

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**COMMENTS OF ANNE ARUNDEL COUNTY, MARYLAND; THE CITY OF ATLANTA, GEORGIA;
THE CITY OF BELLEVUE, WASHINGTON; BLOOMFIELD TOWNSHIP, MICHIGAN; THE CITY OF
BROOKHAVEN, GEORGIA; THE CITY OF BOSTON, MASSACHUSETTS; THE CITY OF COLLEGE
PARK, MARYLAND; THE CITY OF DALLAS, TEXAS; THE CITY OF DUBUQUE, IOWA; THE
DISTRICT OF COLUMBIA; THE CITY OF FONTANA, CALIFORNIA; THE CITY OF GREENBELT,
MARYLAND; HOWARD COUNTY, MARYLAND; THE CITY OF KIRKLAND, WASHINGTON; THE
CITY OF LAREDO, TEXAS; LOS ANGELES COUNTY, CALIFORNIA; THE CITY OF LOS ANGELES,
CALIFORNIA; THE CITY OF LINCOLN, NEBRASKA; MERIDIAN TOWNSHIP, MICHIGAN; THE
MICHIGAN CHAPTER OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS
& ADVISORS; THE MICHIGAN COALITION TO PROTECT PUBLIC RIGHTS-OF-WAY; THE
MICHIGAN MUNICIPAL LEAGUE; THE MICHIGAN TOWNSHIP ASSOCIATION; MONTGOMERY
COUNTY, MARYLAND; MT. HOOD CABLE REGULATORY COMMISSION; THE
CITY OF ONTARIO, CALIFORNIA; THE CITY OF PLANO, TEXAS; THE CITY OF PORTLAND,
OREGON; THE RAMSEY/WASHINGTON COUNTIES SUBURBAN CABLE COMMUNICATIONS
COMMISSION II; THE CITY OF RYE, NEW YORK; THE CITY OF SAN JACINTO, CALIFORNIA;
THE SACRAMENTO METROPOLITAN CABLE TELEVISION COMMISSION; THE VILLAGE OF
SCARSDALE, NEW YORK; THE TEXAS COALITION OF CITIES FOR UTILITY ISSUES; AND THE
TEXAS MUNICIPAL LEAGUE**

Michael Watza
KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK
1 Woodward Ave, 10th Floor
Detroit, MI 48226-3499

Joseph Van Eaton
Gerard Lavery Lederer
Gail A. Karish
John Gasparini
BEST BEST & KRIEGER, LLP
2000 Pennsylvania Ave N.W., Suite 5300
Washington, D.C. 20006

November 14, 2018

SUMMARY

The Commission's Further Notice of Proposed Rulemaking ("Proposal") should be rejected. It is inconsistent with the Cable Act,¹ the Cable Act's legislative history, case law, Commission precedent, and market realities. It would also harm consumers by making them pay for the same service twice.

Since adoption of the Cable Act in 1984 – and for the more than 30 subsequent years – Congress, the Commission, the courts, local franchising authorities, cable operators, and this agency have uniformly recognized a clear distinction between franchise requirements that set out the operator's obligations to its system and services, and franchise fees – the rent paid for use of the rights of way to provide cable services. In 1984, Congress adopted a system of dual regulation, under which localities would be able to ensure that franchise obligations were tailored to meet the needs and interests of their community.

The Commission's most recent effort to interpret the statutory provision under consideration here – Section 621 of the Cable Communications Policy Act of 1984, as amended ("Cable Act") – was soundly rejected by a recent decision of the U.S. Court of Appeals for the Sixth Circuit in *Montgomery County v. FCC*, 863 F.3d 485 (6th Cir. 2017). The new effort, however, suffers from flaws even more profound than those already rejected in court.

As now interpreted by the agency, the carefully balanced design of the Cable Act, which includes a specific renewal provision designed to ensure that a renewal proposal would satisfy the needs and interests of the community, would all boil down to this: Localities can require

¹ As used in these Comments, the "Cable Act" refers to the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, as amended by the Cable Television Consumer Protection and Competition Act of 1992 and the Telecommunications Act.

franchises. They can require franchise fees. They can impose build-out requirements of some sort. If they want anything else, the locality must pay fair market value for it..

The Commission’s proposals ignore the historical context of cable regulation and the structure and function of the Cable Act. By reinterpreting one phrase, “unreasonably refuse,”² it fundamentally alters the structure and meaning of the Act. The proposed findings in the FNPRM take an approach to statutory interpretation that requires the agency to find “elephants in a mousehole.”³ Such an approach to statutory interpretation has already been rejected by the Supreme Court.

Most damning of all, the Commission’s proposals violate the plain language of the statute which authorizes Local Franchise Authorities (LFAs) to both collect franchise fees and to impose franchise requirements on cable operators. To achieve the proposed result, the Commission must torture the statute’s definition of franchise fee beyond recognition and ignore the Sixth Circuit’s findings.

Years of Commission rulings have distinguished franchise fees from cable franchise obligations and have long recognized the jurisdiction of LFAs, which is now in jeopardy. The Commission neither acknowledges nor distinguishes its previous rulings from the current proposals.

The Commission’s proposals are so inconsistent with the statute that the Commission must resort to novel distinctions without basis in fact, or law, in order to save itself from the most extreme implications of these interpretations. For example, the logical import of the

² The Commission begins its analysis, and justification of its actions, by Congress’ revision of Section 621(a)(1) in 1992 to provide that “[a] franchising... *may not unreasonably refuse to award an additional competitive franchise.*” (emphasis in original) FNPRM at ¶2.

³ “Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. American Trucking*, 531 U.S. 457, 468 (2001).

Commission's proposals would be to require local governments to pay even for a cable operator's build out costs. Instead, the Commission fabricates a counter-factual and unworkable distinction between franchise obligations that might result in profit to a cable operator, and those that would not, in order to avoid taxpayer funded cable build-out. But neither facts nor law nor policy support this interpretation.

The Commission's proposals would also, *de facto*, eliminate whole sections of the Cable Act because many, many local governments, both large and small, would either lose all franchise fees or lose all the benefits of cable franchise obligations designed to meet the needs of their communities, including PEG channels, I-Nets, and service to schools, libraries, and government buildings.

Other elements of the FNPRM are no more defensible than the proposed franchise fee offset. The Commission incorrectly attempts to limit local government authority to the regulation of cable services over a cable system. Local governments possess authority as LFAs under Title VI of the Act beyond cable services and also possess police power authority beyond the Cable Act altogether. The Commission's legal analysis comparing Title II and Title VI ignores the differences between common carrier and cable regulation, draws incorrect conclusions, and readopts the same policies rejected by the Sixth Circuit in *Montgomery County*.

Finally, the Commission seeks comment on whether to apply these problematic interpretations to cable franchises in states that adopted state-level franchising. While the Commission's existing interpretations are a poor fit for locally granted franchises, they are especially troublesome when the franchise is mandated by state law. State franchises, crafted by industry, were often adopted in the name of facilitating competitive entry into cable services, but often use terms that are broader to those in the Cable Act, such as granting franchises to video

service providers, not just cable operators. Imposing the Commission's existing interpretations would void the existing state trade-offs and put localities in an impossible position. Moreover, without a more sound factual understanding of state franchises, the Commission's proposals are so vague as to require, at a minimum, a further notice to explain what the application of these policies would mean for state-level franchises.

TABLE OF CONTENTS

SUMMARY	i
INTRODUCTION	1
I. FRANCHISE OBLIGATIONS ARE NOT FRANCHISE FEES	4
A. Concluding that Cable Franchise Obligations are Franchise Fees Subject to the Cap and Offset Fees Owed is Inconsistent with the History of Cable Regulation.	5
1. The History of Local Franchise Regulation Before the Cable Act	5
2. The 1984 and 1992 Cable Acts	7
3. The Commission’s Interpretation of Section 621 Fundamentally Alters the Cable Act.	11
4. This Docket’s Original Premise Has Been Abandoned.....	12
B. Treating Cable Franchise Obligations As Franchise Fees Violates the Statute’s Plain Terms.	14
1. Section 621 and 622 Plainly Authorize the Imposition of Franchise Requirements and Collection of Franchise Fees	14
2. Section 611 Authorizes Recovery of Capital Costs for PEG and I-Nets Above the Franchise Fee.	16
3. The Commission’s Cannot Justify Its Proposal as an Exception to the Franchise Fee Definition.	17
4. Franchise Requirements are Not the Same as a “Tax, Fee or Assessment”	19
C. The Commission’s Proposal is Inconsistent with Commission Precedent and Could Force Subscribers to Pay Twice for the Same Assets.	21
1. The Commission Has Consistently Distinguished Franchise Obligations and Franchise Fees.....	22
2. The Commission Proposal Would Force Cable Subscribers to Pay Twice for the Same Assets.	24
3. The Commission Specifically Recognized the Right of LFAs to Require I-Nets without Offsetting Franchise Fees in this Docket.....	25
4. The Commission Has Recognized Other Franchise Requirements Without Offsets.....	26
D. The Commission’s Proposal to Distinguish Regulation that Might Result in Profit to the Cable Operator is Not Reasonable or Practical.	27

E.	Federally Recognized LFA Authority and Decades of Negotiations Would be Negated by the Commission’s Proposal.....	30
1.	Dallas As A Working Example.....	33
II.	LFAS ARE NOT LIMITED TO REGULATING CABLE SERVICES.....	34
A.	LFA Authority Reaches Beyond Cable Service by Virtue of Both Title VI and in Their Police Powers.....	37
B.	The Commission Cannot Ignore the Statute’s Distinction between Titles II and VI.....	40
C.	Other Provisions Do Not Authorize the Decisions NCTA Seeks.....	43
III.	THE COMMISSION’S RULINGS SHOULD NOT APPLY TO STATE- LEVEL FRANCHISES	44
	CONCLUSION.....	48
	EXHIBIT A - DECLARATION OF SUE BUSKE	

INTRODUCTION

The Commission's Further Notice of Proposed Rulemaking ("Proposal") should be rejected. It is inconsistent with the Cable Act,⁴ the Cable Act's legislative history, case law, Commission precedent, and market realities. It would also harm consumers by making them pay for the same service twice. Anne Arundel County, Maryland; the City of Atlanta, Georgia; the City of Bellevue, Washington; Bloomfield Township, Michigan; the City of Brookhaven, Georgia; the City of Boston, Massachusetts; the City of College Park, Maryland; the City of Dallas, Texas; the City of Dubuque, Iowa; the District of Columbia; the City of Fontana, California; the City of Greenbelt, Maryland; Howard County, Maryland; the City of Kirkland, Washington; the City of Laredo, Texas; Los Angeles County, California; the City of Los Angeles, California; the City of Lincoln, Nebraska; Meridian Township, Michigan; the Michigan Chapter of the National Association of Telecommunications Officers & Advisors; the Michigan Coalition to Protect Public Rights-Of-Way; the Michigan Municipal League; the Michigan Township Association; Montgomery County, Maryland; Mt. Hood Cable Regulatory Commission; the City of Ontario California; the City of Plano, Texas; the City of Portland, Oregon; the Ramsey/Washington Counties Suburban Cable Communications Commission II; the City of Rye, New York; the City of San Jacinto, California; the Sacramento Metropolitan Cable Television Commission; the Village of Scarsdale, New York; the Texas Coalition of Cities For Utility Issues; and the Texas Municipal League urge the Commission to find:

- that franchise requirements that do not involve cash payments do not count against the franchise fee;

⁴ As used in these Comments, the "Cable Act" refers to the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, as amended by the Cable Television Consumer Protection and Competition Act of 1992 and the Telecommunications Act.

