BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 08-3023 (CONS. NO. 15-3578)

MONTGOMERY COUNTY, MARYLAND, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

FCC	Federal Communications Commission
FRFA	Final Regulatory Flexibility Analysis
I-Net	Institutional network
LFA	Local franchising authority
PEG	Public, education and government use
MFN	Most favored nation
RFA	Regulatory Flexibility Act

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JURISDICTION

The Federal Communications Commission released its Order on November 6, 2007. *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*, 22 FCC Rcd 19633 (2007) ("*Second Report and Order*") (App. 237-266). Petitions for review of that Order were filed in this Court and the Fourth Circuit. The Judicial Panel on Multidistrict Litigation randomly assigned the petitions to this Court. In March 2008, the Court granted the FCC's unopposed

motion to hold the case in abeyance until the agency acted on pending petitions for administrative reconsideration of the *Second Report and Order*.

On January 21, 2015, the FCC released an order granting in part and denying in part those petitions. *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*, 30 FCC Rcd 810 (2015) ("*Reconsideration Order*") (App. 344-360). After the *Reconsideration Order* was published in the Federal Register, 80 Fed. Reg. 12,088 (March 6, 2015), Anne Arundel County, Maryland and the City of Dubuque, Iowa jointly petitioned for review of the *Second Report and Order* and the *Reconsideration Order* in the D.C. Circuit. That court granted the FCC's motion to transfer the case to the Sixth Circuit. This Court then consolidated the Anne Arundel/Dubuque petition with Montgomery County's petition for review of the *Second Report and Order*, which had been transferred from the Fourth Circuit in 2008. This Court has jurisdiction to review both the *Second Report and Order* and the *Reconsideration Order* under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

QUESTIONS PRESENTED

A panel of this Court in *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 557 U.S. 904 (2009), affirmed Commission rules that restricted local franchising authorities' ("LFAs'") ability to make unreasonable

demands of applicants for new cable franchises. The Orders on review extended certain of those rules to incumbent cable operators after finding that the statutes on which those rules were based did not distinguish among providers. The Orders also provide that those rules, as extended, will not disrupt existing franchise agreements, nor will they preempt state-level franchising laws.

This case presents the following questions:

1. Whether the Commission reasonably declined to interfere with existing contracts?

2. Whether the Commission's extension of cable franchising rules to incumbent cable operators was consistent with the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*, its own precedent, and otherwise reasonable?

3. Whether the Commission complied with the procedural requirements in the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq*.

STATUTES AND REGULATIONS

The pertinent statutory provisions and regulations are set forth in the addendum to this brief.

COUNTERSTATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

This Court's decision in *Alliance for Community Media*, 529 F.3d 763, comprehensively describes the history of cable regulation. The government

therefore limits its discussion to the statutes and regulations that are relevant to the Orders on review.

Any company seeking to offer "cable service" as a "cable operator" must comply with the cable franchising provisions in Title VI of the Communications Act. 47 U.S.C. §§ 521-573. Section 621(b)(1) of the Act, 47 U.S.C. § 541(b)(1), prohibits cable operators from providing cable service without first obtaining a franchise. Section 621(a)(1), in turn, circumscribes the power of franchising authorities[1] to award or deny such franchises: "A franchising authority may award … 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." 47 U.S.C. § 541(a)(1).

In 2005, the Commission commenced a rulemaking to improve implementation of Section 621(a)(1). On the basis of the record compiled in that proceeding, the Commission found that unreasonable demands made by LFAs during the franchise process often delayed – or even derailed – new entrants' ability to provide video services. *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*, 22 FCC Rcd 5101, 5103

[1] A "franchising authority" is "any governmental entity empowered by Federal, State, or local law to grant a franchise." 47 U.S.C. § 522(10).

(2007) ("*First Report and Order*") (App. 1-106). The Commission found those unwarranted delays and unreasonable demands violated the statutory ban on unreasonable refusals to award competitive franchises in Section 621(a)(1).

To ensure more effective enforcement of that ban, the Commission adopted rules to implement Section 621(a)(1). Those rules required LFAs to render decisions on competitive franchise applications within specified time frames, *id*.¶¶ 66-81 (App. 34-40), and restricted LFAs' ability to impose build-out requirements on competitive franchise applicants, which the Commission found "make entry so expensive" that applicants often "withdraw[] their applications." *Id.* ¶ 88 (App. 43).

In furtherance of the pro-competitive goals in Section 621(a)(1), the Commission also clarified other provisions in Title VI.

Under Section 622(b), an LFA may levy a "franchise fee" on a cable operator that may not exceed 5 percent of the cable operator's revenues from "the operation of the cable system to provide cable services." 47 U.S.C. § 542(b). Excluded from the statutory definition of "franchise fee" (and thus the statutory cap) are "requirements incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages." *Id*., § 542(g)(2)(D). The Commission held that such "incidental" charges are "limited to the list of

incidentals in the statutory provision as well as other minor expenses"; they do not include, *inter alia*, "free or discounted services provided to an LFA." *First Report and Order* ¶¶ 103-104 (App. 48-49). The Commission further held that "in-kind" contributions unrelated to the provision of cable service are subject to the statutory cap on franchise fees. *Id.* ¶¶ 105-109 (App. 49-51).

The Commission also interpreted Section 611, which provides that an LFA may "require" a cable operator to set aside "channel capacity" for "public, educational, or government ["PEG"] use" and "institutional networks ["I-Nets"]." 47 U.S.C. § 531(b). The Commission held that an LFA exercising that authority cannot impose on competitive franchise applicants "more burdensome … obligations than it has imposed upon the incumbent cable operator," *First Report and Order* ¶ 114 (App. 52-53), or obligations that are "completely duplicative" of those of the incumbent. *Id.* ¶ 119 (App. 54).

Finally, the Commission clarified that "an LFA's jurisdiction applies only to the provision of cable services over cable systems." *Id.* ¶ 121 (App. 55). Thus, in the case of "mixed use networks" that are used to provide both cable and non-cable services, an LFA may not refuse to award a competitive cable franchise based on issues related to the applicant's non-cable services or facilities. *Id.* ¶¶ 121-124 (App. 55-56). The Commission based its ruling on Section 602(7)(C) of the Act, 47 U.S.C. § 522(7)(C), which provides that a mixed-use facility qualifies as a "cable

system" only "to the extent such facility is used in the transmission of video programming directly to subscribers." *First Report and Order* ¶ 122 (App. 55).

The Commission preempted local franchising laws and regulations "to the extent they conflict with [these] rules." *Id.* ¶ 129 (App. 57). The agency singled out "level-playing-field" regulations that require LFAs to grant franchises to competitors on the same terms imposed on incumbent cable operators, explaining that these can "unreasonably impede competitive entry." *Id.* ¶ 138 (App. 62-64). The Commission declined to preempt state franchising laws, however, finding it "lack[ed] a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises." *Id.* n.2 (App. 2).

The rules that the Commission adopted in the *First Report and Order* applied only to new entrants' applications for cable franchises. When it adopted those rules, the Commission issued a further notice of proposed rulemaking in the same docket seeking comment on whether "the findings" in the *First Report and Order* "should apply to [incumbent] cable operators that have existing franchise agreements as they negotiate renewal of those agreements" with LFAs. *Id.* ¶ 140 (App. 65).

A number of parties, including Petitioners in this case, filed petitions for review of the *First Report and Order* in multiple courts of appeals. Pursuant to 28

U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation randomly selected this Court to review the petitions. In *Alliance for Community Media*, 529 F.3d 763, a panel of this Court rejected all of petitioners' various claims.

II. THE *ORDERS* ON REVIEW

A. The *Second Report and Order*

While litigation over the *First Report and Order* was pending, the Commission issued another order that "extend[ed] a number of the rules promulgated in [the *First Report and Order*] to incumbents as well as new entrants." *Second Report and Order* ¶ 1 (App. 237). In particular, the Commission concluded that its findings regarding franchise fees, mixed-use networks, and (with some exceptions) PEG channel access would apply equally to incumbent cable operators and their competitors. *Id.* ¶¶ 10-17 (App. 241-245). Those findings, the Commission explained, were based on its interpretation of provisions in Title VI that "do not distinguish between new entrants and incumbents." *Id.* ¶ 6 (App. 239); *id.* ¶¶ 10-11 (franchise fees) (App. 241-242); *id.* ¶ 13 (PEG and I-Nets) (JA 243); ¶ 17 (mixed-use networks) (App. 244-245). The Commission declined to extend the rules concerning time limits and build-out, finding their statutory basis (Section 621(a)(1)) and their "underlying rationale" (removing barriers to entry) "inapplicable to incumbents." *Id.* ¶¶ 8-9 (App. 240-241).

The Commission also clarified that the *First Report and Order* "does not have any effect" on most favored nation provisions in existing franchises. *Second Report and Order* ¶ 20 (App. 10-11). Those contract terms "generally allow" incumbents "to adjust their [franchise] obligations" when an LFA grants a competing provider "more favorable" franchise provisions. *Id*.

