing the franchising process, guidelines, or best practices, and time frames for considering applications.120 The Commission also sought comment on whether build-out requirements, often cited as obstacles by those seeking to enter the cable market,121 created unreasonable barriers to entry.122

B. The New Order and Its Limitations

In late 2006, the Commission released its Report and Order and Further Notice of Proposed Rulemaking ("Order"),122 concluding that the current franchising procedures constituted an unreasonable barrier to entry of the cable market.124 To address this problem, the Commission adopted rules that set forth what would be considered an "unreasonable refusal."125 In doing so, the Commission found that "an LFA's failure to issue a decision on a competitive application within [a set] time frame . . . specified herein constitutes an unreasonable refusal."126 If an applicant has authority to access public rights of way, the LFA has ninety days to rule on the application, otherwise, the LFA has six

118 See id. ¶ 17.
119 Id. ¶ 19 (noting examples of what procedures and requirements could be unreasonable, which included "creating unreasonable delays in the process" and "imposing unreasonable regulatory roadblocks.").
120 See id. ¶ 21.
122 See 2005 NPRM, supra note 109, ¶ 23.
123 2006 Franchising Order, supra note 5. The Further Notice of Proposed Rulemaking, which sought comment on whether to extend these rules to incumbent cable providers, is not discussed in this Comment.
124 Id. ¶ 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.").
125 Id.
126 Id. ¶ 5.
months. An LFA’s failure to act within the specified time constitutes as “unreasonable refusal” and the application is deemed granted on an interim basis, thereby allowing the applicant to either begin providing service or begin building-out its network.

Next, the Order addressed the unreasonable demands on the part of LFAs during franchise negotiations. The Commission acknowledged that certain build-out requirements serve as barriers to entry, and therefore found that an LFA’s denial of a competitive franchise, based on an applicant’s refusal to comply with build-out requirements, may be unreasonable. The Commission also elaborated on which fees and compensation are included within the five-percent cap on franchise fees and asserted that any refusal inconsistent with these rules would be considered an unreasonable refusal. The Commission held that LFAs cannot require unreasonable numbers of PEG channels, and that any refusal based on these demands would also be unreasonable. Lastly, the Order preempted any inconsistent local laws.

IV. THE LEGALITY AND POLICY OF THE FCC RULES

A. Are the FCC Rules Legal?

A challenge of administrative action contains three principal legal issues. First, localities will challenge the FCC’s statutory authority to implement section 621. Second, a court will have to determine what, if any, deference should be given to the FCC’s interpretation of the phrase “unreasonably refuse.” Finally, localities will argue that despite the FCC’s authority to regulate, its regulations are nonetheless arbitrary or capricious.

127 Id. ¶ 67.
128 Id.
129 Id. ¶ 87.
130 See id. ¶ 94. The Commission reiterated that the five-percent cap applies only to revenues from cable service. For example, if a cable operator also provides Internet service, those revenues are excluded from the fee calculation. The Order also clarified that any other charges that are not incidental to the franchising process, as well as any in-kind payments, are included in the franchise fee. Id. ¶¶ 99–109.
131 See id. ¶ 110. (“However, pursuant to Section 621(a)(1), we conclude that LFAs may not make unreasonable demands of competitive applicants for PEG and I-Net and that conditioning the award of a competitive franchise on applicants agreeing to such unreasonable demands constitutes an unreasonable refusal to award a franchise.”).
132 See id. ¶ 125.
1. The Statutory Authority to Implement Section 621(a)(1)

In City of New York v. FCC, the Supreme Court provided the proper framework for determining whether an agency is acting within its statutory authority by stating that "the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action." To make such a conclusion, a court must determine whether the FCC is operating within its statutory authority by examining the text of the statute and the legislative history.

a. The Text of the 1992 Cable Act

The 1992 Cable Act enacted four important changes to the general franchise requirements. First, it added an exception stating that "a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." Second, the statute mandated that the franchising authority allow a cable system a reasonable amount of time to begin to provide cable service to households in the entire franchise area. Third, the franchise requirements permitted an LFA to require PEG channel capacity. Finally, the statute provided a judicial remedy for any applicant whose application had been denied by a final decision.

The FCC maintains that section 621(a)(1) directly empowers it to ensure that franchise applications are not unreasonably refused. The FCC's authority was affirmed in City of Chicago v. FCC, when the Seventh Circuit rejected

134 See id. at 66.
136 See § 621(a)(4). The relevant portion of the statute reads:

In awarding a franchise, the franchising authority—(A) 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; (B) may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; and (C) may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.

Id.

