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
	)	
	)	

COMMENTS OF THE 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 IN RESPONSE TO THE FURTHER NOTICE OF PROPOSED RULEMAKING

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SUMMARY

Before turning to the issues raised in the FNPRM, we must first register our strong disagreement with the findings in the ***Order*** accompanying the FNPRM. Those findings exceed the Commission's authority under the Cable Act and are arbitrary and capricious. We have appealed the ***Order,*** and our positions in these comments are premised on the assumption, solely for the purposes of argument given the procedural posture of the ***Order*** and the FNPRM, that the findings in the ***Order*** might stand.

1. The findings of the *Order* should not he applied to incumbent cable operators, either before expiration of their current franchises, or thereafter. What the *FNPRM* studiously ignores are the franchise renewal provisions of Section 626, the prism through which, unlike the case of new entrants, franchise renewal for incumbent operators must pass.

The ***Order,*** as well as the initial NPRM and this proceeding's very title, rest exclusively on Section 621(a)(1)'s provision prohibiting LFAs from "unreasonably refus[ing] to award an additional competitive franchise." But Section 621(a)(1)'s "unreasonable refusal'' provision does not apply to incumbent cable operators at all. An incumbent cable operator's continued ability to operate in an LFA's jurisdiction at the expiration of its current franchise is governed not by Section 621(a)(1), but by Section 626. Yet, amazingly, the *FNPRM* does not even once mention Section 626.

Section 626 provides for a renewal process intimately tied to an LFA's determination of its future cable-related community needs and interests. An LFA's determination of those needs and interests, and of whether an incumbent operator's renewal proposal meets them, is inherently LFA-specific, and deference is owed to an LFA's determinations on those matters. The

FNPRM's tentative conclusion to extend the findings of the *Order* to incumbent operators at renewal is flatly inconsistent with Section 626's emphasis on an LFA's periodic review and revision of its own specific cable-related needs and interests at the time of franchise renewal. And an LFA's cable-related needs and interests typically do change, sometimes substantially, from one franchise renewal to the next. Applying the *Order's* static findings to incumbents at renewal simply cannot be squared with Section 626's directive that each LFA may review and determine afresh its own unique cable-related needs and interests at the time of incumbent cable franchise renewal.

Only courts, not the Commission, have jurisdiction to construe and enforce Section 626. The *FNPRM* offers only two Cable Act statutory justifications for its tentative conclusion to extend the *Order's* findings to incumbent operators at renewal: Sections 611(a) (concerning PEG) and 622(a) (concerning franchise fees). Section 611 gives the FCC no substantive authority or role. Rather, Section 611 merely codifies preexisting LFA authority to require cable operators to provide PEG capacity and facilities. There is simply no room in the Cable Act for the Commission to insert itself into the inherently local, and community-specific, determinations of PEG needs and interests by individual LFAs in the franchise renewal process. The *FNPRM*'s reliance on Section 622 is likewise misplaced. The Commission will exercise jurisdiction over franchise fee disputes only where the issue "directly impinges on a national policy concerning cable communications *and* implicates the agency's expertise." Neither the *Order* nor the *FNPRM* meets this standard.

Even assuming, *arguendo*, that the FNPRM's proposal to extend the findings of the *Order* to incumbents at renewal were justifiable with respect to some of the *Order's* findings, it clearly is not with respect to others. In particular, the "shot clock," build-out, and "mixed-use

networks" aspects of the *Order* have no application to incumbent cable operators. The time limits and "interim franchise" aspects of the *Order are* flatly inconsistent with the text of Section **626.** The build-out aspects of the *Order* also cannot be applied to incumbent cable operators. The supposed justifications proffered in the *Order* for the build-out findings are on their face inapplicable to incumbents. Moreover, if the build-out provisions of the *Order* were extended to incumbents at renewal, that could well mean that incumbents would never have to extend their current cable service footprint and, in some cases, might be permitted to withdraw from neighborhoods that they currently serve, leaving those neighborhoods completely unserved. The "mixed-use networks" aspects of the *Order* likewise cannot logically be applied to incumbent cable operators. They **are** all premised on the assumption that an LEC entering the cable market might upgrade its existing telephone network prior to providing non-cable and cable services, an assumption that is inherently inaccurate in the case of incumbent cable operators.

