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

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

To: The Commission

REPLY 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, MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, 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

David Honig
Executive Director
Minority Media and Telecommunications Council
3636 16th Street, N.W., Suite B-366
Washington, D.C. 20010
(202) 332-7005
dhonig@crosslink.net

March 28, 2006

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

INTRODUCTION AND SUMMARY

In our initial Comments in this proceeding, MMTC emphasized the need for strong anti-redlining protections at the local level, as well as strong guidance from the Commission on the implementation of this vital economic justice issue. We presented the case for affirming Local Franchising Authorities' ("LFAs") right to fulfill their statutory duty by ensuring that cable service is available to *all* residents in each LFA's jurisdiction – regardless of the average income of the area in which those residents live. We also outlined the parameters of what a successful anti-redlining ordinance or franchise agreement provision might encompass, and urged the Commission to take the lead on recommending best practices and commissioning further studies on policies that have proven successful in combating discrimination in the provision of video and telecommunications services.

MMTC commends the other parties filing comments in response to the *NPRM* for their thoughtful submissions and genuine commitments to end the practice of redlining. We noted in our Comments and repeat below that several telecommunications and cable providers

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1/ These Reply 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. In addition to the 33 organizations signing on to MMTC's February 13, 2006 Comments when they were filed February 13, 2006, the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF) has signed on. MBELDEF, founded in 1980 by the late Congressman Parren J. Mitchell, is a legal and advocacy consortium dedicated to the desegregation of the marketplace especially with respect to telecommunications.

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*").

have taken great strides and made significant progress towards dramatically reducing or even eliminating altogether such race- and class-based discriminatory service and marketing practices.

Unfortunately, some of the comments filed in the initial round indicate that there is one area in which progress has been slow, and that is in the effort to move the debate beyond a false dichotomy that pits free competition against anti-redlining regulation. As we explained in our initial Comments, protecting consumers from redlining is essential to promoting competition and to ensuring that all Americans share in its benefits. It is eminently reasonable that LFAs should take their responsibilities under the Communications Act seriously, working to prevent redlining even if buildout requirements are just one of the methods that can be useful toward achieving that end.

We reiterate in these Reply Comments MMTC's proposal for a reasonable and flexible approach to LFA adoption of anti-redlining laws and policies, eschewing a one-size-fits-all approach in favor of an individually tailored response based on the facts unique to each community. We also call upon the Commission to bring its significant expertise to bear in this area by identifying anti-discrimination best practices. Working together, new entrants and the LFAs reviewing their franchise applications can promote video services competition rather than hindering it, and rapidly deliver the promise of competition to cable customers in all economic strata.

I. THE COMMISSION SHOULD FOSTER NEW ENTRY *AND* ANTI-REDLINING PROTECTION

If any message shines through from the record in this proceeding, it is that competition and civil rights are not at war with one another. They never have been. All Americans need and deserve both.

New competitive video entry is particularly vital for low-income consumers. It is not a luxury. Single-supplier universal service is no more adequate today to fulfill the needs of all Americans than single-provider radio service was adequate to serve the needs of all Americans when the FCC was created. Competitive broadband services are as imperative in an information-based society as public accommodations, fair housing and desegregated public education were two generations ago and still are today. 3/

Further, video competition is itself a public good. The assertion that a single supplier is good enough for the poor is an endorsement of second-class citizenship. If anything, the poor need competitive video choices even more than other citizens, because competition drives down prices and expands program diversity. More than most citizens, low income families need multiple and diverse sources of information that can help deliver them the full benefits of first class citizenship: full employment, a quality education, and the wide range of cultural and informational options that are the earmarks of a modern civilized society. 4/ It is just not acceptable that fewer than 2% of the nation's households have a choice in wireline video

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3/ *See* Mark Lloyd, *Communications Policy is a Civil Rights Issue*, Community Technology Centers Review, January, 1998, *available at* http://www.ctcnet.org/resources/review/r9811loy.htm.

4/ *See* Letter to Hon. Joe Barton and Hon. John D. Dingell from Hon. Bobby L. Rush and Hon. Edolphus Towns, March 23, 2006 ("Rush/Towns Letter") ("Increased competition will provide American consumers with numerous benefits, including lower prices, improved quality, and development and deployment of new advanced services. These benefits, however, must be extended to as many Americans as possible, in as many local communities as possible, without regard to the race, color, national origin, or income of the residents win a community if we want to prevent the emergence of technological haves and have-nots.") As Chairman Martin has observed in a related context, equal employment opportunity results in "[a] more talented workforce" which, in turn, leads to "not just diversity, but also true competition." *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second R&O and Third NPRM*, 17 FCC Rcd 24018, 24129 (2002) (reconsideration pending on other grounds) (Separate Statement of Commission Kevin J. Martin) ("*Broadcast EEO Second Report"*).

providers. 5/ That needs to change and soon.

Just as it follows that needless delays in buildout are intolerable, redlining is equally intolerable. Government should prevent barriers to entry *and* proscribe, prevent, and enforce protections against redlining. 6/

5/ USTA Comments, p. 19, *citing* United States General Accountability Office (GAO), *Report to the Chairman, Comm. On Commerce, Science, and Transportation, U.S. Senate: Telecommunications Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8, p. 20, October 2003, *available at* http://frewebgate.access.gpo.gov.

6/ As a threshold matter, we disagree with Verizon's theory that the First Amendment drastically curtails LFAs' authority over a franchise applicant's choice of where to provide service. *See* Verizon Comments, pp. 16-21 and 47-51. While Verizon's theory is directed to buildout requirements, this theory, if accepted at face value, unavoidably would apply to redlining as well. Whatever merits this First Amendment argument against "forced build-out" may have, no one cannot plausibly contend that anti-redlining laws enforced by LFAs violate the First Amendment rights of a cable operator.

