



July 24, 2019

**ELECTRONICALLY FILED**

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW – Lobby Level  
Washington, DC 20554

*Re: 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)*

Dear Secretary Dortch:

The National Association of Telecommunications Officers and Advisors (“NATOA”),<sup>1</sup> the United States Conference of Mayors (“USCM”),<sup>2</sup> the National League of Cities (“NLC”),<sup>3</sup> and the National Association of Towns and Townships (“NATaT”)<sup>4</sup> (the “Municipal Organizations”) write to express our concerns with the draft Report and Order (“Draft Order”) in the above-referenced docket, which is on the tentative agenda for the Commission’s meeting on August 1, 2019.

We strongly object to the Draft Order, which allows cable operators to rewrite agreements they voluntarily entered into so that these companies can reduce the amount they pay to use taxpayer assets for their cable systems, gutting local budgets and jeopardizing critical public safety communications systems. We further object to the Commission’s assertion of sweeping authority in Section 636(c) of the Cable Act to preempt any state or local authority over the non-cable services of cable operators—authority the Communications Act clearly preserves. Nothing in the draft Order will achieve the Commission’s stated goal of advancing broadband deployment. The Order provides

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<sup>1</sup> NATOA’s membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer communications policy and the provision of such services for the nation’s local governments.

<sup>2</sup> USCM is the official nonpartisan organization of cities with populations of 30,000 or more. There are more than 1,400 such cities in the country today. Each city is represented in the Conference by its chief elected official, the mayor.

<sup>3</sup> NLC is the oldest and largest organization representing cities and towns across America. NLC represents 19,000 cities and towns of all sizes across the country.

<sup>4</sup> NATaT represents the interests of more than 10,000 towns and townships across the country at the federal level.

a windfall to cable companies paid for by subscribers and, ultimately, all taxpayers, and establishes a regulatory advantage for cable operators that Congress studiously sought to avoid.

The Municipal Organizations' filings in this docket discuss our many concerns with the *Second FNPRM*, concerns that remain largely unaddressed in the Draft Order. We will not reiterate those arguments here, but rather highlight several issues raised by the Draft Order.

***1. The “In-Kind” Rule is Not Supported by the Language, Intent or Legislative History of the Cable Act.***

The Draft Order largely adopts the reasoning and conclusions of the *Second FNPRM* in finding that so-called “cable-related, in-kind contributions” are “franchise fees.” The basic reasoning in the Draft Order is that the phrase “tax, fee, or assessment of any kind” *could* include non-monetary “exactions” and since Congress did not expressly exclude cable-related franchise obligations from the definition of “franchise fee,” then these obligations must be “franchise fees.” Yet the Draft Order then contradicts this reasoning by concluding that franchise obligations that are “an essential part of the provision of cable service to subscribers” are not “franchise fees” even though Congress did not expressly exclude these obligations, either. Though there are many issues in the Draft Order, this inconsistency alone should compel the Commission to reject this arbitrary interpretation of the Cable Act.

Compounding the issue is the lack of analysis to support the Draft Order's conclusions. While the Sixth Circuit found that the term “franchise fee” could include “non-monetary exactions,” the draft Order fails to analyze whether the cable franchise obligations it labels as “in-kind contributions” are “exactions.” Having concluded that the definition of “franchise fee” is broad and its exceptions narrow, the Draft Order simply concludes that “any non-monetary contributions related to the provision of cable services” that are “a condition or requirement of a local franchise agreement” are, with limited exceptions, a “franchise fee.” The Draft Order nowhere analyzes or explains why franchise requirements are “assessments” or “exactions.” It summarily dismisses in a footnote the argument that nearly every franchise agreement is the result of arms-length negotiations, which are not government exactions.<sup>5</sup> The Draft Order does not “do the work”<sup>6</sup> of explaining why congressionally-authorized franchise obligations—obligations Congress expected franchising authorities (“LFAs”) to include in cable franchises to achieve the purposes of the Cable Act—are in fact LFA-imposed “assessments” or “exactions” for which LFAs should pay in the form of reduced franchise fees.

