

Case No. 07-3391 (and consolidated cases)

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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ALLIANCE FOR COMMUNITY MEDIA ET AL.  
Petitioners,

v.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS  
COMMISSION,  
Respondents

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

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REPLY BRIEF IN SUPPORT OF PETITIONERS, CITY OF TAMPA,  
VILLAGES OF LARCHMONT AND MAMARONECK AND THE TOWN OF  
MAMARONECK, GREATER METRO TELECOMMUNICATIONS  
CONSORTIUM, ANNE ARUNDEL COUNTY, CITY OF BOSTON, CARROLL  
COUNTY, CHARLES COUNTY, CITY OF CHARLOTTE, CITY OF  
CHICAGO, MONTGOMERY COUNTY, AND CITY OF ST. LOUIS, AND  
INTERVENORS, CITY OF WHITE PLAINS, CITY OF WILMINGTON, CITY  
OF MILWAUKEE, CITY OF DUBUQUE, CITY OF LOS ANGELES, AND  
CITY OF LAREDO

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Kenneth S. Fellman  
Kissinger & Fellman, P.C.  
Ptarmigan Place, Suite 900  
3773 Cherry Creek North Drive  
Denver, Colorado 80209  
Phone: (303) 320-6100  
Fax: (303) 320-6613

Joseph Van Eaton  
Frederick E. Ellrod III  
Marci L. Frischkorn  
Miller & Van Eaton, PLLC  
1155 Connecticut Ave., NW  
Suite 1000  
Washington, DC 20036  
Phone: (202) 785-0600  
Fax: (202) 785-1234

Their Attorneys

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**I. THE FCC CANNOT REGULATE LOCAL GOVERNMENTS AND THEIR PROPERTY, OR THE CABLE FRANCHISING PROCESS, UNDER ITS GENERAL RULEMAKING AUTHORITY OR CONSISTENT WITH THE CABLE ACT OR THE CONSTITUTION.**

According to the FCC and Intervenors USTA and the Ad Hoc Telecom Manufacturer Coalition (“AHTMC”), the FCC’s general authority under Sections 201 and 303 of the Communications Act to regulate services and service providers gives it the right to interpret the word “unreasonably” in Section 621(a)(1) of the Cable Act, 47 U.S.C. § 541(a)(1), and hence to define how and when local governments may exercise franchising authority. FCC Br. 22-23, 37-38.

The FCC, USTA, and AHTMC cite to cases upholding the FCC right to regulate in areas where it has been granted authority to do so by Congress, but never explain how the FCC’s general regulatory authority can be extended to reach to Section 621(a)(1), which by its terms places responsibility for the cable franchising process at the local level. As important, the briefs never explain how the rules adopted can be squared with the structure of the Act. Even if one assumes the FCC has *some* authority with respect to Section 621(a)(1), an *order* that (as Commissioner Adelstein noted<sup>1</sup>) federalizes the franchising process cannot stand, when the FCC and its supporters essentially concede the Congressional intent was to place responsibility for franchising at the local level.

The FCC argues that the intrusion on franchising is minor. Yet the *Order* directly regulates local franchising authorities (“LFAs”), local legislative processes, and state and local property which the federal government does not own or control. It (a) sets deadlines for local action on a franchise application; (b) preempts local rules for public notice and comment, and requirements governing legislative action, to the extent those would “cause” a locality to miss the deadlines established by the FCC; and (c) defines what are unreasonable and reasonable franchise terms. Moreover, the FCC exercises franchising authority by deeming a franchise granted on the terms proposed by an applicant if a locality fails to act in accord with FCC franchising rules. Yet, as the Brief of Petitioners and Intervenors (the “Tampa Coalition”) showed at 8, and as the FCC’s silence on the point underscores, the Cable Act does not authorize the FCC to grant cable franchises directly, or by deeming them issued.<sup>2</sup> Such departures from the basic structure of the Act cannot be justified by reference to general regulatory authority.

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<sup>1</sup> Adelstein Dissent (JA \_\_\_\_\_), 22 F.C.C.R. 5101, 5195 (2006).

<sup>2</sup> The Cable Act defines a franchising authority as “any governmental entity empowered by “Federal, State, or local law to grant a franchise,” 47 U.S.C. § 522(10). Federal departments controlling federal lands are the federal entities referred to in Section 522, *see Cox Cable Communications, Inc. v. U.S.*, 992 F.2d 1178 (11<sup>th</sup> Cir. 1993) (Air Force is franchising authority for airbase). Respondent USTA claims the FCC is a franchising authority, but the FCC has never justified its order on that ground. It cannot therefore be the basis for the Court’s decision. *SEC v. Chenery*, 318 U.S. 80, 88 (1943).

A. The FCC’s General Rulemaking Powers Under Sections 201 and 303 Do Not Authorize It To Regulate Local Franchising Authorities, or the Local Franchising Process.

1. *The Cable Act Places Responsibility for the Franchising Process with State and Local Governments, and the Courts.*

Local cable franchising authority derives not from the Cable Act, but from sovereign control of the state and local government property that cable companies seek to occupy. *Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999). While the Cable Act created a federal requirement that every operator obtain a franchise, as the Tampa Coalition’s Brief showed at 3-8, 13-15, this requirement did not displace local authority. It was instead designed to preserve it, and to eliminate any FCC role in franchising.

The Cable Act’s language and legislative history are extraordinarily explicit on the allocation of responsibilities for cable regulation and franchising. The FCC recognized this point in its *Order* at n. 18, and the FCC does not seriously contest it: Congress wanted franchising to be controlled at the local level, not by the FCC. The clear language and legislative history are critical to deciding whether the FCC can rely on general rulemaking authority to regulate the franchising process. USTA argues that reading the Cable Act to leave important responsibilities to state and local governments without FCC control would be an “odd result.” USTA Br.

17. But reliance on local and state processes is exactly what Congress intended.<sup>3</sup>

This is particularly clear in Cable Act provisions governing initial and renewal franchising. The latter (at 47 U.S.C. § 546) sets out a detailed set of renewal procedures, culminating in a local decision that is subject to judicial (as opposed to FCC) review under 47 U.S.C. § 555. The initial franchising process (described at 47 U.S.C. § 541(a)) is parallel, albeit less detailed. It culminates in a local decision and judicial review under the same section that applies to renewal decisions. Taken together, these provisions leave no room for FCC intervention in, or regulation of, the franchising process.<sup>4</sup> As the FCC itself acknowledged shortly after Congress enacted the Cable Act:

In short, the public no longer participates, at the Commission level, in matters affecting the franchising process. Nor did the Cable Act assign to the Commission any responsibility to regulate or otherwise supervise the franchise procedure either initially or at renewal.

*In the Matter of Amendment of Part 76 of the Commission's Rules and Regulations Relative to the Obligations of Cable Television Systems to Maintain Public Inspection Files and Retain Subscriber Records*, 99 F.C.C.2d 959, ¶ 14 (1985).

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<sup>3</sup> USTA's argument assumes that local and state franchising authority is derived from the federal government, and hence is necessarily subject to complete regulation by the federal government. *Dallas* rejected that claim as to the origin of franchising authority.

<sup>4</sup> Early versions of the Cable Act gave the FCC authority to establish franchising standards and review franchising decisions; but those provisions were

2. *General Rulemaking Powers Cannot Not Authorize Alteration of the Cable Act's Franchising Provisions.*

Nonetheless, the FCC claims to have found sufficient authority to regulate the franchising process. But “an agency's power is no greater than that delegated to it by Congress,” *Lyng v. Payne*, 476 U.S. 926, 937 (1986).<sup>5</sup> Here the delegation of authority over franchising is missing.

