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

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF REGIONAL COUNCILS AND THE NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS

Nancy L. Werner
General Counsel
National Association of Telecommunications Officers and Advisors

Tom Cochran
CEO and Executive Director
The United States Conference of Mayors

Leslie Wollack
Executive Director
National Association of Regional Councils

Clarence E. Anthony
CEO and Executive Director
National League of Cities

Jennifer Imo
Executive Director
National Association of Towns and Townships

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SUMMARY OF REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF REGIONAL COUNCILS AND THE NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS

The National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Regional Councils and the National Association of Towns and Townships submit these Reply Comments in response to the few commenters who filed in support of the Second Further Notice of Proposed Rulemaking in the above-referenced docket.

The overwhelming majority of commenters objected to the proposed rules. The few supportive comments fail to show a need for the proposed rules, nor any support in the Cable Act or its legislative history for altering the decades-old understanding of the meaning and intent of the Cable Act.

Both cable operators and franchising authorities have long understood that cable franchise requirements such as public, educational and government channels are commitments that are separate from, and not included in, the calculation of franchise fees. This understanding is rooted in the plain language of the Cable Act and bolstered by its legislative history. There is no support for essentially rewriting the Cable Act and undermining the bargained-for provisions in thousands of cable franchise agreements across the country.

Similarly, commenters do not provide support for a mixed-use rule that preempts local governments' authority to regulate non-cable services provided by franchised cable operators. There is no basis in the Cable Act—and it is contrary to the legislative history—to assert that a cable franchise replaces all regulatory authority of the local government that issued the franchise.

Both proposals are contrary to the unambiguous language of the Cable Act and the clear intent of Congress. We urge the Commission not to adopt the tentative conclusions articulated in the Second Further Notice of Proposed Rulemaking.

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In the Matter of	)	
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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	)	

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF REGIONAL COUNCILS AND THE NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS

I. INTRODUCTION

The National Association of Telecommunications Officers and Advisors ("NATOA"), the United States Conference of Mayors ("USCM"), the National League of Cities ("NLC"), the National Association of Regional Councils ("NARC"), and the National Association of Towns and Townships ("NATaT") (the "Municipal Organizations") appreciate the opportunity to submit these Reply Comments in the above-referenced docket.

The overwhelming majority of comments submitted in response to the Second Further Notice of Proposed Rulemaking ("FNPRM") objected to the proposed rules as unnecessary, harmful and not supported by the Cable Act.[1] Nothing in the few comments filed in support of the FNPRM provides any basis to move forward with the proposed rules in the face of near unanimous opposition. We urge the Commission not to adopt any of the proposals in the FNPRM.

[1] As used in these Reply Comments, the "Cable Act" or the "Act" refers to the Cable Communications Policy Act of 1984, P. L. 98-549, as amended by the Cable Television Consumer Protection and Competition Act of 1992 and the Telecommunications Act.

II. THE COMMISSION SHOULD REJECT THE "IN-KIND CONTRIBUTIONS" PROPOSAL

A. Cable-Related Franchise Obligations Are Not Franchise Fees

As demonstrated in the Municipal Organizations' Comments[2] as well as many other commenters in this proceeding,[3] neither the plain language nor legislative history of the Cable Act supports the tentative conclusion that cable-related franchise obligations are "franchise fees."

Lacking any support from the Act, supportive commenters merely echo the tentative conclusion in the FNPRM that cable-related franchise obligations are "franchise fees" because the Commission found non-cable-related obligations to be franchise fees.[4] The theory is that the definition of "franchise fee" does not distinguish between cable-related and non-cable-related "contributions," so the same reasoning must apply to both. The flaw in the theory is that it assumes the term "franchise fee" covers virtually every obligation of any kind imposed on a cable operator in the cable franchise, other than build-out requirements.[5] The Act does not support this assumption.

As discussed in the Municipal Organizations' Comments, the Cable Act repeatedly distinguishes franchise fees from other cable-related obligations, conclusively demonstrating that Congress did not consider these obligations to be franchise fees.[6] This conclusion is bolstered by

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[2] Comments of the National Association of Telecommunications Officers and Advisors, *et al.*, ("Municipal Organizations' Comments") at p. 4-6.

