Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 621(a) 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 VERIZON

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I. INTRODUCTION AND SUMMARY.

Commission proposals to reform the local franchising process will benefit consumers by slowing the rising costs of video service and encouraging greater video and broadband deployment. Over the years, the Commission has adopted rules and provided guidance on how local franchising authorities (LFAs) may regulate cable operators and cable television services under the Communications Act. The Commission's *Second Further Notice of Proposed Rulemaking* is another helpful step in clarifying the proper role of LFAs and defining the scope of their regulatory authority.[2]

The Commission's proposal to count cable-related in-kind contributions as part of the statutory cap on franchise fees will help keep in check consumer video prices by limiting the

[1] The Verizon companies participating in this filing ("Verizon") are the regulated, wholly-owned subsidiaries of Verizon Communications Inc.

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

costs and fees imposed on cable operators as they provide service. Contributions to LFAs in the form of either direct payments or in-kind services are costs that are passed on to consumers. Ensuring that all contributions and payments to LFAs are treated as "franchise fees" subject to the statutory five percent franchise fee cap will cabin those costs.

In addition, the Commission's proposal to prohibit LFAs from using their video franchising authority to regulate non-cable services offered over cable systems by cable operators should help ensure a light-touch regulatory approach that will facilitate deployment of broadband service. Taken together, these proposals will spur greater video and broadband competition.

Of course, any decisions that define the regulatory boundaries of local franchising authorities should also apply to state franchising authorities. Ensuring that franchising authorities -- whether at the state or local -- do not impose unreasonable regulatory burdens on providers will further the Commission's efforts to facilitate competition in video and broadband services by preventing a patchwork of separate and potentially conflicting state and/or local requirements.

For these reasons, Verizon supports the Commission's proposals in the *Second FNPRM*. Specifically, the Commission should confirm that:

- All in-kind contributions required by an LFA as a condition of receiving a franchise are included as "franchise fees" subject to the five percent statutory franchise fee cap;
- LFAs are prohibited from leveraging a cable franchise to regulate a franchisee's non-cable services provided over a mixed-use network; and,

- The Commission's decisions regarding the scope of LFA regulatory authority apply with equal force to state-level franchising regulations.

In addition, consistent with its treatment of mixed-use networks, the Commission should take this opportunity to confirm that over-the-top video services are not cable services and are not subject to cable regulation. Just as broadband and Voice over Internet Protocol services should not be subject to LFA regulation, so LFAs should not be permitted to regulate over-the-top video services offered by providers over the Internet, even if those providers may separately offer cable services. Such a ruling will increase competition and consumer choices among video services.

II. THE COMMISSION SHOULD TREAT ALL IN-KIND CONTRIBUTIONS REQUIRED BY A FRANCHISING AUTHORITY AS "FRANCHISE FEES" SUBJECT TO THE FIVE PERCENT STATUTORY CAP.

Verizon supports the Commission's proposal 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."[3] This policy will harmonize the treatment of cable-related, in-kind contributions with the treatment of non-cable-related, in-kind contributions, and prevent LFAs from evading the statutory cap on franchise fees through burdensome demands for free or discounted services from Multichannel Video Programming Distributors (MVPDs).

In the *First Report and Order* in this proceeding, the Commission determined that non-cable-related, in-kind payments or contributions demanded by an LFA as a condition of awarding a franchise should be included within the scope of the "franchise fee" subject to the

[3] *Id.* ¶ 16. Verizon has no objections to the Commission's description of the limited exceptions in Section 622(g)(2). *See id.* ¶¶ 18-19.

statutory five percent fee cap in Section 622.[4] The Commission found that these in-kind payments could deter market entry because an applicant's failure to accede to excessive demands for such contributions could lead to unreasonable refusals to award a franchise. To ensure consumers can benefit from competitive entry, the Commission ruled that "any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap."[5]

Obviously, excessive or burdensome demands for *cable-related*, in-kind contributions (*e.g.*, discounted or free video services to local governments) could have a similar deterrent effect, discouraging new entrants from deploying video and broadband services and incumbents from renewing franchise agreements. In either case, unreasonable LFA demands deprive consumers of the benefits of competition. And, as Verizon has previously explained, unless all in-kind assessments are included within the franchise fee cap, the cap itself would be meaningless.[6] Excluding cable-related, in-kind contributions from the franchise fee calculation would enable LFAs to shift demands for burdensome payments from monetary to non-monetary contributions.[7]

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[4] *See Implementation of Section 621(a) 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, ¶ 105 (2007) ("*First Report and Order*"), *aff'd sub nom. Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 557 U.S. 904 (2009).

