Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

INITIAL COMMENTS OF THE CITY OF PHILADELPHIA, PENNSYLVANIA, CITY OF OKLAHOMA CITY, OKLAHOMA; CITY OF MINNEAPOLIS, MINNESOTA; NORTHWEST SUBURBAN CABLE COMMUNICATIONS COMMISSION; CITY OF SIOUX FALLS, SOUTH DAKOTA; NORTH METRO TELECOMMUNICATIONS COMMISSION; NORTH SUBURBAN COMMUNICATIONS COMMISSION; THE SOUTH WASHINGTON COUNTY TELECOMMUNICATIONS COMMISSION; CITY OF RENTON, WASHINGTON; CITY OF EDMOND, OKLAHOMA; CITY OF COON RAPIDS, MINNESOTA; CITY OF WEST ALLIS, WISCONSIN; TOWN OF PERINTON, NEW YORK; CITY OF URBANDALE, IOWA; CITY OF EDMONDS, WASHINGTON; TOWN OF PITTSFORD, NEW YORK; CITY OF MAPLE VALLEY, WASHINGTON; CITY OF WATERTOWN, WISCONSIN; VILLAGE OF OREGON, WISCONSIN; AND CITY OF NEW LONDON, WISCONSIN.

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November 14, 2018

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SUMMARY

These Initial Comments are submitted on behalf of the above-named municipal entities constituting 46 municipal organizations from the states of Iowa, Minnesota, New York, Oklahoma, Pennsylvania, South Dakota, Washington, and Wisconsin, with a collective population of approximately 3.8 million.[1] Cable service providers occupy the PROW in all of the LFA jurisdictions and provide cable and non-cable services. All of the LFAs receive and rely upon cable franchise fees.[2] Franchise fees typically are general fund revenue[3] and are the rent for the PROW. Franchise Fees are also frequently used to fund public, educational, and/or

[1] The commenting municipal entities and their populations are: City of Philadelphia, Pennsylvania (1,580,863); City of Oklahoma City, Oklahoma (579,999); City of Minneapolis, Minnesota (382,578); Northwest Suburban Cable Communications Commission (collective population 317,272) (a Minnesota municipal joint powers commission consisting of the Minnesota cities of Brooklyn Center (30,104), Brooklyn Park (75,781), Crystal (22,141), Golden Valley (20,371), Maple Grove (61,567), New Hope (20,339), Osseo (2,430), Plymouth (70,576), and Robbinsdale (13,953)); City of Sioux Falls, South Dakota (153,888); North Metro Telecommunications Commission (collective population 109,779) (a Minnesota municipal joint powers commission consisting of the Minnesota cities of Blaine (57,186), Centerville (3,792), Circle Pines (4,918), Ham Lake (15,296), Lexington (2,049), Lino Lakes (20,216), and Spring Lake Park (6,412)); North Suburban Communications Commission (collective population 106,991) (a Minnesota municipal joint powers commission consisting of the Minnesota cities of Arden Hills (9,552), Falcon Heights (5,321), Lauderdale (2,379), Little Canada (9,773), Mounds View (12,155), New Brighton (21,456), North Oaks (4,469), Roseville (33,660), and St. Anthony (8,226)); South Washington County Telecommunications Commission (collective population 105,571) (a Minnesota municipal joint powers commission consisting of the Minnesota municipalities of Woodbury (61,961), Cottage Grove (34,589), Newport (3,435), Grey Cloud Island Township (307), and St. Paul Park (5,279), Minnesota); City of Renton, Washington (population 90,927); City of Edmond, Oklahoma (population 81,405); City of Coon Rapids, Minnesota (61,476); City of West Allis, Wisconsin (60,411); Town of Perinton, New York (46,462); City of Urbandale, Iowa (42,449); City of Edmonds, Washington (39,709); Town of Pittsford, New York (population 29,405); City of Maple Valley, Washington (population 25,758); City of Watertown, Wisconsin (23,861); Village of Oregon, Wisconsin (9,231); and City of New London, Wisconsin (7,295) (collectively, the "LFAs").

[2] *E.g.*, Philadelphia, Pennsylvania, The Mayor's Operating Budget in Brief for Fiscal Year 2019 at p. 21 (identifying cable franchise fees as a relied upon source of revenue), *available at* http://phlcouncil.com/wp-content/uploads/2018/07/FY19-BudgetinBrief_Adopted.pdf.

[3] *Id.*

governmental access television channels.[4] Thus, the LFAs have a significant interest in authorizing PROW use, including cable franchising, and would be directly affected by any action the Federal Communications Commission (the "Commission" or the "FCC") might take pursuant to its September 25, 2018, Second Further Notice of Proposed Rulemaking ("FNPRM").[5]

In the FNPRM the FCC has proposed three different rules: (1) to interpret the definition of franchise fee to include the fair market value of "in-kind compensation" contained in a cable franchise; (2) to interpret the Cable Communications Policy Act of 1984 (herein "Cable Act") as preempting the regulation of non-cable services provided over the cable system; and (3) to preempt state laws that are inconsistent with the proposed rules in the FNPRM. The LFAs disagree with the tentative conclusions and proposed rules in the FNPRM for the reasons summarized below.

The Definition of Franchise Fee

In the Comments, the LFAs explain the proposed actions in the FNPRM are unsupportable. First, the LFAs show that legislative interpretation is not allowed when the meaning of the statute is clear. Here, the statute in question is Section 622 of the Cable Act, which defines a cable franchise fee. Section 622(g) clearly states that a franchise fee is limited to a tax, fee, or assessment of any kind imposed on a cable operator. The dictionary definition and the court decisions interpreting the word "assessment" define "assessment" as a unilateral punitive government action. An "assessment" therefore cannot include cable franchise

[4] *See, e.g.*, South Washington County Telecommunications Commission, *2017 Annual Report*, *available at* http://swctc.org/images/documents/2017_SWCTC_Annual_Report_FINAL_small.pdf

[5] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Further Notice of Proposed Rulemaking, MB Docket No. 05-311 (Sept. 25, 2018) (herein "FNRPM").

provisions sometimes described as franchise requirements or in-kind compensation. Since the statutory definition is clear on its face, the FCC has no authority to interpret it. This conclusion is bolstered by the legislative history, judicial decisions, and other provisions in the Cable Act that allow a cable operator to recover these in-kind franchise provisions through its rates. There are also decades of past practice in which the franchise fee has been calculated only upon a fee on cable operator's gross revenues.

Interpreting the definition of franchise fee as proposed in the FNPRM will also be unconstitutional. Allowing a cable operator to deduct in-kind franchise provisions that were negotiated as part of a cable franchise contract will result in an unconstitutional taking in violation of the Fifth Amendment. Allowing an off-set of the fair market value of in-kind franchise provisions will also result in a dramatic reduction in support of access television channels and operations thereby limiting or eliminating speech in violation of the First Amendment.

The LFAs also made several comments in the alternative in the event the FCC proceeds with interpreting the definition of franchise fee contrary to the Comments of the LFAs and, we anticipate, many others. These comments include urging the FCC to use a cost-based recovery of in-kind franchise provisions rather than fair market value as the FCC has initially proposed. The reasons supporting a cost-based recovery include the fact that provisions in the Cable Act already allow a cable operator to fully recover all of its franchising costs. Allowing a cable operator to recover the fair market value of these costs will allow a cable operator to recover its costs many times over all on the backs of cable subscribers. Cost recovery, not fair market value recovery, is commonly used throughout the Communications Act. If fair market value recovery is allowed, there are no rules in determining fair market value or even who determines it. This

will undoubtedly result in valuation disputes, causing both local franchising authorities and cable operators to expend time and resources determining fair market value. Conversely, using a cost-based model will avoid these negative consequences. Finally, allowing fair market value recovery will significantly impact local government budgets by allowing a greater franchise fee off-set than would cost-recovery.

Also, in the alternative, the LFAs have raised concerns with the potential impact of retroactive application of a new rule allowing the fair market value of in-kind franchise provisions to be deducted, or offset, from franchise fees. Allowing the recovery of multiple years of in-kind franchise provisions could eviscerate a year or more of cable franchise fees. The LFAs also urge the FCC to specifically exempt consideration in other agreements, such as settlement agreements, side agreements, MOUs and IRUs. In-kind franchise provisions in these independent agreements are separate from cable franchise agreement provisions and must not be included in the definition of franchise fee. Finally, there are some LFAs that have agreed on a franchise fee less than the 5% gross revenue fee cap contained in the Cable Act. This includes franchises with a percentage less than 5% or a definition of gross revenues that is less than all of the cable operator's gross revenues. In these situations, there must be no franchise fee off-set unless and until the cable operator can show the recovery is greater than 5% of all of the cable operator's gross revenues derived from the use of the cable system.

Mixed Use Networks

The FCC's "mixed use rule" was articulated in its [First Report and Order] in this docket, applying the Cable Act to new entrants to the cable market that are providers of "telecommunications service" and regulated as "common carriers" under Title II of the Communications Act. The FCC decided that new entrants using "mixed use" networks – i.e.

networks that deliver both cable service and telecommunications services – are exempt from regulation by LFAs under the Cable Act except to the extent that they provide cable service (the "common carrier exception" to Cable Act regulation set forth in the Act's definition of "cable system," which expressly excludes the facilities of common carriers). In the instant FNPRM, the FCC proposes to extend the mixed-use rule to incumbent cable operators that are not common carriers but also furnish non-cable service – notably, broadband Internet access – over their cable systems.

The LFAs argue that, as articulated in the FNPRM, the FCC's proposed rule preempts altogether LFA regulation of cable operators' mixed-use networks to provide non-cable service, precluding even PROW regulation as to the facilities installed on the cable system to deliver such services, and precluding fees for managing their use of the PROW, irrespective of whether the regulation and fees comply with the Communications Act and the FCC's recently issued Order addressing small cell networks. The FCC's justification is that the common carrier exception applies to cable operators' use of their cable systems to provide non-cable services, notwithstanding that they are not common carriers.

The LFAs argue that it is simply a *non sequitur* to apply this exception, limited by its plain language and legislative history to the systems of common carriers, to a service provided by cable operators over a cable system. The LFAs show that the FCC's extension of the mixed-use rule is inconsistent with Congress' intent as expressed in the Committee report for the 1984 Act, and that it misunderstands the Communications Act's very different treatment of cable services and Title 1 and II services. The LFAs argue that for these reasons, the FCC's interpretation of the common carrier exception is plainly contrary to the plain meaning of the Cable Act and therefore cannot withstand scrutiny under *Chevron*.

The LFAs further argue that the FCC's proposed ruling is contrary to the Communications Act's prohibitions on discriminatory and non-competitively neutral treatment of telecommunications service providers in Sections 253 and 332; and that it in fact mandates that LFAs discriminate against common carriers in their provision of non-cable services because it excuses cable operators from PROW use costs that common carriers must incur for the same services – treatment that clearly is not competitively neutral. Again, the proposed rule's violation of the Communications Act cannot survive *Chevron* scrutiny. Finally, the LFAs show that the legislative history shows Congress intended that the status quo in effect in 1984 with respect to the regulation of non-cable services provided over cable networks not be altered by the Cable Act. Congress therefore could not have intended the radical reform of such regulation constituted by the FCC's misapplication of the common carrier exception to preempt LFA regulation of the cable systems of cable operators that use them to provide non-cable services as well as cable services.

State Preemption

Finally, the Commission's proposed rules regarding preemption of state cable franchises and cable franchising laws are not permitted by either the Cable Act or the Commission's Title I authority to regulate information services. The Cable Act's purpose is to "encourage the growth and development of cable systems and [to] assure that cable systems are responsive *to the needs and interests of the local community*."[6] The Commission's proposed rules would unduly restrict states and local governments from addressing local and hyperlocal cable-related issues. This is

[6] Cable Communications Policy Act of 1984 at § 601(2), Pub. L. 98-549, 98 Stat. 2779, 2780 (1984), *amended by* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992), *amended by* Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (herein "Cable Act").

contrary to the Cable Act's very purpose and is therefore an impermissible exercise of the Commission's Title VI authority.

Perhaps recognizing the impermissible nature of its proposed actions, the Commission has also identified increasing access to broadband Internet services as a rational for its proposed rules (e.g., reducing the digital divide between urban and rural areas). While this is a shared concern of the LFAs, it is impermissible for the Commission to regulate Title VI services and systems using the Commission's Title I authority (i.e., authority to regulate information services). Moreover, the Commission has failed to cite even an iota of evidence showing any relationship between preempting state cable franchises and cable franchising laws and increasing access to broadband Internet services other than its own, anecdotal evidence.

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I. INTRODUCTION.

