IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CITY OF PORTLAND, OREGON, et al. *Petitioners*, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*.	No. 19-4162
STATE OF HAWAII, *Petitioner*, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*.	No. 19-4163
ANNE ARUNDEL COUNTY, et al. MARYLAND, et al. CHICAGO, ILLINOIS, et al. *Petitioners*, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*.	No. 19-4165

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OPPOSITION OF THE FEDERAL COMMUNICATIONS COMMISSION TO MOTION TO STAY ORDER

The Federal Communications Commission respectfully opposes the request of Petitioners in *City of Portland, Oregon, et al. v. FCC*, No. 19-4162; *State of Hawaii v. FCC*, No. 19-4163; and *Anne Arundel County, Maryland, et al. v. FCC*, No. 19-4165 (collectively, "Movants") for a stay of the FCC's Third Report and Order in *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 34 FCC Rcd 6844 (2019) ("*Order*"). Movants' request for a stay—which comes two months after the *Order* took effect—is untimely. And in any event, Movants have failed to satisfy any of the traditional criteria for equitable relief.

In the *Order*, the FCC interpreted the term "franchise fee" in Section 622(g)(1) of the Communications Act of 1934, 47 U.S.C. § 542(g)(1), to encompass not only monetary payments from cable operators to local franchising authorities ("LFAs"), but also non-monetary "in-kind" contributions, such as free or discounted cable service. The FCC codified that interpretation in a new rule, 47 C.F.R. § 76.42.

Though Movants have requested a stay of the *Order*,[1] their request comes much too late—the *Order* was issued four months ago, and the rules adopted therein have been in effect for two months. Thus, Movants' stay request is one for injunctive relief. And Movants do not come close to meeting the demanding test for that equitable remedy.

Movants are not entitled to an injunction because they have not shown that they will sustain irreparable injury if the *Order* remains in effect. Movants' foot-dragging in seeking a judicial stay substantially undermines their irreparable injury claim. But even if they had timely sought relief, the harm they assert is not irreparable—it is both speculative and at most mere monetary injury (which could be remedied after final judgment). Movants have not demonstrated that as a result of the *Order*, municipalities will lose access to facilities and services that are critical to public safety—notably, their institutional networks (I-Nets). Moreover, should Movants prevail, the cable industry can make LFAs whole through payment

[1] Although Movants ask the Court to "stay the FCC's *Third R&O* during the pendency of this litigation," Mot. 22, their motion addresses only the effect of the franchise fee rule, notwithstanding that the *Order* addressed other issues, such as mixed-use facilities and preemption. Accordingly, even if Movants could meet the standard for equitable relief (and they cannot), they provide no basis for a stay of the *Order* in its entirety, as their discussion is limited solely to the franchise fee rule, 47 C.F.R § 76.42.

of any amounts that were improperly withheld during the pendency of their appeals.

Movants are also unlikely to succeed on the merits. The FCC's interpretation of "franchise fee" is amply supported by the language and structure of the statute, which broadly defines a "franchise fee" to include "*any* tax, fee or assessment of *any* kind" imposed by a local franchising authority on a cable operator. 47 U.S.C. § 542(g)(2) (emphasis added). This Court has already recognized that a franchise fee can include "in-kind" (non-monetary) contributions as well as monetary exactions. *Montgomery Cty., Md. v. FCC*, 863 F.3d 485, 490-491 (6th Cir. 2017); *Alliance for Cmty. Media, et al. v. FCC*, 529 F.3d 763, 782-783 (6th Cir. 2008), *cert. denied*, 557 U.S. 904 (2009). The FCC in the *Order* merely clarified that in-kind contributions related to cable service are "franchise fees."

Finally, the interests of other parties (notably, cable operators and cable subscribers) and the public interest in implementing statutory limits on LFAs' ability to exact fees and assessments on cable operators both weigh against the grant of injunctive relief here.

The motion for a stay should be denied.

