

**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)
)

PETITION FOR RECONSIDERATION AND CLARIFICATION

**NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND
ADVISORS; THE NATIONAL LEAGUE OF CITIES; THE NATIONAL
ASSOCIATION OF COUNTIES; THE U.S. CONFERENCE OF MAYORS; THE
ALLIANCE FOR COMMUNITY MEDIA; AND THE ALLIANCE FOR
COMMUNICATIONS DEMOCRACY**

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SUMMARY

On October 31, 2007, by a vote of 3 to 2, the Commission adopted its *Second Report and Order*, concluding that “many of the findings” from its *First Report and Order* should be applicable to incumbent video providers. In doing so, however, the Commission, among other things, failed to: (1) preempt Most Favored Nation (“MFN”) clauses; (2) perform appropriate economic impact analyses as required by the Regulatory Flexibility Act (“RFA”); and (3) clarify whether the rulings of the *Second Order* applied to incumbent providers in all states.

MFN clauses and local level-playing-field laws are virtually indistinguishable and seek to accomplish the same goal: to prevent a local franchising authority (“LFA”) from granting a more favorable or less burdensome franchise to a competitive provider. The Commission preempted local level-playing-field laws in the *First Report and Order*, but failed to similarly treat MFN clauses in the *Second Report and Order*. There is simply no basis for treating materially identical provisions differently. Indeed, by failing to preempt MFN clauses, incumbent providers will be permitted to renege on negotiated terms and conditions in existing franchise agreements to the detriment of the LFA and the community it serves. In addition, the operation of an MFN clause will hinder the Commission’s stated preference that any modifications of existing franchise agreements be subjected to a “case-by-case” assessment.

Also, the Commission failed to properly conduct the analyses required by the RFA to determine the true economic impact that its proposed rules would have on small governmental jurisdictions and small organizations. Rather than identifying and analyzing the impacts of its proposed rules concerning capacity and support requirements for PEG channels and of its decision to redefine “incidental,” the Commission merely stated that any rules would, at most,

require modifications to the franchise application review process. Furthermore, the Commission failed to assess the economic impact resulting from its ruling regarding the operation of MFN clauses and the effect such provisions would have on the franchise modification process.

Finally, the Commission erred by failing to clarify whether the rulings of the *Second Order* apply to all incumbent providers, regardless of where they are situated. Without a clear resolution of this issue, LFAs across the nation will be faced with increased litigation, the public interest will be harmed, and deployment of new services will be hampered.

Because of the uncertainties and disruptions that the *Second Order* will necessarily cause to existing franchise agreements, Petitioners request that the Commission reconsider its rulings with respect to MFN clauses, conduct new and proper regulatory flexibility analyses, and clarify the applicability of the *Second Order* to incumbent providers.

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The National Association of Telecommunications Officers and Advisors (“NATOA”), the National League of Cities (“NLC”), the National Association of Counties (“NACo”), the U.S. Conference of Mayors (“USCM”), the Alliance for Community Media (“ACM”), and the Alliance for Communications Democracy (“ACD”) hereby petition the Commission, pursuant to 47 U.S.C. § 405(a) and 47 C.F.R. §§ 1.106 and 1.429, for reconsideration and clarification of certain aspects of its *Second Report and Order* (“*Second Order*”)¹ in the above-captioned proceeding. Specifically, we ask the Commission to revise its rules to: (1) preempt Most Favored Nation (“MFN”) clauses; (2) reconsider and reissue the initial and final Regulatory Flexibility Act analyses to reexamine the financial impact on small governmental jurisdictions²

¹ *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, Second Report and Order* (MB Docket No. 05-311), FCC 07-190 (released November 6, 2007), published in 72 Fed. Reg. 65670 (November 23, 2007) (“*Second Order*”).

² “Small governmental jurisdictions” include the “governments of cities, counties, towns, townships, villages, school districts, with a population of less than fifty thousand” 5 U.S.C. § 601(4).

and small organizations³ that will result from the application of the new rules to incumbent providers; and (3) clarify whether the new statutory interpretations are applicable to incumbent providers in all states.

