

FCC Adopts Final Video Franchise Rules

Following up on our February report, this article details what the FCC wants, and the limits to its authority to change the rules in the first place

By James Moskowitz ■ *Fleischman and Walsh, L.L.P.*

In December, the Federal Communications Commission adopted new rules designed to change the way service providers obtain local video franchises. The FCC aimed to significantly decrease the regulatory burdens associated with entering the cable TV market.

In adopting its franchise reform Order, the FCC valiantly attempted to reduce the regulatory burdens associated with obtaining cable TV franchises. However, its ability to adopt truly groundbreaking reforms was constrained under the federal Cable Act, which does not give the FCC express authority to regulate the local franchising process.

This initiative was the product of intense lobbying from incumbent local telephone companies (often referred to as “incumbent local exchange carriers” or “ILECs”) who hope to reduce the time, cost and regulatory burdens often associated with the franchising process.

From the moment the FCC voted to adopt its franchise reform package back in December there have been real questions about the scope of the changes it made and its legal authority to make them. However, the FCC did not release the new rules or its order explaining them in December. Instead, it issued a two page press release and left the industry speculating about the details. Because cable television services are highly regulated by federal statute, the difficulty in giving effect to the FCC’s deregulatory ambition lies not only in the details of what it did, but also in its legal justification for doing so.

On March 5, the FCC released its detailed rules along with an explanatory order and we are now able to look past the FCC’s general statements to see what it actually did.¹ While these new rules have the potential to streamline the franchising process, it does not appear likely that the FCC’s franchise reform Order will mark an abrupt sea change in the way the industry is regulated or franchises are obtained. Where the FCC appeared to adopt bold new deregulatory principles, it either did so under the aegis of very questionable legal authority (as with its negotiation deadlines), or declaimed its deregulatory pronouncements with so broad a stroke as to do little more than restate existing

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law (as with the limitations on build-out requirements). Consequently, the portions of this ruling likely to be left in place following an almost inevitable court challenge are not likely to immediately alter market conditions on the ground.

For those readers unfamiliar with the current franchising process, understanding the significance of the FCC’s recent Order will require some context. Under federal law, in order to provide cable TV services over cables placed in the public rights-of-way, cable service providers are required to obtain permission, in the form of a local franchise, from the relevant local (city, town, county) or, in some instances, state government authorities.

The process of obtaining a local franchise has developed a reputation for being unnecessarily costly and time consuming. There are several factors that contribute to this. Franchises are often negotiated with very small local government authorities, most of which do not have personnel or resources devoted exclusively to cable television issues. Indeed, some local governments are not staffed full-time and this can lead to long delays in franchise negotiations.

When dealing with larger municipalities, the situation can be worse. Where a larger city does have dedicated staff, officials often tend to draw out the negotiations and spend inordinate

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amounts of time scrutinizing every line of the agreements regardless of how trivial.

And many governments, large and small, employ consultants that have an incentive to spend time negotiating every detail of the agreements and taking advantage of the leverage they have under the franchise system in order to obtain the maximum number of concessions from service providers as possible – whether legitimate or otherwise.

In sum, local governments are often unable to resist the opportunity that this process gives them to demand burdensome and costly terms as a condition for granting a franchise. These conditions, among others, include high fees (over and above the maximum 5 percent of gross revenues permitted under the federal statute), requirements that the service provider offer services to every household in the locality (these are known as “build-out requirements”), and requirements that the service provider dedicate channels for public, education, and government (“PEG”) access use and funds for equipment and facilities for PEG access I-Nets.

Negotiations with these jurisdictions often become protracted, particularly where the local government engages consultants to assist them, and lead to lengthy formal administrative processes. Consequently, it is not surprising that few but the largest telephone companies are pursuing business plans premised on their ability to obtain video franchises.

The FCC's Jurisdiction to Act

In order to change the current process, the FCC first has to have the authority over the actions of the local franchising authorities. The commission's authority

is not a given because one of the main purposes of the Cable Act, which was originally passed in 1984 and amended in 1992 and 1996, was to delineate local and federal authority in the area of cable TV regulation. In that legislation, Congress placed the franchising process

squarely in the hands of the localities. It is not clear on the face of the statute that Congress reserved any role for the FCC in the franchising process.

