July 24, 2019

ELECTRONICALLY FILED

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW – Lobby Level
Washington, DC 20554

Re: **Notice of *Ex Parte***
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)

Dear Secretary Dortch:

On July 24, 2019, the undersigned (by phone), along with the following individuals, met with met with Alexander Sanjenis, Media Advisor to Chairman Pai; Joel Miller, Chief of Staff and Media Legal Advisor, and Christopher McGillen, Legal Intern, for Commissioner O'Rielly; and Evan Swarztrauber, Policy Advisor to Commissioner Carr:

Gerard Lederer, Best Best & Krieger LLP
Kevin McCarty, United States Conference of Mayors
Angelina Panettieri, National League of Cities
Zack George, National Association of Counties
Arthur Scott, National Association of Counties
Mike Wassenaar, Alliance for Community Media

During the meetings, we discussed local governments' concerns with the draft Third Report and Order ("Draft Order") in the above-referenced docket on the Commission's tentative agenda for August 1, 2019. We also referenced the attached letter on behalf of the jurisdictions and organizations listed at the end of the letter, which addresses the many *ex parte* filings of NCTA in this docket, and which we noted in the meetings would be forthcoming.

We also asked, given that the dramatic change in the *status quo* that the Draft Order would cause, that the Commission defer the effectiveness of the Draft Order pending appeal. Not only would adoption of the Draft Order upset expectations reflected in many contracts and state laws (raising significant constitutional issues, as well as substantial severability issues), it could trigger loss of benefits that will directly affect the availability of services to many; result in loss of important local programming; and create significant public safety risks if, for example, the Draft Order's treatment of existing franchise obligations affects infrastructure such as institutional networks now being used for delivery of public safety services. The fact that the Draft Order does not permit cable operators to unilaterally take offsets, or that some operators may choose not to pursue offsets, does not diminish the Draft Order's impacts nationwide, which the Commission should at least consider in determining whether and when the Draft Order should go into effect. We suggest a January 1, 2020 effective date so that claims against franchise fees would not impact 2019 budgets.

In addition to the request to defer the effective date, the representatives of local government requested that the order make clear:

1. The order is permissive not mandatory; a cable operator is not required to demand an offset of its franchise fee payments.
2. If a cable operator seeks an offset against franchise fees for non-monetary, cable-related franchise provisions as provided in the proposed order, the franchising authority should be given an opportunity to show that franchise fees are being spent on PEG capital, thereby reducing the level of franchise fees and creating a possible reduction in the offset available to the operator.
3. The order does not impact terms that were reached as part of settlement agreements between the parties.

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this letter and the attachment is being electronically submitted in the record of this proceeding. Please do not hesitate to contact the undersigned with any questions.

Respectfully submitted,

Nancy Werner
General Counsel
NATOA

cc: Alexander Sanjenis
Joel Miller
Evan Swarztrauber
Michelle Carey
Holly Saurer
Martha Heller
Raelynn Remy

July 2019

Honorable Ajit Pai
Chairman
Honorable Brendan Carr, Michael O'Rielly, Jessica Rosenworcel and Geoffrey Starks, Commissioners
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: 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)

Since the comment period closed in the above-captioned proceeding, NCTA–The Internet & Television Association ("NCTA") has filed a series of extensive *ex parte* letters supplementing and expanding on the arguments it and other industry interests have already made in the record in support of the proposed new interpretations of the Cable Act[1] set forth in the Second Further Notice of Proposed Rulemaking ("*Second FNPRM*")[2] in this docket. While we have reservations about the propriety of NCTA's substantial revision and expansion of its arguments after the formal reply comment period has closed, the undersigned local governments and local government and public, educational, and governmental ("PEG") organizations ("Local Government/PEG Parties") provide this response to the many new arguments NCTA has raised in its *ex parte* filings. We make these comments for the record, and may separately respond to the proposed Order in this matter, released on July 11, 2019, although several of the legal arguments made below are directly relevant to that proposed order.

Notably absent from NCTA's filings is a response to the basic fact that neither the cable industry nor local franchising authorities ("LFAs") have, in the 35 years since the Cable Act became law, interpreted that Act in the manner NCTA now asserts to be the long-standing intent of the Act. Ignoring the text of the Act and express legislative history, NCTA now argues Congress always intended that LFAs would pay the fair market value of non-monetary franchise terms Congress authorized LFAs to incorporate in cable franchises in order to meet the Congressional goals of the Act, and alleges that Congress intended—without including any language to this effect—to preempt local authority over non-cable services.

NCTA's argument requires one to believe that while Congress intended the Act to "establish franchise procedures and standards . . . which assure that cable systems are responsive to the needs and interests of the local community" and to "provide the widest possible diversity

[1] The "Cable Act" or the "Act" refers to the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992 and the Telecommunications Act of 1996. The Telecommunications Act of 1996 is referred to herein as the "1996 Act."

[2] *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992,* MB Docket No. 05-311, Second Further Notice of Proposed Rulemaking, FCC 18-131 (2018).

of information sources and services to the public,"[3] Congress nonetheless expected LFAs to pay to achieve Congress's goals through reduced monetary franchise fee payments. And that Congress intended the Act to "protect[] cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter,"[4] yet Congress expected that any franchise provisions the cable operator proposed to meet those standards would be deducted from franchise fees at their fair market value.

By NCTA's reasoning, the more responsive the cable franchise is to local needs and the more diversity of information sources it promotes—in other words, the more the franchise meets the Act's goals—the less the LFA should receive in fees for use of the rights-of-way ("ROW"). Nothing in the Act indicates Congress intended this self-contradictory result. NCTA's position not only inexplicably links two separate issues—providing clear local authority to require cable operators to meet Congressionally-established goals and requiring cable operators to pay compensation for use of local ROW—but also *disincentivizes* local governments from working to meet the Act's goals in their franchise negotiations.

The leap of logic required to support NCTA's construction of the Act is made even more plain by the fact that Congress correctly assumed most cable franchise agreements would be the product of mutual agreement through informal negotiations.[5] In the rare occasions where the informal renewal process is unsuccessful, Congress enacted a procedure in which the cable operator—not the LFA—proposes the final franchise terms. However broad the phrase "any tax, fee, or assessment of any kind imposed by a franchising authority"[6] may be, there is no reasonable construction that supports the notion that Congress meant for it to encompass nonmonetary franchise terms and commitments mutually agreed to by the parties or proposed by a cable operator and accepted by the LFA.

If there were any doubt remaining, Congress eliminated it by this clear statement in the legislative history: "Subsection 622(g)(2)(C) establishes a specific provision for PEG access in new franchises. In general, this section defines as a franchise fee *only monetary payments* made by the cable operator, and does not include as a 'fee' any franchise requirements for the provision of services, facilities or equipment."[7] Moreover, the Commission itself has recognized that this statement reflects Congressional intent, and is not in a position now to adopt rules that grossly depart from that standard, as NCTA suggests.[8]

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[3] 47 U.S.C. § 521(2), (4).

[4] 47 U.S.C. § 521(5).

[5] H.R. Rep. No. 98-934, at 72 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655 ("House Report") (emphasis added).

[6] 47 U.S.C. § 524(g)(1).

[7] House Report at 65.

[8] *See City of Bowie, Maryland,* 14 FCC Rcd 9596 (Cable Services Bureau, 1999) ("*City of Bowie*"). The Commission relied on *City of Bowie* to support its conclusions in two previous proceedings in this docket: *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 (2007) ("*First Report and Order*"), *petition for review denied sub nom. Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008); and *In re Implementation of*

In amending the Cable Act's franchise fee provision in the 1996 Act, Congress similarly made clear that the amendment does not limit local authority over non-cable services: "The conferees intend that, to the extent permissible under State and local law, *telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government* to, in a nondiscriminatory and competitively neutral way, manage its public rights-of-way *and charge fair and reasonable fees*."[9]

Cable franchise fees are meant to compensate state and local governments for cable operators' use of the ROW to provide cable service. Nothing in the Act or its legislative history supports the argument that Congress intended this compensation to be reduced by promises cable operators made, and LFAs accepted, in the initial franchise grant or a franchise renewal. Nor does the Act or its history support the position that once a cable franchise is granted, state and local authority over any other services the cable franchisee provides simply disappears, or that cable operators, unlike non-cable operators, are entitled to a free ride on the ROW with respect to their non-cable services. As explained below, both the text of the Act and its legislative history clearly establish that the positions asserted by NCTA and in the *Second FNPRM* are untenable.

RESPONSES TO NCTA ARGUMENTS

1. PEG Channel Capacity Is Not a "Franchise Fee."

NCTA's March 11, 2019 Notice of *Ex Parte* ("March 11th *Ex Parte*") argues that nonmonetary franchise requirements relating to PEG access channels, including PEG channel capacity requirements, are a "franchise fee" under Section 622(g) of the Cable Act.[10] As explained in prior local government and PEG center submissions, however, the language, structure and legislative history of the Cable Act make clear that Congress did not intend for the five percent franchise fee cap to apply to cable-related, nonmonetary franchise requirements, and certainly not those, like PEG capacity and facility requirements in Section 611 of the Act,[11] that Congress explicitly authorized.[12] This construction of the Cable Act is confirmed by the

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Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, Second Report and Order, 22 FCC Rcd. 19633 (2007), *order on reconsideration*, 30 FCC Rcd. 810 (2015) ("*Second Report and Order*"), *review granted in part, sub. nom., Montgomery Cty. v. FCC*, 863 F.3d 485 (6th Cir. 2017).

[9] H.R. Rep. No. 104-458, at 180 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 223 ("Conference Report") (emphasis added).

[10] 47 U.S.C. § 542(g).

[11] 47 U.S.C. § 531.

[12] *See, e.g.*, Comments on Second Further Notice of Proposed Rulemaking of the Alliance for Communications Democracy et al. at 5-11, 15-16 (Nov. 14, 2018) ("CAPA et al. Comments"); Reply Comments of the Alliance for Communications Democracy et al. at 3-12 (Dec. 14, 2018) ("CAPA et al. Reply Comments"); Comments of Anne Arundel County, MD et al. at 4-34 (Nov. 14, 2018) ("Anne Arundel County et al. Comments"); Reply Comments of Anne Arundel County, MD et al. at 2-15 (Dec. 14, 2018) ("Anne Arundel County et al. Reply Comments"); Comments of the National Association of Telecommunications Officers and Advisors et al. at 3-13 (Nov. 14, 2018) ("NATOA et al. Comments"); Reply Comments of the National Association of Telecommunications Officers and Advisors et al. at 2-8 (Dec. 14, 2018) ("NATOA et al. Reply Comments"); Reply Comments of Free Press at 2-7

legislative history,[13] as well as the long-standing understanding between LFAs and cable operators.[14]

A. The Value or Cost of Cable-Related Nonmonetary Franchise Requirements Is Not a "Tax, Fee, or Assessment."

As a threshold matter, NCTA, as well as the *Second FNPRM*, proceed from the assumption that the cost or value of any franchise requirement (excluding PEG capital costs and buildout requirements) is *ipso facto* a "tax, fee, or assessment" within the meaning of Section 622(g)(1). But NCTA is wrong, and its reliance on the Sixth Circuit's *Montgomery County* decision[15] as support for this proposition is misplaced. To be sure, in certain dictionary definitions and in unrelated contexts the term "assessment" *may* be construed to include certain kinds of nonmonetary property forfeitures,[16] although that is certainly not the case for all dictionary definitions.[17] But that is not the relevant inquiry here. Instead, what matters is the

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(Dec. 14, 2018) ("Free Press Reply Comments"); Comments of the City of New York at 2-10 (Nov. 14, 2018) ("NYC Comments"); Erratum to Reply Comments of the City of Philadelphia, PA et al. at 2-16 (Dec. 18, 2018) ("City of Philadelphia et al. Reply Comments"); Comments on Behalf of the Association of Washington Cities et al. at 5-14 (Nov. 14, 2018); Comments of Massachusetts Community Media, Inc. at 4-18; (Nov. 14, 2018); Reply Comments of Massachusetts Community Media, Inc. at 4-10 (Dec. 14, 2018).

[13] *See* CAPA et al. Comments at 6, 9, 13; CAPA et al. Reply Comments at 5-9, 11, 14-15; Anne Arundel County et al. Comments at 9, 20-21; Anne Arundel County et al. Reply Comments at 2-6; NATOA et al. Comments at 4-5, 7-8; NATOA et al. Reply Comments at 2-3, 7; City of Philadelphia et al. Reply Comments at 12-14; Free Press Reply Comments at 4-5.

[14] *See City of Bowie* (relying upon and quoting the Cable Act's legislative history in finding that the franchise fee provisions of the Cable Act generally "defines as a franchise fee only monetary payments made by the cable operator, and does not include as a 'fee' any franchise requirements for the provision of services, facilities or equipment."). As noted in footnote 7 above, the Commission relied on *City of Bowie* to support its conclusions in the *First Report and Order* and *Second Report and Order*. *See also* Comments of City of Lynn, Massachusetts at 1 (Nov. 14, 2018) ("This proposed change upends a decades-old understanding of what constitutes franchise fees, an understanding that excludes in-kind services or equipment."); Comments of 'Ōlelo Community Media at 2 (Nov. 14, 2018) ("PEG access channel capacity, connections to access programming origination points, cable service to schools and libraries, etc., have been part of negotiated franchise agreements for decades without being considered subject to the franchise fee cap."); Comments of BRIC at 2 (Nov. 13, 2018) (The *Second FNPRM* proposed treatment of franchise fees "is in contradiction to the original language and congressional intent of the law and contrary to decades of practice.").

[15] *Montgomery Cty. v. FCC*, 863 F.3d 485 (6th Cir. 2017).

