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 FREE STATE FOUNDATION*

These reply comments are filed in response to the Commissions' request for comments on its proposed rulemaking to prohibit local cable franchising authorities (LFAs) from regulating non-cable services offered by cable operators and from requiring in-kind exactions above the 5% franchise fee cap imposed by Congress. These reply comments focus on the Commission's authority for its proposed "mixed-use" network rules and also for its in-kind contribution rules, particularly as they are connected with broadband Internet access services and other information services. Also, these reply comments recommend the Commission apply its proposed rules to state-level franchising actions. Further, these reply comments rebut arguments made in comments opposed to the Commission's cable LFA proposal.

Some local governments have leveraged their cable franchising authority to regulate and impose additional costs on broadband Internet access services. The

* These reply comments express the views of Randolph J. May, President of the Free State Foundation and Seth L. Cooper, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

Commission's cable LFA proposal would prevent such overreach. In particular, its proposed mixed use network rules would prohibit local governments from abusing their cable franchising authority to regulate "information services" such as broadband Internet services. If adopted, LFAs would be expressly preempted "from requiring incumbent cable operators to obtain franchises to provide broadband Internet access service."

Additionally, the Commission's proposal would, subject to certain exceptions, limit in-kind payments from new entrants and cable incumbents in local markets by including such payments within the 5% statutory cap on franchise fees. The 5% cap is measured against a cable operator's gross revenues for the provision of cable services over a 12-month period. In adopting its proposal, the Commission should expressly affirm the provision of broadband Internet access and other information services by cable operators are *not* included in gross revenue figures by which the 5% cap is measured.

Under the Commission's proposal, the 5% cap would apply to in-kind contribution requirements regardless of whether they are cable related or non-cable related, thereby keeping LFAs from abusing and overextending their authority. Accepting an LFA's costly in-kind demands can result in significant barriers to broadband deployment in local markets. Adoption of the proposed in-kind contribution rules would promote entry and competitive neutrality in the video services market.

The Commission's worthy cable LFA proposal is backed by statutory authority under Title VI of the Communications Act, including Section 624(b)'s provision that LFAs "may not ... establish requirements for video programming or other information services." Also, Section 621(a)(1) provides "a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." In *Alliance for Community Media v. FCC* (2008), the Sixth Circuit concluded Section 201(b) of the Communications Act grants the Commission authority to issue rules interpreting Section 621(a)(1). Other circuit court decisions agree.

In addition to Title VI limits on LFA power, the Commission's cable LFA proposal is supported by federal preemptive authority. The Commission's proposal is consistent with the 2017 *Restoring Internet Freedom Order*'s "conclu[sion] that regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements." The *RIF Order* recognized that broadband Internet access services are jurisdictionally interstate "information services" subject to federal deregulatory policy. Thus, the *RIF Order* expressly preempted any "economic" or "public utility-type" regulation of those services by state and local governments. Similarly, varied regulatory burdens on broadband Internet services by cable LFAs would conflict with the federal free market-oriented deregulatory policy regarding these services.

Importantly, the Commission should apply its proposal to franchising actions taken at the state level. This makes for consistent federal policy. Restrictions and burdens on broadband Internet services and other information services create harm and conflict with federal policy, and thereby harm, regardless of whether they are imposed at the state or local level. Further, according to structural federalism principles, the authority LFAs exercise is delegated by their respective states. It would create an unusual if not absurd result to allow state governments to evade restrictions imposed on their LFAs.

State level franchising laws intended to reduce regulation and spur competition may be less likely than LFA actions to impose restrictions or added costs on non-cable services. However, applying the Commission's proposal at the state level would preclude states from responding to restrictions on LFAs by directly exercising statewide authority over non-cable services similar to the way some states responded to the *RIF Order* by imposing restrictions similar to repealed Title II rules on broadband Internet services.

By keeping state and local regulators in check, the Commission can help ensure a market-oriented environment favorable to the deployment of next-generation broadband services. The ultimate beneficiaries of such an environment are the nation's consumers.

II. Administrative and Legal Background

Section 621(a)(1) of the Communications Act recognizes that states and their local governments may require cable operators to obtain franchises in order to provide cable TV service within their respective states or localities. However, "a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise."[1] Other statutory provisions place further limits on LFAs. For instance, Section 622(b) caps the amount of franchise fees an LFA may collect from a cable operator for any 12-month period to 5% of the cable operator's gross revenues for providing cable services during that period.

