

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 )

**REPLY COMMENTS OF**



**NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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## TABLE OF CONTENTS

INTRODUCTION AND SUMMARY .....	1
I. A BROAD GROUP OF COMMENTERS SUPPORT APPLICATION OF THE COMMISSION’S CONCLUSIONS TO ALL OPERATORS .....	3
II. THE CONCLUSIONS OF THE <i>REPORT AND ORDER</i> APPLY TO ALL CABLE OPERATORS IMMEDIATELY .....	8
III. THE ARGUMENTS AGAINST APPLYING THE <i>ORDER’S</i> LEGAL CONCLUSIONS TO EXISTING OPERATORS IGNORE THE LEGAL BASIS FOR THOSE CONCLUSIONS .....	12
IV. MOST FAVORED NATION CLAUSES.....	17
CONCLUSION.....	20

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The National Cable & Telecommunications Association (“NCTA”) hereby submits its reply comments on the *Further Notice of Proposed Rulemaking* (“*Further Notice*”) in the above-captioned proceeding.<sup>1</sup>

**INTRODUCTION AND SUMMARY**

In our initial comments, we demonstrated that in three particular areas addressed in the *Report and Order* in this proceeding, the Commission’s “findings” were – as a matter of law – applicable immediately to all cable operators. Specifically, with respect to (1) The Definition and Computation of Franchise Fees, (2) PEG and Institutional Network (“I-Net”) Requirements, and (3) Regulation of “Mixed-Use Networks,” the Commission essentially restated or clarified the law regarding provisions of the Communications Act, including Section 622 (franchise fees) and Section 611 (PEG/I-Nets), applicable to *all* cable operators. As the Commission said in the

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<sup>1</sup> *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, FCC 06-180, rel. Mar. 5, 2007 (“*Report and Order*” or “*Further Notice*”).

*Further Notice*, Section 622(a) and Section 611 “do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants.”<sup>2</sup>

*First*, in claiming to reach conclusions regarding what franchise fees are “unreasonable” under Section 621(a)(1), the Commission essentially interpreted and clarified the term “franchise fee” as defined in Section 622 of the Act. The resulting definitions or clarifications of the term “franchise fees” under Section 622 apply immediately to all cable operators.<sup>3</sup>

*Second*, in purporting to determine “reasonable” requirements for PEG channels and institutional networks under Section 621(a)(1), the Commission clarified the permissible requirements under Section 611(a) of the Act, which places limits on the authority of local franchising authorities to establish channel capacity requirements for PEG channels and requirements for institutional networks. Just as with franchise fee clarifications, these clarifications of Section 611 requirements also must apply immediately to all cable operators subject to those requirements.<sup>4</sup> And, to the extent the Commission claimed to interpret the term “adequate” PEG requirements in Section 621(a)(4) in reaching its conclusions, that provision is independent of Section 621(a)(1) and applies to all franchise holders.

*Finally*, we showed that the Commission’s “clarification” of what authority LFAs have over “mixed-use” facilities is, at bottom, an interpretation of other provisions of the Act, including the definition of “cable system” under Section 602(7) of the Act, which apply equally to existing cable operators and new entrants alike.<sup>5</sup>

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<sup>2</sup> *Report and Order* at ¶ 140 (emphasis added).

<sup>3</sup> NCTA Comments at 9-17.

<sup>4</sup> *Id.* at 17-19.

<sup>5</sup> *Id.* at 19-20.

As we show below, numerous commenters support application of the Commission’s conclusions in these three areas to existing cable operators. While some endorse the Commission’s tentative conclusion that would apply these findings to existing operators only upon renewal or at some other time, none of those arguments for delayed application are persuasive given that the Commission’s restatement or clarification of the law applies immediately to all subject to those provisions. Finally, those who question the Commission’s authority to apply its conclusions to existing operators proceed from the incorrect premise that the Commission’s action was based on Section 621(a)(1), when, in fact, Commission authority to interpret other statutory provisions – specifically Sections 622, 611(a) and 602(7) – were at issue.

**I. A BROAD GROUP OF COMMENTERS SUPPORT APPLICATION OF THE COMMISSION’S CONCLUSIONS TO ALL OPERATORS**

A wide variety of commenters support application of the Commission’s findings – particularly with regard to franchise fees, PEG/I-Net requirements and “mixed-use” facilities – to all cable operators. In addition to NCTA, these commenters include existing cable operators (*e.g.*, Time Warner Cable, Charter Communications); cable overbuilders (*e.g.*, RCN Telecom, WideOpenWest Finance, Knology, Inc., Broadband Service Providers Association); telephone companies (*e.g.*, Verizon, AT&T); and equipment manufacturing companies and others (*e.g.*, Alcatel-Lucent, Fiber-to-the-Home Council).

