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

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JUL 8 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
Open Video Systems	)	

RECEIVED

JUL 8 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: Cable Services Bureau

MOTION TO ACCEPT LATE FILING OF PETITION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, TO TREAT SUCH PETITION AS FILED IN OPPOSITION TO AND/OR IN SUPPORT OF PETITIONS FOR RECONSIDERATION

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July 8, 1996

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To: Cable Services Bureau

Pursuant to sections 1 3 and 1.45 of the Commission's rules, the National League of Cities; the United States Conference of Mayors; the National Association of Counties; Montgomery County, Maryland; and the City of Los Angeles, California (collectively, "Movants"), hereby move that the Commission accept for filing the attached Petition for Reconsideration in the above docket, which Movants sought to file on July 5, 1996.

When Movants sought to file the attached Petition with the Commission on July 5, 1996, they arrived at the Commission's offices at or before the Commission's 5:30 p.m. closing time. However, the persons making the filing were delayed for a few minutes at the front desk of the Commission's offices while the guards there discussed whether the Commission had formally closed. See attached Declarations of Cheron D. Hunt, Michael J. Lewis, and Cesar A. Navas. As a result of this delay, by the time Movants were allowed

access to the second floor of the Commission's offices, the Secretary's office was locked and Movants were not allowed to file the Petition. Id.

In light of Movants' good-faith effort to make a timely filing, we respectfully request that the Commission accept the attached Petition for filing nunc pro tunc. No party will suffer any significant harm as a result. In addition, the public interest will be served by the Commission's fullest consideration of all issues regarding the order in question.

In the alternative, if the Commission should decline to accept the Petition as stated above, we request that the Commission accept the attached Petition as a filing in the nature of an Opposition to and/or in support of the petitions for reconsideration filed on or before July 5, 1996, in this proceeding.

Respectfully submitted,

THE NATIONAL LEAGUE OF CITIES; THE UNITED STATES CONFERENCE OF MAYORS; THE NATIONAL ASSOCIATION OF COUNTIES; MONTGOMERY COUNTY, MARYLAND; AND THE CITY OF LOS ANGELES, CALIFORNIA

By Frederick E. Ellrod III

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July 8, 1996
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In the Matter of	)	
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	)	
Open Video Systems	)	

To: The Commission

DECLARATION OF CHERON D. HUNT

I, Cheron D. Hunt, declare as follows:

1. I submit this declaration in support of the Motion to File Late of the National League of Cities; the United States Conference of Mayors; the National Association of Counties; Montgomery County, Maryland; and the City of Los Angeles, California ("Movants") in the above-captioned matter. I am fully competent to testify to the facts set forth herein, and if called as witness, would testify to them.

2. I am an employee of Miller, Canfield, Paddock and Stone, P.L.C., counsel to the Movants in this proceeding.

3. On July 5, 1996, at approximately 5:30 p.m., I arrived at the offices of the Federal Communications Commission ("FCC") at 1919 M Street with Cesar Navas and Michael J. Lewis, prepared to file a Petition for Reconsideration of the above parties.

4. On my arrival at the FCC's offices, the digital clock at the front desk read "5:30".

5. When we entered, the guards at the front desk did not initially permit us to pass. As a result, we were delayed for at least a few minutes in bringing the filing upstairs.

6. As a result of the delay at the front desk, when we brought the filing to the second floor, the office door was locked.

7. We attempted to deliver the filing to an FCC staff member on the second floor. The staff member refused to accept the filing.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on July 8, 1996, at Washington, D.C.

Cheron D. Hunt

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Before the
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Washington, D.C. 20554

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	)	
Open Video Systems	)	

To: The Commission

DECLARATION OF CESAR A. NAVAS

I, Cesar A. Navas, declare as follows:

1. I submit this declaration in support of the Motion to File Late of the National League of Cities; the United States Conference of Mayors; the National Association of Counties; Montgomery County, Maryland; and the City of Los Angeles, California ("Movants") in the above-captioned matter. I am fully competent to testify to the facts set forth herein, and if called as witness, would testify to them.

2. I am an employee of Miller, Canfield, Paddock and Stone, P.L.C., counsel to the Movants in this proceeding.

3. On July 5, 1996, at approximately 5:29 p.m., I arrived at the offices of the Federal Communications Commission ("FCC") at 1919 M Street with Cheron D. Hunt and Michael J. Lewis, prepared to file a Petition for Reconsideration of the above parties.

