"THE INAPPLICABILITY, TO THE DISTRICT OF COLUMBIA, OF THE RULES ADOPTED BY THE FEDERAL COMMUNICATION COMMISSIONS IN ITS MARCH 5, 2007 REPORT AND ORDER REGARDING LOCAL CABLE TELEVISION FRANCHISING (MB DOCKET NO. 05-311)"

AN OFFICE OF CABLE TELEVISION AND TELECOMMUNICATIONS

POLICY PAPER

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EXCEUTIVE SUMMARY

On March 5, 2007, the Federal Communications Commission (the "Commission") adopted a *Report and Order and Further Notice of Proposed Rulemaking* ("*Report and Order*") wherein it established new rules regarding local cable television service franchising. In its *Report and Order*, the Commission stated that it was adopting these rules to provide guidance regarding the implementation of Section 621 (a)(1) of the Communications Act of 1934, as amended, which (among other things) prohibits cable franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable service.

In its *Report and Order*, the Commission stated that its new local franchising rules apply only to decisions made by county- and municipal-level (*i.e.*, "local-level") franchising authorities, rather than to state-level franchising authorities that have enacted comprehensive state-wide parameters regarding franchising. Applicable legal authority strongly suggests that the District should be treated as a such a state-level authority, in the context of the application (or, rather, the non-application) of the Commission's *Report and Order*. In support of that conclusion, it is noted that the Communications Act of 1934, as amended (which the *Report and Order* purports to clarify), expressly defines the District of Columbia as a state. Additionally, the nature of the District of Columbia's cable franchising framework is most-analogous to that of a state such as Hawaii, Virginia, Texas and California (each of which has enacted the type of state-wide franchising framework that the Commission's new rules do not alter), rather than to a county or municipality, whose more-limited franchising framework exists within the context of its state's all-encompassing franchising framework. Because the District should be treated as a state the context of the *Report and Order*, the new rules articulated therein do not apply to the District. The FCC's *Report and Order* should be deemed to have no significant impact on the District (or on any of its public, educational and government (PEG) channels).

I. INTRODUCTION

On March 5, 2007, the Federal Communications Commission (the "FCC" or "Commission") adopted (by a 3-2 vote) a *Report and Order and Further Notice of Proposed Rulemaking* ("*Report and Order*") [1] wherein it established new rules regarding local cable television service franchising. In its *Report and Order*, the Commission stated that it was establishing its new rules for the purpose of "address[ing] a variety of means by which local franchising authorities ('LFAs') are unreasonably refusing to award competitive [cable] franchises."

Various cable industry participants have initiated court challenges against the Commission's *Report and Order* on the grounds that it exceeds the FCC's authority; is arbitrary and capricious; is unsupported by substantial evidence; violates the United States Constitution including, without limitation, the Constitution's Fifth and Tenth Amendments; and is otherwise contrary to law. For example, the National Association of Telecommunications Officers and Advisors (NATOA) (of which the District of Columbia's Office of Cable Television and Telecommunications is a member) filed, in the United States Court of Appeals for the Forth Circuit, a Petition for Review of the *Report and Order*. Similar legal challenges were filed by other industry participants in the United States Courts of Appeal for the Second Circuit, Third Circuit, Sixth Circuit, Tenth Circuit and Eleventh Circuit. To date, these legal challenges remain pending.

In its *Report and Order*, the Commission expressly noted that its new local franchising rules apply only to decisions made by county- and municipal-level (i.e., "local-level") franchising authorities, rather than to state-level franchising authorities that have enacted comprehensive state-wide parameters regarding franchising. [2] No legal authority was uncovered wherein the District of Columbia (the "District") is explicitly designated as a state-level cable franchising authority (versus a local-level authority). However, applicable legal authority does strongly suggests that the District should be treated as a state-level authority, in the context of the application (or, rather, the non-application) of the rules established in the Commission's *Report and Order*. As is discussed in greater detail below, the Communications Act of 1934,[3] as amended (the "Communications Act"), defines the District as a "state." Additionally, the nature of the District's cable franchising framework is most-analogous to that of a state such as Hawaii, Virginia, Texas and California (each of which has enacted the type of state-wide franchising framework that the Commission's new rules do not alter), rather than to a county or municipality, whose more geographically-limited franchising framework exists within the context of its state's all-encompassing franchising framework. Additionally discussed below are the numerous cases wherein Congress and/or the United States Supreme Court

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[1] *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*, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180, MB Docket No. 05-311 (Released: March 5, 2007).

