Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

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NCTA – The Internet & Television Association ("NCTA") submits these comments in response to the Commission's Second Further Notice of Proposed Rulemaking ("*Second FNPRM*") in the above-captioned proceeding,[1/] in which the Commission seeks comment on whether franchising authorities should be prohibited from regulating non-cable services offered by cable operators and from requiring in-kind exactions above the five percent franchise fee cap imposed by Congress.

NCTA appreciates the Commission's carefully reasoned tentative conclusions on these issues and agrees that, as explained in greater detail below, the statutory language and Commission precedent compel that these questions be answered in the affirmative. As the Commission wisely recognizes, a decision making clear that franchising authority actions that regulate non-cable services and exact benefits or fees in excess of the five percent statutory cap are unlawful will help promote broadband investment, deployment, and innovation, to the benefit of all Americans.

1/ *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, FCC 18-131 (rel. Sept. 25, 2018) ("*Second FNPRM*").

INTRODUCTION AND SUMMARY

The cable industry continues to be a major investor in network innovations and the expansion of broadband deployment – using coax, fiber, and wireless. As of June 2018, cable operators offered gigabit service or better to 74 percent of cable's broadband footprint (63 percent of U.S. housing units), an increase of 16X in 18 months.[2/] In addition, cable operators offer voice and other information services to tens of millions of U.S. consumers, and many offer a variety of telecommunications services to business and enterprise customers. Over the coming years, cable operators will consider investments of billions of dollars to expand and upgrade their wireline and wireless networks for the benefit of consumers. The largest cable operators have announced their expectation of even more fiber upgrades. Cable operators have already deployed some of the nation's largest public Wi-Fi networks and are exploring even broader wireless investment, using both licensed and unlicensed spectrum. Cable operators also are major providers of backhaul services that can help with the deployment and growth of innovative cable-operated and non-cable-operated wireless services.

To provide American consumers with the cable, broadband, and other groundbreaking services they desire, cable operators require access to the public rights-of-way. To gain such access for these services, Congress required cable operators to negotiate with state and local authorities to secure cable franchises that allow them to deploy their cable systems. As an industry, cable operators pay roughly $3 billion annually in franchise fees to state and local

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[2/] Mark Walker, *The Gigabit Internet Dream Continues to Expand,* CABLELABS (Nov. 1, 2018), https://www.cablelabs.com/gigabit-internet-dream-continues-expand/; *see also* Press Release, Comcast Now Nation's Largest Provider of Gigabit Internet (Oct. 18, 2018) (announcing that "ultra-fast Xfinity Gigabit Internet and Comcast Business Gigabit services [are] now available to nearly all of the company's 58 million homes and businesses passed in 39 states and the District of Columbia"), https://www.businesswire.com/news/home/20181018005863/en/Comcast-Nation%E2%80%99s-Largest-Provider-Gigabit-Internet.

governments. Cable operators also pay permit fees to local governments and pole attachment fees to pole owners in connection with the deployment and operation of their network facilities.

Unfortunately, despite clear statutory language circumscribing state and local authority to abuse the franchising process, a number of jurisdictions have come to rely on the franchising process not as a means of encouraging the deployment of valuable service in their communities, but as a means of leverage to exact financial commitments and obtain products and services paid for by cable operators and their subscribers. Franchising authorities frequently seek excessive fees and all sorts of in-kind contributions – including, but not limited to, courtesy accounts with courtesy equipment, I-Net construction, network capacity, channels, grants, sponsorships, specially created programming, local retail facilities, cash "contributions," free advertising and more – above and beyond the five percent cap on cable franchise fees established by Congress.[3/] They also impose duplicative franchising and fee requirements[4/] by mandating that cable operators obtain separate franchises for, or pay franchise or rights-of-way fees on, non-cable services offered over already franchised cable systems.

Once cable systems are deployed, cable operators lack bargaining power to refuse these demands due to the stranded investment that cannot be recovered in the event of a franchise denial.[5/] As the Commission recognized in a prior order in this proceeding, franchising authority

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[3/] As the Commission states in the *Second FNPRM*, monetary as well as non-monetary demands should be considered franchise fees. *Second FNPRM* ¶ 17.

[4/] A franchise is "duplicative" if it seeks to authorize rights-of-way permissions that the cable operator already has obtained through other means (such as the cable franchise). By arguing that government authorities should not be allowed to require "duplicative" permissions, NCTA does not mean to suggest that cable operators cannot be required to obtain certifications that are unrelated to use of the rights-of-way for the provision of services within their jurisdiction, such as state-required certificates of public convenience and necessity related to the provision of intrastate telecommunications services. Under no circumstances, of course, can a state or local government require even a certification with respect to services outside the scope of their authority, such as broadband or wireless.

[5/] H. Rep. No. 98-934, at 72 (1984) (recognizing the risk to investment posed by unfair denial of renewal by the franchising authority).

"requests for unreasonable concessions are not isolated, and . . . these requests impose undue burdens upon" cable operators,[6/] as duplicative or onerous regulations and fees and other regulatory obstacles hinder the deployment of new facilities and services and ultimately raise costs for consumers. These obstacles are all the more problematic in the increasingly competitive and rapidly evolving marketplace for the delivery of such services.

Recognizing the harmful impact of these unreasonable franchising authority actions, the Commission previously clarified that local franchising authority ("LFA") jurisdiction over cable operators is limited to the provision of cable services over cable systems, that LFAs may not use their franchising authority to regulate non-cable services provided by cable operators, and that non-incidental in-kind payments must count toward the five percent franchise fee cap.[7/] Although the United States Court of Appeals for the Sixth Circuit in *Montgomery County, Md. v. FCC* remanded for further support the Commission's conclusions regarding cable-related in-kind exactions and the application of the mixed-use rule to cable operators that are not Title II carriers, it did not hold that the Commission's conclusions were incorrect, and rightly so.[8/] The Commission's findings in its prior orders adhered to the text of the Communications Act and were consistent with federal policies and congressional intent.

Accordingly, the Commission should continue to faithfully apply the statute by adopting the tentative conclusions appropriately reached in the *Second FNPRM*. Specifically, the Commission should adopt its proposals to reaffirm that the mixed-use rule applies to all cable

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6/ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101, ¶ 43 (2007) ("*First Section 621 Order*").

7/ *See First Section 621 Order* ¶¶ 98-122; *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 22 FCC Rcd. 19633 (2007) ("*Second Section 621 Order*").

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

operators and to clarify that the scope of the rule precludes the imposition of duplicate fees and authorizations for the provision of broadband and other services over franchised cable systems.[9/] In doing so, the Commission will make clear that state and local governments cannot evade the franchise fee limits established by Congress.[10/] The Commission also should adopt its tentative conclusions that all requests for in-kind contributions made by franchising authorities unrelated to the provision of cable services are subject to the statutory five percent franchise fee cap; that cable-related, in-kind contributions required by franchising authorities are franchise fees subject to the five percent cap except where specifically excluded from the definition of franchise fees in the Communications Act; and that in-kind assessments should be valued for purposes of the franchise fee cap at their fair market value.[11/] Finally, the Commission should clarify that neither a cable operator nor a franchising authority may waive these limitations to pay fees or assume obligations that exceed the limits set by federal law.

[9/] *See Second FNPRM* ¶¶ 26-28 (analyzing the Communications Act and tentatively concluding that the mixed-use rule applies to cable operators that are common carriers and those that are not).

[10/] *See City of Eugene v. Comcast of Or. II, Inc.*, 375 P.3d 446 (Or. 2016). The City of Eugene and other municipalities have submitted comments attempting to defend their exaction of additional fees based on the Oregon court's decision, making clear that these issues are squarely presented for clarification by the Commission in this proceeding. *See* Letter from Tillman L. Lay, Counsel for the City of Eugene, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 17-84, 17-79, MB Docket No. 05-311, at 2 (filed Sept. 19, 2018) (disputing NCTA's contention that "the federal 5% cap on cable service franchise fees establishes an upper limit on . . . equivalent taxes or fees such as those at issue in the *Eugene* case" in order to "ensure that those arguments are also included in the record in MB Docket No. 05-311"); *see also id.*, Ex. A at 26 (attaching reply comments filed by the cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee in the Commission's wireless and wireline infrastructure dockets arguing that "[n]ot only . . . is the Oregon Supreme Court's decision correct, but the facts on the ground in Eugene also demonstrate that Eugene's telecommunications ROW license fees have not adversely affected broadband employment at all"); Comments of the City of Salem, MA, MB Docket No. 05-311, at 2 (filed Nov. 6, 2018) (stating that the City of Salem is "deeply concerned about the way in which the FNPRM would limit local control over non-cable services and facilities").

[11/] *See Second FNPRM* ¶¶ 16-22 (tentatively concluding based on the language of the Communications Act and legislative history that cable-related, in-kind contributions required by franchising authorities are franchise fees subject to the five percent cap unless specifically excluded from the definition of franchise fees in the Communications Act); *id.* ¶ 24 (proposing to value cable-related, in-kind contributions at their fair market value).

As the *Second FNPRM* and the discussion below make clear, the Commission has ample authority under the Communications Act to take these actions and to apply them to both state and local franchising authorities. And, by limiting state and local regulations that inhibit the deployment of cable systems and the innovative services offered over them, the Commission will promote broadband deployment and related advanced digital services, further a competitive market for the delivery of video services, and protect consumers against excessive fees.

I. THE COMMISSION SHOULD REAFFIRM THE MIXED-USE RULE

The Commission has ample authority to bar franchising authorities from regulating non-cable services offered over cable systems. Numerous provisions of the Communications Act provide clear legal bases for the Commission to reaffirm the mixed-use rule as applied to cable operators that also provide telecommunications services, reinstate it for all other cable operators, and clarify the scope of the rule to preclude the imposition of duplicative requirements that cable operators obtain franchises for, or pay franchise fees on, non-cable services offered over already franchised cable systems. The Commission wisely reached these conclusions in its prior orders on Section 621[12/] and now, on remand, it can provide the Court with sufficient legal grounds and record evidence to support reaffirming the conclusions, and make it clear that franchising authorities cannot evade the mixed use rule by invoking other sources of authority. Franchising authorities continue to overreach, imposing detrimental franchising and fee requirements on non-cable services and requiring cash and in-kind contributions that value at well over five percent of cable service revenues. Prohibiting such overreach is necessary to support the longstanding federal policies of facilitating the deployment of advanced cable infrastructure for broadband and treating like services alike.

[12/] *See Second FNPRM* ¶¶ 7-12 (discussing prior orders in this proceeding).

A. Congress Limited Franchising Authority To Impose Entry, Regulatory, And Fee Requirements To Cable Service And Cable Facilities.

In the *First Section 621 Order*, the Commission clarified that, under the Cable Act, franchising "jurisdiction applies only to the provision of cable services over cable systems. To the extent a cable operator provides non-cable services and/or operates facilities that do not qualify as a cable system, it is unreasonable for an LFA to refuse to award a franchise based on issues related to such services or facilities."[13/] Under this "mixed-use rule," an LFA "may not use its video franchising authority to attempt to regulate a LEC's entire network beyond the provision of cable services."[14/] As it suggests in the *Second FNPRM* ,[15/] the Commission has ample authority under Title VI and other provisions of the Communications Act to reinstate the mixed-use rule for all cable operators, and should do so here.[16/]

Section 621 and multiple reinforcing provisions of Title VI prohibit franchising authorities from regulating the provision of any service offered over the cable systems of cable operators, other than cable service. Consistent with its tentative conclusion, the Commission

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13/ *First Section 621 Order* ¶ 121.

14/ *Id*. ¶ 122.

15/ *See Second FNPRM* ¶¶ 26-31.

16/ The Commission rightly notes in the *Second FNPRM* that the Sixth Circuit did not vacate the mixed-use rule as applied to cable operators that are also common carriers. *See Second FNPRM* ¶ 26; *Montgomery County v. FCC*, 863 F.3d at 493 (vacating mixed-use rule only as applied to cable operators that are not common carriers). Many cable operators provide telecommunications services on a common carrier basis. The D.C. Circuit has held that various certificated cable CLEC entities are "'telecommunications carriers' within the meaning of the Act." *Verizon Cal., Inc. v. FCC*, 555 F.3d 270, 275 (D.C. Cir. 2009) (rejecting challenge to telecommunications carrier status of cable-affiliated CLECs based on evidence that they held state certificates of public convenience and necessity, entered into interconnection agreements with incumbent LECs, and held themselves out as common carriers). In the recent *Business Data Services* proceeding, some operators also documented their offering of particular services on a common carrier basis. *See, e.g*., Comments of Comcast Corp., WC Docket No. 16-143, at 15-17 (filed June 28, 2016) (explaining that certain of Comcast's BDS offerings are private carrier services, whereas others are offered on a common carrier basis). Because the *Montgomery County v. FCC* court did not disturb this ruling, as a threshold matter, the Commission should reaffirm that the mixed-use rule continues to apply to cable operators that offer Title II services, by adopting its tentative conclusion reaffirming the rule.

should find that the mixed-use rule prohibits franchising authorities from regulating non-cable services when offered by cable operators that are not common carriers, and from regulating the facilities or equipment used to offer those services.[17/] It should further make clear that this prohibition on regulation extends not only to cable franchise agreements and their renewals, but to all franchising authority attempts to regulate these services, and to attempts to regulate these services under any other purported source of authority, even when states and localities claim not to be acting as franchising authorities.

1. A cable franchise authorizes construction and operation of a cable system that provides cable service and other services.

Congress and the Commission have long sought to assure a national framework in which cable systems would be deployed to provide a wide array of services. The goal of this framework was not to enrich and empower franchising authorities, but to limit them, so that they would not impede the development and deployment of technology and services. The provisions of the Communications Act should be read with this purpose in mind.

Early on, the Commission adopted a three percent cap on excessive franchise fees, which it recognized operated as "an indirect and regressive tax on cable subscribers" and a burden that would frustrate cable's evolution to "carry out its part in national communications policy."[18/] In 1984, in response to franchising authorities' excessive demands for fees and other contributions from cable operators, Congress adopted "a national framework and Federal standards … to create an environment in which cable will flourish, providing all Americans with access to a technology that will become an increasingly important part of our national communications

[17/] *See Second FNPRM* ¶ 28.

[18/] *Cable Television Report and Order*, 36 F.C.C.2d 143, 209, *recon. denied*, 36 F.C.C.2d 326 (1972), *aff'd sub. nom ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975).

framework."[19/] By specifically limiting the power of franchising authorities, Congress intended to "encourage the growth and development of cable systems."[20/]

Since 1984, Section 621(a)(2) has given every franchised cable operator the right to build and operate a cable system for mixed use in the public rights-of-way.[21/] Section 621 directs that any franchise "shall be construed" to authorize the construction and operation of a cable system, but cable systems are not limited to providing "cable services."[22/] Congress, the Commission, and the courts have consistently found that a cable system remains a "cable system" under Sections 602(7) and 621, even when used to provide non-cable services, including telecommunications services and information services.[23/] Congress provided for this broad authorization because it intended the Cable Act to establish a national policy to "guide the development of cable television" and to encourage cable operators to provide "the widest possible diversity of information sources and services to the public."[24/]

The right to offer non-cable services over the cable system also has been confirmed in multiple provisions of the Cable Act, as well as in legislative history and case law. As the legislative history states:

> The term "cable system" is not limited to a facility that provides only cable service which includes video programming. Quite the contrary, many cable systems provide a wide variety of cable services and other communications services as well. A facility would be

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19/ H. Rep. No. 98-934 at 20.

