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	)	

REPLY COMMENTS OF THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY; THE ALLIANCE FOR COMMUNITY MEDIA; AND THE CITIES OF BOWIE, MARYLAND; EUGENE, OREGON; PALO ALTO, CALIFORNIA; PORTLAND, MAINE; AND SAN ANTONIO, TEXAS

James N. Horwood
Tillman L. Lay
Jeffrey M. Bayne
SPIEGEL & MCDIARMID, LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

Counsel for The Alliance for Communications Democracy; The Alliance for Community Media; and the Cities of Bowie, Maryland; Eugene, Oregon; Palo Alto, California; Portland, Maine; and San Antonio, Texas

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. THE ARGUMENTS OFFERED BY THE FEW SUPPORTERS OF THE *SECOND FNPRM*'S FRANCHISE FEE PROPOSALS ARE INCONSISTENT WITH THE CABLE ACT AND MUST BE REJECTED. 3

- A. The five percent franchise fee cap does not apply to nonmonetary cable-related franchise obligations authorized under the Cable Act. 3
- B. The Commission should reject ACA's and NCTA's proposed treatment of PEG capital costs. 9
- C. The Commission should reject ACA's argument that only build-out requirements pursuant to Section 521(a)(3), but not other nonmonetary cable-related obligations, are not subject to the franchise fee cap. 12
- D. The Commission should reject NCTA's request that it prohibit cable operators from voluntarily waiving any franchise fee limitations. 14

III. SHOULD THE COMMISSION IMPROPERLY CONCLUDE THAT THE COSTS OF NONMONETARY CABLE-RELATED FRANCHISE REQUIREMENTS COUNT TOWARDS THE FRANCHISE FEE CAP, VALUING THESE REQUIREMENTS AT FAIR MARKET VALUE RATHER THAN INCREMENTAL COST WOULD BE UNWORKABLE AND CONTRARY TO THE CABLE ACT. 16

IV. INDUSTRY COMMENTERS MISCONSTRUE THE ACT IN URGING THE COMMISSION TO PREEMPT NON-DISCRIMINATORY RIGHT-OF-WAY FEES IMPOSED ON CABLE OPERATORS' NON-CABLE SERVICES. 19

V. CONCLUSION...24

The Alliance for Communications Democracy ("ACD"); the Alliance for Community Media ("ACM"); and the Cities of Bowie, Maryland; Eugene, Oregon; Palo Alto, California; Portland, Maine; and San Antonio, Texas (collectively, Cable Act Preservation Alliance ("CAPA")), submit these reply comments in response to the Commission's Second Further Notice of Proposed Rulemaking in this docket,[1] as well as the opening comments on the *Second FNPRM*.

I. INTRODUCTION AND SUMMARY

As set forth in our opening comments, the *Second FNPRM*'s proposal to subject cable-related nonmonetary franchise obligations—including those specifically authorized under the Cable Act—to the five percent franchise fee cap is contrary to the Act. The overwhelming majority of the opening comments filed in response to the *Second FNPRM* agreed. Those comments further demonstrated that the *Second FNPRM*'s proposal would disrupt decades of consistent understanding of what is a franchise fee under the Act and result in devastating fiscal impacts on local governments and public, educational, and governmental ("PEG") access providers across the country.

Only three commenters support the *Second FNPRM*'s proposed treatment of cable-related nonmonetary franchise requirements: NCTA – the Internet & Television Association ("NCTA"), the American Cable Association ("ACA"), and Verizon. But for the most part, their arguments largely repeat or embellish the same flawed reasoning behind the tentative conclusions of the *Second FNPRM* and should be rejected. These industry comments ignore the various provisions of the Cable Act that already provide safeguards against the imposition of unreasonably costly

[1] *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 Further Notice of Proposed Rulemaking, FCC 18-131 (2018) ("*Second FNPRM*").

franchise requirements, including cable-related nonmonetary franchise requirements. Thus, Congress has already provided solutions to the very problem cable operators argue that the Commission should address through the *Second FNPRM*'s proposed rewriting of the scope of the franchise fee cap. The Commission has no authority to second-guess or supplement the solutions Congress enacted.

The Commission should reject the additional requests of NCTA to limit the scope of PEG capital costs and prohibit the voluntary waiver of the franchise fee cap. These arguments have no basis in the statute and are in conflict with express statements in the Act's legislative history. The Commission should also reject ACA's attempt to distinguish build-out requirements from other cable-related nonmonetary franchise requirements authorized under the Cable Act. Whether a franchise requirement is the result of a franchising authority's exercise of discretionary authority permitted by the Act or pursuant to the mandate of Section 541(a)(3) has no bearing on whether the requirement should be considered a franchise fee. Instead, the Cable Act requires that all franchise requirements authorized or permitted by the Act fall outside of the five percent franchise fee cap.

Further, were the Commission to improperly adopt the *Second FNPRM*'s tentative conclusions on franchise fees, the use of fair market value to establish the franchise fee offset "value" of these cable-related nonmonetary franchise requirements would be unworkable and contrary to the Cable Act. At most, only an operator's incremental cost of complying with such a franchise requirement may be regarded as a franchise fee.

Finally, industry arguments that cable operators are entitled to a discriminatory free ride on local rights-of-way with respect to their non-cable services are contrary to the statute, clear legislative history, well-reasoned court precedent, and sound policy. The Act simply cannot be

read as giving cable operators uniquely favorable treatment vis-à-vis non-cable operator providers of non-cable services.

