**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, DC 20554**

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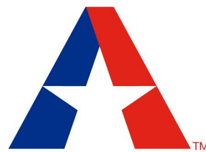
| Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 | ) ) ) ) | MB Docket No. 05-311 |

# COMMENTS OF THE AMERICAN CABLE ASSOCIATION ON THE SECOND FURTHER NOTICE OF PROPOSED RULEMAKING



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## I. INTRODUCTION AND SUMMARY

The American Cable Association ("ACA") hereby provides comments in response to the Second Further Notice of Proposed Rulemaking ("*Second FNPRM*") issued by the Federal Communications Commission ("Commission") in the above-captioned proceeding.[1] The Commission seeks to resolve two issues on remand from the U.S. Court of Appeals for the Sixth Circuit regarding the ability of local franchising authorities ("LFAs") to regulate incumbent cable operators and cable services.[2] The Commission tentatively concludes that "franchise fees" as set forth in Section 622 of the Communications Act, as amended, (the "Act")[3] include "cable-related, in-kind contributions;" and that it should apply its "mixed-use" rule so as to prohibit local franchising authorities ("LFAs") from regulating non-cable services provided over incumbent

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[1] *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Second Further Notice of Proposed Rulemaking, FCC 18-131 (rel. Sept. 25, 2018).

[2] *See Montgomery County, MD. et. al. v. FCC*, 863 F.3d 485 (6th Cir. 2017) ("*Montgomery County").*

[3] 47 U.S.C. § 542.

cable operators' cable systems.[4] ACA supports these tentative conclusions, as explained herein.

ACA represents more than 700 smaller cable operators and other local providers of video programming services to residential and commercial customers. These providers pass approximately 18.2 million households of which 7 million are served. They have longstanding relationships and extensive experiences with LFAs, and, as a rule, these operators find these relationships to be harmonious and productive. Yet, on occasion, ACA members encounter LFA actions that can materially harm their businesses. For instance, one member, an incumbent cable operator, recently reported that two LFAs each seek to impose a new fee on gross revenues from broadband Internet access service ("broadband service"), in addition to a current five percent fee on cable service gross revenues. This operator explained that these new fees would put it at a competitive disadvantage with mobile and fixed wireless providers, as well as satellite providers, that offer similar services but are outside the LFAs' jurisdiction. Because of instances like these, ACA believes the Commission should intervene to clarify LFA authority and the cable operator rights.[5]

As a matter of law, ACA agrees with the *Second FNPRM*'s tentative conclusions regarding cable-related in-kind contributions[6] and application of the "mixed-use network" rule to all cable operators. Provisions in Title VI and elsewhere in the Act support the Commission's interpretations. Moreover, the Commission's tentative conclusions serve the public interest,

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[4] *Second FNPRM*, ¶ 1.

[5] While Title VI governs both State and local government franchising of cable systems, these comments follow the lead of the *Second FNPRM* in focusing, in particular, on the regulatory powers LFAs.

[6] *See Second FNPRM*, ¶ 24. The Commission defines "cable-related, in-kind contributions" to include (other than for the exceptions noted by the Commission in the *Second FNPRM*) "any non-monetary contributions related to the provision of cable services provided by cable operators as a condition or requirement of a local franchise agreement, including but not limited to the free or discounted cable services and the use of cable facilities or equipment," whether provided to the LFA or any entity designated by the LFA. *See id*. ACA agrees with this definition.

permitting LFAs to protect their reasonable interests while ensuring they do not charge excessive fees or recover "twice" for a cable operator's access to public rights-of-way – once for the provision of cable services and then a second time for the provision non-cable services that use the same network facilities. Further, the Commission's tentative conclusions will prevent LFAs from using their franchising authority to impose disparate regulatory burdens on incumbents and new entrants. The Commission's proposed actions also will remove artificial and burdensome disincentives to network investment and further promote cable operators' deployment of innovative and advanced services to communities across the nation.

