

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 05–311; FCC 15–3]

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

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition for reconsideration.

SUMMARY: In this document, the Federal Communications Commission (“Commission” or “we”) respond to Petitions for Reconsideration of the *Second Report and Order*, interpreting Section 621 of the Communications Act of 1934, which deals with local franchising of cable companies. We clarify the applicability of the *Second Report and Order* in states that have state-level franchising, grant the request that we reconsider our Final Regulatory Flexibility Analysis to align with the text of the *Second Report and Order*, and deny the petitions in all other respects.

DATES: Effective April 6, 2015.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Brendan Murray, Brendan.Murray@fcc.gov, of the Media Bureau, Policy Division, (202) 418–1573 or Holly Saurer, Holly.Saurer@fcc.gov, of the Media Bureau, (202) 418–7283.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s *Order on Reconsideration*, FCC 15–3, adopted on January 20, 2015 and released on January 21, 2015. The full text of these documents is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW., CY–A257, Washington, DC, 20554. These documents will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission’s copy contractor, 445 12th Street SW., Room CY–B402, Washington, DC 20554. To request these documents in accessible formats (computer diskettes, large print, audio recording, and Braille), send an email to fcc504@fcc.gov or call the Commission’s Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Summary of the Order on Reconsideration

1. In the *Order on Reconsideration* (“*Order*”), we respond to several Petitions for Reconsideration. Petitioners sought reconsideration of our rulings regarding most favored nation (MFN) clauses, in-kind payments, mixed-use networks, and the applicability of the *Second Report and Order*, 72 FR 65670, November 23, 2007, to state level franchising. They also brought to our attention an inconsistency between the rules adopted and the rules analyzed in the accompanying Final Regulatory Flexibility Analysis (“FRFA”). We reaffirm that (1) prior rulings were intended to apply only to the local franchising process, and not to franchising laws or decisions at the state level; (2) MFN clauses are contractual terms that are not affected by any of the Commission’s prior findings; and (3) “in-kind” payments—non-cash payments, such as goods, or services—count toward the five percent franchise fee cap for incumbent operators and new entrants. We decline to modify our conclusions regarding mixed-use networks. We grant Petitioner’s request that we depart from our Regulatory Flexibility Analysis and submit a revised FRFA in order to comply with the mandates of the Regulatory Flexibility Act.

I. Background

2. In the Cable Communications Policy Act of 1984, Congress added section 621(a)(1) to the Communications Act. That section requires a local franchise for the provision of cable service. A local franchising authority (“LFA”) may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Section 621 prohibits a cable franchise authority from prohibiting, limiting, or restricting the provision of telecommunications service by a cable operator. Congress, in enacting this section, sought to enhance cable competition and accelerate broadband deployment.

3. In 2007, the Commission adopted the *First Report and Order and Further Notice of Proposed Rulemaking*, 72 FR 13189, March 21, 2007, to implement section 621(a)(1). The order adopted rules and provided guidance to ensure that LFAs do not unreasonably refuse to award competitive franchises for the provision of cable services. The *First Report and Order* found that certain LFA practices violated section 621(a)(1) by: (1) Failing to issue a decision on a competitive application within the

order’s specified timeframes; (2) failing to grant a franchise when an applicant did not agree to unreasonable build-out mandates; (3) refusing to grant a competitive franchise when an applicant did not agree to impermissible franchise fee requirements; (4) denying applications based on a new entrant’s refusal to undertake certain obligations relating to public, educational, and government channels (“PEG”), and institutional networks (“I-Nets”); and (5) refusing to grant a franchise based on issues related to non-cable services or facilities. The Commission issued a *Further Notice of Proposed Rulemaking* (“*FNPRM*”) for comment on whether or not these findings should be made applicable to incumbent providers and how that should be done.

4. In the *Second Report and Order*, the Commission determined that the prior findings involving franchise fees relied on statutory provisions that did not distinguish between incumbents and new entrants, and therefore should be applicable to incumbent operators. The Commission also determined that most favored nation clauses would provide some franchisees the option and ability to adjust their existing obligations if and when a competing provider obtains more favorable franchise provisions. Petitioners sought reconsideration of these rulings and brought to our attention an inconsistency between the rules adopted and the rules analyzed in the accompanying Final Regulatory Flexibility Analysis (“FRFA”). We respond to those petitions in the *Order*.

