No. 19-4161 (consolidated with Nos. 19-4162, 19-4163, 19-4164, 19-4165, 19-4166, and 19-4183)

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

CITY OF EUGENE, OREGON, *ET AL.*,
*Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
*Respondents*.

*ON PETITION FOR REVIEW OF AN ORDER OF*
*THE FEDERAL COMMUNICATIONS COMMISSION*

# OPENING BRIEF OF PETITIONERS CITY OF EUGENE, OREGON; ALLIANCE FOR COMMUNICATIONS DEMOCRACY; ALLIANCE FOR COMMUNITY MEDIA; UNITED STATES CONFERENCE OF MAYORS; CITY OF SAN ANTONIO, TEXAS; CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA; COUNTY OF MARIN, CALIFORNIA; CITY OF BOWIE, MARYLAND; CITY OF PALO ALTO, CALIFORNIA; AND CITY OF PORTLAND, MAINE

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May 15, 2020

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: _______________ Case Name: __________________________________

Name of counsel: _______________________________________________________________

Pursuant to 6th Cir. R. 26.1, _______________________________________________________
*Name of Party*

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

CERTIFICATE OF SERVICE

I certify that on ____________________________________ the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/____________________________
______________________________
______________________________

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 19-4164 Case Name: All. for Commc'n Democracy v. FCC

Name of counsel: Tillman L. Lay

Pursuant to 6th Cir. R. 26.1, See Attachment A for list of represented parties.
*Name of Party*
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

See Attachment B for response for each represented party.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on May 15, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Tillman L. Lay

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

# Attachment A

Pursuant to 6th Cir. R. 26.1, the names of the represented parties are:

- Alliance for Communications Democracy;
- Alliance for Community Media;
- United States Conference of Mayors;
- City of San Antonio, Texas;
- City and County of San Francisco, California;
- County of Marin, California;
- City of Bowie, Maryland;
- City of Palo Alto, California; and
- City of Portland, Maine.

# Attachment B

*Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:*

The Alliance for Communications Democracy ("ACD") is a national nonprofit membership organization of nonprofit public, educational, and governmental access ("PEG") organizations that supports efforts to protect the rights of the public to communicate via cable television, and promotes the availability of the widest possible diversity of information sources and services to the public. ACD is not a subsidiary or affiliate of a publicly owned corporation. It does not have any parent companies, and no publicly-held company has a ten percent or greater ownership interest in ACD.

The Alliance for Community Media ("ACM") is a national nonprofit membership organization representing over 3,000 PEG access organizations, community media centers and PEG channel programmers throughout the nation. Those PEG organizations and centers include more than 1.2 million volunteers and 250,000 community groups that provide PEG access cable television programming in local communities across the United States. ACM is not a subsidiary or affiliate of a publicly owned corporation. It does not have any parent companies, and no publicly-held company has a ten percent or greater ownership interest in ACM.

The United States Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes nearly 1,400 cities at present. USCM is not a subsidiary or affiliate of a publicly owned corporation. It does not have any parent companies, and no publicly-held company has a ten percent or greater ownership interest in USCM.

The City of San Antonio, Texas; City and County of San Francisco, California; County of Marin, California; City of Bowie, Maryland; City of Palo Alto, California; and City of Portland, Maine, are governmental entities and therefore exempt from Rule 26.1. 6th Cir. R. 26.1(a).

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## STATEMENT IN SUPPORT OF ORAL ARGUMENT

Petitioners City of Eugene, Oregon; Alliance for Communications Democracy; Alliance for Community Media; United States Conference of Mayors; City of San Antonio, Texas; City and County of San Francisco, California; County of Marin, California; City of Bowie, Maryland; City of Palo Alto, California; and City of Portland, Maine ("Eugene Petitioners"), request oral argument. Given the number of issues presented, the lengthy administrative and judicial history related to this proceeding, and the scope of the administrative record, Eugene Petitioners believe that oral argument will facilitate the Court's consideration of these appeals.

## JURISDICTIONAL STATEMENT

Petitioners seek review of a final order of the Federal Communications Commission ("Commission" or "FCC") captioned *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 ("*Section 621*"), Third Report and Order, 34 FCC Rcd. 6844 (2019) ("*Third Order*") (JA____).

The *Third Order* is an appealable final agency action, and this Court has jurisdiction pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). The *Third Order* was published in the *Federal Register* on August 27, 2019. Petitions for review were timely filed pursuant to 28 U.S.C. § 2344. Petitioner City of Eugene,

Oregon (No. 19-4161) filed on August 30, 2019, in the Ninth Circuit. Petitioners Alliance for Communications Democracy; Alliance for Community Media; United States Conference of Mayors; City of San Antonio, Texas; City and County of San Francisco, California; County of Marin, California; City of Bowie, Maryland; City of Palo Alto, California; and City of Portland, Maine (No. 19-4164), filed on October 23, 2019 in the D.C. Circuit, and that petition was subsequently transferred to the Ninth Circuit.

The Ninth Circuit granted the Commission's motion to transfer these petitions to this Court. Order, Dec. 2, 2019, ECF No. 3. On January 15, 2020, the Court granted the Commission's unopposed motion to consolidate Case Nos. 19-4162, 4163, 4164, 4165, 4166, and 4183 with Case No. 19-4161. Order, Jan. 15, 2020, ECF No. 20.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The Commission ruled that most nonmonetary, cable-related franchise requirements authorized under the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-573, as amended ("Cable Act"), fall within the definition of "franchise fee" under section 622 of the Act, 47 U.S.C. § 542. Did the Commission err in ruling that nonmonetary, cable-related franchise requirements are "franchise fees" and thus subject to section 622's franchise fee cap, even though other provisions of the Cable Act explicitly authorize, and limit, those requirements, and

even though the Commission's interpretation is inconsistent with other Cable Act provisions and its own regulations?

2. If nonmonetary, cable-related franchise requirements authorized under the Cable Act are "franchise fees" under section 622, did the Commission err in ruling that these requirements must be valued at their fair market value, rather than cable operators' cost of compliance with these obligations, for purposes of counting towards the franchise fee cap?

3. Did the Commission err in holding that, when applied to cable operators, right-of-way fees imposed on all broadband internet providers (both cable and non-cable alike) and based on a percentage of their revenue from broadband—not cable—service, are fees "imposed . . . on a cable operator . . . solely because of [its] status as such," 47 U.S.C. § 542(g)(1), and also not a fee "of general applicability," 47 U.S.C. § 542(g)(2)(A)?

4. Did the Commission err in ruling that section 636(c) of the Cable Act preempts application of non-Cable-Act-based state and local government regulation of non-cable services to cable operators?

## STATEMENT OF THE CASE

### *A. Background on Cable Television Regulation*

Cable television first emerged in the 1950s. *All. for Cmty. Media v. FCC*, 529 F.3d 763, 767 (6th Cir. 2008) ("*Alliance*") (citing *City of Dallas, Tex. v. FCC*, 165 F.3d 341, 345-46 (5th Cir. 1999) ("*Dallas*")). Initially, the Commission abstained from regulating cable television, believing it lacked statutory authority to do so. *Id.* Instead, "[i]n virtually all communities serviced by cable, the municipality determined whether to grant a franchise authorizing a particular company to provide cable service to a specified portion of the community." *Am. Civil Liberties Union v. FCC*, 823 F.2d 1554, 1558 (D.C. Cir. 1987) ("*ACLU*"). In exchange for the ability to install and operate their cable systems in the public rights-of-way, "cable operators were required to assume various responsibilities in the public interest." *Id.* These public interest-related obligations typically included requirements to set aside channels for public, educational, and governmental ("PEG") use. H.R. Rep. No. 98-934, at 30 (1984).

The Commission subsequently determined it had ancillary jurisdiction over cable systems, which the Supreme Court affirmed. *United States v. Sw. Cable Co.,* 392 U.S. 157, 178 (1968). In 1972, the Commission "carved out a system of 'deliberately structured dualism'" under which it imposed regulatory requirements

on cable operators and on state or local government-issued cable franchises. *Alliance* at 767 (quoting Cable Television Report and Order, 36 F.C.C.2d 143, on reconsideration, 36 F.C.C.2d 326 (1972), *aff'd sub nom. Am. Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975)).

In 1984, Congress enacted the Cable Act (as Title VI to the Communications Act of 1934) in "response to the 'illdefined [sic] . . . state of regulatory uncertainty' resulting from the overlapping authority of the FCC and municipalities." *Alliance* at 767 (quoting *ACLU* at 1559). The Act "continues reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process." H.R. Rep. No. 98-934, at 19.

### *B. The Cable Franchising Process under the Cable Act*

Section 621[1] (47 U.S.C. § 541) requires cable operators to obtain franchises to provide cable service and establishes certain standards for cable franchises. While local franchising authorities ("LFAs") are permitted to award one or more franchises, they "may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." 47 U.S.C. § 541(a)(1).

Section 621 also specifies that LFAs "may require adequate assurance that the cable operator will provide adequate [PEG] access channel capacity, facilities,

[1] Unless otherwise noted, numbered sections (i.e., section 621) in this brief refer to sections of Title VI of the Communications Act of 1934, as amended.

or financial support." 47 U.S.C. § 541(a)(4)(B). Although LFAs generally cannot require cable operators to provide any telecommunications service or facilities "as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise," this limitation does not apply to institutional networks ("I-Nets"). 47 U.S.C. § 541(b)(3)(D). I-Nets are defined as "a communication network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential subscribers." 47 U.S.C. § 531(f).

Among other things, section 621 requires LFAs to assure that access to cable service is not denied on the basis of income and authorizes LFAs to mandate buildout in franchises, so long as they "allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area." 47 U.S.C. § 541(a)(3), (4)(A).

Section 611 (47 U.S.C. § 531) authorizes LFAs to require operators to designate channel capacity (1) for PEG use, and (2) on I-Nets for educational and governmental use. 47 U.S.C. § 531(b). For franchise renewals, PEG and I-Net requirements are also "subject to section [626, 47 U.S.C. § 546]," which governs franchise renewals. 47 U.S.C. § 531(b).

Congress intended the Act's PEG requirements to ensure that "cable systems are responsive to the needs and interests of the local community" and "provide the widest possible diversity of information sources and services to the public." 47

U.S.C. § 521(2), (4). As the House Report notes, "[l]ocal governments, school systems, and community groups . . . will have ample opportunity to reach the public under [the Act's] grant of authority to cities to require [PEG] access channels." H.R. Rep. No. 98-934, at 19. PEG channels "provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas" and "contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work." *Id.* at 30.

Section 622 (47 U.S.C. § 542) permits LFAs to require cable operators to pay a franchise fee. It defines franchise fees as "any tax, fee, or assessment of any kind imposed by [an LFA] or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such." 47 U.S.C. § 542(g)(1). Excluded from the definition are:

> (A) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers);
>
> (B) in the case of any franchise in effect on October 30, 1984, payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, [PEG] access facilities;

> (C) in the case of any franchise granted after October 30, 1984, capital costs which are required by the franchise to be incurred by the cable operator for [PEG] access facilities;
>
> (D) requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or
>
> (E) any fee imposed under title 17 [of the U.S. Code].

47 U.S.C. § 542(g)(2). The Act caps franchisee fees at "5 percent of [a] cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services." 47 U.S.C. § 542(b).

Section 624 (47 U.S.C. § 544) "permits [LFAs] to impose various franchise requirements to the extent that those requirements are 'related to the establishment or operation of the cable system[.]'" *Montgomery Cty. v. FCC*, 863 F.3d 485, 492 (6th Cir. 2017) ("*Montgomery County*") (quoting 47 U.S.C. § 544(b)).

Section 626 (47 U.S.C. § 546) governs cable franchise renewals. One of the four exclusive bases on which an LFA can deny a renewal proposal is whether "the operator's [renewal] proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests." 47 U.S.C. § 546(c)(1)(D).

