Before the
Federal Communications Commission
Washington, D.C. 20554

The City of Pasadena, California	)	CSR 5441-R
	)	
The City of Nashville, Tennessee	)	CSR 5373
	)	
and	)	
	)	
The City of Virginia Beach, Virginia	)	CSR 5282-R
	)	
Petitions for Declaratory Ruling on Franchise Fee Pass Through Issues	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 1, 2001 **Released: October 4, 2001**

By the Commission: Commissioners Abernathy and Martin issuing a joint statement.

I. INTRODUCTION

1. The City of Pasadena, California ("Pasadena"), the City of Nashville, Tennessee ("Nashville") and the City of Virginia Beach, Virginia ("Virginia Beach") (the "Cities") have filed separate requests with the Commission asking for clarification of whether Federal law authorizes the "pass through" of franchise fees to subscribers on cable television bills based on gross revenues that encompass non-subscriber related revenue, specifically income generated by advertising sales and home shopping commissions. The Cities also question certain itemization practices of cable operators stemming from the pass through of such non-subscriber revenue. These requests are supported by the National Association of Telecommunications Officers and Advisors ("NATOA") and a number of individual municipalities. The requests are opposed by the National Cable and Telecommunications Association ("NCTA") and a number of individual cable operators. The Commission's Local and State Government Advisory Committee ("LSGAC") adopted and filed an Advisory Recommendation supporting the grant of the City of Pasadena's petition.[1]

2. Cable operators have traditionally passed through to subscribers franchise fees based on a percentage of gross revenues. Where cable rates are subject to rate regulation, this pass through is specifically provided for in the Commission's rate rules. Cable operators, such as Charter which serves the City of

[1] Appendix A lists the specific parties filing in support of, or in opposition to, the Pasadena request. Pasadena has informed Commission staff that several local governments informally expressed support for its petition, including: Santa Barbara, CA; Hidden Hills, CA; Malibu, CA; Agoura Hills, CA; Thousand Oaks, CA; Riverside, CA; Norco, CA; Tallahassee, FL; and Albuquerque, NM. Pasadena *ex parte* letter of April 11, 2000. We refer to city commenters as local franchising authorities or "LFAs" where applicable. Intermedia Partners Southeast ("Intermedia") filed an Opposition to the request filed by the City of Nashville. Cox-Comcast filed an Opposition to the request filed by the City of Virginia Beach.

Pasadena, have begun to itemize and pass through to subscribers franchise fees imposed on non-subscriber revenue sources. This pass through gives rise to the instant proceeding.

3. The Order concludes that franchise fees based on non-subscriber revenues can properly be passed through by cable operators to subscribers. In addition, the Order finds that cable operators may pass through the entire amount of the franchise fee assessed by the local franchising authority at any time regardless of whether the cable operator passed through the entire amount of the franchise fee at the first opportunity, or subsequently opted to do so. Finally, the Order determines that cable operators are permitted to itemize on a subscriber's monthly bill the full amount assessed by the LFA as a franchise fee, including non-subscriber related revenues.

II. BACKGROUND

4. Three separate but related provisions of the Communications Act ("Act") relating to franchise fees are involved in this proceeding. Section 622(b) limits the amount a cable operator may be required to pay as a franchise fee under the terms of a franchise.[2] 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.[3] The Act prohibits Federal agencies from regulating the amount of the franchise fees paid by a cable operator or regulating the use of funds derived from such fees, except as provided in Section 622.[4]

5. Section 623 directs the Commission to adopt regulations, to be applied by local franchise authorities, specifying the process for regulating basic tier and equipment rates where effective competition is absent. In devising the rules governing basic cable service, the Commission was instructed to take into account amounts assessed as franchise fees.[5] In implementing this statutory provision, the Commission permitted the total amount of franchise fees to be accorded external treatment (*i.e.*, added back to the rate after other calculations are performed) at the time the system becomes subject to regulation, rather than only the amount of additional franchise fees incurred after that date. Section 76.924(f)(3) of the Commission's rules provides that the costs of franchise fees shall be allocated among the equipment and the service cost categories in a manner that is most consistent with the methodology of assessment of franchise fees by local authorities.[6]

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[2] 47 U.S.C. § 542(b).

