Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

To: The Commission

COMMENTS OF THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, ADVANCEMENT PROJECT, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (AFTRA), AMERICAN INDIANS IN FILM AND TELEVISION, ASIAN AMERICAN JUSTICE CENTER, ASIAN LAW CAUCUS, BLACK COLLEGE COMMUNICATION ASSOCIATION, CENTER FOR ASIAN AMERICAN MEDIA, FAIRNESS AND ACCURACY IN REPORTING, HISPANIC AMERICANS FOR FAIRNESS IN MEDIA, LABOR COUNCIL FOR LATIN AMERICAN ADVANCEMENT, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, LEADERSHIP CONFERENCE FOR CIVIL RIGHTS, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, NATIONAL ASSOCIATION FOR MULTI-ETHNICITY IN COMMUNICATIONS, INC., NATIONAL ASSOCIATION OF BLACK JOURNALISTS, NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, NATIONAL ASSOCIATION OF BLACK TELECOMMUNICATIONS PROFESSIONALS, NATIONAL ASSOCIATION OF HISPANIC JOURNALISTS, NATIONAL ASSOCIATION OF HISPANICS IN INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS, NATIONAL ASSOCIATION OF LATINO INDEPENDENT PRODUCERS, NATIONAL BAR ASSOCIATION, NATIONAL COALITION OF HISPANIC ORGANIZATIONS, NATIONAL COUNCIL OF CHURCHES, USA, NATIONAL INDIAN TELECOMMUNICATIONS INSTITUTE, NATIONAL INSTITUTE FOR LATINO POLICY, NATIONAL PUERTO RICAN COALITION, NATIVE AMERICAN PUBLIC TELECOMMUNICATIONS, OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC., PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, RAINBOW/PUSH COALITION, THE LINKS, INCORPORATED, AND WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS

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The Minority Media and Telecommunications Council *et al*. (collectively "MMTC") 1/ hereby submit these comments in response to the Commission's Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned docket. 2/

1/ These Comments reflect the institutional views of each of the parties and are not intended to reflect the views of any of their individual members, directors or advisors. Descriptions of each of the 33 parties herein are provided in the Appendix.

INTRODUCTION AND SUMMARY

MMTC strongly supports the *NPRM*'s tentative conclusion allowing Local Franchising Authorities ("LFAs") the latitude to "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." 3/

The Communications Act of 1934, as amended (the "Communications Act"), delegates to LFAs the power to assure that franchised cable operators serve subscribers at all income levels. 4/ As Commissioner Adelstein noted in his statement appended to the *NPRM*, Congress directed LFAs to prevent the scourge of economic redlining in order to promote the availability of competitive services. 5/ The Commission should conclude that the power to franchise competitive Multi-channel Video Programming Distributors ("MVPDs") includes the authority to implement protections against economic redlining similar to those imposed in connection with the franchising of incumbent MVPDs. Although it is reasonable for LFAs to take into account differences, such as non-overlapping service areas, that make it difficult for new entrants to deploy facilities in all of the areas previously covered by incumbents, new anti-redlining protections should essentially apply equally to incumbents and new entrants.

Adopting this tentative conclusion is the approach most consistent with the Communications Act, and makes good sense from a policy standpoint as well. Competitive cable and MVPD services are vital to low-income and minority consumers. Without LFA action, redlining is likely to persist in the video services and telecommunications markets, despite the

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2/ *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Notice of Proposed Rulemaking*, 20 FCC Rcd 18581 (2005) ("*NPRM*").

3/ *NPRM*, ¶20 (*quoting* 47 U.S.C. §541(a)(3)).

4/ 47 U.S.C. §541(a)(3).

5/ *NPRM*, Statement of Commissioner Jonathan S. Adelstein.

existence of clear evidence that minority and low-income households disproportionately consume MVPD services. To combat historical tendencies towards redlining, the Commission should defer to LFAs to assure that MVPD service is not denied to low-income and minority subscribers because of the income of the residents in the areas in which these groups of potential subscribers reside. The Commission should also ensure that telecommunications carriers fully appreciate how and to what extent minorities use and over-index in the use of telecommunications and MVPD services, since this information could help to break down the stereotypes and misperceptions that tend to increase the likelihood of redlining based on poor business judgment. Finally, to avoid delay in the rollout of competitive MVPD services, the Commission should develop and offer to LFAs anti-redlining best practices for use in local ordinances and franchise proceedings.

I. THE FCC SHOULD FACILITATE THE RAPID DEPLOYMENT OF COMPETITIVE CABLE AND MVPD SERVICES

Minority and low-income consumers stand to benefit significantly from increased MVPD competition. A multiplicity of service providers, each committed to serving subscribers at all socio-economic levels in a local community, holds out the promise of lower prices, better service quality, and more diversity in terms of programming content and programming ownership. Each of these benefits is particularly relevant to the needs of low-income and minority consumers.

The availability of telecommunications services is essential for the well being, economic development, and empowerment of any community. Just as basic telephone service varies substantially according to income and race, 6/ basic Internet access and access to

6/ In July 2005, telephone subscribership stood at 94.0%. However, it stood at 79.8% for households with annual incomes below $5,000, while the rate for households with incomes between $75,000 and $99,999 was 98.5%. Households headed by Whites had a penetration rate of 94.7%, while those headed by African Americans had a rate of 89.7% and those headed by

broadband and advanced services correlate with income level and race. Non-Hispanic Whites are about twice as likely as African Americans and Hispanics to have Internet access and broadband access in the home. 7/ Minority communities are often among the last to receive Internet and broadband access, which explains why a number of municipalities have expressed interest in construction of municipal Wi-Fi networks in cities throughout the United States. Minority consumers' interest in new video competition also stems in great measure from the role of television in advancing the "uninhibited marketplace of ideas."8/

Fair competition, and increased access to service work to alleviate service disparities, ameliorate programming content bottlenecks, and make services more affordable. Thus, unwarranted franchising delays - unless occasioned by an LFA's genuine need to protect

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Hispanics had a rate of 89.1%. FCC Wireline Competition Bureau, Industry Analysis and Technology Division, "Telephone Subscribership in the United States" (November 2005). In Puerto Rico, telephone penetration is below 70%. *See Federal-State Joint Board on Universal Service; High-Cost Universal Service Support, Further Notice of Proposed Rulemaking*, FCC 05-205, ¶31 (December 9, 2005). A GAO study, using 2000 decennial census data, found penetration rates of about 69% for Native American households on tribal lands in the lower 48 states and of about 87% for Alaska Native villages. Government Accounting Office, "Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands" (January 2006), p. 8. Some tribal lands' penetration rates are reminiscent of third world countries (*e.g.*, the Kickapoo Traditional Tribe of Texas, with a penetration rate of 34%). *Id.*

7/ According to 2003 U.S. Census data, just 37% of Hispanics (age 3 and older) have Internet access, compared with 65% of non-Hispanic Whites. Broadband access has added another layer to the digital divide. 2003 U.S. Census figures also indicate that 14.2% of African Americans and 12.6% of Hispanics lived in broadband households, compared to 25.7% of Whites. *See* Robert W. Fairlie, "Are We Really a Nation Online? Ethnic and Racial Disparities in Access to Technology and Their Consequences," Leadership Conference on Civil Rights Education Fund, September 20, 2005, p. i.