### *C. The City of Eugene's Telecommunications Fee*

The City of Eugene, Oregon, requires that companies providing "telecommunications services" through facilities in the public rights-of-way obtain

a license and pay a license fee equal to seven percent of the revenue generated within the city from "telecommunications activities." Eugene, Or., Code ("ECC") §§ 3.405, 3.415(2). "Telecommunications services" is defined in the Eugene City Code to include telecommunications and broadband services. ECC § 3.005. Cable service is excluded from the Eugene City Code's definition of "telecommunications service" and its telecommunications licensing requirements. ECC §§ 3.005, 3.410(3). While Eugene's telecommunications-related requirements apply to all telecommunications providers, including those that are cable operators, they do not apply to cable services provided by cable operators, or to cable operators that do not provide telecommunications services. *City of Eugene v. Comcast of Or. II, Inc.*, 375 P.3d 446, 535 (Or. 2016) ("*Eugene*") (citing ECC § 3.410(3)).

Both state and federal courts have upheld Eugene's telecommunications ordinance against challenges that federal or state law preempt its fee provisions. In *AT&T Communications of the Pacific Northwest, Inc. v. City of Eugene*, 35 P.3d 1029 (Or. Ct. App. 2001) ("*AT&T Communications*"), the Oregon Court of Appeals rejected arguments that the City's fee was preempted by state law and by 47 U.S.C. § 253. Section 253, added by the Telecommunications Act of 1996, generally prohibits state and local government actions that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate

telecommunications service," but specifically permits state and local governments "to manage the public rights-of-way" and to "require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis," so long as that compensation is publicly disclosed. 47 U.S.C. § 253(a), (c). Finding that AT&T failed to demonstrate that the City's telecommunications ordinance has had any prohibitory effect, the court "conclude[d] that the ordinance does not violate section 253(a) of the Federal Telecommunications Act of 1996." *AT&T Communications* at 1048.

Relying on *AT&T Communications,* other Oregon court cases rejected arguments that Eugene's telecommunications ordinance violated section 253 or 47 U.S.C. § 332(c)(7), also added by the 1996 Act. *Sprint Spectrum v. City of Eugene*, 35 P.3d 327, 328-29 (Or. Ct. App. 2001); *TCI Cablevision v. City of Eugene*, 38 P.3d 269, 270 (Or. Ct. App. 2001); *US W. Commc'ns, Inc. v. City of Eugene*, 37 P.3d 1001, 1002-03 (Or. Ct. App. 2001), *aff'd in relevant part*, 81 P.3d 702 (Or. 2003). In *TCI Cablevision*, the court rejected a cable operator's argument "that the city's registration fee of two percent, when added to the five percent that it already pays under its cable franchise agreement, exceeds the five-percent cap imposed by the federal cable statute," concluding that the City's fee fell within section 622(g)(2)(A)'s exception for fees of "general applicability." *TCI Cablevision*, 38 P.3d at 271-72. Eugene's ordinance has also been upheld against

attack in federal court. *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250 (D. Or. 2002), *aff'd in part, vacated in part and remanded*, 385 F.3d 1236 (9th Cir. 2004), *cert. denied*, 544 U.S. 1049 (2005).

Most recently, in the *Eugene* case, Comcast challenged the City's seven percent telecommunications right-of-way fee. Comcast argued that, because the City was separately charging Comcast a five percent franchise fee on its cable service revenue under its cable franchise, any additional fees imposed on its non-cable services by the City's telecommunications ordinance would exceed the Cable Act's section 622 franchise fee cap. *Eugene* at 536. The Supreme Court of Oregon rejected Comcast's argument, holding that the City's telecommunications right-of-way fee was not a Cable Act franchise fee: "[a] fee is a [Cable Act] franchise fee if it is imposed on a company because it is a cable operator and not for any other reason"; "[t]he city's license fee does not meet that standard. The license fee is imposed on Comcast because it provides telecommunications services over the city's public rights of way." *Id.* at 557-58.

### *D. The Commission's prior orders in the* Section 621 *Proceeding*

While the Commission's orders in the *Section 621* proceeding have touched on a range of issues, those most relevant here are its rulings regarding nonmonetary cable franchise requirements and the Commission's "mixed-use" rule.

**1. The Commission's treatment of nonmonetary franchise requirements and franchise fees**

In 2007, the Commission issued its first order in the *Section 621* proceeding, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 (2007) ("*First Order*") (JA____), *aff'd sub nom. Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008). The *First Order* ruled that "any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap." *First Order* ¶ 105 (JA____). On review, this Court did not address that ruling. *See Montgomery County* at 490 ("[O]ur opinion in *Alliance* analyzed (and approved) only the FCC's interpretation of the term 'incidental' as used in [47 U.S.C.] § 542(g)(2)(D)") (citing *Alliance* at 783).

The Commission issued another notice of proposed rulemaking, seeking "comment on whether it should expand the application of some of the First Order's rules—which applied only to new applicants for a cable franchise—to incumbent cable providers as well." *Montgomery County* at 488. This culminated in a second order and an order on reconsideration, review of which were granted in part and denied in part by this Court. *Section 621*, MB Docket No. 05-311, Second Report and Order, 22 FCC Rcd. 19,633, ¶ 19 (2007) ("*Second Order*) (JA____), *clarified*, 30 FCC Rcd. 810 (2015) ("*Reconsideration Order*") (JA____), *review granted in*

*part and denied in part sub nom. Montgomery Cty. v. FCC*, 863 F.3d 485 (6th Cir. 2017).

The *Second Order* extended the *First Order*'s franchise fee rulings to incumbent cable operators, including its "clarification that any municipal projects requested by LFAs *unrelated* to the provision of cable services that do not fall within the exempted categories in section 622(g)(2) are subject to the statutory 5 percent franchise fee cap." *Second Order* ¶ 11 (emphasis added) (JA____). In the *Reconsideration Order*, the Commission claimed that its interpretation of the term "franchise fee" includes both cable-related and non-cable-related nonmonetary franchise requirements. *Reconsideration Order* ¶ 11-13 (JA____-____).

This Court vacated and remanded the *Second Order*'s ruling that franchise fees included cable-related, nonmonetary franchise requirements. The Court found that "[t]he Second Order says nothing at all in support of this expansion," and that the *Reconsideration Order* wrongly claimed that this issue was already decided by the *First Order*. *Montgomery County* at 491. The Court concluded that the *First Order* "did not make clear that cable-related exactions are franchise fees under § 542(g)(1)" and that its *Alliance* decision never "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)." *Id.* at 490. The Court noted "[t]hat the term 'franchise fee' can include noncash exactions, of course, does not

mean that it necessarily *does* include every one of them." *Id.* at 491. It found that the Commission did not "do the work of actually interpreting" the statute and "has offered no explanation as to why [petitioners'] structural arguments are, as an interpretive matter, incorrect." *Id.* at 491. The Court vacated the orders "to the extent they treat 'in-kind' cable-related exactions as 'franchise fees'." *Id.* at 491-92.

### 2. The Commission's prior "mixed-use" rulings

In the *First Order* (¶ 121, JA____), the Commission ruled that it would be unreasonable for an LFA to refuse to award an additional competitive franchise based on issues related to non-cable services or facilities that do not qualify as a cable system. The Commission added that the definition of "cable system" in section 602(7)(C) "explicitly states that a common carrier [e.g., local exchange carrier] facility subject to Title II is considered a cable system 'to the extent such facility is used in the transmission of video programming . . . .'" *Id.* ¶ 122 (JA____) (quoting 47 U.S.C. § 522(7)(C)). The "mixed use" portion of the *First Order* was not addressed in the *Alliance* case.

The *Second Order* extended the *First Order*'s "mixed-use" ruling to incumbent cable operators, stating that the *First Order*'s ruling depended "upon our statutory interpretation of section 602, which does not distinguish between incumbent providers and new entrants." *Second Order* ¶ 17 (JA____). The

Commission clarified "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." *Id.* ¶ 17 (footnote omitted) (JA____).

The *Second Order* applied to incumbents the *First Order*'s finding that "a cable operator is not required to pay cable franchise fees on revenues from non-cable services." *Id.* ¶ 11 (JA____). But "[t]his finding, of course, does not apply to non-cable franchise fee requirements, such as any lawful fees related to the provision of telecommunications services." *Id.* ¶ 11 n.31 (JA____). The *Reconsideration Order* (¶ 15, JA____) reaffirmed that "LFAs may not use their franchising authority to regulate non-cable services provided by either an incumbent or new entrant."

In *Montgomery County*, this Court rejected the "mixed-use" rulings of the *Second Order* and *Reconsideration Order*. "[The Act] expressly states that [LFAs] may regulate Title II carriers only to the extent they provide cable services." *Montgomery County* at 492 (citing 47 U.S.C. § 522(7)(C)). That this provision does not distinguish between incumbent providers and new entrants "is not an affirmative basis for the FCC's decision in the Second Order to apply the mixed-use rule to incumbent cable operators" that are not Title II carriers. *Id.* at 493. The Court therefore vacated that ruling as applied to non-Title II carriers. *Id.*

### *E. The Commission's* Third Order

The Commission issued another notice of proposed rulemaking to consider whether to (1) "treat cable-related, 'in-kind' contributions required by a franchising agreement as 'franchise fees' subject to the statutory five percent cap on franchise fees," and (2) "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." *Section 621*, Second Further Notice of Proposed Rulemaking, 33 FCC Rcd. 8952, ¶ 1 (2018) ("*Second FNPRM*") (JA____). The Commission also sought comment on whether its rulings in the proceeding, "should be applied to state-level franchising actions and state regulations that impose requirements on local franchising." *Id.* The *Second FNPRM* does not mention the *Eugene* case or suggest that the Commission was considering changing position on non-cable fees.

The Commission's *Third Order* reached four primary conclusions, three of which we address in this brief.[2] *Third Order* ¶¶ 1, 7 (JA____, ____).

#### 1. Nonmonetary, cable-related franchise requirements

The Commission concluded that "cable-related, in-kind contributions required by LFAs from cable operators as a condition or requirement of a franchise agreement are franchise fees subject to [section 622's] statutory five percent cap on

[2] Eugene Petitioners do not address the Commission's fourth conclusion regarding state-level actions but support Anne Arundel Petitioners on that issue.

franchise fees" *Id.* ¶ 7 (JA____). The Commission defined "in-kind, cable-related contributions" as:

> any non-monetary contributions related to the provision of cable services provided by cable operators as a condition or requirement of a local franchise, including but not limited to free or discounted cable service to public buildings, costs in support of PEG access other than capital costs, and costs attributable to the construction of I-Nets. It does not include the costs of complying with build-out and customer service requirements.

*Third Order* ¶ 25 (JA____); 47 C.F.R. § 76.42.

The Commission found that section 622(g)'s "franchise fee" definition provided no basis for excluding cable-related nonmonetary franchise requirements. *Id.* ¶ 11, 14 (JA____, ____). The *Third Order* (¶¶ 15-16, JA____-____) ruled that section 622(g)(2)'s exclusion of pre-Cable Act PEG payments and post-Cable Act PEG "capital costs" from the definition of "franchise fee" suggests that Congress did not intend a general exemption for all cable-related, nonmonetary requirements.

The Commission's exclusion of buildout and customer service requirements from "franchise fee" treatment was not based on the language of section 622.The Commission found including the costs of buildout requirements as franchise fees would be inconsistent with "[t]he statutory framework [that] makes clear that the authority to construct a cable system is granted to the cable operator as part of this

bargain and that the costs of such construction are to be borne by the cable operator." *Id.* ¶ 57 (JA____) (citing 47 U.S.C. § 541(a)(2)(B)).

The Commission distinguished customer service requirements from other cable-related, nonmonetary requirements by explaining that customer service obligations "are regulatory standards that govern how cable operators are available to and communicate with customers." *Id.* ¶ 58 (JA____). It found "no indication [in the statutory text and legislative history] that Congress intended that standards governing a cable operator's 'direct business relation' with its subscribers should count toward the franchise fee cap." *Id.* (quoting H.R. Rep. No. 98-934, at 79).

