Case No. 07-3391 (Initial Version)
(consolidated with Case Nos. 07-3569, 07-3570, 07-3571, 07-3573, 07-3574, 07-3673, 07-3674, 07-3675, 07-3676, 07-3677)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALLIANCE FOR COMMUNITY MEDIA ET AL.,

Petitioners,

STATE OF HAWAII, ET AL,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

AD HOC TELECOM MANUFACTURER COALITION, ET AL.,

Intervenors.

PETITION FOR REVIEW OF ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF OF THE DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF RATE COUNSEL, PETITIONER

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE FCC RULES USURP AND CONFLICT WITH TITLE VI WITH RESPECT TO THE GRANTING OF ADDITIONAL FRANCHISES BY LFAs 4

II. THE FCC RULES USURP AND CONFLICT WITH TITLE VI PROVISIONS APPROVED BY CONGRESS GOVERNING JUDICAL REVIEW AND REMEDIES 12

III. THE FCC FAILS TO EXPLAIN HOW THE RULES ARE CONSISTENT WITH THE STATUTORY SCHEME SET FORTH IN TITLE VI. 13

The FCC rules are contrary to law in that they violate constitutional requirements. 15

IV. NO FACTUAL OR EVIDENTARY SUPPORT EXISTS FOR THE FCC'S PURPORTED RULES 17

V. THE RULES ADOPTED FROM THE NOTICE OF PROPOSED RULEMAKING VIOLATE THE APA AND PROVIDED INSUFFICIENT NOTICE AS REQUIRED BY THE APA. 20

The rules adopted from the notice of proposed rulemaking violate the APA and provided insufficient notice as required by the APA. 21

CONCLUSION 23

ATTACHMENT A

ADDENDUM - Designation of Record for Joint Appendix

TABLE OF AUTHORITIES

Cases

ACLU v. FCC, 823 F.2d 1554 (D.C. Cir 1987) 8, 11

Air Transp. Ass'n of Am. v FAA, 169 F.3d 1, (D.C. Cir. 1999) 21

Alaska Department of Environmental Conservation v. EPA, 540 U.S. 461 (2004) 12

Am. Mining Cong. v. EPA, 907 F.2d 1179 (D.C. Cir. 1990) 16

AT&T Corp. v. FCC, 220 F.3d. 607 (D.C. Cir. 2000) 10

AT&T Corp. v. FCC, 236 F.3d 729, (D.C. Cir. 2001) 10

California v. FCC, 798 F.2d 1515 (D.C. Cir. 1986) 7, 10

Capital Cities Cable, Inc. et al. v Crisp, 467 U.S. 691 (1984) 8

City of Chicago v. FCC, 199 F.3d 424 (7th Cir. 1999) 11

City of Dallas v. FCC, 165 F.3d 341 (5th Cir. 1999) 7, 18

City of New York v. FCC, 486 U.S. 57 (1988) 8

Great Falls Cmty. TV Cable Co. v. FCC, 416 F.2d 238 (9th Cir. 1969) 22

Hormel v. Helvering, 312 U.S. 552 (1941) 22

La. Fed. Land Bank Ass'n., FLCA v. FCA, 336 F.3d 1075 (D.C. Cir. 2003) 16

National Mining Ass'n v. Mine Safety & Health Administration, 116 F.3d 520 (D.C. Cir. 1997) 20

Office of Commc'n of United Church of Christ v. FCC, 779 F.2d 702 (D.C. Cir. 1985) 22

Owner-Operator Independent Drivers Assn., Inc, v Federal Motor Carrier Safety Administration, 2007 U.S. App. Lexis 17513, D.C. Ct. App. No 06-1035 (July 24, 2007) 20

Sprint Corp. v. FCC, 315 F.3d. 369 (D.C. Cir.2003) 20

Tex. Office of Pub. Util. Counsel v. FCC, 265 F.3d 313 (5th Cir. 2001)..... 19

Union CATV, Inc., v. City of Sturgis, Kentucky, 107 F.3d 434 (6th Cir. 1997) 5

Washington Ass'n for Television & Children v. FCC, 712 F.2d 677, (D.C. Cir. 1983)..... 22

Federal Statutes

Administrative Procedure Act 1

Cable Television Consumer Protection Act of 1992 ..... 5, 7

Communications Act of 1934, *as amended*, 47 U.S.C. §§ 151 *et seq*.:

§ 621(a)(1), 47 U.S.C. § 541(a)(1) 5, 6, 9, 11-13, 15

§ 626 47 U.S.C. § 546(c)(1) 6,19

§ 635 47 U.S.C. § 555.....2, 3, 8, 11, 13-15, 20

§ 625 47 U.S.C. §545 ..... 3,6, 20

§ 636(a), (b), and (c) 47 U.S.C. §556 ..... 7,8, 15

§ 622……..9

§ 405……21, 22

State Statutes

Alaska Stat. § 42.05.221 19

ALM GL ch. 166A,..... 16

Conn. Gen. Stat. § 16-330..... 16

HRS §440G-1 16

N.J.S.A. 48:5A-1 16

NY CLS Pub Ser § 211 16

R.I. Gen. Laws § 39-19-1 16

30 *V.S.A*. §501..... 16

SUMMARY OF ARGUMENT

As amply demonstrated in Rate Counsel's Initial Brief, the FCC has imposed a new regulatory scheme upon Local Franchising Authorities ("LFAs") which conflicts with Congresses' comprehensive statutory scheme governing how franchises are to be negotiated and awarded. The FCC's action improperly subverts, modifies, and changes the statute so as to conflict with Congresses' carefully made choices. The clearest example of this is the FCC's decision to permit interim grants for violations of the FCC's new rules. Essentially, the FCC has imposed a deemed grant scenario when its shot clock expires. By such action the FCC has disavowed the express role established by Congress in an unambiguous statute.

In addition, the arguments by the FCC and the intervenors in their opposition briefs as to the adequacy of the record do not refute the fact that the rules adopted exceed the scope of the Notice of Proposed Rulemaking ("NPRM") and thus violate the Administrative Procedure Act ("APA"). Of the rules adopted, the only area actually identified in the NPRM was build-out. By not providing notice of the other issues, the FCC failed to provide an opportunity for notice and comment on the actual rules adopted. Only at the end of the process, did the FCC actually disclose what the rules would

be. This procedural infirmity compels that the rules be vacated and set aside.

A careful review of the record shows no actual determinations were made on the specific instances cited to and relied upon by the FCC that serve as the support for its rules. There is evidence that some negotiations exceeded one year or more, but there is no determination or adjudication in this record that such delays were unreasonable or that such delays were attributable to the unreasonable actions of the LFA. Section 635 of Title VI sets forth the exclusive judicial remedy for refusal to award and that is a suit in state or federal court. Congress did not permit the FCC to direct an award of a franchise for violation of Title VI. The FCC's remedy for a "shot clock" violation is simply beyond its jurisdiction, and is inconsistent with Sections 635 and 635A.

In its opposing brief, the FCC argues that the 90 day shot clock is appropriate for new entrants that have access to rights of ways and 180 days for those new entrants that do not have access to rights of ways. Yet in adopting statutory requirements for renewals, Congress imposed longer periods for negotiation by incumbent operators who have access to rights of ways. Congress also declined to impose any time rules at all for awarding

initial franchises.[1] The FCC's complete failure to address why its shorter periods for negotiation for new franchises are appropriate when Congress imposed longer periods on renewals and Congress provided no specific time limits for negotiations on initial franchises is simply legal error. By failing to consider the renewal time frames mandated by Congress and to address the inconsistent periods applicable to the grant of initial franchises and the renewal of franchises, the FCC failed to address issues that affect the outcome of the rule. This is also legal error and renders the agency's action arbitrary and capricious.

In the adoption of the build-out rule, the FCC failed to explain or articulate in the record why its rule is necessary in light of the statutory protections enacted by Congress in Section 625. Section 625 provides the cable operator an explicit procedure to obtain modification of franchise requirements including relaxation of build-out requirements upon making application to the LFA. Section 625 requires action within 120 days with the right to seek review of any denial under Section 635. The FCC failed to explain why the provisions of Section 625 as established by Congress are inadequate so as to require the imposition of its stand alone build-out rules.

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[1]/ The FCC ignores the comprehensive scheme adopted by Congress, including Section 626(a)(1) that establishes a process that can take three years to complete .

The record shows conclusively that Commissioner Adelstein's concern that the FCC's action is legislation disguised as regulation is correct. Rate Counsel submits that the Court should find the FCC's action improper and vacate those portions of the rules identified by Rate Counsel.