The FCC points to Section 201 (in Title II) and Section 303, which it claims provide it virtually unlimited authority to regulate cable and local cable franchising processes to further competition. FCC Br. 22. But, these sections were in the Communications Act when the Supreme Court held that FCC authority over cable was limited. *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689 (1979). In *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976), the FCC claimed preemption of state rules governing provision of non-cable services via cable systems, based on its authority to eliminate barriers to deployment of new cable technologies under the FCC's general rulemaking authority. The Court held that the FCC's general authority “is not the equivalent of untrammelled freedom to regulate activities over which the

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not included in the bill as enacted. Tampa Coalition Br. 5-7.

<sup>5</sup> The FCC's claim that it may take any action that it is not expressly prohibited from taking is thus incorrect. FCC Br. 21-28.

statute fails to confer, or explicitly denies, Commission authority.” *Id.* at 617.

That authority has not increased over time, *see infra*, Part I.B.<sup>6</sup>

That the FCC and USTA are overreaching when they claim that Sections 201(b) and Section 303 provide the FCC almost unlimited authority is clear in light of the general limits on the FCC’s jurisdiction. The FCC has authority over “interstate and foreign communications by wire” and “persons engaged” in such communication. 47 U.S.C. § 152. Its authority over “cable services” is limited to the authority “as provided in Title VI,” with respect to services, to cable operators, and to facilities of cable operators. Authority over local property, or localities franchising in their legislative capacities, is missing. Indeed, as Tampa Coalition

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<sup>6</sup> The FCC argues that Petitioners confuse the absence of a statutory *requirement* to exercise power with the absence of statutory *authorization* to do so. FCC Br. 23. There is no confusion. The agency always needs statutory authority for its regulations. *Midwest Video* and *NARUC* show that Sections 201 and 303 do not grant the agency the broad authorization it claims with respect to cable, or more importantly, with respect to local property and local franchising authorities. Thus, the *absence* of language in Title VI, and Section 621(a) in particular, *authorizing* the FCC to adopt rules dictating the terms and grant of local franchises, coupled with the express delegation of that authority to localities in Section 621(a), and the legislative history discussed in the Tampa Coalition Brief at 13-18, demonstrate that the FCC lacks the authority to adopt such rules. Moreover, Sections 201 and 303 are not part of the Cable Act. While Section 201(b) has been interpreted broadly, reported cases involve issues arising under Title II, not at issue here. Section 303 has likewise never been interpreted to give the FCC authority to issue franchises for local property. The general authority granted under those provisions does not permit the FCC to override the more specific allocation of authority under the Cable Act. *Edmond v. U.S.*, 520 U.S. 651, 657-8 (1997).

Br. 15 notes, and the FCC and USTA ignore, Congress has gone out of its way to exclude municipal rights-of-way from FCC jurisdiction, 47 U.S.C. §224.

The cases cited by the FCC and Intervenors do not require a different conclusion. *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) construed the EPA's authority under a statute that expressly authorized the EPA to enforce certain requirements. There is no similar authorization in the Cable Act. *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), addressed FCC authority to "regulate services over which it has explicitly been given rulemaking authority." 525 U.S. at 381, n.7. The Court contrasted the rules at issue in *AT&T* with those struck down in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), where the FCC acted (as it has here) with respect to matters "over which it had not explicitly been given rulemaking authority."<sup>7</sup> *ACLU v. FCC*, 823 F.2d 1554, n.4 (D.C. Cir. 1987), supports Petitioners, finding that Cable Act franchising provisions "delegate adjudicatory or regulatory tasks to a particular government body." *Illinois Bell Telephone Co. v. Village of Itasca*, 2007 WL 1560263, at \*14

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<sup>7</sup> *Iowa Utilities Board* found that the Telecommunications Act of 1996 expressly altered the traditional line between regulation of interstate and intrastate common carrier services, and that FCC could adopt regulations consistent with the new authority. The Cable Act, by contrast, as the Tampa Coalition has shown, was designed to limit FCC authority over the franchising process. 525 U.S. at 381, n.7.

(N.D.Ill. May 25, 2007), assumed that the *Order* before this Court is valid, and contains no analysis of the issues raised here.

B. The Adoption of the Cable Act and 1992 Prohibition of “Unreasonable Denials” Did Not Reinsert the FCC Into the Franchising Process.

Because the authority asserted by the FCC cannot come from Section 201 or 303 alone, FCC and USTA must show that, when Congress amended the Cable Act in 1992 to prohibit localities from “unreasonably” refusing to deny a request for a second franchise, without saying so it gave the FCC rulemaking authority over the franchising process, essentially permitting the FCC to re-federalize the process Congress had so carefully de-federalized in 1984. But the “Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions -- it does not, one might say, hide elephants in mouseholes.” *Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001).<sup>8</sup>

Moreover, the FCC’s authority to regulate the franchising process also cannot be derived from Section 636, 47 U.S.C. § 556, which preserves state and

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<sup>8</sup> The legislative history cited at FCC Br. 5-6 shows Congress intended no such change. That history finds that there are strong “natural monopoly” characteristics of cable making it difficult for competitors to enter the market. H.R.Rep. No. 102-628, 1992, pp. 44-45, 1992 WL 166238. Congress focused on solutions administered at the local level, *see id.* at 47 (prohibition on exclusive franchises linked to provision for municipal entry into the cable business). As Tampa Coalition Br. 17-18 pointed out (and FCC and USTA ignore), Congress did not adopt FCC legislative recommendations for issuance of temporary franchises.

local authority to regulate cable “consistent with the act,” and then preempts only those provisions “inconsistent with” the Cable Act. The *Order* goes far beyond preemption, requiring *affirmative action* to grant or deny within 90 days, and “remedying” the failure to so act by a franchise grant. The FCC brief does not explain how a preemption provision can authorize those actions.

C. The FCC Cannot Create Authority Under *Chevron*, Particularly Given Constitutional Issues the *Order* Raises.

The FCC and USTA argue that, because Congress used the “necessarily ambiguous” term “unreasonably” in Section 621, the *Chevron* doctrine allows the FCC to fill a regulatory gap by determining what the term means. The law is otherwise.

1. *Chevron Applies Only if the Cable Act’s Structure Indicates Congress Intended for the FCC To Interpret Section 621(a)(1).*

The *Chevron* doctrine is rooted in a fiction of implied congressional delegation to an administrative agency, theoretically conveyed by Congress’s silences and ambiguities.<sup>9</sup> However, when statutory indicia suggest that Congress did not intend a delegation, that fiction does not apply. In *Whitman*, the Supreme Court rejected a claim that it should defer to an agency interpretation of a statute

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No FCC role is mentioned.

<sup>9</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000) (“*Chevron* deference is premised on the theory that a statute’s ambiguity constitutes an implicit delegation” to the agency to fill statutory gaps).

that served as “the engine that drives nearly all of” a particular statutory title, finding that Congress’s “textual commitment” to the agency was not a “clear one.” *Whitman*, 531 U.S. at 468. The decision has particular force here, where the clear delegation is to local and state governments.

