SUPREME COURT
STATE OF LOUISIANA

DOCKET NO. 2006-C-2227

ELIZABETH W. NAQUIN, PLAINTIFF-RESPONDENT,

VERSUS

LAFAYETTE CITY-PARISH CONSOLIDATED GOVERNMENT, *ET AL*,
DEFENDANTS-APPLICANTS

A CIVIL PROCEEDING

WRIT OF CERTIORARI
TO THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL, DOCKET NO. CA 06-00904
AND THE 15TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF LAFAYETTE, NO. 2006-2014
HONORABLE EDWARD D. RUBIN, DISTRICT JUDGE

BRIEF OF *AMICUS CURIAE* THE FIBER TO THE HOME COUNCIL IN SUPPORT OF LAFAYETTE CITY-PARISH CONSOLIDATED GOVERNMENT, *ET AL*.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Fiber to the Home Council ("FTTH Council") offers the Court this *amicus* brief in support of the Lafayette City-Parish Consolidated Government, the City of Lafayette and the Lafayette Public Utilities Authority (collectively, "Lafayette"). The FTTH Council is a non-profit organization that provides support for its members as well as education to legislators, government agencies, courts, and the public about the opportunities and benefits of advanced communications networks that utilize ultra-high-speed fiber-optic cables and electronics. Such systems are commonly referred to as "fiber-to-the-home ('FTTH')," "fiber-to-the-user," or "fiber-to-the-premises" systems. While there are important distinctions among the various types of fiber-based systems, the FTTH Council will refer to them collectively for the purposes of this brief as "FTTH systems."

The FTTH Council's 135 members include a broad range of nationally and internationally known entities that are working to foster the rapid deployment of FTTH systems and capabilities to all Americans as rapidly as possible. Most of the Council's members are private entities, including companies that offer telecommunications, computing, networking, system integration, engineering, content that can take advantage of robust communications networks, and other high-technology products and services. The Council's membership also includes traditional telecommunications service providers, utilities, and municipalities.

The FTTH Council and its members have unparalleled experience and expertise with FTTH systems, such as the project initiated by Lafayette, and have experienced first-hand the unique contributions that such systems can make to America's local, regional, and global competitiveness and quality of life. In this brief, the FTTH Council will provide the Court important background information concerning this controversy – information that might otherwise escape its attention.

If not reversed, the Third Circuit's decision will prevent the opportunities and benefits provided by Lafayette's FTTH system, and detrimentally impact the United States' global competitive position for FTTH deployment. More specifically, unless the Third Circuit's decision below is reversed, it will deprive many of the FTTH Council's members of an opportunity to partner with Lafayette in constructing and operating its FTTH system or to take advantage of the system's vast resources to offer advanced products and services to customers around the world. No existing party to this litigation has undertaken to speak for these adversely-affected entities, nor could any existing party do so as effectively as the FTTH Council.

OVERVIEW

A century ago, as electric lines began to appear around the United States, it became clear that not all communities would be served by privately-owned electric power companies. Recognizing that electricity was crucial to their economic vitality and quality of life, thousands of communities across America – including Lafayette – took matters into their own hands and formed their own electric utilities. Those that did take such action generally survived and thrived.

Today, a similar situation is occurring in the communications area. While some areas of the country enjoy robust broadband services provided by private sector communications services, many others do not. As compared to the other leading nations in the world, the United States is falling increasingly behind in developing the high-speed communications systems (commonly known as "broadband" systems) on which America's global competitiveness will depend in the decades ahead. Once again, hundreds of municipalities across the United States, including many in Louisiana, are ready, willing, and able to step forward to serve their own needs, on their own timetables, and in their own way. These municipalities want to be competitive with the most progressive cities in the world, and they are not willing to sacrifice the needs of their citizens.

In enacting the Local Government Fair Competition Act of 2004 ("the Act"), the Louisiana State Legislature and Governor Kathleen Babineaux Blanco sought to strike a delicate balance between, on the one hand, allowing the municipalities to develop their own advanced broadband networks and, on the other hand, protecting incumbent communications providers from unfair competition. The Legislature and the Governor achieved both objectives by enacting into law an extensively-negotiated and carefully-crafted compromise among representatives of the communications industry, municipalities, and other key stakeholders. Each individual measure of the Act must therefore be read in a way that accommodates *both* of the two key "legislative findings and declarations of intent" articulated in La. R.S. 45:844.42:

> (6) To ensure that when a local government provides to its inhabitants cable television services, telecommunications services or advanced services, or any combination thereof, and competes with private providers whose activities are regulated by the local governmental entity, the local government does not discriminate against the competing providers of the same services.

