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

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

REPLY COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

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December 14, 2018

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NCTA – The Internet & Television Association ("NCTA") submits these reply comments in response to the comments of other parties on the Commission's Second Further Notice of Proposed Rulemaking ("*Second FNPRM*") in the above-captioned proceeding.[1/]

INTRODUCTION AND SUMMARY

The Cable Act reflects Congress's desire to compensate communities for use of public rights-of-way while protecting cable operators and consumers from the burdens of excessive regulation and fees. As part of this balance, Congress also sought to encourage deployment of, and investment in, expanded and innovative services. In their comments, franchising authorities ignore this clear congressional intent in favor of a strained reading of the Cable Act that they contend should protect municipal budget revenue by allowing them to burden cable operators and their subscribers with cable-related (and in some cases unrelated) in-kind exactions unconstrained by the limits imposed by Congress. Their arguments cannot be squared with the plain language of the statute nor with the legislative history, both of which confirm Congress's

[1/] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Further Notice of Proposed Rulemaking, FCC 18-131 (rel. Sept. 25, 2018) ("Second FNPRM").

intent to make franchising authorities more accountable and transparent to taxpayers and to limit the costs that franchising authorities may impose on cable operators and their subscribers.

In addition, in an effort to retain as many in-kind exactions as possible, franchising authorities argue that any clarification should not apply to existing franchise agreements and further that any in-kind assessments subject to the five percent franchise fee cap should be valued at incremental cost. The Commission should reject these arguments. Both would permit franchising authorities to continue to benefit from excessive in-kind obligations that are contrary to the statute – in the first instance, because exactions in excess of the statutory cap were gained only because cable operators lacked the leverage to refuse them,[2/] and in the second, because an incremental cost valuation would vastly undercompensate cable operators for the true cost of the exactions.

The Commission should instead adopt a fair market valuation for ongoing and future in-kind obligations. Fair market value would be straightforward to calculate and would appropriately account for the large opportunity costs of these exactions. Resources should be allocated in a market according to their opportunity cost, not according to an artificially low cost that incentivizes over-consumption. By placing a reasonable value on the provision of facilities and services, franchising authorities would be required to consider whether they are worth paying for – as Congress intended – as opposed to simply being able to extract for "free" any wish list demand at the expense of cable subscribers.

[2/] It has been the practice of franchising authorities to refuse to grant renewal franchises so they can prolong indefinitely the benefit of the in-kind obligations that were extracted from cable operators. If the rules resulting from this proceeding are not applied to existing contracts, franchising authorities will have no incentive to renew agreements going forward. Given the vast extent of the problem, it would be impractical for cable operators to bring individual actions to challenge unlawful provisions in existing franchises. *See* Comments of NCTA – The Internet & Television Association, MB Dkt. No. 05-311, at 42 (filed Nov. 14, 2018) ("NCTA Comments") (noting that one cable operator estimates that 90 percent of its franchises impose in-kind obligations that do not count against the five percent cap).

The Commission should also reject claims that franchising authorities may regulate and impose fees on the provision of non-cable services over cable systems and the equipment and facilities used to provide them, and that the Commission is powerless to prohibit such regulation. As NCTA and others explained in their comments, these claims are contrary to the scheme enacted by Congress through Title VI and are inconsistent with Commission and federal court precedent regarding the scope of the Commission's authority.

Many of the franchising authorities' remaining arguments are simply claims that the Commission's proposed clarifications will require state and local governments to make choices between funding cable franchise-related exactions and other programs or services of interest to the community. These arguments should likewise be rejected by the Commission. *First*, the Commission's tentative conclusions simply reaffirm the balancing of interests struck by Congress under the Cable Act; the fact that franchising authorities may have been able to evade those statutory limits for a number of years or may have become accustomed to and reliant on abuse of the franchising process is no reason to permit them to continue these practices in the future.

Second, any disruptions to existing budgets are more than outweighed by the harms to economic growth and consumer welfare that will result if the Commission does not adopt its proposals. As detailed in the attached Report of Jonathan Orszag and Allan Shampine ("Orszag/Shampine Economic Analysis"),[3/] "broadband deployment has been and remains an important driver of consumer welfare and economic growth" and "[c]able [broadband] networks in particular are expected to continue to expand their reach and quality through substantial

[3/] *See* Attachment 1.

ongoing investments to implement new technological advances."[4/] However, "[a]s a matter of economics, allowing LFAs to exceed existing limits on franchise fees, or to levy new fees or taxes, creates uncertainty as to the returns on future investment, which will reduce incentives to invest in cable operators' infrastructure, to the detriment of consumers."[5/] The Orszag/Shampine Economic Analysis concludes that these outcomes will, in turn, result in consumer welfare losses in excess of $40 billion.[6/] In addition, since these taxes and fees are not imposed on cable's competitors, allowing franchising authorities to impose them "will also distort competition and further decrease cable operators' incentives to invest, again harming consumers."[7/]

The Commission should therefore take action now to prevent these negative outcomes by adopting the tentative conclusions it correctly reached in the *Second FNPRM*.

I. THE COMMISSION SHOULD ADOPT ITS TENTATIVE CONCLUSION THAT ALL IN-KIND EXACTIONS, EXCEPT PEG CAPITAL COSTS, ARE FRANCHISE FEES SUBJECT TO THE FIVE PERCENT CAP

A. The Cable Act Is Clear That In-Kind Exactions Are Franchise Fees.

The Commission should reject as contrary to the Cable Act and the Sixth Circuit's holding in *Montgomery County, Md. v. FCC*[8/] claims from some commenters that franchise fees are by definition only monetary payments,[9/] and should adopt its tentative conclusion that all in-

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4/ Orszag/Shampine Economic Analysis ¶ 64.

5/ *Id.* ¶ 14.

6/ *Id.* ¶¶ 14, 64.

7/ *Id.* ¶ 45.

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

9/ *See, e.g.,* Initial Comments of the City of Philadelphia, *et al.*, MB Dkt. No. 05-311, at 22 (filed Nov.14, 2018) ("LFA Coalition Comments") ("Based on the ordinary meanings of the terms, there is nothing unclear about what is included as a franchise fee, as all three types of charge (tax, fee, or assessment) are referring to unilateral monetary charges by a unit of government."); Comments of Charles County, Maryland, MB Dkt. No. 05-311, at 7 (filed Nov. 14, 2018) ("Charles County Comments") ("The words tax, fee, and assessment are terms of art and have precise meaning established by lengthy precedent. Congress chose not to draft the statutory language to include other forms of value transfer, such as grants, external costs, or charges, in the statutory definition of franchise fees.").

kind exactions, except PEG capital costs, are franchise fees subject to the five percent cap.[10/] As the Sixth Circuit has already determined, the terms "tax" and "assessment" contained in the definition of "franchise fee" – terms that Congress specified can be "of any kind"[11/] – means that "franchise fees" are not limited to monetary payments, but include in-kind exactions as well.[12/] In fact, the Court could not have been more clear in holding that "'franchise fee' *as defined by § 542(g)(1)* can include noncash exactions."[13/] This proceeding on remand therefore concerns only *which* non-monetary exactions are included as franchise fees, not *whether* they are included.

Consistent with the above and further narrowing the issues on remand, the Sixth Circuit noted that its previous decision in *Alliance* upheld the Commission's clarification in the *First Report and Order* that in-kind exactions unrelated to the provision of cable services are franchise fees.[14/] Although NATOA chooses to read the Court's decision selectively, and incorrectly,[15/] a

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10/ *See Second FNPRM* ¶ 19.

11/ 47 U.S.C. § 542(g)(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").

12/ Contrary to the claims of the National Association of Telecommunications Officers and Advisors' *et al.* ("NATOA"), this holding is consistent with the legislative history of the Cable Act. NATOA cites to a portion of the legislative history that, in discussing Section 622(g)(2)(C), states that "this section defines as a franchise fee only monetary payments made by the cable operator, and does not include as a 'fee' any franchise requirements for the provision of services, facilities or equipment." *See* Comments of the National Association of Telecommunications Officers and Advisors, *et al.,* MB Dkt. No. 05-311, at 5 (filed Nov. 14, 2018) ("NATOA Comments") (quoting H.R. Rep. No. 98-934 at 65); *see also* Comments of Anne Arundel County, *et al.*, MB Dkt. No. 05-311, at 9 (filed Nov. 14, 2018) ("Anne Arundel County Comments"). As the context makes clear, this language is meant only to elaborate on what Congress considers a "fee" under the definition of franchise fee, and not what constitutes an "assessment," the latter of which Congress understood to include in-kind exactions.

13/ *Montgomery County v. FCC*, 863 F.3d at 491 (emphasis added). Indeed, the claim that a franchise fee is only "unilateral monetary charges by a unit of government" and that "*Montgomery County* stands for the premise that a franchise fee can include some provision of noncash in-kind payments extorted or demanded or levied with severity or injustice," LFA Coalition Comments at 22-23, proves too much. By this standard, even a franchise agreement containing a requirement that the cable operator pay five percent of gross revenues to the franchising authority would not contain a franchise fee, since the five percent fee was included in a negotiated document and was not imposed by government fiat.

14/ *Montgomery County v. FCC*, 863 F.3d at 490 (discussing its decision in *Alliance* and stating that the Commission's "First Order rather pointedly concluded that exactions '*unrelated* to the provision of number of franchising authorities rightly concede that Congress intended to include non-cable-related in-kind exactions in the franchise fee.[16/] As NCTA explained, and as some franchising authorities admit, the statute makes no distinction between exactions that are cable-related and those that are not.[17/] Franchise fees therefore include in-kind contributions in either context, and the Commission should so clarify.

B. The Cable Act, Through Its Definition Of Franchise Fees, Carefully Balances The Interests Of Franchising Authorities, Cable Operators, And Cable Subscribers.

As many commenters point out, Congress intended for the cable television services provided by cable operators to be tailored to the needs of each community.[18/] But this fact is not, as franchising authorities appear to believe, license for them to impose cable-related (or non-cable related) in-kind exactions on cable operators above and beyond the maximum franchise fee payment permitted under federal law. As shown in the dozens of examples in the Appendix,[19/] franchising authorities require cable operators to provide free services (including cable,

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cable services' are franchise fees") (emphasis in original); *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

15/ NATOA Comments at 8.

16/ *See, e.g.,* Comments on Second Further Notice of Proposed Rulemaking by The City Coalition, MB Dkt. No. 05-311, at 14 (filed Nov. 14, 2018) ("The City Coalition Comments"). Anne Arundel County *et al.* ("Anne Arundel County") appears to agree with this point as well, a concession that is at odds with its later insistence that in-kind obligations are "regulatory obligations" that are not franchise fees under the Act. *See* Anne Arundel County Comments at 16 (arguing that the statute distinguishes between cable-related and non-cable-related in-kind asks and so non-cable related asks can count against the franchise fee); *id.* at 20 (arguing that in-kind asks should not count against the franchise fee). Anne Arundel County's inability to reconcile these points simply further highlights that the statute makes no distinction between in-kind exactions on the basis of whether they are related or unrelated to the provision of cable service.

17/ *See, e.g.*, Charles County Comments at 9.

18/ *See* The City Coalition Comments at 11; Comments of Alliance for Communications Democracy, *et al.*, MB Dkt. No. 05-311, at 3 (filed Nov. 14, 2018) ("Alliance for Communications Democracy Comments").

19/ *See* Attachment 2.

broadband and Wi-Fi), retail stores, PEG financial and operational support (as opposed to PEG capital costs), PEG channel capacity, institutional networks ("I-Nets"), and more—*on top of* the franchise fee.[20/]

Many franchising authorities appear to believe that they are entitled to a five percent franchise fee by default, as a starting point for other in-kind exactions they may choose to require.[21/] Some franchising authorities have even made explicit or implicit demands that cable operators waive the statutory five percent franchise fee cap, or have attempted to expand "revenues" for franchise fee calculations beyond revenues from cable service.[22/] But Congress adopted the five percent cap as a *limit* "to prevent local governments from taxing private cable operators to death as a means of raising local revenues for other concerns."[23/] Congress afforded franchising authorities a clearly-defined avenue for requiring operators to fund community needs: it authorized the collection of franchise fees of *up* to five percent of revenues from cable service, with franchising authorities dividing those fees between cash and in-kind contributions so as to provide the greatest value to their communities. In some cases, community needs and interests may be fully met with a total franchise fee obligation below five percent, which yields its own benefit by reducing the tax burden on local cable subscribers.

Several franchising authority commenters point to the fact that the Cable Act allows for certain in-kind obligations, such as PEG capacity and PEG support, and suggest that this is

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20/ Appendix at 3-12.

21/ *See, e.g.,* Anne Arundel County Comments at 14 (arguing that "LFAs are authorized to impose and enforce franchise requirements *and* collect franchise fees") (emphasis in original); Alliance for Communications Democracy Comments at 7 (arguing that "Congress treated franchise fees and the costs of meeting cable-related franchise requirements as distinct obligations that LFAs could impose separately from and independently of the franchise fee").

22/ *See* Appendix at 12-14.

23/ *See* 129 Cong. Rec. S8254 (daily ed. June 13, 1983) (statement of Sen. Goldwater).

evidence that Congress intended those types of obligations to be imposed "in addition" to the franchise fee.[24/] But the statutory language forecloses such a result. The cap on franchise fees in Section 622(b) applies broadly to taxes, fees, or assessments "of any kind," with only limited exceptions enumerated in Section 622(g)(2); references to in-kind assessments elsewhere in the Cable Act do not override that clear congressional directive.

That Congress expressly authorized franchising authorities to seek items such as PEG capacity and PEG support as part of their franchise agreements only makes clear that franchising authorities *may* impose such requirements if they decide to expend their franchise fees in this manner on behalf of a local community.[25/] For example, a cable operator may be required to carry PEG channels or allocate franchise fee payments toward PEG operating support if the franchising authority so chooses.[26/] The cable industry has a long history of supporting PEG programming.

24/ *See, e.g.,* Anne Arundel County Comments at 16; Alliance for Communications Democracy Comments at 8.

25/ *See* 47 U.S.C. § 531(b) (authorizing franchising authorities to require "that channel capacity be designated for public, educational, or governmental use"); *id.* § 541(a)(4) ("In awarding a franchise, the franchising authority . . . may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support.").

26/ When the Cable Act was enacted in 1984, the cable system may have been the only vehicle for distribution of PEG programming, so if a cable operator categorically refused to carry PEG channels, that would have effectively been the death knell for PEG in that community. This is plainly no longer the case in a world of YouTube and myriad other online video distribution platforms, which make it easier and more cost-effective than ever for everyday citizens to produce and share videos both locally and worldwide. *See, e.g.*, Letter from Stephen Tavella, Director, West River Valley Thrives, to Ajit Pai, Chairman, FCC, MB Docket No. 05-311, at 1 (filed Dec. 7, 2019) (noting the availability of the relevant community's PEG programming via YouTube); Comments of the City of Laurel, MD, MB Dkt. No. 05-311, at 3 (filed Dec. 6, 2019) (same); *see also* LFA Coalition Comments at 11 ("Much of this programming is also available online and on mobile devices making the programming available to even more citizens."); *id*. at 11 n.52 (noting additional examples of PEG programming available online).

Nonetheless, Congress did not – contrary to Anne Arundel County's claims[27/] – intend that franchising authorities *should* impose any particular PEG or any other cable-related requirements at the expense of cable subscribers, and in fact many do not. Instead, Congress left to the franchising authority's discretion how best to allocate the franchise fee to reflect its community's particular cable-related needs.

Anne Arundel County submitted a "study" purporting to show the value that cable subscribers place on PEG channels,[28/] but this proceeding is not about the value of PEG programming. What is relevant here is that the statute makes clear this type of funding applies against the five percent cap. Congress emphasized its intent to treat ongoing PEG operating costs as franchise fees when it chose to exclude only one type of obligation, PEG capital contributions, from the statutory definition of franchise fees.[29/] Where a franchising authority

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[27/] Anne Arundel County Comments at 30; *see also* Alliance for Communications Democracy Comments at 3-4.

[28/] Anne Arundel County Comments at 28-29, Exhibit A. On closer examination, the study does not address PEG programming at all; in fact, survey participants were asked how important they thought it was "to have local cable TV channels that feature programs about [local] residents, organizations, schools, government, events and issues[.]" *Id.* This question is phrased so broadly that *any* local programming (including local broadcast stations carried on cable systems) would fall into this category, rendering these surveys ineffective. Nor does this study indicate whether any individuals surveyed actually *watch* PEG (or any other local) programming, or whether any of the individuals surveyed actually lived in the relevant franchise areas. Indeed, the study provides only a single chart showing responses to one question out of many, without providing the underlying survey so that the question can be contextualized, the methodology examined, and the responses fully analyzed. The study therefore is of no use in evaluating the appeal and value of PEG programming.

[29/] The Cable Act expressly distinguishes between PEG capital payments and all other PEG support for purposes of the franchise fee cap. Congress grandfathered preexisting franchise requirements by excluding from the definition of franchise fees any payments "in support of the use of public, educational, or governmental access facilities" for franchises in effect on October 30, 1984. 47 U.S.C. § 542(g)(2)(B). But for any franchise entered after that date (*i.e.*, all or nearly all franchises in effect today), Congress specified that only "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities" should be excluded from the scope of franchise fees. *Id.*, § 542(g)(2)(C). Notably, some franchising authorities have taken an overly expansive view of their authority under this exclusion as well – arguing, for example, that live production trucks, cameras, and other remote origination equipment are the equivalent of PEG capital construction. *See, e.g.,* Alliance for Communications Democracy Comments at 15-16 (arguing that PEG capital costs should include "vans, studios, cameras, or other equipment relating to the use of public, educational, or governmental determines that PEG programming is a valuable local interest – taking into account, for instance, viewership and other means to reach a community (*e.g.*, over the Internet) – cable operators will continue to provide PEG operating support (counted against the five percent franchise fee cap). And capital costs for PEG studios will continue to be excluded from the franchise fee cap. Cable operators, as among providers of video programming, are uniquely subject to PEG burdens,[30/] and these burdens should not be exacerbated by failing to properly account for the costs of meeting these requirements.

Further, by specifying that PEG support should be "adequate,"[31/] Congress made clear that where such requirements are imposed, it should only be to the extent reasonable in each community. This was intended as an accountability measure, to ensure that franchising authorities tax cable operators and subscribers no more than needed for adequate PEG support – and never in excess of the five percent cap.

Similarly, that Congress expected franchising authorities to use their franchise fees to meet the needs of their communities does not – as some wrongly contend[32/] – render "superfluous" the Cable Act's related requirement that franchising authorities take the costs of a community's cable-related needs into account in renewing franchises under Section 626.[33/] The

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channel capacity"). In fact, the Commission has determined that PEG capital costs "refer to those costs incurred in or associated with the *construction of PEG access facilities,*" which the Sixth Circuit has affirmed as an "eminently reasonable" statutory interpretation. *Alliance for Community Media v. FCC*, 529 F.3d 763, 784 (6th Cir. 2008) (emphasis added).

30/ *See* Orszag/Shampine Economic Analysis ¶ 25 ("applying different tax treatment to those providers can distort competition between the two, even when the services provided to consumers are indistinguishable to the consumer").

31/ 47 U.S.C. § 541(a)(4).

32/ Alliance for Communications Democracy Comments at 9; *see also* LFA Coalition Comments at 30; Charles County Comments at 10-11; Anne Arundel County Comments at 11.

33/ *See* 47 U.S.C. § 546(c)(1)(D) (directing franchising authorities to consider, among other things, whether a cable operator's franchise 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").

cost/benefit analysis required under this provision underscores that Congress intended franchising authorities to balance the desire for any in-kind exactions requested by parties in the renewal process against the overall franchise fee burdens on cable operators and subscribers.

The franchising process is not *carte blanche* for franchising authorities to force cable operators and their subscribers to fund state and local operations, using the five percent franchise fee cap as a starting point for taxation and adopting even more requirements as in-kind exactions rather than cash payments. Rather, Congress structured this balancing process as another accountability measure on franchising authorities and with the same intent to *limit* these tax burdens, not to increase them. In other words, Congress did not intend franchising authorities to seek the full five percent if they determine that community needs and interests can be met at a lower cost to cable subscribers. Therefore, if a franchising authority's "requirements for PEG channels alone swallow the franchise fee"[34/] it is not due to a flaw in the Cable Act or in the Commission's proposed clarifications, as NATOA contends, but rather the result of overreaching by franchising authorities.

NATOA is also wrong that the costs of cable-related items are supposed to be borne by the operator, and that "cable-related obligations would not impact the operator's 'rate of return' or 'subscriber rates' if they were intended to be included in the franchise fee calculation."[35/] First, as Congress understood, franchise fee costs *are* often ultimately borne by cable subscribers – in the form of pass-through taxation and via more limited deployment and innovation. Indeed, as the Orszag/Shampine Economic Analysis points out:

> [t]he more of the tax borne by cable operators, the bigger the direct effect on investment incentives. However, the more of the tax borne by consumers, the bigger the direct loss of consumer welfare, and the bigger the effect on demand for cable services and thus a

34/ NATOA Comments at 12.

35/ *Id.* at 7.

