

**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)

OPPOSITION TO PETITIONS FOR RECONSIDERATION

The National Cable & Telecommunications Association (“NCTA”) hereby opposes the petitions for reconsideration or clarification¹ of the *Second Report and Order* filed in the above-captioned proceeding.² NCTA is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90% of the nation’s cable television subscribers, as well as more than 200 cable programming networks and services. The cable industry is the nation’s largest broadband provider of high speed Internet access after investing more than \$100 billion in the past ten years to build a two-way interactive network with fiber optic technology. Cable companies also provide state-of-the-art telephone service to millions of American consumers.

¹ Public Notice, Report No. 2846, *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding*, January 16, 2008. Petitions were filed by the City of Albuquerque, New Mexico, *et al.*, (“Albuquerque”), the City of Breckenridge Hills, Missouri (Breckenridge Hills”), and the National Association of Telecommunications Officers and Advisors, *et al.* (“NATOA”)(collectively “Petitioners”).

² *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*, MB Docket No. 05-311, Second Report and Order, 22 FCC Rcd 19633 (2007) (“*Second Order*”).

INTRODUCTION

The *First Order* in this proceeding purported to implement Section 621(a)(1) of the Communications Act (the “Act”) regarding unreasonable refusals to grant additional competitive cable franchises.³ In the *Second Order*, the subject of the pending petitions for reconsideration, the Commission agreed with NCTA and other commenters that most of the decisions it had reached in the *First Order* with respect to franchise fees, PEG and institutional networks, and regulation of mixed use facilities were interpretations of other statutory provisions applicable to all cable operators – new entrants and existing operators alike – and were applicable immediately.⁴

Specifically, in the *Second Order*, the FCC agreed with NCTA that (1) in reaching conclusions that certain specified costs, fees, and other compensation required by local franchising authorities must be counted toward the statutory five percent cap on franchise fees, the Commission interpreted the term “franchise fee” as defined in Section 622 of the Act and that the resulting interpretations therefore apply immediately to all cable operators;⁵ (2) in determining “reasonable” requirements for PEG channels and institutional networks, the Commission essentially interpreted the provisions of Section 611(a) of the Act limiting the authority of local franchising authorities to establish requirements for PEG channels and for institutional networks, and that many of those rulings similarly apply to all operators

³ *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*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101(2006)(“*First Order*”).

⁴ *Second Order* at ¶¶ 10-13, 15-17. The Commission also concluded that: (1) other provisions of the *First Order* regarding build-out and time limits for franchise negotiations are only applicable to new entrants; and (2) the Commission cannot preempt local or state cable customer service requirements, nor can it prevent local franchising authorities and cable operators from agreeing to more stringent standards. The Commission also concluded that the *First Order* had no effect on existing most favored nation (“MFN”) clauses.

⁵ *Id.* at ¶ 10-11.

immediately;⁶ and (3) the Commission’s “clarification” of what authority LFAs have over “mixed-use” (*i.e.*, video and voice) facilities is based on an interpretation of the definition of “cable system” under Section 602(7) of the Act and therefore applies immediately to existing cable operators and new entrants alike.⁷

As the Commission said: “The statutory interpretations set forth above represent the Commission’s view as to the meaning of various statutory provisions, such as section 622, and these interpretations are valid immediately.”⁸ The Commission went on to observe 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.”⁹ Finally, while in the *First Order* the Commission had specifically declined to apply its interpretation of Section 621(a) to states that had adopted state-wide video franchising laws, the Commission in the *Second Order* made clear that its interpretation of other provisions of the Act, such as Sections 622 and 611, are “valid throughout the nation.”¹⁰

The Reconsideration Petitions Should Be Dismissed

Three parties have sought reconsideration, although they each raise related or similar issues. Together the petitions ask the Commission to (1) conclude that the *Second Order* violated the Regulatory Flexibility Act (“RFA”) because the Order will “have a serious impact on local franchising authorities by unduly disrupting existing contracts,” (2) clarify the applicability of the Order to state franchises; (3) reverse its holding that so-called Most Favored Nation (“MFN”) clauses should not be preempted; and (4) reverse several of its statutory

⁶ *Id.* at ¶ 12-13.

