

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 by the Cable Television Consumer
Protection and Competition Act of 1992

MB Docket No. 05-311

REPLY TO NCTA'S OPPOSITION TO PETITION FOR RECONSIDERATION

THE CITY OF BRECKENRIDGE HILLS, MISSOURI

Joseph Van Eaton
Frederick E. Ellrod III
Matthew K. Schettenhelm
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue, N.W. #1000
Washington, D.C. 20036-4306
202-785-0600

Howard Paperner, Esquire
Manchester Professional Building
9322 Manchester Road
St. Louis, Missouri 63119
314-961-0097

Counsel for the City of Breckenridge Hills, Missouri

February 26, 2008

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Pursuant to 47 C.F.R. § 1.429(g), the City of Breckenridge Hills, Missouri (the "City"),¹ by its counsel, hereby submits this Reply to the opposition of the National Cable & Telecommunication Association ("NCTA").² NCTA misreads the *Second Report and Order* and fails to show that the FCC has fulfilled its obligations under the Regulatory Flexibility Act. The City maintains that the FCC must provide notice and conduct a proper regulatory flexibility analysis, and reconsider the *Second Report and Order* accordingly.

I. NCTA FAILS TO EXPLAIN WHY THE FCC'S DECISION TO UNDULY DISRUPT EXISTING CONTRACTS SHOULD NOT BE ANALYZED UNDER THE REGULATORY FLEXIBILITY ACT.

NCTA argues that the FCC should not reconsider the *Second Report and Order* based on defects in the Commission's Final Regulatory Flexibility Act analysis because, in its view, the *Second Order* "should have little, if any, effect on LFAs" and any burdens arising from the order

¹ The City of Breckenridge Hills is a Missouri, third class statutory city, with a population of 4,817, and 20 full time employees.

² Neither Verizon's opposition nor the State of Hawaii's comments addressed the Commission's Regulatory Flexibility Analysis.

are “the result of [LFAs’] conscious choice” to challenge the order. NCTA Comments at 4. Both of these claims are incorrect.

The *Second Report and Order* places obvious and direct burdens on small government jurisdictions that have existing contracts with cable operators. The Commission stated that it was not making the *First Report and Order* effective immediately, precisely so that it would not “unduly disrupt existing contracts.” FRFA at ¶ 15. Contrary to NCTA’s suggestion at n.12, this statement did not originate with the Petitioners, but with the Commission itself. Even assuming that the Commission could authorize cable operators to bring challenges that could impair long-standing contracts,³ the Regulatory Flexibility Act requires the Commission to show that it has tailored that disruption so as to mitigate its effects on small government jurisdictions. The Commission failed to do this in the *Second Report and Order*.

NCTA suggests that any burdens imposed by the *Second Report and Order* are due to the “conscious choice” of LFAs and hence the Commission is absolved of responsibility for those burdens. NCTA Comments at 4. This is because, according to NCTA, the only thing to be done by an LFA whose contract has been impacted by the *Second Report and Order* is to accept “an incumbent’s assertion” about how the existing contract should change. NCTA Comments at 5. Neither law nor common sense, however, requires a local community to accept without question an unsupported claim of preemption by an interested party, nor to give up the important benefits of a franchise agreement without examining the cable operator’s claim closely. No reasonable party would rubber-stamp a reduction in its contractual rights at the request of an opposing party without careful study to determine whether and to what degree the cable operator was correct about the claimed preemption.

³ The City does not concede that the Commission has statutory authority to take the actions involved in the *Second Report and Order* with respect to existing contracts.

This need for careful review represents a potentially significant expense for small governments. Moreover, NCTA appears to assume that preemption will selectively invalidate the portions of an agreement that an operator finds objectionable, while preserving the remainder. But if the consideration central to a contract is impaired, the contract may be wholly invalid, leaving the operator with no authority to provide service, and the community with no choice but to begin a franchising process anew.⁴ Considering that in small communities the operator may generally be presumed to have had significant bargaining power as well as far more experience, it would be entirely reasonable for the Commission to presume that, to the extent particular provisions may be objectionable, they were either voluntary, or justified by settlements of past claims. Certainly there is no good reason to place small governments in the position of having to revisit and potentially defend contracts long since agreed to by the parties.⁵

The *Second Report and Order* directly assigns this potentially onerous and expensive task to the local government: the LFA must assess the “facts and circumstances of each situation . . . on a case-by-case basis to determine whether [the FCC’s] statutory interpretation should alter the incumbent’s existing franchise agreement.” *Second Report and Order*, ¶ 19. Moreover, having completed this assessment, the local government is expected to “work cooperatively to address” the effects of the Commission’s disruption with the cable operator. The Commission even recognizes that this “case-by-case” assessment and re-negotiation process could lead to litigation. *Id.* at ¶ 19.

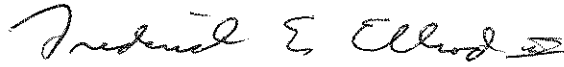
⁴ See, e.g., *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1091-92 (3d Cir. 1988).

⁵ Indeed, while the case is particularly strong for small governments, it is hard to imagine why even larger governments should be forced to bear this expense.

These are serious and substantial burdens that many small government jurisdictions lack the resources to address. Contrary to NCTA's claim at 4, it is evident that many small government jurisdictions will need "additional training or personnel" to deal with these burdens.⁶

As shown in the City's Petition, the Commission must reconsider its *Second Report and Order* in light of the dictates of the Regulatory Flexibility Act.

Respectfully submitted,



Joseph Van Eaton
Frederick E. Ellrod III
Matthew K. Schettenhelm
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue, N.W. #1000
Washington, D.C. 20036-4306
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Howard Paperner, Esquire
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St. Louis, Missouri 63119
314-961-0097

Counsel for the City of Breckenridge Hills, Missouri

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⁶ Had the Commission elected not to apply its findings to small government jurisdictions, these burdens could have been avoided.

CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)

The below-signed signatory has read the foregoing Reply to NCTA's Opposition to the Petition for Reconsideration, and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for any improper purpose.

Respectfully submitted,

February 26, 2008

Date

Frederick E. Ellrod III

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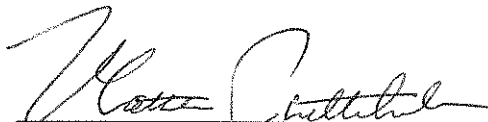
CERTIFICATE OF SERVICE

I hereby certify that I have caused to be mailed this 26th day of February, 2008, copies of the foregoing Reply to NCTA's Opposition to the Petition for Reconsideration, by first-class mail, postage prepaid, to the following persons:

Daniel L. Brenner
Neal M. Goldberg
National Cable & Telecommunications
Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431

Edward Shakin
William H. Johnson
Michael E. Glover
1515 North Courthouse Road
Suite 500
Arlington, VA 22201

Bruce A. Olcott
Herbert E. Marks
Joshua T. Guyan
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004



Matthew K. Schettenhelm

Washington, D.C.
February 26, 2008