NORRIS McLAUGHLIN, PA
A Professional Corporation
400 Crossing Boulevard, 8th Floor
P.O. Box 5933
Bridgewater, New Jersey 08807-5933
(908) 722-0700
Attorneys for Petitioner, CSC TKR, LLC

CSC TKR, LLC Petitioner, v. BOROUGH OF MADISON, Respondent,	STATE OF NEW JERSEY BOARD OF PUBLIC UTILITIES DOCKET NO. VERIFIED PETITION

The Petitioner, CSC TKR, LLC, a wholly owned subsidiary of Altice USA (hereinafter "Altice" or "Petitioner"), hereby petitions the Honorable Board of Public Utilities (the "Board") pursuant to N. J. S. A. 48:5A-9, for an Order ruling that the Borough of Madison (hereinafter "Madison" or "Respondent") must: (1) immediately cease its unlawful demand that Altice agree to pay additional compensation, over and above the cable service franchise fee, in consideration for receiving access to the Highways of the Borough (as defined in N.J.S.A. 48:5A-3(h)); and (2) immediately grant Altice access to all Highways of the Borough so that Altice may: (a) commence long delayed deployment of its Fiber-to-the-Home ("FTTH") cable system by overlashing fiber-optic cable to its existing Hybrid Fiber-Coax ("HFC") cable system within the Borough; and (b) perform regular maintenance and servicing as needed to both its HFC and FTTH cable systems, as is Altice's right under its system-wide cable franchise and the State's cable laws (N.J.S.A 48:5-1 *et. seq.*). In support of this Petition, the Petitioner states as follows:

1. Altice is the holder of a state issued system-wide cable franchise that authorizes Altice under state and federal law to construct a cable system within the Highways of all the communities in its franchise area (including the Borough), and through utility easements (the "Franchise" – *see* Exhibit A). Pursuant to this authorization, Altice provides both cable and non-cable services over its system.
2. Under state law, the issuance of a certificate of approval for a system-wide cable franchise by the Commission to a CATV company like Altice is deemed to confer a franchise upon the CATV company (see N.J.S.A. 48:5A-15). Further, the federal Communications Act states that any cable franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system (see 47 U.S.C. Sec. 541 (a)(2)).
3. Altice also maintains attachment agreements with local utility companies for access to utility poles located within the Highways. In the case of the Borough, Altice pays attachment fees to Verizon, which, as the successor in interest to New Jersey Bell Telephone Company, exclusively manages the Borough's poles and collects all attachment fees pursuant to a joint use agreement with the Borough ("Joint Use Agreement" – *see* Exhibit B at Art. 7 ¶c). On information and belief, Altice has paid, and continues to pay Verizon all required pole attachment fees in the Borough pursuant to its attachment agreement with Verizon and the Joint Use Agreement.
4. With regard to the Borough granting permission for Altice's attachment to its poles as required by Art. 7 ¶b of the Joint Use Agreement, the Borough has previously granted its permission, and is fully aware that Altice and its predecessors' cable systems have been and continue to be attached to the Borough's utility poles, as evidenced by a municipal

consent franchise and three subsequent renewal authorizations adopted and approved by the Borough since 1975, which were in effect prior to Altice converting its authorization, by operation of law, to the current Franchise (*see* N.J.S.A. 48:5A-25.1; N.J.A.C. 14:18-14.13; and Exhibit C). As an example, the Borough's 1988 municipal consent ordinance states, "The Borough hereby grants to the Company its non-exclusive consent to place in, upon, along, across, above, over and under the highways, streets, alleys, sidewalks, public ways, and public places in the Borough poles, wires, cables, underground conduits, manholes, and other television conductors and fixtures necessary for the maintenance and operation in the Borough of a cable television system and cable communications system. Construction pursuant to said consent is conditioned upon prior approval of the Board of Public Utilities." The Borough's 1995 and 2007 municipal consent renewal ordinances contain substantively the same provision.

5. Since 2017, pursuant to its franchises, Altice has been in the process of deploying throughout its service footprint an advanced FTTH cable system, which can provide multi-Gig capable Internet and cable service to residents and small-to-medium businesses in New Jersey. Altice multi-Gig offerings are consistent with State and Federal goals to support infrastructure investments by cable operators to offer advanced communications services (e.g., https://www.nj.gov/governor/news/news/562021/20210521b.shtml). To date, Altice has worked with more than 120 New Jersey municipalities in the *Optimum* brand service area to successfully deploy FTTH (primarily by overlashing its existing aerial cable plant), consistent with both local right-of-way management rules and Altice's franchise authorizations. As a result, as of EOY 2022, the FTTH network passed more than 2.2 million households, and the Company continues to make steady progress on

deployment and service activation (https://www.businesswire.com/news/home/20230222005846/en/Altice-USA-Reports-Fourth-Quarter-and-Full-Year-2022-Results).

6. On or about November 29, 2021, soon after Altice commenced aerial cabling of FTTH in the Borough pursuant to the Franchise, the Borough's police department communicated to Altice's service technicians that they were no longer permitted to conduct any activity within the Highways of the Borough (Exhibit D). Upon contacting the Borough Administrator, Altice was informed that the Borough would not permit Altice to proceed with aerial cabling until it: (1) completed an access agreement to traverse a Borough-owned parking lot within the business district ("Access Agreement"); and (2) negotiated the terms of a pole attachment agreement for the use of the utility poles owned by the Borough ("Attachment Agreement"). Altice quickly negotiated the terms of the parking lot Access Agreement, including the commitment to a $10,000 payment at the Borough's request. Nevertheless, the Borough refused to permit Altice to resume cabling for FTTH until the Attachment Agreement was negotiated with the Borough, despite: (1) Altice's existing attachment agreement with Verizon; and (2) that fact that no new attachments are required for the overlash of FTTH to Altice's existing plant.
7. Six weeks later, on January 10, 2022, the Borough submitted an attachment proposal requiring that Altice pay the Borough a $250,000 annual fee for use of poles already subject of an existing attachment agreement with Verizon (*see* Exhibit E at page 20 ("*Exhibit B*")). To Altice's knowledge, such a fee is paid by no other attachers in the Borough, and is approximately 17 times the current rate paid by Altice for attachment rights in Madison to Verizon. Further, the Borough would not agree to make the

obligation conditional upon Altice's release from its obligation to Verizon, effectively subjecting Altice to an even higher combined annual financial obligation by double-charging Altice for the same poles. On January 18, 2022, Altice viewed the Borough's fee proposal as unreasonably high and discriminatory, as well as being prohibited by the Joint Use Agreement designating Verizon as the sole collector of attachment fees in the Borough.

8. On February 10, 2022, after several weeks of further negotiation, the Borough ultimately rejected a counteroffer from Altice to pay for attachment rights at a rate comparable to those paid by Altice to other municipalities in the State (*see* Exhibit F). Since the Borough's rejection continued to effectively bar Altice from accessing the Highways, Altice once again approached the Borough in late February seeking a reasonable resolution. The Borough thereafter did not respond until May 25, 2022 (three months since Altice's last inquiry and over seven months from the Borough initially stopping Altice's cabling without cause). At that time, because of the resulting delays in deployment, Altice again offered to settle the outstanding attachment dispute as well as additional items raised by the Borough in its May 25th letter. Altice was responsive to all of the Borough's existing and additional requests, agreeing to the terms of the Borough's attachment agreement within a more reasonable fee structure, completing the $10,000 payment for the parking lot Access Agreement, addressing free service requests, and agreeing to provide additional community support as consideration -- all of which the Borough led Altice to believe would result in a timely resolution of the matter. The Borough indicated that the offer would be considered at three different Council meetings, but it was not so considered at any of the meetings. Then on October 5, 2022, the

Borough finally responded to Altice with a counter-offer for Altice to pay the Borough a flat $95,000 per year for the use of all Borough poles (whether actually used or not) with a 2% annual escalator (*see* Exhibit G at page 20 ("*Exhibit B*")). The Borough provided Altice no justification for this amount, which is almost 7 times the amount of Altice's current pole fee obligation to Verizon, and was an increase over the Borough's previous proposal from February 2022.

9. Having made no further progress with the Borough, Altice filed a letter on October 11, 2022 with Lawanda Gilbert, Director of the Office of Cable Television and Telecommunications (the "Office") seeking the Office's intervention in assisting Altice to gain access to the Highways of the Borough pursuant to its rights under the Franchise and applicable law. Director Gilbert held mediation sessions for the parties on January 10 and February 23, 2023, but despite Petitioner's engagement in good faith negotiations, the Borough still refuses to permit Altice access to its Highways to deploy FTTH.

10. Immediately after Altice filed its letter with Director Gilbert seeking assistance with the Borough, the Borough adopted a resolution on October 13, 2022 authorizing the termination of the Joint Use Agreement, which will end Verizon's exclusive authority to receive compensation for attachments to the Borough's poles one year from providing notice to Verizon, on October 13, 2023 (*see* Exhibit H). The Borough took this action 11 month after initially denying Altice the right to deploy FTTH in the Borough unless Altice agreed to pay the Borough pole attachment fees. However Altice maintains that all this time, it continues to have the right to deploy FTTH without additional fees pursuant to its rights under the Franchise, its attachment agreement with Verizon, and

Verizon's exclusive authority to manage and receive compensation for the Borough's poles under the Joint Use Agreement through October 13, 2023.

11. The Borough's *quid pro quo* fee demand for access to the Highways violates the statutory limit on compensation by a cable service provider to a municipality. Under N.J.S.A. 58:5A-30(d)(1)), compensation to municipalities for use of the Highways from system-wide cable providers is capped at 3.5% of the franchisee's annual gross revenue. While the Borough claims the new charge is a pole attachment fee, it is clear from the record that Altice already pays the required attachment fees to Verizon, and that the Borough's demand for additional fees from Altice since November 2021 as consideration for access to the Highways, is over and above the limit on franchise fees that Altice pays the Borough under N.J.S.A. 58:5A-30(d)(1)).
12. The Borough's demand for this additional fee also violates Section 622 of the federal Communications Act's limit on cable franchise fees (47 U.S.C. Sec. 542). In a 2019 Order, the FCC expressly preempted any state or local requirement that would impose obligations on franchised cable operators beyond what the Cable Act allows. Specifically, the FCC preempted any imposition of fees on a franchised cable operator or any affiliate that exceeds the formula set forth in section 622 of the Act whether styled as a "franchise" fee, "right-of access" fee, or a fee on non-cable services. Congress intended that states and localities could not "end-run" the Act's limitations by using other governmental entities or other sources of authority to accomplish indirectly what franchising authorities are prohibited from doing directly (*see* Exhibit I at ¶¶ 80 and 81). In light of the facts here, an "end-run" to extract payment via the Borough's proposed

"attachment fee" (when an attachment fee is already in effect) falls squarely in the type of practices that the FCC forbids against a cable franchisee .

13. The Borough's fee demand is also unlawfully discriminatory under state law in that it imposes a fee on Altice that is not imposed upon Altice's competitor, Verizon. Under N.J.S.A. 58:5A-30(d)(1)), holders of a state-wide franchise and their competitors pay a uniform fee to the municipality and the State. The proposed imposition of the additional "attachment fee" violates not just the State's cap on franchise fees, but also the purpose of that law to ensure that cable entrants in competitive markets pay a uniform franchise fee.

14. The Borough's demands for an excessive flat fee, and the delay these demands have caused, are also discriminatory under federal law in that: (1) they are preventing Altice from entering the Highways to deploy its services; and (2) the compensation demanded is not being imposed on a competitively neutral and non-discriminatory basis (*see* 47 U.S.C. Sec. 253 Secs. (a) and (c)).

15. The unlawfulness of the fee demanded by the Borough in consideration for access to the Highways is further illustrated by the arbitrary and unreasonable nature of the Borough's changing fee proposals. On January 10, 2022, the Borough demanded a flat fee of $250,000/year for all poles whether used or not (*see* Exhibit E). On February 10, 2022, the Borough's demand changed to $20/pole for all poles whether used or not (*see* Exhibit F). On October 5, 2022 the Borough *increased* its demand to $95,000/year (with a 2% annual escalator) for all poles whether used or not (*see* Exhibit G). The arbitrary and unreasonable action by the Borough in making its demand has effectively excluded Altice

from the Highways of the Borough since November 2021 in violation of the Franchise and applicable law.

16. A demand for a separate pole attachment agreement in addition to the one still in effect with Verizon, is not a sufficient justification for barring Altice from access to the Highways of the Borough – particularly, when such position is to the detriment of Borough resident access to advanced services, and to whom such services would otherwise be available but for the unlawful acts of the Borough.
17. For all of these reasons, Petitioner wishes to commence cabling for FTTH in the Borough as soon as possible. Consistent with that goal, Petitioner respectfully requests that the Board retain the matter and appoint a Board Commissioner to preside over the disposition of the case, rather than referring the matter to the Office of Administrative Law. Petitioner believes the Board's retention of the case will help to expedite and streamline the review process, allow the Board to retain a greater degree of control over any substantive and procedural issues that may arise, and enhance the Board's understanding of the issues and parties in this matter. It is further requested that the presiding Board Commissioner hold an initial Pre-Hearing Conference as soon as practicable to assist the parties with the development of a procedural schedule.
18. Questions, correspondence or other communications concerning this filing should be directed to:

Vaughn Parchment
James H. Laskey
Norris McLaughlin, PA
400 Crossing Blvd, 8th Floor
Bridgewater, New Jersey 08807-5933
908-252-4128 (tel)
908-722-0755 (fax)
vparchment@norris-law.com
jlaskey@norris-law.com

with copies to:

Robert Hoch
Senior Counsel, Government Affairs
Altice USA
1 Ct Square W
Long Island City, NY 11101
Robert.Hoch@AlticeUSA.com

Chrissy Buteas
Vice President, Government Affairs
Altice USA
1 Ct Square W
Long Island City, NY 11101
Chrissy.Buteas@AlticeUSA.com

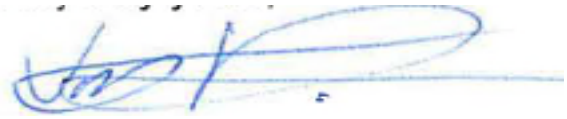
and:

Paul Jamieson
Vice President, Government Affairs and Policy
Altice USA
1 Ct Square W
Long Island City, NY 11101
Paul.Jamieson@AlticeUSA.com

WHEREFORE, Petitioner demands a determination that the Respondent must: (1) immediately cease its unlawful demand that Petitioner agree to pay additional compensation, over and above the cable service franchise fee, in consideration for receiving access to the Highways of the Borough; and (2) immediately grant Petitioner access to all Highways of the Borough so that Petitioner may: (a) commence long delayed deployment of its FTTH cable system by overlashing fiber-optic cable to its existing HFC cable system within the Borough; and (b) perform regular maintenance and servicing as needed to both its HFC and FTTH cable systems, as is Petitioner's right under its system-wide cable franchise and the State's cable laws (N.J.S.A 48:5-1 *et. seq.*).

Respectfully submitted,

Vaughn Parchment
NORRIS McLAUGHLIN, PA
Attorneys for Petitioner



400 Crossing Blvd, 8th Floor
Bridgewater, NJ 08807

Dated: March 14, 2023

VERIFICATION

STATE OF NEW YORK:

ss.:

COUNTY OF QUEENS:

I Chrissy Buteas, of full age, being duly sworn according to law, deposes and says:

1. I am Vice President, Government Affairs for CSC TKR, LLC. I have read the attached Petition, including the exhibits attached thereto, and state that the statements contained therein are true and correct to the best of my knowledge, information and belief.

Chrissy Buteas

Sworn and subscribed to before me
This 14th day of March 2023

Notary Public

ROBERT HOCH
NOTARY PUBLIC, STATE OF NEW YORK
NO. 02HO6002764
QUALIFIED IN WESTCHESTER CO.
COMMISSION EXPIRES FEB. 17 2026

Exhibit A

Agenda Date: 2/22/17
Agenda Item: IIIB

STATE OF NEW JERSEY

Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CABLE TELEVISION

IN THE MATTER OF THE APPLICATION OF CSC TKR, LLC FOR THE RENEWAL OF ITS SYSTEM-WIDE CABLE TELEVISION FRANCHISE	))))	SYSTEM-WIDE CABLE TELEVISION FRANCHISE RENEWAL DOCKET NO. CE16090920

Parties of Record:

Robert Hoch, Counsel, Local Government & Regulatory Affairs, Altice USA, for CSC TKR, LLC
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:

On February 11, 2010, in Docket No. CE10010024, the Board of Public Utilities ("Board") issued an order memorializing the conversion by CSC TKR, LLC of its municipal consent-based franchise in the Borough of Allentown to a system-wide cable television franchise in the above referenced docket number for a term of seven years. CSC TKR, LLC has added an additional 32 municipalities to its System-wide Cable Television Franchise. The addition of these municipalities was memorialized by Orders of Amendment issued by the Board: on August 4, 2010, for five municipalities; on September 16, 2010, for five municipalities; on December 6, 2010, for eight municipalities; on February 10, 2011, for nine municipalities; on September 21, 2011, for two municipalities; on December 18, 2013, for two municipalities; and on February 24, 2016, for one municipality. A list of the municipalities included in CSC TKR, LLC's System-wide Cable Television Franchise is attached as Appendix "I". On May 26, 2016, in Docket No. CM15111255, the Board approved the merger of Altice, USA and Cablevision Systems Corporation, the parent of CSC TKR, LLC. Altice is obligated to abide by all commitments under CSC TKR, LLC's franchise agreements. Although by its terms, CSC TKR, LLC's System-wide Cable Television Franchise expired on January 11, 2017, it is authorized to continue to provide cable television service, pursuant to N.J.A.C. 14:18-14.18(e).

BACKGROUND

On February 12, 2014, the Board notified CSC TKR, LLC of its intention to review its performance under its System-wide Cable Television Franchise pursuant to 47 U.S.C. § 546, N.J.S.A. 48:5A-19(b) and N.J.A.C. 14:18-14.16. On November 10, 2015, the Board invited CSC TKR, LLC to file comments on its performance under its System-wide Cable Television

Franchise and to assess how it will meet the future needs of the communities listed in its franchise application. CSC TKR, LLC filed its Initial Comments with the Board on January 29, 2016. Pursuant to N.J.A.C. 14:18-14.17, on May 25, 2016, the Board issued a report ("Ascertainment Report") on CSC TKR, LLC's performance under its System-wide Cable Television Franchise and the future system-wide cable television franchise needs of the State and the municipalities under the system-wide cable television franchise.

On September 30, 2016, CSC TKR, LLC filed for renewal of its System-wide Cable Television Franchise, pursuant to N.J.S.A. 48:5A-19 and N.J.A.C. 14:18-14.18. Pursuant to N.J.A.C. 14:18-14.3, the Board was required to hold two public hearings in this matter, which were held in the Borough of Wharton on December 6, 2016 at 5:00 p.m. and in the Borough of Union Beach on December 20, 2016 at 4:00 p.m. Written comments were accepted between December 6, 2016 and January 5, 2017 for the Wharton hearing, and between December 20, 2016 and January 21, 2017 for the Union Beach hearing. A comment was submitted by Mark Rodgers, of Somerset, New Jersey, who stated that as long as CSC TKR, LLC complies with all environmental and safety regulations, he welcomes CSC TKR, LLC's competition with Verizon and Comcast.

Following its review of CSC TKR, LLC's application, Board Staff issued discovery requests to CSC TKR, LLC on November 17, 2016, seeking additional follow-up information. CSC TKR, LLC provided responses to Staff's requests on November 18, 2016.

PUBLIC COMMENT

At the hearings, the public was invited to provide oral and/or written comment on the application, and the hearings were transcribed by a court reporter, with the transcripts included in the record of this matter. Mayor William J. Chegwidden, Borough of Wharton, offered comments at the 5:00 p.m. hearing on December 6, 2016. Mayor Chegwidden thanked CSC TKR, LLC for being a great partner with the Borough over the years and providing good service. At both hearings, the New Jersey Division of Rate Counsel ("Rate Counsel") noted the highlights of CSC TKR, LLC's application and stated that it would provide written comments to the Board regarding the application and the issuance of the Renewal System-wide Cable Television Franchise. On December 22, 2016, Rate Counsel filed a letter with the Board stating that it had reviewed the application and supporting documentation and did not oppose Board approval of CSC TKR, LLC's application for a Renewal System-wide Cable Television Franchise. There were no other commenters.

DISCUSSION

In 2006, the Legislature passed amendments to the State Cable Act which allowed CSC TKR, LLC to apply for and receive a System-wide Cable Television Franchise from the Board (P.L. 2006, c. 83). The Legislature articulated certain restrictions and pre-conditions the Board could consider prior to approving any system-wide cable television franchise applicant. The Board is bound by the enabling statute and the adopted rules for application and enforcement.

In determining whether to issue CSC TKR, LLC a renewal of its System-wide Cable Television Franchise, the Board may only consider that which is allowed by the State Cable Act, which provides, at N.J.S.A. 48:5A-16(f), that "[i]n determining whether a system-wide cable television franchise should be issued, the board shall consider only the requirements of sections 17 and 28 of P.L. 1972, c.186 (C. 48:5A-17 and C. 48:5A-28)."

N.J.S.A. 48:5A-17 permits the Board to issue a system-wide cable television franchise following its review of the application, where it finds the applicant has complied or is ready, willing and able to comply with all applicable rules and regulations imposed or pursuant to State or federal law as preconditions for providing cable television service. N.J.S.A. 48:5A-28 sets forth the elements in the application for a system-wide cable television franchise and the required commitments of a system-wide cable television franchise applicant. The Board's review of the application makes it clear that CSC TKR, LLC's application satisfies the requirements set forth by the Legislature.

CONCLUSION

Based upon these findings, the Board **HEREBY CONCLUDES** that, pursuant to the System-wide Cable Television Franchise Act and the Cable Television Act, CSC TKR, LLC has complied or is ready to comply with all applicable rules and regulations imposed by or pursuant to State and federal law as preconditions for engaging in the proposed cable television operations, that CSC TKR, LLC has sufficient financial and technical capacity, meets the legal, character and other qualifications necessary to construct, maintain and operate the necessary installations, lines and equipment, and is capable of providing the proposed service in a safe, adequate and proper manner.

Therefore, CSC TKR, LLC is **HEREBY ISSUED** this Renewal System-wide Cable Television Franchise, for a period of seven years, as evidence of CSC TKR, LLC's authority to operate a cable television system within the jurisdiction set forth in its application, subject to the following conditions:

1. All of the commitments, statements and promises contained in the application for renewal of this System-wide Cable Television Franchise and any amendments thereto submitted in writing to the Board, except as modified herein, are hereby adopted and binding upon CSC TKR, LLC as terms and conditions of this Renewal System-wide Cable Television Franchise, and included as conditions as if fully set forth herein. The application and any other relevant writings submitted by CSC TKR, LLC shall be considered a part of this System-wide Cable Television Franchise and made part hereof by reference.

2. In Denville Township, CSC TKR, LLC shall provide service in accordance with the LEP attached to this order (Appendix "II") based upon a minimum of 15 homes per mile ("HPM"). In Randolph Township and Rockaway Township CSC TKR, LLC shall provide service in accordance with the LEP based upon a minimum of 20 HPM. In Allentown Borough, Bernards Township, Chatham Borough, Dover Town, East Hanover Township, Florham Park Borough, Hanover Township, Highland Park Borough, Keansburg Borough, Manville Borough, Mine Hill Township, Morris Plains Borough, Morris Township, Morristown Town, Raritan Borough, Rockaway Borough, Somerville Borough and Warren Township, CSC TKR, LLC shall provide service in accordance with the LEP based upon a minimum of 25 HPM. In Aberdeen Township, Bridgewater Township, Hamilton Township, Keyport Borough, Matawan Borough, South Bound Brook Borough, Union Beach Borough, Victory Gardens Borough, Watchung Borough and Wharton Borough, CSC TKR, LLC shall provide service in accordance with the LEP based upon a minimum of 35 HPM.

3. In Bound Brook Borough and Madison Borough, CSC TKR, LLC shall provide service to any resident in the municipality at no cost beyond the installation rates contained in its schedule of prices, rates, terms and conditions filed with the Board.

4. CSC TKR, LLC may add additional municipalities to its System-wide Cable Television Franchise without seeking approval from the Board, in accordance with N.J.A.C. 14:18-14.14. CSC TKR, LLC must provide notice to the Board and the affected municipality via certified mail.

5. Under N.J.A.C. 14:18-5.1(a), CSC TKR, LLC shall maintain local business offices where applications for service, complaints, service inquiries, bill payments, and so forth will be received. Currently, CSC TKR, LLC maintains local offices at: 275 Centennial Avenue, Piscataway, New Jersey; 683 Route 10 East, Randolph, New Jersey; 2137 Hamilton Avenue, Hamilton, New Jersey; and 2909 Washing Road, Parlin, New Jersey. CSC TKR, LLC shall maintain its local offices in accordance with applicable law.

6. The designated complaint officer for all municipalities in CSC TKR, LLC's System-wide Cable Television Franchise is the Office of Cable Television. All complaints shall be received and processed in accordance with applicable rules.

7. CSC TKR, LLC shall pay a franchise fee to each municipality served in the amount of 3.5% of its gross revenues, as defined by N.J.S.A. 48:5A-3(x) and -30(d), paid by subscribers in the municipality.

8. CSC TKR, LLC shall pay to the State Treasurer, in accordance with its CATV Universal Access Fund now existing or as will exist in the future, an amount of up to 0.5% of its gross revenues, as defined by N.J.S.A. 48:5A-3(x) and -30(d), paid by subscribers in the municipality.

9. CSC TKR, LLC shall maintain an informational schedule of prices, rates, terms and conditions for unregulated service and promptly file any revisions thereto. Rate and channel line-up changes shall be performed in accordance with applicable rules.

10. Upon written request of a municipality served by its System-wide Cable Television Franchise, CSC TKR, LLC shall provide and maintain a return line or other method of interconnection from any one location in the municipality, without charge, to a location of interconnection in its cable television system in order to allow live or taped cablecasting of PEG access programming by the municipality. The return line or interconnection shall be provided in accordance with N.J.A.C. 14:18-15.4(c). CSC TKR, LLC shall continue to provide and maintain any return line already provided.

11. Upon written request of a municipality served by its System-wide Cable Television Franchise, CSC TKR, LLC shall provide and maintain up to two PEG access channels. If a municipality requests more than two PEG access channels, the municipality shall demonstrate the need for the additional PEG access channels in accordance with N.J.A.C. 14:18-15.4(a)1. The municipality shall assume all responsibility for the management, operations and programming of the PEG access channels in accordance with N.J.A.C. 14:18-15.4(a)4.

12. CSC TKR, LLC shall continue to provide equipment and training for municipalities covered by the system-wide cable television franchise without charge, for use in the development of local programming content that can be shown on PEG access channels. CSC TKR, LLC currently maintains a studio location at 683 Route 10 East, Randolph, New Jersey. CSC TKR, LLC provides training at the access studio upon request.

13. Upon written request of a municipality served by its System-wide Cable Television Franchise, CSC TKR, LLC shall install and maintain, without charge, one service outlet activated for basic cable television service and Internet service to each fire station, public school, police station, public library and any other such building used for municipal purposes, in accordance with N.J.A.C. 14:18-15.5.

14. Pursuant to N.J.A.C. 14:18-14.2, CSC TKR, LLC shall maintain sufficient bond for the faithful performance of all undertakings by the applicant as represented in the application; and shall have sufficient insurance including the Board, all municipalities served and the applicant as insureds, with respect to all liability for any death, personal injury, property damage or other liability arising out of the applicant's construction and operation of its cable television system.

15. Pursuant to N.J.S.A. 48:5A-28(n), CSC TKR, LLC shall continue to comply with any applicable consumer protection requirements.

This Renewal System-wide Cable Television Franchise is subject to all applicable State and federal laws, the rules and regulations of the Office of Cable Television, and any such lawful terms, conditions and limitations as currently exist or may hereafter be attached to the exercise of the privileges granted herein. CSC TKR, LLC shall adhere to the applicable operating standards set forth by the Federal Communications Commission's rules and regulations, 47 C.F.R. §76.1 et seq. including but not limited to, the technical standards 47 C.F.R. §76.601 through §76.630. Any modifications to the provisions thereof shall be incorporated into this Renewal System-wide Cable Television Franchise.

Failure to comply with all applicable laws, rules, regulations and orders of the Board or the Office of Cable Television and/or the terms, conditions and limitations set forth herein may constitute sufficient grounds for the suspension or revocation of this Renewal System-wide Cable Television Franchise.

This Renewal System-wide Cable Television Franchise is issued on the representation that the statements contained in CSC TKR's application are true, and the undertakings therein contained shall be adhered to and be enforceable unless specific waiver is granted by the Board or the Office of Cable Television pursuant to the authority contained in N.J.S.A. 48:5A-1 et seq.

CSC TKR, LLC's Renewal System-wide Cable Television Franchise shall expire on January 10, 2024.

This Order shall be effective on March 4, 2017.

DATED: 2/22/17

BOARD OF PUBLIC UTILITIES
BY:

RICHARD S. MROZ
PRESIDENT

JOSEPH L. FIORDALISO
COMMISSIONER

MARY-ANNA HOLDEN
COMMISSIONER

DIANNE SOLOMON
COMMISSIONER

UPENDRA J. CHIVUKULA
COMMISSIONER

ATTEST:

IRENE KIM ASBURY
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

APPENDIX "I"
CSC TKR, LLC'S
SYSTEM-WIDE CABLE TELEVISION FRANCHISE MUNICIPALITIES

#	Municipality	County
1	Aberdeen Township	Monmouth
2	Allentown Borough	Monmouth
3	Bernards Township	Somerset
4	Bound Brook Borough	Somerset
5	Bridgewater Township	Somerset
6	Chatham Borough	Morris
7	Denville Township	Morris
8	Dover Town	Morris
9	East Hanover Township	Morris
10	Florham Park Borough	Morris
11	Hamilton Township	Mercer
12	Hanover Township	Morris
13	Highland Park Borough	Middlesex
14	Keansburg Borough	Monmouth
15	Keyport Borough	Monmouth
16	Madison Borough	Morris
17	Manville Borough	Somerset
18	Matawan Borough	Monmouth
19	Mine Hill Township	Morris
20	Morris Plains Borough	Morris
21	Morris Township	Morris
22	Morristown Town	Morris
23	Randolph Township	Morris
24	Raritan Borough	Somerset
25	Rockaway Borough	Morris
26	Rockaway Township	Morris
27	Somerville Borough	Somerset
28	South Bound Brook Borough	Somerset
29	Union Beach Borough	Monmouth
30	Victory Gardens Borough	Morris
31	Warren Township	Somerset
32	Watchung Borough	Somerset
33	Wharton Borough	Morris

APPENDIX "II"
OFFICE OF CABLE TELEVISION
LINE EXTENSION POLICY

CSC TKR, LLC
SYSTEM-WIDE CABLE TELEVISION FRANCHISE RENEWAL

A cable operator is required to absorb the cost of extensions to the system in the same proportion that the extension is to the remainder of the system.

Actual subscribers served by the extension are required to absorb the remainder of the cost.

If new subscribers are added to the extension the cost is adjusted and those who previously paid receive an appropriate rebate.

1.	# of homes in extension / mileage of extension	=	homes per mile (HPM) of extension
2.	HPM of extension / Minimum HPM that company actually constructs in the system *	=	ratio of the density of the extension to the minimum density which the company constructs in the system ("A")
3.	Total cost of building the extension times "A"	=	company's share of extension cost
4.	Total cost of building extension less company's share of extension cost	=	total amount to be recovered from subscribers
5.	Total amount to be recovered from subs / Total subscribers in extension	=	each subscriber's share

In any case, the company shall extend its plant along public rights of way to:

1. All residences and businesses within 150 aerial feet of the operator's existing plant at no cost beyond the normal installation rate.

2. All residences and businesses within 100 underground feet of the operator's plant at no cost beyond the normal installation rate.

---

* The minimum HPM that the company actually constructs in the system or municipality is the minimum number of homes that the company has historically constructed at its own cost. This is a function of the operator's break-even point and its rate of return. Unbuilt systems will use the primary service area rather than construction.

The operator's installation policies shall apply to construction beyond the public right of way.

Detailed accounting and/or financial information to support the minimum HPM shall be supplied to the Office for its approval in such form as required. The minimum HPM shall be updated as appropriate.

When a request for service is received, and unless good cause is shown, cable companies shall:

1. Provide a written estimate within 30 days of such a request.

2. Begin construction within 60 days of receipt of any deposit monies from potential subscribers.

3. Complete construction within six months of receipt of any deposit monies from potential subscribers.

4. Inform each home passed along the extension of the potential costs for subscribers.

Subscribers who pay for an extension shall be entitled to rebates in the following manner:

1. If the company acquires new subscribers subsequent to the initial calculation of step 5 above, the formula will be adjusted and those who have previously paid for the extension will be entitled to an appropriate rebate. In no event shall the amount of the rebate exceed the subscriber's contribution.

2. The company shall keep accurate records of the cost of the extension, the amounts paid by subscribers and any appropriate adjustments.

3. The company shall notify subscribers in the extension of their rights and responsibilities concerning the extension.

4. Once the share of the extension cost for an individual dwelling has been paid, future reconnections or installations shall be made at the company's standard rates.

5. After a period of five years from the installation of the first dwelling unit in the extension no further adjustments shall be made. Installations after five years shall be at the company's standard rate.

6. Once a subscriber is installed, that person shall not normally be entitled to a refund of any monies paid for the installations, except in accordance with the rebate procedure outlined in this policy.

Definitions

Primary Service Area

The Primary Service Area (PSA) can be an entire municipality, but in many instances the PSA is a limited area within a community outside of which a line extension policy may apply. The PSA is depicted by a franchise map and narrative, presented and recorded during the franchise proceedings. It normally remains a fixed geographic area throughout the life of the franchise.

Line Extension Survey

Potential subscribers residing outside the PSA who request service are entitled to an estimate of their share of the cost to secure service. When conducting a survey and estimating costs, a cable company should factor in all potential subscribers who could practicably be included in the extension and give consideration to apparent residential construction in areas contiguous to the proposed extension.

IN THE MATTER OF THE APPLICATION OF CSC TKR, LLC FOR THE RENEWAL OF ITS SYSTEM-WIDE CABLE TELEVISION FRANCHISE

SYSTEM-WIDE CABLE TELEVISION FRANCHISE RENEWAL
DOCKET NO. CE16090920

SERVICE LIST

Sidney A. Sayovitz, Esq.
Schenck, Price, Smith & King
Post Office Box 991
Florham Park, NJ 07932-0991

Robert Hoch, Counsel
Local Government & Regulatory Affairs
Altice USA
1111 Stewart Avenue
Bethpage, NY 11714

Stefanie A. Brand, Esq., Director
State of New Jersey
Division of Rate Counsel
140 East Front Street, 4th Floor
Post Office Box 003
Trenton, NJ 08625-0003

Veronica Beke
Deputy Attorney General
State of New Jersey
Department of Law & Public Safety
Division of Law
124 Halsey Street
Post Office Box 45029
Newark, NJ 07101-45029

Lawanda R. Gilbert, Director
Board of Public Utilities
Office of Cable Television & Telecommunications
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, NJ 08625-0350

Karen A. Marlowe
Administrative Analyst 4
Board of Public Utilities
Office of Cable Television & Telecommunications
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, NJ 08625-0350

Exhibit B

AGREEMENT COVERING THE JOINT USE OF POLES

BETWEEN

BOROUGH OF MADISON, NEW JERSEY

AND

NEW JERSEY BELL TELEPHONE COMPANY

This Agreement, made this ninth day of October 1950 by and between the Borough of Madison, a municipal corporation of the State of New Jersey, hereinafter called the "Borough", party of the first part, and the New Jersey Bell Telephone Company, a public utility corporation of the State of New Jersey, hereinafter called the "Telephone Company", party of the second part.

WITNESSETH:

WHEREAS, the Borough, a municipal corporation engaged in the distribution and sale of electrical energy and the Telephone Company, a corporation furnishing communication facilities, desire to provide for the joint use of poles when and where such joint use will be of mutual advantage in meeting their service requirements.

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, the parties hereto, for themselves, their successors and assigns, do hereby covenant and agree as follows:-

ARTICLE I

SCOPE OF AGREEMENT

(a) This Agreement shall be in effect in the territory of the State of New Jersey in which the parties hereto now or in the future both have the right to operate.

(b) Each party shall be the sole judge of its own service requirements.

(c) Each party reserves the right to exclude from joint use, poles which carry or are intended by the owner to carry circuits of such a character that in the Owner's judgment, the proper rendering of its service, now or in the future, makes joint use of such poles undesirable.

ARTICLE II

SPECIFICATIONS

(a) Except as otherwise provided in this Article, the joint use of poles covered by this Agreement shall at all times be in conformity with the terms and provisions of the Specifications attached hereto as Appendix A, hereinafter referred to as Specifications. Appendix A may be superseded, amended or added to from time to time as may be necessary by reason of developments and improvements in the art and as may be mutually agreed upon and approved in writing by the Borough Engineer and the Chief Engineer of the Telephone Company. Any conditions not covered by the Specifications shall conform to the then current edition of the National Electrical Safety Code.

(b) Jointly used poles, including their attachments, existing as of the date of this Agreement, which are not in conformity with the Specifications, shall be brought into conformity during their normal replacement, relocation or reconstruction.

(c) The normal joint pole shall be a 35 foot, Class 4 pole as covered by the American Standards Association Specifications except:-

1. In specific situations taller or heavier poles may be required to provide sufficient strength and adequate space for both parties hereto and to meet the requirements of the Specifications.

2. Shorter poles or poles of less strength may be used in specific cases where such poles will meet the needs of both parties and the requirements of the Specifications.

ARTICLE III

PURCHASE AND OWNERSHIP OF POLES

(a) All poles owned by the Borough as of the date of this Agreement and poles purchased by the Borough or erected at the expense of the Borough, subsequent to the date of this Agreement, shall continue and remain the property of the Borough, notwithstanding that future replacements of such poles may be made at the expense of the Telephone Company.

(b) All poles owned and solely used by the Telephone Company shall remain the property of the Telephone Company, except, that if joint use of any such poles should be mutually agreed upon at any time, the procedure shall be as follows:-

1. If a pole is suitable for joint use, the Telephone Company shall make any rearrangements necessary to comply with the Specifications, and the Borough may attach to the pole at any time thereafter. The Borough shall pay the Telephone Company the depreciated value of the pole.

2. If a pole is not suitable for joint use, the cost of a new pole shall be borne by the Borough and the Borough shall pay the Telephone Company the depreciated value of the old pole, plus the cost of removal thereof. The Borough shall be given credit for salvage, if any, on the replaced pole or shall be given possession thereof.

In either case under 1. or 2. above, the pole shall thereupon become and remain the property of the Borough.

(c) All poles jointly used by the parties hereto and owned by the Telephone Company as of the date of this Agreement, shall be purchased by the Borough as soon as practicable following the execution of this Agreement. The price to be paid to the Telephone Company shall be the depreciated value of the poles purchased.

(d) When either party finds it necessary to erect additional poles, as new pole lines or as extensions of existing lines, the other party shall be consulted as to the desirability of joint use. If joint use is agreed upon, the poles shall be erected at the expense of the Borough. If joint use is not agreed upon, the party erecting the poles at its expense shall be the owner thereof.

(e) When the Telephone Company wishes to attach to a pole, owned by the Borough, and joint use is mutually agreed upon, the procedure shall be as follows:-

1. If the pole is suitable for joint use, the Borough shall make any rearrangements necessary to comply with the Specifications, and the Telephone Company may attach to the pole at any time thereafter.

2. If the pole is not suitable for joint use the Borough, at its expense, shall replace the pole with one suitable for joint use.

(f) Poles located on private property and not owned by the Borough or the Telephone Company are specifically exempted from the terms and provisions of this Agreement.

(g) Depreciated value of a pole as used in this Article III, and in other portions of this Agreement, shall be based on the original cost prevailing at the time a pole was placed, reduced in equal annual increments assuming a thirty (30) year average pole life.

Depreciated value of poles, removal cost and salvage allowance shall be in accordance with the reciprocal prices and rates in effect between the Telephone Company and the Electric Power Company operating in the area adjacent to the Borough.

ARTICLE IV

ESTABLISHING JOINT USE

All requests for joint use between the Borough and the Telephone Company shall be made in writing and accepted or rejected in writing within ten (10) days after receipt thereof. Such negotiations shall be between the Borough Engineer and the District Plant Engineer of the Telephone Company and shall include information regarding the nature of the attachments to be made, any rearrangements or replacements required and the costs, if any, to be borne by either party.

ARTICLE V

MAINTENANCE OF JOINTLY USED POLES AND ATTACHMENTS

(a) Each party shall maintain its wires and attachments in safe and serviceable condition and shall perform all work in a manner to avoid interference with the plant and service of the other party.

Each party shall place guys to sustain unbalanced loads and shall be responsible for any tree trimming or clearance necessary for the proper maintenance of its attachments or service.

(b) Except as covered in Paragraph (c) of this Article, the Telephone Company shall maintain all jointly used poles in safe and serviceable condition, including pole inspection and replacement due to deterioration or defects, without cost to the Borough.

(c) When a jointly used pole has been suitable for the needs of both parties and:-

1. Replacement, relocation, or both, is required due to proposed additional attachments or services of the Borough alone, the Borough shall pay the Telephone Company the depreciated value of the old pole plus the cost of removal thereof. The Borough shall be given credit for salvage, if any, on the old pole or shall be given possession of the old pole. The new pole shall be erected by the Telephone Company, at its expense; however, should a taller or stronger pole be required as a replacement, the Borough shall pay the Telephone Company the excess cost of the new pole over that of a pole of the same height and class as the replaced pole.

In lieu of the arrangements outlined above in this paragraph 1. the Borough may, at its option, replace the pole at its sole expense.

2. Replacement, relocation, or both, is required due to proposed additional attachments or services of the Telephone Company alone, the entire cost of replacement shall be borne by the Telephone Company.

3. Replacement, relocation, or both, is required due to the needs of both parties or due to conditions not created by either party, the cost shall be shared equally by the parties hereto.

(d) In all cases, each party shall place, maintain, rearrange, transfer and remove its own attachments at its own expense. This includes such work done in connection with meeting the provisions of Article III, Purchase and Ownership of Poles.

(e) The Telephone Company shall have the right of free attachment to all jointly used poles as long as this Agreement remains in effect.

(f) When jointly used poles are replaced, consideration shall be given to placing the new pole in the same hole occupied by the old pole, to avoid excessive transfer costs as in the case of poles carrying cable terminals, transformers, underground connections or line dead ends. In all cases of pole moves or replacements, the parties shall cooperate in transferring their attachments.

ARTICLE VI

TERMINATION OF JOINT USE

(a) If the Borough desires at any time to abandon any jointly used pole, it shall give the Telephone Company notice in writing prior to the date on which it intends to abandon such pole. If, on the date specified, the Borough shall have no attachments on such pole, but the Telephone Company shall not have removed all of its attachments therefrom, the pole shall thereupon become the property of the Telephone Company. If the Telephone Company shall have removed its attachments from the pole by the date specified, the pole shall remain the property of the Borough.

(b) If the Telephone Company wishes to discontinue the use of any jointly used pole, it may do so by giving notice in writing to the Borough and by removing therefrom any and all of its attachments.

ARTICLE VII

ATTACHMENT OF OUTSIDE PARTIES

(a) If either party hereto has, prior to this Agreement, conferred upon another party, by contract or otherwise, any rights or privileges to attach to poles covered by this Agreement, nothing herein contained shall be construed as affecting such rights or privileges.

(b) Subsequent to the execution of this Agreement, attachments of another party shall be made only with the approval of both parties to this Agreement.

(c) Any arrangement for payment of rental or other compensation for pole space involving another party referred to in (a) or (b) above, shall be by Agreement between the Telephone Company and the other party.

ARTICLE VIII

WAIVER OF PORTIONS OF AGREEMENT

The failure of either party to enforce, insist upon or comply with any of the terms and provisions of this Agreement, or its waiver of the same in any instance or instances, shall not be construed as a general waiver or relinquishment of any such terms or provisions, but the same shall be and remain at all times in full force and effect.

APPENDIX A TO
AGREEMENT COVERING THE JOINT USE OF POLES

DATED BETWEEN
BOROUGH OF MADISON, NEW JERSEY
AND NEW JERSEY BELL TELEPHONE COMPANY

In accordance with Article II, Specifications, of this Agreement, the attached "Joint Pole Practices for Supply and Communication Circuits" identified as "E.E.I. Publication No. M12 published October 1945 by Edison Electric Institute and American Telephone and Telegraph Company" are hereby marked APPENDIX A to the above Agreement, and shall govern the general application of joint use construction and maintenance under this Agreement, with the following additions, exceptions, or changes which have been mutually agreed upon:

TABLE OF CONTENTS

SCOPE AND APPLICATION

The references to Part 5 shall not apply.

EXPLANATION OF TERMS

Add the following definitions:

Communication Circuit means any circuit used exclusively for public or private communication or signalling purposes, including control of traffic signals; not for the purpose of supplying electrical energy directly to lights or traffic signals and not directly connected to a commercial power supply system.

Supply Circuit means any circuit used for the supply of electrical energy for lighting, power or railway purposes and any circuit not classed as a communication circuit. Traffic signal cables carrying both control and supply circuits take the supply classification.

Street Side of Highway Pole means that semi-circumference facing vehicular traffic. At an intersection it is the semi-circumference facing the intersection.

Street Side of Pole on Private Property means that semi-circumference of pole as determined by the party erecting the pole and shall preferably be designated by placing the pole stencil on that side of the pole.

Field Side of Pole means that semi-circumference opposite the street side.

PART 1 - GENERAL REQUIREMENTS

8. Plates

The following plate shall be added:

PLATE A - SHOWING SPACE ALLOCATION ON TYPICAL 35 FT. AND 40 FT. POLES

PART 2 - NORMAL JOINT USE CONSTRUCTION

9. Application

Add to Section 9.01 (c):

Except as indicated below, joint use involving Telephone Company cables or conductors and open wire supply circuits of the character described in this section, shall not be entered into unless approved in writing by the Borough Engineer of the Borough of Madison and the Chief Engineer of the Telephone Company.

Exception:- The approvals in writing, mentioned above, shall not be required for the attachment of communication wires or cables to one supply pole at a crossing under a supply line.

Add to Section 9.01 (d):

Effectively grounded supply cable or supply cables carried on effectively grounded suspension strand, where the supply voltage or current is in excess of the values specified in Sections 9.01 (a) or 9.01 (b), shall not be installed on any jointly used pole until such measures of coordination as may be necessary to avoid or minimize inductive interference have been agreed upon by the Borough Engineer and the Chief Engineer of the Telephone Company or their duly authorized representatives.

11. Vertical Runs

Modify certain sections as shown below:-

Section 11.04

Exception 3: Shall not apply.

Section 11.05 (b) (1)

On jointly used poles this type of construction shall generally be restricted to poles carrying communication cables.

Section 12.01 (a)

Exception (a): Shall not apply.

14. Street Lamps and Street Lamp Span Wires

Modify Section 14.02 as follows:-

Street lamp fixtures shall not be installed in the communication space without the approval of the Telephone Company. Such fixtures installed below the communication space shall generally be not more than 17-1/2 feet above ground and shall be attached with lag screws when mounted in or below the communication space. The scroll or brace, if any, shall be below the fixture.

Street lamp fixtures may also be mounted in the neutral space with a minimum distance of 30" from the top of the communication space to the upper mounting hole of the lamp fixture. The scroll or brace in these cases shall be above the fixture.

16. Guys

Add the following to Section 16.01:

In dead ending suspension strand or attaching guys in or below the neutral space, the pole shall not be encircled. Such attachments shall be made to bolts passing through the pole.

PART 3 - SPECIAL JOINT USE CONSTRUCTION

20. Application

Add to Section 20.01:

Joint use, involving Telephone Company cables or conductors, with supply circuits of the character described in Part 3 shall not be entered into except upon approval in writing by the Borough Engineer and the Chief Engineer of the Telephone Company.

PART 4 - JOINT USE CONSTRUCTION

SECONDARY OR TROLLEY CIRCUITS

24. Strength Requirements

Replace Sections 24.01, 24.02 and 24.03 with the following:

The strength requirements given in Sections 19.01 to 19.17 shall apply to joint use construction involving secondary circuits.

ARTICLE IX

BILLS AND PAYMENT FOR WORK

When either party is entitled to compensation from the other party for work performed under the terms of this Agreement, bills for the same shall be rendered by the party entitled to compensation within ninety (90) days after the completion of work. Bills shall be paid within sixty (60) days after receipt thereof.

ARTICLE X

TERM OF AGREEMENT

This Agreement may be terminated by either party hereto, at any time after three (3) years following the date of execution of this Agreement by giving one (1) year's advance notice in writing to the other party.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in duplicate, and their corporate seals to be affixed thereto by their respective officers thereunto duly authorized, on the day and year first above written.

BOROUGH OF MADISON, N.J.

By Norman J. Griffiths
Mayor

Attest:
Elsa S. Wick
Borough Clerk

N.J. BELL TELEPHONE COMPANY

By John B. Rees
Vice President

Attest:
W. F. Gray
Secretary

BOROUGH OF MADISON & TELEPHONE CO.

SPECIFICATIONS

ART. II c) Normal Joint Pole- 35', Class 4- A.S.A.S. Except in special cases.

ART. III a) All poles owned and purchased by Boro shall remain property of Boro. Replacements of these poles made by Telephone Co.

b) All poles owned and solely used by Tele Co remain property of Tele C except if joint use is agreed upon then:

1) Tele Co make rearrangement if necessary- then Boro may attach. Boro to pay Tele Co depreciated value of pole. Pole becomes Boro property.

2) If pole not suited for joint use- cost of new pole paid by Boro and Boro to pay Tele Co depreciated value of old pole plus cost of removal thereof. Boro to get credit for salvage, if any, or given possession of replaced pole. New pole becomes property of Boro.

c) All poles jointly used and owned by Tele Co, as of date of this agreement, to be purchased by Boro- price to be depreciated value.

d) When either party erects new pole lines or extensions the other party to be consulted on joint use. If joint use is agreed upon, Boro is to pay for poles. If NO joint use is agreed upon the party erecting poles retains ownership.

e) Tele Co wishes to attach on Boro poles:

1) Boro make any rearrangements for Tele Co to attach.

2) If pole not suited for joint use- Boro to place one suitable at its expense.

f) Poles on private property not owned by Boro or Tele Co are exempt.

g) Depreciated value of poleis based on original cost reduced in equal annual increments over 30 year life.

Depreciated value, removal costs and salvage allowance same as price in effect with Electric Power Co operating adjacent to Boro.

Establishing Joint Use

Art. IV All requests for joint use between Boro and Tele Co be made in writin and shall be accepted or rejected within 10 days- by Boro Engr and District Plant Engr. Give nature of attachment, rearrangements, replacements and costs involved by either party.

Maintenance of Joint Use

Art. V a) Each party maintain its wires and attachments in safe and serviceabl condition without interference. Each party to place guys for unbalanced loads- Tree trimming and clearances necessary.

b) Tele Co to maintain jointly used poles including inspection, moving and replacements without cost to Boro. (Pole only)

c) For jointly used poles- if replacement, relocation is required due t additional attachments of the Boro alone- Boro to pay Tele Co depreciated value of old pole plus cost of removal thereof. Boro given credit for salvage or retain old pole. The new pole be erected by Tele Co at its expense. However, if a taller or stronger pole is required as a replacement- Boro to pay Tele Co the excess cost of the new pole over that of a pole of same height and class as the replaced pole. The Boro at its option, may replace the pole at its sole expense.

2) Replacement, relocation or both, necessary by Tele Co entire cost of replacement to be paid by Tele Co.

3) Replacement, relocation or both required by both parties a conditi not by either party- costs to be shared equally.

d) In all cases each party to take care of its own transfers or remove attachments at its own expense.

e) Tele Co has right of free attachment on all joint poles while agreement is in effect.

f) Replacements of joint poles to occupy same hole. Both parties to cooperate in transferring their attachments.

Termination of Joint Use

Art. VI a) If Boro abandons joint pole- notify Tele Co in writing before abandoned. The party whose attachments remain on last receives ownership of the pole.

b) If Tele Co wishes to discontinue joint use it may by writing Boro and by removing therefrom its attachments.

Attachments of Outside Parties

Art VII a) Previous agreements of either party with outside parties not effecte

b) New attachments by another party must be approved by both parties of this agreement.

c) Rental or compensation for pole space in (a) or (b) shall be by agreement between Tele Co and the other party.

Art IX

Bills and payment for work

Either party to render bill for work performed within 90 days and shall be paid within 30 days after receipt thereof.

Art. VIII

Waiver of Portions of Agreement

Waiver of portions of this agreement in special instances shall not be construed as a general waiver or relinquishment of any such terms and provisions.

Term of Agreement

Agreement may be terminated by either party at anytime after 3 years by giving one years notice in writing.

Exhibit C

ORDINANCE NO. 38-88

ORDINANCE OF THE BOROUGH OF MADISON REPEALING AND REENACTING CHAPTER A237 OF THE MADISON BOROUGH CODE TO RENEW THE CABLE TELEVISION FRANCHISE

WHEREAS, the Borough Council by adoption of Ordinance No. 16-74 on August 12, 1974 granted municipal consent for the construction and operation of a cable television system within the Borough of Madison, which Ordinance is currently set forth in Chapter A237 of the Madison Borough Code; and

WHEREAS, said municipal consent was granted for a term of 15 years, which term shall expire on August 11, 1989; and

WHEREAS, renewal proceedings have been conducted in accordance with regulations promulgated by the New Jersey Office of Cable Television; and

WHEREAS, the Borough Council adopted Ordinance No. 10-88 amending Chapter A237 to renew the franchise for an additional three year term; and

WHEREAS, the franchisee subsequently submitted objections with respect to the form of said ordinance and the three year term to the Office of Cable Television within the Board of Public Utilities; and

WHEREAS, in response to said objections and subsequent communications with the Office of Cable Television, the Borough Council has determined that a new ordinance should be adopted to repeal and reenact Chapter A237, including a five year term and other changes to conform to the current applicable provisions of state and federal law;

NOW, THEREFORE, BE IT ORDAINED by the Council of the Borough of Madison, in the County of Morris and State of New Jersey, as follows:

EXHIBIT F

Section 1. Chapter A237, entitled "Cable Television Francise," of the Madison Borough Code, as last amended by Ordinance No. 10-88, is hereby repealed in its entirety, and a new Chapter A237 is hereby adopted to read as follows:

CHAPTER A237

CABLE TELEVISION FRANCHISE

§ A237-1. Grant of Authority.

The Borough hereby grants to the Company its non-exclusive consent to place in, upon, along, across, above, over and under the highways, streets, alleys, sidewalks, public ways, and public places in the Borough poles, wires, cables, underground conduits, manholes, and other television conductors and fixtures necessary for the maintenance and operation in the Borough of a cable television system and cable communications system. Construction pursuant to said consent is conditioned upon prior approval of the Board of Public Utilities.

§ A237-2. Definitions.

A. For the purposes of this Chapter the following terms shall have the meanings indicated:

ACT or CABLE TELEVISION ACT - Chapter 186 of the Public Laws of New Jersey, 1972, and subsequent amendments thereto, as codified in N.J.S.A. 48:5A-1 et seq.

BOARD - The New Jersey Board of Public Utilities.

COMPANY - The grantee of rights under this Chapter, Sammons Communications of New Jersey, Inc.

B. All other terms used in this Chapter shall be interpreted to be consistent with and shall be governed by the definitions set forth in the Federal Communications Commission Rules and Regulations, 47 C.F.R. § 76.1 et seq., the Cable Communications Policy Act, 47 USC §521 et seq., and the Act and shall not beconstrued to broaden, alter or conflict with the federal or state definitions.

§ A237-3. Statement of findings.

A public hearing concerning the consent herein granted to the Company was held after proper public notice pursuant to the terms and conditions of the Act. Said hearing having been held as above stated and having been fully open to the public, and the Borough Council having received at said hearing all comments regarding the qualifications of the Company to receive this consent, a finding has been made that the Company possesses the necessary legal, technical, character, financial and other qualifications and that the Company's operating and construction arrangements are adequate and feasible.

§ A237-4. Duration of the franchise.

The consent herein granted shall expire five (5) years from the date of expiration of the original Certificate of Approval issued by the Board of Public Utilities for this franchise.

§ A237-5. Expiration and subsequent renewal.

If the Company seeks a successive consent it shall, prior to the expiration of this consent, apply for a municipal consent and Certificate of Approval in accordance with the Cable Television Act, N.J.S.A. 18:5A-11 and 16 and applicable state and federal rules and regulations. The Company shall also petition the Board for a Certificate of Approval authorizing continued operation during the period following expiration of the consent granted herein and until such a time that a decision is made by the Borough Council relative to the renewal of said consent.

§ A237-6. Franchise fee.

Pursuant to the terms and conditions of the Act, the Company shall, during each year of operation under the consent granted herein, pay to the Borough two percent (2%) of the gross revenues from all recurring charges in the nature of subscription fees paid by subscribers to its cable television reception service in the Borough or any amount permitted by the Act or otherwise allowed by law.

§ A237-7. Extension of service.

The Company shall be required to proffer service along any public right-of-way to any residence or business, located in the franchise territory described herein in accordance with the proposal for the provision of services as described in the application. Any additional extension of the system will be made in accordance with the proposal in the application.

§ A237-8. Construction requirements.

A. Restoration. In the event that the Company or its agents shall disturb any pavement, street surfaces, sidewalks, driveways or other surfaces in the natural topography, the Company shall at its sole expense restore and replace such places or things so disturbed in as good a condition as existed prior to the commencement of said work.

B. Relocation. If at any time during the period of this consent, the Borough shall alter or change the grade of any street, alley or other way or place, the Company, upon reasonable notice by the Borough, shall remove, re-lay and relocate its equipment, at the expense of the Company.

C. The Company shall temporarily move or remove appropriate parts of its facilities to allow moving of buildings, machinery or in other similar circumstances. The expense shall be borne by the party requesting such action except when requested by the Borough, in which case the Company shall bear the cost.

D. Removal or Trimming of Trees. During the exercise of its rights and privileges under this franchise, the Company shall have the authority to trim trees upon and over hanging streets, alleys, sidewalks and public places of the Borough so as to prevent the branches of such trees from coming in contact with the wires and cables of the Company. Such trimming shall be only to the extent necessary to maintain proper clearance for the Company's facilities.

§ A237-9. Installation for individual subscribers.

The Company shall provide installation to any person, residence or business as described in the application.

§ A237-10. Territory.

The consent granted herein to the Company shall apply to the entirety of the Borough and any property hereafter annexed thereto.

§ A237-11. Local office.

During the term of this franchise, and any renewal thereof, the Company shall maintain a local business office or agent for the purpose of receiving, investigating and resolving all complaints regarding the quality of service, equipment malfunctions and similar matters. Such local business office shall be open during normal business hours, and in no event less than 9:00 a.m - 5:00 p.m., Monday through Friday. The required business office shall be deemed to be "local" if located within the range of a local non-toll telephone call.

§ A237-12. Municipal complaint officer.

The Office of Cable Television is hereby designated as the complaint officer for the Borough pursuant to N.J.S.A. 48:5A-26(b). All complaints will be received and processed in accordance with N.J.A.C. 14:17-7.1.

§ A237-13. Rate structure for CATV reception services.

The Borough, having determined that the rates proposed in the application for cable television reception service are reasonable, approves them as presented, subject to review and regulation by the Board, if permitted by law.

§ A237-14. Basic service.

The basic service includes those channels which the Company is required to carry by FCC rules and any channel which the Company carries without a separate or additional charge.

§ A237-15. Local access and origination cablecasting.

The Company shall provide access time to non-commercia public, governmental and educational entities to the extent such access was promised to the Borough in the application.

§ A237-16. Free service.

The Company shall provide the installation of one outlet and basic monthly service to each school and library in the Borough free of charge. Each additional outlet installation shall be paid for by the institution on a materials plus labor basis. Monthly service on such additional outlets shall be charged at the regular tariffed rates for additional outlets.

§ A237-17. Equipment and personnel.

The Borough finds that the equipment and/or personnel to be provided by the Company for public, educational or governmental use as provided in the application for municipal consent is reasonable.

§ A237-18. Emergency uses.

The Company shall be required to have the capability at the headend to override the audio portion of the system in order to permit the broadcasting of emergency messages by the Borough. The Company shall in no way be held liable for any injury suffered by the Borough or any other person during an emergency, if for any reason the Borough is unable to make full use of the cable television system as contemplated herein. Reasonable procedures for such uses shall be established and approved by Resolution of the Borough Council.

§ A237-19. Liability insurance.

The Company agrees to maintain and keep in full force and effect at its sole expense at all times during the term of this consent, sufficient liability insurance insuring against loss by any claim, suit, judgment, execution or demand in the minimum amounts for bodily injury or death and for property damage as set forth in the application for municipal consent.

§ A237-20. Incorporation of the application.

In accordance with N.J.S.A. 48:5A-24, the terms of the Company's application for municipal consent are incorporated into this Chapter by reference; provided, however, that any portion of the application which is in conflict with the provisions of the Cable Television Act, N.J.S.A. 48:5A-1 et seq., the Cable Communications Policy Act, 47 U.S.C. 521, et seq., and/or FCC Rules and Regulations, 76.1 et seq., as amended, shall not be construed to be effective under the terms of this Chapter.

§ A237-21. Severability.

If any section, subsection, sentence, clause, phrase or portion of this Chapter is for any reason held to be invalid or unconstitutional by any court or federal or state agency of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portions hereof.

Section 2. This ordinance shall be in effect as provided by law, provided, however, that it shall remain inoperative until August 12, 1989.