[3] 47 U.S.C. § 542(g)(1).

[4] 47 U.S.C. § 542(i).

[5] 47 U.S.C. § 543(b)(2)(C)(v).

[6] 47 C.F.R. § 76.924(f)(3). The Commission has stated that:

> [c]able operators will be required to identify certain locally incurred costs such as franchise fees and local taxes at the franchise level. Instead of mandating that other costs be identified at any level, we require that cable operators, for purposes of calculating external costs and costs in a cost-of-service showing, identify costs at the level at which they identified the category of costs for accounting purposes on April 3, 1993. . . . Because franchise fee determinations may be revenue, tier, or

6. Section 622(c) permits cable operators to identify as a separate line item on each regular subscriber bill the amount of the total bill assessed to satisfy any franchise fee obligation, stating:

> Each cable operator may identify, consistent with the regulations prescribed by the Commission pursuant to section 623, 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.[7]

7. The legislative history accompanying Section 622 states that a cable operator shall itemize "only [the] direct and verifiable costs" associated with the above-listed categories of costs and should "not

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> subscriber sensitive, we require that franchise fees be allocated between tiers and subscribers in a manner most consistent with the way the franchise fee is assessed by franchise authorities. We believe that this overall approach will minimize rate impacts that could otherwise occur if we adopt more definitive requirements at this time.

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5976-7 (1993)(footnote omitted)("*Rate Order*"); s*ee also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service*, Second Report and Order, First Order on Reconsideration and Notice of Proposed Rulemaking, 11 FCC Rcd 2220, 2264 (1996); 47 C.F.R. § 76.924(e)(4).

[7] 47 U.S.C. § 542(c). Section 622(f) states that "[a] cable operator may designate that portion of a subscriber's bill attributable to the franchise fee as a separate item on the bill." 47 U.S.C. § 542(f). Section 622(c) of the Act, as adopted in 1984, had a provision discussing cable franchise fee pass through. This section stated that "a cable operator may pass through to subscribers the amount of any increase in a franchise fee, unless the franchising authority demonstrates that the rate structure specified in the franchise reflects all costs of franchise fees and so notifies the cable operator in writing." *See* former Section 622(c), *repealed by* The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).[7] This version of Section 622(c) was repealed by the 1992 Cable Act and replaced with a new provision, as quoted in paragraph 5 above, that permits the itemization of the total fee, rather than just fee increases.

include in itemized costs indirect costs."[8] The Conference Report adopted Section 622(c), with the specific amendment that Section 622(c) be construed consistently with the Commission's rate regulations implementing Section 623 of the Cable Act.[9] In implementing this provision, the Commission noted that the purpose of Section 622(c) was to assure that there were no regulations preventing cable systems from identifying certain governmentally imposed costs on subscriber bills.[10] The Commission held that operators are not required by this provision to undertake any such itemization, nor does the provision, by itself, preclude the itemization of additional costs (whether or not governmentally imposed) or otherwise mandate that subscriber bills have any particular format or content.[11] The Commission noted that the policy of Section 622(c) was to permit subscribers to be fully apprised of the effect of the enumerated governmentally imposed costs on their bills.[12] The Commission believed that the intent of the statute would be frustrated if a franchising authority imposed burdensome additional itemization restrictions on an operator or otherwise attempted to nullify the effect of a Section 622(c) itemization through local regulations.[13]

III. DISCUSSION

8. We are presented three related questions regarding the appropriate regulatory treatment of franchise fees resulting from non-subscriber revenue. First, may such revenues, together with subscriber-related revenue, be passed through to subscribers in accordance with Section 623(b)(2)(C)(v) of the Communications Act and Section 76.924(f)(3) of the Commission's rules? Second, if franchise fees resulting from non-subscriber revenue can be passed through to subscribers, do our rules permit the entire fee, or only increases thereto, to be passed through to subscribers? Third, if such non-subscriber related revenue can appropriately be passed through to subscribers, does Section 622 of the Communications Act permit the amount of the total franchise fee, including non-subscriber related revenue, to be separately itemized on a subscriber's bill?[14] We address each question below.