137 See id.
138 See § 621(a)(1).
139 See 2006 Franchising Order, supra note 5, ¶¶ 53–64 ("[W]e 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.").
the claim that the FCC did not have regulatory authority over section 621, as codified at 47 U.S.C. § 541.\footnote{City of Chicago v. FCC, 199 F.3d 424, 428 (7th Cir. 1999).} In doing so, the court stated, "that the FCC is charged by Congress with the 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 . . . ."\footnote{Id. (citations omitted).} Although City of Chicago concerned the FCC’s interpretation of the term “cable operator” under sections 602 and 621(b)(1) of the Cable Act, this reasoning directly supports the conclusion that the FCC has authority to implement section 621(a)(1), and specifically, to interpret the phrase “unreasonable refusal.”

Section 201(b) of the Communications Act grants the FCC authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.”\footnote{47 U.S.C. § 201(b) (2000). The phrase “this chapter” was originally “this Act,” which referred to the Communications Act of 1934. Id.} As section 621(a)(1) is a provision of the Communications Act, it follows that the FCC has rulemaking authority to promulgate rules necessary to implement the franchise requirements. The Supreme Court upheld the FCC’s general rulemaking authority under section 201 in AT&T Corp. v. Iowa Utilities Board.\footnote{See AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366 (1999).} The Court found that section 201(b) granted the FCC rulemaking authority over certain provisions of the 1996 Act, because they were subsequently added to the Communications Act.\footnote{See id. at 378–79 (Justice Scalia, speaking for the majority, stated that “the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act,’ which includes §§ 251 and 252, added by the Telecommunications Act of 1996.”).} Based on the Court’s holding, it follows that section 201(b) also grants the FCC authority to implement section 621(a)(1).

Despite the Court’s holding that section 201(b) granted the FCC general rulemaking authority over the Communications Act, some contend that such delegation does not extend to section 621, which pertains to the power of franchising authorities. Whereas section 624(e) explicitly grants the FCC rulemaking authority,\footnote{47 U.S.C. § 544(e) (2000) (stating that “the Commission shall prescribe regulations.”).} no parallel language exists in section 621.\footnote{See id. § 541(a)(1).} As the Supreme Court stated in AT&T, however, “[t]he fallacy in this reasoning is that it ignores the fact that § 201(b) explicitly gives the FCC jurisdiction” to carry out all the provisions of the Communications Act.\footnote{AT&T, 525 U.S. at 380.} Thus, it is clear that Congress granted the FCC the authority to regulate franchising requirements, regardless
of whether one views the FCC's authority as implicitly granted in section 621(a)(1) or explicitly granted in section 201(b).

Others argue that the judicial remedy granted the courts exclusive jurisdiction to determine whether an LFA unreasonably refused an application. The judicial remedy provision provides that:

Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision [to the courts] . . . for failure to comply with this subsection.148

Although the statutory language appears to grant jurisdiction to the courts, a closer examination of the exact language reveals otherwise. First, the FCC has been granted the authority to interpret the phrase "unreasonably refuse to award."149 Courts, on the other hand, have jurisdiction over an application that "has been denied by a final decision."150 The textual difference suggests that the two provisions govern different types of cases. The argument for judicial authority would be stronger if the passage read that an LFA must not unreasonably deny, or in the alternative, that the applicant may appeal if the application has not been awarded by a final decision. Congress intentionally used different wording, and to assume otherwise "violate[s] the long-settled principle of statutory construction that each word in a statutory scheme must be given meaning."151 Therefore, there is no reason to assume that the judicial remedy applies to both denials by final decision and an unreasonable refusal to award.

In the alternative, Congress may also have intended for the FCC and the courts to have concurrent jurisdiction. For instance, in ACLU v. FCC, the U.S. Court of Appeals for the District of Columbia held that the FCC and courts had concurrent jurisdiction in a franchise fee dispute despite the reference to a judicial remedy.152 Additionally, where Congress intended to designate an exclusive remedy in other provisions within the Communications Act, it did so explicitly. For example, section 255(f) states that "[t]he Commission shall have exclusive jurisdiction with respect to any complaint under this section."153 Therefore, based on statutory construction, the FCC properly concluded that "in the absence of an exclusivity provision in the statute, the Commission and

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149 See 2006 Franchising Order, supra note 5, ¶ 1.
150 47 U.S.C. § 541(a)(1) (stating that the appeal process is governed by section 18,555, Judicial Proceedings).
151 2006 Franchising Order, supra note 5 (citing Bailey v. United States, 516 U.S. 137, 146 (1995)) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").
152 ACLU v. FCC, 823 F.2d 1554, 1574 (D.C. Cir. 1987).
courts share jurisdiction." Overall, as section 621(a)(1) does not contain an exclusivity provision, at the very least, the FCC and courts have concurrent jurisdiction.

b. The Legislative History of the 1992 Cable Act

In addition to being consistent with the statutory language, the FCC's rule-making authority under section 621(a)(1) is consistent with the legislative history of the 1992 Cable Act. In its Report to Congress, pursuant to the requirements of the 1984 Cable Act, the FCC recommended that:

Congress amend the Cable Act to forbid local franchise authorities from unreasonably denying a franchise to applicants that are ready and able to provide service. Congress should also make it clear that local authorities may not pass rules whose intent or effect is to create unreasonable barriers to the entry of potential competing multichannel video providers.

