

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Implementation of Section 621(a)(1) of the)
Cable Communications Policy Act of 1984 as) MB Docket No. 05-311
amended by the Cable Television Consumer)
Protection and Competition Act of 1992)
)
)
To: The Commission)

**COMMENTS OF
THE STATE OF HAWAII**

The State of Hawaii (the “State”), by its attorneys and pursuant to Section 1.429(f) of the Commission’s rules, 47 C.F.R. § 1.429(f), hereby provides its comments on the petitions for reconsideration and clarification that were filed in the above captioned proceeding.¹

The petitioners, *inter alia*, seek clarification of the *Second Report and Order* in this proceeding,² with regard to the applicability of certain interpretations of provisions of the

¹ These Comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs. The petitions referred to are: National Association of Telecommunications Officers and Advisors; The National League of Cities; The National Association of Counties; The U.S. Conference of Mayors; The Alliance for Community Media; and the Alliance for Communications Democracy, Petition for Reconsideration and Clarification, MB Docket No. 05-311 (Dec. 21, 2007) (“*NATOA Petition*”); 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, Petition for Reconsideration, MB Docket No. 05-311 (Dec. 21, 2007) (“*Cities Petition*”); and The City of Breckenridge Hills, Missouri, Petition for Reconsideration, MB Docket No. 05-311 (Dec. 21, 2007) (“*Breckenridge Hills Petition*”).

² *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, Second Report and Order, 22 FCC Rcd 19633, FCC 07-190 (2007) (“*Second Report and Order*”).

Communications Act of 1934, as amended (“the Act”) to states with state level franchising.³ The petitioners do not claim that the Commission’s interpretation of the requirements and prohibitions of Section 621(a)(1) apply to states with statewide franchising or that the orders are ambiguous on that issue. As demonstrated below, it is clear that the Commission’s implementation of Section 621(a)(1) does not apply to such states.

The petitioners, however, question whether the Commission’s interpretation of other statutory provisions, primarily Section 622, are applicable to states with state level franchising.⁴ As explained below, further examination of this issue is unnecessary in light of the substantial reforms that have been accomplished through state level franchise legislation. The requested clarification would also be inappropriate without first developing a fuller record in this proceeding.

I. THE APPLICABILITY OF THE COMMISSION’S IMPLEMENTATION OF SECTION 621(a)(1) IS UNAMBIGUOUS

No question exists regarding the fact that the *Second Report and Order* did not apply the Commission’s implementation of the requirements and prohibitions of Section 621(a)(1) to statewide franchising authorities. The Commission expressly excluded such states from the requirements of the *Report and Order* and the *Second Report and Order* did not address the issue.

³ See *NATOA Petition* at 10-11, *Cities Petition* at 3-5, and *Breckenridge Hills Petition* at 8-9.

⁴ *Cities Petition* at 3-5 and *NATOA Petition* at 11. See also *Second Report and Order*, 22 FCC Rcd at 19642, ¶ 19 and n.60.

In the *Report and Order*, the Commission determined that “we expressly limit our findings and regulations in this Order to actions or inactions at the local level where a state has not specifically circumscribed the [local franchising authority’s] authority.”⁵ The Commission recognized that it did not have an adequate record to make determinations on franchise decisions where a state is involved through state franchising or where a state has enacted laws that govern the franchising process.⁶ The absence of a record stemmed from the fact that many states have only recently adopted state level franchise statutes and those states that have had statewide franchise authorities for long periods have not been the subject of significant complaints by existing and aspiring cable operators.

The *Second Report and Order* addressed the issue of how incumbents are to be treated in light of the rules adopted for new entrants in the *Report and Order*. The *Second Report and Order* was silent with respect to the applicability of Section 621(a)(1) to statewide franchising authorities. It did not alter the express limitation of the *Report and Order* to local franchising authority (“LFA”) actions. In its petition, NATOA recognizes that the *Second Report and Order* did not explicitly address the issue.⁷ Therefore, the determination in the *Report and Order* to not impose requirements on statewide franchising authorities could not have been disturbed.

