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

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

COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF REGIONAL COUNCILS AND THE NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS

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SUMMARY OF COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF REGIONAL COUNCILS AND THE NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS

The National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National Association of Counties, the National League of Cities, the National Association of Regional Councils and the National Association of Towns and Townships do not agree with the tentative conclusions in the Further Notice of Proposed Rulemaking in the above-referenced docket.

The tentative conclusion that cable franchise requirements such as public, educational and government channels and customer service obligations are franchise fees is not supported by the Cable Act or its legislative history, and would have significant, negative impacts on local governments and cable subscribers.

The tentative conclusion that local governments have no authority regarding cable operators' use of the rights of way to provide non-cable services similarly is not supported by the language of the Cable Act and clear legislative intent to preserve local authority over cable operators' non-cable services.

Both proposals are contrary to federal law and will create a special class of providers—cable operators—who receive a windfall at the expense of taxpayers and subscribers in communities across the country. We urge the Commission to reconsider its tentative conclusions.

TABLE OF CONTENTS

SUMMARY OF COMMENTS i

I. INTRODUCTION 1

II. CABLE FRANCHISE REQUIREMENTS ARE NOT FRANCHISE FEES 3

A. The Proposed Rules are Contrary to Unambiguous Language of Federal Law 3

B. The Proposed Rules Will Have Significant, Negative Impacts on Local Governments and Provide a Windfall to Cable Operators 9

III. THE MIXED-USE RULE IS NOT AUTHORIZED BY THE CABLE ACT AND CREATES AN UNBALANCED REGULATORY ENVIRONMENT 13

A. The Proposed Rule Is Ambiguous 13

B. The Proposed Rules are Contrary to Unambiguous Language of Federal Law and Legislative History 16

IV. CONCLUSION 24

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I. INTRODUCTION

The National Association of Telecommunications Officers and Advisors ("NATOA"),[1] the United States Conference of Mayors ("USCM"),[2] the National Association of Counties ("NACo"),[3] the National League of Cities ("NLC"),[4] the National Association of Regional

[1] NATOA's membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer communications policy and the provision of such services for the nation's local governments.

[2] USCM is the official nonpartisan organization of cities with populations of 30,000 or more. There are more than 1,400 such cities in the country today. Each city is represented in the Conference by its chief elected official, the mayor.

[3] NACo represents county governments, and provides essential services to the nation's 3,069 counties.

[4] NLC is the oldest and largest organization representing cities and towns across America. NLC represents 19,000 cities and towns of all sizes across the country.

Councils ("NARC"),[5] and the National Association of Towns and Townships ("NATaT")[6] (the "Municipal Organizations") appreciate the opportunity to file comments on the Second Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced docket.

The FNPRM proposes new rules on two issues related to cable franchises. The first, which the FNPRM refers to as "cable-related, in-kind contributions," proposes to allow cable operators to deduct from their franchise fee payments the fair market value of virtually all "non-monetary contributions related to the provision of cable services … as a condition or requirement of a local franchise agreement."[7] The proposed rule is based on the premise that franchise requirements—like public, educational and government ("PEG") channel capacity for local programming and customer service obligations—are "contributions" to the local franchising authority ("LFA"). As discussed below, however, these provisions are not contributions to LFAs. In fact, these requirements are authorized in the Cable Act[8] to meet two of the primary policy goals of the Act: to "ensure that cable systems are responsive to the needs and interests of the local community" and to "provide the widest possible diversity of information sources and services to the public."[9] Unfortunately, this proposal ignores these goals and effectively rewrites cable franchise agreements to significantly reduce negotiated community benefits and compensation for use of

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[5] NARC represents more than 500 councils of government, metropolitan planning organizations, and other regional planning organizations throughout the nation.

[6] NATaT represents the interests of more than 10,000 towns and townships across the country at the federal level.

[7] FNPRM ¶ 24.

[8] As used in these Comments, the "Cable Act" refers to the Cable Communications Policy Act of 1984, P. L. 98-549, as amended by the Cable Television Consumer Protection and Competition Act of 1992 and the Telecommunications Act.

[9] 47 U.S.C. § 521(2); (4).

public assets—replacing meaningful franchise agreements with contracts incapable of addressing the community needs and the intent of the Cable Act.

The second proposed rule, the "mixed use rule," is designed to preempt local governments from regulating the non-cable services provided by franchised cable operators, effectively exempting cable operators from regulations on non-cable services—the same regulations that apply to non-cable competitors. This is a significant departure from the Commission's original interpretation of the Cable Act and would result in disparate treatment of providers of similar services, contrary to the Commission's proclamation that it "should not place its thumb on the scale to give a regulatory advantage to any competitor."[10]

Both proposals are inconsistent with the plain language of federal law and counter to the legislative history of the Cable Act and Telecommunications Act,[11] and thus the Commission lacks authority to promulgate either rule. These proposed rules will have devastating impacts on local budgets and local PEG programming. For these reasons the Municipal Organizations oppose the tentative conclusions of the FNPRM.