All of these commenters make the point that, as a matter of law and policy, the Commission’s findings in a number of areas should apply to existing cable operators. For example, as Time Warner Cable states: “[W]hether or not the Commission has the authority to take all of the actions announced in the Order/FNPRM, it can and should extend a number of those actions to existing operators – particularly the clarification of the franchise fee rates and

PEG/I-Net requirements – for which it clearly has statutory authority independent of Section 621.”<sup>6</sup> Charter makes the same point: “[T]he Commission should, and indeed must, hold that its interpretation of the Cable Act’s provisions apply equally to all cable operators, regardless of when the operator entered the market or the current status of their franchise.”<sup>7</sup> Charter explains: “The Commission’s findings, particularly its interpretation of Section 622 regarding franchise fees and Section 611 regarding I-Nets, must apply immediately to all cable operators to promote robust competition that will benefit consumers. Such an immediate, symmetric application of the Commission’s interpretations is dictated by the Commission’s policies and by the plain language of the statute.”<sup>8</sup>

Overbuilders – or “competitive network operators” – who already have franchises make the same “parity” point as traditional cable operators. Indeed, WideOpenWest draws the same legal conclusion NCTA and others have drawn with respect to application of the Commission’s findings to existing operators: “Much of the Franchising Order confirms existing law and consequently applies to all cable operators and franchising authorities.... [M]uch of the discussion in the *Order* is of existing law that is not just ‘germane,’ but [is] clearly applicable to *all* existing franchises.”<sup>9</sup>

The Broadband Service Providers Association echoed that position in the initial rulemaking:

[T]he current Franchise process has not been completely effective or efficient. ... The only way to effectively break this cycle is to more clearly define the obligations and contributions that are justified for an MVPD network operator to

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<sup>6</sup> Comments of Time Warner Cable Inc. at 4.

<sup>7</sup> Initial Comments of Charter Communications, Inc. at 1.

<sup>8</sup> *Id.* at 15.

<sup>9</sup> Comments of WideOpenWest Finance, LLC at 6 (emphasis in original).

provide to an LFA *and apply them to each operator, incumbent or new*, on a per subscriber basis as historically has been done with franchise fees. Obligations that need to be addressed with clear boundaries include, but are not limited by INET, PEG Channels, and any PEG support fees.<sup>10</sup>

In the same vein, RCN emphasizes that “the same reforms must at a minimum apply to existing cable operators at the time of renewal.”<sup>11</sup> In proposing that LFAs be required to apply the “fresh look” doctrine to existing franchises when a new provider enters a market, RCN notes that “[b]y applying the rule to all operators in a market, the Commission will promote consumer choice and full and fair competition without governmentally-imposed fees and costs on some operators but not others.”<sup>12</sup> Knology makes the same “fair competition” point, concluding, “Knology respectfully requests that the Commission apply those rules to renewals of existing franchises to preserve existing and future competition in the provision of cable television services.”<sup>13</sup>

The Commission observed in the *Further Notice* that the “record does not indicate any opposition by new entrants to the idea that any relief afforded them also be afforded to incumbent cable operators.”<sup>14</sup> In their comments, “new entrants” Verizon and AT&T continue to support extension of the Commission’s findings to all cable operators, albeit with some timing issues.

For example, in discussing the *Report and Order*, Verizon notes that “many of those findings and rules were based in large part on provisions of the Cable Act that, on their face,

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<sup>10</sup> Reply Comments of Broadband Service Providers Association at 6, filed March 28, 2006 (emphasis added).

<sup>11</sup> Comments of RCN Telecom Services, Inc. at 4.

<sup>12</sup> *Id.* at 7.

<sup>13</sup> Comments of Knology, Inc. at 14. *See also id.* at 4 (“Knology supports the extension of the current rules to all cable franchise renewals, whether or not a competitor serves the market.”)