4. On my arrival at the FCC's offices, the digital clock at the front desk read "5:29".

5. When we entered, the guards at the front desk did not initially permit us to pass. As a result, we were delayed for at least a few minutes in bringing the filing upstairs.

6. When we brought the filing to the second floor, the office door was locked.

7. We attempted to deliver the filing to an FCC staff member on the second floor. The staff member refused to accept the filing.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on July 8, 1996, at Washington, D.C.

Cesar A. Navas

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	)	
Open Video Systems	)	

To: The Commission

DECLARATION OF MICHAEL J. LEWIS

I, Michael J. Lewis, declare as follows:

1. I submit this declaration in support of the Motion to File Late of the National League of Cities; the United States Conference of Mayors; the National Association of Counties; Montgomery County, Maryland; and the City of Los Angeles, California ("City") in the above-captioned matter. I am fully competent to testify to the facts set forth herein, and if called as witness, would testify to them.

2. On July 5, 1996, I worked as a temporary legal assistant for Miller, Canfield, Paddock and Stone, P.L.C., counsel to the above parties in this proceeding.

3. On July 5, 1996, at approximately 5:30 p.m., I arrived at the offices of the Federal Communications Commission ("FCC") at 1919 M Street, about twenty seconds behind Cheron D. Hunt and Cesar Navas, prepared to file an original and six copies of a Petition for Reconsideration of the above parties.

4. On my arrival at the FCC's offices, the digital clock at the front desk read "5:30".

5. When I entered, Ms. Hunt and Mr. Navas were talking with the guards at the front desk. The guards did not initially permit us to pass. As a result, we were delayed for at least one minute or more in bringing the filing upstairs.

6. When we brought the filing to the second floor, the office door was locked.

7. We attempted to deliver the filing to an FCC staff member on the second floor. The staff member refused to accept the filing.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on July 5, 1996, at Washington, D.C.

Michael J. Lewis

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To: The Commission

PETITION FOR RECONSIDERATION OF THE NATIONAL LEAGUE OF CITIES; THE UNITED STATES CONFERENCE OF MAYORS; THE NATIONAL ASSOCIATION OF COUNTIES; MONTGOMERY COUNTY, MARYLAND; AND THE CITY OF LOS ANGELES, CALIFORNIA

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July 5, 1996

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SUMMARY

(1) The Order Represents An Unconstitutional Taking of Local Government Property. The Commission cannot preempt non-Title VI local franchising authority over OVS. And even if the 1996 Act gave the Commission authority to effect such a taking of property, the determination of just compensation is a matter for the judiciary, not for the Commission.

The Order asserts that any taking from local governments is of de minimis value. But the real losses to local governments as a result of such a taking would be enormous. The compensation local governments currently receive in franchises goes far beyond a monetary franchise fee and includes in-kind compensation (including institutional networks) and other community benefits such as line extension obligations and system design parameters.

The Order appears to visualize the intrusion of an OVS as merely a single thin wire insinuated harmlessly into the rights-of-way. But installation of an OVS is likely to involve hundreds or thousands of street cuts, vault installations and the like, adding massively to right-of-way costs that are already straining local government budgets. In addition, the Order's claimed preemption of local franchising would deprive local governments of the ability to manage their rights-of-way adequately and raise unnecessary equal protection, due process and Tenth Amendment issues.

(2) The PEG Provisions of the Order Must Be Clarified. An OVS operator's PEG obligations must be no greater or less than those of the cable operator. But those of the cable operator are established by the franchise agreement and may not be reduced by the Commission. Thus, the OVS operator must provide additional PEG support equal to what the cable operator's franchise requires from the cable operator. Moreover, the OVS operator's

matching PEG support obligations include any obligations the cable operator may have to construct an I-net.

(3) The Order Errs In Suggesting Anyone Other Than a LEC Can Be An OVS Operator. The error in the Order's conclusion that "any person," including (under some circumstances) the incumbent cable operator, can become an OVS operator is underscored by the violence it does to other provisions of the 1996 Act and the Cable Act. If cable operators can become OVS operators, both the renewal provisions of the Cable Act and the cable-LEC buyout provisions of the 1996 Act would be eviscerated.

