BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

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

Matthew M. Polka
President and Chief Executive Officer
American Cable Association
Seven Parkway Center
Suite 755
Pittsburgh, PA 15220
(412) 922-8300

Thomas Cohen
Edward Yorkgitis
J. Bradford Currier
Kelley Drye & Warren LLP
3050 K Street, NW
Washington, DC 20007
(202) 342-8518
Counsel to American Cable Association

Ross J. Lieberman
Senior Vice President of Government Affairs
Brian Hurley
Vice President of Regulatory Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

December 14, 2018

TABLE OF CONTENTS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

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

I. INTRODUCTION AND SUMMARY

The American Cable Association ("ACA")[1] hereby provides reply comments in response to the Second Further Notice of Proposed Rulemaking ("*Second FNPRM*") issued by the Federal Communications Commission ("Commission") in the above-captioned proceeding,[2] which addresses two issues remanded by the U.S. Court of Appeals for the Sixth Circuit regarding the ability of local franchising authorities ("LFAs") to regulate incumbent cable operators and cable services.[3] In its initial comments, ACA supported the Commission's tentative conclusions that "franchise fees" as set forth in Section 622 of the Communications

[1] ACA represents more than 700 smaller cable operators and other local providers of video programming services to residential and commercial customers. These providers pass approximately 18.2 million households of which 7 million are served.

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

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

Act, as amended, (the "Act")[4] include "cable-related, in-kind contributions" and that the Commission should apply its "mixed-use" rule so as to prohibit LFAs from imposing fees or regulating non-cable services provided over incumbent cable operators' cable systems.[5] ACA explained that the Commission's conclusions are supported by the Act and are consistent with the public interest, especially to ensure that smaller cable operators are not placed at a competitive disadvantage with other video, broadband, and voice providers. NCTA and Verizon also supported the Commission's tentative conclusions.[6]

By contrast, the Commission's tentative conclusions were opposed by LFAs, local governments and their associations, and public, educational, and governmental ("PEG") channel interests and their associations.[7] One group of local government stakeholders asserted that the Commission's tentative conclusion to include cable-related, in-kind contributions in franchise fees ignores the goals of the Cable Act and "effectively rewrites cable franchise agreements to significantly reduce negotiated community benefits and compensation for use of public assets."[8] As for the Commission's "mixed-use" tentative conclusion, the City Coalition

[4] 47 U.S.C. § 542.

[5] *Second FNPRM* at para. 1. Comments of the American Cable Association on the Second Further Notice of Proposed Rulemaking, MB Docket No. 05-311 (Nov. 14, 2018) ("ACA Comments").

[6] Comments of NCTA – The Internet & Television Association, MB Docket No. 05-311 (Nov. 14, 2018) ("NCTA Comments"); Comments of Verizon, MB Docket No. 05-311 (Nov. 14, 2018) ("Verizon Comments").

[7] *See, e.g.*, Comments of Anne Arundel County, *et al*., MB Docket No. 05-311 (Nov. 14, 2018) ("Anne Arundel Comments"); The City Coalition Comments, MB Docket No. 05-311 (Nov. 14, 2018) ("City Coalition Comments"); Comments on Second Further Notice of Proposed Rulemaking of the Alliance for Communications Democracy, *et al*., MB Docket No. 05-311 (Nov. 14, 2018) ("ACD Comments"); Initial Comments of the City of Philadelphia, Pennsylvania, *et al.*, MB Docket No. 05-311 (Nov. 14, 2018) ("Philadelphia Comments"); Comments of the National Association of Telecommunications Officers and Advisors, *et al*., MB Docket No. 05-311 (Nov. 14, 2018) ("NATOA Comments").

