

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Implementation of Section 621(a) of the Cable)
Communications Policy Act of 1984 as Amended)
By the Cable Television Consumer Protection and)
Competition Act of 1992)

MB Docket No. 05-311

To: Chief, Media Bureau

**NCTA – THE INTERNET & TELEVISION ASSOCIATION’S PETITION FOR
CLARIFICATION OF ORDER DENYING MOTION FOR STAY**

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NCTA – The Internet & Television Association (“NCTA”) hereby petitions the Media Bureau to clarify the Bureau’s November 6, 2019 Order Denying Motion for Stay¹ in the matter of Implementation of Section 621(a) of the Cable Communications Act of 1984 as Amended by the Cable Television Consumer Protection Act of 1992 (“*Third Report and Order*”).² In particular, certain language in Paragraph 21 of the *Stay Denial Order* creates the potential for confusion and the appearance of a conflict with the *Third Report and Order*. NCTA respectfully requests that the Bureau remove this potential conflict by deleting this language, as further detailed below. Removing these sentences will not substantively affect the *Stay Denial Order*’s analysis of the stay motion nor its conclusion.

¹ See *In re Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Order Denying Motion to Stay, DA 19-1149 (rel. Nov. 6, 2019) (hereinafter “*Stay Denial Order*”).

² See *In re Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Third Report & Order, 34 FCC Rcd 6844 (2019) (“*Third Report and Order*”).

ARGUMENT

The *Third Report and Order* adopted rules and interpreted provisions in Title VI of the Communications Act of 1934, including provisions related to franchise fees and regulation of mixed-use facilities, and preempted inconsistent state and local regulations. The Commission released the text of the *Third Report and Order* on August 2, 2019, and the Federal Register published a summary of the *Third Report and Order* on August 27, 2019.³ The *Third Report and Order* became effective on September 26, 2019.

In the *Third Report and Order*, the Commission explained that its in-kind franchise fee rulings were prospective and “[t]o the extent a franchise agreement that is currently in place conflicts with this Order, [the Commission] encourages the parties to negotiate franchise modifications within a reasonable time.”⁴ Notably, the “to the extent” language made clear that the Commission did not believe that negotiations would be required in many instances. Where such negotiations are required, the Commission stated that “120 days should be, in most cases, a reasonable time for the adoption of franchise modifications.”⁵

The Commission then explained how the rules in the *Third Report and Order* would be implemented in the case of a disagreement between a cable operator and a franchising authority over the impact of the *Third Report and Order* on a particular franchise requirement. First, it provided that “[i]f a franchising authority refuses to modify any provision of a franchise agreement that is inconsistent with this Order, that provision is subject to preemption under section 636(c) [of

³ *Local Franchising Authorities’ Regulation of Cable Operators and Cable Television Services*, 84 Fed. Reg. 44725 (Aug. 27, 2019); see also *Stay Denial Order* ¶ 3.

⁴ *Third Report and Order* ¶ 62 (emphasis added).

⁵ *Id.* ¶ 62 n.247.

the Cable Act],”⁶ and it “expressly preempt[ed]” as of the effective date any imposition of obligations on cable operators beyond what Title VI allows.⁷ Second, it explained that “if the LFA believes that the cable operator’s proposed valuation [for in-kind contributions] is too high, the LFA is free to forgo the in-kind contribution, accept a monetary franchise fee payment, and use the funds it received to purchase the good or service in the competitive marketplace.”⁸

None of these provisions, nor any others in the *Third Report and Order*, permit franchising authorities to continue to enforce unlawful franchise provisions pending a cable operator’s success in obtaining judicial enforcement of the *Third Report and Order* against each and every individual franchising authority. To the contrary, the *Third Report and Order* makes clear that “[c]omplying with the terms of the statute is not optional,”⁹ and the Commission explicitly rejected calls by franchising authorities to delay the effectiveness of the *Third Report and Order* until the expiration of existing franchises.¹⁰

On October 7, 2019, after the *Third Report and Order* became effective, the National League of Cities and a group of local government associations moved for a stay of the *Third Report and Order* pending resolution of petitions for review filed in the Third, Ninth, and D.C. Circuits.¹¹ The Media Bureau issued the *Stay Denial Order* on November 6, 2019, denying the motion on several grounds, including that the movants’ delay rendered the request for a stay moot and that

⁶ *Id.* ¶ 62.

⁷ *Id.* ¶ 80.

⁸ *Id.* ¶ 61 n.242; *see also* ¶¶ 54, 63 n.251.

⁹ *Id.* ¶ 63 & n.251. Relatedly, the Commission also advised that “an LFA may not . . . ask a cable operator to ‘voluntarily’ waive the statutory cap” on franchise fees. *Id.*

¹⁰ *Id.* ¶ 63.

¹¹ *See* National League of Cities, et al., Motion for Stay, MB Docket No. 05-311 (filed Oct. 7, 2019); *see also Stay Denial Order* ¶¶ 1, 3.

movants failed to demonstrate a likelihood of success on the merits and likewise failed to show that they would suffer irreparable harm absent a stay.¹²

In the context of disposing of the movants’ claim of irreparable harm, Paragraph 21 of the *Stay Denial Order* addresses situations in which the parties do not reach agreement within a 120-day negotiating period.¹³ Among other things, Paragraph 21 states that “[t]he rules in the *Order* did not supersede provisions in existing franchise agreements on their effective date (September 26, 2019),” and “[i]f negotiations fail, the terms in the franchise remain in effect unless and until a cable operator challenges those terms and proves that the terms violate the *Order’s* requirements.”¹⁴

While Paragraph 21 was presumably intended only to paraphrase controlling statements in the *Third Report and Order*, those sentences could be misinterpreted to conflict with the *Third Report and Order’s* plain directives and require procedures not mandated by the Commission in the *Third Report and Order*.¹⁵ In particular, the conclusions suggested by the *Stay Denial Order*—that the terms of existing franchise agreements were not rendered unlawful as of the *Third Report and Order’s* effective date, and that these unlawful terms can remain in effect “unless and until” a cable operator successfully challenges them in court—are inconsistent with the express language of the *Third Report and Order*,¹⁶ as described above. The resulting confusion could frustrate the Commission’s objective of ensuring that the imposition of franchise fees and other requirements

¹² See generally *Stay Denial Order*.

