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July 24, 2019

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

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

Dear Ms. Dortch:

This *ex parte* letter is submitted on behalf of Anne Arundel County, Maryland; The City of Atlanta, Georgia; The City of Bellevue, Washington; Bloomfield Township, Michigan; The City of Brookhaven, Georgia; The City of Boston, Massachusetts; The City of College Park, Maryland; The City of Dallas, Texas; The City of Davis, California; The City of Dubuque, Iowa; The District of Columbia; The County of Fairfax, Virginia; The City of Fontana, California; The City of Gaithersburg, Maryland; The City of Greenbelt, Maryland; Howard County, Maryland; The City of Kirkland, Washington; The City of Laredo, Texas; The City of Laurel, Maryland; Los Angeles County, California; The City of Los Angeles, California; The City of Lincoln, Nebraska; The Marin Telecommunications Agency; Meridian Township, Michigan; The Michigan Chapter of The National Association of Telecommunications Officers & Advisors; The Michigan Coalition To Protect Public Rights-Of-Way; The Michigan Municipal League; The Michigan Township Association; Montgomery County, Maryland; Mt. Hood Cable Regulatory Commission; The City of Ontario, California; The City of Plano, Texas; The City of Portland, Oregon; The Ramsey/Washington Counties Suburban Cable Communications Commission II; The City of Rye, New York; The City of San Jacinto, California; The Sacramento Metropolitan Cable Television Commission; The Village of Scarsdale, New York; The Texas Coalition of Cities For Utility Issues; and the Texas Municipal League.

This letter responds to the Commission's draft *Third Report and Order* in the above-captioned proceeding, released on July 11, 2019.[1] As described in detail below, and as further substantiated by ample prior submissions in the record, the Commission's proposals are

[1] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, FCC-CIRC1908-08 (rel. Jul. 11, 2019) ("*Draft Order*").

inconsistent with the text and intent of the Communications Act, and are both procedurally and substantively defective and inconsistent with applicable law. This, read in conjunction with the *ex parte* filed by NATOA *et al.* this date, demonstrates that the *Draft Order* as proposed would not pass muster on review, and requires substantial revision.

The *Draft Order* appears to recognize that the new rules are a significant departure from the past, and will affect existing contractual relationships (including existing contractual relationships established pursuant to the procedures set forth in 47 U.S.C. § 626, which provided operators ample opportunity to contest unlawful franchise conditions). The Commission recognizes that, among other things, its actions could affect the availability of service to senior citizens (by eliminating required senior citizen discounts); that its rules may mean that schools, libraries and other organizations that use the connections to provide important services may lose the ability to provide those services; and that state laws that moved franchising from the local to state level may no longer be valid, thus raising questions as to whether the state franchise itself is valid (the *Draft Order* assumes, without basis, that the laws are severable.) Given those potential impacts, the RFRA is inadequate, and more importantly, it would be unwise to allow the rules to go into effect pending review. Essentially, every affected community will need to re-write franchises, and then, if the *Draft Order* is overturned in whole or in part, re-write them again to restore the benefits and burdens originally negotiated. Either the *Draft Order* should not apply to existing franchises at all, given the dramatic change from past understandings of the law (including understandings based on the Commission's own statements), or it should apply after final resolution of the issues raised by the *Draft Order*.

A. The *Draft Order* Is Procedurally, As Well As Substantively Defective.

The *Draft Order* makes at least two determinations that could not have been anticipated, that are significant, and as to which there has been no real opportunity for comment, or where the rationale is either unstated or unclear. Those are the "essential to cable" test,[2] and the Commission's determination[3] broadly preempting state and local authority to impose fees upon, franchise, or regulate facilities owned by a cable operator which are used for the provision of non-cable services.

1. *Essential to cable*. While the flaws in the *Draft Order's* interpretation of Section 622(g) have been amply discussed, the same is not true of the "essential to cable" standard, because it has never previously been proposed by the Commission, nor has any party been given the opportunity to address it in comments. The concept is not found in the NPRM on which the

[2] *Draft Order*, ¶ 25.