[8] NATOA Comments at 2-3.

contended it was "contrary to both federal and state law, which empower LFAs to regulate access to and use of public rights-of-way,"[9] and another group of local government stakeholders submitted that "[l]ocal governments possess authority as LFAs under Title VI of the Act beyond cable services and also possess police power authority beyond the Cable Act altogether."[10]

In these reply comments, ACA reviews the submissions of NCTA and Verizon and responds to the arguments of the LFAs and other local government stakeholders. As ACA demonstrates herein, the Commission's tentative conclusions regarding mixed-used networks and cable-related, in-kind contributions are valid as a matter of law and legislative history. The Commission's tentative conclusions also serve to further the public interest. Today's local communications market is highly competitive, with numerous alternative providers and new entrants, only some of which are subject to local government oversight. In that environment, imposing additional obligations only on incumbent cable operators does not serve their subscribers nor is it justifiable as cable loses out to the competition. Accordingly, the Commission should adopt its tentative conclusions, clarifying the rights of LFAs, local governments, and cable operators.

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

In the *Second FNPRM*, the Commission tentatively concludes that it should apply its "mixed-use" rule so as to prohibit LFAs from regulating non-cable services provided over

[9] City Coalition Comments at 22.

[10] Anne Arundel Comments at iii.

incumbent cable operators' cable systems.[11] ACA supported this tentative conclusion, explaining that, as a matter of law:

- A cable system "designed to" provide cable service need not provide only cable service but can provide non-cable services as well.[12]

- Paragraph 624(b)(1) provides that, in adopting requirements related to "the establishment or operation of a cable system," an LFA may not establish "requirements for video programming or other information services."[13] This blanket statement is broad enough to cover all manner of obligations an LFA might seek to impose on a cable operator in its provision of information services, including fee payments, franchising, quality-of-service or performance requirements, or any other "requirements" an LFA might devise.[14]

- Section 622[15] separately provides that, regardless of the total revenue a cable operator derives from its cable system, its cable service revenues alone from the revenue base shall be used to calculate the maximum franchise fee. No franchise fee can be imposed in excess of that amount on any service provided over the cable system, including non-cable service.[16]

[11] *Second FNPRM* at para. 1.

[12] The Commission and courts have long recognized that the "facilit[ies]" that comprise cable systems may deliver all manner of non-cable services. *See* Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-311, 4 (May 3, 2018) ("NCTA May 3, 2018 *Ex Parte* Letter").

[13] 47 U.S.C. § 544(b).

[14] *See* NCTA May 3, 2018 *Ex Parte* Letter at 4. Subsection 624(b) further provides that paragraph 624(b)(1) applies "to the extent [requirements are] related to the establishment or operation of a cable system." An operator that uses its cable system to deliver information services is clearly engaged in "operation of" that system within the confines of subsection 624(b). While subparagraph 624(b)(2)(B) empowers an LFA to "enforce any requirements contained within the franchise" related to "broad categories of video programming and other services," ACA agrees with the Commission that this provision does not limit the application of (b)(1) as to information services. *See Second FNPRM*, para. 28, n.135 (noting that "[t]he limitation on the authority of LFAs in Section 624(b)(1) extends specifically to 'information services' whereas the authority granted to LFAs in (b)(2) makes no mention of 'information services'").

[15] 47 U.S.C. § 542.

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

- Section 636[17] further constrains local government regulation of such services. Subsection 636(c) provides that any provision of local law or "any provision of any franchise" granted by a local authority is expressly "preempted and superseded" to the extent inconsistent with the provisions of Title VI.[18] Accordingly, an LFA or other local government body may not impose any requirement on a cable operator that conflicts with the terms of subsections 624(b)(1) or 622(b), or any other Title VI provision. Nor can such requirements be imposed indirectly through a waiver or other voluntary commitment from an operator.[19]

- The Commission's *Restoring Internet Freedom Order*[20] ("*RIF Order*") expressly preempts any State or local law that conflicts with the light-touch Federal regulatory framework established for broadband service. That preemption extends to so-called "economic regulation," a category that includes entry requirements such as franchising, as well as rate regulation and other utility-style requirements.[21]

NCTA and Verizon also supported the Commission's tentative conclusion. NCTA explained that paragraph 621(a)(2) gives franchised cable operators the right to build and operate a cable system for mixed use in the public rights-of-way and that "[w]hether a service is broadband, telecommunications, or any other non-cable service, Section 621 authorizes its provision over the cable system."[22] Verizon too noted that Section 621 prohibits an LFA from leveraging "cable franchise agreements to regulate common carrier or telecommunications

[17] 47 U.S.C. § 556.

