

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

In the Matter of

Implementation of Section 621(a)(1) of the
Cable Communications Policy Act of 1984 as
amended by the Cable Television Consumer
Protection and Competition Act of 1992

MB Docket No. 05-311

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

**THE CITY OF ALBUQUERQUE, NEW MEXICO; ANNE ARUNDEL COUNTY,
MARYLAND; ARLINGTON COUNTY, VIRGINIA; CHARLES COUNTY,
MARYLAND; THE CITY OF DUBUQUE, IOWA; THE CITY OF FAIRFAX,
VIRGINIA; THE CITY OF HOUSTON, TEXAS; LOUDOUN COUNTY, VIRGINIA;
AND THE CITY OF WHITE PLAINS, NEW YORK**

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County, Virginia; and the City of White Plains,
New York

February 26, 2008

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Pursuant to 47 C.F.R. § 1.429(g), the City of Albuquerque, New Mexico; Anne Arundel County, Maryland; Arlington County, Virginia; Charles County, Maryland; the City of Dubuque, Iowa; the City of Fairfax, Virginia; the City of Houston, Texas; Loudoun County, Virginia; and the City of White Plains, New York (“Petitioners”), by their counsel, hereby submit this Reply to the oppositions of Verizon and the National Cable & Telecommunication Association (“NCTA”), and to the comments of the State of Hawaii (the “State”).

As demonstrated in the Petition for Reconsideration (“Petition”), the Commission erred by extending many of the findings of the *First Report and Order*¹ to incumbent cable providers in the *Second Report and Order*.² The oppositions of Verizon and NCTA and the comments of

¹ *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, Report and Order and Further Notice of Proposed Rulemaking*, FCC 06-180, MB Docket No. 05-311, 72 Fed. Reg. 13189 (March 21, 2007).

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*

the State only underscore the need for the Commission to clarify its ambiguities and correct its legal errors.

I. VERIZON’S OPPOSITION HIGHLIGHTS THE NEED TO CLARIFY THE TREATMENT OF IN-KIND REQUIREMENTS.

Verizon contends that the *First Report and Order* holds that *all* in-kind requirements must be counted against the franchise fee. Verizon Comments at 9-10. However, as Petitioners have shown, the *First Report and Order* did not find that all in-kind requirements must be counted as franchise fees, but only that “in-kind payments *unrelated to provision of cable service*” should be so counted. *First Report and Order*, ¶ 105 (emphasis added). The Commission made this clear in an opposition brief filed with the Sixth Circuit:

[P]etitioners are mistaken when they claim (Motion at 15) that the FCC’s ruling on in-kind payments means that previously negotiated mandates ‘to provide free cable service’ to various government entities will now be subject to the franchise fee cap. The *Order*’s analysis of in-kind payments was expressly limited to payments that do *not* involve the provision of cable service.

Opposition to Joint Motion for Stay Pending Judicial Review, filed with the Court of Appeals for the Sixth Circuit on June 29, 2007, at n.16.

Verizon argues that the Commission meant to bar all “in-kind payments” in its discussion of the phrase “incidental to” within Section 622(g)(2)(D). *First Report and Order*, ¶ 104. This is wrong for at least two reasons. First, Verizon’s position directly contradicts the Commission’s public defense of the *First Report and Order* before the Sixth Circuit. Second, as Petitioners have pointed out, LFAs need not rely on the “incidental to” exception in Section 622(g)(2)(D); non-monetary benefits never fall within the ambit of the franchise fee definition in the first place.

Act of 1992, Second Report and Order, FCC 07-190, MB Docket No. 05-311, 72 Fed. Reg. 65670 (November 23, 2007).

Petition for Reconsideration at 6. Because in-kind requirements do not meet the definition of “franchise fee” in Section 622(g)(1) to begin with, they need not seek shelter in the safe harbor provided by Section 622(g)(2)(D).

Moreover, the Verizon arguments prove too much. As has been pointed out, the legislative history is very clear that the definition of franchise fee “does not include as a ‘fee’ any franchise requirements for the provision of services, facilities or equipment.” H.R. Rep. No. 98-934 at 65, *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4702. If one reads § 622(g)(2)(D) as broadly as Verizon does, to include any in-kind franchise requirement, the plain language, read in context and with the benefit of the legislative history, would lead to a conclusion opposite to the one Verizon reaches. It would prevent an operator from offsetting against franchise fees *any* costs associated with franchise requirements that could be imposed or enforced under other provisions of the Cable Act. In other words, “requirements incidental to the awarding or enforcing of the franchise” would necessarily encompass a requirement that an operator comply with franchise requirements for cable-related facilities, equipment or services. *See* 47 U.S.C. § 544(b)(2) (allowing enforcement of facilities and service requirements that are cable-related in post-Cable Act franchises), 47 U.S.C. § 544(c) (allowing enforcement of requirements in pre-Cable Act franchises that are not cable-related).

