

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Implementation of Section 621(a)(1) of the)	MB Docket No. 05-311
Cable Communications Policy Act of 1984 as)	
Amended by the Cable Television Consumer)	
Protection and Competition Act of 1992)	

REPLY COMMENTS OF FREE PRESS

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INTRODUCTION

The tentative conclusions in the Commission’s *Second Further Notice of Proposed Rulemaking (Second FNPRM)*¹ run counter to the plain language of the 1984 Cable Act, as well as the relevant legislative history for the provisions at issue here, and decades of Commission interpretation (including decisions rendered in this docket).² As the record reflects, the Commission must abandon its proposal to extend the scope of a “franchise fee” to include nearly all cable-related, in-kind contributions. The current proposal violates the statute while also posing serious harms to the public interest by threatening PEG channel support and other critical franchise obligations. Similarly, the Commission’s articulation of its mixed-use ruling is astonishingly ambiguous and plainly contradicted by statute.

I. The Commission’s Franchise Fee Proposal is Overbroad and Contrary to the Statute.

The Commission’s tentative conclusion that nearly all cable-related, in-kind contributions made pursuant to an agreement with a local franchising authority (“LFA”) should be counted as franchise fees – and accordingly subject to a cap of five percent of the cable operator’s gross revenues – is overbroad and seriously misjudged. Unsurprisingly, the record contains negligible support for this proposal: Only a handful of industry commenters filed praise of this abrupt redefinition of franchise fees, compared to hundreds of local communities, PEG channels, and

¹ See *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, ¶¶16-31 (rel. Sept. 25, 2018) (“*Second FNPRM*”).

² See *Cable Communications Policy Act of 1984*, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

public advocacy groups that raised strong collective opposition to the Commission’s harmful and poorly-reasoned proposal.

As commenters addressed,³ the Commission’s decision to label nearly every possible in-kind contribution not subject to a specific exemption under Section 622(g)(2) as a “franchise fee” wrongly subverts many other statutory goals of the Cable Act. This excessively wide-ranging definition implicates an overwhelming variety of franchise obligations, including those listed by City Coalition as requirements executed by its members:

- Emergency Alert Capability, including an Emergency Alert System;
- Cable service to schools and public buildings;
- Public, educational and governmental (“PEG”) access channel capacity (including standard definition (“SD”) and high definition (“HD”) format);
- Institutional Networks (“I-Nets”) serving governmental and educational facilities;
- Fiber return lines used to transmit PEG programming from educational and governmental buildings to an operator’s headend facility;
- Interconnections between LFAs to promote sharing of local content;
- PEG channel equipment at operator’s headend;
- Ability to promote PEG channels (*i.e.*, advertising inserts on channels; bill stuffers, etc.);
- Maintenance of local offices for customer service;
- Customer service standards that may exceed the Commission’s customer service obligations; and
- Undergrounding of cable/fiber.⁴

³ See Comments of the Alliance for Communications Democracy *et al.*, MB Docket No. 05-311, at 7 (filed Nov. 14, 2018) (“Such a construction would permit Section 542 and its franchise fee cap to swallow various franchise requirements that other provisions of the Cable Act explicitly authorize LFAs to impose, such as PEG and I-Net requirements in Section 531. There is nothing in the Cable Act or its legislative history remotely suggesting that Congress intended for the franchise fee to trump all of the Act’s other provisions and to subject these nonmonetary franchise requirements to the franchise fee cap.”) (“ACD Comments”).

⁴ Comments of the City Coalition, MB Docket No. 05-311, at 9 (filed Nov. 14, 2018) (“City Coalition Comments”).

These requirements serve several statutory mandates and goals in the Cable Act that the Commission's *Second FNPRM* willfully ignores.⁵ Subsuming the provision of all such measures necessary to promote these goals and satisfy LFAs' congressionally-authorized mandates under a comically overbroad definition of a "franchise fee" improperly puts co-equal statutory priorities into unreasonable competition, and places LFAs in the impossible position of being forced to choose which statutorily-authorized rights and obligations to pursue and which to forgo.⁶