[16] *See Montgomery Cty.*, 863 F.3d at 490-91 (citing *The Random House College Dictionary* 1347 (rev. ed. 1982); *Black's Law Dictionary* 106-07 (5th ed. 1979); *Austin v. United States*, 509 U.S. 602, 623-24 (1993) (Scalia, J., concurring) (addressing whether the 8th Amendment of the U.S. Constitution applies to civil forfeitures)). The context of the discussion of the term "assessment" in Justice Scalia's concurrence in *Austin v. United States* is particularly dissimilar to that term's use in the Cable Act. That case did not involve interpretation of the term "assessment" in a statute at all; rather, it involved the language in the Eighth Amendment prohibiting "excessive fines." Justice Scalia explained that "[i]n order to constitute a fine under the Eighth Amendment, however, the forfeiture must constitute 'punishment.'" *Austin*, 509 U.S. at 624 (Scalia, J., concurring). The definition of "assessment" is not central to this issue, and Justice Scalia's analysis of the Eighth Amendment has no bearing on how the Cable Act should be interpreted.

[17] *See, e.g.*, Merriam-Webster, *Assessment*, https://www.merriam-webster.com/dictionary/assessment (last visited July 10, 2019) (defining "assessment" as "the amount assessed: an amount that a person is officially required to pay especially as a tax," and stating this term is "derived from related senses of *assess*, a verb that for over 500 years has

meaning of these terms as used in the Cable Act. Moreover, terms that are potentially broad when read in a vacuum can be "narrowed by the commonsense canon of *noscitur a sociis*–which counsels that a word is given more precise content by the neighboring words with which it is associated."[18] In Section 622(g)(1), "assessment" is the last of a list that includes "tax" and "fee," which refer to monetary payments. Unless "assessment" is to be read as being out of step with the terms listed before it, the list does not include any terms referring to nonmonetary obligations.

Perhaps more to the point, while the *Montgomery County* court recognized that under a broad definition of assessment, "the term 'franchise fee' can include noncash exactions," it cautioned that "of course, [this] does *not* mean that it necessarily *does* include every one of them."[19] The court went on to hold that the "FCC's Second Order and Reconsideration Order do not reflect any consideration of this concern," and thus vacated the orders as arbitrary and capricious to the extent that they treat nonmonetary franchise requirements as franchise fees under Section 622(g)(1).[20] The Commission does not seriously consider this issue; rather, it continues to take its erroneous conclusion for granted. But the language and structure of the Act demonstrate that Congress did not intend for the term "franchise fee" to include cable-related, nonmonetary franchise requirements (such as PEG channel capacity requirements). The legislative history makes that abundantly clear: "this section defines as a franchise fee *only monetary payments* made by the cable operator, and does *not* include as a 'fee' any franchise requirements for the provision of services, facilities or equipment."[21]

Other provisions of the Cable Act confirm this conclusion. Notably, in Section 612[22] Congress established conditions for *commercial* access to the cable system that require each operator to provide access on "reasonable terms and conditions" established by the Commission, and made failure to provide the access (and ancillary billing services) subject to damages claims. Under NCTA's reading, and under the *Second FNPRM*, it follows that one would have to find that Congress meant to allow operators to charge localities fair market value for PEG (without saying so), and intended to provide commercial entities regulated access to the system. The reverse is obviously true: if Congress had meant for operators to recover the costs of providing access for PEG, it would have said so. Indeed, the legislative history explains that the term "commercial use" was used "to distinguish from public access uses which are generally afforded free to the access user, whereas third party access envisioned by this section will result from a commercial arrangement."[23] Under the *Second FNPRM* and NCTA's proposal of the law,

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meant 'to determine the rate or amount of (a tax).' The monetary sense of *assessment* is tied to this oldest use of *assess*. By the 19th century, the verb's object shifted slightly to produce a new meaning, 'to make an official valuation of (property) for the purposes of taxation.'").

[18] *United States v. Williams*, 553 U.S. 285, 294 (2008) (citing *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

[19] *Montgomery Cty.*, 863 F.3d at 491 (emphasis added).

[20] *Id.* at 491-92.

[21] House Report at 65 (emphasis added).

[22] 47 U.S.C. § 532.

[23] House Report at 48.

the distinction between commercial access and other franchise conditions is eliminated; with a few exceptions, they are reduced to "commercial arrangements."

Further, whereas the five percent franchise fee cap ensures that LFAs do not impose excessive or unduly discriminatory monetary payment obligations on cable operators, other provisions of the Cable Act ensure that LFAs do not impose unreasonably costly nonmonetary franchise requirements. Section 611(b), for instance, authorizes an LFA to require a cable operator to designate channel capacity for PEG use, "subject to section 546 [Section 626]."[24] Section 626(c)(1)(D), in turn, requires that, in evaluating a cable operator's franchise renewal proposal, an LFA must "tak[e] into account the cost of meeting [future cable-related community] needs and interests."[25] But Section 626 makes no mention of the five percent franchise fee cap as an applicable limitation. Instead, for PEG channel capacity requirements and other nonmonetary franchise requirements, "[t]he franchising authority is required to balance the community's need for a certain cable service against the cost [to the cable operator] of providing that service."[26] Likewise, Section 621(a)(4)(B) authorizes LFAs to "require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support,"[27] but again makes no reference to the franchise fee cap.

If, as NCTA contends, the value of PEG channel capacity and PEG equipment costs were subject to the Act's five percent fee cap, there would be no need for Congress to require LFAs to take into account cable operators' cost of providing PEG channel capacity or equipment as Section 626(c)(1)(D) requires. Nor would there be any need for LFAs to bother determining whether PEG support is "adequate" within the meaning of Section 621(a)(4)(B). Such efforts by LFAs would be superfluous, because the operator's PEG capacity and equipment costs, and the level of PEG support an operator can be required to provide, would already be confined by Section 622's franchise fee cap. Under NCTA's reading, Section 622's fee cap would swallow up, and moot, most of the Cable Act's franchise-related provisions, transforming them into little more than a "Five Percent Fee Cap Act" and undermining Congress's express purposes in enacting the Cable Act.

B. NCTA Misunderstands the Relationship Between Sections 622(g)(2)(B) and (C).

NCTA's myopic focus on the treatment of PEG operational costs in Section 622(g)(2)(B) and PEG capital costs in Section 622(g)(2)(C) leads it astray in arguing that the cost or value of all other nonmonetary franchise requirements are subject to the franchise fee cap. NCTA asserts that the reference to "capital costs" in Section 622(g)(2)(C) means that the cost of complying with *any* cable-related franchise requirement must count towards the five percent franchise fee cap unless the requirement is for "'capital cost . . . for [PEG] access facilities.'"[28] As explained in prior comments, however, the distinction drawn between Sections 622(g)(2)(B) and (C) is

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[24] 47 U.S.C. § 531(b).

[25] 47 U.S.C. § 546(c)(1)(D).

[26] *Union CATV, Inc. v. City of Sturgis*, 107 F.3d 434, 440 (6th Cir. 1997).

[27] 47 U.S.C. § 541(a)(4)(B).

[28] March 11th *Ex Parte* at 2-3.

between PEG capital costs and PEG support payments, *not* between PEG capital costs and the cost or value of all other cable-related nonmonetary franchise requirements.[29] In the *First Report and Order* in this proceeding, the Commission distinguished capital costs "from *payments* in support of the use of PEG access facilities," such as payments for "salaries and training."[30] It did not remotely suggest, however, that the value or cost of PEG channel capacity that a franchise requires an operator to designate for PEG use, or the cost of complying with any other cable-related franchise requirement, must count towards the five percent franchise fee cap.[31]

C. NCTA's Position Cannot Be Squared with the Act's Definition of "Public, Educational, or Governmental Access Facilities."

NCTA also suggests that Section 622(g)(2)(C)'s reference to PEG capital costs should be interpreted without reference to the Cable Act's definition of "public, educational, or governmental access facilities," because reading them together "would conflate two different statutory provisions."[32] But NCTA cannot substitute its preferred meaning of the term "[PEG] access facilities" for the definition specified by Congress. Moreover, it is hardly "conflat[ing] two different statutory provisions" when the term defined in one provision (Section 602(16)),[33] "public, educational, or governmental access facilities," is used in the other (Section 622(g)(2)(C)). In fact, the only other place this defined term appears in the entire Cable Act is in Section 625(a)(1)(A),[34] which refers more broadly to "facilities or equipment, including public, educational, or governmental access facilities or equipment."

Whether NCTA likes it or not, Congress defined "public, educational, or governmental access facilities" to include both (1) "*channel capacity* designated for public, educational, or governmental use" (Section 602(16)(A)) (emphasis added), and (2) "facilities *and equipment* for the use of such channel capacity" (Section 602(16)(B)) (emphasis added). In Section 622(g)(2)(C), Congress then provided that franchise fees do *not* include "capital costs which are required by the franchise to be incurred by the cable operator *for public, educational, or governmental access facilities*" (emphasis added). The use of this defined term in Section 622(g)(2)(C) can mean only one thing: Congress intended to exclude from the "franchise fee" definition both (1) capital costs for "channel capacity designated for [PEG] use," *and* (2) capital costs for "facilities and equipment for the use of such channel capacity." If, as NCTA claims, Congress had intended for PEG capital costs not to include "channel capacity" and to refer only to payments for "construction" of PEG "facilities," it would not have used a term in Section

[29] *See, e.g.*, CAPA et al. Reply Comments at 9-12.

[30] *First Report and Order* 22 FCC Rcd. at 5150-51, ¶ 109.

[31] By contrast, a requirement in a new franchise that an operator build a fire station may be easily understood as a substitute for a franchise fee, as such a requirement is specifically *unenforceable* as a valid franchise requirement under 47 U.S.C. Sec. 544(b)(2); it is only enforceable as a fee or assessment in kind. Valid franchise requirements, by contrast, are not "in kind" in any sense, but are instead simply the means by which a cable operator satisfies the cable-related needs and interests of the community.

[32] March 11th *Ex Parte* at 2.

[33] 47 U.S.C. § 522(16).

[34] 47 U.S.C. § 545(a)(1)(A).

622(g)(2)(C) that the Act defines to include both "channel capacity designated for [PEG] use" and PEG channel "equipment."

D. The Legislative History of the Act Demonstrates that Franchise Fees Include Only Monetary Payments.

As numerous commenters in the record have already explained, the legislative history of the Cable Act does not support the argument that nonmonetary franchise requirements, including PEG channel capacity requirements, are a "franchise fee."[35] The Cable Act defines "franchise fee" as "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such."[36] A colloquy between Representative Wirth and Representative Bliley in the *Congressional Record* concerning what became Section 622 demonstrates clear Congressional intent that nonmonetary payments are not considered franchise fees:[37]

> Mr. BLILEY. What is the relationship between permissible franchise fees and public, educational, and governmental access commitments in new franchises?
>
> Mr. WIRTH. Subsection 622(g)(2)(C) establishes a specific provision for PEG access in new franchises. In general, this section defines as a franchise fee ***only monetary payments*** made by the cable operator, and does not include as a "fee" any franchise requirements for the provision of services, facilities or equipment.[38]

Further, the history of the Cable Act itself reflects a carefully considered balance between the needs of LFAs and cable operators. The basis of the legislation was a negotiated agreement between the National League of Cities ("NLC") and NCTA.[39] These stakeholders were brought

[35] *See, e.g.*, Anne Arundel County et al. Comments at 5-11 (describing the history of the Cable Act); CAPA et al. Comments at 5-6; CAPA et al. Reply Comments at 3; City of Philadelphia et al. Reply Comments at 13-14; NATOA et al. Comments at 5; NATOA et al. Reply Comments at 2-3 ("As discussed in the Municipal Organizations' Comments, the Cable Act repeatedly distinguishes franchise fees from other cable-related obligations, conclusively demonstrating that Congress did not consider these obligations to be franchise fees. This conclusion is bolstered by the legislative history, which warrants restating here: 'Subsection 622(g)(2)(C) establishes a specific provision for PEG [public, educational, or governmental] access in new franchises. In general, this section defines as a franchise fee only monetary payments made by the cable operator, and does not include as a 'fee' any franchise requirements for the provision of services, facilities or equipment.'") (emphasis omitted) (citation omitted).

[36] 47 U.S.C. § 542(g)(1).

[37] House Report at 65. Numerous commenters in the record have cited the legislative history that contradicts the Commission's proposed rules. *See* Anne Arundel County et al. Comments at 9; Anne Arundel County et al. Reply Comments at 6; CAPA et al. Comments at 5-6; CAPA et al. Reply Comments 1-15; NATOA et al. Comments at 5; NATOA et al. Reply Comments at 2-3; City of Philadelphia et al. Reply Comments at 13-14.

[38] 130 Cong. Rec. 32,283 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4751, 4753 (emphasis added).

[39] *Options for Cable Legislation: Hearings Before the Subcomm. on Telecomms., Consumer Prot., & Finance of the H. Comm. on Energy & Commerce*, 98th Congr. 10 (1983) (statement of Mr. Rover, President, NLC); 130 Cong. Rec. 31,870 (1984): "Therefore, I asked the leadership of the cable industry and the cities to resolve their differences . . . To summarize these negotiations, the National Cable Television Association [NCTA] and the National League

together by the Congressional committee to work out compromise language for the proposed bill, which they did.[40]

NCTA now argues that nonmonetary franchise commitments always should have been included in the definition of franchise fees. But that was not the compromise reached in 1984. NCTA and its members were part of the legislative process from the start. If they made any such argument, Congress declined to adopt it. In cable franchise agreements since the passage of the Cable Act, consistent with the compromise struck in 1984, LFAs and cable operators have treated commitments such as the provision of PEG channel capacity and other cable-related non-monetary franchise requirements (other than PEG operational costs) as separate from franchise fees.