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<sup>5</sup> Draft Order at n. 54. The Draft Order cites NCTA's argument that, by this logic, even the franchise fee would not be a “franchise fee” because it would be a voluntary agreement. This reasoning ignores the fact that the definition of “franchise fee” includes “any fee ...” and thus franchise fees are included, whether part of arms-length negotiations or not. The issue here is whether non-monetary franchise obligations are “assessments,” which the Sixth Circuit held might be the case only if—at a minimum—they are “exactions.”

<sup>6</sup> *Montgomery Cty. v. FCC*, 863 F.3d 485, 491 (6th Cir. 2017).

Nor does the Draft Order meaningfully address the concern that this new interpretation of the term “franchise fee” undermines the provisions of the Cable Act that reflect Congress’s purpose in passing the law. It simply asserts, “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.”<sup>7</sup> The Draft Order 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 the Draft Order finds these are not “franchise fees.” Having conceded that Congress did not, in fact, explicitly state every exception from the definition of “franchise fee,” this argument has no weight.<sup>8</sup>

The record demonstrates that redefining long-standing franchise obligations to be “franchise fees” will impact LFAs’ ability to retain those franchise obligations.<sup>9</sup> This will thwart Congress’s express purposes in the Act, including to “establish franchise procedures and standards . . . which assure that cable systems are responsive to the needs and interests of the local community” and to “provide the widest possible diversity of information sources and services to the public[.]”<sup>10</sup> Repeating the mistakes of the 2007 *Second Report and Order*,<sup>11</sup> the Draft Order again does not adequately consider this concern.

Instead, the Draft Order narrowly focuses on the definition of “franchise fee” and ignores the legislative history to assert that this term includes cable franchise obligations, then concludes that Congress must have intended for LFAs to pay for these franchise obligations in the form of reduced franchise fees. Because it employs this circular logic, the Draft Order never addresses why Congress would have authorized LFAs to include franchise obligations aimed at fulfilling congressional goals and yet—without ever expressly saying so—expected LFAs to accept a fair market value reduction in their franchise fees to pay for it. The Draft Order does not acknowledge that this framework disincentivizes LFAs from including these franchise provisions in cable franchises, and thus thwarts Congress’s purpose, which undermines the entire theory that Congress intended (most, but not all) franchise provisions to be “franchise fees.”

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<sup>7</sup> Draft Order at ¶ 20.

<sup>8</sup> As discussed in our Comments in this docket, Congress intended franchise fees to generally include only monetary payments. *See* Comments of NATOA, et al. at 5 (Nov. 14, 2018). It would not have listed every franchise-related cost as an exception to the franchise fee definition; it assumed those costs were not taxes, fees, or assessments in the first place, and thus there was no need to exclude them.

<sup>9</sup> *See, e.g.*, Comments of NATOA, et al. at 9-12; Comments of Anne Arundel County et al. at 30-34 (Nov. 14, 2018); Massachusetts Municipal Association *Ex Parte* letter dated July 17, 2019.

<sup>10</sup> 47 U.S.C. § 521(2), (4).

<sup>11</sup> *In 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, Second Report and Order, 22 FCC Rcd. 19633 (2007), *order on reconsideration*, 30 FCC Rcd. 810 (2015) (“*Second Report and Order*”), *review granted in part, sub. nom., Montgomery Cty.*, 863 F.3d 485 (6th Cir. 2017).

The Draft Order assumes these negative impacts will be blunted by its “expansion of the ‘capital cost’ exclusion” and its deferral of a decision on whether or not PEG channel capacity can be excluded from franchise fees.<sup>12</sup> This assertion is wrong. The Draft Order will impact PEG access.

