19-4161 (L)

***and* 19-4162, 19-4163, 19-4164, 19-4165, 19-4166, and 19-4183**

United States Court of Appeals for the Sixth Circuit

CITY OF EUGENE, OREGON *et al.*

Petitioners,

CITY OF NEW YORK, NATOA, CORAL GABLES, FL., PEMBROKE PINES, FL., and FLORIDA LEAGUE OF CITIES, INC.,

Intervenors,

against

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

On Petition for Review from an Order of the Federal Communications Commission

BRIEF FOR INTERVENORS CITY OF NEW YORK, NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS & ADVISORS, AND FLORIDA CITIES

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Disclosure of Corporate Affiliations
and Financial Interest

Sixth Circuit

Case Number: 19-4161 (and consolidated cases) Case Name: City of Eugene, et al. v. FCC

Name of counsel: Nancy L. Werner

Pursuant to 6th Cir. R. 26.1, National Association of Telecommunications Officers & Advisors
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on May 29, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Nancy L. Werner
General Counsel
NATOA

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Disclosure of Corporate Affiliations
and Financial Interest

Sixth Circuit

Case Number: 19-4183 Case Name: City of Chicago, IL, et al. v. FCC

Name of counsel: Gary Resnick

Pursuant to 6th Cir. R. 26.1, Florida League of Cities, Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. Florida League of Cities, Inc. certifies that it is a non-governmental corporate entity organized under the laws of Florida. It has no parent corporation and no publicly held corporation owns 10% or more of any of its stock.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on May 29, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Gary Resnick

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PRELIMINARY STATEMENT

Few public resources are more valuable and important to local governments than their streets and other rights-of-way. Since the inception of the cable industry, whenever operators have sought access to these scarce public resources for private gain, they have agreed to pay franchise fees and set aside network capacity for public and governmental use. The costs—let alone market value—of these set asides were never offset against franchise fees. Over the decades, the physical landscape of our cities, the reach of public communications systems, and the agreements between local governments and cable operators have been shaped by this deeply entrenched nationwide practice. That was the case for several decades in the lead up to the Cable Act of 1984, and because Congress carried the practice forward in the Cable Act, it has also held true in the decades since.

That is, until the sea change worked by the Order of the Federal Communications Commission now on review.[1] Until last year, the

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[1] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992,* Third Report and Order, MB Docket No. 05-311 (Aug. 2, 2019).

Commission had never before precluded local franchising authorities from asking cable operators to provide institutional networks ("I-Nets") and public, educational, and governmental ("PEG") access channels—among other cable-related franchise obligations—and *also* to pay up to five percent of their gross revenues in exchange for access to public rights-of-way. But in a sharp U-turn, the Commission's Order has suddenly declared that local governments must start paying, at "fair market value," whatever that means here, for capacity on I-Nets and for PEG-channels.

As petitioners have shown, the Commission's proffered reading of the term "franchise fees" in the Cable Act is untenable, and both the plain language and broader statutory context foreclose it. We write separately to emphasize that, even if the term were ambiguous, the Order should still be vacated because the Commission didn't adhere to the most basic requirements of reasoned decisionmaking when it radically upset settled understandings.

First, the Commission ignored the reliance interests of state and local governments that have invested millions of dollars to build communication networks with the reasonable expectation that the

deeply rooted practice would remain stable. If the Order is allowed to stand, state schemes will be thrown into disarray, and local governments that have negotiated agreements, designed programs, and crafted budgets expecting to continue to receive channel and network capacity for governmental and educational purposes will have to make sacrifices far exceeding what has been thought through by the Commission.

Second, the Commission failed to confront the serious dangers that would be posed to public safety by pulling the rug out from under local governments' institutional networks and governmental channels. Local governments have built critical public safety infrastructure on the backbone of PEG-channels and I-Nets. The Commission's abrupt shift, taken without regard for its statutorily mandated obligation to consider safety, jeopardizes critical law enforcement and public safety functions.

Finally, the Commission utterly failed to explain why—assuming there must be imputed compensation for franchise obligations—it should be set at market value, let alone explain how market value for the unique networks at issue could be ascertained. The Commission's conclusion rests on the mistaken notion that local governments can

make decisions about whether to, for example, create communication links between firehouses on the same economic metrics that animate whether a business pays to link corporate facilities. Police, fire stations, City Halls, public schools, and hospitals are not like widget factories.

Because the Commission did not adequately explain its decision to upset decades of settled policy, the Order must be vacated.

STATEMENT OF THE CASE

A. Half a century of local franchising requiring cable operators to pay franchise fees and also meet other cable-related, non-monetary obligations

The history of cable television regulation shows that the common goals of state, local, and federal regulators are best achieved by adhering to the long-accepted understanding that cable-related franchise requirements are not considered part of franchise fees. Cable television—that is, the distribution of television signals by means of coaxial or fiber-optic cables installed in public rights-of-way—began operating in the late-1940s to bring television to remote and mountainous areas of the country where broadcast (over-the-air) television signals could not reach. Beginning in the 1960s, cable expanded to big cities and metropolitan areas.

The Commission's jurisdiction to regulate cable operators was not recognized until 1968. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). Before the Commission entered the regulatory fray, it was local governments that exclusively regulated the conditions under which private parties could run cables under their streets and sidewalks, imposing franchise fees for the privilege of using these public assets. *See Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 788 (1996) (Kennedy, J., concurring).

Local rights-of-way regulation was by no means limited to cable operators. Communities have been regulating access to rights-of-way since at least the 1880s, because rights-of-way are a valuable public resource, maintained with public funds, and few things fall closer to the core of local power than the orderly management of access to them. *See City of St. Louis v. Western Union Tel Co.*, 148 U.S. 92, 98–99 (1893); *Atlantic Pacific Telegraph Co. v. City of Philadelphia*, 190 U.S. 160, 169 (1903). In exchange for access to and use of public rights-of-way, local governments imposed fees—that is, rent. *City of Dallas v. FCC*, 118 F.3d 393, 397–98 (5th Cir. 1997). By the early 1970s, fees typically

ranged from five to six percent of the operators' gross revenues. *Cable Television Report and Order*, 36 FCC 2d 143, 209 (1972).