The FCC addressed this issue in its Order by adopting, for the first time, the position that it has a general grant of authority to adopt rules implementing the portion of the Cable Act² that bars local franchising authorities from unreasonably refusing to grant competitive franchises. This is notable because, until now, the courts alone have been recognized as having jurisdiction over determining what amounts to an “unreasonable refusal” to grant a competitive franchise.³

The FCC further relied on general grants of authority under Sections 201 and 706 of the Communications Act as a basis for its jurisdiction. However, Section 201 applies to telecommunications services and Section 706 applies to broadband services. Neither of these sections has been interpreted in the past as governing the regulation of cable television services. Accordingly, while the FCC made a concerted effort to establish the legal authority for its actions, it was not able to do so in a clear and irrefutable manner. This inability undermines the efficacy of its franchise reform efforts and creates considerable uncertainty with regard to whether its decision will withstand judicial review.

The FCC Reforms

As discussed in more detail below, in the franchise reform Order the FCC preemptively determines that the following practices and actions by local franchise authori-

ties “unreasonably interfere” with competitive cable entry:

- ⊙ Failure to grant or deny competing franchises within a reasonable time frame;
- ⊙ Imposition of overly burdensome build-out requirements;
- ⊙ Imposition of certain fees and payment obligations in excess of the 5 percent franchise fee “cap”;
- ⊙ Imposition of certain PEG and I-Net obligations on new entrants; and
- ⊙ The imposition of regulations relating to non-cable services, such as telephony, as a condition of providing cable service.

In order to restrict these practices, the FCC adopted specific rules specifying the information to be provided in a franchise application, prohibiting the local franchise authority from requiring negotiations prior to the filing of an application, establishing time limits on franchise negotiations, and perhaps most controversially, giving an applicant the right to begin providing service if a local franchise authority fails to act on a franchise application within these time limits.

The FCC did not adopt specific rules to enforce the other practices that it identified as being unreasonable. Instead, the FCC broadly preempted local franchise authority to:

- ⊙ Mandate certain network build-out requirements,
- ⊙ Mandate certain PEG and I-Net requirements,
- ⊙ Mandate requirements for payments in excess of the 5 percent franchise fee limit,
- ⊙ Impose regulation on non-cable services as a condition of the grant of a competing franchise, and
- ⊙ Enforce requirements that competitive franchises contain the same terms as the incumbent franchise (com-

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monly known as “level playing field” requirements).

It is notable that the FCC’s rules only apply to new entrants seeking competing cable franchises, not to incumbent cable operators. Moreover, the FCC expressly stated that its interpretation of Section 621(a)(1) applies only to franchise requirements imposed by local franchise authorities pursuant to local law and does not invalidate or otherwise apply to franchise procedures or terms established through statewide legislation.

At the same time that the FCC adopted its franchise reform Order, it also invited comments on whether and how the new franchise reform terms would apply to the incumbent providers. However, as things stand now, these rules only apply to competitive entrants in states that do not have state-level franchising legislation.

The New Rules: “Shot Clock” for Consideration of Competing Franchise Applications

The FCC found that local franchising authorities do not always act on competing franchise applications in a timely fashion; thereby frustrating the development of competition. The agency established a “shot clock” for local franchising authorities to render a decision on a competing franchise application. The “shot clock” timeframes set forth by the FCC are as follows:

- ⊙ For entities with existing authority to access public rights-of-way (typically ILECs): **90 days.**
- ⊙ For entities that do not have existing right-of-way authority: **6 months.**

The period within which a local franchising authority must act on an application for a competing franchise begins when the local franchising authority receives an application. The minimum information that must be provided in the

application includes:

- ⊙ The applicant’s name and the names of the applicant’s officers and directors,
- ⊙ The applicant’s business address and contact information,
- ⊙ The geographic area that the applicant proposes to serve,
- ⊙ The applicant’s proposed PEG channel capacity and capital support,
- ⊙ The length of the franchise term requested,
- ⊙ A statement as to whether the applicant holds an existing authorization to access the public rights-of-way within the franchise area,
- ⊙ The amount of the franchise fee the applicant agrees to pay.

Failure to provide the requested information will toll the approval time. The local franchising authority may not compel the applicant to engage in pre-filing negotiations.

One of the more controversial elements of the Order is the “remedy” adopted for situations where a local franchising authority fails to grant or deny a competing franchise application within the specified time period.

