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The Cable Franchising Authority of State and Local Governments and the Communications Act

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SUMMARY

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The Cable Franchising Authority of State and Local Governments and the Communications Act

Companies that provide cable television service (cable operators) are subject to regulation at the federal, state, and local levels. Under the Communications Act of 1934, the Federal Communications Commission (FCC or Commission) exercises regulatory authority over various operational aspects of cable service. At the same time, a cable operator must obtain a franchise from the state or local franchising authority for the area in which it wishes to provide cable service. The franchising authority often negotiates various obligations as a condition of granting the franchise.

Under the Cable Communications Policy Act of 1984 (Cable Act), cable operators must obtain franchises from state or local franchising authorities, and these authorities may continue to condition franchises on various requirements. Nevertheless, the Cable Act subjects franchising authorities to important limitations. For instance, the Cable Act prohibits franchising authorities from charging franchise fees greater than 5% of a cable operator's gross annual revenue and from "unreasonably" refusing to award a franchise.

In a series of orders since 2007, the FCC has interpreted the Cable Act to authorize an expanding series of restrictions on the powers of state and local franchising authorities to regulate cable operators. In particular, these orders clarify (1) when practices or policies by a franchising authority amount to an unreasonable refusal to award a franchise; (2) the types of expenditures that count toward the 5% franchise fee cap; and (3) the extent to which franchising authorities may regulate non-cable services provided by cable operators. Franchising authorities, in turn, have successfully challenged some of the FCC's administrative actions in federal court. The U.S. Court of Appeals for the Sixth Circuit upheld many rules in the FCC's orders, but it also vacated some of the FCC's rules in the 2017 decision in *Montgomery County v. FCC*. In response to the *Montgomery County* decision, the FCC adopted a new order on August 1, 2019, which clarifies its interpretations of the Cable Act. Among other things, the order reiterates the FCC's position that in-kind (i.e., non-monetary) expenses, even if related to cable service, may count toward the 5% franchise fee cap and preempts any attempt by state and local governments to regulate non-cable services provided by cable operators. Some localities have criticized the order for hampering their ability to control public rights-of-way and for reducing their ability to ensure availability of public, educational, and government (PEG) programming in their communities. Several cities have filed legal challenges to the order, which will likely involve many complex issues of statutory interpretation and administrative law, along with constitutional questions regarding the FCC's ability to impose its deregulatory policy on states.

This report first outlines the FCC's role in regulating cable operators and franchising authorities, beginning with the Commission's approach under the Communications Act through the passage of the Cable Act and its amendments. The report then turns to a discussion of recurring legal issues over the FCC's power over franchising authorities. The report concludes with a discussion of possible legal issues that may arise in current legal challenges to FCC regulations and offers considerations for Congress.

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Companies that provide cable television service (cable operators) are subject to regulation at the federal, state, and local levels. Under the Communications Act of 1934 (Communications Act), as amended, the Federal Communications Commission (FCC or Commission) exercises regulatory authority over various operational aspects of cable service—such as technical standards governing signal quality,[1] ownership restrictions,[2] and requirements for carrying local broadcast stations.[3] At the same time, a cable operator must obtain a "franchise" from the relevant state or local franchising authorities for the region in which it seeks to provide cable services.[4] Franchising authorities often require cable operators to meet certain requirements, provide certain services, and pay fees as a condition of their franchise.[5] As a result, the franchising process is an important component of cable regulation.

In the early history of cable regulation, the FCC did not interfere with franchising authority operations, opting instead for a system of "deliberately structured dualism."[6] The Cable Communications Policy Act of 1984 (Cable Act) codified this dualist structure by adding Title VI to the Communications Act.[7] Title VI requires cable operators to obtain franchises from state or local franchising authorities and permits these authorities to continue to condition the award of franchises on an operator's agreement to satisfy various requirements.[8] However, Title VI also subjects franchising authorities to a number of important statutory limitations. For instance, franchising authorities may not charge franchise fees greater than 5% of a cable operator's gross annual revenue and may not "unreasonably refuse" to award a franchise.[9]

As explained below, the FCC issued a series of orders restricting the requirements and costs that franchising authorities may impose on cable operators.[10] The FCC issued its first such order in 2007 (First Order) after gathering evidence suggesting that some franchising authorities were imposing burdensome requirements on new entrants to the cable market.[11] The First Order clarified when practices by franchising authorities, such as failing to make a final decision on franchise applications within time frames specified in the order, amount to an "unreasonabl[e] refus[al]" to award a franchise in violation of the Cable Act.[12] The First Order also provided guidance on which costs count toward the 5% franchise fee cap, and it maintained that franchising authorities could not refuse to grant a franchise based on issues related to non-cable

[1] 47 U.S.C. § 544(e); 47 C.F.R. §§ 76.601–76.640.

[2] 47 U.S.C. § 533; 47 C.F.R. §§ 76.501–76.502.

[3] 47 U.S.C. § 534; 47 C.F.R. § 76.56.

[4] 47 U.S.C. §§ 541(a)–(b), 522(10). In the cable television context, a "franchise" permits a cable system to operate within a given area. *See* 47 U.S.C. § 541(a)(2), (b).

[5] *See, e.g.*, All. for Cmty. Media v. FCC, 529 F.3d 763, 767 (6th Cir. 2008) ("[Franchising authorities] retained discretion to decide whether to grant cable franchises to applicants in their communities. As part of this negotiation process, cable operators frequently agreed to perform various activities on behalf of the public interest in exchange for a franchise.") (citations omitted); Montgomery Cty. v. FCC, 863 F.3d 485, 487 (6th Cir. 2017) ("As a condition of granting a franchise, local government authorities may demand, among other things, that a cable operator provide certain services or equipment for public, educational, or governmental purposes.").

[6] *See All. for Cmty. Media*, 529 F.3d at 767.

[7] Pub. L. No. 98-549, 98 Stat. 2779.

[8] 47 U.S.C. § 541(a)–(b).

[9] 47 U.S.C. §§ 541–542.

[10] *See infra* "FCC Orders" (discussing the various FCC orders). Several key issues addressed in these orders are also discussed in greater detail in the section "Key Legal Issues in Cable Franchising."

[11] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, 22 FCC Rcd. 5101 (2007) [hereinafter First Order].

[12] *Id*. at 5103.

services or facilities.[13] The U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit)[14] upheld the First Order in its 2008 decision in *Alliance for Community Media v. FCC*.[15]

Shortly after issuing the First Order, the FCC adopted another order (Second Order), extending the First Order's rulings to incumbent cable operators as well as new entrants.[16] In a later order responding to petitions for reconsideration (Reconsideration Order), the FCC affirmed the Second Order's findings and further clarified that "in-kind" (i.e., noncash) payments exacted by franchising authorities, even if related to the provision of cable service, generally count toward the maximum 5% franchise fee.[17] In 2017, the Sixth Circuit reviewed aspects of the Second Order and Reconsideration Order in its decision in *Montgomery County v. FCC*, upholding some rules and vacating others.[18] In response, the FCC adopted a new order on August 1, 2019 (Third Order). The Third Order seeks to address the defects identified by the Sixth Circuit by clarifying the Commission's reasoning for counting cable-related, in-kind payments toward the 5% franchise fee cap and for applying the First Order's rulings to incumbent cable operators.[19] The Third Order also explicitly asserts the Cable Act's preemption of state and local laws to the extent they impose fees or other requirements on cable operators who provide non-cable service, such as broadband internet, over public rights-of-way. Some municipalities have criticized this order for, among other things, hampering their ability to control public rights-of-way and reducing their ability to ensure the availability of public, educational, and government (PEG) programming in their communities.[20] Several cities have filed legal challenges to the order that are currently before the Sixth Circuit.[21]

As an aid to understanding the complex and evolving nature of the law in this area, this report provides a basic overview of the federal legal framework governing the cable franchising process. The report begins with a historical overview of the law's evolution, from the Communications Act through the Cable Act and its later amendments, to the FCC's various orders interpreting the act. Next, the report details several key issues that have arisen from the FCC's orders, specifically (1) the circumstances under which a franchising authority might be found to have unreasonably refused to award a franchise; (2) the types of expenditures that count toward the 5% cap on

[13] *Id.* at 5103, 5144–5155.

[14] References to a particular circuit in this report (e.g., the Sixth Circuit) refer to the U.S. Court of Appeals for that circuit.

[15] 529 F.3d 763 (6th Cir. 2008).

[16] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, 22 FCC Rcd. 19633 (2007) [hereinafter Second Order].

[17] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, 30 FCC Rcd. 810 (2015) [hereinafter Reconsideration Order].

[18] 863 F.3d 485 (6th Cir. 2017).

[19] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, MB Docket No. 05-311, FCC 19-80, 2019 WL 3605129 (adopted Aug. 1, 2019) [hereinafter Third Order].

[20] *See, e.g.*, Alliance for Communications Democracy et al., Comment, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, MB Docket No. 05-311, at 4–5 (Nov. 14, 2018), https://ecfsapi.fcc.gov/file/1114050901562/Comments%20on%20621%20Second%20Further%20Notice%20of%20Proposed%20Rulemaking.pdf (stating that the FCC's order would "force [franchising authorities] to choose" between local public, educational, and governmental programming and the "important other public services supported by franchise fees" and, if it limits local government's police power, is "contrary to the Cable Act and a dangerous federal intrusion on local authority that must be rejected").

[21] City of Eugene v. FCC, No. 19-4161 (6th Cir. Dec. 2, 2019); City of Portland v. United States, No. 19-4162 (6th Cir. Dec. 3, 2019); Hawaii v. FCC, No. 19-4163 (6th Cir. Dec. 3, 2019); All. for Commc'ns Democracy v. FCC, No. 19-4164 (6th Cir. Dec. 3, 2019); Anne Arundel Cty. v. FCC, No. 19-4165 (6th Cir. Dec. 3, 2019); City of Pittsburgh v. FCC, No. 19-4166 (6th Cir. Dec. 3, 2019); City of Chicago v. FCC, No. 19-4183 (6th Cir. Dec. 5, 2019).

franchise fees; and (3) the extent to which Title VI allows franchising authorities to regulate "mixed-use" networks, that is, networks through which a cable operator provides cable service and another service such as telephone or broadband internet. The report concludes with a discussion of other legal issues that may arise from pending challenges to the FCC's Third Order and offers some considerations for Congress. A summary of federal restrictions on local authority to regulate cable operators and a glossary of some terms used frequently in this report are found in the **Appendix**.