(7) To ensure that when a local government provides to its inhabitants cable television services, telecommunications services or advanced services, or any combination thereof, it will not be precluded from engaging in "bundling" those services or engaging in any other lawful business practice that its private-sector competitors are legally permitted to engage in.

In the decision on appeal, a panel of the Third Circuit overturned Lafayette's ordinance approving the issuance of bonds to finance its FTTH system, finding that it violated the "level playing field" principles that underlie the Act. The appellate court mistakenly found that Lafayette's bond ordinance unlawfully allows the City to cross-subsidize the provision of covered services – an error fully addressed by Lafayette in its brief. The appellate court also erroneously restricted the availability of loans, despite the fact that such loans would be at market interest rates, and that similar loans would be available to private providers to pay for comparable facilities. In particular, the panel stated that "Although the [Lafayette] communications system may obtain market-rate loans from outside sources, as well as the local government, to provide covered services, or to advance funds for its required feasibility study or its start-up costs, the Act does not permit the communications system to obtain loans from any sources to pay for bonds that have been issued." *Naquin v. Lafayette City-Parish Consolidated Government*, 2006-904, *16-17 (La.App. 3d Cir. 8/10/06), __ So.2d __, 2006 WL 23229117.

The FTTH Council submits that the panel's holding would destroy or severely impair the ability of municipalities in Louisiana to establish FTTH systems, shattering the balance that the Act seeks to establish. It is also marred by a conspicuous and basic misunderstanding of how public and private FTTH systems are developed and operated. As shown below, using Verizon's experience with its FiOS brand FTTH system to illustrate our main points,[1] FTTH systems require major capital investments. Before a public or private owner of a FTTH system can obtain a sufficient stream of revenues from the sale of services over the system to cover current expenses and debt service, it must first build out the system and acquire a sizable customer base – a process that can take years and cost tens of millions of up-front dollars. In the early years of a FTTH project, the public or private system owner must have

[1] We use Verizon for the purposes of comparison because it is the only major telecommunications provider that is using a fiber technology like Lafayette's that requires extension of fiber all the way to residences. BellSouth and AT&T use a less expensive fiber technology that extends fiber only to points some distance from residences and completes the link through existing copper wires. Such "fiber to the curb" or "fiber to the node" deployments are significantly less robust than a FTTH system.

funds from other sources to cover such deficits. Private entities typically obtain such funds through loans, cash transfers from their parent companies, cross-subsidies from the sales of other products or surpluses from other geographic markets, or sales of equity interests. The only one of these options available to municipalities is to take out loans, and the Act requires that any loans from other branches of the local government be at market-based interest rates, as established by the Louisiana Public Service Commission ("LPSC").

Against this backdrop, there is no rational basis for the panel's conclusion that the Act bars municipalities from obtaining loans to repay bonds issued to fund the facilities through which the municipality provides covered services, as distinguished from obtaining loans to provide such services. Nothing in the language, history, or stated purposes of the Act supports the panel's distinction. Moreover, it is flatly inconsistent with the findings of another panel of the Third Circuit on the same issue,[2] and with the final rules and findings of the LPSC,[3] the expert agency under the Louisiana Constitution that the Louisiana legislature charged with responsibility to interpret and implement the relevant anti-cross subsidy provisions of the Act.

The panel's decision also ignores the fact that market-based loans are expressly excluded from the Act's ban on cross-subsidization: "A local government may not cross-subsidize its covered services with tax dollars, income from other local government or utility services, *below-market rate loans from the local government* or any other means. La. R.S. 45:844.53(2) (emphasis added). Because Lafayette's bond ordinance requires Lafayette to obtain market-base interest rates on any such loans, the loans are perfectly legal under the Act. Quite simply, the Third Circuit ignored the purposes and provisions of the Act.

* * *

In Section 3 of Act No. 836 of 2006, the Louisiana legislature recently listed a number of considerations that may assist a court in ascertaining legislative intent. In addition to the text of the statute under interpretation, which is the best evidence of legislative intent, these considerations include "[t]he occasion and necessity for the law, the circumstances under which it was enacted, concepts of

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2 *BellSouth Telecommunications, Inc. v. City of Lafayette*, 2005-1505 (La.App. 3d Cir. 1/5/06), 919 So.2d 844, 860.

