

**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
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)	

ORDER ON RECONSIDERATION

Adopted: February 11, 2020

Released: February 11, 2020

By the Chief, Media Bureau

1. By this *Order*, we grant NCTA – The Internet & Television Association’s (NCTA’s) Petition for Clarification¹ of the Media Bureau’s Order Denying Motion for Stay² of the Commission’s Third Report and Order³ in the above-captioned proceeding.⁴ In its *Petition*, NCTA requests that the Bureau remove from the *Stay Denial Order* certain language in paragraph 21 that “creates the potential for confusion and the appearance of a conflict with the *Third Report and Order*.”⁵ In particular, NCTA asks that the Bureau excise two statements from paragraph 21.⁶ These statements are: “The rules in the [*Third Report and Order*] did not supersede provisions in existing franchise agreements on their effective date” and “[i]f negotiations fail, the terms in the franchise remain in effect unless and until a cable operator challenges those terms and proves that the terms violate the [*Third Report and Order*’s] requirements.”

¹ NCTA Petition for Clarification of Order Denying Motion for Stay, MB Docket No. 05-311, filed Nov. 15, 2019 (*Petition*), available at <https://ecfsapi.fcc.gov/file/1115030634884/2019.11.15%20NCTA%20Petition%20for%20Clarification.pdf>. Although NCTA did not title its submission as a petition for reconsideration, we will treat it as a petition for reconsideration because it seeks further review of the *Stay Denial Order*. See, e.g., *In the Matter of Lucas County Skywarn*, Order on Reconsideration, 24 FCC Rcd 4652, 4653, para. 5, n.12 (WTB 2009).

² *Implementation of Section 621(a) 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, Order Denying Motion for Stay, DA 19-1149 (MB Nov. 6, 2019) (*Stay Denial Order*).

³ *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, Third Report and Order, 34 FCC Rcd 6844 (2019) (*Third Report and Order*). The *Third Report and Order* became effective on September 26, 2019. *Effective Date Announced for Rules Governing Franchising Authority Regulation of Cable Operators*, MB Docket No. 05-311, Public Notice, 34 FCC Rcd 7753 (MB 2019).

⁴ An extensive discussion of the historical background of this proceeding is set forth in the *Third Report and Order* and the *Stay Denial Order*; thus, we do not reiterate it at length here. See *Third Report and Order*, 34 FCC Rcd at 6845-48, paras. 2-6; *Stay Denial Order* at paras. 2-3. After the *Stay Denial Order* was issued, certain municipalities sought a judicial stay of the *Third Report and Order* in the Ninth Circuit. That court subsequently transferred challenges to the *Third Report and Order* then pending before it, including the motion for judicial stay, to the Sixth Circuit.

⁵ *Petition* at 1.

⁶ *Id.* at 4.

2. After reviewing the record developed in response to the *Petition*,⁷ we agree with NCTA that these statements could be interpreted “to conflict with the *Third Report and Order’s* plain directives and require procedures not mandated by the Commission.”⁸ In particular, we note that the *Third Report and Order* states that “[i]f a franchising authority refuses to modify any provision of a franchise agreement that is inconsistent with this Order, that provision is subject to preemption under section 636(c).”⁹ We also note that the *Third Report and Order* “encourage[s] the parties to negotiate franchise modifications within a reasonable time,” and “find[s] that 120 days should be, in most cases, a reasonable time for the adoption of franchise modifications.”¹⁰ Contrary to these statements in the *Third Report and Order*, the statements that NCTA is seeking to excise from the *Stay Denial Order* could be construed as authorizing LFAs to enforce unlawful franchise provisions unless and until a cable operator has proven to a court that they are unlawful.¹¹