[3] *See, e.g.*, Comments of City of New York at p. 3-7; Comments of Anne Arundel County, Maryland, *et al*. at p. 4-20; City Coalition Comments at p. 10-14.

[4] Comments of Verizon ("Verizon Comments") at p. 3-4; Comments of NCTA – The Internet & Television Association ("NCTA Comments") at p. 38-39.

[5] As discussed below, the American Cable Association ("ACA") asserts that the cost of build-out requirements also must be included in "franchise fees."

[6] Municipal Organizations' Comments at p. 5-8.

the legislative history, which warrants restating here: "Subsection 622(g)(2)(C) establishes a specific provision for PEG [public, educational, or governmental] access in new franchises. In 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."[7]

The commenters supporting the FNPRM do not address the text of the Act that unequivocally distinguishes franchise fees from other franchise obligations, nor this legislative history. Instead, ACA argues, "If all PEG-related costs are excluded from treatment as franchise fees simply because subsection 611(b) contemplates that such costs be incurred, the specific exemption for PEG 'capital costs' set forth in subparagraph 622(g)(2)(D) would have no effect."[8] The legislative history quoted above highlights the error in this statement. Franchise fees were intended to cover only monetary fees made by the cable operator, so there was no need to provide exceptions from the definition for non-fee obligations.

The history goes on to specifically call out the meaning of Section 622(g)(2)(D) as it relates to 611(b): "As regards PEG access in new franchises, payments for capital costs required by the franchise to be made by the cable operator are not defined as fees under this provision. These requirements may be established by the franchising authority under Section 611(b) or Section 624(b)(1)."[9] In other words, contrary to ACA's assertions, PEG obligations established pursuant

[7] H.R. REP. No. 98-934 (1984) at 65, reprinted in 1984 U.S.C.C.A.N. 4655, 4702 (emphasis added).

[8] Comments of the American Cable Association ("ACA Comments") at p. 5-6.

[9] H.R. REP. No. 98-934 (1984) at 65, reprinted in 1984 U.S.C.C.A.N. 4655, 4702 (emphasis added). The legislative history ACA cites further supports this conclusion. The colloquy ACA quotes notes that the definition concerns *payments* made by operators, not "in-kind" services or contributions. ACA Comments at p. 8, n. 23.

to Section 611(b) were not intended to be, and are not, franchise fees. The same is true of other cable-related franchise provisions either provided for in the Cable Act or voluntarily provided by the cable operator.

NCTA suggests that local franchising authorities ("LFAs") could simply use franchise fees to pay for I-Nets and other facilities and services provided for in the Cable Act, rather than "demanding in-kind assessments."[10] Congress expressly precluded any effort by federal agencies to mandate specific uses of franchise fees.[11] Yet NCTA's suggestion—and indeed the result of the FNPRM—would do precisely that. The Commission's redefining of franchise fees to include cable-related franchise obligations would effectively require LFAs to use franchise fees to pay for facilities and services previously negotiated in the cable franchise, in violation of the intent if not the letter of the Cable Act. Simply stated: Congress never intended that LFAs would pay for cable-related franchise obligations in the form of franchise fee reductions.

ACA goes so far as to suggest that even build-out requirements should be deducted from franchise fee payments (unless required by the LFA to meet its obligations under Section 621(a)(3)). In doing so, it essentially argues that any cost a cable operator must incur to comply with the franchise is a "franchise fee." By that logic, LFAs would also pay (in the form of franchise fee reductions) for cable operators' cost to operate the entire cable system where actually providing cable service is required under the cable franchise, which it most often is. This result—like ACA's argument—is absurd.

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[10] NCTA Comments at p. 41.

[11] *See* 47 U.S.C. § 542(i) ("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.")

B. Franchises are Mutually Negotiated Agreements, Not Local Mandates

Lacking statutory authority to support the proposal to redefine "franchise fees" to include cable-related franchise obligations, industry commenters point to the supposed abuses by LFAs in the franchising process as requiring Commission action. NCTA, for example, lists a handful of jurisdictions it alleges has abused the process.[12] We believe most of those jurisdictions have or will address the substance of those allegations in this proceeding, providing important clarifications and context. Regardless, calling out the actions of a dozen or so local jurisdictions (or referring to geographic regions without specifying the LFA) out of the "tens of thousands"[13] of LFAs across the country does not evince an issue with the decades-long mutual understanding between LFAs and cable operators of the definition of "franchise fees."