B. The *Order on Reconsideration*

Several parties filed petitions for reconsideration of the *Second Report and Order*. In the *Reconsideration Order*, the Commission denied requests to reconsider its findings regarding most favored nation clauses, franchise fees, and mixed-use networks, but granted requests to clarify the applicability of the *Second Report and Order* in states with state-level franchising and to reconsider its Final Regulatory Flexibility Analysis ("FRFA").

The Commission found meritless Petitioners' argument that most favored nation provisions have the same effect as the level playing field regulations preempted by the *First Report and Order. Reconsideration Order* n.39 (App. 348). The Commission distinguished the latter, which can "unreasonably impede competitive entry," *First Report and Order* ¶ 138 (App. 62-64), from the former, which "merely allow" incumbents to obtain the same franchise terms enjoyed by their new competitors. *Reconsideration Order* n.39 (App. 348).

The Commission also was not persuaded by Petitioners' argument that the *Second Report and Order* expanded the reach of the *First Report and Order* in finding that all in-kind payments – and not just in-kind payments unrelated to cable service – are subject to the 5 percent franchise fee cap. *Reconsideration Order* ¶¶ 11-13 (App. 348-350). The Commission explained that it had already found in the *First Report and Order* that cable-related in-kind payments, such as "free or discounted services provided to an LFA," are a type of "non-incidental cost" that counts toward the statutory cap. *Id.* (citing *First Report and Order* ¶ 104 (App. 49)). In the Commission's view, the *Second Report and Order* mirrored the *First Report and Order*'s holdings regarding non-incidental in-kind fees. *Reconsideration Order* ¶ 13 (App. 348-350).

Nor was the Commission persuaded by Petitioners' argument that the *First Report and Order*'s mixed-use network ruling presumed that a new entrant was a telephone company. *Reconsideration Order* ¶ 15 (App. 350-351). Thus, the Commission affirmed its decision to extend that ruling to incumbent cable operators. *Id*. ¶¶ 14-15 (App. 350-351).

The Commission did grant Petitioners' request to clarify that the *Second Report and Order*, like the *First Report and Order*, "appl[ies] only to the local franchising process, and not to franchising laws or decisions at the state level." *Reconsideration Order* ¶ 7 (App. 346-347). It noted, however, that a district court

"would be required to apply the FCC's interpretation of any provision in the Communications Act" – including the agency's rulings in the *Second Report and Order* – in litigation between a cable operator and a franchising authority. *Reconsideration Order* n.33 (App. 347).

The Commission also acknowledged that the Final Regulatory Flexibility Analysis attached to the *Second Report and Order* mistakenly analyzed the tentative conclusions set forth in the Further Notice of Proposed Rulemaking rather than the rules as adopted. *Reconsideration Order* ¶ 18 (App. 352). The Commission therefore granted petitioners' request that it prepare a revised FRFA to comply with the mandates of the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 604. That analysis showed that the *Second Report and Order* would have a *de minimis* impact on LFAs because it merely extended a limited set of existing rules to incumbent cable operators. *Reconsideration Order* ¶ 18 (App. 352).

SUMMARY OF ARGUMENT

1. The Commission reasonably declined to void most favored nation clauses in existing franchises. Those provisions, unlike the level playing field regulations preempted by the *First Report and Order*, do not increase the obligations applicable to new entrants into the cable market. Finding no conflict with Section 621(a)(1)'s pro-competitive goals, the agency reasonably decided to leave those contract terms intact.

2. The *Second Report and Order*'s holding that all non-incidental in-kind payments are subject to the statutory cap on franchise fees is consistent with Commission precedent. That Order quotes verbatim language in the *First Report and Order* that separately references in-kind payments for cable services and in-kind payments for non-cable services.

In affirming the *First Report and Order*, a panel of this Court considered and rejected Petitioners' argument that a franchise fee includes only monetary payments, not in-kind requirements. *See Alliance for Community Media*, 529 F.3d at 782-83. Consequently, Petitioners are barred by the doctrine of collateral estoppel from renewing that argument here.

Were the Court to reach it, Petitioners' argument would fail again. The Commission reasonably held that under Section 622(g)(1), 47 U.S.C. § 542(g)(1), a "franchise fee" encompasses all contributions (monetary or otherwise) that are not expressly excluded by the statute. *See id.* § 542(g)(2). If non-cash cable-related requirements were not considered to be franchise fees, LFAs could evade the franchise fee cap, *see id.* § 542(b), by demanding any manner of in-kind payment. The Commission's more reasonable interpretation gives effect to that cap. It also is not inconsistent with the agency decisions preceding the *First Report and Order*, which never addressed the issue of whether in-kind contributions count toward the 5 percent cap on franchise fees.

3. The Commission also reasonably extended the mixed-use ruling in the *First Report and Order* to incumbent cable operators. That ruling was based on the definition of "cable system" in Section 602(7)(C), 47 U.S.C. § 522(7)(C), which the Commission found makes no distinction among providers. Nothing in that ruling limits LFAs' statutory authority to require I-Net capacity under Section 611(b), 47 U.S.C. § 531(b), notwithstanding that I-Nets can be used to carry non-cable services.

4. The Commission did not preempt state franchising laws when it noted in the *Reconsideration Order* that a district court "would be required to apply the FCC's interpretation of any provision in the Communications Act" in litigation between a cable operator and a franchising authority. *Reconsideration Order* n.33 (App. 347). That statement merely summarizes judicial precedent holding that a district court lacks jurisdiction to review collaterally the substantive validity of the *Second Report and Order*, or any other FCC final order; review is limited to direct actions in the courts of appeals under the Communications Act, 47 U.S.C. § 402(a), and the Hobbs Act, 28 U.S.C. § 2342(1). And to the extent that Petitioners are confused about the effect of the *Second Report and Order*'s holdings on state franchising laws, they can and should seek clarification from the Commission.

5. Finally, the Commission followed the Regulatory Flexibility Act. The agency found that the rules adopted in the *Second Report and Order* will not have

a significant impact on any small entity, and might actually lessen the burden on LFAs by streamlining the franchising process. The Commission also found no alternatives to the franchise fee, PEG, and mixed-use network holdings in the *Second Report and Order*, which involved matters of statutory interpretation. Petitioners' substantive disagreement with those findings provides no basis to second-guess the agency's compliance with the Regulatory Flexibility Act's purely procedural requirements.

STANDARD OF REVIEW

Petitioners' challenge to the Commission's interpretation of the Communications Act is governed by *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the [Court] is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the implementing agency's reading of an ambiguous statute is reasonable, *Chevron* requires this Court "to accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Assn. v. Brand X Internet Svcs.*, 545 U.S. 967, 980 (2005); *see also Alliance for Community Media*, 529 F.3d

at 778-86 (deferring to the FCC's reasonable interpretation of ambiguous provisions in the Communications Act); *GTE Midwest, Inc. v. FCC*, 233 F.3d 341, 347-48 (6th Cir. 2000) (same).

Petitioners also challenge the reasonableness of the *Second Report and Order* and the *Reconsideration Order*. Under the Administrative Procedure Act ("APA"), a Commission order may be "set aside … only if it is arbitrary, capricious, abusive of discretion or otherwise not in accordance with the law." *Cellnet Commc'ns v. FCC*, 149 F.3d 429, 436 (6th Cir. 1998); *see* 5 U.S.C. § 706(2)(A). When reviewing agency action under this standard, a court "is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S.402, 416 (1971); *see Northeast Ohio Regional Sewer District v. EPA*, 411 F.3d 726, 732 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 2966 (2006). "[T]he arbitrary and capricious standard is deferential toward agency decisions." *Goldin v. FDIC*, 985 F.2d 261, 263 (6th Cir. 1993). To satisfy this standard, an agency need only "articulate a rational connection between the facts found and the choice made" and "provide something in the way of documentary support for its actions." *GTE Midwest*, 233 F.3d at 345 (internal quotations omitted).

Similarly, this Court's review of an agency's interpretation of its own orders and regulations "is especially deferential." *Atrium Medical Center v. U.S. Dept. of*

Health and Human Svcs., 766 F.3d 560, 568 (6th Cir. 2014). "[T]he agency's interpretation is 'controlling unless plainly erroneous or inconsistent with the regulation.'" *Id*. (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

ARGUMENT

I. THE COMMISSION REASONABLY DECLINED TO VOID MOST FAVORED NATION CLAUSES

The Commission in the *Second Report and Order* (App. 246-247) clarified that the *First Report and Order* "does not have any effect" on most favored nation clauses in existing franchises – a determination that it affirmed in the *Reconsideration Order*. (App. 347-348). Petitioners contend that this is inconsistent with the Commission's preemption of "level playing field" regulations in the *First Report and Order*. Pet. Br. 28-31. They are wrong.

To be sure, level playing field and most favored nation clauses are designed to establish regulatory parity among cable operators in a market. But they are not the same, as Petitioners allege. *See* Pet. Br. 30-31. Level playing field regulations require every new entrant to "meet[] substantially all the terms and conditions imposed on the incumbent cable operator." *First Report and Order* ¶ 138 (App. 62-64). In the *First Report and Order*, the Commission found such regulations can be "inconsistent with the 'unreasonable refusal' prohibition of Section 621(a)(1)" because they sometimes impose barriers to entry. *First Report and Order* ¶ 138 (App. 62-64). The record showed that "a competitive video provider who enters

the market today is in a fundamentally different situation" from an incumbent cable operator. *Id.* Unlike incumbents – which entered the cable market as monopolists and could therefore pay for expensive concessions to LFAs "out of the supra-competitive revenue from their on-going operations" in a "captive market" – new entrants have "no assured market position" nor "anywhere near the number of subscribers over which to spread their costs." *Id.*; *id.* ¶¶ 34-35 (App. 18).