But local franchise agreements did far more than charge fees for access. "Local franchising was the first form of cable regulation." *Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 788. The agreements included "great detail about the type of facilities that a cable operator must construct *(e.g.,* channel capacity, t[wo]-way capability, and 'institutional loop' to link libraries and hospitals), as well as the services that the operator must provide (*e.g.*, Cable News Network, HBO, The Health Channel)." H.R. Rep. No. 98-934, at 26 (1984).

In the late 1960s, many cable operators agreed in franchise agreements to provide local PEG access channels at no cost, separate and apart from fees for accessing the rights-of-way. *Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 788. By 1984, "[a]lmost all" franchise agreements required access channels for "local governments, schools, and nonprofit and community groups." H.R. Rep. No. 98-934, at 30. And as technology evolved, by the 1980s, local governments began requiring cable operators to construct more sophisticated "institutional loops," which are systems capable of two-way communication and

intended for non-residential purposes.[2] Many franchise agreements required operators to set aside capacity on those loops for governmental use.[3]

The Commission's pre-Cable Act rulemaking evinces its long-held understanding that governmentally imposed cable-related obligations were entirely independent from franchise fees obligations. In 1972, four years after the Supreme Court held that cable television was within the Commission's jurisdiction, the Commission issued comprehensive rules governing cable operators and local franchising authorities. The rules required that all major cable operators dedicate four channels for public, governmental, educational, and leased access.

The 1972 rules expressly provided that PEG channel capacity had to be provided without charge for five years. The rules also imposed a

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[2] The Cable Act of 1984 defines "institutional network" 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." 47 U.S.C. § 531(f).

[3] *See* Deborah Lynn Estrin, *Thesis Paper: Data Communications Via Cable Television Networks: Technical And Policy Considerations*, MASS. INST. OF TECH. at 49 (1982) ("Increasing numbers of cities are requiring the installation of an institutional network in their downtown centers for government and commercial sector use.").

"reasonable" franchise fee cap of three to five percent of the cable operators' gross subscriber revenues. 36 FCC 2d at 219–20.

Nothing in these rules suggested that the cost (let alone the market value) of PEG obligations had to be charged against that "reasonable" franchise fee cap. Indeed, the Commission clearly contemplated that, while franchise fee revenue would be paid to the franchising authority, future payments for PEG might eventually be paid by PEG users—such as school districts and public-access channel operators. *Id.* at 356. Though the Supreme Court later concluded that the PEG requirements were then outside of the Commission's authority, *see FCC v. Midwest Video Corp.*, 440 U.S. 689, 691–92 (1979), the 1972 rules reflect the Commission's long-held view that the obligation to provide PEG channels should be viewed separate and apart from the payment of franchise fees.

B. Congress' decision to preserve local governments' authority to require PEG and I-Net capacity and separately authorizing franchise fees for use of the rights-of-way

Against this backdrop, Congress passed the Cable Act of 1984, Pub. L. No. 98–549. Rather than preempt local authority and establish

uniform federal rules for the cable industry—as it had done for railways and airlines—here Congress adopted a model of cooperative federalism with the express intent of "preserv[ing] the critical role of municipal governments in the franchise process." H.R. Rep. No. 98-934, at 19 (1984). Congress recognized that local franchising authorities (or "LFAs") had, for decades, been the primary regulators of cable television and should retain control over the conditions for cable operators to access local rights-of-way. *See Alliance for Community Media v. FCC*, 529 F.3d 763, 768 (6th Cir. 2008) (observing that "the 1984 Act effectively 'preserve[d] the role of municipalities in cable regulation'") (quoting *City of Dallas, Tex. v. FCC*, 165 F.3d 341, 345 (5th Cir. 1999)).

Congress likewise preserved the authority of local governments to require cable operators to set aside capacity on networks for governmental use. H.R. Rep. No. 98-934, at 30 (1984). Specifically, under Section 611(b), a franchising authority can require a cable operator to set aside both "channel capacity … for public, educational, or governmental use," and "channel capacity on institutional networks … for educational or governmental use." 47 U.S.C. § 531.

Congress also guarded, from Commission encroachment, local authority to receive compensation from cable operators for their use of the public rights-of-way. H.R. Rep. No. 98-934, at 26 (1984). In Section 622 of the Act, Congress first authorized franchising authorities to require "franchise fees" of up to five percent of a cable operator's gross revenues derived from the operation of its cable system in the area. 47 U.S.C. § 542(b). And Congress then "stripped [the Commission] of the authority to limit by regulation the level of this fee other than as provided in the bill, or to specify the manner in which the income from such fees may be spent." H.R. Rep. No. 98-934, at 26 (1984).

Congress did not disturb the long-held understanding in the industry that set-asides for PEG and I-Nets were different from "fees," for purposes of franchise fees. Section 622(g)(2) defined a "franchise fee" as "any tax, fee, or assessment," except, among other things, fees "of general applicability," payments "required by the franchise … for, or in support of the use of [PEG] access facilities," and "capital costs which are required by the franchise to be incurred by the cable operator for [PEG] access facilities." 47 U.S.C. § 542(g). As petitioners have shown, this definition of fees *excludes* cable-related franchise obligations like

PEG and I-Nets. The legislative history confirms that Congress meant what it said: "this section defines as a franchise fee only monetary payments made by the cable operator, and *does not include as a 'fee' any franchise requirements for the provision of services, facilities or equipment*." H.R. Rep. No. 98-934 (1984) at 65 (emphasis added).[4]

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[4] The notion that franchise fees are only monetary payments and do not include franchise requirements is also reflected in an exchange between Representative Bliley and Representative Wirth, who sponsored the bill. 130 Cong. Rec. S. 14289 (daily ed. Oct. 11, 1984); 130 Cong. Rec. H12239 (daily ed. Oct. 11, 1984). Further evidence confirming that this was the original understanding of the statutory phrase can be found in the Commission's 1985 rulemaking implementing the Act, which rejected industry commenters' requests that the Commission define "what is and is not" a franchise fee under the new Act, stating that "Section 622 of the Cable Act spells out quite clearly the terms of the franchise fee and how it is defined and administered. Therefore, there is no need for us to further define these matters." *Implementation of the Provisions of the Cable Communications Policy Act of 1984*, 50 Fed. Reg. 18,637, 18,648 (1985).

