

Case No. 07-3391 (consolidated with Nos. 07-3569, 07-3570  
07-3571, 07-3572, 07-3573, 07-3574, 07-3673, 07-3674, 07-3675,  
07-3676, 07-3677 and 07-3824)

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

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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.*

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

**BRIEF OF INTERVENOR CITY OF NEW YORK, NEW YORK, ON THE  
SIDE OF PETITIONERS (PROOF COPY)**

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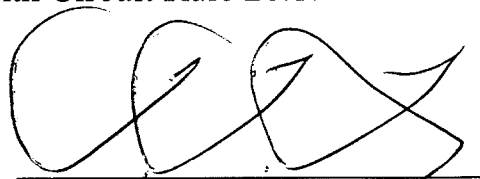
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July 18, 2007

**RULE 26.1 CORPORATE  
DISCLOSURE STATEMENT**

Intervenor the City of New York is not a nongovernmental corporate party and does not issue stock. The City is therefore not required to file a corporate disclosure statement under FRAP 26.1 and Sixth Circuit Rule 26.1.



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Tillman L. Lay

July 18, 2007

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## INTRODUCTION

Intervenor the City of New York, New York (the “City”), challenges the Federal Communications Commission’s Report and Order, *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*, 22 FCC Rcd 5101 (2007) (the “Order”). The City agrees with the arguments of petitioners Alliance for Community Media *et al.*, and the City of Tampa *et al.*, and therefore adopts by reference the arguments contained in the briefs filed by petitioners Alliance for Community Media *et al.* (“ACM Brief”) and petitioners City of Tampa *et al.* (“Tampa Brief”). The City’s brief addresses additional facts and arguments beyond those in the ACM and Tampa briefs.

## JURISDICTIONAL STATEMENT

Jurisdiction is proper under 47 U.S.C. § 402(a) and 28 U.S.C. § 2344. On March 21, 2007, the *Order* was published in the Federal Register, 72 Fed. Reg. 13189.<sup>1</sup> On April 3, 2007, petitioner Alliance for Community Media timely filed a

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<sup>1</sup> There is an error in the paragraph numbering of the *Order* as published in the Federal Register, commencing at ¶ 36, 72 Fed. Reg. 13196, which also includes the full text of ¶ 37 as it appears in the FCC’s version of the *Order*, FCC 06-180, and the FCC Rcd’s version of the *Order*. Accordingly, since the Federal Register version does not properly identify ¶ 37, the paragraph numbering commencing at ¶ 37 in the Federal Register understates the paragraph numbers in the *Order* by one digit from that point forward. All paragraphs cited herein refer to the FCC and/or the FCC Rcd versions of the *Order* and not the Federal Register version.

petition for review in this Court. On May 1, 2007, the City timely filed a petition to intervene in this case. On May 8, 2007, this Court granted the City's motion.

### **STATEMENT OF ISSUES PRESENTED**

The City adopts by reference the questions for review in the Tampa Brief and the statement of issues in the ACM Brief.

### **STATEMENT OF THE CASE**

The City adopts by reference the statement of the case contained in the Tampa Brief and the ACM Brief.

### **STATEMENT OF FACTS**

The City adopts by reference the statement of facts contained in the Tampa Brief and the ACM Brief. In addition, the City provides the following facts relating specifically to the City.

The City has been franchising cable operators since 1970. Today, the City has nine cable franchise agreements that together cover the entire City, and one open video system ("OVS") agreement.<sup>2</sup> The City's current cable franchise agreements are with Time Warner Cable of New York City and Cablevision Systems New York City Corporation. The City's OVS agreement is with RCN Telecom Services of New York, Inc. ("RCN"), with RCN operating as a competitive multichannel video service provider everywhere it provides service in

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<sup>2</sup> See 47 U.S.C. § 573 and 47 C.F.R. §§ 76.1500 *et seq.* for statutory and rule requirements relating to OVS operators.

the City. Verizon has been constructing fiber-optic facilities in certain parts of the City, which it has indicated will be compatible with (among other things) the provision of cable service when completed.

### **STANDARD OF REVIEW**

The City adopts by reference the standard of review contained in the Tampa Brief and the ACM Brief.