<sup>14</sup> *Further Notice* at ¶ 139.

apply equally to all providers.”<sup>15</sup> Indeed, Verizon repeats NCTA’s main point in observing that “many of its specific findings were independently required or supported by other provisions of the Cable Act.”<sup>16</sup>

AT&T’s position is a little more nuanced. It first claims that it “generally supports efforts to deregulate incumbents as competitive conditions warrant it.”<sup>17</sup> However, it then “questions the Commission’s priorities in rushing to ‘level the regulatory playing field’ for incumbent cable operators only six months after extending franchising reform to new video entrants” in light of pending proposals to eliminate regulations on incumbent telephone companies.<sup>18</sup> We appreciate AT&T’s support for efforts to deregulate incumbents in this proceeding and elsewhere. As for the Commission’s “priorities,” since the Commission has committed to concluding this rulemaking and releasing an Order within six months,<sup>19</sup> it has already set its priorities. As Commissioner McDowell said: “Resolving these important questions soon will give much-needed regulatory certainty to all market players, spark investment, speed competition on its way, and make America a stronger player in the global economy.”<sup>20</sup>

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<sup>15</sup> Comments of Verizon at 10.

<sup>16</sup> *Id.*

<sup>17</sup> Comments of AT&T Inc. at 3 (unnumbered).

<sup>18</sup> *Id.*

<sup>19</sup> *Further Notice* at ¶ 140. *See also* Statement of Commissioner Robert M. McDowell at 2 (“I am pleased that the Chairman has agreed to release an order as a result of the Further Notice no later than six months from the release date of this order, and regardless of the appellate posture of this matter.”).

<sup>20</sup> Separate Statement of Commissioner Robert M. McDowell at 2.

In addition to traditional cable operators, overbuilders, and new entrants, equipment manufacturers and others filed comments that recognize the need for competitive parity and urge application of the *Report and Order's* findings to existing cable operators. As Alcatel-Lucent observes: “Regulatory parity among competitors is the most effective means of ensuring such full and fair competition.”<sup>21</sup> It concludes: “As technology develops and allows once-distinct services to be offered over competing platforms, regulatory parity is essential so that no technology is favored over another and the full benefits of competition can be realized.”<sup>22</sup>

Similarly, the Fiber-to-the-Home (“FTTH”) Council makes clear that the “Commission should act to ease the burdens for existing cable operators now, *prior* to the renewal of their franchises, and has the legal authority to take such action.”<sup>23</sup> Indeed, in an analysis similar to NCTA’s, the FTTH Council notes that the “legal findings by the Commission interpret provisions of the statute applicable to all cable operators without qualification.”<sup>24</sup> It concludes that the “key findings in the *Local Franchising Order* regarding franchise fees, PEG/I-Nets, and mixed-use networks are clearly applicable to all existing franchisees....”<sup>25</sup>

For the reasons stated by NCTA and the diverse commenters cited above, the Commission must apply its findings on franchise fees, PEG/I-Nets, and mixed-use facilities to existing cable operators. In the sections below, we address *when* those findings must be applied and rebut arguments that the Commission has no authority either to make those findings or to apply them to existing operators.

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<sup>21</sup> Comments of Alcatel-Lucent at 5.

<sup>22</sup> *Id.* at 8.

<sup>23</sup> Comments of the Fiber-to-the-Home Council at 2 (emphasis in original).

<sup>24</sup> *Id.* at 4.

<sup>25</sup> *Id.* at 9.

## **II. THE CONCLUSIONS OF THE *REPORT AND ORDER* APPLY TO ALL CABLE OPERATORS IMMEDIATELY**

As shown above, a wide variety of commenters demonstrated that – for both legal and policy reasons – the key findings of the *Report and Order* dealing with franchise fees, PEG/I-Net requirements and regulation of “mixed-use” facilities should apply to *all* cable operators. Nevertheless, some of these commenters, while supporting regulatory parity, argue that the Commission’s findings should not apply immediately to existing cable operators, but, instead, should apply at some time in the future.

In a sense this is not surprising for at least two reasons. First, the *Further Notice* specifically asked for comment on the Commission’s “tentative conclusion” that the findings in the *Report and Order* should apply to “cable operators that have existing franchise agreements *as they negotiate renewal of these agreements with LFAs.*”<sup>26</sup> Second, to the extent competitors to existing cable operators can delay a reduction in the regulatory burdens borne by existing operators, the greater advantage they have in winning consumer support.

The most blatant example of the latter is AT&T, which, as noted above, “generally supports efforts to deregulate incumbents,” but apparently, in the case of existing cable operators, not too quickly. At least not until a myriad of unrelated proceedings dealing with incumbent telephone company regulations are completed. That argument falls of its own weight as an obvious attempt to deny the benefits of deregulation to AT&T’s competitors.