These Initial Comments are submitted on behalf of the following municipal entities in order of population size constituting 46 municipal organizations from the states of Iowa, Minnesota, New York, Oklahoma, Pennsylvania, South Dakota, Washington, and Wisconsin, with a collective population of approximately 3.8 million (individual municipal populations in parentheticals: City of Philadelphia, Pennsylvania (1,580,863); City of Oklahoma City, Oklahoma (579,999); City of Minneapolis (382,578); Northwest Suburban Cable Communications Commission (collective population 317,272) (a Minnesota municipal joint powers commission consisting of the Minnesota cities of Brooklyn Center (30,104), Brooklyn

Park (75,781), Crystal (22,141), Golden Valley (20,371), Maple Grove (61,567), New Hope (20,339), Osseo (2,430), Plymouth (70,576), and Robbinsdale (13,953)); City of Sioux Falls, South Dakota (153,888); North Metro Telecommunications Commission (collective population 109,779) (a Minnesota municipal joint powers commission consisting of the Minnesota cities of Blaine (57,186), Centerville (3,792), Circle Pines (4,918), Ham Lake (15,296), Lexington (2,049), Lino Lakes (20,216), and Spring Lake Park (6,412)); North Suburban Communications Commission (collective population 106,991) (a Minnesota municipal joint powers commission consisting of the Minnesota cities of Arden Hills (9,552), Falcon Heights (5,321), Lauderdale (2,379), Little Canada (9,773), Mounds View (12,155), New Brighton (21,456), North Oaks (4,469), Roseville (33,660), and St. Anthony (8,226)); South Washington County Telecommunications Commission (collective population 105,571) (a Minnesota municipal joint powers commission consisting of the Minnesota municipalities of Woodbury (61,961), Cottage Grove (34,589), Newport (3,435), Grey Cloud Island Township (307), and St. Paul Park (5,279), Minnesota); City of Renton, Washington (population 90,927); City of Edmond, Oklahoma (population 81,405); City of Coon Rapids, Minnesota (61,476); City of West Allis, Wisconsin (60,411); Town of Perinton, New York (46,462); City of Urbandale, Iowa (39,463); City of Edmonds, Washington (39,709); Town of Pittsford, New York (population 29,405); City of Maple Valley, Washington (population 25,758); City of Watertown, Wisconsin (23,861); Village of Oregon, Wisconsin (9,231); and City of New London, Wisconsin (7,295).(collectively, the "LFAs").[7]

[7] With the exception of the Northwest Suburbs Cable Communications Commission and the South Washington County Telecommunications Commission, the member cities of the various joint powers commissions award cable franchises to franchise applicants. The joint powers commissions are generally responsible for enforcing and administering their member cities' cable franchises. The Northwest Suburbs Cable Communications Commission and the South

In the states of Minnesota, New York, Oklahoma, Pennsylvania, South Dakota and Washington cable franchises are negotiated by local units of government. In the states of Iowa and Wisconsin, cable franchises were negotiated by local governments until those states adopted state-wide cable franchising laws in 2007.[8] Minnesota, New York, and Oklahoma have cable franchising statutes that uphold cable franchising at the local level of government.[9]

There are one or more cable operators occupying the PROW and providing cable service and other non-cable services to resident subscribers in each of the LFAs. The privilege of occupying the PROW is granted through a cable franchise. As part of a negotiated cable franchise agreement, or state franchise authorization, cable operators pay a franchise fee up to 5% of its gross revenues from operating in each jurisdiction. There are other non-monetary franchise provisions provided under the franchise agreement, such as PEG channels and institutional networks.

In the FNPRM, the FCC has proposed three different rules: (1) to interpret the definition of franchise fee to include the fair market value of "in-kind compensation" contained in a cable franchise; (2) to interpret the Cable Act as preempting the regulation of non-cable services provided over the cable system; and (3) to preempt state laws that are inconsistent with the proposed rules in the FNPRM.

All of the LFAs receive and rely upon cable franchise fees.[10] Franchise fees typically are general fund revenue,[11] and they are frequently used to fund public, educational, and/or

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Washington County Telecommunications Commission, however, are also empowered to award cable franchises on behalf of its member cities.

[8] *See* Iowa Code Ch. 477A; Wis. Stat. § 66.0420.

[9] *See* Minn. Stat. Ch. 238; 16 NYCRR Ch. VIII; O.S. § 22-107A.

[10] *Supra* at n. 2.

[11] *Id*.

governmental access television channels.[12] Thus, the LFAs have a significant interest in cable system franchising, and would be directly affected by any action the Federal Communications Commission (the "Commission" or the "FCC") might take pursuant to its FNPRM.[13]

The LFAs' comments will address the questions and issues raised in ¶¶ 16-32 of the FCC's FNPRM. The LFAs' Comments show the FCC does not have authority to interpret the definition of "franchise fee" in section 622(g)(1). Further, a plain reading of the language in section 622(g)(1) buttressed by the legislative history show the FCC proposed interpretation lacks support because the in-kind franchise provisions are neither assessed nor imposed.

In the alternative, if the FCC, contrary to the position of the LFAs, adopt any rules to allow cable operators to deduct the value of cable-related in-kind franchise provisions from the franchise fee, then it should only allow the actual incremental cost of such consideration rather than the fair market value. To rule otherwise would allow cable operators to recover the value of the consideration from cable subscribers many times over. Additionally, cable operators must be prohibited from seeking retroactive effect of any FCC Order, which could eviscerate a year or more of cable franchise fees already paid. Further, consideration in agreements made outside of the cable franchise agreement, such as a settlement agreement, Memorandum of Understanding (MOU), indefeasible right-of-use (IRU) agreement, letter agreement, agreement for services, or any other agreement must not be allowed to be deducted from the franchise fee.

The LFAs also comment on the Mixed-Use Network rules proposed by the FCC.[14] The LFAs agree with the FCC that Title VI of the Communications Act does not give the LFAs

[12] *Supra* at n. 4.
[13] FNRPM.
[14] *See* FNPRM at ¶¶ 25-31.

authority to regulate non-cable services.[15] It does, however, give LFAs the authority to regulate cable systems over which cable and non-cable services are delivered by incumbent cable operators, including their use of the PROW ("PROW"). The LFAs show further that authority to regulate cable systems' use of the PROW arises in the first instance from state law,[16] and that such state law authority cannot be preempted by the FCC's proposed mixed-use rule, notwithstanding the FCC's apparent intent to use the rule to preempt LFA regulation of cable systems that also carry non-cable services. Thus, the LFAs show that nothing in Title VI preempts local authority as it exists under state law.

Finally, the LFAs comment that the FCC has no authority to preempt state laws that allow franchising, licensing or other authority over non-cable services.

II. BACKGROUND.

The LFAs arguments in these Comments are supported by the history of the cable industry, which we briefly summarize here.

A. Cable Service as a Title I Service from 1966-1984

In 1934, Congress passed the Communications Act of 1934 (referred to herein as the "Communications Act").[17] Cable systems developed and grew between 1950 and 1965.[18] In 1966, the FCC, under Section 2(A) of Title I of the Communications Act, asserted ancillary

[15] *See* FNRPM at ¶ 25.
[16] *See* III.A.1.
[17] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (herein "1996 Act").
[18] *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 163 (1968) (citing *In the Matter of Amendment of Subpart L, Part 91, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service For Microwave Stations to Relay Television Signals to Community Antenna Systems*, 2 F.C.C.2d 725, 738 (1966)).

jurisdiction over and adopted rules for cable systems.[19] In 1972, following a United States Supreme Court decision affirming the FCC's jurisdiction over cable television,[20] the FCC adopted new rules, in which the FCC created a "deliberately structured dualism" for purposes of regulating cable systems. [21] This "dualism" distinguished between matters of national concern, such as signal carriage, and matters of local concern involving basic issues, such as the type and quality of service needed in a community.[22]

Recognizing the importance of local PROW management, the 1972 rules required cable system operators to obtain franchises from local governments and to meet certain minimum standards.[23] Local governments were restricted from collecting a franchise fee greater than three percent (3%) of gross revenues, or, upon petition to the FCC with sufficient justification, up to five percent (5%) of gross revenues.[24] Under the 1972 rules, local governments were charged with handling franchise administration and complaints related to such things as billing, service and other concerns.[25] Over the next ten years, the FCC's authority over cable operators was clarified and refined, commencing with the *Clarification of the Cable Television Rules* and culminating in the passage of the Cable Act in 1984.[26]

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[19] *See* 47 U.S.C. § 152(a). *See CATV and Community Antenna Systems*, 2 F.C.C.2d 725, 6 R.R.2d 1717 (1966).
[20] *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 158 (1968) ("The FCC's authority recognized here is restricted to that reasonably ancillary to the effective performance of its responsibilities for the regulation of television broadcasting.").
[21] *Cable Television Report and Order*, 36 F.C.C.2d 143, 207, 24 R.R.2d 1501 (1972), *modified on recon.*, 36 F.C.C.2d 326 (1972).
[22] *See* Stephen R. Ross, *The Cable Act – How Did We Get There and Where are We Going?*, 39 FED. COMM. L.J. 27, 31 (May 1987).
[23] *Id*. *See* 47 C.F.R. § 76.31 (1972) (eliminated by the Cable Act).
[24] *Id*.
[25] Cable Act at § 622(b).
[26] *In the Matter of Amendment of Part 76 of the Commission's Rules & Regulations Relative to the Advisability of Fed. Preemption of Cable Television Tech. Standards or the Imposition of A Moratorium on Non-Fed. Standards; Amendment of Part. 76 of the Commission's Rules &*

B. The Federal Cable Communications Policy Act of 1984

In October 1984, the U.S. Congress amended the Communications Act by adopting the Cable Communications Policy Act of 1984 (referred to herein as the "Cable Act"). One of the primary purposes of the Cable Act was to "establish a national policy that clarifies the current system of local, state and Federal regulation of cable television."[27] In this regard, the Cable Act established policies in the areas of ownership, channel usage, franchise transfers and renewals, subscriber rates and privacy, obscenity and lockboxes, unauthorized reception of services, equal employment opportunity, and pole attachments.[28] The new law also defined jurisdictional boundaries among federal, state and local authorities for regulating cable television systems.[29] Essentially, Congress accepted and ratified the Commission's 1972 policies as the basis for dual federal-state and/or local regulation.[30] This means local franchising authority over cable systems was preserved, to the extent it existed under state law.[31]

Accordingly, the Cable Act did not eliminate the franchising powers state law conferred on municipalities. As the preamble to the Cable Act specifies, states and local governments are charged with making the important choices of who, what, where and how cable service should be delivered, while the FCC is charged with developing a national and uniform telecommunications policy.[32] The Cable Act was amended in 1992[33] and 1996.[34] However, neither the 1992 Cable

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Regulations Relative to an Inquiry on the Need for Additional Rules in the Area of Pub. Proceedings & Qualifications for Franchisees - Section 73.31(a)(1); Amendment of Part, 46 F.C.C.2d 175 (1974), *overruled by Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601 (D.C.C. 1976).

[27] H.R. Rep. No. 98-934, 1984 U.S.C.C.A.N. 4655 (herein "Cable Act House Report").

[28] *Id*.

[29] *Id*.

[30] *See supra* at n. 22.

[31] *Id*.

[32] *Id*. *See also* Cable Act at § 601.

Act nor the 1996 Act upset the balance of federal and state/local power over cable systems that was preserved by the Cable Act.

C. Cable Franchise Agreements Are Contracts

Cable franchise agreements are unique instruments, since they are negotiated contracts, though typically authorized by ordinance.[35] In the Second Order, the FCC recognized "that franchise agreements involve contractual obligations." [36] Jurisdictions throughout the country overwhelmingly support the view that a franchise is a contract granting valuable privileges.[37] In 2016, the Oklahoma legislature amended its cable statute to expressly recognize that a cable franchise "shall constitute a bargained contract."[38]

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[33] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992) (herein "1992 Cable Act").
[34] 1996 Act.
[35] Cable Act at § 602(8) ("The term 'franchise' means an initial authorization, or renewal thereof . . . issued by a franchising authority, whether such authorization is designated as a . . . contract . . . or otherwise."). *See* Cable Act House Report at 4708 ("Under subsections 625(A) and (B), the cable operator may obtain modification of a requirement for facilities and equipment if it can show, in negotiations with the franchise authority or in court if an action is taken, that the *existing contract requirement* is 'commercially impracticable.'" (emphasis added)).
[36] *In the Matter of Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984 As Amended by the Cable Television Consumer Prot. & Competition Act of 1992*, 22 F.C.C. Rcd. 19633, 19642 (2007).
[37] *Schloss v. City of Indianapolis*, 553 N.E.2d 1204 (Ind. 1990); *Bd. of Sup'rs of New Britain Twp. v. Bucks Cty. Cablevision*, 492 A.2d 461, 462 (Pa. Commonwealth Ct. 1985), aff'd, 511 Pa. 369, 514 A.2d 1370 (1986); *Cable Commc'ns Bd. v. Nor-W. Cable Commc'ns P'ship*, 356 N.W.2d 658 (Minn. 1984); *City of Issaquah v. Teleprompter Corp.*, 611 P.2d 741 (Wash. 1980); *Orth-O-Vision, Inc. v. City of New York*, 422 N.Y.S.2d 781 (N.Y. 1979); *Northern Gas Company v. Town of Sinclair*, 592 P.2d 1138 (Wyo. 1979); *Wisconsin Pub. Serv. Corp. v. Marathon Cty.*, 249 N.W.2d 543 (Wis. 1977); *City of Liberal v. Teleprompter Cable Service, Inc.*, 544 P.2d 330 (Kan. 1975); *City of Hayden v. Washington Water Power Co.*, 700 P.2d 89 (Idaho Ct. App. 1985); *State ex rel. Hutton v. City of Baton Rouge*, 47 So.2d 665 (La. 1950); *City of Baker v. Montana Petroleum Co.*, 44 P.2d 735 (Mont. 1935). *See* McQuillin, *Municipal Corporations*, Vol. 12, § 34.53 (municipal corporation granting franchise to use streets may require compensation for their use by public service companies).
[38] *See* O.S. § 22-107.1(A).