First, the “expanded” definition of capital costs is not the boon to LFAs the Draft Order supposes. As the Draft Order notes, the “new” definition of the term stated in the Draft Order “was affirmed by the Sixth Circuit” in 2008.<sup>13</sup> Based on that decision, LFAs and cable operators have treated certain PEG equipment as “capital costs” regardless of when PEG facilities themselves were constructed.<sup>14</sup> While we appreciate that the Draft Order reaffirms this practical understanding, we do not anticipate it will lead to a significant change in current practice and thus will not meaningfully soften the impact of the Draft Order.

Second, the temporary delay in deciding how to treat PEG channel capacity does not save PEG access from the impacts of the Draft Order. The many PEG access providers that rely on franchise fees for their operating budgets will feel the impact of the franchise fee reductions permitted by the Draft Order even where channel capacity is not included. The permissible offsets for I-Nets alone may eliminate all franchise fees in some jurisdictions. Further, it is not clear how other PEG-related franchise provisions, such as inclusion of PEG on interactive program guides and on-demand services, will be impacted by the Draft Order. So while their channels may remain in place for the time being, PEG access providers may not have the funds to operate them nor the bargained-for obligations to ensure that their programming is treated comparably to other programming on the cable system.

We note that NCTA has taken the position that, based on the Draft Order, use of PEG transport facilities is not a capital cost and thus would be offset from franchise fees.<sup>15</sup> We do not read the Draft Order as addressing this issue, but if NCTA’s position is correct, then LFAs will be obligated to pay to get PEG programming onto the cable system even though PEG channel capacity is not addressed in the Draft Order. It is not at all clear what the fair market value of use of PEG transport facilities would be, and thus PEG channels remain in jeopardy under NCTA’s

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<sup>12</sup> Draft Order at ¶ 53.

<sup>13</sup> Draft Order at ¶ 39, n. 162.

<sup>14</sup> Some franchise agreements reflect this understanding. For example, the 2012 Comcast franchise agreements with the jurisdictions in the Mt. Hood Cable Regulatory Commission define capital costs as “the expenditure of funds for services, products or other resources, whose useful life can be expected to exceed a period of one year or longer.” [http://www.mhcr.org/wp-content/uploads/2014/08/ops\\_renewal\\_Portland-Comcast-Renewal-Franchise-Final.pdf](http://www.mhcr.org/wp-content/uploads/2014/08/ops_renewal_Portland-Comcast-Renewal-Franchise-Final.pdf); [http://www.mhcr.org/wp-content/uploads/2014/08/ops\\_renewalEast-County-Comcast-Renewal-Franchise-Final.pdf](http://www.mhcr.org/wp-content/uploads/2014/08/ops_renewalEast-County-Comcast-Renewal-Franchise-Final.pdf). The Metropolitan Area Communications Commission’s 2015 franchise with Comcast uses a similar definition. [http://maccor.org/images/stories/franchise-agreements/Final\\_FranchisewithAttachments\\_62015.pdf](http://maccor.org/images/stories/franchise-agreements/Final_FranchisewithAttachments_62015.pdf).

<sup>15</sup> See NCTA Notice of *Ex Parte* dated July 18, 2019.

interpretation, as many LFAs will not be able to absorb the loss of franchise fees to pay cable operators the “value” of using PEG transport facilities.

Finally, it is significant that the Draft Order does not contemplate that PEG channel capacity may fall under the newly-created exemption for franchise provisions that are “an essential part of the provision of cable service to subscribers”—a conclusion that is at odds with Congress’s view of PEG, as explained above. The sole question is whether or not channel capacity is a capital cost. This unanswered question leaves LFAs to set next year’s budgets without knowing what may happen to a potentially significant portion of their franchise fee revenue. If the subsequent action on this issue is anything like the Draft Order, LFAs may have only 30 days to react to any changes, which is not enough time to address the budget shortfalls or make other arrangements for PEG channel capacity. Thus, what LFAs take from this Draft Order is not that PEG has been preserved, but rather that this Commission does not view PEG as an essential part of cable services and may reclassify PEG channel capacity as a “franchise fee” in the near future, with little time to adjust to this radical change.