ADOPTED AND APPROVED ON: July 11, 1988

ATTEST:

Fannie Stinson
FANNIE STINSON,
Deputy Borough Clerk

Ralph G. Engelsman
RALPH G. ENGELSMAN,
Mayor

AGENDA DATE: 4/19/89

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STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES CABLE TELEVISION
TWO GATEWAY CENTER
NEWARK, N.J. 07102

PETITION OF SAMMONS COMMUNICATIONS OF NEW JERSEY, INC., FOR A RENEWAL CERTIFICATE OF APPROVAL FOR THE CONSTRUCTION AND OPERATION OF A CABLE TELEVISION SYSTEM IN THE BOROUGH OF MADISON, COUNTY OF MORRIS, STATE OF NEW JERSEY	)	RENEWAL CERTIFICATE OF APPROVAL
	)	DOCKET NO. CE88111202

Robert A. Giegerich Jr., Esq., Scotch Plains, New Jersey, for the Petitioner.

Municipal Clerk, Borough of Madison, New Jersey, by Fannie Stinson, for the Borough.

BY THE BOARD:

On February 13, 1975, the Board granted Morris Cablevision a Certificate of Approval (D.N. 748C-6042) for the construction, operation and maintenance of a cable television system in the Borough of Madison, said Certificate expiring on February 13, 1990.

On June 11, 1982, the Petitioner, Sammons Communications of New Jersey, Inc., pursuant to the Board's Order of Approval (D.N. 823C-6894) acquired Morris Cablevision, all of its assets and the Certificate of Approval for the Borough of Madison.

On November 2, 1988, Petitioner filed for a Renewal Certificate of Approval for its system in the Borough of Madison, pursuant to N.J.S.A. 48:5A-15 and 16.

The filing indicates that the municipality, after public hearing, issued a written report, pursuant to N.J.S.A. 48:5A-23(d), on January 11, 1988 which indicated its intention to grant a municipal consent to the Petitioner and the reasons therefore. A consent, in the form of an ordinance, was adopted on July 11, 1988. Based upon a full review of the applications for municipal consent and this Certificate of Approval, filed by the Petitioner, incorporated by reference and made a part hereof, as well as the report and the ordinance, and in accordance with N.J.S.A. 48:5A-17(a) and (b), the Board upon the recommendation of the Office of Cable Television makes the following findings:

1. The Petitioner's legal, character, financial, technical general fitness, and other qualifications were examined as part of a full municipal public proceeding pursuant to N.J.A.C. 14:18-1.1 et seq. These qualifications have been approved by the municipality and by the Office of Cable Television.

2. The design and technical specifications of the system are of such quality as will ensure safe, adequate and proper service to the company's subscribers.

3. The Petitioner has represented that all required construction within the franchise territory is complete.

4. The franchise period as stated in the ordinance is five (5) years. The Office has found this period to be of reasonable duration.

5. The Petitioner has filed an informational tariff with the Office and will promptly file any revisions thereto.

6. The ordinance specifies that the "Complaint Officer" shall be the Office of Cable Television. All complaints shall be received and processed in accordance with N.J.A.C. 14:17-7.1.

7. The Petitioner will also maintain a local business office for the purpose of receiving, investigating and resolving complaints.

8. The franchise fee to be paid to the municipality is reasonable; i.e. 2% of the Petitioner's gross revenues from all recurring charges in the nature of subscription fees paid by subscribers for its cable television reception service in the municipality. Additional regulatory fees shall be paid to the State in an amount not to exceed 2% of Petitioner's gross operating revenues derived from intrastate operations.

9. The Petitioner has agreed to adopt the line extension policy approved by the Office of Cable Television and annexed hereto as "Appendix I." The munimum Homes Per Mile number to be employed in the use of this policy is thirty-five (35).

10. The Petitioner shall provide local access time and facilities to non-commercial public, governmental and educational entities in accord with representations made by Petitioner in the municipal application.

11. The Petitioner has agreed to apply the rates for standard aerial and underground installation contained in the fifth revised sheet no. 7 of Petitioner's tariff annexed hereto as "Appendix II."

Therefore, the Board, upon the Office's recommendation HEREBY CONCLUDES that the Petitioner has sufficient financial and technical capacity and legal, character and other qualifications to construct, maintain and operate the necessary installations, lines and equipment and to provide the service proposed in a safe, adequate and proper manner. N.J.S.A. 48:5A-28(c).

Based upon the above findings and pursuant to the requirements of N.J.S.A. 48:5A-17, Petitioner is HEREBY ISSUED this Certificate of Approval as evidence of Petitioner's authority to construct and operate a cable television system within the entirety of the Borough of Madison.

This Certificate is subject, however, to all applicable laws, rules and regulations of the Office of Cable Television, and such lawful terms, conditions, and limitations as are now or may hereafter be attached to the exercise of the privileges herein granted.

The Petitioner shall adhere to the operating standards set forth at F.C.C. Rules and Regulations 47 C.F.R. Section 76.1 et seq (1985). Any modifications to the provisions thereof, shall be incorporated into this Certificate.

Failure to comply with all applicable laws, rules, regulations and orders of the Board or Office of Cable Television and the terms, conditions, and limitations hereof may constitute sufficient grounds for the suspension or revocation of this Certificate.

This Certificate is issued on the representation that the statements contained in the cable television system's application are true, and the undertakings therein contained will be carried out unless specific waiver is granted by the Office of Cable Television pursuant to the authority contained in N.J.S.A. 48:5A-1 et seq.

This Certificate shall expire on February 13, 1995.

DATED: April 19, 1989

BOARD OF PUBLIC UTILITIES
BY:

CHRISTINE TODD WHITMAN
PRESIDENT

GEORGE H. BARBOUR
COMMISSIONER

ATTEST:

MARGARET M. FOTI
SECRETARY

"Appendix I"

OFFICE OF CABLE TELEVISION

LINE EXTENSION POLICY

Docket No. CF88111202
Company Sammons Comm. of N.J.
Municipality Bor. of Madison

A cable operator is required to absorb the cost of extensions to the system in the same proportion that the extension is to the remainder of the system.

Actual subscribers served by the extension are required to absorb the remainder of the cost.

If new subscribers are added to the extension the cost is adjusted and those who previously paid receive an appropriate rebate.

1. $\frac{\text{\# of homes in extension}}{\text{mileage of extension}}$ = homes per mile (HPM) of extension

2. $\frac{\text{HPM of extension}}{\text{Minimum HPM that company actually constructs in the system*}}$ = ratio of the density of the extension to the minimum density which the company constructs in the system or "A"

3. Total cost of building the extension times "A" = company's share of extension cost

4. Total cost of building extension less Company's share of extension cost = total amount to be recovered from subscribers

5. $\frac{\text{Total amount to be recovered from subs}}{\text{Total subscribers in extension}}$ = each subscriber's share

In any case, the company shall extend its plant along public rights of way to:

1. All residences and businesses within 150 aerial feet of the operator's existing plant at no cost beyond the normal installation rate.

2. All residences and businesses within 100 underground feet of the operators plant at no cost beyond the normal installation rate.

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* The minimum HPM that the company actually constructs in the system or municipality is the minimum number of homes which the company has historically constructed at its own cost. This is a function of the operator's break even point and its rate of return. Unbuilt systems will use the primary service area rather than construction.

The operator's installation policies shall apply to construction beyond the public right of way.

Detailed accounting and/or financial information to support the minimum HPM shall be supplied to the Office for its approval in such form as required. The minimum HPM shall be updated as appropriate.

When a request for service is received, and unless good cause is shown, cable companies shall:

1. Provide a written estimate within 30 days of such a request.
2. Begin construction within 60 days of receipt of any deposit monies from potential subscribers.
3. Complete construction within six months of receipt of any deposit monies from potential subscribers.
4. Inform each home passed along the extension of the potential costs for subscribers.

Subscribers who pay for an extension shall be entitled to rebates in the following manner:

1. If the company acquires new subscribers subsequent to the initial calculation of step 5 above, the formula will be adjusted and those who have previously paid for the extension will be entitiled to an appropriate rebate. In no event shall the amount of the rebate exceed the subscriber's contribution.
2. The company shall keep accurate records of the cost of the extension, the amounts paid by subscribers and any appropriate adjustments.
3. The company shall notify subscribers in the extension of their rights and responsibilities concerning the extension.
4. Once an individual dwelling has paid its share of the extension cost future reconnections or installations shall be made at the company's standard rates.
5. After a period of five years from the installation of the first dwelling unit in the extension no further adjustments shall be made. Installations after five years shall be at the company's standard rate.
6. Once a subscriber is installed, that person shall not normally be entitled to a refund of any monies paid for the installations, except in accordance with the rebate procedure outlined in this policy.

Definitions

PRIMARY SERVICE AREA

The Primary Service Areas (PSA) can be an entire municipality but in many instances the PSA is a limited area withn a community outside of which a line extension policy may apply. The PSA is depicted by a franchise map and narrative, presented and recorded during the franchise proceedings. It normally remains a fixed geographic area throughout the life of the franchise.

LINE EXTENSION SURVEY

Potential subscribers residing outside the PSA who request service are entitled to an estimate of their share of the cost to secure service. When conducting a survey and estimating costs a cable company should factor-in all potential subscribers who could practicably be included in the extension and give consideration to apparent residential construction in areas contiguous to the proposed extension.

"Appendix II"

Dkt. No: CE88111202
Company: Sammons Comm. of N.J
Municipality: Bor. of Madison

SCHEDULE OF RATES

Installation/Relocation		
A. Residential	$40.00	Installation or relocation of primary set (up to 175' aerial or 150' underground);
	$ 1.00	per foot charge for aerial installations in excess of 175';
	$ 2.00	per foot charge for underground installation in excess of 150';
	$ 5.00	FM/Additional outlets, etc. on same order;
	$15.00	VCR or ancillary equipment on same order;
	$20.00	Installation of primary set only if there is pre-existing drop wiring to drop;
	$ 7.95	Equipment charge for Input Selector (A/B) Switch on same order, or subscriber installed.
B. Commercial		Labor (at $20.00 per man-hour) and materials plus 10% overhead.
C. Reconnection and/or Subsequent Installations	$30.00	Primary set; Input Selector (A/B) Switch (plus equipment charge);
	$ 5.00	F/M Additional outlets, etc. on same order;
D. Premium Service/Switch Charge	$ 3.00	Computerized upgrade of premium service - per household;
	$ 6.00	Computerized change of premium service - per household;
	$15.00	Field upgrade and/or change of premium service:

Date of Issue: March 28, 1988

Effective May 1, 1988

Issued by: James N. Whitson, President
160 East Blackwell Street
Dover, New Jersey 07801

Filed Pursuant to: BPU Common Tariff Order (Docket No. 832C-6969, September 24, 1984; Docket No. CR 85121144, January 30, 1986) and the Cable Communications Policy Act of 1984 (47 U.S.C.A. 609 et. seq., 1984).

AN ORDINANCE OF THE BOROUGH COUNCIL GRANTING A FRANCHISE TO SAMMONS COMMUNICATIONS OF NEW JERSEY, INC., A NEW JERSEY CORPORATION, TO OWN, OPERATE AND MAINTAIN A CABLE TELEVISION SYSTEM IN THE BOROUGH OF MADISON, NEW JERSEY; SETTING FORTH CONDITIONS ACCOMPANYING THE GRANTING OF FRANCHISE AND PROVIDING FOR THE REGULATION AND USE OF SAID SYSTEM.

SECTION 1. Short Title. This Ordinance shall be known and may be cited as the "Sammons Communications of New Jersey, Inc., Franchise Ordinance."

SECTION 2. Definitions. For the purpose of this Ordinance, the following terms, phrases, words and their derivations shall have the meaning given herein. Such meaning or definition of terms shall be interpreted consistent with the definitions of the Federal Communications Commission, F.C.C. Rules and Regulations, 47 C.F.R. Subsection 76.1 et seq., and the Cable Communications Policy Act, 47 C.F.R. 521 et. seq., as amended and shall in no way be construed to broaden, alter or conflict with the Federal or State definitions.

A. "Borough" or "Municipality" is the Municipality of the Borough of Madison in the County of Morris, in the State of New Jersey.

B. "Company" is the grantee of rights under this Ordinance and is known as Sammons Communications of New Jersey, Inc.

C. "State Act" or "Cable Television Act" is Chapter 186 of the General Laws of New Jersey, 1972, and subsequent amendments thereto, N.J.S.A. 48:5A-1, et seq.

D. "State Regulations" shall mean those regulations of the State of New Jersey Board of Public Utilities relating to cable television, N.J.A.C. 14:17-1.1 et.seq., and 14:18-1.1 et.seq., or as such regulations may be amended.

E. "Federal Act" shall mean that Federal statute relating to cable communications commonly known as the Cable Communications Policy Act of 1984, 47 U.S.C. Section 521 et seq., or as that statute may be amended.

F. "Federal Regulations" shall mean those federal regulations relating to cable television service, 47 C.F.R. Section 76.1 et seq. (and, to the extent applicable, any other federal rules and regulations relating to cable television, including, but not limited to those described in 47 C.F.R. Section 76.3), or as such regulations may be amended.

G. "Board" means the Board of Public Utilities of the State of New Jersey.

H. "Commitments" shall mean the commitments, terms and undertakings on the part of Sammons set forth in this Ordinance.

I. "Application" means the application of Sammons Communications of New Jersey, Inc. and addenda thereto, which application and addenda are on file in the office of the Borough Clerk and are incorporated herein by reference and made a part hereof, except as modified, changed, limited or altered by this Ordinance.

SECTION 3. Purpose.

A. The Municipality hereby grants to the Company its non-exclusive consent to place in, upon, along, across, above, over and under the highways, streets, alleys, sidewalks, public ways, and public places in the Municipality poles, wires, cables, underground conduits, manholes, and other television conductors and fixtures necessary for the maintenance and operation in the Municipality of a cable television system and cable communications system. Any of the work noted above shall be done in accordance with those standards promulgated by the New Jersey Office of Cable Television and pursuant to those Borough ordinances and regulations governing road openings. The Company will be required to make application to the Borough for road opening permits, however the Company will be relieved of any requirement to pay the requisite fees for such permits.

B. The Municipality's consent to the renewal of the Franchise is subject to the terms and conditions of this Ordinance and the Company's acceptance of the provisions of this Ordinance and its written confirmation that it will comply with all of the Commitments.

SECTION 4. Statement of Findings. A public hearing regarding the Company's consent application was held on July 25, 1994, after proper public notice, according to the terms and conditions of the State Act. The hearing was fully open to the public, and the Borough received at the hearing, and for a period of thirty (30) days thereafter, all comments regarding the

qualifications of the Company to receive Municipal consent. Pursuant to the terms and conditions set forth herein, the Company possesses the necessary legal, technical, character, financial and other qualifications to support municipal consent, and the Company's operating and construction arrangements are adequate and feasible.

SECTION 5. Franchise Term. The consent herein granted shall be non-exclusive and shall expire twelve (12) years and 6 months from the date of the expiration of the current Certificate of Approval as issued by the Board.

SECTION 6. Expiration and Subsequent Renewal. If the Company seeks a successive consent, it shall, prior to the expiration of this consent, apply for a municipal consent and Certificate of Approval in accordance with the Cable Television Act, N.J.S.A. 48:5A-11 and 16 and applicable State and Federal rules and regulations. The Company shall also petition the Board for a Certificate of Approval authorizing continued operation during the period following expiration of the consent granted herein, and until such a time that a decision is made by the municipal governing body relative to the renewal of said consent.

SECTION 7. Franchise Fee. Pursuant to the terms and conditions of the State Act, the Company shall, during each year of operation under the consent granted herein, pay to the Borough two percent (2%) of the gross revenues from all recurring charges in the nature of subscription fees paid by subscribers to its cable television reception service in the Borough or any greater amount

permitted by the New Jersey Cable Television Act, or otherwise allowed by law, immediately upon the effective date thereof. The fee shall be paid on or before January 25 of each year and at the same time the Company shall file with the Chief Financial Officer of the Municipality a verified statement showing the gross receipts upon which payment is based.

SECTION 8. Construction Schedule. The Company shall be required to proffer service along any public rights-of-way to any person's residence or business located in those areas of the Franchise territory described herein, in accordance with the proposal for the provision of service as described in the Application. Any future extensions of the system or any extension of the system along private roads will be made in accordance with the Company's line extension policy, where applicable.

SECTION 9. Construction Requirements.

A. In the event that the Company or its agents shall disturb any pavement, street surfaces, sidewalks, driveways or other surfaces in the natural topography, the Company shall, at its sole expense, restore and replace such places or things so disturbed in as good condition as existed prior to the commencement of said work.

B. If at any time during the period of this consent the Borough shall alter or change the grade of any street, alley or other way or place, the Company, upon reasonable notice by the Borough, shall remove, re-lay and relocate its equipment, at the expense of the Company. However, to the extent any utility company

is reimbursed for the relocation of its facilities, the Company shall also be reimbursed for its expenses.

C. If the Company shall temporarily move or remove appropriate parts of its facilities to allow moving of buildings, machinery or in other similar circumstances, then the expense for the movement or removal of such facilities shall be borne by the party requesting such action except when requested by the Borough, in which case the Company shall bear the cost.

D. During the exercise of its rights and privileges under this Franchise, the Company may, upon the prior written approval of the Madison Shade Tree Authority, trim trees upon and overhanging streets, alleys, sidewalks and public places of the Borough so as to prevent, but only to prevent the branches of such trees from coming in contact with the wires and cables of the Company. Such trimming shall be only to the extent necessary to maintain proper clearance for the Company's facilities and only to the extent set forth in the written approval of the Madison Shade Tree Authority. This section shall not prohibit the Company from trimming or removing trees in circumstances where failure to do so could result in injury to persons or significant property damage, or where the Company is required to remove or trim trees pursuant to statutory or regulatory mandates.

E. The Company shall by April, 1995 upgrade and rebuild, as necessary its cable television system serving the Borough. Such rebuild/upgrade shall incorporate fiber optic technology into such

project. The bandwidth capacity of the rebuilt/upgraded system shall be no less than 550 Mhz.

F. The Company, as part of its rebuild/upgrade project, shall cause the aerial cables crossing Main street between Green Village Road and Waverly Place to be placed underground or removed, at the option of the Company.

G. The Company shall be required to proffer service to all currently existing homes and/or business located along any and all currently existing public rights-of-way within the Borough. The Company has agreed to extend cable service to all currently existing homes and/or businesses located along all currently existing public rights-of-way within twelve (12) months from the time utility make ready is completed. Any future extensions of the system or any extension of the system along private roads will be made in accordance with the Company's line extension policy, where applicable.

SECTION 10. Installation of Individual Subscribers. The company shall provide installation to each person's residence or business within the Borough based on the price schedule set forth in the Application, which price schedule may be amended from time to time.

SECTION 11. Territory. The consent granted herein to the Company shall apply to the entirety of the Borough and any property hereafter annexed thereto.

SECTION 12. Local Office. During the term of this Franchise, and any renewal thereof, the Company shall maintain a

local business office or agent for the purpose of receiving, investigating and resolving all complaints regarding the quality of service, equipment malfunctions and similar matters. The local business office need not be located within the Borough, but rather within a reasonable distance thereof affording convenient accessibility to Borough subscribers. Such local business office shall be open during normal business hours, and in no event less than 9:00 a.m. - 5:00 p.m., Monday through Friday. In addition, in accord with the Company's application for municipal consent, the Company shall ensure that its telephone hours for its service department are maintained at 9:00 a.m. to 11:00 p.m., Monday through Friday and 9:00 a.m. to 5:00 p.m. on Saturday. Further in accord with N.J.A.C. 14:18-3.6 Company representatives shall be available 24 hours a day to respond to outages and other emergent situations. In addition, telephone response for such purpose will be provided by the company's personnel, representative or agent 24 hours a day.

SECTION 13. Municipal Complaint Officer.

A. The Office of Cable Television (OCTV) is hereby designated as the Complaint Officer for the Borough pursuant to N.J.S.A. 48:5A-26(b).

B. All complaints shall be received and processed in accordance with N.J.A.C. 14:17-6.5.

SECTION 14. Commitments by Company.

A. Facilities and Equipment.

(1) In transmitting its television signals to subscribers in the Borough, the Company shall provide a quality of signal that is at least as good as that customarily provided under prevailing industry standards. The Company shall comply with any requirements imposed by the Federal Regulations, and (to the extent not preempted by Federal law) any State regulations, relating to technical standards for the transmission of television signals, transmission quality, or facilities and equipment.

(2) As soon as practicable after any source of television programming or signals ("Programming Source") carried by the Company commences the transmission of at least fifty-percent (50%) of its programming day utilizing an MTS (stereo) signal, the Company shall, unless compelling reasons dictate otherwise, complete any necessary steps to effect its retransmission of such programming service with an MTS signal. However, the Company shall not be required to effectuate such retransmission as to more than three (3) channels during each year of the renewal term.

(3) The Company shall cause construction plans relating to work on major extensions of the Company plant or work which could have a significant impact on public works within the Borough to be filed with the Borough Clerk. Nothing herein shall create any rights or obligations with respect to any construction work of the Borough or otherwise undermine the regulatory authority of the OCTV or the Board.

B. Customer Service.

(1) In order to maintain its level of telephone accessibility for calls relating to maintenance and repairs ("Service"), installation, addition or deletion of programming services, and other customer inquiries ("Business"), the Company shall do the following:

(a) The Company shall comply with any and all properly adopted rules or regulations of the OCTV or Federal regulatory bodies insofar as they apply to telephone accessibility.

(b) The Company shall meet with the Borough or its authorized representatives on an annual basis to discuss the adequacy or inadequacy of the Company's customer service, including telephone accessibility to Borough subscribers. Such meetings shall be held at the request of the Borough upon reasonable written notice to the Company.

(c) The Company shall submit to the Borough, as may be reasonably requested by the Borough but no more than once annually, a written report on telephone accessibility. Additionally, the Company shall meet with Borough officials as may be reasonably requested in accord with the above schedule to discuss its telephone accessibility and any efforts the Company may take or may have taken to enhance such accessibility.

(d) Nothing herein shall impair the right of any subscriber of the Borough to express any comment or complaint with respect to telephone accessibility to the Complaint Officer (as designated in Section 13 hereof), or impair the right of the

Complaint Officer to take any action which is appropriate under law.

(2) The Company shall maintain a telephone number by which subscribers wishing to communicate with the Company by day or evening for any reason can reach it, by a toll-free telephone call, and as to which the provisions of the preceding Section 14 B.(1) shall apply;

(a) The toll-free number shall be published in every monthly bill;

(b) In the event of major technical changeovers of converter equipment affecting the majority of subscribers, where such changeover of equipment is necessary for such subscribers to maintain their current level of service, the Company shall exchange such equipment for the subscriber at the local office (and to the extent necessary, at night and on Saturday), at no cost to the subscriber other than the usual charges relating to the rental of such converter equipment.

(3) Before sending out any questionnaire which will go exclusively to subscribers in the Borough, which questionnaire concerns subscribers in the Borough, with respect to subscriber experiences, preferences or views, the Company shall provide the Borough or its designee a reasonable opportunity to suggest revisions or matters for inclusion. The Company shall provide the Borough or its designee, with access to the questionnaire and any summaries or compilations of such responses permitted within the subscriber privacy provisions of Federal law.

(4) The Company shall provide, by means which are reasonable in quantity and quality, information informing subscribers and potential subscribers of the most efficient procedures and telephone numbers for requesting installation, repairs, and the addition or deletion of services, for addressing billing problems, and for reporting comments or complaints.

(5) The Company shall credit the accounts of Company subscribers affected by service outages pursuant to any and all properly adopted rules or regulations of the OCTV, or applicable State or Federal statues.

C. Locally Originated Programming.

(1) The Company shall continue to make available two channels for purposes such as public, educational and government ("PEG") use, as set forth in the application, to the Borough. The Company shall be deemed to have satisfied such obligation if those two PEG channels are shared by the Borough with other municipalities. Subject only to: (i) the requirements of law, (ii) any Company requirements that PEG programming be of a noncommercial nature; and (iii) any need for the sharing Municipalities to cooperate in programming origination, the Municipality shall have full discretion and flexibility with respect to program content in its use of the PEG channels, provided all such programming shall comply with applicable statutes,rules and regulations. It shall be understood that views expressed on PEG channels shall not be deemed to be the views of the Company and

it shall not be responsible for the content of PEG programming or for views expressed on programming produced.

(2) The Company shall take any steps which are reasonably necessary to ensure that the signals transmitted on the PEG channels are carried without material degradation, and that, to the extent the PEG channels' programming is originated with a signal whose quality meets accepted industry standards, that it is equal to that of other channels the Company transmits.

(3) The Company will produce, at its expense and upon request of the Borough, at least three (3) programs on an annual basis for the Borough, provided the Company is given at least thirty (30) days' written notice. Such programs shall be aired on the local access channel. The Borough Administrator shall act as the contact person between the Borough and Company with respect to such matters. Borough residents who want the Company to produce a program must present their ideas to the Borough Administrator who will notify and seek approval of the Company. If, however, the Company has already produced programs similar to those requested by the Borough, those programs already produced shall count towards the three (3) program requirement. Similarly, if the Company has already promoted the Borough by way of two programs previously produced by the Company during the year, they shall also be counted towards the Company's requirement under this paragraph. The Borough Administrator must approve, in writing, any program the Company wants to count towards its obligation under this paragraph.

(4) Subject to the provisions herein, and under

supervision, if required, the Company shall lend, to the Borough, for PEG broadcasts, videotapes of programming relating to the Borough or matters of particular interest to the Borough (including, but not limited to, interviews with the Borough officials and sporting events involving Borough teams) which are in the Company's possession or control, and which have been previously shown on the Company Channel or such other channel the Company uses for its own originated programming; provided that the Company may withhold such videotapes on reasonable grounds, including, but not limited to, the rights of copyright holders or its other commitments with respect to such programming.

(5) The Company shall continue its procedure for designating a Company employee as responsible for taking and addressing comments or complaints with respect to the quality of the PEG Designees' transmissions.

(6) At such time as the Borough is ready to produce programing for transmission on the Company's PEG channel(s) and upon thirty (30) days written request, the Company shall offer, at its studio, seminars on the production of television programming for the training of personnel who will assist in productions originiated by the Borough, as well as students from the Borough schools.

(7) In addition to the training programs cited in section six (6), supra, the Company shall provide, at the Borough's request, at least twelve (12) hours of on-site training in the use of production equipment in the first year that the Borough is ready

to produce its own programing. Such training will enable the Borough to become familiar with the equipment and its operation. Thereafter, on an annual basis the Company will, at the Borough's request, provide at least six (6) hours of on site training.

D. Compliance with Law. Notwithstanding any specific mention of applicable Federal or State statutes or regulations above, the Company shall comply with all of the requirements of the Federal Act, the Federal Regulations, the State Act and State Regulations (to the extent not preempted) and any other valid statute, regulation or rule, specifically including, but without limitation, those relating to equal employment opportunity.

SECTION 15. Rates.

A. The Borough will not regulate the rates the Company may charge subscribers for its service; provided, that in the event the Federal Act and other applicable law hereafter is amended to permit the exercise of regulatory power over rates by municipalities the Borough reserves the right to exercise the maximum power permitted by law.

B. The Company shall implement a senior citizens' rate discount as described in its pre-published price schedule to any person 62 years of age or older who subscribes to cable services and does not share the subscription with more than one other person in the same household who is less than 62 years of age. Such subscribers must meet the income and residence requirements of the "Pharmaceutical Assistance to Aged and Disabled" program pursuant to N.J.S.A. 30:4D-21 and N.J.A.C. 10:69 A-1.1 (Eligibility).

C. The Company shall apply the same discount rate as stated in B above to the disabled.

SECTION 16. Programming. Although nothing herein shall require the Company to carry or transmit any particular television stations or programming source, the Company shall provide the subscribers in the Borough with at least the same broad categories of programming, in approximately the same quantity, as are now provided, and which appear in the Application.

SECTION 17. Free Services. The Company shall provide the standard installation of, at least, one outlet and Lifeline and First Tier level of monthly service to the currently existing Borough Police and Fire Departments and each school and library located in the Borough free of charge. Each additional outlet installation fee shall be paid for by the institution on a materials plus labor basis. Monthly service on other such additional outlets shall be charged at the regular tariffed rates.

SECTION 18. Emergency Use. Unless otherwise provided by law, in the event that a predominant number of the municipalities within the Company's service area agree to participate in an emergency use system, the Company shall be required to have the capability at the headend to override the audio portion of the system in order to permit the broadcasting of emergency messages by the Borough. The Borough shall provide such facilities, or if such facilities are provided by the Company, it shall be the responsibility of the Borough to pay for their use. The Company shall in no way be held liable for any injury suffered by the

Borough or any other person, during an emergency, if for any reason, the Borough is unable to make full use of the cable television system as contemplated herein. The Company and the participating municipalities shall also establish reasonable procedures for such uses.

SECTION 19. Indemnification and Liability.

A. Subject to the provision of Section 18 herein, the Company shall indemnify, protect and save the Borough harmless from and against losses and physical damages to property, including those properties owned or under the control of the Borough, and bodily injury or death of persons, including payments made under any Workmen's Compensation Law, which may arise out of or be caused by the Company's negligence in the construction, location, installation, operation, erection, maintenance, presence, repair, replacement, removal or use of the cable television system within the Borough contemplated by this franchise, or by any act or omission of the Company, its agents or employees.

B. The Company shall maintain, at all times, during the term of the Franchise liability insurance naming the Borough as an insured and providing insurance coverage against all claims, demands, actions, judgments, costs, expenses, and liabilities which may arise or result, directly or indirectly, from or by reason of any loss, injury, or damage related to the company's operation of its cable television system. The amounts of such insurance against liability due to physical damages to property or bodily injury or death to any one person shall be not less than One Million Dollars

($1,000,000.00), and not less than One Million Dollars ($1,000,000.00) to any one accident and excess liability (or "umbrella") policy in the amount of Five (5) Million Dollars ($5,000,000.00).

C. The Company shall also carry such insurance as it deems necessary to protect it from all claims under the Workmen's Compensation Laws in effect, that may be applicable to the Franchise.

D. All insurance required by this Ordinance, shall be and remain in full force and effect for the entire life of this Franchise. A Certificate of Insurance must be submitted to the Borough Administrator to review for compliance with above-mentioned limits of liability. Said policy or policies of insurance or Certificate of Insurance shall be deposited with and kept on file by the Borough Clerk, and the Borough shall be a named insured on said policies. The insurer shall notify the Borough at least thirty (30) days prior of its intention to cancel any policy. The insurer further shall certify to the Borough the fact of renewal of every such insurance policy at least fifteen (15) days prior to the expiration date.

SECTION 20. Performance Bond. To insure its faithful performance of its obligations under a renewal of the Franchise during the Renewal Term, the Company shall provide a performance bond, in the sum of $25,000.00. Such bond shall specifically secure the faithful performance of all undertakings of the Company as represented in the Application and in the Commitments. The

Borough reserves the right by resolution to require a reasonable increase in the amount of said bond, subject to review by the OCTV and approval by the Board.

SECTION 21. Incorporation of the Application. All of the statements and commitments contained in the Application and any amendment thereto submitted, in writing, by the Company to the Borough, except as modified herein, are binding upon the Company as terms and conditions of this consent. The application and any other relevant writings submitted by the Company shall be annexed hereto and made a part hereof by reference.

SECTION 22. Number of Subscribers Irrelevant. The Company shall be bound by the terms and provisions of this Ordinance irrespective of the number of subscribers to its system.

SECTION 23. Severability. If any section, subsection, sentence, clause, phrase or portion of this Ordinance is, for any reason, held invalid or unconstitutional by any Court or Federal or State agency of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions hereof.

SECTION 24. Ordinance Repealed. All ordinances or parts thereof in conflict with the provisions of this ordinance are hereby repealed.

SECTION 25. Effective Date. This Ordinance shall take effect immediately upon final passage, approval and publication as required by law.

ADOPTED AND APPROVED
August 28, 1995

ATTEST:

Esther Sebesto

ESTHER SEBESTO, Borough Clerk

DONALD R. CAPEN, Mayor

I hereby certify the foregoing to be a true copy of a Ordinance adopted by the Council of the Borough of Madison at a regular meeting thereof, held Monday, August 28, 1995 at which a quorum was present.

August 31, 1995

Patricia M. Graham

Patricia M. Graham, Deputy Borough Clerk

(278)

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

AGENDA DATE: 7/30/97

CABLE TELEVISION

IN THE MATTER OF THE PETITION OF SAMMONS COMMUNICATIONS OF NEW JERSEY, INC. FOR A CERTIFICATE OF APPROVAL TO BUILD, OPERATE, AND MAINTAIN A CABLE TELEVISION SYSTEM IN AND FOR THE BOROUGH OF MADISON, COUNTY OF MORRIS AND STATE OF NEW JERSEY	)	RENEWAL CERTIFICATE OF APPROVAL
	)	DOCKET NO. CE94110522

Giegerich and Maione, Scotch Plains, New Jersey, by Robert A. Giegerich, Jr., Esq., for the Petitioner.

Borough Clerk, Borough of Madison, New Jersey, by Esther Sebesto, for the Borough.

BY THE BOARD:

On February 13, 1975, the Board granted Morris Cablevision a Certificate of Approval for the construction, operation and maintenance of a cable television system in the Borough of Madison ("Borough"), in Docket No. 748C-6042. On June 11, 1982, the Board approved the transfer of the Certificate of Approval from Morris Cablevision to Sammons Communications of New Jersey, Inc. ("Petitioner") in Docket No. 823C-6894. On April 19, 1989, the Board granted the Petitioner a Renewal Certificate of Approval for the Borough in Docket No. CE88111202, for a term which expired February 13, 1995. On February 21, 1996, in Docket No. CM95080400, the Board approved the transfer of the Certificate of Approval from the Petitioner to TKR Cable Company of Morris. TKR Cable Company of Morris shall be the recipient of the Renewal Certificate of Approval and shall be responsible for all commitments made by the Petitioner. Although the Certificate for the Borough expired on February 13, 1995, the Petitioner is authorized to continue to provide cable television service to the Borough, pursuant to N.J.S.A. 48:5A-25.

The Petitioner filed an application for the renewal of its municipal consent with the Borough on or about May 10, 1994, pursuant to N.J.S.A. 48:5A-23 and N.J.A.C. 14:18-13. Although the Borough held a public hearing on July 25, 1994, it did not adopt a renewal municipal consent ordinance.

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On November 10, 1994, pursuant to N.J.S.A. 48:5A-17(d), the Petitioner filed with the Board for a renewal of its Certificate of Approval for the Borough. The Petitioner alleged that the Borough by not granting the renewal of its municipal consent, was arbitrary, capricious and its decision was unsupported by the record.

Subsequent discussions took place between the parties which culminated in a settlement that resolved the matter. Pursuant, to those discussions the Borough adopted a renewal municipal consent ordinance on August 28, 1995. On September 8, 1995, the Petitioner accepted the terms and conditions of the ordinance, in accordance with N.J.S.A. 48:5A-24. Thereafter, on October 2, 1995, the Petitioner filed an amended petition with the Board.

The Board has reviewed the application for municipal consent, the petition and amended petition for a Renewal Certificate of Approval and the municipal consent ordinance. Based upon this review and the recommendation of the Office of Cable Television, the Board HEREBY FINDS the following:

1. The Petitioner possesses the requisite legal, character, financial and technical qualifications for the awarding of a Certificate of Approval. Further, these qualifications were reviewed by the Borough in conjunction with the municipal consent process. See N.J.S.A. 48:5A-22 to 29 and N.J.A.C. 14:18-13.

2. The design and technical specifications of the system will ensure the Petitioner provides safe, adequate and proper service.

3. The Petitioner has represented that all previously required construction within the franchise territory is complete.

4. The franchise period as stated in the ordinance is twelve years and six months from the date of the expiration of the current Certificate of Approval. The Office of Cable Television finds this term to be of reasonable duration.

5. The Petitioner's rates shall be regulated and tariffs shall be filed for all services, in accordance with the rules and regulations of the Federal Communications Commission, the Board and the Office of Cable Television. The Petitioner shall maintain informational tariffs for unregulated service rates, and promptly file any revisions thereto.

6. Pursuant to N.J.S.A. 48:5A-26(b), the ordinance specifies a complaint officer. In this case it is the Office of Cable Television. All complaints shall be received and processed in accordance with N.J.A.C. 14:17-6.5.

7. The Petitioner will maintain a local business office within a reasonable distance of the Borough, for the purpose of receiving, investigating and resolving complaints. Currently, the local office serving this provision is located at 683 Route 10 in Randolph.

8. The franchise fee to be paid to the Borough is specified to be 2% of the Petitioner's gross revenues from all recurring charges in the nature of subscription fees paid by subscribers for its cable television reception service in the Borough. Additional regulatory fees shall be paid to the State in an amount not to exceed 2% of Petitioner's gross operating revenues derived from intrastate operations. The Board finds these fees to be reasonable.

9. The Petitioner shall extend service to all currently existing homes and/or businesses in the Borough located along any existing public rights-of-way within twelve months of receiving make ready approval, at standard and non-standard installation rates. For future extensions and for extensions on private roads, the Petitioner will utilize the line extension policy ("LEP") attached to the Certificate (Appendix "I"). The minimum homes per mile ("HPM") figure is 35.

10. The Petitioner committed to rebuild the system in the Borough to a minimum of 550 MHz. The Office of Cable Television was informed that the rebuild/upgrade was completed in April of 1995.

11. In accordance with the application and the ordinance the Petitioner shall provide public, educational and governmental ("PEG") access facilities. The Petitioner shall provide two PEG access channels which shall be shared with other municipalities in the system.

12. The Petitioner shall provide use of a character generator, a fully equipped studio, technical assistance and instructional workshops in the production of programming and the use of the studio, pursuant to the application and the ordinance. Upon the request of the Borough and with at least thirty days' notice, the Petitioner shall produce, at its own cost three programs annually for the Borough. The

Petitioner shall provide at least 12 hours of on-site training in the use of production equipment in the first year that the Borough is ready to produce its own programming. Thereafter, the Petitioner shall provide six hours of training annually.

13. The Petitioner shall continue to designate one of its employees as a liaison for taking and addressing comments or complaints with respect to the quality of the PEG designees' transmission.

14. The Petitioner shall provide the standard installation of one outlet, as well as Lifeline and first tier level of monthly cable service, free-of-charge, to the currently existing Police and Fire Departments and to each school and library in the Borough. Each additional outlet installation fee shall be paid for by the institution on a materials plus labor basis.

15. The Petitioner has agreed to offer a senior citizens/disabled discount for persons meeting the eligibility requirements pursuant to N.J.S.A. 30:4D-21 and N.J.A.C. 14:18-3.20.

16. At the request of the Borough, the Petitioner and the Borough's designee shall meet at least once annually to review all matters related to cable television within the Borough. Upon the request of the Borough, but no more than once annually, the Petitioner shall also provide a written report on telephone accessibility to the Borough.

Based upon these findings, the Board HEREBY CONCLUDES that pursuant to N.J.S.A. 48:5A-17(a) and 28(c), the Petitioner has sufficient financial and technical capacity and meets the legal, character and other qualifications necessary to construct, maintain and operate the necessary installations, lines and equipment and is capable of providing the proposed service in a safe, adequate and proper manner.

Therefore, the Petitioner is HEREBY ISSUED this Renewal Certificate of Approval as evidence of Petitioner's authority to construct and operate a cable television system within the entirety of the Borough.

This Certificate is subject to all applicable State and federal laws, the rules and regulations of the Office of Cable Television, and any such lawful terms, conditions, and limitations as currently exist or may hereafter be attached to the exercise of the privileges granted herein.

The Petitioner shall adhere to the operating standards set forth by the Federal Communications Commission's rules and regulations, 47 C.F.R. Section 76.1 et seq. Any modifications to the provisions thereof shall be incorporated into this Certificate. Additionally and more specifically, the Petitioner shall adhere to the technical standards of 47 C.F.R. Part 76, Subpart K.

Failure to comply with all applicable laws, rules, regulations and orders of the Board or Office of Cable Television and/or the terms, conditions, and limitations set forth herein may constitute sufficient grounds for the suspension or revocation of this Certificate.

This Renewal Certificate is issued on the representation that the statements contained in the Petitioner's applications are true, and the undertakings therein contained shall be adhered to and enforceable unless specific waiver is granted by the Office of Cable Television pursuant to the authority contained in N.J.S.A. 48:5A-1 et seq.

This Certificate shall expire on August 13, 2007.

DATED: 7-30-97

BOARD OF PUBLIC UTILITIES
BY:

HERBERT H. TATE
PRESIDENT

CARMEN J. ARMENTI
COMMISSIONER

ATTEST:

JAMES A. NAPPI, ESQ.
SECRETARY

APPENDIX "I"

Office of Cable Television
Line Extension Policy

Docket No.	CE94110522
Company	Sammons Communications of New Jersey, Inc.
Municipality	Borough of Madison

A cable operator is required to absorb the cost of extensions to the system in the same proportion that the extension is to the remainder of the system.

Actual subscribers served by the extension are required to absorb the remainder of the cost.

If new subscribers are added to the extension the cost is adjusted and those who previously paid receive an appropriate rebate.

1.	# of homes in extension / mileage of extension	=	homes per mile (HPM) of extension
2.	HPM of extension / Minimum HPM that company actually constructs in the system *	=	ratio of the density of or "A" the extension to the minimum density which the company constructs in the system
3.	Total cost of building the extension times "A"	=	company's share of extension cost
4.	Total cost of building extension less company's share of extension cost	=	total amount to be recovered from subscribers
5.	Total amount to be recovered from subs / Total subscribers in extension	=	each subscriber's share

In any case, the company shall extend its plant along public rights of way to:

1. All residences and businesses within 150 aerial feet of the operator's existing plant at no cost beyond the normal installation rate.

2. All residences and businesses within 100 underground feet of the operator's plant at no cost beyond the normal installation rate.

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* The minimum HPM that the company actually constructs in the system or municipality is the minimum number of homes which the company has historically constructed at its own cost. This is a function of the operator's break even point and its rate of return. Unbuilt systems will use the primary service area rather than construction.

The operator's installation policies shall apply to construction beyond the public right of way.

Detailed accounting and/or financial information to support the minimum HPM shall be supplied to the Office for its approval in such form as required. The minimum HPM shall be updated as appropriate.

When a request for service is received, and unless good cause is shown, cable companies shall:

1. Provide a written estimate within 30 days of such a request.

2. Begin construction within 60 days of receipt of any deposit monies from potential subscribers.

3. Complete construction within six months of receipt of any deposit monies from potential subscribers.

4. Inform each home passed along the extension of the potential costs for subscribers.

Subscribers who pay for an extension shall be entitled to rebates in the following manner:

1. If the company acquires new subscribers subsequent to the initial calculation of step 5 above, the formula will be adjusted and those who have previously paid for the extension will be entitled to an appropriate rebate. In no event shall the amount of the rebate exceed the subscriber's contribution.

2. The company shall keep accurate records of the cost of the extension, the amounts paid by subscribers and any appropriate adjustments.

3. The company shall notify subscribers in the extension of their rights and responsibilities concerning the extension.

4. Once an individual dwelling has paid its share of the extension cost future reconnections or installations shall be made at the company's standard rates.

5. After a period of five years from the installation of the first dwelling unit in the extension no further adjustments shall be made. Installations after five years shall be at the company's standard rate.

6. Once a subscriber is installed, that person shall not normally be entitled to a refund of any monies paid for the installations, except in accordance with the rebate procedure outlined in this policy.

Definitions

Primary Service Area

The Primary Service Area (PSA) can be an entire municipality but in many instances the PSA is a limited area within a community outside of which a line extension policy may apply. The PSA is depicted by a franchise map and narrative, presented and recorded during the franchise proceedings. It normally remains a fixed geographic area throughout the life of the franchise.

Line Extension Survey

Potential subscribers residing outside the PSA who request service are entitled to an estimate of their share of the cost to secure service. When conducting a survey and estimating costs, a cable company should factor-in all potential subscribers who could practicably be included in the extension and give consideration to apparent residential construction in areas contiguous to the proposed extension.

CF/CR/KM

BOROUGH OF MADISON

ORDINANCE NO. 64-2007

ORDINANCE OF THE BOROUGH OF MADISON GRANTING MUNICIPAL CONSENT FOR THE OPERATION OF A CABLE TELEVISION SYSTEM WITHIN THE BOROUGH OF MADISON, NEW JERSEY TO CSC TKR, INC.

WHEREAS, the governing body of the Borough of Madison (hereinafter referred to as the "Borough") determined that CSC TKR, Inc. (hereinafter referred to as "the Company" or "Cablevision") had the technical competence and general fitness to operate a cable television system in the Borough, and by prior ordinance granted its municipal consent for Cablevision to obtain a non-exclusive franchise for the placement of facilities and the establishment of a cable television system in the Borough; and

WHEREAS, by application for renewal consent filed with the Borough and the Office of Cable Television on or about April 9, 2007, Cablevision has sought a renewal of the franchise; and

WHEREAS, the Borough having held public hearings has made due inquiry to review Cablevision's performance under the Franchise, and to identify the Borough's future cable-related needs and interests and has concluded that Cablevision has substantially complied with its obligations under the Franchise and has committed to certain undertakings responsive to the Borough's future cable-related needs and interests; and

WHEREAS, the governing body of the Borough has accordingly concluded that the consent should be renewed subject to the requirements set forth below; and that, provided Cablevision's proposal for renewal embodies the commitments set forth below, the Borough's municipal consent to the renewal of the Franchise should be given; and

WHEREAS, imposition of the same burdens and costs on other franchised competitors by the Borough is a basic assumption of the parties;

NOW THEREFORE, BE IT ORDAINED by the Mayor and Council of the Borough of Madison, County of Morris, and State of New Jersey, as follows:

SECTION 1. DEFINITIONS

For the purpose of this Ordinance the terms defined above shall have the meanings there indicated, and the following additional terms shall have the following meanings:

(a) "Act" or "Cable Television Act" shall mean that statute of the State of New Jersey relating to cable television, known as the Cable Television Act, N.J.S.A. 48:5A-1 et seq.

(b) "Application" shall mean Cablevision's application for Renewal of Municipal Consent, which application is on file in the Borough's office and is incorporated herein by reference and made a part hereof, except as modified, changed, limited or altered by this Ordinance.

(c) "Board" shall mean the Board of Public Utilities of the State of New Jersey or its successor agency.

(d) "Borough" shall mean the governing body of the Borough of Madison in the County of Morris and the State of New Jersey.

(e) "Company" shall mean CSC TKR, Inc. ("Cablevision"), the grantee of rights under this Ordinance.

(f) "FCC" shall mean the Federal Communications Commission.

(g) "Federal Act" shall mean that federal statute relating to cable communications commonly known as the Cable Communications Policy Act of 1984, 47 U.S.C. Section 521 et seq. and the Telecommunications Act of 1996, or as those statutes may be amended.

(h) "Federal Regulations" shall mean those federal regulations relating to cable television services, 47 C.F.R. Section 76.1 et seq. (and, to the extent applicable, any other federal rules and regulations relating to cable television, including but not limited to, those described in 47 C.F.R. Section 76.3), or as such regulations may be amended.

(i) "Standard installation" shall mean the installation of drop cable to a customer's premises where the distance from the point of entry into the building being served is less than 150 feet from the active cable television system plant.

(j) "State" shall mean the State of New Jersey.

(k) "State Regulations" shall mean those regulations of the State of New Jersey Board of Public Utilities relating to cable television. N.J.A.C. 14:17-1.1 et seq. and N.J.A.C. 14:18-1 et seq. or as such regulations may be amended.

SECTION 2. STATEMENT OF FINDINGS

A public hearing concerning the consent herein granted to Cablevision was held after proper public notice pursuant to the terms and conditions of the Act. Said hearing having been held and fully open to the public, and the municipality having received all comments regarding the qualifications of Cablevision to receive this consent, the Borough hereby finds Cablevision possesses the necessary legal, technical, character, financial and other qualifications to support municipal consent, and that Cablevision's operating and construction arrangements are adequate and feasible.

SECTION 3. GRANT OF AUTHORITY

The Borough hereby grants to Cablevision its non-exclusive consent to place in, upon, along, across, above, over, and under its highways, streets, alleys, sidewalks, public ways, and public places in the municipality poles, wires, cables, and fixtures necessary for the maintenance and operation in the Borough of a cable television system, and for the provision of any communication service over such system as may be authorized by federal or State regulatory agencies. Operation and construction, pursuant to said consent, is conditioned upon prior approval of the Board of Public Utilities.

SECTION 4. DURATION OF FRANCHISE

This consent granted herein shall be non-exclusive and shall be for a term of ten (10) years from the date of issuance of a Certificate of Approval by the Board.

SECTION 5. EXPIRATION AND SUBSEQUENT RENEWAL

If Cablevision seeks successive consent, it shall, prior to the expiration of this consent, apply for a municipal consent and certificate of approval in accordance with N.J.S.A 48:5A-11 and N.J.S.A. 48:5A-16, and applicable state and federal rules and regulations. The Company shall also seek approval from the Board authorizing continued operation during the period following expiration of the consent granted herein, and until such a time that a decision is made by the Borough and the Board relative to the renewal of said consent.

SECTION 6. FRANCHISE TERRITORY

The consent granted under this Ordinance to Cablevision shall apply to the entirety of the Borough and any property hereafter annexed.

SECTION 7. PRIMARY SERVICE AREA

Cablevision shall be required to proffer service along any public right-of-way to any person's residence located in the portion of the franchise territory, as described in the map attached to the Application at tariffed rates for standard and nonstandard installation. Such area designated shall constitute the primary service area.

SECTION 8. FRANCHISE FEE

Cablevision shall pay to the Borough, an annual franchise fee, in accordance with N.J.S.A 48:5A-30.

SECTION 9. FREE SERVICE

Upon enactment of this ordinance by the Borough and issuance of a Certificate of Approval by the Board, the Company shall provide, upon request and within ninety (90) days, free of charge, one (1) standard installation and monthly basic cable television service to all State or locally accredited public, private and parochial schools and all municipal buildings used for governmental purposes within the Borough. A preliminary schedule of said properties is attached hereto as Exhibit A.

Upon enactment of this ordinance by the Borough and issuance of a Certificate of Approval by the Board, the Company shall provide to one municipal location used for governmental purposes, without charge, the following within ninety (90) days: (1) one standard installation; (2) one cable modem per installation; and (3) basic cable modem service for the term of this Ordinance. The Borough shall be permitted to network, at its own cost, four personal computers terminals to the cable modem provided by the Cablevision. This offer shall be subject to the reasonable terms, conditions and use policies of the Company as those policies may exist from time to time.

Upon enactment of this ordinance by the Borough and issuance of a Certificate of Approval by the Board, the Company shall provide, upon request and within ninety (90) days, to state and locally accredited public and private and parochial elementary and secondary schools and municipal public libraries in the Borough, without charge, the following: (1) one standard installation per school and library; (2) one cable modem per installation; and, (3) basic cable modem service for the term of this Ordinance for each installation. Each school and library shall be permitted, at its own cost, to network up to 25 computers to the cable modem provided by Cablevision. This offer shall be subject to the reasonable terms, conditions and use policies of the Company, as those policies may exist from time to time."

SECTION 10. CONSTRUCTION/SYSTEM REQUIREMENTS

Cablevision shall perform construction and installation of its plant and facilities in accordance with applicable State and federal law. The Company shall be subject to the following additional construction requirements with respect to the installation of its plant and facilities in the Borough:

(a) In the event that the Company or its agents shall disturb any pavement, street surfaces, sidewalks, driveways or other surfaces, the Company shall at its sole expense restore and replace such disturbances in as good a condition as existed prior to the commencement of said work.

(b) If at any time during the period of this consent, the municipality shall alter or change the grade of any street, alley or other way or place, the Company, upon reasonable notice by the Borough shall remove or relocate its equipment, at its own expense.

(c) Upon request of a person holding a building or moving permit issued by the Borough, the Company shall temporarily move or remove appropriate parts of its facilities so as to permit the moving or erection of buildings or for the performance of other work. The expense of any such temporary removal or relocation shall be paid in advance to the Company by the person requesting the same. In such cases, the Company shall be given not less than fourteen (14) days prior written notice in order to arrange for the changes required.

(d) During the exercise of its rights and privileges under this consent, the Company shall have the authority to trim public trees upon and overhanging streets, alleys, sidewalks and public places of the Borough so as to prevent the branches of such trees from coming in contact with the wires, cables, conduits and fixtures of the Company. Such trimming shall be only to the extent necessary to maintain proper clearance for the Company's facilities, and shall be coordinated and approved by the Borough of Madison Shade Tree Management Board.

SECTION 11. TECHNICAL AND CUSTOMER SERVICE STANDARDS

Cablevision shall comply with the technical and customer service standards established for the cable industry under applicable federal and State laws, rules and regulations.

SECTION 12. LOCAL OFFICE OR AGENT

Cablevision shall establish and maintain during the entire term of this consent a local area business office or agent for the purpose of receiving, investigating and resolving complaints regarding the quality of service, equipment malfunctions and similar matters. Said office shall be open daily during normal business hours, and in no event less than 9:00 a.m. to 5:00 p.m., Monday through Friday, with the exception of holidays.

SECTION 13. DESIGNATION OF COMPLAINT OFFICER

The Office of Cable Television is hereby designated as the complaint officer for the Borough pursuant to the provisions of N.J.S.A. 48:5A-26. All complaints shall be reviewed and processed in accordance with N.J.A.C. 14:17-6.5.

SECTION 14. LIABILITY INSURANCE

Cablevision agrees to maintain and keep in force and effect at its sole cost at all times during the term of this consent, sufficient liability insurance naming the Borough as an additional insured and insuring against loss by any such claim, suit, judgment, execution or demand in the minimum amounts of five-hundred thousand dollars ($500,000) for bodily injury or death to one person, and one million dollars ($1,000,000) for bodily injury or death resulting from any one accident or occurrence stemming from or arising out of the Company's exercise of its rights hereunder. Cablevision shall provide to the Borough at the commencement of this consent evidence of such insurance, which evidence shall, upon the request of the Borough, also be provided on an annual basis during the term hereof.

SECTION 15. PERFORMANCE BOND

Cablevision shall obtain and maintain, at its sole cost and expense, during the entire term of this Ordinance, a bond to the municipality in the amount of twenty-five thousand dollars ($25,000.00). Such bond shall be to insure the faithful performance of its obligations as provided in this Franchise. The bond shall be filed with the Borough Clerk of the Borough.

SECTION 16. RATES

A. The rates of the Company for cable television service shall be subject to regulation to the extent permitted by federal and State law.

B. Cablevision shall implement a senior citizen discount in the amount of ten percent (10%) off the monthly broadcast basic level of cable television service rate to any person sixty-two (62) years of age or older, who subscribes to cable television services provided by the Company, subject to the following:

(i) Such discount shall only be available to eligible senior citizens who do not share the subscription with more than one person in the same household who is less than sixty-two (62) years of age; and,

(ii) Subscribers seeking eligibility for the discount must meet the income and residence requirements of the Pharmaceutical Assistance to Aged and Disabled (PAAD) program in the State pursuant to N.J.S.A. 30:4D-21;

(iii) The senior citizen discount herein relates only to the entry level basic rate of cable television service, and shall not apply to any additional service, feature, or equipment offered by the Company, including premium channel services and pay-per-view services.

(iv) Senior citizens, who subscribe to a level of cable television service beyond expanded basic service, including any premium or per channel a la carte service, shall not be eligible for the discount.

C. In the event that Cablevision shall be required to increase the franchise fee in accordance with N.J.S.A. 48-5A-30(d), then at such time as the new fee is instituted, Cablevision shall no longer be obligated to maintain or offer the senior discount specified in Section 17(B) above.

SECTION 17. EMERGENCY USES

Cablevision shall be required to have the capability to override the audio portion of the system in order to permit the broadcasting of emergency messages by the Borough pursuant to state and federal requirements. The Company shall in no way be held liable for any injury suffered by the Borough or any other person, during an emergency, if for any reason the municipality is unable to make full use of the cable

television system as contemplated herein. The Borough shall utilize the state-approved procedures for such emergency uses.

SECTION 18. EQUITABLE TERMS

A. In the event that the Borough approves or permits a cable system to operate in the community on terms more favorable or less burdensome than those contained in this Ordinance, such more favorable or less burdensome terms shall be applicable in this consent, subject to a petition to the Board of Public Utilities as provided for in accordance with N.J.S.A. 48:5A-47 and N.J.A.C. 14:17-6.7.

B. In the event that a non-franchised multi-channel video programmer provides service to residents of the Borough, Cablevision shall have a right to request franchise amendments to this Ordinance that relieve Cablevision of regulatory burdens that create a competitive disadvantage to the Company. In requesting amendments, Cablevision shall file with the Board of Public Utilities a petition for approval in accordance with N.J.S.A. 48:5A-47 and N.J.A.C. 14:17-6.7 seeking to amend the Ordinance. Such petition shall: i) indicate the presence of a non-franchised competitor(s); ii) identify the basis for Cablevision's belief that certain provisions of this franchise place it at a competitive disadvantage; and iii) identify the regulatory burdens to be amended or repealed in order to eliminate the competitive disadvantage. The Borough shall not unreasonably withhold or object to granting the Company's petition.

C. In any subsequent municipal consent, the Borough shall require, at a minimum, the same terms and conditions of any other provider of multi-channel video programming subject to the Borough's regulatory authority as those contained in the instant consent. In the event such subsequent consent does not contain the same terms and conditions as the instant consent, the Borough agrees to support the Company's petition to the Board for modification of the consent in accordance with NJSA 48:5A-47 and NJAC 14:17-6.7 to relieve the Company of competitive disadvantages identified in the Company's petition.

SECTION 19. REMOVAL OF FACILITIES

Upon expiration, termination or revocation of this Ordinance, Cablevision at its sole cost and expense and upon direction of the Board, shall remove the cables and appurtenant devices constructed or maintained in connection with the services authorized herein, unless Cablevision, its affiliated entities or assignees should, within six (6) months after such expiration, termination or revocation obtain certification from the FCC to operate an open video system or any other federal or state certification to provide telecommunications.

SECTION 20. PUBLIC, EDUCATIONAL, AND GOVERNMENTAL ACCESS

Cablevision shall continue to make available non-commercial public, educational and governmental (PEG) access as described in the Application for municipal consent.

The Borough agrees that the Company shall retain the right to use the PEG access channel, or portion thereof, for non-PEG access programming, during times when the Borough is not utilizing the channel for purposes of providing PEG access programming. In the event that the Company uses said PEG access channel for the presentation of such other programming, the PEG programming shall remain the priority use and the Company's rights with respect to using the channel for non-PEG programming shall be subordinate to the Borough provision of PEG access programming on such channel.

Within ninety (90) days from the effective date of this franchise, Cablevision shall provide and maintain one access return line at Madison Public Library located at 39 Keep Street in Madison, NJ for the production of non-commercial educational and governmental access programming on the cable system. Upon request of the Borough, Cablevision shall provide access training at least once every year.

In consideration for the rights granted by this Ordinance, Cablevision shall provide the Borough with an initial one-time grant of ten thousand dollars ($10,000.00) (the "Initial Grant"). Such amount shall be paid within sixty (60) days following the grant of the Certificate from the Board. The Grant may be used by the Borough for any cable and/or other telecommunications related purpose as the Borough, in its discretion, may deem appropriate. Beginning in year two of the franchise (measured by the Certificate of Approval) and annually thereafter through year ten of the franchise, Cablevision shall provide the Borough with an annual amount of one thousand five hundred dollars ($1,500.00) (the "Annual Grant"). Cablevision shall not be obligated to make any additional payments beyond year ten of the franchise. The Annual Grant shall be payable to the Borough within sixty (60) days from receipt of the Borough's written request. Notwithstanding the foregoing, should Cablevision apply for a system-wide certification or otherwise convert its municipal consent to a system-wide certification in accordance with applicable law, it shall be relieved of any payments due and owing after the date of such conversion or award of a system-wide franchise, with the exception of the Initial Grant.

SECTION 21. INCORPORATION OF APPLICATION

All of the commitments contained in the Application and any amendment thereto submitted in writing to the Borough by the Company except as modified herein, are binding upon Cablevision as terms and conditions of this consent. The Application and any other written amendments thereto submitted by Cablevision in connection with this consent are incorporated in this Ordinance by reference and made a part hereof, except as specifically modified, changed, limited, or altered by this Ordinance, or to the extent that they conflict with State or federal law.

SECTION 22. CONSISTENCY WITH APPLICABLE LAWS

This consent shall be construed in a manner consistent with all applicable federal, State and local laws.

SECTION 23. SEPARABILITY

If any section, subsection, sentence, clause, phrase, or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portion thereof.

SECTION 24. EFFECTIVE DATE

This Ordinance shall take effect upon issuance of a Certificate of Approval as issued by the Board of Public Utilities.

SECTION 25. WRITTEN REQUEST

The execution hereof by the Mayor of Madison shall fulfill the requirement to provide written notice as specified throughout the Agreement.

BE IT FURTHER ORDAINED that this Ordinance shall take effect upon the passage, and publication as required by law.