II. THE ARGUMENTS OFFERED BY THE FEW SUPPORTERS OF THE *SECOND FNPRM'S* FRANCHISE FEE PROPOSALS ARE INCONSISTENT WITH THE CABLE ACT AND MUST BE REJECTED.

A. The five percent franchise fee cap does not apply to nonmonetary cable-related franchise obligations authorized under the Cable Act.

The overwhelming majority of opening comments strenuously opposed the *Second FNPRM*'s tentative conclusion that cable-related nonmonetary franchise obligations should be subject to the five percent franchise fee cap. Moreover, those comments make plain the longstanding understanding between franchising authorities and cable operators that cable-related nonmonetary franchise obligations are distinct from franchise fees and thus independent from the Cable Act's limitation on franchise fees.[2] Overturning this established and consistent construction of the Cable Act would be contrary to Congress's clear desire, expressed in the statute's legislative history, that the federal standards the Act imposes on local franchising authority "are not continually alternated by Federal, state or local regulation."[3] And as explained in CAPA's initial comments,[4] the understanding that cable-related nonmonetary franchise obligations are not subject to the franchise fee cap is, unlike the *Second FNPRM*'s proposal, consistent with the text of all of the provisions the Cable Act.

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[2] *See, e.g.*, Comments of City of Lynn, Massachusetts at 1 (Nov. 14, 2018) ("This proposed change upends a decades-old understanding of what constitutes franchise fees, an understanding that excludes in-kind services or equipment."); Comments of 'Ōlelo Community Media at 2 (Nov. 13, 2018) ("PEG access channel capacity, connections to access programming origination points, cable service to schools and libraries, etc., have been part of negotiated franchise agreements for decades without being considered subject to the franchise fee cap."); Comments of BRIC at 2 (Nov. 13, 2018) (The *Second FNPRM*'s proposed treatment of franchise fees "is in contradiction to the original language and congressional intent of the law and contrary to decades of practice.").

[3] H.R. Rep. No. 98-934 at 24 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4661 ("H.R. Rep. No. 98-934").

[4] Comments on Second Further Notice of Proposed Rulemaking of the Alliance for Communications Democracy; the Alliance for Community Media; and the Cities of Bowie, Maryland; Eugene, Oregon; Palo Alto, California; and Portland, Maine at 14-16 (Nov. 14, 2018) ("CAPA Comments").

The arguments offered by the three industry supporters of the *Second FNPRM*'s tentative conclusions regarding franchise fees either ignore or misconstrue the relevant provisions of the Act. Those comments identify the supposed harm that cable operators believe the Commission should remedy: "excessive or burdensome demands" for cable-related, nonmonetary franchise requirements.[5] But they overlook that Congress was aware of this concern when it enacted the Cable Act. Rather than squeezing all such requirements into the "mousehole"[6] of "tax, fee, or assessment of any kind,"[7] however, Congress included various other provisions in the Act that enable franchising authorities to advance the goals of the Cable Act while also preventing the imposition on cable operators of unreasonably costly franchise obligations. To be sure, the franchise fee cap was designed to prevent franchising authorities from imposing monetary fees above a certain amount on cable operators because of their status as such. But Congress did not structure the Cable Act so that the five percent franchise fee cap swallows up all other franchise obligations, such as PEG capacity requirements, and institutional network ("I-Net") requirements, that the Act expressly permits franchising authorities to impose. Thus, NCTA's argument that "[t]he Cable Act's *franchise fee provisions* reflect a carefully considered regulatory balance of the interests of franchising authorities, cable operators and, ultimately, cable subscribers"[8] is simply wrong. The Cable Act *as a whole*, *not* just Section 542, reflects a carefully considered regulatory balance of those interests. Applying the franchise fee cap to

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[5] Comments of Verizon at 4 (Nov. 14, 2018) ("Verizon Comments"); *see also* Comments of NCTA – The Internet & Television Association at 3 (Nov. 14, 2018) ("NCTA Comments") (noting that franchising authorities "frequently seek excessive fees and all sorts of in-kind contributions . . . above and beyond the five percent cap"); Comments of the American Cable Association on the Second Further Notice of Proposed Rulemaking at 2-3 (Nov. 14, 2018) ("ACA Comments") (arguing that the tentative conclusions of the *Second FNPRM* "ensur[e] that [franchising authorities] do not charge excessive fees").

[6] *Whitman v. Am. Trucking Ass'n.,* 531 U.S. 457, 468 (2001).

[7] 47 U.S.C. § 542(g)(1).

[8] NCTA Comments at 39 (emphasis added).

cable-related nonmonetary franchise obligations provided for under the Act would disrupt, not reflect, this balance by rewriting, or rendering largely moot, numerous provisions of the Act beyond Section 542.

In the Cable Act, Congress recognized that franchisee fees are compensation "for the operator's use of public ways."[9] As originally enacted in 1984, the Act limited franchise fees to "5 percent of such cable operator's gross revenues derived in [a twelve-month] period from the operation of the cable system."[10] This created a more uniform standard; previous FCC regulations had capped franchise fees at three percent, with the ability of franchising authorities to obtain a waiver to collect "a fee up to 5 percent . . . upon a showing that the cost of regulation exceeds 3 percent."[11] But the Cable Act assigns franchising authorities a much larger role than just receiving compensation for cable operators' use of the public right-of-way. The stated purposes of the Cable Act include "assur[ing] that cable systems are responsive to the needs and interests of the local community."[12] Congress recognized that local franchising authorities, not the federal government, were best positioned to advance this goal. As explained in the Cable Act's legislative history, "[i]t is the Committee [on Energy and Commerce]'s intent that the franchising process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs."[13]

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[9] H.R. Rep. No. 98-934 at 26.