[2] *Id.*. *See also Report and Order*, at Page 56.

[3] *See* 47 U.S.C. §§ 151 *et seq*.

has treated the District as a state, with regard to the application of a federal law. The aforementioned legal authority strongly supports the conclusion that the new rules articulated in the FCC's *Report and Order* do not apply to the District. The FCC's *Report and Order* should be deemed to have no significant impact on the District (or on any of its public, educational and government (PEG) channels). In further support of these conclusions, the following is stated:

II. DISCUSSION

A. The FCC's New Rules and Their Likely Effect.

NATOA and other industry participants (including the undersigned) have concluded that the new rules established by the FCC in its *Report and Order* will significantly weaken the ability of municipal- and county-level franchising authorities to demand various resources from cable television services providers (many of which they received prior to the release of the *Report and Order*) in exchange for a cable television service franchise. These rules regard such issues as the time frame in which a cable franchise must be negotiated (*i.e.*, 90 days or six months, depending on whether or not a right to access public rights-of-way has been previously secured); [4] cable facility "build-out" requirements; [5] limitations regarding the calculation of franchise fees; [6] franchisee support of PEG channels and of Institutional Networks (I-Nets); [7] "level playing field" requirements; [8] and the preemption of local laws (but not state laws). [9]

Municipal- and county-level franchising authorities will likely receive significantly-smaller franchisee fee payments as a result of the Commission's new rules, one of which will require local-level franchising authorities to alter the formula used to calculate franchise fees in a manner that virtually guarantees a reduction in franchise fee payments. Regarding such fee calculations by local-level franchising authorities, the FCC, in its *Report and Order*: (a) stated that "franchise fees paid by a cable operator with respect to any cable system shall not exceed [five] 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services;" [10] (b) found that certain requirements or charges that are "incidental" to the awarding or enforcing of [a] franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties or liquidated damages" may be assessed without counting towards the 5 percent franchise fees cap; and *(c) found that "non-incidental" franchise-related costs required by a local franchising authority must count towards the 5 percent franchise fee cap* (emphasis added). It is this new treatment of "non-incidental" charges that will most-negatively impact local-level franchising authorities.

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[4] *See Report and Order*, at Page 34.
[5] *Id*. at Page 40.
[6] *Id*. at Page 44.
[7] *Id.* at Page 51.
[8] *Id.* at Page 62.
[9] *Id*. at Page 56.
[10] *See* 47 U.S.C. § 542 (B).

The list of these non-incidental charges includes, but is not necessarily limited to, the following: (a) attorney fees; (b) consultant fees; (c) application or processing fees that exceed the reasonable cost of processing the application; (d) free or discounted services provided to a franchising authority (*e.g.*, the free cable television service that is provided to various District agencies and to the Council); and (e) certain in-kind payments (*i.e.*, contributions unrelated to the provision of cable service).[11] Prior to the adoption of the *Report and Order*, local-level franchising authorities were not required to count the above-referenced non-incidental charges against the 5 percent franchise fee cap. If the FCC's new rules (including those regarding the calculation of franchise fees) were deemed to be applicable to the District, the amount of franchise fees that the District now receives from its franchisees would be reduce by the value of the above-referenced non-incidental contributions that the District now receives.

Such a result would mean that the value of the "Basic" and "Expanded Basic" cable television services that Comcast and RCN now provide to District throughout the city without additional charge (the annual amount of which is estimated to be approximately $ 95,641 per month) [12] would, going forward, have to be deducted from the amount of franchise fees that those companies now pay to the District, in addition to the value of all other non-incidental charges. This is just one of the ways in which the District would be adversely impacted if the FCC's new franchising rules were deemed to be applicable to it.

B. The New Franchising Rules Established in the FCC's *Report and Order* Are Not Applicable to the District.

1. The Communications Act of 1934, as Amended, Defines the Term "State" to Include the District of Columbia. Because the Commission's New Franchising Rules Do Not Apply to State-Level Franchising Authorities, They Do Not Apply to the District.

On page two (2) of its *Report and Order*, the Commission indicated that it adopted its new franchising rules to "provide guidance to implement Section 621 (a) (1) of the Communications Act of 1934, as amended." [13] Section 153 (40) of the Communications Act defines the term "State" to include "*the District of Columbia* and the Territories and possessions." [14] In its *Report and Order*, the Commission expressly limited its findings

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[11] As an example of this type of in-kind contribution, the FCC noted that scholarships payments that are required from some new market entrants. *See Report and Order*, at Para. 106.