First, Verizon maintains that the franchising process "inherently threatens free expression because it conditions speech on the advance blessing of local authorities – and silences speech until that blessing is received." Verizon Comments, p. 17; *see also id.*, pp. 47-49 and 51. However, the franchising process is not aimed at constraining the content of the speaker's message, but rather is aimed at the time, place and manner in which that message is conveyed. *See, e.g.*, *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 971 (N.D. Cal. 1987) ("Santa Cruz has a legitimate interest in protecting public safety and maintaining public thoroughfares and to this end may regulate the noncommunicative aspects of cable television through reasonable time, place and manner restrictions tailored to advance that interest" (citations omitted)).

In the face of a First Amendment challenge to anti-redlining protections, courts have upheld the authority of LFAs to withhold a franchise. *See, e.g.*, *Telesat v. City of Riviera Beach*, 773 F. Supp. 383 (S.D. Fla. 1991). The *Telesat* decision held that local government has a substantial interest in managing the public rights of way, and in promoting competition for all its citizens because competition can improve quality and decrease price. *Id*. at 405. The court also recognized the LFA's interest in preventing discrimination – especially where there is evidence that the new entrant intends to serve only certain areas and that "some . . . residents may face a reduction in the quality of the cable television service they receive." *Id*. at 401. As the *Telesat* court explained, pointing to the anti-redlining provisions in Section 621(a)(3), "the City has offered evidence to support the claim that income- and race-based discrimination concerns are reasonable ones in Riviera Beach. . . . And the Supreme Court has recognized unequivocally that government has a compelling interest in eradicating discrimination against its citizens." *Id*. (*citing Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *see also id*. at 405-06 ("the City has made a determination that access to cable service may be denied . . . [to] certain City residents and that a universal service requirement will tend to prevent or limit

Over history, redlining in telecommunications has been all too common. Indeed, the poor have suffered from redlining in virtually every facet of their lives – where they can live in a decent home, where they can insure that home, where they can borrow the money to buy the home, where they can shop, where their children can go to a first-rate school, where their jobs are located, how often buses are available to take them to and from those jobs, how long it takes a taxicab, the police, an ambulance or a cable or phone technician to show up -- even who will deliver them a pizza. 7/ Redlining has happened even when the poor over-indexed on many of these services: they ride buses more, they spend more on staple goods, and they spend more per capita on most media and telecom services, but still they've faced and often still face redlining. 8/ Further, redlining has happened whether the service provider was a monopolist, a second entrant, or the tenth entrant. 9/ It is difficult to think of a single attribute of the lives of poor people that *has not been* redlined.

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such discrimination. . . . [W]e are not prepared to say that this . . . [determination] does not tend to promote a substantial government interest.")

Furthermore, in *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 973 (D.C. Cir. 1996), the Court of Appeals for the District of Columbia held that "a statute that simply permits franchise authorities to regulate where they had previously done so raises no First Amendment problems unless the localities themselves infringe on cable operators' speech." In other words, an LFA *might* infringe upon a cable operator's First Amendment rights by the application of its franchising requirements, but the fact that federal law codified local governments' pre-existing authority to place a limit on the number of local franchisees did not offend the First Amendment. Typically, the burden that the franchising process imposes on speech is minimal in contrast to an LFA's interest in providing these benefits to its citizens.

7/ *See* MMTC Comments, pp. 6-9.

8/ *Id.*, p. 15.

9/ USTA contends that "monopolists have the incentive to restrict service" while new entrants "will serve every customer from which they can recover their costs." USTA Comments, pp. 29, 35. Sometimes this is right: a new entrant's best customers may be those overlooked by a first mover who cream-skimmed. However, in a mature market for customer services, the first mover has already reached all of the potential customers, and a new entrant will often target the

Still, as we noted in our Comments, many telecom and cable companies do not redline anymore. 10/ *The Commission should never assume that just because redlining is inevitable somewhere, it is inevitable everywhere and will be committed by everyone*. Telecom companies have begun to go on the record to declare unequivocally and with considerable moral force that they do not redline and do not intend to redline in the future. 11/ We commend them for that, and we hope that by the time the record closes in this proceeding, all of the nation's telecom (and cable) companies will make similar unequivocal declarations.

Yet the end of telecom and cable redlining in many jurisdictions did not happen without a struggle. Instead, it came about because civil rights organizations "trusted, but verified," and because LFAs imposed and *enforced* anti-redlining regulations. In most cases, litigation was unnecessary because municipal contracts contain built-in deterrence: a company caught breaking such a contract might not receive another one. Still, even companies with very strong anti-discrimination policies cannot completely break free of the propensity to discriminate. Every major company has a policy against employment discrimination, yet it still happens, sometimes on a grand scale. 12/ It happens because any company's anti-discrimination policies are only as strong as the commitment of top managers to apply those policies.

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potential customers it regards, and its investors and banks regard (accurately or not) as the most desirable. Too often, they're not poor people.

10/ MMTC Comments, p. 6 ("some state and local units of telecommunications companies have adopted operating practices that actually make redlining virtually impossible.")

11/ *See* BellSouth Comments, p. 33 ("BellSouth has not engaged in redlining in the past and will not do so in the future"); AT&T Comments, p. 54 ("AT&T, for one, has never engaged in redlining, and has no plan to begin doing so"); *cf.* Verizon Press Release: "Time for Consumer Choice and Price Competition in Video Market," February 15, 2006 (Verizon Chairman and CEO Ivan Seidenberg asserted that Verizon "expects to be subject to federal redlining rules that apply to cable.")

12/ *See, e.g.*, Press Release, U.S. Equal Employment Opportunity Commission, EEOC Announces Intervention in Texaco, Inc. Lawsuit (Nov.20, 1996), *available at*

As MMTC and others have noted, there are very strong economic incentives *not* to redline: minorities over-index on telecom service, and the poor spend as much on telecom service as other Americans spend. 13/ If only all telecom and cable leaders and executives understood, internalized, and acted on these facts. Former NTIA Director Larry Irving, former FCC Chairman Michael Powell and others have performed a wonderful public service by eloquently evangelizing on this point. When every telecom and cable leader and executive takes heed and is held accountable by her company for acting on this good news, telecom and cable redlining will come to an end.