BACKGROUND

1. Title VI of the Communications Act, 47 U.S.C. §§ 521-573, "establishes a framework that reflects the basic terms of a bargain—a cable operator may apply

for and obtain a franchise to access and operate facilities in the local rights-of-way, and in exchange, a franchising authority may impose fees and other requirements as set forth and circumscribed in the Act." *Order* ¶ 84. Congress enacted Title VI to "continue[ ] reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process." *Alliance for Cmty. Media*, 529 F.3d at 768 (quoting H. R. Rep. No. 98–934, 1984 U.S. Code Cong. & Admin. News 4655, 4661).

This case concerns the statutory limit on LFAs' authority to collect franchise fees. Section 622(b) of the Act, 47 U.S.C. § 542(b), provides that 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." The statute broadly defines "franchise fee" as "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator … solely because of their status as such," 47 U.S.C. § 542(g)(1), with five clearly delineated exceptions, *id.* § 542(g)(2).

2. In 2007, the FCC took steps to make it easier for new applicants (notably, telephone companies) to obtain a cable franchise. In *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 22 FCC Rcd 5101

(2007), the FCC concluded that non-cash "in-kind" contributions imposed on new entrant cable operators by LFAs that are not related to the cable operator's provision of cable service are covered by the statutory cap on franchise fees. *Id.* at ¶¶ 105-108. This Court affirmed that decision in *Alliance for Community Media*, 529 F.3d at 782-783.

3. The FCC extended that ruling to LFAs' agreements with incumbent cable operators. *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 22 FCC Rcd 19633 (2007). Several LFAs filed petitions for reconsideration of that order. On reconsideration, the FCC clarified that cable-related, in-kind exactions are franchise fees. *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 30 FCC Rcd 810, 814-816, ¶¶ 11-13 (2015).

This Court vacated and remanded that ruling in *Montgomery County*, 863 F.3d at 490-491. The Court agreed with the FCC that the statutory term "franchise fee" "can include noncash exactions," but held that the agency had not explained why *cable-related* in-kind contributions are "non-cash exactions" that should be treated as franchise fees. *Id.* at 491. The Court directed that "[o]n remand, the FCC should determine and explain anew whether, and to what extent, cable-related exactions are 'franchise fees' under the Communications Act." *Id*. at 492.

4. The *Order* responds to this Court's remand in *Montgomery County*. In it, the FCC reaffirmed and explained its previous conclusion that cable-related in-kind contributions are "franchise fees" subject to the statutory cap on franchise fees. *Order* ¶¶ 8-63. The FCC concluded that there is "no basis in the statute for exempting all cable-related, in-kind contributions for purposes of the five percent franchise fee cap or for distinguishing between cable-related, in-kind contributions and in-kind contributions unrelated to the provision of cable services." *Id.* ¶ 14. As the FCC explained, the definition of "franchise fee" is "broad[]"; it includes "any tax, fee or assessment of any kind." *Id*. Moreover, the statute provides "no general exemption for cable-related, in-kind contributions"; instead, there are "two very specific kinds of cable-related, in-kind contributions" (for costs associated with public, educational, and government access (PEG) channels) that are exempted from the definition of "franchise fee." *Id.* ¶ 15 (citing 47 U.S.C. § 542(g)(2)(B), (C)).

Based on the statute's language and structure, the FCC held that, prospectively, "cable-related, in-kind contributions will count toward the five percent franchise fee cap at their fair market value." *Id*. ¶¶ 59, 62. Recognizing that some existing franchise terms might be inconsistent with the rulings in the *Order*, the FCC encouraged LFAs and cable operators to negotiate franchise modifications "within a reasonable time," which it thought would be "120 days … in most cases." *Id.* ¶ 62 & n.247.

The FCC released the *Order* on August 2, 2019 and held that the rules it adopted would take effect 30 days after publication in the *Federal Register*. *Id.* ¶ 125. A summary of the *Order* was published in the *Federal Register* on August 27, 2019, *see* 84 Fed. Reg. 44725; the rules became effective on September 26, 2019. *Effective Date Announced for Rules Governing Franchising Authority Regulation of Cable Operators*, Public Notice, 34 FCC Rcd 7753 (MB 2019).