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[8] *See* H.R. Rep. 102-628, 102d Cong., 2d Sess. at 86 (1992).

[9] *See* H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 84 (1992).

[10] *See Rate Order*, 8 FCC Rcd at 5967.

[11] *Id.* Section 622(c) affects the format, not the content of subscriber bills. It is intended to disclose costs attributable to governmental authorities and not to directly affect the amount of these costs. *Id.* at 5973.

[12] *Id.* at 5973.

[13] *Id.* The Commission cited the following statement of Senator Lott introducing what became the final version of Section 622(c) as reflecting the objective of this provision:

I would like to offer my amendment . . . dealing with subscriber bill itemization, to give the cable companies an opportunity to itemize these so-called hidden costs to explain to people what is involved in the charges so they will know it is not just the cable company jacking up the prices. . . . The fact is sometimes the rates have gone up because of hidden, unidentified increases in fees or taxes which the cable [company] has to pay and . . . passes on to the consumer. . . "

Id. at 5967, *quoting* 138 Cong. Rec. S569 (Jan. 29, 1992).

[14] While we recognize that the subscriber pass-through amount on franchise fees is limited by the 5% cap set forth in

9. Pasadena and its supporters, as well as Nashville and Virginia Beach in their separate requests, generally ask that the Commission determine the legality of passing through franchise fees based on gross revenues that include cable advertising revenue and home shopping commissions.[15] The LFAs argue that there is no basis, legal or equitable, for allowing a cable operator to add onto and increase rates based on non-subscriber revenues that are not legitimately connected to the subscriber.[16] NATOA argues that while much of the franchise fee paid by a cable operator is related to cable services in general, the pass through of non-subscriber related revenue has no relationship to basic cable services.[17]

10. The LFAs contend that those portions of the franchise fee payment derived from non-subscriber sources should not be charged to subscribers.[18] Rather, non-subscriber based fees should be allocated to the entities from which the revenues are derived. Pasadena suggests that Charter should absorb the franchise fee on non-subscriber revenue or incorporate it into the rates that advertisers pay for cable advertising time instead of having its subscribers subsidize the cost of franchise fees paid to the LFA based on advertising and home shopping revenue.[19] La Canada Flintridge argues that a subscriber who does not purchase goods from the Home Shopping Network and who does not benefit from increased advertising revenue should not be required to pay a franchise fee based on revenue from these activities.[20] LSGAC argues that because franchise fees are the rent cable operators pay for the use of public rights-of-way, they should not pass through to basic subscribers those rental expenses associated with non-subscriber services.[21]

11. NCTA comments that the Commission has made clear that all franchise fees, regardless of the source of the revenue, may be passed through to subscribers.[22] Comcast contends that Section 622 confirms that Congress intended to provide cable operators with the discretion to pass through all franchise

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Section 622(b), we do not reach the issue of whether this provision has been breached by any cable operator. We also note that the Commission has not been asked to interpret the statutory definitions of "franchise fee" and "gross revenues" in this case.

[15] Petition at 16 and Nashville and Virginia Beach, generally; *see also* Burbank Comment at 1; Calabasas Comment at 1; Glendale Comment at 1; La Canada Flintridge Comments at 1; Los Angeles Comments at 2; Milpitas Comments at 1; Monterey Park Comments at 1; North Charleston Comments at 1; Plano Comments at 2; Rutan & Tucker Comments at 3; Temple City at 1.

[16] Los Angeles County Comments at 2; North Charleston Comments at 7.

[17] NATOA Reply at 2.

[18] Glendale Comments at 3; Los Angeles Comments at 6.

[19] Pasadena Reply at 9.

[20] La Canada Flintridge Comments at 2.

[21] *See* LSGAC Advisory Recommendation Number 21 at point 4 (*ex parte* letter filed May 3, 2000).