II. Discussion

A. State Level Franchising

5. Petitioners request clarification regarding whether the *Second Report and Order* applies to state level franchises. We clarify that the prior rulings were intended to apply only to the local franchising process, and not to franchising laws or decisions at the state level. The *First Report and Order* stated that its rulings were limited to competitive franchises “at the local level,” as the Commission did not have a sufficient record to determine what constitutes an “unreasonable refusal to award an additional competitive franchise” with respect to franchising decisions where a state is involved versus a local franchising authority. The United States Court of Appeals for the Sixth Circuit agreed, holding that the Commission, in the *First Report and Order*, did not to preempt state law, state-level franchising decisions, or local franchising decisions authorized by state law because the Commission

lacked the information necessary to evaluate state-level franchising laws.

6. In both the *FNPRM* and the *Second Report and Order*, the Commission expressed its intent to extend the *First Report and Order's* rulings to incumbent cable operators, but said nothing about extending those rulings to state-level franchising laws. The State of Hawaii argues that because the Commission did not address this issue in the *Second Report and Order*, it did not apply its findings to state-level franchising. Both NCTA and Verizon argue that the Commission unambiguously applied the *Second Report and Order's* findings to state-level franchising because it stated that the statutory interpretations at issue in the proceeding are “valid throughout the nation.” The Commission reaffirms that it did not extend those rulings in the *Second Report and Order* to state-level franchising laws or decisions.

B. Most Favored Nation Clauses and Disruption of Existing Contracts

7. Petitioners argue that the Commission's conclusions on MFN clauses are inconsistent with our preemption of level playing field regulations in the *First Report and Order*. NCTA counters that the decisions on MFN clauses should not be reconsidered because of their pro-competitive and public policy purposes. NATOA disagrees with that assertion because both the Department of Justice and the Federal Trade Commission have labeled MFN clauses as “anti-competitive” in certain instances. We decline to modify the conclusions concerning MFN clauses and disruption of existing contracts. In the *Second Report and Order* the Commission concluded that the determinations in the *First Report and Order* may allow competitive providers to enter markets with franchise provisions more favorable than those of the incumbent provider, and expected 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.” We reaffirm the prior conclusion that MFN clauses are contractual terms that are not affected by any of the Commission's findings in the *First Report and Order*.

C. In-Kind Payments

8. LFAs petitioned for reconsideration of the inclusion of in-kind payments in calculating the franchise fee cap, arguing that the Commission's determinations give an overly expansive scope of section 622(g)(2)(D), which exempts “charges incidental to the awarding or enforcing of the franchise”

from the five percent franchise fee cap and also expand the definition of in-kind payments in the *First Report and Order*. We disagree with Petitioners and adhere to our previous conclusions in the *Second Report and Order*. In the *First Report and Order*, the Commission interpreted Section 622, which limits the amount of franchise fees that an LFA may collect from a cable operator to five percent of the cable operator's gross revenues, subject to certain exceptions in subsection (g). The Commission concluded that in-kind payments count toward the five percent franchise fee cap. In the *Second Report and Order*, the Commission concluded that its interpretation of Section 622 “applies to both incumbent operators and new entrants.”

9. We disagree with the Petitioners that the Commission's interpretation of the phrase “incidental to” in section 622(g)(2)(D) goes beyond or is inconsistent with our interpretation in the *First Report and Order*. The Commission concluded in the first order that the term “incidental” in section 622(g)(2)(D) should be limited to the list of incidental charges provided in the statute, as well as other minor expenses. The Commission examined the existing case law under section 622(g)(2)(D) and determined that certain fees are not necessarily to be regarded as “incidental” and thus exempt from the five percent franchise fee cap. The Sixth Circuit Court of Appeals upheld this interpretation. The Commission's interpretation of section 622(g)(2)(D) in the *Second Report and Order* mirrors, and does not expand, the interpretation in the *First Report and Order*.

10. Further, we disagree with Petitioners that the *First Report and Order* limited the exemption of in-kind payments only when such in-kind payments are unrelated to cable service. The *First Report and Order* identified “free or discounted services provided to an LFA” as one type of “non-incidental” cost that counted toward the franchise fee cap. In that context, the Commission was referring to free or discounted cable services. The Sixth Circuit also referenced these different types of in-kind payments separately when it upheld the FCC's interpretation of the five percent cap on fees. For these reasons, we reaffirm our conclusion that in-kind payments count toward the five percent franchise fee cap.

