

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)**

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Intervenor the City of New York, New York (the “City”), submits this Reply Brief in response to the Brief for Respondents (“FCC Br.”) and the Brief for Intervenors USTelecom *et al.* (“USTA Br.”).¹

INTRODUCTION

The City agrees with and supports the arguments in the reply briefs of petitioners Alliance for Community Media *et al.*, and the City of Tampa *et al.*, and therefore adopts them by reference. Here, the City addresses only those arguments in the FCC and USTA briefs that were directed at the City’s opening brief.

For the most part, the FCC and USTA briefs seek to evade the merits of the City’s arguments on procedural grounds, asserting either that those arguments were not raised below or were not also raised by petitioners here. These evasions fail, as we show below. But the reasons for the FCC’s and USTA’s attempts at evasion are not difficult to discern: Neither has any meaningful response to the substance of the City’s arguments.

¹ Citations to the City’s opening brief will be in the format “NYC Br. at ____.” Citations to the Joint Appendix will be in the format “JA ____.” Citations to the opening brief of Petitioners Alliance for Community Media *et al.* will be in the format “ACM Br. at ____,” and citations to the opening brief of Petitioners City of Tampa *et al.* will be in the format “Tampa Br. at ____.”

I. THE COMMISSION AND ITS ALLIES FAIL IN THEIR ATTEMPTS TO DEFEND THE STATUTORY AND FACTUAL BASES FOR THE *ORDER*'S FEDERALIZATION OF LOCAL FRANCHISE BUILDOUT REQUIREMENTS.

With respect to the *Order*'s franchise buildout rulings,² the City argued that the FCC (a) lacked statutory authority under the Cable Act³ to prohibit local franchising authorities ("LFAs") from requiring cable operators to build out their systems so that they are capable of serving all households in the operator's franchise area,⁴ and (b) failed to consider obviously relevant factors in assessing the reasonableness of requiring a competitive cable operator, especially one that is an incumbent local exchange carrier ("ILEC"), to build out its franchise area, rendering the *Order*'s rulings on these issues arbitrary and capricious.⁵ The FCC and USTA fail to come to grips with those arguments, and their efforts to sidestep them procedurally likewise miss the mark.

² *In re 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 & Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5140-44 (¶¶ 82-93) (2007) ("*Order*") (JA ____).

³ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, as amended ("Cable Act").

⁴ NYC Br. at 6-10.

⁵ *Id.* at 10-18.

A. The Cable Act Does Not Give the Commission Authority to Impose the *Order's* Limitations on Local Franchise Buildout Requirements.

The FCC and USTA assert that because (in their view) Section 621(a)(4)(A), 47 U.S.C. § 541(a)(4)(A) is a “*limitation*” on LFAs’ authority rather than a “grant” of authority to them, it does not stand in the way of the Commission’s claimed authority under Section 621(a)(1), 47 U.S.C. § 541(a)(1) to preempt franchise buildout requirements.⁶ But that is no answer to “the central question here.”⁷ How can Section 621(a)(1), enacted at the same time as Section 621(a)(4)(A), plausibly be read to empower the FCC to *prohibit* what Section 621(a)(4)(A) specifically *allows*? Section 621(a)(4)(A) plainly says an LFA may require a cable operator “to become capable of providing cable service to all households in the franchise area,” as long as the LFA “allow[s] [the operator] a reasonable period of time” to do so.

Characterizing Section 621(a)(4)(A) as a “limitation” rather than a “grant” does not alter this contradiction in the FCC’s position. Section 621(a)(4)(A) is not worded as an affirmative grant for the rather obvious reason that LFAs do not

⁶ FCC Br. at 54-55 (emphasis in original). *Accord* USTA Br. at 54.

⁷ FCC Br. at 55.

require an affirmative grant in the Cable Act to have authority to impose buildout requirements; they already possess that authority independent of the Cable Act.⁸

What the FCC and USTA conveniently ignore is the clear language of Section 621(a)(4)(A). Regardless whether it is couched as a grant of authority or as Congress' explicit recognition and affirmation of LFAs' preexisting authority to impose buildout requirements independent of the Cable Act, Section 621(a)(4)(A) means what it says: An LFA may require universal service buildout throughout a cable operator's franchise area, as long as it gives the operator a "reasonable time" to complete that buildout. Any other reading renders Section 621(a)(1) and 621(a)(4)(A) schizophrenic.

