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OVERSIGHT OF THE FEDERAL COMMUNICATIONS COMMISSION

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BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

JUNE 12, 2019

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

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OVERSIGHT OF THE FEDERAL COMMUNICATIONS COMMISSION

WEDNESDAY, JUNE 12, 2019

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m. in room SD–G50, Dirksen Senate Office Building, Hon. Roger Wicker, Chairman of the Committee, presiding.

Present: Senators Wicker [presiding], Cantwell, Capito, Blumenthal, Scott, Schatz, Gardner, Duckworth, Thune, Markey, Blackburn, Tester, Lee, Johnson, Udall, Blunt, Sinema, Sullivan, and Peters.

OPENING STATEMENT OF HON. ROGER WICKER, U.S. SENATOR FROM MISSISSIPPI

Senator WICKER. Good morning and welcome to today's hearing on The Oversight of the Federal Communications Commission.

I'm glad to convene the hearing with my friend and colleague, Ranking Member Cantwell.

I welcome our distinguished panel of witnesses and thank all of them for appearing. Today, we'll hear from FCC Chairman Ajit Pai, Commissioner Michael O'Rielly, Commissioner Benjamin Carr, Commissioner Jessica Rosenworcel, and Commissioner Geoffrey Starks.

One of the FCC's most important responsibilities is to promote the expansion of competitive telecommunications and broadband networks across the United States.

Under Chairman Pai's leadership, the agency has taken steps to close the Digital Divide in Rural America. The Commission has promoted investment and innovation by addressing outdated rules and regulations and has also taken steps to enhance public safety, protect consumers, and improve transparency into agency actions.

I commend the FCC for its efforts but note, as we would all agree, that more work remains. That work starts with closing the Digital Divide once and for all. Access to broadband is essential. Through Internet connectivity, Americans can access jobs, education, economic opportunities, good health, and entertainment.

For too long, Americans across the Nation have gone without access to reliable high-speed Internet service simply because they live in the rural heartland.

In previous hearings, we have discussed how inaccurate maps have contributed to the persistent broadband gap. It is clear to me that short of a completely new approach to developing accurate and reliable maps, the FCC should not move forward on broadband funding decisions until it gets the maps right.

As a first step to improving the Nation's broadband maps, last month I introduced the Broadband Interagency Coordination Act with Senator Klobuchar. This legislation would improve coordination among Federal agencies that administer broadband deployment programs. It would also facilitate information gathering among the FCC, the NTIA, and the Department of Agriculture concerning broadband activity throughout the United States.

Increased coordination will help target broadband resources to unserved areas and communities that lack access to Internet services.

Today, I will introduce the Broadband Data Act with Senators Peters, Thune, and Klobuchar. This legislation would build upon better coordination among Federal agencies and would require the FCC to collect more granular data about where wired, fixed wireless, and satellite broadband is available and where it is not.

I'm sure Commissioners will want to discuss today what the FCC is doing to collect more accurate data about broadband availability as well as how the Commission is verifying the data submitted by carriers.

I also hope the Chairman will provide a status update on the Mobility Fund Phase II Program and discuss how the recently announced $20.4 billion Rural Digital Opportunity Fund will be used to close the Digital Divide.

We must solve the problem and do so without further delays.

The FCC's work also includes ensuring American leadership in 5G, which is critical for the continued economic well-being and security of the United States. The Commission has made real progress in bringing spectrum to market to foster the development of next generation networks.

Mid-band spectrum is particularly important to the initial deployment of 5G, but the United States currently lags behind our competitors in the availability of mid-band spectrum.

This morning's hearing is an opportunity for Commissioners to discuss the FCC's efforts to speed up the availability of mid-band spectrum for 5G and whether they believe congressional action is necessary to advance the Commission's work in this area.

Winning the race to 5G is dependent on the security of the Nation's communications networks. I recently introduced bipartisan legislation, The United States 5G Leadership Act, with Senators Cotton, Warner, Markey, and Sullivan. This legislation would provide relief to providers that need to replace foreign equipment that may present a national security risk.

The legislation would help improve information-sharing among the national security agencies and communications providers to address immediate threats to network security.

I look forward to hearing what more the Commission and the entire Federal Government might do to improve security in the next generation of telecommunications infrastructure.

Finally, let me commend the Commission for taking steps to expand telemedicine in rural areas through its proposed $100 million Connected Care Pilot Program. This program is inspired by the

University of Mississippi Medical Center, which is a national trailblazer in telehealth.

The Commission's focus on expanding connectivity through this program can help reduce the cost of care and improve patient outcomes, especially among the Nation's most underserved populations.

Clearly, there's much to discuss today. I look forward to hearing testimony from the Commissioners and thank them for appearing.

I will now turn to my good friend from the State of Washington, Senator Cantwell.

STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Senator CANTWELL. Thank you, Chairman Wicker, and thank you for holding this important hearing and having the FCC Commissioners before us today.

We have had two and a half of the last years in which I think a lot of the important issues that affect consumers before the FCC have been challenged, and I would say eviscerated, as opposed to the consumer interests that have been pushed forward.

Last year, more than 20 million Americans wrote asking you to protect a free and open Internet, and instead net neutrality protections for consumers were repealed. Don't worry. Big cable companies will do the right thing by you.

Just last week in my own state, Comcast was ordered to pay $9.1 million in fines for deceptive practices that affected 50,000 Washingtonians. And since the repeal of net neutrality, some wireless and broadband companies already appear to be testing ways to undermine the free and open internet.

Wireless carriers have been accused of potentially throttling subscribers to Netflix and YouTube. CenturyLink temporarily blocked access to the Internet in Utah to force consumers to watch ads. Sprint allegedly interfered with competitive Skype services using wireless networks. So these are all questions that I will definitely be following up on in our Q&A session.

But time and time again, big cable companies have prioritized their bottom lines over the fair treatment of consumers and the Internet economy, and we want to know that you are on the front line of consumer interests.

When scientists and weather experts from outside and inside the Trump Administration warned that actions on spectrum could harm forecasting, their concerns were ignored. Peer-reviewed science research has concluded that without key vapor data, that could vanish due to actions on where spectrum has been allocated, that this could impact our weather forecasting. And despite the correct forecasting, if you consider that Sandy impacted hundreds of lives and caused $70 billion, getting that forecast wrong would have been deadly.

I want to thank Chairman Wicker for agreeing to hold a hearing on this topic in the near future because I think it needs to be addressed in more detail.

I also want to make sure that we are clear today we are not going to allow this vital information to be jeopardized in the future.

We have also heard, at a time when motor vehicle accidents claim more than 37,000 lives in the United States each year, that the FCC is pushing to open up key spectrum that jeopardizes the promise of new technologies in this particular area that could prevent as many as 80 percent of those accidents.

So just like spectrum and its important use in transportation, weather, launch forecasting, also the Chairman mentioned broadband. So we all agree that we need to make more access to Internet broadband equitable to Americans.

He mentioned the issue that's so important to all of us, and that is rural telemedicine. But if we've failed at the FCC to collect accurate data about who has access to broadband and we don't have the right information, how can we ever fix the problem?

I know that the FCC wants to put a cap on universal service, the most successful broadband deployment in the Nation's history, because they refuse to make the hard decisions about how to appropriately fund it. So I hope that we will hear about real solutions today and how we get through these challenging times and make sure that we are protecting the public interest.

I know that in the Information Age, we're going to continue to grow and new products and services are going to be there, but we also have to make sure we are aggressive about doing our jobs and protecting that interest on behalf of the consumer.

Thank you, Mr. Chairman.

Senator WICKER. Thank you very much, Senator Cantwell.

And now we'll proceed with hearing opening statements from our panelists, and today, why don't we do it this way? Why don't we hear from Commissioner Pai first and then Ms. Rosenworcel, then Mr. O'Rielly, then Mr. Starks, and finally with Mr. Carr.

So, Chairman Pai, welcome, and we are interested in hearing your five-minute statement.

STATEMENT OF HON. AJIT PAI, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Mr. PAI. Thank you, Chairman Wicker, Ranking Member Cantwell, Members of the Committee.

Thank you for holding this hearing. I appreciate the opportunity to update you on the work of the Federal Communications Commission.

For almost two and a half years, we have worked together with the Committee on a number of important priorities, from advancing our Nation's leadership in 5G, including the 24 gigahertz ban, to tackling robocalls, our Number 1 consumer complaint.

For example, last week, the FCC made clear that voice service providers may block unwanted robocalls by default and last month, the Senate passed the TRACED Act, important legislation that I hope soon becomes law. I'm optimistic that steps like these will make a significant dent in this problem.

This morning, I'd like to focus on my top priority, closing the Digital Divide. The FCC has taken many steps to better enable the private sector to deploy broadband infrastructure, from eliminating unnecessary regulatory burdens to modernizing our rules to make it easier to replace copper with fiber, to groundbreaking reforms, like One Touch Make Ready.

The good news is that we're headed in the right direction. Investment in our Nation's broadband networks rose in 2018 for a second straight year by an estimated $3 billion. Fiber was deployed to more new homes in 2018 than any year before and small cell deployment more than quadrupled. Additionally, Internet speeds are up 40 percent year over year.

We're also maximizing the impact of the Universal Service Fund with aggressive reforms that will deliver more broadband to more Americans. Last year, we finished the Connect America Fund Phase II Reverse Auction. Through this novel approach, we are now awarding about $1.5 billion to connect almost 700,000 unserved homes and businesses nationwide.

We are distributing this funding much more efficiently thanks in part to competitive bidding, saving $3.5 billion from the $5 billion price tag we initially thought would be required to connect these unserved areas. These dollars are making a real difference.

To date, the Commission has authorized $278 million for the build-out of high-speed Internet service to almost 100,000 unserved locations in 27 states. Among other construction, these applicants will be deploying gigabit fiber to locations in rural Hawaii, Kansas, Massachusetts, Minnesota, Missouri, and Tennessee.

I saw a glimpse of the exciting future ahead for consumers in these areas during a recent visit to the East Central Electric Cooperative in Okmulgee, Oklahoma. Thanks in part to FCC funding, this electrical cooperative will build gigabit speed connections to thousands of locations in Rural America, including many tribal residents of the Creek Nation.

Now our efforts don't stop there, we reformed the FCC's A-CAM Program last December and as a result, 186 small rural carriers have now accepted $657 million in additional support to connect 106,000 more rural homes and small businesses. This is a 31 percent overall increase in the number of locations that will have 25 megabit per second service and some states will see a much larger increase, 114 percent in Arizona and 105 percent in Montana.

At the same time, we increased the funding of small rural carriers that rely on the FCC's Legacy cost-based support mechanism and we increased their obligations accordingly.

Under the prior Administration's rules, these carriers were only required to provide 10 megabit per second service to about 115,000 locations. Under our new rules, these same carriers will have to provide 25 megabit per second service to more than 600,000 locations, and we initiated the second round of A-CAM offers to these carriers in exchange for building out 25 megabit per second broadband to all fully funded locations in those service areas.

If all carriers accept offers, over 1.1 million locations will have 25 megabit service, including 58,000 locations in Texas, 42,000 in Indiana, and 36,000 in Missouri, and that's not all.

In the coming months, we will begin a rulemaking to establish a $20 billion Rural Digital Opportunity Fund to spur the deployment of high-speed broadband networks and bring greater economic opportunities to Rural America over the next decade. This program will bring broadband to over four million rural homes and small businesses.

Now while we continue our work closing the Digital Divide, we also understand the importance of improving our broadband deployment maps and that is why I am pleased to announce this morning that, after a thorough review of the record and the painstaking work of our career staff, I intend to recirculate a report and Order of the FCC's monthly meeting in August that would result in more granular and more accurate broadband maps.

That means requiring broadband providers to report where they actually offer service below the census block level and looking to incorporate public feedback into our mapping efforts.

I hope my colleagues will join me in this effort to improve upon our maps and I look forward to working with you on that effort.

Chairman Wicker, Ranking Member Cantwell, Members of the Committee, thank you once again for inviting me to testify. I look forward to answering your questions and continuing to work with you in the days to come.

[The prepared statement of Mr. Pai follows:]

PREPARED STATEMENT OF HON. AJIT PAI, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Chairman Wicker, Ranking Member Cantwell, and Members of the Committee, thank you for holding this hearing. I appreciate this opportunity to update you on the work of the Federal Communications Commission to advance the public interest.

I'd like to lead off by saying how proud I am of the dedicated staff of the Commission. They come to work every day eager to carry out their mission to close the digital divide, promote innovation, protect consumers and public safety, and improve the FCC's processes and programs. It has been a privilege to work alongside them at the FCC's headquarters and in the field. They exemplify what it means to be public servants.

For almost two-and-a-half years, we have worked together to achieve the priorities I set at the beginning of my chairmanship—most notably, the top priority of closing the digital divide. The Commission has taken a variety of steps to better enable the private sector to deploy broadband infrastructure. For example, last year, we made it easier and cheaper for competitive providers to attach fiber to utility poles through a groundbreaking reform called "one-touch make ready."

Of course, there are some areas where the business case for broadband deployment just won't exist—no matter how much red tape we cut. These are typically rural areas with sparser populations and lower incomes. The FCC manages programs to connect these rural communities through the Universal Service Fund. Here, we've been aggressively taking action to maximize the USF's impact—to stretch scarce dollars as far as we can.

Last year, we finished the Connect America Fund Phase II reverse auction. Through this novel approach, we're now awarding about $1.5 billion to connect over 713,000 unserved homes and businesses nationwide.

Before the auction, we identified parts of our country that were unserved by broadband. This was so that we could target funding to leverage—not displace—private capital expenditures. We didn't want to fund overbuilding. We also made sure the auction was open to providers of all types, including rural telecom, cable, fixed wireless, and satellite companies, as well as electric utilities. This ensured that there would be plenty of competition.

The outcome of the auction was a tremendous success. We distributed funding much more efficiently thanks in part to intermodal, competitive bidding, saving $3.5 billion from the $5 billion price we initially thought would be required to connect these unserved areas. And consumers are getting high-quality broadband—99.7 percent of the winning bids are to provide consumers with service of at least 25/3 Mbps.

On Monday, we gave final approval to a second round of auction funding that will provide $166.8 million over the next decade to expand broadband to 60,850 locations in 22 states (including Arizona, Kansas, Missouri, Nevada, New Mexico, and Tennessee). This money will begin flowing by the end of the month. In May, we gave final approval to the first batch of applications to expand service to 37,148 rural homes and businesses in 12 states, and these funds have already started reaching broadband providers. Among other construction, these applicants will be deploying gigabit fiber to thousands of locations in rural Missouri and Hawaii. To date, the Commission has authorized $278.4 million over the next decade for buildout of high-speed Internet service to 97,998 unserved locations. I saw a glimpse of the exciting future ahead for consumers in these areas during a recent visit to East Central Electric Cooperative in Okmulgee, Oklahoma. Thanks in part to CAF funding from the FCC, this electric cooperative will build gigabit-speed connections to thousands of locations in rural Oklahoma, including many Tribal residents of Creek Nation.

Moreover, last December, we implemented reforms to the FCC's Alternative Connect America Cost Model (A–CAM). As a result, a total of 186 small, rural carriers participating in the A–CAM program have now accepted $657 million in additional support over the next decade to provide 106,000 more rural homes and small businesses with 25/3 Mbps broadband service. This represents a 31.8 percent increase in the number of locations that will have high-quality service available through the FCC's A–CAM program. And the increase is much larger in many states, such as 123 percent in New Mexico, 114 percent in Arizona, and 105.4 percent in Montana.

In December, for the first time we also began requiring that small, rural carriers that continue to rely on the Commission's legacy, cost-based support mechanism provide 25/3 Mbps broadband service to specific numbers of rural homes and small businesses in their service areas. Under the prior Administration's rules, these carriers were only required to provide 10/1 Mbps service to 115,441 locations; under our new rules, these same carriers will have to provide 25/3 Mbps broadband to at least 600,535 locations. At the same time, we also initiated a second round of A–CAM offers of fixed, model-based support for a term of ten years to these carriers, in exchange for building out 25/3 Mbps broadband to all fully-funded locations in their service areas. If all legacy-reliant carriers accept the new A–CAM offers, they will be required to provide 25/3 Mbps service to at least 1,126,082 locations. This would include 58,000 locations in Texas and Iowa, 42,000 locations in Indiana, and 36,000 locations in Missouri.

Last year, we took other steps through the Fund to help close the digital divide. For example, we increased the annual cap on rural healthcare program spending by nearly 43 percent to $571 million per year and implemented ongoing annual inflation adjustments—the first increase in the program's funding level since it was established in the 1990s. In addition, in June 2018, we established a process to carry-forward unused rural healthcare program funds from past funding years for use in future funding years. This sensible modification means an additional $83 million can be used in funding year 2019 that will help to provide critical connectivity to rural healthcare institutions.

Going forward, we plan to continue our emphasis on closing the digital divide. Later this year, for instance, we will begin a rulemaking to establish a $20.4 billion Rural Digital Opportunity Fund. Applying lessons learned from the Connect America Fund Phase II reverse auction, this program will spur the deployment of high-speed broadband networks across more of rural America over the next decade, bringing greater economic opportunities to America's heartland. Service providers that win funding in the reverse auction will deploy needed infrastructure to provide up to gigabit-speed broadband in the parts of the country most in need of connectivity. I'm excited about this program—it will be the FCC's single biggest step yet to close the digital divide and will connect up to 4,000,000 rural homes and small businesses to high-speed broadband networks.

Of course, it is vital that we spend USF funds wisely and eliminate waste, fraud, and abuse in these programs. That's why recently, we developed a reorganization plan to create a Fraud Division within the Enforcement Bureau. I am pleased that this proposal was unanimously endorsed by the Commission and cleared by the Office of Management and Budget. This reform will embed a permanent effort to combat USF fraud within the structure of the Enforcement Bureau.

Another critical Commission priority is to maintain and advance our Nation's leadership in 5G, the next generation of wireless connectivity. 5G networks will be 100 times faster than today's networks, perhaps more. They will have lag times that are one-tenth of what they are today. And they'll have much more capacity, being able to connect as many as one million devices per square kilometer.

Our work on 5G will open the door to new services and applications that will grow our economy and improve our standard of living. Smart transportation networks will link connected cars—reducing traffic, preventing accidents, and limiting pollution. Ubiquitous wireless sensors will enable healthcare professionals to remotely monitor your health and transmit data to your doctor before problems become emergencies. Connected devices will empower farms to apply precision agriculture. And there will be more innovations that we can't even conceive of today.

These breakthroughs will boost our economy. One study pegs 5G's potential at three million new jobs, $275 billion in private investment, and $500 billion in new economic growth. And that should not be news to the members of this Committee, which has taken the lead in ensuring America's leadership in 5G by passing laws like the MOBILE NOW Act.

To realize this potential, we've developed and are executing the 5G FAST plan—a comprehensive strategy that will "Facilitate America's Superiority in 5G Technology." It has three key components: (1) pushing more spectrum into the marketplace; (2) promoting the deployment of wireless infrastructure; and (3) modernizing outdated regulations. In my testimony today, I'd like to concentrate on the first prong, spectrum.

The applications and services of tomorrow will require much more bandwidth. They cannot be developed and deployed without spectrum. This critical resource represents the lifeblood of the communications industry—and with it, the future of our economy. That's why the FCC must continue its work to aggressively make more spectrum available for commercial use.

Last year, I stated that the FCC would hold two high-band spectrum auctions during this Fiscal Year: one for the 28 GHz band and another for the 24 GHz band. And I noted that conducting these auctions successfully and promptly would be important to U.S. leadership in 5G.

I am pleased to report that we have done what I said we would do. Our 28 GHz auction began last November and concluded this January. All in all, bidders won 2,965 licenses, and the auction raised $700,309,809 in net bids for the U.S. Treasury. Our 24 GHz auction began in March and concluded in May. In this auction, bidders won 2,904 licenses, and the auction raised $2,022,676,752 in net bids.

These auctions are significant accomplishments, but the FCC cannot and will not rest on our laurels. Instead, we will continue to free up spectrum for commercial use. Starting on December 10, we will hold an auction of the upper 37 GHz, 39 GHz, and 47 GHz bands. This auction will be the largest in American history, releasing 3,400 megahertz of spectrum into the commercial marketplace. All in all, these auctions will free up for the commercial marketplace over 5 gigahertz of spectrum for flexible use. For context, that's more spectrum than is currently used for mobile broadband by all mobile broadband providers in the United States *combined.*

We are also taking aggressive action on mid-band spectrum, important spectrum given the desirable combination of coverage and capacity that these bands offer for wireless services. Next year, we intend to auction mid-band spectrum in the 3.5 GHz band. However, we expect to authorize initial commercial deployments in this band later this summer—well ahead of the auction—after we complete our review of the laboratory test results from the first group of spectrum access systems. And we intend to take action to make available more spectrum in the 2.5 GHz and 3.7–4.2 GHz bands in the coming months. Notably, the MOBILE NOW Act also required the Department of Commerce to evaluate the sharing of the 3.1–3.55 GHz band with commercial operators. Although the Department has only announced that it has started looking at a small portion of that band—the upper 100 megahertz—we look forward to working with our Federal partners on how to effectuate the widespread sharing of the full 450 megahertz of this prime mid-band spectrum.

As part of our balanced spectrum strategy, we have also been working to make more spectrum available for unlicensed use. Earlier this year, for example, we allocated over 21 gigahertz of spectrum in the *Spectrum Horizons* bands for unlicensed operations. And we are continuing our effort to open up a large amount of unlicensed spectrum in the 6 GHz band (while safeguarding incumbents with innovative technologies and sharing techniques). This will make sure we get the most use of this limited, essential resource and deliver consumer value.

The next priority I'll discuss is our important mission to protect public safety. Here, the Commission has been extremely active, both proactively and in response to emergencies that have arisen, such as Hurricanes Harvey, Irma, Maria, and Michael.

Last year, for example, we took important steps to improve Wireless Emergency Alerts, which play a critical role in notifying Americans when emergencies strike. We adopted an order that requires the delivery of more precise, geographically targeted alerts so that the alerts reach only those communities impacted by an emergency. The order also adopted rules to enable the public to better review emergency information by requiring that alert messages remain available on wireless devices for at least 24 hours after receipt, or until consumers choose to delete it.

Last year, we also took important steps to improve the reliability and effectiveness of the Emergency Alert System, or EAS. For example, we adopted an order that authorizes "live code" testing of EAS—that is, the testing of the same alert codes and processes that would be used in actual emergencies—but also requires clear messaging and outreach to make sure the public knows they are receiving a test message, not an actual emergency alert. And to reduce the risk and impact of false alerts, the order requires new safeguards in the configuration of EAS equipment and also requires broadcasters, cable systems, and other EAS participants to notify the Commission's 24/7 operations center when they discover they have transmitted a false alert.

We have also taken steps to ensure that Americans in need can reach someone who can help and that emergency responders can more quickly locate Americans in need. For instance, we have proposed rules to implement Kari's Law—and I would like to thank the members of this Committee again for making this vital 911 improvement law a reality. Kari's Law requires multi-line telephone systems—which commonly serve hotels, office buildings, and campuses—to enable users to dial 911 directly. And it also contains a notification requirement so that when a 911 call is made in these settings, a front desk or security office will be alerted to facilitate building entry by first responders. In March, we also proposed rules to help first responders more precisely locate wireless 911 callers in multi-story buildings. Specifically, we proposed a vertical, or "z-axis" metric to our location accuracy rules that would enable 911 call centers and emergency responders to figure out on what floor wireless 911 callers are located. In the coming year, the Commission intends to take final action to improve our location accuracy rules and implement Kari's Law.

Our work in this area also extends to national security. When it comes to the security of our communications networks, we cannot afford to make risky choices and just hope for the best. We must have a clear view of the threats we face and take action to respond to those threats. That ethos extends to our review of foreign companies that seek to do business in the United States. At our May open meeting, for example, the Commission advanced our national security by denying the application of China Mobile USA, a wireless carrier ultimately owned by the Chinese government, to provide international telecommunications services in the United States.

The process that yielded decision reflects the well-considered, fully-integrated approach of the FCC and Administration to the national security implications of communications networks. The FCC solicited the views of the relevant Federal agencies on whether China Mobile's application raised national security, law enforcement, or related concerns. After a lengthy review of the application and in consultation with the U.S. intelligence community, in 2018, the Executive Branch agencies recommended that the FCC deny China Mobile USA's application due to substantial national security and law enforcement concerns. Notably, this was the first time the Executive Branch had ever recommended that the FCC deny an application due to national security concerns. Based on this recommendation and the full public record in this proceeding, I determined that approving this application would not serve the public interest and the Commission voted to deny China Mobile USA's application. I'm pleased my colleagues agreed with me.

Our cross-agency efforts extend to the international stage. Last month, I was honored to be part of the United States delegation that traveled to Prague for an important conference on how best to secure our 5G networks. I'm grateful to the leaders of the Czech Republic's government for convening this meeting, which featured government officials from more than 30 countries, as well as industry leaders. I'm even more gratified that this gathering was able to develop a set of consensus best practices for 5G security. Dubbed the Prague Proposals, these guiding principles fall into four categories: policy, technology, economy, and security.[1] And the fact that proposals gained such wide support was due in part to the close collaboration among U.S. government agencies, including the FCC, and direct engagement on the international stage.

Going forward, we will continue to prioritize the security of our communications networks. We are working with our Federal partners to implement Executive Order 13,873, the President's May 15 Order on Securing the Information and Communications Technology and Services Supply Chain, and section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019. We are in turn examining the impact of these developments on the FCC's 2018 proposal to ban the use of money from the Universal Service Fund to procure equipment or services from companies that pose a national security threat to our communications networks or the communications supply chain. And we have followed with interest the bipartisan introduction of the United States 5G Leadership Act of 2019, which would create a Supply Chain Security Trust Fund to aid small carriers in replacing such equipment.

The last priority I'll mention—but certainly not the least important—involves attacking unwanted and illegal robocalls. During my tenure as FCC Chairman, I've

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[1] The Prague Proposals issued following the Prague 5G Security Conference are available at *https://www.vlada.cz/en/media-centrum/aktualne/prague-5g-security-conference-announced-series-of-recommendations-the-prague-proposals-173422/*.

had the opportunity to set the agenda for 28 monthly meetings. At almost half of those meetings, we've voted on measures to fight unlawful robocalls and caller ID spoofing. We've taken action to cut off robocalls and spoofing at the source, including authorizing carriers to stop certain spoofed robocalls. We've authorized the creation of a reassigned numbers database. We've taken aggressive enforcement action against those who unleash robocalls on consumers. We've proposed to use the authority Congress gave us in last year's RAY BAUM'S Act to expand the reach of our anti-spoofing rules. Most recently, last week we made clear that voice service providers may block unwanted robocalls by default and sought comment on creating a safe harbor for providers who block such calls that fail Caller ID authentication. I'm optimistic that these steps will make a significant dent in this problem, which generates the most consumer complaints to the Commission.

An important coda on Caller ID authentication framework, which can help combat illegal caller ID spoofing: Call authentication is the best way to ensure that consumers can answer their phones with confidence. It will help consumers know when a phone call is fraudulent before they pick up, thus eroding the ability of scam artists to use false caller ID information to trick vulnerable Americans into answering their phones when they shouldn't. With a robust framework in place, consumers and law enforcement alike will be able to more readily identify the source of illegally spoofed robocalls and reduce their impact.

I have repeatedly demanded that major carriers implement the SHAKEN/STIR Caller ID authentication framework by the end of 2019. If they do not, the Commission has taken the necessary steps to be move directly to final regulations early next year to require that they do so. Our work here is fully in line with, and a complement to, the important work this Committee has done in crafting the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, or TRACED Act—important legislation that I hope soon becomes the law of the land.

In addition, the Commission continues to aggressively enforce the Telephone Consumer Protection Act as well as the Truth in Caller ID Act. We have sent a clear message that those who engage in illegal robocall schemes will pay a price. The FCC coordinates with the Federal Trade Commission on investigations into violations of our Do Not Call rules, and we work together on consumer education programs. The Commission also works with Federal and state agencies to share information and resources that can be used to investigate unwanted calls, such as the Department of the Treasury, Department of Justice, and Department of Homeland Security. Finally, we alert consumers about robocall scams, such as a recent "one-ring" advisory issued this month warning consumers about scam calls using three-digit country codes for Mauritania or Sierra Leone and hanging up after a single ring.[2]

* * *

I would like to conclude by once again thanking our dedicated staff. Day in and day out, they work hard to advance the public interest. Whether they are working to combat robocalls, expand broadband deployment, promote wireless innovation, protect public safety, or address consumer complaints, they serve the American people with skill and dedication, and I am honored to have them as colleagues.

Thank you for this opportunity to testify. I will be pleased to answer any questions that you may have.

Senator WICKER. Thank you very much, Commissioner Pai, and we appreciate that announcement.

Commissioner Rosenworcel, welcome back to the Committee.

STATEMENT OF HON. JESSICA ROSENWORCEL, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Ms. ROSENWORCEL. Good morning, Chairman Wicker, Ranking Member Cantwell, and Members of the Committee. Thank you for the opportunity to be here today.

I believe the future belongs to the connected. No matter who you are or where you live in this country, you need access to modern communications to have a fair shot at 21st Century success, and I saw this just over a month ago in Washington State where, with

[2] The "'One-Ring' Phone Scam" advisory is available at *https://www.fcc.gov/consumers/guides/one-ring-phone-scam.*

the Ranking Member of this Committee, I met a fisherman who suffered a stroke. He was from Shaw Island, a population of 165.

Now that's not a place with a big health care facility, but he was diagnosed remotely and airlifted to a hospital for surgery and telemedicine made it possible.

Just last week, I saw something similar at the Mayo Clinic in Minnesota where heart patients can be sent home with a wearable patch to monitor cardiac activity, offering continuous care outside of the hospital.

But the story that stays with me most is from Arkansas and the Upper Delta. This is an area with a proud history. It's known the world over for the rice its fields produce. It was where Johnny Cash spent his childhood and where Ernest Hemingway penned *A Farewell to Arms* in a barn.

But this region is also on the leading edge of an ugly trend and that's increasing maternal mortality. You see, the United States is the only industrialized nation with a growing rate of maternal mortality and it hits women of color especially hard but in rural communities across the country, obstetric care is disappearing.

Half of our rural counties no longer have a hospital with a maternity ward and in light of this, this team of health care professionals I met at the University of Arkansas for Medical Sciences decided they were going to do something about it. They described for me a typical patient in the Upper Delta and she had been diagnosed with pre-eclampsia, a hypertensive disorder that is a leading cause of maternal mortality, and to manage this disorder monitoring is key.

But this patient lives in a rural area. In fact, she had to drive several hours just to give birth at a specialty hospital. There's just no way she was going to make the same drive on a daily basis during the weeks after delivery.

So this team of health care professionals, they got creative. They sent her home with a blood pressure cuff, a digital scale, and a pulse oximeter to measure the levels of oxygen in her blood and she was told just connect all of these devices to a wireless gateway and transmit daily readings to the medical center. This was great, except for one small detail.

The patient had no wireless service at home. As she described it, she lived in a dead zone. So every day after performing these rituals, she climbed in her truck, drove up to the top of a hill a mile away, and then sent the data along.

Now I can't stop thinking about that story because it tells us about the power of communications but it reminds us of how too many people in too many places in this country are still struggling to connect and during the past 2 years, I don't think the Federal Communications Commission has done enough to address this problem.

For starters, we don't even know with certainty where broadband and wireless service is throughout the country. Our broadband maps are a mess. One cabinet official recently called them "fake news."

The FCC distributes billions each year to help build broadband but it's wasteful and irresponsible to continue to do so without a truly accurate picture of where service is and is not.

On top of this, we have done too little to fix robocalls. At the start of this Administration, consumers received about two billion robocalls a month. They now get about five billion a month. That's crazy.

Last week, the FCC took steps to authorize phone companies to deploy new blocking technology to help with this problem, but here's the kicker. Nothing in this decision prevents carriers from charging consumers for this blocking technology. I think robocall solutions should be free to consumers, full stop. They didn't cause this mess on their phone lines. They shouldn't have to pay to fix it.

Finally, privacy matters. Recent press reports show that for a few hundred dollars some shady middlemen can sell you your location within a few hundred meters based on your wireless phone data. I don't recall consenting to this surveillance when I signed up for wireless service and I bet neither do you.

Think about what the sale of this data means for criminal activity and domestic abuse. It's chilling. This is a matter that's crying out for clarity but so far, the FCC has been totally silent. That's unacceptable. It's time for the agency to hold those who violated the law responsible and make clear to the American public that their wireless location data is safe.

In closing, we have problems to solve, resources that are constrained and communities that are having difficulty navigating the Digital Age. The right communications policies can help and they can even help solve hard problems, like maternal mortality, but the way to do this is have the FCC change course and put the public first.

Thank you. I look forward to answering any questions you may have.

[The prepared statement of Ms. Rosenworcel follows:]

PREPARED STATEMENT OF HON. JESSICA ROSENWORCEL, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Good morning, Chairman Wicker, Ranking Member Cantwell, and Members of the Committee. Thank you for the opportunity to appear before you today.

I believe the future belongs to the connected. No matter who you are or where you live in this country you need access to modern communications to have a fair shot at 21st century success. Clearing the way for this connected future should be at the heart of everything we do at the Federal Communications Commission. I believe we can do this when we focus on the most basic values in our laws: universal service, consumer protection, competition, and public safety.

It saddens me that during the past two years, we have not led with these values. Instead, too often this agency has acted at the behest of the corporate forces that surround it, shortchanging the American people.

You see this clearly in our inability to bring broadband to underserved communities and our bungled efforts to produce an accurate map showing where high-speed service is and is not all across the country. You see it in our slow and tepid response to the robocall epidemic. You see it, too, in the mess we made with our roll back of net neutrality and in our failure to offer anything but total silence in response to revelations that our privacy has been violated with the sale of sensitive wireless location data on our phones.

I am disappointed that the FCC has failed to show the courage I believe is necessary to take on these big challenges. Because on top of these, so many others lie ahead: our leadership in 5G wireless, the extraordinary cybersecurity challenges facing our networks, and the need for a bolder national broadband goal of 100 megabits per second with gigabit speeds in sight—everywhere and for everyone.

Our challenges with 5G leadership are particularly acute. There is widespread agreement that to get 5G out of dense cities and into rural America, we need mid-band spectrum to do it. However, the FCC has made zero mid-band spectrum available at auction for the 5G economy. Instead, we are doubling down with auction after auction of high-band spectrum that is too costly to deploy in rural areas. By doing so we are expanding the digital divide—when we should be collapsing it. Moreover, we are creating a gap between the airwaves used for 5G in the United States and the rest of the world, as China, Japan, South Korea, Australia, Spain, Italy, Austria, Switzerland, Germany, and others put a premium on early 5G deployment with mid-band spectrum. Our choice to focus just on high-band airwaves with limited propagation has consequences—less scale, greater interoperability challenges, and limited prospects for service in remote communities.

The truth is we have problems to solve, resources that are constrained, and communities that are having difficulty navigating the digital age. I still believe that the right communications policies can help. They can help students caught in the homework gap, stuck without the Internet service they need to do their nightly schoolwork. They can help expand the use of telemedicine to tackle our hardest healthcare challenges, like the increasing rate of maternal mortality in this country. They can help make us safer, with improved 911 service in all of our communities. They can help make our democracy stronger, if we can commit to media policies that can ensure news organizations can report without fear or favor.

I believe it is not too late to change course. It is not too late to refocus our attention on our most basic values—universal service, consumer protection, competition, and public safety. To that end, I have some ideas about where we can start to regain what has been lost.

Universal Service

Universal service is a cherished value in communications law. As I noted at the outset, no matter who you are or where you live in this country, you need access to modern communications to have a fair shot at 21st century success.

But the fact of the matter is that too many Americans lack access to broadband. According to the FCC's last-published report, over 21 million Americans do not have access to high-speed Internet service, the bulk of them in rural areas. That's troubling. But even more troubling is that there is no way this statistic is truly credible. Our methodology—assuming a single broadband customer in a census block means service is available throughout—is inadequate. How inadequate? Consider that another study found that 162 million people across the United States do not use Internet service at broadband speeds. That turns our digital divide into a yawning chasm.

We have to figure out what is going on. It is becoming clear that the FCC does not have the full picture of just where service is and is not all across the country. This is unacceptable. It is time to fix this mess with accurate and honest broadband and wireless maps. This is essential because we will never be able to manage problems that we do not measure.

I am not the only one who feels this way. In a congressional hearing earlier this year, a cabinet official pronounced the FCC's maps "fake news." We need to do better. Our wired maps have serious inaccuracies. Our wireless maps are so suspect they are now the subject of an ongoing investigation. To fix our maps, we need to be creative. We should use crowdsourcing, spot checking, auditing, and processes to challenge these maps based on our lived experience. But above all, we should stop taking data from carriers and simply assuming every bit of it is true.

Getting this right matters. If we don't have proper maps, we will not be able to target policy solutions effectively. The FCC distributes billions of dollars each year to help accelerate the build out of broadband, so we can connect all of our communities. It's wasteful and irresponsible for the agency to do so without having a truly accurate picture of where these resources should go.

Consumer Protection

Consumer protection is always in the public interest. It requires the FCC to be nimble, especially as the communications industry changes at a breakneck pace. But our efforts to stem the growing tide of robocalls have been anything but.

At the start of this Administration, American consumers received roughly 2 billion robocalls a month. That number is now about 5 billion a month. That is about two thousand robocalls every second every day. That's insane.

To tackle this mess, the FCC has tried to take on bad actors flooding our lines with these nuisance calls. But as the *Wall Street Journal* reports, out of the hundreds of millions of fines the FCC has assessed on these bad actors, the agency has collected no more than a grand total of $6,790. It's clear the FCC's enforcement is not working. This is like trying to empty the ocean with a teaspoon.

Earlier this month, the FCC decided to take a different approach. The good news is that it authorized phone companies to deploy technology to block robocalls across the network, unless a consumer opts out. The bad news is that nothing in this decision prevents carriers from charging consumers for this blocking technology to stop robocalls. I think robocall solutions should be free to consumers. In fact, I wrote major phone companies in December of last year to demand that they provide free robocall blocking tools to consumers. Consumers didn't cause this mess on their phone lines. They shouldn't have to pay up to fix it. That's because consumers are already paying the price—in scams flooding our phone lines; wasted time responding to false and fraudulent calls offering us what we did not ask for, do not want, and do not need; and a growing distrust in communications networks. It's disappointing that the FCC couldn't simply do what consumers want most—stop robocalls and do it for free.

Competition

Competition is fundamental. It yields lower prices and higher quality services. But right now, too few households have any choice when it comes to high-speed broadband service. I know this personally, because I'm one of them. But I also know this professionally, because the FCC's data show that half the households in this country have no choice of broadband provider.

This is one of the reasons why the FCC adopted net neutrality rules a few years back. With these rules in place, your broadband provider does not have the right to block websites, throttle online services, or censor online content. That sounds good to me—and to American consumers everywhere. In fact, a study from the University of Maryland found that 86 percent of the public support net neutrality. But, the FCC—over my objection—stripped net neutrality from our rules. Now, because of the lack of competition, consumers have nowhere to turn if their broadband provider slows down their service or censors websites. This is not right.

Moreover, in its haste to roll back net neutrality, the agency used a process that should make no one proud. The record was rife with fraud. More than nine million people—including United States Senators—had their identities stolen and used to file views about net neutrality that were not their own. This is a crime under state and Federal laws. However, the FCC refused to assist state authorities looking to understand how this happened and turned away requests from journalists seeking information about this mess. The agency was forced to pay one journalist tens of thousands of dollars to settle a court case and is actively fighting others in court. All of which begs the question, what is the FCC hiding?

Earlier this year, I was the only FCC Commissioner to sit through the oral argument at the court reviewing the FCC decision to eradicate net neutrality. What was obvious to me is that some part of our decision—if not all of it—will be remanded to us. When that happens, I hope that this agency will have the courage to run a fair and open process. I hope that it will reflect the strong desire of the American public to have open Internet policies once again be the law of the land.

Public Safety

Finally, public safety is paramount. In the very first sentence of the Communications Act, Congress instructed the FCC to make available, "to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide radio and communication service" in order to promote the "safety of life and property."

At about this time last year, press reports revealed that wireless carriers were selling our private data about when and where we are using our phones to third-party location aggregators. Then, earlier this year, it was revealed that this data was still for sale—and ending up in the hands of bounty hunters. It turns out that for a few hundred dollars, shady middlemen could use this data to show where you were at any moment within a few hundred meters.

This is outrageous. I don't recall consenting to have my wireless location data sold this way—and yet it has been happening. I don't see how this is permissible under the law—and yet it has been happening.

This is an issue of personal and national security. It is an issue of privacy. Think about what the sale of this data means for criminal activity and domestic abuse. It's chilling. This is a matter that is crying out for clarity from the FCC. But to date, the agency has been totally silent.

That's unacceptable. I believe the FCC needs to do more to provide the public with basic information about what is happening with their real-time location information. So I wrote every major wireless carrier and asked them to confirm that they have stopped this kind of sale of our wireless data. Moreover, I asked them to explain just what has happened to any data that has already been made available to location aggregators or anyone else. I made their responses public. To date, this is the only information publicly available about this practice. It's not enough. It's time—past time—for the FCC to hold those who violated the law responsible and make clear to the American public that their wireless location data is safe.

In closing, thank you for holding this hearing. Thank you for providing me with the opportunity to offer my views. I look forward to answering any questions you may have and I look forward to working with you and your staff in the days ahead.

Senator WICKER. Thank you, Commissioner.

Commissioner O'Rielly, welcome back to the Committee.

STATEMENT OF HON. MICHAEL O'RIELLY, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. O'RIELLY. Thank you, sir. Thank you, Chairman Wicker, Ranking Member Cantwell, and the Members of the Committee.

It is a pleasure to be before this body as it conducts further oversight of the FCC.

With your indulgence, I'd like to raise three areas of communications infrastructure for the Committee's attention.

First, spectrum. I believe there's near universal agreement to free up additional mid-band spectrum given its propagation characteristics and opportunities for global spectrum harmonization.

Continuing what Chairman Pai has put in motion, the Commission must redouble its efforts to allocate additional mid-band frequencies for the next generation license services.

Part of this must be reallocating a portion of the 3.7 to 4.2 gigahertz band or the C-band. One of my foremost concerns is to ensure that the mechanisms selected allow for the quickest possible process, and I remain hopeful that satellite incumbents will be willing to part with closer to 300 megahertz.

Separately, there needs to be a greater effort to identify more Federal bands that can be converted to commercial use. Moreover, the Commission must free additional unlicensed spectrum.

Second, while broadband availability has improved over the years, many unserved areas remain and we must continue our efforts to expand access in an efficient and timely manner. At the same time, I worry that the well-intentioned desire of Congress or selected agencies to expand broadband infrastructure will lead to unexpected wasteful and duplicative spending with adverse consequences for consumers.

Specifically, it is my foremost desire that any new funding go to unserved areas rather than areas where broadband service already exists. Coordination among various agencies and departments is helpful but only through clear legislative directions, like that in the Broadband Interagency Coordination Act of 2019, to ensure funding does not duplicate existing programs and goes to only those Americans without broadband today.

The last issue I want to touch upon is 9-1-1 fee diversion. Every month, millions of consumers pay their phone bills only to see a good portion of the money flowing to a state or territory's general treasury and as a result, only a small percentage goes toward emergency services.

On top of being downright deceptive, this is a serious public safety matter that directly affects emergency call centers and personnel. Following the FCC's December report the states and territories guilty of diverting these critical funds for 2017 were New

York, New Jersey, Rhode Island, Montana, Nevada, West Virginia, and the U.S. Virgin Islands.

I respectfully request the Committee's assistance. The name and shame process generated by our annual report has only been so helpful. I believe new legislation is needed and it'll take a more forceful approach to end diversion once and for all.

Thank you for inviting me to testify. I welcome any questions you may have.

[The prepared statement of Mr. O'Rielly follows:]

PREPARED STATEMENT OF HON. MICHAEL O'RIELLY, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Good morning. It is a pleasure to appear before this Committee once again, as it conducts further oversight of the Federal Communications Commission. I appreciate the opportunity to be here and welcome any questions you may have.

In approaching the current communications landscape, the Committee and the Commission have been focused on the changing nature of the industry, whether in terms of technological advancement, modern networks, or present-day markets. Under Chairman Pai's leadership, the Commission has made a strong effort to modernize our regulations to keep pace with these changes. Make no mistake, this is hard work. However, we have made progress despite the headwinds, and I am excited to see further growth and strengthening of our Nation's communications infrastructure over the coming months and years.

In considering the many different areas of communications policy ripe for discussion at today's hearing, I decided to narrow my testimony to four issues that are of particular importance to me: first and foremost, the need to quickly deploy more mid-band spectrum; second, the urgent need to prevent taxpayer-funded overbuilding of existing infrastructure; third, the need to end theft of 9-1-1 fees by states for unrelated programs; and finally, the need to address illegal robocalls while protecting legal communications. I am happy to answer your questions on these or other topics.

Freeing Additional Spectrum, Especially in the Mid Bands

The Commission continues to make great strides to ensure U.S. leadership in 5G by allocating the necessary millimeter wave frequencies. Over the past three years, however, I have focused most of my energy on crucial mid-band spectrum. There is now near universal acceptance that far more needs to be done to free up additional mid-band spectrum given its propagation characteristics and opportunities for global spectral harmonization.

Finding additional mid-band spectrum is extremely hard. There is no fallow spectrum, incumbent users are everywhere, and a multitude of interested parties have different and often conflicting visions, interests, and needs. I faced these issues head-on when I led, with the Chairman's blessing, the process to review and revise our 3.5 GHz rules. Today, 3.5 GHz is nearly ready to go to auction and will support many functions, including 5G deployment. Unfortunately, software reconfiguration, the testing process, and other issues have delayed our auctions. In turn, the priority access licenses are probably not going to be auctioned until the second quarter of 2020, at best. And, while 3.5 GHz is a good start, current supply cannot meet overall demand, especially since providers are seeking 100 megahertz channels. Building on what the Chairman has already put in motion, the Commission must continue its efforts to allocate additional mid-band frequencies for next-generation licensed services.

Highest on our priority list must be the 3.7 to 4.2 GHz band, or the C-band. The Commission continues a deliberative process to consider the market-based approach, along with other options presented in the record. One of my foremost concerns is to ensure that the mechanism selected allows for the quickest reallocation of the band. I believe that the majority of relevant stakeholders are diligently working through how best to accommodate the current incumbents and provide a sufficiently transparent process. Further, I remain hopeful that the satellite incumbents recognize the great need for such frequencies and are willing to part with closer to 300 or more megahertz, assuming the requisite technology can accommodate this amount.

In addition to 3.5 GHz and C-band, there needs to be a greater effort to identify more Federal agency holdings in the mid bands for reallocation. I have suggested that the 3.45 to 3.55 GHz band be made available for commercial use, and that additional feasibility studies be initiated to determine the extent of commercial offerings that can be introduced in 3.1 to 3.45 GHz. This spectrum can be combined with spectrum at 3.5 and 3.7 to 4.2 GHz to create the channel sizes required for true 5G services. Further, we should also start looking to the 7.125 to 8.5 GHz band to ensure that there is sufficient spectrum for the many entities that want to offer 5G services.

At the same time, the Commission must also consider mid-band spectrum for unlicensed use, such as the 4.9, 5.9, and 6 GHz bands. The community serving this incredibly valuable function needs larger spectrum swaths to meet the speed, capacity, and latency expectations demanded of next-generation Wi-Fi and other unlicensed uses.

Broadband Deployment & Overbuilding Concerns, Especially in Rural Communities

One of the many things my fellow colleagues and I agree on is the critical importance of broadband infrastructure to the American people. It is hard to imagine any part of our current society that hasn't been integrated with Internet connectivity: from education and information, to employment and health care, broadband is a key component of modern American life and has improved our standard of living in so many ways. This is true no matter the underlying characteristics of the technology used to provide digital access—wired or wireless. In fact, both serve interchangeable functions for increasing numbers of Americans and will likely continue to do so going forward.

Similarly, there is consensus among FCC Commissioners that all Americans—including those living in areas with challenging topography and sparse populations—should have the opportunity to access broadband Internet, if they wish to do so. While broadband availability has improved over the years, many unserved areas remain, and we must continue our efforts to expand access in an efficient and timely manner. That is why I have spent so much time over the years promoting better incentives and greater efficiency within our Universal Service Fund programs, and why I have repeatedly called for the implementation of the Remote Areas Fund (RAF) auction—in order to serve those Americans in the hardest to reach communities, which tend to be more rural and of lower economic status. I know that Chairman Pai is committed to this goal as well.

At the same time, I worry that the desire to expand broadband infrastructure will lead to wasteful and duplicative spending and adverse consequences for consumers. Recently, Congress allocated new funding for broadband programs at the Department of Agriculture, and there appears to be interest in funding broadband buildout via the Department of Commerce as well. While I would reiterate my humble request from previous testimony that Congress consider the FCC's Universal Service Fund (USF) as a primary means to distribute new funding, it is my foremost concern that any new funding go to unserved areas, rather than areas where broadband service already exists. Coordination among the various agencies and departments would be helpful, and, of course, there are new legislative efforts by members of this Committee to help facilitate this. However, coordination can mean different things to different government agencies and their employees. Only through clear legislative direction and necessary oversight can Congress ensure that funding does not duplicate existing programs and goes only to those Americans without broadband today.

Failure to prevent overbuilding can undermine providers' existing and future investments and result in extremely problematic outcomes. In particular, providers serving hard-to-reach areas can face serious financial difficulties if a new government-subsidized provider "competes" to serve existing customers—or worse—takes only the most highly profitable customers. I have seen this situation firsthand within the Commission's own USF program. It recently came to my attention that new E-Rate-subsidized fiber networks were overbuilding local USF-funded Texas broadband providers and stealing their anchor customers. By manipulating the contracting process to favor the bids of particular providers or self-provisioned service, some local school districts have been actively undermining local USF-supported providers' existing investments, and as a result, making it even more difficult to serve surrounding communities where some households may lack any Internet access at all.

Ending Theft of 9-1-1 Fees by States & Territories

The next issue that I will touch upon today is one that I've been very vocal about for the past several years and which has caught the attention of this Committee as well: 9-1-1 fee diversion. This is a very significant problem, though not as widespread as it once was, thankfully. Every month, millions of consumers pay their phone bills and if they look closely enough, they'll see a line item that generally refers to 9-1-1 emergency services, though the exact wording varies by jurisdiction. In accordance with the line item, consumers appropriately expect that those funds will go toward maintaining and upgrading 9-1-1 emergency calling systems. In some states and territories, however, this money flows into the general treasury and, as a result, only some portion of the collected fees ends up going toward emergency services. On top of being downright deceptive, this is a serious public safety matter that directly affects emergency call centers and personnel, not to mention all the people who live in or visit these states who expect that when they call 9-1-1, the system is up to date. Following the FCC's December report,[1] the states and territories guilty of diverting these critical funds for 2017 were: New York, New Jersey, Rhode Island, Montana, Nevada, West Virginia, and the U.S. Virgin Islands.

As I noted, some members of this Committee have been outspoken on this issue as well, and I thank them for their efforts. The Commission has been issuing an annual report for the last decade, pursuant to Federal law, that measures the amount of money, if any, that each state diverts, on a total funding and a percentage basis. The report also provides an assessment of whether the diverted funds were used for purposes related in some capacity to public safety or completely unrelated. You may find it shocking that the diversion rate was as high as 90 percent in one state (New York).

Beyond creating a problem of public confidence in the fee system itself, fee diversion also shortchanges the budgets of emergency call centers and has prevented much-needed upgrades. I've been to public safety answering points (PSAP), and I've met with the dedicated emergency communications professionals in many of the states subject to diversion. I can assure you that they are continually frustrated by their state politicians who do not have the will to do the right thing. However, I would be remiss if I didn't also address the positive side of our report. There are many states and territories that have made a concerted effort to get off the list, especially in some cases where the problem was an accounting technicality, and in others where public officials simply did the right thing and rectified their state budget practices. West Virginia has committed to do just this. To those states and their leaders, I tip my cap, and I know that in the long run, the people in their states will be better off and their emergency communications systems will be stronger and more reliable.

It is also important to remind those states and territories that continue this despicable practice: they remain ineligible for new Federal funding to modernize their call centers as the shift to Next Generation 9-1-1 occurs. NG911 will be costly, but these improvements will increase the system's effectiveness and will be vital to saving lives. In the Middle Class Tax Relief and Job Creation Act of 2012, this Committee helped create a new grant program for 9-1-1, E9-1-1, and NG911, and the law specifically excluded states and territories that divert fees from receiving these grants.

In closing on this topic, I respectfully request the Committee's assistance. The "name and shame" process generated by our annual report has only been so helpful. The state leaders of certain recalcitrant states—New York, New Jersey, and Rhode Island—don't seem to care about the shaming part. Moreover, other states and territories seem to spring up after seeing a lack of substantial penalties and decide to divert for a few years to address a budget shortfall or provide new spending for a pet project. I believe new legislation is needed, in addition to what has already been introduced, and that it will take a more forceful approach to end diversion once and for all. I would be pleased to work with any Senators who are interested in this issue.

Stopping Illegal Robocalls & Protecting Legal Calls

The final issue I will discuss is the Commission's rightful focus on the surge of illegal robocalls in this country. These calls, many from overseas, are at best irritating; at worst, they serve to scam susceptible consumers out of their hard-earned money. Implementation of new technology should substantially reduce this menace, as will cooperation with foreign governments, but it is clear that eliminating such calls altogether is likely impossible.

In considering this issue, it is important to maintain a careful and nuanced approach. Not all robocalls are illegal or scams, and we must be precise in describing the actual problem at issue. Many honest, legitimate businesses use automatic dialing technologies to communicate needed information to their customers and doing so is perfectly within the scope and intent of the TCPA. These legal and legitimate

[1] Tenth Annual Report to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges for the Period of January 1, 2017 to December 31, 2017 (Dec. 17, 2018), *https://www.fcc.gov/files/lothannual9llfeereporttocongresspdf.*

calls and texts include fraud alerts, flight schedule changes, school closures, delivery window delays, prescription alerts, appointment reminders, default notices, and public safety information, and share no part in the true robocall problem facing the Nation's communications networks.

In terms of *illegal* calls, I applaud those innovative companies and carriers that have already offered or are in the process of offering free call authentication and call blocking services to their customers. I am hopeful that the Commission's recent Declaratory Ruling allowing carriers to block illegal and unwanted calls on an opt-out basis will help to further protect consumer interests. This includes pushing carriers to adopt expeditious processes for correcting false-positives, to ensure that legal and wanted calls are not incorrectly labeled or blocked.

* * *

Thank you to the Chairman and Ranking Member for inviting me to testify today. I welcome any questions from Committee members related to the topics I have covered or any others that are important to you and your constituents.

Senator WICKER. Thank you very much, Commissioner.

Commissioner Starks, welcome to the Committee.

STATEMENT OF HON. GEOFFREY STARKS, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. STARKS. Good morning, Chairman Wicker, Ranking Member Cantwell, and Members of the Committee.

I'm honored to appear before you as a Commissioner for the first time and I appreciate the support that I received from all of you to assume this post.

The future is already here. It's just not evenly distributed. Wise words that excellently frame the state of our Digital Divide. From this seat, I see a world that is on the cutting edge of a 5G transformation that will open the floodgates of innovation with autonomous vehicles, virtual reality, advanced health, precision agriculture, and artificial intelligence, and while I'm excited about 5G, I'm increasingly concerned about the far too many communities that are stuck with, as Senator Tester has said, no G.

There cannot be two Americas, one where those with much get even more and another for those who are left behind.

Researchers describe the Digital Divide as, quote unquote, persistent, and I agree. To that end, I see a world in which our Digital Divide is hardening into a state of Internet inequality impacting our economy, our democracy, and in fact the individual dignity of our citizens.

We must make sure that quality affordable broadband is available to all Americans and where people are connected great things are possible. For instance, broadband can create opportunities in health care and education. I've seen the power of telehealth while visiting with Corie Nieto, the Director of Telehealth Services at the Nevada Health Center Clinic in Amargosa Valley, where technology connects distant doctors with rural patients, bringing expertise and specialty services that would otherwise be unavailable.

I've also seen the power of high-quality online education at Winston-Salem State University in North Carolina. WSSU's program allows students unable to attend in person to take classes online and study at their own pace. These students efficiently acquire skills needed for jobs that are in high demand across the state, including back home in their own communities, and, for example, I met with Gabriel Bettazzi, a second career student who graduated from SSU's online Health Care Administration Program and now runs the Llibott Consultorios Medicos, a group of four primary care clinics focused on serving North Carolina's Latino community through in-person and telemedicine visits.

And we live in a nation that runs on networks. Fixed and wireless communications are critical to our defense, infrastructure, business, and the billions of communications sent in America every day. Network security is national security and so it concerns me that right now our networks contain insecure Chinese equipment that could allow hostile actors to spy on us or even cripple our communication networks during a national emergency.

While recent White House action has barred U.S. companies from buying or using this equipment moving forward, it did not address equipment that is already in our networks.

I have said that the FCC needs to find it, fix it, and fund it. We need to find the equipment that poses a national security threat. We must fix it to secure our networks and we must fund the removal of insecure equipment in our networks as rapidly as possible while minimizing the disruption to consumers, and it could be expensive but it's an investment that we must make.

Finally, I'd like to highlight two areas where the Commission must do more for our consumers.

First, robocalls. I supported the Commission action last week to clarify that providers can offer call blocking service to consumers by default. This action should make these tools available to millions more and the FCC spoke clearly. We fully expect these services to be offered for free, free. If not, the FCC will know and will initiate a rulemaking and providers have long said that they want to be part of the solution and now is the time.

On Monday, I sent letters to all the major carriers asking whether they plan to offer call opt-out blocking, how they plan to inform their customers and whether it will be free. If they fail to meet my expectations, you will hear of it.

Second, I want to again call for the Commission to act in response to the sale of our location data by wireless carriers. Under this practice, anyone with a few hundred dollars could purchase real-time geo-location information.

As a former Federal prosecutor, I'm shocked to think that a domestic abuser could access location data illegally to track a survivor to a safe house or a shelter. This is downright dangerous and so is our inaction.

This practice was first reported over a year ago and the Commission has yet to find anyone responsible and we need to act now.

In closing, I am honored to serve the American people. We have a lot to do. I look forward to working with you all and with my colleagues to address the many challenges ahead.

Thank you. I look forward to your questions.

[The prepared statement of Mr. Starks follows:]

PREPARED STATEMENT OF HON. GEOFFREY STARKS, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Good morning, Chairman Wicker, Ranking Member Cantwell, and Members of the Committee. I'm honored to appear before you as a Federal Communications Commissioner for the first time today and I appreciate the support that I received from all of you to assume this post.

"The future is already here, it's just not evenly distributed." Wise words, and ones that excellently frame the state of our digital divide. In this seat, I see a world on the cutting edge of transformational fifth generation of wireless technology, or 5G, that will open the floodgates of innovation—autonomous vehicles, virtual and augmented reality, advanced telehealth, precision agriculture, and artificial intelligence. And I'm excited. But while we press forward with 5G, I am increasingly concerned about the far too many communities that are stuck with "no-G." There cannot be two Americas—one where those with much get even more, and another for those who are left behind. Researchers have begun to describe the digital divide as "persistent." I agree. To that end, I see a world in which our "digital divide" is hardening into a state of "internet inequality." This is an issue that affects not only the U.S. economy, but also the individual dignity of our citizens and our democracy. It is absolutely imperative that we make sure that quality, affordable broadband is available to all Americans.

Where people are connected, great things are possible. I'm particularly excited about how broadband can create healthcare and educational opportunities. For health care, I've seen the power of telehealth while visiting with Corie Nieto, the director of telehealth services at the Nevada Health Center Clinic in Amargosa Valley, Nevada—population about 1,500. She demonstrated how telehealth technology connects doctors from distant urban centers with patients in rural communities, bringing expertise and specialty services that would otherwise be unavailable to patients in this rural community. For educational opportunities, I recently saw the power of high-quality online education in action when I visited Winston Salem State University (WSSU) in North Carolina. WSSU's program allows students who may not be able to attend traditional in-person classes due to work or family demands, to study at their own pace to acquire skills needed for high-demand jobs. These same students apply what they've learned back home in their communities. For example, Gabriel Bottazzi, a second-career student who graduated from WSSU's online Healthcare Administration program, now runs LliBott Consultorios Médicos, a group of four primary care clinics that focus on serving the Latino community in North Carolina through in-person and telemedicine visits.

The FCC manages billions of dollars of Universal Service program funds intended to ensure that all Americans have the broadband connectivity needed to access programs like those offered by WSSU and the Nevada Health Center Clinic. But to eliminate Internet inequality we must understand the scope and scale of the problem. The fundamental question is this: does the FCC truly know who has broadband and who does not? Unfortunately, at present, it appears that we do not, and the problem begins with the data. The FCC's recently-released broadband deployment report is, unfortunately, a glaring demonstration of our shortcomings. The first draft of the 706 Report was based on data that overstated high speed broadband connections by more than 62 million connections—that's more than the populations of Mississippi, Washington, Texas, Michigan, and Illinois put together. This is troubling for a host of reasons: that the FCC's data practices lack the sophistication to catch such a significant error by a new entrant; that we had to rely on an outside party to catch the mistake; that a draft with an error of this magnitude was circulated for consideration; that the inaccurate numbers from the draft were publicized in a way that overstated our progress on addressing access disparities; that it took months to correct the data; and that the fluctuating data did not change the FCC majority's analysis in any way. And, even when our data is reported correctly, it still doesn't paint an accurate picture in many instances. Under the current system, if a provider reports that it does, or even could, connect a single home in a census block, we count the entire census block as if everybody who lives there is connected. It's no secret that the FCC's broadband maps have problems. It's past time that we fix this.

Right now, the FCC is considering imposing an arbitrary budget cap on all USF programs. But instead of imposing an arbitrary cap, the FCC should get the data needed to produce granular and accurate maps of where broadband is and is not available in the U.S. The status quo is not good enough—not by a long shot. In short, the FCC should be focused on mapping not capping.

I'd also like mention a universally hated phenomenon—robocalls. Robocalls have overwhelmed the network and consumers, and have fundamentally changed the fabric of our culture—we don't pick up our phones anymore. These calls range from annoying and disruptive to deceptive and dangerous, defrauding unwitting consumers out of real money. Often, calls are spoofed to appear like they are coming from a local business or neighbor. This pernicious practice makes it impossible to differentiate these unwanted robocalls from calls coming from our pastor, doctor, or kids' schools. Put simply, by allowing these calls to proliferate, we've broken phone service in this country.

I supported the Commission's action last week to clarify that voice service providers can offer call blocking service by default on an opt-out basis. This action should make these tools available to millions more consumers. And the FCC spoke clearly—we fully expect these services to be offered to consumers for free. Free. Because if not, the FCC will know about it, and initiate a rulemaking to prohibit these charges.

We live in a nation that runs on networks. The importance of fixed and wireless communications to the U.S. economy can't be overstated. They are critical to military and government communications, utility infrastructure, every sector of business, and the billions of personal e-mails, phone calls, and text messages sent in America every single day. Looking forward, as the Internet of Things emerges and billions of cars, appliances, and other devices come online, the importance of our networks will only grow. Network Security is National Security, and right now there are threats in our communications networks—national security threats posed by unsecure Chinese telecommunications equipment with vulnerabilities that carry the risk of espionage or surveillance, and the ability of foreign entities to cripple our communications networks in times of a national emergency. These threats are serious and their presence in our networks is a problem. And while the President's recent Executive Order barred U.S. companies from buying or using telecommunications equipment deemed to be a national security risk moving forward, it did not address the fact that our networks already contain and depend on much of this equipment.

I have said that we need to "find it, fix it, and fund it." The FCC needs to step up, using its own authority and working with other Federal agencies, to investigate and determine the scope of our network's exposure to these threats. We must *find* any equipment that poses a national security threat. We must *fix* it to secure our networks. And we must *fund* the transition of carriers away from insecure equipment in their networks as rapidly as possible. This may require "ripping and replacing," but it must be done in a way that minimizes disruption to carriers and their customers. This is a national problem that needs a national solution. It could be expensive—estimates range from $150 million for mitigation measures to over $1 billion for full replacement as we offset the cost of purchasing and installing new, secure equipment. But our national security is at stake and we must act to protect it.

Finally, I want to reiterate my call for the Commission to act in response to wireless providers selling customer location data. With each passing month, our inaction becomes harder to explain and more problematic. This outrageous practice allowed anyone with a few hundred dollars to purchase anyone else's real time location. As a former Federal prosecutor, I've personally petitioned courts for restraining orders to protect survivors of domestic abuse. And I'm shocked to think that an abuser could illegally track a survivor's phone to a safehouse or a shelter. The misuse of this data is downright dangerous. This practice was first widely reported more than a year ago, yet the Commission still hasn't acted against those responsible. The passage of this much time is significant—the Commission typically has only a year to act before statutes of limitations run out. We need to act now.

In closing, I am honored to serve the American people. We have a lot to do, and I look forward to working with my colleagues to address the many challenges ahead. Thank you for the opportunity to testify today. I look forward to answering your questions.

Senator WICKER. Thank you very much.

Commissioner Carr, you're recognized. Welcome to the Committee.

STATEMENT OF HON. BRENDAN CARR, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. CARR. Thank you.

Chairman Wicker, Ranking Member Cantwell, Distinguished Members of the Committee, thank you for the invitation to testify.

When I first appeared before this Committee in 2017, the U.S. faced significant challenges in our effort to lead the world in 5G. Our outdated rules meant that it took too long and it cost too much to build out Internet infrastructure in this country. We risked ceding U.S. leadership in 5G and half a trillion dollars it could add to our economy, to our global competitors.

Indeed, China was putting up new cell sites, the building blocks for 5G, at 12 times our pace. We needed to take bold action and that's exactly what we've done at the FCC.

For one, we updated the Federal rules that apply to the construction of small cells, the backpack size antennas needed for next gen connectivity. We did so by excluding them from the costly and time-consuming review that applies to the construction of large 200-foot towers.

For another, we addressed the state and local review process. We did this by building common sense reforms already enacted by elected officials in their own towns, reforms that provide clarity on fees, and ensure timely decisions.

The FCC's reforms are now delivering results. Internet speeds are up nearly 40 percent. More fiber was built out last year than ever before. The number of small cells put up increased from 13,000 in 2017 to more than 60,000 in 2018. Investment in broadband networks is back on the rise, and the U.S. now has the world's largest 5G deployment.

There's more to do, but we've turned the page on the failed policies of the prior FCC. We're now heading in the right direction.

I've had the chance to see firsthand how our decisions are helping to create jobs in communities around the country. In places like Euless, Texas, I visited a manufacturing plant that build the smart poles needed for 5G. One of the workers there, Chris, told me that they're now doubling production every quarter because of an increase in demand for small cells.

In fact, our success in accelerating infrastructure construction has created a new opportunity. Industry could now fill 20,000 job openings for tower techs. That would nearly double their existing workforce and bring thousands of families into the middle class.

So two months ago, I announced a jobs initiative, modeled on a program developed by Aiken Technical College in South Carolina, it looks to community colleges as a pipeline for 5G jobs. In 12 weeks, someone with no training can learn the skills needed to land a good-paying job in the tower industry, and I'm working to open up this program to even more Americans.

While we know broadband can create jobs, it can also help save lives. I learned more about this from a service-disabled veteran named James who served in the Navy for 24 years before suffering a spinal cord injury while on an operation.

James is now under the care of the VA and this used to mean a long two-hour drive from his home to the nearest VA facility, but he's now enrolled in a Connected Care Program that lets James stay home and visit with specialists over a secure video connection. His doctors track his vitals remotely and can intervene if they see something out of range. This has cut in half his need to make the long drive to the VA and improved his care.

James's story is part of a new trend we're seeing in telehealth. The delivery of high-tech, high-quality care is no longer limited to the confines of brick and mortar health care facilities. Remote technologies, whether enabled by a smart phone or tablet, can deliver care directly to patients outside hospitals and regardless of where they're located.

I think the FCC should support this new trend and that's why I'm leading our effort to stand up a new $100 million program to support these Connected Care efforts for low-income consumers and veterans.

I look forward to working with all stakeholders as we continue the work to stand that up.

In closing, I want to thank you again, Chairman Wicker, Ranking Member Cantwell, and Members of the Committee, for the chance to testify. I look forward to your questions.

[The prepared statement of Mr. Carr follows:]

PREPARED STATEMENT OF HON. BRENDAN CARR, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Chairman Wicker, Ranking Member Cantwell, and distinguished Members of the Committee, thank you for the invitation to testify. It is a privilege to appear before you again.

At the outset, I want to commend the Committee on its notable and bipartisan achievements—from passing the TRACED Act, which would increase the FCC's authority to crack down on robocalls, to introducing the STREAMLINE Small Cell Deployment Act, which would update our infrastructure rules to account for new, 5G technologies.

On that note, I want to begin today with an update on the steps we are taking at the FCC to accelerate the buildout of 5G and other broadband infrastructure in communities across the country.

When I first testified before the Committee in 2017, the U.S. faced significant challenges. Outdated rules were holding back broadband deployment. It took too long and it cost too much to build Internet infrastructure in this country. We were at risk of ceding U.S. leadership in 5G—and the half a trillion dollars it could add to our economy—to our global competitors. Indeed, China was putting up new cell sites—the building blocks for 5G—at twelve times our pace.

We needed to take bold action. And that is exactly what we have done at the FCC. I want to highlight two decisions in particular that have made a difference.

First, in March of 2018, we examined some of Federal rules that apply to the construction of small cells. These are the backpack-sized antennas that provide next-gen connectivity. They can be attached to light poles or other structures in a matter of hours. But the Federal review process could take years and cost hundreds of thousands of dollars. This is because our rules treated a single, unobtrusive small cell the same as a new, 200-foot tall tower. Applying all that red tape to every one of the thousands of new small cells needed for 5G threatened to hold the U.S. back. So we excluded small cells from those large tower reviews.

Second, in September, the FCC addressed the state and local review process that applies to small cells. We did so by building on the commonsense reforms already enacted by elected officials in their own communities. This meant updating the shot clocks that have long applied to the local review process, thus ensuring timely decision-making. And it meant providing clarity on the types of fees that can effectively prohibit service in violation of Federal law. As specified in the decision, wireless providers—not cities—will pay the costs imposed by the buildout of small cell infrastructure.

These and other FCC reforms are delivering results. Internet speeds are up nearly 40 percent. Americans saw more fiber broadband built to their homes and businesses last year than ever before. The number of small cells put up in this country increased from around 13,000 in 2017 to more than 60,000 in 2018. The digital divide—the percentage of Americans lacking access to high-speed Internet—narrowed by almost 20 percent last year alone. Investment in broadband networks is now increasing—reversing the significant declines we saw in 2015 and 2016. And a new forecast shows the U.S. will have twice the percentage of 5G connections as Asia.

In fact, the U.S. now has the largest 5G deployment in the world. Fourteen cities went live last year, and we expect 92 5G builds by year's end. While there is much more work to do to secure U.S. leadership and ensure every American has a fair shot at next-generation connectivity, we are now heading in the right direction. The FCC's new policies are working.

But more than the numbers, I've had the chance to see firsthand how the FCC's decisions are helping to create jobs and benefit American workers in communities around the country.

I saw this recently in South Carolina. That's where a company built a 100,000 square foot manufacturing plant less than a year ago to meet the increase in demand for small cells. At the facility, Jake and his crew told me that they got jobs at the plant less than six months ago. They had been employed in general steel and construction work before. They now have 5G jobs. And the company says they are expanding their workforce by nearly 10 percent every month to keep up with demand.

I saw this in Elkmont, Alabama. That's where a small-town manufacturing plant is already seeing a big boost from 5G. The facility makes the harnesses and other gear that America's tower climbers use to install new small cells. The plant has doubled production over the last year and a half with new small cell builds underway.

I've also seen firsthand the hard work that America's tower crews are doing every day to bring more broadband to more Americans. In fact, the successes we are seeing in accelerating infrastructure deployment has created a new opportunity. Industry estimates that it needs to fill another 20,000 job openings for tower climbers and telecom techs to complete this country's 5G build. That would nearly double the size of this group of skilled workers, bringing thousands of families into the middle class.

In April, I announced a jobs initiative to help address this opportunity. It looks to community colleges as a pipeline for these 5G jobs. And it is modeled on a program developed by Aiken Technical College in Graniteville, South Carolina. In 12 weeks, the program can take someone with virtually no training, teach them the mix of classroom and physical skills necessary to build and install new cell sites, and enable them to land a good-paying job in the tower industry. Dr. Gemma Frock, who developed the program, says that 100 percent of her students have received job offers upon graduating from the program.

