

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

ALLIANCE FOR COMMUNITY MEDIA, *et al.*,
Petitioners,

STATE OF HAWAII, *et al.*,
Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

AD HOC TELECOM MANUFACTURER COALITION, *et al.*,
Intervenors.

On Petitions for Review of an Order of the
Federal Communications Commission

**REPLY BRIEF OF PETITIONER-INTERVENOR NATIONAL CABLE &
TELECOMMUNICATIONS ASSOCIATION, INC.**

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SUMMARY OF ARGUMENT

None of the bases upon which the Federal Communications Commission (“FCC” or “Commission”) asserts jurisdiction to set limits on Title VI’s local franchising process support the role the FCC seeks to play. The FCC attempts to find authority for the *Section 621 Order*^{1/} in Section 201(b) of the Act, which speaks only to FCC authority over common carriers under Title II, or in Section 303(r) of the Act, which appears in Title III, dealing with radio communications, but neither of those provisions allows the FCC to override Congress’s decision to grant jurisdiction over franchising disputes to the courts. Contrary to the FCC’s assertions, the Supreme Court has never held otherwise.

The FCC’s assertion that it may proceed incrementally to apply its statutory interpretations to some, but not all, cable operators and only to local, but not state, franchising authorities is similarly misguided. It is well established that an agency must provide a reasoned explanation for any decision to proceed incrementally; may not proceed incrementally when the result is to create a long-lasting unlevel playing field; and may not justify proceeding “incrementally” when establishing new interpretations of law that could easily be extended to all affected parties.

^{1/} *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking, 22 F.C.C.R. 5101 (2007) (Apx. pg. ____).*

Finally, the FCC's efforts to justify its decision to rely on selected evidence from the record without explaining why contrary evidence was rejected are unavailing. The FCC's decision to place material in the record without opportunity for public comment, to rely on facts asserted by interested parties even when those facts were contradicted by credible record evidence, and to exclude material from the record when it did not support the desired result is arbitrary and capricious and contrary to reasoned decisionmaking. No efforts to clean up the record post-decision can alter that result.

ARGUMENT

I. CONGRESS ASSIGNED TO COURTS – AND NOT TO THE FCC – THE AUTHORITY AND RESPONSIBILITY TO IMPLEMENT SECTION 621(a)(1)

The FCC's reply does nothing to diminish the National Cable & Telecommunications Association's ("NCTA's") initial argument: any general authority given the FCC to implement provisions of the Communications Act is superseded by the specific language of Section 621(a)(1) of the Act, 47 U.S.C. § 541(a)(1), which expressly gives *courts* the responsibility of determining whether a franchising authority has violated that section's prohibition against unreasonable refusals to grant additional competitive franchises. The FCC argues that "Congress has given the FCC broad rulemaking authority to implement *all* of the provisions of the Communications Act, including Section 621(a)(1)," FCC Br. 16

(emphasis added), but it fails to support such a sweeping proposition. Congress has limited the Commission’s authority throughout Title VI of the Act; its delegation of authority to courts in Section 621(a)(1) would be superfluous if it were not meant to preclude FCC jurisdiction in this instance.

First, the courts have never found that the FCC has authority to implement Section 621(a)(1). The FCC cites *City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999), *cert. denied*, 531 U.S. 825 (2000) and *National Cable Television Ass’n v. FCC*, 33 F.3d 66, 70-75 (D.C. Cir. 1994), and contends that following these cases, “Petitioners should be well aware that the Commission has the authority to interpret section 621.” FCC Br. 21. But the Commission should itself be well aware that neither of those cases dealt with Section 621(a)(1) – the *only* portion of Section 621 that expressly gives *courts* the responsibility to determine whether its terms have been violated. Rather, both those cases involved FCC interpretations of whether under Section 621(b), which provides in relevant part that “a cable operator may not provide cable service without a franchise,” certain entities were “cable operators.”^{2/} Unlike Section 621(a)(1), nothing in Section 621(b) expressly provides for judicial implementation of its terms and its prohibition. The question

^{2/} In *City of Chicago*, the FCC had held that the operator of a “satellite master antenna television system” was not a “cable operator.” 199 F.3d at 432-33. In *National Cable Television Ass’n*, the FCC had determined that neither a telephone company providing “video dialtone” service nor a video programmer providing its

whether, in those unique sections of Title VI where Congress *did* expressly provide for judicial implementation and did not specifically mention or give any role to the FCC, the FCC nevertheless retains regulatory authority was not at issue in *City of Chicago* or *National Cable Television Ass'n*.