3. We disagree with NATOA that removing the relevant statements from paragraph 21 of the *Stay Denial Order* undermines our reasons for denying the stay petition.¹² That argument ignores our two primary reasons for finding that LFAs will *not* suffer irreparable harm, absent a stay. First, we concluded in the *Stay Denial Order* that the injury claimed by LFAs (municipalities’ loss of critical facilities and services)¹³ is speculative. We determined that localities can maintain access to critical facilities and services by adjusting revenues and expenses in response to changes in franchise fee revenue streams—for example, LFAs can maintain critical facilities and services “either by prioritizing some in-kind contributions over others or by prioritizing in-kind contributions over the fees they would otherwise

⁷ The Media Bureau issued a Public Notice seeking comment on NCTA’s petition. *Media Bureau Seeks Comment on NCTA Petition for Clarification of Order Denying Motion for Stay of Section 621 Third Report and Order*, MB Docket No. 05-311, Public Notice, DA 19-1191 (MB Nov. 18, 2019). One party filed comments opposing the *Petition*. See Comments of the National Association of Telecommunications Officers and Advisors, *et al.* on NCTA Petition for Clarification of Order Denying Motion for Stay of Section 621 Third Report and Order, MB Docket No. 05-311 (filed Dec. 5, 2019) (NATOA Comments). See also Letter from David M. Sears, Senior Vice President, Montgomery College, to the Honorable Ajit V. Pai, Chairman, Federal Communications Commission in MB Docket No. 05-311 (Dec. 13, 2019) (expressing support for the positions of Montgomery County, MD and Anne Arundel County, MD, *et al.* in the motion for judicial stay of the *Third Report and Order*). One party filed comments in support of the *Petition*. See Comments of Verizon, MB Docket No. 05-311 (filed Dec. 6, 2019) (Verizon Comments).

⁸ *Petition* at 4.

⁹ *Third Report and Order*, 34 FCC Rcd at 6877-78, para. 62; *id.* at 6889-90, para. 80 (“[w]e now expressly preempt any state or local requirement . . . that would impose obligations on franchised cable operators beyond what Title VI allows.”); *id.* at 6879, para. 63, n. 251 (“Complying with the terms of the statute is not optional”). See also *Petition* at 4; Verizon Comments at 2; NCTA Reply at 2.

¹⁰ *Third Report and Order*, 34 FCC Rcd at 6877-78, para. 62 & n.247.

¹¹ See, e.g., Letter from Gerard Lavery Lederer, Counsel for Anne Arundel County, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission in MB Docket No. 05-311 (Dec. 17, 2019), Att. (advising localities that cable operators “[have] the burden to prove the existing franchise violates the [*Third Report and Order*]”).

¹² NATOA Comments at 3-5.

¹³ See National League of Cities, *et al.* Motion for Stay, MB Docket No. 05-311, at 16 (filed Oct. 7, 2019), available at <https://ecfsapi.fcc.gov/file/100832956088/FCC%20Motion%20for%20Stay%20621%20Order.pdf> (claiming that decisions to relieve cable operators of their previous obligations to provide I-Net and cable services would require schools, libraries, and police and fire departments to find new sources of funding, and that reducing franchise fee revenues in order to maintain such services would necessitate budget reductions that adversely affect public safety and public services).

recover.”¹⁴ Second, we concluded that the harm alleged by LFAs (loss of free services) was an economic loss, which under well-established case law, does not, in and of itself, constitute irreparable harm.¹⁵ These grounds alone were sufficient for denying the administrative stay request.

4. NATOA claims that budget amendments and procurement processes to authorize payment for services previously furnished pursuant to a cable franchise are often lengthy, and that LFAs “cannot . . . start the process without knowing what value a cable operator will assert for non-monetary franchise obligations that [would be] offset against franchise fee payments.”¹⁶ However, NATOA provides no evidence that any cable operator would abruptly cease services or take other unilateral action during the pendency of the appeal that would adversely affect municipalities, or create immediate or irreparable harm.¹⁷ Instead, as we explained in the *Stay Denial Order*, “the *Order* encouraged LFAs, in response to a request from a cable operator, to negotiate franchise terms that conform to the *Order* in a reasonable amount of time . . . Thus, for example, an LFA is not required to assess the costs of in-kind contributions that it currently receives from a cable operator (e.g., free cable service) against the franchise fee until the cable operator asks the LFA to amend the terms of its franchise.”¹⁸ Accordingly, consistent with the terms of this order, we grant NCTA’s petition.

