Thomas A. Schatz
President

September 13, 2018

Chairman Ajit Pai
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Commissioner Jessica Rosenworcel
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Commissioner Michael O'Rielly
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Commissioner Brendan Carr
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 Chairman Pai, Commissioners Rosenworcel, O'Rielly, and Carr,

On behalf of the more than one million members and supporters of Citizens Against Government Waste (CAGW), I am writing to provide our views on the upcoming proceeding on the Second Further Notice of Proposed Rulemaking in the matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 (the "Act") (MB Docket No. 05-311).

In 2015, the Federal Communications Commission (FCC) reaffirmed certain limitations on local franchising authorities (LFAs) (MB Docket No. 05-311). However, some of these limitations were contested by LFAs before the United States Court of Appeals for the Sixth Circuit in *Montgomery County, Md., et al. v. FCC, et. al*, including the FCC's interpretation of a "franchise fee" as defined by 47 U.S.C. § 542(g)(1) to include noncash and cable-related exactions; and, the FCC's "mixed-use" rule, wherein the FCC determined that an LFA could only regulate the provision of cable services over "cable systems" as defined by the Act.[1] The court remanded

[1] *Montgomery County, Maryland, et al. (Petitioners) v. Federal Communications Commission, et al. (Respondents), and United States Telecom Association, et al. (Intervenors), (Nos. 08-3023/15-3578),* On Petitions for Review of Orders of the Federal Communications Commission. Nos. 07-190; 15-3., United States Court of Appeals for the Sixth Circuit, July 12, 2017, http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0147p-06.pdf.

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sections of the docket back to the FCC for further review.

This proposed rulemaking addresses the court's concerns on remand by clarifying that cable-related, in-kind contributions required by LFAs from cable operators as a condition or requirement of a franchise agreement should be treated as "franchise fees" subject to the statutory 5 percent franchise fee cap; capital costs for public, educational, and government channels required by a franchise agreement are the only cable-related contributions that are not subject to the statutory 5 percent franchise fee cap; and, LFAs cannot use their video franchising authority to regulate non-cable services offered over cable systems by incumbent cable operators, except where LFAs regulate I-Nets.

As the commission is aware, the communications ecosystem continues to converge and evolve, with diverse stakeholders offering similar services, including broadband internet access services, video programming distribution, and voice services (including voice over IP). As often happens when companies expand their offerings, LFAs have perceived them as an opportunity to increase revenue into local government coffers. The city of Eugene, Oregon is a prime example of this practice. After a court decision confirmed the municipality's ability to impose licensing fees and other taxes on cable right-of-way use, the city began using these new revenues to pay down its public pension debt.[2]

These additional fees and taxes are not just borne by companies striving to deploy new networks across the country, they are also passed along to consumers to offset the increased cost to deploy new services.[3] By increasing the cost to use rights-of-way, these municipalities are creating a barrier to entry for new broadband deployment in their communities.

The proposed rulemaking being considered on September 26, 2018, would limit the power of LFAs to impose fees and other requirements that would create disincentives and otherwise inhibit broadband deployment, thereby maintaining a national framework for cable infrastructure, including facilities used to deliver broadband services. By reaffirming its prior decision to restrict LFAs from imposing duplicative franchise and fee requirements on non-cable services offered by franchise cable operators, or on the equipment used to deliver these services, the commission will help prevent localities from gaming the system and holding up future broadband deployment.

In addition to this proposed rulemaking, we ask that the commission consider taking further action to preempt local efforts to invent or impose new fees, taxes, or other impediments to provisioning broadband over existing or future cable infrastructure. In the case of *City of Eugene v. Comcast*, the Oregon Supreme Court determined that the imposition of licensing fees on cable modem services over public rights of way was not a tax barred by the Internet Tax Freedom Act, nor was it a franchise fee barred by the Cable Act.[4] However, we assert that these additional

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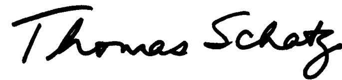
[2] Christian Hill, "Comcast to pay nearly $13.8 million to Lane County Agencies*," The Register-Guard*, July 7, 2018, https://www.registerguard.com/news/20180707/comcast-to-pay-nearly-138-million-to-lane-county-agencies.
[3] Christian Hill, "Comcast charging customers for city fee," *The Register-Guard*, September 10, 2016, https://www.registerguard.com/rg/news/local/34777474-75/story.csp.
[4] *City of Eugene, an Oregon municipal corporation v. Comcast of Oregon II, Inc., (CC 160803280; CA A147114; SC S062816),* On review from the Court of Appeals, Supreme Court of the State of Oregon, May 26, 2016, https://cases.justia.com/oregon/supreme-court/2016-s062816.pdf?ts=1464274982.

"licensing fees" are a hidden tax that is passed on to consumers for the privilege of operating internet service using the city's rights of way.[5]

Such impediments slow the deployment of innovative new services to consumers and detract from efforts to bridge the digital divide. Because these fees constitute a tax on internet access, they are at odds with congressional intent when the Permanent Internet Tax Freedom Act became law in 2016.

Thank you for your consideration of these remarks, as you review 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.

Sincerely,



President
Citizens Against Government Waste

[5] *Ibid,* Christian Hill, "Comcast charging customers for city fee.