[18] 47 U.S.C. § 556(c).

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

[20] *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018) ("*RIF Order*").

[21] *See id*. at para. 195. More broadly, it has long been Federal policy that government not regulate information services, a policy that extends to non-cable services. *See id*. at para. 202, n.747 (citing *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3316-23, paras. 15-25). These Commission policies find support in Section 230(b)(2) of the Act, which establishes as a policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

[22] *See* NCTA Comments at 9-10.

services – whether provided by a new entrant or an incumbent MVPD."[23] As such, an LFA cannot purport to convey the same right to access the public rights-of-way "a second time in exchange for additional consideration," regardless how that additional consideration is characterized.[24] NCTA and Verizon further explained that subparagraph 624(b)(1) prohibits a franchising authority from regulating or imposing any requirements on a cable operator's provision of information services, subparagraph 621(b)(3)(B) bars a franchising authority from prohibiting or otherwise limiting the provision of telecommunications service by a cable operator,[25] and subsection 624(e) prohibits a franchising authority from limiting the use of particular transmission technologies or subscriber equipment by cable systems.[26] In addition, NCTA commented that the Telecommunications Act of 1996,[27] as an "invitation for cable operators to innovate,"[28] amended the franchise fee statute (Section 622) to base the fee on cable operators' revenues from only cable services – and not from use of the cable system.[29]

Both NCTA and Verizon additionally explained that Section 253 of the Act restrains state and local government regulation of non-cable services offered over a cable system.[30] NCTA

---

[23] *See* Verizon Comments at 7.

[24] *See* NCTA Comments at 10-11.

[25] *See* Verizon Comments at 7.

[26] *See* NCTA Comments at 11-14. NCTA noted that subsection 624(b) does not authorize franchising authorities to regulate non-cable facilities or equipment since "that grant of authority must be read in context and in harmony with Section 624(e)."

[27] Pub. L. No. 104-104, 110 Stat. 56.

[28] *See* NCTA Comments at 19. NCTA also explained that the definition of "franchise fee" in paragraph 622(g)(1) applies to both franchising authorities and any other government entity. *See also id*. at 36 ("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.").

[29] *See id*. at 15.

[30] *See id*. at 21-26; *see also* Verizon Comments at 8.

commented that an LFA would be in violation of Section 253[31] – by materially limiting or inhibiting a cable operator's ability to "compete in a fair and balanced legal and regulatory environment" – if it required that operator to obtain additional authorization or pay additional fees to offer over its cable system a telecommunications service or an information service.[32] The rationale is straightforward: the offering of these services imposes no additional burden on the public rights-of-way or management of the rights-of-way for which the cable operator is already paying as franchise fees "fair and reasonable compensation" (if not compensation far in excess of this amount). Moreover, any action by an LFA to charge an additional fee where there is no additional burden would not be competitively neutral or nondiscriminatory. In sum, as NCTA commented, for a state or local government authority to charge a cable operator an additional, non-franchise fee for use of the public rights-of-way to provide non-cable services on its cable system, it would need to 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

[31] Section 253 covers any entity seeking to provide telecommunications services or a telecommunications provider. 47 U.S.C. § 253.

[32] *See* NCTA Comments at 22 ("Such duplicative state and local fees cannot be justified under Section 253(c)…[because] [c]able operators already pay more than 'fair and reasonable compensation' for their use of the public rights-of-way in the form of franchise fees."); *see also Accelerating Wireless Broadband Deployment by Removing Infrastructure Investment, et al*., WT Docket No. 17-19, *et al*., Declaratory Ruling and Third Report and Order, FCC 18-133, paras. 43 *et seq*., 81 *et seq*. (rel. Sept. 27, 2018) ("*Wireless Infrastructure Order*"). In this declaratory ruling, the Commission determined that when a local or state government imposes unwarranted local regulation or excessive fees that impede infrastructure deployment, it violates subsection 253(a). *Id.* at paras. 31-33. While this ruling focused on small cell wireless deployment, because Section 253 establishes rights for providers of telecommunications service, the Commission's determination applies equally to wireline telecommunications providers.

