UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF EUGENE, OREGON, et al. **CITY OF PORTLAND, OREGON, et al.,** Petitioner, v. **UNITED STATES OF AMERICA,** and **FEDERAL COMMUNICATIONS COMMISSION,** Respondents.	Case Nos. 19-72219 (lead case) 19-72391
ANNE ARUNDEL COUNTY, MARYLAND, et al., **CHICAGO, ILLINOIS, et al.** **Petitioner,** **v.** **UNITED STATES OF AMERICA,** **and** **FEDERAL COMMUNICATIONS COMMISSION,** **Respondents.**	Case No. 19-72760

STATE OF HAWAII, **Petitioner,** **v.** **UNITED STATES OF AMERICA,** **and** **FEDERAL COMMUNICATIONS COMMISSION,** **Respondents.**	Case No. 19-72699

MOTION TO STAY ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION PENDING APPEAL

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MOTION TO STAY ORDER PENDING APPEAL

All petitioners in *Portland et al. v. FCC*, No. 19-72391; *State of Hawaii v. FCC*, No. 19-72699; and *Anne Arundel et al.*, No. 19-72760 , as well as Intervenors the City of New York and National Association of Telecommunications Officers and Advisors jointly request the Court stay the Federal Communications Commission's ("FCC's") *Implementation of Section 621(a)(1)*, Third Report and Order, 34 FCC Rcd 6844 (August 2, 2019) ("*Third R&O*" or "*Order*"), subject to seven appeals pending before this Court. Counsel is authorized to represent that all Petitioners, as follows, support the motion: *City of Eugene*, No. 19-72219; *Alliance For Communications Democracy et al.*, No. 19-72736*; City of Chicago et al.*, No. 19-72760 ; and *City of Pittsburgh*, No. 19-72880. Respondent Federal Communications Commission and the United States and Intervenors NCTA oppose the motion. After consultation, and as a courtesy to the Respondents, Movants consent to Respondents' request to file their response on Monday, December 9, 2019 and for Movants' reply to be filed on Monday, December 16, 2019.

This Court may review the FCC's actions under 47 U.S.C. §402(a) and 28 U.S.C. §2342(1), and stay the matter pending appeal pursuant to F.R.A.P. 8 and 18. A stay was sought from the FCC on October 7, 2019 and denied by the FCC's Media Bureau on November 6, 2019. Order Denying Motion for Stay, FCC 19-

1149, MB Docket 05-311 (Media Bureau) ("*Stay Denial*"). The cable industry petitioned for clarification of the *Stay Denial* on November 18, 2019. NCTA-The Internet & Television Association, Petition for Clarification of Stay Denial Order, MB Docket 05-311 (filed Nov. 15, 2019) ("NCTA Petition"); the same day the FCC set comment and reply comment deadlines on December 6 and December 13, respectively. *Public Notice*, MB Docket No. 05-311, DA 19-1991 (Media Bureau Nov. 18, 2019).

The FCC has drastically and impermissibly reinterpreted key provisions of the Cable Act, impacting the franchises under which cable operators are permitted to use public rights of way and, in exchange, are required to meet each community's needs—a key purpose of the Cable Act. 47 U.S.C. §521(2). The Order overturns 35 years of practice, and finds that almost every franchise obligation must either be paid for by the local franchising authority ("LFA"), in the form of deductions to franchise fees, or cannot be established or enforced at all. For existing franchises, local communities must forgo substantial sums or lose the benefits of long-term (typically 10 to 15-year) franchise agreements that, *inter alia*, guarantee access to communications data networks which support critical local government functions, public safety and more. *Third R&O*, nn.247, 251; *Stay Denial*, ¶21. The FCC accomplishes this drastic change by stretching the meaning of the term "franchise fee" beyond recognition.

Local communities are suffering irreparable harm through budgetary uncertainty, by the threatened loss of critical networks that cannot be replicated, and the loss of franchise fees and other costs which cannot be recovered in litigation. The near-term irreparable harm was made clear by the NCTA Petition submitted on November 18 demonstrating that cable operators believe they can justify unilaterally violating any existing franchise simply if the operator believes it to be inconsistent with the FCC's *Order*.

STANDARD OF REVIEW

The Court may grant this Motion if it finds (1) a likelihood that the Petitioners will succeed on the merits; (2) that Petitioners will suffer irreparable injury absent a stay; (3) that a stay will not harm other interested parties; and (4) the public interest supports a stay. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) ("*Nken*"). A relatively strong showing on one factor can compensate for a relatively lesser showing on another factor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011).

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS.

While the full extent of the FCC's errors will be addressed on brief, even the abbreviated discussion below makes clear Petitioners are likely to succeed on the merits. The FCC's actions fail under *Chevron*, regardless of whether the Court applies *Chevron* step one or step two. *Chevron v. Natural Res. Def. Council*, 467

U.S. 837 (1984). It is likely that this Court will find that the FCC has violated the plain meaning of the statute, and even if the Court finds certain statutory terms to be ambiguous, the Court is likely to find that the FCC's ruling stretches the statutory terms "beyond what they can bear," *MCI Corp. v. AT&T Co.*, 512 U.S. 218, 219 (1994) ("*MCI Corp.*"), and is arbitrary and capricious under *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29 at 42-43 (1983) ("*State Farm*").

A. Background on the Cable Act and FCC's 621 Dockets.

The Cable Act, originally adopted in 1984, revised in 1992 and amended modestly thereafter, 47 U.S.C. §521, *et seq.*, requires cable operators (such as Comcast) to obtain local or state franchises to offer cable service, permits franchise fees up to 5 percent of cable service gross revenues, and delegates authority to devise locally-tailored franchise terms to LFAs. LFA authority includes:

- Requiring operators to build a cable system that serves residences (referred to as the subscriber network) and businesses and non-residential customers (referred to as the "institutional network", or "I-Net"[1]);

[1] An institutional network is "constructed or operated by the cable operator and . . . is generally available only to subscribers who are not residential subscribers." 47 U.S.C. §531(f). I-Nets have traditionally been used to provide data transmission. I-Net capacity is often provided in the form of dedicated fiber optic cable, provided cost-effectively by adding additional fiber optic cable to the cable system as it is installed in a community's public rights of way.

- requiring operators to set aside capacity for public, educational and government use on the subscriber and institutional networks ;
- holding operators accountable to technical standards and proper maintenance;
- prohibiting redlining; and
- protecting consumers.

47 U.S.C. §§544(b), 541(a)(3), (b)(3)(D), 531(b)-(c) , 546(c), 552.

In 2007, the FCC considered how to apply the Cable Act to telecommunications companies, like AT&T, that were then seeking to enter the video services market to compete with traditional cable operators. *Implementation of Section 621(a)*, Report and Order, 22 FCC Rcd 5101 (2007) ("*First R&O*"). The FCC focused on section 621(a)(1), which provides that an LFA "may not unreasonably refuse to award an additional competitive franchise." 47 U.S.C. §541(a)(1). The FCC concluded, for example, that LFAs could not reasonably require a new entrant to build a duplicative I-Net but could require it to expand or make payments to support an I-Net. *First R&O* at 5154, ¶¶119-20. It did not conclude—as it does in the *Order* under review—that the franchise fee cap requires localities to treat all cable-related franchise obligations as franchise fees. *Montgomery County v. FCC*, 863 F.3d 485, 490 (6th Cir. 2017) ("*Montgomery County*"). The FCC's *First Order* was largely upheld in *Alliance for Community*

Media v. FCC, 529 F.3d 763 (6th Cir. 2008). The *First R&O* merely concluded that franchise obligations that are *not* cable-related are franchise fees because they could be viewed as an end-run around the cable franchise fee cap. *First R&O*, 22 FCC Rcd at 5150, ¶107 (citing unsubstantiated examples such as wildflower seeds, scholarships).

In a subsequent order, the FCC reinterpreted the Cable Act, as applied to long-standing LFA-cable operator agreements, to vastly expand what would be treated as a franchise fee. *Implementation of Section 621(a)(1)*, Second Report and Order, 22 FCC Rcd 19,633 (2007) ("*Second R&O*") *rev'd in part and aff'd in part sub nom. Montgomery County*, 863 F.3d 485. In this *Second R&O* the FCC concluded with very little explanation that, because *non*-cable-related obligations could be treated as franchise fees, under some circumstances, a *cable-related* franchise obligation (what the FCC called an "in-kind" obligation) is subject to the franchise fee cap. LFAs sought clarification but the FCC did not respond for seven years. *Implementation of Section 621(a)(1),* Reconsideration Order, 30 FCC Rcd 810 (2015) ("*Reconsideration Order*").

During appellate review of the *Second R&O* and the *Reconsideration Order*, the FCC conceded that several of its rulings were in violation of the Cable Act and its own precedent. The Sixth Circuit rejected the FCC's fundamental premise with respect to franchise fees: it found that, just because one can imagine a non-cash contribution that *might* amount to a "tax, fee or assessment" with respect to cable-related obligations, that does not mean "it necessarily *does*…." *Montgomery Cnty.*, 863 F.3d at 491. The Sixth Circuit found the FCC had not explained what counts as "in-kind." *Id.*

On remand, the FCC doubled down, and in the *Order* now under review essentially found that, with the exception of customer service and build-out requirements, all franchise obligations are "in-kind" franchise fees. However, the *Order* still does not address the fundamental question of what legitimately counts as a franchise fee under the Cable Act, and instead relies on *exceptions* to the franchise fee definition as delineating the bounds of the definition itself.

B. The FCC Rewrites the Cable Act, Using Statutory Exceptions to Fundamentally Change the Law.

1. The FCC's Interpretation Stretches the Cable Act Beyond What It Can Bear.

The FCC paradoxically concludes "there is no basis" in the Cable Act for distinguishing between core cable franchise obligations permitted under the Act and "in-kind contributions unrelated to the provision of cable services." *Order*, ¶14. And in a dramatic example of the tail wagging the dog, the FCC interprets *exceptions* to the franchise fee cap as the key to defining franchise fees. *Id.*, ¶¶26, 55.

Section 622 defines franchise fees as “any tax, fee, or assessment of any kind” imposed on a cable operator “because of their status as such.” 47 U.S.C. §542(g)(1), and it goes on to clarify a few items that might otherwise have been included under the cap but should be excluded,[2] such as “requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages.” *Id.*, §542(g)(2)(D). In short, Section 622(g)(2)(D) and the other exceptions mean an LFA *may* impose these costs *regardless* of the cap. The FCC’s *Third R&O* assumes that if a franchise requirement does not fall within the exceptions in Section 622(g), *Order*, ¶¶11, 13-15, it must be a “tax, fee or assessment.” That conclusion does not follow. Congress would have no need to except franchise obligations from the franchise fee definition if they were never a “tax, fee or assessment” in the first place.

The FCC’s interpretation undercuts the Cable Act by collapsing the entire process of cable franchising into the five percent franchise fee cap in Section 622 with the far-fetched result of the regulator paying for the regulatory obligations of cable operators. The due process constraints of franchising and, indeed, all of Section 626 would not make sense if, in fact, a cable operator’s total monetary and

[2] In addition to the incidental exception, Section 622 makes clear that taxes of general applicability are not franchise fees, 47 U.S.C. §542(g)(2)(A), and that, after 1984, support for PEG channel capital costs do not count as franchise fees. 47 U.S.C. §542(g)(2)(B), (C).

non-monetary cost for a franchise could not exceed the Act's franchise fee cap. For example, the Cable Act's renewal process obliges LFAs to conduct a public proceeding in order to identify "future cable-related community needs and interests," 47 U.S.C. §§546(a), and to "take[] into account the cost of meeting such needs and interests" when considering whether an operator's renewal proposal is reasonable. 47 U.S.C. §546(c)(1)(D). Similarly, Section 623 requires the FCC to take into account the cable operator's "costs attributable to satisfying franchise requirements." 47 U.S.C. §543(b)(4). If all or most costs are paid by the LFA, the need to take into account the cable operator's costs would make little sense.