Verizon’s opposition merely underscores the need for the Commission to clarify the portions of the *Second Report and Order* that rely on the *First Report and Order* on this issue.

II. THE COMMISSION’S RULING WITH RESPECT TO MOST FAVORED NATION CLAUSES IS INDEFENSIBLE.

In the Petition, we argued that the Commission “cannot have it both ways” with respect to Most Favored Nation (“MFN”) clauses. Petition at 14. NCTA claims that the Commission’s

ruling with respect to MFN clauses need not be reconsidered, noting that “MFN clauses serve important pro-competitive and public policy purposes by allowing cable competition to unfold based on the price and quality of an operator’s products and services, not which operator has the lesser regulatory burdens in its franchise.” NCTA Comments at 8. However, if this rationale were sufficient to forestall preemption, then the Commission would also have sustained Level Playing Field (“LPF”) clauses, for which exactly the same argument could be made. NCTA’s opposition thus underscores the need for a reasoned explanation from the Commission as to why LPF clauses are subject to preemption but MFN clauses are not.

III. THE OPPOSITIONS AND COMMENTS DEMONSTRATE THAT THE COMMISSION’S RULES ARE HIGHLY AMBIGUOUS IN THEIR APPLICATION.

The oppositions and comments demonstrate that the Commission must clarify how its findings and regulations apply to new entrants and incumbents in places where “a state is involved” in the franchising process. *See First Report and Order*, at ¶ 1, n.2.

The oppositions and comments show that the Commission’s orders are ambiguous on the question of whether the “state involvement” exception applies to the Commission’s interpretations of Section 622.³ Verizon and NCTA claim that the Commission’s interpretation of Section 622 clearly applies nationwide regardless of a state’s involvement in the franchising process. However, Hawaii claims that the state involvement exception clearly controls with

³ In the *Second Report and Order*, the Commission could “not see . . . how Section 622 could mean different things in different sections of the country . . .”. *Second Report and Order*, ¶ 19. However, in the *First Report and Order*, the Commission read the applicable statutes to mean one thing “where a state is involved” and to mean something else where it is not. *First Report and Order*, ¶ 1, n.2.

respect to Section 622, just as it does with respect to Section 621(a)(1). Hawaii Comments at 6.⁴ The fact that the commenters assert that the same order means diametrically opposite things is sufficient to show that clarification is needed.

Verizon is incorrect in claiming that the “Commission did *not* indicate that its definitive interpretations of [provisions other than Section 621(a)(1)] apply in some places but not others.” Verizon Comments at 3 (emphasis in original). On the contrary, the Commission stated: “We expressly limit our findings and regulations *in this Order* to actions or inactions at the local level where a state has not circumscribed the LFA’s authority.” *First Report and Order* at ¶ 126 (emphasis added). Of course, the findings and regulations “in this Order” include not just interpretations of Section 621(a)(1), but also interpretations of Section 622.⁵ Thus, the Commission’s “findings and regulations” in the *First Report and Order* with respect to Section 622 do not appear to apply to new entrants in places where a state is “involved.” In contrast, the *Second Report and Order* could be read to suggest that *incumbent* providers may benefit from the Commission’s reading of Section 622 “through the nation”, apparently without regard to a state’s degree of “involvement.” *Second Report and Order* at ¶ 19, n.60. Yet elsewhere the Commission indicated it was only extending the *First Report and Order* to incumbents – meaning that the *Second Report and Order* would be no broader than the first, and hence would not reach the states. Given the confusion created by this anomaly, it is appropriate for the

⁴ The State contends that the Section 622 interpretations “should not be applied to statewide authorities absent further insight and a complete record regarding franchising practices at the state level.” *Id.*

⁵ *First Report and Order*, at ¶ 129 (“[W]e adopt the rules in this *Order* pursuant to our interpretation of Section 621(a)(1) *and other relevant Title VI provisions . . .*”) (emphasis added).