ADOPTED AND APPROVED
October 10, 2007

Ellwood R Kerkeslager
ELLWOOD R. KERKESLAGER, Mayor

Attest:

Marilyn Schaefer
MARILYN SCHAEFER, Borough Clerk

Introduced and passed: September 10, 2007
Published, Madison Eagle: September 13, 2007
Hearing and final adoption: October 10, 2007
Published, Madison Eagle: October 18, 2007

I, Marilyn Schaefer, Clerk of the Borough of Madison in the County of Morris and State of New Jersey, hereby certify the foregoing to be a true and exact copy of an Ordinance finally adopted at a Regular Meeting of the Council held on this 10th day of October, 2007

Marilyn Schaefer
Marilyn Schaefer, Borough Clerk

Schedule A: Preliminary List of Properties per Section 10

1. Hartley Dodge Memorial Building
2. Madison Fire and Police Building
3. Madison Public Works Building
4. Madison Free Public Library Building
5. Madison Civic Center, 28 Walnut Street
6. Madison Housing Authority
7. Madison High School
8. Madison Junior High School
9. Kings Road School
10. Torey J. Sabatini School
11. Central Avenue School
12. Green Village Road School
13. Bayley Ellard School
14. Museum of Early Trades and Crafts
15. Madison Public Schools Administrative Building
16. St. Vincent Martyr School
17. 22 Central Avenue
18. Madison Electric Department

Agenda Date: 06/13/08
Agenda Item: IIIA

STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.nj.gov/bpu

CABLE TELEVISION

IN THE MATTER OF THE PETITION OF CSC TKR, INC. D/B/A CABLEVISION OF MORRIS FOR RENEWAL OF A CERTIFICATE OF APPROVAL TO CONTINUE TO OPERATE AND MAINTAIN A CABLE TELEVISION SYSTEM IN THE BOROUGH OF MADISON, COUNTY OF MORRIS, STATE OF NEW JERSEY	)	RENEWAL CERTIFICATE OF APPROVAL
	)	DOCKET NO. CE08020097

(SERVICE LIST ATTACHED)

BY THE BOARD:

On February 13, 1975, the Board granted Morris Cablevision a Certificate of Approval, in Docket No. 748C-6042, for the construction, operation and maintenance of a cable television system in the Borough of Madison ("Borough"). Through a series of transfers with required Board approvals, Sammons Communications of New Jersey, Inc. ("Sammons") became the holder of the Certificate. On July 30, 1997, the Board issued a Renewal Certificate of Approval to Sammons in Docket No. CE94110522. Through a series of subsequent transfers with the required Board approvals, the current holder of the Certificate is CSC TKR, Inc. d/b/a Cablevision of Morris ("Petitioner"). Although by its terms the Petitioner's above referenced Certificate expired on August 13, 2007, the Petitioner is authorized to continue to provide cable television service to the Borough pursuant to N.J.S.A. 48:5A-25, pending disposition of proceedings regarding the renewal of its Certificate of Approval.

The Petitioner filed an application for the renewal of its municipal consent with the Borough on January 9, 2007, pursuant to N.J.S.A. 48:5A-23 and N.J.A.C. 14:18-13. The Borough, after public hearing, adopted a municipal ordinance granting renewal consent on October 10, 2007. On January 11, 2008, the Petitioner formally accepted the terms and conditions of the ordinance.

On February 19, 2008, pursuant to N.J.S.A. 48:5A-16, the Petitioner filed with the Board for a renewal of its Certificate of Approval for the Borough. The Board has reviewed the application for municipal consent, the petition for a Renewal Certificate of Approval and the municipal consent ordinance. Based upon this review and the recommendation of the Office of Cable Television, the Board **HEREBY FINDS** the following:

1 The Petitioner possesses the requisite legal, character, financial and technical qualifications for the awarding of a Renewal Certificate of Approval. Further, the Borough reviewed these qualifications in conjunction with the municipal consent process.

2. The design and technical specifications of the system shall ensure that the Petitioner provides safe, adequate and proper service.

3. The Petitioner has represented that all previously required construction within the franchise territory is complete.

4. The franchise period as stated in the ordinance is ten years from the date of issuance of this Certificate. The Board finds this period to be of reasonable duration.

5. The Petitioner's rates shall be regulated and tariffs shall be filed for all services, in accordance with the rules and regulations of the Federal Communications Commission, the Board and the Office of Cable Television. The Petitioner shall maintain an informational schedule of prices, terms and conditions for unregulated service, and shall promptly file any revisions thereto.

6. Pursuant to statutory requirements, the ordinance specifies a complaint officer to receive and act upon complaints filed by subscribers in the Borough. In this case, it is the Office of Cable Television. All complaints shall be received and processed in accordance with the applicable rules.

7. The Petitioner shall maintain a local business office or agent for the purpose of receiving, investigating and resolving complaints. The current local office is located at 683 Route 10 East, Randolph, New Jersey.

8. The franchise fee to be paid to the Borough is specified to be 2% of the Petitioner's gross revenues from all recurring charges in the nature of subscription fees paid by subscribers for its cable television reception service in the Borough, and shall be increased as required by N.J.S.A. 48:5A-30. Additional regulatory fees shall be paid to the State in an amount not to exceed 2% of Petitioner's gross operating revenues derived from intrastate operations. The Board finds these fees to be reasonable.

9. The Petitioner shall install cable in all residences in the Borough at tariffed rates for standard and non-standard installation. Installations to commercial establishments shall be constructed in accordance with the Petitioner's commercial line extension policy attached to this Certificate as Appendix "I."

10. The Petitioner shall provide public, educational and governmental ("PEG") access channels and facilities in accordance with its renewal application and the ordinance. Specifically, the ordinance requires the Petitioner to make available non-commercial PEG access as set forth in the application. The application provides that the Petitioner has two channels for PEG access use: one channel carries non-commercial government/community access and the other channel, currently coordinated by the County College of Morris, carries educational access. These channels may be shared with other municipalities in the system. In addition, the Petitioner maintains a public access studio located in Randolph Township, which is equipped with video and audio recording/playable equipment for public access use. The Petitioner conducts workshops to instruct interested community members in the aspects of operating the studio.

11 Within 90 days from the date of this Certificate, the Petitioner shall provide, and once provided shall maintain, one access return line at Madison Public Library located at 39 Keep Street for the production of non-commercial educational and governmental access programming on the cable television system. Upon request of the Borough, the Petitioner shall provide training in the use of the access studio at least once per year.

12. Within 60 days of the date of this Certificate, the Petitioner shall provide the Borough with a capital contribution for cable and/or telecommunications related purposes in the amount of $10,000.00. Beginning in year two of the franchise as measured from the date of this Certificate, and within 60 days of a written request by the Mayor of the Borough following the anniversary date, the Petitioner shall pay to the Borough an annual grant in the amount of $1,500.00 for cable and/or telecommunications related purposes through year ten. The Petitioner shall be relieved of any remaining payments if it converts its system to a system-wide franchise as authorized by N.J.S.A. 48:5A-25.1a. Upon payment of each portion of the contribution, the Petitioner shall provide the Office of Cable Television with proof of satisfaction of this obligation.

13. Upon issuance of this Certificate, and following issuance, within 90 days' written request of the Mayor of the Borough, the Petitioner shall provide, and, once provided, shall maintain one standard installation and monthly cable service, free of charge, to all state and local accredited public, private and parochial schools and all municipal buildings used for governmental purposes which list shall include but not be limited to: Hartley Dodge Memorial Building, Madison Fire and Police Building, Madison Public Works Building, Madison Free Public Library Building, Madison Civic Center, Madison Housing Authority, Madison High School, Madison Junior High School, Kings Road School, Torey J. Sabatini School, Central Avenue School, Green Village Road School, Bayley Ellard School, Museum of Early Trades and Crafts, Madison Public Schools Administrative Building, St. Vincent Martyr School 22 Central Avenue and Madison Electric Department. Upon completion of all installations, the Petitioner shall provide proof of satisfaction of this obligation.

14. Upon issuance of this Certificate, and within 90 days' written request of the Mayor of the Borough, the Petitioner shall provide, free of charge, one high-speed cable modem and monthly Internet access service, including standard installation, to all state or locally accredited public, private and parochial elementary and secondary schools and to all municipal public libraries in the Borough. Each school and library shall be permitted, at its own cost, to network up to 25 computers to the cable modem provided by the Petitioner. Upon completion of all installations, the Petitioner shall provide proof of satisfaction of this obligation.

15. Upon issuance of this Certificate, and within 90 days' written request of the Mayor of the Borough, the Petitioner shall provide, free of charge, one high-speed cable modem and monthly Internet access service, including standard installation, to one municipal location used for government purposes in the Borough. The Borough shall be permitted, at its own cost, to network up to four computers to the cable modem provided by the Petitioner. Upon completion, the Petitioner shall provide proof of satisfaction of this obligation.

16. The Petitioner shall implement a senior citizens' discount program in the Borough in the amount of 10% off the monthly rate for basic service for senior citizens who meet the income and residency requirements of the Pharmaceutical Assistance to the Aged and Disabled ("PAAD") program, as allowed by N.J.S.A. 48:5A-11.2. If the Petitioner shall be required to increase the franchise fee in accordance with N.J.S.A. 48:5A-30d, then at such time as the new fee is implemented, the Petitioner shall no longer be obligated to maintain or offer a senior citizens' discount.

Based upon these findings, the Board **HEREBY CONCLUDES**, pursuant to N.J.S.A. 48:5A-17(a) and 28(c), the Petitioner has the municipal consent necessary to support the petition, that such consent and issuance thereof are in conformity with the requirements of N.J.S.A. 48:5A-1 et seq., that the Petitioner has complied or is ready, willing and able to comply with all applicable rules and regulations imposed by or pursuant to State or federal law as preconditions for engaging in the proposed cable television operations, that the Petitioner has sufficient financial and technical capacity, meets the legal, character and other qualifications necessary to construct, maintain and operate the necessary installations, lines and equipment, and is capable of providing the proposed service in a safe, adequate and proper manner.

Therefore, the Petitioner is **HEREBY ISSUED** this Renewal Certificate of Approval as evidence of Petitioner's authority to construct and operate a cable television system within the entirety of the Borough.

This Renewal Certificate is subject to all applicable State and federal laws, the rules and regulations of the Office of Cable Television, and any such lawful terms, conditions and limitations as currently exist or may hereafter be attached to the exercise of the privileges granted herein. The Petitioner shall adhere to the standards set forth by the Federal Communications Commission's rules and regulations, 47 C.F.R. §76.1 et seq., including but not limited to, the technical standards of 47 C.F.R. §76.601 through §76.630. Any modifications to the provisions thereof shall be incorporated into this Certificate.

Failure to comply with all applicable laws, rules, regulations and orders of the Board or Office of Cable Television and/or the terms, conditions and limitations set forth herein may constitute sufficient grounds for the suspension or revocation of this Certificate.

This Renewal Certificate is issued on the representation that the statements contained in the Petitioner's applications are true, and the undertakings therein contained shall be adhered to and enforceable unless specific waiver is granted by the Office of Cable Television pursuant to the authority contained in N.J.S.A. 48:5A-1 et seq.

This Certificate shall expire ten years from the date of its issuance.

DATED: 6/16/08

BOARD OF PUBLIC UTILITIES
BY:

Jeanne M. Fox
JEANNE M. FOX
PRESIDENT

Frederick F. Butler
FREDERICK F. BUTLER
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

Christine V. Bator
CHRISTINE V. BATOR
COMMISSIONER

NICHOLAS ASSELTA
COMMISSIONER

ATTEST:

Kristi Izzo
KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

Kristi Izzo

APPENDIX "I"
CSC TKR, INC. D/B/A CABLEVISION OF MORRIS
BOROUGH OF MADISON

COMMERCIAL LINE EXTENSION RATE POLICY

1. Intent. It is the intent of CABLEVISION that a rate policy be established under which any businesses within the company's franchise areas would have the opportunity to obtain cable television service.

2. Applicability. This line extension rate shall apply to all cable television service extensions, aerial and underground, on public and private lands, provided by CABLEVISION.

3. Definitions.

(a) Line or Service. That situation where the company must extend its existing trunk line and/or distribution cable in order to make a tap available from which a drop line can be run so as to provide cable television service to the applicant's premises. The line or service extension shall include, but not be limited to, all poles, cables, amplifiers, extenders, splitters, taps, right-of-way acquisitions and clearing, trenching, backfilling and any other one-time costs incurred by CABLEVISION in connection with extending service to the applicant. A line or service extension shall not include facilities provided by CABLEVISION pursuant to its applicable installation rates then existing.

(b) Applicant. Any person, firm, corporation or association that applies to CABLEVISION for service to a commercial establishment in the franchise area.

(c) Commercial Establishment. Any building or structure, or portion thereof, not used for residential purposes including, but not limited to, profit and non-profit corporations or associations, which has requested the installation of cable television service requiring line or service extension as defined herein.

(d) Drop Line. That cable which connects the subscriber's television receiver to the cable transmission system by way of a tap.

(e) Tap. A connecting device inserted in the cable transmission line which allows for the connection of a drop line. An aerial or underground "drop line" constitutes a transmission cable running from the distribution or feeder cable to the subscriber's connection or receiver.

(f) Trunk Line. Transmission cable running from headend to trunk amplifiers and through each trunk amplifier in cascade in the system from which connections for distribution and feeder cable are provided.

(g) Distribution or Feeder Cable. Transmission cable which extends from the distribution amplifiers serving specific areas within the system and from which drop lines are extended.

(h) Qualified Subscriber. Any applicant who, as a potential subscriber, has committed to purchase at least the basic service from CABLEVISION for a period of not less than two (2) years.

4. Schedule.

(a) Within thirty (30) days after the date on which the service is requested, but not more than ninety (90) days from the date upon which the request for service was made, CABLEVISION shall furnish the applicant with (1) an estimate request form, (2) a copy of this line extension policy, and (3) notification that service can only be provided by means of a line or service extension.

(b) If the applicant requests a written estimate within thirty (30) days after being advised that service can only be provided by means of a line or service extension, CABLEVISION shall, within sixty (60) days of such request, furnish a written estimate, a construction schedule, and a service extension contract to be signed by the applicant.

(c) The applicant must return a signed service extension agreement within thirty (30) days after receipt of the material described in Paragraph (b) together with a check in the amount of $50.00 representing a service extension deposit which will be credited against the applicant's contribution in aid of construction invoice to the applicant which must be signed and returned to CABLEVISION with the full payment before construction will commence.

(d) If the applicant fails to meet any of the applicable deadlines or any of the terms herein before set forth without the approval of CABLEVISION, any obligations pertaining to the proposed line or service extension shall cease and be of no further force or effect.

5. Commercial Line Extension Rate Charges.

A commercial establishment requesting line or service extension shall bear all of the following costs to make a tap available from which a drop line may be installed:

(a) The actual cost to CABLEVISION of materials and equipment necessary to make service available plus shipping charges and applicable taxes.

(b) The actual labor costs incurred by CABLEVISION, exclusive of benefits.

(c) The actual costs of designs, surveys, prints and engineering or other such labor involved in the preparation or actual construction required.

(d) The direct costs of any easements, make-ready or other third party actions required to perform and complete construction such as, but not limited to, power companies, telephone companies, road work, trenching or the like.

(e) In addition, the applicant shall pay to CABLEVISION a sum equal to twenty percent (20%) of the entire actual cost of construction as set forth above.

(f) In the event additional commercial subscribers come on-line in an area in which service extension has been provided in accordance herewith, each additional subscriber shall, in addition to the applicable installation rate, be required to contribute their pro-rata share of the original construction costs. Said pro-rata share shall be derived by dividing the original construction cost by the number of then existing on-line subscribers including the additional subscriber(s).

(g) Any funds collected from additional subscribers will be retained by CABLEVISION in an interest-bearing account and distributed equitably so as to equalize all subscriber construction contributions. Distribution will be made two years after the original service extension was provided. After said two year period, there shall be no further apportionment of the original construction cost.

6. Record Keeping and Annual Reports. CABLEVISION shall maintain appropriate records of its costs, subscriber and applicant billings, and revenues resulting from a request for or the construction of a service extension.

7. Ownership of Facilities. CABLEVISION shall own and maintain the facilities for which a service extension is made and any applicant-subscriber shall not acquire any interest herein.

8. Method of Service Extension. CABLEVISION reserves the right to provide either an aerial or underground service extension.

9. Term of Service. The minimum term of at least basic subscriber service for an applicant requesting service extension, or his successors and assigns, shall be twenty-four (24) months after the service extension has been energized. Said term shall be guaranteed by the applicant in the service extension contract specified in Paragraph 4(c) hereof.

SERVICE LIST

James Eric Andrews, Esq.
Schenck, Price, Smith & King
10 Washington Street
Morristown, NJ 07963

Marilyn Schaefer
Borough Clerk
Borough of Madison
Hartley Dodge Memorial Building
50 Kings Road
Madison, NJ 07940

Adam Falk
Vice President
Government and Public Affairs – NJ
Cablevision
683 Route 10 East
Randolph, NJ 07683

Babette Tenzer
Deputy Attorney General
Division of Law
124 Halsey Street
Newark, NJ 07102

Celeste M. Fasone, Director
Office of Cable Television
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Karen A. Marlowe
Administrative Analyst I
Office of Cable Television
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

CABLEVISION

Adam Falk
Vice President
Government & Regulatory Affairs

July 19, 2010

Ms. Celeste Fasone, Director
Board of Public Utilities
Office of Cable Television
2 Gateway Center
Newark, NJ 07102

VIA FEDERAL EXPRESS

Dear Director Fasone:

Pursuant to Section 19 of P.L. 2006, c. 83, CSC/TKR, LLC d/b/a Cablevision of Morris("Cablevision") hereby provides notice to the Board and the affected municipalities of its conversion, effective on receipt of this notice, of the municipal consent and accompanying certificate of approval to a system-wide franchise for the following communities: Hanover Township, Borough of Madison, and Town of Morristown.

In accordance with Board rules implementing P.L. 2006, c. 83, Cablevision hereby confirms that it will abide by the provisions of N.J.S.A. 48:5A-28h through 28n.

If you have any questions, please do not hesitate to contact the undersigned.

Very Truly Yours,

Adam E. Falk

Adam E. Falk, Vice President of
Government and Regulatory Affairs

cc: Township of Hanover, Borough of Madison, Town of Morristown

Agenda Date: 9/16/10
Agenda Item: IIIB

STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center, Suite 801
Newark, NJ 07102
www.nj.gov/bpu/

CABLE TELEVISION

IN THE MATTER OF CSC TKR, LLC FOR THE CONVERSION TO A SYSTEM-WIDE FRANCHISE IN FIVE MUNICIPALITIES: THE TOWNSHIP OF HANOVER, THE BOROUGH OF MADISON, THE BOROUGH OF MANVILLE, THE TOWN OF MORRISTOWN AND THE BOROUGH OF SOMERVILLE	)	SECOND ORDER OF AMENDMENT
	)	DOCKET NO. CE10010024

Adam Falk, Vice President, Government and Regulatory Affairs, Cablevision Systems Corporation, Bethpage, New York, for CSC TKR, LLC

Township Clerk/Administrator, Township of Hanover, New Jersey, by Joseph Giorgio;
Borough Clerk, Borough of Madison, New Jersey, by Elizabeth Osborne;
Borough Clerk, Borough of Manville, New Jersey by Philip Petrone;
Town Clerk, Town of Morristown, New Jersey, by Matthew Stechauner; and
Borough Clerk/Administrator, Borough of Somerville, New Jersey, by Kevin Sluka, for the municipalities.

BY THE BOARD:

On February 11, 2010, the Board issued an order memorializing the conversion by CSC TKR, LLC of its municipal consent-based franchise in the Borough of Allentown to a System-wide Franchise in the above referenced docket number for a term of seven years to expire on January 11, 2017. On August 4, 2010, the Board issued an Order of Amendment to include five additional municipalities: the Township of Denville, the Town of Dover, the Borough of Morris Plains, the Township of Rockaway and the Township of Warren.

Pursuant to N.J.S.A. 48:5A-25.1 and N.J.A.C. 14:18-14.13, a cable television operator with a municipal consent-based franchise or franchises issued prior to the effective date of the Act may automatically convert any or all of its municipal consent-based franchises upon notice to the Board and to the affected municipality or municipalities. In addition, pursuant to N.J.A.C. 14:18-14.14, a cable television company operating under a system-wide franchise may add municipalities to its system-wide franchise upon notice to the affected municipality or municipalities and the Board.

On July 19, 2010, CSC TKR, LLC filed notice with the Township of Hanover, the Borough of Madison, the Borough of Manville, the Town of Morristown and the Borough of Somerville (collectively, "the municipalities") that it would convert its municipal consent ordinance-based franchises in the municipalities, thereby making them part of its CSC TKR, LLC system-wide franchise; and confirmed that it would abide by the provisions of N.J.S.A. 48:5A-28 (h)-(n), as required by the System-wide Cable Television Franchise Act. That notice was received by the Board on July 20, 2010.

DISCUSSION

Under N.J.S.A. 48:5A-25.1, a cable television operator with a municipal consent-based franchise or franchises issued prior to the effective date of P.L.2006 c. 83 may automatically convert any or all of its municipal consent-based franchises upon notice to the Board and to the affected municipality without meeting the requirements applicable to cable television operators applying for a system-wide franchise, except that the commitment requirements under N.J.S.A. 48:5A-28 (h)-(n) shall be applicable to all system-wide franchises, including conversions. N.J.S.A. 48:5A-28(h)-(n) impose requirements on all cable television companies operating under a system-wide franchise and includes commitments as to line extensions; public, educational and governmental ("PEG") access channels; interconnection with other cable television companies; free cable and Internet service to public schools and municipal buildings; training and equipment for access users; PEG access return feeds; and compliance with customer protection regulations. As noted above, CSC TKR, LLC has committed to provide service to the municipalities as required by these provisions.

DISPOSITION OF CERTIFICATE OF APPROVAL AND UNDERLYING MUNICIPAL CONSENT

As discussed above, the Act allows a cable television company, operating under a municipal consent ordinance-based franchise, to "automatically convert" its system in any or all of its municipalities without approval from the Board or the impacted municipalities. N.J.S.A. 48:5A-25.1(a). Furthermore, N.J.S.A. 48:5A-19 provides that a "certificate of approval issued by the board shall be valid for 15 years from the date of issuance… or until the expiration, revocation, termination or renegotiation of any municipal consent upon which it is based, whichever is sooner."

CSC TKR, LLC's Certificate of Approval and the underlying municipal consent ordinance in the Township of Hanover expired on October 17, 2007. CSC TKR, LLC initiated renewal proceedings with the Township of Hanover and was thereby authorized to continue to provide cable television service to the Township pursuant to N.J.S.A. 48:5A-25, pending disposition of the proceedings regarding the renewal of its Certificate. Because CSC TKR, LLC has now converted the Township of Hanover's municipal consent based-franchise to a system-wide franchise, pursuant to N.J.S.A. 48:5A-19 and N.J.S.A. 48:5A-25.1(a), the Board **FINDS** that CSC TKR, LLC's Certificate of Approval for the Township of Hanover has expired by operation of law.

CSC TKR, LLC's Certificates of Approval and the underlying municipal consent ordinances in the Borough of Madison was set to expire on June 16, 2018; in the Borough of Manville on April 3, 2019; in the Town of Morristown on May 9 2023; and in the Borough of Somerville on October 25, 2013. Because CSC TKR, LLC has now converted these municipal consent based-franchises to a system-wide franchise, pursuant to N.J.S.A. 48:5A-19 and N.J.S.A. 48:5A-

25.1(a), the Board **FINDS** that CSC TKR, LLC's Certificates of Approval for the Borough of Madison, the Borough of Manville, the Town of Morristown and the Borough of Somerville are hereby terminated.

CSC TKR, LLC is authorized to provide cable television service to the municipalities, pursuant to its converted System-wide franchise and the requirements of N.J.S.A. 48:5A-28(h)-(n) and applicable law.

With regard to N.J.S.A. 48:5A-28(h), a system-wide cable television franchise operator is required to meet or exceed the line extension policy ("LEP") commitments of the cable television company operating under a municipal consent ordinance-based franchise at the time the franchise is granted. Therefore, because CSC TKR, LLC was the incumbent municipal consent-based franchise holder in these municipalities, it is required to continue to provide, at a minimum, service to any residence in the five municipalities in accordance with its policies in effect at the time of conversion. Accordingly, CSC TKR, LLC shall provide service to the primary service area ("PSA") of each municipality at no cost beyond the installation rates as contained in its schedule of prices, rates, terms and conditions on file with the Board. In the Borough of Madison, CSC TKR, LLC shall extend cable television service to all residents in the Borough at no cost beyond standard and non-standard installation rates; no LEP shall be used. In the Township of Hanover, the Borough of Manville, the Town of Morristown, and the Borough of Somerville, CSC TKR, LLC shall provide service outside its PSA in accordance with the LEP attached to the original order with a homes per mile figure ("HPM") of 25.

Based upon the elements of the System-wide Franchise, and the legal mandates under which the Board operates, this Order **HEREBY COMMEMORATES** the addition of the municipalities to CSC TKR, LLC's System-wide Franchise.

This Second Order of Amendment to the System-wide Franchise serves to add the Township of Hanover, the Borough of Madison, the Borough of Manville, the Town of Morristown and the Borough of Somerville to CSC TKR, LLC's System-wide Franchise, and does not, in any manner, modify, change or otherwise affect the terms and conditions of that February 11, 2010 Order, except with respect to maintaining the Borough of Madison as a full residential build.

Without limitations to the full requirements set forth in that Order, the Board reminds CSC TKR, LLC that, under the System-wide Franchise, it is subject to all applicable State and federal laws, the rules and regulations of the Office of Cable Television, and any such lawful terms, conditions and limitations as currently exist or may hereafter be attached to the exercise of the privileges granted herein. To the extent possible based upon the technology used in providing service, CSC TKR, LLC shall adhere to the operating standards set forth by the Federal Communications Commission's rules and regulations, 47 C.F.R. §76.1 et seq. including but not limited to, the technical standards 47 C.F.R. §76.601 through §76.630. Any modifications to the provisions thereof shall be incorporated into the System-wide Franchise.

Failure to comply with all applicable laws, rules, regulations and orders of the Board or the Office of Cable Television and/or the terms, conditions and limitations set forth herein may subject CSC TKR, LLC to penalties, as enumerated in N.J.S.A. 48:5A-51, and/or may constitute sufficient grounds for the suspension or revocation of the System-wide Franchise.

This Second Order of Amendment to the System-wide Franchise is issued on the representation that the statements contained in CSC TKR, LLC's applications, notices, and other writings are true, and the undertakings therein contained shall be adhered to and be enforceable unless

specific waiver is granted by the Board or the Office of Cable Television pursuant to the authority contained in N.J.S.A. 48:5A-1 et seq.

DATED: 9/16/10

BOARD OF PUBLIC UTILITIES
BY:

LEE A. SOLOMON
PRESIDENT

JEANNE M. FOX
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

NICHOLAS ASSELTA
COMMISSIONER

ELIZABETH RANDALL
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

SERVICE LIST

IN THE MATTER OF CSC TKR, LLC FOR THE CONVERSION TO A SYSTEM-WIDE CABLE TELEVISION FRANCHISE FOR THE TOWNSHIP OF DENVILLE, THE TOWN OF DOVER, THE BOROUGH OF MORRIS PLAINS, THE TOWNSHIP OF ROCKAWAY AND THE TOWNSHIP OF WARREN

SECOND ORDER OF AMENDMENT
DOCKET NO. CE10010024

Adam Falk, Vice President
Government and Public Affairs
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NY 11714-3581

Sidney Sayovitz, Esq.
Schenck, Price, Smith & King
PO Box 991
Florham Park, NJ 07932-0991

Joseph Giorgio, Township Clerk
Township of Hanover
PO Box 250
Whippany, NJ 07981-0250

Elizabeth Osborne, Borough Clerk
Borough of Madison
50 Kings Road
Madison, NJ 07940

Philip Petrone, Borough Clerk
Borough of Manville
325 North Main Street
Manville, NJ 08835-1800

Matthew Stechauner, Town Clerk
Town of Morristown
PO Box 914
Morristown, NJ 07963-0914

Kevin Sluka, Township Clerk
Borough of Somerville
PO Box 399
Somerville, NJ 08876-1800

Celeste Fasone, Director
Board of Public Utilities
Office of Cable Television
Two Gateway Center
Newark, NJ 07102

Alex Moreau
Deputy Attorney General
State of New Jersey, Division of Law
124 Halsey Street
P.O. Box 45029
Newark, New Jersey 07101

Karen A. Marlowe
Administrative Analyst I
Board of Public Utilities
Office of Cable Television
Two Gateway Center
Newark, NJ 07102

Stefanie A. Brand, Director
Division of Rate Counsel
31 Clinton Street, 11th Floor
Newark, NJ 07102

Chris White, Esq.
Division of Rate Counsel
31 Clinton Street, 11th Floor
Newark, NJ 07102

From:	Marilyn D. Davis
To:	Leo Lopez; Gina Dickens; John Lynn; Craig McLeod; Alexis Reyes Munoz; Francine Tricarico; Pasquale Correale; Robert Hoch
Cc:	Bruno Genova
Subject:	Re: External E-mail - Madison NJ
Date:	Monday, November 29, 2021 4:10:21 PM
Attachments:	image001.png

+Rob for awareness

M

From: Leo Lopez <Leo.Lopez@AlticeUSA.com>
Sent: Monday, November 29, 2021 4:00 PM
To: Gina Dickens <GinaDickens@excellcommunications.com>; John Lynn <John.Lynn@AlticeUSA.com>; Craig McLeod <Craig.McLeod@AlticeUSA.com>; Alexis Reyes Munoz <Alexis.ReyesMunoz@AlticeUSA.com>; Francine Tricarico <Francine.Tricarico@AlticeUSA.com>; Pasquale Correale <Pasquale.Correale@AlticeUSA.com>
Cc: Marilyn D. Davis <Marilyn.Davis16@AlticeUSA.com>; Bruno Genova <BGenova@genovaburns.com>
Subject: RE: External E-mail - Madison NJ

Marilyn, I know this was an issue a few months ago, and Alexis provided all pole info then. Could you please advise on this situation as it is greatly affecting our commitments for this year.

From: Gina Dickens [mailto:GinaDickens@excellcommunications.com]
Sent: Monday, November 29, 2021 3:33 PM
To: John Lynn <John.Lynn@AlticeUSA.com>; Craig McLeod <Craig.McLeod@AlticeUSA.com>; Alexis Reyes Munoz <Alexis.ReyesMunoz@AlticeUSA.com>; Leo Lopez <Leo.Lopez@AlticeUSA.com>; Francine Tricarico <Francine.Tricarico@AlticeUSA.com>
Cc: Helder Pereira <helderpereira@excellcommunications.com>; FTTH Directors <FTTHDirectors@excellcommunications.com>; Bonnie Powers <bonniepowers@excellcommunications.com>; Stacey Arndall <staceyarndall@excellcommunications.com>; Alfonso Alaimo <AlfonsoAlaimo@excellcommunications.com>; Anthony Aber <AnthonyAber@excellcommunications.com>
Subject: External E-mail - Madison NJ

[External Email]

Caution: This email originated outside of Altice USA. Please do not click links or attachments unless you recognize the sender and know the content is safe.

Just spoke with Madison Borough Admin and he has instructed the Police to cease detail due

to fact Madison owns the utility poles and there is no Permit to attach cable to their poles. Please contact Ray Codey 973 593-3038.

VennDiagram

Gina Dickens
ginadickens@excellcommunications.com
23 Willis Ave
Syosset NY 11791
Cell: 917 841-3382
www.excellcommunications.com
Telecom & Connectivity Services

POLE ATTACHMENT AGREEMENT

DATED _____

BETWEEN

THE BOROUGH OF MADISON (LICENSOR)

AND

CSC TKR LLC, a wholly owned subsidiary of CSC Holdings LLC (aka Altice)
(LICENSEE)

POLE ATTACHMENT AGREEMENT

THIS AGREEMENT, made as of the_____day of_____20____, between the Borough of Madison, a municipal corporation, 50 Kings Road, Madison, New Jersey ("Licensor") and CSR TKR, LLC, a wholly owned subsidiary of CSC Holdings, LLC One Court Square West, Long Island City, NY 11101 (hereinafter called "Licensee" aka "Altice").

W I T N E S S E T H

WHEREAS, Licensee for its own use desires to place and maintain cables, equipment and facilities on Poles of Licensor; and

WHEREAS, Licensor is willing to permit the placement of said cables, equipment and facilities on its Poles.

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, the parties do hereby mutually covenant and agree as follows:

ARTICLE I

SCOPE OF AGREEMENT

Subject to the provisions of this Agreement, the Licensor will issue to Licensee for any lawful purpose revocable, nonexclusive licenses authorizing the attachment of Licensee's equipment and facilities to Licensor's Poles in the Borough of Madison.

ARTICLE II

DEFINITIONS

1. Anchor

A facility consisting of an assembly of a rod secured to a fixed object or plate designed to resist the pull of a guy strand or strands.

2. Anchor Attachment

A guy strand attached to an Anchor solely owned or jointly owned by Licensor or for which Licensor is responsible for authorizing attachments.

3. Appurtenance Attachment

Any article of equipment attached to a point on a Pole not normally occupied by a strand attachment (i.e. equipment cabinets, terminals, etc.).

4. Licensor

The owner or custodian of a Pole and the only party permitted to issue licenses to that Pole and its associated Anchor(s).

5. Licensee

The person, corporation or other legal entity authorized by the Licensor under this Agreement to attach its facilities to Pole and Anchor and the party responsible for compliance with Licensor's regulations regarding such accommodations.

6. Licensee's Facilities

The cables and all associated equipment and hardware installed for the sole use of the Licensee.

7. Guy Strand

A metal cable (facility) which is attached to a Pole and Anchor (or another Pole) for the purpose of reducing Pole stress.

8. Joint Owner

A person, corporation or other legal entity having an ownership interest in a Pole and/or Anchor with the Licensor.

9. Joint User

A party who owns Poles or Anchors to which the Licensor is extended or may hereafter be extended joint use privileges, or to which the Licensor has extended or may hereafter extend joint use privileges of the Licensor's Poles or Anchors. The term "Joint User" shall not include Licensees.

10. Make-Ready Work

All work, including but not limited to rearrangement and / or transfer of existing facilities, replacement of a Pole or any other changes required to accommodate the attachment of Licensee's facilities to a Pole or any other changes required to accommodate the attachment of Licensee's facilities to a Pole or Anchor.

11. Other Licensees

Any person, corporation, or other legal entity other than the Licensee herein, to whom the Licensor has or hereafter shall extend an authorization to attach facilities to a Pole or Anchor.

12. Periodic Inspection

Inspections conducted at scheduled intervals on portions of Licensee's facilities, to determine that attachments are authorized and that attachments are maintained in conformance with the required standards.

13. Pole Attachment

Any of Licensee's facilities in direct contact with or otherwise supported by a Pole.

14. Post-Construction Inspection

The work operations and functions performed to measure and/or visually observe Licensee's attachments, during or shortly after completion of the construction of such facilities, to determine that all attachments have been authorized and construction conforms to the standards required by this Agreement.

15. Preconstruction Survey

The work operations and functions performed in order to process an application for Pole and Anchor attachments to the point just prior to performing any necessary make-ready work. There are two elements of the Preconstruction Survey: 1) field inspection of the existing facilities, and 2) administrative effort required to process the application and prepare the make-ready work order.

16. Subsequent Inspections

Inspections performed to confirm the correction of non-conformance to specification that are observed during Post Construction Inspections.

17. Suspension Strand (messenger cable)

A metal cable attached to a Pole and used to support facilities.

18. Unit Cost

A dollar amount subject to periodic revision, applicable to specified work operations and functions, including materials and labor costs.

19. Pole

A Pole solely owned or jointly owned by the Licensor and used to support its facilities, the facilities of a joint user and/or Authorized Licensee.

20. Attachment Rate

A specified amount revised periodically, billed annually to the Licensee, and payable in advance to the Licensor for each attachment.

ARTICLE III

GENERAL CONDITIONS

1. Compliance with Applicable Laws

The Licensee and the Licensor shall at all times observe and comply with the provisions of this Agreement subject to all laws, ordinances, and regulations which in any manner affect the rights and obligations of the parties.

2. Rights in Poles and Anchors

No use, however extended, of a Pole or Anchor or payment of any fee or charge required hereunder shall create or vest in the Licensee any ownership or property right in such a Pole or Anchor.

3. Requirement to Construct and Maintain a Pole and Anchor

Nothing contained herein shall be construed to compel the Licensor to construct, reconstruct, retain, extend, repair, place, replace or maintain any Pole or Anchor or other facility not needed for the Licensor's own service requirements, except as provided in Article IV (3. b. (2)) and Article IV (5. d.).

4. Other Agreements

Nothing contained in this Agreement shall be construed as a limitation, restriction, or prohibition against Licensor entering into agreements with other parties regarding the poles covered by this Agreement. The Licensor, in negotiating and entering into any future agreement(s) and arrangement(s), shall give due and reasonable regard to the Licensee's interest in a Pole and Anchor to be covered by such future agreements(s) and arrangement(s). The rights of the Licensee shall at all times be subject to any existing agreement(s) or arrangement(s) between Licensor and any Joint Owner(s) or Joint User(s) of Licensor's poles.

5. Assignment of Rights

a. Licensee shall not assign or transfer any license or any authorization granted under this Agreement, and such licenses and authorizations shall not inure to the benefit of Licensee's successors or assigns, without the prior written consent of Licensor, which shall be in the form of the document of assignment. Licensor shall not unreasonably withhold, condition, or delay such consent.

b. In the event such consent or consents are granted by Licensor, then the provisions of this Agreement shall apply to and bind the successors and assigns of Licensee. Notwithstanding anything herein to the contrary, Licensee may, assign this Agreement without Licensor's consent to an entity controlling, controlled by, or under common control with Licensee or to an entity acquiring fifty-one percent (51%) or more of Licensee's stock or assets provided that any such assignment shall impose no obligations upon or be effective against Licensor, and Licensor shall have no liability to any assignee of such assignment, until Licensor has received prior notice of any such assignment. Anything herein to the contrary notwithstanding, Licensee shall not be relieved of any of its obligations hereunder without Licensor's prior written consent. Upon Licensee's assignment of the Agreement in compliance with the terms set forth herein, including paragraph c. below, License shall be relieved of its obligations hereunder.

c. All notice of such assignments shall include any change to the notice address provided in Article III (8). Within sixty (60) days of receipt of the document of assignment from Licensee, Licensor will execute the document of assignment. The assignment requirements herein shall be deemed met if Licensor fails to respond within sixty (60) days of such documentation receipt by Licensor.

6. Permits and Consents

a. Licensee shall be responsible for obtaining from private and/or public authority any necessary easement, right of way, license, permit, permission, certification or franchise to construct, operate and/or maintain its facilities on private and public property at the location of the Pole and/or Anchor to which Licensee attaches its facilities. The Licensor does not warrant the validity or apportionability of any rights it may hold to place facilities on private property. The Licensor will, upon written request by the Licensee, provide available information and copies of any documents in its files pertinent to the nature of the rights the Licensor possesses over private property. The cost of providing such information and reproducing documents shall be borne by Licensee.

b. Where Licensor has an easement over a public or private right of way sufficiently broad under applicable law to permit Licensee attachment, Licensee shall not be required to obtain independent permission of the property owner to attach. In any case where the Licensor seeks to obtain any necessary permission from a property owner for Licensee's attachments, the fully allocable costs of such efforts shall be paid by the Licensee along with make-ready costs, if any.

7. This Agreement supersedes all previous agreements (other than the Cook Avenue Parking Lot Utility Relocation Agreement) between the parties for maintenance and placement of aerial cables, equipment and facilities by the Licensee and constitutes the entire agreement between the parties. It may not be modified or amended nor may any obligation of either party be changed or discharged except in writing signed by the duly authorized officer or agent of the party to be charged. Currently effective licenses, if any,issued pursuant to previous agreements shall remain in effect as if issued pursuant to this Agreement.

8. Any legal notice to be given to the Licensee pursuant this Agreement shall be sent by certified mail, return receipt requested or a by a nationally recognized overnight carrier service to:

Legal Department
Altice USA, Inc.
One Court Square West,
Long Island City, NY 11101

Any such notice or communication shall be deemed to have been given on (i) the day such notice or communication is personally delivered, (ii) three (3) days after such notice or communication is mailed by prepaid certified or registered mail, (iii) one (1) working day after such notice or communication is sent by overnight courier, or (iv) the day such notice or communication is faxed or sent electronically, provided that the sender has received a confirmation of such fax or electronic transmission.

If the presence of the Licensee on Licensor's Poles causes Licensor to pay anynew or additional tax which Licensor would not otherwise pay, Licensee shall reimburse Licensor to the full extent of such new or additional tax, as additional rent, within thirty (30) days of receiving a bill therefor from Licensor. Upon request, Licensor shall provide evidence that such new or additional tax was in fact paid by Licensor.

9. This Agreement shall be governed by, and interpreted according to, the laws of the State of New Jersey. The parties agree that venue for any action related to this agreement shall be in the State and Federal courts located in Morristown and Newark, New Jersey, respectively.

ARTICLE IV

PROCEDURES

1. Application for Authorization

a. Prior to the Licensee attaching equipment and/or facilities to any Pole or Anchor, Licensee shall make written application for and have received an authorization therefore. (Exhibit A). The Licensor will accept applications on a first come first served basis and shall attempt to satisfy the designated priority of completions. Licensee shall be obligated to perform the required preconstruction survey and/or make-ready work.

2. Multiple Attachment Applications

The provisions of this Article IV (2) apply in the case of applications received by the Licensor from two or more Licensees for attachment authorizations on the same Pole, prior to completion of the preconstruction survey and the commencement of any make-ready work required to accommodate any Licensee.

a. Applications received from multiple applicants for the same Pole will be classified as follows:

(1) non-simultaneous - received by the Licensor on different business days.

(2) simultaneous - received by the Licensor on the same business day.

b. Where applications are non-simultaneous, the initial applicant will be offered the following options after the application is received from the additional applicant(s):

Option 1 - the application of the initial applicant will be processed as if there is no other attachment application on file for the same Pole or Anchor.

Option 2 - the applications of the initial and additional applicant(s) will be processed as if they were simultaneous applications.

(1) The initial applicant will be required to indicate the option desired no later than fifteen (15) days after the Licensor has quoted the make-ready charges that will apply under each option, otherwise the Licensor will deem the initial applicant to have selected Option 1. Selection of an option prior to the quotation of the aforementioned make-ready charges is permissible.

(2) Option 2 will be subject to acceptance by all of the multiple applicants involved. The additional applicant(s) will have fifteen (15) days from the date of receipt of written notification from the Licensor that the initial applicant has selected Option 2, to accept or reject the conditions applicable under Option 2, otherwise, the Licensor will deem the additional applicant(s) to have rejected such conditions.

(3) All work in progress on the initial applicant's application involving multiple applications will be suspended by the Licensor from the time that the initial applicant is offered Options 1 and 2 until it notifies the Licensor of the option it elects in accordance with (1) preceding.

c. Where multiple applicants are simultaneous or the initial applicant in the case of non-simultaneous applications has selected Option 2, the multiple applicants must develop a mutually agreeable order of facility availability and overall make-ready work completion schedule. Where multiple applicants cannot reach mutual agreement regarding order of facility availability and an overall make-ready work completion schedule within fifteen days (15) of written notification from the Licensor of the charges for the required make-ready work, the Licensor will offer as an alternative to complete the total make-ready work required for all multiple applicants before simultaneously granting attachment authorizations to the multiple applicants.

d. Any multiple applicant who fails to agree to the alternate arrangement set forth in c., preceding within ten (10) days after being advised in writing of the availability of such alternate arrangement by the Licensor, will be considered by the Licensor to have canceled its application(s) relative to those facilities which involve pending attachment applications by other Licensees.

e. Where multiple applications are non-simultaneous and the initial applicant has selected Option 1, the Licensor:

(1) will consider the initial applicant as a non-multiple applicant. Any change of priority or facility availability or work schedule completion that is desired after either has been initially agreed upon by the initial applicant with the Licensor will be subject to the Licensor's ability to accommodate such changes in its established work schedule.

(2) will not perform the required make-ready work for the additional applicant until attachment authorizations have been granted to the initial applicant, unless the performance of such work will not delay the completion of the make-ready work required to accommodate the initial applicant.

f. Preconstruction survey costs will be allocated as follows:

(1) Simultaneous applications - each applicant will bear an equal share of the total initial and resurvey costs involved.

(2) Non-simultaneous applications - each applicant will bear the costs related only to determining the accommodation requirements for its specific application.

g. Make-Ready cost will be allocated as follows:

(1) Simultaneous applications -

(a) each applicant will be charged an equal share of the total make-ready cost.

(b) if only one applicant agrees to the shared portion of total cost, that applicant will be quoted the cost applicable to accommodate a single licensee.

(2) Non-simultaneous applications -

(a) the initial applicant will be charged the total make-ready cost to accommodate its facilities.

(b) the additional applicant(s) will be charged the total added make-ready cost to accommodate the additional applicant's facilities.

3. Specifications

a. Licensee's Facilities shall be placed and maintained in accordance with the requirements and specifications of the latest editions of the "Blue Book - Manual of Construction Procedures" (Blue Book), published by Telcordia Technologies Inc.; the "National Electrical Code" (NEC), published by the National Fire Protection Association, Inc.; the "National Electrical Safety Code" (NESC), published by the Institute of Electrical and Electronics Engineers, Inc.; and rules and regulations of the U.S. Department of Labor issued pursuant to the "Federal Occupational Safety and Health Act of 1970", as amended, (OSHA) or any governing authority having jurisdiction over the subject matter. Where a difference in specifications may exist, the more stringent shall apply.

b. Should Licensor, Joint Owner(s), Joint User(s), or other Licensee need to attach additional facilities to any of Licensor's poles, to which Licensee is attached, Licensee will upon written notice from the Licensor either rearrange its attachments on the pole or transfer them to a replacement pole as reasonably determined by Licensor so that the additional facilities of Licensor, Joint Owner(s) Joint User(s) or other Licensee may be attached. Provided that, except to the extent such relocation is required to accommodate the needs of Licensor, Joint Owner(s), Joint User(s) such rearrangement does not materially reduce, impair or otherwise diminish Licensee's operations from the property and subject to receipt of all necessary government permits and approvals for such rearrangement or transfer. If Licensee does not rearrange or transfer its facilities within sixty (60) days after receipt of written notice from the Licensor requesting such rearrangement or transfer, the Licensor, Joint Owner or Joint User may perform or have performed such rearrangement or transfer and Licensee shall pay the cost thereof. However, prior to rearranging or transferring a Licensee's facilities, Licensor shall notify Licensee by means of US Mail or overnight courier service.

(1) Where such work and/or actions entail new or additional attachments to the Licensor's Anchors, authorizations for such attachments shall be issued by the Licensor. Licensee's privileges and obligations with respect to authorizations so issued shall be as provided in this Agreement.

(2) Where such work and/or actions entail the placement of and attachment to Anchors for the Licensee's sole use, these Anchors shall be the property of the Licensee.

In either (1) or (2) preceding, the guy strand shall be the property of the Licensee.

4. Pre-Construction Surveys and Make-Ready Work

a. A pre-construction survey will be required for each Pole and Anchor for which attachment is requested to determine the adequacy of the Pole and Anchor to accommodate Licensee's facilities. At the option of Licensor, the field inspection will be performed:

(1) by representatives of the Licensor with optional participation by joint owner(s), joint user(s), other Licensees and the Licensee, or

(2) by Licensee. If the field inspection is performed by Licensee,the Licensee shall, prior to commencement of the field inspection, obtain from the Licensor information as to the Licensor's planned future construction on the Poles and/or Anchors involved. Licensee shall furnish the required field inspection data to the Licensor.

The field inspection data shall be of an accuracy and completeness necessary to permit the performance of make-ready and other work required to accommodate Licensee's facilities in a manner consistent with the requirements of Article IV (3.) and IV (4. c.). The Licensee and Licensor may employ contractors to perform the field inspection.

In the event the Licensor determines that a Pole to which Licensee desires to make attachments is inadequate or that a Pole or Anchor needs rearrangement of the existing facilities thereon to accommodate the facilities of Licensee, licensee shall be responsible for performing all make-ready work to the satisfaction of licensor and shall also be responsible for the cost of all surveys and inspections.

b. The Licensor shall specify the point of attachment on each of the Poles and/or Anchors to be occupied by Licensee's equipment and/or facilities. Where multiple Licensee's attachments are involved, the Licensor will attempt, to the extent practical, to designate the same relative position on each Pole for each Licensee's facilities.

c. When Licensor deems it an immediate threat to safety and/or an emergency exists, it may rearrange, transfer, or remove Licensee's attachments to Licensor's Poles at Licensee's expense. Licensor shall make reasonable efforts to contact Licensee as circumstances permit.

d. Upon written notice from Licensor, Licensee shall promptly rearrange and/or transfer its attachments and/or Anchors as required by Licensor to permit Licensor to perform any routine maintenance, including replacement of worn or defective Poles, guys or Anchors. Licensee shall be responsible for all costs associated with such rearrangements/transfers.

e. Authorization to attach a guy strand to an existing utility anchor shall be granted where adequate capacity is available as specified in the then current written procedures for determining the adequacy of attachment capacity. Should the Licensor, Joint Owner or Joint User for itsown service requirements need to increase its load on the Anchor to which Licensee's guy strand is attached, and where a larger Anchor is required that would not have been necessary butfor the attachment of Licensee's guy strand, Licensee will either rearrange its guy strand on the Anchor or transfer it to a replacement Anchor as determined by the Licensor. The cost of such rearrangement/transfer shall be borne by the Licensor, Joint Owner or Joint User requiring the larger Anchor. Licensee shall be solely responsible for collecting its rearrangement/transfer costs under such circumstances. Licensor's responsibility shall be limited to reimbursement of its pro rata share of such costs caused by its own additional

attachment or modification to the Pole. However, Licensor shall, upon receipt of written request, provide Licensee with any information in Licensor's possession which may facilitate Licensee's collection of such costs. If Licensee does not rearrange or transfer its guy strand within thirty (30) days after receipt orwritten notice from the Licensor regarding such requirement, the Licensor or Joint User may perform, or have performed, the work involved and Licensee shall pay the cost thereof. The foregoing shall not preclude Licensee thereafter from seeking reimbursement of any rearrangement/transfer costs in accordance with this paragraph.

f. Licensee shall notify the Licensor in writing before adding to, relocating, replacing or otherwise modifying its equipment and/or facilities on a Pole or Anchor, where additional space or holding capacity may be required.

g. When additional Make-Ready or related work is required as a result of circumstances beyond anyone's control, including but not limited to storms, vehicular accidents, or public work projects, Licensee is responsible for the timely repairing, relocating or replacing of its own facilities.

5. Inspections of Licensee's Facilities

a. The Licensor reserves the right to make post-construction, subsequent and periodic inspections (of any part or all) of Licensee's facilities attached to a Pole and/or Anchor.

b. Licensee shall provide written notice to the Licensor, at least fifteen (15) days in advance, of the exact Pole locations where Licensee's plant is to be constructed and shall also notify the Licensor in writing of the actual dates of attachment, including overlashing, within five (5) days of the date(s) of such attachment.

c. Where post-construction inspection by the Licensor has been completed within thirty (30) days of the date of notice of attachment of Licensee's facilities required in b. above, Licensee shall be obligated to correct such non-complying conditions within fifteen (15) days of the date of the written notice from the Licensor or as agreed to by theparties. If corrections are not completed within said fifteen (15) day period, attachment authorizations for the Poles and/or Anchors where non-complying conditions remain uncorrected shall terminate forthwith, regardless of whether Licensee has energized the facilities attached to said Poles and/or Anchors, and Licensee shall remove its facilities from said Poles and/or Anchors in accordance with provisions in Article VII. No further attachment authorizations shall be issued to Licensee until Licensee's facilities are removed from the Poles and/or Anchors where such non-complying conditions exist.

d. Where post-construction inspection by the Licensor has not been completed within thirty (30) days of the date of notice of attachment of Licensee's facilities, Licensee shall correct such non-complying conditions within fifteen (15) days of the date of the written notice from the Licensor or as agreed to by the parties. If corrections are not made by Licensee within said fifteen (15) day period, the Licensor shall perform or have performed such corrections and Licensee shall pay to the Licensor the cost of performing such work.

e. Within seven (7) days of the completion of a post-construction inspection, the Licensor shall notify the Licensee in writing of the date of the completion of the post-construction inspection.

f. Subsequent inspections to determine if appropriate corrective action has been taken may be made by the Licensor. Licensee shall reimburse the Licensor for the cost

of such inspections as specified in Article VIII.

g. The making of post-construction, subsequent and/or periodic inspections or the failure to do so shall not operate to relieve Licensee of any responsibility, obligation or liability specified in this Agreement.

h. The costs of inspection made during construction and/or the initial post-construction survey shall be billed to the Licensee. The costs of Periodic Inspections or any inspections found necessary due to the existence of substandard or unauthorized attachments shall be the licensee's responsibility.

i. Licensor reserves the right to make periodic inspections of all or any part of the cable, equipment and facilities of Licensee on Poles owned by the Licensor and/or Joint User(s), at the expense of the Licensee as specified in Article VIII. Periodic inspections of the entire plant of the Licensee will not be made more often than once every five years and upon 30 days' notice to Licensee unless in Licensor's judgment such inspections are required for reasons involving safety or because of an alleged violation of the terms of this Agreement by Licensee.

6. Unauthorized Attachment

a. If any equipment and/or facilities of the Licensee shall be found attached to a Pole and/or Anchor for which authorization has not been granted by the Licensor, the Licensor, without prejudice to its other rights or remedies under this Agreement, including termination or otherwise, may impose a charge and require the Licensee to submit in writing, within ten (10) days after receipt of written notification from the Licensor of the unauthorized attachment, a Pole and/or Anchor attachment application. If such application is not received by the Licensor within the specified time period, the Licensee will be required to remove its unauthorized attachment within ten (10) days of the final date for submitting the required application, or the Licensor may remove the Licensee's facilities without liability, and the cost of such removal shall be borne by the Licensee.

b. For the purpose of determining the applicable charge, the unauthorized attachment shall be treated as having existed for a period of five (5) years prior to its discovery or for the period beginning with the date of the initial agreement, whichever period shall be shorter; and the charges as specified in Article VIII shall be due and payable forthwith whether or not Licensee is permitted to continue the attachment.

c. No act or failure to act by the Licensor with regard to said unauthorized attachment shall be deemed as the authorization of the attachment; and, if any authorization should be subsequently issued, said authorization shall not operate retroactively or constitute a waiver by the Licensor of any of its rights or privileges under this Agreement, or otherwise, provided, however, that Licensee shall be subject to all liabilities, obligations and responsibilities of this Agreement in regard to said unauthorized attachment from its inception.

ARTICLE V

OTHER OBLIGATIONS OF LICENSEES

1. Insurance

a. Licensee shall secure and maintain (and ensure its subcontractors, if any, secure and maintain) insurance acceptable to licensee as to form and amount of coverage.

b. All insurance must be in effect before Licensor will authorize Licensee to make attachment to Licensor's poles and shall remain in force until such facilities have been removed from all such poles. For all insurance, the Licensee must deliver an industry-recognized certificate of insurance evidencing the amount and nature of the coverage, the expiration date of the policy and stating that the policy of insurance issued to Licensee will not be cancelled without thirty (30) days written notice to Licensor. Also, where applicable, such certificate of insurance shall evidence the name of the Licensor as an additional insured. The Licensee shall submit such certificates of insurance annually to the Licensor as evidence that it has maintained all required insurance.

c. Licensee is responsible for determining whether the above minimum insurance coverages are adequate to protect its interests. The above minimum coverages shall not constitute limitations upon Licensee's liability.

ARTICLE VI

LIABILITY AND DAMAGES

1. The Licensor reserves to itself, its successors and assigns, the right to relocate and maintain its Poles and Anchors and to operate its facilities in conjunction therewith in such a manner as will best enable it to fulfill its own service requirements. The Licensor shall be liable to Licensee only for and to the extent of any damage caused by the negligence of the Licensor's agents or employees to Licensee's facilities attached to a Pole or Anchor. The Licensor shall not be liable to Licensee for any interruption of Licensee's service or for interference with the operation of Licensee's facilities arising in any manner out of Licensee's use of Poles or Anchors.

2. Licensee shall exercise reasonable care to avoid damaging the facilities of Licensor and of others attached to Licensor's poles, and shall make an immediate report of damage caused by Licensee to the owner of facilities so damaged.

3. Licensee shall each indemnify, protect and save harmless licensor from and against any and all claims, demands, causes of actions and costs, including reasonable attorneys' fees, for damages to the property of licensor and other persons and injury or death to licensor's employees or other persons, including but not limited to, payments under any Workers Compensation law or under any plan for employee's disability and death benefits, which may arise out of or be caused by the negligence or intentional misconduct of the licensee as it relates to the erection, maintenance, presence, use or removal of the licensee's facilities, or by any act or omission of the licensee's employees, agents or contractors on or in the vicinity of Licensor's poles.

4. Licensee shall indemnify, protect and save harmless licensor from and all claims, demands, causes of action and costs, including reasonable attorneys' fees, which arise directly from or are caused by the negligence or intentional misconduct of the licensee as it relates to the construction, attachment or operation of its facilities on Licensor's poles, including but not limited to damages, costs and expense of relocating poles due to the loss of right-of-way or property owner consents, taxes, special charges by others, claims and demands for damages or loss from infringement of copyright, for libel and slander, for unauthorized use of television or radio broadcast programs and other program material, and from and against all claims, demands and costs, including reasonable attorneys' fees, for infringement of patents with respect to the manufacture, use and operation of the indemnifying party's facilities in combination with poles or otherwise. Licensor and Licensee shall promptly advise the other of all claims relating todamage to property or injury to or death of persons, arising or alleged to have been caused by the erection, maintenance, repair, replacement, presence, use or removal of facilities governed by this License Agreement. Copies of all accident reports and statements made to a Licensor'sor Licensee's insurer by the other Licensor or Licensee or affected entity shall be furnished promptly to the Licensor or Licensee.

5. Notwithstanding anything to the contrary herein, neither Licensor nor Licensee shall be liable to the other for any special, consequential or other indirect damages arising under this Agreement, including without limitation loss of profits and revenues.

6. The provisions of this Article shall survive the expiration or earlier termination of this Agreement or any license issued hereunder.

ARTICLE VII

TERMINATIONS OF AUTHORIZATIONS

1. In addition to rights of termination provided to the Licensor under other provisions of this Agreement, the Licensor shall have the right to terminate Pole/or Anchor attachment authorizations and rights granted under provisions of this Agreement where:

a. the Licensee's facilities are maintained or used in violation of any law or in aid of any unlawful act or undertaking, or

b. the Licensee ceases to have authority to construct and operate its facilities on public or private property at the location of the particular Pole or Anchor covered by the authorization and has not sought judicial or regulatory review of any decision that (1) acted to terminate such authority or (2) declared that Licensee lacks such authority; or

c. the Licensee materially fails to comply with any of the terms and conditions of this Agreement or materially defaults in any of its obligations thereunder; or

d. the Licensee attaches to a Pole and/or Anchor without having first been issued authorization therefore; or

e. the Licensee, subject to the provisions specified in Article III (5.), should cease to provide its services.

f. the Licensee sublets or apportions part of the licensed assigned space or otherwise permits its assigned space to be used by an entity or an affiliate not authorized pursuant to Article III (5).

g. except in circumstances in which Licensor has accepted evidence of self-insurance in accordance with Article VI, the Licensee's insurance carrier shall at any time notify the Licensor that the policy or policies of insurance as required in Article VI will be or have been cancelled or amended so that those requirements will no longer be satisfied;

h. the Licensee shall fail to pay any sum due under Article VIII or to deposit any sum required under this Agreement.

i. any authorization that may be required by any governmental or private authority for the construction, operation and maintenance of the Licensee's facilities on a Pole or Anchor is denied, revoked or cancelled by a final, non-appealable order or decision.

2. The Licensor will promptly notify the Licensee in writing of any instances cited in Article VII (1.) preceding. The Licensee shall take corrective action as necessary to eliminate the non-compliance and shall confirm in writing to the Licensor within thirty (30) days following such written notice that the non-compliance has ceased or been corrected. If Licensee fails to discontinue such non-compliance or to correct same and fails to give the required written confirmation to the Licensor within the time stated above, the Licensor may terminate the attachment authorizations granted hereunder for Poles and/or Anchors as to which such non-compliance shall have occurred.

3. Licensee may at any time remove its facilities from a Pole or Anchor after first giving the Licensor written notice of Licensee's intention to so remove its facilities.

4. In the event of termination of any of the Licensee's authorizations hereunder,

the Licensee will remove its facilities from the Poles and Anchors within thirty (30) days of the effective date of the termination; provided, however, that Licensee shall be liable for and pay all fees and charges pursuant to provisions of this Agreement to the Licensor until Licensee's facilities are actually removed from the Poles and Anchors. If the Licensee fails to remove its facilities within the specified period, the Licensor shall have the right to remove such facilities at the Licensee's expense.

5. When Licensee's facilities are removed from a Pole or Anchor, no attachment to the same Pole or Anchor shall be made until the Licensee has first complied with all of the provisions of this Agreement as though no such Pole or Anchor attachment had been previously made and all outstanding charges due to the Licensor for such Pole or Anchor attachment have been paid in full.

ARTICLE VIII

RATES AND CHARGES

The Licensee is responsible for payment of all rates, charges and costs as specified elsewhere in this Agreement and as set forth below. Licensee shall be responsible to perform all make-ready work at its own expense.

Licensee agrees that, in the event Licensee fails to pay an amount due and owing within the period of time set forth for payment in this Agreement, interest shall accrue on the unpaid balance thereof at the rate of 1 1/2% per month for each month from the expiration of such period until payment is received by Licensor.

1. Attachment Rate

The annual attachment rate shall be as specified in a schedule attached hereto as Exhibit B.

2. Charges for Inspections

a. The cost of the post-construction inspection shall be billed in advance If the post-construction inspection is not performed, Licensor shall refund the amounts paid for such inspection.

b. The cost of Periodic Inspection will be billed to the Licensee upon completion of the inspection by the Licensor.

c. Licensee shall pay the cost of subsequent inspections to insure correction of variances from required construction and maintenance practices, determined to exist through post-construction or periodic inspections.

3. Payment of Rates and Charges

Unless otherwise provided elsewhere in this Agreement, Licensee shall pay all rates and charges as specified in the Agreement within fifteen (15) days from the dates of billing thereof.

ARTICLE IX

EQUAL EMPLOYMENT OPPORTUNITIES

Licensee affirms that the Equal Employment Opportunity provisions required by law, regulation or executive order are incorporated in this Agreement.

ARTICLE X

WAIVER OF TERMS AND CONDITIONS

Failure of Licensee or Licensor to enforce or insist upon compliance with any of the terms or conditions of this Agreement or failure to give notice or declare this Agreement or the licenses granted hereunder terminated shall not constitute a waiver or relinquishment of any such term, condition or act but the same shall be and remain at all times in full force and effect.

ARTICLE XI

TERM OF AGREEMENT

If not terminated in accordance with its terms, this Agreement shall continue in effect for a term of five (5) years from the date of full execution, subject to the approval of the Madison governing body. This agreement is subject to renewal at the discretion of the Madison governing body and the consent of Altice.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement inmultiple originals on the day and year first above written.