I. BACKGROUND

A. *First Report and Order*

On December 20, 2006, over the dissent of two commissioners, the Commission adopted its *First Report and Order* (“*First Order*”) concerning the local franchising process, wherein the Commission “adopted rules and provided guidance to implement Section 621(a)(1) of the Communications Act of 1934.”⁴ Among other things, the *First Order* preempted local “laws, regulations, practices and agreements,” including local level-playing field laws, except those in states that have enacted state-level video franchising legislation.

At the same time, the Commission issued a *Further Notice of Proposed Rulemaking* (“*FNPRM*”) “to provide interested parties with the opportunity to provide comment on which of those findings [in the *First Report*] should be made applicable to incumbent providers and how that should be done.”⁵

Subsequently, Petitioners and other interested parties filed petitions for review in various federal appellate court circuits asserting, among other things, that the Commission lacked statutory authority to issue its findings in the *First Order* and, even assuming the Commission had the requisite authority, its rulings were arbitrary and capricious. The various petitions have been consolidated and are pending in the United States Court of Appeals for the Sixth Circuit.⁶

³ A “small organization” includes any “not-for-profit enterprise which is independently owned and operated and is not dominant in its field” 5 U.S.C. § 601(4).

⁴ *Second Order* at ¶ 3.

⁵ *Id.* at ¶ 5.

⁶ *US Court of Appeals, Alliance Community v. FCC*, No. 07-3391 (6th Cir. filed April 3, 2007).

B. *Second Report and Order*

On October 31, 2007, again over the dissent of two commissioners, the Commission adopted its *Second Order*, concluding that “many of the findings” of the *First Order* should be applicable to incumbent operators.⁷

Like the *First Order*, the *Second Order* has been appealed in federal court on many of the same grounds.⁸ Indeed, because the *Orders* are so closely aligned, the court’s decision on the validity of the *First Order* will necessarily have an effect on the validity of the *Second Order*. By filing this Petition for Reconsideration and Clarification (“Petition”), the Petitioners do not, in any way, concede that the Commission had the authority to issue the *First* and *Second Orders* nor does the Petition affect Petitioners’ claim that the Commission’s findings were arbitrary and capricious. Rather, because of the inconsistencies and uncertainties of the *Second Order*, Petitioners seek to have the Commission reconsider and clarify several of its findings in order to provide local franchising authorities (“LFAs”) with some guidance pending judicial review.

⁷ The Commission found that its rules regarding the 90- and 180-day “shot clock” and build-out were not applicable to incumbent providers.

⁸ For example, Montgomery County, Maryland seeks review of the *Second Order* on the grounds that it “exceeds the FCC’s statutory authority, is arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence, in violation of the United States Constitution, including, without limitation, the Fifth and Tenth Amendments, and is otherwise contrary to law. The Second Report and Order also violates the public notice requirements of both the Communications Act and the Administrative Procedure Act.” *Montgomery County, MD v. FCC*, No. 07-2151 (4th Cir. filed Dec. 6, 2007). Similarly, Dayton Access Television, Inc. seeks review based on the grounds that the *Second Order* “exceeds the statutory authority of the FCC, violates the Communications Act, as amended, 47 U.S.C. §§ 151 *et seq.*, is arbitrary, capricious and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, and is otherwise contrary to law.” *Dayton Access Television, Inc. v. FCC*, No. 07-4467 (6th Cir. filed Dec. 5, 2007).

II. ARGUMENT

A. The Commission's Ruling on Most Favored Nation Clauses is Inconsistent with the Commission's Preemption of Local Level-Playing-Field Laws

In its *First Order*, the Commission preempted local level-playing-field laws, finding that they “unreasonably impede competitive entry into the multichannel video marketplace by requiring LFAs to grant franchises to competitors on substantially the same terms imposed on incumbent cable operators.”⁹ (Inexplicably, the Commission did not preempt materially identical *state* level-playing-field statutes. The Petitioners are disputing the Commission's authority to preempt such local laws, along with its inconsistent treatment of similar state statutes, in their pending federal lawsuit challenging the *First Order*.¹⁰) But in the *Second Order*, the Commission failed to extend similar reasoning to MFN clauses.