## II. FRANCHISE FEES INCLUDE CABLE-RELATED IN-KIND CONTRIBUTIONS

Subsection 622(b) of the Act[7] prohibits LFAs from assessing franchise fees that exceed five percent of the gross revenues a cable operator derives from the use of its cable system to provide cable services for any 12-month period. In *Montgomery County*, the Sixth Circuit affirmed the Commission's interpretation of the term "franchise fee" in paragraph 622(g)(1) as sufficiently broad to include non-cash exactions. In other words, non-cash "tax[es] or assessment[s]" a franchising authority "require[s]" a cable operator to "pay" may count towards the statutory five percent cap.[8]

The question before the agency on remand is whether the Act provides an exemption from the term "franchise fee" for non-cash exactions that are deemed "cable-related, in-kind contributions." The local government petitioners in *Montgomery County* argued that treating such contributions as franchise fees would undermine provisions of Title VI that authorize LFAs to impose cable-related obligations on franchisees, and that the Commission had failed to

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[7] 47 U.S.C. § 542(b).

[8] *See* 47 U.S.C. § 542(g)(1) (defining "franchise fee"), (a) ("Subject to the limitation of subsection (b), any cable operator may be required under the terms of any franchise to pay a franchise fee.").

articulate a legal basis for such treatment.[9] The Sixth Circuit accepted the second argument, and it directed the agency on remand "to determine and explain anew, whether, and to what extent, cable-related [in-kind] exactions are franchise fees." In the *Second FNPRM*, the Commission tentatively concludes that such exactions qualify as franchise fees to the extent they meet the definition set forth in Section 622(g)(1) of the Act. ACA agrees.

As an initial matter, the definition of "franchise fee" does not turn on whether an exaction "relates" to provision of cable service. Rather, the term is defined to include "any tax, fee or assessment of any kind imposed by a franchising authority on a cable operator . . . solely because of [its] status as such."[10] That is, this definition in no way excludes fees that relate to the provision of cable service. If anything, exactions related to cable service—the service that a franchised cable operator provides—are more likely to be imposed "solely because of" that status.

Moreover, it is indisputable that "cable-related" exactions may qualify as franchise fees. Indeed, subsection 622(b) contemplates that franchise fees are assessed based upon a cable operator's cable service revenues. In the typical case where a cable operator pays the local franchising authority a fee amounting to five percent of its gross revenues derived from cable services, the operator is undoubtedly paying a fee that is both "cable-related" and a "franchise fee."

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[9] *See Montgomery County*, 863 F.3d at 491. ("The Local Regulators argue that 'franchise fee' does not include "in-kind" cable-related exactions in particular. On that point the Local Regulators offer two contentions, one substantive and one procedural. The substantive argument is that the FCC's interpretation of franchise fee would undermine various provisions of the Act that allow or even require the Local Regulators to impose cable-related obligations as part of their cable franchises…The Local Regulators assert that, if the costs of these requirements count toward the five-percent cap, the Regulators will not be able to impose these requirements in the first place, thereby thwarting Congress's intent in enacting these provisions…The FCC's Second Order and Reconsideration Order do not reflect any consideration of this concern, which leads to the Local Regulators' second contention: that those orders contain scarcely any explanation at all for the FCC's decision to expand its interpretation of 'franchise fee' to include so-called 'in-kind' cable-related exactions.").

[10] 47 U.S.C. § 542(g)(1).

Because "franchise fees" may be—indeed, typically are—cable-related, "cable-related, in-kind contributions" may be exempt from treatment as franchise fees only if the statute provides some basis for distinguishing in-kind contributions from other kinds of exactions. The statute does not. Rather, paragraph 622(g)(1) applies the same standard—"any tax, fee, or assessment of any kind imposed" by an LFA on a cable operator—to determine whether a cash payment, an in-kind contribution, or any other exaction "of any kind" is a "franchise fee."

