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

SECOND REPORT AND ORDER

Adopted: October 31, 2007 **Released: November 6, 2007**

By the Commission: Chairman Martin; Commissioners Tate and McDowell issuing separate statements; Commissioners Copps and Adelstein dissenting and issuing separate statements.

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I. INTRODUCTION

1. In this Second Report and Order ("*Order*"), we provide further guidance on the operation of the local franchising process. To promote the federal goals of enhanced cable competition and accelerated broadband development, we extend a number of the rules promulgated in this docket's preceding Report and Order ("*First Report and Order*")[1] to incumbents as well as new entrants. We also decline to preempt state or local customer service laws that exceed the Commission's standards.

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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*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2006) ("*First Report and Order*").

II. BACKGROUND

2. New competitors are entering markets for the delivery of services historically offered by monopolists: traditional phone companies are entering the multichannel video market, while traditional cable companies are competing in the telephony market.[2] Ultimately, both types of companies are projected to offer customers a "triple play" of voice, high-speed Internet access, and video services over their respective networks. These entities also face competition from other new providers of bundled services, including overbuilders and utility companies. We believe this competition for the delivery of bundled services will benefit consumers by reducing prices and improving the quality of service offerings. In the *First Report and Order*, we stated our concerns that competitive applicants seeking to enter the video market faced unreasonable regulatory obstacles, to the detriment of competition generally and cable subscribers in particular.[3]

3. Specifically, in the *First Report and Order*, we adopted rules and provided guidance to implement Section 621(a)(1) of the Communications Act of 1934, as amended (the "Act"), which prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services.[4] The record in the *First Report and Order* showed that new entrants eager to provide video service are often delayed, and in some cases derailed, by the unreasonable demands made by local franchising authorities ("LFAs") during the franchising process.[5] The *First Report and Order* found that these delays contravened the dual congressional goals of enhancing cable competition and accelerating broadband deployment.[6] As such, the Commission found that the operation of the local franchising process in many jurisdictions constituted an unreasonable barrier to entry.[7]

4. To eliminate unreasonable barriers to entry into the cable market, and to encourage investment in broadband facilities, we found in the *First Report and Order* that: (1) an LFA's failure to issue a decision on a competitive application within the timeframes specified in the order constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (2) an LFA's refusal to grant a competitive franchise because of an applicant's

[2] According to Verizon press releases, FiOS is available to 3.1 million households (Press Release, Verizon FiOS TV Customers Have a Powerful New Way to Find and Enjoy Home Entertainment (July 17, 2007)) and is subscribed to by 348,000 customers (Press Release, Verizon Reports Strong 1Q 2007 Results, Driven By Top-Line Growth Across Key Markets (Apr. 30, 2007)). AT&T had 13,000 Uverse subscribers at the end of the first quarter of 2007 and 51,000 by the end of the second quarter of 2007. Press Release, AT&T Delivers Strong First Quarter: Merger Integration on Track; Advances in Wireless, Business and Broadband Drive Results (Apr. 27, 2007); Press Release, AT&T Posts Strong Second-Quarter Results Led by Accelerated Wireless Growth, Solid Regional Results and a Significant Improvement in Enterprise Trends (July 24, 2007). According to the National Cable and Telecommunications Association ("NCTA"), the cable industry had over 12 million residential cable telephony subscribers as of June 2007. National Cable and Telecommunications Association Statistics, http://www.ncta.com/ContentView.aspx?contentId=54 (last visited Sept. 14, 2007).

[3] *First Report and Order*, 22 FCC Rcd at 5103.

[4] 47 U.S.C. § 541(a)(1).

[5] *First Report and Order*, 22 FCC Rcd at 5103.

[6] *Id.*

[7] *Id.*

unwillingness to agree to unreasonable build-out mandates constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (3) an LFA's refusal to grant a competitive franchise because of an applicant's unwillingness to agree to a variety of franchise fee requirements that are impermissible under Section 622 of the Act constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (4) it would be an unreasonable refusal to award a competitive franchise if the LFA denied an application based upon a new entrant's refusal to undertake certain obligations relating to public, educational, and government channels ("PEG") and institutional networks ("I-Nets"); and (5) it is unreasonable under Section 621(a)(1) for an LFA to refuse to grant a franchise based on issues related to non-cable services or facilities.[8]

5. Some of the Commission's findings in the *First Report and Order* relied, in part, on statutory provisions that do not distinguish between incumbent providers and new entrants;[9] however, in light of the fact that the NPRM in this proceeding focused on competitive entrants, the findings were made applicable only to new entrants. At the same time that we adopted the *First Report and Order,* we therefore issued a *Further Notice of Proposed Rulemaking* ("*FNPRM*") to provide interested parties with the opportunity to provide comment on which of those findings should be made applicable to incumbent providers and how that should be done.

6. This *FNPRM* tentatively concluded that the findings in the *First Report and Order* should apply to incumbent cable operators as they negotiate renewal of their existing agreements with LFAs.[10] We noted that two of the statutory provisions that we discussed in the *First Report and Order*, Sections 611(a) and 622(a), do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants.[11] We sought comment on that tentative conclusion, and also on the Commission's authority to implement this finding.[12] We also sought comment on what effect, if any, the findings in the *First Report and Order* have on most favored nation ("MFN") clauses that may be included in existing franchises.[13] Finally, we asked about the Commission's authority to preempt state or local customer service laws that exceed the Commission's standards.[14] We examined the statutory language of Section 632(d)(2) and tentatively concluded that we can neither preempt state or local customer service laws that exceed the Commission's standards, nor prevent LFAs and cable operators from agreeing to more stringent standards.[15]

III. DISCUSSION

A. Incumbent Treatment

[8] *Id.*

[9] *Id.* at 5164. Other portions of the *First Report and Order* were based entirely on Section 621(a)(1).

[10] *First Report and Order,* 22 FCC Rcd at 5165.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 5166.

[15] *Id.*

7. Based on the comments filed in response to this *Order*, we agree, as detailed below, that many of the findings in the sections of the *First Report and Order* addressing franchise fees, PEG and I-Net obligations, and non-cable related services and facilities should be applicable to incumbent operators. We also conclude, however, that the findings in the *First Report and Order* involving timing and build-out should not be applicable to incumbent operators. Accordingly, we extend the applicable findings from the *First Report and Order* to incumbents as discussed below.

8. *Time Limits.* The "Time Limit for Franchise Negotiations" section of the *First Report and Order* is not applicable to incumbents. Many commenters argue that this section of the *First Report and Order* should not be applicable to incumbents. They point out that Section 626 of the Act, which concerns renewals, clearly delineates the process and timeline for renewal negotiations.[16] We agree. The time limits established in the *First Report and Order* for negotiating initial agreements cannot apply to incumbent renewals because those limits are not consistent with the 36-month renewal procedure set forth in Section 626 of the Act.[17] Moreover, the underlying rationale for the time limits – that is, preventing unreasonable entry delays – is inapplicable to incumbents.[18] Although new entrants are barred from providing service until they obtain a franchise, incumbents are able to continue providing service during renewal negotiations.[19] Accordingly, the rationale for the time limits set forth in the *First Report and Order* does not apply to the renewal context.

9. *Build-Out.* The "Build-Out" section of the *First Report and Order* is also not applicable to incumbents. Again, many commenters argue that the findings in this section of the *First Report and Order* should not be applicable to incumbents. In particular, they contend that eliminating build-out requirements has no relevance for incumbents (and might prompt efforts to shrink existing service areas).[20] We agree that the findings in the *First Report and Order* concerning build-out should not apply to incumbents. Our findings regarding build-out requirements were squarely based on Section 621(a)(1) of the Act, a provision that plainly does not apply to incumbent providers. While we did indicate in the *First Report and Order* that Section 621(a)(4)(A) of the Act did not limit our authority to restrict unreasonable build-out demands made on competitive applicants pursuant to Section 621(a)(1), our findings clearly were

[16] Burnsville/Eagan Telecommunications Commission *et al* Comments at 6; Fairfax County Comments at 7; Certain Florida Municipalities Comments at 2.