2. The *FNPRM* wisely does not propose to apply the *Order's* findings to incumbents prior to expiration of their current franchises. While we disagree with the *FNPRM's* tentative conclusion to apply the *Order's* findings to incumbent cable operators at renewal, we do agree that, if any of those findings are to be applied to incumbents at all (and again, we think they should not), they should only be applied to incumbents at the expiration of their current franchises and not to incumbents' current franchises. Applying the *Order's* findings to current incumbent operator franchise agreements would wreak immediate havoc on existing local government budgets and PEG center budgets. It would upset settled expectations of LFAs and PEG centers that have justifiably relied on the terms of existing franchises not only in developing their budgets, but in anticipating and planning their emergency and other internal communications needs, PEG access needs, and other cable-related needs over the remaining term

of the incumbent's franchise. Moreover, these expectations are fully legitimate and justified. Existing incumbent franchise agreements *are* the product of negotiations between the LFA and incumbent operator, negotiations that took place with the incumbent operator-protective provisions of Section 626 in place and in which the operator was a sophisticated negotiator with full knowledge and awareness of the provisions of the Cable Act. Current franchise agreements also reflect compromises reached between the LFA and incumbent cable operator on a variety of complex, and situation-specific, issues and circumstances. The Commission cannot, and should not, upend the delicate and complex balancing of competing interests and claims settlements embodied in current franchise agreements.

3. The Commission should adopt the *FNPRM*'s tentative conclusion regarding the meaning of Section 632(d)(2). We endorse the *FNPRM*'s tentative conclusion that Section 632(d)(2) bars the Commission from preempting state or local customer service laws that exceed the Commission's cable customer service standards, and from preventing LFAs and cable operators from agreeing to customer service standards more stringent than the Commission's. This tentative conclusion is unassailable, as it merely states that Section 632(d)(2) means what it says.

Before the
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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

COMMENTS OF THE 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 IN RESPONSE TO THE FURTHER NOTICE OF PROPOSED RULEMAKING

The National Association of Telecommunications Officers and Advisors ("NATOA"), the National League of Cities ("NLC"), the National Association of Counties ("NACo"), the U.S. Conference of Mayors ("USCM"), the Alliance for Community Media ("ACM), and the Alliance For Communications Democracy ("ACD), submit these comments in response to the Further Notice of Proposed Rulemaking, released March 5, 2007, in the above-captioned proceeding ("*FNPRM*").

NATOA's membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer cable franchising and telecommunications policy for the nation's local governments.

The NLC is the oldest and largest national organization representing municipal governments throughout the United States. It serves as a resource to and an advocate for more than 18,000 cities, villages, and towns in furtherance of its mission to strengthen and promote cities.

NACo is the only national organization that represents county governments in the United States. It serves as a national advocate for counties; acts as a liaison with other levels of government; and provides legislative, research, technical and public affairs assistance to its members.

USCM is the official nonpartisan organization of the nation's 1,183 U.S. cities with populations of 30,000 or more. Its mission is to promote effective national urban/suburban policy, strengthen federal-city relationships and ensure that federal policy meets urban needs.

ACM is a nonprofit, national membership organization that represents 3,000 public, educational and governmental ("PEG") cable television access organizations and community media centers across the nation. It pursues its mission of assuring access to electronic media for all through its legislative and regulatory agenda, coalition building, public education, and grassroots organizing.

ACD is an advocacy group for public access television, dedicated to preserving and strengthening community access to media through educational programs and participation in court cases involving franchise enforcement and constitutional questions about community television.

INTRODUCTION

Before turning to the issues raised in the *FNPRM*, we must first register our strong disagreement with the findings and rulings in the *Order*[1] accompanying the *FNPRM*. Those findings and rulings exceed the Commission's authority under the Cable Act, are unnecessary to promote competition, violate the Cable Act's goal of ensuring that a cable system is "responsive to the needs and interests of the local community," 47 U.S.C. § 521(2), are in conflict with several other provisions of the Cable Act and other applicable law, and are arbitrary and capricious.[2] We, as well as other local government interests, have petitioned for court review of the *Order* on these and other grounds,[3] and the outcome of those appeals could very well have a significant impact on – indeed, might well moot – most of the issues raised in the *FNPRM*.