That is why we cannot agree with USTA when it asserts that "new entrant networks owners should be free to deploy broadband video wherever they have networks *and as business conditions dictate*" 14/ and that "[o]f course firms in competitive markets always go after the *most profitable customers* first, yet market competition leads them to serve *all customers over time* without regard to income." 15/ While these assertions are innocent in theory, many cable and telecom executives unfortunately and erroneously conflate "most

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http://www.eeoc.gov/press/11-20-96.html ("It is the Commission's finding of a clear pattern and practice of discrimination against an entire class of African American employees that serves as a principal basis for the proposed settlement"); Press Release, U.S. Equal Employment Opportunity Commission, EEOC and Toyota Logistics Services Settle Lawsuit Alleging Sex and Race Bias at New Jersey Port (May 4, 2000), *available at* http://www.eeoc.gov/press/5-4-00.html (announcing settlement resolving suit "alleging that the manner in which [Toyota] recruited drivers and auto accessories installers at its Port Newark facility unlawfully deterred interested females and African Americans from applying for the sought-after positions").

13/ *See, e.g.*, USTA Comments, p. 35 (citing studies documenting that "low-income households purchase video programming services at roughly the same rate as households at other income levels"); AT&T Comments, p. 55 and n. 67 (citing studies documenting that "with respect to video programming . . .subscription rates correlate little with income"); MMTC Comments, p. 13 and n. 46 (addressing minorities' over-indexing on telecom services).

14/ USTA Comments, p. 22 (emphasis supplied).

15/ *Id.*, p. 36 (emphasis supplied).

profitable customers" with "wealthy customers" and also conflate "low income people" with "less profitable customers." When that happens – and sometimes it will – the wealthy will be served first, while middle income and poor families are supposed to be happy to know that they will be served eventually.

No one can predict how much redlining is likely to occur. We *can* predict that if history is a guide, the amount will not be *de minimis*. Whether redlining will occurs in 30% or 3% of municipalities, or some percentage in between, hundreds of thousands, and possibly millions of Americans will be affected. 16/ Ultimately, then, the Commission should continue to permit LFAs to enforce their anti-redlining laws and policies without interference.

Finally, in its deliberations the Commission should not dwell on whether incumbents or new entrants have economic stakes in the outcome of the redlining issue. They both do, but that is irrelevant to the Commission's evaluation of the merits. Apart from nonprofit organizations like ourselves, virtually every party in FCC rulemaking proceedings has an intense economic interest in the outcome. A "true fact" does not become less true simply because its proponent will benefit financially by asserting it. Indeed, had it not been for pragmatists who led many of our nation's leading corporations, and who correctly perceived that segregation was dragging down the economy, the 1964 Civil Rights Act, the 1965 Voting Rights Act and the 1968 Fair Housing Act might never have become law. We look forward to the day when farsighted telecom and cable executives will realize that their companies' success, their industries' success, and our competitiveness as a nation all depend on how long it will take for

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16/ In a landmark Ford Foundation study, *The Realities of Intentional Job Discrimination in America – 1999* (2002), leading scholars Albert and (the late) Ruth Blumrosen examined EEO-1 annual employment data using the standard Supreme Court-approved statistical test for inferring intentional employment discrimination. The study concluded that 30% of telephone companies discriminate against women, 32% discriminate against African Americans, and 25% discriminate against Hispanics. Cable companies and broadcasters fared no better in the Blumrosens' study.

every badge and incident of second class citizenship to be cast aside, and for every obstacle to competitive and universal telephone, video and internet service to be overcome.

II. THE DISTINCTION BETWEEN REDLINING AND BUILDOUT

A. The Definitions Of Redlining And Buildout

As several parties point out, Section 621(a)(3), 47 U.S.C. §541(a)(3), which prohibits redlining, does not 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." *ACLU v. FCC*, 823 F.2d 1554, 1579 (D.C. Cir. 1987). Neither, however, does Section 621(a)(3) prevent an LFA, on its own initiative or pursuant to local law or policy, from essentially requiring universal service within a reasonable time. Thus, for many LFAs, buildout requirements are a reliable and effective way to prevent redlining, 17/ and some local statutes require buildout to be enforced as a means of proscribing redlining. Although at times buildout requirements may contain significant flaws, 18/ the choice of methods of preventing redlining turns on local needs and experiences. Some LFAs could reasonably conclude, based on facts

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17/ *See, e.g.* Leibowitz Comments ("Build out requirements ensure that there is a simple, objective, easily administered test of economic feasibility as to where cable service has to be available. Having a clear test helps to ensure that the cable company's facilities are extended into all neighborhoods meeting this test and that service is offered to all residents in such neighborhoods, regardless of race, age, income or other extraneous factors.")

18/ There can be imperfections in the practical application of buildout requirements. For example, TIA states that buildout requirements can require service availability "within an unreasonably short period of time." TIA Comments, p. 11. A number of parties also urge that some buildout requirements may be flawed by their over-rigid use of "level playing field" provisions under which a new entrant is expected to build out precisely to the boundaries and in the manner of the mature incumbent. *See, e.g.*, AT&T Comments, pp. 58-60 (describing how incumbency's inherent advantages can make the entry process inherently asymmetric); NTCA Comments, p. 7 (asserting that "large incumbents often engage in predatory pricing behavior"); *but see* NCTA Comments, pp. 14-19 (illustrating that cream-skimming can undercut the sustainability of cross-subsidization of service in high value areas in covering the costs of upgrading, expanding and maintaining the entire cable system, *citing* M. Baumann, *The Adverse Effects of Asymmetric Build-Out Requirements in Cable Television*, September 14, 2005 (appended to NCTA Comments as Appendix B)).

specific to their communities and the applicants before them, that buildout is the only realistic way to prevent redlining. Therefore, as we urged in our Comments, the Commission should leave the choice of anti-redlining methods to the discretion of LFAs. 19/

Although buildout has certainly been a preeminent and often very effective anti-redlining tool, Congress did not intend buildout to be the only means by which an LFA might proscribe redlining. Not only did Congress enact separate redlining and buildout provisions, it worded them quite differently. Congress absolutely prohibited redlining under any circumstances, declaring that an LFA "*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" (emphasis supplied)). 20/ On the other hand, Congress allowed LFAs to regulate buildout under the much more relaxed and deferential standard of "reasonableness" (LFA "*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" (emphasis supplied)). 21/ When these redlining and buildout provisions are read together, it is clear that Congress regarded redlining as a far more serious offense than failure to build out the entire franchise area by a particular time – at least if buildout was not itself the means used to proscribe redlining which, certainly, is "unreasonable" within the meaning of Section 621(a)(4)(A).