[17] 47 U.S.C. § 546. *See also* Anne Arundel County *et al* Comments at 3; Burnsville/Eagan Telecommunications Commission *et al* Comments at 12, 16; Fairfax County Comments at 7; Greater Metro Telecommunications Consortium *et al* Reply Comments at 7-8; League of Minnesota Cities *et al* Comments at 5-6; NATOA *et al* Comments at 7-8, 13; New Jersey Division of Rate Counsel Comments at 5; Philadelphia Comments at 3; Qwest Comments at 3.

[18] *First Report and Order*, 22 FCC Rcd at 5134.

[19] Burnsville/Eagan Telecommunications Commission *et al* Comments at 11; Huntsville Comments at 7; League of Minnesota Cities *et al* Comments at 7; Montgomery Comments at 7; New Jersey Board of Public Utilities Comments at 7.

[20] Anne Arundel County *et al* Comments at 3; Burnsville/Eagan Telecommunications Commission *et al* Comments at 12, 18; Fiber-to-the-Home Council Comments at 3; Greater Metro Telecommunications Consortium *et al* Reply Comments at 7-8; League of Minnesota Cities *et al* Comments at 5-8; NATOA *et al* Reply Comments at 3; New Jersey Division of Rate Counsel Comments at 5; Philadelphia Comments at 3.

not based on that provision. As we stated at the time, "Section 621(a)(4)(A) does not address the central question here."[21] We also find there is no basis for applying the build-out rationale in the *First Report and Order* to incumbents, because the underlying rationale – that build-out requirements can serve as a barrier to new entrants – is inapplicable to incumbents.[22] Incumbents by definition are not barred from entry, and allowing incumbents to retract the boundaries of their own franchise areas may create disruptions that would hinder the statutory goal of broadband deployment.[23] Moreover, the *First Report and Order* discussed the differential impact of build-out requirements on incumbents and new entrants.[24]

10. *Franchise Fees*. The "Franchise Fees" section of the *First Report and Order* applies equally to incumbents and new entrants. Most commenters agree that our findings regarding franchise fees from the *First Report and Order* should apply to incumbents. In that section of the *First Report and Order*, we determined that an LFA's refusal to grant a competitive franchise because of an applicant's unwillingness to agree to a variety of franchise fee requirements that are impermissible under Section 622 of the Act constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1).[25] Commenters argue that Section 622 of the Act does not differentiate between new entrants and incumbents, and that when Congress intended to treat various providers differently, it was explicit when doing so.[26] NCTA argues that absent a Congressional mandate otherwise, the Commission has defined its role as establishing a uniform franchising regime, and uniformity requires equal treatment.[27] Some LFAs argue that the Commission was incorrect in its interpretation of Section 622, and it should not extend its interpretation.[28] NATOA states that incumbents have been renewing franchises for years with full knowledge of the Cable Act, and the FNRPM's proposal to extend the franchise fee aspects of the *First Report and Order* to incumbents is a solution in search of a problem.[29]

11. We agree that our findings interpreting Section 622 should apply equally to incumbent operators and new entrants. Section 622 does not distinguish between incumbent providers and new entrants. As a result, to the extent that a franchise-fee requirement is found to be impermissible under Section 622, that statutory interpretation applies to both incumbent

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[21] *First Report and Order*, 22 FCC Rcd at 5141.

[22] *First Report and Order*, 22 FCC Rcd at 5142-45. *See also* NATOA *et al* Comments at 14. *See also* Burnsville/Eagan Telecommunications Commission *et al* at 18; Comments at 12 League of Minnesota Cities *et al* Comments at 8. *But see* Knology Comments at 8, 10.

[23] Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

[24] *First Report and Order*, 22 FCC Rcd at 5143.

[25] *Id.* at 5144-5151.

[26] Charter Comments at 9; Comcast Comments at 3; NCTA Comments at 15; RCN Reply Comments at 3; WideOpenWest Comments at 6.

[27] NCTA Comments at 15-16.

[28] League of Minnesota Cities Comments at 9; Texas Coalition of Cities for Utility Issues Comments at 7-10. Despite this assertion, no parties filed a petition for reconsideration of the *First Report and Order*.

[29] NATOA Comments at 12.

operators and new entrants.[30] The relevant findings from the *First Report and Order* that apply to incumbent providers include the following: (1) our clarification that a cable operator is not required to pay cable franchise fees on revenues from non-cable services;[31] (2) our finding that the term "incidental" in Section 622(g)(2)(D) should be limited to the list of incidentals in the statutory provision, as well as other minor expenses, and that certain fees[32] are not to be regarded as "incidental" and therefore must count toward the 5 percent franchise fee cap;[33] (3) our clarification that any municipal projects requested by LFAs unrelated to the provision of cable services that do not fall within the exempted categories in Section 622(g)(2) are subject to the statutory 5 percent franchise fee cap;[34] and (4) our finding that payments made to support the operation of PEG access facilities are considered franchise fees and are subject to the 5 percent cap, unless they are capital costs, which are excluded from franchise fees under Section 622(g)(2)(C).[35]

12. *PEG/I-Nets.* Much of the "PEG/I-Nets" section of the *First Report and Order* applies equally to incumbents and new entrants. Many commenters argue that our findings regarding PEG and I-Net issues from the *First Report and Order* should apply equally to incumbents because the statutory provisions discussed do not distinguish among differing providers.[36] LFAs, on the other hand, argue that the findings regarding PEG and I-Nets should not be extended to incumbents. They contend that doing so would freeze PEG support at current contribution levels without the possibility for future modification, which would result in either substantially reduced PEG access facility support or decreased general fund monies.[37] They also contend that they would lose the ability to benefit from an affordable I-Net, which cable operators can offer for no net costs.[38] LFAs also assert that I-Nets provide numerous benefits to the community and are vital to government functions, and the Commission may not take any action

[30] Indeed, the case law that shaped the Commission's interpretation of Section 622 in the *First Report and Order* involved incumbent providers. *See generally First Report and Order*, 22 FCC Rcd at 5146-5151 (citing *Robin Cable Systems v. City of Sierra Vista*, 842 F.Supp. 380 (D. Ariz. 1993); *Time Warner Entertainment Co. v. Briggs*, 1993 WL 23710 (D. Mass 1993); *Birmingham Cable Comm. v. City of Birmingham*, 1989 WL 253850 (N.D. Ala. 1989); *Cable TV Fund 14-A v. City of Naperville*, 1997 WL 433628 (N.D. Ill. 1997); *City of Bowie, Maryland*, 14 FCC Rcd. 7675 (Cable Service Bureau, 1999) *as clarified* 14 FCC Rcd 9596 (Cable Services Bureau, 1999)) In that regard, therefore, we have not made entirely new pronouncements but rather have recognized the state of existing law on point.

[31] *First Report and Order*, 22 FCC Rcd at 5146-47. This finding, of course, does not apply to non-cable franchise fee requirements, such as any lawful fees related to the provision of telecommunications services.

[32] 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." *First Report and Order*, 22 FCC Rcd at 5148-49.

[33] *Id.*

[34] *First Report and Order*, 22 FCC Rcd at 5150.

[35] *First Report and Order*, 22 FCC Rcd at 5150-51.

[36] Charter Comments at 13; Comcast Comments at 3; Fiber-to-the-Home Council Comments at 3; NCTA Comments at 17; RCN Reply Comments at 3.

[37] Greater Metro Telecommunications Consortium *et. al* Comments at 3; League of Minnesota Cities at 9; NATOA Comments at 8, 15; Texas Coalition for Utility Issues Comments at 17.