8/ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). The Commission may wish to consider the effects of competitive video services on the prospects for entry and growth by minority and women video programmers, and for rendering moot much of the current debate over a la carte mandates. *See* James Gattuso, "Parents, Pricing, and TV Programming: The Competition Option," Heritage Foundation WebMemo #949 (December 21, 2005) (positing that if competitive entry were accelerated, "policymakers would boost competition and enhance prospects for increased consumer control over television content"). The participation of small businesses in the video services market is an appropriate subject for Commission examination attendant to its periodic review of market entry barriers. *See* 47 U.S.C. §257, under which a triennial report to Congress is due this year.

against redlining or to otherwise protect consumers – could have the effect of disadvantaging low-income and minority consumers. Many of the commenting parties herein, including the Minority Media and Telecommunications Council, help small telecom entrepreneurs raise capital, and thus appreciate that a wide gap in time between the day capital is drawn down and the day it becomes productively deployed tends to raise the cost of capital considerably beyond the net present value of the short term revenues that are foregone during the period of non-deployment. In extreme cases (although probably not to the extent feared by some new entrants) these higher capital costs could render new entry economically unsustainable or cause new entrants to expend their finite resources building out their services in some other community or state. 9/ These hidden side effects of construction delay increase prices and reduce programming choices across the board for consumers, and thus disproportionately impact low-income consumers – who are most in need of new choices of service providers.

The critical caveat – and the balance the Commission should strike - is that reasonable delays necessitated by an LFA's desire to protect against redlining are generally in the public interest. It should never be acceptable if competitive services are rapidly available, but not to the low-income families who need these services the most. America's poor should never be made to settle for 100% of nothing.

II. ALTHOUGH THERE ARE STRONG DISINCENTIVES TO TELECOMMUNICATIONS REDLINING, IT IS LIKELY TO CONTINUE TO OCCUR

Fifty years ago, redlining in telecom and every other aspect of our social and economic life was widespread. It isn't anymore. By 2005, the corporate culture of the

9/ There may be a tipping point at which a reasonably risk averse company will walk away from an opportunity to wire a community. Such a tipping point might be rather low where a new entrant's startup costs exceed the comparable costs of an incumbent or where anticipated customer take-up rates are low; it might be fairly high where the incumbent already has fiber in the ground. We do not know where this tipping point is and hope some of the other parties in this proceeding will address this question.

telecommunications industry had improved so much that the NAACP's Economic Reciprocity Initiative was able to award perfect (4.0) scores on "Service Deployment – Fair Testing/Fair Deployment" to five of the six telecommunications companies for which it had data: Alltel, BellSouth, Qwest, Sprint and Verizon. 10/ This impressive achievement owes much to internal corporate initiative and moral principle, to determined civil rights advocacy, and to FCC and state PUC regulation and oversight.

Indeed, some state and local units of telecommunications companies have adopted operating practices that actually make redlining virtually impossible: frequent longitudinal service deployment reporting directly to the CEO, coupled with tying executive compensation to equal service deployment. These practices were introduced by farsighted CEOs serving at Southwestern Bell-Missouri (now AT&T-Missouri) and at Verizon-D.C., and it is safe to assert that in those and some other telecom operations, redlining would now be simply unthinkable.

Yet despite the progress that has been made, the risk of redlining has not been eliminated. While taking note of progress in deployment of advanced services in the last five to six years, the Commission nonetheless has concluded that it is important to continue monitoring the availability of advanced services to low-income consumers and other groups - urban and rural - identified as vulnerable to not receiving timely access. 11/ In earlier proceedings examining the availability of advanced services, the Commission noted several barriers to access in low-income and inner-city neighborhoods – barriers such as poor quality telecommunications plant or inside wiring in multiple-tenant buildings, high subscription prices for advanced

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10/ NAACP Reciprocity Initiative, "2005 NAACP Consumer Choice Guide-Telecommunications," July 12, 2005.

11/ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, *Third Report*, 17 FCC Rcd 2844, 2884-85 ¶101 (2002).

services, lower computer ownership rates, and a lack of marketing to low-income populations by providers of advanced services. 12/ These barriers to obtaining service exist despite the fact that some of the poorest areas in large cities are located near advanced cable and telecommunications facilities deployed in order to serve adjacent business and industrial areas. 13/

These marketplace barriers still exist today, notwithstanding the strides that have been made in recent years in rolling out advanced services to low-income areas and in expanding service availability for minority populations. Furthermore, history has shown that these barriers will persist unless policy makers act to prevent redlining and other practices with the discriminatory effect of denying or diminishing the availability of service to these groups. 14/

Consequently, absent effective measures to prohibit the practice, redlining will very likely occur even in a competitive cable and video services market. This is true whether or not the practice of diminishing or denying service to low-income and minority populations is motivated by intentional discrimination or occurs simply as a result of economic short-sightedness. Redlining in the American economy and in the telecommunications sector has been with us for too long for the Commission to ignore the problem. The Commission must, therefore, conclude that it is eminently reasonable to allow LFAs to exercise the authority to prevent redlining granted to such LFAs by Section 621(a) of the Communications Act.

Since the depression of the 1930s, when the federal government created the Homeowners Loan Corporation and allowed that entity to use race and income as mechanisms to

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12/ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Second Report*, 15 FCC Rcd 20913, 21002 ¶239 (2000).

13/ *Id*.

14/ *See* Nate Anderson, "Municipal Broadband Deployment Set to Double in 2006," ARS TECHNICA (Jan. 27, 2006), *available at* http://arstechnica.com/news.ars/post/20060127-6064.html.

limit the disbursement of federally guaranteed housing loans, 15/ practices we would now regard as redlining have occurred in a multitude of economic and social venues. Affected civic activities and economic sectors include voting, 16/ school siting, 17/ lending, 18/ municipal services, 19/ land use, 20/ and insurance. 21/ By no means have these discriminatory practices been limited to those industries and activities. As the Commission is aware, broadcasting, 22/

15/ *See* Ira Katznelson, WHEN AFFIRMATIVE ACTION WAS WHITE 35-50 (2005).

16/ *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that gerrymandering that placed almost all minority voters from the City of Tuskegee outside of the city's newly drawn boundaries constituted a violation of due process, equal protection, and the right to vote as guaranteed by the Fifteenth Amendment).

17/ *See Swann v. Mecklenburg*, 402 U.S. 1 (1971) (upholding use of various measures to integrate school system and thereby end school siting and school construction practices previously used to perpetuate a dual, segregated system).

18/ See *United Cos. Lending Corp. v. Sargeant,* 20 F. Supp. 2d 192 (D. Mass. 1998) (upholding a state "reverse-redlining" statute preventing predatory lending to consumers in low-income areas).

19/ *See Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971) (holding that massive disparities in the provision of street lighting, sewer service, and road paving services resulted in a denial of equal protection to residents of African American neighborhoods deprived of such infrastructure).

20/ *See generally* Vicki Been, "Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?" 103 YALE L.J. 1383 (1994).

21/ *See McDiarmid v. Economy Fire and Ins. Co.*, 604 F. Supp. 105 (S.D. Ohio 1984) (citing the Fair Housing Act of 1968, 42 U.S.C. §§ 3601, 3604(a)). The *McDiarmid* court denied the defendant's motion to dismiss a redlining complaint, on the basis that plaintiff's ability to obtain housing was predicated on defendant's obtaining homeowner's insurance, and that the Fair Housing Act did not supersede a state law against redlining. *See* also *Dunn v. Midwestern Indemnity Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979) (holding that insurance redlining is outlawed by Section 804(a) of the Fair Housing Act).

22/ *See Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975) (holding that FCC was required to give some weight to possible public interest benefits afforded by minority ownership of station seeking license modification).

cable television, 23/ and municipally owned Wi-Fi networks 24/ have also been susceptible to redlining.