C. The deeply entrenched, industry-wide understanding that the cost of PEG and I-Net obligations are not counted against franchise fees

1. The Commission's long-standing differential treatment of franchise fees and PEG obligations

In 1992, Congress amended the Cable Act by enacting the Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460. The 1992 Act revised Section 621(a)(1) to protect the public from monopolies by prohibiting local governments from entering into exclusive franchises or unreasonably refusing to award additional competitive franchises. *See Alliance for Community Media v. FCC*, 529 F.3d 763, 768 (6th Cir. 2008). To advance this policy goal, the 1992 amendments further entrenched the industry-wide shared understanding that the cost (or value) of providing PEG and I-Net obligations were not to be deducted from fees. *See* 47 U.S.C. §§ 542(c), 543(b)(2)(C)(v), (vi).

First, as part of the 1992 Act, Congress amended Section 622(c), a transparency provision that allows cable operators to disclose to their customers, as "separate line item[s] on each regular bill," the amount of the subscriber's total bill attributable to governmentally imposed

obligations. Congress required "separate line item[s]" for separate categories of costs—those attributable to paying "a franchise fee" and those traceable to "satisfy[ing] any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels." 47 U.S.C. § 542(c).

Second, the 1992 Act, required the Commission to consider—in setting a formula for rate regulation—in addition to "franchise fees," cable operators' costs attributable to satisfying "franchise requirements for the support of public, educational and governmental (PEG) channels, or amounts for the use of such channels or amounts for any other services required under the franchise." H.R. Rep. No. 102-628 (1992); 47 U.S.C. § 543(b). To ensure the viability of operating a cable system in light of the *cost* of PEG, Congress mandated that "any formula prescribed by the Commission under subsection (b)(1)(C) should reflect the *actual amortized costs* of facilities, equipment and services provided by the operator to support PEG channels or the use of such channels." H.R. Rep. No. 102-628 (1992) (emphasis added).

In breathing life into this legislative mandate, the Commission continued its policy, dating back to its 1972 regulations, of treating

monetary franchise fees differently from PEG obligations. From the Commission's very first interpretation of the 1992 rate regulation amendments and continuing to this day, the Commission has distinguished between franchises fees, on the one hand, and other franchise obligations, such as PEG and I-Net obligations, on the other. 47 C.F.R. §§ 76.922; 76.925.

Take the Commission's first Rate Regulation Order, which set a formula for identifying "external costs" that cable operators can pass on to subscribers. Starting in 1993, the Commission identified "franchise fees" and "costs of franchise requirements, including the costs of satisfying local franchise requirements for public, educational, and governmental access channels," as separate costs to "be accorded external treatment."[5] The Commission imposed different rules "for all

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[5] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking ("Rate Order"), 8 FCC Rcd. 5631, 5747–48 (1993). In upholding portions of the Rate Order, the D.C. Circuit similarly distinguished between franchise fees and other franchise costs. *See Time Warner Entm't Co., L.P. v. FCC*, 56 F.3d 151, 172 (D.C. Cir. 1995) ("[T]he Commission's decision to grant external treatment to such costs was in part meant to give effect to the specific provisions of the Act that require the Commission to take into

(cont'd on next page)

external costs, except for franchise fees," distinguishing between PEG and I-Net costs on the one hand, and franchise fees on the other. Rate Order at 5748.

The Commission also ruled that "costs associated with PEG channels carried on the basic tier" had to be "assigned to the basic tier where possible," while "franchise fees [could] be assessed on a tier, subscriber or revenue sensitive basis," provided that franchise fees were "allocated between tiers and subscribers in a manner reflective of the way they are assessed." Rate Order at 5790. It's clear from the 1993 rate regulations that, like LFAs and the industry, the Commission considered franchise fees and the costs of satisfying PEG and I-Net obligations as different, non-overlapping categories.

The Commission's current rate regulations continue to distinguish between "franchise fees," on the one hand, and the "costs of complying with franchise requirements," such as the cost of PEG channels and I-Nets, on the other. 47 C.F.R. § 76.922(e). The "franchise requirement

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account, in prescribing rate regulations for the basic service tier, both franchise fees and other costs associated with meeting franchise requirements.").

costs" that can be used to justify a rate increase include, among other things, the "[c]osts of providing PEG access channels" and "[c]osts of institutional networks and the provision of video services, voice transmissions and data transmissions to or from governmental institutions and educational institutions, including private schools, to the extent such services are required by the franchise agreement." 47 C.F.R. § 76.925(a). "Franchise fees," a separate concept from the costs associated with non-monetary franchise obligations, are not included in the list of "franchise requirements costs." *Id.*

In 2015, the Commission overhauled its rules governing how cable operators are subject to rate regulation. Even then, it was careful not to disrupt its long-standing distinction between monetary franchise fees and cable-related franchise requirements. *See Amendment to the Commission's Rules Concerning Effective Competition: Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd. 6574 (2015). In approving the Order, then-Chairman Wheeler observed: "nothing in this Order affects other franchising authority responsibilities including the collection of franchise fees, provisions relating to PEG channels and I-Nets, and the creation and enforcement

of customer service standards." Chairman Wheeler Statement, 30 FCC Rcd. at 6607–08.