[38] Greater Metro Telecommunications Consortium *et. al* Comments at 7.

that would inhibit an LFA's ability to require a cable operator to build an I-Net.[39] LFAs further argue that some PEG and I-Net obligations are undertaken as part of a settlement agreement against an operator, and these contracts cannot be invalidated.[40]

13. We determine that some of the findings related to PEG and I-Nets should apply to incumbent providers while others should not. Specifically, the finding, discussed above, that the non-capital costs of PEG requirements must be offset from the cable operator's franchise fee payments[41] is applicable to incumbents because it was based upon our statutory interpretation of Section 622 of the Act. Again, nothing in the language or structure of that provision distinguishes between different classes of providers, and thus our interpretation applies to all providers. Similarly, both our refusal to adopt standard terms for PEG channels for new entrants as well as our refusal to hold that it is *per se* unreasonable for LFAs to require the payment of ongoing costs to support PEG by new entrants (so long as such support costs as applicable are subject to the franchise fee cap) apply to incumbents as well.[42]

14. We conclude, however, that other findings pertaining to PEG and I-Nets should not apply to incumbents. In particular, our findings that it would be unreasonable for an LFA to impose on a new entrant more burdensome PEG carriage obligations than it has imposed upon the incumbent cable operator and that it would be unreasonable for an LFA to require a new entrant to provide PEG support that is in excess of the incumbent cable operator's obligations, by their terms, do not provide relief for incumbents. Neither do we believe that we can similarly conclude that it would be *per se* unreasonable for an LFA to impose less burdensome PEG carriage obligations on a new entrant than it has imposed on an incumbent cable operator or *per se* unreasonable for an LFA to require a new entrant to provide less PEG support than the incumbent cable provider. Requiring an established incumbent operator to have a greater PEG carriage obligation or provide greater PEG support than a fledgling new entrant may very well be reasonable under the circumstances, and we see no statutory provision that categorically precludes such an approach.[43] Finally, in the *First Report and Order*, we found that "completely duplicative PEG and I-Net requirements imposed by LFAs would be unreasonable," and that it was unreasonable for an LFA to refuse to award a competitive franchise unless the applicant

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[39] Anne Arundel Reply Comments at 3, 8; NATOA Reply Comments at 9.

[40] Burnsville/Eagan Telecommunications Commission *et al* Comments at 21; Anne Arundel Reply Comments at 9.

[41] *First Report and Order,* 22 FCC Rcd at 5152.

[42] *See id.* at 5152-5153.

[43] We note that in the *First Report and Order* we found that a *pro rata* cost sharing approach between incumbents and new entrants is *per se* reasonable. *See id.* at 5154. In doing so, we also cited Section 76.1505 of the Commission's rules, which requires an open video system operator to match an incumbent cable operator's PEG obligations. *Id.* at n.396 (citing 47 C.F.R. § 76.1505(d)). Under a matching approach, the open video system operator and incumbent cable operator make equal contributions. In a *pro rata* cost sharing approach, the new entrant would make PEG contributions based on the ratio of its subscribership as compared to the incumbent operator's subscribership. While we did not find a matching arrangement *per se* reasonable, we did not find it *per se* unreasonable either. Section 653(c)(2)(A) of the Act requires that open video system PEG obligations be "no greater or lesser" than obligations imposed on incumbent operators, but the Act makes no such requirement with respect to new cable operator entrants. 47 U.S.C. § 573(c)(2)(A).

agrees to pay the face value of an I-Net that will not be constructed.[44] The problems that these two determinations were designed to address – the required construction of duplicative networks and required payments in lieu of the construction of a duplicative network – are issues that face competitive entrants, and it is not clear to us how these findings would be of practical relevance to incumbents. We therefore do not apply them to incumbents at this time. However, incumbent providers are free in the future to present the Commission with evidence that these findings are of practical relevance to incumbents and therefore should be applied to them in an appropriate form. When doing so, incumbent providers should identify the particular problems that applying some variation of these findings to them would address.

15. We disagree with comments arguing that any changes to the PEG structure means that PEG support would be frozen at current contribution levels without the possibility for future modification to reflect the community's needs at that time.[45] Sections 611 and 626 provide a process for requiring PEG carriage and determining a community's future cable-related needs and interests. Section 626 requires that an LFA identify "future cable-related community needs and interests" prior to the consideration of a franchise renewal proposal.[46] Therefore, LFAs are to evaluate their current and future PEG needs at the time of an incumbent provider's renewal, and are allowed to request such PEG support from their providers, within the limits of the Act and the Commission's statutory interpretation. Our findings here and in the *First Report and Order* have no bearing on these renewal requirements.

16. *Mixed-Use Networks*. The "Mixed-Use Networks" section of the *First Report and Order* also applies equally to incumbents and new entrants. Consistent with their position on other provisions, a number of commenters argue that the Commission's mixed-use network findings in the *First Report and Order* are based upon a statutory interpretation of Section 602(7)(C), and the statute's failure to distinguish among differing providers requires that it applies uniformly to all.[47] LFAs argue that the mixed-use findings presume the competitor is a telecommunications provider, and that the findings do not speak to an incumbent cable provider that already is using its network to provide cable services.[48]

17. Because our findings on mixed-use networks in the *First Report and Order* depended upon our statutory interpretation of Section 602, which does not distinguish between incumbent providers and new entrants, we agree that the findings in this section should be applicable to incumbent providers.[49] Specifically, we clarify that LFAs' jurisdiction under Title VI over incumbents applies only to the provision of cable services over cable systems[50] and that

[44] *See First Report and Order*, 22 FCC Rcd at 5154.

[45] Greater Metro Telecommunications Consortium Comments at 3; NATOA *et al* Comments at 8.

[46] 47 U.S.C. § 626(a)(1).

[47] Charter Comments at 14; Fiber-to-the-Home Council Comments at 3; NCTA Comments at 3.

[48] NATOA Comments at 15; Philadelphia, PA Comments at 6.

[49] *See supra* ¶ 11. These findings are also consistent with existing precedent. *See In re Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4851 (2002) ("*Cable Modem Declaratory Ruling*"), *rev'd*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd*, *NCTA v. Brand X*, 545 U.S. 967 (2005).

[50] *See First Report and Order*, 22 FCC Rcd at 5155.

an LFA may not use its franchising authority to attempt to regulate non-cable services offered by incumbent video providers.[51] For example, the provision of video services pursuant to a cable franchise agreement does not provide a basis for customer service regulation by local law or franchise agreement of a cable operator's entire network, or any services beyond cable services.[52]

18. *Timing.* The Commission tentatively concluded that the findings in the *First Report and Order* should apply to cable operators at the time of renewal:

> [t]he findings in this *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs. We note that Section 611(a) states "A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use" and Section 622(a) provides "any cable operator may be required under the terms of any franchise to pay a franchise fee." These statutory provisions do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants.[53]

Many commenters agreed with our tentative conclusion.[54] However, some incumbent providers argue that regulatory parity requires that the Commission extend the *First Report and Order* immediately to incumbent providers, and not wait until renewal.[55] Specifically, incumbent providers argue that some of the findings in the *First Report and Order*, including franchise fees, PEG/I-Nets, and mixed use networks, were not made solely pursuant to Section 621, but also other sections of the Act that are applicable to all operators, not just new entrants, and that those provisions should be immediately applicable to all providers.[56] Further, a small number of incumbent competitive providers argue that to avoid penalizing them for being the first to risk competitive entry, the *Order* should be applicable to such "legacy" competitive providers immediately or upon entrance of a new competitive provider.[57] They argue that if the Commission adopts the tentative conclusion to apply the decisions in the *First Report and Order* at renewal, it is conceivable, where an incumbent's franchise is up for renewal before a competitive entrant's franchise, that a new competitive entrant and an incumbent would receive the regulatory relief of the *First Report and Order* before the incumbent competitive provider.[58] LFAs, by contrast, argue that if findings from the *First Report and Order* are found to be applicable to incumbents, they should be effective only at the time of renewal. These

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[51] *See First Report and Order*, 22 FCC Rcd at 5155.