In contrast, most favored nation provisions in franchise agreements generally allow incumbents "to adjust their franchise obligations if and when an LFA grants a competing provider any franchise provisions that are more favorable." *Second Report and Order* ¶ 20 (App. 246-247). The Commission found such provisions do not raise "the sort of market entry concerns that led the FCC to preempt level playing field regulations" because they merely reduce the regulatory obligations imposed on incumbent cable operators already serving a community. *Reconsideration Order* n.39 (App. 348). Finding no conflict with Section 621(a)(1)'s pro-competitive goals, the agency reasonably decided to leave those contract terms intact. *Id.* ¶ 10 & n.39 (App. 348); *see Sierra Pacific Industries v. Lyng*, 866 F.2d 1099, 1107 (9th Cir. 1989) (Forest Service decision to "treat bought-out contracts differently from contracts cancelled for other reasons" was reasonable because the former "are qualitatively different" from the latter).

Petitioners assert that most favored nation clauses "in combination with" the Commission's preemption of level playing field requirements will create a "one-way downward ratchet" that results in a reduction of service. Pet. Br. 28-30. That claim lacks merit, for two reasons.

First, Petitioners' argument fails to acknowledge that most favored nation provisions in existing franchises were voluntarily negotiated between LFAs and cable operators. *See Second Report and Order* ¶ 20 (App. 246-247). Presumably, an LFA only consented to such provisions because it believed community needs would continue to be met if the incumbent and a new entrant were subject to the same franchise obligations, notwithstanding that Commission rules may treat them differently. If that prediction proves incorrect, an LFA can renegotiate the terms of the franchise at renewal. *See id.*; 47 U.S.C. § 546. Given LFAs' discretion over most favored nation clauses, the Commission's refusal "to interfere with these contractual provisions" was reasonable. *Second Report and Order* ¶ 20 (App. 246-247); *see Reconsideration Order* ¶¶ 8, 10 (App. 347-348). It also is entirely consistent with the Commission's refusal to provide incumbents a similar "right to breach their existing contractual obligations," *Second Report and Order* ¶ 19

(App. 246), and the agency's longstanding policy that it does not take sides in contract disputes.[2]

Second, Petitioners' argument is speculative. Despite the fact that the *Second Report and Order* was issued more than eight years ago, Petitioners do not identify a single instance where an incumbent cable operator's exercise of a most favored nation clause resulted in a reduction of service. Indeed, because franchise terms typically are 10 to 15 years, it is likely that many (if not the majority) of the most favored nation clauses in effect when the Commission adopted the *Second Report and Order* have expired. *See* Comments of Time Warner Cable Inc., MB Docket No. 05-311 (April 20, 2007) at 7 (Resp. App. 371). "[T]heoretical possibilities … offer no evidence at all" that the Commission's refusal to abrogate most favored nation clauses will shrink cable service availability. *Allied Local and Regional Mfrs. Caucus v. EPA*, 215 F.3d 61, 74 (D.C. Cir. 2000). Absent "fact-based predictions" that community needs will go unmet, the Court should "defer" to the Commission's reasonable refusal to void terms in existing contracts. *Id.*; *see*

[2] *Cf. Regents of Univ. Sys. of Georgia v. Carroll*, 338 U.S. 586, 602 (1950) (holding that the Commission is not the proper forum to litigate contract disputes between licensees and others); *Listeners' Guild v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (endorsing "the Commission's longstanding policy of refusing to adjudicate private contract law questions") *Environmentel v. FCC*, 661 F.3d 80, 85 (D.C. Cir. 2011) (affirming the FCC's determination that "[w]hether consummation actually occurred" and if so, "whether [a] contract should be enforced, are matters for a state court's review").

Second Report and Order ¶ 20 (App. 246-247); *Reconsideration Order* ¶¶ 8, 10 (App. 347-348).

II. THE COMMISSION'S IN-KIND CONTRIBUTION RULING IS REASONABLE AND CONSISTENT WITH AGENCY PRECEDENT

Petitioners contend that the Commission ignored its own precedent and violated the Communications Act when it held in the *Second Report and Order* that cable-related in-kind contributions count toward the 5 percent cap on franchise fees. *See* Pet. Br. 32-45. In fact, the *Second Report and Order* merely applied to incumbent cable operators the franchise fee rulings in the *First Report and Order* that applied to new entrants. Petitioners further argue that cable-related franchise obligations are not franchise fees. *See* Pet. Br. 39-45. However, they are precluded by the doctrine of collateral estoppel from raising that issue here because it already was decided in *Alliance for Community Media*, 529 F.3d at 782-83. That claim lacks merit, in any event.

A. The *Second Report and Order* Merely Extended the Franchise Fee Rulings in the *First Report and Order* to Incumbent Cable Operators

Petitioners assert that the Commission expanded the scope of the *First Report and Order* by holding in the *Second Report and Order* that *all* non-incidental in-kind payments made by incumbent cable operators, including free or discounted cable service provided to LFAs, are subject to the statutory franchise

fee cap. *See* Pet. Br. 32-38; *Second Report and Order* n.32 (App. 242). Petitioners' argument fails because it miscomprehends the *First Report and Order*.

Section 622 of the Communications Act limits franchise fees to 5 percent of a cable operator's revenues from cable service, but excludes from the definition of "franchise fee" requirements "incidental to the awarding or enforcing of the franchise." 47 U.S.C. §§ 542(b), (g)(2)(D); *see* pp. 5-6, above. The Commission in the *First Report and Order* held that the phrase "incidental to" in Section 622(g)(2)(D) is limited to the list of incidentals provided in the statute, as well as other minor expenses. *First Report and Order* ¶ 103 (App. 48-49). In paragraph 104 of that order (App. 49), the agency specifically found that the following types of payments are not categorically regarded as incidental (and thus exempt from the 5 percent franchise fee cap): "attorney fees and consultant fees," "application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided to an LFA, any requirements to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments as discussed below" – *i.e.*, in-kind payments unrelated to provision of cable service, as addressed in the next section of the Order (*see id.* ¶¶ 105-108 (App. 49-50)). The Commission further held that the "value" of "such in-kind services" and "franchise-related costs" must "count towards" a competitive cable provider's franchise fee. *Id.* ¶ 104 (App. 49).

Relying on the reference to "in-kind payments as discussed below," Petitioners contend that the *First Report and Order* only addressed in-kind payments unrelated to cable service. *See* Pet. Br. 32-36. That argument is contradicted by paragraph 104, which "identified 'free or discounted services provided to an LFA'" as a distinct "type of 'non-incidental' cost that counted toward the franchise fee cap." *Reconsideration Order* ¶ 13 (App. 349-350) (quoting *First Report and Order* ¶ 104 (App. 49)). Petitioners' interpretation of the *First Report and Order* renders that language superfluous. *See Lake Cumberland Trust, Inc. v. E.P.A.*, 954 F.2d 1218, 1222 (6th Cir.1992) (Court "mak[es] every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous"); *Flying Dog Brewery, LLLP v. Michigan Liquor Control Comm'n*, 597 Fed.Appx. 342, 369 n.6 (6th Cir. 2015) (applying *Lake Cumberland Trust* to interpret a state regulation). Moreover, paragraph 104 is found in a section of the order entitled "Charges incidental to the awarding or enforcing of a franchise." *First Report and Order* ¶ 99 (App. 47); *id.* 99-104 (App. 47-49). In that context, the Commission clearly "was referring to free or discounted cable services." *Reconsideration Order* ¶ 13 (App. 349-350).

The *Alliance for Community Media* court shared the Commission's interpretation of the *First Report and Order*. In describing the franchise fee holdings in the *First Report and Order*, *Alliance for Community Media* separately

references "free or discounted services provided to an LFA" and "requests made by LFAs that are unrelated to the provision of cable services." 529 F.3d at 782-83. Like the Commission, the Court in that case read the *First Report and Order* to apply the statutory cap on franchise fees to in-kind payments for cable and non-cable services. *Reconsideration Order* ¶ 13 (App. 349-350).

Petitioners argue that the court in *Alliance for Community Media* only "focused on the meaning of incidental," not whether "'cable-related' requirements count against the franchise fee." Pet. Br. 37-38. But the Commission's determination that cable-related in-kind contributions are subject to the franchise fee cap was based on its interpretation of "incidental to" in Section 622(g)(2)(D). *First Report and Order* ¶¶ 103-104 (App. 48-49). In upholding that interpretation, *Alliance for Community Media*, 529 F.3d at 782-83, necessarily "resolve[d] the question now squarely before the Court." Pet. Br. 38.