[10] Cable Communications Policy Act of 1984, § 622(b), 98 Stat. 2779, 2787 (1984); 47 U.S.C. § 542(b) (1984 version).

[11] H.R. Rep. No. 98-934 at 26.

[12] 47 U.S.C. § 521(2).

[13] H.R. Rep. No. 98-934 at 24.

One of the sections of the Cable Act that sets forth this critical role for franchising authorities is Section 546, which establishes the role of franchising authorities in cable franchise renewals. The cable industry's opening comments on the *Second FNPRM* expressed concerns about unreasonable or excessively costly franchise obligations,[14] but these are precisely the concerns that the renewal procedures available to cable operators under Section 546 already address. Indeed, the legislative history specifically notes that the franchise renewal process and the procedures set forth in Section 546 are "designed to assure that the renewal process does not impose unreasonable requirements on the operator."[15]

These renewal procedures establish four bases on which a franchising authority can deny a renewal proposal, including, as most relevant here, if a renewal proposal is not "reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests."[16] Congress provided cable operators with the ability to challenge particular cable-related nonmonetary franchise obligations as unreasonably costly as part of the formal renewal process,[17] as well as on judicial review.[18] But if the costs of franchise fees can, as the *Second FNPRM* proposes, be offset against the Act's fee cap, then there would be no need for a franchising authority in the renewal process, or a court on review of a

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[14] *See* Verizon Comments at 4 (arguing that "excessive or burdensome demands for *cable-related*, in-kind contributions" discourage new entrants from providing services and incumbents from renewing franchises); NCTA Comments at 39 (arguing the *Second FNPRM*'s tentative conclusions about franchise fees "will serve the public interest by protecting cable subscribers from subsidizing excessive costs for in-kind contributions").

[15] H.R. Rep. No. 98-934 at 25-26.

[16] 47 U.S.C. § 546(c)(1)(D).

[17] For instance, under the formal renewal procedures, the cable operator "shall be afforded fair opportunity for full participation [in the proceeding], including the right to introduce evidence (including evidence related to issues raised in the proceeding under subsection (a) [to identify future cable-related community needs and interests and review the performance of the cable operator under its existing franchise]), to require the production of evidence, and to question witnesses." 47 U.S.C. § 546(c)(2).

[18] 47 U.S.C. § 546(e).

franchising authority's renewal decision, to consider "the cost of meeting [those] needs and interests," because those costs would already be capped by Section 542.[19]

Industry's argument that the franchise fee cap must be extended to cover cable-related nonmonetary franchise obligations is therefore wrong. Cable operators already have the ability under the Cable Act to challenge what they believe to be unreasonably costly cable-related nonmonetary franchise requirements. And as NCTA concedes, cable operators exercise this ability in practice.[20] NCTA nevertheless complains that cable operators may "incur costly litigation to enforce their rights,"[21] but this complaint ignores that litigation is also not costless for franchising authorities. They too must incur costly litigation to enforce their rights under the Cable Act if a cable operator challenges a franchise requirement imposed at renewal as unreasonable. Moreover, franchising authorities, particularly in small or rural communities, often lack the level of resources that cable operators have to devote towards litigation. Thus, it is generally the franchising authority—*not* the cable operator, as NCTA contends—whose "negotiating leverage" is compromised in the franchise renewal process.[22] As a result, Section 546 creates an incentive for franchising authorities not to impose unreasonable cable-related nonmonetary franchise obligations likely to be overturned on judicial review.

Perhaps more fundamentally, industry's argument about litigation costs is both beside the point and hypocritical. It is irrelevant because a court, not FCC, remedy is the remedy Congress provided in Section 546(e). It is hypocritical because NCTA blithely ignores the enormous cost

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[19] *See* CAPA Comments at 8-9.

[20] *See, e.g.*, NCTA Comments at 62 nn.178-179 (citing a complaint filed by a cable operator in federal district court regarding a franchising authority's renewal decision).

[21] *Id.* at 57.

[22] *Id.* at 58. Moreover, as the Sixth Circuit noted in *Montgomery Cty. v. FCC*, "[franchising] authorities do not have unlimited discretion in negotiating . . . franchises." 863 F.3d 485, 487 (6th Cir. 2017) (citing 47 U.S.C. § 541(a)(1)).

in lost funding to local franchising authority and PEG providers if the *Second FNPRM*'s proposals were adopted.

Another purpose of the Cable Act is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."[23] Again, Congress gave franchising authorities a critical role in addressing this purpose, authorizing franchising authorities to impose franchising obligations regarding channel capacity and support for PEG access.[24] As with Section 546, the PEG-related provisions of the Cable Act make no reference to the franchise fee cap; instead, Congress set other limitations on PEG-related franchise obligations. A franchising authority's ability to require in a franchise and in a renewal proposal that channel capacity be designated for PEG is "subject to section 546 of this title."[25] Similarly, in awarding a franchise, a franchising authority can require "*adequate* assurance that the cable operator will provide *adequate* public, educational, and governmental access channel capacity, facilities, or financial support."[26] Had Congress intended the cost of PEG channel capacity, facilities, and financial support, as well as I-Net capacity, be included in the Act's fee cap, these Cable Act limitations on PEG and I-Net capacity requirements would be superfluous.

The question of how to ensure that a cable system provides diverse sources of information and is responsive to the cable-related needs and interests of the particular

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[23] 47 U.S.C. § 521(4).