The Commission also concluded "that the costs associated with the provision of PEG channel capacity are cable-related, in-kind costs that fall within the definition of 'franchise fee,'" but found that "the record is insufficiently developed to determine whether such costs should be excluded from the franchise fee as capital cost under the exemption in section 622(g)(2)(C). *Id.* ¶ 42 (JA____). That issue was deferred "for further consideration." *Id.* ¶ 44 (JA____).

Having concluded that almost all nonmonetary, cable-related franchise requirements are "franchise fees," the Commission recognized that "cable operators and LFAs must assign a value to them." *Id.* ¶ 59 (JA____). The Commission ruled that fair market value "is the most reasonable valuation for in-

kind contributions because it is easy to ascertain," and "best adheres to Congressional intent." *Id.* ¶ 61 (JA____).

### 2. Mixed-Use Rule

The Commission concluded "that the mixed-use rule prohibits LFAs from regulating under Title VI the provision of any services other than cable services offered over the cable systems of incumbent cable operators, except as expressly permitted in the Act." *Third Order* ¶ 64 (JA____). Concluding that *Montgomery County* "left undisturbed the application of the rule to incumbent cable operators that are also common carriers" (*Third Order* ¶¶ 66-71, JA____-____), the Commission extended its ruling to non-common carrier incumbent providers. The Commission pointed to section 624, 47 U.S.C. § 544, which provides that "'[an LFA] *may not regulate* the services, facilities, and equipment provided by a cable operator *except to the extent consistent with [Title VI of the Act]*'" and that LFAs "'may not . . . establish requirements for video programming or other *information services*.'" *Id.* ¶ 73 (JA____) (quoting 47 U.S.C. § 544(a), (b)(1)).

Because the Commission has determined that broadband internet access service is an information service, *see Mozilla Corp. v. FCC*, 940 F.3d 1, 18 (D.C. Cir. 2019), it concluded that section 624(b)(1) "precludes LFAs from regulating broadband Internet access provided via the cable systems of incumbent cable operators that are not common carriers." *Third Order* ¶ 74 (JA____).

### 3. Preemption of state and local regulation of non-cable services pursuant to non-Cable Act sources of authority.

The Commission "expressly preempt[ed] any state or local requirement, whether or not imposed by [an LFA], that would impose obligations on franchised cable operators beyond what Title VI allows." *Id.* ¶ 80 (JA____). As an example of the kind of requirements it was preempting, the Commission singled out Eugene's seven percent right-of-way fee, and "repudiate[d]" the Supreme Court of Oregon's decision in *Eugene*. *Third Order* ¶ 105 (JA____).

According to the *Third Order*, "Title VI establishes a framework that reflects the basic terms of a bargain—a cable operator may apply for and obtain a franchise to access and operate facilities in the local rights-of-way, and in exchange, a franchising authority may impose fees and other requirements as set forth and circumscribed in the Act." *Third Order* ¶ 84 (JA____). Because "Congress was well aware that 'cable systems' would be used to carry a variety of cable and non-cable services," the Commission reasoned that "Congress could have, if it wanted, provided significant leeway for states, localities, and franchising authorities to tax or provide other regulatory restrictions on a cable system's provision of non-cable services in exchange for the cable operator receiving access to the rights-of-way." *Id.* ¶ 88 (JA____). Instead, the Commission concluded that Congress intended the Cable Act to be the exclusive means by which local

governments can regulate cable operators' use of rights-of-way, including the use of rights-of-way to provide non-cable services. *Id.* ¶¶ 83-84 (JA____-____).

The Commission rejected arguments that broadband or telecommunications right-of-way fees are not imposed on a cable operator "solely because of their status as such" under section 622(g)(1). *Id.* ¶ 91 (JA____). Instead, it read this phrase "as protective language intended to place a ceiling on any sort of fee that [an LFA] might impose on a cable operator *qua* cable operator or *qua* franchisee—that is, any fee assessed in exchange for the right to construct, manage, or operate a cable system in the rights-of-way." *Id.*

## SUMMARY OF ARGUMENT

***The* Third Order*'s "in-kind contribution" ruling.***

By looking only to section 622(g), and not to other Cable Act provisions, the *Third Order*'s ruling on nonmonetary, cable-related franchise requirement fails to "interpret the statute 'as a symmetrical and coherent regulatory scheme.'" *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)). The Act expressly authorizes nonmonetary, cable-related franchise requirements, subject to statutory limitations independent of the section 622 franchise fee cap. Where Congress intended such franchise requirements to be subject to other parts of the statute, it stated so directly, as it did in subjecting PEG and I-Net channel capacity

requirements to the provisions of sections 621 and 646. The non-cable-related franchise requirements at issue in *Montgomery County*, in contrast, are not authorized or otherwise limited under the statute.

By superimposing section 622's fee cap on top of the explicit statutory limits on authorized cable-related requirements, the *Third Order* perversely imposes greater restrictions on the *cable-related* franchise requirements Congress authorized than on *non-cable-related* franchise requirements. The *Third Order* transforms Congress's clear authorization of PEG and I-Net requirements into a mere listing of possible options for how LFAs might spend their monetary franchise fees.

The *Third Order* conflicts with the subscriber bill and cost itemization provisions of sections 622(c) and 623, as well as the Commission's rules implementing those provisions. It also conflicts with section 622(i)'s prohibition on federal intrusion into how LFAs can spend franchise fee revenues.

By carving out buildout and customer service requirements from the scope of its ruling, the *Third Order* highlights its inconsistency with the Act. These requirements, just like other cable-related requirements, are not franchise fees because they are authorized and governed by other express provisions of the Act.

Even if nonmonetary, cable-related franchise requirements can be considered franchises fees, they must be valued at actual cost, not fair market value, because that is all the operator pays for the requirements.

***The* Third Order*'s preemption ruling.***

Departing from the Commission's prior orders in the *Section 621* docket, the *Third Order* preempts state and local regulation of cable operators' non-cable services pursuant to non-Cable Act sources of authority. This change in course was neither included in the Commission's notice of proposed rulemaking, nor adequately explained in the *Third Order*. And ultimately, the statute provides no basis for such sweeping preemption.

The *Third Order*'s preemption ruling takes misguided aim at Eugene's right-of-way fee on broadband providers, which state and federal courts have upheld. The Cable Act defines franchise fees as those imposed on cable operators "solely because of their status as such." 47 U.S.C. § 542(g)(1). Eugene's right-of-way fee applies to all broadband providers, regardless of whether they also may also be cable operators. It applies only to those cable operators that also provide relevant non-cable services, and it reaches only those cable operators' non-cable service revenues. Eugene's fee is therefore not imposed on cable operators solely—or even partly—because of their status as cable operators. Furthermore, the Cable Act excludes from the franchise fee definition fees of "general applicability" that are

not "unduly discriminatory against cable operators." 47 U.S.C. § 542(g)(2)(A). A uniform right-of-way fee on the broadband service revenues of all broadband providers satisfies the plain language of this exception.

The Commission's conclusion that Cable Act franchises are the exclusive means of state and local regulation of non-cable-related activities of cable operators is also wrong. The Fifth Circuit rejected a nearly identical Commission assertion of preemption authority, explaining that local authority predates, and does not depend on, the Cable Act. *Dallas* at 348. There is no inconsistency with local governments granting cable franchises with respect to cable services while also enforcing generally applicable, competitively neutral right-of-way compensation and management requirements on all broadband providers (including those that also happen to be cable operators). The *Third Order* errs by giving cable operators a discriminatory exemption from generally applicable non-cable fees that their broadband competitors do not enjoy. Moreover, court precedent bars the Commission from basing its preemption on a general "policy of nonregulation of information services" *Third Order* ¶¶ 80, 102 (JA____, ____).

The record refutes the Commission's assumption that fees like Eugene's right-of-way fee adversely affect broadband deployment. Without benefit of the *Third Order*'s preemption, cable operators have developed the most widely

deployed and robust broadband networks in the nation, and Eugene enjoys broadband deployment far above the national average.

## ARGUMENT

### I. STANDARD OF REVIEW

Challenges to the Commission's statutory interpretation are subject to the two-step *Chevron* framework. The initial question is whether "Congress has directly spoken to the precise question at issue"; if so, "that is the end of the matter." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). *Accord Clark Reg'l Med. Ctr. v. U.S. Dep't of Health & Human Servs.*, 314 F.3d 241, 245 (6th Cir. 2002). If the "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

Under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, this Court cannot uphold the *Third Order* if it finds that the Commission "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 US 29, 43 (1983).

## II. THE COMMISSION'S "IN-KIND CONTRIBUTION" RULING IS CONTRARY TO LAW.

### *A. The Commission's "in-kind contribution" ruling is contrary to the text and structure of the Cable Act.*

#### 1. Nonmonetary, cable-related franchise requirements authorized or permitted by other Cable Act provisions are not also subject to the section 622 franchise fee cap.

The Commission's "in-kind contributions" ruling rests solely on its reading of section 622(g), *Third Order* ¶¶ 8, 15, 17 n.77, 26, 35 n.147, 61 (JA____, ____, ____, ____, ____, ____), which it identifies as the "key provision" in the statute, *id.* ¶ 11 (JA____). But nothing about section 622's placement in the Cable Act's structure, or its language for that matter, suggests it is any more "key" than other Cable Act provisions, like sections 611 or 626. "'[I]n expounding a statute, [a court] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 51 (1987) (quoting *Kelly v. Robison*, 479 U.S. 36, 43 (1986)). "A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,'. . . and 'fit, if possible, all parts into an harmonious whole.'" *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 (quoting *Gustafson,* 513 U.S. at 569 and *FTC* v. *Mandel Bros., Inc.,* 359 U.S. 385, 389 (1959)).

These established principles of statutory construction are particularly apt here. Various sections of the Cable Act outside of section 622 explicitly authorize, subject to express statutory standards, the very nonmonetary, cable-related franchise requirements that the Commission would now, for the first time, subject to the section 622 franchise fee cap. But section 622 should not to be read as swallowing up large swaths of the Act. Its proper reach cannot be understood in isolation, but only in the context of these other Cable Act provisions.[3] *Brown & Williamson Tobacco Corp.*, 529 U.S. at 142 (rejecting Food and Drug Administration jurisdiction over tobacco products as a "drug" and "device" under 21 U.S.C. §§ 321(g)-(h) after "[c]onsidering the [Food, Drug, and Cosmetic Act] as a whole," including "[v]arious provisions of the Act").

That larger context distinguishes the *Third Order* from the Commission's prior ruling on *non-cable-related* franchise requirements, which the Cable Act does not authorize. This Court recognized as much in *Montgomery County*, stating that while "the term 'franchise fee' can include noncash exactions," that "of course, does not mean that it necessarily *does* include every one of them." *Montgomery County* at 491. Unlike the case with non-cable-related franchise requirements at

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[3] Indeed, the *Third Order* ( ¶¶ 57, 58, JA____, ____) recognizes the importance of the "structure" and "legislative history" of the Act with respect to buildout and customer services requirements, but the principle mysteriously vanishes when the *Third Order* addresses PEG capacity and I-Net requirements.

issue in *Montgomery County*, the Cable Act specifically authorizes, and places independent limits on, PEG and I-Net franchise requirements through the express provisions of sections 611, 621(a)(4)(B), 621(b)(3)(D), and 626.

Section 611, for instance, authorizes LFAs to require a cable operator to designate channel capacity for PEG and I-Net use and to require rules for the use of that capacity. 47 U.S.C. § 531(b). LFA authority to impose those franchise requirements is constrained only "to the extent provided for in this section" and, in the context of franchise renewals, "subject to section 546 of this title [section 626 of the Cable Act]." 47 U.S.C. § 531(a), (b). Section 621 specifies that LFAs may "require adequate assurance that the cable operator will provide adequate [PEG] access channel capacity, facilities, or financial support," and that they may require I-Nets as a condition of an initial, renewed, or transferred franchise. 47 U.S.C. § 541(a)(4)(B), (b)(3)(D). While these provisions reference limitations in other provisions of the Act, none references section 622.