Assuming, solely for the purposes of argument (as we must, given the procedural posture of the *Order* and the *FNPRM)*, that the findings and rulings in the *Order* might stand, we agree with the *FNPRM's* tentative conclusion that those findings and rulings cannot be applied to incumbent cable operators during the remaining term of their current franchises, but we disagree with the *FNPRM's* tentative conclusion (at ¶ 140) that the *Order's* rulings may be applied to incumbents thereafter. On the other hand, we fully support the *FNPRM's* other tentative conclusion (at ¶ 143) that Section 632(d)(2) of the Communications Act prohibits the

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[1] *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, FCC 06-180 (rel. March 5,2007) *("Order").*

[2] We incorporate by reference our comments, reply comments and *ex parte* filings in this docket. See, *e.g.,* Comments of NATOA **et** *al.,* filed February 13,2006; Reply Comments of NATOA *et al.,* filed March 28,2006; *Ex Parte* Notices filed on August 14,2006, August 17,2006, September 1, 2006, September 13,2006, September 19, 2006, November 3,2006, December 7,2006, December 8,2006, and December 12,2006; November 17,2006, letter from Libby Beaty, Executive Director of the National Association of Telecommunications Officers and Advisors and Tillman **L.** Lay of Spiegel & McDiarmid, tiled on behalf of NATOA et *al.* in response to the October 18,2006, letter tiled by BellSouth Corporation in this proceeding.

[3] *See NATOA v. FCC,* No. 07-1270 (4th Cir. filed April 3,2007); *Larchmont v. FCC,* No. 07-1350-ag (2nd Cir. filed April 3,2007); *NACo v. FCC,* No. 07-1985 (3rd Cir. filed April 3,2007); *ACM v. FCC,* No. 07-3391 (6th Cir. filed April 3, 2007); *GMTC* v. FCC, No. 07-9518 (10th Cir. filed April 3, 2007); *Tampa v. FCC,* No. 07-11464-D (11th Cir. filed April 3, 2007).

Commission from preempting state and local customer service laws that exceed the Commission's cable customer service standards, and from preventing local franchising authorities ("LFAs") and cable operators from agreeing to more stringent cable customer service standards than the Commission's

I. THE FINDINGS OF THE *ORDER* SHOULD NOT BE APPLIED TO INCUMBENT CABLE OPERATORS, EITHER BEFORE EXPIRATION OF THEIR CURRENT FRANCHISES, OR THEREAFTER.

The *FNPRM* tentatively concludes (at ¶ 140) "that the findings in [the] ***Order*** should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs." Two brief justifications are offered for this tentative conclusion.

First, the *FNPRM* (at ¶ **139)** notes that new entrants apparently do not oppose "the idea that any relief afforded them also be afforded to incumbent cable operators" and that incumbent cable operators (not surprisingly) argue that they should enjoy the same "relief' as new entrants. Conspicuously absent from the *FNPRM*'s discussion is any mention or apparent concern at all about the interests and concerns of LFAs, subscribers, viewers and other members of the public who benefit from the availability of PEG access and other public interest franchise obligations of incumbent cable operators – parties that would quite obviously and directly be affected by the *FNPRM*'s proposal.

Second, the *FNPRM* (at ¶ 140) points to Sections 611(a) and 622(a) of the Act (concerning PEG obligations and franchise fees, respectively) and states that they draw no distinction between incumbents and new entrants. As explained more fully below, however, what the *FNPRM* studiously ignores are the franchise renewal provisions of Section ***626,*** the

prism through which, unlike the case of new entrants, franchise renewal for incumbent operators must pass

When carefully analyzed, as it must be, against the Cable Act's touchstone that each local LFA's franchise renewal process must be based on its own, unique cable-related needs and interests as determined at the time of renewal, the *FNPRM*'s proposal to extend the findings of the *Order* to incumbent cable operators comes up wanting.

A. All of the *Order's* Findings Are Premised on Section 621(a)(1) and the Supposed Handicaps Faced by New Entrants, Purported Justifications that are Inapplicable to Incumbent Cable Operators.

The *Order,* as well as the initial *NPRM* in this proceeding[4] -- indeed, this proceeding's very title – rest on Section 621(a)(1) and, more specifically, on its provision prohibiting LFAs from "unreasonably refus[ing] to award *an additional competitive franchise.*" (Emphasis added.) Thus, the *NPRM,* from its opening paragraph (at ¶ 1) to its concluding paragraph's citation to the statutory authority on which the Commission relies (at ¶ 34), and in almost every paragraph in between, is premised on § 621(a)(1) and the Commission's professed desire to assess whether "the local franchising process serves as a barrier to entry" (at ¶ 1).