II. CABLE FRANCHISE REQUIREMENTS ARE NOT FRANCHISE FEES

A. The Proposed Rules are Contrary to Unambiguous Language of Federal Law

The Commission's proposed rules on so-called "cable-related, in-kind contributions" rest on the assumption that "any nonmonetary contributions related to the provision of cable services provided by cable operators as a condition or requirement of a local franchise agreement" are "franchise fees" as defined in the Act.[12] While the FNPRM does not propose a definition of

[10] FNPRM ¶ 22.

[11] Telecommunications Act of 1996.

[12] FNPRM ¶ 24.

"contribution," it suggests that it would include any cable-related franchise obligation for the benefit of an LFA or an entity designated by the LFA. This interpretation is a significant departure from the plain language of the Cable Act, which unambiguously expresses Congress's intent that cable operators pay a franchise fee of five percent of gross revenue from cable services *in addition to* meeting the cable-related needs and interests of the local community.

The FNPRM proposes an interpretation of the Cable Act rendering a virtually any cable-related franchise obligation that is not listed as an exception to the franchise fee definition in Section 622(g) a "franchise fee."[13] The reasoning appears to be that, in *Montgomery County*,[14] the Sixth Circuit stated that a "franchise fee" *could* include in-kind contributions and thus all such contributions *are* franchise fees unless there is a specific exclusion.[15] This proposed interpretation does not reflect a reasonable reading of the Cable Act.

The tentative conclusion rests on the Commission's analysis of the exclusions from franchise fees set out in Section 622(g)(2). Specifically, the FNPRM finds that these exclusions either do not apply or do not include the types of cable-related, in-kind contributions the FNPRM finds to be "franchise fees."[16] The FNPRM assumes that had Congress wanted to exclude these types of obligations from franchise fees, it would have added them to the list of exclusions. This analysis incorrectly assumes Congress considered these obligations to be franchise fees in the first place. If they did not—and the plain text and legislative history of the statute indicates they did not—then there would have been no reason to include them in the list of exclusions.

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[13] The only stated exception is build-out requirements.

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

[15] FNPRM ¶ 17.

[16] *Id*. at ¶ 18-19.

There can be no doubt that Congress did not intend cable franchise requirements to be "franchise fees." This is plainly stated in the legislative history: "Subsection 622(g)(2)(C) establishes a specific provision for PEG access in new franchises. In general, this section defines as a franchise fee *only monetary payments* made by the cable operator, and does not include as a 'fee' any franchise requirements for the provision of services, facilities or equipment."[17] The intent that "franchise fees" are limited to monetary payments could not be clearer.

The legislative history also contradicts the assumption in the FNPRM that cable-related franchise obligations are franchise fees unless there is an exemption in Section 622(g). The history states, "Specific exemptions from the franchise fee limitations are included *for certain payments* related to public, educational and governmental access."[18] The fact that some exemptions exist does not render all other obligations as "franchise fees." Rather, Congress intended the exemptions to address payments that otherwise might be considered franchise fees. Other cable-related obligations were not considered "fees" to begin with, let alone payments that required a specific exemption.

Further, the FNPRM does not consider Section 622(c), the text of which demonstrates that Congress did not consider PEG-related obligations to be franchise fees.[19] Section 622(c) addresses the amounts that may be itemized on customers' bills. Subsection (c)(1) expressly permits a line item on customers' bills stating "[t]he amount of the total bill assessed as a franchise fee… ." Subsection (c)(2) allows itemization of "[t]he amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public,

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[17] H.R. REP. No. 98-934 (1984) at 65, reprinted in 1984 U.S.C.C.A.N. 4655, 4702 (emphasis added).

[18] *Id*. (emphasis added).

[19] 47 U.S.C. § 542(c).

educational, or governmental channels or the use of such channels." If Congress considered these PEG-related franchise obligations to be franchise fees, it would not have provided for separate itemization of "each" of these separate amounts.[20]

Similarly, in establishing the requirements for reasonable rates on the basic service tier, the Act distinguishes between franchise fees and the cost of franchise requirements, including PEG-related requirements.[21] The FCC's rules implementing these Sections of the Act similarly distinguish between franchise fees and PEG-related costs.[22]

This distinction between franchise fees and franchise obligations reflects the different purposes of these provisions of the Cable Act. Section 622 of the Cable Act authorizes LFAs to require cable operators to pay franchise fees for use of the local rights of way for their cable systems. In other words, cable operators must pay rent for their use of public assets.[23] Separately, the Cable Act allows LFAs to impose certain requirements like PEG channel capacity, capacity on institutional networks ("I-Nets"), build-out requirements, customer service standards and other obligations needed to meet the cable-related community needs and interests.[24] Unlike rent, these obligations are more reasonably considered benefits to subscribers than "contributions" to the LFA

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[20] Section 622(c)(2) refers to "each of the following" prior to listing charges that may be itemized.