[5] *Id*.

[6] *See* Opposition of Verizon to Petitions for Reconsideration of Second Franchise Order, MB Docket No. 05-311, at 10 (filed Feb. 11, 2008).

[7] *See Second FNPRM* ¶ 17 ("If in-kind contributions unrelated to the provision of cable services were not treated as franchise fees, LFAs could easily evade the five percent cap by requiring any manner of in-kind contributions, rather than a monetary fee.")

The Commission's proposed policy also is consistent with the Sixth Circuit's affirmance of the Commission's ruling on non-cable-related payments in the *Second Report and Order*.[8] The court explained that in-kind contributions, payments, and exactions clearly fall within the statutory definition of franchise fee as including "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."[9]

> [T]he terms "tax" and "assessment," in particular, can include nonmonetary exactions. The definition of "tax," for example, includes "a burdensome charge, obligation, duty, or demand." . . . And Justice Scalia, for one, has recognized that assessments need not be monetary -- by referring to "in-kind assessments[,]" which closely tracks the FCC's usage of the phrase "in-kind payments" here. . . . Thus we conclude that "franchise fee" as defined by §542(g)(1) can include noncash exactions.[10]

The Commission should follow this commonsense principle that demands for in-kind contributions are equivalent to demands for monetary contributions, and treat both within the statutory definition of "franchise fee."

The Commission should apply this treatment of in-kind contributions to the award of franchises for both new entrants and incumbents.[11] Notably, Section 622 does not distinguish between "franchise fees" for incumbents and new entrants. Disparate treatment of franchise fee requirements may lead to differing regulatory burdens, which could adversely impact consumers

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[8] *See Implementation of Section 621(a) 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 19,633 (2007) ("*Second Report and Order*"), *pet. for review denied in part, granted in part, Montgomery Cty., Md., et al. v. FCC, 863 F.3d 485* (6th Cir. 2017).

[9] 47 U.S.C. § 542(g)(1) (emphasis added).

[10] *Montgomery Cty., Md.*, 863 F.3d at 490-91 (citations omitted).

[11] *See Second FNPRM* ¶ 22.

and franchisees by imposing barriers to new entry or franchise renewal. Maintaining a level playing field will best support consumer access to competitive choices among video service providers.

III. THE COMMISSION SHOULD CONFIRM THAT THE CABLE ACT DOES NOT AUTHORIZE LFAs TO REGULATE NON-CABLE SERVICES ON MIXED-USE NETWORKS.

The Commission should confirm that non-cable services, such as broadband, Voice over Internet Protocol, etc., offered to customers over a mixed-use network are not subject to LFA regulation under a cable services franchise.[12] This finding not only is grounded in the Cable Act but also is consistent with recent steps the Commission has taken to prevent local authorities from imposing a patchwork of regulatory burdens on providers seeking to deploy broadband and other advanced communications services in addition to video service.[13]

First, the plain language of the Cable Act precludes LFA regulation of telecommunications services provided over a cable network. The definition of "cable system" excludes "a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act."[14] Similarly, Section 621(b)(3) states that an LFA may not "impose any

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[12] As the Commission has previously noted, this declaration does not affect the ability of local authorities to regulate non-cable services under other applicable regulatory regimes. *See Second Report and Order* ¶ 11 n.31.

[13] *See*, *e.g.*, *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, ¶¶ 26, 194 (2017) ("*Internet Freedom Order*") (finding broadband Internet access service is an interstate, information service, not subject to state or local regulation); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79 & WC Docket No. 17-84; FCC 18-133, ¶¶ 9-12 (rel. Sept. 27, 2018) ("*Broadband Deployment Ruling*") (clarifying "the scope and nature of the limits Congress imposed on state and local governments through Sections 253 and 332").

[14] 47 U.S.C. § 522(7)(C).

requirement . . . that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator,"[15] nor may an LFA "require a cable operator to provide any telecommunications service or facilities" as a condition of obtaining a franchise.[16] Based on this explicit language, LFAs may not leverage cable franchise agreements to regulate common carrier or telecommunications services[17] -- whether provided by a new entrant or an incumbent MVPD.[18]

The same is true for information services, such as broadband Internet access. Section 624(b) of the Cable Act precludes LFAs from "establish[ing] requirements for video programming or other information services."[19] The Commission notes that the Cable Act does not expressly define "information service," but the description of such services in the legislative history -- "Services providing subscribers with the capacity to engage in transactions or to store, transfer, forward, manipulate, or otherwise process information or data would not be cable services" -- corresponds closely to the definition of "information service" in the Telecommunications Act of 1996.[20] Such parallel language supports the Commission's conclusion that Congress intended to preclude LFA regulation of what are now considered "information services" under cable franchises.