In accord with the FCC recommendation, House Report 628 stated that, "consumers would benefit greatly from the existence of two competing cable systems operating in a given market." Similarly, Senate Report 92 asserted that "[t]he purpose of this legislation is to promote competition in the multichannel video marketplace." The legislative history acknowledged that some local authorities were unreasonably denying cable franchises, which discouraged cable competition. Thus, Congress intended to grant the FCC authority to regulate the franchising process in order to prevent the unreasonable refusal of franchise applications and enhance competition in the multichannel video marketplace.

Despite the language in the House and Senate Reports, some have disagreed with this evaluation of the legislative history. For example, in its comments to the FCC, the National Association of Telecommunications Officers and Advisors ("NATOA") relied on a district court's characterization of the 1992 Act's legislative history. In summarizing the legislative history, the court stated:

Notably, the Conference Committee on 1992 Amendments adopted the Senate Bill's version... rather than the House version. The House version contained a specific list

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154 2006 Franchising Order, supra note 5, at 5129 n.214.
158 Id. at 14; see also H.R. Rep. No. 102-628, at 27.
of "reasonable" grounds for denial. 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."^160 However, the Conference Committee did adopt some reasonable grounds for denial. In adopting the Senate provision on franchise requirements, the Conference Report stated that "[t]he conference agreement adds the provisions from Section 4 of the House amendment."^161 The court's failure to acknowledge the Conference Committee's amendment to the Senate provision resulted in the mischaracterization of the 1992 Cable Act's legislative history. Consequently, NATOA's reliance on the court's characterization of the legislative history is misguided.

2. The FCC's Interpretation is Entitled to Chevron Deference

The FCC's interpretation of the Cable Act will be upheld if the text of the Act is silent or ambiguous and the interpretation is reasonable in light of the statute. ^162 This two-step standard of review is based on the Supreme Court's holding in *Chevron U.S.A. v. Natural Resources Defense Council.* ^163 When undertaking judicial review of an agency's construction of a statute, the court must first determine "whether Congress has directly spoken to the precise question at issue."^164 When doing so, if Congress' intent is clear, then the court and the agency "must give effect to the unambiguously expressed intent of Congress."^165 If, however, Congress's intent is ambiguous, the court must question "whether the agency’s answer is based on a permissible construction of the statute."^166 If both of these requirements are satisfied, the court will give deference to the agency's interpretation. ^167

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161 H.R. REP. NO. 102-862, at 78 (1992), as reprinted in 1992 U.S.C.C.A.N. 1231, 1260 (Conf. Rep.) (emphasis added) (noting that section four of the House amendment specified that "franchising authorities may require applicants for cable franchises to provide adequate assurance that they will provide adequate public access, educational and governmental channels, and may require adequate assurance that the cable operator is financially, technically, and legally qualified to operate a cable system.").
162 *See* City of Chicago v. FCC, 199 F.3d 424, 429 (7th Cir. 1999).
164 *Id.* at 842
165 *Id.* at 843.
166 *Id.*
167 *See id.* at 843–44.
a. Chevron: Step One

The first step of Chevron involves a determination of whether the statute is silent or ambiguous.\(^{168}\) The relevant portion of section 621(a)(1) reads: "[a] franchising authority may award . . . 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."\(^{169}\) The D.C. Circuit has previously classified "reasonable" and "unreasonable" as ambiguous terms in the Communications Act.\(^{170}\) Although the statute provides examples of what LFAs may require of franchise applicants,\(^{171}\) these requirements are still subject to the limitation of reasonableness. Ultimately, the statute provides no guidance as to how to define the phrase "unreasonably refuse."

The legislative history also does not resolve the ambiguity. The House amendment, part of which was adopted, gave examples of when a refusal would be reasonable, such as a cable company not providing adequate PEG access.\(^{172}\) These provisions, however, imbue more ambiguities because there is no explanation as to how much PEG access is "adequate." As a result, the legislative history does not clarify the ambiguity created by the phrase "unreasonably refuse," and thus necessitates Chevron step two analysis.

b. Chevron: Step Two

The second step of Chevron is to determine whether the agency interpretation is reasonable and based on a permissible reading of the statute.\(^{173}\) Section 621 prohibits the unreasonable refusal of a franchise.\(^{174}\) The legislative history conclusively shows that this language was inserted to promote competition.\(^{175}\) Lengthy franchise negotiations increase the costs associated with a franchise application. This increased cost deters entry by potential cable operators, which in turn deters competition. It is reasonable to construe the statute as pro-

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\(^{168}\) Id. at 842.