2. State and local governments' and cable operators' reliance on the consistent differentiation between franchise fees and other franchise obligations

Since 1984, cable franchise agreements have been negotiated with the industry-wide understanding that neither the cost of meeting cable-related franchise obligations, nor the market value of these contractual promises, are "franchise fees" that must be applied toward the five percent cap. The Commission concedes the novelty of its new approach, noting that "[i]n our prior rulemakings, we did not provide guidance on how to value such contributions." Order ¶ 59. But that profoundly understates the case: there are no examples in the Order or in the record of any franchise agreement that ever, in nearly 40 years of history, treated the market value or even cost of cable-related franchise obligations as a component of franchise fees. The opposite is true: even the Commission affirmatively distinguished between monetary franchise fees and non-monetary franchise requirements.

Consistent with the Commission's view, local governments and cable operators have for decades negotiated franchise agreements, and made long-term decisions about the design and operation of communications infrastructures like I-Nets, based on the universally shared understanding that cable-related franchise obligations are not part of franchise fees. In addition to local government infrastructure, local budgets—many of which require legislative approval—have relied on these negotiated agreements.

For example, in reliance on the Commission's long-standing approach to fees, the City of New York accepted strands of unlit fiber within the cable backbone laid by franchisees as they ripped up city streets and sidewalks to install fiber. The cable franchisees agreed to this, decades ago, because it could be done at nominal or no additional cost to them and—with the City's considerable investment—could provide a substantial benefit to the City and its residents. Subsequently, over the decades, the City has woven together and "lit" these fibers into a single institutional network, which costs the providers nothing on an on-going basis except a miniscule fraction of its maintenance expenses. The City, in turn, invested millions of dollars

designing its system and infrastructure, purchasing and operating equipment that runs the network, and developing applications that depend on this network architecture to deliver critical public services to its 8.5 million residents. The City would not have built a public safety network along the backbone of its institutional network if it had known that it might—years later, in the midst of profound budget shortfalls and the most significant threat to public health and safety in recent history—be required to make imputed payments to its franchised cable operators to access these fiber strands, particularly at market value.

Many members of NATOA, ranging from the suburbs of Minneapolis, Minnesota to the City of Murfreesboro, Tennessee also relied on the Commission's long-standing approach to fees. I-Net users or subscribers paid cable operators to construct I-Nets in reliance on the promise of ongoing free capacity on those networks. In making long-term plans, they relied on the continued understanding of franchise fees under the Cable Act.

For example, in a "unique and mutually beneficial arrangement" in Minnesota, when cable operators were conducting a system-wide fiber update, I-Net users—including governments, schools, and

hospitals—fully reimbursed the operators for the entire cost of construction, including labor and materials, plus a 12% profit markup.[6] They incurred these costs in reliance on a long-term promise of free services on the infrastructure they had effectively paid to build. No responsible government charged with protecting the public fisc would have struck that bargain, had it known that the supposed market value of those services would later be offset from its franchise fees; it would have installed the fiber itself, rather than pay construction costs and then pay market rate for the right to use the infrastructure that it built.

As another example, Murfreesboro, like many other LFAs, allowed a cable operator to create a separate line item on subscribers' bills to reimburse itself for I-Net construction costs (JA__, Comments of the City of Murfreesboro, TN at 2). This, too, would have been an irresponsible transaction if Murfreesboro had known it'd have to pay market value for accessing its I-NET out of its franchise fees or general

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[6] *See* JA___ , Minnesota Association of Community Telecommunications Administrators Ex Parte Letter at 3–4 (Mar. 5, 2019); *see also* JA___, Northern Dakota County Cable Communications Commission Reply Comments at 15–16.

budget, even after allowing for full repayment for network construction by its residents.

3. State laws reflecting the uniform understanding that franchise fees are distinct from non-monetary franchise obligations

In reliance on the longstanding regime treating PEG and I-Net requirements differently from franchise fees, half of States have adopted laws distinguishing franchise fees from other franchise obligations. In response to industry advocacy, roughly two dozen States regulate cable franchising at the statewide level—which they implement in a variety of ways.[7] Most of these States' laws displace local franchising, but not the ability of local governments to require some combination of free cable services, PEG, and I-Net obligations from State-franchised cable operators.[8]

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[7] *See* James Parker, *Statewide Cable Franchising: Expand Nationwide or Cut the Cord?*, 64 FED. COMM. L.J., 199, 206–11 (2011).

[8] Ariz. Rev. Stat. Ann. § 9-1442D; Ark. Code Ann. §§ 23-19-206(b) and 23-19-209(b); Cal. Pub. Util. Code § 5860; Conn. Gen. Stat. Ann. § 16-331; Del. Code Ann. tit. 26 § 604; FL Stat. §§ 610.109; 610.112; § 202.24(2)(a); Ga. Code Ann. §§ 36-76-4; 36-76-9; Haw. Rev. Stat. Ann. §§ 440G-8.2(e)–(f); 440G-15(a) and Haw. Code R. § 16-132; Idaho Code Ann. §§ 50-3007; 50-3010; 220 Ill. Comp. Stat. Ann. 5/21-801(a), (d)(1),

(cont'd on next page)

For example, the State of Florida enacted a complex scheme that relies on the long-held understanding of "franchise fees." Florida replaced cable franchise fees with a Communications Services Tax, FL. Stat. § 202.20(2)(b), and prohibits local governments from negotiating for or receiving franchising fees, but allows them to negotiate for PEG channels, *see* FL. Stat. §§ 202.24(2)(a), (c)(8).