In that circumstance, the competing application is deemed to be granted on an “interim” basis and the applicant may immediately begin providing service. If the local franchising authority and applicant eventually agree to the terms of a franchise, the new franchise replaces the interim grant. If the local franchising authority affirmatively denies the application, the applicant can file a lawsuit in federal district court. It appears (but is not completely clear) that the FCC in-

tends for the interim franchise to remain in effect pending a decision as to whether the denial was unreasonable (apart from its lack of timeliness).

The FCC’s grant of interim authority is based on questionable statutory authority. As discussed, the franchise system established under the federal Cable Act contemplates that franchising decisions will be made by the local franchise authorities with the courts reviewing the local franchise authority decisions. There is no clear statutory source of authority that would give the FCC the ability to grant franchises, even on an interim basis, or to give service providers the legal right to occupy rights-of-way controlled by local governments. Under our federal system, local and state governments have the inherent authority to control rights-of-way access. While Congress may preempt this local authority, it must do so clearly – either by expressly preempting local law or by “occupying the field” to be regulated so that there is no legal room for local actions contrary to federal mandates.

Where the granting of franchises is concerned, there is no express congressional preemption of local authority. Nor is it likely that the FCC can “occupy the field” under the Cable Act to the exclusion of local action with regard to franchising.

The FCC’s new rules have the effect of altering the statutory scheme set up by Congress, which only allows for review of *final* local franchising authority decisions (and then by the courts). There is no statutory basis for either the courts or the FCC to intervene in the franchising process prior to a final decision by the

While the FCC made a concerted effort to establish the legal authority for its actions, it was not able to do so in a clear and irrefutable manner. This inability undermines the efficacy of its franchise reform efforts and creates considerable uncertainty with regard to whether its decision will withstand judicial review.

local authorities. Localities have a material claim that the FCC has overstepped its authority in its reform efforts. Given the strong positions already staked out by the local government community on this issue, it is likely that they will challenge this FCC action in court.

Compounding the legal questions regarding the FCC's authority to grant interim franchises, the "shot clock" scheme devised by the FCC also creates practical problems with implementation. First, this system is open to gaming by service providers. For example, a service provider could file an application that contains the minimum application requirements set

forth by the FCC, but that also contains terms that are unacceptable to the local franchise authority.⁴

It is also conceivable that the application could be submitted during a period when the local government is not going to be in session for the entire shot clock period. Under the FCC's rules, the franchise will be granted on an interim basis regardless.

Additionally, it is not clear what recourse a local franchise authority would have to halt the interim authority other than to quickly deny the application. However, a denial after the expiration of the shot-clock may not work to stop the interim grant as the FCC's order appears to contemplate

that an interim grant will remain in place until any appeals are finalized, a process that could be quite prolonged.

FCC Preemption of Local Franchise Conditions

While the FCC created new federal rules governing its "shot clock" procedures, the rest of the actions it took were accomplished by preempting local franchise authority actions that the FCC prospectively determined were unreasonable.

This approach is expeditious from a legal standpoint, in that it avoids the need to craft (and defend) specific implementing rules that set forth the intricacies of the application of the principles adopted. However, this approach has the corresponding shortcomings of creating vague restrictions on local franchise authority while also providing no guidance on how these restrictions will be applied or enforced. As a result, until the kinks are worked out, there will be significant

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uncertainty regarding the application and effectiveness of these reforms.

Limitations on Build-out Requirements

The first set of limitations that the FCC found to be unreasonable are network build-out requirements. The FCC determined that the imposition of certain build-out requirements on new entrants can serve as an impediment to the development of competition. Specifically, the FCC deemed the following build-out mandates unreasonable:

- ⊙ Requiring a new entrant to be able to serve everyone in a franchise area before it can serve anyone;
- ⊙ Requiring a competing new entrant with existing facilities to build out its plant beyond its existing footprint before providing new service;
- ⊙ Imposing more burdensome build-out obligations on a new entrant than those applicable to the incumbent operator (for example, shorter build out deadlines; lower density thresholds).
- ⊙ Requiring the new entrant to build out and serve buildings or developments to which access cannot be obtained on reasonable terms; and
- ⊙ Requiring the new entrant to build out certain areas that cannot be reached using standard technical solutions.

However, the FCC did acknowledge that it is reasonable for a local franchising authority to consider a new entrant's market penetration in establishing a build-out schedule and to set benchmarks requiring the new entrant to increase its build-out after a reasonable period of time had passed and taking into account its market success.