Petitioners further contend that the Commission's position is contrary to the agency's opposition to a motion to stay the *First Report and Order*, which characterized "[t]he *Order*'s analysis of in-kind payments" as "expressly limited to payments that do *not* involve the provision of cable service." *See* Pet Br. 35-37 (quoting Opposition of the Federal Communications Commission to Joint Motion for Stay Pending Judicial Review, 6th Cir. No. 07-3391, at n.16 (filed June 29, 2007)). For the reasons set forth above, that interpretation (which was not

advanced in the Commission's merits brief) is incorrect, and the *Alliance for Community Media* Court did not apply it in affirming the *First Report and Order*. Regardless, that filing has no application here: The Commission in the *Second Report and Order* was clear on this question, and it is well-established that the Commission is not bound by prior positions taken by its lawyers. *See Aviators for Safe and Fairer Regulation, Inc. v. F.A.A.*, 221 F.3d 222, 226 (1st Cir. 2000); *Appalachian Power Co. v. Train*, 620 F.2d 1040, 1045-46 (4th Cir. 1980); *cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

The Commission's treatment of in-kind payments in the *Second Report and Order* "mirrors" its treatment of such payments in the *First Report and Order*. *Reconsideration Order* ¶ 12 (App. 349). The *Second Report and Order* quotes verbatim the language in the *First Report and Order* finding that all non-incidental in-kind fees paid by incumbent cable operators must count toward the statutory cap on franchise fees. *Compare First Report and Order* ¶ 104 (App. 49) *with Second Report and Order* n.32 (App. 242). Petitioners' assertion that the Commission misconstrued its own precedent therefore fails.

B. Petitioners' Claim that Franchise Fees Do Not Include Non-Monetary Contributions Is Collaterally Estopped and Lacks Merit

Petitioners and their supporting amicus curiae contend that under the Communications Act and FCC precedent, a "franchise fee" includes only monetary

payments, not in-kind requirements. *See* Pet. Br. 38-45, Am. Br. 12-14. *Alliance for Community Media*, 529 F.3d at 782-83, rejected an identical challenge to the franchise fee rulings in the *First Report and Order*. Because the *Second Report and Order* merely applies the franchise fee rulings upheld in *Alliance for Community Media* to incumbent cable operators, Petitioners are collaterally estopped from raising the same issue in this case.

For the doctrine of collateral estoppel to apply, four requirements must be met:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

NAACP, Detroit Branch v. Detroit Police Officers Ass'n (DPOA), 821 F.2d 328, 330 (6th Cir. 1987). Each one of those requirements is satisfied here.

First, Petitioners' claim that franchise fees do not include in-kind payments was litigated in the prior case. *See* Brief of the Alliance for Community Media, 6th Cir. No. 07-3391, at 51 (filed November 1, 2007) ("'Franchise fees' … refer to certain types of monetary payments, but not to in-kind facilities and services."); *id.* 52 ("Indeed, even the FCC has previously clarified that franchise fees are limited to 'only' certain monetary payments and not to the provision of services, facilities,

or equipment.") (citing *City of Bowie, Maryland*, 14 FCC Rcd 9596 (1999) & *Social Contract for Time Warner*, 11 FCC Rcd 2788 (1995)) (Resp. App. 449-450).

Second, to uphold the franchise fee provisions in the *First Report and Order*, the *Alliance for Community Media* court had to find that non-incidental in-kind payments count toward the franchise fee cap. *See* p. 23, above.

Third, and relatedly, *Alliance for Community Media* stands as a final judgment on the merits of Petitioners' claim. *See* 529 F.3d at 783 ("[W]e defer to the agency's interpretation [of the 'incidental to' criterion] as reasonable.").

Finally, each petitioner had a full and fair opportunity to litigate this issue, because they all were parties in the earlier litigation.[3]

In any event, Petitioners' argument is unsound. Section 622(g)(1) of the Communications Act defines a "franchise fee" to include "*any* tax, fee, or assessment *of any kind*." 47 U.S.C. § 542(g)(1) (emphasis added). It is true that portions of the legislative history discuss franchise fees in terms of cash contributions. *See* Am. Br. 13-14 (discussing H.R. Rep. No. 98-934, at 65). The statutory text, however, is not so limited, and Petitioners and their amicus curiae

[3] *See* 6th Cir. No. 07-3824 (Petitioners Montgomery County, Maryland; Anne Arundel County, Maryland; and City of Dubuque, Iowa) (consolidated with 6th Cir. Nos. 07-3391 *et al*.).

offer no rational reason why Congress would have subjected monetary contributions to a 5 percent cap, while placing no restriction on LFAs' ability to achieve the same result through in-kind contributions. *Cf. Austin v. United States*, 509 U.S. 602, 624 (1993) (Scalia, J., concurring) ("for the Eighth Amendment to limit cash fines while permitting limitless in-kind assessments would make little sense"); *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 922, 929 (D.C. Cir. 1985) (When "faced with a conflict between the language and structure of the statute, on the one hand, and one portion of its legislative history on the other … the statute must control.").

The fact is that Congress knows how to exempt contributions from the definition of "franchise fee," and in Section 622, it excluded only "requirements or charges incidental to the awarding or enforcing" of a franchise and "capital costs which are required by the franchise to be incurred by the cable operator for [PEG] access facilities." 47 U.S.C. §§ 542(g)(2)(C), (D). Moreover, Congress' decision to exclude "requirements" that are "incidental to" a franchise only makes sense if the term "franchise fee" otherwise encompasses franchise-related non-cash contributions. *See* Pet. Br. 40. As the Supreme Court has explained, courts should not interpret statutes to include superfluous exceptions. *See Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Herndon*, 541 U.S. 1, 13 (2014) ("Exemptions

[in ERISA for working owners] would be unnecessary if working owners could not qualify as participants in ERISA-protected plans in the first place.").

Petitioners assert that Congress did not intend for LFAs to "subsidize" a cable operator's franchise obligations "by off-setting the value of those obligations against [its] franchise fee." Pet. Br. 40; *id.* 44-45. To the contrary, Congress did not intend for cable operators to subsidize unlimited free and discounted services and facilities for LFAs – that is why it placed a 5 percent cap on franchise fees. *See* 47 U.S.C. § 542(b). If such "non-cash cable-related requirements" are not included in franchise fees, Pet. Br. 39-45, that cap would be meaningless, as LFAs could evade it by demanding any manner of in-kind payment as a "franchise obligation" rather than a monetary fee (which Petitioners characterize as "rent"). Pet. Br. 40. The Commission's reasonable interpretation of "franchise fee" in Section 622(g)(1) gives effect to the statutory cap. Petitioners' reading of the statute does not.

Nor is the Commission's treatment of in-kind contributions contrary to its own precedent. *See* Pet. Br. 41-43. Petitioners find no support in *City of Bowie, Maryland*, 14 FCC Rcd 7674 (1999), *amended*, 14 FCC Rcd 9596, 9597-98 (1999), which held that under Section 622(g)(2)(C), a "PEG access fee" was not a "franchise fee" subject to the statutory cap. Nothing in that letter ruling by FCC staff addressed the issue of in-kind contribution requirements. *City of Antioch, California*, 14 FCC Rcd 2285, 2293 (1999), merely held that a cable operator's

obligation to provide a senior citizen discount under a litigation settlement with an LFA "d[id] not conflict with federal law"; FCC staff did not further find that the value of that discount counted toward the cable operator's franchise fee.[4] In any event, neither of those staff actions bind the Commission. *See Comcast v. FCC*, 526 F.3d 763, 770 (D.C. Cir. 2008) ("[U]nchallenged staff decisions are not Commission precedent, and agency actions contrary to those decisions cannot be deemed arbitrary and capricious."). The only Commission orders discussed by Petitioners do not even concern local franchise requirements, much less franchise fees; rather, they address voluntary commitments made by cable operators to the FCC in exchange for flexible federal rate regulation. *See* Pet. Br. 42 nn.122 & 123.

Finally, the Commission's interpretation of Section 622 does not force LFAs to "give up important services and critical infrastructure." Pet. Br. 32; *id.* 43-44; Am. Br. 9-10. If "services to schools, libraries, and other institutions" are a

[4] For the same reason, Petitioners find no support in Section 624(b), 47 U.S.C. § 544(b), which provides that non-cable requirements in franchises issued after 1984 are not enforceable. *See* Pet. Br. 44-45. An LFA's authority to impose a franchise obligation under Section 624 has no bearing on whether the value of that obligation counts against a cable operator's franchise fee under Section 622, which makes no distinction between cable and non-cable services. Regardless, that argument is not before this Court because it was not first presented to the Commission. *See Cellnet*, 149 F.3d at 442 (the Communications Act bars litigants from presenting claims that rely "on questions of fact or law upon which the Commission … has been afforded no opportunity to pass") (quoting 47 U.S.C. § 405(a)).

priority, an LFA can continue to require such services, and deduct the value from the cable operator's franchise fee payment. An LFA, however, cannot make an end-run around the statutory cap by requiring a cable operator to pay a franchise fee equal to five percent of its cable revenues *and* shoulder the cost of providing free cable service.[5]

III. THE COMMISSION REASONABLY EXTENDED THE *FIRST REPORT AND ORDER*'S MIXED-USE NETWORK RULING TO INCUMBENT CABLE OPERATORS

Finding that LFAs' jurisdiction under Title VI of the Communications Act "applies only to the provision of cable services over cable systems," the Commission in the *First Report and Order* concluded that "an LFA may not use its video franchising authority to attempt to regulate a [telephone company's] entire network beyond the provision of cable services." *First Report and Order* ¶¶ 121-122 (App. 55). The Commission based that ruling on the definition of "cable system" in Section 602(7)(C), which provides that a common carrier facility subject to Title II of the Communications Act, 47 U.S.C. § 201 *et seq.*, qualifies as a cable system only "to the extent such facility is used in the transmission of video

[5] Petitioners assert that the Commission failed to define "non-cash 'in-kind' requirement[s]" and how to "calculate" the value of such obligations. Pet. Br. 45-46. Those arguments are not properly before the Court because no party presented them to the Commission. *Cellnet*, 149 F.3d at 442; 47 U.S.C. § 405(a). To the extent Petitioners claim not to understand the *Second Report and Order*, they should have sought clarification from the Commission, not this Court.

programming directly to subscribers." 47 U.S.C. § 522(7)(C). In the *Second Report and Order*, the Commission extended that ruling to incumbent cable operators after finding that Section 602(7)(C) "does not distinguish between incumbent providers and new entrants." *Second Report and Order* ¶ 17 (App. 244-245).