\(^{170}\) See Capital Network Sys., Inc. v. FCC, 28 F.3d 201, 204 (D.C. Cir. 1994).

\(^{171}\) See 47 U.S.C. § 541(a)(4). For example, a franchising authority can require adequate PEG channel capacity and can require that applicants have sufficient financial, technical, and legal capabilities. Id.


\(^{173}\) Chevron, 467 U.S. at 843.


\(^{175}\) See H.R. REP. NO. 102-628, at 46.
hibiting excessive requirements and time frames by LFAs as this inhibits competition. The FCC’s rules that interpret “unreasonably refuse” are based on a permissible construction of the statute; therefore, courts must accept the FCC’s interpretation. Consequently, section 621 satisfies the Chevron step two requirement, and the FCC’s interpretation is entitled to judicial deference.

3. Arbitrary or Capricious

The appropriate standard of review for rules promulgated through informal rulemaking is “arbitrary and capricious” review. Regulations may be invalidated under the arbitrary and capricious standard “if they are not rational and based on consideration of the relevant factors.” The Supreme Court has noted that although this review is “searching and careful,” the court may not “substitute its judgment for that of the agency.” The analysis below will determine whether each of the 2006 regulations is arbitrary or capricious, that is, whether the rule is rational and based on the consideration of relevant factors.

a. Franchise Negotiation “Shot Clock”

The FCC’s determination that franchise negotiations lasting beyond ninety days constitute an “unreasonable refusal” is neither arbitrary nor capricious. One estimate found that the current franchising process delays entry of new providers by eight to sixteen months. BellSouth has commented that its franchise negotiations take an average of ten months. Verizon noted that out of

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176 Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (“If a statute is ambiguous, and if the implementing agency’s construction is reasonable, Chevron requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”).


179 Overton Park, 401 U.S. at 416.

180 See 2006 Franchising Order, supra note 5, ¶ 67.


more than one hundred franchise applications, LFAs had granted only ten within one year.\textsuperscript{183} Some cities have acknowledged that their franchise process takes from eight months to as long as three years.\textsuperscript{184} Additionally, most communities lack a second cable provider, which inherently demonstrates the problematic franchise process.\textsuperscript{185}

At first glance, the ninety-day time limit may seem arbitrary, however, several states that have expedited the franchising process have shown that a drawn-out franchising process is unnecessary. For example, Minnesota LFAs can grant an application in eight weeks.\textsuperscript{186} Similarly, utilizing the Texas statewide franchising process, Verizon was able to begin service forty-five days after submitting its application.\textsuperscript{187} Delays in the franchising process serve as a barrier to entry and prevent potential entrants from attempting to obtain a franchise. Decreasing the negotiation period likewise decreases the costs for potential entrants and, as a consequence, enhances competition. Considering how quickly these franchising authorities can grant applications, and the benefits that result from expedited entry, the ninety-day and six month limitations are not arbitrary.


\textsuperscript{184} See, e.g., In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer protection and Competition Act of 1992, Comments of the City of Chicago, MB Docket No. 05-311, at 4 (Feb. 13, 2006) (accessible via FCC Electronic Comment Filing System) (stating that its franchise process takes one year); In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer protection and Competition Act of 1992, Comments Submitted by the City of Indianapolis, MB Docket No. 05-311, at 8 (Jan. 24, 2006) (accessible via FCC Electronic Comment Filing System) (stating that its franchise process takes three years); In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer protection and Competition Act of 1992, Comments of Miami-Dade County, Florida, MB Docket No. 05-311, at 3 (Feb. 13, 2006) (accessible via FCC Electronic Comment Filing System) (stating that its franchise process takes eight months unless applicant causes delays).

\textsuperscript{185} 2006 Franchising Order, supra note 5, ¶ 19.


