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 ALBUQUERQUE, NEW MEXICO; ANNE ARUNDEL COUNTY, MARYLAND; ARLINGTON COUNTY, VIRGINIA; CHARLES COUNTY, MARYLAND; THE CITY OF DUBUQUE, IOWA; THE CITY OF FAIRFAX, VIRGINIA; THE CITY OF HOUSTON, TEXAS; LOUDOUN COUNTY, VIRGINIA; AND THE CITY OF WHITE PLAINS, NEW YORK

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December 21, 2007

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SUMMARY

The *Second Report and Order* remains in error due to its dependence on the *First Report and Order*, which is currently on appeal. Further, to the extent its purpose is to "level the regulatory playing field" between new entrants and incumbents, it is an improper assertion of control over the cable franchising process.

The *Second Report and Order* creates a new ambiguity with respect to existing franchises in certain states, such as Iowa, Texas, and Virginia. The *First Report and Order* specifically exempted from its rulings franchising decisions where a state is involved. But the *Second Report and Order* includes no such exemption, and appears to hold that a number of the findings in the *First Report and Order* "are valid through the nation." If the *Second Report and Order* is intended to alter the Commission's earlier position regarding state laws, it is unsound and unfounded in the record, and was issued without proper notice.

The extension to incumbent cable operators of the *First Report and Order's* rulings on franchise fees, PEG and I-Nets is subject to the problems already noted in the appeal of that Order, as well as additional objections. The Commission appears to depart from the *First Report and Order* by altering what types of charges are "incidental to the awarding or enforcing of the franchise." This change was made without notice. Moreover, it raises new concerns when applied to deprive LFAs of the benefits negotiated for in an existing agreement.

The *Second Report and Order's* conclusions regarding Title VI authority over mixed-use networks are incorrect. The Cable Act by its terms frequently provides or recognizes local authority with respect to "cable systems" or "cable operators," without restriction to "cable service." Any other reading would raise significant issues under the Fifth and Tenth Amendments.

The Commission's Regulatory Flexibility Act analysis admits that "to impose the findings of the *First Report and Order* immediately" would be to "unduly disrupt existing contracts." The Commission has nonetheless chosen to do so. This decision defeats the intentions of the contracting parties, which would have concluded their agreement differently had they known how the Commission would rule. There is no ground for suggesting that one party to a franchise contract may challenge obligations under a franchise while retaining the benefits. Hence the Commission's decision raises serious concerns under the U.S. Constitution, including the Fifth Amendment.

The *Second Report and Order's* suggestion of four different methods by which a cable operator may be able to unilaterally change its contract with an LFA is also erroneous. Contrary to the Commission's suggestion, the standards for modification under Section 625 are entirely unaffected by the *Second Report and Order*. In addition, the Commission's reference to compliance with law provisions mistakes the nature of such provisions.

The Commission's ruling with respect to "most favored nation" clauses is indefensible. It is inconsistent with the *First Report and Order*. It is arbitrary and capricious: In effect, the Commission makes compliance with a franchise provision impossible for localities and then allows an operator to obtain relief because the locality did not comply. The Commission has no authority to rewrite contracts in this way.

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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 Albuquerque, New Mexico; Anne Arundel County, Maryland; Arlington County, Virginia; Charles County, Maryland; the City of Dubuque, Iowa; the City of Fairfax, Virginia; the City of Houston, Texas; Loudoun County, Virginia; and the City of White Plains, New York ("Petitioners"), by their counsel, hereby submit this Petition requesting that the Commission reconsider *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*"), in light of ambiguities and legal errors contained therein.

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*"). 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.

Petitioners believe that many of the conclusions reached in the *First Report and Order* are arbitrary and capricious and otherwise contrary to law, and notes that that order is currently on appeal before the U.S. Court of Appeals for the Sixth Circuit.[1] This Petition, however, primarily focuses on issues uniquely raised by the further conclusions in the *Second Report and Order*, although to the extent that the *Second Report and Order* reiterates conclusions drawn in the *First Report and Order*, it remains in error for reasons explained in the comments filed in that proceeding and in the pleadings filed in connection with the pending appeal in the Sixth Circuit.[2]

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[1] *Alliance for Cmty. Media v. United States*, Case No. 07-3391 (and consolidated cases) (6th Cir., filed April 3, 2007).