- that the Cable Act does give localities full authority to regulate cable systems regardless of the services that may be provided over them, and authority to regulate non-cable services as provided in the Cable Act (and otherwise, as is provided by state law;
- that the Cable Act does not prohibit localities from charging fees for use of the rights of way for the provision of non-cable services, if permitted under State law (that authority would not derive from Title VI); and
- to reaffirm that there are sufficient distinctions between state franchise regimes and traditional Title VI cable franchising that the holdings in this docket do not apply.⁵

Since 1984 – for more than 30 years – the courts, local franchising authorities, cable operators, and this agency have uniformly recognized a clear distinction between franchise requirements that set out the operator’s obligations with respect to its system and services, and franchise fees – the rent paid for use of the rights of way to provide cable services. In 1984, Congress adopted a system of dual regulation, under which localities would be able to ensure that franchise obligations were tailored to meet the needs and interest of the community. As now interpreted by the agency, the carefully balanced design of the Cable Act, which includes a specific renewal provision designed to ensure that a renewal proposal would satisfy the needs and interests of the community, would all boil down to this: Localities can require franchises. They can require franchise fees. They can impose build-out requirements of some sort. If they want anything else, the locality must pay fair market value for it.

⁵ Further Notice of Proposed Rulemaking, *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, FCC 18-131 (rel. Sep. 25, 2018) (“FNPRM”).

Describing the regulatory scheme is enough to suggest that the Commission’s interpretation makes very little sense. If localities were required to pay fair market value to obtain cable-related franchise benefits, it is hard to imagine what purpose is served by the law – presumably, in an open market, operators would be more than happy to provide services and facilities at fair market value. Asking localities to determine whether a proposal is reasonable in light of the “cost thereof” makes little sense if the cost is to be paid out of the pocket of the franchising authority. The Commission essentially readopts its positions that were rejected by the Sixth Circuit without an analysis that supports that result given the text and structure of the Cable Act.⁶

The Commission seeks comments on three issues. It tentatively concludes that local governments must offset the cost of any “in-kind” franchise obligation⁷ by a commensurate reduction in a local franchise fee and subject to the statutory five percent cap on franchise fees. This proposal is inconsistent with the history of cable regulation, the overall structure of the Cable Act, and with specific statutory provisions. It is inconsistent with the Commission’s own precedent. It would, in practice, deny many communities basic communications infrastructure that benefits education, public safety, and consumers of all kind. If implemented, local governments around the country would be forced to make difficult decisions about reductions in service (i.e., coverage of governmental meetings, community media, and broadband to schools) or increases in local revenue sources in order to ensure their communities can compete in the 21st century.

⁶ *Montgomery County v. FCC*, 863 F.3d 485 (6th Cir. 2017).

⁷ At the outset, and as explained in more detail, *infra*, it is important to note that franchise obligations are not “in-kind contributions” as the Commission labels them—franchise obligations are regulatory (or contractual) obligations or requirements and will be described as such herein.

Second, the Commission tentatively concludes that local governments may not use Title VI authority to regulate services other than cable services, and appears to suggest that localities may not use independent authority under state law to regulate non-cable services or facilities, or to charge rents for use of the rights of way to provide those services. This effectively denies local governments police power authority and sovereign authority delegated by the State unless the Cable Act grants it—a result already rejected by the Sixth Circuit in *Montgomery County*, and inconsistent with the decision of the Fifth Circuit in *City of Dallas v. FCC*.⁸

Third, the Commission unwisely seeks to expand these already faulty interpretations to states that have taken affirmative steps to promote additional competitors in cable markets. Such an attempt would upend legislative choices that were designed (often by the industry) to expedite new entrants into cable markets, and fails to recognize some important statutory distinctions drawn between cable franchising and video service franchising as implemented in many states.

I. FRANCHISE OBLIGATIONS ARE NOT FRANCHISE FEES

The Commission’s core proposal in the FNPRM is to “treat cable-related, in-kind contributions required by LFAs from cable operators as a condition or requirement of a franchise agreement as ‘franchise fees’ subject to the statutory five percent franchise fee cap set forth in Section 622 of the Act.”⁹ This proposal is inconsistent with the plain language of the statute, as laid out in detail in Sections I.B. In order to best understand the statute it is helpful, first, to understand the context in which it was adopted.

⁸ *City of Dallas, Tex. v. FCC*, 165 F.3d 341, 345 (5th Cir. 1999).

⁹ FNPRM at ¶ 16.

A. Concluding that Cable Franchise Obligations are Franchise Fees Subject to the Cap and Offset Fees Owed is Inconsistent with the History of Cable Regulation.

The proposal is devoid of historical context and, when viewed in the context of the 1984 Cable Act and the 1992 Act which amended it, the flaws in the Commission’s reasoning become starkly apparent. The Commission ignores the historic statutory and common law backdrop of cable regulation at the time the provisions in question were adopted by Congress and further ignores this Commission’s consideration of Section 621 starting in 2006. As such, the Commission’s effort to reinterpret the Cable Act’s terms in recent years with no reference to the understanding of Congress when it adopted the provisions in question in the 1980s and 1990s is a fundamental error in the Commission’s proposals.

1. *The History of Local Franchise Regulation Before the Cable Act*

The provisions of the 1984 Cable Act were adopted with an acknowledgement that local franchising authority existed before the Cable Act was adopted. Local government regulation of cable systems began long before the Commission believed it had the authority to regulate cable television¹⁰ and draws its source independent from federal law.¹¹ Local governments, and later local franchise authorities (“LFAs”), have been managing rights-of-way, charging franchise fees and requiring cable operators to undertake specific actions – such as the setting aside of cable access capacity or PEG channels and the creation of institutional networks, (I-Nets) – as part of receiving permission to use the local property, a cable franchise, since the earliest days of cable television.¹²

¹⁰ *City of Dallas*, 165 F.3d at 345.

¹¹ *City of Dallas*, 165 F.3d at 348 (citing H.R. Rep. No. 98–934, at 19 (1984).)

¹² *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

Prior to the 1970s, the Federal Communication Commission did not believe it had any authority over cable television at all. Once it did assert jurisdiction, it was only because that authority was “reasonably ancillary” to the performance of the Commission’s responsibilities for broadcast television.¹³ Even so, as the Commission began to address cable services, it developed a system of “deliberately structured dualism,” which protected local and state interests in cable subject to certain federal constraints.¹⁴ “Within this binary regulatory regime, ‘state or local government issued franchises while the Commission exercised exclusive authority over all operational aspects of cable communication....’”¹⁵ The Commission recognized as fundamental the dual jurisdiction between state and federal authorities and the necessity of local government involvement in both meeting community needs and also managing the rights of way.¹⁶ And while the Commission adopted certain franchise standards, it did not control state or local property. It regulated the operator. A cable operator with a local franchise had to apply to the Commission for a certificate to carry broadcast signals, and the Commission would only issue the certificate if the operator’s franchise complied with Commission standards.¹⁷

Most relevant to this docket, when the Commission first began to extensively regulate cable television it *simultaneously* imposed obligations on cable operators to provide PEG

¹³ *United States v. SW. Cable Co.*, 392 U.S. 157, 162-67 (1968).

¹⁴ *Capital Cities v. Crisp*, 467 U.S. 691, 702 (1984); *City of Dallas*, 165 F.3d at 352; *Implementation of Section 302 of the Communications Act, Open Video Systems*, Third Report and Order, 11 FCC Rcd 20227 (1996); *see also Alliance for Community Media v. FCC*, 529 F.3d 763, 767 (6th Cir. 2008) (quoting *Cable Television Report and Order*, 36 F.C.C. 2d 143, on reconsideration, 36 F.C.C. 2d 326 (1972), *aff’d sub. nom. American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975)).

¹⁵ *Alliance*, 529 F.3d at 767 (quoting *National Cable Television Ass’n v. FCC*, 33 F.3d 66, 68-69 (D.C. Cir. 1994)).

¹⁶ *In the Matter of Amendment of Part 74*, 36 F.C.C. 2d 141 at ¶¶ 177-185 (1972) (“Cable Television R&O”).

¹⁷ *Cable Television R&O*, ¶¶ 178-79.

channels and other similar obligations¹⁸ and also authorized a three to five percent franchise fee¹⁹—never claiming that the provisions of the channels must offset the former. At the same time, it also imposed its own regulatory fee on cable operators.²⁰

By the end of the 1970s, the Commission had eliminated many of its franchise standards²¹ and the Supreme Court in *Midwest Video* ruled that the Commission had no authority to establish PEG channel requirements. Further, the Commission’s regulation of cable had to be ancillary to its authority over common carriers and broadcaster.²²

From that time until 1984, the substance of franchises was set at the local level, and localities could require PEG channels, but a debate arose as to the appropriate level and treatment of franchise fees, and certain franchise obligations – particularly those that were viewed as unrelated to the cable. That debate was settled by Congress.

2. *The 1984 and 1992 Cable Acts*

In 1984, Congress adopted the Cable Communications Policy Act of 1984,²³ which explicitly affirmed local government’s franchising authority and reserved franchising authority primarily to states and localities.²⁴ The Cable Act “balance[d] two conflicting goals: preserv[ing] the critical role of municipal governments in the franchise process . . . while

¹⁸ *Id.* at ¶¶ 121-24.

¹⁹ *Cable Television R&O* at ¶ 185-86. After further consideration, in the *ARTEC* decision, the Commission authorized localities to charge a 5% franchise fee, but only if 40% of that fee (2% of the operator’s gross) were devoted to cable-related purposes, including the support of PEG channels.

²⁰ *Id.* at ¶ 186.

²¹ H.R. Rep. No. 98-934 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4660.

²² *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

²³ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, § 621 (1984) (“1984 Cable Act”).

²⁴ 47 U.S.C. § 541.

affirming the Commission’s exclusive jurisdiction over cable service, and overall facilities which relate to such service.”²⁵ Congress explained that “city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs.”²⁶

Section 621 of the Cable Act, the key provision in this proceeding, mandates receipt of a local franchise prior to offering cable services and authorizes LFAs to award franchises pursuant to its terms.²⁷ By reserving this task to LFAs, Congress in the 1984 Act effectively “preserve[d] the role of municipalities in cable regulation.”²⁸

The Cable Act provided for shared responsibility for developing some standards. The Commission was directed to develop minimum customer service standards,²⁹ but Congress emphasized that additional requirements could be imposed through the franchise, or the exercise of the police power.³⁰ The Act envisions that operators may and should be subject to a wide range of obligations with which may impose costs, but which ensure the cable system provides the facilities, services and equipment tailored to satisfy cable-related needs and interests. The LFA can establish the parameters of the design of the system, including elements such as the number of channels and capacity, the area to be served³¹ and also impose customer service obligations, build-out requirements, facilities requirements, and requirements that capacity be

²⁵ *Alliance*, 529 F.3d at 768. (quoting *City of New York v. FCC*, 814 F.2d 720, 723 (D.C. Cir. 1987)).

²⁶ H.R. Rep. No. 98-934 (1984), reprinted at 1984 U.S.C.C.A.N. 4655, 4661.

²⁷ 47 U.S.C. § 541.

²⁸ *Alliance*, 529 F.3d at 768 (quoting *City of Dallas v. FCC*, 165 F.3d 341, 345 (5th Cir. 1999)).

²⁹ 47 U.S.C. § 552(b).

³⁰ 47 U.S.C. § 552(d)(2).