Verizon’s comments appear to be an example of the former. It supports down the line the Commission’s tentative conclusions about applying the *Report and Order*’s findings to existing operators, including the tentative conclusion that they would apply to operators only at renewal

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<sup>26</sup> *Further Notice* at ¶ 140 (emphasis added).

time – without questioning or discussing why operators need to wait until renewal.<sup>27</sup> It then argues that “to the extent cable operators agreed to more than the Cable Act requires in their existing franchises, they are bound by the terms of those agreements until those franchises expire unless they are able to satisfy the standards for modification of an existing franchise set out in Section 625 of the Cable Act. But they are obviously free to negotiate different terms consistent with the Act when their franchises come up for renewal.”<sup>28</sup>

This is a particularly odd position to take given that Verizon recognizes, as NCTA’s Comments also demonstrated, that “many of [the *Order*’s] specific findings were independently required or supported by other provisions of the Cable Act.”<sup>29</sup> Indeed, Verizon states that the franchise fee, PEG/I-Net and mixed-use facilities findings were “*definitive constructions* of the limitations imposed by these statutory provisions.”<sup>30</sup> As such, those constructions apply immediately to all cable operators, as was the case when the Commission held that cable modem service was not a “cable service” in the *Cable Modem Declaratory Ruling*.<sup>31</sup>

In that decision, the Commission concluded that “[g]iven that we have found cable modem service to be an information service, revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined.”<sup>32</sup> That decision applied immediately to all cable operators and all franchises going forward while the Commission left for a further decision whether franchise fees *previously paid*

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<sup>27</sup> Comments of Verizon at 2, 10-11.

<sup>28</sup> *Id.* at 11.

<sup>29</sup> *Id.* at 10.

<sup>30</sup> *Id.* at 11 (emphasis added).

<sup>31</sup> *Inquiry Concerning High Speed Access to the Internet over Cable and other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002).

<sup>32</sup> *Id.* at 4850-4851 (¶ 105).

to LFAs and collected from subscribers pursuant to Section 622 were lawfully collected at the time and whether those fees should be refunded.<sup>33</sup>

Just as the *Cable Modem Declaratory Ruling* decision was effective immediately for all cable operators,<sup>34</sup> the same result obtains with regard to the Commission's definitive construction of terms regarding franchise fees, PEG/I-Nets and mixed-use facilities.

Moreover, Verizon is wrong to suggest that cable operators must be bound by franchise agreement provisions that are inconsistent with the law as interpreted by the Commission. The whole point of the 1984 Cable Act was to define and limit what may and may not be insisted upon *or agreed to* in franchise agreements. Courts have made clear (1) that the restrictions in Title VI *may not be waived* by cable operators, and (2) that contracts that are inconsistent with the Act's provisions are *preempted*.<sup>35</sup> Therefore, existing agreements do not stand in the way of applying the Commission's conclusions on franchise fees (or other issues) to existing operators immediately.

Knology also takes an unquestioning approach in endorsing the Commission's tentative conclusions and "supports extension of the Commission's rules to all cable franchise renewals."<sup>36</sup> Others suggest that existing operators should not get the benefit of the "findings" in the *Report and Order* until a new competitor enters the market either under an existing most-

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<sup>33</sup> *Id.* at 4852 (¶ 106).

<sup>34</sup> See *Time Warner Cable-Rochester v. Rochester*, 342 F.Supp. 2d 143 (W.D.N.Y., 2004); *Parish of Jefferson v. Cox Communications Louisiana, LLC*, 2003, WL 2163440 (E.D.La, July 3, 2003).

<sup>35</sup> See e.g., *Cable TV Fund 14-1, Ltd., V. City of Naperville*, No. 96 C 5962, 1997 WL 433628 (N.D. Ill, July 20, 1997). See also *Nashoba Communications Ltd. Partnership v. Town of Danvers*, 703 F. Supp. 161, *rev'd on other grounds*, 893 F.2d 435 (1<sup>st</sup> Cir. 1990).

<sup>36</sup> Comments of Knology at 3-5 (emphasis added). See also Comments of WideOpenWest at 5 (suggesting that at least "competitive" franchises should get the benefit of the "findings" prior to renewal).

favoured-nation provision<sup>37</sup> or by modification of the franchise under Section 625 of the Act,<sup>38</sup> or through a “fresh look” approach.<sup>39</sup>

None of these proposals for delay have any merit with respect to immediate application of the Commission’s conclusions regarding franchise fees, PEG/I-Net requirements and regulation of mixed-use facilities to existing operators. As NCTA and others demonstrated, the Commission’s findings on these issues were restatements or clarifications of existing law and therefore, as a matter of law, apply immediately to all cable operators subject to those provisions. Once “definitively construed” for one set of cable operators, those provisions and any clarifications apply to all cable operators immediately without waiting for renewal time, or enforcement of an MFN, or seeking modification of a franchise or until the Commission deals with unrelated requests for incumbent telephone company deregulation.