[21] *See* 47 U.S.C. § 543(b)(2)(C)(v) and (vi).

[22] *See*, *e.g.*, 47 C.F.R. §§ See §76.922; 76.925.

[23] *See* H. Rep. 98-934 (1984) at 26, reprinted at 1984 U.S.C.C.A.N. at 4663 ("Each local franchising authority may assess the cable operator a fee for the operator's use of public ways. FCC regulations currently cap this 'franchise fee' at 3 percent…"); *City of Dallas v. FCC,* 118 F.3d 393, 397 (5th Cir. 1997) (holding that the franchise fee is "essentially a form of rent: the price paid to rent use of public right-of-ways.").

[24] *See*, *e.g.*, 47 U.S.C. §§ 531(b); 541(a)(4); 552(a); 552(d)(2).

and thus, just like the tentative conclusion related to build-out requirements, do not fit—and were not intended to fit—the definition of a franchise fee.

Further, because cable subscribers are only a subset of taxpayers within a franchise area, the FNPRM's interpretation would allow a reduction in rent owed the public based on franchise obligations that benefit only subscribers. The Cable Act was not designed to allow cable operators to meet the "cable-related community needs and interests" by requiring all taxpayers to subsidize those obligations in the form of rent reductions.

Other provisions of the Cable Act similarly reflect the fact that cable-related franchise requirements are not franchise fees. Section 626, for example, allows LFAs to deny a franchise renewal proposal that does not meet the cable-related community needs and interests, such as PEG-related needs, but the LFA must consider the cost to cable operator in meeting those needs and interests.[25] If those costs were, in fact, franchise fees, it would be the LFA who pays for them, rendering the cost consideration in this Section obsolete. Though the language in Section 626 is clear, the legislative history confirms that the "costs" to be considered are the cable operators', not the LFAs': "… in assessing the costs under this criteria, the cable operator's ability to earn a fair rate of return on its investment and the impact of such costs on subscriber rates are important considerations."[26] The costs of these cable-related obligations would not impact the operator's "rate of return" or "subscriber rates" if they were intended to be included in the franchise fee calculation. In this context, it is clear Congress did not think—and certainly did not intend—that

[25] 47 U.S.C. § 546(c)(1)(D).

[26] H.R. REP. No. 98-934 (1984) at 74, reprinted in 1984 U.S.C.C.A.N. at 4711.

franchise obligations required by the LFA or offered by a cable operator would be considered "assessments … imposed by a franchising authority."[27]

The tentative rule relies on two other faulty conclusions. The FNPRM states that in-kind contributions unrelated to cable services are a "franchise fee" and the Commission "see[s] no basis … for distinguishing between in-kind contributions unrelated to the provision of cable services and cable-related, in-kind contributions… ."[28] This statement relies on the Commission's mistaken conclusion that, "The court's decision in *Montgomery County* did not disturb the Commission's treatment of in-kind contributions unrelated to the provision of cable services as franchise fees subject to the statutory five percent cap."[29] This is incorrect, as *Montgomery County* did not address in-kind contributions unrelated to cable services. Further, *Montgomery County* makes clear that the issue was not addressed in *Alliance*,[30] either: "[T]the relevant part of our opinion in *Alliance* analyzed (and approved) only the FCC's interpretation of the term 'incidental' as used in § 542(g)(2)(D). The opinion nowhere analyzed or approved the idea that every cost or expense that a cable operator bears in complying with the terms of its franchise is a 'franchise fee' under § 542(g)(1)."[31] As such, the FNPRM mistakenly assumes that the proposed rules would merely extend an interpretation affirmed in *Montgomery County*.

The Commission also asserts that if it does not conclude that cable-related franchise provisions are franchise fees, "LFAs could circumvent the five percent cap by requiring, for

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[27] 47 U.S.C. § 542(g)(1).

[28] FNPRM ¶ 17.

[29] *Id*.

[30] *Alliance for Community Media et al. v. FCC*, 529 F.3d 763 (6th Cir. 2008) ("*Alliance*"), *cert. denied*, 557 U.S. 904 (2009).

[31] *Montgomery County*, 863 F.3d at 490.

example, unlimited free or discounted cable services and facilities for LFAs, in addition to a five percent franchise fee."[32] This statement not only presumes LFAs would suddenly adopt a practice that hasn't materialized in the decades since adoption of the Cable Act, but also ignores that the Cable Act cabins LFAs' authority to preclude this possibility. For example, the Act allows LFAs to require "adequate assurance that the cable operator will provide adequate [PEG] access channel capacity, facilities or financial support."[33] The renewal provisions of the Act allow consideration of what is "reasonable to meet the future cable-related community needs and interests, taking into account the cost… ."[34] Terms like "adequate" and "reasonable" prevent LFAs from imposing the "unlimited" obligations the FNPRM imagines.