NCTA seeks to sidestep the problem with the statement that "[t]he legislative history similarly reflects Congress's intent to 'grandfather' PEG support obligations in franchise agreements predating the 1984 Cable Act."[41] While true as far as it goes, the portions of the legislative history NCTA cites do not support its broader assertion that all nonmonetary franchise requirements other than PEG capital construction costs are subject to the franchise fee cap. To the contrary, the language NCTA quotes merely explains the term "Public, educational, or governmental access facilities" in the "Definitions" portion of the statute.[42] NCTA also cites to a sentence on page 46 of the House Report, which states in full that "[i]t should be noted that pursuant to section 638 [now codified at 47 U.S.C. Section 557] the provisions of existing franchises covering PEG channel capacity and its use as well as services, facilities and equipment (such as studios, cameras, and vans) related thereto, are fully grandfathered."[43]

That existing PEG-related franchise provisions were grandfathered, however, does not suggest that the franchise fee cap—as opposed to the other Cable Act provisions limiting LFAs' authority to impose nonmonetary franchise requirements—would otherwise apply to them. Indeed, that same section of the legislative history states that "[w]ith respect to a renewal proposal, PEG requirements imposed by a franchising authority *are subject to the standards against which a renewal proposal is to be considered as set forth in section 626*."[44] That section of the legislative history also notes, in a parenthetical, "[s]ee section 622 for explanation of relationship of franchise fee to PEG related expenditures," but the "explanation" in Section 622 clearly states that, in general, "this section defines as a franchise fee *only monetary payments* made by the cable operator, and does *not* include as a 'fee' any franchise requirements for the

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of Cities [NLC] held a series of meetings in an effort to reach a compromise. S. 66 was amended on several occasions to reflect these compromises. Finally, in April of 1983, the president of the NLC and the president of the NCTA sent a letter of endorsement for a revised version of S. 66." (statement of Sen. Goldwater of Ariz.).

[40] *Options for Cable Legislation: Hearings Before the Subcomm. on Telecomms., Consumer Prot., & Finance of the H. Comm. on Energy & Commerce*, 98th Congr. 10-12 (1983) (statement of Mr. Rover, President, NLC).

[41] March 11th *Ex Parte* at 2.

[42] *Id*. at 2-3 (quoting House Report at 45).

[43] *Id*. at 3 n.6 (quoting House Report at 46).

[44] House Report at 46 (emphasis added).

provision of services, facilities or equipment"[45]—a statement flatly at odds with NCTA's and the *Second FNPRM's* entire position.

NCTA cannot have it both ways. It cannot claim that the legislative history supports its narrow reading of PEG capital costs when the very same legislative history passages on which it relies explicitly state that Congress did not intend "franchise fee" to include any nonmonetary franchise requirements, much less PEG service, facilities or equipment requirements.

2. PEG Capital Costs Are Not Limited to Construction Costs.

NCTA also attempts to restrict what capital costs fall within Section 622(g)(2)(C)'s franchise fee exclusions by arguing that "only those costs associated with *construction* of [PEG access] facilities are capital costs excluded from the franchise fee cap."[46] Again, NCTA's argument flies in the face of the plain language of the Cable Act. The Act defines PEG access facilities to include both "facilities *and equipment* for the use of [PEG] channel capacity."[47] NCTA's resort to the legislative history and the Sixth Circuit's *Alliance* decision[48] is unavailing. Those authorities support the Local Government/PEG Parties' position, not NCTA's. The Cable Act's legislative history expressly confirms that PEG access facilities "may include vans, studios, cameras, or other equipment relating to the use of [PEG] channel capacity."[49] The inclusion of mobile vans for filming on location, by itself, establishes that such facilities need not be associated with the construction of a building. And although the Sixth Circuit stated that it was reasonable for the Commission to interpret capital costs as referring to those costs "incurred in or associated with the construction of PEG access facilities," the court also noted the "clear Congressional statement" that "PEG access capacity extends not only to facilities but to related equipment as well," a point the FCC itself had conceded at the time.[50]

[45] *Id.* at 46, 65 (emphasis added).

[46] March 11th *Ex Parte* at 2.

[47] 47 U.S.C. § 522(16)(B) (emphasis added).

[48] *All. for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

[49] House Report at 45.

[50] *Alliance*, 529 F.3d at 784-85 (6th Cir. 2008) (internal quotation marks omitted). The Sixth Circuit neither addressed nor resolved the question of what costs are "incurred in or associated with" the construction of PEG facilities, other than noting that salaries and training are not capital costs. It is disingenuous to suggest that the Sixth Circuit supports NCTA's unreasonable position that if an LFA needs new cameras for its PEG facility, for example, those would not be included in capital costs unless the LFA also requires the cable operator to reconstruct a PEG studio at the same time. Indeed, given the statutory definition of "PEG facility," a far more reasonable reading of the passage in *Alliance* is that costs are "capital costs" so long as they are related to ("associated with") PEG facilities as broadly defined in the statute, without regard to when those were first "constructed."

3. Franchise Requirements Are Negotiated, Not Imposed by LFAs.

A. Cable Franchises Are Voluntary Agreements Negotiated in Arms-Length Transactions.

In its March 13, 2019 *Ex Parte* Letter ("March 13th *Ex Parte*"), NCTA contends that the nonmonetary obligations of cable franchise agreements constitute a "tax, fee, or assessment" because they are involuntarily imposed on cable operators by LFAs.[51] NCTA's claim that franchise agreement terms are not voluntary commitments made in the broader context of cable franchise negotiations does not stand up to reality.[52] In fact, as NCTA and its members well know, cable franchise terms are almost always the result of an arms-length negotiating process between a cable operator and an LFA, in which each side makes voluntary decisions about what terms are acceptable. An agreement to provide PEG channels, for example, is one of the many items of bargained-for consideration that go into a cable franchise agreement. In the rare case that negotiations do not result in a mutually agreed-upon franchise, the Cable Act provides for a formal renewal process in which the cable operator—not the LFA—proposes the terms of the franchise.[53] In short, neither informal renewal negotiations nor cable operator's renewal proposal under the formal renewal process allows the LFA to unilaterally impose the terms of the franchise agreement on a cable operator.

According to NCTA, a cable operator's sunk costs preclude it from engaging in a truly voluntary process.[54] To support this assertion, NCTA cites the section of the Cable Act Committee Report that discussed the formal franchise renewal process: "Such a provision is necessary to protect the heavy investment made by cable operators in a cable system."[55] But NCTA misses the point. The renewal provisions of the Cable Act already do protect that investment, just as Congress intended. Because an LFA cannot deny renewal except in

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[51] March 13th *Ex Parte* at 1 n.4.

[52] *See* Anne Arundel County et al. Reply Comments at 9 ("It should be noted that NCTA's suggestion that local communities have cable operators at a disadvantage in negotiations is absurd. Anyone who has participated in such negotiations is well aware of the numerous advantages the Cable Act affords to cable companies, including through the renewal provisions." (citation omitted)); NATOA et al. Reply Comments at 5 ("What NCTA overlooks is that nearly all franchise agreements are negotiated, mutually agreed upon compromises between LFAs and cable operators, just as the Cable Act intended. The 'demands and requirements' alleged by NCTA are, in reality, proposals made in the course of a negotiation."); CAPA et al. Reply Comments at 7 ("Moreover, franchising authorities, particularly in small or rural communities, often lack the level of resources that cable operators have to devote towards litigation. Thus, it is generally the franchising authority—*not* the cable operator, as NCTA contends—whose 'negotiating leverage' is compromised in the franchise renewal process."); Reply Comments on Behalf of the Association of Washington Cities et al. at 6 (Dec. 14, 2018) ("Washington Cities et al. Reply Comments) (noting that "LFAs have significant pressure upon them not to take actions which would deprive citizens of the ability to purchase cable services[.]"). Further, cable operators themselves often make clear that cable franchise provisions are "voluntary initiatives." *See, e.g.*, City of Mukilteo, Washington Comcast franchise at Section 8.6, https://mukilteo-wa.granicus.com/MetaViewer.php?view_id=4&clip_id=728&meta_id=30577.

[53] *See* 47 U.S.C. § 546(b)(1).

[54] *See* March 13th *Ex Parte* at 2.

[55] *Id*. at 2 n.7 (quoting the House Report at 26).

accordance with the provisions of Section 626(a)-(g) once those sections are properly invoked, and because that Section requires a locality to go through an extensive (and expensive) multi-stage process laid out in Section 626, it is the cable operator, not the LFA, that holds the greater leverage in a renewal negotiation.

The legislative history of the formal renewal procedures provided in Section 626 emphasizes Congress's view of the voluntary nature of franchise renewal negotiations:[56]

> A cable operator and a franchising authority may negotiate the renewal of a franchise independent of this section. Also, independent of this section they may reach agreement on a franchise renewal at any time during the franchise, including at any time after the procedures under this section have been initiated. Indeed, the Committee expects that the vast majority of franchises will be renewed without regard to this section.

As the House Report predicted, the vast majority of cable franchises are renewed through the informal franchise renewal negotiation process. In only a very few jurisdictions over the past 35 years has a cable franchise renewal been determined through completion of the Cable Act's formal renewal process.[57] Well over 99 percent of cable franchises are reached through informal contract negotiations.[58] Indeed, cable operators routinely acknowledge the renewal process as the negotiation of a "mutually satisfactory agreement."[59] The terms resulting from informal franchise renewal negotiations require both parties to agree to the terms and conditions; such bargained-for terms cannot be considered unilaterally-imposed governmental exactions.

Nor can the terms of a cable franchise resulting from the formal renewal process in Section 626 be considered non-voluntary exactions.[60] As noted above, the cable operator has tremendous leverage in informal negotiations. More importantly, in the formal process, the cable operator—not the LFA—proposes the terms of the renewal franchise. The Cable Act contemplates that an LFA will identify its cable-related needs and interests during the renewal process, but it is the cable operator that makes a proposal to the LFA, which the LFA may either accept or deny on limited grounds (which, as discussed above, make no mention of the five percent franchise fee cap).[61] In other words, the decision to renew a cable franchise is based on the *proposal of the cable operator*.[62] If there is a preliminary assessment that a franchise should not be renewed, the cable operator is afforded fair opportunity for full participation in an administrative proceeding to determine if the *cable operator's proposal* is reasonable to meet the

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[56] House Report at 72.

[57] *See* City of Philadelphia et al. Reply Comments, Exh. A, Declaration of Thomas Robinson, § C.1. *See, e.g., Comcast of Cal. II, L.L.C. v. City of San Jose,* 286 F.Supp.2d 1241 (N.D. Cal. 2003).

[58] *See* City of Philadelphia et al. Reply Comments, Exh. A, Declaration of Thomas Robinson, § C.1.

[59] *See id*. App'x 5, Letter from Comcast to the North Metro Telecommunications Commission.

[60] *See id*. §C.1.

[61] *See* 47 U.S.C. § 546(a)-(d).

[62] *See id*.

future cable-related community needs and interests, taking into consideration the cost of meeting such needs and interests.[63] If dissatisfied with the administrative proceeding, the cable operator may seek judicial review.[64] Nothing in the formal renewal process—or elsewhere in the Cable Act—allows an LFA to unilaterally impose franchise terms or take any type of action that resembles a civil forfeiture or exaction.

B. Franchise Requirements Are Not Waivers of the Cable Act.

NCTA further argues that franchise requirements are "in-kind contributions" that run afoul of Congressional intent to protect cable operators from excessive taxation, and that the Act's statutory fee cap cannot be waived as a matter of public policy.[65] As the text, context and legislative history described above make clear, franchise requirements, including the requirement to provide PEG channels, are not "franchise fees" in the first place, and thus the question of whether the franchise fee cap may be waived is irrelevant.[66] Even if waiver were a relevant issue, NCTA's position is built upon thin legal authority and actually cuts against the proposals in the *Second FNPRM*.

NCTA cites *Cable TV Fund 14-A, Ltd. v. City of Naperville* to support its contention that the statutory cap cannot be waived as a matter of public policy.[67] As an initial matter, the *Naperville* case appears at odds with *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1089-99 (3rd Cir. 1988) (rejecting cable operator's argument that fee-related provisions in its franchise and settlement agreements cannot be waived because they contravene public policy). Moreover, *Naperville* is an unreported opinion from 1997 about a franchise modification dispute between an Illinois home-rule municipality and a cable operator.[68] The opinion itself notes:[69]

> An extensive search has revealed no decision from this Circuit or any other which addresses the issue now before the Court, specifically, whether Section 542(b)'s 5% cap on franchise fees is a statutory right which, although conferred on a private party, is so colored with the public interest that it may not be waived because such a waiver would contravene the congressional policy behind the enactment of the Cable Act generally and Section 542 specifically.

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[63] *See* 47 U.S.C. § 546(c)(2).

[64] *See* 47 U.S.C. § 546(e).

[65] March 13th *Ex Parte* at 1-2.

[66] *See* CAPA et al. Reply Comments at 14.

[67] March 13th *Ex Parte* at 2 n.5.

[68] *Cable TV Fund 14-A, Ltd. v. City of Naperville*, No. 96 C 5962, 1997 WL 433628, at *1 (N.D. Ill. July 29, 1997).

[69] *Id.* at *23.

This statement was made over twenty years ago. We have uncovered no more recent caselaw addressing this issue. In other words, there is no compelling legal authority supporting NCTA's position.[70]

Even assuming NCTA's legal assertions were correct and the franchise fee cap is not waivable, this argument cuts against the proposals of the *Second FNPRM*. As NCTA has stated, "Today, the vast majority of cable franchises impose in-kind obligations of some type. In fact, one cable operator estimates that 90 percent of its franchises impose in-kind obligations that do not count against the five percent cap."[71] By NCTA's logic, then, its proposed interpretation of the Cable Act would render the vast majority of cable franchises in effect today (and, for that matter, most cable franchises since 1984) unenforceable because the parties would supposedly have agreed to an unlawful waiver of the franchise fee cap. Such a reading of the Act is untenable, and illustrates that the new reading proposed is simply incompatible with well-established interpretations of the law.

C. Purpose of Statutory Cap on Franchise Fees.

NCTA argues that the purpose of the franchise fee cap was to protect cable operators from excessive taxation.[72] But as noted above, the Cable Act is a legislative compromise that balances the interests of the cable operators and LFAs.[73] A more accurate description of the cap is that it, too, was a compromise. It "establishe[d] the authority of a city to collect a franchise fee of up to 5 percent" and "stripped [the FCC] of the authority" to limit the amount or use of these fees.[74]

Moreover, the statute itself acknowledges certain categories of monetary assessments that may be lawfully imposed on the cable operator in addition to the franchise fee.[75] NCTA's citation to Section 622(g)(1) to support its position is misleading, as NCTA fails to include subsection (g)(2), which enumerates the exceptions to subsection (g)(1). That Congress included in subsection (g)(2) categories of charges that are not a "franchise fee" as defined in the Act demonstrates that the intent was not to cap all fees government could receive from cable

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[70] In another *ex parte* filing, NCTA cites a 1985 Report and Order from the Commission as holding that "neither a cable operator nor a franchising authority may waive mandatory sections of the Cable Act in reaching franchise agreements." NCTA Notice of *Ex Parte* at 2 n.6 (Apr. 4, 2019) ("April 4th *Ex Parte*") (quoting *Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 58 R.R.2d 1 ¶127 n.91 (1985)). While the Report and Order does contain the quoted words, they arise in a footnote speaking to the rate regulation provisions of the 1984 Cable Act, not the franchise fee provisions.