The FTTH Council made this point forcefully:

*In the Local Franchising Order, the Commission issued a set of five findings to “eliminate unreasonable barriers to entry into the cable market” and “encourage investment in broadband facilities.” All but two of these can be readily applied to all existing franchisees prior to the date they would be eligible for franchise renewal. Only the findings dealing with the timing of competitive entry and build-out requirements arguably are relevant exclusively to new entrants (post-adoption of the Local Franchising Order). The findings related to franchise fees, public, educational, and government (“PEG”) channels and institutional networks (“I-Nets”), and mixed-use networks relate both to the award of [a] franchise to a new entrant and the ongoing operations of incumbent and competing existing franchisees.*<sup>40</sup>

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<sup>37</sup> Comments of Alcatel-Lucent at 2, 4.

<sup>38</sup> *Id.* at 6-7. While the FTTH Council observes that the franchise fee, PEG/I-Net and mixed-use findings “apply immediately to existing providers and their franchise agreements,” it also suggests the Commission provide “guidance as to the term ‘commercial impracticability’ [in Section 625] so that existing cable operators can obtain relief by seeking to modify their franchise agreements.” FTTH Council Comments at 3, 9. This is not the appropriate proceeding to provide such “guidance” since, as the FTTH Council notes, the *Report and Order’s* key findings apply immediately to all operators as a matter of law without the need to modify any franchise agreements.

<sup>39</sup> Comments of RCN at 2, 7-9.

<sup>40</sup> FTTH Council Comments at 3 (footnotes omitted; emphasis added).

The FTTH Council explained that both legal and policy grounds support immediate application of the *Report and Order's* findings to existing operators:

*These legal findings by the Commission interpret provisions of the statute applicable to all cable operators without qualification. As such, and because they bear very much on ongoing operations of existing providers, the Commission should declare they are effective for existing franchise agreements as of the effective date of the Local Franchising Order and are to be enforced accordingly. This Commission ruling is of sufficient importance to the public interest that its effectiveness should not be forestalled by possibly ten years or more while waiting for existing franchise agreements to expire. In addition, as a policy matter, because new entrants will operate under these rules, they should apply at the same time to existing franchisees as well.*<sup>41</sup>

For these reasons and those detailed in NCTA's Comments, the findings of the *Report and Order* relating to franchise fees, PEG/I-Nets, and mixed-use facilities apply to all cable operators immediately.

### **III. THE ARGUMENTS AGAINST APPLYING THE *ORDER'S* LEGAL CONCLUSIONS TO EXISTING OPERATORS IGNORE THE LEGAL BASIS FOR THOSE CONCLUSIONS**

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Local franchising authorities and related groups oppose application of the *Report and Order's* findings to existing operators. To the extent those comments oppose application of the findings relating to franchise fees, PEG/I-Nets and mixed-use facilities to existing operators, they generally misapprehend the legal basis for immediate application of those findings to all operators subject to the relevant statutory provisions.

As we and others have noted, the Commission's findings as to franchise fees, PEG/I-Nets and mixed-use facilities were either restatements or clarifications of existing law. And the law being addressed was *not* Section 621(a)(1) dealing with additional competitive franchises; rather

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<sup>41</sup> *Id.* at 4-5 (emphasis added). See also Time Warner Cable Comments at 6-7 (franchise fees); 12 (PEG/I-Nets); 14 (mixed-use facilities); Comments of Charter at 10 (franchise fees); 14 (PEG/I-Nets).

it was Section 622 (franchise fees),<sup>42</sup> Section 611 (PEG/I-Nets)<sup>43</sup> or Section 602(7)(C) (definition of cable system).<sup>44</sup>