Second, the FCC fails to rebut NCTA's showing that Sections 201(b) and 303(r) of the Act were not meant to give the FCC authority to implement all provisions of the Act. NCTA Br. 23-26. As an initial matter, broad grants of authority to the FCC are contained in the "General Provisions" of Title I of the Act, not in the service-specific Titles such as Title II (common carrier) or Title III (radio communications).^{3/} Moreover, if Section 201(b) and Section 303(r) each constituted a grant of *general* regulatory jurisdiction over all matters covered by the Act and not merely the matters covered in their respective titles, they would be redundant. As this Court has recognized, "Under accepted canons of statutory interpretation, [the court] must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."

programming to subscribers via such service was a "cable operator" providing "cable service." 33 F.3d at 72, 74.

^{3/} See, e.g., Note, *AT&T Corp. v. Iowa Utilities Board: The Supreme Court Recognizes Broad FCC Jurisdiction over Local Telephone Competition*, 78 N.C.L. REV. 1645, 1682 (2000) ("From a structural standpoint, the end of [Section] 201 admittedly would be an odd place to locate a general grant of jurisdiction over whatever the Communications Act might come to include").

Lake Cumberland Trust, Inc. v. EPA, 954 F.2d 1218, 1222 (6th Cir. 1992). The only reasonable reading of these provisions is that each was meant to convey a grant of authority only for the respective title of the Act in which they appear.

The FCC's assertion that courts have found such a grant of authority in Sections 201(b) and 303(r) is unfounded. The courts have never addressed whether the FCC's Title II or Title III authority extends to the provisions of Title VI at issue. The FCC cites *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), FCC Br. 28; *see also* USTELECOM *et al.* Br. 20-21, but that case has nothing to do with Title VI. While the Court in *AT&T* did acknowledge that Section 201(b) of the Act gives the Commission authority to carry out "the provisions of this Act," nothing in that opinion holds that the scope of Section 201(b) extends beyond the bounds of Title II, the only title of the Communications Act at issue there.^{4/}

If anything, *AT&T* supports a more limited view of the Commission's rulemaking authority by holding that the Commission cannot regulate in an area over which it has not explicitly been given authority to do so. *AT&T*, 525 U.S. at 381 n.7; *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75

^{4/} Indeed, the rulemaking authority in Section 201(b) was initially enacted as part of a bill adding a very specific provision of Title II relating to the furnishing by common carriers of information about ships at sea, necessitated by a Commission ruling that it lacked authority regarding this matter. 83 CONG. REC. 6291-92 (1938).

(1986) (“To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.”); *Public Citizen v. FTC*, 869 F.2d 1541, 1557 (D.C. Cir. 1989) (“absent an express grant of authority to change the terms of the statute, we will not imply agency authority to alter the statutory mandate”). Under *AT&T*, where, as here, Congress has specified judicial review of a dispute, the FCC is displaced and therefore without authority to prescribe rules.

The case law offered by the FCC as support for its argument that the grant of authority in 303(r) extends to rulemaking under Section 621(a)(1) is similarly misguided. While the FCC cites the Supreme Court’s decision in *City of New York v. FCC*, 486 U.S. 57 (1988), as authority for the proposition that the rulemaking authority conferred by Section 303(r) “extends to Title VI of the Act,” FCC Brief at 23, the Court held no such thing. To the contrary, the Court specifically declined to decide that very question. 486 U.S. at 70 n.6.

Third, even if Section 201(b) or Section 303(r) could somehow be construed to give the Commission plenary rulemaking authority over the provisions of Title VI, any such authority would be negated where particular provisions indicate a

contrary intention.^{5/} The FCC’s analysis of its rulemaking jurisdiction under Section 201(b) and 303(r) begins and ends with a sweeping overgeneralization. Thus, its brief fails to address, much less rebut, the arguments set forth in NCTA’s initial brief as to why the particular express reference to judicial review in Section 621 (and in Sections 625 and 626) was specifically meant to preclude any concurrent authority of the Commission to implement those provisions.