[71] Comments of NCTA at 42 (Nov. 14, 2018) ("NCTA Comments"). We obviously do not agree that the obligations are in-kind; we agree that the vast majority of franchises include requirements that the FCC now proposes to reclassify as "in-kind" franchise fees.

[72] March 13th *Ex Parte* at 1-2.

[73] *See supra* Section 1.D.

[74] House Report at 26.

[75] 47 U.S.C. § 542(g)(2)(A).

operators.[76] Had that been Congress's intent, not only would it not have included the exceptions in subsection (g)(2), it would have plainly stated that nonmonetary provisions in a franchise agreement were included in a "franchise fee." But instead, Congress opted to balance the needs of cities, cable operators and the community, as reflected in the drafting process of the Cable Act described above.[77]

NCTA also cites an opinion from the Illinois Supreme Court regarding whether the LFA could enforce a franchise provision requiring the operator to include revenue from cable modem services in its franchise fee payments.[78] As an initial matter, as pointed out in Part 9 note 143 below, the case on which NCTA relies is both inapposite and incorrectly decided. But in any event, the Illinois court did not address or even imply that non-monetary franchise commitments are properly considered to be a "franchise fee." In the context of the issues in the *Second FNPRM*, the *Congressional Record* (and the text of the Act itself) reflects the intent to balance franchise fee payments with the desire to ensure that PEG access was adequately provided for in franchise agreements.[79]

4. Section 626 of the Cable Act Demonstrates that the Proposal Conflicts with the Act.

In its March 21, 2019 Notice of *Ex Parte* ("March 21st *Ex Parte*"), NCTA incorrectly characterizes the position taken by numerous state and municipal governments regarding the application of Section 626(c)(1)(D) and Section 622 of the Cable Act. But it is NCTA, not Local Government/PEG Parties, that improperly conflates the clear boundaries Congress drew between "community needs and interests" and franchise fees.[80]

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[76] *Id*. That Congress specifically believed that there would be additional franchise costs over and above the franchise fee, including additional *monetary* payments, is obvious from, *inter alia* 47 U.S.C. Section 543(b)(2)(C), which requires the FCC to adopt rules that permit operators to recover franchise fees and separately identify and recover costs attributable to the provision of services required under the franchise. If non-monetary franchise requirements were generally *part of* the franchise fee, there would have been little need for this separate provision. The Commission itself codifies the distinction between franchise fees and the costs of complying with franchise requirements in its rate regulations: 47 CFR Sec. 76.922 defines "external costs" which may be passed-through to subscribers to include the franchise fee, and separately, "(iii) Costs of complying with franchise requirements, including costs of providing public, educational, and governmental access channels as required by the franchising authority."

[77] *See* CAPA et al. Reply Comments at 9 ("Superimposing the franchise fee cap on top of these provisions fundamentally would undermine the balance between cable operators and franchising authorities established in the Cable Act."). *See also id*. at 5 ("The stated purposes of the Cable Act include 'assur[ing] that cable systems are responsive to the needs and interests of the local community.'").

[78] *City of Chi. v. Comcast Cable Holdings, LLC*, 231 Ill. 2d 399, 401 (2008).

[79] *See* House Report at 19-20.

[80] *See* March 21st *Ex Parte* at 1 ("Congress enacted *both* provisions as complementary measures to impose fiscal restraint on franchising authorities.").

A. The Text and Legislative History of the Section 626 Demonstrates that Nonmonetary Franchise Obligations Are Not Franchise Fees.

As discussed above, Section 626 requires LFAs to consider the cost to the cable operator in meeting the cable-related community needs and interests identified in the franchise renewal process.[81] Though the language in Section 626 is clear, the legislative history also confirms that the "costs" to be considered are the cable operator's, not the LFA's: "[I]n assessing the costs under this criteria, the cable operator's ability to earn a fair rate of return on its investment and the impact of such costs on subscriber rates are important considerations."[82] If these costs were instead to be paid by LFAs in the form of reduced monetary franchise fees (as the *Second FNPRM* proposes), the cable operator's rate of return would be unaffected. There is simply no reason to require LFAs to consider the cable operators' costs and rate of return if, as NCTA and the *Second FNPRM* suggest, these obligations are in fact franchise fees to be "paid" by the LFA at fair market value.

NCTA nevertheless insists that Section 626 supports its claim that nonmonetary franchise obligations, such as PEG-related requirements agreed to in a franchise renewal, are actually franchise fees. In NCTA's view, quantifying the cable operators' cost of meeting community needs was Congress's way of forcing LFAs to do a cost-benefit analysis before imposing these obligations.[83] As with other arguments put forth by NCTA, this position requires one to ignore the plain meaning of Section 626. NCTA's reading assumes that Congress commanded local governments to assess the costs to the cable operator of meeting local community cable-related needs, even though the cable operator would not have to incur those costs. (Indeed, under the proposal of the *Second FNPRM*, the calculation would be the fair market value of these obligations, not the costs. Why, then, didn't Congress require LFAs to consider the fair market value, rather than the "costs," of these obligations?[84])

Further, in the formal franchise renewal process set forth in Section 626, it is the cable operator that ultimately proposes the terms of the franchise agreement. While the Act requires LFAs to consider the cable operators' costs when establishing the cable-related community needs, LFAs cannot unilaterally impose any obligations on cable operators through this process.

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[81] 47 U.S.C. § 546(c)(1)(D); 47 U.S.C. § 542.

[82] House Report at 74.

[83] March 21st *Ex Parte* at 1. Of course, this is not what the Act requires. The legislative history explains that in deciding whether an operator's proposal is "reasonable in light of the costs" thereof, "the cable operator's ability to earn a fair rate of return on its investment and the impact of such costs on subscriber rates are important considerations," H.Rep. at 74. If the requirements are offsets to franchise fees, at fair market value, there can be no impact on either the subscriber or the operator.

[84] Notably, to the extent that the expressed concern is that excessive franchise fees adversely affect subscribers, a fair market value test is inconsistent with long-standing rules governing subscriber pass-throughs. Operators may only pass through to subscribers "[t]he amount of the total bill assessed to satisfy any requirements imposed" by the franchise. If an operator incurs no cost to satisfy a requirement, there is nothing to be passed through to subscribers under the Commission's long-standing rules.

Thus, Section 626 cannot serve as a vehicle for LFAs to "elect [how] to spend some of the franchise fees[,]" as NCTA suggests.[85] To the contrary, NCTA's reading of Section 626 incentivizes cable operators to propose excessive franchise provisions that have little or no cost to them but to which a high market value could be attached, thus reducing franchise fees without providing any incremental community benefit. LFAs would then have to consider rejecting the proposal and incurring costly litigation to *reduce* the cable operators' proposed franchise obligations—an absurd result Congress never contemplated.

NCTA goes on to assert that Section 622 "complement[s]" Section 626 by imposing a "specific monetary cap" on franchise obligations, including obligations included in franchise renewals.[86] As commenters previously stated in this docket,[87] this flies in the face of the House Report, which provides that a franchise fee generally is only *"monetary payments made by the cable operator and does not include as a 'fee' any franchise requirements for the provision of services, facilities or equipment."*[88] Given this history and the plain language of the Cable Act, Congress simply could not have intended the cost or value of all non-monetary franchise terms arrived at through the renewal process (or otherwise) to be subject to the franchise fee cap.

B. The Cable Act Does Not Grant Franchising Authorities Carte Blanche.

Also missing the mark is NCTA's reiterated claim that Congress intended to protect cable companies from excessive taxation by folding the value of franchise obligations into the Cable Act's franchise fee cap.[89] NCTA quotes a 1983 Senate Committee Report which highlighted concerns that LFAs might "solve their fiscal problems" through taxes on cable operators.[90] But as already explained by commenters in the docket,[91] the House Report and the Senate Report were discussing concerns about an environment which existed *prior* to the Cable Act's passage—concerns that led to the five percent cap.[92] Whatever can be said of the cost or value of non-monetary franchise obligations, they cannot be said to be "taxes".

Moreover, even if the cost or value of complying with non-monetary cable franchise requirements could be considered a "tax," cable operators are adequately protected from any supposed "excessive taxation" without NCTA's tortured reading of the Act. Section 626(c)(1)(D)

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[85] *Id*. at 2.

[86] *Id*.

[87] *See, e.g.*, NYC Comments at 3-4.

[88] House Report at 65 (emphasis added).

[89] *See* March 21st *Ex Parte* at 2.

[90] *See id*. at 2 n.6.

[91] *See, e.g.,* Reply Comments of the City of the New York, (Dec. 14, 2018) ("NYC Reply Comments").

[92] *See* NYC Reply Comments at 4 (analogizing the Commission's approach as "akin to a doctor calling a patient in for appendix removal surgery based on a years-old report of appendicitis and *after* the patient has already had her appendix removed.").

requires LFAs to consider the cable operators' cost in determining the community needs and interests. The purpose of this requirement is to set boundaries that limit an LFA from making requests that are: (i) not cable-related, or (ii) unreasonable given the community's needs and interests and the costs that would be incurred in meeting those needs.[93] Furthermore, for new entrants, the Commission's *First Report and Order* established a comparable reasonableness test for requirements in the same vein as the community needs and interests language found in Section 626(c)(1)(D) for incumbents.[94] Again, these protections would be redundant if the cost or value of franchise renewal obligations such as PEG and I-Net requirements were already included in the five percent franchise fee cap.

5. *Evidence of the Value of PEG Demonstrates that the* **Second FNPRM** *Is Contrary to the Cable Act and Arbitrary and Capricious.*

A. The Diversity and Localism Interests Served by PEG Are Relevant to Construing Sections 611 and 622.

In its March 13th *Ex Parte*, NCTA argues that this proceeding "is not about the value of PEG programming to the community," and therefore evidence of the diversity and localism interests it serves is not relevant.[95] But this self-serving assertion stems from NCTA's misguided focus only on Section 622, the franchise fee provision of the Cable Act, to the exclusion of Sections 601(2) and (4),[96] 602(16), 611, 621, 626 and other provisions of the Act. These other provisions, including Sections 601(2) and (4), 611, and 621(a)(4)(B), manifest the compelling public interests of diversity and localism that Congress specifically intended to promote through the Act's PEG provisions. And Section 626 tasks LFAs (*not* the FCC) with identifying future cable-related community needs and interests (including PEG-related franchise requirements) and taking into account the cost of meeting those needs and interests.[97] Thus, under a proper reading of the Cable Act, preserving PEG is one of the Act's principal goals, and therefore the value of PEG programming certainly *is* relevant to construing the Act's provisions in light of that goal. If construing Section 622 as NCTA suggests would, in many communities, mean the end of PEG and render Section 611 a dead letter,[98] then something is seriously wrong with NCTA's (and the *Second FNPRM's*) interpretation of Section 622.

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[93] *See* NYC Comments at 6. As explained above, these requests are not "demands" or "exactions." Cable operators make the proposals under the formal process and are in no way required to propose franchise provisions that are not cable-related or are not reasonable to meet the community needs and interests, which includes a consideration of the costs.

[94] *See id*. at 7 (citing *First Report and Order*).

[95] March 13th *Ex Parte* at 5-7.

[96] 47 U.S.C. § 521(2), (4).

[97] *See Union CATV*, 107 F.3d at 438-39 (detailing the role of LFAs in the Section 626 franchise renewal process).

[98] *See*, *e.g.*, Letter from U.S. Senator Angus S. King, Jr. to Ajit V. Pai, Chairman, FCC (Mar. 28, 2019), https://ecfsapi.fcc.gov/file/1040511848865/19-196.pdf; City of Philadelphia et al. Reply Comments at 2-6, Exh. A, Declaration of Thomas Robinson; Anne Arundel County et al. Reply Comments, Exhs. 1C-1F; Anne Arundel County et al. Comments at 30-34; NATOA et al. Comments at 9-13; Comments of the State of Hawaii at 4-8 (Nov.

The truly irrelevant points regarding the *Second FNPRM* are NCTA's policy arguments. They would require amendments to the Cable Act itself as opposed to the Commission's interpretation of the Act. To the extent that NCTA—or the Commission—has concerns that the burdens of complying with cable franchise requirements are "unlikely . . . [to] ever be applied to [over-the-top] providers, and therefore they serve as discriminatory burdens and create unfair market distortions,"[99] or that "[n]ot including cable-related, in-kind contributions within the franchise fee cap is likely to place cable operators at a disadvantage vis-à-vis its competition,"[100] those are criticisms directed at the very concepts of PEG and local franchising, as opposed to FCC, authority over cable franchising—concepts explicitly embodied and preserved in the Cable Act. Therefore, even assuming NCTA's concerns had merit (and they do not), addressing them would require rewriting the Cable Act, something that only Congress, not the Commission, can do.

NCTA's arguments echo those it raised earlier, claiming that franchise requirements result in economic inefficiencies by increasing cable operators' costs and burdens and reducing resources available to them. The notion that somehow requiring cable operators to satisfy the social contract devised by Congress results in increased costs and reduced resources, or inefficiencies, actually cuts against NCTA's proposals. One can assume Congress established conditions, or permitted localities to enforce conditions precisely because, rather than simply permitting the operator to do what it thought was profitable, Congress believed it important that cable systems be tailored to satisfy the needs and interests of the communities served. The fact that these conditions may prevent an operator from taking actions that have the effect of maximizing revenues and limiting the system's responsiveness to the community, is precisely why the conditions *should* be included in a franchise. Second, the notion that the conditions result in costs to the operator is truly unsupported in the record. Free services, for example, may involve no ongoing costs to the operator and hence cannot reduce resources available to the operator (unless one assumes that it is better to allow the operator to make money in all cases). Lastly, while the harm that results from adoption of any rule like that proposed by NCTA is evident, the benefits are not, and the Commission has ample evidence that the current regime has resulted in deployment, including in areas where operators have agreed to assume obligations to which NCTA now objects.[101]

14, 2018); Comments of Wisconsin Community Media and the League of Wisconsin Municipalities et al. at 2-5 (Nov. 14, 2018); CAPA et al. Comments at 3-4.