As such, the issue is not, as local franchising authorities argue, whether Section 621(a)(1) authorizes Commission action with respect to existing operators. Section 621(a)(1) is irrelevant to the franchise fee, PEG/I-Net and mixed-use findings insofar as those findings apply to existing operators. In this regard, NATOA incorrectly argues that the *Report and Order* “rest[s] on Section 621(a)(1) and, more specifically, on its provision prohibiting LFAs from ‘unreasonably refus[ing] to award *an additional competitive franchise.*’”<sup>45</sup> NATOA claims that “[e]ach of the *Order’s* six findings is explicitly tied to the Commission’s alleged authority under Section 621(a)(1)’s ‘unreasonable refusal’ language.”<sup>46</sup> It then erroneously concludes that, because “Section 621(a)(1)’s ‘unreasonable refusal’ provision does not apply to incumbent cable operators at all,”<sup>47</sup> the Commission’s findings cannot apply to existing operators. Similar arguments were made by other local franchising interests.<sup>48</sup>

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<sup>42</sup> NCTA Comments at 10-17.

<sup>43</sup> *Id.* at 17-19.

<sup>44</sup> *Id.* at 19-20.

<sup>45</sup> Comments of the National Association of Telecommunications Officers and Advisors, et al. (“NATOA”) at 5 (emphasis added by NATOA).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 6-7.

<sup>48</sup> *See, e.g.*, Comments of the Greater Metro Telecommunications Consortium, *et al.* at 3 (“By its terms, the ‘unreasonable refusal’ provisions of Section 621(a)(1) apply to ‘additional competitive franchise[s],’ not to incumbent cable operators.”); Comments of Fairfax County, Virginia at 6 (“The Commission’s authority to implement Section 621(a)(1) ends with the award of a franchise.”). Some recognize that the Commission acted under provisions other than Section 621(a)(1), but simply disagree with the Commission’s determinations. *See* Comments of the League of Minnesota Cities, *et al.* at 9 (“[T]he Commission attempts to rewrite a portion of Section [622] by setting forth certain limitations on the franchise fee authorized by Congress under the Cable Act. Minnesota Cities strongly disagree with the findings of the *Order*....”)

NATOA and others also argue that an existing operator’s “continued ability to operate in an LFA’s jurisdiction at the expiration of its current franchise is governed not by Section 621(a)(1), but by Section 626, the Cable Act’s provision concerning renewal of cable franchises” and “Section 626 does not empower the Commission to do what it proposes in the [*Further Notice*].”<sup>49</sup>

NATOA’s comments about Section 621(a)(1) and Section 626 may be correct, but they are irrelevant, at least with respect to application of the *Report and Order*’s franchise fee, PEG/I-Net and mixed-use findings to existing operators. The reason is simple: As NCTA and others<sup>50</sup> have demonstrated, the Commission’s “findings” were restatements or clarifications of existing law under provisions of the Act other than Section 621(a)(1) which need not, and do not, implicate Section 626 either.<sup>51</sup>

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<sup>49</sup> NATOA at 6-7. *See also* Comments of Certain Florida Municipalities at 2 (“Conditions that may be imposed upon cable franchise renewals are governed by Section 626 of [the] Cable Act”); Comments of the New Jersey Division of Rate Counsel at 5 (“Section 626 of the Act sets forth the congressional policy on what legal requirements are imposed on renewals”); Comments of Fairfax County, Virginia at 7 (“[F]ranchise renewals are governed by Section 626, not Section 621(a)(1) of the Communications Act”).

<sup>50</sup> *See e.g.*, Comments of Verizon at 10, 11 (“Many of those findings and rules were based in large part on provisions of the Cable Act that, on their face, apply equally to all providers,” citing Section 622 (franchise fees) in particular and noting that the conclusions regarding PEG and I-Net requirements and local regulation of mixed-use networks “all recognized the limitations imposed on LFAs by provisions of the Cable Act other than Section 621(a)(1)”; Comments of WideOpenWest at 6 (“Much of the franchising *Order* confirms existing law and consequently applies to all cable operators and franchising authorities,” citing the franchise fee findings in particular.); Comments of the Fiber-to-the-Home Council at 4 (FTTH Council recites the Commission’s “findings” on franchise fees, PEG/I-Nets, and mixed-use facilities and concludes that “[t]hese legal findings by the Commission interpret provisions of the statute applicable to all cable operators without qualification.”).

<sup>51</sup> *See* Comments of Charter at 8 (Section 622 and franchise fees); and 12 (Sections 611, 621(a)(4)(B) and PEG/I-Nets); Comments of Time Warner Cable at 4-6 (Section 622 and franchise fees); 11-13 (Sections 611(a) and 621(a)(4)(B) and PEG/I-Nets) and 13-14 (Section 602(7) and mixed-use facilities). Time Warner Cable seeks a further clarification under Section 622 which is consistent with the clarifications the Commission made in the *Report and Order*. Specifically, Time Warner (at 9) asks that the Commission clarify that, for purposes of calculating the five percent franchise fee limit, an operator’s gross revenues should be determined in accordance with GAAP. NCTA urges the Commission to make that clarification.