We need to expand this model program to community colleges across the country to ensure we have the skilled workforce in place to build next-gen networks. I am working toward that goal with a number of stakeholders. These efforts will help address our country's need for 5G workers and close the skills gap.

Programs like these can make a real difference in communities around the country. A few months ago, I joined Senator Blackburn at an automotive manufacturing plant in Chattanooga, Tennessee. This plant partners with a local community college to offer classroom training and on-the-job technical skills to its workers. Immediately upon graduation, students have the potential to get a job—either with the manufacturer or in other high-tech fields—and they start out making more than $40,000 a year.

While we know that broadband deployment can create jobs, it can also save lives. I have seen it in places like Sioux Falls, South Dakota, where doctors used telehealth to treat rural patients for severe burns following a chemical explosion. I have seen it in the small community of Manokotak, Alaska, where a broadband-enabled otoscope can allow an ENT located in Dillingham to diagnose a child's ear infection before it threatens her hearing.

For years, the FCC has played a key role in supporting the deployment of broadband to these facilities through our Rural Health Care Program. But there's a new trend in telehealth—a trend towards connected care everywhere. The delivery of high-tech, high-quality health care is no longer limited to the confines of connected, brick-and-mortar facilities. With remote patient monitoring and mobile health applications that can be accessed on a smartphone or tablet, we now have the technology to deliver high-quality care directly to patients, regardless of where they are located.

I first learned about this trend from Senator Wicker during a trip to Jackson, Mississippi. I then had the opportunity to see the results first-hand in the Mississippi Delta, where I witnessed how an innovative remote patient monitoring program run by the University of Mississippi Medical Center was making a real difference for members of this very rural community.

The Delta is ground zero for the country's diabetes epidemic. It sees diabetes at rates that are about twice the national average. Ruleville, Mississippi is no exception to this trend. In addition to having one of the highest rates of diabetes in the state, more than half of all children in this area live in poverty. That only adds to the challenge of finding and accessing affordable health care. But using remote patient monitoring technologies, the pilot program was helping to treat and control cases of Type II Diabetes in the Delta.

One of the program's patients is Ms. Annie. She noticed the first signs of her diabetes when she woke up one day with blurred vision. After seeing little progress in managing her diabetes with traditional care options, Ms. Annie signed up for a remote patient monitoring pilot program. She walked me through the blood sugar monitor that she uses at home. The monitor uses Bluetooth to connect to her iPad, which chimes every morning to remind her to check her blood sugar. Ms. Annie then pricks her finger and her A1C level is displayed on-screen. Based on that, the iPad app suggests appropriate actions—from a particular food or exercise, to watching a relevant video. If she forgets to enter her numbers that day, she'll get a phone call from a nurse. With this technology, Ms. Annie's A1C levels have gone down and she says she's never felt better.

At the FCC, we are taking steps to align public policy in support of this movement in telehealth. Last August, we initiated a proceeding to provide up to $100 million for connected care pilots that benefit low-income patients, including those eligible for Medicaid and veterans. It would support a limited number of projects over a two- or three-year period, with controls in place to measure and verify the benefits, costs, and savings associated with connected care. It could take the results we've already seen in the limited trials to date and help replicate those results in communities across the country.

From chronic disease management to pediatric cardiology, from PTSD to opioid dependency, this pilot has the potential to make a real difference for low-income individuals that might lack access to quality health care today. I anticipate moving to the next stage of the proceeding this summer, and I look forward to working with my colleagues at the FCC, Federal and state partners, members of the Committee, and all stakeholders as we stand up the Connected Care Pilot Program.

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In closing, I want to thank you again Chairman Wicker, Ranking Member Cantwell, and Members of the Committee for holding this hearing and for the opportunity to testify. I look forward to continuing to work with you on reforms that will accelerate the buildout of broadband networks and the opportunity it enables. I welcome the chance to answer your questions.

Senator WICKER. Well, thank you very much, and it's clear, I think, to every member of the Committee that we have a lot of brainpower and knowledge in front of us.

Let me see if I can start off this way. Ms. Rosenworcel and Mr. Pai, let me give you one minute each to have you comment on something that Commissioner Carr said.

Internet speeds are up nearly 40 percent, more fiber broadband built to homes than ever before, number of small cells increased from 13,000 in 2017 to 60,000. The Digital Divide is being narrowed by almost 20 percent. Investment in broadband networks is now increasing.

As we all know, the Commission on a partisan basis passed the Internet Freedom Act dealing with this net neutrality issue some year and a half ago.

How does the rhetoric involved in this square with these facts that Mr. Carr has outlined in his testimony? First you, Mrs. Rosenworcel, and then Mr. Pai.

Ms. ROSENWORCEL. Sure. I support net neutrality. I believe the FCC made a mistake when it rolled back its Internet policies in 2017. I'm not alone. Eighty-six percent of the American public agrees with me that we made a mistake. They don't like the idea that our broadband providers now have the legal right to block websites and censor content.

If you actually unpack some of that data, what you'll find is during the period after the FCC adopted net neutrality rules, our speeds went up at even greater percentages. Moreover, with respect to investment, which I acknowledge we should all care about, we should stop looking at the data that advocates filed before this agency and start looking at what they tell Wall Street on earnings calls.

Major CEOs have said that our rules have not a whit of difference in their decisions about investment and network deployment. Moreover, that data suggests that their capital expenditures have actually decreased in the last year.

So I would challenge the data that my colleagues have offered because I think the American public are right when they say they want net neutrality to be the law of the land.

Senator WICKER. OK. Well, thank you for that minute-long answer.

Ms. ROSENWORCEL. You're welcome.

Senator WICKER. Chairman Pai, your turn.

Mr. PAI. I appreciate the question, Chairman Wicker, and I think you put your finger on one of the central problems in this entire debate, if you can call it that, which is the rhetoric has tended to obscure the facts.

When we made our decision, there were several predictions clearly made, including by some elected officials. This was the end of the Internet as we know it. You will have to pay $5 per tweet. The Internet will work one word at a time. Our Internet will look like Portugal's, ironically a country that has net neutrality regulations.

A year after our decision in December 2018, the results were in. As my colleague pointed out, Internet speeds have been up. Infrastructure investment is up. The Internet remains free and open and all of these parades of horrible have been dismissed.

Meanwhile, I think that my statement in November 2017 when I outlined the proposal has proved prescient. The greatest threat to a free and open Internet has been the unregulated Silicon Valley tech giants that do, in fact, today decide what you see and what you don't. There's no transparency, there's no consumer protection, and I think bipartisan members of both chambers have now come to that realization.

Meanwhile, the other unfortunate thing is that this entire debate obscures the common ground that is out there. I have long said that I would support legislation, bipartisan legislation out of this body that would ban blocking, ban throttling, ban any competitive paid prioritization, and require every ISP in this country transparency. That is common ground that can go on one page.

Senator WICKER. Thank you very much, and I appreciate both of you trying to give concise answers to a very, very controversial and complicated issue.

Let's talk about 5G and rural providers. Chairman Pai, mid-band spectrum is critical to us winning the race to 5G. How soon do you expect the FCC to take action to make C-band spectrum available for 5G in the way that it's both efficient and equitable?

Mr. PAI. Appreciate the question, Chairman Wicker, and I salute Commissioner O'Rielly for his leadership on this issue, as well.

We are working through some of the very complicated issues with respect to the C-band. We look forward to moving forward as quickly as we can but even just a couple days ago, we received a very complex auction design from one of the parties that has a solution that we need to evaluate. So we're working through it as quickly as we can.

In the meantime, we're moving forward on other bands, including the 2.5, 3.5, and other bands, as well.

In addition, as you might know, in the context of the Sprint/T-Mobile transaction, one of the commitments the parties have made is to build out substantially three-quarters of the United States in 3 years and 88 percent within 6 years their mid-band spectrum assets. That is a critical commitment that will benefit all Americans, especially in Rural America.

Senator WICKER. Thank you very much.

Senator Cantwell.

Senator CANTWELL. Thank you, Mr. Chairman.

I thank the Commissioners for being here. And your view, I don't know, it's reminding me of, you know, the notion that Al Gore created the internet. Chairman Pai is trying to equate the actions of the FCC with somehow enabling or forecasting the great growth of the internet economy.

I guarantee you we live in an information age, and it is going to continue to grow. The question becomes whether we're going to make sure that, as some of our Commissioners have said, that is easily or evenly distributed, and when 21.3 Americans still lack access to high-speed broadband, and 76 percent of rural Americans have no choice among broadband providers, or three cable Internet companies have access to 70 percent of the market, it's no wonder the National Cable Association changed their name to the Internet Broadcasting Association. They don't even want to be associated with the bad behaviors of some of these industry tactics.

So I am concerned about the number of cases that have been brought by Attorney Generals across the United States in the last year for everything from not adequately disclosing fees to consumers. Massachusetts Comcast settled a case in which the company was accused of violating consumer protection laws on fees. Charter settled a consumer fraud case with the New York Attorney General for $172 million for failing to deliver broadband speeds and reliability it promised. Minnesota Attorney General charged Comcast with misrepresenting cable prices.

So I just see this plethora of consumer issues, and then, as Mr. Starks accurately pointed out, there are real security issues, you know.

I hardly heard the word "cybersecurity," other than Mr. Starks' presentation, and yet I guarantee you that is one of the Number 1 concerns of Americans. So I don't know if Ms. Rosenworcel, Mr. Starks, if either of you want to comment on the number of AG cases that we're seeing across America on consumer interests and what else the FCC should be doing.

Ms. ROSENWORCEL. Thank you for the question.

You're right, Senator Cantwell. Consumers do not feel like they're being taken care of by the FCC. State Attorneys General are bringing these suits because we are not doing anything to increase consumer protection when it comes to broadband and communications services that are so essential to modern life.

As you point out, we're not doing enough to think about security either. I mean, the first duty of a public servant is public safety and we should be thinking about cybersecurity and cyber hygiene in everything we do and not just on alternate Thursdays when it occurs to us to pay attention.

With 5G networks, we're going to have connected reality everywhere. We've got to figure out now how to build security in from the start.

Mr. STARKS. Yes, very briefly. Thank you for the question, Senator.

I completely agree that the case that Comcast settled there in Washington was basically where they were putting additional things on folks' bill without them knowing about it. That is the classic definition of an interest that has to be vindicated by consumers and it has to be done on our end. Better coordination with state attorneys general, better enforcement of our consumer protection rules I think is warranted.

Senator CANTWELL. What do you think we should do next on the Huawei case, Mr. Starks?

Mr. STARKS. Yes, it's an issue—thank you for the question.

It's an issue that I am studying. I think, first, we need to understand the scope of it. We do know that there are small rural carriers that have this in their networks. We know that folks are focused on it going forward. I think we need to look at the harms that we have sitting in there right now. So we need to understand the scope of it. We need to understand whether it is just on the edge of the networks with radios and antennas or whether it actually goes to the routers and servers that are actually the core of the network, and we need to make sure that we specifically focus on this national security interest. I think it is critically important.

Senator CANTWELL. And I'm assuming the FCC does get secure briefings on the amount of attacks to our networks on a very frequent basis, is that correct?

Mr. STARKS. Yes, we do have security briefings.

Senator CANTWELL. OK. So you're well aware of the amount of infrastructure issues that are facing us and the fact that this is a very serious issue.

So I don't want people thinking that, you know, we have this horrible choice, that we either give them access because they're already in our infrastructure, or we disable infrastructure. We've got to come up with a better process here because allowing for a back door for a nation that basically doesn't honor the same principles of government prohibiting access to information, we have a challenge here, and so we need to address it.

Mr. STARKS. I think that's right, and in particular the FCC has a specific role that I think we need to lean into. It's very important that we protect the telecommunications networks that we're in charge of.

Senator CANTWELL. Thank you, Mr. Chairman.

Senator WICKER. Thank you.

Senator Capito.

STATEMENT OF HON. SHELLEY MOORE CAPITO, U.S. SENATOR FROM WEST VIRGINIA

Senator CAPITO. Thank you, Mr. Chairman. Thank you all for your service and thanks for the great information.

We had a hearing several weeks ago on broadband mapping and I think my first comment was it was déjà vu all over again. We've had numerous hearings on mapping. The data that you all generate doesn't match with what the anecdotal data that we see in our communities and I think this is universal on the Committee.

So we joined together, I did, with Senators Schatz, Moran, and Tester to introduce The Broadband Data Improvement Act and there are a lot of different bills out that would do this, but our bill would reform and eliminate the current 477 process and would encourage shape file formats, a more granular approach that we think would be more accurate, at least this is what we're looking for, and the new information would give us better data, and I think it would also include sharing data across different government entities without different programs to promote this.

So I was just wondering, Chairman, if you have a reaction to that on the broadband mapping issue and what improvements that you might see that could come about because of the improved more granular data that would generate.

Mr. PAI. I appreciate the question, Senator, and as you and I've discussed before, we've seen it in places like Capon Springs and Wardensville.

Senator CAPITO. Right.

Mr. PAI. We need to understand where broadband is and, more importantly, where it isn't to target those resources.

I support the purpose of your legislation. I understand that our staffs have been in touch and consistent with the announcement I made this morning, we would look forward to working with you as we try to make those maps more granular, more accurate, and ultimately more useful to the Commission and, of course, to you.

Senator CAPITO. What has been the biggest roadblock and why can't we get there or why haven't we gotten there yet with the mapping system?

Mr. PAI. The fundamental problem is that there are only two ways to thread this needle. Either, Number 1, the FCC hires thousands and thousands of people to go out into the country and to verify or we have to rely on information we get from the outside and that's why it's part of this mapping initiative that we're going to be rolling out, we're going to be looking at other sources of information, like crowdsourcing, to try to get a better sense of where broadband is.

Senator CAPITO. Mr. O'Rielly, I think we talked about this. Thank you for your visit the other day.

We talked about the need for coordination among agencies to eliminate any kind of overbuilding. You mentioned you're interested in delivering more to those who have no service at all rather than upping service to folks that are already—could you talk about the different coordinating capacities to be able to maximize and make our process more efficient?

Mr. O'RIELLY. First, let me congratulate and thank the Committee for its leadership on legislation to solve this issue.

I do worry that funding from different agencies will go to upgrade speeds in areas that already have service. We can dispute what the number is in terms of the unserved population, but there is definitely an unserved population and that is my focus.

The hardest to serve—we did the easy cases. We did the medium cases. We did the medium hard cases, and now we're in the really hard cases to solve and that's where I'm trying to spend my time.

I've been talking about the Remote Areas Fund for quite awhile and I know the Chairman's working on that issue and so that's really important.

But coordination is so key and coordination matters to the eye of the beholder and, you know, if that's just a conversation between agencies, that's not sufficient. It's dealing with the fact that we have funding that is going to particular areas that not be duplicated in other programs, whether it's Department of Agriculture, whether it's NTIA, or elsewhere, those dollars not go to the same places to fund competing interests by the Federal Government.

Senator CAPITO. Thank you.

Mr. Carr, I think the FCC generated or reported terms of telehealth that showed some coordination—I think former Commissioner Clyburn sort of brought this to my attention, that showed that the health of where you are—there is some overlap as to the deployment of broadband within your area.

Obviously in West Virginia, we have challenges with our deployment but also challenges with our health. What is the FCC doing with this data in terms of telehealth and how can we assist you? I believe you're coming to West Virginia maybe this summer where we're going to do a deep dive on this. If you could talk about that?

Mr. CARR. Thank you, Senator.

You're exactly right. There is a correlation between low income, lack of broadband access, and poor health outcomes, and the FCC, I think, could have a role to play in addressing that. That's why we're launching this new Connected Care Pilot Program designed for low-income consumers to make sure that regardless of where they're living, they can have access to high-quality care because particularly in Rural America, we're facing a doctor divide where we're going to be short 42,000 to 120,000 doctors in the near term and technology can help address that.

Senator CAPITO. I look forward to having you visit. Thank you.

Senator WICKER. Thank you, Senator Capito.

Senator Blumenthal.

STATEMENT OF HON. RICHARD BLUMENTHAL, U.S. SENATOR FROM CONNECTICUT

Senator BLUMENTHAL. Thanks, Mr. Chairman. Thanks for having this hearing and thank you all for being here today.

As I listened to some of this commentary, I am reminded of my own experience as Attorney General when we brought actions because of failures and lapses at the Federal level to enforce Federal law and protect consumers and I have this feeling we're going to look back on these hearings and say that the FCC and maybe this Committee fiddled and mumbled while our privacy and security burned. That's what's happening at a pace that raises the urgency of strong protection for consumers and Americans generally.

I am absolutely appalled that a year after the first disclosure that mobile carriers are selling geo-location information to subscribers, endangering domestic violence survivors, that we still have no word, none, from the FCC on its supposed investigation of this pratice.

When are we going to hear something, Chairman Pai?

Mr. PAI. Appreciate the question, Senator.

The FCC's career staff has been diligently investigating this case. I can't comment on——

Senator BLUMENTHAL. Can you give us a date by when you will have some briefing, some results, some proposals for action?

Mr. PAI. My understanding is that the staff is wrapping up the investigation and will be coming to me with recommendations in the near future. I don't have a specific date that I can offer you, however. They're still continuing to work on the case.

Senator BLUMENTHAL. Well, I think that's really regretful, particularly for the possibly millions of Americans who will be in endangered, literally in endangered because of that continuing sale of geo-location information.

Let me go to robocalls. The rule that was proposed enables the carriers to charge consumers. My robocall act would require carriers to provide free call blocking technology to consumers. I support the TRACED Act. I commend the new rule, but as Commissioner Rosenworcel has said, this service should be free. It should be required to be free. Do you agree?

Mr. PAI. Senator, my expectation is that it would be free.

Senator BLUMENTHAL. Your expectation is, but why not include it in the rule?

Mr. PAI. Well, Senator, that's part of the reason why, thanks to Commissioner Starks' suggestion, we incorporated it into our decision last week, the regulatory steps that would be necessary for us to move forward, if we get word that telephone carriers are in fact charging for that service.

Senator BLUMENTHAL. And how long will that take?

Mr. PAI. The report will be due to us in a year but today, there are call blocking tools by default that are offered for free.

Senator BLUMENTHAL. Why not require it right now? Why not support the robocall cop-out?

Mr. PAI. For one thing, Senator, we would have notice and comment issues that we would have to go through if you were going to regulate the rates for that particular service. It was important to me to set the legal foundation straight now so carriers——

Senator BLUMENTHAL. Do you personally support requiring that this service be free?

Mr. PAI. Oh, I personally do want these services to be free, yes, both as a regulator and as a consumer.

Senator BLUMENTHAL. And you'd require a mandate for it to be free?

Mr. PAI. From Congress, are you asking, or from——

Senator BLUMENTHAL. From the FCC or Congress?

Mr. PAI. Well, certainly if Congress passes that legislation, we would administer it according to its terms, yes.

Senator BLUMENTHAL. Let me turn to the T-Mobile/Sprint merger. On May 20, you announced your support for it. As you know, I strongly oppose it. A number of my colleagues have joined me in a letter, very detailed letter calling attention to the fact that the vague promises from T-Mobile about Boost Mobile temporary price limits and build-out would address the significant harms to competition, consumers, and workers with no guarantee of those kinds of benefits in those vague promises, and state AGs again have highlighted this issue.

I want to focus on potential interference from the White House because it has been reported that the Department of Justice staff is considering recommending blocking the deal. In response to that news, Fox Business reported that the White House, and I'm quoting, "wants this deal done and that its economic advisors have been encouraging the Assistant Attorney General for Antitrust, Mr. Delrahim, to go against the advice of its staff."

Have you been contacted by anyone in the White House or are you aware of any Commissioner being contacted about the T-Mobile/Sprint merger?

Mr. PAI. I have not been contacted and I am not aware of any other contacts with my fellow commissioners, no.

Senator BLUMENTHAL. Will you report any such contact to this Committee?

Mr. PAI. Yes.

Senator BLUMENTHAL. When you announced on May 20 that you opposed the deal, were you aware that the Department of Justice staff was skeptical about it?

Mr. PAI. No, I don't have any judgment—I don't have any reason to believe they were skeptical or favorable one way or the other.

Senator BLUMENTHAL. My time has expired. Thank you, Mr. Chairman.

Senator WICKER. Thank you, Senator Blumenthal.

Before I recognize Senator Scott, I hope the Committee will indulge me on this.

Mr. Starks, it seems everyone agrees that the robocall fix should be free. Commissioner Pai said there are notice and hearing requirements that had to be complied with. Is that the way you see it?

Mr. STARKS. Senator, yes. Thank you for the question.

The Order states out very clearly the expectation that it is free. We set forth and I voted for a mechanism to institute a rulemaking should we understand that carriers are not offering this for free. We are specifically going to have carriers report to us whether it's being offered for free. If it's not, we'll institute a rulemaking.

Senator WICKER. To have gone ahead and done it would have required notice and hearing, which——

Mr. STARKS. It would not have if we had voted for it the other day, no.

Senator WICKER. So it's your position this could already have been done?

Mr. STARKS. If we had required it, it could have been done. Yes, sir.

Senator WICKER. OK. Well, then we have a difference of interpretation there.

I thank the Committee for indulging me on that little point.

Senator Scott, you are recognized.

STATEMENT OF HON. RICK SCOTT, U.S. SENATOR FROM FLORIDA

Senator SCOTT. Thank you, Chairman.

Chairman Pai, we talked about this a little bit when we met in the office, but we have companies, like Airbus, OneWeb, and other satellite providers, that it's my understanding from what they've told me is they're going to be able to provide satellite service worldwide, including into our rural communities, which we have a lot of them in Florida, that don't have great Internet access now. They don't have good broadband right now, and so they said that within, I guess, what, two or two and a half years, they believe they'll have enough satellites up that they'll be able to provide this and with no Federal reimbursement. It will be basically a service that will be provided and then the consumer will pay just like they pay in any other community.

On the other side, I've talked to people that have come to the Federal Government and are getting $4 plus billion a year to put broadband out in the rural areas.

So where do you think this is going? Do you feel any confidence that the satellite system will work, and will it be able to save us money and help our rural communities even better?

Mr. PAI. Thank you for the question, Senator.

I certainly am optimistic about the prospects for some of the non-geo-stationary satellite constellations that we've approved under this Administration.

I don't pretend to have insight into every single technology that's being deployed. Some are focusing, for example, on industrial IoTs, some are going toward residential broadband, but overall our hope is that they will be successful, that they will be able to provide access and competition at a price point and a speed that will be comparable to what you would get from a terrestrial provider and over time, our hope is that with that injection of competition, we will be able to reduce the amount that we have to expend to build out broadband in those areas.

Our overall preference always is for the private sector to do the job so that we can reduce the burden on America's consumers and taxpayers.

Senator SCOTT. Do any other Commissioners—have you looked at it? Do you have any optimism or skepticism?

Ms. ROSENWORCEL. No. A lot of optimism. I agree with my colleague, the Chairman. We're entering a new commercial space age and we are going to be able to be bringing cost-effective connectivity to remote areas of the globe and this country in ways we've never been able to before.

We're going to have to make sure we monitor it and make sure that we can help that new age come about as soon as possible.

Senator SCOTT. Is there anything we need to do—I mean, my understanding is they're putting satellites up. My understanding is they're not asking for reimbursement. It is also my understanding that they really do believe, everyone I've talked to, that they'll be able to effectively compete with the real broadband.

Is there anything we need to do to make sure that happens because this seems like it's going to help all of our states that have rural areas and mine for sure does?

Mr. PAI. One thing that is important for us to do, I believe, is to update our orbital debris rules. Those rules have been in place since 2004. It has been a decade and a half since we updated them and that's why under my leadership the Commission unanimously, I believe, took a look at updating them to make sure that as we approve these non-geo-stationary satellites, a lot more satellites in space at lower earth orbit, given the potential for orbital debris, it's important to have a conversation about mitigation and I think that's within our authority, given the fact that we license the satellites themselves. The mitigation goes along with that, as I see it.

Ms. ROSENWORCEL. I think there are two things we need to do. First, our Part 25 satellite rules were built for another era of satellite systems when we didn't contemplate constellations with thousands of satellites. We've got to streamline them to reflect the small size of satellites today.

In addition, we do have to update our orbital debris rules. More stuff is going into our skies than ever before, increasing the risk of collision. We've got to manage that before it happens.

Senator SCOTT. What the companies have said to me is there's already a lot of debris up there and a lot of these things are colliding and you just get so much and so I guess at this point it's not a big problem but everybody foresees it to be a problem. So it's something you all are looking at?

Mr. PAI. Very much so, and I can tell you that our International Bureau staff, which handles these issues, have been hard at work not just domestically but in working with foreign counterparts.

Obviously other countries can authorize the launch of these satellites, as well, and so we need to make sure we have the coordinated effort to mitigate the effects of the debris once it's out there.

Ms. ROSENWORCEL. We have so much to do. About 35 years ago, an astronaut dropped a screwdriver in space and it is now hurdling around at over 21,000 miles an hour. That's 10 times faster than the speed of a bullet. So just a small piece of debris in space can have drastic consequences. We've got to figure this out before this new space age nearly takes off.

Senator SCOTT. I think all of us have been in a position, if there's something in legislation that we need to do that's going to accelerate the use of these low level and low orbit satellites, I think all of us, it'll help our rural communities, we'd be interested.

So thank you very much.

Senator WICKER. Thank you, Senator Scott.

Senator Schatz.

STATEMENT OF HON. BRIAN SCHATZ, U.S. SENATOR FROM HAWAII

Senator SCHATZ. Thank you, Mr. Chairman.

Thank you to the Commissioners for being here.

First of all, for every Commissioner, I have a yes or no question. Do you believe that you affirmatively granted permission for your wireless provider to track and sell your location information when you signed up for service, yes or no?

Mr. PAI. No.

Mr. O'RIELLY. No.

Mr. CARR. No.

Ms. ROSENWORCEL. No.

Mr. STARKS. No.

Senator SCHATZ. Thank you. And let me follow up on the T-Mobile/Sprint merger. Commissioner Pai, yes or no, has the staff completed its analysis and recommendations for the T-Mobile/Sprint transaction?

Mr. PAI. So the staff recommendations, yes.

Senator SCHATZ. Has the staff work been shared with all the Commissioners?

Mr. PAI. We followed the consistent practice, which is that the Chairman leads the transactional review effort and then circulates an order to the——

Senator SCHATZ. Commissioner Rosenworcel, have you seen the staff recommendation?

Ms. ROSENWORCEL. No, I've seen no recommendation.

Senator SCHATZ. Mr. Starks.

Mr. STARKS. No, no recommendation, no engineering analysis, no economic analysis, no.

Senator SCHATZ. Mr. Carr, have you seen the staff recommendation?

Mr. CARR. I've reviewed the entire record that's been presented to me. I've had a yearlong review process, met with stakeholders, and my position at this point is based on my review of the record.

Senator SCHATZ. Mr. O'Rielly.

Mr. O'RIELLY. I've not seen the materials. As the Chairman indicates, it's normal for the Chairman to prepare that document and I look forward to reading it in the coming weeks as he has indicated.

Senator SCHATZ. But you tweeted support for the merger?

Mr. O'RIELLY. I said I was inclined to support, based on my ability to read the document, and I intend to read the document——

Senator SCHATZ. Is that normal?

Mr. O'RIELLY. That I read the document? Yes.

Senator SCHATZ. No, not that part. You know what I mean. Is it normal to tweet that you're inclined to support a merger before——

Mr. O'RIELLY. I did not——

Senator SCHATZ.—going through the regular order in the FCC?

Mr. O'RIELLY. I did not comment about mergers ever. This instance was a circumstance where particular publication's going to——

Senator SCHATZ. I guess the question becomes—it's sort of two questions. I have one for you, Mr. O'Rielly, and one for you, Mr. Pai.

What caused you to feel the need to kind of run ahead of the process in this particular instance?

Mr. O'RIELLY. Sure. I was alerted that there was going to be a publication that was going to indicate how I was going to vote and instead of calling that publication and saying—giving them information, I thought it was appropriate to indicate to everyone where I was which was exactly where I've indicated. I'm inclined to support based on the information in the record waiting to see the document and review the materials.

Senator SCHATZ. OK. Mr. Pai, I want to move on and, you know, during your initial confirmation hearings and even in some of the hearings that we had with your predecessor, there was this concern about the FCC suddenly becoming a partisan institution, and I remember multiple both public and private conversations that we've had about our desire to get to more five to zero decisions. That has not come to pass, unfortunately, and as I hear your announcement about broadband mapping, I just wonder whether the Democratic commissioners knew you were going to make that announcement today.

Mr. PAI. Senator, I don't believe any of my colleagues knew and that's one of the things we wanted to introduce was a topic that we know is of great interest to both sides of——

Senator SCHATZ. I mean, if you are a team, if you're an institution, it seems a little weird—one of the foundational concerns of this Committee is the difficulty with getting accurate broadband maps and I understand the desire to make an announcement in a hearing. I get that.

I don't understand why Commissioners Rosenworcel and Starks were out of the loop.

Mr. PAI. Senator, one of the things that has marked this chairmanship has been an unprecedented level of delegation. Under my leadership for the first time in my memory, every member of the sitting Commission has been asked by me personally to lead an effort of significance. For the first time in Commission history that I can remember as a former career staffer, almost every one of our bureau chiefs and office chiefs is a career staffer, not a Democrat and Republican who was brought in from the outside.

Our goal is——

Senator SCHATZ. What about the question that I'm asking about communicating with the other members? That's fine.

Mr. PAI. Yes.

Senator SCHATZ. I stipulate to that. What about the question I'm asking, which is that you just sprung an announcement on your fellow commissioners, and I could see it in their faces, they went huh, that's interesting, and I actually had my staff text to figure out whether they were as surprised as they looked and in fact they were and so I don't want to get into a back and forth, except to say that it is not enough to assign individual projects to members. They have to be in the loop so that you're working together as a commission.

I'll just take this last one for the record. We're all working on broadband mapping, but the difficulty right now is not just getting granular data but the FCC itself was accepting fraudulent data by a company called Barrier-Free Filed Data and claimed that it suddenly went from not serving any census blocks to 1.5 million blocks covering 62 million people.

The FCC failed to catch it and Free Press caught it and so to the extent that we are engaged in magical thinking about the amount of people covered by broadband, it is based on a flawed FCC process, not any partisan dispute between members of this Committee or even members of the Commission.

But to the extent that you went 62 million, that sounds right and then an outside organization had to come in and say that's nuts and then you caught it. It demonstrates the weak foundation on which you're doing your mapping, and I'll take a response for the record.

Thank you.

Senator WICKER. Thank you, Senator Schatz.

Senator Gardner.

STATEMENT OF HON. CORY GARDNER, U.S. SENATOR FROM COLORADO

Senator GARDNER. Thank you, Mr. Chairman.

Thank you to the Commissioners for your service and for being here today.

I'm going to mix my audio-visual metaphors here and sound like a broken record. We need to fix the orphan issue, the orphan county issue in Southwest Colorado. We need to get it fixed once and for all. We've spoken many times at these hearings and in private conversations about the importance of getting this fixed.

Commissioner Pai, I have very significant concerns with your support of the Kansas City Chiefs——

[Laughter.]

Senator GARDNER.—and the problem is the constituents of Southwestern Colorado, who are Broncos fans, they're very concerned about this, and so I've not forgotten your allegiance, but I think we need to address this problem so we don't have to have this conversation again.

In all seriousness, it's far more than about the Broncos, although it's hard to believe that for LaPlata and Montezuma Counties, we need to make sure that they are welcomed into the Colorado News and Colorado programming that they should have.

So it's about local news, weather forecasts, and generally my constituents who are connected to the rest of the state through every other measure should be connected through television, as well.

I'd like to applaud the Commission for approving LaPlata County's initial market modification request and for recently recirculating an item related to the petition, and I'd encourage member Commissioners to vote expeditiously on this item and hope that we settle the pending objections in favor of LaPlata County quickly.

And so, Chairman Pai, if you haven't voted already, will you commit to voting as soon as possible, as soon as you can, and continue to help resolve this longstanding issue?

Mr. PAI. So, Senator, notwithstanding your constituents' misunderstanding of what is in their football interests, we did circulate some time ago an Order along those lines. I approved it immediately. We're still waiting for votes to come in, but I would encourage, as well, my Commissioners to vote.

Senator GARDNER. Will you be voting soon and expeditiously on this?

Mr. PAI. I've already voted. I believe the majority of the Commission has voted and we're just looking for the final votes to come in.

Senator GARDNER. Mr. O'Rielly.

Mr. O'RIELLY. I have voted for the matter.

Senator GARDNER. Thank you. Mr. Carr.

Mr. CARR. I have voted for it, yes.

Senator GARDNER. Thank you. Ms. Rosenworcel.

Ms. ROSENWORCEL. I have voted for it, as well.

Senator GARDNER. Thank you. Mr. Starks.

Mr. STARKS. Unfortunately, it sounds like I need to go vote as expeditiously as possible, Senator. Thank you.

Senator GARDNER. Thank you very much. I appreciate that.

Commissioner Carr, just a brief comment on the robocall situation. According to YouMail Call Registry, about 2.1 million robocalls per day, that's just last month alone, 2.1 million robocalls per day. That's 24.5 robocalls per second. This unending effort to the annoyance of every Coloradan, it doesn't matter where you live, who you are, or where you are at, it affects everyone. Scammers trying to take advantage of the unsuspecting and innocent who simply answer their phone, give private information, it has to stop.

So I'm a proud supporter and co-sponsor of the TRACED Act that Senator Thune has put forward, and I know that it passed the Senate with overwhelming bipartisan support. I'm hopeful that it can go to the House and be signed into law as soon as possible and it's going to require more than congressional action, though, to minimize and eliminate this challenge.

How will the FCC work to ensure that we reduce robocalls even further?

Mr. CARR. Thank you, Senator.

Americans are fed up with robocalls. They're sick and tired. We took a vote a week ago that's going to enable carriers to block many calls before they even reach them on their phone. The legislation that you referenced would give us additional authorities to help continue the crackdown on robocalls and that will be another step in the right direction.

Senator GARDNER. Thank you.

Ms. Rosenworcel, any comments on that?

Ms. ROSENWORCEL. Sure. We need to do three things. We need to put in place call authentication technology which is in the TRACED Act, but we could start it tomorrow and we should.

We should set up a division to manage and help consumers with robocalls. It's 60 percent of the complaints that come into the Commission. Our work should reflect their concerns.

And third, every single thing we do to help block robocalls, we've got to find a way to make it free to consumers. They didn't cause this mess on their lines. They shouldn't have to pay for it.

Senator GARDNER. Thank you very much for that.

Chairman Pai, you talked a little bit about the maps already with Senator Schatz and others. The FCC relies on Form 477 data and other maps for their decisions and it affects funding. It's important these maps are accurate and that they're made accurate and quickly and so looking at the FCC maps of Colorado, as a rural Coloradan, I can tell you where the maps are inaccurate. I can tell you what mile marker they are inaccurate and I can tell you what mile marker they pick up again when we get out of that area that's ruby red on the map or shows coverage.

Senator Manchin and I recently introduced a bill to tackle this issue and my colleagues, Chairman Wicker, Senator Capito, have also been very active in this space, as well, and so I would just hope that you would commit to working with us to improve the granularity and accurateness of the FCC's broadband maps as quickly as you can.

Mr. PAI. Absolutely, Senator. That's something I've seen for myself in your state.

Senator GARDNER. Thank you.

Commissioner O'Rielly, the famous Eaglet Project that needlessly overbuild rural telecom operators in the Eastern Plains left isolated school districts on the Western Slope without adequate access to broadband.

Senator Cortez Masto and I have introduced the Access Broadband Act which would help improve oversight and coordination among Federal agencies that provide broadband funding.

The Universal Service Fund is critically important to rural telecom companies in Colorado that depend on these resources to make sure that we have all four corners of our great state covered. So how are you working with the FCC to make sure that any additional Federal broadband dollars aren't overbuilding existing networks and systems?

Mr. O'RIELLY. Two parts. One is working within the agency and two is working with other agencies and so I've been raising the alarm that there's only so much role that we can have and that's why I would ask for additional legislation. You've been working on it. It has been very helpful. I think that will help other agencies recognize the importance to make sure that we're not duplicating.

Within the agency, I've been raising the alarm that we not have different programs within the Universal Service Fund, the same area, and that's something that's ongoing.

Senator GARDNER. Thank you, Commissioner O'Rielly.

Chairman Pai, we'll come back to you with questions for the record on the Kansas City Chiefs. So thank you, Mr. Chairman.

Senator WICKER. Thank you, Senator Gardner.

Senator Duckworth.

STATEMENT OF HON. TAMMY DUCKWORTH, U.S. SENATOR FROM ILLINOIS

Senator DUCKWORTH. Thank you, Mr. Chairman.

I have no comments on the Chiefs.

[Laughter.]

Senator DUCKWORTH. I want to start by thanking the FCC for its work to address predatory prison phone rates. Each of you has publicly stated your support for clarifying the FCC's legal authority to end the gouging of vulnerable families. To keep things simple, if any of you no longer supports these efforts, please raise your hand. Great. For the record, no one raised their hand.

Chairman Pai, yes or no, if your intrastate authority is clarified, will you reaffirm your commitment to exercising it expeditiously?

Mr. PAI. Yes.

Senator DUCKWORTH. Thank you. That's good because yesterday, Senators Schatz, Markey, Portman, Booker, and King joined me in introducing the bipartisan Martha Wright-Reed Just and Reasonable Communications Act. Our targeted bipartisan legislation would permit the FCC to use its traditional procedures and authorities to end unjust and unreasonable rates, thereby keeping families together and enhancing community safety by reducing recidivism.

The bill is actually named in honor of Martha Wright-Reed, who for years struggled to keep in touch with her grandson while he was in prison. As is often the case, her grandson was moved repeatedly while incarcerated from Virginia to Ohio to Arizona to Kentucky to Pennsylvania. This made it impossible for her to make in-person visits.

As is common, phone calls quickly became the primary method for their family to keep in touch. Her fight for affordable phone rates lasted for more than 20 years but led to the FCC's interim rules implemented by former Commissioner Clyburn who supports my legislation, and today Mrs. Wright's grandson, Ulandes Cortez, is with us in the audience. Wave your hand.

Mr. Cortez, I want to thank you for your family's dedication to this very important issue.

Mr. Chairman, Mr. Cortez recently wrote about his family's experiences and the unfortunes of addressing this issue, and I request unanimous consent that his op-ed be entered into the record.

Senator WICKER. Without objection.

Senator DUCKWORTH. Thank you.

[The information referred to follows:]

Truthout—Op-Ed—Prisons & Policing

MY GRANDMOTHER'S 20–YEAR FIGHT FOR PRISON PHONE JUSTICE

A prisoner makes one of her daily allotment of six phone calls at the York Community Reintegration Center on May 24, 2016, in Niantic, Connecticut.
John Moore/Getty Images

By Ulandis Forte, *Truthout* Published June 21, 2019

Imagine having to choose between purchasing groceries or making a phone call to speak with your incarcerated loved one this week. That's the dilemma facing thousands of families across the country bearing the burden of high-cost *prison phone calls.*

In states like Arkansas, according to the Prison Policy Initiative, it can still cost up to *$24 for a 15-minute phone call* with someone detained at a jail—a plight poignantly dramatized in Ava DuVernay's new series about the Central Park jogger case, "*When They See Us.*" In the series, DuVernay shows us how varied levels of contact and access impacted the now-exonerated men at the heart of the case differently over the course of their years of imprisonment.

This continued injustice is why, for more than 20 years, my grandmother, Martha Wright-Reed, fought the prison phone industry for affordable phone rates. Now, I am working to keep up the fight.

My own incarceration was the initial motivation for my grandmother's struggle for phone justice. However, over time, we realized this fight was much bigger than us; it was about keeping families together across the United States. We also knew that lowering the price of long-distance calls was only one aspect of this ongoing battle.

My grandmother's perseverance and commitment finally bore fruit in 2013 when the Federal Communications Commission (FCC) announced they would cap long-distance prison phone rates. I couldn't have been more proud of my grandmother, who, in her final years, achieved such tremendous change.

This past week, Sen. Tammy Duckworth introduced the *Martha Wright-Reed Just and Reasonable Communications Act* to continue my grandmother's legacy by pushing for fairer prison phone rates across the country. This legislation would restore the FCC's authority to regulate the prison phone industry and cap the rate of prison phone calls from state and local prisons.

My grandmother often had to choose between speaking with me or purchasing the medication she needed to stay alive.

We need to be clear about how prisons disappear our loved ones and break apart families, especially *Black and Brown families.* This isolation from the very communities that provide love and support to incarcerated individuals does not facilitate rehabilitation; it only creates further pain. In episode four of "When They See Us," one of the wrongly convicted men, Korey Wise, conveys his desperation for contact with his mother by literally reaching over the physical barrier between them, begging her to visit him more often as the guards drag him away.

While I was incarcerated, I too, witnessed firsthand how many people suffered great emotional and mental distress from the isolation that incarceration creates. I was incarcerated at a time in the 1990s not long after the Central Park jogger case in New York, when the prison population was exploding nationwide, so I am deeply moved by today's growing conversation around criminal legal reform.

Seeing others suffer from this kind of disconnection made me even more grateful for my phone calls with my grandmother, which were so unaffordable she often had to choose between speaking with me or purchasing the medication she needed to stay alive. These are the tough decisions families like mine must make every day when the prison phone industry goes unregulated.

When I learned that my grandmother was fighting the high cost of these calls, I was skeptical that we could ever win. Despite her being a fearless and resilient fighter, I knew these prison phone companies were literally *profiting* off the misfortune of others and had repeatedly proved to be morally bankrupt. So, when we won in 2013, it reminded me that our agency as directly impacted people is never easily diminished.

My grandmother died in 2015, and I am proud to see her legacy continue to empower other families fighting for their right to communicate with their incarcerated loved ones today.

The fight for prison phone justice is critical to the larger prison reform movement because our ability to communicate with our loved ones is essential to our success when we come home after incarceration, something which I hope people take away from DuVernay's series.

The support I had from my family throughout my incarceration made such a difference—not only was I able to return to my community with my closest relationships intact, but it inspired me to get involved and to make a positive difference for other families that were experiencing what we had gone through.

Supporting the Martha Wright-Reed Just and Reasonable Communications Act means speaking up for those who haven't typically been seen or heard in Washington, D.C., but who deserve and need communication rights as much as anyone else.

That's a vision my grandmother spent more than two decades fighting for, a vision that helped me through some of the most difficult moments of my life, and a vision that I am committed to carrying forward alongside so many others that our system has tried to make disappear.

Ulandis Forte

Ulandis Forte is an activist fighting for prison phone justice, prison reform and inspiring change to better humanity.

Senator DUCKWORTH. Sorry. I should have said Committee Chairman.

My personal legislation enjoys the support of nearly 100 civil rights groups, technology organizations, phone companies, law enforcement entities and experts, yet some who want to protect their golden goose argue that eliminating predatory phone rates and fees will impact public safety.

Commissioner Rosenworcel, there's nothing in my bill that prevents law enforcement from receiving fair compensation for the costs of offering and managing inmate communications. Instead, my bipartisan bill clarifies that inmates and their families should receive just and reasonable charges, drawing on Section 202 of the Communications Act, and these are not radical ideas. Would you agree with this assessment?

Ms. ROSENWORCEL. I would totally agree with that assessment.

Senator DUCKWORTH. Thank you. The simple fact is that our prison phone system suffers from a market failure. Families are forced to pay outrageous charges because location monopolies are protected from marketplace competition, even as new technologies lower costs for providers.

Again, Commission Rosenworcel, today's inmate communications providers use advanced technologies to cut their costs while maintaining the highest levels of security. Do you agree that my legislation makes clear that the obligations of fairness and just and reasonable rates apply to all inmate communications, regardless of technology used?

Ms. ROSENWORCEL. Yes, it does.

Senator DUCKWORTH. Thank you. Achieving just and reasonable intrastate prison phone rates is not rocket science. We know it can be done because states like Illinois are leading the way.

Over the last decade, the price of a 15-minute in-state call from an Illinois prison has dropped 98 percent. So it went from $16.41 for a 15-minute call to just 14 cents. The same goes for out-of-state calls in Illinois.

A final question. Commissioner Pai, minutes ago, you reaffirmed your commitment to acting expeditiously if you were given authority to address intrastate calls, but the FCC can also do more to enforce its existing 25-cents-per-minute out-of-state rate caps that went into effect more than two years ago.

Rates at some correctional facilities still far exceed that limit and when you factor in excessive fees and kickbacks that do nothing to enhance security, the price skyrockets for struggling families.

Will you commit to meeting with me and some of the advocates I've been working with between now and the end of the year to discuss both out-of-state and in-state inmate communication costs? I'm happy to host it.

Mr. PAI. Senator, I would be happy to meet with you and I would also point out that under my leadership, the Commission blocked a merger of two of the leading providers in this area precisely because we thought that would cause a concentration in the marketplace that would end up raising rates even further.

So I share obviously the goal that you have identified in your remarks.

Senator DUCKWORTH. Thank you.

Mr. Chairman, I'd like to enter into the record letters of support from numerous stakeholders who support my legislation.

Senator WICKER. Without objection. Thank you.

Senator DUCKWORTH. As well as some additional documents that have to do with this issue.

Senator WICKER. Is there objection?

[No objection.]

Senator WICKER. Without objection.

[The information referred to follows:]

June 11, 2019

Senator TAMMY DUCKWORTH,
Washington, DC.

Senator CORY BOOKER,
Washington, DC.

Senator ANGUS KING,
Washington, DC.

Senator ED MARKEY,
Washington, DC.

Senator ROB PORTMAN,
Washington, DC.

Senator BRIAN SCHATZ,
Washington, DC.

Dear Senators Duckworth, Booker, King, Markey, Portman, Schatz:

As nonprofit organizations and community members that support reforms of the criminal justice system to strengthen the ties between incarcerated people and their loved ones, we are proud to endorse the Martha Wright-Reed Just and Reasonable Communications Act of 2019, S. 1764.

For more than fifteen years, families have been calling on the Federal Communications Commission ("FCC") to provide relief from the exorbitant costs that the prison phone companies impose just to stay in touch. But some children still have to pay over a $1/minute to talk to an incarcerated parent. Without regulation, these high costs persist because many prison systems, local jails and detention facilities award monopoly contracts to phone companies that charge the highest rates and therefore share the largest portion of the profits with the correctional institution.[1]

While the Federal Communications Commission had made some progress toward capping rates and fees in recent years, the phone companies fought back, attacking the FCC's jurisdiction over the cost of calls and fees and thereby dismantling most of the previously adopted regulation.[2]

Consistent with FCC Chairman Pai's testimony in his confirmation hearing, the bill is narrowly targeted to clarify the Federal Communications Commission's jurisdiction. It makes clear the FCC is required to ensure "just and reasonable" rates for consumers, rather than only protecting phone company profits. The bill also clarifies that the Federal Communications Commission's authority is technology-neutral, which is particularly timely as many of the companies are using new technology. For example, many correctional facilities have expanded their use of video calling technology, which has not only led to banning of in-person visits,[3] but also threatens to circumvent regulation.

Unfortunately, too often, our Nation's criminal justice policies fail to recognize and support the powerful and positive role families play in rehabilitation. This trend is not only harmful to families trying to stay together during the hardship of incarceration; it is also misguided correctional policy. Improving the ability of families, clergy and others to maintain a relationship with incarcerated people improves the safety of all communities. And yet visiting an incarcerated loved one is already difficult for many. Correctional facilities are often located far away from people's home communities, forcing families to rely on phone calls to stay in touch. A recent study found that more than a third of families surveyed went into debt to cover phone and visitation costs.[4]

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[1] For a detailed overview of the dysfunctional system see *Please Deposit All of Your Money: Kickbacks, Rates, and Hidden Fees in the Jail Phone Industry* by Drew Kukorowski, Peter Wagner and Leah Sakala (Prison Policy Initiative), May 8, 2013, available at *https://www.prisonpolicy.org/phones/*

[2] For an overview of the litigation, see *Prison Phone Update: Appellate Court Deals Major Blow to Prisoners and Their Families* by Carrie Wilkinson (Prison Legal News), June 30, 2017, available at *https://www.prisonlegalnews.org/news/2017/jun/30/prison-phone-update-appellate-court-deals-major-blow-prisoners-and-their-families/*

[3] Seventy-four percent of local jails across the country that adopt video visitation eliminate in-person visits. See: *Screening Out Family Time: The for-profit video visitation industry in prisons and jails* by Bernadette Rabuy and Peter Wagner (Prison Policy Initiative), January 2015, available at *https://www.prisonpolicy.org/visitation/report.html*

[4] *Who Pays? The True Cost of Incarceration on Families* by Saneta deVuono-powell, Chris Schweidler, Alicia Walters, and Azadeh Zohrabi (Ella Baker Center for Human Rights, Forward

The Martha Wright-Reed Just and Reasonable Communications Act would enable the Federal Communications Commission to revive the work it has already completed to reduce the cost of telephone communication home from prisons and jails and ensure the new law will be effective regardless of which technology is used to provide communications services. It will also ensure that incarcerated people with disabilities receive protection.

We are hopeful that the Martha Wright-Reed Just and Reasonable Communications Act will rein in the exploitation of families of incarcerated people throughout the country. This bill recognizes and respects the humanity of incarcerated people by offering them the same consumer protections afforded to the rest of the Nation's consumers.

On behalf of the millions of children of incarcerated parents, we thank you for your leadership and look forward to working with you to ensure passage of the Martha Wright-Reed Just and Reasonable Communications Act.

Sincerely,

A New PATH (Parents for Addiction Treatment & Healing)

A New Way of Life Re-Entry Project

Access Humboldt

American Psychological Association

California Families Against Solitary Confinement

California National Organization for Women

Californians United for a Responsible Budget (CURB)

Center on Juvenile and Criminal Justice

Church of Scientology National Affairs Office

Community Works

Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces

CURE (Citizens United for Rehabilitation of Errants)

Robin Davenport

Professor Sharon Dolovich, UCLA School of Law, Director, UCLA Prison Law and Policy Program

Ella Baker Center for Human Rights

End Solitary Santa Cruz County

Face To Face Knox

FAIR CHANCE PROJECT

First Friends of NJ & NY

FedCURE

Whitney Foskey

Franciscan Action Network

Free Press Action

Freedom for Immigrants (formerly CIVIC)

Friends of Guest House

Human Rights Defense Center

Illinois Campaign for Prison Phone Justice

Interfaith Action for Human Rights

International CURE

Islamic Society of North America

Jamila Hammami, MSW

Joanne Hessmiller, Ph.D., LCSW

The Jordan Center

Justice Strategies

Kristie E. Puckett, MA

The Ladies of Hope Ministries (The LOHM)

LatinoJustice PRLDEF

Lawyers Committee for Civil Rights of the San Francisco Bay Area

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Together, and Research Action Design) September 2015, available at: *http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf*

The Leadership Conference on Civil and Human Rights
Legal Services for Prisoners With Children
Life for Pot
LPS/LIFE Progressive Services Group Inc
Maine Prisoner Advocacy Coalition (MPAC)
Middle Ground Prison Reform (Arizona)
Michigan Citizens for Justice
David Miles
NAACP
National Advocacy Center of the Sisters of the Good Shepherd
National Association of Social Workers
National Consumer Law Center, on behalf of its low-income clients
The National Council for Incarcerated and Formerly Incarcerated Women and Girls
National Hispanic Media Coalition
New Jersey Advocates for Immigrant Detainees
No Exceptions Prison Collective
Opportunities, Alternatives and Resources of Tompkins County, NY
Oregon CURE
OVEC-Ohio Valley Environmental Coalition
Place4Grace
Prison Policy Initiative
Public Knowledge
Queer Detainee Empowerment Project
Riverside All of Us or None
Topeka K. Sam
Tamara Sanford
Penny Schoner
Judy Schuler
Gail Smith
Social Workers Against Solitary Confinement
Starting Over, Inc
StoptheDrugWar.org
Urbana-Champaign Independent Media Center
UCLA Prison Law and Policy Program
Union for Reform Judaism
The United Methodist Church—General Board of Church and Society
United Church of Christ, OC Inc.
Voice of the Experienced
Volunteers for Hancock Jail (ME) Residents (VHJR)
Working Narratives
Worth Rises

AMERICAN JAIL ASSOCIATION

1135 Professional Court | Hagerstown, MD 21740-5853
Phone: 301.790.3930 | Fax: 301.790.2941

June 11, 2019

The Honorable Roger Wicker
Chairman, Senate Committee on Commerce, Science, and Transportation
512 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Maria Cantwell
Ranking Member, Senate Committee on Commerce, Science, and Transportation
425 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Wicker and Ranking Member Cantwell:

On behalf of the American Jail Association (AJA), the only national voice of professionals who work in and operate the more than 3,500 jails throughout the United States, we write in support of the Martha Wright-Reed Just and Reasonable Communications Act. AJA has been on the front lines of this issue for nearly a decade, advocating for just and reasonable rates that protect individuals detained in jail and the needs of the facility.

Since the beginning of AJA's involvement on this issue, AJA has come to the table seeking to present decision makers in Washington DC with the information necessary to understand the uniqueness of each jail throughout the country and its operations and budget constraints. AJA knows there are bad actors throughout the country and that because of exorbitant rates, individuals in jails are unable to afford regular communications with their family, friends, and attorneys. AJA members' primary goal is to ensure proper rehabilitation to lower recidivism, while protecting the public. To guarantee a smooth transition out of jail, individuals require regular communications with home and the communities that they will eventually return to. Inmates with regular community contact are less likely to recidivate and are better behaved during incarceration. Thus, telephone, video, and other communications also increase the safety of those who work in jails, AJA's members.

For these reasons, AJA supports the Martha Wright-Reed Just and Reasonable Communications Act. The bill does not provide a prescriptive solution but allows for the Federal Communications Commission (FCC) to go through its rulemaking process, considering the needs of stakeholders, and putting in place a solution that will serve the needs of all involved. We encourage the Committee to consider this bill and stand ready to provide a perspective from the professionals on the ground, as needed.

Sincerely,

Elias Diggins President	Louis Quinones, Jr. Legislative Chair	Robert J. Kasabian Executive Director

The American Jail Association is a national, nonprofit organization that supports the professionals who operate our Nation's jails. It is the only national association that focuses exclusively on issues specific to the operations of local correctional facilities. Through AJA's technical assistance, certification programs, on-site and regional training seminars, and the Annual Conference & Jail Expo, AJA lives up to its role as the leader in the field of American jails.

June 11, 2019

Hon. ROGER WICKER, Chairman,
U.S. Senate Commerce, Science, and Transportation Committee,
Washington, DC.

Hon. MARIA CANTWELL, Ranking Member,
U.S. Senate Commerce, Science, and Transportation Committee,
Washington, DC.

SUPPORT THE MARTHA REED–WRIGHT JUST AND REASONABLE COMMUNICATIONS ACT OF 2019

Dear Senators Wicker and Cantwell:

We write to you as organizations and individuals that represent a wide variety of views on many issues, but that stand united on the need to reduce the exorbitant rates for telephone calls from prisons. A lack of competition in the correctional calling market is not only costing clergy and families extraordinary sums each year, it also deters communication with incarcerated people, thus contributing to recidivism which wastes hundreds of millions of dollars each year in the U.S.[1] We therefore write to express our support for the Martha Reed-Wright Just and Reasonable Communications Act of 2019, which would empower the Federal Communications Commission to address this problem. In your positions as Chairmen of the Senate Commerce, Science and Transportation Committee and the Subcommittee on Communications, Technology, Innovation, and the Internet, respectively, we urge you to hold a hearing and support this legislation.

The costs of telephone calls from incarcerated people are often extraordinarily high—well beyond what most people in our country pay for telephone service. In some cities in the U.S., it could cost a grandmother or a pastor $25 for a 15-minute phone call to jail.[2] Further, a mother attempting to continue her children's relationship with their incarcerated father could be charged $40 for a 40-minute remote video call—as could an attorney planning an incarcerated person's legal strategy.[3] A pastor seeking to deposit money into a prepaid account could be forced to pay more than $3 in fees to deposit $5 into the account.[4]

These calling rates and fees cannot be lowered through market forces because consumers cannot choose the telephone company they use to communicate with prisons. Prisons and jails often select telephone companies based on which company will offer the highest fee or commission to the correctional institution.[5] Therefore, many prisons and jails choose the most expensive service and the costs are passed on to incarcerated people's families in the form of higher telephone rates. On top of these high rates, telephone companies impose additional fees that further inflate their profits on the backs of inmate families and support systems.

The strain on families is extreme. The Prison Policy Initiative estimated in 2013 that families are spending as much as $386 million per year on fees—fees imposed over the costs of the calls themselves.[6] An Ella Baker Center report found 1 in 3 families of incarcerated people went into debt to cover phone and prison costs.[7]

Unjust and unreasonable charges negatively impact the safety and security of communities in the United States by exacerbating recidivism and damaging relationships between people in prison and their support systems. The rate of recidivism

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[1] Pew Center on the States, *State of Recidivism* at 26 (2011) (if 41 states could reduce their recidivism rates by 10 percent, they could save more than $635 million in averted prison costs in one year); Illinois Sentencing Advisory Council, The High Cost of Recidivism (2015) (recidivism will cost Illinois over $16.7 billion over five years); Friedman, Alex, *Lowering Recidivism through Family Communication,* Prison Legal News (April 15, 2014) (summarizing studies showing communication reduces recidivism).

[2] The Wright Petitioners et al, Federal Communications Commission Solutions 2020 Comments, Exhibit A, Public Notice No. 342689 (filed Jan. 11, 2017) (chart detailing intrastate calling rates in late 2016 around the U.S.).

[3] Securus, Facilities and Pricing, Henry County, IL, available at: *https://securustech.net/facilities-and-pricing/-/asset_publisher/oBC88rqvvSp0/content/henry-county-il* (visited 5/25/18). See also Letter from Lee Petro, counsel for Wright Petitioners to Marlene Dortch, Secretary, FCC, Attachments B, C and E (detailing average per minute rates for Securus video visitation by remote family and attorneys and for telephone calls in Michigan).

[4] GTL Connect Network Deposit Amount calculator for Columbia County OR Jail, found at *https://www.connectnetwork.com/webapp/jsps/cn/makepayment/paymentflow.cn* (visited 5/25/18).

[5] Kukorowski, Peter, *The Price to Call Home* (Prison Policy Initiative 2012).

[6] Kukorowski, Peter, *et al., Please Deposit All of Your Money* at 10 (Prison Policy Initiative 2013).

[7] Ella Baker Center, *True Cost of Incarceration* at 9 (2015).

is at crisis levels in the U.S.: within nine years of being released, five out of six, or 83 percent, of state prisoners were arrested at least once;[8] within three years, 67 percent of ex-prisoners re-offend and 52 percent are re-incarcerated.[9] We should not disincentivize communication with incarcerated people—the very behavior that will help us keep families together and in turn reduce future crime.

The Federal Communications Commission possesses the expertise to take a hard look at the costs of providing telephone service in order to ensure just and reasonable rates for all telephone calls and fees in the absence of competition. Congress had delegated that authority to the Commission, until a recent court decision sharply constricted the Commission's previous reform efforts.[10] The Martha Reed-Wright Just and Reasonable Communications Act of 2019 would clarify Congress' intent that the Federal Communications Commission protect all consumers and prevent these outrageous rates that negatively impact the safety of all people in the United States.

Sincerely,

Fr. Michael Bryant, Catholic Chaplain, D.C. Jail
The Rt. Rev. Mariann Edgar Budde, Bishop, Episcopal Diocese of Washington
John Clark (Retired), Warden and Assistant Director, Federal Bureau of Prisons
Sheriff Pete Dougherty, Jefferson County, West Virginia
Kenneth L. Faiver (Retired), Director of Health Care, Michigan Department of Corrections
Ron Hampton, past Executive Director of the National Black Police Association, Inc.
Robert A. Hood, M.Ed., Warden (Retired), Federal "Supermax" Penitentiary
Ken Kerle, founding editor, American Jails Magazine
Stefan LoBuglio, Former Chief of Pre-Release and Reentry Services Division, Montgomery County Department of Correction and Rehabilitation
Sheriff Ross Mirkarimi (Retired), San Francisco, CA
Robert Woodson, Founder and President, Woodson Center

American Civil Liberties Union
Asian Americans Advancing Justice—AAJC
Christian Reformed Church, Office of Social Justice
Friends Committee on National Legislation
Healing Communities USA
Interfaith Action for Human Rights
Interfaith Worker Justice
International CURE
The Leadership Conference on Civil and Human Rights
Michigan Citizens for Justice
Middle Ground Prison Reform (Arizona)
NAACP
National Alliance of Faith and Justice
National Consumer Law Center, on behalf of its low-income clients
Oregon CURE
Prison Policy Initiative
R Street Institute
U.S. Conference of Catholic Bishops
Unitarian Universalist Association
United Church of Christ, OC Inc.

ASSOCIATION OF METROPOLITAN WATER AGENCIES
WATER ENVIRONMENT FEDERATION
WATER UTILITY CLIMATE ALLIANCE
June 11, 2019

Hon. ROGER WICKER,
Chairman,
Committee on Commerce, Science, and Transportation,
United States Senate,
Washington, DC.

Hon. MARIA CANTWELL,
Ranking Member,
Committee on Commerce, Science, and Transportation,
United States Senate,
Washington, DC.

Dear Chairman Wicker and Ranking Member Cantwell:

As representatives of the Nation's water sector professionals and utilities, we recently became aware of a Federal Communications Commission (FCC) plan to auction spectrum in the 24 GHz band to support commercial 5G broadband service. We understand that some stakeholders have raised concerns that the use of 5G in this band could negatively affect satellite data used for weather forecasting, so we therefore ask you to urge the FCC to refrain from taking any action that could carry detrimental effects to the Nation's weather forecasting capabilities.

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[8] Mariel Alper, Ph.D., *et al., 2018 Update on Prisoner Recidivism,* Bureau of Justice Statistics (2018).
[9] Patrick A. Langan, Ph.D., David J. Levin, Ph.D., *Recidivism Of Prisoners Released In 1994,* Bureau of Justice Statistics (2002).
[10] *Global Tel*Link v. Federal Communications Commission,* 866 F.3d 397 (D.C. Cir. 2017).

Modern meteorological forecasts rely on satellite-based observations from the National Oceanic and Atmospheric Administration (NOAA), and these observations include measurements of atmospheric water vapor that must be collected in the band of spectrum between 23.6 and 24 GHz. Meteorologists use this data to predict, among other things, local storm precipitation rates and totals, flood risk and sea-surface height variations, and tropical cyclone trajectories and intensities. But this narrow band of spectrum is also critical to ensuring consistent water service throughout the country.

Our organizations represent the local water systems and professionals that provide service to millions of Americans from coast to coast. To carry out this responsibility, water utilities employ skilled staff who are dedicated to monitoring and interpreting the latest long- and short-term weather forecasts that are informed in part by NOAA's water vapor measurements. This information is used to make critical water supply planning and storm preparedness decisions that ensure water service will continue uninterrupted, no matter the weather.

For example, Seattle Public Utilities uses NOAA's quantitative precipitation forecasts to prepare for and respond to urban flooding, comply with water quality regulations, manage regional water supply, and protect endangered species. The utility believes that a degradation of these forecasts as a result of spectrum interference would impair its ability to maintain public safety and environmental quality.

We understand that concerns have been raised in and out of government about the potential for 5G broadband uses in the 24 GHz band to interfere with NOAA's water vapor observations in the adjacent 23.6–24 GHz band. In particular, we are aware of a March 27, 2019 U.S. Navy memo that warned that this interference "will result in a partial-to-complete loss of remotely sensed water-vapor measurements," with these impacts "concentrated in urban areas of the United States first."

The loss of this key meteorological forecasting metric for the most populated regions of the United States would severely undercut the ability of water utility managers to manage resources in such a way as to ensure that ample water supplies remain available in times of drought, that sufficient storage capacity is available in times of heavy precipitation, and that all necessary preparedness activities have been undertaken in advance of extreme weather events. Denver Water, for example, uses NOAA data to forecast and manage streamflow rates, and less accurate information, particularly ahead of major weather events, could increase risks of flooding to downstream facilities and commwtlties, resulting in increased costs to ratepayers. Additionally, less accurate forecasts could lead the utility to impose unnecessary water use restrictions on customers leading to loss in customer trust and increasing costs on users. Simply put, the loss of water vapor spectrum measurement data in the 24 GHz band would jeopardize the quality and reliability of municipal water service that Americans have come to expect.

As the Commerce, Science, and Transportation Committee conducts an oversight hearing of the FCC on June 12, our organizations ask you to make commissioners aware of the critical importance of preserving the 23.6–24 GHz spectrum band for NOAA's use, and demand that the FCC halt any activities that could threaten weather forecasting capabilities until the preservation of NOAA's band can be guaranteed.

Thank you for your attention to this important matter.

Sincerely,

Association of Metropolitan Water Agencies
Water Environment Federation
Water Utility Climate Alliance

CC: Commerce, Science, and Transportation Committee members

THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS
Washington, DC, June 11, 2019

Senator Roger Wicker,
Chairman,
Committee on Commerce, Science, and Transportation,
U.S. Senate,

Senator Maria Cantwell,
Ranking Member,
Committee on Commerce, Science, and Transportation,
U. S. Senate,

Dear Chairman Wicker and Ranking Member Cantwell:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States, we write to thank the Committee for holding an oversight hearing of the Federal Communications Commission (FCC). We want to highlight two critical civil rights priorities under the FCC's purview for the Committee's attention. We ask you to: (1) carefully review the FCC's quadrennial review process and its failure to address the dearth of ownership by women and people of color; and (2) closely examine the FCC's recent proposals to drastically gut the Lifeline program, the only program that helps low-income consumers access vital communications services, such as broadband.

Media Ownership and Equal Employment Opportunity

Media diversity has long been a top priority of The Leadership Conference because we understand that meaningful protection of civil rights and advancement of key policy objectives rely in great measure on an accurate, independent, and diverse media that serves our constituencies. Racial, gender, and ethnic diversity in broadcast media ownership is essential to preserving a multitude of opinions and points of view in the marketplace of ideas that is accessible to all people. The Local Radio Ownership Rule, the Local Television Ownership Rule, and the Dual Network Rule (collectively the "Media Ownership Rules") serve the public interest and media diversity by assuring an accurate, diverse, and independent media and are the last bulwark against already abysmally low ownership diversity rates.

Despite their vitally important role in maintaining ownership diversity, the FCC proposes to modify or eliminate all of the Media Ownership Rules.[1] Its proposals to radically restructure the radio industry are particularly concerning following similarly detrimental changes to TV regulation in 2017. Moreover, the agency made these proposals without having collected sufficient data to know what effect eliminating the rules will have on ownership diversity.[2] The Commission has persistently failed to obtain reliable data on which broadcast outlets are controlled by women and people of color. The Commission has never corrected identified reporting gaps and numerical tracking errors, nor has it released a report summarizing the 2017 race and gender broadcast data, although it has had these data since March 2018.[3]

The numbers we do have, while unreliable, paint a dire picture of ownership diversity. Women own only 7.4 percent of all full power TV stations, Hispanics and Latinos control 4.5 percent of those stations, and all tracked racial groups collectively controlled 2.6 percent of all full power TV stations.[4] As the following examples show, these groups are, overall, not making progress. African-American ownership has had zero or negative percent increases in all television categories, with African Americans owning less than 180 stations in all categories.[5] In Commercial AM and FM radio, African Americans are experiencing fractions of even 1 percent of

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[1] MB Docket No. 18–349; FCC 18–179, 2018 WL 6589803 (2018) [hereinafter "2018 Quadrennial Regulatory Review"].

[2] Comments, Leadership Conference on Civil and Human Rights, 2018 Quadrennial Regulatory Review, at 2.

[3] Media Bureau Restricted FRN Public Notice, DA 17–1088, 32 F.C.C.Rcd.9330 (2017).

[4] *Federal Communications Commission*'s Industry Analysis Division of the Media Bureau. "Third Report on Ownership of Commercial Broadcast Stations from FCC Form 323 Ownership Data as of October 1, 2015." May 2017. *https://www.fcc.gov/biennial-forms-323-and-323-e-broadcast-ownership-data-and-reports.*

[5] *Id. Full Power Commercial TV:* "Black or African Americans owned 12 stations (0.9 percent) in 2015 and 9 stations (0.6 percent) in 2013" at 7. For Class A TV: "Black or African Americans owned 1 station (0.3 percent) in 2015 and 8 stations (2.0 percent) in 2013" at 9. For Low Power TV: "Black or African Americans owned 8 stations (0.7 percent) in 2015 and 16 stations (1.3 percent) in 2013" at 11.

growth.[6] Asian full-power TV ownership dropped precipitously between 2013 and 2015, from 1.4 percent to .7 percent.[7] Female ownership growth is only 2 percent, with women now owning less than 11 percent of any industry despite making up over half the U.S. population.[8] In all, Hispanics and non-Hispanic minorities are experiencing no more than 3 percent growth in media ownership.[9]

Given the apparent lack of broadcast ownership diversity, which we can only assume to be true without reliable data, we urge the Committee to press the FCC to collect and publish thorough and reliable data on broadcast ownership by women and people of color before eliminating any of the remaining Media Ownership Rules. Furthermore, prior to adopting any further relaxation of the Rules, we hope the Committee will insist that the FCC analyze any proposal specifically for its likely impact on increasing or decreasing media ownership diversity.

The Committee should also consider legislative options, such as the minority tax certificate, to promote diversity in broadcasting and to work with appropriations colleagues to end budget restrictions on the Commission's ability to enforce its local television ownership rules, as those rules promote diversity of ownership.

Similarly, the Commission recently rejected a request to consider its failure to comply with its statutory obligation to collect equal employment opportunity (EEO) data in the broadcast and cable industries. While the FCC spent time and resources considering an inconsequential standardized form that was no longer needed,[10] it did not address its failure to implement a 2004 Bush Administration decision to collect employment data across broadcasting and cable as required by Sections 334 and 554 of the Communications Act.[11] The FCC has not complied with these laws in nearly twenty years.

Broadband Access for All

The Federal Lifeline program provides eligible low-income households with a $9.25 monthly discount on qualified voice and/or broadband service.[12] It has never been more important to ensure that low-income people, communities of color, and other vulnerable populations have access to affordable communications services, especially high-speed broadband. Reliable high-speed broadband is essential for students of color to do their homework, for working mothers to earn their degrees online at night, and for senior citizens and people with disabilities to access tele-health services. Lifeline helps to provide those services.

The program began in the Reagan administration, in recognition that subsidized telephone service for low-income Americans was essential to full participation in the Nation's political, social, and economic life. In the George W. Bush administration, Lifeline was modernized to include wireless phone service. The Obama administration further modernized the Lifeline program by extending its support to broadband service.

Despite this progress, the FCC is considering and has issued proposals that would gut the program. The FCC is now considering pitting the four universal service pro-

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[6] *Id* citing Commercial AM Radio statistics: "Black or African Americans owned 87 stations (2.5 percent) in 2015 and 93 stations (2.5 percent) in 2013" at 13; Commercial FM radio statistics: "Black or African Americans owned 72 stations (1.3 percent) in 2015 and 73 stations (1.3 percent) in 2013" at 15.

[7] Id at 7.

[8] *Id* citing Broadcast ownership and gender statistics: "Women collectively or individually held a majority of the voting interests14 in 1,024 broadcast stations, consisting of 102 full power commercial television stations (7.4 percent) of 1,385 stations; 15 Class A television stations (9.3 percent) of 396 stations; 125 low power television stations (11.0 percent) of 1,137 stations; 314 commercial AM radio stations (8.9 percent) of 3,509 stations; and 446 commercial FM radio stations (8.1 percent) of 5,492 stations."

[9] *Id* citing "Hispanic/Latino persons collectively or individually held a majority of the voting interests in 671 broadcast stations, consisting of 62 full power commercial television stations (4.5 percent) of 1,385 stations; 53 Class A television stations (13.4 percent) of 396 stations; 152 low power television stations (13.4 percent) of 1,137 stations; 176 commercial AM radio stations (5.0 percent) of 3,509 stations; and 228 commercial FM radio stations (4.2 percent) of 5,492 stations" at 3; "Racial minorities collectively or individually held a majority of the voting interests in 402 broadcast stations, consisting of 36 full power commercial television stations (2.6 percent) of 1,385 stations; 7 Class A television stations (1.8 percent) of 396 stations; 27 low power television stations (2.4 percent) of 1,137 stations; 204 commercial AM radio stations (5.8 percent) of 3,509 stations; and 128 commercial FM radio stations (2.3 percent) of 5,492 stations" at 4.