³¹ 47 U.S.C. § 541(a)(3-4).

provided and dedicated to public, educational and government use. Those requirements and other cable-related requirements are all consistent with the Cable Act.³²

Congress broadly authorized local governments to establish requirements for cable facilities to satisfy local needs and interests, including designating capacity on cable systems for institutional networks (“I-Nets”) and PEG channels, as part of the basic obligations associated with entry into the business.³³ The Act did not require any payments by localities to cable operators in return for these obligations, and gave no indication that it intended to treat franchise requirements as a form of “in-kind compensation,” as the Commission assumes. In fact, the legislative history shows that the franchise fee provision “defines as a franchise fee *only monetary payments . . . and does not include . . . any franchise requirements* for the provision of services, facilities or equipment.”³⁴ All that is required is that, for franchises granted after the effective date of the Act, the requirements in the franchise should be “related to the establishment or operation of a cable system.”³⁵

In 1992 Congress amended Section 621 to promote LFA grants of “1 or more franchises within its jurisdiction” and prohibit LFAs from “unreasonably refus[ing] to award an additional

³² See, e.g., 47 U.S.C. § 544(b) (requirements for facilities); 47 U.S.C. § 531(a)-(b) (requirements for capacity for public, educational and government use); 47 U.S.C. § 552 (customer service and build-out requirements); 47 U.S.C. § 541(a)(3) (mandating that franchise must prevent redlining); 47 U.S.C. § 556 (preserving local authority to impose additional requirements consistent with the Cable Act).

³³ 47 U.S.C. §§ 521(2), 531(b) and (f), 546(a)(1), (c)(1)(d). These obligations are no different conceptually than the common carrier obligations imposed under Title II, see, e.g., 47 U.S.C. § 201.

³⁴ H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 65 (1984) (emphasis added) 1984 U.S.C.C.A.N. at 4655, 4702.

³⁵ 47 U.S.C. § 544(b). By contrast, localities were specifically permitted to enforce any provision in any franchise in effect on the effective date of the Act, whether or not related to the “establishment or operation of a cable system.”

competitive franchise.”³⁶ The goals of the 1992 Act were to facilitate competition among multiple competitors. The 1992 Act did not change the existing structure of the Cable Act or the division of authority.³⁷

The Commission did not find a need to interpret Section 621 for another 14 years. Instead during that time the Commission, at the direction of Congress, set up systems where the cost of franchise requirements could be itemized on the cable bill, along with the franchise fee³⁸ and developed customer service standards.³⁹ Congress also continued to recognize LFA authority over I-Nets and PEG capacity. In 1996, when Congress amended the Cable Act to limit local authority to require cable operators to provide telecommunications services (that is, Title II common carrier services) it recognized again that the restriction did not apply to I-Nets, or requirements related to public, educational and government use of the cable system.⁴⁰ The Commission’s own actions, until 2007, never hinted that LFAs must pay for all franchise obligations regardless of whether or not they are authorized by statute.

³⁶ See *Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, 102nd Cong., 1st Sess. (1991) (1992), 1992 U.S.C.C.A.N. 1133 (“1992 Cable Act”).

³⁷ S. Rep. No. 102-92, at 47 (1991) (“Based on the evidence in the record taken as a whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be encouraged to award second franchises. Accordingly, [the 1992 Cable Act] as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises.”).

³⁸ *In the Matter of Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631, 5964-68 (1993) (interpreting 47 U.S.C. § 542(c)).

³⁹ *In the Matter of Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992, Consumer Protection and Customer Service*, MM Docket No. 92-263, Report and Order, 8 FCC Rcd. 2892 (1993).

⁴⁰ 47 U.S.C. § 541(b)(3).

As laid out in more detail below, this history further explains and reinforces that the statutory language prohibits the proposals set forth in the FNPRM.

3. *The Commission's Interpretation of Section 621 Fundamentally Alters the Cable Act.*

The Commission's Proposal assumes that operators are entitled to franchises subject only to the condition that they bear the financial obligations of building-out their network – and that all other costs must be paid for by the community out of franchise fees. Such an interpretation is not sustainable. If the Commission's view were correct, it is hard to see why the Act, as adopted in 1984, or amended in 1992 and again in 1996, exists at all. If the law is, “you can only have what you pay for,” there is very little reason for a law at all. Moreover, some of the Cable Act's rules would make no sense. For example, why would Congress have preserved a locality's authority to enforce requirements for the provision of “broad categories of video programming” or “other services”⁴¹ in a franchise (conditions designed to ensure that an adequate level for service is provided to subscribers), if the locality had to pay to do so. Or, why would Congress, in the context of a renewal, say that an operator's proposal must be “reasonable to meet cable-related needs and interest in light of the cost of meeting the needs and interests,”⁴² but then suggest that virtually all the costs associated with meeting those needs and interests are to be paid for by the locality out of franchise fees. Congress could have easily written that the parties are free to negotiate a price for such services, or simply remained silent on the topic. Finally, why would Congress have provided for itemization of costs on the cable bill, if Congress intended that the costs be deducted from the franchise fee? The overall structure of the Act makes very little sense if every requirement save two (build-out and PEG capital) are to be paid

⁴¹ 47 U.S.C. § 544(b)(2)(B).

⁴² 47 U.S.C. § 546(c)(1)(D).

for by the locality out of franchise fees. Franchise requirements are regulatory conditions Congress thought it was appropriate to preserve for local governments to require in cable franchises.

The Act has been in place for over 30 years and not one court, Commission or state agency has interpreted the Act the way the Commission does now. There is not one word in the legislative history that says what would have been the most obvious thing to say: “all the requirements of the franchise will count against the franchise fee.” The 1992 Act, which added the language under consideration today did not say it. In fact, the legislative history of the Cable Act explicitly states the reverse. The fact is that what the Commission is proposing is so dramatically different than what has ever existed, that one would have expected Congress to mention it. This is truly an elephant in a mousehole.⁴³

4. *This Docket’s Original Premise Has Been Abandoned.*

In 2005-06, several large incumbent telecommunications companies began seeking cable franchises around the country either in the form of state legislation or local negotiations. They also asked the Commission to consider whether it should interpret or further implement Section 621 of the Cable Act as a means to promote new entrants into the cable marketplace. as they complained that the Congressionally-sanctioned local franchising process was limiting their ability to compete in the provision of cable and video programming. The Commission concluded it would offer more specificity to LFAs with respect to what it mean to “unreasonably refuse” to grant a franchise. In the First Order, the Commission overrode strong objections by LFAs and took at face value vague and unsubstantiated industry claims that local governments

⁴³ “Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. American Trucking*, 531 U.S. 457, 468 (2001).

were unreasonably withholding franchise authorizations. Regardless of the validity of the record of that proceeding, the goal was clear: ensure that new entrants into the provision of cable programming were able to begin offering service at maximum speed and with regulatory obligations commensurate with their business plans.

The reevaluation of Section 621 was not premised on a finding by the Commission that LFAs were inappropriately imposing obligations that exceeded the 5 percent franchise fee cap. At no time in these dockets did the Commission make a finding that the 5 percent *franchise fee* cap should apply to the entirety of LFA authority under the Cable Act. In the original rulemaking, the Commission fully acknowledged the role of LFAs, and the rightful obligations imposed pursuant to franchise authority.

Once the Commission had made decisions about what it meant to unreasonably withhold a franchise in the *First Order*, it returned in the *Second Order* to consider what those provisions meant with regard to incumbent cable operators that had been negotiating and operating pursuant to cable franchises for many years. The decision applying the *First Order's* decisions to incumbent operators was not taken with sufficient care or attention to the differences between new entrants and incumbents or the differences in the statutory language that applies to each. For this reason, the Sixth Circuit overturned much of the *Second Order* and the Commission was forced to concede several other points during the course of the litigation.⁴⁴

The Commission in this proceeding is taking several provisions of the Cable Act and reinterpreting them in a manner wholly inconsistent with their plain meaning and with the

⁴⁴ For example, the Commission, after insisting that LFAs could not regulate any non-cable services at all, ultimately conceded in the Sixth Circuit that LFAs were entitled to require I-Nets as part of franchise obligations. See Brief of the Federal Communications Commission, *Montgomery County v. FCC*, Sixth Circuit Case No. 08-3023 at 31. In this new FNPRM, the Commission now insists that LFAs must pay for the I-Nets.

Commission’s own interpretations over the years. The Commission has thus applied the nomenclature “in-kind” to regulatory obligations as a way to justify treating them as franchise fees when neither the statute nor Commission precedent – including its prior orders in this docket – support such a conclusion. The Commission has erroneously backed itself into a new interpretation of the Cable Act which is not justified by facts, law, or any policy considerations, and is wholly inconsistent with decades of Commission interpretation of the Cable Act.

B. Treating Cable Franchise Obligations As Franchise Fees Violates the Statute’s Plain Terms.

The Commission proposes in the FNPRM that it should “treat cable-related in-kind contributions required by LFAs of cable operators as a condition or requirement of a franchise agreement as ‘franchise fees’ subject to the statutory five percent cap.”⁴⁵ The Commission further states that, because the definition of franchise fee “covers ‘any kind’ of tax, fee or assessment” without distinguishing whether that assessment is related to the provision of cable service, cable-related franchise obligations should be subject to the cap.⁴⁶ However, the Cable Act, by its terms and structure, treats all cable-related requirements as part of the franchise and therefore clearly within the authority of the LFA to require and enforce.⁴⁷

1. *Section 621 and 622 Plainly Authorize the Imposition of Franchise Requirements and Collection of Franchise Fees*

A look at the plain language and structure of the Act demonstrates that LFAs are authorized to impose and enforce franchise requirements *and* collect franchise fees. To begin, Section 622(i) states, “Any Federal agency may not regulate the amount of the franchise fees

⁴⁵ FNPRM at ¶ 16.

⁴⁶ *Id.* at ¶ 17.

⁴⁷ 47 U.S.C. § 531(c); 47 U.S.C. § 544(b). By contrast, localities are prohibited from enforcing requirements unrelated to cable systems in Title VI cable franchises issued for the first time after 1984. 47 U.S.C. § 544(c).

paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section.”⁴⁸ Thus, the Commission’s authority is specifically circumscribed by the Act. Even more clear: Section 621 authorizes LFAs to award franchises.⁴⁹ The next section, 622, authorizes LFAs to collect franchise fees. Section 622 operates alongside the other provisions in the Act which also permit LFAs to require franchises and to impose particular conditions as part of those franchises. By adopting both provisions at the same time, Congress authorized LFAs to take both actions.

The language of Section 622 reinforces this meaning. The first words of Section 622, the franchise fee provision, are: “subject to subsection (b)” referring to the five percent cap on franchise fees.⁵⁰ But Section 622 is not subject to any other part of the Act. By putting both provisions alongside each other in the law, Congress authorized LFAs to engage in both activities. Section 621 makes a number of references to other provisions of the Cable Act but nowhere does it subject the authority of Section 621 to the provisions of Section 622.⁵¹

The Commission bases its entire proposal on its conclusion that there is “no basis in the statute or legislative history for distinguishing between in-kind contributions unrelated to the provision of cable services and cable-related, in-kind contributions....”⁵² The basis for distinguishing cable services and all other obligations is the limits of the Cable Act itself. The Cable Act addresses and authorizes LFAs to require franchises *for the construction of cable*

⁴⁸ 47 U.S.C. § 542(i).

⁴⁹ 47 U.S.C. § 542(i).

⁵⁰ 47 U.S.C. § 542(a).

⁵¹ *See, e.g.*, 47 U.S.C. § 541(b)(3)(D) (“Except as otherwise permitted by sections 531 and 532...”)

