

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

PETITION FOR RECONSIDERATION
THE CITY OF BRECKENRIDGE HILLS, MISSOURI

Joseph Van Eaton
Frederick E. Ellrod III
Matthew K. Schettenhelm
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue, N.W. #1000
Washington, D.C. 20036-4306
202-785-0600

Howard Paperner, Esquire
Manchester Professional Building
9322 Manchester Road
St. Louis, Missouri 63119
314-961-0097

Counsel for the City of Breckenridge Hills,
Missouri

December 21, 2007

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	ii
I. BACKGROUND	2
II. THE COMMISSION HAS FAILED TO MEET ITS OBLIGATIONS UNDER THE REGULATORY FLEXIBILITY ACT	3
A. The Regulatory Flexibility Act Requires an Agency To Analyze the Final Rules Adopted.....	3
B. The Commission Has Not Met Its Statutory Obligations Under the Regulatory Flexibility Act With Respect to the <i>Second Report and Order</i>	4
III. THE <i>SECOND REPORT AND ORDER</i> WOULD HAVE A SERIOUS IMPACT ON LOCAL FRANCHISING AUTHORITIES BY UNDULY DISRUPTING EXISTING CONTRACTS.....	6
IV. THE COMMISSION SHOULD MINIMIZE THE SIGNIFICANT IMPACT OF THE <i>SECOND REPORT AND ORDER</i> ON SMALL GOVERNMENTAL ENTITIES.....	10
V. CONCLUSION.....	11
CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)	1

SUMMARY

The Regulatory Flexibility Act requires an agency promulgating a final rule to prepare a final regulatory flexibility analysis containing, among other things, “a description of the . . . compliance requirements of the rule” and “a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule . . .” The Final Regulatory Flexibility Analysis (“FRFA”) prepared by the Commission to accompany the *Second Report and Order* did not analyze the rules that were adopted. Rather, as is evident from the text of the *Second Report and Order*, the Commission merely analyzed the Further Notice of Proposed Rulemaking (“FNPRM”). Specifically, the FRFA relies on the position that the new rules impose no additional burden on local franchising authorities (“LFAs”) because the new rules do not apply until franchise renewal. That was the Commission’s position in the FNPRM. However, contrary to the FNPRM, the *Second Report and Order* ruled that the Commission’s interpretations of federal law were effective immediately. Thus, the Commission has not satisfied its statutory obligations with respect to the rules it actually adopted.

Properly analyzed, the *Second Report and Order* would have a serious impact upon LFAs, including small governmental entities, particularly depending on how it is interpreted with respect to states that have adopted state franchising regulations. As the Commission itself recognized, applying its findings immediately will unduly disrupt existing contracts. Nevertheless, the *Second Report and Order* proposes four routes cable operators can use to create this disruption, each of which is likely to impose significant analysis, negotiation, and/or litigation costs upon LFAs. The Commission’s FRFA wholly fails to account for these new and significant burdens. In fact, this point was raised in comments filed with respect to the regulatory flexibility analysis in this proceeding. The FRFA virtually ignored those comments

because it was analyzing the FNPRM, which would have had no immediate impact on existing contracts.

In addition, in its first *Report and Order*, the Commission made it clear that its new rulings did not apply in states with state-level video franchising schemes. The *Second Report and Order* does not say whether the state exemption continues to apply, or not. If it does not, the Commission will need to consider the effect of its *Order* on small entities in such states. That is something the Commission has never done, and the impact could be significant, as its rulings could delay or confuse state franchising procedures.

As a small governmental entity that must cope with the Commission's disruption of existing contracts, Petitioner requests that the Commission reconsider its decision in the light of an accurate FRFA, and take steps to notice and conduct a proper regulatory flexibility analysis based on the Order that was adopted.

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

PETITION FOR RECONSIDERATION

Pursuant to 47 U.S.C. § 405(a) and 47 C.F.R. § 1.429, the City of Breckenridge Hills, Missouri (“Petitioner”), by counsel, hereby submits this Petition requesting that the Commission reconsider its Final Regulatory Flexibility Analysis (“FRFA”) adopted *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, Second Report and Order*, FCC 07-190, MB Docket No. 05-311, 72 Fed. Reg. 65670 (November 23, 2007) (the “*Second Report and Order*”), and that it further reconsider and clarify the *Second Report and Order* in light of that reconsideration. The FRFA appearing at ¶ 35 and the Appendix is not an analysis of the *Second Report and Order*; it is merely an analysis of the Commission’s Further Notice of Proposed Rulemaking (“FNPRM”) in this proceeding. The *Second Report and Order* differs dramatically from the FNPRM in critical respects. Those differences substantively affect the regulatory flexibility analysis required of the Commission. The rules promulgated by the *Second Report and Order*, which apply immediately, will unduly

disrupt existing contracts and impose significant burdens on small governmental entities.¹ The FRFA is particularly inadequate if the Commission intended its *Second Report and Order* to apply (unlike the first order) in states that regulate cable franchising.