In its 2007 order, the Commission found local government cable franchising processes posed barriers to entry that inhibited competition.[2] It also found local franchising processes could unnecessarily burden and disadvantage incumbent cable

[1] 47 U.S.C. § 541(a)(1).
[2] 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, First Report and Order (2007).

operators in competing with entrants. Comments cite some recent instances of LFAs leveraging their authority to burden non-cable services.[3]

The Commission's 2007 order determined the regulatory jurisdiction of LFAs extends only to cable services provided over cable networks, and not to non-cable services provided over "mixed-use" networks. In that order, the Commission deemed refusals to award a video franchise based on matters involving such non-cable services to be unreasonable and therefore impermissible. Additionally, the Commission determined that "in-kind" contributions charged by LFAs in exchange for video franchises are included within the 5% cap on franchise fees. Importantly, its second 2007 order extended those rules to incumbent cable operators. The Commission recognized that the term "cable system" in Section 602(7)(C) "does not distinguish between incumbent providers and new entrants" and that incumbents could be put at a competitive disadvantage if subject to different rules.[4]

Importantly, the Sixth Circuit's decision in *Alliance For Community Media v. FCC* affirmed the Commission's underlying legal authority for issuing rules and guidelines for implementing Sections 621 and 622.[5] And in *Montgomery County v. FCC*, the Sixth Circuit did not disturb the Commission's mixed-use network rules regarding common carriers.[6] Nor did it disturb the Commission's determination that in-kind contributions unrelated to the provision of cable services are subject to the 5% cap on

---

[3] *See, e.g*., Comments of NCTA, at 26-28; Comments of ACA, at 2.
[4] MB Docket No. 05-311, Second Report and Order (2007), at ¶ 11.
[5] 529 F.3d 763, 773-774 (6th Cir. 2008).
[6] *See* 863 F.3d 485, at 492 (6th Cir. 2017); Notice at ¶ 26.

franchise fees.[7] Those affirmances are significant because the Commission's current proposal relies on those same underlying legal authorities.

However, in *Montgomery County*, the Sixth Circuit concluded the Commission failed to explain adequately the scope and statutory basis for its "mixed-use" network rules – as applied to non-common carriers – and for its "in-kind" contribution rules.[8] The Sixth Circuit narrowed the application of those rules and remanded. The Commission's cable LFA proposal would establish "mixed-use" network and "in-kind" contribution rules with clearer definitions and fuller explanations of their statutory bases.

III. The Commission Should Adopt Its Proposed "Mixed-Use" Network Rules

The Commission should adopt its proposal with respect to "mixed-use" networks, thereby prohibiting LFAs from regulating non-cable services offered by cable operators, including broadband Internet access services.[9] Under its proposal, LFAs would be expressly preempted "from requiring incumbent cable operators to obtain franchises to provide broadband Internet access service."[10] If adopted, the proposal would help keep the Internet unfettered by regulation that conflicts with federal deregulatory policy, and also promote competitive entry into the video services market by providers of non-cable services, while also treating incumbent cable operators equally.

As indicated above, Title VI places important limits on cable LFAs. Section 624(b)'s prohibition of LFA regulation of information services provides convincing statutory support for the Commission's proposal regarding "mixed-use" networks. Under that section, LFAs "may not ... establish requirements for video programming or other

---

[7] *See* 863 F.3d at 490-491; Notice, at ¶ 17.
[8] *See* 863 F.3d at 491-492.
[9] MB Docket No. 05-311, Second Notice of Proposed Rulemaking ("Notice")(released Sep. 25, 2018), at ¶¶ 25-30.
[10] Notice, at ¶ 29.

information services."[11] Also, the Sixth Circuit concluded in *Alliance*: "[P]ursuant to section 201(b), the FCC possesses clear jurisdictional authority to formulate rules and regulations interpreting the contours of section 621(a)(1)."[12] Other circuit court decisions have upheld the Commission's authority to issuing interpretive rules in this area.[13]

Some commenters point out that non-cable services are subject to state or local police and other powers.[14] But that is not in dispute. General exercise of police powers is distinct from direct regulation of broadband Internet access and other information services. The Commission's proposal tracks with the *RIF Order*'s leaving undisturbed states' traditional role of policing fraud, taxation, and general commercial dealings.[15]

Adoption of an express prohibition on LFA regulation of information services is backed by a persuasive analysis indicating "information services" in Section 624(b) is equivalent to Title I's definition of the term and that "Congress intended to bar LFAs from regulating information services."[16] Indeed, this conclusion is consonant with the principle of statutory interpretation, recognized by the Supreme Court, that "[a] term appearing in several places in a statutory text is generally read the same way each time it appears."[17] Certainly, there is nothing in the context or statutory history of the Cable Act of 1992 or the Telecommunications Act of 1996 to override the presumption that those identical words are intended by Congress to have the same meaning.