A buildout requirement is a textbook example of a blanket rule, not expressly aimed at preventing discrimination, which has the desirable side benefit of happening to make discrimination impossible. In the history of civil rights there can be found many such examples;

19/ *See* MMTC Comments, p. 16.

20/ Section 621(a)(3**)**. This prohibition against discrimination has been "an integral component of the Cable Act since its passage in 1984." Comcast Comments, p. 22.

21/ Section 621(a)(4)(A).

most notably, many small towns with two segregated public schools often chose to integrate the schools by making one the elementary school and the other the high school. 22/ Yet as shown below, a buildout requirement may not be the only way to prevent redlining.

B. How Redlining Might Be Proscribed Without A Buildout Requirement

Our Comments provided two examples of how an LFA could reasonably proscribe redlining by means other than through buildout requirements. In particular, an LFA could:

> - 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*. For example, suppose a new entrant has operated, in another venue, a 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.
>
> - 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). 23/

22/ *See, e.g.*, *Brown v. Califano*, 627 F.2d 1221, 1227 n. 26 (D.C. Cir. 1980) (describing desegregation remedy of "pairing," which "treats two schools as one unit, with some of the grade levels housed in one, and the rest housed in the other.")

23/ MMTC Comments, pp. 22-23 (fn. omitted; emphasis in original).

We further noted that “[t]he 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.” 24/

Here is an illustration of how – in a diverse and densely population urban community – redlining could be proscribed by a somewhat different method than a buildout requirement. Suppose a new entrant applies to provide competitive video service in a city with ten wards of approximately equal size. The odd numbered wards are high income and the even numbered wards are low income. The applicant shows that its telephone operations in that city have followed a successful, state of the art anti-redlining program, featuring staff training, internal statistical reports, and compliance financial incentives for managers. Further, because of this plan, installations, repairs and network upgrades are provided with equal speed and quality across all wards. 25/ The applicant promises to implement this plan faithfully in its video operations, and it will provide the LFA with regular, periodic reports documenting the medians and frequency distributions of the incomes of residents in the areas it has build out and has yet to build out. Further, the applicant states that it will build out the entire city in five stages, and in each stage it will complete the buildout of an even numbered ward and an odd numbered ward. The applicant does not yet know which wards will be wired in which order, because the wards' non-income demographics and architecture (*e.g.* its multiple dwelling units and their owners' amenability to allowing new service) are uncertain. Further, the applicant does not know how long it will take to build out the city, although it notes that as a new entrant it has every incentive

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24/ *Id.*, p. 23.

25/ This is not a dream hypothetical. It is essentially the plan that Verizon-D.C. and Comcast-D.C. (among others units of major telephone and cable companies) have operated for several years.

to build in a reasonable time and it promises to build out as promptly as is commercially reasonable.

On these facts, an LFA could responsibly elect to grant the application. If the public needs additional protection against redlining, the LFA can "address this situation by retaining the right in the franchise grant to require upon such showing that those low income customers be served" 26/ *if* – and this is a big "if" – the LFA's anti-redlining statute, regulation or franchise provides for clarity, 27/ public participation, 28/ and, above all, strong enforcement 29/ that are the earmarks of effective modern civil rights laws.

C. Buildout Requirements Are Needed In The Unusual Instance Where A New Entrant's Current Service Area Is Itself Redlined

As we noted in our Comments, "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

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26/ BellSouth Comments, p. 33.

27/ *See* MMTC Comments, pp. 21-22 (anti-redlining statute or regulation should specify what constitutes discrimination, define what constitutes redlining, and describe the services are covered by this definition).

28/ *Id.*, p. 22 (anti-redlining statute or regulation should broadly afford standing, explain how parties may demonstrate standing, establish an accessible venue for appellate review, and provide for the applicability of the Civil Rights Attorneys Fees Act of 1976 or other provisions that would encourage the private bar to assume the risks attendant to bringing anti-redlining cases).

29/ *Id.* (anti-redlining statute or regulation should apply an impact standard rather than an intent standard, specify who decides when redlining has occurred, specify the evidence needed to compel a hearing or trial, provide meaningful, prompt and enforceable and remedies and relief, and prohibit mandatory arbitration). *See also* Rush/Towns Letter ("whether Congress ultimately decides that enforcement best lies with local or federal officials, or both, it must create the proper enforcement tools at the appropriate agency. Those tools must include regular oversight, the ability to compel the production of documents, and the ability to impose significant penalties so as to ensure compliance.")

as the existence of non-overlapping service areas." 30/ Therefore, as a general matter we concur that a new entrant should not be required to build out beyond the boundaries of its own service area where the incumbent's franchise area and the new entrant's service area happen not to be contiguous. 31/

There is, however, an exception, and that is where the service area (either as conceived or approved by the LFA itself, or as the area in which DSL has actually been built out) *is itself redlined*. In most large cities and inner suburbs, the franchise area and the DSL service area will be contiguous, with DSL having already been deployed to virtually 100% of the dwellings. However, it has come to our attention that in some exurban and rural counties, telephone companies may have built out DSL to wealthy sections of the county while delaying buildout to low income areas (such as Indian reservations), even when population density in the low income areas is not an impediment to buildout there. In such a scenario, allowing the service area for DSL to also become the service area for video service would have the effect of replicating the present effects of past discrimination across technologies and across generations. State action ratifying and validating past discrimination in this way is facially invalid, 32/ and

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30/ MMTC Comments, p. 21.