[52] *See id.*

[53] *Id.* at 5165.

[54] Broadband Service Providers Association Comments at 3; Knology Comments at 3-4; National Telecommunications Cooperative Association Reply Comments at 4, 8; Qwest Reply Comments at 1; RCN Comments at 2; Telecommunications Industry Association Comments at 1; Verizon Comments at 10.

[55] Charter Comments at 3-5; Comcast Comments at 2; Discovery Institute Comments at 1; NCTA Comments at 8; Time Warner Comments at 7

[56] Charter Reply Comments at 3, 8-10; Comcast Comments at 3,5; Fiber-to-the-Home Comments at 4-5; NCTA Comments at 7-9, 15-19; RCN Reply Comments at 3; Time Warner Comments at 4, 6;

[57] WideOpenWest Comments at 3-4, RCN Comments at 8.

[58] WideOpenWest Comments at 3-4.

commenters argue that the Commission does not have the authority to void existing agreements, and that to do so would violate LFAs' contractual rights.[59]

19. We believe that neither of the principal views expressed by commenters is entirely correct. 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.[60] 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. We recognize, however, that franchise agreements involve contractual obligations and also note that some terms may have been implemented as part of a settlement agreement regarding rate disputes or past performance by the franchisee.[61] As a result, we believe that the facts and circumstances of each situation must be assessed on a case-by-case basis under applicable law to determine whether our statutory interpretation should alter the incumbent's existing franchise agreement. This *Order* should in no way be interpreted as giving incumbents a unilateral right to breach their existing contractual obligations.[62] Instead, if an incumbent asserts that the terms of its franchise should be amended as a result of this Order, we encourage LFAs and incumbents to work cooperatively to address those issues.[63]

20. *Most Favored Nations ("MFN") Clauses.* The *First Report and Order* does not have any effect on existing MFN clauses. In the *FNPRM,* we sought comment on "what effect, if any, the findings in this *Order* have on MFN clauses that may be included in existing franchises."[64] While provisions differ, MFN clauses generally allow franchisees to adjust their obligations if and when an LFA grants a competing provider any franchise provisions that are more favorable than the provisions in the incumbent's franchise agreement. Some providers state that an incumbent with existing MFN provisions should be able to amend its franchise to reflect the requirements applicable to the new entrant, in order to encourage regulatory parity.[65] Others state that the proceeding should have no effect on MFN clauses, as they do not impose any barriers to entry.[66] They also argue that MFN clauses are negotiated in order to adjust obligations

[59] Fairfax County Comments at 6-7; NATOA *et al* Comments at 15-16; Philadelphia Comments at 5.

[60] In addition, because these interpretations do not depend on Section 621(a)(1), they are also valid through the nation.

[61] Anne Arundel Reply Comments at 9; Burnsville/Eagan Telecommunications Commission *et al* Comments at 21-22; NATOA *et al* Comments at 16, Verizon Comments at 11.

[62] Additionally, nothing in this Order can be used as an independent basis for obtaining retrospective relief.

[63] Should such efforts fail, we recognize that particular disputes eventually may make their way to court but note that there are other means of addressing existing contract provisions. As further described below, incumbent providers may pursue avenues for pre-renewal modifications, including contractual most favored nation clauses, which may allow franchisees to take advantage of the franchise provisions of new competitive entrants. *See infra* ¶ 20. *See also* Alcatel-Lucent Comments at 4; BSPA Comments at 6; Comcast Comments at 12; League of Minnesota Cities et al. at 10; NCTA Reply Comments at 18; NTCA Reply Comments at 4. Parties may also make adjustments to franchise terms pursuant to compliance with law provisions within the franchise or contract. Statutory relief is also available in the form of the franchise modification provision in Section 625 of the Act. *See infra* ¶¶ 21-22.

[64] *First Report and Order*, 22 FCC Rcd at 5165.

[65] Alcatel-Lucent Comments at 4-5; Comcast Comments at 3, 13; NCTA Reply at 18; NTCA Reply at 4.

[66] Comcast Comments at 13; Martin County, Florida Comments at 3.

when a new competitor enters the market, and the Commission has no basis to interfere with these contractual provisions.[67] To the extent that the *First Report and Order* allows competitive providers to enter markets with franchise provisions more favorable than those of the incumbent provider, we expect that MFN clauses, pursuant to the operation of their own design, will provide some franchisees the option and ability to change provisions of their existing agreements. Otherwise, we do not believe that our *First Report and Order* has any effect on MFN clauses.

B. Other Issues

21. *Franchise Modification.* We agree with commenters that the modification provision of the Cable Act will provide some franchisees the option and ability to change their existing agreements. Section 625 of the Act provides that a cable operator may obtain a franchise modification from an LFA: (1) in the case of any requirements for facilities or equipment (including PEG access) where the provider can show that it is "commercially impracticable" to comply with a requirement; or (2) in the case of any requirements for services, if the cable operator demonstrates that the mix, quality, and level of services required by the franchise at the time it was granted will be maintained after any proposed modification.[68]

22. Commenters argue that incumbents without an MFN provision should be allowed to seek modification through Section 625 when a competitor enters the franchise area.[69] They assert that the Commission should find an incumbent's compliance with more burdensome franchise provisions than a new competitor "commercially impracticable" because of the possibility of higher costs.[70] Some LFAs and Verizon agree that Section 625 may be applicable in some circumstances, provided that the incumbent can meet the commercially impracticable test, but contend that there should not be an assumption that all providers can meet this test.[71] NATOA argues that the Commission does not have jurisdiction to construe or enforce this provision under Section 625(b)(1), which provides for review of modification decisions in state or federal district court under Section 635, and that the Commission cannot issue any blanket statements about modifications, as any determinations are fact specific, and cannot be shown merely by the presence of a new competitor.[72] We agree that the *First Report and Order* and this *Order*, to the extent applicable, can be taken into consideration if an incumbent seeks modification of a franchise when a competitor enters the franchise area, within the processes set forth under Section 625. However, it is up to the incumbent to make to the relevant franchising authority the requisite showing of "commercial impracticability."[73]

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[67] Comcast Comments at 13-14; New Jersey Division of Rate Counsel at 6; Anne Arundel *et al* Comments at 4.

[68] 47 U.S.C. § 545(a)(1).

[69] Alcatel-Lucent Comments at 6-7; Fiber-to-the-Home Council Comments at 7.

[70] *Id.*

[71] Greater Metro Telecommunications Consortium Reply at 9; NATOA *et al* Reply at 12-13; NTCA Reply at 4; Verizon Comments at 11.

[72] NATOA *et al* Reply at 12-13.

[73] Section 625(f) states, "For purposes of this section, the term 'commercially impracticable' means, with respect to any requirement applicable to a cable operator, that it is commercially impracticable for the operator to comply with such requirement as a result of a change in conditions which is beyond the control (continued. . .)

23. *Generally Accepted Accounting Principles.* We decline to adopt a requirement that an operator's gross income be determined under Generally Accepted Accounting Principles ("GAAP"). Time Warner asks the Commission to mandate that the calculation of an operator's gross income under Section 622 be determined in accordance with GAAP.[74] Time Warner argues that the Commission has authority from Congress to mandate that uniform federal standards be used to govern franchise fee calculations.[75] Some franchising authorities reject this assertion and argue that GAAP will not produce the clarity and uniformity Time Warner is seeking, because GAAP does not create rules but rather functions as a set of guidelines interpreted by professionals.[76] They also state that GAAP was established by the financial community to govern disclosures to investors and stockholders, not to determine franchise fee payments, and these differing purposes may result in characterization of revenues that are not applicable to cable operations.[77] Finally, they argue this has nothing to do with competitive entry, and a separate NPRM must be issued to consider it.[78] Given the paucity of comments on the matter, and conflicting information of the applicability of GAAP to the franchising process, we do not believe that there is a sufficient record supporting the requested regulation. We therefore decline to adopt such a requirement here.