[2] Petitioners applaud the Commission's refusal to apply to incumbents the *First Report and Order*'s restrictions on build-out requirements. *Second Report and Order* at ¶ 9. At the same time, the *Second Report and Order* is in error to the extent it reiterates the unlawful restrictions imposed in the original order. Under the Cable Act it is not up to the Commission, but to the local franchising authority, to determine what sort of negotiated build-out requirement best serves the local community's needs and interests under 47 U.S.C. § 521(2), and to establish and enforce the relevant franchise requirements pursuant to §§ 544(b) and 552(a)(2). The Commission's assumption that build-out requirements will deter entry is unsupported by evidence and conflicts with the experience of local communities that mutually acceptable build-out requirements can be negotiated as long as the federal government does not interfere. LFAs have broad authority to establish build-out requirements through the franchising process. *See, e.g.*, *Housatonic Cable Vision v. Dept. of Public Utility Control*, 622 F.Supp. 798, 807 (D.Conn. 1985); *see also* H.R. Rep. No. 934, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4705 ("1984 House Report"). To the extent to which the Commission's orders do not merely restate the requirements of 47 U.S.C. §§ 541(a)(1) or 541(a)(4)(A), but attempt to insert new, non-statutory requirements, such as a requirement that a new entrant should not be required to build out on a shorter time schedule than the incumbent's original, decades-old construction program, they are arbitrary and capricious and without foundation in the record.

Further, to the extent that the *Second Report and Order* is based on the notion that its purpose is to "level the regulatory playing field" between new entrants and incumbents, Statement of Chairman Kevin J. Martin, *Second Report and Order* at 24, it underlines the fact that the order represents an improper assertion of control over the cable franchising process. The Commission is nowhere given authority to "level the playing field." It does not appear even to have considered (or obtained comment on) its ability to do so. And federal regulation to level the playing field necessarily involves an intrusion into local decision-making that is left to state and local authorities under Sections 621 and 626. For that reason (as explained in greater detail in the briefs in the appeal pending before the Sixth Circuit), the *Second Report and Order* is unlawful.

II. THE *SECOND REPORT AND ORDER* IS AMBIGUOUS IN ITS APPLICATION TO STATE FRANCHISES.

The *Second Report and Order* creates a new ambiguity with respect to existing franchises in certain states, such as Iowa, Texas, and Virginia.

The *First Report and Order* specifically exempted from its rulings "franchising decisions where a state is involved, either by issuing franchises at the state level or enacting laws governing specific aspects of the franchising process." *First Report and Order*, n.2. The Commission stated: "We expressly limit our findings and regulations in this *Order* to actions or inactions at the local level where a state has not circumscribed the LFA's authority." *Id.* at ¶ 126. This statement was not limited to findings and regulations based on Section 621 alone, but referred to all findings and regulations "in this *Order*." Thus, the *First Report and Order*'s interpretations of various Cable Act provisions did not apply to new entrants in certain states.

The *Second Report and Order*, on the other hand, includes no such exemption. On the contrary, it appears to hold that a number of the findings in the *First Report and Order* "are valid through the nation." *Second Report and Order* at n.60. At the same time, the order does not specifically say that state laws are preempted, and the Regulatory Flexibility Analysis, ¶ 14, notes that the *Second Report and Order* is simply an extension of the findings in the first order. That would imply that the *Second Report and Order* remains limited in scope.