[24] 47 U.S.C. §§ 531(a)-(b), 541(a)(4)(B). Congress understood that PEG access advances the goal of diversity in sources of information. H.R. Rep. No. 98-934 at 30 ("Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas."). In addition, PEG channels "contribute[s] to an informed citizenry by bringing local schools into the home, and by showing the public local government at work." *Id.*

[25] 47 U.S.C. § 531(b).

[26] 47 U.S.C. § 541(a)(4)(B) (emphasis added).

community it serves is not one that can be resolved by a simple arithmetic comparison of five percent of the operator's gross revenue from cable services against the cost of complying with all franchise requirements. That is why Congress gave franchising authorities—who are best positioned to determine the unique needs and interests of their communities—the ability to impose various cable-related nonmonetary franchise obligations tailored to local cable-related community needs and interests. Even assuming for the sake of argument the legitimacy of industry's concerns about supposedly unreasonable cable-related franchise requirements, these concerns cannot justify rewriting the Cable Act to include cable-related nonmonetary franchise obligations in the franchise fee cap. Other Cable Act provisions address industry's concerns that PEG-related and I-Net-related requirements are not excessive or unreasonable. Superimposing the franchise fee cap on top of these provisions fundamentally would undermine the balance between cable operators and franchising authorities established in the Cable Act.

B. The Commission should reject ACA's and NCTA's proposed treatment of PEG capital costs.

For the reasons set forth above and in CAPA's initial comments,[27] ACA's and NCTA's argument that PEG capital costs are the only cable-related, in-kind contribution not subject to the franchise fee cap is wrong.[28] ACA's argument that Section 542(g)(2)(C) supports its claim is also misplaced. In isolation, that provision may appear to single out PEG capital costs for unique treatment, but reading it in conjunction with Section 542(g)(2)(B) and the rest of the Cable Act demonstrates that this provision merely clarifies the tripartite treatment of PEG-related costs intended by Congress: that PEG operating expenses (like PEG capital costs) should be exempt from the franchise fee cap for pre-Cable Act franchises, but (unlike PEG capital costs) should be

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[27] CAPA Comments at 7-14.

[28] ACA Comments at 5-6; NCTA Comments at 47.

subject to the cap in post-Cable Act franchises. The Commission explained the difference between capital costs under Section 542(g)(2)(C) and PEG support payments under Section 542(g)(2)(B) in its *First Report and Order* in this proceeding, stating that "[c]apital costs refer to those costs incurred in or associated with the construction of PEG access facilities" whereas "PEG support payments may include, but are not limited to, salaries and training."[29] Congress exempted these support payments from the franchise fee definition only for franchises in effect prior to the enactment of the Cable Act, 47 U.S.C. § 542(g)(2)(B), but 47 U.S.C. § 542(g)(2)(C) provides that these kinds of PEG support payments, unlike PEG capital costs, would no longer be exempted in franchises granted after the Act became law. Thus, the distinction drawn in Section 542(g)(2)(B) and (C) is between PEG operating costs and PEG capital costs, *not* between PEG capital costs and all other cable-related nonmonetary franchise requirements, such as requirements that channel capacity be designated for PEG access. As a result, these two provisions do not support the claim that all cable-related nonmonetary franchise requirements other than PEG capital costs are subject to the franchise fee cap.

In addition, NCTA is wrong to argue that "the Commission should confirm that PEG capital costs include only construction of PEG facilities (not cameras, playback devices and other equipment)."[30] NCTA's argument is flatly at odds with the Act's plain language. Section 542's PEG capital cost exemption refers to "capital costs . . . for public, educational, or governmental access facilities,"[31] and the Act in turn defines "public, educational, or governmental access

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[29] *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, Report and Order and Further Notice of Proposed Rulemaking ¶ 109, 22 FCC Rcd. 5101, 5150-51 (2007) ("*First Report and Order*") (footnote omitted), *petition for review denied sub nom. Alliance for Cmty. Media v. FCC*, 529 F. 3d 763 (6th Cir. 2008).

[30] NCTA Comments at 47.

[31] 47 U.S.C. § 542(g)(2)(C).

facilities" to include both "facilities *and equipment* for the use of [PEG] channel capacity."[32] And in case this statutory language were somehow not sufficiently clear, the legislative history confirms it: the examples of costs that NCTA claims should be subject to the franchise fee cap—costs for "cameras," "other equipment," and "transport costs"[33]—are the same examples that the legislative history identifies as PEG access facilities.[34]

Apparently aware of these defects in its argument, NCTA concedes in a footnote that "equipment necessary to outfit a new PEG studio would fit this definition [of PEG capital costs]," but suggests that the cost of any other equipment must be subject to the five percent franchise fee cap.[35] But there is no basis or logic for this "new PEG studio[s]" distinction in the Cable Act, its legislative history, prior Commission orders, or *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).[36] Nor would a one-time-only-per-franchise term interpretation of PEG capital costs be consistent with the Cable Act's stated purpose of "assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."[37] Just as cable operators no doubt incur capital costs for periodic equipment replacement and upgrades, so do PEG providers. And just as the need for diversity of information sources and services is ongoing, so is the need for

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[32] 47 U.S.C. § 522(16) (emphasis added).

[33] NCTA Comments at 47.

[34] H.R. Rep. No. 98-934 at 45 ("'Public, educational, or governmental access facilities' means 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. This may include *vans, studios, cameras, or other equipment* relating to the use of [PEG] channel capacity.") (emphasis added).

[35] NCTA Comments at 48 n.143.

[36] The Sixth Circuit in *Alliance for Community Media* found that the Commission's interpretation of "capital costs" as applying to those costs "incurred in or associated with the construction of PEG access facilities" to be reasonable. 529 F.3d at 784. Neither the Court nor the *Second FNPRM* (¶ 19) suggest that construction can only occur for *new* PEG access facilities.