3 *Re City of Lafayette*, General Order (LPSC 10/4/05), 2005 WL 2931870.

reasonableness, and contemporaneous legislative history …." To help the Court put the issues in this case into their broader national and international context, we will begin our discussion below by giving the Court a brief explanation of what FTTH systems are, why communities such as Lafayette are so eager to obtain them, and why it is critically important for Lafayette to prevail in this action, not just for Lafayette or for Louisiana, but also for America as a whole. We will then elaborate on main points that we have summarized above.

DISCUSSION

I. FTTH SYSTEMS ARE CRITICAL TO AMERICA'S LOCAL, REGIONAL, AND GLOBAL COMPETITIVENESS

A. America's Low International Ranking in Broadband Deployment and in Access to Affordable High-Capacity Communications Services and Capabilities Threatens Our Global Competitiveness

The United States gave birth to the Internet and was the world leader until the late 1990s.[4] By 2001, it had fallen to fourth place in broadband deployment.[5] By mid-2004, when the Act was enacted, the United States had dropped to tenth place, which greatly disturbed President Bush:

> America ranks tenth amongst the industrialized world. That's not good enough. We don't like to be ranked tenth in anything. The goal is to be ranked first when it comes to per capita use of broadband technology. It's in our nation's interest. It's good for our economy.[6]

Since then, America's global standing in broadband deployments has continued to deteriorate, reaching as low as 19th place in some surveys.[7] The United States has also fallen far behind the leading nations in access to high-capacity broadband connectivity, cost per unit of bandwidth (information-carrying capacity), and growth of broadband subscribers.[8] In the United States, the cost of bandwidth averages roughly $40 per month for a connection providing transmission capacity of less than 4 Megabits/second (Mbps) downstream, and typically about 500 Kbps upstream. Three examples

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4 *ITU and its Activities Related to Internet-Protocol (IP) Networks*, April 2004, http://www.itu.int/osg/spu/ip/chapter_two.html.

5 Thomas Bleha, *Down to the Wire*, Foreign Affairs, May 1, 2005, http://www.foreignaffairs.org/20050501faessay84311/thomas-bleha/down-to-the-wire.html.

6 The White House, Remarks by the President on Innovation, U.S. Dept. of Commerce, June 24, 2004, http://www.whitehouse.gov/news/releases/2004/06/20040624-7.html.

7 "U.S. 19th Overall in Broadband Penetration," WEBSITEOPTIMIZATION, fig. 2, http://www.websiteoptimization.com/bw/0601.

8 S. Derek Turner, *Broadband Reality Check II: The Truth Behind America's Digital Divide*, Free Press, August 2006, http://www.freepress.net/docs/bbrc2-final.pdf.

highlight the troubling disparity. In Japan, which leads the world with over 6.3 million FTTH lines today,[9] ordinary households can now obtain data speeds of 100 Megabits/second (Mbps) for less than $40 a month.[10] By early 2007, a FTTH system under construction in Paris will offer residents access to 50 Mbps for about $36 a month.[11] In Rotterdam, a public housing development will soon offer 30 Mbps connectivity for about $8.40 a month.[12] These levels of bandwidth capacity are unavailable at any price to the vast majority of residents and small-to-medium-sized businesses in the United States.

These developments are immeasurably important to all Americans because advanced broadband networks will increasingly provide the platforms for most of what we do at work, at home, and at play. As a result, in the emerging global economy, the countries that have the most robust, ubiquitous, and affordable broadband infrastructure will be the ones that are most successful, and those that fall behind may not recover for years, if ever. The Brookings Institution estimated that America's broadband decline could lead to a potential loss of $1 trillion in economic productivity over the next decade, as well as more than 1.2 million jobs that could be created by broader deployment of better broadband.[13]

Comparing the United States and Japan, Thomas Bleha expressed these concerns forcefully in his trenchant article, "Down to the Wire," published in *Foreign Affairs*:[14]

> It is now clear that Japan and its neighbors will lead the charge in high-speed broadband over the next several years. South Korea already has the world's greatest percentage of broadband users, and last year the absolute number of broadband users in urban China surpassed that in the United States. These countries' progress will have serious economic implications. By dislodging the United States from the lead it commanded not so long ago, Japan and its neighbors have positioned themselves to be the first states to reap the benefits of the broadband era: economic growth, increased productivity, technological innovation, and an improved quality of life.