The FCC also distinguished build-out

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requirements from redlining based on income level, reaffirming that local franchising authorities can enforce the prohibition on redlining. However, the agency elected not to define more specifically what constitutes redlining.

The FCC's pronouncements on build-out requirements are not a complete departure from current law. Nor did the FCC curtail local franchising authorities' ability to craft build-out requirements under certain factual circumstances. At best, the FCC's pronouncements may provide a useful source for competitive entrants to rely upon in their negotiations with local franchising authorities. Rather than having to brief these issues in detail for the local franchising authority, a new entrant may be able to fall back on the FCC's decision when faced with local franchising authority requirements that conflict with these principles.

Franchise Fee Provisions

As with the findings relating to build out requirements, the FCC's findings relating to unreasonable franchise fee terms do

little more than reiterate prior decisions on these issues. The FCC found that local franchising authority demands for certain payments by new entrants are inconsistent with the Cable Act's franchise fee rules and thus constitute an unreasonable basis for refusing to grant a competing franchise.

In particular, the Order clarifies that the revenue base for calculating an operator's permitted 5 percent franchise fee payment is limited to revenues from cable services. Thus, a cable operator is not required to pay franchise fees on revenues from Internet access service or other non-cable services.

The Order also clarifies that while certain charges that are "incidental" to the awarding or enforcing of a franchise are exempt from the franchise fee limitation (payments for bonds, security funds, letters of credit, insurance, and liquidated damages), this exemption does not cover processing fees, consultant fees, and attorney fees. The FCC also indicated that application or processing fees that exceed the reasonable cost of processing the application and requirements of free or discounted service also are "non-incidental" and must be off-set against the 5 percent limit.

Other franchise fee-related issues addressed by the FCC include the status of certain "in-kind" payment requirements and payments in support of PEG services and equipment. The Order states that any requests for in-kind payments that are unrelated to the provision of cable services – including requirements for payments for municipal projects such as library construction or recreation centers

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– are subject to and counted toward the statutory 5 percent franchise fee cap.

Also, local franchise authority-mandated contributions in support of PEG services and equipment are exempt from the 5 percent limit only if the payments are for PEG capital costs – costs incurred in or associated with the construction of PEG facilities (as distinct from payments in support of the use of PEG facilities, such as payments relating to salaries, training and program production).

This new system is open to gaming by service providers. For example, a service provider could file an application that contains the minimum application requirements set forth by the FCC, but that also contains terms that are unacceptable to the local franchise authority.

Because the findings the FCC made with regard to costs that should be used to offset franchise fees are consistent with prior precedent regarding these matters, these issues are not likely to be as controversial as other provisions in the FCC's Order, such as the "shot clock" rules and level playing field preemption discussed below. Consequentially, this aspect of the FCC's Order should not mark a material change in the terms permitted in local franchises. However, by stating that these practices are preemptively unreasonable, the FCC may discourage local franchise authorities from insisting that these terms be included in franchises regardless of their legitimacy.

Furthermore, it is unclear as a practical matter what effect an FCC preemption of these terms will have on the franchising process. Does the FCC's preemption mean that if a service provider is forced to accept terms that the FCC has found to be unreasonable that the service provider is free to unilaterally ignore those

conditions? This outcome is problematic because there is nothing in the law to prevent a service provider from accepting one term that the FCC has deemed to be unreasonable, in exchange for not being subject to another condition that is within the local franchise authority's right to require. Nor is it likely that the FCC will

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The FCC also distinguished build-out requirements from redlining based on income level, reaffirming that local franchising authorities can enforce the prohibition on redlining. However, the agency elected not to define more specifically what constitutes redlining.

be able to review a complaint by a service provider that a local franchise authority is contravening the FCC's preemption. This is because the Cable Act clearly confers appellate review jurisdiction upon the courts and not the FCC. And the courts only have the jurisdiction to review application denials. If the FCC wants to somehow review applications prior to a denial, it will need to somehow conjure the authority to do so.

The more plausible scenario for enforcing the FCC's preemption is where a local franchise authority denies an application because of the service provider's failure to include terms that the FCC deemed to be unreasonable. In this circumstance, the service provider could use the FCC's decision to support a court challenge to the denial as contemplated under Sections 621(a) and 635 of the Cable Act.