---

[11] 47 U.S.C. § 544(b)(1).
[12] 529 F.3d at 774
[13] *See* 529 F.3d 774 (citing *City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir.1999); *National Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C.Cir.1994)).
[14] *See, e.g*., Comments of Anne Rundel County, Maryland, *et al*., at 43.
[15] Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order ("Restoring Internet Freedom Order" or "*RIF Order*") WC Docket No. 17-108, (released January 4, 2018), at ¶ 196.
[16] *See* Notice, at ¶¶ 27, 28.
[17] *See, e.g., Ratzlaf v. United States*, 510 U. S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears") (quoted in *Milner v. Department of Navy*, 562 U.S. 562, 570 (2011)). *See also RIF Order*, at ¶ 61 fn. 229 (internal cites omitted)

Rightly, the Commission's proposal also recognizes that LFA regulation of broadband services "would frustrate the light-touch information service framework established by Congress that the Commission previously has found necessary to promote investment and innovation."[18] Leveraging cable franchising authority to burden the provision of broadband Internet access services is flatly contrary to Congressional policy favoring an Internet unfettered by federal and state regulation.

In the *RIF Order*, the Commission adopted "a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals of the 1996 Act."[19] The order was based, in part, on Congress's policy in Section 230(b) of the Telecommunications Act of 1996 "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation."[20] In reclassifying broadband Internet access services as Title I "information services," the order "conclude[d] that regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements."[21] As the *RIF Order* recognized, broadband Internet access services are matters of nationwide concern and the intrastate and interstate portions of those services cannot practically be segregated.[22] Accordingly, the order expressly preempted any "economic" or "public utility-type" regulation of broadband services by state and local governments.[23] Varied, multi-level regulation of broadband Internet

---

[18] Notice, at ¶ 29.
[19] *RIF Order*, at ¶ 194.
[20] 47 U.S.C. § 230(b). *See also RIF Order*, at ¶¶ 1, 8, 58, 161 fn. 597, 275, 274, 284, 293.
[21] Notice, at ¶ 194.
[22] *RIF Order*, at ¶¶ 199-200.
[23] *RIF Order*, at ¶ 195.

services – including through overextension of cable franchising authority – would disrupt federal policy favoring free market competition.

At least one commenter has argued that Title I reclassification of broadband Internet access services and the absence of any declared exercise of ancillary authority removed the Commission's authority over those services.[24] Supposed removal of Commission authority, it is apparently argued, includes removal of preemption authority contemplated in the Commission's cable LFA proposal. However, the Commission did not surrender all its authority over regarding broadband Internet access and leave matters up to state and local governments. The *RIF Order* re-established "an affirmative federal policy of deregulation." This constitutes an exercise of regulatory power according to the understanding articulated by Chief Justice John Marshall in *Gibbons v. Ogden* (1824). In *Gibbons*, Chief Justice Marshall explained "the power to regulate" commerce among the states meant the power "to prescribe the rule by which commerce is to be conducted."[25] The *RIF Order* reestablished free market competition as the basic rule by which interstate commercial activity in the broadband Internet access services market is to be conducted.

Moreover, key precedents such as *NCTA v. Brand X Internet Services* (2002) and *USTelecom Assoc. v. FCC* (2016) establish that the Commission's classification decision regarding broadband Internet access services and the interpretations of statutory terms upon which its decision is based fall within the scope of the Commission's authority and

[24] *See, e.g.*, Comments of Public Knowledge, at 2-5.