Furthermore, the FCC concedes LFAs may require I-Nets as part of franchise agreements but arbitrarily and capriciously does not address the fact that, under its interpretation, the vast majority of localities could not afford to pay commercial rates for an I-Net (*infra* Section II) and that thousands of existing franchises negotiated over the last 20-30 years authorize I-Nets without franchise fee offsets. *Id*., ¶¶ 20, 63.

The FCC stakes its conclusions on its finding that the term "franchise fee" is broad, *e.g.*, *id.*, ¶12, but such a conclusion does not begin to explain why (1) cable-related franchise obligations are a "tax, fee or assessment" within the ordinary meaning of those terms, or (2) explain why Congress would demand a regulator pay for regulatory obligations, especially given that the purpose of the Cable Act is to "assure that cable systems are responsive to the needs and interests of the local community," 47 U.S.C. § 521(2). The FCC, contrary to the Congressional command, now says that the Cable Act *must* be interpreted to require localities to choose between receiving a rent for use of public property (the franchise fee) or imposing obligations to serve local needs.

"When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *Utility Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) (internal quotation omitted). Because the FCC disables the fundamental "engine" driving the Cable Act, its ruling is likely to be overturned. "Congress … does not…hide elephants in mouseholes." *Whitman v. Am. Trucking*, 531 U.S. 457, 468 (2001). As in *Whitman*, an agency "may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Id.*, 459. Nor is any deference due to the agency's interpretation: "[a]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Corp.*, 512 U.S. at 219. The FCC pushes the statute too far.

The *Order* is also arbitrary and capricious, failing to "consider an important aspect of the problem," or offer a rational explanation for its decision. *State Farm*, 463 U.S. 29 at 42-43 (1983). The agency fails to explain why the FCC, LFAs and the cable industry interpreted the Act differently for over 30 years. The FCC does not offer any reason for, and barely acknowledges, its about-face as it is required to do. An agency's decision to change decades-long statutory interpretation requires more than a "summary discussion." *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016).

2. The FCC's Different Treatment of I-Nets and Build-out Demonstrates the Flaws In Its Analysis.

The FCC makes a broad claim that any franchise obligation not included in the exceptions in Section 622(g)(2) should be treated as a franchise fee, and valued at "fair market value," but since this produces untenable results the FCC invents results-driven and arbitrary distinctions between franchise obligations nowhere found in the Cable Act's language. For example, the FCC concludes that construction of I-Nets must be paid for through franchise fee offsets—but not the construction of the cable system—even though the FCC's logic should produce the same treatment for both.

The FCC concludes that construction of an I-Net is a franchise fee because it is a non-monetary franchise obligation and is not one of the exceptions in Section 622(g)(2). *Third R&O* at ¶¶26, 55. But the same is true of the cable system build-out: it is also a non-monetary obligation not exempted in Section 622. This would mean local communities must shoulder the cost of building out the whole cable network nationwide.

Seeking to distinguish the two, the FCC applies Section 621(a)(2)(B), 47 U.S.C. §541(a)(2)(B), to its conclusions about build-out alone. *Third R&O*, ¶57. That section states a cable operator must bear the cost of constructing and maintaining its "facilities" within easements. *Id.* Not only does the section apply only to easements, but the "facilities" of a cable system also encompass I-Nets. *Id.*, ¶¶86-88 (stressing the breadth of "cable system"). If the FCC consistently followed its own analysis, I-Nets and cable build-out would be treated the same; but they are not. This is quintessentially reversible as arbitrary and capricious. *Utility Air*, 573 U.S. at 319. Petitioners are highly likely to prevail on the merits.

II. IRREPARABLE HARM.

Petitioners will suffer irreparable harm without a stay pending review. Cable operators contend that they may unilaterally withhold franchise fee payments or stop adhering to duly adopted franchise agreements as outlined by the FCC's *Order* because of the *Third R&O* and that they are not bound by the terms of the *Stay Denial Order*. NCTA Clarification Petition at 2-6. LFAs are facing loss of essential communications networks and dramatic budget uncertainty, upending decades of consistent implementation of the Cable Act. That is enough to justify a stay. While the *Stay Denial*, if implemented as written, would delay some harms absent a court order, it is clear that the FCC *Order* will regardless result in significant—and in some cases life-threatening—disruptions and chaos during the pendency of this litigation. *Infra* Section II.C.

A. This Request for Stay is Timely and is Needed to Prevent Irreparable Harm.

Contrary to the FCC's *Stay Denial*, ¶¶4-5, 21, this motion for stay is timely. Under the *Order*, cable operators would not withhold fees until the next franchise fee payment is due and after 120-days' notice; in most cases the next quarterly payment is not due until January 2020 or later. Further the FCC denied the stay request on the erroneous assumption that the need for a stay is dependent upon whether it preserves the *status quo*, a view rejected in this Circuit. *Golden Gate Restaurant Ass'n v. City and Cnty. of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008) ("*Golden Gate*").

Even more important, LFAs now require a stay with more urgency because on November 18 the cable industry expressed its belief that the basis for the *Stay Denial* is not binding and sought to remove a key basis for the *Stay Denial*, but the FCC will not issue a clarification until the third week of December at the earliest. *Public Notice*, 1 (final comment deadline December 13, 2019). Given the industry's position, LFAs can now reasonably expect that cable operators are planning to unilaterally apply offsets and withhold franchise fees when the next payments are due, possibly without prior notice, and the FCC's timetable for decision gives LFAs almost no time to plan for the impending loss of franchise obligations or fees. *NCTA Petition*, 2 (stating the FCC Order indicates that franchise negotiations will not be required in "many instances").

Specifically, the *Stay Denial* claimed that local governments did not show "the *Order* will immediately reduce or eliminate services currently provided to municipalities, " because the *Order* "did not supersede . . . existing franchise agreements" and that franchises "remain in effect unless and until a cable operator challenges those terms and proves that the terms violate the *Order's* requirements." *Stay Denial*, ¶21. NCTA has requested the FCC excise these two sentences as contrary to the *Third R&O* and argues they are not binding because the Media Bureau *Stay Denial* cannot supersede a decision of the full FCC. *NCTA Petition*, 6-7, n.22. NCTA states the *Third R&O* does not "permit franchising authorities to continue to enforce unlawful franchise provisions." *Id.*, 3.

LFAs require a stay, regardless of the process used to modify franchises, because of the nature of the obligations that will be disrupted, and the impact on budget processes as laid out below. *Infra* II.B,C. The likelihood of harm easily meets the legal standard. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008); *Tamara v. El Camino Hosp.*, 964 F. Supp. 2d 1077, 1087 (N.D. Cal. 2013) (injury need not be certain, must be likely). The court may act based on the cable industry's "avowed future intent." *LaDuke v. Nelson*, 762 F.2d 1318, 1330 (9th Cir.1985). A threat of irreparable harm is sufficiently immediate when the harm occurs before a decision on the merits can be rendered. *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016). Even a speedy appellate review under expedited briefing and argument is likely to take at least a year to decision, and the process set forth in the *Stay Denial Order* (if the industry complies with it) could easily be completed before a decision is rendered here.

B. The FCC Order Causes Irreparable Harm, Exacerbated by LFA Budget, Procurement and Other Constraints.

Regardless of the timing and mechanism of the *Order's* enforcement, the harm is irreparable because LFAs are in the impossible position of either forgoing significant revenue irreplaceable in the middle of a budget year or losing access to services and infrastructure for which they have already bargained. *See Morales v. Trans World Airlines*, 504 U.S. 374, 381 (1992) (harm of either exposure to huge liability or obeying an invalid law justified injunction). Further, States losing the benefit of state-level franchising laws suffer irreparable harm. *Maryland v. King*, 133 S.Ct. 1, 3 (2012) (Roberts, J., as Circuit Justice).

LFAs are unable to avail themselves of the options supposedly offered to them by the FCC's *Order*. While the FCC assumes reallocating budget dollars to cover the fair market value of the franchise obligations is simple, *Id.*, ¶63, n.251, many local and state laws impose significant constraints during a budget year if reallocation is permitted at all. *E.g.*, Oregon Const., Art. XI, §11b (constraining fund transfers between schools and general revenues); Anne Arundel County Code,

§8-2-106 (requiring procurement procedures for purchases over $25,000); Colón Declaration ("Colón"), ¶18. Further, LFAs are facing substantial difficulties making contingency plans because they have no means to know how cable operators will set the fair market value of franchise obligations, Colón, ¶19, Pastor Declaration ¶¶26-32 ("Pastor"), particularly because in many cases no comparable services or products exist in the commercial marketplace. Colón, ¶14. The *Order's* entire discussion of how to value I-Nets, for example, is contained in a footnote which concludes "certain business or enterprise services *may be* comparable to I-Nets." *Third R&O*, n.241 (emphasis added). The Northern District of California found that irreparable harm had been established where a local government faced budgetary uncertainty that interfered with its "ability to budget, plan for the future, and properly serve their residents" and the harm caused by mitigation, including setting aside reserve funds that could not be used for other purposes. *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 536-37 (N.D. Ca. 2017) .

Economic harm is irreparable if it is unrecoverable. If an LFA did absorb a franchise fee offset, it is by no means certain that the LFA could recover those funds once the FCC's *Order* is overturned. Cable operators must refund to subscribers any franchise fee reductions. 47 U.S.C. §542(e). And because the FCC *Order* arguably entitles cable operators to offsets while it is in effect, LFAs may not be able to recover those funds without a stay even if the *Order* is later overturned. Thus, because this suit under the APA will not automatically result in money damages for LFAs, it meets the test for irreparable harm in this Circuit. *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018).

This Circuit has similarly recognized irreparable harm when no remedy at law exists. *Mort v. United States*, 86 F.3d 890, 892–93 (9th Cir. 1996). Other FCC decisions have been stayed in the case of unrecoverable economic harm. *National Lifeline Association v. FCC*, 2018 WL 4154794, at *1 (D.C. Cir. 2018); *Iowa Utilities Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996). Even if franchise fee offsets are recoverable, the cost to taxpayers to rebid and renegotiate contracts is not recoverable. Thus, contrary to the FCC's conclusion, there is little possibility that "adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation." *Stay Denial*, ¶18 (citing *Chaplaincy of Full Gospel Churches*, 454 F.3d 290, 297-98 (quoting *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

In analogous circumstances, Justice Powell granted a stay because otherwise the state would "bear the administrative costs of changing its system to comply with the District Court's order" invalidating AFDC rules. *Ledbetter v. Baldwin*, 479 U.S. 1309, 1310 (1986) (Powell, J., as Circuit Justice). See also *National Medical Care, Inc. v. Shalala*, Case No. 95–0860 (WBB), 1995 WL 465650 (D.C.

Dist., 1995) (stay granted because it was "absurd" to permit 90,000 hours and $1 million of compliance costs).

C. I-Nets Form Essential Communications Infrastructure Not Easily Replaced in 120 Days or At All.

Irreparable harm occurs when "[r]etroactive restoration of benefits would be inadequate to remedy . . . hardships." *Golden Gate* , 512 F.3d at 1126 (9th Cir. 2008) (quotation omitted). The examples below illustrate the impossibility of restoring benefits to LFAs across the country.

The I-Net in the State of Hawaii (the "State") is "the primary communications infrastructure for most of the State and county government agencies in Hawaii." Colón, ¶5. The State can neither cover the fair market value of its I-Net through cable franchise fee offsets nor could it procure or construct an alternate network over the course of many years, let alone in 120 days. *Id*., ¶17. Commercial providers do not sell the equivalent of a cost-effective dedicated optic network which comprises a significant portion of the I-Net in the State. *Id.,* ¶14. For this reason, the cost of commercial services would "far exceed" the annual relevant IT budgets by many multiples because commercial providers offer connectivity based on the amount of data usage. *Id*., ¶¶14-17. Further, the Department of Education network "has taken decades" to build and develop, it could not be easily replaced in a limited timeframe. *Id*., ¶ 16.