What NCTA overlooks is that nearly all franchise agreements are negotiated, mutually agreed upon compromises between LFAs and cable operators, just as the Cable Act intended. The "demands and requirements" alleged by NCTA are, in reality, proposals made in the course of a negotiation. If they are incorporated into a final franchise, or into an agreement outside the franchise (such as a settlement agreement reached in good faith to resolve a dispute or a franchise violation), it is because they were accepted by the cable operator. If an operator believes an LFA is making unreasonable requests or exceeding its authority in the Cable Act, the cable operator

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[12] NCTA Comments at p. 43-45. Among the "bad acts" called out by NCTA are several LFAs who "rejected the application of Generally Accepted Accounting Principles ("GAAP")" to the franchise fee calculation. *Id*. at p. 45-46. NCTA fails to note that in the *Second Order* the Commission recognized there is "conflicting information of the applicability of GAAP to the franchising process" and declined Time Warner's request to mandate use of GAAP in cable franchises. *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 Order*") at ¶ 23.

[13] This figure was provided by AT&T in a previous filing in this docket. Comments of AT&T Inc., MB Docket No. 05-311, p. 2 (February 13, 2006).

need not accept the terms. If a cable operator chooses to accept them as part of the give-and-take of negotiations, then they are not impositions demanded by LFAs; they are contractual provisions voluntarily accepted by cable operators who are more than capable of holding their own in negotiations with LFAs.[14] In short, there is no basis to deem virtually every cable-related franchise provision a "tax, fee, or assessment … imposed by a franchising authority."[15]

C. Capital Costs Are Not Limited to Facility Construction

NCTA asks the Commission to "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."[16] NCTA goes on to ask the Commission to "reevaluate its assumption in the *Second FNPRM* that 'costs for studio equipment are treated as capital costs for purposes of section 622(g)(2)(C)' …."[17] NCTA's asks cannot be squared with the plain language of the Cable Act.

Section 622(g)(2)(c) excludes from the five percent franchise fee cap "capital costs which are required by the franchise to be incurred by the cable operator for *public, educational, or*

[14] The notion that LFAs have the leverage to arm-twist cable operators into agreeing to unwanted terms is unsubstantiated and does not comport with reality. Ultimately, the LFA's leverage—not renewing the franchise and forcing the operator out of the rights of way—is no leverage at all, as the result would be residents and businesses losing services they opted to receive, not to mention the loss of PEG channels and franchise fees. NCTA's argument that litigation costs preclude cable operators from enforcing their rights applies equally—if not more—to LFAs, who are on the other side of any litigation (often with considerably more constrained resources).

[15] 47 U.S.C. § 542(g)(1). This is particularly true with respect to settlement agreements that are not part of the cable franchise.

[16] NCTA Comments at p. 47-48.

[17] *Id*. at p. 48.

governmental access facilities."[18] The term "public, educational, or governmental access facilities" is a defined term that means: "(A) channel capacity designated for public, educational, or governmental use; and (B) facilities and equipment for the use of such channel capacity."[19] 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. This unambiguous statutory language cannot be reinterpreted as suggested by NCTA.

Further, NCTA's interpretation was rejected by the Sixth Circuit in *Alliance for Community Media*:[20]

> In clarifying the precise scope of the term "PEG access facilities," Congress explained that it refers to "channel capacity (including any channel or portion of any channel) designated for public, educational, or governmental use, as well as facilities *and equipment* for the use of such channel capacity." H.R.Rep. No. 98-934, at 45 (emphasis added). In further detail, Congress specified that "[t]his may include vans, studios, cameras, or other equipment relating to the use of public, educational, or governmental channel capacity." Thus, the unambiguous expression of Congress confirms that "PEG access capacity" extends not only to facilities but to related equipment as well.[21]

Where the legislative history makes clear that the cost of providing things like vans are "capital costs" not "franchise fees," NCTA's suggestion that the term should be limited to "only construction of PEG facilities" is unquestionably erroneous.