5. On October 7, 2019, the National League of Cities, the U.S. Conference of Mayors, the National Association of Regional Councils, the National Association of Towns and Townships, and the National Association of Telecommunications Organizations and Advisors ("NATOA") (collectively, "NLC") filed with the FCC a motion seeking an administrative stay of the *Order*. The FCC's Media Bureau (the "Bureau") issued an order denying NLC's request on November 6, 2019. *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 2019 WL 5861929 (MB Nov. 6, 2019) ("*Stay Denial Order*").

At the outset, the Bureau held that NLC's stay motion was procedurally defective, because it was filed after the franchise fee rule took effect; thus, the rule could not be stayed. *Stay Denial Order* ¶ 4.

Applying the traditional, four-factor standard for a stay, the Bureau also held that the motion should be denied on the merits. It explained that the FCC in the *Order* had already considered and rejected NLC's assertions that the agency's interpretation of "franchise fee" in Section 622(g)(1) of the Act was unreasonable under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706. *Stay Denial Order* ¶¶ 7-13. The Bureau also concluded that NLC's claimed harm (the elimination of services provided to municipalities) was not sufficiently certain to warrant a stay given LFAs' ability "to adjust revenues and expenses in response to changes in franchise fee revenue streams." *Id.* ¶ 17. And the Bureau concluded that it would not be in the public interest to allow LFAs to continue to assess fees and other exactions that are in excess of those permitted under the FCC's interpretation of the Act. *Id*. ¶ 23.

6. On November 25, 2019, several LFAs that had filed petitions for review in the United States Court of Appeals for the Ninth Circuit, joined by intervenors City of New York and NATOA, filed a joint motion in that Court to stay the *Order* pending review. The next day, the Ninth Circuit granted the FCC's motion to transfer the petitions to this Court. On December 4, the same petitioners (without the City of New York and NATOA) filed a joint motion asking this Court to stay the *Order*.

ARGUMENT

Although Movants characterize their motion as a request for a stay, the rules at issue here went into effect on September 26 and thus cannot be stayed. It is well established that "[a] stay simply suspend[s] judicial alteration of the status quo." *Nken v. Holder*, 556 U.S. 418, 429 (2009); *Reed v. Rhodes*, 472 F. Supp. 603, 605 (N.D. Ohio 1979) ("[a] stay does not reverse, annul, undo, or suspend what has already been done."). Because the rules adopted in the *Order* became effective two months before Movants filed their stay request, a stay would alter the status quo, not maintain it.

Movants' request to suspend the effectiveness of the rules adopted in the *Order* is therefore a request for an injunction pending appeal. In determining whether to grant such relief, this Court considers the traditional four factors for granting injunctive relief: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *A. Philip Randolph Inst. v. Husted*, 907 F.3d 913, 917 (6th Cir. 2018). None of these factors supports an injunction in this case.

I. Movants Have Not Established Irreparable Harm

Movants fail to demonstrate that LFAs would suffer irreparable injury from the *Order* pending appeal. The irreparable harm factor "is indispensable: If the plaintiff isn't facing imminent and irreparable injury, there's no need to grant relief *now* as opposed to at the end of the lawsuit." *D.T. v. Sumner Cty. Schools*, 942 F.3d 324, 327 (6th Cir. 2019). To justify an injunction, an injury "must be both certain and immediate, rather than speculative or theoretical.'" *Mich. Coal. of Radioactive Materials Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) (citing *Wisconsin Gas Co. v. Fed. Energy Reg. Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Movants fail to make this showing.

