

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)
)
Implementation of Section 621(a) of the Cable) MB Docket No. 05-311
Communications Policy Act of 1984 as)
Amended by the Cable Television Consumer)
Protection and Competition Act of 1992)
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**OPPOSITION OF VERIZON¹ TO PETITIONS FOR RECONSIDERATION OF
SECOND FRANCHISE ORDER**

The Commission should reject the arguments raised by the local franchising authorities (LFAs) in their various petitions² for reconsideration of the *Second Franchise Order*.³ In that Order, the Commission adopted straightforward interpretations of several provisions of the Cable Act, including provisions imposing federal statutory limits on local authority over franchise fees and over mixed-use networks. Contrary to the LFAs' arguments, the Commission's interpretations of the Cable Act apply nationwide, as the *Second Franchise Order* correctly recognized. Moreover, the Commission's interpretations of the statutory constraints on LFAs are

¹ The Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

² See Petition for Reconsideration, City of Albuquerque, New Mexico, *et al.*, MB Docket No. 05-311 (Dec. 21, 2007) ("*Albuquerque Petition*"); Petition for Reconsideration and Clarification, National Assoc. of Telecom. Officers and Advisors, *et al.*, MB Docket No. 05-311, (Dec. 21, 2007) ("*NATOA Petition*"); Petition for Reconsideration, City of Breckenridge Hills, Missouri, MB Docket No. 05-311 (Dec. 21, 2007) ("*Breckenridge Petition*").

³ Second Report and Order, *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*, 22 FCC Rcd 19,633 (Nov. 6, 2007) ("*Second Franchise Order*").

required by both the plain language of the Cable Act and by the Commission's reasoning in the *First Franchise Order*.⁴ The Commission should deny the LFA's petitions.

ARGUMENT

I. The Commission's Interpretations of the Cable Act Apply Nationwide.

The Commission's interpretations of the Cable Act adopted initially in the *First Franchise Order* and reaffirmed in the *Second Franchise Order* apply nationwide. In the *Second Franchise Order*, the Commission considered whether several of its earlier interpretations of the Cable Act, adopted while considering the limitations of LFA authority in the context of competitive franchise applicants in the *First Franchise Order*, extend to cable incumbents as well. The Commission confirmed that these interpretations were straightforward readings of the Cable Act that "do not depend on Section 621(a)(1)" and that "are also valid through the nation." *Second Franchise Order* ¶ 19 n.60. The LFAs' petitions are wrong when they suggest that there is ambiguity on this point. The Cable Act does not mean one thing in some geographic locations, and another thing in others.

In an effort to find ambiguity where there is none, the LFAs point to the Commission's decision in the *First Franchise Order* to apply certain rules adopted solely pursuant to Section 621(a)(1) only to LFAs, but not to "franchising decisions where a state is involved."⁵ The LFAs argue here that the Commission must have intended to exempt state authorities from all other constraints imposed by the Cable Act, such as the Commission's interpretation of the federal

⁴ Report and Order and Further Notice of Proposed Rulemaking, *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*, 22 FCC Rcd 5101 (March 5, 2007) ("*First Franchise Order*").

⁵ *First Franchise Order* ¶ 1 n.2.

statute's franchise fee and PEG provisions.⁶ The Commission did no such thing, and instead recognized that its interpretations of the federal statute are a binding source of federal law that apply nationwide.

As an initial matter, the LFAs overstate the extent to which state laws were spared from the Commission's rules and findings in the *First Franchise Order*. In that order, the Commission decided on the record before it not to extend to state laws certain rules and conclusions premised solely on Section 621(a)(1) – a provision barring actions that rise to the level of an unreasonable refusal to grant a competitive franchise. But the Commission did *not* indicate that its definitive interpretations of other provisions of the Cable Act apply in some places but not others.⁷ To the contrary, many of the Commission's specific findings even in the *First Franchise Order* were independently required by other provisions of the Cable Act. For example, in addressing the limitations placed by the Section 622's five percent limit on franchise fees, the Commission recognized that its conclusions were "a matter of statutory construction." *Id.* ¶ 105 n.351; *see also id.* ¶¶ 94-109. Likewise, the Commission's conclusions with respect to issues such as limitations on build-out requirements, *id.* ¶¶ 83-86; PEG and I-Net requirements, *id.* ¶¶ 112-20; and local regulation of mixed-use broadband networks and broadband services, *id.* ¶¶ 121-23, all recognized the limitations imposed on LFAs by substantive provisions of the Cable Act other than Section 621(a)(1). And nowhere in the *First Franchise Order* did the Commission indicate that state laws were exempt from any of these limitations imposed by the Cable Act.