### **SUMMARY OF ARGUMENT**

For the many reasons set forth in the Tampa Brief and the ACM Brief, the *Order* under review is legally infirm on multiple grounds and must be overturned. We amplify here on just two of the *Order*'s infirmities.

Buildout Requirement. The *Order*'s buildout rulings are doubly flawed. As an initial matter, the Federal Communications Commission ("FCC" or "Commission") has no authority under the Communications Act to serve as a federal overseer of local franchising authority ("LFA") buildout requirements. The Act specifically assigns responsibility over buildout requirements to LFAs in the first instance and, where disputes arise, to the courts. The *Order*'s reliance on 47 U.S.C. § 541(a)(4)(A) as a basis for its actions is wholly misplaced, and the *Order* completely overlooks several other provisions of the Act and its legislative history making clear that buildout requirements are assigned to LFAs, not the FCC.

Moreover, the substance of the *Order*'s buildout rulings are arbitrary and capricious. The *Order*'s finding that it would generally be unreasonable for an LFA to impose more aggressive buildout requirements on a new entrant today than were imposed on the incumbent decades ago rests on little more than the FCC's say-so. The *Order* completely ignores the dramatically-changed revenue and cost conditions currently governing system buildout decisions, conditions that make buildout economically feasible in locations today where it would not have been decades ago. The *Order* likewise seems oblivious to the fact that incumbent local exchange carriers ("ILECs") entering the cable market today already have a substantial existing infrastructure and revenue base in place in the LFA areas they seek to enter, and are thus in a far more economically favorable position to enter the market than the incumbent cable operator was decades ago. Ultimately, the reasonableness of any particular franchise buildout requirement hinges on the unique facts in each LFA's jurisdiction. And that is precisely why Congress left buildout requirements to LFAs, with court review if disputes arise.

Franchise Fees. The *Order*'s rulings on cable franchise fees under Section 622, 47 U.S.C. § 542, were nowhere noticed in the underlying Notice of Proposed Rulemaking that led to the *Order*. The *Order*'s franchise fee rulings are therefore invalid under the Administrative Procedure Act.

Moreover, the *Order*'s statement in paragraph 98 that "a cable operator is not required to pay franchise fees on revenues from non-cable service" is either intolerably and misleadingly terse, or simply wrong as a matter of law. To the extent that the statement is intended to suggest that, unlike other providers of non-cable service that may be subject to non-cable local franchise requirements and franchise fees under applicable law, cable operators are somehow immune from paying *non-cable* franchise fees on their non-cable services, the statement is flatly incorrect. The Telecommunications Act of 1996, in which the amendment to Section 622(b) on which the *Order* relies was enacted, makes clear that cable operators, just like other providers of non-cable service, are subject to reasonable franchise fee compensation for their non-cable services where such non-cable services are subject to non-cable local franchise requirements under applicable state or local law. Any other result would fly in the face of the 1996 Act's goal of competitive neutrality.

## **ARGUMENT**

The City adopts by reference the arguments set forth in the Tampa Brief and the ACM Brief. In this brief, the City supplements those arguments on two issues: The flaws in (1) the *Order*'s discussion of franchise buildout requirements (at paragraphs 82-93), and (2) the *Order*'s discussion of franchise fees (at paragraphs 94-109).

**I. THE COMMISSION LACKS THE STATUTORY AUTHORITY AND FACTUAL BASIS TO MAKE ANY GENERALIZED PRONOUNCEMENTS CONCERNING THE REASONABLENESS OF LOCAL FRANCHISE BUILDOUT REQUIREMENTS.**

The fulcrum of the *Order* is the FCC's finding of substantial public benefits that arise from promoting the swift availability of competition in the provision of cable service. "We believe this competition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of service offerings." *Id.* at ¶ 2. Yet the *Order* then adopts rulings (at ¶¶ 82 through 91) that appear designed to constrain LFAs from requiring that the cable operators they franchise offer these same "substantial public benefits" of competition to as many households as possible, as quickly as possible.