20/ *Id.* at 40.

21/ *See* 47 U.S.C. §§ 541(a)(2), 522(9).

22/ 47 U.S.C. § 541(a)(2).

23/ *See, e.g.*, H.R. Rep. No. 98-934, at 22, 24; *Heritage Cablevision Associates of Dallas, L.P. v. Tex. Utils. Elec. Co.*, Memorandum Opinion and Order, 6 FCC Rcd. 7099, ¶ 24 (1991), *aff'd*, *Tex. Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993); *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 333 (2002).

24/ 47 U.S.C. § 521(4); H.R. Rep. No. 98-934 at 40.

> a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable.[25/]

Indeed, "cable operators are permitted *under the provisions of Title VI* to provide any mixture of cable and non-cable service they choose."[26/] The Supreme Court likewise has held that: "No one disputes that a cable attached by a cable television company, which provides only cable television service, is an attachment 'by a cable television system.' If one day its cable provides high-speed Internet access, in addition to cable television service, the cable does not cease, at that instant, to be an attachment 'by a cable television system.'" The addition of a service does not change the character of the attaching entity.[27/] Whether a service is broadband, telecommunications, or any other non-cable service, Section 621 authorizes its provision over the cable system. A franchised cable operator already has a bargained-for right to access the rights-of-way to build and operate its cable system, a right for which it already compensates the franchising authority. The franchising authority cannot "double-dip" by purporting to convey that very same right a second time in exchange for additional consideration,[28/] contrary to what the *City of Eugene*[29/] decision wrongly purports to allow and what is now being done or threatened by a growing number of local governments. This is true whether the additional

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[25/] H.R. Rep. No. 98-934 at 44; *see also id.* ("Some examples of [such] non-cable services would be: shop-at-home and bank-at-home services, electronic mail, one-way and two-way transmission on non-video data and information not offered to all subscribers, data processing, video-conferencing, and all voice communications.").

[26/] *Id.* (emphasis added).

[27/] *National Cable and Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 332-33 (2002).

[28/] *See Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216, 219 (1st Cir. 2005) ("The award of a franchise allows a cable operator to use, among others, the public rights-of-way.") (citing Section 621(a)(2)); *id.* at 221 ("The Board, in granting a franchise to Liberty, enables Liberty to use the public 'rights-of-way' within the municipalities. Therefore, the municipalities' attempts to assess fees for use of these same rights-of-way are inconsistent with the Cable Act and are necessarily preempted.").

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

consideration is characterized as a franchise fee on non-cable services, or a rights-of-way fee to provide non-cable services over the cable system.

2. Congress made clear that franchising authorities' regulatory and fee authority does not extend to non-cable services or the facilities and equipment used to provide them, and courts have confirmed that conclusion.

At the same time it made clear that cable systems may offer a variety of services, Congress also clarified its intent to limit the authority of franchising authorities, prohibiting them from regulating information, telecommunications and other non-cable services and the cable facilities used to provide them. The courts have consistently upheld these prohibitions.

a. The Communications Act bars franchising authority regulation of information services.

As the Commission highlights in the *Second FNPRM*,[30/] Section 624(b)(1) explicitly states that, in connection with a cable television franchise renewal, a "franchising authority, to the extent related to the establishment or operation of a cable system . . . may not . . . establish requirements for video programming or *other information services*." The Commission correctly concludes that the term "information services" in this provision is best read as having the same meaning as set forth in Section 3(24) of the Act, and that the term includes, among other things, broadband Internet access service ("BIAS").[31/] The statute therefore plainly bars franchising

30/ *See Second FNPRM* ¶¶ 27-28

31/ *See id*. When the Commission first classified cable modem services as information services in its 2002 *Cable Modem Declaratory Ruling*, it adhered to this statutory text in tentatively concluding that "[o]nce a cable operator has obtained a franchise for [constructing and operating a cable system over public rights of way]," the legal classification of Internet access service "should not affect the right of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service." *Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798, ¶ 102 (2002) ("*Cable Modem Declaratory Ruling*"). When the Commission temporarily reclassified cable modem service as a telecommunications service, it reached the same conclusion that if a cable operator holds an existing cable franchise, then it is authorized to offer additional services, including Internet access; that is, the classification of Internet access as a telecommunications service

authorities from regulating the provision of BIAS and other information services by cable operators.[32/] Subsequent 1996 amendments to the Cable Act confirm Congress's intent that broadband remain "unfettered" by state and local regulation, which would include, among other things, additional fees or authorizations required by a franchising authority.[33/] This evidence of congressional intent remains relevant regardless of whether these provisions convey specific authority to the Commission.[34/]

b. The statute bars franchising authority regulation of telecommunications services.

Congress reinforced these limits on the authority of franchising authorities over telecommunications services in the 1996 Act. Section 621(b)(3)(B) bars a state or locality from leveraging its Title VI franchising authority to "prohibit[], limit[], restrict[], or condition[]" the provision of a telecommunications service by a cable operator.[35/] Thus, a franchising authority cannot attempt to franchise a telecommunications service or impose any requirement that has the

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should not serve as any "justification for a state or local franchising authority to require a party with a franchise to operate a 'cable system' . . . to obtain an additional or modified franchise in connection with the provision of broadband Internet access service, or to pay any new franchising fees in connection with the provision of such services." *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, ¶ 433 n. 1285 (2015) ("*Title II Order*").

[32/] *See Second FNPRM* ¶ 28.

[33/] *See, e.g.*, 47 U.S.C. §§ 230(b), 1302(a).

[34/] *See Second FNPRM* ¶ 31 n.146.

[35/] 47 U.S.C. § 541(b)(3)(A), (b)(3)(B). Section 621(b)(3)(C) further provides that a franchising authority may not order a cable operator or affiliate to discontinue the provision of a telecommunications service for lack of a franchise for telecommunications services. As the Ninth Circuit explained in discussing the City of Portland's attempt to regulate AT&T's "@Home" broadband/cable modem service: "*The Communications Act includes cable broadband transmission as one of the 'telecommunications services' a cable operator may provide over its cable system. Thus, AT&T need not obtain a franchise to offer cable broadband, see* 47 U.S.C. § 541(b)(3)(A); Portland may not impose any requirement that has 'the purpose or effect of prohibiting, limiting, restricting or conditioning' AT&T's provision of cable broadband, see 47 U.S.C. § 541(b)(3)(C)." *AT&T Corp v. City of Portland*, 216 F.3d 871, 878-79 (9th Cir 2000), *overruled on other grounds by Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005) (emphasis added). While cable broadband services are no longer regulated as a telecommunications service, the broader point remains valid.

prohibited purpose or effect.[36/] In addition, Section 621(b)(3)(D) states that a franchising authority "may not require a cable operator to provide any telecommunications service or facilities" as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.[37/]

As one court has explained, the 1996 Telecommunications Act reflects a clear federal policy "that market competition, rather than state or local regulations, would primarily determine which companies would provide the telecommunications services demanded by consumers. To carry out this goal, Congress adopted sweeping restrictions on the authority of state and local governments to limit the ability of telecommunications companies to do business in local markets."[38/] The statute, thus, clearly bars franchising authorities from regulating the provision of telecommunications services by cable operators.[39/]

c. The Communications Act bars franchising authority regulation of non-cable facilities or equipment.

As amended in 1996, Section 624(e) prohibits state and local governments from limiting the use of particular transmission technologies or subscriber equipment by cable systems, in order to avoid "the patchwork of regulations that would result from a locality-by-locality approach," which would be "particularly inappropriate in today's intensely dynamic technological environment."[40/] In implementing the 1996 amendments, the Commission noted that "transmission technology" is not a defined term, but determined that Congress intended to allow cable systems to deploy wired and wireless facilities of their own choosing, and that "local

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[36/] *See City of Portland*, 216 F.3d at 878-79.

[37/] 47 U.S.C. § 541(b)(3)(D).

[38/] *Bell Atlantic-Md., Inc. v. Prince George's Cty.*, 49 F. Supp. 2d 805, 813 (D. Md. 1999) (internal citation omitted), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000).

[39/] *See* 47 U.S.C. § 541(b)(3).

[40/] H.R. Rep. No. 104-204 at 110 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 11, 78.

authorities may not control whether a cable operator uses … coaxial cable, fiber optic cable, or microwave radio facilities."[41/] This amendment reinforces Congress's intent to promote the operation of cable systems to provide non-cable services without further state or local regulation or fees for the use of new technologies used to provide them.[42/]

Nor is Section 624(b) an authorization to regulate non-cable facilities or equipment, as the Commission rightly points out in the *Second FNPRM*.[43/] Although Section 624(b) refers to a franchising authority's ability to regulate equipment or facilities, that grant of authority must be read in context and in harmony with Section 624(e). Since franchising authorities cannot regulate non-cable services, the provision does not authorize franchising authorities to regulate facilities or equipment to the extent they are used to provide such non-cable services.[44/] The Commission should state explicitly that if a cable operator holds a cable franchise for the right to construct and operate its cable system in the rights-of-way, then no additional rights-of-way fees are required for those facilities, even when used to provide information, telecommunications, or other non-cable services.

d. The statutory prohibitions on franchising authority extend to the imposition of unwarranted and duplicative fees.

Section 622 confirms the limitations on a franchising authority's powers, by expressly limiting the scope of the franchise fee obligation that can be imposed on revenues "derived from the operation of a cable system" – *i.e.*, a facility Congress recognized would be used to provide

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41/ *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd. 5296, ¶ 141 (1999).

42/ As discussed above, Section 621(a)(2), enacted as part of the 1984 Cable Act, already granted franchised cable operators the right to deploy non-cable equipment in the rights-of-way as part of the cable system. *See supra* Section I.A.1.

43/ *Second FNPRM* ¶ 28.

44/ *See id.* ¶ 28 ("In light of our tentative finding that Section 624(b)(1) bars LFAs from regulating information services, we do not believe this provision authorizes LFAs to regulate facilities or equipment to the extent they are used to provide such services, including broadband Internet access service.").

cable and non-cable services – solely to revenue from the provision of "cable service." Indeed, Congress in the 1996 Act amended Section 622 to cap the amount of compensation that franchising authorities can require for use of the public rights-of-way to five percent of the cable operator's revenues from "cable services,"[45/] rather than from its use of the cable system, thereby limiting the scope of services provided from the operation of a cable system that could be subject to franchise fees, notwithstanding Congress's knowledge and intention that non-cable services would be furnished over cable systems. This cap is applied to any "franchise fees paid by a cable operator with respect to any cable system" and includes "any tax, fee, or assessment of any kind."[46/]

Congress added this limitation to promote the use of cable systems for the provision of non-cable services without additional fees or burdens imposed by franchising authorities.[47/] Yet as described in Section I.B below, franchising authorities continue to impose such additional franchising and fee requirements on non-cable services. The Commission is specifically charged with "the *ultimate* responsibility for ensuring" such franchise fee limits, which have clear national policy ramifications.[48/] It should make clear that the mixed-use rule not only limits

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[45/] 47 U.S.C. §§ 542(b).

[46/] 47 U.S.C. §§ 542(b), 542(g)(1).

[47/] *See e.g., Comcast Cable of Plano, Inc. v. City of Plano*, 315 S.W.3d 673, 680 (Tex. Ct. App. 2010) ("We conclude that § 542(b) unambiguously prohibits the City from charging Comcast any franchise fee on revenues generated from services that are furnished over its cable system and are not 'cable services.'"); *City of Chicago* v. *Comcast Cable Holdings, L.L.C.*, 900 N.E.2d 256 (Ill. 2008); *City of Minneapolis v. Time Warner Cable, Inc.*, No. CIV. 05-994 ADM/ADB, 2005 WL 3036645 (D. Minn. Nov. 10, 2005); *Parish of Jefferson v. Cox Commc'ns Louisiana*, LLC, No. 02-344, 2003 U.S. Dist. LEXIS 27078 (E.D. La. July 3, 2003).

[48/] *See ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) (holding that the FCC has "the *ultimate* responsibility for ensuring a 'national policy' with respect to franchise fees") (emphasis in original); *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013) ("It suffices to decide this case that the preconditions to deference under Chevron are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication."); *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008) (interpreting Section 622).

franchising authority regulatory authority to the provision of cable services, but that it also precludes the imposition of franchise or rights-of-way fees on non-cable services.

In addition, the Commission has previously stated that local governments are not authorized to impose franchise or fee requirements on the provision of broadband service,[49/] and federal courts have rejected efforts by local governments to impose franchising and fee requirements on a cable operator's provision of broadband service, even where pre-existing franchise agreements provided otherwise.[50/] As part of this proceeding, the Commission should state explicitly that these restrictions apply to *any* non-cable service offered over the cable system. It should also state explicitly that the bar on imposing franchising or fee requirements on non-cable services or facilities applies not just to attempts to impose these requirements during the cable franchising process, but to *any* such attempts, including by adopting a statute or ordinance unilaterally.

[49/] *Cable Modem Order* ¶ 105 ("[R]evenue from cable modem service would [therefore] not be included in the calculation of gross revenues from which the franchise fee ceiling is determined"); *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, 30 FCC Rcd 5601, n.1285 (2015) ("*Title II Order*") (reaffirming that state or local franchising authorities may not require cable operators franchised to operate cable systems to obtain an additional or modified franchise in connection with the provision of broadband Internet access service).

[50/] *See Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216, 224 (1st Cir. 2005); *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356, 364 (4th Cir. 2001) (to the extent cable Internet access service "is classified as an information service, it would not be subject to local franchising or common carrier regulation"); *Parish of Jefferson*, 2003 U.S. Dist. LEXIS 27078; *City of Chicago v. AT&T Broadband, Inc.*, No. 02-C-75 17, 2003 U.S. Dist. LEXIS 15453 (N.D. Ill. Sept. 4, 2003), *vacated on other grounds sub nom City of Chicago v. Comcast Cable Holdings, L.L.C.*, 384 F.3d 901 (7th Cir. 2004); *Comcast Cable of Plano*, 315 S.W.3d at 673; *City of Minneapolis*, 2005 WL 3036645; *Time Warner Cable-Rochester v. City of Rochester*, No. 03-CV-6257, slip op. (W.D.N.Y. Dec. 12, 2003) (ruling from bench); *see also City of Chicago*, 900 N.E.2d at 265 (noting unanimity of authority rejecting efforts by LFAs to exact franchise fees from cable modem service).

3. State and local governments cannot avoid the limitations established by Congress by asserting some state or local (or general federal taxing) authority outside the Act.

The Commission seeks comment on "whether there are any other statutory provisions that relate to the authority of LFAs to regulate the provision of non-cable services offered over a cable system by an incumbent cable operator."[51/] The answer to this question is yes, as it was Congress's intent to prohibit state or local governments from seeking to evade the limits of their franchising authority by asserting sources of authority outside of Title VI.

Allowing state and local governments to circumvent express limitations on franchising authority by subjecting broadband service, telecommunications service, or other non-cable services offered by cable operators to otherwise impermissible fee requirements predicated on some source of authority outside Title VI would "completely defeat[]" federal policy.[52/] It would give with one hand that which was expressly taken away by the other, and in so doing, render meaningless Congress's goal of limiting franchising authorities so that they would not impede the development and deployment of technology and services. It would make little sense for Congress to make clear that franchising authorities must construe franchise agreements to authorize the use of the rights-of-way to construct and operate a cable system facility for cable and non-cable services, while simultaneously allowing state and local governments to constrain the provision of such non-cable services through duplicative franchising and fee requirements. Permitting such requirements would defeat the congressional purpose of facilitating deployment

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[51/] *Second FNPRM* ¶ 31.