Nor does “the existence of ambiguity” in a word or phrase trigger *Chevron* deference. “The ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity,” *American Bar Ass'n v. F.T.C.*, 430 F.3d 457, 469 (D.C. Cir.2005), particularly where the “ambiguity” is used to trench on basic state-federal relationships, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-173 (2001), or to alter long-standing regulatory practices. *ABA*, 430 F.3ed at 469. This is precisely the case where the clearest indication is required that Congress intended the FCC to act.<sup>10</sup>

The indications are to the contrary. The plain language of the Communications Act, Section 152(a), states that “[t]he provisions of this Act shall apply with respect to cable service ... *as provided in title VI.*” 47 U.S.C. § 152(a) (emphasis added). This is a textual indication that Congress allocated the

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<sup>10</sup> As the Tampa Coalition Br. 5 shows, the FCC never asserted franchising authority over state or local property pre or post-Cable Act (USTA mistakenly characterizes the FCC’s 1972 certification process as franchising). Since 1978, the FCC has not regulated or reviewed franchising processes.

respective roles under Title VI expressly, not through implication. Title VI is consistent with this reading, providing a specific role for LFAs in some areas, a role for the FCC in others, and for shared authority in others.<sup>11</sup> The FCC concedes that under Title VI, “LFAs [are] the primary decision makers in the cable franchising process,” FCC Br. 27, but fails to recognize the significance of this structural standard. It indicates that the FCC authority to regulate cannot be implied under *Chevron* based on the alleged ambiguity of the term “unreasonably.”

2. *The FCC Ignores the Serious Constitutional Issues That Guide Interpretation of Section 621(a)(1).*

Alleged ambiguities cannot authorize an agency to interpret a statute in a manner that raises substantial constitutional questions. “[W]ithin the bounds of fair interpretation, statutes will be construed to defeat administrative orders” that raise such questions. *Bell Atlantic Telephon*, 24 F.3d 1441, 1445 (D.C. Cir. 1994). *See also Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991). The FCC and Intervenors’ briefs merely emphasize that the constitutional issues the *Order* raises, discussed in the Tampa Coalition Br. 20-24, are serious, and require this Court to reject the FCC’s interpretation of the statute (or find the *Order* unconstitutional).

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<sup>11</sup> *ACLU*, 825 F.2d, n.4. The Tampa Coalition does not contend that the FCC lacks regulatory authority under the Cable Act; we argue that the authority does not extend to controlling the initial or renewal franchise process.

*i Tenth Amendment.*

The FCC claims its *Order* raises no Tenth Amendment issues because it gives localities a choice between regulating in accordance with a federal scheme, or having regulatory authority over cable preempted. Of course, Congress acting within the scope of its Commerce Clause power can encourage states and localities to participate in a federal program so long as it does not cross the line between "coercion " and cooperation. *New York v. U.S.*, 505 U. S. 144, 166 (1992). A law will pass muster under the Tenth Amendment if a state or locality is given a genuine choice between (a) regulating in accordance with a federal statute; or (b) having its regulatory authority preempted altogether.

However, that is not the choice the FCC presents in its *Order*, as its brief makes clear in discussing interim franchises. The FCC states the interim franchise is a "remedy" for the failure of the locality to act in accordance with the FCC dictated scheme. *See* FCC Br. 48. A decision by a locality to "opt out" of the FCC scheme does not result in preemption of local authority with the FCC assuming franchising responsibilities; rather, the "LFA will be deemed to have granted" a franchise on the applicant's terms. *See* FCC Br. 48.<sup>12</sup>

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<sup>12</sup> In its discussion of the Tenth Amendment, the FCC coyly states that if localities do not act "federal rules" fill the void with "an interim franchise." FCC Br. 79. But the earlier discussion of interim franchises, cited above, makes it clear

In this context, the FCC's assertion that a locality can avoid the remedy by complying with the FCC regulations is not a defense. Rather, it highlights the problem. The FCC candidly admits the remedy is intended to coerce compliance; this "coercion" crosses the line between what is constitutionally permissible, and what is not. It is direct regulation of the conduct of the locality's legislative power, which the Tenth Amendment prohibits. *FERC v. Mississippi*, 456 U.S. 742, 762-766 (1982).

***ii Fifth Amendment.***

The *Order* grants interim franchises on the applicant's terms, without qualification. If no compensation is proposed, the locality obtains no compensation. *Order* ¶ 77 (JA\_\_\_\_). The FCC attempts to avoid the obvious Fifth Amendment problem created by asserting that every interim franchise requires the payment of a 5% fee. FCC Br. 62-63.<sup>13</sup> The *Order* contains no such requirement, and *post-hoc* rewriting cannot cure the defect. *Investment Co. Institute v. Camp*, 401 U.S. 617, 628 (1971).

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that the "federal rule" purports to exercise the legislative authority of local governments by deeming *the local* government to have issued the franchise. That creates the Tenth Amendment problem.

<sup>13</sup> The FCC also reiterates unsupported claims in the *Order* regarding municipal property rights, and rights of telephone companies to occupy property without compensation. Those were rebutted at Tampa Coalition Br. n.11, to which the FCC fails to respond.

The FCC's alternative argument -- that the Tucker Act can remedy any taking the *Order* creates -- is no better. The Fifth Amendment problem still must be considered in determining whether the FCC's interpretation of the Act is correct -- particularly as the agency's Tucker Act argument implies that the FCC may indebt the Treasury to advance broadband goals. *Bell Atlantic Telephone Companies v. F.C.C.*, 24 F.3d 1441 (D.C. Cir. 1994). Moreover, a Fifth Amendment challenge lies against regulations that create an identifiable class of actions that constitute a taking (as is the case here). *Id.*

***iii First Amendment.***

The *Order* failed to consider the impact of preempting general public procedures and legislative requirements. That failure was error, and leads to serious first amendment issues that the FCC fails to address substantively, and asks this Court to ignore. The issues are properly before this Court,<sup>14</sup> and as the

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<sup>14</sup>The procedural issues which underlie the first amendment arguments were raised below, Comments of the City of Philadelphia, 8-9 (JA\_\_\_); Comments of the City of Pasadena, 9-10 (JA \_\_\_\_). The agency also recognized that its *Order* created a broad range of constitutional issues, 22 F.C.C.R. 5201-02 (JA \_\_). That is sufficient. If the FCC is complaining that the first amendment issues were not identified specifically enough, the fault lies with the *Notice of Proposed Rulemaking*, which does not hint that the FCC intended to preempt charter and statutory provisions for public processes. Nor was the scope of the preemption something that could be anticipated. The Cable Act relies primarily on *local* procedures. To find, as the FCC did, that it is "unreasonable" and hence "unlawful" to follow those procedures is neither logical nor consistent with the statutory scheme.

Tampa Coalition Br. 23 explains, require rejection of the FCC's claim that it has authority to preempt local legislative processes under Section 621(a)(1).

The FCC argues no procedures may be lost, because an applicant and franchising authority can agree to extend the time for action. It is no response to the first amendment issue to make public rights contingent on an applicant's consent. The FCC complains there was no specific showing of any local requirement that would be preempted. There was ample evidence that franchising procedures could take longer than the 90 days adopted by the FCC, and the FCC explicitly treated them as part of the problem and preempted them. The FCC cannot claim it has "substantial evidence" procedures are causing harm, requiring preemption, and then suggest on brief that no offending procedures may exist.

D. *Chevron* Would Not Justify the FCC's Order In Any Case.

1. *Section 621(a)(1) is not ambiguous.*

Even if *Chevron* does apply, the *Order* is not entitled to any deference, and the FCC has no authority to adopt the regulations at issue here unless the language of Section 621(a)(1) is ambiguous.

In Order to determine whether Section 621(a)(1) is ambiguous, the Court must apply traditional tools of statutory interpretation. *OfficeMax, Inc. v. United States*, 428 F.3d 583, 592 (6th Cir. 2005). Contrary to the FCC and USTA, the Court must determine whether Section 621(a)(1) is ambiguous in light of the

presumption against preemption. *National Association of State Utility Consumer Advocates (NASUCA) v. FCC*, 457 F.3d 1238 (11th Cir. 2006); *Dallas, supra*; *Commonwealth of Massachusetts v. United States Department of Transp.*, 93 F.3d 890, 893-94 (D.C. Cir. 1996). As this Court held in *Wachovia Bank v. Watters*, 431 F.3d 556, n.3 (6th Cir. 2005), *aff'd on other grounds*, 127 S.Ct. 1559 (2007), this presumption applies except “in fields of regulation that been substantially occupied by federal authority for an extended period of time.” Here, the issuance of franchises for the use of local property is a historic power of the State.