The *Order's* findings are likewise rooted in § 621(a)(1), and the Commission described each of the rulings therein as "measures to address **a** variety of means by which . . . [LFAs] are unreasonably refusing to award competitive franchises." *Order* at ¶ 1. Each of the *Order's* six findings is explicitly tied to the Commission's alleged authority under Section 621(a)(1)'s "unreasonable refusal" language. *Id.* at ¶ 5. *See also id.* at ¶ 66 (time limits to act on competitive franchise applications), ¶ 82 (build-out requirements), ¶ 94 (franchise fee

[4] *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, Notice of **Proposed** Rulemaking, FCC 05-189 (rel. Nov. 18,2005) ("*NPRM*").

limitations are adopted as "an exercise [of] our authority under Section 621(a)(1)"), ¶ 110 (PEG/Institutional Networks), ¶ 121 (various alleged demands of LFAs relating to mixed-use networks are "unreasonable"), and ¶ 125 (preemption of local law, regulations and requirements).

The Commission having inextricably linked each and every one of the ***Order's*** findings to Section 621(a)(1)'s "unreasonable refusal" language, the *FNPRM* turns around and, with little more than a "why not?", proceeds to propose to apply them to incumbent cable operators at renewal (at ¶ 139-140). But even if the Cable Act could be stretched as far as the ***Order*** attempts (and we think not), it cannot be stretched any further as the *FNPRM* proposes.

We begin with what should be obvious: Section 621(a)(1)'s "unreasonable refusal" provision does not apply to incumbent cable operators at all.[5] By definition, an LFA has not "refuse[d] to award" a franchise to the incumbent cable operator; that operator already has a franchise. Except in those areas where an LFA has already granted one or more competitive franchises, an incumbent's franchise is also not "an additional competitive franchise" within the meaning of Section 621(a)(1). And in those areas where an **LFA** has already awarded "an additional competitive franchise," the LFA has by definition not "refuse[d] to award such a franchise," reasonably or otherwise.

Put a little differently, every incumbent cable operator, whether it is the only current franchiseholder in an area or one of several such franchiseholders, has by definition been granted a franchise. And that incumbent cable operator's continued ability to operate in an LFA's jurisdiction at the expiration of its current franchise is governed not by Section 621(a)(1), but by Section 626, the Cable Act's provision concerning renewal of cable franchises.

[5] *See. e.g., NEPSK, Inc. v. Town of Houlton*, 167 F.Supp.2d 98 (D. Maine 2001), *aff'd*, 283 F.3d 1 (1st Cir. 2002).

Amazingly, the *FNPRM* does not even once mention Section 626. And as we now show, Section 626 does not empower the Commission to do what it proposes in the *FNPRM*.

B. Renewal of Incumbent Cable Operators' Franchises Is Governed by Section 626, Not Section 621(a)(1), and the Commission Lacks Jurisdiction to Construe or Enforce Section 626.

1. Section 626 is the Exclusive Means for Addressing Renewal of Incumbent Cable Operator's Franchises, and It Is Based on LFA-Specific Cable-Related Needs and Interests

One of the Cable Act's express purposes is to "establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal." 47 U.S.C. § 521(5). That goal is accomplished through Section 626 (47 U.S.C. § 546), which "sets forth procedures and standards which may be used for the renewal of cable franchises."[6]

Section 626 provides for a two-step renewal process, with the first step involving an LFA "identifying [its] future cable-related community needs and interests." Section 626(a)(1)(A). Once an LFA has determined those needs and interests, one of the key issues in the second step – determining whether a franchise will be renewed – is whether the incumbent operator's renewal proposal "is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests." Section 626(c)(1)(D). An LFA's determination of its future community cable-related needs and interests, and of whether an incumbent operator's renewal proposal meets those needs and interests, is inherently LFA-specific, and deference is owed to an LFA's determinations on those issues:

> "The Cable Act recognizes that municipalities are best able to determine a community's cable-related needs and interests. The city council's knowledge of the community gives it an institutional advantage in identifying the community's cable needs and

[6] H.R. Rep. No. 934, 98th Cong., 2d Sess. at 72 ("*1984 House Report*")

> interests. It would be inappropriate for a federal court to second-guess the city in its identification of such needs."'