D. The Power to Contract Is Very Different From the Power to Regulate

Since cable franchise agreements are contracts, local governments use their power to contract in negotiating and ultimately entering into cable franchise agreements.[39] The Indiana Supreme Court explained in the *Schloss* decision that the power to contract is very different than the power to regulate.[40] In ruling on a franchise fee dispute, the Schloss Court ruled:

> [The City] had the power to contract. And the **power to regulate** as a governmental function, **and the power to contract for the same end, are quite different things. One requires the consent only of the one body, the other the consent of the two.** In this instance the city acted in the exercise of its power to contract, and it is therefore entitled to the benefits of its bargain.[41]

Schloss is consistent with the historical view throughout the country of a franchise as a contract between a municipality and a cable operator franchisee.[42]

E. Franchise Fees and Other In-Kind Franchise Provisions

Cable Franchise contracts require the payment of a franchise fee based on a cable operator's gross revenues. Federal courts have held a franchise fee is "essentially a form of rent" for use of public property and PROW to provide cable services.[43] The Cable Act caps the franchise fee at 5% of a cable operator's gross revenues.[44] As the Fifth Circuit Court of Appeals has explained, "A cable operator calculates a franchise fee simply by paying to the franchising authority an amount equal to 5% of its gross revenues."[45] Franchise fee cases never mention any other consideration constituting the cable franchise fee. While cable franchises typically require

[39] *See Schloss v. City of Indianapolis,* 553 N.E.2d 1204 (Ind. 1990)
[40] *See Schloss,* 533 N.E.2d at 1207-1208.
[41] *Id* (emphasis added).
[42] *See supra* at n. 37.
[43] *See Tex. Coal. Of Cities for Util. Issues v. FCC,* 324 F.3d 802, 806 (5th Cir. 2003) ("A franchise fee is 'essentially a form of rent: the price paid to rent use of public right-of-ways.'") (quoting *City of Dallas v. FCC,* 118 F.3d 393, 397 (5th Cir. 1997)).
[44] See Cable Act at § 622.
[45] *City of Dallas v. FCC,* 118 F.3d 393, 397 (5th Cir. 1997) (herein "*City of Dallas*").

a 5% fee, some cities agree to exclude certain cable operator revenue or to a smaller percentage of gross revenues.[46]

Separate from the franchise fee, negotiated cable franchise contracts contain additional provisions articulating obligations to which the franchisee agrees. In the FNPRM, the FCC refers to these franchise provisions as "in-kind contributions,"[47] which we believe is an inaccurate classification. In *City of Bowie*, these franchise provisions were called "franchise requirements."[48] For purposes of these Comments, we will refer to these franchise provisions as "in-kind franchise provisions." These in-kind franchise provisions include but are not limited to: public, educational, and governmental ("PEG") channels, facilities and transmission requirements, video-on-demand, electronic programming guide, customer service provisions, broad categories of programming for subscribers, rate provisions, PROW provisions, such as cable system relocation, maintenance and restoration, discounts for seniors and disabled persons, network interconnections and institutional networks, nondiscrimination requirements, cable system build out provisions.[49]

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[46] *E.g.*, Sioux Falls, South Dakota, *Cable System Franchise Renewal Agreement Between Midcontinent Communications and the City of Sioux Falls, South Dakota* at § 2.8 (2009) (limiting the franchise fee to 2.5% of Midcontinent's gross revenues), *available at* http://docs.siouxfalls.org/sirepub/cache/2/krxark431v0rmdqbk0khmaau/24480111122018094025383.PDF.

[47] FNPRM at ¶ 16.

[48] *City of Bowie, Maryland c/o David Deutsch*, 14 F.C.C. Rcd. 7675 (1999), *amended by Cable Services Bureau Action*, 14 F.C.C. Rcd. 9596 (1999).

[49] *E.g.*, Oklahoma City, Oklahoma, *A Cable Television Franchise Agreement Between the City of Oklahoma City, Oklahoma and Coxcom, LLC* (2012), *available at* https://www.okc.gov/home/showdocument?id=3760; Coon Rapids, Minnesota, City Code Ch. 4-100 (2000) (*amended by* Coon Rapids, Minnesota, Ord. 2127 (2015) (modifying certain PEG commitments from Comcast and extending the term of the franchise)).

These in-kind franchise provisions all benefit the cable subscribers and the citizens of the local franchise authorities.[50] For example, PEG channels allow cable subscribers to view programming such as candidate profiles prior to elections, city council and school board meetings, and high school sporting events.[51] Much of this programming is also available online and on mobile devices making the programming available to even more citizens.[52] PROW provisions ensure that cable providers use and maintain the PROW in a fair and responsible way for the benefit of all citizens of the local franchising authorities.[53] Discounts for senior citizens and disabled citizens benefit some of the most vulnerable citizens of the LFAs.[54] Institutional networks allow municipalities to provide services and communicate effectively with its citizens.[55] Customer service provisions including provisions requiring local customer service locations benefit cable subscribers giving them the ability to quickly address customer services questions and complaints.[56] These in-kind franchise provisions differ among local franchising

[50] *See, e.g.*, North Suburban Communications Commission, *Staff Report on CenturyLink Cable Franchise Application* (Apr. 9, 2015), *available at* https://ctvnorthsuburbs.org/content/pdfs/CenturyLink/1StaffReport20150409(FINAL).pdf.
[51] *See* Cable Act House Report at 4667.
[52] *See, e.g.*, North Metro Telecommunications Commission, *North Metro TV Live Stream, available at* https://northmetrotv.com/channel-15-live/; West Allis, Wisconsin, *YouTube City Channel, available at* https://www.youtube.com/user/westalliscitychannel.
[53] *See* Cable Act House Report at 4696. *See, e.g.*, Philadelphia, Pennsylvania, *Cable Franchise Agreement Between City of Philadelphia and Comcast of Philadelphia, LLC, Comcast of Philadelphia II, LLC* (2015), *available at* https://phila.legistar.com/View.ashx?M=F&ID=4160967&GUID=CFA9C658-6CBE-4521-BAF1-6A3F47C06C25.
[54] *See, e.g.*, Renton, Washington, *Cable Franchise Agreement Between City of Renton, Washington and Comcast Cable Communication Management, LLC and Comcast Cable Holdings, LLC* at § 5.3 (2014), *available at* https://renton.civicweb.net/filepro/document/34953/Comcast%20ORD.pdf.
[55] *See supra* at n. 50.
[56] *See supra* at n. 54.

authorities and cable operators because they are negotiated between the cable operator and the local franchising authority to meet the cable related needs and interest of each jurisdiction.[57]

F. Decades of Past Practice and Legislative History

Since at least 1972, the cable franchise fee has been based solely on a cable operator's gross revenues.[58] In 1984, this practice was codified in the Cable Act, as was a limitation or cap of the franchise fee at 5% of a cable operator's gross revenues.[59] Congress and the FCC also allow a cable operator to fully recover the franchise fee from subscribers.[60] Additionally, since at least 1972, cable operators and local governments have negotiated for the other consideration mentioned above.[61] Indeed, when cable operators first began seeking cable franchises, the cable operators offered in-kind franchise provisions as part of contract negotiations over and above the gross revenues franchise fee.[62] By way of illustration, but not limitation, this consideration included institutional networks, PEG channels and PEG facilities. These in-kind franchise provisions have never been considered or even argued to be part of the capped franchise fee.

However, Congress recognized that a cable operator would have franchising costs – costs incurred to fulfill its negotiated obligations in the franchise agreement – and specifically allowed a cable operator to recover those costs through its rates and later through its basic service tier rate.[63] The FCC also allowed a cable operator to recover interest on these costs at 11.25%

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[57] *See* Cable Act at § 626.
[58] *See* Cable Act at § 622(b); Cable Act House Report at 4663.
[59] Cable Act at § 622(b).
[60] Cable Act at § 622(c).
[61] *See, e.g.*, Minneapolis, Minnesota, *Northern Cablevision Cable Franchise Proposal*, Minnesota State Archives in the Minnesota Historical Society, 107 C.9.8(F), Box 8 (1979), *available at* https://www.dropbox.com/s/37cc1h0qq0a0rdu/Northern%20Cablevision%20Proposal%20%28Minneapolis%29%201979.pdf?dl=0.
[62] *See id.*
[63] 47 C.F.R. § 76.922(f)(1)(iii) (1993).

interest, which is still the practice today although one could argue the interest rate is now unreasonable.[64] Thus, Congress and the FCC created a regulatory structure that allows a cable operator to recover the actual costs of literally all of the in-kind franchise provisions provided in a cable franchise agreement either through the cable operator's rates or through a line item charge. It is under this structure that cable operators have built perhaps the most robust broadband networks in the country.[65]

G. Settlement Agreements and Other Agreements

Cable operators and local governments also resolve differences through settlement agreements, side agreements, MOUs, IRUs and other various contracts.[66] These agreements are outside of the cable franchise, but they typically contain valuable consideration for both the cable operator and the local government. Consider the following examples:

- The City of Philadelphia entered into a contract, pursuant to the franchise, for discounted institutional network services throughout the City, providing for data transport service to government buildings;[67]

- The City of Minneapolis entered into an IRU to resolve a dispute over ownership of certain network assets built for the City;[68]

- The City of Renton, Washington entered into an IRU to resolve a dispute over ownership of certain network assets built for the City;[69]

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[64] *Id* at (e)(3)(i).
[65] *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2018 Broadband Deployment Report, 33 F.C.C. Rcd. 1660, 1680 (2018).
[66] *Infra at* nn. 67-73..
[67] Philadelphia, Pennsylvania, *Cable Franchise Agreement Between City of Philadelphia and Comcast of Philadelphia, LLC, Comcast of Philadelphia II, LLC* (2015), *available at* https://phila.legistar.com/View.ashx?M=F&ID=4160967&GUID=CFA9C658-6CBE-4521-BAF1-6A3F47C06C25.
[68] Minneapolis, Minnesota, *Indefeasible Right of Use Agreement* (2009), *available at* http://ci.minneapolis.mn.us/www/groups/public/@council/documents/webcontent/convert_285918.pdf.

- As part of a cable franchise renewal, certain member cities of the North Suburban Communications Commission agreed to enter into discounted enterprise service contracts to resolve a dispute over the continued provision of an intuitional network;[70]

- Several Minnesota franchising authorities entered into a Settlement Agreement with their franchised cable operator to resolve open compliance issues during a proposed cable franchise transfer.[71]

- The North Suburban Communications Commission entered into an IRU to resolve certain rate issues;[72] and

- Comcast entered into a social contract to resolve certain cable franchise violations to provide a plethora of cable-related in-kind services;[73]

This consideration was in addition to the franchise fees contained in a cable franchise. Although at times these agreements are referenced in cable franchise agreements or provide that a violation of the agreement is also a cable franchise agreement.[74]

H. State Cable Franchising

In 2007, the states of Iowa and Wisconsin enacted new laws that allowed the state to grant franchises.[75] In Iowa, an incumbent cable operator has the option of either renewing a cable franchise with a municipality or seek a certificate of franchise authority from the state,

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[69] Renton, Washington, *Institutional Network Lease Agreement* (2009), *available at* https://rp.rentonwa.gov/Documents/DocView.aspx?dbid=0&id=459791&page=1&cr=1.
[70] *E.g.*, Roseville, Minnesota, *Comcast Enterprise Services Master Services Agreement (MSA)* (2017), *available at* https://mn-roseville.civicplus.com/AgendaCenter/ViewFile/Item/728?fileID=20202.
[71] *E.g.*, Minneapolis, Minnesota, *Franchise Settlement Agreement* (2015), *available at* http://www.minneapolismn.gov/www/groups/public/@clerk/documents/webcontent/wcms1p-136574.pdf.
[72] North Suburban Communications Commission, *Memorandum of Understanding* (1994), *available at* https://ctvnorthsuburbs.org/content/franchise/memofunderstanding94.pdf.
[73] *See In the Matter of Soc. Contractor Comcast Cable Commc'ns, Inc.*, 13 F.C.C. Rcd. 3612 (1997).
[74] *See, e.g.*, *supra* at n. 71.
[75] *See* Iowa Code Ch. 477A; Wis. Stat. § 66.0420.

while in Wisconsin, the state is the exclusive franchising authority.[76] Holders of a state franchise authorization may pay a franchise fee of up to 5% of a cable operator's gross revenues if requested by a municipality in which the cable operator is serving.[77] Municipalities may also request PEG channels, which the municipality is responsible for managing the content and operation of the channel, while the cable operator is responsible only for the transmission of the PEG channels.[78]

I. Mixed Use Networks

Today, unlike 1984 when the Cable Act was adopted, cable operators provide many services over their networks.[79] These services include cable service, internet service, telephone service, mobile phone service, and security service.[80] Cable Operators also provide ancillary services, such as providing backhaul fiber to wireless partners and providers.[81] As a result, it is difficult to ascertain where a cable operator's network is a cable system and where it is not.[82]

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[76] *See* Iowa Code §§ 364.2 & 477A.2. The cable operator for the City of Urbandale, Iowa chose to obtain a certificate of franchise authority from the State in 2007. Despite this, Iowa municipalities maintain local franchising authority to the extent a cable operator chooses to negotiate a cable franchise agreement directly with the municipality. *See also* Wis. Stat. § 66.0420(4).

[77] *See* Iowa Code §§ 364.2(f) & 477A.2 (authorizing local franchising authorities to collect a franchise fee regardless of whether a cable operator is acting pursuant to a local franchise of a state-wide certificate of franchise authority); Wis. Stat. § 66.0420(2)(i) (describing franchise fees as a percentage of a cable operator's revenues); Wis. Stat. § 66.0420(3)(e)(2)(b) (defining "franchise fee" to mirror the definition found in the Cable Act).

[78] *See* Iowa Code § 477A.6(1); Wis. Stat. § 66.0420(5).

[79] *See* FNRPM at ¶ 25.

[80] *See Montgomery Cty., Maryland v. Fed. Commc'ns Comm'n*, 863 F.3d 485, 492 (6th Cir. 2017) ("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." (citations omitted)) (herein "*Montgomery County*").

[81] *See Business Data Services in an Internet Protocol Environment, Tariff Investigation Order and Further Notice of Proposed Rulemaking*, 31 FCC Rcd. 4723, 4749 (2016) ("By 2008, network upgrades allowed cable industry executives to begin 'including cell backhaul in their

While local governments have attempted to regulate non-cable services, such as cable modem internet service under the Cable Act when the classification of internet services was unclear.[83] There was also a dispute about whether cable modem internet service revenues should be considered part of a cable operator's gross revenues in calculating a franchise fee.[84] Since the *Brand X* decision, local governments have not attempted to regulate non-cable services provided by a cable operator under the Cable Act. Instead, the regulation of a service provided by a cable operator (or any other communications provider) is dependent on the type of service provided and under which Title of the Communications Act it falls. Under the current classification structure, internet services are considered information services subject to Title I. Telephone service is considered a Title II telecommunications service. Mobile service is considered a personal wireless service also subject to Title II. And cable service is a cable service subject to Title VI.

J. Franchise Authority Is Derived From State Law

Just as local governments do not derive their cable franchising authority exclusively or principally from Title VI (the Cable Act) of the Communications Act, local governments also do

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overall commercial service planning,' and by 2011, cable companies were expanding their service to mid-sized businesses with between 20 and 500 employees." (citations omitted)).

[82] FNRPM at ¶ 25.