With this presumption, and when read in context, as part of a provision providing for judicial review of a decision denying a request for a franchise, it becomes evident that Congress was not establishing a vague regulatory standard, but rather was establishing the standard by which the local action was to be assessed on judicial review, on a case by case basis. It is not ambiguous.

The FCC dismisses the fact that Section 621(a)(1) expressly includes a judicial remedy, arguing that this language “does not diminish the agency’s authority to issue rules.” FCC Br. 28.<sup>15</sup> But this argument ignores the fact that the

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<sup>15</sup> The cases cited for this principle are inapt. *ACLU*, discussed *supra*, found guidance appropriate with respect to a provision where the Cable Act did not specifically determine how disputes were to be resolved. That is not the case with Section 621(a)(1). In *AT&T*, the Court interpreted a provision that expressly directed the Commission to adopt rules.

review provision is inextricably linked to, and gives meaning to, the terms that precede it. Prior to the addition of the term, courts reviewing franchise denials applied a standard of review based on common law or state law principles. *See, e.g., Communications System, Inc. v. City of Danville*, 880 F.2d 887 (6th Cir. 1989) (applying a standard of arbitrary, capricious, bad faith, or abuse of discretion under Kentucky law). By using the word “unreasonably,” Congress simply adopted a standard of review that balanced its desire to outlaw exclusive franchises with its desire to leave LFAs with the discretion to balance the needs and interests of their communities. This hardly creates a gap the agency may fill with regulations.

The FCC and USTA contend that the term “unreasonably” is inherently ambiguous, FCC Br. 38, citing its use in other contexts. But “[l]anguage, of course, cannot be interpreted apart from context...” *Smith v. United States*, 508 U.S. 223, 229 (1993). To determine whether a word is ambiguous, “the court must look to the particular statutory language at issue, *as well as the language and design of the statute as a whole.*” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (emphasis added). Here, the design of the statute removes any ambiguity.

2. *Because The Order Fundamentally Changes the Franchising Process That Congress Preserved Under Title VI, It Would Not Survive Even If the Term “Unreasonable” Were Ambiguous.*

Moreover, as shown in Tampa Coalition Br. 13-27, an agency’s construction of even an ambiguous statute falls if the agency construction is inconsistent with

the statute's design, or contrary to the "will of Congress." *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 233 (1986).

As the FCC Br. n. 2 suggests, the *Order* creates a franchise regime in many respects similar to, but more intrusive on local authority than, the certification rules that it adopted in 1972. Yet it is clear from the Cable Act's text and history that Congress never intended for the Act to be read in a way that re-created the 1972 federal regime.

The *Order* makes the FCC the ultimate franchising authority (as FCC Br. 3 emphasizes), in sharp contrast with the Cable Act's reliance on local processes. The FCC argues that its rules are nonetheless consistent with the Cable Act, because the rules "do not affect LFAs' broad discretion to craft *reasonable* franchise agreements that satisfy the specific needs of their localities," but merely define what is "unreasonable." FCC Br. 27. The *Order* does not actually respect the line the FCC Brief identifies as critical. With respect to PEG, for example, the *Order* dictates that "[t]o the extent that a new entrant agrees to share *pro rata* costs with the incumbent cable operator, such an arrangement is *per se* reasonable." *Order* ¶ 120 (JA\_\_\_\_). While the FCC contends that a locality can define PEG obligations to meet local needs, its *Order* states: "[a] new entrant may agree to provide PEG support over and above the incumbent cable operator's existing obligations, but such support is at the *entrant's* discretion." *Order* ¶ 120, n.396

(JA\_\_\_). At FCC Br. 73, the FCC claims the right to determine what PEG support is “adequate.” At FCC Br. 57, the FCC makes a specific determination as to what constitutes local “needs and interests” with respect to build-out; at 39 it states it may declare what is “generally reasonable.” In sum, the current intrusion into areas reserved for local governments is sweeping, not narrow. As important, under the FCC’s interpretation of the law, there is no limit as to how far it may go in defining what may and may not be included in a franchise, and establishing initial franchising procedures.<sup>16</sup> Once the *Order* is examined in light of what it actually does, it is clear that it far exceeds any possible authority the agency may have under the Cable Act. *See also* Fairfax Reply Br. 12.

The FCC’s citation of cases observing that an agency’s view of its authority is entitled to deference does not help the agency’s argument. FCC Br. 19. The cases on which the FCC relies involved the interpretation of statutes that *expressly*

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<sup>16</sup> At FCC Br. 30-31, the FCC claims that it is allowed to define what it means to “unreasonably refuse” to issue a franchise; it then defines “unreasonably refuse” as anything that might contribute to a delay or a refusal, including unreasonable negotiating positions; and thus asserts that it may define what localities may and may not request from new entrants. Any “unreasonable refusal” so defined is by definition inconsistent with the Act, and therefore preempted by Section 636. Thus, a provision that actually only reaches “unreasonable refusals” is expanded to give the FCC authority over any aspect of franchising. This renders the preemption provision, and indeed, the express terms of Section 621(a)(1), meaningless. In *Iowa Utilities*, the Supreme Court made it clear that this sort of expansion of the plain language of a statute cannot survive review even under *Chevron*.

granted *the agency* authority to take a specific action. And, as noted above, even where authority is express, an agency's interpretation cannot be upheld where the result is at odds with the structure of the statute. Similarly, FCC's Br., n. 21 argues that when the statutory "purpose" of meeting local needs and interests and the agency's goal of promoting competition "cannot both be fully achieved," it may choose which to satisfy. But local franchising and satisfying local needs and interests is not just a purpose of the Act – it is the central element of its structure. *See, e.g.,* 47 U.S.C. § 546(c) (renewal may be denied for failure to reasonably satisfy local needs and interests, in light of costs). The FCC cannot use whatever authority it may have to "balance the competing interests served by the Cable Act," FCC Br. 23, n. 20, to depart from the scheme set out by Congress no matter how important the purpose being served. *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 233-234 (1994).

The question before the Court is whether a federalized system of franchising, controlled by the FCC, can really be squared with the structure of the Cable Act and its studied reliance on local franchising. It cannot.

## **II. THE FCC CANNOT UNDO LOCAL AUTHORITY BASED ON A RECORD IT ADMITS WAS FLAWED AND INACCURATE.**

### **A. The FCC and Intervenors Do Not Properly Apply the Substantial Evidence Test.**

Every element of the *Order* rests on the FCC’s finding that there is a pattern of localities unreasonably refusing to grant franchises to new entrants (directly, by delay, or by insisting on certain unreasonable conditions) that the agency may address. FCC Br. 2, 8-9, 12.<sup>17</sup>

Petitioners showed that this finding was based on evidence that was inaccurate or unsupported, and ignored entire lines of evidence submitted to the agency. The FCC (echoed by USTA) responds in three ways: it ignores the deficiencies in its evidence pointed out by the briefs; it asserts the right to rely on inaccurate and unsupported information; and it argues that there was a significant amount of evidence that supported its findings. The FCC, USTA and AHTMC argue that this is “substantial evidence” to support the FCC’s findings.