[3] *Id.*, ¶¶ 82-110.

Draft Order is based. If the Commission wishes to establish a binding rule that will have the force of law, it should first provide appropriate notice and opportunity for comment before pursuing such a standard. Failure to do so is fatal to the adoption of the new standard.[4]

This standard lacks any basis in the Act, nor does the Commission point to any evidence suggesting Congress intended to treat some requirements as franchise fees, and some requirements not. The absence of notice is particularly troubling because, as the Commission recognizes, and as the comments have shown, the new standard is not consistent with the Commission's own orders, legislative history[5] or long-standing understandings of Section 622 reflected in state law and local franchises, or the structure of the Cable Act.

The legislative history is particularly illuminating. While the Commission puts itself in the position of declaring what is important and what is not (the former not being franchise fees, while the latter are), the legislative history explained that the Act placed the franchising process at the local level "where city officials have the best understanding of local communications needs and can requires cable operators to tailor the cable system to meet those needs."[6] What is "essential" is to be determined through the local processes envisioned by the Cable Act; and any non-cash requirement that the Cable Act permits a locality to establish was determined by Congress to be appropriate, and therefore just as essential as any other. The legislative history explains that in addition to providing new video service options, cable systems were being designed "to provide the full range of communications and data transmission services to government and educational institutions and private business."[7] It goes on to note that the franchise process "has significant […] implications for the full development of cable telecommunications."[8] and concludes that "[t]he ability of a local government to require

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[4] *See Daimler Trucks North America LLC v. EPA*, 737 F.3d 95, 100 (D.C. Cir. 2013) ("A final rule is a logical outgrowth of the proposed rule 'only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.'" (quoting *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94–95 (D.C.Cir.2010)). In *Daimler,* an agency rule was remanded where the agency's notice "did not propose, and offered no indication that it was contemplating" regulation on a particular topic. *Daimler Trucks North America*, 737 F.3d at 100. Similarly, the Second NPRM gave commenters no indication that creation of this new legal standard was contemplated.

[5] *See Draft Order,* n. 60; Comments of Anne Arundel County, et al, at 20-21.

[6] H.R. Rep. No. 98-934, at 24 (1984).

[7] *Id.* at 21.

[8] *Id.* at 22.

particular cable facilities (and to enforce requirements in the franchise to provide those facilities) is essential if cable systems are to be tailored to the needs of each community."[9] The "essential to cable" test as the Commission purports to apply it turns the goals of the Act on their head, and establishes a new federal standard that requires that "tailoring" be paid for by the local community.

The standard itself defies understanding – which is another reason why drafting a rule, and then seeking comment upon it, is necessary. There is nothing that actually distinguishes build-out requirements (no offset) from requirement for construction of Institutional Networks ("I-Nets") in the Cable Act. The requirements are both established pursuant to the authority to establish facilities requirements under 47 U.S.C. § 544. The only difference between the two is that one is the portion of the system is designed to serve primarily residential customers, while the other is the portion of the system primarily designed to serve non-residential customers, including government and educational institutions. But both elements were viewed as critical to the development of an advanced communications network in 1984, and it turns out both are in fact critical elements of the cable industry's business model.[10] Why one building a network to serve one group is "essential" and another not is unclear. To give another example: the construction of a system is treated as "essential," but its maintenance seems to be treated as inconsequential, although, under Section 626, failure to provide service of a quality that is reasonable in light of community needs is ground for denial.[11]

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[9] *Id.* at 26.

[10] Comcast, *Comcast Reports 3rd Quarter 2018 Results* (Oct. 25, 2018), https://www.cmcsa.com/news-releases/news-release-details/comcast-reports-3rd-quarter-2018-results.

