

**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)
)

REQUEST FOR STAY

**NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND
ADVISORS; THE NATIONAL LEAGUE OF CITIES; THE NATIONAL ASSOCIATION
OF COUNTIES; THE U.S. CONFERENCE OF MAYORS; THE ALLIANCE FOR
COMMUNITY MEDIA; AND THE ALLIANCE FOR COMMUNICATIONS
DEMOCRACY**

Libby Beaty
Executive Director
Stephen Traylor
Deputy Director, Government Relations
NATOA
1800 Diagonal Road, Suite 495
Alexandria, VA 22314
(703) 519-8035

Lani Williams
General Counsel
Local Government Lawyer's Roundtable
N67W34280 Jorgenson Court
Oconomowoc, WI 53066
(262) 966-7438

December 21, 2007

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i.
SUMMARY	ii.
I. INTRODUCTION	2.
II. ARGUMENT	3.
A. Petitioners Are Likely to Prevail on Their Petition for Reconsideration and Clarification	4.
1. The Commission’s Ruling on Most Favored Nation Clauses is Inconsistent with the Commission’s Preemption of Local Level- Playing-Field Laws	4.
2. The Commission’s Economic Impact Analyses Pursuant to the Regulatory Flexibility Act are Deficient and Must be Reconsidered	5.
3. The Commission Should Clarify Whether the <i>Second Order</i> Applies to Incumbent Providers in States with State-Level Video Franchising Laws	8.
B. Petitioners’ Members Will Suffer Irreparable Harm in the Absence of a Stay	8.
C. Issuance of a Stay Will Not Result in Substantial Injury to Other Parties	10.
D. The Public Interest Favors Granting a Stay	11.
III. CONCLUSION	11.

SUMMARY

On October 31, 2007, by a vote of 3 to 2, the Commission adopted its *Second Report and Order*, concluding that “many of the findings” from its *First Report and Order* should be applicable to incumbent video providers. In doing so, however, the Commission, among other things, failed to: (1) preempt Most Favored Nation (“MFN”) clauses; (2) perform appropriate economic impact analyses as required by the Regulatory Flexibility Act (“RFA”); and (3) clarify whether the rulings of the *Second Order* applied to incumbent providers in all states.

Petitioners have filed a Petition for Review and Clarification of the Commission’s *Second Order*. In addition, other interested parties have filed petitions for review in federal court. Petitioners are also seeking judicial review of the Commission’s *First Report and Order*.

A stay of the *Second Order* is necessary to ensure that the Commission fully reconsiders and clarifies several of its rulings before they take effect. In the absence of a stay, Petitioners’ members will be irreparably harmed by the Commission’s actions.

By failing to preempt Most Favored Nation (“MFN”) clauses, as it had local level-playing-field laws, the Commission has upended the franchise negotiation process. It has given incumbent operators free reign to unilaterally modify their existing contractual obligations, including PEG and I-Net support. It will permit incumbents to circumvent the Commission’s stated objective that any modifications to existing agreements be assessed on a “case-by-case” basis.

Furthermore, both the initial and final analyses conducted pursuant to the Regulatory Flexibility Act (“RFA”) are deficient. Among other things, the analyses fail to assess the

economic impact of the rules on the franchise modification process. The Commission points out four processes by which an incumbent may seek a modification, but fails to assess the impact of each of those options on small governmental jurisdictions and small organizations.

Finally, the Commission was unclear in stating whether the *Second Order* applied to all incumbent providers, regardless of where they are located. While the *First Order* was clear that its rules did not apply in states that adopted state-level video franchising legislation, the *Second Order* is not.

Petitioners are likely to prevail on the merits of the case and the granting of a stay by the Commission will serve merely to preserve the *status quo* until the court or the Commission takes further action. Petitioners' members will suffer irreparable and irreversible harm if a stay is not granted. Incumbents will seek to take immediate advantage of the new rules, which will result in the disruption of thousands of existing, free negotiated contracts.

