List of Subjects in 43 CFR Part 10

Administrative practice and procedure, Graves, Hawaiian Natives, Historic preservation, Indians—claims, Museums, Reporting and recordkeeping requirements, Repatriation.

■ In consideration of the foregoing, 43 CFR Subtitle A is amended as follows.

PART 10—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REGULATIONS

■ 1. The authority for part 10 continues to read as follows:

Authority: 25 U.S.C. 3001 *et seq.*

■ 2. Add § 10.13 to read as follows:

§ 10.13 Future applicability.

(a) General. This section sets forth the applicability of the Act to museums and Federal agencies after expiration of the statutory deadlines for completion of summaries and inventories.

(b) New holdings or collections.

(1) Any museum or Federal agency that, after completion of the summaries and inventories as required by §§ 10.8 and 10.9, receives a new holding or collection or locates a previously unreported current holding or collection that may include human remains, funerary objects, sacred objects or objects of cultural patrimony, must:

(i) Within 6 months of receiving a new holding or collection or locating a previously unreported current holding or collection, or within 6 months of the effective date of this rule, whichever is later, provide a summary of the holding or collection as required by § 10.8 to any Indian tribe or Native Hawaiian organization that is, or is likely to be, affiliated with the collection; and

(ii) Within 2 years of receiving a new holding or collection or locating a previously unreported current holding or collection, or within 2 years of the effective date of this rule, whichever is later, prepare, in consultation with any affiliated Indian tribe or Native Hawaiian organization, an inventory as required by § 10.9 of these regulations. Any museum that has made a good faith effort to complete its inventory, but which will be unable to complete the process by this deadline, may request an extension of the time requirements under § 10.9(f).

(2) Additional pieces or fragments of previously repatriated human remains, funerary objects, sacred objects and objects of cultural patrimony may be returned to the appropriate Indian tribe or Native Hawaiian organization without publication of a notice in the **Federal Register**, as otherwise required under §§ 10.8(f) and 10.9(e), if they do not change the number or cultural affiliation of the cultural items listed in the previous notice.

(3) A museum or Federal agency that receives a new holding or collection for which a summary or inventory was previously prepared, as required by §§ 10.8 or 10.9, may rely upon the previously prepared documents. The receiving museum or Federal agency must provide a copy of the previously prepared summary or inventory to all affiliated Indian tribes or Native Hawaiian organizations, along with notification that the receiving museum or Federal agency has assumed possession and control of the holding or collection.

(c) New Indian tribes.

(1) Any museum or Federal agency that has possession or control of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are, or are likely to be, culturally affiliated with a newly Federally recognized Native American tribe, must:

(i) Within 6 months of the publication in the **Federal Register** of the Native American group's placement on the list of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, or within 6 months of the effective date of this rule, whichever is later, provide a summary of the collection as required by § 10.8 to that Indian tribe; and

(ii) Within 2 years of the publication in the **Federal Register** of the Native American group's placement on the list of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, or within 2 years of the effective date of this rule, whichever is later, prepare, in consultation with the newly recognized culturally affiliated Indian tribe an inventory as required by § 10.9. Any museum that has made a good faith effort to complete its inventory, but which will be unable to complete the process by this deadline, may request an extension of the time requirements under § 10.9(f).

(2) The list of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs is published in the **Federal Register** as required by provisions of the Federally Recognized Indian Tribe List Act of 1994 [Pub. L. 103–454, 108 Stat. 4791].

(d) New Federal funds. Any museum that has possession or control of human remains, funerary objects, sacred objects, or objects of cultural patrimony and receives Federal funds for the first time after expiration of the statutory deadlines for completion of summaries and inventories must:

(1) Within 3 years of the date of receipt of Federal funds, or within 3 years of the effective date of this rule, whichever is later, provide a summary of the collection as required by § 10.8 to any Indian tribe or Native Hawaiian organization that is, or is likely to be, culturally affiliated with the collections; and

(2) Within 5 years of the date of receipt of Federal funds, or within 5 years of the effective date of this rule, whichever is later, prepare, in consultation with any affiliated Indian tribe or Native Hawaiian organization, an inventory as required by § 10.9.