Historical Evolution of the Federal Legal Framework for Cable Regulation

Regulation of Cable Services Prior to 1984

The FCC's earliest attempts to regulate cable television relied on authority granted by the Communications Act,[22] a legal framework that predated cable television's existence. The Communications Act brought all wire and radio communications under a unified federal regulatory scheme. The act also created the FCC to oversee the regulatory programs prescribed by the Communications Act. Title II of the act gave the FCC authority over "common carriers," which principally were telephone service providers. Title III governed the activities of radio transmission providers.

The FCC's Title III jurisdiction encompasses broadcast television transmitted via radio signals.[23] For the first half of the 20th Century, when virtually all commercial television broadcast in this manner, Title III thus gave the FCC regulatory authority over this industry. In the late 1940s and early 1950s, however, municipalities with poor broadcast reception began experimenting with precursors to modern cable systems. These areas erected large "community antennas" to pick up broadcast television signals, and the antenna operators routed the signals to residential customers by wire, or "cable."[24] Through the 1950s, the FCC declined to regulate these systems, initially known as "Community Antenna Television" systems and later simply as "cable television."[25] The FCC reasoned that cable television was neither a common carrier service subject to Title II regulation nor a broadcasting service subject to Title III regulation.[26]

The FCC changed course in a 1966 order in which it first asserted jurisdiction over cable television.[27] The Commission acknowledged that it lacked express statutory authority to regulate cable systems.[28] Even so, the agency concluded that it had jurisdiction because of cable television's "uniquely close relationship" to the FCC's then-existing regulatory scheme.[29] The Supreme Court affirmed the FCC's authority to regulate cable television in a 1968 decision,

[22] Pub. L. No. 73–416, 48 Stat. 1064.

[23] *See generally* FED. COMMC'NS. COMM'N, THE PUBLIC AND BROADCASTING 6 (2018), https://www.fcc.gov/media/radio/public-and-broadcasting.

[24] *See generally* United States v. Sw. Cable Co., 392 U.S. 157, 161–62 (1968).

[25] *Id.* The FCC began using the term "cable television" in 1972. *See* United States v. Midwest Video Corp., 406 U.S. 649, 651 n.3 (1972). For ease of reading, this report uses the terms "cable television" and "cable" interchangeably.

[26] *Sw. Cable Co.*, 392 U.S. at 164; *see also* City of Dallas v. FCC, 165 F.3d 341, 345 (5th Cir. 1999).

[27] 2 F.C.C. 2d 725 (1966).

[28] *See id.* at 729–30.

[29] *Id.* at 729–44.

relying on the FCC's argument that regulatory authority over cable television was necessary for the FCC's performance of its statutory responsibility to "provid[e] a widely dispersed radio and television service, with a fair, efficient and equitable distribution of service among the several States and communities."[30] Following this reasoning, the Court construed the Communications Act as enabling the FCC to regulate what was "reasonably ancillary" to its responsibilities for regulating broadcast television under Title III.[31]

The FCC thereafter maintained regulatory authority over operational aspects of cable television, such as technical standards and signal carriage requirements. However, state and local "franchising authorities" continued to regulate cable operators through the negotiation and grant of franchises.[32] The Commission recognized that cable television regulation had an inherently local character, insofar as local regulators were better situated to manage rights-of-way and to determine how to divide large urban areas into smaller service areas.[33] As part of their franchising process, franchising authorities often imposed fees and other conditions on cable operators in exchange for allowing them to use public rights-of-way to construct their cable systems.[34] Federal courts at the time tolerated this local regulation, noting that because cable systems significantly affect public rights-of-way, "government must have some authority . . . to see to it that optimum use is made of the cable medium in the public interest."[35]

The Cable Act and Its Amendments

The Cable Communications Policy Act of 1984 (Cable Act) was the first federal statutory scheme to regulate expressly cable television.[36] The act's purposes, as defined by Congress, included "assur[ing] that cable systems are responsive to the needs and interests of the local community," providing the "widest possible diversity of information sources," promoting competition, and minimizing unnecessary regulation in the cable industry.[37] The House Energy and Commerce Committee report accompanying the legislation explained that the act was intended to preserve the "critical role" of municipal governments in the franchising process, while still making that power subject to some "uniform federal standards."[38]

To these ends, the Cable Act added Title VI to the Communications Act to govern cable systems.[39] Specifically, Section 621of Title VI preserved the franchising authorities' power to

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[30] *Sw. Cable Co.*, 392 U.S. at 173–74 (quoting 47 U.S.C. § 307(b) (internal quotation marks omitted)).

[31] *Id.*. at 178.

[32] Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 36 F.C.C. 2d 141, 207 (1972), *on reconsideration*, 36 F.C.C. 2d 326 (1972); *see also* All. for Cmty. Media v. FCC, 529 F.3d 763, 767 (6th Cir. 2008) ("Within this binary regulatory regime, state or local government issued franchises while the FCC exercised exclusive authority over all operational aspects of cable communication, including technical standards and signal carriage.") (internal quotations and citations omitted).

[33] Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 36 F.C.C. 2d at 207.

[34] *See generally* ACLU v. FCC, 823 F.2d 1554, 1558 (D.C. Cir. 1987).

[35] Cmmty. Commcn's Co., Inc. v. City of Boulder, 660 F.2d 1370, 1379 (10th Cir. 1981); *see also ACLU*, 823 F.2d at 1554 n.2.

[36] Pub. L. No. 98-549, 98 Stat. 2779 (1984).

[37] 47 U.S.C. § 521.

[38] *See* H.R. REP. NO. 98-934 (1984).

[39] A "cable system" is defined in the Act as "a facility . . . that is designed to provide cable service," including video programming, "to multiple subscribers within a community," excepting facilities that (A) only retransmit broadcast television signals, (B) do not use any public rights of way, (C) provide common carrier services and do not provide

award franchises and required cable operators to secure franchises as a precondition to providing services.[40] Title VI also permits franchising authorities to require that cable operators designate "channel capacity" for PEG[41] use or provide "institutional networks" ("I-Nets").[42] But the power of franchising authorities is limited to regulating "the services, facilities, and equipment provided by a cable operator," such as by prohibiting franchising authorities from regulating "video programming or other information services."[43]

Section 622 of Title VI allows franchising authorities to charge fees to cable operators as a condition of granting the franchise, but it caps those fees at 5% of the operator's gross annual revenue from providing cable services.[44] Section 622 defines "franchise fee" to include "any tax, fee, or assessment of any kind imposed by a franchising authority . . . on a cable operator or a cable subscriber, or both, solely because of their status as such[.]"[45] Franchise fees do not include taxes or fees of "general applicability," capital costs incurred by the cable operator for PEG access facilities (PEG capital costs exemption), and any "requirements or charges incidental to the awarding or enforcing of the franchise" (incidental costs exemption).[46]

Congress amended Title VI in the Cable Television Consumer Protection and Competition Act of 1992,[47] with a stated goal of increasing competition in the cable market.[48] Specifically, Congress amended Section 621 to prohibit the grant of exclusive franchises and to prevent franchising authorities from "unreasonably refus[ing] to award an additional competitive franchise."[49] Congress also granted potential cable operators the right to sue a franchising authority for refusing to award a franchise.[50]

Congress amended the Cable Act again in 1996 to further promote competition in the cable television marketplace by enabling telecommunications providers regulated under Title II of the Communications Act (i.e., telephone companies) to offer video programming services.[51] Congress

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cable services, or (D) are solely for operating electric utility systems. 47 U.S.C. § 522(7) (1988). The Telecommunications Act of 1996 added an exception to this definition for open video systems. *See infra* note 53 and accompanying text. This definition is discussed in further detail in the "Franchising Authority over Mixed-Use Networks" section, *infra*.

[40] 47 U.S.C. § 541 (1988).

[41] 47 U.S.C. §§ 531, 541(a)(4)(B). The statute does not define "channel capacity for public, educational, or governmental use." However, the FCC has explained that (1) "public" channels are "available for use by the general public" and are "usually administered by the cable operator or by a third party designated by the franchising authority"; (2) "educational" channels are "used by educational institutions" and that the franchising authority or cable operator typically allocates time among "local schools, colleges and universities"; and (3) "governmental" channels are "used for programming by local governments" and generally directly controlled by the local governments. *Public, Educational, and Governmental Access Channels ("PEG Channels")*, FED. COMMC'NS COMM'N, https://www.fcc.gov/media/public-educational-and-governmental-access-channels-peg-channels (last updated Dec. 9, 2015).

[42] 47 U.S.C. §§ 531(b), 541(b)(3)(D). An "institutional network" is defined as "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." *Id.* § 531(f).

[43] *Id.* § 544(a), (b). For an overview of the Cable Act's restrictions on franchising authorities, see the **Appendix**, *infra*.

[44] *Id.* § 542.

[45] *Id.* § 542(g)(1).

[46] *Id.* § 542(g)(2). These exemptions are discussed further in the "Franchise Fees" section below.

[47] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[48] *Id.*

[49] 47 U.S.C. § 541 (2018).

