September 6, 2007

VIA ELECTRONIC COMMENT FILING SYSTEM (ECFS)

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Protection and Competition Act of 1992, MB Docket No. 05-311

Dear Ms. Dortch:

This *ex parte* notice is filed on behalf of the National Association of Telecommunications Officers and Advisors ("NATOA"), the National League of Cities ("NLC"), the National Association of Counties ("NACo"), the United States Conference of Mayors ("USCM"), the Alliance for Community Media ("ACM"), and the Alliance for Communications Democracy ("ACD"). On September 5, 2007, Tillman L. Lay, Gloria Tristani, Christina Fletcher Loftus, Nantz Rickard and Steve Traylor met with Michelle Carey, Legal Advisor to Chairman Kevin Martin. Also on September 5, 2007, Tillman L. Lay, Gloria Tristani, Nantz Rickard and Steve Traylor met with Amy Blankenship, Legal Advisor to Commissioner Deborah Taylor Tate, and Commissioner Robert McDowell and his Legal Advisor, Cristina Pauze. The presentations in all three meetings focused on the comments submitted by the associations in the above-referenced proceeding. The attached summary of arguments in MB Docket No. 05-311 was distributed in each meeting. In addition, a copy of the presentation was submitted to Rudy Brioché, Legal Advisor to Commissioner Jonathan S. Adelstein, and Bruce Gottlieb, Legal Advisor to Commissioner Michael J. Copps.

National Association of Telecommunications Officers and Advisors
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Pursuant to Commission rules, please include a copy of this notice in the record for the proceeding noted above.

Sincerely,

/s/ Steve Traylor

Steve Traylor
Deputy Director, Government Relations
NATOA

Attachment

cc: Tillman L. Lay, Spiegel & McDiarmid
Gloria Tristani, Spiegel & McDiarmid
Christina Fletcher Loftus, NLC
Nantz Rickard, ACM
Jeff Arnold, NACo
Larry Jones, USCM
Anthony Riddle, ACM
Barbara Popovic, ACD
Commissioner Robert McDowell
Cristina Pauze, Legal Advisor to Commissioner Robert McDowell
Michelle Carey, Legal Advisor to Chairman Kevin Martin
Amy Blankenship, Legal Advisor to Commissioner Deborah Taylor Tate
Rudy Brioché, Legal Advisor to Commissioner Jonathan S. Adelstein
Bruce Gottlieb, Legal Advisor to Commissioner Michael J. Copps

Ex Parte Meeting on FCC
Video Franchising _FNPRM_:
NATOA, NLC, NACo, USCM, ACM & ACD

As the Commission knows, we continue to believe that the findings and rulings in the March *Order* underlying the *FNPRM* are beyond its legal authority and arbitrary and capricious. Our appeal of the *Order* is pending in the Sixth Circuit. Subject to that caveat, we supplement our views on the *FNPRM* as expressed in our opening and reply comments as follows:

I. To the extent that the *Order*'s rulings are applied to incumbent cable operators at all, we agree with the *FNPRM*'s tentative conclusion that they should be applied to incumbents only at the expiration of incumbents' current franchises.

A. Applying the *Order*'s rulings to existing franchises would be unfair and would disrupt LFAs' settled franchise contract expectations.

B. Applying the *Order*'s rulings to existing franchises would also increase uncertainty and litigation. Because those franchises were adopted long before the *Order*, their wording will vary from that in the *Order*. That does not necessarily mean that they are inconsistent with the *Order*, but it does mean that incumbents and LFAs will become embroiled in disputes over every wording variance.

C. Waiting until franchise expiration to apply the rules to incumbents is not unfair to them. Incumbents are sophisticated bargainers fully knowledgeable of the Cable Act. Incumbents were also keenly aware of the possibility of subsequent competitive entry when they negotiated their current franchises and, of course, they also have the advantage of incumbency. Existing agreements reflect both the LFA's and the incumbent's best understanding at that time of what is consistent

with the Cable Act and is also responsive to the LFA's own particular community cable-related needs and interests.

D. Applying the rulings to incumbents would also pose serious retroactive rulemaking concerns.

II. While, for the reasons stated in our comments and reply comments, we do not believe any of the *Order*'s rulings should be applied to incumbents, certain rulings in the *Order* should not apply to incumbents under any circumstances.

A. The "Shot Clock" requirements cannot be applied to incumbents. Incumbents are governed by the Cable Act's franchise renewal provisions, Section 626, which are inconsistent with the "shot clock" rule. Section 626, of course, controls over the "shot clock" rules.