(e) Amendment of previous decision.

(1) Any museum or Federal agency that has previously published a notice in the **Federal Register** regarding the intent to repatriate unassociated funerary objects, sacred objects, and objects of cultural patrimony under § 10.8(f), or the completion of an inventory of Native American human remains and associated funerary objects as required by § 10.9(e), must publish an amendment to that notice if, based on subsequent information, the museum or Federal agency revises its decision in a way that changes the number or cultural affiliation of the cultural items listed.

(2) Repatriation may not occur until at least 30 days after publication of the amended notice in the **Federal Register**.

(f) All actions taken as required by this section must also comply with all other relevant sections of 43 CFR 10.

Dated: March 6, 2007.

David M. Verhey,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E7–5113 Filed 3–20–07; 8:45 am]

BILLING CODE 4312–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 05–311; FCC 06–180]

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

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopts rules and provides guidance to implement section 621(a)(1) of the Communications Act. The Commission solicited and reviewed comments on this section and found

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. The Commission adopts measures to address a variety of means by which local franchising authorities are unreasonably refusing to award competitive franchises. The rules and guidance will facilitate and expedite entry of new cable competitors into the market for the delivery of video programming, and accelerate broadband deployment.

DATES: The rules in § 76.41 contains information collection requirements that have not been approved by OMB, subject to the Paperwork Reduction Act. The Federal Communications Commission will publish a document announcing the effective date upon OMB approval.

ADDRESSES: You may submit comments, identified by MB Docket No. 05–311, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Holly Saurer, *Holly.Saurer@fcc.gov* or Brendan Murray, *Brendan.Murray@fcc.gov* of the Media Bureau, Policy Division, (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order (Order),* FCC 06–180, adopted on December 20, 2006, and released on March 5, 2007. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. These documents will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Paperwork Reduction Act of 1995 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 will be invited to comment on the new information collection requirements contained in this proceeding. The Commission will publish a separate document in the **Federal Register** at a later date seeking these comments. 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 previously sought specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

Summary of the Report and Order

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''), 47 U.S.C. 541(a)(1), which prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services. 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. 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, 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. 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. 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. 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. 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, and accelerate broadband deployment consistent with our statutory responsibilities. 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.

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) of the Communications Act; (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 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'' as a ''cable operator'' 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, and subsection (a)(1) grants to franchising authorities the power to award such franchises.

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''), was to delineate the role of LFAs in the franchising process. 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.'' 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. In that Report, 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.''

8. In response, Congress revised Section 621(a)(1) through the Cable Television Consumer Protection and Competition Act of 1992 (the ''1992 Cable Act'') 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.*'' 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.

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.

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.'' 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.

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.'' 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. 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 for potential new cable entrants into the MVPD market. 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. 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 the number of: (a) LFAs in the United States; (b) competitive franchise applications filed to date; and (c) ongoing franchise negotiations. 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;
- Whether to establish a maximum time frame for an LFA to act on an application for a competitive franchise;
- 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;
- 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;
- 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; and
- Whether current procedures or requirements are appropriate for any cable operator, including incumbent cable operators.

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. Accordingly, the Commission sought comment on how it could best remedy any problems with the current franchising process.

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. 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.'' 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.

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. Some counties and municipalities have cable ordinances that govern the structure of negotiations, while others may proceed on an applicant-by-applicant basis. Where franchising negotiations are focused at the local level, some LFAs create formal or informal consortia to pool their resources and expedite competitive entry.

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. Verizon estimates, for example, that it will need 2,500–3,000 franchises in order to provide video services throughout its service area. AT&T states that its Project Lightspeed deployment

is projected to cover a geographic area that would encompass as many as 2,000 local franchise areas. BellSouth estimates that there are approximately 1,500 LFAs within its service area. Qwest's in-region territory covers a potential 5,389 LFAs. While other companies are also considering competitive entry, 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. 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. 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. 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.

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. In Louisiana, the Governor vetoed a bill that would have created a State franchise structure, provided for automatic grant of an application 45 days after filing, and contained no build-out requirements. In Maine, a bill that would have replaced municipal franchises with State franchises was withdrawn. 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.