Moreover, this overbroad re-definition ignores clear statutory language and significant legislative history. The Commission implausibly argues that legislative history provides no basis for distinguishing between franchise fees and in-kind contributions, seemingly opting for sad word games to conflate the statutory reference to "assessment[s] of any kind" with "in-kind contributions." Yet numerous commenters identified the precise legislative report language that does exactly what the Commission fails to see – or more likely, willfully ignores. As the ACD Comments among many others note, the House report accompanying the 1984 Act specifically noted that Section 622 generally "defines as franchise fee only monetary payments made by the cable operator[.]"⁷ Court cases leading to the *Second FNPRM* dwell on the fact that an assessment may be non-monetary. Yet as the *Montgomery County v. FCC* decision conceded, the

⁵ See ACD Comments at 7; Comments of the National Association of Telecommunications Officers and Advisors, MB Docket No. 05-311, at 2 (filed Nov. 14, 2018) ("NATOA Comments").

⁶ See Comments of the State of Hawaii, MB Docket No. 05-311, at 3-4 (filed Nov. 14, 2018) ("Hawaii Comments").

⁷ See ACD Comments at 6 (emphasis added); see also City Coalition Comments at 13-14; NATOA Comments at 5 (filed Nov. 14, 2018); Hawaii Comments at 3-4. As the ACD Comments note more fully, "[i]n explaining the Cable Act's definition of franchise fee, Congress stated that '[i]n general, this section [Section 622] defines as franchise fee only monetary payments made by the cable operator, and does not include as a 'fee' any franchise requirements for the provision of [PEG] services, facilities, or equipment.'";

fact that a fee or assessment “can include noncash exactions, of course, does not mean that it necessarily does include every one of them.”⁸ Here, there is legislative history that definitively answers this question, whether or not the Commission purports to see it.

The ACD Comments also point out several instances in which the Cable Act itself “explicitly differentiates between franchise fees on the one hand, and the costs of franchise requirements on the other,” including by allowing cable operators to itemize franchise fee costs separately from PEG channel support costs and instructing the Commission to also consider these costs separately when ensuring reasonable rates.⁹ This plain language distinction should not come as a shock to the Commission, which has recognized these separate definitions for decades. As Anne Arundel County, Maryland and its joint commenters specifically note, the Commission recognized the rights of LFAs to require I-Nets in franchise agreements without counting their cost the five percent franchise fee cap in this very docket.¹⁰ The Commission’s sudden about-face relies not on new law or evidence, but on a glaringly obvious “retcon” to rewrite past Commission decisions on this very topic. This kind of subterfuge just won’t cut it.

The Commission’s solitary exemption of build-out requirements, from its proposed, all-encompassing, but improper treatment of in-kind contributions, casts the proposal’s internal inconsistencies into sharp relief. While Free Press supports the decision to exclude the costs for meeting build-out requirements from the definition of a franchise fee, the Commission’s reasoning for making this distinction is insupportable. Specifically, the Commission abandons

⁸ 863 F.3d 485, 491 (6th Cir. 2017).

⁹ ACD Comments at 6, 10-11.

¹⁰ See Comments of Anne Arundel County, Maryland *et al.*, MB Docket No. 05-311, at 25-26 (filed Nov. 14, 2018).

the bounds of the statute to invent a test that excludes build-out requirements on the basis that they are “not specifically for the use or benefit of the LFA,” and “ultimately may result in profit to the cable operator.”¹¹ But under this contrived test, PEG channel and I-Net support requirements deserve similar exemptions, as these contributions benefit the public not the LFA.¹² Other obligations such as requirements to offer discounted service may also result in cable operator profit – yet the Commission flip-flops once again, specifically listing discounted service requirements as an example of a cable-related in-kind contribution that would count as a franchise fee under this preposterous new treatment.¹³

These glaring inconsistencies are unsurprising, as commenters note, since the Commission’s invented distinction is unreasonable and impractical, and it has no basis in law or fact.¹⁴ The ACD Comments object to the arbitrary test, rightly calling it “untethered from the text and structure of the Cable Act, apparently resting on nothing more than the Commission’s subjective assessment that franchise build-out requirements are good policy while PEG and I-Net franchise requirements are not.”¹⁵ Instead, as commenters rightly assert, the costs for meeting build-out requirements along with the in-kind costs for meeting PEG and I-Net requirements must be excluded from the definition of a franchise fee because all of these requirements are explicitly authorized to LFAs by the Cable Act.¹⁶

¹¹ *Second FNPRM* ¶ 21.