[50] *Id.*

[51] Pub. L. No. 104-104, 110 Stat. 56 (1996).

repealed a provision banning telecommunications providers from offering video programming to customers in their service area[52] and added a provision governing the operation of "open video systems," a proposed competitor to cable systems.[53] These amendments also added provisions barring franchising authorities from conditioning the grant of a franchise on a cable operator's provision of telecommunications services or otherwise requiring cable operators to obtain a franchise to operate a telecommunications service.[54]

FCC Orders

In the decades following the passage of the Cable Act and its amendments, many phone companies upgraded their networks to enter the cable market.[55] To streamline the process for these new entrants, the FCC issued orders interpreting the franchising provisions of Title VI.[56] The four orders discussed in this section—the First, Second, Reconsideration, and Third Orders—each address a range of topics and in some cases retread topics covered by an earlier order. **Table 1** summarizes the orders.

[52] *See* 110 Stat. at 124.

[53] 47 U.S.C. § 573 (2018). The Cable Act as amended explicitly exempted open video systems from franchise fees and other requirements, including the requirement to obtain a local franchise. *Id.* § 573(c). However, Congress required open video system operators to make most of the channel capacity on their systems available to unaffiliated video programming providers on a nondiscriminatory basis. *Id.* § 573(b)(1). In 1999, the Fifth Circuit held that this section of the Cable Act did not prevent state and local authorities from imposing franchise requirements on open video systems. City of Dallas v. FCC, 165 F.3d 341 (5th Cir. 1999). The FCC now lists only a small number of current filings for certification of open video systems. *See Current Filings for Certification of Open Video Systems*, FED. COMMC'NS COMM'N, https://www.fcc.gov/general/current-filings-certification-open-video-systems (last updated Feb. 16, 2018).

[54] 47 U.S.C. § 541(b)(3).

[55] *See, e.g.*, First Order, 22 FCC Rcd. 5101, 5103, 5114, paras. 2, 27 (2007) ("New competitors are entering markets for the delivery of services historically offered by monopolists: traditional phone companies are primed to enter the cable market, while traditional cable companies are competing in the telephony market. . . . [Phone companies] have made their plans to enter the video services market abundantly clear . . . . For instance, they are investing billions of dollars to upgrade their networks to enable the provision of video services . . . .").

[56] The Communications Act gives the FCC broad authority to "prescribe such rules and regulations as may be necessary in the public interest," and courts have recognized that this authority extends to Title VI. 47 U.S.C. § 201(b); *see, e.g.*, All. for Cmty. Media v. FCC, 529 F.3d 763, 774 (2008) ("[B]ecause 'the grant in § 201(b) means what it says[,]' we are bound by this plain meaning and thereby conclude that, pursuant to section 201(b), the FCC possesses clear jurisdictional authority to formulate rules and regulations interpreting the contours of section 621(a)(1).") (quoting AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 378 (1999)); *see also* City of Chicago v. FCC, 199 F.3d 424, 428 (7th Cir. 1999) ("We have said the FCC is charged by Congress with the administration of the Cable Act. We are not convinced that for some reason the FCC has well-accepted authority under the Act but lacks authority to interpret [Section 621] and to determine what systems are exempt from franchising requirements.") (citations omitted).

Table 1. Title VI Orders and Key Features

Order	Topics Discussed	Status
First Order	Conduct constituting an "unreasonable refusal" for new entrants	Upheld in *Alliance for Community Media v. FCC* and unchanged by later orders
	Costs subject to 5% franchise fee cap for new entrants	Extended to incumbent cable operators by Second Order and expanded to include cable-related in-kind contributions by Reconsideration and Third Orders
	Regulation of non-cable services for new entrants ("mixed-use" regulation)	Extended to incumbent cable providers by Second, Reconsideration, and Third Orders
Second Order	Costs subject to 5% franchise fee cap (extended to incumbent cable operators)	Expanded to include cable-related in-kind contributions by Reconsideration and Third Orders
	Mixed-use regulation (extended to incumbent cable operators)	Affirmed in Reconsideration Order; vacated in *Montgomery County v. FCC*; reintroduced in Third Order
Reconsideration Order	Inapplicability to state-level franchising authorities	Overruled in Third Order
	Treatment of cable-related in-kind contributions as franchise fees	Vacated in *Montgomery County v. FCC*; reintroduced in Third Order
	Mixed-use regulation (adhering to Second Order conclusions)	Vacated in *Montgomery County v. FCC*; reintroduced in Third Order
Third Order	Treatment of cable-related in-kind contributions as franchise fees	Third Order to be reviewed by the Sixth Circuit
	Mixed-use regulation	
	Treatment of equipment and PEG transport facilities under PEG Capital Costs exemption	
	Preemption of conflicting state and local regulation	
	Applicability to state-level franchising authorities	

Source: CRS analysis of orders and subsequent legal actions.

In 2007, after gathering evidence suggesting that some local and municipal governments were imposing burdensome demands on new entrants, the FCC adopted the First Order.[57] The Commission observed that the franchising process had prevented or delayed the entry of telephone companies into the cable market.[58] The First Order thus sought to reduce entry barriers by clarifying when Title VI prohibits franchising authorities from imposing certain franchise

[57] First Order, 22 FCC Rcd. at 5110, para. 18 ("Based on the voluminous record in this proceeding, which includes comments filed by new entrants, incumbent cable operators, LFAs, consumer groups, and others, we conclude that the current operation of the franchising process can constitute an unreasonable barrier to entry for potential cable competitors, and thus justifies Commission action.").

[58] *Id.* at 5110–11, paras. 18–20.

conditions on new entrants.[59] The FCC gave examples of practices by franchising authorities that constitute an "unreasonable refusal" to award a franchise, such as

1. a delay in making a final decision on franchise applications beyond the time frames set forth in the order;[60]
2. requiring cable operators to "build out" their cable systems to provide service to certain areas or customers as a condition of granting the franchise;[61]
3. imposing PEG and I-Net Requirements beyond those imposed on incumbents;[62] and
4. requiring that new cable operators agree to franchise terms that are substantially similar to those agreed to by incumbent cable operators (called "level-playing-field requirements").[63]

The First Order further clarified when certain costs counted toward the 5% franchise fee cap and maintained that franchising authorities could not refuse to grant a franchise based on issues related to non-cable services or facilities.[64] Several franchising authorities and their representative organizations challenged the legality of the Order in the Sixth Circuit. But the Sixth Circuit denied those challenges in *Alliance for Community Media v. FCC*, upholding both the FCC's authority to issue rules construing Title VI and the specific rules in the First Order itself.[65]

Although the First Order applied only to new entrants to the cable market, the FCC shortly thereafter adopted the Second Order, extending many of the First Order's rulings to incumbent cable television service providers.[66] Following the release of the Second Order, the Commission received three petitions for reconsideration, to which it responded in the Reconsideration Order in 2015.[67] In the Reconsideration Order, the FCC affirmed its conclusions from the Second Order applying its earlier rulings to incumbent cable operators.[68] The Reconsideration Order also clarified that "in-kind" (i.e., noncash) payments exacted by franchising authorities, even if unrelated to the provision of cable service, may count toward the maximum 5% franchise fee allowable under Section 622.[69] In 2017, in *Montgomery County v. FCC*, the Sixth Circuit vacated the FCC's determinations in the Second Order and Reconsideration Order on both issues.[70] Following the ruling in *Montgomery County,* the Commission started a new round of rulemaking and, on August 1, 2019, adopted another order, the Third Order, addressing the issues raised by the Sixth Circuit.[71] In the Third Order, the FCC clarified its basis for counting in-kind payments

[59] *Id.* at 5110–11, para. 5. The FCC relied on its authority under Section 621(a)(1) of the Cable Act, which prohibits a franchising authority from "unreasonably refus[ing] to award an additional competitive franchise," to determine when franchising authority behavior constituted an unreasonable refusal. 47 U.S.C. § 541(a)(1). For more discussion on this point, see the section below titled "Unreasonable Refusal to Award a Franchise."

[60] *Id*. at 5134–5136, paras. 65–73.

[61] *Id.* at 5140–5144, paras. 82–91.

[62] *Id.* at 5154, paras. 119–120.

[63] *Id.* at 5124, 5164, paras. 47–49, 138.

[64] *Id.* at 5103, 5144–5151, 5155, paras. 5, 94–109, 121–24.

[65] All. for Cmty. Media v. FCC, 529 F.3d 763 (2008).

[66] *See* Second Order, 22 FCC Rcd. 19633, 19636, para. 7 (2007).

[67] Reconsideration Order, 30 FCC Rcd. 810 (2015).

[68] *Id.* at 816, paras. 14–15.

[69] *Id.* at 814–16, paras. 11–13.

[70] 863 F.3d 485 (6th Cir. 2017). These issues are discussed below in "Key Legal Issues in Cable Franchising."

[71] Third Order, MB Docket No. 05-311, FCC 19-80, 2019 WL 3605129. (adopted Aug. 1, 2019).

toward the 5% franchise fee cap, provided additional reasoning for applying the First Order's rulings to incumbent cable operators, and preempted state and local regulation inconsistent with Title VI.[72] While prior orders applied only to local franchising authorities, the Third Order extended the Commission's rules in all three orders to state-level franchising authorities, concluding that there was "no statutory basis for distinguishing between state- and local-level franchising actions."[73] This report addresses issues raised in these various orders in greater detail below.

Key Legal Issues in Cable Franchising

As the foregoing discussion reflects, the FCC's post-2007 orders have focused on several key issues within Title VI's framework. Most notably, the Commission has addressed (1) when certain franchise requirements amount to an "unreasonable refusal" to award the franchise under Section 621; (2) the types of costs that are subject to the 5% franchise fee cap under Section 622; and (3) the extent to which franchising authorities may regulate "mixed-use" networks operated by cable operators. This section first reviews the relevant statutory provisions from which each of these three issues arise and then discusses the FCC's interpretations of those provisions.