[11] 47 U.S.C. § 546(c)(1)(B). While the Commission's maintenance claims purport to relate to "maintenance" of PEG or I-Nets as compared to maintenance of other portions of the system, it is not clear what the difference is between that maintenance of PEG and I-Net capacity and maintenance of any other portion of the system. PEG channels are part of the basic service offered to residential subscribers – Congress could not have intended for subscribers to pay for that service (at now unregulated rates) while also paying, through taxes, for maintenance necessary to receive good quality signals. Indeed, there is no real factual support for the claim that there are additional cognizable costs associated with providing the PEG channels, and as both the text of the law and its legislative history indicate Congress did not mean to allow operators to recover fair market value. *See also* NATOA Ex Parte at 36-37 (Jul. 24, 2019). Similarly, with respect to I-Nets, I-Net capacity of schools and government is often provided in the form of dark fiber, and the actual operation is by the users. That capacity is a PEG capital expense by the under the plain language of the Cable Act, 47 U.S.C. §§ 522(16), 531(b).

2. *The new preemption standard*. The *Draft Order's* attempts to impose sweeping preemption on local governments rests on an overly broad reading of 47 U.S.C. § 556(c), while ignoring other provisions of the law that authorize actions of the sort the Commission declares are preempted. The analysis begins by suggesting that the entirety of the facilities built by any cable operator are a cable system, and that the cable franchise issued authorizes the construction of all facilities. This comes just pages after the FCC declares that the portions of any network used to provide non-cable services are *not* part of the cable system, and therefore not subject to control under the Cable act, with limited exceptions. The two positions cannot be squared.[12]

But even setting that aside, the FCC's conclusion that the only permissible requirements that may be imposed on cable operators are those permitted under Title VI ignores 47 U.S.C. § 541(d)(2), which states that "Nothing in this title shall be construes to affect the authority of any state to regulate any cable operator to the extent that such operator provides any communications service other than cable service…" Subsection (d)(1) specifically authorizes the fling of informational tariffs every communications service other than cable service offered by a cable system. Other filings have pointed out that the Commission's interpretation of Section 542 is not supported by language of the statute; neither is the Commission's reading of the provisions of Section 621, which prevent a locality or state from using Title VI authority to regulate telecommunications or establish requirements for telecommunications facilities, with limited exceptions.[13] The Act states that a franchise for telecommunications is not required "under this title;" the provisions of "this title" shall not apply "for the provision of telecommunications services; a franchising authority may not impose any requirement "under this title" that condition the provision of a telecommunications service. Under the Commission's reading, all these limitations, and others, are irrelevant and redundant, because Congress actually meant to prevent states and localities from exercising *any* authority to regulate non-cable services. The interpretation is not only counter-textual, its conflicts with the holding of *Dallas v. FCC* 165

General maintenance of an I-Net would be no different than, and just as essential to the provision of services (albeit to commercial customers), as maintenance of facilities used in providing services to residents.

[12] The *Draft Order's* discussion at nn. 264-65 underlines the conflict. The legislative history makes it quite clear that Title VI was not meant to undo state authority to regulate non-cable services, or facilities. In many states, but not all, exclusive regulatory authority lies with the state public utilities commission, while in other states, authority is retained at the local level in whole or part by state law or constitution. That authority was specifically reserved by statute, as shown in the next paragraph.

[13] 47 U.S.C. § 621.

F.3d 341 (5th Cir. 1999), where the FCC attempted to argue that the Cable Act prevented franchising of open video systems.