¹² *See* Comments of the City of Corvallis, Oregon, MB Docket No. 05-311, at 2 (filed Nov. 14, 2018); Hawaii Comments at 10-11; ACD Comments at 12-14.

¹³ *See Second FNPRM* ¶ 11.

¹⁴ *See* Anne Arundel County Comments at 27-28.

¹⁵ ACD Comments at 13.

¹⁶ *See id.* at 12.

Even among the few commenters that support the Commission’s unjustifiably broad redefinition of franchise fees, only one supports this tortured exemption logic.¹⁷ The Commission should abandon this arbitrary and inconsistent test and return to the firm legal ground of the statute, exempting all in-kind cable-related contributions that serve the goals of the statute.

If the Commission ignores the plain language of the statute, significant legislative history and its own internal inconsistencies, the implementation of this thoroughly misguided proposal will cause serious harm to local communities. Hundreds of PEG channel operators and local governments filed comments articulating the specific harms that would befall them and their communities under these proposals.¹⁸ At the same time, no incumbent cable operators, cable lobbying associations, or putative new entrants made credible arguments for real harms to them under the current definition of a franchise fee. The abuses the Commission aims to combat are the stuff of fiction.¹⁹

II. The Commission’s “Mixed-Use” Proposal is Vague and Improper.

The Commission’s mixed-use proposal is an ambiguous and poorly-reasoned attempt to rectify the fallout from its improper reclassification of broadband in the poorly-named *Restoring Internet Freedom Order*. As several commenters note, it is unclear from the *Second FNPRM*

¹⁷ Compare Comments of NCTA, MB Docket No. 05-311, at 51 (filed Nov. 15, 2018), with Comments of ACA, MB Docket No. 05-311, at 7 (filed Nov. 15, 2018), and Comments of Verizon, MB Docket No. 05-311 (filed Nov. 14, 2018). Only NCTA supports the build-out exception, while otherwise supportive ACA argues the Commission’s exemption reasoning is “flawed,” and Verizon maintains a careful silence on the subject.

¹⁸ See, e.g., NATOA Comments at 9-13; Hawaii Comments at 4-8; Anne Arundel County Comments at 33-34; City of Corvallis Comments at 5.

¹⁹ See Hawaii Comments at 12-15; *id.* at 12 (“The *Second FNPRM* . . . has provided no factual basis whatsoever to support its assumption that unreasonable rent-seeking has occurred under the decades-old regulatory scheme[.]”).

whether the Commission now claims that Title VI does not give local franchising authorities the power to regulate non-cable services through franchise agreements, or if the Commission intends to go even further by asserting that Title VI preempts LFAs from regulating any non-cable services at all.²⁰ If the latter, Public Knowledge rightly notes that the Commission lacks authority to preempt the police powers of local franchising authorities.²¹

Regardless of the Commission's intended meaning, the language of the proposals is unacceptably vague and inconsistent. The City Coalition notes that the Commission must make some exception for certain requirements on the "mixed-use" network, such as customer service and privacy requirements. LFAs are specifically authorized to require these commitments from cable operators without limiting these obligations to cable service, yet such requirements appear to be implicated in the Commission's sweeping and ill-stated proposal.²²

Instead of constructing another wobbly layer of this reclassification house of cards, the Commission should abandon its ambiguous mixed-use proposal and return broadband internet access to its proper classification as a Title II service for any number of reasons, including its apparent desire to implement provisions of the Cable Act that prevent LFA regulation of telecom services without first properly classifying broadband as the telecom service it is.

CONCLUSION

The Commission's *Second FNPRM* ignores both clear statutory language and legislative history in order to prop up a series of tentative conclusions supported by ideology rather than

²⁰ See ACD Comments at 17; NATOA Comments at 13-15.

²¹ See *generally* Comments of Public Knowledge, MB Docket No. 05-311 (filed Nov. 14, 2018).

²² City Coalition Comments at 21-22.

evidence. We urge the Commission to weigh the overwhelming record evidence in initial comments opposing its proposals, and accordingly to reject its overbroad reinterpretation of franchise fees as well as its vague and unsupported mixed-use ruling.

Respectfully Submitted,

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