The *FNPRM*'s tentative conclusion to extend the findings of the ***Order*** to incumbent operators at renewal is flatly inconsistent with the Section 626's emphasis on an LFA's periodic review, and revision, of its own specific cable-related needs and interests at the time of franchise renewal. Instead, the ***Order's*** apparent finding that a new entrant's PEG and I-Net requirements, for instance, must not exceed those of the incumbent cable operator would seem to mean, if applied to the incumbent operator at franchise renewal, that an LFA would be unable to ascertain and revise its cable-related needs and interests at renewal but would instead be perpetually locked down to the level of community cable-related needs and interests as determined in the incumbent's last renewal before the new entrant arrived. But such a permanent, one-way ratchet on community needs and interests simply cannot be squared with Section 626's directive that each LFA may review and determine afresh its cable-related needs and interests at the time of incumbent cable franchise renewal. And indeed, an LFA's cable-related needs and interests typically do change, sometimes substantially, from one franchise renewal to the next.

In short, applying the ***Order's*** interpretation of Section 621(a)(1) to Section 626 – which is precisely what the *FNPRM* proposes to do in applying those findings to incumbent operators at renewal – would be inserting a square peg in a round hole. And even if the Commission were to make such an effort, it would fail, because the Cable Act makes clear that only courts, not the Commission, have jurisdiction to construe and enforce Section 626, as we now show.

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[1] *Union CATV v. City of Sturgis*, 107 F.3d **434,441** (6th **Cir. 1997). As noted** in Part I(B)(2) **below,** only **courts, not the FCC, have jurisdiction to construe or enforce Section** 626.

2. The Commission Has No Jurisdiction To Construe or Enforce Section 626.

Section 626 is, like Section 621(a) and 625, one of only three franchising-related provisions of the Cable Act which expressly provides for review by the courts under Section 635. In our opening and reply comments in response to the *NPRM* in this proceeding, we set forth the arguments why this means that the Commission has no jurisdiction to construe or enforce any of those three provisions, and we incorporate these arguments by reference here.[8]

We recognize, of course, that the *Order* (at ¶¶ 53-64) concluded otherwise with respect to Section 621(a)(1). But even assuming *arguendo* that the *Order's* ruling is correct with respect to FCC jurisdiction over § 621(a)(1) (and we think it clearly is not), both Section 626(e)(1) and its legislative history leave no doubt that the jurisdiction over Section 626 given to courts is intended to encompass all Section 626 disputes:

> "A cable operator adversely affected by a franchising authority's failure to comply at any time with the procedural requirements of this section or whose proposal for renewal is denied may appeal to state court or to the U.S. District Court under the provisions of section [635]. *If a ,franchising authority grunts renewal, **but** subject to specified conditions which the operator refuses to accept, the operator may appeal that decision as if it were a denial.* If the incumbent is granted renewal pursuant to his proposal, there is no right of appeal by any other party."

1984 House Report at *75* (emphasis added). *See also id.* at 94.

Further, contrary to the *Order's* suggestion (at ¶ 56, n.214), *ACLU v. FCC,* 823 F.2d 1554 (D.C. Cir. 1987), supports our position on this issue, not the Commission's. The *ACLU* court noted that unlike Section 622, the provision of the Cable Act at issue in that case, "[s]everal other provisions of the [Cable] Act, by contrast, delegate adjudicatory or regulatory

[8] *See* Comments of NATOA *et al.* in Docket No. 05-311, at 4-21 (filed Feb. 13, **2006); Reply** Comments of NATOA *et al.* in Docket No. 05-311, at **4-20** (filed March 28,2006).

tasks to a particular governmental body," such as the courts. *Id.* at 1559 n.4. *See also id.* at 1574 & n.39. Section 626 is, of course, one of the provisions of the Act that does delegate authority to a particular body, and that body is the courts, not the Commission. And unlike Section 622, which contains a reference to court review relating only to one subsection of Section 622. *see ACLU*, 823 F.2d at 1574 & n.40,[9] the court review authority over franchise renewals under Sections 626 and 635 is complete, encompassing the entirety of Section 626.