The fact that paragraph 622(g)(2) carves out specific exceptions to the definition of "franchise fee" in paragraph 622(g)(1) only strengthens the case that no general exemption exists for "cable-related, in-kind contributions." Reading such a broad exemption into the statute would render superfluous one of the more specific exceptions set out in subparagraph 622(g)(2)(C). That provision excludes from the definition of "franchise fee" the capital costs that an operator that was granted its franchise on or after October 30, 1984 incurs in furnishing public, educational, and governmental ("PEG") facilities to a franchising authority—a contribution that would seem to qualify as both "cable-related" and "in-kind". But if all such contributions were exempt from the definition of "franchise fee," this more specific exception carved out for PEG capital costs would serve no purpose. Giving effect to all words of a statute if possible is a bedrock canon of statutory interpretation,[11] one that applies with particular force where, as is the case here, the language at issue is the product of careful and precise drafting.[12]

Nor can any of the other exceptions set forth in paragraph 622(g)(2) be read to cover all, or even a substantial share, of the "cable-related, in-kind" contributions a franchising authority

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[11] *See e.g., Duncan v. Walker*, 533 U.S. 167, 174, 150 L. Ed. 2d 251, 121 S. Ct. 2120 (2001).

[12] Subparagraphs (g)(2)(B) and (g)(2)(C) of Section 622 establish distinct PEG-related franchise fee exceptions for franchises granted as of October 30, 1984, the date the Cable Act was signed into law, and those granted after, respectively. In the case of the former, any payments that "support" PEG facilities are excepted from treatment from franchise fees. *See* Section 622(g)(2)(B). In the case of the latter, only "capital costs" are excluded. *See* Section 622(g)(2)(C).

might seek to extract from a cable operator, such as free or discounted cable services or use of cable facilities and equipment. The Sixth Circuit has affirmed that subparagraph 622(g)(2)(D), which creates an exemption for fees "incidental to the awarding or enforcing of a franchise," is limited to enumerated examples such as "bonds" and "security funds" as well as other "minor expenses."[13] The remaining three exceptions—those codified in subparagraphs 622(g)(2)(A), (B), and (E)[14]— fail to cover "cable-related, in-kind contributions" to any significant extent. Indeed, none of the paragraph 622(g)(2) exceptions can be read to cover contributions of free or discounted services or the use of cable facilities for an LFA's chosen purposes. Accordingly, paragraph 622(g)(2) fails to establish a general exemption for "cable-related, in-kind contributions" from treatment as franchise fees under Title VI.

ACA further agrees with the Commission's tentative conclusion that "cable-related, in-kind contributions" are "franchise fees" under paragraph 622(g)(1) even if expressly contemplated elsewhere in Title VI. For instance, the fact that subsection 611(b)[15] authorizes LFAs to require franchisees to designate channel capacity on institutional networks ("I-Nets") for governmental use does not exempt the costs incurred to provide that capacity from treatment as franchise fees. As an initial matter, there is no textual basis in subsection 622(g) for finding that Section 611(b) imposes any limit on definition of "franchise fee."[16] Moreover, as explained above, reading into the Act a broad exemption from the definition of "franchise fee" for any in-kind contribution directly authorized by Title VI would read out the specific exception set forth in subparagraph 622(g)(2)(D). If all PEG-related costs are excluded from treatment as franchise

[13] *See Second FNPRM*, ¶ 18.

[14] Subparagraph 622(g)(2)(C) applies to franchises granted after October 30, 1984 and is not relevant to the discussion above.

[15] 47 U.S.C. § 531.

[16] That is, subsection 622(g) contains no qualifying language, *e.g.*, "except as provided in . . .," that would suggest that another Title VI provision limits its scope.

fees simply because subsection 611(b) contemplates that such costs be incurred, the specific exemption for PEG "capital costs" set forth in subparagraph 622(g)(2)(D) would have no effect.