ARGUMENT

I. THE FCC RULES USURP AND CONFLICT WITH TITLE VI WITH RESPECT TO THE GRANTING OF ADDITIONAL FRANCHISES BY LFAs

The FCC chronicles how regulation of cable progressed from 1970 to the present and how that history supports its claim that it has authority to issue the rules now under review. However, the FCC fails to fully address the very clear and comprehensive scheme established by Congress under the Cable Television Consumer Protection Act of 1992 which serves as the basis for the rules now under review. Under the statute, Congress assigned authority to LFAs to negotiate and award local franchises with any disputes related thereto left to state and federal courts. There is nothing ambiguous about this provision, and the FCC's citation to Section 201(b) of Title II of the Act is unpersuasive. For over 15 years, the FCC has not involved itself in the award of initial franchises and has not relied on section 201(b) or other Title II provisions as its authority. Indeed, Section 201(b) does not provide such authority, and thus the proposed rule represents an attempt at

legislative change in the guise of rulemaking. The Courts have, on numerous occasions, set aside FCC rules that attempted to modify and revise the comprehensive scheme established by Congress in the 1992 Act and this Court should so do here.

The FCC's also fails to address Rate Counsel's arguments that it is improperly trying to federalize a process that Congress has declared should be left to LFAs. The FCC cites an ambiguity that does not exist. The plain meaning of the applicable sections of Title VI, do not provide expressed, implied or implicit authority for the FCC's actions. (JA) It is clear from the plain meaning of the statute that Congress did not intend to have the FCC assume the responsibility for determining any of the local public interest factors inherent in complying with Section 621(a), as claimed. Under the Act, if a franchise is not approved, new entrant may file suit in Federal District Court or a state court. The statute does not authorize the FCC to set up, establish, or institute a deemed grant regime such as that provided in the rules.

In *Union CATV, Inc., v. City of Sturgis, Kentucky*, 107 F.3d 434 (6th Cir. 1997) (*Union CATV*), the Court addressed the statute's intent.[2] The Court stated that it "must determine whether, based on the administrative

[2] / 47 U.S.C. § 546(c)(1)

record, the cable operator has demonstrated that its proposal is "reasonable" despite its failure to meet certain identified community needs and interests." Similarly, Congress intended courts to employ the same analysis under Section 621 when it amended the Cable Act in 1992 with the language, "A franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise."[3] More specifically, the statute provides; "Any applicant…denied by a final decision of the franchising authority *may appeal* such final decision pursuant to the provisions of section 635 for failure to comply with this subsection.[4] Section 635 provides that "[a]ny cable operator adversely affected by and final determination made by a franchising authority under section 621(a)(1), 625, or 626 may commence an action within 120 days after receiving notice of such determination, which may be brought in – (1) the district court of the United States for any judicial district in which the cable system is located; or (2) in any State court of general jurisdiction having jurisdiction over the

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[3] / 47 U.S.C. § 541(a)(1).

[4] / *Id*.

parties."[5] There is nothing ambiguous about these provisions and the agency is this not free to substitute its own scheme. See *City of Dallas v. FCC*, 165 F.3d 341, 353 (5th Cir. 1999) (*City of Dallas*) ("Commission has ignored plain text and has attempted to manufacture an ambiguity in order to obtain increased level of judicial deference") and *California v. FCC*, 798 F.2d 1515 (D.C. Cir. 1986) (*California*).[6]

The FCC's rules also preempt the authority of LFAs to negotiate and award franchises based upon local needs and objectives. (JA) Section 636(c) only permits preemption, however, of the law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority which is inconsistent with the Act. No such inconsistency exists here.

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[5] / 47 U.S.C. § 555

[6] / The FCC lumps together various petitioners' arguments and dismisses them based upon one liners (Those arguments rest on a fundamental misunderstanding of the statutory scheme FCC Br. at 10); (the Commission did nothing here to usurp the proper role of either LFAs or reviewing courts, FCC Br. at 24); (the order does not displace the Courts... this claim is baseless, FCC Br. at 27-28); and (Petitioners' claim of no expressed preemption,,, Congress…stated its intent to limit local franchising authority more clearly, at 30). These same types of erroneous arguments are raised by intervenors. USTELECOM Br. at 16-24, 24-40, 40-57. These one liners do not undermine the validity of Rate Counsel's and other petitioners' arguments.