ATTEST:

THE BOROUGH OF MADISON IN THE COUNTY OF MORRIS

_____

By: _____

ELIZABETH OSBORNE
BOROUGH CLERK

ROBERT H. CONLEY
MAYOR

ATTEST:

CSC Holdings LLC

_____

By: _____

ATTEST:

CSC TKR, LLC

_____

By: _____

ALTICE USA, INC.

By: _____

EXHIBIT A

APPLICATION AND POLE LICENSE

In accordance with the terms and conditions of the Pole Attachment Agreement between us, date as of_____20_____, application is hereby made for a license to make attachments to all Borough of Madison Utility Poles, excluding those Poles covered by the Cook Avenue Parking Lot Utility Relocation Agreement.

CSC HOLDINGS LLC

By: _____

CSC TKR, LLC

By: _____

ALTICE USA, INC.

By: _____

EXHIBIT B

SCHEDULE OF RATES FOR
BOROUGH OF MADISON
STANDARD POLE ATTACHMENT

1. RATE

Pole Attachment Annual Fee: $250,000.00. The Pole Attachment Annual Fee provides Licensee with access to all Borough of Madison Utility Poles, excluding those poles covered by the Cook Avenue Parking Lot Utility Relocation Agreement.

2. COMPUTATION

The first payment of the annual charge for licenses granted under this Agreement shall be prorated from the execution date hereof. Thereafter, the full annual fee is due and payable on the first business day of each succeeding year.

3. PAYMENT DATE

The Attachment fee shall be due and payable annually, in advance, on the 1st business day of January each year. Failure to pay such fee within fifteen (15) days after presentment of the bill therefore or on the specified payment date, whichever is later, shall constitute default under this Agreement.

4. TERMINATION OF LICENSE

Upon termination of a license granted hereunder, the applicable attachment fee shall be retained by the Licensor.

Exhibit F

From: Codey, Ray
To: Bruno Genova; Marilyn D. Davis
Cc: Robert Hoch; Ronald Kavanagh; William F. Harrison; Burnet, Jim; Vogel, Robert; Mattina, James; Conley, Robert
Subject: External E-mail - Re: Following-up
Date: Thursday, February 10, 2022 4:55:10 PM

[External Email]

Caution: This email originated outside of Altice USA. Please do not click links or attachments unless you recognize the sender and know the content is safe.

Bruno - I'm sorry that we're not able to reach a meeting of the minds regarding access to the Borough of Madison electric utility infrastructure. The proposed reduced attachment fee did not even reflect the historic unilateral use of our infrastructure by Altice with no compensation being paid to the Borough, nor did your response address the Cook Avenue Parking Lot agreement or universal pole attachment agreement requirements.. Good luck with your roll out in other communities.
Ray Codey, Borough Administrator

From: Bruno Genova <BGenova@genovaburns.com>
Sent: Thursday, February 10, 2022 3:46 PM
To: Codey, Ray; Marilyn D. Davis
Cc: Robert Hoch; Ronald Kavanagh; William F. Harrison; Burnet, Jim; Vogel, Robert; Mattina, James
Subject: RE: Following-up

CAUTION: This email has originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Ray –

Thank you for your email.

Altice rejects the Borough's proposal of $20/pole for this and subsequent years. This is still considerably in excess of the per pole charge that Altice is paying elsewhere. Provided the Borough agrees to $12/pole, Altice is willing to make a one-time donation of $35k to the Borough to support any local project. The donation terms would be set forth in a separate side letter agreement between Altice and the Borough.

Altice's offer is valid until 10 a.m. tomorrow, February 11, 2022. Altice hereby reserves all of its rights under applicable state and federal law and regulation, and in equity, with regard to any and all potential claims arising from any and all matters contained herein.

We look forward to your response.

Thank you.

Bruno Genova
Of Counsel
Genova Burns LLC
494 Broad St. Newark, NJ 07102
Tel: 973.646.3261 | Fax: 973.533.1112
www.genovaburns.com

From: Codey, Ray <codeyr@rosenet.org>
Sent: Thursday, February 10, 2022 12:54 PM
To: Marilyn D. Davis <Marilyn.Davis16@AlticeUSA.com>
Cc: Bruno Genova <BGenova@genovaburns.com>; Robert Hoch <Robert.Hoch@AlticeUSA.com>; Ronald Kavanagh <rkavanagh@cgajlaw.com>; William F. Harrison <WHarrison@genovaburns.com>; Burnet, Jim <BurnetJ@rosenet.org>; Vogel, Robert <vogelr@lus.rosenet.org>; Mattina, James <mattinaj@elc.rosenet.org>
Subject: Re: Following-up

Security Warning. This is an EXTERNAL email.

Marilyn - Sorry for the delay in our response. We would propose the following: (1). Altice pay Twenty dollars ($ 20.00) per pole annually (2680 poles X $20 = $53,600). (2). Full payment due upon full execution of the agreement for the first year with succeeding year's payment due no later than January 15th of each year thereafter. (3). Simultaneous execution of the previously forwarded Cook Avenue Parking Lot Agreement with payment and Universal Pole Attachment Agreement. (4). All fees paid are in addition to the annual franchise fee payment. (5). This proposal is subject to formal approval by the Madison governing body. Ray

---

From: Marilyn D. Davis <Marilyn.Davis16@AlticeUSA.com>
Sent: Thursday, February 10, 2022 9:37 AM
To: Codey, Ray
Cc: Bruno Genova; Robert Hoch; Ronald Kavanagh; William F. Harrison
Subject: Following-up

CAUTION: This email has originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Ray,

I'm reaching out to see if the Town has an update yet. We are eager to resolve this matter and resume working in Madison. Any update you can provide is greatly appreciated, preferably before 10 am, if possible.

Thanks,
Marilyn

Exhibit G

POLE ATTACHMENT AGREEMENT

DATED _____

BETWEEN

THE BOROUGH OF MADISON (LICENSOR)

Commented [DM1]: Dos the borough own the poles or a municipal owned utility? Is this the correct entity?

Commented [RK2R1]: Yes. Borough owns

AND

CSC TKR LLC, ~~a wholly owned subsidiary of CSC Holdings LLC (aka Altice)~~
~~(LICENSEE)~~

POLE ATTACHMENT AGREEMENT

THIS AGREEMENT, made as of the_____day of_____20____, between the Borough of Madison, a municipal corporation, 50 Kings Road, Madison, New Jersey ("Licensor") and CSR TKR, LLC, a wholly owned subsidiary of CSC Holdings, LLC One Court Square West, Long Island City, NY 11101 (hereinafter called "Licensee") ~~aka "Altice")~~.

Commented [DM3]: Confirm correct entity

Commented [RK4R3]: Borough is correct

W I T N E S S E T H

WHEREAS, Licensee for its own use desires to place and maintain cables, equipment and facilities on Poles of Licensor; and

WHEREAS, Licensor is willing to permit the placement of said cables, equipment and facilities on its Poles.

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, the parties do hereby mutually covenant and agree as follows:

ARTICLE I

SCOPE OF AGREEMENT

Subject to the provisions of this Agreement, the Licensor will issue to Licensee for any lawful purpose revocable, nonexclusive licenses authorizing the attachment of Licensee's equipment and facilities to Licensor's Poles in the Borough of Madison.

ARTICLE II

DEFINITIONS

1. Anchor

A facility consisting of an assembly of a rod secured to a fixed object or plate designed to resist the pull of a guy strand or strands.

2. Anchor Attachment

A guy strand attached to an Anchor solely owned or jointly owned by Licensor or for which Licensor is responsible for authorizing attachments.

3. Appurtenance Attachment

Any article of equipment attached to a point on a Pole not normally occupied by a strand attachment (i.e. equipment cabinets, terminals, etc.).

4. Licensor

The owner or custodian of a Pole and the only party permitted to issue licenses to that Pole and its associated Anchor(s).

5. Licensee

The person, corporation or other legal entity authorized by the Licensor under this Agreement to attach its facilities to Pole and Anchor and the party responsible for compliance with Licensor's regulations regarding such accommodations.

6. Licensee's Facilities

The cables and all associated equipment and hardware installed for the sole use of the Licensee.

7. Guy Strand

A metal cable (facility) which is attached to a Pole and Anchor (or another Pole) for the purpose of reducing Pole stress.

8. Joint Owner

A person, corporation or other legal entity having an ownership interest in a Pole and/or Anchor with the Licensor.

9. Joint User

A party who owns Poles or Anchors to which the Licensor is extended or may hereafter be extended joint use privileges, or to which the Licensor has extended or may hereafter extend joint use privileges of the Licensor's Poles or Anchors. The term "Joint User" shall not include Licensees.

10. Make-Ready Work

All work, including but not limited to rearrangement and / or transfer of existing facilities, replacement of a Pole or any other changes required to accommodate the attachment of Licensee's facilities to a Pole or any other changes required to accommodate the attachment of Licensee's facilities to a Pole or Anchor.

11. Other Licensees

Any person, corporation, or other legal entity other than the Licensee herein, to whom the Licensor has or hereafter shall extend an authorization to attach facilities to a Pole or Anchor.

12. Periodic Inspection

Inspections conducted at scheduled intervals on portions of Licensee's facilities, to determine that attachments are authorized and that attachments are maintained in conformance with the required standards.

13. Pole Attachment

Any of Licensee's facilities in direct contact with or otherwise supported by a Pole.

14. Post-Construction Inspection

The work operations and functions performed to measure and/or visually observe Licensee's attachments, during or shortly after completion of the construction of such facilities, to determine that all attachments have been authorized and construction conforms to the standards required by this Agreement.

15. Preconstruction Survey

The work operations and functions performed in order to process an application for Pole and Anchor attachments to the point just prior to performing any necessary make-ready work. There are two elements of the Preconstruction Survey: 1) field inspection of the existing facilities, and 2) administrative effort required to process the application and prepare the make-ready work order.

16. Subsequent Inspections

Inspections performed to confirm the correction of non-conformance to specification that are observed during Post Construction Inspections.

17. Suspension Strand (messenger cable)

A metal cable attached to a Pole and used to support facilities.

18. Unit Cost

A dollar amount subject to periodic revision, applicable to specified work operations and functions, including materials and labor costs.

19. Pole

A Pole solely owned or jointly owned~~, managed and controlled~~ by the Licensor and used to support its facilities, the facilities of a joint user and/or Authorized Licensee.

Commented [RK5]: Change rejected

20. Attachment Rate

A specified amount revised periodically, billed annually to the Licensee, and payable in advance to the Licensor for each attachment.

ARTICLE III

GENERAL CONDITIONS

1. Compliance with Applicable Laws

The Licensee and the Licensor shall at all times observe and comply with the provisions of this Agreement subject to all laws, ordinances, and regulations which in any manner affect the rights and obligations of the parties.

2. Rights in Poles and Anchors

No use, however extended, of a Pole or Anchor or payment of any fee or charge required hereunder shall create or vest in the Licensee any ownership or property right in such a Pole or Anchor.

3. Requirement to Construct and Maintain a Pole and Anchor

Nothing contained herein shall be construed to compel the Licensor to construct, reconstruct, retain, extend, repair, place, replace or maintain any Pole or Anchor or other facility not needed for the Licensor's own service requirements, except as provided in Article IV (3. b. (2)) and Article IV (5. d.).

4. Other Agreements

Nothing contained in this Agreement shall be construed as a limitation, restriction, or prohibition against Licensor entering into agreements with other parties regarding the poles covered by this Agreement. The Licensor, in negotiating and entering into any future agreement(s) and arrangement(s), shall give due and reasonable regard to the Licensee's interest in a Pole and Anchor to be covered by such future agreements(s) and arrangement(s). The rights of the Licensee shall at all times be subject to any existing agreement(s) or arrangement(s) between Licensor and any Joint Owner(s) or Joint User(s) of Licensor's poles.

5. Assignment of Rights

a. Licensee shall not assign or transfer any license or any authorization granted under this Agreement, and such licenses and authorizations shall not inure to the benefit of Licensee's successors or assigns, without the prior written consent of Licensor, which shall be in the form of the document of assignment. Licensor shall not unreasonably withhold, condition, or delay such consent.

b. In the event such consent or consents are granted by Licensor, then the provisions of this Agreement shall apply to and bind the successors and assigns of Licensee. Notwithstanding anything herein to the contrary, Licensee may, assign this Agreement without Licensor's consent to an entity controlling, controlled by, or under common control with Licensee or to an entity acquiring fifty-one percent (51%) or more of Licensee's stock or assets provided that any such assignment shall impose no obligations upon or be effective against Licensor, and Licensor shall have no liability to any assignee of such assignment, until Licensor has received prior notice of any such assignment. Anything herein to the contrary notwithstanding, Licensee shall not be relieved of any of its obligations hereunder without Licensor's prior written consent. Upon Licensee's assignment of the Agreement in compliance with the terms set forth herein, including paragraph c. below, License shall be relieved of its obligations hereunder.

c. All notice of such assignments shall include any change to the notice address provided in Article III (8). Within sixty (60) days of receipt of the document of assignment from Licensee, Licensor will execute the document of assignment. The assignment requirements herein shall be deemed met if Licensor fails to respond within sixty (60) days of such documentation receipt by Licensor.

6. Permits and Consents

a. Licensee shall be responsible for obtaining from private and/or public authority any necessary easement, right of way, license, permit, permission, certification or franchise to construct, operate and/or maintain its facilities on private and public property at the location of the Pole and/or Anchor to which Licensee attaches its facilities. The Licensor does not warrant the validity or apportionability of any rights it may hold to place facilities on private property. The Licensor will, upon written request by the Licensee, provide available information and copies of any documents in its files pertinent to the nature of the rights the Licensor possesses over private property. The cost of providing such information and reproducing documents shall be borne by Licensee.

b. Where Licensor has an easement over a public or private right of way sufficiently broad under applicable law to permit Licensee attachment, Licensee shall not be required to obtain independent permission of the property owner to attach. In any case where the Licensor seeks to obtain any necessary permission from a property owner for Licensee's attachments, the fully allocable costs of such efforts shall be paid by the Licensee along with make-ready costs, if any.

7. This Agreement supersedes all previous agreements (other than the Cook Avenue Parking Lot Utility Relocation Agreement) between the parties for maintenance and placement of aerial cables, equipment and facilities by the Licensee and constitutes the entire agreement between the parties. It may not be modified or amended nor may any obligation of either party be changed or discharged except in writing signed by the duly authorized officer or agent of the party to be charged. Currently effective licenses, if any,issued pursuant to previous agreements shall remain in effect as if issued pursuant to this Agreement.

8. Any legal notice to be given to the Licensee pursuant this Agreement shall be sent by certified mail, return receipt requested or a by a nationally recognized overnight carrier service to:

Legal Department
Altice USA, Inc.
One Court Square West~~,~~
Long Island City, NY 11101

Any such notice or communication shall be deemed to have been given on (i) the day such notice or communication is personally delivered, (ii) three (3) days after such notice or communication is mailed by prepaid certified or registered mail, (iii) one (1) working day after such notice or communication is sent by overnight courier, or (iv) the day such notice or communication is faxed or sent electronically, provided that the sender has received a confirmation of such fax or electronic transmission.

If the presence of the Licensee on Licensor's Poles causes Licensor to pay anynew or additional tax which Licensor would not otherwise pay, Licensee shall reimburse Licensor to the full extent of such new or additional tax, as additional rent, within thirty (30) days of receiving a bill therefor from Licensor. Upon request, Licensor shall provide evidence that such new or additional tax was in fact paid by Licensor.

9. This Agreement shall be governed by, and interpreted according to, the laws of the State of New Jersey. The parties agree that venue for any action related to this agreement shall be in the State and Federal courts located in Morristown and Newark, New Jersey, respectively.

ARTICLE IV

PROCEDURES

1. Application for Authorization

a. Prior to the Licensee attaching equipment and/or facilities to any Pole or Anchor, Licensee shall make written application for and have received an authorization therefore. ~~Licesnor acknowledges the existing Attachments as described in~~ (Exhibit A). The Licensor will accept applications on a first come first served basis and shall attempt to satisfy the designated priority of completions. Licensor shall promptly administer and process permit applications Licensee shall be obligated to perform the required preconstruction survey and/or make-ready work.

Commented [RK6]: Exhibit A does not describe the existing equipment.

2. Multiple Attachment Applications

The provisions of this Article IV (2) apply in the case of applications received by the Licensor from two or more Licensees for attachment authorizations on the same Pole, prior to completion of the preconstruction survey and the commencement of any make-ready work required to accommodate any Licensee.

a. Applications received from multiple applicants for the same Pole will be classified as follows:

(1) non-simultaneous - received by the Licensor on different business days.

(2) simultaneous - received by the Licensor on the same business day.

b. Where applications are non-simultaneous, the initial applicant will be offered the following options after the application is received from the additional applicant(s):

Option 1 - the application of the initial applicant will be processed as if there is no other attachment application on file for the same Pole or Anchor.

Option 2 - the applications of the initial and additional applicant(s) will be processed as if they were simultaneous applications.

(1) The initial applicant will be required to indicate the option desired no later than fifteen (15) days after the Licensor has quoted the make-ready charges that will apply under each option, otherwise the Licensor will deem the initial applicant to have selected Option 1. Selection of an option prior to the quotation of the aforementioned make-ready charges is permissible.

(2) Option 2 will be subject to acceptance by all of the multiple applicants involved. The additional applicant(s) will have fifteen (15) days from the date of receipt of written notification from the Licensor that the initial applicant has selected Option 2, to accept or reject the conditions applicable under Option 2, otherwise, the Licensor will deem the additional applicant(s) to have rejected such conditions.

(3) All work in progress on the initial applicant's application involving multiple applications will be suspended by the Licensor from the time that the initial applicant is offered Options 1 and 2 until it notifies the Licensor of the option it elects in accordance with (1) preceding.

c. Where multiple applicants are simultaneous or the initial applicant in the case of non-simultaneous applications has selected Option 2, the multiple applicants must develop a mutually agreeable order of facility availability and overall make-ready work completion schedule. Where multiple applicants cannot reach mutual agreement regarding order of facility availability and an overall make-ready work completion schedule within fifteen days (15) of written notification from the Licensor of the charges for the required make-ready work, the Licensor will offer as an alternative to complete the total make-ready work required for all multiple applicants before simultaneously granting attachment authorizations to the multiple applicants.

d. Any multiple applicant who fails to agree to the alternate arrangement set forth in c., preceding within ten (10) days after being advised in writing of the availability of such alternate arrangement by the Licensor, will be considered by the Licensor to have canceled its application(s) relative to those facilities which involve pending attachment applications by other Licensees.

e. Where multiple applications are non-simultaneous and the initial applicant has selected Option 1, the Licensor:

(1) will consider the initial applicant as a non-multiple applicant. Any change of priority or facility availability or work schedule completion that is desired after either has been initially agreed upon by the initial applicant with the Licensor will be subject to the Licensor's ability to accommodate such changes in its established work schedule.

(2) will not perform the required make-ready work for the additional applicant until attachment authorizations have been granted to the initial applicant, unless the performance of such work will not delay the completion of the make-ready work required to accommodate the initial applicant.

f. Preconstruction survey costs will be allocated as follows:

(1) Simultaneous applications - each applicant will bear an equal share of the total initial and resurvey costs involved.

(2) Non-simultaneous applications - each applicant will bear the costs related only to determining the accommodation requirements for its specific application.

g. Make-Ready cost will be allocated as follows:

(1) Simultaneous applications -

(a) each applicant will be charged an equal share of the total make-ready cost.

(b) if only one applicant agrees to the shared portion of total cost, that applicant will be quoted the cost applicable to accommodate a single licensee.

(2) Non-simultaneous applications -

(a) the initial applicant will be charged the total make-ready cost to accommodate its facilities.

(b) the additional applicant(s) will be charged the total added make-ready cost to accommodate the additional applicant's facilities.

3. Specifications

a. Licensee's Facilities shall be placed and maintained in accordance with the requirements and specifications of the latest editions of the "Blue Book - Manual of Construction Procedures" (Blue Book), published by Telcordia Technologies Inc.; the "National Electrical Code" (NEC), published by the National Fire Protection Association, Inc.; the "National Electrical Safety Code" (NESC), published by the Institute of Electrical and Electronics Engineers, Inc.; and rules and regulations of the U.S. Department of Labor issued pursuant to the "Federal Occupational Safety and Health Act of 1970", as amended, (OSHA) or any governing authority having jurisdiction over the subject matter. Where a difference in specifications may exist, the more stringent shall apply.

b. Should Licensor, Joint Owner(s), Joint User(s), or other Licensee need to attach additional facilities to any of Licensor's poles, to which Licensee is attached, Licensee will upon written notice from the Licensor either rearrange its attachments on the pole or transfer them to a replacement pole as reasonably determined by Licensor so that the additional facilities of Licensor, Joint Owner(s) Joint User(s) or other Licensee may be attached. Provided that, except to the extent such relocation is required to accommodate the needs of Licensor, Joint Owner(s), Joint User(s) such rearrangement does not materially reduce, impair or otherwise diminish Licensee's operations from the property and subject to receipt of all necessary government permits and approvals for such rearrangement or transfer. If Licensee does not rearrange or transfer its facilities within sixty (60) days after receipt of written notice from the Licensor requesting such rearrangement or transfer, the Licensor, Joint Owner or Joint User may perform or have performed such rearrangement or transfer and Licensee shall pay the cost thereof. However, prior to rearranging or transferring a Licensee's facilities, Licensor shall notify Licensee by means of US Mail or overnight courier service.

(1) Where such work and/or actions entail new or additional attachments to the Licensor's Anchors, authorizations for such attachments shall be issued by the Licensor. Licensee's privileges and obligations with respect to authorizations so issued shall be as provided in this Agreement.

(2) Where such work and/or actions entail the placement of and attachment to Anchors for the Licensee's sole use, these Anchors shall be the property of the Licensee.

In either (1) or (2) preceding, the guy strand shall be the property of the Licensee.

4. Pre-Construction Surveys and Make-Ready Work

a. A pre-construction survey will be required for each Pole and Anchor for which attachment is requested to determine the adequacy of the Pole and Anchor to accommodate Licensee's facilities. At the option of Licensor, the field inspection will be performed:

(1) by representatives of the Licensor with optional participation by joint owner(s), joint user(s), other Licensees and the Licensee, or

(2) by Licensee. If the field inspection is performed by Licensee,the Licensee shall, prior to commencement of the field inspection, obtain from the Licensor information as to the Licensor's planned future construction on the Poles and/or Anchors involved. Licensee shall furnish the required field inspection data to the Licensor.

The field inspection data shall be of an accuracy and completeness necessary to permit the performance of make-ready and other work required to accommodate Licensee's facilities in a manner consistent with the requirements of Article IV (3.) and IV (4. c.). The Licensee and Licensor may employ contractors to perform the field inspection.

In the event the Licensor determines that a Pole to which Licensee desires to make attachments is inadequate or that a Pole or Anchor needs rearrangement of the existing facilities thereon to accommodate the facilities of Licensee, Lilicensee shall be responsible for performing all make-ready work to the satisfaction of ~~licensor~~Licensor and shall also be responsible for the cost of all surveys and inspections.

b. The Licensor shall specify the point of attachment on each of the Poles and/or Anchors to be occupied by Licensee's equipment and/or facilities. Where multiple Licensee's attachments are involved, the Licensor will attempt, to the extent practical, to designate the same relative position on each Pole for each Licensee's facilities.

c. When Licensor deems it an immediate threat to safety and/or an emergency exists, it may rearrange, transfer, or remove Licensee's attachments to Licensor's Poles at Licensee's expense. Licensor shall make reasonable efforts to contact Licensee as circumstances permit.

d. Upon written notice from Licensor, Licensee shall promptly rearrange and/or transfer its attachments and/or Anchors as required by Licensor to permit Licensor to perform any routine maintenance, including replacement of worn or defective Poles, guys or Anchors. Licensee shall be responsible for all costs associated with such rearrangements/transfers.

e. Authorization to attach a guy strand to an existing utility anchor shall be granted where adequate capacity is available as specified in the then current written procedures for determining the adequacy of attachment capacity. Should the Licensor, Joint Owner or Joint User for itsown service requirements need to increase its load on the Anchor to which Licensee's guy strand is attached, and where a larger Anchor is required that would not have been necessary butfor the attachment of Licensee's guy strand, Licensee will either rearrange its guy strand on the Anchor or transfer it to a replacement Anchor as determined by the Licensor. The cost of such rearrangement/transfer shall be borne by the Licensor, Joint Owner or Joint User requiring the larger Anchor. Licensee shall be solely responsible for collecting its rearrangement/transfer costs under such circumstances. Licensor's responsibility shall be limited to reimbursement of its pro rata share of such costs caused by its own additional

attachment or modification to the Pole. However, Licensor shall, upon receipt of written request, provide Licensee with any information in Licensor's possession which may facilitate Licensee's collection of such costs. If Licensee does not rearrange or transfer its guy strand within thirty (30) days after receipt orwritten notice from the Licensor regarding such requirement, the Licensor or Joint User may perform, or have performed, the work involved and Licensee shall pay the cost thereof. The foregoing shall not preclude Licensee thereafter from seeking reimbursement of any rearrangement/transfer costs in accordance with this paragraph.

f. Licensee shall notify the Licensor in writing before adding to, relocating, replacing or otherwise modifying its equipment and/or facilities on a Pole or Anchor, where additional space or holding capacity may be required.

g. When additional Make-Ready or related work is required as a result of circumstances beyond anyone's control, including but not limited to storms, vehicular accidents, or public work projects, Licensee is responsible for the timely repairing, relocating or replacing of its own facilities.

5. Inspections of Licensee's Facilities

a. The Licensor reserves the right to make post-construction, subsequent and periodic inspections (of any part or all) of Licensee's facilities attached to a Pole and/or Anchor.

b. Licensee shall provide written notice to the Licensor, at least fifteen (15) days in advance, of the exact Pole locations where Licensee's plant is to be constructed and shall also notify the Licensor in writing of the actual dates of attachment, including overlashing, within five (5) days of the date(s) of such attachment.

c. Where post-construction inspection by the Licensor has been completed within thirty (30) days of the date of notice of attachment of Licensee's facilities required in b. above, Licensee shall be obligated to correct such non-complying conditions within fifteen (15) days of the date of the written notice from the Licensor or as agreed to by theparties. If corrections are not completed within said fifteen (15) day period, attachment authorizations for the Poles and/or Anchors where non-complying conditions remain uncorrected shall terminate forthwith, regardless of whether Licensee has energized the facilities attached to said Poles and/or Anchors, and Licensee shall remove its facilities from said Poles and/or Anchors in accordance with provisions in Article VII. No further attachment authorizations shall be issued to Licensee until Licensee's facilities are removed from the Poles and/or Anchors where such non-complying conditions exist.

d. Where post-construction inspection by the Licensor has not been completed within thirty (30) days of the date of notice of attachment of Licensee's facilities, Licensee shall correct such non-complying conditions within fifteen (15) days of the date of the written notice from the Licensor or as agreed to by the parties. If corrections are not made by Licensee within said fifteen (15) day period, the Licensor shall perform or have performed such corrections and Licensee shall pay to the Licensor the cost of performing such work.

e. Within seven (7) days of the completion of a post-construction inspection, the Licensor shall notify the Licensee in writing of the date of the completion of the post-construction inspection.

f. Subsequent inspections to determine if appropriate corrective action has been taken may be made by the Licensor. Licensee shall reimburse the Licensor for the cost

of such inspections as specified in Article VIII.

g. The making of post-construction, subsequent and/or periodic inspections or the failure to do so shall not operate to relieve Licensee of any responsibility, obligation or liability specified in this Agreement.

h. The costs of inspection made during construction and/or the initial post-construction survey shall be billed to the Licensee. The costs of Periodic Inspections or any inspections found necessary due to the existence of substandard or unauthorized attachments shall be the L~~l~~icensee's responsibility.

i. Licensor reserves the right to make periodic inspections of all or any part of the cable, equipment and facilities of Licensee on Poles owned by the Licensor and/or Joint User(s), at the expense of the Licensee as specified in Article VIII. Periodic inspections of the entire plant of the Licensee will not be made more often than once every five years and upon 30 days' notice to Licensee unless in Licensor's judgment such inspections are required for reasons involving safety or because of an alleged violation of the terms of this Agreement by Licensee.

6. Unauthorized Attachment

a. If any equipment and/or facilities of the Licensee shall be found attached to a Pole and/or Anchor for which authorization has not been granted by the Licensor, the Licensor, without prejudice to its other rights or remedies under this Agreement, including termination or otherwise, may impose a charge and require the Licensee to submit in writing, within ten (10) days after receipt of written notification from the Licensor of the unauthorized attachment, a Pole and/or Anchor attachment application. If such application is not received by the Licensor within the specified time period, the Licensee will be required to remove its unauthorized attachment within ten (10) days of the final date for submitting the required application, or the Licensor may remove the Licensee's facilities without liability, and the cost of such removal shall be borne by the Licensee.

b. For the purpose of determining the applicable charge, the unauthorized attachment shall be treated as having existed for a period of five (5) years prior to its discovery or for the period beginning with the date of the initial agreement, whichever period shall be shorter; and the charges as specified in Article VIII shall be due and payable forthwith whether or not Licensee is permitted to continue the attachment.

c. No act or failure to act by the Licensor with regard to said unauthorized attachment shall be deemed as the authorization of the attachment; and, if any authorization should be subsequently issued, said authorization shall not operate retroactively or constitute a waiver by the Licensor of any of its rights or privileges under this Agreement, or otherwise, provided, however, that Licensee shall be subject to all liabilities, obligations and responsibilities of this Agreement in regard to said unauthorized attachment from its inception.

ARTICLE V

OTHER OBLIGATIONS OF LICENSEES

1. Insurance

a. Licensee shall secure and maintain (and ensure its subcontractors, if any, secure and maintain) insurance acceptable to Licensee as to form and amount of coverage.

b. All insurance must be in effect before Licensor will authorize Licensee to make attachment to Licensor's poles and shall remain in force until such facilities have been removed from all such poles. For all insurance, the Licensee must deliver an industry-recognized certificate of insurance evidencing the amount and nature of the coverage, the expiration date of the policy and stating that the policy of insurance issued to Licensee will not be cancelled without thirty (30) days written notice to Licensor. Also, where applicable, such certificate of insurance shall evidence the name of the Licensor as an additional insured. The Licensee shall submit such certificates of insurance annually to the Licensor as evidence that it has maintained all required insurance.

c. Licensee is responsible for determining whether the above minimum insurance coverages are adequate to protect its interests. The above minimum coverages shall not constitute limitations upon Licensee's liability.

ARTICLE VI

LIABILITY AND DAMAGES

1. The Licensor reserves to itself, its successors and assigns, the right to relocate and maintain its Poles and Anchors and to operate its facilities in conjunction therewith in such a manner as will best enable it to fulfill its own service requirements. The Licensor shall be liable to Licensee only for and to the extent of any damage caused by the negligence of the Licensor's agents or employees to Licensee's facilities attached to a Pole or Anchor. The Licensor shall not be liable to Licensee for any interruption of Licensee's service or for interference with the operation of Licensee's facilities arising in any manner out of Licensee's use of Poles or Anchors.

2. Licensee shall exercise reasonable care to avoid damaging the facilities of Licensor and of others attached to Licensor's poles, and shall make an immediate report of damage caused by Licensee to the owner of facilities so damaged.

3. Licensee shall each indemnify, protect and save harmless L~~l~~icensor from and against any and all claims, demands, causes of actions and costs, including reasonable attorneys' fees, for damages to the property of L~~l~~icensor and other persons and injury or death to L~~l~~icensor's employees or other persons, including but not limited to, payments under any Workers Compensation law or under any plan for employee's disability and death benefits, which may arise out of or be caused by the negligence or intentional misconduct of the L~~l~~icensee as it relates to the erection, maintenance, presence, use or removal of the ~~licensee~~Licensee's facilities, or by any act or omission of the ~~licensee~~Licensee's employees, agents or contractors on or in the vicinity of Licensor's poles.

4. Licensee shall indemnify, protect and save harmless L~~l~~icensor from and all claims, demands, causes of action and costs, including reasonable attorneys' fees, which arise directly from or are caused by the negligence or intentional misconduct of the ~~licensee~~Licensee as it relates to the construction, attachment or operation of its facilities on Licensor's poles, including but not limited to damages, costs and expense of relocating poles due to the loss of right-of-way or property owner consents, taxes, special charges by others, claims and demands for damages or loss from infringement of copyright, for libel and slander, for unauthorized use of television or radio broadcast programs and other program material, and from and against all claims, demands and costs, including reasonable attorneys' fees, for infringement of patents with respect to the manufacture, use and operation of the indemnifying party's facilities in combination with poles or otherwise. Licensor and Licensee shall promptly advise the other of all claims relating todamage to property or injury to or death of persons, arising or alleged to have been caused by the erection, maintenance, repair, replacement, presence, use or removal of facilities governed by this License Agreement. Copies of all accident reports and statements made to a Licensor'sor Licensee's insurer by the other Licensor or Licensee or affected entity shall be furnished promptly to the Licensor or Licensee.

5. Notwithstanding anything to the contrary herein, neither Licensor nor Licensee shall be liable to the other for any special, consequential or other indirect damages arising under this Agreement, including without limitation loss of profits and revenues.

6. The provisions of this Article shall survive the expiration or earlier termination of this Agreement or any license issued hereunder.

ARTICLE VII

TERMINATIONS OF AUTHORIZATIONS

1. In addition to rights of termination provided to the Licensor under other provisions of this Agreement, the Licensor shall have the right to terminate Pole/or Anchor attachment authorizations and rights granted under provisions of this Agreement where:

a. the Licensee's facilities are maintained or used in violation of any law or in aid of any unlawful act or undertaking, or

b. the Licensee ceases to have authority to construct and operate its facilities on public or private property at the location of the particular Pole or Anchor covered by the authorization and has not sought judicial or regulatory review of any decision that (1) acted to terminate such authority or (2) declared that Licensee lacks such authority; or

c. the Licensee materially fails to comply with any of the terms and conditions of this Agreement or materially defaults in any of its obligations thereunder; or

d. the Licensee attaches to a Pole and/or Anchor without having first been issued authorization therefore; or

e. the Licensee, subject to the provisions specified in Article III (5.), should cease to provide its services.

f. the Licensee sublets or apportions part of the licensed assigned space or otherwise permits its assigned space to be used by an entity or an affiliate not authorized pursuant to Article III (5).

g. except in circumstances in which Licensor has accepted evidence of self-insurance in accordance with Article VI, the Licensee's insurance carrier shall at any time notify the Licensor that the policy or policies of insurance as required in Article VI will be or have been cancelled or amended so that those requirements will no longer be satisfied;

h. the Licensee shall fail to pay any sum due under Article VIII or to deposit any sum required under this Agreement.

i. any authorization that may be required by any governmental or private authority for the construction, operation and maintenance of the Licensee's facilities on a Pole or Anchor is denied, revoked or cancelled by a final, non-appealable order or decision.

2. The Licensor will promptly notify the Licensee in writing of any instances cited in Article VII (1.) preceding. The Licensee shall take corrective action as necessary to eliminate the non-compliance and shall confirm in writing to the Licensor within thirty (30) days following such written notice that the non-compliance has ceased or been corrected. If Licensee fails to discontinue such non-compliance or to correct same and fails to give the required written confirmation to the Licensor within the time stated above, the Licensor may terminate the attachment authorizations granted hereunder for Poles and/or Anchors as to which such non-compliance shall have occurred.

3. Licensee may at any time remove its facilities from a Pole or Anchor after first giving the Licensor written notice of Licensee's intention to so remove its facilities.

4. In the event of termination of any of the Licensee's authorizations hereunder,

the Licensee will remove its facilities from the Poles and Anchors within thirty (30) days of the effective date of the termination; provided, however, that Licensee shall be liable for and pay all fees and charges pursuant to provisions of this Agreement to the Licensor until Licensee's facilities are actually removed from the Poles and Anchors. If the Licensee fails to remove its facilities within the specified period, the Licensor shall have the right to remove such facilities at the Licensee's expense.

5. When Licensee's facilities are removed from a Pole or Anchor, no attachment to the same Pole or Anchor shall be made until the Licensee has first complied with all of the provisions of this Agreement as though no such Pole or Anchor attachment had been previously made and all outstanding charges due to the Licensor for such Pole or Anchor attachment have been paid in full.

ARTICLE VIII

RATES AND CHARGES

The Licensee is responsible for payment of all rates, charges and costs as specified elsewhere in this Agreement and as set forth below. Licensee shall be responsible to perform all make-ready work at its own expense.

Licensee agrees that, in the event Licensee fails to pay an amount due and owing within the period of time set forth for payment in this Agreement, interest shall accrue on the unpaid balance thereof at the rate of 1 1/2% per month for each month from the expiration of such period until payment is received by Licensor.

1. Attachment Rate

The annual attachment rate shall be as specified in a schedule attached hereto as Exhibit B.

2. Charges for Inspections

a. The cost of the post-construction inspection shall be billed in advance If the post-construction inspection is not performed, Licensor shall refund the amounts paid for such inspection.

b. The cost of Periodic Inspection will be billed to the Licensee upon completion of the inspection by the Licensor.

c. Licensee shall pay the cost of subsequent inspections to insure correction of variances from required construction and maintenance practices, determined to exist through post-construction or periodic inspections.

3. Payment of Rates and Charges

Unless otherwise provided elsewhere in this Agreement, Licensee shall pay all rates and charges as specified in the Agreement within fifteen (15) days from the dates of billing thereof.

ARTICLE IX

EQUAL EMPLOYMENT OPPORTUNITIES

Licensee affirms that the Equal Employment Opportunity provisions required by law, regulation or executive order are incorporated in this Agreement.

ARTICLE X

WAIVER OF TERMS AND CONDITIONS

Failure of Licensee or Licensor to enforce or insist upon compliance with any of the terms or conditions of this Agreement or failure to give notice or declare this Agreement or the licenses granted hereunder terminated shall not constitute a waiver or relinquishment of any such term, condition or act but the same shall be and remain at all times in full force and effect.

ARTICLE XI

TERM OF AGREEMENT

If not terminated in accordance with its terms, this Agreement shall continue in effect for a term of five (5) years from the date of full execution, subject to the approval of the Madison governing body. This agreement is subject to renewal at the discretion of the Madison governing body and the consent of Altice~~, provided, said Agreement shall continue on a year to year basis until renewed, replaced or lawfully terminated.~~ .

Commented [RK7]: Change rejected

IN WITNESS WHEREOF, the parties hereto have executed this Agreement inmultiple originals on the day and year first above written.

ATTEST:

_____
ELIZABETH OSBORNE
BOROUGH CLERK

THE BOROUGH OF MADISON IN THE COUNTY OF MORRIS

By: _____
ROBERT H. CONLEY
MAYOR

~~ATTEST:~~

~~_____~~

~~CSC Holdings LLC~~

~~By: _____~~

ATTEST:

_____

CSC TKR, LLC

By: _____

~~ALTICE USA, INC.~~

~~By: _____~~

EXHIBIT A

APPLICATION AND POLE LICENSE

In accordance with the terms and conditions of the Pole Attachment Agreement between us, dated as of July 24, 20220, application is hereby made for a license to make attachments to all Borough of Madison Utility Poles, excluding those Poles covered by the Cook Avenue Parking Lot Utility Relocation Agreement. Licensee agrees that attachments shall be limited to Internet, wired telephone and cable television communications equipment, as well as overlashing of existing equipment. Fifth-generation wireless (5G) and cellular telephone equipment is specifically excluded and may not be placed on the Poles.

~~CSC HOLDINGS LLC~~

~~By:~~ _____

CSC TKR, LLC

By: _____

~~ALTICE USA, INC.~~

~~By:~~ _____

EXHIBIT B

SCHEDULE OF RATES FOR
BOROUGH OF MADISON
STANDARD POLE ATTACHMENT

1. RATE

Pole Attachment Annual Fee: Ninety-Five Thousand Dollars ($95,000.00) for the first year of the Agreement. There shall be a 2% increase each year thereafter. ~~Twelve Dollars ($12.00), per Pole Attachment, per year,~~ ~~250,000.00.~~ The Pole Attachment Annual Fee provides Licensee with access to all Borough of Madison Utility Poles~~,~~ , provided this fee does not apply to ~~excluding~~ those poles covered by the Cook Avenue Parking Lot Utility Relocation Agreement.

2. COMPUTATION

The first payment of the annual charge for licenses granted under this Agreement shall be prorated from the execution date hereof. Thereafter, the full annual fee is due and payable on the first business day of each succeeding year.

3. PAYMENT DATE

The Attachment fee shall be due and payable annually, in advance, on the 1st business day of January each year. Failure to pay such fee within ~~fifteen (15)~~thirty (30) days after presentment of the bill therefore or on the specified payment date, whichever is later, shall constitute default under this Agreement.

Commented [RK8]: Change accepted.

4. TERMINATION OF LICENSE

Upon termination of a license granted hereunder, the applicable attachment fee shall be retained by the Licensor.

Exhibit H

R 259-2022

RESOLUTION OF THE BOROUGH OF MADISON AUTHORIZING THE TERMINATION OF THE JOINT POLE USE AGREEMENT BETWEEN NEW JERSEY BELL TELEPHONE COMPANY (SUCCESSOR ENTITY "VERIZON") AND THE BOROUGH OF MADISON

WHEREAS, the Borough Administrator has recommended that the Borough terminate the attached Joint Use of Poles Agreement between New Jersey Bell Telephone Company (successor entity "Verizon") and the Borough of Madison dated October 9, 1950, (the Agreement) and;

WHEREAS, the agreement allows for termination by either party with one (1) year's advance notice in writing to terminate the Agreement; and

WHEREAS, the Borough Council has determined to terminate the Agreement and give notice of such termination to be effective on October 13, 2023 at midnight.

NOW, THEREFORE, BE IT RESOLVED by the Council of the Borough of Madison, in the County of Morris and State of New Jersey, that the Borough Administrator is hereby authorized to execute, on behalf of the Borough, a notice of termination of the Joint Use of Poles Agreement between New Jersey Bell Telephone Company (successor entity "Verizon") and the Borough of Madison, which shall be effective on October 13, 2023 at midnight, and to immediately forward said notice to the appropriate Verizon representative.

ADOPTED AND APPROVED
October 12, 2022

ROBERT LANDRIGAN, Acting Mayor

Attest:

ELIZABETH OSBORNE, Borough Clerk

I, Elizabeth Osborne, Clerk of the Borough of Madison, hereby certify the foregoing to be a true and exact copy of a resolution adopted by the Council at a duly convened meeting held October 12, 2022

Elizabeth Osborne, Borough Clerk

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

THIRD REPORT AND ORDER

Adopted: August 1, 2019 **Released: August 2, 2019**

By the Commission: Chairman Pai and Commissioners O'Rielly and Carr issuing separate statements; Commissioners Rosenworcel and Starks dissenting and issuing separate statements.

TABLE OF CONTENTS

I. INTRODUCTION

1. In this *Third Report and Order* (*Third Order*), we interpret sections of the Communications Act of 1934, as amended (the Act) that govern how local franchising authorities (LFAs) may regulate cable operators and cable television services, with specific focus on issues remanded from the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) in *Montgomery County, Md. et al.*

v. FCC.[1] First, we conclude that cable-related, "in-kind" contributions required by a cable franchise agreement are franchise fees subject to the statutory five percent cap on franchise fees set forth in section 622 of the Act, with limited exceptions, including an exemption for certain capital costs related to public, educational, and governmental access (PEG) channels.[2] Second, we find that under the Act, LFAs may not regulate the provision of most non-cable services,[3] including broadband Internet access service, offered over a cable system by an incumbent cable operator. Third, we find that the Act preempts any state or local regulation of a cable operator's non-cable services that would impose obligations on franchised cable operators beyond what Title VI of the Act allows. Finally, we conclude that Commission requirements that concern LFA regulation of cable operators should apply to state-level franchising actions and state regulations that impose requirements on local franchising.

II. BACKGROUND

2. Every LFA as well as every "cable operator"[4] that offers "cable service"[5] must comply with the cable franchising provisions of Title VI of the Act.[6] Section 621(b)(1) prohibits a cable operator from providing cable service without first obtaining a cable franchise,[7] while section 621(a)(1) circumscribes the power of LFAs to award or deny such franchises.[8] In addition, section 622 allows LFAs to charge franchise fees and sets the upper boundaries of those fees. Notably, section 622 caps the fee at five percent of a "cable operator's gross revenues derived . . . from the operation of the cable system to provide cable service."[9] When Congress initially adopted these sections in 1984, it explained that it was setting forth a federal policy to "define and limit the authority that a franchising authority may exercise through the franchise process."[10] Congress also expressly preempted any state or local laws or actions that conflict with those definitions and limits.[11]

3. As summarized in detail in the *Second FNPRM*, the Commission has an extensive history of rulemakings and litigation interpreting sections 621 and 622.[12] In short, the Commission in 2007 released a *First Report and Order* to provide guidance about terms and conditions in local franchise

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

[2] 47 U.S.C. § 542.

[3] *See infra* note 257 (defining "non-cable service").

[4] *Id*. § 502(5) ("the term 'cable operator' means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.").

[5] *Id*. § 502(6) ("the term 'cable service' means— (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.").

[6] *Id*. §§ 521-573.

[7] *Id*. § 541(b)(1).

[8] *Id*. § 541(a)(1).

[9] *Id*. § 542.

[10] H.R. Rep. No. 98-934, at 19 (1984).

[11] 47 U.S.C. § 556(c). *See, e.g.*, *Comcast v. City of Plano*, 315 S.W.3d 673, 678-80 (Tex. Ct. App. 2010) (discussing historical development of federal regulatory scheme); *City of Chicago v. Comcast Cable Holdings, L.L.C.*, 231 Ill.2d 399, 405-07 (2008).

[12] *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, 33 FCC Rcd 8952, 8953-59, paras. 3-14 (2018) (*Second FNPRM*).

agreements that are unreasonable under section 621 of the Act with respect to new entrants' franchise agreements.[13] Two major conclusions that the Commission adopted are that (1) non-cash, "in-kind" contributions from cable operators to franchise authorities are franchise fees that count toward the statutory cap of five percent of cable operator revenue,[14] and (2) franchising authorities may not use their cable franchising authority to regulate non-cable services (like telephone and broadband services) that the new entrants deliver over their mixed-use networks (*i.e.*, networks that carry broadband services, voice services, and other non-cable services, in addition to video programming services).[15] The Commission also sought comment on whether to extend those conclusions to agreements that LFAs have with incumbent cable operators,[16] and ultimately decided in a *Second Report and Order*[17] and an *Order on Reconsideration*[18] that those conclusions should apply to incumbent cable operators.

4. In *Montgomery County*, the Sixth Circuit addressed challenges by LFAs to the *Second Report and Order* and the *Order on Reconsideration*.[19] The court agreed that in-kind (*i.e.*, non-cash) contributions are franchise fees as defined by section 622(g)(1), noting that section 622(g)(1) defines "franchise fee" to include "*any* tax, fee, or assessment *of any kind*" and that the terms "tax" and "assessment" can include nonmonetary exactions.[20] The court found, however, that the fact that the term franchise fee *can* include in-kind contributions "does not mean that it necessarily does include every one of them."[21] The court concluded that the Commission failed to offer any explanation in the *Second Report and Order* or in the *Order on Reconsideration* as to why section 622(g)(1) allows it to treat cable-related, "in-kind" exactions—such as free or discounted cable services or obligations related to PEG channels—as franchise fees.[22] LFAs had claimed that the Commission's interpretation would limit LFAs' ability to enforce their statutory authority to require cable operators to dedicate channel capacity for PEG use and to impose build-out obligations in low-income areas,[23] and the court noted that the Commission's orders did not reflect any consideration of this concern.[24] The court also stated that the Commission failed to define what "in-kind" means.[25] The court therefore vacated as arbitrary and capricious the *Second Report and Order* and the *Order on Reconsideration* to the extent that they treat cable-related, in-

[13] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007) *(First Report and Order*), *aff'd sub nom*. *Alliance for Community Media et al. v. FCC*, 529 F.3d 763 (6th Cir. 2008) (*Alliance*), *cert. denied*, 557 U.S. 904 (2009). The term "new entrants" as used in the *First Report and Order* refers to entities that choose to offer "cable service" over a "cable system" utilizing public rights-of-way and thus are deemed under the Act to be "cable operator[s]" that must obtain a franchise. *First Report and Order*, 22 FCC Rcd at 5106 n.24. Such new entrants largely were telecommunications carriers subject to Title II of the Act that were seeking to enter the cable services market.

[14] *First Report and Order*, 22 FCC Rcd at 5149-50, paras. 105-08.

[15] *Id*. at 5155-56, paras. 121-24.

[16] *Id*. at 5164-65, paras. 139-40.

[17] *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, 19637-38, 19640-41, paras. 11, 17 (2007) (*Second Report and Order*).

[18] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Order on Reconsideration, 30 FCC Rcd 810, 814-17, paras. 11-15 (2015) (*Order on Reconsideration*).

[19] *Montgomery County*, 863 F.3d at 487.

[20] *Id*. at 490-91.

[21] *Id*. at 491.

[22] *Id*. In the *First Report and Order*, the Commission ruled that "any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap." (continued….)

kind exactions as franchise fees under section 622(g)(1).[26] The court directed the Commission to determine and explain on remand to what extent cable-related, in-kind contributions are franchise fees under the Act.[27]

5. The court in *Montgomery County* also agreed with LFAs that neither the *Second Report and Order* nor the *Order on Reconsideration* offered a valid statutory basis for the Commission's application of its prior "mixed-use ruling" to incumbent cable operators.[28] Under the mixed-use rule, "LFAs' jurisdiction applies only to the provision of cable services over cable systems" and "an LFA may not use its video franchising authority to attempt to regulate a LEC's entire network beyond the provision of cable services."[29] The court stated that the Commission's decision in the *First Report and Order* to apply the mixed-use rule to new entrants had been defensible because section 602(7)(C) of the Act expressly states that LFAs may regulate Title II carriers only to the extent that they provide cable services and the Commission found that new entrants generally are Title II carriers.[30] The court observed that in extending the mixed-use rule to incumbent cable operators in the *Second Report and Order*, the Commission merely relied on the *First Report and Order*'s interpretation of section 602(7)(C), noting that section 602(7)(C) "does not distinguish between incumbent providers and new entrants."[31] The court found, however, that this reasoning is not an affirmative basis for the Commission's decision in the *Second Report and Order* to apply the mixed-use rule to incumbent cable operators because section 602(7)(C) by its terms applies only to Title II carriers and "many incumbent cable operators are not Title II carriers."[32] The court further found that the *Order on Reconsideration* did not offer any statutory basis for the Commission's decision to extend the mixed-use rule to incumbent cable operators.[33] Accordingly, the court concluded that the Commission's extension of the mixed-use rule to incumbent cable operators that are not common carriers was arbitrary and capricious.[34] The court vacated the mixed-use rule as applied to those incumbent cable operators and remanded for the Commission "to set forth a valid

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First Report and Order, 22 FCC Rcd at 5149, para. 105. This ruling was upheld by the Sixth Circuit in *Alliance*. 529 F.3d at 782-83. The Commission later relied on the *First Report and Order* to conclude that "in-kind payments involving both cable and non-cable services" count toward the franchise fee cap. *Order on Reconsideration*, 30 FCC Rcd at 816, para. 13. The court found that the *Order on Reconsideration* incorrectly asserted that the *First Report and Order* had already treated "in-kind" cable-related exactions as franchise fees and that the Sixth Circuit had approved such treatment in *Alliance*. *Montgomery County*, 863 F.3d at 490. The court also found that the *First Report and Order* did not make clear that cable-related exactions are franchise fees under section 622(g)(1). *Id*. In this regard, the court pointed out that the Commission specifically told the Sixth Circuit in *Alliance* that the *First Report and Order*'s "analysis of in-kind payments was expressly limited to payments that do not involve the provision of cable service." *Id*.

[23] 47 U.S.C. § 531.

[24] *Montgomery County*, 863 F.3d at 491.

[25] *Id*.

[26] *Id*. at 491-92.

[27] *Id*. at 492.

[28] *Id*. at 493. The court noted that LFAs' primary concern with the mixed-use ruling is that it would prevent them from regulating "institutional networks" or "I-Nets"—communication networks that are constructed or operated by the cable operator and are generally available only to subscribers who are not residential customers—even though the Act makes clear that LFAs may regulate I-Nets. *Id*. at 492; *see* 47 U.S.C. §§ 531(b) (authorizing franchising authorities to require as part of a franchise or franchise renewal that channel capacity on institutional networks be designated for educational or governmental use), 541(b)(3)(D) ("Except as otherwise permitted by sections 611 and (continued….)

statutory basis, if there is one, for the rule as so applied."[35]

6. The Commission in September 2018 issued the *Second FNPRM* to address the issues raised by the remand from the Sixth Circuit in *Montgomery County*. In the *Second FNPRM*, the Commission tentatively concluded that: (1) it should treat cable-related, in-kind contributions required by LFAs from cable operators as a condition or requirement of a franchise agreement as franchise fees subject to the statutory five percent cap on franchise fees set forth in section 622 of the Act, with certain exceptions;[36] and (2) it should apply its mixed-use rule to incumbent cable operators.[37] The Commission sought comment on these tentative conclusions.[38] The Commission also sought comment on whether other statutory provisions limit LFAs' authority to regulate non-cable services offered over a cable system by an incumbent cable operator or the facilities and equipment used to provide such services.[39] Finally, the Commission invited comment on whether it should apply its proposals and tentative conclusions in the *Second FNPRM*, and its prior decisions governing regulation of cable operators by local franchising authorities, to franchising actions taken at the state level and state regulations that impose requirements on local franchising.[40]

III. DISCUSSION

7. We largely adopt our tentative conclusions in the *Second FNPRM*.[41] First, we conclude that cable-related, in-kind contributions required by LFAs from cable operators as a condition or requirement of a franchise agreement are franchise fees subject to the statutory five percent cap on

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612, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise"). *See also id*. § 531(f) (defining "institutional networks"). The court observed, however, that the Commission acknowledged that its mixed-use rule was not meant to prevent LFAs from regulating I-Nets. *Montgomery County*, 863 F.3d at 492.

[29] *First Report and Order*, 22 FCC Rcd at 5155, paras. 121-22.

[30] *Montgomery County*, 863 F.3d at 492-93.

[31] *Id*. at 493.

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] *Second FNPRM*, 33 FCC Rcd at 8960-64, paras. 16-24. The Commission proposed to apply this treatment of cable-related, in-kind contributions to both incumbent cable operators and new entrants. *Id*. at 8963-64, para. 22.

[37] *Second FNPRM*, 33 FCC Rcd at 8964-65, para. 25. In particular, the Commission tentatively concluded that the mixed-use rule prohibits LFAs from regulating the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers, or from regulating facilities and equipment used in the provision of such non-cable services, with the exception of I-Nets. *Id*. at 8965-66, para. 26. Similarly, the Commission tentatively concluded that LFAs are prohibited from regulating the provision of non-cable services provided by incumbent cable operators that are not common carriers, or the facilities and equipment used to provide such services. *Id*. at 8966-68, paras. 27-28.

[38] *Id*. at 8952, para. 1.

[39] *Id*. at 8969-71, para. 31.

[40] *Id*. at 8971-72, para. 32.

[41] As discussed below, we define "cable related, in-kind contributions" slightly differently than proposed, and our reasoning for not applying build-out costs is different than what we proposed. *Compare infra* paras. 25 and 57 *with Second FNPRM*, 33 FCC Rcd at 8963-64, paras. 21 and 24.

franchise fees set forth in section 622 of the Act. We find that the Act exempts capital contributions associated with the acquisition or improvement of a PEG facility from this definition and remind LFAs that under the Act they may only require "adequate" PEG access channel capacity, facilities, or financial support. Second, we find that our mixed-use rule applies to incumbent cable operators. Third, we find that the Act preempts any state or local regulation of a cable operator's non-cable services that would impose obligations on franchised cable operators beyond what Title VI of the Act allows. Finally, we decide that our guidance related to the local franchising process in this docket also will apply to state-level franchising actions and state regulations that impose requirements on local franchising.

A. In-Kind Contributions

8. Section 622 of the Act contains a broad definition of franchise fees. For the reasons provided below, we find that most cable-related, in-kind contributions are encompassed within this definition and thus must be included for purposes of calculating the statutory five percent cap on such fees. In this section, we first explain our interpretation of section 622 and why the definition of franchise fees includes most cable-related, in-kind contributions. We then explain how our interpretation applies to certain common franchise agreement terms. Lastly, we explain the process that LFAs and cable operators should use to amend their franchise agreements to conform to this Order.

1. Interpretation of Cable-Related, In-Kind Contributions Under Section 622

9. Addressing the first issue raised by the remand from the Sixth Circuit in *Montgomery County*, we adopt our tentative conclusion that we should treat cable-related, in-kind contributions[42] required by LFAs from cable operators as a condition or requirement of a franchise agreement as franchise fees subject to the statutory five percent cap set forth in section 622 of the Act, with limited exceptions as described herein.[43] We also adopt our tentative conclusion that this treatment of cable-related, in-kind contributions should be applied to both new entrants and incumbent cable operators.[44] As explained below, we find that this interpretation is consistent with the statutory language and legislative history.

10. Section 622 of Title VI, entitled "Franchise fees," governs cable operator obligations with respect to franchise fees.[45] Specifically, section 622(a) states that any cable operator may be required under the terms of any franchise agreement to pay a franchise fee, and section 622(b) sets forth the limitation that "[f]or any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services."[46] Notably, section 622(g) defines the term "franchise fee" for purposes of this section.[47]

11. To understand what types of contributions from cable operators are franchise fees subject to the five percent statutory cap, the key provision is the section 622(g) definition, which states that "the term 'franchise fee' includes *any tax, fee, or assessment of any kind* imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as

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[42] We define this term *infra* para. 25, to include "any non-monetary contributions related to the provision of cable services provided by cable operators as a condition or requirement of a local franchise, including but not limited to free or discounted cable service to public buildings, non-capital costs in support of PEG access, and costs attributable to the construction of I-Nets. It does not include the costs of complying with build-out and customer service requirements."

[43] *Second FNPRM*, 33 FCC Rcd at 8960, para. 16.

[44] *Id*. at 8963, para. 22.

[45] 47 U.S.C. § 542.

[46] *Id*. § 542(a), (b).

[47] *Id*. § 542(g).

such," subject to certain enumerated exceptions.[48] Specifically, according to the definition, the term "franchise fee" does not include the following: (1) any tax, fee, or assessment of general applicability;[49] (2) in the case of any franchise in effect on October 30, 1984, payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, PEG access facilities;[50] (3) in the case of any franchise granted after October 30, 1984, capital costs which are required by the franchise to be incurred by the cable operator for PEG access facilities;[51] (4) requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages;[52] or (5) any fee imposed under Title 17.[53] Because Congress spoke directly to the issue of what constitutes a franchise fee in section 622(g), our analysis of whether cable-related, in-kind exactions are included in the franchise fee is appropriately focused on this statutory language.

12. As a preliminary matter, we note our prior finding, which was upheld by the Sixth Circuit in *Montgomery County*, that the franchise fee definition in section 622(g) can encompass both monetary payments imposed by a franchising authority or other governmental entity on a cable operator, as well as "in-kind" payments – *i.e.*, payments consisting of something other than money, such as goods and services[54] – that are so imposed.[55] The definition of "franchise fee" in section 622(g)(1) broadly covers "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator . . . solely because of [its] status as such."[56] Because the statute does not define the terms "tax," "fee," or "assessment," we look to the ordinary meaning of such terms.[57] As the court explained in *Montgomery County*, the definitions of the terms "tax" and "assessment," in particular, "can include noncash exactions."[58] Further, as the court observed, section 622(g)(1) "more specifically defines 'franchise fee' to include '*any* tax, fee, or assessment *of any kind*[,]' . . . which requires us to give those terms maximum breadth."[59] Thus, consistent with the court's conclusion on this issue, the term franchise fee in section 622(g)(1) includes non-monetary payments.[60] We, therefore, reject arguments that it should

[48] *Id*. § 542(g)(1) (emphasis added).

[49] *Id*. § 542(g)(2)(A). In the *Second FNPRM*, we noted that, by definition, a tax, fee, or assessment of general applicability does not cover cable-related, in-kind contributions, and therefore we tentatively concluded that this exclusion is not applicable to such contributions. *Second FNPRM*, 33 FCC Rcd at 8961, para. 18. *See also* H.R. Rep. No. 934, 98th Cong., 2nd Sess. 1984 at 64 ("This would include 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 which, while they may differentiate the rates charged to different types of utilities, do not unduly discriminate against the cable operator so as to effectively constitute a tax directed at the cable system."). No commenter disputes this analysis, and we affirm it here.

[50] 47 U.S.C. § 542(g)(2)(B). *See infra* Section III.A.2.b (discussing PEG costs).

[51] *Id*. § 542(g)(2)(C). *See infra* Section III.A.2.b (discussing PEG costs).