Thus, the *Second Report and Order* leaves local franchising authorities ("LFAs") in many states uncertain as to their rights vis-à-vis incumbent cable providers. In Michigan, for example, a person providing video services can decide to negotiate a traditional cable franchise with a locality, or opt for a uniform state agreement containing a PEG fee that can be used for any PEG purpose. Section 13, Michigan Uniform Video Services Local Franchise Act, P.A. 480 (2006). By definition, a person that opts for a uniform state agreement, as opposed to a traditional franchise, is voluntarily agreeing to those terms, leaving nothing to challenge under the Commission's *Second Report and Order*. Similarly, the states have in many cases provided for transitions from one franchising scheme to another – transitions on which the whole scheme rests. Virginia and California are both examples where the timing of going-forward obligations and the nature of going-forward obligations are central to the structure of the law. If the Commission intended to open the door to challenges to these acts, it may be calling the validity of the entire state structure into question by holding that critical portions may be preempted.

Moreover, it is not even clear that the Commission can conclude that its generalized statements with respect to the Cable Act apply to state laws. State laws (as in Michigan, for example) often are not addressed to cable operators, but to video providers generally. Thus, fees imposed under such laws may not even fall within the ambit of 47 U.S.C. § 542(g)(1)-(2) (defining a franchise fee as a fee imposed upon a cable operator because of its status as such, and not reaching fees also imposed on other utilities).

The Commission does not appear to have considered the issue of the relationship between the first and second orders in this respect. The *Second Report and Order* fails to point to any evidence in the record about state laws. Nor does it contain any analysis of the state laws. Nowhere in the FNPRM or elsewhere did the Commission provide notice that it intended to make such a change with respect to state laws in the *Second Report and Order*. Thus, if in the *Second Report and Order* the Commission did mean to extend its earlier rulings to states-level franchising rules, that action would violate the Administrative Procedures Act.

Accordingly, Petitioners request that the Commission clarify whether the *Second Report and Order* applies in cases where a state has "circumscribed the LFA's authority."

III. THE *SECOND REPORT AND ORDER*'S FINDINGS REGARDING FRANCHISE FEES, PEG AND I-NETS ARE AMBIGUOUS AND CONTRARY TO LAW.

The *Second Report and Order* extends to incumbent cable operators the *First Report and Order's* rulings with respect to franchise fees, PEG and I-Nets. *See Second Report and Order* at ¶¶ 10-15. To the extent to which these rulings would alter existing franchise terms agreed to by cable operators that were well acquainted with the Cable Act and the case law, they are subject to the problems already noted in the appeal of the *First Report and Order*, as well as to additional objections.

First, at n.32 the Commission appears to alter what types of charges must be treated as franchise fees based on the notion that those charges are "incidental to the awarding or enforcing of the franchise." On the list in the *Second Report and Order* at n.32, the Commission included "free or discounted services," "any requirement to lease or purchase equipment from an LFA at prices higher than market value," and "in-kind payments." However, it is unclear why the Commission mentions these items in connection with the "incidental to" exception at all. As far as Petitioners are aware, no one has claimed that in-kind franchise benefits of these kinds are not franchise fees because they fall under the "incidental to" exception. Rather, they are not franchise fees for other reasons (for example, because they are not monetary payments).[3] Moreover, the *First Report and Order* did not find that all such requirements were franchise fees, only that "in-kind payments *unrelated to provision of cable service*" should be counted as franchise fees. *First Report and Order,* ¶ 105 (emphasis added). In fact, the Commission has taken the position before the Sixth Circuit that in-kind requirements related to the provision of cable service do not constitute franchise fees, and it has never defended any contrary position.[4]

The Commission's apparent expansion of the *First Report and Order* in this respect runs afoul of basic administrative precepts (the Commission did not provide adequate notice that it was even considering the matter), and given the representations made to the Sixth Circuit it cannot be justified as a fair or lawful reading of the *First Report and Order*. The Commission has certainly failed to discuss, much less justify, such a change from its interpretation of the franchise fee provisions under the first order. The Commission should strike n.32 of the *Second Report and Order* and, at a minimum, make clear that it did not intend to alter the position it has taken in the *First Report and Order* and before the court with respect to the limitations imposed on local franchising authorities in interpreting the franchise fee provisions of the Act.

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[3] *See* 1984 U.S.C.C.A.N. at 4702. The FCC indicates as much in *City of Bowie, Maryland*, 14 FCC Rcd. 9596 (1999).