The preemption in the *Draft Order* ultimately rests on a broad reading of 47 U.S.C. § 556(c). But "express preemption statutory provisions should be given a narrow interpretation."[14] Nowhere does the *Draft Order* acknowledge any need for restraint in interpreting preemption provisions; it instead casts a wide net, raising many of the issues confronting the Commission in its *Restoring Internet Freedom* proceeding, in which it attempted to simultaneously preempt all state and local regulation in furtherance of its regulatory framework, while disavowing any authority to actually regulate.[15] In that case, the Commission relied heavily on the "impossibility exception," allowing it to preempt state authority even absent a specific grant of preemption authority.[16] The *Draft Order* offers no such basis, relying only on a flawed and impermissibly expansive reading of a narrow preemption provision. But even if it did, the preemption contemplated here is not justified. FCC actions qualify for the "impossibility exception" only when "(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,"[17] and the FCC must also justify its entire preemption order by "demonstrating that the order is narrowly tailored to preempt only such state regulations as would negate valid FCC regulatory goals."[18] None of these three showings have been made. Numerous aspects of rights-of-way management addressed through franchising of both cable and non-cable services are inherently intrastate matters, yet the Commission sweeps aside that authority. The Commission furthermore offers no evidence as to the necessity of Federal regulation in this space. Indeed, as the record shows, local rights-of-way practices & fees have little to no impact on deployment decisions.[19] And finally, no effort is made either narrowly tailor the preemption, nor even to characterize it as such.

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[14] *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir.2005).

[15] *See In the Matter of Restoring Internet Freedom,* Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, ¶¶ 194-95 (2018).

[16] *Id.* ¶ 198.

[17] *Minnesota Pub. Utilities Comm'n. v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007).

[18] *People of State of Cal. v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990).

[19] *See* Reply Comments of Anne Arundel County, et al., at Exhibit 5, ECONorthwest Report, Effect on Broadband Deployment of Local Government Right of Way Fees and Practices (Dec. 14, 2018).

B. The *Draft Order* Fails Properly Apply the Ordinary Meaning of "Tax, Fee and Assessment"

The *Draft Order* correctly relies on the ordinary meanings of the terms "tax," "fee," and "assessment" to interpret 47 U.S.C. § 542(g)(1).[20] The *Draft Order* recognizes[21] the Sixth Circuit holding that that it is *possible* for a non-cash requirement to be a tax, fee, or assessment, but that just because a non-cash obligation *could* be considered a tax, fee, or assessment, does not mean that it *should be*.[22] This tracks the principle that generally, taxes, fees, and assessments are monetary, but that in exceptional circumstances (such as forfeitures) non-monetary obligations may also qualify. But the *Draft Order* then reverses the calculation: rather than defining which categories of obligations fall within those exceptional circumstances, it instead presumes that *any* non-monetary obligation imposing a cost on a cable operator is an assessment, except for a small subset of requirements which fall outside the franchise fee.[23]

This flawed approach has one benefit for the Commission – it allows it to sidestep consideration of what constitutes a tax, fee, or assessment as distinct from ordinary costs of complying with regulations. While the *Draft Order* pretends at such an analysis, it never actually conducts it.[24] In Virginia, for example, it is undisputed that the annual vehicle tax is, in fact, a tax. But no one would claim that the costs of regulations requiring particular upkeep of cars

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[20] *Draft Order*, ¶ 12.

[21] *Id.*, ¶ 13.

[22] *Montgomery County, Md. et al. v. FCC*, 863 F.3d 485, 490-91 (6th Cir. 2017).

[23] *Draft Order*, ¶ 14. Hence, when the Commission states that "there is no basis in the statute for excluding all cable-related in-kind contributions," *Id.* it inverts the proper analysis, which would find silence an indication that social contract obligations *do not* count as franchise fees. The Commission finds the broad reading is justified by the fact that a special exception is made for PEG support. But, as Congress knew, that exception is necessary because PEG support is often provided in the form of cash payments to the franchising authority in addition to the franchise fee. Hence, what the exception defines are circumstances where dollar contributions may be required by franchising authority as a condition of issuing a franchise.

[24] *Draft Order* n. 70. The Commission here suggests it conducts a two-step analysis with respect to a given "type of contribution," but the *Draft Order's* text shows no such analysis, unless the Commission considers all "cable-related in-kind contributions" to constitute a single "type of contribution." Such an approach glosses over the details of PEG, I-Net, and other obligations specifically contemplated by the Act by lumping them all under one umbrella. As shown above, the effort to then separate those from other requirements by labelling some as essential and others as not is not supportable.