[37] 47 U.S.C. § 521(4).

ongoing capital costs to support the PEG access centers that provide these diverse sources of information and services.

NCTA nonetheless argues that "[the] Commission should find that franchising authorities may only accrue PEG capital funds in connection with specific construction projects that the parties have planned and agreed to, including a reasonable and established timeframe for the expenditure of such funds."[38] Again, there is nothing in the Act that supports a requirement that specific construction projects must be identified and agreed upon in order for a franchise to require a cable operator to incur PEG capital costs. Instead, the Cable Act provides that "*[i]n awarding a franchise*, the franchising authority . . . may require adequate assurances that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support."[39] It would not be reasonable to require that when a franchising authority awards a franchise—which is typically for a term of ten or fifteen years—it must identify at the outset any and all PEG projects or capital expenditures that will occur over the entire term of that franchise. Certainly no cable operator provides, or is expected to provide, such certainty and precision in long-term capital budgeting. Nothing in that Act suggests that franchising authorities or PEG access centers should be required to do so.

C. The Commission should reject ACA's argument that only build-out requirements pursuant to Section 541(a)(3), but not other nonmonetary cable-related obligations, are not subject to the franchise fee cap.

In the *Second FNPRM* (¶ 21), the Commission proposed to distinguish build-out requirements from other cable-related nonmonetary franchise requirements for the purposes of the franchise fee on the basis that build-out requirements "are part of the provision of cable

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[38] NCTA Comments at 48.

[39] 47 U.S.C. § 541(a)(4)(B) (emphasis added).

service in the franchise area and the facilities ultimately may result in profit to the cable operator." ACA (at 7-8) proposes an alternative means of separating build-out requirements from the various cable-related nonmonetary franchise conditions provided for under the Cable Act. Like the *Second FNPRM*'s reasoning,[40] however, ACA's reasoning has no basis in the statute.

ACA argues that build-out requirements pursuant to the statutory mandate of Section 541(a)(3) should not count towards the franchise fee cap, whereas obligations imposed "at the discretion" of a franchising authority should count toward the franchise fee cap.[41] But nothing in the Act's franchise fee definition distinguishes between franchise requirements that franchising authorities are mandated to impose versus those they are permitted to impose. Nor does the Act distinguish between franchise requirements that are for the "benefit of the LFA" or that "may result in profit to the cable operator" and those that do not.[42] Moreover, ACA does not, and cannot, deny that the more expansive a franchise build-out requirement is, the more likely it is that cable service will not be denied to potential subscribers on the basis of their income, as provided in 47 U.S.C. § 541(a)(3). Instead, as explained above and in CAPA's opening comments (at 7-14), the Cable Act requires that all franchising requirements authorized or permitted by the Act must not be subject to the five percent franchise fee cap.

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[40] CAPA Comments at 12-14 (explaining the distinction for build-out requirements in the *Second FNPRM* is not based on the statute and, in any event, would apply equally to other cable-related nonmonetary franchise obligations).

[41] ACA Comments at 7-8.

[42] ACA Comments at 7.

D. The Commission should reject NCTA's request that it prohibit cable operators from voluntarily waiving any franchise fee limitations.

NCTA argues that the Commission should prohibit cable operators and franchise authorities from waiving the five percent franchise fee cap, particularly as NCTA would apply it to cable-related nonmonetary franchise requirements.[43] But NCTA has shown no need for such Commission action, and it would result in much mischief by cable operators.

As an initial matter, NCTA's argument appears premised on the assumption that all in-kind franchise obligations over and above the 5% franchise fee must be a product of the operator's supposed "waiver" at the Act's 5% fee cap. That is not true; franchise obligations—even monetary ones—agreed to as part of a settlement or release of claims are not a "franchise fee." As the Commission already recognized in this very docket in discussing franchise fees:

> [F]ranchise agreements involve contractual obligations and . . . some terms may have been implemented as part of a settlement regarding . . . past performance by the franchisee . . . . This *Order* should in no way be interpreted as giving incumbents a unilateral right to breach their existing contractual obligations.[44]

NCTA also overlooks the legislative history of the Cable Act, which makes clear that Congress envisioned that voluntary payments made by cable operators, particularly to support PEG access, would not be subject to the five percent franchise fee cap. In describing the relationship between franchise fees and PEG-related expenditures, H.R. Rep. No. 98-934 states that "any payments which *a cable operator makes voluntarily* relating to support of public, educational and governmental access and which are not required by the franchise *would not be*

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[43] NCTA Comments at 55-59.

[44] *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. 19,633, 19,642, ¶ 19 (2007) ("*Second Section 621 Order*), *clarified*, 30 FCC Rcd. 810 (2015), *review granted in part and denied in part on other grounds sub nom. Montgomery Cty. v. FCC*, 863 F.3d 485 (6th Cir. 2017). *See also* Eugene September Letter, Ex. A at 31-32.

subject to the 5 percent franchise fee cap."[45] The legislative history reflects the plain language of the statute. In order for a payment to be a "franchise fee," and therefore subject to the five percent cap, it must be "*imposed by a franchising authority or other governmental entity* on a cable operator or cable subscriber, or both, solely because of their status as such."[46] Any payments that a cable operator voluntarily agrees to provide, in contrast, is not "imposed" by a franchising authority.