[10] Elimination of Obligation to File Broadcast MidTerm Report (Form 397) Under Section 73.2080(f)(2), Report & Order, FCC 19–10 (rel. Feb. 15, 2019).

[11] *Id.,* Statement of Commissioner Geoffrey Starks; 47 U.S.C. § 334(a) (mandating retention of broadcast reporting rules); see also 47 U.S.C. § 554(d)(3)(A) (imposing obligation on MVPDs).

[12] USAC Spreadsheet, *LI08 Lifeline Subscribers by State or Jurisdiction.* Available at *https://www.usac.org/about/tools/fcc/filings/2019/q2.aspx.*

grams, including Lifeline, against one another with a budget cap.[13] Further, the FCC's proposed rulemaking in 2017 proposes to eliminate non-facilities-based providers, which would leave a majority of Lifeline subscribers with no service.[14] It also would also impose a "self-enforcing" budget cap, which would create unpredictability and drive eligible low-income households away from the program. Finally, the proposal would mandate a co-pay, which would effectively eliminate the most popular Lifeline services, leaving some of our most vulnerable communities unconnected. These proposed changes would devastate families currently enrolled in the program and further widen the digital divide. They have received virtually no support in the FCC's docket and at the same time, the mere possibility of their adoption is destabilizing the program. These proposals should be rejected, and the rulemaking should be promptly brought to a close. At the same time, it is unclear whether the FCC is placing a sufficient priority on the actions that would assist low-income people, such as ensuring access to the most complete databases for the new Lifeline national eligibility verifier and ensuring that the verification process is accessible and usable for low-income people.

We urge the Committee to inquire about the status of these proposals and urge the FCC Commissioners to commit to protecting the Lifeline program and ensuring access to broadband and other eligible communications services for everyone.

We look forward to working with the Committee to encourage and promote media ownership opportunities for women and people of color, as well as to ensure the continued viability of the Lifeline program. Please contact Leadership Conference Media/Telecommunications Co-Chairs Cheryl Leanza, United Church of Christ, Office of Communication, Inc., at 202–904–2168, or Kate Ruane, American Civil Liberties Union, at (202) 675–2309, or Corrine Yu, Leadership Conference Senior Program Director at 202–466–5670, if you would like to discuss the above issues.

Sincerely,

VANITA GUPTA,
President and CEO.

KRISTINE LUCIUS,
Executive Vice President for Policy and Government Affairs.

June 11, 2019

Hon. ROGER WICKER,
Chairman, Senate Committee on Commerce, Science and Technology,

Hon. MARIA CANTWELL,
Ranking Member, Senate Committee on Commerce, Science and Technology.

Dear Chairman Wicker and Ranking Member Cantwell:

As part of your oversight hearing related to the Federal Communications Commission, I am submitting this letter on behalf of the American Association of State Highway and Transportation Officials (AASHTO). AASHTO represents all 50 states, the District of Columbia, and Puerto Rico and serves as a liaison between state departments of transportation (state DOTs) and the Federal government. The top priority for AASHTO and the state DOTs has been, and will remain, the safety of all transportation system users. An emerging technology that could significantly improve the safety of our transportation system are connected vehicles (CVs) that would create a cooperative transportation environment and is enabled by Vehicle-to-Everything (V2X) communications. Cooperative systems achieved through communication between vehicles, infrastructure, and other users will provide an enhanced layer of safety and must be advanced. This ability to communicate will be essential for extending the range of vehicle-based sensing and achieving the full potential of safety benefits envisioned by connected and automated vehicles (CAVs). AASHTO and the state DOTs believe that the deployment of CAVs will yield significant transportation safety benefits just like seat belts and airbags did in the 1980s and 1990s.

An integral part of enabling a CV environment is V2X communications and the 5.9 GHz wireless spectrum that is currently allocated solely for transportation safety purposes. Allocated by the FCC in 1999 for the safety of the public, there have

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[13] *https://www.fcc.gov/document/fcc-initiates-evaluation-funding-usf;* see also Eggerton, "FCC's O'Reilly Promotes Cap on USF Fund," Broadcasting & Cable (April 2, 2019).

[14] *Bridging the Digital Divide for Low-Income Consumers et al,* Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 32 FC Rcd 10475 (2017) ("2017 NPRM").

been recent developments where other industries and associations have advocated for the 5.9 GHz band to be reallocated for other purposes because it is currently not being utilized to its highest potential. The reality is that in order to realize the full potential of a CV environment, an unprecedented amount of collaboration between the private and public sectors will have to occur on a scale not currently required between transportation infrastructure owners and operators (IOOs) and original equipment manufacturers (OEMs). Already, the public and private sectors have invested hundreds of millions of dollars to develop and deploy CV technologies and this collaboration will continue to take time to develop further and it is critical that the current 5.9 GHz band continue to be reserved for transportation safety purposes.

As IOO of the Nation's surface transportation infrastructure, state and local transportation agencies are at the core of creating the CV environment. While automakers and device manufacturers (aka OEMs) will dictate availability of vehicular equipment, transportation agencies will control the deployment and operation of roadside infrastructure and the incorporation of CV technologies into infrastructure applications. Only through a strong partnership between USDOT, IOOs, and OEMs will the maximum potential benefits to safety and mobility be realized.

AASHTO recognizes that there is no current agreement among the transportation industry on which technology will be used to broadly deploy V2X applications. AASHTO's position is that the only existing technology ready for deployment to enable V2X communications using the 5.9 GHz spectrum is DSRC. As documented in numerous different reports, demonstrations, and research projects on the subject,[1] there are many advantages to using DSRC, the most important being that it is ready for deployment today. For example, an effort led by State and local public-sector transportation IOOs is the national Signal Phase and Timing (SPaT) Challenge.[2] Under this initiative, over 200 infrastructure communications devices have already been deployed with more than 2,100 planned by 2020 under this initiative in 26 States and 45 cities with a total investment of over $38 million. Furthermore, it is the goal of the SPaT Challenge to deploy a DSRC-based V2X communications infrastructure with SPaT broadcasts in at least one corridor with at least 20 signalized intersections, in each of the 50 States by January 2020. There are other trade associations and companies pushing for competing technologies that use the 5.9 GHz spectrum including LTE C–V2X and 5G New Radio that are purported to be better than DSRC. While other V2X technologies are being developed and tested, the most important advantage of DSRC is that it is ready for deployment *today* which no other technology can claim at this time. However, AASHTO understands and appreciates the fact that this technology will most definitely evolve over time.

The current debate among stakeholders in the transportation industry on how best to use the 5.9 GHz spectrum should not be utilized as an excuse to open the spectrum for non-transportation safety purposes. Rather, it must be seen as a reason to continue to preserve the spectrum because the transportation industry needs and wants to use the spectrum for transportation safety and a CV environment can only be created if there is a spectrum available with which CV technologies can use to communicate. Thus, continuing to preserve the spectrum will create a greater imperative for USDOT, IOOs, and OEMs to continue their strong partnership to determine a way forward to use the spectrum. And, AASHTO stands ready to support this endeavor in any way we can.

In closing, AASHTO's members understand that a CV environment holds the potential to support a fundamental advance in ensuring the safety of our surface transportation system. While the vehicle component and infrastructure component of the transportation system have traditionally been only loosely coupled (through static signing and markings, dynamic message signs, traffic censors, etc.), CV technology will allow these components to work actively together—creating a fully cooperative transportation environment. This provides the potential for significant safety improvements, reduction in congestion, reduced fuel consumption, lowered emissions, and improved traveler experience. However, in order for this future to become a reality, the 5.9 GHz spectrum must be preserved for transportation safety purposes.

[1] Please see *http://cav.transportation.org*

[2] More information on the SPaT Challenge is available here: *https://transportationops.org/spatchallenge*

If you would like to discuss the issues raised in this letter, please contact Matthew Hardy, Ph.D., AASHTO's Program Director for Planning and Performance Management at (202) 624–3625.

Sincerely,

JIM TYMON,
Executive Director,
American Association of State Highway and Transportation Officials.

INTELLIGENT TRANSPORTATION SOCIETY OF AMERICA
June 12, 2019

Hon. ROGER WICKER,
Chair
Committee on Commerce, Science, and Transportation,
United States Senate
Washington, DC.

Hon. MARIA CANTWELL,
Ranking Member,
Committee on Commerce, Science, and Transportation,
United States Senate
Washington, DC.

Dear Chairman Wicker and Ranking Member Cantwell:

In anticipation of the Senate Committee on Commerce, Science, and Transportation's upcoming hearing entitled "Oversight of the Federal Communications Commission," the Intelligent Transportation Society of America (ITS America) writes to underscore that the Federal Communications Commission (FCC) embraced the use of spectrum in the 5.9 GHz band to promote the development of technology that saves lives and improves the safety of roadways. It is time to move past the regulatory uncertainty that has hung like a cloud for the past six years and provide automakers and transportation operators the environment they need to make our transportation system safer and save lives. It is time to accelerate the deployment of Vehicle-to-Everything (V2X) safety transportation communications technologies.

New and developing V2X technology that depends on the 5.9 GHz band is allowing us to finally address the lives lost on our Nation's roads. Vehicle-to-Vehicle (V2V), Vehicle-to-Infrastructure (V2I), and Vehicle-to-Pedestrian (V2P)—collectively referred to as V2X—have incredible potential to dramatically improve the safety, accessibility, and operational performance of our roads and vehicle safety; this includes all V2X technologies—Dedicated Short Range Communications (DSRC) as well as Cellular vehicle-to-everything (C–V2X).

Safety is the top priority of the Nation's transportation system. According to the U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA), 37,133 people lost their lives in motor vehicle crashes in 2017, which roughly breaks down to a little more than 100 fatalities per day. V2V deployments available today include systems that provide emergency braking and the ability for vehicles to be the "eyes and ears" of other vehicles. Non-Line-of-Sight awareness means that drivers and vehicles can see around corners and receive information about hazards in the roadway, even if they cannot see the hazard. V2V communications help move traffic more efficiently with demand responsive traffic signaling, which allows emergency response vehicles to preempt signals.

V2I provides vehicles and drivers information about infrastructure operations—weather and pavement condition, how signals are directing traffic, and even the location of potential hazards at intersections and other critical road safety hotspots. V2I applications include red light violation warnings, reduced speed zone warnings, curve speed warnings, and spot weather impact warnings. V2I soon will support other applications that will disseminate the condition of the infrastructure, such as bridge integrity, and may even collect vehicle data that describes pavement condition. According to NHTSA, V2I technology helps drivers safely negotiate intersections and could help prevent 41 to 55 percent of intersection crashes. Another connected vehicle safety application that helps drivers with left turns at intersections could help prevent 36 to 62 percent of left-turn crashes, according to NHTSA. In addition to the lives saved, just these two applications alone could prevent up to 592,000 crashes and 270,000 injuries each year.

V2X will enable us to deploy safety solutions to protect vulnerable users of the system, which will be transformational. V2P is an extremely important communications component. In Colorado, where the largest increase was in vulnerable users of the system, fatalities increased from 484 in 2014 to nearly 700 in 2017. By allowing vehicles to communicate with these users through sensors or vehicle-to-device communication, we can significantly reduce the number of pedestrians killed on our roadways.

Public sector agencies can also reap the benefits of V2X. Increasingly, vehicles will rely on digital formatting of roadway information to process roadway rules. ITS America member Regional Transportation Commission of Southern Nevada recently became the first in the world to put roadway information into a digital format. As connected vehicles drive over the actual roadway, they can pick up differences between the "digital" road and the actual road. This could eliminate the need for agencies to manually examine roadways for striping or automatically report potholes instead of waiting for enough drivers to incur tire damage before fixing them. These vehicles will also give an up-to-the-minute snapshot of the system—how it is performing, are there any incidents, live weather conditions, etc. Millions of dollars have already been invested in this effort, including states and cities incorporating connected vehicle technologies into infrastructure. A majority of states and dozens of cities are deploying or planning to deploy connected vehicle technology. V2I deployments include expansions of the Safety Pilot Model Deployment in Ann Arbor (MI), large pilot deployments in New York City, Tampa (FL), and Wyoming, and the Smart City Challenge in Columbus (OH). These technologies can also enhance automated driving systems, which can provide numerous economic, environmental, and societal benefits, such as decreased congestion and fuel consumption and increased access for older adults and people with disabilities.

However, V2X communications are by no means guaranteed. The 5.9 GHz band for V2X is being targeted by cable companies and their supporters who are seeking additional spectrum for WiFi and are aggressively pressuring the FCC to force V2X to share that spectrum with unlicensed consumer broadband devices. Speed matters when safety information is involved. Sharing the band could compromise the speed and put lives at risk. What if a driver knew, in fractions of a second, that an airbag deployed in a car in front of him/her? Alternatively, that the car in front, around the next curve, was sliding on black ice? Or a pedestrian is around the next corner? Thanks to V2X technology, that driver would react—and avoid a crash. Deploying life-saving technologies that allow cars, buses, trucks, bicycles, pedestrians, motorcycles, streetlights, and other infrastructure to talk to each other will ensure more people arrive home safely.

ITS America supports prioritizing the entire 5.9 GHz band for existing, new, and developing V2X technologies. We want to make sure all three phases of testing for the 5.9 GHz band are complete in a timely manner before the FCC rules on whether the spectrum can be shared between V2X operations and unlicensed devices like WiFi. Any unlicensed use in the band should be done without harmful interference to the incumbent technology or other intelligent transportation systems technologies. Finally, it is time to move past the regulatory uncertainty and accelerate the deployment of life saving V2X transportation technologies.

Sincerely,

SHAILEN P. BHATT,
President and CEO,
Intelligent Transportation Society of America.

Cc: Senate Committee on Commerce, Science, and Transportation
Ron Thaniel, ITS America Vice President of Legislative Affairs, *rthaniel@itsa.org*

UNITED STATES SENATE
Washington, DC, June 25, 2019

Hon. ROGER WICKER,
Chairman,
Senate Committee on Commerce,
Science, and Transportation,
Washington, DC.

Hon. MARIA CANTWELL,
Ranking Member,
Senate Committee on Commerce,
Science, and Transportation,
Washington, DC.

Dear Chairman Wicker and Ranking Member Cantwell:

We are writing to request that the Senate Committee on Commerce, Science and Transportation (CST) include *S. 1764, the Martha Reed-Wright Just and Reasonable Communications Act of 2019,* in the next Business Meeting agenda. This important legislation is the result of bipartisan efforts to address long-standing concerns regarding predatory calling rates at prison facilities across the U.S.

Policymakers of all stripes acknowledge that the existing market has failed to produce adequate competition to protect family, clergy, and counsel who communicate with prisoners, inmates and detainees. The *Martha Wright-Reed Just and*

Reasonable Communications Act is a technology-neutral legislative solution that provides the Federal Communications Commission (FCC) with the appropriate authority to address the U.S. Circuit Court of Appeals decision in Global Tel*Link v. FCC. As all five FCC Commissioners recently reaffirmed, they welcome clarity for their authority in this space.

This commonsense technical fix advances three key policy goals:

1. Protects consumers : While existing law requires all intra- and interstate inmate calling to be "fair," the U.S. Court of Appeals found that the term only applies to communications providers, not consumers. This bipartisan legislation makes clear that ratepayers should also receive just and reasonable charges, drawing on the standard in Section 202 of the Communications Act of 1934.
2. Future-proof: When Section 276 of the Communications Act was adopted in 1996, it was written with traditional telephone service and traditional payphones in mind. Today's inmate communications providers utilize advanced technology to lower their costs, promote the highest security and provide innovative services. This legislation makes clear that the obligations of fairness and just and reasonable rates apply to all inmate communications regardless of technology used, like video visitation services and other advanced communications services. This also ensures that the needs of inmates with disabilities is addressed.
3. Targeted purpose: This legislation is precisely targeted at clarifying existing law in light of the U.S. Court of Appeals decision and to permit the FCC to use its traditional procedures and authority to address unjust and unreasonable rates. Just and reasonable communications rates enhance community safety and security by improving the community connections of inmates that studies have shown to reduce recidivism.

After a decade of delay, it is time to address predatory prison phone rates. We respectfully request that the Committee include this bill on its next Business Meeting agenda. Thank you in advance for your consideration of our request.

Sincerely,

TAMMY DUCKWORTH
United States Senator

ROB PORTMAN
United States Senator

BRIAN SCHATZ
United States Senator

CORY A. BOOKER
United States Senator

EDWARD J. MARKEY
United States Senator

ANGUS S. KING, JR.
United States Senator

NCIC INMATE COMMUNICATIONS
July 2, 2019

MARK A. COPELAND,
Senior Policy Advisor,
Office of Tammy Duckworth,
Washington, DC.

Dear Mr. Copeland,

NCIC Inmate Communications (Network Communications International Corp) strongly supports the Martha Wright-Reed Just and Reasonable Communications Act which will help to address the shortcomings of Federal Communications Commission and state regulators in controlling abuses by inmate communications providers.

NCIC has been the most vocal inmate communications provider in supporting the efforts of the FCC and state regulatory agencies to curb excessive calling rates and fees for inmate telephone services going back to the original FCC preceding in 2013. NCIC was instrumental in educating the FCC, state regulators and the corrections industry on the myriad of fees that have been assessed on inmates and their families, and encouraging jail and prison authorities to specifically target elimination of these abusive fees when contracting with inmate phone providers. Often, jail authorities are oblivious to the hidden fees levied by some providers. Further, NCIC was the only company to intervene in support of both the FCC and the Alabama Public Service Commission when several providers appealed both of their rulings.

NCIC applauded the FCC and state regulators for understanding the continued need for jails and prisons to continue to receive compensation to offer and manage their inmate communications, while many attorneys and inmate phone providers were trying to encourage the FCC to regulate or eliminate commission payments.

The Martha Wright-Reed Just and Reasonable Communications Act will permit inmate service providers and correctional facilities to maintain the freedom to structure their agreements as they see fit, but will direct the Federal Communications Commission to close the remaining loopholes that permits some inmate service providers to continue to charge unreasonably high rates and fees to inmates and their families.

Thank you for reaching out to us and don't hesitate to contact me if you have any questions.

Sincerely,

WILLIAM L. POPE,
President.

STATEMENT FROM THE AMERICAN SOCIETY OF CIVIL ENGINEERS

Introduction

Chairman Wicker, Ranking Member Cantwell, and Members of the Senate Committee on Commerce, Science, and Transportation, on behalf of the American Society of Civil Engineers (ASCE),[1] thank you for the opportunity to submit a statement for the record on the importance of preserving the 5.9 GHz band of spectrum for transportation security purposes. ASCE is eager to work with the Committee in 2019 and beyond on finding ways further strengthen our Nation's vital transportation infrastructure systems, its ever-growing relationship with technology, and efforts to enhance human safety.

ASCE and its more than 150,000 members hold paramount public health, safety, and welfare as they design, build, construct, operate, and maintain the built environment. Through this commitment, we recognize the impacts of evolving technologies such as the development of connected and autonomous vehicles (CAV) on our infrastructure systems and advocate for policies that strengthen the quality of our infrastructure system and enhance human safety. Encouraging a strong CAV environment through vehicle-to-vehicle (V2V), vehicle-to-infrastructure (V2I), and vehicle-to-pedestrian (V2P) communication, collectively known as V2X communications, is essential to modernize existing transportation infrastructure, foster connected communities, enhance mobility, and save lives.

Our nation's transportation infrastructures systems are critical to our Nation's public safety, national security, and economic competitiveness. In the 20th Century, the Federal government led the charge in transportation infrastructure by building our Nation's greatest infrastructure systems. Looking back to the Works Progress Administration projects completed during the Great Depression, to the creation of the Interstate Highway System in the 1950s and 1960s, the 20th Century will be remembered as a time when Americans took pride in building a strong and lasting infrastructure foundation.

Now in the 21st Century, we're living in a nation where technology has a fast, growing impact on all aspects of our daily lives, including our surface transportation network. Despite this everchanging landscape in our surface transportation network, investment has not kept pace with this immense growth. Our nation currently has a significant investment gap of nearly $2 trillion over the next ten years. If we hope to repair, modernize, and support the technological growth of our surface transportation infrastructure systems to be competitive in the 21st century marketplace, we must close this gap.

Failure to Act: Closing the Infrastructure Investment Gap for America's Economic Future

Infrastructure is the foundation that connects the Nation's businesses, communities, and people, serves as the backbone to the U.S. economy, and is vital to the Nation's public health and welfare.

In 2016, ASCE released *Failure to Act: Closing the Infrastructure Investment Gap for America's Economic Future*.[2] This economic study analyzed the impact of current infrastructure investment trends on America's GDP, jobs, personal income, and businesses. The study determined that the U.S. is on track to invest only half of

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[1] ASCE was founded in 1852 and is the country's oldest national civil engineering organization. It represents more than 150,000 civil engineers individually in private practice, government, industry, and academia who are dedicated to the advancement of the science and profession of civil engineering. ASCE is a non-profit educational and professional society organized under Part 1.501(c) (3) of the Internal Revenue Code. *www.asce.org,*

[2] Failure to Act: Closing the Infrastructure Investment Gap for America's Economic Future. (2016) *www.asce.org/failuretoact*

what is needed in infrastructure over the next decade. This underinvestment will cause our infrastructure to further degrade, resulting in a loss of 2.5 million jobs, $3.9 trillion in GDP, and $7 trillion in lost business sales by 2025. In addition, poor infrastructure will cost each American family $3,400 a year, which is $9 a day, in personal disposable income. To catch up and fill in the investment gap, we must invest an additional $144 billion each year, which is an average investment of just $4 per day per household. This small investment would put $3,400 back into the wallets of American families each year for a three to one return.

Failure to Act found that our infrastructure challenges are significant, but solvable. Surface transportation categories, including roads, bridges, transit, and commuter rail, face the largest investment gap. We must invest an additional $1 trillion throughout this network to ensure we have an infrastructure system fit for the 21st century and its technology.

Fundamental Criteria for Future Infrastructure Investment

ASCE believes that all infrastructure programs and projects supported by infrastructure investment legislation must meet the following fundamental criteria:

- Investments must provide substantial, long-term benefits to the public and the economy;
- The cost of a project over its entire life span—including designing, building, operating, and maintaining the infrastructure—must be taken into account;
- Projects should be built sustainably and resiliently; and
- Federal investment should leverage state, local, and private investment, not replace these other critical sources of infrastructure funding.

ASCE urges the Committee to focus first on prioritizing those aspects of our infrastructure most in need of repair, replacement, and modernization, to sustain our economy, public health, and safety. As we use these fundamental criteria to rebuild our nation, we must also ensure that the use of ever-changing CAV technology will be able to successfully operate in the built environment as a means to improve our Nation's quality of life.

ASCE's *2017 Infrastructure Report Card*

Infrastructure is the foundation that connects the Nation's businesses, communities, and people, serves as the backbone to the U.S. economy, and is vital to the Nation's public health and welfare. Every four years, ASCE publishes the *Infrastructure Report Card,* which grades 16 major infrastructure categories using a simple "A" to "F" school report card format. ASCE released its *2017 Infrastructure Report Card*[3] giving the Nation's overall infrastructure a grade of "D+," with an investment gap of $2 trillion over the next 10 years—and the total investment needed is nearly $4.6 trillion. Our transportation infrastructure categories earned mixed grades, with bridges "C+" and roads "D," and have a near $1.1 trillion 10-year investment gap.

Transportation Infrastructure Systems

Bridges

The nation has 614,387 bridges, almost four in ten of which are 50 years or older. In 2016, 56,007—9.1 percent—of the Nation's bridges were structurally deficient, meaning that they require significant maintenance, rehabilitation, or replacement. In that same year, on average there were 188 million trips across a structurally deficient bridge each day. While the number of bridges that are in such poor condition and considered structurally deficient is increasing, the average age of America's bridges keeps increasing and many of the Nation's bridges are approaching the end of their design life. The most recent estimate puts the Nation's backlog of bridge rehabilitation needs at $123 billion.

Roads

With over four million miles of roads across the US—15 lane interstates to residential streets—roads are among the most visible and familiar forms of infrastructure. In 2016, U.S. roads carried people and goods over 3.2 trillion miles—or more than 300 round trips between Earth and Pluto. After a slight dip during the 2008 recession, Americans are driving more, and vehicles miles traveled hit a record high in 2016.

Despite the high use and demand, the Nation's roads are often crowded, frequently in poor condition, chronically underfunded, and are becoming more dan-

[3] *https://www.infrastructurereportcard.org/*

gerous. The average commuter spends 42 hours per year delayed in traffic. More than two out of every five miles of the Nation's urban interstates are congested, and traffic delays cost the country $170 billion in wasted time and fuel in 2017. One out of every five miles of highway pavement is in poor condition and our roads have a significant and increasing backlog of rehabilitation needs. After years of decline, driving on unsafe roads has led to 36,750 people dying in 2018 on our Nation's roads.

Technology Solutions

Our nation's elected leaders must act quickly to address the widening investment gap for transportation infrastructure systems. The Federal government has historically been the leader in strengthening our surface transportation network. In addition to direct investment, the Federal government must support technology that benefits vehicle and human safety. Because of this Federal leadership role, ASCE urges Congress to:

- Through the wide scope of CAV available technology, we must continue to ensure that CAVs are a means to improve not only human safety, but also our transportation infrastructure. As CAV technology continues to develop, cooperative systems must be achieved through strong partnerships between vehicles manufacturers, infrastructure owners, government entities, and private sector actors.
- A strong, resilient, and properly maintained infrastructure system is mandatory to maximize the safety benefits that CAV technology.
- Emerging technologies such as CAVs and V2X communications must be considered as viable tools to enhance existing transportation infrastructure, foster connected communities, enhance mobility, and save lives. Therefore, we should encourage technology ready for deployment to enable V2X communications by preserving the 5.9 GHz band for secure, interoperable, and dedicated vehicle safety.

Conclusion: A 21st Century Vision for America's Infrastructure

ASCE thanks the Committee for holding this hearing on a topic that affects the quality of life and livelihood of every American.

In the 21st century, American should be thriving because of its high-quality infrastructure. For the U.S. economy to be the most competitive country in the world, we must have a first-class infrastructure system: transportation systems that move people and goods efficiently, at reasonable cost by land, water, and air; transmission systems that deliver reliable, low-cost power from a wide range of energy sources; and water systems that drive industrial processes as well as the daily functions in our homes. We must also protect technological advances that can increase our mobility and save human lives.

Let's commit today to make our vision of the future a reality—an American infrastructure system that is the source of our prosperity. ASCE and its members look forward to working with the Senate Committee on Commerce, Science, and Transportation to improve America's infrastructure so that every family, community, and business can thrive.

Senator WICKER. Senator Thune.

STATEMENT OF HON. JOHN THUNE,
U.S. SENATOR FROM SOUTH DAKOTA

Senator THUNE. Thank you, Mr. Chairman.

Thanks to all the Commissioners for being here.

Chairman Pai, the MOBILE NOW Act, which I authored with a number of my colleagues on this Committee and which was signed into law last year, recognizes the importance of both licensed and unlicensed use and its implementation will be critical for paving the way for 5G services.

Under your leadership, the FCC has completed successful auctions in the 24 and 28 gigahertz bands. I commend you for bringing this spectrum to market as it is vital to the United States to maintain its global leadership in the race to 5G.

I understand potential interference concerns were raised around the 24 gigahertz band. Could you tell us what steps the Commission took to address those concerns?

Mr. PAI. Appreciate the question, Senator, and more generally your support for our efforts on 5G, including the recently completed 24 gigahertz auction.

In 2016, the previous FCC issued an Order teeing up millimeter wave bands, including the 24 gigahertz band, as a possible test bed for 5G innovation. In 2017, a unanimous Commission identified this 24 gigahertz band and asked all of our Federal agencies, as well as private stakeholders, if you have any thoughts about interference, share them with us, do some studies, let's work together to figure out what the appropriate protection limit should be in terms of the devices and bay stations that are operating in this band.

If there are any concerns, we would be happy to address them and in the absence of that, we'll go with the traditional minus 20 dbm limit that the FCC has adopted for many decades, including for current fixed and microwave links that are adjacent to the 23.6 gigahertz band.

One of our Federal partners said they had a study in 2017. We then worked with them, as well as other Federal stakeholders, to identify some serious flaws in that study. That study was ultimately withdrawn.

At the time the 24 gigahertz auction started, we had not had any validated study that showed that our protection limit was inappropriate. At the 11th hour, however, one of our Federal partners suggested there was such a study. We asked to work with them, get some insight into what their study was showing.

Until May 10, our staff never got the code that was necessary for evaluating that study. So far from it being peer reviewed, it wasn't even reviewed by some of the sister agencies.

In the meantime, we have consistently said that we believe that our protection limits are appropriate and so that's part of the reason why we're evaluating any contrary arguments. One of the agencies, the National Oceanic and Atmospheric Administration (NOAA) has suggested that these—based on their study, that a much higher protection limit is appropriate but in our view, the assumptions that undergird that study are fundamentally flawed.

For example, it ignores the fact that 5G will involve beam forming, essentially adaptive antenna arrays that will more precisely send 5G signals, sort of a rifle shot, if you will, instead of a shotgun blast of 5G spectrum.

In addition, that study assumes that bay stations and user devices will be communicating simultaneously. That is impossible with the TDD technology that is involved in this spectrum, and there are a few other methodological flaws, including the fact that this band we're talking about, 24 gigahertz, is separated from the passive weather sensors in question by over 250 megahertz and so we believe ultimately that we can have the best of both worlds.

We can allocate the 24 gigahertz band for 5G and we can improve tech, the very important passive weather sensors and other functionalities that other agencies and other parts of the government work on.

Senator THUNE. Another band that has been the subject of much debate is the 5.9 gigahertz band. Recognizing the important safety considerations at issue, I've said for years that it would be a positive public policy outcome for consumers if engineers could find a reliable way for both Wi-Fi and connected vehicle technology to safely exist in the 5.9 gigahertz band.

You've acknowledged that this valuable mid-band spectrum has largely been unused for the past two decades. At the same time, the Department of Transportation said that preserving this band for transportation communications is essential for safety now and into the future.

In your view, what is the best way to start a conversation that would give all stakeholders an opportunity to discuss the potential outcomes for this band?

Mr. PAI. Appreciate the question, Senator. You're correct. The spectrum for 22 years has not reached its highest value of use and that's part of the reason why I think it's important to have an open conversation.

I appreciated the chance I had to share my view with the Secretary of Transportation herself. In our view, at least, we need to make sure that 75 megahertz spectrum is dedicated to important functionalities. One of the reasons why we need to have this conversation about it in the Notice of Proposed Rulemaking is could it be connected vehicles to everything, CV2X? That's an automotive safety analogy and—I saw just last week in a demonstration by Ford.

We can't do CV2X unless the FCC acts. Should it be Wi-Fi, as some have suggested? Well, we can't do Wi-Fi without a notice of proposed rulemaking. Essentially, the status quo means we are locked into one particular technology, called DSRC, now and forever, unless the FCC has that conversation.

I'm not saying what the answer should be. I'm simply saying let's ask the questions that would enable us to have an informed conversation.

Senator THUNE. Mr. Chairman, my time's expired, but I'd like for the record to get the other Commissioners comments with respect to that issue, and I would simply ask all of you, I assume you all think it's important for the TRACED Act to pass?

[All Commissioners nod yes.]

Senator THUNE. OK. Good. Thank you. Thank you, Mr. Chairman.

Senator WICKER. All five members nodded their heads vigorously.

Senator Markey.

STATEMENT OF HON. EDWARD MARKEY, U.S. SENATOR FROM MASSACHUSETTS

Senator MARKEY. My head is nodding vigorously, as well.

Senator WICKER. Thank you.

Senator MARKEY. Thank you, Mr. Chairman. Thank you, Senator Thune.

The Telecommunications Act of 1996 created the Universal Service Fund, as we know it today. The goal both then and now was a bipartisan one, ensuring universal connectivity throughout America. That's why members of both parties have been supporting all four programs within the Universal Service Fund: E-rate, Lifeline, the Rural Health Care Fund, and the Connect America Fund.

Each of these four programs is designed to target separate areas of need. For example, the E-rate provides broadband to schools and libraries while the Rural Health Care Fund provides improved health in rural communities.

Yet despite these different needs, the FCC just issued a Notice of Proposed Rulemaking that would not only implement a shared funding cap for all four USF programs but would also directly pit the E-rate against the Rural Health Care Fund and force these two worthy programs to vie for the same piece of the pie.

Commissioner Rosenworcel, is a Hunger Games scenario possible under this Notice of Proposed Rulemaking? Could the proposed USF cap lead to a fight amongst four deserving programs for scarce resources?

Ms. ROSENWORCEL. Yes, Senator, I share your concern. Congress set aside specific programs for universal service that we're supposed to use to help bridge the Digital Divide, but this proposal would lead to doctors and nurses in rural health care centers fighting with kids who want Internet access from school to get support for universal service.

I don't think we need the Hunger Games. I think we should end this proceeding right now.

Senator MARKEY. And I agree with you. I just think that we don't need these four programs, each competing against each other. They should be able to stand independently rather than in this kind of Darwinian struggle which is being set up.

On children's television in 1990, I was able to author the Children's Television Act, and I wrote that bill because I believed then, as I believe now, that all children, regardless of their family's income, deserve access to educational programming that will help them to thrive and grow.

Commissioner Rosenworcel, some say that kids today can stream programming online, so there's no need for quality educational programming on broadcast TV, is that true?

Ms. ROSENWORCEL. That's true for some portion of the population, but a quarter of the low-income households with kids under eight rely on over-the-air television. The Children's Television Act still matters.

Senator MARKEY. Yes, and so we're talking about in many instances children of color in the country——

Ms. ROSENWORCEL. Absolutely.

Senator MARKEY.—and they're in the poorest families and they need the nutrition that comes from high-quality programming for their young brains.

Ms. ROSENWORCEL. Right.

Senator MARKEY. I agree with you a hundred percent.

Ms. ROSENWORCEL. And this legislation created a marketplace for that that didn't exist before. It's still powerful. It's good stuff.

Senator MARKEY. Yes, kids should have access to 3 hours of high-quality educational and informational programming per week on every single TV station in the country and that programming should be aired at a time in the day when kids are actually watching television.

And, finally, the Public Educational and Governmental Television, also known as PEG, or Cable Access TV offers critical coverage of local government proceedings, cultural events, and community meetings.

These stations are invaluable platforms for local voices in an era of media globalization and consolidation, but the FCC has proposed a change to current rules governing franchise agreements that would allow cable companies to shirk their obligations to the communities where they operate.

The proposal would allow cable companies to avoid paying some franchise fees to local cities and towns. That would imperil PEG channels across the country.

Again, Commissioner Rosenworcel, why is it critical that PEG channels continue to have the resources they need to serve their communities?

Ms. ROSENWORCEL. There are thousands of PEG channels in communities across this country. They cover the high school football games. They cover city hall. They provide people with truly local information.

I don't think the FCC's franchise fees proceeding should bring all of those stations and all of that coverage to an end.

Senator MARKEY. Commissioner Starks, could you comment upon the need to ensure that we continue robust funding for the local PEG channels. Every single city and town in America has it and it's greatly reliant upon the information that is provided.

Mr. STARKS. Yes. These PEG channels we know also are some of the—on the vanguard when there are national emergencies. They are often relied upon in that context.

I think it's important that these PEG channels continue to have the funding that they need in order to survive and go to the very touchstone of our broadcast rules, which is for localism.

Senator MARKEY. Yes, and I agree with that. I know that when the big TV stations go away, the only thing that's left in many communities is just that local cable access channel. So the people who live in that one small community can continue to watch the big issue developing in their local area, and if this gets diminished, it's just the loss of a great resource for the communities across the country.

Thank you, Mr. Chairman.

Senator WICKER. Thank you, Senator Markey.

Senator Blackburn, and then Senator Tester.

STATEMENT OF HON. MARSHA BLACKBURN, U.S. SENATOR FROM TENNESSEE

Senator BLACKBURN. Thank you so much, Mr. Chairman, and to each of you, I want to say thank you for being here. It's good to see you all.

Mr. Starks, welcome.

Mr. STARKS. Thank you, Senator.

Senator BLACKBURN. This is the first time I've had you before me, but I will tell you I enjoyed working through the process last year in the House when we executed the reauthorization of the

FCC for the first time in nearly 30 years, a big win for those of us in Congress and for you all as a Commission, and included in this we put Mr. Thune's MOBILE NOW Act and were able to push this forward.

So we appreciate the work that you all are doing, continuing to focus on closing that Digital Divide, and I heard this week from some constituents in West Knox County, Tennessee, who are still without access to high-speed Internet and the need to continue with this, and I know, Mr. Carr, you've been out and we appreciate the work you've done with some of our rural areas.

Mid-band spectrum, I know the Chairman asked about that and we're all very concerned about that, 5G, of course. 24 gigahertz had some questions around that that Mr. Thune covered, but one other thing, Chairman Pai, I want you to just circle back to.

We know some of the government agencies are encouraging a more stringent emission limits on this. You mentioned NOAA, but then I want you just to add a quick bit about how this would affect the wireless providers that have already bid on this spectrum with the 24 gigahertz.

Mr. PAI. Appreciate the question, Senator. If the Department of Commerce's position were to prevail, not only would the spectrum be unusable for 5G domestically but we would also put at risk the U.S. position in the upcoming International Conference in October where the overall world limit for the 24 gigahertz band, among other 5G bands, will be set and if that limit is artificially high around the world, then we will forever forestall, I fear, the millimeter wave development, development of these millimeter waves for 5G.

That is not a road that we want to go down, especially when our current limit is sufficient to protect the passive weather sensors in the 23.6 to 24 gigahertz band, which again is 250 megahertz away from the band we just auctioned.

Senator BLACKBURN. And that effect would be felt not only by the commercial sector but the military sector, also?

Mr. PAI. Senator, that's absolutely right. In fact, the limit that the Commerce Department is proposing is similar to the one the European Space Agency is proposing with respect to the 37 gigahertz band, among others, and that is where the Department of Defense has identified potential 5G applications for our military. That is not something we want to foreclose, especially when we're talking about soldiers, sailors, and airmen in theater who might need to rely on these 5G applications.

Senator BLACKBURN. Thank you for that further clarification on that.

Mr. PAI. Thank you.

Senator BLACKBURN. Let me come back to the $20.4 billion Rural Digital Opportunity Fund, which, of course, this is something that is important to me. It's important to Tennesseans. What we need to know is the steps that you're going to take to ensure that we continue to focus on unserved and that this money does not go into overbuilding.

So, Chairman Pai and then Mr. Carr, I'd like to hear from you on this.

Mr. PAI. Appreciate the question, Senator.

In fact, just this morning, I spoke with the public servant who's leading our rural broadband efforts on this issue and she is focused on this in particular.

Our goal is, and we'll be rolling this proposal out later this year, is to incorporate some of the same principles that have made the Connect America Fund so successful, adopt a rural auction in which numerous different companies, not just rural telephone companies, but electric utilities, satellite companies, others can compete.

Second, have more accountability to have specific metrics you have to build out within 4 years, 5 years, and 6 years, have accountability at the back end, too, accelerated payback schedules and the like. If you don't do what you say you're going to do, you have to pay back some of that money, and that's one of the reasons——

Senator BLACKBURN. Incremental accountability?

Mr. PAI. Accountability at every step of the way, from the minute those applications are filed until the minute that deadline expires at the end of 6 years or whatever term we decide.

We want to make sure that you have the confidence in this program that you and your constituents deserve.

Senator BLACKBURN. Thank you.

Mr. Carr.

Mr. CARR. I would agree with his steps. I think we're making really good progress around the country with deploying broadband, but there are still too many areas that don't have any facilities right now. We need to make sure we're prioritizing universal service there and not over-building in areas that have it.

Senator BLACKBURN. And the rural health, you want to comment on that?

Mr. CARR. Yes, telehealth is an area where I think we are looking to stand up this new Connective Care Program. It can make a big difference with driving down costs and improving health care, particularly in rural areas that don't necessarily have access to high-quality care today. So we're working hard toward that goal.

Senator BLACKBURN. Thank you. Yield back.

Senator WICKER. Thank you, Senator Blackburn.

I have Senator Tester, followed by Lee and then Johnson.

STATEMENT OF HON. JON TESTER, U.S. SENATOR FROM MONTANA

Senator TESTER. Thank you, Mr. Chairman. Thanks for having this hearing.

Chairman Pai, Senator Capito talked a little bit about her Broadband Data Improvement Act of 2019. Are you familiar with that bill?

Mr. PAI. Yes, Senator.

Senator TESTER. Does your rule replace that bill?

Mr. PAI. I think it's generally consistent with the purpose. I'd have to fly speck exactly how the terms match up, but I think the overall gist of it is we're on the same page.

Senator TESTER. Yes, right on. So in that bill, it says that the FCC will determine a penalty for those willingly and knowingly to submit inaccurate information. We may have enabled bad behavior here with what's gone on already.

What kind of penalties are you talking about because what kind of penalties would you set up? What's going to be the stick because the truth is we've all talked about it? The maps were bad, you guys know that, and we'll waste a lot of money if we don't get it squared away. So what kind of penalties are we talking about?

Mr. PAI. So under current law, the FCC can't administer Title 18, so criminal penalties, but with respect to Title 4 of the Act, the Act specifies certain fines that the FCC can impose for violation of our rules and that is the tool.

Senator TESTER. So what kind of fines are we talking about?

Mr. PAI. It depends on the particular violation.

Senator TESTER. If somebody gives you bad information and, by the way, we're not talking about putting a man on the Moon here, we're talking about wire that goes into a house, OK, it seems to me they give you bad information, they want to give you bad information. Why? Because they want to cover that area at some point in time. I got no tolerance for it, quite frankly, because we're wasting taxpayer dollars, based on somebody's trying to gain the system.

So the question is you're going to put the boots to them, tell me why you're going to do it.

Mr. PAI. Why we're going to do it is because——

Senator TESTER. No, not why but how? I mean, it's got to hurt——

Mr. PAI. Yes.

Senator TESTER.—and if they know it's going to hurt going in, they'll give you good information.

So the question is, what kind of fines are we talking about?

Mr. PAI. Senator, I think you used specific fine threshold that the maximum is permitted under our rules, but what I can tell you is we've kicked folks out of our——

Senator TESTER. How much is it?

Mr. PAI. I can't remember the specific number off the top of my head.

Senator TESTER. If you guys kick—can you guys make it so they can't get grants to put in fiber if they lied to you?

Mr. PAI. Senator, I've been in the foremost about wanting to kick folks out of the program for abusing the system.

Senator TESTER. OK. So, look, communication's critical and so I really think it's going to be incumbent upon the FCC and especially you to let the folks know, even with your rule, that if they don't take this stuff seriously, they're going to pay a price. You're going to do that?

Mr. PAI. Yes, sir.

Senator TESTER. Good deal. Thank you.

Senator WICKER. Chairman Pai, if you could get back to us on the record as to whether that's a possible sanction, the question Senator Tester asked.

Mr. PAI. I'd be happy to do that, Mr. Chairman.

Senator TESTER. OK. So everybody on the Commission says that they feel that robocalls should be free. I'm not going to beat the dead horse, but my head will explode if I get a charge. I mean, I may just quit. OK?

So the bottom line is, is why not just take all doubt away and make it—if you've got to take a comment period, OK, so it takes 60 or 90 days, but at least we know. That's all. That's all I'm going to say. If you all think it should be free, we all think it should be free, make it free, give certainty.

I want to go a little bit off of what Senator Scott talked about and that's satellite versus fiber because this is an issue that I've been thinking about for awhile. We're spending millions of dollars. What is it? A million bucks a mile to lay in fiber and that may be obsolete in a few years and we've pumped in a lot of money.

Can you tell me if this is real and maybe we're spending money in the wrong spots to lay fiber? Maybe we should be focused on satellite technology and going that route which I don't even know much about but appears to me could be a heck of a lot cheaper. What's the downside?

Mr. PAI. Senator, assuming the question is directed to me,——

Senator TESTER. Yes, it is.

Mr. PAI. Senator, I think it depends on the particular area. Different technologies might work. I think there's a place for fiber, there's a place for satellite. For example, in places like St. Ignatius where I've been, where you can tell the building season's going to be pretty short, the topological challenges are pretty great, it might cost too much money to get fiber in. So there might you imagine satellite.

Senator TESTER. OK. So how do we get there because the truth is, is that I think Rosenworcel said it, I mean, we will be left behind. This is access to the Internet with high-speed Internet connection is what's going to put people back in Rural America and with all the tariff stuff that's going on, we're going to see a mass exodus again because people are going to start going broke.

So we've got to figure out how people can have access to the Internet in Rural America. Why? Because so they can do the same business in Scobey, Montana, that they can in New York City.

So the question is, is how do we encourage the most cost-effective way, and if it's satellites, I'm all for it. Tell me what the downside is of satellites.

Mr. PAI. One of the concerns that has been expressed about satellite services has been that the latency is not what you would get from a terrestrial provider.

Senator TESTER. OK. Is there any way we can speed that up?

Mr. PAI. That's one of the things the new satellite constellations have suggested they may be able to solve. The latency for some of these low earth orbit satellites would be much less. They would be comparable to a terrestrial provider.

Senator TESTER. Thank you very much. I wish I had another 20 minutes. Thank you, Mr. Chairman. We'll come in and visit some more.

Mr. PAI. OK.

Senator WICKER. Thank you, Senator Tester.

Senator Lee, and then Senator Johnson.

STATEMENT OF HON. MIKE LEE, U.S. SENATOR FROM UTAH

Senator LEE. Thank you very much, Mr. Chairman.

Thanks to each of you for being here and working in an area that's heavily dependent on technology. The technology that you address has an intimate relationship with 300+ million Americans.

It's important that we continue to have technological innovation. In your area in particular, innovation is heavily dependent on the availability of spectrum. We know that spectrum is in a lot of hands. It's especially in the hands of a lot of Federal Government agencies.

The Federal Government and its various agencies and departments owns a lot—not just a lot of spectrum categorically but it owns a lot of spectrum that's of the especially valuable sort, what you might call beachfront property, the sort that's really useful to a lot of people, and yet we know that there's kind of some problem with this.

Unlike a private actor, unlike an individual or a corporation whose business it is to ensure that they're using their spectrum in the most efficient possible manner, the government doesn't necessarily act that way and that's OK. We understand that. We don't expect governments to act necessarily in the same way that private actors will.

But just the same, in order to make sure that we're using it effectively and efficiently, we need to know what it's worth. We need to have some type of valuation. Now that's why I introduced the bill called "The Government Spectrum Valuation Act."

This bill, if passed into law today, would do nothing to actually move the spectrum. It would simply require an appraisal of sorts, a valuation of what it is that the government owns, where it owns it, and what it's worth. It's a bill calling for a study for more data so that we can understand what the opportunity costs are for the Federal Government owning this much beachfront property, so to speak.

Mr. O'Rielly, I'll start with you. Given that spectrum is a finite limited resource, do you think it's important for Congress to have access to data about the value of the spectrum that it holds and to identify inefficiencies that might exist in the spectrum allocations?

Mr. O'RIELLY. Absolutely, and I support your bill wholeheartedly.

Senator LEE. Thank you, thank you. I appreciate that. I appreciate you getting right to the point on that.

The type of data being sought in this bill, which includes the identification of opportunity costs, do you believe that that in particular is a useful tool toward helping Congress and Federal agencies figure out how to allocate spectrum?

Mr. O'RIELLY. Yes, I do believe we have—that's the first step in the equation. The second step is how do you use that data to then make a decision at your level and how do you free particular bands—and I'll give you one band, for example.

3.45 to 3.55, we were led to believe in multiple conversations we had that a hundred megahertz was going to come from the Department of Defense to the FCC to make it commercially available and that decision has since changed and now we're doing a feasibility study whether it can be shared which is much different than making a hundred megahertz of prime mid-band spectrum available for commercial purposes.

Shared spectrum is valuable, too, and it has its place, but here's a band that has changed behavior based on something I can't describe what happened. If you had a valuation of what that piece is worth, I think that would be critical for decisionmakers to be able to go forward.

Senator LEE. Mr. Carr, would you agree that having access to this kind of information would be helpful to Congress and Federal agencies?

Mr. CARR. Thank you, Senator.

I agree with you. We shouldn't be flying blind when it comes to decisions about those assets. If the government has $30 billion worth of assets in a warehouse or it has half a trillion dollars worth of assets in a warehouse, you all should be able to know that to make informed decisions about what to do with it.

Senator LEE. Ms. Rosenworcel.

Ms. ROSENWORCEL. Yes, absolutely. We need a uniform system of valuation and once we have one, we need to develop incentives so those Federal actors can see some gain and not just loss from reallocation for new commercial use.

Senator LEE. Mr. Starks.

Mr. STARKS. I would agree, as well, Senator. It certainly sounds like a proposal that needs to be executed here and getting a better understanding of what the value of this is holistically so that we can make the right decisions in real time.

Senator LEE. Thank you.

Chairman Pai, I'm going to ask you to answer the same question and at the same time, I want you to describe for me what the Digital Divide is, what it means when we talk about closing the Digital Divide.

Mr. PAI. Appreciate the question, Senator.

I want to join my colleagues in advocating for your approach and I think it actually dovetails quite nicely with the FCC's determination to make spectrum decisions in this area that are based on sound engineering.

So if we can get the economics right, we can get the engineering right, I have a feeling the policy and politics will take care of themselves.

To me at least, the Digital Divide means people not having the access necessary to be able to educate their kids, to do telemedicine, to engage in precision agriculture, to start a business, to do all the other great things that broadband affords, and I saw that when I was recently in your state. I visited Moab where I got to see a telemedicine application remotely connected with a school in far southern Utah that is just clinging on to access.

When you see what it means to these kids who are in a school that has just eight students to be able to gain access to the Internet and learn at the same pace and at the same level as their counterparts in Moab, that's a big game changer, and to me that's why closing the Digital Divide has to be our national mission.

Senator LEE. Mr. Chairman, can I ask a simple yes or no question and a follow up? I promise to be very brief.

Senator WICKER. Sure.

Senator LEE. Does that include—when we talk about the Digital Divide, you refer to all those uses, does it include entertainment or should it properly under the statute include access to entertainment?

Mr. PAI. Yes, Senator, any type of application that broadband would allow.

Senator LEE. Thank you. Thank you, Mr. Chairman.

Senator WICKER. Thank you, Senator Lee.

Senator Johnson.

STATEMENT OF HON. RON JOHNSON, U.S. SENATOR FROM WISCONSIN

Senator JOHNSON. Thank you, Mr. Chairman.

I'm not going to be asking Commissioners to endorse any bill but well done.

Since I joined the Committee, I've been looking at spectrum maps and not understanding them. So let me state that. I'm not a scientist when it comes to this. But we all agree, I think everybody agrees that 5G is crucial for our economy, correct, the development of it?

I believe all five Commissioners completely agree in the 24 gigahertz auction, is that also true?

So as I'm reading articles about, as the Chairman said, about the 11th hour concern issued by the Commerce Department, I'm just trying to scratch my head why. I've got one article in front of me that says, "The Commerce Department and NOAA are blanketing the press and Capitol Hill with dire predictions they will lose 70 percent of weather forecasting data if 24 gigahertz auction goes forward." Their proof is based on protecting the sensor that was never deployed.

So again I'm just trying to understand when all of government, I think all of our society wants 5G, the way to produce 5G is to have a spectrum band available to it. You've all agreed. I mean, the experts in this field, your staff agree it's 24 gigahertz. What's pulling off? Why the 11th hour objection?

Mr. PAI. Senator, I think, unfortunately, some folks in the Federal Government believe, wrongly, that for whatever reason the development of 5G technologies and this and other bands shouldn't happen. It may pose an unacceptable risk to some Federal uses.

I firmly reject those determinations, especially in the 24 gigahertz band, where we've consistently had——

Senator JOHNSON. So I want you to be more specific. OK? I don't want you to be diplomatic here.

Who's trying to block this and why? I mean, literally, this makes no sense whatsoever.

Mr. PAI. Senator, I don't want to speculate, but what I will say is that it has been difficult over the last several months trying to have a framework where we can work cooperatively with some of our sister agencies. Unfortunately, one department has been very active in trying to undermine the United States' position in these international negotiations and make it more difficult for us to free up spectrum in 5G.

Senator JOHNSON. So do any of the Commissioners want to speculate? If we're going to overcome this and again this would probably be—this is gumming up the works here and we don't have the time. We can't afford to have the works gummed up here. We need to get to the bottom of this. Anybody else want to volunteer, be a little less diplomatic?

Ms. ROSENWORCEL. I can be a little less diplomatic. I have not been in the meetings that the Chairman has referred to, but I can tell you this. The situation we have is embarrassing. We have to resolve these issues before we put the spectrum to market in an auction.

The idea that this one part of the Administration is not talking to another, we bring these airwaves to market, ask carriers to spend billions of dollars on them, and then don't exactly know what the terms of service will look like, all the while we're headed into the World Radio Conference and possibly undermining our ability to negotiate these issues.

We've got to figure this stuff out before we hold an auction. Otherwise, the integrity of our future auction structures are at stake.

Senator JOHNSON. Mr. O'Rielly.

Mr. PAI. We did figure this out before in 24 gigahertz. The Chairman has done a great job. The problem is the 11th hour rising, and I would answer two points, speculating to your point.

It's not just about 24 gigahertz. It's about every other band that we're talking about in the millimeter wave, and they want to come back and retest and rechallenge decisions that we are making and that's very problematic.

So 24 is only so valuable. There are other bands that are going to be even more valuable for different technologies, and I think this is about precedent-setting and why they're talking about a sensor that doesn't exist on the satellite.

Senator JOHNSON. Is there any validity or legitimacy to the issues they've raised, Chairman Pai?

Mr. PAI. No, absolutely not. Currently, before we made our decision, there were some 40,000 fixed and microwave links in the band immediately adjacent to the 23.6 gigahertz band that's in question. There has never been a reported case of interference.

Over the last two and a half years, we've patiently waited for a validated study to suggest that our proposed limit is inappropriate. We've never gotten such a validated study. Now the study that has been propounded, first of all, we didn't get the source code for many, many weeks, despite asking for it. Once we did get it, the assumptions that clearly underlay that study were so flawed as to make the study, in our view at least, meaningless and so part of the reason we're frustrated, I'm personally frustrated and spending a lot of time on this issue is that the Department of Commerce has been blocking our efforts at every single turn and the situation, frankly, has gotten worse since the head of NTIA, David Reynolds, resigned recently.

Senator JOHNSON. Quickly, what should this Committee do to help you out?

Mr. PAI. In terms of the passage of legislation, we would welcome a simple resolution saying that it's the policy of the United States for 5G development and deployment to be pursued as quickly as possible. That one-sentence resolution alone would give us, I think, some momentum.

Senator JOHNSON. Thank you for your service.

Senator WICKER. Does each member of the Commission agree with the scientific conclusion on this issue? I'll start with Mr. Pai.

Mr. PAI. Yes, Senator, after very extensive conversations with our Office of Engineering and Technology and other outside experts, I believe the FCC's proposed protection limits have been and will continue to be appropriate for the protection of passive weather sensors.

Senator WICKER. Mr. O'Rielly, in your view, all five of you are on the same page here?

Mr. O'RIELLY. Yes.

Senator WICKER. Mr. Carr.

Mr. CARR. Yes.

Senator WICKER. Ms. Rosenworcel.

Ms. ROSENWORCEL. I have not been in some of the meetings that the Chairman is describing, but I will tell you we have to resolve issues like this before we go to auction full stop.

Senator WICKER. So but are you or are you not satisfied with the scientific conclusion that there's no interference?

Ms. ROSENWORCEL. We have a bunch of different studies on the record and I have not been in the meetings where we have gotten to the bottom of just what threshold for out-of-band emissions should apply, but I share your disappointment that we are in this position right now. I don't think it's fair and I don't think it's right.

Senator WICKER. Mr. Starks.

Mr. STARKS. I would share Commissioner Rosenworcel's perspective. This item, 24 gigahertz, precedes my term, first of all. I would agree that the integrity of our decisionmaking process is at issue here. I have not personally studied this.

The last thing that I would say is that I do have confidence in the Office of Engineering and Technology at the FCC, but I haven't personally studied this issue.

Senator WICKER. Thank you.

Senator Udall.

STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you, Mr. Chairman, and thank you to all of the Commissioners today.

There are so many critical issues that deserve attention today. The President's continued threats to free and open media, the unrelenting flood of robocalls to consumers, corporate consolidation of media that undermines local broadcasting, and the Digital Divide that hurts our rural and tribal communities.

On the Digital Divide, I'm particularly concerned about the proposal to cap the overall Universal Service Fund budget, especially since we don't even have an accurate picture of where people lack broadband and wireless service. This is unacceptable.

Corporate-backed pilot projects are nice but they cannot substitute for the agency to fully engage on this issue.

Chairman Pai, you recently recommended approval for the T-Mobile/Sprint merger. I'm very skeptical that their claims that they will serve Rural America with 5G coverage. Companies that seek regulatory clearance for mega-mergers will say whatever they want to make the government happy. However, when the rubber hits the road, they can come up with reasons they can't meet their stated goals.

For example, T-Mobile paid a $40 million settlement for failing to complete calls in rural areas and now I understand that T-Mobile is also under investigation for overstating their 4G coverage.

On May 23, six Senators, including myself, sent you a letter regarding the new promises from T-Mobile and Sprint. We requested that these merger conditions be a part of the public record so that interested parties can weigh in.

Chairman Pai, I received your response late yesterday afternoon and thank you very much for that. I'm disappointed you will not specifically take public comment on these conditions and I remain concerned that this merger will do nothing to serve Rural America.

Commissioner Rosenworcel, yes or no, did you think the public should have been able to weigh in on these conditions?

Ms. ROSENWORCEL. Absolutely, yes.

Senator UDALL. And, Commissioners Rosenworcel and Starks, both of you have commented publicly the curious nature of the Chairman agreeing to this merger, apparently without any analysis from the expert staff at the FCC.

Do either of you know why this consequential decision was made as hastily as it seems to have been and is that common practice at the FCC?

Ms. ROSENWORCEL. No, this is highly unusual. I have no economic analysis, legal analysis, or paper before me, and yet my colleagues have announced that they're going to support this transaction via press release. That's just the worst of what people expect from Washington. It looks like some back room dealing. This is really irregular.

Mr. STARKS. Yes, thank you for the question, Senator.

In many ways, this is my first rodeo, certainly my first mega-merger as a seated commissioner, but I do have concerns on the way that this has played itself out.

One additional note that I would note for you is that with regard to the divestitures, in the *Sinclair-Tribune* merger, divestitures were in fact sent out for public notice and so I'm curious why divestitures would not be sent out for public commentary here, as well.

Senator UDALL. Thank you very much.

I want to ask about tribal nation visits to all of you. As you all are aware, the population most underserved by wireless and broadband companies in the United States are tribal areas. I recognize that some companies provide service to these areas, including tribally owned ventures, but much more investment is needed and it is essential that each of you understand the conditions on tribal lands, conditions that can't be fully appreciated without getting out of Washington and visiting tribal communities.

Please go down the line. Have your travels included visits to tribal nations, and have you sat down with tribal leadership to discuss their needs and priorities? Chairman Pai.

Mr. PAI. Thank you for the question, Senator.

Just two weeks ago, I sat down with the Governor of Chickasaw Nation in Ada, Oklahoma, and talked about these very issues. As we discussed a few months ago, I visited the Hemas and Zia Pueblos in your state along with your staff to understand the conditions there, been to the Rosebud Sioux Reservation in South Dakota. I've been to many other tribal lands and Alaska Native villages during my time at the FCC.

These are, I think, the communities where you see the Digital Divide the starkest and that's why our efforts on this issue are so very important. So thank you for your leadership on it.

Senator UDALL. Thank you. Commissioner O'Rielly.

Mr. O'RIELLY. Yes, it has in the past. It hasn't recently. I have a 9-month-old, so I don't travel that much, but when I do, I'll circle back.

Senator UDALL. When you start getting out, it's really important when you get into these states——

Mr. O'RIELLY. I agree with you. It is almost Third World in some circumstances. It doesn't mean that every company faces it or every area, but it's really problematic.

Senator UDALL. Commissioner Carr.

Mr. CARR. Yes, I've spent time on tribal lands. I've met with tribal leaders, and we need to continue to close the Digital Divide there.

Senator UDALL. You were just in Montana and I don't think you met with any tribes, is that correct?

Mr. CARR. I did not meet with any tribes on that particular trip, but I've spent time now in 30 states in the 2-years that I've been in the job and met with a lot of tribal leaders in that time.

Senator UDALL. OK. Commissioner Rosenworcel.

Ms. ROSENWORCEL. Absolutely. Multiple trips to Alaska, Hawaii, North Dakota, Nevada, New Mexico, and also just last month with the Lummi Tribe and its leadership in Washington State.

Senator UDALL. Thank you. Mr. Starks.

Mr. STARKS. Yes, Senator. One of my very first—probably my third meeting was with tribal folks here at the FCC. I've been seated now for about 4 months or so. I have not had the opportunity but it is in particular I've already teed up some meetings with tribal nations and I look forward to those conversations.

Senator UDALL. Thank you. Thank you for the courtesies, Mr. Chairman.

Senator WICKER. Thank you, Senator Udall.

Ms. Rosenworcel, did you find it terribly dry out there in New Mexico?

Ms. ROSENWORCEL. I drank a lot of water.

Senator UDALL. She stayed very well hydrated.

Senator WICKER. New Mexico is a beautiful state.

Senator Blunt.

STATEMENT OF HON. ROY BLUNT, U.S. SENATOR FROM MISSOURI

Senator BLUNT. Thank you, Chairman.

The advantage of coming so late is having the ability to comment on things that have already been mentioned by others. I do believe on the all-important Kansas City Chief front that there is bipartisan Chief support on the Commission, and I'm glad to see that.

I would also say on the topic of T-Mobile and Sprint, without hearing all of the discussions or whether this report was looked at by somebody as often as it should have because of where Sprint is, I've taken great interest in its survival and success over a long period of time. It has seemed to me for some time, without having access to the analysis that you all do that they have a true competitive environment. You needed a strong third competitor, and either T-Mobile would wind up with Sprint or Sprint would wind up with T-Mobile.

My preference would have been for Sprint to wind up with T-Mobile but it didn't work out that way. I don't think there's actually anything wrong with the FCC having an opinion on this, and I certainly don't think that the FCC has to wait for Justice to have an opinion on this. I think you know more about this than the Department of Justice does and you should give voice to that.

I'm not trying to weigh in on how that should have been done, but I wanted to be sure you heard that not everybody agrees with the Attorney Generals on this who, frankly, probably haven't spent a lot of time thinking about this particular marketplace or how important it is that there's a strong third competitor.

I think one of the options you easily could have here is a situation with no competitor, except for the two big competitors, if the third and fourth competitor don't figure out how to be in a truly competitive place. Without getting into how you should do this, I believe that generally there is no reason for the FCC to wait for Justice to have an opinion as to whether a merger that's largely under your jurisdiction makes sense and to announce that opinion.

And while I'm going down my list, I believe I heard my friend, Senator Markey, talk about the franchise cap. I personally think that while there are things like public service announcements and even programming that the franchise partner can produce, at some point it's really important that the non-monetary things don't allow local governments to force things beyond the cap that is set in law.

I believe you're moving forward with that, but I want to be sure you heard from somebody on this panel that believes that it is a legitimate concern.

Let me talk for a couple of minutes here on broadband. Missouri's behind. We're catching up. We're not as far behind as we were but still as the evidence of a lot of your allocation indicates, you appreciate the fact that for whatever reason—mapping, topography, or other reasons our state has been behind in this. We've closed a lot of that gap but there's still more of a gap than I would like to see addressed.

Missouri providers were just awarded over $254 million from the recent auction. That would be assigned to serve about 95,000 individual locations. That's an important amount of money and we are grateful for it.

I want to be sure that this allocation is in no way impacted by a provider that turns out not to be able to do the job. I'd like the money allocated for Missouri to be spent in Missouri and I've talked to our state officials about this. I believe we're prepared to do whatever we can to be helpful doing our part to try to remove unnecessary obstacles, but if you've chosen someone who it turns out can't perform, that should not be the fault of those 95,000 Missourians that have been allocated here.

The question is, are you willing to work with me and with the state, to ensure the money awarded to Missouri through the auction stays allocated to those geographic areas that it has been allocated to, Chairman?

Mr. PAI. Yes, Senator.

Senator BLUNT. Does anybody have a different view of that? I think you all understand what I'm saying here. It's not the fault of Missourians, or even your fault, if someone is unable to perform, but if the money were to go anywhere but to some other situation to meet the Missouri need, it would be a huge problem for me. If there are any obstacles or gaps in the authority you have to do what we just talked about, I would be glad to help with that, too. I've known most of you for a long time and I'm grateful for your service. I think your job gets more complicated all the time and, I don't think it's likely to get less complicated for a while. This Committee takes it seriously and I know you do, too. Thank you all for appearing today.

Senator WICKER. Well said, Senator Blunt.

Senator Sinema.

STATEMENT OF HON. KYRSTEN SINEMA, U.S. SENATOR FROM ARIZONA

Senator SINEMA. Thank you, Mr. Chairman, and thanks to Chairman Pai and to all the Commissioners for being here today.

The issues of connectivity and access are vital to all Arizonans in urban, rural, and tribal areas. While many Arizonans look forward to fast 5G networks and connected self-driving cars, we must remember that too many Arizonans have been left on the wrong side of the Digital Divide.

As others today have mentioned, it's imperative that we win the race to 5G, but we cannot lose focus on those who still have zero Gs.

So I look forward to working with my colleagues on this Committee and with all of you at the FCC to improve access through smart policy and smart allocation of our resources, both spectrum resources and financial resources.

My first question is for Commissioner Rosenworcel. My name is tough, too. I'm concerned regarding the FCC's relationship with Arizona's 22 federally recognized tribes. Currently, more than 20 tribal nations around the country are suing the FCC regarding tribal broadband deployment due to the FCC's failure to consult with the tribes and the D.C. Circuit reversed and remanded a troubling plan to cut assistance to low-income consumers through the Tribal Lifeline Program.

These actions have kept children on tribal lands from getting online and getting ahead. Less coordination and support for tribal communities limits access to jobs, health care, and other services.

So what can and what should the FCC do to improve these troubling decisions that impact Arizona's tribal communities and, of course, these are areas where the Digital Divide is most pronounced?

Ms. ROSENWORCEL. Thank you for the question.

You're absolutely right, Senator. There is so much more we need to do to connect our tribal lands. I mean, Native Americans shouldn't be the last Americans to connect to the Digital Age.

So here are a few things we can do. First, the GAO came out with a report and they just trashed our data. They said basically we do not know where service is and is not in tribal areas. So I think we should use our Tribal Nations Task Force, go to them and say here's what we have, we'd like you to help us, tell us from your lived experience on the ground how we can get this data right so we can target our resources.

Second, we're headed to court on that wireless siting issue you described. We have 573 federally recognized tribes in this country. Not one of them supported our efforts. We've got to fix that.

And then, finally, we should be doing something with what's called the Tribal Broadband Factor, which will help bring more funding to rural communities on tribal lands.

Senator SINEMA. Thank you.

My next question is for Commissioner Starks. The FCC proposed in April 2018 to prohibit companies from using Universal Service Funds to purchase equipment and services from companies, such as Huawei, that pose national security threats.

The Administration invoked an Executive Order and at the Department of Commerce have agreed that their equipment creates "an undue risk of sabotage." Do you agree with this perspective?

Mr. STARKS. I do. Thank you for the question, Senator.

I do agree that for Huawei equipment, both prospectively as the Executive Order and the NDAA tells us about in our supply chain item, but also we need to focus on the risks inherent with this equipment that's already in our infrastructure.

Senator SINEMA. So everyone seems to agree that it is a risk, but recently the President signaled that restrictions could be lifted in exchange for a better deal or for better terms in a negotiated U.S.-China trade deal.

How should or could the FCC react if the White House changes its mind on these restrictions?

Mr. STARKS. The nature of the risk inherent in the national security issues that are going on with Huawei, I don't think in particular play into the trade aspect of that.

I think these are inherent risks to having exposure and we need to look at it from that national security lens.

Senator SINEMA. And, Chairman Pai, would you agree with that perspective and should or could the FCC change its position on this company if the White House does reach a trade deal with China?

Mr. PAI. Senator, Executive Order 13873 has been issued and we're currently determining its effect on our current supply chain proceeding, but if one were to assume for whatever reason that the Executive Order didn't exist, just went away, nonetheless, the FCC would have authority to prohibit the use of Federal funding from the FCC from being spent on equipment or services that come from companies or countries that are determined to be a threat and I will give you my commitment that I will be steadfast in making sure that we do everything within our power to secure these communications networks.

Senator SINEMA. Great. Thank you.

Commissioner Rosenworcel, as the Ranking Member on the Aviation and Space Subcommittee of this Committee, I think it's important to address the intersecting issues of space and telecommunications.

I hear from Arizonans frequently about the importance of space because we have a large aerospace manufacturing industry and, of course, the cutting edge research that's performed in our universities, but I'm concerned the FCC isn't paying enough attention to these issues.

So does the FCC need a permanent seat on the Space Council and what is the FCC doing to address the issue of orbital debris, and then in your opinion, is it enough?

Ms. ROSENWORCEL. All right. We are headed into a new space age. It is really exciting.

The FCC is the only entity with responsibility for commercial satellites and spectrum in this country, but somehow we've been left off the National Space Council. That's not right. In addition, orbital debris, we should all be concerned. There are about 5,000 satellites in space, according to the U.N. right now, but in the last year, this agency authorized another 13,000.

We are going to junk up our skies if we do not update our orbital debris policies and do it fast.

Senator SINEMA. And, Chairman Pai, do you agree that the FCC should be engaged in the issue of orbital debris and does the FCC need a permanent space on the Space Council?

Mr. PAI. Senator, on orbital debris, I couldn't agree more. That's why I teed up the first proposed update to our rules since 2004. I think it's critical as we're approving these new LEO, Low Earth Orbit, constellations when we think about how to update those rules, including to give some clarity to some of the folks in Arizona who are trying to pioneer the next generation in space.

With respect to the Space Council, I'd be happy to look at that. I can tell you we engage regularly with folks who are on the Council on a whole bunch of different issues and I think that kind of coordination is very important.

Senator SINEMA. Thanks. Thank you, Mr. Chairman.

Senator WICKER. Thank you, Senator Sinema.

Senator Sullivan.

STATEMENT OF HON. DAN SULLIVAN, U.S. SENATOR FROM ALASKA

Senator SULLIVAN. Thank you, Mr. Chairman, and I want to thank the Commissioners for being here. You guys have a tough job, an important job.

You've seen a lot of the discussion bipartisan on the issues of rural connectivity, particularly as it relates to telehealth, and, you know, as I've said to many of you, there's Rural America and then there's Alaska. You know, we're almost one quarter the size of the entire Lower 48 and if you superimposed my state on the Lower 48, you'd see that it's a continental-wide expanse in terms of size.

We're also 80 percent of my communities are not connected by roads and I think all of you, many of you, all of you have been up to Alaska more than once. So you recognize this and with the

FCC's Alaska Plan which I appreciated. What I haven't appreciated has been the reinterpretation and retroactive application of rules that have related to the Rural Health Care Program.

As a matter of fact, that's probably one of my biggest, if not my biggest, frustration since I have been here in the Senate the dozens and dozens of hours that my staff and I have worked with mostly the Chairman's Office on this.

So I don't want to relitigate exactly what's happened here, but I will tell you that as we've discussed, Mr. Chairman, you know, the health care ecosystem in Rural Alaska has been very negatively disrupted by these reinterpretation retroactive applications, literally hundred of jobs lost, broadband investment deferred, and most distressingly six clinics as of now are dropping out of the Rural Health Care Program with hopefully not more but maybe a lot more to come because of the administrative uncertainty that has been happened by your actions. So you and I've talked about this countless hours.

Commissioner O'Rielly, Commissioner Rosenworcel, you've been to Alaska a number of times. Did you support the way in which the Chairman's Office reinterpreted these rules and are you aware of these negative impacts that happened? It's just good to get more of a—I've been dealing the Chairman's Office and you guys have a lot of experience and I would like to quickly because I have questions for the Chairman, but I think you understand. You've been keeping an eye on this. I'd like your views, as well.

Mr. O'RIELLY. I appreciate the question. I think what happened with—the telehealth system in Alaska is top-notch and I've been troubled by the concerns that you raised and troubled by what could be the harm of closing six clinics.