Therefore, it is extremely likely the State will lose access to at least some of its I-Net, which provides several critical services, and thus suffer irreparable harm. For example, all state and county law enforcement agencies use the I-Net-based data communication networks in the State to access the critical criminal history record system. *Id.*, ¶6. *Maryland v. King*, 133 S.Ct. 1, 3 (loss of a valuable law enforcement tool for a few months is irreparable harm). Additionally, without security measures deployed via the I-Net, the State will be susceptible to "cyber-attacks and millions of dollars' worth in damages" including "fines, loss of trust in government, and personal damages to the residents of Hawaii." Colón, ¶¶15-16. *Am. Trucking Ass'n v. City of L.A.*, 559 F.3d 1046, 1058 (9th Cir. 2009) (loss of goodwill is irreparable harm). Public school students throughout Hawaii would lose access to classes not otherwise available in local schools which are provided over the I-Net. Colón, ¶8 (citing loss of AP classes). *D.R. ex rel. Courtney R. v. Antelope Valley Union High Sch. Dist.*, 746 F. Supp. 2d 1132, 1145 (C.D. Cal. 2010) (regularly losing access to 10-45 minutes of class constitutes irreparable harm).

The City of New York would face similar irreparable harm. The institutional network capacity and facilities it uses are integrated with other City networks to create a highly reliable network (called Citynet), which is essential for a city that has experienced, and must be prepared to respond to, emergencies that place many millions of people at risk. Pastor, ¶¶3-4, 6-8, 33. For example, the New York City Fire Department (FDNY) uses franchise connectivity to access real-time information about unusual conditions—such as storage of combustibles in a particular area—during emergency operations. *Id.*, ¶¶19-23. The current arrangements are longstanding and have been relied upon to create connections vital to the provision of public safety services, as well as to the day-to-day functioning of the nation's largest city. *Id.*, ¶¶9-17 (describing complex self-healing network and successful network recovery during Hurricane Sandy and challenges for the City's Board of Elections, which was not on Citynet at the time). The City is "unable to bargain" with cable operators over costs because it is "essentially a captive customer" and would accumulate "unknown amounts" of liability during the pendency of this suit. *Id.*, ¶¶26-29. In the alternative, replacing the network would take "five to seven years," "would cost millions upon millions" of dollars exceeding the current budget for communications services, be bound by complex procurement and other rules, and would require difficult and technically complicated migration of services over a parallel network. *Id.*, ¶¶31-32.

III. A STAY WILL NOT HARM OTHER PARTIES AND THE PUBLIC INTEREST SUPPORTS A STAY.

Petitioners meet the final two prongs: a stay will not harm other interested parties and the public interest supports a stay, which are considered together when the government is a party. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014); *Nken*, 556 U.S. at 435.

The last 35 years of franchising negotiations have occurred under the prior interpretations of the Cable Act and no harm has resulted to the cable industry. As described herein, failure to grant a stay results in considerable harm to thousands of LFAs and community residents who will stand to lose the benefits of their duly negotiated franchise agreements.

Moreover, the FCC's slow pace and the facts on the ground mean that the equities balance in favor of a stay. The FCC's attempt to reinterpret the Cable Act as to cable operator franchises began with the Second Report and Order in 2007. At one point these proceedings were on hiatus for seven years while the FCC took no action on a pending petition for reconsideration. *Supra* Section I.A. It makes more sense to minimize disruption during the pendency of appellate review rather than open the door to changes to thousands of franchise agreements nationwide.

Moreover, the harms which accrue to LFAs will, in turn, cause injury to local community residents and taxpayers who may be forced to do without essential services or to pay for services for which their local or state governments have already negotiated.

Cable operators will not be harmed because, if a stay is granted, they would continue to operate under franchise agreements which they negotiated pursuant to statutory language in the Cable Act that has not materially changed since its passage in 1984. Further, cable operators will not be financially harmed because they must pass through to subscribers any decrease in a franchise fees. 47 U.S.C. §542(e).

Finally, the conditions established in the *Stay Denial*, even if eventually altered in response to the NCTA Petition, suggest that the agency believes additional time is needed to implement the *Order* and that it will not be a simple process. A court-mandated stay permits all parties to move forward rationally once the merits of the case are decided.

A stay is warranted because the public interest is served by a stay and no party will be harmed by a stay. *Prometheus Radio Project v. FCC*, Case No. 17-1107, 2003 WL 22052896, at *1 (3d Cir. 2003).

CONCLUSION

Wherefore Petitioners request this Court stay the FCC's *Third R&O* during the pendency of this litigation and grant all other relief as may be just and reasonable.

DATED: November 25, 2019

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November 25, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on November 25, 2019, the forgoing Motion to Stay was served via ECF/CMF on the parties.

Respectfully submitted,

/s/ *Cheryl A. Leanza*

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Counsel for Petitioners

November 25, 2019

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ATTACHMENTS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF EUGENE, OREGON, et al. **CITY OF PORTLAND, OREGON, et al.,** Petitioner, v. **UNITED STATES OF AMERICA,** and **FEDERAL COMMUNICATIONS COMMISSION,** Respondents.	Case Nos. 19-72219 (lead case) 19-72391
ANNE ARUNDEL COUNTY, MARYLAND, et al., **CHICAGO, ILLINOIS, et al.** **Petitioner,** **v.** **UNITED STATES OF AMERICA,** **and** **FEDERAL COMMUNICATIONS COMMISSION,** **Respondents.**	Case No. 19-72760

STATE OF HAWAII, **Petitioner,** **v.** **UNITED STATES OF AMERICA,** **and** **FEDERAL COMMUNICATIONS COMMISSION,** **Respondents.**	Case No. 19-72699

Declaration of
Catherine P. Awakuni Colón
Director of the Department of Commerce and Consumer Affairs
of the State of Hawaii

1. My name is Catherine P. Awakuni Colón, Director of the Department of Commerce and Consumer Affairs of the State of Hawaii ("DCCA"). The DCCA is the local franchising authority ("LFA") for the State of Hawaii (the "State").

2. The State of Hawaii franchises at the state level. Hawaii Revised Statutes ("HRS") § 440G-1 *et seq*.

3. Currently binding franchise agreements for the State mandate local cable operators to provide institutional networks ("I-Nets").

4. In some cases the State agencies and local governments in Hawaii reimbursed its local cable operators for the original construction of the I-Nets at the actual cost of labor and materials. In other cases, the construction was provided at no cost. In all cases the cable operator was required to maintain and repair the network at no cost to the State.

5. The I-Net is the primary communications infrastructure for most of the State and county government agencies in Hawaii. The I-Nets created through the franchise agreements serve a large number of state agencies and local government agencies, including: the Hawaii State Judiciary, the City and County of Honolulu, the County of Kauai, the County of Hawaii, the County of Maui (which consists of the tri-islands of Maui, Molokai and Lanai), the University of Hawaii (with campuses statewide), the Hawaii State Public Library Systems (with 51 library locations throughout the State) and the Department of Education which runs the single statewide school district.

Examples of Significant State Reliance on its I-Nets

6. All State and county law enforcement agencies use the I-Net-based data communication networks to access the critical criminal history record system hosted in the State data center. The County of Maui accesses the Motor Vehicle and Driver License systems and a variety of criminal justice information systems managed by the State Attorney General via the I-Net.

7. Without the I-Net, impacted agencies will not be protected by the security appliances that are strategically positioned on the I-Net. Without adequate protection, agencies could be susceptible to cyber-attacks and millions of dollars' worth in damages. State and local governments are frequently targeted by criminals in order to profit against stealing data and installing malware. Successful cyber-attacks against the State could result in fines, loss of trust in government, and personal damages to the residents of Hawaii.

8. The I-Net in the State provides data connections between the Department of Education's ("DOE") data centers and 260 DOE schools statewide serving over 210,000 students, teachers and staff. The DOE and local schools rely on the I-Net to provide: over 270 Google domains for email, calendaring, document management, collaboration and

communications; 87 "E-School" remote classes for children whose local school does not offer a class, such as Advanced Placement classes, including 22 E-School courses for Kahuku High School in the 2018-19 school year; access to online math and reading curriculum daily for 179,000 students; and critical network resiliency and bandwidth for DOE Safety and Operations.

9. The Hawaii State Judiciary uses the I-Net for data, voice and video communications. Data communications is used by court operations to access courts cases and court documents, court customers use it to electronically file court documents and to access court case data directly. The I-Net supports video conferencing for arraignment and plea and other hearings with clients at the State hospital, Halawa Correctional Facility or the Oahu Community Correctional Center.

10. Across the State, more than 80,000 state employees in the executive, legislative, and judicial branches rely heavily on the I-Net-based state network infrastructure to securely access the new payroll system to update their personal information and to retrieve documents, such as pay statements and W-2 forms.

Impact of FCC's Third Report & Order

11. As described in detail below, implementing the Federal Communications Commission's ("FCC's") Third Report and Order, *Implementation of Section 621(a)(1)*, 84 Fed. Reg. 44725 (August 27, 2019) ("Third R&O" or "Order") would cause significant, irreparable harm for the State.

12. Per the franchises and other agreements, the State does not have direct access to maintain and repair the I-Net facilities itself.

13. I-Nets created via existing franchise agreements are more cost-effective than commercial retail market rates: it costs very little for a cable operator to install additional fiber strands as part of the network build-out in State-owned rights-of-way.

14. No commercial solution comparable to the I-Net is available in a cost effective manner. The current I-Net infrastructure, which is comprised significantly of dedicated fiber-optic assets (the physical connections and the maintenance of those connections) keeps costs under a ceiling because the State obtains the physical maintenance of the cable via its franchises instead of purchasing capacity on a fully managed network. Currently carriers, including cable providers, do not sell bare connectivity in Hawaii, instead they offer connectivity priced by the amount of data usage which is significantly more expensive.

15. For example, the fiscal year 2020 total budget of the Office of Enterprise Technology Services ("ETS") (which manages the State IT and connectivity statewide except for the DOE and the University of Hawaii) is $35,048,059, including $11,100,583 for personnel and a $23,947,476 operating budget. The expected commercial cost to fund a non-I-Net supported statewide network far exceeds the total ETS budget by large multiples.

16. Similarly, the existing DOE I-Net has taken decades to build and develop. Funding commercial replacement solutions to the I-Net would cost tens of millions of dollars—vastly exceeding even one year of the DOE's IT infrastructure budget, if such solutions even

exist. Given the current fiscal situation in Hawaii, it is highly unlikely that the DOE could radically increase the amount appropriated to it to cover these costs.

17. The State can neither cover the fair market value of its I-Net through cable franchise fee offsets nor could it procure and construct an alternate network over the course of many years, let alone in 120 days. Both budgetary and procurement rules, among others, limit the State and its agencies ability to respond to the FCC's Order. *See, e.g.,* HRS §§ 37–31 to 37–41 (budget); HRS Chapter 103D (procurement).

18. The DCCA believes that, per the terms of the duly negotiated franchise agreements, it paid for and should be able to continue using the existing I-Net infrastructure without additionally compensating local cable operators for the network or the costs to maintain that network. The State does not concede any offset owed to its cable operators under the FCC's Third R&O but if it receives a demand from a cable operator, it would be unable to develop a solution within 120 days. As a result, it would face franchise fee offsets, which will create substantial budget uncertainty, or it will force reductions in essential services.

19. The State is facing extreme difficulty in attempting to plan for these eventualities given that the State has no way of knowing what fair market value cable operators will assign to its I-Net. The *Order* provides no mechanism to challenge the cable operator's determination of fair market value if the State disagrees.

20. This statement is true to my personal knowledge based on information provided to me by various state and county entities and agencies and is made under penalty of perjury of the laws of the United States of America.

SIGNED: DATE:

Catherine P. Awakuni Colón

November 15, 2019

Catherine P. Awakuni Colón
Director of the Department of Commerce and Consumer Affairs,
State of Hawaii

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19-72391

(and 19-72219)

United States Court of Appeals
for the Ninth Circuit

CITY OF PORTLAND, OREGON, *et al.*,

Petitioners,

against

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

DECLARATION OF MICHAEL PASTOR IN SUPPORT OF JOINT MOTION TO STAY ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION PENDING APPEAL

I, Michael Pastor, declare under penalty of perjury under 28 U.S.C. § 1746 that the following is true and correct:

1. I am the General Counsel of the New York City Department of Information Technology and Telecommunications ("DoITT"). I make this declaration based on my personal

knowledge, as well as documents in DoITT's possession, and conversation with City employees.