(4) The Order Fails to Impose on OVS Operators the Reasonable Rate and Non-Discrimination Obligations Required By the Statute. The rules would allow OVS operators, like cable operators, to control essentially all the programming on their systems behind a facade of open access. The Commission's rules will encourage routine filing of carriage complaints by all video programming providers and thus flood the Commission with complaints. Moreover, a claim of discrimination requires documentary evidence or an affidavit describing the differential of which it complains. Yet a complainant will have no access to anyone else's rate except through discovery, after it files the complaint. The Commission's rules regarding the burden of proof in effect turn the OVS operator's two-thirds statutory set-aside obligation into only a one-third set-aside obligation.

OVS carriage rates are determined by a vague imputed rate formula, whose inputs and methodology are known only to the operator. Moreover, if this formula implies that the operator can charge the same rate for carriage that it charges its subscribers for its own programming, then the operator can readily price all carriage applicants out of the market.

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PETITION FOR RECONSIDERATION OF THE NATIONAL LEAGUE OF CITIES; THE UNITED STATES CONFERENCE OF MAYORS; THE NATIONAL ASSOCIATION OF COUNTIES; MONTGOMERY COUNTY, MARYLAND; AND THE CITY OF LOS ANGELES, CALIFORNIA

To: The Commission

Pursuant to 47 C.F.R. § 1.429, the National League of Cities; the United States Conference of Mayors; the National Association of Counties; Montgomery County, Maryland; and the City of Los Angeles, California, hereby petition the Commission to reconsider its order regarding open video systems ("OVS"), Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46, Second Report and Order (released June 3, 1996) ("Order"), together with the rules adopted therein.

Much of the Order is misguided. The Commission's overall approach to OVS is a giveaway that enriches well-heeled local exchange carriers ("LECs") at local governments' — and ultimately federal taxpayers' — expense. The Commission has impermissibly attempted to insert itself into the complex web of existing property relationships that exists between cities, counties, and LECs. The Commission should confine itself to making federal rules for OVS,

as the statute directs, and refrain from attempting to intrude upon state and local right-of-way relationships with OVS operators.

I. THE COMMISSION CANNOT PREEMPT LOCAL FRANCHISING REQUIREMENTS BASED ON STATE AND LOCAL LAW INDEPENDENT OF THE FEDERAL CABLE ACT.

Although far from a model of clarity, the Order appears to preempt all local franchising authority over OVS, whether based on federal or on state and local law.[1] To be sure, parts of its discussion correctly refer to "Title VI" franchises — the federal franchising requirements from which OVS is exempted under the Telecommunications Act of 1996 ("1996 Act").[2] Similarly, Chairman Hundt's statement appears to suggest that the Order is intended to preserve all rights under state and local law, including, where applicable, the right to require a franchise.[3] Key sections of the Order's discussion, however, are couched in terms that would allow OVS operators to argue that all local franchise requirements are preempted.[4]

The Commission should revise the Order to make clear that no such preemption is intended.

---

[1] See Order, ¶¶ 207-222 (headed "Preemption of Local Franchising Requirements").

[2] Id. at ¶¶ 211-212, 214.

[3] Separate Statement of Chairman Reed E. Hundt at 2.

[4] See ¶ 211 ("Title VI franchise-like"); ¶ 213, referring to "any requirement"; ¶ 215; and ¶ 222.

A. The Order Has No Authority Under the 1996 Act to Preempt Non-Title VI Local Franchising.

Section 302 of the 1996 Act exempts OVS only from certain provisions of Title VI; it makes no reference at all to preempting non-Title VI state or local requirements to obtain a franchise or similar authorization to use of local public property not owned by the federal government.[5] Many state constitutions, as well as city charters, establish such requirements.[6] Given the prevalence of such provisions, Congress must be presumed to have known of them. Rather, Congress made clear that the 1996 Act was not to be read to preempt any local authority by implication.[7] Thus, even if the Order gave any grounds for supposing that preemption of state and local law requirements was intended by Congress — and it does not — the Commission could not assume that such a preemption was intended in the absence of a specific directive from Congress.[8] The Commission's apparent attempt to aggrandize its authority at the expense of state sovereignty, without congressional authorization, raises serious Tenth Amendment issues.[9]

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[5] Reply Comments of the National League of Cities, et al. at 37-42 (April 11, 1996) ("NLC Reply Comments").

[6] See, e.g., Constitutions of Alabama, Arizona, Colorado, Georgia, Idaho, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, Utah, Virginia and Wyoming.

[7] See 1996 Act, § 601(c)(1) ("This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments").

[8] See Order at ¶¶ 212-213 (claiming without any support that all state and local franchise requirements would conflict with Section 653)

[9] "The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. CONST. amend. 10.