Furthermore, a stay will not result in substantial injury to third parties. Competitive providers would not be affected by a stay and incumbent providers are already providing service. In addition, a stay would not deprive the public of video service, choice or competition. Granting a stay will be in the public interest because it will protect current franchises, ensuring that the public, in general, and public safety services, in particular, can continue to rely on the services that were freely negotiated by the parties.

**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)
)

REQUEST FOR STAY

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”), hereby submit this Request for Stay pursuant to Sections 1.41 and 1.42 of the Commission’s rules¹ of the findings adopted by the Commission in the *Second Report and Order*² (“*Second Order*”) in the above-captioned proceeding. Petitioners have simultaneously filed a Petition for Reconsideration and Clarification (“Petition”) of the *Second Order*. In addition, other interested parties have filed petitions seeking judicial review of the Commission’s action.³

¹ 47 C.F.R. §§ 1.41 and 1.43.

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

³ For example, Montgomery County, Maryland seeks review of the *Second Order* on the grounds that it “exceeds the FCC’s statutory authority, is arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence, in violation of the United States Constitution,

Petitioners are seeking judicial review of the *First Report and Order* (“*First Order*”), which was adopted by the Commission on December 20, 2006, in the above-captioned proceeding.⁴ The Petitioners are likely to prevail on the merits of the appeal because the Commission acted without statutory authority in adopting the *First Order* and, assuming *arguendo* that it did have such authority, the Commission’s rulings were arbitrary and capricious. The validity of the *First Order* and its rulings will likely affect the validity of the *Second Order*.

Furthermore, a stay of the *Second Order* is necessary to ensure that the Commission fully reconsiders and clarifies several of its rulings. In the absence of a stay, Petitioners’ members will be irreparably harmed by the Commission’s action. On the other hand, granting a stay pending judicial review or the Commission’s full consideration of the Petition will not change the status quo of other parties and will further the public interest. Indeed, the requested stay will not interfere with the rulings of the *First Order* as they are applied to competitive providers.

For all these reasons, the grant of a stay is warranted under well-established Commission precedent.

I. INTRODUCTION

On December 20, 2006, over the strong dissent of two commissioners, the Commission adopted its *First Report* concerning local video franchising. A consolidated lawsuit challenging

including, without limitation, the Fifth and Tenth Amendments, and is otherwise contrary to law. The Second Report and Order also violates the public notice requirements of both the Communications Act and the Administrative Procedure Act.” *Montgomery County, MD v. FCC*, No. 07-2151 (4th Cir. filed Dec. 6, 2007). Similarly, Dayton Access Television, Inc. seeks review based on the grounds that the *Second Order* “exceeds the statutory authority of the FCC, violates the Communications Act, as amended, 47 U.S.C. §§ 151 *et seq.*, is arbitrary, capricious and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, and is otherwise contrary to law.” *Dayton Access Television, Inc. v. FCC*, No. 07-4467 (6th Cir. filed Dec. 5, 2007).

⁴ *Alliance Community v. FCC*, No. 07-3391 (6th Cir. filed April 3, 2007).

the *First Order*, filed by the Petitioners and others, is currently pending the United States Court of Appeals for the Sixth Circuit.

Subsequently, on October 31, 2007, the Commission, again over the dissent of two commissioners, adopted its *Second Report*, which, with some exceptions, extended the applicability of the rules and statutory interpretations of the *First Order* to incumbent cable operators. The *Second Order* was released on November 6, 2007 and published in the Federal Register on November 23, 2007. Unless stayed by the Commission, the rules and statutory interpretations will become effective on December 24, 2007.

Because thousands of existing franchise agreements may be adversely affected by the *Second Order*, Petitioners have filed a Petition for Reconsideration and Clarification. Petitioners respectfully request that the Commission stay the effective date of the *Second Order* until either: (1) the Commission takes final action on our Petition; or (2) the United States Court of Appeals for the Sixth Circuit issues its opinion regarding the *First Order*, the validity of which directly affects the validity of the *Second Order*.

