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	)	MB Docket No. 05-311
by the Cable Television Consumer Protection and	)	
Competition Act of 1992	)	
	)	

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION AND CLARIFICATION

The National Association of Telecommunications Officers and Advisors ("NATOA"), the National League of Cities ("NLC"), the National Association of Counties ("NACo"), the U.S. Conference of Mayors ("USCM"), the Alliance for Community Media ("ACM"), and the Alliance for Communications Democracy ("ACD") (collectively, "Petitioners") file this Reply to the Oppositions filed by the National Cable & Telecommunications Association ("NCTA") and Verizon and the Comments of the State of Hawaii in response to the Petitioners' Petition for Reconsideration and Clarification ("Petition"). The Oppositions and Comments show that the *Second Order*[1] lacks clarity on the issue of whether the Commission's "interpretative guidance" applies to incumbent providers in *all* states. None of the filings address the shortcomings of the Regulatory Flexibility Act ("RFA") analyses highlighted in our Petition or adequately

[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*, Second Report and Order (MB Docket No. 05-311), FCC 07-190 (released November 6, 2007), published in 72 Fed. Reg. 65670 (November 23, 2007) ("*Second Order*").

address the need for the Commission to reconsider its inconsistent treatment of Most Favored Nation ("MFN") clauses.

I. THE *SECOND ORDER* LACKS CLARITY AS TO ITS APPLICABILITY TO INCUMBENT PROVIDERS IN *ALL* STATES AND THE COMMISSION SHOULD CLARIFY ITS RULING

The Commission's *First Order*[2] preempted certain "local laws, regulations, practices and agreements"[3] with respect to the local cable franchising process except those in states that have enacted state-level video franchising legislation. The *First Order* specifically stated that the Commission was not "address[ing] the reasonableness of demands made by state level franchising authorities, such as Hawaii, which may need to be evaluated by different criteria than those applied to the demands of local franchising authorities."[4] The Commission further stated, "Consequently, unless otherwise stated, references herein to 'the franchising process' or 'franchising' refer solely to process controlled by county- or municipal-level franchising authorities, including but not limited to the ultimate decision to award a franchise."[5] Hawaii's Comments regarding the narrow applicability of the *Second Order's* legislative rules and interpretive guidance stem from these and similar statements found throughout the *First Order*.

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2 *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2006) ("*First Order*").
3 *Id.* at ¶ 129.
4 *Id.* at ¶1, n. 2.
5 *Id.*

However, as has been pointed out in the Oppositions, the *Second Order* states that its legislative rules and interpretive guidance are "valid through the nation."[6] Indeed, both NCTA and Verizon argue that neither the *First* nor *Second Orders* exempt state-level franchising laws except with respect to those rules specifically promulgated pursuant to Section 621(a)(1).[7] Considering the diametrically opposed views concerning the applicability of the *Second Order* held by NCTA, Verizon, and Hawaii, as well as the ambiguities of the two *Orders* expressed by Petitioners, all parties would benefit from clarification of the Commission's intent.

Petitioners reiterate the need for the Commission to clarify the scope of its *Second Order*. In addition, in light of the divergent views as to the applicability of the *Second Order*, Petitioners urge the Commission to grant its previously filed Request for Stay in order to preserve the *status quo* while the Commission considers this issue.

II. REGULATORY FLEXIBILITY ACT ANALYSES

Neither the Oppositions nor the Comments address the failure of the Commission to conduct the proper analyses of the true economic impact of the *Second Order* as required by the RFA. The Commission failed to follow the requirements of the RFA, leading it to issue seriously flawed analyses. Both the initial and final analyses are deficient and should be reissued after proper consideration.

To reiterate, the Commission should have, at a minimum, assessed the cost to small governmental jurisdictions and small organizations incurred as a result of its issuance of rules and interpretations related to statutory language that has been in place

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[6] NCTA Opposition at 6 and Verizon Opposition at 2, both quoting the *Second Order* at ¶19, n. 60.

[7] NCTA Opposition at 6 and Verizon Opposition at 3.

for years. The Commission's initial and final analyses failed to give effect to Congressional intent that agencies use regulatory flexibility analysis as an analytical tool to reach well-founded decisions by gathering information on costs and balancing competing interests. *See*, *Southern Offshore Fishing Association v. Daley*, 995 F. Supp. 1411, 1433 & 1437 (M.D. Fla. 1998). Small governmental jurisdictions, small organizations, and cable providers have spent decades negotiating franchise agreements only to have the Commission change the rules mid-stream, without regard to the costs for such a stark change.