24. *Fresh Look.* We reject RCN's request that we invoke the fresh look doctrine. The fresh look doctrine is used to re-open contracts.[79] The Commission utilizes it sparingly, when it is "necessary to promote consumer choice and eliminate barriers to competition."[80] RCN urges the Commission to invoke its "fresh look" doctrine to require that LFAs reconsider existing franchises when a new entrant enters the franchise area and, in markets where there is more than

(Continued from previous page)
of the operator and the nonoccurrence of which was a basic assumption on which the requirement was based." 47 U.S.C. § 545(f).

[74] Time Warner Comments at 9-11.

[75] *Id.* at 11.

[76] Anne Arundel *et al.* Reply at 14.

[77] *Id.*

[78] *Id.*; NATOA *et al* Reply at 10.

[79] *AT&T Inc. and BellSouth Corporation*, 22 FCC Rcd 5662, 5773 (2007); *Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, 16991-92 (2003); *In the Matter of Direct Access to the INTELSAT System*, 14 FCC Rcd. 15703, 15751-15754 (1999)(all declining to impose "fresh look").

[80] *In the Matter of Direct Access to the INTELSAT System*, 14 FCC Rcd. 15703, 15752-54 (1999) (declining to impose the fresh look doctrine because the Commission did "not believe it would be reasoned decision-making to upset previous commitments freely entered into by all parties"). *See also AT&T Inc. and BellSouth Corporation*, 22 FCC Rcd 5662, 5773 (2007) (declining to adopt the "fresh look" doctrine for failure to demonstrate the ability to use contracts for anti-competitive purposes); *Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, 17401-03 (2003) (finding that the "fresh look" doctrine is not appropriate "because it would be unfair to both incumbent LECs and other competitors, disruptive to the market place, and ultimately inconsistent with the public interest," in part because the terms at issue "were established by a process of bilateral negotiation or arbitration, not fiat" and because there was "not sufficient evidence, in this record, of abuse of market power by the incumbent LECs or some other wrong that must be retroactively addressed here."). *But see* n. 83 *infra*.

one franchised operator, when the first existing franchise comes up for renewal.[81] RCN suggests that when a new provider files an application to provide service, the LFA should provide notice to existing franchisees and allow them to terminate their franchise and negotiate a new one reflecting the rules in the *First Report and Order.*[82] Similarly, the Broadband Service Providers Association asks that if one cable operator in a competitive market is able to eliminate franchise requirements deemed unlawful by the *First Report and Order*, other operators in that LFA should be able to submit a renewal proposal at any time that would allow that operator to conform its franchise to the rules in the *First Report and Order.* RCN argues that this proceeding is consistent with other contexts where the Commission adopted the fresh look doctrine, because the entity holding the long-term contracts has market power, that entity has exercised that power to create long term contracts to "lock up" the market in a way that creates unreasonable barriers to competition, and the contractual obligations can be nullified without harm to the public interest.[83]

25. We do not believe that it is necessary to invoke the fresh look doctrine here. As indicated above, we believe that any contractual issues arising from today's *Order* should be decided on a case-by-case basis. The fresh look doctrine was developed to allow customers to take advantage of competition, not to protect incumbent service providers when competitors enter the market. The case precedent is thus distinguishable from the circumstances addressed here.[84]

C. Customer Service

26. We find that the explicit statutory language of Section 632 of the Act prohibits the Commission's preemption of state or local cable customer service laws that exceed the Commission's standards. The Commission previously sought comment on whether customer service requirements should be allowed to vary greatly between jurisdictions.[85] Commenters urged the Commission to adopt a number of rules limiting LFA authority to adopt local customer service regulations.[86] After reviewing those comments, we sought additional comment on our tentative conclusion that Section 632(d)(2) of the Act prevents us from preempting state or local customer service laws exceeding Commission standards, and allows LFAs and cable operators to agree to more extensive customer service requirements.[87]

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[81] RCN Comments at 2.

[82] *Id.* at 8.

[83] RCN Comments at 7; *citing Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd 7341 (1993), and *Competition in the Interstate Interexchange Marketplace*, 7 FCC Rcd 2677 (1992).

[84] The first of these proceedings allowed special access customers to cancel contracts that were more than three years in length. *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd 7341. The second allowed customers to cancel certain 800 service contracts without termination liability. *Competition in the Interstate Interexchange Marketplace*, 7 FCC Rcd 2677.

[85] *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*, Notice of Proposed Rulemaking, 20 FCC Rcd 18581, 18588 (2005) ("*Local Franchising NPRM*").

[86] *First Report and Order*, 22 FCC Rcd at 5165.

[87] *Id.* at 5166.

27. Section 632 of the Communications Act sets out the regulatory framework for cable customer service.[88] It authorizes LFAs to establish and enforce customer service requirements and directs the Commission to establish standards by which cable operators may fulfill these requirements. Specifically, Section 632(d)(1) provides that "[n]othing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title." Further, Section 632(d)(2) states that

> [n]othing in this title shall be construed to prevent the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under the section, or addresses matters not addressed by the standards set by the Commission under this section.[89]

The statute's explicit language makes clear that Commission standards are a floor for customer service requirements, rather than a ceiling, and thus do not preclude LFAs from adopting stricter customer service requirements.[90]

28. In response to the *FNPRM*, some commenters ask that we clarify certain issues surrounding customer service.[91] Verizon recognizes that while LFAs have some discretion in the crafting of customer service regulations, they argue that this discretion is limited by the language of Section 632(d)(2) to cable customer service issues.[92] They urge the Commission to plainly state that LFAs only have authority to regulate cable customer service standards and that the Commission has the authority to preempt regulations that do not concern customer service for cable service.[93] They argue that onerous regulations, as well as those unrelated to the provision of cable services couched as customer service rules, should be preempted because they amount to an unreasonable burden under Section 621(a)(1).[94] They suggest that customer service requirements be limited to those general types of issues recognized in Section 632(b).[95] That provision authorizes the Commission to "establish standards by which cable operators can fulfill their customer service requirements" including "(1) cable system office hours and telephone availability; (2) installations, outages, and service calls; and (3) communications between the

[88] 47 U.S.C. § 552.

[89] 47 U.S.C. §552(d)(2).

[90] *Id.*

[91] *See, e.g.*, Verizon Comments at 2; AT&T Comments at 6; Qwest Comments at 4.

[92] Verizon Comments at 2.

[93] *Id.* at 9. *See* AT&T Comments at 7; Qwest Comments at 4.

[94] Verizon Comments at 3-5; AT&T Comments at 7. AT&T urges the Commission to read Section 632(d) consistent with Section 621(a)(1)'s prohibition against unreasonable refusals to grant additional competitive franchises.