D. Mixed Use Networks

11. Petitioners argue that the *Second Report and Order's* findings that LFA jurisdiction is limited to cable service is incorrect, as the Act “recognizes local authority with respect to ‘cable systems’

or ‘cable operators’ without restriction to ‘cable service.’” We adhere to our previous determination on this issue. The Commission's *First Report and Order* and the *Second Report and Order* make clear that LFAs may not use their franchising authority to regulate non-cable services provided by either an incumbent or new entrant. As petitioners have not raised any new arguments, we reaffirm the prior conclusion.

E. Conclusion

12. We reaffirm that (1) prior rulings were intended to apply only to the local franchising process, and not to franchising laws or decisions at the state level; (2) MFN clauses are contractual terms that are not affected by any of the Commission's prior findings; and (3) “in-kind” payments—non-cash payments, such as goods, or services—count toward the five percent franchise fee cap for incumbent operators and new entrants. We decline to modify our conclusions regarding mixed-use networks. We grant Petitioner's request that we depart from our Regulatory Flexibility Analysis and submit a revised FRFA in order to comply with the mandates of the Regulatory Flexibility Act.

III. Procedural Matters

A. Paperwork Reduction Act Analysis

13. The *Order* 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 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 44 U.S.C. 3506(c)(4).

B. Final Regulatory Flexibility Analysis

14. As required by the Regulatory Flexibility Act, the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to the *Report and Order*.

C. Congressional Review Act

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

IV. Final Regulatory Flexibility Analysis

16. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the

FNPRM. 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. Subsequently, the Commission adopted a Final Regulatory Flexibility Analysis (“FRFA”) in the *Second Report and Order* in this proceeding. Following the release of the *Second Report and Order*, petitioners sought reconsideration of the FRFA based on an inconsistency between the rules adopted and the rules analyzed in the accompanying FRFA. As explained in the *Order*, we submit this Supplemental Final Regulatory Flexibility Analysis to reflect the rules adopted in the *Second Report and Order* and to conform to the RFA.

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

17. The need for FCC regulation in this area derives from eliminating barriers to competitive entry of cable operators into local markets. This *Order* extends a number of the rules and findings promulgated in the *First Report and Order* dealing with Section 611 and Section 622 of the Communications Act of 1934. The objectives of the rules we adopt are to support a competitive market for both new and incumbent cable operators to further the interrelated goals of enhanced cable competition and broadband deployment.

18. Specifically, we reaffirm that (1) prior rulings were intended to apply only to the local franchising process, and not to franchising laws or decisions at the state level; (2) most favored nation (“MFN”) clauses are contractual terms that are not affected by any of the Commission’s prior findings; and (3) “in-kind” payments—non-cash payments, such as goods, or services—count toward the five percent franchise fee cap for incumbent operators and new entrants. We decline to modify our conclusions regarding mixed-use networks. We grant Petitioner’s request that we depart from our Regulatory Flexibility Analysis and submit a revised FRFA in order to comply with the mandates of the Regulatory Flexibility Act.

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

19. 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 minimus* effect on small governments, specifically engendering additional training and hiring.

20. We disagree with the Local Government Lawyer’s Roundtable’s assertion that our rules will have any more than a *de minimus* effect on small governments. LFAs will continue to review and decide upon competitive and renewal cable franchise applications. Additional training and hiring of additional personnel is not necessary to understand these actions. The *Order* simply extends existing, limited requirements, and therefore should not need additional training or personnel to implement.

21. After issuing the FRFA in the *Second Report and Order*, the Commission received a Petition for Reconsideration and Clarification from the National Association of Telecommunications Officers and Advisors (“NATOA”) *et al.* regarding the Regulatory Flexibility Analysis. The petition repeated the Local Government Lawyer’s Roundtable’s arguments, and also argued that the Commission failed to consider actual alternatives, failed to include small organizations in the IRFA, and that the FRFA provided an analysis of the tentative conclusions set forth in the IRFA rather than the rules adopted.

22. The Commission determined that since the findings in the *Second Report and Order* were matters of statutory interpretation, the result was statutorily mandated regardless of the RFA analysis, and that, therefore, no meaningful alternatives existed. Additionally, we find that the IRFA and FRFA discuss the economic impact on small entities. No commenter suggested that further entities should be additionally considered in the analysis. However, the Commission does agree with the analysis was inadvertently based on the tentative conclusions presented in the IRFA. In order to comply with the mandates of the RFA, we are submitting this Supplemental Final Regulatory Flexibility Analysis to correctly reflect the rules adopted in the *Second Report and Order*.