I. BACKGROUND

On March 5, 2007, the Commission released *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, Report and Order and Further Notice of Proposed Rulemaking*, FCC 06-180, MB Docket No. 05-311, 72 Fed. Reg. 13189 (March 21, 2007) (the “*First Report and Order*”). The FNPRM proposed making the findings in the *First Report and Order* applicable to incumbent cable operators at the time of renewal. *Id.* at ¶ 140. The Commission included in the *First Report and Order* an Initial Regulatory Flexibility Analysis with respect to this proposed change. *Id.* at ¶ 147, Appendix C.

On November 6, 2007, the Commission released the *Second Report and Order*, which makes many of the findings in the Commission’s *First Report and Order* applicable to incumbent cable operators. *Second Report and Order* at ¶ 7. Significantly, the *Second Report and Order* rejects the NPRM’s tentative conclusion that the findings of the *First Report and Order* should only apply at the time of renewal. *Id.* at ¶¶ 18-19. Instead, the Commission stated that its new rulings “are valid immediately.” *Id.* at ¶ 19.

The FRFA attached to the *Second Report and Order* does not analyze the final *Order*, but is instead an analysis of the FNPRM. It rests on the assumption that the new rulings apply only at renewal, which is inconsistent with the order itself. For that reason, the Commission rejects

¹ In light of the Commission’s failure to satisfy the minimum requirements of the Regulatory Flexibility Act, Petitioner also refers the Commission to its Emergency Motion for Stay, filed contemporaneously with this Petition.

comments filed with respect to the impact of the *Second Report and Order* on small entities with existing contracts. The Commission never published a regulatory flexibility analysis of the order that it actually adopted.

II. THE COMMISSION HAS FAILED TO MEET ITS OBLIGATIONS UNDER THE REGULATORY FLEXIBILITY ACT.

The Regulatory Flexibility Act, 5 U.S.C. §§ 601-612, sets out clear requirements when an agency promulgates a final rule. If an agency fails to satisfy these requirements, the courts are directed to take corrective action, including deferring the enforcement of the rule. Courts have also found that major errors in the regulatory flexibility analyses can constitute grounds for overturning a rule. Here, by blatantly failing to analyze the impact of the *Second Report and Order*, the Commission failed to meet the requirements of federal law.

A. The Regulatory Flexibility Act Requires an Agency To Analyze the Final Rules Adopted.

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612, an agency promulgating a final rule must prepare a final regulatory flexibility analysis containing the following elements:

- (1) a succinct statement of the need for, and objectives of, the rule;
- (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- (3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- (4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the

other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

5 U.S.C. § 604.

In 1996, Congress amended the Regulatory Flexibility Act specifically to include a judicial remedy. 5 U.S.C. § 611. Pursuant to that section, courts are directed to “order the agency to take corrective action,” including by “remanding the rule to the agency” or “deferring the enforcement of the rule against small entities” unless the court is able to specifically find that “continued enforcement of the rule is in the public interest.” *Id.* at (a)(4).

Even before Congress added this language, courts stressed that major errors in Regulatory Flexibility Act analyses could constitute grounds for overturning a rule. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 738 (D.C. Cir. 2000), quoting *Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327-340-41 (D.C. Cir. 1985). The Court of Appeals for the Sixth Circuit has cautioned that an agency may not “clearly abdicate[] its responsibility under the Regulatory Flexibility Act” by adopting “a conclusory statement with no evidentiary support in the record.” *National Truck Equipment Ass’n v. National Highway Traffic Safety Admin.*, 919 F.2d 1148, 1157-58 (6th Cir. 1990).

B. The Commission Has Not Met Its Statutory Obligations Under the Regulatory Flexibility Act With Respect to the *Second Report and Order*.

The Commission has not met its statutory obligations under the Regulatory Flexibility Act with respect to the *Second Report and Order*. The Commission’s FRFA is based on the FNPRM, which indicated that the rules would not apply until renewal.² This is evident from several passages. As the Commission put it:

Local franchising authorities (“LFAs”) will continue to perform its [*sic*] role of reviewing and deciding upon competitive cable franchise applications; the rules adopted in this *Order* will decrease the procedural burdens faced by LFAs. Since

² *First Report and Order* at ¶ 140.

the adopted rules do not apply until franchise renewal, there is no additional burden beyond what has been required during past renewals. Therefore, the rules adopted will not require any additional special skills beyond any already needed in the cable franchising context.