What policy reason does the Order give for invading local property rights and exceeding the express mandate of Congress? The Order offers only the unsupported suggestion that any lesser preemption would render an OVS operator's exemption from Title VI franchise requirements meaningless. Order at ¶ 215. But the Order offers no evidence that non-Title VI local franchises could or would impose build-out requirements of the sort to which the Order objects. If that is the Commission's worry, it should preempt such build-out requirements rather than preempting non-Title VI franchise requirements.

B. Preemption of Non-Title VI Franchises Would Violate the Fifth Amendment.

1. The Order's Claim That Just Compensation Is De Minimis Ignores the Actual Market Value of the Rights-of-Way.

The Order claims that since any loss in value is de minimis, the fee in lieu represents "just compensation" for taking the rights-of-way. This unsupported claim is sheer nonsense. It does not in any case avoid a takings analysis, since constitutional protection does not "depend on the size of the area permanently occupied."[10] But in any event, it ignores the scope of a local government's loss if its rights-of-way are left open for anyone to install an OVS, whether that loss is measured as a reduction in market value or based on the new direct costs imposed on local governments by OVS.

---

[10] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436-437 (1982).

2. The Order Grossly Underestimates the Market Value Compensation Due to Franchising Authorities, As Reflected In Existing Franchises.

The Order grossly underestimates the amounts that would be required to compensate local governments for the Commission's proposed seizure of local rights-of-way.[11] The Order claims that "Congress enacted the cable franchise fee as the consideration given" by a cable operator, and suggests that the OVS "fee in lieu" is therefore all that is needed to make local governments whole.[12] But local governments have a right to compensation for the use of their public rights-of-way as a matter of property law, not by congressional enactment, and the compensation a local government receives in a franchise goes far beyond a monetary franchise fee.

The sample franchise agreements attached to this Petition illustrate the commitments that cable operators and other telecommunications users of the rights-of-way make as part of their compensation to the franchising authority.[13] It is clear from these examples that the full compensation may be well over twice the amount of any cable franchise fee.[14] It is also clear

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[11] See NLC Comments at 65-67.

[12] Order at ¶ 219 (emphasis added).

[13] See Cable Television Franchising Agreement Between City of Alexandria, Virginia and Jones Intercable of Alexandria, Inc. (June 18, 1994) ("Alexandria Franchise"); Franchise Agreement Between Tele-Vue Systems, Inc. D/B/A Viacom Cable and King County, Washington (1995) ("King County Franchise"); Resolution of Board of Estimate, City of New York, granting Metropolitan Fiber Systems of New York, Inc., a franchise (June 29, 1990) ("New York Franchise"); County of Boone, Ordinance No. 450.1, Granting a Cable TV Franchise to Storer Communications of Northern Kentucky, Inc. (Dec 16, 1980) ("Boone/Storer Franchise"); Ordinance No. 450.4, granting a franchise to Jacor Cable, Inc. (1989) ("Boone/Jacor Franchise").

[14] See, e.g., Alexandria Franchise (only three percent franchise fee out of total calculable benefits approximating seven percent of gross revenues); New York Franchise at § 8.1 (compensation includes ten percent of gross revenues from telecommunications services and five percent of gross revenues from leases and sales, in addition to exclusive use of between 12 and 24 strands of dark fiber plus additional fiber, drop cables).

that both the amount and the types of compensation that result from negotiations in the marketplace will vary from case to case, even within a given franchise area. Such types of compensation include, without limitation, the following broad categories:

(a) **Franchise fee** (cash compensation that may be used by the franchising authority for any purpose[15]).

(b) **In-kind compensation**. Such compensation, over and above franchise fees, includes public, educational, and governmental ("PEG") channels, services, facilities and equipment, provided both literally in kind and through funds dedicated to capital costs for PEG access facilities.[16] In effect, the 1984 Cable Act channeled compensation through PEG by limiting the amount of franchise fees: if it had limited all compensation, the 1984 provision too would have violated the Fifth Amendment. PEG facilities, in turn, also include institutional networks ("I-nets"), which, as discussed below, may be negotiated into franchise requirements.[17] Other in-kind compensation may include providing cable or other services to municipal facilities without charge.

(c) **Other community benefits**. A franchises requires the franchise-holder to provide numerous other public benefits in return for the right to occupy local public rights-of-way. Depending on individual community needs and interests and the results of negotiations,

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[15] See 47 U.S.C. § 542(i).