[99] Michael O'Rielly, Commissioner, FCC, Remarks Before the ACA Connects' 26th Annual Summit (Mar. 20, 2019), https://docs.fcc.gov/public/attachments/DOC-356660A1.pdf.

[100] Comments of the American Cable Association on the Second Further Notice of Proposed Rulemaking at 9 n.25 (Nov. 14, 2018).

[101] Congress was well aware that operators would incur costs in complying with franchise obligations, but as noted above, it contemplated and provided a specific process for recovering those costs through rates from subscribers. Notably, the legislative history shows that not only were these costs specifically recognized, Congress would never have endorsed the "fair market value standard" proposed by NCTA. In discussing the rate regulation provisions, Congress noted that it required "the Commission to establish a formula by which cable operators will identify and allocate costs attributable to satisfying franchise requirements to support public, educational, and governmental channels or the use of such channels, or any other services required under the franchise. The Committee recognizes that any misallocation of costs under this subsection could harm consumers and threaten the viability of PEG access channels. The Committee contemplates that any formula prescribed by the Commission…should reflect the actual

B. Including PEG-Related Obligations in "Franchise Fees" Demonstrates that the Proposed Definition Is Arbitrary and Violates the Due Process Clause.

The *Second FNPRM* "tentatively find[s] that treating all cable-related, in-kind contributions as 'franchise fees,' unless expressly excluded by the statute, would best effectuate the statutory purpose."[102] Despite this broad proposed interpretation, the *Second FNPRM* then goes on to exclude build-out requirements because "build-out obligations . . . involve the construction of facilities that are not specifically for the use or benefit of the LFA or any other entity designated by the LFA, but rather are part of the provision of cable service in the franchise area and the facilities ultimately may result in profit to the cable operator."[103] The extensive evidence in the record establishing that PEG-related franchise obligations are for the benefit of the community—not the LFA or the designated access provider—is not only relevant, it conclusively demonstrates that it is arbitrary to exclude build-out requirements from the new definition of "franchise fee" but include PEG-related obligations.[104]

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amortized costs of facilities, equipment and services provided by the operator to support PEG channels or the use of such channels," H. Rep. No. 102-628 at 84 (1992). The Committee went on to note that when PEG costs are itemized, the itemization should not include "indirect costs. For example, a cable operator shall not include in the itemized cost of providing PEG channels the value of such channels if they were used for commercial purposes." *Id.* at 86.

[102] *Second FNPRM* ¶ 20.

[103] *Id.* ¶ 21.

[104] *See, e.g.,* Anne Arundel County et al. Comments at 27-30; CAPA et al. Comments at 12-14; NATOA et al. Comments at 6-7. Indeed, the provision of PEG, which includes the provisions of institutional networks, has long been recognized as critical to the basic model for cable, under which ownership of the conduit and control of content are largely unseparated. The question of whether cable should function wholly as a common carrier, or more like a broadcaster (controlling content but with public interest obligations) has been hotly debated since the inception of cable regulation. In its first order establishing rules for cable systems, the Commission found that "a portion of the channel capacity of a…cable system" should be reserved for public and leased use "on a common carrier basis," In the Matter of Amendment of Part 74, Subpart k, of the Commission's Rules & Regulations Relative to Cmty. Antenna Television Sys., 20 F.C.C.2d 201, 207 (1969). While the courts subsequently determined that the Commission lacked ancillary authority to impose such obligations on operators in return for the significant benefits afforded them, Congress has repeatedly recognized that entities that deliver video and exercise control over content should be treated differently than those that do not. Hence, in 1996, Congress provided that entities that provided video on a common carrier basis would not be subject to the requirements of Title VI, 47 U.S.C. §571(2), except for the provisions barring certain buy-outs. It provided that an entity that dedicated a portion of its system capacity to common carriage—so-called "open video systems"—would be subject to "reduced regulatory burdens," 47 U.S.C. § 573(a)-(c). Among other things, the Commission determined that unlike regular cable operators, open video system operators could not be required to build institutional networks, for example, because the Cable Act's provisions permitting LFAs to establish facilities and equipment requirements did not apply to OVS. Under NCTA's interpretation of the Cable Act, or any approach that treats franchise public interest obligations permissible under the Cable Act as franchise fees, that basic structure is effectively undone. Under the OVS model, an OVS operator can be charged a franchise fee, but not required to build an I-Net. *Dallas v. FCC* 165 F.3d 341 (5th Cir. 1999). Under NCTA's approach, there is effectively no difference between the obligations, as the cable operator is able to deduct the fair market value of the institutional network from the franchise fee. That is not a reasonable interpretation of what Congress intended. And certainly, the distinctions drawn show that any test that is based on whether a requirement is beneficial to the operator or its system is irrelevant. The relevant question is whether the condition may be imposed and enforced consistent with the Cable Act.

That the proposed definition is arbitrary is further illustrated by NCTA's assertion that "the cost of fulfilling statutorily-authorized requirements, including, among others, customer service obligations and subscriber privacy protections" would not fall under the new definition.[105] NCTA views these statutorily-authorized (but not mandated) requirements the same as build-out requirements, which is to say requirements that are not specifically for the benefit or use of the LFA or its designee.[106] But neither NCTA nor the Commission explains why statutory-authorized PEG requirements that are designed to benefit the public, not the LFA or its designee, should be considered a "franchise fee" while these other requirements would not. In fact, the *Second FNPRM*'s proposals improperly reflect the Commission's, not Congress's or franchising authorities', franchise requirement preferences. There is no discernable difference in these statutorily-authorized provisions—and nothing in the *Second FNPRM*—that would allow one to understand which requirements are a "franchise fee" and which are not, and no effort has been made to explain how the text of the Act permits these distinctions even if they were adequately explained. This renders the proposed definition not only arbitrary, but also raises significant due process concerns.[107]

6. Settlement Agreements and Side Agreements Are Not Franchise Fees, and NCTA's Proposal to Address Them Is Unmoored From Anything in the Cable Act.

NCTA provides conflicting responses to commenters' arguments that the provisions of settlement and other non-franchise agreements between LFAs and cable operators cannot be a "franchise fee." NCTA "generally agrees" that these agreements "should not count against the statutory cap."[108] But then it concludes by stating that "any in-kind contributions," whether found in a cable franchise "or any other agreement" should be subject to the cap if it is "consideration for the cable operator's use of the public ROW."[109] NCTA does not articulate a distinction between what it would consider ROW-based consideration subject to the cap, as opposed to non-franchise fee consideration given in a settlement agreement. Indeed, NCTA's position is that nearly every obligation required of a cable operator in a settlement agreement is a "franchise fee" and states that franchise fees "compensate localities for a cable operator's operation of its cable system in the public ROW," which indicates that NCTA's proposed distinction is no distinction at all.[110]

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[105] March 13th *Ex Parte* at 8-9.

[106] *Id*.

[107] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*. 463 U.S. 29, 43 (1983) ("the agency must examine the relevant data and articulate a satisfactory explanation for its action . . . "); *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (the "vagueness doctrine addresses at least two connected but discrete due process concerns: first, that the regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."); *see also Montgomery Cty.*, 863 F.3d at 492-93.

[108] March 13th *Ex Parte* at 7.

[109] *Id*. at 7-8 (emphasis omitted).

[110] *Id*. at 12.

The following examples illustrate the problems with NCTA's proposed distinction:

- Montgomery County, Maryland found that its operator had failed to comply with provisions of the franchise and owed substantial dollars in damages as a result—and under the Cable Act, could have been denied renewal altogether. Outside of the franchise, the parties agreed to settle the dispute, as contemplated by the Cable Act's cure provisions, clearing the way to renewal. In effect, *because* compliance is to be considered at the time of renewal and transfer, it is neither surprising nor suspicious that settlements often occur in those contexts;

- The City of Minneapolis entered into an Indefeasible Right of Use ("IRU") to resolve a dispute over ownership of certain network assets built for the City;[111]

- The City of Renton, Washington, entered into an IRU to resolve a dispute over ownership of certain network assets built for the City;[112]

- As part of a cable franchise renewal, certain member cities of the North Suburban Communications Commission agreed to enter into discounted enterprise service contracts to resolve a dispute over the continued provision of an institutional network;[113]

- Several Minnesota franchising authorities entered into a Settlement Agreement with their franchised cable operator to resolve open compliance issues during a proposed cable franchise transfer; and[114]

- The North Suburban Communications Commission entered into an IRU to resolve certain rate issues.[115]

These agreements resolved a variety of disputes that involved both cable and non-cable services. The consideration was separate from any cable franchise agreement and was not consideration for the continued use of the ROW, but rather the resolution of a dispute or the forbearance by the LFA from exercising other legal remedies. Although at times these

[111] Minneapolis, Minn., *Indefeasible Right of Use Agreement* (2009).

[112] Renton, Wash., *Institutional Network Lease Agreement* (2009), https://edocs.rentonwa.gov/Documents/DocView.aspx?id=459791&dbid=0&repo=CityofRenton.

[113] *See, e.g.*, Roseville, Minn., *Request for Council Action, Consider Approving Cable Television Franchise Ordinance and Agreement*, Exhs. B1-B2, *Comcast Enterprise Services Master Services Agreement (MSA)* (2017).

[114] *See, e.g.*, Minneapolis, Minn., *Franchise Settlement Agreement* (2015).

[115] N. Suburban Commc'ns Comm'n, *Memorandum of Understanding* (1994), https://web.archive.org/web/20170226121529/http://ctvnorthsuburbs.org/content/franchise/memofunderstanding94.pdf.

agreements are referenced in cable franchise agreements, this is similar to referencing and requiring compliance as a condition of a release of obligations that would otherwise apply.[116]

Further, the Commission simply has no authority over settlement agreements between state and local governments and cable operators. Any obligations contained in such agreements are not related to the grant or renewal of a franchise, but rather to the settlement not only of franchise violations, but in many cases other state or local law or service contract issues unrelated to the franchise. The Cable Act does not give the Commission authority to involve itself in the resolution of these kinds of disputes.[117] As NCTA recognizes, "settlements may provide a mutually beneficial alternative to costly enforcement proceedings or litigation."[118] Where the LFA and the cable operator agree that a settlement is the best course of action, nothing in the Cable Act permits the Commission to disrupt that agreement by redefining the consideration exchanged in those agreements as "franchise fees."

7. The Proposed Rule Does Not Provide a Basis for Excluding Customer Service, Privacy and Other Consumer Protection Requirements from Franchise Fees.

NCTA has indicated it is not suggesting that the cost of complying with customer service, privacy, and other consumer protection requirements could be deducted from the franchise fee.[119] While we appreciate the clarification, the *Second FNPRM*'s proposed definition of "franchise fee" does not appear to exclude these costs, nor is there any justification for the seemingly arbitrary distinctions between what franchise obligations would and would not be "franchise fees" under the proposed rules.[120] In essence, the proposed rule seems to be that those franchise requirements a majority of the FCC dislikes will be a "franchise fee," while those the majority likes will not. In other words, the *Second FNPRM*'s proposals would improperly turn the Commission into a national franchising authority, with discretion to treat various franchise requirements differently on a case-by-case basis. This is a replay of the sorts of disputes that led Congress to adopt the Cable Act in the first place.

Moreover, a cable operator's cost of complying with customer service requirements, as well as costs and all other nonmonetary franchise obligations, are, and always have been,

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[116] Thus, as a condition in several of its rate orders, the Commission required cable operators to provide free Internet and cable services to public institutions; it never contended that it would have had authority under the Cable Act to impose such a requirement on cable operators, but the mention of the obligation within a rate order did not somehow render the orders themselves suspect in any way. *See, e.g.*, *In re City of Antioch, CA*, CSR-5239-R (1999); Social Contract for Time Warner, 11 FCC Rcd 2788, 2792, 2820 (1995); Continental Cablevision, Inc., Amended Social Contract, 11 FCC Rcd 11118 (1996); Social Contract for Comcast Cable Communications, Inc., 13 FCC Rcd 3612, 3613 (1997).

[117] *See* Anne Arundel County et al. Reply Comments at 18-19.

[118] March 13th *Ex Parte* at 7.

[119] *Id*. at 8.

[120] *See supra* Section 5.B.

embedded in the cable rates the operator charges its cable subscribers.[121] Allowing any portion of these nonmonetary requirements to be deducted from the franchise fee will result in cable operators' double recovery of these costs. The Cable Act plainly does not intend to bestow such an arbitrary and unreasonable windfall on cable operators, further demonstrating that the proposed "in-kind" rule is not supported by the Act.

8. The Proposed Rule Violates Section 622(i), Which Bars the Commission from Regulating the Amount of Franchise Fee Payments.

Section 622(i) prohibits the FCC from regulating the amount of franchise fees paid by a cable operator. Though NCTA argues that "[n]o one is proposing to regulate the amount of franchise fees (e.g., by limiting fees to four percent),"[122] the Commission's proposed re-definition of "franchise fee" would definitely reduce the "amount of the franchise fees" paid to LFAs by half or more, on some estimates, if not reduce those fees to zero in some jurisdictions.[123] By any reasonable, common-sense understanding, the Commission's proposals, if adopted, would regulate the amount of franchise fees paid by cable operators. That, in fact, is the purpose and effect of those proposals.

NCTA's defense of this proposed overreach is unavailing. NCTA's argument apparently is that the phrase, "regulate the amount of the franchise fees paid by a cable operator," in Section 622(i) means, and can only mean, regulate the *numerical percentage* of gross revenues at which the fee is capped.[124] According to NCTA, so long as the Commission does not purport to change the percentage, it is free to "clarify[] which costs count as franchise fees."[125] But that is not what Section 622(i) says. Under the plain meanings of the words of the statute, the FCC does not have authority to regulate the amount of franchise fees paid to LFAs. Just as the FCC cannot change the numerical percentage, it cannot skirt the statute by redefining the term "franchise fee" to achieve a purpose—regulation of franchise fee payments—prohibited by the Act. Yet the *Second FNPRM* does just that. It is in fact regulating the amount *and* use of franchise fees, down to mandating a fair market value methodology to be used in calculating them, in clear contravention of Section 622(i).[126]

Section 622(i) similarly prohibits the FCC from dictating how an LFA may use cable franchise fee proceeds. Here, too, the effect of the *Second FNPRM* is to force LFAs to use their franchise fees to pay for franchise provisions authorized by the Cable Act to support Congress's

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[121] *See supra* Section 4.