II. ARGUMENT

The Commission considers requests for stay under well-established principles. Petitioners must show that they are: (1) likely to prevail on the merits; (2) will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be substantially harmed if the stay is granted; and (4) the public interest favors granting a stay.⁵

When evaluating these factors, the probability that the Petitioners will succeed on the merits may vary depending on the Commission's assessment of the remaining three factors. It is

⁵ *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified by *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 59 F.2d 841, 843 (D.C. Cir. 1977).

not necessary that the Petitioners establish with absolute certainty that they will prevail on the merits. Indeed, if the remaining factors favor interim relief, the Commission may exercise its discretion to grant a stay. The Commission performs its balancing test on a case-by-case basis and may grant a stay if Petitioners can make a particularly strong showing as to at least one of the factors, while there may be no showing as to another.⁶ In difficult situations, and where the equities of the case favor maintaining the *status quo*, the Commission may properly stay its decision. Here, Petitioners have satisfied the requirements for a stay.

A. Petitioners Are Likely to Prevail on Their Petition for Reconsideration and Clarification

Petitioners are likely to prevail on their Petition because the Commission: (1) failed to recognize that local level-playing-field laws are virtually indistinguishable from Most Favored Nation (“MFN”) clauses and, as a result, has issued inconsistent rules; (2) failed to conduct proper analyses of the economic impact that the rules would have on small governmental jurisdictions and small organizations as required by the Regulatory Flexibility Act (“RFA”); and (3) failed to clarify whether the *Second Order* applies to all incumbent operators, including those located in states that have adopted state-level video franchising legislation.

1. The Commission’s Ruling on Most Favored Nation Clauses is Inconsistent with the Commission’s Preemption of Local Level- Playing-Field Laws

The Commission’s treatment of MFN clauses in the *Second Order* is totally at odds with the Commission’s treatment of local level-playing-field statutes in the *First Order*. In the *First Order*, the Commission specifically preempted *local* level-playing-field statutes. (Curiously, the

⁶ See, e.g., *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies*, Third Memorandum Opinion and Order, Third Further Notice of Proposed Rulemaking and Order, 19 F.C.C. Rcd 25045, 25063, ¶ 43 (2004).

Commission did not preempt materially identical *state* level-playing-field statutes. Petitioners are challenging the Commission’s authority to preempt such laws, along with its inconsistent treatment of similar state statutes, in federal court.⁷) However, in the *Second Order*, the Commission failed to extend similar reasoning to MFN provisions.

The Commission should treat local level-playing-field laws and MFN clauses in a similar manner. Indeed, from the local franchising authority (“LFA”) perspective, MFN clauses are virtually indistinguishable from local level-playing-field laws and, from the viewpoint of the incumbent provider, both level-playing field statutes and MFN clauses serve the same purpose: they prevent the LFA from granting a more favorable or less burdensome competitive franchise. *If* the Commission has the authority to preempt local level-playing-field statutes in its *First Order* – a question to be resolved by the court – then there is simply no basis for leaving identical MFN provisions in place in its *Second Order*.

Preempting MFN clauses does not leave the incumbent provider without a means to seek a modification of its agreement in the event a competitive franchise is granted on more favorable terms. In fact, the *Second Order* itself sets forth a number of alternatives the incumbent may take, including engaging in “cooperative” negotiations with the LFA and seeking a modification pursuant to Section 625(b)(1).

2. The Commission’s Economic Impact Analyses Pursuant to the Regulatory Flexibility Act are Deficient and Must be Reconsidered

The Regulatory Flexibility Act (“RFA”), 5 U.S.C. § 603 (1996), requires the Commission to consider the economic impact that a proposed rulemaking will have on small governmental

⁷ *Alliance Community v. FCC*, No. 07-3391 (6th Cir. filed April 3, 2007).

jurisdictions and small organizations through the issuance of an initial regulatory flexibility analysis (“IRFA”). Both the initial and final analyses are deficient.

The IRFA estimated that 84,098 or fewer small government jurisdictions would be affected by the proposed rules. (The Final Regulatory Flexibility Act Analysis (“FRFAA”) revises this figure upward to 84,377 small government jurisdictions.) However, the Commission’s IRFA completely fails to include an estimate of small organizations that will be affected by the *Second Order*, except to note that some 1.6 million small organizations exist in total in the United States.