imposed on the cable operator is nondiscriminatory compared to fees charged to other similarly situated providers of telecommunications services…for rights-of-way access."[33]

Local government stakeholders offered a variety of arguments to support their ability to regulate or otherwise impose requirements on non-cable services offered by incumbent cable operators. These include:

- The Cable Act (Section 624) grants LFAs authority over cable systems and permits LFAs to establish requirement for facilities and equipment to the extent related to the establishment and operation of a cable system.[34]

- LFA authority to regulate applies to a cable system, even if it is used for non-cable services, and thus LFAs have the authority to expressly require compliance with the jurisdiction's right-of-way management regulations.[35]

- The Cable Act does not limit LFA jurisdiction to only cable services over a cable system because it permits, for instance, LFAs to require I-Nets.[36]

The local government stakeholders, however, ignore that LFA authority under Title VI, including their authority under Section 624 to establish requirements for cable system facilities and equipment, is circumscribed by other parts of that section and by other provisions in Title VI. First, paragraph 624(b)(1) provides that, in connection with a franchise renewal, the LFA may not impose requirements for video programming or other information services.[37] Second,

---

[33] NCTA Comments at 25-26.

[34] *See* Anne Arundel Comments at 37.

[35] *See* Philadelphia Comments at 47.

[36] *See* Anne Arundel Comments at 37; *see also id.* at 42 (the Commission cannot extend the common carrier exception in Section 602(7)(C) to cable operators that are not Title II carriers); Philadelphia Comments at 46 (this exception was designed to protect Title II carriers' provision of telecommunications services from Cable Act regulation and not cable operators' provision of Title II and other non-cable services over a cable system). As discussed above, there is ample authority elsewhere in Title VI for the Commission to adopt its tentative conclusion.

[37] *See* NCTA Comments at 14 ("Nor is Section 624(b) an authorization to regulate non-cable facilities or equipment….[T]hat grant of authority [in that section] must be read in context and 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.").

subparagraph 621(b)(3)(B) effectively prevents an LFA from seeking to impose any requirement on the provision of a telecommunications service by a cable operator, and subparagraph 621(b)(3)(D) prohibits an LFA from requiring that a cable operator provide telecommunications service. Third, subsection 624(e), in prohibiting franchising authorities from restricting a cable operator's transmission technology or subscriber equipment, supports the ability of a cable operator to deploy technologies that support the offering of a variety of communications services without additional franchising authority oversight. Fourth, as provided in Section 622, cable operators are obligated to pay franchise fees from operation of their cable systems only based on the gross revenues from the provision of cable service.

Local government stakeholders also argued that, apart from oversight from LFAs, local governments retain broad authority from other sources – their police powers granted by the state – to regulate the provision of non-cable services.[38] While a local government may have authority from other sources, in addition to the limitations imposed by Title VI on an LFA to regulate non-cable services, a local government's exercise of its police power to control its rights-of-way and thereby regulate communications services is circumscribed in a number of ways by federal law. First, for the provision of telecommunications services, local governments are subject to the limitations imposed by Section 253, including that they cannot engage in actions that materially limit or inhibit the provision of telecommunications services or charge fees for managing the rights-of-way that are not cost-based. These limitations apply as well to information services that are provided over the facilities used to provide telecommunications services, including a cable system. Second, for the provision of information services, local governments are subject to restrictions on state and local regulation imposed by the Commission in the *RIF Order*, which effectively prohibit states and local governments from

[38] *See, e.g.*, Anne Arundel Comments at 38-40; NATOA Comments at 14-15, 17.

adopting economic regulations, such as entry and exit regulation. Within these strictures, a local government may control access to its rights-of-way; however, if the offering of these services imposes no greater burden on a local government to manage its rights-of-way – which would be the case when they are offered over a cable system – the local government has no basis to impose any additional charge.[39]