Senator SULLIVAN. Some of the poorest people in America.

Mr. O'RIELLY. I worked with Senator Stevens.

Senator SULLIVAN. Don't have hospitals or anything.

Mr. O'RIELLY. And no ability to get there any time soon. I'm sympathetic. I wasn't party to a lot of the conversations to know how we got to where we are. So I——

Senator SULLIVAN. Commissioner Rosenworcel?

Ms. ROSENWORCEL. Yes, what this agency has done to rural health care in Alaska is not right. We are shutting down health centers in some of the most remote locations in this country. They're not participating in this program anymore. We have work to do. We've got to fix that.

Senator SULLIVAN. So let me turn to Commissioner Pai. As part of Commissioner Carr's confirmation process, you committed to me a number of things that relate to these.

Let me just get a quick update on these commitments, which I think you agree with, but I'm not sure where we are on it. One, you committed to ensuring that the new interpretation and subsequent application of the statute and the Rural Health Care Program and the rules could be subjected, would be subjected to a public full commission review, which is why I asked other commissioners, by granting the affected parties review of appeals.

I think you and I got agreement together on by the first quarter of this past year and then an expeditious review of any appeals by the full commission. What is your view of a reasonable definition of an expeditious review? I'm going to run out of time here. So let me just hit you up on the other commitments.

You also committed to finalizing the Rural Health Care Rules at the end of Q2, which is quickly approaching, and I want to know where we are on that, and if other commissioners have seen that work that's important. Again, it would be really good to have the other commissioners involved.

And then the public notice providing guidance, you've done that as your reinterpretation of rural rates. We didn't agree with the substance, but those were your three commitments.

If you could touch on those briefly?

Mr. PAI. Thank you for the question, Senator, and thank you and your staff for spending many hours on this issue. I know it has been of great importance to you and your constituents.

With respect to the first commitment, we did put the issues out for public comment, I believe in the first quarter, can't remember the specific month. With respect to the application for review we had talked about, we are on track—we got a little bit delayed because of the Federal shutdown for about a month, but we are on track to circulate an order to the Commissioners. I would expect it either late June to mid-July. There are still some moving pieces but we're basically going to meet that deadline that we had talked about.

And with respect to the third, finalizing the health care rules, I would anticipate that the staff will be presenting to me an item for my review and ultimately for the Commission's review soon.

In addition to that, I wanted to flag for you that I did learn from the staff recently, and I believe we had put this out publicly, as well, that the adjusted increase in the budget for this coming fiscal year will be approximately $593 million. That's almost 50 percent above what the program was when I came into office.

In addition to that, there's going to be some rollover funding from the previous year that we can use to fill any gaps and so I just want to make sure——

Senator SULLIVAN. So, sorry, Mr. Chairman, just one final clarification. On the first one I had mentioned, on the expeditious review, what is your reasonable definition of an expeditious review?

I mentioned first quarter, but this is about the affected parties. As you know, there are at least two, there could be more, with regard to review and the granting of full commission review.

One of the frustrations here is this has been—a lot of this has been done retroactively. So there was no notice and, you know, services were provided and yet it took years, months to get to this point.

So the expeditious review aspect that you and I talked about, the same with Commissioner Carr, it's very important.

Senator WICKER. Commissioner, what is your expeditious definition of an expeditious review?

Mr. PAI. So my tradition, what typically happens when the Chairman circulates an item to the other Commissioners, the Chairman votes to approve immediately. I would anticipate doing that and then it will be up to my fellow Commissioners. As long as three members vote in affirmance, we can then move to get that order out as quickly as possible. But as soon as we circulate that item in late June to mid-July, depending on the specific timing, I'll be voting to approve it.

Senator WICKER. Thank you. There will be questions for the record, of course.

Thank you, Senator Sullivan.

Senator SULLIVAN. Thank you, Mr. Chairman.

Senator WICKER. Senator Peters.

STATEMENT OF HON. GARY PETERS, U.S. SENATOR FROM MICHIGAN

Senator PETERS. Thank you, Mr. Chairman, and thank you to all of you for your testimony here today.

A lot of questions have been asked and answered over the course of this hearing, many of them I wanted to ask. So thank you for answering those questions, although I just want to say I want to concur with I think it was the overwhelming sentiment of everybody on this Committee that we need to do a whole lot more when it comes to broadband Internet in rural areas and Michigan is also a very rural state, as well.

So we want to continue to work closely with you and I'm pleased to have joined with the Chairman, Chairman Wicker, on the mapping bill that was introduced today, so we can base this on good data, which is incredibly important.

My question, though, first question was really a follow up on a question I think Senator Thune asked related to vehicles and, you know, as the Nation moves forward with increasingly connected vehicles and with autonomy becoming a major feature of transforming mobility generally, not just the auto industry but mobility in a dramatic way, I'm concerned that if we allow unlicensed Wi-Fi to operate in some of the channels that these autos are going to be relying on, that could be problematic.

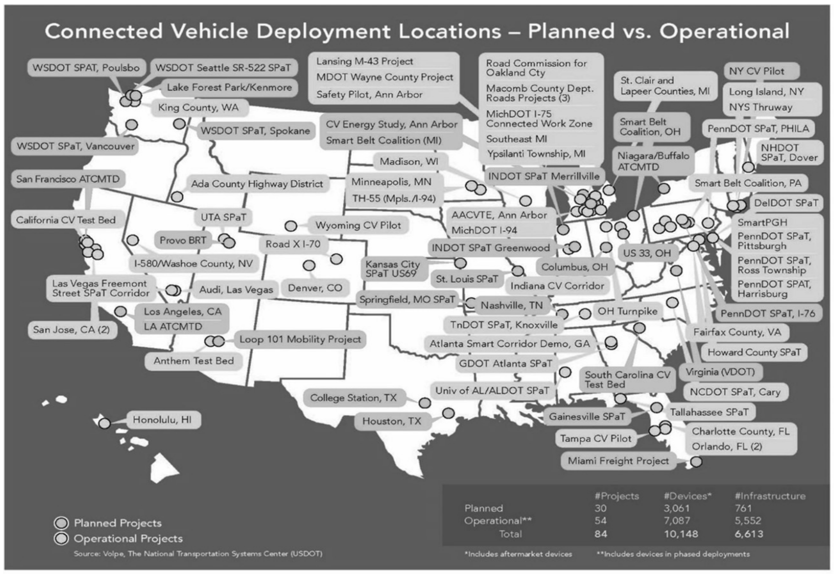
I think a question that was asked of you, Chairman Pai, was related to the spectrum reserve for auto safety in the 5.9 gigahertz and I believe your answer was it's not being used very widely.

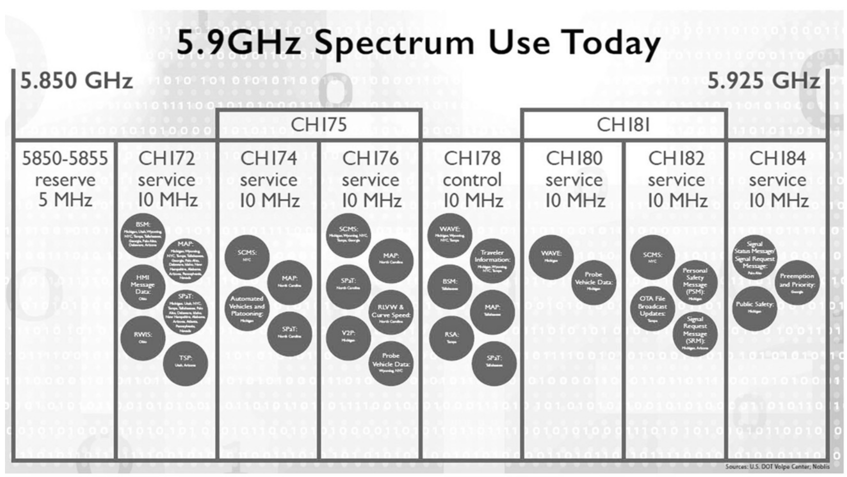
I want to respectfully disagree and show you this map here which is basically connected vehicle deployment locations, both ones that are operational now and will be coming online very quickly.

Mr. Chairman, without objection, I'd like to enter this map into the record, if I may, on deployment.

Senator WICKER. Without objection.

[The information referred to follows:]





Senator PETERS. If you can't see it from where you're standing, although you can see the colored areas, I'm sure, you can see that there is quite a bit going on. You are not aware of all this going on or want to kind of elaborate on your answer that you gave earlier?

Mr. PAI. Sure, Senator, and my fellow Commissioners Rosenworcel and O'Rielly have talked about this a lot, but I think it is fair to say that DSRC has not progressed as people would have anticipated in 1997 when the FCC first opened the door to this technology and currently, there is not a single automaker with the exception of one that is looking to pursue this into the future.

And, second, in the meantime, one of the automakers has done very interesting work on cellular vehicle to everything, CV2X. I saw a demonstration of that just last week by Ford and part of the issue is from our perspective at least we can't move forward with other automotive safety technologies like CV2X unless we have a conversation and it could well be one of the things I want to tee up. Should we stick with the current system, which is a DSRC-based? Should we open it up to other technologies, like CV2X? Should we think about Wi-Fi?

But we can't get to the right answer if we never even ask the right questions and that's part of my concern here.

Senator PETERS. I guess the question is you appreciate, I hope, the importance of making sure that we have the ability for connected vehicles, whatever technology it may be, so we can be technology-neutral, but I understand that the safety impact on travel is dramatic and we want to make sure that our auto companies are able to pursue that.

So you're committed to doing that and trying to have tests that are independent tests that can look at whether or not these technologies are compatible. Is that an accurate statement?

Mr. PAI. Well, with respect to the first question, yes, Senator, I mean, I've long shared the view that spectrum is important for automotive industry. In fact, under my leadership in my first year in office, we allocated four gigahertz of spectrum, from 77 to 81 gigahertz, for vehicular radar, recognizing this is an important thing.

With respect to the second, however, testing, we've already done Phase 1 of the testing. Phases 2 and 3 are reliant on the Department of Transportation. So I can't answer for them as to what the testing protocols or timing would be.

Senator PETERS. But it would be a three-phase test.

Ms. Rosenworcel, would you like to comment on this, as well? We had some conversations about it yesterday.

Ms. ROSENWORCEL. Sure. Absolutely.

Senator PETERS. You can elaborate on the record about it. I'd appreciate it.

Ms. ROSENWORCEL. Yes, I agree with the Chairman that DSRC technology, which has been around for 20 years, is not really on the roadway. So we have an opportunity to look at the more modern technologies that the auto industry is bringing forward with CV2X, simultaneously ask questions about unlicensed spectrum.

I have some optimism we're going to find space in our skies to do all these good things. We could do it together and prevent car crashes. So I agree with the Chairman to the respect that with respect to his efforts to try to start a new proceeding on just this issue.

Senator PETERS. The question for you, as well, across Michigan, the educational broadband service has been successfully used to provide connectivity to communities who otherwise would not have broadband access. I think you're familiar with that.

For example, Northern Michigan University serves over 11,000 students and families and over 51 Michigan Upper Peninsula communities right now and the university's on track to expand its service by 2020 to 114 underserved and unserved communities.

The FCC appears to be moving in the direction of auctioning off EBS frequencies and removing educational requirement for use of the band.

My question for you, ma'am, is can you describe the potential problems that would be caused by auctioning off the EBS to the highest bidder?

Ms. ROSENWORCEL. Sure. EBS spectrum was first developed during the Kennedy Administration. Education has been in its DNA from the start, and I've met with some of those folks from the Upper Peninsula. They're doing some really interesting things with these airwaves.

It would be a shame if the FCC took education out of the 2.5 gigahertz band and cut those entities off. I think we need to be a whole lot more creative about how we can keep education in this band because I think there's a lot of good we can do.

Senator PETERS. Thank you. Thank you, Mr. Chairman.

Senator WICKER. Thank you, Senator Peters, and thank you all. It has been a very free discussion and very helpful.

The hearing record will remain open for two weeks. During this time, Senators are asked to submit any questions for the record. Upon receipt, the witnesses are requested to submit their written answers to the Committee as soon as possible but by no later than Wednesday, July 10, 2019.

So thank you all and this concludes the hearing.

[Whereupon, at 12:25 p.m., the hearing was concluded.]

A P P E N D I X

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROGER WICKER TO HON. AJIT PAI

Question 1. In her letter to you dated May 13, 2019, Sen. Cantwell references "an internal U.S. Navy action office-level working document." Was that document submitted to the FCC by the Department of Defense? If so, when and by whom? Does the document's analysis of "interference to weather satellites permitted by future commercial broadband uses at 24 GHz operating at the FCC's emission levels" contain sufficient information for the Commission to determine if its conclusions are reasonable and supported by sound analysis? If not, why not? Is it your understanding that the conclusions of this "an internal U.S. Navy action office-level working document" constitute an official position of the Department of Defense?

Answer. Although we are aware of the referenced working-level document, it does not constitute an official position of the Department of Defense to our knowledge and has never been submitted by the Department of Defense to the Commission. Notably, that document contained no analysis of interference whatsoever; it instead analyzed potential operational impacts based on assumed harmful interference. Because a sound analysis of harmful interference in this band shows that the United States can both lead in 5G and protect our weather satellites (a position consistent with the views developed through the Interdepartment Radio Advisory Committee), the document's conclusions are quite mistaken.

Question 2. Senator Cantwell mentioned a number of issues in her opening statement characterized as "wireless and broadband companies already appear[ing] to be testing ways to undermine the free and open internet." Specifically, she mentioned: (1) "Comcast [being ordered] to pay $9.1 million in fines for deceptive practices that affected 50,000 Washingtonians since the repeal of net neutrality," (2) "CenturyLink temporarily blocking access to the Internet in Utah to force consumers to watch ads," and (3) "Sprint allegedly interfered with competitive Skype services using wireless networks." To the extent you are aware of these issues, is there reason to believe they would have been likely to have constituted a violation of the FCC's Open Internet rules in effect before the Restoring Internet Freedom order?

Answer. The FCC investigated and resolved the allegations regarding Comcast in 2016 under a different set of regulations (47 CFR § 76.981). I do not believe anyone understood Comcast's conduct to violate the Title II Order's rules at the time.

My understanding is that the allegations against CenturyLink were the result of CenturyLink's attempt to comply with a Utah law requiring ISPs to offer content filtering for material harmful to minors and to notify customers in a conspicuous manner regarding the availability of such filtering. It is also my understanding that CenturyLink ended this particular method of notification due to customer dissatisfaction, and it has not been an ongoing problem. Thus, we have not analyzed whether its action would have violated the Title II Order's rules. Additionally, with respect to the allegations against Sprint, we do not have sufficient evidence to determine that Sprint engaged in conduct violating the Title II Order's rules. Moreover, my understanding is that Sprint has denied the allegations and that the researchers of the study alleging that Sprint discriminated against Skype acknowledged they themselves could not replicate the alleged conduct in the lab.

Question 3. In December 2018, you launched an investigation into whether carriers violated the Mobility Fund Phase II rules by submitting inaccurate coverage maps. What is the status of that investigation? At the conclusion of the investigation, will the Commission release an updated map of areas eligible for Mobility Fund Phase II support, or will a new data collection be necessary?

Answer. Staff is actively wrapping up this investigation, and I hope that we will be able to report the results of that investigation soon. The Commission's next steps will depend on those results.

Question 4. Mid-band spectrum is critical to the U.S. winning the race to 5G. I know the Commission recently sought public comment on its authority to employ various clearing mechanisms to make C-band spectrum available for 5G. How soon do you expect the FCC will take action to make C-band spectrum available for 5G in an efficient and equitable manner? How will the Commission ensure that rural providers have access to C-band spectrum when it becomes available?

Answer. I hope to move forward with an item addressing the C-band this fall. As part of our review process, Commission staff are specifically looking at how to ensure that rural providers have access to C-band spectrum when it becomes available, an issue we sought comment on in the Notice of Proposed Rulemaking.

Question 5. On January 1, 2017, a 32-day-blackout occurred between Cable One and Northwest Broadcasting. The blackout affected northern Mississippi where all four network channels for 21 counties were blacked out and another 16 counties only had access to ABC affiliate WABG. To the extent that you are aware of these issues, what, if any, oversight activity did the Commission engage in during this blackout?

Answer. Under Section 325(b) of the Communications Act, parties to a retransmission consent negotiation are required to negotiate in good faith. The Commission implemented specific rules to outline what constitutes "good faith" negotiations and those rules are enforced through complaints. We generally encourage parties to come to an agreement as quickly as possible to mitigate the impact on consumers. Commission staff monitored this specific situation at the time it happened, but there was not a formal complaint filed with the Commission by either party.

Question 6. In December 2018, I wrote you a letter regarding SSR Communications Inc.'s 2013 petition for rulemaking to the FCC to create a new commercial FM class, referred to as the "Class C4 FM allocation." I appreciated your response to my letter in February. Please provide a status update on the FCC Media Bureau's efforts to review the comments submitted as part of the FCC's notice of inquiry and when we can expect further action.

Answer. I agree with you that local radio stations provide essential service to their communities, and as Chairman I have worked to help bolster this important industry. As you know, I circulated a Notice of Proposed Rulemaking on this issue, but it was changed to a Notice of Inquiry as a result of input from my colleagues. Commission staff continue to review the record developed in this proceeding, which includes balancing the benefits of the proposed power increases for some stations with the potential for increased harmful interference to others. My ability to move forward on this issue will also depend on whether a majority of Commissioners is willing to support such action.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHN THUNE TO HON. AJIT PAI

Question. The 6 GHz band has a lot of potential for fulfilling the requirements under the MOBILE NOW Act, which was signed into law last year. How soon can the Committee expect the Commission to issue rules for this particular band?

Answer. I agree that the 6 GHz band shows great promise in fulfilling the MOBILE NOW Act's directives. As you are aware, the Commission's October 2018 Notice of Proposed Rulemaking proposed allowing unlicensed use of the 6 GHz band while ensuring that the licensed services operating in the spectrum would continue to thrive. Now that the comment period has closed, we are reviewing the lengthy and complex record to determine the best method for minimizing potential harmful interference to the incumbents. At the same time, stakeholders continue to provide ex parte briefings concerning the issues raised.

I want to ensure that we have properly considered the outstanding issues and that the final rules are supported by a comprehensive and solid engineering analysis. We will proceed as expeditiously as possible toward a final resolution in this matter, and keep your office apprised of our progress.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DAN SULLIVAN TO HON. AJIT PAI

Question 1. As I've observed the Commission's work in my role as Senator for Alaska, I'm continually struck by what appears to be a lack of transparent, fair, due process for petitioners. I appreciated the Chairman's commitment during the hearing to circulate an order regarding GCI's Application for Review of the WCB's October 2018 determination of "rural rates." As you know, we have other highly consequential, outstanding items before the Commission. Please provide a status update on the following petitions, including a commitment on timeline for circulating the related orders—

- Maniilaq Association's appeal of USAC's denial of FY 2017 FRNs
- Copper Valley Telephone Cooperative's Request for Review of USAC's denial of "Incorrect Treatment of Substantial Rent Expense Paid to an Affiliate"

Answer. The Commission makes every effort to conclude its review of Universal Service support appeals as quickly as possible and in a fair and transparent manner. I have asked Commission staff to review promptly (while still thoroughly) both the Maniilaq Association appeal of its FY 2017 USF Rural Health Care funding requests (filed on July 2, 2019) and the Copper Valley Telephone Cooperative's Request for Review of USAC's denial of support for certain of its expenses under the universal service high-cost program (filed on May 24, 2019). I can assure you that we will take into consideration the issues and concerns presented by all stakeholders in reaching a decision consistent with the Commission's rules and policies.

Question 2. As you are aware, Alaskan carriers rely heavily on the 3.7–4.2 GHz Band, referred to as the C Band. Last year, the Commission imposed a freeze on the filing of new license applications in the 3.7–4.2 GHz band, while the Commission considers potential reallocation of this spectrum for 5G use. The freeze is creating significant hardships for Alaskan schools, health care providers, businesses including telecoms that rely on C band satellite services for connectivity. Some applications to license C band satellite earth station sites in Alaska have been pending at the Commission for as long as a year. As you know, "construction season" in Alaska is short and limited to the summer months. We are now well into our second construction season without clarity or resolution.

What timeline can you commit to for processing these pending applications?

If the answer depends on the conclusion of the larger C Band proceeding ongoing at the FCC, when will that be complete?

Answer. A number of carriers have asked the Commission to waive its temporary freeze on the filing of new earth station applications in the 3.7–4.2 GHz band to enable the construction and operation of new earth stations. As you note, the freeze was adopted to preserve the current landscape of authorized operations in that band pending Commission action on permitting terrestrial broadband use. At the same time, the Commission understands the critical role of C-band operations in Alaska, as well as the unique challenges presented by building and operating there. Thus, while future terrestrial use is one consideration in the review of the waiver applications, the answer does not depend on conclusion of the larger C-band proceeding; rather, Commission staff is carefully reviewing the record in each of these cases and weighing these considerations under the waiver standard specified in our rules. We seek to resolve the waiver requests expeditiously and are considering the issues and concerns presented by the applicants, as well as the Commission's goal to expand flexible use of mid-band spectrum.

Question 3. On February 28, 2018, the Commission's Wireline Competition Bureau and Wireless Telecommunications Bureau released an order requiring Alaska Plan participants to submit highly detailed network maps. The Bureaus required that all of the network elements on these maps be certified as geospatially accurate to within 7.6 meters 95 percent of the time. Please provide in full and with appropriate citations: (1) the Bureaus' stated justification for requiring this level of accuracy as opposed to some lower level of accuracy, (2) the cost-benefit analysis the Bureaus relied on for requiring this level of accuracy as opposed to some lower level of accuracy, and (3) specific examples of other contexts in which the Commission has imposed such stringent mapping requirements.

As you know, the Alaska Plan participants did not object to the obligation to submit network maps. Certain Alaska Plan participants, however, did seek a waiver of the 7.6 meter accuracy standard for certain network elements, including buried fiber that may be dozens of miles or more from the nearest customer or wireless antenna. The Bureaus denied the waiver request and an application for review has been filed. Please commit to a date certain by when you will circulate to the full Commission a draft order proposing to address the pending Application for Review.

Answer. The Wireline Competition Bureau and Wireless Telecommunications Bureau affirmed the 7.6-meter accuracy standard in the February 28, 2018 Order on Reconsideration, finding that the 7.6-meter standard "provides an important backstop to ensure carriers maximize their commitments and service" and is "necessary for the Bureaus to maintain compatibility with the census boundary and road data for the census-block based Alaska Plan." The Bureaus concluded the standard "is critical for obtaining a complete picture of facilities' locations in relation to other existing data" and to identify duplicative facilities. Notably, no carriers sought review of the February 28, 2018 Order on Reconsideration; in fact, most carriers subject to the requirement have already fully certified to the 7.6-meter accuracy standard.

Additionally, the 7.6-meter standard is fairly widely used; for instance, the Commission has used it in the context of its high-cost data to account for inherent error in census block measurements, and the Census Bureau also uses the same standard.

To be sure, one Alaska Plan recipient has a remaining objection relating to this requirement. That recipient, GCI, receives more than $58 million every year under that Plan, an amount that is substantially larger than that received by any other participant in the Alaska Plan (most of whom, again, have already apparently complied with the requirement). What is more, GCI's remaining application for review extends from a waiver request that came more than a year after the Order on Reconsideration. GCI did not provide a cost estimate regarding how much more it would cost to comply with the mapping data requirement or explain why it did not adequately document the location of fiber it deployed in 2018 after it was made aware of the 7.6-meter standard. The Commission is analyzing the arguments raised in GCI's Application for Review of the Waiver Denial Order, and the relevant record is being studied by staff. I expect they will present me a recommendation on how to proceed in the coming months.

Response to Written Questions Submitted by Hon. Mike Lee to Hon. Ajit Pai

Question 1. During the hearing, we began a conversation regarding a definition of the term "digital divide." During this exchange, you noted that such a definition would include any type of application that broadband would allow, including "access to entertainment."

A. If the term "digital divide" is determined by such continually evolving categories like "entertainment" or "any type of application that broadband would allow" is it possible to ever close the "digital divide"?

Answer. Although precisely defining the term "digital divide" is no doubt a difficult task, I believe closing it must be our priority. To me, that means helping to make high-speed broadband available to every American who wants access to the Internet. I have seen for myself in 45 states, including Utah, and the territories of Puerto Rico and the U.S. Virgin Islands what affordable high-speed Internet access can do for a community—for its families, its schools, its hospitals, its farms, its businesses—as well as the impact of its absence. High-speed Internet access is critical to economic opportunity, job-creation, education, and civic engagement. That's why we have encouraged carriers to replace aging copper with fiber on an expedited basis, modernized our rules to reduce barriers to infrastructure investment, and held our Nation's first reverse auction for fixed broadband support, among many other things. The results of these actions will be felt throughout America, and especially in rural America, where the case for building out broadband is already challenging for many businesses.

Question 2. As you know, Section 706 requires the FCC to determine whether "advanced telecommunications capabilities" are being deployed in a timely and reasonable fashion. The metrics used, like the setting of the broadband speed, are important because such determinations can trigger substantial FCC authority.

A. Can you identify any limits as to how the FCC establishes the metrics used to make Section 706 determinations?

Answer. Under the prior Administration's interpretation, there were no limits to the statutory language in section 706, and thus to the FCC's authority under that statute. The previous FCC not only set an impossibly high bar for determining whether "advanced telecommunications" were being deployed, it then found section 706 to be an authority-granting statute that imbued the Commission with vast regulatory powers.

We have rejected an interpretation of section 706 that is so elastic as to render limits meaningless. First, we have recognized that the words of the statute mean what they say: We must assess progress in broadband deployment (whether advanced telecommunications capability "is being deployed to all Americans in a reasonable and timely fashion" (emphasis added))—not that every single American across the country has broadband at this very moment. Second, we have recognized that people use the Internet in various ways, so we have adopted a holistic approach under which we examine progress in multiple speed tiers and types of services. Third, we have re-established the proper understanding of section 706—it is not an authority-granting statute but a hortatory statute that, should the Commission make a negative finding on the deployment of advanced telecommunications, simply exhorts the Commission to use its preexisting authority to deregulate (not heavily regulate) and spur competition.

Question 3. The Connect America Fund (CAF) is a Federal program that gives subsidies to companies to build networks in high cost areas. You've made a number of recent changes to the CAF program, including increasing the target speeds to 25/3 Mbps.

A. Does increasing target speeds under CAF affect the overall cost for a carrier to deploy a network? If so, what would those costs be?

B. How would increased carrier costs affect the overall CAF budget as well as the larger Universal Service Fund (USF) budget? Will these requirements necessitate increases to the CAF budget and the overall fees for consumers?

C. The USF is funded by fees placed on Americans. These fees are generally regressive and affect lower- and middle-income Americans more than higher earners. Could these requirements increase USF costs to American consumers?

Answer. Increasing speed targets under the CAF doesn't necessarily increase meaningfully the overall costs to deploy a network. For example, fiber networks are generally capable of providing service at various speed tiers for negligible marginal-cost differences—so increasing speed requirements for such builds generally benefits the consumer without significantly increasing the cost to the recipient or the taxpayer.

The Connect America Fund Phase II reverse auction, part of our broader effort to close the digital divide in rural America, is a great example of targeting finite USF funds to connect unserved areas with high-quality services in an efficient manner. Through this novel approach, we're now awarding about $1.5 billion to connect over 713,000 unserved homes and businesses nationwide. The Commission distributed funding much more efficiently thanks in part to intermodal, competitive bidding, saving $3.5 billion from the $5 billion price we initially thought would be required to connect these unserved areas. And consumers will receive high-quality broadband—99.7 percent of the winning bids are to provide consumers with service of at least 25/3 Mbps, and over half are receiving service of 100/20 Mbps or better.

Question 4. The FCC is currently working on a rule related to reforms of Section 621 or the regulations governing the issues of franchises for cable operators.

A. Can you share an update on the timing for the rulemaking as well as any particular findings on how the current cable franchise framework affects cable operators, including the overall costs for broadband deployment?

Answer. The Commission is scheduled to vote on a Third Report and Order in this proceeding to resolve the pending rulemaking at its August open meeting. A draft of this item was made public last week and is currently available for review on our website. The pending proceeding is a direct result of a 2017 remand by the U.S. Court of Appeals for the Sixth Circuit in Montgomery County, Md., et al v. FCC. The item, if adopted, would reach the following conclusions. First, we would conclude that cable-related, "in-kind" contributions required by a cable franchising agreement are franchise fees subject to the statutory five percent cap on franchise fees set forth in section 622 of the Communications Act, with limited exceptions, including an exemption for certain capital costs related to public, educational, and governmental access (PEG) channels. Second, we would find that under the Communications Act, local franchise authorities (LFAs) may not regulate the provision of most non-cable services, including broadband Internet access service, offered over a cable system by an incumbent cable operator. Third, we find that the Communications reempts any state or local regulation of a cable operator's non-cable services that would impose obligations on franchised cable operators beyond what Title VI of the Act allows. Finally, we would conclude that Commission requirements that concern LFA regulation of cable operators should apply to state-level franchising actions and state regulations that impose requirements on local franchising. I believe the Third Report and Order not only faithfully interprets the Communications Act but will also curtail practices of LFAs and other state and local entities to circumvent the franchise fee restrictions of the Communications Act. For example, the record shows that some entities are requiring cable operators to pay additional fees for the provision of non-cable services, a practice which is prohibited by the Communications Act. I expect that ending this practice will result in lower costs for consumers and additional investment in broadband networks, which will serve the public interest.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RON JOHNSON TO HON. AJIT PAI

Question 1. As you know, I, along with my colleagues in the Wisconsin delegation, sent you a letter regarding the importance of accurate broadband maps for our state. I appreciate your quick response to that letter and am glad to hear this is a shared priority of ours. At the hearing, you made two great announcements—(1) plans for a $20 billion investment in rural broadband, known as the Rural Digital Opportunity Fund, and (2) plans to move forward with a broadband mapping proposal in August.

a. Do you agree that the FCC must first improve its broadband maps to ensure that this valuable funding goes to the places that need it most?

b. Will your mapping proposal ensure that the maps will be promptly updated so that the new program is not delayed?

Answer. I agree that using updated and accurate broadband deployment data is critical to accomplishing the goal of making broadband available to all Americans, regardless of where they live. We need to understand where broadband is available and where it is not to target our efforts and direct funding to areas that are most in need. That is why the Commission began a top-to-bottom review of our deployment data collection to ensure that broadband data will be more precise, granular, and ultimately useful to the Commission and the public. I have circulated a Report and Order for the FCC's upcoming monthly meeting on August 1. That Report and Order would yield more granular and more accurate broadband maps. It also would provide for regular updates of the filed data to ensure that the maps we rely on are current. These updated maps would be used to focus funding to expand broadband through future initiatives such as the second phase of the proposed Rural Digital Opportunity Fund (RDOF). Once implemented, the RDOF would provide over $20 billion over the next decade to connect millions of rural homes and businesses to high-speed broadband, representing the FCC's single biggest step yet to close the digital divide.

Question 2. I understand there are a few proposals to fix this problem, including having providers submit "shapefiles" showing their actual service areas. This is not a new idea. In fact, some states and the Rural Utilities Service have already been using "shapefiles" showing providers' actual service areas to produce more accurate maps. Additionally, I understand USTelecom is currently piloting another method for collecting mapping information called "broadband serviceable location fabric."

a. Is the FCC considering these ideas as part of its Report and Order?

b. Is Congressional action needed to support the FCC's mapping goals?

Answer. The item that I circulated for the August Open Meeting, if adopted, would require broadband providers to report where they actually offer service below the census block level, including by submitting broadband coverage polygons (similar to shapefiles). The item also provides for incorporating public feedback into our mapping efforts. Lastly, the draft item I circulated seeks comment on how we could incorporate the fabric or similar location data into the new maps. I welcome your support for this project and look forward to continuing to work with you on our shared goal of improving the Commission's broadband coverage maps.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TODD YOUNG TO HON. AJIT PAI

Question 1. Chairman Pai, I want to first ask a couple of questions about the 24 GHz auction and the process that has undertaken.

Please describe what you believe to be the flaws in the Department of Commerce's study that claims 5G services in the 24 GHz band would cause harmful interference to weather sensors.

Interagency disagreements like this on the 24 GHz auction could send a message abroad that the U.S. Government isn't speaking within one voice when it comes to spectrum policy. What risks do we face at the World Radiocommunication Conference later this year if the U.S. doesn't speak with a unified voice on spectrum policy?

Answer. Unfortunately, the emission limits most recently advanced by the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) and the National Aeronautics and Space Administration (NASA) are based on an unvalidated and badly flawed study. As just one example, international guidance from the ITU suggests that analyses should be based on the adaptive array antennas (beamforming) expected to be used in this spectrum. (To roughly describe the concept, think of beamforming as a laser sending a single discrete pulse of light, instead of a regular light bulb sending streams of light everywhere.) These adaptive array antennas are one of the innovations that make mobile 5G in millimeter-wave bands possible. They significantly reduce the impact of commercial 5G operations on passive weather satellites. And yet, NOAA did not use such antennas in its study.

There are many other problems with the study. It assumes base stations and respective user equipment are transmitting at the same time, which is impossible under Time Division Duplex (TDD) systems that will be used for 5G services. It overestimates both the quantity of and power from base stations and user equipment. It does not adequately take into account "clutter," that is, the effects of buildings and trees that would block potentially interfering signals. And the wireless deployment scenarios the study uses are not consistent with any reasonable expectation of how 24 GHz band spectrum will actually be used. These and other flaws exist despite international guidance that any study methodology should include appropriate and reasonable input parameters.

Just as importantly, the most recent study has not been vetted through any public process, including through the ITU processes other studies have gone through. Indeed, the FCC staff was prevented from conducting a thorough review until May 10, 2019, when NASA finally provided the code for review after repeated requests by NTIA and FCC for the underlying study simulation. Only then, two months ago, could the FCC undertake an informed and detailed analysis of the study for the first time.

Such input from stakeholders, including the technical experts with the Commission, is critical for a study to be validated. FCC review has already revealed the substantial impact of the study's known flaws. And this review process is especially important since NOAA's prior study on this issue was withdrawn and abandoned by NTIA earlier this year due to flaws uncovered by the FCC and industry participants.

I strongly agree that the U.S. must speak with a unified voice internationally. If we do not, there are several risks. First, we raise the chances that the WRC–19 process results in spectrum policies that do not allow American companies to fully develop and deploy 5G services and applications and do not enable American consumers to be among the first 5G beneficiaries. And second, to the extent that the United States would be bound by a decision made at the WRC–19, that decision could well override domestic rules and policies and be based on unsound scientific and engineering analysis—each of which would set a bad precedent for the future.

The bottom line: the FCC looks forward to advancing U.S. positions for the WRC–19 that will advance U.S. leadership in 5G and protect passive weather services in the 24 GHz band. Based on the ongoing work of the Commission's spectrum engineering experts, we do not need to choose between 5G and critical weather forecasting tools. Sound and sober engineering analyses lead us to the firm belief that the United States can have both.

Question 2. Chairman Pai, U.S. intelligence agencies allege that Huawei and ZTE are linked to the Chinese government and their equipment could contain "backdoors" for Chinese intelligence. To address the concern, President Trump issued an Executive Order prohibiting the acquisition and installation of telecommunications technology that are determined to be a threat towards national security. With the FCC starting to consider how to apply the ban, rural carriers are now facing uncertainty.

Can you explain the "rip and replace" process and how it might affect rural carriers and their infrastructure? Furthermore, what do you believe would be the overall cost to replace Huawei, ZTE and other equipment?

Answer. National security threats posed by certain communications equipment providers have long been a matter of concern to both the Executive Branch and Congress. In April 2018, the Commission adopted a Notice of Proposed Rulemaking proposing to restrict use of universal service funds prospectively to purchase or obtain any equipment or services produced or provided by any company posing a national security threat to the integrity of communications networks or the communications supply chain. The NPRM seeks comment on ways to determine which companies pose a national security threat to communications networks or the communications supply chain, including approaches based on existing legislation (such as the Spectrum Act of 2012 and the National Defense Authorization Act for Fiscal Year 2018), as well as approaches that would rely on other Federal agencies to maintain a list of suppliers that they believe pose national security threats to U.S. communications networks. The NPRM also sought comment on the potential costs associated with the proposed rule.

Last October, the Bureau sought comment on the applicability of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 to the Commission's NPRM and the Commission's universal service programs. Some commenters have suggested carriers will need to remove and replace equipment purchased from entities determined to pose a national security threat to communications networks or the communications supply chain—but we have yet to find hard data on the costs of such a rip and replace process. The comment cycles have been completed and Commission staff is carefully reviewing the record in these proceedings, as well as the potential implications of the recent Executive Order.

Question 3. Chairman Pai, millions of rural Americans lack access to fixed high-speed broadband, which in today's economy is perceived as basic infrastructure. In the FCC's 2019 Broadband Deployment Report, the FCC concluded that broadband is being deployed to all Americans, including rural Americans, in a timely fashion. The report also asserted that FCC policies are promoting investments and removing burdensome barriers.

Given the ongoing growth in private investments, what are the FCC's priorities moving forward to ensure U.S. broadband providers have the resources they need in the free market for continued investments in rural America?

Additionally, how will the FCC continue to update its mapping to provide an accurate account of high-speed service?

Answer. The Commission has taken many steps to better enable the private sector to deploy broadband infrastructure. For example, last year, we made it easier and cheaper for competitive providers to attach fiber to utility poles through a groundbreaking reform called "one-touch make ready." We've also modernized rules that delay service providers from replacing outdated facilities with modern technologies like fiber. In March, we re-chartered the Broadband Deployment Advisory Committee (BDAC). In its second term, the BDAC will continue its work to craft recommendations for the Commission on how to accelerate the deployment of high-speed broadband, including ways to reduce and remove regulatory barriers to infrastructure investment, increase deployment and availability of broadband to low income communities, and train the workforce needed to deploy next generation networks.

We also need to understand where broadband is available and where it is not to target our efforts and direct funding to areas that are most in need. That is why the Commission began a top-to-bottom review of our deployment data collection to ensure that broadband data was more accurate, granular, and ultimately useful to the Commission and the public. After a thorough review of the record and the painstaking work of our career staff, I circulated a Report and Order for consideration at the FCC's August Open Meeting that would result in more granular and more accurate broadband maps through the creation of the Digital Opportunity Data Collection. That means requiring broadband providers to report where they actually offer service below the census block level and incorporating public feedback to ensure up to date and accurate broadband deployment maps.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BRIAN SCHATZ TO HON. AJIT PAI

Question. PEG channels are a critical way for the public to stay informed and engaged in their local communities. Access to PEG programming is particularly important to maintain media diversity, local content, and government transparency in Hawaii and around the Nation. So, I am troubled by the proposal currently under consideration in the Second FNPRM in MB Docket No. 05–311, which I have been told could drastically impact the quality and availability of PEG channels and programming.

I understand that the FCC has not yet ruled in this proceeding, but you have been a strong proponent of data-based decision making and conducting cost-benefit analyses. As such, I expect that you will collect and use robust and reliable data to evaluate your decision on this issue. Has the FCC collected data about the likely impact of this proposal on PEG channel and programming availability? Please provide the current and historical data the FCC is considering that detail the levels of actual and/or estimated in-kind contributions for PEG channel capacity and equipment. What percent of actual contributions for PEG channel capacity and equipment do you assume that cable providers will deduct from their franchising fee requirements? How did you determine these contribution levels? What other essential data points is the FCC evaluating in its cost benefit analysis? Has the FCC's Office of Economics and Analytics done a specific report on this proceeding in which it analyzes this and all other relevant data upon which the Commission intends to base its decision? If so, please provide a copy, and if not, why not? Please provide all of the relevant data that the FCC is considering in its analysis and, whenever possible, please provide Hawaii specific information in addition to national averages. If the data and analyses requested in this question is not available, will you commit to delaying circulation of a report and order in the docket until you have collected it and provided it to my staff?

Answer. I appreciate your questions regarding this proceeding. As you may be aware, the Commission adopted a Third Report and Order in this proceeding on August 1, 2019. For your convenience, I have included a copy of the final document as adopted. As the Commission's 74 pages of painstaking analysis, and my own separate statement make clear, this decision was driven primarily by the statutory framework outlined by Congress in the Communications Act—namely, Section 622's five-percent cap on franchise fees that local franchise authorities may collect from cable operators. As I observed in my statement, to the extent that those who disagree with the decision on policy grounds want a different result, "[t]he solution is simple: change the law. The job of administrative agencies like ours is not to rewrite laws set forth by Congress. It is to implement those laws. As the Supreme Court has opined, '[u]nder our system of government, Congress makes laws and the President, acting at times through agencies . . ., 'faithfully execute[s]' them. The power of executing the laws . . . does not include a power to revise clear statutory terms [quoting *Utility Air Regulatory Group v. EPA,* 573 U.S. 302, 327 (2014)]."

With respect to one issue you raise, the Commission's Office of Economics and Analytics did review the draft item prior to circulation, but as is generally the case, did not write an additional written report. Indeed, as indicated above, the primary issues in this proceeding involved statutory interpretation. Please feel free to reach out if you would like to discuss this issue further.

FEDERAL COMMUNICATIONS COMMISSION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05–311

THIRD REPORT AND ORDER

ADOPTED: AUGUST 1, 2019 RELEASED: AUGUST 2, 2019

By the Commission: Chairman Pai and Commissioners O'Rielly and Carr issuing separate statements; Commissioners Rosenworcel and Starks dissenting and issuing separate statements.

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I. INTRODUCTION

1. In this *Third Report and Order* (*Third Order*), we interpret sections of the Communications Act of 1934, as amended (the Act) that govern how local franchising authorities (LFAs) may regulate cable operators and cable television services, with specific focus on issues remanded from the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) in *Montgomery County, Md. et al. v. FCC.*[1] First, we conclude that cable-related, "in-kind" contributions required by a cable franchise agreement are franchise fees subject to the statutory five percent cap on franchise fees set forth in section 622 of the Act, with limited exceptions, including an exemption for certain capital costs related to public, educational, and governmental access (PEG) channels.[2] Second, we find that under the Act, LFAs may not regulate the provision of most non-cable services,[3] including broadband Internet access service, offered over a cable system by an incumbent cable operator. Third, we find that the Act preempts any state or local regulation of a cable operator's non-cable services that would impose obligations on franchised cable operators beyond what Title VI of the Act allows. Finally, we conclude that Commission requirements that concern LFA regulation of cable operators should apply to state-level franchising actions and state regulations that impose requirements on local franchising.

II. BACKGROUND

2. Every LFA as well as every "cable operator"[4] that offers "cable service"[5] must comply with the cable franchising provisions of Title VI of the Act.[6] Section 621(b)(1) prohibits a cable operator from providing cable service without first obtaining a cable franchise,[7] while section 621(a)(1) circumscribes the power of LFAs to award or deny such franchises.[8] In addition, section 622 allows LFAs to charge franchise fees and sets the upper boundaries of those fees. Notably, section 622 caps the fee at five percent of a "cable operator's gross revenues derived. . .from the operation of the cable system to provide cable service."[9] When Congress initially adopted these sections in 1984, it explained that it was setting forth a Federal policy to "define and limit the authority that a franchising authority may exercise through the franchise process."[10] Congress also expressly preempted any state or local laws or actions that conflict with those definitions and limits.[11]

3. As summarized in detail in the *Second FNPRM,* the Commission has an extensive history of rulemakings and litigation interpreting sections 621 and 622.[12] In short, the Commission in 2007 released a *First Report and Order* to provide guidance about terms and conditions in local franchise agreements that are unreasonable under section 621 of the Act with respect to new entrants' franchise agree-

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[1] *Montgomery County, Md. et al., v. FCC,* 863 F.3d 485 (6th Cir. 2017) (*Montgomery County*).
[2] 47 U.S.C. § 542.
[3] *See infra* note 257 (defining "non-cable service").
[4] *Id.* § 502(5) ("the term 'cable operator' means any 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.").
[5] *Id.* § 502(6) ("the term 'cable service' means—(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.").
[6] *Id.* §§ 521–573.
[7] *Id.* § 541(b)(1).
[8] *Id.* § 541(a)(1).
[9] *Id.* § 542.
[10] H.R. Rep. No. 98–934, at 19 (1984).
[11] 47 U.S.C. § 556(c). *See, e.g., Comcast v. City of Plano,* 315 S.W.3d 673, 678–80 (Tex. Ct. App. 2010) (discussing historical development of Federal regulatory scheme); *City of Chicago v. Comcast Cable Holdings, L.L.C.,* 231 Ill.2d 399, 405–07 (2008).
[12] *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,* Second Further Notice of Proposed Rulemaking, 33 FCC Rcd 8952, 8953–59, paras. 3–14 (2018) (*Second FNPRM*).

ments.[13] Two major conclusions that the Commission adopted are that (1) non-cash, "in-kind" contributions from cable operators to franchise authorities are franchise fees that count toward the statutory cap of five percent of cable operator revenue,[14] and (2) franchising authorities may not use their cable franchising authority to regulate non-cable services (like telephone and broadband services) that the new entrants deliver over their mixed-use networks (*i.e.,* networks that carry broadband services, voice services, and other non-cable services, in addition to video programming services).[15] The Commission also sought comment on whether to extend those conclusions to agreements that LFAs have with incumbent cable operators,[16] and ultimately decided in a *Second Report and Order*[17] and an *Order on Reconsideration*[18] that those conclusions should apply to incumbent cable operators.

4. In *Montgomery County,* the Sixth Circuit addressed challenges by LFAs to the *Second Report and Order* and the *Order on Reconsideration.*[19] The court agreed that in-kind (*i.e.,* non-cash) contributions are franchise fees as defined by section 622(g)(1), noting that section 622(g)(1) defines "franchise fee" to include "*any* tax, fee, or assessment *of any kind"* and that the terms "tax" and "assessment" can include nonmonetary exactions.[20] The court found, however, that the fact that the term franchise fee *can* include in-kind contributions "does not mean that it necessarily does include every one of them."[21] The court concluded that the Commission failed to offer any explanation in the *Second Report and Order* or in the *Order on Reconsideration* as to why section 622(g)(1) allows it to treat cable-related, "in-kind" exactions—such as free or discounted cable services or obligations related to PEG channels—as franchise fees.[22] LFAs had claimed that the Commission's interpretation would limit LFAs' ability to enforce their statutory authority to require cable operators to dedicate channel capacity for PEG use and to impose build-out obligations in low-income areas,[23] and the court noted that the Commission's orders did not reflect any consideration of this concern.[24] The court also stated that the Commission failed to define what "in-kind" means.[25] The court therefore vacated as arbitrary and capricious the *Second Report and Order* and the *Order on Reconsideration* to the extent that they treat cable-related, in-kind exactions as franchise fees

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[13] *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,* Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007) *(First Report and Order*), *aff'd sub nom. Alliance for Community Media et al., v. FCC,* 529 F.3d 763 (6th Cir. 2008) (*Alliance*), *cert. denied,* 557 U.S. 904 (2009). The term "new entrants" as used in the *First Report and Order* refers to entities that choose to offer "cable service" over a "cable system" utilizing public rights-of-way and thus are deemed under the Act to be "cable operator[s]" that must obtain a franchise. *First Report and Order,* 22 FCC Rcd at 5106 n.24. Such new entrants largely were telecommunications carriers subject to Title II of the Act that were seeking to enter the cable services market.

[14] *First Report and Order,* 22 FCC Rcd at 5149–50, paras. 105–08.

[15] *Id.* at 5155–56, paras. 121–24.

[16] *Id.* at 5164–65, paras. 139–40.

[17] *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,* Second Report and Order, 22 FCC Rcd 19633, 19637–38, 19640–41, paras. 11, 17 (2007) (*Second Report and Order*).

[18] *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,* Order on Reconsideration, 30 FCC Rcd 810, 814–17, paras. 11–15 (2015) (*Order on Reconsideration*).

[19] *Montgomery County,* 863 F.3d at 487.

[20] *Id.* at 490–91.

[21] *Id.* at 491.

[22] *Id.* In the *First Report and Order,* the Commission ruled that "any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap." *First Report and Order,* 22 FCC Rcd at 5149, para. 105. This ruling was upheld by the Sixth Circuit in *Alliance.* 529 F.3d at 782–83. The Commission later relied on the *First Report and Order* to conclude that "in-kind payments involving both cable and non-cable services" count toward the franchise fee cap. *Order on Reconsideration,* 30 FCC Rcd at 816, para. 13. The court found that the *Order on Reconsideration* incorrectly asserted that the *First Report and Order* had already treated "in-kind" cable-related exactions as franchise fees and that the Sixth Circuit had approved such treatment in *Alliance. Montgomery County,* 863 F.3d at 490. The court also found that the *First Report and Order* did not make clear that cable-related exactions are franchise fees under section 622(g)(1). *Id.* In this regard, the court pointed out that the Commission specifically told the Sixth Circuit in *Alliance* that the *First Report and Order*'s "analysis of in-kind payments was expressly limited to payments that do not involve the provision of cable service." *Id.*

[23] 47 U.S.C. § 531.

[24] *Montgomery County,* 863 F.3d at 491.

[25] *Id.*

under section 622(g)(1).[26] The court directed the Commission to determine and explain on remand to what extent cable-related, in-kind contributions are franchise fees under the Act.[27]

5. The court in *Montgomery County* also agreed with LFAs that neither the *Second Report and Order* nor the *Order on Reconsideration* offered a valid statutory basis for the Commission's application of its prior "mixed-use ruling" to incumbent cable operators.[28] Under the mixed-use rule, "LFAs' jurisdiction applies only to the provision of cable services over cable systems" and "an LFA may not use its video franchising authority to attempt to regulate a LEC's entire network beyond the provision of cable services."[29] The court stated that the Commission's decision in the *First Report and Order* to apply the mixed-use rule to new entrants had been defensible because section 602(7)(C) of the Act expressly states that LFAs may regulate Title II carriers only to the extent that they provide cable services and the Commission found that new entrants generally are Title II carriers.[30] The court observed that in extending the mixed-use rule to incumbent cable operators in the *Second Report and Order,* the Commission merely relied on the *First Report and Order's* interpretation of section 602(7)(C), noting that section 602(7)(C) "does not distinguish between incumbent providers and new entrants."[31] The court found, however, that this reasoning is not an affirmative basis for the Commission's decision in the *Second Report and Order* to apply the mixed-use rule to incumbent cable operators because section 602(7)(C) by its terms applies only to Title II carriers and "many incumbent cable operators are not Title II carriers."[32] The court further found that the *Order on Reconsideration* did not offer any statutory basis for the Commission's decision to extend the mixed-use rule to incumbent cable operators.[33] Accordingly, the court concluded that the Commission's extension of the mixed-use rule to incumbent cable operators that are not common carriers was arbitrary and capricious.[34] The court vacated the mixed-use rule as applied to those incumbent cable operators and remanded for the Commission "to set forth a valid statutory basis, if there is one, for the rule as so applied."[35]

6. The Commission in September 2018 issued the *Second FNPRM* to address the issues raised by the remand from the Sixth Circuit in *Montgomery County.* In the *Second FNPRM,* the Commission tentatively concluded that: (1) it should treat cable-related, in-kind contributions required by LFAs from cable operators as a condition or requirement of a franchise agreement as franchise fees subject to the statutory five percent cap on franchise fees set forth in section 622 of the Act, with certain exceptions;[36] and (2) it should apply its mixed-use rule to incumbent cable operators.[37] The Commission sought comment on these tentative conclusions.[38] The

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[26] *Id.* at 491–92.

[27] *Id.* at 492.

[28] *Id.* at 493. The court noted that LFAs' primary concern with the mixed-use ruling is that it would prevent them from regulating "institutional networks" or "I-Nets"—communication networks that are constructed or operated by the cable operator and are generally available only to subscribers who are not residential customers—even though the Act makes clear that LFAs may regulate I-Nets. *Id.* at 492; *see* 47 U.S.C. §§ 531(b) (authorizing franchising authorities to require as part of a franchise or franchise renewal that channel capacity on institutional networks be designated for educational or governmental use), 541(b)(3)(D) ("Except as otherwise permitted by sections 611 and 612, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise"). *See also id.* § 531(f) (defining "institutional networks"). The court observed, however, that the Commission acknowledged that its mixed-use rule was not meant to prevent LFAs from regulating I-Nets. *Montgomery County,* 863 F.3d at 492.

[29] *First Report and Order,* 22 FCC Rcd at 5155, paras. 121–22.

[30] *Montgomery County,* 863 F.3d at 492–93.

[31] *Id.* at 493.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Second FNPRM,* 33 FCC Rcd at 8960–64, paras. 16–24. The Commission proposed to apply this treatment of cable-related, in-kind contributions to both incumbent cable operators and new entrants. *Id.* at 8963–64, para. 22.

[37] *Second FNPRM,* 33 FCC Rcd at 8964–65, para. 25. In particular, the Commission tentatively concluded that the mixed-use rule prohibits LFAs from regulating the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers, or from regulating facilities and equipment used in the provision of such non-cable services, with the exception of I-Nets. *Id.* at 8965–66, para. 26. Similarly, the Commission tentatively concluded that LFAs are prohibited from regulating the provision of non-cable services provided by incumbent cable operators that are not common carriers, or the facilities and equipment used to provide such services. *Id.* at 8966–68, paras. 27–28.

[38] *Id.* at 8952, para. 1.

Commission also sought comment on whether other statutory provisions limit LFAs' authority to regulate non-cable services offered over a cable system by an incumbent cable operator or the facilities and equipment used to provide such services.[39] Finally, the Commission invited comment on whether it should apply its proposals and tentative conclusions in the *Second FNPRM,* and its prior decisions governing regulation of cable operators by local franchising authorities, to franchising actions taken at the state level and state regulations that impose requirements on local franchising.[40]

III. DISCUSSION

7. We largely adopt our tentative conclusions in the *Second FNPRM.*[41] First, we conclude that cable-related, in-kind contributions required by LFAs from cable operators as a condition or requirement of a franchise agreement are franchise fees subject to the statutory five percent cap on franchise fees set forth in section 622 of the Act. We find that the Act exempts capital contributions associated with the acquisition or improvement of a PEG facility from this definition and remind LFAs that under the Act they may only require "adequate" PEG access channel capacity, facilities, or financial support. Second, we find that our mixed-use rule applies to incumbent cable operators. Third, we find that the Act preempts any state or local regulation of a cable operator's non-cable services that would impose obligations on franchised cable operators beyond what Title VI of the Act allows. Finally, we decide that our guidance related to the local franchising process in this docket also will apply to state-level franchising actions and state regulations that impose requirements on local franchising.

A. In-Kind Contributions

8. Section 622 of the Act contains a broad definition of franchise fees. For the reasons provided below, we find that most cable-related, in-kind contributions are encompassed within this definition and thus must be included for purposes of calculating the statutory five percent cap on such fees. In this section, we first explain our interpretation of section 622 and why the definition of franchise fees includes most cable-related, in-kind contributions. We then explain how our interpretation applies to certain common franchise agreement terms. Lastly, we explain the process that LFAs and cable operators should use to amend their franchise agreements to conform to this Order.

1. Interpretation of Cable-Related, In-Kind Contributions Under Section 622

9. Addressing the first issue raised by the remand from the Sixth Circuit in *Montgomery County,* we adopt our tentative conclusion that we should treat cable-related, in-kind contributions[42] required by LFAs from cable operators as a condition or requirement of a franchise agreement as franchise fees subject to the statutory five percent cap set forth in section 622 of the Act, with limited exceptions as described herein.[43] We also adopt our tentative conclusion that this treatment of cable-related, in-kind contributions should be applied to both new entrants and incumbent cable operators.[44] As explained below, we find that this interpretation is consistent with the statutory language and legislative history.

10. Section 622 of Title VI, entitled "Franchise fees," governs cable operator obligations with respect to franchise fees.[45] Specifically, section 622(a) states that any cable operator may be required under the terms of any franchise agreement to pay a franchise fee, and section 622(b) sets forth the limitation that "[f]or any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived

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[39] *Id.* at 8969–71, para. 31.
[40] *Id.* at 8971–72, para. 32.
[41] As discussed below, we define "cable related, in-kind contributions" slightly differently than proposed, and our reasoning for not applying build-out costs is different than what we proposed. *Compare infra* paras. 25 and 57 *with Second FNPRM,* 33 FCC Rcd at 8963–64, paras. 21 and 24.
[42] We define this term *infra* para. 25, to include "any non-monetary contributions related to the provision of cable services provided by cable operators as a condition or requirement of a local franchise, including but not limited to free or discounted cable service to public buildings, non-capital costs in support of PEG access, and costs attributable to the construction of I-Nets. It does not include the costs of complying with build-out and customer service requirements."
[43] *Second FNPRM,* 33 FCC Rcd at 8960, para. 16.
[44] *Id.* at 8963, para. 22.
[45] 47 U.S.C. § 542.

in such period from the operation of the cable system to provide cable services."[46] Notably, section 622(g) defines the term "franchise fee" for purposes of this section.[47]

11. To understand what types of contributions from cable operators are franchise fees subject to the five percent statutory cap, the key provision is the section 622(g) definition, which states that "the term 'franchise fee' includes *any tax, fee, or assessment of any kind* imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such," subject to certain enumerated exceptions.[48] Specifically, according to the definition, the term "franchise fee" does not include the following: (1) any tax, fee, or assessment of general applicability;[49] (2) in the case of any franchise in effect on October 30, 1984, payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, PEG access facilities;[50] (3) in the case of any franchise granted after October 30, 1984, capital costs which are required by the franchise to be incurred by the cable operator for PEG access facilities;[51] (4) 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;[52] or (5) any fee imposed under Title 17.[53] Because Congress spoke directly to the issue of what constitutes a franchise fee in section 622(g), our analysis of whether cable-related, in-kind exactions are included in the franchise fee is appropriately focused on this statutory language.

12. As a preliminary matter, we note our prior finding, which was upheld by the Sixth Circuit in *Montgomery County,* that the franchise fee definition in section 622(g) can encompass both monetary payments imposed by a franchising authority or other governmental entity on a cable operator, as well as "in-kind" payments—*i.e.,* payments consisting of something other than money, such as goods and serv-

[46] *Id.* § 542(a), (b).

[47] *Id.* § 542(g).

[48] *Id.* § 542(g)(1) (emphasis added).

[49] *Id.* § 542(g)(2)(A). In the *Second FNPRM,* we noted that, by definition, a tax, fee, or assessment of general applicability does not cover cable-related, in-kind contributions, and therefore we tentatively concluded that this exclusion is not applicable to such contributions. *Second FNPRM,* 33 FCC Rcd at 8961, para. 18. *See also* H.R. Rep. No. 934, 98th Cong., 2nd Sess. 1984 at 64 ("This would include such payments as a general sales tax, an entertainment tax imposed on other entertainment businesses as well as the cable operator, and utility taxes or utility user taxes which, while they may differentiate the rates charged to different types of utilities, do not unduly discriminate against the cable operator so as to effectively constitute a tax directed at the cable system."). No commenter disputes this analysis, and we affirm it here.

[50] 47 U.S.C. § 542(g)(2)(B). *See infra* Section III.A.2.b (discussing PEG costs).

[51] *Id.* § 542(g)(2)(C). *See infra* Section III.A.2.b (discussing PEG costs).

[52] *Id.* § 542(g)(2)(D). In the *First Report and Order,* the Commission found that the term "incidental" in this section should be limited to the list of incidentals in the statutory provision, as well as certain other minor expenses, and the court in *Alliance* upheld this determination. *First Report and Order,* 22 FCC Rcd at 5148, para. 103; *Alliance,* 539 F.3d at 782–83. The Commission also emphasized that non-incidental costs should be counted toward the five percent cap on franchise fees, and listed various examples including attorney fees and consultant fees, application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided to an LFA, and in-kind services unrelated to the provision of cable services. *First Report and Order,* 22 FCC Rcd at 5149, para. 104. In the *Second FNPRM,* we explained that, although the statute does not define the term "incidental," based on the interpretive canon of *noscitur a sociis,* the exemplary list delineated in the text of the provision as well as the applicable legislative history suggests that the term refers to costs or requirements related to assuring that a cable operator is financially and legally qualified to operate a cable system, not to cable-related, in-kind contributions. *Second FNPRM,* 33 FCC Rcd at 8961–62, para. 18 (citing *Gustafson v. Alloyd Co.,* 513 U.S. 561, 575 (1995)). *See also* H.R. Rep. No. 934, 98th Cong., 2nd Sess. 1984 at 64 ("[F]ranchise fee is defined so as not to include any bonds, security funds, or other incidental requirements or costs necessary to the enforcement of the franchise."). Consistent with this analysis and precedent, we find that cable-related, in-kind contributions demanded by an LFA do not qualify as "incidental" charges excluded in section 622(g)(2)(D). *See id.* No commenter disputes our interpretation of this particular exclusion.

[53] 47 U.S.C. § 542(g)(2)(E). In the *Second FNPRM,* we explained that this section excludes from the definition of franchise fees any fees imposed under the Copyright Act under Title 17, United States Code, and thus does not appear to apply to cable-related, in-kind contributions. *Second FNPRM,* 33 FCC Rcd at 8961, para. 18. *See also* H.R. Rep. No. 934, 98th Cong., 2nd Sess. 1984 at 64 ("Any fee imposed under the Copyright Act would not be considered a franchise fee."). No commenter disputes this analysis, and we affirm it here.

ices[54]—that are so imposed.[55] The definition of "franchise fee" in section 622(g)(1) broadly covers "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator . . . solely because of [its] status as such."[56] Because the statute does not define the terms "tax," "fee," or "assessment," we look to the ordinary meaning of such terms.[57] As the court explained in *Montgomery County,* the definitions of the terms "tax" and "assessment," in particular, "can include noncash exactions."[58] Further, as the court observed, section 622(g)(1) "more specifically defines 'franchise fee' to include '*any* tax, fee, or assessment *of any kind*[,]' . . . which requires us to give those terms maximum breadth."[59] Thus, consistent with the court's conclusion on this issue, the term fran-

[54] *See* Merriam-Webster, Definition of "In-Kind," available at *https://www.merriam-webster.com/dictionary/in-kind* (defining "in-kind" as "consisting of something (such as goods or commodities) other than money"). According to the record, LFAs in some cases require a grant or other monetary contribution earmarked for cable-related services, such as PEG and I-Net support. *See, e.g.,* Altice May 9, 2019 *Ex Parte* at 7–8 (describing Altice's payment of "PEG grants" to LFAs). While we focus here on whether cable-related, *in-kind* (non-monetary) contributions are subject to the five percent cap on franchise fees, we note that these monetary contributions are subject to the franchise fee cap, unless otherwise excluded under section 622(g)(2). *See infra* note 61.

[55] *See First Report and Order,* 22 FCC Rcd at 5149, paras. 104–05; *Second FNPRM,* 33 FCC Rcd at 8960, para. 17. We reject the argument that franchise considerations are not "imposed" by a franchising authority because they are negotiated in an arms-length transaction between the parties and "are not established by force." *See* Comments of the Association of Washington Cities *et al.,* at 10 (Nov. 14, 2018) (AWC *et al.* Comments); Comments of the City of Philadelphia, *et al.,* at 21–23 (Nov. 14, 2018) (City of Philadelphia *et al.* Comments); Reply Comments of the City of Philadelphia, *et al.,* at 6–7 (Dec. 14, 2018) (City of Philadelphia *et al.* Reply); NATOA *et al.* July 24, 2019 *Ex Parte* at 2. The definition of the term "impose" is not limited to "established as if by force," but can also mean "to establish or apply by authority." *See* Merriam-Webster, Definition of "Impose," *available at* https://www.merriam-webster.com/dictionary/impose. *See also* Reply Comments of Free State Foundation, at 11–12 (Dec. 14, 2018) (Free State Foundation Reply) ("Nor should the Commission accept the contention that in-kind contributions are purely voluntary and therefore ought not be restricted by the Commission's proposal. Sections 621 and 622 reflect the understanding that LFAs are not ordinary private market participants but governing authorities with significant power and policy setting concerns."). Further, under this narrow interpretation of the term, no monetary or in-kind payments could be construed as a franchise fee if they are negotiated by the parties as terms of the franchise agreement. As NCTA points out, "[b]y this standard, even a franchise agreement containing a requirement that the cable operator pay five percent of gross revenues to the franchising authority would not contain a franchise fee, since the five percent fee was included in a negotiated document and was not imposed by government fiat." Reply Comments of NCTA—The Internet & Television Association, at 5, n.13 (Dec. 14, 2018) (NCTA Reply).

[56] 47 U.S.C. § 542(g)(1) (emphasis added).

[57] *Taniguchi v. Kan Pac. Saipan, Ltd.,* 566 U.S. 560, 566, 132 S. Ct. 1997, 2002, 182 L. Ed. 2d 903 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."). *See* Merriam-Webster, Definition of "Tax," available at *https://www.merriam-webster.com/dictionary/tax* (defining "tax" as "a charge usually of money imposed by authority on persons or property for public purposes; a sum levied on members of an organization to defray expenses"); Black's Law Dictionary (7th ed. 1999), Definition of "Tax," (noting that "[m]ost broadly, the term embraces all governmental impositions on the person, property, privileges, occupations, and enjoyment of the people. . . . Although a tax is often thought of as being pecuniary in nature, *it is not necessarily payable in money"* (emphasis added)); Merriam-Webster, Definition of "Fee," available at *https://www.merriam-webster.com/dictionary/fee* (defining "fee" as "a fixed charge; a sum paid or charged for a service"); Black's Law Dictionary (7th ed. 1999), Definition of "Fee," (defining "fee" as "[a] charge for labor or services"); Merriam-Webster, Definition of "Assessment," available at *https://www.merriam-webster.com/dictionary/assessment* (defining "assessment" as "the amount assessed: an amount that a person is officially required to pay especially as a tax"); Black's Law Dictionary (7th ed. 1999), Definition of "Assessment," (defining "assessment" as the "[i]mposition of something, such as a tax or fine, according to an established rate"). *See also Montgomery County,* 863 F.3d at 490 (noting that the term "assessment" has been defined as "[a]n enforced contribution of money *or other property* . . . [or] *any contribution* imposed by government upon individual, for the use and service of the state," and observing that Justice Scalia has recognized that assessments need not be monetary by referring to "in-kind assessments") (emphasis in original) (citations omitted). We disagree with NATOA *et al.*'s contention that the Commission "nowhere analyzes or explains why [certain] franchise requirements are 'assessments' or 'exactions.'" *See* NATOA *et al.* July 24, 2019 *Ex Parte* at 2. *See also* Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 8 (arguing that the Commission does not "offer[ ] a basis in established law for the idea that any imposition of costs is presumptively a tax, fee, or assessment"). Rather, we find that an "assessment," the term used in the statute, includes any contribution imposed by government, based on its ordinary meaning.

[58] *See Montgomery County,* 863 F.3d at 490–91.

[59] *Id.*

chise fee in section 622(g)(1) includes non-monetary payments.[60] We, therefore, reject arguments that it should be construed to cover only monetary payments.[61]

13. As the court noted in *Montgomery County,* "that the term 'franchise fee' can include noncash exactions, of course, does not mean that it necessarily *does* include every one of them."[62] As such, the next step in our analysis is to evaluate specifically whether *cable-related,* in-kind contributions[63] are included within the franchise fees. The Commission previously determined that in-kind contributions unrelated to the provision of cable service are franchise fees subject to the statutory five percent cap, and the court's decision in *Montgomery County* upheld this interpretation.[64] In making this determination, the Commission pointed to examples in the record where LFAs demanded in-kind contributions unrelated to the provision of cable services in the context of franchise negotiations, and it explained that such requests do not fall within any of the exempted categories in section 622(g)(2) and thus should be considered a franchise fee under section 622(g)(1).[65]

14. We find that there is no basis in the statute for exempting all cable-related, in-kind contributions for purposes of the five percent franchise fee cap or for distinguishing between cable-related, in-kind contributions and in-kind contributions unrelated to the provision of cable services. As noted above, the section 622(g)(1) franchise fee definition broadly covers "any tax, fee, or assessment of any kind,"[66] and we conclude that cable-related, in-kind contributions fall within this definition. There is nothing in this language that limits in-kind contributions included in the franchise fee.[67] In fact, Congress specified that the definition covers "*any*" tax, fee, or assessment "*of any kind,*" which means those terms should be interpreted expansively and given "maximum breadth."[68]

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[60] *Id. See also* NCTA Reply at 4–5; Comments of Verizon, at 5 (Nov. 14, 2018) (Verizon Comments); Reply Comments of Altice USA, Inc., at 19 (Dec. 14, 2018) (Altice Reply); ICLE July 18, 2019 *Ex Parte* at 3–13.

[61] *See* City of Philadelphia *et al.* Comments at 22 (arguing that "[b]ased on the ordinary meanings of the terms, there is nothing unclear about what is included as a franchise fee" and that all of the terms used in the definition "are referring to unilateral monetary charges by a unit of government"); Comments of Charles County, Maryland, at 7 (Nov. 14, 2018) (Charles County Comments) (arguing that "the words tax, fee, and assessment are terms of art and have precise meaning established by lengthy precedent" and that "Congress chose not to draft the statutory language to include other forms of value transfer, such as grants, external costs, or charges, in the statutory definition of franchise fees"); Reply Comments of Anne Arundel County, Maryland *et al.,* at 6 (Dec. 14, 2018) (Anne Arundel County *et al.* Reply) ("The Act is clearly structured to consider as franchise fees only *monetary payments,* and to treat other, cable-related non-monetary services and facilities requirements *differently* . . .."). Contrary to these arguments, the terms used in the statute are not limited to monetary payments. *See supra* note 57 and accompanying text. Moreover, these arguments ignore Congress' specification that the franchise fee includes "*any* tax, fee, or assessment *of any kind,*" essentially reading this expansive language out of the statute. For example, although Anne Arundel County *et al.* argue "that generally, taxes, fees, and assessments are monetary, but that in exceptional circumstances (such as forfeitures) non-monetary obligations may also qualify," there is nothing in the statute—which specifically applies to a tax, fee, or assessment *of any kind*—or in the definition of these terms that supports this statement. *See* Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 7.

[62] *Montgomery County,* 863 F.3d at 491.

[63] *See supra* note 42 (defining and providing examples of "cable-related, in-kind contributions").

[64] *See Second FNPRM,* 33 FCC Rcd at 8960, para. 17 (citing *Montgomery County,* 863 F.3d at 490–91; *First Report and Order,* 22 FCC Rcd at 5149, para. 105). *See also* NCTA Reply at 5–6. *But see* Comments of the National Association of Telecommunications Officers and Advisors *et al.,* at 8 (Nov. 14, 2018) (NATOA *et al.* Comments). Contrary to the contention of NATOA *et al.,* the Commission's finding in the *First Report and Order* that in-kind contributions unrelated to the provision of cable services are franchise fees subject to the statutory five percent cap was undisturbed by subsequent court decisions in *Alliance* and *Montgomery County.* The court in *Montgomery County* vacated the orders to the extent they treat *cable-related,* in-kind exactions as franchise fees, and thus the Commission's finding with regard to in-kind contributions unrelated to the provision of cable services still stands.

[65] *See First Report and Order,* 22 FCC Rcd at 5149–50, paras. 105–08. In the *First Report and Order,* the Commission cited examples of in-kind contributions unrelated to the provision of cable services from the record, including requests for traffic light control systems, scholarships, and video hookups for a holiday celebration. *See First Report and Order,* 22 FCC Rcd at 5149–50, paras. 106–07.

[66] 47 U.S.C. § 542(g)(1).

[67] *See* Comments of the American Cable Association, at 4 (Nov. 14, 2018) (ACA Comments); Comments of NCTA—The Internet & Television Association, at 41–42 (Nov. 14, 2018) (NCTA Comments).