Preemption is only permitted in narrow circumstances. The FCC's authority to preempt is limited to situations where the LFA violates an expressed provision of the law. In *Capital Cities Cable, Inc. et al. v Crisp,* 467 U.S. 691 (1984) (*Crisp*), the FCC preempted an Okalahoma law prohibiting alcoholic beverage advertising over cable. In *City of New York v. FCC*, 486 U.S. 57, 62-63 (1988), the FCC preempted statutes designed to insure cable signal quality. In both instances the preempted area is narrow, in context, and related to specific provisions of the Act.

The preemption claimed here involves matters that do not conflict with explicit provisions of the law and to matters which Congress left to the discretion of the LFAs. The FCC justifies this by stating that the rules will avoid disputes that may cause the franchising process to be a barrier to entry. This is speculative and does not provide justification for preemption. The FCC's actions are thus outside of the expressed preemption afforded and limited under Section 636(c) and contravene unambiguous provisions of Title VI, including Sections 636(a) and (b).

The FCC relies upon *ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir 1987), *cert denied*, 485 U.S. 959 (1988) (*ACLU*) to support its claim that it has jurisdiction to enact the rules and to argue that the judicial review provisions of Section 635 do not diminish its rulemaking authority. FCC Br. at 10, 28,

and 56; USTELECOM Br. at 16-23. However, the limited holding regarding franchise fees in that case does not support its position. In *ACLU* at 1559-1574, the Court upheld concurrent jurisdiction of the FCC over franchise fees under Section 622 based the FCC's election not to pursue enforcement actions. Unlike Section 622, however, Section 621 does not grant the FCC any specific enforcement authority. In addition, the Court in *ACLU* set aside the FCC's attempt to redefine the term "Basic Cable Service" under a claim of ambiguity and *Chevron* deference. *ACLU* at 1565-1570. The Court also rejected claims of authority under Section 623 relating to the FCC's establishment of an automatic pass through as being contrary to law, and the signal availability standard adopted by rule because the Court found that the agency action was undifferentiated rulemaking. *ACLU* at 1570-1573. Thus, rather than supporting the FCC's actions, *ACLU* confirms that the FCC's not free to legislate by rule where the statute is unambiguous.[7]

Finally, the factual predicates relied upon by the FCC for its new rules are based upon mere speculation and conjecture as opposed to any evidence of unreasonable action by the LFAs. The claims made by the intervenors

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[7]/ In *ACLU*, the Court notes that violations of leased access rules could only go to the FCC, if there was a showing of prior adjudicated violations of Section 532 (e). As discussed herein, there is no adjudication that LFAs have unreasonable delayed entry.

about evidence in the record are misplaced. There has been no finding that any LFA acted unreasonably so as to cause unreasonable delay or a refusal to award a franchise. Ad Hoc Br. at 4-11; USTELECOM Br. at 24-40.

Without evidence of an actual problems, the mere allegation of problems is insufficient to support the FCC's claims that rules are needed.

The problem is simply there is no evidence in the record of any MVPD encountering a barrier to entry. The FCC relies on anecdotal evidence in many of its discussions which falls far short of the substantial evidence needed to sustain an agency decision. *AT&T Corp. v. FCC*, 236 F.3d 729, 734 (D.C. Cir. 2001) and *AT&T Corp. v. FCC*, 220 F.3d. 607, 616 (D.C. Cir. 2000). This fact is specifically noted by the comments of Commissioner Adelstein stating in his dissent accompanying the Order "there are over 30,000 LFAs… [yet the FCC] fail[ed] to cite to even a single actual, present-day problem pending with any specific LFA."[8] There exist no facts in the record that would support that the delays identified are the result of unreasonable action by any LFA. Clearly, there are allegations, but mere allegations are not adjudications that any LFA acted unreasonably or such actions are in fact barriers to entry.

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[8] / Adelstein Statement at 5197.

The FCC would have the Court overlook the Court's holdings in *ACLU* that the FCC's power to act must be based upon expressed authority established by Congress. *ACLU* at 1576. No such expressed authority is found in Sections 621 and 635. The FCC reliance upon *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999), *cert denied*, 531 U.S. 825 (2000) (*City of Chicago*) is also misplaced.