The question then becomes, what is a franchise requirement that represents consideration for the settlement or release of a claim, on the one hand, a voluntary contribution made by a cable operator, on the other hand, and a purported waiver of the Act's fee cap, on still another. Contrary to NCTA's assertion, the answer to these questions will inherently be fact-specific, "and the facts and circumstances of each situation must be assessed on a case-by-case basis under applicable law."[47] Here, as in the case of any franchise agreement dispute, there is no substitute for court resolution of disputed facts. NCTA's suggestion (at 57) that it is "simply not possible for cable operators to bring lawsuits every time an in-kind contribution is imposed and not applied towards the franchise fee" is an argument at odds with the Cable Act, which provides cable operators with specific court remedies through which they may challenge what they believe are unreasonable terms of an initial franchise, 47 U.S.C. §§ 541(a)(3) and 555(a), or a franchise renewal, 47 U.S.C. §§ 546(e) and 555(a).

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[45] H.R. Rep. No. 98-934 at 65 (emphasis added). In its first order in this proceeding, the Commission limited its consideration of contributions in support of PEG services and equipment to "LFA-*mandated* contributions." *First Report and Order* ¶ 109 (emphasis added).

[46] 47 U.S.C. § 542(g)(1) (emphasis added).

[47] *Second Section 621 Order,* 22 FCC Rcd 19,642.

The implications of NCTA's argument are even more problematic when combined with its claim that all "in-kind exactions" must be subject to the five percent franchise fee cap.[48] These arguments are nothing short of a license for a cable operator to unilaterally decide what is a "franchise fee" and what is not, and perhaps worse still, to intentionally deceive a franchising authority by agreeing to the terms of a franchise the operator has no intention of fulfilling.

III. SHOULD THE COMMISSION IMPROPERLY CONCLUDE THAT THE COSTS OF NONMONETARY CABLE-RELATED FRANCHISE REQUIREMENTS COUNT TOWARDS THE FRANCHISE FEE CAP, VALUING THESE REQUIREMENTS AT FAIR MARKET VALUE RATHER THAN INCREMENTAL COST WOULD BE UNWORKABLE AND CONTRARY TO THE CABLE ACT.

Were the Commission to conclude (improperly) that the costs of cable-related nonmonetary franchise obligations must be deducted from franchise fees, the opening comments illustrate that the use of fair market value to quantify these costs would be a grossly improper measuring stick. As an initial matter, as explained in greater detail in CAPA's initial comments,[49] cable operators have already recovered, and continue to recover, the costs of satisfying their franchise requirements through their rates to subscribers. Before there could be any offset against franchise fees, the Commission would have to first ensure that cable operators are not allowed to double-recover these costs through both subscriber rate and franchise fee offsets.

To the extent that there are costs of franchise requirements that are not already recovered through subscriber rates (an inherently implausible assumption), the initial comments show that there is no agreed-upon methodology for determining market value for many of these cable-related nonmonetary obligations. In contrast, the actual costs of complying with a franchise

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[48] NCTA Comments at 63.

[49] CAPA Comments at 16.

requirement could at least be subject to audit and verification.[50] Even NCTA, who argues in favor of using market value, concedes that "actual costs" would have to be used for many of the common nonmonetary franchise requirements.[51]

For those franchise requirements that NCTA argues fair market value should be used, the provisions of the Cable Act show why the Commission must reject the use of fair market value (were it to improperly subject cable-related nonmonetary franchise requirements to the franchise fee cap). For example, NCTA states that the "[v]alue of [PEG] channel space" should be determined by the "[m]arket value of comparable services."[52] NCTA does not attempt to identify what services are "comparable" to PEG channel capacity. It would be contrary to Congress's intent in providing for PEG access in the Cable Act to use the value of commercial channel capacity to calculate any offset against franchise fees. The purpose of PEG access is to "provide groups and individuals who generally *have not had access to the electronic media* with the opportunity to become sources of information in the electronic marketplace of ideas."[53] The Cable Act allows franchising authorities to require that channel capacity be set aside for PEG access precisely because the commercial media do not otherwise provide these groups and individuals with such access. Requiring franchising authorities to, in essence, pay for PEG

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[50] *See, e.g.,* Comments of the State of Hawaii at iii (Nov. 14, 2018) (explaining that "the calculation of a given contribution's 'fair market value' will inevitably be a point of disagreement between franchisees and franchising authorities."); City of Roseville, Letter Re: MB Docket No. 05-311 at 2 (Nov. 14, 2018) ("The 'fair market value' of such services may be impossible to discern and would likely be a source of litigation between cable operators and local governments."); California Tri-Valley Cities of Dublin, Livermore, Pleasanton, San Ramon, and the Town of Danville, Letter Re: MB Docket No. 05-311 at 1 (Nov. 13, 2018) (same); City of Simi Valley, Letter Re: MB Docket No. 05-311 at 2 (Nov. 13, 2018) (same); City of Martinez, CA, Letter Re: MB Docket No. 05-311 at 2 (Nov. 5, 2018) (same); City of Albany, CA, Letter Re: MB Docket No. 05-311 at 2 (Nov. 14, 2018) (same); City of San Luis Obispo, Letter Re: MB Docket No. 05-311 at 2 (Nov. 14, 2018) (same); City of Placentia, Letter Re: MB Docket No. 05-311 at 1 (Nov. 6, 2018) (same).

[51] NCTA Comments at 53-55.

[52] NCTA Comments at 54.