The overarching but unstated premise of NCTA's and ACA's comments is that the Cable Act did not intend cable operators to have to any responsibilities to the public unless those responsibilities will be paid for by LFAs. This is not what the Cable Act says, nor what Congress

[18] 47 U.S.C. § 542(g)(2)(C) (emphasis added).

[19] 47 U.S.C. § 522(16).

[20] *Alliance for Community Media et al. v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 557 U.S. 904 (2009) (citation omitted).

[21] *Id*. at p. 784-85.

intended. NCTA acknowledged as much in an earlier filing in this docket in which it described why a cable franchise is more than a simple authorization to use the rights of way (and thus why telecommunications providers must obtain cable franchises prior to providing cable service even if they have preexisting authority to use the rights of way):

> When Congress passed the 1984 Cable Act and through amendments in 1992 and 1996, it established a comprehensive scheme, detailing rights and responsibilities of both cable operators and franchising authorities. These rights and responsibilities reflect Congress's understanding that the provision of cable service in a community was more than a mere transmission activity that takes place in a right-of way. Instead, Congress recognized that a franchised cable operator provides services that affect communities in significant ways; that, to some extent, franchising authorities should ensure that certain "social" responsibilities are met … .[22]

The Cable Act still exists as it did in 1996, when it reaffirmed cable operators' responsibilities to the public as an obligation of the cable franchise. The FNPRM would turn what has been, since at least 1984, cable operators' responsibilities into LFAs' responsibilities, a result that cannot stand under the unambiguous language and clear intent of the Act.

III. THE COMMISSION SHOULD REJECT THE PROPOSED REWRITING OF THE MIXED-USE RULE

A. The Proposed "Mixed-Use Rule" Does Not Reflect the Commission's Original Statement or Application of the Rule

As stated in the Municipal Organizations' Comments, the proposed mixed-use rule is so removed from that articulated in the *First Order*[23] as to be unrecognizable.[24] The FNPRM

[22] Reply Comments of the National Cable & Telecommunications Association, MB Docket No. 05-311, p. 18 (March 28, 2006).

[23] *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 Order*").

[24] Comments at 14-15.

specifically asks whether the mixed-use rule from the *First Order* "should be applied to incumbent cable operators to the extent that they offer or begin offering non-cable services."[25] The *First Order*'s mixed-use rule, as articulated in the FNPRM, held that "it is unreasonable for an LFA to refuse to award a [cable] franchise based on issues related to [non-cable] services or facilities [and] an LFA may not use its video franchising authority to attempt to regulate a new entrant's entire network beyond the provision of cable services."[26] The new version of the rule, which both ACA and NCTA support, would preempt local governments from regulating cable operators' non-cable services both inside and outside the context of the cable franchise.

We reiterate that the statement of the mixed-use rule articulated in the *First Order*—the rule the Commission purports to be considering extending to certain incumbent cable operators in this FNPRM—does ***not*** preempt local authority outside the context of cable franchising authority. Even Verizon acknowledges this new version of the rule is an unreasonable reinterpretation, stating that the mixed-use rule articulated in the *Second Order* "does not affect the authority of local authorities to regulate non-cable services under other applicable regulatory regimes."[27]

Nothing in the record indicates that when telecommunications providers received video franchises pursuant to the *First Order* local governments lost all authority over their telecommunications facilities. This is, of course, because this did not happen. The restated mixed-use rule, however, would have that effect. Every local government that has issued a cable franchise—whether to an incumbent cable company or a telecommunications company that has entered the cable market—suddenly would lose all authority over these services. What started as

[25] FNPRM ¶ 25.

[26] *Id*. at ¶ 7.

[27] Verizon Comments at p. 6, n. 12.

the Commission's interpretation of what constitutes an "unreasonable refusal" to grant a competitive cable franchise will have inexplicably morphed into preemption of all local authority over non-cable services provided by any entity that also provides cable service.

Should the Commission adopt ACA's and NCTA's interpretation of the mixed-use rule, it would, in effect, rewrite the previous version of the rule and create tremendous uncertainty as to the authority local governments have over a wide range of services. This revised mixed-use rule has not been reviewed by the courts and, to date, does not apply to incumbent local exchange carriers ("ILECs") or other entities that are competitive entrants in the cable market, whose non-cable services have continued to be regulated in whatever manner they were prior to the *First Order*.