[95] *Id.* at 5.

cable operator and subscriber."[96] They assert that requirements beyond these limited categories impose unreasonable burdens on new entrants.[97]

29. Supporters of the Commission's tentative conclusion regarding Section 632(d)(2) argue that the statute expressly authorizes the establishment and enforcement of local customer service standards that go beyond those delineated by the Commission.[98] They assert that the unreasonable refusal language of Section 621(a)(1) has no application to customer service standards under Section 632.[99] In fact, they argue that the only way to read these sections together is to conclude that Congress intended that local customer service standards exceeding Commission standards do not amount to an unreasonable refusal.[100]

30. New entrants also take issue with the local character of customer service requirements. AT&T cites difficulties created by disparate local standards and local data reporting requirements and suggested the Commission adopt uniform customer service standards because of the inefficiency inherent in varying standards.[101] They argue that requiring new entrants to comply with these differing standards can be a potential barrier to entry.[102] They further argue that the imposition of local data collection requirements also poses a barrier to entry.[103] AT&T states that under their regional systems it is not currently possible to compile their data on a franchise area basis.[104] At minimum, they ask the Commission to allow regional providers to demonstrate compliance with local standards through aggregate regional data.[105]

31. Given the explicit language of Section 632, we conclude that the Commission cannot preempt local or state cable customer service requirements, nor can it prevent LFAs and cable operators from agreeing to more stringent standards. However, an LFA's authority to implement customer service rules under Section 632 is limited to the adoption of regulations that, in fact, involve customer service matters and impose customer service requirements on the provision of cable services.[106] For instance, LFAs cannot implement a "customer service" rule

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[96] 47 U.S.C. §552(b).

[97] Burnsville/Eagan Telecommunications Commission *et al* Reply Comments at 25; New Jersey Board of Public Utilities Comments at 7; City of New York Comments at 5.

[98] *See* Anne Arundel County *et al* Reply Comments at 10; Burnsville/Eagan Telecommunications Commission *et al* Reply Comments at 2-3; Fairfax County Comments at 9; League of Minnesota Cities Comments at 12; NATOA Reply Comments at 23.

[99] *See* NATOA *et al* Reply Comments at 23; Burnsville/Eagan Telecommunications Commission *et al* Reply Comments at 8-9.

[100] *See* NATOA *et al* Reply Comments at 23.

[101] AT&T Comments at 2. *See also* Verizon Comments at 3; Discovery Institute Comments at 4-5.

[102] AT&T Comments at 5. *See also* Verizon Comments at 8; Discovery Institute Comments at 4; RCN Reply Comments at 6.

[103] Local data collection requirements include requests from LFAs to provide data regarding various customer service aspects (*e.g.*, monthly outage logs for the franchise area, quarterly logs of customer service complaints for the franchise area).

[104] AT&T Comments at 5. *See* Verizon Reply Comments at 3; RCN Reply Comments at 6.

[105] AT&T Comments at 5-6.

[106] 47 U.S.C. § 552(d)(2).

requiring a six percent franchise fee payment. Furthermore, it would constitute an unreasonable refusal under Section 621(a)(1) for an LFA to make the grant of a competitive franchise contingent upon a cable customer service requirement that does not, in fact, involve cable customer service.[107] While localities may have independent authority to impose customer service requirements on a cable operator's non-cable activities, franchising authorities may not condition the exercise of their video franchising authority on an operator's agreement to such non-cable requirements because we interpret Section 632 to apply only to customer service requirements related to cable service.

32. Local franchise authorities maintain that Congress made a policy judgment when it permitted individual franchising authorities to adopt local customer service standards, despite the inconvenience it may pose to new entrant compliance.[108] They note that incumbents operating regional networks have complied with local data reporting requirements and other differing local standards.[109] They state that local data collection requirements also are consistent with Section 626 of the Act, which allows LFAs to take the quality of an operator's service into account during the franchise renewal process.[110] They argue that limiting local data collection, as AT&T suggests, would make it impossible for LFAs to assess an operator's performance within their respective communities.[111]

33. The language of Section 632(d)(2) provides that, while the Commission may adopt standards applicable to all cable operators, it may not prohibit LFAs from imposing requirements that exceed those standards.[112] We conclude, therefore, that we do not have authority to grant AT&T's request for uniform local customer service standards or data collection requirements. In sum, we find that the explicit statutory language of Section 632 prohibits the Commission's preemption of state or local cable customer service laws that exceed the Commission's standards.

IV. PROCEDURAL MATTERS

34. *Paperwork Reduction Act Analysis*. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, we note that there is no new or modified "information burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* U.S.C. 3506(c)(4).

[107] *First Report and Order*, 22 FCC Rcd at 5103.

[108] Fairfax County Reply Comments at 10; Greater Metro Telecommunications Consortium Reply Comments at 10; NATOA *et al* Comments at 17; New York State Dept. of Public Service Comments at 2.

[109] Burnsville/Eagan Telecommunications Commission *et al* Reply Comments at 17-18; Greater Metro Telecommunications Consortium Reply Comments at 10.

[110] Fairfax County Reply Comments at 10.

[111] Fairfax County Reply Comments at 10; New York State Department of Public Service Comments at 3.

[112] *See* 47 U.S.C. § 552(d)(2).

35. *Final Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act,[113] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *Report and Order*. The FRFA is set forth in Appendix B.

36. *Congressional Review Act*. The Commission will send a copy of this *Report and Order* in a report to be send to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

37. *Additional Information*. For additional information on this proceeding, please contact Holly Saurer, Policy Division, Media Bureau at (202) 418-2120, or Brendan Murray, Policy Division, Media Bureau at (202) 418-2120.

V. ORDERING CLAUSES

38. IT IS ORDERED that, pursuant to the authority contained in Sections 1, 2, 4(i), 303, 303r, 403, 405, 602, 611, 621, 622, 625, 626, and 632 of the *Communications* Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 303(r), 403, 405, 522, 531, 541, 542, 545, 546, and 552, this *Report and Order* IS ADOPTED.

39. IT IS FURTHER ORDERED that the *Second Report and Order* SHALL BE EFFECTIVE 30 days after publication of the *Second Report and Order* in the Federal Register.

40. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Second Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

41. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this *Second Report and Order* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[113] *See* 5 U.S.C. § 604.

APPENDIX

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[114] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Further Notice of Proposed Rulemaking* ("*FNPRM*") to this proceeding.[115] The Commission sought written public comment on the proposals in the FNPRM, including comment on the IRFA. The Commission received one comment on the IRFA. This Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[116]

A. Need for, and Objectives of, the Second Report and Order

2. This *Second Report and Order* ("*Order*") adopts rules and provides guidance to implement the findings in the First Report and Order dealing with Section 611 and Section 622 of the Communications Act of 1934, as amended (the "Communications Act").[117] The First Report and Order adopted rules in accordance with Section 621(a) of the Communications Act to prevent Local Franchising Authorities ("LFAs") from creating unreasonable barriers to competitive entry.[118] It also provided clarifications of Section 611, restricting LFAs' authority to establish capacity and support requirements for PEG channels,[119] and Section 622, setting limits on the franchise fees LFAs may charge cable operators.[120] Neither of these sections distinguishes between the treatment of new entrants and incumbent cable operators.[121] The Commission extends these findings to incumbent cable operators to further the interrelated goals of enhanced cable competition and accelerated broadband deployment. The Commission also finds that it cannot preempt state or local customer service rules exceeding Commission standards.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. Only one commenter, the Local Government Lawyer's Roundtable, submitted a comment that specifically responded to the IRFA. The Local Government Lawyer's Roundtable contends that the Commission should issue a revised IRFA because of the erroneous determination that the proposed rules would have a *de minimis* effect on small governments. They argue that the

[114] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[115] *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, 5164 (2006) ("*First Report and Order*").

[116] *See* 5 U.S.C. § 604.

[117] 47 U.S.C. §§ 531, 622.

[118] *First Report and Order*, 22 FCC Rcd at 5103.

[119] 47 U.S.C. § 531.

[120] 47 U.S.C. § 622.

[121] 47 U.S.C. §§ 531(a), 622(a)

Commission has not given weight to the economic impact the rules will have on small governments, including training and hiring concerns.

