

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)
)
Implementation of Section 621(a)(1) of the) MB Docket No. 05-311
Cable Communications Policy Act of 1984)
As Amended by the Cable Television Consumer)
Protection and Competition Act of 1992)

**COMMENTS OF THE
NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE**

INTRODUCTION AND SUMMARY

On March 5, 2007, the Commission issued a Further Notice of Proposed Rulemaking (FNPRM), published on March 21, 2007 in the Federal Register, in the above-entitled proceeding inviting comments on the Commission’s tentative conclusion that, *inter alia*, the Commission cannot preempt state or local customer service laws that exceed the Commission’s own standards, nor prevent local franchising authorities (LFAs) and cable operators from agreeing to more stringent standards. The New York State Department of Public Service (NYDPS) submits these comments in response to the aforementioned Federal Register notice.

The Commission has correctly recognized that the plain, explicit statutory language of Section 632(d)(2) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992,¹

¹ 47 U.S.C. §552(d)(2).

prohibits the Commission from preempting state or local customer service laws more stringent than Commission standards. It is well-known and indisputable that in every case concerning federal preemption of state law, “the purpose of Congress is the ultimate touch-stone.”² In determining the purpose of Congress, the primary focus is upon the plain statutory language, as “the plain wording of the clause ... necessarily contains the best evidence of Congress’ pre-emptive intent.”³ Section 632(d)(2) squarely states that “[n]othing in this Title shall be construed to prevent the establishment and enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, nor addresses matters not addressed by the standards set by the Commission under this section.”⁴ Congress could not possibly have made its non-preemptive intent any more obvious. Therefore, all State and local customer service laws and regulations more stringent than the Commission’s standards are expressly preserved, and the Commission has absolutely no authority to preempt such state and local laws and regulations.

The FNPRM also points to AT&T’s request that the Commission adopt rules to prevent LFAs from imposing customer service performance data collection requirements in exchange for a franchise.⁵ As a legal matter, the Commission cannot oblige AT&T’s request. First, such data collection requirements are among those preserved by Section 632(d)(2). To the extent such requirements are more stringent than, or are simply not

² *Meditronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

³ *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62 (2002).

⁴ 47 U.S.C. §552(d)(2).

⁵ FNPRM at ¶ 141.

addressed by, Commission standards, they are expressly preserved. Second, a United States Court of Appeals has held that there was no federal preemption of State information-gathering requirements when those requirements neither related to issues that were expressly within federal jurisdiction, nor conflicted with federal requirements.⁶ Moreover, as a policy matter, even if the Commission could preempt LFA customer service performance data collection requirements, it should not do so. LFAs depend upon the ability to collect such data in order to monitor the quality of service provided by the cable operator, and are in the best position to take corrective action when necessary. In conclusion, the Commission's tentative conclusion that it lacks authority to preempt LFA customer service requirements more stringent than its own, including but not limited to LFA customer service performance data collection requirements, and that the Commission likewise cannot prevent LFAs and cable operators from agreeing to more stringent standards, is correct.

Respectfully submitted,

s/ Peter McGowan

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⁶ *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587, 592-95 (3d Cir. 1985).