[68] *See supra* note 59 and accompanying text. *But see* Comments of Anne Arundel County, Maryland *et al.,* at 20 (Nov. 14, 2018) (Anne Arundel County *et al.* Comments). Anne Arundel County *et al.* make the conclusory statement that "[r]egulatory obligations are clearly not a tax or fee," without citing a definition of these terms or including the term "assessment," and they

15. Further, there is no general exemption for cable-related, in-kind contributions in the five excluded categories listed in section 622(g)(2).[69] Only two of the exclusions encompass two very specific kinds of cable-related, in-kind contributions, but not all such contributions generally. In particular, section 622(g)(2)(B) excludes payments required by the franchise to be made by the cable operator for, or in support of the use of, PEG access facilities (for franchises in effect on October 30, 1984), and section 622(g)(2)(C) excludes capital costs which are required by the franchise to be incurred by the cable operator for PEG access facilities (for franchises granted after October 30, 1984).[70] We agree with ACA that the structure of the relevant statutory provision is "straightforward," providing a broad definition of franchise fee, "then expressly provid[ing] a limited number of exceptions to this definition, none of which is so broad as to include all cable-related, in-kind contributions." [71]

16. Moreover, the fact that Congress carved out specific exceptions to the franchise fee definition for certain PEG-related contributions bolsters the conclusion that Congress did not intend to establish a general exemption for all cable-related, in-kind contributions from treatment as franchise fees.[72] Because support for PEG access facilities and PEG capital costs fall within 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.[73] We disagree with the contention that the specific exceptions in section 622(g)(2) were intended to address only "payments that otherwise might be considered franchise fees," and that "[o]ther cable-related obligations were not considered 'fees' to begin with, let alone payments that required a specific exemption." [74] This argument erroneously constricts the definition of franchise fees to apply only to "fees," while the statute more broadly includes "any tax, fee, or assessment of any kind." Further, we believe it is more consistent with the statutory text and structure to construe the exceptions as carve-outs from a broader definition that sweeps in all cable-related, in-kind contributions.[75]

17. While the statutory text is alone sufficient to support our conclusion, we also find that the legislative history supports our position that cable-related, in-kind contributions are franchise fees subject to the five percent cap.[76] As we observed in the *Second FNPRM,* we see no basis in the legislative history for distinguishing between in-kind contributions unrelated to the provision of cable services and cable-related, in-kind contributions for purposes of the five percent franchise fee cap.[77] Further,

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make no mention of the court's own conclusion in *Montgomery County* that the term franchise fee "can include noncash exactions." *See Montgomery County,* 863 F.3d at 490–91.

[69] *See* ACA Comments at 5–6.

[70] *See supra* notes 50–51. We analyze and interpret these two PEG-related exclusions in Section III.A.2.b, *infra.*

[71] *See* Reply Comments of the American Cable Association, at 14 (Dec. 14, 2018) (ACA Reply). According to Anne Arundel County *et al.,* the Commission incorrectly implies that "unless something falls within an exception, it must be a tax, fee, or assessment." *See* Anne Arundel County *et al.* Comments at 19. However, this is inconsistent with our analysis, in which we first evaluate whether a type of contribution meets the definition of franchise fee in section 622(g)(1) and, if so, then determine whether it falls within a specified exception in section 622(g)(2). It is also inconsistent with our conclusion herein that certain requirements, such as customer service and build-out requirements, are not covered by the definition of franchise fee. *See infra* Section III.A.2.d.

[72] *See* ACA Comments at 5.

[73] *See id.*

[74] *See* NATOA *et al.* Comments at 5; Reply Comments of the National Association of Telecommunications Officers and Advisors *et al.,* at 3 (Dec. 14, 2018) (NATOA *et al.* Reply); Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 12. *See also* Anne Arundel County *et al.* Comments at 17–18 ("The subsections in 622(g)(2) are designed to *permit* collection of additional fees that otherwise might be misinterpreted to fall within the cap. The exceptions to the definition of franchise fee are expansions of LFA authority, and do not narrow the definition of franchise fees."); Comments of the City of New York, at 9–10 (Nov. 14, 2018) (City of New York Comments); Reply Comments of the State of Hawaii, at 2 (Dec. 14, 2018) (Hawaii Reply).

[75] For example, under section 622(g)(2)(B), payments required by the franchise to be made by the cable operator for, or in support of the use of, PEG access facilities are included in the franchise fee only for franchises granted after October 30, 1984.

[76] *See* ACA Comments at 8.

[77] *Second FNPRM,* 33 FCC Rcd at 8960, para. 17. According to NCTA, the legislative history shows that Congress' intent generally was to *limit* the total financial obligations that franchising authorities may impose on cable operators. *See* NCTA Reply at 7 ("But Congress adopted the five percent cap as a *limit* 'to prevent local governments from taxing private cable operators to death as a means of raising local revenues for other concerns.'") (citing 129 Cong. Rec. S8254 (1983), statement of Sen. Goldwater). *See also* NCTA Comments at 39–40. We find that allowing LFAs to circumvent the statutory five percent cap by not counting cable-related, in-kind contributions that clearly fall within the statutory definition of franchise fees would be contrary

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we see no basis in the legislative history to treat in-kind payments differently from monetary payments for purposes of determining what is a franchise fee. The legislative history, in discussing what constitutes a franchise fee, refers to the definition in section 622(g)(1), which "include[s] any tax, fee, or assessment imposed on a cable operator or subscribers solely because of their status as such," and it makes no distinction between cable-related contributions and those unrelated to cable services, nor between monetary and non-monetary payments.[78] The legislative history then elaborates on the specific exemptions in Section 622(g)(2) and, in particular, notes that "[s]pecific exemptions from the franchise fee limitations are included for certain payments related to public, educational and governmental access."[79] It specifies that, "[f]or existing franchises, a city may enforce requirements that additional payments be made above the 5 percent cap to defray the cost of providing public, educational and governmental access, including requirements related to channels, facilities and support necessary for PEG use."[80] Because Congress limited this exception to then-existing franchises, this provision elucidates Congress' intent that contributions in support of PEG access—which are cable-related, in-kind contributions—are subject to the five percent cap for franchises granted after the 1984 Cable Act.[81]

18. We disagree with commenters who cite to a portion of the legislative history as evidence of Congress' intent that franchise fees include only monetary payments made by cable operators. Specifically, LFA commenters cite a statement in the discussion of subsection 622(g)(2)(C), which excludes certain PEG-related capital costs from the franchise fee definition, that "[i]n general, 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."[82] LFA commenters' reading of this statement is inconsistent with the overall text and structure of section 622(g).[83] Section 622(g)(1) "specifically defines 'franchise fee' to include '*any* tax, fee, or assessment *of any kind*[,]'" subject to certain enumerated exclusions, and the court in *Montgomery County* was clear that this statutory language "requires us to give those terms maximum breadth."[84] The Commission has already concluded, and the Sixth Circuit has twice upheld, that non-monetary payments can be franchise fees. Further, this reading would render section 622(g)(2)(C) superfluous because there would not need to be an exemption for PEG-related in-kind contributions if non-monetary contributions were not franchise fees in the first place.[85]

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to Congress' intent as reflected in the broad definition of franchise fee in the statute. *See Second FNPRM,* 33 FCC Rcd at 8961, para. 17.

[78] *Second FNPRM,* 33 FCC Rcd at 8960, para. 17 (citing H.R. Rep. No. 934, 98th Cong., 2nd Sess. 1984 at 64, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4701).

[79] H.R. Rep. No. 934, 98th Cong., 2nd Sess. 1984 at 64–65.

[80] *Id.* at 65.

[81] Although the City of New York opines that the examples of franchise fees in the legislative history are all "services that do not use the cable operator's cable system or other communications facilities ('CF') or call on the core competencies ('CC') of the cable operator," this reading overlooks the fact that certain PEG-related costs are included as franchise fees, and it creates a distinction that is not apparent from either the statute or the legislative history. *See* City of New York Comments at 4.

[82] *Id. See* Comments of the Alliance for Communications Democracy *et al.,* at 6 (Nov. 14, 2018) (CAPA Comments); Comments of The City Coalition, at 13–14 (Nov. 14, 2018) (City Coalition Comments); Comments of the State of Hawaii, at 3–4 (Nov. 14, 2018) (Hawaii Comments); NATOA *et al.* Comments at 5; City of New York Comments at 3; Anne Arundel County *et al.* Reply at 6; Reply Comments of Free Press, at 4–5 (Dec. 14, 2018) (Free Press Reply); Hawaii Reply at 4–5; NATOA *et al.* Reply at 3. We discuss further in Section III.A.2.b below the extent to which certain PEG-related requirements are exempted from the statutory definition of franchise fees.

[83] *See also* NCTA Reply at 5, n.12 (stating that "[a]s the context makes clear, this language is meant only to elaborate on what Congress considers a 'fee' under the definition of franchise fee, and not what constitutes an 'assessment,' the latter of which Congress understood to include in-kind exactions"). For the same reason, we are not persuaded by Anne Arundel County *et al.*'s reliance on a letter from the Commission's Cable Services Bureau that quotes the legislative history. *See* Anne Arundel County *et al.* Comments at 23–24 (citing *City of Bowie,* 14 FCC Rcd 9596 (Cable Services Bureau, 1999)); Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 12; Letter from Sen. Chris Van Hollen to Chairman Ajit Pai, FCC at 2 (June 12, 2019). First, this Bureau-level letter does not bind the Commission. *See Comcast v. FCC,* 526 F.3d 763, 769 (D.C. Cir. 2008) (an agency is not bound by the actions of its staff if the agency has not endorsed those actions). Second, to the extent that the Bureau's guidance 20 years ago conflicts with the conclusions in this rulemaking, it is reversed and superseded. We note that the letter merely cites the statute and legislative history, without analysis.

[84] *See Montgomery County,* 863 F.3d at 490–91.

[85] *See, e.g., Duncan v. Walker,* 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *United States v. Menasche,* 348 U.S. 528, 538–539 (1955))).

19. Because we believe that the pertinent statutory provision in section 622(g) supports our conclusion that cable-related, in-kind contributions are franchise fees, we reject arguments raised by franchise authorities that other Title VI provisions should be read to exclude costs that are clearly included by the franchise fee definition. Instead of focusing on the key definition of "franchise fee" as "any tax, fee, or assessment of any kind" subject to certain enumerated exceptions, LFA commenters cite to other parts of the statute which, they argue, evince Congress' intent to exclude cable-related, in-kind contributions from the statutory cap on franchise fees.[86] We reject each of these arguments in turn below.

20. First, we affirm our tentative conclusion that treating cable-related, in-kind contributions as franchise fees would not undermine the provisions in the Act that authorize or require LFAs to impose cable-related obligations on franchisees.[87] For example, section 611(b) of the Act permits LFAs to require that channel capacity be designated for PEG use and that channel capacity on I-Nets be designated for educational and governmental use.[88] Anne Arundel County *et al.* argue that the Commission errs by not acknowledging that the Cable Act "authorize[s] LFAs to both impose cable franchise obligations [in section 611] *and* collect franchise fees [in section 622]—they do not offset each other."[89] However, as we observed in the *Second FNPRM,* the fact that the Act authorizes LFAs to impose such obligations does not mean that the value of these obligations should be excluded from the five percent cap on franchise fees.[90] We agree with NCTA and ACA that there is no basis in the statutory text for concluding that the authority provided in section 611(b) affects the definition of franchise fee in section 622(g).[91] As explained above, section 622(g) is the key provision that defines what is included in the franchise fee, and section 622(g)(2) carves out only limited exclusions for PEG-related costs and makes no mention of an I-Net-related exclusion. Since Congress enacted the PEG and I-Net provisions at the same time it added the franchise fee provisions, it could have explicitly excluded all costs related to PEG and I-Nets if it had intended they not count toward the cap.[92] Instead, they just excluded a subset of those costs. Further, if we were to interpret the statute such that all costs related to PEG, I-Nets, or other requirements imposed in section 611 are excluded from treatment as franchise fees because section 611(b) contemplates that such costs be incurred, the specific exemption for PEG capital costs in section 622(g)(2)(D) would be superfluous.[93] While we acknowledge that PEG channels and I-Nets provide benefits to consumers,[94]

[86] *See, e.g.,* Comments of the City of Arlington, Texas, at 6–7 (Nov. 14, 2018) (City of Arlington Comments); Comments of the City of Austin, Texas, at 7–8 (Nov. 14, 2018) (City of Austin Comments).

[87] *See Second FNPRM,* 33 FCC Rcd at 8962, para. 20.

[88] 47 U.S.C. § 531(b) ("A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, . . . that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use. . . ."). *See also* 47 U.S.C. § 541(b)(3)(D) ("Except as otherwise permitted by sections 531 and 532 of this title, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of the franchise, a franchise renewal, or a transfer of a franchise.").

[89] Anne Arundel County *et al.* Comments at 15–16. *See also* AWC *et al.* Comments at 6–8; CAPA Comments at 3-4; Comments of the Illinois Municipal League, at 1–2 (Nov. 7, 2018); Comments of the International Municipal Lawyers Association, at 2 (Nov. 13, 2018) (IMLA Comments); Reply Comments of Media Alliance, at 4 (Nov. 19, 2018).

[90] *Second FNPRM,* 33 FCC Rcd at 8963, para. 20.

[91] *See* ACA Comments at 6; NCTA Reply at 7–8.

[92] We disagree with the Cable Act Preservation Alliance (CAPA) that "it is equally true that Congress could have explicitly noted the franchise fee limitation in 47 U.S.C. Section 531(b) if it had intended to include these PEG-related costs as franchise fees." CAPA Comments at 8. There was no need for Congress to specify which PEG-related costs are franchise fees in section 611 when the statute sets forth a standalone provision, section 622, that defines what is included in the franchise fee and specifically addresses PEG-related costs. *See* NCTA Reply at 14 ("Congress was not required to reiterate the limitations imposed by the five percent cap at every mention of permissible in-kind assessments in other provisions."). NATOA *et al.* argue that the Commission "ignores that build-out and customer service obligations also were enacted by Congress at the same time it added the franchise fee provisions and were not explicitly excluded from the cap, yet . . . finds these are not 'franchise fees.'" NATOA *et al.* July 24, 2019 *Ex Parte* at 3. However, we explain herein that Congress expressly stated that cable operators are responsible for the cost of constructing cable systems. *See infra* Section III.A.2.d. We also find herein that federally mandated customer service standards are not a "tax, fee, or assessment" and, thus, there was no need for Congress to exclude them from the franchise fee. *See id.*

[93] *See* ACA Comments at 6–7.

[94] *See infra* Sections III.A.2.b (PEG), III.A.2.c (I-Nets).

such benefits cannot override the statutory framework, which carves out only limited exclusions from franchise fees.

21. Next, we do not find persuasive the argument that section 626 of the Act "reflects the fact that cable-related franchise requirements are not franchise fees." [95] Section 626 directs franchising authorities to consider, among other things, whether a cable operator's franchise renewal proposal "is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests." [96] NATOA *et al.* contend that if cable-related, in-kind requirements are included as franchise fees, "it would be the LFA who pays for them, rendering the cost consideration in this Section obsolete." [97] We disagree with this reasoning.[98] As NCTA explains, "[t]he cost/benefit analysis required under this provision underscores that Congress intended franchising authorities to balance the desire for any in-kind exactions requested by parties in the renewal process against the overall franchise fee burdens on cable operators and subscribers." [99] The section 626 assessment does not lose its purpose if cable-related, in-kind contributions are counted as franchise fees; as part of this assessment, for example, a franchising authority could determine that cable-related community needs and interests can be met at a lower cost to cable subscribers than the full five percent franchise fee.[100] Moreover, the community needs assessment in section 626 also accounts for items that are not in-kind contributions subject to the franchise fee cap, such as build-out requirements.[101]

22. Finally, we disagree with commenters that cite a provision in section 622 that relates to itemization on customer bills as evidence that Congress did not intend PEG-related franchise obligations to be included in franchise fees. In particular, LFA commenters point to section 622(c)(1), which specifies that cable operators may identify as a separate line item on each subscriber bill each of the following: (1) the amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid; (2) the amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support PEG channels or the use of such channels; and (3) the amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber.[102] LFA commenters argue that "[t]hrough this language, Congress clearly outlined a separation between franchise fees and cable-related, in-kind fees." [103] On the contrary, "the fact that Section 622(c) allows cable operators to itemize certain charges on subscriber bills has no bearing on which charges meet the definition of franchise fees under Section 622(g)."[104] While section 622(g) was adopted as part of the 1984 Cable Act, Congress adopted section 622(c) years later in 1992 to promote transparency by allowing cable operators to inform subscribers about how much of their total bill is made of charges imposed by local governments through the franchising process.[105] By differentiating the types of charges that can be itemized on subscriber bills,

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[95] NATOA *et al.* Comments at 7.

[96] 47 U.S.C. § 546(c)(1)(D).

[97] NATOA *et al.* Comments at 7–8.

[98] *See* CAPA Comments at 8–9; Charles County Comments at 10–11; City of New York Comments at 5–6; City of Philadelphia *et al.* Comments at 30; Comments of the Telecommunications Board of Northern Kentucky, at 9–10 (Nov. 14, 2018) (TBNK Comments); Reply Comments of the Alliance for Communications Democracy *et al.,* at 6–7 (Dec. 24, 2018) (CAPA Reply); Reply Comments of the City of Hagerstown, Maryland, at 8–9 (Dec. 13, 2018) (City of Hagerstown Reply); Reply Comments of the City of Newton, Massachusetts, at 9–10 (Dec. 14, 2018).

[99] NCTA Reply at 10–11.

[100] *See id.* at 11. *See also* Reply Comments of NTCA—The Rural Broadband Association, at 3 (Dec. 14, 2018) ("The Commission's tentative conclusion in no way restricts the 'in-kind' contributions franchising authorities can impose on cable operators, provided such contributions are cable-related and limited in value to the overall level of the cap. As a result, franchise authorities can continue to condition cable operators' franchise authority upon fulfilling certain community needs; they may just have to be more tailored and precise in value than is currently the practice."). As Congress noted when it adopted the five percent cap, the Commission capped franchise fees at three percent of a cable operator's revenue. H.R. Rep. 98–934, 1984 U.S.C.C.A.N. at 4663; *see* 47 CFR § 76.31 (1984).

[101] Build-out requirements are subject to section 626's directive to assess reasonableness while taking into account the cost of such requirements, and a build-out requirement requested by an LFA could be challenged under section 626. *See* NCTA Comments at 51.

[102] 47 U.S.C. § 622(c).

[103] City of Arlington Comments at 9. *See also* City of Austin Comments at 10; CAPA Comments at 10; NATOA *et al.* Comments at 5–6; TBNK Comments at 5–6.

[104] NCTA Reply at 12.

[105] *Id.* at 12–13 (citing *Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation,* Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5967, para. 545 (1993)).

there is no indication that Congress intended to exclude certain charges from the franchise fee.[106]

23. Having established our interpretation of section 622(g), we adopt our tentative conclusion that this treatment of cable-related, in-kind contributions should be applied to both new entrants and incumbent cable operators.[107] As the Commission has previously observed, section 622 "does not distinguish between incumbent providers and new entrants." [108] We affirm our belief that applying the same treatment of cable-related, in-kind contributions to both new entrants and incumbent cable operators will ensure a more level playing field and that the Commission should not place its thumb on the scale to give a regulatory advantage to any competitor.[109]

24. We disagree with the contention that our interpretation of the franchise fee definition in section 622(g) is impermissible under *Chevron.*[110] Charles County, Maryland posits that "[b]ecause Congress has directly addressed the questions at issue by employing precise, unambiguous statutory language in Section 622 of the Act, the FCC's proposed rules re-imagining. . .what constitutes a 'franchise fee' are impermissible," as "[o]nly Congress may alter or amend Federal law." [111] Charles County does not offer an explanation for why the statutory language is unambiguous beyond arguing that the words "tax, fee, or assessment" in the definition are terms of art.[112] But regardless of whether these are terms of art, they can include non-monetary contributions, as the Sixth Circuit observed.[113] And we believe that our interpretation of this language using traditional tools of statutory construction is a reasonable and permissible construction of the statute that effectuates Congressional intent for the reasons set forth above.[114] Indeed, it is the interpretation that is most consistent with the plain meaning of the statutory definition of franchise fee.

2. Specific Types of Cable-Related, In-Kind Contributions Under Section 622

25. In this section, we analyze whether specific types of cable-related, in-kind contributions are franchise fees subject to the five percent statutory cap under section 622. First, we find that costs attributable to franchise terms that require free or discounted cable service to public buildings are franchise fees, consistent with our tentative conclusion that treating all cable-related, in-kind contributions as franchise fees unless expressly excluded would best effectuate the statutory purpose. Next, we adopt our tentative conclusion that costs in support of PEG access are franchise fees, with the exception of capital costs as defined below. Similarly, we find that costs attributable to construction of I-Nets are franchise fees. Finally, we conclude that build-out and customer service requirements do not fall within the statutory definition of franchise fee.[115] Based on these conclusions with respect to specific types of costs, we adopt a definition of "in-kind, cable-related contributions" to include "any non-monetary contributions related to the provision of cable services provided by cable operators as a condition or requirement of a local franchise, including but not limited to free or discounted cable service to public buildings, costs in support of PEG access other than capital costs, and costs attributable to the construc-

[106] Moreover, as NCTA observes, "[t]he fallacy that Section 622(c) distinguishes franchise fees from other exactions, as NATOA and others claim, is underscored by the fact that subsection (c)(3) repeats virtually *verbatim* Section 622(g)(1)'s broad definition of a franchise fee. Yet, by NATOA's logic, the itemization of a cost under subsection (c)(3) would control its treatment for franchise fee purposes, *removing* it from the very definition that Congress established for such fees in Section 622(g)(1). . . ." *Id.* at 14, n.52.

[107] *See Second FNPRM,* 33 FCC Rcd at 8963–64, para. 22. *See also* NCTA Comments at 50.

[108] *Second Report and Order,* 22 FCC Rcd at 19637, para. 11. *See* Verizon Comments at 5; Altice Reply at 20.

[109] *See* Verizon Comments at 5–6. *See also* Reply Comments of Frontier Communications Corporation, at 3 (Dec. 14, 2018).

[110] Review of the FCC's interpretation of the statutes it administers is governed by *Chevron USA, Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984).

[111] Charles City Comments at 5–8. *See also* IMLA Comments at 3; City of Philadelphia *et al.* Comments at 19–20; City of Hagerstown Reply at 7–8.

[112] *See* Charles City Comments at 5–8.

[113] *See Montgomery County,* 863 F.3d at 490–91.

[114] Where a "statute is silent or ambiguous" with respect to a specific issue, "the question" for the court is whether the agency has adopted "a permissible construction of the statute." *Chevron,* 467 U.S. at 843. *See also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 980 (2005). *See* Free State Foundation Reply at 11.

[115] *See infra* Section III.A.2.d.

tion of I-Nets. It does not include the costs of complying with build-out and customer service requirements." [116]

a. Free and Discounted Cable Service to Public Buildings

26. We find that costs attributable to franchise terms that require a cable operator to provide free or discounted cable service to public buildings, including buildings leased by or under control of the franchise authority, are cable-related, in-kind contributions that fall within the five percent cap on franchise fees. The record includes examples of cable operators providing cable service to public buildings as part of a franchise agreement.[117] Consistent with our statutory interpretation above, providing free or discounted cable service to public buildings is an in-kind (*i.e.,* nonmonetary) contribution imposed on a cable operator by a franchise authority, and is not included in one of the enumerated exceptions from the franchise fee in section 622(g)(2).[118] Although certain commenters emphasize that free and discounted cable services have been considered franchise considerations that are not subject to the five percent cap on franchise fees in past franchise agreements,[119] we find that our reading that free and discounted services count towards the franchise fee cap is a reasonable interpretation and best effectuates Congressional intent given that the statute defines franchise fee broadly, carving out only limited exclusions. If LFAs could circumvent the five percent cap by requiring unlimited free or discounted cable services for public buildings, in addition to a five percent franchise fee, this result would be contrary to Congress's intent as reflected in the broad definition of "franchise fee" in the statute.[120] We find that the Act does not provide any basis for treating the value attributable to free or discounted services in a different manner than other in-kind services which must be included in the franchise fee. Although we acknowledge that the provision of free or discounted cable service to public buildings, such as schools or libraries, can benefit the public, such benefits cannot override the statutory framework. Further, there are policy rationales for limiting free services, given that, in a competitive market, such contributions may raise the costs of the cable operator's service, reduce resources available for other services, and result in market inefficiency.[121]

b. PEG Access Facilities

27. We conclude in this section that in-kind contributions related to PEG access facilities are cable-related, in-kind contributions, and are therefore included within the statutory definition of "franchise fees" under section 622(g)(1).[122] We next conclude that the term "capital cost" in section 622(g)(2)(C) should be given its ordinary meaning, which is a cost incurred in acquiring or improving a capital asset. Applying that interpretation, we conclude that the exclusion for capital costs under section 622(g)(2)(C) could include equipment that satisfies this definition, regardless of whether such equipment is purchased in connection with the construction of a PEG access facility. We then conclude that the record is insufficiently developed for the Commission to determine whether the provision of PEG channel capacity is included

[116] *See Second FNPRM,* 33 FCC Rcd at 8964, para. 24. We modify the definition slightly from what was proposed in the *Second FNPRM* to reflect the conclusions adopted herein.

[117] *See, e.g.,* Comments of the City of Newton, Massachusetts, at 19 (Nov. 14, 2018) (City of Newton Comments).

[118] *See* 47 U.S.C. § 542(g)(2); *supra* para. 11.

[119] *See, e.g.,* AWC *et al.* Comments at 7 (arguing that "[t]he Commission has acknowledged local authority to include additional franchise considerations within the franchise," and that requiring LFAs to pay for these negotiated franchise considerations is inconsistent with precedent and decades of franchise agreements). AWC cites a Bureau-level order in which the Cable Services Bureau found that where the LFA and cable operator agreed to establish franchise provisions regarding the eligibility standards for a senior citizen discount rate and the formula for adjusting that rate, these terms were not preempted by Federal law. *See City of Antioch, California,* Memorandum Opinion and Order, CSR–5239–R, 14 FCC Rcd 2285 (CSB 1999). While this decision is about the inclusion of discounted services in the franchise terms, it does not address whether discounted services should be included in the franchise fee and, thus, is not inconsistent with our findings herein.

[120] *See Second FNPRM,* 33 FCC Rcd at 8961, para. 17.

[121] *See* NCTA Comments at 50 ("[I]f products and services are available to a franchising authority without charge, or at a below-market rate, the franchising authority will not be required to evaluate a 'need' in light of its market cost, and as a result will tend to over-consume at the cable operator's buffet, resulting in market inefficiency.").

[122] PEG channels provide third-party access to cable systems through channels dedicated for use by the public, including local governments, schools, and non-profit and community groups. H.R. Rep. No. 98–934, at 30. The Act provides for the creation and support of PEG channels in various ways, including by authorizing LFAs to require franchisees to designate channel capacity for PEG, and by excluding certain costs associated with PEG access facilities from the definition of franchise fees under section 622(g)(2). *See* 47 U.S.C. §§ 522(16), 531, 542(g).

within section 622(g)(2)(C)'s exclusion for capital costs. We also find that the installation of PEG transport facilities are capital costs that are exempt from the five percent franchise fee cap,[123] and that maintenance of those facilities are operating costs that count toward the cap. Finally, we address policy arguments regarding the impact of these conclusions on the provision of PEG programming.

(i) The Franchise Fee Definition Generally Includes Contributions for PEG Access Facilities

28. Consistent with our tentative conclusion in the *Second FNPRM,*[124] we find that the definition of franchise fee in section 622(g)(1) encompasses PEG-related contributions. Like other taxes, fees, or assessments imposed by LFAs, we find that contributions related to PEG access facilities imposed by an LFA are subject to the five percent cap on franchise fees, unless they fall within one of the five exclusions set forth in section 622(g)(2). Consistent with the statutory analysis above, we conclude that the provision of equipment, services, and similar contributions for PEG access facilities are cable-related, in-kind contributions that meet the definition of franchise fee.[125] Such PEG-related contributions are not exempt under section 622(g)(2) of the Act unless they fall under the limited exceptions for capital costs and costs incurred by franchises existing at the time of the Cable Act's adoption in 1984.[126] As explained above, our starting point for analyzing cable operator contributions to LFAs is that the Act defines "franchise fee" broadly and has limited, narrow exceptions. Thus, we believe that including in the franchise fee cap any costs that are not specifically exempt is consistent with the statute and reasonably effectuates Congressional intent.

29. Further, including contributions for PEG access facilities within the franchise fee definition is consistent with the overall structure of section 622. For "any franchise in effect on October 30, 1984," section 622(g)(2)(B) excludes from the definition of "franchise fee" "payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of [PEG] access facilities."[127] There would have been no reason for Congress to grandfather in these PEG-related contributions for existing franchises if such payments were not otherwise included within the definition of "franchise fees." In effect, excluding PEG-related contributions would read "in the case of any franchise in effect on October 30, 1984" out of section 622(g)(2)(B), extending this grandfathered exclusion to all franchises.

30. Some commenters claim that other sections of Title VI, including the section authorizing LFAs to require the designation of PEG channel capacity in section 611, override section 622's definition of "franchise fee."[128] As discussed above, we find these arguments unpersuasive.[129] We also reject arguments that provisions of the Act unrelated to cable franchising demonstrate that PEG-related fees are not franchise fees.[130] For example, section 623 of the Act, which governs the regulation of cable rates, instructs the Commission to take the following two factors (among others) into account when prescribing rate regulations:

> (v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;

[123] As explained below, "PEG transport facilities" are facilities that LFAs use to deliver PEG services from studios or other locations where the programming is produced to the cable headend. *See infra* para. 49.

[124] *Second FNPRM,* 33 FCC Rcd at 8960, para. 16.

[125] In some cases, LFAs require a grant or other *monetary* contribution earmarked for PEG-related costs. *See, e.g.,* Altice May 9, 2019 *Ex Parte* at 7–8 (describing Altice's payment of "PEG grants" to LFAs). These monetary contributions are likewise subject to the five percent cap on franchise fees, unless otherwise excluded under section 622(g)(2). *See supra* note 54. Section 622 exempts only the items delineated in (g)(2), and Congress did not distinguish between in-kind and monetary contributions, nor did it exempt monetary contributions earmarked for a purpose that would otherwise not be excluded under section 622(g)(2). Thus, we make clear that monetary contributions—like in-kind contributions—must be counted toward the franchise fee cap unless expressly exempt under section 622(g)(2).

[126] *See* 47 U.S.C. § 542(g)(2); *supra* para. 11.

[127] 47 U.S.C. § 542(g)(2)(B).

[128] 47 U.S.C. § 531(b). *See, e.g.,* Reply Comments of Charles County, Maryland, at 7 (Dec. 14, 2018) (Charles County Reply); Reply Comments of Massachusetts Community Media, Inc., at 8 (Dec. 14, 2018) (MassAccess Reply) ("Cable operators cannot classify as 'in-kind' an obligation which they are legally bound to fulfill.").

[129] *See supra* paras. 20–22.

[130] *See* CAPA Comments at 11. *See also* City of Newton Apr. 10, 2019 *Ex Parte* at 2.

(vi) any amount required [ ] to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise. . . .[131]

Commenters argue that the separate listing of franchise fees (in v) and the costs of PEG franchise requirements (in vi) is evidence that franchise fees do not include PEG-related costs.[132] We disagree. We note that that the question of which factors the Commission should consider in setting rate regulations is both legally and analytically distinct from the question of which costs are included as a franchise fee under section 622. Even if it were not, the separate listing of franchise fees and PEG-related exactions in section 623 does not indicate that Congress understood these categories to be mutually exclusive. In general, section 623(b) directs the Commission to consider several factors relating to cable operators' costs, revenue, and profits to ensure that the Commission sets "reasonable" rates.[133] Ensuring that a rate is "reasonable" requires a full consideration of the costs borne by cable operators. Listing only franchise fees would fail to account for some of these costs, even under the interpretation adopted in this Order: Franchise fees and PEG costs only partially overlap, given that section 622(g)(2) excludes certain PEG-related exactions from the definition of franchise fees.[134] We therefore find nothing inconsistent about the separate listing of franchise fees and PEG-related costs in section 623 and the interpretation of section 622(g) adopted in this Order. The same analysis applies to the bill-itemization requirements in section 622(c), which permits the separate itemization of franchise fees and PEG-related assessments in subscriber bills.[135]

(ii) Scope of Specific Franchise Fee Exclusions Related to PEG Access Facilities

31. Consistent with our tentative conclusions in the *Second FNPRM,*[136] we conclude (1) that PEG support payments for any franchise in effect on October 30, 1984 and (2) PEG capital costs for any franchise granted after October 30, 1984 are exempt from the definition of franchise fee. As discussed above, two provisions of section 622(g)(2) exclude certain costs associated with PEG access facilities from the definition of "franchise fee" in section 622(g)(1): First, section 622(g)(2)(B) excludes PEG support payments, but only with respect to franchises granted prior to 1984.[137] To the extent that any such franchises are still in effect, we affirm that under section 622(g)(2)(B), PEG support payments made pursuant to such franchises are excluded from the five percent franchise fee cap. Consistent with the statutory language and legislative history, we find this exclusion is broad in scope, and commenters did not dispute this interpretation in the record.[138]

32. Second, for any franchise granted after 1984, section 622(g)(2)(C) contains a narrower exclusion covering only PEG "capital costs which are required by the franchise to be incurred by the cable operator for [PEG] access facilities."[139] The Cable Act does not define "capital costs". We address the scope of this exclusion below by first clarifying the definition of "capital costs" and concluding that it can apply to contributions for both construction-related and non-construction-related contribu-

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[131] *See* 47 U.S.C. § 543(b)(2).

[132] CAPA Comments at 11 ("If Congress had intended that the amounts required to satisfy franchise requirements be subject to, and included in, the five percent franchise fee cap, Congress's direction that the Commission consider these [factors in Section 623(b)(2)(C)] as separate factors makes no sense.").

[133] 47 U.S.C. § 542(b)(1).

[134] *Id.* § 542(g)(2)(C).

[135] *Id.* § 542(c). Several commenters raised section 622(c) as evidence that franchise fees do not include PEG-related assessments. *See, e.g.,* Anne Arundel County *et al.* Comments at 11; NATOA *et al.* Comments at 6; Hawaii Reply at 2. We note that section 622(c) was adopted years after section 622(g) was enacted. *See generally* NCTA Reply at 12–13 (discussing the legislative history of section 622(c)); Cable Television Consumer Protection and Competition Act, Pub. L. No. 102–385, §§ 3, 9, 14, 106 Stat. 1460 (1992).

[136] *Second FNPRM,* 33 FCC Rcd at 8962, para. 19.

[137] 47 U.S.C. § 542(g)(2)(B) (excluding, "in the case of any franchise in effect on [October 30, 1984], payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, public, educational, or governmental access facilities").

[138] *See Second FNPRM,* 33 FCC Rcd at 8962, para. 19. The legislative history further supports this interpretation. H.R. Rep. No. 98–934, at 65 (1984) ("For existing franchises, a city may enforce requirements that additional payments be made above the 5 percent cap to defray the cost of providing public, educational and governmental access, including requirements related to channels, facilities and support necessary for PEG use.").

[139] 47 U.S.C. § 542(g)(2)(C) (excluding, "in the case of any franchise granted after [October 30, 1984], capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities").

tions to PEG access facilities. We then determine that the record is insufficient to determine whether costs associated with providing PEG channel capacity are subject to this exclusion, and we discuss the application of the exclusion to PEG transport.

33. *Definition of "capital costs."* Although the Commission previously asserted with respect to section 622(g)(2)(C) that "[c]apital costs refer to those costs incurred in or associated with the construction of PEG access facilities," we now revisit that interpretation and provide additional clarity on the definition of this term.[140] As described below, we find that the term "capital costs" is not limited to construction-related costs; rather, it generally encompasses costs incurred in acquiring or improving capital assets for PEG access facilities.[141] The Commission's previous reading of the phrase "capital costs" was based in part on section 622(g)'s legislative history, which states that the Cable Act excludes from the franchise fee cap "the capital costs associated with the construction of [PEG] access facilities."[142] The Sixth Circuit affirmed the Commission's prior reading in *Alliance,* where, rejecting a challenge to the Commission's construction of the term "capital costs" in the *First Report and Order,* the court held that:

> [t]o determine the permissibility of the Commission's construction of Section 622(g)(2)(C), we start by consulting the legislative history. During the enactment of this provision, Congress made clear that it intended Section 622(g)(2)(C) to reach "capital costs *associated with the construction* of [PEG] access facilities." H.R.Rep. No. 98–934, at 26 (emphasis added). Against this legislative pronouncement, the FCC's limitation of "capital costs" to those "incurred in or associated with the construction of PEG access facilities" represents an eminently reasonable construction of Section 622(g)(2)(C).[143]

34. We asked for additional comment on the definition of "capital costs" under section 622(g)(2)(C) in the *Second FNPRM.*[144] Arguably, the Commission's previous construction left unsettled the extent to which the "capital costs" exclusion encompassed PEG equipment—such as vans, studios, or cameras. In *Alliance,* the Sixth Circuit observed that the Commission's definition of capital costs could encompass the costs of such equipment, but only insofar as the equipment costs were "relate[d] to the construction of PEG facilities."[145] But neither the *First Report and Order* nor the legislative history from which it borrowed expressly *limited* capital costs to *construction-related* capital costs. Both statements are silent—or, at most, unclear—about the treatment of *non-construction-related* capital costs.

35. Based on the arguments in the record and our further consideration of the statutory text and legislative history we now conclude that the Commission's earlier statement regarding the definition of "capital costs" was overly narrow. As commenters note, many local governments receive payments from cable operators that are not simply for the construction of PEG studios, but also for, among other things, the acquisition of equipment needed to produce PEG access programming.[146] LFAs argue for a broader definition of "capital costs" that would include PEG channel capacity and certain equipment costs associated with PEG access facilities.[147] By con-

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[140] *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,* First Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5150–51, para. 109 (2007).

[141] *See infra* paras. 33–41.

[142] *See* H.R. Rep. No. 98–934, at 26 (making clear that Congress intended section 622(g)(2)(C) to reach "capital costs associated with the construction of [PEG] access facilities.").

[143] *All. for Cmty. Media v. FCC,* 529 F.3d 763, 784 (6th Cir. 2008).

[144] The *Second FNPRM* noted that "capital costs which are required by the franchise to be incurred by the cable operator for [PEG] access facilities" are excluded from the definition of franchise fee, and sought comment on treating the costs of studio equipment as capital costs for the purpose of this exemption from the franchise fee cap. *See Second FNPRM,* 33 FCC Rcd at 8962, para. 19 & n.95.

[145] *All. for Cmty. Media v. FCC,* 529 F.3d 763, 784 (6th Cir. 2008) ("Instead, the Commission underscores that the central test for determining whether an expense is a capital cost is whether it is 'incurred in or associated with the construction of PEG access facilities.' (*Id.*) This definition could potentially encompass the cost of purchasing equipment, as long as that equipment relates to the construction of actual facilities.").

[146] *See, e.g.,* NCTA Reply, Appendix (*Examples of Franchising Authority Overreach*) at 7 & n.2 (noting that New York City provides that public-access-related exactions may be designated for, among other things, "studio and portable production equipment, editing equipment and program playback equipment, cameras, [and] office equipment").

[147] *See, e.g.,* CAPA Comments at 15–16 ("The costs of acquiring studio equipment clearly are capital costs. Studio equipment has a useful life of several years, and the cost of acquiring such

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trast, cable companies have urged the Commission to reaffirm, based on its previous statement, that "capital costs" are limited to costs associated with the *construction* of PEG access facilities (and thus do not include channel capacity and equipment such as cameras, or other equipment necessary to run a PEG access facility).[148]

36. In general, when a term is undefined in a statute, courts look to that term's "ordinary meaning."[149] While there is no general definition of the precise term "capital costs," *Black's Law Dictionary* defines a similar term,[150] "capital expenditure," as "[a]n outlay of funds to acquire or improve a fixed asset," and defines a "fixed asset," or "capital asset" as "[a] long-term asset used in the operation of a business or used to produce goods or services, such as equipment, land, or an industrial plant."[151] *Merriam-Webster* similarly defines "capital expenditure" as "costs that are incurred in the acquisition or improvement of property (as capital assets) or that are otherwise chargeable to a capital account," and defines "capital assets" as "long-term assets either tangible or intangible (as land, buildings, patents, or franchises)."[152] An accounting textbook provides yet another similar definition:

> Expenditures for the purchase or expansion of plant assets are called capital expenditures and are recorded in asset accounts. . . . In brief, any material expenditure that will benefit several accounting periods is considered a *capital expenditure.* Any expenditure that will benefit only the current period or that is not material in amount is treated as a *revenue expenditure.*[153]

We also note that *capital* costs are distinct from *operating* costs (or operating expenses), which are generally defined as expenses "incurred in running a business and producing output."[154] Reflecting this distinction, the Commission has distin-

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equipment is capitalized. And these costs are equally clearly for PEG access facilities."); Anne Arundel County *et al.* Reply at 13–14 (noting that capital expenditures commonly include, for example, "everything from repairing a roof, to building, to purchasing a piece of equipment, or building a brand new factory"). Similarly, several commenters argue that section 611's grant of authority to require PEG channels suggests that the cost of such channels cannot count toward the five percent franchise fee cap. Charles County Comments at 15 ("Section 611 of the Act is unambiguous that PEG channels and PEG capacity are PEG capital costs, not franchise fees subject to the statutory five percent cap."); CAPA Comments at 8 (noting that "Congress could have explicitly noted the franchise fee limitation in 47 U.S.C. Section 531(b) if it had intended to *include* these PEG-related costs as franchise fees."). We disagree with the notion that the Act's grant of authority to require designation for PEG use necessarily excludes the costs of PEG from the definition of franchise fees. As we note above, the fact that the Act authorizes LFAs to impose such obligations does not mean that the value of these obligations should be excluded from the five percent cap on franchise fees. *See supra* para. 20. Section 622 governs "Franchise Fees" and makes clear that any items *not* expressly excluded from that section's broad definition of franchise fees are included against the statutory cap. Section 622 excludes some—but not all—PEG-related costs.

[148] NCTA Comments at 47–48 ("Accordingly, the Commission should confirm that PEG capital costs include only construction of PEG facilities (not cameras, playback devices and other equipment), including construction costs incurred in or associated with a PEG return line from the PEG studio to the operator's facility, and that any additional asks (including transport costs) are not part of the statutory exemption and must count towards the franchise fee cap.").

[149] *Taniguchi v. Kan Pac. Saipan, Ltd.,* 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."); *Sorenson Commc'ns, LLC v. FCC,* 897 F.3d 214, 228 (D.C. Cir. 2018) ("Because § 225 does not define 'efficient,' we give the term its ordinary meaning." (citing *Taniguchi*)).

[150] Costs and expenditures are related, but not identical, concepts. *Black's Law Dictionary* defines "cost" as "the amount paid or charged for something; price or expenditure." Black's Law Dictionary (10th ed. 2014). *Black's* relevantly defines "expenditure" as "a sum paid out." *Id.* While we recognize that "cost" and "expenditure" have distinct meanings in the accounting context, for the purposes of our interpretation of section 622(g)(2)(C), we find that the meanings of these terms are highly analogous—*i.e.,* both pertain to expending resources to acquire a capital asset. *See also Rosebud Enterprises, Inc. v. Idaho Pub. Utilities Comm'n,* 128 Idaho 624, 628, 917 P.2d 781, 785 (1996) ("Capital costs include costs of constructing and installing generating equipment and facilities and the financial carrying costs associated with the utility's investment in the facility. Once incurred, these investment costs are assumed to be "fixed" and will not vary with changes in the actual amount of generation."); 42 CFR § 412.302 (defining "capital costs" to mean, in the Medicare context, "allowable capital-related costs for land and depreciable assets" including depreciation and capital-related interest expense).

[151] Black's Law Dictionary (10th ed. 2014). *Cf.* Collins English Dictionary, *https://www.collinsdictionary.com/us/dictionary/english/capital-cost* (last accessed May 6, 2019) (defining "capital cost" as "a cost incurred on the purchase of land, buildings, construction and equipment to be used in the production of goods or the rendering of services").

[152] Merriam-Webster, Definition of "Capital Expenditure," www.merriam-webster.com (accessed Apr. 15, 2019).

[153] Williams *et al.,* Financial & Managerial Accounting: The Basis for Business Decisions 396–97 (14th ed. 2008).

[154] Black's Law Dictionary (10th ed. 2014) (operating expense).

guished between costs incurred in *building* of PEG facilities, which are capital costs, and costs incurred in *using* those facilities, which are not.[155]

37. While we may also look to legislative history or other context in ascertaining a statute's meaning,[156] none of these sources here compels a narrower definition than that set forth above. The legislative history is ambiguous: The passage relied on by the Commission in the *First Report and Order,* from a summary in the House Report, notes that "capital costs associated with the construction of [PEG] access facilities are excluded from the definition of a franchise fee."[157] But section 622(g)(2)(C) does not itself restrict capital costs to costs that are construction related, nor does this passage in the legislative history expressly say that the capital costs exclusion is *limited* to such costs. And, as some commenters recognize, not all capital costs related to PEG access facilities are related to construction: studio equipment, vans, and cameras, often have useful lives of several years, and the costs of acquiring such equipment are often capitalized.[158] Such costs therefore often fall within the ordinary meaning of capital costs. Had Congress wished to exclude such costs, it could have done so by narrowing the definition of "capital costs" in the statute.

38. Consistent with our analysis above, we find that the phrase "capital costs" in section 622(g)(2)(C) should be interpreted in a manner consistent with its ordinary meaning. Based on the definitions discussed above, the term "capital cost" generally would be understood to mean a cost incurred in acquiring or improving a capital asset. Because the ordinary meaning of this term is not limited to construction-related costs, we now find that the definition of "capital costs" as used in section 622(g)(2)(C) is not limited to costs "incurred in or associated with the construction of PEG access facilities."[159] We conclude that while capital costs *include* costs associated with the construction of PEG access facilities, they are not *limited* to such costs.[160]

39. The ordinary meaning of "capital costs" could encompass the acquisition of a non-construction-related capital asset—such as a van or a camera. Section 622(g)(2)(C) only excludes certain capital costs—those "which are required by the franchise to be incurred by the cable operator for [PEG] access facilities."[161] Section 602(16) defines PEG access facilities as "channel capacity . . . and facilities *and equipment* for the use of such channel capacity."[162] In the legislative history, Congress explains that "[t]his may include vans, studios, cameras, or other equipment relating to the use of public, educational, or governmental channel capacity."[163] Based on this statutory language and legislative history as well as the current record, we believe at the present time that the definition of "capital costs" in section 622(g)(2)(C) includes equipment purchased in connection with PEG access facilities, even if it is not purchased in conjunction with the construction of such facilities.[164] But, as both sections 622(g)(2)(c) and 602(16) make clear, the capital costs of such

[155] *First Report and Order,* 22 FCC Rcd at 5150–51, para. 109.

[156] *See, e.g.,* AT&T Corp. v. Ameritech Corp., Memorandum Opinion & Order, 13 FCC Rcd 21438, para. 28 (1998) ("Accordingly, using the traditional tools of statutory construction, we look next to the context in which the term is used and any relevant legislative history to determine a reasonable meaning."); *In the Matter of Enf't of Section 275(a)(2) of the Commc'ns Act of 1934, As Amended by the Telecommunications Act of 1996, Against Ameritech Corp.,* 13 FCC Rcd 19046, para. 11 (1998) ("When the meaning of a statute is ambiguous, it is appropriate to turn to legislative history for guidance.").

[157] *See* H.R. Rep. No. 98–934, at 19 (1984), as reprinted in 1984 U.S.C.C.A.N. 4655, 4656.

[158] *See, e.g.,* CAPA Comments at 15 ("The costs of acquiring studio equipment clearly are capital costs. Studio equipment has a useful life of several years, and the cost of acquiring such equipment is capitalized. And these costs are equally clearly for PEG access facilities.").

[159] *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,* First Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5150–51, para. 109 (2007).

[160] We agree with NATOA that franchising authorities should be given an opportunity to show that franchise fees are being spent on PEG capital costs if a cable operator requests an offset against franchise fees for non-monetary, cable-related franchise provisions. Letter from Nancy Werner, General Counsel, NATOA, to Marlene H. Dortch, Secretary, FCC at 2 (July 24, 2019) (NATOA July 24, 2019 *Ex Parte*).

[161] 47 U.S.C. § 542(g)(2)(C) (excluding, "in the case of any franchise granted after [October 30, 1984], capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities").

[162] *See id.* § 522(16) (emphasis added).

[163] H.R. Rep. No. 98–934, at 45.

[164] We note that this view was affirmed by the Sixth Circuit in *Alliance.* 529 F.3d at 785 (finding that "the unambiguous expression of Congress confirms that 'PEG access capacity' extends not only to facilities but to related equipment as well").

equipment may be excluded only insofar as they are for the use of PEG channel capacity.[165]

40. This interpretation seems most faithful to the text of section 622(g)(2)(C), which does not restrict capital costs to those that are related to construction. We recognize that this interpretation reflects a broader sense of capital costs than described in the *First Report and Order.* To the extent that our interpretation today is inconsistent with the Commission's earlier statements about the capital cost exclusion, we find that the interpretation in this Order better comports with the Act's language, structure, and policy objectives.[166]

41. We disagree with NCTA's assertion that there would have been "no good reason" to grandfather PEG equipment—such as vans and cameras—if such equipment were "subject to the permanent exception from franchise fees under section 622(g)(2)(C)."[167] The statute itself *fully* excludes PEG obligations for franchises in effect on October 30, 1984, but excludes only PEG-related *capital costs* for franchises granted after that date.[168] The broader exclusion for existing franchises in section 622(g)(2)(B) reflects the legislative intent to grandfather the provisions of existing PEG franchises.[169] Section 622(g)(2)(C) provides a narrower exclusion for new franchises than the broad exclusion enjoyed by grandfathered existing franchises; one would therefore expect these two exclusions to overlap, but not be coextensive. Even under our interpretation of section 622(g)(2)(C), section 622(g)(2)(B) remains a much broader exclusion than section 622(g)(2)(C): a number of costs—most notably, operating expenses—would still be excluded by section 622(g)(2)(B), but not by section 622(g)(2)(C).[170]

42. *PEG channel capacity.* While we find that the costs associated with the provision of PEG channel capacity are cable-related, in-kind costs that fall within the definition of "franchise fee," we find that the record is insufficiently developed to determine whether such costs should be excluded from the franchise fee as a capital cost under the exemption in section 622(g)(2)(C). The *Second FNPRM* stated that, while the Act authorizes LFAs to require that channel capacity be designated for PEG use, this authorization does not necessarily remove the costs of such obligations from the five percent cap on franchise fees.[171] In the record in this proceeding, cable operators generally agreed with this statement,[172] and LFAs generally disagreed.[173] As discussed above, the Act's authorization of a franchise obligation (*e.g.,* one related to PEG access facilities or I-Nets) does not remove that obligation from the five percent cap on franchise fees.[174] It follows, then, that the costs associated with providing PEG channel capacity fall within this cap as a cable-related, in-kind contribution unless they are otherwise excluded under section 622(g)(2).[175]

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[165] *See* 47 U.S.C. § 542(g)(2)(C) (excluding only capital costs "*for* public, educational, or governmental access facilities" (emphasis added)); *id.* § 522(16) (defining PEG access facilities as "channel capacity . . . and facilities and equipment *for the use of such channel capacity"* (emphasis added)).

[166] NCTA requests that we "make clear that cable operators have the right to audit a franchising authority's use of the contributions and that a franchising authority must provide reasonable supporting documentation during an audit that such funds are, or were, being used for PEG capital expenses." NCTA Comments at 49. We decline to do so. We find nothing in the Act that precludes a cable operator from auditing an LFA's use of PEG capital funds, nor do we find anything that gives a cable operator an audit right. We note that under section 635(b) of the Act, a court may award a cable operator the right to audit if the court finds that relief appropriate. 47 U.S.C. § 555(b).

[167] NCTA Mar. 11, 2019 *Ex Parte* at 3.

[168] *Compare* 47 U.S.C. § 542(g)(2)(B) *with id.* § 542(g)(2)(C).

[169] H.R. Rep. No. 98–934 at *45 (1984). *See also id.* at *46 ("[P]rovisions of existing franchises covering PEG channel capacity and its use as well as services, facilities and equipment (such as studios, cameras, and vans) related thereto, are fully grandfathered.").

[170] Salaries and training are two examples of operating costs excluded by section 622(g)(2)(B), but not by section 622(g)(2)(C). *See First Report and Order,* 22 FCC Rcd at 5151, para. 109 ("[Capital] costs are distinct from payments in support of the use of PEG access facilities. PEG support payments may include, but are not limited to, salaries and training.").

[171] *See Second FNPRM,* 33 FCC Rcd at 8962–63, para. 20.

[172] *See, e.g.,* ACA Comments at 6 ("[T]he fact that subsection 611(b) authorizes LFAs to require franchisees to designate channel capacity on institutional networks ('I-Nets') for governmental use does not exempt the costs incurred to provide that capacity from treatment as franchise fees.").

[173] *See* Charles County Reply at 7; MassAccess Reply at 8 ("Cable operators cannot classify as 'in-kind' an obligation which they are legally bound to fulfill.").

[174] *See supra* para. 20.

[175] One commenter notes that California law requires "all video service providers"—a category broader than just cable providers—to "designate a sufficient amount of capacity" for the provision of PEG channels. *See* Comments of the City and County of San Francisco, California Comments, at 8–9 (Nov. 14, 2018) (City and County of San Francisco Comments) (quoting Cal. Pub. Util. Code § 5870(a)). Because this requirement applies to more than just cable operators, com-

43. LFAs claim that the costs of providing PEG channel capacity do fall within section 622(g)(2)(C)'s exclusion for PEG-related capital costs. In support, they point out that the Act defines "[PEG] access facilities" as "(A) channel capacity designated for public, educational, or governmental use; and (B) facilities and equipment for the use of such channel capacity."[176] Thus, they assert, because section 622(g)(2)(C) expressly applies to costs incurred by a cable operator for "[PEG] access facilities," it necessarily applies to costs associated with PEG channel capacity.[177] But, as the cable operators state, the Act's inclusion of channel capacity in the definition of "[PEG] access facilities" does not settle the question of whether channel capacity costs fall under section 622(g)(2)(C). This is because section 622(g)(2)(C) excludes only a particular subset of PEG access facility costs—capital costs—from the definition of franchise fees subject to the five percent cap, and cable operators claim that PEG channel capacity is not a capital cost.[178] Moreover, even assuming that PEG channel capacity is not a capital cost and is therefore subject to the five percent cap, the record reveals serious difficulties regarding how to calculate the value of PEG channel capacity to account for this cost.[179]

44. Given this, we find that the questions raised by channel capacity are complex, and that the record is not developed enough to allow us to answer them. We therefore defer this issue for further consideration.[180] In the meantime, we find that the status quo should be maintained, and that channel capacity costs should not be offset against the franchise fee cap. This approach will minimize disruption and provide predictability to both local franchise authorities and cable operators.

45. *Limits on LFA Authority to Establish PEG Requirements.* While we do not reach a conclusion with respect to the treatment of PEG channel capacity, we reit-

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menters argue, it is a fee of "general applicability" excluded under section 622(g)(2)(A) from the definition of franchise fee. *See id.* The Eastern District of California recently held that a CPUC fee under the same California law was a fee of general applicability on these grounds. *Comcast of Sacramento I, LLC v. Sacramento Metropolitan Cable Television Commission,* 250 F. Supp. 3d 616 (E.D. Cal. 2017). The Ninth Circuit recently vacated and remanded this ruling on other grounds. *Comcast of Sacramento I, LLC v. Sacramento Metro. Cable Television Comm'n,* 923 F.3d 1163 (9th Cir. 2019). An assessment aimed only at cable or cable-like services would not fall within section 622(g)(2)(A)'s exclusion as a "tax, fee, or assessment of general applicability." The text of section 622(g)(2)(A) of the Cable Act identifies a "tax, fee, or assessment imposed on *both* utilities and cable operators or their services" as a paradigmatic example of an assessment of "general applicability." 47 U.S.C. § 542(g)(2)(A) (emphasis added). The legislative history further explains that an assessment of "general applicability" "could include such payments as a general sales tax, an entertainment tax imposed on other entertainment business as well as the cable operator, and utility taxes or utility user taxes which, while they may differentiate the rates charged to different types of utilities, do not unduly discriminate against the cable operator as to *effectively constitute a tax directed at the cable system."* H.R. Rep. No. 98–934, at 64 (1984) (emphasis added). Here, the provision of PEG capacity appears to be an obligation specific to cable operators—the California law itself references the provision of PEG capacity by "cable operator[s]." Cal. Pub. Util. Code § 5870(a). We also note that the PEG authority provided in section 611 only applies to cable service, and that there are no PEG requirements under Federal law for other video providers, like Direct Broadcast Service (DBS) or over-the-top streaming services. In any case, we need not settle the question whether a specific state law is of general applicability to determine whether the provision of PEG capacity, in general, falls within the definition of "franchise fee." Accordingly, we decline to do so here. *See infra* para. 94.

[176] *See* 47 U.S.C. § 522(16). *See also* NATOA *et al.* Reply at 6–7 ("Thus, by its very terms, the Cable Act excludes from franchise fees the costs of "facilities and equipment" that facilitate use of PEG channel capacity.").

[177] *See, e.g.,* Anne Arundel County *et al.* Comments at 16–17.

[178] *See, e.g.,* NCTA Mar. 11, 2019 *Ex Parte* at 2 (making this argument, and noting that "the structure of Section 622(g)(2)(B)-(C) makes clear that not all costs related to PEG access facilities are capital costs").

[179] NCTA proposes valuing channel capacity at market cost; anything less, NCTA argues, would be an additional subsidy beyond the cost of the service itself. *See* NCTA Comments at 51, 54 ("If in-kind exactions are valued only at incremental costs to the cable operator, the provider is still subsidizing them—a result that is contrary to Congress's goals of limiting the overall amount a provider is required to give to the community and that works against the Commission's goals of ensuring that providers can put funds to their highest and best use, including for broadband deployment."). LFAs raise a host of problems with using the fair market value approach to value channel capacity. *See, e.g.,* MassAccess Reply at 11 ("The 'fair market value' of PEG channels and PEG capacity, however, is zero dollars."); Charles County Comments at 21 & n.74 ("Since PEG capacity has no commercial value, the only cost to the cable operator for providing such capacity is the capital cost of provisioning PEG channels."); AWC *et al.* Comments at 14 (noting that assessing fair market value to PEG channel capacity would leave LFAs without objective and sufficient guidelines for valuation).

[180] *See U.S. Cellular Corp. v. FCC,* 254 F.3d 78, 86 (D.C. Cir. 2001) ("[A]gencies need not address all problems in one fell swoop." (citations and internal quotation marks omitted)). We encourage parties to supplement the record on the channel capacity issue. To the extent that we are provided sufficient information to answer the complex questions raised by channel capacity, we intend to resolve them in the next twelve months.

erate here that sections 611(a) and 621(a)(4)(B) of the Act restrict the authority of LFAs to establish PEG channel capacity requirements.[181] We discussed the limits imposed by section 611(a) in the *First Report and Order.*[182] We noted that, while section 611(b) does not place a limit on the amount of channel capacity that a franchising authority may require, section 621(a)(4)(b) provides that a franchising authority may require "adequate assurance" that the cable operator will provide "adequate" PEG access channel capacity, facilities, or financial support.[183] We determined that "adequate," as used in the statute, should be given its ordinary meaning—"satisfactory or sufficient."[184]

46. In the *Second FNPRM,* the Commission again discussed the limits on franchising authority requirements for PEG channels under section 611(b), identifying PEG channel capacity as an in-kind contribution and seeking comment on the effects on cable operators and cable subscribers of "allowing LFAs to seek unlimited" PEG operating support and other cable-related, in-kind contributions.[185] In response, commenters submitted examples of what they claim are LFA requirements for excessive numbers of PEG channels.[186] LFAs responded with comments defending such requirements, as well as requirements for associated PEG support.[187]

47. We note that many states have attempted to strike a balance between the costs of PEG channels to cable operators and the benefits of PEG channels to the public by imposing reasonable limits on PEG channel capacity. For example, some states have limited the number of PEG channels—typically to two or three.[188] Others have required that PEG channels be returned if they are not substantially used.[189] States have also tied the number of appropriate PEG channels to the size of the population served.[190]

48. We decline the invitation by cable operators to establish fixed rules as to what constitutes "adequate" PEG channel capacity under section 621(a)(4)(B).[191] We rec-

[181] 47 U.S.C. §§ 531(a), 541(a)(4)(b).

[182] *First Report and Order,* 22 FCC Rcd at 5152, para. 112.

[183] 47 U.S.C. § 541(a)(4)(B).

[184] *First Report and Order,* 22 FCC Rcd at 5152, para. 112 (quoting American Heritage Dictionary, Second College Edition (1991)). Citing section 621(a)(1)'s prohibition on franchising authorities from "unreasonably" refusing to award competitive franchises, the Commission found that, as a general matter, PEG support required by an LFA in exchange for a franchise should be limited to what is reasonably necessary to support "adequate" PEG facilities. *Id.* at 5153, para. 115. Based on that reasoning, the *First Report and Order* found certain LFA requirements regarding PEG channels to be unreasonable, including (1) duplicative PEG requirements; or (2) requiring a new entrant to pay PEG support in excess of the incumbent's obligations. *Id.* at 5154, paras. 119–20.

[185] *Second FNPRM,* 33 FCC Rcd at 8963–64, paras. 20, 23.

[186] *See* NCTA Reply, Appendix (*Examples of Franchising Authority Overreach*) at 10–11 (describing LFA demands ranging from seven to as many as 43 PEG channels).

[187] *See, e.g.,* Minnesota Association of Community Telecommunications Administrators Mar. 5, 2019 *Ex Parte* at 2-3.

[188] *See, e.g.,* Kan. Stat. § 12–2023(5)(B)(h)(1) (establishing limit of two PEG channels); N.R.S § 711.810 (Nevada) (establishing limit of three PEG channels); Mo. Rev. Stat § 67.2703 (same); O.C.G.A § 36–76–8 (Georgia) (same); LA. RS 45:1369 (Louisiana) (same); Ohio Rev. Code. § 1332.30 (same); S.C. Code Ann. § 58–12–370 (same); Tenn. Code Ann. § 7–59–309(e) (same); Tex. Util. Code § 66.009(c) (same); Wisc. Stat. § 66.0420(5)(a) (same).

[189] *See, e.g.,* Fla. Stat. § 610.109(5) (PEG channels must be "activated and substantially used" for "at least 10 hours per day on average, of which at least 5 hours must be non-repeat programming as measured on a quarterly basis," excluding "[s]tatic information screens or bulletin-board programming"; and requiring the return of PEG capacity if these criteria are not met); Cal. Pub. Util. Code § 5780(e) (requiring the return of PEG capacity to the cable operator where the channel "is not utilized by the local entity for at least eight hours per day as measured on a quarterly basis"); Wis. Stat. § 66.0420(5)(b)(1)(a)-(b) (requiring the return of PEG capacity that is not "substantially utilized by the municipality," defined as providing "40 hours or more of programming on the PEG channel each week and at least 60 percent of that programming is locally produced"). *See also* NCTA Apr. 18, 2019 *Ex Parte* at 6, n.28.

[190] *See, e.g.,* O.C.G.A § 36–76–8 (maximum of two PEG channels where the population is less than 50,000, and maximum of three PEG channels elsewhere); Wisc. Stat. § 66.0420(5) (same); N.R.S § 711.810 (same, but using 55,000 population as the inflection point); Tenn. Code Ann. § 7–59–309 (maximum of one PEG channel where the population is less than 25,000, maximum of two PEG channels where the population is greater than 25,000 but less than 50,000, and maximum of three PEG channels where the population exceeds 50,000).

[191] *See, e.g.,* Altice May 9, 2019 *Ex Parte* at 9 ("Given the uncertainty around the valuation of channel capacity on cable systems for PEG use, the Commission should consider adopting a rebuttable presumption under Section 621(a)(4)(B) that providing three linear standard-definition PEG channels satisfies a cable operator's obligations under Section 611(a), unless state law requires fewer channels." (citations omitted)). As noted in paragraph 45, the Commission concluded that "adequate" should be given its plain meaning, "satisfactory or sufficient" in the *First Report and Order. First Report and Order,* 22 FCC Rcd at 5152, para. 112. The Sixth Circuit affirmed this interpretation. *All. for Cmty. Media,* 529 F.3d at 785.

ognize that the number of channels necessary to further the goals of the Cable Act might vary depending on, among other things, the number of subscribers within a franchise, the area covered by a franchise, the number of cable operators within a franchise, the area's population and geography, the cable-related community needs and interests, and whether PEG channel capacity is substantially used.[192] In general, each of these factors is relevant in determining whether an LFA has exceeded its authority under section 621(a)(4)(B) by demanding more than "adequate" capacity.[193] We note that LFA demands for PEG capacity requirements that are more than "adequate" are subject to judicial challenge under section 635 of the Act, as well as other forms of relief.[194] We also reserve the right to establish fixed rules in the future should there be widespread evidence of LFAs requiring more than adequate PEG channel capacity.

49. *PEG transport.* We find that the installation of transport facilities dedicated for long-term use by a PEG provider for the transmittal of recurring programming to a cable headend or other point in the cable system—PEG transport—does not count toward the five percent franchise fee cap. For the reasons explained above, we find that exempting capital costs from the five percent cap is consistent with the Act. The expenditure for the installation of a system that carries PEG programming from a PEG studio to a cable operator's headend facility is a capital expenditure because it is a long-term asset meant to deliver the programming.[195] The ongoing costs associated with the maintenance or operation of that facility would not qualify as a capital expenditure, however, as these are operating costs that are necessary to run the business and produce output.[196] NCTA requests that we declare PEG transport costs beyond "a single PEG transport return line [that] is dedicated to connecting the PEG studio to the cable network or headend" to count toward the five percent cap.[197] Although we agree that the costs associated with the use of transport lines for "episodic" or "short-term" PEG programming is an operating cost that is subject to the franchise fee cap,[198] we decline to establish a fixed quantity of PEG transport return lines that is "adequate" under section 621(a)(4)(B).[199] Like the number of PEG channels on a system, the number of adequate return lines in a franchise area might vary according to particular circumstances like the number of subscribers in the franchise area, the area covered by the franchise and the number of cable operators in the franchise. The number also might vary depending on the number of PEG channels provided in a franchise area and the types of programming offered over them. Nevertheless, any LFA requests for multiple transport connections dedicated for long-term PEG use that the cable operator considers to be

[192] *See, e.g.,* LFA Comments at 12 (discussing the need for a greater number of PEG channels where a franchise covers a large area with many cable operators). *See also* 47 U.S.C. § 546(a)(1)(A), 546(c)(1)(D) (discussing cable renewal standards).

[193] LFAs argue that relying on the section 621 "adequate" standard conflicts with the standards established by section 626 in the context of franchise renewals, which generally ask whether a renewal proposal is reasonable to meet the "needs and interests" of the community. *See* Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 8. We see no such conflict. Section 621 establishes "General Franchise Requirements," and nothing in Section 626 suggests that these general limits do not apply in the context of a franchise renewal. *See* 47 U.S.C. §§ 541, 546. As NCTA points out, to find that franchise renewals are constrained only by section 626's "needs and interests" inquiry would mean, among other things, that franchise renewals would be unconstrained by the statutory cap on franchise fees in section 622. *See* NCTA July 25, 2019 *Ex Parte* at 6.

[194] 47 U.S.C. § 555(a) ("Any cable operator adversely affected by any final determination made by a franchising authority under Section 621(a)(1), 625 or 626 may commence an action within 120 days after receiving notice of such determination may be brought in—(1) the district court of the United States for any judicial district in which the cable system is located; or (2) in any State court of general jurisdiction having jurisdiction over the parties.").

[195] *See supra* para. 36 (distinguishing capital expenditures from operating expenditures).

[196] *Id. See also* NCTA July 18, 2019 *Ex Parte* at 2 ("the costs for using [a PEG] facility—and the costs for using capacity over shared facilities to transmit PEG programming—and not just the costs of maintenance of such facility, would be considered operating costs under the statute and the *Draft Order.* The fair market value of the use of such capacity, therefore, are costs that count against the franchise fee cap.").

[197] NCTA July 18, 2019 *Ex Parte* at 2; NCTA Comments at 47–48.

[198] NCTA July 29, 2019 *Ex Parte* at 2–3. *See also* Merriam-Webster, Definition of "Capital Expenditure," *www.merriam-webster.com* (accessed Apr. 15, 2019) (defining "capital assets" as "*long-term* assets either tangible or intangible"); *supra* para. 36.

[199] 47 U.S.C. § 541(a)(4)(B); NCTA July 18, 2019 *Ex Parte* at 2. We note, however, that NCTA cites a particularly egregious example of a "transport line [that] is used once a year for a Halloween parade" that seems well beyond what constitutes adequate facilities. NCTA July 29, 2019 *Ex Parte* at 1–2.

more than "adequate" are subject to judicial challenge under section 635 of the Act.[200]

(iii) Policy Concerns and the Impact on PEG Programming

50. We acknowledge the benefits of PEG programming and find that our interpretations adopted above are faithful to the policy objectives of the Cable Act. A significant number of comments in the record stressed these benefits, which include providing access to the legislative process of the local governments, reporting on local issues, providing a forum for local candidates for office, and providing a platform for local communities—including minority communities.[201] Of course, Congress itself similarly recognized the importance of PEG programming by authorizing LFAs to require the provision of PEG channel capacity in the Cable Act,[202] and by carving out certain costs of such programming from the five percent cap on franchise fees.[203] Nothing in this proceeding disturbs the Commission's longstanding view that PEG programming serves an important role in local communities.[204]

51. At the same time, the Cable Act seeks to encourage deployment and competition by limiting the franchise fees that LFAs may collect.[205] These include limitations on imposing costs associated with the provision of PEG programming.[206] A number of cable operators express concern with excessive LFA requirements for PEG channel capacity, support, and in-kind contributions.[207] Altice, for example, notes that "PEG operational contributions . . . are common and routinely treated as separate from the 5 percent franchise fee."[208] Commenters likewise suggest that these excessive PEG-related demands can hinder competition and deployment.[209]

52. The Cable Act itself, as interpreted in this Order, balances these costs and benefits. By excluding PEG-related capital costs from the five percent cap on franchise fees, but leaving other PEG-related exactions subject to that cap, the Cable

[200] 47 U.S.C. § 555(a) ("Any cable operator adversely affected by any final determination made by a franchising authority under Section 621(a)(1), 625 or 626 may commence an action within 120 days after receiving notice of such determination may be brought in—(1) the district court of the United States for any judicial district in which the cable system is located; or (2) in any State court of general jurisdiction having jurisdiction over the parties.").

[201] *See, e.g.,* ACT Comments at 3 (calling local PEG programming "critically important"); City Coalition Comments at 17–18 (noting, among other things, that PEG programming has become increasingly important and other sources of local news have experienced resource constraints and industry consolidation); Comments of Common Frequency, at 2 (Nov. 14, 2018) (Common Frequency Comments) ("PEGs also provide platforms for free speech, space for communities to organize, and serve as advocates for media access."); Comments of King County, Washington, at 9 (King County Comments) (noting that PEG channels provide important programming such as County Council meetings and programming targeted at minority communities); LMCTV Comments at 1–2 (citing the educational resources that PEG channels provide to the local community); Letter from Rony Berdugo, Legislative Representative, League of California Cities, to Ajit Pai, Chairman, FCC, at 2 (Oct. 30, 2018) ("PEG programming offers a host of community benefits, including public access channels, educational access channels, and government access channels all aimed at providing locally beneficial information."); City and County of San Francisco Comments at 2 (noting that SFGovTV provides "access to the legislative process," explains local issues, explores neighborhoods, and offers a forum for local candidates for office).

[202] 47 U.S.C. § 542(g)(2)(C) (excluding only PEG related "capital costs" from the definition of "franchise fees").

[203] *Id.* § 542(g)(2)(B)-(C). *See also* H.R. Rep. No. 98–934, at 30 ("Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work.").

[204] *Accessibility of User Interfaces, & Video Programming Guides & Menus,* Report and Order, MB Docket Nos. 12–108, 12–107, 28 FCC Rcd 17330, 17378, para. 75 (2013) ("We recognize the important role of PEG providers in informing the public, including those who are blind or visually impaired, on local community issues. ").

[205] 47 U.S.C. § 542. *See* Letter from Rep. Robert E. Latta, Member of Congress, *et al.,* to Chairman Ajit Pai, FCC at 1 (July 22, 2019) ("The Cable Act carefully balanced the need to compensate communities for use of public rights-of-way with imperatives to expand services and limit costs for consumers.").

[206] 47 U.S.C. § 541(a)(4)(B).

[207] *See, e.g.,* Altice Reply at 7 (describing what it claims are excessive demands for PEG support); NCTA Reply, Appendix (*Examples of Franchising Authority Overreach*) at 9–11 (describing what NCTA argues are excessive LFA demands for PEG operational support, financial support, and channel capacity requirements).

[208] Altice Reply at 7.