B. The New Mixed-Use Rule Does Not Reflect A Reasonable Reading of the Cable Act

The interpretation of the Cable Act advanced by industry commenters is that Congress intended that all cable franchises—regardless of the agreed upon language of those franchises, and regardless of the fact that the Cable Act defines cable systems to exclude any portion of the system used for common carrier services—authorize cable operators to install any facilities and equipment in the rights of way to provide any services the cable operators wish to provide, all for a fee calculated only on the revenue from their cable services. As explained below, this is not what Congress intended. The unambiguous intent of the Cable Act was to ensure that cable providers are subject to the same local regulations related to their non-cable services as non-cable providers are for the provision of those same services.

Industry commenters do not proffer any provisions of the Cable Act or legislative history to support the position that once a cable franchise is granted, all regulatory authority over non-cable service evaporates. As discussed in the Municipal Organizations' Comments, no statutory provision suggested in the FNPRM supports the new version of the mixed-use rule.[28] The Cable Act itself expressly cabins the limits on LFA authority to the authority exercised in the cable franchising process.[29] Further, the legislative history plainly states that the Cable Act does not, and was not intended to, interfere with local authority over the then-emerging telecommunications services cable operators may opt to provide: "The conferees intend that, to the extent permissible under State and local law, ***telecommunications 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."[30]

Industry commenters ignore both the plain language and the legislative history of the Act. ACA, for example, argues "where Title VI makes reference to 'cable system,' the scope of services that may be provided over such facilities includes both cable service and non-cable services."[31] This assertion ignores the fact that the definition of "cable system" excludes common carrier facilities.[32] The portion of a system used to provide telecommunications services is not a cable system, and thus any reference in the Act to a "cable system" does not include that portion of the system used to provide common carrier services. While a cable system may provide—meaning, is technically capable of providing—non-cable services, that does not mean the Cable Act nor every cable franchise authorizes the provision of those services.

Again, the intent of Congress was to preserve local authority over non-cable services to enable the level playing field envisioned by the Telecommunications Act. NCTA and cable

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[28] Municipal Organizations' Comments at p. 16-24.

[29] *Id*.

[30] *Id*. at p. 17 (emphasis added).

[31] ACA Comments at p. 11.

[32] 47 U.S.C. § 522(7).

operators understood and embraced the policy of "similar treatment for similar services" as new companies entered the cable market. They argued vigorously that ILECs and other potential new entrants must obtain cable franchises prior to offering cable services. The notion that this would result in "duplicative" or "additional" fees or regulations—the thrust of their argument in favor of the new mixed-use rule—was not an issue. Telecommunications providers subject to rights of way regulations and fees were nonetheless required to obtain cable franchises before providing cable services, a result supported by the cable industry.

In fact, in its initial Reply Comments in this docket in 2006, NCTA recognized the importance of ensuring local governments could treat similar services in a similar manner:

> As Comcast explains, "it is difficult to see how treating ILECs and cable operators equally under a level-playing field statute would be 'inconsistent' with the Act. Ensuring that 'like services are treated alike' is a principle that the Commission has repeatedly endorsed."
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> Notably, in other contexts, regulatory "parity" is the Bells' theme, as NCTA has previously pointed out. BellSouth, for example, has argued that "both law and policy require that competing providers be subject to the same obligations regardless of the technologies they use." Verizon has struck the same theme, observing that "it would be irrational to impose disparate regulatory treatment on identical services which are offered in an identical manner, based solely on the identity of the service provider." As Verizon's Tom Tauke has said: "It's not logical to treat different sectors of the communications marketplace differently based on what technology they use, when we're all delivering the same services." AT&T (then SBC) has perhaps said it most simply: "Companies that provide similar services should be regulated the same. There is no reason for treating them any differently." Except here, apparently.[33]

Now that NCTA's members are hoping to benefit from the FNPRM's restated mixed-use rule, it appears to have abandoned its "level playing field" principle. Like the telecommunications providers it mocked for advocating against this same principle after previously endorsing it, NCTA

[33] Reply Comments of the National Cable & Telecommunications Association, MB Docket No. 05-311, p. 30-31 (March 28, 2006) (citations omitted).

now finds itself in the position of abandoning its principles when it is expedient. In 2006, NCTA argued that relieving competitors from local requirements that continue to apply to incumbent providers "would distort marketplace competition in a way that harms rather than benefits consumers."[34] Except here, apparently.