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. Although LFAs adduced evidence that they have granted some competitive franchises, and competitors acknowledge that they have obtained some franchises, the record includes only a few hundred examples of competitive franchises, many of which were obtained after months of unnecessary delay. For example, Verizon has obtained franchises covering approximately 200 franchise areas. In the vast majority of communities, cable competition simply does not exist. 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 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. 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 Miami-Dade has granted 11 franchises to six providers, and currently is considering the application of another potential entrant. New Jersey has granted five competitive franchises, but only two ultimately provided service to customers.

20. The dearth of competition is due, at least in part, to the franchising process. 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. 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. 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 8–18 months. 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. Verizon noted that delays are often caused by mandatory waiting periods. BellSouth explained that negotiations took an average of 10 months for each of its 20 cable franchise agreements, and that in one case, the negotiations took nearly three years. 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. BellSouth notes that absent such demands (in Georgia, for example), the company's applications were granted quickly. Most of Ameritech's franchise negotiations likewise took a number of years. New entrants other than the large incumbent local exchange carriers (''LECs'') 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. 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).

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. We note that certain franchising authorities may have existing authority to regulate LECs through State and local rights-of-way statutes and ordinances. 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. Recognizing this distinction, some States have enacted or proposed streamlined franchising procedures specifically tailored to entities with existing access to public rights-of-way. 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, which would enable applicants to seek judicial review under Section 635. Rather, negotiations are often drawn out over an extended period of time. As a result, the record shows that numerous new entrants have accepted franchise terms they considered unreasonable in order to avoid further delay. Others have filed lawsuits seeking a court order compelling the LFA to act, which entails additional delay, legal uncertainty, and great expense. 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. Alternatively, some prospective entrants have walked away from unduly prolonged negotiations. 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.

25. Despite this evidence, incumbent cable operators and LFAs nevertheless assert that new entrants can obtain and are obtaining franchises in a timely fashion, and that delays are largely due to unreasonable behavior on the part of franchise applicants, not LFAs. 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 states that it is willing to negotiate and tailor the model franchise to each locality's needs. For example, Minnesota LFAs claim that they can grant a franchise in as little as eight weeks. The record, however, shows that expeditious grants of competitive franchises are atypical. Most LFAs lack any temporal limits for 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. 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. For example, a consolidated franchising authority in Oregon negotiated and approved competitive franchises within 90 days. An advisory committee in Minnesota granted two competitive franchises in six months, after a statutorily imposed eight-week notice and hearing period. While we laud the prompt disposition of franchise applications in these particular areas, the record shows that these examples are atypical. For example, the cities of Chicago and Indianapolis acknowledged that, as currently operated, their franchising processes take one to three years, respectively. 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.

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. 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. 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. 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. 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 demonstrates 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 would make little sense if they were not planning to enter the video market. 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.

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. 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. 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.

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. 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. 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 demonstrate that new entrants can and do obtain competitive franchises in a timely manner. 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. 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. 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. Comcast argues that it faces competition from cable overbuilders in several markets. 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. 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. Large incumbent LECs, small and mid-sized incumbent LECs, competitive LECs 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, urge the Commission to address this aspect of the current franchising process in order to speed competitive entry.

32. The record demonstrates that build-out requirements can substantially reduce competitive entry. Numerous commenters urge the Commission to prohibit LFAs from imposing any build-out requirements, and particularly universal build-out requirements. 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. 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.

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. Furthermore, Qwest has withdrawn franchise applications in eight communities due to build-out requirements. In each case, Qwest determined that entering into a franchise agreement that mandates universal build-out would not be economically feasible.

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. 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.

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. 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. For example, Verizon has expressed significant concerns about deploying service in areas heavily populated with MDUs already under exclusive contract with another MVPD. 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.