A “small organization” includes independent not-for-profit enterprises. *See*, 5 U.S.C. § 601(4). Many PEG channel operations throughout the United States fall within this definition and were excluded from the Commission’s “analysis.” The Commission failed to make any effort to quantify these affected small entities and solicit comments from them specifically regarding the potential effects of what were, at that time, its tentative conclusions.

The IRFA accompanying the Commission’s *Further Notice of Proposed Rulemaking* (“*FNPRM*”) stated its intended action would have only a *de minimis* impact on small governmental jurisdictions. Rather than identifying and analyzing the impacts of its proposed rules, the Commission simply stated that any rules that “might be adopted pursuant to [the *FNPRM*] likely would require at most only modifications to” the competitive cable franchise application review process. *See*, IRFA at ¶14.

The economic impact on small entities of “modifications” to the franchise renewal process is simply not addressed in the IRFA. Furthermore, in the FRFAA, the Commission made no attempt to assess the economic impact of the rules it actually adopted. For instance, the Commission made no assessment of the economic impact of modifying current franchise

agreements as a result of its decision related to MFN clauses. Further, the Commission stated its rules could result in the existing franchise modification through “cooperative” negotiations, use of MFN clauses and other contractual provisions, franchise modifications pursuant to Section 625 of the Act, and, of course, court action. Each of these modifications comes at an economic cost, which was not assessed by the Commission.

These costs include both legal and accounting expertise, among other things. At a minimum, the Commission has failed to comply with the requirements of the RFA by failing to assess and report on the amount and cost to small governmental jurisdictions and small organizations for the professional skills necessary to comply with the *Second Order*.

Because the Commission assumed its rules would impose no significant economic impact on affected small entities, it failed to include a description of any significant alternatives that could accomplish its objectives and minimize the true economic impact of the proposed rules on small entities. The Commission simply asserted that allowing LFAs to continue “unreasonable” practices would be unacceptable. The IRFA then solicited comments on its “analysis.” Because the Commission failed to identify any significant alternatives and failed to include small organizations in the IRFA, the IRFA should be reissued and a FRFAA should then only be issued after these small entities have an opportunity to comment.

Ultimately, the *First* and *Second Orders* hinged on unsubstantiated anecdotes, rather than meaningful analysis of the franchising process that has functioned well for decades. The Commission compounded the error of relying on such information when it failed to analyze the true economic consequences of its actions on the affected small entities. However, there is not a single reported case in which an LFA has been found to have unreasonably denied a franchise.

The Commission's IRFA and FRFAA are both deficient and do not analyze the economic impact of the rules contained in the *Second Order* and *FNPRM*.

3. The Commission Should Clarify Whether the *Second Order* Applies to Incumbent Providers in States with State-Level Video Franchising Laws

The *First Order* contains dozens of references to "preemption" and specifically states that the rules adopted do not apply in states that have enacted state-level video franchising legislation. Yet, the *Second Order* never explicitly addresses this issue except in the context of customer service standards.

It would be reasonable to conclude that the *Second Order's* rulings do not apply to incumbent providers in states that have enacted such legislation. But the Commission's statement that "[w]e do not see, for example, how Section 622 could mean different things in different sections of the country depending on when various incumbents' franchise agreements come up for renewal"⁸ muddies that position. Without a clear resolution of this issue, LFAs located in states with state-level video franchising laws will be faced with uncertainty as to the applicability of the *Second Order* to incumbent providers, which will most assuredly lead to increased litigation, negatively impact the deployment of new services, and harm the public interest.

B. Petitioners' Members Will Suffer Irreparable Harm in the Absence of a Stay

The rules and new statutory interpretations of the *Second Order* will take effect on December 24, 2007 unless stayed by the Commission. If allowed to take effect, incumbent providers will seek to take immediate advantage of the Commission's rulings to the detriment of local governments and the American public.

⁸ *Second Order* at ¶ 19.