Industry commenters' statutory arguments are, like its policy arguments, unsupportable. NCTA's argument with respect to Section 624(b)(1) is patently wrong. It acknowledges this subsection relates to LFAs' authority in context of a cable franchise initial proposal or renewal, then concludes—with no explanation—that this language "plainly bars" LFAs from regulating cable operators' internet access and other information services.[35] Section 624(b)(1) says nothing about LFAs' authority outside the context of cable franchise grants and renewals, and thus says nothing about local authority over non-cable services not included in the cable franchise.

NCTA next argues that "Section 621(b)(3)(B) bars a state or locality from leveraging its Title VI franchising authority to 'prohibit[], limit[], restrict[], or condition[]' the provision of a telecommunications service by a cable operator."[36] They further cite Section 621(b)(3)(D) to support the assertion that Congress intended to preempt local authority over cable operators' telecommunications services. Here, too, NCTA is mistaken. These Sections expressly relate only to authority LFAs exercise in issuing or renewing cable franchise agreements. They do not address authority to regulate non-cable services outside the cable franchise context. This express language is abundantly clear. If there were any doubt, the previously-cited legislative history eliminates it. Congress did not preempt local authority over the non-cable services provided by cable operators

[34] Comments of the National Cable & Telecommunications Association, MB Docket No. 05-311, p. 30 (February 13, 2006).

[35] NCTA Comments at p. 11-12.

[36] NCTA Comments at p. 12.

because it wanted to ensure comparable treatment of those services by local regulators. Congress anticipated what NCTA ignores: preempting local governments' authority over cable operators' non-cable services creates the unlevel playing field the Telecommunications Act sought to avoid.

NCTA further argues that LFAs "expressly should be precluded from evading federal cable franchise fee limits by attempting to impose additional fees on the operation of cable systems simply by citing to another general federal or state law as authority to charge what Congress forbids."[37] It is disingenuous to claim that imposing fees on cable operators' non-cable services is an "evasion" of law or "additional fee" on the cable system. Congress knew that cable operators would use their cable systems to provide non-cable services, and yet expressly and unambiguously stated that they would be subject to both the five percent cable franchise fee and any "fair and reasonable fees" imposed on those services.

Curiously, NCTA argues that local regulations of cable operators' non-cable services "creates a competitive disparity between wireless and wireline providers, which itself violates Section 253 [of the Telecommunications Act]." To be clear, NCTA argues that cable operators should be permitted to install any desired facilities, apparently including wireless facilities that compete with wireless providers, without having to comply with the same fees and other obligations as wireless providers. *This* would create a competitive disparity. NCTA has itself acknowledged this disparity and the anti-competitive implications:

> [R]egulating like services alike is both reasonable and pro-competitive. Indeed, imposing regulatory requirements on one competitor but not on another is more likely to distort the competitive marketplace. It results in winners and losers being chosen on the basis of regulatory disparities rather than on the basis of who can best and most efficiently meet consumer demand.[38]

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[37] NCTA Comments at p. 21.

[38] Comments of the National Cable & Telecommunications Association, MB Docket No. 05-311, p. 3 (February 13, 2006).

NCTA made this argument in support of its position that telecommunications providers entering the cable market must comply with the same franchising obligations as incumbent cable operators. The result of this (largely successful) argument is that a company that began as a telecommunications provider and has expanded to provide cable service is subject to local regulation as both a telecommunications provider and a cable operator (the former, of course, refers to regulations established outside the context of the cable franchise). NCTA offers no theory for why it would now be an "effective prohibition" barred by Section 253 of the Telecommunications Act for cable operators to face the same regulatory outcome as a telecommunications provider offering cable service, namely, compliance with the regulations applicable to each of the services they provide.