In sum, Section 626 denies the Commission jurisdiction to extend the findings of the *Order* to incumbent cable operators at renewal

C. The Legal Justifications Offered in the *FNPRM* for Extending the *Order's* Findings to Incumbents Fail.

The *FNPRM* offers only two Cable Act statutory justifications for its tentative conclusion to extend the *Order's* findings to incumbent operators at renewal: Sections 611(a) (concerning PEG) and 622(a) (concerning franchise fees). *FNPRM* at ¶ 140 & App. C at ¶ 3. Neither suffices.

Unlike many other provisions of the Communications Act, Section 611 gives the FCC no substantive authority or role. Rather, Section 611 merely codifies preexisting LFA authority to require cable operators to provide PEG capacity and facilities:

> "In passing the PEG provision [Section 611], Congress thus merely recognized and endorsed the preexisting practice of local franchise authorities conditioning their cable franchises on the granting of PEG access . . . . All the statute does, then, is preempt states from prohibiting local PEG requirements (if any states were to choose to do so) and preclude federal preemption challenges to such [PEG]

[9] It bears noting that, even in the case of Section 622, whose sole reference to "court action'' applies only to one subsection, the *ACLU* court had no difficulty concluding that courts nevertheless share concurrent jurisdiction with the FCC over all of Section 622. *Id.*

> requirements, challenges that cable operators might have brought in the absence of [Section 611]."[10]

Because Section 611 "simply permits franchise authorities to regulate where they had previously done so [before the Cable Act]," it provides the Commission with no authority to regulate or limit LFA PEG requirements.

Any doubt on this point is dispelled by Section 626, which provides that PEG and I-Net requirements at renewal will be determined by the LFA based on "future cable-related community needs and interests," Section 626(a)(1)(A) & (c)(1)(D), with the LFA's determination entitled to deference and subject only to "very limited" court – and only court – review. *Sturgis*, 107 F.3d at 441. There is simply no room in the Cable Act for the Commission to insert itself into the inherently local, and community-specific, determinations of PEG needs and interests by individual LFAs in the franchise renewal process.

The *FNPRM*'s reliance on Section 622 is likewise misplaced, although for different reasons. To be sure, the Commission does share concurrent jurisdiction with the courts on Section 622 franchise fee disputes, and under its policy of forbearance with respect to such disputes, the Commission will exercise jurisdiction over a franchise fee dispute only where the dispute "directly impinges on a national policy concerning cable communications ***and*** implicates the agency's expertise." Neither the ***Order*** nor the *FNPRM*, however, meets this standard.

There is no suggestion in the ***Order*** or the *FNPRM* of any current dispute between LFAs and incumbent cable operators concerning Section 622's meaning, much less one that implicates

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[10] *Time Warner Entertainment v. FCC*, 93 F.3d 957, 972-73 (D.C. Cir. 1996) (citations omitted). *Accord* 1984 *House Report* at 30.

[11] *Time Warner*, 93 F.3d at 972. *Accord ACLU*, 832 F.2d at 1559 ("Section 611 empowers franchising authorities, ***in*** *their discretion*, to require that cable operators designate channels for [PEG] use") (emphasis added).

[12] *ACLU*, 823 F.2d at 1573-74 (quoting *Amendment of Parts 1, 63 and 76 of the Commission's Rules to implement Provisions of the Cable Communications Policy Act of 1984*, 104 F.C.C.2d 386, 60 R.R.2d (P&F) 514, 518 (1986)) (emphasis added).

a national policy concerning cable communications ***and*** falls within the Commission's expertise. To the contrary, incumbent operators and LFAs have been negotiating franchise fee-related provisions in franchises for years. They have reached, and relied upon, mutually acceptable agreements on franchise fee and other issues, and each party – but especially the incumbent cable operator – is a sophisticated and knowledgeable party fully aware of the applicable provisions of Section 622. Nor can it be plausibly asserted that incumbent operators, sophisticated and knowledgeable of the Cable Act as they are, were forced to reach such agreements against their will. On the contrary, they reached such agreements with the full knowledge that they are protected by the renewal provisions of Section 626, which were specifically designed to protect incumbent cable operators from the imposition of unreasonable requirements in renewal franchises.[13] The *FNPRM's* proposal to extend the franchise fee aspects of the ***Order*** to incumbent cable operators is therefore a solution in search of a problem, and one that does not satisfy the threshold of the Commission's own forbearance policy with respect to franchise fee disputes.