B. *The Proposed Rules Will Have Significant, Negative Impacts on Local Governments and Provide a Windfall to Cable Operators*

In addition to the legal infirmities with the FNPRM, it will have significant impacts on local governments that undermine the express goals of the Cable Act. The proposed reduction in franchise fees of the fair market value of nearly every cable-related franchise obligation will be felt by local governments of all sizes throughout the country. By the cable industry's estimate, it is fair to say that billions of dollars are on the line.[35] The potentially significant reductions in franchise fees contemplated in the FNPRM would drastically reduce, and in some cases eliminate, the rent Congress intended LFAs to receive.

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[32] *Id*.

[33] 47 U.S.C. § 621(a)(4)(B).

[34] 47 U.S.C. § 626(c)(1)(D).

[35] *See* Letter from Rick Chessen, Chief Legal Officer, Senior Vice President, Legal & Regulatory Affairs, NCTA – The Internet & Television Association, to Marlene H. Dortch, Secretary, FCC, at p.1 (June 11, 2018) (stating that cable operators are collectively paying about $3 billion annually in franchise fees to state and local governments).

The rules would also have a significant impact on PEG operators. Some PEG stations are funded in whole or in part by franchise fees. For these stations, drastic reductions in franchise fees jeopardize their existence. In other cases, LFAs that cannot absorb the franchise fee reduction may have no choice but to reduce the PEG-related benefits of the franchise agreement. PEG provides significant public benefits. PEG channels provide our communities with access to local and regional government meetings; educational programming including for-credit courses; coverage of local events such as festivals, parades and high school sporting events; important information including local election coverage, candidate forums, public safety programming; and a range of other programming that is at the very heart of the Cable Act's intent that cable systems "provide the widest possible diversity of information sources and services to the public."[36]

The proposed rules may similarly impact other cable-related franchise requirements. Institutional networks, for example, are expressly permitted by the Cable Act and have been used for decades in some jurisdictions to provide communications for and between public buildings. A new requirement that LFAs effectively pay fair market value for these connections (the costs of which, as discussed below, likely have long since been repaid) requires LFAs to either effectively become customers of the cable operator or seek out new providers who may have to construct new facilities to maintain these long-standing connections.

Other cable franchise provisions—electronic programming guide services, discounts for senior citizens or economically disadvantaged groups, accommodations for hearing impaired subscribers, customer service centers located in the franchise area—are negotiated between the LFA and cable operator to address the community's needs. Subscribers rely on these franchise requirements to enable them to afford, access and utilize their cable services. Allowing the fair

[36] 47 U.S.C. § 521(4).

market value of these requirements to be deducted from franchise fees will either immediately or over the course of franchise renewals result in diminished services and less access, particularly for those most vulnerable.

As discussed above, the Cable Act allows for recovery from subscribers of the costs of franchise requirements.[37] Not only does this reflect the fact that the Act does not consider these requirements to be franchise fees, but it also illustrates the windfall industry would reap under the proposed rule. First, it would result in a windfall to cable operators should they be allowed to deduct from franchise fees the fair market value of requirements that have already been paid for by subscribers. For example, I-Nets, PEG origination points and cable service connections to schools, libraries and other public buildings in most cases were constructed years ago and cable operators have been fully repaid. It is unreasonable to now allow cable operators to collect from LFAs the fair market value of assets fully funded by subscribers. Similarly, because the Cable Act expressly allows these costs to be collected from subscribers, the only reasonable way to address the possible double recovery moving forward would be to effectively rewrite Section 622(c)(2) to no longer permit the deductions allowed in that subsection—a power this Commission does not have.

Further, Section 622(c) and Section 626 (discussed above) both reference the "cost" of these obligations. We reject the premise that the Act allows for deduction of these cable-related obligations as franchise fees, but it is even further afield to read into the Act a fair market value deduction. This, too, would simply be a windfall to cable operators, ultimately at the expense of subscribers.

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[37] *See* 47 U.S.C. § 522(c).

The proposed rules would also effectively punish LFAs that have more than one cable operator because the deductions will have a disproportionate impact. Let's assume there are two LFAs, each with the same franchise fee revenue and each with 4 PEG channels. If we further assume that the fair market value of a PEG channel is $10,000 per year (a number wholly made up for purposes of this example), then each LFA would stand to lose $40,000 per year in franchise fees. If, however, we assume LFA A has two cable operators in the franchise area and LFA B has only one, LFA A will lose $80,000 in franchise fee revenue under the same assumptions.

This impact is exacerbated where the LFA's franchise area is large and has many cable operators, such as in Clackamas County, Oregon. Clackamas County has nine different cable operators and each franchise requires at least three PEG channels.[38] This means that whatever the fair market value of a channel is, it will be multiplied by 27 for purposes of reducing franchise fees in the County.[39] This calculation does not include the many other cable-related "contributions" from these cable operators, each of which will be multiplied by nine in terms of calculating the reduction. For Clackamas County and other jurisdictions with multiple cable franchises, the proposed rules could completely eliminate franchise fee payments for some or all cable operators. Such a result—where the franchise requirements for PEG channels alone swallow the franchise fee—is an untenable reading of the Cable Act and therefore not sustainable under *Chevron*.[40]

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[38] The County actually has 12 separate franchise agreements. Due to historic acquisitions and transfers, Comcast subsidiaries have three different franchises and Wave Broadband has two different franchises. For the most part, there are 12 separate franchise areas rather than head-to-head competition for cable services.