\textsuperscript{187} Reply Comments of Verizon, supra note 183, at 37–38.
b. Build-Out Requirements

The FCC’s new rules also proscribe unreasonable build-out requirements.\footnote{2006 Franchising Order, supra note 5, ¶¶ 87–91.} The Cable Act states that LFAs “shall assure that access to cable service is not denied to any . . . subscribers because of [their] income,”\footnote{47 U.S.C. § 541(a)(3) (2000).} and “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.”\footnote{Id. § 541(a)(4)(A).} This section does not, however, give LFAs authority to require build-outs to the entire cable area in every case.\footnote{In fact, the Conference Committee declined to adopt the universal build-out requirement in the House amendment. See H.R. REP. NO. 102-862, at 78 (1992), as reprinted in 1992 U.S.C.C.A.N. 1231, 1260 (Conf. Rep.).} Any build-out requirements remain subject to the reasonableness standard and the FCC has found many instances of unreasonable build-out requirements.\footnote{See 2006 Franchising Order, supra note 5, ¶¶ 89–90.}

Phone companies have commented that unreasonable build-out requirements are the greatest barriers to a competitive cable market.\footnote{See, e.g., In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Comments of Qwest Communications International Inc., MB Docket No. 05-311, at 2 (Feb. 13, 2006) [hereinafter Qwest Comments] (accessible via FCC Electronic Comment Filing System) (“It is Qwest’s experience that the primary obstacles to the robust development of competitive wireline cable television service are all focused around what are called ‘build-out’ requirements.”).} For example, in California, Verizon was required to build-out the entire franchise area before it could provide cable to a single community.\footnote{In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992, Comments of Verizon on Video Franchising, MB Docket No. 05-311, at 41 (Feb. 13, 2006) [hereinafter Verizon Comments] (accessible via FCC Electronic Comment Filing System).} Similarly, Qwest has withdrawn franchise applications due to the economic constraints of build-out requirements.\footnote{Qwest Comments, supra note 193, at 9–10.} Many level playing field requirements are also unreasonable.\footnote{See 2006 Franchising Order, supra note 5, ¶ 34.} These provisions require that a competitive cable operator build-out to the same area as the incumbent provider without guaranteeing the amount of market share that the incumbent provider was guaranteed.\footnote{See Qwest Comments, supra note 193, at 8. For example, the first entrant in a cable market is willing to build out to the entire geographic area because it is a monopoly and is entitled to the entire market share in that geographic area. A competitive entrant, however, is required to build-out the entire area, but is not guaranteed the same returns in market share. This makes most level playing field build-out requirements a barrier to entry. Id.} In its 2006 franchising order,
the FCC cited several economic studies outlining the harm to competition caused by build-out requirements. Ultimately, by deterring entry, the incumbent provider is given a "de facto exclusive" franchise, which is prohibited by the Cable Act. As competition was one of the hallmarks of the 1992 Cable Act and the reason for inserting the "unreasonably refuse" language, the FCC's rules prohibiting unreasonable build-out requirements are rational and are based on the consideration of relevant factors.

c. Franchise Fees

In response to the request of those providing comments, the FCC Order clarified how the five-percent franchise fee is calculated. Previously, the ambiguity of how the fee was calculated allowed LFAs to demand other forms of in-kind compensation and fees. Examples of in-kind compensation include: purchasing street lights, wiring all houses of worship, installing cell phone towers, subsidizing cell phone service for town employees, providing library parking at facilities, connecting traffic signals with fiber optics, and providing free wireless broadband. Examples of contributions that other companies have been required to provide include a scholarship fund and a pool and recreation center. The FCC explained that these forms of in-kind compensation and fees not incidental to the franchise application are to be included in the five-percent franchise fee calculation. In doing so, the FCC relied on several court decisions and the legislative history of the 1984 Cable Act.

The legislative history of the 1984 Act states that "lump sum grants not related to PEG access for municipal programs such as libraries, recreation de-

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198 2006 Franchising Order, supra note 5, ¶ 36.
199 Id. ¶ 40.
200 See, e.g., Verizon Comments, supra note 194, at 63.
201 2006 Franchising Order, supra note 5, ¶¶ 97–98.
202 Verizon Comments, supra note 194, at 57.
205 2006 Franchising Order, supra note 5, ¶¶ 104–05.
207 See 2006 Franchising Order, supra note 5, ¶ 103.
partments, detention centers, or other payments not related to PEG access would be subject to the 5 percent limitation.”208 The FCC also clarified that fees “incidental” to the franchise application are not counted toward the five-percent cap.209 In doing so, the FCC noted that attorney fees, consulting fees, and any fee in excess of the reasonable cost of processing the application are not “incidental.”210 As a result, these fees now count towards the five-percent franchise fee.211 The FCC’s clarification of the franchise fee is rational and based on relevant consideration and is, therefore, neither arbitrary nor capricious.