⁵² FNPRM at ¶ 17.

systems and collect franchise fees under the terms of the franchise authorizing *cable service*.⁵³

To the extent it addresses obligations, it explicitly distinguishes between those that are related to the cable system, and those which are not, at least for franchises issued after the effective date of the Cable Act.⁵⁴ Thus, the Commission commits a fundamental error in not acknowledging the subject of and authorization in the Cable Act to authorize LFAs to both impose cable franchise obligations *and* collect franchise fees –they do not offset each other.

2. *Section 611 Authorizes Recovery of Capital Costs for PEG and I-Nets Above the Franchise Fee.*

Section 621 authorizes LFAs to “require as part of a cable operator’s proposal for a franchise renewal, ... that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use...”⁵⁵ Further, the Act defines “public, educational, or governmental access facilities” as “channel capacity designated for public, educational, or governmental use; and facilities and equipment for the use of such channel capacity.”⁵⁶ I-Nets are designated capacity authorized by the same provision that authorizes PEG. Thus, the same rules that apply to PEG apply to I-Nets.

With respect to franchise fees, this means the same gross revenues exception that applies to PEG also applies to I-Nets. For franchises adopted after the 1984 Cable Act, Section 622(g)

⁵³ 47 U.S.C. §§ 541(a) and 542(a), (b).

⁵⁴ As we explain in more detail below, the Commission is committing a basic plain language interpretive error. To be a franchise fee, something must be a “tax, fee or assessment,” and the dictionary meaning of those terms *generally* reaches only cash payments. The Commission jumps from the conclusion that there may be *exceptions* to the general rule, to the conclusion that *all but a few* franchise requirements are the equivalent of cash payments. That jump is unsupported.

⁵⁵ 47 U.S.C. § 531(b).

⁵⁶ 47 U.S.C. § 522(16).

excludes from franchise fees “capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities...”⁵⁷ The Commission’s proposal to require LFAs to pay for I-Nets and PEG channels cannot be squared with the statute.

3. *The Commission’s Cannot Justify Its Proposal as an Exception to the Franchise Fee Definition.*

The Commission attempts to analyze the exceptions to the franchise fee definition to support its analysis. However, in order to correctly understand the statute, it is important to understand the structure of the definition of franchise fees. The statute authorizes the collection of franchise fees and places a 5 percent cap on those fees. Then the statute defines franchise fees but *excludes* from the capped fees a variety of other types of fees in Section 622(g)(2)(A)-(D).⁵⁸

The subsections in 622(g)(2) are designed to *permit* collection of additional fees that otherwise

⁵⁷ 47 U.S.C. § 542(g).

⁵⁸ The provision is as follows:

(g) “Franchise fee” defined For the purposes of this section—

(1) the term “franchise fee” includes 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;

(2) the term “franchise fee” does not include—

(A) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers);

(B) in the case of any franchise in effect on October 30, 1984, payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, public, educational, or governmental access facilities;

(C) in the case of any franchise granted after October 30, 1984, capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities;

(D) requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

(E) any fee imposed under title 17.

might be misinterpreted to fall within the cap. The exceptions to the definition of franchise fee are expansions of LFA authority, and do not narrow the definition of franchise fees.

Despite this, the Commission attempts to review the various exceptions to the franchise fee definition in an attempt to show that cable-related obligations are not exempted from the definition. This analysis fails to recognize that franchise obligations were not exempted from the fee, as described above, *because they were never intended to be included by Congress in the first place*. The Commission goes through the exemptions in subsections (A), (B), (C) and (E) and concludes they do not apply.⁵⁹

The Commission then continues its erroneous analysis in its examination of the ‘incidental’ exception in (g)(2)(D) which was rejected by the Sixth Circuit to justify its conclusion. Specifically, the Commission—with no analysis at all—states that if ‘in-kind’ payments *unrelated* to the provision of cable service then cable-related franchise obligations must also be subject to the cap.⁶⁰ But that is the very same analysis directly rejected in *Montgomery County*.⁶¹ The Sixth Circuit stated: “the First Order rather pointedly concluded that exactions ‘*unrelated to the provision of cable services*’ are franchise fees, which yields a plain negative inference that, so far as the First Order was concerned, exactions that *are* related to the provision of cable services are *not* franchise fees. ... The FCC’s current (as opposed to prior) interpretation of the First Order on this point is therefore plainly erroneous.”⁶² And in fact, as the Commission acknowledges, it previously assured the Sixth Circuit in its review of the *First*

⁵⁹ FNPRM at ¶¶ 18-20.

⁶⁰ FNPRM at ¶ 18.

⁶¹ FNPRM at n. 56.

⁶² *Montgomery County*, 863 F.3d at 490 (citations omitted).

Order that the *First Order's* “analysis of in-kind payments was expressly limited to payments that do not involve the provision of cable service.”⁶³

The Commission’s analysis is no more sufficient now than during its first attempt. The Commission may not simply reiterate the same analysis in the *First Order* which was rejected as insufficient in *Montgomery County*. It is a fundamental obligation under the Administrative Procedures Act that the Commission must cite to changed facts or circumstances to revise its position.⁶⁴

The Commission’s analysis is also arbitrary and capricious because it does not follow logic. Because something that falls outside an exception to a franchise fee does not mean that something *is* a franchise fee. In order for something to be a franchise fee it must meet that definition in the first place. The Commission’s implicit conclusion that, unless something falls within an exception, it must be a tax, fee, or assessment is not supported by either the plain language of the law, or by any reasoned explanation. The Commission’s approach turns the law on its head, making every franchise requirement a franchise fee unless it falls within the “incidental” requirement (and making the requirement that something be a tax, fee or assessment in the first place superfluous). The re-write, particularly with respect to free services or connections for schools, and discounted cable services (such as special rates for low-income or senior citizens) alters more than 30 years of franchising history, as explained above.⁶⁵

4. *Franchise Requirements are Not the Same as a “Tax, Fee or Assessment”*

Nor has the Commission made its case that franchise obligations meet the definition of a franchise fee in the first place. The Commission cites the franchise fee definitional language

⁶³ *Id.*

⁶⁴ *Motor Veh. Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29 (1983).

⁶⁵ *See supra* Part I.A.

describing a 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.”⁶⁶ But as the court in *Montgomery County* found “[t]hat the term ‘franchise fee’ *can* include noncash exactions, of course, does not mean that it necessarily *does* include every one of them.”⁶⁷

The Commission offers no positive explanation of why the term franchise fee does include franchise obligations. Under Section 622(g), a franchise fee must be a “tax, fee or assessment.” Regulatory obligations are clearly not a tax or fee. And the term “assessment” ordinarily refers either to the “determination of the rate or amount of something” or to “the imposition of something, such as a tax or fine, according to the established rate.”⁶⁸ The 1984 Act’s legislative history also distinguishes fees from franchise obligations. The 1984 House Report states that Section 542, the Act’s franchise fee provision, “defines as a franchise fee *only monetary payments . . . and does not include . . . any franchise requirements* for the provision of services, facilities or equipment.”⁶⁹ Under the Cable Act’s regime, so-called ‘in-kind’ cable-related requirements are obligations of the franchise itself; by contrast, the franchise fee is “essentially a form of rent: the price paid to rent use of public right-of-ways.”⁷⁰ Franchise fees

⁶⁶ 47 U.S.C. 542(g)(1) cited at FNPRM at ¶ 17.

⁶⁷ *Montgomery County*, 863 F.3d at 491 (emphasis added).

⁶⁸ Black’s Law Dictionary 125 (9th ed. 2009).

⁶⁹ H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 65 (1984) (emphasis added) 1984 U.S.C.C.A.N. at 4655, 4702.

⁷⁰ *City of Dallas*, 118 F.3d 393 at 397.

are regularly recognized in federal and state courts as rent for the privilege of using city property and not as taxes or other types of charges.⁷¹

Beyond this, the only analysis proffered by the Commission justifying its conclusion that cable-related franchise obligations should be subject to the franchise fee cap is that “if cable-related, in-kind contributions are not counted as franchise fees, LFAs, could circumvent the five percent cap by requiring, for example, unlimited free or discounted cable services and facilities for LFAs, in addition to the five percent franchise fee.”⁷²

The law says LFAs must not unreasonably refuse to grant a franchise, and on renewal, an operator can show that its proposal is “reasonable in light of the costs thereof.” A locality thus cannot impose “unlimited” obligations through the initial franchising or renewal procedures.⁷³

C. The Commission’s Proposal is Inconsistent with Commission Precedent and Could Force Subscribers to Pay Twice for the Same Assets.

The treatment of franchise requirements is inconsistent with the statute and with the Commission’s orders implementing the statute. For decades the Commission has clearly treated franchise fees separately from franchise obligations. Moreover, for decades cable operators (pursuant to these decisions) have passed on to cable subscribers the costs of franchise fees and franchise requirements. Subscribers have therefore already reimbursed cable operators for

⁷¹ See, e.g., *City of St. Louis v. W. Union Tel. Co.*, 148 U.S. 92(1893)(fee paid to a municipality for the use of rights-of-way is rent, not a tax); *United States v. City of Huntington*, 999 F.2d 71 (4th Cir.1993)(“user fees” are payments given in return for government-provided benefits, while taxes are enforced contributions to support the government); *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d 785, 789 (E.D. Mich. 1998), aff’d, 206 F.3d 618 (6th Cir. 2000) (“there is nothing inappropriate with the city charging compensation, or ‘rent’, for the City owned property that the Plaintiff seeks to appropriate for its private use.”); *Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1192 (Colo. App. 2005) (Municipalities routinely charge a franchise fee for the right to operate a cable television system within their jurisdiction.).

⁷² FNPRM at ¶ 17.

⁷³ 47 U.S.C. § 546.

significant portions of the costs of complying with franchise obligations and franchise fees. To now require one to offset the other would result in double dipping by the cable operator at the expense of cable customers. Not only are the Commission's proposals inconsistent with the Cable Act, they are inconsistent with the Commission's own rulings. The FNPRM does not recognize or distinguish these prior rulings.

1. *The Commission Has Consistently Distinguished Franchise Obligations and Franchise Fees.*

With the exception of a stray, unsupported sentence in the *First Order*--which was found insufficient by the Sixth Circuit--the Commission has, until the *Reconsideration Order* adopted in 2015, been clear that LFAs retain important rights under the Cable Act which would be eliminated if the instant proposals are adopted. Until 2007, the Commission has consistently recognized that cable-related requirements in a franchise generally are not "taxes, fees or assessments" within the meaning of Section 622. For example, when the Commission implemented the rate regulation provisions of the Cable Act, it also explicitly recognized that the statute distinguished between franchise fees and franchise requirements. As part of the implementation of the rate regulation standard, the Commission adopted per channel rates for the basic and cable programming services tier, and then permitted operators, as part of the calculation of the maximum permitted rate, to recover costs of franchise fees and franchise requirements:

Taxes, Franchise Fees, Costs of other Franchise Requirements. The Cable Act of 1992 requires that in setting basic service rates, we take into account the reasonably and properly allocable portion of: (1) taxes and fees imposed by any state or local authority on transactions between cable operators and subscribers; (2) assessments of general applicability imposed by a governmental entity applied against cable operators or cable subscribers; (3) the cost of satisfying franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and (4) the costs of any public, educational, and governmental access programming required

by the franchising authority. We meet this statutory directive through the GNP-PI adjustment described earlier and by providing that certain costs unique to cable operations may be treated as costs external to the cap. In particular, we conclude that we should exclude from the cap taxes imposed on the provision of cable television service, *franchise fees, and the costs of satisfying franchise requirements, including the costs of satisfying franchise requirements for local, public, educational, and governmental access channels.* These costs are largely beyond the control of the cable operator, *and should be passed on to subscribers without a cost-of-service showing.* Our accounting and cost allocation rules adopted herein require that costs associated with PEG channels carried on the basic tier be directly assigned to the basic tier where possible; remaining costs of taxes and costs of satisfying franchise requirements will be allocated between or among tiers in proportion to the number of channels on each tier.⁷⁴

While the discussion quoted above refers to PEG channels, the cable industry more broadly insisted that it be permitted to recover the costs associated with *any franchise requirement*, including specifically institutional network requirements. That is precisely what the Commission did.⁷⁵ The Commission's contemporaneous interpretation of the Act bolsters the import of the Act's plain language: there would have been no reason for Congress to distinguish between franchise fees and franchise requirements if franchise requirements were generally deductible from the franchise fees. Further, there would be no reason for the Commission to allow a pass-through of those costs to consumers if those costs were in fact deductible from the franchise fee.