2. I make this declaration to explain the devastating impact that would be felt by New York City, if cable operators were able to escape or charge "fair market value" for obligations currently contained within the City's franchise agreements with its cable franchisees.

3. As relevant here, as part of its cable television franchise agreements, cable operators are required to: (1) maintain dark fiber within the cable system that the City uses at no cost to operate its institutional network and (2) provide cable equipment that provides connectivity to the City's networks at no cost or at discounted prices to certain public buildings including firehouses.

4. As I explain in more detail below, both the City's institutional network and its cable connections are essential to the City's ability to meet its critical public mission. The FCC Order that is the subject of this litigation threatens to make maintaining the City's current networks cost-prohibitive. Even if the

petitioners ultimately prevail in the litigation, the City will suffer irreparable harm if the Order remains in effect during the pendency of this litigation because the Order forces the City to choose between two equally untenable options: either devote several years and untold resources to creating a new system or prepare to pay each cable operator for services at an unknown rate untethered from any market forces and without the benefit of competition.

A. Franchise Fiber that was provided and is maintained at no cost to the City enabled the City to build Citynet.

5. DoITT operates and manages a communications network commonly known as Citynet.

6. In addition to requiring cable operators to set aside capacity on their subscriber network (which is used to provide public, educational, and government programming to residents), franchise agreements include negotiated provisions that require capacity for institutional use by the City. This capacity is provided, in part, in the form of dark fiber at no cost to the City as part of those franchise agreements ("Franchise Fiber").

Franchisees are not required to provide any communications services over Franchise Fiber. Rather, franchisees maintain the Franchise Fiber, and agree not to pass those maintenance costs on to the City.

7. The City utilizes Franchise Fiber to operate Citynet. Citynet provides the fundamental transport mechanism for inter- and intra-agency electronic communications throughout the city's five boroughs. Citynet connects 220 locations in New York City and serves over 60 City agencies. The City operates, maintains and controls all the equipment that permits communications to and among these sites. The equipment is attached directly or indirectly to Franchise Fiber.

8. Each individual franchisee's fiber is only part of the fiber-optic backbone on which Citynet was built. The City has obtained fiber through other franchises and has itself built connections that tie to the Franchise Fiber. If the capacity that is provided via Franchise Fiber is no longer available, or is only available at an undefined fair market value, the integrity of the entire network is threatened.

9. Since its inception, the role of Citynet has evolved. It has progressed from a simple data-transport facility to a large and complex, carrier-class, multi-protocol information utility. Citynet transports all forms of network communications. It provides access to data (including emails, file sharing, applications, databases, etc.), secure network connectivity to private and public clouds, and it is the underlying mechanism used by many City agencies for information sharing, internet, video, and voice service. Citynet also provides networking circuits to meet the bandwidth demands of the various applications that help the City's agencies serve our constituents.

10. **Citynet utilizes various technologies and solutions designed and customized to meet the City's unique needs.** A main benefit of operating our network using Franchise Fiber is that the City has been able to design—at considerable cost—a system tailored to the specific needs of New York City's government. The choices DoITT's network architects made relied on an assumption that we would continue to have access to no-cost Franchise Fiber. Those architects would not have

made the same choices if they had known that DoITT would later have to assemble a new network from scratch. Moreover, considerable resources, including personnel, time, and money, have been sunk into designing the various secure, proprietary systems and applications that rely on Citynet to function.

11. For example, DoITT's engineers designed Citynet as a self-healing network, which protects the system by maximizing redundancy. This was very expensive to implement, but is essential for a government network, because it enables critical operations to quickly be restored in case of an emergency. If the City had relied on purchasing commercially available services or leasing commercially available dark fiber as the basis for its network, it would not have been cost-effective to deploy this technology. DoITT also designed Citynet using complex (and expensive) equipment that allows us to optimize bandwidth by combining and transmitting multiple signals simultaneously at different wavelengths on the same fiber. We also designed it to operate as a mostly-closed network, meaning it has a reduced "attack surface" or "attack vector," enhancing our cybersecurity.

12. **Citynet allows for secure inter-agency data sharing.** City agencies that handle sensitive information are able to share large quantities of information in a secure manner over Citynet's internal networks. Without Franchise Fiber, sensitive data could be vulnerable to compromise and data leakage because it would have to transverse multiple commercial carriers' central offices. The City would also lose visibility, that is, the ability to monitor network activity traversing commercial networks. City agencies might also be limited in the volume of data that they could transmit.

13. **Citynet is reliable and resilient.** While Franchise Fiber is maintained by the companies, the equipment required to manage the network and place a signal on the fiber is controlled by the City. As a result, the City controls which services are provided via the Franchise Fiber capacity. One of the main benefits of operating our own network on Franchise Fiber is that it gives the City of New York the ability to maintain ground-level control of the network in the event of emergencies. During disasters, there are safety protocols in place that determine when

one can gain access to an impacted location to repair equipment and which services are prioritized for repair. Operating our own network allows the City to make those decisions in a manner that best meets the safety needs of the public. In case of emergencies, commercial operators may not be able to prioritize the City's needs when restoring services. Relatedly, Franchise Fiber also provides an avenue for DoITT to restore services during disasters to those agencies that do not normally use Citynet.

14. The reliability and resilience of the network was put to the test in the aftermath of Hurricane Sandy, which struck New York City in October 2012. As mentioned above, because DoITT had control over which services were repaired first, DoITT was able to work with City leaders to set priorities and quickly restore connectivity to essential agencies.

15. While many commercial cable operators—and thus, agencies using their services—experienced interruptions as a result of the storm, agencies on Citynet did not experience data or voice outages. For example, New York City Emergency Management (NYCEM) (then, operating as the Office of

Emergency Management (OEM)) did not experience any issues with their information technology systems because they were connected to Citynet.

16. On the other hand, the Board of Elections in the City of New York—which was not on Citynet at the time—was impacted on October 29, 2012, just eight days before an election. DoITT rapidly leveraged Citynet over Franchise Fibers to restore data and telephone services for the agency at a critical time.

17. As another example, 311 is a vital service which allows constituents to call and obtain services and information from the City. During the hurricane, as commercial cable operators were losing telephone services, DoITT proactively routed calls to 311 over Citynet so that New Yorkers would be able to get services from City agencies as they weathered the storm.

18. **Citynet's intranet provides essential functions such as timekeeping and payroll services.** In addition to providing data, video, and voice services to city agencies, Citynet hosts the City's intranet, which serves important administrative functions. For example, the intranet provides timekeeping

functionality for 112 city agencies. This enables the City to manage payroll for its roughly 350,000 employees. Losing access to Citynet would be hugely disruptive to the City's timekeeping and payroll systems, and thus, all other City operations and services.

B. Low- or no-cost cable equipment provided to many buildings to provide connectivity for City agencies is essential to the City's ability to perform its vital public mission.

19. In addition to Franchise Fiber, under the City's franchise agreements with cable operators, many buildings used by City agencies are given no-cost or discounted equipment that provides connectivity to Citynet and other internal networks via the cable network ("Modem Connections").

20. While there are many agencies that use Modem Connections, I will focus here on the New York City Fire Department (FDNY). The FDNY firehouses throughout the City rely heavily on Modem Connections for a variety of applications, some of which also cross over Franchise Fiber. FDNY has a main campus in Brooklyn, known as the Metrotech Campus, which is the base of operations for FDNY's administrative network.

Firehouses throughout the city communicate with the Metrotech Campus using Modem Connections. As explained in more detail below, these Modem Connections allow firehouses to access FDNY's base of operations.

21. **DiamondPlate.** Firefighters use Modem Connections to access administrative content, including a timekeeping application and a portal to an application called DiamondPlate. DiamondPlate provides textual and visual content specific to operational readiness, situational awareness, and disaster and terrorism preparedness. This allows FDNY to quickly distribute potentially life-saving information to firefighters, EMTs, and paramedics.

22. **Critical Information Dispatching System (CIDS).** CIDS is a system that stores critical safety information about buildings in the city. The information is collected by fire company officers as part of their daily field inspection activities. A short message is composed and submitted to the system. If an emergency situation occurs at the designated building, the CIDS message is appended to the fire ticket so all responding units are

made aware of the unusual condition prior to arriving on-scene. For example, if a fire inspector finds that a local business is storing large quantities of combustibles in a particular area, this information would be appended to a fire ticket. The submission of these messages to the central dispatch system uses Modem Connections.

23. Messages based on recent events are made available to units on the next tour. This information can save lives. For example, in the 1978 Waldbaum's Supermarket fire, six firefighters died because they were unaware that renovations had been made to the supermarket's roof, which—had they known—would have changed the way that the FDNY fought that fire.[1]

24. **The firefighter dispatch system.** The Alarm-Teleprinter/Selector is a device in each firehouse that notifies fire companies about incidents to which they have been assigned to respond. The device receives relevant incident information,

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[1] John "Jay" Jonas, *Waldbaum's: 40 Years Later*, Firehouse (Aug. 1, 2018), https://www.firehouse.com/operations-training/article/21010959/40th-anniversary-of-waldbaums-supermarket-fire

including location and incident type. The ticket also includes relevant CIDS messages and EMS or NYPD comments. The firehouse unit uses the same device to inform the central dispatcher that they are responding to the alarm. This device must be regularly updated with anti-virus files and operating system security patches, which are delivered by connecting to the FDNY's administrative network via Modem Connections. Other device management activities such as diagnostics and software upgrades are also accomplished through Modem Connections.

25. **Battalion recorders.** During active emergencies, FDNY vehicles record all local radio traffic on a device known as a Battalion Recorder that is located in the vehicle. When the vehicle returns to the firehouse, the recording is transmitted from the FDNY firehouse to the FDNY's administrative network at the Metrotech Campus using Modem Connections. This information is dissected for forensic, training, and operational purposes.

C. It would cause New York City irreparable harm if it were directed to pay market value for maintenance of Franchise Fiber or for Modem Connections during the pendency of this litigation.

26. Given the uncertainty about the scope and reach of the Order, it is difficult to understand what exactly must be paid for and how fair market value should be assessed for either Franchise Fiber or Modem Connections, particularly given that there are no sufficiently similar comparators in the marketplace. As we understand it, there is no clear limit on what an operator may claim as a "fair market value," even if the providers are limited to charging for "maintenance" under the FCC Order.

27. The City is unable to bargain with cable operators over maintenance costs, where the Franchise Fiber—bundled with commercially leveraged fiber—has already been laid and is now integrated into the City's network. Once the Franchise Fiber or the cable that connects to a Modem Connection leaves a City location, the responsibility for maintenance shifts to the operator. If a particular fiber is impacted, the City cannot send signals via that fiber until it is repaired. Thus, sound maintenance is critical to the functional integrity of Citynet. But because Franchise Fiber

is integrated with the cable operator's network, only cable operators have authority to maintain the physical fiber and connections throughout the City. As a result, the City is effectively a captive customer of each of the cable operators who have provided Franchise Fiber.

28. Setting market value is further complicated by the fact that multiple cable companies have provided Franchise Fiber and the City has built and paid for complex networks of fiber that branch off and connect between those connections.

29. And given the essential nature of Citynet and Modem Connections, even without knowing in advance how much franchisees will charge for services or equipment related to Franchise Fiber and Modem Connections, without a stay, the City may be required to pay unknown amounts during the pendency of this lawsuit. If the Order is reversed or clarified, money paid might not be recoverable.

30. The alternative, replacing or redesigning the system to avoid relying on Franchise Fiber or Modem Connections would be

very difficult to do, and certainly impossible to do within the timeframe of this litigation.