[12] Comcast and RCN currently provide Basic and Expanded Basic cable service to the District (at no additional charge) at 1185 outlets within District-owned and/or District–controlled facilities. The average of the commercial rates charged for those services is approximately $80.71 per month. That amount, multiplied by the above-referenced number of facilities (*i.e.*, 1185) equals the $95,641 per month amount that the District would have to charge against franchise fees owed to it (if the new rules announced in the FCC's *Report and Order* were deemed applicable to the District).

[13] *Report and Order*, at Para. 1.

[14] 47 U.S.C. § 153 (40) (Emphasis added).

and regulations therein "to actions or inactions at the local [rather than state] level." [15] The various United States (and the decisions made by their respective state-level franchising authorities) were expressly exempted from the application of the mandates set forth in the *Report and Order*. Because the very act that is being "clarified" by the FCC's *Report and Order* (*i.e.*, the Communications Act of 1934, as amended) characterizes the District as a state, it logically and necessarily follows that the District is exempt from the mandates purportedly established by the *Report and Order*, as other states are.

2. The District's Franchising Framework is Most-Analogous to That of a State That has Enacted the Type of State-Wide Franchising Framework that the Commission's New Franchising Rules Do Not Alter. Accordingly, the Commission's New Rules Should Not be Applied to the District.

In its *Report and Order*, the FCC stated as follows:

> In light of the differences between *the scope* of franchises issued at the state level and those issued at the local level, we do not address the reasonableness of demands made by state level franchising authorities, such as Hawaii, which may need to be evaluated by different criteria than those applied to the demands of local franchising authorities . . . . As a result, our Order today only addresses decisions made by county- or municipal-level franchising authorities. . . . [U]nless otherwise stated, references herein to "the franchising process" or "franchising" refer solely to processes controlled by county- or municipal-level franchising authorities, including but not limited to the ultimate decision to award a franchise.[16] (Emphasis added).

By this language, the Commission unambiguously provided that its new rules apply only to franchising authorities whose decisions and mandates do *not* apply across the entire, comprehensive jurisdiction in which it is situated. In its *Report and Order*, the Commission distinguished between the "scopes" of state- and local-level processes and authorities by stating as follows:

> The record in this proceeding demonstrates that the franchising process differs significantly from locality to locality. In most states, franchising is conducted at the local level, affording counties and municipalities broad discretion in deciding whether to grant a franchise. . . . .

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[15] *Report and Order*, at Para. 126.
[16] *Report and Order*, at Footnote 2.

> To provide video services over a geographical area that encompasses more than one LFA [Local Franchising Authority], a prospective entrant must become familiar with all applicable regulations. This is a time-consuming and expensive process that has a chilling effect on competitors. Verizon estimates, for example, that it will need 2,500 – 3000 franchises in order to provide video services throughout its service area.[17]

The problem that the FCC purported to address is that of a prospective new entrant having to obtain numerous franchises in order to be positioned to provide video services throughout one state-level jurisdiction. To that end, the Commission additionally stated that "[t]he record [articulated in the *Report and Order*] indicates that state-level franchising may provide a practical solution to the problems that facilities-based entrants face when seeking to provide competitive services on a broader basis than county or municipal boundaries and seek to provide service in a significant number of franchise areas." [18]

The District is not, in any relevant way, analogous to the above-referenced county- or municipality-level franchising authority that is co-located within a larger, state-level franchising authority. Contrary to the circumstance described by the *Report and Order*'s above-referenced language (wherein a prospective new entrant is required to obtain numerous franchises within one state-level jurisdiction), prospective new entrants are required to obtain only one franchise in order to provide cable service throughout the entire jurisdiction that is the District of Columbia. New entrants are *not* required to obtain separate franchises from each of the District's various sub-jurisdictions (*i.e.*, wards). Once a prospective new entrant receives its single franchise from the District government, it will be authorized to provide cable television services to residents in all of the District's eight wards. In light of these facts, it is clear that the District is most-analogous to a state-level franchising authority (rather than to a county- or municipal-level franchising authority). Accordingly, the District should be treated as a state, in the context of an analysis of implementation of the *Report and Order*. The FCC's new franchising rules may *not* lawfully be applied to the District.

3. <u>The Supreme Court of the United States has Often Treated the District as a State, for the Purpose of Applying Various Federal Laws, and the District Should be Similarly Treated in the Context of the *Report and Order*. Accordingly, the Commission's New Franchise Rules Should Not be Applied to the District</u>.

