

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*

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

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Intervenor the City of New York, New York (the “City”), submits this Reply Brief in response to the Brief for Respondents (“FCC Br.”) and the Brief for Intervenors USTelecom *et al.* (“USTA Br.”).<sup>1</sup>

### INTRODUCTION

The City agrees with and supports the arguments in the reply briefs of petitioners Alliance for Community Media *et al.*, and the City of Tampa *et al.*, and therefore adopts them by reference. Here, the City addresses only those arguments in the FCC and USTA briefs that were directed at the City’s opening brief.

For the most part, the FCC and USTA briefs seek to evade the merits of the City’s arguments on procedural grounds, asserting either that those arguments were not raised below or were not also raised by petitioners here. These evasions fail, as we show below. But the reasons for the FCC’s and USTA’s attempts at evasion are not difficult to discern: Neither has any meaningful response to the substance of the City’s arguments.

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<sup>1</sup> Citations to the City’s opening brief will be in the format “NYC Br. at \_\_\_\_.” Citations to the Joint Appendix will be in the format “JA \_\_\_\_.” Citations to the opening brief of Petitioners Alliance for Community Media *et al.* will be in the format “ACM Br. at \_\_\_\_,” and citations to the opening brief of Petitioners City of Tampa *et al.* will be in the format “Tampa Br. at \_\_\_\_.”

**I. THE COMMISSION AND ITS ALLIES FAIL IN THEIR ATTEMPTS TO DEFEND THE STATUTORY AND FACTUAL BASES FOR THE *ORDER*'S FEDERALIZATION OF LOCAL FRANCHISE BUILDOUT REQUIREMENTS.**

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With respect to the *Order*'s franchise buildout rulings,<sup>2</sup> the City argued that the FCC (a) lacked statutory authority under the Cable Act<sup>3</sup> to prohibit local franchising authorities ("LFAs") from requiring cable operators to build out their systems so that they are capable of serving all households in the operator's franchise area,<sup>4</sup> and (b) failed to consider obviously relevant factors in assessing the reasonableness of requiring a competitive cable operator, especially one that is an incumbent local exchange carrier ("ILEC"), to build out its franchise area, rendering the *Order*'s rulings on these issues arbitrary and capricious.<sup>5</sup> The FCC and USTA fail to come to grips with those arguments, and their efforts to sidestep them procedurally likewise miss the mark.

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<sup>2</sup> *In re 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 & Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5140-44 (¶¶ 82-93) (2007) ("*Order*") (JA \_\_\_\_).

<sup>3</sup> Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, as amended ("Cable Act").

<sup>4</sup> NYC Br. at 6-10.

<sup>5</sup> *Id.* at 10-18.

**A. The Cable Act Does Not Give the Commission Authority to Impose the *Order's* Limitations on Local Franchise Buildout Requirements.**

The FCC and USTA assert that because (in their view) Section 621(a)(4)(A), 47 U.S.C. § 541(a)(4)(A) is a “*limitation*” on LFAs’ authority rather than a “grant” of authority to them, it does not stand in the way of the Commission’s claimed authority under Section 621(a)(1), 47 U.S.C. § 541(a)(1) to preempt franchise buildout requirements.<sup>6</sup> But that is no answer to “the central question here.”<sup>7</sup> How can Section 621(a)(1), enacted at the same time as Section 621(a)(4)(A), plausibly be read to empower the FCC to *prohibit* what Section 621(a)(4)(A) specifically *allows*? Section 621(a)(4)(A) plainly says an LFA may require a cable operator “to become capable of providing cable service to all households in the franchise area,” as long as the LFA “allow[s] [the operator] a reasonable period of time” to do so.

Characterizing Section 621(a)(4)(A) as a “limitation” rather than a “grant” does not alter this contradiction in the FCC’s position. Section 621(a)(4)(A) is not worded as an affirmative grant for the rather obvious reason that LFAs do not

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<sup>6</sup> FCC Br. at 54-55 (emphasis in original). *Accord* USTA Br. at 54.