[4] Opposition of the Federal Communications Commission to Joint Motion for Stay Pending Judicial Review, filed with the Court of Appeals for the Sixth Circuit on June 29, 2007, at n.16: "[P]etitioners are mistaken when they claim (Motion at 15) that the FCC's ruling on in-kind payments means that previously negotiated mandates 'to provide free cable service' to various government entities will now be subject to the franchise fee cap. The *Order*'s analysis of in-kind payments was expressly limited to payments that do *not* involve the provision of cable service."

But the Commission should go further. The Commission's misreading of the phrase "incidental to" in Section 622(g)(2)(D) raises new concerns when used to deprive LFAs of the benefits negotiated for in an existing agreement. (See the Fifth Amendment discussion in Section V below.) The Commission ignored the plain meaning of the term "incidental to the awarding or enforcing of the franchise" and arbitrarily limited that category of charges.[5] Moreover, the Commission concluded without explanation that certain charges are *per se* beyond the scope of the "incidental to" exception. *Second Report and Order* at n.32.[6] In reaching these conclusions, the *Second Report and Order* suggests that the Commission was relying on four thinly-reasoned district court decisions, three of which are unreported, and none of which deal with all the matters identified in n.32. *Second Report and Order* at n.30. These cases, however, have little or no precedential value. They contain no significant analysis of the meaning of the statutory language. For the Commission to use such conclusory opinions as the basis for overturning the terms of hundreds or thousands of existing contracts, without conducting any substantive analysis of its own, is arbitrary and capricious.

Moreover, the FCC continues to fail to recognize that fees imposed on an *applicant* for a cable franchise do not constitute franchise fees. The Cable Act defines a "franchise fee" as "any

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[5] *See First Report and Order* at ¶ 102, *Second Report and Order* at ¶ 11; Brief of Fairfax County, *ACM v. FCC*, 07-3391 (6th Cir.) at 51-55; Reply Brief of Fairfax County, 07-3391 (6th Cir.) at 24-26. For a similar usage of "incidental to," *see, e.g.*, the Internet Tax Nondiscrimination Act, P.L. 108-435, sec. 6. The Commission itself favored a broad, rather than a narrow, reading of "incidental to" in a different context, that of the fundamental definition of "communications." *See In the Matter of Expanded Interconnection with Local Telephone Company*, FCC 92-440, 7 FCC Rcd. 7369 at ¶ 162 & n.364 (October 19, 1992). *See also In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, FCC 92-168, 7 FCC Rcd. 3528 at ¶ 23 (May 8, 1992).

[6] When applied to incumbents, such a *per se* conclusion is inconsistent with the Commission's acknowledgement elsewhere in the order that the validity of provisions in existing contracts depends on the particular facts and circumstances. *See Second Report and Order* at ¶¶ 19, 25.

tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity *on a cable operator* or cable subscriber, or both, solely because of their status as such." 47 U.S.C. § 542(g)(1) (emphasis added). But an applicant, by definition, is not yet a cable operator. Fees relating to the application process fall outside the sphere of ongoing transactions between franchisor and franchisee to which the franchise fee limitation applies.[7] The Commission seems to assume that the cost of analyzing an application will be recouped through the franchise fee. But one cannot make that assumption, as applicants can (and do) withdraw applications; or obtain franchises and then never build (as was the case with Wide Open West); or fail to obtain significant penetration in the marketplace. There is little indication that Congress intended for taxpayers to bear the cost of reviewing applications.