In his most recent State of the Union address, President Bush acknowledged that America's ability to remain competitive in the "dynamic world economy" is at risk.[15] Noting the rapid emergence

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9 Organization for Economic Co-operation and Development, *OECD Broadband Statistics to June 2006*, http://www.oecd.org/document/9/0,2340,en_2649_34223_37529673_1_1_1_1,00.html.

10 Karl Bode, *100 Mbps for $39 in Japan*, BROADBAND REPORTS, Aug. 11, 2006, http://www.broadbandreports.com/shownews/77192.

11 *Iliad Announces FTTH Network in Paris and Other French Cities*, MUNIWIRELESS.COM, Sept. 11, 2006, http://muniwireless.com/municipal/1360.

12 James Enck, *Second Gear*, EuroTelcoBlog, Aug. 18, 2006, http://eurotelcoblog.blogspot.com/2006/08/second-gear.html.

13 John Reinan, *Broadband Gap Looms as Net Loss for U.S.*, MINNEAPOLIS STAR TRIBUNE, Feb. 22, 2006, http://www.startribune.com/535/v-rint/story/257956.html.

of competition from China, India, and other countries, he challenged all Americans to take the dramatic steps necessary to ensure that we will continue to occupy the position of global leadership to which Americans have grown accustomed.[16] As shown in the next section, rapid deployment of FTTH systems is an essential component of meeting that challenge.

B. Rapid Deployment of FTTH Systems Is Essential to America's Future

In response to concerns such as those discussed above, many thoughtful studies and reports have concluded that the United States must increasingly concentrate on information-based high technology products and services, supported by advanced communications services and capabilities. The Institute of Electronic and Electrical Engineers of the United States (IEEE-USA), a highly respected impartial professional organization that includes electrical engineer members from private telecommunications companies and municipalities, recently issued a report that succinctly reflects this thinking:[17]

> A new generation of broadband, or "gigabit networks," can mean significant benefits to the United States, but our nation must act promptly to ensure that such an infrastructure is ubiquitous and available to all. If we do not act, the consequence will be to relegate the U.S. telecommunications infrastructure to an inferior competitive position, thus undermining the future of our country's economy. This issue demands the attention of policymakers as well as the public at large.
> …
> The U.S. economy is based on knowledge — its creation, dissemination and application. A knowledge economy uniquely creates new wealth through invention and innovation. Development depends on research that depends on access to the entire body of existing knowledge and the rapid exchange of new knowledge throughout the economy and the society. Modern research typically retrieves, creates and exchanges massive information files at gigabit rates. After the research, many follow-on functions will benefit from gigabit networks, including computer-aided design; integration of design, manufacturing, sales, and distribution; and collaboration among all through high quality video conferencing.
> …
> U.S. broadband networks badly lag behind those of many other countries. By one measure, 19 countries have broadband service superior to that of the United States. U.S. maximum public broadband capabilities by DSL and cable modem are in the range of 1 to 5 Mb/s downstream to the user, but generally 500 kb/s or less upstream. By contrast,

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14 Bleha, *supra* note 2; http://www.foreignaffairs.org/20050501faessay84311/thomas-bleha/down-to-the-wire.html?mode=print.

15 The White House, The State of the Union Address by the President, United States Capitol, Washington D.C., January 31, 2006, http://www.whitehouse.gov/stateoftheunion/2006/index.html

16 For discussions of the threats posed to America's global competitiveness posed by India, China, and the European Union, respectively, *see* T. Friedman, *The World is Flat: A Brief History of the Twenty-first Century* (2005); T. Fishman, *China, Inc.: How the Rise of the Next Superpower Challenges America and the World* (2005); T. R. Reid, *The United States of Europe* (2005).

17 IEEE-USA, *Providing Ubiquitous Gigabit Networks in the United States*, http://www.ieeeusa.org/volunteers/committees/ccip/docs/Gigabit-WP.pdf

> most South Korean residents have access to 50 to 100 Mb/s, which in many cases is symmetric. South Korea achieved this infrastructure through a government policy supporting deregulation, competition and investment.

Among IEEE-USA's specific suggestions of ways for America to stay abreast of the other leading nations is encouraging municipalities to participate in the deployment of gigabit networks. *IEEE-USA Report* at 4-5.