In telecommunications, redlining is the practice of building, upgrading, and providing telecommunications services more rapidly in affluent neighborhoods than in low-income neighborhoods. 25/ Factors correlated with income - such as race, household wealth, age and condition of the physical plant, genders of heads of households, rental or home ownership status, local crime rates, supposed creditworthiness, or the cost of obtaining and maintaining insurance in a particular area - could also serve as a basis or proxy for economic redlining.

Through the passage of the Cable Communications Policy Act of 1984 ("1984 Cable Act"), 26/ the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), 27/ and the Telecommunications Act of 1996 ("1996 Telecommunications Act") 28/, the federal government has created and refined a national policy against redlining in the provision of multi-channel video via cable. As noted above, the 1984 Cable Act amended the

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23/ *See, e.g.*, Southeast Fla. Cable, Inc. v. Martin County, 173 F.3d 1332, 1335 (11th Cir. 1999) (reinstating complaint of cable operator alleging, among other complaints, that LFA had allowed competing cable operator "to serve only select upper-income, high-revenue, low-cost residential communities and to deny service to lower income, high-cost areas of [the] County.")

24/ *See* Jonathan Krim, "New Orleans's New Connection; City-Owned Wi-Fi System To Be Announced Today," WASH. POST, November 29, 2005, reporting that the State of Louisiana restricted municipally funded Internet connection speeds to 144 kilobits per second, at the behest of telephone and cable companies. Interestingly, this article also contains a map of New Orleans showing that while BellSouth's DSL service has been built out throughout the city, the wireless Internet system owned by the City of New Orleans is being rolled out such that the first residential district to enjoy service is the high-income French Quarter, rather than the mostly low-income African American neighborhoods surrounding it.

25/ *See* Leslie Cauley, "Cable, Phone Companies Duke it out for Customers," USA TODAY, May 23, 2005, p. 1B.

26/ *See* Pub. L. No. 98-549, 98 Stat. 2779.

27/ *See* Pub. L. No. 102-385, 106 Stat. 1460.

28/ *See* Pub. L. No. 104-104, 110 Stat. 56.

Communications Act to make certain that "[i]n 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." 29/ As part of their original franchise agreements with MVPDs, many LFAs fashioned buildout schedules that require service to all sectors of the community as a way of satisfying the federal mandate to prohibit redlining. 30/

When enforcing laws against discrimination in lending and employment, courts historically have not required proof of discriminatory intent to establish that racial discrimination has occurred. In these instances, the courts have acknowledged that facially neutral policies or statutes can have discriminatory effects, and that intent is often difficult or impossible to prove. 31/ For example, in *Saldana v. Citibank*, 32/ a federal district court held that in order to establish a case of lending discrimination under the Fair Housing Act 33/ or the Equal Credit Opportunity Act, 34/ a plaintiff does not need to prove intent to discriminate on the part of the defendant. 35/ In the seminal equal employment case, *Griggs v. Duke Power Co*., 36/ the Supreme Court unanimously held that plaintiffs could establish a claim for employment

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29/ Section 621(a)(3) of the Communications Act, as codified at 47 U.S.C. §541(a)(3).

30/ Some buildout schedules may have been tailored as an obligation to be borne in exchange for the cable operator's opportunity to secure a first mover advantage.

31/ *See, e.g*., *Sheridan v. E.I. DuPont de Nemours and Co*., 100 F.3d 1061, 1071 (3d Cir. 1996) (*en banc*), *cert. denied*, 521 U.S. 1129 (1997) ("Cases charging discrimination are uniquely difficult to prove and often depend upon circumstantial evidence . . . . direct evidence of an employer's motivation will often be unavailable or difficult to acquire.")

32/ 1996 U.S. Dist. LEXIS 8327 (N.D. Ill. June 13, 1996).

33/ Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. §§3601–31.

34/ 15 U.S.C §1691.

35/ Saldana, 1996 U.S. Dist. LEXIS 8327 at *6.

36/ 401 U.S. 424 (1970).

discrimination under Title VII of the Civil Rights Act of 1964 by showing disparate impact alone. 37/ In the voting context, where the Supreme Court's decision in *City of Mobile v. Bolden* 38/ established an intent standard in voting rights discrimination cases, the intent requirement was discarded when City of Mobile was superseded by the 1982 Amendments to Section 2 of the Voting Rights Act. 39/

Courts have also found that seemingly innocuous and legitimate bases may serve as pretexts to perpetuate discrimination. In *McDonnell Douglas Corp. v. Green*, for example, the Supreme Court held that the plaintiff should have been entitled to establish that the defendant's stated reason for not rehiring him was pretextual. 40/ Pretextual bases for discrimination may include the purported following of human resources guidelines as justification for lay-offs, 41/ supposed poor work performance as a reason for terminating an employee, 42/ or alleged poor financial qualifications as a reason to deny loans. 43/ Plaintiffs may demonstrate that such bases

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37/ *Id*. at 432 ("Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.")

38/ 446 U.S. 55 (1980).

39/ *See* 42 U.SC. §1973.

40/ *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (holding that an employee was entitled to a fair opportunity at trial to show that the employer used his conduct as a pretext for racial discrimination).

41/ *See Beaird v. Seagate Tech*., 145 F.3d 1159 (10th Cir. 1998) (remanding the case to give plaintiff the opportunity to establish pretextual discrimination).

42/ *See Kocher v. Poe & Brown, Inc.*, 123 F. Supp. 2d 1337 (M.D. Fla. 2000) (holding that plaintiff should be given the opportunity to establish that the reason given by the defendant for firing him – namely, poor work performance – was pretextual, as the plaintiff had established a *prima facie* case for age discrimination); *see also Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004) (work performance as pretext for gender discrimination).

43/ *See Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 322, 336 (N.D. Ill. 1995) (holding that "to survive summary judgment on allegations that Citibank was redlining, Plaintiffs will need to produce evidence challenging Citibank's assertion that the loans were denied to African-American applicants who lived in predominantly African-American communities due to

for termination of employment or denial of services are tied to a discriminatory intent or have an impermissible disparate impact.

In view of this longstanding precedent, MMTC urges the Commission to recognize that evidence of discriminatory intent is not necessary to prove the existence of the type of redlining that Section 621(a)(3) authorizes LFAs to prevent. The purpose of anti-redlining protections is to prohibit economic discrimination and promote universal service, irrespective of the causes of unequal service. 44/ In the market for competitive cable and multi-channel video programming services, LFAs are empowered by Section 621(a)(3) of the Communications Act to assure that service is not denied to potential subscribers because of the income of residents in the area in they reside.

In the case of telecommunications services, it is likely that such redlining will occur, often using the income of residents in an area as a pretext to deny or delay services. Over the years, redlining has been practiced by ILECs, by CLECS, by cable, and even (in marketing and promotion) by wireless companies. 45/ Ironically, companies' reluctance to serve low-

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inadequate financial qualifications. Without such evidence neither the Court nor a jury could infer – on the basis of statistics alone – that Citibank engaged in discriminatory redlining. Therefore, financial qualifications, at least for the class representatives, are a prerequisite for injunctive relief.")

44/ *See* Leonard M. Baynes, "Deregulatory Injustice And Electronic Redlining: The Color Of Access To Telecommunications," 56 ADMIN. L. REV. 263, 269 (2004) ("Regardless of the decision makers' motivation, electronic redlining imperils certain communities because of their lack of access to quality telephone service.")