The FCC is taking the Court's view of the word "use" in a very specific part of Title VI which limits the FCC's jurisdiction (cannot regulate satellite master antenna television system as a cable operator) and arguing that it may use an alleged ambiguity and *Chevron* to expand the scope of its authority under Section 621 when Congress has enacted a comprehensive scheme which contains no expressed delegation to the FCC. The FCC ignores the dissent in the *City of Chicago* and improperly expands the holdings in *City of Dallas* while ignoring *ACLU* which under cuts its claim of jurisdiction.

In view of the above, the Court should vacate the rules set forth Section 76.41(c)-(g) and the other limitations imposed on LFAs as to build out, franchise fees, PEG/Institutional networks and mixed-use network restrictions as beyond its authority and jurisdiction.

II. THE FCC RULES USURP AND CONFLICT WITH TITLE VI PROVISIONS APPROVED BY CONGRESS GOVERNING JUDICAL REVIEW AND REMEDIES

The FCC asserts that Section 201(b) provides the necessary authority for the FCC to promulgate rules under the Act and that authority includes Section 621. FCC Br. at 22. The FCC fails to explain, however, how this newly discovered authority was not exercised previously by the FCC. The FCC's prior rules implementing Title VI do not cite or rely upon Section 201(b) as authority for the actions previously taken. See Attachment A hereto and the three orders implementing the Title VI and a Further Notice of Proposed Rulemaking that do not cite as authority Section 201(b). In fact the Order under review does not cite Section 201(b) as authority for the rules adopted (JA).

The FCC places reliance on *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) (*ADEC*) for conclusion that Section 201(b) provides the requisite authority to oversee LFAs' award of franchises. However, the Court in *ADEC* relied in large part on the finding that the EPA has a long standing construction of the Act that construction permitted the EPA to rule on the reasonableness of decisions made by state permitting authorities. *ADEC* at 487.

More importantly, the Court's finding were predicated upon the specific provisions of Section 113(a)(5) wherein Congress authorized the issuance of orders prohibiting construction, the imposition of administrative penalties or the issuance of injunctive relief. *ADEC* at 468. *ADE*C is distinguishable on the facts. There is no long standing policy of the FCC using Section 201(b) to adopt regulations regarding Title VI and there is no provision in Section 621 that permits the FCC to interject itself into the award of franchises. Title VI contains the expressed remedies available to a company and those remedies are set forth in Section 635 and Section 635(a). Title VI does not authorize the FCC to issue orders, injunctive relief or impose penalties, if they believe a LFA has acted improperly under Section 621. That power is expressly given to the courts. The FCC may not use rulemaking to otherwise enlarge or change its power under Title VI.

A general grant of authority cannot trump explicit provisions that control the franchise process. As a result, the FCC's reliance upon Section 201(b) is misplaced and may not serve to insulate its rules from attack.

III. THE FCC FAILS TO EXPLAIN HOW THE RULES ARE CONSISTENT WITH THE STATUTORY SCHEME SET FORTH IN TITLE VI.

The most obvious flaw in the FCC's response is the fact that it fails to even refute or address Rate Counsel's argument that the FCC needs a

specific Congressional grant to impose a deemed grant regime. In FCC Br. at 48-53, the FCC responds to other petitioners' claims about the proposed remedy but the FCC offers no response to the Rate Counsel's claims. In RC Br. at 9-13, Rate Counsel noted that the deemed grant regime is not sanctioned or authorized by the plain language of Title VI and this jettisons the Congressionally authorized remedies for denial of a franchise. Rate Counsel also argued

> that the FCC may not adopt a deemed grant approach unless specifically authorized by Title VI. There are no expressed provisions in Title VI to permit this action. Absent Congress authority to impose a deemed grant, the FCC simply lacks the authority to impose the requirement. There are at least 39 statutory provisions enacted by Congress that permit deemed grants or similar type relief. All 39 instances are based upon specific and expressed statutory provisions. The applicable statutory provisions are set out in the Addendum to the brief.

RC Br. at 16.

There is no statutory provision within Title VI that authorizes the FCC to impose a deemed grant. Additionally, the FCC fails to explain how the deemed grant regime is not facially inconsistent with the limited remedies set forth in Sections 635 and 635A. In the absence of explicit Congressional authorization to impose a deemed grant, the Court should vacate that portion of the rules that permit a deemed grant for violations of the 90/180 day shot

clock. The FCC claims that it may impose the deemed grant remedy but the FCC can find no support that Congress intended the FCC to have enforcement authority over the local franchise process. The opposite conclusion is evidenced by the comprehensive scheme established by Congress.