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[15] *Id.* § 541(b)(3)(B).
[16] *Id.* § 541(b)(3)(D).
[17] *See MediaOne Group v. County of Henrico*, 257 F.3d 356, 363-64 (4th Cir. 2001) (relying on Sections 602(7)(C) and 621(b)(3) to prohibit LFA regulation of Internet access service).
[18] *See Second FNPRM* ¶ 26.
[19] 47 U.S.C. § 544(b)(1).
[20] *Second FNPRM* ¶ 27 (quoting H.R. Rep. No.98-934, 98th Cong., 2nd Sess., reprinted in 1984 U.S.C.C.A.N. 4655, 4679). *Cf.* 47 U.S.C. § 153(20) (Defining "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications").

In addition, while some statutory provisions use the terms "common carrier" and "telecommunications" to describe services not subject to LFA regulation, the Commission has recently clarified that "telecommunications" networks may include commingled networks that are capable of providing both voice and data services.[21] Just as the Commission found that limiting the scope of Sections 253 and 332 to voice services could allow local jurisdictions to inhibit broadband deployment, so it should find here that allowing LFAs to regulate broadband or other services on mixed-use networks would result in additional barriers for MVPDs deploying commingled voice, video, and data networks.

Second, as the Commission explains, prohibiting LFAs from regulating information services is consistent with longstanding federal policy and the legislative goals of the Communications Act.[22] The Commission has determined that broadband Internet access services are interstate services subject to regulation only at the federal level.[23] If LFAs can use state and local laws to regulate broadband Internet access service, the result will be disparate service around the country based on state and local officials' differing conceptions of what form Internet regulation should take. Service offerings available in one state or locality would be prohibited in a neighboring one. Regulatory burdens for service providers would multiply dramatically.

The Commission has emphasized that preventing application of such a patchwork of local regulatory burdens to broadband providers is critical to the legislative goal of promoting advanced communications services.[24] "[R]egulation of broadband Internet access service should

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[21] *See Broadband Deployment Ruling* ¶ 36.
[22] *See Second FNPRM* ¶¶ 29-30.
[23] *See Internet Freedom Order* ¶¶ 194-96.
[24] *See Second FNRPM* ¶ 15.

be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements."[25]

Ensuring that LFAs -- whether at the local or state level -- do not impose regulatory burdens on providers' non-cable services will further the Commission's efforts to facilitate broadband deployment by preventing "a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which [an MVPD] operates."[26] Any such regulation would undermine the Commission's and Congress' goals of accelerating broadband deployment. Therefore, the Commission should confirm that a cable franchise agreement cannot be the basis for LFA regulation of non-cable services for both incumbents and new entrants.

IV. THE COMMISSION SHOULD CONFIRM THAT OVER-THE-TOP VIDEO SERVICE PROVIDERS ARE NOT CABLE OPERATORS SUBJECT TO LEGACY CABLE REGULATIONS.

Consistent with ruling that LFAs may not regulate non-cable services, the Commission should take this opportunity to confirm that over-the-top video distributors are immune from legacy cable regulations because they are not "cable operators" and do not provide a "cable service" over a "cable system." Rather, as Commissioner O'Rielly has noted, such providers "are rightfully not governed by archaic rules designed to implement woefully outdated statutory provisions."[27] A contrary result – such as allowing LFAs to insist that online video service providers obtain franchise agreements across the country and contribute franchise fees – would

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[25] *Internet Freedom Order* ¶ 194.

[26] *Id.*

[27] Statement of Commissioner Michael O'Rielly, *Modernization of Media Regulation Initiative*, *et al.,* Further Notice of Proposed Rulemaking and Report and Order, MB Docket No. 17-105, *et al*., FCC 18-148 (rel. Oct. 23, 2018) ("O'Rielly Statement").

be inconsistent with law and the Commission's policy goals to facilitate the entry and growth of new competitors to traditional pay TV services.