It is not. The substantial evidence test was designed to end the “practice of agencies to rely upon ‘suspicion, surmise, implications, or plainly incredible evidence.’” *Universal Camera v. NLRB*, 340 U.S. 474, 484 (1951). The APA overturned the prior regime under which courts upheld agency determinations if

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<sup>17</sup> At FCC Br. 32, the agency states a “number” of its rules simply involve issues of statutory construction, but the *Order* and the brief are clear that (with the possible exception of the franchise fee rulings) the agency is interpreting what would be “unreasonable” under Section 621(a)(1), rather what is lawful under other provisions of the Act (NCTA claims that the rules must be extended to incumbents are therefore misplaced). If there is no pattern of unreasonable delay, the rules fall.

the agency could point to portions of a record that supported its decision, without regard to the contrary evidence. Accordingly, the substantial evidence test requires a searching review of the entire record, to consider the substantiality of the evidence supporting the agency determination, taking “into account whatever in the record fairly detracts from its weight.” *Id.* at 488. Although an agency need not discuss every piece of evidence in the record, an order that ignores an entire line of evidence is not supported by substantial evidence. *Golembiewski v. Barnhart*, 322 F.3d 912 (7<sup>th</sup> Cir. 2003). Further, the agency must articulate a rational connection between the facts found and the choice made. *Motor Vehicle Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

B. There Is No Rational Connection Between Facts Found and Conclusions Drawn.

The FCC does not draw a rational connection between facts found and conclusions drawn. Tampa Coalition Br. 29-33. Despite what it calls a “voluminous record,” FCC Br. 9, not a single specific franchise denial case is identified, much less a pattern of denials. The FCC does not identify a pattern of delay connected to unreasonable conduct, much less municipal conduct. It never discusses how long it takes to go through the franchising process identified by the Cable Act, or to identify local needs as required by the Cable Act. As a result, it does not distinguish between lawful conduct and misconduct. There is nothing in the data that indicates that the problems are widespread, considering the number of

franchising authorities. To a large degree, the finding of “unreasonable” delay is merely a finding that localities are not satisfying the deadlines the FCC is now establishing,<sup>18</sup> or is based on a criticism of the cost and delay associated with local franchising generally, FCC Br. at 8. There is no basis for drawing a conclusion of municipal misconduct, as becomes apparent when the few isolated examples cited by the FCC and Intervenors are examined in light of the whole record.

C. The Evidence Cited By the FCC and Intervenors Is Not Substantial When Considered In Light of the Entire Record.

The FCC and Intervenors’ citations amount to the following:

1. Rather than point to significant record evidence of supported and verifiable municipal misconduct, the FCC repeats the unverified allegations cited in the *Order* (see, e.g., Brief 35 n.27), and argues that it was entitled to treat uncorroborated and untested testimony as substantial evidence. However, as the case cited by the FCC makes clear, such is the case only if no evidence is presented contradicting that evidence or testimony. See *Honeywell International Inc. v. E.P.A.*, 372 F.3d 441, 447 (D.C. Cir. 2004); *EchoStar Communications Corp v.*

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<sup>18</sup> The FCC, at n. 35, in a strained effort to match the findings with the facts, admits that franchising authorities whose speed it praises in the *Order* did not meet its new deadlines. What it meant, the agency says, is that they should be lauded, but also should act “more quickly.”

*FCC*, 292 F.3d 749, 752-3 (D.C. Cir. 2002).<sup>19</sup> This follows from the “whole record” test.

The *Order*'s dependence on unreliable evidence is best illustrated by the FCC's discussion of Tampa's conduct. The FCC admits allegations concerning the City of Tampa's conduct were incorrect, but argues that was of no moment, because the *Order* acknowledges the allegations were false. But the *Order*, while conceding the allegations were false, relies on them as evidence of municipal misconduct. *Order*, ¶43 (JA\_\_\_\_\_). That is surely not consistent with reasoned decisionmaking, or substantial evidence.

2. Similarly, the FCC continues to rely on BellSouth's statements about its franchising experiences. USTA claims BellSouth's statements are “unrefuted.” *See, e.g.*, FCC Br. 34, n.24; *see* USTA Br. 29, n.17. Neither mentions the affidavit of *BellSouth's own franchise negotiator* indicating that BellSouth itself was responsible for delays, and indicating that he saw no instances of unreasonable behavior by LFAs. Comments of the Howell Group, LLC d/b/a Telecommunications Consulting Associates (JA\_\_\_). The same is true with respect

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<sup>19</sup> Basing rulemakings on accusations against unidentified parties that cannot be checked or rebutted violates fundamental standards of due process. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

to allegations regarding Qwest's franchising experience, discussed in detail in Petitioner's opening brief; entire lines of contrary evidence are ignored.

3. Philadelphia is cited as an example of a city-caused delay, USTA Br. 26, n.14, but the record indicates delays there were attributable to the incumbent operator, not the City. Philadelphia Reply Comments, 2 (JA\_\_\_\_). The record with respect to the Town of Hanover, New Hampshire is based on a statement by a former NYNEX (now Verizon) employee, stating that the main entry obstacle was the state's level playing field law (not affected by the *Order*); the Town executed an agreed-upon franchise; but the company refused to do so. Comments of Fiber-to-the-Home Council, McGarty Declaration , ¶¶ 38, 40, 44 (JA\_\_\_\_). This is hardly evidence of municipal delay.

5. In other respects the FCC also cites to the record as if it supported the FCC's chosen conclusions, when it did not. The FCC argues that Indianapolis recommended that the franchising process be shortened to six to nine months. FCC Br. 34. Indianapolis said it believed the franchising process could be completed in six to nine months for applicants of similar size and resources, *if* the applicants accepted existing franchise agreements as a starting point. Indianapolis Comments, 8. (JA\_\_\_\_). But the FCC has stated that LFAs cannot insist upon existing franchise agreements as the starting point. *Order* at ¶ 26 (JA\_\_\_\_). The FCC likewise ignored caveats in other municipal comments.

6. To justify its Order, the FCC needed to conclude that LFAs were “unreasonably refus[ing]” franchise applications and therefore needed to be coerced into compliance by the threat of an interim franchise. *See* FCC Br. 48, 50. The record contained substantial, detailed evidence that the unreasonable positions taken, and cumbersome procedures used, by applicants such as Verizon had unnecessarily delayed franchise negotiations. Reply Comments of Anne Arundel, *et al.*, 12-38 (JA\_\_\_). In its initial brief the FCC tries to divert the court from its failure to consider countervailing evidence by stating that “the Commission reasonably rejected” such arguments as “inconsistent with both the record [and] common sense.” FCC Br. 34 n.25, citing *Order* ¶ 27 (JA\_\_\_). That is not what the *Order* said,<sup>20</sup> but even if it were, common sense is not subject to deference, and does not fulfill the agency's obligation under *Universal Camera*: “deficiencies of the cited references cannot be remedied by the Board's general conclusions about what is ‘basic knowledge’ or ‘common sense.’” *In re Sang-Su Lee*, 277 F.3d 1338, 1334 (2002).<sup>21</sup>

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<sup>20</sup> The conclusory remark in the *Order* only refers to cable incumbents’ argument that delay “is attributable to competitors that are not really serious about entering the market,” not to the crucial question of whether local governments are unreasonably delaying entry. On that question, the failure to consider countervailing evidence is striking and unsupported.