Unfortunately, the entire purpose of franchise reform is to free service providers from the cost and delay associated with having to litigate franchise agreement denials. Therefore, it is unclear how the FCC's preemption of unreasonable conditions will translate into a significantly more streamlined franchising process.

PEG and I-Net Requirements

Citing Section 621(a)(4) of the Cable Act, which provides that local franchise authority may require "adequate assurance" that a cable operator will provide "adequate" PEG capacity, facilities and financial support, the FCC ruled that it has the authority to define what is "adequate" and to prohibit local franchise authorities from imposing PEG obligations that go beyond what is "satisfactory or sufficient."

The FCC expressly declined to establish standard PEG channel rules. Instead, the FCC ruled that local franchise authorities are free to establish their own requirements for PEG access, provided that they do not run afoul of the FCC general proscriptions and that the non-capital costs of such requirements are offset from the service provider's franchise fee payments.

By way of general guidance on what "adequate" PEG capacity is, the FCC specified that it is unreasonable for a local franchise authority to impose more burdensome PEG obligations on a new entrant than those imposed on the incumbent.

The FCC also deemed unreasonable PEG and I-Net obligations that would require the new entrant to duplicate facilities constructed by the incumbent. While acknowledging that a certain level of I-Net redundancy may provide additional capability or functionality (thereby providing a public benefit), the FCC indicated that the local franchising authority should consider whether such additional functionality can be achieved by requiring the new entrant to supplement existing facilities with financial support rather than by requiring the construction of new facilities.

As with the other areas where the FCC preempted unreasonable local franchise authority conditions, it is unclear what benefit the FCC's pronouncements will have in their application in the "real world." Setting aside the issue of the FCC's authority to regulate PEG requirements, by its own terms the FCC's Order leaves the local franchise authorities with significant leeway for devising PEG and I-Net obligations. By announcing the general parameters of "adequate" PEG capacity, the FCC

may make the negotiation process easier by providing the negotiating parties with a general, objective overview of acceptable PEG requirements.

Regulation of "Mixed Use" Networks

The Order clarifies that, to the extent an applicant for a cable franchise provides non-cable services or operates non-cable facilities (for instance, Internet services or telephony), it is unreasonable for a local franchise authority to demand that the applicant subject its non-cable services to local regulation as a condition for obtaining a franchise. Once again, this is consistent with current law in this area. For example, the FCC deemed it unreasonable for a local franchise authority to require an entity that already has authority to access the public rights of way (such as an incumbent local exchange carrier) to obtain a video franchise for the purpose of upgrading its network unless and until that entity actually is proposing to offer cable services over the upgraded network.

A cable operator is not required to pay franchise fees on revenues from Internet access service or other non-cable services.

Thus, if a local exchange carrier ("LEC") seeks to upgrade its plant with fiber that is capable of providing both cable TV and non-cable services, the deployment of the fiber does not alone trigger the obligation to obtain a cable franchise. A local franchise authority also may not demand that a LEC obtain a franchise before it installs curbside boxes that house the infrastructure to be used for cable and non-cable services.

Similarly, the Order finds that it is unreasonable for a local franchise authority to attempt to use its ability to grant cable franchises to regulate any non-cable

services offered by video providers. Thus, the local franchise authority may not claim the right to impose customer service regulations on the operator's entire network or on non-cable services.

The FCC also confirmed that a facility that provides only "interactive on-demand services" is not a cable system subject to cable franchising. However, the FCC declined to address whether particular services (such as AT&T's "U-Verse" service) constitute "interactive on-demand services" or whether video services transmitted using Internet Protocol are "cable services."

These pronouncements should help clarify that the local franchise authorities may not regulate non-cable TV services through the franchise process. Similarly, it should also give some added leverage for service providers to resist calls to negotiate franchises for non-cable TV ser-

Rather than having to brief these issues in detail for the local franchising authority, a new entrant may be able to fall back on the FCC's decision when faced with local franchising authority requirements that conflict with these principles.

vices that are sometimes made by local franchise authorities.

Because the interstate broadband services are regulated by the FCC, there is a better case to be made that the FCC has authority to address these issues. Accordingly, where a local franchise authority does insist on applying franchising re-

quirements to broadband services, it is more likely that the FCC could step in to resolve any resulting dispute based upon a complaint.