[52] *Id*. § 542(g)(2)(D). In the *First Report and Order*, the Commission found that the term "incidental" in this section should be limited to the list of incidentals in the statutory provision, as well as certain other minor expenses, and the court in *Alliance* upheld this determination. *First Report and Order*, 22 FCC Rcd at 5148, para. 103; *Alliance*, 539 F.3d at 782-83. The Commission also emphasized that non-incidental costs should be counted toward the five percent cap on franchise fees, and listed various examples including attorney fees and consultant fees, application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided to an LFA, and in-kind services unrelated to the provision of cable services. *First Report and Order*, 22 FCC Rcd at 5149, para. 104. In the *Second FNPRM*, we explained that, although the statute does not define the term "incidental," based on the interpretive canon of *noscitur a sociis*, the exemplary list delineated in the text of the provision as well as the applicable legislative history suggests that the term refers to costs or requirements related to assuring that a cable operator is financially and legally qualified to operate a cable system, not to cable-related, in-kind contributions. *Second FNPRM*, 33 FCC Rcd at 8961-62, para. 18 (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)). *See also* H.R. Rep. No. 934, 98th Cong., 2nd Sess. 1984 at 64 ("[F]ranchise fee is defined (continued….)

be construed to cover only monetary payments.[61]

13. As the court noted in *Montgomery County*, "that the term 'franchise fee' can include noncash exactions, of course, does not mean that it necessarily *does* include every one of them."[62] As such, the next step in our analysis is to evaluate specifically whether *cable-related*, in-kind contributions[63] are included within the franchise fees. The Commission previously determined that in-kind contributions unrelated to the provision of cable service are franchise fees subject to the statutory five percent cap, and the court's decision in *Montgomery County* upheld this interpretation.[64] In making this determination, the Commission pointed to examples in the record where LFAs demanded in-kind contributions unrelated to the provision of cable services in the context of franchise negotiations, and it explained that such requests do not fall within any of the exempted categories in section 622(g)(2) and thus should be considered a franchise fee under section 622(g)(1).[65]

14. We find that there is no basis in the statute for exempting all cable-related, in-kind contributions for purposes of the five percent franchise fee cap or for distinguishing between cable-related, in-kind contributions and in-kind contributions unrelated to the provision of cable services. As noted above, the section 622(g)(1) franchise fee definition broadly covers "any tax, fee, or assessment of any kind,"[66] and we conclude that cable-related, in-kind contributions fall within this definition. There is nothing in this language that limits in-kind contributions included in the franchise fee.[67] In fact, Congress specified that the definition covers "*any*" tax, fee, or assessment "*of any kind*," which means those terms should be interpreted expansively and given "maximum breadth."[68]

15. Further, there is no general exemption for cable-related, in-kind contributions in the five excluded categories listed in section 622(g)(2).[69] Only two of the exclusions encompass two very specific kinds of cable-related, in-kind contributions, but not all such contributions generally. In particular, section 622(g)(2)(B) excludes payments required by the franchise to be made by the cable operator for, or in support of the use of, PEG access facilities (for franchises in effect on October 30, 1984), and section

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so as not to include any bonds, security funds, or other incidental requirements or costs necessary to the enforcement of the franchise."). Consistent with this analysis and precedent, we find that cable-related, in-kind contributions demanded by an LFA do not qualify as "incidental" charges excluded in section 622(g)(2)(D). *See id*. No commenter disputes our interpretation of this particular exclusion.

[53] 47 U.S.C. § 542(g)(2)(E). In the *Second FNPRM*, we explained that this section excludes from the definition of franchise fees any fees imposed under the Copyright Act under Title 17, United States Code, and thus does not appear to apply to cable-related, in-kind contributions. *Second FNPRM*, 33 FCC Rcd at 8961, para. 18. *See also* H.R. Rep. No. 934, 98th Cong., 2nd Sess. 1984 at 64 ("Any fee imposed under the Copyright Act would not be considered a franchise fee."). No commenter disputes this analysis, and we affirm it here.

[54] *See* Merriam-Webster, Definition of "In-Kind," *available at* https://www.merriam-webster.com/dictionary/in-kind (defining "in-kind" as "consisting of something (such as goods or commodities) other than money"). According to the record, LFAs in some cases require a grant or other monetary contribution earmarked for cable-related services, such as PEG and I-Net support. *See, e.g.*, Altice May 9, 2019 *Ex Parte* at 7-8 (describing Altice's payment of "PEG grants" to LFAs). While we focus here on whether cable-related, *in-kind* (non-monetary) contributions are subject to the five percent cap on franchise fees, we note that these monetary contributions are subject to the franchise fee cap, unless otherwise excluded under section 622(g)(2). *See infra* note 61.

[55] *See First Report and Order*, 22 FCC Rcd at 5149, paras. 104-05; *Second FNPRM*, 33 FCC Rcd at 8960, para. 17. We reject the argument that franchise considerations are not "imposed" by a franchising authority because they are negotiated in an arms-length transaction between the parties and "are not established by force." *See* Comments of the Association of Washington Cities *et al*., at 10 (Nov. 14, 2018) (AWC *et al*. Comments); Comments of the City of Philadelphia, *et al.*, at 21-23 (Nov. 14, 2018) (City of Philadelphia *et al*. Comments); Reply Comments of the City of Philadelphia, *et al*., at 6-7 (Dec. 14, 2018) (City of Philadelphia *et al*. Reply); NATOA *et al*. July 24, 2019 *Ex Parte* at 2. The definition of the term "impose" is not limited to "established as if by force," but can also mean "to establish or apply by authority." *See* Merriam-Webster, Definition of "Impose," *available at* https://www.merriam-webster.com/dictionary/impose. *See also* Reply Comments of Free State Foundation, at 11-12 (Dec. 14, 2018) (Free State Foundation Reply) ("Nor should the Commission accept the contention that in-kind
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622(g)(2)(C) excludes capital costs which are required by the franchise to be incurred by the cable operator for PEG access facilities (for franchises granted after October 30, 1984).[70] We agree with ACA that the structure of the relevant statutory provision is "straightforward," providing a broad definition of franchise fee, "then expressly provid[ing] a limited number of exceptions to this definition, none of which is so broad as to include all cable-related, in-kind contributions."[71]

16. Moreover, the fact that Congress carved out specific exceptions to the franchise fee definition for certain PEG-related contributions bolsters the conclusion that Congress did not intend to establish a general exemption for all cable-related, in-kind contributions from treatment as franchise fees.[72] Because support for PEG access facilities and PEG capital costs fall within the broader category of cable-related, in-kind contributions, Congress would not have needed to craft these narrow exceptions if all cable-related, in-kind contributions generally were exempted.[73] We disagree with the contention that the specific exceptions in section 622(g)(2) were intended to address only "payments that otherwise might be considered franchise fees," and that "[o]ther cable-related obligations were not considered 'fees' to begin with, let alone payments that required a specific exemption."[74] This argument erroneously constricts the definition of franchise fees to apply only to "fees," while the statute more broadly includes "any tax, fee, or assessment of any kind." Further, we believe it is more consistent with the statutory text and structure to construe the exceptions as carve-outs from a broader definition that sweeps in all cable-related, in-kind contributions.[75]

17. While the statutory text is alone sufficient to support our conclusion, we also find that the legislative history supports our position that cable-related, in-kind contributions are franchise fees subject to the five percent cap.[76] As we observed in the *Second FNPRM*, we see no basis in the legislative history for distinguishing between in-kind contributions unrelated to the provision of cable services and cable-related, in-kind contributions for purposes of the five percent franchise fee cap.[77] Further, we see no basis

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contributions are purely voluntary and therefore ought not be restricted by the Commission's proposal. Sections 621 and 622 reflect the understanding that LFAs are not ordinary private market participants but governing authorities with significant power and policy setting concerns."). Further, under this narrow interpretation of the term, no monetary or in-kind payments could be construed as a franchise fee if they are negotiated by the parties as terms of the franchise agreement. As NCTA points out, "[b]y 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." Reply Comments of NCTA – The Internet & Television Association, at 5, n.13 (Dec. 14, 2018) (NCTA Reply).

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

[57] *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566, 132 S. Ct. 1997, 2002, 182 L. Ed. 2d 903 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."). *See* Merriam-Webster, Definition of "Tax," *available at* https://www.merriam-webster.com/dictionary/tax (defining "tax" as "a charge usually of money imposed by authority on persons or property for public purposes; a sum levied on members of an organization to defray expenses"); Black's Law Dictionary (7th ed. 1999), Definition of "Tax," (noting that "[m]ost broadly, the term embraces all governmental impositions on the person, property, privileges, occupations, and enjoyment of the people. . . . Although a tax is often thought of as being pecuniary in nature, *it is not necessarily payable in money*" (emphasis added)); Merriam-Webster, Definition of "Fee," *available at* https://www.merriam-webster.com/dictionary/fee (defining "fee" as "a fixed charge; a sum paid or charged for a service"); Black's Law Dictionary (7th ed. 1999), Definition of "Fee," (defining "fee" as "[a] charge for labor or services"); Merriam-Webster, Definition of "Assessment," *available at* https://www.merriam-webster.com/dictionary/assessment (defining "assessment" as "the amount assessed: an amount that a person is officially required to pay especially as a (continued….)

in the legislative history to treat in-kind payments differently from monetary payments for purposes of determining what is a franchise fee. The legislative history, in discussing what constitutes a franchise fee, refers to the definition in section 622(g)(1), which "include[s] any tax, fee, or assessment imposed on a cable operator or subscribers solely because of their status as such," and it makes no distinction between cable-related contributions and those unrelated to cable services, nor between monetary and non-monetary payments.[78] The legislative history then elaborates on the specific exemptions in Section 622(g)(2) and, in particular, notes that "[s]pecific exemptions from the franchise fee limitations are included for certain payments related to public, educational and governmental access."[79] It specifies that, "[f]or existing franchises, a city may enforce requirements that additional payments be made above the 5 percent cap to defray the cost of providing public, educational and governmental access, including requirements related to channels, facilities and support necessary for PEG use."[80] Because Congress limited this exception to then-existing franchises, this provision elucidates Congress' intent that contributions in support of PEG access – which are cable-related, in-kind contributions – are subject to the five percent cap for franchises granted after the 1984 Cable Act.[81]

18. We disagree with commenters who cite to a portion of the legislative history as evidence of Congress' intent that franchise fees include only monetary payments made by cable operators. Specifically, LFA commenters cite a statement in the discussion of subsection 622(g)(2)(C), which excludes certain PEG-related capital costs from the franchise fee definition, that "[i]n general, this section defines as a franchise fee only monetary payments made by the cable operator, and does not include as a 'fee' any franchise requirements for the provision of services, facilities or equipment."[82] LFA commenters' reading of this statement is inconsistent with the overall text and structure of section 622(g).[83] Section 622(g)(1) "specifically defines 'franchise fee' to include '*any* tax, fee, or assessment *of any kind*[,]'" subject to certain enumerated exclusions, and the court in *Montgomery County* was clear that this statutory language "requires us to give those terms maximum breadth."[84] The Commission has

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tax"); Black's Law Dictionary (7th ed. 1999), Definition of "Assessment," (defining "assessment" as the "[i]mposition of something, such as a tax or fine, according to an established rate"). *See also Montgomery County*, 863 F.3d at 490 (noting that the term "assessment" has been defined as "[a]n enforced contribution of money *or other property* . . . [or] *any contribution* imposed by government upon individual, for the use and service of the state," and observing that Justice Scalia has recognized that assessments need not be monetary by referring to "in-kind assessments") (emphasis in original) (citations omitted). We disagree with NATOA *et al*.'s contention that the Commission "nowhere analyzes or explains why [certain] franchise requirements are 'assessments' or 'exactions.'" *See* NATOA *et al*. July 24, 2019 *Ex Parte* at 2. *See also* Anne Arundel County *et al*. July 24, 2019 *Ex Parte* at 8 (arguing that the Commission does not "offer[] a basis in established law for the idea that any imposition of costs is presumptively a tax, fee, or assessment"). Rather, we find that an "assessment," the term used in the statute, includes any contribution imposed by government, based on its ordinary meaning.

[58] *See Montgomery County*, 863 F.3d at 490-91.

[59] *Id*.

[60] *Id*. *See also* NCTA Reply at 4-5; Comments of Verizon, at 5 (Nov. 14, 2018) (Verizon Comments); Reply Comments of Altice USA, Inc., at 19 (Dec. 14, 2018) (Altice Reply); ICLE July 18, 2019 *Ex Parte* at 3-13.

[61] *See* City of Philadelphia *et al*. Comments at 22 (arguing that "[b]ased on the ordinary meanings of the terms, there is nothing unclear about what is included as a franchise fee" and that all of the terms used in the definition "are referring to unilateral monetary charges by a unit of government"); Comments of Charles County, Maryland, at 7 (Nov. 14, 2018) (Charles County Comments) (arguing that "the words tax, fee, and assessment are terms of art and have precise meaning established by lengthy precedent" and that "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"); Reply Comments of Anne Arundel County, Maryland *et al*., at 6 (Dec. 14, 2018) (Anne Arundel (continued….)

already concluded, and the Sixth Circuit has twice upheld, that non-monetary payments can be franchise fees. Further, this reading would render section 622(g)(2)(C) superfluous because there would not need to be an exemption for PEG-related in-kind contributions if non-monetary contributions were not franchise fees in the first place.[85]

19. Because we believe that the pertinent statutory provision in section 622(g) supports our conclusion that cable-related, in-kind contributions are franchise fees, we reject arguments raised by franchise authorities that other Title VI provisions should be read to exclude costs that are clearly included by the franchise fee definition. Instead of focusing on the key definition of "franchise fee" as "any tax, fee, or assessment of any kind" subject to certain enumerated exceptions, LFA commenters cite to other parts of the statute which, they argue, evince Congress' intent to exclude cable-related, in-kind contributions from the statutory cap on franchise fees.[86] We reject each of these arguments in turn below.

20. First, we affirm our tentative conclusion that treating cable-related, in-kind contributions as franchise fees would not undermine the provisions in the Act that authorize or require LFAs to impose cable-related obligations on franchisees.[87] For example, section 611(b) of the Act permits LFAs to require that channel capacity be designated for PEG use and that channel capacity on I-Nets be designated for educational and governmental use.[88] Anne Arundel County *et al*. argue that the Commission errs by not acknowledging that the Cable Act "authorize[s] LFAs to both impose cable franchise obligations [in section 611] *and* collect franchise fees [in section 622]—they do not offset each other."[89] However, as we observed in the *Second FNPRM*, the fact that the Act authorizes LFAs to impose such obligations does not mean that the value of these obligations should be excluded from the five percent cap on franchise fees.[90] We agree with NCTA and ACA that there is no basis in the statutory text for concluding that the authority provided in section 611(b) affects the definition of franchise fee in section 622(g).[91] As explained above, section 622(g) is the key provision that defines what is included in the franchise fee, and section 622(g)(2) carves out only limited exclusions for PEG-related costs and makes no mention of an I-

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County *et al*. Reply) ("The Act is clearly structured to consider as franchise fees only *monetary payments*, and to treat other, cable-related non-monetary services and facilities requirements *differently*. . . ."). Contrary to these arguments, the terms used in the statute are not limited to monetary payments. *See supra* note 57 and accompanying text. Moreover, these arguments ignore Congress' specification that the franchise fee includes "*any* tax, fee, or assessment *of any kind*," essentially reading this expansive language out of the statute. For example, although Anne Arundel County *et al*. argue "that generally, taxes, fees, and assessments are monetary, but that in exceptional circumstances (such as forfeitures) non-monetary obligations may also qualify," there is nothing in the statute—which specifically applies to a tax, fee, or assessment *of any kind*—or in the definition of these terms that supports this statement. *See* Anne Arundel County *et al*. July 24, 2019 *Ex Parte* at 7.

[62] *Montgomery County*, 863 F.3d at 491.

[63] *See supra* note 42 (defining and providing examples of "cable-related, in-kind contributions").

[64] *See Second FNPRM*, 33 FCC Rcd at 8960, para. 17 (citing *Montgomery County*, 863 F.3d at 490-91; *First Report and Order*, 22 FCC Rcd at 5149, para. 105). *See also* NCTA Reply at 5-6. *But see* Comments of the National Association of Telecommunications Officers and Advisors *et al*., at 8 (Nov. 14, 2018) (NATOA *et al*. Comments). Contrary to the contention of NATOA *et al*., the Commission's finding in the *First Report and Order* that in-kind contributions unrelated to the provision of cable services are franchise fees subject to the statutory five percent cap was undisturbed by subsequent court decisions in *Alliance* and *Montgomery County*. The court in *Montgomery County* vacated the orders to the extent they treat *cable-related*, in-kind exactions as franchise fees, and thus the Commission's finding with regard to in-kind contributions unrelated to the provision of cable services still stands.

[65] *See First Report and Order*, 22 FCC Rcd at 5149-50, paras. 105-08. In the *First Report and Order*, the Commission cited examples of in-kind contributions unrelated to the provision of cable services from the record, including requests for traffic light control systems, scholarships, and video hookups for a holiday celebration. *See First Report and Order*, 22 FCC Rcd at 5149-50, paras. 106-07.

[66] 47 U.S.C. § 542(g)(1).

[67] *See* Comments of the American Cable Association, at 4 (Nov. 14, 2018) (ACA Comments); Comments of NCTA (continued….)

Net-related exclusion. Since Congress enacted the PEG and I-Net provisions at the same time it added the franchise fee provisions, it could have explicitly excluded all costs related to PEG and I-Nets if it had intended they not count toward the cap.[92] Instead, they just excluded a subset of those costs. Further, if we were to interpret the statute such that all costs related to PEG, I-Nets, or other requirements imposed in section 611 are excluded from treatment as franchise fees because section 611(b) contemplates that such costs be incurred, the specific exemption for PEG capital costs in section 622(g)(2)(D) would be superfluous.[93] While we acknowledge that PEG channels and I-Nets provide benefits to consumers,[94] such benefits cannot override the statutory framework, which carves out only limited exclusions from franchise fees.

21. Next, we do not find persuasive the argument that section 626 of the Act "reflects the fact that cable-related franchise requirements are not franchise fees."[95] Section 626 directs 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."[96] NATOA *et al*. contend that if cable-related, in-kind requirements are included as franchise fees, "it would be the LFA who pays for them, rendering the cost consideration in this Section obsolete."[97] We disagree with this reasoning.[98] As NCTA explains, "[t]he 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."[99] The section 626 assessment does not lose its purpose if cable-related, in-kind contributions are counted as franchise fees; as part of this assessment, for example, a franchising authority could determine that cable-related community needs and interests can be met at a lower cost to cable subscribers than the full five percent franchise fee.[100] Moreover, the community needs assessment in section 626 also accounts for items that are not in-kind contributions subject to the franchise fee cap, such as build-out requirements.[101]

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– The Internet & Television Association, at 41-42 (Nov. 14, 2018) (NCTA Comments).

[68] *See supra* note 59 and accompanying text. *But see* Comments of Anne Arundel County, Maryland *et al*., at 20 (Nov. 14, 2018) (Anne Arundel County *et al*. Comments). Anne Arundel County *et al*. make the conclusory statement that "[r]egulatory obligations are clearly not a tax or fee," without citing a definition of these terms or including the term "assessment," and they make no mention of the court's own conclusion in *Montgomery County* that the term franchise fee "can include noncash exactions." *See Montgomery County*, 863 F.3d at 490-91.

[69] *See* ACA Comments at 5-6.

[70] *See supra* notes 50-51. We analyze and interpret these two PEG-related exclusions in Section III.A.2.b, *infra*.

[71] *See* Reply Comments of the American Cable Association, at 14 (Dec. 14, 2018) (ACA Reply). According to Anne Arundel County *et al*., the Commission incorrectly implies that "unless something falls within an exception, it must be a tax, fee, or assessment." *See* Anne Arundel County *et al*. Comments at 19. However, this is inconsistent with our analysis, in which we first evaluate whether a type of contribution meets the definition of franchise fee in section 622(g)(1) and, if so, then determine whether it falls within a specified exception in section 622(g)(2). It is also inconsistent with our conclusion herein that certain requirements, such as customer service and build-out requirements, are not covered by the definition of franchise fee. *See infra* Section III.A.2.d.

[72] *See* ACA Comments at 5.

[73] *See id*.

[74] *See* NATOA *et al*. Comments at 5; Reply Comments of the National Association of Telecommunications Officers and Advisors *et al*., at 3 (Dec. 14, 2018) (NATOA *et al*. Reply); Anne Arundel County *et al*. July 24, 2019 *Ex Parte* at 12. *See also* Anne Arundel County *et al*. Comments at 17-18 ("The subsections in 622(g)(2) are designed to *permit* collection of additional fees that otherwise might be misinterpreted to fall within the cap. The exceptions to (continued….)

22. Finally, we disagree with commenters that cite a provision in section 622 that relates to itemization on customer bills as evidence that Congress did not intend PEG-related franchise obligations to be included in franchise fees. In particular, LFA commenters point to section 622(c)(1), which specifies that cable operators may identify as a separate line item on each subscriber bill each of the following: (1) the amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid; (2) the amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support PEG channels or the use of such channels; and (3) the amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber.[102] LFA commenters argue that "[t]hrough this language, Congress clearly outlined a separation between franchise fees and cable-related, in-kind fees."[103] On the contrary, "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)."[104] While section 622(g) was adopted as part of the 1984 Cable Act, Congress adopted section 622(c) years later in 1992 to promote transparency by allowing cable operators to inform subscribers about how much of their total bill is made of charges imposed by local governments through the franchising process.[105] By differentiating the types of charges that can be itemized on subscriber bills, there is no indication that Congress intended to exclude certain charges from the franchise fee.[106]

23. Having established our interpretation of section 622(g), we adopt our tentative conclusion that this treatment of cable-related, in-kind contributions should be applied to both new entrants and incumbent cable operators.[107] As the Commission has previously observed, section 622 "does not distinguish between incumbent providers and new entrants."[108] We affirm our belief that applying the same treatment of cable-related, in-kind contributions to both new entrants and incumbent cable operators will ensure a more level playing field and that the Commission should not place its thumb on the scale to give a regulatory advantage to any competitor.[109]

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the definition of franchise fee are expansions of LFA authority, and do not narrow the definition of franchise fees."); Comments of the City of New York, at 9-10 (Nov. 14, 2018) (City of New York Comments); Reply Comments of the State of Hawaii, at 2 (Dec. 14, 2018) (Hawaii Reply).

[75] For example, under section 622(g)(2)(B), payments required by the franchise to be made by the cable operator for, or in support of the use of, PEG access facilities are included in the franchise fee only for franchises granted after October 30, 1984.

[76] *See* ACA Comments at 8.

[77] *Second FNPRM*, 33 FCC Rcd at 8960, para. 17. According to NCTA, the legislative history shows that Congress' intent generally was to *limit* the total financial obligations that franchising authorities may impose on cable operators. *See* NCTA Reply at 7 ("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.'") (citing 129 Cong. Rec. S8254 (1983), statement of Sen. Goldwater). *See also* NCTA Comments at 39-40. We find that allowing LFAs to circumvent the statutory five percent cap by not counting cable-related, in-kind contributions that clearly fall within the statutory definition of franchise fees would be contrary to Congress' intent as reflected in the broad definition of franchise fee in the statute. *See Second FNPRM*, 33 FCC Rcd at 8961, para. 17.

[78] *Second FNPRM*, 33 FCC Rcd at 8960, para. 17 (citing H.R. Rep. No. 934, 98th Cong., 2nd Sess. 1984 at 64, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4701).

[79] H.R. Rep. No. 934, 98th Cong., 2nd Sess. 1984 at 64-65.

[80] *Id*. at 65.

[81] Although the City of New York opines that the examples of franchise fees in the legislative history are all "services that do not use the cable operator's cable system or other communications facilities ('CF') or call on the core competencies ('CC') of the cable operator," this reading overlooks the fact that certain PEG-related costs are (continued….)

24. We disagree with the contention that our interpretation of the franchise fee definition in section 622(g) is impermissible under *Chevron*.[110] Charles County, Maryland posits that "[b]ecause Congress has directly addressed the questions at issue by employing precise, unambiguous statutory language in Section 622 of the Act, the FCC's proposed rules re-imagining . . . what constitutes a 'franchise fee' are impermissible," as "[o]nly Congress may alter or amend federal law."[111] Charles County does not offer an explanation for why the statutory language is unambiguous beyond arguing that the words "tax, fee, or assessment" in the definition are terms of art.[112] But regardless of whether these are terms of art, they can include non-monetary contributions, as the Sixth Circuit observed.[113] And we believe that our interpretation of this language using traditional tools of statutory construction is a reasonable and permissible construction of the statute that effectuates Congressional intent for the reasons set forth above.[114] Indeed, it is the interpretation that is most consistent with the plain meaning of the statutory definition of franchise fee.

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included as franchise fees, and it creates a distinction that is not apparent from either the statute or the legislative history. *See* City of New York Comments at 4.

[82] *Id*. *See* Comments of the Alliance for Communications Democracy *et al*., at 6 (Nov. 14, 2018) (CAPA Comments); Comments of The City Coalition, at 13-14 (Nov. 14, 2018) (City Coalition Comments); Comments of the State of Hawaii, at 3-4 (Nov. 14, 2018) (Hawaii Comments); NATOA *et al*. Comments at 5; City of New York Comments at 3; Anne Arundel County *et al*. Reply at 6; Reply Comments of Free Press, at 4-5 (Dec. 14, 2018) (Free Press Reply); Hawaii Reply at 4-5; NATOA *et al*. Reply at 3. We discuss further in Section III.A.2.b below the extent to which certain PEG-related requirements are exempted from the statutory definition of franchise fees.

[83] *See also* NCTA Reply at 5, n.12 (stating that "[a]s 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"). For the same reason, we are not persuaded by Anne Arundel County *et al*.'s reliance on a letter from the Commission's Cable Services Bureau that quotes the legislative history. *See* Anne Arundel County *et al*. Comments at 23-24 (citing *City of Bowie*, 14 FCC Rcd 9596 (Cable Services Bureau, 1999)); Anne Arundel County *et al*. July 24, 2019 *Ex Parte* at 12; Letter from Sen. Chris Van Hollen to Chairman Ajit Pai, FCC at 2 (June 12, 2019). First, this Bureau-level letter does not bind the Commission. *See Comcast v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (an agency is not bound by the actions of its staff if the agency has not endorsed those actions). Second, to the extent that the Bureau's guidance 20 years ago conflicts with the conclusions in this rulemaking, it is reversed and superseded. We note that the letter merely cites the statute and legislative history, without analysis.

[84] *See Montgomery County*, 863 F.3d at 490-91.

[85] *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *United States v. Menasche*, 348 U.S. 528, 538–539 (1955))).

[86] *See, e.g.*, Comments of the City of Arlington, Texas, at 6-7 (Nov. 14, 2018) (City of Arlington Comments); Comments of the City of Austin, Texas, at 7-8 (Nov. 14, 2018) (City of Austin Comments).

[87] *See Second FNPRM*, 33 FCC Rcd at 8962, para. 20.

[88] 47 U.S.C. § 531(b) ("A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, . . . that channel capacity be designated
(continued….)

2. Specific Types of Cable-Related, In-Kind Contributions Under Section 622

25. In this section, we analyze whether specific types of cable-related, in-kind contributions are franchise fees subject to the five percent statutory cap under section 622. First, we find that costs attributable to franchise terms that require free or discounted cable service to public buildings are franchise fees, consistent with our tentative conclusion that treating all cable-related, in-kind contributions as franchise fees unless expressly excluded would best effectuate the statutory purpose. Next, we adopt our tentative conclusion that costs in support of PEG access are franchise fees, with the exception of capital costs as defined below. Similarly, we find that costs attributable to construction of I-Nets are franchise fees. Finally, we conclude that build-out and customer service requirements do not fall within the statutory definition of franchise fee.[115] Based on these conclusions with respect to specific types of costs, we adopt a definition of "in-kind, cable-related contributions" to include "any non-monetary contributions related to the provision of cable services provided by cable operators as a condition or requirement of a local franchise, including but not limited to free or discounted cable service to public buildings, costs in support of PEG access other than capital costs, and costs attributable to the construction of I-Nets. It does not include the costs of complying with build-out and customer service requirements."[116]

a. Free and Discounted Cable Service to Public Buildings

26. We find that costs attributable to franchise terms that require a cable operator to provide free or discounted cable service to public buildings, including buildings leased by or under control of the franchise authority, are cable-related, in-kind contributions that fall within the five percent cap on franchise fees. The record includes examples of cable operators providing cable service to public buildings as part of a franchise agreement.[117] Consistent with our statutory interpretation above, providing free or discounted cable service to public buildings is an in-kind (*i.e.*, non-monetary) contribution imposed on a cable operator by a franchise authority, and is not included in one of the enumerated exceptions from the franchise fee in section 622(g)(2).[118] Although certain commenters

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for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use. . . ."). *See also* 47 U.S.C. § 541(b)(3)(D) ("Except as otherwise permitted by sections 531 and 532 of this title, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of the franchise, a franchise renewal, or a transfer of a franchise.").

[89] Anne Arundel County *et al*. Comments at 15-16. *See also* AWC *et al*. Comments at 6-8; CAPA Comments at 3-4; Comments of the Illinois Municipal League, at 1-2 (Nov. 7, 2018); Comments of the International Municipal Lawyers Association, at 2 (Nov. 13, 2018) (IMLA Comments); Reply Comments of Media Alliance, at 4 (Nov. 19, 2018).

[90] *Second FNPRM*, 33 FCC Rcd at 8963, para. 20.

[91] *See* ACA Comments at 6; NCTA Reply at 7-8.

[92] We disagree with the Cable Act Preservation Alliance (CAPA) that "it is equally true that Congress could have explicitly noted the franchise fee limitation in 47 U.S.C. Section 531(b) if it had intended to include these PEG-related costs as franchise fees." CAPA Comments at 8. There was no need for Congress to specify which PEG-related costs are franchise fees in section 611 when the statute sets forth a standalone provision, section 622, that defines what is included in the franchise fee and specifically addresses PEG-related costs. *See* NCTA Reply at 14 ("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."). NATOA *et al*. argue that the Commission "ignores that build-out and customer service obligations also were enacted by Congress at the same time it added the franchise fee provisions and were not explicitly excluded from the cap, yet . . . finds these are not 'franchise fees.'" NATOA *et al*. July 24, 2019 *Ex Parte* at 3. However, we explain herein that Congress expressly stated that cable operators are responsible for the cost of constructing cable systems. *See infra* Section III.A.2.d. We also find herein that federally mandated customer service standards are not a "tax, fee, or assessment" and, thus, there was no need for Congress to exclude them from the franchise fee. *See id*.

emphasize that free and discounted cable services have been considered franchise considerations that are not subject to the five percent cap on franchise fees in past franchise agreements,[119] we find that our reading that free and discounted services count towards the franchise fee cap is a reasonable interpretation and best effectuates Congressional intent given that the statute defines franchise fee broadly, carving out only limited exclusions. If LFAs could circumvent the five percent cap by requiring unlimited free or discounted cable services for public buildings, in addition to a five percent franchise fee, this result would be contrary to Congress's intent as reflected in the broad definition of "franchise fee" in the statute.[120] We find that the Act does not provide any basis for treating the value attributable to free or discounted services in a different manner than other in-kind services which must be included in the franchise fee. Although we acknowledge that the provision of free or discounted cable service to public buildings, such as schools or libraries, can benefit the public, such benefits cannot override the statutory framework. Further, there are policy rationales for limiting free services, given that, in a competitive market, such contributions may raise the costs of the cable operator's service, reduce resources available for other services, and result in market inefficiency.[121]

b. PEG Access Facilities

27. We conclude in this section that in-kind contributions related to PEG access facilities are cable-related, in-kind contributions, and are therefore included within the statutory definition of "franchise fees" under section 622(g)(1).[122] We next conclude that the term "capital cost" in section 622(g)(2)(C) should be given its ordinary meaning, which is a cost incurred in acquiring or improving a capital asset. Applying that interpretation, we conclude that the exclusion for capital costs under section 622(g)(2)(C) could include equipment that satisfies this definition, regardless of whether such equipment is purchased in connection with the construction of a PEG access facility. We then conclude that the record is insufficiently developed for the Commission to determine whether the provision of PEG channel capacity is included within section 622(g)(2)(C)'s exclusion for capital costs. We also find that the

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[93] *See* ACA Comments at 6-7.

[94] *See infra* Sections III.A.2.b (PEG), III.A.2.c (I-Nets).

[95] NATOA *et al*. Comments at 7.

[96] 47 U.S.C. § 546(c)(1)(D).

[97] NATOA *et al*. Comments at 7-8.

[98] *See* CAPA Comments at 8-9; Charles County Comments at 10-11; City of New York Comments at 5-6; City of Philadelphia *et al*. Comments at 30; Comments of the Telecommunications Board of Northern Kentucky, at 9-10 (Nov. 14, 2018) (TBNK Comments); Reply Comments of the Alliance for Communications Democracy *et al*., at 6-7 (Dec. 24, 2018) (CAPA Reply); Reply Comments of the City of Hagerstown, Maryland, at 8-9 (Dec. 13, 2018) (City of Hagerstown Reply); Reply Comments of the City of Newton, Massachusetts, at 9-10 (Dec. 14, 2018).

[99] NCTA Reply at 10-11.

[100] *See id*. at 11. *See also* Reply Comments of NTCA—The Rural Broadband Association, at 3 (Dec. 14, 2018) ("The Commission's tentative conclusion in no way restricts the 'in-kind' contributions franchising authorities can impose on cable operators, provided such contributions are cable-related and limited in value to the overall level of the cap. As a result, franchise authorities can continue to condition cable operators' franchise authority upon fulfilling certain community needs; they may just have to be more tailored and precise in value than is currently the practice."). As Congress noted when it adopted the five percent cap, the Commission capped franchise fees at three percent of a cable operator's revenue. H.R. Rep. 98-934, 1984 U.S.C.C.A.N. at 4663; *see* 47 CFR § 76.31 (1984).

[101] Build-out requirements are subject to section 626's directive to assess reasonableness while taking into account the cost of such requirements, and a build-out requirement requested by an LFA could be challenged under section 626. *See* NCTA Comments at 51.

[102] 47 U.S.C. § 622(c).

installation of PEG transport facilities are capital costs that are exempt from the five percent franchise fee cap,[123] and that maintenance of those facilities are operating costs that count toward the cap. Finally, we address policy arguments regarding the impact of these conclusions on the provision of PEG programming.

(i) The Franchise Fee Definition Generally Includes Contributions for PEG Access Facilities

28. Consistent with our tentative conclusion in the *Second FNPRM*,[124] we find that the definition of franchise fee in section 622(g)(1) encompasses PEG-related contributions. Like other taxes, fees, or assessments imposed by LFAs, we find that contributions related to PEG access facilities imposed by an LFA are subject to the five percent cap on franchise fees, unless they fall within one of the five exclusions set forth in section 622(g)(2). Consistent with the statutory analysis above, we conclude that the provision of equipment, services, and similar contributions for PEG access facilities are cable-related, in-kind contributions that meet the definition of franchise fee.[125] Such PEG-related contributions are not exempt under section 622(g)(2) of the Act unless they fall under the limited exceptions for capital costs and costs incurred by franchises existing at the time of the Cable Act's adoption in 1984.[126] As explained above, our starting point for analyzing cable operator contributions to LFAs is that the Act defines "franchise fee" broadly and has limited, narrow exceptions. Thus, we believe that including in the franchise fee cap any costs that are not specifically exempt is consistent with the statute and reasonably effectuates Congressional intent.

29. Further, including contributions for PEG access facilities within the franchise fee definition is consistent with the overall structure of section 622. For "any franchise in effect on October 30, 1984," section 622(g)(2)(B) excludes from the definition of "franchise fee" "payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of [PEG] access facilities."[127] There would have been no reason for Congress to

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[103] City of Arlington Comments at 9. *See also* City of Austin Comments at 10; CAPA Comments at 10; NATOA *et al*. Comments at 5-6; TBNK Comments at 5-6.

[104] NCTA Reply at 12.

[105] *Id*. at 12-13 (citing *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, 5967, para. 545 (1993)).

[106] Moreover, as NCTA observes, "[t]he 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) . . . ." *Id*. at 14, n.52.

[107] *See Second FNPRM*, 33 FCC Rcd at 8963-64, para. 22. *See also* NCTA Comments at 50.

[108] *Second Report and Order*, 22 FCC Rcd at 19637, para. 11. *See* Verizon Comments at 5; Altice Reply at 20.

[109] *See* Verizon Comments at 5-6. *See also* Reply Comments of Frontier Communications Corporation, at 3 (Dec. 14, 2018).

[110] Review of the FCC's interpretation of the statutes it administers is governed by *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[111] Charles City Comments at 5-8. *See also* IMLA Comments at 3; City of Philadelphia *et al*. Comments at 19-20; City of Hagerstown Reply at 7-8.

[112] *See* Charles City Comments at 5-8.

grandfather in these PEG-related contributions for existing franchises if such payments were not otherwise included within the definition of "franchise fees." In effect, excluding PEG-related contributions would read "in the case of any franchise in effect on October 30, 1984" out of section 622(g)(2)(B), extending this grandfathered exclusion to all franchises.

30. Some commenters claim that other sections of Title VI, including the section authorizing LFAs to require the designation of PEG channel capacity in section 611, override section 622's definition of "franchise fee."[128] As discussed above, we find these arguments unpersuasive.[129] We also reject arguments that provisions of the Act unrelated to cable franchising demonstrate that PEG-related fees are not franchise fees.[130] For example, section 623 of the Act, which governs the regulation of cable rates, instructs the Commission to take the following two factors (among others) into account when prescribing rate regulations:

> (v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;
>
> (vi) any amount required [ ] to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise . . . .[131]

Commenters argue that the separate listing of franchise fees (in v) and the costs of PEG franchise requirements (in vi) is evidence that franchise fees do not include PEG-related costs.[132] We disagree. We note that that the question of which factors the Commission should consider in setting rate regulations is

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[113] *See Montgomery County*, 863 F.3d at 490-91.

[114] Where a "statute is silent or ambiguous" with respect to a specific issue, "the question" for the court is whether the agency has adopted "a permissible construction of the statute." *Chevron*, 467 U.S. at 843. *See also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). *See* Free State Foundation Reply at 11.

[115] *See infra* Section III.A.2.d.

[116] *See Second FNPRM*, 33 FCC Rcd at 8964, para. 24. We modify the definition slightly from what was proposed in the *Second FNPRM* to reflect the conclusions adopted herein.

[117] *See, e.g.*, Comments of the City of Newton, Massachusetts, at 19 (Nov. 14, 2018) (City of Newton Comments).

[118] *See* 47 U.S.C. § 542(g)(2); *supra* para. 11.

[119] *See, e.g.*, AWC *et al*. Comments at 7 (arguing that "[t]he Commission has acknowledged local authority to include additional franchise considerations within the franchise," and that requiring LFAs to pay for these negotiated franchise considerations is inconsistent with precedent and decades of franchise agreements). AWC cites a Bureau-level order in which the Cable Services Bureau found that where the LFA and cable operator agreed to establish franchise provisions regarding the eligibility standards for a senior citizen discount rate and the formula for adjusting that rate, these terms were not preempted by federal law. *See City of Antioch, California*, Memorandum Opinion and Order, CSR-5239-R, 14 FCC Rcd 2285 (CSB 1999). While this decision is about the inclusion of discounted services in the franchise terms, it does not address whether discounted services should be included in the franchise fee and, thus, is not inconsistent with our findings herein.

[120] *See Second FNPRM*, 33 FCC Rcd at 8961, para. 17.

[121] *See* NCTA Comments at 50 ("[I]f products and services are available to a franchising authority without charge, or at a below-market rate, the franchising authority will not be required to evaluate a 'need' in light of its market cost, and as a result will tend to over-consume at the cable operator's buffet, resulting in market inefficiency.").

[122] PEG channels provide third-party access to cable systems through channels dedicated for use by the public, including local governments, schools, and non-profit and community groups. H.R. Rep. No. 98–934, at 30. The Act (continued….)

both legally and analytically distinct from the question of which costs are included as a franchise fee under section 622. Even if it were not, the separate listing of franchise fees and PEG-related exactions in section 623 does not indicate that Congress understood these categories to be mutually exclusive. In general, section 623(b) directs the Commission to consider several factors relating to cable operators' costs, revenue, and profits to ensure that the Commission sets "reasonable" rates.[133] Ensuring that a rate is "reasonable" requires a full consideration of the costs borne by cable operators. Listing only franchise fees would fail to account for some of these costs, even under the interpretation adopted in this Order: Franchise fees and PEG costs only partially overlap, given that section 622(g)(2) excludes certain PEG-related exactions from the definition of franchise fees.[134] We therefore find nothing inconsistent about the separate listing of franchise fees and PEG-related costs in section 623 and the interpretation of section 622(g) adopted in this Order. The same analysis applies to the bill-itemization requirements in section 622(c), which permits the separate itemization of franchise fees and PEG-related assessments in subscriber bills.[135]

(ii) Scope of Specific Franchise Fee Exclusions Related to PEG Access Facilities

31. Consistent with our tentative conclusions in the *Second FNPRM*,[136] we conclude (1) that PEG support payments for any franchise in effect on October 30, 1984 and (2) PEG capital costs for any franchise granted after October 30, 1984 are exempt from the definition of franchise fee. As discussed above, two provisions of section 622(g)(2) exclude certain costs associated with PEG access facilities from the definition of "franchise fee" in section 622(g)(1): First, section 622(g)(2)(B) excludes PEG support payments, but only with respect to franchises granted prior to 1984.[137] To the extent that any such franchises are still in effect, we affirm that under section 622(g)(2)(B), PEG support payments made pursuant to such franchises are excluded from the five percent franchise fee cap. Consistent with the statutory language and legislative history, we find this exclusion is broad in scope, and commenters did not dispute this interpretation in the record.[138]

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provides for the creation and support of PEG channels in various ways, including by authorizing LFAs to require franchisees to designate channel capacity for PEG, and by excluding certain costs associated with PEG access facilities from the definition of franchise fees under section 622(g)(2). *See* 47 U.S.C. §§ 522(16), 531, 542(g).

[123] As explained below, "PEG transport facilities" are facilities that LFAs use to deliver PEG services from studios or other locations where the programming is produced to the cable headend. *See infra* para. 49.

[124] *Second FNPRM*, 33 FCC Rcd at 8960, para. 16.

[125] In some cases, LFAs require a grant or other *monetary* contribution earmarked for PEG-related costs. *See*, *e.g.*, Altice May 9, 2019 *Ex Parte* at 7-8 (describing Altice's payment of "PEG grants" to LFAs). These monetary contributions are likewise subject to the five percent cap on franchise fees, unless otherwise excluded under section 622(g)(2). *See supra* note 54. Section 622 exempts only the items delineated in (g)(2), and Congress did not distinguish between in-kind and monetary contributions, nor did it exempt monetary contributions earmarked for a purpose that would otherwise not be excluded under section 622(g)(2). Thus, we make clear that monetary contributions—like in-kind contributions—must be counted toward the franchise fee cap unless expressly exempt under section 622(g)(2).

[126] *See* 47 U.S.C. § 542(g)(2); *supra* para. 11.

[127] 47 U.S.C. § 542(g)(2)(B).

[128] 47 U.S.C. § 531(b). *See, e.g.*, Reply Comments of Charles County, Maryland, at 7 (Dec. 14, 2018) (Charles County Reply); Reply Comments of Massachusetts Community Media, Inc., at 8 (Dec. 14, 2018) (MassAccess Reply) ("Cable operators cannot classify as 'in-kind' an obligation which they are legally bound to fulfill.").

[129] *See supra* paras. 20-22.

[130] *See* CAPA Comments at 11. *See also* City of Newton Apr. 10, 2019 *Ex Parte* at 2.

32. Second, for any franchise granted after 1984, section 622(g)(2)(C) contains a narrower exclusion covering only PEG "capital costs which are required by the franchise to be incurred by the cable operator for [PEG] access facilities."[139] The Cable Act does not define "capital costs". We address the scope of this exclusion below by first clarifying the definition of "capital costs" and concluding that it can apply to contributions for both construction-related and non-construction-related contributions to PEG access facilities. We then determine that the record is insufficient to determine whether costs associated with providing PEG channel capacity are subject to this exclusion, and we discuss the application of the exclusion to PEG transport.

33. *Definition of "capital costs."* Although the Commission previously asserted with respect to section 622(g)(2)(C) that "[c]apital costs refer to those costs incurred in or associated with the construction of PEG access facilities," we now revisit that interpretation and provide additional clarity on the definition of this term.[140] As described below, we find that the term "capital costs" is not limited to construction-related costs; rather, it generally encompasses costs incurred in acquiring or improving capital assets for PEG access facilities.[141] The Commission's previous reading of the phrase "capital costs" was based in part on section 622(g)'s legislative history, which states that the Cable Act excludes from the franchise fee cap "the capital costs associated with the construction of [PEG] access facilities."[142] The Sixth Circuit affirmed the Commission's prior reading in *Alliance*, where, rejecting a challenge to the Commission's construction of the term "capital costs" in the *First Report and Order*, the court held that:

> [t]o determine the permissibility of the Commission's construction of Section 622(g)(2)(C), we start by consulting the legislative history. During the enactment of this provision, Congress made clear that it intended Section 622(g)(2)(C) to reach "capital costs *associated with the construction* of [PEG] access facilities." H.R.Rep. No. 98–934, at 26 (emphasis added). Against this legislative pronouncement, the FCC's limitation of "capital costs" to those "incurred in or associated with the construction of PEG access

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[131] *See* 47 U.S.C. § 543(b)(2).

[132] CAPA Comments at 11 ("If Congress had intended that the amounts required to satisfy franchise requirements be subject to, and included in, the five percent franchise fee cap, Congress's direction that the Commission consider these [factors in Section 623(b)(2)(C)] as separate factors makes no sense.").

[133] 47 U.S.C. § 542(b)(1).

[134] *Id*. § 542(g)(2)(C).

[135] *Id*. § 542(c). Several commenters raised section 622(c) as evidence that franchise fees do not include PEG-related assessments. *See, e.g.*, Anne Arundel County *et al*. Comments at 11; NATOA *et al*. Comments at 6; Hawaii Reply at 2. We note that section 622(c) was adopted years after section 622(g) was enacted. *See generally* NCTA Reply at 12-13 (discussing the legislative history of section 622(c)); Cable Television Consumer Protection and Competition Act, Pub. L. No. 102–385, §§ 3, 9, 14, 106 Stat. 1460 (1992).

[136] *Second FNPRM*, 33 FCC Rcd at 8962, para. 19.

[137] 47 U.S.C. § 542(g)(2)(B) (excluding, "in the case of any franchise in effect on [October 30, 1984], payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, public, educational, or governmental access facilities").

[138] *See Second FNPRM*, 33 FCC Rcd at 8962, para. 19. The legislative history further supports this interpretation. H.R. Rep. No. 98-934, at 65 (1984) ("For existing franchises, a city may enforce requirements that additional payments be made above the 5 percent cap to defray the cost of providing public, educational and governmental access, including requirements related to channels, facilities and support necessary for PEG use.").

[139] 47 U.S.C. § 542(g)(2)(C) (excluding, "in the case of any franchise granted after [October 30, 1984], capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities").

facilities" represents an eminently reasonable construction of Section 622(g)(2)(C).[143]

34. We asked for additional comment on the definition of "capital costs" under section 622(g)(2)(C) in the *Second FNPRM*.[144] Arguably, the Commission's previous construction left unsettled the extent to which the "capital costs" exclusion encompassed PEG equipment—such as vans, studios, or cameras. In *Alliance*, the Sixth Circuit observed that the Commission's definition of capital costs could encompass the costs of such equipment, but only insofar as the equipment costs were "relate[d] to the construction of PEG facilities."[145] But neither the *First Report and Order* nor the legislative history from which it borrowed expressly *limited* capital costs to *construction-related* capital costs. Both statements are silent—or, at most, unclear—about the treatment of *non-construction-related* capital costs.

35. Based on the arguments in the record and our further consideration of the statutory text and legislative history we now conclude that the Commission's earlier statement regarding the definition of "capital costs" was overly narrow. As commenters note, many local governments receive payments from cable operators that are not simply for the construction of PEG studios, but also for, among other things, the acquisition of equipment needed to produce PEG access programming.[146] LFAs argue for a broader definition of "capital costs" that would include PEG channel capacity and certain equipment costs associated with PEG access facilities.[147] By contrast, cable companies have urged the Commission to reaffirm, based on its previous statement, that "capital costs" are limited to costs associated with the *construction* of PEG access facilities (and thus do not include channel capacity and equipment such as cameras, or other equipment necessary to run a PEG access facility).[148]

36. In general, when a term is undefined in a statute, courts look to that term's "ordinary meaning."[149] While there is no general definition of the precise term "capital costs," *Black's Law Dictionary* defines a similar term,[150] "capital expenditure," as "[a]n outlay of funds to acquire or improve a fixed asset," and defines a "fixed asset," or "capital asset" as "[a] long-term asset used in the operation

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[140] *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*, First Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5150-51, para. 109 (2007).

[141] *See infra* paras. 33-41.

[142] *See* H.R. Rep. No. 98–934, at 26 (making clear that Congress intended section 622(g)(2)(C) to reach "capital costs associated with the construction of [PEG] access facilities.").

[143] *All. for Cmty. Media v. FCC*, 529 F.3d 763, 784 (6th Cir. 2008).

[144] The *Second FNPRM* noted that "capital costs which are required by the franchise to be incurred by the cable operator for [PEG] access facilities" are excluded from the definition of franchise fee, and sought comment on treating the costs of studio equipment as capital costs for the purpose of this exemption from the franchise fee cap. *See Second FNPRM*, 33 FCC Rcd at 8962, para. 19 & n.95.

[145] *All. for Cmty. Media v. FCC*, 529 F.3d 763, 784 (6th Cir. 2008) ("Instead, the Commission underscores that the central test for determining whether an expense is a capital cost is whether it is 'incurred in or associated with the construction of PEG access facilities.' (*Id*.) This definition could potentially encompass the cost of purchasing equipment, as long as that equipment relates to the construction of actual facilities.").

[146] *See, e.g.*, NCTA Reply, Appendix (*Examples of Franchising Authority Overreach*) at 7 & n.2 (noting that New York City provides that public-access-related exactions may be designated for, among other things, "studio and portable production equipment, editing equipment and program playback equipment, cameras, [and] office equipment").

[147] *See, e.g.*, CAPA Comments at 15-16 ("The costs of acquiring studio equipment clearly are capital costs. Studio equipment has a useful life of several years, and the cost of acquiring such equipment is capitalized. And these costs (continued….)

of a business or used to produce goods or services, such as equipment, land, or an industrial plant."[151] *Merriam-Webster* similarly defines "capital expenditure" as "costs that are incurred in the acquisition or improvement of property (as capital assets) or that are otherwise chargeable to a capital account," and defines "capital assets" as "long-term assets either tangible or intangible (as land, buildings, patents, or franchises)."[152] An accounting textbook provides yet another similar definition:

> Expenditures for the purchase or expansion of plant assets are called capital expenditures and are recorded in asset accounts. . . . In brief, any material expenditure that will benefit several accounting periods is considered a *capital expenditure*. Any expenditure that will benefit only the current period or that is not material in amount is treated as a *revenue expenditure*.[153]

We also note that *capital* costs are distinct from *operating* costs (or operating expenses), which are generally defined as expenses "incurred in running a business and producing output."[154] Reflecting this distinction, the Commission has distinguished between costs incurred in *building* of PEG facilities, which are capital costs, and costs incurred in *using* those facilities, which are not.[155]

37. While we may also look to legislative history or other context in ascertaining a statute's meaning,[156] none of these sources here compels a narrower definition than that set forth above. The legislative history is ambiguous: The passage relied on by the Commission in the *First Report and Order*, from a summary in the House Report, notes that "capital costs associated with the construction of [PEG] access facilities are excluded from the definition of a franchise fee."[157] But section 622(g)(2)(C) does not itself restrict capital costs to costs that are construction related, nor does this passage in the legislative history expressly say that the capital costs exclusion is *limited* to such costs. And, as some commenters recognize, not all capital costs related to PEG access facilities are related to construction: studio equipment, vans, and cameras, often have useful lives of several years, and the costs of acquiring such equipment are often capitalized.[158] Such costs therefore often fall within the ordinary meaning of

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are equally clearly for PEG access facilities."); Anne Arundel County *et al*. Reply at 13-14 (noting that capital expenditures commonly include, for example, "everything from repairing a roof, to building, to purchasing a piece of equipment, or building a brand new factory"). Similarly, several commenters argue that section 611's grant of authority to require PEG channels suggests that the cost of such channels cannot count toward the five percent franchise fee cap. Charles County Comments at 15 ("Section 611 of the Act is unambiguous that PEG channels and PEG capacity are PEG capital costs, not franchise fees subject to the statutory five percent cap."); CAPA Comments at 8 (noting that "Congress could have explicitly noted the franchise fee limitation in 47 U.S.C. Section 531(b) if it had intended to *include* these PEG-related costs as franchise fees."). We disagree with the notion that the Act's grant of authority to require designation for PEG use necessarily excludes the costs of PEG from the definition of franchise fees. As we note above, the fact that the Act authorizes LFAs to impose such obligations does not mean that the value of these obligations should be excluded from the five percent cap on franchise fees. *See supra* para. 20. Section 622 governs "Franchise Fees" and makes clear that any items *not* expressly excluded from that section's broad definition of franchise fees are included against the statutory cap. Section 622 excludes some—but not all—PEG-related costs.

[148] NCTA Comments at 47-48 ("Accordingly, the Commission should confirm that PEG capital costs include only construction of PEG facilities (not cameras, playback devices and other equipment), including construction costs incurred in or associated with a PEG return line from the PEG studio to the operator's facility, and that any additional asks (including transport costs) are not part of the statutory exemption and must count towards the franchise fee cap.").

[149] *Taniguchi v. Kan Pac. Saipan, Ltd*., 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."); *Sorenson Commc'ns, LLC v. FCC*, 897 F.3d 214, 228 (D.C. Cir. 2018) ("Because § 225 does not define 'efficient,' we give the term its ordinary meaning." (citing *Taniguchi*)).

[150] Costs and expenditures are related, but not identical, concepts. *Black's Law Dictionary* defines "cost" as "the (continued….)

capital costs. Had Congress wished to exclude such costs, it could have done so by narrowing the definition of "capital costs" in the statute.

38. Consistent with our analysis above, we find that the phrase "capital costs" in section 622(g)(2)(C) should be interpreted in a manner consistent with its ordinary meaning. Based on the definitions discussed above, the term "capital cost" generally would be understood to mean a cost incurred in acquiring or improving a capital asset. Because the ordinary meaning of this term is not limited to construction-related costs, we now find that the definition of "capital costs" as used in section 622(g)(2)(C) is not limited to costs "incurred in or associated with the construction of PEG access facilities."[159] We conclude that while capital costs *include* costs associated with the construction of PEG access facilities, they are not *limited* to such costs.[160]

39. The ordinary meaning of "capital costs" could encompass the acquisition of a non-construction-related capital asset—such as a van or a camera. Section 622(g)(2)(C) only excludes certain capital costs—those "which are required by the franchise to be incurred by the cable operator for [PEG] access facilities."[161] Section 602(16) defines PEG access facilities as "channel capacity . . . and facilities *and equipment* for the use of such channel capacity."[162] In the legislative history, Congress explains that "[t]his may include vans, studios, cameras, or other equipment relating to the use of public, educational, or governmental channel capacity."[163] Based on this statutory language and legislative history as well as the current record, we believe at the present time that the definition of "capital costs" in section 622(g)(2)(C) includes equipment purchased in connection with PEG access facilities, even if it is not purchased in conjunction with the construction of such facilities.[164] But, as both sections 622(g)(2)(c) and 602(16) make clear, the capital costs of such equipment may be excluded only insofar as they are for the use of PEG channel capacity.[165]

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amount paid or charged for something; price or expenditure." Black's Law Dictionary (10th ed. 2014). *Black's* relevantly defines "expenditure" as "a sum paid out." *Id*. While we recognize that "cost" and "expenditure" have distinct meanings in the accounting context, for the purposes of our interpretation of section 622(g)(2)(C), we find that the meanings of these terms are highly analogous—*i.e.*, both pertain to expending resources to acquire a capital asset. *See also Rosebud Enterprises, Inc. v. Idaho Pub. Utilities Comm'n,* 128 Idaho 624, 628, 917 P.2d 781, 785 (1996) ("Capital costs include costs of constructing and installing generating equipment and facilities and the financial carrying costs associated with the utility's investment in the facility. Once incurred, these investment costs are assumed to be "fixed" and will not vary with changes in the actual amount of generation."); 42 CFR § 412.302 (defining "capital costs" to mean, in the Medicare context, "allowable capital-related costs for land and depreciable assets" including depreciation and capital-related interest expense).

[151] Black's Law Dictionary (10th ed. 2014). *Cf.* Collins English Dictionary, https://www.collinsdictionary.com/us/dictionary/english/capital-cost (last accessed May 6, 2019) (defining "capital cost" as "a cost incurred on the purchase of land, buildings, construction and equipment to be used in the production of goods or the rendering of services").

[152] Merriam-Webster, Definition of "Capital Expenditure," www.merriam-webster.com (accessed Apr. 15, 2019).

[153] Williams *et al*., Financial & Managerial Accounting: The Basis for Business Decisions 396-97 (14th ed. 2008).

[154] Black's Law Dictionary (10th ed. 2014) (operating expense).

[155] *First Report and Order*, 22 FCC Rcd at 5150-51, para. 109.

[156] *See, e.g.*, *AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion & Order, 13 FCC Rcd 21438, para. 28 (1998) ("Accordingly, using the traditional tools of statutory construction, we look next to the context in which the term is (continued….)

40. This interpretation seems most faithful to the text of section 622(g)(2)(C), which does not restrict capital costs to those that are related to construction. We recognize that this interpretation reflects a broader sense of capital costs than described in the *First Report and Order*. To the extent that our interpretation today is inconsistent with the Commission's earlier statements about the capital cost exclusion, we find that the interpretation in this Order better comports with the Act's language, structure, and policy objectives.[166]

41. We disagree with NCTA's assertion that there would have been "no good reason" to grandfather PEG equipment—such as vans and cameras—if such equipment were "subject to the permanent exception from franchise fees under section 622(g)(2)(C)."[167] The statute itself *fully* excludes PEG obligations for franchises in effect on October 30, 1984, but excludes only PEG-related *capital costs* for franchises granted after that date.[168] The broader exclusion for existing franchises in section 622(g)(2)(B) reflects the legislative intent to grandfather the provisions of existing PEG franchises.[169] Section 622(g)(2)(C) provides a narrower exclusion for new franchises than the broad exclusion enjoyed by grandfathered existing franchises; one would therefore expect these two exclusions to overlap, but not be coextensive. Even under our interpretation of section 622(g)(2)(C), section 622(g)(2)(B) remains a much broader exclusion than section 622(g)(2)(C): a number of costs—most notably, operating expenses—would still be excluded by section 622(g)(2)(B), but not by section 622(g)(2)(C).[170]

42. *PEG channel capacity.* While we find that the costs associated with the provision of PEG channel capacity are cable-related, in-kind costs that fall within the definition of "franchise fee," we find that the record is insufficiently developed to determine whether such costs should be excluded from the franchise fee as a capital cost under the exemption in section 622(g)(2)(C). The *Second FNPRM* stated that, while the Act authorizes LFAs to require that channel capacity be designated for PEG use, this authorization does not necessarily remove the costs of such obligations from the five percent cap on franchise fees.[171] In the record in this proceeding, cable operators generally agreed with this statement,[172] and LFAs generally disagreed.[173] As discussed above, the Act's authorization of a franchise obligation

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used and any relevant legislative history to determine a reasonable meaning."); *In the Matter of Enf't of Section 275(a)(2) of the Commc'ns Act of 1934, As Amended by the Telecommunications Act of 1996, Against Ameritech Corp.*, 13 FCC Rcd 19046, para. 11 (1998) ("When the meaning of a statute is ambiguous, it is appropriate to turn to legislative history for guidance.").

[157] *See* H.R. Rep. No. 98-934, at 19 (1984), as reprinted in 1984 U.S.C.C.A.N. 4655, 4656.

[158] *See, e.g.*, CAPA Comments at 15 ("The costs of acquiring studio equipment clearly are capital costs. Studio equipment has a useful life of several years, and the cost of acquiring such equipment is capitalized. And these costs are equally clearly for PEG access facilities.").

[159] *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*, First Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5150-51, para. 109 (2007).

[160] We agree with NATOA that franchising authorities should be given an opportunity to show that franchise fees are being spent on PEG capital costs if a cable operator requests an offset against franchise fees for non-monetary, cable-related franchise provisions. Letter from Nancy Werner, General Counsel, NATOA, to Marlene H. Dortch, Secretary, FCC at 2 (July 24, 2019) (NATOA July 24, 2019 *Ex Parte*).

[161] 47 U.S.C. § 542(g)(2)(C) (excluding, "in the case of any franchise granted after [October 30, 1984], capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities").

[162] *See id*. § 522(16) (emphasis added).

[163] H.R. Rep. No. 98–934, at 45.

[164] We note that this view was affirmed by the Sixth Circuit in *Alliance*. 529 F.3d at 785 (finding that "the (continued….)

(*e.g.*, one related to PEG access facilities or I-Nets) does not remove that obligation from the five percent cap on franchise fees.[174] It follows, then, that the costs associated with providing PEG channel capacity fall within this cap as a cable-related, in-kind contribution unless they are otherwise excluded under section 622(g)(2).[175]

43. LFAs claim that the costs of providing PEG channel capacity do fall within section 622(g)(2)(C)'s exclusion for PEG-related capital costs. In support, they point out that the Act defines "[PEG] access facilities" as "(A) channel capacity designated for public, educational, or governmental use; and (B) facilities and equipment for the use of such channel capacity."[176] Thus, they assert, because section 622(g)(2)(C) expressly applies to costs incurred by a cable operator for "[PEG] access facilities," it necessarily applies to costs associated with PEG channel capacity.[177] But, as the cable operators state, the Act's inclusion of channel capacity in the definition of "[PEG] access facilities" does not settle the question of whether channel capacity costs fall under section 622(g)(2)(C). This is because section 622(g)(2)(C) excludes only a particular subset of PEG access facility costs—capital costs—from the definition of franchise fees subject to the five percent cap, and cable operators claim that PEG channel capacity is not a capital cost.[178] Moreover, even assuming that PEG channel capacity is not a capital cost and is therefore subject to the five percent cap, the record reveals serious difficulties regarding how to calculate the value of PEG channel capacity to account for this cost.[179]

44. Given this, we find that the questions raised by channel capacity are complex, and that the record is not developed enough to allow us to answer them. We therefore defer this issue for further consideration.[180] In the meantime, we find that the status quo should be maintained, and that channel capacity costs should not be offset against the franchise fee cap. This approach will minimize disruption and provide predictability to both local franchise authorities and cable operators.

45. *Limits on LFA Authority to Establish PEG Requirements.* While we do not reach a conclusion with respect to the treatment of PEG channel capacity, we reiterate here that sections 611(a)

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unambiguous expression of Congress confirms that 'PEG access capacity' extends not only to facilities but to related equipment as well").