It is clear that the District is not actually a state. That Congress has the sole power to exercise exclusive legislation over the District of Columbia is an unambiguous reminder

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[17] *Report and Order*, at Page 8.
[18] *Id*.

of that fact**.** [19] That fact notwithstanding, Congress has often used its powers under the "District Clause" of the United States Constitution to treat the District as though it were a state, for both statutory and constitutional purposes. As is discussed in a law review article written by noted law professor Jamin B. Raskin, hundreds of federal statutes provide that "for the purposes of this legislation, the term 'State' shall include the District of Columbia." [20] In that law review article, Professor Raskin stated as follows:

> There are 537 federal statutes that treat the District of Columbia as though it were a state for programmatic, governmental and constitutional purposes. *See, e.g.*, 2 U.S.C. § 431 (1994) (Federal Election Campaign Act); 15 U.S.C. § 1692a (1994) (Fair Debt Collection Act of 1977); 17 U.S.C. § 101 (1994) (subject matter and scope of copyright); 18 U.S.C. § 1961 (1994) (Racketeer Influenced and Corrupt Organizations); 23 U.S.C. § 101 (1994) (federal-aid highways); 42 U.S.C. § 1973ee-6 (1994) (voting accessibility for the elderly and handicapped); 42 U.S.C. § 1973ff-6 (1994) (Uniformed and Overseas Citizens Absentee Voting Act of 1986); 42 U.S.C. § 1973gg-1 (1994) (National Voter Registration Act of 1993). *See also* D.C. Representation in Congress: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong. 7-12 (1978) (testimony of Senator Edward M. Kennedy).

In addition to his above-referenced statement regarding Congress' recurring treatment of the District as a state, Professor Raskin also noted that the Supreme Court of the United States has also been willing to see--and to allow Congress to treat--the District as though it were a state for various other constitutional purposes as well. [21]

In the matter of *District of Columbia v. Carter*, Supreme Court Justice Brennan concluded that whether the District of Columbia constitutes a "state" within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the special provision involved. [22] As was discussed above, the language of the FCC's *Report and Order* makes it clear that the Commission did not intend to impose its new rules on franchising authorities whose decisions and mandates apply across the entire,

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[19] U.S. Const., art. I, § 8, cl. 17.

[20] *See* Jamin B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 Harv. C.R.-C.L. L. Rev. 39, 49 (Winter 1999).

[21] *See Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317 (1820) (in this case, Chief Justice Marshall found that Congress could impose a direct tax on residents of the District despite the fact that Article I, Section 2 of the Constitution specifically provides that direct taxes need to be apportioned "among the several *states* which may be included within this union."); and *National Mutual Insurance Co. v. Tidewater Transfer Co*., 337 U.S. 582 (1949) (In this case, the Supreme Court affirmed the constitutionality of a federal statute that gave federal courts diversity jurisdiction over lawsuits between District and state residents, despite the fact that Article III, Section 2 of the Constitution creates diversity jurisdiction in federal court only between citizens of different *states*.). The Supreme Court, in both of these cases, treated the District like a state within the meaning of the Constitution.

[22] *See District of Columbia v. Carter*, 409 U.S. 418, 420 (1973). Although the entities distinguished in *Carter* were the District and United States territories (rather than the District versus a county), these two sets of entities are sufficiently analogous as to make Justice Brennan's above-referenced test applicable in the instant context.

comprehensive jurisdiction in which it is situated. As is the case with various states, the District's decisions and rules regarding the provision of cable television services do, in fact, apply across the entire jurisdiction that constitutes the District of Columbia. These facts, and the analysis thereof in the context of the Supreme Court's above-referenced "aim" test, demonstrates that: (a) the District should be treated as a state, in the context of the FCC's *Report and Order*; and (b) accordingly, the Commission's new franchising rules are not applicable to the District.

III. CONCLUSION

The aforementioned language of the Communications Act, decisions of Congress and the United States Supreme Court strongly support the conclusion that the District should be treated as a state, in the context of the Federal Communications Commission's Report and Order. The language of the Commission's *Report and Order* clearly indicates that the FCC did not intend for its new franchising rules to be imposed on a state-level entity whose decisions and rules apply across state (or state-like jurisdiction). The District is such an entity. Accordingly, the FCC's new franchising rules do not apply to the District. The District's Office of Cable Television should, as soon as possible, seek clarification regarding this issue from the Commission.

J. Carl Wilson