It bears emphasizing in this regard that Section 621(a)(4)(A) is quite specific on the issue of universal buildout, while Section 621(a)(1) does not speak directly to buildout requirements at all. Section 621(a)(4)(A)'s specific, albeit conditional, preservation of universal buildout requirements must therefore control over Section 621(a)(1)'s generalisms.⁹ Indeed, the *only* logical way to read the two provisions together is that, as long as an LFA gives an operator "a reasonable time" to be

⁸ See Tampa Br. at 3-5 (citing *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999)) & 43 (citing *Housatonic Cable Vision v. Dept. of Public Utility Control*, 622 F. Supp. 798, 807 (D. Conn. 1985)).

⁹ *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981); *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 552 (1954); *United States v. Ware*, 161 F.3d 414, 423 (6th Cir. 1998); *FDIC v. Bates*, 42 F.3d 369, 372 (6th Cir. 1994); *Metro. Detroit Area Hospital Services, Inc. v. United States*, 634 F.2d 330, 334 (6th Cir. 1980).

capable of serving all households in the franchise area, such a universal service buildout requirement is not, and cannot be, an “unreasonable refusal” within the meaning of Section 621(a)(1). In effect, Section 621(a)(4)(A) is a “reasonable time” safe harbor for LFA buildout requirements.

As pointed out in our brief (at 8-9) and Tampa’s (Tampa Br. at 43), any doubt as to the correctness of this reading of the Act is dispelled by Sections 624(b), 47 U.S.C. § 544(b), and 632(a)(2), 47 U.S.C. § 552(a)(2), and the legislative history of the Cable Act.¹⁰ Sensing the weakness of their position on this score, the FCC and USTA try to change the subject – the FCC through procedural legerdemain and straw men, the USTA through extemporization.

The FCC, citing *Cellnet Communications v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998), and 47 U.S.C. § 405(a), first claims that this argument was not raised to the FCC below and thus the Court may not consider it. FCC Br. at 56-57. The FCC is wrong; the argument was raised below.¹¹ More generally, there can be no question that the FCC was presented below with a host of arguments that

¹⁰ H.R. Rep. No. 934, 98th Cong., 2d Sess. at 59 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4696 (“1984 House Report”).

¹¹ *See, e.g.*, Letter to M. Dortsch from Frederick Ellrod on behalf of Anne Arundel County, MD (Dec. 6, 2006), at attachment, p. 3 (JA ____); NCTA Reply Comments, filed March 28, 2006, at 15 & n.42 (JA ____).

FCC-imposed limitations on local franchise buildout requirements were contrary to the Cable Act.¹²

The FCC's argument seems to be that unless the precise statutory subsection number or page of legislative history is cited to it below, it has not had the opportunity to pass on an argument within the meaning of Section 405(a). Neither *Cellnet* nor any other precedent cited by the FCC, however, suggests that the question whether an argument was raised below within the meaning of Section 405(a) can be sliced as thinly as the FCC claims here. To the contrary, the "new" argument on appeal involved in *Cellnet* was a new procedural argument completely unrelated to the merits arguments. 149 F.3d at 442. That is certainly not true with respect to the argument at issue here: Whether the FCC has authority under the Cable Act to limit local franchise buildout requirements. The FCC's narrow parsing of what constitutes a "question[] of fact or law upon which the Commission . . . has been afforded no opportunity to pass" (FCC Br. at 56-57) would mean that, unless a commenter were clairvoyant about precisely what rulings and analysis the Commission would ultimately adopt in its order,

¹² See, e.g., *id.* at 25-31 (JA ___), NATOA *et al.* Reply Comments, filed March 28, 2006, at 23-26 (JA ___); Reply Comments of Comcast Corporation, filed March 28, 2006, at 34-35 (JA ___); Virginia Cable Telecommunications Assoc. Comments, filed Feb. 13, 2006, at 6-7 (JA ___); Southeast Michigan Municipalities Reply Comments, filed Feb. 28, 2006, at 44-48 (JA ___).

reconsideration petitions would in most cases be required as “a condition precedent to judicial review,” in conflict with Section 405(a)’s language.¹³

As to the merits of the argument, the FCC resorts to the straw man that neither Section 624(b) nor 632(a)(2), nor the legislative history, “grants LFAs *carte blanche* to impose build-out requirements that result in ‘unreasonabl[e] refus[als] to award’ competitive franchises under Section 621(a)(1).” FCC Br. at 57. But that is not our argument. We do not claim that Section 621(a)(1) places no limit at all on unreasonable buildout requirements.¹⁴ Rather, our argument is that these additional provisions and legislative history, when read together with Section 621(a)(4)(A), mean that Section 621(a)(1) cannot be read to preempt a franchise requirement that a competitive franchise applicant must build its system out to

