

Case No. 07-3391 (consolidated with Nos. 07-3569, 07-3570
07-3571, 07-3572, 07-3573, 07-3574, 07-3673, 07-3674, 07-3675,
07-3676, 07-3677 and 07-3824)

**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.

*ON PETITION FOR REVIEW OF ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION*

**REPLY BRIEF OF INTERVENOR CITY OF
NEW YORK, NEW YORK,
ON THE SIDE OF PETITIONERS (PROOF COPY)**

Michael A. Cardozo, Corporation Counsel
Bruce Regal, Senior Counsel
New York City Law Department
Office of the Corporation Counsel
100 Church Street
New York, New York 10007
(212) 788-1327

Of Counsel

October 4, 2007

Tillman L. Lay
SPIEGEL & MCDIARMID LLP
2nd Floor
1333 New Hampshire Avenue, NW
Washington, DC 20036-1536
(202) 879-4000

Counsel for Intervenor

City of New York, New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION.....	1
I. THE COMMISSION AND ITS ALLIES FAIL IN THEIR ATTEMPTS TO DEFEND THE STATUTORY AND FACTUAL BASES FOR THE <i>ORDER</i> 'S FEDERALIZATION OF LOCAL FRANCHISE BUILDOUT REQUIREMENTS.....	2
A. The Cable Act Does Not Give the Commission Authority to Impose the <i>Order</i> 's Limitations on Local Franchise Buildout Requirements.....	3
B. Neither the Commission Nor Its Industry Allies Has Any Meaningful Response to the <i>Order</i> 's Failure Even to Consider Obviously Relevant Factors Relating to Buildout Requirements.....	9
II. THE COMMISSION CONCEDES THAT THE <i>ORDER</i> DOES NOT LIMIT THE IMPOSITION OF NON-CABLE FRANCHISE FEES ON CABLE OPERATORS' NON-CABLE SERVICES.....	11
CONCLUSION.....	13
CERTIFICATE OF COMPLIANCE	14

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Allen v. Grand Central Aircraft Co.</i> , 347 U.S. 535 (1954).....	4, 9
<i>Calif. Public Broadcasting Forum v. FCC</i> , 752 F.2d 670 (D.C. Cir. 1985).....	10, 12
<i>Cellnet Communications v. FCC</i> , 149 F.3d 429 (6th Cir. 1998)	5, 6
<i>City of Dallas v. FCC</i> , 165 F. 3d 341 (5th Cir. 1999)	4
<i>Environmental Integrity Project v. EPA</i> , 425 F.3d 992 (D.C. Cir. 2005).....	7
<i>FDIC v. Bates</i> , 42 F.3d 369 (6th Cir. 1994)	4, 9
<i>HCSC-Laundry v. United States</i> , 450 U.S. 1 (1981).....	4, 9
<i>Housatonic Cable Vision v. Dept. of Public Utility Control</i> , 622 F. Supp. 798 (D. Conn. 1985).....	4
<i>Metro. Detroit Area Hospital Services, Inc. v. United States</i> , 634 F.2d 330 (6th Cir. 1980)	4, 9
<i>Motor Vehicle Mfrs. Ass'n. v. State Farm Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	11
<i>Ohio River Valley Environmental Coalition v. Kempthorne</i> , 473 F.3d 94 (4th Cir. 2006)	11
<i>Radio-Television News Directors Ass'n. v. FCC</i> , 184 F.3d 872 (D.C. Cir. 1999).....	11

<i>SEC v. Chenery Corp.</i> , 318 U.S. 80 (1943).....	8
<i>Synovus Financial Corp. v. Bd. of Governors of Fed. Reserve System</i> , 952 F.2d 426 (D.C. Cir. 1991).....	10, 12
<i>United States v. Ware</i> , 161 F. 3d. 414 (6th Cir. 1998)	4, 9
<i>United States Telecom Ass’n. v. FCC</i> , 227 F.3d 450 (D.C. Cir. 2000).....	11

FEDERAL STATUTES

28 U.S.C. § 2348	11
Administrative Procedure Act, 5 U.S.C. § 551 <i>et seq.</i>	7
Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, as amended (“Cable Act”).....	<i>passim</i>
Communications Act of 1934, <i>as amended</i> , 47 U.S.C. §151 <i>et seq.</i>	
Section 402(e), 47 U.S.C. § 402(e).....	11
Section 405(a), 47 U.S.C. § 405(a).....	5, 6, 7
Section 621(a)(1), 47 U.S.C. § 541(a)(1)	<i>passim</i>
Section 621(a)(4)(A), 47 U.S.C. § 541(a)(4)(A).....	<i>passim</i>
Section 622(b), 47 U.S.C. § 542(b)	12
Section 624(b), 47 U.S.C. § 544(b)	5, 7, 8, 9
Section 632(a)(2), 47 U.S.C. § 552(a)(2)	5, 7, 8, 9

RULES

Federal Rule of Appellate Procedure 15(d)	11
---	----