The Commission proposes excluding 'build-out requirements" from the definition of "franchise fee," reasoning that such requirements are not imposed for the benefit of the LFA and "ultimately may result in profit to the operator."[17] Under this approach, the expenditures necessary to meet build-out obligations would not be considered "contributions" to the LFA but simply "part of the provision of cable service" under a franchise.[18] ACA submits the Commission's reasoning is flawed and its proposal is too broad. First, build-out requirements may provide a benefit to the LFA, ensuring service is provided to certain constituencies within an expedited time frame that would otherwise not incur in an unregulated market. Second, while a build-out obligation may provide revenues to a cable operator, it also imposes costs, which may be so great that the cable operators incurs a loss. Accordingly, build-out requirements should only be excluded to the extent an LFA needs to meet its obligation under paragraph 621(a)(3).[19] Under that provision, an LFA "shall assure" that access to cable service is not denied to potential subscribers on the basis of income. To the extent an LFA is acting to fulfill this statutory mandate, it is not exercising its discretion within the bounds of subsection 622(b) to assess franchise fees.[20] Yet build-out requirements that exceed the scope of paragraph 621(a)(3)—for instance, requirements unrelated to extending cable service to ensure low-income residents are served—are, like the PEG and I-Net requirements an LFA "may"

[17] *See* Second FNPRM, ¶ 21.

[18] *See id*.

[19] 47 U.S.C. § 521(a)(3).

[20] By contrast, a LFA is exercising its discretion when it requires a cable operator to set aside sufficient PEG channel capacity. *See* 47 USC § 541(a)(4)(B).

impose under Section 611, imposed at the discretion of the LFA and should be treated as "cable-related, in-kind contributions" within the definition of "franchise fee."[21]

The Commission's interpretation of the Section 622 is bolstered by the legislative history.[22] As an initial matter, the legislative history provides no textual basis for finding that in-kind contributions are categorically exempt from treatment as franchise fees when related to the provision of cable service. In fact, the history supports a contrary reading. In particular, the House Report on H.R. 4103, the House version of the 1984 Cable Act and the bill from which Section 622 is derived, discusses the PEG capital costs exception set forth in subparagraph 622(g)(2)(D).[23] As part of that discussion, the report explains that "any payments which a cable operator makes voluntarily related to [PEG] access and which are not required by the franchise" would not count as franchise fees.[24] This clarification would be necessary only if there were PEG-related costs that count as franchise fees when required under a franchise. Indeed, there are: any operating costs a cable operator might be required to incur in furnishing PEG access—a cable-related, in-kind contribution—would qualify as franchise fees.

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[21] ACA also observes that that Section 621(a)(3) was designed to prevent economic redlining and not to require cable operators to build where it is uneconomic.

[22] ACA believes that the term "franchise fee" within Section 622 unambiguously embraces cable-related, in-kind contributions. The legislative history corroborates this reading of the statute but is not necessary to sustain it.

[23] "Cable Franchise Policy and Communications Act of 1984," Report of the House Committee on Energy and Commerce, H. Rpt. 98-934 at 63-65 (Aug. 1, 1984). *See also Congressional Record*, Vol. 130, No. 127, at H 10441 (Oct. 1, 1984). During debate on the final legislation the Chairman of the House Telecommunications Subcommittee, Representative Wirth, and Representative Bliley engaged in the following colloquy:

> Mr. Bliley: What is the relationship between permissible franchise fees and public, educational, and government access commitments in new franchises?
>
> Mr. Wirth: Subsection 622(g)(2)(C) establishes a specific provision for PEG access in new franchises…As regards PEG access in new franchises, payment for capital costs required by the franchise to be made by the cable operator are not defined as [franchise] fees under this provision. In addition, any payments which a cable operator makes voluntarily…would not be subject to the 5 percent franchise fee cap."

[24] *See* H. Rpt. 98-934 at 65.

In addition to being compelled under the statute, the Commission's proposed treatment of "cable-related, in-kind" contributions" as franchise fees would serve the public interest. If these "in-kind" contributions are not counted as franchise fees, a cable operator faces a dilemma: either "eat" the costs or pass them along to subscribers, raising the total cost of service. Neither of these alternatives serves the public interest. If a cable operator's margins are reduced, it will have less capital to invest in deploying new plant and rolling out new services. If service prices are raised, either consumers will suffer, or, if they migrate to another provider that is not subject to the fee, the cable operator will lose revenues.[25] The Commission's interpretation of Section 622 helps address this concern. Thus, as a matter of statutory interpretation and policy, the Commission should adopt its tentative conclusion that cable-related, in-kind contributions count toward the five percent cap.[26]