⁵ *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, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5102, FCC 06-180, n.2 (2006) (“*Report and Order*”).

⁶ *Id.* at 5156, ¶ 126 (“[T]he record before us does not provide sufficient information to make determinations with respect to franchising decisions where a state is involved, issuing franchises at the state level or enacting laws governing specific aspects of the franchising process.”).

⁷ See *NATOA Petition* at 10-11.

This result was appropriate because statewide authorities are providing a rapid and reasonable franchising process for new entrants to the cable industry. As Verizon has repeatedly acknowledged, Verizon has enjoyed “success with state franchise laws”⁸ and Verizon is now “content with the status quo.”⁹ Therefore, any clarification is unnecessary regarding the Commission’s exemption of state level franchise authorities from its implementation of Section 621(a)(1) in both the *Report and Order* and in the *Second Report and Order*.

II. ABSENT A MORE COMPLETE RECORD, THE COMMISSION SHOULD NOT CONSIDER WHETHER ITS INTERPRETATIONS OF OTHER STATUTORY PROVISIONS APPLY TO STATE LEVEL FRANCHISE AUTHORITIES

The petitioners request the Commission to explain whether its interpretation of other statutory provisions, primarily Section 622, are applicable to states with state level franchising.¹⁰ It would be inappropriate for the Commission to make such a determination without first developing a record regarding the franchising practices of state level franchise authorities.

The Commission’s interpretations of Section 622 in the *Report and Order* and the *Second Report and Order* were undertaken following a review and analysis of franchising practices undertaken by LFAs. Granted, the Commission’s interpretation of Section 622 of the Act may have been primarily an act of statutory construction. The Commission, however, interpreted the

⁸ *For Verizon, It's 2006 or Never on Federal Pay-TV Franchising Bill*, Television A.M., Warren Publishing, Inc. (Aug. 23, 2006) (quoting Verizon Executive Vice President Tom Tauke at the annual Progress & Freedom Foundation conference in Aspen, Colorado).

⁹ *Verizon Narrows Lobbying Goal to Broadband Access, Tauke Says*, Telecom A.M., Warren Publishing, Inc. (Feb. 13, 2007) (quoting Verizon Executive Vice President Tom Tauke in a discussion with journalists).

¹⁰ *Cities Petition* at 3-5 and *NATOA Petition* at 11. See also *Second Report and Order*, 22 FCC Red at 19642, ¶ 19 and n.60. The Commission also provided an interpretation of the jurisdiction of local franchising authorities with respect to mixed use networks pursuant to Section 602(7)(C). The primary section at issue, however, is Section 622, which is discussed herein.

statute (and justified its interpretations) based in part on its analysis of recent and historical practices of LFAs in considering and granting local franchises to cable operators.

The Commission, however, did not consider the franchising practices of state level franchise authorities prior to interpreting Section 622 and other statutory provisions. The collection and consideration of a state level franchising record could change the Commission's interpretation of the statute as it is applied to states.

For example, in the *Report and Order*, the Commission interpreted the meaning of charges "incidental" to the awarding or enforcing of a franchise, which are excluded from the five percent franchise fee.¹¹ The Commission's interpretation of "incidental" excluded attorneys and consultant fees, as well as other expenses that were not deemed "incidental" or "minor."¹²

The Commission relied on reports of the parties that "disputes over such issues as well as unreasonable demands being made by some franchising authorities in this regard may be leading to delays in the franchising process as well as unreasonable refusals to award competitive franchises."¹³ The record that the Commission considered did not include a record of statewide franchising. Based on such a record, the Commission arguably could determine that the term "incidental" could include attorneys or consultant fees because such fees could be "incidental" or "minor" when seen in the context of (1) the cable revenues of a statewide operator, (2) a five

¹¹ See *Report and Order*, 22 FCC Rcd at 5147-5149, ¶¶ 99-104.

¹² See *id.* at 5148-5149, ¶¶ 103-104. In citing to this example, the State is not conceding that the Commission's interpretation of the statute was appropriate in this instance. The State is simply employing the example to illustrate the process that the Commission used to reach its conclusion.