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. Non-profit research organizations the Mercatus Center and the Phoenix Center argue that build-out requirements reduce consumer welfare. Each conclude that build-out requirements imposed on competitive cable entrants only benefit an incumbent cable operator. 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. The Phoenix Center study contends that build-out requirements deter entry and conflict with Federal, State, and local government goals of rapid broadband deployment. 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. 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. In many instances, placing build-out conditions on competitive entrants harms consumers and competition because it increases the cost of cable service. 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. 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. 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 providers for every household. In many cases, build-out requirements may have precisely the opposite effects—they deter competition and deny consumers a choice.

37. 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. In some cases, a potential new entrant's service area comprises only a portion of the area under the LFA's jurisdiction. 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. 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. For example, some wire center service areas may encompass a disproportionate level of business locations or multi-dwelling units (''MDUs'') with MVPD exclusive contracts. 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 provide service in low-density areas. New entrants argue that the imposition of build-out requirements in either circumstance creates a disincentive for them to enter the marketplace.

38. Incumbent cable operators assert that new entrants' claims are exaggerated, and that, in most cases, LEC facilities are coterminous with municipal boundaries. 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. The cable industry has adduced no contrary evidence. The fact that few LFAs argued that non-coterminous boundaries are a problem is not sufficient to contradict the incumbent LECs' evidence.

39. 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, 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.

40. Besides thwarting potential new entrants' deployment of video services and depriving consumers of reduced prices and increased choice, 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.'' We agree with AT&T that Section 706, in conjunction with Section 621(a)(1), requires us to prevent LFAs from adversely affecting the deployment of broadband services through cable regulation.

41. 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.

42. *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; the *Wall Street Journal* reported that Verizon also faced a request for a video hookup for Christmas celebrations and video cameras to record a math-tutoring program. In Maryland, some localities conditioned a franchise upon Verizon's agreement to make its data services subject to local customer service regulation. 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. FTTH 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. 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. 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.

43. *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. 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), 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. Other LFAs have requested consultant and attorneys' fees. Several Pennsylvania localities have requested franchise fees based on cable and non-cable revenues. Some commenters assert that an obligation to provide anything of value, including PEG costs, should apply toward the franchise fee obligation.

44. 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. 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.

45. *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 support PEG and I–Nets. 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. LFAs have demanded funding for PEG programming and facilities that exceeds their needs, and will not provide an accounting of where the money goes. 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. 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. 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.

46. *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. 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. Some LFAs impose level-playing-field requirements on new entrants even without a statutory, regulatory, or contractual obligation to do so. 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. 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. NATOA contends, however, that

although level-playing-field provisions sometimes can complicate the franchising process, they do not present unreasonable barriers to entry. 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.

47. The record demonstrates that local level-playing-field mandates can impose unreasonable and unnecessary requirements on competitive applicants. 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. Comcast asserts that MSOs have not threatened litigation to delay franchise approvals, but to insist that their legal and contractual rights are honored in the grant of a subsequent franchise. 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. In most cases, incumbent cable operators entered into their franchise agreements in exchange for a monopoly over the provision of cable service. 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.

48. 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,'' the more compelling evidence indicates that they do not because they prevent competition. Local level-playing-field provisions impose costs and risks sufficient to undermine the business plan for profitable entry in a given community, thereby undercutting the possibility of competition.

49. *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. 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. 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.

50. We also conclude that broadband deployment and video entry are ''inextricably linked'' 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. The record demonstrates that broadband deployment is not profitable without the ability to compete with the bundled services that cable companies provide. 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 built to that household.'' DOJ's comments underscore that additional video competition will likely speed deployment of advanced broadband services to consumers. 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. 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.

51. In sum, the current operation of the franchising process deters entry and thereby denies consumers choices. Delays in the franchising process also hamper accelerated broadband deployment and investment in broadband facilities in direct contravention of the goals of Section 706, the President's competitive broadband objectives, and our established broadband goals. 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. We discuss below our authority to address these problems.

B. The Commission Has Authority to Adopt Rules to Implement Section 621(a)(1)

52. In the *Local Franchising NPRM*, the Commission tentatively concluded that it has the authority to adopt rules implementing Title VI of the Act, including Section 621(a)(1). The Commission sought comment on whether it has the authority to adopt rules or whether it is limited to providing guidance. 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).