[22] NCTA Comments at 7, *citing* Public Notice, Cable Television Rate Regulation Questions and Answers on Form 393, Question 31(rel. May 13, 1993) ("the entire amount of franchise fees may be passed through to subscribers").

fees to subscribers.[23] Comcast believes that neither Section 622(c) nor (f) condition in any way the right of a cable operator to pass through or itemize franchise fees in their entirety.[24] Comcast believes that the requirement in 622(e) that operators pass through any decrease in franchise fees implies that Congress assumed cable operators would assess the entire franchise fee on subscribers.[25]

12. LSGAC argues that a cable operator should not allocate 100% of its franchise fee expense to subscribers. It states that the Commission should clarify that cable operators do not have discretion under the rate regulation rules to pass through expenses related to competitive services to the subscribers of monopoly basic services.[26] LSGAC states that Generally Accepted Accounting Principles ("GAAP") require that rent, like any other expense of doing business, be proportionally allocated among the various sources of revenues.[27] It also states that antitrust law and regulatory principles prohibit the use of cross subsidies between competitive and monopoly services, and to allow more than a proportional pass through is to permit an explicit cross subsidy.[28]

13. In response to LGSAC, Charter contends that the Committee cannot contest the fact that operators are permitted to assess their customers the cost of this "rent."[29] Charter states that LGSAC's objection in this proceeding is premised on the fact that a cable operator's "rental" obligation is often expressed in terms of revenue, rather than a flat fee.[30] Charter argues that it is immaterial whether the revenue was generated directly from subscribers, through monthly subscriber fees, or indirectly, through advertising and home shopping revenues; franchise fees are based on all gross revenues and may be passed on to subscribers in their entirety.[31] Charter argues that there is no reason to deny an operator the right to pass through to customers its entire franchise fee cost, regardless of whether that cost is expressed in terms of a flat fee or a gross revenue calculation—the fact that some of the franchise fee obligation is derived from non-subscriber revenues should have no bearing on the subscriber pass through.[32]

14. We first address the question of whether, under any circumstances, franchise fees based on non-subscriber revenue can be passed through to subscribers. The Commission's rate regulation rules provide that rates are to be calculated initially without franchise fees included. After the proper rates are calculated,

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[23] Joint Comments of Comcast and CoxCom at 3.

[24] *Id.* at 4.

[25] *Id.*

[26] *See* LSGAC Advisory Recommendation Number 21 at point 5.

[27] *Id.*

[28] *Id.*

[29] Charter's Response to LSGAC's Recommendation at 3.

[30] *Id.*

[31] *Id.*

[32] *Id.*

franchise fees are added on as an "external cost."[33] The rate rules further provide that the "costs of franchise fees shall be allocated among the equipment basket and the service cost categories in a manner that is most consistent with the methodology of assessment of franchise fees by local authorities."[34] These rules have their origin in Section 623(b)(2)(C)(v) of the Communications Act, which provides that in establishing rate rules the Commission shall take into account "the reasonably and properly allocable portion of any amount assessed as a franchise fee. . . ."[35]

15. There is no dispute among the parties to this proceeding, or in relevant precedent, that advertising revenue and home shopping commissions can be considered part of an operator's gross revenues for franchise fee calculation purposes. The Fifth Circuit's decision in *Dallas v. FCC* makes clear that gross revenues are derived from "all money collected" by the cable operator.[36] The initial question presented in this proceeding is whether franchise fees based on such revenues can properly be passed through to subscribers. We find that they can. Section 623 does not expressly speak to this question other than to provide that the Commission shall establish rate regulations that take into account "the reasonably and properly allocable portion of *any amount* assessed as a franchise fee. . . ."[37] In the absence of a specific statutory provision on this matter, we must examine the overall structure of this Section and the Act's legislative history. There is nothing in either the text or legislative history of Section 623 to indicate that Congress intended other than the full amount of the franchise fee to be reflected in a cable operator's rates, or that a specific class of franchise fee should be excluded from such rates. If Congress was concerned about increases in franchise fees, it could have enacted language limiting the pass through to particular sources of gross revenue. It did not expressly do so, and there is no legislative history suggesting that such intent was implied. Indeed, an amendment made to a companion provision of the Act appears to support the opposite inference.[38] We believe that if the cable operator agrees to include non-subscriber revenue in the definition of gross revenues, the operator is permitted to pass through any portion of the total franchise fee, based on that definition, to subscribers.[39] If the local franchising authority includes advertising revenue and home shopping commissions in the definition of gross revenue, Section 623 permits the entire amount of the franchise fee to be passed through to subscribers.