[53] H.R. Rep. No. 98-934 at 30 (emphasis added).

channel capacity on the same terms as commercial programmers would undermine Congress's desire to promote the "video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet."[54]

More broadly, NCTA's argument in favor of using fair market value would fundamentally alter the role of franchising authorities set forth in the Cable Act and render large portions of the Act superfluous. In its initial comments, NCTA notes that market valuation would mean that franchising authorities would "not [be] at any disadvantage by choosing to obtain those services from the franchise cable operator," because they would pay the market rate to another provider if it did not obtain the services through a franchise obligation.[55] This is correct; offsetting the market value of nonmonetary franchise obligations against franchise fees means that franchising authorities are in the same position as if they simply purchased these services from the market.[56] But there would have been no reason for Congress to authorize franchising authorities to impose PEG and other cable-related requirements in franchises if what it intended was only that franchising authorities could do what they—and anyone else, for that matter— already could do: purchase facilities or services to fulfill the required franchise requirement at market value.

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[54] *Id.*

[55] NCTA Comments at 52.

[56] As a hypothetical, consider a franchising authority that collects $100 in franchise fees and the cable operator complies with cable-related nonmonetary franchise obligations with a market value of $10. If the market value of the franchise obligations are offset from franchise fees, the franchising authorities receives $90 in fees and the benefit of the nonmonetary franchise obligations. If it were to impose a $100 franchise fee and purchased from the market $10 of cable-related benefits, it would be in the same position: it would receive a net of $90 along with the cable-related benefits.

IV. INDUSTRY COMMENTERS MISCONSTRUE THE ACT IN URGING THE COMMISSION TO PREEMPT NON-DISCRIMINATORY RIGHT-OF-WAY FEES IMPOSED ON CABLE OPERATORS' NON-CABLE SERVICES.

As we and other commenters noted, the *Second FNPRM*, although not a model of precision, tentatively concluded that franchising authorities may not use their Title VI (*i.e.*, Cable Act) authority to regulate or impose fees on cable operators' non-cable services.[57] NCTA (at 4-5, 10, 14-26) and ACA (at 9-15), however, ask the Commission to go beyond the *Second FNPRM*'s proposal and rule that the Cable Act, along with Section 253, prohibit local governments from exercising any of their right-of-way compensation or management authority with respect to cable operators' use of the rights-of-way to provide non-cable service. NCTA (at 10, 20, 26), in particular, takes aim at *Eugene v. Comcast of Or. II, Inc.*, 375 P.3d 446 (Or. 2016), where the Oregon Supreme Court upheld application of the City of Eugene's generally applicable seven percent telecommunications right-of-way fee to Comcast's broadband service revenues.

Although NCTA disagrees with the *Eugene* decision, it cannot even bring itself to so much as mention, much less confront, the *Eugene* court's reasoning and analysis of the relevant Communications Act and Cable Act provisions, the legislative history, or even prior FCC and court decisions discussed and distinguished by the *Eugene* court. Perhaps that is because, along with Comcast, NCTA (as well as ACA), as *amici* in the *Eugene* case,[58] raised the virtually same arguments NCTA raises here, and the *Eugene* court thoroughly addressed and rejected each one.

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[57] *See, e.g.*, CAPA Comments at 17; Comments of the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National Association of Counties, the National League of Cities, the National Association of Regional Councils and the National Association of Towns and Townships at 13-14 (Nov. 14, 2018) (citing *Second FNPRM*, ¶¶ 1 & 25).

[58] 375 P.3d at 448.

Among other arguments, the *Eugene* court addressed NCTA's Section 541(a)(2) argument,[59] *see* 375 P.3d at 456-58; it addressed NCTA's Section 542 argument,[60] *see* 375 P.3d at 462-63; and it addressed NCTA's Section 541(b) arguments,[61] *see* 375 P.3d at 458-61.

CAPA members have already responded to those arguments as well in this docket, and they have also responded to NCTA's Section 253 argument (NCTA Comments at 21-28).[62] We will not repeat those arguments here, but do draw the Commission's attention to the following key points:

First, NCTA's discussion of the Cable Act's franchise fee provision, 47 U.S.C. § 542, purposefully avoids any mention of the key phrase in the Act's "franchise fee" definition that dooms its position: "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, *solely because of their status as such*."[63] NCTA never explains how a generally applicable right-of-way fee, like Eugene's, that is imposed on telecommunications and broadband service providers, regardless of whether those providers are also "cable operator[s]" or operate a "cable system" as defined in the Cable Act,[64] is a fee imposed on cable operator or subscriber "solely because of their status as such."[65] Indeed, Eugene's telecommunications right-of-way fee does not apply to cable service,

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[59] NCTA Comments at 8-11.

[60] NCTA Comments at 14-21.

[61] NCTA Comments at 11-15.

[62] Letter from Tillman L. Lay, Counsel for the City of Eugene, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311, WC Docket Nos. 17-84, 17-79 (filed Sept. 19, 2018) ("September Eugene Letter"). NCTA notes the September Eugene Letter in its comments (at 5 n.10), but curiously never responds to the arguments raised in that filing.

[63] 47 U.S.C. § 542(g)(1) (emphasis added).

[64] 47 U.S.C. § 522(5), (6).

[65] And if, as is clear, a generally applicable telecommunications/broadband right-of-way fee is not a "franchise fee" under the Cable Act, then that fee is not barred by that Act, and the other Cable Act provisions cited by NCTA and ACA (47 U.S.C. §§ 522, 541, 544, 556) do not and cannot alter that conclusion.

and it does not apply to cable operators at all, *unless* those cable operators also provide broadband or telecommunications services. Thus, Eugene's fee applies to telecommunications and broadband service providers solely because of their status as telecommunications and broadband service providers, *not* because of their status as cable operators (let alone *solely* because of their status as such). This trait distinguishes non-cable right-of-way fees like Eugene's from the cases cited by NCTA (NCTA Comments at 19), where a municipality sought, through its cable franchise agreement or otherwise, to impose a fee on cable operators'—and only cable operators'—cable broadband or telecommunications services.