[209] NCTA Comments at 43 (citing *First Report and Order,* 22 FCC Rcd 5149–50, paras. 105–08). *See also* Americans for Tax Reform May 8, 2019 *Ex Parte,* Att. at 3 (showing that extra-statutory exactions from cable operators "reduce the expected flow of revenues and/or increase the cost of an investment project, either of which reduces the net present value of an investment project and attenuates capital investments").

Act divides the financial burden of supporting PEG programming between LFAs and cable operators.[210] By counting a portion of these costs against the statutory cap on franchise fees that LFAs may collect, the Cable Act allows LFAs to seek support for PEG programming from cable operators, while guarding against the possibility that LFAs will make demands for such programming without regard to cost.

53. Some commenters have suggested that the proposals in the *Second FNPRM* threaten to eliminate or drastically reduce PEG programming.[211] We disagree. Significantly, any adverse impact of our ruling on PEG programming should be mitigated by (1) the expansion of the "capital cost" exclusion beyond merely capital costs associated with construction;[212] and (2) our decision to defer ruling on whether the costs of channel capacity may be counted under this exclusion.[213] Under the interpretation adopted in this Order, cable operators will continue to provide support where an LFA chooses, but some aspects of that support will now be properly counted against the statutory five percent franchise fee cap, as Congress intended.[214] We recognize that this represents a departure from the longstanding treatment of PEG costs by LFAs and cable operators. We do not, however, believe that these conclusions will eliminate PEG programming. Nor do we believe that the existing practice was lawful merely because it was longstanding: the Commission's duty is to conform its rules to law, not tradition.

54. To the extent that existing practices are inconsistent with the law, LFAs will still have a choice: they can continue to receive monetary franchise payments up to the five percent cap, they can continue to receive their existing PEG support and reduce the monetary payments they receive, or they can negotiate for a reduction of both that fits within the bounds of the law that Congress adopted.

c. I-Nets

55. We find that the costs associated with the construction, maintenance, and service of an I-Net fall within the five percent cap on franchise fees. Such costs are cable-related, in-kind contributions that meet the definition of franchise fee. In particular, agreeing to construct, maintain, and provide I-Net service pursuant to the terms of a franchise agreement is necessarily cable-related, is an in-kind (*i.e.,* non-monetary) contribution imposed on a cable operator by a franchise authority, and is not included in one of the enumerated exceptions from the franchise fee in section 622(g)(2) of the Act.[215] Thus, we believe that including such services in the franchise

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[210] *See supra* paras. 38–41 (discussing the capital cost exclusion under section 622(g)(2)(C)).

[211] *See, e.g.,* Free Press Reply at 1 (noting that the proposal "threaten[s] PEG channel support"); NATOA *et al.* Comments at 10 (warning that "drastic reductions in franchise fees" will jeopardize the existence of PEG stations); Hawaii Comments at 7 ("Treating PEG channel capacity as a franchise fee would also result in an impossible choice for the State because the majority of the franchise fees that are currently collected are allocated to the PEG access organizations for their operating expenses"). This concern was also expressed in a number of letters from members of Congress. *See, e.g.,* Letter from Sen. M. Hirono to Ajit Pai, Chairman, FCC (Dec. 18, 2018) ("The proposed rulemaking, if adopted as currently proposed, would implement an overly broad definition of in-kind contributions in a way that would encourage cable providers to reduce the dollar contribution portion of the franchise fee. This would have the effect of constraining PEGs ability to serve the public as they have for decades."); Letter from Rep. G. Moore to Ajit Pai, Chairman, FCC, at 2 (Dec. 14, 2018) ("Under the FCC's proposal, Wisconsin municipalities will have a hard choice to make between crucial municipal services and purchasing a PEG channel for the use of the community."); Letter from Rep. E. Engel to Ajit Pai, Chairman, FCC (Dec. 13, 2018) ("I am concerned that the FCC's current proposal could jeopardize critical funding for public, educational, and governmental (PEG) stations.").

[212] *Compare supra* para. 40 *with Second FNPRM,* 33 FCC Rcd at 8962, para. 19.

[213] *Compare supra* para. 44 *with Second FNPRM,* 33 FCC Rcd at 8962–63, para. 20. NATOA *et al.* say that these aspects of our decision will not have a mitigating impact on the availability of PEG programming. *See* NATOA *et al.* July 24, 2019 *Ex Parte* at 4. They suggest that this Order "is not a boon to LFAs" because it was already clear that both construction-related and non-construction-related PEG equipment costs are exempt from the franchise fee cap. This is incorrect. As we explain above, the scope of the PEG capital cost exemption previously was left unsettled. *See supra* para. 34. This Order clarifies that issue by finding that equipment costs unrelated to construction may be considered capital costs for purposes of section 622(g)(2)(C).

[214] Finally, a number of commenters argue that PEG requirements confer a benefit on the community, like buildout requirements, and therefore should similarly not be considered a "contribution" to LFAs. We find that PEG requirements are distinguishable from buildout requirements for the reasons discussed below. *See infra* para. 57. PEG requirements, unlike buildout requirements, are also specifically discussed in the definition of franchise fee.

[215] *See* 47 U.S.C. § 542(g)(2); *supra* para. 11. *See also* 47 U.S.C. § 531(f) (defining an "institutional network" or I-Net as "a communications network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential subscribers").

fee is consistent with the statute.[216] As we tentatively concluded in the *Second FNPRM,* treating cable-related, in-kind contributions, such as I-Net requirements, as franchise fees would not undermine provisions in the Act that authorize or require LFAs to impose cable-related obligations on franchisees.[217] We disagree with LFA commenters who argue that the cost of I-Nets should be excluded from the franchise fee.[218] Although such commenters contend that "[t]he Commission's proposal to require LFAs to pay for I-Nets. . .cannot be squared with the statute,"[219] it is entirely consistent with the statute to find that franchising authorities may impose cable-related requirements, such as requiring dedicated channel capacity on I-Nets, on cable operators, but also to find that funding for these franchise requirements applies against the five percent cap.[220] Similar to our conclusion with respect to PEG support, while we acknowledge that I-Nets provide benefits to communities,[221] such benefits cannot override the statutory framework, which carves out only limited exclusions from franchise fees.

56. Further, as we conclude above, we disagree with commenters that section 611(b) of the Act, which authorizes LFAs to require that channel capacity on I-Nets be designated for educational and governmental use, should be interpreted to exempt the costs of I-Nets from franchise fees.[222] There is no basis in the statutory text for concluding that section 611(b) imposes any limit on the definition of franchise fee.[223] Moreover, section 622(g) defines what is included in the franchise fee, and section 622(g)(2) carves out only limited exclusions for PEG-related costs and does not exclude I-Net-related costs. As we observe above,[224] since Congress enacted the PEG and I-Net provisions at the same time it added the franchise fee provisions, it could have explicitly excluded all costs related to I-Nets if it had intended they not count toward the cap.[225]

d. Build-Out and Customer Service Requirements

57. We conclude that franchise terms that require cable operators to build their systems to cover certain localities in a franchise area do not count toward the five percent cap.[226] As we explain herein, Title VI establishes a framework that reflects a fundamental bargain between the cable authority and franchising authority—a cable operator may apply for and obtain a franchise to construct and operate facili-

[216] *See* NCTA Comments at 49–50. *See Second FNPRM,* 33 FCC Rcd at 8963, para. 20.

[217] *Second FNPRM,* 33 FCC Rcd at 8962–63, para. 20. *See supra* para. 20.

[218] *See, e.g.,* City of Arlington Comments at 9; Charles County Comments at 17–19.

[219] *See* Anne Arundel County *et al.* Comments at 17.

[220] *See, e.g.,* NCTA Reply at 9 (explaining that "Congress left to the franchising authority's discretion how best to allocate the franchise fee to reflect its community's particular cable-related needs"); *supra* para. 20.

[221] *See, e.g.,* Hawaii Comments at 8; City of Hagerstown Reply at 10–11. *See also* NATOA July 24, 2019 *Ex Parte* at 1 (arguing that this decision could "create significant public safety risks if, for example, [its] treatment of existing franchise obligations affects infrastructure such as institutional networks now being used for delivery of public safety services"). Anne Arundel County *et al.* contend that the obligation to provide I-Nets "benefits not only the public, but also the cable operator, who is in a position to sell commercial services via I-Nets," and they argue that the Commission "offers no explanation as to how such a mutually beneficial arrangement constitutes a tax." *See* Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 8. However, it is unclear from the record to what extent, if any, cable operators benefit from providing I-Nets. *See, e.g.,* NCTA Reply at 17 ("I-Nets, and other in-kind exactions serve no similar essential function for the provision of cable service to subscribers, but rather provide value to franchising authorities or particular third parties for purposes determined to be in the public interest by the franchising authority.").

[222] 47 U.S.C. § 531(b); *supra* para. 20.

[223] *See* ACA Comments at 6; NCTA Reply at 7–8.

[224] *See supra* para. 20.

[225] Anne Arundel County *et al.* suggests that our interpretation of the statute as it relates to I-Nets is somehow inconsistent with the Commission's holding in a 1996 open video systems order. *See* Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 12–13 (citing *Implementation of Section 302 of the Telecommunications Act of 1996; Open Video Systems,* Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227 (1996) (*OVS Order*)). Contrary to Anne Arundel County *et al.*'s assertion, the Commission did not conclude in the *OVS Order* that I-Nets were meant to be excluded from the franchise fee. Rather, that order affirmed the Commission's decision to preclude local franchising authorities from requiring open video system operators to build I-Nets, while also clarifying that this decision is not inconsistent with permitting the local franchising authority to require channel capacity on a network if an open video system operator does build one. *See OVS Order,* 11 FCC Rcd at 20290–91, paras. 146–47. As we explain above, it is entirely consistent with the statute to find that franchising authorities may impose cable-related requirements, such as requiring dedicated channel capacity on I-Nets, but also to find that funding for these requirements applies against the five percent cap.

[226] *See Second FNPRM,* 33 FCC Rcd at 8963, para. 21. Build-out requirements are requirements that a franchisee expand cable service to parts or all of the franchise area within a specified period of time. *See First Report and Order,* 22 FCC Rcd at 5107, para. 7.

ties in the local rights-of-way and, in exchange, an LFA may impose fees and other requirements as set forth in the Act.[227] The statutory framework makes clear that the authority to construct a cable system is granted to the cable operator as part of this bargain and that the costs of such construction are to be borne by the cable operator. Specifically, section 621(a)(2)(B) of the Act provides that "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, . . . except that in using such easements the cable operator shall ensure . . . that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both."[228] Because the statute is clear that cable operators, not LFAs, are responsible for the cost of building out cable systems, it would be inconsistent with the statutory text and structure to count these costs as part of the franchise fee.[229] Both cable industry and LFA commenters generally support the contention that build-out obligations should not count toward the five percent franchise fee cap.[230]

58. We also conclude that franchise terms that require cable operators to comply with customer service standards do not count toward the five percent cap.[231] LFA commenters explain that cable operators are required to comply with customer service standards under Federal or state law, and that cable franchises may include an obligation to comply with customer service standards.[232] Notably, section 632 of the Act directs the Commission to "establish standards by which cable operators may fulfill their customer service requirements," including "at a minimum, requirements governing—(1) cable system office hours and telephone availability; (2) installations, outages, and service calls; and (3) communications between the cable operator and the subscriber (including standards governing bills and refunds."[233] The Commission implemented this mandate in section 76.309 of its rules, which sets forth with specificity the customer service standards to which cable operators are required to adhere relating to cable system office hours and telephone availability, installations, outages and service calls, and communications between cable operators and cable subscribers.[234] We find that franchise terms that require cable operators to adhere to customer service standards are not part of the franchise fee. In contrast to in-kind, cable-related contributions that are franchise fees subject to the statutory cap, such as the provision of free cable service to government buildings or PEG and I-

[227] *See infra* para. 84.

[228] 47 U.S.C. § 541(a)(2)(B).

[229] Because the statute is clear with regard to cable operator responsibility for construction costs, we reject ACA's argument that "build-out obligations should only be excluded [from the franchise fee] to the extent an LFA needs to meet its obligation under paragraph 621(a)(3)" to assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides. *See* ACA Comments at 7–8; 47 U.S.C. § 541(a)(3). *See also* Anne Arundel County *et al.* Reply at 9–11; CAPA Reply at 13.

[230] *See* Comments of the City of Murfreesboro, Tennessee, at 2 (Nov. 6, 2018) (City of Murfreesboro Comments); Comments of the City of Pasco, Washington, at 2 (Nov. 14, 2018); Comments of the City of Springfield, at 2 (Nov. 13, 2018); Anne Arundel County *et al.* Reply at 9–10; Free Press Reply at 5, NCTA Reply at 16. While some LFA commenters disagree with distinguishing between build-out obligations and other cable-related contributions such as PEG and I-Net support based on which entities receive the benefit of such obligations or whether such obligations can be considered "essential" to the provision of cable services, because we have clarified the rationale for excluding build-out obligations, we do not need to address these arguments. *See* AWC *et al.* Comments at 10–11; CAPA Comments at 12–13; Hawaii Comments at 10–11; City of Murfreesboro Comments at 2–3; NATOA *et al.* Comments at 6–7; City of New York Comments at 8–9; TBNK Comments at 7; Free Press Reply at 5–6; Hawaii Reply at 3–4. *See also* State of Hawaii July 22, 2019 *Ex Parte* at 1–4; Anne Arundel County, *et al.* July 24, 2019 *Ex Parte* at 2–4; NATOA *et al.* July 25, 2019 *Ex Parte* at 5–6.

[231] In the *Second FNPRM,* we sought comment on whether there are other requirements besides build-out requirements that should not be considered contributions to an LFA. *See Second FNPRM,* 33 FCC Rcd at 8963, para. 21.

[232] *See* Anne Arundel County *et al.* Comments at 28 ("LFAs often impose obligations such as ... minimum customer service obligations on cable operators that may still result in profit to the cable operator ... but also do not directly serve county personnel or buildings."); *id.* at 29 (providing as an example the California state franchise, which requires state franchise holders to comply with customer service and protection standards); City of Newton Comments at 14 ("Under Federal and state law, cable operators are required to comply with customer service standards. Cable franchise agreements include an obligation to comply with these customer service standards. Compliance with types of consumer-facing standards should not be treated as cable-related in-kind contributions."). *See also* NCTA Mar. 13, 2019 *Ex Parte* at 8 (observing that "neither the Commission nor the cable industry has suggested that ... costs [of customer service obligations] should count toward the statutory cap").

[233] 47 U.S.C. § 552(b).

[234] 47 CFR § 76.309(c)(1)-(3).

Net support,[235] customer service obligations are not a "tax, fee, or assessment" imposed on a cable operator; they are regulatory standards that govern how cable operators are available to and communicate with customers. Indeed, as the legislative history explains, "[i]n general, customer service means the direct business relation between a cable operator and a subscriber," and "customer service requirements include requirements related to interruption of service; disconnection; rebates and credits to consumers; deadlines to respond to consumer requests or complaints the location of the cable operator's consumer service offices; and the provision to customers (or potential customers) of information on billing or services."[236] Based on our review of the statutory text and legislative history, we find no indication that Congress intended that standards governing a cable operator's "direct business relation" with its subscribers should count toward the franchise fee cap. Apart from ACA, no commenter argued that customer service obligations should be included as franchise fees.[237]

3. Valuation of In-Kind Contributions and Application to Existing Franchises

59. As we explain in this section, we conclude that cable-related, in-kind contributions will count toward the five percent franchise fee cap at their fair market value. Because we conclude above that most cable related, in-kind contributions must be included in the franchise fee, cable operators and LFAs must assign a value to them. In our prior rulemakings, we did not provide guidance on how to value such contributions,[238] but in the *Second FNPRM,* the Commission recognized that cable-related contributions could count toward the franchise fee cap at cost or at fair market value, and proposed to count toward the franchise fee cap at their fair market value.[239]

60. Most critiques of applying fair market valuation in this context challenge how it could be applied to PEG channel capacity.[240] But, as discussed above, we have not yet determined whether to assign the value of PEG channel capacity contributions toward the five percent franchise fee cap, and therefore we do not need to address these arguments.

61. We must address the value of other in-kind contributions, however, including free service to public buildings and I-Net contributions. We believe that fair market value, where there is a product in the market,[241] is the most reasonable valuation for in-kind contributions because it is easy to ascertain—cable operators have rate cards to set the rates that they charge customers for the services that they offer. Moreover, a fair market valuation "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."[242] In contrast, valuing these in-kind contributions at cost would "shift the true cost of an exaction from their taxpayer base at large to the smaller subset of taxpayers who are also cable subscribers."[243] As we note above, Congress adopted a broad definition of franchise fee to limit the amount that LFAs may exact

[235] We clarify that if LFAs request build-out to an area that includes a public building, we would consider that to be a build-out requirement that is not subject to the franchise fee. However, we note that our conclusion with respect to build-out and customer service requirements is entirely separate from our findings regarding the provision of free or discounted services to public buildings and the provision of I-Net services. I-Net services as well as free or discounted services to public buildings are counted toward the franchise fee for the reasons explained above. *See supra* Sections III.A.2.a, III.A.2.c.

[236] H.R. Rep. No. 98–934, at 79 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4716.

[237] *See* ACA Reply at 17 (arguing that cable-related, in-kind contributions on any cable franchisee, other than capital costs for PEG access facilities, should count towards the franchise fee cap). For the reasons discussed above, we disagree with ACA that the costs of complying with mandated customer service standards should be counted toward the franchise fee cap.

[238] *First Report and Order,* 22 FCC Rcd at 5149–50, paras. 105–108.

[239] *Second FNRPM,* 33 FCC Rcd at 8964, para. 24.

[240] *See, e.g.,* Anne Arundel County *et al.* Comments at 31; QC4 Comments at 5; CCSF Comments at 4–7; BNN Reply at 4.

[241] *See, e.g.,* NCTA Comments at 53–55 (explaining that parties can establish the value of many services, including I-Net service, based on what "cable operators are charging third parties for a comparable service" and the "[m]arket value of equivalent services and equipment from the relevant cable operator"). We note that certain business or enterprise services may be comparable to I-Nets.

[242] NCTA Comments at 52. This demonstrates the flaw in NATOA *et al.*'s argument that we must provide guidance on how to calculate fair market value. *See* NATOA July 24 *Ex Parte* at 7. If the LFA believes that the cable operator's proposed valuation is too high, the LFA is free to forgo the in-kind contribution, accept a monetary franchise fee payment, and use the funds it received to purchase the good or service in the competitive marketplace.

[243] NCTA Reply at 19.

from cable operators.[244] Accordingly, we conclude that a fair market valuation for in-kind contribution best adheres to Congressional intent.

62. The franchise fee rulings we adopt in this Order are prospective.[245] Thus, cable operators may count only ongoing and future in-kind contributions toward the five percent franchise fee cap after the Order is effective. There is broad record support for applying the rulings prospectively; no commenter argues that our rulings should apply retroactively to allow cable operators to recoup past payments that exceed the five percent franchise fee cap.[246] To the extent a franchise agreement that is currently in place conflicts with this Order, we encourage the parties to negotiate franchise modifications within a reasonable time.[247] If a franchising authority refuses to modify any provision of a franchise agreement that is inconsistent with this Order, that provision is subject to preemption under section 636(c).

63. Many LFAs express concern that our rulings could disrupt their budgets, which rely upon the franchise fees that they expect to receive.[248] It is by no means clear from the record what fiscal choices remain available to the LFAs, but in any event, delaying the effect of our decision to address this concern would not be consistent with the statutory text. It is strongly in the public interest to prevent the harms from existing franchise agreements to continue for years until those agreements expire.[249] In addition, the changes we adopt today were reasonably foreseeable because we largely adopt the tentative conclusions set forth in the *Second FNPRM*.[250] Finally, we note that LFAs can continue to benefit from their agreements by choosing to continue to receive their existing in-kind contributions, while reducing the monetary payments they receive.[251] Thus, consistent with the Act, we

[244] *See supra* paras. 12–16. *See also* 129 CONG. REC. 15,461 (1983) (remarks of Senator Goldwater) ("[T]he overriding purpose of the 5-percent fee cap was to prevent local governments from taxing private operators to death as a means of raising local revenues for other concerns. This would be discriminatory and would place the private operator/owners at a disadvantage with respect to their competitors.")

[245] 5 U.S.C. § 551(4) ("'rule' means the whole or a part of an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy." (emphasis added)).

[246] *See, e.g.,* City Coalition Comments at 18–19; Free State Reply at 12–13; King County Comments at 11; NCTA Reply at 22–23.

[247] The City Coalition proposes that the parties should modify their franchises to comply with this Order via the franchise modification process set forth in section 625 of the Act. 47 U.S.C. § 545; City Coalition Comments at 19, n.89 ("the Second FNPRM could only be incorporated into existing agreements through a Section 545 proceeding."). Under those procedures, an LFA has 120 days to make a final decision about a cable operator's request to modify a franchise agreement. We do not adopt this framework, however, because as NCTA points out, the parties may not modify PEG requirements under section 625, and therefore cable operators and LFAs could not use that procedure to bring franchise agreements into compliance in every case. NCTA July 19 *Ex Parte* at 4. Therefore, we encourage the parties to negotiate franchise modifications within a reasonable time and find that 120 days should be, in most cases, a reasonable time for the adoption of franchise modifications.

[248] *See, e.g.,* City Coalition Comments at 18–19; City of Newton Apr. 17, 2019 *Ex Parte* at 9; AWC Apr. 3, 2019 *Ex Parte* at 5; Letter from Charlie Seelig, Town Administrator, Town of Halifax, MA, to Marlene H. Dortch, Secretary, FCC at 1 (July 22, 2019).

[249] *See* Letter from Katie McAuliffe Executive Director, Digital Liberty Federal Affairs Manager, Americans for Tax Reform, to Marlene H. Dortch, Secretary, FCC at Attachment at 8 (May 8, 2019) (stating that cable franchise agreements "typically have terms of about 10 to 15 years").

[250] *See supra* note 41. Indeed, the lawfulness of excluding costs associated with PEG/I-Nets from the franchise fee cap has been under Commission scrutiny for more than a decade (*see, e.g.,* 621 First R&O and FNRPM, 22 FCC Rcd 5701, 5750–51, 5765, paras. 109, 110, 140 (2007)), and in 2008, the Sixth Circuit affirmed the Commission's determination as to new entrants that PEG related costs which do not qualify as capital costs are subject to the franchise fee cap. *See Alliance for Community Media v. FCC,* 529 F.3d 763, 583–86 (6th Cir. 2008). Therefore, we find Anne Arundel County's argument that this "decision represents [an] 'unexpected surprise'" to be unfounded. *See* Letter from Joseph Van Eaton *et al,,* Counsel to Anne Arundel County, *et al.* to Marlene H. Dortch, Secretary, FCC at 13 (July 24, 2019) (citing *Kisor v. Wilkie,* 139 S.Ct. 2400 (2019); *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515–16 (2009)).

[251] Take, for example, a franchise agreement that requires a cable operator to deliver free cable service to all municipal buildings and contribute a monetary payment of five percent of its gross revenues derived from the operation of its cable system to provide cable services. In that case, the LFA may wish to either (1) continue to receive the existing free cable service and a monetary payment of five percent minus the fair market value of that service, or (2) discontinue service and receive a monetary payment of five percent, or (3) reduce the free cable service to select municipal buildings and receive a monetary payment of the five percent minus the fair market value of the reduced service. However, what an LFA may not do is ask a cable operator to "voluntarily" waive the statutory cap by asking it to continue providing free cable service to all municipal buildings and contribute the five percent monetary payment, or request that a cable operator waive anything else under the statute as interpreted by the Commission.

Continued

apply our rulings to future contributions cable operators make pursuant to existing franchise agreements.

B. Mixed-Use Rule

64. In this section, we address the second issue remanded from the Sixth Circuit in *Montgomery County,* which relates to the Commission's mixed-use rule. As explained above, the court in *Montgomery County* found that the Commission, in its *Second Report and Order* and *Order on Reconsideration,* failed to identify a valid statutory basis for its application of the mixed-use rule to incumbent cable operators because the statutory provision on which the Commission relied to do so—section 602(7)(C) of the Act—applies by its terms only to Title II carriers, and "many incumbent cable operators are not Title II carriers."[252] The court thus vacated and remanded the mixed-use rule as applied to those cable operators, directing the Commission "to set forth a valid statutory basis . . . for the rule as so applied."[253] For the reasons set forth below, we adopt our tentative conclusion that the mixed-use rule prohibits LFAs from regulating under Title VI the provision of any services other than cable services offered over the cable systems of incumbent cable operators, except as expressly permitted in the Act.[254]

65. Our conclusions regarding the scope of LFAs' authority to regulate incumbent cable operators' non-cable services, facilities, and equipment follow from the statutory scheme. Congress in Title VI intended, among other things, to circumscribe the ability of franchising authorities to use their Title VI authority to regulate non-cable services provided over the cable systems of cable operators and the facilities and equipment used to provide those services. As explained below, the legislative history of the 1984 Cable Act and subsequent amendments to Title VI reflect Congress's recognition that cable operators potentially could compete with local telephone companies in the provision of telecommunications service and its intent to maintain the then-existing *status quo* concerning regulatory jurisdiction over cable operators' non-cable services, facilities, and equipment.[255] Under the *status quo,* regulation of non-cable services provided over cable systems, including telecommunications and information services, was the exclusive province of either the Commission or state public utility commissions.[256]

66. *The Mixed-Use Rule Prohibits LFAs From Regulating Under Title VI the Non-Cable Services, Facilities, and Equipment of Incumbent Cable Operators That Are Also Common Carriers.* As an initial matter, we reaffirm the Commission's application of the mixed-use rule to prohibit LFAs from using their cable franchising authority to regulate any services other than cable services provided over the cable

See, e.g., Altice May 9, 2019 *Ex Parte* at 9 ("Some franchising authorities take advantage of periods in which they have maximum leverage to ask cable operators like Altice USA to 'voluntarily' waive the cap and accede to making payments or contributions that are not offset against the statutory limit on franchise fees. That pressure puts operators in a bind because, as a practical matter, they are often not in a position to resist franchising authority demands since the franchising authority exercises the sole domain over ROW access—which is one of the precise concerns that led to adoption of the Federal Cable Act in the first place."). *See also Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984,* Report and Order, 58 R.R.2d 1, 35, n.91 ("we note that neither a cable operator nor a franchising authority may waive mandatory sections of the Cable Act in reaching franchise agreements."). Accordingly, we reject the request of NATOA that we clarify that this Order "is permissive not mandatory." NATOA July 24, 2019 *Ex Parte* at 2. Complying with the terms of the statute is not optional.

[252] *Montgomery County,* 863 F.3d at 493.

[253] *Id.*

[254] *Second FNPRM,* 33 FCC Rcd at 8952, para. 26 (tentatively concluding that to the extent that any incumbent cable operators offer any telecommunications services, they can be regulated by LFAs only to the extent they provide cable service); *id.* paras. 27–28 (tentatively concluding that LFAs are prohibited from regulating the provision of broadband Internet access and other information services by incumbent cable operators that are not common carriers).

[255] *See infra* notes 271, 272.

[256] Specifically, the Commission historically has had jurisdiction over interstate telecommunications and information services. States have had jurisdiction over intrastate telecommunications services but not information services, which are jurisdictionally interstate. *See infra* note 272. We thus reject the City of Eugene's suggestion that maintaining the "status quo" supports broad state and local authority over non-cable services provided via cable systems. *See* City of Eugene July 24, 2019 *Ex Parte* at 5.

systems of any incumbent cable operator that is a common carrier,[257] with the exception of channel capacity on I-Nets.[258]

67. As noted above, the Commission in the *First Report and Order* found that the then-existing operation of the local franchising process constituted an unreasonable barrier to new entrants in the marketplace for cable services and to their deployment of broadband, in violation of section 621(a)(1) of the Act.[259] The Commission adopted the mixed-use rule with respect to new entrants to address this unreasonable barrier. It provides, in relevant part:

> LFAs' jurisdiction applies only to the provision of cable services over cable systems. To the extent a cable operator provides non-cable services and/or operates facilities that do not qualify as a cable system, it is unreasonable for an LFA to refuse to award a franchise based on issues related to such services or facilities [A]n LFA may not use its video franchising authority to attempt to regulate [an] entire network beyond the provision of cable services.[260]

68. The Commission in the *Second Report and Order* extended to incumbent cable operators several rules adopted in the *First Report and Order,* including the mixed-use rule.[261] Although, as noted, the Sixth Circuit in *Montgomery County* vacated and remanded the Commission's application of the mixed-use rule with respect to incumbent cable operators that are not common carriers, it left undisturbed application of the rule to incumbent cable operators that are also common carriers.[262] Consistent with the court's ruling, therefore, we adopt our tentative conclusion and reaffirm that the mixed-use rule prohibits LFAs from regulating the provision of non-cable services offered over the cable systems of incumbent cable operators that are common carriers.[263]

69. Our interpretation is consistent with the text of section 602(7)(C), which excludes from the term "cable system" "a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of this Act."[264] We are not persuaded by assertions to the contrary. Anne Arundel County *et al.* argues, for example, that a cable operator's provision of telecommunications services via its cable system (either directly or through a subsidiary) "does not . . . suddenly [transform its cable system] into a Title II facility" for purposes of applying the section 602(7)(C) common carrier exception.[265] City of Philadelphia *et al.* similarly argues

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[257] "Non-cable" services offered by cable operators include telecommunications services and non-telecommunications services. *Second FNPRM,* 33 FCC Rcd at 8964–65, para. 25. Telecommunications services offered by cable operators include, for example, business data services, which enable dedicated point-to-point transmission of data at certain guaranteed speeds and service levels using high-capacity connections, and wireless telecommunications services. *Id.* Non-telecommunications services offered by cable operators include, but are not limited to, information services (such as broadband Internet access services), private carrier services (such as certain types of business data services), and Wi-Fi services. *Id.* Cable operators also may offer facilities-based interconnected Voice over Internet Protocol (VoIP) service, which the Commission has not classified as either a telecommunications service or an information service, but which is not a cable service. *Id.*

[258] Nothing in this Order is intended to limit LFAs' express authority under section 611(b) of the Act, 47 U.S.C. § 531(b), to require I-Net capacity. *But see supra* paras. 55–56 regarding franchise fee treatment of I-Nets.

[259] *First Report and Order,* 22 FCC Rcd at 5102, para. 1. The Sixth Circuit rejected challenges to the Commission's *First Report and Order. Alliance,* 529 F.3d 763.

[260] *First Report and Order,* 22 FCC Rcd at 5153, paras. 121–22.

[261] *Second Report and Order,* 22 FCC Rcd at 19640–41, para. 17. The Commission adhered to that conclusion on reconsideration. *Order on Reconsideration,* 30 FCC Rcd at 816, para. 14.

[262] *Montgomery County,* 863 F.3d at 493 (finding that "on the record now before us, the FCC's extension of the mixed-use rule to incumbent cable providers that are not common carriers is arbitrary and capricious"). Our conclusion that the mixed-use rule applies to cable operators that are common carriers is based on our interpretation of sections 3(51) and 602(7)(C) of the Act. *Second FNPRM,* 33 FCC Rcd at 8965–66, para. 26. Under section 3(51) of the Act, a "provider of telecommunications services" is a "telecommunications carrier," which the statute directs "shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(51). Thus, to the extent that an incumbent cable operator provides telecommunications service, it would be treated as a common carrier subject to Title II of the Act with respect to its provision of such telecommunications service.

[263] *Second FNPRM,* 33 FCC Rcd at 8965–66, para. 26. NCTA asserts that many cable operators currently provide telecommunications services. NCTA Comments at 7, n.16.

[264] 47 U.S.C. § 522(7)(C).

[265] Anne Arundel County *et al.* Comments at 40–41 (asserting that under common carrier law, "it is the service which is the focus, not the facility. . . . [A] telecommunications service is defined 'regardless of the facilities used'. . . . Thus, a common carrier facility is subject to Title II

Continued

that the common carrier exception in section 602(7)(C) was meant to protect Title II common carriers from regulation by LFAs under their Title VI franchising authority and thus cannot reasonably be read to apply to any cable operator that provides Title II and other non-cable services over a system that is a cable system.[266]

70. To the extent these commenters argue that section 602(7)(C) precludes LFAs only from regulating non-cable services provided over the facilities of incumbent local exchange carriers that subsequently begin to provide cable service, we find such argument is not supported by the language of the statute. As noted in the *Second FNPRM,* although new entrants into the cable services market may confront obstacles different from those of incumbent cable operators, the statute makes no distinction between these types of providers.[267] In the absence of any textual basis for treating incumbent cable operators that provide telecommunications services differently from new entrants that do so, we conclude that a facility should be categorized as "a facility of a common carrier" under section 602(7)(C) so long as it is being used to provide some type of telecommunications service, irrespective of whether the facility was originally deployed by a provider that historically was treated as a "common carrier."

71. This interpretation also is consistent with the legislative history of the 1984 Cable Act. Although, as City of Philadelphia *et al.* points out, one of the concerns expressed in the legislative history was the potential that cable operators' provision of telecommunications services could enable large users of such services to bypass the local telephone companies and thereby threaten universal service,[268] the legislative history also reflects Congressional recognition that "ultimately, local telephone companies and cable companies could compete in *all* communications services."[269] The legislative history clarifies, moreover, that Congress intended the 1984 Cable Act to "maintain[] [then-]existing regulatory authority over all . . . communications services offered by a cable system, including . . . services that could compete with communications services offered by telephone companies."[270] Indeed, the legislative history is replete with statements reflecting Congress's intent to preserve the then-*status quo* regarding the ability of federal, state, and local authorities to regulate non-cable services provided via cable systems.[271] In light of its stated intention to

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only to the extent it is offering Title II services, and a facility owned by the cable operator could be used in the provision of Title II services without being a common carrier facility").

[266] City of Philadelphia *et al.* Comments at 44–45. City of Philadelphia *et al.* asserts further that:

> The FCC ignores the structure of the Communications Act by conflating communications *services,* cable and non-cable, with communications *systems.* Title II defines 'common carriers' . . . in terms of the 'telecommunications services' they provide, not in terms of the facilities they use to provide them. Title VI, to the contrary, focuses on the facility, by defining a 'cable system' as a communications system that has particular characteristics . . . and that is 'designed to provide cable service which includes video programming.' The cable system is a cable system if it satisfies the defining characteristics of such a communications system, regardless of whether it is used for non-cable, non-Title VI services. LFA authority to regulate goes with the system. . ..

Id. at 46–47 (citations omitted).

[267] *Second FNPRM,* 33 FCC Rcd at 8965–66, para. 26.

[268] City of Philadelphia *et al.* Comments at 46–48, *citing* 1984 Cable Act House Report, H.R. Rep. No. 98–934 (1984), *as reprinted in* 1984 U.S.C.C.A.N. at 4659–60. In particular, City of Philadelphia *et al.* asserts that:

> Congress' stated reason for excepting Title II telephone and data transmission services from LFA regulation . . . was to protect Title II telephone companies from unfair competition by cable operators. . . . Congress' fear was that cable operators could furnish the core services of Title II carriers . . . at lower cost because they were not subject to common carrier regulations, forcing [telephone companies] to raise rates on telephone service to compensate for the lost business. . . . [T]he Title II exception was [intended] to achieve competitive equity between Title II telephone companies and cable operators.

Id. (citations omitted). *See also* 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4664–66.

[269] *Id.* at 4665 (emphasis added).

[270] *Id.* at 4666.

[271] *See, e.g.,* id. at 4678 ("The Committee intends that nothing in Title VI shall be construed to affect existing regulatory authority with respect to non-cable communications services provided over a cable system"); *id.* ("This legislation does not affect existing regulatory authority over the use of a cable system to provide non-cable communications services, such as private line transmission or voice communication, that compete with services provided by telephone companies."); *id.* at 4697 ("The Committee intends that state and Federal authority over non-cable communications services under the status quo shall be unaffected by the provisions of Title VI. This approach protects cable companies from unnecessary regulation, while reserving for state and Federal officials the authority they need to address the issue of competition between telephone and cable companies. . . ."); *id.* at 4698 ("The Committee does not intend to address the question of regulatory jurisdiction over non-cable communications services provided over cable systems. The intent of the Committee is not to address the jurisdictional question

maintain the jurisdictional *status quo,* we find that Congress intended via section 602(7)(C) to preclude LFAs from regulating under Title VI the provision of telecommunications services by incumbent cable operators, services that historically have been within the exclusive purview of the Commission (with respect to interstate services) or state public utility commissions (with respect to intrastate services).[272] Moreover, section 602(7)(C) broadly states that, with narrow exceptions, the facility of a common carrier is only "considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers," and therefore not with respect to provision of any other services. For these reasons, we see no basis for altering our previous conclusion, as upheld by the Sixth Circuit,[273] that the mixed-use rule prohibits LFAs from exercising their Title VI authority to regulate the provision of non-cable services provided via the cable systems of incumbent cable operators that are common carriers, except as otherwise provided in the Act.

72. *The Mixed-Use Rule Prohibits LFAs From Regulating Under Title VI the Non-Cable Services, Facilities, and Equipment of Incumbent Cable Operators That Are Not Common Carriers.* We also adopt our tentative conclusion that LFAs are precluded from using their Title VI franchising authority to regulate the non-cable services (*e.g.,* information services such as broadband Internet access) of incumbent cable operators that do not provide telecommunications services.[274] As directed by the court, we explain herein our statutory bases for concluding that LFAs lack authority under Title VI to regulate non-cable services of incumbent cable operators that do not provide telecommunications services.

73. Section 624 of the Act, which principally governs franchising authority regulation of services, facilities, and equipment, provides in subsection (a) 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 of the Act].*"[275] The subsequent provision, section 624(b)(1), provides that franchising authorities "may not . . . establish requirements for video programming or other *information serv-*

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at all."); *id.* at 4700 ("It is the intent that, with respect to non-cable communications services, both the power of any state public utility commission and the power of the FCC be unaffected by the provisions of Title VI. Thus, Title VI is neutral with respect to such authority.").

[272] This interpretation is reinforced by both the text of section 621(b)(3) of the Act and its legislative history (relating to the provision of telecommunications services by cable operators), which Congress added to Title VI through the Telecommunications Act of 1996:

The intent of [section 621(b)(3)(A)] is to ensure that regulation of telecommunications services, which traditionally has been regulated at the Federal and State level, remains a Federal and State regulatory activity. The Committee is aware that *some [LFAs] have attempted to expand their authority over the provision of cable service to include telecommunications service offered by cable operators.* Since 1934, the regulation of interstate and foreign telecommunications services has been reserved to the Commission; the State regulatory agencies have regulated intrastate services. It is the Committee's intention that when an entity, whether a cable operator or some other entity, enters the telephone exchange service business, such entity should be subject to the appropriate regulations of Federal and State regulators.

1996 Act House Report, H.R. Rep. No. 104–204, 104th Cong., 1st Sess. 86, 93 (1995) (emphasis added). The fact that section 621(b)(3) seeks to protect *incumbent* cable operators from LFA regulation under Title VI when they provide certain non-cable services, *i.e.,* telecommunications services, further undermines LFAs' assertion that the common carrier exception in section 602(7)(C) was intended to shield from LFA regulation only the provision of non-cable services by *new entrants.*

[273] *Second Report and Order,* 22 FCC Rcd at 19640, para. 17; *Montgomery County,* 863 F.3d at 493. *See also Second FNPRM,* 33 FCC Rcd at 8965–66, para. 26 (tentatively concluding that the mixed-use rule "prohibits LFAs from regulating the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers, or from regulating any facilities and equipment used in the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers. . ..."). Certain LFA advocates appear to concede that the Act precludes LFAs from regulating under Title VI a cable operator's provision of telecommunications services via its cable system. *See, e.g.,* NATOA *et al.* Comments at 16–17 (stating that the definition of cable system "establishes that Title VI does not authorize LFAs to regulate the telecommunications services provided over what is otherwise a cable system"); Anne Arundel County *et al.* Comments at 37–38 (recognizing that various provisions in section 621 preclude LFA regulation of telecommunications services by cable operators, but stating that "[a]s long as a local government possesses authority to regulate telecommunications from a source other than Title VI franchise authority, none of these provisions prohibit it"). *See also Montgomery County,* 863 F.3d at 492 ("The Local Regulators admit that the FCC's mixed-use decision is 'defensible as applied to Title II carriers,' since the Act expressly states that [LFAs] may regulate Title II carriers only to the extent they provide cable services.").

[274] *Second FNPRM,* 33 FCC Rcd at 8966–67, para. 27.

[275] 47 U.S.C. § 544(a) (emphasis added).

ices." [276] Although the term "information service" is not defined in section 624, the legislative history of that provision distinguishes "information service" from "cable service." [277] In particular, the legislative history explains that "[a]ll services offered by a cable system that go beyond providing generally-available video programming or other programming are not cable services" and "a cable service may not include 'active *information services'* such as at-home shopping and banking that allows transactions between subscribers and cable operators or third parties." [278]

74. We find significant that the description of the term "information services" in the legislative history (*i.e.,* "services providing subscribers with the capacity to engage in transactions or to store, transfer, forward, manipulate, or otherwise process information or data [which] would not be cable services")[279] aligns closely with the 1996 Telecommunications Act's definition of "information service" codified in section 3(24) of the Act (*i.e.,* "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications").[280] We conclude, therefore, that for purposes of applying section 624(b), interpreting the term "information services" to have the meaning set forth in section 3(24) of the Act is most consistent with Congressional intent.[281] Because the Commission has determined that broadband Internet access service is an "information service" under section 3(24),[282] we likewise find that section 624(b)(1) precludes LFAs from regulating broadband Internet access provided via the cable systems of incumbent cable operators that are not common carriers. Moreover, even if the definition set forth in section 3(24) was not the intended definition of "information services" for purposes of section 624(b)(1), the highly analogous descriptions of this term in the legislative history of the 1984 Act also would apply to broadband Internet access service.[283] Thus, in either case, LFAs may not lawfully impose fees for the provision of information services (such as broadband Internet access) via a franchised cable system or require a franchise (or other authorization) for the provision of information services via such cable system.[284] We also clarify that LFAs and other state and local governmental units[285] cannot impose additional requirements on mixed-use "cable systems" in a manner inconsistent with this Order and the Act under the pretense that they are merely regulating facilities and equipment rather than information services.[286]

[276] *Id.* § 544(b)(1) (emphasis added). While the preamble to section 624(b) specifically limits the provision to franchises "granted after the effective date of this title" and therefore appears to grandfather local regulation of information services that may have occurred prior to 1984, when Title VI took effect, we note that very few franchises in effect today were granted prior to that year.

[277] 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4679.

[278] *Id.* (emphasis added). *See also id.* at 4681 ("Some examples of non-cable services would be: shop-at-home and bank-at-home services, electronic mail, one-way and two-way transmission of non-video data and information not offered to all subscribers, data processing, video-conferencing, and all voice communications."); *id.* ("Many commercial *information services* today offer a package of services, some of which (such as news services and stock listings) would be cable services and some of which (such as electronic mail and data processing) would not be cable services....[T]he combined offering of a non-cable shop-at-home service with service that by itself met all the conditions for being a cable service would not transform the shop-at-home service into a cable service, or transform the cable service into a non-cable communications service.") (emphasis added).

[279] *Id.* at 4679.

[280] 47 U.S.C. § 153(24).

[281] *Second FNPRM,* 33 FCC Rcd at 8966–67, para. 27. The fact that the "information services" definition in section 3(24) of the Act was enacted as part of the 1996 Act—more than ten years after Congress passed section 624(b)—supports our conclusion that LFAs lack authority under section 624(b)(1) to regulate information services. The absence in Title VI of specific references to the section 3(24) definition of "information service" suggests only that Congress, in passing the 1996 Act, did not wish to re-open the 1984 Cable Act; it does not indicate that Congress intended to grant LFAs general authority to regulate information services.

[282] The Commission in 2018 reinstated the "information service" classification of broadband Internet access service. *Restoring Internet Freedom Order,* WC Docket No. 17–108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd at 320–321, paras. 26–29 (2018) (*Restoring Internet Freedom Order*).

[283] 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4680–81.

[284] Application of the mixed-use rule to broadband Internet access service is not tied to the Commission's classification of broadband as an information service. Under the Commission's prior conclusion in 2015 that broadband Internet access service is a Title II telecommunications service, the mixed-use rule would apply based on the provisions of Title VI for the reasons explained above in paragraphs 66–71.

[285] *See infra* section III.C.

[286] For this reason, we reject assertions that section 624's grant of authority to "establish" and "enforce" certain requirements for facilities and equipment would permit LFAs to bypass the

75. Although we recognize that a later provision, section 624(b)(2)(B), permits franchising authorities to enforce requirements for "broad categories of video programming or *other services,"*[287] when read together with the specific injunction against regulation of "information services" in section 624(b)(1), we find that it would be unreasonable to construe section 624(b)(2)(B) as authorizing LFA regulation of information services when (b)(1) precludes franchising authorities from regulating such services.[288] As we noted in the *Second FNPRM,* the legislative history explains that section 624(b)(2)'s grant of authority "to enforce requirements. . .for broad categories of video programming or other services"[289] was intended merely to "assure[] the franchising authority that commitments made in an arms-length situation will be met," while protecting the cable operator from "being forced to provide specific programming or items of value which are not utilized in the operation of the cable system."[290] Reading these provisions together, it is apparent that Congress intended to permit LFAs to *enforce* franchise requirements governing "other services" under (b)(2), but only to the extent they are otherwise permitted to *establish* such requirements under (b)(1).[291] Because LFAs lack authority to regulate information services under section 624(b)(1), they may not lawfully enforce provisions of a franchise agreement permitting such regulation under section 624(b)(2), even if such provisions resulted from arms-length negotiations between the cable operator and LFA.[292] That is, the grant of authority to "enforce" certain requirements under section 624(b)(2)(B) does not give franchising authorities an independent right to impose requirements that they otherwise may not "establish" under section 624(b)(1).[293] We thus reject claims to the contrary.[294]

76. As discussed above, Congress in the 1984 Cable Act intended to preserve the *status quo* with respect to federal, state, and local jurisdiction over non-cable services, which lends further support to our conclusion that LFAs may not use their cable franchising authority to regulate information services provided over a cable system.[295] Because information services that are interstate historically have fallen outside the lawful regulatory purview of state and local authorities,[296] including

statutory prohibition on regulation of information services. *See, e.g.,* Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 9.

[287] 47 U.S.C. § 544(b)(2)(B) (emphasis added).

[288] *Second FNPRM,* 33 FCC Rcd at 8967–68, para. 28. We note further that the limitation on the ability of franchising authorities to establish requirements under section 624(b)(1) extends specifically to "information services," whereas the authority granted to franchising authorities in section 624(b)(2) makes no mention of "information services." *Id.* n.135.

[289] 47 U.S.C. § 544(b)(2)(B).

[290] *Second FNPRM,* 33 FCC Rcd at 8967–68, para. 28, n. 135, *citing* 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4706.

[291] Although the legislative history provides examples of "broad categories of video programming," *id.* at 4705–06 (stating that the franchising authority may enforce provisions for children's programming, news and public affairs programming, sports programming and other broad categories of programming), it does not specify what services are encompassed within the phrase "other services" for purposes of applying section 624(b)(2)(B). Although the phrase "other services" is ambiguous, it would be unreasonable to conclude that Congress intended for it to include services, such as information services, that franchising authorities are not empowered to regulate under section 624. Rather, we find it more reasonable to construe the phrase as referring to services that franchising authorities lawfully could require under Title VI, such as the provision of PEG channels and I-Net capacity. We, therefore, reject Anne Arundel County *et al.*'s assertion that the term "other service" in section 624(b)(2)(B) includes information services. Anne Arundel County *et al.* Comments at 38–39, n. 111.

[292] We thus disagree with City Coalition's contention that "[i]f . . . a cable operator agrees to undertake obligations regarding information services though arms-length negotiation—be they obligations regarding facilities that are not part of the cable system or obligations regarding noncable services—then a LFA may enforce those obligations." City Coalition Comments at 22.

[293] NCTA Reply at 28 ("Although . . . Section 624(b) discusses [the prohibition on LFA regulation of information services] in the context of cable franchise proposals and renewals, the prohibition would lose all practical meaning if franchising authorities were able to circumvent it simply by waiting to impose . . . requirements on non-cable services until after cable franchise negotiations concluded. . . .").

[294] Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 8–9.

[295] 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4666.

[296] *Id.* at 4700 ("The FCC [under section 621(d)(1)] may require a cable operator to file informational tariffs for enhanced services which are under the FCC's jurisdiction when offered by common carriers. States would not have the authority to require cable operators to file [such] tariffs for . . .enhanced services which are interstate in character. . . ."). The Commission has determined that the term "information service" has essentially the same meaning as the term "enhanced service" for purposes of applying the Act. *See, e.g.,* Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended,

Continued

LFAs, construing section 624(b) to bring those services within the scope of permissible LFA authority under Title VI would be fundamentally at odds with Congressional intent. For this reason, we reject City of Philadelphia *et al.*'s contention that our application of the mixed-use rule is barred by the Act because "[t]he 'regulatory and jurisdictional status quo' in 1984 . . . included [LFAs'] use of the franchise and franchise agreement to regulate . . . cable systems that [Congress] recognized were carrying both cable services and non-cable communications services." [297] The statutory design as reflected in other provisions of Title VI reinforces our conclusion that LFAs are precluded under section 624(b)(1) from regulating non-cable services provided over the cable systems of incumbent cable operators that are not common carriers.[298] LFAs, therefore, may not lawfully regulate the non-cable services of such cable operators, including information services (such as broadband Internet access), private carrier services (such as certain types of business data services), and interconnected VoIP service.[299] For example, this precludes LFAs from not only requiring such a cable operator to pay fees or secure a franchise to provide broadband service via its franchised cable system, but also requiring it to meet prescribed service quality or performance standards for broadband service carried over that cable system.

77. We find unconvincing arguments that the statute compels a broader reading of LFAs' authority under Title VI to regulate cable operators' non-cable services, facilities, and equipment. Anne Arundel County *et al.* maintains, for example, that because section 624(a) grants LFAs authority to regulate a "cable operator," a term the Act defines as "[a] person . . . who provides cable service over a cable system," [300] LFAs generally are authorized to regulate any of the services provided by a "cable operator" over a "cable system," including non-cable services.[301] Anne Arundel County *et al.* contends further that under section 624(b), LFAs "to the extent related to the establishment or operation of a cable system . . . may establish requirements for facilities and equipment" [302] and argues that the Act cannot be construed as limiting LFAs' jurisdiction to cable services since it permits LFAs to require, for example, build out and institutional networks.[303] We disagree with these arguments. Although, as Anne Arundel County *et al.* and others note,[304] the Act in

CC Docket No. 96–149, 11 FCC Rcd 21905, 21955, para. 102 (1996); *Federal-State Joint Board on Universal Service,* CC Docket No. 96–45, Report to Congress, 13 FCC Rcd 11501, 11511, para. 21 (1998). *See also* 1996 Act Conference Report, S. Rep. 104–230 at 18 (Feb. 1, 1996) (stating that the 1996 Act "defines 'information service' similar to the FCC definition of 'enhanced services'"); *NCTA v. Brand X Internet Svcs.,* 545 U.S. 967, 992–994 (2005). Moreover, even assuming that LFAs at the time Congress passed the 1984 Cable Act used their cable franchising authority to regulate non-cable services as City of Philadelphia *et al.* asserts, the provisions of section 624 plainly evidence Congressional intent to treat pre-and post-Act cable franchises differently. *Compare* 47 U.S.C. § 544(b) (authorizing franchising authorities, in the case of franchises granted after the effective date of Title VI, to take certain actions "*to the extent related to* the establishment or operation of the cable system") (emphasis added) *with* 47 U.S.C. § 544(c) (authorizing franchising authorities, in the case of franchises effective under prior law, to enforce requirements for the provision of services, facilities, and equipment "*whether or not related to* the establishment or operation of the cable system") (emphasis added).

[297] City of Philadelphia *et al.* Comments at 50–51.

[298] *See, e.g.,* 47 U.S.C. § 542(b) (limiting the franchise fees that a franchising authority may assess on a cable operator to "[five] percent of such cable operator's gross revenues derived . . . from the operation of the cable system *to provide cable services*") (emphasis added); *id.* § 541(b)(3)(B) (barring a franchising authority from "impos[ing] any requirement [under Title VI] that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator"); *id.* § 541(b)(3)(D) (barring a franchising authority from "requir[ing] a cable operator to provide any telecommunications services or facilities" as a condition of the grant or renewal of a franchise, with certain exceptions). We discuss section 622(b) of the Act, *id.* § 542(b), in greater detail in section C.

[299] Although interconnected VoIP service has not been classified by the Commission, LFA regulation of this service is prohibited under the mixed-use rule, as clarified in this Order, regardless of whether it is deemed a telecommunications service or an information service.

[300] *Id.* § 522(5)(A).

[301] *See, e.g.,* Anne Arundel County *et al.* Comments at 37, n. 105. Insofar as Anne Arundel County *et al.* is arguing that "once a cable operator, always a cable operator," and "once a cable system, always a cable system," *i.e.,* that when a cable operator deploys facilities, those facilities remain part of a cable system even when used to provide non-cable services, we disagree with that assertion. Consistent with our interpretation of section 602(7)(C) above, we find that a more reasonable reading of the statute is that the nature of facilities (*i.e.,* "cable system" or not) depends on how the facilities are used, not on whether the provider offered cable service at the time the facilities were deployed.

[302] Anne Arundel County *et al.* Comments at 37.

[303] *Id. See also* Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 9, n.26 (noting that section 632(a) of the Act, 47 U.S.C. § 552(a), permits franchising authorities to establish and enforce "construction schedules and other construction-related performance requirements, of the cable operator").

[304] *See, e.g.,* id.; City Coalition Comments at 21–22; City of New York Comments at 11–12.

certain circumstances permits LFAs to impose on cable operators certain requirements that are not strictly related to the provision of cable service,[305] such circumstances constitute limited exceptions to the general prohibition on LFA regulation of non-cable services contained in section 624.[306] They also do not override the specific prohibition on regulation of information services set forth in section 624(b)(1). This interpretation accords with one of the 1984 Cable Act's principal purposes to "continue[] reliance on the local franchising process as the primary means of cable television regulation, while *defining and limiting the authority that a franchising authority may exercise through the franchise process.*"[307]

78. We also conclude, contrary to the assertions of some commenters,[308] that it would conflict with Congress's goals in the Act to permit LFAs to treat incumbent cable operators that are not common carriers differently from incumbent cable operators and new entrants that are common carriers in their provision of information services, including broadband Internet access service.[309] As we noted in the *Second FNPRM,* incumbent and new entrant cable operators (whether or not they are also common carriers) often compete in the same markets and offer nearly identical services to consumers.[310] Thus, to allow LFAs to regulate the latter group of providers more strictly, such as by subjecting them to franchise and fee requirements for the provision of non-cable services,[311] could place them at a competitive disadvantage.[312] A report submitted by NCTA asserts, for example, that two fixed broadband providers may build out their networks differently, with one utilizing wireless backhaul and the other using landline backhaul, but "if one has inputs subjected to [fees] and the other does . . . treatment can distort competition between the two, even when the services provided . . . are indistinguishable to the consumer."[313] The distortion to competition that stems from "hampering a subset of competitors,"[314] in turn, reduces the incentives of those competitors to invest in cable system upgrades for the provision of both cable and non-cable services, which could thwart the 1996 Act's goals to promote competition among communications providers and secure lower prices and higher quality services for consumers.[315] Such regulations,

[305] *See, e.g.,* 47 U.S.C. § 531(b), (f) (permitting franchising authorities, among other things, to require channel capacity on institutional networks); *id.* § 551(g) (providing that "[n]othing in [Title VI] shall be construed to prohibit any State or any franchising authority from enacting or enforcing laws consistent with this section for the protection of subscriber privacy").

[306] *See id.* § 544(a) ("[A] franchising authority *may not regulate* the services, facilities, and equipment provided by a cable operator *except to the extent consistent with this subchapter* ") (emphasis added); *id.* § 541(b)(3)(D) ("[A] franchising authority *may not require* a cable operator to provide any telecommunications service or facilities, *other than institutional networks,* as a condition of the initial grant of a franchise, a franchise renewal, or transfer of a franchise.") (emphasis added). *See also id.* § 541(b)(3)(A)-(C). NATOA *et al.* agree that the grant to LFAs of authority to require I-Nets is an exception from the general injunction in section 621(b)(3)(D) against requiring cable operators to provide telecommunications services or facilities. NATOA *et al.* Comments at 18, n.52. NATOA *et al.* also appear to concede that section 624(b) precludes LFAs from regulating under Title VI information services provided over cable systems. *Id.* at 18, n.53 ("To the extent [the Commission's conclusion] is that Title VI does not grant LFAs authority over the information services provided over cable systems (other than as expressly provided in the Act . . .) . . . we agree that Title VI does not expressly grant such authority.").

[307] 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4656 (emphasis added).

[308] *See, e.g.,* NATOA *et al.* Comments at 20–21.

[309] *Second FNPRM,* 33 FCC Rcd at 8969, para. 30.

[310] *Id.*

[311] In section III.C., we discuss franchise and fee requirements imposed by state and local governments, including LFAs, on franchised cable operators' provision of non-cable services. We find that such requirements are preempted under section 636(c) of the Act.

[312] As NCTA notes, under the *First Report and Order,* LFAs may not lawfully require a telecommunications carrier with a preexisting right to access public rights-of-way for the provision of telecommunications services, to secure a Title VI franchise to provide non-cable services over its network. We agree with NCTA that a cable operator with a preexisting right to access public rights-of-way for the provision of cable service likewise should not be required to obtain a separate authorization to provide non-cable services over its cable system, given that there is no incremental burden on the rights-of-way. NCTA May 3, 2019 *Ex Parte* at 6.

[313] NCTA Reply App. 1, Report of Jonathan Orszag and Allan Shampine at 11 (Orszag/Shampine Analysis).

[314] *Id.*

[315] *Second FNPRM,* 33 FCC Rcd at 8969, para. 30. *See also* Orszag/Shampine Analysis at 6 (estimating that even modest reductions in network improvements as a consequence of reduced incentives to invest easily could result in consumer welfare losses exceeding $40 billion by 2023); ICLE July 18, 2019 *Ex Parte* at 19 ("[T]here is little economic sense in arbitrarily distinguishing between new entrants and incumbents. If the taxation of new broadband entrants under cable franchising rules would decrease their incentive to deploy, then the taxation of incumbent cable providers offering broadband services would similarly decrease their incentive to expand, up-

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moreover, impede the Commission's development of a "consistent regulatory framework across all broadband platforms,"[316] which is "[o]ne of the cornerstones of [federal] broadband policy."[317]

79. We also are not convinced by arguments that interpreting the Act to bar LFAs from regulating non-cable facilities and equipment placed in public rights-of-way would pose a safety risk to the public because cable operators would have unfettered discretion to install non-cable facilities without review or approval by local authorities.[318] Section 636(a) of the Act specifically provides that "[n]othing in [Title VI] shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of [Title VI]."[319] This provision, which is an express exception to Title VI's general prohibition on franchising authority regulation of non-cable facilities and equipment, thus permits LFAs to impose requirements on non-cable facilities and equipment designed to protect public safety, so long as such requirements otherwise are consistent with the provisions of Title VI.[320]

C. Preemption of Other Conflicting State and Local Regulation

80. As noted above, Title VI does not permit franchising authorities to extract fees or impose franchise or other requirements on cable operators insofar as they are providing services other than cable services. Ample record evidence shows, however, that some states and localities are purporting to assert authority to do so outside the limited scope of their authority under Title VI. These efforts appear to have followed the decision by the Supreme Court of Oregon in *City of Eugene v. Comcast,*[321] which upheld a local government's imposition of an additional seven percent "telecommunications" license fee on the provision of broadband services over a franchised cable system with mixed use facilities. To address this problem, we now expressly preempt 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.[322] Specifically, we preempt (1) any imposition of fees on a franchised cable operator or any affiliate using the same facilities franchised to the cable operator[323] that exceeds the formula set forth in section 622(b) of the Act and the rulings we adopt today, whether styled as a "franchise" fee, "right-of-access" fee, or a fee on non-cable (*e.g.,* telecommunications or broadband) services, and (2) any requirement that a cable operator with a Title VI franchise secure an addi-

grade, or make other broadband network investments."). We find no record basis for concluding that these concerns are raised only with respect to incumbent cable operators, and not new entrants. *Second FNPRM,* 33 FCC Rcd at 8969, para. 30, n.145 (seeking comment on whether concerns regarding regulatory disparity apply to new entrants that are not common carriers).

[316] *Communications Assistance for Law Enforcement Act and Broadband Access and Services,* ET Docket No. 04-295, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, para. 33 (2005).

[317] *Id. See also Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* CC Docket No. 02–33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14852, paras. 1, 17 (2005) (recognizing the benefits of "crafting an analytical framework that is consistent, to the extent possible, across multiple platforms that support competing services," and thus adopting a framework that "regulat[es] like services in a similar functional manner."). The fact that section 602(7)(C) excludes from the term "cable system" a facility of a common carrier subject to Title II of the Act, 47 U.S.C. § 522(7)(C), does not persuade us that Congress intended to permit LFAs to regulate incumbent cable operators that are not common carriers differently from incumbent cable operators and new entrants that are common carriers in their provision of non-cable services. Rather, given Congress's desire in the Act to ensure "competitively neutral and nondiscriminatory" regulation, *see, e.g.,* 47 U.S.C. § 253(c), we find that section 602(7)(C)'s carve out of Title II facilities from the definition of "cable system" merely evinces Congressional intent to preclude franchising authorities from regulating any telecommunications services carried over a cable system.

[318] *See, e.g.,* City Coalition Comments at 24–25; City of Philadelphia *et al.* Comments at 44; King County Comments at 9–10; City of Lakewood Comments at 2; Massachusetts Municipal Association Comments at 2.

[319] 47 U.S.C. § 556(a).

[320] *See* NCTA Mar. 13, 2019 *Ex Parte* at 11 (asserting that the mixed-use rule would not "authorize cable operators to place new installations in public [rights-of-way] without limit" or prevent a locality from addressing "legitimate public safety and welfare issues, such as road closures and traffic management during installation and maintenance of cable plant and enforcement of building and electrical codes").

[321] *City of Eugene v. Comcast of Or. II, Inc.,* 375 P.3d 446 (Or. 2016) (*Eugene*).

[322] Such preemption applies to the imposition of duplicative taxes, fees, assessments, or other requirements on affiliates of the cable operator that utilize the cable system to provide non-cable services. NCTA July 18, 2019 *Ex Parte* at 5.

[323] For example, a cable operator may provide voice or broadband services through affiliates, and an LFA could not impose duplicative fees on those affiliates.

tional franchise or other authorization to provide non-cable services via its cable system.[324] We base these conclusions on Congress's express decision to preempt state and local laws that conflict with Title VI of the Communications Act (section 636(c)), the text and structure of Title VI and the Act as a whole, Congressional and Commission policies (including the policy of nonregulation of information services), and the Supremacy Clause of the U.S. Constitution.[325]

81. *Authority to Preempt.* Congress has the authority to preempt state law under Article VI of the U.S. Constitution. While Congress's intent to preempt sometimes needs to be discerned or implied from a purported conflict between Federal and state law, here Congress spoke directly to its intent to preempt state and local requirements that are inconsistent with Title VI. This express preemption extends beyond the actions of any state or local franchising authority. Section 636(c) of the Act provides that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded."[326] The reference in section 636(c) to "this chapter" means that Congress intended to preempt any state or local law (or any franchise provision) that is inconsistent with any provision of the Communications Act, whether or not codified in Title VI.[327] Moreover, section 636(c) applies broadly to "*any* [inconsistent] provision of law" of "*any State, political subdivision, or agency thereof.*"[328]

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[324] We do not set forth an exhaustive list of state and local laws and legal requirements that are deemed expressly preempted. Rather, we simply clarify that state and local laws and other legal requirements are preempted to the extent that they conflict with the Act and the Commission's implementing rules and policies. As discussed in paragraph 105 below, such preempted requirements include those expressly approved in *Eugene.*

[325] Contrary to some assertions in the record, we find that the *Second FNPRM* provided adequate notice to interested parties that the Commission could exercise its preemption authority under section 636(c) to address local regulation of non-cable services outside Title VI. *See, e.g.,* NATOA *et al.* July 24, 2019 *Ex Parte* at 10, City of Eugene July 24, 2019 *Ex Parte* at 2–4. In support of its tentative conclusion that "[s]ection 624(b) of the Act prohibits LFAs from using their franchising authority to regulate the provision of information services, including broadband Internet access service," the *Second FNPRM* specifically cited section 636(c) and set forth the text of that provision nearly verbatim. *Second FNPRM,* 33 FCC Rcd at 8966–67, para. 27, n. 126. In addition, the Commission in the *Second FNPRM* tentatively concluded that preempted "entry and exit restrictions" include requirements that an incumbent cable operator obtain a franchise to provide broadband Internet access service and that LFAs therefore are expressly preempted from imposing such requirements. *Id.* at 8968, para. 29. The Commission sought comment on that tentative conclusion and on "whether there are other regulations imposed by LFAs on incumbent cable operators' provision of broadband Internet access service that should be considered entry and exit restrictions, or other types of economic or public utility-type regulations, preempted by the Commission." *Id.* Such regulations include duplicative fee and franchise requirements imposed by franchising authorities such as the City of Eugene, which is a "governmental entity empowered by . . . [s]tate [ ] or local law to grant a [cable franchise]." 47 U.S.C. § 522(10). Indeed, the fact that multiple LFA advocates recognized that the *Second FNPRM* could be read to seek comment on the Commission's authority to preempt requirements imposed outside Title VI contradicts claims that the *Second FNPRM* did not adequately apprise parties of the possible scope of the Commission's preemption ruling. *See, e.g.,* CAPA Comments at 17; City Coalition Comments at 21–22; NATOA *et al.* Comments at 13–15; Free Press Reply at 7–8. Moreover, the fact that cable commenters in this proceeding referenced section 636(c) as a potential basis for our preemption ruling, *see, e.g.,* ACA Comments at 14; NCTA Comments at 36; ACA Reply at 5, demonstrates that such ruling is a "logical outgrowth" of the *Second FNPRM. Covad Communications Co. v. FCC,* 450 F.3d at 528, 548 (D.C. Cir. 2006), *citing Small Refiner Lead Phase-Down Task Force v. EPA,* 705 F.2d 506, 548–49 (D.C. Cir. 1983) ("Whether the 'logical outgrowth' test is satisfied depends on whether the affected party 'should have anticipated' the agency's final course in light of the initial notice.").

[326] 47 U.S.C. § 556(c). For purposes of this provision, the term "State" has the meaning given such term in section 3 of the Act. *Id.* Section 3, in turn, provides that "the term 'State' includes the District of Columbia and the Territories and possessions." *Id.* § 153(47).

[327] *Id.* § 556(c). Section 636(c)'s reference to "this chapter" is to the Communications Act of 1934, as amended, which is codified in Chapter 5 of Title 47 of the United States Code. Section 636(c)'s reference to "this chapter" stands in contrast to other provisions in section 636, which reference "this subchapter," or Title VI of the Act. *Compare* 47 U.S.C. § 556(c) *with id.* § 556(a), (b).

[328] *Id.* § 556(c) (emphasis added). Contrary to some LFAs' assertion, *see* Anne Arundel County, *et al.* July 24, 2019 *Ex Parte* at 6, given that Congress in section 636(c) expressly preempted certain state and local laws, we need not find that Federal preemption of laws governing intrastate telecommunications services is permissible under the "impossibility exception." Nevertheless, we find that the impossibility doctrine further supports our decision herein. *See Min. Pub. Util. Comm'n v. FCC,* 483 F.3d 570, 578 (8th Cir. 2007) ("the 'impossibility exception' of 47 U.S.C. § 152(b) allows the FCC to preempt state regulation of a service if (1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) Federal regulation is

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That means that Congress intended that states and localities could not "end-run" the Act's limitations by using other governmental entities or other sources of authority to accomplish indirectly what franchising authorities are prohibited from doing directly.[329]

82. Where Congress provides an express preemption provision such as section 636(c), the Commission has delegated authority to identify the scope of the subject matter expressly preempted and assess whether a state's law falls within that scope.[330] The Commission may, therefore, expressly bar states and localities from acting in a manner that is inconsistent with both the Act and the Commission's interpretations of the Act, so long as those interpretations are valid.[331] We therefore disagree with assertions that the Commission lacks authority to preempt non-cable regulations imposed by states and localities pursuant to non-Title VI sources of legal authority.[332]

83. *Scope of Preemption.* The Commission's task, then, in interpreting the scope of preemption under section 636(c) is to determine whether specific state or local requirements are inconsistent with Title VI or other provisions in the Communications Act. Looking at the provisions of Title VI and the Act as a whole, we have little trouble concluding that Congress did not intend to permit states, municipalities, or franchising authorities to impose fees or other requirements on cable operators beyond those specified under Title VI, under the guise of regulating "non-cable services" or otherwise restricting a cable operator's construction, operation, or management of facilities in the rights-of-way.

84. As an initial matter, we note that Title VI establishes a framework that reflects the basic terms of a bargain—a cable operator may apply for and obtain a franchise to access and operate facilities in the local rights-of-way, and in exchange, a franchising authority may impose fees and other requirements as set forth and circumscribed in the Act. So long as the cable operator pays its fees and complies with the other terms of its franchise, it has a license to operate and manage its cable system free from the specter of compliance with any new, additional, or unspecified conditions (by franchise or otherwise) for its use of the same rights-of-way.

85. The substantive provisions of Title VI make the terms of this bargain clear. For starters, section 621(a)(1) provides franchising authorities with the right to grant franchises, and section 621(a)(2) explains that such franchises "shall be construed to authorize the construction of a cable system over public rights-of-way . . ."[333] A "cable operator," in turn, may not provide "cable service" unless the cable operator has obtained such a franchise.[334] Other provisions make clear that a franchise does not merely authorize the construction of a cable system, but also the "management and operation of such a cable system,[335] including the installation of Wi-Fi and small cell antennas attached to the cable system."[336]

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necessary to further a valid Federal regulatory objective, *i.e.,* state regulation would conflict with Federal regulatory policies.").

[329] Contrary to the suggestion of the City of Eugene, our preemption authority does not depend on Section 706 of the Act. *See* City of Eugene July 24, 2019 *Ex Parte* at 5.

[330] *First Report and Order,* 22 FCC Rcd at 5157, para. 128.

[331] *See, e.g., Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas,* 417 F.3d 216, 219–221 (1st Cir. 2005) (finding municipal ordinances that imposed franchise fees on cable operators were preempted under section 636(c) where inconsistent with section 622 of the Communications Act). The Commission bears the responsibility of determining the scope of the subject matter expressly preempted by section 636(c). *See Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 519 (1992); *Capital Cities Cable v. Crisp,* 467 U.S. 691, 699 (1984).

[332] *See, e.g.,* NATOA *et al.* Comments at 14–18; NATOA *et al.* Reply at 13; City of Philadelphia *et al.* Reply at 22-23; NATOA Mar. 15, 2019 *Ex Parte* at 2; Anne Arundel County *et al.* Comments at 37–39. *See also* City of Eugene Sept. 19, 2018 *Ex Parte* at 29–31, *citing Gregory v. Ashcroft,* 501 U.S. 452, 460–61 (1991) (asserting that if Congress intends to preempt a power traditionally exercised by state or local governments, it must make such intent unmistakably clear in the language of the statute).

[333] 47 U.S.C. § 541(a)(2).

[334] *Id.* § 541(b)(1).

[335] *Id.* § 522(5). *See also id.* § 544(b) (establishing limitations on rules for "establishment or operation of a cable system"). We therefore reject LFA assertions that the absence in section 621(a)(2) of an express grant of authority to "operate" a cable system evinces Congress's intent that a Title VI franchise bestow only the right to construct, but not to operate, a cable system over public rights-of-way. *See, e.g.,* Anne Arundel County *et al.* Comments at 43.

[336] NCTA May 3, 2019 *Ex Parte* at 2 (urging the Commission to clarify that the Act precludes duplicative authorizations and fees imposed for access to rights-of-way to deploy Wi-Fi and small cell antennas attached to, or part of, the cable system); NCTA June 11, 2018 *Ex Parte* at 2 (asserting that certain localities have refused to authorize permits allowing installation of Wi-Fi equipment on cable facilities on the basis that the equipment does not support cable service, even though the equipment is used, in part, to allow cable subscribers to watch subscription video programming).