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[33] *Implementation of Sections of the Cable Television and Consumer Protection and Competition Act of 1992: Rate Regulation,* First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, 9 FCC Rcd 1164, 1209 (1993).

[34] 47 C.F.R. § 76.924(f)(3).

[35] 47 U.S.C. § 543(b)(2)(C)(v).

[36] The Court provides a litany of references supporting its holding stating, *inter alia*, that "gross revenues is defined by Black's [Law Dictionary] as receipts of a business before deduction for any purpose except those items specifically exempted" and "the term 'all gross revenue'. . . is to be construed in the broadest sense, i.e. all money received." *Dallas v. FCC,* 118 F.3d 393, 395 (5th Cir. 1997).

[37] 47 U.S.C. § 543(b)(2)(C)(v) (emphasis added).

[38] *See infra* at ¶ 19 (discussing the 1992 Cable Act amendment to Section 622(c) of the Communications Act).

[39] One city, during the course of the *Dallas v. FCC* franchise fee litigation, seemingly admitted that a cable operator can pass through the entire franchise fee to subscribers. *See Petition for Review of an Order of the Federal Communications Commission*, Reply Brief of Petitioner, City of Laredo, Texas at 12 (the cable operator has an "admittedly understandable desire to pass through all the effects of an increased expense in its retail price to subscribers—something that the Cable Act and the FCC rate rules allow (but do not require) the operator to do.").

16. We are cognizant of the fact that our decision herein can lead to the result that, as a cable operator's home shopping and advertising revenues increase and consequently the non-subscriber revenue portion of the LFAs franchise fee increases, so too will the rates charged to subscribers. We are nevertheless constrained by our determination that such pass through is permissible under the Communications Act and our rules and that this process is consistent with the political accountability purposes of Section 622. We note that cable operators and LFAs may, through contractual agreement, modify the definition of gross revenues during the franchising process, if no pertinent state or local law otherwise prohibits. If LFAs and cable operators do not want to burden subscribers with higher franchise fee pass throughs, they may expressly omit certain items, such as advertising revenue and home shopping commissions, from the gross revenue definition. If the parties so limit the amount of gross revenues paid to the LFA to exclude non-subscriber revenue, there would be no franchise fee based on these amounts for the cable operator to pass through to subscribers. In such a case and as advocated by Pasadena and the Cities in this proceeding, the cable subscriber would be required to pay a franchise fee pass through based solely on subscriber-related gross revenues.

17. A related matter, raised in some of the filings, involves the second question of whether, under the rate rules, in those situations where there is no dispute that the category of fee involved can be itemized and passed-through, can the entire fee be itemized and passed-through or only increases in such fee. According to Pasadena, Charter has begun billing subscribers for the entire franchise fee amount sixteen years after the operator signed the franchise agreement. Pasadena complains that this action does not comport with the Commission's rate regulation rules because only real changes in external costs may be passed on to subscribers, not a change due to a different method of accounting.[40] Los Angeles County maintains that under Section 76.933, a franchise authority has the power to review and refund an increase in pass-through of franchise fees to subscribers upon determining that the increase exceeds the amount of franchise fees allocable to the basic tier.[41]

18. Charter contends that the fee as specified in the franchise had been the same since the franchise was enacted, but that nevertheless, its method of accounting and payment has changed.[42] Charter maintains that it developed a methodology for estimating franchise fees based upon third party revenues from prior quarters, and has subsequently provided its calculations to the City of Pasadena.[43] Comcast argues that under Pasadena's "use it or lose it" approach, an operator would be required to pass-through the full amount of the franchise fee from the onset of rate regulation or otherwise forfeit the right to pass it through at a later date.[44] Comcast argues that franchise fees form a unique class of external costs that may be passed through to

[40] Petition at 13, *citing* 47 C.F.R. § 76.922(e)(2)(ii)(A) ("Operators may project for increases in franchise related costs to the extent that they are reasonably certain and reasonably quantifiable.").

[41] Los Angeles Comments at 5, *citing* 47 C.F.R. §76.933. Section 76.933 permits a franchising authority to review basic cable rates and equipment costs.