d. PEG Requirements

The FCC’s determination that unreasonable PEG requirements could constitute an unreasonable refusal of a franchise is neither arbitrary nor capricious. Telephone companies claim that LFAs are making unreasonable demands pertaining to PEG channel capacity,212 which in turn delay the franchising process and slow entry into the market.213 This is evident in the disparity in the cost of PEG facilities in different localities. In particular, one locality in Florida requested $6 million for PEG facilities, while another municipality in Massachusetts required 10 PEG channels when the incumbent provider only had two.214 The FCC addressed “the proper treatment of LFA-mandated contributions in support of PEG services and equipment.”215 In doing so, it found that PEG support is not subject to the five-percent cap and must be included in the franchise fee.216

The FCC’s limit on PEG requirements was appropriate. LFAs are only permitted to require an “adequate” amount of PEG channel capacity.217 The record indicates that excessive PEG requirements delay the franchising process; therefore, the FCC rule limiting PEG requirements furthers the goal of cable competition. As a result, the FCC rule is rational and is neither arbitrary nor capricious.

209 2006 Franchising Order, supra note 5, ¶ 99.
210 Id. ¶ 103.
211 See id. ¶ 104.
212 See, e.g., Verizon Comments, supra note 194, at 65–66; FTTH Comments, supra note 203, at 36.
213 2006 Franchising Order, supra note 5, ¶ 46.
216 Id.
In summary, Congress delegated authority to the FCC to implement Section 621(a)(1) of the Cable Act. Courts considering this provision should apply *Chevron* deference. The FCC’s interpretation of “unreasonably refuse” is reasonable in light of the ambiguous nature of the statute. Finally, the rules promulgated by the FCC are rational and are based on the consideration of relevant factors; therefore, they are neither arbitrary nor capricious.

B. Are the FCC Rules Good Policy?

1. *FCC Rules as Pro-Competitive Economic Policy*

   *a. Economic Effects*

   Cable rates have nearly doubled since 1995. Several commentators have shown that local regulation contributes to a lack of competition, and thus higher cable rates. For example, one article showed that franchise regulation costs consumers $8.4 billion annually and greater competition could save each consumer an average of $86 per year. It concluded, “[f]ranchise regulation may not be the only barrier to entry that new video competitors face, but most evidence suggests that it is a significant one.”

   The anti-competitive nature of build-out requirements can also be seen in a computer-based simulation to test the economic effects on three specific situations. The first situation involved a locality with no build-out requirements, otherwise known as free entry. In this case, a cable firm would provide cable to the number of households that maximizes profit, which would likely be less than the entire geographic area. Here, some consumers would benefit from more competition, more output, and lower prices. In the second situation, a firm chose to operate cable in a locality with a build-out requirement.
was found to be the most optimal situation for consumers because it yielded maximum competition, output, and price reduction. The third situation envisioned build-out requirements that were so burdensome that the firm chose not to enter the market. This was found to be the worst situation for consumers. The article concluded that the first situation was best overall. Although the second situation was best for consumers, the simulation found that firms would only enter a market with a build-out requirement about twenty-three percent of the time. While acknowledging that build-out requirements may be well intentioned, the article concluded that they are a "risky gamble."

As a pure economic question, there is strong evidence that the current regulatory system inhibits cable competition. The increased costs imposed by franchise fees, excessive PEG requirements, and impractical build-out requirements deter entry into the market. By limiting these excessive requirements and streamlining the franchise process, the FCC has spurred competition, which should ultimately lead to lower cable rates for consumers.

b. State Action

Several states have streamlined their cable franchising process in order to enhance competition and speed broadband deployment. California adopted a statewide franchising system in 2006. Under its system, a cable provider submits a franchise application to the Public Utilities Commission ("PUC") and can begin operating cable service within fourteen days of submitting an application. If the PUC has not ruled on the application within forty-four days, the application is deemed granted. The California law also grants cable