The Commission attempts to avoid the clear implication of the Act's structure relating to PEG and I-Net system capacity requirements with the circular reasoning that Congress "could have explicitly excluded all costs related to PEG and I-Nets if it had intended they not count toward the cap." *Third Order* ¶ 20 (JA____) (footnote omitted). But that begs the question whether Congress intended the cost or value of nonmonetary, cable-related franchise requirements it explicitly

authorized LFAs to impose to be considered a "tax, fee, or assessment" within the meaning of section 622. Given that Congress stated that PEG serves two of the Act's statutory goals, 47 U.S.C. § 521(2), (4), and that it authorized and limited PEG and I-Net capacity requirements in other sections of the Act, 47 U.S.C. §§ 531(b), 541(a)(4)(B), it strains credulity to suggest that Congress also wanted to subject those requirements to the limitations of those other provisions of the Act *and* the fee cap in section 622.

The Commission misunderstands the purpose of section 622(g)(2)(C)'s exclusion of PEG "capital costs" from the "franchise fee" definition in post-Cable Act franchises and its relationship with section 622(g)(2)(B)'s exclusion of pre-Cable Act PEG payments from that definition. *See Third Order* ¶¶ 15, 18 (JA____, ____). The distinction Congress drew in section 622(g)(2)(C) was *not* between PEG capital costs and all other nonmonetary, cable-related franchise requirements; it was between PEG capital costs and other, non-capital monetary PEG support payments, which section 622(g)(2)(B) excludes from the franchise fee definition for pre-Cable Act franchises.

Because the "payments" referred to in the section 622(g)(2)(B) exception would otherwise fall within the section 622(g)(1) franchise fee definition, section 622(g)(2)(B) was intended to grandfather pre-Cable Act franchise requirements for monetary PEG support payments. *Accord* 47 U.S.C. § 557 (generally

grandfathering pre-Cable Act franchises). That, in turn, necessitated the 622(g)(2)(C) exception, which clarifies that, although monetary payments for PEG operating costs would count as franchise fees in post-Cable Act franchises, costs incurred by cable operators for PEG capital costs would continue to not count towards the section 622 franchise fee cap. The Commission is therefore wrong to argue that section 622(g)(2)(C) would be superfluous if non-monetary franchise requirements "were not franchise fees in the first place." *See Third Order* ¶ 18 (JA____). Absent section 622(g)(2)(C), the PEG-related exception for pre-Cable Act franchises in section 622(g)(2)(B) could be read to imply that all PEG-related payments count as franchise fees in post-Cable Act franchises.

The *Third Order*'s reading of section 622 is also at odds with section 626's formal franchise renewal process. That process imposes comprehensive procedural and substantive constraints on LFAs, including an exclusive list of four bases on which a renewal proposal can be denied. 47 U.S.C. § 546(c)(1)(A)-(D), (d). Neither franchise fees nor section 622's fee cap is mentioned in section 626.

By requiring LFAs to make cable franchise renewal decisions based on whether "the operator's proposal is reasonable to meet the future cable-related community needs and interests, *taking into account the cost of meeting such needs and interests*," 47 U.S.C § 546(c)(1)(D), (d) (emphasis added), the Act permits LFAs to adopt nonmonetary, cable-related franchise requirements, but prevents

excessively costly cable-related franchise requirements.[4] As this Court has held, section 626 requires LFAs "to balance the community's need for a certain cable service against the cost of providing that service." *Union CATV v. City of Sturgis*, 107 F.3d 434, 440 (6th Cir. 1997).

The *Third Order* (¶ 26, JA____) ignores section 626's cable operator cost protections and incorrectly states that LFAs could require "unlimited free or discounted cable services" if cable-related franchise requirements are not constrained by the section 622 franchise fee cap. Although the Commission may prefer a revenue-based constraint on cable-related franchise requirements, it cannot displace Congress's instruction that LFAs instead "balance" community needs against the cost to providers. *Union CATV*, 107 F.3d at 440.

The Commission's interpretation of the Act as imposing additional—as opposed to distinct—federal restrictions on nonmonetary, cable-related franchise requirements also conflicts with the text and structure of the Cable Act in several other respects.

*First*, under the Commission's reading of section 622, the other Cable Act provisions authorizing specific cable-related franchise requirements do little more

[4] Note that section 626 does not permit an LFA to deny a renewal proposal for failing to include obligations *unrelated* to cable-related needs and interests. This distinguishes cable-related requirements from the non-cable-related requirements this Court concluded can be franchise fees in *Montgomery County*.

than offer options as to how LFAs might spend their monetary franchise fees—options that would exist even without those provisions. As the *Third Order* recognizes (¶ 61 n.242, JA____), LFAs always have the option to use franchise fee revenues to purchase what they otherwise could obtain through a franchise requirement (or anything else). For instance, if Congress intended for I-Net requirements to be subject to the section 622 franchise fee cap, there would be no need to expressly authorize such requirements in section 611. Rather, they would be no different than a non-cable-related franchise requirement that could be offset against monetary franchise fee payments or purchased directly with franchise fee revenues.

*Second*, the *Third Order* would perversely construe the Cable Act as imposing *greater* restrictions on nonmonetary, *cable*-related franchise requirements that Congress explicitly authorized than on *non-cable*-related franchise requirements that the Act neither authorizes nor permits. PEG-related requirements, for example, would be subject to both the section 622 franchise fee cap and section 626's "taking into account the cost" limitation, 47 U.S.C. § 546(c)(1)(D). But a *non*-cable-related requirement such as "library parking at Verizon's facilities" (*First Order* ¶ 43, JA____) would be constrained only by the section 622 franchise fee cap. Given Congress's explicit endorsement and

authorization of PEG and I-Net related requirements in the Cable Act,[5] the statute cannot plausibly be read as imposing *greater* restrictions on cable-related franchise requirements than on non-cable-related franchise requirements.

*Third*, the *Third Order* creates an irreconcilable inconsistency between section 626's "reasonable cost" restrictions on cable-related franchise requirements and section 622(i)'s authorization of LFAs to charge the full five percent in franchise fees. The Commission incorrectly claims that its ruling makes sense even in light of section 626's directive for LFA's to take costs into account. It argues an LFA could identify the least expensive franchise requirements to fulfill its section 626 "reasonable cost" obligation. But that obligation would be a distinction without a difference under the Commission's interpretation because section 626(i) would still entitle the LFA to collect the full five percent franchise fee. The Commission's interpretation therefore makes superfluous Section 626's directive that LFAs take cost into account when considering local needs and interests.

The Commission claims that "the community needs assessment in section 626 also accounts for items that are not in-kind contributions subject to the franchise fee cap, such as build-out requirements," *Third Order* ¶ 21 (JA____), but section 626 draws no distinction between franchise requirements subject to the section 622 fee cap and those that are not. Congress's general instruction that

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[5] 47 U.S.C. § 521(2), (4). *See* H.R. Rep. No. 98-934, at 19.

LFAs "tak[e] into account the cost of meeting [cable-related community] needs and interests," *id.*, cannot be read as requiring that, while all franchise requirement costs must be balanced against cable-related needs and interests, all except for buildout and customer service requirements must also be specifically calculated and offset against section 622's franchise fee cap.

*Fourth*, the *Third Order* is inconsistent with section 622(i)'s prohibition on federal regulation of state or local governments' use of franchise fee payments. Prior to the Cable Act, Commission regulations had restricted LFAs' use of franchise fee revenue to cable-related uses, but the Act invalidated those regulations, making clear that LFAs were free to spend cable franchise fees for purposes unrelated to cable. *See* H.R. Rep. No. 98-934, at 65. It would be contradictory for Congress to have eliminated federal restrictions on LFAs' use of franchise fee proceeds for non-cable related purposes yet simultaneously to have required LFAs to pay for most cable-related franchise requirements through franchise fee offsets. Requiring LFAs to choose between using franchise fees for cable-related purposes or forfeiting the ability to impose cable-related franchise requirements that the Act endorses would empty section 622(i) of meaning.

**2. The Cable Act and the Commission's own regulations consistently treat franchise fees and non-monetary franchise requirements as distinct and separate obligations.**

The *Third Order* also cannot be reconciled with numerous other provisions of the Cable Act and Commission regulations. One example is section 622(c), which allows cable operators to itemize separately three categories of expenses on subscriber bills. Section 622(c) explicitly differentiates between "[t]he amount of the total bill assessed" (1) "as a franchise fee," and (2) "to satisfy any requirements imposed on the cable operator by the franchise agreement to support [PEG] channels or the use of such channels." 47 U.S.C. § 542(c)(1), (2). *Accord* 47 C.F.R. § 76.985(a)(1), (2). Unless one assumes that Congress intended to authorize deceptive billing practices by sanctioning the double-counting of PEG costs and franchise fees on subscribers' bills, this statutorily-mandated separate categorization of PEG requirement costs and franchise fees cannot be squared with the *Third Order*'s suggestion (¶ 28, JA____) that Congress intended for all PEG-related costs to fall under the definition of franchise fee except for the exceptions of section 622(g)(2)(B) and (C).

Another example is section 623, which is the Cable Act's rate regulation provision. Section 623 specifies the factors the Commission must take into account in setting rates for the basic service tier. It similarly lists franchise fees as a cost separate and distinct from the cost of non-monetary franchise requirements. 47

U.S.C. § 543(b)(2)(C)(v)-(vi). The *Third Order* (¶ 30, JA____) asserts that "section 623 does not indicate that Congress understood these categories to be mutually exclusive." But section 623 "indicate[s]" precisely that: *all* of the other categories listed in section 623(b)(2)(C)(i)-(vii) are mutually exclusive.

The *Third Order* cannot explain how these factors could be considered as overlapping yet also separately itemized, without double-counting the costs attributable to each. The Commission argues instead that both categories are necessary, despite their overlap, because some cable-related requirements are not franchise fees under the *Third Order* (¶ 30, JA____). But if that were what Congress had intended, it could have directed the Commission to consider both franchise fees and the costs of those franchise requirements as not being subject to section 622's franchise fee cap. Instead, Congress treated *all* authorized non-monetary PEG franchise requirements as a separate type of cost, distinct from the franchise fee.

The Commission's regulations on cable rates and accounting similarly distinguish between franchise fees and the costs of non-monetary franchise requirements, without differentiating between requirements that are subject to the section 622 franchise fee cap and those that are not. 47 C.F.R. § 76.922(f)(ii), (iii) (separately identifying "[f]ranchise fees" and the "[c]osts of complying with franchise requirements, including costs of providing [PEG] access channels as

required by the franchising authority"); 47 C.F.R. § 76.924(c) (distinguishing between "franchise fees" and the "costs of franchise requirements" for certain accounting practices); 47 C.F.R. § 76.925 (defining "Costs of franchise requirements" to include various costs related to PEG access and I-Nets). The *Third Order* does not address these Commission regulations that consistently distinguish between franchise fees and the costs of cable-related franchise requirements.[6]

Simply put, the *Third Order*'s redefinition of non-monetary, cable-related franchise requirements as a "franchise fee" cannot be squared with the language of section 622(c) or section 623 of the Act, or with the Commission's own rules implementing those sections.

**3. The legislative history confirms that Congress intended franchise fees to apply only to monetary payments.**

The Commission wrongly claims that the legislative history "makes no distinction . . . between monetary and nonmonetary payments." *Third Order* ¶ 17 (JA____). The House Report for the 1984 Cable Act explains that "[i]n general, this section [section 622] defines as a franchise fee *only monetary payments* made by the cable operator, and *does not include as a 'fee' any franchise requirements*

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[6] The issue was brought to the Commission's attention. Alliance for Communications Democracy, et al., Comments at 11-12 (JA____-____).

*for the provision of services, facilities, or equipment*." H.R. Rep. No. 98-934, at 65 (emphasis added).

Moreover, the House Report's discussion of the section 626's formal renewal process explains that "in assessing the costs under [section 626(c)(1)(D)], 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." *Id.* at 74. But if permissible non-monetary franchise requirements were subject to the five percent franchise fee cap, there would be no reason to undertake these "important considerations."