[122] *See* March 13th *Ex Parte* at 9.

[123] *See* City of Philadelphia et al. Reply Comments, Exh. A, Declaration of Thomas Robinson, § C. *See also* Comments of the City and County of Denver (Nov. 14, 2018); Comments of City of Lansing, Michigan (Nov. 14, 2018).

[124] March 13th *Ex Parte* at 9.

[125] *Id*.

[126] Section 622(i)'s savings clause, "except as provided in this section," does not help NCTA's argument because nothing in Section 622 mandates NCTA's or the Commission's very specific construction of the prohibition.

policy goals.[127] NCTA demonstrates this forced payment scheme in its proposal for how cable operators could offset their franchise fee payments.[128] NCTA suggests that, once cable operators have unilaterally calculated the fair market value of franchise obligations, LFAs must "choose whether to keep, reduce or forego" these franchise obligations.[129] If no choice is made, franchise fees will be reduced.[130] This is no choice at all, and it is the scenario Congress meant to avoid in removing from the Commission any authority over how franchise fees are used.

9. The Cable Act Does Not Preempt ROW Authority over Non-Cable Services.

NCTA's March 13th *Ex Parte* reiterates its argument that the Cable Act bars local governments from exercising their ROW compensation authority with respect to cable operators' use of the public ROW to provide non-cable services. Local governments have previously responded to NCTA's arguments,[131] and we will not repeat those responses in full here. But NCTA's persistent amplification of its arguments, although unavailing, compels us to underscore the fatal errors in its reasoning.

A. The Cable Act Does Not Prohibit Local Governments from Exercising Generally-Applicable ROW Authority with Respect to Non-Cable Services.

NCTA begins with the unhelpful truism that local governments may not "end-run" the Cable Act by pointing to some other authority to accomplish what the Cable Act prohibits.[132] But this reasoning assumes the answer to the relevant question: Whether the Cable Act bars local governments from applying generally-applicable ROW requirements to cable operators' use of the ROW to provide non-cable services. As our previous submissions have explained, it does not.[133] And were NCTA's position correct, it would create the very type of discrimination that NCTA claims to abhor.[134] NCTA studiously ignores this discrimination, however, because it would benefit cable operators.

[127] *See* 47 U.S.C. § 521.

[128] April 4th *Ex Parte* at 2. *See also* March 21st *Ex Parte* at 2 (arguing that LFAs will have to "spend some of the franchise fees" to retain existing cable franchise provisions).

[129] *See id.*

[130] *Id*.

[131] *See, e.g.*, CAPA et al. Reply Comments at 19-23; Letter from Tillman L. Lay, Counsel for the City of Eugene, to Marlene H. Dortch, Secretary, FCC (Sept. 19, 2018) ("Letter from City of Eugene to Marlene H. Dortch"); Anne Arundel County et al. Comments at 34-44; Anne Arundel County et al. Reply Comments at 19-28; NATOA et al. Comments at 13-24; NATOA et al. Reply Comments at 8-17; NYC Comments at 10-14.

[132] March 13th *Ex Parte* at 10-11.

[133] *See, e.g.*, CAPA et al. Reply Comments at 19-21; Letter from City of Eugene to Marlene H. Dortch; NATOA et al. Comments at 17-18; NATOA Reply Comments et al. at 10-17; Anne Arundel County et al. Comments at 35-43; Anne Arundel County et al. Reply Comments at 21-23.

[134] *See* NATOA et al. Reply Comments at 12 (quoting NCTA's previous filing in this docket approving of Comcast's statement that "it is difficult to see how treating ILECs and cable operators equally under a level-playing field statute would be 'inconsistent' with the Act. Ensuring that 'like services are treated alike' is a principle that the Commission has repeatedly endorsed."); *see also id*. at 11-13.

NCTA points out that Section 622(g)(1) defines franchise fees to include those imposed by either a franchising authority or another governmental entity. That is true, but the relevant points are that Cable Act franchise fees (1) are limited to those imposed "on a cable operator or cable subscriber, or both, *solely because of their status as such*,"[135] and (2) do not include any "tax, fee, or assessment of general applicability" unless it is "unduly discriminatory" against cable operators or cable subscribers.[136] Generally-applicable ROW fees on telecommunications and broadband services, like those upheld in *City of Eugene*,[137] are not imposed on cable operators solely because of their status as such; in fact, their status as cable operators has no bearing at all on the imposition of the fees. Those fees are generally applicable and not unduly discriminatory: They are imposed on all telecommunications and broadband service providers that install facilities in the ROW, regardless of whether those providers might also happen to be cable operators. They do not apply at all to cable services or, indeed, to a cable operator that provides only cable services.

Thus, generally-applicable ROW fees are distinct from the fees at issue in the cases NCTA cites in its March 13th *Ex Parte* and prior comments. In *City of Minneapolis v. Time Warner Cable, Inc.*,[138] for example, the local government claimed that the cable operator was required to pay five percent of its gross revenue derived from cable modem services. But that claim was not based on a generally-applicable ROW fee that applied to both cable operators and non-cable operators. Rather, "Minneapolis base[d] its claim *on language from the Franchise Agreement*,"[139] which "grant[ed] permission to Time Warner Cable to use public rights-of-way to provide cable services."[140]

The court held that the "*language of the Franchise Agreement* is preempted by federal law,"[141] emphasizing that a fee "*targeting cable providers*, such as the one at issue here, is a franchise fee."[142] In other words, the fee Minneapolis imposed on Time Warner Cable's cable modem service was imposed on the cable operator precisely because of its status as a franchised cable operator.

Each of the other cases cited by NCTA in its March 13th *Ex Parte* similarly involved a local government's attempt (after the 1996 Act's amendment to Section 622) to collect fees for non-cable services through cable franchise agreements with cable operators, not through

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[135] 47 U.S.C. § 542(g)(1) (emphasis added).

[136] 47 U.S.C. § 542(g)(2)(A).

[137] *City of Eugene v. Comcast of Or. II, Inc.*, 375 P.3d 446 (Or. 2016).

[138] No. Civ. 05-994 ADM/AJB, 2005 WL 3036645 (D. Minn. Nov. 10, 2005) (cited in NCTA Comments at 15 n.47).

[139] *City of Minneapolis*, 2005 WL 3036645 at *5 (emphasis added).

[140] *Id.* at *1.

[141] *Id.* at *6 (emphasis added).

[142] *Id.* (emphasis added).

generally-applicable ROW fees.[143] Because generally-applicable fees for using the ROW to provide non-cable services do *not* target cable operators, those fees are not franchise fees under the Cable Act.

B. Generally-Applicable ROW Fees for Non-Cable Service Are Not Imposed on Cable Operators "Solely Because of Their Status As Such."

NCTA next argues that "all fees that are imposed on a cable operator for the operation of its cable system in the public ROW"[144] are imposed solely because of its status as a cable operator, and thus are subject to the Cable Act's franchise fee cap. NCTA's arguments regarding Sections 621(a)(2), 621(b), and 622 were specifically addressed and discredited by the Oregon Supreme Court in *City of Eugene*,[145] as well as by comments filed in response to the *Second FNPRM*.[146] The flaws in NCTA's argument are summarized below.

First, NCTA incorrectly asserts that the statutory definition of franchise fees "encompasses all fees that are imposed on a cable operator for the operation of its cable system in the public ROW."[147] That's simply not what the "franchise fee" definition says. Section 622(g)(1) defines franchise fees as those imposed on a cable operator or cable subscriber, or both, "solely because of their status as such." NCTA does not, and cannot, explain how a generally-applicable ROW fee imposed on all landline broadband and telecommunications service providers—regardless of their status as "cable operators" or their networks' status as a "cable system," as defined in 47 U.S.C. Section 522(5)-(6)—can nevertheless be construed to be a tax or fee imposed on a cable operator "solely" because of its status as such, especially given that the fee does not apply at all to cable service, or to cable operators that provide only cable service.

NCTA seeks to sidestep this problem by pointing to Section 621(a)(2), which provides that "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way." But this provision states only what a Cable Act "franchise" authorizes a cable operator to construct; it does not specify the scope of the services beyond cable service that a Cable Act franchise authorizes a cable operator to use the ROW to provide, let alone specify that cable operators' non-cable services are exempt from a local government's generally-

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[143] March 13th *Ex Parte* at 12 n.65, 13 n.71. *See City of Chi. v. Comcast Cable Holdings, LLC*, 231 Ill.2d 399, 401 (2008) (the City's attempt to collect a fee from cable operators' revenue from cable modem service was based the terms of "their cable franchise renewal agreements"); *Comcast Cable of Plano, Inc. v. City of Plano*, 315 S.W.3d 673, 675 (Tex. App. 2010) ("The City of Plano sued Comcast Cable of Plano, Inc. for franchise fees allegedly due *under a franchise agreement*.") (emphasis added); *City of Cincinnati, Ohio v. Time Warner Cable, Inc.*, No. C-1-07-724, 2008 WL 11352596 (S.D. Ohio July 1, 2008) (the City alleged that the cable operator violated the terms of its cable franchise agreement by excluding from its calculation of gross revenue any revenue related to cable modem services).

[144] March 13th *Ex Parte* at 12; *see id*. at 11-14.

[145] *See City of Eugene*, 375 P.3d at 456-58, 458-61, 462-63.

[146] *See, e.g.*, CAPA et al. Reply Comments at 19-23; Letter from City of Eugene to Marlene H. Dortch; Anne Arundel County et al. Comments at 37-44; NATOA et al. Comments at 13-24; Anne Arundel County et al. Reply Comments at 10-17; NYC Comments at 5-6.

[147] March 13th *Ex Parte* at 12.

applicable ROW compensation authority.[148] Section 622 addresses that issue. And where, as is the case in Eugene, the ROW fee about which NCTA complains is imposed on telecommunications and broadband providers, whether or not they are also cable operators, Section 621(a)(2) says nothing to alter the plain-language conclusion that such a fee is not a Cable Act "franchise fee" because it is not imposed on a cable operator "solely because of [its] status as such."[149]

Second, NCTA claims that the interpretation of "solely because of their status as such" confirmed in *City of Eugene* cannot be correct because Section 622(g)(2)(A) also provides that generally-applicable fees are not franchise fees. As an initial matter, "[t]he canon against surplusage is not an absolute rule,"[150] and "assists only where a competing interpretation gives effect to every clause and word of a statute."[151] NCTA's interpretation, in contrast, conflicts with the "solely because of their status as such" clause in Section 622(g)(1). The fact that two different parts of Section 622's franchise fee definition both state that fees like Eugene's are not franchise fees supports the Local Government/PEG Parties' position, not NCTA's.

Third, NCTA's argument that a generally-applicable ROW fee is unduly discriminatory against cable operators has it backwards. What would be discriminatory and not competitively neutral would be for cable operators, and *only* cable operators, to be exempt from generally-applicable fees for the use of the ROW to provide telecommunications and broadband services. Where an entity provides a second service (cable service) that others do not, it is not discriminatory to charge that entity a separate, non-overlapping fee for its use of the public ROW to provide that second service.

Fourth, the Act's limitation of the cable franchise fee to five percent of gross revenue "from the operation of the cable system to provide cable services,"[152] does not suggest that Congress intended the Cable Act franchise fee to provide full compensation for cable operators' use of the ROW to provide non-cable services. Rather, this provision aligns Cable Act franchise fees associated with the provision of cable service, which the Act permits cable operators to allocate to cable subscribers and to recover through cable operators' revenue derived from providing *cable* service.[153] And as discussed below, the clear legislative history—which NCTA only now acknowledges and attempts (unsuccessfully) to confront—confirms that is what Congress intended.

[148] Indeed, the Act makes clear the cable operator's network is not even a "cable system" with respect to its provision of some non-cable services. *See* 47 U.S.C. § 522(7)(C)-(D).

[149] 47 U.S.C. § 542(g)(1).

[150] *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013) (citing *Arlington Cent. School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 299 n.1 (2006) ("While it is generally presumed that statutes do not contain surplusage, instances of surplusage are not unknown.")).

[151] *Id*. (quoting *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011)) (internal quotation marks omitted).

[152] 47 U.S.C. § 542(b).

[153] *See* 47 U.S.C. §542(c)(1), (f).

C. NCTA's Interpretation Is Contrary to the Legislative History and the Commission's Prior Conclusion in this Docket.

The legislative history of the 1996 Act dooms NCTA's argument that Congress intended for cable operators' non-cable services to be immune from fair, reasonable, and nondiscriminatory ROW fees. The Conference Report to the 1996 Act states that "[t]he conferees intend that, to the extent permissible *under State and local law*, telecommunications services, *including those provided by a cable company*, shall be subject to the authority of a local government to, in a nondiscriminatory and competitively neutral way, *manage its public rights-of-way and charge fair and reasonable fees*."[154]

In its March 13th *Ex Parte*, NCTA at long last acknowledges this legislative history. But it then attempts to erase this passage by arguing that it can *never* be "nondiscriminatory and competitively neutral" and "fair and reasonable" to subject cable operators to fees for non-cable services. That is a facially nonsensical assertion: Essentially, NCTA is claiming that it is somehow discriminatory for cable operators to pay the same ROW compensation for their non-cable services as non-cable operators pay to provide those same non-cable services. Just as NCTA's position is contrary to the text and legislative history of the statute, it is also fundamentally inconsistent with the 1996 Act's goal of competitive neutrality.