The Commission came to the same conclusion distinguishing franchise requirements and franchise fees in 1999. The Commission's *City of Bowie, Maryland*, decision⁷⁶ specifically finds (relying upon and quoting the Cable Act's legislative history) that the franchise fee provisions of the Cable Act generally "defines as a franchise fee only monetary payments made by the cable

⁷⁴ *In the Matter of Implementation of Section of the Cable Television Consumer Prot. & Competition Act of 1992 Rate Regulation*, 8 F.C.C. Rcd. 5631 (1993) (emphasis supplied).

⁷⁵ *Id.* at 5828-29.

⁷⁶ *City of Bowie*, 14 FCC Rcd 9596 (Cable Services Bureau, 1999).

operator, and does not include as a ‘fee’ any franchise requirements for the provision of services, facilities or equipment.”⁷⁷

The Commission was also clear in the *First Order* that other franchise requirements were not subject to the franchise fee cap. The Commission found “that any requests made by LFAs ... *unrelated* to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap.”⁷⁸ The Commission also cited and reiterated its support for *Bowie* in the *First Order* and the *Second Order* in this docket.⁷⁹ And the Commission clearly stated such to the Sixth Circuit, acknowledged in *Montgomery County*, that in the *First Order*, the Commission did *not* intend to apply its finding with regard to cable-related franchise obligations.⁸⁰ Despite these repeated statements and rebuke by the Sixth Circuit, the Commission repeats the same error which put it at odds with the Sixth Circuit in *Montgomery County*.

2. *The Commission Proposal Would Force Cable Subscribers to Pay Twice for the Same Assets.*

As described above and laid out in more detail below, when cable operators pass through the costs they incur by paying franchise fees, or pass through the costs of complying with franchise obligations, they recoup those costs from cable subscribers.⁸¹ The Commission’s proposals would permit a cable operator which negotiated, pursuant to Section 546, a franchise

⁷⁷ The *Bowie* decision also notes that voluntary payments made by a cable operator would not be counted against the cap, a point which was affirmed by the *First Order*, ¶109 (addressing only “the proper treatment of LFA-*mandated* contributions in support of PEG services and equipment”).

⁷⁸ *First Order*, ¶ 105 (emphasis added).

⁷⁹ *First Order*, ¶ 109; *Second Order*, n.30.

⁸⁰ See FNPRM at n. 56 (citing *Montgomery County*).

⁸¹ The cost of the channel itself was captured through the basic service rate under the per channel approach.

which includes I-Nets, and collected the costs in rates and to now turn around and deduct the cost from the franchise fee, essentially double-dipping. A locality that loses fees would have little alternative but to cut services or increase assessments on the residents, many of whom are already cable subscribers. Nothing about such a scenario would make sense.

3. *The Commission Specifically Recognized the Right of LFAs to Require I-Nets without Offsetting Franchise Fees in this Docket.*

In the *First Order*, the Commission recognized the right of LFAs to require I-Nets and did not subject those I-Nets to the franchise fee cap. The thorough consideration of how to address I-Nets in a competitive cable franchise belies any claim that the Commission interpreted the Act as authorizing a franchise fee offset for those I-Nets. In interpreting Section 621, the Commission placed a reasonableness constraint around the local rights to “require adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support,” including I-Nets.⁸² The Commission addressed in some detail what would be considered an “unreasonable” I-Net request. For example, it prohibited construction of duplicate I-Nets or payments in lieu of I-Nets that would never be built, but also recognized that adding functionality to an I-Net would be reasonable, and encouraged LFAs to “consider whether a competitive franchisee can provide such additional functionality by providing financial support or actual equipment to supplement existing I-Net facilities, rather than by constructing new I-Net facilities.”⁸³ Thus the *First Order* specifically contemplated that entrants would be subject to I-Net requirements and did not question the right to establish I-Nets. At no point in the *First Order* did the Commission state that LFAs must pay

⁸² *First Order*, ¶ 110 (quoting 47 U.S.C. § 541(a)(4)(B)).

⁸³ *First Order*, ¶ 119.

for I-Nets out of franchise fee proceeds, and it is odd to *limit* what the locality may do if the Commission believed that the cost will be paid by the community, regardless.

4. *The Commission Has Recognized Other Franchise Requirements Without Offsets.*

Beyond the authority to collect a franchise fee, the Commission has also previously recognized the right of LFAs to require free or discounted cable services. Many localities, for example, include provisions within franchises requiring that cable operators offer a senior citizen discount. The Commission has specifically affirmed local authority to include such requirements in a franchise, finding that:

Congress clearly intended to encourage cable operators to offer, and to continue to offer through franchise agreements, reasonable discounts to senior citizens or other economically disadvantaged groups. Thus, we conclude that the disputed senior rate does not conflict with federal law, but is consistent with the purpose and operation of the 1992 Cable Act.⁸⁴

The notion proffered in the current FNPRM that Congress intended for the local governments to pay for those discounts is not supported anywhere in the history or law. Likewise, the Commission, instead of requiring cable operators to refund overcharges to subscribers, has itself required operators to provide free connections and services to schools and other public buildings, and affirmed that additional discounted or free service requirements may be imposed through the local franchising process.⁸⁵ In justifying the decision to provide for the connections (rather than require operators to refund money to subscribers), the Commission concluded that the contracts were consistent with the Cable Act's "policy goals to ensure that cable operators continue to

⁸⁴ *In re City of Antioch, CA*, CSR-5239-R (1999).

⁸⁵ *Social Contract for Time Warner*, 11 FCC Rcd 2788, 2792, 2820 (1995) (Time Warner agrees *inter alia*, to offer free cable connection to public schools and affirms additional obligations may be negotiated in cable franchises).

expand the capacity and programs offered over their systems, where economically viable.”⁸⁶

Discounted service requirements, in other words, have always been considered cable-related franchise requirements imposed consistent with the Congressional goals for the Cable Act—not rents for use of the rights-of-way, which is how the Commission now proposes to treat them.

D. The Commission’s Proposal to Distinguish Regulation that Might Result in Profit to the Cable Operator is Not Reasonable or Practical.

In response to LFAs' contention that the proposed interpretation would require LFAs to bear the cost of all franchise obligations, the Commission creates a new, completely novel, distinction in order to exclude some cable-related franchise obligations from the cap. Specifically, the Commission concludes “because build-out obligations (unlike I-Net facilities) 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 ... are part of the provision of cable service in the franchise areas and the facilities ultimately may result in profit to the cable operator” they should not be considered contributions to the LFA subject to the cap.⁸⁷ This distinction not only demonstrates the flaws in the Commission’s proposed rule but also is impractical and could not be easily applied.

In its analysis, the Commission essentially admits that its proposed interpretation would require LFAs to pay for build-out obligations and then attempts to rescue itself from this plainly erroneous result by inventing a distinction with no basis in law or fact. The Commission is incorrect as a factual matter that all build-out obligations might result in profits to the cable operator. In fact, quite often, if a cable operator faced sufficient economic incentives to build out

⁸⁶ *Id.* at 2790. See also, *Continental Cablevision, Inc., Amended Social Contract*, 11 FCC Rcd 11118 (1996); *Social Contract for Comcast Cable Communications, Inc.*, 13 FCC Rcd 3612, 3613 (1997).

⁸⁷ FNPRM at ¶ 21.

to a particular neighborhood, no LFA build out requirement would be needed. In such a case, the cable operator has determined that whatever revenue it might receive from serving a particular area is not sufficient to justify build-out. Further, as explained above, LFAs often impose obligations such as senior citizen discounts or minimum customer service obligations on cable operators that *may still* result in profit to the cable operator (there is nothing about a discount that suggests it is being provided below cost or at *no* profit) but also do not directly serve county personnel or buildings.

Similarly, previous Commission decisions are inconsistent with the Commission's proposal. The Commission has acknowledged that PEG channels benefit a community as a whole and served important public policy objectives such as increasing access to a wide diversity of viewpoints. In its implementation of the 1992 Cable Act, the Commission explicitly acknowledged (referring to the legislative history) that Congress had found PEG channels of value to the community as a whole, and intended to ensure that those channels be widely available:

...The House Report then discusses at some length the importance of providing all cable subscribers access to PEG channels.

160. We decline to adopt the interpretation urged by Nashoba and Falcon, which would allow a cable operator to carry PEG channels on a non-basic tier unless the franchising authority required carriage on the basic tier...Given this clear congressional direction and the evidence of the importance attached to PEG channels, we require a cable operator to carry PEG channels on the basic tier unless the franchising agreement explicitly permits carriage on another tier.⁸⁸

In fact, recent needs assessments of local communities demonstrate the high value cable subscribers place on PEG channels. As demonstrated in the attached declaration, in surveys of 16 communities, an average of over 80 percent of cable subscribers believe that it is important or

⁸⁸ *In the Matter of Implementation of Section of the Cable Television Consumer Prot. & Competition Act of 1992 Rate Regulation*, 8 F.C.C. Rcd. 5631 (1993).

very important that cable systems feature local channels, such as PEG, which “feature programs about local residents, organizations, schools, government, events and issues.”⁸⁹

The Proposal further fails to recognize that not all franchise obligations inure to the benefit of the LFA or the public. Sometimes the beneficiary of a franchise obligation is the cable operator. For example, in Bellevue, Washington, Comcast is the beneficiary of an indefeasible right to use a conduit lease crossing the local interstate and accessing City Hall, as well as access to numerous handholes and junction boxes within the City. The failure of the FNPRM to understand that franchise obligations inure to the benefit of the cable operator reflects the Commission’s lack of understanding of how cable franchises have evolved over the years to meet the needs of all parties.

For example, the California state franchise statute requires state franchise holders to comply with consumer service standard.⁹⁰ Local entities are provided the authority to enforce all of the customer service and protection standards contains in the section.⁹¹ Pursuant to these sections, Los Angeles County collects and process complaints received from local residents within the unincorporated Los Angeles County against state franchise holders. These services provided to the consumers of Los Angeles County can in no way be described as benefits to the LFA itself and the costs of meeting them should not be deducted from a franchise fee. But neither do they fit the Commission’s proposed distinction that the obligations (like build-out obligations) could result in profit to the cable operator. Anne Arundel County and Bellevue

⁸⁹ Exhibit A, Declaration of Sue Buske, (describing 16 community surveys).

⁹⁰ Cal. Gov. Code §§ 53055, 53055.1, 53055.2 (cable television operators must establish and comply with customer service standards) and §53088.2 (requires video providers to render reasonably efficient service, make prompt repairs and interrupt service only as necessary). See DIVCA, Cal. Pub. Util. Code § 5900, et. seq.