### *B. The Commission's inconsistent treatment of cable-related franchise requirements authorized by the Cable Act is arbitrary and capricious.*

The Commission's conclusion that franchise buildout and customer service requirements are not franchise fees is correct, but it provides no rational basis for exempting these, but not other, non-monetary franchise requirements from the franchise fee cap. Buildout requirements are governed by 47 U.S.C. § 541(a)(3) and § 541(a)(4)(A). Customer service requirements are authorized by 47 U.S.C. § 552(a) and § 552(d)(2). PEG and I-Net capacity requirements are likewise explicitly authorized and limited by the Act. 47 U.S.C. §§ 531, 541, 546. None of these requirements should therefore be subject to the section 622 fee cap.

The Commission's claim that the statute provides for unique treatment of buildout requirements (*Third Order* ¶ 57, JA____) (citing 47 U.S.C. § 542(a)(2)(B)), is misplaced. While it is appropriate for the Commission to consider the "statutory framework" and "structure," *id.*, it is arbitrary to do so with respect to buildout requirements while concluding that only section 622(g) is "pertinent" to determining whether PEG and I-Net requirements are franchise fees. Moreover, the one provision of the Cable Act on which the Commission relies—section 621(a)(2)(B), 47 U.S.C. § 541(a)(2)(B)—lends no support to its claim that the Act uniquely carves out buildout requirements from the franchise fee definition. That provision merely makes clear that the cable operator, not the pre-existing easement holder or the subservient property owner, is responsible for the costs of cable facilities built on the compatible easements that the Act entitles the operator to use. It does not, as the Commission claims (*Third Order* ¶ 57, JA____), specify "that cable operators, not LFAs, are responsible for the cost of building out cable systems." Section 621(a)(2)(A)-(C) applies only to cable operators' use of easements dedicated for compatible uses, not to LFAs' public rights-of-way. Section 621(a)(2)(B) therefore refers to the relationship between a cable operator and the existing easement holder and the underlying property owner (typically, a private property owner), *not* the relationship between operator and the LFA.[7]

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[7] *See Cable Holdings of Ga. v. McNeil Real Estate Fund VI*, 953 F.2d 600, 609-10

The *Third Order* likewise fails to provide a rational basis for distinguishing customer service requirements. The Commission defines "in-kind" contributions as "payments consisting of something other than money, such as goods *and services*." *Third Order* ¶ 12 (JA____) (emphasis added). By that definition, the cost or value of customer service requirements are "in-kind" "services" no different from the cost or value of other cable-related services the Cable Act permits LFAs to include as franchise requirements. The Commission is certainly correct that the "statutory text and legislative history" provide no indication that Congress intended customer service requirement to count towards the franchise fee cap (*Third Order* ¶ 58, JA____), but that is equally true of the other cable-related franchise requirements authorized under the Cable Act that the *Third Order* classifies as a "franchise fee."

Ultimately, the Cable Act does not permit the Commission to use the "franchise fee" definition as a vehicle to promote those cable-related franchise requirements it favors, and discourage those it disfavors. The Act "establish[es] guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems," 47 U.S.C. § 521(3), specifying that LFAs—*not* the Commission—are to determine what cable-related requirements to include in a

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(11th Cir. 1992) (explaining that interpreting "easements . . . dedicated for compatible uses" in 47 U.S.C. § 541(a)(2) as easements voluntarily dedicated by a private property owner to general utility use "eliminate[s] these substantial Fifth Amendment concerns").

franchise. *Union CATV*, 107 F.3d at 441 ("The Cable Act recognizes that municipalities are best able to determine a community's cable-related needs and interests."); *accord* H.R. Rep. No. 98-934, at 24. The Cable Act's language, structure, and purposes prevent the Commission from substituting its judgment about what constitutes reasonable local cable-related needs and interests for those of LFAs.

### *C. If cable-related franchise requirements are subject to the franchise fee cap, they must be valued at actual costs.*

The *Third Order*'s fair market valuation of nonmonetary, cable-related requirements fails to satisfy the Commission's obligation to "supply a reasoned basis for its decision," *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 764 (6th Cir. 1995) (citing *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994)), *motion to recall mandate denied sub nom. BellSouth Corp. v. FCC*, 96 F.3d 849 (6th Cir. 1996), and therefore cannot stand. Aside from repeating that "Congress adopted a broad definition of franchise fee [in section 622] to limit the amount that LFAs may exact from cable operators," *Third Order* ¶ 61 (JA____), the *Third Order* contains little explanation of the Commission's reasoning. The Commission states only that fair market value "is easy to ascertain" and represents what LFAs would otherwise pay to obtain those benefits. *Id.* Neither point is relevant under the statute.

Instead, section 622(a) clearly provides that the franchise fee is to be measured by what is paid by a cable operator, *not* the price an LFA would otherwise pay to purchase the franchise requirement's benefit in the market. 47 U.S.C. § 542(a). The actual incremental cost the cable operator incurs in fulfilling nonmonetary, cable-related franchise obligations is the only burden such obligations impose on an operator. Therefore, to the extent that nonmonetary, cable-related franchise requirements can be considered a "tax, fee, or assessment" under the Cable Act (which, we argue, they cannot), they must be valued at actual costs.

## III. THE COMMISSION'S PREEMPTION OF NON-CABLE ACT SOURCES OF STATE AND LOCAL AUTHORITY OVER NON-CABLE SERVICES IS CONTRARY TO LAW.

### *A. The Commission's preemption ruling has no valid basis under the statute.*

#### 1. Non-cable right-of-way fees like Eugene's are not "franchise fees" under the plain language of section 622.

Section 622 defines franchise fees as "any tax, fee, or assessment of any kind imposed . . . on a cable operator or cable subscriber, or both, *solely because of their status as such*." 47 U.S.C. § 542(g)(1) (emphasis added). Generally applicable right-of-way license fees, like the right-of-way fee on broadband providers upheld by the Oregon Supreme Court in *Eugene*, are not imposed on an entity "solely because" of its status as a cable operator. *Eugene* at 462-63.

Eugene's seven percent right-of-way fee applies to all providers of telecommunications or broadband services, regardless of whether they also may be cable operators. If a cable operator chooses not to provide telecommunications or broadband services, it would not be subject to Eugene's right-of-way fee. Eugene's fee also does *not* apply to cable service revenues; it applies only to an entity's telecommunications/broadband service revenues. Thus, Eugene's fee does *not* apply to cable operators *qua* cable operators; it applies only to telecommunications/broadband service providers in their capacity as such. Eugene's fee is therefore not imposed on cable operators solely—or even partly—because of their status as cable operators. The imposition of these types of generally applicable right-of-way fees on broadband service providers therefore does not constitute a "franchise fee" within the plain language of section 622(g)(1) and thus is not preempted by section 636(c).

The Commission's responses to this argument in the *Third Order* are unavailing. First, the Commission says the phrase, "solely because of their status as such," encompasses "fee[s] that a franchising authority might impose on a cable operator *qua* cable operator or *qua* franchisee." *Third Order* ¶ 91 (JA____). But as just explained, Eugene's fee is the antithesis of that description. Second, the Commission emphasizes that Congress understood that non-cable services may "be supplied over the same cable facilities." *Id.* But again, this only highlights the error

in the Commission's reasoning. Despite this awareness, Congress defined franchise fees to include only those fees imposed on a cable operator "solely because" of its status as a cable operator, *not* as any fee imposed on a cable operator because of its status as *something else*, such as a provider of telecommunications or broadband service.

That should end the matter, but the Commission goes on to try to discredit the reasoning of the *Eugene* court by inaccurately asserting that the decision is an outlier among courts that have addressed the "franchise fee" issue. *Third Order* ¶ 105 & n.391 (JA____). None of the cases the Commission relies on concerns the subject at issue in *Eugene* or in the *Third Order*'s preemption ruling: the imposition of a uniform fee on all providers of telecommunications or broadband services using the rights-of-way, whether or not they are also cable operators. Rather, each case the *Third Order* cites involved fees imposed on a cable operator's non-cable service revenues through the *cable franchising process*. *Comcast Cable of Plano, Inc. v. City of Plano,* 315 S.W.3d 673, 675 (Tex. App. 2010) (suit for "franchise fees allegedly due under a [cable] franchise agreement"); *City of Chicago v. Comcast Cable Holdings, LLC*, 231 Ill.2d 399, 401 (Ill. 2008) (suit "alleg[ing that] the [cable operator] defendants violated their cable franchise renewal agreements by discontinuing payment of a portion of a 5% franchise fee required by the agreements"); *City of Minneapolis v. Time Warner Cable, Inc.*, No.

CIV.05-994 ADM/AJB, 2005 WL 3036645, at *1 (D. Minn. Nov. 10, 2005) (suit alleging alleged breach of a "Franchise Agreement" that granted permission "to use public rights-of-way to provide cable services"); *City of Chicago v. AT&T Broadband, Inc.*, No. 02-C-7517, 2003 WL 22057905, at *1 (N.D. Ill. Sept. 4, 2003) (suit for failure to comply with cable franchise agreement), *vacated on jurisdictional grounds*, 384 F.3d 901 (7th Cir. 2004); *Parish of Jefferson v. Cox Commc'ns La., LLC,* No. 02-3344, 2003 WL 21634440, at *1 (E.D. La. July 3, 2003) (suit for alleged breach of a "Cable Television Franchise").

Even if a fee like Eugene's could plausibly be characterized as being applied to a cable operator "solely because" of its status as such (which it cannot), Congress also expressly excluded from section 622(g)'s definition of franchise fees "any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers)." 47 U.S.C. § 542(g)(2)(A). Imposing a uniform right-of-way fee on the telecommunications and broadband service revenues of all telecommunications and broadband service providers—which is what Eugene's fee does—satisfies the plain language of this exception.

The *Third Order* nevertheless claims that such fees are unduly discriminatory because they "are assessed on cable operators *in addition to* the five

percent franchise fees such operators must pay for use of public rights-of-way." *Third Order* ¶ 92 n.353 (JA____). But that cannot be the meaning of "unduly discriminatory" under section 622(g)(2)(A). By definition, every fee "of general applicability" exempt from the definition of "franchise fee" can be imposed on a cable operator "in addition" to the section 622 franchise fee. While it may be unduly discriminatory to impose a different broadband fee on cable operators than the fee imposed on other broadband service providers, it is not at all discriminatory to impose the same broadband fee on all providers of broadband service. And that is all Eugene's ordinance does. *Eugene* at 450-51.

The Commission is also wrong to claim that, under Eugene's ordinance, "cable operators must pay *twice* for access to rights-of-way . . . whereas non-cable providers must pay only once for such access." *Third Order* ¶ 92 n.353 (JA____) (citing NCTA Mar. 13, 2019 *Ex Parte* at 13 (JA____)). Rather, under Eugene's ordinance, cable operators and non-cable operators operate under the same, nondiscriminatory set of rules: (1) a Cable Act franchise fee that applies to all entities that qualify as cable operators, which applies only to their cable service revenues; and (2) a separate right-of-way fee that applies to all entities providing telecommunications or broadband services over the rights-of-way, which applies only to their telecommunications/broadband service revenues.

#### 2. Section 636(c) does not provide the Commission with authority to preempt non-Cable-Act-based state and local requirements.

Section 636(c) contains an express preemption provision, and "matters beyond that reach are not pre-empted." *Cipollone v. Liggett Grp.*, 505 U.S. 504, 517 (1992). Section 636(c) preempts only those state and local actions that are "inconsistent with" the Act. 47 U.S.C. § 556(c). State and local regulation of non-cable services pursuant to non-Cable Act sources of authority do not fit that description.

Both the Cable Act and the Communications Act evince Congress's intent to preserve state and local authority to manage and receive compensation for the use of public rights-of-way to provide non-cable services. Section 636(c) is preceded by a savings clause providing that "[n]othing in [the Cable Act] shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter." 47 U.S.C. § 556(a). Section 253(c) of the Communications Act, added in 1996, specifically protects the ability of state and local governments "to manage the public rights-of-way" and "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the public-rights-of-way on a nondiscriminatory basis." 47 U.S.C. § 253(c). Thus,

Congress intended to preserve state and local governments' authority to regulate cable operators' provision of non-cable services under non-Cable Act sources of authority, and it is not "inconsistent with [the Communications Act]" for them to do that. 47 U.S.C. § 556(c).