¹³ See *id.* ¶ 21.

¹⁴ *Id.*

¹⁵ See Letter from Rick Chessen to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-311, at 1 (Nov. 12, 2019) (“NCTA Ex Parte”).

¹⁶ Compare *Third Report and Order* ¶¶ 61-63, 80, with *Stay Denial Order* ¶ 21.

on cable operators comports with the statutory mandates of the Cable Act. Specifically, Paragraph 21 could be misinterpreted to put the onus on cable operators to sue in order to bring existing franchises into compliance with the Cable Act, thereby absolving franchising authorities of any responsibility to implement the requirements of the *Third Report and Order* in the absence of a court order.¹⁷

Indeed, the language of Paragraph 21 already has been misinterpreted by franchising authorities in just such a manner. Counsel for one group of franchising authorities has issued guidance noting that, while the denial of the stay was not unexpected, “what was unexpected and welcome news, were some very beneficial explanations of how to implement the Cable Franchise Order.”¹⁸ Specifically, counsel is advising its franchising authority clients that the *Stay Denial Order* “makes clear that, before taking as an offset the FMV of what the FCC calls in-kind benefits: (1) The cable operator must ask for an amendment to the franchise and then negotiate for up to 120 days before offsetting franchise fees and (2) The cable operator has the burden to prove the existing franchise violates the Cable Franchise Order.”¹⁹ The National Association of Telecommunications Officers and Advisors (“NATOA”) has published similar guidance, characterizing Paragraph 21 as a “partial victory” and effectively interpreting the *Stay Denial*

¹⁷ The confusion created by Paragraph 21 could also give franchising authorities a perverse incentive not to negotiate in good faith regarding any changes in franchise terms necessary to conform a franchise to the *Third Report and Order*.

¹⁸ Best Best & Kreiger, *FCC Denies Franchise Order Stay Request But Provides Implementation Guidance* (last visited Nov. 12, 2019), https://www.bbklaw.com/News-Events/Insights/2019/Legal-Alerts/11/FCC-Denies-Cable-Franchise-Order-Stay-Request-But?utm_source=Constant_Contact&utm_medium=read_more&utm_campaign=LA_FCC_Denial_Cable_Franchise&utm_content=Legal_Alert.

¹⁹ *Id.*

Order as superseding the process set out in the *Third Report and Order* for implementing the latter's rules and interpretations with respect to individual franchise agreements.²⁰

Contrary to these interpretations of the *Stay Denial Order*, however, the *Third Report and Order* does not place the burden on cable operators to “prove” that unlawful franchise agreements must be reformed.²¹ Nor, fairly read, does the *Stay Denial Order* actually place this burden on cable operators. But because franchising authorities have come to such a clear misunderstanding of the *Stay Denial Order*, the Bureau should step in and correct this confusion to ensure implementation of the *Third Report and Order* in a manner consistent with the statutory mandates of the Cable Act, the language of the *Third Report and Order*, and the Commission's intent.

In light of the foregoing, NCTA respectfully requests that the Media Bureau clarify the *Stay Denial Order* by removing the identified sentences from Paragraph 21.²² Such a clarification would alleviate any confusion while leaving unchanged the Bureau's broader and correct conclusion that the stay movants failed to show the immediacy of any harm that would result absent a stay. Given the 120-day period for negotiations anticipated by the Commission in the *Third Report and Order*, excising these two sentences from the *Stay Denial Order* will not

²⁰ See NATOA, *FCC Denies Motion to Stay on Cable Order*, https://www.natoa.org/web/site_issue/issue_detail/92. According to one NCTA member, counsel for a franchising authority has raised Paragraph 21 and its implications in the context of pending renewal negotiations.

²¹ In fact, as noted above, it clearly states that, as of the date the *Third Report and Order* became effective, “we now expressly preempt any state or local requirement, whether or not imposed by a franchising authority, that would impose obligations on franchised cable operators beyond what Title VI allows.” *Third Report and Order* ¶ 80.

²² In the event of a conflict between the Commission's *Third Report and Order* and the Bureau's *Stay Denial Order*, the former governs. See, e.g., *Comcast v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (an agency is not bound by the actions of its staff if the agency has not endorsed those actions); *In re Northstar Wireless, LCC*, 30 FCC Rcd 8887, 8937 ¶ 121 n.354 (2015) (stating that the Commission may disavow decisions of Media Bureau inconsistent with Commission policies and interpretations).

undermine the Bureau's otherwise effective demonstration that any purported harm localities might suffer would not be imminent absent a stay.

CONCLUSION

For the foregoing reasons, NCTA respectfully requests that the Media Bureau clarify the Order Denying Motion to Stay to remove two sentences from Paragraph 21 that could be – and already have been – misinterpreted to conflict with the *Third Report and Order*.

Respectfully submitted,

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