IV. THE *SECOND REPORT AND ORDER'S* FINDINGS REGARDING TITLE VI AUTHORITY OVER MIXED-USE NETWORKS ARE INCORRECT.

The *Second Report and Order* states that "LFAs' jurisdiction under Title VI over incumbents applies only to the provision of cable services over cable systems and that an LFA may not use its franchising authority to attempt to regulate non-cable services offered by incumbent video providers." *Second Report and Order* at ¶ 17. This is, however, not the case. The Cable Act by its terms frequently provides or recognizes local authority with respect to "cable systems" or "cable operators," without restriction to "cable service." *See, e.g.,* 47 U.S.C. § 552 (a LFA may establish and enforce "customer service requirements of the cable operator"); 47 U.S.C. § 551 (a cable operator is subject to privacy requirements when it provides "any cable service or other service to a subscriber"). The Act's legislative history makes clear that when it

[7] Note that the legislative history states that such requirements may be imposed in a franchise ordinance or a request for proposals. 1984 House Report at 1984 U.S.C.C.A.N. 4655, 4701.

created these provisions, Congress realized that cable systems and cable operators provided non-cable services.[8] The Act also contains specific restrictions on local authority that would be unnecessary if the Commission's interpretation of local authority under Title VI were correct, including, for example, 47 U.S.C. § 541(b)(3).

The Cable Act assumes that LFAs have the right and responsibility to promote *all* the possible benefits to the public that are related to a cable system or connected with a cable operator. Where the scope of a provision is limited to a particular category of service, the Act specifically says so. *See, e.g.*, 47 U.S.C. § 542(b) (Title VI franchise fee cap is set in terms of cable service revenue).[9] Thus, the *Second Report and Order* is mistaken in its assumption that

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[8] The Act's legislative history repeatedly emphasizes that localities have authority over cable systems, even if those systems are used to provide other services. *See, e.g.*, 1984 House Report at 4678-79, 4681. "The term 'cable system' is not limited to a facility that provides only cable service which includes video programming. Quite the contrary, many cable systems provide a wide variety of cable services and other communications services as well. A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service." *Id.* at 4681. Thus, the FCC's general conclusions with respect to local control over facilities are incorrect.

Certainly, any reliance on Section 602(7)(C) as a general exemption of facilities from local control if they are used for other purposes is mistaken. In the first place, that provision addresses only Title II facilities, and the Commission has never found, nor can it reasonably assume, that all mixed-use facilities are Title II common carrier facilities. Moreover, the section by its terms actually makes it clear that even Title II facilities are subject to local authority "to the extent such facility is used" in the transmission of video programming. This implies that mixed-use facilities are subject to local jurisdiction *whenever* they are used for delivery of cable programming.

The Commission's attempt to limit local authority over services is also mistaken. The Act itself (in the privacy sections, for example) specifically recognizes that Title VI authority may extent to other services.

[9] The *Second Report and Order* curiously appears to tie this unlawful restriction to an interpretation of § 602 of the Act, the definitional section. *Second Report and Order* at ¶ 17. Those definitions, however, explicitly recognize that a cable system and a cable operator may provide services other than cable service. *See, e.g.*, 47 U.S.C. § 522(7). Similarly, the Commission's reference to the *Brand X* decision, *Second Report and Order* at n.49, does not support the Commission's statement. Whether Internet access is a "cable service" may affect the

LFAs' jurisdiction, even under Title VI, is limited to cable service and is limited as to mixed-use facilities that fit the definition of a cable system under federal law. Any other reading would raise significant issues under the Fifth and Tenth Amendments, as the Commission would be effectively divesting localities of control over property in the public rights-of-way.[10]

V. THE *SECOND REPORT AND ORDER* IMPROPERLY DISRUPTS EXISTING CONTRACTS.

The Commission's analysis attached to the *Second Report and Order* declares that "to impose the findings of the *First Report and Order* immediately" would be to "unduly disrupt existing contracts." Final Regulatory Flexibility Act Analysis at ¶ 15. That is certainly true. Despite the Commission's own finding, however, the *Second Report and Order* dismissed the NPRM's tentative conclusions and concluded that many of the *First Report and Order's* rulings should apply immediately. *Second Report and Order* at ¶ 19.

The Commission's decision to "unduly disrupt existing contracts" will have a significant adverse impact on LFAs. As Commissioner Adelstein noted, the FCC has created a "regulatory minefield" for local governments. Dissenting Statement of Commissioner Adelstein at 28. Instead of being able to rely on settled agreements, LFAs now find that "each situation must be assessed on a case-by-case basis under applicable law to determine whether [the Commission's] statutory interpretation should alter the incumbent's existing franchise agreement." *Second*

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franchise fee cap, which is stated in "cable service" terms, but does not affect a Cable Act provision stated in "cable system" or "cable operator" terms.