FRFA at ¶ 12 (emphasis added). Later, the FRFA again stresses the point:

In the *Order*, we provide that the *First Report and Order*'s findings resting upon statutory provisions that do not distinguish between new entrants and incumbents should be extended to incumbent cable operators *at the time of franchise renewal*. This will result in decreasing the regulatory burdens on incumbent cable operators. *We declined to impose the findings of the First Report and Order immediately so that we do not unduly disrupt existing contracts.*

FRFA at ¶ 15 (emphasis added). Comments discussing the burden on small entities were ignored because those comments addressed the impact on existing contracts.

By contrast, the order the Commission actually adopted, the *Second Report and Order*, *rejected* the NPRM's tentative conclusion that the findings of the *First Report and Order* should apply to incumbents only at the time of renewal. *Second Report and Order*, ¶¶ 18-19. Instead, the Commission ruled that its findings would be valid "immediately." *Id.* at ¶ 19. As a result, an LFA or a court, or both, must analyze the "facts and circumstances of each situation" to determine whether the Commission's "statutory interpretation should alter the incumbent's existing franchise agreement."³

By analyzing the rule it tentatively proposed, but not the one it actually adopted, the Commission has wholly failed to provide both a "description of the . . . compliance requirements of the rule, including . . . the type of professional skills necessary for preparation of the report or record" and a "statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule."

³ As discussed in Section III, this imposes significant burdens on small governmental entities.

III. THE SECOND REPORT AND ORDER WOULD HAVE A SERIOUS IMPACT ON LOCAL FRANCHISING AUTHORITIES BY UNDULY DISRUPTING EXISTING CONTRACTS.

As was already evident from comments filed in connection with the Commission's initial regulatory flexibility analysis, a rule that applies to existing contracts would have a serious impact on LFAs by unduly disrupting the existing cable franchising process. Significantly, the FRFA itself recognizes that a decision to make the *First Report and Order* effective immediately will "unduly disrupt existing contracts." FRFA at ¶ 15. Nevertheless, the *Second Report and Order* purports to authorize immediate, undue disruption via no fewer than four different avenues.

a. Negotiation and/or Litigation

The Commission proposes that a cable operator may use the *Second Report and Order* to invalidate or alter an existing contract through negotiation followed by litigation. The Commission states: "[I]f an incumbent asserts that the terms of its franchise should be amended as a result of this Order, we encourage LFAs and incumbents to work cooperatively to address those issues. In a footnote, the Commission continues, "Should such efforts fail, we recognize that particular disputes eventually may make their way to court . . ." *Second Report and Order* at ¶ 19 & n.63.

b. Most Favored Nation Clauses

The second route the Commission provides is the use of most favored nation ("MFN") clauses. The Commission stated: "[W]e expect that MFN clauses, pursuant to the operation of their own design, will provide some franchisees the option and ability to change provisions of their existing agreements." *Second Report and Order* at ¶ 20.

c. Compliance With Law Provisions

The third option the Commission suggests for altering existing contracts immediately is reliance on “compliance with law” provisions. As the Commission put it: “Parties may also make adjustments to franchise terms pursuant to compliance with law provisions within the franchise or contract.” *Id.* at n.63. The Commission did not explain what sorts of provisions it had in mind or how such “adjustments” would be made.

d. Franchise Modification

The final route the Commission offers for the immediate disruption of existing franchise agreements is franchise modification. *Second Report and Order* at ¶ 21 (“[T]he modification provision of the Cable Act will provide some franchisees the option and ability to change their existing agreements.”). The *Second Report and Order* recognizes that this procedure will impose burdens on both cable operators and LFAs: “[I]t is up to the incumbent to make to the relevant franchising authority the requisite showing of ‘commercial impracticability.’” *Id.* at ¶ 22. As the statute indicates, “Any final decision by a franchising authority under this subsection shall be made in a public proceeding.” 47 U.S.C. § 545(a)(2). In addition, if a cable operator objects to the LFA’s decision, the parties are likely to find themselves in litigation. 47 U.S.C. § 545(b).

* * *

The Commission’s four avenues for undue disruption of existing agreements impose significant new burdens upon LFAs, including small governmental entities. First, the Commission obviously errs in suggesting that LFAs will not need to train or hire additional staff to “understand” the Commission’s actions. FRFA at ¶ 4. As pointed out above, the Commission itself has grossly misread its *Second Report and Order* in the FRFA. LFAs, whose legal departments generally do not include attorneys specializing in communications law, are likely to

have at least as difficult a time understanding it. Small communities will thus incur the burden of having to obtain specialized advice and expertise to interpret and apply the Commission's rulings.