> bigger indirect effect on incentives for investment. Thus, LFAs imposing fees on non-cable services and in-kind demands that do not count against the 5% franchise fee will deter investment in new infrastructure and services regardless of whether cable operators can pass some or all of those costs through to consumers."[36/]

Second, it made sense for Congress to include "cable-related obligations" in discussions of subscriber rates or rates-of-return, because in past decades, not all cable operators were passing though PEG operating costs as franchise fees, even though they could, making rate of return important for franchising authorities to consider during franchise negotiations.[37/] Therefore, the reference to subscriber rates or rates of return says nothing about whether or not Congress intended these obligations to be franchise fees.

C. The Franchising Authorities' Arguments Would Rewrite Congress' Definition of Franchise Fee, And Should Be Rejected.

Faced with a clear franchise fee definition and statutory scheme, franchising authorities nonetheless make a series of strained arguments based on selective or ill-considered readings of Title VI that would rewrite the franchise fee definition to exclude a wide range of costs that are not among the specific exemptions enumerated by Congress. Each is wrong.

First, the fact that Section 622(c) allows cable operators to itemize certain charges on subscriber bills has no bearing on which charges meet the definition of franchise fees under Section 622(g) of the 1984 Cable Act. Rather, Congress adopted Section 622(c) years later, in 1992, to promote transparency and political accountability by allowing cable operators to inform

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36/ Orszag/Shampine Economic Analysis ¶ 29.

37/ *See*, *e.g.,* 47 U.S.C. § 521 (establishing a goal of "assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public"). The Orszag/Shampine Economic Analysis addresses the issue of pass-through to consumers and the resulting impact on cable investment by examining "three possibilities: 1) that cable operators bear the full amount of new taxes and fees, because they either are prohibited from passing those fees along or are unable to pass them along; 2) that cable operators pass through half of new taxes and fees, so consumer bills rise by half the amount of those taxes and fees; and 3) that consumer bills rise by the full amount of those taxes and fees." *Id.* ¶ 34. As Orszag and Shampine explain, "[t]he total impact ranges from \$2.1 billion to \$5.0 billion in 2018 to \$3.5 billion to \$8.3 billion in 2023. That could fall entirely on cable operators, entirely on consumers, or on both groups." *Id.*

subscribers about how much of their total bill is made up of franchise fees, PEG fees, or other charges imposed by local governments through the franchising process.[38/] As stated by Senator Lott, who introduced what would become the final version of Section 622(c), "sometimes the rates have gone up because of hidden, unidentified increases in fees or taxes which the cable [company] has to pay and the cable company passes on to the consumers;" therefore, the section "give[s] the cable companies an opportunity to itemize these so-called hidden costs to explain to people what is involved in the charges so they will know it is not just the cable company jacking up the prices[.]"[39/]

Contrary to the comments of NATOA, the structure of Section 622(c) does not show that Congress intended PEG-related obligations and franchise fees to be mutually exclusive.[40/] Section 622(c)(1) permits pass-through of any PEG-related costs that fit the statutory definition of franchise fees, which can include noncash exactions, as the Commission has held and the Sixth Circuit has affirmed.[41/] Section 622(c)(2) simply ensures that any other PEG support obligations (including capital costs, which by definition are not franchise fees) may also be itemized on subscriber bills, consistent with congressional intent to promote political accountability for these charges. And Section 622(c)(3) is a catch-all permitting itemization of any other charges imposed by a franchising authority, whether they are described as "franchise

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38/ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631, ¶ 545 (1993) ("Section 622(c) has to do with increasing political accountability for regulatory costs imposed, by permitting subscribers to be informed that a portion of their bills are related to governmentally imposed obligations.").

39/ 138 Cong. Rec. S569 (Jan. 29, 1992).

40/ *See* NATOA Comments at 4-5.

41/ *See Montgomery County*, 863 F.3d at 491.

fees" or some other term (*e.g.*, "right-of-way fees").[42/] The scope of what is – and is not – a franchise fee subject to the five percent cap is a separate question addressed in Section 622(g), which should govern the Commission's analysis here.

Second, the Alliance for Communications Democracy *et al.*'s argument that Congress could have discussed the franchise fee cap in Section 611(b) if it had intended to include the value of PEG capacity towards franchise fees misunderstands the statute's structure.[43/] Congress did not need to reference the franchise fee cap in Section 611– or any other Cable Act provision. As its title indicates, Section 622 governs "Franchise Fees" and makes clear that any items *not* expressly exempted from that section's broad definition of franchise fees are included against the statutory cap. Thus, while 611(b) provides that franchising authorities "may" require PEG channel capacity, such a requirement is expressly made subject to Section 626, which, as noted above, imposes a reasonableness standard on such demands in the renewal context.[44/] The authority to impose PEG demands must also be read in the overall context of Title VI, including Section 622(b)'s directive that franchise fees "shall not exceed" the statutory cap. Congress was not required to reiterate the limitations imposed by the five percent cap at every mention of permissible in-kind assessments in other provisions.[45/]

[42/] The fallacy that Section 622(c) distinguishes franchise fees from other exactions, as NATOA and others claim, is underscored by the fact that subsection (c)(3) repeats virtually *verbatim* Section 622(g)(1)'s broad definition of a franchise fee. Yet, by NATOA's logic, the itemization of a cost under subsection (c)(3) would control its treatment for franchise fee purposes, *removing* it from the very definition that Congress established for such fees in Section 622(g)(1), which would be an absurd result.

[43/] Alliance for Communications Democracy Comments at 8.

[44/] *See* 47 U.S.C. § 546(c)(1)(D).

[45/] It is worth noting as well that Section 611 functions primarily as a *limitation* on franchising authorities, with narrowly crafted permissive authority for PEG and I-Net capacity requests, subject to the franchise fee cap.

Third, Anne Arundel County's argument that it is somehow meaningful that Section 621's reference to PEG costs does not state that it is subject to the provisions of Section 622[46/] fails for a similar reason – it does not need to, because the definition of franchise fees in Section 622(g) applies throughout Title VI.[47/] NATOA and Anne Arundel County also argue that since Congress did not consider cable-related in-kind obligations as fees, it would not have viewed them as needing a specific exemption from the franchise fee definition.[48/] This argument, however, does not comport with the statutory text, as it entirely ignores Congress's decision to define franchise fees to include "assessments of any kind." It also ignores that Congress in fact considered these issues in crafting the broad definition of franchise fees. As shown above, Section 622(g)(2)(B) and (C) provide specific exemptions for existing PEG support obligations in franchises pre-dating the 1984 Cable Act and PEG capital costs in franchises effective after that date.

Finally, the fact that Section 623(b)'s rate regulation scheme separately made clear that cable operators could recover the costs of franchise fees and the costs of in-kind obligations is not proof that PEG-related costs are not franchise fees.[49/] Section 623(b) directs the Commission to adopt rate regulation rules that would identify the costs of satisfying franchise requirements and account for all franchise requirements in those regulations. Section 623(b) separately lists franchise fees and certain in-kind obligations not because these obligations (with the exception of PEG capital) were not franchise fees, but because in practice some cable operators may not

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[46/] Anne Arundel County Comments at 15.

[47/] Anne Arundel County also baselessly claims that Section 611 authorizes recovery of capital costs for PEG *and* I-Nets above the franchise fee. *See* Anne Arundel County Comments at 16-17. This is patently incorrect. Section 611 does not address the provisioning of I-Nets nor does it purport to exempt anything from the franchise fee definition.

[48/] *See* NATOA Comments at 3-5; Anne Arundel County Comments at 17-19.

[49/] *See, e.g.,* LFA Coalition Comments at 29-30.

have been passing these costs through, and Congress wanted to ensure that the Commission's regulations were clear that recovery of all such costs was permissible.[50/] The Commission accordingly adopted regulations designed to be abundantly clear that all such franchise requirements could be passed through regardless of rate benchmarks, holding that "These costs are largely beyond the control of the cable operator, and should be passed on to subscribers without a cost-of-service showing."[51/] The rules applied regardless of whether a franchise requirement was also a franchise fee (like PEG operating support) or was not a franchise fee (like PEG capital costs); their mention was not meant to, and does not, bear any relationship to whether an in-kind payment should also count against the five percent cap.

D. Build-Out Obligations Are Distinct From Franchise Fees.

The Commission reasonably and correctly concludes that build-out obligations are not franchise fees because they are an essential part of providing service to the community, and many commenters supported this interpretation of the Act, including franchising authorities.[52/] In this regard, the *Second FNPRM* reflects the principle that cable-related in-kind exactions require the cable operator to transfer something of value to the franchising authority or its designee (*e.g.*, free cable service to government buildings or channel capacity to a PEG group), whereas other franchise requirements may impose costs on the cable operator but relate primarily

[50/] 47 U.S.C. §543(b)(2)(C)(v)-(vi), (b)(4).

[51/] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631, ¶ 254 (1993). Identifying the costs of franchise requirements also served Congress' additional transparency directives. *City of Pasadena*, 16 FCC Rcd. 18192 (2001) ("Fee itemization … is intended to inform subscribers that local elected officials are imposing franchise fees so that there will be a measure of political accountability for fees and fee increases."), aff'd *Texas Coalition of Cities, et al. v. FCC*, 324 F.3d 802 (5th Cir. 2003) (FCC had correctly determined that the purpose of itemizing the entire amount of franchise fees on subscriber bills was to promote the political accountability of local governments.).

[52/] *See, e.g.*, Comments of the City of Pasco, Washington, MB Dkt. No. 05-311, at 2 (filed Nov. 14, 2018); Comments of the City of Springfield, MB Dkt. No. 05-311, at 2 (filed Nov. 13, 2018); Comments of the City of Murfreesboro, MB Dkt. No. 05-311, at 2 (filed Nov. 6, 2018).

to the provision of cable service to subscribers (*e.g.*, line extensions to additional homes in a franchise area).[53/]

A few franchising authorities argue that the Commission has drawn an illogical line between build-out and other obligations, because many obligations imposed on cable operators benefit the community. But this misses the point. *All* franchise conditions imposed by a franchising authority should benefit the community (*i.e.*, the public) in some way. Build-out obligations are distinct from franchise fees because they are a basic requirement for service in a franchise area – you cannot serve households to which you have not built out. PEG obligations, I-Nets, and other in-kind exactions serve no similar essential function for the provision of cable service to subscribers, but rather provide value to franchising authorities or particular third parties for purposes determined to be in the public interest by the franchising authority.

The Cable Act also treats these obligations differently as a matter of statutory authority. Whereas in-kind exactions are discretionary on the part of the franchising authority (*e.g.*, a franchising authority "may" require adequate PEG channel capacity, facilities, or financial support[54/]), certain build-out obligations are mandatory (*e.g.*, a franchising authority "shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of . . . income"[55/]).

The Commission should reject efforts by some commenters to paint PEG obligations and build-out requirements with the same brush by claiming that neither are for the benefit of the

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53/ *See Second FNPRM* ¶ 21 (noting that build-out requirements "are not free for cable operators," but are different from in-kind exactions in that line extensions "are not specifically for the use or benefit of the LFA or any other entity designated by the LFA, but rather are part of the provision of cable service in the franchise area").

54/ 47 U.S.C. § 541(a)(4)(B).

55/ 47 U.S.C. § 541(a)(3).

franchising authority, but are rather for the benefit of the "community as a whole."[56/] As stated above, in the *Second FNPRM*, the Commission recognized that in-kind exactions may benefit the franchising authority or a third party designated by the franchising authority, such as a PEG operator. In each instance, the franchising authority is exacting value from the cable operator and its subscribers to benefit some community interest.

II. THE COMMISSION SHOULD VALUE IN-KIND CONTRIBUTIONS AT THEIR FAIR MARKET VALUE

Franchising authorities contend that the Commission should value in-kind exactions, if at all, at incremental cost, arguing that (i) using incremental cost is consistent with other provisions of the Cable Act; (ii) fair market value is too hard to calculate or is zero dollars for some exactions; and (iii) fair market valuations would allow double recovery of franchise fees. The Commission should reject each of these arguments.

First, as NCTA explained[57/] – and as the Orszag/Shampine Economic Analysis discusses in further detail – valuing in-kind exactions at incremental cost vastly undercompensates cable operators for the costs of providing these items because the true cost of an item is not the out-of-pocket cost to the operator, but its opportunity cost.[58/] For example, in determining how requests for "free" public service announcements ("PSAs") or PEG advertisements by franchising authorities should be handled, one could look to the value of advertising time, which provides a good example of why incremental cost is not a good metric. Allowing a franchising authority to have "free" PSAs or PEG advertisements may result in minimal out-of-pocket costs to the cable

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56/ Alliance for Communications Democracy Comments at 13; *see also* Anne Arundel County Comments at 27-28.

57/ NCTA Comments at 51-52.

58/ Orszag/Shampine Economic Analysis ¶ 20.

operator. The opportunity cost, however, is quite large, since the cable company would otherwise be able to sell this time to run another advertisement.[59/]

The true cost of "free" in-kind services and facilities is significant, and cable operators should be able to account for it in full. As the Orszag/Shampine Economic Analysis explains, fair market value is the best proxy for opportunity cost.[60/] Adopting a fair market value standard thus ensures that the valuation of in-kind obligations imposed on cable operators and, ultimately, cable subscribers reflects their full costs and best effectuates Congress's intent to limit the overall taxation of cable operators and subscribers. Valuing in-kind obligations at incremental cost, in contrast, would allow franchising authorities to shift the true cost of an exaction from their taxpayer base at large to the smaller subset of taxpayers who are also cable subscribers. Adhering to Congress' intent to limit the overall taxation of cable operators and subscribers is especially important since a growing number of non-cable video providers competing with cable operators are not subject to franchising obligations.

Valuing a requirement at its fair market value also ensures that a franchising authority will not consume more resources simply because they are available at an artificially reduced price. Using the example above, if advertising space is available at incremental cost from a franchised cable operator but at a substantially higher market cost from other sources, a franchising authority will be incentivized to purchase more overall advertising time than it otherwise would purchase at full market price. Lower price equates to greater demand. The franchising authority also would have the incentive to purchase all of its advertising time from the franchised cable operator via in-kind exactions and none from competitors that might want a fair opportunity to make a sale on commercial terms, thereby skewing the market for advertising.

59/ *Id.* ¶ 21.

60/ *Id.*

Second, contrary to claims from some commenters,[61/] using fair market value is not inconsistent with Section 622(c), which allows itemization of certain regulatory costs on subscriber bills. As discussed above, these regulatory costs are more accurately described in terms of opportunity cost. Moreover, as detailed below, a properly contextualized review of the legislative history confirms that using fair market value would best align with congressional intent.

In its comments, Alliance for Communications Democracy *et al.* claims that the legislative history supports use of incremental cost because Section 622(c) authorizes only itemization of "direct and verifiable costs" for PEG requirements.[62/] This quote, however, has been removed from its proper context. The excerpt appears in a broader discussion of cable rate regulation and the Commission methodology for rate-setting. At a time when some cable operators had a local monopoly and were subject to rate regulation, it made sense that Congress would expect itemization of PEG-related costs to be consistent with the applicable rate-setting methodology.[63/] However, in the 1992 amendments that created the pass-through itemization provisions under Section 622(c), Congress also made clear that it prefers "competition rather than regulation" by "provid[ing] that, where the FCC finds that a cable system is subject to effective competition, there shall be no regulation of any of the system's rates by any level of government."[64/] Thus, legislative history shows that where effective competition exists, Congress expected the market to set rates, not a regulator.

61/ *See, e.g.*, Alliance for Communications Democracy Comments at 14.

62/ *Id.*

63/ More generally, it also made sense in a monopoly context to avoid deferring to a fair market value standard, because there was no competitive "market" to discipline pricing so as to make it "fair."

64/ H.R. Rep. 102-628 at *80 (1992).

There is now a presumption of effective competition nationwide. In the vast majority of the nation, the market, not a regulator, sets cable rates. The valuation of PEG-related costs should therefore also be market-based, both for the five percent cap and for bill itemization purposes. Stated differently, it makes no sense to apply backward-looking references to "direct and verifiable costs" calculated under a Commission-prescribed formula for rate regulation in today's highly competitive marketplace. Rather, the "direct and verifiable costs" to cable operators for PEG-related obligations and other in-kind contributions should be market-based, just like cable rates. And as explained above, the best proxy for the opportunity costs of these in-kind obligations is their fair market value.[65/]

Third, the fair market value of in-kind exactions is not difficult to determine.[66/] NCTA has provided straightforward suggestions for how to assess the fair market value of many common in-kind exactions, including PEG operating costs and I-Nets.[67/] Contrary to the claims

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65/ Contrary to the claims of several municipalities, this conclusion does not conflict with the Commission's determination in the wireless infrastructure context that local governments should charge no more than a reasonable approximation of costs incurred where wireless providers seek to install small cell infrastructure in the public rights-of-way. *See* Comments of the City of Corvallis, Oregon, MB Dkt. No. 05-311, at 5 n.4 (filed Nov. 14, 2018); Comments of the City and County of San Francisco on the Second Further Notice of Proposed Rulemaking, MB Dkt. No. 05-311, at 5-6 (filed Nov. 14, 2018); *see also Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79 *et al*., FCC 18-133, ¶ 50 (rel. Sept. 27, 2018). As discussed above, many of the services and facilities that cable operators provide through in-kind contributions are available in competitive markets. But there is no competitive "market" for right-of-way access, so allowing a local government to charge "fair market value" would essentially leave a monopolist free to charge whatever it wants. *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Order Denying Motion for Stay, WT Docket No. 17-79 et al., DA 18-1240, ¶ 14 n.47 (rel. Dec. 10, 2018). On the other hand, market forces would typically preclude a cable operator from charging a monopoly rate to a local government for any in-kind exactions, because the government could instead choose to purchase comparable services or facilities from a different provider.

66/ *See* The City Coalition Comments at 20 (arguing that "cable-related, non-monetary obligations are not disposed to a fair and simple valuation process").

67/ *See* NCTA Comments at 53-55.

of Charles County, PEG capacity does not have a fair market value of zero dollars.[68/] As is also explained in the Orszag/Shampine Economic Analysis, "[w]hen a cable network is required to devote bandwidth to in-kind demands such as PEG channels, that leaves less bandwidth available for other purposes"[69/] – bandwidth that could be sold, for instance, for a comparable service. There are also continued operational and opportunity costs for the maintenance of I-Nets built in previous years and for services provided over previously installed connections.[70/] These commitments of fiber capacity are not available for commercial usage[71/] and these should be recovered at their fair market value. In particular, the present day fair market cost would be comparable commercial charges or maintenance contracts to keep the facilities and services up and running.

Fourth, adopting a fair market valuation approach to in-kind exactions would not result in "double recovery" by cable operators.[72/] NCTA is not proposing to count against future franchise fees the value of in-kind exactions provided to franchising authorities in previous years, but instead to count against the franchise fee cap the fair market value of any ongoing or future in-kind obligations. The Administrative Procedure Act commands that legislative rules giving effect to statutory language may have prospective effect only, and NCTA is not suggesting that any of the Commission's determinations apply retroactively.[73/] Prospective

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68/ *See* Charles County Comments at 21-22.

69/ Orszag/Shampine Economic Analysis ¶ 20.

70/ *See* Anne Arundel County Comments at 31 (arguing that "there is no cost to the operator associated with providing the actual service").

71/ Orszag/Shampine Economic Analysis ¶ 22.

72/ *See, e.g.,* NATOA Comments at 10-11; Anne Arundel County Comments at 24-25.

73/ *See* 5 U.S.C. § 551(4) ("'[R]ule' means the whole or a part of an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy.") (emphasis added); *see also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue application of the Commission's guidance on this issue – *i.e.*, to in-kind exactions in future agreements and to ongoing and remaining in-kind exactions in existing agreements – will eliminate any double recovery concern.[74/] Franchise fees, including in-kind contributions, will then simply continue to be recovered from cable subscribers, in whole or in part, at the option of the cable operator, as they are today.[75/]

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the rule in the first instance"); *National Cable & Telecommunications Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) (retroactive action alters "the past legal consequences of past actions," whereas the D.C. Circuit has "repeatedly made clear that an agency order that only upsets expectations based on prior law is not retroactive") (internal quotation marks omitted). Moreover, the rulings proposed in the *Second FNPRM* are not a change in Commission policy, but a clarification of existing law, and franchising authorities have been on notice for more than a decade that the Commission's orders implementing Section 621 could affect their understanding of the costs subject to the franchise fee cap.

74/ Claims that the Commission's proposals would result in an unconstitutional taking are equally baseless. *See* LFA Coalition Comments at 30-33. The Cable Act expressly preempts "any provision of any franchise . . . which is inconsistent with this chapter," *see* 47 U.S.C. § 556(c), and franchising authorities can have no protectable property interest in franchise conditions that conflict with federal law. As the D.C. Circuit has held, "most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect." *Mobile Relay Associates v. FCC*, 457 F.3d 1, 11 (2006). That is particularly apt here. Franchising authorities cannot claim they are entitled to "just compensation" for property interests in franchise fees or in-kind exactions that were never lawfully theirs in the first instance.

75/ NATOA argues that the only reasonable way to address the possible double recovery moving forward would be to effectively rewrite Section 622(c)(2), *see* NATOA Comments at 11, but this argument goes too far. As explained above, the separate provisions of Section 622(c) are not mutually exclusive and were not intended to specify which costs are subject to the franchise fee cap. To promote political accountability, subsection (c)(1) allows any costs included in the cable operator's franchise fee payment to be itemized on subscriber bills. Subsection (c)(2) permits itemization of PEG-related costs, including some, such as PEG capital costs, that are not franchise fees. Subsection (c)(3) is simply a catch-all for any other government-imposed charges that are not covered by the other provisions but are clearly within the broad definition of franchise fees under Section 622(g)(1). Nothing about this statutory scheme would allow cable operators to itemize the same cost twice under different provisions (*e.g.*, as a franchise fee *and* a PEG-related cost), and cable operators have no intention of doing so.