53. 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 telephone, telegraph, cable, or radio.' '' 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.'' 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.'' ''[T]he grant in section 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.' '' 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. * * *'' 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.''

54. Section 2 of the Communications Act grants the Commission explicit jurisdiction over ''cable services.'' Moreover, as we explained in the *Local Franchising NPRM*, Congress specifically charged the Commission with the administration of the Cable Act, including Section 621. In addition, Federal courts have consistently upheld the Commission's authority in this area.

55. 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 indicate that Congress gave the courts exclusive jurisdiction to interpret and enforce Section 621(a)(1), including authority to decide what constitutes an unreasonable refusal to award a competitive cable franchise. 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. 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. 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.'' Other provisions in the Act demonstrate that when Congress intended to grant exclusive jurisdiction, it said so in the legislation. Here, however, neither Section 621(a)(1) nor Section 635 includes an exclusivity provision, and we decline to read one into either provision.

56. 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. 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.

57. 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. 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.'' 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. 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).

58. 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. 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. 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. 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. 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. While the judicial review provisions in Sections 621(a)(1) and 635 refer to a ''final decision'' or ''final determination,'' 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.

59. 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. Commenters point to the Conference Committee Report on the 1992 Amendments, which adopted the Senate version of Section 621, rather than the House version, which ''contained five examples of circumstances under which it is reasonable for a franchising authority to deny a franchise.'' 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. 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, to have the authority to do so. There is nothing in the statute or the 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).

60. 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.'' 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.'' In response, Congress revised Section 621(a)(1) to prohibit a franchising authority from unreasonably refusing to award an additional competitive franchise. The regulations set forth herein give force to that restriction and vindicate the national policy goal of promoting competition in the video marketplace.

61. 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.'' 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. 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. 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. As the DOJ points out, potential gains from competition, such as expedited broadband deployment, are more likely to be realized without imposed restrictions or conditions on entry in the franchising process.

62. 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. 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.'' 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, we received comments from both groups that agree that Commission guidance concerning factors that are ''reasonable'' will help to expedite the franchising process. 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.

63. 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. 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).

C. Steps To Ensure That the Local Franchising Process Does Not Unreasonably Interfere With Competitive Cable Entry and Rapid Broadband Deployment

64. 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) 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

65. As explained above, 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, 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.

66. 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. 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

67. 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. Other commenters propose time limits ranging from 30 days to six months. While NATOA in its comments opposes any time limit, in February 2006 a NATOA representative told the Commission that the six-month time limit that California law imposes is reasonable. 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.

68. 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. 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. 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. 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. 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.

69. 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. 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. Recognizing this distinction, some States have created streamlined franchising procedures specifically tailored to entities with existing access to public rights-of-way. Second, 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. 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. 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. 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. 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.

70. 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. 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. 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. An LFA should be able to 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, 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.

71. 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. 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.

72. 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, 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, provided that a final decision is made within the time period established under this *Order.*

b. Commencement of the Time Period for Negotiations

73. 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. 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 or a proposed agreement. 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. Specifically, the company advocates starting the clock when the applicant initiates negotiations with the LFA, which could be documented informally between the applicant and the LFA or with a formal Commission filing for evidentiary purposes.

74. 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. 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

75. 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.

76. 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 service. 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. 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.

77. 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. 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.' '' 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.'' ''[T]he grant in section 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.' '' Section 2 of the Communications Act grants the Commission explicit jurisdiction over ''cable services.'' 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.

78. 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.'' 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 services. 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*.'' And the Commission granted interim franchises for cable services in areas where there was no other franchising authority.

79. 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. 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). 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.''

80. 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

81. As discussed above, build-out requirements in many cases may constitute unreasonable barriers to entry into the MVPD market for facilities-based competitors. Accordingly, we limit LFAs' ability to impose certain build-out requirements pursuant to Section 621(a)(1).

a. Authority

82. 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. 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.

83. 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.'' 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.

84. Our interpretation of Section 621(a)(4)(A) is consistent with relevant jurisprudence and the legislative history. The DC 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. 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 jurisdiction of the franchising authority.'' By declining to adopt this language, Congress made clear that it did not intend to impose uniform build-out requirements on all franchise applicants.