The *Third Order* fails to identify any conflict with federal law. The Commission cites to the provisions in section 621(a) that authorize LFAs to grant franchises and specify that these franchises authorize the construction of cable systems over public rights-of-way and certain easements. *Third Order* ¶ 85 (JA____) (citing 47 U.S.C. § 541(a)(1), (2)). These authorizations, however, do not support the Commission's conclusion that cable franchises are the exclusive means for state and local governments to regulate a cable operator's non-cable-related activities. There is no inherent inconsistency with state and local governments granting cable franchises with respect to cable services while also enforcing generally applicable, competitively neutral right-of-way compensation and management requirements on all telecommunications and broadband service providers, including those that also happen to be cable operators.

The *Third Order*'s reliance on section 624(b) is equally misplaced. *See id.* ¶¶ 73-77, 86, 99, 106 (JA____-____, ____, ____, ____). That provision illustrates Congress's awareness that non-cable services may be provided over a cable system, but on its face section 624(b) addresses only cable franchise requirements,

not generally applicable non-cable requirements. 47 U.S.C. § 544(b). It prohibits an LFA from conditioning the grant of a cable franchise on requirements related to other information services. But, if a cable operator chooses to provide non-cable services, section 624(b) does not exempt that operator from all state and local regulation of those non-cable services.

The Commission points to statements in the Cable Act's legislative history indicating Congress's desire "to maintain the then-existing *status quo* concerning regulatory jurisdiction over cable operators' non-cable services, facilities, and equipment." *Third Order* ¶ 65 (JA____); *see also id.* ¶¶ 71, 76, 95 (JA____, ____, ____). That proposition supports our position, not the Commission's. Prior to the Cable Act, local governments had authority over entities using the rights-of-way to provide non-cable services and charged fees for the use of the rights-of-way. The Fifth Circuit explained this history in *Dallas*, and rejected a similar Commission argument "that '[a]fter the 1984 Cable Act added Title VI to the Communications Act, section 621 became the exclusive source of local franchising authority over cable operators.'" *Id.* at 348 (quoting the Commission).

*Dallas* concerned open video system ("OVS") operators, which are exempt from a number of Cable Act obligations imposed on cable operators, including the franchise requirement of section 621(b)(1). 47 U.S.C. § 573(c)(1)(C). The Fifth Circuit flatly rejected the Commission's finding that the OVS exemption from

section 621(b)(1)'s franchise requirement meant that state and local governments were preempted from imposing any non-Cable Act franchise requirements on OVS operators. *Dallas* at 347. The court explained that "[w]hile § 621 may have expressly *recognized* the power of localities to impose franchise requirements, it did not *create* that power, and elimination of § 621 for OVS operators does not eliminate local franchising authority." *Id.* at 348.

#### 3. The legislative history confirms that Congress intended for cable operators to be subject to reasonable and nondiscriminatory telecommunications right-of-way fees.

The Commission claims that legislative history supports its "broad and exclusive" interpretation of section 622, pointing to isolated statements in the House and Senate Reports describing Congress's decision in 1996 to limit section 622's franchise fee cap to five percent of gross revenue from the provision of cable services (not overall revenue). *Third Order* ¶ 93 (JA____). But these statements discuss only the reach of section 622; they shed no light on state and local governments' *non*-Cable Act authority.

The 1996 Conference Report—the "most persuasive evidence of [C]ongressional intent" other than "the statute itself"[8]—directly addresses this very issue: "[t]he conferees intend that, to the extent permissible under State and local law, telecommunications services, *including those provided by a cable company*,

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[8] *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981).

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." H.R. Rep. No. 104-458, at 180 (1996) (Conf. Rep.) (emphasis added). This is consistent with the 1996 Telecommunications Act's broader purpose of promoting competitive neutrality among telecommunications service providers. *USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment*, 465 F.3d 817, 820 (8th Cir. 2006) (explaining that "[t]he Telecommunications Act of 1996 . . . was intended by Congress to foster competition among telecommunications providers") (citing *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 115, (2005)). By limiting the Cable Act franchise fee revenue base to cable services, Congress prevented cable operators' *non*-cable service revenues from being subject to the Cable Act's five percent fee, a fee that would not apply to the non-cable services of their non-cable operator competitors. But as the Conference Report makes clear, Congress was equally concerned about the obverse: exempting cable operators, and only cable operators, from telecommunications and other non-cable right-of-way fees, which would give cable operators a competitive advantage over their non-cable operator competitors. By doing just that, the *Third Order* undermines Congress's goal of competitive neutrality.

### *B. The Commission's "public policy" justifications have no basis in the statute, are arbitrary and capricious, and in any event, are contradicted by the record.*

#### 1. The Commission's public policy analysis provides no valid basis for preemption.

To preempt state and local laws, the Commission must "act[] within the scope of its congressionally delegated authority." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Although the Commission justifies its *Third Order* actions as advancing its "policy of nonregulation of information services," *Third Order* ¶¶ 80, 102 (JA____, ____), Congress gave the Commission no authority to preempt on this basis.

The Commission ties its public policy analysis to two statutory provisions, but neither provides authority to preempt. *Third Order* ¶ 102 (citing section 230(b) of the Communications Act, 47 U.S.C. § 230(b)) (JA____), ¶ 104 n.390 (citing section 706 of the Telecommunications Act, 47 U.S.C. § 1302) (JA____). In *Mozilla Corp. v. FCC*, 940 F.3d at 78-80, the D.C. Circuit rejected the Commission's reliance on section 230(b) as a basis for preemption, explaining that, "[a]s the Commission has itself acknowledged, [section 230(b)] is a 'statement[] of policy,' not a delegation of regulatory authority." *Id.* at 78 (quoting *Comcast Corp. v. FCC*, 600 F.3d 642, 652 (D.C. Cir. 2010)). The same is true of section 706 of the Telecommunications Act, which the Commission previously explained is "better interpreted as hortatory, and not as grants of regulatory authority." *Restoring*

*Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311, ¶ 268 (2018).

More generally, having disclaimed authority to regulate broadband service, the Commission cannot now preempt state and local actions in that area. As the D.C. Circuit held in *Mozilla*, 840 F.3d at 75, "in any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law."

**2. The record refutes the notion that nondiscriminatory and competitively neutral fee requirements, such as Eugene's fee, have had any adverse effect on investment or deployment.**

The *Third Order* fails to provide a "rational connection between the facts found and the choice made." *State Farm Mut. Auto Ins. Co*, 463 U.S. at 43. The Commission claims that preemption will "encourag[e] broadband investment and deployment by cable operators," but it provides scant analysis of the alleged impacts of non-Cable Act fees and requirements on cable operator broadband investment or deployment. *Third Order*, App. B, Final Regulatory Flexibility Analysis ¶ 3 (JA____); *see also Third Order* ¶ 104 (JA____).

In fact, the record shows that, absent Commission preemption, cable operators became the nation's largest broadband providers. *See, e.g.*, Alliance for Communications Democracy, et al., Reply Comments at 22-23 (JA____-____) (showing that cable operators are the largest broadband service providers in the nation) (citing *455,000 Added Broadband in 2Q 2018*, Leichtman Research Group,

Inc. (Aug. 14, 2018), https://www.leichtmanresearch.com/455000-added-broadband-in-2q-2018/); Anne Arundel County, et al. *Ex Parte* Letter, Ex. F (JA____-____); NCTA, Comments at 2 (JA____) (stating that "[a]s of June 2018, cable operators offered gigabit service or better to 74 percent of cable's broadband footprint (63 percent of U.S. housing units), an increase of 16X in 18 months") (citing reports on cable operator's investments). Although the Commission asserts that "investments likely would be higher absent such requirements" *Third Order* ¶ 104 (JA____) (citing Orszag/Shampine Analysis at 17 (JA____)), it makes no attempt to analyze the impact that the fee requirements it attacks have actually had in particular localities.

Tellingly, while the *Third Order* criticizes Eugene's right-of-way fee on broadband providers at length, it ignores the unrefuted record evidence showing that Eugene has become one of the nation's leading high-tech and broadband communities, with high levels of broadband deployment and penetration. City of Eugene, *Ex Parte* Letter, Ex. A at 26 (JA____). The record shows Eugene's telecommunications licensing ordinance has had no adverse effect on deployment or subscribership. *Id.* It therefore lends no support at all to the Commission's conclusion that Eugene's fee or similar fee requirements "impede Congress's goal to accelerate deployment of 'advanced telecommunications capabilities to all Americans.'" *Third Order*, ¶ 104 (citing 47 U.S.C. § 1302).

### 3. The *Third Order*'s preemption ruling undermines competitive neutrality.

Under the *Third Order*, cable operators, and only cable operators, would be exempt from state and local fees applicable to non-cable services. Thus, it is the *Third Order*'s preemption ruling—*not* the state and local fees it would preempt—that would be discriminatory and not competitively neutral.

This is not a hypothetical concern. The record shows that cable operators' cable service business is declining, while their non-cable services are growing. Alliance for Communications Democracy, et al., Reply Comments at 23 nn.71-72 (JA____-____) (citing reports showing that cable operators' broadband subscribership is more than 25 percent greater than its television subscribership, and growing); NCTA, Reply Comments at 33 (JA____) (noting "a cable landscape in which viewership is declining"). Under the *Third Order*'s ruling, cable operators' overall fee obligations for use of the rights-of-way will decline even as the rights-of-way become more valuable in terms of the non-cable service revenues, and even as their non-cable operator competitors' fee obligations will increase. That is fundamentally inconsistent with Congress's intent that various providers compete on a level playing field.

### *C. The Third Order's Preemption Ruling Is Arbitrary and Capricious Because It Fails to Explain Rationally Its "Disavowal" of the Second Order.*

The Commission's prior orders in the *Section 621* docket focused on LFAs' Cable Act franchising authority. The "mixed-use" rule developed in the *First Order* prohibited an LFA from "us[ing] its *video franchising authority* to attempt to regulate a LEC's entire network beyond the provision of cable services." *First Order* ¶ 122 (emphasis added) (JA____). In the *Second Order*, the Commission concluded that its finding regarding section 622 franchise fees "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* ¶ 11 n.31 (emphasis added) (JA____).[9] The *Third Order*'s preemption of those very non-cable franchise fee requirements therefore represents a dramatic about-face from the *Second Order*.[10]

---

[9] That statement in the *Second Order* is consistent with past Commission policy. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631, ¶ 546 n.1399 (1993) ("A special tax imposed on rights-of-way, also applicable to other utilities, over and above a franchise fee assessed under a franchise agreement would *not* be part of a franchise fee itemized *pursuant to the definition in Section 622(g)*.") (emphasis added).

[10] The Commission also failed to include this issue in its notice of proposed rulemaking, in violation of the APA. 5 U.S.C. § 553(b)(3). Although Eugene's broadband right-of-way fee and the Oregon Supreme Court's *Eugene* decision are the poster children for the *Third Order*'s preemption ruling, the *Second FNPRM* mentioned neither, nor any other similar fees. The *Eugene* decision was issued

Yet the *Third Order* mentions this passage in the *Second Order* only once, buried in a footnote. *Third Order* ¶ 96 n.371 (JA____). And it offers only this terse explanation for its about-face: "we disavow [the *Second Order*'s statement] based on the record before us and the arguments made throughout this item." *Id.* But even if this one-line disavowal of what was once "of course" true were an adequate explication of a complete reversal in course,[11] the only "arguments" to which the *Third Order* specifically refers are the same paying "twice" (*Third Order* ¶ 96 n.371, JA____) and "competitively neutral and nondiscriminatory" (*id.* ¶ 96 n.372, JA____) arguments that, as shown above, conflict with the statutory language, the legislative history and the record. For this reason alone, the *Third Order*'s preemption ruling with respect to non-cable franchise fees cannot stand. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2120 (2016).

## CONCLUSION

The Court should grant the petitions and vacate the *Third Order* in its entirety.