Nor is there anything ambiguous or inconsistent about the Commission's express conclusion in the *Second Franchise Order* that its constructions of statutory provisions apply

⁶ *See Albuquerque Petition* at 3-5; *NATOA Petition* at 10-11; *Breckenridge Petition* at 8-9.

throughout the country and to all providers. As the Commission noted in the context of discussing limitations on permissible franchise fees, “Section 622 does not distinguish between incumbent providers and new entrants,” and, “[a]s a result, to the extent that a franchise-fee requirement is found to be impermissible under Section 622, which statutory interpretation applies to both incumbent operators and new entrants.” *Second Franchise Order* ¶ 11.

Following the same logic, the Commission went on to correctly conclude that its statutory interpretations apply not only to all providers, but also immediately and in all places. The Commission stated:

The statutory interpretations set forth above represent the Commission’s view as to the meaning of various statutory provisions, such as Section 622, and these interpretations are valid immediately. We do not see, for example, how Section 622 could mean different things in different sections of the country depending on when various incumbents’ franchise agreements come up for renewal.

Id. ¶ 19. At the same time, the Commission reiterated that “because these interpretations do not depend on Section 621(a)(1), they are also valid through the nation.” *Id.* ¶ 19 n.60.

Indeed, a contrary conclusion – applying federal statutory limitations in some parts of the country, but not others – would be impermissible. Statutory language, once definitively interpreted by the Commission, cannot mean different things in different places. *See, e.g., Maximum Home Health Care, Inc. v. Shalala*, 272 F.3d 318, 321 (6th Cir. 2001) (finding the “purpose of a regulatory scheme . . . is to provide uniform rules by which all participants may be treated equally”). Just as a state could not require a 6% franchise fee when the statute sets a 5% cap, it also cannot ignore the Commission’s interpretations of the Cable Act – an equally binding source of federal law.

⁷ *First Franchise Order* ¶ 1 n.2.

In fact, courts have repeatedly concluded that the Commission's reasonable interpretations of statutory provisions within its jurisdiction are binding and preemptive on both state and local governments. *See, e.g., AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 384 (1999). Indeed, Section 636 of the Act expressly preempts State or local laws that are contrary to federal law, stating that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded." 47 U.S.C. § 556; *see, e.g., Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216 (1st Cir. 2005) (holding municipal franchise fee provisions preempted by Section 636 because inconsistent with Section 622); *City of Chicago v. FCC*, 199 F.3d 424, 429-33 (7th Cir. 1999) (rejecting franchise requirements that were inconsistent with the Commission's interpretation of the Cable Act); *City of Chicago v. AT&T Broadband, Inc.*, No. 02-C-7517, 2003 U.S. Dist. LEXIS 15453, *6 (N.D. Ill. Sept. 4, 2003) (finding that Section 636 required preemption of local franchising agreements that would require payment of franchise fees on cable modem service, in light of Commission's determination that cable modem service was not a "cable service").

Therefore, the Commission should reject the reconsideration or "clarification" requested by the LFAs, and should stand by its conclusion that its interpretations of the Cable Act initially adopted in the *First Franchise Order* and reaffirmed in the *Second Franchise Order* apply nationwide.

II. LFA's Franchising Authority Is Limited to Cable Services and Facilities.

In the *Second Franchise Order*, the Commission also correctly reaffirmed its prior holding that LFAs do not, by virtue of their cable franchising authority, possess authority to

regulate non-cable services, such as broadband Internet access services, nor do they have authority to regulate the mixed-use networks over which these services are delivered.

In challenging this interpretation of the statute, the LFAs' argue that 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.'" *Albuquerque Petition* at 8-9. But the LFAs' argument fails to take into account the interrelationship between these statutory terms and wrongly assumes that if an LFA has authority over a provider or a facility for some purposes, that it has jurisdiction for all purposes.