⁹¹ See DIVCA. Cal. Gov. Code§5900(c).

Washington also imposes customer service obligations. Similarly in Dubuque, Iowa, state law requires customer service standards consistent with those contained in 47 C.F.R. 76.309.⁹² The state does not address consumer complaints –instead issues not resolved through an undefined “informal process” can be addressed if the municipality requests a confidential nonbinding mediation, the costs of which are shared between the municipality and cable operator.⁹³

E. Federally Recognized LFA Authority and Decades of Negotiations Would be Negated by the Commission’s Proposal.

The consequences of the Commission’s “in-kind” ruling with respect to cable-related discounted fees and services is significant. The Commission claims “[t]he fact that the Act authorizes LFAs to impose such obligations does not, however, mean that the value of these obligations should be excluded from the five percent cap....”⁹⁴ The practical impact of the Commission’s proposed interpretation, would, in fact, to require localities to either eliminate requirements from the franchise that Congress thought *should* be imposed in accordance with community need, or to eliminate or dramatically reduce franchise fee revenue. Thus, to adopt this rule would be to *de facto* eliminate significant provisions of the Cable Act. The Commission also asked for information on the value of PEG channels and other franchise requirements. Without conceding the question is relevant – there is no statutory basis for treating the requirements as “taxes” much less determining the amount of the tax based on “value,” to the limited extent that relevant information is available, we offer the following observations.

First, “free services” typically involve construction of a connection to a facility, and the provision of equipment that is necessary to receive a signal. It is not unusual for franchises to

⁹² Iowa Code §§ 477A.8.1 (2018).

⁹³ Iowa Code §§ 477A.8.2 (2018).

⁹⁴ FNPRM at ¶ 20.

require connections to facilities within a certain distance of the cable system, and to localities to pay extraordinary costs, for example, where facilities are an exceptional distance from the system. In most cases, these connections were provided long ago, have been fully cost-recovered, and newer franchises limit the number of facilities that can be added. As far as we have been able to determine, there is no cost to the operator associated with providing the actual service. That is, even where an operator is permitted to charge an incremental cost associated with the programming, the cost seems to be rarely billed. The cost of obtaining substitute services can be prohibitive, as commercial rates can be hundreds of dollars per month per location or per room. Absent the existing service arrangements, we would expect many schools and public buildings to drop services altogether.

The value of PEG channels is likewise difficult to quantify. What we do know is that industry has valued PEG channels at levels that would in fact leave many communities without a franchise fee at all, or with a substantially reduced fee, or owing the cable operator money. Analyses prepared by Kane Reece in connection with the Commission's consideration of multicast must-carry suggest that the value per channel claimed by industry could exceed \$2 million, and it suggests that nationwide, the impact of the Commission's rules would reduce franchise fees by billions of dollars.⁹⁵

⁹⁵ In 2003, Comcast claimed in a renewal proceeding in San Jose that each PEG channel was worth \$2.1 million a year, or \$21 million over a franchise term. In 2007 Kane Reece Associates, Inc. was retained by the National Cable & Telecommunications Association (NCTA) to render an opinion on the value of the cable broadband bandwidth that would be used if Congress mandated carriage of most or all multicast streams. The per-stream annual values estimated in that study are all well in excess of \$2 million per channel per year. The figures in that study are based on a hybrid digital/analog system circa 2005, and all-digital cable systems are today capable of delivering many more channels to the home using that same bandwidth. The figures are obviously subject to debate, and we are not suggesting the analysis is correct. But, in analyzing the impact of its rule for purposes of the Regulatory Flexibility Act analysis, and more importantly, for purposes of determining whether Congress intended this result, the NCTA study

The “value” that might be attributed to institutional networks is even more nebulous and difficult to estimate because of the wide variation in the way institutional network provisions were included in franchises. In some cases, communities agreed to pay the incremental cost of construction of those networks; in some cases, communities paid costs for extensions of networks to particular locations, but received capacity on fiber rings at low or no cost (thus actually reducing the cost of system extension by allowing the operator to piggyback construction to its own customers on construction paid for by the locality). In some cases, communities provided free access to conduit in return for access to fiber installed within that conduit. Still other times, the operator agreed to build the capacity as part of an upgrade of its network, under circumstances where the additional cost of construction would be *de minimis*; and the community helped subsidize some of the construction costs. That is, in many cases, institutional networks were actually paid for under some agreed formula reflected in the franchise. It is odd indeed for the Commission to now suggest an offset when in many cases the capacity was actually paid for by the locality – or alternatively (under the rate regulation rules discussed above) paid for by ratepayers in accordance with the long-standing understanding that franchise requirements are not franchise fees.⁹⁶

suggests that if the value of PEG channels may be deducted from franchise fees, industry will claim values which would result in many, and perhaps most, communities receiving no franchise fees, or no PEG channels, and those which maintain PEG channels may actually owe money to the cable operator. That is an incredible reading of the Cable Communications Policy Act of 1984, and one we suspect Congress might have mentioned at some point during the years of debate preceding its adoption, had they in any way intended that result. At the simplest level, the reading treats PEG channels as if the capacity were being leased, which means that there is effectively no difference between Section 611 (PEG) and Section 612 (commercial leased access).

⁹⁶ Institutional network (and other PEG support requirements) are often reached as part of a settlement of substantial franchise breaches, where an operator failed to perform as promised.

Nonetheless, while some of the arrangements cannot be described in detail, we do know that there is wide variation in the way operators value institutional network capacity, as some operators do offer a “managed service” or a “dark fiber” offering as a substitute for institutional network agreements within the franchise. Those arrangements, depending on the service characteristics, may range in price from \$350 - \$1200 or more per site per month, plus installation costs, depending on term, quality of service, and the operator. In some cases, the fee is for dark fiber; in some cases the fee is for a managed service; and in the case of the latter, the prices quoted may be for services ranging from 100 Mbps to 1 Gbps services. It is often the case that the price of services offered is higher over the term of a proposed contract than the cost to the locality of building out a network itself.

1. *Dallas As A Working Example*

An example of how the Proposal could harm consumers and local government can be seen clearly when applied to the City of Dallas, Texas. Based on known subscriber counts from other large urban communities, Dallas has an estimated 397,000 cable subscribers,⁹⁷ which generate approximately \$12.2 million in franchise fees annually. Each of Dallas’s cable operators carries 10 PEG channels. Assuming a similar allocation of customers between dominant providers (Spectrum and AT&T) and competitive providers (Frontier and Grande) and using the approximate per-subscriber annual leased access rate of \$2.22 per channel developed for NCTA by Kane Reece cited above, Dallas could see its franchise fee receipts slashed eighty-four (84%) percent or approximately \$10.29 million, annually. This is likely a conservative estimate, as the \$2.22 figure is based on 2005 data and has not been adjusted to reflect more than a decade of inflation. Furthermore, the two dollar and twenty two cent figure is a nationwide average;

⁹⁷ Under Texas law, the cable operator under a state statute is not required to provide information on the number or location of cable subscribers.

carriage in Dallas, a major media market, could potentially be valued higher. It is not unrealistic to believe that, given inflation and the higher value of a channel in Dallas that Dallas see the total elimination of franchise fee revenues. Or even more absurd, the Commission's interpretation outlined in the Proposal could find Dallas being required to pay out of pocket expenses to cable operators for PEG carriage. In sum, the potential ramifications of PEG carriage alone are devastating.

As reflected by the Dallas example, the Commission in the FNPRM offers an interpretation that so significantly changes the environment of cable franchising that it is unreasonable to believe that Congress would not have been addressed these consequences a long ago. There is nothing in the Act or in the legislative history to indicate Congress had any such intent.

II. LFAS ARE NOT LIMITED TO REGULATING CABLE SERVICES

In addition to requiring local government to pay for the franchise obligations of cable companies out of right-of-way proceeds, the Commission proposes to constrict local government authority to cable services alone.

It is important to note that, after foundering in its analysis before the Sixth Circuit, the Commission has revised its previous analysis of LFA authority over telecommunications services. Specifically, in the current FNPRM the Commission is now forced to acknowledge that its previous contention-- that LFAs were prohibited from any regulation touching on telecommunications services – was in error, as LFAs clearly possess Title VI authority over I-Nets which can and often are used to provide telecommunications and other communications

services.⁹⁸ In the instant FNPRM, the Commission has now concluded that LFAs may require I-Nets but must also pay for them. The Commission further conjectures that it can limit local governments to only the authority granted to them in the Cable Act by Title VI—failing to acknowledge that local governments act as LFAs under the Cable Act beyond just cable service and also act with their own police powers as local governments regardless of their status under the Cable Act. Finally, the Commission draws erroneous conclusions because it fails to distinguish, with precision, the differences between the scope of Title II regulation and Title VI regulation.

Understanding the history of this rule is essential for understanding the flaw in the Commission’s proposal. In the *First Order* in 2006, the Commission described a “mixed use” network as a Title II common carrier network that already possessed authorization to use the rights of way to provide telephone services but that could also be used to provide cable services. At that time, the Commission relied on the definition of “cable system” in Section 602(7)(C) to conclude that “LFAs’ jurisdiction applies only to the provision of cable services over cable systems.”⁹⁹ Specifically, Section 602(7)(C) excludes from the definition of “cable system” “a facility of a common carrier which is subject ... to the provisions of [Title II].”¹⁰⁰ In the *First Order*, the Commission rejected as unreasonable LFA interests in control over Title II “non-cable services or facilities,” prohibiting LFAs from requiring a franchise as a prerequisite for upgrading Title II facilities if there was a “non-cable” purpose in the upgrade, and also prohibiting LFA authority to attempt to regulate a telephone company’s entire network “beyond

⁹⁸ *Montgomery County*, 863 F.3d at 492 (“The FCC now concedes that its mixed-use ruling was not meant to prevent local franchising authorities from regulating institutional networks.”)

⁹⁹ *First Order*, ¶ 121.

¹⁰⁰ 47 U.S.C. § 522(7)(C).

the provision of cable services.”¹⁰¹ In the *Second Order*, the Commission concluded that because it relied upon the definition of “cable system” in the *First Order* to limit LFA jurisdiction over Title II “mixed use” networks, it should apply that ruling to cable incumbents as well because “cable system” does not “distinguish between incumbent providers and new entrants.”¹⁰² As explained below, the court in *Montgomery County* rejected this analysis in the *Second Order* as arbitrary and capricious and without statutory foundation.

Further, to understand the errors in the Commission’s proposals, it is also important to understand the difference between cable regulation in Title VI and common carrier regulation in Title II. As the Sixth Circuit explained in part, cable regulation applies to a cable *system*—and the cable system can support services other than cable service.¹⁰³ LFAs are specifically authorized to impose certain kinds of regulation of the *system*, as well as certain regulations of services. Common carriers, in contrast, are regulated according to the *service* they provide. For this reason, the Commission’s analysis is flawed as it attempts to classify permissible LFA authority with regard to the services offered, when LFA authority is connected statutorily to the cable system.

¹⁰¹ *First Order*, ¶¶ 121-122. Effectively, the Commission was finding that with respect to Title II facilities used in the provision of cable service, only that portion used for cable service would be treated as a cable system.

¹⁰² *Second Order*, ¶ 17.

¹⁰³ *Montgomery County*, 863 F.3d at 492 (“the infrastructure that supports cable services—which the Act refers to as ‘cable systems’—can also support at least two other kinds of services: ‘telecommunications services[,]’ such as telephone service offered directly to the public, and ‘information services[,]’ such as certain internet add-on applications and other ways to make information available via telecommunications.”) (alterations original).