## ***2. The New Standard for What Is a “Franchise Fee” Is Arbitrary and Ambiguous.***

As noted above, the Draft Order offers a new standard for what constitutes a “franchise fee” under the revised definition. While neither the standard offered in the *Second FNPRM*<sup>16</sup> nor the new standard (“franchise terms that are an essential part of the provision of cable service to subscribers”) has any basis in the language of the Cable Act, the new standard has additional flaws.

As an initial matter, we object to the inclusion of a new standard in the Draft Order that was not included in the *Second FNPRM*. There has been no opportunity for commenters to comment on this new standard and thus no ability for the Commission to fully understand the implications of this new standard. If the Commission is inclined to move forward with this definition, we ask that it first seek comment on this significant change from the *Second FNPRM*.

With respect to the substance of this new standard, the Draft Order provides no analysis of why franchise obligations that are “an essential part of the provision of cable service to subscribers” are not “taxes, fees, or assessments of any kind.” The Order’s entire analysis of what is a “franchise fee” turns on a reading of the Act in which the definition of “franchise fee” is “expansive[]” and the exceptions narrow, resulting in the “broader definition ... sweep[ing] in all cable-related, in-kind contributions.”<sup>17</sup> Because the Act includes exclusions for only “two very specific kinds of” franchise obligations, the Draft Order concludes that “Congress did not intend to establish a general exemption for all” franchise obligations.<sup>18</sup>

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<sup>16</sup> See *Second FNPRM* at ¶ 21 (suggesting a franchise provision that was “specifically for the use or benefit of the LFA or any other entity designated by the LFA” and “may result in profit to the cable operator” would be a “franchise fee”).

<sup>17</sup> Draft Order at ¶ 14; 16.

<sup>18</sup> Draft Order at ¶ 15-16.

The Draft Order’s exception for franchise provisions that are “essential” to providing service does not fit within this reading. Having determined—erroneously—that the only exceptions to the definition of “franchise fee” are those expressly stated in the Act, it is arbitrary for the Draft Order to then assert a new, ambiguous exception that is not rooted in any language in the Act.

The Draft Order attempts to avoid this problem by claiming that franchise obligations that are an “essential part” of services are not “taxes, fees, or assessments” in the first place. But given its determination that the phrase is expansive, the conclusory statement that these “essential” provisions are not swept up in the definition is not enough. The Draft Order asserts, without support or discussion, that these “essential” provisions, such as build-out and customer service requirements, “are simply part of the provision of cable service under a franchise.”<sup>19</sup> But Congress clearly thought that PEG access and other franchise obligations designed to meet community needs were an essential part of providing cable service, too: “The ability of a local government entity to require 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, and H.R. 4103 explicitly grants this power to the franchising authority.”<sup>20</sup>

While we agree with the Draft Order’s conclusion that build-out and customer service obligations are not “franchise fees,” the fact that the Draft Order includes a completely new standard from that proposed in the *Second FNPRM* demonstrates that this exception to the redefined term “franchise fee” is arbitrary. If including these exceptions to the new definition requires an inconsistent and arbitrary reading of the Act—as it surely does—the Commission should have serious reservations about moving forward with the proposed redefinition of “franchise fees.”

### ***3. The Draft Order Fails to Address Significant Issues Raised by Allowing “Fair Market Value” Deductions from Franchise Fees.***

As explained in our previous filings in this docket, that the Draft Order authorizes franchise obligations to be quantified at fair market value further illustrates the degree to which this new interpretation is outside any permissible reading of the Cable Act.<sup>21</sup> Nowhere does the Act or its legislative history indicate that “franchise fees” would include the fair market value of franchise obligations.

To the contrary, where franchise obligations are discussed at all, the Act references costs, not fair market value. For example, Section 626 requires that, in the franchise renewal process, LFAs consider the cost to the cable operator in meeting the LFA-identified cable-related community

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<sup>19</sup> Draft Order at ¶ 57.