[52/] *City of Minneapolis v. Time Warner Cable, Inc.*, No. 05-994, 2005 U.S. Dist. LEXIS 27743 (D. Minn. Nov. 10, 2005) ("The FCC and numerous courts have found that under the Telecommunications Act, Congress intended that cable modem service revenues are not to be included in the assessment of franchise fees. Under Minneapolis' analysis, however, Congressional intent is completely defeated if a franchising authority can simply cite to another federal or state law authority to charge what Congress forbids under the Telecommunications Act.").

of technology and services by elevating form over substance, validating the overreaching that Congress sought to limit.[53/]

The legislative history of the 1984 Cable Act confirms that Congress's objective in capping franchise fees at five percent was to ensure that franchise fees would not be abused by franchising authorities as a revenue-raising tool.[54/] This legislative history alone is fatal to the argument put forward by some local governments in this proceeding that they should be allowed to solve their fiscal problems by imposing additional fees on the operation of cable systems for non-cable services.[55/]

Moreover, as discussed above, Congress's subsequent amendment of Section 622(b) was intended to limit franchise fees to be based solely on cable service revenues, further shielding cable operators from excessive fees designed more to raise revenue than to compensate for any real impact on the rights-of-way. It defies logic to suppose that Congress intended to allow governments to end-run that important protection by simply donning the garb of some

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[53/] The Commission has cautioned against attempts by franchising authorities to evade limits on their authority in the past. For example, it determined that the franchise transfer process cannot be used to impose otherwise unlawful requirements upon cable operators, specifying when it adopted Form 394 that: "[i]t should be emphasized . . . that in exercising their transfer jurisdiction, franchising authorities may not seek to circumvent the Commission's authority over rate regulation, franchise fees or other matters. For example, a franchising authority may not delay a transfer or impose conditions on a transfer authorization that would impinge upon the Commission's statutory authority." *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992--Cross-Ownership Limitations and Anti-Trafficking Provisions*, Report and Order, 8 FCC Rcd. 6828, n.38 (1993).

[54/] *See* 129 Cong. Rec. S8254 (daily ed. June 13, 1983) (statement of Sen. Goldwater) (stating that the "overriding purpose" of the five percent cap was to prevent franchising authorities from "taxing private cable operators to death as a means of raising . . . revenues for other concerns"); S. Rep. No. 98-67, at 25 (1983) ("The committee feels it is necessary to impose such a franchise fee ceiling because the committee is concerned that, without a check on such fees, local governments may be tempted to solve their fiscal problems by what would amount to a discriminatory tax not levied on cable's competitors.").

[55/] *See, e.g.*, Letter from Sen. Patricia Jehlen, General Court of Massachusetts, et al., MB Docket No. 05-311, at 1 (filed Oct. 16, 2018) (expressing the concern that determining that in-kind contributions count toward the five-percent cap on franchise fees would "negatively impact" certain local revenue streams "as municipalities' telecommunication revenue decreases"); *see also* Comment of North Andover CAM, MB Docket No. 05-311 (filed Oct. 25, 2018); Comments of City of Lakewood, California, MB Docket No. 05-311 (filed Oct. 26, 2018).

government agency other than the designated franchising authority. In fact, Congress expressly prohibited just this type of mischief by defining "franchise fee" to include fees imposed "by a franchising authority *or other governmental entity*."[56/] The 1996 Act was an invitation for cable operators to innovate, not an invitation for franchising authorities to impose higher fees on cable systems than before by artificially carving them up into multiple single-service systems and applying a separate rights-of-way access and use fee on each "service."

Recognizing this, courts have held repeatedly that state and local governments may not seek to impose additional fees on cable operators beyond the five percent franchise fee on cable service revenue, whether or not the government entity assumes some role other than that of a cable franchising authority.[57/] As one court held, Section 622(b) "clearly now provides that the franchise fee *on the entire system* cannot exceed five percent of the revenues derived from the provision of cable services only," and the statute does not "permit the imposition of two franchise fees—one for cable services and one for non-cable services."[58/] Another determined that: "a fee of virtually any kind targeting cable operators . . . is a franchise fee[,]" and that "[c]ongressional intent is completely defeated if a franchising authority can simply cite to another federal law or state law as authority to charge what Congress forbids."[59/] The franchise fee limit was enacted to prevent franchising authorities from "solving their fiscal problems by assessing large fees and/or taxes against cable operators, an abuse that was widespread prior to

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[56/] 47 U.S.C. § 542(g)(1) (emphasis added).

[57/] *See, e.g.*, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984) ("[A]s we have repeatedly explained, when federal officials determine, as the FCC has here, that restrictive regulation of a particular area is not in the public interest, States are not permitted to use their police power to enact such a regulation.") (internal quotation marks and citations omitted).

[58/] *City of Cincinnati v. Time Warner Cable, Inc.*, No. C-1-07-724, 2008 WL 11352596, at*4, 7 (S.D. Ohio July 1, 2008) (emphasis added).

[59/] *City of Minneapolis v. Time Warner Cable, Inc.,* No. 05-994 ADM/AJB, 2005 U.S. Dist. LEXIS 27743, at *19 (D. Minn. Nov. 10, 2005).

the 1972 initiation of federal regulation by the FCC."[60/]

However, one state court recently held otherwise. In *City of Eugene*, a state court upheld the imposition of a separate and additional telecommunications license fee on the provision of broadband services over a franchised cable system, reasoning that the fee was not imposed pursuant to the city's cable franchising authority.[61/] This wrongly decided holding has led to an increasing number of cities attempting to impose separate, additional fees on the operation of a franchised cable system to provide broadband service – whether it be an actual fee related to broadband services, demands for in-kind broadband services, demands for broadband-related grants, or similar demands – even though the cable operator is already remitting the maximum permissible franchise fee in exchange for the right to operate that cable system to provide both cable and non-cable services. For the statutory limits on franchise fees to be meaningful, the Commission must reinforce these applicable statutory provisions and policies with clear guidance. Doing so will underscore that *City of Eugene* was wrongly decided, and safeguard against similar attempts by state and local governments to evade the limits established by Congress.

Evasion of the national framework must not be tolerated. Just as franchising authorities are prohibited from using their franchise transfer authority to circumvent rate regulation,

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[60/] *Cable TV Fund 14-A, Ltd. v. City of Naperville and Ameritech New Media, Inc.*, No. 96-C-5962, 1997 U.S. Dist. LEXIS 11511 (N.D. Ill. July 29, 1997).

[61/] In *City of Eugene*, the Supreme Court of Oregon rejected a challenge to the city's seven percent fee on broadband and telecommunications revenue, notwithstanding clear language in the Communications Act and the Commission orders prohibiting such duplicative fees. Specifically, the court erred in (1) rejecting the argument that the five percent cap on franchise fees under Section 622(b) of the Communications Act, 47 U.S.C. § 542(b), bars the city's license fee, *see* 395 Or. at 555-58, and (2) also rejecting the argument that, under Section 621(a)(2) of the Act, 47 U.S.C. 541(a)(2), the city's franchise *must* be construed to authorize the provision of cable and non-cable services (including broadband services) over the same cable system, thereby barring the city from requiring an additional "license" and corresponding fees, *see* 395 Or. at 544-49. The Commission should take this opportunity to state unequivocally that these holdings were wrong.

franchise fee, and similar federal limits,[62/] they expressly should be precluded from evading federal cable franchise fee limits by attempting to impose additional fees on the operation of cable systems simply by citing to another general federal or state law as authority to charge what Congress forbids. Franchising authorities may not seek to tax or impose fees on broadband, voice, or any other non-cable service provided from the operation of a cable system.

4. It is not "fair and reasonable" or "competitively neutral and nondiscriminatory" under Section 253 to charge twice for the same rights.

Congress' intention to prohibit state and local authorities from asserting additional authority over the non-cable services offered by cable operators is also reinforced by the limitations it set out in Section 253, specifically with regard to telecommunications services.[63/] Section 253(a) provides that "[n]o 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."[64/] The Commission recently recognized that unwarranted local regulation and excessive fees violate Section 253(a) because they impede the deployment of wireless telecommunications infrastructure.[65/] The Commission should extend these findings to the wireline context and apply its legal analysis of Section 253 to cable systems that utilize their facilities to provide telecommunications services.

62/ *See* Section I.A.2.d, *supra*.

63/ *See Second FNPRM* ¶ 31 (inviting comment on Section 253 as a limitation on LFA authority to regulate the provision of non-cable services or the facilities and equipment used in the provision of such services).

64/ 47 U.S.C. § 253(a).

65/ *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC-18-133, ¶¶ 43 *et seq.* (rel. Sept. 27, 2018) ("*Wireless Infrastructure Order*") (excessive fees); *id.* ¶¶ 81 *et seq.* (other requirements).

Congress intended for Section 253 to reduce barriers to entry and therefore, as the courts have recognized, Section 253 authorizes "broad preemption of laws that inhibit competition[.]"[66/] Moreover, a state or local "prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a)."[67/] Rather, as the Commission held in *California Payphone*, Section 253 prohibits state or local governments from adopting any telecommunications regulation that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[68/] To avoid preemption, state and local regulation must be "competitively neutral and nondiscriminatory," and limited to providing "fair and reasonable compensation" for the use of the public rights-of-way.[69/]

Applying the *California Payphone* standard, any requirement that a cable operator obtain an additional authorization or pay duplicative fees to offer a telecommunications service "materially limits or inhibits [its] ability . . . to compete in a fair and balanced legal and regulatory environment."[70/] By the same token, requiring a cable operator that provides telecommunications services to obtain an additional authorization to offer broadband and/or VoIP materially impedes its investment in plant used for telecommunications services and thereby undermines entry and fair competition. Accordingly, Section 253 prohibits state and local governments from charging cable operators twice for the right to provide telecommunications or broadband services over cable system facilities. Moreover, requiring cable operators to obtain a second or third authorization to access the public rights-of-way where

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66/ *Puerto Rico Tel. Co. v. Telecomm. Reg. Bd. of Puerto Rico*, 189 F.3d 1, 11 n.7 (1st Cir. 1999).

67/ *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002).

68/ *California Payphone Association Petition for Preemption of Ordnance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd. 14191, ¶ 31 (1997) ("*California Payphone Order*").

69/ 47 U.S.C. §§ 253(c), (d); *TCG N.Y., Inc.*, 305 F.3d at 76-77.

70/ *California Payphone Order* ¶ 31.

there is no additional burden on the rights-of-way also creates a competitive disparity between wireless and wireline providers, which itself violates Section 253.[71/]

Such duplicative state and local fees cannot be justified under Section 253(c). The Commission has determined that a fee is "fair and reasonable" if it compensates localities for their costs in managing the rights-of-way.[72/] Cable operators already pay more than "fair and reasonable compensation" for their use of the public rights-of-way in the form of franchise fees. The fees generated by five percent of cable revenues alone far exceed any costs incurred by localities; as the Commission highlighted in its recent *Wireless Infrastructure Order*, courts have held that a five percent gross revenue fee far exceeds a locality's rights-of-way management costs.[73/] The provision of additional services over cable system facilities has no incremental impact on the public rights-of-way. Requiring further compensation for the provision of broadband, VoIP, telecommunications, or other services over cable system facilities from cable operators who already pay more than full compensation for their use of the public rights-of-way cannot be "fair and reasonable," or "competitively neutral and nondiscriminatory."[74/] Section 253 therefore preempts these state and local requirements.

[71/] *See Wireless Infrastructure Order* ¶ 39 ("We clarify that '[a] regulatory structure that gives an advantage to particular services or facilities has a prohibitory effect, even if there are no express barriers to entry in the state or local code[.]'") (citation omitted).

[72/] *See id.*¶ 50.

[73/] *See id.* ¶¶ 43-44.

[74/] In addition, the Commission has made clear that Section 253's requirement for reasonable cost-based fees "do[es] not provide any basis for increasing the regulation of services deployed consistent with Section 621 of the Cable Communications Policy Act of 1984." *Id.* at n.74. This is especially true since the Commission has determined that Congress intended for Section 253 and Section 332 – which have "analogous purposes" and "consistent language" – "to cover the universe of fees charged by state and local governments in connection with the deployment of telecommunications infrastructure." *Id.* ¶ 68; s*ee also id.* ¶ 69 ("[T]he requirement that compensation be limited to a reasonable approximation of objectively reasonable costs and be non-discriminatory applies to all state and local government fees paid in connection with a provider's use of the ROW to deploy Small Wireless Facilities[.]").

Section 253 applies to facilities that are capable of providing telecommunications services, including cable systems that utilize their facilities to provide telecommunications services along with cable, broadband, and/or VoIP services. Cable companies offer telecommunications services through certificated competitive local exchange carrier affiliates in states where they operate.[75/] These affiliates currently offer an array of telecommunications services, including certain enterprise, wireless backhaul, and switched access services, and may also serve as wholesale carriers for their VoIP affiliates.[76/] Moreover, an entity need not be a telecommunications carrier to invoke Section 253, which "is designed to protect 'any entity' seeking to provide telecommunications services from state and local barriers to entry."[77/]

State or local governments cannot avoid preemption of duplicative and excessive fees based on the savings clause in Section 253(b). That provision only preserves authority for *state* governments (as well as local governments to which the state has specifically delegated authority) to impose regulations on telecommunications services that are "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[78/] Where a cable operator is already paying for the right to operate its cable system in the right of way, there can

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75/ *See* Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 12 & n.39 (June 11, 2018) (noting that "[m]any cable operators provide telecommunications services on a common carrier basis").

76/ It is well-established that a wholesale carrier is still considered a telecommunications carrier, even if its only customer is a VoIP affiliate. *See In the Matter of Bright House Networks, LLC, et al.,* 23 FCC Rcd 10,704, 10,717-20, ¶¶ 37-41 (2008), *aff'd*, *Verizon California, Inc. v. FCC*, 555 F.3d 270, 276 (D.C. Cir. 2009) ("Like the Commission, we are not troubled by the fact that Bright House and Comcast-affiliated carriers are currently serving only their affiliates.").

77/ *Wireless Infrastructure Order* ¶ 42.

78/ 47 U.S.C. § 253(b); *see BellSouth Telecomm., Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304, 1307 (S.D. Fla. 1999) ("While states may regulate universal service, protect consumers, ensure quality and protect the public safety and welfare, *local governments can only manage the public rights-of-way*, unless of course a state specifically delegated the state authority to its local governments.") (emphasis added).

be no serious argument that allowing telecommunications, VoIP, or broadband service data to accompany cable service data in traversing facilities already in place somehow implicates universal service, consumer protection, or public safety and welfare concerns. To the contrary, placing additional burdensome conditions on the operation of a cable system to provide broadband and voice services runs directly *counter* to universal service objectives, including the effort to close the digital divide.[79/]

Moreover, Section 253, which sets forth "the standard applied to local government management of its rights of way" for telecommunications service providers, must be read in harmony with Section 622(b), which establishes the standard for state or local government management of the rights of way for cable systems, regardless of the different services (or their regulatory classifications) that may be offered from the operation of those facilities. Any doubt on this point is resolved by the Commission's recent declaratory ruling interpreting Section 253 in the *Wireless Infrastructure Order*.