86. The right to construct, manage, and operate a "cable system" does not mean merely the right to provide cable service.[337] Numerous provisions in Title VI evidence Congress's knowledge and understanding that cable systems would carry non-cable services—including telecommunications and information services. The definition of "cable system," for example, anticipates that some facilities may carry both telecommunications and cable services.[338] With respect to information services, section 601 of the Act provides that one of Title VI's purposes is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."[339] And, as we have already seen, Congress expressly provided in section 624(b) for "mixed-use" facilities that carry both cable services and "video programming or other information services."[340]

87. The legislative history reinforces the conclusion that Congress understood that a franchised "cable system" would carry both cable and non-cable services. The House Report, for example, explains that "[t]he term 'cable system' is not limited to a facility that provides only cable service which includes video programming. Quite the contrary, many cable systems provide a wide variety of cable services and other communications services as well. A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service."[341]

88. The point is that Congress was well aware that "cable systems" would be used to carry a variety of cable and non-cable services. It follows that Congress could have, if it wanted, provided significant leeway for states, localities, and franchising authorities to tax or provide other regulatory restrictions on a cable system's provision of non-cable services in exchange for the cable operator receiving access to the rights-of-way. But as it turns out, the balance of Title VI makes clear that Congress sharply circumscribed the authority of state or local governments to regulate the terms of this exchange. Today, we make clear that, under section 636(c), states, localities, and franchising authorities may not impose fees or restrictions on cable operators for the provision of non-cable services in connection with access to such rights-of-way, except as expressly authorized in the Act. We provide further explanation in two critical areas to clarify that these categories of state and local restrictions are preempted: (a) additional franchise fees beyond those authorized in Section 622 and (b) additional franchises or regulatory restrictions on a cable operator's construction, management, or operation of a cable system in the rights-of-way.

89. *Additional fees.* Both Congress and the Commission have recognized that the franchise fee is the core consideration that franchising authorities receive in exchange for the cable operator's right to access and use the rights-of-way.[342] As explained in detail above, Congress carefully circumscribed how this fee should be calculated: It provided that "the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system *to provide cable services"*.[343] We must assume that Congress's careful choice of words was intentional. While the fee would apply to the "cable operator" with respect to any "cable system," it would only apply to revenue obtained from "cable services," *not* non-cable services that Congress understood could provide additional sources of revenue.

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[337] As noted, under section 621(a)(2), "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way." 47 U.S.C. § 541(a)(2). Because the "construction of a cable system" includes the installation of facilities and equipment needed to provide both cable and non-cable services, such as wireless broadband and Wi-Fi services, the grant of a Title VI franchise bestows the right to place facilities and equipment in rights-of-way to provide such services.

[338] *See, e.g.,* 47 U.S.C. § 522(7)(C) (providing that a "cable system" shall extend to the facility of a common carrier providing a Title II service only "to the extent such facility is used in the transmission of video programming directly to subscribers . . .").

[339] *Id.* § 521(4).

[340] *Id.* § 544(b)(1).

[341] 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4681 ("[C]able operators are permitted under the provisions of [the Cable Act] to provide any mixture of cable and non-cable service they choose."). *See also Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.,* 6 FCC Rcd 7099, 7104, para. 24 (1991) ("[T]he House report accompanying the Cable Act clearly defeats [the] claim that a cable operator's facilities cease being a 'cable system' merely because they carry non-cable communications services in addition to video entertainment."), *aff'd, Texas Utils. Elec. Co. v. FCC,* 997 F.2d 925, 931–932 (D.C. Cir. 1993).

[342] 47 U.S.C. § 542. *See also* 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4663 (recognizing local government's entitlement to "assess the cable operator a fee for the operator's use of public ways" and establishing "the authority of a city to collect a franchise fee"); *First Report and Order,* 22 FCC Rcd at 5161, para. 135 (stating that "Congress enacted the cable franchise fee as the consideration given in exchange for the right to use the public ways").

[343] 47 U.S.C. § 542(b) (emphasis added).

90. We find additional support for this conclusion in Congress's broad definition of the term "franchise fee," which covers "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."[344] This broad definition was intended to limit the imposition of any tax, fee, or assessment of any kind—including fees purportedly for provision of non-cable services or for, access to, use of, or the value of the rights of way[345]—to five percent of the cable operator's revenue from cable services.[346] And its language reinforces the text of section 636(c) by making clear that a different state or local "governmental entity" cannot end-run the cap by imposing fees for access to any public right of way within the franchise area or in instances of overlapping jurisdiction.[347]

91. In reaching this conclusion, we read the phrase "solely because of their status as such" as protective language intended to place a ceiling on any sort of fee that a franchising authority might impose on a cable operator *qua* cable operator or *qua* franchisee—that is, any fee assessed in exchange for the right to construct, manage, or operate a cable system in the rights-of-way. We therefore reject the claim of some commenters that this language permits localities to charge additional fees so long as the cable operator also acts as a telecommunications provider or Internet service provider, or so long as the state or locality can articulate some non-cable related rationale for its actions.[348] This alternate rationale flies in the face of statutory text. As noted above, a "cable operator" is defined not only as a person or entity that provides cable service, but also one that "controls or is responsible for, through any arrangement, the *management and operation* of such a cable system."[349] The management or operation of a cable system includes the maintenance of the system to provide non-cable services—which Congress understood would be supplied over the same cable facilities.[350] Because a fee that a state or locality imposes on a cable operator's provision of non-cable services relates to the "manage[ment] and operat[ion]" of its cable system, such fee is imposed on the cable operator "solely because of [its] status" as a cable operator and is capped by section 622.[351]

92. The structure of section 622 as a whole provides further support for our reading. The language "solely because of their status as such" operates to distinguish fees imposed on cable operators for access to the rights-of-way ("franchise fees"), which are capped, from "any tax, fee, or assessment of general applicability," which are not.[352] Section 622 thus envisions two mutually exclusive categories of assessments—(1) fees imposed on cable operators for access to the rights-of-way in their capacity as franchisees (that is, "solely because of their status as such") and (2) broad-based taxes. Understood in this manner, any assessment on a cable operator for constructing, managing, or operating its cable system in the rights-of-way is subject to the five-percent cap—even if other non-cable service providers (*e.g.,* telecommunications or broadband providers) are subject to the same or similar access

[344] *Id.* § 542(g)(1).

[345] NCTA Apr. 19, 2019 *Ex Parte* at 2–3 (claiming that some governmental entities, such as the state of California, are imposing fees that exceed the five percent cap by styling such fees as a "tax" that nominally applies to other users of the rights-of-way, but whose valuation is inextricably linked to the provision of video services).

[346] State and local advocates do not appear to dispute that section 622(b) limits franchise fees to five percent of a cable operator's gross revenues derived from the provision of cable service only. *See, e.g.,* NATOA *et al.* Comments at 21–22; CAPA Reply at 20. *See also* City of New York Comments at 13. Rather, their claims, as discussed herein, are that fees on broadband and telecommunications services are not "franchise fees" at all—claims that we show are belied by the text, structure, and purposes of Title VI.

[347] *See, e.g.,* NCTA Apr. 19, 2019 *Ex Parte* at 1–2, *citing Liberty Cablevision,* 417 F.3d at 223; NCTA July 3, 2019 *Ex Parte* at 2 (asserting that the state of Maryland has begun to require franchised cable operators to enter into separate "resource sharing agreements" with the state's Department of Information Technology that impose duplicative fees and other requirements for continued access to rights-of-way).

[348] CAPA Reply at 20–21. *See also* NATOA *et al.* July 24, 2019 *Ex Parte* at 25–28 (asserting that the Act does not preclude local governments from exercising generally-applicable rights-of-way authority over a cable operator's provision of non-cable services).

[349] 47 U.S.C. § 522(5) (emphasis added).

[350] *Id.* As NCTA notes, a service provider may have status as a cable operator *either* because of its provision of cable service *or* because of its operation of a cable system. NCTA Mar. 13, 2019 *Ex Parte* at 12, n.64, *citing* 47 U.S.C. § 522(5). A service provider that is operating a cable system to provide broadband Internet access service thus is providing such service "solely because of" its status as a cable operator. 47 U.S.C. § 542(g)(1).

[351] *Id.*

[352] *Williams v. Taylor,* 529 U.S. 362, 404 (2000) (holding that, where possible, every word in a statute should be given meaning).

fees.[353] This is because the definition of "franchise fee" in section 622(g)(1) centers on *why* the fee is imposed on a cable operator, *i.e.,* "solely because of [its] status" as a franchisee, and not *to whom* the fee is imposed, *i.e.,* "solely applicable" to a cable operator.[354] The entire category of "franchise fees" is subject to the five-percent cap, in distinction to generally-applicable taxes whose validity must be shown, at least in part, by their application to broader classes of entities or citizens beyond providers of cable and non-cable communications services.[355]

93. The legislative history and purposes of the 1984 Cable Act support this broad and exclusive interpretation of the term "franchise fees." It reveals, for example, that Congress initially established the section 622(b) cap on franchise fees out of concern that local authorities could use such fees as a revenue-raising mechanism.[356] A reading of section 622 that would permit states and localities to circumvent the five percent cap by imposing unbounded fees on "non-cable services" would frustrate the Congressional purpose behind the cap and effectively render it meaningless. The legislative history behind the 1996 amendments to section 622(b) make this intent explicit. Prior to 1996, section 622 provided, in relevant part, that "the franchise fees paid by a cable operator with respect to any cable system shall not exceed [five percent] of such cable operator's gross revenues derived . . . from *the operation of the cable system."*[357] The House Report accompanying the 1996 amendment,[358] which explained the addition of the key limitation "for the provision of cable services" in section 622(b), provides that:

> Franchising authorities may collect franchise fees under [section 622 of the Act] solely on the basis of the revenues derived by an operator *from the provision of cable service*. . . . This section does not restrict the right of franchising authorities to collect franchise fees on revenues from cable services and cable-related services, such as, but not limited to, revenue from the installation of cable service, equipment used to receive cable service, advertising over video channels, compensation received from video programmers, and other sources related to the provision of cable service over the cable system.[359]

94. If, as CAPA asserts, Congress had intended the term "cable operator" as used in section 622(b) to refer to an entity only to the extent such entity provides cable

[353] *See* NCTA Mar. 13, 2019 *Ex Parte* at 12–13. Although a "franchise fee" does not include "any tax, fee, or assessment of general applicability," we note that this exception excludes a tax, fee, or assessment "which is unduly discriminatory against cable operators or cable subscribers." 47 U.S.C. § 542(g)(2)(A). Even if "telecommunications" fees such as those at issue in *Eugene* could reasonably be characterized as fees of general applicability by virtue of their application to providers other than cable operators, we find that such fees would be "unduly discriminatory"—and thus constitute "franchise fees"—as applied to franchised cable operators. This is because such fees are assessed on cable operators *in addition to* the five percent franchise fees such operators must pay for use of public rights-of-way. That is, cable operators must pay *twice* for access to rights-of-way (*i.e.,* one fee for cable service and a second fee for non-cable service), whereas non-cable providers must pay only once for such access (*i.e.,* for non-cable service). NCTA Mar. 13, 2019 *Ex Parte* at 13. We, therefore, conclude that interpreting the Act to preclude localities from assessing fees on cable operators' use of rights-of-way to provide non-cable services would be "competitively neutral and nondiscriminatory," contrary to the suggestion of some commenters. *See, e.g.,* NATOA *et al.* July 24, 2019 *Ex Parte* at 9.

[354] *See* NCTA Mar. 13, 2019 *Ex Parte* at 12–13.

[355] We thus disagree with assertions that Congress did not intend for franchise fees to cover cable operators' use of public property for the provision of services other than cable services. *See, e.g.,* AWC Reply at 9 ("Congress determined . . . that a fair compensation for the use of the rights-of-way for the purpose of providing cable service can be up to [five percent] of cable gross revenues. . . . [T]he right to occupy this limited and valuable public property for other purposes was never intended to be compensated by the provisions of the Cable Act.").

[356] S. Rep. No. 98–67, at 25 (1983) ("The committee feels it is necessary to impose such a franchise fee ceiling because without a check on such fees, local governments may be tempted to solve their fiscal problems by what would amount to a discriminatory tax not levied on cable's competitors."). *See also* 129 Cong. Rec. S8254 (daily ed. June 13, 1983) (statement of Sen. Goldwater) (stating that the purpose of the cap was to prevent franchising authorities from "taxing private cable operators to death as a means of raising revenues for other concerns").

[357] 47 U.S.C. § 542(b) (Supp. I 1992), *amended by* 47 U.S.C. § 542(b) (Supp. II 1996).

[358] The conference agreement adopted the House version of this provision. *See* H.R. Rep. No. 104–458, at 180 (1996) (Conf. Rep.).

[359] H.R. Rep. No. 204, 104th Cong., 1st Sess. 93 (1995) (emphasis added). We note that the Senate Report similarly clarifies that this amendment to section 622 "was intended to make clear that the franchise fee provision is not intended to reach revenues that a cable operator derives from providing new telecommunications services over its system that are different from the cable-related revenues operators have traditionally derived from their systems." S. Rep. 104–23, at 36 (1995).

service, there would have been no need for Congress to amend section 622(b) in this manner.[360]

95. Although, as LFA advocates note,[361] section 621(d)(2) of the Act provides that "[n]othing in [Title VI] shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis,"[362] this provision is not an affirmative grant to states of authority to regulate non-cable services that they historically have not been empowered to regulate. First, the term "State" in section 621(d) does not extend to LFAs; it is defined by reference to section 3 of the Communications Act. The legislative history makes clear that this was a reference to the division of regulatory authority between the "state public utility commission and. . .the FCC."[363] Second, this provision merely reflects Congress's intent in the 1984 Cable Act to preserve the *status quo* with respect to Federal and state jurisdiction over non-cable services.[364] As noted, under the then-existing *status quo,* the Commission had jurisdiction to regulate interstate services; states had jurisdiction to regulate intrastate services.[365] Because the Commission historically has concluded that information service is jurisdictionally interstate,[366] it traditionally has fallen outside the proper regulatory sphere of state and local authorities.[367] Moreover, the Commission has long recognized the impossibility of separately regulating interstate and intrastate information services.[368] Thus, neither a state nor its political subdivisions may lawfully regulate such service under section 621(d)(2) by requiring a cable operator with a Title VI franchise to pay a fee or secure a franchise or other authorization to provide broadband Internet access service over its cable system. To conclude otherwise would contravene Congress's intent in Title VI to maintain the jurisdictional *status quo* with respect to federal, state, and local regulation of non-cable services.[369]

96. We find unpersuasive NATOA *et al.*'s selective reading of the legislative history to conclude that Congress intended to permit states and localities to require franchised cable operators to pay additional rights-of-way fees for the provision of non-cable services. NATOA *et al.* note that the House Conference Report accompanying the 1996 amendment stated that "to the extent permissible under state and local law, communications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a nondiscriminatory and competitively neutral way, manage its public rights-of-way and charge fair and

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[360] *See* CAPA Reply at 20–21.

[361] Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 5–6.

[362] 47 U.S.C. § 541(d)(2).

[363] 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4700.

[364] NCTA July 25, 2019 *Ex Parte* at 5–6.

[365] 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4666.

[366] *Restoring Internet Freedom Order,* 33 FCC Rcd at 430, para. 199 (reaffirming the Commission's view that Internet access service is jurisdictionally interstate because a substantial portion of Internet traffic involves accessing interstate or foreign websites).

[367] The Commission recognized as much when it stated:

> [T]he Commission has independent authority to displace state and local regulations in accordance with the longstanding Federal policy of nonregulation for information services. For more than a decade prior to the 1996 Act, the Commission consistently preempted state regulation of information services (which were then known as "enhanced services"). When Congress adopted the Commission's regulatory framework and its deregulatory approach to information services in the 1996 Act, it thus embraced our longstanding policy of preempting state laws that interfere with our Federal policy of nonregulation.

Restoring Internet Freedom Order, id. at 431, para. 202, *citing Petition for Declaratory Ruling that Pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service,* Memorandum Opinion and Order, 19 FCC Rcd 3307, 3316–23, paras. 15–25 (2004) (discussing the Federal policy of nonregulation for information services). Because broadband Internet access service is jurisdictionally interstate whether classified as a telecommunications or an information service, regulatory authority over such service resides exclusively with the Commission.

[368] *See California v. FCC,* 39 F.3d 919 (9th Cir 1994); *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.,* 7 FCC Rcd 1619 (1992).

[369] We also reject claims that section 621(d)(1)'s grant to states of authority to require the filing of tariffs by cable operators for the provision of certain non-cable services reflects Congress's intent to permit state regulation of those services. Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 5. As explained in section III.B. above, that provision was intended only to permit states to require tariffs for services that they otherwise were authorized to regulate, such as telecommunications services that are purely intrastate. *See* 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4698 ("A regulatory agency [under section 621(d)] may require a cable operator to file an informational tariff for a non-cable communications service only if the agency has jurisdiction over a common carrier's provision of such a service.").

reasonable fees."[370] Although the cited legislative history is relevant to our interpretation of the statute,[371] we do not read this language so broadly as permitting states and localities to charge redundant or duplicative fees on cable franchisees that are subject to the five-percent cap—a reading that would, as we have explained, eviscerate the cap entirely. Rather, we conclude that, under section 636(c), and taking into account the provisions of Title VI as a whole, any fees that exceed the five-percent cap, as formulated in section 622, are not "fair and reasonable."[372]

97. Consistent with Congress's intent, as early as 2002, the Commission has construed section 622(b) to permit franchising authorities to include in the revenue base for franchise fee calculations only those revenues derived from the provision of cable service.[373] Thus, if a cable operator generates additional revenue by providing non-cable services over its cable system, such additional revenue may not be included in the gross revenues for purposes of calculating the cable franchise fee.[374]

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[370] NATOA Mar. 15, 2019 *Ex Parte* at 2, *citing* H.R. Conf. Rep. No. 104–458, at 209 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 223 (emphasis added).

[371] As some LFA advocates note, Anne Arundel County *et al.* July 25, 2019 *Ex Parte* at 10, n.29, the Commission previously noted in passing that, while a cable operator is not required to pay cable franchise fees on revenues from non-cable services, this rule "does not apply to non-cable franchise fee requirements, such as any lawful fees related to the provision of telecommunications service." *Second Report and Order,* 22 FCC Rcd at 19638, para. 11, n.31. For the reasons explained below, we would deem an LFA's assessment of a cable operator twice for accessing public rights-of-way (once as a cable operator and again as a telecommunications provider) to be unlawful as not "fair and reasonable" nor "competitively neutral and nondiscriminatory." *See infra* note 372. *See also* 47 U.S.C. § 253(c). To the extent our earlier statement may suggest any broader application, we disavow it based on the record before us and the arguments made throughout this item.

[372] We disagree with LFA assertions that this interpretation is inconsistent with section 253 of the Act and the Commission's 2018 *Wireless Infrastructure Order.* Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 10, n.29, *citing Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, n. 130 (2018). Although section 253 permits states and localities to require "fair and reasonable" compensation from telecommunications providers on a "competitively neutral and nondiscriminatory basis" for use of public rights-of-way, 47 U.S.C. § 253(c), as explained above, we find that imposing fees on cable operators beyond what Title VI allows is neither "fair and reasonable" nor "competitively neutral and nondiscriminatory." Moreover, although the Commission in the *Wireless Infrastructure Order* concluded, among other things, that fees to use the rights-of-way to deploy small cells for the provision of telecommunications must be cost-based and no greater than those charged to "similarly situated" entities for comparable uses of the rights-of-way, we do not believe that our approach today introduces any inconsistency. Rather, as NCTA notes, we merely recognize that under the Act, cable operators must compensate local governments for accessing public rights-of-way under a statutory framework different from that applicable to telecommunications providers, and that Congress did not intend for them to be assessed twice for the provision of cable service or the facilities used in the provision of such service. NCTA July 25, 2019 *Ex Parte* at 6–7. Any difference in approach, therefore, follows from different standards established by Congress in Sections II and VI of the Act.

[373] In the *Cable Modem Declaratory Ruling,* for example, the Commission stated:

> We note that section 622(b) provides that 'the franchise fees paid by a cable operator with respect to any cable system shall not exceed [five percent] of such cable operator's gross revenues derived . . .from the operation of the cable system to provide cable services.' Given that we have found cable modem service to be an information service, revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined.

Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4851, para. 105 (2002) (citations omitted) (*Cable Modem Declaratory Ruling*).

[374] In the *First Report and Order,* the Commission affirmed its 2002 interpretation of section 622(b):

> We clarify that a cable operator is not required to pay franchise fees on revenues from non-cable services. Section 622(b) provides that the 'franchise fees paid by a cable operator with respect to any cable system shall not exceed [five percent] of such cable operator's gross revenues derived ... from the operation of the cable system to provide *cable services'.* The Commission [has] determined that a franchise authority may not assess franchise fees on non-cable services, such as cable modem service...Although [the *Cable Modem Declaratory Ruling*] related specifically to Internet access service revenues, the same would be true for other 'non-cable' service revenues. Thus, Internet access services, including broadband data services, and any other non-cable services are not subject to 'cable services' fees.

First Report and Order, 22 FCC Rcd at 5146, para. 98 (emphasis in original) (citations omitted).

98. As courts have recognized, the Commission is charged with "the ultimate responsibility for ensuring a 'national policy' with respect to franchise fees." [375] We exercise that authority today by making clear that states, localities, and cable franchising authorities are preempted from charging franchised cable operators more than five percent of their gross revenue from cable services. This cap applies to any attempt to impose a "tax, fee, or assessment of any kind" that is not subject to one of the enumerated exemptions in section 622(g)(2) on a cable operator's non-cable services or its ability to construct, manage, or operate its cable system in the rights-of-way.

99. *Additional Franchises or Other Requirements.* Congress also made clear that states, localities, and franchising authorities lack authority to require additional franchises or place additional nonmonetary conditions on a cable operator's provision of non-cable services that are not expressly authorized in the Act. Several provisions state explicitly that franchising authorities may not regulate franchised "cable systems" to the extent that they provide telecommunications services.[376] In addition, as we noted above, section 624(b)(1) precludes franchising authorities from "establish[ing] requirements for video programming or other information services." [377] In the mixed-use rule we adopt today, we reasonably construed this provision to prohibit LFAs from regulating information services provided over cable systems.[378]

100. As noted above, section 636(c) operates to preempt state and local requirements that would use non-Title VI authority to accomplish indirectly what franchising authorities are prohibited from doing directly. Consistent with this reasoning, we conclude that any state or local law or legal requirement that obligates a cable operator franchised under Title VI to obtain a separate, additional franchise (or other authorization) or imposes requirements beyond those permitted by Title VI to provide cable or non-cable services, including telecommunications and information services, over its cable system conflicts with the Act and thus also is expressly preempted by section 636(c). The mixed-use rule we adopt today represents a reasonable interpretation of the relevant provisions of Title VI as well as a balanced accommodation of the various policy interests that Congress entrusted to the Commission; therefore, it too has preemptive effect under section 636(c).[379]

101. *Public Policy.* Apart from our analysis of the text and structure of the Act and our longstanding delegated authority to preempt state regulations that are inconsistent with the Act, our preemption decisions today are also consistent with Congress's and the Commission's public policy goals and an appropriate response to problems that are apparent in the record.

102. Recognizing that excessive regulation at the local level could limit the potential of cable systems to deliver a broad array of services, Congress expressed its intent to "minimize unnecessary regulation that would impose an undue economic burden on cable systems" [380] and "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." [381] More generally, section 230(b) of the Act expresses Congress's intent "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." [382] Accordingly, the Commission has previously preempted state and

[375] *ACLU v. FCC,* 823 F.2d 1554, 1574 (D.C. Cir. 1987).

[376] *See, e.g.,* 47 U.S.C. § 541(b)(3)(B) ("A franchising authority may not impose any requirement under this subchapter that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof"); *id.* § 541(D) (A franchising authority may not impose any requirement under this subchapter that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof). *See also Montgomery County,* 863 F.3d at 492 ("The Act also makes clear that local franchising authorities can regulate so called 'Title II carriers' (basically, providers of phone services) only to the extent that Title II carriers provide cable services.").

[377] 47 U.S.C. § 544(b)(1).

[378] *See supra* paras. 72–76.

[379] We reject arguments that the Commission lacks authority to preempt state and local regulation of information services without asserting ancillary jurisdiction over information services. *See, e.g.,* Public Knowledge Comments at 1; Common Frequency Comments at 5 (claiming that if the Commission has no authority to regulate information services, then it has no ability to preempt conflicting state and local regulation). Because we are relying on express preemption authority under section 636(c), there is no reason for us to rely upon ancillary authority in this proceeding.

[380] 47 U.S.C. § 521(6).

[381] *Id.* § 521(4).

[382] *Id.* § 230(b)(2). "Interactive computer services" are defined, in relevant part, as "any information service, system, or access software provider that provides or enables computer access by

local regulations that would conflict with this Federal policy of nonregulation of information services.[383] These longstanding Federal policies provide further support for our decision today to read Title VI as prohibiting states, localities, and franchising authorities from imposing fees and obligations on cable operators beyond those expressly set forth in that Title.

103. Our preemption decision today will advance these Federal policies by preventing further abuses of state and local authorities of the kind manifested in the record in this proceeding. In recent years, governmental entities at the local level increasingly have sought to regulate non-cable services provided over mixed-use cable systems franchised under Title VI, particularly broadband Internet access service.[384] Such governmental entities have included not only state and local franchising authorities acting pursuant to the cable franchising provisions of Title VI, but also state and local entities purportedly acting pursuant to their police powers to regulate public rights-of-way or other powers derived from sources outside Title VI. Although the record reveals that such regulation takes many different forms, NCTA and other industry advocates have expressed acute concerns about two particular kinds of state and local regulation: (1) requirements obligating cable operators with a Title VI franchise that are subject to the franchise fee requirement in section 622(b) of the Act to pay additional fees for the provision of non-cable services (such as broadband Internet access) via their cable systems; and (2) requirements obligating cable operators with a Title VI franchise to secure an additional franchise (or other authorization) to provide non-cable services over their cable systems.[385] Our preemption decisions today are carefully tailored to address these problems and prevent states and localities from continuing to circumvent the carefully calibrated terms of Title VI through these and similar kinds of regulations.

104. We disagree with those commenters who attempt to minimize the harm posed by the state and local requirements that we preempt today. We disagree, for example, that cable industry claims regarding the impact of duplicative fee and franchise requirements on broadband deployment are belied by the industry's substantial investments to date in broadband infrastructure, and that such requirements thus will not adversely affect broadband investment going forward.[386] As the record reflects, even if cable operators were to continue to invest, such investments likely would be higher absent such requirements, and even small decreases in investment can have a substantial adverse impact on consumer welfare.[387] We also are persuaded that the imposition of duplicative requirements may deter investment in new infrastructure and services irrespective of whether or to what extent a cable operator passes on those costs to consumers.[388] Contrary to the assertions of some commenters,[389] we also believe that such requirements impede Congress's goal to accelerate deployment of "advanced telecommunications capability to all Americans."[390]

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multiple users to a computer server, including specifically a service or system that provides access to the Internet. . . ." *Id.* § 230(f)(2).

[383] *See, e.g., Cable Modem Declaratory Ruling,* 17 FCC Rcd at 4850, para. 102; *Restoring Internet Freedom Order,* 33 FCC Rcd at 426–28, paras. 194–95. *See also Charter Advanced Services (MN), LLC v. Lange,* No. 17–2290 (8th Cir. filed Sept. 7, 2018) (noting that "[a]ny [local] regulation of an information service conflicts with the Federal policy of nonregulation" and is therefore preempted).

[384] *See, e.g.,* NCTA Comments at 26–28; NCTA Reply, Appendix; NCTA Mar. 13, 2019 *Ex Parte* at 10; NCTA June 11, 2018 *Ex Parte* at 4–5.

[385] NCTA Comments at 26–28; Altice Reply at 14.

[386] *See, e.g.,* City of New York Reply at 2–3 (asserting that restricting LFA authority to regulate incumbent cable operators' provision of non-cable services will not facilitate broadband deployment). *See also* Anne Arundel County *et al.* Reply at Exh. 5; Anne Arundel County *et al.* July 24, 2019 *Ex Parte* and Atts. (submitting analyses purporting to show that rights-of-way fees and practices at the local level have a minor impact on cable operators' broadband deployment decisions). Although LFAs also submitted an engineering analysis of public rights-of-way processes, *id.,* because this study is from 2011 and does not address cable franchise fees, it has no bearing on our findings herein. NCTA July 25, 2019 *Ex Parte* at 11–12.

[387] Orszag/Shampine Analysis at 17.

[388] *Id.* at 13 (claiming that LFAs' imposition of fees on non-cable services would deter investment in new infrastructure and services regardless of whether cable operators can pass some or all of those costs through to consumers). *See also* Americans for Tax Reform May 8, 2019 *Ex Parte,* Att. (using a two-stage investment model to show how local authorities' extra-statutory exactions deter investment by incumbent and new entrant cable operators).

[389] *See, e.g.,* AWC Reply at 11–13.

[390] 47 U.S.C. § 1302. MMTC asserts, for example, that the adverse effects of such local regulations are likely to be felt most acutely by consumers, particularly small businesses and people in low income communities. MMTC Apr. 25, 2019 *Ex Parte* at 1. In particular, MMTC asserts that:

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105. Other Legal Considerations. In reaching our decision today, we agree with the majority of courts that have found that a Title VI franchise authorizes a cable operator to provide non-cable services without additional franchises or fee payments to state or local authorities.[391] In so doing, we repudiate the reasoning in a 2016 decision by the Supreme Court of Oregon in *City of Eugene v. Comcast,*[392] which appears to have prompted an increasing number of states and municipalities to impose fees on franchised cable operators' provision of non-cable services.[393] In *Eugene,* the court upheld the city's imposition of a separate, additional "telecommunications" license fee on the provision of broadband services over a franchised cable system, reasoning that the fee was not imposed pursuant to the city's Title VI cable franchising authority, but rather, under the city's authority as a local government to impose fees for access to rights-of-way for the provision of telecommunications services. For the reasons stated above, we conclude that *Eugene* fundamentally misreads the text, structure, and legislative history of the Act, and clarify that any state or local regulation that imposes on a cable operator fees for the provision of non-cable services over a cable system franchised under Title VI conflicts with section 622(b) of the Act and is preempted under section 636(c).[394]

106. As noted above, although Sections 602(7)(C) and 624(b)(1) by their terms circumscribe *franchising authority* regulation of non-cable services *pursuant to Title VI,* section 636(c) makes clear that state and local authorities may not end-run the provisions of Title VI simply by asserting some other source of authority—such as their police powers to regulate access to public rights-of-way—to accomplish what Title VI prohibits. To be sure, section 636(a) provides that "[n]othing in [Title VI] shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of [Title VI]."[395] While we recognize that states and municipalities possess authority to manage rights-of-way that is distinct from their cable franchising authority under Title VI,[396] states and localities may not exercise that authority in a manner that conflicts with Federal law. As the U.S. Supreme Court has found, "[w]hen Federal

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[D]uplicative fees . . . are most burdensome to lower-income households that spend a far larger share of their income on broadband than wealthier families. . . . [and] small, minority businesses. . . . Increased broadband access costs can be especially problematic for the unemployed or underemployed who become shut out from the very tools they need to pursue new skills and opportunities.

Id. at 1–2.

[391] *See, e.g., Comcast Cable of Plano, Inc. v. City of Plano,* 315 S.W.3d 673, 681 (Tex. App. 2010); *City of Chicago v. Comcast Cable Holdings, LLC,* 231 Ill.2d 399, 412–413 (2008). *See also City of Minneapolis v. Time Warner Cable, Inc.,* No. CIV.05–994 ADM/AJB, 2005 WL 3036645, at *5–6 (D. Minn. Nov. 10, 2005); *City of Chicago v. AT&T Broadband, Inc.,* No. 02–C–7517, 2003 WL 22057905, at *6 (N.D. Ill. Sept. 4, 2003); *Parish of Jefferson v. Cox Communications La., LLC,* No. 02–3344, 2003 WL 21634440, at *4–8 (E.D. La. July 3, 2003). *See also* NCTA June 11, 2018 *Ex Parte* at 3, n.9.

[392] *See Eugene,* 375 P.3d 446. The regulations at issue in *Eugene* included that: (i) Comcast's franchise agreement for the provision of cable services over the city's public rights-of-way did not give it the right to provide cable modem service over those rights-of-way; (ii) the Communications Act did not give Comcast an independent right to provide cable modem service over the city's public rights-of-way; (iii) the Act did not preclude the city from assessing fees on revenues derived from Comcast's provision of cable modem service over public rights-of-way; and (iv) such fees did not constitute franchise fees under section 622(b) of the Act. *See id.* at 453–463.

[393] NCTA asserts that in the wake of *Eugene,* a multitude of cities in Oregon have adopted or reinterpreted ordinances to impose fees on gross revenues derived from the provision of broadband services, in addition to those already imposed under cable franchises. NCTA Comments at 26–27; NCTA Mar. 13, 2019 *Ex Parte* at 9, 11–12. NCTA notes that multiple communities in Ohio also have passed ordinances requiring that cable operators secure a "Certificate of Registration" in addition to a state-issued cable franchise before offering non-cable services, and that such certificates require payment of additional fees as a condition of occupying rights-of-way. NCTA Comments at 27. NCTA asserts further that such duplicative fees are imposed not only at the local level, but also at the state level. *Id.*

[394] Such regulation includes not only requirements imposed by a state or locality acting pursuant to the cable franchising provisions of Title VI, but also requirements imposed by a state or locality purportedly acting pursuant to any powers granted outside Title VI.

[395] 47 U.S.C. § 556(a).

[396] *See, e.g.,* MassAccess Reply at 11–12 (asserting that "[t]he authority and police powers vested in state and municipal governments encompass significantly more than those in the Cable Act. . . . [and] arise from a number of sources, including . . . municipal law, state law, common law, and [f]ederal statutes and regulations"); City of Philadelphia *et al.* Comments at 16–17 (claiming that local governments do not derive their authority over Title I and Title II services from Federal law, but rather, sources such as state law, state constitutions, municipal charters, and state common law). *See also* Anne Arundel County *et al.* Comments at 37–39; Free Press Reply at 7; Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 5.

officials determine, as the FCC has here, that restrictive regulation of a particular area is not in the public interest, [s]tates are not permitted to use their police power to enact such . . . regulation."[397]

107. Our decision today still leaves meaningful room for states to exercise their traditional police powers under section 636(a).[398] While we do not have occasion today to delineate all the categories of state and local rules saved by that provision, we note that states and localities under section 636(a) may lawfully engage in rights-of-way management (*e.g.,* road closures necessitated by cable plant installation, enforcement of building and electrical codes) so long as such regulation otherwise is consistent with Title VI.[399] Similarly, we do not preempt state regulation of telecommunications services that are purely intrastate, such as requirements that a cable operator obtain a certificate of public convenience and necessity to provide such services. State regulation of intrastate telecommunications services is permissible so long as it is consistent with the Act and the Commission's implementing rules and policies.[400] We also do not disturb or displace the traditional role of states in generally policing such matters as fraud, taxation, and general commercial dealings, so long as the administration of such laws does not interfere with Federal regulatory objectives.[401]

108. We also find unconvincing Anne Arundel County *et al.*'s argument that the Commission's preemption of state and local management of public rights-of-way violates the Tenth Amendment to the U.S. Constitution by "direct[ing] local governments to surrender their property and management rights to generate additional funds for use in the expanded deployment of broadband."[402] In particular, Anne Arundel County *et al.* contends that by preventing states and localities from overseeing use of their rights-of-way, the Commission effectively is commanding them to grant rights-of-way access on terms established by the Commission, rather than state or local governments.[403] That argument fails for multiple reasons.

109. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[404] We find that Anne Arundel County *et al.* has failed to demonstrate any violation of the Tenth Amendment.[405] As the Supreme Court has stated, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."[406] Therefore, when Congress acts within the scope of its authority under the Commerce Clause, no Tenth Amendment issue arises.[407] Regulation of interstate telecommunications and information services, and cable services, is within Congress' authority under the Commerce Clause.[408] Thus, because our authority derives from a proper exercise of Congressional power, the Tenth Amendment poses no obstacle to our preemption of state and local laws and other legal requirements.[409]

110. We also find no merit to arguments that the Commission's preemption of certain state and local requirements constitutes an improper "commandeering" of state governmental power.[410] The Supreme Court has recognized that "where Congress

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[397] *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 708 (1984).

[398] Given the robust scope that we retain in this Order for the operation of section 636(a), we reject the City of Eugene's assertion that we have not engaged in "meaningful discussion" of this provision. City of Eugene July 24, 2019 *Ex Parte* at 4.

[399] *See* NCTA Mar. 13, 2019 *Ex Parte* at 11.

[400] We note, for example, that section 253(a) of the Act prohibits state or local statutes, regulations, or other legal requirements that prohibit or have the effect of prohibiting the ability of any entity to provide "any interstate or *intrastate* telecommunications service." 47 U.S.C. § 253(a) (emphasis added).

[401] *See Restoring Internet Freedom Order,* 33 FCC Rcd at 428, para. 196.

[402] Anne Arundel County *et al.* Reply at 14–15.

[403] *Id.*

[404] U.S. Const. Amend. X.

[405] *Montgomery County, Md. v. FCC,* 811 F.3d 121, 127–129 (4th Cir. 2015).

[406] *See New York v. U.S.,* 505 U.S. 144, 156 (1992).

[407] *See id.* at 157–58.

[408] *MCI Telecommunications Corp. v. Bell Atlantic,* 271 F.3d 491, 503 (3rd. Cir. 2001) ("The Telecommunications Act of 1996 was clearly a congressional exercise of its Commerce Clause power.").

[409] *See Qwest Broadband Services, Inc. v. City of Boulder,* 151 F.Supp.2d 1236, 1245 ("[T]he inquiries under the Commerce Clause and the Tenth Amendment are mirror images, and a holding that a Congressional enactment does not violate the Commerce Clause is dispositive of a Tenth Amendment challenge) (citing *United States v. Baer,* 235 F.3d 561, 563 n.6 (10th Cir. 2000)).

[410] *See* Michigan Municipal League Comments at 25; Anne Arundel County *et al.* Comments at 51.

has the authority to regulate private activity under the Commerce Clause," Congress has the "power to offer States the choice of regulating that activity according to Federal standards or having state law preempted by Federal regulation."[411] Title VI provides that a franchising authority "may award" franchises "in accordance with this title."[412] It thus simply establishes limitations on the scope of that authority when and if exercised. Here, we are 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. As noted, Congress in Section 636(c) expressly authorized Commission preemption of state and local laws and other legal requirements that conflict with Federal standards.[413] Because the Commission has the constitutional authority to adopt such standards, and because those standards do not require that state or local governments take or decline to take any particular action, we conclude that our preemption decisions in this Order do not violate the Tenth Amendment.[414]

D. State Franchising Regulations

111. As proposed in the *Second FNPRM,* we find that the conclusions set forth in this Order, as well as the Commission's decisions in the *First Report and Order*[415] and *Second Report and Order,*[416] as clarified in the *Order on Reconsideration,*[417] apply to franchising actions taken at the state level and state regulations that impose requirements on local franchising. In the *First Report and Order,* the Commission declined to "address the reasonableness of demands made by state level franchising authorities" or to extend the "findings and regulations" adopted in its section 621 orders to actions taken at the state level.[418] It noted that many state franchising laws had only been in effect for a short time and that the Commission

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[411] *See New York v. U.S.,* 505 U.S. at 167.

[412] 47 U.S.C. § 541(a)(1).

[413] *Id.* § 556(c).

[414] We also conclude that our actions do not violate the Fifth Amendment to the U.S. Constitution. *See, e.g.,* City of Eugene Sept. 19, 2018 *Ex Parte* at 30. The "takings" clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. First, our actions herein do not result in a Fifth Amendment taking. Courts have held that municipalities generally do not have a compensable "ownership" interest in public rights-of-way, but rather hold the public streets and sidewalks in trust for the public. *Liberty Cablevision,* 417 F.3d at 222. Moreover, even if there was a taking, Congress provided for "just compensation" through cable franchise fees. *See U.S. v. Riverside Bayview Homes,* 474 U.S. 121, 128 (1985) (the Fifth Amendment does not prohibit takings, only uncompensated ones). Section 622(h)(2) of the Act provides that a franchising authority may recover a franchise fee of up to five percent of a cable operator's annual gross revenues derived from the provision of cable service. 47 U.S.C. § 542(h)(2). Congress intended that the cable franchise fee serve as the consideration given in exchange for a cable operator's right to use public rights-of-way. *See* 1984 Cable Act House Report, 1984 U.S.C.C.A.N. at 4663 (recognizing the local government's authority to "assess the cable operator a fee for the operator's use of public ways" and establishing "the authority of a city to collect a franchise fee of up to [five percent] of an operator's annual gross revenues"). Our actions herein do not eviscerate the ability of local authorities to impose such franchise fees. Rather, our actions simply ensure that local authorities do not impose duplicative fees for the same use of rights-of-way by mixed use facilities of cable operators, contrary to express statutory provisions and policy goals set forth in the Act.

[415] In the *First Report and Order,* the Commission adopted time limits for LFAs to render a final decision on a new entrant's franchise application and established a remedy for applicants that do not receive a decision within the applicable time frame; concluded that it was unlawful for LFAs to refuse to grant a franchise to a new entrant on the basis of unreasonable build-out mandates; clarified which revenue-generating services should be included in a new entrant's franchise fee revenue base and which franchise-related costs should and should not be included within the statutory five percent franchise fee cap; concluded that LFAs may not make unreasonable demands of new entrants relating to PEG channels and I-Nets; adopted the mixed-use network ruling for new entrants; and preempted local franchising laws, regulations, and agreements to the extent they conflict with the rules adopted in that order. *First Report and Order,* 22 FCC Rcd at 5134–40, paras. 66–81; *id.* at 5143–44, paras. 89–90; *id.* at 5144–51, paras. 94–109; *id.* at 5151–54, paras. 110–120; *id.* at 5155–56, paras. 121–24; *id.* at 5157–64, paras. 125–38.

[416] In the *Second Report and Order,* the Commission extended to incumbent cable operators the rulings in the *First Report and Order* relating to franchise fees and mixed-use networks and the PEG and I-Net rulings that were deemed applicable to incumbent cable operators, *i.e.,* the findings that the non-capital costs of PEG requirements must be offset from the cable operator's franchise fee payments, that it is not necessary to adopt standard terms for PEG channels, and that it is not *per se* unreasonable for LFAs to require the payment of ongoing costs to support PEG, so long as such support costs as applicable are subject to the franchise fee cap. *Second Report and Order,* 22 FCC Rcd at 19637–41, paras. 10–17.

[417] *Order on Reconsideration,* 30 FCC Rcd at 812–13, para. 7.

[418] *First Report and Order,* 22 FCC Rcd at 5102, n.2.

lacked a sufficient record regarding their effect.[419] In the *Order on Reconsideration,* the Commission indicated that if any interested parties believed the Commission should revisit the issue in the future, they could present the Commission with evidence that the findings in the *First Report and Order* and *Second Report and Order* "are of practical relevance to the franchising process at the state-level and therefore should be applied or extended accordingly."[420]

112. In the *Second FNPRM,* we again asked whether the Commission should apply the decisions in this proceeding to franchising actions and regulations taken at the state level.[421] As we noted, more than ten years have passed since the Commission first considered whether to apply its decisions interpreting section 621 to state-level franchising actions and state regulations. The decade of experience with the state-franchising process, along with comments responding to the questions related to this issue raised in the *Second FNPRM,* provide us with an adequate record regarding the effect of state involvement in the franchising process.

113. We now find that the better reading of the Cable Act's text and purpose is that 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. While we need not opine on the reasonableness of specific state actions raised by commenters, we find that there is evidence in the record that state franchising actions—alone or cumulatively with local franchising actions—in some cases impose burdens beyond what the Cable Act allows.[422] We see no reason—statutory or otherwise—why the Cable Act would prohibit these actions at the local level but permit them at the state level.

114. The Cable Act does not distinguish between state and local franchising authorities. Section 621(a) and the other cable franchising provisions of Title VI circumscribe the power of "franchising authorities" to regulate services provided over cable systems.[423] The Cable Act defines "franchising authority" as "any governmental entity empowered by Federal, State or local law to grant a franchise."[424] In other words, the provisions of Title VI that apply to "franchising authorities" apply equally to any entity "empowered by. . .law"—including state law—"to grant a franchise." Many states have left franchising to local authorities, making those authorities subject to the limits imposed under Title VI.[425] Twenty-three states, however, have empowered a state-level entity, such as a state public utility commission, to grant cable franchise authorizations, rendering them "franchising authorities" under Title VI.[426] Bolstering the conclusion that Congress intended the Cable Act to gov-

[419] *See id.; Order on Reconsideration,* 30 FCC Rcd at 812–13, para. 7.

[420] *Order on Reconsideration,* 30 FCC Rcd at 812–13, para 7.

[421] *Second FNPRM,* 33 FCC Rcd at 8971–72, para. 32. ("We seek comment on whether to apply the proposals and tentative conclusions set forth herein, as well as the Commission's decisions in the First Report and Order and Second Report and Order, as clarified in the Order on Reconsideration, to franchising actions taken at the state level and state regulations that impose requirements on local franchising.").

[422] *See, e.g.,* NCTA Comments at 62–64; Altice Reply at 5–6; NCTA Apr. 19, 2019 *Ex Parte* at 2.

[423] 47 U.S.C. § 541(a)(1) ("A *franchising authority* may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a *franchising authority* may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." (emphases added)).

[424] *Id.* § 522(10).

[425] *See, e.g.,* Md. Code Ann., Local Gov't § 1–708(c) ("The governing body of a county or municipality may. . .grant a franchise for a cable television system that uses a public right-of-way ").

[426] *See* Ark. Code Ann. § 23–19–203 (provider must elect either a local franchise or a state-issued certificate of franchise authority); Cal. Pub. Util. Code § 5840(a); Conn. Gen. Stat. Ann. § 16–331(a); Del. Code Ann. tit. 26, §§ 601 (state-issued franchises outside of municipalities), 608 (municipal franchises subject to PUC review); Fla. Stat. § 610.102; Ga. Code Ann. § 36–76–3 (provider must elect either a local franchise or a state-issued authorization); 220 Ill. Comp. Stat. Ann. § 5/21–301(a)(provider must elect either a local franchise or a state-issued authorization); Ind. Code § 8–1–34–16(a); Iowa Code § 477A.2; Kan. Stat. Ann. § 12–2023(a); Haw. Rev. Stat. § 440G–6; La. Rev. Stat. §§ 45:1364, 45:1377 (state is franchising authority except in home rule charter communities); Mich. Gen. Laws § 484.3305 (franchises are granted by local government, but only on uniform terms set by statute); Mo. Rev. Stat. § 67.2679.4; Nev. Rev. Stat. § 711.410; N.J. Stat. Ann. §§ 48:5A–9, 48:5A–15, 48:5A–16 (provider must elect either a local franchise or a state-issued certificate of franchise authority); N.C. Gen. Stat. Ann. § 66–351; Ohio Rev. Code Ann. § 1332.24(A)(2); S.C. Code §§ 58–12–300(5), 58–12–310; Tenn. Code Ann. § 7–59-304(a) (pro-

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ern state-level action is section 636 of the Cable Act, which expressly preempts "any provision of law *of any State,* political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority" that conflicts with the Cable Act.[427] Limiting the Commission's rulings to local-level action would call for some plausible interpretation of these provisions; those opposing the extension of the Commission's rulings to state franchising authorities offer none. Accordingly, we find that the Cable Act does not distinguish between state-and local-level franchising actions, and that the Commission's rulings should therefore apply equally to both.

115. In addition, we find unavailing claims in the record that the Commission should limit its decisions to local authorities for policy reasons. To the contrary, we find that extending the Commission's rulings to state level franchising actions and regulations furthers the goals of the Cable Act. Unreasonable barriers to entry imposed by any franchising authority—state or local—frustrate the goals of competition and deployment. In the *First Report and Order,* we found that removing regulatory obstacles posed by local franchising authorities would further these goals.[428] We now find that this policy rationale applies with equal force to franchising actions taken at the state level.

116. We disagree that extending the Commission's rulings to state-level franchising and regulation, however, will eliminate the benefits of state-level action. We are not persuaded that extending the Commission's rulings to state-level actions would prevent—or even discourage—state-level franchising and regulation. Indeed, applying the Commission's rulings to state-level action will merely ensure that the same rules that apply to LFAs also apply at the state level.[429] This consistency is itself beneficial, ensuring that various statutory provisions—such as sections 621 and 622—are interpreted uniformly throughout the country. As one commenter notes, "state-level cable regulations may be modeled on the Federal act, and so, allowing disparate interpretations of the same language could lead to confusion among consumers, regulators, and franchisees."[430]

117. Nor should applying our interpretations of the Cable Act to state-level actions interfere with states' authority to enact general taxes and regulations. Some commenters express concern that the Commission's rulings would disturb state franchising laws that apply more broadly than the Cable Act.[431] While we decline here to opine on the application of the Cable Act to specific state laws, we note that these concerns are largely settled by section 622, which excludes "any tax, fee, or assess-

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vider must elect either a local franchise or a state-issued certificate of franchise authority); Tex. Util. Code Ann. § 66.001; Vt. Stat. Ann. tit. 30, § 502(b); Wis. Stat. Ann. § 66.0420(4).

[427] 47 U.S.C. § 556(c) (emphasis added). As we explain above, this preemption does not extend to state regulation of intrastate telecommunications services or regulation related to matters of public health, safety, and welfare that otherwise is consistent with the Act, and nothing in this Order is intended to disturb the traditional role that states have played in these regards. *See supra* para. 79 and *infra* para. 117.

[428] *First Report and Order,* 22 FCC Rcd at 5102, para. 1 ("We find that the current operation of the local franchising process in many jurisdictions constitutes an unreasonable barrier to entry that impedes the achievement of the interrelated Federal goals of enhanced cable competition and accelerated broadband deployment.").

[429] For these reasons, we disagree with commenters who argue that applying the Commission's rules at the state level is contrary to the Cable Act's purpose of "assur[ing] that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2). The City of Philadelphia, for example, argues that extending the Commission's rules to state-level actions would "unduly restrict state and local governments from addressing local and hyperlocal cable-related issues." *See* City of Philadelphia *et al.* Comments at vii. For the reasons discussed above, we are not convinced that applying our rules to state franchising authorities will impede the ability of state and local authorities to address local issues. Rather, by doing so, we ensure that the goals of the Cable Act, as determined by Congress, including "encourag[ing] the growth and development of cable systems," are fully realized. 47 U.S.C. § 521(2).

[430] Comments of Verizon at 11–12.

[431] *See, e.g.,* Anne Arundel County *et al.* Comments at 45; City and County of San Francisco Comments at 8–9. For example, California's Digital Infrastructure and Video Competition Act (DIVCA) assesses an annual administrative fee and authorizes LFAs to assess on both cable operators and non-cable video franchise holders, up to a one-percent fee on gross revenues for PEG, in addition to a state franchise fee of five percent of gross revenues. Cal. Pub. Util. Code §§ 441 (providing for the annual determination of franchise fees), 5830(f), (h) (establishing that DIVCA applies to all "holders of a state franchise" that authorizes the "operation of any network in the right-of-way capable of providing video service to subscribers"). *See also* City and County of San Francisco Comments at 8–9. The Eastern District of California found that DIVCA was a law of "general applicability" for the purposes of section 622 in *Comcast of Sacramento.* 250 F. Supp. 3d at 624, *vacated and remanded Comcast of Sacramento I, LLC v. Sacramento Metro. Cable Television Comm'n,* No. 17–16847, 2019 WL 2018280, at *7 (9th Cir. May 8, 2019).

ment of general applicability" from the definition of franchise fees.[432] Other provisions of the Act similarly make clear that the Act does not affect state authority regarding matters of public health, safety, and welfare, to the extent that states exercise that authority consistent with the express provisions of the Cable Act.[433]

118. Finally, some commenters assert that extending the Commission's rulings to state-level actions would "upend carefully balanced policy decisions by the states."[434] According to commenters, local governments might wish to refuse these benefits if they come at the expense of franchise fees—but they will be unable to do so where they are mandated by state law.[435]

119. We are not convinced that these concerns justify limiting the Commission's rulings to local-level actions. Again, our conclusion in this section will disturb existing state laws only to the extent that they conflict with the Cable Act and the Commission's rulings implementing the Act. While this may upset some preexisting legislative compromises, it will also root out state laws that impose demands and conditions that Congress and the Commission have found to be unreasonable. Further, ensuring that the Cable Act is applied uniformly between state and local franchising authorities is necessary to further the goals of the Act, and more importantly, is consistent with the language of the Act. As some commenters have noted, if the Commission does not apply these requirements to state franchises, states could pass laws circumventing the Cable Act's limitations on LFAs.[436] That result would thwart Congress's intent in imposing those limitations. For these reasons, we conclude that the benefits of extending the Commission's rulings and interpretations to state-level actions outweigh any burdens caused by upsetting existing state-level policy decisions.

IV. PROCEDURAL MATTERS

120. *Final Regulatory Flexibility Act Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[437] the Commission has prepared a Final Regulatory Flexibility Act Analysis (FRFA) relating to this Order. The FRFA is set forth in the Appendix.

121. *Paperwork Reduction Analysis.* This document does not contain new or revised information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. §§ 3501–3520). In addition, therefore, it does not contain any new or modified "information burden for small business concerns with fewer than 25 employees" pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, 44 U.S.C. § 3506(c)(4).

122. *Congressional Review Act.* The Commission will send a copy of this Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

123. *Additional Information.* For additional information on this proceeding, contact Maria Mullarkey or Raelynn Remy of the Media Bureau, Policy Division, at *Maria.Mullarkey@fcc.gov, Raelynn.Remy@fcc.gov* or (202) 418–2120.

V. ORDERING CLAUSES

124. Accordingly, *IT IS ORDERED* that, pursuant to the authority found in sections 1, 4(i), 201(b), 230, 303, 602, 621, 622, 624, and 636 of the Communications

[432] *See, e.g.,* Anne Arundel County *et al.* Comments at 45 (quoting 47 U.S.C. § 542(g)(2)(A)).

[433] 47 U.S.C. § 556(a) ("Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter.").

[434] Anne Arundel County *et al.* Comments at 45–48. In Illinois, for example, state law requires that cable operators provide "line drops and free basic service to public buildings." *See* City Coalition Comments at 26 (citing 220 ILCS 5/22–501(f)). The Illinois statute defines a "service line drop" as "the point of connection between a premises and the cable or video network that enables the premises to receive cable service or video service." 220 ILCS 5/22–501.

[435] *See id.* Similarly, one commenter claims that DIVCA reflected a legislative compromise between cable operators and franchising authorities that would be upset if the Commission's rules were extended to state level actions. Anne Arundel County *et al.* Comments at 46–47 ("For the Commission to import, wholesale, its determinations under Section 621 into the California state franchise would upset state policy and undermine the very goal of the Commission to ease entry by new entrants.").

[436] NCTA Reply at 29–30 & n.100.

[437] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601, *et. seq.,* has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104–121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 201(b), 230, 303, 522, 541, 542, 544, and 556, this Third Report and Order *IS ADOPTED*.

125. *IT IS FURTHER ORDERED* that the the Commission's rules *ARE HEREBY AMENDED* as set forth in Appendix A and such rule amendments shall be effective 30 days after publication in the *Federal Register*.

126. *IT IS FURTHER ORDERED* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *SHALL SEND* a copy of this Third Report and Order, including the Final Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

127. *IT IS FURTHER ORDERED* that, pursuant to section 801(a)(1)(A) of the Congressional Review Act, 5 U.S.C. §801(a)(1)(A), the Commission *SHALL SEND* a copy of the Third Report and Order to Congress and the Government Accountability Office.

FEDERAL COMMUNICATIONS COMMISSION
MARLENE H. DORTCH
Secretary

APPENDIX A

FINAL RULES

Part 76 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows: PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 201, 230, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 541, 542, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Revise Subpart C to read as follows:

Subpart C—Cable Franchising

3. Add new Section 76.42 to read as follows:

§ 76.42—In-Kind Contributions.

(a) In-kind, cable-related contributions are "franchise fees" subject to the five percent cap set forth in 47 U.S.C. 542(b). Such contributions, which count toward the five percent cap at their fair market value, include any non-monetary contributions related to the provision of cable service by a cable operator as a condition or requirement of a local franchise, including but not limited to:

(1) Costs attributable to the provision of free or discounted cable service to public buildings, including buildings leased by or under control of the franchising authority;

(2) Costs in support of public, educational, or governmental access facilities, with the exception of capital costs; and

(3) Costs attributable to the construction of institutional networks.

(b) In-kind, cable-related contributions do not include the costs of complying with build-out and customer service requirements.

4. Add new Section 76.43 to read as follows:

§ 76.43—Mixed-Use Rule.

A franchising authority may not regulate the provision of any services other than cable services offered over the cable system of a cable operator, with the exception of channel capacity on institutional networks.

APPENDIX B

FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Second Fur-

[1] *See* 5 U.S.C. §603. The RFA, 5 U.S.C. §§601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104–121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

ther Notice of Proposed Rulemaking (Second FNPRM) in this proceeding.[2] The Federal Communications Commission (Commission) sought written public comment on the proposals in the Second FNPRM, including comment on the IRFA. The Commission received one comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3]

A. Need for, and Objectives of, the Report and Order

2. In the Report and Order, we interpret sections of the Communications Act of 1934, as amended (the Act) that govern how local franchising authorities (LFAs) may regulate cable operators and cable television services, with specific focus on issues remanded from the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) in *Montgomery County, Md. et al., v. FCC* (*Montgomery County*).[4] Section 621(a)(1) of the Act prohibits LFAs from unreasonably refusing to award competitive franchises for the provision of cable television services.[5] To better define what constitutes "unreasonable" acts by an LFA, the Commission adopted rules implementing section 621(a)(1), including rules governing the treatment of certain costs and fees charged to cable operators by LFAs and LFAs' regulation of cable operators' "mixed-use" networks.[6]

3. In *Montgomery County,* the court directed the Commission on remand to provide an explanation for its decision to treat cable-related, in-kind contributions charged to cable operators by LFAs as "franchise fees" subject to the statutory five percent cap on such fees set forth in section 622(g) of the Act.[7] The court also directed the Commission to provide a statutory basis for its decision to extend its "mixed-use" ruling—which prohibits LFAs from regulating the provision of services other than cable services offered over cable systems used to provide both cable services and non-cable services—to incumbent cable operators that are not common carriers.[8] This Order seeks to explain and establish the statutory basis for the Commission's interpretation of the Act in order to better fulfill the Commission's goals of eliminating regulatory obstacles in the marketplace for cable services and encouraging broadband investment and deployment by cable operators.

4. In this Order, we first conclude that cable-related, "in-kind" contributions required by a cable franchise agreement are franchise fees subject to the statutory five percent cap on franchise fees set forth in section 622 of the Act.[9] We base this conclusion on the broad definition of franchise fee in section 622, which is not limited to monetary contributions. We interpret the Act's limited exceptions to the definition of franchise fee, including an exemption for capital costs related to public, educational, and governmental access (PEG) channels, such as equipment costs or those associated with building a facility.[10] We also reaffirm that this rule applies to both new entrants and incumbent cable operators. Second, we conclude that under the Act, LFAs may not regulate the provision of most non-cable services, including broadband Internet access service, offered over a cable system by an incumbent cable operator that is not a common carrier. Finally, we conclude that Commission guidance concerning LFAs' regulation of cable operators should apply to state-level franchising actions and regulations that impose requirements on local franchising.

B. Legal Basis

5. The authority for the action taken in this rulemaking is contained in Sections 1, 4(i), 201(b), 230, 303, 602, 621, 622, 624, and 636 of the Communications Act of

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[2] *See 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,* Second Further Notice of Proposed Rulemaking, MB Docket No. 05–311, 33 FCC Rcd 8952, 8953–9 (2018) (*Second FNPRM*).

[3] *See* 5 U.S.C. § 604.

[4] *Montgomery County, Md. et al., v. FCC,* 863 F.3d 485 (6th Cir. 2017).

[5] 47 U.S.C. § 541(a)(1).

[6] *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,* Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007) (*First Report and Order*), *aff'd sub nom. Alliance for Community Media et al., v. FCC,* 529 F.3d 763 (6th Cir. 2008) (*Alliance*), *cert. denied,* 557 U.S. 904 (2009); *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,* Second Report and Order, 22 FCC Rcd 19633 (2007) (*Second Report and Order*), *recon. Granted in part, denied in part; 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,* Order on Reconsideration, 30 FCC Rcd 810 (2015) (*Order on Reconsideration*); *Second FNPRM,* 33 FCC Rcd 8952 (2018).

[7] *Montgomery County,* 863 F.3d at 491–92.

[8] *Id.* at 493.

[9] 47 U.S.C. § 542.

[10] *Id.*

1934, as amended, 47 U.S.C. §§ 151, 154(i), 201, 230, 303, 522, 541, 542, 544, and 556.

C. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. Only one commenter, the City of Newton Massachusetts, submitted a comment that specifically responded to the IRFA.[11] The City of Newton suggests that a transition period of at least six years is needed to satisfy the Commission's Regulatory Flexibility Act obligation to minimize significant financial impacts on small communities and non-profit organizations. This City of Newton argues that this transition period is needed to allow time for affected parties to: (1) identify cable-related in kind contributions which count against the franchise fee cap; (2) reach agreement on the valuation of cable-related in-kind contributions; (3) resolve any disputes with respect to those issues; and (4) adjust their contractual commitments in light of any prospective reduction in franchise fee revenues (and the timing of those reductions).

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

7. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules.[12] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[13] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[14] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[15] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

8. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe three broad groups of small entities that could be affected under these rules.[16] First, while we do use industry specific size standards for small businesses in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.[17] These types of small businesses represent 99.9 percent of all businesses in the United States which translates to 28.8 million businesses.[18]

9. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[19] Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).[20]

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[11] Letter from Ruthanne Fuller, Mayor and Issuing Authority, and Alan D. Mandl, Assistant City Solicitor, City of Newton, Massachusetts, to Chairman Pai and Commissioners Carr, O'Rielly and Rosenworcel, FCC, MB Docket No. 05–311, at 7 (filed Nov. 14, 2018) (City of Newton Letter); City of Newton Comments at 3–4.

[12] 5 U.S.C. § 603(b)(3).

[13] *Id.* § 601(6).

[14] *Id.* § 601(3) (incorporating by reference the definition of "small-business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[15] 15 U.S.C. § 632.

[16] *See* 5 U.S.C. § 601(3)-(6).

[17] *See* SBA, Office of Advocacy, "Frequently Asked Questions, Question 1—What is a small business?" *https://www.sba.gov/sites/default/files/advocacy/SB–FAQ–2016*_WEB.pdf (June 2016).

[18] *See* SBA, Office of Advocacy, "Frequently Asked Questions, Question 2—How many small businesses are there in the U.S.?" *https://www.sba.gov/sites/default/files/advocacy/SB–FAQ–2016*_WEB.pdf (June 2016).

[19] 5 U.S.C. § 601(4).

[20] Data from the Urban Institute, National Center for Charitable Statistics (NCCS) reporting on nonprofit organizations registered with the IRS was used to estimate the number of small organizations. Reports generated using the NCCS online database indicated that as of August 2016 there were 356,494 registered nonprofits with total revenues of less than $100,000. Of this number, 326,897 entities filed tax returns with 65,113 registered nonprofits reporting total revenues of $50,000 or less. *See https://nccs.urban.org/sites/all/nccs-archive/html//tablewiz/tw.php* where the report showing this data can be generated by selecting the following data

10. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty-thousand." [21] U.S. Census Bureau data from the 2012 Census of Governments[22] indicate that there were 90,056 local governmental jurisdictions consisting of General and Specific Purpose governments in the United States.[23] Of this number there were 37,132 General Purpose governments (county,[24] municipal and town or township[25]) with populations of less than 50,000 and 12,184 Special Purpose governments (independent school districts[26] and special districts[27]) with populations of less than 50,000. The 2012 U.S. Census Bureau data for the types of governments in the local government category show that most of these governments have populations of less than 50,000.[28] Based on these data, we estimate that at least 49,316 local government jurisdictions fall in the category of "small government jurisdictions." [29]

11. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as "establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry." [30] The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[31] U.S. Census data for

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fields: Show: "Registered Nonprofit Organizations"; By: "Total Revenue Level (years 1995, Aug. to 2016, Aug.)"; and For: "2016, Aug.".

[21] 5 U.S.C. § 601(5).

[22] *See* 13 U.S.C. § 161. The Census of Governments is conducted every five (5) years compiling data for years ending with "2" and "7". *See also* Program Description Census of Government. *https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=program&id=program.en.COG#*

[23] *See* U.S. Census Bureau, 2012 Census of Governments, Local Governments by Type and State: 2012—United States-States *https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG02.US01&prodType=table.* Local governmental jurisdictions are classified in two categories—General purpose (county, municipal, and town or township) and Special purpose (special districts and independent school districts).

[24] *See id.,* County Governments by Population-Size Group and State: 2012—United States-States. *https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG06.US01&prodType=table.* There were 2,114 county governments with populations of less than 50,000.

[25] *See id.,* Subcounty General-Purpose Governments by Population-Size Group and State: 2012-United States-States. *https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG07.US01&prodType=table.* There were 18,811 municipal and 16,207 town/township governments with populations of less than 50,000.

[26] *See id.,* Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012—United States-States. *https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG11.US01&prodType=table.* There were 12,184 independent school districts with enrollment populations of less than 50,000.

[27] *See id.,* Special District Governments by Function and State: 2012—United States-States. *https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG09.US01&prodType=table.* The U.S. Census Bureau data did not provide a population breakout for special district governments.

[28] *See id.,* County Governments by Population-Size Group and State: 2012—United States-States. *https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG06.US01&prodType=table;* Subcounty General-Purpose Governments by Population-Size Group and State: 2012—United States-States. *https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG07.US01&prodType=table;* and Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012—United States-States. *https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG11.US01&prodType=table.* While U.S. Census Bureau data did not provide a population breakout for special district governments, if the population of less than 50,000 for this category of local government is consistent with the other types of local governments, the majority of the 38,266 special district governments have populations of less than 50,000.

[29] *Id.*

[30] *See* 13 CFR § 120.201. The U.S Census Bureau uses the NAICS code 517110 for the Wired Telecommunications Carrier category. *See https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t#none.*

[31] *Id.* § 201.121.

2012 show there were 3,117 firms that operated that year.[32] Of this total, 3,083 operated with fewer than 1,000 employees.[33] Thus, under this size standard, the majority of firms in this industry can be considered small.

12. *Cable Companies and Systems (Rate Regulation Standard).* The Commission has developed its own small business size standards for cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[34] Industry data indicate that of 4,600 cable operators nationwide, all but nine are small under this size standard.[35] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[36] Industry data indicate that of 4,600 systems nationwide, 3,900 have fewer than 15,000 subscribers, based on the same records.[37] Thus, under this second size standard, the Commission believes that most cable systems are small.

13. *Cable System Operators.* The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one-percent of all subscribers in the United States and is not affiliated with any; entity or entities whose gross annual revenues in the aggregate exceed $250,000."[38] There are approximately 52,403,705 cable subscribers in the United States today.[39] Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total revenues of all its affiliates, do not exceed $250 million in the aggregate.[40] Based on the available data, we find that all but nine independent cable operators are affiliated with entities whose gross annual revenues exceed $250 million.[41] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, we note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[42] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under the definition in the Communications Act.

14. *Open Video Services.* Open Video Service (OVS) systems provide subscription services[43] and the OVS framework is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[44] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services or "Wired Telecommunications Carriers."[45] The SBA has developed a small business size standard for this category which covers all such firms having 1,500 or fewer employees.[46] According to the 2012 U.S. Census, there were 3,117 firms considered Wired Telecommunications Carriers in 2012, of which 3,083 operated with fewer

[32] *See* U.S. Census Bureau, *2012 Economic Census of the United States,* Table No. EC1251SSSZ5, *Information: Subject Series—Estab & Firm Size: Employment Size of Firms: 2012.* (517110 Wired Telecommunications Carriers). *https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110.*

[33] *Id.*

[34] 47 CFR § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementations of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[35] The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on August 15, 2015. *See* FCC, Cable Operations and Licensing Systems (COALS). *www.fcc.gov/coals* (last visited June 21, 2019).

[36] 47 CFR § 76.901(c).

[37] *See* FCC, Cable Operations and Licensing Systems (COALS). *www.fcc.gov/coals.*

[38] 47 U.S.C. § 543(m)(2). *See also* 47 CFR § 76.901(f).

[39] *See* SNL Kagan at *https://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx.*

[40] 47 CFR § 76.901(f); *See FCC Announces New Subscriber Count for the Definition of Small Cable Operator,* Public Notice, 16 FCC Rcd 2225 (Cable Services Bur. 2001).

[41] *See* SNL Kagan at *https://www.snl.com/interactivex/TopCableMSOs.aspx.*

[42] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules.

[43] *See* 47 U.S.C. § 573.

[44] *Id.* § 571(a)(3)-(4). *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Thirteenth Annual Report, 24 FCC Rcd 542, 606, Para. 135 (2009) (*13th Annual Report*).

[45] 13 CFR § 201.121. The U.S Census Bureau uses the NAICS code 517110 for the Wired Telecommunications Carrier category. *See https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t#none.*

[46] *Id.*

than 1,000 employees.[47] Based on these data, most of these firms can be considered small. In addition, we note that the Commission has certified approximately 45 OVS operators to serve 116 areas, although most of these operators are not yet providing service.[48] Broadband Service Providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises.[49] At least one OVS operator, Affiliates of Residential Communications Network, Inc. (RCN), has sufficient revenues to ensure they do not qualify as a small business entity. However, the Commission does not have financial or employment information for the other entities which are not yet operational. Thus, the Commission concludes that up to 44 OVS operators (those remaining) could potentially qualify as small businesses that may be affected by the rules and policies adopted herein.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

15. The rules adopted in this Order will impose no additional reporting or recordkeeping requirements. We expect the compliance requirements—namely, modifying and renewing cable franchise agreements to comport with the law—will have only a *de minimis* effect on small entities. As ACA explains, "most franchising authorities understand the limits of their authority and do not impose unlawful requirements on [small cable operators]."[50] LFAs will continue to review and make decisions on applications for cable franchises as they already do, and any modifications to the local franchising process resulting from these rules will further streamline that process. The rules will streamline the local franchising process by providing guidance as to: the appropriate treatment of cable-related, in-kind contributions demanded by LFAs for purposes of the statutory five percent franchise fee cap, what constitutes "cable-related, in-kind contributions," and how such contributions are to be valued. The rules will also streamline the local franchising process by making clear that LFAs may not use their video franchising authority to regulate the provision of certain non-cable services offered over cable systems by incumbent cable operators. The same can be said of franchising at the state level. The rules will help streamline the franchising process by ensuring that applicable statutory provisions are interpreted uniformly throughout the country.

F. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

16. The RFA requires an agency to describe any significant alternatives it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities."[51]

17. To the extent that these rules are matters of statutory interpretation, we find that the adopted rules are statutorily mandated and therefore no meaningful alternatives exist.[52] Moreover, as noted above, the rules are expected to have only a *de minimis* effect on small entities. The rules will also streamline the local franchising process by providing additional guidance to LFAs.

18. Treating cable-related, in-kind contributions as "franchise fees" subject to the statutory five percent franchise fee cap will benefit small cable operators by ensuring that LFAs do not circumvent the statutory five percent cap by demanding, for

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[47] *See* U.S. Census Bureau, *2012 Economic Census of the United States,* Table No. EC1251SSSZ5, *Information: Subject Series—Estab & Firm Size: Employment Size of Firms: 2012* (517110 Wired Telecommunications Carriers). *https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110.*

[48] A list of OVS certifications may be found at *https://www.fcc.gov/general/current-filings-certification-open-video-systems#block-menu-block-4.*

[49] *See 13th Annual Report,* 24 FCC Rcd at 606–07, para. 135. BSPs are newer firms that are building state-of-the-art facilities-based networks to provide video, voice, and data services over a single network.

[50] Letter from Ross Lieberman, Senior Vice President, Government Affairs ACA Connects—America's Communications Association, to Marlene Dortch, Secretary, FCC, at 1 (July 25, 2019).

[51] 5 U.S.C. § 603(c)(1)-(4).