(such as to meet safety inspection standards) constitutes an assessment, though these undoubtedly impose both monetary and non-monetary costs on drivers. Under the Commission's approach, all regulatory conditions are treated as taxes, except those the Commission considers essential, even though the Commission concedes that the requirements may benefit the residents, businesses, organizations, the franchising authority and are cable-related requirements that are contemplated under the Act and prior FCC precedent. In the case of I-Net construction costs, the result of the obligation benefits not only the public, but also the cable operator, who is in a position to sell commercial services via I-Nets. The *Draft Order* offers no explanation as to how such a mutually beneficial arrangement constitutes a tax, nor offers a basis in established law for the idea that any imposition of costs is presumptively a tax, fee, or assessment.

C. The Order Is Significantly Flawed in Other Respects.

While it is impossible to catalogue all the flaws in the *Draft Order* – most have been addressed directly or indirectly through comments and through *ex partes* discussing filings by NCTA – it is worth noting that the *Draft Order* often depends on unsupported, shorthand assertions that have no basis in law.

- The Commission asserts that in a renewal, a locality can only require "adequate" PEG support, relying on Section 621. But Section 626 sets specific standards for renewal, and other those standards, a renewal may be denied *unless* the operator's proposal is reasonable to meet the identified needs and interests of the community, taking into account the cost of satisfying those needs and interests.[25]

- The *Draft Order* repeatedly confuses services and facilities which are subject to different treatment under the Act, and ignores the full text of the statute and the legislative history to which it points. A good example is in the discussion of Section 624, where the Commission finds that the prohibition on requiring "information services" in an RFP means that an authority can neither establish or enforce agreed-to service requirements. In fact, the Act's prohibition on *requiring* services extended to both cable services and information services, and is followed by a separate provision allowing localities to enforce general

[25] As others have pointed out, this language strongly contradicts the assumption made by the Commission that the costs of franchise requirements were to be borne by the franchising authority with limited exceptions. It also means that needs and interests are to be determined based on the process specified by Congress in Sections 626(a)-(g), and cannot be specified by the Commission.

requirements to provide cable and other services, while prohibiting enforcement of provisions that require *specific* services. The legislative history explains the distinction: it intended for general service requirements to be established through arms' length negotiations, rather than by fiat; the language cannot be used (as the Commission seeks to use it) as a basis for precluding regulation of non-cable services. Moreover, while there are restrictions on what services can be required, there are no similar restrictions on the facilities that can be required.[26]

- That failure to recognize the distinction is most pronounced in the discussion of mixed use facilities. The statute by its terms states that a facility is not a cable system if it is the facility of a common carrier, and the facility is subject to Title II of the Act.[27] Under the *Draft Order*, a facility is not a cable system if it is used for a telecommunications service, even if not owned by a common carrier, and even if the facility itself is not a Title II facility. That is not the line drawn by the Act; the problem is compounded because the FCC then improperly expands the statute and exempts portions of a cable system that do not meet the statutory test in the interest of maintaining parity. That is both improper and unnecessary.[28]

- The Commission relies on implied preemption as a ground for limiting authority in some instances; but Section 636, by its terms, leaves no room for implied preemption. Indeed, the cases cited by the Commission (at n. 317) that it could have (consistent with the Constitution) or does have the broad authority to define the scope of preemption as is claimed

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[26] Indeed, in addition to the specific authority to require facilities under Section 624, Section 632, 47 U.S.C. § 552(a), broadly permits localities to establish and enforce "constructions schedules and other construction-related performance requirements, of the cable operator." That right does not depend on what services will be provided via the facilities that the operator is building.

[27] 47 U.S.C. § 522(7).