<sup>20</sup> H.R. Rep. No. 98-934, at 26 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655 (“House Report”).

<sup>21</sup> Comments of NATOA et al. at 11.

needs and interests.<sup>22</sup> Not only does this Section not discuss fair market value, it clearly indicates that the costs of franchise obligations were to be borne by cable operators, undermining the entire idea that “franchise fees” include franchise obligations. The Draft Order dismisses this argument, accepting NCTA’s assertion that, “[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.”<sup>23</sup> But if Congress intended these so-called “exactions” to be deducted from franchise fees at their fair market value, then Section 626 would have required LFAs to consider the value, not the cost, of the franchise obligations they identified in the renewal process.

Not only does the Act not support the notion that “franchise fees” include the fair market value of franchise obligations, the Draft Order fails to address important implications of its interpretation. For example, the Draft Order finds that “in-kind contributions related to PEG access facilities,” including “PEG transport facilities,” are “franchise fees.”<sup>24</sup> While the Draft Order finds that construction of these facilities are capital costs and thus excluded from “franchise fees,” maintenance costs are not excluded.<sup>25</sup> The Draft Order later instructs cable operators to calculate franchise obligations at fair market value without addressing whether this applies to the calculation of PEG transport facility maintenance costs or how one would determine the “fair market value” of what presumably is a readily-ascertainable actual cost.

Nor is there any guidance about how the fair market value of any other franchise obligations should be calculated. The Draft Order cites to NCTA’s Reply Comments in which they use the example of PEG advertisements, acknowledging these spots involve “minimal” cost, but asserting the “opportunity cost, however, is quite large, since the cable company would otherwise be able to sell this time to run another advertisement.”<sup>26</sup> Yet the record shows that in some franchise agreements, PEG ads may be placed only in “unsold advertising availability spots,” meaning “there is literally no cost to the operator, nor any lost revenue opportunity.”<sup>27</sup> The Draft Order makes no mention of whether or how these circumstances would impact the calculation of fair market value.

Similarly, the record shows that in many cases I-Nets were paid for directly by LFAs or by subscribers through line item pass throughs.<sup>28</sup> The Draft Order does not address how the fair market value of I-Nets would be calculated by a cable operator, and certainly does not address if and how it

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<sup>22</sup> 47 U.S.C. § 546(c)(1)(D); 47 U.S.C. § 542.

<sup>23</sup> Draft Order at ¶ 21.

<sup>24</sup> Draft Order at ¶ 27.

<sup>25</sup> Draft Order at ¶ 49.

<sup>26</sup> NCTA Reply Comment at 18-19.

<sup>27</sup> Northern Dakota County Cable Communications Commission Reply Comments (“NDC4 Reply”) at 10.

<sup>28</sup> See, e.g., Comments of Anne Arundel et al. at 32-33; Minnesota Association of Community Telecommunications Administrators *Ex Parte* letter dated March 5, 2019 (“MACTA *Ex Parte*”) at 3-4; NDC4 Reply at 12;15-16.

should be calculated where the cable operator did not pay to construct the I-Net. NCTA suggests the calculation should be based on the “rate that cable operators are charging third parties for a comparable service.”<sup>29</sup> The Draft Order does not adopt or even address this suggestion, and there are serious questions about how that calculation could be appropriate where the cable operator did not have to pay to construct the I-Net facilities. Further, in some instances the I-Net paid for by the LFA or subscribers is used to provide services to commercial customers that are not affiliated with the LFA.<sup>30</sup> In those cases, the cable operator has already reaped a windfall from the I-Net by using it to provide profitable services to third parties even though they did not have to incur the full construction costs of the network.<sup>31</sup> Surely those circumstances should be considered before any franchise fee offsets are allowed.

The failure of the Draft Order to address these and many other issues related to the “fair market value” calculation will lead to uncertainty and litigation. Where LFAs cannot put their scarce resources toward challenging the cable operators’ fair market value calculation, all taxpayers will end up paying for the “value” of franchise obligations that in many cases subscribers or LFAs already paid for.