⁷ *Id.* at ¶16-17.

⁸ *Id.* at ¶ 19.

⁹ *Id.*

¹⁰ *Id.* at n. 60.

interpretations and its holding that “mixed use” facilities are not subject to Title VI. None of these arguments warrant Commission reconsideration and reversal.

Petitioners’ Regulatory Flexibility Act Claims are Without Merit

Petitioners contend that the Commission must “notice and conduct a proper regulatory flexibility analysis based on the Order that was adopted.”¹¹ They argue that the Final RFA (“FRFA”) analysis was based on the proposal in the *Notice of Proposed Rulemaking* where the Commission had suggested that any statutory interpretations would only be effective at an incumbent’s renewal. Petitioners argue that making the statutory interpretations effective immediately instead of upon renewal, and failing to recognize that in the FRFA, will “unduly disrupt existing contracts” and will impose “significant analysis, negotiation, and/or litigation costs upon LFAs,”¹² that were not taken into account in the RFA analysis. These claims are without merit.

First, the *Second Order’s* statutory interpretations should have little, if any, effect on LFAs. As the Commission said in the Final Regulatory Flexibility Act analysis, “[t]his *Order* simply extends existing requirements to apply to incumbent providers. LFAs should be familiar with existing requirements, and therefore should not need additional training or personnel to implement the *Order’s* requirements.”¹³ Moreover, that statement is true as a matter of law regardless of whether the Commission erred in suggesting in the FRFA analysis that the interpretations applied at the time of renewal as opposed to immediately.

Second, any burdens LFAs argue they must bear arising from the *Second Order* will be the result of their conscious choice to challenge the preemptive effect of that order’s statutory

¹¹ Breckenridge Hills Petition at iii.

¹² *Id.* at ii. See also NATOA Petition at 6-10.

¹³ *Second Order*, FRFA at ¶ 4.

interpretations. By concluding, as it must, that its statutory interpretations apply “immediately,” the Commission made clear that inconsistent existing franchise terms are preempted.¹⁴ Only if Petitioners and other local franchising authorities were to challenge such a conclusion might there be “new and significant burdens” on them. The “four avenues” that the *Second Order* lays out for challenge to an incumbent’s assertion that inconsistent franchise provisions are preempted – and which the Petitioners rely on in claiming they will be burdened by the Commission’s conclusions – only come into play if an LFA does not agree with an incumbent’s assertion that “the terms of its franchise should be amended as a result of [the *Second Order*].”¹⁵ As the Commission said: [W]e encourage LFAs and incumbents to work cooperatively to address those issues.”¹⁶

Accordingly, any burdens on LFAs do not arise from the statutory interpretations of the *Second Order*, but rather from any challenges an LFA makes to the validity and preemptive

¹⁴ The Albuquerque Petition proceeds from this premise. See Albuquerque Petition at 12 (“The Commission is taking the position that it can *selectively preempt* certain contract terms in favor of the cable operator, then force the LFA to live with a deal that is less than it could have (and would have) required in the original negotiation”) (emphasis added). The NATOA Petition (at 4) concedes that the *Second Order* “expos[es] existing franchise obligations, such as PEG and I-Net, to *possible preemption* or modification” (emphasis added).

¹⁵ *Second Order* at ¶19. As the Commission notes, litigation is, of course, always an option if LFAs do not agree that clauses in existing franchise agreements which are inconsistent with the Commission’s statutory interpretations are preempted by the Commission’s decision. Resort to “pre-renewal modifications, including [MFNs],” compliance of law provisions, and franchise modifications under Section 625 were also mentioned, but, again, would only appear to be required if the LFA refuses to acknowledge that inconsistent franchise provisions are preempted.