[28] The reason for excluding Title II facilities is because the expansion and design of those facilities can be controlled by the Commission under Title II, or will be regulated by states. Those facilities are not relieved from regulatory burdens – they are simply subject to different ones. Applying the exemption to non-Title II facilities does not maintain parity. At n. 265, the Commission misstates the position of franchising authorities. We do not contend that Section 522 was intended to shield any services from regulation; it was intended to classify Title II facilities as something other than a cable system, that would then be subject to separate regulatory control.

- While the Commission accuses local governments of using legislative history and cases selectively, it is the Commission itself that takes quotes out of context and transforms their meaning. Thus, at n. 326, the Commission cites its decision in the *First Report and Order* as proof that Congress intended the franchise fee to be the *exclusive* remuneration for use of the rights-of-way – but fails to mention that it later made clear that it did not intend to prevent localities and states from charging fees under state law in connection with the provision of other services.[29]

D. The *Draft Order* Fails To Properly Interpret the Act

Having started off on the wrong foot, the *Draft Order* stacks error atop error by mistaking the trees for the forest and ignoring those areas it finds inconvenient. The *Draft Order* fails to follow the most basic principles of statutory interpretation. According to Justice Scalia, "statutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[30] Courts must look to the broader body of law containing a particular provision, as well.[31] The view taken by the *Draft Order* extends only to those provisions favorable to the desired

[29] See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, Second Report and Order, 22 FCC Rcd 19633, n.31 (2007) ("Second Order"). Furthermore, the FCC effort to dismiss Section 253 by declaring that any fee that is in addition to the franchise fee is unreasonable is both made without adequate notice and consideration, and is rebutted by the Commission's lengthy discussion in Part C, which actually underscores that competitive inequities would result if the provision of non-cable services by a cable operator are subject to different rules than applied to other entities In their provision of services. rulings. As interpreted by the FCC, a person who sells telecommunications or information service only may be subject to a state utility tax for use of the rights-of-way. Under the Draft Order, a person delivering an identical service via a cable system would avoid that fee altogether (the franchise fee is allocated entirely to cable subscribers under FCC rules). The result is actually inconsistent with the Commission's determinations under Section 253. See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, n. 130 (2018).

[30] *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988).

[31] *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1990).

outcome, while looking at the broader statutory context only long enough to reject the relevance of those provisions.[32]

For example, the *Draft Order* effectively concludes that all franchise requirements must be franchise fees, on the basis that any other interpretation renders the inclusion of an exception for PEG capital support (but not other forms of PEG support) nonsensical. But this logic only holds so long as the *Draft Order* ignores how PEG support has been provided and past Commission decisions regarding cable regulation.[33] Likewise, the treatment of I-Nets ignores Congress' clear intent to authorize and endorse localities requiring the provision of such networks.[34] If Congress had intended the rule the *Draft Order* adopts – that franchising authorities only get the benefits they pay for – there would be no need for these provisions in the Act at all. Their presence evinces an intent that I-Nets be required of franchisees – the *Draft Order* effectively renders those sections superfluous, which the Commission is clear it cannot do.[35]

Ultimately, the *Draft Order* depends on the Commission's assumption that Congress meant for every social contract provision to be treated as a franchise fee unless the requirements fell within one of the exceptions to the franchise fee, or where "essential." That idea, which is obviously critical to the structure of the Act, is not mentioned in the legislative history. The legislative history actually says otherwise, a point the Commission acknowledges, but then dismisses. The Commission's new thesis is not mentioned in any of the amendments to the Cable Act (in 1992 or 1996). As NATOA has shown, it is inconsistent *inter alia*, with Commission regulations, including its regulations governing recovery of the costs of franchising, orders establishing requirements for free service and the Commission's prior endorsement of the *Bowie* letter. The *First Order* in this proceeding cited *City of Bowie* in substantiating an interpretive statement regarding PEG support payments.[36] And in the *Second Order* in this

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[32] *See, e.g. Draft Order,* ¶¶ 20-22.

