**Before the**

**Federal Communications Commission**

**Washington, D.C. 20554**

In the Matter of )

)

Implementation of Section 621(a)(1) of the Cable ) MB Docket No. 05-311

Communications Policy Act of 1984 as Amended )

By the Cable Television Consumer Protection and )

Competition Act of 1992 )

**COMMENTS OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION**

1. Introduction

The International Municipal Lawyers Association, Inc. (“IMLA”) appreciates the opportunity to file comments on the Commission’s Second Further Notice of Proposed Rulemaking (“FNPRM”) in the docket. IMLA is a nonprofit, nonpartisan professional organization consisting of over 2,500 members. IMLA’s membership is comprised of local government entities, including cities, counties and subdivisions thereof, state municipal leagues, and individual attorneys representing governmental interest. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Since its establishment in 1935, IMLA has advocated for the rights and privileges of local governments and is the oldest and largest association of attorneys representing municipal interests. IMLA’s mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on key legal issues.

We strongly oppose the Commission’s tentative conclusion that cable-related in-kind[[1]](#footnote-1) contributions are cable franchise fees subject to the statutory five percent fee cap, and instead agree with the United States Court of Appeals for the Sixth Circuit in *Montgomery County v. Federal Communications Commission* for the reasons described below.

1. The Commission’s Interpretation of the Definition of a Franchise Fee Undermines Congressional Intent

The Commission errs in its tentative conclusion that the treatment of cable-related in-kind contributions as franchise fees is consistent with statutory language and legislative history is incorrect. The contention that a cable-related in-kind contribution is a franchise fee conflicts with Congressional intent because, as the Sixth Circuit stated, this contention undermines various provisions of the Cable Act, which allow in some instances and require in others, LFAs to impose cable-related obligations as part of their cable franchises.[[2]](#footnote-2) For example, the Cable Act allows LFAs to require channel capacity for public, educational, or government programming (“PEG”) as a condition of the franchise agreement.[[3]](#footnote-3) Moreover, the Act allows local governments to require institutional networks (“i-Nets”) designated for educational and governmental use.[[4]](#footnote-4) Finally, the Act requires LFAs to ensure potential residential cable subscribers are not denied cable service due to the income of the area where these residents reside, which often results in build-out obligations imposed by LFAs as required under the Act.[[5]](#footnote-5)

It stands to reason that if Congress intended to subject all cable-related in-kind contributions to the statutory franchise fee cap, it would not have created these statutory allowances and requirements for LFAs to exact. Instead, Congress would have merely written the statute to require exactions of any kind regardless of whether they are monetary or in lieu of monetary contributions be subject to the statutory 5% fee cap.

Aside from our concerns as outlined above, the Commission does not have the authority to change the nature of franchise fees under *Chevron*. Considering that the Act has been interpreted the same way for close to 40 years lends itself to our contention that it is not ambiguous. Because the Act lacks ambiguity, the Commission is not empowered to rewrite an act of Congress to suit its preference. The Act does not allow a federal agency to regulate the amount of the franchise fee.[[6]](#footnote-6) By redefining “franchise fee”, it seems as if the Commission seeks to regulate the amount of the franchise fee itself and how that fee is paid. Congress clearly intended for the issue of franchise fees to be regulated by statute, not in the hands of the agency. From a more practical standpoint, the definition of “franchise fees” and the LFA’s exercise of their rights under the statute have stood the test of time. Each cable provider flourished financially until their own high rates and imperious practices led to cord cutting, thereby switching their product from cable to Internet and wireless services.

1. Expanding the Definition of Franchise Fees will Undermine LFAs Ability to Impose Obligations on Franchisees

For similar reasons, treating cable-related in-kind contributions as franchise fees would undermine the provisions of the Act that require or authorize LFAs to impose such obligations on franchisees, not as contributions, but as an exercise of the Congressional intent to provide the public important benefits derived from the award of the franchise. Should the retail value of cable-related in-kind contributions will undoubtedly exceed the cap on franchise fees, will the LFAs be forced to pay the cable providers? In such a situation, it seems that the LFAs would owe cable providers and if this were to happen, localities would have to terminate public access channels and other services, specifically permitted in the Act and designed to benefit the public whose rights of way are being appropriated for use by the cable companies. In some areas the affect could lead to the complete loss of local public access in jurisdictions where, under the state constitution or state law, government entities cannot provide funds to one another to pay for services.

1. Other Considerations Regarding Expanding the Definition of Cable Franchise Fees

There are other considerations the Commission has not addressed in the Second FNPRM regarding changes to the franchising rules. These changes will burden local governments and the constituents they serve.