Unreasonable Refusal to Award a Franchise

Title VI prohibits franchising authorities from "unreasonably refus[ing]" to grant a franchise to a cable operator.[74] In the First Order, the FCC identified specific types of franchising conditions or practices that violate the unreasonable refusal standard, such as failing to process an application within certain time periods. The Sixth Circuit reviewed and upheld the First Order's interpretation of this standard, which remains in effect.[75]

Statutory Provisions Governing the "Unreasonable Refusal" Standard

Title VI allows franchising authorities to condition a franchise on the cable operator performing or meeting certain requirements. Sections 621(a)(4)(B) and 621(b)(3)(D) explicitly allow franchising authorities to require cable operators to provide PEG channel "capacity, facilities, or financial support" and to provide I-Net "services or facilities."[76] Section 621(a)(1), however, imposes a significant limitation on franchising authorities' ability to impose such conditions. Under that provision, franchising authorities may not "grant an exclusive franchise" or "unreasonably refuse to award an additional competitive franchise."[77]

[72] *See id.* at *4, *24, *30, paras. 8, 64, 80.

[73] *Id.* at *41, para. 113 ("We now find that the better reading of the Cable Act's text and purpose is that the rules and decisions adopted in this Order, as well as those adopted in the First Report and Order and Second Report and Order, should fully apply to state-level franchising actions and regulations. First, we see no statutory basis for distinguishing between state- and local-level franchising actions. Nor do we think such a distinction would further Congress's goals: unreasonable demands by state-level franchising authorities can impede competition and investment just as unreasonable demands by local authorities can.").

[74] 47 U.S.C. § 541(a)(1).

[75] All. for Cmty. Media v. FCC, 529 F.3d 763, 777–86 (6th Cir. 2008).

[76] 47 U.S.C. § 541(a)(4), (b)(3)(D).

[77] *Id.* § 541(a)(1).

FCC Interpretations of the "Unreasonable Refusal" Standard

In the First Order, the FCC clarified when certain practices or requirements amount to an unreasonable refusal of a new franchise under Section 621(a)(1) of Title VI. The FCC gave four specific examples of unreasonable refusals: (1) delaying a final decision on franchise applications; (2) requiring cable operators to "build out" their cable systems to provide service to certain areas or customers as a condition of granting the franchise; (3) imposing PEG and I-Net requirements that are duplicative of, or are more burdensome than, those imposed on incumbents; and (4) requiring that new cable operators agree to franchise terms that are substantially similar to those agreed to by incumbent cable operators (the "level-playing-field requirements").[78]

As for delays in acting on a franchise application, the FCC stated that a franchising authority unreasonably refuses a franchise when it subjects applicants to protracted negotiations, mandatory waiting periods, or simply a slow-moving franchising process.[79] To prevent such delays, the FCC set decision deadlines of 90 days for applications by entities with existing access to rights-of-way and six months for applications by entities without such access.[80] Once these time periods expire, franchise applications are deemed granted until the franchising authority takes final action on the application.[81]

As for build-out requirements, the FCC stated that requiring new franchise applicants to build out their cable systems to cover certain areas may constitute an unreasonable refusal of a franchise.[82] The Commission explained that what constitutes an "unreasonable" build-out requirement may vary depending on the applicant's existing facilities or market penetration, but it clarified that certain build-out requirements are *per se* unreasonable refusals under Section 621.[83]

The FCC also determined that certain PEG and I-Net terms and conditions constitute an unreasonable refusal.[84] Specifically, the Commission determined that PEG and I-Net requirements that are "completely duplicative" (i.e., a requirement for capacity or facilities that would not provide "additional capability or functionality, beyond that provided by existing I-Net facilities") are unreasonable unless redundancy serves a public safety purpose.[85] The FCC also viewed PEG requirements as unreasonable when such requirements exceeded those placed on incumbent cable operators.[86]

Lastly, the FCC determined that level-playing-field requirements in local laws or franchise agreements amount to an unreasonable refusal of a franchise.[87] The Commission explained that such requirements are unreasonable because new cable entrants are in a "fundamentally different

[78] *See* First Order, 22 FCC Rcd. 5101, 5103, 5134–5140, 5141–5144, 5151–120, paras. 5, 66–81, 82–91, 110–120 (2007).

[79] *See id.* at 5111–16, paras. 22–30.

[80] *Id.* at 5134–37, paras. 66–73.

[81] *Id.* at 5138–39, paras. 76–81.

[82] *Id.* at 5142–43, paras. 87–91.

[83] *Id.* at 5143, paras. 89–90. Examples of *per se* unreasonable refusals include requiring build-out to (1) all houses within a franchise area; (2) buildings to which the applicant cannot reasonably obtain access; (3) a greater area than was required of the incumbent cable operator; or (4) an area beyond the applicant's existing facilities when the applicant is a common carrier. *Id.*

[84] *Id.* at 5123–24, 5151–54, paras 46, 110–120.

[85] *Id.* at 5154, para. 119.

[86] *Id.* at 5154, para. 120.

[87] *See id.* at 5124–25, paras. 47–49.

situation" from incumbent operators.[88] The FCC therefore concluded that these mandates "unreasonably impede competitive entry" into the cable market and are unreasonable refusals.[89]

As discussed above, several franchising authorities and their representative organizations unsuccessfully challenged the FCC's interpretation of the unreasonable refusal standard in *Alliance for Community Media v. FCC*, in which the Sixth Circuit upheld the First Order in its entirety.[90] Applying the framework set forth in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*[91]—which guides courts when reviewing agency regulations that interpret the agency's governing statute—the court reasoned that the phrase "unreasonably refuse" is inherently ambiguous because the word "unreasonably" is subject to multiple interpretations.[92] The court then held that the First Order's interpretation of this phrase was entitled to deference because it was reasonable and not unambiguously foreclosed by Title VI.[93]

As a result, the First Order's rules on what constitutes an unreasonable refusal remain binding on franchising authorities. Accordingly, if a franchising authority denies a cable operator's franchise request for a reason the FCC's has deemed unreasonable—such as the cable operator's refusal to accept build-out or level-playing-field requirements—the cable operator may sue the franchising authority for "appropriate relief" as determined by the court.[94] Alternatively, if the franchising authority fails to make a final decision within the allotted time, the franchise will be deemed granted until the franchising authority makes a final decision.[95]

Franchise Fees

Title VI limits franchising authorities to charging cable operators "franchise fees" of up to 5% of the cable operator's revenue, subject to specific exceptions. However, the types of obligations limited by the 5% cap have been a point of contention. The FCC, in its various orders, has clarified the scope of the exceptions to the 5% cap (in particular, the PEG capital costs and incidental costs exemptions); it has further explained that, unless they fall under one of the express exceptions, non-monetary (or "in-kind") contributions are subject to the 5% cap even if they are related to the provision of cable service. Litigation over the Commission's current interpretations of what constitutes a "franchise fee" is ongoing.

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[88] *Id.* at 5163, para. 138. The FCC specifically acknowledged that incumbent operators enjoyed a captive market and therefore could more easily recoup the costs of concessions to franchising authorities than new entrants. *Id.* at 5125, para. 48.

[89] *Id.* at 5163–5164, para. 138.

[90] All. for Cmty. Media v. FCC, 529 F.3d 763 (6th Cir. 2008).

[91] 467 U.S. 837 (1984).

[92] *All. for Cmty. Media*, 529 F.3d at 777.

[93] *Id.* at 778–86. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, 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."). For a more detailed overview of *Chevron*, see CRS Report R44954, *Chevron Deference: A Primer*, by Valerie C. Brannon and Jared P. Cole.

[94] 47 U.S.C. § 555(a)–(b).

[95] First Order, 22 FCC Rcd. at 5138–39, paras. 76–81.

Statutory Provisions Governing Franchise Fees

Section 622 allows franchising authorities to charge franchise fees to cable providers, but it subjects such fees to a cap.[96] For any "twelve-month period," franchise fees may not exceed 5% of the cable operator's gross annual revenues derived "from the operation of the cable system to provide cable service."[97] Section 622 broadly defines "franchise fees" to include "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."[98] However, Section 622 exempts certain costs from this definition, including

1. "any tax, fee, or assessment of general applicability";[99]
2. "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities" (PEG capital costs exemption)[100]; and
3. "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" (incidental costs exemption).[101]

FCC Interpretations of the Statutory Franchise Fee Provisions

The FCC has provided guidance on the types of expenses subject to the 5% cap. In particular, it has clarified (1) when non-monetary (or "in-kind") contributions must be included in the calculation of franchise fees subject to the 5% cap; (2) the scope of the PEG capital costs exemption; and (3) the scope of the incidental costs exemption.

In-Kind Contributions

The FCC has elaborated on the types of in-kind contributions that are subject to the 5% cap. In the First Order, the Commission maintained that in-kind fees *unrelated* to provision of cable service—such as requests that the cable operator provide traffic light control systems—are subject to the 5% cap because they are not specifically exempt from the "franchise fee" definition.[102] In the Reconsideration Order, the agency further clarified that the First Order's conclusions were not limited to in-kind exactions *unrelated* to cable service and that *cable-related* in-kind contributions (such as providing free or discounted cable services to the franchising authority) could also count toward the 5% cap.[103] The Sixth Circuit vacated this conclusion, however, in *Montgomery County v. FCC*. The Sixth Circuit recognized that Section 622's

[96] 47 U.S.C. § 542(a)–(b).

[97] *Id.* § 542(b).

[98] *Id.* § 542(g)(1).

[99] *Id.* § 542(g)(2)(A).

[100] *Id.* § 542(g)(2)(C). For franchises that predate the Cable Act, Section 622 allows a broader range of PEG costs to be excluded from the franchise fee definition. Specifically, for such franchises, the definition excludes any payments made during the term of the franchise "for, or in support of the use of, public, educational, or governmental access facilities." *Id.* § 542(g)(2)(B).

[101] *Id.* § 542(g)(2)(D). Fees imposed under federal copyright law are also excluded from the definition of "franchise fees." *Id.* § 542(g)(2)(E).

[102] First Order, 22 FCC Rcd. 5101, 5149–50, paras. 105–108 (2007).