31/ *See* Verizon Comments, p. 7; AT&T Comments, p. 49; *but see* NATOA Comments, p. 34 n. 37 ("The number of places where that is true is not significant at all.") Certainly it is fundamental that a competitive entrant should not be permitted to choose a video service area *less* expansive that its DSL service area. *See* Letter to Hon. Joe Barton and Hon. John D. Dingell from Hon. Hilda L. Solis, March 14, 2006, urging that a non-discrimination provision in new telecom legislation not "only apply to communities self-selected for access to video services by new service providers" and, in effect, "allow a service provider to select only the few, elite communities for video services, so long as the provider does not discriminate *within* that community" (emphasis in original); Rush/Towns Letter ("In defining the scope of the non-discrimination provision, it is important that Congress require that non-discrimination apply not just to a small number of communities that a provider may self-select, but rather to the entire footprint of a provider.")

32/ It is well settled that government can remedy the present effects of race discrimination in which government was a passive participant. *See, e.g., City of Richmond v. J.A. Croson Co,* 488 therefore in this scenario the general principle that buildout should not be required beyond a new entrant's service area must stand aside to accommodate equal protection principles. 33/

III. THE RECORD SHOWS THAT SOME LFAS COULD BENEFIT IF THE COMMISSION DREW ON ITS EXPERTISE TO DEVELOP MODEL AND ADVISORY ANTI-DISCRIMINATION BEST PRACTICES

Irrespective of whether national or state franchising laws take effect, responsibility for anti-redlining enforcement probably should remain at the local level unless the Commission simply has no choice but to fill this role to protect the public. 34/ The Commission presently lacks the staff and resources needed to operate a new civil rights enforcement program. 35/ Furthermore, cable regulation often requires immediate action to respond to

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U.S. 469, 492 (1989) (O'Connor, J.) (holding that a government has a compelling interest in assuring that public dollars "do not serve to finance the evil of private prejudice"); *id.* at 519 (Kennedy. J., concurring in part and concurring in the judgment); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992); *United States v. Paradise*, 480 U.S. 149, 166 (1987); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976); *see also Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000), *cert. dismissed as improvidently granted*, 534 U.S. 103 (2001) (defining the applicable compelling governmental interest as "not perpetuating the effects of racial discrimination in [the government's] own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by [government] disbursements.")

33/ A provision of the recently enacted Indiana cable statute also appears on its face to offend equal protection. See IND. CODE § 8-1-34-28(b)(2), *added by* 2006 Ind. Legis. Serv. P.L. 27-2006, §58, which provides that a franchisee may fulfill its nondiscrimination obligation by reselling satellite television service or any alternative technology that offers video content comparable to that provided through a cable system, rather than by building wireline facilities. Satellite service may entail sizeable upfront payments by the customer, and some satellite service is not yet comparable to wireline service in reliability, speed, or technical compatibility.

34/ *See* MMTC Comments, p. 24 ("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.")

35/ The Commission's experience operating its EEO and minority broadcast ownership programs has been mixed. For example, the Commission inexplicably delayed, by fourteen months, the commencement of its program of broadcast EEO audits that it had promised to neighborhood-level issues for which any federal agency is ill equipped. 36/ No federal agency, dealing with day-to-day questions of service interruptions, billing confusion, or network unreliability, would possess the granular awareness of local history and demographics to appreciate when these individually routine matters form a pattern that could be indicative of systemic discrimination.

Many LFAs lack the resources to engage fulltime attorneys, economic consultants or demographers to advise them on how to respond to the seldom-arising occasions when a new cable franchise application is submitted. Therefore LFAs, especially in smaller franchise areas, would probably find dispassionate, non-binding anti-discrimination best practices information to be useful. 37/ Well-conceived best practices can help an LFA avoid delay (and errors of either over-reaching or under-reaching) in considering a new franchise application. 38/ Best practices would also be extraordinarily useful to members of the public,

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undertake in the *Broadcast EEO Second Report,* 17 FCC Rcd at 24066 ¶155. And in its broadcast multiple ownership rulemaking proceeding, the Commission failed to consider the likely effect on minority ownership of its plan to eliminate of the Failing Station Solicitation Rule (FSSR), even though the FSSR was created, *inter alia*, to preserve minority ownership. *See Prometheus Radio Project v. FCC*, 372 F.3d 373, 420-21 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 2902 (2005). These errors of judgment do not mean that the Commission is incapable of administering a civil rights initiative, but they do suggest that even with the best of intentions, civil rights can fall between the Commission's regulatory cracks.

36/ *See* Leibowitz Comments, pp. 6-11, providing numerous illustrations and anecdotes, and this observation: "Because service issues are local, customer service must be handled at the local level. These complaints are made and addressed within the community. There are thousands of customer service complaints across the country, which are addressed at the local level. The State or the Commission is simply not equipped with handling the sheer number of these customer service complaints."

37/ *See* NATOA Comments, p. 3 (while the Commission should not impose *de facto* national standards on LFAs, it "may have a useful role to play by gathering data about local franchising[.]")

38/ NATOA urges that "Title VI certainly cannot plausibly be construed to grant the FCC authority to become a sort of national franchising authority or national LFA oversight board[.]" NATOA Comments, p. 35; *compare* NTCA Comments, p. 6 ("Guidelines will…offer LFAs a whose knowledgeable participation in local regulatory processes is often vital to consumer protection and civil rights.

The record in this proceeding provides at least two examples of how best practices could come in handy in local franchising:

1. The "Shot Clock." There appears to be no agreement among the parties on how long an LFA should be allowed to consider a franchise application, or the time limit beyond which LFA's withholding of a franchise becomes tantamount to denial of one. Examples of the lengths of time suggested by the parties are 90 days, 39/ four months, 40/ and no time limit at all. 41/ Cable systems must be "responsive to the needs and interests of the *local* community,"42/ and therefore, if there is a "shot clock," it should be designed to afford local members of the public a fair opportunity to digest, consider, comment and participate in public hearings on the application and thereby help ensure that discrimination would not even unintentionally infect the buildout of new service. Certainly with so much at stake it is wiser to

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clearer understanding of what requirements are reasonable and *will not be preempted*" (emphasis supplied). We agree with NATOA. Best practices should not be *de facto* preemption limits; rather, they should be models to provide LFAs with good information drawn from other LFAs across the country. For that reason, in our Comments we urged the Commission should solicit the assistance of the State Regulators Council of the Advisory Committee on Diversity for Communications in the Digital Age to develop model best practices. *See* MMTC Comments, p. 24. The best practices the State Regulators Council should develop should be models, published as guidance only, with the express disclaimer that they should not be mischaracterized as establishing national standards or invoked so that the fact that an LFA did not adopt a best practice could be interpreted as an actionable transgression.