In addition to legal arguments, local government stakeholders contended that the Commission's tentative conclusion would be discriminatory, since it would allegedly give cable operators an economic advantage over non-cable competitors.[40] ACA appreciates the concern of local governments that communications providers that are similarly situated should be subject to the same regulatory construct and be treated on a nondiscriminatory basis. ACA recognizes that over the past century different communications providers have gained access to the public rights-of-way on a different basis. But, any problem of discrimination arising from that history should not be addressed by simply layering on additional regulations or taxes on some communications providers. Rather, the problem should be addressed holistically and by adopting a solution that ensures that all communications providers that use the public rights-of-way are not subject to different regulations than competitors and are assessed fees based on the reasonable and objective costs incurred by local governments to manage those rights-of-

[39] *See* NATOA Comments at 17, where it refers to the conference report language from the 1996 Act to uphold local government authority. H.R. Conf. Rep. No. 104-458, at 209 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 223. ACA notes this report language confirms that this authority is circumscribed as set forth herein.

[40] *See* Philadelphia Comments at 49; City Coalition Comments at 23. The City Coalition asserted that "[s]mall cell and other mobile broadband equipment is not part of a cable system." City Coalition Comments at 23. ACA disagrees. Modern cable systems include facilities for wireless, portable, and mobile connectivity, which may be used for the provision of cable, telecommunications, and information services. Rather than focus on how these facilities may be used, the proper inquiry, as the Commission effectively set forth in the *Wireless Infrastructure Order*, is whether they add to the local government's burden to manage the public rights-of-way, *i.e.*, impose an additional, objective cost to the local government.

way. This is especially important since many communications providers that offer the same video, telecommunications, and information services to consumers do not occupy the public rights-of-way and thus are not subject to local regulations or fees. As a result, if those providers using the public rights-of-way are subject to more onerous regulations or have to pay unreasonable fees, it would place them at a competitive disadvantage. In effect, the imposition of non-cost-based fees by local government handicaps one subset of providers, deterring their investments in networks and provision of services to consumers. That is not only inconsistent with the law, but the public interest as well.

For all of the reasons provided above, the Commission's tentative conclusion is well founded as a matter of law and the public interest. By adopting it, the Commission will spur competition, investment, and the provision of innovative services.

III. FRANCHISE FEES INCLUDE CABLE-RELATED, IN-KIND CONTRIBUTIONS

In the *Second FNPRM*, the Commission tentatively concludes that cable-related, in-kind contributions are exactions that qualify as franchise fees to the extent they meet the definition set forth in paragraph 622(g)(1).[41] In its comments, ACA explained that, as a matter of law, the Commission's tentative conclusion was correct for the following reasons:[42]

- It is settled law that in-kind contributions unrelated to the provision of cable services are franchise fees subject to the statutory cap.

[41] *Second FNPRM* at paras. 16-17.

[42] ACA also explained that the Commission's tentative conclusion is supported by the legislative history and that it is consistent with the public interest. *See* ACA Comments at 8-9. ACA does not oppose having cable operators set aside capacity for PEG channels or the imposition of other requirements provided for in the statute; as explained herein, it only wants the cost of such cable-related requirements to be included as part of franchise fees, except where specifically exempted. This would enhance LFA accountability and not place cable operators at a competitive disadvantage.

- Because the definition of "franchise fee" (paragraph 622(g)(1)) does not turn on whether an exaction "relates" to provision of cable service,[43] the statute provides no basis for distinguishing cable-related, in-kind contributions from other kinds of exactions.

- The specific exceptions (paragraph 622(g)(2)) to the definition of "franchise fee" include only one of the many types of cable-related, in-kind contributions – capital contributions for PEG channels.[44]

- Cable-related, in-kind contributions are not franchise fees under paragraph 622(g)(1) even if expressly contemplated elsewhere in Title VI.[45]

NCTA and Verizon also supported the Commission's tentative conclusion. NCTA explained that cable-related, in-kind contributions are franchise fees because the definition of "franchise fees" is so sweeping, including "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity," and because Section 622 expressly provides for a limited number of exceptions, which do not include all cable-related, in-kind contributions.[46] Verizon noted that the *Montgomery County* court found that a "franchise fee" can include

[43] 47 U.S.C. § 542(g)(1). The term is defined to include "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator . . . solely because of [its] status as such."