[165] *See* 47 U.S.C. § 542(g)(2)(C) (excluding only capital costs "*for* public, educational, or governmental access facilities" (emphasis added)); *id.* § 522(16) (defining PEG access facilities as "channel capacity . . . and facilities and equipment *for the use of such channel capacity*" (emphasis added)).

[166] NCTA requests that we "make clear that cable operators have the right to audit a franchising authority's use of the contributions and that a franchising authority must provide reasonable supporting documentation during an audit that such funds are, or were, being used for PEG capital expenses." NCTA Comments at 49. We decline to do so. We find nothing in the Act that precludes a cable operator from auditing an LFA's use of PEG capital funds, nor do we find anything that gives a cable operator an audit right. We note that under section 635(b) of the Act, a court may award a cable operator the right to audit if the court finds that relief appropriate. 47 U.S.C. § 555(b).

[167] NCTA Mar. 11, 2019 *Ex Parte* at 3.

[168] *Compare* 47 U.S.C. § 542(g)(2)(B) *with id.* § 542(g)(2)(C).

[169] H.R. Rep. No. 98-934 at *45 (1984). *See also id*. at *46 ("[P]rovisions of existing franchises covering PEG channel capacity and its use as well as services, facilities and equipment (such as studios, cameras, and vans) related thereto, are fully grandfathered.").

[170] Salaries and training are two examples of operating costs excluded by section 622(g)(2)(B), but not by section 622(g)(2)(C). *See First Report and Order*, 22 FCC Rcd at 5151, para. 109 ("[Capital] costs are distinct from payments in support of the use of PEG access facilities. PEG support payments may include, but are not limited to, salaries and training.").

[171] *See Second FNPRM*, 33 FCC Rcd at 8962-63, para. 20.

[172] *See, e.g.*, ACA Comments at 6 ("[T]he fact that subsection 611(b) authorizes LFAs to require franchisees to designate channel capacity on institutional networks ('I-Nets') for governmental use does not exempt the costs (continued….)

and 621(a)(4)(B) of the Act restrict the authority of LFAs to establish PEG channel capacity requirements.[181] We discussed the limits imposed by section 611(a) in the *First Report and Order*.[182] We noted that, while section 611(b) does not place a limit on the amount of channel capacity that a franchising authority may require, section 621(a)(4)(b) provides that a franchising authority may require "adequate assurance" that the cable operator will provide "adequate" PEG access channel capacity, facilities, or financial support.[183] We determined that "adequate," as used in the statute, should be given its ordinary meaning—"satisfactory or sufficient."[184]

46. In the *Second FNPRM*, the Commission again discussed the limits on franchising authority requirements for PEG channels under section 611(b), identifying PEG channel capacity as an in-kind contribution and seeking comment on the effects on cable operators and cable subscribers of "allowing LFAs to seek unlimited" PEG operating support and other cable-related, in-kind contributions.[185] In response, commenters submitted examples of what they claim are LFA requirements for excessive numbers of PEG channels.[186] LFAs responded with comments defending such requirements, as well as requirements for associated PEG support.[187]

47. We note that many states have attempted to strike a balance between the costs of PEG channels to cable operators and the benefits of PEG channels to the public by imposing reasonable limits on PEG channel capacity. For example, some states have limited the number of PEG channels—typically to two or three.[188] Others have required that PEG channels be returned if they are not substantially used.[189] States have also tied the number of appropriate PEG channels to the size of the population served.[190]

48. We decline the invitation by cable operators to establish fixed rules as to what constitutes "adequate" PEG channel capacity under section 621(a)(4)(B).[191] We recognize that the number of channels necessary to further the goals of the Cable Act might vary depending on, among other things, the number of subscribers within a franchise, the area covered by a franchise, the number of cable

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incurred to provide that capacity from treatment as franchise fees.").

[173] *See* Charles County Reply at 7; MassAccess Reply at 8 ("Cable operators cannot classify as 'in-kind' an obligation which they are legally bound to fulfill.").

[174] *See supra* para. 20.

[175] One commenter notes that California law requires "all video service providers"—a category broader than just cable providers—to "designate a sufficient amount of capacity" for the provision of PEG channels. *See* Comments of the City and County of San Francisco, California Comments, at 8-9 (Nov. 14, 2018) (City and County of San Francisco Comments) (quoting Cal. Pub. Util. Code § 5870(a)). Because this requirement applies to more than just cable operators, commenters argue, it is a fee of "general applicability" excluded under section 622(g)(2)(A) from the definition of franchise fee. *See id.* The Eastern District of California recently held that a CPUC fee under the same California law was a fee of general applicability on these grounds. *Comcast of Sacramento I, LLC v. Sacramento Metropolitan Cable Television Commission*, 250 F. Supp. 3d 616 (E.D. Cal. 2017). The Ninth Circuit recently vacated and remanded this ruling on other grounds. *Comcast of Sacramento I, LLC v. Sacramento Metro. Cable Television Comm'n*, 923 F.3d 1163 (9th Cir. 2019). An assessment aimed only at cable or cable-like services would not fall within section 622(g)(2)(A)'s exclusion as a "tax, fee, or assessment of general applicability." The text of section 622(g)(2)(A) of the Cable Act identifies a "tax, fee, or assessment imposed on *both* utilities and cable operators or their services" as a paradigmatic example of an assessment of "general applicability." 47 U.S.C. § 542(g)(2)(A) (emphasis added). The legislative history further explains that an assessment of "general applicability" "could include such payments as a general sales tax, an entertainment tax imposed on other entertainment business as well as the cable operator, and utility taxes or utility user taxes which, while they may differentiate the rates charged to different types of utilities, do not unduly discriminate against the cable operator as to *effectively constitute a tax directed at the cable system*." H.R. Rep. No. 98-934, at 64 (1984) (emphasis added). Here, the provision of PEG capacity appears to be an obligation specific to cable operators—the California law itself references the provision of PEG capacity by "cable operator[s]." Cal. Pub. Util. Code § 5870(a). We also note that the PEG authority provided in section 611 only applies to cable service, and that there are no PEG requirements under federal law for other video providers, like Direct Broadcast Service (DBS) or over-the-top streaming services.
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operators within a franchise, the area's population and geography, the cable-related community needs and interests, and whether PEG channel capacity is substantially used.[192] In general, each of these factors is relevant in determining whether an LFA has exceeded its authority under section 621(a)(4)(B) by demanding more than "adequate" capacity.[193] We note that LFA demands for PEG capacity requirements that are more than "adequate" are subject to judicial challenge under section 635 of the Act, as well as other forms of relief.[194] We also reserve the right to establish fixed rules in the future should there be widespread evidence of LFAs requiring more than adequate PEG channel capacity.

49. *PEG transport.* We find that the installation of transport facilities dedicated for long-term use by a PEG provider for the transmittal of recurring programming to a cable headend or other point in the cable system—PEG transport—does not count toward the five percent franchise fee cap. For the reasons explained above, we find that exempting capital costs from the five percent cap is consistent with the Act. The expenditure for the installation of a system that carries PEG programming from a PEG studio to a cable operator's headend facility is a capital expenditure because it is a long-term asset meant to deliver the programming.[195] The ongoing costs associated with the maintenance or operation of that facility would not qualify as a capital expenditure, however, as these are operating costs that are necessary to run the business and produce output.[196] NCTA requests that we declare PEG transport costs beyond "a single PEG transport return line [that] is dedicated to connecting the PEG studio to the cable network or headend" to count toward the five percent cap.[197] Although we agree that the costs associated with the use of transport lines for "episodic" or "short-term" PEG programming is an operating cost that is subject to the franchise fee cap,[198] we decline to establish a fixed quantity of PEG transport return lines that is "adequate" under section 621(a)(4)(B).[199] Like the number of PEG channels on a system, the number of adequate return lines in a franchise area might vary according to particular circumstances like the number of subscribers in the franchise area, the area covered by the franchise and the number of cable operators in the franchise. The number also might vary depending on the number of PEG channels provided in a franchise area and the types of programming offered over them. Nevertheless, any LFA requests for

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In any case, we need not settle the question whether a specific state law is of general applicability to determine whether the provision of PEG capacity, in general, falls within the definition of "franchise fee." Accordingly, we decline to do so here. *See infra* para. 94.

[176] *See* 47 U.S.C. § 522(16). *See also* NATOA *et al*. Reply at 6-7 ("Thus, by its very terms, the Cable Act excludes from franchise fees the costs of "facilities and equipment" that facilitate use of PEG channel capacity.").

[177] *See, e.g.*, Anne Arundel County *et al*. Comments at 16-17.

[178] *See, e.g.*, NCTA Mar. 11, 2019 *Ex Parte* at 2 (making this argument, and noting that "the structure of Section 622(g)(2)(B)-(C) makes clear that not all costs related to PEG access facilities are capital costs").

[179] NCTA proposes valuing channel capacity at market cost; anything less, NCTA argues, would be an additional subsidy beyond the cost of the service itself. *See* NCTA Comments at 51, 54 ("If in-kind exactions are valued only at incremental costs to the cable operator, the provider is still subsidizing them – a result that is contrary to Congress's goals of limiting the overall amount a provider is required to give to the community and that works against the Commission's goals of ensuring that providers can put funds to their highest and best use, including for broadband deployment."). LFAs raise a host of problems with using the fair market value approach to value channel capacity. *See, e.g.*, MassAccess Reply at 11 ("The 'fair market value' of PEG channels and PEG capacity, however, is zero dollars."); Charles County Comments at 21 & n.74 ("Since PEG capacity has no commercial value, the only cost to the cable operator for providing such capacity is the capital cost of provisioning PEG channels."); AWC *et al*. Comments at 14 (noting that assessing fair market value to PEG channel capacity would leave LFAs without objective and sufficient guidelines for valuation).

[180] *See U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 86 (D.C. Cir. 2001) ("[A]gencies need not address all problems in one fell swoop." (citations and internal quotation marks omitted)). We encourage parties to supplement the record on the channel capacity issue. To the extent that we are provided sufficient information to answer the complex questions raised by channel capacity, we intend to resolve them in the next twelve months.

[181] 47 U.S.C. §§ 531(a), 541(a)(4)(b).

multiple transport connections dedicated for long-term PEG use that the cable operator considers to be more than "adequate" are subject to judicial challenge under section 635 of the Act.[200]

(iii) Policy Concerns and the Impact on PEG Programming

50. We acknowledge the benefits of PEG programming and find that our interpretations adopted above are faithful to the policy objectives of the Cable Act. A significant number of comments in the record stressed these benefits, which include providing access to the legislative process of the local governments, reporting on local issues, providing a forum for local candidates for office, and providing a platform for local communities—including minority communities.[201] Of course, Congress itself similarly recognized the importance of PEG programming by authorizing LFAs to require the provision of PEG channel capacity in the Cable Act,[202] and by carving out certain costs of such programming from the five percent cap on franchise fees.[203] Nothing in this proceeding disturbs the Commission's longstanding view that PEG programming serves an important role in local communities.[204]

51. At the same time, the Cable Act seeks to encourage deployment and competition by limiting the franchise fees that LFAs may collect.[205] These include limitations on imposing costs associated with the provision of PEG programming.[206] A number of cable operators express concern with excessive LFA requirements for PEG channel capacity, support, and in-kind contributions.[207] Altice, for example, notes that "PEG operational contributions . . . are common and routinely treated as separate from the 5 percent franchise fee."[208] Commenters likewise suggest that these excessive PEG-related demands can hinder competition and deployment.[209]

52. The Cable Act itself, as interpreted in this Order, balances these costs and benefits. By excluding PEG-related capital costs from the five percent cap on franchise fees, but leaving other PEG-related exactions subject to that cap, the Cable Act divides the financial burden of supporting PEG programming between LFAs and cable operators.[210] By counting a portion of these costs against the

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[182] *First Report and Order*, 22 FCC Rcd at 5152, para. 112.

[183] 47 U.S.C. § 541(a)(4)(B).

[184] *First Report and Order*, 22 FCC Rcd at 5152, para. 112 (quoting American Heritage Dictionary, Second College Edition (1991)). Citing section 621(a)(1)'s prohibition on franchising authorities from "unreasonably" refusing to award competitive franchises, the Commission found that, as a general matter, PEG support required by an LFA in exchange for a franchise should be limited to what is reasonably necessary to support "adequate" PEG facilities. *Id*. at 5153, para. 115. Based on that reasoning, the *First Report and Order* found certain LFA requirements regarding PEG channels to be unreasonable, including (1) duplicative PEG requirements; or (2) requiring a new entrant to pay PEG support in excess of the incumbent's obligations. *Id*. at 5154, paras. 119-20.

[185] *Second FNPRM*, 33 FCC Rcd at 8963-64, paras. 20, 23.

[186] *See* NCTA Reply, Appendix (*Examples of Franchising Authority Overreach*) at 10-11 (describing LFA demands ranging from seven to as many as 43 PEG channels).

[187] *See, e.g.*, Minnesota Association of Community Telecommunications Administrators Mar. 5, 2019 *Ex Parte* at 2-3.

[188] *See*, *e.g.*, Kan. Stat. § 12-2023(5)(B)(h)(1) (establishing limit of two PEG channels); N.R.S § 711.810 (Nevada) (establishing limit of three PEG channels); Mo. Rev. Stat § 67.2703 (same); O.C.G.A § 36-76-8 (Georgia) (same); LA. RS 45:1369 (Louisiana) (same); Ohio Rev. Code. § 1332.30 (same); S.C. Code Ann. § 58-12-370 (same); Tenn. Code Ann. § 7-59-309(e) (same); Tex. Util. Code § 66.009(c) (same); Wisc. Stat. § 66.0420(5)(a) (same).

[189] *See, e.g.*, Fla. Stat. § 610.109(5) (PEG channels must be "activated and substantially used" for "at least 10 hours per day on average, of which at least 5 hours must be non-repeat programming as measured on a quarterly basis," excluding "[s]tatic information screens or bulletin-board programming"; and requiring the return of PEG capacity if

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statutory cap on franchise fees that LFAs may collect, the Cable Act allows LFAs to seek support for PEG programming from cable operators, while guarding against the possibility that LFAs will make demands for such programming without regard to cost.

53. Some commenters have suggested that the proposals in the *Second FNPRM* threaten to eliminate or drastically reduce PEG programming.[211] We disagree. Significantly, any adverse impact of our ruling on PEG programming should be mitigated by (1) the expansion of the "capital cost" exclusion beyond merely capital costs associated with construction[212]; and (2) our decision to defer ruling on whether the costs of channel capacity may be counted under this exclusion.[213] Under the interpretation adopted in this Order, cable operators will continue to provide support where an LFA chooses, but some aspects of that support will now be properly counted against the statutory five percent franchise fee cap, as Congress intended.[214] We recognize that this represents a departure from the longstanding treatment of PEG costs by LFAs and cable operators. We do not, however, believe that these conclusions will eliminate PEG programming. Nor do we believe that the existing practice was lawful merely because it was longstanding: the Commission's duty is to conform its rules to law, not tradition.

54. To the extent that existing practices are inconsistent with the law, LFAs will still have a choice: they can continue to receive monetary franchise payments up to the five percent cap, they can continue to receive their existing PEG support and reduce the monetary payments they receive, or they can negotiate for a reduction of both that fits within the bounds of the law that Congress adopted.

c. I-Nets

55. We find that the costs associated with the construction, maintenance, and service of an I-Net fall within the five percent cap on franchise fees. Such costs are cable-related, in-kind contributions that meet the definition of franchise fee. In particular, agreeing to construct, maintain, and provide I-Net service pursuant to the terms of a franchise agreement is necessarily cable-related, is an in-kind (*i.e.*, non-monetary) contribution imposed on a cable operator by a franchise authority, and is not included in one of the enumerated exceptions from the franchise fee in section 622(g)(2) of the Act.[215] Thus, we believe that

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these criteria are not met); Cal. Pub. Util. Code § 5780(e) (requiring the return of PEG capacity to the cable operator where the channel "is not utilized by the local entity for at least eight hours per day as measured on a quarterly basis"); Wis. Stat. § 66.0420(5)(b)(1)(a)-(b) (requiring the return of PEG capacity that is not "substantially utilized by the municipality," defined as providing "40 hours or more of programming on the PEG channel each week and at least 60 percent of that programming is locally produced"). *See also* NCTA Apr. 18, 2019 *Ex Parte* at 6, n.28.

[190] *See, e.g.*, O.C.G.A § 36-76-8 (maximum of two PEG channels where the population is less than 50,000, and maximum of three PEG channels elsewhere); Wisc. Stat. § 66.0420(5) (same); N.R.S § 711.810 (same, but using 55,000 population as the inflection point); Tenn. Code Ann. § 7-59-309 (maximum of one PEG channel where the population is less than 25,000, maximum of two PEG channels where the population is greater than 25,000 but less than 50,000, and maximum of three PEG channels where the population exceeds 50,000).

[191] *See, e.g.*, Altice May 9, 2019 *Ex Parte* at 9 ("Given the uncertainty around the valuation of channel capacity on cable systems for PEG use, the Commission should consider adopting a rebuttable presumption under Section 621(a)(4)(B) that providing three linear standard-definition PEG channels satisfies a cable operator's obligations under Section 611(a), unless state law requires fewer channels." (citations omitted)). As noted in paragraph 45, the Commission concluded that "adequate" should be given its plain meaning, "satisfactory or sufficient" in the *First Report and Order*. *First Report and Order*, 22 FCC Rcd at 5152, para. 112. The Sixth Circuit affirmed this interpretation. *All. for Cmty. Media*, 529 F.3d at 785.

[192] *See, e.g.*, LFA Comments at 12 (discussing the need for a greater number of PEG channels where a franchise covers a large area with many cable operators). *See also* 47 U.S.C. § 546(a)(1)(A), 546(c)(1)(D) (discussing cable renewal standards).

[193] LFAs argue that relying on the section 621 "adequate" standard conflicts with the standards established by section 626 in the context of franchise renewals, which generally ask whether a renewal proposal is reasonable to meet the "needs and interests" of the community. *See* Anne Arundel County *et al*. July 24, 2019 *Ex Parte* at 8. We see no such conflict. Section 621 establishes "General Franchise Requirements," and nothing in Section 626

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including such services in the franchise fee is consistent with the statute.[216] As we tentatively concluded in the *Second FNPRM*, treating cable-related, in-kind contributions, such as I-Net requirements, as franchise fees would not undermine provisions in the Act that authorize or require LFAs to impose cable-related obligations on franchisees.[217] We disagree with LFA commenters who argue that the cost of I-Nets should be excluded from the franchise fee.[218] Although such commenters contend that "[t]he Commission's proposal to require LFAs to pay for I-Nets . . . cannot be squared with the statute,"[219] it is entirely consistent with the statute to find that franchising authorities may impose cable-related requirements, such as requiring dedicated channel capacity on I-Nets, on cable operators, but also to find that funding for these franchise requirements applies against the five percent cap.[220] Similar to our conclusion with respect to PEG support, while we acknowledge that I-Nets provide benefits to communities,[221] such benefits cannot override the statutory framework, which carves out only limited exclusions from franchise fees.

56. Further, as we conclude above, we disagree with commenters that section 611(b) of the Act, which authorizes LFAs to require that channel capacity on I-Nets be designated for educational and governmental use, should be interpreted to exempt the costs of I-Nets from franchise fees.[222] There is no basis in the statutory text for concluding that section 611(b) imposes any limit on the definition of franchise fee.[223] Moreover, section 622(g) defines what is included in the franchise fee, and section 622(g)(2) carves out only limited exclusions for PEG-related costs and does not exclude I-Net-related costs. As we observe above,[224] since Congress enacted the PEG and I-Net provisions at the same time it added the franchise fee provisions, it could have explicitly excluded all costs related to I-Nets if it had intended they not count toward the cap.[225]

d. Build-Out and Customer Service Requirements

57. We conclude that franchise terms that require cable operators to build their systems to cover certain localities in a franchise area do not count toward the five percent cap.[226] As we explain

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suggests that these general limits do not apply in the context of a franchise renewal. *See* 47 U.S.C. §§ 541, 546. As NCTA points out, to find that franchise renewals are constrained only by section 626's "needs and interests" inquiry would mean, among other things, that franchise renewals would be unconstrained by the statutory cap on franchise fees in section 622. *See* NCTA July 25, 2019 *Ex Parte* at 6.

[194] 47 U.S.C. § 555(a) ("Any cable operator adversely affected by any final determination made by a franchising authority under Section 621(a)(1), 625 or 626 may commence an action within 120 days after receiving notice of such determination may be brought in—(1) the district court of the United States for any judicial district in which the cable system is located; or (2) in any State court of general jurisdiction having jurisdiction over the parties.").

[195] *See supra* para. 36 (distinguishing capital expenditures from operating expenditures).

[196] *Id*. *See also* NCTA July 18, 2019 *Ex Parte* at 2 ("the costs for using [a PEG] facility—and the costs for using capacity over shared facilities to transmit PEG programming—and not just the costs of maintenance of such facility, would be considered operating costs under the statute and the *Draft Order*. The fair market value of the use of such capacity, therefore, are costs that count against the franchise fee cap.").

[197] NCTA July 18, 2019 *Ex Parte* at 2; NCTA Comments at 47-48.

[198] NCTA July 29, 2019 *Ex Parte* at 2-3. *See also* Merriam-Webster, Definition of "Capital Expenditure," www.merriam-webster.com (accessed Apr. 15, 2019) (defining "capital assets" as "**long-term** assets either tangible or intangible"); *supra* para. 36.

[199] 47 U.S.C. § 541(a)(4)(B); NCTA July 18, 2019 *Ex Parte* at 2. We note, however, that NCTA cites a particularly egregious example of a "transport line [that] is used once a year for a Halloween parade" that seems well beyond what constitutes adequate facilities. NCTA July 29, 2019 *Ex Parte* at 1-2.

[200] 47 U.S.C. § 555(a) ("Any cable operator adversely affected by any final determination made by a franchising
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herein, Title VI establishes a framework that reflects a fundamental bargain between the cable authority and franchising authority—a cable operator may apply for and obtain a franchise to construct and operate facilities in the local rights-of-way and, in exchange, an LFA may impose fees and other requirements as set forth in the Act.[227] The statutory framework makes clear that the authority to construct a cable system is granted to the cable operator as part of this bargain and that the costs of such construction are to be borne by the cable operator. Specifically, section 621(a)(2)(B) of the Act provides that "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, . . . except that in using such easements the cable operator shall ensure . . . that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both."[228] Because the statute is clear that cable operators, not LFAs, are responsible for the cost of building out cable systems, it would be inconsistent with the statutory text and structure to count these costs as part of the franchise fee.[229] Both cable industry and LFA commenters generally support the contention that build-out obligations should not count toward the five percent franchise fee cap.[230]

58. We also conclude that franchise terms that require cable operators to comply with customer service standards do not count toward the five percent cap.[231] LFA commenters explain that cable operators are required to comply with customer service standards under federal or state law, and that cable franchises may include an obligation to comply with customer service standards.[232] Notably, section 632 of the Act directs the Commission to "establish standards by which cable operators may fulfill their customer service requirements," including "at a minimum, requirements governing—(1) cable system office hours and telephone availability; (2) installations, outages, and service calls; and (3) communications between the cable operator and the subscriber (including standards governing bills and refunds."[233] The Commission implemented this mandate in section 76.309 of its rules, which sets forth with specificity the customer service standards to which cable operators are required to adhere relating to cable system office hours and telephone availability, installations, outages and service calls, and communications between cable operators and cable subscribers.[234] We find that franchise terms that

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authority under Section 621(a)(1), 625 or 626 may commence an action within 120 days after receiving notice of such determination may be brought in—(1) the district court of the United States for any judicial district in which the cable system is located; or (2) in any State court of general jurisdiction having jurisdiction over the parties.").

[201] *See, e.g.*, ACT Comments at 3 (calling local PEG programming "critically important"); City Coalition Comments at 17-18 (noting, among other things, that PEG programming has become increasingly important and other sources of local news have experienced resource constraints and industry consolidation); Comments of Common Frequency, at 2 (Nov. 14, 2018) (Common Frequency Comments) ("PEGs also provide platforms for free speech, space for communities to organize, and serve as advocates for media access."); Comments of King County, Washington, at 9 (King County Comments) (noting that PEG channels provide important programming such as County Council meetings and programming targeted at minority communities); LMCTV Comments at 1-2 (citing the educational resources that PEG channels provide to the local community); Letter from Rony Berdugo, Legislative Representative, League of California Cities, to Ajit Pai, Chairman, FCC, at 2 (Oct. 30, 2018) ("PEG programming offers a host of community benefits, including public access channels, educational access channels, and government access channels all aimed at providing locally beneficial information."); City and County of San Francisco Comments at 2 (noting that SFGovTV provides "access to the legislative process," explains local issues, explores neighborhoods, and offers a forum for local candidates for office).

[202] 47 U.S.C. § 542(g)(2)(C) (excluding only PEG related "capital costs" from the definition of "franchise fees").

[203] *Id*. § 542(g)(2)(B)-(C). *See also* H.R. Rep. No. 98–934, at 30 ("Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work.").

[204] *Accessibility of User Interfaces, & Video Programming Guides & Menus*, Report and Order, MB Docket Nos. 12-108, 12-107, 28 FCC Rcd 17330, 17378, para. 75 (2013) ("We recognize the important role of PEG providers in (continued….)

require cable operators to adhere to customer service standards are not part of the franchise fee. In contrast to in-kind, cable-related contributions that are franchise fees subject to the statutory cap, such as the provision of free cable service to government buildings or PEG and I-Net support,[235] customer service obligations are not a "tax, fee, or assessment" imposed on a cable operator; they are regulatory standards that govern how cable operators are available to and communicate with customers. Indeed, as the legislative history explains, "[i]n general, customer service means the direct business relation between a cable operator and a subscriber," and "customer service requirements include requirements related to interruption of service; disconnection; rebates and credits to consumers; deadlines to respond to consumer requests or complaints the location of the cable operator's consumer service offices; and the provision to customers (or potential customers) of information on billing or services."[236] Based on our review of the statutory text and legislative history, we find no indication that Congress intended that standards governing a cable operator's "direct business relation" with its subscribers should count toward the franchise fee cap. Apart from ACA, no commenter argued that customer service obligations should be included as franchise fees.[237]

3. Valuation of In-Kind Contributions and Application to Existing Franchises

59. As we explain in this section, we conclude that cable-related, in-kind contributions will count toward the five percent franchise fee cap at their fair market value. Because we conclude above that most cable related, in-kind contributions must be included in the franchise fee, cable operators and LFAs must assign a value to them. In our prior rulemakings, we did not provide guidance on how to value such contributions,[238] but in the *Second FNPRM*, the Commission recognized that cable-related contributions could count toward the franchise fee cap at cost or at fair market value, and proposed to count toward the franchise fee cap at their fair market value.[239]

60. Most critiques of applying fair market valuation in this context challenge how it could be applied to PEG channel capacity.[240] But, as discussed above, we have not yet determined whether to

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informing the public, including those who are blind or visually impaired, on local community issues. . . .").

[205] 47 U.S.C. § 542. *See* Letter from Rep. Robert E. Latta, Member of Congress, *et al*., to Chairman Ajit Pai, FCC at 1 (July 22, 2019) ("The Cable Act carefully balanced the need to compensate communities for use of public rights-of-way with imperatives to expand services and limit costs for consumers.").

[206] 47 U.S.C. § 541(a)(4)(B).

[207] *See, e.g.*, Altice Reply at 7 (describing what it claims are excessive demands for PEG support); NCTA Reply, Appendix (*Examples of Franchising Authority Overreach*) at 9-11 (describing what NCTA argues are excessive LFA demands for PEG operational support, financial support, and channel capacity requirements).

[208] Altice Reply at 7.

[209] NCTA Comments at 43 (citing *First Report and Order*, 22 FCC Rcd 5149-50, paras. 105-08). *See also* Americans for Tax Reform May 8, 2019 *Ex Parte,* Att. at 3 (showing that extra-statutory exactions from cable operators "reduce the expected flow of revenues and/or increase the cost of an investment project, either of which reduces the net present value of an investment project and . . . attenuates capital investments").

[210] *See supra* paras. 38-41 (discussing the capital cost exclusion under section 622(g)(2)(C)).

[211] *See, e.g.*, Free Press Reply at 1 (noting that the proposal "threaten[s] PEG channel support"); NATOA *et al*. Comments at 10 (warning that "drastic reductions in franchise fees" will jeopardize the existence of PEG stations); Hawaii Comments at 7 ("Treating PEG channel capacity as a franchise fee would also result in an impossible choice for the State because the majority of the franchise fees that are currently collected are allocated to the PEG access organizations for their operating expenses"). This concern was also expressed in a number of letters from members of Congress. *See, e.g.*, Letter from Sen. M. Hirono to Ajit Pai, Chairman, FCC (Dec. 18, 2018) ("The proposed rulemaking, if adopted as currently proposed, would implement an overly broad definition of in-kind contributions
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assign the value of PEG channel capacity contributions toward the five percent franchise fee cap, and therefore we do not need to address these arguments.

61. We must address the value of other in-kind contributions, however, including free service to public buildings and I-Net contributions. We believe that fair market value, where there is a product in the market,[241] is the most reasonable valuation for in-kind contributions because it is easy to ascertain—cable operators have rate cards to set the rates that they charge customers for the services that they offer. Moreover, a fair market valuation "reflects the fact that, if a franchising authority did not require an in-kind assessment as part of its franchise, it would have no choice but to pay the market rate for services it needs from the cable operator or another provider."[242] In contrast, valuing these in-kind contributions at cost would "shift the true cost of an exaction from their taxpayer base at large to the smaller subset of taxpayers who are also cable subscribers."[243] As we note above, Congress adopted a broad definition of franchise fee to limit the amount that LFAs may exact from cable operators.[244] Accordingly, we conclude that a fair market valuation for in-kind contribution best adheres to Congressional intent.

62. The franchise fee rulings we adopt in this Order are prospective.[245] Thus, cable operators may count only ongoing and future in-kind contributions toward the five percent franchise fee cap after the Order is effective. There is broad record support for applying the rulings prospectively; no commenter argues that our rulings should apply retroactively to allow cable operators to recoup past payments that exceed the five percent franchise fee cap.[246] To the extent a franchise agreement that is currently in place conflicts with this Order, we encourage the parties to negotiate franchise modifications within a reasonable time.[247] If a franchising authority refuses to modify any provision of a franchise agreement that is inconsistent with this Order, that provision is subject to preemption under section 636(c).

63. Many LFAs express concern that our rulings could disrupt their budgets, which rely upon the franchise fees that they expect to receive.[248] It is by no means clear from the record what fiscal

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in a way that would encourage cable providers to reduce the dollar contribution portion of the franchise fee. This would have the effect of constraining PEGs ability to serve the public as they have for decades."); Letter from Rep. G. Moore to Ajit Pai, Chairman, FCC, at 2 (Dec. 14, 2018) ("Under the FCC's proposal, Wisconsin municipalities will have a hard choice to make between crucial municipal services and purchasing a PEG channel for the use of the community."); Letter from Rep. E. Engel to Ajit Pai, Chairman, FCC (Dec. 13, 2018) ("I am concerned that the FCC's current proposal could jeopardize critical funding for public, educational, and governmental (PEG) stations.").

[212] *Compare supra* para. 40 *with Second FNPRM*, 33 FCC Rcd at 8962, para. 19.

[213] *Compare supra* para. 44 *with Second FNPRM*, 33 FCC Rcd at 8962-63, para. 20. NATOA *et al*. say that these aspects of our decision will not have a mitigating impact on the availability of PEG programming. *See* NATOA *et al*. July 24, 2019 *Ex Parte* at 4. They suggest that this Order "is not a boon to LFAs" because it was already clear that both construction-related and non-construction-related PEG equipment costs are exempt from the franchise fee cap. This is incorrect. As we explain above, the scope of the PEG capital cost exemption previously was left unsettled. *See supra* para. 34. This Order clarifies that issue by finding that equipment costs unrelated to construction may be considered capital costs for purposes of section 622(g)(2)(C).

[214] Finally, a number of commenters argue that PEG requirements confer a benefit on the community, like buildout requirements, and therefore should similarly not be considered a "contribution" to LFAs. We find that PEG requirements are distinguishable from buildout requirements for the reasons discussed below. *See infra* para. 57. PEG requirements, unlike buildout requirements, are also specifically discussed in the definition of franchise fee.

[215] *See* 47 U.S.C. § 542(g)(2); *supra* para. 11. *See also* 47 U.S.C. § 531(f) (defining an "institutional network" or I-Net as "a communications network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential subscribers").

choices remain available to the LFAs, but in any event, delaying the effect of our decision to address this concern would not be consistent with the statutory text. It is strongly in the public interest to prevent the harms from existing franchise agreements to continue for years until those agreements expire.[249] In addition, the changes we adopt today were reasonably foreseeable because we largely adopt the tentative conclusions set forth in the *Second FNPRM*.[250] Finally, we note that LFAs can continue to benefit from their agreements by choosing to continue to receive their existing in-kind contributions, while reducing the monetary payments they receive.[251] Thus, consistent with the Act, we apply our rulings to future contributions cable operators make pursuant to existing franchise agreements.

B. Mixed-Use Rule

64. In this section, we address the second issue remanded from the Sixth Circuit in *Montgomery County*, which relates to the Commission's mixed-use rule. As explained above, the court in *Montgomery County* found that the Commission, in its *Second Report and Order* and *Order on Reconsideration*, failed to identify a valid statutory basis for its application of the mixed-use rule to incumbent cable operators because the statutory provision on which the Commission relied to do so – section 602(7)(C) of the Act – applies by its terms only to Title II carriers, and "many incumbent cable operators are not Title II carriers."[252] The court thus vacated and remanded the mixed-use rule as applied to those cable operators, directing the Commission "to set forth a valid statutory basis . . . for the rule as so applied."[253] For the reasons set forth below, we adopt our tentative conclusion that the mixed-use rule prohibits LFAs from regulating under Title VI the provision of any services other than cable services offered over the cable systems of incumbent cable operators, except as expressly permitted in the Act.[254]

65. Our conclusions regarding the scope of LFAs' authority to regulate incumbent cable

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[216] *See* NCTA Comments at 49-50. *See Second FNPRM*, 33 FCC Rcd at 8963, para. 20.

[217] *Second FNPRM*, 33 FCC Rcd at 8962-63, para. 20. *See supra* para. 20.

[218] *See, e.g.*, City of Arlington Comments at 9; Charles County Comments at 17-19.

[219] *See* Anne Arundel County *et al*. Comments at 17.

[220] *See, e.g.*, NCTA Reply at 9 (explaining that "Congress left to the franchising authority's discretion how best to allocate the franchise fee to reflect its community's particular cable-related needs"); *supra* para. 20.

[221] *See, e.g.*, Hawaii Comments at 8; City of Hagerstown Reply at 10-11. *See also* NATOA July 24, 2019 *Ex Parte* at 1 (arguing that this decision could "create significant public safety risks if, for example, [its] treatment of existing franchise obligations affects infrastructure such as institutional networks now being used for delivery of public safety services"). Anne Arundel County *et al*. contend that the obligation to provide I-Nets "benefits not only the public, but also the cable operator, who is in a position to sell commercial services via I-Nets," and they argue that the Commission "offers no explanation as to how such a mutually beneficial arrangement constitutes a tax." *See* Anne Arundel County *et al*. July 24, 2019 *Ex Parte* at 8. However, it is unclear from the record to what extent, if any, cable operators benefit from providing I-Nets. *See, e.g.*, NCTA Reply at 17 ("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.").

[222] 47 U.S.C. § 531(b); *supra* para. 20.

[223] *See* ACA Comments at 6; NCTA Reply at 7-8.

[224] *See supra* para. 20.

[225] Anne Arundel County *et al*. suggests that our interpretation of the statute as it relates to I-Nets is somehow inconsistent with the Commission's holding in a 1996 open video systems order. *See* Anne Arundel County *et al*. July 24, 2019 *Ex Parte* at 12-13 (citing *Implementation of Section 302 of the Telecommunications Act of 1996; Open Video Systems*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227 (1996) (*OVS Order*)). Contrary to Anne Arundel County *et al*.'s assertion, the Commission did not conclude in the *OVS Order* that I-Nets were meant to be excluded from the franchise fee. Rather, that order affirmed the Commission's

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operators' non-cable services, facilities, and equipment follow from the statutory scheme. Congress in Title VI intended, among other things, to circumscribe the ability of franchising authorities to use their Title VI authority to regulate non-cable services provided over the cable systems of cable operators and the facilities and equipment used to provide those services. As explained below, the legislative history of the 1984 Cable Act and subsequent amendments to Title VI reflect Congress's recognition that cable operators potentially could compete with local telephone companies in the provision of telecommunications service and its intent to maintain the then-existing *status quo* concerning regulatory jurisdiction over cable operators' non-cable services, facilities, and equipment.[255] Under the *status quo*, regulation of non-cable services provided over cable systems, including telecommunications and information services, was the exclusive province of either the Commission or state public utility commissions.[256]

66. *The Mixed-Use Rule Prohibits LFAs From Regulating Under Title VI the Non-Cable Services, Facilities, and Equipment of Incumbent Cable Operators That Are Also Common Carriers.* As an initial matter, we reaffirm the Commission's application of the mixed-use rule to prohibit LFAs from using their cable franchising authority to regulate any services other than cable services provided over the cable systems of any incumbent cable operator that is a common carrier,[257] with the exception of channel capacity on I-Nets.[258]

67. As noted above, the Commission in the *First Report and Order* found that the then-existing operation of the local franchising process constituted an unreasonable barrier to new entrants in the marketplace for cable services and to their deployment of broadband, in violation of section 621(a)(1) of the Act.[259] The Commission adopted the mixed-use rule with respect to new entrants to address this unreasonable barrier. It provides, in relevant part:

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decision to preclude local franchising authorities from requiring open video system operators to build I-Nets, while also clarifying that this decision is not inconsistent with permitting the local franchising authority to require channel capacity on a network if an open video system operator does build one. *See OVS Order*, 11 FCC Rcd at 20290-91, paras. 146-47. As we explain above, it is entirely consistent with the statute to find that franchising authorities may impose cable-related requirements, such as requiring dedicated channel capacity on I-Nets, but also to find that funding for these requirements applies against the five percent cap.

[226] *See Second FNPRM*, 33 FCC Rcd at 8963, para. 21. Build-out requirements are requirements that a franchisee expand cable service to parts or all of the franchise area within a specified period of time. *See First Report and Order*, 22 FCC Rcd at 5107, para. 7.

[227] *See infra* para. 84.

[228] 47 U.S.C. § 541(a)(2)(B).

[229] Because the statute is clear with regard to cable operator responsibility for construction costs, we reject ACA's argument that "build-out obligations should only be excluded [from the franchise fee] to the extent an LFA needs to meet its obligation under paragraph 621(a)(3)" to assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides. *See* ACA Comments at 7-8; 47 U.S.C. § 541(a)(3). *See also* Anne Arundel County *et al*. Reply at 9-11; CAPA Reply at 13.

[230] *See* Comments of the City of Murfreesboro, Tennessee, at 2 (Nov. 6, 2018) (City of Murfreesboro Comments); Comments of the City of Pasco, Washington, at 2 (Nov. 14, 2018); Comments of the City of Springfield, at 2 (Nov. 13, 2018); Anne Arundel County *et al*. Reply at 9-10; Free Press Reply at 5, NCTA Reply at 16. While some LFA commenters disagree with distinguishing between build-out obligations and other cable-related contributions such as PEG and I-Net support based on which entities receive the benefit of such obligations or whether such obligations can be considered "essential" to the provision of cable services, because we have clarified the rationale for excluding build-out obligations, we do not need to address these arguments. *See* AWC *et al*. Comments at 10-11; CAPA Comments at 12-13; Hawaii Comments at 10-11; City of Murfreesboro Comments at 2-3; NATOA *et al*. Comments at 6-7; City of New York Comments at 8-9; TBNK Comments at 7; Free Press Reply at 5-6; Hawaii Reply at 3-4. *See also* State of Hawaii July 22, 2019 *Ex Parte* at 1-4; Anne Arundel County, *et al*. July 24, 2019 *Ex*
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> LFAs' jurisdiction applies only to the provision of cable services over cable systems. To the extent a cable operator provides non-cable services and/or operates facilities that do not qualify as a cable system, it is unreasonable for an LFA to refuse to award a franchise based on issues related to such services or facilities. . . . [A]n LFA may not use its video franchising authority to attempt to regulate [an] entire network beyond the provision of cable services.[260]

68. The Commission in the *Second Report and Order* extended to incumbent cable operators several rules adopted in the *First Report and Order*, including the mixed-use rule.[261] Although, as noted, the Sixth Circuit in *Montgomery County* vacated and remanded the Commission's application of the mixed-use rule with respect to incumbent cable operators that are not common carriers, it left undisturbed application of the rule to incumbent cable operators that are also common carriers.[262] Consistent with the court's ruling, therefore, we adopt our tentative conclusion and reaffirm that the mixed-use rule prohibits LFAs from regulating the provision of non-cable services offered over the cable systems of incumbent cable operators that are common carriers.[263]

69. Our interpretation is consistent with the text of section 602(7)(C), which excludes from the term "cable system" "a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of this Act."[264] We are not persuaded by assertions to the contrary. Anne Arundel County *et al*. argues, for example, that a cable operator's provision of telecommunications services via its cable system (either directly or through a subsidiary) "does not . . . suddenly [transform its cable system] into a Title II facility" for purposes of applying the section 602(7)(C) common carrier exception.[265] City of Philadelphia *et al*. similarly argues that the common carrier exception in section 602(7)(C) was meant to protect Title II common carriers from regulation by LFAs under their Title VI franchising authority and thus cannot reasonably be read to apply to any cable operator that provides Title II and other non-cable services over a system that is a cable system.[266]

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Parte at 2-4; NATOA *et al*. July 25, 2019 *Ex Parte* at 5-6.

[231] In the *Second FNPRM*, we sought comment on whether there are other requirements besides build-out requirements that should not be considered contributions to an LFA. *See Second FNPRM*, 33 FCC Rcd at 8963, para. 21.

[232] *See* Anne Arundel County *et al*. Comments at 28 ("LFAs often impose obligations such as . . . minimum customer service obligations on cable operators that may still result in profit to the cable operator . . . but also do not directly serve county personnel or buildings."); *id*. at 29 (providing as an example the California state franchise, which requires state franchise holders to comply with customer service and protection standards); City of Newton Comments at 14 ("Under federal and state law, cable operators are required to comply with customer service standards. Cable franchise agreements include an obligation to comply with these customer service standards. Compliance with types of consumer-facing standards should not be treated as cable-related in-kind contributions."). *See also* NCTA Mar. 13, 2019 *Ex Parte* at 8 (observing that "neither the Commission nor the cable industry has suggested that . . . costs [of customer service obligations] should count toward the statutory cap").

[233] 47 U.S.C. § 552(b).

[234] 47 CFR § 76.309(c)(1)-(3).

[235] We clarify that if LFAs request build-out to an area that includes a public building, we would consider that to be a build-out requirement that is not subject to the franchise fee. However, we note that our conclusion with respect to build-out and customer service requirements is entirely separate from our findings regarding the provision of free or discounted services to public buildings and the provision of I-Net services. I-Net services as well as free or discounted services to public buildings are counted toward the franchise fee for the reasons explained above. *See supra* Sections III.A.2.a, III.A.2.c.

[236] H.R. Rep. No. 98-934, at 79 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4716.

70. To the extent these commenters argue that section 602(7)(C) precludes LFAs only from regulating non-cable services provided over the facilities of incumbent local exchange carriers that subsequently begin to provide cable service, we find such argument is not supported by the language of the statute. As noted in the *Second FNPRM*, although new entrants into the cable services market may confront obstacles different from those of incumbent cable operators, the statute makes no distinction between these types of providers.[267] In the absence of any textual basis for treating incumbent cable operators that provide telecommunications services differently from new entrants that do so, we conclude that a facility should be categorized as "a facility of a common carrier" under section 602(7)(C) so long as it is being used to provide some type of telecommunications service, irrespective of whether the facility was originally deployed by a provider that historically was treated as a "common carrier."

71. This interpretation also is consistent with the legislative history of the 1984 Cable Act. Although, as City of Philadelphia *et al*. points out, one of the concerns expressed in the legislative history was the potential that cable operators' provision of telecommunications services could enable large users of such services to bypass the local telephone companies and thereby threaten universal service,[268] the legislative history also reflects Congressional recognition that "ultimately, local telephone companies and cable companies could compete in *all* communications services."[269] The legislative history clarifies, moreover, that Congress intended the 1984 Cable Act to "maintain[] [then-]existing regulatory authority over all . . . communications services offered by a cable system, including . . . services that could compete with communications services offered by telephone companies."[270] Indeed, the legislative history is replete with statements reflecting Congress's intent to preserve the then-*status quo* regarding the ability of federal, state, and local authorities to regulate non-cable services provided via cable systems.[271] In light of its stated intention to maintain the jurisdictional *status quo*, we find that Congress intended via section 602(7)(C) to preclude LFAs from regulating under Title VI the provision of telecommunications services by incumbent cable operators, services that historically have been within the exclusive purview of the Commission (with respect to interstate services) or state public utility commissions (with respect to intrastate services).[272] Moreover, section 602(7)(C) broadly states that, with narrow exceptions, the

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[237] *See* ACA Reply at 17 (arguing that cable-related, in-kind contributions on any cable franchisee, other than capital costs for PEG access facilities, should count towards the franchise fee cap). For the reasons discussed above, we disagree with ACA that the costs of complying with mandated customer service standards should be counted toward the franchise fee cap.

[238] *First Report and Order*, 22 FCC Rcd at 5149-50, paras. 105-108.

[239] *Second FNRPM*, 33 FCC Rcd at 8964, para. 24.

[240] *See*, *e.g*., Anne Arundel County *et al.* Comments at 31; QC4 Comments at 5; CCSF Comments at 4-7; BNN Reply at 4.

[241] *See*, *e.g*., NCTA Comments at 53-55 (explaining that parties can establish the value of many services, including I-Net service, based on what "cable operators are charging third parties for a comparable service" and the "[m]arket value of equivalent services and equipment from the relevant cable operator"). We note that certain business or enterprise services may be comparable to I-Nets.

[242] NCTA Comments at 52. This demonstrates the flaw in NATOA *et al.*'s argument that we must provide guidance on how to calculate fair market value. *See* NATOA July 24 *Ex Parte* at 7. If the LFA believes that the cable operator's proposed valuation is too high, the LFA is free to forgo the in-kind contribution, accept a monetary franchise fee payment, and use the funds it received to purchase the good or service in the competitive marketplace.

[243] NCTA Reply at 19.

[244] *See supra* paras. 12-16. *See also* 129 CONG. REC. 15,461 (1983) (remarks of Senator Goldwater) ("[T]he overriding purpose of the 5-percent fee cap was to prevent local governments from taxing private operators to death as a means of raising local revenues for other concerns. This would be discriminatory and would place the private operator/owners at a disadvantage with respect to their competitors.")

[245] 5 U.S.C. § 551(4) ("'rule' means the whole or a part of an agency statement of general or particular applicability (continued….)

facility of a common carrier is only "considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers," and therefore not with respect to provision of any other services. For these reasons, we see no basis for altering our previous conclusion, as upheld by the Sixth Circuit,[273] that the mixed-use rule prohibits LFAs from exercising their Title VI authority to regulate the provision of non-cable services provided via the cable systems of incumbent cable operators that are common carriers, except as otherwise provided in the Act.

72. *The Mixed-Use Rule Prohibits LFAs From Regulating Under Title VI the Non-Cable Services, Facilities, and Equipment of Incumbent Cable Operators That Are Not Common Carriers*. We also adopt our tentative conclusion that LFAs are precluded from using their Title VI franchising authority to regulate the non-cable services (e.g., information services such as broadband Internet access) of incumbent cable operators that do not provide telecommunications services.[274] As directed by the court, we explain herein our statutory bases for concluding that LFAs lack authority under Title VI to regulate non-cable services of incumbent cable operators that do not provide telecommunications services.

73. Section 624 of the Act, which principally governs franchising authority regulation of services, facilities, and equipment, provides in subsection (a) that "[a] franchising authority *may not regulate* the services, facilities, and equipment provided by a cable operator *except to the extent consistent with [Title VI of the Act]*."[275] The subsequent provision, section 624(b)(1), provides that franchising authorities "may not . . . establish requirements for video programming or other *information services*."[276] Although the term "information service" is not defined in section 624, the legislative history of that provision distinguishes "information service" from "cable service."[277] In particular, the legislative history explains that "[a]ll services offered by a cable system that go beyond providing generally-available video programming or other programming are not cable services" and "a cable service may not include 'active *information services*' such as at-home shopping and banking that allows transactions between subscribers and cable operators or third parties."[278]

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and future effect designed to implement, interpret, or prescribe law or policy." (emphasis added)).

[246] *See*, *e.g.*, City Coalition Comments at 18-19; Free State Reply at 12-13; King County Comments at 11; NCTA Reply at 22-23.

[247] The City Coalition proposes that the parties should modify their franchises to comply with this Order via the franchise modification process set forth in section 625 of the Act. 47 U.S.C. § 545; City Coalition Comments at 19, n.89 ("the Second FNPRM could only be incorporated into existing agreements through a Section 545 proceeding."). Under those procedures, an LFA has 120 days to make a final decision about a cable operator's request to modify a franchise agreement. We do not adopt this framework, however, because as NCTA points out, the parties may not modify PEG requirements under section 625, and therefore cable operators and LFAs could not use that procedure to bring franchise agreements into compliance in every case. NCTA July 19 *Ex Parte* at 4. Therefore, we encourage the parties to negotiate franchise modifications within a reasonable time and find that 120 days should be, in most cases, a reasonable time for the adoption of franchise modifications.

[248] *See*, *e.g.*, City Coalition Comments at 18-19; City of Newton Apr. 17, 2019 *Ex Parte* at 9; AWC Apr. 3, 2019 *Ex Parte* at 5; Letter from Charlie Seelig, Town Administrator, Town of Halifax, MA, to Marlene H. Dortch, Secretary, FCC at 1 (July 22, 2019).

[249] *See* Letter from Katie McAuliffe Executive Director, Digital Liberty Federal Affairs Manager, Americans for Tax Reform, to Marlene H. Dortch, Secretary, FCC at Attachment at 8 (May 8, 2019) (stating that cable franchise agreements "typically have terms of about 10 to 15 years").

[250] *See supra* note 41. Indeed, the lawfulness of excluding costs associated with PEG/I-Nets from the franchise fee cap has been under Commission scrutiny for more than a decade (*see, e.g., 621 First R&O and FNRPM*, 22 FCC Rcd 5701, 5750-51, 5765, paras. 109, 110, 140 (2007)), and in 2008, the Sixth Circuit affirmed the Commission's determination as to new entrants that PEG related costs which do not qualify as capital costs are subject to the franchise fee cap. *See Alliance for Community Media v. FCC,* 529 F.3d 763, 583-86 (6th Cir. 2008). Therefore, we
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74. We find significant that the description of the term "information services" in the legislative history (*i.e.*, "services providing subscribers with the capacity to engage in transactions or to store, transfer, forward, manipulate, or otherwise process information or data [which] would not be cable services")[279] aligns closely with the 1996 Telecommunications Act's definition of "information service" codified in section 3(24) of the Act (*i.e.*, "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications").[280] We conclude, therefore, that for purposes of applying section 624(b), interpreting the term "information services" to have the meaning set forth in section 3(24) of the Act is most consistent with Congressional intent.[281] Because the Commission has determined that broadband Internet access service is an "information service" under section 3(24),[282] we likewise find that section 624(b)(1) precludes LFAs from regulating broadband Internet access provided via the cable systems of incumbent cable operators that are not common carriers. Moreover, even if the definition set forth in section 3(24) was not the intended definition of "information services" for purposes of section 624(b)(1), the highly analogous descriptions of this term in the legislative history of the 1984 Act also would apply to broadband Internet access service.[283] Thus, in either case, LFAs may not lawfully impose fees for the provision of information services (such as broadband Internet access) via a franchised cable system or require a franchise (or other authorization) for the provision of information services via such cable system.[284] We also clarify that LFAs and other state and local governmental units[285] cannot impose additional requirements on mixed-use "cable systems" in a manner inconsistent with this Order and the Act under the pretense that they are merely regulating facilities and equipment rather than information services.[286]

75. Although we recognize that a later provision, section 624(b)(2)(B), permits franchising authorities to enforce requirements for "broad categories of video programming or *other services*,"[287] when read together with the specific injunction against regulation of "information services" in section

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find Anne Arundel County's argument that this "decision represents [an] 'unexpected surprise'" to be unfounded. *See* Letter from Joseph Van Eaton *et al*,, Counsel to Anne Arundel County, *et al*. to Marlene H. Dortch, Secretary, FCC at 13 (July 24, 2019) (citing *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)).

[251] Take, for example, a franchise agreement that requires a cable operator to deliver free cable service to all municipal buildings and contribute a monetary payment of five percent of its gross revenues derived from the operation of its cable system to provide cable services. In that case, the LFA may wish to either (1) continue to receive the existing free cable service and a monetary payment of five percent minus the fair market value of that service, or (2) discontinue service and receive a monetary payment of five percent, or (3) reduce the free cable service to select municipal buildings and receive a monetary payment of the five percent minus the fair market value of the reduced service. However, what an LFA may not do is ask a cable operator to "voluntarily" waive the statutory cap by asking it to continue providing free cable service to all municipal buildings and contribute the five percent monetary payment, or request that a cable operator waive anything else under the statute as interpreted by the Commission. *See, e.g.*, Altice May 9, 2019 *Ex Parte* at 9 ("Some franchising authorities take advantage of periods in which they have maximum leverage to ask cable operators like Altice USA to 'voluntarily' waive the cap and accede to making payments or contributions that are not offset against the statutory limit on franchise fees. That pressure puts operators in a bind because, as a practical matter, they are often not in a position to resist franchising authority demands since the franchising authority exercises the sole domain over ROW access—which is one of the precise concerns that led to adoption of the Federal Cable Act in the first place."). *See also Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 58 R.R.2d 1, 35, n.91 ("we note that neither a cable operator nor a franchising authority may waive mandatory sections of the Cable Act in reaching franchise agreements."). Accordingly, we reject the request of NATOA that we clarify that this Order "is permissive not mandatory." NATOA July 24, 2019 *Ex Parte* at 2. Complying with the terms of the statute is not optional.

[252] *Montgomery County*, 863 F.3d at 493.

[253] *Id*.

624(b)(1), we find that it would be unreasonable to construe section 624(b)(2)(B) as authorizing LFA regulation of information services when (b)(1) precludes franchising authorities from regulating such services.[288] As we noted in the *Second FNPRM*, the legislative history explains that section 624(b)(2)'s grant of authority "to enforce requirements . . . for broad categories of video programming or other services"[289] was intended merely to "assure[] the franchising authority that commitments made in an arms-length situation will be met," while protecting the cable operator from "being forced to provide specific programming or items of value which are not utilized in the operation of the cable system."[290] Reading these provisions together, it is apparent that Congress intended to permit LFAs to *enforce* franchise requirements governing "other services" under (b)(2), but only to the extent they are otherwise permitted to *establish* such requirements under (b)(1).[291] Because LFAs lack authority to regulate information services under section 624(b)(1), they may not lawfully enforce provisions of a franchise agreement permitting such regulation under section 624(b)(2), even if such provisions resulted from arms-length negotiations between the cable operator and LFA.[292] That is, the grant of authority to "enforce" certain requirements under section 624(b)(2)(B) does not give franchising authorities an independent right to impose requirements that they otherwise may not "establish" under section 624(b)(1).[293] We thus reject claims to the contrary.[294]

76. As discussed above, Congress in the 1984 Cable Act intended to preserve the *status quo* with respect to federal, state, and local jurisdiction over non-cable services, which lends further support to our conclusion that LFAs may not use their cable franchising authority to regulate information services provided over a cable system.[295] Because information services that are interstate historically have fallen outside the lawful regulatory purview of state and local authorities,[296] including LFAs, construing section 624(b) to bring those services within the scope of permissible LFA authority under Title VI would be fundamentally at odds with Congressional intent. For this reason, we reject City of Philadelphia *et al*.'s contention that our application of the mixed-use rule is barred by the Act because "[t]he 'regulatory and jurisdictional status quo' in 1984 . . . included [LFAs'] use of the franchise and franchise agreement to

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[254] *Second FNPRM,* 33 FCC Rcd at 8952, para. 26 (tentatively concluding that to the extent that any incumbent cable operators offer any telecommunications services, they can be regulated by LFAs only to the extent they provide cable service); *id*. paras. 27-28 (tentatively concluding that LFAs are prohibited from regulating the provision of broadband Internet access and other information services by incumbent cable operators that are not common carriers).

[255] *See infra* notes 271, 272.

[256] Specifically, the Commission historically has had jurisdiction over interstate telecommunications and information services. States have had jurisdiction over intrastate telecommunications services but not information services, which are jurisdictionally interstate. *See infra* note 272. We thus reject the City of Eugene's suggestion that maintaining the "status quo" supports broad state and local authority over non-cable services provided via cable systems. *See* City of Eugene July 24, 2019 *Ex Parte* at 5.

[257] "Non-cable" services offered by cable operators include telecommunications services and non-telecommunications services. *Second FNPRM*, 33 FCC Rcd at 8964-65, para. 25. Telecommunications services offered by cable operators include, for example, business data services, which enable dedicated point-to-point transmission of data at certain guaranteed speeds and service levels using high-capacity connections, and wireless telecommunications services. *Id*. Non-telecommunications services offered by cable operators include, but are not limited to, information services (such as broadband Internet access services), private carrier services (such as certain types of business data services), and Wi-Fi services. *Id*. Cable operators also may offer facilities-based interconnected Voice over Internet Protocol (VoIP) service, which the Commission has not classified as either a telecommunications service or an information service, but which is not a cable service. *Id*.

[258] Nothing in this Order is intended to limit LFAs' express authority under section 611(b) of the Act, 47 U.S.C. § 531(b), to require I-Net capacity. *But see supra* paras. 55-56 regarding franchise fee treatment of I-Nets.

[259] *First Report and Order*, 22 FCC Rcd at 5102, para. 1. The Sixth Circuit rejected challenges to the Commission's *First Report and Order*. *Alliance,* 529 F.3d 763.

regulate . . . cable systems that [Congress] recognized were carrying both cable services and non-cable communications services."[297] The statutory design as reflected in other provisions of Title VI reinforces our conclusion that LFAs are precluded under section 624(b)(1) from regulating non-cable services provided over the cable systems of incumbent cable operators that are not common carriers.[298] LFAs, therefore, may not lawfully regulate the non-cable services of such cable operators, including information services (such as broadband Internet access), private carrier services (such as certain types of business data services), and interconnected VoIP service.[299] For example, this precludes LFAs from not only requiring such a cable operator to pay fees or secure a franchise to provide broadband service via its franchised cable system, but also requiring it to meet prescribed service quality or performance standards for broadband service carried over that cable system.

77. We find unconvincing arguments that the statute compels a broader reading of LFAs' authority under Title VI to regulate cable operators' non-cable services, facilities, and equipment. Anne Arundel County *et al.* maintains, for example, that because section 624(a) grants LFAs authority to regulate a "cable operator," a term the Act defines as "[a] person . . . who provides cable service over a cable system,"[300] LFAs generally are authorized to regulate any of the services provided by a "cable operator" over a "cable system," including non-cable services.[301] Anne Arundel County *et al*. contends further that under section 624(b), LFAs "to the extent related to the establishment or operation of a cable system . . . may establish requirements for facilities and equipment"[302] and argues that the Act cannot be construed as limiting LFAs' jurisdiction to cable services since it permits LFAs to require, for example, build out and institutional networks.[303] We disagree with these arguments. Although, as Anne Arundel County *et al*. and others note,[304] the Act in certain circumstances permits LFAs to impose on cable operators certain requirements that are not strictly related to the provision of cable service,[305] such circumstances constitute limited exceptions to the general prohibition on LFA regulation of non-cable services contained in section 624.[306] They also do not override the specific prohibition on regulation of

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[260] *First Report and Order*, 22 FCC Rcd at 5153, paras. 121-22.

[261] *Second Report and Order*, 22 FCC Rcd at 19640-41, para. 17. The Commission adhered to that conclusion on reconsideration. *Order on Reconsideration*, 30 FCC Rcd at 816, para. 14.

[262] *Montgomery County*, 863 F.3d at 493 (finding that "on the record now before us, the FCC's extension of the mixed-use rule to incumbent cable providers that are not common carriers is arbitrary and capricious"). Our conclusion that the mixed-use rule applies to cable operators that are common carriers is based on our interpretation of sections 3(51) and 602(7)(C) of the Act. *Second FNPRM*, 33 FCC Rcd at 8965-66, para. 26. Under section 3(51) of the Act, a "provider of telecommunications services" is a "telecommunications carrier," which the statute directs "shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(51). Thus, to the extent that an incumbent cable operator provides telecommunications service, it would be treated as a common carrier subject to Title II of the Act with respect to its provision of such telecommunications service.

[263] *Second FNPRM*, 33 FCC Rcd at 8965-66, para. 26. NCTA asserts that many cable operators currently provide telecommunications services. NCTA Comments at 7, n.16.

[264] 47 U.S.C. § 522(7)(C).

[265] Anne Arundel County *et al*. Comments at 40-41 (asserting that under common carrier law, "it is the service which is the focus, not the facility. . . . [A] telecommunications service is defined 'regardless of the facilities used'. . . . Thus, a common carrier facility is subject to Title II only to the extent it is offering Title II services, and a facility owned by the cable operator could be used in the provision of Title II services . . . without being a common carrier facility").