The *AT&T* case, on which the FCC seeks to rely, does not add to the FCC’s authority when Congress otherwise has curtailed it. In *AT&T*, the Court concluded that Congress, in the Telecommunications Act of 1996, had essentially made local telecommunications competition a matter of federal policy under Title II. *AT&T*, 525 U.S. at 378. This, the Court held, gave the FCC primacy over state governments, via Section 201(b), in implementing *all* the provisions of Sections 251 and 252, notwithstanding the provisions of Section 2(b) of the Act, which had previously precluded the FCC from exercising jurisdiction over intrastate communications. *Id.* at 379-81. Thus, the FCC could adopt rules governing

^{5/} The language of Section 303(r) itself notes that its grant of rulemaking authority to the FCC is valid only “except as otherwise provided in this Act” and to the extent “not inconsistent with law.” 47 U.S.C. § 303(r). Section 201(b)’s grant of authority is similarly limited: in *AT&T*, after holding that Section 201(b) gave the broad rulemaking authority to implement Sections 251 and 252 of the Act, the Court nevertheless considered whether “certain individual provisions in the 1996 Act negate particular aspects of the Commission’s implementing authority.” 525 U.S. at 383.

resolution by state commissions of interconnection disputes, even though the state commission decisions were subject to judicial review. *See* FCC Br. 28.

In contrast, Congress in Title VI did *not* give the FCC overriding authority over all cable regulatory matters. Rather, one of the core purposes of Title VI was specifically to *allocate* regulatory responsibilities for cable, in response to the tension that had grown between local authorities and the FCC, which had increasingly sought to assert a greater role in the franchising process. NCTA Br. 5-8. Congress sought to “clarify the authority of Federal, state *and* local government to regulate cable through the franchise process,” H.R. REP. NO. 98-934, at 23 (1984) (“House Report”). It meant to ensure that the FCC did not seek to insert itself any further into the local franchising process than the role Congress had crafted for the FCC, by preserving the role of local government in franchising and “firmly establish the authority *at each level of government.*” *Id.* at 24 (emphasis added).

There is a common thread linking Section 621(a)(1) and the two other provisions of Title VI for which Congress has provided for judicial implementation pursuant to Section 635: all three of those provisions impose standards of “reasonableness” on the give and take of the cable franchising process. Congress intended that “the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable

operators to tailor the cable system to meet those needs.” House Report at 24. Congress envisioned the process – whether for obtaining an initial franchise (Section 621), modifications of franchise terms (Section 625), or franchise renewals (Section 626) – as primarily, a *negotiation*. The FCC cannot negate this intent.

The reasonableness of the demands of franchising authorities and franchise applicants in franchise negotiations depends on the circumstances of those negotiations and on the “local communications needs,” and was not meant to be subject to across-the-board rules and standards. Even the question of whether a refusal to act within a certain period of time is tantamount to a denial of a franchise and is unreasonable depends on the context and on the behavior of *both* parties. Perhaps the franchising authority has placed unreasonable financial or construction demands on the applicant – or perhaps the applicant has been unreasonable in complying with necessary documentation. These are matters to be determined on a case-by-case basis, where the trier of fact can get to the bottom of why a franchise grant has been delayed or refused.

Thus, unlike the *AT&T* case, in which the Supreme Court could divine no logical reason why Congress might have conferred FCC jurisdiction only over certain “curious and isolated matters” while “denying Commission jurisdiction over much more significant matters,” 525 U.S. at 381, in this case there are easily

discernible reasons why Congress gave courts and not the FCC jurisdiction over the three provisions identified in Section 635. The *AT&T* reasoning cannot apply to these provisions.

The FCC's concession that it "will not hear appeals involving LFAs' denials of competitive franchises," FCC Br. 29, but will only adopt general rules "interpreting and implementing section 621(a)(1)," *id.* at 28, does not cure its jurisdictional problem. Congress did not contemplate that the reasonableness of demands and decisions by franchising authorities and franchise applicants in the franchising process be determined by FCC rules of general applicability. Where Congress chose to enact or authorize such prospective rules and standards, it did so specifically in other sections of Title VI. The FCC cannot undo that determination here.