D. The sea change wrought by the Commission's Order all but ignoring long-standing practice and the implications of abruptly changing course

Without addressing the strong reliance interests formed over decades of treating I-Net and PEG differently from franchise fees, the Commission pulled a sharp regulatory U-turn in 2019. The Order on review declares that, contrary to the universally held understanding,

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5/22-501(f)(1); Ind. Code Ann. § 8-1-34-16(a)(1); Iowa Code Ann. § 477A.3(1); Kan. Stat. Ann. § 12-2023(a); La. Stat. Ann. § 45:1364A; Mont. Code Ann. § 67.2689(1); Nev. Rev. Stat. Ann. § 711.410(1); N.J. Stat. Ann. § 48:5A-25.1; N.C. Gen. Stat. Ann. § 66-351(a); Ohio Rev. Code Ann. § 1332.24(A)(1); 39 R.I. Gen. Laws Ann. § 39-19-3; S.C. Code Ann. § 58-12-310(B); Tenn. Code Ann. § 7-59-304(a)(4); Tex. Util. § 66.001; 18-1 Vt. Code R. § 29; Wis. Stat. Ann. § 66.0420(4). For example, Ohio's state franchising statute provides for a franchise fee to local governments of up to five percent and mandates that cable operators provide a certain number of PEG channels to municipalities, based on how many there were as of 2007.

the term "franchise fee" refers to traditional monetary fees, *plus* the market value of an assortment of non-monetary, cable-related obligations that have long been treated separately. In other words, across the nation, these obligations are now counted toward the five-percent fee cap. This disturbs frameworks that states and local governments built in reliance on long-settled understandings, and forces them to spend franchise fees or other revenues to pay for cable operators' franchise commitments, or to abandon community services and public safety systems.

SUMMARY OF ARGUMENT

We agree with petitioners that since the Order purports to rely on a plain-text reading of the Act, albeit a mistaken one, no deference is due under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*see* Joint Brief of Petitioners ("Jt. Petr's Br.") at 19). Because the Commission did not rely on policy justifications, they cannot now be invoked as a *post hoc* rationale for the Commission's decision. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943).

We write to further add that even if the Order could be read as an attempted exercise of agency expertise and discretion, the Commission

has not exercised the type of reasoned decisionmaking entitled to deference under *Chevron*. The Administrative Procedures Act ("APA") directs courts to set aside agency actions that are "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706. The Commission's change to the definition of franchise fee—that effectively reduces the fees that states, counties, and municipalities receive and makes them pay market value for cable-related franchise obligations that they have received at no cost and have relied upon for decades—is arbitrary and capricious. It must be set aside for three reasons.

First, the Commission failed to justify its departure from long-standing practices or account for the effect on regulated parties, as the Supreme Court recently clarified an agency must do when disrupting long-settled reliance interests. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). For example, the Commission failed to consider the effect of the Order on jurisdictions like New York City that have spent decades—and millions upon millions of dollars—threading together fiber strands from multiple providers into a complex network that cannot be untangled without significant and expensive redesigning. Likewise, the Commission failed to consider the effect on

local jurisdictions in certain states, such as Florida, whose regulatory scheme is based on the long-accepted understanding of the term franchise fees. The Commission provides no answer to these reliance interests.

Second, the Commission failed to consider the damage its unacknowledged regulatory U-turn will do to critical public safety networks. PEG channels and I-Nets are used throughout the country to deliver critical, life-saving communications to the public and first responders. The institutional network in New York City delivers information about building conditions to firehouses and first responders. The PEG channel operated by the City of Pembroke Pines, Florida serves as the prime method of disseminating public safety information to the City's large elderly community, many of whom do not have access to broadband. The PEG channel regularly informs the public during hurricane season, and the need for it is particularly acute now, in the midst of the global pandemic.[9] The Order will result in cash-strapped jurisdictions having to discontinue reliance on such cable

[9] *See Pine Media TV: An Inside Look*, The City of Pembroke Pines Website, available at https://tinyurl.com/y9zvrqa7.

services. The Commission's failure to consider the public safety implications of its Order is a separate basis to invalidate the Order. *See Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (setting aside Commission's order for failing to consider public safety implications).

Finally, in setting the price to be paid by franchising authorities for their new financial obligations at market rate (Order at ¶ 59)—as opposed to actual cost—the Commission's decision fails to meet the requirements of reasoned decisionmaking set out in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42–43 (1983). The Commission did not "consider an important aspect of the problem," that is, how market rate will be assessed. *Id.* at 43. And the Order lacks "reasoned analysis" indicating that, in selecting market rate as the baseline, the Commission "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The Cable Act and its prior implementing regulations—such as its rate-setting regulations—have always focused on costs, not market

value, when considering government-imposed obligations. The decision to set compensation at "market value" instead of the familiar metric of "costs" is founded on pure speculation: that this figure is easily and reliably ascertainable. An unabashed desire to give cable operators a windfall is an insufficient rationale to survive judicial scrutiny under the APA. Indeed, the Commission provides no guidance about how to calculate the market rate of the unique services received by many LFAs. For example, there is no market, and thus no market rate, for what New York City receives: patches of dark fiber provided by different companies that span miles and miles of city streets. Similarly, there are no private providers from whom a Florida city can purchase the distribution of PEG channels from its City Hall to cable facilities. The Commission's decision to use market rates is not "reasonable and reasonably explained." *Mfrs. Ry. Co. v. Surface Transp. Bd.*, 676 F.3d 1094, 1096 (D.C. Cir. 2012) (Kavanaugh, J.).

ARGUMENT

THE ORDER IS FUNDAMENTALLY INFIRM IN THREE INDEPENDENT RESPECTS

A. The Commission failed to account for significant, decades-old reliance interests.

The Order is arbitrary and capricious, among other reasons, because it presents a novel and misguided textual reading, and that alone, as the justification for the Commission's regulatory about-face, without demonstrating any consideration of the impact of that change. The Commission has reinterpreted the statute to achieve a new policy goal—maximizing cable profit—upending over 40 years of practice that has permeated how local governments operate their institutional networks and manage their rights-of-way, with the effect of imposing new and significant obligations on local governments. Under well-settled precedent, an agency's overturning of a long-standing policy without accounting for the substantial reliance interests of regulated entities—as the Commission has done here—is arbitrary and capricious. *FCC v. Fox TV Stas., Inc.*, 556 U.S. 502, 515 (2009).