Second, NCTA, ACA, and Verizon all studiously ignore the legislative history of the Cable Act and the 1996 Telecommunications Act, as well as FCC decisions,that undermine their position. None of the industry Commenters mention, much less attempt to refute, the Conference Report to the 1996 Act, which flatly contradicts their position that Congress intended cable operators' non-cable services to be immune from "fair and reasonable fees" for use of the right-of-way.[66] Also unmentioned by NCTA is the Commission's own Second Report and Order in this very docket, which stated that its finding that a cable operator cannot be required to pay cable franchise fees on revenues from non-cable services "of course, does *not* apply to non-cable franchise fee requirements, such as any lawful fees related to the provision of telecommunications services."[67] Unlike NCTA, the *Eugene* court recognized and applied these

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[66] H.R. Rep. No. 104-458 at 180 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 193. *See also* Eugene September Letter, Ex. A at 31.

[67] *Second Section 621 Order,* 22 FCC Rcd at 19,638 n. 31 (emphasis added). *See also* Eugene September Letter, Ex. A at 31-32.

authorities,[68] so it is NCTA, not the *Eugene* court, whose position "defies logic" in the face of clear Congressional intent.[69]

Third, NCTA's claim (at 35) that its position "would help promote a level playing field between cable operators and other rights-of-way users," is 180 degrees off the mark. NCTA's position—that cable operators, and *only* cable operators, are immune from a generally applicable right-of-way fee on telecommunications and broadband service providers—would be discriminatory, not competitively neutral, and would treat likes (wireline telecommunications/broadband services providers) unalike, depending on whether they are also cable operators.

Fourth, that cable operators, unlike non-cable operators, pay a five percent cable franchise fee is beside the point. Cable operators can—and uniformly do—itemize and recover their cable franchise fee from cable subscribers.[70] So under NCTA's and ACA's approach, cable operators' broadband/telecommunications services would receive a free ride on the right-of-way, while broadband/telecommunications providers that are not cable operators would have to pay right-of-way fees on their broadband/telecommunications services.

Fifth, NCTA's suggestion (at 23) that the five percent cable franchise fee is "more than 'fair and reasonable compensation' for [cable operators'] use of the public rights-of-way" is irreconcilably at odds with the Cable Act itself, which permits a five percent cable franchise fee.

Sixth, NCTA's assertion (at 21-26) that imposing generally applicable gross revenue-based right-of-way fees on cable operators' non-cable services is a local entry barrier under Section 253 is unsupported by facts or common sense. Cable operators are by far the largest

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[68] *See* 375 P. 3d at 459-61.

[69] NCTA Comments at 18.

[70] *See* 47 U.S.C. § 542(c).

broadband service providers in the nation,[71] and they have more broadband subscribers than cable subscribers.[72] Moreover, the record stands unrefuted that Eugene's telecommunications right-of-way fee has not prohibited telecommunications or broadband service in any way.[73] To suggest that requiring cable operators to pay the same gross revenue-based fee that their non-cable wireline broadband competitors pay is an entry barrier is therefore belied by the record. To be sure, NCTA (at 21-23) points to the Commission's recent *Small Cell Order*[74] for the proposition that "fair and reasonable compensation" under Section 253 is limited to costs. But the rhetoric of NCTA, ACA and Verizon does not, and cannot, refute the record evidence[75] showing that the fees about which they complain have had no prohibitory effect.

In sum, neither the Cable Act nor Section 253 preempts application of non-discriminatory telecommunications right-of-way compensation fees on cable operators' use of the right-of-way to provide non-cable service. NCTA, ACA and Verizon are simply incorrect in asserting otherwise.

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[71] *455,000 Added Broadband in 2Q 2018*, Leichtman Research Group, Inc. (Aug. 14, 2018), https://www.leichtmanresearch.com/455000-added-broadband-in-2q-2018/.

[72] *See* Cable's Customer Base, NCTA, (66.4 million broadband customers, 51.9 million "television" customers), https://www.ncta.com/chart/cables-customer-base (last visited Dec. 13, 2018).

[73] *See* Letter from Tillman L. Lay, Counsel for the City of Eugene, to Marlene H. Dortch, Secretary, and Elizabeth Bowles, Chair, Broadband Deployment Advisory Comm., FCC, WC Docket No. 17-84, GN Docket No. 17-83, WT Docket No. 17-79, at 3-4 & Att. 5 (filed Dec. 19, 2017).

[74] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Reported Order*, Declaratory Ruling and Third Report and Order ¶¶ 43 *et seq.*, FCC 18-133, (rel. Sept. 27, 2019) ("*Small Cell Order*").

[75] *See id.*

V. CONCLUSION

The Commission should abandon the *Second FNPRM*'s proposal to treat cable-related nonmonetary franchise requirements as a franchise fee and reject NCTA's request to prohibit voluntary waiver of the franchise fee cap. It also should abandon its proposal to modify and expand the "mixed-use" rule.

Respectfully submitted,

/s/ James N. Horwood

James N. Horwood
Tillman L. Lay
Jeffrey M. Bayne
SPIEGEL & MCDIARMID, LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

Counsel for The Alliance for Communications Democracy; The Alliance for Community Media; and the Cities of Bowie, Maryland; Eugene, Oregon; Palo Alto, California; Portland, Maine; and San Antonio, Texas

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