31. If the City were suddenly unable to use Franchise Fiber, we estimate it would take the City five to seven years to replace its network and would cost millions upon millions of dollars. The City would have to follow a complex procurement process and reallocate budget lines within agencies and among agencies in order to assign revenue to pay for these services. The replacement of the Franchise Fiber would require new construction, finding space for equipment, providing cooling and power in those spaces, and potentially building a new inside plant cabling distribution system in new and existing buildings. This would also entail the time-consuming and expensive process of hiring and training new engineers to design and operate the new system. And, because Citynet is a transport mechanism for many essential City functions, the migration of services would require the City to first build a parallel network, test that network, and then engage in the cumbersome and difficult process of migrating services for each of the City's agencies that now rely on Citynet or

Modem Connections. This migration of services alone could take several years, and could begin only after the many months or perhaps years necessary for procurement, funding, hiring, designing and engineering a new system in a secure and compliant manner, and acquiring new capital equipment, all while applying appropriate controls necessary to protect and monitor each network. After all of that, obtaining the level of security, resiliency, and reliability that the City currently gets from Citynet from a commercial cable operator would potentially be cost-prohibitive.

32. Creating a new system could render existing equipment and applications—many of which were acquired and developed at considerable cost—obsolete. Such a project would exceed the City's current budget for cable and telecommunications services. Thus, the project would require reordering municipal priorities and potentially diverting funds from other vital governmental operations.

33. In sum, if the FCC's Order remains in effect during this litigation, the City will suffer irreparable harm because the

City's agencies rely so heavily on Franchise Fiber and Modem Connections, which have been provided by cable operators to the City for decades under longstanding cable television franchise agreements. Our ability to deliver basic City services has been built around this decades-old system. The FCC's abrupt and radical change in policy has disrupted, and will continue to disrupt this complex, reliable and essential system—a system that is central to the City's provision of a diverse array of essential public services to our 8.5 million residents. The City could neither design an alternative system nor quickly find the resources that would be required to pay whatever fees providers may choose to set during the pendency of this litigation.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Michael Pastor
General Counsel
Department of Information
Technology &
Telecommunications
mpastor@doitt.nyc.gov

Executed on November 25, 2019
New York, New York

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

ORDER DENYING MOTION FOR STAY

Adopted: November 6, 2019 **Released: November 6, 2019**

By the Chief, Media Bureau:

1. On August 2, 2019, the Commission released its Third Report & Order (*Order*) in the above-captioned proceeding.[1] After the rules adopted in the *Order* took effect,[2] the National League of Cities and a group of local government associations (collectively, NLC) filed a Motion for Stay of the *Order* pending judicial review (Motion).[3] For the reasons discussed below, we deny the Motion.

I. BACKGROUND

2. In the *Order*, the Commission adopted rules[4] and interpreted provisions in Title VI of the Communications Act of 1934, as amended (the Act), that govern how local franchising authorities (LFAs) may regulate cable operators and cable television services, with particular focus on issues remanded from the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) in *Montgomery County, Maryland et al. v. FCC*.[5] First, the *Order* adopted a rule requiring that cable-related, "in-kind" contributions required by a cable franchise agreement are franchise fees subject to the statutory five percent cap on franchise fees codified in section 622 of the Act,[6] with limited exceptions. One notable exception is the one for certain capital costs related to public, educational, and governmental access (PEG) channels.[7]

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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*, Third Report and Order, MB Docket No. 05-311, 34 FCC Rcd 6844 (2019).

[2] *Effective Date Announced for Rules Governing Franchising Authority Regulation of Cable Operators*, Public Notice, MB Docket No. 05-311, 34 FCC Rcd 7753 (MB 2019) (Effective Date Public Notice).

[3] National League of Cities, *et al.* Motion for Stay, MB Docket No. 05-311 (filed Oct. 7, 2019), available at https://ecfsapi.fcc.gov/file/100832956088/FCC%20Motion%20for%20Stay%20621%20Order.pdf. *See id.* at 1 n.1 (listing parties joining the motion). NCTA – The Internet & Television Association (NCTA) filed an opposition to the Motion. NCTA Opposition to the Motion for Stay of the National League of Cities, *et al.*, MB Docket No. 05-311 (filed Oct. 15, 2019), available at https://ecfsapi.fcc.gov/file/101554671244/NCTA%20Section%20621%20Stay%20Opposition%20(10-15-19).pdf.

[4] 47 CFR §§ 76.42, 76.43.

[5] *Montgomery County, Md. et al. v. FCC*, 863 F.3d 485 (6th Cir. 2017) (*Montgomery County*).

[6] 47 U.S.C. § 542.

[7] *Order*, 34 FCC Rcd at 6849-58, paras. 9-24 (Part III.A.1). The Commission's rules include, as franchise fees subject to the five percent cap, (i) costs attributable to franchise terms that require free or discounted cable service to public buildings; (ii) costs in support of PEG access, with the exception of capital costs; and (iii) costs attributable to the construction of I-Nets. Build-out and customer service requirements were excluded from the cap, and the record was insufficient to determine whether the provision of PEG channel capacity is included within the cap. *Id.* at 6859-

(continued….)

Second, the Commission concluded that the Act precludes LFAs from regulating the provision of most non-cable services (including broadband Internet access service) that incumbent cable operators provide over their cable systems, and adopted a rule implementing that statutory prohibition.[8] Third, the Commission determined that the Act preempts any state or local regulation of a cable operator's non-cable services that would impose obligations on franchised cable operators beyond what Title VI of the Act allows.[9] Finally, the Commission determined that its rules governing LFA regulation of cable operators should extend to state-level franchising actions and state regulations that impose requirements on local franchising.[10]

3. The Commission released the full text of the *Order* on August 2, 2019. The Federal Register published a summary of the *Order* on August 27, 2019,[11] and the *Order* became effective on September 26, 2019.[12] Parties have filed petitions for judicial review of the *Order* in the United States Court of Appeals. for the Third,[13] Ninth,[14] and D.C. Circuits.[15]

II. DISCUSSION

A. The Stay Motion Is Procedurally Defective

4. We deny the Motion because it is moot. NLC seeks "a stay of the Order pending judicial review."[16] Because the rules adopted in the *Order* took effect on September 26, 2019, those rules can no longer be stayed.[17]

5. For the same reason, NLC's delay in filing the Motion undermines its assertion that LFAs face imminent irreparable harm without a stay.[18] Notwithstanding that the Commission released the full text of the *Order* on August 2, 2019, NLC elected not to request a stay until October 7, 2019 – two months after the *Order* was released, and two weeks after the rules took effect. NLC provides no explanation for its delay in seeking equitable relief.[19] Given NLC's failure to request a stay before the

(Continued from previous page)
76, paras. 25-58 (Part III.A.2). *See also* 47 CFR § 76.42. The Commission concluded further that cable-related, in-kind contributions must count toward the five percent franchise fee cap at their fair market value. *Order,* 34 FCC Rcd at 6876-78, paras. 59-63 (Part. III.A.3).

[8] *Id.* at 6879-89, paras. 64-79 (Part III.B). *See also* 47 CFR § 76.43.

[9] *Order,* 34 FCC Rcd at 6889-903, paras. 80-110 (Part III.C).

[10] *Id.* at 6904-07, paras. 111-19 (Part III.D).

[11] *See* 84 FR 44725 (Aug. 27, 2019), https://www.federalregister.gov/documents/2019/08/27/2019-18230/local-franchising-authorities-regulation-of-cable-operators-and-cable-television-services.

[12] *See* Effective Date Public Notice.

[13] *City of Pittsburgh v. FCC*, Case No. 19-3478 (3rd Cir. 2019).

[14] *See City of Eugene v. FCC*, Case No. 19-72219 (9th Cir. 2019); *City of Portland, et al. v. FCC*, Case No. 19-72391 (9th Cir. 2019); *State of Hawaii v. FCC*, Case No. 19-72699 (9th Cir. 2019).

[15] *Alliance for Community Media et al. v. FCC*, Case No. 19-1221 (D.C. Cir. 2019); *City of Chicago v. FCC*, Case No. 19-1226 (D.C. Cir. 2019); *Anne Arundel Cty., Md. et al. v. FCC*, Case No. 19-1225 (D.C. Cir. 2019).

[16] Motion at i.

[17] *See Reed v. Rhodes*, 472 F. Supp. 603, 605 (N.D. Ohio 1979) ("A stay does not reverse, annul, undo, or suspend what has already been done…."). *See also Nken v. Holder*, 556 U.S. 418, 429 (2009) ("A stay simply suspend[s] judicial alteration of the status quo.") (quotation marks and citation omitted); *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (A "stay pending appeal … is preventative, or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit.").

effective date of the *Order*, we cannot find that it is entitled to equitable relief.[20]

B. NLC Has Failed to Satisfy the Requirements for Obtaining a Stay

6. When evaluating a stay request, the Commission considers: (1) whether the requesting party has made a strong showing that it is likely to succeed on the merits; (2) whether the requesting party will be irreparably injured without a stay; (3) whether a stay will substantially injure other interested parties; and (4) whether the public interest supports a stay.[21] The third and fourth factors merge where, as here, the federal government is an opposing party.[22] For the reasons set forth below, we find that NLC has failed to satisfy these factors.

1. NLC Has Failed to Show a Likelihood of Success on the Merits

7. NLC claims that the *Order*: (1) conflicts with the clear terms of Title VI of the Act;[23] (2) is arbitrary and capricious under the Administrative Procedure Act;[24] and (3) violates the Fifth Amendment and Tenth Amendment to the U.S. Constitution.[25] According to NLC, these claims "raise serious legal questions" and "have more than a fair prospect of success."[26] We disagree. NLC's purported "claims" are instead conclusory assertions unsupported by any legal analysis and do not justify a stay.

8. *Alleged Conflict with Title VI of the Act*. NLC's assertion that the *Order* unreasonably interpreted certain provisions in Title VI of the Act is unlikely to succeed.[27] NLC argues that the Commission's interpretation of "franchise fee" in section 622(g)(1)[28] of the Act is facially inconsistent with the definition of that term in the statute.[29] The Commission already considered and rejected this argument in the *Order*. As the *Order* explained in detail, both the language and structure of the Act support the Commission's determination that the term "franchise fee" includes not only monetary assessments, but also in-kind contributions demanded by an LFA, including those that are related to a cable operator's provision of cable services.[30] NLC's Motion provides no textual support to rebut the Commission's statutory interpretation. It also disregards the Sixth Circuit's holding in *Montgomery*

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[18] *See infra* para. 21.

[19] *See Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) (under the laches doctrine, a party is not entitled to equitable relief if she does not press her claims expeditiously); *Accord Murphy v. Timberlane Regional School Dist.*, 973 F.2d 13, 16 (1st Cir. 1992).

[20] *See Wreal, LLC v. Amazon.com, Inc*., 840 F.3d 1244, 1248 (11th Cir. 2016) ("[A] party's failure to act with speed or urgency in moving for a preliminary injunction necessarily undermines a finding of irreparable harm.") (cataloguing cases). NLC "request[ed] action on th[e] Motion by October 28, 2019, the deadline for filing for judicial review of the Order." Motion at iii. It thus appears that NLC's decision whether to intervene in pending court cases – not imminent irreparable harm to franchising authorities – determined the timing of this motion.

[21] *Nken v. Holder*, 556 U.S. 416, 425-26 (2009). *See also Winter v. Nat'l Res. Def. Council*, 555 U.S. 7, 22 (2008).

[22] *See Nken*, 556 U.S. at 435.

[23] Motion at 2, 4-6.

[24] *Id.* at 6-8.

[25] *Id.* at 8-9; U.S. Const. Amend. V; U.S. Const. Amend. X.

[26] Motion at 4.

[27] *Id.* at 4, n.11, *citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[28] 47 U.S.C § 542(g)(1).

[29] Motion at 5.

County that the term "franchise fee" encompasses non-cash exactions.[31] Accordingly, NLC has not convinced us that it is likely to succeed in its challenge to the Commission's interpretation of "franchise fee" in the *Order*.

9. The same is true of NLC's challenge to the *Order's* application of the mixed-use rule, which prohibits franchising authorities from regulating cable operators' non-cable services. NLC contends the mixed-use ruling is unlawful, because nothing restricts local regulation of non-cable services pursuant to sources of authority found outside Title VI of the Act.[32] NLC does not acknowledge that the Sixth Circuit in *Montgomery County* previously upheld the application of the mixed-use rule to incumbent cable operators that are common carriers.[33] In the *Order*, the Commission merely determined that the text, structure, and legislative history of section 624 of the Act required extension of the same rule to incumbent cable operators that are *not* common carriers.[34] Like NLC's arguments about the franchise fee rulings in the *Order*, its contentions about the mixed-use rule simply revive arguments that were previously rejected by the Commission.