III. THE COMMISSION HAS AMPLE AUTHORITY TO REAFFIRM THAT THE MIXED-USE RULE APPLIES TO ALL CABLE OPERATORS

A. The Act Is Clear That Franchising Authorities Do Not Have Authority Over A Cable Operator's Provision Of Non-Cable Services.

As numerous parties acknowledge, a cable system is a cable system regardless of whether it is also used for non-cable services.[76/] Nonetheless, franchising authorities have regulated, and continue to regulate, non-cable services through franchise requirements and assess fees on revenue cable operators earn from broadband and other services, and the facilities used to provide those services, above and beyond the five percent franchise fee the cable operators already pay.[77/] NCTA urges the Commission to make clear that such regulations and fees – imposed on any and all cable operators – violate the mixed-use rule.

As NCTA detailed in its comments, Title VI sets forth the full scope of state and local authority over services provided over a cable system and the facilities used to provide those services, and it clearly prohibits franchising authorities from regulating non-cable services when offered by cable operators and from regulating the facilities or equipment used to offer those services.[78/] Therefore, the Commission need not, as Anne Arundel County contends, look at

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[76/] *See, e.g.,* Anne Arundel County Comments at 36 (stating that a "cable system can support services other than cable service").

[77/] The Appendix contains examples of such regulations and fees in violation of the mixed use rule. *See* Appendix at 1-3.

[78/] Contrary to NATOA's contentions, Section 253 is not an additional source of authority for regulation of already-franchised cable systems that also provide telecommunications services. *See* NATOA Comments at 23-24. Rather, as NCTA has explained, Section 253's directive that compensation for use of public rights-of-way must be "fair and reasonable" and "competitively neutral and nondiscriminatory" bars franchising authorities from requiring further compensation for the provision of broadband, VoIP, telecommunications, or other services over cable system facilities from cable operators who already pay more than full compensation for their use of the public rights-of-way via cable franchise fees. *See* NCTA Comments at 21-26.

outside sources of authority claimed by franchising authorities,[79/] and indeed, should reject such attempts to evade the limits Congress established.[80/]

NATOA claims that the Commission is deliberately overlooking the *City of Eugene* case, and asserts that the state court in that case "expressly rejected arguments that the Cable Act or the amendments thereto in the Telecommunications Act preempt LFAs from imposing fees or other regulations on the non-cable services provided by cable operators,"[81/] But the *City of Eugene* decision's analysis of the city's authority over non-cable services misapplied the Cable Act. As NCTA has explained,[82/] the state court erred in its interpretation of Sections 621 and 622.

Contrary to *City of Eugene*, (a) Section 621(a)(2) already grants cable operators the right to construct and operate a cable system "over the public rights of way," including for cable and non-cable services such as broadband; and (b) Section 622(b) sets a cap of five percent of *cable service* revenues as adequate compensation for the use of public rights-of-way for these services, thereby barring the city from requiring an additional "license" and corresponding fees for other services provided over that same cable system. The state court based its reasoning on the city's assertion that the license fee for cable modem service was *not* imposed pursuant to the city's

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79/ *See* Anne Arundel County Comments at 39-40. In addition, Anne Arundel County's interpretation of Section 621(a)(2) – that it permits "construction" of a cable system but does not authorize that cable system to offer any particular service – strains credulity. *See* Anne Arundel County Comments at 43. Under this interpretation, a franchising authority would be free to allow construction of a cable system but then refuse to allow the operator to offer *any* service over the system, an outcome clearly contrary to congressional intent.

80/ As NCTA has already shown, Congress in the 1996 Act amended Section 622 to cap the amount of compensation that franchising authorities can require for use of the public rights-of-way to five percent of the cable operator's revenues from "cable services," rather than from any service provided over the cable system, thereby limiting the scope of services provided from the operation of a cable system that could be subject to franchise fees. *See* NCTA Comments at 15 (discussing 47 U.S.C. § 542(b)).

81/ NATOA Comments at 20.

82/ *See* NCTA Comments at 20.

cable franchising authority, but rather under the city's purported authority as a local government to impose separate right-of-way fees for telecommunications services. The Commission should therefore make clear that local governments cannot evade federal cable franchise fee limits by attempting to impose additional fees on the operation of cable systems simply by citing to another general federal or state law as authority to charge what Congress forbids.[83/]

B. The Commission Has Authority To Prohibit Franchising Authority Regulation Of Broadband Services Provided Over Cable Systems.

Public Knowledge argues that the Commission cannot preempt state and local regulation of information services offered over cable systems because it gave up the power to regulate such services in the *Restoring Internet Freedom Order*.[84/] This argument fundamentally misunderstands the Commission's decision in that *Order* and the scope of the Commission's authority. The Commission has ample authority to apply the mixed-use rule to prohibit franchising authorities from regulating information services provided over cable systems.

As an initial matter, the central premise of Public Knowledge's argument – that the Commission has disclaimed authority to regulate information services in general and broadband Internet access service ("BIAS") in particular – is wrong. Far from abandoning power to regulate information services, the Commission used its authority to restore the longstanding federal policy of non-regulation of information services in the *Restoring Internet Freedom Order*,[85/] while also establishing a "calibrated federal regulatory regime" for such services.[86/] For instance, the *Restoring Internet Freedom Order* specifically found that Section 257 provides

83/ *See* NCTA Comments at 17-21.

84/ Comments of Public Knowledge, MB Dkt. No. 05-311, at 1-2 (filed Nov. 14, 2018).

85/ *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 31 ¶¶ 2, 20 (2017) ("*Restoring Internet Freedom Order*").

86/ *Id.* ¶ 194.

affirmative "authority for the transparency requirements" adopted therein,[87/] which enable "oversight over [BIAS providers'] practices [by] the Commission, FTC, and other antitrust and consumer protection authorities."[88/] The Commission also preempted state and local measures that re-impose the rules the Commission repealed or impose "'economic' or 'public utility-type' regulations" on BIAS providers.[89/] By clarifying that state and local franchising regulation of information services provided over cable systems – and regulation of cable facilities to the extent they are used to provide such services – is prohibited under federal law, the proposed mixed-use rule will simply align these practices with the same federal deregulatory policies.[90/]

Indeed, as the Commission's tentative decision rightly concludes, Congress itself has already *explicitly* prohibited franchising authorities from regulating information services

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87/ *Id.* ¶ 232.

88/ *Id.* ¶ 234.

89/ *Id.* ¶¶ 194-95. The Commission explained that "[t]he terms 'economic regulation' and 'public utility-type regulation,' as used here, are terms of art that the Commission has used to include, among other things, requirements that all rates and practices be just and reasonable; prohibitions on unjust or unreasonable discrimination; tariffing requirements; accounting requirements; entry and exit restrictions; interconnection obligations; and unbundling or network-access requirements." *Id.* ¶ 195 n.730. The Commission also correctly tentatively concluded in the Second FNPRM that "entry and exit restrictions" include requirements that franchised cable operators obtain a separate franchise to provide BIAS. *Second FNPRM* ¶ 29.

90/ Moreover, the fact that BIAS and other information services provided over cable systems are jurisdictionally interstate, *see, e.g., Restoring Internet Freedom Order* ¶ 199, provides yet another basis for ensuring that state and local franchising authorities adhere to these federal deregulatory policies. *See, e.g., Minnesota PUC*, 483 F.3d at 578 ("the 'impossibility exception' of 47 U.S.C. § 152(b) allows the FCC to preempt state regulation" when "federal regulation is necessary to further a valid federal regulatory objective, i.e., state regulation would conflict with federal regulatory policies"); *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) (agreeing with cases "in which FCC preemption of state regulation was upheld where it was *not* possible to separate the interstate and intrastate components" of a communications service.); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 430, 431 (D.C. Cir. 1989) (recognizing that "providing interstate [communications] users with the benefit of a free market and free choice" is a "valid goal" and that "[t]he FCC may preempt state regulation … to the extent that such regulation negates the federal policy of ensuring a competitive market"); *Howard v. America Online,* 208 F.3d 741, 752-53 (9th Cir. 2000) (finding that the Commission's determination that ISPs are not common carriers meets Congress's policy of nonregulation).

provided by a cable operator – in Section 624.[91/] Although, as some commenters note,[92/] Section 624(b) discusses this prohibition in the context of cable franchise proposals and renewals, the prohibition would lose all practical meaning if franchise authorities were able to circumvent it simply by waiting to impose regulations or requirements on non-cable services until after cable franchise negotiations concluded, or by relying on some other non-franchising source of authority. The Commission should not allow franchising authorities to thwart Congress's clear policies in this manner.

Further, as NCTA explained in its initial comments,[93/] Section 624(e) prohibits state and local governments from limiting the use of particular transmission technologies or subscriber equipment by cable systems. The Commission has explained that this prohibition allows cable systems to deploy wired and wireless facilities of their own choosing, reinforcing Congress's intent to promote the operation of cable systems to provide non-cable services without further state or local regulation or fees for the use of new technologies used to provide them.

NCTA also explained that the fact that government authorities cannot require duplicative rights-of-way permissions does not mean that cable operators cannot be required to obtain certifications that are unrelated to use of the rights-of-way for the provision of services within their jurisdiction.[94/] NATOA's argument that the Commission concluded in the *TCI Cablevision of Oakland County* case that 624(e) does not prohibit an LFA from requiring a cable operator to obtain appropriate authorization prior to providing telecommunications services over the cable

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91/ *See* 47 U.S.C. § 544(b)(1) (stating that a franchising authority "may establish requirements for facilities and equipment, but may not . . . establish requirements for video programming or other information services").

92/ *See* NATOA Comments at 18-19; Anne Arundel County Comments at 39-40.

93/ NCTA Comments at 13-14.

94/ *See* NCTA Comment at 3, n.4 (noting that the mixed-use rule would not preclude certifications such as state-required certificates of public convenience and necessity).

system[95/] misses the point. In the *TCI* decision, the Commission made clear that appropriate authorization did not "reach[] beyond traditional rights-of-way matters … to impose a redundant 'third tier' of telecommunications regulation which aspires to govern the relationships among telecommunications providers or the rates, terms and conditions under which telecommunications service is offered to the public."[96/] Indeed, contrary to NATOA's assertions, the Commission has, in interpreting Section 624(e), clearly proscribed some franchising authorities' current practice of refusing to authorize facilities that can support non-cable services.[97/]

IV. THE COMMISSION SHOULD APPLY THESE STATUTORY INTERPRETATIONS TO ALL CABLE FRANCHISES

As NCTA detailed in its comments,[98/] Title VI expressly provides that its limitations apply to both state franchising authorities and local franchising authorities.[99/] As such, any limitations on imposing multiple franchises and fees on services offered over the cable system, or on in-kind exactions, that the Commission adopts in this proceeding should apply to state level franchising as well.[100/]

95/ NATOA Comments at 23.

96/ *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd. 21396, 21441 (1997). As to the type of authority reserved under Section 253(c), the Commission specified that these "matters include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way." *Id.*

97/ *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996,* 14 FCC Rcd. 5296, ¶¶141-143 (1999).

98/ *See* NCTA Comments at 60-61.

99/ *See* 47 U.S.C. § 522(10) ("[T]he term 'franchising authority' means any governmental entity empowered by Federal, State, or local law to grant a franchise[.]"); *see also* H.R. REP. 98-934 at 94 (1984) ("A state may, for instance, exercise authority over the whole range of cable activities…– as long as the exercise of that authority is consistent with Title VI.").

100/ In addition to the plain language of the statute, there are practical reasons for the Commission to apply its tentative conclusions regarding in-kind exactions and mixed-use to state franchises. Some states, like some of their local franchising counterparts, have imposed regulation on non-cable service, In an attempt to get around this clear statutory text, Anne Arundel County argues that since franchise fees imposed by some state video franchising laws apply to more than just cable providers, these fees are not franchise fees under the Cable Act – instead, they are taxes, fees, or assessments of general applicability.[101/] The Commission should reject this argument.

A cable franchise is an authorization awarded by a franchising authority for cable systems to construct and operate a cable system in the public rights-of-way within that franchising authority's jurisdiction.[102/] Section 621(b)(1) is explicit that "a cable operator may not provide cable service without a franchise," and Section 622 establishes that the franchise fee is the fee paid for that cable franchise.[103/] Under federal law, state authorizations held by cable operators give them rights to construct and operate a cable system. They are therefore unambiguously cable franchises, and the fees paid for those authorizations are, correspondingly, cable franchise fees. That the state may use the same regulatory scheme to authorize other video providers' use of the rights-of-way and assess a fee for that use does not make it any less of a cable franchise for purposes of Sections 621 and 622.[104/] As cable franchise laws, they must, as

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duplicative fees on non-cable services and required in kind-exactions on top of franchise fees in the form of PEG support, PEG channel capacity and I-Nets. Appendix at 2-3, 5-6, 9-12. One state's franchise requires the cable operator to state explicitly that the I-Net capacity and services it provides are not creditable against the five percent franchise fee cap. Appendix at 14. In addition, if the Commission does not apply these requirements to state franchises, states could pass laws aimed at circumventing the local franchise authority mixed use and in-kind limitations, thereby thwarting the congressional intent.

101/ Anne Arundel County Comments at 44-45.

102/ *See* 47 U.S.C. § 541(a)(2).

103/ Franchising authorities also put forward the strained argument the fee can be broken into two separate parts – the franchise fee, which is purportedly "compensation for use of public property," and franchise obligations, which are "consideration for the right to provide cable service within the jurisdiction." *See* The City Coalition Comments at 10. Not surprisingly, there is no support cited for this proposition, as it is contrary to the plain language of the statue.

104/ Nor are such assessments fees of general applicability, which Congress intended to cover "such payments as a general sales tax, an entertainment tax imposed on other entertainment businesses as well as the cable operator, and utility taxes or utility user taxes." H.R. REP. 98-934 at *64 (1984). A franchise fee by any other name is still a franchise fee.

NCTA and others demonstrated,[105/] be subject to the federal limitations governing cable franchises.

V. ALLOWING THESE STATUTORILY PROHIBITED PRACTICES TO CONTINUE WILL HAVE A SERIOUS IMPACT ON CONSUMER WELFARE

The comments in this proceeding plainly demonstrate why the Commission must clarify the limitations on in-kind exactions and permissible rights-of-way fees, and apply the limits prospectively to existing and future franchise agreements. Numerous franchising authorities admit that they are using the franchising process (including costly in-kind contributions on top of five percent franchise fee payments and in some cases, fees on broadband, telecommunications, or other non-cable services as well) to engage in precisely the kind of general revenue-raising activities that Congress sought to curb when it enacted the franchise fee cap to protect cable subscribers from the burdens of excessive taxation.[106/] Indeed, many of the franchising authorities' comments discuss at length the communities' desire for additional revenues for

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[105/] *See* NCTA Comments at 60-64; Comments of the American Cable Association, MB Dkt. No. 05-311, at n.5 (filed Nov. 14, 2018) (stating that "Title VI governs both State and local government franchising of cable systems").

[106/] *See, e.g.*, Comments of the North Carolina League of Municipalities, MB Dkt. No. 05-311, at 3 (filed Nov. 14, 2018) ("The League membership also holds deep concerns that a cut to this revenue stream would jeopardize cities' ability to support existing PEG programming, a community benefit that would then compete for funding with other property tax-funded services such as transportation and public safety."); Comments of the City of Auburn Comments, MB Dkt. No. 05-311, at 2 (filed Nov. 14, 2018) ("The City relies on the cable franchise fee to fund primary services such as public safety and streets. As a result of the proposed fee change, the City of Auburn's budget will be impacted up to $1,000,000 annually and many of the services funded by the franchise fee may be in jeopardy as a result."); Comments of the City of Issaquah, MB Dkt. No. 05-311, at 3 (filed Nov. 14, 2018) ("We oppose this NPRM because it puts crucial public services at risk by forcing cities to choose between providing needed services and funding general city operations."). These are but a few examples of franchising authorities who admit that they approach the franchising process in this manner. As discussed above, franchising authorities routinely demand such in-kind exactions.

transportation and public safety services or general city operations, which is not relevant to whether or not fees may be lawfully imposed through a cable franchise.[107/]

While these commenters may claim their dependence on franchise fees and/or additional license fees for all manner of government services cautions *against* any Commission action in this proceeding, NCTA believes the record shows precisely the *opposite*: Without clarification of federal limits on such fees and obligations, certain franchising authorities will continue to "solv[e] their fiscal problems by assessing large fees and/or taxes against cable operators" in violation of Congress's express objective in enacting the five percent statutory cap.[108/]

Franchising authorities (whether operating in their capacity as a franchising authority or in some other governmental guise) have thus far been able to successfully demand multiple franchises or exactions above the five percent franchise fee cap not because – as some claim[109/] – these exactions are acceptable and consistent with congressional intent, but instead because in the "typical franchise process there . . . exist incentives for system operators to offer and for franchise authorities to accept fees beyond what is reasonable and relevant to the regulation of cable system operations[.]"[110/] As the existence of such exactions in so many current franchises demonstrates, a cable operator is at a severe disadvantage in franchise negotiations, because it has invested millions to build a network and faces the threat of a total loss of its right to do business in the relevant franchise area. By comparison, franchising authorities – which exercise

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107/ In addition, the purposes for which the franchising authorities seek additional revenues are not specific to cable subscribers, but rather are general community matters. As such, franchising authorities are requiring residents who choose to subscribe to cable to bear a heavier tax load for government services than those who choose not to subscribe to cable.

108/ *See Cable TV Fund 14-A, Ltd. v. City of Naperville and Ameritech New Media, Inc.*, No. 96-C-5962, 1997 U.S. Dist. LEXIS 11511, *80-81 & n.37 (N.D. Ill. July 29, 1997) (citing and quoting relevant legislative history).

109/ *See, e.g.*, The City Coalition Comments at 15.

110/ *City of Miami, Florida*, 56 R.R.2d 458, ¶ 16 (1984); *see also* NCTA Comments at 57-59.

what amounts to monopoly control of the rights-of-way – face few practical consequences for wrongfully denying a cable franchise or prolonging the renewal process and holding out to preserve existing or exact new contributions.

These incentives have not disappeared, and addressing them has become especially urgent given a cable landscape in which viewership is declining but demands for fees and in-kind exactions keep growing from some franchising authorities, including many that inappropriately use this process to fill budget shortfalls or to address other municipal needs. At the same time, numerous other video distribution platforms now compete with cable without being subject to any franchise requirements or fee payments.

Nor are these concerns hypothetical, as some franchising authorities claim.[111/] As illustrated in the Appendix, municipalities across the country have made – and continue to make – multiple demands in the franchising process that cannot be squared with federal law. The Appendix contains just a sampling of the vast catalogue of such demands that cable operators are facing nationwide.

Franchising authorities should not be allowed to continue to benefit from excessive in-kind exactions that are contrary to the statute and gained because cable operators have no other choice but to go along or file expensive, time-consuming lawsuits, suffer reputational harm from the resulting negative press, and struggle through the business uncertainty posed by the potential loss of franchise rights.[112/] It is no argument that being forced to comply with the statute will

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111/ *See*, *e.g.*, Alliance for Communications Democracy Comments at 4 (complaining that "[t]he Second FNPRM cites no examples of such alleged abuses.").

112/ In many cases, the fact that an agreement was negotiated or renewed simply reflects a cable operator's calculation that the monetary and reputational costs of challenging the illegal exactions contained in the agreement would be greater than the cost of providing the exactions. *See* NCTA Comments at 57-58 (discussing the high cost of prosecuting even the most extreme franchising authority practices).

result in a budget shortfall for some franchising authorities.[113/] As discussed above, Congress did not intend for franchising authorities to use the franchising process to raise revenue at the expense of cable operators and subscribers beyond reasonable measures, and never beyond the statutory cap. Rather, Congress intended for the franchising process and franchise fees to be used primarily to address the cable-related needs of a franchising authority's community. Moreover, the franchising authorities have been on notice since 2007 that in-kind exactions above the franchise fee cap are impermissible – any franchising authorities that continued to rely on such in-kind exactions to preserve revenues for other purposes assumed these risks of their own accord.[114/]

The Commission should also clarify that any limitations on franchising authorities adopted in this proceeding cannot be evaded by claiming that cable-related exactions were the subject of separate negotiations, processes, or other subterfuge that some of the franchising

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[113/] *See, e.g.,* The City Coalition Comments at 18-20. Nor is it likely that the *Second FNPRM*'s proposals would put "critical services . . . in jeopardy," as some localities have claimed. *See, e.g.*, Comments of Tanya Hannah, Chief Information Officer, and Christina R. Jaramillo, Office of Cable Communications, King County, Washington, MB Dkt. No. 05-311, at 8 (filed Nov. 13, 2018). King County, for example, boasts that its tax base consists of 2.2 million residents with a "high median household income." *Id*. at 1. The county claims that the Commission's proposed action would adversely impact its police and fire department budgets. *Id*. at 8. But the county reports it receives only $3 million in franchise fees annually, *id*., a relatively small slice of the county's $5.8 *billion* annual budget. King County, 2019-2020 Proposed Budget Overview, at 3, https://www.kingcounty.gov/~/media/depts/executive/performance-strategy-budget/budget/2019-2020/19-20_Budget-Book/Executive_Summary_2019-2020_Biennial_Budget_Book.ashx?la=en. There is no credible basis to argue that public safety services would be jeopardized if the county is required to adhere to federal law.