[103] Reconsideration Order, 30 FCC Rcd. 810, 815, paras. 11–13 (2015).

definition of "franchise fee" is broad enough to encompass "noncash exactions."[104] But the court explained that just because the term "can include noncash exactions, of course, does not mean that it necessarily *does* include every one of them."[105] The court faulted the FCC for giving "scarcely any explanation at all" for its decision to expand its interpretation of "franchise fee" to include cable-related exactions,[106] and held that this defect rendered the Commission's interpretation "arbitrary and capricious" in violation of the Administrative Procedure Act (APA).[107]

Following the Sixth Circuit's decision in *Montgomery County*, the Commission issued the Third Order, in which it detailed its reasons for including cable-related in-kind contributions in the 5% cap. The FCC first explained that, as recognized by the court in *Montgomery County*, the definition of "franchise fee" is broad enough to encompass in-kind contributions as well as monetary fees.[108] The Commission also acknowledged the Sixth Circuit's observation that just because the definition is broad enough to include in-kind fees "does not mean that it necessarily *does* include everyone one of them."[109] Nevertheless, the FCC maintained that cable-related in-kind contributions should be included in the fee calculation because there is nothing in the definition that "limits in-kind contributions included in the franchise fee."[110] The Commission further reasoned that Section 622's specific exceptions do not categorically exclude such expenses, as there is no "general exemption for cable-related, in-kind contributions."[111] Along with its construction of Section 622, the FCC rejected arguments that "other Title VI provisions should be read to exclude costs that are clearly included by the franchise fee definition," such as the provision that allows franchising authorities to require that cable operators designate channel capacity for PEG use.[112] According to the Commission, "the fact that the Act authorizes [franchising authorities] to impose such obligations does not mean that the value of these obligations should be excluded from the five percent cap on franchise fees."[113]

While the Third Order concluded that cable-related, in-kind contributions are not categorically exempt from the 5% cap, it recognized that certain types of cable-related in-kind contributions might be excluded. For instance, the FCC concluded that franchise terms requiring a cable operator to build out its system to cover certain localities or to meet certain customer service obligations are not franchise fees.[114] The Commission reasoned that these requirements are "simply part of the provision of cable service" and are not, consequently, a "tax, fee, or

[104] Montgomery Cty. v. FCC, 863 F.3d 485, 491 (6th Cir. 2017).

[105] *Id.*

[106] *Id.*

[107] *Id.* at 491–92; 5 U.S.C. § 706(2).

[108] The FCC specifically reasoned that the definition refers to "any tax, fee, or assessment of any kind" imposed by franchising authorities and that the words "tax" and "assessment" are broad enough to include "noncash exactions." Third Order, 2019 WL 3605129, at *5, para. 12.

[109] *Id.* at *6, para. 13 (quoting *Montgomery Cty.*, 863 F.3d at 491).

[110] *Id.* at *6, para. 14.

[111] *Id.* at *6, para. 15. The FCC further maintained that certain exemptions would be superfluous if all in-kind, cable-related costs were exempt. In particular, Section 622 exempts capital costs incurred by cable operators for PEG access facilities, and, for franchises in effect on October 30, 1984, it exempts all cable operator payments in support of PEG access facilities. 47 U.S.C. § 542(g)(2). The FCC argued that, because these exceptions "fall within in the broader category of cable-related, in-kind contributions, Congress would not have needed to craft these narrow exceptions if all cable-related, in-kind contributions generally were exempted." Third Order, 2019 WL 3605129, at *7, para. 16.

[112] *Id.* at *8, para. 19.

[113] *Id.* at *8, para. 20.

[114] *Id.* at *22, paras. 57–58.

assessment."[115] Furthermore, the FCC noted that the PEG capital costs exemption, which exempts costs associated with the construction of public, educational, or governmental access facilities, covers certain cable-related, in-kind expenses, and, as discussed below, the PEG capital costs exemption provides guidance on the types of costs to which it applies.[116] On the other hand, the agency also identified specific cable-related, in-kind expenses that are subject to the 5% cap, such as franchise terms requiring cable operators to provide free or discounted cable service to public buildings or requiring operators to construct or maintain I-Nets.[117]

Lastly, the Third Order concluded that, for purposes of the 5% cap, cable-related in-kind services should be measured by their "fair market value" rather than the cost of providing the services.[118] The FCC reasoned that fair market value is "easy to ascertain" and "reflects the fact that, if a franchising authority did not require an in-kind assessment as part of its franchise, it would have no choice but to pay the market rate for services it needs from the cable operator or another provider."[119]

In sum, despite the setback for the Commission in *Montgomery County*, the FCC has maintained its position that in-kind contributions—even if related to cable service—are not categorically exempt from the 5% cap. The issue is not settled, however. As discussed later, the Third Order is being challenged in court, and it remains to be seen whether the FCC's position will ultimately be upheld.[120]

PEG Capital Costs Exemption

The FCC's interpretation of the PEG capital costs exemption has evolved. In the First Order, the Commission interpreted this exemption as applying to the costs "incurred in or associated with" constructing the facilities used to provide PEG access.[121] However, the FCC broadened its interpretation in the Third Order. In the Third Order, the Commission conceded that its earlier statements were "overly narrow" because the plain meaning of the term "capital costs" can include equipment costs as well as construction costs.[122] Consistent with this analysis, the FCC concluded that the term "capital costs" is not limited to construction-related costs, but can also include equipment purchased for the use of PEG access facilities, "such as a van or a camera."[123] The Third Order noted that capital costs "are distinct from *operating* costs"—that is, the "costs incurred in using" PEG access facilities—and that operating costs are not exempt from inclusion in the franchise fee calculation.[124]

While the Third Order provided additional clarification on the PEG capital costs exemption, it left at least one issue unresolved. Specifically, the FCC determined there was an insufficient record before it to conclude whether "the costs associated with the provision of PEG channel capacity"

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[115] *Id.*

[116] *See* section below titled "PEG Capital Costs Exemption" for a discussion of this provision.

[117] Third Order, 2019 WL 3605129, at *11, *21, paras. 26, 55.

[118] *Id.* at *23, para 61.

[119] *Id.*

[120] *See infra*, "Legal Challenges."

[121] First Order, 22 FCC Rcd. 5101, 5150–51, para. 109.

[122] Third Order, 2019 WL 3605129, at *15, paras. 35–36.

[123] *Id.* at *16, para. 39.

[124] *Id.* at *15, para. 36.

fall within the exclusion.[125] Consequently, it deferred consideration of this issue and stated that, in the meantime, channel capacity cost "should not be offset against the franchise fee cap."[126]

Ultimately, the scope of the PEG capital costs exemption remains in flux. The FCC's Third Order is being challenged in court, and it is possible the agency's interpretation of the PEG capital costs exemption could be vacated.[127] Even if the Third Order is upheld, it left unresolved whether the costs of providing PEG channel capacity fall under the capital costs exclusion; thus, while franchise authorities are not required to offset such costs against the 5% cap in the interim, it is unclear whether these costs will count toward the franchise fee cap in the long run.

Incidental Costs Exemption

While the FCC has articulated its position on in-kind contributions and the PEG capital costs exemption over the course of several orders, the Commission largely addressed its interpretation of the "incidental costs" exemption in the First Order.[128] There, the FCC read the exemption narrowly to include only those expenses specifically listed in Section 622(g)(2)(D)—namely, "bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages."[129] The Commission explained that it did not interpret unlisted costs—including, among other things, attorney fees, consultant fees, and in-kind payments—to be "incidental" costs, based on the text of the exemption and the legislative history of Section 622.[130] The FCC noted, however, that certain "minor expenses" beyond those listed in the statute may be included as "incidental costs," such as application or processing fees that are not unreasonably high relative to the cost of processing the application.[131]

In *Alliance for Community Media v. FCC*, the Sixth Circuit denied petitions challenging the First Order's interpretation of the "incidental costs" exemption.[132] Petitioners argued that the plain meaning of the phrase "incidental to" meant that the fee had to be "related to the awarding or enforcing of the franchise."[133] According to petitioners, the FCC's *per se* listing of non-incidental fees—such as attorney and consultants' fees—contradicted this plain meaning.[134] The court, however, upheld the FCC's interpretation. The court reasoned that the phrase "incidental to" lent itself to multiple interpretations, including both the FCC's and the petitioners' readings.[135] Consequently, it concluded under *Chevron* that the "FCC's rules regarding fees" qualified as "reasonable constructions" of Sections 622(b) and 622(g)(2)(D) that are entitled to deference.[136]

In sum, unlike in-kind contributions and the PEG capital costs exemption, the FCC's interpretation of the incidental costs exemption is not subject to any ongoing legal challenge. Consequently, with the exception of the "minor expenses" mentioned in the First Order, only

[125] *Id.* at *17, para. 42.

[126] *Id.* at *18, para. 44.

[127] See the section below titled "Legal Challenges."

[128] First Order, 22 FCC Rcd. at 5147, paras. 99–104.

[129] *Id.* at 5148, para. 103; 47 U.S.C. § 542(g)(2)(D).

[130] First Order, 22 FCC Rcd. at 5148–49, paras. 103–104.

[131] *Id.* at 5149, para. 104.

[132] 529 F.3d 763 (6th Cir. 2008).

[133] *Id.* at 783.

[134] *Id.*

[135] *Id.*

[136] *Id.*

those expenses listed in Section 622(g)(2)(D) (bonds, security funds, etc.) are exempt from the 5% cap under the incidental costs exemption.

Franchising Authority over Mixed-Use Networks

A continuing area of disagreement between the FCC and franchising authorities has been the extent to which franchising authorities can regulate *non*-cable services that a cable operator provides over the same network used for its cable service (e.g., a "mixed-use network"). From the First Order onward, the Commission has maintained that, based on its interpretation of various Title VI provisions, franchising authorities may not regulate the non-cable services aspects of mixed-use networks. While the First Order applied this rule only to new entrants to the cable market, the Second Order extended it to incumbent cable operators.[137] The Sixth Circuit upheld this rule as applied to new entrants into the cable market, but vacated the FCC's application of it to incumbent cable operators.[138] The Commission sought to cure this defect in the Third Order, and it further clarified that any efforts by state and local governments to regulate non-cable services provided by cable operators, even if done outside the cable franchising process and relying on the state's inherent police powers, are preempted by Title VI. However, given the ongoing legal challenge to the Third Order, this issue, too, remains unsettled.