It is difficult to ascertain how MFN clauses differ from level-playing-field statutes. Indeed, from the LFA perspective, MFN clauses are virtually indistinguishable from level-playing-field provisions and, from the viewpoint of the incumbent provider, both level-playing-field statutes and MFN clauses serve the exact same purpose: they prevent the LFA from granting a more favorable or less burdensome competitive franchise. *If* the Commission has the authority to preempt local level-playing-field laws in its *First Order* – a question to be resolved by the court – then there is simply no basis for leaving identical MFN provisions in place in its *Second Order*.

Permitting MFN clauses to stand, while at the same time exposing existing franchise obligations, such as PEG and I-Net, to possible preemption or modification, completely undermines the contractual bargaining positions of the parties. Doing so allows incumbent

⁹ *First Order* at ¶ 138.

¹⁰ *Second Order* at ¶ 20.

providers to renege on negotiated terms and conditions and take advantage of some of the Commission's rulings in the *First Order* that were adopted to benefit *competitive providers*, not *incumbent operators*. Indeed, the Commission itself acknowledges 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.”¹¹ (Emphasis added.)

Furthermore, permitting incumbents to make use of MFN clauses “pursuant to the operation of their own design” conflicts with the Commission’s recognition that “franchise agreements involve contractual obligations and . . . that some terms may have been implemented as part of a settlement agreement regarding rate disputes or past performance by the franchisee. As a result, we believe that the facts and circumstances of each situation must be assessed on a case-by-case basis under applicable law to determine whether our statutory interpretation should alter the incumbent’s existing franchise agreement.”¹² The operation of an MFN clause does not necessarily require the individualized assessment as to whether the statutory interpretations of the *First Order* should apply prior to renewal as envisioned by the Commission. For example, while the Commission apparently concludes that it would not be *per se* unreasonable to impose more burdensome PEG and I-Net obligations on incumbent providers, it fails to explain why its position is not undermined by the continued inclusion and operation of an MFN clause.

Finally, the Commission fails to explain if an MFN clause remains valid in a jurisdiction where the local level-playing-field law has been preempted as a result of the *First Order*. It is

¹¹ *Second Order* at ¶ 20.

¹² *Second Order* at ¶ 19.

inconsistent, and bordering on the absurd, for the Commission to preempt these laws without preempting MFN clauses as well.

Preempting MFN clauses does not leave an incumbent provider without a means to seek a modification of its agreement in the event a competitive franchise is granted on more favorable terms. In fact, the *Second Order* itself sets forth a number of alternatives the incumbent may take, including engaging in “cooperative” negotiations with the LFA and seeking a modification pursuant to Section 625(b)(1). Therefore, the Commission should reconsider its ruling on this issue and, to be consistent with and in light of its earlier ruling on local level-playing-field laws, preempt MFN clauses.

B. The Commission’s Economic Impact Analyses Pursuant to the Regulatory Flexibility Act are Deficient and Must be Reconsidered

The Commission should reissue its Regulatory Flexibility Act (“RFA”) analyses, issued in support of the *FNPRM*, to consider the true economic impact of the *Second Order*. Both the initial and final analyses are deficient and should be reexamined.

The RFA, 5 U.S.C. § 603 (1996), requires agencies to consider the economic impact that a proposed rulemaking will have on small entities through the issuance of an initial regulatory flexibility analysis (“IRFA”). The IRFA must include the following:

- (1) a description of the impact of the proposed rule on small entities; *see*, 5 U.S.C. § 603 (a);
- (2) the reasons the action is being considered; *see*, 5 U.S.C. § 603 (b)(1);
- (3) a succinct statement of the objectives of, and legal basis for the proposal; *see*, 5 U.S.C. §603 (b)(2);
- (4) an estimate of the number and types of small entities to which the proposed rule will apply; *see*, 5 U.S.C. § 603 (b)(3);

(5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; *see*, 5 U.S.C. § 603 (b)(4); and

(6) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize *any significant economic impact* of the proposed rule on small entities, *see*, 5 U.S.C. § 603 (c)(emphasis added).