---

more than two years before the *Second FNPRM*, and Eugene's generally applicable telecommunications license fee had been in place for well over two decades before the *Second FNPRM*. If this was the type of fee requirement the Commission was proposing to preempt, the APA required its notice to state so directly.

[11] It is not. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (requiring that an agency "adequately explain[] the reasons for a reversal of policy").

Respectfully submitted,

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May 15, 2020

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I hereby certify that on this 15th day of May, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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## Statutory Addendum

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## 47 U.S.C. § 230(b)

## PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL

* * *

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) 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;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

* * *

# 47 U.S.C. § 253

## REMOVAL OF BARRIERS TO ENTRY

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

## 47 U.S.C. § 521

## PURPOSES

The purposes of this subchapter are to—

(1) establish a national policy concerning cable communications;

(2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community

(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;

(5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and

(6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

**47 U.S.C. § 522(7)**

**DEFINITIONS**

* * *

(7) the term ''cable system'' means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 573 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility system;

* * *

## 47 U.S.C. § 531

## CABLE CHANNELS FOR PUBLIC, EDUCATIONAL, OR GOVERNMENTAL USE

(a) Authority to establish requirements with respect to designation or use of channel capacity

A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.

(b) Authority to require designation for public, educational, or governmental use

A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to section 546 of this title, that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

(c) Enforcement authority

A franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity. Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of channel capacity, whether or not required by the franchising authority pursuant to subsection (b).

(d) Promulgation of rules and procedures

In the case of any franchise under which channel capacity is designated under subsection (b), the franchising authority shall prescribe—

(1) rules and procedures under which the cable operator is permitted to use such channel capacity for the provision of other services if such channel capacity is not being used for the purposes designated, and

(2) rules and procedures under which such permitted use shall cease.

(e) Editorial control by cable operator

Subject to section 544(d) of this title, a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section, except a cable operator may refuse to

transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity.

(f) ‘‘Institutional network’’ defined

For purposes of this section, the term ‘‘institutional network’’ means a communication network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential subscribers.

## 47 U.S.C. § 541

## GENERAL FRANCHISE REQUIREMENTS

(a) Authority to award franchises; public rights-of-way and easements; equal access to service; time for provision of service; assurances

(1) A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 555 of this title for failure to comply with this subsection.

(2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure—

(A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

(3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

(4) In awarding a franchise, the franchising authority—

(A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;

(B) may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; and

(C) may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.

(b) No cable service without franchise; exception under prior law

(1) Except to the extent provided in paragraph

(2) and subsection (f), a cable operator may not provide cable service without a franchise.

(2) Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

(3)(A) If a cable operator or affiliate thereof is engaged in the provision of telecommunications services—

(i) such cable operator or affiliate shall not be required to obtain a franchise under this subchapter for the provision of telecommunications services; and

(ii) the provisions of this subchapter shall not apply to such cable operator or affiliate for the provision of telecommunications services.

(B) A franchising authority may not impose any requirement under this subchapter that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.

(C) A franchising authority may not order a cable operator or affiliate thereof—

(i) to discontinue the provision of a telecommunications service, or

(ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal under this subchapter with respect to the provision of such telecommunications service.

(D) Except as otherwise permitted by sections 531 and 532 of this title, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.

(c) Status of cable system as common carrier or utility

Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

(d) Informational tariffs; regulation by States; ''State'' defined

(1) A State or the Commission may require the filing of informational tariffs for any intrastate communications service provided by a cable system, other than cable service, that would be subject to regulation by the Commission or any State if offered by a common carrier subject, in whole or in part, to subchapter II of this chapter. Such informational tariffs shall specify the rates, terms, and conditions for the provision of such service, including whether it is made available to all subscribers generally, and shall take effect on the date specified therein.

(2) Nothing in this subchapter shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis.

(3) For purposes of this subsection, the term ''State'' has the meaning given it in section 153 of this title.

(e) State regulation of facilities serving subscribers in multiple dwelling units

Nothing in this subchapter shall be construed to affect the authority of any State to license or otherwise regulate any facility or combination of facilities which serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management and which does not use any public right-of-way.

(f) Local or municipal authority as multichannel video programming distributor

No provision of this chapter shall be construed to—

(1) prohibit a local or municipal authority that is also, or is affiliated with, a franchising authority from operating as a multichannel video programming distributor in the franchise area, notwithstanding the granting of one or more franchises by such franchising authority; or

(2) require such local or municipal authority to secure a franchise to operate as a multichannel video programming distributor.

## 47 U.S.C. § 542

## FRANCHISE FEES

(a) Payment under terms of franchise

Subject to the limitation of subsection (b), any cable operator may be required under the terms of any franchise to pay a franchise fee.

(b) Amount of fees per annum

For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services. For purposes of this section, the 12-month period shall be the 12-month period applicable under the franchise for accounting purposes. Nothing in this subsection shall prohibit a franchising authority and a cable operator from agreeing that franchise fees which lawfully could be collected for any such 12-month period shall be paid on a prepaid or deferred basis; except that the sum of the fees paid during the term of the franchise may not exceed the amount, including the time value of money, which would have lawfully been collected if such fees had been paid per annum.

(c) Itemization of subscriber bills

Each cable operator may identify, consistent with the regulations prescribed by the Commission pursuant to section 543 of this title, as a separate line item on each regular bill of each subscriber, each of the following:

(1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid.

(2) The amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels.

(3) The amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber.

(d) Court actions; reflection of costs in rate structures

In any court action under subsection (c), the franchising authority shall demonstrate that the rate structure reflects all costs of the franchise fees.

(e) Decreases passed through to subscribers

Any cable operator shall pass through to subscribers the amount of any decrease in a franchise fee.

(f) Itemization of franchise fee in bill

A cable operator may designate that portion of a subscriber's bill attributable to the franchise fee as a separate item on the bill.

(g) ''Franchise fee'' defined

For the purposes of this section—

(1) the term ''franchise fee'' includes any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such;

(2) the term ''franchise fee'' does not include—

(A) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers);

(B) in the case of any franchise in effect on October 30, 1984, payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, public, educational, or governmental access facilities;

(C) in the case of any franchise granted after October 30, 1984, capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities;

(D) requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

(E) any fee imposed under title 17.

(h) Uncompensated services; taxes, fees and other assessments; limitation on fees

(1) Nothing in this chapter shall be construed to limit any authority of a franchising authority to impose a tax, fee, or other assessment of any kind on any person (other than a cable operator) with respect to cable service or other communications service provided by such person over a cable system for which charges are assessed to subscribers but not received by the cable operator.

(2) For any 12-month period, the fees paid by such person with respect to any such cable service or other communications service shall not exceed 5 percent of such person's gross revenues derived in such period from the provision of such service over the cable system.

(i) Regulatory authority of Federal agencies

Any Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section.

**47 U.S.C. § 543(b)(2)**

**REGULATION OF RATES**

* * *

(b) Establishment of basic service tier rate regulations

* * *

(2) Commission regulations

Within 180 days after October 5, 1992, the Commission shall prescribe, and periodically thereafter revise, regulations to carry out its obligations under paragraph (1). In prescribing such regulations, the Commission—

(A) shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission;

(B) may adopt formulas or other mechanisms and procedures in complying with the requirements of subparagraph (A); and

(C) shall take into account the following factors:

(i) the rates for cable systems, if any, that are subject to effective competition;

(ii) the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier pursuant to paragraph

(7)(B), and changes in such costs;

(iii) only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined, in accordance with regulations prescribed by the Commission, to be reasonably and properly allocable to the basic service tier, and changes in such costs;

(iv) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier;

(v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;

(vi) any amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and

(vii) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1).

* * *

**47 U.S.C. § 544(b)**

**REGULATION OF SERVICES, FACILITIES, AND EQUIPMENT**

* * *

(b) Requests for proposals; establishment and enforcement of requirements

In the case of any franchise granted after the effective date of this subchapter, the franchising authority, to the extent related to the establishment or operation of a cable system—

(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 546 of this title), may establish requirements for facilities and equipment, but may not, except as provided in subsection (h), establish requirements for video programming or other information services; and

(2) subject to section 545 of this title, may enforce any requirements contained within the franchise—

(A) for facilities and equipment; and

(B) for broad categories of video programming or other services.

* * *

**47 U.S.C. § 546**

**RENEWAL**

(a) Commencement of proceedings; public notice and participation

(1) A franchising authority may, on its own initiative during the 6-month period which begins with the 36th month before the franchise expiration, commence a proceeding which affords the public in the franchise area appropriate notice and participation for the purpose of (A) identifying the future cable-related community needs and interests, and (B) reviewing the performance of the cable operator under the franchise during the then current franchise term. If the cable operator submits, during such 6-month period, a written renewal notice requesting the commencement of such a proceeding, the franchising authority shall commence such a proceeding not later than 6 months after the date such notice is submitted.

(2) The cable operator may not invoke the renewal procedures set forth in subsections (b) through (g) unless—

(A) such a proceeding is requested by the cable operator by timely submission of such notice; or

(B) such a proceeding is commenced by the franchising authority on its own initiative.

(b) Submission of renewal proposals; contents; time

(1) Upon completion of a proceeding under subsection (a), a cable operator seeking renewal of a franchise may, on its own initiative or at the request of a franchising authority, submit a proposal for renewal.

(2) Subject to section 544 of this title, any such proposal shall contain such material as the franchising authority may require, including proposals for an upgrade of the cable system.

(3) The franchising authority may establish a date by which such proposal shall be submitted.

(c) Notice of proposal; renewal; preliminary assessment of nonrenewal; administrative review; issues; notice and opportunity for hearing; transcript; written decision

(1) Upon submittal by a cable operator of a proposal to the franchising authority for the renewal of a franchise pursuant to subsection (b), the franchising authority shall provide prompt public notice of such proposal and, during the 4-month period which begins on the date of the submission of the cable operator's proposal pursuant to subsection (b), renew the franchise or, issue a preliminary

assessment that the franchise should not be renewed and, at the request of the operator or on its own initiative, commence an administrative proceeding, after providing prompt public notice of such proceeding, in accordance with paragraph (2) to consider whether—

(A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;

(B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix or quality of cable services or other services provided over the system, has been reasonable in light of community needs;

(C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and

(D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

(2) In any proceeding under paragraph (1), the cable operator shall be afforded adequate notice and the cable operator and the franchise authority, or its designee, shall be afforded fair opportunity for full participation, including the right to introduce evidence (including evidence related to issues raised in the proceeding under subsection (a)), to require the production of evidence, and to question witnesses. A transcript shall be made of any such proceeding.

(3) At the completion of a proceeding under this subsection, the franchising authority shall issue a written decision granting or denying the proposal for renewal based upon the record of such proceeding, and transmit a copy of such decision to the cable operator. Such decision shall state the reasons therefor.

(d) Basis for denial

Any denial of a proposal for renewal that has been submitted in compliance with subsection

(b) shall be based on one or more adverse findings made with respect to the factors described in subparagraphs (A) through (D) of subsection (c)(1), pursuant to the record of the proceeding under subsection (c). A franchising authority may not base a denial of renewal on a failure to substantially comply with the material terms of the franchise under subsection (c)(1)(A) or on events considered under subsection (c)(1)(B) in any case in which a violation of the franchise or the events considered under subsection (c)(1)(B) occur after the effective date of this subchapter unless the franchising authority has provided the operator with notice

and the opportunity to cure, or in any case in which it is documented that the franchising authority has waived its right to object, or the cable operator gives written notice of a failure or inability to cure and the franchising authority fails to object within a reasonable time after receipt of such notice.

(e) Judicial review; grounds for relief

(1) Any cable operator whose proposal for renewal has been denied by a final decision of a franchising authority made pursuant to this section, or has been adversely affected by a failure of the franchising authority to act in accordance with the procedural requirements of this section, may appeal such final decision or failure pursuant to the provisions of section 555 of this title.