¹⁶ *Id.* Although the *Second Order* suggested that there may be some settlements that take precedence over the preemptive effect of the interpretations announced in the *Order*, a settlement inconsistent with the terms of the statute would be invalid under the general principle that private parties may not waive statutory provisions intended to benefit the public. See e.g., *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 704 (1945). The whole point of the 1984 Cable Act was to define and limit what may and may not be insisted upon or agreed to in franchise agreements. Courts have made clear (1) that the restrictions in Title VI *may not be waived* by cable operators, and (2) that contracts that are inconsistent with the Act’s provisions are *preempted*. See e.g., *Cable TV Fund 14-1, Ltd., v. City of Naperville*, No. 96 C 5962, 1997 WL 433628 (N.D. Ill., July 20, 1997). See also *Nashoba Communications Ltd. Partnership v. Town of Danvers*, 703 F. Supp. 161, *rev’d on other grounds*, 893 F.2d 435 (1st Cir. 1990). Therefore, existing agreements arising from settlements or otherwise do not stand in the way of applying the Commission’s conclusions on franchise fees (or other issues) to existing operators immediately. In any event, this is only a narrow class of cases where an operator and an LFA have reached a settlement of a dispute over franchise compliance so they should not impose the types of burdens alleged by petitioners.

effect of those interpretations.¹⁷ In that case, it is the LFA which has opted to incur the costs and burdens of negotiation and litigation, not the Commission which has imposed such costs on the LFA. In any event, any burden on LFAs would likely be “de minimis” as the FRFA concluded.¹⁸

The Second Order Clearly Applies to State Franchises

Petitioners ask the Commission to “clarify” whether the *Second Order* applies to incumbents in states with state-level video franchise laws, claiming the Order was ambiguous in its application to state franchises.¹⁹ But there is no such ambiguity that requires “clarification.”

The *Second Order* clearly stated that its statutory interpretations, in addition to being effective immediately, are “valid through the nation.”²⁰ While Petitioners try to make much of the fact that certain “findings” in the *First Order* were not applied to states with state-wide franchise laws, those findings related to certain alleged barriers to entry that the Commission claimed the authority to redress under Section 621(a). As the Commission itself noted, however, its statutory interpretations in the *Second Order* “do not depend on Section 621(a).”²¹ And because the Commission’s decisions were based on statutory interpretations, its conclusions regarding a related issue are also applicable here: “The statutory interpretations set forth above represent the Commission’s view as to the meaning of various statutory provisions, such as Section 622, and these interpretations are valid immediately. *We do not see, for example, how Section 622 could mean different things in different sections of the country depending on when*

¹⁷ Nothing in the *Second Order* would “force[] [LFAs] to engage immediately in costly and time-consuming analysis, negotiation, and/or litigation over contracts that were settled, working agreements until the Commission intervened.” Breckenridge Hills Petition at 8.

¹⁸ *Second Order*, FRFA at ¶12.

¹⁹ NATOA Petition at 10-11; Albuquerque Petition at 3-5.

²⁰ *Second Order* at note 60.

²¹ *Id.*

various incumbents' franchise agreements come up for renewal."²² By the same token, the Commission's interpretation of a statutory provision cannot mean one thing in the context of a municipal franchise agreement and another in the context of a state-issued franchise agreement.²³

Finally, the Commission's conclusion applying its statutory interpretations immediately and throughout the nation is consistent with the purposes of Title VI, as established by Congress in Section 601 of the Act. In particular, Congress intended through Title VI to "establish a *national* policy concerning cable communications," with "franchise procedures and standards which encourage the growth and development of cable systems."²⁴

The Commission's MFN Conclusions Do Not Warrant Reconsideration

Petitioners argue that the Commission's conclusion that MFN clauses are not affected by the conclusions of the *First Order* should be reversed.²⁵ They offer no sound reason for that result. Rather they argue that, because the *First Order* preempted local level playing field laws, MFN clauses should have been similarly preempted in the *Second Order*.²⁶ There is no merit to this argument.²⁷

While level playing field and MFN clauses are both means for establishing parity between cable operators serving a community, they achieve parity from different perspectives.