10. We reach the same conclusion with respect to NLC's claim that the *Order's* preemption ruling exceeds the bounds of the Commission's statutory authority.[35] As described in the *Order*,[36] section 636(c) of the Act[37] expressly bestows on the Commission broad authority to preempt conflicting regulation of non-cable services carried over franchised cable systems, irrespective of whether such regulation is imposed pursuant to the cable franchising provisions of Title VI.[38] Because the Commission considered and rejected NLC's objections to preemption in the *Order*,[39] we find no reason to conclude that NLC's arguments are likely to prevail on judicial review.

11. Further, we are not persuaded by NLC's contention that the *Order* bypasses the franchise renewal process set forth in section 625 of the Act[40] by "press[ing] franchising authorities and cable

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[30] *Order*, 34 FCC Rcd at 6849-54, paras. 9-16. In particular, the Commission found that the definition of "franchise fee" in section 622(g)(1) supports interpreting that term expansively and in a way that confers "maximum breadth." *Id.* at 6852-53, para. 14.

[31] *Montgomery County*, 863 F.3d at 491. We note that the issue remanded to the Commission was whether or to what extent *cable-related* exactions constitute franchise fees. *Order* at 6850-52, para. 12.

[32] *Id.*

[33] *Montgomery County*, 863 F.3d at 493. In the *Order*, the Commission reaffirmed its previous application of the mixed-use rule to preclude LFAs from regulating under Title VI non-cable services offered by incumbent cable operators that are common carriers. *Order*, 34 FCC Rcd at 6879-80, para. 66.

[34] *Id.* at 6883-87, paras. 72-77.

[35] Motion at 5-6.

[36] *Order*, 34 FCC Rcd at 6890-91, para. 81 (finding that section 636(c) "extends beyond the actions of any state or local franchising authority" because the provision, by its terms, preempts laws that conflict with *any* provision of the Act and are imposed by *any* state, political subdivision, or agency thereof). *See also Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216, 219-21 (1st Cir. 2005) (stating, among other things, that "Congress has made it 'unmistakably clear' [in section 636(c)] that the Cable Act will preempt *any* inconsistent state or local law").

[37] 47 U.S.C. § 556(c).

[38] NLC's reliance on *Mozilla v. FCC*, No. 18-1051 (D.C. Cir. Oct. 1, 2019), *reh'g pet. pending*, is misplaced. Motion at 6. The *Mozilla* court drew a distinction between the Commission's "fail[ure] to ground" its preemption of

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operators to negotiate informally, and threaten[ing] preemption if franchise authorities refuse."[41] The *Order* does not "bypass" section 625, because the franchise renewal process in that statutory provision is not applicable in this circumstance. Section 625 allows a cable operator to request a modification of a franchise term where the cable operator demonstrates that the term is "commercially impracticable." In contrast, the *Order* permits cable operators to request amendment of franchise terms that the Commission in the *Order* found violate the Act.[42]

12. Finally, we note that the *Order* considered and rejected NLC's claim[43] that the Commission impermissibly substituted the "adequate" standard that applies to cable operators' PEG obligations in section 621(a)(4)(B) of the Act with the "reasonable standard" that applies to the community "needs and interest" assessment in the franchise renewal process in section 626(c)(1)(D).[44] NLC's view would mean that the specific restrictions on LFAs' authority in section 621 – notably, the limit on cable operators' PEG obligations – would apply to initial franchises but not franchise renewals.[45] NLC provides no statutory or other ground for this distinction, which would enable LFAs to make demands in the franchise renewal process that they were barred from making when the initial franchise was negotiated. In light of the foregoing, we find that NLC has presented no statutory construction argument that is likely to succeed on the merits.

13. *Alleged Arbitrary and Capricious Action.* Also unlikely to succeed is NLC's assertion that the Commission engaged in arbitrary and capricious action because, among other things, it purportedly failed to consider or address issues in the record, failed to explain its conclusions,[46] and did not base its conclusions on evidence in the record.[47] The *Order* thoroughly explained the Commission's interpretation of the Act, responded to the major concerns raised by local franchising authorities and other interested parties, and rejected their contrary reading of the statute.[48] We further find no merit to NLC's claim that the Commission failed to establish that the rules adopted in the *Order* would encourage infrastructure deployment by cable operators.[49] In fact, the Commission considered economic analyses in the record, and ultimately gave greater weight to those positing that a reduction in franchise fees would

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certain local broadband regulation in a source of statutory authority over broadband service, *Mozilla* at *51, whereas the *Order* invoked the express preemption provision of section 636(c) of the Act to preempt inconsistent local regulation of non-cable services.

[39] *Order*, 34 FCC Rcd at 6896, para. 91.

[40] 47 U.S.C. § 545.

[41] Motion at 6.

[42] *Order*, 34 FCC Rcd at 6877-78, paras. 62-63.

[43] Motion at 6, 12.

[44] *See* 47 U.S.C. § 541(a)(4)(B), *id.* § 546(c)(1)(D).

[45] *Order*, 34 FCC Rcd at 6870, n. 192.

[46] *See, e.g.*, Motion at 7-8 (asserting that the Commission failed to "grapple with the consequences and statutory inconsistencies caused by its decision to include 'cable-related in-kind obligations' in the franchise fee definition"; failed to identify a "rational line between franchise obligations that are a 'tax, fee or assessment' and those that are not"; failed to address sufficiently arguments concerning potential public safety issues arising from the *Order*; failed to address record evidence that cable operators already have recovered the cost of their franchise obligations via line-item fees; and failed to provide guidance as to how the fair market value of PEG transport must be calculated).

[47] *See, e.g.*, *id.* (claiming that the Commission's finding that the *Order* would lead to greater cable system investment was not supported by rational economic analyses).

[48] *See, e.g.*, *Order*, 34 FCC Rcd at 6855-56, 6860-76, paras. 20, 27-58 (explaining, among other things, why its decision to treat cable-related, in-kind contributions as "franchise fees" is harmonious with statutory provisions requiring or authorizing LFAs to impose cable-related obligations on cable franchisees); *id.* at 6874, para. 55, n.221
(continued….)

foster the deployment of new facilities.[50] NLC's disagreement with the Commission's conclusions provides no basis to find that NLC is likely to succeed in establishing that the *Order* is arbitrary and capricious.

14. *Alleged Constitutional Violations.* We also find no merit to NLC's assertion that the *Order* violates the Constitution. NLC argues that the Order: (1) violates the Tenth Amendment[51] by directing states and localities to surrender their property and management rights to advance federal policies relating to broadband deployment,[52] and (2) violates the Fifth Amendment[53] by authorizing private use of local property without just compensation.[54] We note that the Commission squarely addressed these constitutional arguments in the *Order*.[55] We likewise find unavailing the argument that the *Order's* "*ex post facto* modification of franchise contracts confers only a private benefit and offers no public use," which, NLC claims, is an impermissible taking under the Fifth Amendment.[56] Local governments have no property interest in funds that are obtained from cable operators in violation of federal law.[57] Moreover, we reject NLC's claim that bringing franchise agreements into compliance with the law provides no public benefits. As the Commission explained, the *Order* benefits consumers through increased investment in broadband deployment and promotes competition among providers to secure lower prices and higher quality services for consumers.[58]

2. NLC Has Failed to Show that Local Governments Will Suffer Irreparable Harm

15. Even if NLC could demonstrate a likelihood of success on the merits, it would not be entitled to a stay. NLC fails to demonstrate that LFAs would suffer irreparable injury from the *Order* pending appeal, the "single most important prerequisite for the issuance of a preliminary injunction" for a stay.[59] To justify a stay, the claimed injury must be: (1) "actual and not theoretical"; (2) more than mere

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(addressing arguments that treating I-Net requirements as "franchise fees" could create public safety risks); *id.* at 6857-58, para. 22 (addressing line itemization of certain in-kind costs on cable subscribers' bills); *id*. at 6872-74, paras. 53, 55 (explaining that LFAs can choose to continue to receive in-kind contributions or the cash value of those contributions); *id*. at 6889, 6902, paras. 79, 107 (noting that LFAs are entitled to impose public safety regulations on non-cable facilities that are consistent with Title VI); *id*. at 6877, para. 61 (explaining that valuing in-kind contributions at their fair market value best adheres to Congressional intent).

[49] Motion at 8 (arguing that the *Order* failed to address how section 622(e) of the Act, which requires cable operators to pass through to subscribers franchise fee reductions, would facilitate infrastructure deployment).

[50] *Order*, 34 FCC Rcd at 6900, para. 104 and nn.386-88.

[51] U.S. Const. Amend. X.

[52] Motion at 9 (arguing that by precluding local governments from overseeing their rights-of-way, the Commission effectively is commandeering them to grant access to those rights-of way on terms established by the Commission, contrary to the Tenth Amendment).

[53] U.S. Const. Amend. V.

[54] Motion at 9 (arguing that the Commission's decision to preempt regulation of information services provided over franchised cable systems deprives localities of fair and reasonable compensation for use of scarce public rights-of-way).

[55] *Order*, 34 FCC Rcd at 6902-03, paras. 108-10 (addressing arguments that the Commission's preemption ruling violates the Tenth Amendment); *id.* at 6903, para. 110, n.114 (addressing arguments that the Commission's preemption ruling violates the Fifth Amendment).

"economic loss"; and (3) "imminent" and "likely" to occur.[60] NLC does not establish any of these elements.

16. *NLC's alleged harms are speculative.* NLC posits that irreparable harm will result absent a stay, because reductions in franchise fees stemming from the *Order* will lead to an interruption, reduction, or elimination of the facilities and services provided to municipalities – in particular, I-Nets and PEG access.[61] NLC asserts that LFAs will not have enough time to procure replacements to the (formerly free) facilities and services offered by cable operators (notably I-Nets) or recoup the additional revenue they must now expend to pay for once-free services by taxes and other assessments.[62] We find NLC's argument to be purely speculative. Though NLC offers examples of seven jurisdictions that allegedly will be irreparably harmed by the *Order*,[63] it does not provide any data about the services and facilities that purportedly will no longer be available in those jurisdictions, the cost to replace free or subsidized services and facilities offered by cable operators, or the size of those municipalities' budgets. Without that context, we cannot find that the potential injury to LFAs will be "certain" or "great" enough to justify a stay.[64]

17. Further, NLC's argument ignores local governments' ability to adjust revenues and expenses in response to changes in franchise fee revenue streams. Any allegedly adverse impact on in-kind contributions caused by the *Order* could be avoided (or at least mitigated) by localities' own budgeting decisions.[65] For example, if an I-Net is critically important to providing a locality with public safety information, then the LFA can apply its franchise fee to the I-Net and forego a less vital expense. NLC provides no data or other evidence to show that municipalities – either by prioritizing some in-kind contributions over others or by prioritizing in-kind contributions over the fees they would otherwise collect – would be unable to maintain critical facilities and services for the public as result of the *Order*.[66] As the *Order* explained with respect to PEG, "LFAs will still have a choice: they can continue to receive monetary franchise payments up to the five percent cap, they can continue to receive their existing PEG support and reduce the monetary payments they receive, or they can negotiate for a reduction of both that

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[56] Motion at 9.

[57] *Cf. Penn Cent. Transp. Co. v. City of N.Y.,* 438 U.S. 104, 124 (1978) (explaining that the Fifth Amendment does not require compensation for all laws or programs that "adversely affect recognized economic values," such as uses of the taxing power and government actions not "sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes"); *M&J Coal Co. v. U.S.,* 47 F.3d 1148, 1154-55 (Fed. Cir. 1995) (where plaintiff did not acquire the right to mine in such a way as to endanger the public safety, the Government's actions preventing such endangerment did not take any recognizable property right).

[58] *Order,* 34 FCC Rcd at 6887-88, para. 78, 6900, para. 104. *See also* NCTA Opposition to the Motion for Stay, at 16-17.

[59] *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2nd Cir. 2005).