[42] Charter Comments at 15.

[43] *Id.* at 4.

[44] Joint Comments of Comcast and CoxCom at 9.

subscribers at any time.[45] NCTA argues that the Commission has determined that franchise fees, unlike other external costs, are to be recovered separate and apart from the maximum permitted subscriber rate, making them outside of the rate regulation formula and always subject to external cost pass-through.[46] NCTA asserts that there is nothing in the rules that prohibits a cable operator that has elected not to recover all of the franchise fee payments to later decide to exercise its statutory and regulatory right to pass the entirety of its payments through and to itemize them on the subscriber's bill.[47]

19. We do not agree with the arguments raised by Pasadena and the other local franchising authorities that only fee increases are eligible for pass-through under the Commission's rate rules. It does not matter whether Charter's action in passing through increased franchise fees can be considered a "change" for the purposes of Section 76.922 because, as discussed above, the Commission's rate regulation rules permit cable operators to pass through franchise fees in their entirety as external costs. Indeed, prior to the enactment of the 1992 Cable Act, Section 622(c) expressly limited a cable operator's franchise fee pass through to fee increases and provided that "a cable operator may pass through to subscribers the amount of any increase in a franchise fee, unless the franchising authority demonstrates that the rate structure specified in the franchise reflects all costs of franchise fees and so notifies the cable operator in writing."[48] This version of Section 622(c) was repealed by the 1992 Cable Act and replaced with the current version of Section 622(c) that permits the cable operator to itemize "the amount of the total bill assessed as a franchise fee. . . ."[49] The apparent intent of this amendment was to enable cable operators to pass through to subscribers the entire amount of the franchise fee assessed by the LFA at any time regardless of whether the cable operator passed through the entire amount of the franchise fee at the first opportunity, or subsequently opted to do so.

20. Nor do we find the Commission rule provisions cited by the Cities to be persuasive evidence to the contrary. Section 76.922(e)(2)(ii)(A) provides that cable operators may project increases in related costs to the extent they are reasonably certain and reasonably quantifiable.[50] Section 76.933(g)(5) provides that an LFA regulating the basic service tier may review and order refund of rate increases based on increased franchise fees if such increased rates exceed the increased franchise fee allocable to the basic tier.[51] These rule provisions merely acknowledge the fact that franchise fees can increase over time. The provisions do not, however, stand for the proposition, as asserted by the Cities, that only increases in franchise fees are permitted to be passed through to subscribers, or that cable operators that have elected not to pass through the entire amount of a franchise fee are prohibited from subsequently so doing.

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[45] *Id.* at 8.

[46] NCTA Comments at 6.

[47] *Id.*

[48] *See* former Section 622(c), *repealed by* The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[49] 47 U.S.C. § 542(c).

[50] 47 C.F.R. § 76.922(e)(2)(ii)(A).

[51] 47 C.F.R. § 76.933(g)(5).

21. We now move to the related issue of whether Section 622 permits a cable operator to itemize the full amount of the franchise fee, including non-subscriber related revenue, on a subscriber's bill. We find that it does. Pasadena and the LFAs generally argue that Charter and other cable operators misrepresent the rate of the franchise fee on subscribers' bills when they itemize and add to subscriber bills fees on non-subscriber revenues. Pasadena maintains that the change in subscriber billing practices undermines subscribers' expectations that the franchise fees they pay will be directly related to the dollar amount of the monthly cable services that they purchase from the cable operator.[52]

22. In opposition, Charter maintains that by itemizing the full amount of the franchise fee, subscribers are fully informed of the scope of the franchise fee assessments, which was the purpose intended by Congress in enacting Section 622.[53] Charter argues that line itemization prevents franchising authorities from evading political accountability.[54] NCTA argues that the function of the pass through is to inform subscribers as to what portion of their cable bill goes to the government.[55] NCTA submits that LFAs are preempted from determining the extent to which franchise fees may be identified as a separate line item on monthly bills by Section 622.[56]