Petitioners contend that the Commission erred and they can regulate other non-cable services. *See* Pet. Br. 47-49. Underlying Petitioners' challenge is their "particular concern" that the mixed-use network ruling in the *Second Report and Order* will undermine "local authority to continue to require the provision of I-Net capacity." Pet. Br. 52. That concern is baseless. The *Second Report and Order* merely extended the "'Mixed-Use Networks' section of the *First Report and Order*," which did not mention I-Nets, let alone restrict LFAs' jurisdiction over them. *Second Report and Order* ¶ 16 (App. 244); *First Report and Order* ¶¶ 121-124 (App. 55-56). Consequently, the *Second Report and Order* cannot reasonably be read to have any effect on LFAs' express authority under Section 611(b), 47 U.S.C. § 531(b), to require I-Net capacity.

Nor can Petitioners bootstrap their jurisdiction over I-Nets to regulate mixed-use networks. *See* Pet. Br. 50-52. To be sure, under Section 611 of the Act, an LFA can require a cable operator to provide "channel capacity" for an I-Net, which is defined as "a communication network … constructed or operated by the cable operator" that "is generally available only to subscribers who are not

residential subscribers." 47 U.S.C. § 531(b), (f). Section 611, however, is a limited exception to the general prohibition against LFA regulation of non-cable services and facilities. *See* 47 U.S.C. § 541(b)(3)(D) ("[A] franchising authority may not require a cable operator to provide any telecommunication service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.").[6]

Any broader challenge to the Commission's determination that LFAs' jurisdiction is limited to cable services relies on Petitioners' cramped reading of Section 602(7)(C). According to Petitioners, Section 602(7)(C) only prohibits LFA regulation of non-cable services provided over facilities deployed by "Title II common carriers" (*i.e.*, telephone companies) because "common carriage regulation focuses on the provision of a defined service," not facilities. Pet. Br. 49. Petitioners' argument fails under its own reasoning: If "a facility of a common carrier" under Section 602(7)(C) is one that is used to provide a common carrier service, Pet. Br. 48-49, it necessarily follows that a cable operator's facility is the "facility of a common carrier" – and not within the regulatory purview of LFAs –

[6] Section 631 of the Communications Act, 47 U.S.C. § 551, also does not provide LFAs authority to regulate non-cable services. *See* Pet. Br. 51. Although the disclosure requirements in Section 631 apply to "other services" using cable facilities, they are to be enforced in a civil action in a United States district court – not by LFAs. *See* 47 U.S.C. § 551(a)(2), (f).

when the cable operator starts providing a common carrier service (*e.g.*, telephone service).

The Commission more reasonably found that the statute accords similar treatment to telephone companies and cable operators. It interpreted Section 602(7)(C) to categorize a facility as "a facility of a common carrier" or a "cable system" according to the service provided over it (*i.e.*, cable or non-cable), without regard to whether the facility was deployed by a provider historically regulated as a "common carrier" or a "cable operator." *See Second Report and Order* ¶ 17 (App. 244-245); *Reconsideration Order* ¶ 15 (App. 350). This is consistent with Commission precedent holding that facilities originally deployed as part of a cable system can carry non-cable services. *See Second Report and Order* n.49 (App. 244) (citing *Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) (holding that LFAs cannot collect franchise fees on revenue from cable modem service, an "information service"

under 47 U.S.C. § 153(24)), *affirmed*, *NCTA v. Brand X Internet Svcs.*, 545 U.S. 967 (2005)).[7]

It also is impossible to reconcile Petitioners' claim that LFAs have authority to regulate mixed-use networks with other statutory restrictions on LFAs' jurisdiction. *See* Pet. Br. 49. For example, an LFA may not "impose any requirement … that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator," 47 U.S.C. § 541(b)(3)(B), nor may an LFA "require a cable operator to provide any telecommunications service or facilities" as a condition of a franchise. *Id.* § 541(b)(3)(D). Another circuit held that under these provisions, LFAs have no jurisdiction over non-cable services provided over a mixed-use network. *See MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356, 363-64 (4th Cir. 2001) (finding an LFA lacked authority to regulate Internet access service). Moreover, a service provider only is a "cable operator" to the extent that it provides "cable service" over a "cable system." 47 U.S.C. § 522(5). Consequently, statutory

[7] The Commission subsequently reclassified cable modem service and other broadband Internet access services as "telecommunications services," which necessarily makes them "common carrier services" subject to the provisions in Title II of the Communications Act. *See Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, 5757-77 (¶¶ 355-387) (2014), *pets. for review pending, United States Telecom. Assoc. et al. v. FCC*, D.C. Cir. No. 15-1063 (and consolidated cases).

provisions applicable to "cable operators" do not give LFAs authority to regulate any provider delivering non-cable services over a mixed-use network. *Cf. NARUC v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (finding that "one can be a common carrier with regard to some activities but not others"); *In re FCC 11-161*, 753 F.3d 1015, 1094 (10th Cir. 2014) (holding that an entity can be eligible for federal subsidies as a "common carrier" even if it also provides non-common carrier services).

IV. THE *SECOND REPORT AND ORDER* DID NOT PREEMPT STATE FRANCHISING LAWS

The *Reconsideration Order* clarified that the *Second Report and Order*'s findings regarding franchise fees, mixed-use networks, and PEG access channels "apply only to the local franchising process, and not to franchising laws or decisions at the state level." *Reconsideration Order* ¶ 7 (App. 346-347). It further noted that:

> [n]othing in this *Order on Reconsideration* … changes the fact that in litigation involving a cable operator and a franchising authority, a court anywhere in the nation would be required to apply the FCC's interpretation of any provision of the Communications Act that would be pertinent (e.g., Section 622), including those interpretations set forth in the *First Report and Order* and *Second Report and Order*.

Reconsideration Order n.33 (App. 347).

Petitioners contend these statements are "plainly contradictory" and demonstrate a "change of heart" by the Commission because they declare that the

agency's "rulings do not apply and must be applied." Pet. Br. 53, 56. To the contrary, those statements simply clarify that a district court cannot review the substantive validity of the *Second Report and Order*, or any other FCC final order, in litigation between a cable operator and a franchising authority. This is made clear by the Commission's citation to judicial decisions holding that federal courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part) or to determine the validity of" all final FCC Orders brought under the Hobbs Act, 28 U.S.C. § 2342(1), as invoked by the Communications Act, 47 U.S.C. § 402(a).[8]

Petitioners concede that under the Hobbs Act, "a federal district court may not overturn the Commission's ruling," but argue that the *Reconsideration Order* infringed on a district court's authority to determine "whether a particular agency interpretation or ruling appropriately applies in a particular circumstance." Pet. Br. 56. Petitioners misread the *Reconsideration Order*, which provides that in franchise litigation, a district court must "apply" FCC interpretations that are "pertinent." *Reconsideration Order* n.33 (App. 347). In other words, if and when a

[8] *Reconsideration Order* n.33 (App. 347) (citing *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014); *Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir. 2013); *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010); *United States v. Dunifer*, 219 F.3d 1004, 1008 (9th Cir. 2000)); *see Leyse v. Clear Channel Broad., Inc. v. FCC*, 545 Fed.Appx. 444, 447-48 (6th Cir. 2013).

district court finds that a provision in the Communications Act is relevant to a dispute between an LFA and a cable operator, it must apply the Commission's interpretation of that statutory provision, as required by the Communications Act and the Hobbs Act. Otherwise, Commission rulings – including those in the *Second Report and Order* – have no application (and thus no preemptive effect). *Cf. Alliance for Community Media*, 529 F.3d at 775 ("Although the courts may have to grant deference to the [*First Report and Order*], this does not in any way impede the courts' fact-finding or legal analysis during actual judicial proceedings.").