A. Movants Have Unduly Delayed in Seeking Relief

At the outset, the Court should not grant Movants' request for equitable relief because they unduly delayed in requesting a stay. "It is well settled that 'equity aids the vigilant.' Injunctive relief is reserved for those who manifest reasonable diligence in asserting their rights to equitable protection." *Reams v. Vrooman-Fehn Printing Co*, 140 F.2d 237, 242 (6th Cir. 1944); *accord Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("[A] party requesting a preliminary injunction must generally show reasonable diligence.").

Here, Movants allowed months to elapse, during which the rules went into effect, before seeking an injunction. Notwithstanding that the FCC released the text of the *Order* on August 2, the *Order* and the rules were published in the Federal Register on August 27, and the rules became effective on September 26, Movants elected not to request a judicial stay until November 25—more than three months after the *Order* was released, and almost two months after the rules took effect. Movants' delay substantially undermines their assertion that LFAs face irreparable harm absent injunctive relief.

Movants suggest (Mot. 13) that their stay request is timely, because the *Order* encouraged LFAs and cable operators to renegotiate existing franchise terms to comport with the *Order* within a reasonable time, which the Commission suggested might be "120 days." *See Order* ¶ 62 & n.247. But that 120-day "guideline" did not suspend the effective date of the rules (September 26, 2019). Regardless, the possibility that LFAs might not feel the effects of modified franchise fee payments before January 2020 does not excuse Movants' failure to seek an injunction to suspend the rules at the earliest possible opportunity.[2]

[2] Movants contend that there is now "more urgency" to their stay request because the cable industry has filed with the FCC a petition for clarification of the *Stay Denial Order*. Mot 13. But the clarification request addresses whether a cable operator bears the burden of proving that a franchise agreement is inconsistent with the rulings in the *Order*. NCTA–The Internet & Television Association's Petition for Clarification of Order Denying Motion for Stay, at 6. Regardless of who bears the burden, however, it remains the case that the *Order* took effect on September 26, and that LFAs knew they would then have an opportunity to "negotiate franchise modifications within a reasonable time." *Order* ¶ 62 & n.247. The clarification request does not excuse the LFAs' delay in moving for a stay.

B. Movants' Alleged Harms Are Speculative

Movants contend that they will incur irreparable harm absent a stay because the *Order* requires them either to "forgo[] significant revenue irreplaceable in the middle of a budget year" or "los[e] access to services and infrastructure for which they have bargained." Mot. 15.

Movants' irreparable harm argument assumes that the fair market value of the in-kind contributions when added to the value of cash exactions in existing franchise agreements will always exceed the statutory cap on franchise fees. But Movants provide no evidentiary support for that supposition. If the fair market value of an in-kind contribution in combination with any cash payment in a franchise agreement is less than the statutory franchise fee cap, an LFA would not need to find additional sources of funding to support the facilities and services provided by a cable operator under the franchise agreement.

Movants also do not acknowledge that LFAs can avoid (or at least mitigate) the *Order*'s effect on in-kind contributions by adjusting how they spend the franchise fees they collect from cable operators. In this regard, Movants continue to "provide[] no data or other evidence to show that municipalities—either by prioritizing some in-kind contributions over others or by prioritizing in-kind contributions over the fees they would otherwise collect—would be unable to maintain critical facilities and services for the public." *Stay Denial Order* ¶ 17. The

Bureau explained in the *Stay Denial Order* that "if an I-Net is critically important to providing a locality with public safety information, then the LFA can apply its franchise fee to the I-Net and forego a less vital expense." *Id*. Alternatively, an LFA is "free to forego the in-kind contribution, accept a monetary franchise fee payment, and use the funds it received to purchase the good or service in the competitive marketplace." *Order* n.242.

Movants contend that "because they have no means to know how cable operators will set the fair market value of franchise obligations," the *Order* engenders a degree of "budgetary uncertainty" that amounts to irreparable injury. Mot. 16. To the contrary, the FCC explained, fair market value is ordinarily "easy to ascertain," because "cable operators have rate cards to set the rates that they charge customers for the services that they offer." *Order* ¶ 61. In other cases, fair market value can be established based on the charges for a "comparable service." *Id*. n.241. Though Movants broadly assert that "in many cases no comparable services or products exist in the commercial marketplace," Mot. 16, they do not identify such services or products, or any that cannot be replaced by substantial equivalents.

