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 by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION REPLY COMMENTS

The National Telecommunications Cooperative Association (NTCA)[1] files these reply comments in response to initial comments filed April 20, 2007, regarding the Federal Communications Commission's (Commission's or FCC's) Report and Order and Further Notice of Proposed Rulemaking (Order or FNPRM) on new competitive video franchise applications.[2] NTCA affirms its view that the Commission should allow rural incumbent video providers to choose whether to adopt the Commission's new competitive franchise framework or to negotiate with the LFA and create an alternative framework during the renewal process.[3] This approach will allow rural incumbents to maintain good relationships with their LFAs while providing them with a fall-back regulatory framework if the LFAs demand unreasonable concessions.

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[1] NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents 575 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

[2] *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*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking (rel. Mar. 5, 2007) (Order or FNPRM).

[3] NTCA Comment, pp. 1-2. NTCA affirms its positions stated in its initial comments. NTCA silence on any positions or proposals raised by parties in this proceeding connotes neither agreement nor disagreement by NTCA with those positions or proposals.

Many commenters agreed with NTCA that incumbent cable providers should be able to benefit from some or all of the Commission's new video franchise rules for new entrants.[4] The Commission should reject the suggestions by some to preserve the status quo because incumbents, like new entrants, can be faced with unreasonable franchise demands by the LFAs. Existing cable providers whose franchise agreements become commercially impracticable due to competitive entry can turn to either their "most favored nations" (MFN) contract provisions or to Section 625 of the Cable Act to modify their existing franchise agreements.

I. Commenters Agree That Video Providers And Their Subscribers Will Benefit If They Can Participate Using The New Video Franchise Rules.

NTCA agrees with TIA that the local franchise process can impede timely investment in new facilities and capabilities, slowing delivery of competitive and innovative services to consumers.[5] A new entrant may cause the incumbent's franchise agreement to become commercially impracticable, according to the Fiber-To-The-Home-Council.[6] Regulatory competitive parity is critical when a new entrant's arrival renders the incumbent's existing franchise agreement uneconomic. In such a circumstance, the incumbent cable operator should be allowed to either renegotiate its franchise with the LFA or implement the new provisions.

Requiring all incumbents to adhere to the new competitive franchise rules may not be in the best interests of the incumbents' rural customers as it can create hard adversarial stances,

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[4] Alcatel-Lucent Comment, p. 5; AT&T, Inc., Comment, p. 2; Charter Communications Comment, p. 1; Fiber-To-The-Home-Council Comment, p. 3; National Cable & Telecommunications Association (NCTA) Comment, pp. 4-5; RCN Telecom Services, Inc. Comment, p. 2; Telecommunications Industry Association (TIA) Comment, p. 3; Time Warner Cable, Inc. (Time Warner Cable) Comment, p. 4; Verizon Comment, p. 3.

[5] TIA Comment, p. 3.

[6] Fiber-To-The-Home-Council Comment, pp. 6-7.

rather than cooperative negotiation positions that would otherwise exist. Contrary to the positions of some commenters, though, granting relief to new entrants but not incumbents does create barriers – barriers to competition, creating an imbalance in abilities to deploy broadband and new video services.[7] Allowing incumbents to choose whether to proceed under the old system or access the new franchise framework will maximize the video providers' flexibility.

II. The Commission Should Reject Calls To Prevent Incumbent Video Providers From Accessing Streamlined Franchise Procedures.

Several commenters urged the Commission not to extend the new franchising rules to incumbent video providers.[8] NATOA *et al.*, for example, assert that incumbents do not face the same handicaps as new entrants, so build-out requirements and mixed-use aspects of the Video Franchise Order should not be extended to incumbents.[9] This perspective fails to acknowledge that LFAs may attempt to insert unreasonable provisions into the incumbent's new franchise agreement during negotiations between LFA and cable provider, thus delaying the renewal process. The New Jersey Board of Public Utilities and commenters from cities in Colorado, Massachusetts, New Hampshire, New York, Oregon and Washington contend that either state law prevents the FCC from exercising its authority or the FCC lacks the authority under Section 621 of the Cable Act to extend the new franchising framework to incumbents.[10] The

[7] *See, e.g.,* Massachusetts and New Hampshire Cities of Abington, MA, *et al.* Comment, p. 2.