B. The buildout aspects of the *Order* cannot and should be not applied to incumbents. The *Order*'s justification for buildout limitations is based entirely on the supposed handicaps faced by new entrants, a justification inapplicable to incumbents. Moreover, applying the *Order*'s buildout limitations to incumbents could result in the loss, or withdrawal, of service by incumbents, frustrating broadband deployment.

C. The "mixed-use network" aspects of the *Order* have no application to incumbents.

III. If the FCC were to decide to apply some or all of the *Order*'s franchise fee, PEG and I-Net preemption rulings to incumbents before their current franchises expire (which we believe it should not), fundamental fairness, contractual integrity, and consistency with

the *Order* dictate that it should preempt any most favored nations provisions ("MFNs") in incumbent franchises as well.

A. In our comments and replies, we did not address MFNs because, in light of our view that the FCC should not apply the *Order*'s rulings to incumbents until their current franchises expire, it would have been inconsistent to urge the FCC to preempt MFNs in existing franchises prior to their expiration.

B. If, however, the FCC were to apply some aspects of the *Order* to preempt provisions in current incumbent franchises prior to their expiration, then allowing MFNs to stand would be completely one-sided and undo the entire contractual bargain underlying existing incumbent franchises.

1. It would allow incumbents to renege on existing franchise requirements that benefit the LFA and its residents while allowing the incumbent to retain only those aspects of its franchise (like the MFN) that benefit the operator. No LFA would have agreed to an MFN with an incumbent had it known that a subsequent FCC order would have rendered the LFA powerless to impose comparable PEG, I-Net and franchise fee obligations on a subsequent competitive franchise applicant.
2. This sort of one-way cherry-picking of a contract for the exclusive benefit of one party to a franchise contract (the incumbent cable operator) goes beyond permissible reformation of a contract and would require instead the voidance of that contract entirely.

3. MFNs are indistinguishable from franchise "level playing field" provisions, which the Commission preempted in the *Order*. Indeed, an MFN is nothing more than a kind of "level playing field" provision, and an ill-defined kind at that. From the incumbent operator's point of view, "level playing field" and MFN provisions serve the same purpose: To deter an LFA from granting a competitive franchise to a new entrant on terms that are more favorable to, or less burdensome on, the incumbent. If, as the *Order* concludes, franchise "level playing field" provisions should be preempted, there is no rational basis for not preempting MFNs as well, which are nothing more than a subspecies of "level playing field" provisions.

C. Allowing MFNs to survive while exposing existing PEG/I-Net franchise obligations to possible preemption also would threaten vital first-responder communications needs in many communities.

1. In many communities, the I-Net required in the incumbent's franchise is the network through which police and fire departments obtain and disperse data and video information, from terrorist alerts to retrieving suspect identification information. I-Nets are also used for landline backhaul connections for 800 MHz public safety networks.

2. Depending on how an MFN is worded, it could allow the incumbent to abandon its I-Net obligations unless any new entrant is required to build an identical I-Net. Where that is true, allowing incumbents to use MFNs to void such obligations would pose a direct and immediate threat to local

police and fire departments' ability to obtain and disseminate the information that is essential to carrying out their vital public safety and homeland security responsibilities.

IV. We support the *FNPRM*'s tentative conclusion that Section 632(d)(2) bars the FCC from preempting state or local customer service laws that exceed the FCC's cable customer service standards, and from preventing LFAs and cable operators from agreeing to cable customer service standards that exceed the FCC's.

A. Verizon is wrong in suggesting that the FCC can or should preempt any customer service standard that "unreasonably burdens competitive video entry" or "undermines federal policies" promoting broadband deployment. If a state or local customer service standard falls within Section 632(d)(2), then it is protected, regardless whether it might otherwise be viewed as "unreasonably burden[ing] competitive video entry" or "undermin[ing] federal policies encouraging broadband deployment." The reason: Nothing in Section 621(a)(1) (the basis for Verizon's "burdening competitive video entry" argument) trumps Section 632(d)(2), and Section 706 (the basis for Verizon's "broadband deployment" argument) likewise can't be read to trump Section 632(d)(2).

B. Verizon's assertion that the FCC should "make explicit" that customer service standards are "true" standards and not "other regulations in disguise" is insulting and inappropriate. There is no factual basis in the record supporting the assertion, and the FCC should not be reaching out to deal with hypotheticals that do not exist. Whether a given state or local standard falls within Section 632(d)(2) depends on the facts.