[114/] It has been more than a decade since the Commission first issued its Section 621 orders implementing statutory requirements for cable franchising for new entrants and incumbents. *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 22 FCC Rcd. 19633 (2007); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 (2007), *aff'd sub nom Alliance for Community Media et al. v. FCC*, 529 F.3d 763 (6th Cir. 2008). The interpretations proposed in the *Second FNPRM* are consistent with prior Commission guidance, and franchising authorities have known for years that the Commission's authority to implement the Cable Act includes clarification of matters related to the franchise fee cap.

authorities seek to exempt.[115] Moreover, the rules should explicitly provide that the franchise fee cap cannot be waived. As discussed above, cable operators lack leverage in negotiations with franchising authorities and are often left with no choice but to agree to unreasonable and illegal terms. Franchising authorities should not be allowed to evade statutory restrictions and exact commitments from cable operators in excess of the five percent cap by using trumped up allegations of franchise "violations" or by inventing new types of red tape.

Failing to stop these practices risks a very significant negative impact on investment, innovation, and the broader economy. As described in the Orszag/Shampine Economic Analysis, the benefits that broadband deployment confers on consumer welfare and economic growth have increased over time as broadband networks have expanded their reach and quality:

> The statute and the FCC's rules play an important part in this process by preventing regulatory opportunism to expropriate the returns from those investments. Such opportunism is a well-recognized economic risk that deters investment. As cable operators' experience under the existing cable franchising process demonstrates, in the absence of effective federal constraints, LFAs can be expected to impose, and are in fact imposing, substantial new taxes on broadband and other services delivered over cable networks in the form of fees and in-kind demands – a burden that can be substantial relative to the ongoing levels of investment. Increased bills to consumers (to the extent such taxes are passed through) directly reduce consumer welfare, and the portion borne by cable operators directly reduces incentives to invest. Incentives to invest are further reduced because of decreased consumer demand due to higher prices and possible distortions of competition. Overall, such taxes and in-kind demands can cause substantial harm to consumer welfare and the economy. The total additional tax burden could reach $8 billion per year by 2023, and even modest reductions in network improvements as a result of reduced incentives to invest can easily result in consumer welfare losses in excess of $40 billion over that same period."[116]

The Orszag/Shampine Economic Analysis further confirms the Commission's recent finding that state and local regulatory fees above reasonable costs drain providers' limited capital

[115] *See, e.g.*, Anne Arundel County Comments at 32 n.96 (arguing that I-Net and PEG support requirements "are often reached as part of a settlement" of alleged franchise breaches); LFA Coalition Comments at 42 (arguing that the Commission should not apply its conclusions to in-kind exactions contained in agreements negotiated separately from cable franchises to settle disputes).

[116] Orszag/Shampine Economic Analysis ¶ 64.

budgets and materially inhibit deployment[117/] – and as NCTA has explained, the five percent cable franchise fee is more adequate to compensate franchising authorities for legitimate regulatory costs.[118/] The Commission must not allow state and local governments to slow deployment, reduce broadband investment, and cause billions of dollars in harm to consumer welfare when Congress already has spoken clearly to the issue.

CONCLUSION

For the reasons set forth above and in NCTA's initial comments, and in keeping with the Commission's sound tentative conclusions, the Commission should: (1) reaffirm the mixed-use rule as applied to all cable operators; (2) clarify the scope of the cable franchise to preclude the imposition of duplicate fees and authorizations for all additional services offered over the cable system; (3) reaffirm that any requests for in-kind contributions made by franchising authorities, whether related or unrelated to the provision of cable service, are subject to the statutory five percent franchise fee cap unless those asks are specifically excluded from the definition of franchise fees; (4) find that in-kind assessments should be valued for purposes of the franchise fee cap at their fair market value; and (5) clarify that these decisions apply to all franchising authorities, whether at the state or local level, and that neither a cable operator nor a franchising authority may waive these federal limitations.

117/ *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC-18-133, ¶¶ 62. (rel. Sept. 27, 2018) (recognizing "that have constrained resources for entering new markets or introducing, expanding, or improving existing services" and that "resources consumed in serving one geographic area are likely to deplete the resources available for serving other areas"); *id.* ¶ 60 ("We are persuaded that providers and infrastructure builders, like all economic actors, have a finite (though perhaps fluid) amount of resources to use for the deployment of infrastructure.").

118/ *See* NCTA Comments at 40.

Respectfully submitted,

/s/

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December 14, 2018

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

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

Report of
Jonathan Orszag and Allan Shampine

December 14, 2018

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I. QUALIFICATIONS AND SUMMARY OF OPINIONS

A. Jonathan Orszag

1. My name is Jonathan Orszag. I am a Senior Managing Director and member of the Executive Committee of Compass Lexecon, LLC, an economic consulting firm. My services have been retained by a variety of public-sector entities and private-sector firms ranging from small businesses to Fortune 500 companies. These engagements have involved a wide array of matters, from entertainment and telecommunications issues to issues affecting the sports and technology sectors. I have provided testimony to the U.S. Congress, U.S. courts, the European Court of First Instance, the Federal Communications Commission ("FCC"), and other domestic and foreign regulatory bodies on a range of issues, including competition policy, industry structure, and fiscal policy.

2. Previously, I served as the Assistant to the U.S. Secretary of Commerce and Director of the Office of Policy and Strategic Planning and as an Economic Policy Advisor on President Clinton's National Economic Council. For my work at the White House, I was presented the Corporation for Enterprise Development's 1999 leadership award for "forging innovative public policies to expand economic opportunity in America."

3. I am currently a Lecturer at UCLA, teaching a class on antitrust and merger analysis. I received an M.Sc. in economic and social history from Oxford University, which I attended as a Marshall Scholar. I graduated *summa cum laude* in economics from Princeton University, was elected to Phi Beta Kappa, and was named to the *USA Today* All-USA College Academic Team. In 2004, I was named by the *Global Competition Review* as one of "the world's 40 brightest young antitrust lawyers and economists" in its "40 under 40" survey. In 2006, the *Global Competition Review* named me as one of the world's "Best Young Competition Economists." And in 2016, I was named as one of the most highly regarded competition economists in the world by *Who's Who Legal.*

4. I have been active in applied analysis of issues affecting the Multichannel Video Programming Distributor ("MVPD") sector. While I served in the federal government, I worked on a number of policy issues involving the MVPD sector, including the implementation of the Satellite Home Viewer Improvement Act of 1999, which permitted Direct Broadcast Satellite ("DBS") providers, such as EchoStar and DIRECTV, to offer subscribers local broadcast stations.

5. Since leaving government, I have served as a consultant to a number of major MVPDs (*e.g.*, DIRECTV (now part of AT&T), Comcast, Cablevision (now Optimum), Verizon, and EchoStar) and programming providers (*e.g.*, Discovery, AMC Networks, Comcast, College Sports Television). I also have submitted testimony to the FCC and regulators throughout the world regarding mergers and regulatory matters affecting the MVPD sector.

6. A copy of my *curriculum vitae* is included as Appendix A.

B. Allan Shampine

7. My name is Allan Shampine. I am an Executive Vice-President of Compass Lexecon, an economic consulting firm. I received a B.S. in Economics and Systems Analysis *summa cum laude* from Southern Methodist University in 1991, an M.A. in Economics from the University of Chicago in 1993, and a Ph.D. in Economics from the University of Chicago in 1996. I have been with Compass Lexecon since 1996.

8. I specialize in applied microeconomic analysis with a particular focus on technological innovation. I am the editor of the book Down to the Wire: Studies in the Diffusion and Regulation of Telecommunications Technologies, a contributor to the Telecom Antitrust Handbook and The Cambridge Handbook of Technical Standardization Law, and have published a variety of articles on the economics of telecommunications and network industries, as well as patents, technology diffusion and antitrust issues and remedies. I am an editor of the American Bar Association journal *Antitrust Source*.

9. I have worked on telecommunications matters throughout my career, and have submitted testimony concerning mergers, antitrust concerns and regulation of telecommunication and broadband networks in multiple countries. I have previously provided economic evidence to the Federal Communications Commission, International Trade Commission, state public utility commissions, Federal Maritime Commission, United States district courts, arbitrators, European Commission, Korean Fair Trade Commission, Chinese National Development & Reform Commission, Info-Communications Development Authority of Singapore, and the Australian Competition & Consumer Commission. I have submitted testimony before regulators in various countries concerning the impact of regulatory policies on investment, particularly with respect to Internet and data networks (*e.g.*, the Australian national broadband network).

10. A copy of my *curriculum vitae* is included as Appendix B.

C. Summary of Opinions

11. The FCC has invited comments concerning the regulatory permissibility of certain franchise fees by local franchising authorities ("LFAs")[1], *i.e.*, whether LFAs can levy additional franchise fees on Internet, data or other non-cable services provided over cable operators' networks, and whether "in-kind" demands by LFAs – whether related to cable service or otherwise – should count against the statutory limit on franchise fees of 5% of revenues.[2] The FCC views this analysis "as part of the Commission's larger, ongoing effort to reduce regulatory barriers to infrastructure investment."[3]

12. We agree with the FCC's concerns that LFAs' imposing these fees may create regulatory barriers to infrastructure investment and the deployment of new services. Firms make investments in their networks in anticipation of earning at least a risk-adjusted normal rate of return on those investments. All else equal, an increase in the expected rate of return will increase incentives to invest, and a decrease in the expected rate of return will decrease incentives to invest. Given flexibility in the amount of investment, reduced incentives to invest will result in less investment, and possibly no investment whatsoever. That is, if the risk-adjusted, expected returns on an investment are insufficient, then the firm will not make the investment or will scale back on its investment plans to the detriment of consumers.

13. LFA franchising practices present these very types of threats to investment and overall consumer welfare. Congress placed limits on the franchise fee and other regulatory burdens that LFAs may impose on cable operators and their subscribers for use of local rights-of-way, but we

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1 We understand that in some cases local government entities have claimed that they have authority other than their local franchising authority to impose fees or taxes on cable operators providing service using public rights-of-way. We use the term "LFAs" to refer to local governments generally, regardless of the authority they cite as the basis for their regulatory action. In addition, while we use the term "LFAs" for simplicity, the same analysis applies whether the taxing entity is a city, county, state or other body that seeks to impose in-kind obligations without counting their value towards the 5% franchise fee cap or to require additional fees for rights-of-way permissions already covered through the cable franchise.

2 FCC, Second Further Notice of Proposed Rulemaking in the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, FCC 18-131, September 25, 2018 ("2nd FNPRM").

3 2nd FNPRM, ¶15.

understand those statutory limits are being circumvented and exceeded through non-cash franchise fee exactions and duplicative taxes and franchising requirements on broadband and other non-cable services delivered over the cable system.

14. As a matter of economics, allowing LFAs to exceed existing limits on franchise fees, or to levy new fees or taxes,[4] creates uncertainty as to the returns on future investment, which will reduce incentives to invest in cable operators' infrastructure, to the detriment of consumers.[5] Further, levying taxes on some, but not all, competitors distorts competition and further reduces incentives to invest for the competitors subject to the taxes. While harm to consumer welfare that results from these fees may be unintended, it can have significant adverse effects on continued investment in upgrading cable systems to provide new cable services as well as broadband and other non-cable services for consumers. For example, areas that are "on the bubble" with respect to upgrades, or with respect to receiving broadband service at all, such as areas in which it is expensive and difficult to build infrastructure, *e.g.*, rural communities, are particularly likely to be adversely impacted by new taxes and fees that reduce the already marginal returns on investment in those areas. As we show below, the total burden from new taxes on broadband and voice services imposed by franchising authorities could reach $8 billion per year by 2023, and even modest reductions in network improvements as a result of reduced incentives to invest can easily result in consumer welfare losses in excess of $40 billion over that same period.

II. FRANCHISING AUTHORITIES ARE IMPOSING SIGNIFICANT FEES AND OTHER REQUIREMENTS ON CABLE OPERATORS IN EXCESS OF THE 5% FRANCHISE FEE CAP

15. The 2nd FNPRM was issued because a growing number of LFAs have imposed in-kind demands over and above the franchise fee limits set by Congress, and some are also now seeking to regulate and impose franchise fees and other regulatory requirements on cable operators' broadband and other non-cable revenues.[6]

16. With respect to franchise fees, Congress and the FCC addressed the potential for abuse decades ago and adopted strict limits on LFAs for those fees. In 1972, the FCC capped franchise

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4 For purposes of our discussion here, we use the terms "fees" and "taxes" interchangeably.

5 See, *e.g*, Dixit, Avinash & Robert Pindyck, *Investment Under Uncertainty*, Princeton University Press, 1994.

6 See, *e.g.*, 2nd FNPRM, ¶¶10-14.

fees at 3% of a cable system's gross revenues, but allowed LFAs to seek waivers from the FCC to go up to 5% upon a showing that the fees would not interfere with federal regulatory goals and that they were "appropriate in light of the planned regulatory program" (*i.e.*, compensation for use of rights-of-way and costs of regulation).[7] However, many LFAs immediately demanded 5%, plus a wide range of other cash and in-kind requirements. For example, Sacramento, California drafted a cable franchise specification requiring 20,000 trees to be planted; St. Paul, Minnesota required the franchisee to rebuild Union Station; and St. Louis, Missouri requested a minimum of $1 million or a 20 percent stock contribution, in addition to the 5%.[8] Accordingly, the FCC and Congress took action and ultimately franchise fees were expressly limited to 5% of gross video revenues from the operation of a cable system plus public, educational, and governmental capital costs.[9] In 1996, Congress amended and further limited the statutory cap to up to 5% of the revenues from *cable services* provided by operation of a cable system, thus shielding broadband and other non-cable service revenues from such fees and promoting their continued growth and availability to consumers.[10]

17. **In-Kind Demands.** LFAs have sought, and continue to seek, ways to circumvent the limits just discussed. We understand that most LFAs require cash payments up to the 5% statutory maximum,[11] but then require additional compensation through the wide-spread use of in-kind demands. In-kind demands tend to fall into several categories, including: 1) provision and support of institutional networks ("I-nets"); 2) provision and support of public, education and government access channels ("PEGs"); 3) free services (*e.g.*, video service, Internet service or advertising); and 4) creation or relocation of physical facilities, often in conjunction with additional local contracting and hiring obligations.

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7 See, *e.g.*, *Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737 (D.C. Cir. 1986).

8 Comments of NCTA – The Internet & Television Association, November 14, 2018, pp. 42-43.

9 *Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737 (D.C. Cir. 1986).

10 See 47 U.S.C. § 542(b).

11 To use one state as an example, in South Carolina, as of June 2018, the great majority of Charter systems are in communities at the statutory maximum of 5% franchise fees. So far as we are aware, no LFA in South Carolina reduced franchise fees in the prior year, but LFAs not already at the maximum did increase franchise fees. Since mid-2017, the franchise fees on Charter cable systems in Marion County and the cities of Elgin, and Chapin all were increased from 3% to the maximum of 5%. Data from Charter.

18. In-kind demands are significant because unless they are counted against the statutory limit on franchise fees, LFAs gain the ability to "end-run the fee cap."[12] (And, of course, if there are additional fees imposed on, say, broadband revenues, there will also likely be additional in-kind demands relating to those services.) As noted by Commissioner O'Rielly, "this isn't simply a theoretical issue, as there are concrete instances in which franchise authorities have already abused their powers to force these 'contributions.'"[13] In other words, the point of the statutory fee cap is to limit the total tax burden the municipality is allowed to impose on cable operators and cable subscribers. If there is a simple way to evade that fee cap – by adding substantial in-kind demands on top of a direct fee already at the cap – then history, basic economics, and common sense indicate that LFAs will take advantage of that, resulting in an increasing number of LFAs imposing total tax burdens exceeding the fee cap.

19. We also note that there can be logistical costs to managing in-kind demands that can be out of proportion to the out-of-pocket costs. For example, requests that are outside the normal services of a company (*e.g.*, planting trees) require managerial effort and the creation of new processes and procedures. Maintaining those processes and procedures also has costs (*e.g.*, handling ongoing in-kind demands for advertising avails, or maintenance of computers). Below, we summarize examples of in-kind demands leveled against cable operators, noting their range and the fact that they can be quite costly to the cable operators and their subscribers.

20. In general, in-kind demands have an impact on investment incentives greater than their direct out-of-pocket cost. This is because of the opportunity cost of the resources required to provide the in-kind demand. For example, cable networks have a specific amount of bandwidth that is divided between a range of services (*e.g.*, video, broadband, voice, and other data). The number of video channels carried is defined by the amount of bandwidth available for video, and Internet services are similarly defined by the amount of bandwidth available for Internet traffic. When a cable network is required to devote bandwidth to in-kind demands such as PEG channels, that leaves less bandwidth available for other purposes.

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12 2nd FNPRM, Statement of Commissioner Michael O'Rielly, p. 32.

13 *Id.*, p. 32. See also FCC, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180, 22 FCC Rcd. 5101, March 5, 2007, ¶43 ("Based on this record evidence, we are convinced that LFA requests for unreasonable concessions are not isolated, and that these requests impose undue burdens upon potential cable providers.").

21. More generally, dollars invested in meeting in-kind demands are dollars that are not available for other investments – investments that have some expected rate of return that is foregone as a result of the in-kind demand. As we discuss in the next section, these opportunity costs reduce the expected return on investments, which in turn reduce incentives to invest.[14] The fair market value of the products being demanded can be a useful and analytically tractable way to approach the quantification of in-kind demands (*e.g.*, the economic opportunity cost of an advertising slot used to promote PEGs is the foregone revenue from selling that advertising slot on the open market – the fair market value of the slot – which can be readily determined based on the rates for similar advertising slots). Fair market value is also appropriate in light of the nationwide presumption of effective competition for cable services, which has eliminated cable rate regulation in almost all cable systems and allows market factors to set prices and other terms. Thus, fair market value is the best readily available proxy for opportunity cost in this context.

22. For example, ongoing requirements related to I-nets can have substantial opportunity costs. Some I-net requirements include commitments of fiber capacity,[15] which is capacity no longer available for commercial usage. Similarly, PEG requirements often involve allocation of multiple HD channels, as well as ongoing per subscriber per month grants (many of which are greater than $1 per month per subscriber[16]) and other cash grants. For example, in New York City, cable operators are required to make recurring payments of between $1.12 and $1.40 per subscriber per month to support public access, along with advertising avails and lump sum grants.[17] Again, in addition to the out-of-pocket costs, those channels take up bandwidth that is not available for other commercial channels, or for allocation to Internet or other data traffic, and the dedicated air time for announcements and advertisements is not available for commercial

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14 For example, if a network is required to devote bandwidth to PEG channels that the network would otherwise monetize, *e.g.*, through additional commercial channels or data products, that will directly reduce the expected returns from that network, which in turn will reduce incentives to invest in the network in the first place.

15 We understand that New York City's franchises require cable operators to provide the lesser of six strands of fiber or 10% of total fiber optic capacity for the City's exclusive use.

16 Based on information from NCTA members.

17 Comments of NCTA – The Internet & Television Association, November 14, 2018, pp. 44-45 and information from NCTA members.

purposes. Similarly, Montgomery County, Maryland has charged a cable operator more than $4 million per year for PEG channels (more than $3 per subscriber per month) and requires provision of "courtesy" cable services with market value of nearly $1 million per year.[18] In-kind demands of even $1 per subscriber per month – which, as noted, is less than many municipalities require – if applied to the roughly 52 million basic video cable subscriber households nationwide would result in costs of more than $600 million per year nationally. These demands represent resources and products that could have been sold commercially but were not.

23. Overall, we observe that LFAs frequently charge the maximum allowed by statute for video franchise fees, and also make in-kind demands on top of the maximum fee. One cable operator estimates that in-kind obligations that are not counted against the 5% cap are imposed on 90% of its franchises.[19] In their initial comments, cable operators have documented the costs and burdens of some of these obligations in excess of the statutory cap and their adverse effects on investment and innovation, as well as on the operators' ability to compete with other video providers that are not subject to cable franchise regulation.[20]

24. **Regulation of Non-Cable Services.** LFAs are increasingly also starting to apply additional fees and franchise-type obligations directly or indirectly to non-cable services offered over the cable system, particularly broadband and voice services. Those fees are often at the same level or greater than the video franchise fees, *i.e.*, at 5% or 7%, and related franchise-type requirements may include additional in-kind demands. For example, Eugene, Oregon levies a 7% fee on broadband services provided over a cable system, on top of the 5% franchise fee.[21] This results in cable operators paying twice for the same access to rights-of-way – once by paying the franchise fee, and then a second time through additional fees on broadband services.

25. We are not opining on the legal aspects of this regulatory process. We simply note that the total tax burden on cable systems is substantially higher as a result. Moreover, not every

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18 Comments of NCTA – The Internet & Television Association, November 14, 2018, p. 43 and information from NCTA member.