[44] Reading such a broad exemption into the statute would render superfluous subparagraph 622(g)(2)(C), which excludes from the definition of "franchise fee" the capital costs that an operator that was granted its franchise after October 30, 1984 incurs in furnishing PEG facilities to a franchising authority.

[45] For instance, the fact that subsection 611(b) authorizes LFAs to require franchisees to designate channel capacity on institutional networks for governmental use does not exempt the costs incurred to provide that capacity from treatment as franchise fees because there is no textual basis in subsection 622(g) for finding that Section 611(b) imposes any limit on the definition of "franchise fee" and because reading into the Act a broad exemption from the definition of "franchise fee" for any in-kind contribution directly authorized by Title VI would read out the specific exception set forth in subparagraph 622(g)(2)(D).

ACA also argued in its comments that the Commission erred in proposing to exclude "build-out requirements" from the definition of "franchise fee," reasoning that such requirements are not imposed for the benefit of the LFA and "ultimately may result in profit to the operator." ACA Comments at 7.

[46] NCTA Comments at 41.

noncash exactions and submitted that the "Commission should follow th[e] commonsense principle that demands for in-kind contributions are equivalent to demands for monetary contributions, and treat both within the statutory definition of 'franchise fee.'"[47] As such, as NCTA discussed, the franchise fee provision, which increased the cap to five percent cap from the three percent limit imposed by the Commission until enactment of the statute, provides "franchising authorities more than enough funds to defray regulatory costs related to cable systems."[48]

Local government stakeholders opposed the Commission's tentative conclusion, arguing that the Commission's interpretation of Section 621 fundamentally alters the Cable Act and Congressional intent to enable LFAs to assess and collect franchise fees and to impose regulatory conditions as part of cable franchises without one offsetting the other.[49] Further, one group of these stakeholders claimed that the Commission's analysis "fails to recognize that franchise obligations were not exempted from the fee…*because they were never intended to be*

[47] Verizon Comments at 5.

[48] NCTA Comments at 40.

[49] *See, e.g.,* Anne Arundel Comments at 11-12, 16; City Coalition Comments at 10 ("[F]ranchise fees are compensation for the use of public property….The remaining part of the bargain – franchise obligations – is the consideration for the right to provide cable service within the jurisdiction."); ACD Comments at 7 ("Congress treated franchise fees and the costs of meeting cable-related franchise requirements as distinct obligations that LFAs could impose separately from and independently of the franchise fee.").

ACA notes that the City of Philadelphia *et al.* alleged that the FCC lacks authority because the definition of franchise fee is unambiguous and its meaning is apparent from the statute's text and relationship with other laws. Philadelphia Comments at 21-26. ACA disagrees. As the *Second FNPRM* points out, "[t]he court in *Montgomery County* acknowledged that the term 'franchise fee' can include in-kind contributions, but stated that further explanation was necessary in order for the Commission to concluded that *cable-related*, in-kind contributions are covered within the definition." *Second FNPRM* at para. 17. The court (at 491) further opened the door to Commission interpretation of the term by finding that the Commission failed to define what "in-kind" means. Thus, the statute's words are subject to "multiple constructions," and the Commission has authority to interpret them. *See Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 777 (6th Cir. 2008).

included by Congress in the first place."[50] Local government stakeholders also claimed that the Commission has recognized the right of LFAs to impose a variety of franchise obligations without offsetting franchise fees[51] and that the harm to local governments and their residents would be severe should the Commission adopt its tentative conclusion.[52]

Despite the local government stakeholders' assertions, no arguments made by them undermine the Commission's assessment of the statute that, as a matter of law, cable-related, in-kind expenses are franchise fees that are not covered by any of the exemptions in paragraph 622(g)(2).[53] The structure of Section 622 is straightforward. It first provides an encompassing definition of a franchise fee – "any tax, fee, or assessment of any kind imposed…on a cable operator" – which the Commission can exercise its authority to further refine. It then expressly provides a limited number of exceptions to this definition, none of which is so broad as to include all cable-related, in-kind contributions. Further, the statute, as the Commission found and the court in *Montgomery County* did not undo, permits the Commission to determine that non-cable related, in-kind contributions are included as franchise fees, and it does not distinguish between cable-related and non-cable-related, in-kind contributions.[54] Accordingly, the statute supports the Commission's tentative conclusion.