5. We therefore conclude that the following two sentences in paragraph 21 of the *Stay Denial Order* misinterpret the *Order*: “The rules in the [*Third Report and Order*] did not supersede provisions in existing franchise agreements on their effective date” and “[i]f negotiations fail, the terms in the franchise remain in effect unless and until a cable operator challenges those terms and proves that the terms violate the [*Third Report and Order*’s] requirements.” The same is true of the sentence in paragraph 21 of the *Stay Denial Order* that reads: “At that point, the LFA and the cable operator have 120 days to renegotiate the franchise agreement.” Instead, we find, in accordance with the *Third Report and Order*, that the LFA and the cable operator have a reasonable period of time to renegotiate the franchise agreement, which in most cases is 120 days.¹⁹ If negotiations fail, the cable operator and the LFA can continue to rely on the processes and remedies that may be contained in their franchise agreement or that are otherwise available.²⁰

6. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in sections 4(i), 4(j), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)-(j), 303(r),

¹⁴ *Stay Denial Order* at para. 17. As NCTA notes, “revenues would be recoverable in the event that the *Third Report and Order* is ultimately overturned on appeal, further undermining the notion that such losses could constitute irreparable harm.” NCTA Reply at 3, n.11 (citing *In re Franchise Fee “Pass Through” and Dallas v. FCC*, Memorandum Opinion and Order, 13 FCC Rcd 4566, 4568, para. 8 (CSB 1998) (noting that cable operators must “recompense local authorities for the underpayments . . . that resulted from following the Bureau and Commission’s . . . Orders, which were subsequently reversed on appeal”).

¹⁵ *Stay Denial Order* at para. 18.

¹⁶ NATOA Comments at 3. NCTA asserts that this argument is baseless and states that “[a]ll NCTA seeks in its Petition is what the *Third Report and Order* already provided: clarification that parties should negotiate timely and in good faith to reach mutually agreeable franchise terms that comply with the Cable Act and rulings set forth in the *Order*.” NCTA Reply at 4.

¹⁷ NATOA Comments at 3.

¹⁸ *Stay Denial Order* at para. 21.

¹⁹ *Third Report and Order*, 34 FCC Rcd at 6877-78, para. 62 & n.247.

²⁰ For example, the cable operator and the LFA can take the dispute to court or, in the case of an interpretive dispute regarding the scope of the rules adopted in the *Third Report and Order*, request a declaratory ruling from the Commission. See, e.g., *County of Los Angeles v. Time Warner NY Cable LLC*, 2013 WL 12126774 (C.D. Cal. July 3, 2013); 47 CFR § 1.2 (providing that the Commission “on motion or by its own motion may issue a declaratory ruling terminating a controversy or removing uncertainty”); *City of Pasadena, California, et al. Petitions for Declaratory Ruling on Franchise Fee Pass Through Issues*, 16 FCC Rcd 18192 (CSB 2001).

and 405 and the authority delegated in sections 0.61, 0.283, and 1.106 of the Commission's rules, 47 CFR §§ 0.61, 0.283, and 1.106, this *Order* in MB Docket No. 05-311 **IS ADOPTED**.

7. **IT IS FURTHER ORDERED** that the Petition for Clarification of Order Denying Motion for Stay pending judicial review of the *Third Report and Order* in this proceeding, filed by NCTA, **IS GRANTED** to the extent indicated above.

8. **IT IS FURTHER ORDERED** that this *Order* **SHALL BE EFFECTIVE** upon its release.

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief, Media Bureau