39/ NTCA Comments, p. 9.

40/ Fiber to the Home Council Comments, p. 61; Verizon Comments, p. 36.

41/ NATOA Comments, p. 36. NATOA points out that "[i]f an applicant knows that its franchise will be 'deemed granted' within a set number of days, it has little or no incentive to bargain in good faith with an LFA. On the contrary, it will have an increased incentive to stonewall." *Id.*

42/ 47 U.S.C. §521(2) (emphasis added).

avoid extremely short periods of time for application review. In this regard, it is instructive that Congress saw fit to afford radio and television consumers 90 days within which to review the application for license renewal of a local broadcast station – an application that is actually a postcard. 43/

2. Data Gathering. There appears to be disagreement among the parties concerning the extent to which an LFA should collect data from franchisees on customer service requests. 44/ Cable franchising issues are location-specific, thus enhancing the need for informed public participation. 45/ Data gathering and transparency make public participation meaningful, 46/ and therefore have great importance in anti-redlining enforcement, regardless of

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43/ *See Radio Broadcast Services: Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees,* 49 RR2d 740, *recon. denied*, 87 F.C.C.2d 1127 (1981), *aff'd sub nom. Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983) (authorizing postcard renewals); 47 C.F.R. §73.3584(a) (governing petitions to deny broadcast license renewals).

44/ *See, e.g.*, AT&T Comments, p. 72 (contending that some LFAs impose excessive data collection requirements, including some that cannot be satisfied on a city-specific basis).

45/ The courts and the Commission have long recognized that it is preferable for government review of media companies' performance to be driven by citizen rather than governmental initiative. *See, e.g., Stone v. FCC*, 466 F.2d 316, *rehearing denied*, 466 F.2d 331, 332 (D.C. Cir. 1972) (holding that a "unified community" can sometimes "effectively supplement the constitutional and statutory authority of the FCC," a development the Court has "consistently welcomed as serving the public interest"); *cf. Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (First Report and Order),* 15 FCC Rcd 2329, 2379 ¶123 (2000), *recon. denied*, 15 FCC Rcd 22548 (2000), *reversed on other grounds sub nom. MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, *petition for rehearing and rehearing en banc denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied sub nom. MMTC v. FCC,* 534 U.S. 1113 (2002) ("[g]iven the Commission's limited resources, we believe that it is important that the community have a role in monitoring broadcaster compliance with our EEO Rule.")

46/ Consumers' access to information on the civil rights *bonafides* of a communications company is vital to meaningful public participation in the regulatory process. *See, e.g.*, *Stone v. FCC*, 466 F.2d at 332 (noting that Commission acquiescence in a licensee's pattern of withholding evidence on its efforts to serve the public "might discourage representatives of the public from submitting Petitions to Deny, since it would convey the message that the renewal the means an LFA chooses to proscribe redlining. Further, since even the most well intended companies sometimes (intentionally or not) violate civil rights laws and policies and, when doing so, conceal the information needed to prove discrimination, 47/ data gathering can play a vital role in ensuring that companies engage in conscious self-assessment. 48/

The parties' lack of agreement on these and other issues demonstrates the wisdom of having best practices. From its national perch and with its years of expertise, the Commission is very effective at developing best practices. 49/ It can play its most useful role in the video arena by offering LFAs, and the public, guidance instead of regulatory intervention.

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process is a meaningless exercise, or a never-ending battle for which they have insufficient resources.")

47/ Intentional discrimination is often "clandestine and covert," *Teamsters v. U.S*, 431 U.S. 324, 335 n. 15 (1977), and whether intentional or not, discrimination can be "a subtle process which leaves little evidence in its wake." *Bilingual Bicultural Coalition on the Mass Media v. FCC*, 492 F.2d 656, 659 (D.C. Cir. 1974); *see also Riordan v. Kempiners*, 831 F.2d 690, 697-98 (7th Cir. 1987) ("Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it . . . .That is why the availability of evidence to test for possible discrimination is critical.")

48/ In its EEO jurisprudence, the Commission has often emphasized that compliance data assists licensees in preventing discrimination. *See, e.g.*, *In Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, 5 FCC Rcd 4893, 4898 ¶43 (1990), *recon. denied*, 8 FCC Rcd 398 (1993), *aff'd. sub nom. Florida State Conference of Branches of the NAACP v. FCC*, 24 F.3d 271 (D.C. Cir. 1994) ("the licensee did not maintain adequate records and does not appear to have engaged in meaningful self-assessment of its EEO program. Had it done so, it would have discovered that its recruitment efforts were not productive.")

49/ *See, e.g.*, FCC International Bureau, *Best Practices for National Spectrum Management* (March 30, 2005); FCC Wireless Telecommunications Bureau, *Best Practices Guide for Avoiding Interference Between Public Safety and Commercial Wireless 800 MHz Communications Systems* (February 9, 2001); Career Advancement Subcommittee of the FCC's Advisory Committee on Diversity for Communications in the Digital Age, *Workplace Diversity: A Global Necessity and an Ongoing Commitment*, June 14, 2004, approved by the full Advisory Committee, December 10, 2004.

IV. THE COMMISSION SHOULD MONITOR VIDEO COMPETITION TO ENSURE THAT EXCESSIVE BARRIERS TO ENTRY DO NOT DEVOLVE INTO 'NATIONAL REDLINING"

Our Comments observed that the law of unintended consequences can apply when good intentions, poorly executed, frighten business away and leave consumers without the benefits of competition:

> 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. 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. 50/

We added:

> 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. 51/

50/ MMTC Comments, p. 5 (emphasis in original). Others have addressed this point as well; *see, e.g.*, AT&T Comments, pp. 44, 48-53; BellSouth Comments, p. 34; USTA Comments, pp. 22-25 (giving several examples). *See, however*, NATOA Comments, p. 29 (making the important point that "a cable franchise is not a unilaterally-imposed instrument but a negotiated contract between the LFA and the cable operator. As a result, any complaints by one party in bilateral negotiations about delays must be taken with a grain of salt, since any delay can just as easily be the fault of recalcitrance in that party's negotiating position as it is the recalcitrance of the other" (fn. omitted)).