Under the interpretive framework of the *Wireless Infrastructure Order*, a government authority could charge a separate, non-franchise fee for a cable operator's use of the rights-of-way to provide telecommunications services from the operation of a cable system (including the integrated telecommunications equipment), *only* if the government authority could show that: (1) the cable franchise fee falls short of a reasonable approximation of the local government's specific costs actually incurred to manage the rights-of-way; (2) those costs were reasonably incurred; and (3) the total amount of the fees imposed on the cable operator is nondiscriminatory

[79/] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, FCC 18-111, ¶ 147 (rel. Aug. 3, 2018) (preempting, under Section 253, state and local actions that "impose significant costs that impede the deployment of telecommunications infrastructure and thereby exacerbate the digital divide"); *id*. ¶ 155 ("[A]s a practical matter, moratoria run counter to the goal of preserving and advancing universal service as moratoria prevent or materially limit deployments that could assist in achieving universal service.").

compared to fees charged to other similarly situated providers of telecommunications services, including the ILEC, for rights-of-way access (*e.g.*, the cable operator could be assessed an additional 1 percent fee only if similarly situated telecommunications service providers are being assessed a 6 percent fee).[80/] This reading of Section 253 is also consistent with case law interpreting it.[81/]

B. Franchising Authorities Continue To Seek To Impose Franchising And Fee Requirements On Non-Cable Services, To The Detriment Of Infrastructure Investment And Competition.

The need for Commission action is critical given continued state and local actions imposing both duplicative franchise requirements and additional fees on non-cable services offered by cable operators, in contravention of federal law and policy. Some examples include:

- In the wake of the wrongly decided *City of Eugene* decision, almost two dozen Oregon cities have adopted or reinterpreted ordinances to impose fees on gross revenues from broadband in addition to the fees already imposed under cable franchises. For example:

[80/] *See Wireless Infrastructure Order* ¶ 50; *cf. id.* ¶ 79 (stating that localities can rebut the presumption that fees above the Commission's presumptively reasonable "safe harbor" levels would be permissible upon a showing that those fees are a reasonable approximation of the locality's reasonable costs, and that the fees are nondiscriminatory). Similarly, where a telco already pays right of way access fees pursuant to Section 253, but then begins to also provide cable service using the same facilities, the telco's infrastructure becomes a "cable system" as defined in Section 602(7). Once it provides cable service, the telco would become obligated to pay cable franchise fees for access to the rights-of-way for its "cable system" under Section 622, rather than Section 253.

[81/] *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 22 (1st Cir. 2006) (holding that Section 253(c) requires that the amount of a right of way access fee "directly relate to the extent of actual use of public rights of way"); *Qwest Corp. v. City of Santa Fe, N.M.*, 380 F.3d 1258, 1273 (10th Cir. 2004) (holding that state and local ordinances that impose conditions or requirements that "do not bear directly on the management of rights of way" are not permissible under Section 253(c), and concluding that information submission requirements would have to "explicitly connect[] . . . to the management of the rights-of-way" to avoid preemption); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 82 (2d Cir 2002) (stating that Section 253(c) "requires compensation to be reasonable" in order to prevent local governments from engaging in "monopolistic pricing" for right of way access by "exact[ing] artificially high rates"); *see also Bell Atlantic-Md., Inc. v. Prince George's Cty.*, 49 F.Supp.2d 805, 813 (D. Md. 1999), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000) (finding that "[i]t was Congress's intention that market competition, rather than state or local regulations, would primarily determine which companies would provide the telecommunications services demanded by consumers," and holding that, through Section 253, "Congress adopted sweeping restrictions on the authority of state and local governments to limit the ability of telecommunications companies to do business in local markets") (internal citation omitted).

- The City of Corvallis, Oregon requires a cable operator to pay a fee of five percent of revenues for voice services, on top of the maximum franchise fee for cable service. Corvallis also requires a cable operator to obtain a separate telecommunications franchise to deploy Wi-Fi equipment and for cellular backhaul.

- The City of Garibaldi, Oregon has imposed a seven percent duplicative fee on the provision of broadband service, as have the Cities of Tillamook, Oregon (seven percent duplicative fee), Florence, Oregon (five percent duplicative fee), Independence, Oregon (seven percent duplicative fee), Gold Beach, Oregon (seven percent duplicative fee), Creswell, Oregon (five percent duplicative fee), Oakridge, Oregon (five percent duplicative fee), Hermiston, Oregon (seven percent duplicative fee), Monmouth, Oregon (seven percent duplicative fee), and Dallas, Oregon (five percent duplicative fee).

- Communities in Ohio, including Athens, Akron, Kettering, Upper Arlington, and Newcomerstown, have adopted ordinances that require that cable operators obtain a "Certificate of Registration," in addition to a state-issued cable franchise, before offering non-cable services. Such certificates require compliance with extensive regulations, including additional costs and fees, as a condition of occupying the rights-of-way. The communities seek to impose franchise obligations not imposed by Ohio's state franchise process, including requirements that cable operators provide extensive mapping data, business plans, plans to expand their networks, reports (including any information requested by the city), and proof of technical, legal, financial, and managerial qualifications.

- As discussed in detail in Section III below, state authorities have also imposed duplicative franchise and fee requirements on non-cable services offered by cable operators.

These franchising authorities are using the franchising process to leverage benefits and commitments beyond the amounts authorized by law, and to impose burdens on cable operators well beyond those permitted by Congress.[82/] Their efforts are discouraging the deployment of broadband and other valuable services in their communities, imposing added costs on cable subscribers and forcing cable operators to allocate funds and other resources towards fees in excess of the statutory cap for using the public rights-of-way – despite imposing no additional burdens on those rights-of-way – rather than towards investment in broadband and facilities.

[82/] This is a familiar pattern. As discussed in Section II below, even after the Commission imposed its original franchise fee cap, instances of local abuse proliferated.

Moreover, these excessive costs and fees put cable operators at a competitive disadvantage in the market for video services, where many of cable's competitors have no such obligations and pay inconsequential fees.

C. Restricting State And Local Authority Promotes Important Congressional And Commission Goals.

Confirming in this proceeding that federal law and policy prohibit franchising authorities from regulating (or requiring fees for) non-cable services offered over cable systems by cable operators, or the facilities or equipment used to offer those services, would advance the stated goals of Congress and the Commission to promote broadband deployment, encourage competition and a level playing field, and maintain a federal policy of reasonable broadband regulation free from state and local interference.

1. Reaffirming the limited scope of franchising authority would promote broadband deployment.

As the Commission has acknowledged, "[a]ccess to high-speed broadband is an essential component of modern life, providing unfettered access to information and entertainment, an open channel of communication to far-away friends and relatives, and unprecedented economic opportunity."[83/] The benefits of broadband are numerous – beyond serving as a platform for recreation, human connection, and remote commerce, broadband enables telemedicine services that are changing the way healthcare is provided; facilitates precision agriculture technologies that help farmers and ranchers manage and improve production; expands educational opportunities and access for students of all ages; and advances the public's ability to directly engage with state, local, and federal governments, among other things.

[83/] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd. 11128, ¶ 1 (2017).

Broadband is also a critical driver of economic development. A recent Bureau of Economic Analysis estimate placed the value of the digital economy at $1.2 trillion in 2016, 6.5 percent of the U.S. GDP.[84/] Moreover, broadband generates economic value well over and above what would be expected had dial-up remained the only means of access to the Internet.[85/] The continued deployment of broadband is therefore of utmost importance, and accordingly, Congress has established a clear goal of promoting its continued deployment, upgrade and improvement.[86/]

The infrastructure on which Americans depend for high-speed broadband access has been and is being built by private capital, with the cable industry alone investing over $275 billion in capital infrastructure over the past 20 years.[87/] Over 93 percent of U.S. homes currently have access to high-speed Internet from a cable provider,[88/] and cable operators plan to invest billions more in expanding and upgrading their networks. Cable networks will also support and promote

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[84/] *See* Kevin Barefoot *et al.*, *Defining and Measuring the Digital Economy*, Working Paper, Bureau of Economic Analysis 3 (Mar. 15, 2018), https://www.bea.gov/system/files/papers/WP2018-4.pdf. "Digital economy" is defined by the BEA to include digital-enabling infrastructure, digital transactions, and the content that digital economy users create and access. BEA's initial estimates include only goods and services that are "primarily digital," and therefore do not include elements, like the sharing economy, which have a non-digital in-person services component.

[85/] *Unleashing Connectivity and Entertainment in America*, NCTA – THE INTERNET & TELEVISION ASSOCIATION, https://www.ncta.com/sites/default/files/2017-08/Bortz%20Report%20FINAL%20511.pdf (last accessed Oct. 15, 2018) ("At $125 billion in 2010, the broadband bonus was estimated to add almost one percent to U.S. GDP (and certainly seems likely to exceed that level today based on its recent growth pattern).").

[86/] *See, e.g.,* 47 U.S.C. § 1302 (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans"); 47 U.S.C. § 230 ("It is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media[.]").

[87/] *Broadband by the Numbers*, NCTA – THE INTERNET & TELEVISION ASSOCIATION, https://www.ncta.com/broadband-by-the-numbers (last accessed Oct. 15, 2018).

[88/] *Unleashing Connectivity and Entertainment in America*, NCTA – THE INTERNET & TELEVISION ASSOCIATION, https://www.ncta.com/impact (last accessed Oct. 15, 2018).

5G services – which the Commission notes will unleash even more economic growth[89/] – as fixed broadband networks will carry a significant portion of the resulting data traffic.[90/]

State and local regulations and requirements for franchises or fee payments for broadband services, however, disincentivize investment. As the Commission recently recognized, providers "have constrained resources for entering new markets or introducing, expanding, or improving existing services, particularly given that a provider's capital budget for a given period of time is often set in advance."[91/] The Commission and the courts have repeatedly recognized that franchising requirements, fee obligations, and other demands and regulatory requirements imposed by franchising authorities on non-cable services provided over a cable system deplete these resources, and so stand as a barrier to deployment of broadband services.[92/] This can be especially detrimental in rural areas, where deployment is threatened by overregulation that makes investment more costly.

[89/] *Wireless Infrastructure Order* ¶¶ 1-2.

[90/] CABLE: 5G WIRELESS ENABLER, CABLELABS, 2-3 (2017), http://www.cablelabs.com/wp-content/uploads/2017/02/cable-5g-wireless-enabler.pdf (stating that Wi-Fi carries nearly all wireless data traffic and that cable has the largest share of Wi-Fi).

[91/] *Wireless Infrastructure Order* ¶ 62; *see also id.* ("[T]he resources consumed in serving one geographic area are likely to deplete the resources available for serving other areas.").

[92/] *See Wireless Infrastructure Order* ¶ 57 (finding that state or local legal requirements and fees that are above those needed to cover costs incurred by the locality can constitute barriers to deployment); *id.* ¶ 73 ("[W]e give weight to [Broadband Deployment Advisory Committee] comments that, '[a]s a policy matter, the Commission should recognize that local fees designed to maximize profit are barriers to deployment.'"); *Cable Modem Order* ¶ 105 ("We also note Congress' concern regarding new taxes on Internet access imposed for the purpose of generating revenues when no specific privilege, service, or benefit is conferred and its concern regarding multiple or discriminatory taxes on electronic commerce."); *see also Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006) (finding that a local ordinance imposing a fee obligation constituted a barrier to deployment); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002) (determining that various aspects of an ordinance constituted barriers to deployment); *RT Communications v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000) (upholding a Commission order that preempted a Wyoming statute protecting small incumbent companies from competition because the statute constituted a barrier to entry).

In fact, Congress and the Commission have long appreciated that a key aspect of promoting deployment is keeping services free of regulatory and fee barriers. For example, Congress explicitly stated a clear federal policy of nonregulation to "preserve the vibrant and competitive free market" for broadband and "promote the continued development of the Internet[.]"[93/] In keeping with congressional intent, the Commission has on numerous occasions affirmed this policy of nonregulation of broadband services, stressing that federal authority is "preeminent in the area of information services"[94/] and that broadband must "remain insulated from unnecessary and harmful economic regulation at both the federal and state levels."[95/] This is the case even where service has already been deployed, as lower regulatory barriers allow providers to continually invest in their networks and develop new and cutting-edge services.[96/]

[93/] 47 U.S.C. § 230(b)(1)-(2); *accord* 47 U.S.C. § 253(a) (setting a longstanding federal policy of reducing local entry barriers for competitive telecommunications services); 47 U.S.C. § 157 (encouraging the provision to new technologies and services and stating that those opposing new technologies or services have the burden of demonstrating that the proposal is inconsistent with the public interest).

[94/] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. 3307, ¶ 16 (2004) ("*Free World Dialup*") ("[F]ederal authority has already been recognized as preeminent in the area of information services, and particularly in the area of the Internet and other interactive computer services, which Congress has explicitly stated should remain free of regulation.").

[95/] *Free World Dialup* ¶ 1; *see also Restoring Internet Freedom*, 33 FCC Rcd. 311, ¶ 203 (2017) ("*Restoring Internet Freedom Order*") ("Multiple provisions enacted by the 1996 Act confirm Congress's approval of our preemptive federal policy of nonregulation for information services."); *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd. 22404, ¶¶ 1, 15 (2004) (holding that preemption of State regulation of an interstate information service, VoIP, "is compelled to avoid thwarting valid federal objectives for innovative new competitive services" and noting "consistency between [Commission] action here and Congress's articulated policies in sections 230 and 706 of the Act"); *Restoring Internet Freedom Order* ¶ 89 ("[I]ncreased broadband deployment and subscribership require investment, and the regulatory climate affects investment."); *accord Minn. PUC* v. *FCC*, 483 F. 3d 570, 580 (8th Cir. 2007) ("[A]ny state regulation of an information service conflicts with the federal policy of nonregulation."); *Howard v. America Online,* 208 F.3d 741, 752-53 (9th Cir. 2000) (finding that the Commission's determination that ISPs are not common carriers meets Congress's policy of nonregulation).

[96/] *See Wireless Infrastructure Order* ¶ 38 n.88 (rejecting arguments suggesting that the provision of some level of service "necessarily demonstrates that there is no effective prohibition of service under the state or local legal requirements").

Improving broadband service and promoting competition are essential parts of Congress's and the Commission's goals,[97/] and barriers to deployment must be curtailed in light of these goals.

In addition, reducing regulatory and fee barriers grants providers more freedom to innovate, allowing the market to dictate advances. As one Member of Congress put it: "Under [the Communications Act], the market, not the government, is going to tell us what the next wave of technology is."[98/] Prohibiting franchising authorities from regulating and imposing fees on non-cable services offered over cable systems would therefore – consistent with federal policy – facilitate innovation and growth in and robust deployment of broadband services.

2. Reaffirming the limited scope of franchising authorities' ability to regulate non-cable service would avoid a conflicting patchwork of state and local regulations.

As the Commission sensibly reiterates in the *Second FNPRM*, broadband Internet access service is an interstate service.[99/] The Commission has long held that interstate services – such as broadband services – must be subject only to federal jurisdiction to avoid a patchwork of conflicting regulatory obligations.[100/] In the *Restoring Internet Freedom Order*, the Commission

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97/ *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd. 11128, ¶ 3 (2017) ("And by reducing the costs to deploy high-speed broadband networks, we make it more economically feasible for carriers to extend the reach of their networks, increasing competition among broadband providers to communities across the country.").