¹³ *Id.* at 5147, ¶ 99.

percent franchise fee on such statewide revenues, and (3) the application costs necessary for review of a statewide franchise application. The Commission could find that such relatively minor fees are not “leading to delays in the franchising process” or “unreasonable refusals to award competitive franchises” at the state level. The necessary record to make this determination, however, has not been collected and considered by the Commission.

It is therefore evident based on the Commission’s analysis in the *Report and Order* and *Second Report and Order* that the Commission’s interpretation of Section 622 and other statutory provisions entailed an exercise of both statutory construction and an analysis of local regulatory conditions. Therefore, the Commission’s interpretations of these provisions should not be applied to statewide authorities absent further insight and a complete record regarding franchising practices at the state level. Once such a record for statewide regulatory practices does exist, the Commission arguably could find that the statutory interpretations that are applicable to LFAs should not be applied to states in the same manner. As explained below, however, there is no need to undertake such an effort at this time.

III. IT IS UNNECESSARY FOR THE COMMISSION TO ADDRESS WHETHER ITS INTERPRETATIONS OF OTHER STATUTORY PROVISIONS APPLY TO STATE LEVEL AUTHORITIES

Not only would it be inappropriate for the Commission to consider at this time whether its interpretations of Section 622 and other provisions apply to state level franchise authorities, but it would also be unnecessary. The Commission interpreted Section 622 in the *Report and Order* to further the purpose of the proceeding—to implement Section 621(a)(1) of the Communications Act and prohibit *local* franchise authorities from “unreasonably” refusing to

award franchises to new entrants.¹⁴ Since the Commission has not applied its Section 621(a)(1) findings to state level franchise authorities, it is unnecessary to determine whether the Commission's collateral interpretations of other statutory sections apply to state level authorities.

Commission consideration of this issue is also unnecessary because, as explained above, state level authorities have implemented efficient and reasonable franchising procedures that have expedited market entry for competitive cable operators. Finally, clarification of the *Second Report and Order* is unnecessary because no state with state level franchising or carrier seeking a statewide franchise sought clarification of the Commission's orders in this proceeding. Only cities, counties and their national associations filed petitions for clarification of the *Second Report and Order* addressing this issue. No ambiguity exists with respect to the applicability of the orders to LFAs.¹⁵

Therefore, no need exists to issue a further notice and develop a sufficient record in this proceeding to determine whether the Commission's interpretations of Section 622 and other statutory sections should be applied to states with state level franchising authorities. The

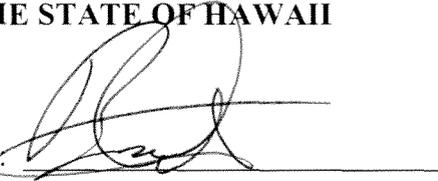
¹⁴ *See id.* at 5102, ¶ 1.

¹⁵ To the extent an LFA is uncertain whether the orders apply in circumstances where both local and statewide franchising are available, it may be reasonable to conclude that the orders apply in circumstances where an LFA has unfettered discretion under state statute in the negotiation and drafting of franchises. *See Cities Petition* at 4. Such an approach is supported by the Commission's conclusion that its exemption for statewide franchising authorities applies only where the state has "specifically circumscribed the LFAs authority." *Report and Order*, 22 FCC Rcd at 5102, n.2. The Commission, however, can clarify this discrete issue without attempting to address the far broader issue of the overall scope of the Commission's exemption for state level authorities.

statewide franchising process is functioning well and does not require further attention in this proceeding.

Respectfully submitted,

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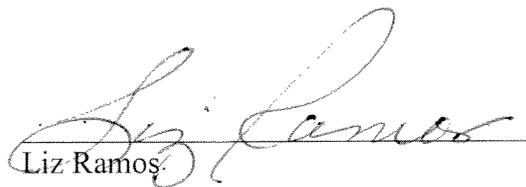
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of the State of Hawaii was mailed this 11th day of February, 2008 by U.S. mail to the following:

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