[83] *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *City of Chicago v. Comcast Cable Holdings, L.L.C.*, 900 N.E.2d 256 (Ill. 2008).

[84] *See Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities*, 17 F.C.C. Rcd. 4798, 4818–19 (2002) ("Cable modem service, for purposes of this proceeding, is a service that uses cable system facilities to provide residential subscribers with high-speed Internet access, as well as many applications or functions that can be used with high-speed Internet access. Parties advocate several different legal classifications for cable modem service, including 'cable service,' 'information service,' both cable service and information service, a combination of 'telecommunications service' and information service, and 'advanced telecommunications capability.'" (citations omitted)).

not derive their regulatory authority over Title I and Title II services from federal law.[85] This franchising authority arises from a number of sources including, but not limited, to state law,[86] state constitutions,[87] municipal charters,[88] and state common law, including state statutory and common law recognition of local authority to manage the PROW. To the extent the Communications Act does not lawfully restrict or address a particular service, the local government may regulate the service as state law provides.[89] This issue was recently addressed by the Oregon Supreme Court.[90] In *City of Eugene*, the City opted to require a license fee on all internet service providers based on authority the City had in Oregon state law.[91] The Oregon Supreme Court upheld the City's authority based upon the licensing authority the City had under state law.[92]

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[85] *See* Stephen R. Ross, *The Cable Act – How Did We Get There and Where are We Going?*, 39 FED. COMM. L.J. 27, 36 (May 1987); 47 U.S.C. §§ 201 *et seq* (limiting a municipality's previously existing authority only to the extent necessary to further national goals). *See also Schloss v. City of Indianapolis*, 553 N.E.2d 1204, 1207 (Ind. 1990) ("The city's authority to accept franchise fees from the cable companies stems from its power to enter into contracts with those companies and not from its power to issue licenses and charge fees tied to regulatory costs.")

[86] *See, e.g.*, Minn. Stat. § 222.37 & Ch. 238.

[87] *See, e.g.*, Okla. Const. art. XV, § 5(a).

[88] *See, e.g.*, Philadelphia, Pennsylvania, Philadelphia Home Rule Charter, *available at* http://library.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia_pa/philadelphiahomerulecharter?f=templates$fn=default.htm$3.0$vid=amlegal:philadelphia_pa$anc=JD_PHILADELPHIAHOMERULECHARTER; Minneapolis, Minnesota, Charter, *available at* https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=CH.

[89] *See City of Eugene v. Comcast of Oregon II, Inc.*, 375 P.3d 446, 460 (Or. 2016) ("The legislative history confirms our reading that the provisions Comcast relies on were not intended to exempt telecommunications services offered by cable operators from fees that state or local governments are otherwise allowed to impose on telecommunications services.").

[90] *Id*.

[91] *Id*.

[92] *Id*.

K. Procedural Posture of Cable Franchising Rulemaking

In response to anticipated competition in the cable market by traditional phone companies, the FCC commenced this docket, which resulted in the FCC issuing its First Report and Order.[93] In the First Report and Order, the FCC made a number of rulings on how the Cable Act, particularly Section 621 (setting forth general cable franchising requirements) applies to new entrants to the cable market that are telecommunications service providers and common carriers under Title II of the Communications Act. A few months later, the FCC issued a Second Report and Order addressing whether the rules adopted in the First Report and Order would apply to incumbent cable operators.[94] A petition for reconsideration was filed and eight years later the FCC issued a Reconsideration Order.[95] The Second Report and Order and the Reconsideration Orders were appealed to the Sixth Circuit Court of Appeals.[96] In *Montgomery County*, the court vacated and remanded the Second Report and Order and the Order on Reconsideration with respect to two of the Commission's rulings: (1) the Commission's decision to treat cable-related, in-kind contributions as "franchise fees" subject to the statutory five percent cap on franchise fees set forth in 47 U.S.C. § 542, and (2) the Commission's decision to extend its "mixed-use" ruling in the First Report and Order to incumbent cable operators that are not common carriers. The "mixed use" ruling in the First Report and Order prohibited local

[93] *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 F.C.C. Rcd. 5101, 5102 (2007) (herein "First Report and Order"), *aff'd sub nom. Alliance for Community Media v. F.C.C.*, 529 F.3d 763 (6th Cir. 2008) (herein "*Alliance*"), *cert. denied* 557 U.S. 904 (2009).
[94] *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 F.C.C. Rcd. 19633 (2007) (herein "Second Report and Order").
[95] *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,* Order on Reconsideration, 30 F.C.C. Rcd. 810 (2015) (herein "Order on Reconsideration").
[96] *Montgomery County*.

franchising authorities from regulating non-cable services provided by Title II common carriers over their telecommunications networks – "mixed use networks" in that they provide both cable services and non-cable services -- telecommunications and information services – over the same facility. As stated in the Second Report and Order, the Commission's extension of the "mixed-use" ruling to incumbent cable operators is comprised by its "clarification" that "LFAs' jurisdiction under Title VI over incumbents applies only to the provision of cable services over cable systems and that an LFA may not use its franchising authority to attempt to regulate non-cable services offered by incumbent video providers."[97] The LFAs argue in Section III.B.1. that the mixed-use network ruling as stated in the FNPRM would go further than this "clarification," to preclude LFA regulation of the cable system that is used to deliver non-cable services as well as cable services, including its use of the PROW and the imposition of fees for that use.

III. COMMENTS

A. The Definition of Cable Franchise Fees

1. The FCC Lacks Legal Authority To Rewrite The Definition Of Franchise Fee.

An administrative agency is entitled to no deference on the interpretation of a statute if the language of the statute is clear and unambiguous.[98] As Justice Scalia explained,

> In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a "strict constructionist" of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for *Chevron* deference exists. It is

[97] Second Report and Order at ¶ 17.
[98] *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (herein "*Chevron*").

> thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt.[99]

Under *Chevron's* two-step test, a reviewing court will first examine the statute in question for ambiguity using the "traditional tools of statutory construction."[100] The reviewing court must attempt to find the meaning of the statute looking at the "particular statutory language at issue, as well as the language and design of the statute as a whole."[101] *Chevron* did not eliminate the judiciary's proper role; the judiciary retains the right "to say 'what the law is,' that is, to interpret statutes."[102] Only after applying these tools for statutory construction and finding statutory language ambiguous must it defer to an agencies' reasonable construction.[103] The Supreme Court has noted that a "fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."[104] "Absent persuasive evidence to the contrary, reviewing courts are required to give statutorily defined terms their ordinary meaning.[105] Here, in the FNPRM, the FCC is wrongfully attempting to interpret the definition of franchise fee, a term that is clear and unambiguous.

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[99] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989).
[100] *Chevron* at 842.
[101] *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).
[102] *Mississippi Poultry Ass'n, Inc. v. Madigan*, 31 F.3d 293, 299 (5th Cir.1994) (*quoting Chevron* at 843 n. 9).
[103] *See Chevron* at 843-44.
[104] *Perrin v. United States*, 444 U.S. 37, 42 (1979).
[105] *City of Dallas* at 396 n. 4.

a. The Definition of Franchise Fee in the Cable Act is Unambiguous and its Meaning is Apparent from its Text and from its Relationship with other Laws.

In the FNPRM, the FCC has proposed to interpret the definition of franchise fee to include certain in-kind franchise provisions negotiated in cable franchises.[106] But Congress has already clearly and unambiguously spoken to the precise issue at question.[107] In 1984, Congress defined the term "franchise fee" in the Federal Cable Act 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."[108] For over 34 years, this definition has remained unchanged for good reason as the statute is crystal clear. The FCC, however, has proposed to interpret the phrase "assessment of any kind imposed by a franchising authority" to include non-monetary in-kind franchise provisions.[109] It is improper for the FCC to interpret the definition of franchise fee because there is nothing ambiguous about the definition, which explains why Congress hasn't amended the definition since its original passage in 1984.[110]

The FCC's interpretation is contrary to a plain reading of the statute. The definition of franchise fee includes three types of charges as franchise fees: (1) a tax; (2) a fee; or (3) an assessment of any kind imposed on a cable operator. The definition of tax or fee is not at issue in this proceeding. An "assessment"[111] is defined as an "imposition of something, such as a tax

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[106] FNPRM at ¶¶ 16-24.
[107] *See* Cable Act at § 621(a)(1). *See also* Cable Act House Report.
[108] *Id*.
[109] FNPRM at ¶¶ 17-18.
[110] *See* 1996 Act; 1992 Cable Act.
[111] Inexplicably, the FCC appears to assume without analysis that bargained for in-kind franchise provisions are imposed assessments but fails to show any analysis for this conclusion in the FNPRM. Instead the FNPRM relies on the phrase "of any kind" as a catch all for essentially all

or fine, according to an established rate; the tax or fine so imposed."[112] The word "imposed" means "to establish or apply by authority."[113] Examples of the use of the word "impose" by Merriam-Webster are:

> *Impose* a tax
> *Impose* new restrictions
> *Impose* penalties[114]

Thus, from a plain reading of the word "impose," to be considered a "franchise fee," there must be a charge unilaterally established or applied by a governmental entity. Based on the ordinary meanings of the terms, there is nothing unclear about what is included as a franchise fee, as all three types of charge (tax, fee, or assessment) are referring to unilateral monetary charges by a unit of government. The FCC has no authority to interpret it to include in-kind franchise provisions.[115]

In-kind franchise provisions can never fit the definition of franchise fee in the Federal Cable Act because in-kind franchise provisions are negotiated bargained for consideration and are neither assessed nor imposed. Courts across the country have recognized that cable franchises are negotiated contracts.[116] The Federal Cable Act itself recognizes that cable franchises contracts will be negotiated over a long period of time, pointing to the fact that they

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cable franchise provisions. The FCC's analysis is misplaced because a franchise fee only includes an "*assessment* of any kind." An assessment by definition is a unilateral punitive action by a government and does not include bargained for consideration. *See* III.A.1.a.

[112] ASSESSMENT, Black's Law Dictionary (10th ed. 2014).

[113] IMPOSED, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/imposed (retrieved November 6, 2018).

[114] *Id*.

[115] *Chevron* at 842–43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

[116] *See supra* at n. 37.

are the result of contested, arms-length bargaining.[117] There isn't a court in the country that has interpreted franchise fee to include in-kind franchise provisions.[118] Indeed, federal appellate courts have held that franchise fees are simply gross revenues fees.[119]

In *Montgomery County* the Sixth Circuit Court of Appeals concluded that the term franchise fee "can include noncash exactions," but it "does not mean that it necessarily does include every one of them." [120] Importantly, in *Montgomery County* the FCC mischaracterized the in-kind franchise provisions as "exactions."[121] Merriam-Webster defines "exaction" as something extorted or a fee, reward, or contribution demanded or levied with severity or injustice.[122] As a result, *Montgomery County* stands for the premise that a franchise fee can include some provision of noncash in-kind payments extorted or demanded or levied with severity or injustice.

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[117] *See* Cable Act at § 626(a).

[118] The *Montgomery County* court held that in-kind exactions *could* be "assessments" but did not affirmatively hold that such exactions *are* assessments within the meaning of the Cable Act and did not substantively address this issue. *Montgomery County* at 491; *Grp. W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 975 (N.D. Cal. 1987) ("Nor does existing legislation help in determining fair value. Both Congress and the California legislature limit franchise fees to 5% of gross revenues but permit local franchising authorities to impose a range of in-kind charges on cable franchisees."). Rather, these in-kind contributions are viewed as non-discriminatory in light of the heavy impact cable operators have on the public PROW. *See Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580, 604 (W.D. Pa. 1987) ("Consequently, the Court concludes that any failure of the City to impose cash and in-kind fee requirements on other media forms is attributable to the extensive degree to which ETI's business activity involves the use of the public PROW."), *aff'd as amended sub nom. Erie Telecommunications, Inc. v. City of Erie, Pa.*, 853 F.2d 1084 (3d Cir. 1988).

[119] *Id*.

[120] *See Montgomery County* at 491.

[121] If a franchise fee can include non-cash "exactions," then a local franchising authority would be an "exactor." The term "exactor" is defined as "a gather or receiver of money; a collector of taxes." *See* EXACTOR, Black's Law Dictionary (6th ed. 1990) at 557.

[122] EXACTION, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/exaction (retrieved November 7, 2018).

Because the record was incomplete,[123] the *Montgomery* Court did not determine what "noncash exactions" would be included in franchise fees.[124] Instead, the court favorably cited Justice Scalia's concurrence in *Austin v. United States* because the use of "in kind assessments" in *Austin* closely tracked the FCC's usage of the phrase "in-kind payments."[125] In *Austin*, following the conviction of a criminal drug offense in South Dakota, the United States Government commenced an *in rem* civil forfeiture proceeding seeking forfeiture of the convicted criminal's mobile home and auto body shop.[126] Recognizing that the forfeiture of property was a penalty, the U.S. Supreme Court held that such an action was subject to the Excessive Fines Clause of the Eighth Amendment. Justice Scalia, in his concurrence, concluded that such in-kind assessments "are certainly payment to a sovereign as punishment for an offense.[127] Justice Scalia only used the word "assessment" in describing how the government imposed a fine.[128] The purpose of the "assessment" or taking was "punitive."[129] It was "not compensatory," but rather "[p]unishment [was] being imposed,"[130] which is consistent with the plain meaning of "assessment" as unilaterally imposed by an authority, as described above.