II. THE COMMISSION MAY NOT PROCEED INCREMENTALLY WHEN THE RESULT IS A DISPARATE IMPACT ON COMPETITION

The FCC asserts that its decision to apply its statutory interpretation to some, but not all, cable operators and only to local, but not state franchising authorities is reasonable because it has "broad discretion to proceed incrementally" in addressing a problem it identifies. FCC Br. 84-86. This assertion of authority is baseless. This Court already has rejected the wide-sweeping authority the FCC invokes. Under well-established standards, an agency must provide a reasoned

explanation for any decision to proceed incrementally; may not proceed incrementally when the result is to create a long-lasting unlevel playing field; and may not justify proceeding “incrementally” when establishing new interpretations of law that could easily be extended to all affected parties. The FCC’s action fails to meet these standards.

First, the FCC failed to provide a reasoned explanation for its decision to exclude cable operators from the benefit of its statutory interpretation. In *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995) – the very case cited by the FCC – the Court did observe that agencies “ordinarily may proceed one step at a time.” FCC Br. 84, n.67 (quoting *Cincinnati Bell Tel.*, 69 F.3d at 767). However, it went on to say that despite this general rule, the FCC may not act so as to impose “disparate treatment” on similarly situated providers in a manner that “impacts on their ability to compete” without “giv[ing] a reasoned explanation for its disparate treatment.” *Cincinnati Bell Tel.*, 69 F.3d at 767-68.

The Court held that “simply stat[ing] that the record . . . was insufficient to determine” whether competitors should be treated equally was “arbitrary and capricious.” *Id.* at 768. Rather, if those competitors’ services (which in that case, were similar, but not identical) “are sufficiently similar to [be] expected to compete for customers on price, quality, and services,” then the FCC is required to articulate “what difference between the two services justifies keeping the

[regulation at issue] intact” for only one set of competitors but not the other, other than a “raw assertion that the two industries are different.” *Id.* at 768.

The FCC’s decision here cannot meet the standards established by this Court. As in *Cincinnati Bell Tel.*, the FCC seeks to justify its disparate treatment of competing providers by “simply stating” the record is insufficient to justify applying its statutory interpretation to all cable operators, whether existing or new, and all franchising authorities, whether administered at the local or state level. *See* FCC Br. 85 (“The record here simply did not allow the agency to make those kinds of judgments”); *id.* (“Because the NPRM in this proceeding focused on new entrants, the record generally did not address incumbents”). This Court already has concluded that such blithe assertions constitute arbitrary and capricious decisionmaking, a result underscored by the fact that the FCC’s argument – that the statute can mean one thing for one competitor yet hold another meaning for a different competitor – defies common sense and reasoned decisionmaking.

Second, the FCC’s assertion that any “complaint about disparate treatment is premature” because the Commission has tentatively concluded that certain of its statutory interpretations should apply to cable operators when they next negotiate renewals of their franchise agreements, FCC Br. 85, also ignores established law. This Court and others have recognized that when the FCC imposes disparate regulatory treatment on competitors, “time is of the essence on this issue,” because

such regulation presents one set of competitors from competing with the other on a “level playing field.” *Cincinnati Bell Tel. Co.*, 69 F.3d at 767-68; *see also GTE Serv. Corp. v. FCC*, 782 F.2d 263, 274 (D.C. Cir. 1986) (Commission cannot be said to abuse its discretion by adopting timetables it considers necessary to effective treatment of complex problems *unless* such timetables cause “some unreasonable delay or significant prejudice to the parties”); *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004) (citations omitted) (FCC discretion to control the disposition of its caseload and defer consideration of particular issues to future proceedings when it thinks that doing so would be conducive to the efficient dispatch of business and the ends of justice is permissible only “[s]o long as the FCC’s decision to postpone consideration of the transiting issue doesn’t result in unreasonable delay or impose substantial hardship”). Even if the FCC determines it will extend the regulatory protections it established to established cable operators when their existing franchises expire, those franchises generally last at least ten years and more frequently fifteen or more years. Asking established cable operators to compete on an unlevel playing field for the foreseeable future is not a permissible exercise of incremental decisionmaking.