Moreover, it is incorrect for the Commission to suggest that the Commission's four-pronged approach for the immediate disruption of existing contracts will serve to "streamline the franchising process" for LFAs. FRFA at ¶ 4. With respect to an existing contract, the Commission's rules do not streamline the process at all. The process has been completed; the parties are living with the resulting agreement. Invalidation of any franchise term may result in invalidation of the entire contract and will in any case require costly, time-consuming new negotiations.

Since the body of the order expressly anticipates litigation as incumbent cable operators seek to escape their current obligations, *Second Report and Order* at n.63, the Commission can hardly claim in the FRFA analysis that the *Second Report and Order* "should prevent small entities from facing costly litigation." FRFA at ¶ 15. The burden of franchise litigation is certainly not "*de minimus*" [*sic*] for a small governmental entity. FRFA at ¶ 12. LFAs, including small governmental jurisdictions, will be forced to engage immediately in costly and time-consuming analysis, negotiation, and/or litigation over contracts that were settled, working agreements until the Commission intervened. This vastly increases the burdens placed upon LFAs, contrary to the Commission's contention that it is "lessening the economic burdens placed upon LFAs" (FRFA at ¶ 4). Small governmental entities, such as Petitioner, are especially ill-equipped to deal with these time-consuming and costly processes.

The problems are particularly significant if the *Second Report and Order* applies nationwide, as it appears to suggest. *Second Report and Order* at ¶ 19 n.60. The first order did not apply in states that regulate the franchising process, and the Commission admitted it had not

conducted any analysis to determine whether its rulings should apply in such states. If the *Second Report and Order* does apply nationwide, the Commission must now consider its impact on small entities in states that were not affected in any respect by the *First Order*. That impact could be significant (and of course, it may affect the decision of states to opt for the new franchising models).

In Missouri, for example, a cable operator must continue to meet its existing franchise obligations to provide “monetary and other support for PEG access facilities” until the original expiration date or January 1, 2012, whichever is sooner.⁴ In Michigan, an entity providing video services can decide to negotiate a traditional cable franchise with a locality, or to opt for a uniform state agreement that contains a PEG fee that can be used for any PEG purpose. By definition, a person that opts for such a uniform state agreement, as opposed to a traditional franchise, is voluntarily agreeing to those terms. Suggesting that the PEG fee or support required by a state law may be invalid – or making it subject to later challenge – disrupts this entire structure. And it may be unnecessary, because in many cases, such as those of Missouri and Michigan, the state requirements apply to a cable operator not because of its status as such (as is required for a payment to constitute a franchise fee), but instead involve a broader state law applicable to both cable operators and other video providers using public property. If the Commission intended to apply its rulings to states with state franchising laws, then it must analyze these effects. If it did not – if it merely intended to extend the *First Report and Order* to incumbents – then it needs to make that clear.

⁴ See Chapter 67 RSMo, § 67.2703.8.

IV. THE COMMISSION SHOULD MINIMIZE THE SIGNIFICANT IMPACT OF THE *SECOND REPORT AND ORDER* ON SMALL GOVERNMENTAL ENTITIES.

Petitioner believes it would be preferable for the Commission to return to the FNPRM's position for all entities with respect to the *Second Report and Order*. But if the Commission chooses to do otherwise, it should issue the required notices and conduct an appropriate regulatory flexibility analysis with respect to the order that was actually adopted, taking into account these comments and any further comments that may be received as part of the analysis. Moreover, for reasons that are described in an Emergency Motion for Stay being filed with this Petition, the Commission should stay the effect of the *Second Report and Order* pending the conclusion of that analysis.

Federal law suggests consideration of the following options:

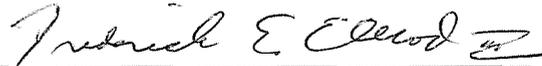
- (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
- (3) the use of performance rather than design standards; and
- (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

5 U.S.C. § 603(c). Petitioner urges the Commission to find that to the extent the findings in the *Second Report and Order* apply at all, they should only apply with respect to small governmental entities at the time of renewal.

V. CONCLUSION

The Commission has failed to meet its statutory duty to analyze the rules promulgated in the *Second Report and Order* under the Regulatory Flexibility Act. For the reasons indicated above, the Bureau should reconsider the *Second Report and Order*, and amend or eliminate its rules accordingly.

Respectfully submitted,



Joseph Van Eaton
Frederick E. Ellrod III
Matthew K. Schettenhelm
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue, N.W. #1000
Washington, D.C. 20036-4306
202-785-0600

Howard Paperner, Esquire
Manchester Professional Building
9322 Manchester Road
St. Louis, Missouri 63119
314-961-0097

Counsel for the City of Breckenridge Hills,
Missouri

December 21, 2007

6913\02\00134188.DOC