98/ 141 Cong. Rec. H8294 (Aug. 2, 1995) (statement of Rep. White); *see also Second Computer Inquiry*, 77 FCC 2d 384, ¶ 114 (1980) ("We believe that, consistent with our overall statutory mandate, enhanced services should not be regulated under the Act"); *id.* ¶ 116 (noting that deregulation of enhanced services ensures that "administrative processes [are not] interjected between technology and its marketplace applications").

99/ *See Second FNPRM* ¶ 29 ("The Commission has previously concluded that broadband Internet access service is a jurisdictionally interstate service because a substantial portion of Internet traffic involves accessing interstate or foreign websites.") (internal quotation marks omitted).

100/ *See Second Computer Inquiry*, 77 FCC 2d 384, ¶ 116 (1980) (noting that deregulation of enhanced services avoids "inconsistent regulatory scheme[s]"). This policy was recently reaffirmed in the *Restoring Internet Freedom Order,* ¶ 194 ("[R]egulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork of separate state and local requirements.").

again emphasized that "allowing state and local governments to adopt their own separate requirements, which could impose far greater burdens than the federal regulatory regime, could significantly disrupt the balance" struck by federal policy.[101/] In addition, state and local regulations could "impair the provision of [broadband service] by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates."[102/] And, because providers are not able to cabin their services or institute different procedures for each franchising authority, disparate or conflicting requirements will inevitably result in providers adjusting service to meet the lowest common denominator.

The Commission should reaffirm its longstanding approach and, in keeping with its tentative conclusions, reinforce that franchising authorities may not regulate broadband Internet access service and other interstate services because "doing so would frustrate the light-touch information service framework established by Congress that the Commission has previously found necessary to promote investment and innovation."[103/] The Commission should also explicitly reinforce that franchising authorities are expressly preempted from requiring cable operators to obtain franchises, pay fees, or comply with any other "economic" or "public utility-type" state and local regulatory requirements as a condition of providing broadband Internet access service, voice service, or other non-cable services.[104/]

[101/] *Restoring Internet Freedom Order* ¶ 194.

[102/] *Id.* ¶ 194.

[103/] *Second FNPRM* ¶ 29.

[104/] *See id.* (tentatively concluding that LFAs are preempted from requiring cable operators to obtain franchises to provide BIAS and seeking comment on whether other types of regulations should be preempted by the Commission).

3. Reaffirming the limited scope of franchising authority would promote competition and a level playing field.

As the Commission has elsewhere recognized, treating like services alike promotes competition by allowing markets to determine the better operator, rather than the government granting certain competitors artificial regulatory advantages.[105/] Accordingly, "achieving the goal of developing a consistent regulatory framework across all broadband platforms" is "[o]ne of the cornerstones of the Commission's broadband policy."[106/]

In the current context, the Commission has stated the importance of applying the mixed use rule to all cable operators, whether or not they provide telecommunications services.[107/] NCTA agrees that this like treatment is important and justified. By leveling the playing field between different types of cable operators, the Commission would ensure that regulatory advantages do not dictate the particular mix of services that cable operators choose to offer, and that instead, cable operators can make decisions based on their best business judgment about the marketplace and their drive to innovate to best serve consumers. As the Commission rightly

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[105/] *See, e.g.*, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, ¶¶ 17, 1 (2005) (recognizing the benefits of "crafting an analytical framework that is consistent, to the extent possible, across multiple platforms that support competing services," and accordingly adopting a framework that "regulat[es] like services in a similar functional manner"); *Wireless Infrastructure Order* ¶ 39 ("[P]roviders must be allowed to compete in a fair and balanced regulatory environment.") (internal quotation marks omitted); *id.* ¶ 58 (finding that "fees cannot be discriminatory or introduce competitive disparities, as such fees would be inconsistent with a balanced regulatory marketplace" and noting that this is true "even in the case of fees that are a reasonable approximation of the actual and reasonable costs incurred by the state or locality") (internal quotation marks omitted). The federal policy of promoting competition by treating like services alike is also reflected in the many Communications Act provisions that reduce state and local barriers to entry and competition. *See, e.g.,* 47 U.S.C. § 230(b) (stating that it is the policy of the United States to "promote the continued development of the Internet" and to "preserve the vibrant and *competitive free market* that presently exists for the Internet . . . *unfettered by Federal or State regulation*") (emphasis added); 47 U.S.C. § 253(a) (setting a federal policy of reducing local entry barriers for competitive telecommunications services).

[106/] *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 14989, ¶ 33 (2005).

[107/] *Second FNPRM* ¶ 30.

states, "it would be contrary to the goals of the Communications Act to permit LFAs to treat incumbent cable operators that are not also common carriers differently than incumbent cable operators and new entrants that are also common carriers" with regard to the provision of broadband and other information services.[108/]

Limiting franchising authorities to reasonable rights-of-way management would help promote a level playing field between cable operators and other rights-of-way users. As discussed above, cable operators pay for access to and use of the public rights-of-way through cable franchise fees of up to five percent of revenues from cable services, far exceeding any regulatory costs incurred by franchising authorities. In contrast, fees charged to wireless broadband providers for deployment of small wireless facilities in rights-of-way "are only permitted to the extent that they represent a reasonable approximation of the local government's objectively reasonable costs, and are nondiscriminatory."[109/] In some cases, wireless broadband providers pay no rights-of-way access fees at all, unless attaching to someone else's facilities.[110/] It is contrary to the Commission's goals of regulatory parity to allow wireless broadband providers to access the rights-of-way at cost or less, while also allowing franchising authorities to impose onerous, expensive, and duplicative fees and requirements on broadband provided by cable operators.[111/] Such requirements are discriminatory, imposing additional barriers to

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[108/] *Id.* ¶ 30.

[109/] *Wireless Infrastructure Order* ¶ 32. And, as noted above and by the Commission in the *Wireless Infrastructure Order*, courts have held that a five percent gross revenue fee far exceeds a locality's costs. *See id.* ¶¶ 43-44.

[110/] *See* Letter from Keith C. Buell, Senior Counsel, Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Aug. 13, 2018) ("Under California law, Sprint does not pay any right-of-way access fees for its own poles, but does pay rent to the pole owner, whether it's the local government, an electric company, or a wireline telephone company.").

[111/] It need not be discriminatory against wireless to impose a variety of cost-based fees on wireless providers for installing wireless facilities in the rights-of-way, without imposing the same fees on cable operators installing facilities in the rights-of-way, when cable operators already pay to install their

deployment that apply only to cable operators.[112] While the Commission cannot alter the statutory-based cable franchise fee cap, it can and should reinforce here that franchising authorities and state and local governmental entities are prohibited from imposing additional fee obligations on top of that franchise fee.

D. The Commission Has Ample Basis To Exercise Its Interpretive, Declaratory, And Preemptive Authority.

As discussed above, the Communications Act clearly limits state and local authority to impose entry, regulatory, and fee requirements to cable service and cable facilities only, and state and local franchising authorities therefore have no authority to regulate non-cable services offered over cable systems. To the extent that they claim such authority, the Commission has ample basis to preempt them.

The Communications Act explicitly preempts state and local actions that frustrate federal goals with regard to cable franchising and the services provided over cable systems. Section 636(c) of the Communications Act provides that "*any* provision of law of any State, political subdivision, or agency thereof, or franchising authority . . . which is inconsistent with this [Act] shall be deemed to be preempted and superseded."[113] As the Commission has previously held, Section 636(c) "precludes states and localities from acting in a manner inconsistent with the

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facilities – including any wireless components thereof – via their franchise fees. Indeed, to the extent that cable operators generally pay higher fees to municipalities than wireless firms, such a fee structure may be discriminatory against cable operators.

[112] And, without the mixed-use rule there would be no limit on the franchise fees that franchising authorities could demand of cable operators for broadband service. Nothing would stop a franchising authority from seeking to fill any budgetary shortfall with fees related to broadband deployed over cable systems.

[113] 47 U.S.C. § 556(c) (emphasis added).

Commission's interpretations of Title VI" and it "is the Commission's job, in the first instance, to determine the scope of the subject matter expressly preempted by Section 636."[114/]

In addition, Section 624(a) of the Communications Act further specifies that franchising authorities "may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title."[115/] As discussed above, Title VI makes clear Congress's intent to prohibit franchising authorities from regulating the provision of any services other than cable services offered over cable systems. Any state and local regulations inconsistent with this federal policy are therefore barred under Section 624(a) as well.

Federal courts have affirmed the Commission's preemption authority, holding that the Commission is specifically charged with "the *ultimate* responsibility for ensuring" franchise and fee limits, as they have clear national policy ramifications.[116/] They have also specifically affirmed the Commission's "authority under Title I to preempt non-federal regulations that

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[114/] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101, ¶ 129 (2007); *see also Capital Cities Cable v. Crisp*, 467 U.S. 691, 700 (1984) ("[I]f the FCC has resolved to pre-empt an area of cable television regulation and if this determination represents a reasonable accommodation of conflicting policies that are within the agency's domain, we must conclude that all conflicting state regulations have been precluded.") (internal citation and quotation marks omitted); *City of Burlington v. Mountain Cable Co.*, Dkt. S1190-86CnC (Vt. Superior Ct. Dec. 31, 1986) ("[P]reemption . . . extends to any state common law or contract which might impair the stated national objectives and policy."), *aff'd,* 559 A.2d 153, 165 (Vt. 1988) ("Here, the stated public policy is clear and unequivocal, and the enforcement of the contract provision would undermine and detract from that policy."); *accord Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, First Order on Reconsideration, 9 FCC Rcd. 1164 n.105 (1993) ("An agreement to regulate rates in a manner inconsistent with Commission rules is, in any event, squarely prohibited by Section 623(a)(3)(A).").

[115/] 47 U.S.C. § 544(a).

[116/] *ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) (holding that the FCC has "the *ultimate* responsibility for ensuring a 'national policy' with respect to franchise fees") (emphasis in original); *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013) ("It suffices to decide this case that the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication."); *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008) (interpreting Section 622).

negate the Commission's goals, including regulations affecting enhanced services."[117/] In fact, federal court decisions make clear that the Commission has legal authority to preempt local and state-level franchising and other governmental regulations that are inconsistent with its decisions arising from this *Second FNPRM* and prior orders in this proceeding.[118/]

Commission precedent further reinforces the Commission's preemption authority over state and local franchising actions inconsistent with the mixed-use rule. For instance, the Commission has found that it has "independent authority to displace state and local regulations in accordance with the longstanding federal policy of nonregulation for information services."[119/] State and local requirements that incumbent cable operators obtain franchises, pay fees, or comply with any other "economic" or "public utility-type" state and local regulatory requirements to deploy non-cable services over their cable systems actively interfere with this federal policy and should be explicitly preempted.

II. THE COMMISSION SHOULD CLARIFY THAT IN-KIND OBLIGATIONS, WHETHER CABLE-RELATED OR NON-CABLE-RELATED, COUNT TOWARDS THE FRANCHISE FEE UNLESS SPECIFICALLY EXCLUDED BY CONGRESS

In prior orders in this proceeding, the Commission correctly clarified that any requests for in-kind contributions made by franchising authorities unrelated to the provision of cable services

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[117/] *Cable Modem Order* ¶ 98; s*ee also California* v. *FCC,* 39 F.3d 919, 933 (9th Cir. 1994) (upholding preemption of state regulation of enhanced services).

[118/] "[C]ourts routinely recognize that there may be circumstances where state regulation would necessarily conflict with the Commission's valid exercise of authority." *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd. 22404, 22414 (2004) (citing *Louisiana Pub. Serv. Comm'n*, 476 U.S. 355, 375 n. 4 (1986)); *see also New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984)); *Minnesota PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007); *accord Wireless Infrastructure Order* ¶ 99, n.277 (finding that the Commission need not wait for a Section 253(d) petition to adopt preemptive interpretations of the meaning of Section 253).

[119/] *Restoring Internet Freedom Order* ¶ 202; *see also id.* ¶ 194 ("[C]ourts have uniformly held that an affirmative federal policy of deregulation is entitled to the same preemptive effect as a federal policy of regulation").

by incumbents and new entrants are subject to the statutory five percent franchise fee cap.[120/] This sound conclusion was not – as the Commission notes – disturbed by the Sixth Circuit's decision.[121/] To best effectuate congressional intent and the Cable Act's franchise fee statutory framework, however, the Commission should further extend this principle and adopt its correct – and essential – tentative conclusion that cable-related, in-kind contributions required by franchising authorities are franchise fees subject to the five percent cap unless those asks are specifically excluded from the definition of franchise fees in the Communications Act.[122/] Clear Commission guidance reinforcing these statutory mandates will discourage franchising authority attempts to evade the franchise fee cap and will serve the public interest by protecting cable subscribers from subsidizing excessive costs for in-kind contributions on top of the franchise fees they already pay.

A. Congress Established A Statutory Framework For In-Kind Contributions Subject To The Franchise Fee Cap.

The Cable Act's franchise fee provisions reflect a carefully considered regulatory balance of the interests of franchising authorities, cable operators and, ultimately, cable subscribers. Specifically, Congress enacted the franchise fee cap because it expressly deemed five percent of revenues from cable service sufficient to compensate franchising authorities for authorizing the construction and operation of cable systems in the rights-of-way for cable and non-cable

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[120/] *See First Section 621 Order* ¶ 108; *Second Section 621 Order* ¶ 11.

[121/] *See Second FNPRM* ¶ 17.

[122/] *See id.* ¶ 16 ("We tentatively conclude that we should treat cable-related, in-kind contributions required by LFAs from cable operators as a condition or requirement of a franchise agreement as 'franchise fees' subject to the statutory five percent franchise fee cap set forth in Section 622 of the Act, with limited exceptions."). As the Commission states in the *Second FNPRM*, monetary as well as non-monetary demands should be considered franchise fees. *Id.* ¶ 17.

services.[123/] In doing so, Congress also expressly limited the total financial obligations that franchising authorities may impose on cable operators and their customers – regardless of whether the financial obligations are related to cable service.

Prior to the Cable Act, the Commission limited franchise fees to three percent of gross subscriber revenues per year.[124/] This limit, the Commission found, was generally "adequate . . . to defray the costs of local regulation."[125/] But to account for variations in localities, the Commission also created a waiver process that allowed for fees in the range of three to five percent upon a showing that the increased percentage was reasonable and justified – even though the "paucity of petitions [the Commission] . . . received to allow fees above 3%" suggested that more than three percent was not often needed to offset franchising authority regulatory costs.[126/]

In the Cable Act, however, Congress increased the maximum franchise fee to five percent – mooting the franchise-by-franchise waiver review and the requirement that franchising authorities show justification for higher fees. The Cable Act granted franchising authorities more than enough funds to defray regulatory costs related to cable systems. But part of this legislative deal – for which the Commission has ultimate enforcement responsibility – was that

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[123/] When one considers that the number of cable services offered and the revenue from those services has increased over time, while use of the rights-of-way by cable operators has largely remained the same, franchising authorities are more than adequately compensated for cable operators' use of the rights-of-way.

[124/] *Amendment of Subparts B and C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships*, Report and Order, 66 F.C.C.2d 380, ¶¶ 43, 59 (1977) (reaffirming its franchise fee limit of three percent).

[125/] *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, et al.*, Cable Television Report and Order, 36 F.C.C.2d 143, ¶ 185 (1972).