85. 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.'' 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.'') 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.'' The U.S. Court of Appeals for the District of Columbia

Circuit (the ''DC 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.

b. Discussion

86. 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. 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 service. Thus, a financial burden was placed upon the monopoly provider in exchange for the undeniable benefit of being able to operate without competition.

87. 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. 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. 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. 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.

88. 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. 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. 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. 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.

89. 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 forestall competition by placing substantial demands on competitive entrants.

90. 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

91. 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.'' 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).

92. 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. 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). 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. We note these suggestions but do not require them.

3. Franchise Fees

93. In response to questions in the *Local Franchising NPRM* concerning existing practices that may impede cable entry, 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. Such matters include not only the universe 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), 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. 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 an 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.

94. 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.

95. 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.'' 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.'' 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.'' 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.'' It has been established that certain types of ''in-kind'' obligations, in addition to monetary payments, may be subject 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.''

96. 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. 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. 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*, 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.

97. We clarify that a cable operator is not required to pay franchise fees on revenues from non-cable services. Advertising revenue and home shopping commissions have been included in an operator's gross revenues for franchise fee calculation purposes. 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.'' 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.'' 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.'' Although this decision related specifically to Internet access service revenues, the same would be true for other ''non-cable'' service revenues. Thus, Internet access services, including broadband data services, and any other non-cable services are not subject to ''cable services'' fees.

98. 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.'' 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. 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.

99. 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. 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. OPASTCO asserts that higher fees discourage investment and often will need to be passed on to consumers. Verizon also requests that we clarify that fees that exceed the cap are unreasonable.

100. AT&T argues that we should find unreasonable any fees or contribution requirements that are not credited toward the franchise fee obligation. AT&T also asserts that any financial obligation to the franchising authority that a provider undertakes, such as application or acceptance fees 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.

101. 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. 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.

102. 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.'' 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. 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. 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.'' 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. 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 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.''

103. 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. 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. For future guidance, LFAs and video service providers may look to judicial cases to determine other costs that should be considered ''incidental.''

104. 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, few parties provided specific details surrounding the in-kind payment demands of LFAs. 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. 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. 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. 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.

105. The Broadband Service Providers Association states that an example of a municipal capital requirement can include traffic light control systems. FTTH Council states that non-video requirements raise the cost of entry for new entrants and should be prohibited. As an example, FTTH 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. 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. 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.

106. 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. 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.

107. 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.'' Accordingly, any such requests for municipal projects will count towards the 5 percent cap.

108. 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. 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.'' 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 with the construction of PEG access facilities. 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. 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. Thus, for any franchise granted after 1984, this exemption from franchise fees no longer applies.

4. PEG/Institutional Networks

109. 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'' because this promotes important statutory and public policy goals. 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. 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). 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.* 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.

110. As an initial matter, we conclude that we have the authority to address issues relating to PEG and I–Net support. Some commenters argue that Congress explicitly granted the responsibility for PEG and I–Net regulation to State and local governments. 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. In response, Verizon claims that PEG requirements should extend only to channel capacity, and that LFAs can obtain other contributions only to the extent that they are agreed to voluntarily by the cable operator. Verizon also asserts that the record confirms that LFAs often demand PEG support that exceeds statutory limits.

111. 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.'' 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. 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.'' 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. We therefore conclude that ''adequate'' should be given its plain meaning: the term does not mean significant but rather ''satisfactory or sufficient.'' 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).

112. AT&T asserts that we should shorten the period for franchise negotiations by adopting standard terms for PEG channels. 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.

113. 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. We find that it is unreasonable for an LFA to impose on a new entrant more burdensome PEG carriage obligations than it has imposed upon the incumbent cable operator.

114. 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. 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.

115. 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. 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. 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.

116. FTTH Council, Verizon, and AT&T asked 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. AT&T and Verizon argue that Section 621(a)(4)(B) requires adequate facilities, not duplicative facilities. 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. 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.