Statutory Provisions Governing Mixed-Use Networks

Several Title VI provisions arguably prohibit franchising authorities from regulating non-cable services (such as telephone or broadband internet access service) provided over mixed-use networks, or networks over which an operator provides both cable and non-cable services. Section 602's definition of "cable system" explicitly excludes the "facility of a common carrier" except "to the extent such facility is used in the transmission of video programming directly to subscribers."[139] Further, with respect to broadband internet access service, Section 624(b)(1) states that franchising authorities "may not . . . establish requirements for video programming or other information services."[140] Lastly, Section 624(a) states that "[a] franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with [Title VI]."[141]

FCC Interpretations of Statutory Provisions Governing Mixed-Use Networks

Beginning with the First Order, the FCC has relied on these statutory provisions to clarify the bounds of franchising authority jurisdiction over mixed-use networks.[142] The Commission asserted that a franchising authority's "jurisdiction applies only to the provision of cable services over cable systems."[143] To support its view, the FCC cited Section 602's definition of "cable system," which explicitly excludes common carrier facilities except to the extent they are "used

[137] *See* **Table 1** for a summary of how different orders treated mixed-use networks.

[138] *See* Montgomery Cty. v. FCC, 863 F.3d 485 (6th Cir. 2017).

[139] 47 U.S.C. § 522(7).

[140] *Id.* § 544(b)(1)

[141] *Id.* § 544(a).

[142] *See* First Order, 22 FCC Rcd. at 5155–56, paras. 121–124.

[143] *Id.* at 5155, para. 121.

in the transmission of video programming directly to subscribers."[144] The Commission did not address whether video services provided over the internet might are "cable services."[145]

The First Order applied only to new entrants to the cable market. However, in the Second Order, the FCC determined that the First Order's conclusions regarding mixed-use networks should apply to incumbent providers because those conclusions "depended upon [the Commission's] statutory interpretation of Section 602, which does not distinguish between incumbent providers and new entrants."[146] The FCC reaffirmed this position in the Reconsideration Order, stating that franchising authorities "cannot . . . regulate non-cable services provided by an incumbent."[147]

In *Montgomery County v. FCC*, however, the Sixth Circuit vacated the FCC's extension of its mixed-use network rule to incumbent cable providers on the ground that this interpretation was arbitrary and capricious.[148] The court explained that the Commission could not simply rely on the reasoning in its First Order because Section 602 did not support an extension of the mixed-use rule to incumbent cable providers.[149] The court observed that the FCC correctly applied its mixed-use rule to new entrants—who were generally common carriers—because Section 602's definition of "cable system" expressly excludes common carrier facilities.[150] But most incumbents, by contrast, are not common carriers. Consequently, because the Commission did not identify any other "valid basis—statutory or otherwise—" for its extension of its mixed-use rule to non-common carrier cable providers, the court vacated that decision as arbitrary and capricious.[151]

Responding to *Montgomery County*, the FCC's Third Order provides additional support for extending the mixed-use rule to incumbent cable operators. The Order first reiterates that Section 602's definition of "cable system" provides the basis for barring franchising authorities from regulating incumbent cable operators when acting as common carriers, because the definition explicitly excludes common carrier facilities except to the extent they are "used in the transmission of video programming directly to subscribers."[152] Similarly, the Commission concluded that franchising authorities cannot regulate *non*-common carriers to the extent they provide other services along with cable, in particular, broadband internet access.[153] The Third Order supports that conclusion by reference to Section 624(b)(1)'s command that franchising authorities may not "establish requirements for video programming or *other information services*."[154] While "information services" is not defined in Title VI, the FCC concluded that, based on Title VI's legislative history, the term should have the same meaning it has in Title I of the Communications Act.[155] The Commission has interpreted "information service" under Title I

[144] *Id.* at 5155, para. 122 (citing 47 U.S.C. § 522(7)(C)).

[145] *Id.* at 5156, para. 124.

[146] Second Order, 22 FCC Rcd. 19633, 19640, para. 17 (2007). The Second Order did not, however, extend the First Order's determinations involving time frames and build-out requirements to incumbent operators. *Id.* at 19636–37, paras. 8–9.

[147] Reconsideration Order, 30 FCC Rcd. 810, 816–17, para. 15 (2015).

[148] 863 F.3d 485 (6th Cir. 2017).

[149] *Id.* at 493.

[150] *Id.* at 492–93.

[151] *Id.* at 493.

[152] Third Order, 2019 WL 3605129, at *26, para. 71 (citing 47 U.S.C. § 522(7)(C)).

[153] *Id.* at *27–*30, paras. 72–79.

[154] *Id.* at *27, para. 73 (citing 47 U.S.C. § 544(b)(1)).

[155] *Id.* at *27–*28, paras. 74, 76. The Third Order further cites to Section 624(a), which provides that a franchising authority "may not regulate the services, facilities, and equipment provided by a cable operator except to the extent

of the Communications Act to include broadband internet access service,[156] and the D.C. Circuit has upheld that interpretation.[157] The Third Order also notes that "it would conflict with Congress's goals in the Act" to treat cable operators that are not common carriers differently from those that are common carriers, as allowing franchising authorities to regulate non-common carrier operators more strictly "could place them at a competitive disadvantage."[158]

Beyond clarifying that franchising authorities cannot use their Title VI authority to regulate the non-cable aspects of a mixed-use cable system, the Third Order also explicitly preempts state and local laws that "impose[] fees or restrictions" on cable operators for the "provision of non-cable services in connection with access to [public] rights-of-way, except as expressly authorized in [Title VI]."[159] Prior to the Third Order's issuance, for example, the Oregon Supreme Court in *City of Eugene v. Comcast*[160] upheld the City of Eugene's imposition of a 7% fee on the revenue a cable operator generated from its provision of broadband internet services. Rather than impose the fee as part of the cable franchising process, the city cited as its authority an ordinance imposing a "license-fee" requirement on the delivery of "telecommunications services" over the city's public rights-of-way.[161] The court held that Title VI did not prohibit the city from imposing the fee, as it was not a "franchise fee" subject to the 5% cap because the ordinance applied to both cable operators and non-cable operators.[162] Thus, the court reasoned, the city did not require Comcast to pay the fee "solely because of" its status as a cable operator and the franchise fee definition was not met.[163] In the aftermath of the Oregon Supreme Court's decision, other state and local governments relied on sources of authority outside of Title VI, such as their police power under state law, to regulate the non-cable aspects of mixed-use networks.[164]

The Third Order rejects *City of Eugene*'s reading of Title VI.[165] The FCC reasoned that Title VI establishes the "basic terms of a bargain" by which a cable operator may "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."[166] Although Congress was "well aware" that cable systems would carry non-cable services as well as cable, it nevertheless "sharply circumscribed" the authority of state and local governments to "regulate the terms of this exchange."[167] Consequently, the Commission concluded, the Third Order "expressly preempt[s] any state or local requirement, whether or not imposed by a franchising authority, that would impose obligations on franchised cable operators beyond what Title VI allows."[168] The Third

consistent with [Title VI]." *Id.* at *27, *29, paras. 73, 77.

[156] Restoring Internet Freedom, 33 FCC Rcd. 311, 320–21, para. 26 (2018).

[157] Mozilla Corp. v. FCC, 940 F.3d 1, 35 (D.C. Cir. 2019) ("We conclude . . . that the Commission permissibly classified broadband Internet access as an 'information service' by virtue of the functionalities afforded by DNS and caching.").

[158] Third Order, 2019 WL 3605129, at *29, para. 78.

[159] *Id.* at *33, para. 88.

[160] 375 P.3d 446 (Or. 2016).

[161] *Id.* at 450–451.

[162] *Id.* at 463.

[163] *Id.*

[164] Third Order, 2019 WL 3605129, at *30, para. 80.

[165] *Id.* at *38, para. 105.

[166] *Id.* at *32, para. 84.

[167] *Id.* at *33, para. 88.

[168] *Id.* at *30, para. 80.

Order also concluded that the FCC has authority to preempt such laws because, among other things, Section 636(c) of Title VI expressly preempts any state or local law" that is "inconsistent with this chapter."[169] Thus, in the FCC's view, wherever such express preemption provisions are present, the "Commission has [been] delegated authority to identify the scope of the subject matter expressly preempted."[170]

In sum, while franchising authorities may not use the cable franchising process to regulate non-cable services provided over mixed-use networks by new entrants to the cable market, the FCC's extension of this rule to incumbents has not yet been upheld in court. Furthermore, the Third Order's broad preemption of any state and local law regulating cable operators' use of public rights-of-way beyond what Title VI allows raises even more uncertainty. As discussed further below, the Third Order's preemption raises difficult questions about the extent to which the Commission may rely on Title VI to preempt not only state and local cable franchising requirements but also generally applicable state regulations and ordinances that regulate non-cable services provided by cable operators.

Legal Challenges

Several cities, franchising authorities, and advocacy organizations have filed petitions for review of the Third Order in various courts of appeals,[171] and these petitions have been consolidated and transferred to the Sixth Circuit.[172] In their petitions, the petitioners generally allege that the Third Order violates the Communications Act and the U.S. Constitution and is arbitrary and capricious under the APA.[173] The same parties filed a motion with the FCC to stay the Third Order, which the Commission recently denied.[174]

While the petitions challenging the order state their legal theories in general terms, this case will likely raise complex issues of statutory interpretation, as well as administrative and constitutional law.[175] For instance, petitioners could argue, as commenters did during the rulemaking process for the Third Order, that the text and structure of Title VI contradicts the FCC's broad interpretation that a franchise fee should include most cable-related, in-kind expenses.[176] Pointing to provisions

[169] *Id.* at *31, para. 81.