¹³ The problem is exacerbated here due to the *Order*’s Administrative Procedure Act defects. See NYC Br. at 18-19 & n.8; ACM Br. at 58-59. While the FCC contends that the *Order*’s detailed buildout, franchise fee and PEG rulings were a “logical outgrowth” of the notice of proposed rulemaking in this proceeding (FCC Br. at 82-83), we invite the Court to read that notice in its entirety, *In re Implementation of Section 621 (a)(1) of the Cable Communications Policy Act as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 20 FCC Rcd 18581 (2005) (“*NPRM*”), and decide for itself whether the *Order*’s many detailed rulings could have been divined from the *NPRM*, or whether the FCC has instead “pull[ed] a surprise switcheroo” by converting an at best skeletal *NPRM* on Section 621(a)(1) into a detailed ruling on virtually every franchise-related provision of the Cable Act. *Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

¹⁴ See NYC Br. at 11 & 12 (failing to allow a “reasonable time” to complete buildout to all households might constitute an “unreasonable” demand under § 621(a)(1)). We do, however, agree with petitioners that the Cable Act gives only the courts, not the FCC, jurisdiction to make such a determination. See *id.* at 9-11, 15-16 & 18; ACM Br. at 17-25.

make service available to all homes in the franchise area, as long as it is given a reasonable time to do so. The FCC therefore lacked any statutory authority to suggest otherwise in the *Order*.

USTA (at 55) extemporizes further, speculating that Section 632(a)(2)'s reference to "construction schedules" may have more to do with "the hours during which system construction is undertaken" than where the system is built. As an initial matter, USTA's novel speculation about the meaning of Section 632(a)(2) is barred by *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), because the FCC's buildout rulings may be upheld, if at all, only on the reasoning offered by the FCC, and the FCC has offered no such reading of Section 632(a)(2), either here or below.

In any event, USTA's incredibly parsimonious construction of Section 632(a)(2) is at odds with both the statute's broad language and its legislative history, and does not explain Section 624(b) at all. USTA also ignores Section 632(a)(2)'s two references to LFAs' authority to impose "construction-related" requirements.

USTA makes the companion assertion (at 55) that the language in the *1984 House Report*, at 59, about "service area" being "subject to state and local authority" applies only "to the extent" local buildout requirements "are not addressed" in the Cable Act, and that Section 621(a)(1) addresses those

requirements. But this is sheer bootstrap. Sections 621(a)(4)(A) and 632(a)(2) specifically speak to buildout; Section 621(a)(1) does not. As noted above,¹⁵ to construe Section 621(a)(1)'s generalisms as trumping the specific language in Sections 621(a)(4)(A), 624(b), and 632(a)(2) would turn the statutory language on its head.

B. Neither the Commission Nor Its Industry Allies Has Any Meaningful Response to the *Order's* Failure Even to Consider Obviously Relevant Factors Relating to Buildout Requirements.

The City argued in its opening brief (at 12-18) that it was arbitrary and capricious for the FCC to ignore a host of other obviously relevant factors and to focus myopically on only a single factor – that a competitive cable franchise entrant will not have the advantage of the *de facto* monopoly that the incumbent enjoyed years (usually decades) ago when it originally built out its system – to justify the *Order's* restrictions on buildout requirements.¹⁶ Among the obviously relevant factors favorably affecting buildout economic feasibility today that the FCC ignored in the *Order* were dramatic increases in expected cable and non-cable revenue streams per subscriber over the past twenty-to-thirty years; an ILEC

¹⁵ See n.9 *supra*.

¹⁶ *Order* at ¶¶ 87-88 (JA ____). USTA disingenuously attempts to sidestep the argument by asserting that the FCC focused on this “*de facto* prior monopoly” factor only in responding to LFAs’ “regulatory parity” arguments. USTA Br. at 56 (citing *Order* at ¶ 34 (JA ____)). Apparently, USTA hopes that if the Commission’s discussion of the matter in the buildout part of the *Order* is ignored, perhaps it will go away. *Order* at ¶¶ 87-88 (JA ____).

entrant's pre-existing subscriber, network and revenue base; intervening Cable Act cable rate deregulation; and intervening Cable Act prohibitions on non-cable-related franchise requirements. *See* NYC Br. at 12-18.

The Commission has no answer at all to the merits of this argument, saying only in a footnote that is "legally meritless," without so much as a word explaining why. FCC Br. at 60 n.53. Instead, the FCC's sole defense is to once again seek procedural shelter with the assertion that the City's arguments "are not properly before the Court to the extent they reach beyond petitioners' claims." *Id.*

The problem with the FCC's procedural defense is that it rests entirely on a false premise. The City's arguments about the obviously relevant factors overlooked in the *Order* fall squarely within claims made by petitioners City of Tampa *et al.* in their brief.¹⁷ Those arguments also were raised before the FCC below.¹⁸

But the FCC's effort to erect procedural hurdles, while unavailing, is understandable, because the *Order*'s failure to address such obviously relevant

¹⁷ Tampa Br. at 45-46. Moreover, the FCC's argument that intervenors like the City are restricted essentially to rehashing petitioners' arguments is itself suspect. *See* n.21 *infra* and accompanying text.