[10] The Commission has no basis for assuming that mixed-use facilities are occupying the rights-of-way pursuant to any authority other than Title VI authority. It is quite common for cable operators, for example, to lease capacity to affiliates. Those affiliates may then provide telecommunications services, but the facility itself may never be licensed by or regulated by the state – because the affiliate is not the facility owner.

Report and Order at ¶ 19. As the Commission recognizes, this process is likely to lead to litigation. *Id.* at n.63.

The *Second Report and Order* disrupts the settled expectations of the contracting parties. For example, in one community, a cable operator may own and operate a local studio and produce both PEG and local origination programming at that site. The *Second Report and Order*, however, appears to suggest that the cable operator may now be able to charge the costs of the PEG operation against franchise fees. *See* Section III above. Such a result would defeat the intentions of the contracting parties. If, for example, the LFA had known at the time of the franchise agreement that the Commission would allow it to recover studio construction costs but not to require the operator to run the studio, it could have required the operator to build the studio for the LFA, then leased the studio back to the operator for the provision of local origination programming. However, at the time the contract was entered into, the LFA could not have predicted that the Commission would arbitrarily distinguish between these two means of reaching the same end – or make a serious issue of whether a signed contract was "voluntary" or not.

The Cable Act itself does not allow the Commission to draw such a distinction. 47 U.S.C. § 531(c), for example, provides that a franchising authority may "enforce any requirement in any franchise regarding the providing or use of such [PEG] channel capacity. Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities or equipment proposed by the cable operator which relate" to PEG use. The Commission has elsewhere in the order recognized the distinction between what may be *required* without running afoul of the Cable Act, and what may be *enforced* as a result of entry into an agreement. Yet it fails to recognize that this distinction means that existing contracts should be fully enforceable according to their terms.

Certainly there is no slightest ground for suggesting that one party to a franchise – which is, after all, a contract – may challenge its obligations under the franchise while retaining the benefits. The basic law of contracts is to the contrary. *See, e.g., Erie Telecommunications v. City of Erie*, 853 F.2d 1084 (3rd Cir. 1988). Nor is it consistent with the Cable Act, which is designed to ensure that a franchise serves local needs, to allow an operator to continue to operate after omitting the very provisions that the parties agreed satisfied those needs. At the very least, the Commission would have to allow localities to establish additional requirements at the time of the challenge.[11]

Given the one-sided nature of the Commission's decision – removing consideration while failing to provide for substitute performance – the Commission's decision raises serious concerns under the U.S. Constitution, including the Fifth Amendment. The Commission is taking the position that it can selectively preempt certain contract terms in favor of the cable operator, then force the LFA to live with a deal that is less than it could have (and would have) required in the original negotiation. (By contrast, the Commission proposes no fewer than four methods by which cable operators can take advantage of these windfall benefits. *See Second Report and Order* at ¶ 19 n.63.) The Commission is thus arbitrarily preventing LFAs from obtaining the full value of their public rights-of-way, as represented by the full benefits embodied in the franchise agreement. This is a deprivation of property under the Fifth Amendment.[12]

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[11] Further evidence of the Commission's improper assertion of control over the cable franchising process may be found in the admission that, contrary to its statements elsewhere, the Commission *is* making determinations as to what is reasonable, not just what is unreasonable, in a franchise agreement. *See Second Report and Order* at n.43 (finding *pro rata* cost sharing *per se* reasonable); Commission's brief on appeal at 26-27.