[266] City of Philadelphia *et al*. Comments at 44-45. City of Philadelphia *et al*. asserts further that:

> The FCC . . . ignores the structure of the Communications Act by conflating communications *services*, cable and non-cable, with communications *systems*. Title II defines . . . 'common carriers' . . . in terms of the . . . 'telecommunications services' they provide, not in terms of the facilities they use to provide them. . . . Title VI, to the contrary, focuses on the facility, by

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information services set forth in section 624(b)(1). This interpretation accords with one of the 1984 Cable Act's principal purposes to "continue[] reliance on the local franchising process as the primary means of cable television regulation, while *defining and limiting the authority that a franchising authority may exercise through the franchise process*."[307]

78. We also conclude, contrary to the assertions of some commenters,[308] that it would conflict with Congress's goals in the Act to permit LFAs to treat incumbent cable operators that are not common carriers differently from incumbent cable operators and new entrants that are common carriers in their provision of information services, including broadband Internet access service.[309] As we noted in the *Second FNPRM*, incumbent and new entrant cable operators (whether or not they are also common carriers) often compete in the same markets and offer nearly identical services to consumers.[310] Thus, to allow LFAs to regulate the latter group of providers more strictly, such as by subjecting them to franchise and fee requirements for the provision of non-cable services,[311] could place them at a competitive disadvantage.[312] A report submitted by NCTA asserts, for example, that two fixed broadband providers may build out their networks differently, with one utilizing wireless backhaul and the other using landline backhaul, but "if one has inputs subjected to [fees] and the other does not, the differential . . . treatment can distort competition between the two, even when the services provided . . . are indistinguishable to the consumer."[313] The distortion to competition that stems from "hampering a subset of competitors,"[314] in turn, reduces the incentives of those competitors to invest in cable system upgrades for the provision of both cable and non-cable services, which could thwart the 1996 Act's goals to promote competition among communications providers and secure lower prices and higher quality services for consumers.[315] Such regulations, moreover, impede the Commission's development of a "consistent regulatory framework across all broadband platforms,"[316] which is "[o]ne of the cornerstones of [federal] broadband policy."[317]

79. We also are not convinced by arguments that interpreting the Act to bar LFAs from

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> defining a 'cable system' as a communications system that has particular characteristics . . . and that is 'designed to provide cable service which includes video programming.' The cable system is a cable system if it satisfies the defining characteristics of such a communications system, regardless of whether it is used for non-cable, non-Title VI services. LFA authority to regulate goes with the system. . . .

Id. at 46-47 (citations omitted).

[267] *Second FNPRM*, 33 FCC Rcd at 8965-66, para. 26.

[268] City of Philadelphia *et al*. Comments at 46-48, *citing* 1984 Cable Act House Report, H.R. Rep. No. 98-934 (1984), *as reprinted in* 1984 U.S.C.C.A.N. at 4659-60. In particular, City of Philadelphia *et al*. asserts that:

> Congress' stated reason for excepting Title II telephone and data transmission services from LFA regulation . . . was . . . to protect Title II telephone companies from unfair competition by cable operators. . . . Congress' fear was that cable operators could furnish the core services of Title II carriers . . . at lower cost because they were not subject to common carrier regulations, . . . forcing [telephone companies] to raise rates on telephone service to compensate for the lost business. . . . [T]he Title II exception was [intended] to achieve competitive equity between Title II telephone companies and cable operators.

Id. (citations omitted). *See also* 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4664-66.

[269] *Id.* at 4665 (emphasis added).

[270] *Id*. at 4666.

[271] *See, e.g.*, *id*. at 4678 ("The Committee . . . intends that nothing in Title VI shall be construed to affect existing regulatory authority with respect to non-cable communications services provided over a cable system"); *id*. ("This legislation does not affect existing regulatory authority over the use of a cable system to provide non-cable communications services, such as private line transmission or voice communication, that compete with services provided by telephone companies."); *id*. at 4697 ("The Committee intends that state and federal authority over non-

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regulating non-cable facilities and equipment placed in public rights-of-way would pose a safety risk to the public because cable operators would have unfettered discretion to install non-cable facilities without review or approval by local authorities.[318] Section 636(a) of the Act specifically provides that "[n]othing in [Title VI] shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of [Title VI]."[319] This provision, which is an express exception to Title VI's general prohibition on franchising authority regulation of non-cable facilities and equipment, thus permits LFAs to impose requirements on non-cable facilities and equipment designed to protect public safety, so long as such requirements otherwise are consistent with the provisions of Title VI.[320]

C. Preemption of Other Conflicting State and Local Regulation

80. As noted above, Title VI does not permit franchising authorities to extract fees or impose franchise or other requirements on cable operators insofar as they are providing services other than cable services. Ample record evidence shows, however, that some states and localities are purporting to assert authority to do so outside the limited scope of their authority under Title VI. These efforts appear to have followed the decision by the Supreme Court of Oregon in *City of Eugene v. Comcast,*[321] which upheld a local government's imposition of an additional seven percent "telecommunications" license fee on the provision of broadband services over a franchised cable system with mixed use facilities. To address this problem, we now expressly preempt any state or local requirement, whether or not imposed by a franchising authority, that would impose obligations on franchised cable operators beyond what Title VI allows.[322] Specifically, we preempt (1) any imposition of fees on a franchised cable operator or any affiliate using the same facilities franchised to the cable operator[323] that exceeds the formula set forth in section 622(b) of the Act and the rulings we adopt today, whether styled as a "franchise" fee, "right-of-access" fee, or a fee on non-cable (*e.g.*, telecommunications or broadband) services, and (2) any requirement that a cable operator with a Title VI franchise secure an additional franchise or other authorization to provide non-cable services via its cable system.[324] We base these conclusions on

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cable communications services under the status quo shall be unaffected by the provisions of Title VI. . . . This approach protects cable companies from unnecessary regulation, while reserving for state and federal officials the authority they need to address the issue of competition between telephone and cable companies. . . ."); *id*. at 4698 ("The Committee does not intend to address the question of regulatory jurisdiction over non-cable communications services provided over cable systems. . . . The intent of the Committee is not to address the jurisdictional question at all."); *id*. at 4700 ("It is the intent . . . that, with respect to non-cable communications services, both the power of any state public utility commission and the power of the FCC be unaffected by the provisions of Title VI. Thus, Title VI is neutral with respect to such authority.").

[272] This interpretation is reinforced by both the text of section 621(b)(3) of the Act and its legislative history (relating to the provision of telecommunications services by cable operators), which Congress added to Title VI through the Telecommunications Act of 1996:

> The intent of [section 621(b)(3)(A)] is to ensure that regulation of telecommunications services, which traditionally has been regulated at the Federal and State level, remains a Federal and State regulatory activity. The Committee is aware that *some [LFAs] have attempted to expand their authority over the provision of cable service to include telecommunications service offered by cable operators*. Since 1934, the regulation of interstate and foreign telecommunications services has been reserved to the Commission; the State regulatory agencies have regulated intrastate services. It is the Committee's intention that when an entity, whether a cable operator or some other entity, enters the telephone exchange service business, such entity should be subject to the appropriate regulations of Federal and State regulators.

1996 Act House Report, H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 86, 93 (1995) (emphasis added). The fact that section 621(b)(3) seeks to protect *incumbent* cable operators from LFA regulation under Title VI when they provide certain non-cable services, *i.e.*, telecommunications services, further undermines LFAs' assertion that the common carrier exception in section 602(7)(C) was intended to shield from LFA regulation only the provision of (continued….)

Congress's express decision to preempt state and local laws that conflict with Title VI of the Communications Act (section 636(c)), the text and structure of Title VI and the Act as a whole, Congressional and Commission policies (including the policy of nonregulation of information services), and the Supremacy Clause of the U.S. Constitution.[325]

81. *Authority to Preempt*. Congress has the authority to preempt state law under Article VI of the U.S. Constitution. While Congress's intent to preempt sometimes needs to be discerned or implied from a purported conflict between federal and state law, here Congress spoke directly to its intent to preempt state and local requirements that are inconsistent with Title VI. This express preemption extends beyond the actions of any state or local franchising authority. Section 636(c) of the Act provides that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded."[326] The reference in section 636(c) to "this chapter" means that Congress intended to preempt any state or local law (or any franchise provision) that is inconsistent with any provision of the Communications Act, whether or not codified in Title VI.[327] Moreover, section 636(c) applies broadly to "*any* [inconsistent] provision of law" of "*any State, political subdivision, or agency thereof*."[328] That means that Congress intended that states and localities could not "end-run" the Act's limitations by using other governmental entities or other sources of authority to accomplish indirectly what franchising authorities are prohibited from doing directly. [329]

82. Where Congress provides an express preemption provision such as section 636(c), the Commission has delegated authority to identify the scope of the subject matter expressly preempted and assess whether a state's law falls within that scope.[330] The Commission may, therefore, expressly bar states and localities from acting in a manner that is inconsistent with both the Act and the Commission's interpretations of the Act, so long as those interpretations are valid.[331] We therefore disagree with assertions that the Commission lacks authority to preempt non-cable regulations imposed by states and localities pursuant to non-Title VI sources of legal authority.[332]

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non-cable services by *new entrants*.

[273] *Second Report and Order*, 22 FCC Rcd at 19640, para. 17; *Montgomery County*, 863 F.3d at 493. *See also Second FNPRM*, 33 FCC Rcd at 8965-66, para. 26 (tentatively concluding that the mixed-use rule "prohibits LFAs from regulating the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers, or from regulating any facilities and equipment used in the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers. . . ."). Certain LFA advocates appear to concede that the Act precludes LFAs from regulating under Title VI a cable operator's provision of telecommunications services via its cable system. *See, e.g.*, NATOA *et al*. Comments at 16-17 (stating that the definition of cable system "establishes that Title VI does not authorize LFAs to regulate the telecommunications services provided over what is otherwise a cable system"); Anne Arundel County *et al*. Comments at 37-38 (recognizing that various provisions in section 621 preclude LFA regulation of telecommunications services by cable operators, but stating that "[a]s long as a local government possesses authority to regulate telecommunications from a source other than Title VI franchise authority, none of these provisions prohibit it"). *See also Montgomery County*, 863 F.3d at 492 ("The Local Regulators admit that the FCC's mixed-use decision is 'defensible as applied to Title II carriers,' since the Act expressly states that [LFAs] may regulate Title II carriers only to the extent they provide cable services.").

[274] *Second FNPRM*, 33 FCC Rcd at 8966-67, para. 27.

[275] 47 U.S.C. § 544(a) (emphasis added).

[276] *Id*. § 544(b)(1) (emphasis added). While the preamble to section 624(b) specifically limits the provision to franchises "granted after the effective date of this title" and therefore appears to grandfather local regulation of information services that may have occurred prior to 1984, when Title VI took effect, we note that very few franchises in effect today were granted prior to that year.

[277] 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4679.

83. *Scope of Preemption.* The Commission's task, then, in interpreting the scope of preemption under section 636(c) is to determine whether specific state or local requirements are inconsistent with Title VI or other provisions in the Communications Act. Looking at the provisions of Title VI and the Act as a whole, we have little trouble concluding that Congress did not intend to permit states, municipalities, or franchising authorities to impose fees or other requirements on cable operators beyond those specified under Title VI, under the guise of regulating "non-cable services" or otherwise restricting a cable operator's construction, operation, or management of facilities in the rights-of-way.

84. As an initial matter, we note that Title VI establishes a framework that reflects the basic terms of a bargain—a cable operator may apply for and obtain a franchise to access and operate facilities in the local rights-of-way, and in exchange, a franchising authority may impose fees and other requirements as set forth and circumscribed in the Act. So long as the cable operator pays its fees and complies with the other terms of its franchise, it has a license to operate and manage its cable system free from the specter of compliance with any new, additional, or unspecified conditions (by franchise or otherwise) for its use of the same rights-of-way.

85. The substantive provisions of Title VI make the terms of this bargain clear. For starters, section 621(a)(1) provides franchising authorities with the right to grant franchises, and section 621(a)(2) explains that such franchises "shall be construed to authorize the construction of a cable system over public rights-of-way . . ."[333] A "cable operator," in turn, may not provide "cable service" unless the cable operator has obtained such a franchise.[334] Other provisions make clear that a franchise does not merely authorize the construction of a cable system, but also the "management and operation of such a cable system,[335] including the installation of Wi-Fi and small cell antennas attached to the cable system."[336]

86. The right to construct, manage, and operate a "cable system" does not mean merely the right to provide cable service.[337] Numerous provisions in Title VI evidence Congress's knowledge and understanding that cable systems would carry non-cable services—including telecommunications and

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[278] *Id.* (emphasis added). *See also id.* at 4681 ("Some examples of non-cable services would be: shop-at-home and bank-at-home services, electronic mail, one-way and two-way transmission of non-video data and information not offered to all subscribers, data processing, video-conferencing, and all voice communications."); *id*. ("Many commercial *information services* today offer a package of services, some of which (such as news services and stock listings) would be cable services and some of which (such as electronic mail and data processing) would not be cable services. . . . [T]he combined offering of a non-cable shop-at-home service with service that by itself met all the conditions for being a cable service would not transform the shop-at-home service into a cable service, or transform the cable service into a non-cable communications service.") (emphasis added).

[279] *Id.* at 4679.

[280] 47 U.S.C. § 153(24).

[281] *Second FNPRM*, 33 FCC Rcd at 8966-67, para. 27. The fact that the "information services" definition in section 3(24) of the Act was enacted as part of the 1996 Act – more than ten years after Congress passed section 624(b) – supports our conclusion that LFAs lack authority under section 624(b)(1) to regulate information services. The absence in Title VI of specific references to the section 3(24) definition of "information service" suggests only that Congress, in passing the 1996 Act, did not wish to re-open the 1984 Cable Act; it does not indicate that Congress intended to grant LFAs general authority to regulate information services.

[282] The Commission in 2018 reinstated the "information service" classification of broadband Internet access service. *Restoring Internet Freedom Order*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd at 320-321, paras. 26-29 (2018) (*Restoring Internet Freedom Order*).

[283] 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4680-81.

[284] Application of the mixed-use rule to broadband Internet access service is not tied to the Commission's classification of broadband as an information service. Under the Commission's prior conclusion in 2015 that broadband Internet access service is a Title II telecommunications service, the mixed-use rule would apply based on the provisions of Title VI for the reasons explained above in paragraphs 66-71.

information services. The definition of "cable system," for example, anticipates that some facilities may carry both telecommunications and cable services.[338] With respect to information services, section 601 of the Act provides that one of Title VI's purposes is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."[339] And, as we have already seen, Congress expressly provided in section 624(b) for "mixed-use" facilities that carry both cable services and "video programming or other information services."[340]

87. The legislative history reinforces the conclusion that Congress understood that a franchised "cable system" would carry both cable and non-cable services. The House Report, for example, explains that "[t]he term 'cable system' is not limited to a facility that provides only cable service which includes video programming. Quite the contrary, many cable systems provide a wide variety of cable services and other communications services as well. A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service."[341]

88. The point is that Congress was well aware that "cable systems" would be used to carry a variety of cable and non-cable services. It follows that Congress could have, if it wanted, provided significant leeway for states, localities, and franchising authorities to tax or provide other regulatory restrictions on a cable system's provision of non-cable services in exchange for the cable operator receiving access to the rights-of-way. But as it turns out, the balance of Title VI makes clear that Congress sharply circumscribed the authority of state or local governments to regulate the terms of this exchange. Today, we make clear that, under section 636(c), states, localities, and franchising authorities may not impose fees or restrictions on cable operators for the provision of non-cable services in connection with access to such rights-of-way, except as expressly authorized in the Act. We provide

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[285] *See infra* section III.C.

[286] For this reason, we reject assertions that section 624's grant of authority to "establish" and "enforce" certain requirements for facilities and equipment would permit LFAs to bypass the statutory prohibition on regulation of information services. *See, e.g.*, Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 9.

[287] 47 U.S.C. § 544(b)(2)(B) (emphasis added).

[288] *Second FNPRM*, 33 FCC Rcd at 8967-68, para. 28. We note further that the limitation on the ability of franchising authorities to establish requirements under section 624(b)(1) extends specifically to "information services," whereas the authority granted to franchising authorities in section 624(b)(2) makes no mention of "information services." *Id.* n.135.

[289] 47 U.S.C. § 544(b)(2)(B).

[290] *Second FNPRM*, 33 FCC Rcd at 8967-68, para. 28, n. 135, *citing* 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4706.

[291] Although the legislative history provides examples of "broad categories of video programming," *id*. at 4705-06 (stating that the franchising authority may enforce provisions for children's programming, news and public affairs programming, sports programming and other broad categories of programming), it does not specify what services are encompassed within the phrase "other services" for purposes of applying section 624(b)(2)(B). Although the phrase "other services" is ambiguous, it would be unreasonable to conclude that Congress intended for it to include services, such as information services, that franchising authorities are not empowered to regulate under section 624. Rather, we find it more reasonable to construe the phrase as referring to services that franchising authorities lawfully could require under Title VI, such as the provision of PEG channels and I-Net capacity. We, therefore, reject Anne Arundel County *et al.*'s assertion that the term "other service" in section 624(b)(2)(B) includes information services. Anne Arundel County *et al*. Comments at 38-39, n. 111.

[292] We thus disagree with City Coalition's contention that "[i]f . . . a cable operator agrees to undertake obligations regarding information services though arms-length negotiation – be they obligations regarding facilities that are not part of the cable system or obligations regarding noncable services – then a LFA may enforce those obligations." City Coalition Comments at 22.

further explanation in two critical areas to clarify that these categories of state and local restrictions are preempted: (a) additional franchise fees beyond those authorized in Section 622 and (b) additional franchises or regulatory restrictions on a cable operator's construction, management, or operation of a cable system in the rights-of-way.

89. *Additional fees.* Both Congress and the Commission have recognized that the franchise fee is the core consideration that franchising authorities receive in exchange for the cable operator's right to access and use the rights-of-way.[342] As explained in detail above, Congress carefully circumscribed how this fee should be calculated: It provided that "the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system *to provide cable services*".[343] We must assume that Congress's careful choice of words was intentional. While the fee would apply to the "cable operator" with respect to any "cable system," it would only apply to revenue obtained from "cable services," *not* non-cable services that Congress understood could provide additional sources of revenue.

90. We find additional support for this conclusion in Congress's broad definition of the term "franchise fee," which covers "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber or both, solely because of their status as such."[344] This broad definition was intended to limit the imposition of any tax, fee, or assessment of any kind—including fees purportedly for provision of non-cable services or for, access to, use of, or the value of the rights of way[345]—to five percent of the cable operator's revenue from cable services.[346] And its language reinforces the text of section 636(c) by making clear that a different state or local "governmental entity" cannot end-run the cap by imposing fees for access to any public right of way within the franchise area or in instances of overlapping jurisdiction.[347]

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[293] NCTA Reply at 28 ("Although . . . Section 624(b) discusses [the prohibition on LFA regulation of information services] in the context of cable franchise proposals and renewals, the prohibition would lose all practical meaning if franchising authorities were able to circumvent it simply by waiting to impose . . . requirements on non-cable services until after cable franchise negotiations concluded. . . .").

[294] Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 8-9.

[295] 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4666.

[296] *Id.* at 4700 ("The FCC [under section 621(d)(1)] may require a cable operator to file informational tariffs for enhanced services which are under the FCC's jurisdiction when offered by common carriers. . . . States would not have the authority to require cable operators to file [such] tariffs for . . . enhanced services . . . which are interstate in character. . . ."). The Commission has determined that the term "information service" has essentially the same meaning as the term "enhanced service" for purposes of applying the Act. *See, e.g.*, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended,* CC Docket No. 96-149, 11 FCC Rcd 21905, 21955, para. 102 (1996); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11511, para. 21 (1998). *See also* 1996 Act Conference Report, S. Rep. 104-230 at 18 (Feb. 1, 1996) (stating that the 1996 Act "defines 'information service' similar to the FCC definition of 'enhanced services'"); *NCTA v. Brand X Internet Svcs.*, 545 U.S. 967, 992-994 (2005). Moreover, even assuming that LFAs at the time Congress passed the 1984 Cable Act used their cable franchising authority to regulate non-cable services as City of Philadelphia *et al*. asserts, the provisions of section 624 plainly evidence Congressional intent to treat pre- and post-Act cable franchises differently. *Compare* 47 U.S.C. § 544(b) (authorizing franchising authorities, in the case of franchises granted after the effective date of Title VI, to take certain actions "*to the extent related to* the establishment or operation of the cable system") (emphasis added) *with* (continued….)

91. In reaching this conclusion, we read the phrase "solely because of their status as such" as protective language intended to place a ceiling on any sort of fee that a franchising authority might impose on a cable operator *qua* cable operator or *qua* franchisee—that is, any fee assessed in exchange for the right to construct, manage, or operate a cable system in the rights-of-way. We therefore reject the claim of some commenters that this language permits localities to charge additional fees so long as the cable operator also acts as a telecommunications provider or Internet service provider, or so long as the state or locality can articulate some non-cable related rationale for its actions.[348] This alternate rationale flies in the face of statutory text. As noted above, a "cable operator" is defined not only as a person or entity that provides cable service, but also one that "controls or is responsible for, through any arrangement, the *management and operation* of such a cable system."[349] The management or operation of a cable system includes the maintenance of the system to provide non-cable services—which Congress understood would be supplied over the same cable facilities.[350] Because a fee that a state or locality imposes on a cable operator's provision of non-cable services relates to the "manage[ment] and operat[ion]" of its cable system, such fee is imposed on the cable operator "solely because of [its] status" as a cable operator and is capped by section 622.[351]

92. The structure of section 622 as a whole provides further support for our reading. The language "solely because of their status as such" operates to distinguish fees imposed on cable operators for access to the rights-of-way ("franchise fees"), which are capped, from "any tax, fee, or assessment of general applicability," which are not.[352] Section 622 thus envisions two mutually exclusive categories of assessments—(1) fees imposed on cable operators for access to the rights-of-way in their capacity as franchisees (that is, "solely because of their status as such") and (2) broad-based taxes. Understood in this manner, any assessment on a cable operator for constructing, managing, or operating its cable system in the rights-of-way is subject to the five-percent cap—even if other non-cable service providers (*e.g.*, telecommunications or broadband providers) are subject to the same or similar access fees.[353] This is because the definition of "franchise fee" in section 622(g)(1) centers on *why* the fee is imposed on a cable

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47 U.S.C. § 544(c) (authorizing franchising authorities, in the case of franchises effective under prior law, to enforce requirements for the provision of services, facilities, and equipment "*whether or not related to* the establishment or operation of the cable system") (emphasis added).

[297] City of Philadelphia *et al*. Comments at 50-51.

[298] *See, e.g.*, 47 U.S.C. § 542(b) (limiting the franchise fees that a franchising authority may assess on a cable operator to "[five] percent of such cable operator's gross revenues derived . . . from the operation of the cable system *to provide cable services*") (emphasis added); *id.* § 541(b)(3)(B) (barring a franchising authority from "impos[ing] any requirement [under Title VI] that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator"); *id*. § 541(b)(3)(D) (barring a franchising authority from "requir[ing] a cable operator to provide any telecommunications services or facilities" as a condition of the grant or renewal of a franchise, with certain exceptions). We discuss section 622(b) of the Act, *id*. § 542(b), in greater detail in section C.

[299] Although interconnected VoIP service has not been classified by the Commission, LFA regulation of this service is prohibited under the mixed-use rule, as clarified in this Order, regardless of whether it is deemed a telecommunications service or an information service.

[300] *Id.* § 522(5)(A).

[301] *See, e.g.*, Anne Arundel County *et al*. Comments at 37, n. 105. Insofar as Anne Arundel County *et al*. is arguing that "once a cable operator, always a cable operator," and "once a cable system, always a cable system," *i.e.*, that when a cable operator deploys facilities, those facilities remain part of a cable system even when used to provide non-cable services, we disagree with that assertion. Consistent with our interpretation of section 602(7)(C) above, we find that a more reasonable reading of the statute is that the nature of facilities (*i.e.*, "cable system" or not) depends on how the facilities are used, not on whether the provider offered cable service at the time the facilities were deployed.

[302] Anne Arundel County *et al*. Comments at 37.

operator, *i.e.*, "solely because of [its] status" as a franchisee, and not *to whom* the fee is imposed, *i.e.*, "solely applicable" to a cable operator.[354] The entire category of "franchise fees" is subject to the five-percent cap, in distinction to generally-applicable taxes whose validity must be shown, at least in part, by their application to broader classes of entities or citizens beyond providers of cable and non-cable communications services.[355]

93. The legislative history and purposes of the 1984 Cable Act support this broad and exclusive interpretation of the term "franchise fees." It reveals, for example, that Congress initially established the section 622(b) cap on franchise fees out of concern that local authorities could use such fees as a revenue-raising mechanism.[356] A reading of section 622 that would permit states and localities to circumvent the five percent cap by imposing unbounded fees on "non-cable services" would frustrate the Congressional purpose behind the cap and effectively render it meaningless. The legislative history behind the 1996 amendments to section 622(b) make this intent explicit. Prior to 1996, section 622 provided, in relevant part, that "the franchise fees paid by a cable operator with respect to any cable system shall not exceed [five percent] of such cable operator's gross revenues derived . . . from *the operation of the cable system*."[357] The House Report accompanying the 1996 amendment,[358] which explained the addition of the key limitation "for the provision of cable services" in section 622(b), provides that:

> Franchising authorities may collect franchise fees under [section 622 of the Act] solely on the basis of the revenues derived by an operator *from the provision of cable service*. . . . This section does not restrict the right of franchising authorities to collect franchise fees on revenues from cable services and cable-related services, such as, but not limited to, revenue from the installation of cable service, equipment used to receive cable service, advertising over video channels, compensation received from video programmers, and other sources related to the provision of cable service over the cable system.[359]

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[303] *Id*. *See also* Anne Arundel County *et al*. July 24, 2019 *Ex Parte* at 9, n.26 (noting that section 632(a) of the Act, 47 U.S.C. § 552(a), permits franchising authorities to establish and enforce "construction schedules and other construction-related performance requirements, of the cable operator").

[304] *See, e.g.*, *id*.; City Coalition Comments at 21-22; City of New York Comments at 11-12.

[305] *See, e.g.*, 47 U.S.C. § 531(b), (f) (permitting franchising authorities, among other things, to require channel capacity on institutional networks); *id*. § 551(g) (providing that "[n]othing in [Title VI] shall be construed to prohibit any State or any franchising authority from enacting or enforcing laws consistent with this section for the protection of subscriber privacy").

[306] *See id.* § 544(a) ("[A] franchising authority *may not regulate* the services, facilities, and equipment provided by a cable operator *except to the extent consistent with this subchapter*. . . .") (emphasis added); *id.* § 541(b)(3)(D) ("[A] franchising authority *may not require* a cable operator to provide any telecommunications service or facilities, *other than institutional networks*, as a condition of the initial grant of a franchise, a franchise renewal, or transfer of a franchise.") (emphasis added). *See also id.* § 541(b)(3)(A)-(C). NATOA *et al*. agree that the grant to LFAs of authority to require I-Nets is an exception from the general injunction in section 621(b)(3)(D) against requiring cable operators to provide telecommunications services or facilities. NATOA *et al*. Comments at 18, n.52. NATOA *et al*. also appear to concede that section 624(b) precludes LFAs from regulating under Title VI information services provided over cable systems. *Id.* at 18, n.53 ("To the extent [the Commission's conclusion] is . . . that Title VI does not grant LFAs authority over the information services provided over cable systems (other than as expressly provided in the Act. . .) . . . we agree that Title VI does not expressly grant such authority. . . .").

[307] 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4656 (emphasis added).

[308] *See, e.g.*, NATOA *et al*. Comments at 20-21.

[309] *Second FNPRM*, 33 FCC Rcd at 8969, para. 30.

94. If, as CAPA asserts, Congress had intended the term "cable operator" as used in section 622(b) to refer to an entity only to the extent such entity provides cable service, there would have been no need for Congress to amend section 622(b) in this manner.[360]

95. Although, as LFA advocates note,[361] section 621(d)(2) of the Act provides that "[n]othing in [Title VI] shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis,"[362] this provision is not an affirmative grant to states of authority to regulate non-cable services that they historically have not been empowered to regulate. First, the term "State" in section 621(d) does not extend to LFAs; it is defined by reference to section 3 of the Communications Act. The legislative history makes clear that this was a reference to the division of regulatory authority between the "state public utility commission and … the FCC."[363] Second, this provision merely reflects Congress's intent in the 1984 Cable Act to preserve the *status quo* with respect to federal and state jurisdiction over non-cable services.[364] As noted, under the then-existing *status quo*, the Commission had jurisdiction to regulate interstate services; states had jurisdiction to regulate intrastate services.[365] Because the Commission historically has concluded that information service is jurisdictionally interstate,[366] it traditionally has fallen outside the proper regulatory sphere of state and local authorities.[367] Moreover, the Commission has long recognized the impossibility of separately regulating interstate and intrastate information services.[368] Thus, neither a state nor its political subdivisions may lawfully regulate such service under section 621(d)(2) by requiring a cable operator with a Title VI franchise to pay a fee or secure a franchise or other authorization to provide broadband Internet access service over its cable system. To conclude otherwise would contravene Congress's intent in Title VI to maintain the jurisdictional *status quo* with respect to federal, state, and local regulation of non-cable services.[369]

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[310] *Id*.

[311] In section III.C., we discuss franchise and fee requirements imposed by state and local governments, including LFAs, on franchised cable operators' provision of non-cable services. We find that such requirements are preempted under section 636(c) of the Act.

[312] As NCTA notes, under the *First Report and Order*, LFAs may not lawfully require a telecommunications carrier with a preexisting right to access public rights-of-way for the provision of telecommunications services, to secure a Title VI franchise to provide non-cable services over its network. We agree with NCTA that a cable operator with a preexisting right to access public rights-of-way for the provision of cable service likewise should not be required to obtain a separate authorization to provide non-cable services over its cable system, given that there is no incremental burden on the rights-of-way. NCTA May 3, 2019 *Ex Parte* at 6.

[313] NCTA Reply App. 1, Report of Jonathan Orszag and Allan Shampine at 11 (Orszag/Shampine Analysis).

[314] *Id*.

[315] *Second FNPRM*, 33 FCC Rcd at 8969, para. 30. *See also* Orszag/Shampine Analysis at 6 (estimating that even modest reductions in network improvements as a consequence of reduced incentives to invest easily could result in consumer welfare losses exceeding $40 billion by 2023); ICLE July 18, 2019 *Ex Parte* at 19 ("[T]here is little economic sense in arbitrarily distinguishing between new entrants and incumbents. If the taxation of new broadband entrants under cable franchising rules would decrease their incentive to deploy, then the taxation of incumbent cable providers offering broadband services would similarly decrease their incentive to expand, upgrade, or make other broadband network investments."). We find no record basis for concluding that these concerns are raised only with respect to incumbent cable operators, and not new entrants. *Second FNPRM*, 33 FCC Rcd at 8969, para. 30, n.145 (seeking comment on whether concerns regarding regulatory disparity apply to new entrants that are not common
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96. We find unpersuasive NATOA *et al*.'s selective reading of the legislative history to conclude that Congress intended to permit states and localities to require franchised cable operators to pay additional rights-of-way fees for the provision of non-cable services. NATOA *et al*. note that the House Conference Report accompanying the 1996 amendment stated that "to the extent permissible under state and local law, communications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a nondiscriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees."[370] Although the cited legislative history is relevant to our interpretation of the statute,[371] we do not read this language so broadly as permitting states and localities to charge redundant or duplicative fees on cable franchisees that are subject to the five-percent cap—a reading that would, as we have explained, eviscerate the cap entirely. Rather, we conclude that, under section 636(c), and taking into account the provisions of Title VI as a whole, any fees that exceed the five-percent cap, as formulated in section 622, are not "fair and reasonable."[372]

97. Consistent with Congress's intent, as early as 2002, the Commission has construed section 622(b) to permit franchising authorities to include in the revenue base for franchise fee calculations only those revenues derived from the provision of cable service.[373] Thus, if a cable operator generates additional revenue by providing non-cable services over its cable system, such additional revenue may not be included in the gross revenues for purposes of calculating the cable franchise fee.[374]

98. As courts have recognized, the Commission is charged with "the ultimate responsibility for ensuring a 'national policy' with respect to franchise fees."[375] We exercise that authority today by making clear that states, localities, and cable franchising authorities are preempted from charging franchised cable operators more than five percent of their gross revenue from cable services. This cap applies to any attempt to impose a "tax, fee, or assessment of any kind" that is not subject to one of the

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carriers).

[316] *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, para. 33 (2005).

[317] *Id. See also Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14852, paras. 1, 17 (2005) (recognizing the benefits of "crafting an analytical framework that is consistent, to the extent possible, across multiple platforms that support competing services," and thus adopting a framework that "regulat[es] like services in a similar functional manner."). The fact that section 602(7)(C) excludes from the term "cable system" a facility of a common carrier subject to Title II of the Act, 47 U.S.C. § 522(7)(C), does not persuade us that Congress intended to permit LFAs to regulate incumbent cable operators that are not common carriers differently from incumbent cable operators and new entrants that are common carriers in their provision of non-cable services. Rather, given Congress's desire in the Act to ensure "competitively neutral and nondiscriminatory" regulation, *see, e.g.*, 47 U.S.C. § 253(c), we find that section 602(7)(C)'s carve out of Title II facilities from the definition of "cable system" merely evinces Congressional intent to preclude franchising authorities from regulating any telecommunications services carried over a cable system.

[318] *See, e.g.*, City Coalition Comments at 24-25; City of Philadelphia *et al*. Comments at 44; King County Comments at 9-10; City of Lakewood Comments at 2; Massachusetts Municipal Association Comments at 2.

[319] 47 U.S.C. § 556(a).

[320] *See* NCTA Mar. 13, 2019 *Ex Parte* at 11 (asserting that the mixed-use rule would not "authorize cable operators to place new installations in public [rights-of-way] without limit" or prevent a locality from addressing "legitimate public safety and welfare issues, such as road closures and traffic management during installation and maintenance of cable plant and enforcement of building and electrical codes").

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

[322] Such preemption applies to the imposition of duplicative taxes, fees, assessments, or other requirements on affiliates of the cable operator that utilize the cable system to provide non-cable services. NCTA July 18, 2019 *Ex Parte* at 5.

enumerated exemptions in section 622(g)(2) on a cable operator's non-cable services or its ability to construct, manage, or operate its cable system in the rights-of-way.

99. *Additional Franchises or Other Requirements.* Congress also made clear that states, localities, and franchising authorities lack authority to require additional franchises or place additional nonmonetary conditions on a cable operator's provision of non-cable services that are not expressly authorized in the Act. Several provisions state explicitly that franchising authorities may not regulate franchised "cable systems" to the extent that they provide telecommunications services.[376] In addition, as we noted above, section 624(b)(1) precludes franchising authorities from "establish[ing] requirements for video programming or other information services."[377] In the mixed-use rule we adopt today, we reasonably construed this provision to prohibit LFAs from regulating information services provided over cable systems.[378]

100. As noted above, section 636(c) operates to preempt state and local requirements that would use non-Title VI authority to accomplish indirectly what franchising authorities are prohibited from doing directly. Consistent with this reasoning, we conclude that any state or local law or legal requirement that obligates a cable operator franchised under Title VI to obtain a separate, additional franchise (or other authorization) or imposes requirements beyond those permitted by Title VI to provide cable or non-cable services, including telecommunications and information services, over its cable system conflicts with the Act and thus also is expressly preempted by section 636(c). The mixed-use rule we adopt today represents a reasonable interpretation of the relevant provisions of Title VI as well as a balanced accommodation of the various policy interests that Congress entrusted to the Commission; therefore, it too has preemptive effect under section 636(c).[379]

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[323] For example, a cable operator may provide voice or broadband services through affiliates, and an LFA could not impose duplicative fees on those affiliates.

[324] We do not set forth an exhaustive list of state and local laws and legal requirements that are deemed expressly preempted. Rather, we simply clarify that state and local laws and other legal requirements are preempted to the extent that they conflict with the Act and the Commission's implementing rules and policies. As discussed in paragraph 105 below, such preempted requirements include those expressly approved in *Eugene*.

[325] Contrary to some assertions in the record, we find that the *Second FNPRM* provided adequate notice to interested parties that the Commission could exercise its preemption authority under section 636(c) to address local regulation of non-cable services outside Title VI. *See, e.g.*, NATOA *et al.* July 24, 2019 *Ex Parte* at 10, City of Eugene July 24, 2019 *Ex Parte* at 2-4. In support of its tentative conclusion that "[s]ection 624(b) of the Act prohibits LFAs from using their franchising authority to regulate the provision of information services, including broadband Internet access service," the *Second FNPRM* specifically cited section 636(c) and set forth the text of that provision nearly verbatim. *Second FNPRM*, 33 FCC Rcd at 8966-67, para. 27, n. 126. In addition, the Commission in the *Second FNPRM* tentatively concluded that preempted "entry and exit restrictions" include requirements that an incumbent cable operator obtain a franchise to provide broadband Internet access service and that LFAs therefore are expressly preempted from imposing such requirements. *Id.* at 8968, para. 29. The Commission sought comment on that tentative conclusion and on "whether there are other regulations imposed by LFAs on incumbent cable operators' provision of broadband Internet access service that should be considered entry and exit restrictions, or other types of economic or public utility-type regulations, preempted by the Commission." *Id.* Such regulations include duplicative fee and franchise requirements imposed by franchising authorities such as the City of Eugene, which is a "governmental entity empowered by . . . [s]tate [] or local law to grant a [cable franchise]." 47 U.S.C. § 522(10). Indeed, the fact that multiple LFA advocates recognized that the *Second FNPRM* could be read to seek comment on the Commission's authority to preempt requirements imposed outside Title VI contradicts claims that the *Second FNPRM* did not adequately apprise parties of the possible scope of the Commission's preemption ruling. *See, e.g.,* CAPA Comments at 17; City Coalition Comments at 21-22; NATOA *et al.* Comments at 13-15; Free Press Reply at 7-8. Moreover, the fact that cable commenters in this proceeding referenced section 636(c) as a potential basis for our preemption ruling, *see, e.g.,* ACA Comments at 14; NCTA Comments at 36; ACA Reply at 5, demonstrates that such ruling is a "logical outgrowth" of the *Second FNPRM*. *Covad Communications Co. v. FCC*, 450 F.3d at 528, 548 (D.C. Cir. 2006), *citing Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 548-49 (D.C. Cir.

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101. *Public Policy.* Apart from our analysis of the text and structure of the Act and our longstanding delegated authority to preempt state regulations that are inconsistent with the Act, our preemption decisions today are also consistent with Congress's and the Commission's public policy goals and an appropriate response to problems that are apparent in the record.

102. Recognizing that excessive regulation at the local level could limit the potential of cable systems to deliver a broad array of services, Congress expressed its intent to "minimize unnecessary regulation that would impose an undue economic burden on cable systems"[380] and "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."[381] More generally, section 230(b) of the Act expresses Congress's intent "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[382] Accordingly, the Commission has previously preempted state and local regulations that would conflict with this federal policy of nonregulation of information services.[383] These longstanding federal policies provide further support for our decision today to read Title VI as prohibiting states, localities, and franchising authorities from imposing fees and obligations on cable operators beyond those expressly set forth in that Title.

103. Our preemption decision today will advance these federal policies by preventing further abuses of state and local authorities of the kind manifested in the record in this proceeding. In recent years, governmental entities at the local level increasingly have sought to regulate non-cable services provided over mixed-use cable systems franchised under Title VI, particularly broadband Internet access service.[384] Such governmental entities have included not only state and local franchising authorities acting pursuant to the cable franchising provisions of Title VI, but also state and local entities purportedly acting pursuant to their police powers to regulate public rights-of-way or other powers derived from

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1983) ("Whether the 'logical outgrowth' test is satisfied depends on whether the affected party 'should have anticipated' the agency's final course in light of the initial notice.").

[326] 47 U.S.C. § 556(c). For purposes of this provision, the term "State" has the meaning given such term in section 3 of the Act. *Id.* Section 3, in turn, provides that "the term 'State' includes the District of Columbia and the Territories and possessions." *Id*. § 153(47).

[327] *Id*. § 556(c). Section 636(c)'s reference to "this chapter" is to the Communications Act of 1934, as amended, which is codified in Chapter 5 of Title 47 of the United States Code. Section 636(c)'s reference to "this chapter" stands in contrast to other provisions in section 636, which reference "this subchapter," or Title VI of the Act. *Compare* 47 U.S.C. § 556(c) *with id.* § 556(a), (b).

[328] *Id.* § 556(c) (emphasis added). Contrary to some LFAs' assertion, *see* Anne Arundel County, *et al.* July 24, 2019 *Ex Parte* at 6, given that Congress in section 636(c) expressly preempted certain state and local laws, we need not find that federal preemption of laws governing intrastate telecommunications services is permissible under the "impossibility exception." Nevertheless, we find that the impossibility doctrine further supports our decision herein. *See Min. Pub. Util. Comm'n v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007) ("the 'impossibility exception' of 47 U.S.C. § 152(b) allows the FCC to preempt state regulation of a service if (1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a valid federal regulatory objective, *i.e*., state regulation would conflict with federal regulatory policies.").

[329] Contrary to the suggestion of the City of Eugene, our preemption authority does not depend on Section 706 of the Act. *See* City of Eugene July 24, 2019 *Ex Parte* at 5.

[330] *First Report and Order*, 22 FCC Rcd at 5157, para. 128.

[331] *See, e.g.*, *Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216, 219-221 (1st Cir. 2005) (finding municipal ordinances that imposed franchise fees on cable operators were preempted under section 636(c) where inconsistent with section 622 of the Communications Act). The Commission bears the responsibility of determining the scope of the subject matter expressly preempted by section 636(c). *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 519 (1992); *Capital Cities Cable v. Crisp*, 467 U.S. 691, 699 (1984).

[332] *See, e.g.*, NATOA *et al*. Comments at 14-18; NATOA *et al*. Reply at 13; City of Philadelphia *et al*. Reply at 22-
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sources outside Title VI. Although the record reveals that such regulation takes many different forms, NCTA and other industry advocates have expressed acute concerns about two particular kinds of state and local regulation: (1) requirements obligating cable operators with a Title VI franchise that are subject to the franchise fee requirement in section 622(b) of the Act to pay additional fees for the provision of non-cable services (such as broadband Internet access) via their cable systems; and (2) requirements obligating cable operators with a Title VI franchise to secure an additional franchise (or other authorization) to provide non-cable services over their cable systems.[385] Our preemption decisions today are carefully tailored to address these problems and prevent states and localities from continuing to circumvent the carefully calibrated terms of Title VI through these and similar kinds of regulations.

104. We disagree with those commenters who attempt to minimize the harm posed by the state and local requirements that we preempt today. We disagree, for example, that cable industry claims regarding the impact of duplicative fee and franchise requirements on broadband deployment are belied by the industry's substantial investments to date in broadband infrastructure, and that such requirements thus will not adversely affect broadband investment going forward.[386] As the record reflects, even if cable operators were to continue to invest, such investments likely would be higher absent such requirements, and even small decreases in investment can have a substantial adverse impact on consumer welfare.[387] We also are persuaded that the imposition of duplicative requirements may deter investment in new infrastructure and services irrespective of whether or to what extent a cable operator passes on those costs to consumers.[388] Contrary to the assertions of some commenters,[389] we also believe that such requirements impede Congress's goal to accelerate deployment of "advanced telecommunications capability to all Americans."[390]

105. *Other Legal Considerations.* In reaching our decision today, we agree with the majority of courts that have found that a Title VI franchise authorizes a cable operator to provide non-cable services without additional franchises or fee payments to state or local authorities.[391] In so doing, we repudiate the reasoning in a 2016 decision by the Supreme Court of Oregon in *City of Eugene v.*

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23; NATOA Mar. 15, 2019 *Ex Parte* at 2; Anne Arundel County *et al*. Comments at 37-39. *See also* City of Eugene Sept. 19, 2018 *Ex Parte* at 29-31, *citing Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (asserting that if Congress intends to preempt a power traditionally exercised by state or local governments, it must make such intent unmistakably clear in the language of the statute).

[333] 47 U.S.C. § 541(a)(2).

[334] *Id*. § 541(b)(1).

[335] *Id*. § 522(5). *See also id.* § 544(b) (establishing limitations on rules for "establishment or operation of a cable system"). We therefore reject LFA assertions that the absence in section 621(a)(2) of an express grant of authority to "operate" a cable system evinces Congress's intent that a Title VI franchise bestow only the right to construct, but not to operate, a cable system over public rights-of-way. *See, e.g.*, Anne Arundel County *et al*. Comments at 43.

[336] NCTA May 3, 2019 *Ex Parte* at 2 (urging the Commission to clarify that the Act precludes duplicative authorizations and fees imposed for access to rights-of-way to deploy Wi-Fi and small cell antennas attached to, or part of, the cable system); NCTA June 11, 2018 *Ex Parte* at 2 (asserting that certain localities have refused to authorize permits allowing installation of Wi-Fi equipment on cable facilities on the basis that the equipment does not support cable service, even though the equipment is used, in part, to allow cable subscribers to watch subscription video programming).

[337] As noted, under section 621(a)(2), "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way." 47 U.S.C. § 541(a)(2). Because the "construction of a cable system" includes the installation of facilities and equipment needed to provide both cable and non-cable services, such as wireless broadband and Wi-Fi services, the grant of a Title VI franchise bestows the right to place facilities and equipment in rights-of-way to provide such services.

[338] *See, e.g.*, 47 U.S.C. § 522(7)(C) (providing that a "cable system" shall extend to the facility of a common carrier providing a Title II service only "to the extent such facility is used in the transmission of video programming
(continued….)

Comcast,[392] which appears to have prompted an increasing number of states and municipalities to impose fees on franchised cable operators' provision of non-cable services.[393] In *Eugene*, the court upheld the city's imposition of a separate, additional "telecommunications" license fee on the provision of broadband services over a franchised cable system, reasoning that the fee was not imposed pursuant to the city's Title VI cable franchising authority, but rather, under the city's authority as a local government to impose fees for access to rights-of-way for the provision of telecommunications services. For the reasons stated above, we conclude that *Eugene* fundamentally misreads the text, structure, and legislative history of the Act, and clarify that any state or local regulation that imposes on a cable operator fees for the provision of non-cable services over a cable system franchised under Title VI conflicts with section 622(b) of the Act and is preempted under section 636(c).[394]

106. As noted above, although Sections 602(7)(C) and 624(b)(1) by their terms circumscribe *franchising authority* regulation of non-cable services *pursuant to Title VI*, section 636(c) makes clear that state and local authorities may not end-run the provisions of Title VI simply by asserting some other source of authority—such as their police powers to regulate access to public rights-of-way—to accomplish what Title VI prohibits. To be sure, section 636(a) provides that "[n]othing in [Title VI] shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of [Title VI]."[395] While we recognize that states and municipalities possess authority to manage rights-of-way that is distinct from their cable franchising authority under Title VI,[396] states and localities may not exercise that authority in a manner that conflicts with federal law. As the U.S. Supreme Court has found, "[w]hen federal officials determine, as the FCC has here, that restrictive regulation of a particular area is not in the public interest, [s]tates are not permitted to use their police power to enact such . . . regulation."[397]

107. Our decision today still leaves meaningful room for states to exercise their traditional police powers under section 636(a).[398] While we do not have occasion today to delineate all the

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directly to subscribers . . .").

[339] *Id*. § 521(4).

[340] *Id*. § 544(b)(1).

[341] 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4681 ("[C]able operators are permitted under the provisions of [the Cable Act] to provide any mixture of cable and non-cable service they choose."). *See also Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.,* 6 FCC Rcd 7099, 7104, para. 24 (1991) ("[T]he House report accompanying the Cable Act clearly defeats [the] claim that a cable operator's facilities cease being a 'cable system' merely because they carry non-cable communications services in addition to video entertainment."), *aff'd*, *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 931-932 (D.C. Cir. 1993).

[342] 47 U.S.C. § 542. *See also* 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4663 (recognizing local government's entitlement to "assess the cable operator a fee for the operator's use of public ways" and establishing "the authority of a city to collect a franchise fee"); *First Report and Order*, 22 FCC Rcd at 5161, para. 135 (stating that "Congress enacted the cable franchise fee as the consideration given in exchange for the right to use the public ways").

[343] 47 U.S.C. § 542(b) (emphasis added).

[344] *Id*. § 542(g)(1).

[345] NCTA Apr. 19, 2019 *Ex Parte* at 2-3 (claiming that some governmental entities, such as the state of California, are imposing fees that exceed the five percent cap by styling such fees as a "tax" that nominally applies to other users of the rights-of-way, but whose valuation is inextricably linked to the provision of video services).

[346] State and local advocates do not appear to dispute that section 622(b) limits franchise fees to five percent of a cable operator's gross revenues derived from the provision of cable service only. *See, e.g.*, NATOA *et al*.
(continued….)

categories of state and local rules saved by that provision, we note that states and localities under section 636(a) may lawfully engage in rights-of-way management (*e.g.*, road closures necessitated by cable plant installation, enforcement of building and electrical codes) so long as such regulation otherwise is consistent with Title VI.[399] Similarly, we do not preempt state regulation of telecommunications services that are purely intrastate, such as requirements that a cable operator obtain a certificate of public convenience and necessity to provide such services. State regulation of intrastate telecommunications services is permissible so long as it is consistent with the Act and the Commission's implementing rules and policies.[400] We also do not disturb or displace the traditional role of states in generally policing such matters as fraud, taxation, and general commercial dealings, so long as the administration of such laws does not interfere with federal regulatory objectives.[401]

108. We also find unconvincing Anne Arundel County *et al*.'s argument that the Commission's preemption of state and local management of public rights-of-way violates the Tenth Amendment to the U.S. Constitution by "direct[ing] local governments to surrender their property and management rights to generate additional funds for use in the expanded deployment of broadband."[402] In particular, Anne Arundel County *et al*. contends that by preventing states and localities from overseeing use of their rights-of-way, the Commission effectively is commanding them to grant rights-of-way access on terms established by the Commission, rather than state or local governments.[403] That argument fails for multiple reasons.

109. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[404] We find that Anne Arundel County *et al*. has failed to demonstrate any violation of the Tenth Amendment.[405] As the Supreme Court has stated, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."[406] Therefore, when Congress acts within the scope of its authority under the Commerce Clause, no Tenth Amendment issue arises.[407] Regulation of interstate telecommunications and information services, and

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Comments at 21-22; CAPA Reply at 20. *See also* City of New York Comments at 13. Rather, their claims, as discussed herein, are that fees on broadband and telecommunications services are not "franchise fees" at all—claims that we show are belied by the text, structure, and purposes of Title VI.

[347] *See, e.g.,* NCTA Apr. 19, 2019 *Ex Parte* at 1-2, *citing Liberty Cablevision,* 417 F.3d at 223; NCTA July 3, 2019 *Ex Parte* at 2 (asserting that the state of Maryland has begun to require franchised cable operators to enter into separate "resource sharing agreements" with the state's Department of Information Technology that impose duplicative fees and other requirements for continued access to rights-of-way).

[348] CAPA Reply at 20-21. *See also* NATOA *et al.* July 24, 2019 *Ex Parte* at 25-28 (asserting that the Act does not preclude local governments from exercising generally-applicable rights-of-way authority over a cable operator's provision of non-cable services).

[349] 47 U.S.C. § 522(5) (emphasis added).

[350] *Id.* As NCTA notes, a service provider may have status as a cable operator *either* because of its provision of cable service *or* because of its operation of a cable system. NCTA Mar. 13, 2019 *Ex Parte* at 12, n.64, *citing* 47 U.S.C. § 522(5). A service provider that is operating a cable system to provide broadband Internet access service thus is providing such service "solely because of" its status as a cable operator. 47 U.S.C. § 542(g)(1).

[351] *Id*.

[352] *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (holding that, where possible, every word in a statute should be given meaning).

[353] *See* NCTA Mar. 13, 2019 *Ex Parte* at 12-13. Although a "franchise fee" does not include "any tax, fee, or assessment of general applicability," we note that this exception excludes a tax, fee, or assessment "which is unduly discriminatory against cable operators or cable subscribers." 47 U.S.C. § 542(g)(2)(A). Even if "telecommunications" fees such as those at issue in *Eugene* could reasonably be characterized as fees of general applicability by virtue of their application to providers other than cable operators, we find that such fees would be
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cable services, is within Congress' authority under the Commerce Clause.[408] Thus, because our authority derives from a proper exercise of Congressional power, the Tenth Amendment poses no obstacle to our preemption of state and local laws and other legal requirements.[409]

110. We also find no merit to arguments that the Commission's preemption of certain state and local requirements constitutes an improper "commandeering" of state governmental power.[410] The Supreme Court has recognized that "where Congress has the authority to regulate private activity under the Commerce Clause," Congress has the "power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation."[411] Title VI provides that a franchising authority "may award" franchises "in accordance with this title."[412] It thus simply establishes limitations on the scope of that authority when and if exercised. Here, we are simply requiring that, should state and local governments decide to open their rights-of-way to providers of interstate communication services within the Commission's jurisdiction, they do so in accordance with federal standards. As noted, Congress in Section 636(c) expressly authorized Commission preemption of state and local laws and other legal requirements that conflict with federal standards.[413] Because the Commission has the constitutional authority to adopt such standards, and because those standards do not require that state or local governments take or decline to take any particular action, we conclude that our preemption decisions in this Order do not violate the Tenth Amendment.[414]

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"unduly discriminatory" – and thus constitute "franchise fees" -- as applied to franchised cable operators. This is because such fees are assessed on cable operators *in addition to* the five percent franchise fees such operators must pay for use of public rights-of-way. That is, cable operators must pay *twice* for access to rights-of-way (*i.e.,* one fee for cable service and a second fee for non-cable service), whereas non-cable providers must pay only once for such access (*i.e.,* for non-cable service). NCTA Mar. 13, 2019 *Ex Parte* at 13. We, therefore, conclude that interpreting the Act to preclude localities from assessing fees on cable operators' use of rights-of-way to provide non-cable services would be "competitively neutral and nondiscriminatory," contrary to the suggestion of some commenters. *See, e.g.*, NATOA *et al.* July 24, 2019 *Ex Parte* at 9.

[354] *See* NCTA Mar. 13, 2019 *Ex Parte* at 12-13.

[355] We thus disagree with assertions that Congress did not intend for franchise fees to cover cable operators' use of public property for the provision of services other than cable services. *See, e.g.*, AWC Reply at 9 ("Congress determined . . . that a fair compensation for the use of the rights-of-way for the purpose of providing cable service can be up to [five percent] of cable gross revenues. . . . [T]he right to occupy this limited and valuable public property for other purposes was never intended to be compensated by the provisions of the Cable Act.").

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

[357] 47 U.S.C. § 542(b) (Supp. I 1992), *amended by* 47 U.S.C. § 542(b) (Supp. II 1996).

[358] The conference agreement adopted the House version of this provision. *See* H.R. Rep. No. 104-458, at 180 (1996) (Conf. Rep.).

[359] H.R. Rep. No. 204, 104th Cong., 1st Sess. 93 (1995) (emphasis added). We note that the Senate Report similarly clarifies that this amendment to section 622 "was intended to make clear that the franchise fee provision is not intended to reach revenues that a cable operator derives from providing new telecommunications services over its system that are different from the cable-related revenues operators have traditionally derived from their systems." S. Rep. 104-23, at 36 (1995).

[360] *See* CAPA Reply at 20-21.

[361] Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 5-6.

D. State Franchising Regulations

111. As proposed in the *Second FNPRM*, we find that the conclusions set forth in this Order, as well as the Commission's decisions in the *First Report and Order*[415] and *Second Report and Order*,[416] as clarified in the *Order on Reconsideration*,[417] apply to franchising actions taken at the state level and state regulations that impose requirements on local franchising. In the *First Report and Order*, the Commission declined to "address the reasonableness of demands made by state level franchising authorities" or to extend the "findings and regulations" adopted in its section 621 orders to actions taken at the state level.[418] It noted that many state franchising laws had only been in effect for a short time and that the Commission lacked a sufficient record regarding their effect.[419] In the *Order on Reconsideration*, the Commission indicated that if any interested parties believed the Commission should revisit the issue in the future, they could present the Commission with evidence that the findings in the *First Report and Order* and *Second Report and Order* "are of practical relevance to the franchising process at the state-level and therefore should be applied or extended accordingly."[420]

112. In the *Second FNPRM*, we again asked whether the Commission should apply the decisions in this proceeding to franchising actions and regulations taken at the state level.[421] As we noted, more than ten years have passed since the Commission first considered whether to apply its decisions interpreting section 621 to state-level franchising actions and state regulations. The decade of experience with the state-franchising process, along with comments responding to the questions related to this issue raised in the *Second FNPRM*, provide us with an adequate record regarding the effect of state involvement in the franchising process.

113. We now find that the better reading of the Cable Act's text and purpose is that that the

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[362] 47 U.S.C. § 541(d)(2).

[363] 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4700.

[364] NCTA July 25, 2019 *Ex Parte* at 5-6.

[365] 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4666.

[366] *Restoring Internet Freedom Order,* 33 FCC Rcd at 430, para. 199 (reaffirming the Commission's view that Internet access service is jurisdictionally interstate because a substantial portion of Internet traffic involves accessing interstate or foreign websites).

[367] The Commission recognized as much when it stated:

> [T]he Commission has independent authority to displace state and local regulations in accordance with the longstanding federal policy of nonregulation for information services. For more than a decade prior to the 1996 Act, the Commission consistently preempted state regulation of information services (which were then known as "enhanced services"). When Congress adopted the Commission's regulatory framework and its deregulatory approach to information services in the 1996 Act, it thus embraced our longstanding policy of preempting state laws that interfere with our federal policy of nonregulation.

Restoring Internet Freedom Order, id. at 431*,* para. 202, *citing Petition for Declaratory Ruling that Pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3316-23, paras. 15-25 (2004) (discussing the federal policy of nonregulation for information services). Because broadband Internet access service is jurisdictionally interstate whether classified as a telecommunications or an information service, regulatory authority over such service resides exclusively with the Commission.

[368] *See California v. FCC*, 39 F.3d 919 (9th Cir 1994); *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp*., 7 FCC Rcd 1619 (1992).

[369] We also reject claims that section 621(d)(1)'s grant to states of authority to require the filing of tariffs by cable operators for the provision of certain non-cable services reflects Congress's intent to permit state regulation of those services. Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 5. As explained in section III.B. above, that (continued….)

rules and decisions adopted in this Order, as well as those adopted in the *First Report and Order* and *Second Report and Order*, should fully apply to state-level franchising actions and regulations. First, we see no statutory basis for distinguishing between state- and local-level franchising actions. Nor do we think such a distinction would further Congress's goals: unreasonable demands by state-level franchising authorities can impede competition and investment just as unreasonable demands by local authorities can. While we need not opine on the reasonableness of specific state actions raised by commenters, we find that there is evidence in the record that state franchising actions—alone or cumulatively with local franchising actions—in some cases impose burdens beyond what the Cable Act allows.[422] We see no reason—statutory or otherwise—why the Cable Act would prohibit these actions at the local level but permit them at the state level.

114. The Cable Act does not distinguish between state and local franchising authorities. Section 621(a) and the other cable franchising provisions of Title VI circumscribe the power of "franchising authorities" to regulate services provided over cable systems.[423] The Cable Act defines "franchising authority" as "any governmental entity empowered by Federal, State or local law to grant a franchise."[424] In other words, the provisions of Title VI that apply to "franchising authorities" apply equally to any entity "empowered by . . . law"—including state law—"to grant a franchise." Many states have left franchising to local authorities, making those authorities subject to the limits imposed under Title VI.[425] Twenty-three states, however, have empowered a state-level entity, such as a state public utility commission, to grant cable franchise authorizations, rendering them "franchising authorities" under Title VI.[426] Bolstering the conclusion that Congress intended the Cable Act to govern state-level action is section 636 of the Cable Act, which expressly preempts "any provision of law *of any State*, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority" that conflicts with the Cable Act.[427] Limiting the Commission's rulings to local-level action

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provision was intended only to permit states to require tariffs for services that they otherwise were authorized to regulate, such as telecommunications services that are purely intrastate. *See* 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4698 ("A regulatory agency [under section 621(d)] may require a cable operator to file an informational tariff for a non-cable communications service only if the agency has jurisdiction over a common carrier's provision of such a service.").

[370] NATOA Mar. 15, 2019 *Ex Parte* at 2, *citing* H.R. Conf. Rep. No. 104-458, at 209 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 223 (emphasis added).

[371] As some LFA advocates note, Anne Arundel County *et al.* July 25, 2019 *Ex Parte* at 10, n.29, the Commission previously noted in passing that, while a cable operator is not required to pay cable franchise fees on revenues from non-cable services, this rule "does not apply to non-cable franchise fee requirements, such as any lawful fees related to the provision of telecommunications service." *Second Report and Order*, 22 FCC Rcd at 19638, para. 11, n.31. For the reasons explained below, we would deem an LFA's assessment of a cable operator twice for accessing public rights-of-way (once as a cable operator and again as a telecommunications provider) to be unlawful as not "fair and reasonable" nor "competitively neutral and nondiscriminatory." *See infra* note 372. *See also* 47 U.S.C. § 253(c). To the extent our earlier statement may suggest any broader application, we disavow it based on the record before us and the arguments made throughout this item.

[372] We disagree with LFA assertions that this interpretation is inconsistent with section 253 of the Act and the Commission's 2018 *Wireless Infrastructure Order*. Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 10, n.29, *citing Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, n. 130 (2018). Although section 253 permits states and localities to require "fair and reasonable" compensation from telecommunications providers on a

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would call for some plausible interpretation of these provisions; those opposing the extension of the Commission's rulings to state franchising authorities offer none. Accordingly, we find that the Cable Act does not distinguish between state- and local-level franchising actions, and that the Commission's rulings should therefore apply equally to both.

115. In addition, we find unavailing claims in the record that the Commission should limit its decisions to local authorities for policy reasons. To the contrary, we find that extending the Commission's rulings to state level franchising actions and regulations furthers the goals of the Cable Act. Unreasonable barriers to entry imposed by any franchising authority—state or local—frustrate the goals of competition and deployment. In the *First Report and Order*, we found that removing regulatory obstacles posed by local franchising authorities would further these goals.[428] We now find that this policy rationale applies with equal force to franchising actions taken at the state level.