#### ***4. The Mixed-Use Rule Tips the Regulatory Scale in Favor of Cable Operators.***

The Draft Order stands in direct contradiction to the congressional mandate that “telecommunications services ... 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.”<sup>32</sup> The attempt to avoid this clear statement of congressional intent is unavailing.

The Draft Order states: “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.” It goes on to conclude that “any fees on telecommunications services that exceed the five-percent cap ... are not ‘fair and reasonable.’”<sup>33</sup> As the Draft Order notes, Congress understood in drafting the 1996 amendments to the Cable Act that cable operators were providing non-cable services over their cable systems.<sup>34</sup> Had Congress intended Title VI to exempt cable operators from fees on their non-cable services, or found those fees to be unfair and unreasonable, it would have

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<sup>29</sup> NCTA Comments at 53.

<sup>30</sup> See, e.g., MACTA *Ex Parte* at 3-4; NDC4 Reply at 15-16.

<sup>31</sup> Moreover, in many cases there are restrictions on the LFA’s use of the I-Net capacity to ensure that it is only used for not-for-profit educational and governmental purposes, and for PEG transport (in lieu of requiring independent PEG transport facilities). This is unlike a commercial contract.

<sup>32</sup> H.R. Rep. No. 104-458, at 180 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 223 (“Conference Report”).

<sup>33</sup> Draft Order at ¶ 96.

<sup>34</sup> Draft Order at ¶ 73.

said so. But it did not, and in fact the history shows that they did not do so because that was not their intent. The Draft Order isn't merely a narrow reading of the legislative history, it takes an eraser to it.

In fact, the Telecommunications Act of 1996 itself preserves these rights of way fees and requirements, and Congress again made clear that it expected those fees to be (among other things) “competitively neutral and nondiscriminatory.”<sup>35</sup> The Draft Order’s reading of the Act’s history requires one to believe that Congress expected fees on telecommunications providers to be “competitively neutral and nondiscriminatory,” yet in the very same Act gave cable operators a free pass to avoid paying any fees on these services, which they knew would compete with non-cable operators’ services. Such a reading is unsupportable.

As discussed in our previous filings in this docket, the Draft Order’s mixed-use rule creates an unlevel playing field and gives cable operators a competitive advantage in providing non-cable services.<sup>36</sup> What’s more, this is a significant departure from past Commission precedent without any justification for this radical change. The Commission’s original “mixed-use rule” from the *First Order*—the rule the Commission purports to be considering extending to certain incumbent cable operators in the *Second FNPRM*—does not preempt local authority outside the context of cable franchising authority. The mixed-use rule as articulated in the *Second Order* similarly “does not affect the authority of local authorities to regulate non-cable services under other applicable regulatory regimes.”<sup>37</sup> The Draft Order in many instances recites a similar version of the rule<sup>38</sup> but ultimately concludes—without any acknowledgement that it is significantly rewriting its original rule—that the Cable Act “expressly preempt[s] 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.”<sup>39</sup>

Adding to the confusion, the Draft Order “reaffirms” its application of the original mixed-use rule to incumbent cable operators that are common carriers, which the Sixth Circuit did not vacate.<sup>40</sup> It then turns to the discussion of whether to extend this rule to incumbent cable operators that are not common carriers, ultimately concluding in the affirmative. Yet somewhere along the way, without explanation, the rule morphed from a statement that Title VI does not serve as the source of authority to regulate these services into a sweeping preemption of that authority. The Draft Order thus “reaffirms” a rule it then appears to rewrite, with no explanation of whether or how its

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<sup>35</sup> 47 U.S.C. § 253(c).

<sup>36</sup> Reply Comments of NATOA et al. at 11-17 (Dec. 14, 2018).

<sup>37</sup> Verizon Comments at p. 6, n. 12.

<sup>38</sup> See, e.g., Draft Order at ¶¶ 68-69; 71; 73-74; 78.