First, the LFAs' argument ignores the interplay between the various statutory terms. While some statutory requirements speak to "cable operators" or "cable systems," that does not mean that those provisions apply outside of the cable context or extend to other types of services. In fact, all of these statutory terms interrelate. A provider is only a "cable operator" to the extent that it is providing "cable service" over a "cable system." 47 U.S.C. § 522(5). Therefore, statutory provisions applicable to "cable operators" provide no authority over a provider engaged in delivering other non-cable services, such as Internet access or voice. *Cf. Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("Whether an entity in a given case is to be considered a common carrier," turns not on its typical status but "on the particular practice under surveillance."); *NARUC v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (finding it "logical to conclude that one can be a common carrier with regard to some activities but not others").

The same is true in the cases of statutory provisions that speak to "cable systems." The Act defines a "cable system" as a "facility . . . that is designed to provide cable service." 47 U.S.C. § 522(7). And this definition further excludes "a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such

facility shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to subscribers.”⁸ *Id.*

Furthermore, the LFAs’ argument for broad jurisdiction over mixed-use facilities ignores other statutory limitations. Under Section 621(b)(3), for example, an LFA may not “impose any requirement . . . that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator,” 47 U.S.C. § 541(b)(3)(B), nor may an LFA “require a cable operator to provide any telecommunications service or facilities” as a condition of a franchise, *id.* § 541(b)(3)(D). As the Fourth Circuit has held, under these provisions, to the extent a mixed-use network is used for non-cable service (including telecommunications or information services), it is not subject to LFA jurisdiction. *See MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356, 363-64 (4th Cir. 2001) (relying, *inter alia*, on Sections 602(7)(C) and 621(b)(3) in vacating LFA regulation of Internet access service).

In fact, if anything, the Commission should take additional steps to ensure that assertions of regulatory authority by LFAs do not undermine the Commission’s broadband policies, and should preempt any local regulations having that effect. *See Verizon Comments*, MB Docket No. 05-311, at 6-9 (April 20, 2007) (explaining the Commission’s authority to preempt local regulation that undermines federal broadband policies). The Commission has already determined that broadband Internet access services are inherently interstate services subject to regulation, if at all, at the federal level,⁹ and encouraging the deployment of broadband is a

⁸ The LFAs suggest in a footnote that “to the extent” should be interpreted to mean “whenever,” in this context. *Albuquerque Petition* at 9 n.8. That argument is contrary to the plain language of the statute and to the Commission’s reasonable interpretation of the “cable system” definition. *See First Franchise Order* ¶ 122.

⁹ *GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148*, 13 FCC Rcd 22,466, ¶¶ 26-29 (1998) (concluding impractical to separate the interstate and intrastate aspects of DSL services).

preeminent federal communications policy. “Section 706 of the Telecommunications Act of 1996 directs the Commission to encourage broadband deployment by removing barriers to infrastructure investment.” *First Franchise Order* ¶ 4. As the Commission already recognized, any unreasonable barriers to broadband infrastructure investment posed by local regulation are “in direct contravention of the goals of Section 706, the President’s competitive broadband objectives, and our established broadband goals.” *Id.* ¶ 52. There is no legal or policy basis for expanding local regulation of mixed-use networks used to provide inherently interstate, broadband services, and any such regulation that undermines the Commission’s goals of encouraging broadband deployment, as would local regulation of broadband Internet access services, should be preempted.

III. The Order’s Limitations on Franchise Fee Requirements Are Consistent with the Cable Act and the *First Franchise Order*.

Finally, some of the LFAs argue that the Commission unreasonably expanded the *First Franchise Order*’s conclusions concerning franchise fee limitations.¹⁰ The complained-of language, however, is a direct quote – not an expansion – of the Commission’s earlier order, and the conclusion reached by the Commission is correct.

The LFAs’ argument largely focuses on a single footnote in the *Second Franchise Order* which explains that “certain fees” do not fit within the statutory “incidental” exception to the franchise fee definition – and thus are not exempted from the annual cap on franchise fees. *Id.*

¶ 11. In its entirety, the footnote states:

Such fees include “processing fees, consultant fees, and attorney fees”, and “application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided to an LFA, any requirement to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments.”

¹⁰ *Albuquerque Petition* at 5.