Third, contrary to the FCC’s assertion, FCC Br. 84-86, the Supreme Court’s decision in *National Cable & Telecommunications Ass’n v. Brand X Internet*

Servs., 545 U.S. 967 (2005), does not permit the FCC’s action here. In *Brand X*, the Supreme Court held that the FCC could permissibly classify cable modem service provided by cable operators as an unregulated information service without simultaneously extending the same classification to a different service, DSL service, provided by different carriers, facilities-based telephone companies, because the FCC was not required to revisit its “longstanding” prior classification of DSL at the same time it ruled for the first time on the appropriate classification of a new service. *Id.* at 1002. The services at issue in *Brand X* were different enough that the FCC might take the time to consider how its new policy should apply. This is a very different situation from that presented here, in which the statute already explicitly covers all cable operators, and the FCC is drawing an artificial distinction not contemplated or supported by the statutory language.

Similarly, in *National Ass’n of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984), also cited by the FCC, the court held that “in regulating a new technology such as [direct broadcast satellite service] in light of extant economic and technical forces, the Commission need not reopen at the same time all previous proceedings also arguably affected by those forces.” *Id.* at 1208. That reasoning cannot apply here. In the proceeding below, the FCC was not asked to revisit and reverse any prior determinations as it was in *Brand X* and *NAB*, but rather to extend fresh interpretations of statutory provisions which by their explicit terms

govern the entire cable industry (Sections 611, 621(a)(4) and 622 of the Act) to all cable operators providing cable service. Its failure to do so without a reasoned explanation unjustifiably hinders established cable operators' ability to compete for the foreseeable future. Such inaction cannot be justified in the name of "incremental" rulemaking or by mischaracterizing it as an application of Section 621(a)(1).

III. THE FCC'S RELIANCE ON SELECT, SOLICITED MATERIALS AS SUPPORT FOR ITS CONCLUSIONS IS ARBITRARY AND CAPRICIOUS

A. Tailoring the Record to Support Desired Conclusions Is Arbitrary and Capricious Rulemaking.

The FCC attempts to dismiss NCTA's demonstration of the FCC's deliberate attempts to skew the record – by rejecting material from the City of Tampa that did not support its conclusions, soliciting material from Verizon that did support its conclusions, and relying heavily on a Phoenix Center report that was later changed – by claiming that the Commission did not benefit from these actions and that any change to the report was a "normal incident of the peer review process." FCC Br. 37, n.29. These claims are disingenuous.

First, the record is clear with respect to the City of Tampa-Verizon dispute that the FCC solicited input from Verizon at the same time it rejected input from Tampa as untimely. *Compare* Letter from David L. Smith, City Attorney, City of Tampa, to Kevin Martin, Chairman, FCC (Jan. 5, 2007) (on file in MB Docket No.

05-311, *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*) (with FCC notation “This submission has a status of ‘Sunshine’ - Not for staff inspection. Submission was received during the Sunshine Agenda period, and is associated with, but not made part of the record.”) (Apx. pg. ___) *with* Letter from Dee May, Vice President Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC (Jan. 26, 2007) (on file in MB Docket No. 05-311, *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*) (stating that “Verizon submits this letter in response to a request from Chairman Martin’s office”) (Apx. pg. ___). The FCC does not dispute this, but argues only that it should not be held accountable for this action because it did not rely on the Verizon information and in any event recently made the Tampa letter part of the record.

On their face, neither of these arguments makes sense: why would the FCC solicit material from a party that it did not intend to use and how does such an action comport with reasoned decisionmaking? How does including the Tampa letter in the record months after the proceeding has closed remedy the problem that the FCC deliberately attempted to suppress evidence that would weaken its conclusions? Moreover, these arguments fail to address the real problem,

identified by NCTA in its opening brief, *see* NCTA Br. 45-49, that when the record is not complete and timely, the public has no opportunity to submit comments and to review and respond to the comments of others. *Dismas Charities, Inc. v. DOJ*, 401 F.3d 666, 678 (6th Cir. 2005).