[8] *See, e.g.*, Fairfax County Comment, p. 6.

[9] National Association of Telecommunications Officers and Advisors (NATOA) *et al.* Comment, pp. 5, 14; Massachusetts and New Hampshire Cities of Abington, MA, *et al.*, Comment, p. 1.

[10] Greater Metro Telecommunications Consortium, City of Colorado Springs, Colorado, and City of Tacoma, Washington Comment, p. 2; New Jersey Board of Public Utilities Comment, pp. 2-3; Massachusetts and New Hampshire Cities of Abington, MA, *et al*., Comment, p. 3; New York City Comment, p. 2; MACC and Oregon Cities Comment, p. 2.

Commission has already stated it does not have enough evidence to make a determination regarding state law.[11] To think the Commission will exempt new state franchise laws from the Cable Act's prohibition against unreasonable barriers to entry and unreasonable refusals of franchise agreements at this early stage is wishful thinking.

The Commission can exercise its jurisdiction under various sections of the Cable Act to extend the Video Franchise Order's framework to incumbents. The time to for cable operators to consider exercising that jurisdiction, as discussed later, is either: 1) in accordance with the "Most Favored Nations" (MFN) contract provisions that may be contained in the existing franchise agreements; 2) upon renewal; or 3) upon a showing of "commercial impracticability" under Section 625 of the Cable Act. The National Cable & Telecommunications Association (NCTA) correctly noted that the Commission's clarification of "franchise fee" falls squarely within Section 622, which applies to all cable operators.[12] Likewise, the Commission's new framework for public, education and government (PEG) and institutional network (I-Net) channels fall within the Commission's authority under Section 611(a) of the Cable Act.[13] Similarly, the authority that LFAs have over "mixed-use" facilities of both incumbents and new entrants is restricted under Section 602(7) of the Cable Act. These provisions and more provide adequate authority for the Commission to extend the Video Franchise Order provisions to incumbents.

Commenters from cities in Minnesota and Iowa urge the Commission to delay extending the new framework to incumbents either because appeals of the Video Franchise Order are

[11] NPRM, ¶¶ 1, 16.

[12] NCTA Comment, pp. 3-4.

[13] *Id.*, p. 4.

pending or because the new rules will eliminate a cable operator's incentive to negotiate in good faith.[14] For those cable operators whose franchise agreements are due for renewal, and for those operators whose existing agreements have become "commercially impracticable" due to competitive entry, waiting for a final appellate resolution is neither practical nor reasonable. These existing cable operators should be allowed to negotiate in accordance with the new video franchise framework if they so choose. As for manipulating the cable operator's incentive, rural cable operators generally reside in or near the communities they serve so they have ample incentive to maintain good relationships with the LFA and to negotiate in good faith. For those few instances where an LFA is delaying the agreement, the new franchise framework will provide plenty of incentive for the LFA to negotiate in good faith.

III. The New Rules Should Be Implemented Upon Renewal, Through MFN Provisions, Or Upon A Showing Of Commercial Impracticability Under Section 625.

The time to for cable operators to consider implementing the provisions of the Video Franchise Order is either: 1) in accordance with the MFN contract provisions that may be contained in the existing franchise agreements; 2) upon renewal; or 3) upon a showing of "commercial impracticability" under Section 625 of the Cable Act. The Commission's NPRM seeks comment on the effect of MFN clauses contained in franchise agreements that would allow cable operators to revise their existing franchise agreements to match those of new entrants.[15] Alcatel-Lucent contends that those cable operators whose franchise agreements contain MFN clauses should be allowed to exercise the clauses because "MFN clauses were included in

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[14] Minnesota Cities of Burnsville, *et al.*, Comment, p. 7; Iowa City Comment, p. 1.