<sup>7</sup> FCC Br. at 55.

require an affirmative grant in the Cable Act to have authority to impose buildout requirements; they already possess that authority independent of the Cable Act.<sup>8</sup>

What the FCC and USTA conveniently ignore is the clear language of Section 621(a)(4)(A). Regardless whether it is couched as a grant of authority or as Congress' explicit recognition and affirmation of LFAs' preexisting authority to impose buildout requirements independent of the Cable Act, Section 621(a)(4)(A) means what it says: An LFA may require universal service buildout throughout a cable operator's franchise area, as long as it gives the operator a "reasonable time" to complete that buildout. Any other reading renders Section 621(a)(1) and 621(a)(4)(A) schizophrenic.

It bears emphasizing in this regard that Section 621(a)(4)(A) is quite specific on the issue of universal buildout, while Section 621(a)(1) does not speak directly to buildout requirements at all. Section 621(a)(4)(A)'s specific, albeit conditional, preservation of universal buildout requirements must therefore control over Section 621(a)(1)'s generalisms.<sup>9</sup> Indeed, the *only* logical way to read the two provisions together is that, as long as an LFA gives an operator "a reasonable time" to be

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<sup>8</sup> See Tampa Br. at 3-5 (citing *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999)) & 43 (citing *Housatonic Cable Vision v. Dept. of Public Utility Control*, 622 F. Supp. 798, 807 (D. Conn. 1985)).

<sup>9</sup> *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981); *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 552 (1954); *United States v. Ware*, 161 F.3d 414, 423 (6th Cir. 1998); *FDIC v. Bates*, 42 F.3d 369, 372 (6th Cir. 1994); *Metro. Detroit Area Hospital Services, Inc. v. United States*, 634 F.2d 330, 334 (6th Cir. 1980).

capable of serving all households in the franchise area, such a universal service buildout requirement is not, and cannot be, an “unreasonable refusal” within the meaning of Section 621(a)(1). In effect, Section 621(a)(4)(A) is a “reasonable time” safe harbor for LFA buildout requirements.

As pointed out in our brief (at 8-9) and Tampa’s (Tampa Br. at 43), any doubt as to the correctness of this reading of the Act is dispelled by Sections 624(b), 47 U.S.C. § 544(b), and 632(a)(2), 47 U.S.C. § 552(a)(2), and the legislative history of the Cable Act.<sup>10</sup> Sensing the weakness of their position on this score, the FCC and USTA try to change the subject – the FCC through procedural legerdemain and straw men, the USTA through extemporization.

The FCC, citing *Cellnet Communications v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998), and 47 U.S.C. § 405(a), first claims that this argument was not raised to the FCC below and thus the Court may not consider it. FCC Br. at 56-57. The FCC is wrong; the argument was raised below.<sup>11</sup> More generally, there can be no question that the FCC was presented below with a host of arguments that

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<sup>10</sup> H.R. Rep. No. 934, 98th Cong., 2d Sess. at 59 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4696 (“1984 House Report”).

<sup>11</sup> *See, e.g.*, Letter to M. Dortsch from Frederick Ellrod on behalf of Anne Arundel County, MD (Dec. 6, 2006), at attachment, p. 3 (JA \_\_\_\_); NCTA Reply Comments, filed March 28, 2006, at 15 & n.42 (JA \_\_\_\_).

FCC-imposed limitations on local franchise buildout requirements were contrary to the Cable Act.<sup>12</sup>

The FCC's argument seems to be that unless the precise statutory subsection number or page of legislative history is cited to it below, it has not had the opportunity to pass on an argument within the meaning of Section 405(a). Neither *Cellnet* nor any other precedent cited by the FCC, however, suggests that the question whether an argument was raised below within the meaning of Section 405(a) can be sliced as thinly as the FCC claims here. To the contrary, the "new" argument on appeal involved in *Cellnet* was a new procedural argument completely unrelated to the merits arguments. 149 F.3d at 442. That is certainly not true with respect to the argument at issue here: Whether the FCC has authority under the Cable Act to limit local franchise buildout requirements. The FCC's narrow parsing of what constitutes a "question[] of fact or law upon which the Commission . . . has been afforded no opportunity to pass" (FCC Br. at 56-57) would mean that, unless a commenter were clairvoyant about precisely what rulings and analysis the Commission would ultimately adopt in its order,