[33] *See* Comments of Anne Arundel County, et al., MB Docket No. 05-311, at 5-14 (Nov. 14, 2018).

[34] *See, e.g.* 47 U.S.C. §§ 531(b), (f), 541(b)(3)(D).

[35] *See Draft Order* ¶ 18, n. 84 (citing *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.") (additional citations omitted)).

[36] *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, n. 364 (2007) ("*First*

proceeding, the Commission listed *City of Bowie* among "the case law that shaped the Commission's interpretation of Section 622."[37] The *Draft Order* seeks to avoid the impact of those pre-existing regulations and orders by arguing that none of them explicitly say that what may be required is not a franchise fee, but the reason for the silence is obvious: the Commission did not need to address the issue because the Commission did not imagine the requirements were franchise fees. By contrast, if (when it endorsed senior discounts) the Commission intended for them to be paid for out of franchise fees, one would have expected the Commission to say so, given the potential budgetary impacts on local governments. In fact, there would have been no reason why the Commission would have needed to endorse or consider the validity of a deal between a cable operator and a franchising authority if the discounts were to be paid for by the regulator.

Equally unlikely, while the Commission asserts now that the construction costs of I-Nets are franchise fees, in the *First Order,* it emphasized that localities should limit their requests to new entrants to require them to make a fair contribution to the construction of an institutional network.[38] It seems unlikely that what the Commission thought it was requiring was a payment with the left hand, and a deduction with the right. Similarly, in its open video decision, the Commission found that an OVS operator could not be required to build an institutional network, but "once an open video system operator decides to build an institutional network, the 1996 Act's mandate that an open video system operator's PEG access obligations be no greater or lesser than

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Order"), *aff'd sub nom. Alliance for Community Media et al. v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 557 U.S. 904 (2009).

[37] *Second Order*, n. 30.

[38] The Commission previously stated that "[w]e agree with AT&T, FTTH Council, Verizon, and others that completely duplicative PEG and I-Net requirements imposed by LFAs would be unreasonable. Such duplication generally would be inefficient and would provide minimal additional benefits to the public, unless it was required to address an LFA's particular concern regarding redundancy needed for, for example, public safety. We clarify that an I-Net requirement is not duplicative if it would provide additional capability or functionality, beyond that provided by existing I-Net facilities. <u>We note, however, that we would expect an LFA to consider whether a competitive franchisee can provide such additional functionality by providing financial support or actual equipment to supplement existing I-Net facilities, rather than by constructing new I-Net facilities</u>. Finally, we find that it is unreasonable for an LFA to refuse to award a competitive franchise unless the applicant agrees to pay the face value of an I-Net that will not be constructed. Payment for I-Nets that ultimately are not constructed are unreasonable as they do not serve their intended purpose." *First Order,* ¶ 119 (emphasis added).

those of the cable operator become operative."[39] Effectively, the FCC reads this provision to mean that localities must both require, and pay for institutional networks from multiple entities. It is hard to imagine Congress could dictate that arrangement consistent with the Tenth Amendment or the Commerce Clause, or that the Commission imagined it was requiring localities to require, and pay for channel capacity from an OVS. The Commission never confronts, much less explains the departure from prior precedent, and its interpretation of its own prior rulings and regulations, and as a result, its determinations cannot pass muster and are entitled to no deference.[40]

The burden to explain the departure from the status quo should be particularly high where, as here, parties have relied on it for years; in effect, the decision represents the sort of "unexpected surprise" that *Kisor* found so distressing. This is, in a real sense, not an effort to interpret something that has been misunderstood, but an in appropriate attempt to rewrite a law that has long been in place. That effort takes the Commission far beyond the bounds of appropriate administrative interpretation under *Chevron.*

Respectfully submitted,

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[39] *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Sys*., 11 F.C.C. Rcd. 20227 (1996).

[40] *Kisor v. Wilkie* ___ U.S. __, 2019 WL 2605554 (U.S. June 26, 2019); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).