Movants point to declarations from officials from the State of Hawaii and New York City, who contend that it will be impossible for them to replace, or in the alternative pay the fair market value of, services provided by their I-Nets. They further claim that there is a great deal of uncertainty concerning how cable operators will set the fair market value of such services. *Id*. at 18-20; *see also id*. at 27-31 (Declaration of Catherine Colon); *id*. at 31-48 (Declaration of Michael Pastor). But these conclusory harms are purely speculative. Movants have not asserted that cable operators have asked Hawaii and New York City to renegotiate the terms in their existing franchises, or if they have asked, that negotiations have failed. Moreover, neither Hawaii nor New York City provide any data about the amount of franchise fees they collect, the estimated value of the obligations in their franchises, and their budgets. Without that evidentiary support, Movants cannot demonstrate that their potential injury will be "certain" or "great" enough to justify a stay. *Griepentrog*, 945 F.2d at 154; *accord Stay Denial Order* ¶ 16

Movants' contention that an LFA is "unable to bargain with cable operators over costs because it is essentially a captive customer" is baseless. Mot. 20. LFAs have substantial bargaining power, because a "franchising authority exercises the sole domain over [right-of-way]," where cable facilities are deployed. *Order* n.251. The fact that Movants have yet to identify a single instance when a cable operator withheld or threatened to withhold services and facilities from a municipality calls into question Movants' claim that they lack bargaining power relative to cable operators.

In short, Movants' theory of injury depends on a series of *ifs*: *if* a cable operator requests to offset the value of its in-kind contributions against the franchise fee it pays an LFA, and *if* the fair market value of the in-kind contributions exceeds the statutory cap on franchise fees, and *if* the LFA cannot adjust how it spends the franchise fee to cover an essential facility or service, like an I-Net, and *if* the LFA and the cable operator cannot renegotiate franchise terms to conform to the franchise fee rules in the *Order*, then there *might* be an interruption, reduction, or elimination of the facilities and services provided to municipalities. As this Court has held, however, "those 'ifs' rule out the 'certain and immediate harm'" required for equitable relief. *Sumner Cty. Schools*, 942 F.3d at 327 (quoting *Griepentrog*, 945 F.2d at 154).

C. Movants' Claimed Injuries Are Financial

Movants' claimed injuries are also not irreparable because they are financial: They assert that as a result of the *Order*, municipalities might have to pay for the services and facilities that they currently receive for free from cable operators. But it is well settled that "potential monetary damage does not constitute irreparable harm." *Baker v. Adams Cty./Ohio Valley School Bd.*, 310 F.3d 927, 930 (6th Cir. 2002). "Economic loss is generally recoverable while injunctive relief is available only when legal remedies prove inadequate." *State of Ohio ex rel. Celebrezze v. Nuclear Reg. Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987). Here, compensatory relief is available. As the Bureau explained, "cable operators can repay franchise fees to LFAs, if needed to give effect to a reviewing court's determination that the franchise fee rulings in the [*Order*] are unlawful." *Stay Denial Order* ¶ 18.

Movants nonetheless contend that repayment "is by no means certain," because "[c]able operators must refund to subscribers any franchise fee reductions" under Section 622(e) of the Act, 47 U.S.C. § 542(e). Mot. 16. But they do not explain why a cable operator's statutory obligation to pass through any decrease in a franchise fee immunizes cable operators from reimbursing LFAs for franchise fees that are later found to have been unlawfully withheld. Movants also contend that "[e]ven if franchise fee offsets are recoverable," they would not be able to recover "the cost to taxpayers to rebid and renegotiate contracts." *Id*. at 17. Courts, however, have repeatedly held that compliance costs are a necessary expense and do not constitute the type of irreparable injury required to justify equitable relief. *See, e.g.*, *MetroBanc v. Federal Home Loan Bank Bd.*, 666 F. Supp. 981, 985 (E.D. Mich. 1987); *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005).