Relying on hypothetical conflicts between the *Second Report and Order* and laws in Michigan and Texas, Petitioners further complain that "local governments are left not knowing whether" state franchising laws are "enforceable." Pet. Br. 54-55. This argument is not before the Court because it was never presented to the Commission. *See Cellnet*, 149 F.3d at 442; 47 U.S.C. § 405(a).[9] Moreover,

[9] Petitioners cite a 2007 reply comment filed by Fairfax County, Virginia, in response to the *Further Notice of Proposed Rulemaking* that preceded the *Second Report and Order*. *See* Pet. Br. n.156 (citing App. 155). In that filing, Fairfax County asserted that a "competitive entrant mistakenly concluded" that it could take advantage of the provisions in the *First Report and Order*, notwithstanding that Virginia has state-level franchising. *Id.* That is irrelevant to Petitioners' assertion here that language in the subsequently adopted *Second Report and Order*, as clarified by the *Reconsideration Order*, preempts state franchising laws.

contingent claims of this sort are not ripe for judicial review. "The [ripeness] doctrine dictates that courts should decide only existing, substantial controversies, not hypothetical questions or possibilities." *City Commc'ns, Inc. v. City of Detroit*, 888 F.2d 1081, 1089 (6th Cir. 1989). If Petitioners and other LFAs do not understand the effect of the *Second Report and Order* on a particular state's franchising law, they can and should seek clarification from the Commission. *See* 47 C.F.R. § 1.2(a) ("The Commission may … on motion … issue a declaratory ruling terminating a controversy or removing uncertainty.").

V. THE COMMISSION COMPLIED WITH THE REGULATORY FLEXIBILITY ACT

The Regulatory Flexibility Act requires an agency to "prepare a final regulatory flexibility analysis" when the agency "promulgates a final rule under [5 U.S.C. §] 553." 5 U.S.C. § 604(a). This "purely procedural" requirement "directs agencies to state, summarize, and describe" a rule's economic impact on small entities and the steps taken to minimize their compliance costs. *Nat'l Tel. Co-op Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) ("*NTCA*") (quoting *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001)). "[T]he Act in and of itself imposes no substantive constraint on agency decisionmaking." *Id.* All that is required of the agency is a "reasonable, good-faith effort to carry out [the RFA's] mandate." *U.S. Cellular*, 254 F.3d at 88 (quoting *Alenco Comm'cns, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000)).

The Commission's revised Final Regulatory Flexibility Analysis found that the rules adopted in the *Second Report and Order* "will not impose a significant impact on any small entity." *Reconsideration Order*, App. ¶ 16 (App. 360). Noting LFAs' familiarity with the rules in the *First Report and Order*, the Commission found that LFAs "should not need additional training or personnel" to apply those same rules to incumbent cable operators. *Id.*, App. ¶ 4 (App. 355); *id.*, App. ¶ 13 (App. 359). In fact, the Commission predicted that the more expansive application of those rules would lessen the burden on LFAs by "limit[ing] the terms" that LFAs "may impose and negotiate for" in cable franchises, *id.*, App. ¶ 13 (App. 359), and, consequently, "prevent[ing] costly litigation" between cable operators and LFAs "over contractual terms." *Id.*, App. ¶ 16 (App. 360). The Commission also found no "alternatives" to the franchise fee, PEG, and mixed-use network holdings in the *Second Report and Order*, which were "mandated regardless of the RFA analysis" because they involved "matters of statutory interpretation." *Reconsideration Order* ¶ 18 (App. 352); *id.*, App. ¶ 16 (App. 360).

Petitioners contend that the Commission's analysis is "defective" because it does not consider the "negative financial impact" of most favored nation clauses on small governments. Pet. Br. 58. To the contrary, the Commission found that the *Second Report and Order* would have a *de minimis* impact on small entities because, *inter alia*, it "did not disturb" provisions in "existing franchise

requirements," including MFN clauses. *Reconsideration Order*, App. ¶ 16 (App. 360). LFAs only will expend "substantial resources" to "renegotiate[] settled agreements" if they contest cable operators' exercise of such clauses. Pet. Br. 58. Hence, any "burden on local governments," *id*., will result from LFAs' choice to renege on voluntarily negotiated contract terms – not the *Second Report and Order*.

Petitioners further contend that the Commission failed to "consider the impact on small entities of its 'in-kind' ruling." Pet. Br. 58. That is incorrect. The Commission's revised FRFA reasonably found that extending holdings in the *First Report and Order*, including those regarding franchise fees, would have no impact on small governments. *See Reconsideration Order* ¶ 18 (App. 352); *id.*, App. ¶¶ 4, 13, 16 (App. 355, 359, 360). Those rules had already been in effect for eight years, with no substantiated burden on LFAs. The Commission was not required to analyze the in-kind ruling separately, as Petitioners seem to demand. *See* Pet. Br. 58. Under Section 607 of the Regulatory Flexibility Act, 5 U.S.C. § 607, an agency "may provide … general descriptive statements" "of the effects of a proposed rule." *See also NTCA*, 563 F.3d at 541 ("the FCC's explanation of implementation costs" need not be "elaborate," only "reasonable and reasonably explained in light of the record"). The Commission reasonably took that approach here, where further economic analysis would have been superfluous due to the fact that the in-kind

contribution ruling was "statutorily mandated." *See Reconsideration Order* ¶ 18 (App. 352); *id.*, App. ¶ 16 (App. 360).

Regardless, the Regulatory Flexibility Act imposes no substantive limitation on the agency's judgment; it only requires that the Commission consider the impact of its rules. *See Envtl. Defense Ctr., Inc. v. EPA*, 344 F.3d 832, 879 (9th Cir. 2003) ("[T]he analyses required by RFA are essentially procedural hurdles; after considering the relevant impacts and alternatives, an administrative agency remains free to regulate as it sees fit."), *cert. denied*, 541 U.S. 1085 (2004). Because Petitioners have merely shown that they disagree with the Commission's revised FRFA, Pet. Br. 58-59 – not that the agency failed to analyze the impact of its orders on small entities – they have identified no basis to vacate and remand the Orders on review.

CONCLUSION

The petitions for review should be denied.

Respectfully submitted,

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April 29, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MONTGOMERY COUNTY, MARYLAND, ET AL., PETITIONERS, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 08-3023 (CONS. NO. 15-3578)

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 9,246 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times Roman font.

/s/ Maureen K. Flood
Maureen K. Flood

Statutory and Regulatory Addendum

Contents

5 U.S.C. § 604

§ 604. Final regulatory flexibility analysis

(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain--

(1) a statement of the need for, and objectives of, the rule;

(2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

(4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(6)1 a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected; and

(6)1 for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities.

(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.

5 U.S.C. § 607

§ 607. Preparation of analyses

In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 2342

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of--

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

47 U.S.C. § 402

§ 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(10) By any person who is aggrieved or whose interests are adversely affected by a determination made by the Commission under section 618(a)(3) of this title.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature

of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of Title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party

intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

47 U.S.C. § 405

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the

Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 522

§ 522. Definitions

For purposes of this subchapter--

(1) the term “activated channels” means those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use;

(2) the term “affiliate”, when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person;

(3) the term “basic cable service” means any service tier which includes the retransmission of local television broadcast signals;

(4) the term “cable channel” or “channel” means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation);

(5) the term “cable operator” means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

(6) the term “cable service” means--

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service;

(7) the term “cable system” means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control

equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 573 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility system;

(8) the term "Federal agency" means any agency of the United States, including the Commission;

(9) the term "franchise" means an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to section 546 of this title), issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system;

(10) the term "franchising authority" means any governmental entity empowered by Federal, State, or local law to grant a franchise;

(11) the term "grade B contour" means the field strength of a television broadcast station computed in accordance with regulations promulgated by the Commission;

(12) the term "interactive on-demand services" means a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming prescheduled by the programming provider;

(13) the term "multichannel video programming distributor" means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite

program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming;

(14) the term “other programming service” means information that a cable operator makes available to all subscribers generally;

(15) the term “person” means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity;

(16) the term “public, educational, or governmental access facilities” means--

(A) channel capacity designated for public, educational, or governmental use; and

(B) facilities and equipment for the use of such channel capacity;

(17) the term “service tier” means a category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator;

(18) the term “State” means any State, or political subdivision, or agency thereof;

(19) the term “usable activated channels” means activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as determined by the Commission; and

(20) the term “video programming” means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

47 U.S.C. § 531

§ 531. Cable channels for public, educational, or governmental use

(a) Authority to establish requirements with respect to designation or use of channel capacity

A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.

(b) Authority to require designation for public, educational, or governmental use

A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to section 546 of this title, that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

(c) Enforcement authority

A franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity. Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of channel capacity, whether or not required by the franchising authority pursuant to subsection (b) of this section.

(d) Promulgation of rules and procedures

In the case of any franchise under which channel capacity is designated under subsection (b) of this section, the franchising authority shall prescribe--

(1) rules and procedures under which the cable operator is permitted to use such channel capacity for the provision of other services if such channel capacity is not being used for the purposes designated, and

(2) rules and procedures under which such permitted use shall cease.

(e) Editorial control by cable operator

Subject to section 544(d) of this title, a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section, except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity.

(f) “Institutional network” defined

For purposes of this section, the term “institutional network” means a communication network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential subscribers.

