

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

ALLIANCE FOR COMMUNITY MEDIA; <i>et al.</i>,)	
<i>Petitioners, and</i>)	
)	
STATE OF HAWAII; CITY AND COUNTY OF SAN FRANCISCO; NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, INC.; CITY OF NEW YORK; CITY OF MILWAUKEE, WISCONSIN; CITY OF WHITE PLAINS, NEW YORK; CITY OF WILMINGTON, DELAWARE, <i>Intervenors,</i>)	No. 07-3391 <i>Intervenors</i>
v.)	
FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA, <i>Respondents and</i>)	No. 07-3673 <i>Petitioner</i>
)	
AD HOC TELECOM MANUFACTURER COALITION; QWEST COMMUNICATIONS INTERNATIONAL, INC.; USTELECOM; VERIZON; AT&T, <i>Intervenors.</i>)	
)	

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

Appeal from Federal Communications Commission

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July 18, 2007

**DISCLOSURE OF CORPORATE AFFILIATIONS AND
FINANCIAL INTERESTS**

Pursuant to F.R.A.P. 26.1 and 6 Cir. R. 26.1, the **NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, INC.** makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If Yes, list the identity of such corporation and the nature of the financial interest:

NO

Michael Schooler (F.S.)
Michael Schooler

7/18/07
Date

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to 6 Cir. R. 34(a), oral argument should be heard in this case because the case presents an issue of national importance affecting the rights and obligations of cable operators and franchising authorities nationwide. NCTA believes oral argument would be of value to the Court.

JURISDICTIONAL STATEMENT

(a) Petitioners request review of the *Section 621 Order* of the Federal Communications Commission (“FCC” or “Commission”). *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) (“*Section 621 Order*” and “*Section 621 FNPRM*”) (Apx. pg. ____). The FCC claimed subject matter jurisdiction to issue the *Section 621 Order* under 47 U.S.C. §§ 151, 152, 154(i), 201(b), 303(r); and section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (47 U.S.C. § 157 nt.).

(b) The *Section 621 Order* is a final order of the FCC reviewable by this Court under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

(c) The FCC released the *Section 621 Order* on March 5, 2007 and it was published in the Federal Register on March 21, 2007. 72 Fed. Reg. 13230 (2007). By its own terms, the *Section 621 Order* became final 30 days following publication in the Federal Register. *Section 621 Order* ¶ 155 (Apx. pg. ____). Timely notices of appeal were filed within the 60-day deadline set forth in 28 U.S.C. § 2344. Through the use of the random selection process of 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation consolidated the appeals in this Court on April 10, 2007.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the FCC exceed its statutory authority by seeking to enforce Section 621(a)(1) of the Communications Act of 1934 even though Congress has specifically assigned that role to the courts?
2. Did the FCC exceed its statutory authority when it “interpreted” the statute in a manner that overrides Congressional intent?
3. Did the FCC act in an arbitrary and capricious manner by reaching conclusions in the *Section 621 Order* that had no evidentiary support in the record?

STATEMENT OF THE CASE

At issue in this case is the *Section 621 Order* of the FCC, which was released on March 5, 2007 and purports to implement Section 621(a)(1) of the Communications Act of 1934 (the “Communications Act”), as amended in relevant part by the Cable Communications Policy Act of 1984 (the “1984 Act”) and the Cable Consumer Protection and Competition Act of 1992 (the “1992 Act”).

Section 621(a)(1) precludes a franchising authority (which can be a municipality, county, or a state, *see* 47 U.S.C. § 602(10) (defining “franchising authority”)) from granting only one “franchise” for the provision of cable service in a local area:

A franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction, except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 635 for failure to comply with this subsection.

47 U.S.C. § 541(a)(1).

The FCC's *Section 621 Order* found that the FCC had authority to "implement" Section 621(a)(1)'s prohibition on unreasonable refusals to award additional franchises; that Section 621(a)(1) prohibited not only actual refusals to award a competitive franchises, but also any procedures and requirements that constitute a *de facto* unreasonable refusal; and that the FCC had authority under Section 621(a)(1) to "establish[] limits on LFAs' ability to delay, condition, or otherwise 'unreasonably refuse to award' competitive franchises" by limiting what local franchising authorities ("LFAs") -- but not state franchising authorities -- may seek in negotiations with applicants for a second franchise, even though the Communications Act otherwise contemplates that outside the uniform standards established by the Act, franchising authorities are free to negotiate the terms under which they allow franchise applicants to use their local rights-of-way. *Section 621 Order* ¶¶ 18, 40 (Apx. pg. ____).

The rules established by the FCC, applicable solely to applicants for a second franchise, restrict an LFA's ability to negotiate with an applicant over the

terms and conditions of the franchise; impose limits on the fees that an LFA may charge beyond the limits already established in the Communications Act; restrict the ability of LFAs to require second entrants to serve the entire community, rather than just the more affluent or concentrated areas; and suggest that requirements commonly imposed on existing providers, such as the provision of multiple channels for public, educational and governmental (“PEG”) use and the construction of “institutional networks” (“I-Nets”) for government use, may be inherently “unreasonable.” *See generally Section 621 Order ¶¶ 66-120* (Apx. pg. ____).

The FCC did not extend these findings to existing providers’ franchise agreements. To the contrary, the Commission deferred consideration of that issue to a later time, and ruled that any local laws requiring equal treatment of all franchised video service providers are preempted to the extent that they conflict with the rules adopted in the *Section 621 Order*. *Section 621 Order ¶¶ 5, 138* (Apx. pg. ____). As a result, in addition to limiting an LFA’s ability to negotiate franchise agreements, the *Section 621 Order* grants a competitive advantage to new franchisees over existing franchisees. This appeal followed.

STATEMENT OF FACTS

The 1984 Act established for the first time a federal statutory framework for the regulation of cable television systems. For many years before that, cable