In the 1996 Act, Congress sought to open telecommunications markets to greater competition by promoting competitive neutrality among different types of providers. Because the Cable Act required cable operators, unlike non-cable operator telecommunications providers, to obtain a cable franchise, Congress amended that Act in 1996 to ensure that the cable franchise requirement did not disadvantage cable operators' provision of telecommunication services. Thus, Congress prohibited the use of a Cable Act franchise as a means to regulate a cable operator's provision of telecommunications services,[155] and it specified that the Cable Act franchise fee revenue base would be limited to the cable operator's revenue derived from the provision of cable services.[156] This Cable Act amendment ensured that cable operators would no longer have to pay the five percent Cable Act fee on their non-cable services—a fee their non-cable, ROW-using competitors did not have to pay. Instead, as the Conference Report makes clear, cable operators would have to pay the same ROW fee on their non-cable services as their non-cable, ROW-using competitors do.

As the Commission has explained, "Congress clearly intended to separate the functions of cable franchising from the regulation of telecommunications services."[157] This separation advanced competitive neutrality by establishing that the ROW and service regulation of cable service would occur through the Cable Act franchising process, whereas other state or local legal

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[154] Conference Report at 180. Meanwhile, in the Internet Tax Freedom Act, Congress expressly excluded Sec. 1105(c)(8) fees in return for benefits provided—including franchise-type fees.

[155] 47 U.S.C. § 541(b)(3).

[156] 47 U.S.C. § 542(b).

[157] *In re TCI Cablevision of Oakland Cty., Inc.*, Docket No. CSR-4790, Memorandum Opinion and Order ¶ 6, 12 FCC Rcd. 21396 ¶ 6 (1997), *denying reconsideration*, 13 FCC Rcd. 16400 (1998). *Accord, id.* at ¶ 42 (emphasis added).

authority would govern the ROW and service regulation of telecommunications services, regardless of whether those services were provided by a non-cable telecommunications carrier or by a cable operator. Thus, cable operators and non-cable operators would be able to compete on equal footing with respect to their provision of non-cable services. Requiring cable operators to pay the same generally-applicable ROW fee on their non-cable services as non-cable operators pay on their non-cable services is therefore *not* double billing;[158] it is treating cable operators and non-cable operators alike with respect to their use of the ROW to provide non-cable service revenues.[159]

That Congress separated regulation of cable operator-provided telecommunications services from *Cable Act franchising regulation* does not indicate that Congress intended to exempt cable operators from *all* ROW or service regulation that would otherwise apply to providers of telecommunications and other non-cable services. If that were the case, Congress would have imposed an absolute prohibition on any state or local ROW or service regulation of a cable operator's provision of telecommunications or other non-cable services. It did not. Instead, Congress only limited franchising authorities' ability to regulate a cable operator's provision of telecommunications services under "this subchapter," i.e., under the Cable Act.[160]

The language from the Conference Report confirms that Congress intended that local governments retain their authority to exercise their ROW compensation authority with respect to the provision of telecommunications service, whether by cable operators or others, as otherwise permitted by State and local law. Provision of cable service is regulated, and compensated, under a Title VI cable franchise; provision of other services is regulated, and compensated, under the separate laws and agreements that pertain to those other services. Indeed, the Commission has already reached this conclusion in the *Second Report and Order* in this very docket: "This finding [that "a cable operator is not required to pay cable franchise fees on revenues from non-cable services"], of course, does *not* apply to non-cable franchise fee requirements, such as any lawful fees related to the provision of telecommunications services."[161]

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[158] *See* March 13th *Ex Parte* at 2.

[159] The same division is reflected in the sections of the Cable Act authorizing common carriers to enter the video service market. Entities using the right-of-way—whether as an OVS provider or cable operator—were subject to the Title VI cable franchise fee, while those providing service only on a common carrier basis were not—but would have been subject to fees imposed under state and local law on telecommunications service providers, subject only to the limits of Section 253.

[160] *See* 47 U.S.C. § 541(b)(3)(A)(i) (a cable operator providing telecommunications services "shall not be required to obtain a franchise *under this subchapter* for the provision of telecommunications services") (emphasis added), 541(b)(3)(A)(ii) ("the provisions *of this subchapter* shall not apply to such cable operator or affiliate for the provision of telecommunications services") (emphasis added), 541(b)(3)(B) ("A franchising authority may not impose any requirement *under this subchapter* that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof") (emphasis added), 541(b)(3)(C)(ii) (a franchising authority may not order a cable operator "to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal *under this subchapter* with respect to the provision of such telecommunications service") (emphasis added). The exceptions to this general rule are also notable: requirements can be established and enforced with respect to institutional networks and other PEG uses of the system.

[161] *Second Report and Order*, 22 FCC Rcd. at 19638 & n.31 (emphasis added).

NCTA's argument that cable operators—and only cable operators—are immune from fair and reasonable ROW fees for telecommunications and other non-cable services is fundamentally at odds with the 1996 Act's goal of competitive neutrality. Nothing in the Act or its legislative history supports NCTA's argument that five percent of a cable operator's cable service revenue is adequate compensation for a cable operator's use of the public ROW to provide both cable and non-cable services. Nor is this even a rational assumption. Under NCTA's reasoning, the overall fees for a cable operator's use of the public ROW should be cut in half if its cable service revenue falls by fifty percent, even if its revenue from broadband or other non-cable services that use the public ROW more than doubles. Meanwhile, a telecommunications or broadband provider subject to a generally-applicable ROW fee would (appropriately) see its ROW fee double if its broadband or telecommunications revenue doubled.

This is not merely an abstract concern. Cable operators' cable service revenues have indeed been declining, while the value of their access to the public ROW has increased as they generate greater and greater amounts of revenues from non-cable services.[162] The 1996 Act was enacted to eliminate competitive disadvantages based on Cable Act requirements, not to establish new competitive advantages available only to cable operators. NCTA's argument—that cable operators, and only cable operators, get a free ride on the ROW with respect to their non-cable services—is a blatant plea for preferential, discriminatory advantage that flies in the face of the Act's goals of non-discrimination and competitive neutrality.

10. The **Second FNPRM***'s Proposals Would "Commandeer" State and Local Government Authority.*

The *Second FNPRM*'s proposed interpretation of the Act goes beyond any preemption put in place by Congress and instead unconstitutionally commandeers the resources of state and local governments to carry out the FCC's federal program of promoting broadband deployment. The most striking—though not the only—example is the mixed-use rule, in which the Commission asserts that the Cable Act permits cable operators to use the ROW to install any equipment they desire, without regard to the terms of the cable franchise or any applicable state and local requirements and without paying compensation to the local government. In other words, the proposal commands that state and local governments acquiesce to cable operators' uncompensated use of the ROW for non-cable facilities in furtherance of a federal regulatory

[162] *See, e.g.*, *Cable Operator Charter Beats Quarterly Revenue Estimates*, Reuters (Jan. 31, 2019), https://www.reuters.com/article/charter-communications-results/cable-operator-charter-beats-quarterly-revenue-estimates-idUSL3N1ZV4KH ("Charter Communications Inc topped quarterly revenue estimates on Thursday [January 31, 2019], as the cable operator attracted *more customers for its internet services*, offsetting a *drop in video subscribers*.") (emphasis added); Emily Steel, *Internet Customers Surpass Cable Subscribers at Comcast*, The New York Times (May 4, 2015), https://www.nytimes.com/2015/05/05/business/media/comcasts-earnings-rise-10-driven-by-high-speed-internet.html (reporting that the number of people subscribing to Comcast's internet service surpassed its total video subscribers for the first time in the second quarter of 2015). Notably, this sort of revenue data also shows that the Commission's argument—that somehow burdens must be reduced to encourage deployment of cable systems—is simply unfounded. The cable industry is enormously profitable, and is maintaining profitability even in the face of a changing video marketplace.

program. This reading of the Act squarely violates the Tenth Amendment of the United States Constitution.[163]

NCTA asserts that "anti-commandeering principles apply to acts of Congress, so this kind of argument is necessarily directed primarily at the provisions of Title VI themselves, rather than any proposed action by the Commission."[164] But that is nonsense. NCTA cannot seriously contend that Congress is barred from commandeering state and local governments but regulatory agencies like the FCC have authority to do so through their interpretations of federal statutes enacted by Congress. The Commission cannot interpret the Act to commandeer state and local government resources any more than Congress could do so directly by amending the Act to say what the FCC proposes to construe it to mean here. In fact, a reading of the law that *authorizes* commandeering is necessarily suspect, under standard principles of statutory interpretation.

NCTA goes on to argue that the Act does not force states to act or commandeer their resources to further a federal regulatory program.[165] Under the long-standing interpretation of the Act, this is true. But the *Second FNPRM*'s proposed reinterpretation of the Act does exactly that. The proposed new interpretation would mandate that state and local governments allow cable operators to install in the ROW virtually any equipment the operator wants to install for use in providing any services the operator wants to provide, regardless of whether the state or local government has actually authorized installation of that equipment and without paying applicable fees required of non-cable competitors making the same use of the ROW. In short, state and local governments are forced to accept uncompensated equipment deployments in their ROWs as part of a federal regulatory scheme that (supposedly) would encourage more cable operator broadband deployment. That reading is inconsistent with *Dallas v. FCC, supra* (finding the Cable Act did not expressly preempt local franchising authority over open video services; it follows it could not have eliminated that authority over other services by silence).

Moreover, this misguided interpretation of the Act violates at least two of the overarching principles animating the anti-commandeering rule: accountability and shifting of costs. As the Supreme Court has noted,

> [T]he anticommandeering rule promotes political accountability. When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred.[166]

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[163] *See, e.g.*, *Printz v. U.S.*, 521 U.S. 898 (1997); *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018); *New York v. U.S.*, 505 U.S. 144 (1992).

[164] March 13th *Ex Parte* at 15-16.

[165] *Id*. at 16.

[166] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018) (citations omitted).

Here, the Commission's proposed mixed-use rule unquestionably blurs responsibility. Residents unhappy with the deployment of these facilities likely will blame their local elected officials when in fact it is the federal government mandating they acquiesce to such deployments.

Second, the Supreme Court has held that the anticommandeering principle:

> prevents Congress from shifting the costs of regulation to the States. If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program. It is pressured to weigh the expected benefits of the program against its costs. But if Congress can compel the States to enact and enforce its program, Congress need not engage in any such analysis.[167]

The *Second FNPRM*'s proposals shift the costs of providing broadband deployment to state and local governments in several ways. A couple of examples will suffice: The proposals would substantially reduce monetary cable franchise fee payments to local governments, putting more money in cable operators' hands, to further the FCC's stated goal of promoting broadband deployment. Likewise, the compensation local governments may be entitled to for use of the ROW for non-cable services—compensation expressly protected by Section 253(c) of the 1996 Act—is usurped. The Commission has read it out of the Act and replaced it with a commandment that states and municipalities (and thus their taxpayers) subsidize this use of the ROW out of their budgets.

11. The Proposal Would Broadly Preempt State Video Franchising Laws.

Local governments' comments in the record point out the problems with extending the proposals in the *Second FNPRM* to apply to—and thus preempt—state franchising authorities.[168] NCTA argues that the new rules "would not broadly preempt state-level franchise regimes."[169] What NCTA fails to address is that many state franchising laws apply to "video service," which is more broadly defined than "cable service." Changing the franchise fee calculation for cable operators will create a discrepancy in the operation of state video franchising laws, requiring each state to either allow the discrepancy or revise its statutes to comply with the *Second FNPRM*'s new interpretation of the Cable Act. This would require more than "conforming adjustments";[170] it would upend the carefully balanced policy choices of state legislatures and alter the long-standing laws applicable to both cable operators and video service providers—and may make invalidate the state laws themselves, to the extent that balance is upset.

NCTA is correct that "both state and local authorities are subject to Title VI's requirements."[171] But that does not support NCTA's position or the proposals in the *Second*

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[167] *Id*. (citations omitted).

[168] *See, e.g.,* Anne Arundel County et al. Comments at 44-47; Washington Cities et al. Reply Comments at 16-17.

[169] March 13th *Ex Parte* at 18.

[170] *Id*.

[171] *Id*. (emphasis omitted).

FNPRM. To the contrary, it demonstrates that Congress could not have intended the Cable Act to preempt state or local authority over a franchised cable operators' non-cable services. The broad preemption the Commission proposes to read into the mixed-use rule would create significant issues if applied at the state level. As proposed, where a state is the franchising authority, the rule would mean that a state no longer has authority over the telecommunications services provided by cable operators.[172]

12. Retroactive Impacts of the Proposed Rule on Franchises.

NCTA argues that the *Second FNPRM*'s proposals would not impermissibly and retroactively impair contracts and contends that applying the rule to existing franchises going forward is permissible under existing caselaw.[173] In addition to ignoring the *Erie* case, NCTA also ignores that the secondary retroactivity effects of the rules would upset settled expectations and preexisting interests.[174] Local governments and cable operators have negotiated existing franchise agreements—and have expectations based upon those agreements—based on 35 years of well-settled, consistent interpretations of the Cable Act. The proposed rules upend the bargains struck in nearly every franchise across the country by allowing cable operators to unilaterally decide to reduce the consideration owed for use of public property.

NCTA tacitly acknowledges this substantial potential retroactive impact when it suggests that LFAs be permitted, after cable operators decide how much they may reduce their franchise fee payments under the *Second FNPRM*'s proposals, to "choose whether to keep, reduce, or forego" the franchise terms the operator used to calculate its deduction.[175] In other words, NCTA concedes that LFAs will lose the franchise benefits they bargained for, and that NCTA's members agreed to provide, if the *Second FNPRM*'s proposals are implemented. Given this outcome, the Commission must first explicitly "balance the harmful 'secondary retroactivity' of upsetting prior expectations or existing investments against the benefits of applying their rules to those preexisting interests" and determine that the costs are outweighed.[176] Should the Commission undertake the required analysis, we believe it will show that the harms outweigh any benefits of applying the proposed rules retroactively. But until the Commission actually

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[172] We note that the record in this proceeding already shows that NCTA is incorrect as a matter of law when it claims that the Cable Act limits local authority over non-cable services, see e.g. 47 U.S.C. Section 544 (authorizing enforcement of requirements for broad categories of video programming and "other services").

[173] March 13th *Ex Parte* at 3.