<sup>21</sup> USTA and FCC’s “common sense” is nonsense. Localities compete with one another for development, and are not likely to risk opportunities for broadband

7. Finally, the FCC treats as proof of delay the very fact that the franchising process takes more time than the agency thinks is appropriate.<sup>22</sup>

Miami is criticized because deadlines for local action did not begin until a complete application was submitted. Yet, the FCC defends its own rules because (it claims) they contain precisely that requirement. Conduct reasonable under the

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deployment in order to gain some modest advantage at the bargaining table. Given the benefits to consumers, it is hard to imagine that an elected official would risk the wrath of voters by delaying competitive entry. As Verizon put it, conceding it was obtaining all the franchises it needed: “Who’s going to turn that down?” NCTA Comments, 8-9 (JA\_\_\_\_\_). However, in a concentrated industry like the communications industry, providers might find it rewarding to delay agreements until the communities agreed to concessions. Moreover, delay could benefit them if there is the prospect of significant regulatory or legislative relief. It is therefore hardly surprising that companies would tell the FCC that franchising breeds problems, while at the same time stating elsewhere that deployment is not being delayed. Jon Kreucher, *Forced Franchising*, 44-52 (ICMA, Nov. 2006) (“ICMA”) (JA\_\_\_).

<sup>22</sup> The AHTMC points to studies that purport to show that telecommunications providers are submitting more orders for broadband equipment in states with streamlined franchising processes. The studies are questionable. The studies claim orders in Texas went up as a result of state franchising legislation, but admit that “Verizon and AT&T had fairly significant plans to deploy video in Texas prior to the enactment” of a state bill. RVA Render & Assoc. Study at 13, attached letter to from Fiber-to-the-Home Council dated 12/12/06 (JA\_\_\_). Other record evidence showed that a year after state franchising was passed, only two applications for state franchises had been filed by ILECs in Texas. Comments of Anne Arundel County and Montgomery County, Maryland at 15-16 (JA\_\_\_). The studies assume that there was no deployment in states with local franchising where the record showed that there was substantial deployment. *See, e.g.*, ICMA at 76-77 (JA\_\_\_). But, even viewed most generously, the studies show that statewide franchising speeds deployment, not that local misconduct is delaying deployment.

FCC's rules is treated as evidence of misconduct to justify the FCC Order. The FCC cites the City of Chicago's comments (which indicate that franchising can take more than a year) as proof of delay. Yet the *Order* recognizes that if both parties agree, it is not unreasonable for franchise negotiations to take longer than 90 days. *Order*, ¶ 73 (JA\_\_\_). The FCC never inquired whether parties effectively agreed to the length of Chicago's franchising process. The FCC simply assumed that the delay must have been unjustified – a conclusion based on precisely the sort of speculation that *Universal Camera* says is not sufficient to support a rule.<sup>23</sup>

### **III. THE FCC'S ORDER IS OTHERWISE ARBITRARY AND CAPRICIOUS, AND INCONSISTENT WITH THE CABLE ACT**

#### **A. The FCC Does Not Defend Its *Order* As Written**

As shown, above, the finding fundamental to all of the agency's ruling – its conclusions that localities were unreasonably delaying entry – is not supported by substantial evidence. However, the Tampa Coalition Br. 38-56 and other Petitioners also explained in detail that the rules adopted by the FCC were inconsistent with the Cable Act, and otherwise arbitrary and capricious, among other things having “relied on factors which Congress has not intended” the FCC

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<sup>23</sup> The conclusion is particularly indefensible when the Chicago comments are viewed as a whole. The City pointed out that it has approved overlapping franchises for three cable operators, two of them overbuilders, including Ameritech New Media – hardly a sign of hostility toward competition.

to consider and having “entirely failed to consider” important aspects of the issues before the FCC, *Motor Vehicle Mfrs.*, 463 U.S. at 43. Moreover, because *categorical* rules are involved, the record must show that each categorical rule would hold “true in so many cases” that case-by-case inquiry would be needless and wasteful. *Ragsdale v. Wolverine Worldwide*, 535 U.S. 81, 93 (2002). The Tampa Coalition Br. n. 36 showed that the categorical rule would apply in almost *no* cases, particularly with respect to build-out.<sup>24</sup>

Those arguments independently justify reversing the *Order*. The briefs of FCC and USTA ignore many of the arguments made, and do not even defend large portions of the *Order*. In some cases, the FCC attempts to dismiss criticisms by rewriting its own *Order*. The FCC claims, for example, that its build-out requirements permit a locality to consider “other factors” in establishing build-out rules, FCC Br. 53-54, and hence permit localities to meet local needs and protect against discrimination. FCC Br. 54-55. The FCC never acknowledges or defends the *Order* ¶ 90 (JA\_\_\_), which sets out absolute rules, including a *per se* prohibition on build-out requirements for new entrants “more stringent” than those imposed on incumbents.

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<sup>24</sup> The FCC’s effort to dismiss arguments as hypothetical is effectively an admission the agency does not know whether its categorical rules apply in most instances; it is not a defense of the *Order*.

The Tampa Coalition argued that the FCC’s deadlines would not allow it to conduct investigations contemplated by the Act. The FCC Br. at 46 responds that deadlines may be tolled while a locality is waiting for information from an applicant. But while there is language in the text of the *Order* that could be read to support the claim, the rule as written, 47 C.F.R. § 76.41, contains *no* tolling provision, and simply provides that once an application is complete, the deadlines run.

Such categorical omissions and alterations<sup>25</sup> suggest that the agency understands that in critical respects its *Order* and rules as written are indefensible.

B. The FCC’s and Intervenors’ Defense of Specific Rules Cannot Survive Scrutiny.

The Tampa Coalition Brief addresses many of the arguments raised by the FCC and Intervenors, and shows that cases relied upon are not relevant. We will not repeat those arguments here, but a few points deserve emphasis.

1. *The 90 and 180 day deadlines.*

The deadlines depend on the FCC’s assertion that local governments are unduly delaying franchise decisions, a claim that is not supported by the record

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<sup>25</sup> Those alterations include the point, noted in Part II, that the agency defends the *Order* on the ground it defines only “unreasonable” conduct when it plainly does more. This, and other conflicts and contradictions identified in the Tampa Coalition Br. 32, are never rebutted.

considered as a whole. Nor are the deadlines reasonable: the FCC never considered how long it would take to reasonably conduct a franchising process contemplated by the Cable Act, and indeed, on brief is forced to suggest that the deadlines are subject to exceptions that do not appear on the face of the rule.

The FCC goes on to claim that it is possible to negotiate a franchise starting from scratch in 90 days because the agency has so dramatically narrowed the scope of franchising that the list of “legitimate issues is short.” FCC Br. 45. Setting aside the fact that this claim is not supported by the record, see pp. 21-29 *supra*, and that nowhere does the FCC identify these “legitimate issues” so that this Court could determine whether the FCC’s assertion is correct, it is enough to note that its claim that the issues are few and the scope of negotiation narrowly defined cannot be squared with its claim that it has merely identified what actions are unreasonable and left local authorities substantial authority to satisfy local needs.<sup>26</sup>

## 2. *The Proposed Interim Franchise Remedy.*

As discussed above, the FCC lacks authority to issue franchises, and it cannot create such authority indirectly by labeling its action a “remedy.” An

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<sup>26</sup> The FCC argues that the consequences of the deadline may be avoided by denying an applicant’s application, and suggests that this may be done if a locality believes an applicant is not negotiating in good faith. FCC Br. 46. But setting an arbitrary deadline that forces court review of negotiations in progress is not what Congress contemplated when it provided for review of final franchising authority

agency's "authority to determine proper remedies for violations" of its authorizing statute "is not without limits," *ICC v. Transcon Lines*, 513 U.S. 138, 145 (1995). While an agency's "judgment that a particular remedy is an appropriate exercise of its enforcement authority under" the statute "is entitled to some deference," *ICC*, 513 U.S. at 145, a court should not uphold a choice of remedy that is "inconsistent with the statutory scheme as a whole." *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990); *see also Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). This is particularly so when the remedy is in the nature of a mandamus; mandamus actions are reserved to the courts. 47 U.S.C. § 401.