4. We disagree with the Local Government Lawyer's Roundtable's assertion that our rules will have any more than a *de minimis* effect on small governments. LFAs today must review and decide upon competitive and renewal cable franchise applications, and will continue to perform that role. While the Local Government Lawyer's Roundtable expresses concern about additional training that may be necessary to understand these actions, and potential hiring of additional personnel to accommodate the *Order's* requirements, we disagree that those steps will be necessary. This *Order* simply extends existing requirements to apply to incumbent cable providers. LFAs should be familiar with those existing requirements, and therefore should not need additional training or personnel to implement the *Order's* requirements. Moreover, modifications made to the franchising process that result from this proceeding further streamline the franchising process, lessening the economic burdens placed upon LFAs.

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

5. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.[122] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small government jurisdiction."[123] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[124] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[125]

6. The rules adopted by this *Order* will streamline the local franchising process by adopting rules that provide guidance as to the applicability of prior findings in this proceeding to incumbents and the limitations on the Commission's authority regarding customer service regulations. The Commission has determined that the group of small entities directly affected by the rules adopted herein consists of small governmental entities (which, in some cases, may be represented in the local franchising process by not-for-profit enterprises). Therefore, in this FRFA, we consider the impact of the rules on small governmental entities. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

[122] 5 U.S.C. § 603(b)(3).

[123] *Id.* § 601(6)

[124] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[125] 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

7. *Small Governmental Jurisdictions*. The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[126] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[127] We estimate that, of this total, 84,377 entities were "small governmental jurisdictions."[128] Thus, we estimate that most governmental jurisdictions are small.

8. *Cable and Other Program Distribution*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material."[129] The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: all such firms having $13.5 million or less in annual receipts.[130] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[131] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[132] Thus, under this size standard, the majority of firms can be considered small.

9. *Cable Companies and Systems*. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[133] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[134] In addition, under the Commission's rules, a "small system" is a cable system

[126] 5 U.S.C. § 601(5).

[127] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

[128] We assume that the villages, school districts, and special districts are small, and total 48,558. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

[129] U.S. Census Bureau, 2002 NAICS Definitions, "517510 Cable and Other Program Distribution"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM.

[130] 13 C.F.R. § 121.201, NAICS code 517510.

[131] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[132] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[133] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[134] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

serving 15,000 or fewer subscribers.[135] Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.[136] Thus, under this second size standard, most cable systems are small.

10. *Cable System Operators*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[137] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[138] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[139] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[140] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

11. *Open Video Systems ("OVS")*. In 1996, Congress established the open video system framework, one of four statutorily recognized options for the provision of video programming services by local exchange carriers ("LECs").[141] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[142] OVS falls within the SBA small business size standard of Cable and Other Program Distribution Services, which consists of such entities having $13.5 million or less in annual receipts.[143] The Commission has certified 25 OVS operators, with some now providing service. Broadband service providers ("BSPs") are currently

[135] 47 C.F.R. § 76.901(c).

[136] Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[137] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[138] 47 C.F.R. § 76.901(f); *see* Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[139] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

[140] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[141] 47 U.S.C. § 571(a)(3)-(4). *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report*, 20 FCC Rcd 2507, 2549 (2006) ("*2006 Cable Competition Report*").

[142] *See* 47 U.S.C. § 573.

[143] 13 C.F.R. § 121.201, NAICS code 517510.

the only significant holders of OVS certifications or local OVS franchises.[144] As of June, 2005, BSPs served approximately 1.4 million subscribers, representing 1.5 percent of all MVPD households.[145] Affiliates of Residential Communications Network, Inc. ("RCN"), which serves about 371,000 subscribers as of June, 2005, is currently the largest BSP and 14th largest MVPD.[146] RCN received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.

12. The rule and guidance adopted in the *Order* will require a *de minimus* additional reporting, record keeping, and other compliance requirements. Local franchising authorities ("LFAs") will continue to perform its role of reviewing and deciding upon competitive cable franchise applications; the rules adopted in this *Order* will decrease the procedural burdens faced by LFAs. Since the adopted rules do not apply until franchise renewal, there is no additional burden beyond what has been required during past renewals. Therefore, the rules adopted will not require any additional special skills beyond any already needed in the cable franchising context.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternative Considered

13. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, why may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[147]

14. In the *FNPRM*, the Commission sought comment on the extension of its findings that do not distinguish between new entrants and incumbents in the *First Report and Order* to incumbents and its authority to do so.[148] The Commission also invited comment on the effect, if any, the findings in the *First Report and Order* had on most favored nation clauses in existing franchises.[149] Additionally, the Commission also sought comment on its tentative conclusion that it cannot preempt state or local customer service laws exceeding Commission standards, nor can it

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[144] *See 2006 Cable Competition Report*, 20 FCC Rcd at 2549. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[145] *See id.* at 2507.

[146] *See 2006 Cable Competition Report*, 20 FCC Rcd at 2549. WideOpenWest is the second largest BSP and 16th largest MVPD, with cable systems serving about 292,000 subscribers as of June, 2005. The third largest BSP is Knology, serving approximately 170,800 subscribers as of June, 2005. *Id.*

[147] 5 U.S.C. § 603(c)(1)-(c)(4).

[148] *First Report and Order*, 22 FCC Rcd at 5164.

[149] *Id.* at 5165.

prevent LFAs and cable operators from agreeing to more stringent standards.[150] The Commission tentatively concluded that any rules likely would have at most a *de minimis* impact on small governmental jurisdictions, and that the interrelated, high-priority federal communications policy goals of enhanced cable competition and accelerated broadband deployment necessitated the extension of its rules to incumbent cable providers. We agree with those tentative conclusions, and we believe that the rules adopted in the *Order* will not impose a significant impact on any small entity.

15. In the *Order*, we provide that the *First Report and Order*'s findings resting upon statutory provisions that do not distinguish between new entrants and incumbents should be extended to incumbent cable operators at the time of franchise renewal. This will result in decreasing the regulatory burdens on incumbent cable operators. We declined to impose the findings of the *First Report and Order* immediately so that we do not unduly disrupt existing contracts. As an alternative, we considered not extending the *First Report and Order*'s rules to incumbent cable operators at all. We conclude that the guidance we provide minimizes any adverse impact on small entities because it clarifies the terms within which parties must negotiate, and should prevent small entities from facing costly litigation over those terms.

Report to Congress: The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[151] In addition, the Commission will send a copy of the *Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[152]

[150] *Id.* at 5166.

[151] *See* 5 U.S.C. § 801(a)(1)(A).

[152] *See id.* § 604(b).

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: 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

In our prior order in this docket, the Commission took action to remove regulatory barriers to competition in the video marketplace by giving meaning to the words Congress wrote in section 621 of the Cable Act. Our findings in that order only applied to new entrants. In today's item we find that some of the Commission's findings in that order apply equally to incumbent providers as they do to new entrants. Given this, the order we adopt today takes action to level the regulatory playing-field between these providers. It is important to emphasize that today's order in no way gives incumbents a unilateral right to breach their existing contractual obligations. As I have said before, I am committed to seeing that consumers are able to realize the benefits of competition in the forms of better services and lower prices. I hope that the regulatory parity that we establish in this order helps to achieve this goal.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS, DISSENTING**

Re: 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

I strongly dissented last year when the Commission issued an order short-circuiting the franchise negotiation process between new entrants into the video market and local governments. Our decision that day found no justification in the record compiled in the proceeding, and it struck me as violative of the basic principles of federalism and the statute Congress has given us. In short, I found no rationale for the FCC to intrude into these negotiations.

I dissent to today's item because I believe the legal and factual justifications for this new decision—concerning the negotiations between existing franchise holders and local governments—are even weaker. And they are even more contrary to good government. If our previous decision was a body blow to the principle of federalism, today's decision is the *coup de grace*.

As I explained in my prior statement, the record before us at that time did not contain sufficient granularity to convince me that the process for competitive entry into the video market was fatally flawed. Nor could I find sufficient justification in the plain language of the statute for the FCC to insert itself into the franchise negotiation process. I instead read Congress's words as indicating that negotiations should be conducted between companies and Local Franchise Authorities, with legal disputes to be adjudicated by federal district courts.

