

**STATEMENT OF
CHAIRMAN AJIT PAI**

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

As Scott Turow famously said in *One L: The Turbulent True Story of a First Year at Harvard Law School*, reading law is “something like stirring concrete with [your] eyelashes.” And in few areas of law is the stirring more difficult than statutory interpretation. The canons of statutory construction are not plot points in John Grisham thrillers, and I doubt they will feature in next year’s *Legally Blonde 3*. But as an agency charged with implementing the laws passed by Congress, statutory construction is fundamental to the Commission’s work.

Thankfully, some issues of statutory interpretation are more straightforward than others. For example, today we decide that “in-kind” contributions made by cable operators for the non-capital costs of public, educational, and government (PEG) access channels count against the five percent cap on franchise fees set forth in Section 622 of the Communications Act (the Act).¹ I understand that many PEG operators are unhappy with this outcome. But it is the inevitable result of the statute passed by Congress.

Here’s why. The statute plainly defines a “franchise fee” to include “any tax, fee, or assessment of any kind.”² It then sets forth two exceptions to that definition related to PEG channels. For franchises in effect back in 1984, when the statute was passed, there is a broad exemption for “payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support or the use of, public, educational, or government access facilities.”³ But for franchises granted later, the exemption is much narrower, covering only “capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities.”⁴

This legal framework tells us two things. First, given these specific exemptions, the five percent cap (and associated franchise fee definition) does not include a general exemption from cable-related, in-kind contributions. Congress could have—but did not—create one. And the specific exemptions would be unnecessary if there were such a general exemption. The Supreme Court has made clear that it is “reluctan[t] to treat statutory terms as surplusage” in any setting.⁵ So are we.

Second, with respect to post-1984 franchises, capital costs are the only PEG costs that are exempt from the definition of franchise fees. Understandably, PEG operators and many local governments in this proceeding would like to benefit from the broader exclusion. But that’s not what the statute says. The broader exemption by its plain terms only applies to franchises in existence back in 1984. Congress was clearly aware of the distinction between existing and post-1984 franchises when it established these exemptions, and we don’t have the authority to rewrite the statute to expand the narrower, post-1984 one. This is Statutory Interpretation 101.

¹ 47 U.S.C. § 542(b).

² 47 U.S.C. § 542(g)(1) (emphasis added).

³ 47 U.S.C. § 542(g)(2)(B).

⁴ 47 U.S.C. § 542(g)(2)(C).

⁵ *Duncan v. Walker*, 533 U.S. 167, 174 (2001), quoting *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995).

To be sure, all of the issues of statutory construction addressed in this item aren't as easy as this one. But in each instance, we carefully parse the statute and arrive at the right result. For example, we correctly affirm that local franchising authorities (LFAs) may not regulate the provision of most non-cable services, including broadband Internet access service, offered over a cable system. And we find that the Act preempts any state or local regulation of a cable operator's non-cable services that would impose obligations on franchised cable operators beyond what Title VI of the Act allows. Obviously, some local governments that are eager to keep biting the regulatory apple object to this outcome. But the question of preemption is squarely addressed by the statute. Section 636(c) of the Act explicitly provides that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act *shall* be deemed to be preempted and superseded."⁶

Now, let us suppose—and I know it seems improbable, but bear with me here—that some are not convinced by legal arguments and simply want to allow contributions the statute explicitly forbids, and permit regulations that it explicitly does not permit. The solution is simple: change the law. The job of administrative agencies like ours is not to rewrite laws set forth by Congress. It is to implement those laws. As the Supreme Court has opined, "[u]nder our system of government, Congress makes laws and the President, acting at times through agencies . . . , 'faithfully execute[s]' them. The power of executing the laws . . . does not include a power to revise clear statutory terms."⁷

Looking beyond the law, today's *Third Report and Order* is good for American consumers. That's because costs imposed by LFAs through in-kind contributions and fees imposed on broadband Internet access service get passed on to consumers. LFAs have not cracked the secret to a free lunch. Moreover, every dollar paid in excessive fees is a dollar that by definition cannot and will not be invested in upgrading and expanding networks. This discourages the deployment of new services like faster home broadband or better Wi-Fi or Internet of Things networks. So, by simply insisting that LFAs comply with the law, we will reduce costs for consumers and expedite the deployment of next-generation services. Good law *and* good policy.

Thank you to the dedicated staff who worked on this important item: from the Media Bureau, Michelle Carey, Martha Heller, Maria Mullarkey, Brendan Murray, Raelynn Remy, and Holly Saurer; and from the Office of General Counsel, Susan Aaron, Michael Carlson, Maureen Flood, Thomas Johnson, and Bill Richardson. When it comes to stirring the concrete of statutory construction, you bring a cement mixer to the task rather than eyelashes.

⁶ 47 U.S.C. § 556(c) (emphasis added).

⁷ *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 327 (2014).