Reading *Montgomery County* and the *Austin* decisions harmoniously, "in-kind assessments" are unilateral punitive payments to a unit of government. Contractually bargained for consideration is neither unilateral nor punitive and would clearly fall outside the boundaries

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[123] *Montgomery County* at 491 ("Thus the FCC has offered no explanation as to why the statutory text allows it to treat "in-kind" cable-related exactions as franchise fees.").
[124] *Id.*
[125] *Id.*
[126] *Austin v. United States*, 509 U.S. 602, 604 (1993).
[127] *Id* at 627.
[128] *Id* at 624 ("[Criminal *in personam* forfeitures] are assessments, whether monetary or in kind, to punish the property owner's conduct.").
[129] *Id* at 625.
[130] *Id*.

of an imposed assessment.[131] To the extent in-kind franchise provisions are in state franchising laws, such provisions are not punitive and fall outside the definition of franchise fee. As such, no reasonable reading of the statute can support the FCC's proposed interpretation of franchise fee under the Cable Act.[132]

The proposed action by the FCC to interpret Section 622 in the FNPRM is similar to the failed attempt by the FCC to interpret the same statute in *City of Dallas*. In *City of Dallas*, the FCC attempted to interpret the term "gross revenue" to exclude certain revenue which was contrary to the plain meaning of the words in the statute, including the definition contained in Black's Law Dictionary.[133] As in *City of Dallas*, the action proposed in the FNPRM will not survive judicial review. As the *City of Dallas* court explained, "[t]here is nothing in the text of the statute, the structure of the statute, or sparse committee reports to conclude that Congress intended [the defined terms] to have a specialized meaning as used in Section 542(b)."[134]

An FCC letter ruling in *City of Bowie*, is consistent with the *City of Dallas* decision.[135] In *City of Bowie*, contrary to the position described in the FNPRM, the FCC recognized that "[i]n general [subsection 622(g)(2)(c)] defines as a franchise fee only monetary payments made by the operator *and does not include as a 'fee' any franchise requirements for the provision of services facilities or equipment*."[136] The "franchise requirements" in *City of Bowie* are synonymous with the "in-kind compensation" described in the FNPRM.[137] Consistent with a plain reading of the

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[131] *See supra* at n. 37.
[132] See *Montgomery County* at 491 (The FCC "has offered no explanation as to why the [local franchising authorities'] structural arguments are, as an interpretive matter, incorrect.").
[133] *See City of Dallas* at 395-397.
[134] *Id*.
[135] *See City of Bowie, Maryland c/o David Deutsch*, 14 F.C.C. Rcd. 7675 (1999) (*amended by Cable Services Bureau Action*, 14 F.C.C. Rcd. 9596 (1999)).
[136] *Cable Services Bureau Action*, 14 F.C.C. Rcd. 9596, 9597 (1999).
[137] *See id*; FNRPM at ¶¶ 16-24.

statute, the legislative history, judicial precedent and the FCC's own precedent, franchise fees are monetary payments based on a cable operator's gross revenues. This construction of "franchise fee" is also consistent with state cable franchising laws.[138]

b. The Sparse Legislative History of Section 622 Does not Support FCC Action to Redefine Franchise Fees

The FCC claimed in the FNPRM that its decision to interpret the definition of franchise fee to include in-kind franchise provisions is supported by the legislative history of Section 622.[139] The claim is unfounded. As the *City of Dallas* decision indicated, the legislative history of Section 622 is "sparse."[140] Indeed, the House Report merely states: "Franchise Fee is defined by Subsection 622(g) to include any tax, fee, or assessment imposed on a cable operator or subscribers solely because of their status as such."[141] As in *City of Dallas*, there is nothing in the House Report to suggest that Congress intended to deviate from the plain and ordinary usage of the words "assessment" and "imposed."[142] To the extent the sparse legislative history provides any guidance, it shows the intent of Congress to set the franchise fee as "5 percent of the gross revenues derived from the use of the system."[143] Congress characterized the franchise fee and exemptions from the franchise fees as "payments."[144] When the word "assess" was used in the legislative history of Section 622, it was to confirm that a local franchising authority "may assess

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[138] *See* Iowa Code §§ 364.2(f) & 477A.2 (authorizing local franchising authorities to collect a franchise fee regardless of whether a cable operator is acting pursuant to a local franchise of a state-wide certificate of franchise authority); Wis. Stat. § 66.0420(2)(i) (describing franchise fees as a percentage of a cable operator's revenues); Wis. Stat. § 66.0420(3)(e)(2)(b) (defining "franchise fee" to mirror the definition found in the Cable Act).
[139] See FNPRM at ¶¶ 17-20.
[140] *See City of Dallas* at 396.
[141] *See* Cable Act House Report at 4701.
[142] *See id.*
[143] *See id* at 4702.
[144] *See id* at 4701-2.

the cable operator a fee for the operator's use of the Public Ways."[145] Congress of course was referring to the five percent gross revenues fee,[146] which is consistent with the holdings in *City of Dallas*.[147] Nowhere in the legislative history does Congress expressly or impliedly indicate in-kind franchise provisions are included in definition. Thus, there is nothing in the legislative history to indicate a reason to deviate from assigning the plain and ordinary meaning of the statute defining cable franchise fees. As shown above, no reasonable reading of the statute could include negotiated in-kind franchise provisions in the franchise fee.

c. Decades of Past Practice shows that Franchise Fees do not include in-kind contractual consideration.

Since cable franchising began, at no time have in-kind franchise provisions been considered part of the cable franchise fee.[148] The franchise fee was always a gross revenues fee required of a cable operator for a cable franchise.[149] When the Federal Cable Act was passed, it was Congress' intent to maintain the past practices of local franchise authorities and cable operators.[150] Since the definition of franchise fee was passed, the franchise fee has always been only a gross revenue fee.[151] Indeed, in many franchises the cable operator has specifically acknowledged that in-kind franchise provisions are not part of the franchise fee.[152] If cable

[145] *See id* at 4701.
[146] *Id* at 4663.
[147] *See City of Dallas* at 397.
[148] *See* II.F.
[149] *See City of Dallas*.
[150] *See* Cable Act House Report at 4656 ("[The Cable Act] establishes a national policy that clarifies the current system of local, state, and federal regulation of cable television.").
[151] *See City of Dallas* at 396 ("When Congress drafted the laws regulating the cable industry it was not drawing upon a blank slate. Instead, the statutory regulation supplanted a long-standing regime established by the FCC."). *See , e.g.*, Blaine Minnesota, Municipal Code app. C, art. ii, div. 1 § 8.3.1;
[152] *See, e.g.*, Northwest Suburbs Cable Communications Commission, *Franchise Renewal Agreement Between Northwest Suburbs Cable Communications Commission and Comcast of*

operators believed that in-kind franchise provisions were franchise fees, then the definition of franchise fee in cable franchises would include in-kind franchise provisions. Further, as shown above, cable operators have recovered the costs of in-kind franchise provisions through either rates or a monthly line-item charge to its subscribers. Decades of past practice show that the definition of franchise fee never included in-kind franchise provisions.

d. Other provisions of the Cable Act Support a Conclusion that In-Kind Franchise Provisions Are Not Part of the Franchise Fee

In addition to the plain language of Section 622, decades of past practices, and the legislative history of Section 622, other provisions in the Cable Act plainly show that in-kind franchise provisions has been considered a cable franchising cost that cable operators have been allowed to fully recover plus interest at 11.25%.[153]

When the FCC initiated rate regulation in 1992-93, it stated that the assumption was that *all* costs were recovered in rates.[154] Later, it then split the rates into pots – Basic Service Tier (BST), Programming Service Tier (PST), equipment basket (equipment and installations) and pay channels.[155] Later the FCC added on franchise fees as a separate item that could recovered as a line item on the bill and was not part of the "costs" used to set rates.[156]

Minnesota/Wisconsin Inc. at § 7.12(c) (Aug. 20, 2014), *available at* https://ccxmedia.org/wp-content/uploads/2018/02/Franchise-Renewal-between-NWSCCC-and-Comcast-signed-10-1-14.pdf.

[153] *See* 47 C.F.R. § 76.922.

[154] *See* H.R. Rep. 102-628, 82 ("The Committee intends that the formula established by the Commission allow cable operators a full recovery of the costs identified in that formula as well as a reasonable profit (to be defined by the Commission) on the provision of the basic service tier."); *id* at 83 ("The rate formula allowing cost recover shall take into account "amounts for any other services required under the franchise.").

[155] *See generally* 1992 Cable Act.

[156] *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, 5789 (1993) ("In particular, we

The FCC rules promulgated under Section 623 of the Federal Cable allows a cable operator to recover all of its cable franchise costs.[157] Not only can the operator recover its franchise costs, but it can also recover interest at 11.25%.[158] These franchising costs include in-kind franchise provisions.[159] Cable operators are allowed to recover franchise fees.[160] If in-kind franchise provisions were part of the franchise fee, there would be no need to have additional provisions allowing a cable operator to recover its franchising costs. Indeed, the legislative history of Section 623 shows that cable franchising costs recoverable under a cable operator's rates was the purpose for the language in section 623.[161] Franchise Fees are allowed to be

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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.").

[157] Cable Act at § 623, *amended by* 1992 Cable Act. *See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 11 F.C.C. Rcd. 2220, 2254 (1996); *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 11 F.C.C. Rcd. 388, 440 (1995); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service*, 9 F.C.C. Rcd. 4527, 4615 (1994).

[158] *In the Matter of Implementation of Sections of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation & Adoption of A Unif. Accounting Sys. for Provision of Regulated Cable Serv.*, 9 F.C.C. Rcd. 4527 (1994) ("Based on these considerations, we are prescribing an overall cost of capital of 11.25%, a figure that lies between the two estimates at the upper end of the range.").

[159] *See* 47 C.F.R. 76.922(f)(1)(iii).

[160] *In the Matter of Implementation of Sections of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation & Adoption of A Unif. Accounting Sys. for Provision of Regulated Cable Serv.*, 9 F.C.C. Rcd. 4527 (1994) ("We find that while the franchise fee should be allocated among the equipment basket and the service cost categories as the rules currently require, the rules should not list subscribers as a category in which such costs should be allocated."). *See City of Dallas*.

[161] H.R. Rep. 102-862, 60, 1992 U.S.C.C.A.N. 1231, 1242 ("Section 623(b) provides that the FCC shall, by regulation, establish a formula to establish the maximum price of the basic service tier. The formula shall take into account the number of signals carried on the basic tier, the direct costs of providing the services on the basic tier, a portion of the joint and common costs properly allocable to providing such services, a reasonable profit, rates for comparable cable systems that are subject to effective competition, any franchise fee, tax or charge imposed on cable operators

recovered as a separate line item charge on cable subscriber bills.[162] The proposed rule in the FNPRM allowing in-kind franchise provisions to be treated as a franchise fee would render the provisions of Section 623 as superfluous and would be contrary to proper statutory interpretation.[163]

Similarly, in Section 626 of the Cable Act, local franchising authorities are allowed to negotiate renewal franchise agreements with cable operators to meet the franchising authority's cable related needs and interests.[164] While the Cable Act sets forth a formal cable franchise renewal process, that process is rarely followed to completion. Instead, cable operators and local franchising authorities prefer to use in the informal cable franchise contract renewal process.[165] Those needs and interests include certain in-kind franchise provisions that are negotiated between the cable operator and the local franchising authority. If all of the consideration was in the Franchise Fee, there would be no need for Section 626 and certainly no incentive for the cable operator to negotiate these provisions.

2. The Commission's Proposed Interpretation of the Franchise Fee Definition Violates the Fifth Amendment and the First Amendment.

In addition to the defects in the Commission's proposed interpretation of "franchise fees" discussed above, the proposed rule to dramatically, *ex post facto*, alter private contracts between

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or subscribers, and any amount required to satisfy franchise requirements to support public, educational, or governmental channels.").

[162] 47 C.F.R. 76.922(f)()1)(ii). *See Texas Coal. of Cities for Util. Issues v. F.C.C.*, 324 F.3d 802, 808 (5th Cir. 2003), *aff'g The City of Pasadena, Cal., et al., Petitions for Declaratory Ruling on Franchise Fee Pass Through Issues*, Memorandum Opinion and Order, 16 F.C.C. Rcd. 18 (2001)).

[163] *See United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365 (1988) (giving effect to all words in a statute to determine the statute's plain meaning).

[164] Cable Act at § 626(h).

[165] *Id*.

the LFAs and cable operators, the Commission will violate the Fifth Amendment Takings Clause and the LFAs' First Amendment freedom of speech rights.

a. Eliminating Bargained For Contractual Consideration is a Taking in Violation of the Fifth Amendment.

The Fifth Amendment's Takings Clause prohibits the federal government and its agencies from impermissibly interfering with private contracts, such as those between local franchising authorities and cable operators. The Takings Clause allows private property to be taken only if: (1) the private property is taken for public use, and (2) the entity is fairly compensated.[166] The Commission's proposed rules satisfy neither of these conditions and therefore amount to an impermissible taking under the Fifth Amendment and violate the LFAs' Fourteenth Amendment due process rights.

For example, in the case of *Nectow v. City of Cambridge*, a zoning ordinance prevented a private property owner from constructing industrial or commercial buildings on a plat, despite the fact that the plat was surrounded by industrial factories and railroads.[167] In effect, the zoning ordinance required the property owner to construct residential buildings (e.g., dwellings) in an area and manner that would be of no practical use to either the property owner or any resident or tenant.[168] As such, the Court found that the zoning ordinance bore no "substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense" and held the zoning ordinance invalid.[169]

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[166] *See Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923).
[167] *Nectow v. City of Cambridge*, 277 U.S. 183, 186 (1928). Although *Nectow* centers on Fourteenth Amendment violations, the Court has made clear that Fifth Amendment "takings" that are not for public use nevertheless raise Fourteenth Amendment due process concerns. *See Berman v. Parker*, 348 U.S. 26 (1954).
[168] *Id* at 187.
[169] *Id* at 187-88 (citing *Euclid v. Ambler Co.*, 272 U. S. 365, 395 (1926)).