[126/] *Amendment of Subparts B and C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships*, Report and Order, 66 F.C.C.2d 380, ¶ 58 & n.3 (1977) ("Because we understand that no single numerical percentage of revenues can fit all cases, we have provided for a range of three to five percent, depending on the extent of the local regulatory program and the justification for it.").

local and state authorities would respect this increased limit, and not attempt to circumvent and exceed it through other exactions. This understanding is evident in the definition of "franchise fee," which "includes any tax, fee, or assessment *of any kind* imposed by a franchising authority or other governmental entity,"[127/] subject only to specific, enumerated exceptions.[128/] Thus, while franchising authorities and local governments may spend their five percent franchise fee in myriad ways, they may not (with the exception of small incidentals and capital costs for PEG channel access, as discussed below) exceed the five percent fee by demanding in-kind assessments.

This means, for example, that a franchising authority could, consistent with the Cable Act, use its five percent fee to finance PEG studio operations, purchase Public Service Announcements ("PSAs"), buy institutional data transport, or arrange for Internet service. It cannot, however, simply add those financial burdens to franchise requirements over and above the five percent franchise fee limit. As the Commission recognizes, allowing franchising authorities to circumvent the five percent cap in this manner "would be contrary to Congress's intent as reflected in the broad definition of 'franchise fee' in the statute."[129/]

Moreover, the five percent limit applies equally to cable and non-cable related requests. As the Commission points out, there is "no basis in the statute or legislative history for distinguishing between in-kind contributions unrelated to the provision of cable services and

[127/] 47 U.S.C. § 542(g)(1) (emphasis added).

[128/] *See also Second FNPRM* ¶¶ 17-19.

[129/] *Id.* ¶ 17; *see also id.* ("If in-kind contributions unrelated to the provision of cable services were not treated as franchise fees, LFAs could easily evade the five percent cap by requiring any manner of in-kind contributions, rather than a monetary fee. Likewise, if cable-related, in-kind contributions are not counted as franchise fees, LFAs could circumvent the five percent cap by requiring, for example, unlimited free or discounted cable services and facilities for LFAs, in addition to a five percent franchise fee.").

cable-related, in-kind contributions for purposes of the five percent franchise fee cap."[130/]

Congress's statutory scheme applies whether or not the in-kind exactions are related to cable service, and the Commission should so clarify.

B. The Commission's Tentative Conclusion Correctly Reaffirms Congress's Intent To Limit All In-Kind Exactions Demanded From Cable Operators.

It has become commonplace for franchising authorities to attempt to circumvent Commission regulation and congressional intent by demanding in-kind exactions above and beyond payment of a five percent franchise fee. Today, the vast majority of cable franchises impose in-kind obligations of some type. In fact, one cable operator estimates that 90 percent of its franchises impose in-kind obligations that do not count against the five percent cap.

Indeed, this practice began to emerge almost immediately after the Commission imposed its original franchise fee cap to rein in franchising authorities.[131/] For instance, as later reported to Congress, Sacramento, California drafted a cable specification requiring planting of 20,000 trees; St. Paul, Minnesota required the franchisee to rebuild Union Station; and Miami, Florida required $200,000 toward the police department's anti-drug campaign.[132/] St. Louis, Missouri requested a minimum of $1 million or a 20 percent stock contribution, in addition to the five percent fee, and the St. Louis Post Dispatch quoted the then city council president as "trying to extort a little money" from cable for the franchise.[133/] The Commission sought to address such

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[130/] *See id.* ¶ 17.

[131/] *See Amendment of Subparts B and C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships*, Report and Order, 66 F.C.C.2d 380, ¶ 33 (1977) (evaluating the franchise fee limitation and finding that "[w]hile the Commission's concern is that local franchising authorities be adequately compensated for their regulatory costs while not unduly burdening the development of the cable television medium, local franchisors often see cable television as a convenient revenue-producing enterprise").

[132/] Options for Cable Legislation: Hearings on H.R. 4103 and H.R. 4229 before the House Telecommunications Subcomm., 98th Cong., 1st Sess. 776 (1983).

[133/] *Id.*

abuses again in *City of Miami*,[134] and that same year, Congress wisely took action by enacting Section 622, setting a federal statutory franchise fee cap to curb these outrageous local practices.[135]

Yet despite the clear statutory scheme enacted by Congress – a scheme which *increased* the franchise fee cap from three to five percent to even further compensate franchising authorities – franchising authorities continue to this day to routinely seek in-kind exactions and additional cash payments above and beyond the five percent franchise fee cap. The Commission addressed some of these exactions in its prior orders in this proceeding, finding that these kinds of abuses have a negative impact on competition and deployment.[136] Despite these Commission pronouncements, abuses continue to be widespread.[137] For example, recent demands and requirements include the following:

- In addition to requirements to serve schools and public buildings in Minnesota, certain LFAs in that state have required the cable operator to also provide free cable service to municipal liquor stores, waste water treatment plants, arenas, marinas, aquatic centers, golf courses, heritage centers, museums, parks, nature centers, theaters, convention centers, regional airports, and an ice skating warming house.

- In a 2016 franchise renewal, Montgomery County, Maryland required the cable operator to (1) provide another three percent of annual cable service revenues in PEG support not limited to capital expenses and $10,000 per PEG channel position reassignment; (2) provide and maintain fiber connections between the County and local colleges and an existing, extensive I-Net, which is unrelated to PEG access; (3) provide courtesy cable service to all public buildings currently receiving courtesy service (at present 898 complimentary accounts with an estimated value of $949,000 annually) and up to three additional locations per

[134] 56 R.R.2d 458 (1984)

[135] 47 U.S.C. § 542.

[136] *See First Section 621 Order* ¶¶ 105-108; *Second Section 621 Order* ¶ 11.

[137] The examples of in-kind exactions detailed in these comments are representative and not exclusive. Franchising authorities have used their regulatory authority over cable operators in various contexts to exact monetary payments and in-kind contributions, such as charitable contributions, reimbursements of various application fees, third party costs for processing applications, etc.

year, as well as courtesy Internet service to fifty locations; and (4) provide up to 14 PEG channels (currently providing 11).

- Ramsey-Washington Suburban Cable Commission, Minnesota, covering 11 communities with a combined total of 22,000 cable subscribers, requires the cable operator to provide: (1) six PEG channels with an option to launch two more on request; (2) free cable hookups to anyone who wants to receive only the PEG channels; (3) a free, 32-mile dark fiber I-Net to 16 locations, which are used for governmental data purposes and have no relation to video or PEG channel services, and a separate hybrid-fiber-coax (HFC) network used to transport PEG signals from 50 live video origination sites for PEG channels; and (4) courtesy digital cable service to 60 locations with no restriction on adding additional sites, as well as complimentary Internet service to 19 sites.

- Hopkinsville, Kentucky currently requires the cable operator to maintain "an attractive, retail-oriented facility" that "includes displays that allows customers to try to evaluate [the cable operator's] products." Hopkinsville has also insisted in renewal negotiations that customer service calls originating from Hopkinsville be handled in the local office during normal business hours, with overflow calls going to the call center in Louisville.

- In New York City, the cable operator provides service under the terms of five franchises that, in aggregate, require it to make payments and in-kind support to the City and each borough's public access organization as follows:

  - $7.88 million in fixed "Public Access Channel Grants" for "development and production of local public access programming" – an amount that is in addition to a $6.05 million grant for "capital needs" for the City's "Governmental/Educational Access Channel";

  - Recurring payments, paid per subscriber per month, to support public access in an amount varying from $1.12 to $1.40 per borough. This annual obligation resulted in $12.4 million in payments for the 2017 calendar year. These funds are likewise designated for use by the public access organizations "*in [their] discretion for public access costs*, including but not limited to studio and portable production equipment, editing equipment and program playback equipment, cameras, office equipment, renovation or construction of Public Access Channel facilities, local public access programming development by the [Community Access Organization ("CAO")], *and other public access costs as may be determined by the CAO and its Board of Directors*." (emphasis added);

  - $1.7 million, over the term of the franchise, of "in-kind support through cablecasting of thirty second public service announcements regarding the citywide educational/governmental access channels"; and

- 100 advertising "avails" to each of the public access organizations in Brooklyn and Manhattan "for promotional and public interest purposes."

Notably, the public access support payments, by the terms of the franchise, "shall not constitute or be treated as a deduction or credit against Franchise Fees payable to the City by Franchisee pursuant to this Agreement (nor shall any provision of services or funds to the City pursuant to this Agreement constitute or be treated as such a deduction or credit)." In other words, the cable operator cannot offset any of the above amounts against the five percent franchise fee, even though by the terms of the franchise these amounts do not constitute capital support.

- Northern Dakota County Cable Communications Commission, Minnesota, representing seven communities with a total of 19,000 subscribers, has moved into the formal renewal process with a cable operator with demands for: (1) seven PEG channels; (2) a three percent PEG fee not limited to capital uses and a waiver of any offset right; (3) an unspecified number of 30-second advertising spots for community promotions; (4) complimentary cable service to more than 71 locations including municipal golf courses; (5) six satellite feeds and 26 live feeds from neighboring cable systems for sharing of PEG programming; (6) six fiber-optic drops for live broadcasting from government buildings in addition to 40 fiber return locations; (7) 25 hours of VOD storage per city; and (8) I-Net connectivity to more than 40 municipal sites.

Other franchising authorities have attempted to circumvent the franchise fee cap by altering the definition of gross revenues contained in their franchise agreements in an effort to recoup more money from cable operators. For instance, the Sacramento Metropolitan Cable Television Commission ("SMCTC"), Houston-area franchising authorities, and other LFAs have looked to exceed the five percent franchise fee cap by expanding the definition of "gross revenues" outside of accounting norms and beyond what was contemplated when Congress established the cap. SMCTC has rejected the application of Generally Accepted Accounting Principles ("GAAP") and has sued a cable operator in an attempt to expand the collection of franchise fees on revenues earned from ancillary fees (like late payment fees) earned from multi-service customers (arguing that cable operators should pay on 100 percent of the late fee revenue from multi-service customers even though GAAP dictates that the revenue should be allocated proportionately between cable and non-cable services earned from service bundles).

Likewise, a coalition of communities in the Houston area has filed a similar lawsuit seeking to expand their revenue collections by evading GAAP, and further seeking to force the cable operator to pay franchise fees on revenues the cable company earns for selling advertising on other companies' distribution systems (such as ads viewed by satellite customers in the Houston market), and on ad sales commissions earned by the agents who represent the ad buyer. These abuses of the "gross revenues" definition and evasion of GAAP harm consumers through higher franchise fees, and harm cable operators by increasing the costs of doing business, including the passed-through regulatory costs that their competitors do not bear.

We request that the Commission clarify that all such practices cease, consistent with Congress's intent to limit cash payments and in-kind exactions (with a single exception for PEG capital costs).

In delineating which in-kind obligations count towards the franchise fee, the Commission should be guided by several principles:

First, any in-kind obligation that is not referenced in the Cable Act must be negotiated at its fair market value, and if agreed to by the cable operator, must count towards the franchise fee cap. For example, cable operators routinely encounter franchising authority in-kind demands for PEG marketing; PSAs; free or discounted service to government buildings, schools, and even locations unrelated to government services (like water parks, municipal liquor stores and other quasi-commercial enterprises); I-Net and PEG data transport; relocation for PEG origination; and location of a physical facility in a particular jurisdiction to add to a community's property tax base or employment. Other franchising authorities mandate that cable operators hire a minimum number of local contractors or comply with other requirements for government procurements that dictate specific hiring practices and impose additional costs. These demands – and this list

is not exhaustive – must all count toward the five percent cap. The Commission should also make clear that all demands for cash contributions, charitable contributions, and reimbursement of application fees or third party costs, such as a franchising authority's attorney's fees and consultant fees, count toward the five percent cap as well.

Second, cable-related exactions that are referenced in the Cable Act, once negotiated, may be excluded from the fee cap only if Congress has specifically excluded them from the franchise fee definition, as it has done for capital costs required to be incurred by the cable operator for PEG access facilities.[138/] In fact, as the Commission rightly tentatively concludes based on its analysis of the Cable Act, PEG capital costs required by a franchise are the *only* in-kind contribution Congress excluded from the five percent cap,[139/] and as such, the only in-kind contribution that may be imposed in addition to the franchise fee.

To ensure that the exclusion for PEG capital costs is not abused, the Commission should also clarify which PEG costs qualify as capital costs. As the Commission highlights, the court in *Alliance for Community Media* affirmed as "eminently reasonable" the Commission's interpretation of the PEG capital exemption in Section 622(g)(2)(C) as being limited to costs incurred in or associated with the construction of PEG facilities.[140/] Accordingly, the Commission should confirm that PEG capital costs include only construction of PEG facilities (not cameras, playback devices and other equipment), including construction costs incurred in or associated with a PEG return line from the PEG studio to the operator's facility, and that any additional asks (including transport costs) are not part of the statutory exemption and must count

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[138/] *See* 47 U.S.C. § 542(g)(2)(C).

[139/] *See Second FNPRM* ¶ 19.

[140/] *See id.* ¶ 19 n.95 (quoting *Alliance for Community Media v. FCC*, 529 F.3d 763, 784 (6th Cir. 2008) (finding that "the FCC's limitation of 'capital costs' to those 'incurred in or associated with the construction of PEG access facilities' represents an eminently reasonable construction of section 622(g)(2)(C)")).

towards the franchise fee cap.[141/]

Further, the Commission should reevaluate its assumption in the *Second FNPRM* that "costs for studio equipment are treated as capital costs for purposes of section 622(g)(2)(C) by both cable operators and LFAs given that most PEG facilities are already constructed."[142/] Rather, franchising authorities and PEG groups frequently *demand* equipment and production support for remote origination of programming, free transport, live event coverage, and other activities that go well beyond "construction of PEG access facilities." For example, some franchise agreements require the cable operator to purchase production trucks for live PEG programming – at a cost approaching $1 million per truck – and to replace or purchase additional production trucks over the term of the franchise.[143/] These exactions should be properly treated as in-kind contributions rather than PEG capital costs.

Moreover, it is not reasonable or consistent with congressional intent for franchising authorities to demand PEG capital payments that exceed the reasonable needs of a community in order to build up reserve funds for undefined future uses. The Commission should find that franchising authorities may only accrue PEG capital funds in connection with specific construction projects that the parties have planned and agreed to, including a reasonable and established timeframe for the expenditure of such funds.

[141/] This clarification will also encourage more efficient use of existing infrastructure where, for example, return line and other PEG functionality can be provided by leasing available capacity in lieu of additional construction.

[142/] *Second FNPRM* ¶ 19 n.95.

[143/] As the court affirmed in *Alliance for Community Media*, the Commission's view of PEG capital costs "could potentially encompass the cost of purchasing equipment, *as long as that equipment relates to the construction of actual facilities*." *Alliance for Community Media*, 529 F.3d at 784 (emphasis added). While equipment necessary to outfit a new PEG studio would fit this definition, it does not follow from the court's opinion or the Commission's prior orders that *all* equipment used for PEG production (including remote production trucks and the like) may be excluded from the franchise fee cap as a PEG capital cost.