II. Petitioners Are Unlikely to Prevail on the Merits Because the FCC's Interpretation of the Act Is Reasonable

Even if Movants could demonstrate irreparable harm, they cannot demonstrate the "strong likelihood of success on the merits" necessary to support injunctive relief. *S. Glaziers Distrib. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017).

The FCC reasonably interpreted the statutory term "franchise fee"—which is broadly defined as "*any* tax, fee, or assessment of *any* kind"—to encompass non-cash, in-kind contributions made by cable operators to LFAs. *Order* ¶ 14 (quoting 47 U.S.C. § 542(g)(1)) (emphasis added). That interpretation simply extended this Court's determination in *Alliance for Community Media*, 529 F.3d at 782-783, and *Montgomery County*, 863 F.3d at 490-491, that non-monetary contributions made by a cable operator to an LFA can count as franchise fees. The FCC's reasonable interpretation of the Act is entitled to deference under well settled principles of administrative law. *Alliance for Cmty. Media*, 529 F.3d at 776 (citing *Chevron*, 467 U.S. at 844).

The FCC also reasonably determined that the term "franchise fee" encompasses most *cable-related* in-kind contributions. *Order* ¶¶ 16-17. The statute does not generally distinguish between cable-related and non-cable related in-kind contributions; instead, Section 622(g)(2) expressly excludes specific kinds of payments, such as those for the capital costs associated with PEG access facilities. 47 U.S.C. § 542(g)(2). As the FCC explained, "Congress would not have needed to craft these narrow exceptions if all cable-related, in-kind contributions were generally exempted." *Order* ¶ 16.

The FCC's interpretation is also consistent with the legislative history, which likewise "makes no distinction between cable-related contributions and those unrelated to cable services, nor between monetary and non-monetary payments." *Id.* ¶ 17. Instead, "Congress' intent generally was to limit the total financial obligations that franchising authorities may impose on cable operators." *Id*. n.77 (citing 129 Cong. Rec. S8254 (1983) (statement of Senator Goldwater) (Congress adopted that cap on franchise fees "to prevent local governments from taxing private cable operators to death as a means of raising local revenues for other concerns.").

Movants nonetheless assert that the FCC's interpretation of "franchise fee" is unreasonable, because it "relies on *exceptions* to the franchise fee definition as delineating the bounds of the definition itself." Mot. 7; *id.* at 8. But it was entirely reasonable for the FCC to rely on the exclusions from the term "franchise fee" to determine that all non-excluded in-kind contributions are included in the term. As this Court has recognized, "if a statute specifies exceptions to its general application, other exceptions not explicitly mentioned are excluded." *In re Robinson*, 764 F.3d 554, 562 (6th Cir. 2014); *accord Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980).

Movants contend that the FCC's interpretation of "franchise fee" has "the far-fetched result of the regulator paying for the regulatory obligations of cable operators." Mot. 8. But "the fact that the Act authorizes LFAs to impose such obligations does not mean that the value of these obligations should be excluded from the five percent cap on franchise fees." *Order* ¶ 20. The FCC noted that even though the I-Net obligations in Section 611(b), 47 U.S.C. § 531(b), were enacted at the same time as the franchise fee provisions in Section 622(g), 47 U.S.C. § 542(g), Congress did not exclude I-Net costs from the definition of franchise fee. *Order* ¶ 20.