[170] *Id.* at *31, paras. 81–82.

[171] *See* City of Pittsburgh v. FCC, No. 19-3478 (3d Cir. Oct. 28, 2019); State of Hawaii v. United States, No. 19-72699 (9th Cir. Oct. 24, 2019); Anne Arundel Cty. v. FCC, No. 72760 (D.C. Cir. Oct. 24, 2019); All. for Commc'ns Democracy v. FCC, No. 19-72736 (D.C. Cir. Oct. 23, 2019); Petition for Review, City of Portland v. United States, No. 19-72391 (9th Cir. Sept. 19, 2019); Petition for Review, City of Eugene v. FCC, No. 19-72219 (9th Cir. Aug. 30, 2019).

[172] City of Eugene v. FCC, No. 19-72391 (9th Cir. Nov. 26, 2019) (order granting motion to consolidate petitions and transfer petitions to the Sixth Circuit); City of Eugene v. FCC, No. 19-4161 (6th Cir. Dec. 2, 2019) (docketing case in the Sixth Circuit).

[173] Petition for Review at 2, City of Eugene v. FCC, No. 19-72219 (9th Cir. Aug. 30, 2019); Petition for Review at 2, City of Portland v. United States, No. 19-72391 (9th Cir. Sept. 19, 2019).

[174] Order Denying Motion for Stay, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, MB Docket No. 05-311, DA 19-1149, 2019 WL 5861929 (Nov. 6, 2019).

[175] *See* Motion for Stay, National League of Cities et al., Implementation of Section 621(a) of the Cable Communications Policy Act of 1984, MB Docket No. 05-311 (Oct. 7, 2019) [hereinafter NLC Motion for Stay], https://ecfsapi.fcc.gov/file/100832956088/FCC%20Motion%20for%20Stay%20621%20Order.pdf.

[176] *See* All. for Commc'ns Democracy, Comment, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, at 6 (Nov. 14, 2018), https://ecfsapi.fcc.gov/file/1114050901562/Comments%20on%20621%20Second%20Further%20Notice%20of%20Proposed%20Rulemaking.pdf [hereinafter Alliance for Communications

such as Section 611(b), which authorizes franchising authorities to impose PEG and I-Net requirements without any reference to the franchise fee provision, some commenters argued that Title VI treats the cost of complying with franchise requirements as distinct from the franchise fee.[177]

A reviewing court would likely apply the *Chevron* framework to resolve such statutory arguments.[178] While it is difficult to predict how a reviewing court would decide any given issue, the Sixth Circuit's decision in *Montgomery County* indicates that the court might uphold the Third Order's legal interpretation of the franchise fee provision under the *Chevron* doctrine. Specifically, as discussed above, the Sixth Circuit held that Section 622's definition of franchise fee is broad enough to include "noncash exactions."[179] Given this decision, the Sixth Circuit could potentially hold that the franchise fee definition is broad enough to accommodate the FCC's interpretation and that the FCC's interpretation is reasonable and entitled to deference.

Even were the Sixth Circuit to reach that conclusion, however, that is not the end of the analysis. As the Sixth Circuit's decision in *Montgomery County* also demonstrates, the FCC's rulings may be vacated regardless of whether the Commission's statutory interpretation enjoys *Chevron* deference if the court concludes that the FCC's interpretation is arbitrary and capricious under the APA. A federal agency's determination is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[180] In *Montgomery County*, the Sixth Circuit held that the FCC had acted arbitrarily and capriciously by failing to give "scarcely any explanation at all" for expanding its franchise fee interpretation to cable-related in-kind expenses and for failing to identify a statutory basis for extending its mixed-use rule to incumbents.[181] While the Commission took pains to address these concerns in the Third Order,[182] it remains to be seen whether a court would find those efforts sufficient or accept other arguments as to why the FCCs interpretations should be held arbitrary and capricious. For instance, those challenging the Third Order might argue that the Commission failed to address evidence that "runs counter" to its rules or failed to consider important counterarguments.[183] One such area of focus for petitioners in their motion to stay the Third Order was the FCC's alleged failure to address potential public safety effects of the Third Order's treatment of cable-related in-kind contributions.[184]

In addition, the Third Order's assertion of preemption may come under scrutiny from state or local challengers who seek to regulate mixed-use networks. A recent D.C. Circuit decision struck

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Democracy Comment].

[177] *Id.* at 6–7.

[178] *See, e.g.*, Nat'l Cable & Telecomm. Ass'n v. FCC, 567 F.3d 659, 663 (D.C. Cir. 2009) ("Because this issue involves an agency's interpretation of its governing statute, *Chevron*'s familiar framework applies.").

[179] Montgomery Cty. v. FCC, 863 F.3d 485, 491 (6th Cir. 2017).

[180] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[181] *Montgomery Cty.*, 863 F.3d at 491.

[182] *See* Third Order, 2019 WL 3605129, at *2–3, paras. 4–6.

[183] *State Farm*, 463 U.S. at 43.

[184] NLC Motion for Stay, *supra* note 175, at 7. Two dissenting FCC commissioners expressed concern that the Third Order's franchise fee provisions could frustrate the operation of I-Nets used to support public safety functions. *See* Third Order, 2019 WL 3605129, at *58, *59 (statements of Commissioners Jessica Rosenworcel and Geoffrey Starks, dissenting). The D.C. Circuit recently remanded an FCC order due to the agency's failure to consider public safety. *See* Mozilla Corp. v. FCC, 940 F.3d 1, 59–60 (D.C. Circ. 2019).

down the FCC's attempt to preempt "any state or local requirements that are inconsistent with [the FCC's] deregulatory approach" to broadband internet regulation.[185] Additionally, in a recent opinion concurring in the U.S. Supreme Court's denial of a petition for certiorari in a case involving a state's effort to regulate Voice over Internet Protocol service, Justice Thomas, joined by Justice Gorsuch, voiced concerns about allowing the FCC's deregulatory policy to preempt state regulatory efforts.[186] Both the D.C. Circuit and Justices Thomas and Gorsuch expressed skepticism that the FCC has statutory authority to preempt state and local regulation in areas where the FCC itself has no statutory authority to regulate. Cities and local franchising authorities may seize on the reasoning in these opinions to argue that Title VI's preemption provision cannot extend to non-cable services that fall outside Title VI's purview.[187]

Lastly, along with statutory interpretation and administrative law issues, challengers to the Third Order may assert constitutional arguments. As mentioned, the Third Order prevents state and local governments from relying on state law to regulate non-cable services provided by cable operators.[188] However, some commenters have argued that the Third Order violates the anti-commandeering doctrine, a constitutional rule that prohibits the federal government from compelling states to administer federal regulations.[189] The Supreme Court recently clarified the anti-commandeering doctrine in *Murphy v. NCAA*.[190] In *Murphy*, the Court struck down the Professional and Amateur Sports Protection Act of 1992, which prohibited states from legalizing sports gambling.[191] Justice Alito, writing for the Court, reasoned that the anti-commandeering doctrine prohibits Congress from "issu[ing] direct orders to state legislatures," compelling them to either enact certain legislation or to restrict them from enacting certain legislation.[192] The Court explained that the anti-commandeering doctrine promotes accountability, because, when states regulate at Congress's command, "responsibility is blurred."[193] Justice Alito further explained that the doctrine "prevents Congress from shifting the costs of regulation to the States."[194] The Court contrasted unlawful commandeering with permissible "cooperative federalism" regimes.[195] Under such regimes, Congress allows, but does not require, states to implement a regulatory program according to federal standards, and a federal body implements the program when a state refrains from doing so.[196]

According to some commenters, the FCC's Third Order violates the anti-commandeering doctrine because it "effectively command[s] local government[s] to grant right-of-way access on the terms

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[185] *Mozilla*, 940 F.3d at 74 (quoting Restoring Internet Freedom, 33 FCC Rcd. 311, 427, ¶ 194 (2018)).

[186] Lipschultz v. Charter Advanced Servs. (MN), LLC, 589 U.S. ___, 140 S. Ct. 6 (2019) (Thomas, J., concurring).

[187] *See* NLC Motion for Stay, *supra* note 175, at 5–6 (citing the D.C. Circuit's decision in *Mozilla* for the proposition that "the Commission does not have broad powers to issue sweeping preemptions of state and local regulation of information services").

[188] *See* "FCC Interpretations of Statutory Provisions Governing Mixed-Use Networks," *supra*, for more discussion.

[189] Anne Arundel Cty. et al., Reply Comment, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, at 14 (Dec. 14, 2018), https://ecfsapi.fcc.gov/file/1215023763651/REPLY%20COMMENTS%20OF%20LOCALITIES.pdf [hereinafter Anne Arundel Reply Comment]; see Printz v. United States, 521 U.S. 898, 933 (1997) (describing the principles of anti-commandeering doctrine).

[190] 138 S. Ct. 1461 (2018).

[191] *Id.* at 1470.

[192] *Id.* at 1478.

[193] *Id.* at 1477.

[194] *Id.* at 1467.

[195] *Id.* at 1479.