As a threshold matter, the text cannot support the weight the Commission has placed on it (*see* Jt. Petr's Br. at 19–38; Opening Brief of Petitioners City of Eugene *et al*. ("Eugene Petr's Br.") at 26-41). But

the Order would fare no better if the analysis reached *Chevron*'s second step, where the Court must consider the agency's "past practice," *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005), to ensure that the agency has paid due regard to "serious reliance interests" by regulated entities, *Fox*, 556 U.S. at 515. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). Because the Commission has not done so, the Order cannot survive this Court's review for that reason as well.

Where it is textually supported, an agency may adopt an interpretation that "represents a sharp break with prior interpretations," *Chevron*, 467 U.S. at 862, since agencies are given latitude to adapt "to the demands of changing circumstances," *Motor Vehicle Mfrs.,* 463 U.S. at 42 (citation omitted). But that latitude is not boundless; an agency "cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate." *Fox*, 556 U.S. at 537 (Kennedy, J., concurring).

Rather, when an agency changes its mind, it must "provide a reasoned explanation for the change." *Encino Motorcars*, 136 S. Ct. at

2125. Although the agency "'need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate,' … the agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Id.* at 2125–26. Thus, when explaining a changed position, the agency must demonstrate that it recognizes that long-standing policies may have "engendered serious reliance interests that must be taken into account." *Fox*, 556 U.S. at 515. Unexplained inconsistencies in agency position are arbitrary and capricious and therefore unlawful. *Brand X*, 545 U.S. at 981.[10]

The Supreme Court's recent decision in *Encino Motorcars* is instructive. The Court rejected the U.S. Department of Labor's reinterpretation of its long-standing interpretation of overtime exemptions without providing a reasoned explanation for its change. 136 S. Ct. at 2121–27. The agency's failure to acknowledge, let alone justify, its policy change undermined the courts' ability to review the

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[10] "[I]t is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U.S. at 515–16.

new policy's underpinnings, and thus doomed the interpretation. *See id.* at 2125–26.

So too here. For decades, everyone, including the Commission, believed that the term franchise fees did not include the costs (or value) of cable-related, non-monetary conditions in franchise agreements such as the provision of an I-Net or PEG channels. That long-held understanding is clear from decades of franchise agreements and from the Commission's own behavior over last four decades. For example, the Commission's regulations implementing the 1992 amendments to the Act allowed cable operators to treat the cost of paying franchise fees differently from the cost of meeting PEG obligations, when charging them to subscribers. 47 C.F.R. §§ 76.922; 76.925. Likewise, both the Act and the Commission's implementing rules contemplated that operators would distinguish between, and separately disclose, the portion of the customer's bill attributable to franchise fees, on one hand, and meeting PEG access obligations, on the other. 47 U.S.C. § 542(c); 47 C.F.R. § 76.985.

The deeply entrenched understanding holding franchise fees separate from franchise-imposed, cable-related obligations has

engendered significant reliance interests. If the Order is allowed to stand, the effect on local governments and their residents will be devastating. Cities have invested millions of taxpayer dollars to create programming to reach citizens over PEG channels and to develop closed I-Nets that allow government agencies to securely communicate across their jurisdictions. Considering limited municipal budgets, the Order will require shifting funds from other public services to pay for essential I-Net or PEG services, a prospect that is especially daunting as state and local governments face unprecedented budget shortfalls arising out of the current public health emergency. Even if funds can be reallocated, a web of state and local laws will require municipalities to go through public hearings before doing so, and since 25 States have some form of state franchising, amendments to state law may be required too.

For example, cities like New York City have built complex and expensive infrastructure by integrating capacity from different cable operators. The City's understanding that it would continue receiving fiber strands has been physically manifested on and under its public spaces over many decades. Unlike a for-profit company linking its

campuses, cities cannot increase prices to pay for the increased cost of connectivity. So, under the Order's new regime, many localities will simply have to do without—abandoning capabilities, physical equipment, and taxpayer investments that can no longer be used.

For jurisdictions in states that preempt local franchising, but permit local governments to require PEG and I-Net, the Commission has disrupted state-legislative and local-budgetary reliance interests. For example, in states like Florida that franchise at the state level, it's unclear whether, if local governments require PEG channels at no cost, the franchising authority—there, the State—will pay for them. This is further complicated because Florida law allows counties and municipalities to request PEG, but prohibits them from "negotiat[ing] those terms and conditions related to franchise fees" with cable operators. FL Stat. § 202.24(2)(a).[11] The Order throws Florida's scheme—like two dozen other State schemes—into disarray. The Commission refused to consider these reliance interests, declaring that

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[11] In 2019, in anticipation of the Commission's franchise fee order, Florida added language confirming that local governments could request PEG channels even if PEG channels were franchise fees under the Cable Act. Ch. 2019-131, codified at FL Stat. § 337.401(3)(f).

it need not consider the impact of its Order on any specific States, let alone local jurisdictions therein. *See* Order ¶ 117 (stating that "we decline here to opine on the application of the Cable Act to specific State laws.").

The Commission offered no policy explanation for repudiating over 40 years of consensus about the meaning of the statutory franchise fee cap, even though the issue was raised specifically in the record,[12] and even though its interpretation will have dire consequences as a result of the reliance interests of regulated entities. Indeed, the Commission has not cited a single new circumstance that calls for reinterpretation of the Act. Rather, the entirety of the Commission's policy discussion is contained in a few paragraphs limited to the impacts on PEG programming (Order at ¶¶ 50-54). There, the Commission claims that its "departure from the longstanding treatment of PEG costs by LFAs and cable operators" merely "conform[s] its rules to law" (Order at ¶ 53).

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[12] *See* JA___, Comments of the City of New York at 8; JA___, *Ex Parte* Letter from NYC Department of Information Technology and Telecommunications at 1; JA___, Comments of NATOA *et al.* at 10–13; Comments of Anne Arundel County *et al.* 30–34.