[25] 22 U.S. 1, 96. For a more detailed analysis of the Commission's jurisdiction over broadband Internet access services in light of Marshall's jurisprudence, *see* Randolph J. May and Seth L. Cooper, "John Marshall's Jurisprudence Supports Preemption of California Law Regulating Broadband Internet Services," *Perspectives from FSF Scholars*, Vol. 13, No. 41 (November 2, 2018), at: http://www.freestatefoundation.org/images/John_Marshall_s_Jurisprudence_Supports_Preemption_of_California_Law_Regulating_Broadband_Internet_Services_110118.pdf.

are accorded "*Chevron* deference."[26] Title I classification puts broadband Internet access services, as jurisdictionally interstate services, on a free market and deregulatory footing, consistent with Congressional policy for an Internet unfettered by federal or state regulation. As the *RIF Order* pointed out, court precedents recognize agency decisions favoring deregulation may receive preemptive force. Franchising actions in conflict with the federal affirmative deregulatory policy adopted in the *RIF Order* are therefore subject to preemption.

IV. The Commission Should Adopt Its Proposed In-Kind Contribution Rules

The Commission should adopt its proposal to clarify that Section 622(b)'s 5% cap on how much LFAs can require cable operators to pay to obtain cable franchises applies regardless of whether the in-kind contributions required were cable or non-cable related. In adopting its proposal, the Commission should affirm that cable operator revenues from broadband Internet access and other information services are *not* included in gross revenue figures by which the 5% cap is measured.

The proposal tracks with categories of expenses that are statutorily excluded from and outside the scope of the 5% cap on contributions.[27] Notably, the proposal excludes from the 5% cap capital cost payments for providing public, educational, and government (PEG) access.[28] This exclusion effectively accords with the text of Section 622(b)(2)(C) and with the Sixth Circuit's decision in *Alliance*, belying some commenters' claims that the Commission's proposal's effect on PEG access exceeds the law.[29] Further, the

---

[26] 545 U.S. 967, 980, 989; 825 F.3d 674 (D.C. Cir. 2016), rehearing *en banc* denied, 855 F.3d 381 (D.C. Cir. 2017).
[27] *See* Notice, at ¶¶ 18-19, 24.
[28] Notice, at ¶ 19.
[29] *See*, *e.g.*, Comments of the County and City of San Francisco, at 4; Comments of the League of Minnesota Cities, at 3-4; Comments of the Assoc. of Washington Cities, at 14-15.

proposal's exclusion of PEG capital costs in combination with the proposal's recognition that LFA's could require other PEG-related costs to be incorporated into franchise agreements subject to the 5% cap gives LFAs opportunity to ensure PEG access.[30]

Although some LFA commenters object to the Commission's proposal regarding in-kind contributions because they foresee future revenue losses,[31] such an objection is unpersuasive. The proposal is a logical extrapolation from the terms of Section 622, and it ensures LFAs do not evade the 5% statutory cap, including by imposing in-kind contributions directly affecting broadband Internet access networks. Despite some comments' claims that in-kind contributions are clearly excluded from "franchise fees" subject to the 5% cap,[32] the statute does not plainly address the status of in-kind contributions. And in *Montgomery County*, the Sixth Circuit acknowledged that in-kind contributions *could* be within the meaning of "franchise fees."[33] The Commission's proposal should therefore receive *Chevron* deference.[34] Moreover, loss of local revenues by itself does not alter or trump federal policy. Also, the proposal respects local general taxing authority, consistent with Section 622(g)(2)(A)'s exclusion from the 5% cap for "any tax, fee, or assessment of general applicability."[35]

Nor should the Commission accept the contention that in-kind contributions are purely voluntary and therefore ought not be restricted by the Commission's proposal. Sections 621 and 622 reflect the understanding that LFAs are not ordinary private market participants but governing authorities with significant power and policy setting concerns.

---

[30] *See* Notice, at ¶ 20.
[31] *See, e.g.*, Comments of NATOA, at 9; Comments of the League of Minnesota Cities, at 5.
[32] *See, e.g.*, Comments of Anne Rundel County, Maryland, *et al*., at 19.
[33] 863 F.3d at 491.
[34] *See Alliance*, 529 F.3d at 776, *et seq*.
[35] 47 U.S.C. § 542(g)(2)(A).

Failure to accept an LFA's in-kind demands prohibits entry and inhibits competition in local markets. The proposed in-kind contribution rules are attuned to those power dynamics. Their adoption would help ensure that future voluntary negotiations over franchising agreements take place in a setting favorable to market entry and competition.