[39] If each franchise is the basis for calculation regardless of whether it is the same parent company, then the deduction would be based on 12 franchises with at least three channels, or 36 times the per channel value.

[40] *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

For the reasons stated above, the Municipal Organizations respectfully suggest that the Commission not adopt the proposed rules related to "cable-related, in-kind contributions." There is no basis in the Cable Act to change the long- and widely-held understanding that cable operators must meet the cable-related community needs and interests in addition to paying a five percent franchise fee for use of local rights of way.

III. THE MIXED-USE RULE IS NOT AUTHORIZED BY THE CABLE ACT AND CREATES AN UNBALANCED REGULATORY ENVIRONMENT

A. The Proposed Rule Is Ambiguous

The FNPRM is ambiguous regarding whether the proposed "mixed-use rule" is that an LFA cannot use its authority under Title VI to regulate non-cable services or whether the proposed interpretation is that Title VI preempts local authority over non-cable services. The Commission states it both ways in different portions of the FNPRM even though there is a significant difference between these statements.

The first paragraph of the FNPRM states: "We also tentatively conclude that we should apply our prior mixed-use network ruling to incumbent cable operators, thus prohibiting LFAs from using their video franchising authority to regulate the provision of most non-cable services, such as broadband Internet access service, offered over a cable system by an incumbent cable operator." The proposed rule is similarly phrased in the second sentence of Paragraph 25.

By the next paragraph, Paragraph 26, the FNPRM states: "We thus tentatively conclude that the mixed-use network ruling prohibits LFAs from regulating the provision of any services other than cable services offered over the cable systems of incumbent cable operators … ." The reference to use of "video franchise authority" has been dropped, resulting in what could be read as a conclusion that the Cable Act affirmatively preempts local governments from regulating certain non-cable services.

The significance of the phrasing in the FNPRM is not merely semantics. The statements in the first and twenty-fifth paragraphs of the FNPRM describe the Commission's interpretation of the scope of authority LFAs may exercise under Title VI relative to cable operators and cable franchises. It says nothing about local authority to regulate services or facilities that do not fall under Title VI and where the local government is acting outside its capacity as a cable franchising authority, which as a general matter is consistent with the Cable Act. The statements in Paragraph 26 and paragraph five of the Initial Regulatory Flexibility Analysis, by contrast, seem to interpret Title VI as preempting LFAs from exercising any authority over non-cable services and facilities, even where the local government is not acting as an LFA—that is, where the local government is acting under some other authority and not as the entity authorized to issue cable franchises as defined in the Cable Act. Such a conclusion, if intended, is well beyond the scope of the plain language of the Cable Act.

Further, such an interpretation is beyond the scope of the *First Order*, which is the "rule" the FNPRM purports to extend to incumbent cable operators.[41] The *First Order* addressed competitive entrants into the cable market—mainly LECs or other entities with existing access to the ROW.[42] In it, the Commission concludes: "[We] find that it is unreasonable under Section 621(a)(l) for an LFA to refuse to grant a franchise based on issues related to non-cable services or facilities."[43] Paragraph 65 of *First Order* states the issue addressed by the mixed-use rule as: "facilities-based new entrants' obligations to comply with local consumer protection and customer

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[41] *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 (2007) (*First Order*).

[42] *Id*. at ¶ 3 (Describing the franchising issues "particularly with respect to facilities-based telecommunications and broadband providers that already have access to rights-of-way").

[43] *Id*. at ¶ 5; *see also id*. at ¶ 121.

service standards when the same facilities are used to provide other regulated services, such as telephony." In short, the *First Order* says nothing about local government losing authority over LECs' telecommunications facilities once the cable franchise was issued. Yet that is the result of the preemptive restatement of the mixed-use rule in the FNPRM.[44]

In restating the mixed-use rule in the *Second Order*,[45] the Commission put it this way: "Specifically, we clarify that LFAs' jurisdiction under Title VI over incumbents applies only to the provision of cable services over cable systems and that an LFA may not use its franchising authority to attempt to regulate non-cable services offered by incumbent video providers."[46] This is the recitation of the mixed-use rule considered in *Montgomery County*.[47] Here, again, the rule is a statement of what authority is granted under Title VI and the limits of an LFA's franchising authority under that Title. It is not stated as a preemption of any local authority over non-cable services.

We urge the Commission to clarify that the mixed-use rule, consistent with the *First Order* and *Second Order*, and as intended to be applied here, describes only the scope of authority provided under Title VI and is not preemptive of local authority, outside the context of Title VI, to regulate non-cable services provided over a cable system.