19 Comments of NCTA – The Internet & Television Association, November 14, 2018, p. 42.

20 *Id.*

21 Oregon Supreme Court Opinion, *City of Eugene v. Comcast of Oregon II, Inc.*, CC 160803280; CA A147114; SC S062816, May 26, 2016, 528. See also Christian Hill, "Comcast charging customers for city fee," *The Register-Guard*, September 10, 2016, available at https://www.registerguard.com/rg/news/local/34777474-75/story.csp.

service provider uses the same technologies, even when the services provided are close substitutes for consumers. For example, providers of wireless data services and/or satellite service providers may compete with providers of fixed data services, but if one has inputs subjected to substantial taxes and the other does not, the differential tax treatment can distort competition between the two.[22] Two fixed broadband providers may also build out their networks differently, perhaps with one using wireless backhaul and the other using landline backhaul. Again, applying different tax treatment to those providers can distort competition between the two, even when the services provided to consumers are indistinguishable to the consumer. The distortions to competition from hampering a subset of competitors are likely to harm consumers by reducing the benefits they receive from competition.

26. After the Supreme Court of Oregon allowed Eugene's actions, other municipalities in Oregon similarly imposed fees on broadband service, including Florence, Creswell, Oakridge and Dallas, each at 5% on broadband revenues, and Garibaldi, Tillamook, Independence, Gold Beach, Hermiston and Monmouth, each at 7%.[23] We understand that municipalities in other states are seeking to follow the same path.

27. These additional fees and requirements have reduced incentives for investment and innovation for broadband and voice services and, without federal restraint, will do so going forward at substantially greater levels. For purposes of analyzing possible effects on investment,

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[22] LFAs might claim that to the extent fees are cost based, different technologies that impose different costs on rights-of-way should be taxed at different rates. Given how common it is to impose rates at a statutory maximum, it seems unlikely that the fees, in fact, vary based on municipality cost, but rather are functioning as general revenue generating mechanisms for the municipality. The fact that fees are being charged multiple times for the same physical facilities also indicates that the fees are not, in fact, cost-based (*e.g.*, the same physical facilities may provide both cable video service and broadband data service, but with separate fees of, say, 5% of revenues assessed against each). In addition, from a public policy perspective, taxing these services can have much higher social costs than taxing a conventional good at the same level because of the exceptionally high costs to society and consumers of discouraging investment in cable infrastructure and reducing competition between firms. See, *e.g.*, Goolsbee, Austan, "The Value of Broadband and the Deadweight Loss of Taxing New Technology," NBER Working Paper No. 11994, January 2006; and Darby, Larry & Joseph P. Fuhr, Jr. "Investing in Economic Growth: Broadband Network Tax Forbearance," 18 *Media Law & Policy*, Fall 2008.

[23] Comments of NCTA – The Internet & Television Association, November 14, 2018, p. 27.

we will look at additional fees totaling 3%, 5%, and 7% of broadband and voice revenues (including both direct fees and the value of in-kind demands). This range can be thought of as the national average of the sum of both direct fees and in-kind demands. To be clear, our analysis is forward-looking, but there have been in-kind demands not counted against the 5% statutory cap on cable services that have been dampening investment incentives for years. Creating greater certainty as to returns going forward by clarifying the treatment of in-kind demands and capping the total tax burden at the statutory 5% will help promote network investment, as we explain in detail below.

28. Though actual fees will likely vary across municipalities and over time, using a national average is appropriate because investment decisions are made on a forward-looking basis, and the potential for future taxation is highly relevant to those decisions.[24] **Table 1** shows the potential extent of new fees if LFAs start to impose them at these levels. The first three rows are forecasts of industry revenues from SNL Kagan. The remaining rows indicate the total tax burden if 3%, 5% or 7% of those revenues are taxed (directly or through the lost value of in-kind demands).

Table 1: Potential Extent of LFA Taxation

	2017	2018	2019	2020	2021	2022	2023
Residential High Speed Data / Voice	$ 48.688	$ 53.946	$ 59.772	$ 66.227	$ 73.380	$ 81.305	$ 90.086
Business High Speed Data / Voice	$ 15.136	$ 16.770	$ 18.581	$ 20.588	$ 22.812	$ 25.275	$ 28.005
Sum ($ Billions)	$ 63.823	$ 70.716	$ 78.353	$ 86.815	$ 96.191	$ 106.580	$ 118.091
Cost of Additional Taxes ($ Billions)							
3%	$ 1.915	$ 2.121	$ 2.351	$ 2.604	$ 2.886	$ 3.197	$ 3.543
5%	$ 3.191	$ 3.536	$ 3.918	$ 4.341	$ 4.810	$ 5.329	$ 5.905
7%	$ 4.468	$ 4.950	$ 5.485	$ 6.077	$ 6.733	$ 7.461	$ 8.266

Source: SNL Kagan U.S. Cable Industry Benchmarks. 2017 figures are actual. Later years assume prior 10 years CAGR of 10.8% continues.

III. IN-KIND DEMANDS AND TAXATION OF NON-CABLE SERVICES RAISE COSTS TO BOTH FIRMS AND CONSUMERS

29. Given a tax on cable operators' broadband revenues, some of that tax will be borne by the cable operators and some by consumers. The more of the tax borne by cable operators, the

[24] We assume data and voice revenues will grow at the same rate as reported over the past ten years per SNL Kagan. We do not report video revenues in this table. This table covers only possible additional taxation on data and voice services.

bigger the direct effect on their investment incentives. However, the more of the tax borne by consumers, the bigger the direct loss of consumer welfare, and the bigger the effect on demand for cable services and thus a bigger indirect effect on incentives for investment. Thus, LFAs imposing fees on non-cable services and in-kind demands that do not count against the 5% franchise fee will deter investment in new infrastructure and services regardless of whether cable operators can pass some or all of those costs through to consumers.[25]

30. Historically, cable operators have passed through franchise fees as line items on video services bills. However, it is unclear whether additional fees on broadband or other non-cable revenues would or could be passed through in their entirety. Competition from other video and Internet providers makes it difficult to pass through increased taxes in their entirety, particularly when such taxes do not fall on all competitors equally.

A. Economic literature on pass-through

31. As a matter of economic theory, the degree to which cost increases are passed through by firms can depend on many factors, including the type of cost (*e.g.*, variable or marginal, fixed but recoverable, and fixed but non-recoverable), whether the change in cost applies to all firms or only some, and the competitiveness of the industry. With respect to costs imposed by regulators, other considerations also arise, such as whether firms may be explicitly prohibited from passing through a cost, fee or tax, in whole or in part.[26]

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[25] As we discuss in more detail in the next section, if only one competitor is subject to a tax, its incentives to invest and ability to compete will be decreased in two ways. First, to the extent the competitor is able to pass through any of the tax in the form of higher relative prices, its customers will bear part of the burden of the tax, and the higher relative prices will make the firm less competitive. Second, the reduced demand for the firm's services because of higher prices and the direct reduction in the firm's rate of return on investments because of the portion of taxation that the firm bears directly will reduce incentives to invest by reducing the expected rate of return on those investments. Over time, reduced investment will further reduce the firm's ability to compete.

[26] Furthermore, while in some circumstances pass-through rates may be greater than 100%, that is unlikely in the context here. In particular, if taxes do not fall equally on all competitors, it is more difficult for those competitors subject to the taxes to pass them through at all, much less at a greater than 100% rate. Similarly, increases in competition exert downward pressure on prices. Of course, pass-through rates greater than 100% would simply increase the burden on consumers. Put another way, in the unlikely event of greater than 100% pass-through, that would imply that a reduction in taxes of a given amount would reduce consumer bills by more than that amount.

32. In-kind demands and lump sum demands are also less likely to be passed through than increases in variable (marginal) costs. Indeed, it is possible there may be no direct pass-through to consumers of such costs. That does not, however, mean that imposing such costs is innocuous – they can still impact incentives for investment by reducing the expected return on that investment.

33. Further, when a tax falls on only some firms and not others, it will be more difficult for the taxed firms to pass through the increase in costs. For example, a simple theoretical model predicts that given three firms in a market, a cost increase such as a tax on revenue (which in economic terms is considered a marginal cost) that affects only one of the firms will be passed through at a rate of 1/4.[27] Similarly, prior studies on pass-through of cable content price increases and the impact of franchise fees on retail prices have not found full pass-through.[28] There are substantially more providers of video and Internet services today than when those prior studies were conducted and more competition generally makes it more difficult for an individual firm to pass through a cost increase or tax.

B. Incidence of new LFA taxation

34. To analyze the impact on cable investment, we examine three possibilities: 1) that cable operators bear the full amount of new taxes and fees, because they either are prohibited from passing those fees along or are unable to pass them along; 2) that cable operators pass through half of new taxes and fees, so consumer bills rise by half the amount of those taxes and fees; and 3) that consumer bills rise by the full amount of those taxes and fees. As we noted in **Table 1**, the total impact ranges from $2.1 billion to $5.0 billion in 2018 to $3.5 billion to $8.3 billion in 2023. That could fall entirely on cable operators, entirely on consumers, or on both groups.

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27 Different models yield different specific predictions, but the basic principle is not controversial – the more competitors not subject to a cost increase, the more difficult the firms subject to the cost increase are likely to find it to pass through the full amount of the cost increase. This example is from Neil Walker, "Concrete Evidence? An Empirical Approach to Quantify the Impact of EU Emissions Trading on Cement Industry Competitiveness," University College Dublin, Dept. of Planning and Environmental Policy Paper 06/10, 2006, Appendix 1.

28 See, *e.g.*, Ford, George & John Jackson, "Horizontal Concentration and Vertical Integration in the Cable Television Industry," 12 *Review of Industrial Organization* 1997; and Beard, Randolph, Richard Saba, George Ford & R. Carter Hill, "Fragmented Duopoly: A Conceptual and Empirical Investigation," 78 *Journal of Business* 2005.

35. We next address the relative magnitudes of these numbers. If consumers and cable operators are being taxed between $2 and $8 billion per year, what do those figures mean?

36. Given roughly 70.7 million U.S. cable high speed data customers in 2018,[29] if consumers bear all of the burden of the tax, their bills would rise between $2.50 and $5.84 per month.[30] As new and improved services become available and consumers purchase more data services than before, the tax burden per consumer would increase over time as well. Assuming the number of high speed data customers continues to grow at the same rate as over the prior 10 years[31] and using the SNL Kagan projections of data and voice revenues, then by 2023 the increases in consumer bills would be between $3.06 and $7.15 per subscriber per month.[32] If the tax increases fall entirely on consumers, then by 2023, consumers would be paying an additional $8.3 billion per year.

37. If the tax increases fall entirely on the cable operators, that reduces the expected rate of return for any given investment. For example, if the incidence of the tax is entirely on the cable operator and the expected risk-adjusted return on investment was only 7% of revenues, a tax of 7% of revenues would wipe out that return entirely. Another way to look at this is to note that, as discussed previously, by 2023, the fees imposed by LFAs could amount to roughly $8.3 billion per year. This annual figure exceeds SNL Kagan's forecast for network upgrade and scalable infrastructure investments for that year.[33]

38. If consumers and cable operators each bear half of the tax burden, then with a 7% tax on revenues in 2018, the burden on cable operators would be roughly $2.5 billion, or nearly half the forecast investment in network upgrades and scalable infrastructure,[34] and the total impact on cable subscribers' bills also would be roughly $2.5 billion per year, or an additional $2.92 per month.

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29 Estimated as 2017 total plus 6.4%, the CAGR between 2007 and 2017, per SNL Kagan.

30 $2.121 billion or $4.950 billion per year divided by 70.7 million subscribers and by 12 to put the figure on a monthly basis.

31 As of 2023, this rate (6.4% per year) yields 96.4 million subscribers.

32 $3.543 billion or $8.266 billion per year divided by 96.4 million subscribers and by 12 to put the figure on a monthly basis.

33 SNL Kagan data.

34 SNL Kagan data.

39. As we discuss in the next section, firms make investments in anticipation of earning a rate of return on that investment. If a firm's expected rate of return on investments declines because of increases in taxes and fees, incentives to invest will also decline. The larger the reduction in expected rate of return, the larger the reduction in incentives to invest.

IV. DECREASING RETURNS ON NETWORK INVESTMENTS WILL DECREASE INCENTIVES TO INVEST

40. Cable operators have invested over $150 billion in capital expenditures over the last ten years.[35] The effects of that investment have been dramatic and ongoing.

41. Ookla, the broadband testing company that administers Speedtest, explains that "Fixed broadband in the United States is fast and getting faster."[36] As Ookla notes, the gains are due to both improvements in technology and the investments cable operators have made to date to deploy DOCSIS 3.1 technology. These improvements have been made to keep up with consumer demand and respond to competitive pressures. However, additional investment is needed for further improvements such as Full Duplex DOCSIS 3.1, which will enable gigabit upload speeds.[37] Additional DOCSIS improvements, now in development, will be needed to meet marketplace demands. Maintaining and improving the DOCSIS network necessarily will require additional capital investment. In particular, cable operators will need to push fiber optic cable deeper and deeper into the network, as well as replace and upgrade other parts of the network.

42. Enhancements to the network not only improve consumer services (existing and new) but also enable new network services that may be provided by other firms. Continued entry by new network service providers with new and improved services enabled by enhanced networks

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35 Per SNL Kagan data.

36 Speedtest is a commonly used application for testing broadband performance. Ookla, the company which operates Speedtest, publishes regular reports based on testing data it has gathered. Speedtest, United States Fixed Broadband Market Report, September 1, 2017, available at https://www.speedtest.net/reports/united-states/2017/#fixed. Another broadband performance testing service is provided by SamKnows. For further discussion of the metrics provided by the two services, see the FCC's Eighth Measuring Broadband America Fixed Broadband Report, available in DOC-355405A1, at https://docs.fcc.gov/public/attachments/DOC-355405A1.pdf.

37 For more detailed discussion of ongoing developments at CableLabs, see CableLabs, "Driving Gigabit Speeds: From Lab to Consumer," Fall 2018, available at https://www.cablelabs.com/insights/driving-gigabit-speeds-from-lab-to-consumer/.

benefits consumers both directly, by making available those new and improved services, and indirectly, through increased competition. For example, recent advances in cable technology can support the high capacity needs that mobile services will require for backhaul.[38] Given the upcoming 5G wireless network deployments and the expectation of many new and improved services that will take advantage of 5G technology, the need for transporting large amounts of data from cell sites to backbone networks will only increase, and cable networks will have to invest heavily to meet that demand and help 5G reach its full potential.

43. Large cable industry capital expenditures will be needed to meet these demands, but those investments are threatened by increased uncertainty related to increased demands on franchise fees and concerns about imposition of franchise fees on broadband and other services.

44. Some commenters claim that because cable firms have invested billions of dollars in the presence of existing taxes and fees, that existing fees must therefore have had no impact on those investments, with the implication that the imposition of additional taxes and fees will have no impact on investment going forward.[39] Such a claim is without economic basis. The commenters fail to recognize that investment in the absence of onerous regulation would be expected to be greater, and that even small delays or decreases in investment can have substantial adverse impacts on consumer welfare. Allowing franchise authorities to increase demands for in-kind contributions and impose new fees on non-cable services will have an even greater impact on investment incentives. No one is suggesting that investment will cease completely even if fees increase, but there is no basis to claim that such increases would be innocuous. To the contrary, as we discuss below, the economics literature has long recognized the disincentives to investment resulting from regulatory uncertainty and *ex post* opportunism, and those disincentives have been observed in action around the world.

45. As we discussed in the prior section, taxes and fees of between 3% and 7% of broadband/voice revenues can produce a tax burden up to $8 billion per year. This tax burden, to the extent born by the cable operators, directly reduces incentives to invest by reducing expected rates of return on those investments, and the levels of taxes and fees discussed are substantial

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38 *Id.* See also, CableLabs, "Cable: 5G Wireless Enabler," Winter 2017, available at http://www.cablelabs.com/wp-content/uploads/2017/02/cable-5g-wireless-enabler.pdf.

39 See, *e.g.*, Comments on Second Further Notice of Proposed Rulemaking by The City Coalition, November 14, 2018, pp. 3-5.

relative to the amounts expected to be spent on improving cable networks to the benefit of consumers. Even assuming taxes and fees of only 3%, and assuming that consumers bear half of those taxes and fees, the amount of taxes and fees borne by the cable operators would still be equal to approximately a quarter of expected infrastructure spending on network improvements. Furthermore, the diminished incentive to invest holds whether the effect on investment incentives is direct or indirect. To the extent the taxes and fees are borne by consumers, that will harm consumers and decrease demand for such services and reduce incentives to invest. Also, to the extent that the taxes and fees fall only on cable operators and not their competitors, that will also distort competition and further decrease cable operators' incentives to invest, again harming consumers.

46. Firms make investments in their networks in anticipation of earning at least a risk-adjusted normal rate of return on the investments. All else equal, an increase in the expected rate of return will increase incentives to invest, and a decrease in the expected rate of return will decrease incentives to invest. Given flexibility in the amount of investment, reduced incentives to invest will result in less investment, and possibly no investment whatsoever. That is, if the risk-adjusted, expected returns on an investment are insufficient, then the firm will not make the investment or will scale back on its investment plans to the detriment of consumers.

47. This is not a theoretical argument, as can be seen in other industries and other countries. For example, in the regulatory context, "sunk" aspects of the investment (by which we mean investments that cannot be readily repurposed) create a concern that after a firm has made an investment, the regulator may "expropriate" that investment by materially reducing (or even eliminating) the expected return.[40] Fears of such expropriation have significantly reduced infrastructure investments in many countries.[41] This means that even if LFAs do not immediately impose new taxes on broadband revenues, or begin by imposing such taxes at

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40 Armstrong, Mark & David Sappington, "Recent Developments in the Theory of Regulation," in *Handbook of Industrial Organization*, M. Armstrong and R. Porter (eds), 2007, pp. 1631-32.

41 See, for example, Levine, Paul, John Stern & Francesc Trillas, "Utility price regulation and time inconsistency: comparisons with monetary policy" *Oxford Economic Papers* 2005, 57, p. 449; and Levy, B. & P. Spiller (eds) (1996) *Regulations, Institutions and Commitment*, Cambridge University Press, Cambridge, p. 2. See also Katz, Raul, Ernesto Flores-Roux & Fernando Callorda, "Assessment of the Economic Impact of Taxation on Communications Investment in the United States: A report to the Broadband Tax Institute," Telecom Advisory Services, LLC, October 2012.

relatively low levels, fears that those taxes will grow after the investment is made can discourage investment immediately.

48. A firm's concerns about the risks of expropriation can be quite rational, driven in part by competing priorities on the part of policy-makers. In order to earn a return on its investments, a firm must be able to earn revenues in excess of the proper measure of the flow of costs. However, once the firm has made that investment, the policy-maker may wish to tax the proceeds from that investment, potentially lowering return on investment below the anticipated level that justified the investment in the first place. Clearly, had the firm known in advance that such course of action was possible or even likely, it would not have been willing to make an initial investment. This concern is well known in the economics literature in general and the literature dealing with utility regulation in particular.[42] The usual solution is a credible commitment to not expropriate firms' investments, such as the limitation on the video franchise fee to no more than 5% of gross revenues from the cable services provided by operation of the system, as compensation for use of the public rights-of-way.[43]

V. EVEN MODEST REDUCTIONS IN NETWORK INVESTMENT CAN CAUSE SUBSTANTIAL HARM TO THE ECONOMY AND CONSUMER WELFARE

49. We have previously estimated that direct net consumer benefits from home broadband grew from $20 billion per year in 2005 to $32 billion per year in 2009.[44] We anticipated at that time that ongoing network improvements would continue to increase benefits as new and improved services were introduced, and, as we discuss further below, recent research indicates we were correct – the benefits to a given increase in network quality have grown substantially since our earlier work. That is, we estimated that moving from 5 Mbps connections to 50 Mbps

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42 See, for example, Newbery, David, *Privatization, Restructuring, and Regulation of Network Utilities*, 1999, MIT Press, p. 29.

43 That commitment may be made in the form of rate of return regulation, which explicitly guarantees firms an appropriate return on investment. The cap on franchise fees is an equivalent commitment here – a commitment not to extract rents beyond that amount. Armstrong & Sappington (2007), p. 1632; Newbery (1999), pp. 72-73.

44 Dutz, Mark, Jonathan Orszag & Robert Willig, "The Substantial Consumer Benefits of Broadband Connectivity for U.S. Households," Report Commissioned by the Internet Innovation Alliance, July 2009, pp. 4-5. See also Crandall, Robert & Charles Jackson, "The $500 Billion Opportunity: The Potential Economic Benefit of Widespread Diffusion of Broadband Internet Access," in *Down to the Wire: Studies in the Diffusion and Regulation of Telecommunications Technologies*, Allan Shampine (ed.), 2003.

connections would be associated with at least $5.8 billion in additional direct consumer welfare, just for households that had broadband in 2009.[45] The benefits from this increase in speed alone, setting aside other network improvements, would be far greater today as more households have broadband than did in 2009 and there are far more services available that take advantage of those speeds. A 2017 paper has estimated that the benefit of the same improvement in network speed is now more than seven times larger.[46]

50. It is important to note that increased consumer benefits are driven directly by 1) expansion of networks so that more people have access to broadband, and 2) improvements in the quality of those networks, increasing, for example, the speeds available to consumers. The latter benefits are in turn increased further by development of new and improved services to take advantage of those network improvements. For example, video streaming services like Netflix, which have profoundly impacted the entire video industry, exist because of massive investments by cable operators and others in the networks used by consumers. Similarly, innovators are contemplating and developing new services like streaming interactive virtual reality that will require yet further network improvements. Of course, regulatory changes that reduce ongoing network expansion and improvements will necessarily also reduce any associated consumer welfare gains. Areas that are "on the bubble" with respect to upgrades, with respect to entry by a competitor, or with respect to receiving broadband service at all, such as areas that are expensive and difficult to build infrastructure in, *e.g.*, rural communities, are particularly likely to be impacted by regulatory changes that reduce already marginal returns on investment in those areas.