117. 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. 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. Others agree that PEG interconnection is necessary to maximize the value of local access channels when more than one video provider operates in a community. 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. NATOA counters that AT&T's complaint regarding space mischaracterizes PEG studio requirements that exist in some franchises. 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.

118. We agree with AT&T, FTTH Council, Verizon, and others that completely duplicative PEG and I–Net requirements imposed by LFAs would be unreasonable. 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. 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.

119. 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. 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 operator to connect with the existing PEG feeds, with such costs borne by the OVS operator.

5. Regulation of Mixed-Use Networks

120. 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. 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. 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.

121. 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.'' 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. 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). 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 * * * .'' As discussed above, revenues from non-cable services are not included in the base for calculation of franchise fees.

122. In response to requests that we address LFA authority to regulate ''interactive on-demand services,'' 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. ''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 prescheduled by the programming provider.'' We do not address at this time what particular services may fall within the definition.

123. 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.''

D. Preemption of Local Laws, Regulations and Requirements

124. 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.

125. 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.* 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, 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.

126. 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.'' 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, the Commission 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. 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). 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.

127. The doctrine of Federal preemption arises from the Supremacy Clause, which provides that Federal law is the ''supreme Law of the Land.'' 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. 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. Second, preemption can be implied and can occur where Federal law conflicts with State law. 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.''

128. 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. 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. It is the Commission's job, in the first instance, to determine the scope of the subject matter expressly preempted by Section 636. 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. 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).

129. 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. 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.'' 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. The national policy of promoting a competitive multichannel video marketplace has been repeatedly reemphasized by Congress, the Commission, and the courts. 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. 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, limits on LFA's ability to impose build-out requirements, and limits on LFA collection of franchise fees, 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.

130. 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. 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,* the Commission can only preempt where it is given express statutory authority to do so. 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.'' Moreover, Section 621 expressly limits the authority of franchising authorities by prohibiting exclusive franchises and unreasonable refusals to award additional competitive franchises. Congress could not have stated its intent to limit local franchising authority more clearly. These provisions therefore satisfy any express preemption requirement.

131. 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. 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. As noted above, Congress charged the Commission with the task of administering the Communications Act, including Title VI, and the Commission has clear authority to adopt rules implementing provisions such as Section 621. Consequently, our rules preempt any contrary local regulations.

132. 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. 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.'' 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).

133. 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. The ''takings'' clause of the Fifth Amendment provides: ''[N]or shall private property be taken for public use, without just compensation.'' 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, but rather hold the public streets and sidewalks in trust for the public. As one court explained, ''municipalities generally possess no rights to profit from their streets unless specifically authorized by the State.'' Also, we note that telecommunications carriers that seek to offer video service already have an independent right under State law to occupy rights-of-way. 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. Because all municipal power is derived from the State, courts have held that ''a State can take public rights-of-way without compensating the municipality within which they are located.'' 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.

134. Moreover, even if there was a taking, Congress provided for ''just compensation'' to the local franchising authorities. 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. Congress enacted the cable franchise fee as the consideration given in exchange for the right to use the public ways. 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.'' 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. 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

135. Finally, LFAs maintain that the Commission's preemption of local governmental powers offends the Tenth Amendment of the U.S. Constitution. 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.'' In support of their position, commenters argue 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. Contrary to the local franchising authorities' claim, however, they have failed to demonstrate any violation of the Tenth Amendment. ''If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.'' Thus, when Congress acts within the scope of its authority under the Commerce Clause, no Tenth Amendment issue arises. Regulation of cable services is well within Congress' authority under the Commerce Clause. 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. 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. 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.'' 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.

136. 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; (2) allow an LFA to impose unreasonable build-out requirements on competitive franchise applicants; or (3) authorize or require a local franchising authority to collect franchise fees in excess of the fees authorized by law.

137. 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. We find 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. 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. 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.'' 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.'' 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

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. 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.

IV. Procedural Matters

138. *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 will be invited to comment on the new information collection requirements contained in this proceeding. The Commission will publish a separate document in the **Federal Register** at a later date seeking these comments. 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.''

139. 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.

140. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act, the Commission has prepared a Final Regulatory Flexibility Analysis (''FRFA'') relating to this *Report and Order.*

141. *Congressional Review Act.* The Commission will send a copy of this *Report and Order* 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).

142. *Additional Information.* For additional information concerning the PRA proposed information collection requirements contained in this *Report and Order,* contact Cathy Williams at 202–418–2918, or via the Internet to *Cathy.Williams@fcc.gov.*

Final Regulatory Flexibility Act Analysis

143. As required by the Regulatory Flexibility Act of 1980, as amended (''RFA'') an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the *Notice of Proposed Rulemaking* (''NPRM'') to this proceeding. 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.

Need for, and Objectives of, the Report and Order

144. 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''). Section 621 of the Communications Act prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services. 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 Rule Changes.

Summary of Significant Issues Raised by Public Comments in Response to the IRFA

145. 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.

146. 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 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.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

Entities Directly Affected By Proposed Rules

147. 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. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small government jurisdiction.'' In addition, the term ''small business'' has

the same meaning as the term ''small business concern'' under the Small Business Act. 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).

148. 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.

149. *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.'' As of 1997, there were approximately 87,453 governmental jurisdictions in the United States. 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

150. 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

151. 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 a small business size standard for this census category, which includes all such companies generating $13.0 million or less in revenue annually. 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. 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.

152. *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. The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995. 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.

153. *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.'' The Commission has determined that there are 67,700,000 subscribers in the United States. 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. Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, 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.

154. *Open Video Services.* Open Video Service (''OVS'') systems provide subscription services. As noted above, the SBA has created a small business size standard for Cable and Other Program Distribution. 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. Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, DC, 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

155. 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.'' 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. 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.

156. *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. According to Commission data, 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.

157. *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. According to Commission data, 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.

Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

158. The rule and guidance adopted in the Order will require de minimus additional reporting, recordkeeping, 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.

Steps Taken To Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

159. 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.

160. 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.

161. 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.

Report to Congress

162. 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. 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**.

V. Ordering Clauses

163. *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 is adopted.

164. *It is further ordered* that pursuant to the authority contained in 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 the rule changes. 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.

165. *It is further ordered* that the rules in § 76.41 contains information collection requirements that have not been approved by OMB, subject to the Paperwork Reduction Act. The Federal Communications Commission will publish a document announcing the effective date upon OMB approval.

List of Subjects in 47 CFR Part 76

Cable television, Television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 76 as follows:

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

■ 2. Add Subpart C to part 76 to read as follows:

Subpart C—Cable Franchise Applications

§ 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 paragraph (b)(5) of this section;

(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 paragraph (d) of this section, 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 paragraph (b) of this section.

(f) If after expiration of the time limit specified in paragraph (d) of this section a franchising authority denies an application, the competitive franchise applicant must discontinue operating under the interim franchise specified in paragraph (e) of this section 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 paragraph (d) of this section 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.

[FR Doc. E7–5119 Filed 3–20–07; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 070213033–7033–01; I.D. 031507D]

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher Processor Vessels Using Trawl Gear in the Bering Sea and Aleutian Islands Management Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by catcher processor vessels using trawl gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2007 first seasonal allowance of the Pacific cod total allowable catch (TAC) specified for catcher processor vessels using trawl gear in the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), March 17, 2007, through 1200 hrs, A.l.t., April 1, 2007.

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SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2007 first seasonal allowance of the Pacific cod TAC specified for catcher processor vessels using trawl gear in the BSAI is 18,555 metric tons (mt) as established by the 2007 and 2008 final harvest specifications for groundfish in the BSAI (72 FR 9451, March 2, 2007), for the period 1200 hrs, A.l.t., January 20, 2007, through 1200 hrs, A.l.t., April 1, 2007. See § 679.20(c)(3)(iii), § 679.20(c)(5), and § 679.20(a)(7)(i)(B).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS, has determined that the 2007 first seasonal allowance of the Pacific cod TAC specified for catcher processor vessels using trawl gear in the BSAI will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 17,705 mt, and is setting aside the remaining 850 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by catcher processor vessels using trawl gear in the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.