FTTH systems are critically important to America's future for multiple reasons. These include their vast carrying capacity, their relatively low operating costs, their high security owing to the difficulty of tapping into them without the knowledge of system operators, and their immunity to lightning strikes.

FTTH systems are essentially "future proof," as they have virtually unlimited capacity to carry information. FTTH networks can easily support simultaneous transmission of voice, enormous data files, multiple streams of video, including data-rich high-definition television (HDTV), and unlimited video-on-demand. They support applications for distance-learning; telework (high-speed communications that enable workers to minimize travel); health care monitoring, consultation, and treatment; public safety; homeland security; traffic control, environmental protection; multi-player gaming; and an endless list of other products and services that are known, under development, or yet to be imagined.

Alone among the technologies in use or under development in the United States today, FTTH systems can easily match or exceed the 100+ Mbps data speeds that the leading nations are deploying today.[18] But is all that capacity really necessary? A leading industry observer recently provided a concise analysis of this issue:

> The bandwidth debate rages on. In an April research note, Think Equity analyst Eric Kainer argued that AT&T will likely scale back its current fiber-to-the-node deployment over the next two to three years in view of the realization that it simply doesn't provide enough bandwidth to the home to effectively compete against cable and satellite video providers.

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[18] An ordinary "twisted pair" of copper wires can carry 6 telephone calls simultaneously. In contrast, a single fiber pair can carry more than 2.5 *million* telephone calls simultaneously. James Farmer and Leonard Ray, *Overview and Technical Tutorial*, which is available online at the Federal Communications Commission's website, http://www.fcc.gov/oet/tutorial/FTTH_Tutorial-8-7-03.ppt#291,1,Fiber-to-the-Home%20Overview%20&%20Technical%20Tutorial. Viewed from a different perspective, with extensive upgrades, copper wires can reach data speeds of up to 24 Mbps, whereas fiber optic cables can reach data speeds more than 1000 times greater (2.5 Gigabits/second).

> Here's Kainer's math: Assume that technological advancement can compress high-definition television signals from their current size of about 20 Mb/s down to 10 Mb/s. The typical American home will soon have three HDTV sets, Kainer said. And in many cases, each set will have a dual-tuner digital video recorder (DVR), doubling the bandwidth it consumes. Three HDTVs with dual-tuner DVRs comes to 60 Mb/s — and that's just the video service, not voice or data. In that picture, AT&T deploying 25 Mb/s to the home, Kainer said, "is like going to war with pitchforks when the enemy has laser-guided robots."[19]

The conclusion that America will soon need vastly more broadband capacity than is generally available or under development today also finds support from numerous other knowledgeable sources. For example, a study by Jupiter Research in 2005 concluded that, by 2009, average households will need 57-72 Mbps of bandwidth and that "tech savvy" households will consume nearly 100 Mbps.[20] A significant amount of this bandwidth will support in-home wireless applications, as well as high definition television and other bandwidth-rich applications. According to a leading industry journal, Jupiter's research "provides justification for such technologies as FTTx, which can deliver that bandwidth to the home…."[21]

Another recent study, by Technology Futures, Inc., is of particular interest because it was funded and supported by the Bell companies. That study concluded:

> In the 2006 timeframe, a shift to much higher data rates in the range of 24 Mb/s to 100 Mb/s is likely to begin. So far, only a few places have access at these rates, notably Japan.
>
> Leading broadband countries are a full generation ahead of North America. Japan and Korea are already rolling out the subsequent generation of services operating at 20 Mb/s and above, and have plans to complete the transition by 2010.[22]

The difference between 100 Mbps and the more common 5-10 Mbps involves more than just faster data speed. Rather, the difference is an economically crucial one because it results in a profound shift in how the medium is used. In Japan, a recent academic study of the effects of widespread availability of affordable near-symmetric 100 Mbps, found a dramatic increase in the use of peer-to-peer

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19 Ed Gubbins, *How Much Bandwidth is Enough?* TELEPHONY ONLINE, June 5, 2006, http://telephonyonline.com/mag/telecom_bandwidth_enough/.

20 Jupiter Research, *Jupiter Research Predicts that Wireless Home Bandwidth Requirements Could Top 57 Mbps by 2009*, http://www.jupitermedia.com/corporate/releases/04.11.04-newjupresearch.html.