45/ An especially notorious example was uncovered by the Greenlining Institute and the Latino Issues Forum. After WorldCom promised the California State PUC that it would provide service to low-income and low-usage customers, WorldCom executives – at a September, 1998 "MCI WorldCom Launch Meeting" – "told their operatives that the newly-merged entity would be marketing only to upper-end, high value consumers, and that "through pricing minimums" WorldCom would "discourage low spending customers." *See* Response of Greenlining Institute and Latino Issues Forum to Motion of MCI WorldCom and Sprint to Withdraw Merger Application, Before the Public Utilities Commission of the State of California in re Request of MCI WorldCom, Inc. and Sprint Corporation for Approval to Transfer Control of Sprint Corporation's California Operating Subsidiaries to MCI WorldCom, Inc., Application No. 99-

income or minority customers may reflect service providers' misperceptions about the extent to which these customers index in the use of services. The assumption that minorities consume less in the way of communications services than non-minority groups is demonstrably false. 46/

Despite the business incentives that should flow from the opportunity to serve new customers and historically underserved populations, over-indexing does not mean that anti-redlining regulations are unnecessary. Anti-redlining protections remain necessary for several reasons:

1. Because creating efficiencies of scale maximizes profits, businesses have a tremendous incentive to sell to "upscale" or high-income communities first. Companies assume – often incorrectly - that initial investments would be recouped faster if deployments in low-income areas were delayed. 47/ The tendency for businesses to redline may be unintentional or based on stereotypical notions of low-income or predominantly minority communities. Thus, despite the good intentions of some current media and telecommunications executives, there is no historical basis for assuming that redlining will not occur amongst new entrants in the multi-channel video market. 48/

2. New entrants can outflank an incumbent by appealing to groups the incumbent took for granted or poorly served, but new entrants can also cream-skim and leave the incumbent with what both the incumbent and the new competitor perceive (correctly or not) to be low-value customers. Certain CLECs were notorious for this practice in

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12-012 (August 18, 2000), p. 7 ("Greenlining Response"). This misconduct occurred in the wireless market.

46/ *See, e.g.*, Adriana Waterston, "Are You Ready for the General Market?" MULTICHANNEL NEWS, July 21, 2003, *available at* http://multichannel.com/article/CA311934.html?display=Opinion ("Data has shown . . . Americans in urban, ethnic markets are indeed, among cable and broadband's most valuable customers . . . . Moreover, added-revenue services such as premium subscriptions and pay-per-view usage are higher in urban markets, compared to the national market, and highest of all in urban African-American and Latino households.") The article also notes that digital cable penetration was at 26% in a survey of 2000 multicultural consumers in urban markets. The survey found that only 21% of total homes passed subscribed to digital cable. *See also* "Blacks, Latinos Pay More for Media," DIVERSITYINC., April 26, 2005.

47/ *See* Cauley, *supra* note 25; *see also* Steve Lohr, "Data Highway Ignoring Poor, Study Charges," N.Y. TIMES, May 24, 1994; Paul Farhi and Sandra Sugawara, "Will the 'Information Superhighway' Detour the Poor?" WASH. POST, Dec. 19, 1993.

48/ *See, e.g.*, Baynes, *supra* note 44.

the 1990s. 49/ In particular, new entrants may use buildout as both a method and proxy for redlining. 50/

49/ Unfortunately, in 1998, when it approved WorldCom's acquisition of MCI, the Commission gave short shrift to dramatic evidence of facilities-based redlining. *See Applications of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., Memorandum Opinion and Order,* 13 FCC Rcd 18025, 18142-46 ¶¶207-12 (1998) ("*WorldCom*") (finding that "deployment of MCI's fiber in certain areas reflects MCI's historical business strategy, which deployed fiber based on the locations of its existing base of business customers and did not view fiber as a primary means of reaching residential customers." *Id.* at 18145 ¶210. The Commission did not discuss evidence that MCI and WorldCom fiber lines detoured around African American business and educational centers such as Howard University and the medical and business facilities surrounding it. Instead, relying on WorldCom and MCI pleadings and letters, the Commission concluded that "we agree with the Applicants that the current placement of fiber networks in and around city centers means that, as the combined entity builds out its local networks, low-income and minority communities located in and around these city centers are well-positioned to receive the benefits of local competition." *Id.* Adding to the Commission's reassurance level was WorldCom's "stated intention to provide telecommunications services to MDUs" (multiple dwelling units) which "will enable [WorldCom] to serve consumers of all socio-economic levels."

Was the Commission misled!! In 2000, the Greenlining Institute and the Latino Issues Forum elicited from WorldCom an admission that it "builds its local network to serve concentrations of potential business customers . . . . [and] does not build local fiber networks into residential communities of any type." *See* Greenlining Response, pp. 7-8, citing, at n. 19, Trial Exhibit 115. Thus, WorldCom tricked the FCC into rejecting a civil rights complaint and approving its 1998 purchase of MCI, by specifically promising to abandon its previous strategy of building out only to business users and instead to now build out to low-income residential communities. As soon as the merger closed, WorldCom turned around and did exactly the opposite of what it had promised the Commission. The Greenlining Response contains two additional examples of how WorldCom promised the FCC and the California State PUC that it would build out to, and market to low-income residential customers, then broke those promises. *Id.* at 7-11.

WorldCom is in responsible hands now. Still, this episode illustrates why the Commission should permit LFAs to "trust, but verify" promises to obey civil rights laws. *See, e.g.*, Reply Comments of EEO Supporters in Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, MM Docket No. 98-204 (filed May 29, 2002) (documenting that the state broadcast associations, which had professed their obedience to EEO outreach policies, instead operated websites on which 42% of the job listings failed even to contain the "EOE" tag which previously had been ubiquitous in the industry).

50/ *See NPRM*, ¶6, n. 37. The *NPRM* quotes Cauley, *supra* note 25, regarding SBC's plan to "focus almost exclusively on affluent neighborhoods," for its new Lightspeed service by initially offering service based on customer spending levels in targeted service areas and contemplating that less than 5% of Lightspeed's deployment would occur in 'low-value' neighborhoods – places where people spend less than $110 a month." *See also* Ted Hearn, "Sachs: SBC Would 'Redline'; NCTA Chief Fires a Volley at Telco's 'Lightspeed' Fiber Build," MULTICHANNEL NEWS, Dec. 20, 2004. This report raises important questions, although, in fairness, by itself this

3. Minorities have over-indexed on media, telecom and other services for years but that never stopped providers from discriminating. 51/ Minorities over-indexed in telephone use in the 1970s (as they do now), yet at the time the (pre-divestiture) AT&T redlined extensively in scheduling rollouts of its custom calling services. Minorities have always over-indexed in television viewership, yet discrimination by television stations was once endemic, 52/ and it remains a serious problem today. Even multiple supermarket chains once discriminated in price according to whether a store was located in the ghetto. 53/ Redlining was most obvious in transportation: although most of the bus riders in Montgomery were African Americans, the bus company still made Rosa Parks sit in the back. Seldom is the irrationality of discrimination sufficient to bring it to an end.

4. Even if a company's anti-discrimination policies carry the full authority of the CEO, middle managers can and often do apply these policies unevenly. An anti-redlining regulation empowers a pro-civil rights CEO because she can tell her line staff that disobedience with company policy could also subject the company to sanctions. 54/

5. If minorities over-index, someone else is under-indexing, and those who under-index should not be deprived of service either. Those groups most likely to be under-represented in the use of communications services could be poor Whites, or a subset of the minority population such as late adopters or persons of a certain national or ethnic background. Many late adopters and other individuals from typically disadvantaged populations may be poor, and therefore are most in need of new competitive services.

6. Consumers, and especially low-income consumers, are often poorly informed and ill equipped to protect themselves from redlining.

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report does not compel the conclusion that SBC (now AT&T) will redline. *See supra* p. 5 (discussing pioneering anti-redlining initiative at Southwestern Bell – Missouri).