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[44] To the extent the FNPRM is implying that this broad interpretation of the "mixed use rule" applies to competitive providers under the *First Order*, the *First Order* does not support this reinterpretation.

[45] *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 Order*).

[46] *Id*. at ¶ 17.

[47] *Montgomery County*, 863 F.3d at 492.

B. The Proposed Rules are Contrary to Unambiguous Language of Federal Law and Legislative History

The Sixth Circuit in *Montgomery County* held that the Commission failed to cite statutory authority to support its implementation of the mixed-use rule. The FNPRM does not remedy that issue. The plain language of the Cable Act and its legislative history conclusively demonstrate that Title VI does not preempt LFA authority over non-cable services provided by cable operators.

The FNPRM's analysis begins with the assumption that the Court in *Montgomery County* vacated the mixed-use rule only as applied to incumbent cable operators that are not common carriers and thus it remains intact with respect to cable operators that are common carriers.[48] As discussed above, the statement of the mixed-use rule reviewed in *Montgomery County* was not preemptive; it merely stated that Title VI does not grant authority to LFAs over non-cable services. To the extent the FNPRM is intended to state that a preemptive version of the mixed-use rule was reviewed or sustained by the Sixth Circuit, this is inaccurate. The Commission should not rely on any asserted conclusions by the Court in *Montgomery County* to support a new rendering of the mixed-use rule.

The FNPRM bases it tentative conclusion that the mixed-use rule applies to prohibit LFAs from regulating the non-cable services and facilities of incumbent cable operators that are also common carriers based on the exclusion of Title II services from the definition of "cable system" in Section 602(7)(C).[49] The definition, however, does not create an affirmative preemption of LFAs. Nothing in the definition addresses LFA authority in any way. By excluding common carrier facilities from "cable systems," the definition simply establishes that Title VI does not

[48] FNPRM ¶ 26.

[49] *Id*.

authorize LFAs to regulate the telecommunications services provided over what is otherwise a cable system. As explained above, this is not tantamount to a preemption.

The provision of the Act that does address LFA authority over telecommunications services—Section 621(b)(3)—very clearly limits the authority only over actions taken pursuant to Title VI. For example, Section 621(b)(3)(A)(i) says a cable operator providing telecommunications services "shall not be required to obtain a franchise *under this title* for the provision of telecommunications services." (Emphasis added.) Section 621(b)(3)(A)(ii) says "the provisions *of this title* shall not apply to such cable operator … for the provision of telecommunications services." (Emphasis added.) Section 621(b)(3)(B) says "A franchising authority may not impose any requirement *under this title* that has the purpose or effect of prohibiting … the provision of telecommunications services by a cable operator… ." (Emphasis added.) These sections plainly relate only to an LFA's exercise of authority under Title VI.[50] They do not preempt local governments from exercising authority they may have outside the context of Title VI.

This clear language is supported by the legislative history:

> The conferees intend that, to the extent permissible under State and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a nondiscriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees.[51]

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[50] Further, "franchising authority" is a defined term that relates to a government entity with authority to issue a franchise under the Cable Act.[50] Any limits on the authority of a "franchising authority" is limited to the entity's role in issuing cable franchises, not its authority over non-cable services and facilities outside the cable franchising context.

[51] H.R. Conf. Rep. No. 104-458, at 209 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 223.

It makes sense that Congress intended to leave non-cable services open to local regulation and fees; a preemption of local authority would have resulted in a lopsided regulatory environment, which Congress intended to prevent by taking non-cable services out of Title VI and out of the cable franchise to ensure they were treated the same as competing non-cable services.[52]

Having cited no other source of authority for this conclusion, the FNPRM, like the *Second Order*, fails to state a sufficient statutory basis for the preemptive mixed-use rule apparently proposed in the FNPRM as applied to incumbent cable operators that are also common carriers.

With respect to non-common carriers, the FNPRM cites to 624(b) as the basis for preempting LFAs' authority to regulate information services provided over cable systems.[53] Section 624(b) states, "the franchising authority, to the extent related to the establishment or operation of a cable system … in its request for proposals for a franchise (including requests for renewal proposals …), may establish requirements for facilities and equipment, but may not … establish requirements for video programming or other information services." The FNPRM's citation to this provision excludes the context that this limitation is only in the scope of requests for cable franchise proposals and renewals. This provision says nothing about preempting regulation outside the cable franchising context. A local ordinance regulating use of the public rights of way, for example, is not a requirement in a cable franchise renewal proposal and thus

[52] The exceptions to this are clearly stated in the Cable Act. For example, Section 621(b)(3)(D) expressly exempts I-Nets from the limitation on LFAs' authority to require the provision of telecommunications services as a condition of the franchise grant.