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226 Id. at 214.
227 Id. at 212. ("Because of the build-out rule, the entrant must construct a larger network to serve all H homes, instead of the h* homes it otherwise would have chosen. Making the entrant build a larger network will reduce its gross profits and raise entry costs.").
228 Id. at 214.
229 Id. at 215.
230 Id. at 214-16, 224 ("Our benchmark simulation [] shows that a universal build-out rule has the effect of the entrant bypassing entire communities (77% of the communities in particular.").
231 Id. at 225 ("[A] build-out rule, in fact, creates a tremendous disincentive for a new entrant to invest and is likely to result in entire communities being bypassed.").
233 See id. § 5840(h)(2).
234 Id. § 5840(h)(4) ("The failure of the commission to notify the applicant of the completeness or incompleteness of the application before the 44th calendar day after receipt of an application shall be deemed to constitute issuance of the certificate applied for without further action on behalf of the applicant.").
operators significant flexibility with regard to PEG channel capacity. For example, if a PEG channel does not have more than eight hours of programming per day, the cable operator may choose not to transmit the channel.\footnote{\textit{Id.} § 5870(e).} Texas has also adopted a statewide franchising authority.\footnote{\textit{See} 2 \textit{Tex. Util. Code Ann.} § 66.001 (Vernon Supp. 2006). ("The commission shall be designated as the franchising authority for a state-issued franchise for the provision of cable service or video service.").} Similar to the California law, the Texas authority is required to rule on the franchise application within seventeen days.\footnote{\textit{Id.} § 66.003(b).} Cable operators in Texas are also given significant flexibility in terms of build-out requirements and PEG channels. For example, "[t]he holder of a state-issued certificate of franchise authority shall not be required to comply with mandatory build-out provisions."\footnote{\textit{Id.} § 66.007.} Cable operators are also required to carry as many PEG channels as the incumbent provider in that municipality.\footnote{\textit{Id.} § 66.009(b).} If there are no PEG access channels, however, the number of PEG channels is capped at three for large municipalities, and two for smaller ones.\footnote{\textit{Id.} § 66.009(c).} A study conducted on behalf of the Fiber-to-the-Home Council found that fiber optic video in Texas has grown eight times faster than the rest of the country.\footnote{\textit{Fiber-to-the-Home Council, Study of the Effects of the Texas State-Issued Video Franchise Law on Fiber to the Home Deployments and Video Competition 3 (2006) [hereinafter FTTH Study], available at http://www.ftthcouncil.org/documents/958275.pdf.}} The study concluded that the passage of the Texas franchising law significantly influenced the high growth rate.\footnote{\textit{Id.} at 14.}

As seen in Texas and California, there is a general trend in policy towards streamlining the franchising process. In light of this trend, the FCC rules should be characterized as a positive step towards competition and lower cable rates. Greater competition in the cable market is not only a goal of the federal government, but is also a goal of state legislatures across the nation.

2. Effect on Local Control

There are, however, several strong arguments against the new rules, the strongest being its effect on local control. Supporters of the new cable franchising rules make strong economic-based arguments for streamlining the franchising process; however, the argument for maintaining local control is not an eco-
One of the goals of the Cable Act is to "assure that cable systems are responsive to the needs and interests of the local community." The new rules undermine this congressionally mandated purpose by "limiting the authority of a local government to determine how its community places value on its right of ways in exchange for video service."  

In addition to being arbitrary, time limits give franchise applicants incentive to negotiate in bad faith. A franchise applicant can choose not to submit to any LFA requirements and wait for the 90-day time limit to expire. At that point, the LFA is forced to either grant or deny the application without any substantive negotiation. The new rules also prohibit some PEG demands. For example, LFAs cannot require more PEG channels than the incumbent provider, which is inconsistent with the purpose of maintaining local control. NATOA has commented that Congress intended for PEG requirements to differ between communities because they are based on each community’s needs. Build-out requirements are essential to providing cable to as many citizens as possible; however, most communities do not require applicants to build-out beyond a certain household density limitation. Build-out requirements are not a barrier to entry unless the “business plans are to provide new service only to selected demographic neighborhoods of a community, leaving less lucrative neighborhoods in the community only with a lesser, second-class form of service, or no service at all.”

The final argument in favor of local control is political accountability. LFAs are politically accountable to their localities, whereas the FCC is not. If local representatives are being unreasonable, constituents have the ability to

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243 See NATOA Comments, supra note 159, at 30 (“While Verizon’s preference is certainly understandable from its business point of view, . . . Verizon’s complaints about supposed ‘delay’ in the franchising process are thus, in many respects, really a complaint about the local community needs-based model of franchising that is one of the cornerstones of the Cable Act.”).


245 Harris & Chester, supra note 22.

246 See NATOA Comments, supra note 159, at 36. (“[A] deadline to act and a ‘deemed granted’ effect of inaction also would provide franchise applicants with an affirmative incentive to delay applying for the required local franchise until the last minute.”).

247 Id. at 36.

248 See id.

249 2006 Franchising Order, supra note 5, ¶ 120.

250 NATOA Comments, supra note 159, at 34.

251 Id. at 33.

252 Id. at 34.

253 Id. at 23 (“LFA franchising decisions are made by elected legislative bodies—city councils, county councils and commissions, and town councils. As such, LFAs are accountable, and must be responsive, to the desires of their electorates. And the Commission can rest assured that LFAs’ constituents want competition in cable service.”).
change their local representatives. They cannot change the FCC Commissioners.

The 1992 Cable Act mandates that the franchising process be receptive to local needs. Local control ensures that cable service is delivered in a non-discriminatory fashion and contains sufficient local educational programming. It is true that one of the hallmarks of the Cable Act is maintaining local control over franchising so as to best suit the needs of localities. However, another equally important goal is competition. Under the new FCC rules, the loss in local control is marginal while furthering the important congressional goals of incentivizing competition and broadband deployment.