51. Furthermore, there are many additional benefits to the economy from increased investment in broadband networks beyond the direct improvements to consumer welfare. The "economic gains to society as a whole from broadband adoption also include economic profits and producer surplus generated by the investments of broadband service providers and the providers of value-added services via broadband. These factors and others amount to billions and billions of dollars of additional economic gain to society each year from broadband

45 Dutz, Orszag & Willig (2009), pp. 26-27.

46 Liu, Yu-Hsin, Jeffrey Prince & Scott Wallsten, "Distinguishing Bandwidth and Latency in Households' Willingness-to-Pay for Broadband Internet Speed," Technology Policy Institute, August 2017, p. 32.

adoption."[47] For example, we have estimated that a rough approximation of benefits to companies from broadband (*i.e.*, producer surplus) was at least $5.8 billion in 2005 growing to at least $10.6 billion in 2008.[48]

52. Broadband can also create indirect benefits to the economy and to consumers and those benefits can take many forms. For example, the economic literature has analyzed "job multiplier" effects. Jobs associated with high technology ("high-tech") are typically well paid and associated with value creation that can have knock-on effects and create additional jobs in the community where the high-tech firm is located, and in other communities based on new business opportunities created by innovation at the first company. Goos, Konings and Vandeweyer have estimated "that every high-tech job in a region creates five additional low-tech jobs in that region because of the existence of a local high-tech job multiplier."[49] In addition, Crandall, Lehr and Litan have found that "for every one percentage point increase in broadband penetration in a state, employment is projected to increase by 0.2 to 0.3 percent per year. … At a more disaggregated level, we find that employment in both manufacturing and services industries (especially finance, education and health care) is positively related to broadband penetration. We also find that state output of goods and services is positively associated with broadband use…"[50]

53. Similarly, a joint report from the London School of Economics and the Information Technology and Innovation Foundation found that broadband is "an essential contributor to long-term economic, productivity, and wage growth." The authors note that network deployment and upgrades involve significant labor costs, which directly create jobs, and create network effects that spur additional job creation, because "broadband itself increases business productivity, spurs upstream investment (*e.g.*, of higher speed computer equipment), and contributes to the creation

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47 Dutz, Orszag & Willig (2009), p. 27.

48 *Id.*, p. 36.

49 Goos, Maarten, Jozef Konings & Marieke Vandeweyer, "Employment Growth in Europe: The Roles of Innovation, Local Job Multipliers and Institutions," VIVES Discussion Paper, October 2015.

50 Crandall, Robert, William Lehr & Robert Litan, "The Effects of Broadband Deployment on Output and Employment: A Cross-sectional Analysis of U.S. Data," 6 *Issues in Economic Policy*, 2007.

of new industries." The authors estimated that an investment of £5 billion would result in roughly 280,500 additional jobs in the U.K.[51]

54. Literature surveys from the International Telecommunications Union summarize these findings, noting that the "evidence is fairly conclusive about the positive contribution of broadband to GDP growth. … Broadband has been found to have a positive impact on productivity within the firm. Broadband does contribute to employment growth, both as a direct result of network construction programmes and as a result of spill-over effects on the rest of the economy. Finally, beyond economic growth and job creation, broadband has a positive effect on consumer surplus in terms of benefits to the end user. These benefits include efficient access to information, savings in transport, and benefits in health and entertainment."[52] More specifically, U.S. evidence is that "county employment was positively related to broadband adoption in multiple sectors, including manufacturing and certain services. For rural economies of the United States, broadband penetration contributed to job creation in financial services, wholesale trade and health sectors, as a result of enterprise relocation…" That survey also notes evidence of an "[i]ncrease in average household income as a result of broadband access."[53]

55. However, these benefits depend upon ongoing investment. Crandall, Lehr and Litan caution that "increased use will require an expansion of supply, specifically greater investment by service providers in broadband infrastructure, which already is facing capacity constraints as new applications, such as video streaming, become ever more popular. *It is critical, therefore, that new regulatory policies not reduce investment incentives for these carriers*."[54] As we discussed earlier, investment occurs on a continuum. No one is claiming that increased taxation by LFAs will cause investment to cease completely, and the FCC and Congress's efforts to provide certainty and restraint on taxation of cable and broadband have certainly been helpful in

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51 Liebenau, Jonathan, Robert Atkinson, Patrik Karrberg, Daniel Castro & Stephen Ezell, "The UK's Digital Road to Recovery," London School of Economics Enterprise Ltd. and the Information Technology and Innovation Foundation, April 2009.

52 Katz, Raul, "Broadband and the economy: Growth, productivity and employment," 5 *ITU News*, June 2011.

53 Katz, Raul, "Social and Economic Impact of Digital Transformation on the Economy," *ITU*, GSR-17 Discussion paper, 2017.

54 Crandall, Robert, William Lehr & Robert Litan, "The Effects of Broadband Deployment on Output and Employment: A Cross-sectional Analysis of U.S. Data," 6 *Issues in Economic Policy*, 2007. (Emphasis added.)

this regard, but continual increases in taxation, particularly substantial ones, will result in less investment on the margin, and the cumulative effects of deterring or delaying investment to even a modest degree in this industry quickly become substantial.

56. What sort of impact might then be expected given the levels of increased taxation discussed in the prior section? We note first that average effective download speeds, according to Speedtest, have increased by 40% between October 2017 and October 2018, and CableLabs reports that available download speeds have been increasing at 50% per year and are expected to continue to do so, with 10 Gbps service available in 2024.[55] However, small reductions in a rate of growth have cumulative effects, and when, as here, even modest reductions in network quality can mean substantial reductions in consumer welfare, the cumulative effects quickly become very large. If the levels of taxation increase, then, as we have discussed, incentives for ongoing investment will decrease. Incentives to invest will also be impacted immediately by the expectations of such fees increasing over time, even if the fees do not immediately reach the discussed levels in every municipality. For example, if a firm is contemplating an investment that will take a year and a half to complete and that will be in service for at least a decade, the firm will look forward to what taxes and fees are likely to be at that point in the future and going forward. The fact that fees might not be imposed for a year would still make investment less likely. The firm would realize that such fees are coming and that the firm's returns will therefore be lower as a result, and it will act accordingly.

57. While the link between increased taxation and concerns about uncertainty on rates of return and decreased investment is clear, this is a rapidly evolving industry and we are not aware of any precise quantitative estimates of how much a given increment of taxation impacts investment. As noted above, even assuming taxes and fees of only 3%, and assuming that consumers bear half of those taxes and fees, the amount of taxes and fees borne by the cable

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55 Speedtest report for the United States, available at http://www.speedtest.net/global-index/united-states#fixed. For historical Speedtest data, see also the FCC's International Broadband Data Report Appendices, Table 11 and Figure 1. CableLabs, "Driving Gigabit Speeds: From Lab to Consumer," Fall 2018. See also the FCC's Eighth Measuring Broadband America Fixed Broadband Report, with extensive data based on SamKnows covering median speeds and relation of advertised speed with effective speed. The 2017 median speed reported based on SamKnows of 72 Mbps is similar to that reported by Speedtest. Both reports are available in DOC-355405A1, at https://docs.fcc.gov/public/attachments/DOC-355405A1.pdf.

operators would still be equal to approximately a quarter of expected infrastructure spending on network improvements. Furthermore, reduced investment can impact network quality in many ways beyond just download speeds, and again, we are not aware of any precise quantitative estimates of the relation between a particular increment of investment and the precise levels of quality on each of those dimensions. Thus, in order to provide an order of magnitude of the effects of increased taxation, we must make some assumptions.

58. As we noted earlier, we have previously estimated that, as of 2009, an increase in service offering quality from 5 Mbps to 50 Mbps (measured based on listed or advertised speed, not effective speed) would be associated with $5.8 billion in additional consumer welfare. One might ask if even today there are any welfare gains above, say, a 5 Mbps connection, since that is nominally sufficient for HD video streaming. It is important to note several things.

- First, speed in this example is a rough proxy for overall network improvements, which are occurring on multiple dimensions.
- Second, people do pay more for faster connections, including some consumers who purchase gigabit service. Thus, consumers demonstrably do value higher speeds even today, and greater investment in cable networks and competition between service providers increases both the availability and affordability of such enhanced services.
- Third, forward looking welfare estimates should consider the introduction of new services. For example, in the age of dial-up, moving to a 1.44 Mbps service made existing services work much more smoothly, but one might ask at the time if there was any benefit to going beyond that speed. Once such speeds became available, however, new services were introduced to take advantage of them, such as streaming video.
- Fourth, improved network quality allows increased consumer welfare from more intensive use of existing services. For example, streaming video is reshaping the video landscape. The intensity of use of streaming video has increased sharply and is continuing to increase. Significant network upgrades are required to accommodate that increase. As Cisco, a large network infrastructure provider, has noted, “The size and complexity of the internet continues to grow in ways that many could not have

imagined," and "service providers are transforming their networks to better manage and route traffic."[56]

59. Thus, it should not be surprising that continued network investment produces substantial new consumer welfare gains. Indeed, a recent paper from the Technology Policy Institute estimates that consumer welfare gains from network improvements are now substantially higher than in 2009. For example, in 2009, we estimated that consumer willingness to pay for moving from 5 to 50 Mbps was roughly $7 per month per subscriber.[57] The Technology Policy Institute paper estimates a gain of more than $50 per month for roughly the same improvement of speed. They also note there are substantial consumer welfare gains associated with other dimensions of network improvement, including more than $8 per month from going from upload speeds of 3 Mbps to 25 Mbps and more than $8 per month from reducing latency from 60-150 ms to 10-30 ms.[58]

60. These increases in incremental consumer welfare for a given increment of network improvement between 2009 and 2017 illustrate how the continued introduction of new services and improvement of existing services increase the consumer welfare gains. While within a given year there may be declining benefits beyond a certain threshold of network quality, there is still room for substantial welfare gains even based on existing services, and over time, the introduction of new and improved services will continue to shift that threshold upwards.

61. The focus of the Technology Policy Institute analysis is on improvements in network quality in addition to download speed. A few simple calculations indicate that a reduction in investment leading to even a small reduction in network improvements would have large welfare effects. If we assume that reduced network investment results in average download speeds in a year being about 10 Mbps slower than they otherwise would be, that average upload speeds end up being about 5 Mbps slower than they otherwise would be, and that latency ends up being

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[56] Communications Daily, "Video to Comprise 82% of Swelling Internet Traffic in 4 Years, Says Cisco," November 28, 2018.

[57] Dutz, Orszag & Willig (2009), pp. 26-27.

[58] Liu, Yu-Hsin, Jeffrey Prince & Scott Wallsten, "Distinguishing Bandwidth and Latency in Households' Willingness-to-Pay for Broadband Internet Speed," Technology Policy Institute, August 2017, p. 32.

about 5 ms higher than it otherwise would be, the loss in consumer welfare for that one year would be roughly \$3.15 billion.[59]

62. Such effects are not only cumulative over time, but when the rate of growth of these improvements is reduced, the effect in each additional year is greater than in the prior years as well. That is, these losses will not only cumulate over time, but the additional loss in each year will become larger for two reasons. First, a slower growth rate in improvements means that each year network quality falls farther and farther behind the curve, so a 2% shortfall may become a 3% shortfall, then a 4% shortfall, and so on. Second, a slower rate of growth means a delay in the introduction of new services that take advantage of higher network quality, which means that for any given increment of improvement, the value to consumers will be higher. We note that comparing the 2009 figure with the 2017 figure, the consumer welfare benefit for the same incremental improvement in speed is roughly seven times higher, that is the consumer welfare gain grew by 7.2 times over eight years. If we apply that same rate of change going forward then by year five, the \$3.15 billion will be \$12.9 billion, with a cumulative loss of \$40.2 billion.[60]

63. Returning to the estimate from our 2009 paper based on download speeds, our assumption of total consumer welfare gains of \$5.8 billion per year nationwide for network improvements associated with a 45 Mbps increase in speeds is therefore likely to be conservative. The basic point here is simply that network improvements create substantial consumer welfare. While precise measurements are difficult, this point is widely acknowledged. However one measures these consumer gains, reducing the rate of network improvements will therefore result in substantial lost consumer welfare. These calculations should therefore be viewed as a useful starting place to look at the general magnitude of effects.

VI. CONCLUSION

64. To summarize, there is an economic consensus that broadband deployment has been and remains an important driver of consumer welfare and economic growth. Those benefits have grown over time as broadband networks have expanded their reach and quality. Cable networks in particular are expected to continue to expand their reach and quality through substantial ongoing investments to implement new technological advances. The statute and the FCC's rules

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59 We assume consumers are operating in the 100 to 150 Mbps download range, the 25 to 100 Mbps upload range, and in the 10-60 ms latency range.

60 The net present value as of year 1 with a discount rate of 5% would be \$35.4 billion.

play an important part in this process by preventing regulatory opportunism to expropriate the returns from those investments. Such opportunism is a well-recognized economic risk that deters investment. As cable operators' experience under the existing cable franchising process demonstrates, in the absence of effective federal restraints, LFAs can be expected to impose, and are in fact imposing, substantial new taxes on broadband and other services delivered over cable networks in the form of fees and in-kind demands – a burden that can be substantial relative to the ongoing levels of investment. Increased bills to consumers (to the extent such taxes are passed through) directly reduce consumer welfare, and the portion borne by cable operators directly reduces incentives to invest. Incentives to invest are further reduced because of decreased consumer demand due to higher prices and possible distortions of competition. Overall, such taxes and in-kind demands can cause substantial harm to consumer welfare and the economy. The total additional tax burden could reach $8 billion per year by 2023, and even modest reductions in network improvements as a result of reduced incentives to invest can easily result in consumer welfare losses in excess of $40 billion over that same period.

APPENDIX A

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PROFESSIONAL EXPERIENCE:

- **Senior Managing Director**, Compass Lexecon (previously Competition Policy Associates, Inc. ("COMPASS") and before that, Sebago Associates, Inc.), March 2000-Present. Manage economic consulting firm specializing in antitrust, economic policy, and litigation matters. Member of the firm's Executive Committee. Conduct economic and financial analysis on a wide range of complex issues involving mergers, litigation, public policy, and regulations for corporations and public-sector entities. Serve as expert witness in proceedings before U.S. and international courts and administrative agencies and the European Court of First Instance on competition policy issues, including industry structure, vertical relationships, and intellectual property rights.
- **Assistant to the Secretary and Director of the Office of Policy and Strategic Planning,** U.S. Department of Commerce (Washington, D.C.), March 1999-March 2000. Served as the Secretary of Commerce's chief policy adviser. Responsible for coordinating the development and implementation of policy initiatives within the Department. Worked on a wide range of issues, from implementing the steel loan guarantee program to telecommunications and e-commerce issues. Represented the Secretary of Commerce in meetings with other government officials and outside organizations, and testified before Congress on behalf of the Department on budget and Native American economic development issues.

- **Economic Policy Advisor**, National Economic Council, The White House (Washington, D.C.), August 1997-March 1999; Assistant Director, January 1996-November 1996. Coordinated policy processes on a wide range of issues, from Social Security reform to job training reform, unemployment insurance reform, homeownership and low-income housing issues, the minimum wage, and Individual Development Accounts. Responsible for helping to coordinate the Administration's daily economic message and to promote (and defend) President Clinton's economic record.
- **Economics Teacher,** Phillips Exeter Academy Summer School (Exeter, New Hampshire), June 1997-August 1997. Taught introductory economics at Phillips Exeter Academy Summer School.
- **Economic Consultant,** James Carville (Washington, D.C.), August 1995-January 1996. Helped James Carville, President Clinton's 1992 campaign strategist, research and write his *New York Times* #1 best-selling book, *We're Right, They're Wrong: A Handbook for Spirited Progressives*.
- **Special Assistant to the Chief Economist**, U.S. Department of Labor, (Washington, D.C.), August 1994-August 1995. Served as an economic aide to the Chief Economist (Alan B. Krueger) and the Secretary of Labor (Robert B. Reich).

Volunteer Positions

- **Director of Policy Preparations for Vice Presidential Debate,** Gore-Lieberman Presidential Campaign, September 2000-October 2000. Oversaw policy preparations for Democratic Vice Presidential candidate before his debate with the Republican Vice Presidential candidate.
- **Weekly Commentator,** *Wall Street Journal Online,* September 2004-November 2004. Commented on economic issues during the 2004 presidential campaign. Topics of weekly commentary included jobs, health care, energy, trade, taxes, tort reform, appointments, and fiscal policy.

EDUCATION:

- Oxford University, M.Sc. in Economic and Social History, 1997
- Princeton University, A.B. *summa cum laude* in Economics, 1996
- Phillips Exeter Academy, graduate with High Honors, 1991

HONORS, PROFESSIONAL ASSOCIATIONS, AND APPOINTMENTS:

- Phi Beta Kappa, inducted June 1996
- Marshall Scholar, 1996
- *USA Today* All-USA College Academic Team, 1996
- Corporation for Enterprise Development Leadership Award for "Forging Innovative Public Policies to Expand Economic Opportunity in America," 1999
- *Who's Who in America*, 2001-Present; Also, *Who's Who in the World*; *Who's Who in Science and Engineering*; *Who's Who in Finance and Business*; and *Who's Who of Emerging Leaders*
- California Workforce Investment Board, 2000-2003
- California Governor's Technology Advisory Group, 2000-2003
- Adjunct Lecturer, University of Southern California (Los Angeles, CA), January 2002-June 2002.

- *Global Competition Review*'s "40 under 40: The World's 40 Brightest Young Antitrust Lawyers and Economists," 2004
- *Global Competition Review*'s "Best Young Competition Economists," 2006
- *The International Who's Who of Competition Economists*, 2007-Present
- LawDay Leading Competition Economics Experts, 2009-Present.
- Expert Guides, Best of the Best USA, 2011-Present.
- Fellow, University of Southern California's Center for Communication Law & Policy, 2007-2015.
- FTI Consulting Inc., Founders Award, 2008.
- Senior Fellow, Center for American Progress, 2009-2016.
- Lecturer, University of California at Los Angeles (UCLA), School of Law, 2018-Present.
- Board of Directors, Sebago Associates, Inc., 2000-2007; Competition Policy Associates, Inc., 2003-2006; The First Tee of Washington, DC, 2005-2011; Ibrix, Inc. (Sold to Hewlett-Packard), 2006-2007; JMP Securities, Inc. (NYSE: JMP), 2011-Present; Tiger Woods Foundation, Board of Governors, 2012-Present; Children's Golf Foundation, 2013-Present; Friends of the Global Fight Against AIDS, Tuberculosis, and Malaria, 2013-Present.
- Clinton Global Initiative, Member, 2008-2016; Grassroot Soccer, Ambassadors Council, 2010-Present; The First Tee, Trustee, 2013-Present; Good+ Foundation, Fatherhood Leadership Council, 2017-Present.
- Member of the American Economic Association, the Econometric Society, the American Finance Association, and the United States Golf Association.

Reports, Papers, and Notes:

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- "The Benefits of Patent Settlements: New Survey Evidence on Factors Affecting Generic Drug Investment," with Bret Dickey, Commissioned by the Generic Pharmaceutical Association, July 23, 2013.

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- "An Econometric Analysis of the Matching Between Football Student Athletes and Colleges," with Yair Eilat, Bryan Keating, and Robert D. Willig, January 2009.
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- “Computers in Schools: Domestic and International Perspectives,” California Technology, Trade, and Commerce Agency and Sebago Associates, Inc., March 2001.
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- “Analysis of Votes for Buchanan by Precinct within Palm Beach and Broward Counties,” with Peter R. Orszag, Sebago Associates, Inc., November 9, 2000.
- “A Statistical Analysis of the Palm Beach Vote,” with Peter R. Orszag, Sebago Associates, Inc., November 8, 2000.
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- “Quantifying the Benefits of More Stringent Aircraft Noise Regulations,” with Peter R. Orszag, Northwest Airlines and Sebago Associates, Inc., October 2000.
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OP-EDS/LETTERS TO THE EDITOR:

- “Hitting Budget Numbers May Be Up for Auction,” *Roll Call*, December 19, 2013.
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- “PBMs Save Us Billions,” *The Hill*, November 28, 2011.
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- “Credit Where It’s Due,” *Wall Street Journal*, October 25, 2007.
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- “Paul O’Neill Doesn’t Cry for Argentina,” Sebago Associates, Inc., August 3, 2001.
- “Do You Recognize The Clinton West Wing in *The West Wing*?” *The Atlantic Monthly* Online, March 2001.