In another example, in the case of *Horne v. Dep't of Agric.*, the United States Department of Agriculture required raisin growers to freely give a portion of their crop yield to the federal government in an effort to stabilize crop pricing.[170] Although the Court found this taking to be for a public use, raisin growers were entitled to and not provided just compensation.[171]

In its FNPRM, the Commission is proposing to *ex post facto* modify existing contracts by reducing one party's (local franchising authorities') contractual benefits to the other party's (cable operators') direct benefit.[172] Contrary to what is required under the Fifth Amendment, this type of modification is clearly not for a public use.[173] Unlike in *Kelo*, the Commission appears to be performing a taking "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[174] The sole beneficiary of the Commission's proposed rules are cable operators, and in no way can the public reasonably expect to benefit from this taking.[175] The Commission's proposed *ex post facto* modification of the franchise contracts confers only a private benefit and offers no public use. Such a taking is clearly impermissible under the Fifth Amendment.[176]

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[170] *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2424, 192 L. Ed. 2d 388 (2015).
[171] *Id* at 2430. This is despite the fact that the raisin growers retained a contingent property interest in any forfeited crops. *Id*.
[172] It is well settled that contractual rights are a form of property. *See Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923); *Monongahela Nav. Co. v. United States*, 148 U.S. 312 (1893).
[173] *See Kelo v. City of New London*, 545 U.S. 469 (2005).
[174] *Id* at 478.
[175] *See* Verizon Communications Inc., Q3 2018 Earnings Call Transcript, *available at* https://seekingalpha.com/article/4213544-verizon-communications-inc-vz-q3-2018-results-earnings-call-transcript?part=single ("Yeah on the 5G rollout certainly we were glad to see the FCC rules around the small cell adoption, doesn't necessarily increase the velocity that we see. . . . I don't see [the Commission's rules] having a material impact to our [5G] build out plans.").
[176] *See Kelo v. City of New London*, 545 U.S. 469 (2005); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

Even if a court were to determine that the Commission's *ex post facto* modification of private contracts served a public use, the Commission has failed to identify any form of "just compensation" that would be paid to the LFAs.[177] Where such a taking occurs without compensation effects an inverse condemnation.[178] In such an instance, the Commission would be liable to the LFAs for damages incurred thereof. Therefore, the Commission has failed to satisfy either element of a valid Fifth Amendment taking, making the Commission's proposed rules impermissible under the Fifth Amendment.

In addition, the Commission's proposed rules constitute a Fifth Amendment regulatory taking. Whereas a taking involves the federal government's direct appropriation of private property, a regulatory taking involves a regulation, enacted by the federal government, that has the effect of unduly depriving private property from the property's owner.[179] As is discussed in greater detail *infra*, the Commission's proposed rules would impose a significant economic impact on the LFAs,[180] are an impermissible interference with private contracts, and confer only a private benefit to cable operators.[181] Moreover, the Commission has failed to identify or provide any form of compensation that would be paid to the LFAs in exchange for this taking. Therefore, the Commission's proposed rules additionally constitute an impermissible regulatory taking under the Fifth Amendment.

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[177] U.S. CONST. amend. V.
[178] *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).
[179] *See infra* at n. 182.
[180] *See* III.A.3.e.
[181] *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Armstrong v. United States*, 364 U.S. 40 (1960); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

b. The FCC's New Interpretation of Franchise Fee would negate previously bargained for Consideration in Violation of the First Amendment.

The Commission's proposed rules are also unlawful under the First Amendment. The LFAs rely on franchise fees for a significant portion of the funding necessary to support the production of governmental access channel programming and access channel management. Reducing this funding as the Commission has proposed would result in either a dramatic reduction in the volume of programming produced or elimination of access channel programming altogether.[182] This is an infringement of the LFA's First Amendment Rights.[183]

When producing and cablecasting access channel programming, the LFAs are "cable programmers . . . entitled to the protection of the speech and press provisions of the First Amendment."[184] Moreover, a public access channel on a cable system is a First Amendment public forum.[185] The Commission's proposed interpretation of "franchise fee" would knowingly cause a significant reduction or elimination of access channel funding.[186] This, in turn, would cause the LFAs' the volume of access channel programming to be dramatically reduced or altogether eliminated.[187] In either case, the Commission's proposed rules would have a chilling effect on the LFAs' First Amendment free speech rights and are an impermissible intrusion into a First Amendment public forum.

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[182] *See* III.A.3.e.
[183] *See Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 636 (1994); *FCC v. Time Warner Entertainment Co., LP v. FCC,* 93 F.3d 957 (D.C. Cir. 1996).
[184] *Id*.
[185] *See Missouri Knights of the Ku Klux Klan v. Kansas City*, 723 F.Supp. 1347, 1351-52 (W.D. Mo. 1989).
[186] *See* III.A.3.e.
[187] *Id*.

3. In The Alternative, In-kind franchise provisions Must Be Determined At The Cable Operator's Incremental Cost

If, contrary to our arguments above, the FCC interprets the definition of Franchise Fee to include in-kind franchise provisions, the FCC has requested comment on whether in-kind franchise provisions should be calculated based on cost or fair market value. For the reasons described below, we urge the FCC to calculate in-kind franchise provisions to be based on the actual incremental cost to the cable operator.

a. All in-kind franchise provisions Are Franchise Costs Recoverable in Rates or a Per Subscriber line item charge

Congress recognized that cable operators would have franchising costs, such as in-kind franchise provisions, and Congress expressly allowed the recovery of these costs through its rates.[188] The FCC developed rate regulation rules as required by Congress.[189] These rules allow a cable operator to recover all of its franchising costs.[190] Since 1984, cable operators have been recovering all of their franchising costs, plus interest at 11.25%.[191] For years, cable operators have filed annual rate reports to recover franchising costs in their cable rates.[192] Thus, as the above discussion shows, cable operators have been recovering all of their franchising costs, including in-kind franchise provisions.[193]

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[188] *See supra* at n. 156.
[189] *Id*.
[190] *Id*.
[191] *See* 47 C.F.R. § 76.922(e)(3)(i)
[192] Cable Act at § 623(k).
[193] The state of Iowa limits cost recovery for transmission costs in an amount "not to exceed the provider's incremental costs." *See* Iowa Code 477A.6(1)(b).

b. Calculating In-kind franchise provisions at Fair Market Value will allow Cable Operators to double recover costs from cable subscribers

The FNPRM has provided no information on how fair market value would be determined under its proposed rule.[194] Thus, it is difficult to ascertain precisely the fiscal impact on local franchising authorities. What is clear is that cable operators have already been allowed to recover their cable franchising costs, including in-kind franchise provisions, through their rates as shown in the previous section.[195] If the FCC were to allow a cable operator to calculate in-kind franchise provisions as fair market value instead of cost, it would allow a cable operator to recover its costs many times over from cable subscribers. In most instances, since the in-kind franchise provisions have been or are being recovered plus interest, the net cost to the cable operator is negligible.[196]

For example, in the instance of a cable franchise requirement commencing in 2010 for the provision of an intuitional network that cost $100,000 to connect 50 government buildings, the cable operator would recover the $100,000 plus interest of 11.25% over an eight year period of time. In 2018, the cost of that intuitional network would be fully recovered plus interest. Under this example, should the FCC's proposed rule allowing in-kind franchise provisions to be reduced from the franchise fee become effective, the cable operator in this example will now reduce from its Franchise Fee the fair market value of the intuitional network even though it had already fully recovered its costs plus interest. If this is allowed, the cable operator would now be allowed to recover an undefined fair market value on top of the cost. If the fair market value were to be $500 per site per month, the cable operator would recover $300,000 in one year. The

[194] *See* FNPRM at ¶ 24.
[195] III.A.3.a.
[196] *See id.*

result in this hypothetical would be the triple recovery of the cost of the in-kind franchise provisions in just the first year.[197] Since the Franchise Fee paid by cable operators is passed through to cable subscribers, cable subscribers will pay for in-kind franchise provisions many times over.[198] Such a result is inconsistent with the charge of the FCC under the Cable Act.[199]

Contrary to elementary administrative law, the proposed rule would be inconsistent with the FCC's own regulations, because it would allow cable operators to recover the costs of negotiated in-kind franchise provisions as part of the cable operator's rates (under rules promulgated under Section 623) and then recover the fair market value of that same consideration through the franchise fee (under rules promulgated under Section 622).[200]

c. Cost Recovery – Not Fair Market Value - is Consistently Used In Cable and Telecommunications Regulation

The use of fair market value in determining in-kind franchise provisions off set from the franchise fee would be a significant departure from past practices with no statutory support.[201] There are multiple instances in the Communications Act and the corresponding FCC rules where cable and telecommunications companies are allowed to recover certain costs.[202] There are no instances in which the Communications Act and the corresponding FCC's rules allow communications companies to recover the fair market value of their costs. The reasoning seems too obvious to state, but clearly Congress intended that cable operators be made whole by

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[197] $500 per site per month is likely a conservative estimate. Cable operators have been demanding per site institutional network charges as higher than $1,600 per site per month.
[198] *See* III.A.3.a.
[199] Cable Act at § 601. *See* Cable Act House Report at 4689.
[200] *See Jewish Hosp. v. Secretary of Health & Human Servs.*, 19 F.3d 270, 273 (6th Cir. 1994) ("It is an essential principal of administrative law that agencies are bound to follow their own regulations.").
[201] *See, e.g.*, 47 U.S.C. §§ 201(b), 229(e), 532, 543 & 1008(e). *See also, e.g.*, FCC Form 499-A & FCC From 1240.
[202] *See id.*

recovering their costs, not that they unfairly profit from the recovery on the backs of the public.[203]

d. Use of Fair Market Value Will Result in Valuation Disputes

In the event the FCC decides to allow cable operator's to reduce the fair market value of in-kind franchise provisions from franchise fee, it will result in valuation disputes. Nothing in the FNPRM provides guidance as to how the fair market value of in-kind franchise provisions will be determined.[204] Presumably then, cable operators will determine fair market value and reduce the 5% gross revenues franchise fee accordingly, forcing local franchising authorities to either accept whatever the cable operator determines or to spend time and resources analyzing the cable operator's determination. In the event of disagreement, both the local franchising authorities and cable operators will be forced to spend time and resources in compliance hearings.[205]

For instance, in our example in subsection III(A)(3)(b) above, the cable operator determined the fair market value of each I-Net location at $500 per month. But there is nothing to justify that price other than the cable operator's claim of the fair market value. The fair market value could just as easily be $50 per year. However, if the FCC adopts the fair market value approach it is probable that the cable operator will deduct $500 per site per month and reduce that amount from the 5% franchise fee. Even if the local franchising authority acted immediately, the compliance process would likely take many months resulting in a loss of $22,500 per month plus costs and expenses. Using actual incremental costs instead of fair market value should create little or no disagreements. If the FCC insists on allowing the

[203] Cable Act House Report at 4701.
[204] *See* FNPRM at ¶ 24.
[205] *See* Cable Act at § 625, *amended by* 1992 Cable Act at § 23.

reduction of fair market value from franchise fees, local franchising authorities must be allowed to recover their costs and expenses from any compliance proceedings related to the determination of fair market value.

e. Valuing In-kind franchise provisions at Fair Market Value will Significantly Impact LFA Budgets and Public Benefits

Again, the precise impact of the new interpretation of Section 622 on each local franchising authority is difficult if not impossible to ascertain. Local franchising authorities have estimated the impact could be a reduction of current franchise fees greater than 30%. The FNPRM preliminarily determines that PEG channels would be considered in-kind compensation and a franchise fee.[206] For illustrative purposes only, using the FCC's commercial leased access channel rules the off-set from existing franchise fees would be significant, ranging up to $0.55 per subscriber per month per channel.[207] For example under these rules, in Rochester, New York, the value of a PEG access channel would be $0.19 per subscriber per month. The Town of Pittsford is a suburb of Rochester, New York. The Town has 3 PEG channels and has approximately 6,500 cable subscribers. The fiscal impact of just one channel would be approximately $15,000 per year per channel, or $45,000 for the three PEG channels. Over the course of a ten year cable franchise, the impact on each Town would be nearly a half million dollars reduced from the general fund of the Town.

In the City of Minneapolis, using the rate from the above source of a metropolitan area from a neighboring state, the value of each PEG channel would be approximately $20,000 per

[206] *See* FNPRM at ¶ 16.
[207] *See* Gregory Rose, *Commercial Cable Leased Access Fees: Are the FCC Regulations Being Followed?* (Oct. 12, 2007), *available at* https://ecfsapi.fcc.gov/file/6519810135.pdf; The LFAs do not endorse using the leased access channel rules but use them for illustrative purposes to show the FNRPM's potential financial implications.

month (56,500 subscribers multiplied by $0.36) or $240,000 per year. The City has franchise provisions establishing nine (9) channels. Under the rules proposed in the FNPRM, the annual off-set from current franchise fees from just the nine PEG channels could be over $2.1 million, which would amount to about 2/3 of the current franchise fee.

As these examples show, it is not unreasonable for local franchising authorities to estimate the fiscal impact of the FNPRM as a 20-30% reduction or off-set of current franchise fees. Indeed, in some instances, as the examples show, the negative impact may be significantly higher. The examples shown related to only one of many in-kind franchise provisions contained in franchise and would now be considered franchise fees under the FNPRM. The financial impact will be significant, but besides the loss of funding, the impact is likely to result in other negative impacts, such as the reduction or elimination of access television channels and programming.[208] Any reduction in franchise fees will directly impact the operation of their PEG channels.[209] The result is less programming and less access to government programming and less government transparency.[210]

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[208] *See, e.g., In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Comments of the North Suburban Access Corporation, at pp. 1-2, MB Docket No. 05-311 (Nov. 14, 2018) ("This ruling will cripple the organization financially which provides platforms for community centric shows such as multi-award winning Disability Viewpoints."); and Mass Access, *File Comments with the FCC Today* (2018), *available at* https://vimeo.com/299319264.

[209] *See, e.g.*, Sam Houghton, *FCC Rules Threaten Public Access Television*, THE ENTERPRISE (Nov. 9, 2018) ("'If passed, this proposal could devastate community media centers and public, educational, and government [channels] across the country,' is a line from one PSA voiced by Sarah Colvin, news director for the Cape Cod Community Media Center."), *available at* https://www.capenews.net/regional_news/fcc-rules-threaten-public-access-television/article_07201cd8-0583-5905-8aa0-331080ee07b7.html.

[210] *Id* ("Mashpee TV station general manager William R. Nay said the new proposal would ultimately limit the programming and offerings provided to the community.").