## III. LOCAL AUTHORITIES MAY NOT REGULATE OR IMPOSE FEES ON INCUMBENT CABLE OPERATORS WITH RESPECT TO BROADBAND INTERNET ACCESS SERVICE AND OTHER NON-CABLE SERVICES PROVIDED OVER "MIXED-USE" CABLE SYSTEMS

Cable operators have entered franchise agreements pursuant to section 621[27] that provides them with access to public rights-of-way for the purpose of deploying networks that provide cable services. Over time, cable operators have upgraded their networks to enable the

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[25] Not including cable-related, in-kind contributions within the franchise fee cap is likely to place cable operators at a disadvantage vis-à-vis its competition. Satellite providers, for instance, are not be subject LFA authority. In addition, providers that do not offer cable service, but offer telecommunications and broadband service, which includes over the top video service, may pay lower fees to state and local governments for permission to use the public rights-of-way and provide service. For similar reasons, ACA supports the Commission's proposal that its interpretation apply to both incumbent cable operators and new entrants. *See Second FNPRM*, ¶22 ("[T]he Commission should not place its thumb on the scale to give a regulatory advantage to any competitor.")

[26] As proposed by the Commission, ACA agrees it should not distinguish between incumbent cable operators and new entrants in delineating the term "franchise fee" under paragraph 622(g)(1). The Sixth Circuit has not directed the Commission to consider this question on remand. Accordingly, the Commission should apply a consistent definition of the term "franchise fee" with respect to operators in both categories. And, as explained herein, that definition should be read to cover "cable-related, in-kind contributions."

[27] 47 U.S.C. § 541.

provision of a broad array of non-cable services, including telecommunications services, broadband and other information services,[28] and interconnected VoIP service[29] These upgrades and offerings of non-cable services do not impose new material costs on LFAs in managing cable operators' use of the rights-of-way, and in fact provide substantial benefits to subscribers.[30] ACA has every reason to believe its members will continue to invest in network upgrades that deliver even more benefits, including deployment of fiber and Wi-Fi access points, and that in almost all instances LFAs will recognize these practices are undertaken within existing cable franchise arrangements, not warranting additional fees or regulations beyond those applicable to cable services. Unfortunately, there are "outlier" LFAs that have sought or are seeking to add fees and regulations regardless of statutory prohibitions. Because these actions stand to harm cable operators, and may set precedent that other LFAs seek to follow, the Commission should make clear that further overregulation of cable systems at the local government level is impermissible.

The Commission has ruled in prior orders that LFAs may not use their franchising authority to regulate cable operators in their provision of non-cable services.[31] There is no dispute that this "mixed-use" rule is "defensible" as applied to two types of cable operators: new

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[28] For instance, some cable operators may provide home security services or specialized services to commercial and institutional customers.

[29] As the Commission observes in the *Second FNPRM*, it has not classified non-nomadic interconnected VoIP as either a telecommunications service or an information service, but it is not a cable service.

[30] As a rule, cable operators have been carrying out these and similar upgrades pursuant to their rights under their existing cable franchises to occupy public rights-of-way.

[31] *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5153 ¶ 121 (2007) (First Report and Order), *aff'd sub nom. Alliance for Community Media et al. v. FCC*, 529 F.3d 763 (6th Cir. 2008) (Alliance), *cert. denied*, 557 U.S. 904 (2009) (First Report and Order); 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, Second Report and Order, 22 FCC Rcd 19633, 19640-41, ¶ 17 (2007) (Second Report and Order).

entrants and incumbent cable operators that provide telecommunications service.[32] On remand, the question before the agency is whether and how the mixed-use rule should apply to a third type: incumbent cable operators that are not telecommunications carriers. ACA urges the Commission to find that Federal law denies local governments the right, both within and beyond their capacity as LFAs, to impose fees on or otherwise regulate such operators in their provision of non-cable services over their cable systems.