21 *Research House Foresees 100 Mb/s Homes by 2009,* TELECOMWEB, May 8, 2005, http://www.telecomweb.com/news/1099596358.htm.

22 L. Vanston, R. Hodges, J. Savage, *Forecasts for Higher Broadband Bandwidth Needs*, http://www.tfi.com/pubs/r/r02004_broadband.html.

applications of various kinds, as well as in the number of "heavy hitter" users who take advantage of such applications.[23] The study thus confirms that affordable "big broadband," as distinguished from "baby broadband" of the kind that is generally available in the United States today is crucial to promoting economic development and quality of life, as it enables a broad range of users to produce and distribute their own content and applications.

These studies, and others like them, underscore the importance of FTTH systems to the future of America, including its wireless future. In short, FTTH is the only proven technology that can allow network connections exceeding 100 Mbps. That is where the leading nations, and the future leading nations, of the world are heading, and if the United States wants to continue to be a leader in the emerging global economy, it cannot delay getting there as well. As Ivan Seidenberg, CEO of Verizon recently stated,[24]

> As you know, the high-tech industry has long had a vision of networks capable of delivering 100-megabits – or more – to the home. We can see the transformational power of super-high-speed networks in the business market today, where streaming media, rich media applications and other high-bandwidth services are the norm.
>
> But I don't think we fully appreciate how thoroughly 100-megabit speeds – combined with the next generation of electronics and applications – will transform the broadband experience as we know it today.
>
> The next generation of broadband experiences won't be text-based or verbal, as they are today. They'll be visual. High-definition. Three-dimensional. Like the holograms in "Star Wars" – that come to life.
>
> Nobody quite knows how all of this comes together, but what it does mean is that all of the applications we've been predicting for years will be compelling in a very new and more powerful way. With widespread deployment of 100-megabit networks:
>
> Doctors will "see" their patients. Students will be "in" the classroom. Business partners will negotiate "face to face" across the conference room. People with disabilities will "go" to work. E-Bay shoppers will "touch and feel" the merchandise. On-line gamers will "become" the game. And grandparents will practically be able to blow out the candles and taste the cake at their grandkids' birthday party. All of this will be possible, no matter if you're across the street, across the country, or across the globe.

Lafayette agrees with Verizon's statements and should be afforded the benefit of every reasonable construction and inference to make its vision a reality in Lafayette. *Gurst v. City of Natchitoches*, 428 So.2d 502, 504 (La. App. 3rd Cir. 1983) ("Municipal legislative acts are presumed to

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[23] K. Cho, K. Fukuda, H. Esaki, A. Kato, *The Impact and Implications of the Growth in Residential User-to-User Traffic*, February 11, 2006, http://www.iijlab.net/~kjc/tmp/rbb-20060211.pdf.

[24] Remarks of Ivan Seidenberg, USTA TelecomNEXT '06, March 20, 2006, http://newscenter.verizon.com/leadership/speeches/seidenberg-telecomnext-03202006.html.

be valid and are to be interpreted to sustain validity if susceptible to reasonable interpretation having this effect"). Furthermore, as the Court reviews the specific legal issues in this case, the FTTH Council urges it to consider the huge stake that America has in Lafayette's success, not just for Lafayette's own residents, businesses, and institutions, but also for the other communities across the Nation that are looking to Lafayette as a model of courage and determination to keep Lafayette and America at the forefront of global competitiveness.

II. THE THIRD CIRCUIT HAS MISINTERPRETED THE LOCAL GOVERNMENT FAIR COMPETITION ACT

The FTTH Council does not claim expertise in Louisiana's law of municipal finance, particularly as it applies to "pledges." On such matters, the Council will defer to Lafayette and the Louisiana Municipal Association. The Council does, however, know a great deal about FTTH projects such as Lafayette's. From that perspective, the Council will show in this section that the Third Circuit's decision cannot be reconciled with the language and intent of the Act.

A. The Third Circuit's Decision Would Effectively Preclude Louisiana Municipalities From Developing FTTH Systems

In enacting the Act, the Legislature and the Governor sought to strike a balance between, on the one hand, allowing the municipalities to develop their own advanced broadband networks and, on the other hand, protecting incumbent communications providers from unfair competition. These dual goals were reflected in the Act's "legislative findings and declarations of intent," as set forth in La. R.S. 45:844.42:

> (6) To ensure that when a local government provides to its inhabitants cable television services, telecommunications services or advanced services, or any combination thereof, and competes with private providers whose activities are regulated by the local governmental entity, the local government does not discriminate against the competing providers of the same services.
>
> (7) To ensure that when a local government provides to its inhabitants cable television services, telecommunications services or advanced services, or any combination thereof, it will not be precluded from engaging in "bundling" those services or engaging in any other lawful business practice that its private-sector competitors are legally permitted to engage in.