[174] *See* NATOA et al. Reply Comments at i ("Both cable operators and franchising authorities have long understood that cable franchise requirements such as public, educational and government channels are commitments that are separate from, and not included in, the calculation of franchise fees. This understanding is rooted in the plain language of the Cable Act and bolstered by its legislative history. There is no support for essentially rewriting the Cable Act and undermining the bargained-for provisions in thousands of cable franchise agreements across the country.").

[175] April 4th *Ex Parte* at 2.

[176] *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009).

undertakes such a study, it cannot make a rational determination of the relative burdens the proposed rules will impose on the parties.[177]

The *Second FNPRM* represents a startling departure from several decades of practice, and from the Commission's own rate regulation rules, which permitted operators to recover the *cost* of franchise requirements. Leaving aside whether the "in-kind" determination is correct and the problems with NCTA's proposed valuation scheme,[178] the change requires the Commission to at least consider the impact of the change, procedurally and substantively, on small entities. It is significant: NCTA envisions significant litigation costs surrounding the establishment of fair market value, and of course, free services (which often involve no cost to the operator in fact) are now to be valued at commercial rates.[179] The effect on small school districts and other institutions is likely to be significant, but has not been analyzed by the FCC.

In addition to the secondary retroactivity effects, we note that although NCTA asserts that the new rules "would have prospective effect only," the *Second FNPRM* does not directly address retroactivity.[180] As many commenters noted, retroactively applying any new rules will allow cable operators to double-recover cable franchising costs. Franchise fees already can be—and are—recovered as a separate line item charge on cable subscriber bills.[181] In addition, cable operators also have recovered the cost of nonmonetary franchise requirements through their underlying subscriber rates.[182] Allowing retroactive application of the proposed new definition of "franchise fee" would be an even greater windfall to cable operators at the expense of LFAs and consumers.

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[177] Such a study must provide a comprehensive analysis of the precise impact of applying these rules to existing franchises. This analysis cannot be completed based solely on the assertions contained in the record of this docket. Questions that must be resolved by such a study would include: Does the fair market value of franchise obligations vary by market? If the value of PEG channels, for example, is to be credited against the five percent franchise fee cap, what is the value of those channels? What do cable operators charge in each market for channel bandwidth and what will they charge LFAs? What is the value of standard-definition channels versus high-definition channels? Because franchise fees are considered rent for the use of public ROW, the Commission must analyze how much franchise fee revenue is actually generated in each jurisdiction with a cable franchise, and what kind of government expenditures franchise fee revenues pay for. How will loss of those fees impact other government functions? Moreover, if local communities bargained with cable operators and reached agreements that included franchise commitments over and above franchise fees, how will the Commission make the local communities whole when it rewrites those agreements?

[178] As discussed at *infra* Section 13, the Local Governments reject the idea that fair market value is a reasonable method to determine any franchise fee offsets. If the Commission nevertheless were to adopt a fair market value calculation, at a minimum, any valuation formula would necessitate cable operators disclosing the fees (if any) they charge all content providers for channel capacity on the cable system in the same markets as those in which the PEG channels are being valued. Unless cable operators are willing to be fully transparent and make all of these commercial terms and conditions public and part of an analysis to value PEG channels, NCTA's proposal cannot be given serious consideration.

[179] April 4th *Ex Parte* at 2-3.

[180] March 13th *Ex Parte* at 3.

[181] 47 C.F.R. § 76.922(f)(1)(ii). *See Tex. Coal. of Cities for Util. Issues v. FCC*, 324 F.3d 802, 808 (5th Cir. 2003), *aff'g The City of Pasadena, Cal., Petitions for Declaratory Ruling on Franchise Fee Pass Through Issues*, Memorandum Opinion and Order, 16 FCC Rcd. 18,192 (2001).

[182] *See, e.g.*, 47 C.F.R. § 76.922(f)(1)(iii).

13. If the Commission Proceeds with the Misguided New Rules, Fair Market Value Is Not Appropriate.

As demonstrated above, there is no support in the Cable Act or its legislative history for the *Second FNPRM*'s proposed "in-kind" rule. If the Commission were nevertheless to adopt it, reductions in monetary franchise fees should be calculated based on the incremental costs to the cable operator of the franchise obligations, not fair market value. NCTA argues that uncompensated fair market value is being transferred to LFAs through franchise obligations and thus cost-based deductions from franchise fees are inappropriate.[183] NCTA's argument proposes a significant departure from past understanding and practice for which there is no support in the Cable Act.[184]

Once again, it is NCTA that illustrates how far this proposal deviates from the plain language of the Cable Act. In its April 4th *Ex Parte*, NCTA lays out its vision for how the proposed reductions will occur. NCTA proposes to allow a cable operator to unilaterally calculate the fair market value of (presumably) whatever cable franchise obligations it believes fall within the vague description of "in-kind contributions" in the *Second FNPRM*.[185] After receiving this information from the cable operator, the LFA would have a "reasonable time" to choose to "keep, reduce, or forgo" the franchise obligations the cable operator has deemed "in-kind contribution."[186] If the LFA fails to choose, the operator would unilaterally reduce the monetary fee payments it makes to the LFA based on the operator's calculation.[187] The LFA's only recourse to challenge the franchise provisions included in the calculation and the fair market value the operator assigned to each provision would be litigation.[188] There is no support in the Cable Act for this process. To the contrary, as discussed above, the Cable Act provides for the recovery of franchise-related costs through rates and pass-throughs, *not* through franchise fee reductions.[189]

Perhaps more importantly, nothing in the Act lays out how this "fair market value" calculation is to be made at the outset of a franchise grant or renewal. It is absurd to assert that Congress intended franchise fees to be reduced by the fair market value of the franchise obligations it expressly authorized LFA's to impose (and, indeed, encouraged as a means of advancing Congress's policy goals for diverse, local programming), yet failed to include this fair market value concept—much less a process for determining it—in the Act itself. The absurdity

[183] March 21st *Ex Parte* at 3.

[184] *See, e.g.,* 47 U.S.C. §§ 201(b), 229(e), 532, 543, 1008(e). *See also, e.g.,* FCC Form 499-A & FCC Form 1240.

[185] April 4th *Ex Parte* at 2.

[186] *Id*.

[187] *See id*.

[188] *Id*.

[189] *See supra* Section 4.

is even more apparent given that Congress (presciently) expected the vast majority of franchise agreements to be the product of negotiations. Had Congress expected LFAs and cable operators to mutually agree on franchise terms only to then have to quantify how much LFAs would pay to keep those terms, surely it would have said so.

Finally, Section 622(d) does not provide a "backstop" for addressing this proposed new ability for cable operators to unilaterally redefine franchise obligations and franchise fee payments.[190] Section 622(d) states, "In any court action under subsection (c), the franchising authority shall demonstrate that the rate structure reflects all costs of the franchise fees." Subsection (c) authorizes cable operators to itemize franchise fees and other costs of franchise compliance on cable subscribers' bills.[191] Section 622(d), then, permits localities to challenge the amount that subscribers are being charged; the section has nothing to do with underpayments of franchise fees. Thus, the section does not provide an avenue for LFAs to address a cable operator's reduction in franchise fee payments based on its unilateral calculation of fair market value of nearly every nonmonetary cable franchise obligation.

CONCLUSION

Neither NCTA's many *ex parte* arguments nor the *Second FNPRM* itself provide support for the proposed re-interpretation of the Cable Act. The Local Government/PEG Parties strongly oppose the Commission's adoption of the proposed new rules. There is no basis in law nor any need to upend the long-standing interpretation of the Act upon which thousands of local franchise agreements have been negotiated, and through which cable operators have become the largest broadband service providers in the nation.[192]

Respectfully submitted,

On behalf of the following organizations and jurisdiction:

International Municipal Lawyers Association
National Association of Telecommunications Officers and Advisors (NATOA)
National League of Cities
United States Conference of Mayors
City of New York

On behalf of the following jurisdictions and organizations represented by Tillman L. Lay, James N. Horwood and Jeffrey M. Bayne, Spiegel & McDiarmid LLP, Washington, D.C.:

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[190] April 4th *Ex Parte* at 3.

[191] 47 U.S.C. § 542(d).

[192] CAPA et al. Reply Comments at 21-22.

Alliance for Communications Democracy
Alliance for Community Media
City of Bowie, Maryland
City of Eugene, Oregon
City of Palo Alto, California
City of Portland, Maine
City and County of San Francisco, California

On behalf of the following jurisdictions and organizations represented by Joseph Van Eaton, Gerard Lavery Lederer, Gail A. Karish and John Gasparini, Best, Best & Krieger, LLP, Washington, D.C., and Michael Watza, Kitch Drutchas Wagner Valitutti & Sherbrook, Detroit, Michigan:

Anne Arundel County, Maryland
City of Atlanta, Georgia
City of Bellevue, Washington
Bloomfield Township, Michigan
City of Brookhaven, Georgia
City of Boston, Massachusetts
City of College Park, Maryland
City of Dallas, Texas
City of Davis, California
City of Dubuque, Iowa
District of Columbia
County of Fairfax, Virginia
City of Fontana, California
City of Gaithersburg, Maryland
City of Greenbelt, Maryland
Howard County, Maryland
City of Kirkland, Washington
City of Laredo, Texas
City of Laurel, Maryland
Los Angeles County, California
City of Los Angeles, California
City of Lincoln, Nebraska
Marin Telecommunications Agency
Meridian Township, Michigan
Michigan Chapter of The National Association of Telecommunications Officers & Advisors
Michigan Coalition To Protect Public Rights-Of-Way
Michigan Municipal League
Michigan Township Association
Montgomery County, Maryland
Mt. Hood Cable Regulatory Commission

City of Ontario, California
City of Plano, Texas
City of Portland, Oregon
Ramsey/Washington Counties Suburban Cable Communications Commission II
City of Rye, New York
City of San Jacinto, California
Sacramento Metropolitan Cable Television Commission
Village of Scarsdale, New York
Texas Coalition of Cities For Utility Issues
Texas Municipal League

On behalf of the following jurisdictions and organizations represented by Michael R. Bradley, Michael C. Athay and Vincent W. Rotty, Bradley Law, LLC, Woodbury, Minnesota:

Brigham City, Utah
City of Coon Rapids, Minnesota
City of Edmond, Oklahoma
City of Edmonds, Washington
League of Minnesota Cities
City of Maple Valley, Washington
City of Marshfield, Wisconsin
City of Minneapolis, Minnesota
Minnesota Association of Cable Television Administrators (MACTA)
City of Murfreesboro, Tennessee
City of New London, Wisconsin
North Metro Telecommunications Commission: Minnesota cities of Blaine, Centerville, Circle Pines, Ham Lake, Lexington, Lino Lakes and Spring Lake Park
North Suburban Communications Commission: Minnesota cities of Arden Hills, Falcon Heights, Lauderdale, Little Canada, Mounds View, New Brighton, North Oaks, Roseville and St. Anthony
Northwest Suburban Cable Communications Commission: Minnesota cities of Brooklyn Center, Brooklyn Park, Crystal, Golden Valley, Maple Grove, New Hope, Osseo, Plymouth and Robbinsdale
OCA Media, Oregon, Wisconsin
City of Oklahoma City, Oklahoma
Village of Oregon, Wisconsin
Town of Perinton, New York
City of Philadelphia, Pennsylvania
Town of Pittsford, New York
City of Renton, Washington
City of Rushford, Minnesota
Saint Paul Neighborhood Network (SPNN), Saint Paul, Minnesota
City of Sioux Falls, South Dakota

Town of Smyrna, Tennessee
South Washington County Telecommunications Commission: Minnesota municipalities of Woodbury, Cottage Grove, Newport, Grey Cloud Island Township and St. Paul Park
City of Urbandale, Iowa
City of West Allis, Wisconsin
Wisconsin Community Media

On behalf of the following jurisdictions and organization represented by Kenneth Fellman and Gabrielle Daley, Kissinger & Fellman, P.C., Denver, Colorado:

Colorado Communications and Utility Alliance: Adams County, Adams 12 Five Star Schools, Arapahoe County, Arvada, Aurora, Boulder, Breckenridge, Brighton, Broomfield, Burlington, Castle Pines, Castle Rock, CDOT ITS Branch, Centennial, Central City, Cherry Hills Village, Colorado Springs, Columbine Valley, Commerce City, Dacono, Delta, Denver, Douglas County, Durango, Eagle County Government, Edgewater, Englewood, Erie, Estes Park, Federal Heights, Town of Firestone, Fort Collins, Fort Lupton, Frederick, Glendale, Golden, Grand Junction, Greeley, Greenwood Village, Idaho Springs, Jefferson Public Schools, Lafayette, Lakewood, Larimer County, Littleton, Lone Tree, Longmont, Louisville, Loveland, Lyons, Montrose, Northglenn, Paonia, Parker, Pitkin County, Region 10 LEAP Inc., Sheridan, Southwest Colorado Council of Governments, Thornton, Westminster, Wheat Ridge, Wray
Jersey Access Group
City of Kent, Washington
King County, Washington
Rainier Communications Commission: Pierce County, City of Puyallup, City of University Place, City of Sumner, City of Fife, City of DuPont, City of Orting, City of Ruston
City of Tacoma, Washington

On behalf of the following jurisdictions and organization represented by Elana Zana, Ogden Murphy Wallace P.L.L.C., Seattle, Washington:

Association of Washington Cities
City of Everett, Washington
City of Issaquah, Washington
City of Mukilteo, Washington
City of Richland, Washington

On behalf of the following jurisdictions and organization represented by Brian T. Grogan, Moss & Barnett, Minneapolis, Minnesota:

City of Bloomington, Minnesota
City of Chicago, Illinois
City of Eagan, Minnesota

City of Fridley, Minnesota
City of Granite Falls, Minnesota
City of Montevideo, Minnesota
City of Northfield, Minnesota
City of North Mankato, Minnesota
City of Pipestone, Minnesota
City of Red Wing, Minnesota
City of Rochester, Minnesota
City of Seattle, Washington
City of Spokane, Washington
City of St. Louis Park, Minnesota
City of St. Paul, Minnesota
City of Tacoma, Washington
City of Waite Park, Minnesota
City of Winona, Minnesota
City of Worthington, Minnesota
Northern Dakota County Cable Communications Commission
Southwest Suburban Cable Commission