To ensure that these PEG capital contributions are properly and timely used for construction of PEG facilities and not for other purposes, the Commission should make clear that cable operators have the right to audit a franchising authority's use of the contributions and that a franchising authority must provide reasonable supporting documentation during an audit that such funds are, or were, being used for PEG capital expenses. This right is essential to preventing franchising authority abuse of PEG capital payments, as past audits, some conducted in the context of litigation, have shown that franchising authorities have previously misused these funds for purposes unrelated to PEG capital costs, resulting in an end-run around the five percent cap on franchise fees.[144/]

Third, the value of other in-kind exactions that are referenced in the Cable Act but not excluded from the definition of franchise fee, such as franchise requirements for PEG operating costs or "free" I-Nets,[145/] must always count towards the five percent franchise fee cap. The Commission is correct that, while Congress authorized franchising authorities to impose these obligations, it chose not to exclude them from the franchise fee cap.[146/] Accordingly – and as the Commission rightly acknowledges – treating all in-kind contributions "as franchise fees, unless

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[144/] For example, a court determined that Glendale, California had improperly used PEG fees acquired from the cable operator for non-capital costs, including for a lease. The court "made unchallenged factual findings concerning the legitimacy of the GFA lease arrangement and concluded, as a factual matter, that the arrangement was a sham." *City of Glendale v. Marcus Cable* Associates, 231 Cal.App.4th 1359, 1388 (2014). In addition, in the context of renewal negotiations with franchising authorities in Richland, Washington, a cable operator learned through a public records request in 2014 that the City spent excessively in the years leading up to renewal negotiations in order to deplete its stockpiled PEG fees, most of which were spent on non-capital items – a violation of the cap on franchise fees since the cable operator already paid the City a five percent franchise fee.

[145/] *See* 47 U.S.C. §§ 541(a)(4)(B), 541(b)(3)(D).

[146/] *See Second FNPRM* ¶ 20 ("The fact that the Act authorizes LFAs to impose such obligations does not, however, mean that the value of these obligations should be excluded from the five percent cap on franchise fees. . . . Since Congress enacted the PEG and I-Net provisions at the same time it added the franchise fee provisions, it could have explicitly excluded those costs in addressing the scope of the PEG-related costs in that subsection if it had intended they not count toward the cap.").

expressly excluded by the statute, would best effectuate the statutory purpose."[147/]

Finally, the Commission should adopt its proposal to apply this treatment to new entrants and incumbent cable operators alike.[148/] The statute's clear limits on franchise fees apply to "any cable operator,"[149/] and the definition of "cable operator" applies to "any person" providing "cable service" over a "cable system."[150/] None of these concepts relates to whether the person providing service is an incumbent or new entrant.

In addition to effectuating the clearly expressed intent of Congress, there are important policy rationales for limiting in-kind demands.[151/] Most significantly, in a competitive market, there is no such thing as "free." In-kind demands for "free" service, "free" advertising, or other "voluntary" contributions put cable operators at a clear competitive disadvantage: any extra in-kind assessments on the cable operator raise the costs of the cable operator's service, and in turn ultimately raise costs on consumers, who can move to an alternate provider not subject to such costs. The cost of providing "free" items also reduces resources available for deployment of broadband services and facilities.[152/]

In addition, if products and services are available to a franchising authority without charge, or at a below-market rate, the franchising authority will not be required to evaluate a "need" in light of its market cost, and as a result will tend to over-consume at the cable operator's buffet, resulting in market inefficiency.

[147/] *See id.* ¶ 20; *see also id.* ¶ 17.

[148/] *See id.* ¶ 22.

[149/] 47 U.S.C. § 542(a).

[150/] 47 U.S.C. § 522(5).

[151/] *See Second FNPRM* ¶ 23 (seeking comment on the impact excluding cable-related, in-kind contributions from franchise fees would have on new entrants and incumbents).

[152/] *See Wireless Infrastructure Order* ¶ 60 ("We are persuaded that providers and infrastructure builders, like all economic actors, have a finite (though perhaps fluid) amount of resources to use for the deployment of infrastructure.").

NCTA agrees with the Commission that, by contrast, as contemplated by the Cable Act, reasonable build-out requirements "are part of the provision of cable service in the franchise area", and so, as the Commission suggests, these requirements are not in-kind contributions and would not be subject to the five percent franchise fee cap.[153/] Build-out obligations are still, of course, subject to Section 626's requirements regarding reasonableness and cost – and importantly, reasonableness should be evaluated on a franchise-by-franchise basis rather than on a company-wide basis.[154/]

C. In-Kind Exactions Must Be Valued At Their Market Price.

In the market for network services, prices need to cover fixed costs, costs of capital, operating costs, and profit. As such, to accurately account for the benefit a franchising authority receives from an in-kind exaction, and the true cost to the cable operator in providing it, the exaction must be valued at its market price. If in-kind exactions are valued only at incremental costs to the cable operator, the provider is still subsidizing them – a result that is contrary to Congress's goals of limiting the overall amount a provider is required to give to the community and that works against the Commission's goals of ensuring that providers can put funds to their highest and best use, including for broadband deployment.[155/]

[153/] *See Second FNPRM* ¶ 21 ("Because build-out obligations (unlike I-Net facilities) involve the construction of facilities that are not specifically for the use or benefit of the LFA or any other entity designated by the LFA, but rather are part of the provision of cable service in the franchise area and the facilities ultimately may result in profit to the cable operator, we do not think they should be considered contributions to an LFA.").

[154/] *See* 47 U.S.C. § 546(c)(1)(D).

[155/] *See Wireless Infrastructure Order* ¶ 62 (recognizing that providers "have constrained resources for entering new markets or introducing, expanding, or improving existing services, particularly given that a provider's capital budget for a given period of time is often set in advance"). Even in-kind exactions requested by franchising authorities that, after negotiation, are not included in franchise agreements drain time and resources away from cable operators that would otherwise be available for other uses.

Market valuation also reflects the fact that, if a franchising authority did not require an in-kind assessment as part of its franchise, it would have no choice but to pay the market rate for services it needs from the cable operator or another provider, and so is not at any disadvantage by choosing to obtain those services from the franchised cable operator. Moreover, as noted above, requiring a government authority to pay the market price creates an incentive for the government entity to examine its spending carefully, protecting against excessive costs to cable operators and customers. The Commission should therefore adopt its prudent and reasonable proposal to value in-kind assessments for purposes of the franchise fee cap at their fair market value.[156/]

In addition, the Commission should offer guidance on how to calculate a fair market price for the most common types of in-kind exactions, to ensure proper valuation and the use of consistent methodology across franchising authorities. This guidance should adhere to the following principles:

- For in-kind exactions that are sold on the open market – or are similar to items sold – fair market value should be guided by the market rate charged by the cable operator for the items.
- For in-kind exactions with no market equivalent – *e.g.*, local contracting and hiring requirements, facilities relocations, etc. – the Commission should attempt to capture the out-of-pocket costs to the cable operator, a valuation that is conservative since it does not compensate for opportunity cost, provide for a reasonable return, or account for the cost of creating a product specifically for a franchising authority.

[156/] *See Second FNPRM* ¶ 24 (proposing to value cable-related, in-kind contributions at their fair market value).

The chart below, for example, shows a fair and reasonable means for assessing the value of some of the more common in-kind assessments.

In-Kind Exaction	Components of Valuation
I-Nets (The nature of the ask differs by community but can include server space, hosting capacity, managed services, signal transport among governmental buildings, network management, or similar I-Net-related asks)	1. The rate that cable operators are charging third parties for a comparable service.
I-Net Construction (Constructing, operating and maintaining a new I-Net to serve local governmental or educational purposes)	1. Materials. Actual cost of materials used. 2. Labor. In-house labor should be valued at the equivalent hourly labor rate paid by the cable operator to the staff required, based on wage/salary, benefits, and overhead allocations. This is the same method of calculating in-house labor costs as the Commission adopted for the Incentive Auction reimbursement process.[157/] If an outside contractor is hired, labor should be valued as the amount paid to the contractor.[158/] 3. Permits/License/Inspection Fees. Actual costs related to any required permitting, licenses or inspection.
PEG Operating Costs (Including PEG programming production, encoding, and carriage of HD/SD linear and VOD content; transport; program guide listings; PEG studio maintenance; and training)	1. PEG programming production, encoding, and carriage. • Programming production: If the cable operator is required to produce programming (*e.g.*, film a high school sports event), then (a) labor; (b) actual costs related to any required permitting, licenses or inspection; (c) actual cost of any materials; and (d) actual cost of equipment used for remote/mobile event coverage.

[157/] *See Post-Auction Reimbursement: Broadcaster Frequently Asked Questions*, FCC, https://www.fcc.gov/sites/default/files/reimbursement-faqs-07242018.pdf (last updated July 24, 2018).

[158/] Labor should be valued in this way in each case where it is described as a component of fair market value.

In-Kind Exaction	Components of Valuation
	• Program encoding: Actual costs. • Value of the channel space: Market value of comparable service. 2. Transport. Market value of equivalent services and equipment. 3. Labor. 4. Training. In-house labor for any required or requested training should be valued at the equivalent hourly labor rate paid by the cable operator to the staff required, based on wage/salary, benefits, and overhead allocations. If an outside contractor is hired, labor for training should be valued as the amount paid to the contractor. In the alternative, the classes providing training could be valued at a flat fee, based on similar types of classes. 5. Program or interactive guide listings. • Actual cost of encoding on the cable system; • Actual cost of any system/headend changes and construction necessary to accommodate guide listings; and • Labor. 6. Facilities maintenance. • Labor for upkeep, repairs, and security as required. • Market rate for utilities such as water, heat, and electric.
Facilities Relocation (Forced relocation of cable facilities (including relocation costs for PEG origination), or forced undergrounding of cable facilities, not required of other users of the rights-of-way)	1. Actual cost of relocation or undergrounding, including new fiber runs. 2. Labor. 3. Permits/License/Inspection Fees. Actual costs related to any required permitting, licenses or inspection.
Free Advertising (Such as PEG marketing or	1. Value of advertising time based on current rates.

In-Kind Exaction	Components of Valuation
public service announcements)	
Free Service (Free or discounted cable, broadband or telecommunications service – including IoT and security services – to government buildings, schools, or other institutions, including any equipment provided)	1. Market value of equivalent services and equipment from the relevant cable operator.
Local Contracting and Hiring Requirements	1. Additional staffing. If the cable operator is required to hire a minimum number of local residents: labor valued at the equivalent hourly labor rate paid by the cable operator to the staff required, based on wage/salary, benefits, and overhead. 2. If a service or call center or retail stores must be located within a particular franchise territory (as opposed to a local office at which subscribers may pay bills and pick up or drop off equipment): rent or mortgage payments, utility payments, labor costs.

D. The Commission Must Prohibit Cable Operators From Agreeing To Waive These Restrictions.

The five percent franchise fee limit – including the cap on in-kind exactions – is part of a statutory scheme imposed by Congress to balance franchising authority compensation for regulatory costs against the burden of these costs on cable operators and American consumers. As the limit is a matter of statutory public policy and consumer protection, it must be enforced and protected by the Commission. Accordingly, as it has previously held, the Commission should reiterate that neither a cable operator nor a franchising authority may waive these provisions.

Federal court and Commission precedent make clear that the federal policies detailed in the Cable Act preempt any asserted corresponding state or local authority and they may not be contracted around or waived.[159/] In fact, the Commission has so stated explicitly, noting that "neither a cable operator nor a franchising authority may waive mandatory sections of the Cable Act in reaching franchise agreements."[160/]

While the issue of waiver has come up most often in the context of rate regulation, the principle expressed by the Commission and the courts extends far beyond it, and has been recognized as applying in the context of the franchise fee cap.[161/] As the federal courts have explained, "Congress imposed a cap on franchise fees in recognition of the fact that the levy of large fees would place cable operators at a substantial competitive disadvantage, thereby stifling competition which, in turn, harms the public. . . . [W]aiver would effectively eviscerate the safeguards which protect both the cable operator's long term ability to remain competitive . . . and the public's ability to choose from a variety of cable companies at reasonable rates."[162/]

[159/] *See, e.g., Cablevision Sys. Corp. v. Town of East Hampton*, 862 F. Supp. 875 (E.D.N.Y. 1994) (upholding the Commission determination that the basic service tier requirements of Section 543(b)(7)(A) preempt the requirements of franchise agreements); *City of Dubuque v. Group W Cable*, No. C-85-1046, 1986 WL 15646, at *2 (N.D. Iowa June 18, 1986) ("[W]hile the Act confers a statutory right on the [cable operator], that right directly affects the public and may not be waived or released if such a waiver contravenes the statutory policy."); *City of Dubuque v. Group W Cable*, No. C-85-1046, 1986 WL 11826 (N.D. Iowa Feb. 25, 1987); *accord Town of Norwood v. Adams-Russell Co.*, 549 N.E.2d 1115 (Mass. 1990) (contractual provisions cannot prevail over rate regulation provisions of Cable Act).

[160/] *Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 58 R.R.2d 35, n.91 (1985).

[161/] *See, e.g.*, *Cable TV Fund 14-A, Ltd. v. City of Naperville*, No. 96 C 5962, 1997 U.S. Dist. LEXIS 11511, at *86 (N.D. Ill. July 25, 1997) ("[T]he five percent cap on franchise fees provided in Section 542(b) of the Cable Act may not be waived.").

[162/] *Id.* at *84-85; *accord Wireless Infrastructure Order* at n.252 ("Another type of restriction that imposes substantial burdens on providers, but does not meaningfully advance any recognized public-interest objective, is an explicit or implicit *quid pro quo* in which a municipality makes clear that it will approve a proposed deployment only on condition that the provider supply an 'in-kind' service or benefit to the municipality[.]").

It is evident that an explicit prohibition is essential to restore regulatory limits. Even though the Commission clarified in 2007 that certain franchise requirements must count against the franchise fee cap, franchising authorities throughout the country have routinely required cable operators to pay extra fees or assume extra requirements without counting their value towards the cap on franchise fees, forcing cable operators to accept the terms or incur costly litigation to enforce their rights. In fact, franchising authorities sometimes require cable operators to adopt language in franchise agreements that specifically exempts in-kind exactions – such as complimentary service and grants paid in support of public access – from being treated as franchise fees and seeks to prohibit challenges to fees on the basis that they exceed permissible limits.

For example, New York City prohibits a cable operator from deducting grants paid in support of public access against franchise fees. The City of Yuma, Arizona has mandated that a cable operator treat all costs related to the provision of complimentary service as separate from the franchise fee, and prohibits these costs from being offset against it. Lewiston, Maine requires a cable operator to provide upstream programming origination capability from all municipal buildings in the city, and states that the costs of providing this capability may not be treated as a franchise fee.

It is simply not possible for cable operators to bring lawsuits every time an in-kind contribution is imposed and not applied toward the franchise fee, for every municipality they deal with. For one cable operator, approximately 90 percent of its franchises impose some level of in-kind "contributions" that they do not count against the five percent franchise fee cap. It can cost millions of dollars in attorney fees to prosecute even the most extreme and abusive franchising authority practices. Just a few examples of the cost of fighting back against

unreasonable demands for in-kind contributions include those incurred by a cable operator in the following cases: 1) one that cost almost $2.5 million; 2) one that cost more than $700,000; 3) one that cost more than $500,000; and 4) one that cost almost $500,000 and is still continuing. Notably, the cable operator prevailed in each of the three examples that have concluded.

Moreover, cable operators cannot risk harming their relationships with franchising authorities, with whom they must work for many years on a close and ongoing basis, and on whom they depend for franchise renewal. Cable operators have invested billions of dollars in sunk costs in cable systems, and they cannot just walk away from these systems every time a franchising authority suggests an abusive in-kind contribution. Cable operators value their relationships with franchising authorities; a positive relationship allows cable operators and franchising authorities to work together to provide the best possible service to consumers in each community.