[12] A local community's interests in the public rights-of-way (except to the extent the state provides otherwise) include the power to charge fair and reasonable compensation for the private, commercial use of this public property. *See, e.g., TCG Detroit v. City of Dearborn*, 16

Moreover, the *Second Report and Order's* suggestion of four different methods by which a cable operator may be able to unilaterally change its contract with an LFA is erroneous. One of the Commission's suggested methods is a Section 625 modification action. *Second Report and Order* at ¶¶ 21-22. The *Order* is correct that a cable operator must meet the "commercial impracticability" standard to modify its contract pursuant to Section 625, or (in the case of a service requirement, such as a PEG service provision) demonstrate "that the mix, quality, and level of services required by the franchise at the time it was granted will be maintained after such modification." 47 U.S.C. § 545(a)(1). But the Commission's two orders do not in any way affect the requirements of Section 625. Thus, it is incorrect for the Commission to suggest that the orders "can be taken into consideration" in a modification action. *Id.* at ¶ 22. If the Commission is implying that its *First Report and Order* conferred special benefits on new entrants, granting them additional negotiating leverage against local communities so as to extract more advantageous deals, that would concede the impropriety and capriciousness of the *First Report and Order*. But if the Commission is not drawing such a conclusion, the two orders can have no effect at all on a Section 625 action.[13]

The Commission also suggests that cable operators may be able to escape from their contractual commitments "pursuant to compliance with law provisions within the franchise or contract." *See Second Report and Order* at ¶ 19 n.63. This suggestion mistakes the nature of such provisions. A provision requiring that the cable operator comply with applicable law is designed to ensure that the LFA can act to prevent lawbreaking by the cable operator. It incorporates the parties' understanding that the terms to which they have expressly agreed *do*

F. Supp. 2d 785, 789 (E.D. Mich. 1998), *aff'd*, 206 F.3d 618 (6th Cir. 2000); *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 99 (1893).

comply with applicable law. Such a provision is not intended to give the cable operator, or the Commission, *carte blanche* to make unilateral modifications of the LFA's contractual rights. No local community would agree to a provision that would give a federal regulatory agency power to arbitrarily alter its contract with the cable operator. The legal position suggested by the *Order's* statement here would arrogate to the Commission essentially unlimited power to change the terms of local communities' contracts at will. Among its numerous other defects, such a position would be inconsistent with the structure of the Cable Act, which carefully preserves local authority to enter into binding contracts with cable operators.

VI. THE COMMISSION'S RULING WITH RESPECT TO MOST FAVORED NATION CLAUSES IS INDEFENSIBLE.

In the *First Report and Order,* the Commission acknowledges that it found some "most favored nation" clauses (also called level playing field clauses) preempted as against public policy. In the *Second Report and Order,* apparently for the sole purpose of excusing the incumbent cable operator from its contractual obligations, the Commission finds that such provisions may be enforced by an incumbent against the franchising authority.

The Commission cannot have it both ways. The Commission claims to have found that level playing field or most favored nation provisions of franchises were inconsistent with the law and therefore (under 47 U.S.C. § 556) "deemed to be preempted and superseded." It is hard to imagine how a provision that is superseded can be enforced against a franchising authority. Nor can the Commission justify its actions by claiming that it is effectively re-writing the contract to allow the terms to be enforced by an incumbent, while the locality is prohibited from taking steps

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[13] See discussion at p. 3 *supra*. Put more bluntly, the Commission is effectively admitting that its *First Report and Order* allows entry on unfair terms and conditions; otherwise commercial impracticability issues would not arise.

to comply with those terms (by requiring comparable obligations of the new entrant). In effect, the Commission makes compliance with a franchise provision impossible for localities and then allows an operator to obtain relief because the locality did not comply. The Commission has no authority to rewrite contracts in this way. Nor (as noted above) may the Commission justify the action on the ground that it is deregulatory. The Commission points to no authority that would permit it to change its rules to arbitrarily reduce franchise obligations. And for reasons suggested in the *First Report and Order* and in the briefs on appeal, it has no such authority.

VII. CONCLUSION

For the reasons indicated above, the Bureau should reconsider the *Second Report and Order*, and amend or eliminate its rules accordingly.

Respectfully submitted,

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December 21, 2007

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

The below-signed signatory has read the foregoing Petition for Reconsideration, 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

Frederick E. Ellrod III