SPEECHES AND PRESENTATIONS:

- “Industry Professional Panel,” Panelist at Music Industry Research Association, Los Angeles, CA, June 26, 2018.
- “The Amex Decision: Turning the Tables?” Panelist at Concurrences Review and Fordham University School of Law, “Antitrust in the Financial Sector: Hot Issues & Global Perspectives,” New York, NY, May 3, 2018.
- “Views from the Trenches: Anthem/Cigna and Aetna/Humana,” Panelist at the 66th American Bar Association Section of Antitrust Law Spring Meeting, Washington, DC, April 11, 2018.
- “Consolidation Craze,” Moderator at UCLA Law Entertainment Symposium, “Progress is Paramount — Why Hollywood Will Always Matter,” Los Angeles, CA, March 24, 2018.
- “Setting the Stage: State Involvement in A Market Economy,” Panelist at Concurrences Review and New York University School of Law Conference on “Antitrust in Emerging and Developing Economies: Africa, Brazil, China, India, Mexico…,” New York, NY, October 23, 2015.
- “Office Superstores: What Changed in 15 Years?” Panelist on ABA Section of Antitrust Law, Economics and Mergers & Acquisitions Committees, Washington, DC, January 6, 2014.
- “Five Bars: Spectrum Policy and the Future of the Digital Economy,” Panelist at Third Way Briefing, House of Representatives, Washington, DC, December 11, 2013.
- “An Economic Perspective on Reverse Payment Settlements in the Pharmaceutical Sector,” Speech to the Generic Pharmaceutical Association 2013 Annual Meeting, Orlando, Florida, February 21, 2013.
- “Navigating Our Economic Challenges and the Role of Public Policy,” Speech to the South Carolina Manufacturers Alliance Fourth Annual Textile Summit, Spartanburg, South Carolina, January 10, 2013.
- “Upward Price Pressure and Merger Analysis: What Is UPP’s Proper Role and How Can UPP Deal With Real-World Issues?” Presentation to Gilbert + Tobin, Sydney, Australia, December 4, 2012.
- “Obama’s Second Term: What It Means for the U.S. and World Economies,” FTI Consulting, Inc., Brisbane, Australia, December 3, 2012.
- “Merger Substance: How to Conduct a Proper Analysis of a Merger’s Competitive Effects, and How to Frame Related Legal Standards?” Panelist at Antitrust in Asia, American Bar Association, New Delhi, India, December 1, 2012

- “Financial Issues in College Sports,” Panelist at the Third Annual Sports Law Symposium: What is the Proper Role of Sports in Higher Education?, Institute of Sports Law and Ethics, Santa Clara University, September 6, 2012.
- “Pricing and Bundling of IT Products: Drawing The Line Between Lawful and Unlawful Behaviour,” Panelist on GCR Live’s Antitrust and Technology 2012, London, England, March 14, 2012.
- “The Role of Economic Evidence in Cartel Enforcement,” Speaker on ABA Section of International Law Teleconference, February 28, 2012.
- “Reverse Payment Settlements in the Pharmaceutical Industry,” Presentation to the House Energy and Commerce Committee Staff, July 15, 2011.
- “Increased Government Intervention: The Good, The Bad, and the Ugly,” Panelist, Association of Management Consulting Firms, New York, NY, December 2, 2010.
- “The Economic Challenges and Trade-Offs Facing the Obama Administration,” Remarks to RBS Citizens, Boston, MA, June 8, 2010.
- “Competition Policy As Innovation Policy,” Panelist, Computer & Communications Industry Association, Washington DC, October 27, 2009.
- “State of the Market: Regulatory Evolution and Policy,” Moderator, Youth, I.N.C. and Piper Jaffray, New York, NY, September 29, 2009.
- “The Empirical Effects of Collegiate Athletics,” Presentation to the NCAA Leadership Advisory Board, Detroit, Michigan, April 4, 2009.
- “The Economic Challenges and Trade-Offs Facing the Obama Administration,” Remarks to the Junior Capital Group, Proskauer Rose, LLP, New York, NY, February 10, 2009.
- “Managing Communications During Unprecedented Economic Times,” Panelist, The California Club, Los Angeles, CA, January 27, 2009.
- Presentation to the Computer & Communications Industry Association’s Antitrust Summit on Innovation and Competition Policy in High-Tech Markets, Washington DC, October 24, 2008.
- Presentation to the Center for American Progress Action Fund Session on the “Avoiding the Pitfalls of Credit Card Debt,” Washington, DC, February 25, 2008.
- “Distribution Fund Planning and Management: Lessons Learned from the Global Research Analyst Settlement,” with Francis McGovern, Presentation to the Securities and Exchange Commission, Washington, DC, January 31, 2006.
- “The Empirical Effects of Division II Intercollegiate Athletics,” Presentation to the National Collegiate Athletic Association 2006 Annual Convention, Indianapolis, Indiana, January 8, 2006.
- “Rules of the Game: Defining Antitrust Markets in Cases Involving Sports,” Presentation to the Wilmer, Cutler, Pickering, Hale & Dorr Antitrust Lunch, Washington, DC, December 8, 2005.
- “Competition Policy, Antitrust, and The High-Tech Economy,” Keynote Address to the Computer & Communications Industry Association TechSummit 2005, Laguna Beach, CA, October 26, 2005.
- “The Empirical Effects of Division II Intercollegiate Athletics,” Presentation to the Division II Chancellors and Presidents Summit, Orlando, FL, June 25, 2005.
- “The Empirical Effects of Collegiate Athletic Spending: An Update and Extension,” Presentation to the President’s Task Force on the Future of Intercollegiate Athletics, Tucson, AZ, June 9-10, 2005.

- “The Empirical Effects of Collegiate Athletic Spending: An Update and Extension,” Presentation to the NCAA Division I Board of Directors, Indianapolis, IN, April 28, 2005.
- “An Analysis of Division II Athletic Expenditures: Preliminary Findings,” Presentation to the NCAA Division II Board of Directors, Indianapolis, IN, April 28, 2005.
- “An Analysis of Division II Athletic Expenditures: An Overview of Study Design,” Presentation to the National Collegiate Athletic Association 2005 Annual Convention, Grapevine, Texas, January 8, 2005.
- “The Empirical Effects of Collegiate Athletic Spending: An Interim Report,” Presentation to the National Association of State Universities and Land Grant Colleges Annual Conference, November 17, 2003.
- “The Impact of Asbestos Liabilities on Workers in Bankrupt Firms,” *South Texas Law Review*, “Symposium: Asbestos Litigation,” Fall 2003.
- “The Impact of Asbestos Liabilities on Workers in Bankrupt Firms,” Presentation to the Conference on “Understanding Asbestos Litigation: The Genesis, Scope, and Impact,” U.S. Chamber of Commerce, Washington, DC, January 23, 2003.
- “The Process of Economic Policy-Making During the Clinton Administration,” Presentation to the Conference on “American Economic Policy in the 1990s,” Center for Business and Government, John F. Kennedy School of Government, and Harvard University, Cambridge, MA, June 29, 2001.
- “The Impact of Paying for College on Family Finances,” Presentation to the Conference on "Funding Excellent Schools and Colleges for All Students," National Conference of State Legislatures, Savannah, Georgia, February 17, 2001.
- “China and the Internet,” Remarks on Entertainment and the Internet in China at the EMASIA 2000 Forum, The Asia Society, Los Angeles, CA, May 23, 2000.
- “Is It The Star or Just an Extra? The Role Government Plays in a Digital Economy,” Remarks on the Regulation of Global Electronic Commerce at the eCommerce and Global Business Forum, The Anderson School at UCLA and the University of Washington Business School, Santa Cruz, CA, May 18, 2000.
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APPENDIX B

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M.A. UNIVERSITY OF CHICAGO: Economics, 1993
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B.S. SOUTHERN METHODIST UNIVERSITY: Economics and Systems Analysis, Mathematics Minor, 1991
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PROFESSIONAL EXPERIENCE

Compass Lexecon (formerly Lexecon), Chicago, Illinois: (1996 – date)

Editor for *The Antitrust Source*, American Bar Association (2011 – Present)

Chief of staff for numerous engagements, including the overall chief of staff for the economics analysis for AT&T in the AT&T / Time Warner merger and trial – *United States of America v. AT&T, Inc., et al.*

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RESEARCH PAPERS

“Identifying Benchmarks for Applying Non-Discrimination in FRAND” with Dennis Carlton (2014 - SSRN)

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“An Evaluation of the Social Costs of Payment Methods Literature” (2012 – SSRN)

“A New Direction in Mixed Income Housing,” submitted to Chicago Housing Authority (1993).

“A Survey of the Economics of Information, Focusing on Water” (1992).

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OTHER PROFESSIONAL EXPERIENCE

Panelist at American University, Washington College of Law’s Patent Pledges: Developing a Research Agenda conference, May 30, 2014.

Panelist at Texas Intellectual Property Law Journal’s 15th Annual Intellectual Property Symposium, FRAND and the Antitrust / Intellectual Property Interface, February 21, 2014.

Panelist at Georgetown University Law Center’s Hotel & Lodging Legal Summits, “Navigating Antitrust Issues Arising from the Online Distribution World” (October 24-25, 2013).

“An Economic Interpretation of FRAND” paper with Dennis Carlton, presented by Carlton at the Heath Lecture & Workshop on FRAND, University of Florida Law Advocacy Center (September 2013).

Interviewed by *IEEE Spectrum* for “The High Cost of Taking Your Money” (June 2012).

“Testing Interchange Fee Models Using the Australian Experience,” presented as part of a special session “Interchange Fees: Regulation and Implications” at Economics of Payments VI conference, Bank of Canada, May 24, 2012.

Interviewed by *The Oregonian* for “Those credit card rewards cost us a lot of cash” (July 31, 2010).

Participant in “The Law and Economics of Interchange Fees and Credit Card Markets” symposium sponsored by International Center for Law & Economics (December 8-9, 2009).

“The Evaluation of Social Welfare for Payment Methods,” 2009 Oxford Business & Economics Conference (June 24-26, 2009).

Interviewed by *Cards Insider* for "Payments: Cash Replacement, Anonymity provides lifeline for cash over cards" (January 28, 2008).

"Boom and Bust in Network Industries: Rising from the Ashes," 6th Global Conference on Business & Economics, Harvard University (October 15-17, 2006), with Hal S. Sider.

"House of Cards: The Economics of Interchange Fees," Presentation to the Federal Reserve Bank of New York Conference, *Antitrust Activity in Card-Based Payment Systems: Causes and Consequences* (September 16, 2005), with Alan S. Frankel.

"The Impact of Technology on the Modern Labor Market," 68th Annual Meeting of the Southwestern Social Science Association (March 29, 1990)

Presented papers on information externalities and technology diffusion at the *Economics and Public Policy Workshop* (3) and *Price Theory Workshop* (1), University of Chicago (1995, 1996)

Coordinated the *Conference on Valuing Non-Market Goods*, University of Chicago (July 21-22, 1995)

Assisted in coordinating the *Conference on Research in Health Economics*, University of Chicago (October 21-22, 1994)

Assisted in organizing the *Economic Policy and Public Finance Workshop*, University of Chicago (1993 - 1996)

Member of the *American Economics Association*

Associate member of the *American Bar Association*

Referee for the *Agricultural and Resource Economics Review, American Journal of Agricultural Economics, Antitrust Law Journal, Journal of Business, Journal of Legal Studies* and *Journal of Evolutionary Economics*.

ACADEMIC HONORS

Undergraduate:
Graduated Summa Cum Laude, Honors, Departmental Distinction
Award for Excellence (given to the outstanding senior in the Economics Department as decided by the vote of the faculty)
Presidential Scholarship (full scholarship)
National Merit Scholar (honorary)
Hyer Society (honorary society of Southern Methodist University)
Honor Roll (1987-1991)
Phi Beta Kappa
Alpha Lambda Delta (Treasurer, honorary society recognizing academic achievement)
Phi Eta Sigma (honorary society recognizing academic achievement)

Omicron Delta Epsilon (international honor society in economics)
Kappa Mu Epsilon (honor society in mathematics)

Graduate:
Full Merit Scholarship (tuition and stipend)

APPENDIX TO NCTA COMMENTS
EXAMPLES OF FRANCHISING AUTHORITY OVERREACH

I. VIOLATIONS OF THE MIXED USE RULE

A. LFA and Municipal Regulation of Non-Cable Services and the Rights-of-Way

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

2. Corvallis, Oregon requires the cable operator to obtain a telecom franchise for WiFi equipment and another telecom franchise for cellular backhaul, in addition to the cable franchise.

3. Some municipalities have asserted that cable operators must sign an encroachment agreement, in addition to a state-issued cable franchise, before offering non-cable services. Such agreements include requirements to construct, operate, and maintain cable systems to provide cable and non-cable services and to relinquish facilities to the municipality upon expiration of the agreement, which is in conflict with a cable operator's renewal rights under federal and state law. For example, Ontario, California, a community engaged in the construction of its own broadband network, has attempted to force a cable operator into signing an encroachment agreement by repeatedly freezing the cable operator's construction permits.

4. Port Orange, Florida, has imposed new obligations on all communications providers, including cable operators, to operate in the rights-of-way. In addition to its obligations under its state-issued cable franchise, the cable operator is being asked to purchase security bonds and obtain additional municipal authority to operate and construct in the rights-of-way that essentially duplicates requirements in the operator's state-issued authorization to provide cable service.

B. Proposed LFA Regulation of Non-Cable Services and the Rights-of-Way

1. The City of Lenoir, North Carolina is attempting to circumvent limits on the fees it can charge by requiring cable operators to sign new agreements that impose new payment obligations to place facilities in the rights-of-way.

2. Dry Ridge and Florence, Kentucky, have proposed requiring cable operators to obtain additional telecommunications franchises for use of the rights-of-way to provide non-cable services, which municipal representatives have indicated could include broadband, during the

negotiation of the cable franchise. The proposals would require payment of fees on non-cable gross revenue in addition to cable franchise fees.

3. New York City has proposed a local law that would impose cable television-like notice, customer call answering standards and other customer service related requirements on cable-provided broadband services.

C. State Regulation of Non-Cable Service

1. The Vermont Public Utilities Commission ("VPUC") conditioned the cable operator's franchise on, among other things, construction of "no less than 550 miles" of line extensions, making clear that expanding broadband service to the maximum number of households (i.e., universal service) was a key objective for the condition. In effect, the VPUC was relying on its limited jurisdiction as a cable franchising authority to order the buildout of broadband infrastructure irrespective of demand for cable service.

D. LFA Duplicative Fees Assessed on Cable Providers

1. The City of Eugene, Oregon requires the cable operator to pay a fee of 7% of revenues and a 2% business license fee for <u>each</u> of the following: voice services, broadband services, and cell backhaul service, in addition to the fees already imposed on the cable franchise.

2. In the wake of the 2016 *City of Eugene v. Comcast of Oregon II* decision, the Oregon cities listed below have adopted ordinances imposing fees on gross revenue from broadband service in addition to the fees already imposed on cable franchises.

    a. Garibaldi, OR imposed a 4% duplicative fee[1]
    b. Tillamook, OR imposed a 7% duplicative fee
    c. Florence, OR imposed a 5% duplicative fee
    d. Independence, OR imposed a 7% duplicative fee
    e. Gold Beach, OR imposed a 7% duplicative fee
    f. Creswell, OR imposed a 5% duplicative fee
    g. Oakridge, OR imposed a 5% duplicative fee
    h. Hermiston, OR imposed a 7% duplicative fee
    i. Monmouth, OR imposed a 7% duplicative fee
    j. Dallas, OR imposed a 5% duplicative fee

3. The City of Corvallis, Oregon requires the cable operator to pay a fee of 5% of revenues for voice services, in addition to the maximum 5% franchise fee for cable service.

4. In California, in addition to a 5% franchise fee, cable operators pay a "possessory interest" tax as imputed rent for access to the public rights-of-way. Counties generally calculated the tax by applying the franchise fee percentage (usually 5%) to cable revenue. In 2006, the Los Angeles County assessor substantially increased the tax on Los Angeles by adding broadband and telephony revenues to its calculation.

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[1] NCTA incorrectly identified the City of Garibaldi's broadband fee as 7% in its initial comments. NCTA Comments at 27. 4% is the correct fee.

5. Localities in several states require the cable operator to pay transaction taxes based on the receipts it derives from the provision of services that require occupation of the localities' rights-of-way, which may reasonably be considered duplicative of the rights and authorizations provided to the cable operator under its cable franchise as well as the significant fees it pays for those franchise rights. These duplicative exactions include city business license taxes in California, local business license taxes in Missouri, local business and occupation taxes in Nebraska, and local business and occupation taxes in West Virginia.

E. State Duplicative Fees Assessed on Cable Providers

1. In Texas, Chapter 283 of the Local Government Code requires cable operators to pay tens of millions of dollars per year in rights–of-way fees to provide voice services. As a result, cable operators are assessed two rights-of-way fees (one for voice and one for cable) even if a single facility is used to provision both services.

2. As a condition of access to the rights-of-way, the state of Maine levies a 0.25% (one quarter of one percent) surcharge on all wireline and VoIP telecommunications services to fund the ConnectME Authority, which provides grants for "last mile" infrastructure to provide high-speed internet access to customers in unserved areas of Maine.

II. IN-KIND EXACTIONS ON TOP OF THE FRANCHISE FEE

A. LFA Requirements for Complimentary Services on Top of the Franchise Fee

Free Cable Service

1. Montgomery County, Maryland requires the cable operator to provide courtesy Basic and Expanded Service to all public buildings currently receiving courtesy service and up to three additional locations per year (there are now 898 complimentary accounts with an estimated value of $949,000 annually) and to provide courtesy Internet service to fifty locations.

2. Ramsey-Washington Suburban Cable Commission, Minnesota (a community with 22,000 cable subscribers) requires the cable operator to provide courtesy Digital Starter cable service to 60 locations with no restriction on adding additional sites, as well as complimentary Internet service to 19 sites.

3. In Minnesota, in addition to requirements that cable operators serve all schools (current and future, public and private, administrative buildings, maintenance and transportation buildings, vocational technical colleges, universities, etc.) and public buildings (current and future, owned and leased), free service demands have included the following:

   - St. Cloud, Minnesota required complimentary service to parks, a nature center, a theater, convention center, a waste water treatment facility, an ice skating warming house, a history museum, and a regional airport;

   - Red Wing, Minnesota required complimentary service to a marina and municipal theater;

- Apple Valley, Farmington, and Rosemount, Minnesota, negotiating jointly, requested, but ultimately were not provided, complimentary service to four municipal liquor stores, an aquatic center, a golf course, and a vocational technical college;

- Buffalo, Minnesota required complimentary service to a municipal liquor store; and

- The Northern Dakota County Cable Communications Commission has requested complimentary service to three golf courses, an ice arena, a municipal pool, an airport, a park activity center, a historical society and museum, a community college, and a water treatment plant.

4. Rochester, New York recently demanded that the cable operator provide complimentary service to two city-owned cemeteries under a franchise provision that requires free service to all municipally-owned buildings.

5. In New York City, two cable operators must provide, free of charge, "those services which a [cable operator] was providing free of charge to such locations as of March 1, 2011" (representing thousands of locations), and further must provide service to dozens of additional sites across all five NYC boroughs. These cable operators also must provide free service to the third party public access community organizations. A third operator in the City was required to pay grants to support City-designated educational and technological needs in an amount totaling $4 million in lieu of offering free services.

6. Bangor, Maine has interpreted a franchise provision requiring free service to municipal buildings to include Cross Insurance Center Arena, a city-owned arena that hosts minor league hockey games and concerts.

7. Grand Island, Nebraska requires free cable service to a municipally owned "commercial" water park (in which adults are charged $8 per day entry fee).

8. Under Kentucky law, cities that receive payments from the state from a fund created by a statewide tax on telecommunications and cable services may not impose any additional in-kind or cash obligations upon cable operators, aside from requesting PEG channel capacity. Nonetheless, multiple cities that receive payments from the fund still demand that the cable operator "donate" multiple free video accounts as part of renewal negotiations, with one city initially requesting (but not likely to ultimately receive) free service for 27 locations, including to an employee lunch room, a workout room, a Nature Park, a decommissioned fire house, and a shooting range.

9. The City of Yuma, Arizona requires the cable operator to provide, at no charge, service to one outlet at each of the City government buildings and I-Net locations to which service was being provided as of January 1, 2015. The franchise further requires the cable operator to "install additional service outlets to such facilities for only its time and material costs." For any location added after that date, the franchise states that the cable operator "shall, upon request, install at no charge, one service outlet to any City government building or I-Net location and shall charge only its additional time and material costs, if any, if the request

requires it to extend its distribution system feeder more than 150 feet to reach a point where the location may be served by a drop."

10. The cities of Pasco and Richland, Washington, requested free drops and equipment for every public building, school, library, and university in their area (existing or new), without regard to whether the building is located close enough to the cable operator's plant to be served without a costly plant extension. The cable operator ultimately agreed to provide basic service with one set top box to three government buildings in Richland and two in Pasco, and at each elementary and public school building and public library that received service on the effective date of the franchise. But to obtain this result, the cable operator had to pursue the formal franchise renewal process under the federal Cable Act to fight against these demands, costing hundreds of thousands of dollars in legal expenses.

Free Broadband and WiFi Service

11. New York City required cable operators to sign side letters setting forth a commitment to expend a combined $10 million dollars to support Wi-Fi access to public parks. New York City also required that cable operators provide this Wi-Fi service free to their broadband customers, and to members of the public who are NOT cable operator broadband customers at a set rate. Any changes to that set rate can only be done with City approval.

12. A small community in New Hampshire with just over 500 video subscribers has refused to finalize a franchise renewal solely because the cable operator will not agree to continue providing free broadband service to its town hall.

Miscellaneous Free Services

13. Two cities in Northern Kentucky requested "at least fifty (50) spots per month on the cable system promoting City events which shall be evenly rotated on all cable networks and times." While the LFA ultimately dropped the request, renewal negotiations are ongoing.