The IRFA accompanying the Commission’s *FNPRM* stated its intended action would have only a *de minimis* impact on small governmental jurisdictions. Rather than identifying and analyzing the impact of its proposed rules regarding capacity and support requirements for PEG channels and of its decision to redefine “incidental” costs and other franchise fee cap offsets, the Commission simply stated that any rules that “might be adopted pursuant to [the *FNPRM*] likely would require at most only modifications to” the competitive cable franchise application review process. *See*, IRFA at ¶ 14. The Commission had no basis for making this statement. The economic impact on small entities is simply not “described” in the IRFA. This is particularly problematic considering the substance of the *Second Order* was not described in detail in the *FNPRM* or IRFA.

The economic impact these processes suggested in the *Second Order* will have on small entities is simply not addressed. The costs of these activities will necessarily include both legal and accounting expertise. At a minimum, the Commission has failed to comply with the requirements of 5 U.S.C. § 603 (b)(4), by failing to assess and report on the amount and cost to small governmental jurisdictions and small organizations for the professional skills necessary to comply with the *Second Order*.

The IRFA outlined the need for, and objectives of, the proposed rules as furthering the goals of enhanced cable competition and accelerated broadband deployment. The Commission’s

legal basis of the proposed rules was that neither Section 611(a) nor Section 622(a) differentiates between incumbents and new entrants.

The IRFA estimated that 84,098 or fewer small governmental jurisdictions would be affected by the proposed rules. (The Final Regulatory Flexibility Act Analysis (“FRFAA”) revises this figure upward to 84,377 small governmental jurisdictions.) However, the Commission’s IRFA completely fails to include an estimate of small organizations that will be affected by the *Second Order*, except to note that some 1.6 million small organizations exist in total in the United States.

A “small organization” includes independent not-for-profit enterprises. *See*, 5 U.S.C. § 601(4). Many PEG channel operations throughout the United States fall within this definition and were excluded from the Commission’s “analysis.” The Commission should have made an effort to quantify these affected small entities and solicit comments from them specifically regarding the potential effects of what were, at that time, its tentative conclusions.

Because the Commission began from the assumption that its rules would impose no significant economic impact on affected small entities, it did not include a description of any significant alternatives that accomplish its objectives and minimize the true economic impact of the proposed rules on small entities. The Commission simply asserted that allowing LFAs to continue “unreasonable” practices would be unacceptable. The IRFA then solicited comments on its “analysis.” Because the Commission failed to truly analyze the economic impact on small entities, failed to consider actual alternatives, and failed to include small organizations in the IRFA, the IRFA should be reissued and a FRFAA should then only be issued after these small entities have an opportunity to comment.

The FRFAA ratified the findings of *de minimis* economic impact on small governmental jurisdictions and similarly did not identify any alternatives considered by the Commission to minimize the significant economic impact of the PEG and franchise fee rules on small governmental jurisdictions, despite the fact that 5 U.S.C. § 604 (a)(5) requires the Commission to do so. Nor was any attempt made to assess the impact on small organizations or to consider alternatives to minimize the impact on these small entities.

It is important to point out that the *Second Order* rejected the *FNPRM's* tentative conclusion that the findings of the *First Order* would apply to incumbent providers only at the time of renewal. Instead, the *Second Order* stated that the findings would apply immediately. As a result, no analysis of the adopted rules was conducted. Furthermore, the Commission made no attempt to assess the economic impact of “modifications” to current franchise agreements resulting from its rulings related to MFN clauses. For example, the Commission stated that the franchise modification process could include “cooperative” negotiations, use of MFN clauses and other contractual provisions, franchise modifications pursuant to Section 625 of the Act, and, of course, court action. Each of these “modifications” comes at an economic cost, which was not assessed by the Commission.