Id. ¶ 11 n.32 (citation omitted). Although the LFAs argue that “it is unclear why the Commission mentions these items in connection with the ‘incidental to’ exception at all,” they argue that this footnote is an “apparent expansion” of the *First Franchise Order*. *Albuquerque Petition* at 5-6. They also argue that certain of these items – free or discounted service, requirements to lease or purchase equipment from an LFA at above cost, or in-kind payments – are exempt from the franchise fee cap for other reasons. *Id.*

As the quotations marks within the footnote indicate, the LFAs’ argument that the Commission has somehow expanded its rulings concerning permissible franchise fees is false. Indeed, the language in the footnote comes straight out of the *First Franchise Order*, where the Commission concluded that these items count towards the franchise fee cap. The Commission stated:

We find these decisions [concerning the “incidental” exception] instructive and emphasize that LFAs must count such non-incidental franchise-related costs toward the cap. We agree with these judicial decisions that non-incidental costs include the items discussed above, such as attorney fees and consultant fees, but may include other items, as well. Examples of other items include *application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided to an LFA, any requirement to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments as discussed below*. Accordingly, if LFAs continue to request the provision of such in-kind services and the reimbursement of franchise-related costs, the value of such costs and services should count towards the provider’s franchise fee payments.

First Franchise Order ¶ 104 (emphasis added). Therefore, rather than an “expansion,” the offending language comes verbatim from the Commission’s previous order.

Second, the LFAs argue that in-kind fees do not count as franchise fees, unless they are “in-kind payments unrelated to provision of cable service.” *Albuquerque Petition* at 6. That argument, however, misreads the *First Franchise Order*. After concluding in the paragraph

quoted above that the value of in-kind fees “should count towards the provider’s franchise fee payments,” *First Franchise Order* ¶ 104, the Commission went on in the very next paragraph to address other “in-kind payments unrelated to provision of cable service.” *See id.* ¶ 105. In context, the order is clear that this was intended to address additional types of in-kind payments that some LFAs had demanded, and not to modify the Commission’s previous conclusion that things of value, including in-kind payments or free cable service, count towards the franchise fee cap. In any event, the LFAs’ proposed reading would be contrary to the Cable Act, which counts as a franchise fee “any tax, fee, or assessment *of any kind.*” 47 U.S.C. § 542(g)(1) (emphasis added). If in-kind payments were not counted as franchise fees, the statutory cap would quickly become meaningless, as LFAs could overcome the annual 5% cap by demanding any manner of in-kind payment, rather than a monetary fee.

Finally, the LFAs continue to disagree with the Commission’s interpretation of the “incidental” exception, and in particular with the Commission’s reliance on several judicial decisions addressing that exception. *Albuquerque Petition* at 7. But the LFAs’ provide no new basis to support their view of this exception, or to overcome the Commission’s reasonable interpretation of this provision. Moreover, although the LFAs argue that court decisions¹¹ that the Commission found persuasive “have little or no precedential value” and are “conclusory,”¹² such claims are not enough to overcome the reasonableness of the Commission’s interpretation of the statute, particularly given the lack of any judicial decisions taking a contrary view to the Commission or the four federal courts to have considered the issue.¹³

¹¹ *See First Franchise Order* ¶ 103 (discussing cases interpreting the “incidental” exception to the franchise fee definition).

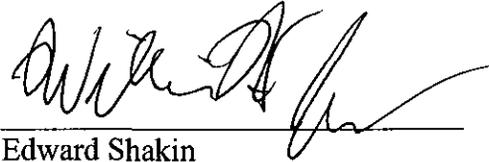
¹² *See Albuquerque Petition* at 7.

¹³ Without pointing to anything in the *Second Franchise Order*, the LFAs also raise in passing the argument that “fees imposed on an *applicant* for a cable franchise do not constitute franchise

CONCLUSION

The Commission should deny the LFAs' petitions for reconsideration.

Respectfully submitted,



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fees.” *Id.* at 7-8. The Commission has already explained in its brief to the Sixth Circuit in the pending appeal of the *First Franchise Order* that this argument is baseless and would eviscerate the statutory limits imposed on LFAs and render statutory language meaningless. *See* Brief of Respondents, *Alliance Community Media v. FCC*, Sixth Circuit U.S. Court of Appeals, Case No. 07-3391, at 65-66 (filed Sept. 17, 2007). The argument is all the more puzzling in the context of the *Second Franchise Order*, which addresses incumbent providers who, by definition, already have franchises and are thus undeniably cable operators.