[60] *Nken*, 556 U.S. at 434-35 ("[S]imply showing some '*possibility* of irreparable injury' fails to satisfy the second factor" of the test for granting a stay) (emphasis added); *Wisc. Gas v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 2015).

[61] Motion at 14-17.

[62] *Id.* at 16-17.

[63] *Id.* at 12-19.

[64] *Wisc. Gas*, 758 F.2d, 674 (to demonstrate irreparable harm "the injury must be both certain and great; it must be actual and not theoretical").

[65] We note that the Commission in the *Order* also mitigated potential threats to public safety by clarifying that under section 636(a) of the Act, 47 U.S.C. § 556 (a), LFAs may impose requirements on non-cable facilities and equipment designed to protect public safety, so long as such requirements otherwise are consistent with Title VI. *Order*, 34 FCC Rcd at 6889, para. 79.

fits within the bounds of the law that Congress adopted."[67]

18. *NLC's claimed injuries are economic and thus do not constitute irreparable harm.* NLC's assertion that the *Order* will jeopardize the continuing availability of critical facilities and services (*e.g.*, I-Nets, PEG channels, and free cable service to schools and government buildings) fails to demonstrate irreparable harm. As courts have long held, "economic loss does not, in and of itself, constitute irreparable harm."[68] To be sure, as a result of the *Order*, LFAs may have to adjust their demand for franchise fees and other contributions by cable operators to be consistent with the Act, as interpreted by the Commission. But that is simply a complaint that LFAs might, only in the absence of other revenue or expense adjustments, pay more for the services that they currently receive from the cable operators – *i.e.,* the type of monetary loss that does not give rise to irreparable harm. Also, as NLC concedes, cable operators can repay franchise fees to LFAs, if needed to give effect to a reviewing court's determination that the franchise fee rulings in the *Order* are unlawful.[69] "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm."[70]

19. We also are not convinced that the administrative and legal costs LFAs allegedly will incur to comply with the *Order* warrants a stay.[71] NLC's concerns appear to center around LFAs' purported inability to recoup costs associated with having to renegotiate franchise agreements or renewals as a consequence of the *Order*.[72] Courts, however, have repeatedly held that compliance costs are a necessary expense and do not constitute the type of irreparable injury required to justify the extraordinary remedy of a stay.[73] That is so even if LFAs have to renegotiate franchise agreements a second time, should the *Order* fail to withstand judicial scrutiny. Regardless, NLC offers no context for how much time and money LFAs will expend to amend existing franchise agreements, as compared to the time and money they would have spent in the normal course. Without that information, we cannot determine what (if any) effect the *Order* will have on LFAs' compliance costs, and thus we cannot find that those costs rise to the level of irreparable harm.

20. Likewise, any increase in the legal costs LFAs will incur to negotiate franchise terms does not warrant a stay, because the Courts have similarly held that "mere litigation expense, even

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[66] NLC asserts that the *Third Report & Order's* "assum[ption] that LFAs can comply with the Order simply by allowing the deduction from franchise fees of the "fair market value" if their I-Nets … ignores the likelihood that many LFAs will be required to undertake a procurement process required by state and local law for these services rather than simply paying the cable operator." Motion at 16. Critically, NLC does not explain why LFAs would have to go through the procurement process.

[67] *Order*, 34 FCC Rcd at 6873, para. 54.

[68] *Wisc. Gas*, 758 F.2d at 674; *accord DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013) ("Economic loss, on its own, is not an irreparable injury so long as the losses can be recovered.").

[69] Motion at 21-22.

[70] *Chaplaincy of Full Gospel Churches*, 454 F.3d 290, 297-98 (quoting *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

[71] *See, e.g.*, Motion at 11-12 ("The *Order's* new interpretation . . . will require . . . incurring significant additional expense. . . ."); *id.* at 12 (arguing that there is no clear mechanism to recover the costs of repeated negotiations); *id.* at 13 (referencing LFAs' inability to recoup "administrative and legal costs" resulting from franchise renegotiations).

[72] *Id.* at 12.

[73] *See Freedom Holdings*, 408 F.3d at 115 ("[O]rdinary compliance costs are typically insufficient to constitute irreparable harm."); *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) ("[I]njury resulting from attempted compliance with government regulation ordinarily is not irreparable harm).

substantial and unrecoupable cost, does not constitute irreparable injury."[74] Were that not the case, NLC still has not demonstrated irreparable harm, because it has presented no evidence that LFAs' litigation expenses will substantially increase as a result of the *Order*. Though NLC attached to its Motion a pleading made by Comcast in a franchise renewal proceeding asserting that Comcast's new franchise agreement must conform to the rules adopted in the *Order*, that proceeding was underway when the Commission adopted the *Order*; thus, any increase in the LFA's legal expenses from the Commission's actions will be incremental.[75] Finally, NLC's irreparable harm claim is based on speculation that an unsubstantiated number of LFAs and cable operators will litigate rather than renegotiate the terms in franchise agreements to conform to the *Order*.

21. *NLC Fails to Show Immediacy of Harm.* Petitioners seeking a stay must show "[t]he injury complained of is of such imminence that there is a 'clear and present need' for equitable relief to prevent irreparable harm."[76] NLC fails to show that any potential harm is "imminent." NLC has not, and cannot, show that the *Order* will immediately reduce or eliminate services currently provided to municipalities. The rules in the *Order* did not supersede provisions in existing franchise agreements on their effective date (September 26, 2019). Instead, the *Order* encouraged LFAs, in response to a request from a cable operator, to negotiate franchise terms that conform to the *Order* in a reasonable amount of time, which the Commission found in most cases would be no more than 120 days.[77] Thus, for example, an LFA is not required to assess the costs of in-kind contributions that it currently receives from a cable operator (*e.g.*, free cable service) against the franchise fee until the cable operator asks the LFA to amend the terms of its franchise. At that point, the LFA and the cable operator have 120 days to renegotiate the franchise agreement. If negotiations fail, the terms in the franchise remain in effect unless and until a cable operator challenges those terms and proves that the terms violate the *Order's* requirements. NLC fails to explain why it is unreasonable to expect a cable operator and an LFA to renegotiate franchise terms within 120 days.[78]

3. A Stay Would Harm Other Parties and Be Contrary to the Public Interest

22. NLC contends that maintaining the Commission rules and policies in effect prior to the *Order* would enable all parties, including cable operators, to avoid the costs resulting from conformance to the *Order*.[79] NLC, however, mischaracterizes the *status quo*. Because the *Order* had been effective for two weeks when NLC requested a stay, granting NLC's motion would, in fact, alter the *status quo*. Since the *Order* was released on August 2, 2019, cable operators (and, presumably, LFAs) should have been evaluating the effect of the *Order* on existing franchise agreements, and whether and what steps they must take to amend those agreements to conform the rules adopted in the *Order*. Indeed, NLC's Motion demonstrates that at least one cable operator has sought to invoke the *Order*'s provisions in a pending franchise renewal proceeding.[80] If NLC believed that LFAs would suffer irreparable harm from the new rules, it should have timely sought a stay before they took effect. It would be contrary to the public

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[74] *Renegotiation Bd. v. Bannercroft Clothing Co*., 415 U.S. 1, 24 (1974); *accord Standard Oil Co. of Calif. v. FTC*, 449 U.S. 232, 244 (1980) ("the expense and annoyance of litigation 'is part of the social burden of living under government.'") (quoting *Petroleum Exploration, Inc. v. Public Service Comm'n*, 304 U.S. 209, 222, (1938)).

[75] Motion at 12-13.

[76] *Wisconsin Gas*, 758 F.2d at 674; *see Minnesota Vikings Football Stadium*, *LLC v. Wells Fargo Bank,* 157 F. Supp. 3d 834 (D. Minn. 2016) ("Speculative injury is insufficient to justify a preliminary injunction, and a moving party's long delay after learning of the threatened harm may indicate that the harm is neither great nor imminent.").

[77] *Order*, 34 FCC Rcd at 6877-78, para. 62, n.247.

[78] Because NLC has failed to demonstrate that it is likely to succeed on the merits of its constitutional claims, we conclude that such claims similarly are insufficient to establish irreparable harm. *See supra* para. 14.

[79] Motion at 20.

[80] *Id.* at 12-13.

interest to allow NLC to waste the time and resources of those entities that have been diligently taking steps to comply with the rules adopted in the *Order*.

23. Even if NLC had timely filed its Motion, we find that it would not be in the public interest to stay the effectiveness of our rules. A stay would allow LFAs to collect fees and other compensation that exceed the 5 percent cap on cable operators' franchise fees, in violation of the Act. It also would permit LFAs to regulate cable operators' non-cable services, notwithstanding the statutory bar against doing so. Particularly given NLC's failure to seek a stay before the effective date of the rules adopted in the *Order*, we see no reason to take the extraordinary step of granting equitable relief so that LFAs can continue to charge fees and impose requirements that the Commission has found are prohibited under the Act. For the foregoing reasons, we conclude that a stay of the *Order* would be contrary to the public interest. We, therefore, deny NLC's Motion.

III. ORDERING CLAUSES

24. Accordingly, **IT IS ORDERED THAT**, pursuant to the authority contained in sections 4(i) , 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)-(j), and 303(r) and the authority delegated in sections 0.61 and 0.283 of the Commission's rules, 47 CFR §§ 0.61 and 0.283, this Order Denying Motion for Stay in MB Docket No. 05-311 **IS ADOPTED**.

25. It is **FURTHER ORDERED** that the Motion for Stay pending judicial review of the Third Report and Order in this proceeding, filed by the National League of Cities, *et al.*, **IS DENIED**.

26. It is **FURTHER ORDERED** that this Order Denying Motion for Stay **SHALL BE EFFECTIVE** upon its release.

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief
Media Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended By the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

To: Chief, Media Bureau

NCTA – THE INTERNET & TELEVISION ASSOCIATION'S PETITION FOR CLARIFICATION OF ORDER DENYING MOTION FOR STAY

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November 15, 2019

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended By the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

NCTA – THE INTERNET & TELEVISION ASSOCIATION'S PETITION FOR CLARIFICATION OF THE ORDER DENYING MOTION FOR STAY

NCTA – The Internet & Television Association ("NCTA") hereby petitions the Media Bureau to clarify the Bureau's November 6, 2019 Order Denying Motion for Stay[1] in the matter of Implementation of Section 621(a) of the Cable Communications Act of 1984 as Amended by the Cable Television Consumer Protection Act of 1992 ("*Third Report and Order*").[2] In particular, certain language in Paragraph 21 of the *Stay Denial Order* creates the potential for confusion and the appearance of a conflict with the *Third Report and Order*. NCTA respectfully requests that the Bureau remove this potential conflict by deleting this language, as further detailed below. Removing these sentences will not substantively affect the *Stay Denial Order*'s analysis of the stay motion nor its conclusion.

[1] *See In re Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Order Denying Motion to Stay, DA 19-1149 (rel. Nov. 6, 2019) (hereinafter "*Stay Denial Order*").

[2] *See In re Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Third Report & Order, 34 FCC Rcd 6844 (2019) ("*Third Report and Order*").

ARGUMENT

The *Third Report and Order* adopted rules and interpreted provisions in Title VI of the Communications Act of 1934, including provisions related to franchise fees and regulation of mixed-use facilities, and preempted inconsistent state and local regulations. The Commission released the text of the *Third Report and Order* on August 2, 2019, and the Federal Register published a summary of the *Third Report and Order* on August 27, 2019.[3] The *Third Report and Order* became effective on September 26, 2019.

In the *Third Report and Order*, the Commission explained that its in-kind franchise fee rulings were prospective and "*[t]o the extent a franchise agreement that is currently in place conflicts with this Order*, [the Commission] encourages the parties to negotiate franchise modifications within a reasonable time."[4] Notably, the "to the extent" language made clear that the Commission did not believe that negotiations would be required in many instances. Where such negotiations are required, the Commission stated that "120 days should be, in most cases, a reasonable time for the adoption of franchise modifications."[5]

The Commission then explained how the rules in the *Third Report and Order* would be implemented in the case of a disagreement between a cable operator and a franchising authority over the impact of the *Third Report and Order* on a particular franchise requirement. First, it provided that "[i]f a franchising authority refuses to modify any provision of a franchise agreement that is inconsistent with this Order, that provision is subject to preemption under section 636(c) [of

[3] *Local Franchising Authorities' Regulation of Cable Operators and Cable Television Services*, 84 Fed. Reg. 44725 (Aug. 27, 2019); *see also Stay Denial Order* ¶ 3.