A final justification for the *FNPRM's* proposal to extend the ***Order's*** findings to incumbents at renewal, while less specific, appears to be the notion of "competitive neutrality" or a "level playing field" – that is, incumbent cable operators should receive the same treatment as their new entrant competitors. ***See*** *FNPRM* at ¶ 139. But this justification is inconsistent with the ***Order's*** purported preemption of franchise level playing field provisions. ***See Order*** at ¶¶ 48 & 138.

[13] **47 U.S.C.** § 521(5). ***See*** *also 1984* ***House*** *Report* at *25-26.*

D. Even if the *FNPRM*'s Proposal to Extend the *Order's* Findings to Incumbents Were Sustainable with Respect to Some of the *Order's* Findings, It Clearly Is Not with Respect to Other Findings in the *Order.*

Even assuming, ***arguendo,*** that the *FNPRM*'s proposal to extend the findings of the ***Order*** to incumbents at renewal were justifiable with respect to some of the ***Order's*** findings, it clearly is not with respect to others. In particular, the "shot clock," build-out and "mixed-use networks" aspects of the ***Order*** do not, and cannot, have any application to incumbent cable operators.

1. Section 626 Bars Application of the *Order's* Franchise Negotiation Time Limit Provisions to Incumbent Cable Ouerators.

The new time limits and "interim franchise" aspects of the ***Order*** (at ¶¶ 66-81 & Appendix B) are all predicated on Section 621(a)(1). **As** noted in Parts I(A) and (B) above, Section 621(a)(1) does not apply to incumbent cable operators. Their franchises are governed instead by the renewal provisions of Section 626.

The time limits and "interim franchise" aspects of the ***Order*** are flatly inconsistent with Section 626. That section has its own specific timelines that the Commission is powerless to alter. Section 626 explicitly provides for a three-year formal franchise renewal process (Section 626(a)-(g)) to be initiated by either the incumbent operator or the LFA. The Commission cannot compress or otherwise change that timeline; only Congress can. Moreover, the Commission also cannot superimpose a new timeline for the informal renewal process of Section 626(h), because that section specifically allows an LFA to grant or deny an incumbent cable operator's informal renewal proposal "at any time."

In short, Section ***626*** bars the Commission from extending the "shot clock" provisions of the *Order* to incumbent cable operators at the time of franchise renewal.

2. The Build-Out Aspects of the *Order* Cannot Rationally Be Applied to Incumbent Cable Operators.

The build-out aspects of the *Order* (at ¶¶ **82-93)** should not, and cannot, be applied to incumbent cable operators, for at least two reasons.

First, the bases offered in the *Order* for limitations on LFA build-out requirements relate to the purported handicaps that the Commission claims a new entrant faces and thus, even if that were true, those supposed handicaps have no applicability to incumbent operators. Indeed, the underlying basis for the *Order's* entire discussion of build-out requirements is the Commission's claims about the supposed "entry-deterring effect of build-out conditions" *(Order* at ¶¶ **88,** 89, 90 & 91). Even if the Commission were correct on this issue as to new entrants (which it is not), incumbents by definition do not, and cannot, face "entry-deterring effects."

Second, if the build-out provisions of the *Order* were extended to incumbents at renewal, that could well mean that incumbents would never have to extend their current cable service footprint and, in some cases, might be permitted to withdraw from areas and neighborhoods that they currently serve, leaving those areas and neighborhoods completely unserved. Such a result would mean reduced cable and broadband service availability in direct violation of the Commission's stated goal of promoting broadband deployment *(id.* at ¶ **88).**

3. The "Mixed-Use Networks" Aspects of the *Order* Cannot Be Applied to Incumbent Operators.

The "mixed-use networks" aspects of the *Order* (at ¶¶ 121-124) likewise cannot logically be applied to incumbent cable operators. Those aspects of the *Order* are all premised on the

assumption that an LEC entering the cable market might upgrade its existing telephone network prior to providing non-cable and cable services. That assumption is inherently inaccurate in the case of incumbent cable operators. Incumbents are, by definition, not merely "propos[ing] to offer cable services" ***(Order*** at ¶ 121) but are already using their networks to provide such services. Any upgrades of incumbent cable operators' existing networks are therefore as intimately tied (if not more so) to the provision of cable service as an LEC's upgrade may be tied to telecommunications or other non-cable services.

IJ. THE *FNPRM* WISELY DOES NOT PROPOSE TO APPLY THE *ORDER'S* FINDINGS TO INCUMBENTS PRIOR TO EXPIRATION OF THEIR CURRENT FRANCHISES.