In other words, the Commission disavowed any claim that policy considerations justify its shift.[13]

But as petitioners have shown, the Commission's reading of the Act simply cannot be squared with its actual text. And if there were interpretive gaps for the agency to fill, it cannot sidestep the requirement that it account for reliance interests simply by insisting that it has not changed long-standing policy. *Am. Wild Horse Preserv. Campaign v. Perdue*, 873 F.3d 914, 927–28 (D.C. Cir. 2017) (an agency cannot "insist that nothing changed" when its "actions for at least twenty years corroborate[]" its previous approach).

In abandoning its own deeply rooted interpretation of the Cable Act term "franchise fees," the Commission "disregarded facts and circumstances that underlay … the prior policy" without even a "minimal level of analysis," let alone a "reasoned explanation." *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox*, 556 U.S. at 515–16); *see also*

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[13] Unlike with respect to its franchise-fee holding, where no policy justification is supplied, the Commission has asserted a policy justification for its sweeping preemption of local authority over cable operators' non-cable services. We agree with petitioners that the Commission's policy justification for preemption is lacking (Eugene Petr's Br. at 52–57).

Judulang v. Holder, 565 U.S. 42, 53 (2011) (reviewing courts must "examin[e] the reasons for agency decisions [or] the absence of such reasons."). A regulatory U-turn requires more.

At bottom, the Commission's departure "from decades-long past practices and official policies" with respect to franchise fees, without paying due regard to reliance interests, *Fox*, 556 U.S. at 515, or providing any reasoned explanation or even acknowledgment of the change, *Encino*, 136 S.Ct. at 2125–26, was arbitrary and capricious. *See Am. Wild Horse Preserv.*, 873 F.3d at 923, 927 (an agency's "failure even to acknowledge its past practice and formal policies …, let alone to explain its reversal of course … was arbitrary and capricious.").

B. The Commission violated its statutory mandate to consider public safety.

Making matters worse, the Commission failed to heed state and local governments' warnings about the serious harm its policy change would have on public safety.[14] The comments warned that critical

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[14] *See* JA___, *Ex Parte* Letter from NYC Department of Information Technology and Telecommunications at 1; JA___, *Ex Parte* Letter from Association of Washington Cities *et al.* at 2; JA___, Comments of the State of Hawaii at 6; 11.

communications among local government agencies, as well as between the government and its citizens, rely on I-Nets and PEG channels.

For example, New York City heavily relies on its I-Net to protect public safety. "Every City agency is in some fashion using the City's I-Net," which has been in place close to 50 years (JA___, *Ex Parte* Letter from NYC Department of Information Technology and Telecommunications at 1 (July 25, 2019)). As just one example, the I-Net supports all New York City firehouses' connectivity, including by bringing critical, time-sensitive, situational-awareness to firefighters responding to emergency calls. New York City is not unique in this respect. Many of NATOA's members—small and large—rely on their I-Net to provide broadband communication services to "fire and police stations, 911 communications center[, and their] emergency operation center" (JA___, Comments of the City of Murfreesboro, TN at 2 (Nov. 6, 2018)).

The case of Durango, Colorado illustrates how PEG channels are essential to fulfilling municipalities' public safety role. As Durango's comments to the Commission explained, in August 2015, when three million gallons of mining sludge spilled in the Animas River and turned

it bright orange, the more-than-30-year-old Durango PEG Government Channel, or DGOV, kept residents updated on the condition and health risks (JA___, *Ex Parte* Letter from Association of Washington Cities *et al*. at 2). And, in June 2019, when the 416 Wildfire struck Colorado, burning roughly sixty thousand acres of forest over five months, the City again turned to DGOV to provide continuous information to its residents about the fire, evacuations, road closures, and damage.

The cities of Coral Gables and Pembroke Pines, Florida also both regularly rely on their government access channels, in their cases, to provide important public safety information to residents before and after hurricanes, including to share hurricane preparedness plans, evacuation routes, and information about which shelters are open, and to inform the public about access, road conditions, and other life-saving emergency information.

Many local governments have been put to the test in recent months by the deadly COVID-19 pandemic. New York City, an epicenter of the virus, was able to rapidly adapt to the State's stay-at-home order thanks, in part, to the City's highly adaptable institutional network. And local governments throughout Florida have disseminated

critical information through local PEG channels, including carrying programming produced by the State-funded The Florida Channel, such as the Governor's press conferences about Emergency Orders, live briefings from the State Emergency Operations Center, and COVID-19 safety information.[15] Local PEG channels are particularly vital to Florida's elderly population, many of whom do not have internet access in their homes.

As the D.C. Circuit recently confirmed in *Mozilla v. FCC*, 940 F.3d 1, 59 (D.C. Cir. 2019), the Commission cannot ignore its duty—set out in its enabling act, 47 U.S.C. § 151—to promote public safety. 940 F.3d at 59-60; *see also Nuvio Corp. v. FCC*, 473 F.3d 302, 307–08 (D.C. Cir. 2006). The *Mozilla* court remanded an order from the Commission that eliminated net neutrality protections for broadband internet because the Commission had not considered the impact of its decision on public safety—including the fact that local government first responders relied on broadband connections to do their jobs. Here, the Commission has repeated the same mistake.

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[15] *About FTC: Who We* Are, Fla. Channel Website, available at https://tinyurl.com/ycmut5cz.

Notwithstanding the Commission's express mandate to consider public safety, 47 U.S.C. § 151, and despite record evidence showing substantial public safety concerns associated with broadening the definition of franchise fees to increase the cost of local governments' critical networks, the Commission's Order did not discuss public safety at all. "[T]he complete absen[c]e of any discussion of a statutorily mandated factor" renders the Order arbitrary and capricious. *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004) (internal citations omitted).

C. The Commission did not justify its decision to set the amount to be paid for non-monetary franchise requirements at market value as opposed to costs.