The answer is there is no reasonable support for this theory. Congress, in drafting the Telecommunications Act of 1996—which included the addition of Section 253 and amendments to Section 622(b) to limit cable franchise fees to revenue from cable services—intended the result NCTA argued for in 2006, not their argument of today:

> Subsection (b) amends section 622(b) of the Communications Act by inserting the phrase "to provide cable services." This amendment makes clear that the franchise fee provision is not intended to reach revenues that a cable operator derives for providing new telecommunications services over its system, but only the operators cable-related revenues. … The conferees intend that, to the extent permissible under State and local law, telecommunications 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.[39]

It is not by accident that this statement mirrors language in Section 253(c) of the Telecommunications Act. Congress knew cable operators were using their cable systems to

[39] H.R. Conf. Rep. No. 104-458, at 209 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 223.

provide telecommunications service and expressly preserved local authority to treat those services the same as services provided by their telecommunications competitors.

Having failed to demonstrate a statutory basis for its support for the mixed-use rule, NCTA cites federal policy. NCTA's position appears to be that the federal policy is to preclude any regulation of broadband providers at the local level, including rights of way fees and regulation. NCTA advocates for the Commission to hold that "franchising authorities may not regulate broadband Internet access service … ."[40] Not only is this position beyond the authority of the Commission under the Communications Act and counter to the reservation of local authority in the Telecommunications Act and Internet Tax Freedom Act,[41] it would lead to absurd results. A new entrant that provides only broadband services would be completely free of any local regulations: no permits or review process to ensure the safety of the installations; no franchises or regulations regarding construction in the rights of way; no compensation for use of public property. Nothing in federal law, or the record of this proceeding, supports such a result, nor could such a result be a sustainable policy considering the clear public safety implications.

Finally, NCTA argues that "without the mixed-use rule there would be no limit on the franchise fees that franchising authorities could demand of cable operators for broadband service. Nothing would stop a franchising authority from seeking to fill any budgetary shortfall with fees related to broadband deployed over cable systems."[42] Here, again, NCTA's argument is patently false. First, there is no evidence in the record that local governments have or would use rights of

[40] NCTA Comments at p. 33.

[41] Municipal Organizations' Comments at p. 21.

[42] NCTA Comment at p. 36, n. 112.

way fees as a revenue-raising mechanism.[43] Second, the Cable Act already limits the cable franchise fee to revenue from the provision of cable services; even without the mixed-use rule, LFAs could not use the cable franchise to impose fees on broadband services that are not cable services. If a local government imposed any regulatory requirements on broadband services, it would have to do so outside the context of the cable franchise and thus could not target only broadband deployed over cable systems. In short, this unsubstantiated concern, even if it existed, does not require the mixed-use rule to be remedied.

IV. OVER-THE-TOP VIDEO IS NOT RAISED IN THIS PROCEEDING

Verizon asks the Commission to "take this opportunity to confirm that over-the-top video services are not cable services and are not subject to cable regulation."[44] This docket does not provide the Commission with such an opportunity. This issue was not raised in the FNPRM and is not properly before the Commission. Further, in a previous docket in which this issue was raised (but not resolved) by the Commission, many commenters conclusively demonstrated that these services fit the definition of cable services.[45]

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[43] The fact that several jurisdictions have implemented ordinances that include rights of way fees on broadband providers is not evidence of a revenue-raising intent. These ordinances may serve many policy goals, including nondiscriminatory management of the rights of way.

[44] Verizon Comments at p. 3.

[45] *See, e.g.*, Comments of Anne Arundel County, Maryland, *et al.*, MB Docket No. 14-261 (March 3, 2015).

V. CONCLUSION

The few comments submitted in support of the FNPRM do not demonstrate a legal, policy or practical basis to proceed with the proposed rules. As such, the Municipal Organizations respectfully request that the Commission refrain from enacting the tentative conclusions and rules as stated in the FNPRM.

Respectfully submitted,

Nancy L. Werner
General Counsel
NATOA
3213 Duke Street, #695
Alexandria, VA 22314
(703) 519-8035

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Copies to:
The United States Conference of Mayors, kmccarty@usmayors.org
National League of Cities, panettieri@nlc.org
National Association of Regional Councils, maci.morin@narc.org
National Association of Towns and Townships, jimo@tfgnet.com