Second, the FCC's argument that commenting on the Phoenix Center report was a "normal incident of the peer review process," FCC Br. 37, n.29, is defied by the Phoenix Center's own cover letter to the FCC stating that "To our knowledge, this is the first time the Commission has bestowed this distinction on research provided by a non-governmental organization." Letter from Thomas M. Koutsky, Resident Scholar, Phoenix Center for Advanced Legal & Economic Public Policy Studies, to Monica Desai, Media Bureau, FCC (Mar. 1, 2007) (on file in MB Docket No. 05-311, *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*) (Apx. pg.____). That the FCC took the unusual step of asking for changes to a private report on which it relied to buttress its conclusions, yet made no mention of that step in the *Section 621 Order* nor offered the revised report for public comment, precludes the *Section 621 Order* from being the product of reasoned decisionmaking.

B. Relying on Selected Evidence from the Record Without Explanation of Why Contrary Evidence was Rejected Is Arbitrary and Capricious and Contrary to Reasoned Decisionmaking.

The FCC seeks to justify its efforts to unfairly advantage applicants for “an additional competitive franchise” by relying on a Government Accountability Office (“GAO”) report finding that established cable operators lowered prices in response to wireline competition (as opposed to competition from direct satellite service or the myriad other sources of video competition that exist). *See, e.g.*, FCC Br. 7-8 (citing U.S. General Accountability Office, *Subscriber Rates and Competition in the Cable Television Industry*, GAO-04-262T (Mar. 2004)); *id.* at 15 (discussing need to promote wireline competition to control cable rates) and statements from the lobbyists of interested parties. Such reliance is arbitrary and capricious in light of record evidence to the contrary that the FCC wholly ignores.

In particular, plaintiff NCTA submitted evidence in the proceeding below rebutting the GAO report. NCTA’s study – based on 433 communities instead of the six examined by GAO – demonstrated that any lower prices charged in markets with wireline competitors could “not be used as competitive benchmarks for prices in other markets.” *See Reply Comments of the National Cable & Telecommunications Association at 42-43 (Mar. 28, 2006) (on file in MB Docket No. 05-311, 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) (describing contrary study) (Apx. pg.____). In each of the communities studied by GAO, the lower prices were due to anomalous situations – *e.g.*, the competitors were charging artificially low rates and had to later raise rates or go out of business; competitors had purchased their facilities from failed competitors at pennies on the dollar – that could not be applied in support of an argument to grant regulatory advantages to new telco wireline competitors in the name of controlling cable rates. *Id.* Yet the FCC wholly failed to mention this evidence, let alone articulate a reasonable explanation for why it chose to disregard it in favor of the now-rebutted GAO study. It is well established that an agency decision that fails to address and rebut relevant comments does not meet the standard for reasoned decisionmaking. *W. Coal Traffic League v. Interstate Commerce Comm.*, 677 F.2d 915, 927 (D.C. Cir. 1982) (“[A]n agency decision may not be reasoned if the agency ignores vital comments regarding relevant factors, rather than providing an adequate rebuttal.”); *Lloyd Noland Hosp. and Clinic v. Heckler*, 762 F.2d 1561, 1567 (11th Cir. 1985) (“[A]n agency should rebut vital relevant comments.”); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977)(footnote omitted) (“[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”).

Moreover, the FCC fails to rebut NCTA’s demonstration, *see* NCTA Br. 41-42, that it had no basis in the record to conclude that the practices that it prohibited

were preventing new entrants from seeking and obtaining franchises. To the contrary, it asserts that it may base a decision on any facts that have “something in the way of documentary support,” FCC Br. 20, and that it should get “the benefit of the doubt” (*id.* at 33), *even* when there is contrary record evidence from the very person on which the FCC relies.