Congress set forth the forum for addressing claims related to Section 621 and Congress limited the remedies to declaratory and injunctive as set forth in Section 635A. The FCC replaces that defined and limited approach with a new scheme that is inconsistent with specific statutory provisions of Title VI. This is the essence of arbitrary and capricious agency action.

The FCC rules are contrary to law in that they violate constitutional requirements.

The FCC asserts that the constitutional issues raised by the petitioners lack merit. The FCC through a strained construction and interpretation of Sections 636(a), (b), and (c) seeks to alter the clearly expressed Congressional recognition that LFA actions are state matters and may only be preempted in very narrow circumstances. The FCC improperly infringes on the statutory scheme established by Congress as to the authority of LFAs and remedies that are authorized by Congress. The FCC's action clearly runs afoul of the 10th Amendment. The FCC's rules infringes on the

statutory scheme that recognizes LFAs inherent right under the 10th Amendment to control such matters. [9]

In addition, the FCC is claiming that the 11th does not apply is misplaced. FCC Br. at 82. The FCC claims that the 11th Amendment does not apply to of local governments. The FCC argument ignores the fact that state agencies are LFAs.[10] As a result, the 11th Amendment is implicated and the FCC's failure to address the 11th Amendment issues requires vacating the rules at issue.

If the FCC had addressed the 11th Amendment issues, a change in the rules would be required. See *La. Fed. Land Bank Ass'n., FLCA v. FCA*, 336 F.3d 1075, 1080 (D.C. Cir. 2003); *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1188 (D.C. Cir. 1990).[11] The FCC's attempt to avoid *Federal*

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[9]/ The FCC's attempt to circumvent the constitutional infirmities raised by the petitioners and Rate Counsel are based upon its interpretation of Title VI such interpretations are questions of law subject to *de novo* review by the court. The FCC rules cross the line to where an executive agency is rewriting Title VI in derogation of the separation of powers.

[10]/ New Jersey, *N.J.S.A.* 48:5A-1 *et. seq.*; Hawaii, *HRS* §440G-1 *et. seq.*; Connecticut, *Conn. Gen. Stat.* § 16-330 *et. seq.*; Massachusetts, *ALM GL* ch. 166A, *et. seq.*; Rhode Island, R.I. Gen. Laws § 39-19-1, *et. seq.*; New York, *NY CLS Pub Ser* § 211, *et. seq.*; Alaska, *Alaska Stat.* § 42.05.221, (according to the Alaska Public Utilities Commission GCI Cable/Juneau, Inc. is regulated for basic tier service); Vermont, 30 *V.S.A.* §501, *et. seq.*

[11]/ In addition, Rate Counsel and other petitioners have clearly supported the various claims that the rules as adopted are constitutionally

Maritime is unavailing to the extent that the FCC is using rulemaking to interject itself into adjudicating issues between LFAS and new entrants. The FCC can not use its rulemaking authority as a means of handling disputes that are within the province of state agencies. To do so runs a foul of the 11th Amendment.[12]

IV. NO FACTUAL OR EVIDENTARY SUPPORT EXISTS FOR THE FCC'S PURPORTED RULES

The FCC asserts that its rules under review are lawful and reasonable and supported by the record. This is not the case. The record shows that the FCC acted arbitrarily and capriciously with respect to each of its assumptions and conclusions. There are no facts found that can support the FCC conclusion in regards to: 1) the authority of the FCC to alter LFA rules and procedures, or to preempt State policy decisions; 2) the alleged barriers LFA sovereignty in this area creates for market entry; 3) the need to preempt LFA rules and procedures; 4) the FCC's findings concerning build-out

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infirmed under the 1st, 5th, 10th, and 11th Amendments, as well, implicating separation of power issues. Commissioner Adelstein noted that this proceeding is legislation disguised as rulemaking. The FCC can not rewrite the laws of Congress through rules. Such attempts offend basic principles of federalism. As previously discussed by Rate Counsel, the actions of the FCC are inconsistent and violate constitutional protections. As a result, the FCC rules are contrary to law and should be vacated.