14. Six LFAs in Minnesota require the cable operator to provide free cable hookups and equipment to non-customers who want to receive only the PEG channels.

B. State-Imposed Requirements for Complimentary Services on Top of the Franchise Fee

Free Cable Service

1. Florida requires free basic service to all K-12 schools, public libraries, and local government buildings located within 200 feet of plant upon the request of any municipality or county.

2. In Hawaii, the state Department of Commerce and Consumer Affairs acts as the franchising authority and issues regional-level franchises in the state. With minor limitations, the Hawaii franchises require cable operators to provide a cable drop and basic cable service at no cost to any school or institution of higher learning within its service area.

3. In Indiana, cable operators must continue to provide free cable services to any locations receiving such services as of the effective date of the statewide franchise statute so long as local governments request that they do so.

4. In Massachusetts, although franchising is handled at the local level, state law expressly requires franchises to provide for a free cable drop and an outlet along the provider's cable system to public schools, police and fire stations, public libraries, and other public buildings designated in writing by the city or town in which the system is located.

5. In New Jersey, holders of system-wide franchises in the state must provide one service outlet activated for basic cable service to any and all fire stations, public schools, police stations, public libraries, and other such buildings used for municipal purposes.

6. In North Carolina, cable operators must provide free basic cable service to local government buildings, public and charter schools, and libraries located within 125 feet of cable plant.

Free Broadband Service

7. The VPUC requires the cable operator to provide commercial-class broadband service and equipment at no charge to every PEG operator, school, public library, and municipality within its franchise territory. The market value of these services and related costs do not count toward the 5% cap.

8. New Jersey requires holders of system-wide cable franchises to provide free Internet service to any and all fire stations, public schools, police stations, public libraries, and other such buildings used for municipal purposes.

C. LFA Store Obligations on Top of the Franchise Fee

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

D. LFA Demands/Requirements for PEG Financial Support on Top of the Franchise Fee

1. Montgomery County, Maryland requires the cable operator to provide 3% of annual cable service revenues for PEG support. The County may use one-third of the grant for PEG operating expenses, or up to two-thirds of the grant for PEG operating expenses to the extent it provides matching funds out of the franchise fees to support PEG operations, and to provide $10,000 per PEG channel position reassignment.

2. Ramsey-Washington Suburban Cable Commission, Minnesota currently requires the cable operator to provide PEG funding exceeding $4.00 per customer per month, more than $3.00 of which is for PEG operating costs, for a combined total exceeding $1.1 million per year in

PEG funding. In addition, the cable operator pays more than half of the rent for the PEG studio facility, costing an additional $78,000 annually.

3. In New York City, cable operators provide service under the terms of multiple franchises that require payments and in-kind support as follows:

    - More than $11.88 million in fixed "Public Access Channel Grants" for "development and production of local public access programming" (note that this amount is on top of at least $19.1 million in grants for "capital needs" for the City's "Government/Educational Access Channel");

    - Recurring payments, paid per subscriber per month, to support public access in an amount varying from $1.12 to $1.40 per borough. For each operator, this amounts to millions of dollars of payments each year;[2]

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

    - One cable operator is required to provide 100 "avails," and another operator air time worth as much as $500,000, to each of the public access organizations covered in their respective franchises.

    Note that the public access support payments, by the terms of the franchises, "shall not constitute or be treated as a deduction or credit against Franchise Fees payable to the City by Franchisee pursuant to this Agreement (nor shall any provision of services or funds to the City pursuant to this Agreement constitute or be treated as such a deduction or credit)." In other words, cable operators cannot offset any of the above amounts against the 5% franchise fee, even though by the terms of the franchises these amounts do not constitute capital support.

4. The City of Rochester, New York's franchise (executed in 1992) required a grant of $175,000 to the non-profit corporation that administers and operates its public access channels. The franchise states that this grant is for "administration and operation of the public access channel(s)." The franchise includes an annual increase to the public access grant that amounts to 5% per year, half of which is payable by the franchisee and half of which may be passed through to subscribers. The City refused to renegotiate the franchise upon its expiration in 2002, now more than 15 years ago. The City continues to refuse renewal to continue the annual increases. The public access grant has increased each year since 1992, even as the number of the cable operator's video customers has declined substantially as new forms of video programming and over the top services have proliferated. In 2018, the public access grant ballooned to more than $620,000 per year. In addition, the

[2] These funds are likewise designated for use by the public access organizations "*in [their] discretion for public access costs*, including, but not limited to, studio and portable production equipment, editing equipment and program playback equipment, cameras, office equipment, renovation or construction of Public Access Channel facilities, local public access programming development by the CAO, *and other public access costs as may be determined by the CAO and its Board of Directors*." (Emphasis added).

franchise states that the cable operator "shall not charge against the franchise fee in any way the expenses incurred in supporting [PEG] access programming." As a result, the cable operator cannot offset this annual payment from the franchise fee without creating a potential dispute over whether it is in compliance with its franchise, even though the City has acknowledged during renewal discussions that it is using much of the public access grant for PEG operating support and not capital expenses. The City continues to delay the franchise renewal while the cable operator operates pursuant to temporary authority under state rules, rather than negotiate a reasonable franchise that is consistent with federal law.

5. The Lockport Community Cable Commission ("LCCC"), a non-profit entity designated by the City of Lockport and Town of Lockport, New York (which serves fewer than 10,000 customers) to grant and administer the cable franchises in both communities, entered into a franchise with the cable operator's predecessor in 1992 under which LCCC receives the maximum 5% franchise fee permitted by federal law. In addition, the LCCC, which is "responsible for the operation and administration of the [PEG] Access Center" receives an aggregate amount of more than $170,000 per year of in-kind contributions that are not counted against the 5%, representing the following annual contributions:

    - $5,000 in annual scholarship grants "for Lockport Community students pursuing a career in video production or communications";
    - Annual payments of $65,000 beginning in 1992, which have ballooned to $113,225.41 due to an inflation adjustment provision in the franchise, to LCCC's non-profit entity, which is charged with "managing all aspects of local, educational, and government access programming serving the Lockport Community";
    - More than $40,000 annually to support LCCC's studio, as the franchise requires the cable operator to provide rent-free space for the studio and to pay property taxes, utilities, and structural maintenance for that space; and
    - $15,000 in annual support for equipment replacement, with any unused amounts rolling over into succeeding years, with a $75,000 cap on roll-over. The cable operator was also required to make a one-time payment of $22,000 to allow LCCC to acquire a mobile production van.

6. The existing franchise with three members of the Tompkins County Council of Governments ("TCCOG"), which includes the City of Ithaca, New York, requires the cable operator to provide a PEG access studio and to pay the utilities as well as routine maintenance of equipment and facilities. The annual costs to the cable operator of operating this studio are approximately $200,000. The cable operator is also required to employ one full-time and one part-time staff member at the studio. TCCOG's refusal to assume the obligation to operate and maintain the studio has impeded any progress on a renewal of the long expired franchises in these communities.

7. The Cities of Pasco and Richland, Washington demanded that the cable operator provide and maintain return lines to 9 locations in a tri-city area (including at least one location outside the franchise area), PEG studios in neighboring cities, outside of the franchise area; simulcast

5 standard definition channels and up to 6 high definition PEG channels, despite not being able to fully program 3 PEG channels at the time of renewal; make 30 new hours of PEG programming available on demand, per month; and promote the cities' PEG channels for free. These demands significantly impeded renewal negotiations, resulting in a formal proceeding in which the cable operator had to expend hundreds of thousands of dollars in legal fees. In the end, the franchise entered into in these cities was on terms that were substantially similar to the terms the cable operator was offering informally, prior to the initiation of the formal renewal process.

8. In light of a state law prohibiting capital support grants for PEG access programming, the City of Yuma, Arizona insisted that the cable operator agree to provide a $40,000 annual "local origination" payment that is similar to, but slightly different from, a PEG grant, which clearly defies the spirit of the state law. (Note that the term "local origination" is used in the cable industry to describe programming of local interest produced by the cable operator, not a community.)

Some LFAs have even used the renewal process to request or require higher PEG fees, despite having no or very limited PEG operations, including:

9. A mid-sized city in Michigan sought to impose a unilateral increase in PEG fees, defined as "the cost of PEG access facilities and services," from 0.14% of gross revenue per subscriber to 2%, without providing a justification for the increase. The City engaged counsel and threatened litigation, resulting in the cable operator having to retain its own counsel before agreeing to pay 0.39% of gross revenues to the city.

10. Under California law, communities may adopt an ordinance requiring cable operators to pay a fee of up to 1% to support PEG facilities, regardless of whether there is any actual PEG operation in place or community need or interest in commencing one. Presently, a number of communities collect the fee despite not engaging in any PEG operations, including the city of Wildomar. Other California jurisdictions use this provision to collect significantly more PEG funding than they actually spend on capital facilities. For example, The Community Media Center of Marin manages PEG access programming for Marin County and nine incorporated cities. Their activities report for fiscal year 2017-2018 indicates they have collected (from the member communities via a 1% PEG fee) $822,798. Their capital spend for the same period was only $105,228. The difference appears to go toward other expenses.

E. State Demands/Requirements for PEG Support on Top of the Franchise Fee

PEG Financial Support

1. Texas requires providers to pay 1% of gross revenues to support PEG. Dozens of cities across Texas are collecting the 1% and stockpiling funds despite not having any PEG operations (though note that some cities have waived the requirement). One large city in Texas, though it does have a PEG channel, has received tens of millions of dollars in PEG support from one cable operator, but does not appear to have used anywhere near the full amount of those funds for PEG purposes.

PEG Operational Support

2. The VPUC has ordered the cable operator to provide program-specific listings on its interactive program guide for each hyper-local PEG channel in Vermont. This would require major engineering changes, new equipment and facilities, and operational changes costing over $4 million, which the VPUC has mandated the cable operator to make "at its expense," with no offset against its 5% franchise fee payments.[3]

3. The VPUC mandates that the cable operator pay for "remote origination sites" and other live production capabilities for PEG programming (beyond the ordinary video return lines to the headend), in addition to its 5% franchise fees. This would require the cable operator to build potentially dozens of remote origination sites in municipal buildings, schools, and libraries throughout its Vermont footprint. The construction costs per site would range from $4,000 to more than $120,000, depending on the location and distance from the fiber network that the cable operator uses to deliver live video back to its headends.

PEG Return Lines and I-Nets

4. Indiana requires providers to continue to support any I-Net obligations and return lines in existence as of the effective date of the statewide franchise statute so long as local governments request that they do so. If there are other state franchisees in the community, they may share a portion of the cost to provide the I-Net. But if there are no other franchisees, the incumbent must continue to provide the I-Net by itself.

F. LFA PEG Channel Capacity Requirements

1. New York City's cable franchises permit the City and relevant borough community access organizations to require each of the three franchised cable operators to provide as many as 43 PEG channels. The cable operators are also required to set aside video on demand capacity for PEG use.

2. Ramsey-Washington Suburban Cable Commission, Minnesota currently uses 6 PEG channels, 2 of which are also carried in HD. In its Needs Assessment Report prepared for franchise renewal, Ramsey-Washington is seeking carriage of 7 PEG Channels with an option to launch 1 more on request, all in HD and SD, as well as 30 hours of video on demand.

3. Eugene, Oregon requires the cable operator to provide a private PEG channel for public safety training purposes with free digital-to-analog converters to access the programming.

[3] The cable system populates its channel listings, including PEG channels, at the headend level. In some markets, PEG channels are "hyper-local," meaning that they share the same headend but their local programming is only distributed to particular subsets of households served by the headend. This makes it impossible for the cable operator to provide individual, program-specific scheduling information for each PEG channel. In Vermont, the cable operator carries 45 of these hyper-local PEG channels.

G. State-Imposed PEG Channel Capacity Requirements

Several states permit municipalities to mandate channel capacity be set aside for PEG purposes.

1. California: In addition to mandating that cable operators provide up to 3 PEG channels, under California law, video providers are prohibited from moving PEG channels without the consent of the local community. In an attempt to leverage the cable operator's desire to have a standardized channel line-up throughout the state, which would have involved moving one PEG channel, Glendale refused to agree to the channel relocation unless the cable operator agreed to City ownership of a 48 count fiber I-NET connecting approximately 50 public buildings. In addition, the City had improperly used its PEG fees for non-capital costs and was thus in violation of the franchise fee cap. Litigation ensued and, with respect to the I-NET, the City's central witness was deemed not credible and the Court found that the company had never transferred any ownership to the City. Regarding the PEG fees, the Court held that the cable operator paid PEG fees of 2%, and franchise fees of 5% to Glendale during the relevant time period, and that Glendale's argument that the fees were being used for capital costs was premised entirely on a lease that was, in the Court's words, "smoke and mirrors" and a "shell mechanism." Judgment was entered on November 28, 2012, in favor of the cable operator on each of these issues. Many hundreds of thousands of dollars were expended by the cable operator on this litigation.

2. Hawaii: Under the terms of its Hawaii franchises, the cable operator is required to provide 7 to 13 PEG channels per island, including multiple statewide "video-on-demand" channels. Further, the state has refused to permit the cable operator to consolidate its video-on-demand content to a single, statewide channel, despite the fact that all the content could be located on sub-menus under that single channel. This requirement prevents the cable operator from making the most efficient use of its channel capacity.

3. Minnesota requires that channel 6 be designated for uniform regional channel usage in the Minneapolis-St. Paul Metro Area free of charge.

H. LFA I-Net Demands/Other Demands on Top of the Franchise Fee

1. New York City's franchises require cable operators to provide an I-Net by setting aside certain strands of fiber from their total fiber optic capacity to the City for the City's exclusive use, and also to provide grants in the aggregate amount of more than $20 million for the City to implement this network. The cable operators are also required to maintain these "dark fiber" networks and maintain return connections from each community access organization site, all at no cost to the City.

2. Ramsey-Washington Suburban Cable Commission, Minnesota requires the cable operator to provide a free, 32-mile dark fiber I-Net to 16 locations, which are used for governmental data purposes and have no relation to video or PEG channel services, and a separate hybrid-fiber-coax (HFC) network used to transport PEG signals from 50 live video origination sites for PEG channels. In its Needs Assessment Report prepared for franchise renewal, Ramsey-Washington seeks to continue the free dark fiber I-Net and to add 5 locations (estimated at $64,000) as well as additional locations throughout the term of the franchise (estimated at

$900,000), the full replacement of the 32 miles of fiber throughout the renewal term, and to replace or upgrade the HFC network for PEG transport.

3. The City of Yuma, Arizona, requires the cable operator to satisfy its I-Net obligation by providing the City access to certain fiber lines through a no-cost "Indefeasible Right-of-Use Agreement," and to provide maintenance and support of the fibers through a "Maintenance Agreement" at substantially below market rates.

4. The existing franchise for the small Town of Chili, New York requires the cable operator to "construct, maintain, and operate a fiber optic interconnection containing four (4) strands of dark fiber for use by the Town and any entity authorized by the Town." The franchise expired in 2017, and the Town has said that it will not renew the franchise without a similar commitment from the cable operator.

5. The existing franchise with the City of Ithaca, TCCOG's anchor member, requires the cable operator to maintain an I-Net within the City. TCCOG is unwilling to relieve the cable operator of this obligation, nor will it consider transitioning the arrangement to a business services contract outside of the cable franchise.

6. Columbia, Nebraska and Bar Harbor, Maine, have refused to advance the renewal process, due in part to the cable operator's refusal to continue to provide I-Nets without the value of their use counting against the franchise fee cap.

7. In its renewal request, the Northern Dakota County Cable Commission in Minnesota has listed 30 locations in which the cable operator must provide a fiber return line for PEG transport, including a water treatment plant, golf course, municipal pool, and a transportation building.

I. State-Imposed I-Net Demands/Other Demands on Top of the Franchise Fee

1. The VPUC requires the cable operator to respond to each request for proposal for an I-Net by any government agency, educational institution, or an educational or governmental access entity, while arbitrarily limiting the cable operator's proposed charges for such I-Nets. This obligation to bid for – and potentially construct – an unlimited number of I-Nets on non-market terms also provides no ability to offset the costs against the cable operator's 5% franchise fee payments.

J. LFA Attempts to Expand "Revenues" for Franchise FCC Calculations

LFAs are constantly pushing the boundaries of what revenues are subject to franchise fees, seeking to expand their franchise fee collections.

1. Thirteen cities in the greater Houston market jointly hired a consultant to audit the cable operator's franchise fee payments (5% of gross revenues) and "in-kind" payments (1% of gross revenues) under the Texas state franchising statute over a four-year period from 2013 to 2017. It is undisputed that during this period the cable operator accurately paid $15 million in franchise fees and $2.8 million in "in-kind" fees. However, the LFAs seek to

collect an additional $1 million by demanding the following additional revenues be included in the fee calculations:

- *Revenues earned from multi-service bundles* – To the extent the cable operator earns revenue from ancillary fees like late fees, bounced check fees, and other convenience fees from customers who subscribe to multi-service bundles, the LFAs demand that 100% of such revenue be included in the calculation of the 5% franchise fee. The LFAs object to the cable operator's practice of paying the 5% franchise fee on only the pro-rata share of such revenues in proportion to the cable service portion of those bundles, which is the accounting treatment required by GAAP. LFA consultants argue that GAAP should not apply and that these fees were charged when the company offered only cable service and therefore must be 100% attributable to the cable service. In this dispute, the additional franchise fees at issue are approximately $450,000. This same argument is advanced by LFA consultants for clients across the country in many audits.

- *Advertising commissions of ad buyers' agents* – When an advertiser hires an agent to create their ad and place the ad with the media, the buyer frequently owes its agent a commission or fee for placing the ad. Those agents buy advertising time on cable systems. It is common in the industry for the advertising medium (in this case the cable operator) to provide an invoice which includes the amount the cable company will be paid on the ad and (as a courtesy) the buyers' agents' commission. The agent then collects the full amount from their client, keeps their commission, and forwards the amount due the cable operator for the advertising time. The LFAs want the buyers' agents' commissions included in the calculation of franchise fees, despite clear GAAP guidance that such commissions are not revenue to the cable company. The amount of this claim in franchise fees is estimated to be approximately $300,000.

- *Revenues earned by representing other media companies* – In some markets, the cable operator's advertising sales team also represents other communications companies in the sale of advertising time on their distribution systems. This provides "one stop shopping" for an advertiser that wishes to reach an entire market in one advertising purchase. The cable operator earns a fee from the other distributors for providing this advertising sales service. The LFAs seek to have these revenues included in the calculation of franchise fees on the basis that if the cable operator did not have a cable system authorized by a cable franchise in their market, the company would not have the advertising representation business, thereby rendering those revenues subject to franchise fees.

2. The Sacramento Metropolitan Cable Television Commission ("SMCTC"), a joint powers agency representing the County of Sacramento and the cities of Sacramento, Citrus Heights, Folsom, Rancho Cordova, Elk Grove, and Galt, has conducted several recent franchise fee audits pursuant to the California state franchising statute, Digital Infrastructure and Video Competition Act of 2006 (DIVCA), Cal. Pub. Util. Code §§5800 et seq., in which the LFAs seek to expand their franchise fee revenues, resulting in litigation with the cable operator over the following topics:

   - *The State Public Utility Commission Fee* – When DIVCA was enacted putting franchising authority with the California PUC, it authorized the PUC to collect a fee to offset the costs of regulating franchising. In 2018, this PUC fee assessed on cable operators statewide is expected to total almost $1 million. To stay within the federal 5% cap on franchise fees, cable operators in California have routinely deducted the PUC fee from the franchise fees they remit to local governments, but several communities have objected to this practice and filed lawsuits to collect the amounts deducted by cable operators. The SMCTC's claim that a cable operator must pay the PUC fee in addition to its 5% franchise fee payments is presently on appeal to the 9th Circuit.

- *Treatment of Other Revenues* – The LFAs assert additional claims to revenues based on their argument that GAAP should not govern how cable operators classify revenue for purposes of calculating franchise fees. The refusal to recognize the propriety and applicability of GAAP creates substantial uncertainty for cable operators as to the franchise fees that are due in any given period, and thus the fees that should be collected from customers, and subjects the companies to allegations of underpayment and franchise violations based on the whim of the particular auditor conducting the LFA's review. This matter is presently the subject of a separate lawsuit.

K. LFA Explicit or Implicit Demands for Waiver of Franchise Fee Cap

A substantial number of franchises contain explicit demands to treat particular types of expenses as exempt from franchise fees, including by way of example:

1. The cable operator's franchise with the City of Yuma, Arizona, states that all costs related to the provision of return feeds for transmission of PEG programming and complimentary service are not part of the franchise fee and may not be offset against it.

2. The cable operator's franchise in Lewiston, Maine requires upstream programming origination capability from all municipal buildings in the city, and states that the costs of providing this capability may not be treated as a franchise fee.

3. The cable operators' franchises in Lincoln, Nebraska provide that the cable operators may not treat any of the PEG commitments in the franchises as a franchise fee for the purpose of offsetting against the franchise fee, despite the fact the franchises all permit use of some PEG funds for operational purposes.

L. State-Imposed Explicit or Implicit Demands for Waiver of Franchise Fee Cap

Hawaii: The cable operator's franchises in Hawaii requires that the cable operator explicitly state that the multiple millions of dollars of I-Net capacity and services required by the franchise are not franchise fees and therefore not creditable against the 5% cap.