51/ On the other hand, if there were several new entrants, it would become more likely that one of them would counter-program the others by specializing in service to low-income families. That certainly has been the Commission's experience with Title III services; for example, when in 1995 the Commission waived its foreign ownership policies to permit News Corp. to retain the Fox network, it acted in substantial part because Fox was able to counter-program the other networks by providing formerly scarce programming attuned to minorities. *See Fox Television Stations, Inc.,* 11 FCC Rcd 5714, 5731 (1995) (Separate Statement of Commissioner James H. Quello) and *id. at* 5733 (Separate Statement of Commissioner Andrew C. Barrett).

52/ *See, e.g.*, *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (directing FCC to designate segregationist television licensee for evidentiary license renewal hearing) and *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969) (vacating FCC's grant of the license renewal).

53/ *See generally* David Koplovitz, THE POOR PAY MORE (1971).

54/ *See supra* p. 5 (discussing pioneering anti-redlining initiatives by telephone companies in Missouri and in Washington, D.C.)

7. Even if it were the case that anti-redlining regulations would seldom need to be invoked today, they could be needed in the future given the cyclical trends in the history of civil rights. As evidenced by Reconstruction and by the Commission's own EEO and minority ownership jurisprudence, civil rights enforcement and attitudes towards equality ebb and flow. No one contends, for example, that Title II of the 1964 Act, governing public accommodations, should be repealed notwithstanding the relative infrequency with which violations are proved today. 55/

8. If a company maintains that it does not redline, it should not matter to that company that a local ordinance or statute prohibits conduct in which the company does not engage, as long as addressing redlining issues does not unreasonably delay deployment.

9. An anti-redlining statute memorializes our values as a nation and plays an important role in reaffirming self worth and status as a first class citizen.

The Commission should recognize the detrimental effects of redlining in the cable and multi-channel video services context. In order to ensure that such redlining does not occur, the Commission must allow LFAs to exercise the reasonable authority granted to them by Section 621(a)(3) of the Communications Act. The Commission should also ensure that telecommunications carriers fully appreciate how and to what extent minorities use and over-index in telecommunications use, since this information would help to diminish the stereotypes and misperceptions that tend to increase the likelihood of redlining. 56/

55/ Discrimination can raise its ugly head where we least expect it. Perhaps the ultimate recent teachable moment in this country occurred in 1993 when the Annapolis Denny's failed to serve six African American U.S. Secret Service agents.

56/ The *NPRM* also seeks comment on whether the Commission should defer to LFAs on the subject of requiring "adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support." *See id.* at ¶20 (*citing* 47 U.S.C. §541(a)(4)(B) and tentatively concluding this power of LFAs "promote[s] important public policy goals.") Public, educational and governmental ("PEG") access channels have proven to be an indispensable forum for local residents, particularly people of color and women, to participate in the presentation of diverse and locally relevant content not available in mainstream commercial or noncommercial media. In many communities, PEG channels are the only programming forums available to several language or religious minorities. Under no circumstances should the Commission preempt an LFA's decision to ensure that all franchisees meet their communities' needs through PEG access.

III. THE COMMISSION SHOULD DEFER TO LFAS THAT REFUSE TO GRANT A FRANCHISE BASED ON THE LFAS' GOOD FAITH CONCERNS ABOUT POTENTIAL REDLINING

The *NPRM* seeks comment on the propriety of Commission intervention in the franchising process if an LFA "unreasonably refuse[s]" to award cable franchises to competitive entrants. 57/ The *NPRM* tentatively concludes, however, that it is not unreasonable for an LFA to prohibit redlining by fulfilling the statutory duty outlined in Section 621(a)(3) of the Communications Act. As noted above, subsection (a)(3) states: "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." 58/ Thus, LFAs may *reasonably* refuse to award a franchise if an applicant provides no satisfactory assurances that it will not engage in redlining. As the *NPRM* makes clear, "[t]hese powers and limitations on franchising authorities promote important public policy goals." 59/

The Commission generally defers to state legislation, state regulations, and local ordinances, unless federal law preempts these local laws. This deference to local authority is nowhere more evident than in the cable franchising context, where the Communications Act delegates to LFAs the authority to award franchises, 60/ regulate rates for basic service in the

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57/ *See* 47 U.S.C. §541(a)(1) ("A franchising authority may award . . . 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and *may not unreasonably refuse* to award an additional competitive franchise") (emphasis added).

58/ *Id*., §541(a)(3) (emphasis added).

59/ *NPRM*, ¶20.

60/ 47 U.S.C. §541(a)(1).

absence of effective competition between MVPDs, 61/ and enforce consumer protection and customer service provisions against cable operators providing service within the LFAs jurisdiction. 62/

MMTC agrees with the *NPRM*'s tentative conclusion that the Commission should defer to LFA implementation of the anti-redlining mandate in Section 621(a)(3) of the Communications Act. 63/ Beyond the obvious statutory basis for this conclusion, the Commission should adopt the tentative conclusion as its final conclusion in this proceeding for three additional reasons:

1. State and local anti-redlining laws on this subject are neither superseded nor preempted by the Communications Act.

2. Even if these local laws were superseded or preempted by the Act, Congress' 1996 amendment to Section 151 of the Communications Act prohibited race and gender discrimination in the provision of wire and radio communications services. 64/ This anti-discrimination provision is

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61/ *Id*., §543(a)(1) ("Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, . . .to the extent provided under this section.")

62/ *Id*., §552(a) ("A franchising authority may establish and enforce (1) customer service requirements of the cable operator"); *see also id*. §552(d)(1) ("nothing in this subchapter shall be construed to prohibit any State or franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this subchapter.")

63/ As Commissioner Adelstein explained in his separate statement appended to the *NPRM*:

> We should not and indeed cannot usurp for ourselves the authority granted by Congress to local governments. This tentative conclusion makes clear we respect the powers specifically enumerated by Congress for the LFAs. . . .We ask important questions about how much deference . . . the Commission [should] grant to LFAs in the exercise of their authority. My opinion is that to the extent they are operating in a manner to carry out the responsibilities Congress intended, they deserve substantial deference, and the courts have clearly afforded them such deference.

64/ As the Commission declared in 1998, the practice of bypassing low-income and minority populations "would be contrary to the purpose of the Communications Act, the obligations imposed on common carriers in the Communications Act, and the fundamental goal of the 1996 Act to bring communications services 'to all Americans.'" *WorldCom*, 13 FCC Rcd at 18143-44 ¶208 (*citing*, *inter alia*, 47 U.S.C. §151 (requiring the Commission to ensure that

not self-executing, and can best be implemented in the Section 621 context by ensuring that the LFAs are able to enforce reasonable franchising decisions and ordinances without interference. Indeed, Commission interference in such local enforcement efforts could be regarded as contravening Section 151, in the absence of an effective federal anti-redlining regulatory program.

3. Redlining, whether based on race, income, or proxies for these categories, offends several of Congress' and the Commission's well established policy objectives, such as equal access and universal service in the telecommunications context and a host of other public interest goals. 65/

While the Commission generally should defer to LFAs' implementation of the anti-redlining protections called for in Section 621(a)(3), the extent and duration of the Commission's deference should depend on the situation presented to a particular LFA attempting to follow this Communications Act mandate. The Commission's posture towards a reasonable LFA anti-redlining decision should depend on whether any of the following four scenarios applies within the LFA's jurisdiction:

1. an LFA intends to update its current anti-redlining laws or regulations;

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communications services are made available "so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex" (underscored language added in the 1996 Act)) (emphasis added).