51/ *Id.*, p. 5 n. 9.

Still, the risk of a new entrant "walkaway" from an LFA's bargaining table should not be overestimated. Certainly there are strong incentives for both parties in a franchising negotiation to reach an agreement, including the sunk costs of planning invested by the applicant, the possibility that another new entrant (such as a broadband-over-power lines (BPL) company) will seize the lucrative second-mover advantage position, the prospect of cable operators' "triple play" of voice, data and video service, and the political consequences to an LFA of frightening away a company that could deliver diverse new programming and reduce consumers' cable bills. Most of the "walkaways" documented in the record have involved small rural communities or suburbs. Perhaps a large city is a "must-have" for a video provider.

Yet the risk of a new entrant walkaway should not be underestimated either. On the one hand, an inexperienced LFA can overreach or simply perform clumsily or too slowly at the bargaining table, unintentionally raising the cost of entry beyond what is commercially reasonable. On the other hand, a skillful national or regional business could play communities against one another, demanding concessions as the price of being "chosen" for early deployment. 52/

52/ Examples of such behavior are legion. Professional sports franchises often work to persuade municipalities that the city must finance the team's new stadium and afford the team tax relief or else risk losing the team. *See, e.g.,* David Nakamura, *Council Forges Deal on Stadium*, WASH. POST, Feb. 8, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/02/07/AR2006020701727.html ("The D.C. Council voted to reject a baseball stadium lease agreement last night, then reconsidered four hours later . . . after a plea from Mayor Anthony A. Williams and a threat from Major League Baseball President Robert A. DuPuy"). Some "big-box" chain retail stores, and some manufacturers, also demand tax, sewer and zoning relief and threaten to locate somewhere else if these benefits are not provided by local governments. *See, e.g.*, "Why are large, mass-market, big-box retailers a problem?", *available at* http://www.books-glba.org/Hudson_Ohio/Q&A.html (last visited March 27, 2006) (outlining case against zoning exceptions for big box stores). Often these companies make good on their threats to re-locate or abandon their plans to build in a community when their demands for special exemptions are not met. *See* Steven Greenhouse, *Developer Drops Plan for City's First Wal-Mart*, N.Y. TIMES, Feb. 24, 2005, at B9. The current wave of cable franchising is too new to allow a prediction of whether any of the (possibly dozens of) new entrants would refuse

Especially troubling is the possibility that a disproportionate number of communities that are *not* chosen for early deployment could be those whose residents are poor and thus not regarded by some applicants as especially attractive potential customers. 53/ That could lead to "national redlining" – whereupon wealthy cities or homogeneous suburbs are built out first, while cities with large populations of poor people are built out last. 54/ Some LFAs in communities with many poor people may be facing a classic Hobson's Choice: (1) franchising a competitor that builds out in a manner the LFA believes to be discriminatory, or (2) having no franchisee at all. While, as noted above, that risk may be low in large cities, depressed areas greatly in need of telecom competition (*e.g.,* the Mississippi Delta; western South Dakota, southeastern Oklahoma, eastern Kentucky) might find themselves on the wrong side of the digital divide.

Competitive franchising is still fairly new, so if national redlining were to take hold there will be time to correct it. Therefore, it would be worthwhile for the Commission to closely monitor trends in local franchising to ascertain whether national redlining is taking place, and ask its experts – the State Regulators Council of its Advisory Committee on Diversity for

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to deal with a community that insists on strong anti-redlining measures. Still, the possibility cannot be ruled out.

53/ Cities with high residential poverty rates often are also those having the least resources for rapid review and negotiation of cable franchises. Further, officials in these cities understandably and quite properly may be risk averse when it comes to protecting their citizens from discrimination. In a franchising negotiation, they may choose to err on the size of overzealousness rather than risk discovering, later, that their leniency caused the poorest citizens to be left behind as the new entrant builds out its system.

54/ *See* TIA Comments, p. 10 (predicting that the result of excessive buildout requirements that are "'designed to prevent "economic redlining" *within a community* essentially imposes a different form of "economic red-lining" *between communities*,' causing 'more marginal communities to be bypassed entirely'" (emphasis in original), *citing* George S. Ford, Thomas M. Koutsky, and Lawrence J. Spiwak, *Phoenix Center Policy Paper Number 22: The Consumer Welfare Cost of Cable "Build-Out" Rules* (July 2005, Second Release), pp. 21 and 15.

Communications in the Digital Age – to examine the conditions that could make national redlining possible and identify the steps needed to avoid this unintended potential consequence of Congress' redlining and buildout mandates.

V. THE BENEFITS OF NEW ENTRY WILL ONLY BE REALIZED IF NEW ENTRANTS DO NOT MERGE WITH INCUMBENTS

Regardless of the outcome of this proceeding, there is likely to be new competitive entry on a wide scale. Hopefully this will occur both rapidly and fairly, resulting in head to head competition and, consequently, more program diversity and price competition. Yet we have just seen the conclusion of a long battle between two large industries, each trying to gain traction on the other's traditional turf, and each doing so by contending that its entry into the other industry's turf would result in price and service competition. 55/ The outcome of this battle was that one side's companies "won" and thereupon purchased the losing side's largest companies at reduced stock prices.

55/ *See, e.g., Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, *Memorandum Opinion and Order*, 20 FCC Rcd 18433 ¶1 (2005). In the introduction to its decision approving the merger between Verizon and MCI, the Commission observed:

> This merger would combine one of the largest regional Bell Operating Companies (BOCs) with one of the largest providers of interexchange and competitive local service. This proposed merger occurs against the backdrop of ongoing change in the industry, including the pending merger of SBC and AT&T . . . .Verizon and MCI offer competing services in many communications markets, and each also supplies wholesale inputs relied upon by the other Applicant and other competitors in various retail markets. Thus, the proposed merger requires us to examine its effects on competition – which are both horizontal and vertical in nature – in a wide range of significant communications markets.