4. In the Alternative, No Retroactive Application of the Proposed Redefinition of "Franchise Fee" Should Be Allowed

As discussed above, franchise fees have never included in-kind franchise provisions.[211] Promulgating a rule allowing the fair market value of in-kind franchise provisions to be off set from current gross revenue franchise fees will negatively impact local franchising authorities.[212]

Cable operators have recovered the cost of the in-kind franchise provisions through rates.[213] Therefore, cable operators would not be harmed if the FCC prohibited the retroactive application of its proposed rule. Conversely, local franchising authorities would be significantly harmed if cable operators were allowed to retroactively seek offsets from franchise fees for years of past in-kind franchise provisions based upon fair market value. The impact could be to eviscerate a year or more of franchise fees creating very real budgetary issues for local franchising authorities. Further, the prior budgets impacted by the FNPRM have long since been expended.

5. In the Alternative, Consideration From Settlement Agreements, Side Agreements, MOUs, IRUs and Other Agreements Must Not Be Allowed to be Reduced from the Franchise Fee.

In the Second Order, the FCC recognized "that some terms may have been implemented as part of a settlement agreement regarding rate disputes or past performance by the franchisee.[214] The legislative history expressly recognizes that voluntary payments supporting PEG which are not required by the franchise are not subject to the 5% gross revenues franchise fee cap.[215]

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[211] *See* II.F.
[212] *See* III.A.3.e.
[213] *Id*.
[214] Second Report and Order at 19642.
[215] Cable Act House Report at 4702.

As shown in the Background Section of these Comments, local franchising authorities and cable operators have entered into many different types of agreements including Settlement Agreements,[216] Side Agreements,[217] IRUs,[218] MOUs,[219] and Managed Services Contracts.[220] To the extent the FCC alters how franchise fees are calculated, no consideration contained in separately negotiated agreements (apart from the cable franchise agreement) should be considered part of the franchise fee subject to the cable franchise fee cap. These separate agreements contain consideration related to franchise violations, Institutional Networks, Rate disputes, PEG Channels, and PEG Funding, and other issues.[221] Consistent with the Second Order, the consideration in these agreements should not be included in any offsets of franchise fee payments, because the consideration is separately negotiated from any cable franchise and have been voluntarily agreed to by the parties.[222]

6. In the Alternative, No Franchise Fee Reduction Should Be Allowed When A LFA Is Charging Less Than 5% Franchise Fee.

In some instances, a LFA has agreed to a Franchise Fee less than federal cap of 5% of the cable operator's gross revenues.[223] For example, the City of Sioux Falls, South Dakota

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[216] *E.g.*, Minneapolis, Minnesota, *Franchise Settlement Agreement* (2015), *available at* http://www.minneapolismn.gov/www/groups/public/@clerk/documents/webcontent/wcms1p-136574.pdf.
[217] *E.g.*, Minneapolis, Minnesota, *CenturyLink Indemnity Agreement* (2015), *available at* http://www.minneapolismn.gov/www/groups/public/@clerk/documents/webcontent/wcms1p-149155.pdf.
[218] *E.g.*, Minneapolis, Minnesota, *Settlement Agreement and Mutual Release* (2006), *available at* http://www.minneapolismn.gov/www/groups/public/@council/documents/proceedings/wcms1q-070082.pdf; *supra* at n. 69.
[219] *Supra at* n. 72.
[220] *E.g.*, *supra* at nn. 67 & 70.
[221] *Supra at* nn. 215-19.
[222] *Id*.
[223] *Supra at* n. 46.

negotiated a gross revenue franchise fee of 2.5% with its franchised cable operators.[224] There must be no deduction from franchise fees unless and until the in-kind franchise provisions exceeds 5% of the gross revenue of the franchised cable operator.

B. Mixed Use Networks

1. The FCC's Proposed Ruling On Mixed-Use Networks Is Indefensible On Both Statutory And Legislative History Grounds and Cannot Survive Chevron Scrutiny.

a. The Proposed Ruling is Contrary to The Structure of the Communications Act and Ignores the Legislative History of the Cable Act.

The FCC's "tentative conclusion" in the FNPRM is that Section 624(b) of the Cable Act "also bars LFAs from regulating the provision of broadband Internet access and other information services by incumbent cable operators that are not common carriers."[225] The LFAs do not here challenge the proposition that Congress intended to exclude the provision of Title II non-cable communications services from LFA regulation under Title VI. But the FCC's tentative conclusion, fairly read, goes much further in its preemptive reach, categorically barring all LFA regulation of both the non-cable services and the system used to deliver them:[226]

> We further note that under Section 624(b), "the franchising authority, *to the extent related to the establishment or operation of a cable system …* may establish requirements for facilities and equipment." In light of our tentative finding that Section 624(b)(1) bars LFAs from regulating information services, we do not believe this provision authorizes

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[224] *Id*.

[225] *See* FNRPM at ¶ 26. "Also" because this conclusion follows its contention that it is settled by *Montgomery County*, and acknowledged by the LFA Petitioners in that case, that the Cable Act prohibits LFAs from regulating the provision of non-cable services by Title II telecommunications services providers that also deliver cable service over their Title II authorized networks.

[226] The industry has in fact asked the FCC for just such a ruling. *See Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Protection and Competition Act of 1992*, NCTA Notice of Ex Parte, MB Docket No. 05-311 (Sep. 20, 2018).

> LFAs to regulate facilities or equipment to the extent they are used to provide such services, including broadband Internet access service. [227]

The FCC's point, though perhaps not stated in so many words, clearly is that its finding a 624(b)(1) bar to LFA regulation of information services also bars LFAs from regulating cable facilities or equipment used by the cable operator to provide information service, i.e. broadband Internet access service.[228] Repetition of the statutory qualifier, "to the extent related to …," does not change this result.[229] In the nature of the case, a mixed-use network, whether operated by a cable company or a Title II telecommunications company, is one facility, one infrastructure of poles, wires, vaults, underground conduits, cabinets, transformers, electrical switch gear, etc., used to provide both cable and non-cable services. LFA regulation of that system – notably, regulation of its use of the PROW to install the system and the imposition of PROW use fees – is barred, categorically, if its use for information service takes it out of the LFA's Cable Act regulatory authority and out of its state law authority to franchise and to regulate its PROW. Fairly read, the FCC's proposed ruling would give cable franchisees the right to install in the PROW, on their cable infrastructure, whatever wireless and other broadband equipment and facilities they choose, wherever they choose, in whatever numbers they choose, and to do it for

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[227] FNPRM at ¶ 28. The FCC's statement of its mixed-use ruling in the FNPRM is ambiguous, it must be presumed deliberately so. The language here quoted is preemptive as described, and fairly read is the broad preemption described. Other language in the FNPRM appears to limit the FCC's prohibition to LFA exercise of its Title VI regulatory authority to regulate non-cable service and facilities. (*See* FNPRM at ¶ 25.) The cable industry of course seeks the broadest preemption. The LFAs are concerned, based on their reading of the FNPRM's confusing language, that broad preemption is the FCC's intent and that the ambiguity in the FNPRM facilitates that outcome. Accordingly, in this subsection the LFAs address the broadly preemptive construction of the proposed mixed-use network rule and show that it is inconsistent with the Communications Act, including Title VI, and with the legislative history of Title VI, and that it is not entitled to *Chevron* deference.

[228] FRNPM at ¶ 26.

[229] Cable Act at § 624(b).

free, because they use that system to deliver an information service as well as cable service.[230] Under this regime, cable operators would, for example, be free to install small cell networks on their cable plant without paying any of the generally applicable PROW management fees that apply to non-cable systems' use of the PROW. This is preemption of LFA regulatory authority.

The FCC reaches its result by the following reasoning:

> Under Section 3(51) of the Act, a "provider of telecommunications services" is a "telecommunications carrier," which the statute directs "shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services. *Thus, an incumbent cable operator, to the extent it offers telecommunications service, would be treated as a common carrier subject to Title II of the Act.* Section 602(7)(C) of the Act, in turn, excludes from the term "cable system" "a facility of a common carrier which is subject, *in whole or in part,* to the provisions of title II of this Act, except that such facility shall be considered a cable system … to the extent such facility is used in the transmission of [cable service].[231]

The FCC's analysis is flawed for multiple reasons, starting with its misuse of the exception for Title II carriers articulated in the first sentence.[232] As applied to Cable Act regulation, the point of the exception is to protect Title II common carriers from regulation by LFAs under their Title VI franchising authority.[233] The legislative history of the Cable Act makes very clear that such was Congress' intent in reciting the exception in the Section 602(7)(C) definition of "cable system,"[234] and it goes against the FCC's conclusion in the second

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[230] FNRPM at ¶ 26 ("We thus tentatively conclude that the mixed-use network ruling prohibits LFAs from regulating the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers, or from regulating any facilities and equipment used in the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers (with the exception of I-Nets, as noted above).").
[231] FNPRM at ¶ 26.
[232] *See* Communications Act at Title II. *See* FNRPM at ¶ 26.
[233] *Id.*
[234] Cable Act House Report at 4699.

sentence: It simply does not follow that an exception created specifically to protect Title II common carriers' provision of Title II services from Cable Act regulation applies also to cable operators' provision of Title II and other non-cable services over a system that is a cable system.

The FCC's non-sequitur ignores the structure of the Communications Act by conflating communications *services*, cable and non-cable, with communications *systems*.[235] Title II defines the "common carriers" it regulates in terms of the *services*, "telecommunications services," they provide, not in terms of the facilities they use to provide them: "[a] telecommunications carrier shall be treated as a common carrier … only to the extent that it is engaged in providing telecommunications services" (47 U.S.C. 153(51)" and telecommunications service is defined as "the offering of telecommunications for a fee directly to the public … *regardless of the facilities used*" (47 U.S.C. 153(53) (emphasis added).[236] Title II regulation of common carriers is thus based on the nature of the service delivered. Title VI, to the contrary, focuses on the facility, by defining a "cable system" as a communications system that has particular characteristics (e.g. closed transmission pathways, specifically limited interaction) and that is "designed to provide cable service which includes video programming."[237] The cable system is a cable system if it satisfies the defining characteristics of such a communications system, regardless of whether it is used for non-cable, non-Title VI services.[238] LFA authority to regulate goes with the system – the Cable Act grants authority to regulate a communications *system*, in accordance with the

[235] *See* Cable Act at § 602; Communications Act at § 3. *See* FNRPM at ¶¶ 25-31.
[236] Cable Act at § 602. In adopting the Cable Act, Congress clearly understood that Title II telecommunications services, including data transmission services, were provided over non-Title II facilities, specifically including cable facilities (i.e., that cable systems are or would be mixed-use networks). The Cable Act nonetheless relies on a very particular definition of "cable system" to articulate the Cable Act's regulatory rules. Cable Act House Report at 4700.
[237] Cable Act at § 602(6).
[238] Indeed, the drafters of the Communications Act acknowledged that a cable system remains a cable system even when it carries non-cable services. *See* Cable Act House Report at 4700.

Cable Act, if it is a cable system.[239] The nature of that regulation is limited by the Act, to be sure, but it has since 1984 included regulation of the system's use and occupancy of the ROW.[240] The LFA's regulatory tool is of course the negotiated franchise (license) it issues to the cable company to operate a cable system in its PROW and the franchise agreement setting forth the terms of that license, and within broad limits set by the Act, LFAs are free to negotiate terms with franchisees that cover many aspects of the cable system's construction and operation, and to expressly require (as nearly every cable franchise expressly requires) compliance with the jurisdiction's ROW management regulations.[241]

The FCC's upending of this established regulatory regime ignores Congress' stated reason for excepting Title II telephone and data transmission services from LFA regulation, which was specifically to protect Title II telephone companies from unfair competition by cable operators.[242] The House Report stressed that Title II service providers are subject to regulation as common carriers, including common carrier nondiscrimination requirements, whereas operators of cable systems are not.[243] Congress' fear was that cable operators could furnish the core services of Title II carriers, telephone and data transmission service, at lower cost because they were not subject to common carrier regulations, resulting in their taking over these core

[239] Cable Act at § 621(a)(2).
[240] *Id*. For example, certain kinds of equipment regulation and programming regulation are limited by the Cable Act. Regulation of customer services standards and plant condition, including compliance with applicable codes, are permitted as terms incorporated in a cable franchise.
[241] The granting clauses in a cable franchise grant authority specifically for the construction and operation of a cable system. The fact that, as a technical matter, a cable system can deliver broadband Internet access, and is so used, cannot supersede an LFA's authority to regulate any equipment and facilities comprising a cable system. It should also be noted that franchising authority in most states comes from state common and/or statutory law and not exclusively or principally from the Cable Act. *See* II.J.
[242] Cable Act House Report at 4659-60.
[243] *Id*.

telephone company businesses and forcing them to raise rates on telephone service to compensate for the lost business.[244] Congress wanted both to protect the telephone companies' markets and preclude what it saw as a likely major negative financial impact on their consumer and business subscribers.[245] Thus Congress' objective in articulating the Title II exception was not to relieve cable operators from alleged burdens of LFA regulation of their cable systems to provide broadband internet access, which did not yet exist as a commercial market, but rather to achieve competitive equity between Title II telephone companies and cable operators.[246]

The lesson is that the FCC's non sequitur both violates the structure of the Communications Act and ignores its legislative history. It is also inconsistent with the Second Report and Order.[247] There simply is no justification in the language of the Act or its legislative history for concluding that a measure to protect telephone company markets against cable industry competition compels or justifies a rule preempting LFA regulation of cable systems' use of the ROW.[248]

b. The Proposed Ruling Mandates Favorable Treatment of Incumbent Cable Operators' Provision of Broadband Internet Access Service in Violation of the Communications Act's Conditions on Local ROW Regulation in Sections 253(c) and 332.