23. Fee itemization under Section 622, as is reflected in the legislative history quoted above, is intended to inform subscribers that local elected officials are imposing franchise fees so that there will be a measure of political accountability for fees and fee increases.[57] Section 622 expressly permits the itemization of "the amount of the total bill assessed as a franchise fee"[58] and further provides that the operator may "designate that portion of a subscriber's bill attributable to the franchise fee as a separate item on the bill."[59] We have already concluded that Section 623 permits a cable operator to pass through, as an external cost, the total franchise fee, including non-subscriber related franchise fees, in its regulated rates. The itemization provisions of Section 622 and the rate provisions of Section 623 are intended to work in tandem so that the amount of franchise fee added as an external cost is the same as the amount itemized on a subscriber's bill. Permitting cable operators to itemize on a subscriber's monthly bill the full amount assessed by the LFA, including non-subscriber related revenue, best effectuates this intent.

24. In this proceeding, we have provided clarification regarding the appropriate allocation of non-subscriber related franchise fees. The parties also have raised a variety of peripheral franchise fee matters in their pleadings.[60] We believe that these other matters are not appropriately addressed in the context of this

[52] Petition at 33.

[53] Charter Comments at 7.

[54] *Id.* at 11.

[55] NCTA Comments at 11.

[56] *Id.* at 12.

[57] *See supra* n.13 and accompanying text (Statement of Senator Lott).

[58] 47 U.S.C. § 542(c).

[59] 47 U.S.C. § 542(f).

[60] For example, Los Angeles maintains that Charter should provide a detailed projection of non-cable revenues and a

order and are more appropriately resolved in proceedings related to the specific factual circumstances in which they arise.

IV. ORDERING CLAUSE

25. Accordingly, **IT IS ORDERED** that the requests of the Cities **ARE DENIED** to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

(continued)
description of that accounting process. Los Angeles Comments at 5. This, and similar issues, are more suitable for resolution in the context of a local rate proceeding.

APPENDIX A

COMMENTS IN SUPPORT OF PASADENA

1. Azusa, Duarte, and West Covina, CA (jointly)
2. Burbank, CA
3. Calabasas, CA
4. Glendale, CA
5. La Canada Flintridge, CA
6. Los Angeles County, CA
7. Milpitas, CA
8. Monterey Park, CA
9. Temple City, CA
10. The Communications Support Group (on behalf of unnamed California municipalities)
11. Lexington Fayette Urban County Government, KY
12. Michigan Coalition to Protect Public Rights of Way ("Protec")
13. N. Charleston and Charleston County, NC
14. Plano, Texas
15. Texas Coalition of Cities on Franchised Utility Issues; Fairfax County, VA; Montgomery County, MD; St. Louis, MO; and National Association of Telecommunications Officers and Advisors ("NATOA") (filing jointly)
16. Bowling Green, KY
17. The Local and State Government Advisory Committee ("LSGAC")

COMMENTS IN OPPOSITION TO PASADENA

1. Charter
2. Comcast –Cox (filing jointly)
3. California Cable Television Association ("CCTA")
4. National Cable Television Association ("NCTA")

Separate Statement of Commissioners Kevin Martin and Kathleen Abernathy

Re: The City of Pasadena, California, the City of Nashville, Tennessee, and the City of Virginia Beach, Virginia, Petitions for Declaratory Ruling on Franchise Fee Pass Through Issues

We agree with today's Order that the Communications Act does not prohibit cable operators from itemizing and passing through to their cable television subscribers the full amount of franchise fees, even when those fees are based partially on revenues not related to the subscribers' services. We write separately to emphasize two points.

First, nothing in today's Order prevents local franchising authorities ("LFAs") and cable operators from reaching an agreement through contract to change how franchise fees are calculated or passed through. As the Order explains, "If LFAs and cable operators do not want to burden subscribers with higher franchise fee pass throughs, they may expressly omit certain items, such as advertising revenue and home shopping commissions, from the gross revenue definition." *Order* at ¶17.

Second, nothing in today's Order authorizes a cable operator to collect more money from subscribers as a franchise fee pass-through than the operator ultimately pays as a franchise fee to the LFAs. Thus, if a cable operator unintentionally over-collects from subscribers—due, for instance, to a mis-calculation or estimation of gross revenues—the cable operator must take some action to correct the discrepancy.

With the above two concerns addressed, we support today's Order.