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

23. 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 proposed rules. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental entity” under Section 3 of the Small Business Act. In

addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. 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”).

24. The rules adopted by the *Order* will streamline the local franchising process by adopting rules that provide guidance as to the applicability or prior findings in this procedure 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 SFRFA, we consider the impact of the rules on small governmental organizations.

D. Small Businesses, Small Organizations, and Small Governmental Jurisdictions

25. Our action may, over time, affect small entities that are not easily categorized at present. Small businesses represented 99.9% of the 27.5 million businesses in the United States in 2009. There were 1,621,315 small organizations nationwide in 2007, which are defined as independently owned and operated not-for-profit enterprises that are not dominant in their perspective fields. Finally, there were 89,527 small governmental jurisdictions in 2007, which are defined as governments of cities, towns and other entities with a population of less than fifty thousand.

E. Cable and Other Subscription Programming

26. This category includes establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. Census data for 2007 shows that there were 396 such firms that operated for the entire year. Of that number, 349 operated with annual revenues below \$25 million and 47 operated with annual revenues of \$25 million or more. Therefore, under this size standard, the majority of such businesses can be considered small.

F. Cable Companies and Systems

27. The Commission defines a small cable company as one that serves 400,000 or fewer subscribers

nationwide. There are 1,258 cable operators—all but 10 incumbent cable companies are small under this size standard. In addition, the Commission defines a small cable system as one that serves 15,000 or fewer subscribers. There are 4,584 cable systems nationwide. Of this total, 4,012 cable systems have 20,000 subscribers or more. Thus, under this standard, we estimate that most cable systems are small.

G. Cable System Operators (Telecom Act Standard)

28. The Communication Act of 1934 defines a small cable system operator as “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.” 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. Industry data indicate that, of 1,076,934 cable operators nationwide, all but 13 are small under this size standard.

H. Open Video Systems (“OVS”)

29. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services, which is Wired Telecommunications Carriers. A small business in this category is a business that has 1,500 or fewer employees. Census data for 2007 shows that there were 3,188 firms that operated that year. Of this total, 3,144 had fewer than 1,000 employees and 44 had 1,000 or more employees. Therefore, under this size standard, we estimate that a majority of businesses can be considered small entities.

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

30. The rule and guidance adopted in the Order imposes no additional reporting or record keeping requirements and imposes *de minimus* other compliance requirements. Because the rules limit the terms than an LFA may consider and impose in a franchise agreement, the rules will decrease the procedural burdens faced by LFAs. Therefore, the rules adopted will not require any additional special skills beyond any already needed in the cable franchising context.

J. Steps Taken To Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

31. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which 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.

32. In the *FNPRM*, the Commission sought comment on the extension of its findings in the First Report and Order to incumbent cable operators, and to comment on the basis for the Commission’s authority to do so. The Commission tentatively concluded that the rules adopted in the Second Report and Order likely would have at most a *de minimus* 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 in the *Second*

Report and Order will not impose a significant impact on any small entity.

K. Federal Rules Which Duplicate, Overlap, or Conflict With the Commission’s Proposals

33. None.

V. Ordering Clauses

34. Accordingly, *it is ordered* that pursuant to the sections 1, 2, 4(i), 303, 405, 602, 611, 621, 622, 625, 626, and 632 of the Communications Act of 1934, 47 U.S.C. 151, 152, 154(i), 303, 405, 522, 531, 541, 542, 545, 546, and 552, and § 1.429 of the Commission’s rules, 47 CFR 1.429, the Order on Reconsideration *is adopted*.

35. *It is further ordered* that the petitions for reconsideration filed by the City of Albuquerque, New Mexico et al, the City of Breckenridge Hills, Missouri and National Association of Telecommunications Officers and Advisors, et al. *are hereby granted in part and denied in part* as described above. This action is taken pursuant to the authority contained in sections 1, 2, 4(i), 303, 405, 602, 611, 621, 622, 625, 626, and 632 of the Communications Act of 1934, 47 U.S.C. 151, 152, 154(i), 303, 405, 522, 531, 541, 542, 545, 546, and 552, and § 1.429 of the Commission’s rules, 47 CFR 1.429.

36. *It is further ordered* that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of the Order on Reconsideration, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

37. *It is further ordered* that the Commission *shall send* a copy of the Order on Reconsideration 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.

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