Application of the rulings to *existing, freely negotiated* franchise agreements would disrupt local franchising authorities' well-settled, and in many cases, long-standing, contractual expectations. Immediate application of the rulings prior to the court's review of the *First Order* or the Commission's full consideration of our Petition will only result in increased uncertainty and expensive litigation and irreparable and irreversible harm.

Permitting MFN clauses to stand is short-sighted, one-sided, and will serve only to undermine the entire contractual bargaining foundation underlying existing incumbent franchise agreements. The ruling would permit incumbent operators to renege on existing franchise agreement commitments that benefit the LFA and the residents it serves. For example, in many communities, the I-Net required in an incumbent's agreement permits police and fire departments to receive and exchange vital public safety information, and may act as landline backhaul connections for 800 MHz public safety networks. Depending upon the particular wording of the MFN provision, the incumbent provider may argue that it can, as a result of the *Second Order*, abandon its existing I-Net obligations. Permitting incumbents to void such obligations poses a direct and immediate threat to public safety. Indeed, such harm will not only be irreparable, but irreversible as well. The loss or diminution of such services and the increased threat to public safety as a result simply cannot be remedied at a later date by monetary payments.

Also, the failure to preempt MFN clauses poses a direct threat to the continued vitality of existing PEG access channels. Once again, depending on the specific wording of the MFN clause, the inclusion of which may have been necessitated by a now-preempted local level-playing-field statute, the provision may result in a decrease of freely negotiated financial support, the shutting down of facilities, and diminished channel capacity. These irreparable and

irreversible harms to PEG operations across the country cannot be adequately addressed by monetary compensation. Once facilities go dark, once channel capacity is lost, the damage is beyond repair. Further, such a determination is wholly at odds with the Commission's stated goal of the preservation of localism.

In addition, the true economic impact that the *Second Order* will have on small government entities and small organizations is unknown at this time. Both the IRFA and FRFAA are deficient and the Commission must reconsider its analyses and rulemaking.

Finally, the uncertainty over whether the *Second Order* is applicable to all incumbent providers, no matter where situated, will expose LFAs to increased litigation and hamper deployment of new services. Indeed, failing to issue a stay may result in the modification of countless franchise agreements on terms that may very well be summarily rejected by the court.

Preservation of the *status quo* pending a decision by the Sixth Circuit Court of Appeals, or, at the very least, upon full consideration of the Petition by the Commission, is necessary to avoid these and other adverse consequences that will arise from the immediate application of the *Second Order*.

C. Issuance of a Stay Will Not Result in Substantial Injury to Other Parties

A stay of the rules set forth in the *Second Order* pending judicial review or Commission reconsideration would not harm either incumbent or competitive cable service providers. The *Second Order* does not address competitive providers and incumbent providers are already in the marketplace; a stay of the new rules will have no effect on their continued ability to offer their video services to the American public.

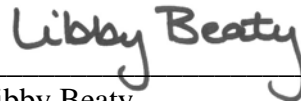
D. The Public Interest Favors Granting a Stay

The public has an interest in maintaining the cable services it currently receives from its incumbent providers. And LFAs have an interest in assuring that existing franchise agreements remain in place – based on freely negotiated terms by both parties – until the time of renewal. Local franchise authorities have taken efforts to ensure, consistent with the Communications Act, that these agreements reflect the needs and interests of the public they serve. Staying the effective date of the *Second Order* will not deprive the public of cable service, choice or competition. Indeed, a stay pending judicial review of the *Orders* or full consideration of the Petition by the Commission is consistent with rational decision-making. The granting of a stay will help encourage a competitive marketplace and promote the public interest.

III. CONCLUSION

For the foregoing reasons established herein, it is respectfully requested that the Commission stay the effective date of the *Second Order* in the above-referenced proceeding.

Respectfully submitted,



Libby Beaty
Executive Director
Stephen Traylor
Deputy Director, Government Relations
NATO
1800 Diagonal Road, Suite 495
Alexandria, VA 22314
(703) 519-8035

Lani Williams
Executive Director
Local Government Lawyer's Roundtable
N67W34280 Jorgenson Court
Oconomowoc, WI 53066
262-966-7438

December 21, 2007