[53] FNPRM ¶ 27. The tentative conclusion is that Section 624(b) "prohibits LFAs from using their franchising authority to regulate the provision of information services … ." To the extent the conclusion is intended to state that Title VI does not grant LFAs authority over the information services provided over cable systems (other than as expressly provided in the Act, such as with respect to I-Nets), in other words to the extent the conclusion is not preemptive, we agree that Title VI does not expressly grant such authority (with the caveat noted). We stress that Title VI certainly does not preempt such authority.

nothing in Section 624(b) impacts local authority to apply such ordinances to the non-cable services of cable operators.[54]

The FNPRM also asserts that the Commission has authority to preempt local rights of way authority based "longstanding federal policy," citing its *RIF Order*[55] and Section 706 of the Communications Act.[56] The latter citation is interesting given that in the *RIF Order*, the Commission found that Section 706 does not grant it any authority.[57] Thus, by the Commission's own reasoning, and as acknowledged in the FNPRM,[58] Section 706 does not provide any authority to preempt local governments' regulation of non-cable services.

The *RIF Order* also does not provide authority for preemption. The FNPRM implies that the Commission would extend to this proceeding its attempt to preempt state and local authority to enact measures that would reinstate the net neutrality rules it repealed or from which it refrained from imposing. Assuming its preemptive language is enforceable—an assumption that is being challenged in active litigation—the *RIF Order* does not even purport to preempt local rights of way regulations. The net neutrality rules the Commission eliminated in the *RIF Order*, and which it is attempting to preempt state and local governments from enacting, are not at issue in the FNPRM, nor was local rights of way authority at issue in the *RIF Order*.

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[54] The FNPRM in footnote 134 cites the *First Order* for the proposition that "the Commission has previously determined that an LFA is prohibited from assessing franchise fees on revenues from non-cable services." We note that the *Second Order* made clear that the holding in the *First Order* does not extend to non-cable fees imposed outside the cable franchising context: "This finding, of course, does not apply to non-cable franchise fee requirements, such as any lawful fees related to the provision of telecommunications services." *Second Order* at fn. 31.

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

[56] FNPRM ¶ 29.

[57] *RIF Order* at ¶ 268.

[58] FNPRM fn. 146.

The *RIF Order* purports to preempt "economic" or "public utility-type" regulations, which "are terms of art that the Commission has used to include, among other things, requirements that all rates and practices be just and reasonable; prohibitions on unjust or unreasonable discrimination; tariffing requirements; accounting requirements; entry and exit restrictions; interconnection obligations; and unbundling or network-access requirements."[59] Here, again, rights of way regulations do not fit into any of these categories. While the FNPRM suggests that franchise requirements may be "entry and exit restrictions," these "terms of art" are not intended to preempt local regulations related to use of local rights of way.[60]

Not mentioned in the FNPRM is the Oregon Supreme Court's decision in *City of Eugene v. Comcast*,[61] which rejected the argument that local governments are preempted from applying their generally applicable rights of way regulations to broadband services. In that case, the Court expressly rejected arguments that the Cable Act or the amendments thereto in the Telecommunications Act preempt LFAs from imposing fees or other regulations on the non-cable services provided by cable operators. Nothing in the FNPRM addresses the clear reasoning of this decision.

Finally, the FNPRM proposes to apply the mixed-use rule to incumbent cable operators that are non-common carriers to ensure parity among cable operators.[62] Otherwise, its interpretation of Section 602 would give an advantage to cable operators who are also common carriers. This potential outcome does not create authority that has not been granted in the Cable Act. Rather, this potential outcome demonstrates that the FNPRM has stretched the language of

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[59] *RIF Order* at fn. 730.

[60] *RIF Order* at ¶ 196.

[61] *City of Eugene v. Comcast of Oregon II, Inc.*, 375 P.3d 446, 359 Or. 528 (2016).

[62] FNPRM ¶ 30.

the Act too far in its application of this reinvented mixed-use rule to cable operators that are common carriers. This is not remedied by further stretching the language to find a preemption of local governments' authority over virtually all non-cable services provided by virtually all cable operators. There is a far easier way to avoid this outcome, one that is in line with the clear language and intent of the Act: continue to allow local governments to apply their ordinances to all similarly-situated providers. This is precisely what Congress intended in its amendments to the Cable Act. This intent is further reflected in Section 253 of the Telecommunications Act and the Internet Tax Freedom Act, both of which preserve local authority to manage and receive compensation for use of their rights of way by providers of cable, telecommunications and broadband services. [63]

The remaining statutory bases for authority proposed by NCTA similarly do not support the proposed mixed-use rule.

Section 621(a)(2) simply states that a cable franchise authorizes the construction of a cable system: "Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way …". Nothing in this language discusses non-cable services or preempts local regulations of non-cable services. Reading a preemption into this language is contrary to the plain language of the statue and the legislative intent cited above.