Franchising authorities – who are well aware of this dynamic – have been known to make large demands on the eve of the grant or renewal, and to refuse to renew franchises altogether if they do not continue to contain in-kind contributions received in the past. For example, one cable operator's Troy, New York franchise was issued in 1968, but the franchising authority has since refused to renew it because it prefers the old terms (which include many in-kind contributions).

The fact that these in-kind demands continue reflects the captive nature of cable systems, which compromises a cable operator's negotiating leverage in franchise renewals. The Commission itself has acknowledged this negotiating imbalance and has stressed that the franchise fee cap exists because "as a result of the dynamics of the typical franchise process there will exist incentives for system operators to offer and for franchise authorities to accept fees

beyond what is reasonable and relevant to the regulation of cable system operations[.]"[163/] These unlawful conditions result in increased costs to cable operators and ultimately to consumers, and fewer funds for deployment of new services and options.

The Commission should prevent this outcome by clarifying that neither a cable operator nor a franchising authority may waive the limitations on franchise fees, and moreover, that any waiver contained in an existing franchise agreement is unenforceable. As the Commission stated in its *Second Section 621 Order*, "[t]he statutory interpretations set forth [therein] represent the Commission's view as to the meaning of various statutory provisions . . . and these interpretations are valid immediately."[164/] Likewise here, the Commission should reaffirm that "[w]e do not see . . . how [the franchise fee cap] could mean different things in different sections of the country" and make clear that its findings regarding in-kind contributions are immediately binding on franchising authorities, both with respect to incumbents and new entrants.[165/] These clarifications by the Commission will simply reinforce the proper interpretation and application of these statutes and federal policies, and therefore are authoritative pronouncements of existing law. Accordingly, any existing in-kind obligations imposed by franchising authorities on cable operators will have to account for these federal law mandates. It is time for franchising authorities to be required to start adhering to the statutory scheme that Congress put in place.

III. THE COMMISSION SHOULD APPLY ITS FRANCHISING DECISIONS TO STATE LEVEL FRANCHISING REGULATIONS

In 2007, the Commission declined to "address the reasonableness of demands made by state level franchising authorities" or to extend the "findings and regulations" adopted in its

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[163/] *City of Miami, Florida*, 56 R.R.2d 458, ¶ 16 (1984).

[164/] *Second Section 621 Order* ¶ 19.

[165/] *Id.; see also id.* ¶ 11 (finding that "Section 622 does not distinguish between incumbent providers and new entrants," and that "to the extent that a franchise-fee requirement is found to be impermissible under Section 622, that statutory interpretation applies to both incumbent operators and new entrants").

Section 621 orders to state franchising.[166] It noted that many state franchising laws had only been in effect for a short time and the Commission lacked a sufficient record about the effect of such provisions.[167] The *Order on Reconsideration* clarified, however, that the statutory interpretations contained in the Section 621 orders "represent the Commission's view as to the meaning of various statutory provisions" and are "valid throughout the nation."[168] Accordingly, "in litigation involving a cable operator and a franchising authority, a court anywhere in the nation would be required to apply the FCC's interpretation of any provision of the Communications Act that would be pertinent . . . including those interpretations set forth in the *First Report and Order* and *Second Report and Order*."[169]

In the *Order on Reconsideration*, the Commission invited interested parties to ask the FCC to revisit the issue in the future, by presenting evidence that the findings in the *First Section 621 Order* and *Second Section 621 Order* "are of practical relevance to the franchising process at the state-level and therefore should be applied or extended accordingly."[170] The Commission now asks whether to apply any decision in this proceeding to franchising actions taken at the state level as well as local level.[171] Because the statute compels that result, and because some

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[166] *First Section 621 Order*, 22 FCC Rcd at 5102 n.2.

[167] *See id.*; *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*, Order on Reconsideration, 30 FCC Rcd. 810, ¶ 7 (2015) ("*Order on Reconsideration*").

[168] *Order on Reconsideration* ¶ 7 n.30.

[169] *Id.* On appeal, the Sixth Circuit affirmed that this statement "merely makes the jurisdictional point that district courts cannot review the substantive validity of the FCC's orders." *Montgomery County v. FCC*, 863 F.3d 485, 494-95 (6th Cir. 2017). Hence, a district court reviewing a cable operator's claims against a state-level franchising authority would be bound to apply the Commission's relevant statutory interpretations, even if its implementing rules have not yet been extended to state authorities.

[170] *Order on Reconsideration* ¶ 7.

[171] *Second FNPRM* ¶ 32 ("We seek comment on whether to apply the proposals and tentative conclusions set forth herein, as well as the Commission's decisions in the *First Report and Order* and *Second Report and Order*, as clarified in the *Order on Reconsideratio*n, to franchising actions taken at the state level and state regulations that impose requirements on local franchising.").

state franchising authorities are engaging in the same type of overreaching occurring at the local level, any relief the Commission provides in this proceeding should apply to all cable franchising authorities.

As detailed extensively above, Section 621(a) and the other cable franchising provisions of Title VI circumscribe the power of "franchising authorities" to regulate services provided over cable systems. The statute defines "franchising authority" as "any governmental entity empowered by Federal, State or local law to grant a franchise,"[172/] and while many states have left franchising to local authorities, 23 states now empower a state-level entity, such as a state public utilities commission, to grant cable franchise authorizations, rendering them franchising authorities under Title VI.[173/] Because the plain language of the statute does not limit the applicability of the Commission's franchising decisions to local franchising authorities,[174/] the Commission should so hold in affirming and extending the mixed-use rule.[175/]

[172/] 47 U.S.C. § 522(10).

[173/] *See* Ark. Code Ann. § 23-19-203 (provider must elect either a local franchise or a state-issued certificate of franchise authority); Cal. Pub. Util. Code § 5840(a); Conn. Gen. Stat. Ann. § 16-331(a); Del. Code Ann. tit. 26, §§ 601 (state-issued franchises outside of municipalities), 608 (municipal franchises subject to PUC review); Fla. Stat. § 610.102; Ga. Code Ann. § 36-76-3 (provider must elect either a local franchise or a state-issued authorization); 220 Ill. Comp. Stat. Ann. § 5/21-301(a)(provider must elect either a local franchise or a state-issued authorization); Ind. Code § 8-1-34-16(a); Iowa Code § 477A.2; Kan. Stat. Ann. § 12-2023(a); Haw. Rev. Stat. § 440G-6(a); La. Rev. Stat. §§ 45:1364, 45:1377 (state is franchising authority except in home rule charter communities); Mich. Gen. Laws § 484.3305 (franchises are granted by local government, but only on uniform terms set by statute); Mo. Rev. Stat. § 67.2679.4; Nev. Rev. Stat. § 711.410; N.J. Stat. Ann. §§ 48:5A-9, 48:5A-15, 48:5A-16 (provider must elect either a local franchise or a state-issued certificate of franchise authority); N.C. Gen. Stat. Ann. § 66-351; Ohio Rev. Code Ann. § 1332.24(A)(2); S.C. Code §§ 58-12-300(5), 58-12-310; Tenn. Code Ann. § 7-59-304(a) (provider must elect either a local franchise or a state-issued certificate of franchise authority); Tex. Util. Code Ann. § 66.001; Vt. Stat. Ann. tit. 30, § 502(b); Wis. Stat. Ann. § 66.0420(4).

[174/] *See Second FNPRM* ¶ 32 (seeking comment on whether there is any statutory basis to maintain a distinction between state-level franchising actions and local franchising actions).

[175/] NCTA does not suggest the Commission should take any action with respect to state laws that prohibit local governments from issuing franchises that favor one provider over another or state laws that otherwise proscribe the bounds of local government authority. The Commission's authority to disrupt the relationship between a state and its subdivisions requires a clear statement of Congressional intent that does not extend to such state-level control of local franchising. *See Nixon v. Missouri Municipal League*,

Further, the policy rationale for clarifying the limits of franchising authority applies with equal force to franchising actions taken at the state level. The cable franchising laws and actions of several states mirror the overreaching of LFAs with respect to mixed use networks and in-kind contributions.

For example, in one recent cable franchise renewal, the Vermont Public Utility Commission ("VPUC") ordered a cable company to cover millions of dollars of PEG, I-Net, and other costs *on top of* assessing the maximum five percent franchise fees. The VPUC's additional requirements beyond the five percent franchise fee included:

1) the provision of commercial-class broadband service and equipment "at no charge" to every PEG operator, school, public library, and municipality within its franchise territory;[176/]

2) an obligation on the cable operator to bid for—and potentially construct – I-Nets proposed by any government agency, educational institution, or an educational or governmental access entity, while limiting the operator's proposed charges for such I-Nets;[177/]

3) a mandate that the cable operator build and pay for potentially dozens of "remote origination sites" and other live production capabilities at municipal buildings, schools, and libraries for PEG programming (beyond the ordinary video return lines to the headend),[178/] at a cost of $4,000 to more than $120,000 *per site*,[179/] and

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541 U.S. 125 (2004) (no clear statement of Congressional intent for the Commission to preempt state laws that prohibited municipal delivery of telecommunications services); *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016) (no clear statement of Congressional intent for the Commission to preempt state law limiting geographic area of municipal broadband service).

[176/] *Renewal of the Certificate of Public Good of Comcast of Connecticut/Georgia/ Massachusetts/New Hampshire/New York/North Carolina/Virginia/Vermont, LLC, d/b/a Comcast, expiring on December 29, 2016, to provide cable television service*, Renewed and Consolidated Certificate of Public Good Issued Pursuant to 30 V.S.A. §§ 231, 503, 504, and 506, Docket No. 8301, ¶ 56 (Vt. Pub. Serv. Bd. Jan. 13, 2017) ("Comcast shall provide each AMO and each school, public library, and municipality within its service area with a cable modem and internet access at no charge. The internet service provided to an AMO's base production facility shall be commercial-class service.").

[177/] *See id.* ¶116.

[178/] *See* Amended Complaint ¶ 101, *Comcast v. Vermont Public Utility Commission et al.*, Civil Action No. 5:17-cv-161 (D. Vt. Filed Jan. 8, 2018) ("*Comcast VPUC Complaint*").

[179/] *See Comcast VPUC Complaint* ¶¶ 104-105.

4) over $4 million for re-engineering the cable operator's system architecture, providing new equipment and facilities, and operational changes solely to provide each program listing for each of its many local PEG channels on its interactive program guide.[180/]

Instead of using the franchise fees it had collected to buy PEG production sites, institutional data transport, or Internet service, the VPUC sought to exact them "free of charge" from the cable operator as conditions for its franchise renewal.

Similarly, above and beyond the five percent franchise fee, the Hawaii Department of Commerce and Consumer Affairs requires that its cable operator: (1) "voluntarily" provide broadband service to all public schools, institutions of higher learning and libraries throughout the state until the cable operator constructs an I-Net; and (2) provide at least 60 Mbps broadband service to consumers and deploy at least 1,000 new public Wi-Fi access points throughout the cable franchise area.

In Texas, Chapter 283 of the Local Government Code requires the cable operator to pay approximately $25 million per year in right of way fees to provide voice services. As a result, cable operators are assessed two rights-of-way fees (one for voice and one for cable) even if a single facility is used to provide both services.

As the Commission has already held, some of these requirements are undoubtedly franchise fees because they are in-kind contributions unrelated to the provision of cable services. The others are cable-related, in-kind contributions, of the sort the Commission has tentatively and correctly concluded are franchise fees subject to the five percent cap. The Commission must reaffirm Congress' intent to limit all in-kind exactions and decide that such exactions by a state authority count towards the five percent franchise fee cap.

[180/] *See* Vermont Public Utility Commission, *Renewal of the Certificate of Public Good of Comcast of Connecticut/Georgia/Massachusetts/New Hampshire/New York/North Carolina/Virginia/Vermont, LLC*, Order, Docket No. 8301 (Jan. 13, 2017) ("*VPUC Renewal Order*"). Comcast currently provides an appropriate topical channel designation such as "Government Access" or "Public Access" for these hyper-local PEG channels.

As noted above, NCTA agrees that buildout requirements do not generally qualify as in-kind contributions subject to the five percent cap.[181/] However, buildout requirements can sometimes be a subterfuge for franchising authorities to mandate new facilities for broadband and other non-cable services, contrary to the Commission's mixed-use rule. For example, the VPUC's recent franchise renewal provides a clear example of this kind of state regulatory overreach. The VPUC ordered the cable operator to "construct no less than 550 miles of line extensions" over the term of the franchise to advance goals of providing access to "cable, voice, and broadband Internet services in areas of Vermont that were previously underserved."[182/] There is no evidence that consumer demand for cable television in Vermont justifies the line extensions. Rather, the VPUC was relying on its limited jurisdiction as a *cable* franchising authority to order the buildout of *broadband* infrastructure, in violation of the mixed-use rule and federal deregulatory policies for broadband Internet access service.

As detailed in Section I.D, the Commission has ample authority to preempt franchising laws and regulations, including state franchising actions such as these. The Commission should make clear that its franchise fee, in-kind exaction, and mixed-use network determinations apply to franchising actions taken at the state level and to state regulations that impose requirements on local franchising, to prevent the types of overreaching and abusive practices described above.

181/ *Second FNPRM* ¶ 21.

182/ *See VPUC Renewal Order* at 87. The VPUC made clear that expanding broadband service to the maximum number of households (*i.e.*, universal service) was a key objective for the condition. *Id.* at 82, 86-87 (stating that "the newly installed plant is capable of providing unregulated voice and internet services in addition to cable television services," and that previous line extensions "have provided significant public benefit by providing access to Comcast's cable, voice, and broadband internet services in areas of Vermont that were previously underserved"); *see also* Zack Huffman, *Comcast Says Vermont is Unfairly Dumping Costs on It*, Courthouse News, Aug. 31, 2017, https://www.courthousenews.com/comcast-says-vermont-unfairly-dumping-costs/ (observing that "Vermont is trying to connect its Northeast Kingdom to the worldwide web" with the line extension condition).

CONCLUSION

NCTA applauds the Commission's ongoing efforts to reduce barriers to deployment of advanced cable infrastructure for broadband. The Commission's faithful analysis of the Communications Act and its tentative conclusions in this proceeding would help rein in abusive practices and overreaching by franchising authorities, who have long ignored the five percent cap on franchise fees and the clear limitations on their ability to regulate non-cable services offered over cable systems, to the ultimate detriment of consumers. Therefore, to maximize deployment, investment, and innovation, the Commission should reaffirm the mixed-use rule as applied to all cable operators, and clarify the scope of the rule to preclude the imposition of duplicate fees and authorizations. The Commission should also reaffirm that any requests for in-kind contributions made by franchising authorities unrelated to the provision of cable services are subject to the statutory five percent franchise fee cap; clarify that cable-related, in-kind contributions required by franchising authorities are franchise fees subject to the five percent cap unless those asks are specifically excluded from the definition of franchise fees; and find that in-kind assessments should be valued for purposes of the franchise fee cap at their fair market value. This protects cable operators, and ultimately consumers, from the cost of providing services and payments that are well-beyond what Congress intended. Finally, the Commission should clarify that these decisions apply to all franchising authorities, whether at the state or local level, and that neither a cable operator nor a franchising authority may waive these federal limitations.

Respectfully submitted,

/s/

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