

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

EMERGENCY MOTION FOR STAY

THE CITY OF BRECKENRIDGE HILLS, MISSOURI

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December 21, 2007

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Pursuant to 47 C.F.R. §§ 1.41, 1.43 and 1.429(k), the City of Breckenridge Hills, Missouri (the “City”), by counsel, hereby moves the Commission to stay the effect of *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*”), based on the Commission’s failure to comply with the Regulatory Flexibility Act in adopting the *Second Report and Order*. The Final Regulatory Flexibility Analysis (“FRFA”) attached to the *Second Report and Order* is based on the tentative conclusions the Commission proposed in its Notice of Proposed Rulemaking. The Commission has not analyzed the significantly different rules it actually adopted in the *Second Report and Order*.

The Regulatory Flexibility Act expressly recognizes that a stay is an appropriate remedy for failure to comply with the statute. 5 U.S.C. § 611(a)(5). A stay of the rulings promulgated in the *Second Report and Order* is necessary here to ensure that the rulings do not harm citizens

and LFAs until the Commission complies with the Regulatory Flexibility Act by carrying out the required analysis of the order the Commission actually issued.

As the Regulatory Flexibility Act specifically empowers courts to defer the effective date of a regulation pending compliance, the City asks that the Commission grant this motion immediately, so that it is not required to file a petition with the courts for relief.

I. BACKGROUND

On March 5, 2007, the FCC 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 Further Notice of Proposed Rulemaking proposed making the findings in the *First Report and Order* applicable to incumbent cable operators at the time of renewal. *Id.* at ¶ 140. The FCC included an Initial Regulatory Flexibility Analysis with respect to this proposed change. *Id.* at ¶ 147, Appendix C.

On November 6, 2007, the FCC released the *Second Report and Order*, which makes many of the findings in the FCC’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 ruled that its interpretations of federal law “are valid immediately.” *Id.* at ¶ 19. The *Second Report and Order* included an FRFA which discussed the NPRM’s tentative conclusions, but which neglected to discuss the rulings that the FCC promulgated in the *Second Report and Order*, as

discussed in more detail below. Federal Register publication of the *Second Report and Order* set December 24, 2007, as its effective date. *Id.* at ¶ 39; 72 Fed. Reg. 65670 at ¶ 54.

II. THE COMMISSION HAS FAILED TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT WITH RESPECT TO THE *SECOND REPORT AND ORDER*.

The Regulatory Flexibility Act instructs that “[w]hen an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, . . . the agency shall prepare a final regulatory flexibility analysis.” 5 U.S.C. § 604(a). The statute requires that each final regulatory flexibility analysis contain:

- (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.

Id.

The FRFA that accompanies the *Second Report and Order* fails to satisfy these requirements. *Second Report and Order* at ¶ 35 and Appendix. The FCC’s purported “analysis”

of the *Second Report and Order* in the RFRA is based upon the express assumption that the rules in the *Second Report and Order* do not apply until renewal. 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 *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 this 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).

There is, however, one problem with this assumption: It is not what the *Second Report and Order* actually provides. In the *Second Report and Order*, the FCC *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, courts (and in some cases, local franchising authorities) may be called upon to analyze the “facts and circumstances of each situation” to determine whether the FCC’s “statutory interpretation should alter the incumbent’s existing franchise agreement.” This disruption to the ordinary cable franchising process is likely to lead to costly and time-consuming analysis, negotiation, and litigation.¹ The impact of these costs on small entities is not addressed, because no analysis was conducted of the rules that were adopted.

By analyzing only the rules that it tentatively proposed, not those that 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.” The FCC has effectively promulgated final rules without engaging in any final analysis of the rules at all.² This constitutes a complete failure to meet the Commission’s obligations under the Regulatory Flexibility Act.

III. THE COMMISSION MUST STAY THE EFFECTIVE DATE OF THE *SECOND REPORT AND ORDER* UNTIL THE AGENCY HAS COMPLIED WITH FEDERAL LAW.

Simultaneously with this Motion, the City is filing a petition for reconsideration and clarification of the *Second Report and Order* that asks the Commission to conduct the required regulatory flexibility analysis, and also to consider whether its rules should change after conducting that analysis. The Commission must stay the effect of the *Second Report and Order* until it has prepared a final regulatory flexibility analysis in accordance with 5 U.S.C. § 604. By its terms, the *Second Report and Order* becomes effective on December 24, 2007. *Id.* at ¶ 39; 72 Fed. Reg. 65670 at ¶ 54. This means that it will begin to affect local communities before the Commission issues a Final Regulatory Flexibility Analysis with respect to the rules it actually

¹ For a more detailed discussion, *see* the City’s Petition for Reconsideration, filed simultaneously with this Motion.

² The FCC may not explain its delay by relying on the emergency exception under 5 U.S.C. § 608(b). To benefit from that provision, the Commission would have been required to make a written finding at the time the *Second Report and Order* was published in the Federal Register. On the contrary, the statute requires that a rule may not be promulgated “until a final regulatory flexibility analysis has been completed by the agency.” *Id.*

adopted. The Commission's rules empower the agency to "stay the effective date of a rule pending a decision on a petition for reconsideration." 47 C.F.R. § 1.429(k).

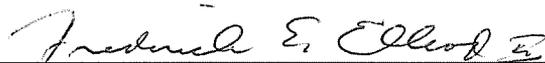
A stay of the *Second Report and Order* is appropriate and necessary in this matter. Absent a stay, all affected communities are irreparably harmed, as they will lose the very protections the Regulatory Flexibility Act was designed to provide to them. There is no question that the Commission failed to conduct the required analysis. Thus, on the merits, there is no excuse for applying the rulings without correcting the error. There is no harm in staying the effect of the *Second Report and Order*, since at worst it will delay the date an operator can first challenge the terms of an existing contract to which it agreed and under which it has been operating. That is, delaying the effectiveness of the *Order* merely maintains the *status quo*.

As importantly, the City is entitled to a stay as a matter of law. The Regulatory Flexibility Act specifically directs courts to require agency compliance with the Act, and to defer enforcement or issue stays as appropriate. 5 U.S.C. § 611(a)(4)-(5). Therefore, should the agency deny this application, the City will be entitled to a stay through the courts.

IV. CONCLUSION

For the reasons indicated above, the Bureau should stay the *Second Report and Order*.

Respectfully submitted,



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CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)

The below-signed signatory has read the foregoing Emergency Motion for Stay, and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for any improper purpose.

Respectfully submitted,

Dec 21, 2007

Date

Frederick E. Ellrod III

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