None of the FCC cases cited support the notion that the FCC may devise a remedy or "prophylactic" rule which exceeds the agency's statutory authority. *Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990), merely notes the agency is entitled to deference as to its choice of regulatory techniques. The case involved a challenge to the rationality of the remedy, not the agency's authority to impose it. *American Telephone & Telegraph Co. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006), allowed sanctions permitted under the Act. *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 490 U.S.

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decisions. 47 U.S.C. §621(a)(1).

1039 (1989), notes that the power to prescribe a rate of return necessarily included the right to require refunds of amounts collected in excess of the prescribed return.

3. *Build-out Requirements.*

As noted above, the FCC does not even defend all of the build-out requirements in its *Order*; but those it does defend are arbitrary and inconsistent with the Act.

To the extent the FCC defends the rules, the defense rests on three points. First, the FCC argues that localities have no authority to require an operator to build out a system, and are actually limited in their ability to require a build-out by 47 U.S.C. § 541(a)(4). FCC Br. 54-56. This (the FCC believes) leaves it free to define what build-out can be required in light of Section 621(a). FCC Br. 56-58. However, the *Order*, and now the brief, ignore explicit provisions of the Cable Act that courts have recognized give localities authority to establish build-out requirements, *see, e.g.*, 47 U.S.C. §§ 544, 552; *Housatonic Cable Vision v. Dept. of Public Utility Control*, 622 F. Supp. 798 (D.Conn.1985).<sup>27</sup>

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<sup>27</sup> The FCC brief argues that these provisions were never specifically identified below, and can be ignored. In fact, they were; moreover, localities consistently claimed the authority to impose build-out obligations under the Cable Act. See NATOA Reply Comments 23 (JA\_\_\_); Comments of Michigan Municipal League 12 (JA\_\_\_).

Second, the FCC Br. 34-35, 58-59 suggests that build-out regulations are necessary because localities are requiring new entrants to build “further and faster than their economic interests dictate.” But the point of a build-out requirement is to ensure an operator builds to meet community needs, and not just to satisfy its profit margin. The argument again emphasizes that the FCC rules are not consistent with the Cable Act.

Finally, the rules depend in part on the FCC’s finding that new entrants are at a fundamental economic disadvantage as compared to existing operators. Yet, the FCC never actually considered evidence that showed that new entrants have many significant advantages, while incumbent cable operators faced substantial disadvantages at the time they first entered the market, and it continues to ignore these points on brief. Instead, the FCC asserts incorrectly that incumbents had the benefits of exclusive franchises. That claim, reiterated by USTA, is not supported by the record, and is contradicted by the legislative history of the 1992 amendments to the Cable Act.

As importantly, the FCC’s claim that new entrants (particularly incumbent telephone companies) are at a substantial disadvantage is belied by the FCC’s conclusion, elsewhere, that these entities are so well-established in the rights of

way and in the marketplace that one need not even seriously consider their financial, technical and legal qualifications to perform.<sup>28</sup>

4. *Franchise fees.*

The FCC argues that the agency (a) properly defined what costs are “incidental” to the award of a franchise; (b) properly classified “in-kind contributions” as franchise fees; and (c) properly found that payments made for PEG other than those made in connection with “construction” of PEG studios are part of the franchise fee. The first point is addressed comprehensively in the Reply Briefs of Fairfax County and the City of San Francisco.

“In-kind” contributions. The Cable Act’s legislative history states that the Cable Act “defines as a franchise fee only monetary payments” and does not include “any franchise requirements for the provision of services, facilities or equipment.” H.R. REP. No. 98-934 (1984), *reprinted* in 1984 U.S.C.C.A.N. 4655, 4705. In adopting its rules, the FCC ignores that congressional intent. The FCC argues the distinction is irrational, claiming that, unless in-kind contributions are

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<sup>28</sup> FCC Br. 61, n.54 argues that telephone companies do not have a large existing base of video customers, and could not use their telephone revenues to enter the video marketplace. No such finding was made in the Order, nor could it have been. Telephone companies claimed that they are upgrading their *telephone* systems; indeed, the *Order* assumes the companies are “financially qualified” because of their position in the telephone marketplace. And of course the *Order* assumes deployment of advanced facilities will be encouraged precisely because

franchise fees, a requirement that a franchisee “build a library” would not be subject to the franchise fee cap. FCC Br. 68. That argument betrays the FCC’s fundamental misunderstanding of the franchising requirements of the Cable Act. A locality cannot require a franchisee to build a library because it may only enforce requirements related to the establishment of operation of a cable system. 47 U.S.C. § 544(b). Requirements that are related to the “establishment and operation” of a cable system, are, by contrast, imposed to ensure the operator satisfies its obligation to meet local needs and interests, and are enforceable. 47 U.S.C. § 544(b)(1). Thus the “library” requirement never arises, and the costs of satisfying the cable-related requirements are not “in-kind” payments in any sense. They are simply expenses incurred by the operator in the course of satisfying its Cable Act obligations.<sup>29</sup> The line drawn in the legislative history thus identifies

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telephone companies will sell bundled services to their existing market.

<sup>29</sup> An operator will incur many expenses it might prefer not to incur in satisfying franchise obligations: costs associated with meeting customer service standards, build-out obligations, and privacy obligations, among others. But it would be odd to suggest that such costs can be deducted from franchise fees owed to the local government. Interestingly, the title of the FCC’s argument (referring to “in-kind payments unrelated to the provision of cable service”) recognizes that some in-kind requirements cannot be treated as franchise fees, but the title draws the wrong line. The relevant question under the statute is whether a requirement is related to the establishment or operation of a cable system.

precisely – and rationally – the line drawn by the plain language of the Act.<sup>30</sup> The FCC specifically endorsed the legislative history in *City of Bowie Maryland*, 14 FCC Rcd 7674 (1999), *as amended* 14 FCC Rcd 9596 (1999), quoting approvingly the language on monetary payments cited above. The *Order* is thus inconsistent with the statute and with the agency’s prior determinations.<sup>31</sup>

Construction costs. The Fairfax Reply Br.26 points out that the FCC’s determination that PEG costs are limited to “construction costs” is not consistent with either the language of the Cable Act or common sense. It is also not supported by the legislative history or the amended *Bowie* letter. The FCC relies upon the summary portion of the legislative history, which recognizes (correctly) that payments for construction of PEG facilities are not counted against the franchise fee. The FCC ignores the full discussion of the PEG exemption at 1984 U.S.C.C.A.N. at 4702, which is reinforced by a colloquy included as part of the

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<sup>30</sup> The FCC also claims that the reference to “requirements” or “charges” for bonds and other security instruments at 47 U.S.C. § 542(g)(2) implies that “in-kind” requirements are counted against the franchise fee. The reference in 47 U.S.C. § 542(g)(2)(D) simply recognizes that a requirement calling for cash payments in the case of defaults could be included in a franchise, or a charge could be levied that allows the locality to buy a bond. Neither cash payment is a franchise fee. The reference to PEG “requirements” in 47 U.S.C. § 542(g)(2)(C) recognizes that the only cash PEG obligations that are subject to the provision are “requirements” in a franchise.

legislative history at 1984 U.S.C.C.A.N. at 4735. The full discussion makes clear that payments for *any capital costs* associated with PEG are in addition to the franchise fee - which is, of course, exactly what the Act's language provides.