65/ *See Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988) (noting that universal service is an important commission objective); *see also* White House, "Administration White Paper on Communications Act Reforms," Jan. 27, 1994; 47 U.S.C. §202(a) (making it unlawful for any common carrier to "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for . . . communication service . . . or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage"); *In re Telephone Company-Cable Television Cross-Ownership Rules, Second Report and Order*, 7 FCC Rcd 5781, 5785–86 (1992) (discussing measures designed to foster a diversity of video services available to the public); *Metro Broadcasting Co. v. FCC*, 497 U.S. 547, 568 (1990) (noting in the broadcasting context that the "benefits of [programming] diversity are not limited to the members of minority groups . . . [and] redound to all members of the viewing and listening audience"). Finally, it is worth noting that Section 621(a) not only empowers LFAs to prevent redlining in cable franchising, but also envisions local franchising requirements that allow all applicants to "become capable of providing cable service to all households in the cable area" within a reasonable time. *See* 47 U.S.C. §541(a)(4)(A).

2. an LFA has no relevant laws or regulations, but wants to consider adopting them;

3. an LFA awards franchises that contain anti-redlining language that is neither specifically compelled nor specifically precluded by any local ordinance or regulation. For example, a franchising ordinance might authorize the LFA to enter into franchise agreements that serve community interests, and the LFA may decide – without explicit support for the proposition in the franchise ordinance – to condition franchise awards on the inclusion of anti-redlining language; or

4. an LFA withholds a new franchise while it wrestles with redlining issues, but the LFA uses a different definition of redlining than the Communication Act's residential income-based definition in Section 621(a)(3).

In each of these scenarios, the LFA's anti-redlining purpose and efforts could be frustrated if the Commission were to open the door too quickly to appeals by franchise applicants seeking the Commission's intervention for allegedly "unreasonable" delays in the franchising process. Generally, the Commission should find it "reasonable" for an LFA to take some time to update its anti-redlining policy in order to reflect current technology and legal precedents. Most LFAs have given redlining considerable thought, and LFAs generally do not want to delay new entry.

However, if an LFA does virtually nothing to move a franchise application forward, or acts with glacial speed to update its policies, its actions could be construed as being in bad faith. In such instances, the Commission could reasonably depart from its general conclusion that LFA action to implement Section 621(a)(3) is perfectly consistent with an LFA's duties under Section 621(a)(1) to refrain from unreasonably denying franchise applications. 66/ However, the Commission should not and need not directly intervene with the LFA. Instead, in the rare instance where a new entrant or consumers seeks mandamus alleging bad faith by an

66/ Bad faith is a higher standard than "unreasonable" since reasonable people can differ about what is "unreasonable." Bad faith justifying mandamus implies corruption or indefensible sloth.

LFA, and the Court asks the parties to respond, it would be reasonable for the Commission to provide its views as well, if the Commission deems it necessary.

IV. TO ENCOURAGE LFAS' RAPID DEVELOPMENT OF LOCAL ANTI-REDLINING POLICIES, AND THEREBY FACILITATE AND EXPEDITE THE FRANCHISING OF NEW ENTRANTS, THE COMMISSION SHOULD DEVELOP ANTI-REDLINING BEST PRACTICES

Because of the Commission's wide field of vision, its expertise in communications policy, and its universal service and nondiscrimination mandates, it is uniquely suited to develop anti-redlining best practices and make them available to LFAs. By providing this assistance to LFAs, the Commission can help to reduce local regulatory logjams caused by uncertainty over which anti-redlining practices are best. In this way, the Commission can promote the more rapid franchising of competitive entrants – and on terms that will be fair to all consumers. 67/

The FCC's recommended regulations, if adopted by LFAs, could have a prophylactic and deterrent effect. Litigation under these regulations would be rare. Such regulations would seek to balance the interests of low-income households and business by both promoting competition and preventing discrimination. In particular, a credible anti-redlining regulatory program should generally provide that anti-redlining protections will apply equally to incumbents and new entrants while accommodating real and relevant differences between these companies, such as the existence of non-overlapping service areas. Further, a credible anti-redlining regulatory program should perform the following functions:

1. Specify what constitutes discrimination (*e.g.*, discrimination based on race, household wealth, age and condition of the physical plant, genders of heads of households, rental or home ownership status, local crime rates, supposed creditworthiness, or the cost of obtaining and maintaining insurance in a particular area)

67/ We emphasize that these best practices should be advisory only. They should not be intended as a precursor to Commission preemption of LFAs' jurisdiction.

2. Define specifically, and in terms understandable to lay people, what constitutes redlining and what services are covered by this definition (*e.g.,* promotional campaigns, responsiveness to service and repair calls, and locations of neighborhood sales and bill-paying offices)

3. Apply an impact standard rather than an intent standard (because of *Mobile v. Bolden* and the 1982 revisions to the Voting Rights Act that corrected the problem)

4. Specify who decides when redlining has occurred

5. Specify the evidence needed to compel a hearing or trial to determine whether redlining has occurred in a specific community

6. Broadly afford standing to complain and explain how parties may demonstrate standing

7. Provide meaningful, prompt and enforceable remedies and relief (*e.g.,* temporary injunctive relief before trial, or permanent relief thereafter; but not cessation or interruption of construction, the prospect of which would profoundly increase the cost of capital and thereby discourage even non-redlined buildouts) 68/

8. Prohibit mandatory arbitration 69/ and provide individuals with other fora in which to adjudicate complaints alleging redlining in the provision of communications services

9. Establish an accessible venue for appellate review

10. Provide for the applicability of the Civil Rights Attorneys Fees Act of 1976 70/ or other provisions to encourage the private bar to assume the risks attendant to bringing these cases

11. Afford a new entrant a means of obtaining pre-clearance of its buildout plans, with such pre-clearance establishing a rebuttable presumption that the company will not redline. 71/ For example, suppose a new entrant has operated, in another venue, a

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68/ Suits for damages are precluded by 47 U.S.C. §555a(a), except where discrimination has occurred on the basis of race, color, sex, age, religion, national origin, or handicap, 47 U.S.C. §555a(c).

69/ *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893-94 (9th Cir. 2002), for a rejection of a unilaterally imposed, asymmetrical, mandatory arbitration requirement in an employment setting.

70/ *See* 42 U.S.C. §1988.

71/ An analogy for this approach can be seen in the "unitary status" holdings of federal judges, establishing that a school system has been desegregated. *See, e.g.*, *Little Rock School Dist. v. Armstrong*, 359 F.3d 957 (8th Cir. 2004) (providing a recent example of an appeal involving analysis of a school district's unitary status). Just as state education policies affect unitary status determinations, telecom redlining pre-clearance might operate differently depending on whether new franchises are issued statewide or by municipal authorities. The

successful anti-redlining program with such vital features as having the compliance officer directly report to the CEO, maintaining granular longitudinal compliance tracking, and tying line executives' anti-redlining success to their compensation. Suppose further that the new entrant proposes to replicate that very plan in the community it proposes to build out. On those facts, an LFA could reasonably decide to pre-clear the new entrant.

12. Perhaps allow a new entrant (and the incumbent) to choose among regulatory options, such that fulfillment of the chosen option would be sufficient to allow for buildout to commence without delay while the granular details of anti-redlining reporting are being finalized. For example, the options could be configured as follows:

    Option A: Rapid Buildout Plan. The new entrant agrees to build out in its service area so rapidly that there is no need for periodic verification of approximate income-service equality throughout the area to be served.

    Option B: Equal Service Verification Plan. The new entrant agrees to provide very frequent verification of approximate income-service equality in its service area, such that there is no need for a buildout requirement.

    Option C: Combined Plan. The new entrant pledges moderately fast buildout (rapidly, but not as rapidly as in Option A) and also agrees to verify equal service periodically (but not as frequently as in Option B).