In the *Further Notice*, the Commission itself made plain that, at least with respect to its franchise fee and PEG/I-Net conclusions, it was relying on provisions of the Act other than Section 621(a)(1). It specifically cited Section 622 with respect to its franchise fee conclusions and Section 611(a) with respect to its PEG/I-Net conclusions and observed: “These statutory provisions do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants.”<sup>52</sup> Nothing could make it clearer that the *Report and Order* findings rest on provisions other than Section 621(a)(1). The same principle applies to the Commission’s conclusions regarding mixed-use networks under Section 602(7) of the Act. As a result, the arguments made by NATOA and others which are premised on the proposition that Section 621(a)(1) is inapplicable to existing operators and franchisees are irrelevant to whether the findings made under other provisions of the Act apply to all cable operators and apply immediately.

NATOA does belatedly and briefly acknowledge that the Commission did proffer “two Cable Act statutory justifications” for its tentative conclusions, citing Section 611 and Section 622, but it argues neither is valid. But it is NATOA’s argument that will not withstand scrutiny.

As for Section 622, NATOA concedes that, unlike the case with Section 621(a)(1), “the Commission does share concurrent jurisdiction with the courts on Section 622 franchise fee disputes....”<sup>53</sup> But, NATOA argues, since there is no “current dispute between LFAs and incumbent cable operators concerning Section 622’s meaning,” extending the *Report and Order*’s conclusions would be “a solution in search of a problem.”<sup>54</sup> It argues that, in order for

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<sup>52</sup> *Further Notice* at ¶ 140.

<sup>53</sup> Comments of NATOA at 11.

<sup>54</sup> *Id.* at 11, 12.

the Commission to address franchise fee issues, there must be a dispute that “directly impinges on a national policy concerning cable communications *and* implicates the agency’s expertise.”<sup>55</sup>

These arguments are off point. NATOA concedes, as it must, that the Commission has the authority to interpret and construe the franchise fee requirements in Section 622. The Commission obviously has the authority to *restate* and *clarify* existing law. That is what it has done in this case. To the extent a “dispute” over the statutory terms was needed for the Commission to take the action it did, these issues were presented in the proceeding that led to the *Report and Order* and provided a basis for the Commission to clarify the franchise fee requirements for all cable operators, since all are subject to those provisions. In any event, these issues are certainly joined in comments on the *Further Notice* and are in need of resolution. Indeed, if LFAs claim the right to charge more than the law permits, that is a “dispute” that is ripe for national declaratory relief.

As for the Commission’s citation to Section 611 as support for its conclusions on PEG/I-Net issues, NATOA asserts that “Section 611 gives the FCC no substantive authority or role [but] merely codifies preexisting LFA authority to require cable operators to provide PEG capacity and facilities.”<sup>56</sup> As a result, NATOA argues, Section 611 “provides the Commission with no authority to regulate or limit LFA PEG requirements.”<sup>57</sup>

This argument is also without merit. Unlike the case with Section 621(a)(1), where authority to implement, enforce, and review grants and denials under that provision is placed only in the courts and not the FCC, Section 611 has no such limitations. The Commission has

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<sup>55</sup> *Id.* at 11 citing *ACLU v. FCC*, 823 F.2d, 1554, 1573-74 (D.C. Cir. 1987) (emphasis added by NATOA).

<sup>56</sup> *Id.* at 10.

<sup>57</sup> *Id.* at 11.

the authority to interpret, construe and clarify its terms as it does with other provisions of its governing statute except where a provision includes limiting language (as does Section 621(a)(1)). As a matter of policy, to assure the Commission's stated goals of national uniformity, competition and consumer welfare, the same statute must have the same meaning for all parties subject to the statute's requirements.<sup>58</sup>

#### IV. MOST FAVORED NATION CLAUSES

The Commission also sought comment on “what effect, if any, the findings in this *Order* have on most favored nation clauses that may be included in existing franchises.”<sup>59</sup> Only a few parties addressed the MFN issue. For example, Minnesota Cities note that they “generally found MFN clauses acceptable because the cities understood that the cities, as LFAs, would control the franchise granted to competitive operators.”<sup>60</sup> But, they note that “this model has changed under the [*Report and*] *Order* since an LFA may now be forced to grant more favorable terms to a competitive operator even if the LFA does not agree that such terms are in the best interests of the community.”<sup>61</sup> They urge the Commission “to adopt policies that strengthen local authority to adopt cable television franchises which meet local community needs and interests by taking