[196] *Id.* (quoting Hodel v. Va. Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)).

the Commission, not local government or the states set."[197] Further, some commenters, including the National Association of Telecommunications Officers and Advisors and National League of Cities, argue that the Third Order would violate the accountability and cost-shifting principles animating the anti-commandeering doctrine, as explained in *Murphy*. According to these commenters, the FCC's "mixed-use rule unquestionably blurs responsibility" because residents unhappy with cable operators' use of the right-of-way for non-cable purposes would "blame their local elected officials," and the mixed-use rule would shift cost to local governments by "usurp[ing]" the "compensation local governments may be entitled to for use of the [rights-of-way] for non-cable services."[198] Ultimately, this issue may turn on whether Title VI, as interpreted by the FCC's rules, is a permissible "cooperative federalism" program under *Murphy*. In its Third Order, the Commission argued Title VI was such a program because it "simply establishes limitations on the scope of [states' authorities to "award franchises" to cable operators] when and if exercised."[199] The FCC further maintained that, rather than "requir[ing] that state or local governments take or decline any particular action," its rules were "simply requiring that, should state and local governments decide to open their rights-of-way to providers of interstate communication services within the Commission's jurisdiction, they do so in accordance with federal standards."[200] It remains to be seen, however, how broadly lower courts will apply *Murphy*'s cooperative federalism distinction.[201]

Considerations for Congress

Beyond the various legal arguments discussed above, there are notable disagreements over the practical impact of the FCC's rules. On the one hand, localities and their representative organizations have claimed that the Commission's Third Order will "gut[] local budgets" and that, by subjecting in-kind franchise requirements such as PEG and I-Net requirements to the 5% cap, it will force franchising authorities to "choose between local PEG access and I-Nets, and the important other public services supported by franchise fees."[202] Similarly, the two FCC commissioners who dissented from the Third Order—Jessica Rosenworcel and Geoffrey Starks—maintained in their dissents that the Third Order was part of a broader trend at the Commission of "cutting local authorities out of the picture" and that it would, among other things, diminish the "value of local public rights-of-way."[203] In response, the FCC's chairman, Ajit Pai, and other

[197] Anne Arundel Reply Comment, *supra* note 189, at 15.

[198] Nat'l Ass'n of Telecomms. Officers and Advisors, Notice of Ex Parte letter to Marlene H. Dortch, Secretary, FCC, In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, at 33 (July 24, 2019), https://ecfsapi.fcc.gov/file/1072434308156/Pai%20Carr%20O'Rielly%20Ex%20Parte.pdf [hereinafter NATOA Ex Parte Letter].

[199] Third Order, 2019 WL 3605129, at *40, para. 110.

[200] *Id.*

[201] For further discussion of Murphy and its implications for future cases, see CRS Legal Sidebar LSB10133, *The Supreme Court Bets Against Commandeering: Murphy v. NCAA, Sports Gambling, and Federalism*, by Wilson C. Freeman and Jay B. Sykes.

[202] NATOA Ex Parte Letter, *supra* note 198, at 1 ("We strongly object to the Draft Order, which allows cable operators to rewrite agreements they voluntarily entered into so that these companies can reduce the amount they pay to use taxpayer assets for their cable systems, gutting local budgets and jeopardizing critical public safety communications systems."); All. for Commc'ns Democracy Comment, *supra* note 176, at 4 ("Treating these statutorily-recognized requirements as subject to [Section 622's] five percent franchise fee cap would allow [Section 622] to swallow [Section 531], among other Act provisions, and it would force [franchising authorities] to choose between local PEG access and I-Nets, and the important other public services supported by franchise fees.").

[203] Third Order, 2019 WL 3605129, at *58 (Statement of Commissioner Jessica Rosenworcel, dissenting) ("[T]his decision is part of a broader trend at this agency. Washington is cutting local authorities out of the picture when it

Commissioners in the majority contended that the rule would benefit consumers because the costs imposed by franchising authorities through in-kind contributions and fees get "passed on to consumers" and discourage the deployment of new services like "faster home broadband or better Wi-Fi or Internet of Things networks."[204]

Given the competing arguments relating to the FCC's interpretation of Title VI's scope, Congress may be interested in addressing the issues raised by the Third Order. For instance, Congress might address the extent to which Section 622's definition of "franchise fee" includes cable-related, in-kind expenses such as PEG and I-Net services. It might also address whether Title VI preempts state and local governments from relying on their police powers or other authorities under state law to regulate non-cable services provided by cable operators. However, Congress also might consider federalism issues implicated by any attempt to prohibit state and local authorities from regulating such services. As discussed in the previous section, the anti-commandeering principle prohibits direct orders to states that command or prohibit them from enacting certain laws, but permits lawful "cooperative federalism" regimes where Congress gives states a choice of either refraining from regulating a particular area or regulating according to federal standards.[205] Thus, Congress may avoid anti-commandeering issues by setting federal standards for regulation of ancillary non-cable services rather than prohibiting states from regulating these services.

comes to infrastructure. You see it here in the way we limit local public, educational, and governmental channels and public safety services like I-Nets."); *id.* at *60 (Statement of Commissioner Geoffrey Starks, dissenting) ("[T]he value of local public rights-of-way will be immediately diminished[,] limiting the ability of local authorities to raise revenue and support important programs. At its core, this means that difficult choices will need to be made by local leaders, contrary to the public interest, due to the Commission's misreading of the statute.").

[204] *Id.* at *53 (Statement of Chairman Ajit Pai); *see also id.* at *56 (Statement of Commissioner Brendan Carr) ("Yet politicians around the country have been treating Americans' cable and broadband bills as a piggy bank to line government coffers. Those illegal taxes only raise our costs, make it harder to access the Internet, and curb competition."); *id.* at *54 (Statement of Commissioner Michael Reilly) ("[E]ach step we have taken to update anachronistic and clunky regulations makes it slightly easier for regulated industries to compete with their unregulated competitors.").

[205] *See supra*, Legal Challenges."

Appendix. Supplemental Information

Federal Standards and Restrictions on Franchising Authority Power

The following table summarizes functions and areas traditionally regulated by franchising authorities that are subject to federal standards or federal restrictions. This table is not a summary of all federal requirements and regulations cable operators face under the act, only those that implicate the powers of franchising authorities.

Cable Operator Regulated Function	Federal Standard	Federal Restriction on Franchising Authority
Designating channels for public, educational, or governmental (PEG) programming	No editorial control by cable operator other than prevention of obscene material (47 U.S.C. § 531)	No restrictions on franchising authority to condition franchise on designation of PEG channels (47 U.S.C. § 531)
Designating commercial channels	Percentage of channels required to be used by persons unaffiliated with the operator; no editorial control other than prevention of obscene material; federal authority to determine maximum rates that operator may charge (47 U.S.C. § 532)	May not require designations in excess of the federal percentages (47 U.S.C. § 532)
Owning other video systems	Ownership of satellite services in same service area is prohibited (47 U.S.C. § 533)	May not prohibit ownership of a cable system based on ownership or control of any other media interests, except when ownership interest is in another cable system in the same jurisdiction or when such ownership would eliminate or reduce competition (47 U.S.C. § 533)
State/franchising authority ownership of cable systems	None	Permitted so long as entity with ownership interest does not exercise any editorial control (47 U.S.C. § 533)
Sale or transfer of a cable system	None	Must act within 120 days of any request for approval if approval is required for sale/transfer (47 U.S.C. § 537); some conditions on sales or transfers made to or by the franchising authority after denial of franchise renewal or revocation of franchise for cause (47 U.S.C. § 547)
Grant of franchise	Cable operator may not offer service without a franchise (47 U.S.C. § 541)	May not grant exclusive franchises and may not "unreasonably refuse" to award additional competitive franchises; may not require cable provider offering telecommunications services to provide services or facilities as a condition of a grant of franchise; grant of franchise implies authorization of construction over public rights-of-way (47 U.S.C. § 541)

Cable Operator Regulated Function	Federal Standard	Federal Restriction on Franchising Authority
Build-out of cable systems	None	Must allow operator a reasonable amount of time for build-out in deciding whether or not to award franchise; must assure that cable service is not denied to any potential subscribers based on income (47 U.S.C. § 541)
Provision of telecommunications services	Operator not required to obtain franchise to provide telecommunications services (47 U.S.C. § 541)	May not impose requirement that "has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service" and may not require operator to discontinue cable system or telecommunications service due to failure to obtain franchise for telecommunications service (47 U.S.C. § 541)
Payment of franchise fees	Capped at 5% of annual gross revenues (47 U.S.C. § 542)	Must respect 5% cap; however, "incidental" charges are permitted, as are generally applicable taxes (47 U.S.C. § 542)
Setting rates for basic service	No regulation of rates if FCC determines that there is effective competition; if no effective competition, federal regulation of rates (47 U.S.C. § 543)	May not regulate rates unless authority certifies to FCC that it will regulate consistent with FCC regulations; FCC may disapprove/revoke authority to regulate (47 U.S.C. § 543)
Provision of services and maintenance of facilities/equipment	Sets minimum technical standards, to be updated periodically (47 U.S.C. § 544)	Regulation of services/ facilities/equipment that is "consistent" with federal law permitted; otherwise prohibited (47 U.S.C. § 544)
Customer service	Sets standards with respect to office hours and telephone availability, service calls, and communications between operator and customer (47 U.S.C. § 552)	No restrictions on franchising authority power to establish and enforce customer service requirements that exceed federal standards (47 U.S.C. § 552)

Glossary

Build-Out Requirement: A requirement placed on a cable operator to provide cable service to particular areas or residential customers.

Cable Operator: From the Cable Act, 47 U.S.C. § 522, "[a]ny 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."

Cable Service: One-way transmission of video programming to customers, and any customer interaction required for the selection or use of such video programming.

Cable System: A facility designed to provide video programming to multiple subscribers within a community, with limited exceptions. See note 39, *supra*, for the precise exceptions.

Common Carrier: A person or entity who provides interstate telecommunications service.

Franchise: A right to operate a cable system in a given area.

Franchise Fee: From the Cable Act, 47 U.S.C. § 542, "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," with several exceptions. See the "Franchise Fees" section, *supra*, for a discussion of some of these exceptions.

Franchising Authority: A state or local governmental body responsible for awarding franchises.

I-Net: Abbreviation for "institutional network"; a communication network constructed or operated by a cable operator for use exclusively by institutional (non-residential) customers.

In-Kind: Non-monetary.

Mixed-Use Network: A communication network over which a person or entity provides both cable service and other service(s), such as telecommunications service.

PEG: Abbreviation for "Public, Educational, or Governmental." See note 41, *supra*, for more discussion of this term.

Telecommunications: From the Communications Act, 47 U.S.C. § 153, "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

Telecommunications Service: The offering of telecommunications directly to the public for a fee.

Title VI: The collected provisions of the Cable Act, as amended.

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