Legacy cable regulation cannot apply to over-the-top video distributors because the Internet is not a "cable system."[28] The definition of "cable system" requires "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service…."[29] A broadband network does not include "associated signal generation, reception, and control equipment that is designed to provide cable service" for an over-the-top video distribution service.[30] Moreover, as the Commission has explained, wireless networks -- including soon to be prevalent 5G wireless broadband networks that rival speeds of wireline networks -- do not operate over "closed transmission paths" and cannot be deemed "cable systems."[31]

Confirming that over-the-top video services are not subject to cable regulation is not only legally correct, but also necessary as a matter of policy to ensure that over-the-top video services thrive. While some regulators may see a competitive or financial benefit in subjecting online video services to cable regulation, such regulation was designed for a much different purpose: to

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[28] As the Commission has previously noted, unlike a provider of a true over-the-top video service, "an entity that delivers cable services via IP is a cable operator to the extent it delivers those services as managed video services over its own facilities and within its footprint." *See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd 15,995, ¶ 74 (2014) ("*OTT MVPD NPRM*").

[29] 47 U.S.C. § 522(7).

[30] The Commission has referred to such equipment as including "headend equipment." *See Telephone Co.-Cable Television Cross-Ownership Rules*, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069, ¶ 24 (1992).

[31] *See Definition of a Cable System*, Report and Order, 5 FCC Rcd 7638, ¶ 5 (1990).

address monopoly cable operators where consumers' only choice was between the local cable incumbent or broadcast TV.

Over-the-top video services are innovating and flourishing in part because they do not have to seek franchises and comply with local, state, and federal cable requirements.[32] Even the threat of having to meet such requirements would deter innovation and investment, whether the over-the-top video distributor simply provides streaming video online or also owns the broadband connection used by some subscribers and provides a managed video service over the same facilities. The Commission has already tentatively concluded, and now should confirm, that over-the-top video distribution services are not subject to legacy cable regulation.[33] And the Commission should reach this result even if the online video distributor also provides a separate, managed video service and/or broadband Internet access service.

V. THE COMMISSION SHOULD APPLY ITS POLICIES ON THE AWARD OF CABLE FRANCHISES AND FRANCHISE FEES TO BOTH LOCAL AND STATE FRANCHISING REGULATIONS AND DECISIONS.

The Commission should apply its decisions in this proceeding and those in the *First Report and Order* and *Second Report and Order* to franchising actions taken at the state level and state regulations that impose requirements on local franchising.[34] It makes no sense for Sections 621 and 622 of the Cable Act to apply in one way in one state and another way in a second state, and subject an MVPD to conflicting decisions in neighboring states. Moreover, state-level cable regulations may be modeled on the federal act, and so, allowing disparate

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[32] *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568, ¶¶ 128-187 (2017). *Cf.* O'Rielly Statement (describing over-the-top video providers as "well-funded and highly successful").

[33] *See OTT MVPD NPRM* ¶ 78.

[34] *See Second FNPRM* ¶ 32.

interpretations of the same language would lead to confusion among consumers, regulators, and franchisees.[35]

While the Commission initially chose not to extend to state decisions its rulings on what actions rise to the level of an unreasonable refusal to grant a franchise,[36] it explained in the *Second Report and Order* that its constructions of the Cable Act apply to both incumbents and new entrants -- and nationwide. For example, when discussing the limitations on permissible franchise fees, the Commission stated:

> The statutory interpretations set forth above represent the Commission's view as to the meaning of the various statutory provisions, such as Section 622, and these interpretations are valid immediately. We do not see, for example, how Section 622 could mean different things in different sections of the country depending on when various incumbents' franchise agreements come up for renewal.[37]

And it reiterated that "because these interpretations do not depend on Section 621(a)(1), they are also valid through the nation."[38]

Consistent application of the Commission's franchising rulings at the state and local levels will benefit consumers, regulators, and MVPDs. The Commission should therefore confirm that its rulings on the meaning and application of various provisions of the Cable Act and what actions constitute an unreasonable refusal to award a franchise -- whether to a new

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[35] *See*, *e.g.*, Iowa Code § 477A.11 (stating that Iowa Code for Cable or Video Service Franchises "is intended to be consistent with the federal Cable Act, 47U.S.C. § 521, *et seq.*"); Cal. Pub. Util. Code §§ 5830(b-d) (linking definitions of "cable operator," "cable service," and "cable system" to definitions in federal Cable Act).

[36] *See First Report and Order* ¶ 1 n.2.

[37] *Second Report and Order* ¶ 19 (footnote omitted).

[38] *Id.* n.60.

entrant or incumbent -- apply nationwide and to both state-level and local-level franchising rules and decisions on the awarding of franchises.

VI. CONCLUSION.

Verizon recommends that the Commission adopt the rulings outlined above.

Respectfully submitted,

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