5. *Limits on PEG Obligations.*

The FCC discussion on PEG obligations never confronts the arguments actually raised by the Tampa Coalition, to which we refer the Court. Instead, the FCC opts to twist the language of the *Order* in an effort to show that the agency rules are really meant to allow localities to impose very different obligations on new entrants than on incumbents, and that it meant to give *localities* the right to establish cost-sharing requirements. FCC Br. 72. The *Order*, of course, says otherwise. Among other things, it makes cost-sharing arrangements proposed by the *applicant* per se reasonable. But the best indication that the FCC has no answer to the Tampa Coalition's arguments is its disavowal of the relevance of the *OVS Order*, at n. 62. It was this very *Order* that the FCC relied upon as the

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<sup>31</sup> The agency never suggests it is changing position (much less explains the change). Instead, the FCC Br. 69, n.59, asserts, incorrectly, that the *Bowie* letter does not address in-kind compensation.

support for the PEG rules it adopted, and the FCC’s conclusion that the *Order* is not relevant on brief is an admission that its rules lack any rational footing.<sup>32</sup>

#### 6. *Mixed Use Networks*

The Tampa Coalition Brief at 54-55 showed that localities are not limited to regulating only cable services, but are entitled to regulate the *cable system*, even if it is a “mixed use facility.” The legislative history is clear. “The term cable system is not limited to a facility that provides only cable service....Quite the contrary, many cable systems provide a wide variety of...communications services. A facility would be a cable system if it were designed to include the provision of cable services...along with communications services other than cable service.” 1984 U.S.C.C.A.N. at 4681. Rather than respond, the FCC asserts (incorrectly) that the Tampa Coalition agreed Title VI authority is limited to cable services.<sup>33</sup> No such concession was made. The agency never confronts the

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<sup>32</sup> That is perhaps why the argument to which the FCC responds is one on which Tampa did not focus, with respect to payments for I-Nets “never built.” But (as the FCC *Brief* elsewhere recognizes), a locality may consider total PEG capital costs, including the incumbent’s I-Net costs, in balancing PEG obligations, even if the new entrant will not itself build an I-Net.

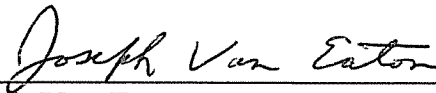
<sup>33</sup> Title VI authority will extend in certain regards to non-cable services. *See, e.g.* 47 U.S.C. § 551 (protecting privacy with respect to non-cable services provided via a cable system); 47 U.S.C. § 541(b)(3)(D)(locality may establish telecommunications requirements related to a cable system’s PEG and institutional network obligations).

language of the Act and its legislative history, which shows that the agency's "mixed use" rules are contrary to law.<sup>34</sup>

## CONCLUSION

The Court should reverse the agency's *Order*.

Respectfully submitted,



Joseph Van Eaton  
Frederick E. Ellrod III  
Marci L. Frischkorn  
Miller & Van Eaton, PLLC  
1155 Connecticut Avenue, N.W.  
Suite 1000  
Washington, DC 20036  
Phone: (202) 785-0600  
Fax: (202) 785-1234

### Their Attorneys

Kenneth S. Fellman  
Kissinger & Fellman P.C.  
Suite 900  
3773 Cherry Creek N. Drive

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<sup>34</sup> The FCC erroneously assumes all mixed use facilities are Title II common carrier facilities. USTA argues only Title II facilities "dedicated" to cable are part of a cable system; the Act states any portion of a Title II facility *used* to provide cable service is a cable system.

Denver, CO 80209

Attorney for the Greater Metro  
Telecommunications Consortium

**CERTIFICATE OF COMPLIANCE**

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 9,985 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Word for Windows 2003.

*Joseph Van Eaton*

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Joseph Van Eaton

October 4, 2007

### Designation of Record for Joint Appendix

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

ALLIANCE FOR COMMUNITY  
MEDIA ET AL.

Petitioners,

v.

Case Nos. 07-3391, and consolidated  
cases

UNITED STATES OF  
AMERICA; FEDERAL  
COMMUNICATIONS  
COMMISSION,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be delivered as of September 20, 2007, via first class U.S. Mail, copies of the foregoing Reply Brief of Petitioners, City of Tampa, Villages of Larchmont and Mamaroneck and the Town of Mamaroneck, Greater Metro Telecommunications Consortium, Anne Arundel County, City of Boston, Carroll county, Charles County, City of Charlotte, City of Chicago, Montgomery County, and City of St. Louis, and Intervenors, City of White Plains, City of Wilmington, City of Milwaukee, City of Dubuque, City of Los Angeles, and City of Laredo.

Christopher J. White, Esq.  
Division of the Ratepayer Advocate  
31 Clinton Street, 11<sup>th</sup> Floor  
P.O. Box 46005  
Newark, NJ 07102

C. Grey Pash  
Office of General Counsel  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Kenneth S. Fellman  
Kissinger & Fellman P.C.  
3773 Cherry Creek N. Drive  
Suite 900  
Denver CO 80209

Catherine G. O'Sullivan  
U.S. Department of Justice  
Antitrust Division, Appellate Section  
950 Pennsylvania Avenue, N.W.  
Room 3224  
Washington, DC 20530-0001

D. Jacques Smith  
Alan G. Fishel  
Jeffrey E. Rummel  
Arent Fox LLC  
1050 Connecticut Avenue, N.W.  
Washington, DC 20036

Michael S. Schooler  
National Cable & Telecommunications  
Association  
25 Massachusetts Avenue, NW  
Suite 100  
Washington, DC 20001

Tillman L. Lay  
Spiegel & McDiarmid  
1333 New Hampshire Avenue, N.W.  
Washington, DC 20036

Rodney L. Joyce  
Joyce & Associates  
10 Laurel Parkway  
Chevy Chase, MD 20815

Dennis J. Herrera  
City Attorney  
City and County of San Francisco  
1 Dr. Carlton B. Goodlett Place  
Suite 234  
San Francisco, CA 94102-4682

Pierre H. Bergeron  
Squire, Sanders & Dempsey  
312 Walnut  
Suite 3500  
Cincinnati, OH 45202-4036

Herbert E. Marks  
Squire, Sanders & Dempsey  
1201 Pennsylvania Avenue, N.W.  
Washington, DC 20004

William K. Sanders  
City Attorney's Office  
1 Dr. Carlton B. Goodlett Place  
City Hall Room 234  
San Francisco, CA 94102

Robert B. McKenna  
Tiffany West Smink  
1801 California Street  
10th Floor  
Denver, CO 80202

Michael K. Kellogg  
Austin C. Schlick  
Kellogg, Huber, Hansen, Todd, Evans  
& Figel  
1615 M Street, N.W.  
Suite 400  
Washington, DC 20036-3209

Jonathan Banks  
United States Telecom Association  
607 14<sup>th</sup> Street, N.W.  
Suite 400  
Washington, DC 20005-2164

Michael E. Glover  
Verizon  
1515 North Courthouse Road  
Suite 500  
Arlington, VA 22201-2909

Matthew C. Ames\*  
Miller & Van Eaton, P.L.L.C.  
1155 Connecticut Avenue, N.W.  
Washington, DC 20036

James N. Horwood  
Spiegel & McDiarmid  
1333 New Hampshire Ave., N.W.  
Washington, DC 20036-4798

Lani L. Williams  
Local Government Lawyer's Round  
Table  
N67W34280 Jorgenson Court  
Oconomowoc, WI 53066

Thomas W. Cohen  
Edward A. Yorkgitis, Jr.  
Kelley Drye & Warren  
3050 K Street, N.W., Suite 400  
Washington, D.C. 20007



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Marci L. Frischkorn

\* Via hand delivery

Dated: October 4, 2007  
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