[12]/ See *Federal Maritime Commission v. South Carolina State Port Authority,* 535 U.S. 743 (2002) (*Federal Maritime*)

requirements, franchise fees, PEG/Institutional Networks, and Mixed-Use Networks; and 5) concluding with time limits on negotiations. FCC Br. at 37-74. The FCC arguments do not satisfy the legal requirements imposed by *Motor Vehicle Manufacturers*. The record shows that the FCC failed to provide a reasoned analysis justifying the sudden and drastic change in the regulatory regime. The intervenors arguments in support of the FCC are misplaced, as well. USTELECOM Br. at 24-30, 40-41, 41-44, 46-50, 51-57.

The premise upon which the FCC issued the rules was in response to the issue that "…potential competitors seeking to enter the multichannel video programming distributor ("MVPD") marketplace have alleged that in many areas the current operation of the local franchising process serves as a barrier to entry."[13]

The FCC did not consider significant sections of Title VI that undercut the premises on which the rules are based. The FCC ignores Rate Counsel's arguments that the rules are inconsistent and contrary to the expressed provisions of Title VI.[14] RC Br. at 15-28. The FCC's rule that

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[13] / NPRM, ¶ 1.

[14]/ As already noted The FCC's failure to follow the plain language of Title VI invalidates its actions. *See City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999) (invalidating rules concerning Open Video Service operators for ignoring plain text of statute). (JA)

adopts the 90/180 shot clock lacks a reasoned basis and explanation in the record. RC Br. at 25-26. The shot clock rule represents both a deviation from the previous policy of no deadlines, and lacks any basis as to why the deadlines chosen are more appropriate that some other deadlines. The mere selection of a number without explanation of why other alternatives were considered and rejected is defective decision making. *See Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 328 (5th Cir. 2001).

The FCC's support of its shot clock rule is premised upon its belief that access to rights-of-ways justify the 90/180 shot clock times. FCC Br. at 11. This conclusion is directly at odds with Section 626, which address renewals. In adopting requirements for renewal, Congress set and imposed by statute longer periods for negotiation of renewals by incumbent operators who have access to rights of ways. Incumbent cable operators have franchises and existing use of rights-of-ways. The FCC simply fails to explain why these longer periods for renewal of franchises do not undercut its purported rationale for selecting 90/180 days.

The failure to address this obvious defect in logic is the epitome of unreasonable agency action. In addition, since Congress declined to impose time rules for awarding initial franchises while maintaining time frames for

renewal, the FCC action is even more susceptible to challenge as arbitrary and capricious agency action.

V. THE RULES ADOPTED FROM THE NOTICE OF PROPOSED RULEMAKING VIOLATE THE APA AND PROVIDED INSUFFICIENT NOTICE AS REQUIRED BY THE APA.

In addition, the variance between the NPRM and the rules actually adopted and the absence of any substantiated and verified claims that LFAs acted unreasonably is a clear violation of the APA. The subject rules at issue are simply beyond the scope of the NPRM and additional notice and comment was required. See *National Mining Ass'n v. Mine Safety & Health Administration,* 116 F.3d 520 (D.C. Cir. 1997); *Sprint Corp. v. FCC*, 315 F.3d. 369 (D.C. Cir.2003). This defect and other issues identified by the petitioners fully support vacating the FCC's rules.

None of the FCC's challenged rules under review satisfy the legal standard under the APA. There is no substantial evidence as to the facts found and a rational connection between the facts found and the choices made.[15]

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[15]/ The FCC failure to follow the APA is exemplified by its rational regarding its build-out rules. The FCC fails to address how its build-out rule is consistent with Sections 625, 635, and 635A. Cable entrants have multiple avenues to seek relief but the FCC did not address how Sections 625, 635, and 635A are no sufficient to remedy the FCC's reasons for its build-out rule.

The FCC buries in its brief at footnote 29 the fact that staff solicited Phoenix Center's response to staff view on its studies. Such action is clearly arbitrary and capricious action under established law. See *Owner-Operator Independent Drivers Assn., Inc, v Federal Motor Carrier Safety Administration*, 2007 U.S. App. Lexis 17513, D.C. Ct. App. No 06-1035 (July 24, 2007) (an agency action is vacated where the failure to disclose supporting documents during the notice and comment period). The FCC should have given the parties notice of staff concerns and the responses received from Phoenix Center in order to permit the matters to be refuted. See *Air Transp. Ass'n of Am. v FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999).

The rules adopted from the notice of proposed rulemaking violate the APA and provided insufficient notice as required by the APA.