---

[50] Anne Arundel Comments at 18 (emphasis in original). As further support for this claim, numerous local government stakeholders contend the legislative history clearly shows that franchise fees are limited to monetary payments and do not include franchise requirements for the provision of services, facilities, or equipment. *See, e.g.*, NATOA Comments at 5.

[51] *See, e.g.*, Anne Arundel Comments at 25-27; City Coalition Comments at 8; ACD Comments at 11-12.

[52] *See, e.g.*, City Coalition Comments at 8; *see also* Anne Arundel Comments at 27-28; ACD Comments at 12-13 (arguing that the Commission's rationale for permitting LFAs to require build-out obligations, *i.e.*, that the cable operator would benefit, is not supportable and demonstrates that its proposal is flawed).

[53] *See Second FNPRM* at paras 18-20.

[54] *See id.* at para. 17.

In addition, ACA submits that local government stakeholders are off the mark in claiming that the authors to the Cable Communications Policy Act of 1984[55] ("1984 Act") intended for them to both collect a franchise fee up to the five percent cap and impose any cable-related regulatory obligations without such costs being included as franchise fees. As indicated by both the House Report[56] and Senate Report[57] on the 1984 Act, Congress in enacting Section 622 was concerned that LFAs were exacting unreasonable franchise fees as entities were vying to become exclusive cable franchisees in urban and other areas across the country, placing cable operators at a competitive disadvantage and harming the deployment of cable networks to the public's detriment. To address this concern, Congress, while establishing "the authority of a city to collect franchise fee,"[58] instituted the five percent cap to limit unreasonable assessments. The capped fee would "permit State or local governments to recover revenues sufficient to cover the *cost of cable-related expenses*…encourage the continued growth of cable by

[55] Pub. L. No. 98-549, 98 Stat. 2779.

[56] Cable Franchise Policy and Communications Act of 1984, Report of the Committee on Energy and Commerce, H. Rept. 98-934 at 26 (Aug. 1, 1984) ("House Report") ("According to the FCC, some cities collect fees in excess of 3 percent (or even 5 percent) without a waiver. Cities have historically argued that the Federal government cannot regulate the rates they set for use of their streets; cable companies assert that high franchise fees are unreasonable and inhibit development of cable."). *See also id*. at 64 (stating that taxes of general applicability "do not unduly discriminate against the cable operator so as to effectively constitute a tax directed at the cable system").

[57] Cable Telecommunications Act of 1983, Report of the Senate Committee on Commerce, Science, and Transportation, S. Rept. 98-67 at 25 (Apr. 27, 1983) ("Senate Report") ("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. This would clearly place cable operators at a competitive disadvantage and thus be detrimental to the public."). ACA recognizes that the 1984 Act is largely based on the legislation passed by the House, but the franchise fee provisions of both the House and Senate bill are similar in key aspects, including giving LFAs authority to assess a franchise fee with a five percent cap. In addition, as discussed above, the rationales in adopting this provision as explained in the Committee reports are largely similar.