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<sup>12</sup> See, e.g., *id.* at 25-31 (JA \_\_\_), NATOA *et al.* Reply Comments, filed March 28, 2006, at 23-26 (JA \_\_\_); Reply Comments of Comcast Corporation, filed March 28, 2006, at 34-35 (JA \_\_\_); Virginia Cable Telecommunications Assoc. Comments, filed Feb. 13, 2006, at 6-7 (JA \_\_\_); Southeast Michigan Municipalities Reply Comments, filed Feb. 28, 2006, at 44-48 (JA \_\_\_).

reconsideration petitions would in most cases be required as “a condition precedent to judicial review,” in conflict with Section 405(a)’s language.<sup>13</sup>

As to the merits of the argument, the FCC resorts to the straw man that neither Section 624(b) nor 632(a)(2), nor the legislative history, “grants LFAs *carte blanche* to impose build-out requirements that result in ‘unreasonabl[e] refus[als] to award’ competitive franchises under Section 621(a)(1).” FCC Br. at 57. But that is not our argument. We do not claim that Section 621(a)(1) places no limit at all on unreasonable buildout requirements.<sup>14</sup> Rather, our argument is that these additional provisions and legislative history, when read together with Section 621(a)(4)(A), mean that Section 621(a)(1) cannot be read to preempt a franchise requirement that a competitive franchise applicant must build its system out to

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<sup>13</sup> The problem is exacerbated here due to the *Order*’s Administrative Procedure Act defects. See NYC Br. at 18-19 & n.8; ACM Br. at 58-59. While the FCC contends that the *Order*’s detailed buildout, franchise fee and PEG rulings were a “logical outgrowth” of the notice of proposed rulemaking in this proceeding (FCC Br. at 82-83), we invite the Court to read that notice in its entirety, *In re Implementation of Section 621 (a)(1) of the Cable Communications Policy Act as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 20 FCC Rcd 18581 (2005) (“*NPRM*”), and decide for itself whether the *Order*’s many detailed rulings could have been divined from the *NPRM*, or whether the FCC has instead “pull[ed] a surprise switcheroo” by converting an at best skeletal *NPRM* on Section 621(a)(1) into a detailed ruling on virtually every franchise-related provision of the Cable Act. *Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

<sup>14</sup> See NYC Br. at 11 & 12 (failing to allow a “reasonable time” to complete buildout to all households might constitute an “unreasonable” demand under § 621(a)(1)). We do, however, agree with petitioners that the Cable Act gives only the courts, not the FCC, jurisdiction to make such a determination. See *id.* at 9-11, 15-16 & 18; ACM Br. at 17-25.

make service available to all homes in the franchise area, as long as it is given a reasonable time to do so. The FCC therefore lacked any statutory authority to suggest otherwise in the *Order*.

USTA (at 55) extemporizes further, speculating that Section 632(a)(2)'s reference to "construction schedules" may have more to do with "the hours during which system construction is undertaken" than where the system is built. As an initial matter, USTA's novel speculation about the meaning of Section 632(a)(2) is barred by *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), because the FCC's buildout rulings may be upheld, if at all, only on the reasoning offered by the FCC, and the FCC has offered no such reading of Section 632(a)(2), either here or below.

In any event, USTA's incredibly parsimonious construction of Section 632(a)(2) is at odds with both the statute's broad language and its legislative history, and does not explain Section 624(b) at all. USTA also ignores Section 632(a)(2)'s two references to LFAs' authority to impose "construction-related" requirements.

USTA makes the companion assertion (at 55) that the language in the *1984 House Report*, at 59, about "service area" being "subject to state and local authority" applies only "to the extent" local buildout requirements "are not addressed" in the Cable Act, and that Section 621(a)(1) addresses those