    The reason for allowing a new entrant to choose between a pure buildout option and a pure equal service verification option is that buildout requirements, though meant to prevent redlining, might in some instances end up being themselves a strong barrier to entry and thus counterproductive.

The general principles embodied in these twelve suggested points for anti-redlining best practices need to be fleshed out with the addition of numerical coefficients. For example, as to the twelfth point, how fast is "rapid" buildout, and how much variability in income strata of built-out and non-built out areas would give rise to or rebut an inference of redlining? Further, are different standards appropriate for small jurisdictions, whose governments often lack the resources to carry out a robust anti-redlining data-tracking and enforcement program, for communities with especially strict (but race and income-neutral) undergrounding requirements, or for low-density rural areas?

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question of whether states or municipalities should award new franchises is beyond the scope of this proceeding.

Fleshing out these general principles and providing numerical coefficients is a task for experts. The Commission already has such an expert body at the ready: the State Regulators Council of the Advisory Committee on Diversity for Communications in the Digital Age. 72/ The State Regulators Council should be charged with developing a report that would contain detailed and authoritative anti-redlining best practices to be made available to LFAs.

In the absence of local anti-redlining provisions, and as a backstop protection against the practice, the Commission might consider the development of rules implementing Section 621(a)(3)'s prohibitions against economic redlining. If such federal rules were adopted, they should only apply where LFAs have not themselves taken steps to enact and enforce protections, such as buildout schedules and other requirements in franchise agreements and local ordinances that assure that economic redlining will not occur. 73/

CONCLUSION

For the foregoing reasons, MMTC submits that the Commission should adopt the *NPRM*'s tentative conclusion that LFAs may reasonably act to assure that new franchisees provide multi-channel video services to subscribers at all income levels. Indeed, this conclusion is the only result consistent with the Section 621(a)(3) mandate requiring LFAs to prevent

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72/ *See* "Council of State Commissioners and Regulators to Assist FCC's Diversity Committee," FCC News Release, February 11, 2005 (stating that the Council will be assisting the Advisory Committee to "execute its mandate by encouraging state-federal cooperation to better promote the shared goal of diversity in communications . . . . The Council will assist the Committee by developing joint federal-state initiatives, by promoting awareness of both the mission and the work of the Diversity Committee throughout the nation, and by expanding the Committee's work on industry best practices") (emphasis added).

73/ The Commission's jurisdiction to adopt its own regulations is found, *inter alia*, in 47 U.S.C. §§151 (nondiscrimination) and 154(i) (the "any and all acts" provision). The State Regulators Council might be asked to evaluate whether serious enforcement gaps in LFA anti-redlining protections exist, how federal and state regulation could coexist harmoniously, and whether a federal regulation filling those gaps could operate efficiently so as not to unnecessarily delay or discourage competitive entry. Lacking such an expert evaluation, we are not prepared to state that federal rules are necessary. Nonetheless, the subject is worthy of exploration.

redlining in the provision of cable service. The Commission should inform the industry about the communications services consumed by minorities and devise anti-redlining best practices that LFAs could implement, but should generally defer to LFA enforcement of anti-redlining ordinances and franchise agreements. The Commission's leadership on these issues will expedite the franchising of much-needed competitive new entrants and simultaneously expand the range of communications services available to low-income and minority populations.

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Respectfully submitted,

/s/

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Black College Communication Association
Center for Asian American Media
Fairness and Accuracy in Reporting
Hispanic Americans for Fairness in Media
Labor Council for Latin American Advancement
Lawyers' Committee for Civil Rights Under Law
Leadership Conference for Civil Rights
League of United Latin American Citizens
National Association for Multi-Ethnicity in Communications, Inc.
National Association of Black Journalists
National Association of Black Owned Broadcasters
National Association of Black Telecommunications Professionals
National Association of Hispanic Journalists
National Association of Hispanics in Information Technology and Telecommunications
National Association of Latino Independent Producers
National Bar Association
National Coalition of Hispanic Organizations
National Council of Churches, USA
National Indian Telecommunications Institute
National Institute for Latino Policy
National Puerto Rican Coalition
Native American Public Telecommunications
Office of Communication of the United Church of Christ, Inc.
Puerto Rican Legal Defense and Education Fund
Rainbow/PUSH Coalition
The Links, Incorporated
Women's Institute for Freedom of the Press

February 13, 2006

APPENDIX

THE COMMENTING PARTIES

The **Minority Media and Telecommunications Council (MMTC**) is a national nonprofit organization dedicated to promoting and preserving equal opportunity and civil rights in the mass media and telecommunications industries. Founded in 1986, MMTC trains communications lawyers, operates a media brokerage and holds the annual Access to Capital media and telecom financing conference. MMTC is generally recognized as the nation's leading advocate for minority advancement in the media and telecommunications industries.

The **Advancement Project** is a democracy and justice action organization. The Advancement Project works with communities seeking to build a fair and just multi-racial democracy in America. Using law, public policy and strategic communications, the Advancement Project acts in partnership with local communities to advance universal opportunity, equity and access for those left behind in America.

The **American Federation of Television and Radio Artists (AFTRA)** is a national labor union representing over 70,000 performers, journalists and other artists working in the entertainment and news media. AFTRA's scope of representation covers broadcast, public and cable television, radio (news, commercials, hosted programs), sound recordings, "non-broadcast" and industrial material as well as Internet and digital programming. The union negotiates and enforces over 300 collective bargaining agreements that guarantee minimum salaries, safe working conditions and health and retirement benefits. AFTRA advocates on legislative and public policy issues that directly affect members' wages and working conditions, including ownership consolidation in the broadcast industry, equal employment opportunity laws and regulations, and copyright and performance rights issues.

American Indians in Film and Television seeks to advance the economic development of American Indians and the accurate portrayal and inclusion of American Indians in the mediums of film and television.

The **Asian American Justice Center (AAJC)** works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. In accomplishing its mission, AAJC focuses its work to promote civic engagement, to forge strong and safe communities, and to create an inclusive society in communities on a local, regional, and national level.

The mission of the **Asian Law Caucus** is to promote, advance and represent the legal and civil rights of the Asian and Pacific Islander communities. Recognizing that social, economic, political and racial inequalities continue to exist in the United States, the Asian Law Caucus is committed to the pursuit of equality and justice for all sectors of our society with a specific focus directed toward addressing the needs of low-income Asian and Pacific Islanders.

The mission of the **Black College Communication Association (BCCA)** is to identify resources necessary for strengthening communications programs at Historically Black Colleges and Universities (HBCUs), provide technical assistance to HBCUs seeking accreditation, and establish state-of-the-art hardware systems that can be shared by member institutions to promote the understanding and advancement of communication as an academic and professional field.

The **Center for Asian American Media** (formerly NAATA) is a nonprofit media arts organization dedicated to informing and education the general public about the Asian American experience through film and public television, advocating for increasing the presence of Asian Americans and the accuracy of the portrayals of them in mainstream media, exhibiting Asian American films and videos on public television and during an annual film festival funding Asian American projects, and distributing media works to schools, universities, libraries, and community groups across the country.

Fairness & Accuracy In Reporting (FAIR) is a national media watch group that has been offering well-documented criticism of media bias and censorship since 1986. FAIR works to invigorate the First Amendment by advocating for greater diversity in the press and by scrutinizing media practices that marginalize public interest, minority and dissenting viewpoints. As an anti-censorship organization, FAIR exposes neglected news stories and defend working journalists when they are muzzled. As a progressive organization, FAIR believes that structural reform is ultimately needed to break up the dominant media conglomerates, establish independent public broadcasting and promote strong non-profit sources of information.