NCTA's only basis for opposing the Petitioners' argument on the Commission's failure to perform the proper RFA analyses is its suggestion that local franchising authorities can simply acquiesce to franchise modifications.[8] However, as even the Commission recognizes, existing franchises are protected by the Contracts Clause of the federal Constitution. Local franchising authorities would be breaching their fiduciary duty to the public by simply repealing duly negotiated and enforceable contract terms at the whim of cable providers.

As pointed out in our Petition, the Commission's RFA analyses are deficient and must be reconsidered because they simply do not analyze the economic impact of the *Second Order* on small governmental jurisdictions and small organizations. Petitioners urge the Commission to reconsider and reissue its analyses and rulemaking without the need for court intervention.

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[8] *See*, NCTA Opposition at 4-6.

III. THE COMMISSION MUST RECONSIDER ITS TREATMENT OF MOST FAVORED CLAUSES

As set forth in our Petition, the Commission's ruling on MFN clauses in the *Second Order* is inconsistent with the Commission's treatment of local level-playing-field laws in its *First Order*. Therefore, Petitioners have urged the Commission to reconsider its ruling on this issue and act to treat MFN clauses consistently with the *First Order*. Nothing in the Opposition filed by NCTA should convince the Commission otherwise.

NCTA is simply wrong when it states that MNF clauses "serve pro-competitive and public policy purposes."[9] Indeed, both the United States Department of Justice[10] and the Federal Trade Commission[11] have characterized such clauses as anticompetitive. Yet somehow, NCTA concludes that local level-playing-field laws are "barriers to entry" while MFN clauses are not.

Local level-playing-field laws, which the Commission has summarily preempted, ensure that a new competitor's contractual terms are neither more beneficial nor less burdensome than those of the incumbent operator. MFN clauses are used by incumbents to ensure that if a new competitor is granted any market entry concessions, the incumbent likewise receives those advantages. Rather than a tool to "foster fair competition,"[12]

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[9] *See*, NCTA Opposition at 8.
[10] Press Release, Department of Justice and Arizona State Attorney General, Break Up Dental Group's Conspiracy to Eliminate Discounting, August 30, 1994, *available at* http://www.usdoj.gov/opa/pr/Pre_96/August94/azdental.txt.html.
[11] Press Release, Federal Trade Commission, FTC Challenges "Most Favored Nation" Clause in Tennessee Pharmacy Network Contract, January 19, 1996, *available at* http://www.ftc.gov/opa/1996/01/rxcare.shtm.
[12] *See*, NCTA Opposition at 8.

MFN clauses act to bind the local franchising authority's ability to help a new entrant[13] gain a foothold in the video marketplace. This is especially true in cases where the competitor is a small, startup operation and must compete against the better established incumbent with the majority of market share.

The Commission itself recognizes that some new entrants may need some assistance in order to compete. However, if these benefits may be made applicable to incumbent operators through the operation of a MFN clause, the new entrant is deprived of these benefits and both operators are subject to the same franchise requirements. The new entrant would have lost any reasonable incentive it may have had to enter the marketplace.

As we stated in our Petition, preempting MFN clauses does not leave the incumbent without a means to seek a modification of its existing franchise. In fact, even NCTA states in its Opposition that "cable operators need not rely on MFNs to obtain the benefits of the *Second Order's* conclusions."[14] Since the Commission has acted to preempt level playing field laws, it should act consistently and take the same actions with respect to the preemption of MFN clauses.

IV. CONCLUSION

The Commission now has before it conflicting views on the application of the *Second Order* with respect to states that have enacted state-level video franchise legislation. The Commission must clarify this particular aspect of the *Second* Order.

[13] Clearly, AT&T and Verizon are not, in our opinion, new entrants requiring regulatory, legislative or contractual assistance in gaining a foothold in the video services marketplace. Rather, we refer herein to true startup wireline competitors such as WOW!, Grande Communications, and so on.
[14] Opposition at f. 27.

Furthermore, the Commission must conduct proper regulatory flexibility analyses to properly account for the economic impact of *Second Order* on small governmental jurisdictions and small organizations. Lastly, the Commission must reconsider its inconsistent ruling as to MFN clauses.

For all the foregoing reasons, Petitioners urge the Commission to grant reconsideration and clarification of these aspects of its *Second Order*.

Respectfully Submitted,

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