[58] House Report at 26.

eliminating excessive fee demands...[and] permit the entry of new cable entrepreneurs."[59] Further, as set forth in paragraph 622(g)(2), Congress clearly specified the taxes, fees, and *other assessments* that were to be "exempted" from being deemed franchise fees. As the House Report explained, "[t]axes of general applicability and the capital costs associated with the construction of public, educational and governmental access facilities are excluded from the definition of a franchise fee."[60] In sum, Congress permitted LFAs to assess a higher franchise fee than the FCC permitted without a waiver, but clearly provided that the fee included the costs of any cable-related requirements other than capital costs for PEG channels.[61]

Even apart from the law and Congressional intent, without some governor (*i.e.*, financial accountability) on the imposition of cable-related obligations, LFAs are almost certain to act on their natural tendency and ask for "more" at cable operators' expense, harming the ability of

[59] Senate Report at 25 (emphasis added). The House Report states that an LFA may assess a franchise fee "for the operator's use of the public ways." House Report at 26. No doubt any franchise fee must be linked to use and management of the public rights-of-way. It is for that reason that LFAs cannot assess a franchise fee on or regulate a SMATV or DBS provider, neither of which uses the public rights-of-way. At the same time, a fee based on the gross revenues from cable service clearly does not reflect the local government's costs to permit and manage access to the public rights-of-way, and ACA submits a fee based on cable service gross revenues with a five percent cap exceeds any reasonable cost an LFA might incur to manage its rights-of-way. As NCTA noted in its comments, in 1972, "the Commission found [a three percent limit] was generally 'adequate to defray the costs of local regulation.'" NCTA Comments at 40. Given that cable service and gross revenues from such service have expanded greatly in the past 45 years, LFAs are more than fully compensated.

[60] House Report at 26.

[61] The NATOA Comments (at 5) and City Coalition Comments (at 13-14) cite to the House Report (at 65), to contend that franchise fees only include monetary payments made by a cable operator and not franchise requirements for the provision of services, facilities, and equipment. As discussed herein, this interpretation runs counter to the statutory language. In addition, this reading of the statute would effectively enable LFAs to exact an endless array of cable-related, in-kind contributions from cable operators, regardless of the burden and regardless of the concern of the authors of the 1984 Act that LFAs were seeking to extract ever greater franchise fees.

cable operators to compete and invest in their networks.[62] Today, LFAs ask cable operators to provide a great many cable-related, in-kind contributions, including not just capacity for PEG channels but a variety of other kinds of support for PEG channels, free service to schools and public buildings and even locations unrelated to government services, interconnections between LFAs, maintenance of local offices for customer service, and location of other cable facilities in the LFA's jurisdiction.[63] NCTA commented that the vast majority of LFAs impose these type of in-kind obligations and that, in virtually all instances today, LFAs do not consider these obligations to be franchise fees subject to the cap.[64] LFAs ask the Commission to turn back the clock to 1984 and the era of exclusive franchises and limited multi-channel video competition. But those days are long past. By seeking to have unbounded authority to effectively tax or assess only cable franchisees, LFA actions will further distort the market, harming both franchisees and their subscribers. Accordingly, the Commission needs to ensure the law and Congressional intent are followed and require that cable-related, in-kind contributions imposed on any cable franchisee – other than capital costs for PEG access facilities, which are expressly excluded by the statute – count towards the franchise fee cap.

IV. CONCLUSION

ACA submits that, as a matter of law, the Commission is correct in tentatively concluding that the Commission should apply its "mixed-use" rule so as to prohibit LFAs from regulating non-cable services provided over incumbent cable operators' cable systems and that "franchise fees" as set forth in Section 622 include cable-related, in-kind contributions. These tentative conclusions also are supported by the legislative history and would further the public interest,

[62] *See Second FNPRM* at para. 17.

[63] *See* City Coalition Comments at 9; *see also* NCTA Comments at 42-46.

[64] *See* NCTA Comments at 42.

especially by providing a level playing field for cable operators and other providers of video, telecommunications, and information services. ACA urges the Commission to adopt them.

Respectfully submitted,

By: 

Matthew M. Polka
President and Chief Executive Officer
American Cable Association
Seven Parkway Center
Suite 755
Pittsburgh, PA 15220
(412) 922-8300

Thomas Cohen
Edward A. Yorkgitis
J. Bradford Currier
Kelley Drye & Warren LLP
3050 K Street, NW
Washington, DC 20007
(202) 342-8518
Counsel to American Cable Association

Ross J. Lieberman
Senior Vice President of Government Affairs
Brian Hurley
Vice President of Regulatory Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

December 14, 2018