An analysis of LFA authority to regulate non-cable services provided over cable systems must start with Title VI's distinction between "cable services" and "cable systems." "Cable services" involve one-way transmission of video programming to subscribers.[33] A "cable system," in turn, is defined as "a facility . . . that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community."[34] A system "designed to" provide cable service need not provide only cable service; the Commission and Courts have long recognized that the "facilit[ies]" that comprise cable systems may deliver all manner of non-cable services.[35] Accordingly, where Title VI makes reference to "cable system," the scope of services that may be provided over such facilities includes both cable service and non-cable services. By the same token, where Title VI imposes limits on the regulation of cable systems, those limitations may operate to curtail regulation of non-cable services.

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[32] *See Montgomery County,* 863 F.3d at 492. Accordingly, the Commission should affirm its tentative conclusion that *Montgomery County* leaves undisturbed the mixed-use rule as applied to incumbent cable operators that offer any telecommunications service, i.e., such operators are covered under the common carrier exception in subparagraph 602(7)(C). *See* 47 U.S.C. § 522(7)(C).

[33] 47 U.S.C. § 522(6).

[34] 47 U.S.C. § 522(7).

[35] *See* Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-311 at 4 (May 3, 2018) ("NCTA May 3, 2018 *Ex Parte* Letter").

A clear example of the latter can be found in Section 624.[36] The Commission has proposed that this section bars LFAs from use of their Title VI franchising authority to regulate information services provided over cable systems.[37] ACA concurs. Section 624 demarks LFA authority to impose requirements on cable operators' "services, facilities, and equipment" through franchising. Under subsection (b), any such requirements related to "the establishment or operation of a cable system" may not include "requirements for video programming or other information services."[38] While Section 624 predates the Telecommunications Act of 1996,[39] which established the definition of "information service", a similar definition of the term was prominently in use at the time of Section 624's enactment.[40] The legislative history suggests that Congress had this definition in mind when drafting Section 624, as the House Report uses many of the same terms—"storing," "transforming," and "process[ing] information"—to describe the characteristics of an "information service"[41] And while the Telecommunications Act amended parts of Title VI, it did not amend Section 624 to differentiate use of the term "information service" in that provision from the definition of the term being codified under Section 153. The term is therefore best read to hold the same meaning under both provisions.[42]

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[36] 47 U.S.C. § 544.

[37] *See Second FNPRM*, ¶ 28.

[38] 47 U.S.C. § 544(b).

[39] *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, § 624 (1984); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("Telecommunications Act").

[40] *Compare United States v. AT&T*, 552 F. Supp. 131, 178 (D.D.C. 1982) (defining "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information which may be conveyed via telecommunications") *with* 47 USC 153(24) ("The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. . . .")

[41] H.R. Rep. No. 98-934, 1984.

[42] The foregoing analysis applies to interconnected VoIP to the extent such service may be classified as an information service. To the extent it is classified as a "telecommunications service," any provider of such service would qualify as a Title II carrier subject to the exception set forth in subparagraph 602(7)(C).

Accordingly, paragraph 624(b)(1) imposes a flat ban on LFA regulation of information services carried over cable systems. The activity the section proscribes—"establish[ing] requirements for . . . information services"—is broad enough to cover all manner of obligations an LFA might seek to impose on a cable operator in its provision of information services, including fee payments, franchising, quality-of-service or performance requirements, or any other "requirements" an LFA might devise.[43] Moreover, subsection 624(b) provides that paragraph 624(b)(1) applies "to the extent [requirements are] related to the establishment or operation of a cable system."[44] An operator that uses its cable system to deliver information services is clearly engaged in "operation of" that system within the confines of subsection 624(b). While subparagraph 624(b)(2)(B) empowers an LFA to "enforce any requirements contained in a franchise" related to "broad categories of video programming and other services," ACA agrees with the Commission that this provision does not limit the application of (b)(1) as to information services[45]

Section 622 separately operates to limit the fees an LFA may impose on non-cable services carried over a cable system. Under subsection 622(b), franchise fees paid "with respect to any cable system" are capped at five percent of gross revenues "derived . . . from operation of the cable system to provide cable services." The Act defines a "franchise" as an instrument that "authorizes construction or operation of a cable system,"[46] so, by any reasonable interpretation, the term "franchise fee" includes fees that pertain to non-cable services provided over a cable system. Yet the "franchise fees" an LFA may impose "with

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[43] *See* NCTA May 3, 2018 *Ex Parte* Letter at 4.