Similarly, Section 622, which among other things limits cable franchise fees to revenue from the provision of cable services, does not preempt local authority over non-cable services. Section 622(a) makes clear that this Section refers to the franchise fee that may be required in a

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[63] *See* 47 U.S.C. §253(c); 47 USC § 151, note (prohibiting state and local governments from imposing "taxes on Internet access," but defining a "tax" as "any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes, and is not a fee imposed for a specific privilege, service, or benefit conferred," such as the privilege of using local rights of way).

cable franchise. It does not address obligations that may arise outside the context of a cable "franchise" or fees that are not "franchise fees."[64]

Further, there is no support in the Cable Act for the idea that Congress intended that the cable franchise authorize use of the rights of way for non-cable facilities (even though it expressly excluded common carrier facilities from that grant of authority) and at the same time limited rent to revenue from cable services. To the contrary, the limitation on the franchise fee base is consistent with the legislative history that, as quoted above, conclusively states the intent that the Cable Act not limit local authority over telecommunications services. Indeed, the Court in *Eugene v. Comcast* expressly held that the Cable Act does not authorize use of the rights of way for internet access services nor preempt local fees imposed on cable operators for their use of the rights of way to provide those services.[65]

NCTA also cites Section 624(e), which states that LFAs cannot "prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology." Regulating non-cable services provided over whatever transmission technology the cable operator chooses to use is not tantamount to an LFA conditioning or restricting cable system transmission technology.

[64] "Franchise" is defined as "an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to section 546 of this title), issued by a franchising authority, … which authorizes the construction or operation of a cable system[.] 47 U.S.C. § 522(9). "Franchise fees," as used in the Cable Act, refer only to taxes, fees or assessments imposed on a cable operator "solely because of their status as such[.]" 47 U.S.C. § 542(g)(1). With respect to the latter definition, the *Eugene* Court highlighted the importance of the language: "Whether the fee is imposed on a cable operator is a different question from whether the fee is imposed solely because of a company's status as a cable operator." *City of Eugene*, 375 P.3d at 463.

[65] *City of Eugene*, 375 P.3d at 457-58; 462-63.

The FCC previously found in *TCI Cablevision of Oakland County, Inc.*,[66] that 624(e) does not prohibit an LFA from requiring a cable operator to obtain appropriate authorization prior to providing telecommunications services over the cable system. The Commission later restated the holding in *TCI*, making clear that "services" are distinct from "transmission technology": "[A] city condition that cable construction permits would not be used for telecommunications purposes did not violate Section 624(e) because the condition concerned the nature of services the cable operator would be providing over its facilities pursuant to its cable franchise rather than either the transmission technology or subscriber equipment used for the services."[67] The Commission went on to hold, "Local governments perform a range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, and to manage facilities that crisscross the streets and public rights-of-way, which are unaffected by Section 624(e)."[68]

NCTA next cites Section 230(b), a statement of policy regarding interactive computer services. The Commission reaffirmed in the *RIF Order* its previously stated position that Section 230(b) "is hortatory," a statement of policy that delegates no regulatory authority.[69]

Finally, NCTA cites to Section 253 of the Telecommunications Act as a source of support for the mixed-use rule. This reference is rather puzzling in that Section 253 expressly *preserves*

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[66] 12 FCC Rcd 21396, 21441 (1997), *reconsideration denied*, 13 FCC Rcd 16400.

[67] *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd. 5296 ¶ 143, fn. 396 (1999). In citing to this decision in its May 3, 2018 letter, NCTA omitted reference to this footnote and other clear statements that Section 624(e) does not preempt local authority over the rights of way. Letter from Rick Chessen, Chief Legal Officer, Senior Vice President, Legal & Regulatory Affairs, NCTA – The Internet & Television Association, to Marlene H. Dortch, Secretary, FCC at p. 3, n. 14 (May 3, 2018).

[68] *Id.*

[69] *RIF Order* at ¶ 284.

local authority to receive compensation for use of the rights of way to provide telecommunications services.[70] A preservation of authority cannot be read as a preemption. Further, Section 253(c) references "competitively neutral and non-discriminatory" compensation, indicating that Congress did not intend this Section to serve as a source of authority to implement a regulatory regime that discriminates in favor of cable operators' telecommunications services.

In any event, Congress has rejected NCTA's argument that cable franchise fees are "compensation" for purposes of Section 253. As noted above, the legislative history of the Telecommunications Act makes clear that Congress saw the five percent franchise fee in the Cable Act as compensation only for use of the rights of way for the provision of cable services over the cable system. They explicitly intended to preserve "the authority of a local government to, in a nondiscriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees" including with respect to cable operators' telecommunications services.[71] This intent is unquestionably inconsistent with NCTA's position that the cable franchise fee also compensates local governments for additional uses of the rights of way.

For the reasons discussed above, the Commission should not adopt the proposed mixed-use rule to preempt local authority over cable operators' non-cable services.

IV. CONCLUSION

The Municipal Organizations respectfully request that the Commission refrain from enacting the tentative conclusions and rules as stated in the FNPRM.

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[70] *See* 47 U.S.C. §253(c).

[71] H.R. Conf. Rep. No. 104-458, at 209 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 223.

Respectfully submitted,

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