Preemption of Local Level Playing Field Provisions

One other area where the FCC made a sweeping preemption of local law has to do with local "level playing field" provisions. These are requirements of local law that forbid competitive franchises being granted on terms more favorable or less burdensome than required of the incumbent cable TV provider.

According to the FCC, locally-adopted regulations that require a competing franchise applicant to comply with substantially the same franchise terms imposed on incumbent cable operators are unreasonable. In addition, the Order indicates that any other local laws and regulations that conflict with the FCC's

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interpretation of Section 621(a)(1) also are preempted.

The latter would include local laws that authorize a local franchising authority to exceed the specified time limits for granting or denying a competing franchise application or that allow a local franchising authority to impose unreasonable build-out requirements, collect excessive franchise fees, or impose unreasonable PEG/I-Net obligations.

These provisions once again raise questions regarding the FCC's authority to act. In addition, the FCC's preemption of level playing field provisions also once again raises significant questions regarding the scope of this preemption. For example, it would appear that notwithstanding the Order, a franchising authority can enforce build-out, PEG and I-Net requirements that would otherwise be preempted if the competing applicant voluntarily agrees to be bound by those requirements.

On the other hand, the 5 percent limit on franchise fee payments arguably is not subject to waiver and thus even voluntary agreements to make payments in excess of those limits are not enforceable.

Also, the FCC's statements exempting state-mandated requirements from the restrictions adopted in the Order would appear to suggest that level playing field provisions adopted by state legislatures are not preempted. However, the factual and legal distinctions between locally mandated and state mandated level playing field requirements are unclear. Put another way, if these requirements are unreasonable, what difference does it make whether they are state or locally mandated?

Finally, once again, the Order does not expressly set forth any procedures for the resolution of complaints alleging that a local franchise authority is seeking to impose unreasonable terms on an applicant for a competing franchise.

Conclusion

In lieu of acting under express statutory authority, the FCC was left to try to craft what reform it could out of the limited authority available to it under the federal statute. The result is a franchising reform package that contains some key

changes that, if they withstand judicial scrutiny, should significantly reduce the time necessary to gain the regulatory approvals necessary to provide competitive cable TV services.

However, the FCC's ability to withstand judicial scrutiny is not a given. The FCC's Order raises some serious legal concerns and petitions for reconsideration and/or judicial challenges to the Order appear likely. Indeed, it should not be a surprise if the courts are asked to stay the enforcement of this Order before it ever goes in to effect.⁵

This should give some pause to competitive operators hoping to rely on the FCC's Order to gain local franchises. There is, to be sure, a value to be placed on attempting to take advantage of the reduced regulatory burdens that the FCC's franchise reform order promises.

However, before service providers move forward under these rules, it is imperative that they weigh that value against the possible contingencies should the rules be stayed or overturned. Indeed, there may well be some providers that are willing to bear the risks and apply for franchises under the FCC's reform procedures. And there may be others that are willing to bear the cost that will be associated with defending any legal challenges that may greet these first franchises.

However, most service providers will probably opt to be very circumspect at the outset in relying on the FCC's franchise reforms. It is very difficult to justify the significant capital outlays that pursuing a cable TV entry strategy entails in a climate of significant regulatory uncertainty.

Until it is clear that the franchise reform order will survive the coming legal challenges, which have already been filed, the fulfillment of the promise of the FCC's franchise reform initiative is unlikely to be fully realized. **BBP**

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References

- 1 The rules and guidelines contained in the *Order* will become effective 30 days after the *Order* is published in the Federal Register.
- 2 Section 621(a)(1).
- 3 Section 621(a)(1) states in relevant part: "A franchising authority may award, in accordance with the provisions of this title, one or more franchises within its jurisdiction; except that a franchising authority may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of Section 635 [granting review authority to state and federal courts] for failure to comply with this subsection."
- 4 Many of the practices that the FCC has listed as being unreasonable are not particularly clear. For example, there is uncertainty with regard to the kinds of build-out requirements that are permitted; in addition, even under the FCC's reforms, the local franchising authorities still have considerable leeway in determining PEG capacity requirements.
- 5 It is worth noting that the *Order* was adopted by a narrow 3-2 vote, with Commissioners Copps and Adelstein dissenting. Commissioner Adelstein in particular argued that the FCC lacked the authority to intrude so deeply into the local franchising process and predicted that the *Order* would be struck down by the courts.