[44] *See* 47 U.S.C. § 544(b).

[45] *See Second FNPRM*, ¶ 28, n.135 (noting that "[t]he limitation on the authority of LFAs in Section 624(b)(1) extends specifically to 'information services' whereas the authority granted to LFAs in (b)(2) makes no mention of 'information services').

[46] 47 U.S.C. § 522(9).

respect to [a] cable system" are limited to five percent of "cable service" revenues.[47] That is, regardless of the total revenue a cable operator derives from its cable system, its cable service revenues alone form the revenue base used to calculate the maximum franchise fee. No franchise fee can be imposed in excess of that amount on any service provided over the cable system, including non-cable service.[48]

The foregoing analysis makes clear that Title VI denies power to local governments, acting in their capacity as LFAs, to regulate information services provided over cable systems. Section 636[49] further constrains local government regulation of such services. Subsection 636(c) provides that any provision of local law or "any provision of any franchise" granted by a local authority is expressly "preempted or superseded" to the extent "inconsistent with the provisions of Title VI."[50] Accordingly, an LFA or other local government body may not impose any requirement on a cable operator that conflicts with the terms of subsections 624(b)(1) or 622(b) or any other Title VI provision. Nor can such requirements be imposed indirectly through a waiver or other voluntary commitment from an operator.[51]

There also are broader Federal laws and policies—beyond Title VI—that place affirmative limits on local government regulation of information services provided by cable operators. In particular, the Commission's *Restoring Internet Freedom Order*[52] expressly preempts any State or local law that conflicts with the light-touch Federal regulatory framework

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[47] 47 U.S.C. § 522(b).

[48] Even if such fee were deemed not to meet the definition of a "franchise fee," it would still be subject to the prohibition on LFA regulation of information services set forth in Section 624.

[49] 47 U.S.C. § 556.

[50] 47 U.S.C. § 556(c).

[51] *See* NCTA May 3, 2018 *Ex Parte* Letter at 3, n.12 ("As a matter of statutory public policy, preemption may not be contracted around or waived.").

[52] *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, (2018) ("*RIF Order*").

established for broadband service. That preemption extends to so-called "economic regulation," a category that includes entry requirements such as franchising, as well as rate regulation and other utility-style requirements.[53] More broadly, it has long been Federal policy that government not regulate information services, a policy that extends to non-cable services.[54] These Commission policies find support in Section 230(b)(2) of the Act, which establishes as a policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[55]

Finally, a finding that local governments lack authority to regulate non-cable services provided over incumbent operators' cable systems serves the public interest. Such a finding would preserve regulatory parity among cable operators in their provision of information services that are not generally distinguishable based on just whether the cable operator is an incumbent or new entrant.[56] Also, it would ensure that cable operators are not charged duplicative fees or otherwise regulated twice for the facilities and equipment they are authorized to construct and operate under their cable franchises. When an authority is compensated by a cable operator for the use and occupation of the public rights-of-way through a cable franchise fee, it has been fairly and reasonably compensated, even if the cable operator uses its cable system facilities to provide non-cable services as well. The local authority incurs no additional costs to manage the rights-of-way from the provision of non-cable services over the same facilities that provide cable services, so there is no rationale for assessment of additional fees.

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[53] *See id*., ¶ 195.

[54] *See id*., ¶ 202, n.747 (citing *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3316-23, ¶¶ 15-25).

[55] 47 U.S.C. § 230(b)(2).

[56] Application of different regulatory requirements may be appropriate in certain instances, such as where a firm has market power or where the statute makes such distinction.

## IV. CONCLUSION

ACA supports the Commission's tentative conclusions that "franchise fees" as set forth in Section 622 include "cable-related, in-kind contributions" and that it should apply its "mixed-use" rule so as to prohibit LFAs from regulating non-cable services provided over incumbent cable operators' cable systems. These conclusions are supported by the statute and are consistent with the public interest. ACA requests the Commission move promptly after reply comments are filed to issue an order adopting them.

Respectfully submitted,

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