116. We disagree that extending the Commission's rulings to state-level franchising and regulation, however, will eliminate the benefits of state-level action. We are not persuaded that extending the Commission's rulings to state-level actions would prevent—or even discourage—state-level franchising and regulation. Indeed, applying the Commission's rulings to state-level action will merely ensure that the same rules that apply to LFAs also apply at the state level.[429] This consistency is itself beneficial, ensuring that various statutory provisions—such as sections 621 and 622—are interpreted uniformly throughout the country. As one commenter notes, "state-level cable regulations may be modeled on the federal act, and so, allowing disparate interpretations of the same language could lead to confusion among consumers, regulators, and franchisees."[430]

117. Nor should applying our interpretations of the Cable Act to state-level actions interfere with states' authority to enact general taxes and regulations. Some commenters express concern that the Commission's rulings would disturb state franchising laws that apply more broadly than the Cable Act.[431] While we decline here to opine on the application of the Cable Act to specific state laws, we note that

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"competitively neutral and nondiscriminatory basis" for use of public rights-of-way, 47 U.S.C. § 253(c), as explained above, we find that imposing fees on cable operators beyond what Title VI allows is neither "fair and reasonable" nor "competitively neutral and nondiscriminatory." Moreover, although the Commission in the *Wireless Infrastructure Order* concluded, among other things, that fees to use the rights-of-way to deploy small cells for the provision of telecommunications must be cost-based and no greater than those charged to "similarly situated" entities for comparable uses of the rights-of-way, we do not believe that our approach today introduces any inconsistency. Rather, as NCTA notes, we merely recognize that under the Act, cable operators must compensate local governments for accessing public rights-of-way under a statutory framework different from that applicable to telecommunications providers, and that Congress did not intend for them to be assessed twice for the provision of cable service or the facilities used in the provision of such service. NCTA July 25, 2019 *Ex Parte* at 6-7. Any difference in approach, therefore, follows from different standards established by Congress in Sections II and VI of the Act.

[373] In the *Cable Modem Declaratory Ruling*, for example, the Commission stated:

> We note that section 622(b) provides that 'the franchise fees paid by a cable operator with respect to any cable system shall not exceed [five percent] of such cable operator's gross revenues derived . . . from the operation of the cable system to provide cable services.' Given that we have found cable modem service to be an information service, revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined.

Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4851, para. 105 (2002) (citations omitted) (*Cable Modem Declaratory Ruling*).

[374] In the *First Report and Order*, the Commission affirmed its 2002 interpretation of section 622(b):

> We clarify that a cable operator is not required to pay franchise fees on revenues from non-cable services. Section 622(b) provides that the 'franchise fees paid by a cable operator with respect to

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these concerns are largely settled by section 622, which excludes "any tax, fee, or assessment of general applicability" from the definition of franchise fees.[432] Other provisions of the Act similarly make clear that the Act does not affect state authority regarding matters of public health, safety, and welfare, to the extent that states exercise that authority consistent with the express provisions of the Cable Act.[433]

118. Finally, some commenters assert that extending the Commission's rulings to state-level actions would "upend carefully balanced policy decisions by the states."[434] According to commenters, local governments might wish to refuse these benefits if they come at the expense of franchise fees—but they will be unable to do so where they are mandated by state law.[435]

119. We are not convinced that these concerns justify limiting the Commission's rulings to local-level actions. Again, our conclusion in this section will disturb existing state laws only to the extent that they conflict with the Cable Act and the Commission's rulings implementing the Act. While this may upset some preexisting legislative compromises, it will also root out state laws that impose demands and conditions that Congress and the Commission have found to be unreasonable. Further, ensuring that the Cable Act is applied uniformly between state and local franchising authorities is necessary to further the goals of the Act, and more importantly, is consistent with the language of the Act. As some commenters have noted, if the Commission does not apply these requirements to state franchises, states could pass laws circumventing the Cable Act's limitations on LFAs.[436] That result would thwart Congress's intent in imposing those limitations. For these reasons, we conclude that the benefits of extending the Commission's rulings and interpretations to state-level actions outweigh any burdens caused by upsetting existing state-level policy decisions.

IV. PROCEDURAL MATTERS

120. *Final Regulatory Flexibility Act Analysis*. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[437] the Commission has prepared a Final Regulatory Flexibility Act Analysis

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> any cable system shall not exceed [five percent] of such cable operator's gross revenues derived . . . from the operation of the cable system to provide *cable services'*. . . . The Commission [has] determined . . . that a franchise authority may not assess franchise fees on non-cable services, such as cable modem service. . . . Although [the *Cable Modem Declaratory Ruling*] related specifically to Internet access service revenues, the same would be true for other 'non-cable' service revenues. Thus, Internet access services, including broadband data services, and any other non-cable services are not subject to 'cable services' fees.

First Report and Order, 22 FCC Rcd at 5146, para. 98 (emphasis in original) (citations omitted).

[375] *ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987).

[376] *See, e.g.*, 47 U.S.C. § 541(b)(3)(B) ("A franchising authority may not impose any requirement under this subchapter that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof"); *id.* § 541(D) (A franchising authority may not impose any requirement under this subchapter that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof). *See also Montgomery County*, 863 F.3d at 492 ("The Act also makes clear that local franchising authorities can regulate so called 'Title II carriers' (basically, providers of phone services) only to the extent that Title II carriers provide cable services.").

[377] 47 U.S.C. § 544(b)(1).

[378] *See supra* paras. 72-76.

[379] We reject arguments that the Commission lacks authority to preempt state and local regulation of information services without asserting ancillary jurisdiction over information services. *See, e.g.*, Public Knowledge Comments

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at 1; Common Frequency Comments at 5 (claiming that if the Commission has no authority to regulate information services, then it has no ability to preempt conflicting state and local regulation). Because we are relying on express preemption authority under section 636(c), there is no reason for us to rely upon ancillary authority in this proceeding.

[380] 47 U.S.C. § 521(6).

[381] *Id*. § 521(4).

[382] *Id*. § 230(b)(2). "Interactive computer services" are defined, in relevant part, as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . ." *Id*. § 230(f)(2).

[383] *See*, *e.g.*, *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4850, para. 102; *Restoring Internet Freedom Order*, 33 FCC Rcd at 426-28, paras. 194-95. *See also Charter Advanced Services (MN), LLC v. Lange*, No. 17-2290 (8th Cir. filed Sept. 7, 2018) (noting that "[a]ny [local] regulation of an information service conflicts with the federal policy of nonregulation" and is therefore preempted).

[384] *See, e.g.*, NCTA Comments at 26-28; NCTA Reply, Appendix; NCTA Mar. 13, 2019 *Ex Parte* at 10; NCTA June 11, 2018 *Ex Parte* at 4-5.

[385] NCTA Comments at 26-28; Altice Reply at 14.

[386] *See, e.g.*, City of New York Reply at 2-3 (asserting that restricting LFA authority to regulate incumbent cable operators' provision of non-cable services will not facilitate broadband deployment). *See also* Anne Arundel County *et al.* Reply at Exh. 5; Anne Arundel County *et al.* July 24, 2019 *Ex Parte* and Atts. (submitting analyses purporting to show that rights-of-way fees and practices at the local level have a minor impact on cable operators' broadband deployment decisions). Although LFAs also submitted an engineering analysis of public rights-of-way processes, *id.,* because this study is from 2011 and does not address cable franchise fees, it has no bearing on our findings herein. NCTA July 25, 2019 *Ex Parte* at 11-12.

[387] Orszag/Shampine Analysis at 17.

[388] *Id*. at 13 (claiming that LFAs' imposition of fees on non-cable services would deter investment in new infrastructure and services regardless of whether cable operators can pass some or all of those costs through to consumers). *See also* Americans for Tax Reform May 8, 2019 *Ex Parte,* Att. (using a two-stage investment model to show how local authorities' extra-statutory exactions deter investment by incumbent and new entrant cable operators).

[389] *See, e.g.*, AWC Reply at 11-13.

[390] 47 U.S.C. § 1302. MMTC asserts, for example, that the adverse effects of such local regulations are likely to be felt most acutely by consumers, particularly small businesses and people in low income communities. MMTC Apr. 25, 2019 *Ex Parte* at 1. In particular, MMTC asserts that:

> [D]uplicative fees . . . are most burdensome to lower-income households that spend a far larger share of their income on broadband than wealthier families . . . . [and] small, minority businesses. . . . Increased broadband access costs can be especially problematic for the unemployed or underemployed who become shut out from the very tools they need to pursue new skills and opportunities.

Id. at 1-2.

[391] *See, e.g.*, *Comcast Cable of Plano, Inc. v. City of Plano,* 315 S.W.3d 673, 681 (Tex. App. 2010); *City of Chicago v. Comcast Cable Holdings, LLC*, 231 Ill.2d 399, 412-413 (2008). *See also City of Minneapolis v. Time Warner Cable, Inc.*, No. CIV.05-994 ADM/AJB, 2005 WL 3036645, at *5-6 (D. Minn. Nov. 10, 2005); *City of Chicago v. AT&T Broadband, Inc.*, No. 02-C-7517, 2003 WL 22057905, at *6 (N.D. Ill. Sept. 4, 2003); *Parish of Jefferson v. Cox Communications La., LLC,* No. 02-3344, 2003 WL 21634440, at *4-8 (E.D. La. July 3, 2003). *See also* NCTA June 11, 2018 *Ex Parte* at 3, n.9.

[392] *See Eugene*, 375 P.3d 446. The regulations at issue in *Eugene* included that: (i) Comcast's franchise agreement for the provision of cable services over the city's public rights-of-way did not give it the right to provide cable

(continued….)

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modem service over those rights-of-way; (ii) the Communications Act did not give Comcast an independent right to provide cable modem service over the city's public rights-of-way; (iii) the Act did not preclude the city from assessing fees on revenues derived from Comcast's provision of cable modem service over public rights-of-way; and (iv) such fees did not constitute franchise fees under section 622(b) of the Act. *See id*. at 453-463.

[393] NCTA asserts that in the wake of *Eugene*, a multitude of cities in Oregon have adopted or reinterpreted ordinances to impose fees on gross revenues derived from the provision of broadband services, in addition to those already imposed under cable franchises. NCTA Comments at 26-27; NCTA Mar. 13, 2019 *Ex Parte* at 9, 11-12. NCTA notes that multiple communities in Ohio also have passed ordinances requiring that cable operators secure a "Certificate of Registration" in addition to a state-issued cable franchise before offering non-cable services, and that such certificates require payment of additional fees as a condition of occupying rights-of-way. NCTA Comments at 27. NCTA asserts further that such duplicative fees are imposed not only at the local level, but also at the state level. *Id.*

[394] Such regulation includes not only requirements imposed by a state or locality acting pursuant to the cable franchising provisions of Title VI, but also requirements imposed by a state or locality purportedly acting pursuant to any powers granted outside Title VI.

[395] 47 U.S.C. § 556(a).

[396] *See, e.g.*, MassAccess Reply at 11-12 (asserting that "[t]he authority and police powers vested in state and municipal governments encompass significantly more than those in the Cable Act. . . . [and] arise from a number of sources, including . . . municipal law, state law, common law, and [f]ederal statutes and regulations"); City of Philadelphia *et al*. Comments at 16-17 (claiming that local governments do not derive their authority over Title I and Title II services from federal law, but rather, sources such as state law, state constitutions, municipal charters, and state common law). *See also* Anne Arundel County *et al*. Comments at 37-39; Free Press Reply at 7; Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 5.

[397] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984).

[398] Given the robust scope that we retain in this Order for the operation of section 636(a), we reject the City of Eugene's assertion that we have not engaged in "meaningful discussion" of this provision. City of Eugene July 24, 2019 *Ex Parte* at 4.

[399] *See* NCTA Mar. 13, 2019 *Ex Parte* at 11.

[400] We note, for example, that section 253(a) of the Act prohibits state or local statutes, regulations, or other legal requirements that prohibit or have the effect of prohibiting the ability of any entity to provide "any interstate or *intrastate* telecommunications service." 47 U.S.C. § 253(a) (emphasis added).

[401] *See Restoring Internet Freedom Order,* 33 FCC Rcd at 428, para. 196.

[402] Anne Arundel County *et al*. Reply at 14-15.

[403] *Id*.

[404] U.S. Const. Amend. X.

[405] *Montgomery County, Md. v. FCC*, 811 F.3d 121, 127-129 (4th Cir. 2015).

[406] *See New York v. U.S.*, 505 U.S. 144, 156 (1992).

[407] *See id*. at 157-58.

[408] *MCI Telecommunications Corp. v. Bell Atlantic*, 271 F.3d 491, 503 (3rd. Cir. 2001)
("The Telecommunications Act of 1996 was clearly a congressional exercise of its Commerce Clause power.").

[409] *See Qwest Broadband Services, Inc. v. City of Boulder*, 151 F.Supp.2d 1236, 1245 ("[T]he inquiries under the Commerce Clause and the Tenth Amendment are mirror images, and a holding that a Congressional enactment does not violate the Commerce Clause is dispositive of a Tenth Amendment challenge) (citing *United States v. Baer,* 235 F.3d 561, 563 n.6 (10th Cir. 2000)).

[410] *See* Michigan Municipal League Comments at 25; Anne Arundel County *et al*. Comments at 51.

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[411] *See New York v. U.S.*, 505 U.S. at 167.

[412] 47 U.S.C. § 541(a)(1).

[413] *Id*. § 556(c).

[414] We also conclude that our actions do not violate the Fifth Amendment to the U.S. Constitution. *See, e.g.*, City of Eugene Sept. 19, 2018 *Ex Parte* at 30. The "takings" clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. First, our actions herein do not result in a Fifth Amendment taking. Courts have held that municipalities generally do not have a compensable "ownership" interest in public rights-of-way, but rather hold the public streets and sidewalks in trust for the public. *Liberty Cablevision*, 417 F.3d at 222. Moreover, even if there was a taking, Congress provided for "just compensation" through cable franchise fees. *See U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 128 (1985) (the Fifth Amendment does not prohibit takings, only uncompensated ones). Section 622(h)(2) of the Act provides that a franchising authority may recover a franchise fee of up to five percent of a cable operator's annual gross revenues derived from the provision of cable service. 47 U.S.C. § 542(h)(2). Congress intended that the cable franchise fee serve as the consideration given in exchange for a cable operator's right to use public rights-of-way. *See* 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4663 (recognizing the local government's authority to "assess the cable operator a fee for the operator's use of public ways" and establishing "the authority of a city to collect a franchise fee of up to [five percent] of an operator's annual gross revenues"). Our actions herein do not eviscerate the ability of local authorities to impose such franchise fees. Rather, our actions simply ensure that local authorities do not impose duplicative fees for the same use of rights-of-way by mixed use facilities of cable operators, contrary to express statutory provisions and policy goals set forth in the Act.

[415] In the *First Report and Order*, the Commission adopted time limits for LFAs to render a final decision on a new entrant's franchise application and established a remedy for applicants that do not receive a decision within the applicable time frame; concluded that it was unlawful for LFAs to refuse to grant a franchise to a new entrant on the basis of unreasonable build-out mandates; clarified which revenue-generating services should be included in a new entrant's franchise fee revenue base and which franchise-related costs should and should not be included within the statutory five percent franchise fee cap; concluded that LFAs may not make unreasonable demands of new entrants relating to PEG channels and I-Nets; adopted the mixed-use network ruling for new entrants; and preempted local franchising laws, regulations, and agreements to the extent they conflict with the rules adopted in that order. *First Report and Order*, 22 FCC Rcd at 5134-40, paras. 66-81; *id*. at 5143-44, paras. 89-90; *id*. at 5144-51, paras. 94-109; *id*. at 5151-54, paras. 110-120; *id*. at 5155-56, paras. 121-24; *id*. at 5157-64, paras. 125-38.

[416] In the *Second Report and Order*, the Commission extended to incumbent cable operators the rulings in the *First Report and Order* relating to franchise fees and mixed-use networks and the PEG and I-Net rulings that were deemed applicable to incumbent cable operators, *i.e.*, the findings that the non-capital costs of PEG requirements must be offset from the cable operator's franchise fee payments, that it is not necessary to adopt standard terms for PEG channels, and that it is not *per se* unreasonable for LFAs to require the payment of ongoing costs to support PEG, so long as such support costs as applicable are subject to the franchise fee cap. *Second Report and Order*, 22 FCC Rcd at 19637-41, paras. 10-17.

[417] *Order on Reconsideration*, 30 FCC Rcd at 812-13, para. 7.

[418] *First Report and Order*, 22 FCC Rcd at 5102, n.2.

[419] *See id*.; *Order on Reconsideration*, 30 FCC Rcd at 812-13, para. 7.

[420] *Order on Reconsideration*, 30 FCC Rcd at 812-13, para 7.

[421] *Second FNPRM*, 33 FCC Rcd at 8971-72, para. 32. ("We seek comment on whether to apply the proposals and tentative conclusions set forth herein, as well as the Commission's decisions in the First Report and Order and Second Report and Order, as clarified in the Order on Reconsideration, to franchising actions taken at the state level and state regulations that impose requirements on local franchising.").

[422] *See*, *e.g.*, NCTA Comments at 62-64; Altice Reply at 5-6; NCTA Apr. 19, 2019 *Ex Parte* at 2.

[423] 47 U.S.C. § 541(a)(1) ("A *franchising authority* may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a *franchising authority* may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." (emphases added)).

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[424] *Id*. § 522(10).

[425] *See, e.g.*, Md. Code Ann., Local Gov't § 1-708(c) ("The governing body of a county or municipality may . . . grant a franchise for a cable television system that uses a public right-of-way . . . .").

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

[427] 47 U.S.C. § 556(c) (emphasis added). As we explain above, this preemption does not extend to state regulation of intrastate telecommunications services or regulation related to matters of public health, safety, and welfare that otherwise is consistent with the Act, and nothing in this Order is intended to disturb the traditional role that states have played in these regards. *See supra* para. 79 and *infra* para. 117.

[428] *First Report and Order*, 22 FCC Rcd at 5102, para. 1 ("We find that the current operation of the local franchising process in many jurisdictions constitutes an unreasonable barrier to entry that impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment.").

[429] For these reasons, we disagree with commenters who argue that applying the Commission's rules at the state level is contrary to the Cable Act's purpose of "assur[ing] that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2). The City of Philadelphia, for example, argues that extending the Commission's rules to state-level actions would "unduly restrict state and local governments from addressing local and hyperlocal cable-related issues." *See* City of Philadelphia *et al*. Comments at vii. For the reasons discussed above, we are not convinced that applying our rules to state franchising authorities will impede the ability of state and local authorities to address local issues. Rather, by doing so, we ensure that the goals of the Cable Act, as determined by Congress, including "encourag[ing] the growth and development of cable systems," are fully realized. 47 U.S.C. § 521(2).

[430] Comments of Verizon at 11-12.

[431] *See, e.g.*, Anne Arundel County *et al*. Comments at 45; City and County of San Francisco Comments at 8-9. For example, California's Digital Infrastructure and Video Competition Act (DIVCA) assesses an annual administrative fee and authorizes LFAs to assess on both cable operators and non-cable video franchise holders, up to a one-percent fee on gross revenues for PEG, in addition to a state franchise fee of five percent of gross revenues. Cal. Pub. Util. Code §§ 441 (providing for the annual determination of franchise fees), 5830(f), (h) (establishing that DIVCA applies to all "holders of a state franchise" that authorizes the "operation of any network in the right-of-way capable of providing video service to subscribers"). *See also* City and County of San Francisco Comments at 8-9. The Eastern District of California found that DIVCA was a law of "general applicability" for the purposes of section 622 in *Comcast of Sacramento*. 250 F. Supp. 3d at 624, *vacated and remanded Comcast of Sacramento I, LLC v. Sacramento Metro. Cable Television Comm'n*, No. 17-16847, 2019 WL 2018280, at *7 (9th Cir. May 8, 2019).

[432] *See, e.g.*, Anne Arundel County *et al*. Comments at 45 (quoting 47 U.S.C. § 542(g)(2)(A)).

[433] 47 U.S.C. § 556(a) ("Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter.").

[434] Anne Arundel County *et al*. Comments at 45-48. In Illinois, for example, state law requires that cable operators provide "line drops and free basic service to public buildings." *See* City Coalition Comments at 26 (citing 220 ILCS 5/22-501(f)). The Illinois statute defines a "service line drop" as "the point of connection between a premises and (continued….)

(FRFA) relating to this Order. The FRFA is set forth in the Appendix.

121. *Paperwork Reduction Analysis*. This document does not contain new or revised information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. §§ 3501-3520). In addition, therefore, it does not contain any new or modified "information burden for small business concerns with fewer than 25 employees" pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, 44 U.S.C. § 3506(c)(4).

122. *Congressional Review Act*. The Commission will send a copy of this Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

123. *Additional Information*. For additional information on this proceeding, contact Maria Mullarkey or Raelynn Remy of the Media Bureau, Policy Division, at Maria.Mullarkey@fcc.gov, Raelynn.Remy@fcc.gov or (202) 418-2120.

V. ORDERING CLAUSES

124. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in sections 1, 4(i), 201(b), 230, 303, 602, 621, 622, 624, and 636 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201(b), 230, 303, 522, 541, 542, 544, and 556, this Third Report and Order **IS ADOPTED**.

125. **IT IS FURTHER ORDERED** that the the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix A and such rule amendments shall be effective 30 days after publication in the *Federal Register*.

126. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Third Report and Order, including the Final Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

127. **IT IS FURTHER ORDERED** that, pursuant to section 801(a)(1)(A) of the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A), the Commission **SHALL SEND** a copy of the Third Report and Order to Congress and the Government Accountability Office.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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the cable or video network that enables the premises to receive cable service or video service." 220 ILCS 5/22-501.

[435] *See id.* Similarly, one commenter claims that DIVCA reflected a legislative compromise between cable operators and franchising authorities that would be upset if the Commission's rules were extended to state level actions. Anne Arundel County *et al*. Comments at 46-47 ("For the Commission to import, wholesale, its determinations under Section 621 into the California state franchise would upset state policy and undermine the very goal of the Commission to ease entry by new entrants.").

[436] NCTA Reply at 29-30 & n.100.

[437] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601, *et. seq.,* has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

APPENDIX A

Final Rules

Part 76 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 201, 230, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 541, 542, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Revise Subpart C to read as follows:

Subpart C – Cable Franchising

3. Add new Section 76.42 to read as follows:

§ 76.42 – In-Kind Contributions.

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

(1) Costs attributable to the provision of free or discounted cable service to public buildings, including buildings leased by or under control of the franchising authority;
(2) Costs in support of public, educational, or governmental access facilities, with the exception of capital costs; and
(3) Costs attributable to the construction of institutional networks.

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

4. Add new Section 76.43 to read as follows:

§ 76.43 – Mixed-Use Rule.

A franchising authority may not regulate the provision of any services other than cable services offered over the cable system of a cable operator, with the exception of channel capacity on institutional networks.

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Second Further Notice of Proposed Rulemaking (Second FNPRM) in this proceeding.[2] The Federal Communications Commission (Commission) sought written public comment on the proposals in the Second FNPRM, including comment on the IRFA. The Commission received one comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3]

A. Need for, and Objectives of, the Report and Order

2. In the Report and Order, we interpret sections of the Communications Act of 1934, as amended (the Act) that govern how local franchising authorities (LFAs) may regulate cable operators and cable television services, with specific focus on issues remanded from the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) in *Montgomery County, Md. et al. v. FCC* (*Montgomery County*).[4] Section 621(a)(1) of the Act prohibits LFAs from unreasonably refusing to award competitive franchises for the provision of cable television services.[5] To better define what constitutes "unreasonable" acts by an LFA, the Commission adopted rules implementing section 621(a)(1), including rules governing the treatment of certain costs and fees charged to cable operators by LFAs and LFAs' regulation of cable operators' "mixed-use" networks.[6]

3. In *Montgomery County*, the court directed the Commission on remand to provide an explanation for its decision to treat cable-related, in-kind contributions charged to cable operators by LFAs as "franchise fees" subject to the statutory five percent cap on such fees set forth in section 622(g) of the Act.[7] The court also directed the Commission to provide a statutory basis for its decision to extend its "mixed-use" ruling—which prohibits LFAs from regulating the provision of services other than cable services offered over cable systems used to provide both cable services and non-cable services—to incumbent cable operators that are not common carriers.[8] This Order seeks to explain and establish the

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[1] *See* 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

[2] *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Further Notice of Proposed Rulemaking, MB Docket No. 05-311, 33 FCC Rcd 8952, 8953-9 (2018) (*Second FNPRM*).

[3] *See* 5 U.S.C. § 604.

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

[5] 47 U.S.C. § 541(a)(1).

[6] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007) (*First Report and Order*), *aff'd sub nom. Alliance for Community Media et al. v. FCC*, 529 F.3d 763 (6th Cir. 2008) (*Alliance*), *cert. denied*, 557 U.S. 904 (2009); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 22 FCC Rcd 19633 (2007) (*Second Report and Order*), *recon. Granted in part, denied in part*; *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Order on Reconsideration, 30 FCC Rcd 810 (2015) (*Order on Reconsideration*); *Second FNPRM*, 33 FCC Rcd 8952 (2018).

[7] *Montgomery County*, 863 F.3d at 491-92.

[8] *Id*. at 493.

statutory basis for the Commission's interpretation of the Act in order to better fulfill the Commission's goals of eliminating regulatory obstacles in the marketplace for cable services and encouraging broadband investment and deployment by cable operators.

4. In this Order, we first conclude that cable-related, "in-kind" contributions required by a cable franchise agreement are franchise fees subject to the statutory five percent cap on franchise fees set forth in section 622 of the Act.[9] We base this conclusion on the broad definition of franchise fee in section 622, which is not limited to monetary contributions. We interpret the Act's limited exceptions to the definition of franchise fee, including an exemption for capital costs related to public, educational, and governmental access (PEG) channels, such as equipment costs or those associated with building a facility.[10] We also reaffirm that this rule applies to both new entrants and incumbent cable operators. Second, we conclude that under the Act, LFAs may not regulate the provision of most non-cable services, including broadband Internet access service, offered over a cable system by an incumbent cable operator that is not a common carrier. Finally, we conclude that Commission guidance concerning LFAs' regulation of cable operators should apply to state-level franchising actions and regulations that impose requirements on local franchising.

B. Legal Basis

5. The authority for the action taken in this rulemaking is contained in Sections 1, 4(i), 201(b), 230, 303, 602, 621, 622, 624, and 636 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201, 230, 303, 522, 541, 542, 544, and 556.

C. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. Only one commenter, the City of Newton Massachusetts, submitted a comment that specifically responded to the IRFA.[11] The City of Newton suggests that a transition period of at least six years is needed to satisfy the Commission's Regulatory Flexibility Act obligation to minimize significant financial impacts on small communities and non-profit organizations. This City of Newton argues that this transition period is needed to allow time for affected parties to: (1) identify cable-related in kind contributions which count against the franchise fee cap; (2) reach agreement on the valuation of cable-related in-kind contributions; (3) resolve any disputes with respect to those issues; and (4) adjust their contractual commitments in light of any prospective reduction in franchise fee revenues (and the timing of those reductions).

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

7. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules.[12] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[13] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[14] A small business concern is one which:

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[9] 47 U.S.C. § 542.

[10] *Id*.

[11] Letter from Ruthanne Fuller, Mayor and Issuing Authority, and Alan D. Mandl, Assistant City Solicitor, City of Newton, Massachusetts, to Chairman Pai and Commissioners Carr, O'Rielly and Rosenworcel, FCC, MB Docket No. 05-311, at 7 (filed Nov. 14, 2018) (City of Newton Letter); City of Newton Comments at 3-4.

[12] 5 U.S.C. § 603(b)(3).

[13] *Id.* § 601(6).

[14] *Id.* § 601(3) (incorporating by reference the definition of "small-business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes (continued….)

(1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[15] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

8. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe three broad groups of small entities that could be affected under these rules.[16] First, while we do use industry specific size standards for small businesses in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.[17] These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.[18]

9. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[19] Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).[20]

10. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty-thousand."[21] U.S. Census Bureau data from the 2012 Census of Governments[22] indicate that there were 90,056 local governmental jurisdictions consisting of General and Specific Purpose governments in the United States.[23] Of this number there were 37,132 General Purpose governments (county,[24] municipal and town or township[25]) with populations of less than 50,000 and 12,184 Special Purpose governments (independent school districts[26] and special districts[27]) with populations of less than 50,000. The 2012 U.S. Census Bureau data for the types of governments in the local government category show that most of these governments have populations of less than 50,000.[28] Based on these data, we estimate that at least 49,316 local government jurisdictions fall in the category of

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one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[15] 15 U.S.C. § 632.

[16] *See* 5 U.S.C. § 601(3)-(6).

[17] *See* SBA, Office of Advocacy, "Frequently Asked Questions, Question 1 – What is a small business?" https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).

[18] *See* SBA, Office of Advocacy, "Frequently Asked Questions, Question 2 – How many small businesses are there in the U.S.?" https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).

[19] 5 U.S.C. § 601(4).

[20] Data from the Urban Institute, National Center for Charitable Statistics (NCCS) reporting on nonprofit organizations registered with the IRS was used to estimate the number of small organizations. Reports generated using the NCCS online database indicated that as of August 2016 there were 356,494 registered nonprofits with total revenues of less than $100,000. Of this number, 326,897 entities filed tax returns with 65,113 registered nonprofits reporting total revenues of $50,000 or less. *See* https://nccs.urban.org/sites/all/nccs-archive/html//tablewiz/tw.php where the report showing this data can be generated by selecting the following data fields: Show: "Registered Nonprofit Organizations"; By: "Total Revenue Level (years 1995, Aug. to 2016, Aug.)"; and For: "2016, Aug.".

[21] 5 U.S.C. § 601(5).

[22] *See* 13 U.S.C. § 161. The Census of Governments is conducted every five (5) years compiling data for years ending with "2" and "7". *See also* Program Description Census of Government. https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=program&id=program.en.COG#

[23] *See* U.S. Census Bureau, 2012 Census of Governments, Local Governments by Type and State: 2012 - United States-States.

(continued….)

"small government jurisdictions."[29]

11. *Wired Telecommunications Carriers*. The U.S. Census Bureau defines this industry as "establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[30] The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[31] U.S. Census data for 2012 show there were 3,117 firms that operated that year.[32] Of this total, 3,083 operated with fewer than 1,000 employees.[33] Thus, under this size standard, the majority of firms in this industry can be considered small.

12. *Cable Companies and Systems (Rate Regulation Standard)*. The Commission has developed its own small business size standards for cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[34] Industry data indicate that of 4,600 cable operators nationwide, all but nine are small under this size standard.[35] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[36] Industry data indicate that of 4,600 systems nationwide, 3,900 have fewer than 15,000 subscribers, based on the same records.[37] Thus, under this second size standard, the Commission believes that most cable systems are small.

13. *Cable System Operators*. The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer

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https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG02.US01&prodType=table. Local governmental jurisdictions are classified in two categories – General purpose (county, municipal, and town or township) and Special purpose (special districts and independent school districts).

[24] *See id*., County Governments by Population-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG06.US01&prodType=table. There were 2,114 county governments with populations of less than 50,000.

[25] *See id*., Subcounty General-Purpose Governments by Population-Size Group and State: 2012-United States-States. https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG07.US01&prodType=table. There were 18,811 municipal and 16,207 town/township governments with populations of less than 50,000.

[26] *See id*., Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG11.US01&prodType=table. There were 12,184 independent school districts with enrollment populations of less than 50,000.

[27] *See id*., Special District Governments by Function and State: 2012 - United States-States. https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG09.US01&prodType=table. The U.S. Census Bureau data did not provide a population breakout for special district governments.

[28] *See id*., County Governments by Population-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG06.US01&prodType=table; Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG07.US01&prodType=table; and Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG11.US01&prod

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than one-percent of all subscribers in the United States and is not affiliated with any; entity or entities whose gross annual revenues in the aggregate exceed $250,000."[38] There are approximately 52,403,705 cable subscribers in the United States today.[39] Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total revenues of all its affiliates, do not exceed $250 million in the aggregate.[40] Based on the available data, we find that all but nine independent cable operators are affiliated with entities whose gross annual revenues exceed $250 million.[41] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, we note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[42] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under the definition in the Communications Act.

14. *Open Video Services*. Open Video Service (OVS) systems provide subscription services[43] and the OVS framework is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[44] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services or "Wired Telecommunications Carriers."[45] The SBA has developed a small business size standard for this category which covers all such firms having 1,500 or fewer employees.[46] According to the 2012 U.S. Census, there were 3,117 firms considered Wired Telecommunications Carriers in 2012, of which 3,083 operated with fewer than 1,000 employees.[47] Based on these data, most of these firms can be considered small. In addition, we note that the Commission has certified approximately 45 OVS operators to serve 116 areas, although most of these operators are not yet providing service.[48] Broadband Service Providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises.[49] At least

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Type=table. While U.S. Census Bureau data did not provide a population breakout for special district governments, if the population of less than 50,000 for this category of local government is consistent with the other types of local governments, the majority of the 38,266 special district governments have populations of less than 50,000.

[29] *Id*.

[30] *See* 13 CFR § 120.201. The U.S Census Bureau uses the NAICS code 517110 for the Wired Telecommunications Carrier category. *See* https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t#none.

[31] *Id*. § 201.121.

[32] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012*. (517110 Wired Telecommunications Carriers). https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110.

[33] *Id*.

[34] 47 CFR § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementations of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[35] The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on August 15, 2015. *See* FCC, Cable Operations and Licensing Systems (COALS). www.fcc.gov/coals (last visited June 21, 2019).

[36] 47 CFR § 76.901(c).

[37] *See* FCC, Cable Operations and Licensing Systems (COALS). www.fcc.gov/coals.

one OVS operator, Affiliates of Residential Communications Network, Inc. (RCN), has sufficient revenues to ensure they do not qualify as a small business entity. However, the Commission does not have financial or employment information for the other entities which are not yet operational. Thus, the Commission concludes that up to 44 OVS operators (those remaining) could potentially qualify as small businesses that may be affected by the rules and policies adopted herein.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

15. The rules adopted in this Order will impose no additional reporting or recordkeeping requirements. We expect the compliance requirements—namely, modifying and renewing cable franchise agreements to comport with the law—will have only a *de minimis* effect on small entities. As ACA explains, "most franchising authorities understand the limits of their authority and do not impose unlawful requirements on [small cable operators]."[50] LFAs will continue to review and make decisions on applications for cable franchises as they already do, and any modifications to the local franchising process resulting from these rules will further streamline that process. The rules will streamline the local franchising process by providing guidance as to: the appropriate treatment of cable-related, in-kind contributions demanded by LFAs for purposes of the statutory five percent franchise fee cap, what constitutes "cable-related, in-kind contributions," and how such contributions are to be valued. The rules will also streamline the local franchising process by making clear that LFAs may not use their video franchising authority to regulate the provision of certain non-cable services offered over cable systems by incumbent cable operators. The same can be said of franchising at the state level. The rules will help streamline the franchising process by ensuring that applicable statutory provisions are interpreted uniformly throughout the country.

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[38] 47 U.S.C. § 543(m)(2). *See also* 47 CFR § 76.901(f).

[39] *See* SNL Kagan at https://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx.

[40] 47 CFR § 76.901(f); *See FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bur. 2001).

[41] *See* SNL Kagan at https://www.snl.com/interactivex/TopCableMSOs.aspx.

[42] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules.

[43] *See* 47 U.S.C. § 573.

[44] *Id*. § 571(a)(3)-(4). *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 606, Para. 135 (2009) (*13th Annual Report*).

[45] 13 CFR § 201.121. The U.S Census Bureau uses the NAICS code 517110 for the Wired Telecommunications Carrier category. *See* https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t#none.

[46] *Id*.

[47] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ5, *Information: Subject Series – Estab & Firm Size: Employment Size of Firms: 2012* (517110 Wired Telecommunications Carriers). https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110.

[48] A list of OVS certifications may be found at https://www.fcc.gov/general/current-filings-certification-open-video-systems#block-menu-block-4.

[49] *See 13th Annual Report*, 24 FCC Rcd at 606-07, para. 135. BSPs are newer firms that are building state-of-the-art facilities-based networks to provide video, voice, and data services over a single network.

[50] Letter from Ross Lieberman, Senior Vice President, Government Affairs ACA Connects–America's Communications Association, to Marlene Dortch, Secretary, FCC, at 1 (July 25, 2019).

F. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

16. The RFA requires an agency to describe any significant alternatives it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities."[51]

17. To the extent that these rules are matters of statutory interpretation, we find that the adopted rules are statutorily mandated and therefore no meaningful alternatives exist.[52] Moreover, as noted above, the rules are expected to have only a *de minimis* effect on small entities. The rules will also streamline the local franchising process by providing additional guidance to LFAs.

18. Treating cable-related, in-kind contributions as "franchise fees" subject to the statutory five percent franchise fee cap will benefit small cable operators by ensuring that LFAs do not circumvent the statutory five percent cap by demanding, for example, unlimited free or discounted services. This in turn will help to ensure that local franchising requirements do not deter small cable operators from investing in new services and facilities. Similarly, applying these rules at the state level helps to ensure that such deterrence does not come from state-level franchising requirements either. Finally, applying the Commission's mixed-use rule to all incumbent cable operators helps to ensure that all small cable operators may compete on a level playing field because incumbent cable operators will now be subject to the same rule that applies to competitive cable operators. We disagree with the City of Newton's argument that we should afford small entities six years to implement these changes—the issues that City of Newton raises are matters of statutory interpretation, and the Communications Act does not provide for the implementation period that the City of Newton requests.

G. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

19. None.

H. Report to Congress

20. The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[53] In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. The Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register.[54]

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[51] 5 U.S.C. § 603(c)(1)-(4).

[52] For this reason, we disagree with NATOA *et al*. that our actions will affect service to senior citizens, or to schools, libraries, and other public buildings and that this analysis is inadequate. *See* Letter from Joseph Van Eaton *et al*., Counsel to Anne Arundel County, *et al*. to Marlene H. Dortch, Secretary, FCC at 2 (July 24, 2019). This argument is essentially that the statutory cap does not afford local governments enough money to serve their constituents, and we do not have the authority to amend the statute.

[53] *See id*. § 801(a)(1)(A).

[54] *See id*. § 604(b).

STATEMENT OF
CHAIRMAN AJIT PAI

Re: *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.

As Scott Turow famously said in *One L: The Turbulent True Story of a First Year at Harvard Law School*, reading law is "something like stirring concrete with [your] eyelashes." And in few areas of law is the stirring more difficult than statutory interpretation. The canons of statutory construction are not plot points in John Grisham thrillers, and I doubt they will feature in next year's *Legally Blonde 3*. But as an agency charged with implementing the laws passed by Congress, statutory construction is fundamental to the Commission's work.

Thankfully, some issues of statutory interpretation are more straightforward than others. For example, today we decide that "in-kind" contributions made by cable operators for the non-capital costs of public, educational, and government (PEG) access channels count against the five percent cap on franchise fees set forth in Section 622 of the Communications Act (the Act).[1] I understand that many PEG operators are unhappy with this outcome. But it is the inevitable result of the statute passed by Congress.

Here's why. The statute plainly defines a "franchise fee" to include "*any* tax, fee, or assessment *of any kind*."[2] It then sets forth two exceptions to that definition related to PEG channels. For franchises in effect back in 1984, when the statute was passed, there is a broad exemption for "payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support or the use of, public, educational, or government access facilities."[3] But for franchises granted later, the exemption is much narrower, covering only "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities."[4]

This legal framework tells us two things. First, given these specific exemptions, the five percent cap (and associated franchise fee definition) does not include a general exemption from cable-related, in-kind contributions. Congress could have—but did not—create one. And the specific exemptions would be unnecessary if there were such a general exemption. The Supreme Court has made clear that it is "'reluctan[t] to treat statutory terms as surplusage' in any setting."[5] So are we.

Second, with respect to post-1984 franchises, capital costs are the only PEG costs that are exempt from the definition of franchise fees. Understandably, PEG operators and many local governments in this proceeding would like to benefit from the broader exclusion. But that's not what the statute says. The broader exemption by its plain terms only applies to franchises in existence back in 1984. Congress was clearly aware of the distinction between existing and post-1984 franchises when it established these exemptions, and we don't have the authority to rewrite the statute to expand the narrower, post-1984 one. This is Statutory Interpretation 101.

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[1] 47 U.S.C. § 542(b).

[2] 47 U.S.C. § 542(g)(1) (emphasis added).

[3] 47 U.S.C. § 542(g)(2)(B).

[4] 47 U.S.C. § 542(g)(2)(C).

[5] *Duncan v. Walker*, 533 U.S. 167, 174 (2001), quoting *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995).

To be sure, all of the issues of statutory construction addressed in this item aren't as easy as this one. But in each instance, we carefully parse the statute and arrive at the right result. For example, we correctly affirm that local franchising authorities (LFAs) may not regulate the provision of most non-cable services, including broadband Internet access service, offered over a cable system. And we find that the Act preempts any state or local regulation of a cable operator's non-cable services that would impose obligations on franchised cable operators beyond what Title VI of the Act allows. Obviously, some local governments that are eager to keep biting the regulatory apple object to this outcome. But the question of preemption is squarely addressed by the statute. Section 636(c) of the Act explicitly provides that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act *shall* be deemed to be preempted and superseded."[6]

Now, let us suppose—and I know it seems improbable, but bear with me here—that some are not convinced by legal arguments and simply want to allow contributions the statute explicitly forbids, and permit regulations that it explicitly does not permit. The solution is simple: change the law. The job of administrative agencies like ours is not to rewrite laws set forth by Congress. It is to implement those laws. As the Supreme Court has opined, "[u]nder our system of government, Congress makes laws and the President, acting at times through agencies . . . , 'faithfully execute[s]' them. The power of executing the laws . . . does not include a power to revise clear statutory terms."[7]

Looking beyond the law, today's *Third Report and Order* is good for American consumers. That's because costs imposed by LFAs through in-kind contributions and fees imposed on broadband Internet access service get passed on to consumers. LFAs have not cracked the secret to a free lunch. Moreover, every dollar paid in excessive fees is a dollar that by definition cannot and will not be invested in upgrading and expanding networks. This discourages the deployment of new services like faster home broadband or better Wi-Fi or Internet of Things networks. So, by simply insisting that LFAs comply with the law, we will reduce costs for consumers and expedite the deployment of next-generation services. Good law *and* good policy.

Thank you to the dedicated staff who worked on this important item: from the Media Bureau, Michelle Carey, Martha Heller, Maria Mullarkey, Brendan Murray, Raelynn Remy, and Holly Saurer; and from the Office of General Counsel, Susan Aaron, Michael Carlson, Maureen Flood, Thomas Johnson, and Bill Richardson. When it comes to stirring the concrete of statutory construction, you bring a cement mixer to the task rather than eyelashes.

[6] 47 U.S.C. § 556(c) (emphasis added).

[7] *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 327 (2014).

STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *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.

As I've stated many times since we began the media modernization effort, the video marketplace is changing dramatically, and each step we have taken to update anachronistic and clunky regulations makes it slightly easier for regulated industries to compete with their unregulated competitors. Though much work remains, I look forward to continuing the effort. At the same time, and as we see in the background of today's item, it is unsurprising that other stakeholders, such as franchise authorities, also feel their own pressures due to the changing market dynamics, whether budgetary or political. They too seek ways to either continue their past practices unabated or seek ways to maximize returns on their regulatory roles. However, Title VI of the Communications Act places important restraints on their reach, and unauthorized expansion of the statute is flatly wrong and must be held in check. The courts have agreed, and I am pleased that today we make strides toward answering the Sixth Circuit, by addressing three main areas raised in or affected by its remand.

First, the Order rightly counts cable-related "in-kind" contributions against the statutory cap. Failing to do so would effectively render the statute's restraints meaningless, or nearly so. Critics may argue that local franchise authorities have the weaker position when dealing at arm's length with video providers, but the record and experience show otherwise. There are numerous examples of where video providers lack the ability to say no to "voluntary" waivers of the five percent cap, having no recourse but to agree to all manner of in-kind contributions, ranging from providing all the necessary equipment to produce PEG programming in New York City, to supplying transport lines to cover ice cream socials in Minnesota. There are many examples in the record, but the point is: failure to agree to such terms could result in jeopardizing the franchise, and that is a risk many companies simply cannot afford to take. The Commission's role is to interpret and enforce the statute based on the record, and today we appropriately define cable-related in-kind contributions to prevent end-runs around the statutory cap.

Second, the Order also correctly preempts state-level franchise authorities who would seek to obliterate the statutory boundaries that are in place. Unfair and unreasonable fees and contributions beyond five percent of gross revenues for cable services conflict with the law, whether the franchisor is a state or local actor. The statute itself explicitly refuses to restrict states from exercising jurisdiction over cable services. In fact, about half of all states have authorized state-level franchise authorities. There is no good legal or policy reason for restraining the activities of local franchisors while allowing state authorities to continue unbounded, and I thank the Chairman for including this matter in the NPRM so that we could go to Order today on it.

Third, there are two issues regarding PEG contributions that could receive further attention as the record more fully develops. While I would have preferred a narrower definition of "capital costs," limiting such contributions to construction-related costs for PEG facilities, the item does acknowledge today that the current record has room to grow, leaving us the option to revisit this matter in the future. Similarly, we clearly acknowledge the need to resolve the PEG channel capacity cost question and expressly commit to doing so within the next year. This is a vital endeavor, so I thank the Chairman for working with me on this matter and look forward to the admittedly complex and rigorous undertaking.

Separately, and perhaps most significantly, the item properly rejects the ability of state or local governments to impose franchise fees on non-cable services. Inappropriate court determinations, such as the Eugene, Oregon, franchise case, have wrongly tried to open the door to the imposition of such fees on other services offered by what have traditionally been called cable operators. However, the statute is quite clear on the matter and the item appropriately clarifies that franchises authorities can only regulate

cable services. Today's action closes off potential revenues for franchise authorities from non-cable services, which is the right statutory reading. Further, allowing these entities to usurp the statute by imposing fees on the offering of broadband services would ignore the resulting harm to consumers. For instance, Congress has recognized multiple times that allowing governmental fees and taxes does affect Internet adoption rates. Given that almost everyone recognizes the importance of broadband availability, deterring its use would be at best, counterproductive. Moreover, without such a limitation, there appears to be no outer limit to the types of non-cable services for which a cable operator could be forced to pay fees. Today, it's broadband in the cross-hairs, but tomorrow it could be cloud services or over-the-top video services, for example.

Finally, I'll end with two points regarding the judicial and legislative implications of today's item. On the matter of applying today's Order to existing franchise agreements, I worry that we are punting too much of the burden to the overworked courts and would be better served by delineating a clear process under the Commission's purview. However, I support the efforts of my colleague Commissioner Carr to make Section 636 controlling, which will at a minimum provide a clearer starting point for negotiations. I would also note that I support my colleague's effort to clarify that the provisions of this Order cannot be waived. We will be closely watching to ensure that no franchise authorities seek to make an end run around the reforms contained in this Order by demanding that franchisees waive any of the provisions. Regarding the need for legislation, I hope that Congress will take note of our effort today and consider launching an ambitious, but much needed, review of Title VI in its entirety. We are bringing the regulations more in line with the statute today, but the whole ecosystem would be well-served by a wholesale rewrite of the statute and an acknowledgement of the current market realities.

But, this item shouldn't and won't be the end of our work to eliminate outdated rules and scale back inappropriate actions by state and local franchise authorities. For our media modernization initiative, I will be submitting soon a new round of ideas for the Chairman's consideration. On a larger scale, I am hard at work on a blog outlining the fundamental overhaul needed to address our outdated franchising regime and the need to further curtail "creatively harmful" efforts by franchise authorities.

I approve.

STATEMENT OF
COMMISSIONER BRENDAN CARR

Re: *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.

If you tax something, you get less of it. Yet politicians around the country have been treating Americans' cable and broadband bills as a piggy bank to line government coffers. Those illegal taxes only raise our costs, make it harder to access the Internet, and curb competition. Today, we vote to end this outlier conduct.

Doing so is not only required by federal law. It's the right thing to do. Policymakers at all levels of government should be making it easier and less expensive to build out broadband infrastructure. That is why this FCC has been eliminating regulatory costs and cutting red tape. It's so that next-gen networks can be built, increasing competition and choice.

Regulatory reform matters—and not just in some abstract or theoretical sense. We know it from our own experience.

Take this Commission's actions to get the government out of the way so the private sector can build 5G. We modernized the federal historic and environmental rules that apply to small cells. We addressed outlier conduct at the state and local level by tackling high fees and long delays in the permitting process. Combined, those two decisions cut about $3.6 billion in red tape that had slowed down broadband builds and limited competition.

In fact, those and other FCC reforms are already delivering results. Internet speeds are up nearly 40 percent. Americans saw more fiber broadband built to their homes last year than ever before. The number of small cells put up increased from 13,000 in 2017 to more than 60,000 in 2018. Investment in broadband networks is back on the rise. And the U.S. now has the world's largest 5G deployment.

We know the opportunity that broadband enables—from creating jobs to improving access to high-quality healthcare and education. That's why, as policymakers and regulators, we must always view broadband as an opportunity for consumers—not tax collectors.

That brings us to today's Order. Congress recognized decades ago that excessive taxes and in-kind demands, which have the same effect, could threaten innovative services and lead to higher prices. That's why Congress capped franchise fees at five percent of cable revenue. Congress wanted to encourage voice and Internet service offered over cable systems by shielding those services from taxes and regulations.

The Commission knows well that outlier fees and restrictions limit buildout. We saw that with small cells, where cities like New York and San Jose leveraged their monopolies over the rights of way to demand exorbitant fees and concessions wholly unrelated to the cost of rights of ways. And we're seeing a similar dynamic here with cable franchising.

Some local franchising authorities have taken advantage of their roles as regulators to force providers to offer free service to municipal liquor stores and government-owned golf courses. Others have imposed broadband and voice taxes on top of existing franchise fees. And others have required providers to obtain entirely separate franchises to provide Wi-Fi and cellular backhaul even though they're already authorized under existing franchise laws.

This abusive behavior has consequences. Money that could otherwise be spent on network

deployments and upgrades is instead diverted to the government's own pockets. Ultimately, consumers take the hit—whether it's a higher-priced cable bill or decreased investment and competition in their communities. An economic analysis in our record shows that without reform, illegal taxes will reduce consumer welfare by $40 billion by 2023.

So I'm glad we take these steps today to crack down on bad actors who seek to tax broadband and thus provide less access and competition for all of us. I'm also glad my colleagues agreed to some edits that have strengthened this item to further protect consumers from harm.

First, we now make clear that illegal franchise terms are *per se* preempted under the statute and by this Order, which will help bring franchises into compliance more quickly. Consumers shouldn't have to pay higher prices while protracted negotiations take place. Their cable bills should simply reflect the law. Second, we make clear that Wi-Fi and wireless services provided over the cable system are exempt from duplicative fees, which will encourage providers to invest more in these 5G-ready services. Third, we affirm that franchising authorities may not ask cable operators to voluntarily waive these regulatory reforms as a negotiating tactic or to perform an end-run around the statutory franchise fee cap. And finally, we ensure that in-kind contributions requested by franchise authorities are calculated at their fair market value, because consumers shouldn't have to pay more for cable services than the governments who represent them.

These and other edits I requested help ensure consumers are protected from higher prices and that more money is spent on the investments needed to bring more broadband to more Americans. So I want to thank my colleagues for expanding the relief that we provide in this decision. I also want to thank the Media Bureau for its work on the item. It has my support.

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL,
DISSENTING

Re: *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.

Do just a bit of research on the state of local journalism in this country and you will see stark headlines with words like "decline," "shrink," and "crisis."

These headlines are not fake news. According to the Associated Press, more than 1,400 cities and towns across the United States have lost a newspaper during the last decade and a half. This trend extends beyond newspapers. Over roughly the last decade, newsroom employment—the reporters, editors, photographers, and videographers who work day-in and day-out to publish, broadcast, and report local news in this country have declined by 25 percent.

This downsizing deserves attention. While national news is on many of our screens, local journalism is disappearing. This has consequences. The loss of a local outlet means there is no one to report on the day's events. Coverage of the school board doesn't take place. Highlights from the local football game go unreported. Investigations into property assessments and local corruption fall by the wayside. But these are the facts that keep us informed as citizens and provide us with the news we need to help make decisions about our lives, our communities, and our democracy.

I think this context matters—and this context is important for today's decision. Because this agency should seize opportunities to reinvigorate local newsgathering and community coverage. In fact, that has traditionally been a hallmark of Federal Communications Commission media policy. But on that score, today's decision misses the mark. That's because it cuts at public, educational, and governmental channels across the country. It goes beyond placing reasonable limits on contributions subject to the statutory franchise fee and jeopardizes the day-to-day costs, like staff and overhead, required to run such stations.

I'm not the only one with this concern. Take a look at the record. We've heard from thousands of communities across the country worried we are cutting the operations of so many local channels. I am saddened that this agency refuses to listen.

I think their pleas fell on deaf ears because this agency has convinced itself that by making these changes, we will see more broadband. They insist that funding these local stations and related efforts damages the ability of our nation's broadband providers to extend their networks to communities without high-speed service. But comb through the text of this decision. You will not find a single commitment made to providing more broadband service in remote communities. There is no enforceable obligation to expand broadband capacity. There is no agreement that any savings from today's action is pushed into new network deployment. I fear this absence speaks volumes.

That's because in the final analysis, this decision is part of a broader trend at this agency. Washington is cutting local authorities out of the picture when it comes to infrastructure. You see it here, in the way we limit local public, educational, and governmental channels and public safety services like I-Nets. You see it in the way we cut local officials out of decisions about wireless facilities deployed in their own backyards. You see it the way that just last month we preempted a local law designed to increase broadband competition in a city where residents were crying out for more choices for internet access.

I don't think this is the way to govern. I believe the way we are proceeding is at odds with our

long legal history and tradition of dual sovereignty in the United States. I think instead of speeding our way to the digital future, it is slowing us down, increasing our division and diminishing the dignity of local institutions. I dissent.

STATEMENT OF
COMMISSIONER GEOFFREY STARKS,
DISSENTING

Re: *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.

One of our primary responsibilities at the Commission is to ensure that spectrum, a scarce public resource that underscores our broadcasting industry and our wireless communications, is distributed equitably and in the public interest. However, spectrum is not the only public resource integral to the deployment of our communications networks. Access to public real estate and property is similarly critical. Specifically, public rights-of-way managed by states and municipalities fuel the build-out of our networks. Providers need access to this resource to dig trenches to lay conduit and reach homes.

For many decades, state, municipal, or local governing bodies have been recognized as the arbiters of the use of this valuable public resource. This recognition formed the basis of the Cable Act,[1] which spawned our local franchising rules and allowed providers to come freely to local franchising authorities to negotiate the use of public rights-of-way. Historically, LFAs have sought and cable providers have agreed to a fee for the use of this public property, along with other public interest terms. In return, providers have been able to run profitable businesses, acquiring new customers and reaping hundreds of billions of dollars in revenue.

I dissent from today's item because it threatens the ability of states and municipalities to manage their local affairs through an improper reading of the statute. The expansive and unprecedented reading of the term "franchise fee" in today's item significantly devalues the use of public rights-of-way and could, within months, threaten settled and longstanding franchise agreements across the country. In doing so, it puts at risk the careful balance developed over many decades between the interests of providers and the local communities that they serve.

Thousands of federal, state, and local leaders have submitted substantive comments in our docket, pointing out how our action today will frustrate other important goals of the statute, and target certain terms negotiated into franchise agreements that are of great importance to local communities.[2] From free or discounted services to schools or government buildings, to institutional networks, or I-Nets, which are viewed as critical infrastructure by many cities and relied upon to support government functions and public safety communications, much is at stake. Additionally, the item itself recognizes that it will shake the very foundation of another statutory priority, the provision of public, educational, or governmental, or PEG, stations, which the item notes provide critical and unique local service to communities across the country.[3]

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[1] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

[2] *See, e.g.*, Letter from Sen. E. Markey *et al.*, to Ajit Pai, Chairman, FCC (July 29, 2019); Letter from Sen. K. Gillibrand and Sen. C. Schumer, to Ajit Pai, Chairman, FCC (July 25, 2019); Letter from Sen. C. Van Hollen, to Ajit Pai, Chairman, FCC (June 12, 2019); Letter from Rep. Y. Clarke, to Ajit Pai, Chairman, FCC (May 9, 2019); Letter from Sen. M. Hirono, to Ajit Pai, Chairman, FCC (Dec. 18, 2018); Letter from Rep. G. Moore, to Ajit Pai, Chairman, FCC, at 2 (Dec. 14, 2018); Letter from Rep. E. Engel, to Ajit Pai, Chairman, FCC (Dec. 13, 2018); Reply Comments of CAPA et al. at 9; Comments of King County, Washington, at 9; City Coalition Comments at 17-18; Comments of NATOA *et al*. at 10.

[3] *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, Draft Third Report and Order, para. 50 (adopted Aug. 1, 2019) (*Third Report and Order*).

Perhaps the most significant departure in today's item is the expansive new reading of the term "franchise fee" for the purposes of the statutory cap on LFAs' collection of such fees. The term will now broadly include "cable-related, in-kind contributions."[4] This new interpretation of the statute will upend decades of settled regulatory determinations and innumerable franchise agreements currently in place across the country, and cause a seismic shift in the relationship between LFAs and providers, maximizing providers' leverage and minimizing the ability of LFAs to secure adequate service to their local communities.

The Commission's unilateral decision to avoid the words and intent of our statute and expand the definition of "franchise fee" in this proceeding is puzzling. As numerous commenters have extensively noted, and I agree, our mandate seems clear.[5] Section 622 of the Act caps franchise fees at five percent of a cable operator's gross revenues from the provisioning of cable services.[6] The term "franchise fee" is given a relatively straightforward definition in the statute: "any tax, fee, or assessment of any kind."[7] And, if the plain meaning of the words used raised any question about whether we are talking about money or some other type of contribution, the legislative history included a strikingly clear clarification: "[i]n general, this section defines as a franchise fee only monetary payments made by the cable operator and does not include as a 'fee' any franchise requirements for the provision of services, facilities or equipment."[8] On this issue, it is exceedingly clear – we are talking about money.

It is true that the Sixth Circuit returned this issue to us on procedural grounds with dicta considering whether the term "franchise fee" can include "noncash exactions" in narrow instances.[9] However, in almost the same breath the Court noted, notwithstanding its brief exploration of the definitions of the words at issue, "[t]hat the term 'franchise fee' can include noncash exactions, of course, does not mean that it necessarily *does* include every one of them."[10] The item's reliance on that brief discussion to support today's line-drawing exercise, in the face of a clearly worded statute and clearly stated congressional intent, is inappropriate.[11]

What does this really mean for communities across the country? It means that freely negotiated franchise terms, agreed to by cable providers in addition to franchise fees, in arm's length negotiations with LFAs all across the country, will almost immediately be treated differently now than they have for 35 years. And as a result, the value of local public rights-of-way will be immediately diminished limiting the ability of local authorities to raise revenue and support important programs. At its core, this means that difficult choices will need to be made by local leaders, contrary to the public interest, due to the Commission's misreading of the statute. For instance:

- The City of Medford, Massachusetts told us that they will need to decide whether to "divert resources away from core municipal and school services to maintain existing PEG programming,

[4] *Third Report and Order* at paras. 13-15.

[5] *See, e.g.,* NATOA *et al*. July 24, 2019 *Ex Parte* at 2; Anne Arundel County *et al*. July 24, 2019 *Ex Parte* at 8; Comments of City of Philadelphia *et al*. at 22 (Nov. 14, 2018); Comments of Charles County, Maryland, at 7 (Nov. 14, 2018); Reply Comments of Anne Arundel County, Maryland *et al*., at 6 (Dec. 14, 2018).

[6] 47 U.S.C. § 542.

[7] *Id.* § 542(g)(1).

[8] 1984 U.S.C.C.A.N. 4751, 4753; H.R. Rep. No. 98-934 at 65 (1984) (emphasis added).

[9] *Montgomery County, Md. et al. v. FCC*, 863 F.3d 485, 490-91 (6th Cir. 2017).

[10] *Id.* (emphasis in original).

[11] *Id.*

suffer a dramatic reduction in the scope of PEG channels, or lose them altogether."[12]

- Durango, Colorado worries that reductions in funding will likely mean its PEG channels will be cut altogether, leaving the city without a way to warn citizens when a disaster strikes. PEG channels were used to alert citizens when 3 million gallons of mining sludge leaked into a major river which flows through the middle of the town. A PEG station's drone was used to obtain video and track the progress of the spill by local emergency management officials. Later, PEG channels were used to advise of evacuations and road closures when a massive wildfire broke out nine miles north of the city. Reductions in funding will likely mean PEG channels will be cut all together, leaving the city without a way to warn citizens when a disaster strikes.[13]
- I was in New York City earlier this week meeting with city officials and was told that they worry greatly about the impact of today's item on the future of the city's I-Net, a network that has become so integral to city services that it will be nearly impossible to replace. FDNY uses the I-Net for "critical public safety communications" among other things, and every city agency is plugged into it in some fashion.[14]

Our record is clear: the services negotiated in local franchising agreements are incredibly important, and reflect the significant value associated with permission to use public rights-of-way. When it comes to PEG channels, I can't say it any better than the item already does: "A significant number of comments in the record stressed [the benefits of PEG stations], which include providing access to the legislative process of the local governments, reporting on local issues, providing a forum for local candidates for office, and providing a platform for local communities—including minority communities."[15] Free or discounted service to cash-strapped schools, provision of critical I-Nets, discounts to vulnerable communities – all of these franchise terms advance the public interest and are a small imposition given the value received by providers in franchise negotiations. Our action today is unnecessary, unsupported by law or precedent, and risks causing grave harm to local communities.

In short, today's item jeopardizes the public interest and threatens to significantly alter the ability of state and local governments to determine how best to serve their communities. This item will undoubtedly end up back in litigation, and I believe the court will find that the majority's decision is at odds with clear congressional direction. I dissent.

[12] Letter from Stephanie M. Burke, Mayor, City of Medford, MA, to Ajit Pai, Chairman, FCC (July 25, 2019).

[13] Association of Washington Cities *et al.* April 3, 2019 *Ex Parte*.

[14] City of New York July 25, 2019 *Ex Parte* at 1.

[15] *Third Report and Order* at para 50.