I find today's *Order* to be even ***more*** intrusive into traditional prerogatives of local franchising authorities than our prior *Order*, while simultaneously ***less*** persuasive about the policy or legal grounds for taking such a step. To begin with, I do not see any evidence in the record that existing franchise operators are facing meaningful competitive disadvantages or barriers. And our decision today certainly does not have the virtue of introducing new competition to the market. Rather, it addresses—and changes—an existing negotiation process that is respectful of the principles of federalism and that appears to be working well today. If it ain't broke, why are we fixing it?

My concern about today's decision is not just philosophical. As the record indicates, one possible consequence of this new set of regulations may be to deprive American consumers of access to PEG channels that serve important community needs. Another effect may be to deprive local governments of access to I-Net facilities that support public safety and other important government operations. Finally, this decision opens the Commission to enormous legal risk. Why incur such results when Congress provided a workable process for incumbent video providers and LFAs to negotiate with each other for franchises, with recourse to federal district courts if disagreements arose?

In conclusion, I certainly understand my colleagues' interest in establishing regulatory parity between different video services providers. Parity is an important value and I generally support it. But this is parity moving in the wrong direction. It is parity undercutting good policy; parity denying generations of productive state and local relationships; and parity that will harm consumers, localities and public safety, among others. It represents exactly the sort of unexpected—or at least unpublicized—consequences that flow from our original mistaken franchising decision. Though the genie is out of the bottle for now, I hope that at some point my colleagues and I will consider removing the Commission from the field of local franchise regulation—where we are not welcome and have no reason to be.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
DISSENTING

***Re*:** 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

In the *First Report and Order*, I said that "the policy goals of [that] *Order*, to promote competitive video offerings and broadband deployment, are laudable. But while I support these goals, [the] item goes out on a limb in asserting federal authority to preempt local governments, and then saws the limb off with a highly dubious legal and policy scheme that substitutes our judgment as to what is reasonable for that of local officials – all in violation of the franchising framework established in the Communications Act."

Today's *Second Report and Order* picks up where the *First Report and Order* left off, providing further disruption, confusion and complication to the operation of the local franchising process. Similar to its predecessor order, the instant *Order's* attempt to provide comparable regulatory relief to incumbent cable operators is arbitrary and capricious. Unlike the prior decision, however, today's decision undermines the Commission's principal responsibility and local governments' ability to ensure the safety and welfare of the American people.

While I understand the need for regulatory parity, today's decision represents a "race to bottom," an unraveling of important local protections set in motion by the Commission's prior misguided decision-making in the *First Report and Order.*

In the *Further Notice of Proposed Rulemaking* that established the record for today's *Order*, the Commission sought comment on what effect, if any, the findings in the *First Report and Order* have on "most favored nation" (MFN) clauses in existing franchise agreements. Now, in a cursory discussion wanting of serious analysis, the Commission asserts that "we expect the MFN clauses, pursuant to the operation of their own design, will provide some franchisees the option and ability to change provision of their existing agreements." The Commission simply concludes that "we do not believe that our *First Report and Order* has any effect on MFN clauses." In the real world, this finding could not be further from the truth.

As I predicted, the *First Report and Order*, which purported to provide clarification with respect to which franchise fees are permissible under the Communications Act, has in fact muddled the regime and left communities, incumbent cable operators and new entrants with conflicting views about funding and support for public, education and government (PEG) facilities, including local institutional networks (I-NETs). For example, while section 622(g)(2)(C) of the Communications Act excludes from the term "franchise fee" any "capital costs which are required by the franchise to be incurred by the cable operator for public, educational or governmental access facilities," the Commission has limited "capital costs" to simply the costs associated with the "construction of PEG access facilities." But the Communications Act defines "PEG access facilities" to mean channel capacity, facilities and equipment. 47 U.S.C. §522(16). Moreover, the legislative history of the 1984 Cable Act clearly indicates that "any franchise requirement for the provision of services, facilities or equipment is not included as a 'fee.'"

Many local governments, however, receive payments from cable operators that are not simply for the construction of PEG studios, but also for the acquisition of equipment needed to produce PEG access programming. PEG facilities and access provide important resources to thousands of communities across this country.

In terms of public safety, redundant or even duplicative I-NETs provides invaluable homeland security and public health, safety and welfare functions in towns, cities, localities and municipalities across America. It was my hope that the *First Report and Order* would not have undermined these and other important local community resource needs. But it has because local governments cannot require new entrants to provide I-NET support beyond that which has been provided by the incumbent. The Commission effectively created a *per se* rule that freezes PEG/INET funding support to what constituted as "adequate" many years ago when the incumbent cable franchise was consummated.

In this post-911 era, the Commission's action is an unfortunate undermining of public safety, which could otherwise benefit from redundant communications networks. PEG capacity and facilities are interconnected with local I-NETs and they provide local first responders with essential public safety communication capabilities. When you couple the effects of the *First Report and Order* with today's decision to leave MFN clauses in force – without any meaningful analysis, the Commission has created a dangerous two-step, downward spiral. Step one: local government cannot require more from the new entrant today than it required from the incumbent provider years ago. Step two: the incumbent providers can enforce the MFN clause to get the same treatment as the new entrant. By adding bad decisions on top of one another, this Commission has converted the entire cable franchise fees and PEG/I-NET support regime into a regulatory minefield for local governments, and that will likely impact the ability of local governments to provide critical, state-of-the-art services when they matter most.

Accordingly, I dissent.

STATEMENT OF COMMISSIONER DEBORAH TAYLOR TATE

Re: 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

Today's item, like many we consider, requires a broader examination of Commission principles, particularly the principle of regulatory parity. I was pleased that our original order required us to consider this matter in a timely manner- within six months. I believe we must ensure that our policies do not unreasonably create asymmetry in the marketplace and if they do, to promptly correct them. In this order, we continue down a path of deregulatory policies designed to encourage market entry, innovation, and investment. Indeed, "encourage[ing] more robust competition in the video marketplace" has long been a stated goal of the Commission as well as a driving force behind the statutory language we interpret today.

Section 621(a)(1) of the Communications Act of 1934 states that franchising authorities ("LFAs") may not "unreasonably refuse to award" a competitive franchise to provide cable service. I agree with our conclusion that we have the broad jurisdictional authority to interpret this section of the Act and adopt rules to implement it. That is what expert agencies do everyday. While it is up to the LFA and the MVPD to set the terms of the licensing agreements, I believe the FCC has a role to play in protecting MVPDs against overly zealous and specifically in this case, unreasonable, terms.

I am pleased that today we clearly require that franchise fees be limited to those costs actually associated with providing video service. This ensures a more level playing field.

I am also pleased that we will include the costs of PEG requirements as part of the operator's franchise fees. Public, Education, and Government access channels provide our citizens with a window to view the work of their local government. We should do all we can to encourage and support the MVPDs' efforts to provide those channels.

I hope that we will continue to implement policies that promote parity across platforms. As new services and providers emerge, the FCC should seek to apply a light but equitable regulatory touch to ensure fair competition for all participants.

STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL

Re: 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

Today's Order will encourage fair and full competition among video service providers by picking up where we left off in our video franchise reform order released last spring. This Order levels the playing field by extending to incumbent providers many of the de-regulatory benefits we provided to new entrants in our First Report and Order. No governmental entities, including those of us at the FCC, should have any thumb on the scale to give a regulatory advantage to any competitor. The Order will provide regulatory certainty to market players, enhance video competition, accelerate broadband deployment and produce lower rates for consumers. Furthermore, as with the First Report and Order, I am confident that our action today is fully supported by substantial legal authority.

Thank you to the Chairman and thank you to the Bureau for your hard work on this item.