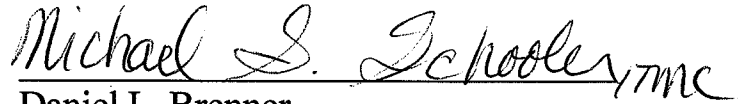
The FCC fails, for example, to provide any explanation of why it may permissibly rely on a statement from Verizon’s lobbyist that the franchising process was causing delays in competition, even as the record reflected unequivocal statement by Verizon’s CEO (Seidenberg), CFO (Toben), and President (Ruesterholz) that Verizon was not encountering any delays. *See, e.g.*, Letter from Daniel K. Alvarez, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC (Dec. 11, 2006) (on file in MB Docket No. 05-311, *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*) (Apx. pg.____) (citing Glen Dickson & John M. Higgins, *Verizon Details TV Progress*, *Broadcasting & Cable*, Sept. 27, 2006 (Verizon Telecom President Virginia Ruesterholz stating that franchising “isn’t holding us back in our deployment of video” because Verizon “has been able to match the pace of franchise agreements to the buildout of” its cable service); Olga Kharif, *Verizon’s Muddy TV Picture*, *BusinessWeek Online*, Sept. 28, 2005 (quoting Ivan Seidenberg as saying “We

haven't been turned down anywhere we've gone."); and Statement of Doreen Toben at UBS 34th Annual Global Media Conference, Thomson StreetEvents, Conference Call Transcript, at 7 (Dec. 6, 2006) ("[W]e have become very successful now in getting franchising. So we don't see that as an issue certainly going forward.")). This does not meet the standard for reasoned decisionmaking. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The agency must make findings that support its decision, and those findings must be supported by substantial evidence"); *Wyatt v. HHS*, 974 F.2d 680, 683 (6th Cir. 1992) (in determining if agency findings are supported by substantial evidence, must look at record as a whole and take into account "whatever in the record fairly detracts from its weight") (quoting *Allen v. Califano*, 613 F.2d 139, 145 (6th Cir. 1980) and *Beavers v. Secretary of Health, Educ. & Welfare*, 577 F.2d 383, 387 (6th Cir. 1978)); *Ruegsegger Trucking Serv., Inc. v. Interstate Commerce Comm'n*, 600 F.2d 591, 593 (6th Cir. 1979) (must examine "total facts" in the record to determine if agency action is permissible); *Telespectrum, Inc. v Public Serv. Comm'n of Kentucky*, 227 F.3d 414, 423 (6th Cir. 2000) (court must look at entire record, including evidence opposed to the result of the decision).

CONCLUSION

For the reasons described above and those in NCTA's principal brief, the FCC's *Section 621 Order* should be reversed.

Respectfully submitted,

A handwritten signature in cursive script that reads "Michael S. Schooler" followed by a horizontal line and the initials "msc".

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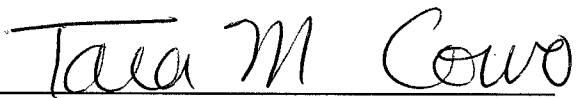
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October 4, 2007

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief complies with the type-volume limitation provided in FRAP 32(a)(7)(B). The foregoing Brief contains 5176 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this Brief was Microsoft Word for Windows XP.



Tara M. Corvo

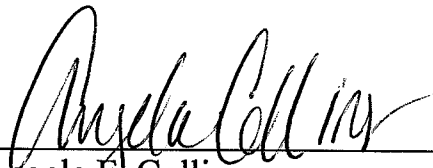
CERTIFICATE OF SERVICE

I, Angela F. Collins, hereby certify that the foregoing “Reply Brief of Petitioner-Intervenor National Cable & Telecommunications Association” was served this 4th day of October, 2007, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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Angela F. Collins

Dated: 10/4/07

DESIGNATION OF JOINT APPENDIX CONTENTS

Petitioner-Intervenor NCTA, per 6 Cir. R. 28(d) and 30(b), hereby designates the following additional portions of the record before the Federal Communications Commission for inclusion in the Joint Appendix:

<u>Description of Entry</u>	<u>Date</u>	<u>Record Entry No. (if any)</u> ^{6/}
Reply Comments of the National Cable & Telecommunications Association at 42-43 (Mar. 28, 2006) (on file in MB Docket No. 05-311, <i>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</i>)	3/28/2006	--
Letter from Daniel K. Alvez, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC (Dec. 11, 2006) (on file in MB Docket No. 05-311, <i>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</i>)	12/11/2006	--

^{6/} The certified list of record items provided to the Court by the FCC on May 11, 2007 did not contain record entry numbers.