47 U.S.C. § 541

§ 541. General franchise requirements

(a) Authority to award franchises; public rights-of-way and easements; equal access to service; time for provision of service; assurances

(1) A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 555 of this title for failure to comply with this subsection.

(2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure--

(A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

(3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

(4) In awarding a franchise, the franchising authority--

(A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;

(B) may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; and

(C) may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.

(b) No cable service without franchise; exception under prior law

(1) Except to the extent provided in paragraph (2) and subsection (f) of this section, a cable operator may not provide cable service without a franchise.

(2) Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

(3)(A) If a cable operator or affiliate thereof is engaged in the provision of telecommunications services--

(i) such cable operator or affiliate shall not be required to obtain a franchise under this subchapter for the provision of telecommunications services; and

(ii) the provisions of this subchapter shall not apply to such cable operator or affiliate for the provision of telecommunications services.

(B) A franchising authority may not impose any requirement under this subchapter that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.

(C) A franchising authority may not order a cable operator or affiliate thereof--

(i) to discontinue the provision of a telecommunications service, or

(ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal

under this subchapter with respect to the provision of such telecommunications service.

(D) Except as otherwise permitted by sections 531 and 532 of this title, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.

(c) Status of cable system as common carrier or utility

Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

(d) Informational tariffs; regulation by States; "State" defined

(1) A State or the Commission may require the filing of informational tariffs for any intrastate communications service provided by a cable system, other than cable service, that would be subject to regulation by the Commission or any State if offered by a common carrier subject, in whole or in part, to subchapter II of this chapter. Such informational tariffs shall specify the rates, terms, and conditions for the provision of such service, including whether it is made available to all subscribers generally, and shall take effect on the date specified therein.

(2) Nothing in this subchapter shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis.

(3) For purposes of this subsection, the term "State" has the meaning given it in section 153 of this title.

(e) State regulation of facilities serving subscribers in multiple dwelling units

Nothing in this subchapter shall be construed to affect the authority of any State to license or otherwise regulate any facility or combination of facilities which serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management and which does not use any public right-of-way.

(f) Local or municipal authority as multichannel video programming distributor

No provision of this chapter shall be construed to--

(1) prohibit a local or municipal authority that is also, or is affiliated with, a franchising authority from operating as a multichannel video programming distributor in the franchise area, notwithstanding the granting of one or more franchises by such franchising authority; or

(2) require such local or municipal authority to secure a franchise to operate as a multichannel video programming distributor.

47 U.S.C. § 542

§ 542. Franchise fees

(a) Payment under terms of franchise

Subject to the limitation of subsection (b) of this section, any cable operator may be required under the terms of any franchise to pay a franchise fee.

(b) Amount of fees per annum

For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services. For purposes of this section, the 12-month period shall be the 12-month period applicable under the franchise for accounting purposes. Nothing in this subsection shall prohibit a franchising authority and a cable operator from agreeing that franchise fees which lawfully could be collected for any such 12-month period shall be paid on a prepaid or deferred basis; except that the sum of the fees paid during the term of the franchise may not exceed the amount, including the time value of money, which would have lawfully been collected if such fees had been paid per annum.

(c) Itemization of subscriber bills

Each cable operator may identify, consistent with the regulations prescribed by the Commission pursuant to section 543 of this title, as a separate line item on each regular bill of each subscriber, each of the following:

(1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid.

(2) The amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels.

(3) The amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber.

(d) Court actions; reflection of costs in rate structures

In any court action under subsection (c) of this section, the franchising authority shall demonstrate that the rate structure reflects all costs of the franchise fees.

(e) Decreases passed through to subscribers

Any cable operator shall pass through to subscribers the amount of any decrease in a franchise fee.

(f) Itemization of franchise fee in bill

A cable operator may designate that portion of a subscriber's bill attributable to the franchise fee as a separate item on the bill.

(g) “Franchise fee” defined

For the purposes of this section--

(1) the term “franchise fee” includes 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;

(2) the term “franchise fee” does not include--

(A) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers);

(B) in the case of any franchise in effect on October 30, 1984, payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, public, educational, or governmental access facilities;

(C) in the case of any franchise granted after October 30, 1984, capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities;

(D) requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

(E) any fee imposed under Title 17.

(h) Uncompensated services; taxes, fees and other assessments; limitation on fees

(1) Nothing in this chapter shall be construed to limit any authority of a franchising authority to impose a tax, fee, or other assessment of any kind on any person (other than a cable operator) with respect to cable service or other communications service provided by such person over a cable system for which charges are assessed to subscribers but not received by the cable operator.

(2) For any 12-month period, the fees paid by such person with respect to any such cable service or other communications service shall not exceed 5 percent of such person's gross revenues derived in such period from the provision of such service over the cable system.

(i) Regulatory authority of Federal agencies

Any Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section.

47 U.S.C. § 544

§ 544. Regulation of services, facilities, and equipment

(a) Regulation by franchising authority

Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.

(b) Requests for proposals; establishment and enforcement of requirements

In the case of any franchise granted after the effective date of this subchapter, the franchising authority, to the extent related to the establishment or operation of a cable system--

(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 546 of this title), may establish requirements for facilities and equipment, but may not, except as provided in subsection (h) of this section, establish requirements for video programming or other information services; and

(2) subject to section 545 of this title, may enforce any requirements contained within the franchise--

(A) for facilities and equipment; and

(B) for broad categories of video programming or other services.

(c) Enforcement authority respecting franchises effective under prior law

In the case of any franchise in effect on the effective date of this subchapter, the franchising authority may, subject to section 545 of this title, enforce requirements contained within the franchise for the provision of services, facilities, and equipment, whether or not related to the establishment or operation of a cable system.

(d) Cable service unprotected by Constitution; blockage of premium channel upon request

(1) Nothing in this subchapter shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or renewal thereof,

that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.

(2) In order to restrict the viewing of of of1 programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

(3)(A) If a cable operator provides a premium channel without charge to cable subscribers who do not subscribe to such premium channel, the cable operator shall, not later than 30 days before such premium channel is provided without charge--

(i) notify all cable subscribers that the cable operator plans to provide a premium channel without charge;

(ii) notify all cable subscribers when the cable operator plans to offer a premium channel without charge;

(iii) notify all cable subscribers that they have a right to request that the channel carrying the premium channel be blocked; and

(iv) block the channel carrying the premium channel upon the request of a subscriber.

(B) For the purpose of this section, the term “premium channel” shall mean any pay service offered on a per channel or per program basis, which offers movies rated by the Motion Picture Association of America as X, NC-17, or R.

(e) Technical standards

Within one year after October 5, 1992, the Commission shall prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and signal quality. The Commission shall update such standards periodically to reflect improvements in technology. No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology.

(f) Limitation on regulatory powers of Federal agencies, States, or franchising authorities; exceptions

(1) Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter.

(2) Paragraph (1) shall not apply to--

(A) any rule, regulation, or order issued under any Federal law, as such rule, regulation, or order (i) was in effect on September 21, 1983, or (ii) may be amended after such date if the rule, regulation, or order as amended is not inconsistent with the express provisions of this subchapter; and

(B) any rule, regulation, or order under Title 17.

(g) Access to emergency information

Notwithstanding any such rule, regulation, or order, each cable operator shall comply with such standards as the Commission shall prescribe to ensure that viewers of video programming on cable systems are afforded the same emergency information as is afforded by the emergency broadcasting system pursuant to Commission regulations in subpart G of part 73, title 47, Code of Federal Regulations.

(h) Notice of changes in and comments on services

A franchising authority may require a cable operator to do any one or more of the following:

(1) Provide 30 days' advance written notice of any change in channel assignment or in the video programming service provided over any such channel.

(2) Inform subscribers, via written notice, that comments on programming and channel position changes are being recorded by a designated office of the franchising authority.

(i) Disposition of cable upon termination of service

Within 120 days after October 5, 1992, the Commission shall prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber.

47 U.S.C. § 546

§ 546. Renewal

(a) Commencement of proceedings; public notice and participation

(1) A franchising authority may, on its own initiative during the 6-month period which begins with the 36th month before the franchise expiration, commence a proceeding which affords the public in the franchise area appropriate notice and participation for the purpose of (A) identifying the future cable-related community needs and interests, and (B) reviewing the performance of the cable operator under the franchise during the then current franchise term. If the cable operator submits, during such 6-month period, a written renewal notice requesting the commencement of such a proceeding, the franchising authority shall commence such a proceeding not later than 6 months after the date such notice is submitted.

(2) The cable operator may not invoke the renewal procedures set forth in subsections (b) through (g) of this section unless--

(A) such a proceeding is requested by the cable operator by timely submission of such notice; or

(B) such a proceeding is commenced by the franchising authority on its own initiative.

(b) Submission of renewal proposals; contents; time

(1) Upon completion of a proceeding under subsection (a) of this section, a cable operator seeking renewal of a franchise may, on its own initiative or at the request of a franchising authority, submit a proposal for renewal.

(2) Subject to section 544 of this title, any such proposal shall contain such material as the franchising authority may require, including proposals for an upgrade of the cable system.

(3) The franchising authority may establish a date by which such proposal shall be submitted.