The FCC attempt to evade following APA requirements based upon Section 405 is without merit. The FCC makes repeated claims that the various arguments raised by petitioners are precluded from consideration by the Court under Section 405(a) of the Act. FCC Br. at 57, 61, 63, 64-65, 75, 81, and 82. The FCC claims that Section 405(a) prohibits litigants from presenting claims that rely upon "on questions of fact or law" not presented to the FCC. The cases relied upon by the FCC involve adjudications and not rulemaking. The subject rules are reviewable under Section 706(2)(A) of

the APA. In a rulemaking, the Courts must make a close and searching analysis of the record in order to determine whether the agency action is contrary to the law and otherwise constitute a reasoned decision based upon the record. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.,* 463 U.S. 29, 43 (1983) (*Motor Vehicle Manufacturers*) Rate Counsel submits that Section 405(a) is not an absolute bar. In addition, in the context of rulemaking, the issues raised go to whether the FCC issued a reasoned decision considering all matters that could affect the rule actually adopted. The issues identified by various petitioners for which the FCC claims are precluded from consideration by the Court are specific matters that show that the rules adopted lack the fair notice required by the APA. The record shows that petitioners have demonstrated compelling examples as to why the rules adopted are not the logical outgrowth of the NPRM (JA). If the parties have been given adequate notice, the parties could have raised the issues below. The FCC can not assert Section 405(a) as a bar to claims that a violation of the APA requirement for notice and comment has occurred.

The FCC also fails to acknowledge that applicable case law leaves room for the operation of sound judicial discretion to determine whether and to what extent judicial review of questions not raised before the agency should be denied. *Office of Commc'n of United Church of Christ v. FCC*,

779 F.2d 702, 706 (D.C. Cir. 1985) (*quoting Great Falls Cmty. TV Cable Co. v. FCC*, 416 F.2d 238, 239 (9th Cir. 1969)). Exhaustion is excused where the "obvious result would be a plain miscarriage of justice." *Hormel v. Helvering*, 312 U.S. 552, 558 (1941); See *Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 682 (D.C. Cir. 1983).

CONCLUSION

In view of the foregoing, Rate Counsel asks that the Court vacate the rules set forth in Sections 76.41(c)-(g), vacate the limitations imposed on LFAs regarding build out, franchise fees, PEG/Institutional networks and restrictions on mixed-use networks, and grant such other relief the Court deems appropriate.

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Dated: October 4, 2007

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 34(a)(7)(C) and 6th Rule the undersigned certifies that this brief complies with the applicable type-volume limitations. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) this brief contains 4, 605 words. This brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2003) used to prepare this brief.

Dated: October 4, 2007

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CROSS-DESIGNATION OF JOINT APPENDIX CONTENTS

Pursuant to 6th Circuit Rules 28(d) and 30(b), Petitioner, New Jersey Division of

Rate Counsel, makes the following cross-designation of material in the agency record (MB Docket No. 05-3111) to be included in the joint appendix.

Description of Entry	Date Filed
Comments of the NJ Division of Ratepayer Advocate	February 10, 2006
Reply Comments of the NJ Division of the Ratepayer Advocate	March 28, 2006
Ex Parte Meeting on June 1, 2006 on ATT's Proposed Acquisition of BellSouth, WC Docket No.06-74; Broadband Consumer Protection, WC Docket No. 05-271; Cable Television Franchise, Implementation of 621-A of the Cable communications Policy Act, MB Docket No. 05-311; Petition of AT&T for Waiver of commission's Rules to Treat Certain Local Number Portability Costs as Exogenous Costs Under Section 61.45 (d), CC Docket No. 95-116; and A La Caret options for consumers	June 2, 2006

ATTACHMENT A

1. Report and Order, *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, 8 FCC Rcd 5631 (1993)

2. Third Order on Reconsideration, *In the Matter of Implementation of Sections of the Cable television Consumer Protection and Competition Act of 1992: Rate Regulation and Buy-Through Prohibition*, 9 FCC Rcd 4316 (1994)

3. Thirteenth Order on Reconsideration, *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 11 FCC Rcd 388 (1995)

4. Fourth Further Notice of Proposed Rulemaking, *In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, 10 FCC Rcd 4617

CERTIFICATE OF SERVICE

I, Christopher J. White, hereby certify that an original of the Reply Brief of Rate Counsel was served on the Court by overnight delivery and through electronic version to the following persons listed below and mail two copies by regular mail.

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