Commission to resolve the issue, and it should be resolved as suggested in the initial comments filed by Petitioners.

IV. THE SECOND REPORT AND ORDER'S FINDINGS REGARDING TITLE VI AUTHORITY OVER MIXED-USE NETWORKS ARE INCORRECT.

Verizon seeks to defend the Commission's position that "LFAs' jurisdiction under Title VI over incumbents applies only to the provision of cable services over cable systems and that an LFA may not use its franchising authority to attempt to regulate non-cable services offered by incumbent video service providers." *Second Report and Order*, ¶ 17; Verizon Comments at 5-8.

Petitioners pointed out that the Cable Act expressly confers authority upon LFAs with respect to "cable systems," not just cable services.⁶ Petition at 8. Verizon counters that these terms "interrelate" and that "[a] provider is only a 'cable operator' to the extent that it is providing 'cable service' over a 'cable system.'" Verizon Comments at 6. Verizon overlooks the legislative history indicating that localities have authority over cable systems even if those systems are also used to provide other services. *See* Petition at 9, n.8 (citing H.R. No. 98-834, *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4681).

Verizon also ignores the fact that the definition of "cable system" does not distinguish between mixed-use and non-mixed use systems except in very specific respects: for example, a facility that is regulated under Title II is treated as a cable system to the extent used to provide cable services. (There is also a narrow exception for electric utility facilities.) But this necessarily means a facility that does not fall within these exceptions, even if used for multiple purposes, *is* a cable system. It also means that while Title II facilities that are not used in the

⁶ Structurally, the Cable Act focuses on facility regulation. Local authority to require particular cable services is limited. *See, e.g.*, 47 U.S.C. § 544.

delivery of cable services are not part of the cable system, the physical facilities that are used in connection with cable services are a cable system, and are subject to LFA jurisdiction under Title VI. In the *Second Order*, the Commission extended its “mixed-use” findings while ignoring the fact that it was extending those findings to facilities that clearly are not Title II facilities (or electric facilities). This was clear error, and nothing in Verizon’s argument demonstrates otherwise.

Moreover, the policy interests that serve as the basis for a statutory structure based on local franchising, such as the management of the use of local property and the protection of local consumers, are equally at stake regardless of what services are provided over the system. Nothing in the Cable Act suggests that it was intended to deprive LFAs of general consumer protection or right-of-way management authority, or to limit that authority based on how the system is used.⁷

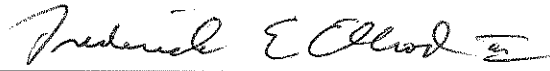
V. THE SECOND REPORT AND ORDER IMPROPERLY DISRUPTS EXISTING CONTRACTS.

Neither Verizon nor NCTA has defended the Commission’s failure simply to apply its rulings at the time of renewal in light of the implication in the *Second Report and Order* that to impose the findings of the *First Report and Order* immediately would be to unduly disrupt existing contracts. See Final Regulatory Flexibility Act Analysis at ¶ 15. As previously discussed, Petitioners agree with the Commission’s analysis on the disruptive effect of its

⁷ As Petitioners have pointed out, if the Cable Act limited local authority to cable services, substantial portions of the Act would be surplusage, including 47 U.S.C. § 541(b)(3) (limitation on local authority to regulate telecommunications services or facilities through Title VI). Moreover, the specific exceptions at 47 U.S.C. § 541(b)(3)(D) to the general rule would make little sense.

decision. Petition at 10. The *Second Order*, however, fails to address the legal and practical concerns that follow from that disruption, which, in this case, should have led the Commission to apply its general rulings only at the time of renewal, if at all.

Respectfully submitted,



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February 26, 2008

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CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)

The below-signed signatory has read the foregoing Reply to Oppositions to Petition for Reconsideration, and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for any improper purpose.

Respectfully submitted,

February 26, 2008

Date

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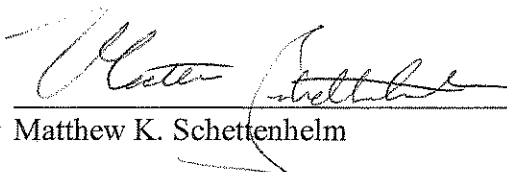
CERTIFICATE OF SERVICE

I hereby certify that I have caused to be mailed this 26th day of February, 2008, copies of the foregoing Reply to Oppositions to Petition for Reconsideration, by first-class mail, postage prepaid, to the following persons:

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