V. Objections Regarding Rights-of-Way and Retroactivity are Not Persuasive

Some commenters claim the Commission's proposal would undermine local authority over rights-of-way.[36] To the extent that Sections 621 and 622 incidentally limit LFA authority regarding cable and non-cable services offered using public rights-of-way, the proposal is in keeping with the balance struck by Congress. The proposal does not expressly preempt any authority over rights-of-way that local governments did not previously possess. Indeed, one commenter criticizes the Commission for supposedly asserting preemptive authority over local rights-of-way in its proposal, but then it maintains that the proposal's contemplated preemption of "entry and exit restrictions" would not preempt local government decisions over use of public rights-of-way after all.[37] Contrary to another commenter, the proposal does not allow cable operators to put any equipment they want in public rights-of-way.[38]

Furthermore, some commenters object that the Commission's proposal would or could apply retroactively and undermine existing franchise agreements.[39] The proposal should be applied consistent with the general principle and presumption, reflected in canons of statutory interpretation and the Administrative Procedures Act,[40] that rules

---

[36] *See, e.g.*, Comments of Milwaukie, Oregon, at 3-4.
[37] *See* Comments of NATOA, et al., at 19-20.
[38] Comments of Anne Rundel County, Maryland, *et al*. ("LFA Cities"), at 43
[39] *See, e.g.*, Comments of Charles County, Maryland, at 4; Comments of the City of Philadelphia, Pennsylvania, *et al*., at 41.
[40] *See, e.g., Gozlon-Peretz v. United States,* 498 U.S. 395, 404 (1991); 5 U.S.C. § 551(4).

apply on a prospective basis. Thus, adoption of the proposal by itself would not void existing franchise agreements but apply to agreements negotiated in the future.

However, the mixed-network rules should constitute an exception. Third parties cannot contract away federal authority over jurisdictionally interstate services. There may be individual instances that call for exceptions to the general principle of prospectively applied rules. To the extent certain cable franchising agreements effectively regulate the network management functions of broadband Internet access services or other information services, such agreements should be preempted. Further, there might be instances where it may be shown, on a case-by-case basis, that a particular franchising agreement provision regarding in-kind contributions conflicts with federal policy in such a way as to overcome the presumption of prospective application and be subject to preemption.

VI. The Commission Should Apply Its Proposal to State-Level Franchising Actions

Finally, the Commission should apply its proposal to franchising actions at the state level and to state regulatory requirements on local franchising.[41] State governments should not be able to misuse cable franchising to regulate information services.

Application of the Commission's proposal to both state and local level franchising makes for consistent federal policy. As indicated, Congress expressly favors an Internet remaining unfettered by federal and state regulation. Legal as well as agency precedents recognize that information services are jurisdictionally interstate. Restrictions and burdens on broadband Internet access and other information services create harm and conflicts with federal policy regardless of whether imposed at the state or local level.

Although the Communications Act reflects the historical authority of cable LFAs,

[41] *See* Notice, at ¶ 32.

there does not appear to be any statutory basis that compels a continuing distinction between franchising actions at the state and local levels. The statute was adopted against the backdrop of constitutional federalism. As comments acknowledge,[42] the authority LFAs exercise is delegated by their respective states. It creates an unusual if not absurd result to bar state governments from indirectly burdening broadband Internet services by delegations to their LFAs while permitting state governments to directly impose burdens.

As a practical matter there is now less reason for any distinction between franchising actions at the state and local levels than might have been the case in 1992 or in 2007. Several years ago, many states began to modify or displace the authority of their LFAs by adopting streamlined statewide video franchising laws to encourage entry and competition. It can no longer be said that such laws have been in effect for a short time. Nonetheless, the Commission may consider adopting an effective date for its in-kind rules that would permit states sufficient time to adjust to and comply with the new rules.

State level franchising laws intended to reduce regulation and spur competition may be less likely than LFA actions to impose restrictions or added costs on non-cable services. However, there are prophylactic reasons for applying the Commission's proposal at the state level. If the Commission adopts its proposal to restrict cable LFAs' authority, some states may respond by asserting direct authority over non-cable services. A similar type of occurrence followed the *RIF Order*'s adoption, as some states have sought to impose restrictions similar to the repealed Title II rules on broadband Internet access services through state legislation or gubernatorial executive orders. Application of the proposal to both state and local governments would preclude such an occurrence in the context of cable and video franchising authority.

---

[42] *See, e.g.*, Comments of the City of Philadelphia, Pennsylvania, *et al*., at 16-17.

VII. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

Respectfully submitted,

Randolph J. May
President

Seth L. Cooper
Senior Fellow

Free State Foundation
P.O. Box 60680
Potomac, MD 20859
301-984-8253

December 14, 2018