[4] *Third Report and Order* ¶ 62 (emphasis added).

[5] *Id.* ¶ 62 n.247.

the Cable Act],"[6] and it "expressly preempt[ed]" as of the effective date any imposition of obligations on cable operators beyond what Title VI allows.[7] Second, it explained that "if the LFA believes that the cable operator's proposed valuation [for in-kind contributions] is too high, the LFA is free to forgo the in-kind contribution, accept a monetary franchise fee payment, and use the funds it received to purchase the good or service in the competitive marketplace."[8]

None of these provisions, nor any others in the *Third Report and Order*, permit franchising authorities to continue to enforce unlawful franchise provisions pending a cable operator's success in obtaining judicial enforcement of the *Third Report and Order* against each and every individual franchising authority. To the contrary, the *Third Report and Order* makes clear that "[c]omplying with the terms of the statute is not optional,"[9] and the Commission explicitly rejected calls by franchising authorities to delay the effectiveness of the *Third Report and Order* until the expiration of existing franchises.[10]

On October 7, 2019, after the *Third Report and Order* became effective, the National League of Cities and a group of local government associations moved for a stay of the *Third Report and Order* pending resolution of petitions for review filed in the Third, Ninth, and D.C. Circuits.[11] The Media Bureau issued the *Stay Denial Order* on November 6, 2019, denying the motion on several grounds, including that the movants' delay rendered the request for a stay moot and that

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[6] *Id.* ¶ 62.

[7] *Id.* ¶ 80.

[8] *Id.* ¶ 61 n.242; *see also* ¶¶ 54, 63 n.251.

[9] *Id.* ¶ 63 & n.251. Relatedly, the Commission also advised that "an LFA may not . . . ask a cable operator to 'voluntarily' waive the statutory cap" on franchise fees. *Id.*

[10] *Id.* ¶ 63.

[11] *See* National League of Cities, et al., Motion for Stay, MB Docket No. 05-311 (filed Oct. 7, 2019); *see also Stay Denial Order* ¶¶ 1, 3.

movants failed to demonstrate a likelihood of success on the merits and likewise failed to show that they would suffer irreparable harm absent a stay.[12]

In the context of disposing of the movants' claim of irreparable harm, Paragraph 21 of the *Stay Denial Order* addresses situations in which the parties do not reach agreement within a 120-day negotiating period.[13] Among other things, Paragraph 21 states that "[t]he rules in the *Order* did not supersede provisions in existing franchise agreements on their effective date (September 26, 2019)," and "[i]f negotiations fail, the terms in the franchise remain in effect unless and until a cable operator challenges those terms and proves that the terms violate the *Order's* requirements."[14]

While Paragraph 21 was presumably intended only to paraphrase controlling statements in the *Third Report and Order*, those sentences could be misinterpreted to conflict with the *Third Report and Order*'s plain directives and require procedures not mandated by the Commission in the *Third Report and Order*.[15] In particular, the conclusions suggested by the *Stay Denial Order*—that the terms of existing franchise agreements were not rendered unlawful as of the *Third Report and Order*'s effective date, and that these unlawful terms can remain in effect "unless and until" a cable operator successfully challenges them in court—are inconsistent with the express language of the *Third Report and Order*,[16] as described above. The resulting confusion could frustrate the Commission's objective of ensuring that the imposition of franchise fees and other requirements

12 *See generally Stay Denial Order*.

13 *See id.* ¶ 21.

14 *Id.*

15 *See* Letter from Rick Chessen to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-311, at 1 (Nov. 12, 2019) ("NCTA Ex Parte").

16 *Compare Third Report and Order* ¶¶ 61-63, 80, *with Stay Denial Order* ¶ 21.

on cable operators comports with the statutory mandates of the Cable Act. Specifically, Paragraph 21 could be misinterpreted to put the onus on cable operators to sue in order to bring existing franchises into compliance with the Cable Act, thereby absolving franchising authorities of any responsibility to implement the requirements of the *Third Report and Order* in the absence of a court order.[17]

Indeed, the language of Paragraph 21 already has been misinterpreted by franchising authorities in just such a manner. Counsel for one group of franchising authorities has issued guidance noting that, while the denial of the stay was not unexpected, "what was unexpected and welcome news, were some very beneficial explanations of how to implement the Cable Franchise Order."[18] Specifically, counsel is advising its franchising authority clients that the *Stay Denial Order* "makes clear that, before taking as an offset the FMV of what the FCC calls in-kind benefits: (1) The cable operator must ask for an amendment to the franchise and then negotiate for up to 120 days before offsetting franchise fees and (2) The cable operator has the burden to prove the existing franchise violates the Cable Franchise Order."[19] The National Association of Telecommunications Officers and Advisors ("NATOA") has published similar guidance, characterizing Paragraph 21 as a "partial victory" and effectively interpreting the *Stay Denial*

[17] The confusion created by Paragraph 21 could also give franchising authorities a perverse incentive not to negotiate in good faith regarding any changes in franchise terms necessary to conform a franchise to the *Third Report and Order*.

[18] Best Best & Kreiger, *FCC Denies Franchise Order Stay Request But Provides Implementation Guidance* (last visited Nov. 12, 2019), https://www.bbklaw.com/News-Events/Insights/2019/Legal-Alerts/11/FCC-Denies-Cable-Franchise-Order-Stay-Request-But?utm_source=Constant_Contact&utm_medium=read_more&utm_campaign=LA_FCC_Denial_Cable_Franchise&utm_content=Legal_Alert.

[19] *Id*.

Order as superseding the process set out in the *Third Report and Order* for implementing the latter's rules and interpretations with respect to individual franchise agreements.[20]

Contrary to these interpretations of the *Stay Denial Order*, however, the *Third Report and Order* does not place the burden on cable operators to "prove" that unlawful franchise agreements must be reformed.[21] Nor, fairly read, does the *Stay Denial Order* actually place this burden on cable operators. But because franchising authorities have come to such a clear misunderstanding of the *Stay Denial Order*, the Bureau should step in and correct this confusion to ensure implementation of the *Third Report and Order* in a manner consistent with the statutory mandates of the Cable Act, the language of the *Third Report and Order*, and the Commission's intent.

In light of the foregoing, NCTA respectfully requests that the Media Bureau clarify the *Stay Denial Order* by removing the identified sentences from Paragraph 21.[22] Such a clarification would alleviate any confusion while leaving unchanged the Bureau's broader and correct conclusion that the stay movants failed to show the immediacy of any harm that would result absent a stay. Given the 120-day period for negotiations anticipated by the Commission in the *Third Report and Order*, excising these two sentences from the *Stay Denial Order* will not

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[20] *See* NATOA, *FCC Denies Motion to Stay on Cable Order*, https://www.natoa.org/web/site_issue/issue_detail/92. According to one NCTA member, counsel for a franchising authority has raised Paragraph 21 and its implications in the context of pending renewal negotiations.

[21] In fact, as noted above, it clearly states that, as of the date the *Third Report and Order* became effective, "we now expressly preempt any state or local requirement, whether or not imposed by a franchising authority, that would impose obligations on franchised cable operators beyond what Title VI allows." *Third Report and Order* ¶ 80.

[22] In the event of a conflict between the Commission's *Third Report and Order* and the Bureau's *Stay Denial Order*, the former governs. *See*, *e.g.*, *Comcast v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (an agency is not bound by the actions of its staff if the agency has not endorsed those actions); *In re Northstar Wireless, LCC*, 30 FCC Rcd 8887, 8937 ¶ 121 n.354 (2015) (stating that the Commission may disavow decisions of Media Bureau inconsistent with Commission policies and interpretations).

undermine the Bureau's otherwise effective demonstration that any purported harm localities might suffer would not be imminent absent a stay.

CONCLUSION

For the foregoing reasons, NCTA respectfully requests that the Media Bureau clarify the Order Denying Motion to Stay to remove two sentences from Paragraph 21 that could be – and already have been – misinterpreted to conflict with the *Third Report and Order*.

Respectfully submitted,

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PUBLIC NOTICE

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MEDIA BUREAU SEEKS COMMENT ON NCTA PETITION FOR CLARIFICATION OF ORDER DENYING MOTION FOR STAY OF SECTION 621 THIRD REPORT AND ORDER

MB Docket No. 05-311

Comment Date: December 6, 2019
Reply Comment Date: December 13, 2019

On November 15, 2019, NCTA – The Internet & Television Association (NCTA) filed a Petition for Clarification[1] of the Media Bureau's Order Denying Motion for Stay[2] of the Commission's Third Report and Order[3] in the above-captioned proceeding. In its *Petition*, NCTA requests that the Bureau clarify "certain language in [p]aragraph 21 of the *Stay Denial Order* [that] creates the potential for confusion and the appearance of a conflict with the *Third Report and Order*."[4] In particular, NCTA asserts that the Bureau's statements in paragraph 21 that "[t]he rules in the [*Third Report and Order*] did not supersede provisions in existing franchise agreements on their effective date"[5] and "[i]f negotiations fail, the terms in the franchise remain in effect unless and until a cable operator challenges those terms and proves that the terms violate the [*Third Report and Order*'s] requirements"[6] could be interpreted in a way that "conflict[s] with the *Third Report and Order*'s plain directives and require[s] procedures not mandated by the Commission."[7] NCTA asks that the Bureau address this apparent conflict with the *Third Report and Order* by removing the relevant statements from the *Stay Denial Order*.[8]

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[1] NCTA Petition for Clarification of the Order Denying Motion for Stay, MB Docket No. 05-311, filed Nov. 15, 2019 (*Petition*), available at https://ecfsapi.fcc.gov/file/1115030634884/2019.11.15%20NCTA%20Petition%20for%20Clarification.pdf.

[2] *Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Order Denying Motion for Stay, DA 19-1149 (MB Nov. 6, 2019) (*Stay Denial Order*).

[3] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Third Report and Order, MB Docket No. 05-311, 34 FCC Rcd 6844 (2019) (*Third Report and Order*). The *Third Report and Order* became effective on September 26, 2019. *Effective Date Announced for Rules Governing Franchising Authority Regulation of Cable Operators*, Public Notice, MB Docket No. 05-311, 34 FCC Rcd 7753 (MB 2019).

[4] *Petition* at 1.

[5] *Id.* at 4.

[6] *Id.*

[7] *Id.* NCTA argues, for example, that these statements in the *Stay Denial Order* could be construed as placing on cable operators the burden to file suit in order to bring existing franchises into compliance with the Cable Act,

We issue this Public Notice to seek comment on the *Petition*.[9] All filings in response to this Public Notice must reference MB Docket No. 05-311. Comments on the *Petition* must be filed by December 6, 2019; reply comments must be filed by December 13, 2019.[10]

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://apps.fcc.gov/ecfs/.

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

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Filings are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC 20554, telephone (202) 418-0270.

"thereby absolving franchising authorities of any responsibility to implement the requirements of the *Third Report and Order* in the absence of a court order." *Id.* at 4-5. NCTA claims that franchising authorities already have begun to interpret the relevant statements in such a manner. *Id.* at 5-6.

[8] *Id.* at 1, 6. NCTA maintains that in the event of a conflict between the *Third Report and Order* and the *Stay Denial Order*, the former decision governs. *Id.* at 6, n.22.

[9] *See* 47 CFR § 1.2(a), (b) (authorizing the Commission to issue a ruling to "terminat[e] a controversy or remov[e] uncertainty" and directing the relevant Commission bureau or office to seek comment on requests for such rulings via public notice).

[10] *See id.* § 1.2(b) (prescribing default deadlines for pleadings filed in response to petitions for declaratory ruling "[u]nless otherwise specified by the [B]ureau").

This proceeding is treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[11] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

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[11] *Id.* §§ 1.1200 *et seq.*