One issue is that of certainty. As the Sixth Circuit pointed to, it is unclear what “in-kind” includes; it is a broad brush to paint with and the Commission has not released guidance on what falls under this category.[[7]](#footnote-7) It is also unclear what the Commission considers a cable versus non-cable purpose. It is unclear how the value of in-kind assets will be ascertained, whether the Commission will require a deduction in the depreciated value of those assets today, and it is unclear what the acquisition price of those assets would be. Furthermore, there are questions such as how the value of these non-monetary in-kind contributions will be calculated and what happens when that value exceeds the statutory 5% fee cap.

There are also administrative and public safety issues for local governments associated with the Commission’s tentative conclusions. First, there is the burden of renegotiating agreements between LFAs and cable franchisees to comply with these changes to consider and absent a renegotiation the legal right to use the rights of way will fall into question. This type of renegotiation would require significant time and resources from local governments across the country with the potential to dissolve into costly legal battles. Second, the tentative conclusions implicates public safety. For many of our members, much of their public safety planning has been tied to these cable franchising agreements and the fate of those plans will have a great impact on public safety. The question of who must pay for the equipment and networks involving public safety, where that money will come from, and what the cost will be is not one that should be taken lightly considering the potential consequences.

IMLA is also concerned that the Commission may be upending settled law and complicating the existing legal landscape due to the interaction between the Commission’s potential rules (tentative conclusions) with existing state laws, state regulatory frameworks, and even state constitutional mandates as noted by other commenters.[[8]](#footnote-8)

In the face of these considerations, it is unwise to revise the cable rules in such a significant way without also releasing guidance for LFAs on what is and is not allowed before enacting such rules. Guidance will allow local governments and other similarly situated commenters to have a true understanding of the legal landscape should the Commission act in the manner discussed in the FNPRM.

Finally, we echo the concerns of the Georgia Municipal Association that the FNPRM seems to address an imbalance created by the Commission in the Third Report and Order of the Accelerating Wireless Broadband Deployment proceeding, which seems to have placed cable operators at a disadvantage.[[9]](#footnote-9) On this note, we would like to add our observation that, like in the Accelerating Wireless Broadband Deployment proceeding, when local governments require a relatively small fee from private operators for use of the public right-of-way the Commission has restricted collection of such fees to cost of maintenance, however when private operators seek to charge local governments for use of negotiated in-kind exactions, the Commission seeks to allow private operators to exact fair market value from local governments. We find it unsettling that a federal agency would establish an imbalance so clearly designed to harm taxpayers and local communities.

1. Conclusion

On behalf of our members, IMLA strongly disagrees with the Commission’s tentative conclusions relating to the treatment of cable-related in-kind contributions as franchise fees. IMLA endorses the comments of the municipalities who have commented in this proceeding.

Respectfully submitted,

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1. We contest the use of the term “in-kind” because requirements by local franchising authorities (“LFAs”) are not in-kind payments or contributions in lieu of money, but instead are independent requirements set by the LFAs. The Sixth Circuit in *Montgomery County v. FCC* highlights this issue with calling these requirements an “in-kind” contribution. *See Montgomery Cty v. FCC*, 863 F.3d 485, 491-92 (6th Cir. 2017). Additionally, the use of the term “contribution” implies the services the cable franchisees are required to provide are services to the local government itself. This is not the case. Instead these exactions benefit subscribers to the cable service, therefore it does not make sense to reduce rent payments because a subset of the taxpayers benefit from exactions. Again exactions are not a benefit to the LFAs, instead they are a benefit to the public and to a subset of taxpayers. The LFAs are not looking to profit off of these cable franchise agreements. For ease of reference, we use the term “in-kind contribution” throughout our filing, but wish to maintain our perspective that this is an inaccurate term for the reasons stated above. [↑](#footnote-ref-1)
2. *Montgomery Cty v. FCC*, 863 F.3d 485, 491-92 (6th Cir. 2017) [↑](#footnote-ref-2)
3. 47 U.S.C. § 531(b) [↑](#footnote-ref-3)
4. 47 U.S.C. § 541 (b)(3)(D) [↑](#footnote-ref-4)
5. 47 U.S.C. § 541(a)(3); *see also Montgomery Cty v. FCC*, 863 F.3d 485, 491 (6th Cir. 2017) (explaining it is contrary to the intent of Congress for the Commission to include both

   requirements imposed by statute and allowances made by statute as a franchise fee) [↑](#footnote-ref-5)
6. *See* 47 U.S.C. § 542(i) (stating, “any Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section”) [↑](#footnote-ref-6)
7. *See Montgomery Cty v. FCC*, 863 F.3d 485, 488-92 (6th Cir. 2017) [↑](#footnote-ref-7)
8. Jurisdictions who will encounter these issues include municipalities in California, Texas, and Michigan, though this list is not exhaustive. One comment IMLA wishes to highlight for the Commission is that of Lansing, MI who addresses this issue in greater detail. [↑](#footnote-ref-8)
9. *See* Georgia Municipal Association, Comments at pg. 1-2 [↑](#footnote-ref-9)