To the FTTH Council, the most striking feature of the Third Circuit's decision is that it fundamentally misunderstands what actually happens in a typical FTTH project, be it public or private. Contrary to the stated legislative intent of the Act to encourage municipal broadband initiatives in appropriate circumstances, the decision would make it virtually impossible for any municipality to

develop a FTTH system, no matter what it did to comply with the specific "level playing field" provisions of the Act.

FTTH systems such as the one that Lafayette has proposed are capital-intensive endeavors that generally take several years to develop. In such a project, the system owner must first obtain sufficient capital to build out the system, including the costs of feasibility studies, engineering design, fiber optic cable, electronics and other equipment, labor, pole and conduit attachment fees, financing costs, legal fees, and numerous other costs. The system owner will have to pay most of these costs before any revenue comes in from consumers – after all, consumers may be eager to receive the advanced services that a state-of-the-art FTTH system can deliver, but few will agree to pay for such services before the system is built and operational. As a result, a FTTH system will inevitably have to "run in the red" for several years, while construction continues and until consumer revenues have grown to the point that they are sufficient to pay for current operating expenses, debt service, and other costs, including reserves for upgrades.

The profile of a typical FTTH system, as just described above, applies to both public and private systems. For example, of the major telecommunications providers, the only one that has elected to build a FTTH system similar to Lafayette's is Verizon. In 2004, when Verizon announced its plan to do so, Wall Street analyzed the deal as follows:[25]

> How long would it take Verizon (which, by the way, is the most highly leveraged of any Bell but Qwest, with $45 billion in debt) to make money on this venture? Stock analyst [Susan] Kalla has constructed several return-on-investment models. If Verizon is shooting for an optimistic return-on-capital rate of 12%, it will take ten years to pay back the $1,000 investment per home, assuming the company gets consumers to sign up for at least one new service – like video – at $50 per month. Under a more pessimistic scenario (a 6% return on capital), it will still take five years, Kalla estimates. Historically, the Bells have undertaken projects only if the wait for payback is less than four years.

In September 2006, Verizon's chief financial officer Doreen Toben gave Wall Street an update on the status of Verizon's FTTH project:[26]

> Toben presented one hypothetical market in particular as a model: one with about 25,000 lines in which half of the access network is buried and half is aerially mounted. Verizon would spend about $45 million bringing FiOS to that market, $20 million of which would

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25 Julie Creswell, *Ivan Seidenberg, CEO of Verizon, Vows to Overpower the Cable Guys by Plowing Billions Into a '90s-style Broadband Blowout...*, FORTUNE, May 31, 2004, http://money.cnn.com/magazines/fortune/fortune_archive/2004/05/31/370724/index.htm

26 *Verizon Details FTTP Cost Curves and ROI*, TELEPHONY ONLINE, Sept. 27, 2006, http://www.telephonyonline.com/home/news/verizon_fttp_roi_092706/.

> be used bringing fiber past homes but not connecting them. Eighty percent of Verizon's expenditures in the market would be made in the first three years of its efforts there. Assuming 37% FiOS penetration and 24% video penetration in five years, Verizon expects FiOS to reach positive earnings before interest, taxes depreciation and amortization (EBITDA) in its third year in that market and generate positive operating income by its fourth year.

As Verizon's experience confirms, the owner of a FTTH system must make substantial investments up front, well before it fully develops its customer base, and long before it even begins to generate positive operating income. While it is operating "in the red," it must cover its deficits somehow. In the case of major telecommunications and cable companies, this is accomplished through transfers from the parent company, external or intra-company loans that are not tied to profits and losses in any single market, cross-subsidies from surplus revenues generated on other products (e.g., wireless telephone service) or geographic markets, and issuance of additional equity shares.[27]

While municipalities in Louisiana have the same need as private entities to cover revenue shortfalls in the early years of a municipal broadband project, the Act leaves them only limited means to do so. The most important is the ability to borrow funds at market-rates established by the Louisiana Public Service Commission (LPSC) pursuant to La. R.S. 45:844.52(C)(2). A prior panel of the Third Circuit expressly confirmed this in *BellSouth Telecommunications, Inc. v. City of Lafayette*, 2005-1505 (La. App. 3rd Cir. 1/5/06), 919 So.2d 844, 860 ("We recognize that the City could loan the Communications Services funds derived from other sources so long as the loan is 'at interest rates and on terms and conditions available to private enterprises in the open market,'" citing La. R.S. 45:844.52(C)(2).)