Id. Despite these potentially wide-ranging effects on competition, the Commission found that the RBOC-IXC mergers would serve the public interest and likely result in significant benefits, *see id.*, ¶2, even though the applicants had previously competed for each other's business and customers in the enterprise, mass market local exchange, and long distance markets.

Perhaps here we are again: two large industries, fighting each other tenaciously, seeking entry into one another's markets. As representatives of consumers, we welcome the opportunity to observe this battle, because it is the stuff of democracy. Yet this battle too could play out in an unfortunate way: one side "wins" and its companies buy the strongest companies on the other side, raising prices (again) and, ironically, eliminating the local competition whose touted benefits delivered the "win" in the first place. 56/

Consequently, when it issues its Report and Order in this proceeding, the Commission should state unequivocally that it expects to hold proponents of any merger of local video competitors to the highest standards of proof and persuasion.

56/ While this is not the occasion to address the merits of the currently pending merger between AT&T and BellSouth, we note that it does not carry this potential for reduced local video competition.

Respectfully submitted,

/s/____________________________

David Honig, Executive Director
Minority Media and Telecommunications Council
3636 16th Street, N.W., Suite B-366
Washington, D.C. 20010
(202) 332-7005
dhonig@crosslink.net

Counsel for:

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
Minority Business Enterprise Legal Defense and Education Fund
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

March 28, 2006

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 28th day of March 2006 caused a copy of the foregoing "Reply Comments" to be delivered by electronic mail to the following:

Hon. Kevin Martin, Chairman
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Hon. Michael Copps, Commissioner
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Hon. Jonathan Adelstein, Commissioner
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Hon. Deborah Tate, Commissioner
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Donna Gregg, Esq.
Chief, Media Bureau
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Matthew Leibowitz, Esq.
Ila L. Feld, Esq.
Elini Pantaridis, Esq.
Leibowitz & Associates, P.A.
One S.E. Third Ave., Suite 1450
Miami, FL 33131

Thomas W. Cohen, Esq.
Edward A. Yorkgitis, Jr., Esq.
Erin W. Emmott, Esq.
Theresa Gaugler, Esq.
Kelley Drye & Warren LLP
1200 19th St. N.W., Suite 500
Washington, D.C. 20036

Daniel Mitchell, Esq.
Jill Canfield, Esq.
Karlen J. Reed, Esq.
National Telecommunications Cooperative Association
4121 Wilson Blvd., 10th floor
Arlington, VA 22203

Edward Shakin, Esq.
William H. Johnson, Esq.
Verizon
1515 N. Courthouse Road, Suite 500
Arlington, VA 22201

Henry Weissmann, Esq.
Aimee Feinberg, Esq.
Munger, Tolles & Olson LLP
355 S. Grand Ave., 35th fl.
Los Angeles, CA 90071
Counsel for the Verizon telephone companies

Evan T. Leo, Esq.
Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC
1615 M St. N.W., Suite 400
Washington, D.C. 20036
Counsel for the Verizon telephone companies

Joseph W. Waz, Jr.
Comcast Corporation
1500 Market St.
Philadelphia, PA 19102

James R. Coltharp, Esq.
Comcast Corporation
2001 Pennsylvania Ave. N.W. Suite 500
Washington, D.C. 20006

Thomas R. Nathan, Esq.
Comcast Cable Communications, LLC
1500 Market St.
Philadelphia, PA 19102

James L. Casserly, Esq.
Johnathan Friedman, Esq.
Daniel K. Alvarez, Esq.
Willkie Farr & Gallagher LLP
1875 K St. N.W.
Washington, D.C. 20006
Counsel for Comcast Corporation

James W. Olson, Esq.
Indra Sehdev Chalk, Esq.
Jeffrey S. Lanning, Esq.
Robin E. Tuttle, Esq.
United States Telecom Association
607 14th St. N.W., Suite 400
Washington, D.C. 20005

Jim Lamoureux, Esq.
Bruce R. Byrd, Esq.
Gary L. Phillips, Esq.
Paul K. Mancini, Esq.
AT&T Inc.
1401 Eye St. N.W., Suite 1100
Washington, D.C. 20005

David W. Carpenter, Esq.
Sidley Austin LLP
One South Dearborn St.
Chicago, IL 60603
  Counsel for AT&T Inc.

David L. Lawson, Esq.
David M. Levy, Esq.
James Young, Esq.
C. Frederick Beckner III, Esq.
Christopher T. Shenk, Esq.
Sidley Austin LLP
1501 K St. N.W.
Washington, D.C. 20005
  Counsel for AT&T Inc.

Grant E. Seiffert, Esq.
Derek R. Kholpin, Esq.
Danielle M. Jafari, Esq.
Telecommunications Industry Association
2500 Wilson Blvd., Suite 300
Arlington, VA 22201

Richard M. Sbaratta, Esq.
J. Phillip Carver, Esq.
Bellsouth Corporation
Bellsouth Entertainment, LLC
675 W. Peachtree St. N.E.
Atlanta, GA 30375

Bennett L. Ross, Esq.
Bellsouth Corporation
1133 21st St. N.W., Suite 900
Washington, D.C. 20036

James N. Horwood, Esq.
Tillman L. Lay, Esq.
Ruben D. Gomez, Esq.
Spiegel & McDiarmid
1333 New Hampshire Ave. N.W., 2nd fl.
Washington, D.C. 20036
Counsel for the National Association of Telecommunications Officers and Advisors, The National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the Alliance for Community Media, and the Alliance for Communications Democracy

Daniel L. Brenner, Esq.
Michael S. Schooler, Esq.
Diane B. Burstein, Esq.
National Cable and Telecommunications Association
1724 Massachusetts Ave. N.W.
Washington, D.C. 20036

//s/______________________________
David Honig