(c) Notice of proposal; renewal; preliminary assessment of nonrenewal; administrative review; issues; notice and opportunity for hearing; transcript; written decision

(1) Upon submittal by a cable operator of a proposal to the franchising authority for the renewal of a franchise pursuant to subsection (b) of this section, the franchising authority shall provide prompt public notice of such proposal and, during the 4-month period which begins on the date of the submission of the cable operator's proposal pursuant to subsection (b) of this section, renew the franchise or, issue a preliminary assessment that the franchise should not be renewed and, at the request of the operator or on its own initiative, commence an administrative proceeding, after providing prompt public notice of such proceeding, in accordance with paragraph (2) to consider whether--

(A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;

(B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix or quality of cable services or other services provided over the system, has been reasonable in light of community needs;

(C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and

(D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

(2) In any proceeding under paragraph (1), the cable operator shall be afforded adequate notice and the cable operator and the franchise authority, or its designee, shall be afforded fair opportunity for full participation, including the right to introduce evidence (including evidence related to issues raised in the proceeding under subsection (a) of this section), to require the production of evidence, and to question witnesses. A transcript shall be made of any such proceeding.

(3) At the completion of a proceeding under this subsection, the franchising authority shall issue a written decision granting or denying the proposal for

renewal based upon the record of such proceeding, and transmit a copy of such decision to the cable operator. Such decision shall state the reasons therefor.

(d) Basis for denial

Any denial of a proposal for renewal that has been submitted in compliance with subsection (b) of this section shall be based on one or more adverse findings made with respect to the factors described in subparagraphs (A) through (D) of subsection (c)(1) of this section, pursuant to the record of the proceeding under subsection (c) of this section. A franchising authority may not base a denial of renewal on a failure to substantially comply with the material terms of the franchise under subsection (c)(1)(A) of this section or on events considered under subsection (c)(1)(B) of this section in any case in which a violation of the franchise or the events considered under subsection (c)(1)(B) of this section occur after the effective date of this subchapter unless the franchising authority has provided the operator with notice and the opportunity to cure, or in any case in which it is documented that the franchising authority has waived its right to object, or the cable operator gives written notice of a failure or inability to cure and the franchising authority fails to object within a reasonable time after receipt of such notice.

(e) Judicial review; grounds for relief

(1) Any cable operator whose proposal for renewal has been denied by a final decision of a franchising authority made pursuant to this section, or has been adversely affected by a failure of the franchising authority to act in accordance with the procedural requirements of this section, may appeal such final decision or failure pursuant to the provisions of section 555 of this title.

(2) The court shall grant appropriate relief if the court finds that--

(A) any action of the franchising authority, other than harmless error, is not in compliance with the procedural requirements of this section; or

(B) in the event of a final decision of the franchising authority denying the renewal proposal, the operator has demonstrated that the adverse finding of the franchising authority with respect to each of the factors described in subparagraphs (A) through (D) of subsection (c)(1) of this section on which the denial is based is not

supported by a preponderance of the evidence, based on the record of the proceeding conducted under subsection (c) of this section.

(f) Finality of administrative decision

Any decision of a franchising authority on a proposal for renewal shall not be considered final unless all administrative review by the State has occurred or the opportunity therefor has lapsed.

(g) “Franchise expiration” defined

For purposes of this section, the term “franchise expiration” means the date of the expiration of the term of the franchise, as provided under the franchise, as it was in effect on October 30, 1984.

(h) Alternative renewal procedures

Notwithstanding the provisions of subsections (a) through (g) of this section, a cable operator may submit a proposal for the renewal of a franchise pursuant to this subsection at any time, and a franchising authority may, after affording the public adequate notice and opportunity for comment, grant or deny such proposal at any time (including after proceedings pursuant to this section have commenced). The provisions of subsections (a) through (g) of this section shall not apply to a decision to grant or deny a proposal under this subsection. The denial of a renewal pursuant to this subsection shall not affect action on a renewal proposal that is submitted in accordance with subsections (a) through (g) of this section.

(i) Effect of renewal procedures upon action to revoke franchise for cause

Notwithstanding the provisions of subsections (a) through (h) of this section, any lawful action to revoke a cable operator's franchise for cause shall not be negated by the subsequent initiation of renewal proceedings by the cable operator under this section.

47 U.S.C. § 551

§ 551. Protection of subscriber privacy

(a) Notice to subscriber regarding personally identifiable information; definitions

(1) At the time of entering into an agreement to provide any cable service or other service to a subscriber and at least once a year thereafter, a cable operator shall provide notice in the form of a separate, written statement to such subscriber which clearly and conspicuously informs the subscriber of--

(A) the nature of personally identifiable information collected or to be collected with respect to the subscriber and the nature of the use of such information;

(B) the nature, frequency, and purpose of any disclosure which may be made of such information, including an identification of the types of persons to whom the disclosure may be made;

(C) the period during which such information will be maintained by the cable operator;

(D) the times and place at which the subscriber may have access to such information in accordance with subsection (d) of this section; and

(E) the limitations provided by this section with respect to the collection and disclosure of information by a cable operator and the right of the subscriber under subsections (f) and (h) of this section to enforce such limitations.

In the case of subscribers who have entered into such an agreement before the effective date of this section, such notice shall be provided within 180 days of such date and at least once a year thereafter.

(2) For purposes of this section, other than subsection (h) of this section--

(A) the term “personally identifiable information” does not include any record of aggregate data which does not identify particular persons;

(B) the term “other service” includes any wire or radio communications service provided using any of the facilities of a cable operator that are used in the provision of cable service; and

(C) the term “cable operator” includes, in addition to persons within the definition of cable operator in section 522 of this title, any person who (i) is owned or controlled by, or under common ownership or control with, a cable operator, and (ii) provides any wire or radio communications service.

(b) Collection of personally identifiable information using cable system

(1) Except as provided in paragraph (2), a cable operator shall not use the cable system to collect personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned.

(2) A cable operator may use the cable system to collect such information in order to--

(A) obtain information necessary to render a cable service or other service provided by the cable operator to the subscriber; or

(B) detect unauthorized reception of cable communications.

(c) Disclosure of personally identifiable information

(1) Except as provided in paragraph (2), a cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator.

(2) A cable operator may disclose such information if the disclosure is--

(A) necessary to render, or conduct a legitimate business activity related to, a cable service or other service provided by the cable operator to the subscriber;

(B) subject to subsection (h) of this section, made pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed;

(C) a disclosure of the names and addresses of subscribers to any cable service or other service, if--

(i) the cable operator has provided the subscriber the opportunity to prohibit or limit such disclosure, and

(ii) the disclosure does not reveal, directly or indirectly, the--

(I) extent of any viewing or other use by the subscriber of a cable service or other service provided by the cable operator, or

(II) the nature of any transaction made by the subscriber over the cable system of the cable operator; or

(D) to a government entity as authorized under chapters 119, 121, or 206 of Title 18, except that such disclosure shall not include records revealing cable subscriber selection of video programming from a cable operator.

(d) Subscriber access to information

A cable subscriber shall be provided access to all personally identifiable information regarding that subscriber which is collected and maintained by a cable operator. Such information shall be made available to the subscriber at reasonable times and at a convenient place designated by such cable operator. A cable subscriber shall be provided reasonable opportunity to correct any error in such information.

(e) Destruction of information

A cable operator shall destroy personally identifiable information if the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsection (d) of this section or pursuant to a court order.

(f) Civil action in United States district court; damages; attorney's fees and costs; nonexclusive nature of remedy

(1) Any person aggrieved by any act of a cable operator in violation of this section may bring a civil action in a United States district court.

(2) The court may award--

(A) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(B) punitive damages; and

(C) reasonable attorneys' fees and other litigation costs reasonably incurred.

(3) The remedy provided by this section shall be in addition to any other lawful remedy available to a cable subscriber.

(g) Regulation by States or franchising authorities

Nothing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing laws consistent with this section for the protection of subscriber privacy.

(h) Disclosure of information to governmental entity pursuant to court order

Except as provided in subsection (c)(2)(D) of this section, a governmental entity may obtain personally identifiable information concerning a cable subscriber pursuant to a court order only if, in the court proceeding relevant to such court order--

(1) such entity offers clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity and that the information sought would be material evidence in the case; and

(2) the subject of the information is afforded the opportunity to appear and contest such entity's claim.

47 C.F.R. § 1.2

§ 1.2 Declaratory rulings.

(a) The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

(b) The bureau or office to which a petition for declaratory ruling has been submitted or assigned by the Commission should docket such a petition within an existing or current proceeding, depending on whether the issues raised within the petition substantially relate to an existing proceeding. The bureau or office then should seek comment on the petition via public notice. Unless otherwise specified by the bureau or office, the filing deadline for responsive pleadings to a docketed petition for declaratory ruling will be 30 days from the release date of the public notice, and the default filing deadline for any replies will be 15 days thereafter.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Montgomery County, MD, Petitioner

v.

Federal Communications Commission
and the United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Maureen K. Flood, hereby certify that on April 29, 2016, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

/s/ Maureen K. Flood
Counsel

Federal Communications Commission
Washington, DC 20554