In effect, the Commission relies on benefits from swift and broad-based competition to justify its purported new preemptions of LFAs, but then suggests that when LFAs seek, through buildout requirements, to assure the broad availability of competition in their jurisdictions, LFAs may be preempted from doing so. Such an internally contradictory approach, undermining the very public interests that the *Order* itself purports to promote, would at the very least require an explicit statutory mandate from Congress, a clear and consistent policy explanation for such a counter-intuitive restriction on the scope of cable competition within an LFA, and a clear statement of what exactly the FCC is purportedly doing in the buildout paragraphs of the *Order*. Yet paragraphs 83-91

of the *Order* lack a statutory justification for acting, lack clarity even regarding what the *Order* is purporting to do with respect to buildout requirements, and lack even the rudiments of a defensible explanation of the Commission’s authority and rationale for its actions.

**A. The Commission Lacks Statutory Authority to Impose Limits on LFA Buildout Requirements.**

Section 621(a)(4)(A), 47 U.S.C. § 541(a)(4)(A), provides that “a franchising authority . . . shall allow the applicant’s cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area.”<sup>3</sup> This language unambiguously expresses a Congressional intent that an LFA may require, as an element of the franchises it grants, that a cable operator build out its cable system throughout the franchise area, such that the operator becomes capable of providing cable service to all households in that area, as long as the LFA gives the operator a “reasonable period of time” to achieve such ubiquitous buildout. But the *Order* (at ¶¶ 82-91) contorts Section 621(a)(4)(A) in an attempt to constrain LFAs’ authority to do precisely what that provision clearly contemplated that LFAs have authority to do.

The *Order* (at ¶¶ 83-86) includes a legal discussion of what the FCC believes is its own authority with respect to franchise buildout requirements, but

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<sup>3</sup> Section 601 *et seq.* of the Communications Act of 1934, as amended (“Cable Act” or “1984 Cable Act”).

that analysis is entirely beside the point of the Commission's seeming efforts to constrain LFA authority over buildout. The *Order*'s legal discussion goes only to the question of whether Section 621(a)(4)(A) imposes a *federal* requirement of ubiquitous buildout on cable operators, and rejects that reading of the provision. But assuming, *arguendo*, that the Commission is correct and no *federal* mandate exists requiring ubiquitous cable buildout by cable operators, that has absolutely nothing to do with the scope of an *LFA*'s authority to mandate buildout in franchise provisions in the absence of such a federally-mandated buildout requirement. On that question, as observed above, Section 621(a)(4)(A) leaves no room for doubt: Congress explicitly contemplated that LFAs do have such authority, so long as they do not impose unreasonable time schedules on achieving such buildout. The discussion at ¶¶ 83-86 of the *Order* thus provides no legal justification whatsoever for what appear to be the Commission's attempts in ¶¶ 89-91 of the *Order* to restrict LFA authority over buildout requirements generally or, more specifically, to restrict LFA authority to mandate ubiquitous buildout.

Moreover, the FCC is apparently under the mistaken impression that Section 621(a)(4)(A) is the only statutory basis in the Cable Act for LFA buildout requirements. That is simply incorrect. Section 621(a)(4)(A) is a single "reasonable period of time" limitation on the otherwise-broad authority over

system buildouts that the Cable Act leaves to LFAs. The legislative history makes plain that Congress intended Section 621(a)(1) to leave to LFAs, not the FCC, such matters as “delineation of the service area” and “extension of service.”<sup>4</sup> Section 624(b), 47 U.S.C. § 544(b), in turn, grants LFAs broad authority to establish “facility and equipment” requirements in franchises. And Section 632(a)(2), 47 U.S.C. § 552(a)(2), removes all doubt by providing that LFAs “may establish and enforce . . . construction schedules and other construction-related requirements, including construction-related performance requirements, of the cable operator.”

The *Order* does not even acknowledge these explicit provisions of the Cable Act unequivocally leaving buildout requirements to LFAs, much less attempt to square these provisions with the *Order*’s improperly federalized view of FCC oversight of local buildout requirements. But these provisions doom the *Order*’s buildout rulings as a matter of law.

The *Order*’s federalized, cookie-cutter approach to buildout requirements is also squarely at odds with the Cable Act’s over-arching goal of ensuring that “cable systems are responsive to the needs and interests of the *local community*.” 47 U.S.C. § 521(2) (emphasis added). How the FCC, which has no idea of the demographics, household density, and system construction cost characteristics in

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<sup>4</sup> H.R. Rep. No. 934, 98<sup>th</sup> Cong, 2d Sess. at 59 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4696 (“1984 House Report”).