A. LFA Authority Reaches Beyond Cable Service by Virtue of Both Title VI and in Their Police Powers.

In the instant *FNPRM*, the Commission proposes, “to prohibit LFAs from using their video franchising authority to regulate most non-cable services offered over cable systems by incumbent cable operators.”¹⁰⁴ The Commission describes a wide variety of non-cable services which it speculates are outside of LFA jurisdiction.

But Section 624 of the Cable Act grants local government cable franchising authority over “a person ... provid[ing] a cable service over a cable *system*”¹⁰⁵ and permits, as the Commission acknowledges, LFAs “to the extent related to the establishment or operation of a cable *system*... may establish requirements for facilities and equipment....”¹⁰⁶ Moreover, as the Commission has partially conceded, LFA jurisdiction cannot be limited to only cable services over a cable system because the Cable Act clearly authorizes more. For example, LFAs may require build out. And as the Commission was forced to concede in *Montgomery County*, LFAs may require I-Nets. The Commission’s *FNPRM* sweeps with a broad brush without looking in detail at the powers clearly granted to LFAs by the Cable Act.¹⁰⁷

Beyond the authority granted to LFAs by Title VI, local governments retain broad authority regardless of the limits of Title VI. Congress clearly granted and defined the parameters by which LFAs can regulate the provision of cable service over a cable system. But

¹⁰⁴ *FNPRM* at ¶ 25.

¹⁰⁵ 47 U.S.C. § 544(a) states, “Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.” 47 U.S.C. § 522(C)(7) defines a “cable operator” as “a person who provides cable service over a cable system.”

¹⁰⁶ 47 U.S.C. § 544(b).

¹⁰⁷ Among other things, the privacy provisions of the Act and the consumer protection provisions are not limited by their terms to cable services, and the locality may by statute enforce service requirements that are not limited to cable service.

that grant *does not mean* that all local government authority is limited by federal law to regulating cable operators only to “the extent they provide cable service.” Title VI’s constraints cannot divest local governments of the authority they possess outside of Title VI.

The Commission’s citations of several Cable Act provisions to support its theory actually prove the opposite.¹⁰⁸ Congress acknowledges local governments might have authority other than Title VI by clearly distinguishing Title VI power from other power a local government might possess. Section 621(b)(3)(B) precludes a franchising authority from imposing “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 affiliate thereof.”¹⁰⁹ Section 621(b)(3)(D) makes it even more explicit: “a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, *as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.*”¹¹⁰ As long as a local government possesses authority to regulate telecommunications from a source other than Title VI franchise authority, none of these provisions prohibit it.

In the same way, the Commission’s attempt to rely on Section 624(b) with respect to cable operators that are not common carriers also fails. The Commission’s hypothesis that Section 624(b) “prohibits LFAs from using their franchising authority to regulate the provision of information services, including broadband Internet access service”¹¹¹ over cable operators that

¹⁰⁸ FNPRM at n. 122.

¹⁰⁹ 47 U.S.C. § 541(b)(3)(B) (emphasis added).

¹¹⁰ 47 U.S.C. § 541(b)(3)(D) (emphasis added).

¹¹¹ FNPRM ¶ 27. The Commission also errs in concluding that the succeeding section, which allows localities to enforce commitments to provide “video programming or other services”

are not common carriers is incorrect for the same reasons described above. Section 624(b) prohibits LFA authority, “to the extent related to the establishment or operation of a cable system” to establish requirements for “information services” “*in its request for a franchise*” under Title VI.¹¹² It does not impact local government authority drawn from sources other than Title VI.

For the same reason, the Commission’s proposal that “the statute bars LFAs from regulation the provision of broadband Internet access and other information services by incumbent cable operators that are not common carriers”¹¹³ and NCTA’s similar requests¹¹⁴ cannot be adopted. As the Oregon Supreme Court correctly explained in the *City of Eugene* with regard to license fees imposed on a cable operator for the provision of telecommunications services, “Not all fees imposed on a cable operator are franchise fees. ...A fee is a franchise fee if it is imposed on a company because it is a cable operator and not for any other reason. ... The license fee is imposed on Comcast because it provides telecommunications services over the city’s public rights of way. The relationship between that reason and Comcast’s status as a cable operator is only incidental.”¹¹⁵

The Commission cannot preempt or otherwise invalidate any particular local government action without investigating the authority cited by the local government to undertake the action

excludes “information services.” Textually, the term “other service” would include “information services” and services in addition to information services.

¹¹² 47 U.S.C. § 544(b)(1) (emphasis added).

¹¹³ FNPRM at ¶ 28.

¹¹⁴ FNPRM at ¶ 31 and n.148 (citing NCTA May 3, 2018 Ex Parte Letter at 5 asserting that Section 622 reinforces the Commission’s authority to prohibit LFAs from imposing unwarranted and duplicative fees on franchised cable operators that offer non-cable services over their cable systems).

¹¹⁵ *City of Eugene v. Comcast of Oregon II, Inc.*, 359 Or. 528, 557-558 (2016).

in question. It is impossible for the Commission to make a finding that any particular action violates the Cable Act unless and until the Commission can analyze the authority cited by these local governments to determine whether their actions are subject to Commission jurisdiction under the Cable Act or not.¹¹⁶

B. The Commission Cannot Ignore the Statute’s Distinction between Titles II and VI.

The Commission tentatively concludes, “to the extent that any incumbent cable operators offer any telecommunications services, ... they are covered under the common carrier exception in Section 602(7)(C), and thus can be regulated by LFAs only to the extent they provide cable service.”¹¹⁷ It also suggests that *Montgomery County* invalidated the Commission’s *Second Order* only to the extent that it applied the mixed use rule to cable operators that are not common carriers.¹¹⁸

The entire basis of the Commission’s analysis is in error. Section 602(7) defines a cable system and exempts certain categories from that definition, including “a facility of a common carrier which is subject, in whole or in part,” to Title II.¹¹⁹ As an initial matter, we note that incumbent cable operators do not generally act as if their cable systems are Title II facilities. It appears to be common for any voice or Internet services to be provided by a subsidiary, and not the cable operator itself. While it is not even clear that the services at issue fall within title II, even assuming that those service clearly did, the fact that a subsidiary may offer a service does

¹¹⁶ The Commission has previously urged the industry *not* to engage in this sort of advocacy that relies on allegations against unnamed jurisdictions. *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking and Notice of Inquiry*, WT Docket No. 17-79, at ¶ 22 (rel. Apr. 21, 2017).

¹¹⁷ *Id.* at ¶ 26.

¹¹⁸ FNPRM at ¶¶ 26.

¹¹⁹ 47 U.S.C. § 522(7)(C).

not mean that the cable system itself is suddenly transformed into a Title II facility, a fact admitted by NCTA.¹²⁰ Common carrier law makes clear that, in contrast, that it is the *service* which is the focus, not the facility. Specifically, “a common carrier is such by virtue of his occupation’ ... one can be a common carrier with regard to some activities but not others.”¹²¹ And a telecommunications service is defined “regardless of the facilities used.”¹²² The Supreme Court has confirmed, “[a] cable system may operate as a common carrier with respect to a portion of its service only.”¹²³ Thus, a common carrier facility is subject to Title II *only to the extent it is offering Title II services*, and a facility owned by the cable operator could be used in the provision of Title II services by its subsidiary without being a common carrier facility. Even if a cable operator were directly offering Title II services it cannot escape all Title VI regulation by virtue of that effort.

Moreover, the Commission’s suggestion that *Montgomery County* would have only invalidated the mixed use rule as it applies to cable operators that are not common carriers makes no sense.¹²⁴ The whole point of the ‘mixed use’ rule was to account for operators that initially offered common carriage services and then began to offer a mix of cable and common carriage services. The crux of the Commission’s analysis is based in Section 602(7)(C) which relates to Title II *facilities*. A cable operator that is not a common carrier cannot be impacted by that

¹²⁰ NCTA Wireline Infrastructure June 11 Letter at 2 (a “cable system remains a ‘cable system’ under Section 602, even when it is used to provide non-cable services, such as information services.”)

¹²¹ *Nat’l Ass’n of Regulatory Util. Comm’rs v. F.C.C.*, 533 F.2d 601, 608 (D.C. Cir. 1976) (quoting *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211-12 (1927)).

¹²² 47 U.S.C. § 153(53).

¹²³ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701, n. 9 (1979).

¹²⁴ FNPRM at ¶ 26.

section and the Commission was not attempting to apply it in that manner so it could not have been invalidated by *Montgomery County*.

Even more ironic, while the Commission attempts to develop a theory with respect to cable operators that offer common carriage services, it then goes on to conclude that the same rule should apply to cable operators that do *not* offer common carriage services because otherwise the two classes of operators would be treated unequally and thus unfairly.¹²⁵ Companies subject to different regulatory schemes are often treated differently. To apply the ‘mixed use’ rule to cable operators that do not offer common carriage services would be to invalidate Section 602(7)(C) which clearly limits the exception to Title II facilities.

The problems with the Commission’s conclusions are abundantly clear because the Commission’s effort to apply a “mixed use” rule to incumbent cable operators was declared arbitrary and capricious and without statutory foundation by the Sixth Circuit last year.¹²⁶ The Sixth Circuit criticized the Commission’s reliance on Section 602(7)(C) to apply the mixed use rule to cable operators, “most of whom are not Title II carriers and thus to whom [Section 602(7)(C)] does not apply.”¹²⁷ Because Section 602(7)(C) “by its terms applies only to Title II carriers” the court concluded that “the FCC’s orders offer no valid basis—statutory or otherwise—for its application of the mixed-use rule to bar local franchising authorities from regulating the provision of non-telecommunications services by incumbent cable providers” and vacated the mixed use rule as applied to incumbent cable operators.¹²⁸ Despite this clear finding

¹²⁵ FNPRM at ¶ 28, 30.

¹²⁶ *Montgomery County*, 863 F.3d at 492.

¹²⁷ *Id.*

¹²⁸ *Id.*

by the Sixth Circuit, the Commission proposes to adopt the same rule and justifies its conclusions by bootstrapping with the same legal analysis invalidated by the court.

C. Other Provisions Do Not Authorize the Decisions NCTA Seeks.

The Commission seeks comments on several statutory provisions that NCTA claims limit LFA authority.¹²⁹ NCTA is incorrect that Section 621(a)(2) grants franchised cable operators the right to construct and operate a cable system in the public rights-of-way and, therefore, “delivering non-cable services over a cable system is within the scope of the rights that Congress intended a cable franchise to grant and LFAs may not impose additional burdens on the provision of non-cable services over a franchised cable system.”¹³⁰ By its terms, Section 621(a)(2) permits “construction” of a cable system. It does not authorize that cable system to offer any particular service.¹³¹ Moreover, non-cable services and facilities that are not part of the cable system are subject to local government regulation—not via Title VI franchising authority but via local government police and other powers. Similarly, nothing in the Cable Act permits an operator who uses a cable system to occupy the rights of way to provide other services without paying right-of-way use fees associated with occupancy of the rights-of-way to provide those services. As the Commission discussion of the Cable Act suggests, the franchise fee limit in the Cable Act does not limit local authority to impose generally applicable fees and assessments or utility fees and assessments on cable operator in connection with their provision of other services.

Moreover, NCTA’s requests for relief would also upset the balance of power set forth in the Communications Act and the Constitution between the federal government and local

¹²⁹ FNPRM at ¶ 31.

¹³⁰ NCTA May 3, 2018 Ex Parte Letter at 3-4.