Hispanic Americans for Fairness in Media (HAFM) works to improve the image and employment of Latinos in radio, television, film, and print media. Established in 1999, HAFM set as one of its main goals the creation of an Online Job Bank to link the Hispanic community to employment opportunities.

The **Labor Council for Latin American Advancement (LCLAA)** is the home of the Latino Labor Movement. LCLAA serves as a voice for change in the Latino community and mobilizes workers and their families. LCLAA seeks improved working conditions for all Latino workers in the United States and throughout the Americas.

The **Lawyers' Committee for Civil Rights Under Law** is a nonpartisan, nonprofit organization formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law. The Lawyers' Committee implements its mission and objectives by marshaling the pro bono resources of the bar for litigation, public policy advocacy, and other forms of service by lawyers to the cause of civil rights.

The **Leadership Conference on Civil Rights (LCCR)** is dedicated to uniting all Americans as one nation true to its promise of equal justice, equal opportunity and

mutual respect. It is the nation's premier civil rights coalition, and has coordinated the national legislative campaign on behalf of every major civil rights law since 1957.

The mission of the **League of United Latin American Citizens (LULAC)** is to advance the economic condition, educational attainment, political influence, health and civil rights of the Hispanic population of the United States. LULAC is the nation's oldest and largest national Hispanic civil rights organization.

The **National Association for Multi-Ethnicity in Communications, Inc. (NAMIC)** is a 501(c)(6) trade association. Founded in 1980. NAMIC educates, advocates and empowers for multi-ethnic diversity in the telecommunications industry through its 17 nationwide chapters.

The **National Association of Black Journalists (NABJ)** is an advocacy organization established in 1975 in Washington, D.C. NABJ is the largest organization of journalists of color in the nation, with more than 4,000 members. It provides educational, career development and support to Black journalists worldwide.

The **National Association of Black Owned Broadcasters (NABOB)** is dedicated to creating opportunities for success for African Americans in the media and telecommunications industries. It is the first and largest trade organization representing the interests of African American owners of radio and television stations across the country. NABOB's two principal objectives are to increase the number of African American owners of media and telecommunications facilities, and to improve the business climate in which they operate.

The mission of the **National Association of Black Telecommunications Professionals (NABTP)** is to be the premier source of education and information regarding the telecommunications industry for its members, interfacing organizations, and the public, with a specific emphasis on the African American community. NABTP is the leading representative of African American executives and entrepreneurs in telecommunications.

The **National Association of Hispanic Journalists (NAHJ)** is dedicated to the recognition and professional advancement of Hispanics in the news industry. Established in April 1984, NAHJ created a national voice and unified vision for all Hispanic journalists.

The **National Association of Hispanics in Information Technology and Telecommunications (HITT)** is a non-profit organization geared toward the advancement of Hispanics in the information technology and the telecommunications industry. It is the leading representative of Hispanic executives and entrepreneurs in telecommunications.

The **National Association of Latino Independent Producers (NALIP)** is a seven-year old Latino/a media arts service organization comprised over 950 Latino/a film,

television, documentary, broadcast and new media makers -- writers, producers, directors and key creative talent. NALIP is committed to increasing the quality and quantity of images by and about Latino/as by providing professional development programs, supplying communication and information, plus advocating for their interests or teaching them to advocate on their own behalf.

The **National Bar Association (NBA)** is the nation's oldest and largest national association of predominately African American lawyers and judges. The NBA works to advance the science of jurisprudence, improve the administration of justice, preserve the independence of the judiciary and to uphold the honor and integrity of the legal profession, to promote professional and social intercourse among the members of the American and the international bars, to promote legislation that will improve the economic condition of all American citizens, regardless of race, sex or creed in their efforts to secure a free and untrammeled use of the franchise guaranteed by the Constitution of the United States, and to protect the civil and political rights of the citizens and residents of the United States.

The **National Coalition of Hispanic Organizations (NCHO)** is a non-profit association of organizations devoted to problems and challenges facing Hispanics similarly situated in the areas of employment, education, health, and public services in the public and private sectors.

The **National Council of the Churches, USA (NCC)** has been the leading force for ecumenical cooperation among Christians in the United States. The NCC's member faith groups — representing a wide spectrum of Protestant, Anglican, Orthodox, historic African American and Living Peace churches — include 45 million persons in more than 100,000 local congregations in communities across the nation.

The **National Indian Telecommunications Institute (NITI)** is a dynamic, Native-founded and run organization dedicated to using the power of electronic technologies to provide American Indian, Native Hawaiian, and Alaskan Native communities with extensive educational tools, equal opportunity and a strong voice in self-determination.

The **National Institute for Latino Policy** is a project of the Puerto Rican Legal Defense and Education Fund. The Institute conducts civil rights policy analysis and advocacy, and collaborates with PRLDEF's Litigation Division to integrate the organization's litigation and policy work.

The mission of the **National Puerto Rican Coalition (NPRC)** is to systematically strengthen and enhance the social, political, and economic well being of Puerto Ricans throughout the United States and in Puerto Rico with a special focus on the most vulnerable.

Native American Public Telecommunications (NAPT) supports the creation, promotion and distribution of Native public media. NAPT accomplishes this mission by

producing and developing telecommunication programs for all media including public television and public radio, distributing and encouraging the broadest use of such education telecommunications programs, providing training opportunities to encourage increasing numbers of American Indians and Alaska Natives to produce quality public broadcasting programs, promoting increased control and use of information technologies by American Indians and Alaska Natives, providing leadership in creating awareness of and developing telecommunications policies favorable to American Indians and Alaska Natives, and building partnerships to develop telecommunications projects with tribal nations, Indian organizations, and native communities.

The **Office of Communication of the United Church of Christ, Inc. (OC, Inc.)** was incorporated in 1959 to advocate on behalf of those who had been historically excluded from the media, especially people of color and women. OC, Inc., was the first voice to demand that those holding FCC licenses and authorizations act on behalf of the public interest and be held accountable as stewards of the public trust. Today O.C., Inc. continues to promote diversity in the marketplace of ideas by supporting efforts to establish low power FM radio, safeguarding the rights of all to affordable access to emerging technologies and the transmission of data, addressing issues of media consolidation, and establishing basic corporate character requirements for those information age stewards who transmit images and data in our ever-changing world.

The mission of the **Puerto Rican Legal Defense and Education Fund (PRLDEF)** is to serve, promote, and protect the civil and human rights of the Puerto Rican and larger Latino community. PRLDEF champions an equitable society. Using the power of the law together with advocacy and education, PRLDEF creates opportunities for all Latinos to succeed in school and work, fulfill their dreams, and sustain their families and communities.

The **Rainbow/PUSH Coalition** is grassroots organization that seeks to protect, defend and gain civil rights, to equalize the economic and educational playing fields in all aspects of American life, and to bring peace to the world. The Rainbow/PUSH Telecommunications Project, founded in 1998, advocates for minority business opportunity in the media and telecom industries.

The Links, Incorporated is a not-for-profit organization of more than 10,000 accomplished, dedicated women of color, committed to enhancing the quality of life in their communities. Links members are newsmakers, role models, mentors, activists and volunteers who work toward the realization of making the name "Links" not only a chain of friendship, but also a chain of purposeful service.

The mission of the **Women's Institute for Freedom of the Press (WIFP)** is to increase communication among women and reach the public with our experience, perspectives, and opinions. WIFP seeks to democratize the communications media by expanding freedom of the press (which includes its modern day electronic forms) to enable all people, rich and poor, male and female, to have the equal opportunity to speak directly to the whole public about their own issues and concerns.