[15] NPRM, ¶ 140.

franchise agreements specifically so that incumbents could amend their agreements if new entrants had differing franchise obligations." For those franchise agreements that do not contain MFN clauses, Alcatel-Lucent contends that the cable operator should be allowed to modify the agreement under Section 625 to address unforeseen circumstances that render the agreement commercially impracticable.[16] Verizon echoes this position, saying that an incumbent cable operator should be bound to the agreements it made with the LFA until renewal or unless the cable operator satisfies the Section 625 modification standard and procedures for "commercial impracticability."[17] RCN supports implementation of the Video Franchise Order upon renewal.[18]

This approach is sound and reflects basic contract principles and existing statutory relief. Section 625(f) defines "commercially impracticable" as: "commercially impracticable for the operator to comply with such requirement as a result of a change in conditions which is beyond the control of the operator and the nonoccurrence of which was a basic assumption on which the requirement was based."[19] A cable operator who seeks to modify an existing franchise using a Section 625 "commercial impracticability" premise can seek state or federal court revision of the franchise agreement if the LFA denies the cable operator's request after a public proceeding.[20]

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[16] Alcatel-Lucent Comment, p. 6.

[17] Verizon Comment, p. 11.

[18] RCN Comment, p. 4.

[19] 47 U.S.C. § 545.

[20] 47 U.S.C. § 545(a); 47 U.S.C. § 555.

Several commenters urge the Commission to implement the new rules immediately.[21] Time Warner Cable, for example, contends that waiting until renewal will distort competition and create an inconsistent regulatory framework.[22] Time Warner Cable contends that it would be arbitrary, capricious and contrary to law if the Commission did not allow incumbents to benefit from the rule changes immediately.[23] NCTA recommends that the provisions in the Video Franchise Order regarding franchise fee calculation, PEG/I-Net obligations, and mixed-use regulation be implemented immediately.[24] The Commission should hesitate following these recommendations because they contradict the reasonable expectations of the LFA and cable operator that existed at the time the franchise agreement was finalized.

The Commission chose not to consider in its NPRM extending its new franchise rules immediately to existing cable operator franchises but, instead, chose to conclude tentatively that these rules could be extended upon renewal or negotiation of new agreements.[25] This conclusion is correct. Section 625 provides a mechanism, albeit somewhat cumbersome, whereby a cable operator can change or modify its existing franchise agreement. Rather than implementing new changes immediately, as Time Warner Cable suggests, the better course is to allow incumbents to demonstrate through a Section 625 review that their existing agreements are so unfair as to be commercially impracticable. There is no need for the Commission to ignore the statutory fail-

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[21] Time Warner Cable Comment, p. i; Charter Communications, p. 5.

[22] Time Warner Cable Comment, p. i.

[23] *Id.*, p. ii.

[24] NCTA Comment, p. 8.

[25] NPRM, ¶ 140.

safe device that was created to protect cable operators from unforeseen circumstances. If a cable operator thinks, for example, that its franchise fee is too high or is calculated incorrectly, it can seek Section 625 review with the LFA first and, if necessary, with the federal courts second. Section 625 already provides adequate protections for cable operators who find themselves with commercially impracticable franchise agreements.

III. Conclusion.

For these reasons, the Commission should allow incumbent rural franchisees to choose whether to adopt the Commission's new competitive franchise framework or to negotiate with the LFAs and create an alternative framework upon renewal. The Commission should reject the suggestions by some to preserve the status quo because incumbents, like new entrants, can be faced with unreasonable franchise demands by the LFAs. Existing cable providers whose franchise agreements become commercially impracticable due to competitive entry can turn to either their MFN contract provisions or to Section 625 of the Cable Act to modify their existing franchise agreements.

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CERTIFICATE OF SERVICE

I, Adrienne Rolls, certify that a copy of the foregoing Reply Comments of the National Telecommunications Cooperative Association in MB Docket No. 05-311, FCC 06-180, was served on this 7th day of May, 2007 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

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