[16] See 47 U.S.C. § 542(g)(2)(C). The Supreme Court has recently held explicitly that PEG channels represent "part of the consideration an operator gives in return for permission to install cables under city streets and to use public rights-of-way." Denver Area Educational Telecommunications Consortium, Inc. v. FCC, Nos. 95-124 and 95-227, slip op. at part I, p. 3 (June 28, 1996) (opinion of Breyer, J., Stevens, J., O'Connor, J., and Souter, J.).

[17] See 47 U.S.C. § 531(b), (f).

franchise-holders may provide several additional forms of compensation to the public in return for use of public property, including inter alia:

- line extension obligations that typically require the franchisee to extend service to all areas of the community above a specified minimum density requirement
- system design parameters, including channel capacity and system architecture requirements
- emergency access or override requirements
- requirements for specific types of service or broad categories of programming, such as local origination programming
- conditions regarding the sale or transfer of a franchise, including right of first refusal
- conditions forbidding exclusive contracts and discrimination among customers
- subscriber privacy provisions
- customer service and service quality standards
- continuous service obligations and remedies for unauthorized interruptions
- construction, safety, restoration, relocation and removal requirements
- interconnection requirements
- employment, purchasing, and minority business requirements
- provisions regarding insurance, indemnification, reimbursement of costs, and interest on late payments
- franchise term limitations and other mechanisms permitting the parties to reopen the agreement under specified circumstances

- security funds, performance bonds letters of credit, liquidated damages, termination procedures and other means of enforcing the above obligations

All the above benefits constitute part of a franchise-holder's total compensation to the community in return for use of the community's property.

The Order's rules fall far short of ensuring that an OVS operator will match this level of compensation. As to franchise fees, the revenue base for the fee in lieu is different from the cable franchise fee base, insofar as programming revenues for independent video programming providers are not included.[18] In addition, the Commission has not made clear that the local government has positive authority based on federal law to charge and receive the fee in lieu. Thus, if state law normally requires that such a charge must be made through grant of a franchise, the Commission's rules create the possibility that some communities may not be able to obtain the fee in lieu.[19]

As to in-kind and other benefits, the OVS operator's compensation will equal that of the cable operator only if the OVS operator provides the same or equal benefits, in every respect, that the cable operator must provide under its franchise agreement. To the extent that the benefits provided by an OVS operator under the Commission's rules, over and above any such benefits already required of a cable operator under its franchise agreement, would fall short of this standard, the local government must have the opportunity to negotiate equivalent benefits,

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[18] See Order, ¶ 220.

[19] In addition, the Order incorporates the effects of the Commission's incorrect decision in United Artists Cable of Baltimore, Memorandum Opinion and Order, FCC 96-188 (April 26, 1996). See ¶ 220 n.499. This decision is currently on appeal to the Fifth Circuit. There is no statute or Commission rule that places such a limitation on franchise fees.

or else the Commission will have deprived the community of just compensation and failed to match the cable operator's obligations. To the extent that the Commission's vicarious generosity extends to multiple OVS operators (since "any person" is eligible), a local government's potential loss of compensation may be multiplied many times.

Local governments' potential compensation from leasing the rights-of-way are of exactly the same kind as the federal government's potential benefits from spectrum auctions, of which the Commission has spoken so highly. The "de minimis" claim ignores this potential. When a major value of the property lies in the owner's ability to lease remaining space to OVS and other telecommunication providers, an attempt by the Commission to allow "any person" to take such a lease for free would deprive the owners of the enormous market value associated with lost opportunities for revenue.

3. The Order Fails to Recognize That OVS Will Impose Massive Costs On Local Governments.

The Order's off-hand attempt to dismiss as de minimis local governments' costs of repair and maintenance for the rights-of-way, including costs attributable to street cuts, paving and repaving, makes clear that the Commission is woefully ignorant of the costs of repairing and maintaining rights-of-way.

The Order appears to visualize the intrusion of an OVS as merely a single thin wire insinuated harmlessly into the rights-of-way. This naive picture is grossly inaccurate.[20]

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[20] The Court in United States v. Causby, 328 U.S. 256, 265 n. 10 (1946) noted that ejectment would lie for a single telephone wire strung over plaintiff's property even if it did not touch the soil. "[A]n owner is entitled to the absolute and undisturbed possession of every part of his premises . . . If the wire had been a huge cable there would have been a