Proponents of local control argue that ninety days is arbitrary; however, it could be argued that ninety days is arbitrarily too long. Currently, it takes less than two months for a franchise applicant to obtain a statewide franchise in California and less than one month in Texas. There is no need for the negotiations to last longer than three months for one locality. Additionally, it is unlikely that the ninety-day shot clock gives applicants an incentive to unilaterally reject LFA requests and negotiate in bad faith. If an applicant negotiated in bad faith, it would be hard to argue that the LFA was being unreasonable. Studies show that build-out requirements are perhaps the greatest barrier to entry. Relaxing these requirements allows greater entry, which should reduce prices for at least some cable subscribers. Once in the market, cable operators can assess the market and build-out accordingly. While some may worry that cable operators will only build-out to wealthier communities, LFAs have the authority to deny those applications under the anti-redlining provision of the Cable Act.

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255 Id. (stating that the purpose of the Cable Act 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.”).
256 See discussion supra Part IV.B.1.b.
257 See discussion supra Part III.B.
258 See Qwest Comments, supra note 193, at 9–10.
259 See 2006 Franchising Order, supra note 5, ¶ 45 (“[N]ew 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.”); see also id. ¶ 89 (“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.”).
260 NATOA Comments, supra note 159, at 34.
261 See 47 U.S.C. § 541(a)(3) (2000) (“[A] franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because
The political accountability argument is also flawed. Many localities still have a monopoly cable provider with cable rates rising. To say that LFAs are politically accountable is to say that constituents prefer higher cable rates. LFAs do not maintain the transparency of Congress or even state legislatures, thereby making them less politically accountable. It also bears noting that several politically accountable state legislatures have adopted statewide franchising.

3. The FCC Rules are Good Policy

Legal challenges aside, the FCC rules are sound policy. The FCC has increased the rate of growth in the cable market by putting a time limit on extensive franchise negotiations. The new rules limit franchise fees that are passed on to consumers. The rules proscribe unreasonable build-out requirements. This will encourage more entry into the market, increase competition, and reduce cable rates. States such as Texas and California have realized the benefit of a more streamlined franchising process.

The new rules do restrict local authority; however, the loss in local control is only marginal. LFAs can still require adequate PEG access and reasonable build-out requirements. It is still the goal of the Cable Act to have a franchising system that is responsive to local needs. If a franchise applicant negotiates in bad faith, refuses to provide adequate PEG access, or provides cable in a discriminatory way, LFAs have the statutory authority to deny those applications.

Additionally, the substantial economic benefits of the rules outweigh the loss in local authority, as illustrated by the study of broadband deployment in Texas. The Cable Act preserves local authority and ensures that the process is receptive to local needs; however, LFAs can no longer be unreasonable. The FCC has defined unreasonable in light of the substantial benefits to be gained by increased competition. These benefits include greater broadband deployment across the nation, increased competition, and lower cable rates.

V. CONCLUSION

The FCC rules are legally and economically sound. Congress delegated authority to the FCC to implement Section 621(a)(1) of the Cable Act, as amended. The FCC’s rules are neither arbitrary nor capricious, and deserve deference from the courts. The FCC rules also spur competition by streamlining the franchising process. This decreases negotiating costs and excessive of the income of the residents of the local area in which such group resides.”).
fees, PEG demands, and build-out requirements. Consumers will reap the benefits of more cable options at lower costs.

While this Comment argues that the FCC rules are both sound legal and economic policy, litigation is likely inevitable. Localities, cable companies, and telephone companies will spend millions of dollars to fight or support the FCC rules. There are two appropriate solutions to this problem: Congressional action or state and local government action.

The most recent update of federal cable franchising procedures occurred fifteen years ago. It is time for Congress to re-clarify the respective roles of the FCC and LFAs. By adding telephone companies to the mix in the Telecommunications Act of 1996, Congress fundamentally reshaped the cable market. Yet, ten years since the passage of that Act, cable rates have doubled. Federal franchising law should be updated to account for the increase in potential market participants. Congress can resolve any ambiguities in the statute in order to allow competition to go forward free of litigation.

An alternative solution is for states and localities to continue to reform the franchising process themselves. This is the best solution to carry out the goals of the Cable Act. Similar to the FCC rules, state and local reform would spur broadband deployment, enhance competition, and lower cable rates. Unlike the FCC rules, however, state and local reform would remain receptive to local needs and would not get tied-up in litigation. States and localities should continue to reform their franchising procedures. If they do so, their constituents will enjoy greater broadband access and lower cable bills.