Movants also assert that the FCC's interpretation conflicts with Sections 623 and 626 of the Act, which direct that a cable operator's costs should be considered in the context of rate setting and franchise renewal. Mot. 8-9.[3] According to Movants, "[i]f all or most costs are paid by an LFA, the need to take into account the cable operator's costs would make little sense." *Id.* at 9. That argument lacks merit, because Sections 623 and 626 require an accounting of the costs of franchise requirements that do *not* count toward the franchise fee cap, such as cable operators' obligation to deploy cable facilities to serve cable subscribers (*i.e.*, "build-out" requirements) and customer service requirements. *Order* ¶¶ 21, 57-59;

[3] Section 623(b)(4) directs the FCC "to identify the costs attributable to satisfying franchise requirements to support public, educational, and governmental channels or the use of such channels or any other services required under the franchise" in setting cable rates. 47 U.S.C § 543(b)(4). Section 626(c)(1)(D) directs LFAs to consider whether a cable operator's franchise renewal proposal is "reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests." 47 U.S.C. § 546(c)(1)(D).

47 U.S.C. §§ 541(a)(2)(B), 542(g)(2)(B), (C), 543(b)(2)(C)(iv), (vi). Thus, even under Movants' theory, both sections still have effect under the FCC's reading.

Movants argue that if the costs of constructing an I-Net count toward the five percent franchise fee cap, then the costs of building out the cable system itself must likewise be covered, and local communities will have to "shoulder the cost of building out the whole cable network nationwide." Mot. 11. This Court lacks jurisdiction over this argument, because it was not raised before the FCC. *Cellnet Commcn's, Inc. v. FCC*, 149 F.3d 429, 442-443 (6th Cir. 1998); 47 U.S.C. § 405(a) (providing that the filing of petition for reconsideration with the FCC is a "condition precedent to judicial review" of any "questions of fact or law upon which the Commission … has been afforded no opportunity to pass").[4]

Finally, Movants assert that the *Order* is "arbitrary and capricious," because it "fails to explain why the FCC, LFAs, and the cable industry interpreted the Act differently for over 30 years." Mot. 10. But prior to 2007, when the FCC held that cable-related in-kind contributions were subject to the statutory franchise fee cap, *Montgomery County*, 863 F.3d at 490, the agency had never ruled on the issue.

[4] Parties in the proceeding, including the State of Hawaii and Anne Arundel County, raised a different argument. *See Order* n.230 ("The FCC should not "distinguish[] between build-out obligations and other cable-related contributions such as PEG and I-Net support based on which entities receive the benefit of such obligations or whether such obligations can be considered 'essential' to the provision of cable services."). They do not make that argument here.

There was thus no change in position that the FCC was required to explain. Mot. 11. In any event, the *Order* amply explains why the language, structure, and legislative history of the statute support the reasonableness of the FCC's interpretation. *See, e.g.*, *Order* ¶¶ 14-22.

III. A Stay Would Harm Other Parties and Be Contrary to the Public Interest

The interest of other parties (notably, cable operators and cable subscribers) and of the public also weighs against the grant of injunctive relief. Movants would have this Court permit LFAs, during the pendency of this litigation, to "charge fees and impose requirements that the Commission has found are prohibited under the Act," because they "exceed the 5 percent cap on cable operators' franchise fees." *Stay Denial Order* ¶ 23. But fees and assessments in excess of the five percent cap often get passed through to cable subscribers. *Order* ¶ 21. They also deter cable operators' investment in infrastructure that supports broadband Internet access. *Id.* ¶ 104. Thus, "[i]t is strongly in the public interest to prevent the harms from existing franchise agreements to continue for years." *Id.* ¶ 63. *See Waskul v. Washtenaw Cty. Cmty. Mental Health*, 221 F. Supp. 3d 913, 922 (E.D. Mich. 2016) (denying an injunction where that relief would "violat[e] Medicaid regulations" and cause a third-party "severe budgetary difficulties"), *aff'd* 900 F.3d 250 (6th Cir. 2018).

CONCLUSION

For these reasons, the Court should deny the motion for stay.

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December 16, 2019

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I, Maureen K. Flood, hereby certify that on December 16, 2019, I filed the foregoing Opposition of the Federal Communications Commission to Motion to Stay Order with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the electronic CM/ECF system. The participants in the case who are registered CM/ECF users will be served electronically by the CM/ECF system.

/s/ Maureen K. Flood

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