Indeed, as the Act expressly provides on its face, a loan at market-based rates does not constitute unlawful cross-subsidization. Specifically, the Act states that: "A local government may not cross-subsidize its covered services with tax dollars, income from other local government or utility services, *below-market rate loans from the local government* or any other means." La. R.S. 45:844.53(2) (emphasis added). The panel improperly read this provision out of the Act. *Bridges v. Autozone*

Properties, Inc., 2004-0814 (La. 3/24/05), 900 So.2d 784, 799 (courts should give effect to all parts of a statute and should not adopt a statutory construction that makes any part superfluous or meaningless, if that result can be avoided). A complete reading of the Act makes it abundantly clear, without any stated exception, that the local government telecommunications enterprise could procure internal loans from the municipal utility system.

Acting on its authority under La. R.S. 45:844.52(C)(2), the LPSC duly promulgated a mechanism to determine the appropriate market-based interest rates. *Re City of Lafayette*, General Order (LPSC 10/4/05), 2005 WL 2931870. These rules are now beyond challenge, and have the force of law. In accordance with its Bond Ordinance, any inter-governmental loans obtained by Lafayette must be repaid at the rates specified by the LPSC, and there is no claim that Lafayette would abuse this right. Any such claim would in any event be hypothetical and premature. That should be the end of the matter. Indeed, what could be more simple?

Yet, in the decision under review, the *Naquin* panel found:

> Regarding whether local government loans, under the Ordinance, are being improperly used as sources of payment of future bond obligations, we must first clarify that the "provision of covered services" contemplated by the Fair Competition Act does not include the "payment of bond obligations." *Although the communications system may obtain market-rate loans from outside sources, as well as the local government, to provide covered services, or to advance funds for its required feasibility study or its start-up costs, the Fair Competition Act does not permit the communications system to obtain loans from any sources to pay for bonds that have been issued*.[28]

This panel's analysis, the FTTH Council submits, would effectively render municipal broadband illusory in Louisiana, contrary to the language and stated purposes of the Act to make municipal broadband a meaningful opportunity. Furthermore, the panel's analysis is based upon a conspicuous fallacy. If a municipality obtains a market-rate loan to pay bonds for facilities that are used to provide

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[27] *See, e.g.*, Ritsuko Ando, *Verizon Profit Up, Internet Additions Disappoint*, REUTERS, October 30, 2006 ("[Verizon] expects FiOS to cut earnings by between 31 cents and 32 cents a share for full-year 2006, compared with its previous forecast of 28 cents to 30 cents. Chief Financial Officer Doreen Toben said FiOS will hurt earnings by the same amount in 2007. The company, like its bigger rival AT&T, has benefited from strong growth in mobile phone subscriptions in the past few years, as traditional phone line users decline."), http://today.reuters.com/news/articleinvesting.aspx?type=hotStocksNews&storyID=2006-10-30T221717Z_01_WEN8364_RTRUKOC_0_US-TELECOMS-VERIZON-EARNS.xml.

[28] *Naquin v. Lafayette City-Parish Consolidated Government*,2006-904, *16-17 (La.App. 3d Cir. 8/10/06),___ So.2d ___, 2006 WL 23229117 (emphasis added).

covered services, then, by definition, the loan does not come within the Act's ban on cross-subsidization. The panel Circuit creates a distinction – using a loan to pay bonds versus using a loan to provide service – where one does not exist, and frustrates the intent of the Act in the process. Because the loans at issue here are market-based, they are perfectly lawful under the Act.

CONCLUSION

For the reasons stated above and in the briefs of Lafayette and the Louisiana Municipal Association, the Court should reverse the decision under review and enter judgment in favor of Lafayette.

Respectfully submitted:

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I CERTIFY that a copy of this pleading has been served upon the respondent judges and all counsel of record, as follows:

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