<sup>39</sup> Draft Order at ¶ 82.

<sup>40</sup> Draft Order at ¶ 70.

new rule applies to new entrants and incumbents that are common carriers—the two categories of operators to which the old iteration of the mixed-use rule applied.<sup>41</sup>

##### ***5. The Commission Does Not Have Sweeping Preemption Authority to Establish the Mixed-Use Rule.***

Before addressing the substantive issues with the Draft Order’s preemption analysis, there is another procedural issue in that the *Second FNPRM* did not assert that Section 636(c) could serve as broad authority to preempt actions taken by states and local governments outside the context of cable franchising even where those actions do not target or discriminate against cable operators. Section 636(c) is referenced once in the *Second FNPRM*, as a secondary reference in footnote 126. As we noted with respect to the new exemption from “franchise fees” for “essential parts” of cable service, the Commission should not act under the auspices of Section 636(c) without notice and additional opportunity to comment.

With respect to the proposed preemption, the Municipal Organizations object to the broad assertion of Commission authority in the Draft Order. Section 636(c) does not grant the Commission the authority to preempt actions states or local governments may take outside the context of Title VI. As but one example of the overreach demonstrated in the Draft Order, it states: “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.” It is not necessary for the Communications Act to “expressly authorize” fees or other requirements, as the right to charge fees or establish requirements is an incident of the ownership or control of property, or is an essential part of State sovereignty. Hence, when the Commission says that states and localities cannot apply these fees to cable operators’ voice services that compete with non-cable operators’ voice services unless expressly authorized, that holding is inconsistent with preemption principles, the statutory text, and the legislative history, which clearly shows that the intent was to *preserve* local authority:

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<sup>41</sup> There is further confusion in the Draft Order in that it repeatedly conflates the fact that Title VI does not authorize LFAs to impose obligations on cable operators’ non-cable services with the preemption of any authority—even if found outside of Title VI—over these services. For example, in footnote 296, the Draft Order characterizes an acknowledgement that the Cable Act does not grant LFAs authority over information services as “appear[ing] to concede that Section 624(b) precludes LFAs from regulating ... information services.” In that same footnote, the Draft Order implies that the Municipal Organizations agree with the *Second FNPRM* that Section 624 preempts local authority over non-cable services. Our Comments, which reference Section 621(b)(3)(D), refer to limits on the conditions an LFA can impose *in a cable franchise*. It says nothing about the scope of Section 624, and in fact the subsequent footnote in our Comments states (once again) our position that Section 624 is in no way a preemption of local authority that may be exercised outside the context of a cable franchise. The Draft Order confuses the significant distinction between what is authorized or precluded from being included in a cable franchise with preemption of authority exercised outside the context of Title VI. As noted in the legislative history, the latter authority may be derived (or preempted) at the state or local level, but Congress clearly did not intend Title VI to preempt this authority—nor did it include any words to that effect in the Act itself. *See* Conference Report at 180.

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 data transmission or voice communication, that compete with services provided by telephone companies.<sup>42</sup>

As noted above, Congress similarly maintained state and local authority over non-cable services in the 1996 amendments to the Act. The Draft Order’s sweeping preemption cannot be reconciled with these clear statements from Congress that the Cable Act does not preempt local authority over cable operators’ non-cable services.

Not so long ago, the Commission itself agreed with this statement. In the *Second Report and Order*, the Commission acknowledged the limits of its finding that a “cable operator is not required to pay cable franchise fees on revenues from non-cable services.” It stated “[t]his finding, of course, does not apply to non-cable franchise fee requirements, such as any lawful fees related to the provision of telecommunications services.”<sup>43</sup> The Draft Order does not acknowledge this finding nor explain the basis for suddenly changing course.

For the reasons discussed above, the Municipal Organizations urge the Commission not to adopt the Draft Order.

Sincerely,



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<sup>42</sup> House Report at 41.

<sup>43</sup> *Second Report and Order* at ¶ 11, n. 31.