¹⁸ *See, e.g.*, Letter to Marlene Dortch from Bruce Regal (Dec. 7, 2006), at 1-2 (JA ___); NYC Comments, filed Feb. 13, 2006, at 8-9 (JA ___); Comcast Reply Comments, filed March 28, 2006, at 22 (JA ___); Cablevision Systems Reply Comments, filed March 28, 2006, at 21 (JA ___); Charter Reply Comments, filed March 28, 2006, at 9-10 (JA ___); City of Boston Comments, filed February 13, 2006, at 4 (JA ___).

market and economic factors clearly renders its rulings on franchise buildout requirements arbitrary and capricious. Indeed, to focus myopically on one relevant factor while not even acknowledging, much less assessing the effect of, other obviously relevant factors is the archetype of arbitrary and capricious decisionmaking.¹⁹

**II. THE COMMISSION CONCEDES THAT THE
*ORDER DOES NOT LIMIT THE
IMPOSITION OF NON-CABLE FRANCHISE
FEES ON CABLE OPERATORS’
NON-CABLE SERVICES.***

The City argued that to the extent that a passage in the *Order* suggests that cable operators that provide non-cable services are immune from non-cable franchise fees, it is contrary to the Act. NYC Br. at 18-23. The FCC again tries to duck the City’s argument, asserting that it was not presented to the FCC below and was not raised by petitioners here. FCC Br. at 63.

Once again, the FCC is mistaken. The City’s argument on this score was presented below.²⁰ Furthermore, the FCC’s position that intervenors are confined to doing little more than regurgitating petitioners’ arguments is simply wrong.

There is nothing in Fed. R. App. P. 15(d), 47 U.S.C. § 402(e) or 28 U.S.C. § 2348

¹⁹ See *Motor Vehicle Mfrs. Ass’n. v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Ohio River Valley Environmental Coalition v. Kempthorne*, 473 F.3d 94, 102 (4th Cir. 2006); *United States Telecom Ass’n. v. FCC*, 227 F.3d 450, 461-62 (D.C. Cir. 2000); *Radio-Television News Directors Ass’n. v. FCC*, 184 F.3d 872, 885 (D.C. Cir. 1999).

²⁰ Reply Comments of NATOA *et al.*, March 28, 2006, at 29 (JA ____).

regarding intervention “that forbids an intervenor from raising, or a reviewing court from considering, an issue not mentioned by the petitioner or respondent” as long as the issue was raised below.²¹ Here, the issue was raised below.²² No more is required.

The FCC’s final attack on the City’s non-cable franchise fee argument – that it is not ripe (FCC Br. at 63-64) – is simply a camouflaged concession. The FCC admits that the *Order* “addresses only whether ‘non-cable services are . . . subject to ‘cable services’ fees’ under Section 622(b) . . . , and does not speak to the lawfulness of fees other than cable franchise fees.” *Id.* (Emphasis in original.)

That is all that the City asked. The Court should hold the Commission to its concession: Section 622(b), 47 U.S.C. § 542(b), does not limit the amount of non-cable franchise fees an LFA may impose on a cable operator’s non-cable services.

²¹ *Synovus Financial Corp. v. Bd of Governors of Fed. Reserve System*, 952 F.2d 426, 433 (D.C. Cir. 1991); *Calif. Public Broadcasting Forum v. FCC*, 752 F.2d 670, 683 n.10 (D.C. Cir. 1985).

²² See n.20 *supra*.

CONCLUSION

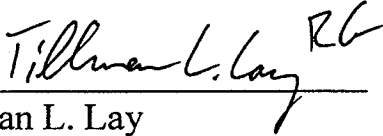
For the foregoing reasons and those set forth in the briefs of petitioners, the Court should grant the ACM and Tampa petitions, and the *Order* should be reversed.

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I hereby certify that the foregoing brief complies with the type-volume limitations provided in Fed.R.App.P. 32(a)(7)(B). The foregoing brief contains 3,077 words of Times Roman (14 point) proportional type. The Word processing software used to prepare this was Microsoft Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 4th day of October 2007, pursuant to Fed. R. App. P. 15(d), caused the foregoing document to be served via first-class mail, postage prepaid, upon all parties to this proceeding, as listed below.

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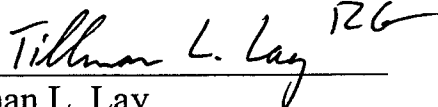
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