(2) The court shall grant appropriate relief if the court finds that—

(A) any action of the franchising authority, other than harmless error, is not in compliance with the procedural requirements of this section; or

(B) in the event of a final decision of the franchising authority denying the renewal proposal, the operator has demonstrated that the adverse finding of the franchising authority with respect to each of the factors described in subparagraphs (A) through (D) of subsection (c)(1) on which the denial is based is not supported by a preponderance of the evidence, based on the record of the proceeding conducted under subsection (c).

(f) Finality of administrative decision

Any decision of a franchising authority on a proposal for renewal shall not be considered final unless all administrative review by the State has occurred or the opportunity therefor has lapsed.

(g) ‘‘Franchise expiration’’ defined

For purposes of this section, the term ‘‘franchise expiration’’ means the date of the expiration of the term of the franchise, as provided under the franchise, as it was in effect on October 30, 1984.

(h) Alternative renewal procedures

Notwithstanding the provisions of subsections (a) through (g) of this section, a cable operator may submit a proposal for the renewal of a franchise pursuant to this subsection at any time, and a franchising authority may, after affording the public adequate notice and opportunity for comment, grant or deny such proposal at any time (including after proceedings pursuant to this section have commenced). The provisions of subsections (a) through (g) of this section shall not apply to a decision to grant or deny a proposal under this subsection. The denial of a renewal

pursuant to this subsection shall not affect action on a renewal proposal that is submitted in accordance with subsections (a) through (g).

(i) Effect of renewal procedures upon action to revoke franchise for cause

Notwithstanding the provisions of subsections (a) through (h), any lawful action to revoke a cable operator's franchise for cause shall not be negated by the subsequent initiation of renewal proceedings by the cable operator under this section.

## 47 U.S.C. § 552

## CONSUMER PROTECTION AND CUSTOMER SERVICE

(a) Franchising authority enforcement

A franchising authority may establish and enforce—

(1) customer service requirements of the cable operator; and

(2) construction schedules and other construction-related requirements, including construction-related performance requirements, of the cable operator.

(b) Commission standards

The Commission shall, within 180 days of October 5, 1992, establish standards by which cable operators may fulfill their customer service requirements. Such standards shall include, at a minimum, requirements governing—

(1) cable system office hours and telephone availability;

(2) installations, outages, and service calls; and

(3) communications between the cable operator and the subscriber (including standards governing bills and refunds).

(c) Subscriber notice

A cable operator may provide notice of service and rate changes to subscribers using any reasonable written means at its sole discretion. Notwithstanding section 543(b)(6) of this title or any other provision of this chapter, a cable operator shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, franchise fee, or any other fee, tax, assessment, or charge of any kind imposed by any Federal agency, State, or franchising authority on the transaction between the operator and the subscriber.

(d) Consumer protection laws and customer service agreements

(1) Consumer protection laws

Nothing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this subchapter.

(2) Customer service requirement agreements

Nothing in this section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission under subsection (b). Nothing in this subchapter shall be construed to prevent the establishment or enforcement of any

municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.

## 47 U.S.C. § 556

## COORDINATION OF FEDERAL, STATE, AND LOCAL AUTHORITY

(a) Regulation by States, political subdivisions, State and local agencies, and franchising authorities

Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter.

(b) State jurisdiction with regard to cable services

Nothing in this subchapter shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this subchapter.

(c) Preemption

Except as provided in section 557 of this title, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.

(d) ‘‘State’’ defined

For purposes of this section, the term ‘‘State’’ has the meaning given such term in section 153 of this title.

## 47 U.S.C. § 1302

## ADVANCED TELECOMMUNICATIONS INCENTIVES

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Demographic information for unserved areas

As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1)) 1 and to the extent that data from the Census Bureau is available, determine, for each such unserved area—

(1) the population;

(2) the population density; and

(3) the average per capita income.

(d) Definitions

For purposes of this subsection: 2

(1) Advanced telecommunications capability

The term ‘‘advanced telecommunications capability’’ is defined, without regard to any transmission media or technology, as highspeed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools

The term ‘‘elementary and secondary schools’’ means elementary and secondary schools, as defined in section 7801 of title 20.

**47 C.F.R. § 76.42**

**IN-KIND CONTRIBUTIONS.**

(a) In-kind, cable-related contributions are ‘‘franchise fees’’ subject to the five percent cap set forth in 47 U.S.C. 542(b). Such contributions, which count toward the five percent cap at their fair market value, include any non-monetary contributions related to the provision of cable service by a cable operator as a condition or requirement of a local franchise, including but not limited to:

(1) Costs attributable to the provision of free or discounted cable service to public buildings, including buildings leased by or under control of the franchising authority;

(2) Costs in support of public, educational, or governmental access facilities, with the exception of capital costs; and

(3) Costs attributable to the construction of institutional networks.

(b) In-kind, cable-related contributions do not include the costs of complying with build-out and customer service requirements.

**47 C.F.R. § 76.922(f)**

**RATES FOR THE BASIC SERVICE TIER AND CABLE PROGRAMMING SERVICES TIERS.**

* * *

(f) External costs. (1) External costs shall consist of costs in the following categories:

(i) State and local taxes applicable to the provision of cable television service;

(ii) Franchise fees;

(iii) Costs of complying with franchise requirements, including costs of providing public, educational, and governmental access channels as required by the franchising authority;

(iv) Retransmission consent fees and copyright fees incurred for the carriage of broadcast signals;

(v) Other programming costs; and

(vi) Commission cable television system regulatory fees imposed pursuant to 47 U.S.C. §159.

(vii) Headend equipment costs necessary for the carriage of digital broadcast signals.

(2) The permitted charge for a regulated tier shall be adjusted on account of programming costs, copyright fees and retransmission consent fees only for the program channels or broadcast signals offered on that tier.

(3) The permitted charge shall not be adjusted for costs of retransmission consent fees or changes in those fees incurred prior to October 6, 1994.

(4) The starting date for adjustments on account of external costs for a tier of regulated programming service shall be the earlier of the initial date of regulation for any basic or cable service tier or February 28, 1994. Except, for regulated FCC Form 1200 rates set on the basis of rates at September 30, 1992 (using either March 31, 1994 rates initially determined from FCC Form 393 Worksheet 2 or using Form 1200 Full Reduction Rates from Line J6), the starting date shall be September 30, 1992. Operators in this latter group may make adjustment for changes in external costs for the period between September 30, 1992, and the initial date of regulation or February 28, 1994, whichever is applicable, based either on changes in the GNP-PI over that period or on the actual change in the

external costs over that period. Thereafter, adjustment for external costs may be made on the basis of actual changes in external costs only.

(5) Changes in franchise fees shall not result in an adjustment to permitted charges, but rather shall be calculated separately as part of the maximum monthly charge per subscriber for a tier of regulated programming service.

(6) Adjustments to permitted charges to reflect changes in the costs of programming purchased from affiliated programmers, as defined in §76.901, shall be permitted as long as the price charged to the affiliated system reflects either prevailing company prices offered in the marketplace to third parties (where the affiliated program supplier has established such prices) or the fair market value of the programming.

(i) For purposes of this section, entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities.

(ii) Attributable interest shall be defined by reference to the criteria set forth in Notes 1 through 5 to §76.501 provided, however, that:

(A) The limited partner and LLC/LLP/RLLP insulation provisions of Note 2(f) shall not apply; and

(B) The provisions of Note 2(a) regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

(7) Adjustments to permitted charges on account of increases in costs of programming shall be further adjusted to reflect any revenues received by the operator from the programmer. Such adjustments shall apply on a channel-by-channel basis.

(8) In calculating programming expense, operators may add a mark-up of 7.5% for increases in programming costs occurring after March 31, 1994, except that operators may not file for or take the 7.5% mark-up on programming costs for new channels added on or after May 15, 1994 for which the operator has used the methodology set forth in paragraph (g)(3) of this section for adjusting rates for channels added to cable programming service tiers. Operators shall reduce rates by decreases in programming expense plus an additional 7.5% for decreases occurring after May 15, 1994 except with respect to programming cost decreases on channels added after May 15, 1994 for which the rate adjustment methodology in paragraph (g)(3) of this section was used.

* * *

**47 C.F.R. § 76.924(c)**

**ALLOCATION TO SERVICE COST CATEGORIES.**

* * *

(c) Accounts level. Except to the extent indicated below, cable operators electing cost of service regulation or seeking adjustments due to changes in external costs shall identify investments, expenses and revenues at the franchise, system, regional, and/or company level(s) in a manner consistent with the accounting practices of the operator on April 3, 1993. However, in all events, cable operators shall identify at the franchise level their costs of franchise requirements, franchise fees, local taxes and local programming.

* * *

**47 C.F.R. § 76.985**

**SUBSCRIBER BILL ITEMIZATION.**

(a) Cable operators may identify as a separate line item of each regular subscriber bill the following:

(1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid.

(2) The amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels.

(3) The amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber. In order for a governmental fee or assessment to be separately identified under this section, it must be directly imposed by a governmental body on a transaction between a subscriber and an operator.

(b) The charge identified on the subscriber bill as the total charge for cable service should include all fees and costs itemized pursuant to this section.

(c) Local franchising authorities may adopt regulations consistent with this section.

## 47 C.F.R. § 76.925

## COSTS OF FRANCHISE REQUIREMENTS.

(a) Franchise requirement costs may include cost increases required by the franchising authority in the following categories:

(1) Costs of providing PEG access channels;

(2) Costs of PEG access programming;

(3) Costs of technical and customer service standards to the extent that they exceed federal standards;

(4) Costs of institutional networks and the provision of video services, voice transmissions and data transmissions to or from governmental institutions and educational institutions, including private schools, to the extent such services are required by the franchise agreement; and

(5) When the operator is not already in the process of upgrading the system, costs of removing cable from utility poles and placing the same cable underground.

(b) The costs of satisfying franchise requirements to support public, educational, and governmental channels shall consist of the sum of:

(1) All per channel costs for the number of channels used to meet franchise requirements for public, educational, and governmental channels;

(2) Any direct costs of meeting such franchise requirements; and

(3) A reasonable allocation of general and administrative overhead.

(c) The costs of satisfying any requirements under the franchise other than PEG access costs shall consist of the direct and indirect costs including a reasonable allocation of general and administrative overhead.

## ***Excerpt* Eugene, Or., Code § 3.005**

## **GENERAL.**

* * *

*Telecommunications services*. The transmission for hire, of information in electromagnetic frequency, electronic or optical form, including, but not limited to, voice, video, or data, whether or not the transmission medium is owned by the provider itself, and whether or not the transmission medium is wireline or wireless. Telecommunications service includes all forms of telephone services and voice, data and video transport, but does not include: (1) cable service; (2) OVS service; (3) private communications system services; (4) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto; and (5) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act of 1996.

* * *

**Eugene, Or., Code § 3.405**

**TELECOMMUNICATIONS ACTIVITIES – REGISTRATION REQUIRED.**

(1) No person may, without first registering with the city and then paying the fee required by section 3.415(1), engage in any telecommunications activity through a communications facility located in the city.

(2) Registration under this section shall be submitted pursuant to section 3.020, on a form provided by the city. The registration shall be accompanied by any additional documents required therein or in rules issued by the city manager pursuant to section 2.019 of this code.

**Eugene, Or., Code § 3.410(3)**

**TELECOMMUNICATIONS – LICENSE REQUIRED.**

* * *

(3) The fact that a particular communications facility may be used for multiple purposes does not obviate the need to obtain a license for other purposes. By way of illustration and not limitation, a cable operator of a cable system must obtain a license to construct, install or locate a cable system to provide cable services, and, should it intend to provide telecommunications services over the same facilities, must also obtain a separate license.

* * *

**Eugene, Or., Code § 3.415(2)**

**TELECOMMUNICATIONS – ANNUAL REGISTRATION AND LICENSE FEES.**

* * *

(2) Annual License Fee. As compensation for use of right-of-way, each operator required to obtain a license pursuant to section 3.410 of this code shall pay, in addition to the registration fee described in subsection (1) of this section, a fee in the amount of 7% of the licensee's gross revenues derived from telecommunications activities within the city, to compensate the City for the use of the rights-of-way.

* * *