The Congressional intent of the RFA was for federal agencies to use regulatory flexibility analysis as an analytical tool to reach well-founded decisions. *See, Southern Offshore Fishing Association v. Daley*, 995 F. Supp. 1411, 1433 (M.D. Fla. 1998) (agencies are required to consider the effect of proposed regulations on small entities and design mechanisms to minimize any adverse consequences). As part of the process, Congress envisioned agencies would gather information on the costs of proposed rules and balance competing interests. *See, id. Offshore Fishing*, 995 F. Supp. at 1437 (agencies are required to make reasonable, good-faith efforts to

inform the public of potential adverse effects and about less harmful alternatives); *see also*, *North Carolina Fisheries Ass'n v. Daley*, 27 F. Supp.2d 650 (E.D. Va. 1998) (agency criticized for failing to consider costs of any kind and for failing to consider actual effect on small entities).

While the IRFA and FRFAA used most of the terms contained in the RFA, they were used merely for cursory reference, rather than to actually analyze the economic consequences of the Commission's actions. Simple reference to the RFA's requirements does not meet the Commission's statutory obligation under the RFA. Ultimately, the *First* and *Second Orders* hinged on unsubstantiated anecdotes, rather than meaningful analysis of the franchising process that has functioned well for decades. Indeed, there is not a single reported case in which an LFA has been found to have unreasonably denied a franchise. The Commission compounded the error of relying on such information when it failed to analyze the true economic consequences of its actions on the affected small entities.

The Commission's IRFA and FRFAA are both deficient and should be reconsidered because they do not analyze the economic impact of the rules contained in the *Second Order* and *FNPRM*. While courts can and have vacated and remanded rulemakings to federal agencies for failing to comply with Congress' directives in the RFA, Petitioners urge the Commission to reconsider and reissue its analyses and rulemaking without the need for court intervention.

C. The Commission Should Clarify Whether the *Second Order* Applies to Incumbent Providers in States with State-Level Video Franchising Laws

Petitioners seek Commission clarification as to whether, and to what extent, the findings of the *Second Order* are applicable to incumbent providers in states that have enacted state-level video franchising legislation. The *First Order* contains dozens of references to "preemption" and specifically states that the rules adopted do not apply in states that have enacted such

legislation. Yet, the *Second Order* never explicitly addresses this issue except in the context of customer service standards.

It would be reasonable to conclude that the *Second Order's* rulings do not apply to incumbent providers in states that have enacted state-level video franchising legislation. But the Commission's statement 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"¹³ muddies that position. Without a clear resolution of this issue, LFAs located in states with state-level video franchising laws will be faced with uncertainty as to the applicability of the *Second Order* to incumbent providers, which will most assuredly lead to increased litigation, negatively impact the deployment of new services, and harm the public interest.

III. CONCLUSION

The Commission's treatment of MFN clauses in the *Second Order* is inconsistent with its preemption of local level-playing-field statutes in the *First Order*. The Commission seeks to create a distinction where one does not exist. As such, the Commission should reconsider its ruling and act to preempt MFN clauses.

Also, the Commission should reconsider its regulatory flexibility analyses and properly analyze the economic impact of its new rules on small governmental entities and small organizations.

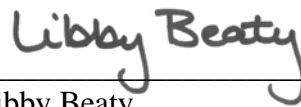
Finally, the *Second Order* is unclear as to its applicability of its findings to incumbent providers located in states that have adopted state-level video franchising legislation. In this

¹³ *Second Order* at ¶ 19.

respect, the Commission should take steps to avoid profound confusion and act to clarify this particular aspect of the *Second Order*.

For all the foregoing reasons, Petitioners urge the Commission to grant reconsideration and clarification of these aspects of its *Second Order*.

Respectfully submitted,



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