Compounding the problem further, the Commission irrationally decreed that the price that local governments must pay for these new "franchise fees" should be determined by the market, instead of the more reasonable and familiar metric: the cost to the cable company. Under settled precedent, the Commission's reasoning on this point, too, is insufficient to survive APA review. *See Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 762–64 (6th Cir. 1995).

As a threshold matter, the Commission's failure to confront uncertainties about the mechanics of imposing market-rate obligations on government entities across the nation is itself a compelling reason to reject the Order. *Farmers Union Cent. Exch., Inc. v. Fed. Energy Regulatory Com.*, 734 F.2d 1486, 1503 (D.C. Cir. 1984).[16] For years, jurisdictions have negotiated cable franchise agreement renewals at arms-length with cable operators (*see* JA__, Philadelphia Comments and Reply Comments). "Well over 99 percent of cable franchises are reached through informal contract negotiations" (JA___, Philadelphia Reply Comments at 6). In the past, at the negotiating table, local governments and cable operators engaged in a give-and-take to balance the needs of the public against the cable operator's cost of meeting those needs. The process of negotiating renewals is now in disarray, because it makes little sense to negotiate if every concession by an operator will be deemed an "exaction" akin to unilaterally imposing a fee.

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[16] The Commission acknowledged that "the record reveals serious difficulties regarding how to calculate the value of PEG channel capacity," (Order at ¶ 43), but the Commission left similarly complex questions unanswered with respect to the valuation of I-Nets and PEG transport.

Setting that "exaction" at market value exacerbates the uncertainty. In many jurisdictions, there are no comparable services offered to any private consumer because the services local governments receive are tailored to the specific needs of their communities and integrated with other systems. And private, for-profit entities are differently situated, in terms of negotiating—at the outset—for services and also in terms of their ability to use traditional cost/benefit and price-adjustment metrics that underlay market-based pricing. During the renewal process, in particular, local governments are now in an impossible position because they have no choice but to pay whatever is demanded by an existing provider that owns the infrastructure on which the jurisdiction has come to rely. Funding these services (sometimes for the second time) will force local governments to cut other vital public services to stay within state and local budget constraints.

Moreover, the Commission's assertion that market rate is the right price, based on its unsubstantiated assumption that it "is easy to ascertain" (Order at ¶ 61) and represents what franchising authorities would pay without the franchise provision, rests on pure speculation with "little or no factual support for its assertions," *Cincinnati Bell*, 69

F.3d at 762. The Commission ignores the record evidence that, in many cases, LFAs have already fully reimbursed cable operators for their costs (or more) in constructing I-Nets, unlike a typical residential or small business subscriber paying a set market rate. (*e.g.*, JA___, Minnesota Association of Community Telecommunications Administrators Ex Parte Letter at 3–4 (Mar. 5, 2019)). The Commission's reliance on unfounded assumptions in place of evidence was arbitrary and capricious. *See Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1115 (D.C. Cir. 2019); *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42–43 (1983).

The Commission acknowledges as much. The Commission explicitly refused to "provide guidance on how to calculate fair market value" because LFA's can simply "forgo" these franchise obligations if they "believe[] that the cable operator's proposed valuation is too high" (Order at ¶ 61 n. 242). The Commission suggestion that LFAs' remedy for an unreasonably high valuation is to abandon decades old commitments on which they have long relied is no answer to these uncertainties. In some cases, there are no market-based alternatives

and in others, LFAs or residents have already paid for many of the costs that would ordinarily be part of a market valuation.

The Commission's decision to set the compensation at market value is also anomalous, because the Act and all previous Commission precedent look to actual costs, not market value, whenever they address operators' non-fee franchise obligations. As this Court explained in *Lopez v. Sessions*, absent "a reasoned explanation" or a relevant distinction between statutory provisions, an agency has no warrant to use *Chevron* deference to take opposing positions about the same concept, just because it helps them to do one thing in some cases and something else in others. 851 F.3d 626, 631 (6th Cir. 2017).

First, Section 623 of the Act—the provision allowing cable operators to itemize certain costs on subscribers' bills—applies only to direct and verifiable costs. It would be inconsistent to require operators to use actual costs for purposes of bill itemization, yet use market value for purposes of offsetting franchise fee payments.

Second, the Act and the Commission's rate regulations require that the cost of PEG and I-Nets—not their market value—be considered when setting the rate that subscribers can be charged. 47 U.S.C.

§ 543(b)(2)(C)(vi). The rate itself builds in recovery for PEG channel capacity. 47 C.F.R. § 76.922. Setting recovery at market value would allow cable operators to more than double-recover—once from subscribers for the cost of providing PEG and I-Net, and again from the LFA, this second time at an even greater market value (JA___, Comments of NATOA *et al*. at 11).

Finally, in the rare situations in the past when it was confronted with the question of how cable-related services to public entities should be valued, the Commission itself used costs, not market value. For example, in the 1990s, when approving federally sponsored rate increases in response to cable operator's pleas for financial assistance, the Commission required operators to provide franchise services to schools based on "costs." In the Social Contract that the Commission negotiated with Comcast in 1997, Comcast was required to provide free outlets to certain schools, based on their distance from its facilities.[17] Services to schools further away were to be provided *at cost*.

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[17] FCC News Release: *Commission Unanimously Adopts Comcast Social Contract,* Commission NEWSReport No. CS-97- 27, Oct. 15, 1997,

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The Commission has never, until the Order, required government franchise authorities to pay the fair market value of cable services provided to government facilities. In this regard, as elsewhere, the Commission has failed to satisfy its obligation to "supply a reasoned basis for its decision," and therefore its Order cannot stand. *Cincinnati Bell*, 69 F.3d at 764.

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available at https://tinyurl.com/yalerl3w; *In re Continental Cablevision, Inc. Amended Social Contract*, 11 FCC Rcd. 11118 (1996).

CONCLUSION

This Court should invalidate the Order.

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Respectfully submitted,

By:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 8,718 words, not including the table of contents, table of authorities, this certificate, and the cover.

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