While we do not agree with the *FNPRM*'s tentative conclusion to apply the ***Order's*** findings to incumbent cable operators at the time of renewal of their current franchises, we do agree that, if any of those findings are to be applied to incumbents at all (and again, we believe they should not), they should only be applied to incumbents at the expiration of their current franchises and not to incumbents' current franchises. In this limited and contingent respect, we support the *FNPRM*'s tentative conclusion regarding application of the ***Order's*** findings to incumbent operators.

Applying the ***Order's*** findings to current incumbent operator franchise agreements, in contrast, would wreak immediate havoc on existing local government budgets and PEG center budgets. It would upset settled expectations of LFAs and PEG centers that have justifiably relied on the terms of existing franchises not only in developing their budgets, but in anticipating and planning their emergency and other internal communications needs, PEG access needs, and other cable-related needs over the remaining term of the incumbent's franchise. These expectations extend not only to LFAs and PEG centers, but also to their taxpaying residents and PEG viewers,

who have come to expect a certain level of local government communications capability and PEG programming from the incumbent operator's franchise.

Moreover, these expectations are fully legitimate and justified. Existing incumbent franchise agreements are the product of negotiations between the LFA and incumbent operator, negotiations that took place with the incumbent operator-protective provisions of Section **626** in place and in which the operator was a sophisticated negotiator with full knowledge and awareness of the provisions of the Cable Act. Current franchise agreements also reflect compromises reached between the LFA and incumbent cable operator on a variety of complex, and situation-specific, issues and circumstances. Incumbent franchise agreements, for example, often include benefits received in return for the LFA's settlement and release of claims that it may have had against the incumbent under the franchise existing prior to its latest renewal franchise. Similarly, existing franchise agreements also often reflect voluntary offers of cable-related services made by the incumbent operator that the Cable Act sanctions. See, *e.g.*, 47 U.S.C. § 544(b)(2).

The Commission cannot, and should not, upend the delicate and complex balancing of competing interests and claims settlements embodied in current franchise agreements. If the findings in the ***Order*** are to be applied to incumbents at all, the *FNPRM* properly concludes that they should be applied only at the end of incumbent's current franchise. That approach would at least give LFAs and PEG centers some opportunity to revise their budgets and cable-related priorities to plan for and accommodate the financial and other hardships that application of the ***Order's*** findings to incumbents would create.

III. THE COMMISSION SHOULD ADOPT THE *FNPRM*'S TENTATIVE CONCLUSION REGARDING THE MEANING OF SECTION 632(d)(2).

We endorse and applaud the *FNPRM*'s tentative conclusion (at ¶ 143) that Section 632(d)(2) bars the Commission from preempting state or local customer service laws that exceed the Commission's cable customer service standards, and from preventing LFAs and cable operators from agreeing to customer service standards more stringent than the Commission's. This tentative conclusion is unassailable, as it merely states that Section 632(d)(2) means what it says.

The *FNPRM* notes (at ¶ 141) the complaints of AT&T and Verizon that customer service requirements may vary from jurisdiction to jurisdiction. But even if the Commission deems such local variation undesirable from a policy standpoint (and we believe it should not[14]), Congress in Section 632(d)(2) has explicitly made the opposite policy judgment. The Commission is powerless to second-guess, or rewrite, the policy judgment reflected in Section 632(d)(2). And that judgment – a wise one, we believe – is clear: The Commission's cable customer service standards are a floor, not a ceiling.

CONCLUSION

For the foregoing reasons, the Commission should not adopt the *FNPRMs* tentative conclusion to extend the *Order's* findings to incumbent operators. If the Commission is nevertheless inclined to adopt that tentative conclusion, it should stand by the *FNPRMs* conclusion not to apply those findings to incumbents until the expiration of their current franchises. The Commission should adopt the *FNPRM*'s tentative conclusion that Section

[14] State and, especially, local cable customer service standards reflect the particular concerns and problems that cable customers have experienced in that jurisdiction, problems and concerns that may vary considerably from community to community. They also reflect the LFA's balancing of those customer service problems against the burdens such requirements place on an operator.

632(d)(2) prohibits the Commission from preempting state or local customer service laws that exceed the Commission's customer service standards, and from preventing LFAs and operators from agreeing to standards that exceed the Commission's.

Respectfully submitted,

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