¹³¹ See *City of Eugene v. Comcast of Oregon II, Inc.*, 359 Or. 528, 545(2016).

authorities. Section 624 proscribes LFAs from dictating the type of transmission technology used by a *cable system*.¹³² This limitation is a far cry from permitting cable operators to place any equipment they may choose in the public right-of-way or dictating deadlines for local permitting procedures. As explained in the Smart Communities comments in the Wireline Infrastructure docket, local governments are very receptive to new services for their residents and seek to quickly and appropriately authorize use of the public rights-of-way subject to their extremely important public safety and public resources management obligations.¹³³ If a cable operator proposes facilities or equipment outside of the cable franchise’s authorization, the cable operator must comply with the generally applicable rules to acquire needed authorization.

III. THE COMMISSION’S RULINGS SHOULD NOT APPLY TO STATE-LEVEL FRANCHISES

The Commission also seeks comment on whether to apply the interpretations and proposals in the First and Second Orders and the instant FNPRM to franchises granted pursuant to state statute.¹³⁴ Previously the Commission eschewed application of its interpretations to state franchises, but implied that federal courts could apply them. The *Montgomery County* litigation settled the question that the current interpretations do not apply to franchises issued pursuant to state statute.¹³⁵

The Commission should not apply the existing and proposed interpretations to state-level franchises. State franchising laws often apply more broadly than the scope of the Cable Act. For example, the Texas and California state franchise laws apply, in part, to “video service

¹³² 47 U.S.C. § 544(e).

¹³³ Smart Communities Wireline Comments, WC Docket No. 17-84 at 1-3, 25-30 (June 15, 2018).

¹³⁴ FNPRM at ¶ 32.

¹³⁵ *Montgomery County*, 863 F.3d at 492 at 494-95.

providers.”¹³⁶ But this group of entities is much broader than cable providers and include video providers that do not qualify as cable providers under federal law.¹³⁷ In such a case the fee imposed by these statutes do not meet the federal definition of a franchise fee. Instead they are a “tax, fee, or assessment of general applicability” which is excluded under Section 622.¹³⁸

Moreover, as described above, the original premise of the Commission’s new interpretations of Sections 621 and 622 were the supposed barriers to entry posed for new cable competitors by local franchising. Whether or not they strike the correct balance, state franchising laws have been adopted almost universally as a response to that concern to facilitate rapid entry by those competitors. Moreover, the state franchising laws often deliberately modify the existing trade-offs in their statutes – substituting a state finding with regard to the appropriate balance of franchise obligations, franchise fees and management of rights-of-way. For the Commission to selectively impose its own interpretations to facilitate entry might upend carefully balanced policy decisions by the states. Moreover, such a decision would put local governments in those states in a very difficult position.

For example, the State of California adopted the Digital Infrastructure and Video Competition Act in 2006 (“DIVCA”).¹³⁹ Under DIVCA, the sole franchise authority is the California Public Utility Commission (CPUC). Local governments, such as the County of Los Angeles, are given authority to enforce certain provision of the Act, including consumer service regulations. DIVCA also provides local authority to determine the percentage of franchise fees and PEG fees consistent with the federal Communications Act. Because of DIVCA, Los

¹³⁶ Tex. Util. Code §66.002(11); Cal. Pub. Util. Code § 5830(t).

¹³⁷ *Cty. of Los Angeles v. Time Warner NY Cable LLC*, No. CV1206655SJOJCX, 2013 WL 12126774, at *5 (C.D. Cal. July 3, 2013).

¹³⁸ 47 U.S.C. § 542(g)(2)(A).

¹³⁹ See DIVCA, Pub. Util. Code §§ 5800, *et seq.*

Angeles County cannot choose the benefits that it can require from state video franchise holders. And the County receives a franchise fee of five percent (5%) of gross revenues pursuant to state law, which are paid directly to the County.¹⁴⁰

Before DIVCA, Los Angeles County conducted a full hearing to consider the renewal of County issued video franchises which included an opportunity for public comment where members of the public could raise issues, concerns, and deficiencies in the delivery of video services by video franchise holders. Before DIVCA, Los Angeles County required franchise holders to provide detailed information about the basis for the calculation for franchise and PEG fees whereas now state franchise holders now submit minimal information regarding the basis of gross revenues for calculating the franchise fee. Under DIVCA, local governments can conduct audits, but local governments must incur the full costs of the audit unless the franchise holder has underpaid franchise fees for the audit period by more than 5 percent.¹⁴¹

The state of California has made its own balancing decisions with respect to franchising in the state. Local governments in California cannot make a trade-off with regard to benefits and franchise fees. Each are set in state statute. And yet, the cable industry received many elements that it prefers in this structure—for example a more streamlined renewal process and often less oversight of its computation of gross revenue and franchise fees. For the Commission to import, wholesale, its determinations under Section 621 into the California state franchise would upset state policy and undermine the very goal of the Commission to ease entry by new entrants.

In Iowa a similar framework applies. Local governments do not negotiate particular benefits. Franchise fees of 5 percent and PEG support of 1.75% of gross revenues for video

¹⁴⁰ See DIVCA, Pub. Util. Code §§ 5840(q) and 5860(d).

¹⁴¹ DIVCA, Pub. Util. Code §5860(i).

service only are paid to local governments directly.¹⁴² Cable service to schools & government buildings is not mandated in the state franchise.

Michigan offers an alternative plan. The statute allows an operator and City to agree to franchise terms following the Cable Act's specified procedures,¹⁴³ or alternatively, provides for a streamlined process under which the operator and locality can agree to state conditions that, *inter alia*, limit PEG fees that may be charged, but also permit those fees to be used for PEG facilities and support, and not just for capital purposes.¹⁴⁴ Texas, similarly, provides for a streamlined franchising process which limited the PEG fee that can be charged, but also allows localities to require operators to provide free connections to schools as long as the communities or schools pay any incremental costs incurred by the operator.¹⁴⁵

The federal system benefits from experiments such as these which can provide appropriate compensation and benefits to communities and at the same time meet the needs of industry. The Commission should not upset the settled legislative decisions of states that have chosen to heed the Commission's concerns with regard to streamlined franchising by forcing them to reconsider anew their franchising laws.

Further, because of the complexity and differences among the many state statutes that have been drafted, the Commission does not yet have a record that would even support a notice of proposed rulemaking on this topic. The proposals in the instant FNPRM are so vague as to be impossible to understand how they would apply to the vast majority of state statutes. At a minimum a further notice would be necessary in order to provide adequate notice for local

¹⁴² Iowa Code §§ 477A.7.1.b, 477A.7.2 (2018).

¹⁴³ M.C.L. 484.3313.

¹⁴⁴ M.C.L. 484.3306. *Cf. First Order*, ¶109 (counting non-capital support against the franchise fee).

¹⁴⁵ Texas Utilities Code §§66.009, 66.006 (d)(2).

governments seeking to understand how the Commission would apply previous rulings to state franchises.

CONCLUSION

The Commission's proposals are inconsistent with the statute, the legislative history and its own precedent. The proposals must be rejected.

Respectfully submitted,

/s/ Michael Watza

Michael Watza
KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK
1 Woodward Ave, 10th Floor
Detroit, MI 48226-3499

/s/ Joseph Van Eaton

Joseph Van Eaton
Gerard Lavery Lederer
Gail A. Karish
John Gasparini
BEST BEST & KRIEGER, LLP
2000 Pennsylvania Ave N.W., Suite 5300
Washington, D.C. 20006

DECLARATION OF SUE BUSKE

1. My name is Sue Buske. I am the President of the Buske Group, a position that I have held since 1987. Prior to founding The Buske Group, I was the Executive Director of the National Federation of Local Cable Programmers (now known as the Alliance for Community Media), a Washington, D.C. based national organization serving cities, schools, and nonprofit access corporations.
2. The Buske Group, located at 4808 T Street, Sacramento, CA 95819 is a highly experienced consulting firm that offers a broad range of communication services including: cable franchise renewals, cable company franchise compliance and performance reviews and most importantly for this declaration, community cable needs assessments that include public opinion research, including focus groups, on-line surveys and statistically valid telephone surveys. Examples of our consulting experience and presentations may be found at <http://thebuskegroup.com/index.htm>
3. During the past five years, The Buske Group has conducted community needs assessments for 16 different franchise areas in six different states.
4. Telephone and/or online surveys were included in each of the 16 needs assessments. One of the questions in each survey was “How important do you think it is to have local cable TV channels that feature programs about [local] residents, organizations, schools, government, events and issues?” Respondents could indicate that they felt this was “Very Important,” “Important,” “Not Very Important,” “Not Important At All,” or “Don’t Know.”
5. Below is a chart that shows the percentage breakdown of the answers to this question by the respondents in each of the 16 locations.

6. Telephone surveys were conducted in 3 locations (400 respondents for each telephone survey).
7. Online surveys were conducted in the other 13 locations (cumulative total: 6,339 respondents to these 13 online surveys).
8. When responses to this question from all 16 locations are combined, an average of over 80% of the respondents from all 16 locations answered “Very Important” or “Important.”
9. In every location, at least two-thirds of the respondents answered “Very Important” or “Important.”
10. In five locations, over 90% of the respondents answered “Very Important” or “Important.”

I declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink that reads "Sue Miller Buske". The signature is written in a cursive style and is positioned above a solid horizontal line.

Sue Buske

Executed on November 14, 2018.

sue@thebuskegroup.com

How important do you think it is to have local cable TV channels that feature programs about [local] residents, organizations, schools, government, events and issues? (Surveys conducted in 2013-2018)

Survey Date	Location	RESPONSES				
		Very Important	Important	Not Very Important	Not Important At All	Don't Know
Oct. 2013 (online)	St. Paul, MN	60.6%	30.1%	4.3%	2.6%	2.3%
Nov. 2013 (online)	Eagan, MN	18.9%	49.1%	20.5%	5.7%	5.8%
February 2014 (online)	Belmont, MA	60.5%	30.2%	8.1%	0%	1.2%
April 2014 (telephone)	Northern Dakota County, MN	32.3%	38.8%	16.5%	8.3%	4.3%
April 2014 (telephone)	San Jose, CA	27.5%	41.0%	10.5%	11.3%	9.8%
March 2015 (online)	Port Angeles, WA	28.6%	40.1%	19.5%	6.2%	5.7%
Oct. 2015 (telephone)	Roseville Area Suburbs, MN	19.8%	50.0%	19.8%	8.3%	1.8%
March 2016 (online)	Malden, MA	57.9%	33.6%	3.8%	1.5%	3.2%
March 2017 (online)	Salisbury, MA	55.0%	37.0%	4.2%	1.6%	2.1%
March 2017 (online)	Danvers, MA	48.5%	40.0%	6.8%	3.0%	1.7%
June 2017 (online)	Reading, MA	55.5%	33.0%	8.8%	1.3%	1.3%
Dec. 2017 (online)	New York*	34.4%	39.7%	15.9%	7.9%	2.1%
Dec. 2017 (online)	New York*	32.2%	42.2%	14.9%	7.3%	3.5%
April 2018 (online)	Montana*	59.1%	31.4%	3.4%	2.8%	3.4%
May 2018 (online)	Massachusetts*	36.3%	39.0%	12.2%	4.9%	7.6%
Sept. 2018 (online)	Massachusetts*	39.0%	43.2%	9.9%	3.1%	4.7%
		Very Important	Important	Not Very Important	Not Important At All	Don't Know
	AVERAGES	41.6%	38.7%	11.2%	4.7%	3.8%

* In these locations, the needs assessment report and data have not been made public to date. Therefore, only the identification of the state is provided.