The Communications Act permits localities to regulate their PROW and require fair and reasonable compensation provided they do so in a non-discriminatory and competitively neutral

[244] *Id*.
[245] *Id*.
[246] *Id*.
[247] *See* II.K.
[248] *See United States v. Comcast Corp.*, No. 1:11-cv-00106, 2011 WL 5402137 (D.D.C. 2011) (addressing concerns that Comcast would engage in anticompetitive behavior in the cable market after acquiring NBC Universal, Inc.).

manner .[249] The point is reinforced by the legislative history of the 1996 Act, which affirms local government regulatory authority over their PROW, subject to the proviso, and explicitly applies it to cable companies.[250]

Discriminatory, non-competitively-neutral treatment by LFAs is, however, exactly the result of barring LFA regulation of cable systems that carry broadband internet access services. That subset of broadband providers would have the economic advantage of having no locally imposed ROW management costs – a very considerable economic advantage, if the industry is to be believed in its vigorous complaints of excessive burden imposed by localities in the form of ROW management fees and rentals for municipal property in the ROW. And cable operators would have this economic advantage notwithstanding that their broadband networks are indistinguishable, certainly in their use of the ROW and often in their equipment and architecture, from Title II carriers providing broadband services.[251]

By mandating that LFAs manage their PROW in a manner inconsistent with Sections 253 and 332, the proposed rule goes directly against the Communications Act's express conditions on local ROW management.[252] As explained in Section III.A.1. of these Comments, a federal agency's proposed construction of a statute cannot survive *Chevron* scrutiny if it is inconsistent

[249] *See, e.g.*, 47 U.S.C. §§ 253(c) (preserving a local government's authority to manage the public PROW and to require fair and reasonable compensation from telecommunications providers "on a competitively neutral and nondiscriminatory basis") § 332(C)(7)(B) (permitting a local government to deny a wireless siting application unless, *inter alia*, a denial would be "unreasonably discriminatory").
[250] TELECOM-LH 2, 1995 WL 17207513 (A.&P.L.H.), 34 ("However, the Committee intends that telecommunications services provided by a cable company shall be subject to the authority of a local government to manage its public rights of way in a non-discriminatory and competitively neutral manner and to charge fair and reasonable fees for its use.").
[251] *See* Cable Act House Report at 4678.
[252] *See Chevron*; III.A.1.

with the plain language of the statute.[253] The FCC reads Section 3(51) and Section 602(7)(C) of the Act together in a manner flatly inconsistent with Sections 253(c) and 332(C)(7)(B). The proposed rule cannot be adopted consistent with the Act or *Chevron*.[254]

c. The Proposed Ruling is Barred by the Cable Act's Preservation of Cable Regulatory Authority Existing at the Time of Its Enactment.

The Committee repeats at multiple points in H.R. 98-934 that it intends to leave unchanged the then existing regulatory regime governing the provision of non-cable services over cable systems.[255] For example, in commenting on the definition of cable services: "The committee also intends that nothing in Title VI shall be construed to affect existing regulatory authority with respect to non-cable communications services provided over a cable system." [256] As noted above, the same point is made in the Cable Act House Report: "H.r. 4103 maintains existing regulatory authority over all other Communications services offered by a cable system, including the lucrative Private line voice and data transmission services that could compete with Communications services offered by telephone companies. H.r. 4103 preserves the regulatory and jurisdictional status quo with respect to non-cable communications services."[257] The "regulatory and jurisdictional status quo" in 1984 had included local franchising authorities and their use of the franchise and franchise agreement to regulate cable systems and cable service for several decades,[258] including the same cable systems that the Committee recognized were

[253] *Id*.
[254] *Id*.
[255] *See id*.
[256] *Id*.
[257] *Id* at 4666.
[258] *Id*.

carrying both cable services and non-cable communications services.[259] It also included localities and LFAs' state law authority to franchise cable and to regulate their PROW, as discussed in Section II of these Comments.[260] It is true that the Committee referenced state regulation through state public service commissions,[261] but it remains the case that the Committee deliberately left in place a regulatory regime that included LFA regulation of cable systems throughout the country that it expressly recognized were carrying Title II communications services as well as cable services, and that derived authority from state law as they do now.[262] This forbearance in favor of the regulatory status quo goes directly against the FCC's construction of the common carrier exception as preempting LFA regulation of cable systems because they carry common carrier services. That construction is exactly the kind of regulatory change the Committee decided it would *not* make in the Cable Act. Once again, the FCC's proposed ruling is directly contrary to the legislative history of the Cable Act.

C. State Cable Franchises and State Franchising Laws

1. Federal Preemption of State Cable Franchises and Cable Franchising Laws Is Not Permitted By the Cable Act

In its FNPRM, the Commission has sought comment on whether to apply its "decisions in the First Report and Order and Second Report and Order, as clarified in the Order on Reconsideration, to franchising actions at the state level and state regulations that impose requirements on local franchising."[263] As previously discussed, the Cable Act does not authorize

[259] *See* III.B.1.
[260] II.B.
[261] *See* III.B.1.
[262] *Id.*
[263] FNPRM at ¶ 32.

the Commission to enact such preemptive measures by interpreting well-settled terms in the Cable Act.[264]

The purpose of the Cable Act is to "encourage the growth and development of cable systems and [to] assure that cable systems are responsive *to the needs and interests of the local community*."[265] In drafting the Cable Act, Congress recognized that certain aspects of cable franchising raise local and hyperlocal issues, such as PROW management, that would be impractical and inefficient for a federal agency to address because doing so would likely result in undue delays in the cable franchising process.[266] Applying the Commission's decisions in the First Report and Order and Second Report Order to state level franchising actions or state level cable franchising regulations, as the Commission has suggested, would be contrary to Congress' intent and the Cable Act's purpose.

First, state level franchising actions and state regulations governing the local franchising process do not currently "impede competition or discourage investment in infrastructure that can be used to provide services, including video, voice, and broadband Internet access service, to consumers" as the Commission has suggested.[267] Instead, these state level actions and regulations promote competition and investment infrastructure to benefit consumers by more effectively addressing local and hyperlocal issues that are too narrow for the Commission to

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[264] *See* III.A.1.
[265] Cable Act at § 601(2) (emphasis added).
[266] *See* Cable Act House Report at 4731 ("A state may, for instance, exercise authority over the whole range of cable activities, such as negotiation with cable operators; consumer protection; construction requirements; rate regulation or deregulation; the assessment of financial qualifications; the provision of technical assistance with respect to cable; and other franchise related issues—as long as the exercise of that authority is consistent with Title VI."). *See also* Frederick E. Ellrod III & Nicholas P. Miller, *Property Rights, Federalism, and the Public Rights of Way*, 26 SEATTLE U. L. Rev. 475 (2003).
[267] FNPRM at ¶ 32.

address in broad, sweeping regulations.[268] Federal and state cable franchising laws and regulations do not unduly prevent cable operators from constructing communications facilities and networks.[269] Rather, these laws and regulations primarily govern how and when these facilities and networks can be used to provide cable service.[270] Preempting state level franchising actions and state regulations would have the unintended effect of not only prohibiting state and local governments from addressing local and hyperlocal issues, but doing so would also make the cable franchising process more arduous, resulting in lengthier and more expensive cable franchise negotiations, neither of which is a benefit for cable operators, local franchising authorities, or consumers.

For example, Minnesota has a comprehensive state cable franchising law that benefits both cable operators and local franchising authorities by providing a clear, predictable pathway to obtaining or renewing a cable franchise.[271] This reduces or eliminates a number of uncertainties in the cable franchising process stemming from Minnesota's local and hyperlocal cable franchising issues. In this way, Minnesota's cable franchising law provides a transparent process which facilitates and streamlines cable franchise negotiations for both parties. Under this

[268] *See, e.g.*, Cable Act at § 636.
[269] *See, e.g.*, Cable Act at § 621(b)(1) ("A cable operator may not provide *cable service* without a franchise." (emphasis added)); Minn. Stat. § 238.08 (2010) ("A municipality shall require a franchise or extension permit of any cable communications system providing [cable] service within the municipality.").
[270] *Id*.
[271] *See* Minn. Stat. Ch. 238. *See, e.g.*, Minn. Stat. § 238.081, subd. 4 (2004) (providing a clearly delineated list of requirement components of a cable franchise application). *See also* Donaldson, W.D., *Minnesota's Approach to the Regulation of Cable Television,* 10 WM. MITCHELL L. REV. 413, 417 (1984) ("Based in part on the 1972 New York cable legislation, Minnesota's statute has been praised for its balancing of regulatory, developmental, and public service interests. In this respect, Minnesota, along with New York, differs from most other states with comprehensive cable regulation. Many other states focus largely on centralized rate setting and control. Minnesota, on the other hand, leaves rate setting, franchise decisions, and system oversight to local government. The state role is concentrated on standard setting and policy development." (citations omitted)).

framework, Minnesota communities have benefitted by having access to reliable, high-quality cable services and have developed a strong network of access television providers.[272]

In another example, the state of New York's cable franchising regulations require every new cable franchise to contain a provision requiring that "cable television service will be available to a significant number of subscribers within one year."[273] Similarly, every renewal franchise requires a cable operator to provide "a description of the system as constructed and as will be expanded or enhanced during the term of the renewal."[274] These build-out provisions help ensure that a local franchising authority's residents have access to cable services in a reasonable and timely manner and that cable operators remain competitive with one another by requiring them to compete for the same subscribers in the franchising area.[275] As both Congress and the Commission have noted, this type of competition greatly benefits the public.[276] Preempting such build-out requirements or construing them as in-kind contributions is not only impermissible under applicable law but is also clearly contrary to Congress' findings and the Commission's stated purposes and goals.

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[272] *See* Donaldson, W.D., *Minnesota's Approach to the Regulation of Cable Television*, 10 WM. MITCHELL L. REV. 413 (1984).
[273] 16 NYCRR 895.1(b).
[274] *Id*.
[275] *See generally* H.R. Rep. 102-628, 46 ("In the Committee's view, as noted above, consumers would benefit greatly from the existence of two competing cable systems operating in a given market. Evidence presented to the Committee indicates that where such competition exists, cable rates frequently decline and customer service improves.").
[276] *See* H.R. Rep. 102-628, 30 ("The [1992 Cable Act] will protect consumers from unreasonable behavior by the "renegades" in the cable industry, while promoting the development of competing multichannel video programming distributors."); *In the Matter of Implementation of Sections 11 & 13 of the Cable Television Consumer Prot. & Competition Act of 1992*, 8 F.C.C. Rcd. 6828 (1993) ("The Senate Report observed that without the presence of another multichannel video programming distributor, cable operators face no local competition, which leads to undue market power for existing cable operators."). *See also* H.R. Rep. 102-628, 31 (noting that deregulation caused unreasonable rate increases).

Second, the Commission has suggested promoting access to broadband Internet access service as a basis for preempting state level franchising actions and state regulations.[277] The purpose of the Commission's National Broadband Plan is to "ensure that every American has 'access to broadband capability.'"[278] The National Broadband Plan does not concern a cable operator's provisioning of cable service or communications facilities in their function as components of a cable system, and the Commission has made clear that different uses of communications facilities are subject to different regulations and requirements under the Communications Act.[279] In particular, the Commission has declared broadband Internet access service to be an information service subject to the Commission's Title I authority.[280] As previously stated, the Cable Act does not govern the installation of communications facilities, other than those facilities comprising a cable system, and the Commission does not otherwise have authority to govern these issues.[281] Instead, the Cable Act governs how these facilities are

[277] FNPRM at ¶ 22 ("In adopting rules and guidance implementing Section 621(a)(1), including rules governing the treatment of certain costs and fees charged by LFAs, the Commission found that existing operation of the local franchising process constituted a reasonable barrier to new entrants in the marketplace for cable services and *to their deployment of broadband*." (emphasis added)).

[278] Federal Communications Commission, *Connecting America: The National Broadband Plan* (2010) (quoting American Recovery and Investment Act of 2009, Pub. L. 111-5, 123 Stat. 115, 516 (2009) (directing the FCC to develop the National Broadband Plan)).

[279] *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order at ¶ 2, WC Docket No. 17-108 (Jan. 4, 2018) ("We find that reclassification [of broadband Internet access service] as an information service best comports with the text and structure of the Act, Commission precedent, and our policy objectives."). *See generally* 47 U.S.C. Ch. 5.

[280] *Id*.

[281] *See* Frederick E. Ellrod III & Nicholas P. Miller, *Property Rights, Federalism, and the Public Rights of Way,* 26 SEATTLE U. L. Rev. 475, 485 (2003) ("Historically, local and state governments had the primary responsibility for managing the public PROW to serve the needs of pedestrians and vehicular traffic." (citing HENK BRANDS & EVAN T. LEO, THE LAW AND REGULATION OF TELECOMMUNICATIONS CARRIERS 4 (Artech House 1999))). *Contra* 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.").

used (e.g., to provide cable service).[282] Despite the use of a single facility to simultaneously provide multiple regulated services (e.g., cable service and broadband Internet access service), it would be therefore impermissible for the Commission to reinterpret the Cable Act pursuant to its Title I authority.

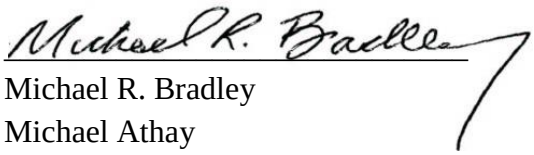
V. CONCLUSION.

For the foregoing reasons, the FCC does not have authority to redefine the definition of franchise fee to include negotiated in-kind franchise provisions. Such action has no support from the plain language of the statute in question, the sparse legislative history, and is contrary to the past dealings between local franchising authorities and cable operators. Any such rule would also violate the First, Fifth and Tenth Amendments of the United States Constitution. In the Alternative, should the FCC adopt the proposed definition, it must limit the recovery of such bargained for in-kind franchise provisions to the actual incremental cost of the cable operator. Allowing fair market value recovery will allow cable operators to recover the cost of the consideration many times over on the back of cable subscribers. Further, consideration in agreements outside of the cable franchise agreements must not be considered part of the franchise fee and there must be no franchise fee off-set unless and until a cable operator can show the recovery is greater than 5% of all of a cable operator's gross revenues derived from the

[282] *See generally* 47 U.S.C. Ch. 5.

use of the cable system. Finally, the FCC does not have authority to preempt regulation of mixed use networks or state laws as proposed in the FNPRM.

Respectfully submitted,



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November 14, 2018