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<sup>58</sup> The Minnesota Cities (at 21-22) take issue with three particular findings concerning the definition of franchise fees. First they argue that PEG access and institutional network obligations in agreements outside of the franchise agreement are not subject to the Federal franchise fee cap and that institutional network commitments paid for by local franchising authorities are not franchise fees. The short answer to these arguments is that individual cases raising specific issues must be dealt with on their merits in the courts. If such cases exist, they do not call into question the general rule and specific franchise fee clarifications made by the Commission in the *Report and Order* which must be applied to existing operators. Minnesota Cities also claim (at 22) that, in some cases, institutional networks were provided as “in-kind contributions” and are not franchise fees. But the issue of “in-kind” payments was addressed and clarified by the Commission in the *Report and Order* where the Commission concluded that they were subject to the five percent franchise fee cap. *Report and Order* at ¶¶ 105-108.

<sup>59</sup> *Further Notice* at ¶ 140.

<sup>60</sup> Comments of Minnesota Cities at 11.

<sup>61</sup> *Id.*

into consideration the obligations already imposed on existing cable operators.”<sup>62</sup> The New Jersey Division of Rate Counsel observes that MFN “clauses are matters that rest with the LFA and the cable operator and should be dealt with by these parties. The FCC has no role to play in these purely local matters.”<sup>63</sup>

As an initial matter, cable operators need not rely on MFNs to obtain the benefits of the Commission’s conclusions on the franchise fee, PEG/I-Net and mixed-use facilities issues since, as NCTA and others have shown, those conclusions apply immediately to all operators as a matter of law. In any event, as NCTA noted in its comments,<sup>64</sup> while MFN provisions will differ from franchise to franchise, any relief provided to new entrants must be made available to existing operators under most favored nation clauses.

It is important to note that, as opposed to some forms of level playing field clauses (requiring other franchisees to match all of the regulatory obligations of the existing franchise), most favored nation clauses are intended by the parties to relieve a franchisee of burdens not imposed on other franchisees by the local franchising authority. Moreover, MFN clauses serve important pro-competitive and public policy purposes by allowing cable competition to unfold based on the price and quality of an operator’s products and services, not which operator has the lesser regulatory burdens in its franchise. As a tool to foster fair competition, MFN clauses are especially important because cable companies face aggressive competition from telephone companies. Telephone companies’ resources vastly exceed those of cable companies, and the

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<sup>62</sup> *Id.* at 12.

<sup>63</sup> Comments of the New Jersey Division of Rate Counsel at 6. The Comments of the Local Community Coalition (Anne Arundel County, Maryland *et al.*) discuss (at 3-4) MFN clauses but erroneously interpret the Commission’s interest to relate to “clauses under which a cable operator may be contractually required to extend to a given community terms as good as those it affords to certain other (often nearby) communities.”

<sup>64</sup> NCTA Comments at n. 69.

telcos are aggressively seeking lower regulatory burdens in their franchises than the traditional commitments made by cable operators to service availability, PEG and other cable-related needs.

While the effects of the Commission's conclusions will vary from franchise to franchise depending on the terms of any MFN, as a general matter, consistent with the Commission's purpose in reducing unnecessary regulatory burdens, existing cable operators will – and should – obtain the benefit of MFN provisions if new entrants are able to obtain franchise conditions more favorable than those of the existing operator.

## CONCLUSION

As NCTA and others have demonstrated, with respect to its “findings” on franchise fee issues, PEG/I-Net requirements, and mixed-use facilities, the Commission can and indeed – by operation of law – must, afford identical relief for existing cable operators who operate under the same statutory provisions that the Commission was clarifying for new entrants. And that relief is applicable, not just at the time of the operator’s next renewal as the Commission tentatively concludes, but immediately. Since its conclusions with respect to franchise fees, PEG/I-Net requirements and mixed-use facilities are based on restatements of existing law or clarifications of statutory provisions other than Section 621(a)(1), the argument that the Commission has no authority under Section 621(a)(1) to affect existing operators or franchises is irrelevant. The Commission should and must apply those conclusions to existing operators and existing franchises immediately.

Respectfully submitted,

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