²² *Id.* at ¶19 (emphasis added).

²³ Albuquerque (at 5) argues that the *Second Order* "fails to point to any evidence in the record about state laws. Nor does it contain any analysis of the state laws." But no such "evidence" or "analysis" was required. Unlike the case with the *First Order*'s findings on shot clock, build-out and the like which purported to support FCC action under Section 621(a), the conclusions in the *Second Order* interpreting statutory provisions such as Section 622 were pure matters of law.

²⁴ 47 U.S.C. §§ 521(1), (2) (emphasis added).

²⁵ Albuquerque Petition at 14-15; NATOA Petition at 4-6.

²⁶ Albuquerque Petition at 14. NATOA Petition at 4. Albuquerque also claims that MFNs are "also called level playing field clauses" seeking to equate the two. *Id.* But the two types of provisions are quite different.

²⁷ As an initial matter, cable operators need not rely on MFNs to obtain the benefits of the *Second Order*'s conclusions on the franchise fee, PEG/I-Net and mixed-use facilities issues since, as the Commission concluded, those statutory interpretations apply immediately to all operators as a matter of law and inconsistent franchise provisions are subordinate to those interpretations.

The first applies the incumbent’s regulatory framework to the new entrant; the second gives the incumbent the benefit of a lighter regulatory scheme conferred on the new entrant. The Commission preempted level playing field clauses, based on its authority under Section 621(a), because it found that they impose barriers to entry for new entrants into the video market. MFN clauses, by contrast, generally apply to incumbents rather than new entrants, and they reduce regulation.

Finally, MFN clauses serve important pro-competitive and public policy purposes by allowing cable competition to unfold based on the price and quality of an operator’s products and services, not which operator has the lesser regulatory burdens in its franchise. As a tool to foster fair competition, MFN clauses are especially important because cable companies face aggressive competition from telephone companies. Telephone companies’ resources vastly exceed those of cable companies, and the telcos are aggressively seeking lower regulatory burdens in their franchises than the traditional commitments made by cable operators to service availability, PEG and other cable-related needs.

Therefore, the *Second Order*’s conclusion that existing cable operators can – and should – obtain the benefit of MFN provisions if new entrants are able to obtain franchise conditions more favorable than those of the existing operator²⁸ is consistent with the Commission’s purpose in reducing unnecessary regulatory burdens and serves pro-competitive and public policy purposes as well. It should not be reconsidered.²⁹ Whatever action the Commission took in the

²⁸ The *Second Order* noted that, “[t]o the extent that the First Report and Order allows competitive providers to enter markets with franchise provisions more favorable than those of the incumbent provider, we expect that MFN clauses, pursuant to the operation of their own design, will provide some franchisees the option and ability to change provisions of their existing agreements.” *Second Order* at ¶20.

²⁹ 47 U.S.C. §§ 521(1), (2) (emphasis added).

First Order – where it purported to act under Section 621(a)’s provisions applicable to new entrants – has no impact on MFNs, as the *Second Order* correctly concluded.

CONCLUSION

For the reasons stated above, The Commission should deny each of the Petitions for Reconsideration.³⁰

Respectfully submitted,

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³⁰ Albuquerque’s claims that the *Second Order*’s statutory interpretations regarding franchise fees, PEG and I-Nets (at 5-8) as well as its claims regarding the Commission’s authority over mixed-use networks (8-10) are equally without merit. First, most, if not all, of those arguments were raised in this proceeding already and have been correctly rejected by the Commission. Second, as the Petition notes (at 5), many of the claims have been raised in the appeal of the *First Order*. To the extent the Court finds merit in the LFA’s arguments on these points, they will be addressed on remand of the *First Order*. At that time, the Commission may assess the effect on the *Second Order*’s conclusions of any Commission decision on remand of the *First Order*.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2008, I served two copies of the foregoing Opposition to Petitions for Reconsideration via first-class postage pre-paid on the following parties:

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