[52] For this reason, we disagree with NATOA *et al.* that our actions will affect service to senior citizens, or to schools, libraries, and other public buildings and that this analysis is inadequate. *See* Letter from Joseph Van Eaton *et al.,* Counsel to Anne Arundel County, *et al.* to Marlene H. Dortch, Secretary, FCC at 2 (July 24, 2019). This argument is essentially that the statutory cap does not afford local governments enough money to serve their constituents, and we do not have the authority to amend the statute.

example, unlimited free or discounted services. This in turn will help to ensure that local franchising requirements do not deter small cable operators from investing in new services and facilities. Similarly, applying these rules at the state level helps to ensure that such deterrence does not come from state-level franchising requirements either. Finally, applying the Commission's mixed-use rule to all incumbent cable operators helps to ensure that all small cable operators may compete on a level playing field because incumbent cable operators will now be subject to the same rule that applies to competitive cable operators. We disagree with the City of Newton's argument that we should afford small entities six years to implement these changes—the issues that City of Newton raises are matters of statutory interpretation, and the Communications Act does not provide for the implementation period that the City of Newton requests.

G. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

19. None.

H. Report to Congress

20. The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[53] In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. The Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register.[54]

STATEMENT OF CHAIRMAN AJIT PAI

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

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

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

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

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

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[53] *See id.* § 801(a)(1)(A).
[54] *See id.* § 604(b).
[1] 47 U.S.C. § 542(b).
[2] 47 U.S.C. § 542(g)(1) (emphasis added).
[3] 47 U.S.C. § 542(g)(2)(B).
[4] 47 U.S.C. § 542(g)(2)(C).
[5] *Duncan v. Walker,* 533 U.S. 167, 174 (2001), quoting *Babbitt v. Sweet Home Chapter, Communities for Great Ore.,* 515 U.S. 687, 698 (1995).

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

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

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

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

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

STATEMENT OF COMMISSIONER MICHAEL O'RIELLY

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

As I've stated many times since we began the media modernization effort, the video marketplace is changing dramatically, and each step we have taken to update anachronistic and clunky regulations makes it slightly easier for regulated industries to compete with their unregulated competitors. Though much work remains, I look forward to continuing the effort. At the same time, and as we see in the background of today's item, it is unsurprising that other stakeholders, such as franchise authorities, also feel their own pressures due to the changing market dynamics, whether budgetary or political. They too seek ways to either continue their past practices unabated or seek ways to maximize returns on their regulatory roles. However, Title VI of the Communications Act places important restraints on their reach, and unauthorized expansion of the statute is flatly wrong and must be held in check. The courts have agreed, and I am pleased that today we make strides toward

[6] 47 U.S.C. § 556(c) (emphasis added).
[7] *Utility Air Regulatory Group v. EPA,* 573 U.S. 302, 327 (2014).

answering the Sixth Circuit, by addressing three main areas raised in or affected by its remand.

First, the Order rightly counts cable-related "in-kind" contributions against the statutory cap. Failing to do so would effectively render the statute's restraints meaningless, or nearly so. Critics may argue that local franchise authorities have the weaker position when dealing at arm's length with video providers, but the record and experience show otherwise. There are numerous examples of where video providers lack the ability to say no to "voluntary" waivers of the five percent cap, having no recourse but to agree to all manner of in-kind contributions, ranging from providing all the necessary equipment to produce PEG programming in New York City, to supplying transport lines to cover ice cream socials in Minnesota. There are many examples in the record, but the point is: failure to agree to such terms could result in jeopardizing the franchise, and that is a risk many companies simply cannot afford to take. The Commission's role is to interpret and enforce the statute based on the record, and today we appropriately define cable-related in-kind contributions to prevent end-runs around the statutory cap.

Second, the Order also correctly preempts state-level franchise authorities who would seek to obliterate the statutory boundaries that are in place. Unfair and unreasonable fees and contributions beyond five percent of gross revenues for cable services conflict with the law, whether the franchisor is a state or local actor. The statute itself explicitly refuses to restrict states from exercising jurisdiction over cable services. In fact, about half of all states have authorized state-level franchise authorities. There is no good legal or policy reason for restraining the activities of local franchisors while allowing state authorities to continue unbounded, and I thank the Chairman for including this matter in the NPRM so that we could go to Order today on it.

Third, there are two issues regarding PEG contributions that could receive further attention as the record more fully develops. While I would have preferred a narrower definition of "capital costs," limiting such contributions to construction-related costs for PEG facilities, the item does acknowledge today that the current record has room to grow, leaving us the option to revisit this matter in the future. Similarly, we clearly acknowledge the need to resolve the PEG channel capacity cost question and expressly commit to doing so within the next year. This is a vital endeavor, so I thank the Chairman for working with me on this matter and look forward to the admittedly complex and rigorous undertaking.

Separately, and perhaps most significantly, the item properly rejects the ability of state or local governments to impose franchise fees on non-cable services. Inappropriate court determinations, such as the Eugene, Oregon, franchise case, have wrongly tried to open the door to the imposition of such fees on other services offered by what have traditionally been called cable operators. However, the statute is quite clear on the matter and the item appropriately clarifies that franchises authorities can only regulate cable services. Today's action closes off potential revenues for franchise authorities from non-cable services, which is the right statutory reading. Further, allowing these entities to usurp the statute by imposing fees on the offering of broadband services would ignore the resulting harm to consumers. For instance, Congress has recognized multiple times that allowing governmental fees and taxes does affect Internet adoption rates. Given that almost everyone recognizes the importance of broadband availability, deterring its use would be at best, counterproductive. Moreover, without such a limitation, there appears to be no outer limit to the types of non-cable services for which a cable operator could be forced to pay fees. Today, it's broadband in the cross-hairs, but tomorrow it could be cloud services or over-the-top video services, for example.

Finally, I'll end with two points regarding the judicial and legislative implications of today's item. On the matter of applying today's Order to existing franchise agreements, I worry that we are punting too much of the burden to the overworked courts and would be better served by delineating a clear process under the Commission's purview. However, I support the efforts of my colleague Commissioner Carr to make Section 636 controlling, which will at a minimum provide a clearer starting point for negotiations. I would also note that I support my colleague's effort to clarify that the provisions of this Order cannot be waived. We will be closely watching to ensure that no franchise authorities seek to make an end run around the reforms contained in this Order by demanding that franchisees waive any of the provisions. Regarding the need for legislation, I hope that Congress will take note of our effort today and consider launching an ambitious, but much needed, review of Title VI in its entirety. We are bringing the regulations more in line with the statute today, but the whole ecosystem would be well-served by a wholesale rewrite of the statute and an acknowledgement of the current market realities.

But, this item shouldn't and won't be the end of our work to eliminate outdated rules and scale back inappropriate actions by state and local franchise authorities. For our media modernization initiative, I will be submitting soon a new round of ideas for the Chairman's consideration. On a larger scale, I am hard at work on a blog outlining the fundamental overhaul needed to address our outdated franchising regime and the need to further curtail "creatively harmful" efforts by franchise authorities.

I approve.

STATEMENT OF COMMISSIONER BRENDAN CARR

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

If you tax something, you get less of it. 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. Today, we vote to end this outlier conduct.

Doing so is not only required by Federal law. It's the right thing to do. Policymakers at all levels of government should be making it easier and less expensive to build out broadband infrastructure. That is why this FCC has been eliminating regulatory costs and cutting red tape. It's so that next-gen networks can be built, increasing competition and choice.

Regulatory reform matters—and not just in some abstract or theoretical sense. We know it from our own experience.

Take this Commission's actions to get the government out of the way so the private sector can build 5G. We modernized the Federal historic and environmental rules that apply to small cells. We addressed outlier conduct at the state and local level by tackling high fees and long delays in the permitting process. Combined, those two decisions cut about $3.6 billion in red tape that had slowed down broadband builds and limited competition.

In fact, those and other FCC reforms are already delivering results. Internet speeds are up nearly 40 percent. Americans saw more fiber broadband built to their homes last year than ever before. The number of small cells put up increased from 13,000 in 2017 to more than 60,000 in 2018. Investment in broadband networks is back on the rise. And the U.S. now has the world's largest 5G deployment.

We know the opportunity that broadband enables—from creating jobs to improving access to high-quality healthcare and education. That's why, as policymakers and regulators, we must always view broadband as an opportunity for consumers—not tax collectors.

That brings us to today's Order. Congress recognized decades ago that excessive taxes and in-kind demands, which have the same effect, could threaten innovative services and lead to higher prices. That's why Congress capped franchise fees at five percent of cable revenue. Congress wanted to encourage voice and Internet service offered over cable systems by shielding those services from taxes and regulations.

The Commission knows well that outlier fees and restrictions limit buildout. We saw that with small cells, where cities like New York and San Jose leveraged their monopolies over the rights of way to demand exorbitant fees and concessions wholly unrelated to the cost of rights of ways. And we're seeing a similar dynamic here with cable franchising.

Some local franchising authorities have taken advantage of their roles as regulators to force providers to offer free service to municipal liquor stores and government-owned golf courses. Others have imposed broadband and voice taxes on top of existing franchise fees. And others have required providers to obtain entirely separate franchises to provide Wi-Fi and cellular backhaul even though they're already authorized under existing franchise laws.

This abusive behavior has consequences. Money that could otherwise be spent on network deployments and upgrades is instead diverted to the government's own pockets. Ultimately, consumers take the hit—whether it's a higher-priced cable bill or decreased investment and competition in their communities. An economic analysis in our record shows that without reform, illegal taxes will reduce consumer welfare by $40 billion by 2023.

So I'm glad we take these steps today to crack down on bad actors who seek to tax broadband and thus provide less access and competition for all of us. I'm also glad my colleagues agreed to some edits that have strengthened this item to further protect consumers from harm.

First, we now make clear that illegal franchise terms are *per se* preempted under the statute and by this Order, which will help bring franchises into compliance more quickly. Consumers shouldn't have to pay higher prices while protracted negotiations take place. Their cable bills should simply reflect the law. Second, we make clear that Wi-Fi and wireless services provided over the cable system are exempt from duplicative fees, which will encourage providers to invest more in these 5G-ready services. Third, we affirm that franchising authorities may not ask cable operators to voluntarily waive these regulatory reforms as a negotiating tactic or to perform an end-run around the statutory franchise fee cap. And finally, we ensure that in-kind contributions requested by franchise authorities are calculated at their fair market value, because consumers shouldn't have to pay more for cable services than the governments who represent them.

These and other edits I requested help ensure consumers are protected from higher prices and that more money is spent on the investments needed to bring more broadband to more Americans. So I want to thank my colleagues for expanding the relief that we provide in this decision. I also want to thank the Media Bureau for its work on the item. It has my support.

STATEMENT OF COMMISSIONER JESSICA ROSENWORCEL, DISSENTING

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

Do just a bit of research on the state of local journalism in this country and you will see stark headlines with words like "decline," "shrink," and "crisis."

These headlines are not fake news. According to the Associated Press, more than 1,400 cities and towns across the United States have lost a newspaper during the last decade and a half. This trend extends beyond newspapers. Over roughly the last decade, newsroom employment—the reporters, editors, photographers, and videographers who work day-in and day-out to publish, broadcast, and report local news in this country have declined by 25 percent.

This downsizing deserves attention. While national news is on many of our screens, local journalism is disappearing. This has consequences. The loss of a local outlet means there is no one to report on the day's events. Coverage of the school board doesn't take place. Highlights from the local football game go unreported. Investigations into property assessments and local corruption fall by the wayside. But these are the facts that keep us informed as citizens and provide us with the news we need to help make decisions about our lives, our communities, and our democracy.

I think this context matters—and this context is important for today's decision. Because this agency should seize opportunities to reinvigorate local newsgathering and community coverage. In fact, that has traditionally been a hallmark of Federal Communications Commission media policy. But on that score, today's decision misses the mark. That's because it cuts at public, educational, and governmental channels across the country. It goes beyond placing reasonable limits on contributions subject to the statutory franchise fee and jeopardizes the day-to-day costs, like staff and overhead, required to run such stations.

I'm not the only one with this concern. Take a look at the record. We've heard from thousands of communities across the country worried we are cutting the operations of so many local channels. I am saddened that this agency refuses to listen.

I think their pleas fell on deaf ears because this agency has convinced itself that by making these changes, we will see more broadband. They insist that funding these local stations and related efforts damages the ability of our Nation's broadband providers to extend their networks to communities without high-speed service. But comb through the text of this decision. You will not find a single commitment made to providing more broadband service in remote communities. There is no enforceable obligation to expand broadband capacity. There is no agreement that any savings from today's action is pushed into new network deployment. I fear this absence speaks volumes.

That's because in the final analysis, this decision is part of a broader trend at this agency. Washington is cutting local authorities out of the picture when it 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. You see it in the way we cut local officials out of decisions about wireless facilities deployed in their own backyards. You see it the way that just last month we preempted a local law designed to increase broadband competition in a city where residents were crying out for more choices for Internet access.

I don't think this is the way to govern. I believe the way we are proceeding is at odds with our long legal history and tradition of dual sovereignty in the United States. I think instead of speeding our way to the digital future, it is slowing us down, increasing our division and diminishing the dignity of local institutions. I dissent.

STATEMENT OF COMMISSIONER GEOFFREY STARKS, DISSENTING

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

One of our primary responsibilities at the Commission is to ensure that spectrum, a scarce public resource that underscores our broadcasting industry and our wireless communications, is distributed equitably and in the public interest. However, spectrum is not the only public resource integral to the deployment of our communications networks. Access to public real estate and property is similarly critical. Specifically, public rights-of-way managed by states and municipalities fuel the build-out of our networks. Providers need access to this resource to dig trenches to lay conduit and reach homes.

For many decades, state, municipal, or local governing bodies have been recognized as the arbiters of the use of this valuable public resource. This recognition formed the basis of the Cable Act,[1] which spawned our local franchising rules and allowed providers to come freely to local franchising authorities to negotiate the use of public rights-of-way. Historically, LFAs have sought and cable providers have agreed to a fee for the use of this public property, along with other public interest terms. In return, providers have been able to run profitable businesses, acquiring new customers and reaping hundreds of billions of dollars in revenue.

I dissent from today's item because it threatens the ability of states and municipalities to manage their local affairs through an improper reading of the statute. The expansive and unprecedented reading of the term "franchise fee" in today's item significantly devalues the use of public rights-of-way and could, within months, threaten settled and longstanding franchise agreements across the country. In doing so, it puts at risk the careful balance developed over many decades between the interests of providers and the local communities that they serve.

Thousands of federal, state, and local leaders have submitted substantive comments in our docket, pointing out how our action today will frustrate other important goals of the statute, and target certain terms negotiated into franchise agreements that are of great importance to local communities.[2] From free or discounted services to schools or government buildings, to institutional networks, or I-Nets, which are viewed as critical infrastructure by many cities and relied upon to support government functions and public safety communications, much is at stake. Additionally, the item itself recognizes that it will shake the very foundation of another statutory priority, the provision of public, educational, or governmental, or PEG, stations, which the item notes provide critical and unique local service to communities across the country.[3]

Perhaps the most significant departure in today's item is the expansive new reading of the term "franchise fee" for the purposes of the statutory cap on LFAs' collection of such fees. The term will now broadly include "cable-related, in-kind contributions."[4] This new interpretation of the statute will upend decades of settled regulatory determinations and innumerable franchise agreements currently in place across the country, and cause a seismic shift in the relationship between LFAs and

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[1] Cable Communications Policy Act of 1984, Pub. L. No. 98–549, 98 Stat. 2779 (1984).

[2] *See, e.g.,* Letter from Sen. E. Markey *et al.,* to Ajit Pai, Chairman, FCC (July 29, 2019); Letter from Sen. K. Gillibrand and Sen. C. Schumer, to Ajit Pai, Chairman, FCC (July 25, 2019); Letter from Sen. C. Van Hollen, to Ajit Pai, Chairman, FCC (June 12, 2019); Letter from Rep. Y. Clarke, to Ajit Pai, Chairman, FCC (May 9, 2019); Letter from Sen. M. Hirono, to Ajit Pai, Chairman, FCC (Dec. 18, 2018); Letter from Rep. G. Moore, to Ajit Pai, Chairman, FCC, at 2 (Dec. 14, 2018); Letter from Rep. E. Engel, to Ajit Pai, Chairman, FCC (Dec. 13, 2018); Reply Comments of CAPA *et al.,* at 9; Comments of King County, Washington, at 9; City Coalition Comments at 17–18; Comments of NATOA *et al.* at 10.

[3] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992,* MB Docket No. 05–311, Draft Third Report and Order, para. 50 (adopted Aug. 1, 2019) (*Third Report and Order*).

[4] *Third Report and Order* at paras. 13–15.

providers, maximizing providers' leverage and minimizing the ability of LFAs to secure adequate service to their local communities.

The Commission's unilateral decision to avoid the words and intent of our statute and expand the definition of "franchise fee" in this proceeding is puzzling. As numerous commenters have extensively noted, and I agree, our mandate seems clear.[5] Section 622 of the Act caps franchise fees at five percent of a cable operator's gross revenues from the provisioning of cable services.[6] The term "franchise fee" is given a relatively straightforward definition in the statute: "any tax, fee, or assessment of any kind."[7]

And, if the plain meaning of the words used raised any question about whether we are talking about money or some other type of contribution, the legislative history included a strikingly clear clarification: "[i]n general, 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."[8] On this issue, it is exceedingly clear—we are talking about money.

It is true that the Sixth Circuit returned this issue to us on procedural grounds with dicta considering whether the term "franchise fee" can include "noncash exactions" in narrow instances.[9] However, in almost the same breath the Court noted, notwithstanding its brief exploration of the definitions of the words at issue, "[t]hat the term 'franchise fee' can include noncash exactions, of course, does not mean that it necessarily *does* include every one of them."[10] The item's reliance on that brief discussion to support today's line-drawing exercise, in the face of a clearly worded statute and clearly stated congressional intent, is inappropriate.[11]

What does this really mean for communities across the country? It means that freely negotiated franchise terms, agreed to by cable providers in addition to franchise fees, in arm's length negotiations with LFAs all across the country, will almost immediately be treated differently now than they have for 35 years. And as a result, the 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. For instance:

- The City of Medford, Massachusetts told us that they will need to decide whether to "divert resources away from core municipal and school services to maintain existing PEG programming, suffer a dramatic reduction in the scope of PEG channels, or lose them altogether."[12]
- Durango, Colorado worries that reductions in funding will likely mean its PEG channels will be cut altogether, leaving the city without a way to warn citizens when a disaster strikes. PEG channels were used to alert citizens when 3 million gallons of mining sludge leaked into a major river which flows through the middle of the town. A PEG station's drone was used to obtain video and track the progress of the spill by local emergency management officials. Later, PEG channels were used to advise of evacuations and road closures when a massive wildfire broke out nine miles north of the city. Reductions in funding will likely mean PEG channels will be cut all together, leaving the city without a way to warn citizens when a disaster strikes.[13]
- I was in New York City earlier this week meeting with city officials and was told that they worry greatly about the impact of today's item on the future of the city's I-Net, a network that has become so integral to city services that it will be nearly impossible to replace. FDNY uses the I-Net for "critical public safety communications" among other things, and every city agency is plugged into it in some fashion.[14]

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[5] *See, e.g.,* NATOA *et al.* July 24, 2019 *Ex Parte* at 2; Anne Arundel County *et al.* July 24, 2019 *Ex Parte* at 8; Comments of City of Philadelphia *et al.* at 22 (Nov. 14, 2018); Comments of Charles County, Maryland, at 7 (Nov. 14, 2018); Reply Comments of Anne Arundel County, Maryland *et al.,* at 6 (Dec. 14, 2018).

[6] 47 U.S.C. § 542.

[7] *Id.* § 542(g)(1).

[8] 1984 U.S.C.C.A.N. 4751, 4753; H.R. Rep. No. 98–934 at 65 (1984) (emphasis added).

[9] *Montgomery County, Md. et al., v. FCC,* 863 F.3d 485, 490–91 (6th Cir. 2017).

[10] *Id.* (emphasis in original).

[11] *Id.*

[12] Letter from Stephanie M. Burke, Mayor, City of Medford, MA, to Ajit Pai, Chairman, FCC (July 25, 2019).

[13] Association of Washington Cities *et al.* April 3, 2019 *Ex Parte.*

[14] City of New York July 25, 2019 *Ex Parte* at 1.

Our record is clear: the services negotiated in local franchising agreements are incredibly important, and reflect the significant value associated with permission to use public rights-of-way. When it comes to PEG channels, I can't say it any better than the item already does: "A significant number of comments in the record stressed [the benefits of PEG stations], which include providing access to the legislative process of the local governments, reporting on local issues, providing a forum for local candidates for office, and providing a platform for local communities—including minority communities."[15] Free or discounted service to cash-strapped schools, provision of critical I-Nets, discounts to vulnerable communities—all of these franchise terms advance the public interest and are a small imposition given the value received by providers in franchise negotiations. Our action today is unnecessary, unsupported by law or precedent, and risks causing grave harm to local communities.

In short, today's item jeopardizes the public interest and threatens to significantly alter the ability of state and local governments to determine how best to serve their communities. This item will undoubtedly end up back in litigation, and I believe the court will find that the majority's decision is at odds with clear congressional direction. I dissent.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. EDWARD MARKEY TO HON. AJIT PAI

IP–CTS and Automated Speech Recognition. Automated speech recognition (ASR) has great promise for Internet Protocol Captioned Telephone Service (IP–CTS). However, I understand that current ASR engines vary in quality and accuracy, and I am concerned that nascent technologies might be certified for IP–CTS use without adequate testing. I believe that we need to be careful about implementing this service before it is fully ready.

Question 1. Chairman Pai, what testing is being done to ensure that ASR services can handle 911 and related public safety calls? Given that ASR engines vary in quality and accuracy, will you commit to ensure such testing will occur before certifying an ASR-only provider?

Question 2. Do you agree that we need to ensure ASR-only providers can handle 911 and related public safety calls before such technology is FCC approved? In your view, has the FCC done enough adequate testing of all types of ASR engines?

Answers. I agree that IP CTS is a critical service for individuals with hearing loss. As you know, the vast majority of captioned telephone services already rely on automated speech recognition. However, those services previously have required the interposition of a communications assistant between the caller and the speech recognition software to "revoice" a caller's words. This interposition slows transcription, reduces the privacy of calls for callers, and increases the costs of IP CTS. That's why the Commission took steps to modernize IP CTS in June 2018 when we authorized the use of automated speech recognition without a communications assistant. We found that such automated speech recognition has become a viable alternative with its improvements in accuracy, speed, and privacy. Additionally, consumers will continue to be able to select a provider based on quality of service and available methods, as automated speech recognition will not be the sole means of offering IP CTS. Finally, I want to stress that nothing regarding our reforms allows substandard service: Providers using automated speech recognition must continue to meet the Commission's minimum standards and report data to the Commission to help us determine if further measures are necessary. Importantly, all certified IP CTS providers (including those using ASR) must demonstrate that their services support 911 emergency calling and meet the applicable emergency call handling requirements.

Protecting the C-Band for Public Radio. The Public Radio Satellite System relies on C-Band frequencies to distribute news, programming, and public safety information to nearly 1,300 interconnected local public radio stations and millions of Americans across the country.

Question 3. Can you assure me that any plans to transition C-Band spectrum for new wirelesses services will not impair the vital role that public radio plays in our news, educational programming, and emergency services?

Answer. Rest assured that protecting vital incumbent services in the C-Band is a focus as the Commission moves forward to put this valuable spectrum resource to its highest and best use for all Americans. To that end, the Commission's Notice

[15] *Third Report and Order* at para 50.

of Proposed Rulemaking sought extensive comment on how to protect incumbents in the band. The item asked numerous questions regarding how current end users will be protected, regardless of the transition approach ultimately adopted, including the provision of filters and technical assistance, relocation of earth stations, and adequate compensation for any costs incurred by incumbents. Further, the Commission recently collected additional information from earth stations that will provide a detailed picture of the number and location of earth stations in the band to ensure that licensed or registered earth stations are protected from harmful interference. The Commission will conduct a thorough review of this record and will aim to move forward in a way that protects these important interests, including the need for continued distribution of programming to American consumers.

Energy Efficiency. The Commission recently issued a Notice of Proposed Rulemaking to allow unlicensed, indoor "Wi-Fi" use of the 6GHz band. Yet we also know that energy-efficiency building codes established by the Department of Energy directly impact wireless penetration of a building's outer envelope.

Question 4. Chairman Pai, has the Commission consulted with the Department of Energy (DOE) on this rulemaking? Has the Commission and DOE considered establishing a working group between the two agencies to address how these two goals—improving connectivity and energy-efficiency in buildings—intersect with one another?

Answer. While we have not spoken directly with DoE representatives on this matter, the Leading Builders of America are an active participant in this proceeding, having submitted comments and held several meetings with Commission staff. The Leading Builders have provided information regarding new building energy efficiency and its effect on RF signals. To the extent that we need additional information, we won't hesitate to contact the experts at DoE.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO HON. AJIT PAI

Question 1. There was a significant outage of the CenturyLink broadband network, which caused the Verizon Wireless to also go out, right after Christmas last year that impacted many New Mexicans, including essential business operations because businesses were unable to process credit card payments. Is the FCC currently reviewing this outage? Has the FCC issued any guidance or taken any enforcement actions against companies that fail to maintain resilient networks?

Answer. As I have emphasized, Americans must have access to essential communications networks in times of emergencies, including natural disasters. Maintaining and restoring these vital networks must be a priority. The Commission has completed its investigation of the December 27, 2018, CenturyLink network outage, and a final report will be released very soon. I should also note that the Commission does not comment on potential enforcement matters.

Question 2. I along with other members of this Committee have been vocal about the need for a dedicated tribal broadband fund. I am aware that there have been incremental changes, including lifting the operating expenses caps for some tribal carriers. But these are insufficient to truly meet the need for serving tribal lands. The FCC recently published a report that had been mandated in the 2018 RAY BAUM Act. The report discussed the 25 percent discount given to tribal-serving carriers in the Alternative Connect America Cost Model or A–CAM methodology, and stated that a fund for legacy carriers is out for public comment. Mr. Chairman, our communities are tired of waiting for comments. They want action. When will the FCC move on this proposal?

Answer. Having been to Tribal areas where access is challenging—like the Rosebud Sioux Reservation in South Dakota to the Navajo Nation in Arizona—I have made closing the digital divide on Tribal lands a priority and the Commission has taken significant steps toward that goal. In last year's CAF II reverse auction, winning bidders committed to serve 76,710 rural homes and businesses on Tribal lands, and Tribally owned carriers—like the Northern Arapaho Tribe, which is receiving more than $4.1 million to deploy gigabit-speed fiber to 849 homes and businesses on the Wind River Reservation in Wyoming—won bids totaling more than $30 million in broadband support. And as you noted, we proposed a 25 percent Tribal broadband factor for the second A–CAM offer, which generated significant interest from carriers serving Tribal lands, and we sought comment on incorporating a similar Tribal support factor into our existing support mechanism for legacy carriers. This month, the Commission voted to propose the Rural Digital Opportunity Fund, a $20 billion investment in high-speed broadband for rural Americans, and we sought comment on several steps to target new funding to Tribal lands, including applying the Tribal Broadband Factor to increase support available, prioritizing support to areas that lack even 10/1 Mbps broadband, and offering a Tribal bidding credit to induce participation on Tribal lands. I look forward to working with you and my colleagues to ensure that those in Indian Country get access to the digital opportunities they need and deserve.

Question 3. Tribal communities continue to lag behind the rest of the country in the deployment of broadband. The GAO found that inaccuracies in FCC broadband data have led to underestimates of the magnitude of the digital divide on tribal lands. So we may not even have a clear picture as to how wide that gap really is given the current data collection regime. What changes is the FCC considering as part of its efforts to modernize FCC form 477 in order to specifically address the under-reporting in Tribal communities? What are some ways that the FCC can look outside the beltway to engage on this issue?

Answer. Obtaining and using precise, accurate, up-to-date broadband deployment data is critical to accomplishing the goal of making broadband available to all Americans, including Tribal communities. We need to understand where broadband is available and where it is not to target our efforts and direct funding to areas that are most in need, such as many rural, Tribal areas.

That is why the Commission began a top-to-bottom review of our broadband deployment data collection to ensure that that data will be more precise, granular, and ultimately useful to the Commission and the public. Along those lines, the Commission adopted a Report and Order on August 1 to create the Digital Opportunity Data Collection, a new approach to mapping fixed broadband in which providers submit geospatial polygons depicting their broadband deployment and thereby yielding more granular and more precise broadband maps. That Report and Order also provides for regular updates of the filed data to ensure that the maps we rely on are current. The Report and Order also adopted a mechanism for verifying those maps through crowdsourcing—feedback directly from the public. Through this new tool, Tribal governmental entities (among others) will be able to submit information disputing providers' fixed broadband availability data, leveraging their experience concerning service (or the lack thereof).

The concurrently-adopted Further Notice of Proposed Rulemaking seeks comment on how best to incorporate input of Tribal governments on broadband coverage maps. For example, the Further Notice proposes outreach directly with Tribal governments to facilitate their involvement in the dispute process and to provide technical assistance to them as needed. The item also seeks comment on any additional issues specific to Tribal governments that we should consider in connection with any disputes concerning coverage data. Finally, it seeks comment on whether we should expand these proposals to include other Tribal entities, such as inter-Tribal organizations.

Question 4. President Trump is trying to use existing emergency authorities in an unprecedented way when he cannot get Congress or our allies and trading partners to do what he wants them to do. He has also been very clear that he sees the media as "the enemy of the people" and levies daily attacks on a variety of FCC-regulated media organizations and other media owners, threatening them with retaliation.

Existing law gives the president the ability to declare an emergency and close down parts of the Internet and take over broadcast networks to transmit messages. We expect that this would only occur in the direst circumstances such as war or extreme natural disasters. But there is no guarantee that is the case with this—or any other President.

Would the commission work with Congress and provide technical assistance to better reform our emergency laws regarding communications technology to ensure that emergency authority is not abused by any President for political or personal purposes?

Answer. As with all proposed legislation implicating the Communications Act, the Commission can supply technical assistance should Congress wish to engage with respect to concrete legislative proposals.

Question 5. Millions of Americans rely on their local public radio station for news, educational and cultural programming, emergency alerts and public safety information—including in rural, remote and tribal areas. Many public radio stations are the only local news organizations in their communities, and provide unique programming and information tailored to their communities' needs and tastes. The public radio satellite system relies on C-Band spectrum to distribute national and regional programming to and among the local stations. In parts of New Mexico and other rural and tribal areas, there are few alternative sources of news, public safety information, and regional programming—and no workable alternatives to satellite as a means to distribute public radio programming.

As the FCC considers plans to transition C-Band spectrum for 5G and commercial wireless services, please detail how the agency will ensure the C-Band spectrum and satellite service necessary for local public radio stations to continue to provide vital news, programming, and public safety services to America's rural and tribal communities.

Answer. Rest assured that protecting vital incumbent services in the C-Band is a focus as the Commission moves forward to put this valuable spectrum resource to its highest and best use for all Americans. To that end, the Commission's Notice of Proposed Rulemaking sought extensive comment on how to protect incumbents in the band. The item asked numerous questions regarding how current end users will be protected, regardless of the transition approach ultimately adopted, including the provision of filters and technical assistance, relocation of earth stations, and adequate compensation for any costs incurred by incumbents. Further, the Commission recently collected additional information from earth stations that will provide a detailed picture of the number and location of earth stations in the band to ensure that licensed or registered earth stations are protected from harmful interference. The Commission will conduct a thorough review of this record and will aim to move forward in a way that protects these important interests, including the need for continued distribution of programming to American consumers in rural and Tribal communities.

Question 6. I understand that some Connect America Fund deployments that have been delayed, potentially creating buildout compliance issues, due to bureaucratic issues. Have you heard of these types of issues? What steps can be taken to help streamline the process to enable providers to meet FCC deadlines and more importantly ensure that those living on tribal lands can more quickly experience the benefits of broadband?

Answer. I understand that Commission staff has had conversations with Frontier Communications, a CAF Phase II recipient, about its ability to deploy broadband on Navajo Nation lands. Frontier informed Commission staff that the delays are due to gaining access to the necessary rights-of-way, which are matters controlled at the state, local, or Tribal level or through another Federal agency that (of course) operates independent of the Commission's jurisdiction. Staff have encouraged the relevant parties to come to the table to efficiently find a resolution so that those living on Tribal lands may soon enjoy the benefits of broadband.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TAMMY BALDWIN TO HON. AJIT PAI

Question 1. I understand from stakeholders in Wisconsin that USAC has issued guidance on the treatment of A–CAM locations that are home-based businesses which conflicts with the FCC's rules. Such confusion among A–CAM recipients on what qualifies as a "location" is leaving many rural broadband providers in an uncertain position regarding meeting the agreed-upon service targets for broadband deployments and is having a chilling effect on companies considering taking an A–CAM II offer.

It is my understanding that a Petition has been filed seeking clarification or Declaratory Ruling that the guidance issued by USAC will not supersede FCC rules. Can you provide an update on when the FCC will clarify its treatment of home-based businesses by asking USAC to update its guidance and, if not, when the FCC will seek comment on the Petition?

Answer. As you note, Northeast Iowa Telephone Co. and the Western Iowa Telephone Association recently filed a joint petition concerning the definition of "location" under the Alternative Connect America Cost Model for residences that also include a home-based business. On June 20, 2019, the Wireline Competition Bureau sought comment on the petition. The record closed on July 25, and Commission staff is now carefully reviewing that record.

Question 2. Congress passed the National Suicide Hotline Improvement Act (P.L. 115–233) last year, which tasks the Federal Communications Commission (FCC) with studying the feasibility of transitioning the 1–800 number to a single-use N11 code. Furthermore, it asks FCC to consider recommendations surrounding improved infrastructure and operations. As you may know, the lesbian, gay, bisexual, transgender and queer (LGBTQ) community, particularly LGBTQ youth, is disproportionately affected. Lesbian, gay and bisexual youth seriously contemplate suicide at almost three times the rate of heterosexual youth, while more than a third of transgender adults reported making a suicide attempt prior to the age of 25.

Given that the LGBTQ population is at a heightened risk for suicide, I am requesting a status update on the following:

a. What is FCC doing to address the concerns raised by over 100 commenters to its open docket to consider the need for specialization of services for LGBTQ populations in relation to implementation of the Hotline Improvement Act?

b. Has FCC considered, as an infrastructure or operational improvement, the mandatory training of counselors for identifying and responding to LGBTQ youth in crisis, or the set-up of an Integrated Voice Response (IVR) to send LGBTQ callers to organizations with particular expertise in serving these communities?

c. Does FCC plan to vote on these recommendations and allow Commissioners to make amendments to the report?

Answer. The Commission's Wireline Competition Bureau and Office of Economics and Analytics submitted the report required under the National Suicide Hotline Improvement Act of 2018 to Congress on August 14, 2019. The report reflects consultation with the Department of Health and Human Services' Substance Abuse and Mental Health Services Administration (SAMHSA), the Department of Veterans Affairs (VA), and the North American Numbering Council, as required under the statute.

The report finds that (1) designating a 3-digit dialing code dedicated solely for the purpose of a national suicide prevention and mental health crisis hotline would likely make it easier for Americans in crisis to access potentially life-saving resources; and (2) the Commission should initiate a rulemaking proceeding to consider designating 988 as the 3-digit code to be used for this important purpose.

The report also recognizes that suicide rates are higher across various at-risk populations and that some commenters have advocated for the need for specialized hotline services for such populations, including LGBTQ youth and Veterans. As you and other commenters have indicated, these specialized services could include establishing an interactive voice response system to a group that has the resources and expertise to best serve LGBTQ youth and for specialty partners across all at-risk groups to assist SAMHSA in conducting further training to increase the ability for existing counselors to best serve callers. The report finds that the need for specialized hotline services for at-risk populations, including LGBTQ youth and Veterans, should be a factor for (1) SAMHSA, the VA, and Congress when considering any improvements to the National Suicide Prevention Lifeline; and (2) the Commission as it considers designating a 3-digit dialing code for a national suicide prevention and mental health crisis hotline.

I appreciate the importance of such a hotline for LGBTQ individuals and have met with various stakeholders, including The Trevor Project, to hear their views. I am committed to launching a rulemaking proceeding in which the Commission would consider designating a 3-digit number—specifically, 988—for a national suicide prevention and mental health crisis hotline. All interested stakeholders will be invited to fully participate and provide further public comment in that proceeding.

Response to Written Questions Submitted by Hon. Tammy Duckworth to Hon. Ajit Pai

Question 1. Regarding 5.9 GHz band use, what is the Commission doing to make sure it gathers all the engineering and economic information it needs to decide between the various proposals on the record?

Answer. For two decades, the Commission's rules have only permitted one technology—Dedicated Short-Range Communications or DSRC—to be used in the 5.9 GHz band. Given the importance of ensuring that spectrum use is maximized, the Commission, in 2013, began exploring the possibility of expanding the 5.9 GHz band to include unlicensed devices. Since that time, the Commission has built an extensive record from a variety of stakeholders, including automotive companies and unlicensed device advocates. The Commission has explored the feasibility of a variety of band sharing proposals to determine the best course of action for this spectrum band.

In 2016, the Commission released a Public Notice to refresh the record, gather specific comment on various proposed sharing plans, solicit prototype unlicensed devices for testing, and seek comment on a three-phase test plan for those prototype devices. Subsequently, the FCC, along with NTIA and the U.S. Department of Transportation, collaborated on executing Phase I of the test plan. In 2018, the Commission's Office of Engineering and Technology released its Phase I Test Report and solicited comments. The Commission continues to work with DOT and NTIA on Phase II (limited field testing) and Phase III ("real-world" testing). Additionally, the

Commission continues to engage stakeholders and attend related fora to ensure it has the most up-to-date and relevant information regarding vehicular and unlicensed device needs so it can make the best decision for ongoing and future use of this spectrum.

Question 2. Regarding the Rural Digital Opportunity Fund, can you provide a more specific timeline regarding when the FCC plans to the auction? Are there any specific issues or obstacles to implementation?

Answer. On August 1, the Commission adopted a Notice of Proposed Rulemaking proposing to establish the Rural Digital Opportunity Fund. This modernized approach for connecting the hardest-to-serve corners of our country will be the biggest step the Commission has yet taken to close the digital divide, including the gaps I've seen for myself in places like downstate Illinois.

Building on the success of the CAF Phase II auction, the Rural Digital Opportunity Fund would make available more than $20 billion to support up to gigabit-speed service to millions of unserved Americans through a competitive auction that will ensure that unserved Americans will be covered for the lowest cost possible. It would target support to areas that lack access to fixed voice and 25/3 Mbps broadband and would be implemented through a two-phase approach. Phase I would allocate support to wholly unserved census blocks—those areas where existing data show there is no service at all—while Phase II would allocate support to unserved locations in partially unserved census blocks once the Commission has more granular broadband availability data, along with areas not won in Phase I. Our aim is to begin the auction process for Phase I next year. The primary issues regarding implementation involve administrative steps required to finalize the auction process (that is, moving from a Notice of Proposed Rulemaking to a final Order) and complexities with respect to designing and conducting the auction. I am confident in the ability of FCC career staff to enable us to conduct a successful auction that will bring millions more Americans online.

Question 3. In the FCC's E-rate and Rural Health Care programs, long-term consortium contracts are an effective method for ensuring broadband providers meet buildout and service obligations to all covered anchor institutions. Has the FCC considered whether long-term contracts between rural governments (*i.e.,* county-level or municipal) and broadband providers could be similarly effective in solving the residential broadband gap?

Answer. Although the Commission has not previously examined such contracts, that is an interesting idea that may be worth exploring.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JON TESTER TO HON. AJIT PAI

Question 1. The FCC's Captioned Telephone Services gives folks independence to connect with the world. I support the FCC's intention to ensure this program can handle the influx in participates, however I am concerned about using an automatic speech recognition to replace humans. What is the Commission doing to ensure this technology is adequate and the quality of this service does not decrease?

Answer. I agree that IP CTS is a critical service for individuals with hearing loss. As you know, the vast majority of captioned telephone services already rely on automated speech recognition. However, those services have previously required the interposition of a communications assistant between the caller and the speech recognition software to "revoice" a caller's words. This interposition slows transcription, reduces the privacy of calls for callers, and increases the costs of IP CTS. That's why the Commission took steps to modernize IP CTS in June 2018 when we authorized the use of automated speech recognition without a communications assistant. We found that such automated speech recognition has become a viable alternative with its improvements in accuracy, speed, and privacy. Additionally, consumers will continue to be able to select a provider based on quality of service and other available methods, as automated speech recognition will not be the sole means of offering IP CTS. Finally, I want to stress that nothing regarding our reforms allows substandard service: Providers using automated speech recognition must continue to meet the Commission's minimum standards and report data to the Commission to help us determine if further measures are necessary.

Question 2. I am also concerned that reforms to this program would require candidates to travel to their State equipment distributor to receive certification instead of from their physician. As you move forward, will you take into consideration what impact this will have on folks in rural America?

Answer. Yes. Coming from rural Kansas, I am always mindful of the impact of our decisions on rural Americans.

Question 3. According to your Report on Broadband Deployment in Indian Country, less than half of homes on rural reservations have access to that same level of broadband service. What are your recommendations for Congress on how to help?

Answer. Although broadband deployment to Tribal lands has increased in recent years, it is clear that more work needs to be done to bridge the broadband gap in Indian Country. While we did not provide specific recommendations for Congress in our recent report, the Commission has taken measures to ensure that Americans living on Tribal lands have access to broadband. We recently authorized more than $4.1 million in CAF II auction support over ten years to the Northern Arapaho Tribe to deploy gigabit-speed broadband to 849 rural homes and small businesses on the Wind River Reservation in Wyoming. And earlier this month, the Commission proposed the Rural Digital Opportunity Fund, a $20 billion reverse auction that would help deploy broadband for millions of unserved Americans that included proposals to ensure that sufficient funding is directed to Tribal lands, such as using a Tribal Broadband Factor and Tribal bidding credits and prioritizing support to areas that do not yet have access to 10/1 Mbps services. We are ready to work with your office and others in Congress to continue to address this important issue.

Question 4. Consultations play such an important role, is the FCC's office of Native Affairs and Policy adequately staffed?

Answer. Yes. Within the Bureau, the Office of Native Affairs and Policy (ONAP) greatly benefits from the synergies with other components of the Consumer and Governmental Affairs Bureau (where ONAP itself is located), including routine coordination with intergovernmental staff in the Office of Intergovernmental Affairs and other Bureau-level specialists. In addition, ONAP regularly coordinates with subject-matter experts in the Wireless Telecommunications Bureau, the Wireline Competition Bureau, and the Media Bureau, as well as the Office of Engineering, Office of Economics and Analytics, and Office of Managing Director on items of significant Tribal interest.

Question 5. Do you have any updates on the progress of the Native Nations Communications Task Force?

Answer. I personally have met with the Task Force and informed them of our shared goal to boost connectivity on Tribal lands. The Task Force held its most recent in-person meeting on June 11 in Oklahoma, and has additional meetings planned for November 5–6. The Task Force continues to work on its mission to provide guidance, expertise, and recommendations to specific requests from the Commission on a range of communications issues that directly or indirectly affect Tribal governments and their people.

Question 6. Do you believe we need to remove existing Huawei equipment from our telecommunications infrastructure?

Answer. The Commission has an ongoing proceeding involving the Universal Service Fund to evaluate the steps necessary to secure the integrity of our communications supply chain and ensure the security of equipment already installed by domestic communications providers. We have not yet made any final decisions in this proceeding, but I can assure you of my strong belief that we must protect the national security interests involving our communications infrastructure.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JACKY ROSEN TO HON. AJIT PAI

IP CAPTIONED TELEPHONE SERVICE. One area where telecommunications technology is making a real impact is with our most vulnerable populations, from our seniors to our disabled veterans to our hard of hearing and deaf population. As a member of the Special Committee on Aging I am especially concerned with the 38,000 deaf and hard of hearing people in my state of Nevada. With a growing aging population, not in just my state, but across the country, many will rely on IP Captioned Telephone Service to communicate. This service allows a person with hearing loss to talk normally into the phone, while reading captions of what the person on the other end of the line is saying in real time. My office has heard from consumers who are concerned that as these services move toward automated technologies, the replacement of humans with fully automated speech recognition may result in an inferior service.

Question 1. Chairman Pai, is the FCC currently testing the automated service in real-world conditions? Will you commit to additional study and testing to ensure accuracy of the service?

Answer. I agree that IP CTS is a critical service for individuals with hearing loss. As you know, the vast majority of captioned telephone services already rely on automated speech recognition. However, those services previously have required the interposition of a communications assistant between the caller and the speech recognition software to "revoice" a caller's words. This interposition slows transcription, reduces the privacy of calls for callers, and increases the costs of IP CTS. That's why the Commission took steps to modernize IP CTS in June 2018 when we authorized the use of automated speech recognition without a communications assistant. We found that such automated speech recognition has become a viable alternative with its improvements in accuracy, speed, and privacy. Additionally, consumers will continue to be able to select a provider based on quality of service and available methods, as automated speech recognition will not be the sole means of offering IP CTS. Finally, I want to stress that nothing regarding our reforms allows substandard service: Providers using automated speech recognition must continue to meet the Commission's minimum standards and report data to the Commission to help us determine if further measures are necessary.

SMART TRANSPORTATION IN NEVADA. As we look to find new applications for emerging technologies, one promising area of development is in the growth of "smart" transportation systems, including vehicle-to-vehicle and vehicle-to-infrastructure communications such as Dedicated Short Range Communications or DSRC. As you may know, there are three operational DSRC connected vehicle projects underway in Nevada, including one in Washoe County and two in Las Vegas. These cities have already made significant investments in vehicle-to-vehicle communications.

Chairman Pai, you recently announced that the FCC plans to take a "fresh look" at the 5.9-gigahertz spectrum that is reserved exclusively for automotive safety, with the potential to open up this band for unlicensed Wi-Fi use. Back in 2016, the FCC made a commitment to complete three phases of harmful interference testing to determine if sharing the band with unlicensed Wi-Fi is possible. It is my understanding that the FCC completed the first phase, which showed that Wi-Fi use in the band *did* indeed cause harmful interference to DSRC. Since then, there has not been any additional testing.

Question 2. Can one of the panelists tell us where the FCC is on Phases II and III of the testing, why these phases have not yet been completed, and if the FCC plans to continue working with the Department of Transportation to complete the testing *prior* to making any changes to the 5.9-gigahertz band?

Question 3. If interference is found in this band, what does the FCC propose to do to mitigate the impact on vehicle-to-vehicle communications?

Answers. The Phase I tests performed at the FCC Laboratory showed that the Wi-Fi device features that are designed to avoid causing harmful interference to DSRC performed as claimed. The Department of Transportation is responsible for conducting Phases II and III of the testing.

In the meantime, automotive stakeholders have asked the Commission to allow deployment of C–V2X technology in this spectrum—a technology not authorized by the Commission's rules nor part of the agreed testing protocols. Given the lack of widespread deployment of the DSRC technology and the importance of maximizing the use of this prime spectrum, the Commission is considering taking a fresh look that would gather stakeholder input to ensure that we have the most up-to-date information.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROGER WICKER TO HON. JESSICA ROSENWORCEL

Question 1. Senator Johnson asked the panel about the interagency coordination problems regarding the U.S. position on interference in the 24 GHz band. In response you stated, "I can be a little less diplomatic. I have not been in the meetings that the chairman has referred to, but I can tell you this; the situation we have is embarrassing. We have to resolve these issues before we put the spectrum to market in an auction." Did you vote to adopt the final procedures for Auction 102 on August 3, 2018?

Answer. Yes.

Question 2. When I asked Commissioner Starks if he was satisfied with the Commission's analysis regarding spectrum interference Commissioner Starks stated, "The last thing that I would say is that I do have confidence in the Office of Engineering and Technology at the FCC, but I haven't personally studied this issue." Do you share Commissioner Starks' confidence in the Office of Engineering and Technology at the FCC?

Answer. Yes.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. TODD YOUNG TO HON. JESSICA ROSENWORCEL

Question. Currently, millions of rural Americans lack access to fixed high-speed broadband, which in today's economy is perceived as basic infrastructure. In the FCC's 2019 Broadband Deployment Report, the FCC concluded that broadband is being deployed to all Americans, including rural Americans, in a timely fashion. The report also asserted that FCC policies are promoting investments and removing burdensome barriers.

With that said, according to a preliminary analysis, which was released on Monday by USTelecom, U.S. broadband provider investments increased by approximately $3 billion to total roughly $75 billion in 2018.

Given the ongoing growth in private investments, what are the FCC's priorities moving forward to ensure U.S. broadband providers have the resources they need in the free market for continued investments in rural America? Additionally, how will the FCC continue to update its mapping to provide an accurate account of high-speed service?

Answer. Broadband is the essential infrastructure of the digital age. It supports all aspects of modern commercial and civic life. As you suggest, there are many communications companies—large and small—that have done significant work to deploy high-speed service across the country. However, there remain too many places, especially in rural communities, where broadband is unavailable.

In a report released this year, the FCC announced that 21.3 million Americans lack access to broadband, including 16.8 million in rural areas. That's unacceptable.

What is worse, however, is that these numbers likely overstate the reach of high-speed service across the country. That's because there are serious problems with the data the FCC uses to assess the state of broadband deployment. The methodology used to determine the presence of service is both overbroad and imprecise. Under the present data collection system used by the FCC, if a service provider claims that they serve a single customer in a census block, the agency assumes that there is service throughout the census block. As a result, the FCC's claim that there are only 21.3 million people in the United States without access to broadband is just not credible. As further evidence, consider that another recent analysis reported in the New York Times that concluded that as many as 162 million people across the country do not use Internet service at broadband speeds.

Unfortunately, the inaccurate data used in the FCC's broadband report earlier this year is the same data that is used to populate the agency's broadband maps. These maps, as you may know, have been criticized—by consumers, carriers, and members of Congress—for failing to provide an accurate picture of where broadband is and is not across the country.

I believe we cannot manage what we do not measure. If we lack the data needed to develop accurate maps, we will not be able to target policy solutions effectively. The FCC distributes billions of dollars each year to help accelerate the build out of broadband to connect all of our communities. These funds are an especially critical part of ensuring the deployment of high-speed service in rural communities. But it's fundamentally irresponsible for the FCC to continue to send these dollars out without having a truly accurate picture of where those resources should go.

Going forward, the FCC must make it a top priority to update its maps and improve the accuracy of the information it collects. In doing so, I think the agency should mobilize all resources it has at its disposal. In other words, instead of limiting our efforts to information collected from the carriers, the FCC should explore other ways of refining and improving our broadband data. This should include a process for stakeholders to challenge data submitted to the agency. In addition, the FCC should enlist the assistance of the Universal Service Administrative Company and the agency's own field offices around the country to perform spot checks on data submitted to the agency. It also should incorporate crowdsourcing. So many Americans have stories to tell about where service is lacking in their communities. We need to develop ways to incorporate what they know and their desire to help refine our data—by developing a way for the public to participate in the improvement of our maps.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. AMY KLOBUCHAR TO HON. JESSICA ROSENWORCEL

Question 1. I have repeatedly raised concerns about the harmful effects of the proposed merger of T-Mobile and Sprint—which would combine two of the four remaining nationwide wireless carriers—and have called on the Commission and the Justice Department to reject it. At the hearing, you testified that you have never seen a merger transaction dealt with like this—you said that you still have not received economic analysis or legal analysis on the transaction, yet some of your colleagues have already announced their support for the merger. Can you elaborate on your concerns regarding the FCC's review process for this merger?

Answer. On May 20, 2019, the Chairman of the FCC announced in a press release that this "transaction is in the public interest" and that he would "recommend to [his] colleagues that the FCC approve it." Shortly thereafter, two of my colleagues followed his lead and announced their support for the merger.

At the time of these announcements, no economic, legal, or engineering analysis from the agency regarding this transaction had been shared with my office at the FCC. More than two months later, I still have not received such analysis in any draft decision concerning the merits of this merger. I remain skeptical that this combination is good for consumers, good for competition, or good for the economy.

Moreover, in light of substantial changes to the original transaction made through negotiation with the Department of Justice, I believe that before the FCC votes on this merger, the public should have the opportunity to weigh in and comment. Too much here has been done behind closed doors.

Question 2. One in five rural households in my state lack access to high-speed Internet service, and the FCC's maps do not report this accurately in my state or across the country. I introduced the Improving Broadband Mapping Act with Senators Capito, Manchin, and Hoeven to direct the FCC to establish rules to improve its data collection process to determine where broadband service is available. Can you explain how using consumer-reported data, as well as state and local municipalities' data, could help the FCC to create more accurate coverage maps?

Answer. To build better broadband maps, the FCC needs to reach out beyond Washington. Traditionally, the agency has relied on carrier-supplied data and maps to determine where service is and is not across the country. It is essential that we improve upon this effort by incorporating input from consumers and state and local authorities. To this end, I believe the FCC should explore how crowdsourcing can inform our maps. This may be accomplished on our website or by incorporating the data that comes in to the FCC via its speed test app, which has been downloaded more than 200,000 times. In addition, we need to find ways to incorporate the data-gathering done by state and local authorities and provide them with a process to challenge service information they believe may be incorrect at the FCC. We also should explore how the FCC's regional offices and the universal service fund administrator can spot check and audit carrier-submitted data in the field. Finally, we should be open to creative ways to improve the data that informs our maps, including tracking service via postal trucks in rural areas.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. EDWARD MARKEY TO HON. JESSICA ROSENWORCEL

IP–CTS and Automated Speech Recognition. Automated speech recognition (ASR) has great promise for Internet Protocol Captioned Telephone Service (IP–CTS). However, I understand that current ASR engines vary in quality and accuracy, and I am concerned that nascent technologies might be certified for IP–CTS use without adequate testing. I believe that we need to be careful about implementing this service before it is fully ready.

Question 1. Do you agree that we need to ensure ASR-only providers can handle 911 and related public safety calls before such technology is FCC approved? In your view, has the FCC done enough adequate testing of all types of ASR engines?

Answer. For individuals with hearing loss, access to Internet Protocol Captioned Telephone Service can significantly enhance their ability to communicate and participate in modern life. With IP CTS, those with residual hearing can use their own voice to speak during a call but then read captions on their device when the called party responds. This means that people with hearing loss can do the things so many of us take for granted—picking up the phone and seeking emergency help; securing a job; making a doctor's appointment; following up with a child's teacher; and connecting with family and friends.

As you suggest, automated speech recognition (ASR) holds promise for IP CTS. But I believe the FCC got it backwards when it declared that IP CTS using ASR was eligible for compensation from the Telecommunications Relay Service fund before setting forth standards for ASR that would ensure functional equivalency under the Americans with Disabilities Act. As I said at the time of this decision, the FCC's action put the cart before the horse by introducing ASR into the IP CTS program before we address our most basic regulatory responsibilities. Naturally, one of these responsibilities involves how 911 and public safety calls will be handled. While this is a topic of discussion in the FCC's ongoing rulemaking, I agree that the agency will need to ensure that IP CTS using ASR can demonstrate that it can handle 911 and related public safety calls.

Protecting the C-Band for Public Radio. The Public Radio Satellite System relies on C-Band frequencies to distribute news, programming, and public safety information to nearly 1,300 interconnected local public radio stations and millions of Americans across the country.

Question 2. Can you assure me that any plans to transition C-Band spectrum for new wirelesses services will not impair the vital role that public radio plays in our news, educational programming, and emergency services?

Answer. In the Public Broadcasting Act, Congress found that it "is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes." I wholeheartedly agree.

Today C-Band spectrum is used to deliver more than 450,000 hours of news, music, and cultural programming to 1,278 public radio stations throughout the United States. This programming reaches roughly 95 percent of the United States population.

The FCC is exploring a range of mechanisms to open up a portion of the C-Band for new mobile use. This is important, because the United States has been slow, relative to our international peers, at bringing mid-band spectrum to market for the next generation of wireless service, known as 5G. Identifying sources of these airwaves that may be viable for new wireless use is a necessary part of the United States reclaiming leadership in 5G deployment. However, as we explore opportunities in the C-band, we must acknowledge that these frequencies are in use today by television and radio broadcasters and cable operators responsible for delivering programming to more than 100 million households. Consequently, I believe the FCC will need to addresses the challenges associated with introducing new mobile activity in this band while taking into consideration the significance of present use. I also believe we need to be creative as we assess this band and preserve opportunities for public radio as we move forward.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO HON. JESSICA ROSENWORCEL

Question 1. Has the FCC has done enough to push companies into building resilient networks or even publishing best practices to help prevent future outages?

Answer. When communications outages occur, so much of modern life grinds to a halt. This is not just an inconvenience, it can be a threat to our economic and national security.

In light of this, I believe the FCC must do a better job studying what went wrong during outages in the past in order to better prepare for network failures in the future. To this end, I am disappointed that the agency has been slow to issue reports on the performance and resiliency of networks in the wake of disasters like the 2017 hurricane season. Likewise, I am concerned that the agency has yet to issue a report assessing the nationwide CenturyLink outage in late 2018, which included some locations in New Mexico. Consequently, I believe the FCC should investigate and issue a timely report following every major network outage. I also believe the agency should annually issue a general report on outages in order to assess trends, areas of concern, and develop best practices.

As a related matter, the Government Accountability Office issued a report in 2018 criticizing the FCC with respect to its work on network resiliency. The GAO recommended the FCC develop specific and measurable objectives for its wireless resiliency framework, which was developed to strengthen communications networks during emergencies. Since that time, the FCC has issued four public notices, seeking comment on the framework, its implementation, and its effectiveness. In addition, on November 5, 2018, the agency's Public Safety and Homeland Security Bureau sent letters to carriers that had committed to the principles of the framework and asked that they provide post-disaster action reports from the 2017 and 2018 hurricane seasons. I believe that with the information filed in response to these letters and public notices, the FCC should update this framework and address the deficiencies identified by GAO. At the same time, the agency should modernize its reporting requirements for network outages. While today our policies require outage reporting for traditional telephony, no comparable reporting is required for broadband.

Question 2. Tribal communities continue to lag behind the rest of the country in the deployment of broadband. The GAO found that inaccuracies in FCC broadband data have led to underestimates of the magnitude of the digital divide on tribal lands. So we may not even have a clear picture as to how wide that gap really is given the current data collection regime. What changes is the FCC considering as part of its efforts to modernize FCC form 477 in order to specifically address the under-reporting in Tribal communities? What are some ways that the FCC can look outside the beltway to engage on this issue?

Answer. Native Americans should not be the last Americans to benefit from the power of the digital age. Unfortunately, as you note, the FCC has been criticized by the Government Accountability Office for its faulty data regarding the state of broadband access on Tribal lands. To make matters worse, in the FCC's recently released Report on Tribal Deployment in Indian Country the agency did not address the GAO's concerns.

However, the FCC adopted a rulemaking on August 1, 2019 seeking comment on ways to improve data collection, including how best to incorporate the input of Tribal governments in broadband coverage maps. This is a positive development. There are also things we can do now while this rulemaking is ongoing. To this end, I believe the FCC should work with its Native Nations Communications Task Force to come up with a plan to collect better broadband data on Tribal lands. This effort could include sharing existing data with members of the Task Force for community assessment followed by in-person consultations to witness the state of deployment in their Tribal areas firsthand.

Question 3. President Trump is trying to use existing emergency authorities in an unprecedented way when he cannot get Congress or our allies and trading partners to do what he wants them to do. He has also been very clear that he sees the media as "the enemy of the people" and levies daily attacks on a variety of FCC-regulated media organizations and other media owners, threatening them with retaliation.

Existing law gives the president the ability to declare an emergency and close down parts of the Internet and take over broadcast networks to transmit messages. We expect that this would only occur in the direst circumstances such as war or extreme natural disasters. But there is no guarantee that is the case with this—or any other President.

Would the commission work with Congress and provide technical assistance to better reform our emergency laws regarding communications technology to ensure that emergency authority is not abused by any President for political or personal purposes?

Answer. Section 706 of the Communications Act allows the President of the United States to shut down or take control of "any facility or station for wire communication" upon proclamation "that there exists a state or threat of war involving the United States." While at one point "wire communication" meant telephone calls or telegrams, today this language might be interpreted to cover the internet. As a result, Section 706 could serve as an Internet "kill switch" in the United States, available to the president in times of war or emergency.

It is difficult to understate the potential impact of such action or the potential for abuse. The ambiguity in this statute could be used to disrupt political discourse, hinder political activity, or infringe on constitutional rights. This is alarming.

I commit to working with Congress and providing technical assistance, as needed, to reform our emergency laws regarding communications technology in order to ensure that this emergency authority is not abused by any President for political or personal purposes.

Question 4. Millions of Americans rely on their local public radio station for news, educational and cultural programming, emergency alerts and public safety information—including in rural, remote and tribal areas. Many public radio stations are the only local news organizations in their communities, and provide unique programming and information tailored to their communities' needs and tastes. The public radio satellite system relies on C-Band spectrum to distribute national and regional programming to and among the local stations. In parts of New Mexico and other rural and tribal areas, there are few alternative sources of news, public safety information, and regional programming—and no workable alternatives to satellite as a means to distribute public radio programming.

As the FCC considers plans to transition C-Band spectrum for 5G and commercial wireless services, please detail how the agency will ensure the C-Band spectrum and satellite service necessary for local public radio stations to continue to provide vital news, programming, and public safety services to America's rural and tribal communities.

Answer. In the Public Broadcasting Act, Congress found that it "is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes." I wholeheartedly agree.

Today C-Band spectrum is used to deliver more than 450,000 hours of news, music, and cultural programming to 1,278 public radio stations throughout the United States. This programming reaches roughly 95 percent of the United States population.

The FCC is exploring a range of mechanisms to open up a portion of the C-Band for new mobile use. This is important, because the United States has been slow, relative to our international peers, at bringing mid-band spectrum to market for the next generation of wireless service, known as 5G. Identifying sources of these airwaves that may be viable for new wireless use is a necessary part of the United States reclaiming leadership in 5G deployment. However, as we explore opportunities in the C-band, we must acknowledge that these frequencies are in use today by television and radio broadcasters and cable operators responsible for delivering programming to more than 100 million households. Consequently, I believe the FCC will need to addresses the challenges associated with introducing new mobile activity in this band while taking into consideration the significance of present use. I also believe we need to be creative as we assess this band and preserve opportunities for public radio as we move forward.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JON TESTER TO
HON. JESSICA ROSENWORCEL

Question 1. The FCC's Captioned Telephone Services gives folks independence to connect with the world. I support the FCC's intention to ensure this program can handle the influx in participates, however I am concerned about using an automatic speech recognition to replace humans. What is the Commission doing to ensure this technology is adequate and the quality of this service does not decrease?

Answer. For individuals with hearing loss, access to Internet Protocol Captioned Telephone Service can significantly enhance their ability to communicate and participate in modern life. With IP CTS, those with residual hearing can use their own voice to speak during a call but then read captions on their device when the called party responds. This means that people with hearing loss can do the things so many of us take for granted—picking up the phone and seeking emergency help; securing a job; making a doctor's appointment; following up with a child's teacher; and connecting with family and friends.

Automated speech recognition (ASR) holds promise for IP CTS. But I believe the FCC got it backwards when it declared that IP CTS using ASR was eligible for compensation from the Telecommunications Relay Service fund before setting forth standards for ASR that would ensure functional equivalency under the Americans with Disabilities Act. As I said at the time of our decision, the FCC's action put the cart before the horse by introducing ASR into the IP CTS program before we address our most basic regulatory responsibilities. As the FCC proceeds and evaluates the use of ASR in connection with this service, it must ensure that it lives up to the functional equivalency standard required by the law.

Question 2. I am also concerned that reforms to this program would require candidates to travel to their State equipment distributor to receive certification instead of from their physician. As you move forward, will you take into consideration what impact this will have on folks in rural America?

Answer. Yes, absolutely.

Question 3. According to your Report on Broadband Deployment in Indian Country, less than half of homes on rural reservations have access to that same level of broadband service. What are your recommendations for Congress on how to help?

Answer. I believe that Native Americans should not be the last Americans to benefit from the power of the digital age. Yet, as you note, less than half of homes on rural reservations have access to broadband service. There is clearly more work to do—and both the FCC and Congress can help.

At the outset, it has been nearly two decades since the FCC released its Statement of Policy establishing a government-to-government relationship between the agency and federally-recognized Tribes. I believe refreshing this statement and updating its principles of consultation would be a worthwhile exercise. It would set the stage for greater cooperation, consistent with our Federal trust responsibility.

The FCC recently released a Report on Broadband Deployment in Indian Country. Under the law, it is now required to conduct a proceeding to address the unserved areas identified in the report. This proceeding is an opportunity to get the data right and implement policies to address the inadequate state of broadband on Tribal lands.

On August 1, 2019, the FCC adopted a rulemaking seeking comment on ways to improve its broadband data collection. As part of this effort, the agency asked how best to incorporate the input of Tribal governments in order to improve broadband coverage maps.

Congress should monitor these efforts closely. Congress also should direct the FCC to improve its outreach efforts with Tribes to increase the likelihood that broadband connections are available at anchor institutions—schools, libraries, and health centers—on Tribal lands. While funds for these institutions are available via the E-Rate and Rural Health Care program, not all Tribal communities make full use of this resource. Finally, Congress may wish to allocate funds from future spectrum auctions to directly provide enhanced universal service support to carriers serving Tribal lands.

Question 4. Consultations plays such an important role, is the FCC's office of Native Affairs and Policy adequately staffed?

Answer. The Chairman is uniquely situated to provide information about staffing for the FCC's Office of Native Affairs and Policy. However, I believe the answer to your question is "no." I do not believe that this office has been given the staffing or authority it needs to vigorously participate in the full range of FCC proceedings that impact Tribal communities and Tribal lands.

Question 5. Do you have any updates on the progress of the Native Nations Communications Task Force?

Answer. On February 8, 2018, the Native Nations Task Force was renewed for a new, three-year term and renamed the Native Nations Communications Task Force. On October 24, 2018, the Chairman of the FCC appointed the members of this Task Force.

Although the Chairman is uniquely situated to provide an update as to the progress of the Task Force, I believe it can play a significant role in the agency's work to expand communications on Tribal lands. To this end, I would seek guidance from the Task Force on three subjects. First, I would ask for their assistance with the ongoing effort to improve data regarding the state of broadband on Tribal lands. Second, I would seek their assistance with the recent remand from the courts involving the FCC's decision in 2017 to limit the availability of Lifeline support on Tribal lands. I did not support this decision, but I think any subsequent effort from the agency regarding this program and its availability in Tribal communities would benefit from the participation of the Task Force. Third, I would seek their continued input on the use of spectrum on Tribal lands. The FCC recently changed its policies concerning Educational Broadband Service, creating a new opportunity for Tribal communities to seek spectrum licenses in the 2.5 GHz band. The Task Force could assist with outreach to Tribes on this initiative.

Question 6. Do you believe we need to remove existing Huawei equipment from our telecommunications infrastructure?

Answer. Yes. I understand that the Senate Committee on Commerce, Science, and Transportation recently approved the United States 5G Leadership Act, which would make $700 million available to help communications providers across the country remove insecure equipment from their existing networks. In addition, this legislation would take steps to prevent the support of insecure equipment on a going forward basis.

As we proceed with such policies, I believe that we should consider the lessons learned from equipment purchases required by the relocation of broadcast stations in the wake of the 600 MHz incentive auction.

When Congress authorized the FCC to conduct this incentive auction, it required the agency to reimburse a range of equipment costs incurred by full power and Class A television licensees that were assigned to new channels, as well as certain costs incurred by multichannel video program distributors to continue to carry such stations. Congress later expanded the list of entities eligible to be reimbursed for auction-related expenses to include low-power television, translator, and FM broadcast stations.

Before making the authorized funds available, the FCC required eligible entities to certify to the agency basic information about their current broadcasting equipment and detailed cost estimates for their replacement. Next, the FCC conducted audits, data validations, and site visits to ensure the accuracy of the information submitted. To ensure transparency, the FCC made certain equipment eligibility, cost, and disbursement information available to the public. Finally, the FCC clarified early in the process that it would only fund comparable equipment and not upgrades.

In the end, these measures helped maximize the funds available for reimbursement and reduced waste, fraud, and abuse. I believe this effort could serve as a model for the removal of insecure equipment and the implementation of the United States 5G Leadership Act.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JACKY ROSEN TO HON. JESSICA ROSENWORCEL

BROADBAND FOR LOW–INCOME COMMUNITIES. According to the Pew Foundation, rural Americans, seniors, racial minorities, and those with lower incomes are less likely to have broadband service at home. Nonetheless, the FCC recently proposed making changes to the Lifeline program, which helps low-income households stay connected. This would potentially threaten access to broadband for rural, senior, and low-income Americans. The proposal would bar resellers from participating in the Lifeline program. That means approximately 86,000 families in Nevada could be negatively impacted, including 28,000 seniors, 48,000 households with children, 8,000 veteran families, and 600 tribal families.

Furthermore, if this proposal were to take effect, only one service provider would meet the FCC's new rule, and that carrier provides services in only a limited number of states. This could undermine the ability of rural and low-income Nevadans and other Americans to connect to loved ones, health services, their employer, or even to public safety services.

Question 1. Commissioner Rosenworcel, would you please share your thoughts about this proposal and discuss how we might mitigate the potential loss of phone and broadband service by millions, especially those living in rural and tribal areas?

Answer. For more than three decades, the Lifeline program has provided support for basic communications in low-income households across the country. However, in a rulemaking adopted in 2017, the FCC proposed to slash this program from front to back, reducing the number of participants by as much as 70 percent. In a dissenting statement, I strongly objected to this proposal. I believe it is at odds with our statutory duty to support and advance universal service. Moreover, cutting off communications like this is cruel for the communities that rely on Lifeline service, including more than 2 million elderly, 1.3 million veterans, 500,000 individuals in Puerto Rico, as well as residents of many tribal communities. In addition, cutting off Lifeline service would disproportionately harm those victims of domestic violence and homeless youth who rely on this program to stay connected and stay safe. The FCC should not continue in any way, shape, or form with its proposal to cut participation in the Lifeline program by as much as 70 percent. Moreover, it should terminate the docket and close the proceeding entirely.

IP CAPTIONED TELEPHONE SERVICE. One area where telecommunications technology is making a real impact is with our most vulnerable populations, from our seniors to our disabled veterans to our hard of hearing and deaf population. As a member of the Special Committee on Aging I am especially concerned with the 38,000 deaf and hard of hearing people in my state of Nevada. With a growing aging population, not in just my state, but across the country, many will rely on IP Captioned Telephone Service to communicate. This service allows a person with hearing loss to talk normally into the phone, while reading captions of what the person on the other end of the line is saying in real time. My office has heard from consumers who are concerned that as these services move toward automated technologies, the replacement of humans with fully automated speech recognition may result in an inferior service.

Question 2. Commissioner Rosenworcel what safeguards are needed to ensure that new and emerging services like automated captioning and others that record voice data protect consumer privacy?

Answer. For individuals with hearing loss, access to Internet Protocol Captioned Telephone Service can significantly enhance their ability to communicate and participate in modern life. With IP CTS, those with residual hearing can use their own voice to speak during a call but then read captions on their device when the called party responds. This means that people with hearing loss can do the things so many of us take for granted—picking up the phone and seeking emergency help; securing a job; making a doctor's appointment; following up with a child's teacher; and connecting with family and friends.

Automated speech recognition (ASR) holds promise for IP CTS. But I believe the FCC got it backwards when it declared that IP CTS using ASR was eligible for compensation from the Telecommunications Relay Service fund before setting standards for ASR that would ensure functional equivalency under the Americans with Disabilities Act. Moreover, these standards must be informed by a thoughtful assessment of the implications for consumer privacy. In particular, the FCC needs to set forth expectations regarding the protection, retention, storage, and sharing of any conversations that use ASR.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. RON JOHNSON TO HON. MICHAEL O'RIELLY

Question. You've talked about the need to improve the FCC's broadband mapping while also being mindful of the costs of any new data collection. In reviewing any new mapping proposal, should the FCC try to balance granularity and complexity with speed and cost? If yes, how can this balance be achieved?

Answer. Yes, the flaws of the FCC's current Form 477 mapping approach are well-known, and I have supported legislative efforts to improve the effectiveness and accuracy of our data. In determining the appropriate level of data granularity, the FCC must be mindful of the costs of and our mandate for producing more specific maps. The Chairman has circulated an item on improving the Commission's Form 477 data for the August 2019 Open Meeting, and I look forward to examining the record in that proceeding to ensure that we achieve an appropriate balance.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. TODD YOUNG TO HON. MICHAEL O'RIELLY

Question. Currently, millions of rural Americans lack access to fixed high-speed broadband, which in today's economy is perceived as basic infrastructure. In the FCC's 2019 *Broadband Deployment Report,* the FCC concluded that broadband is being deployed to all Americans, including rural Americans, in a timely fashion. The report also asserted that FCC policies are promoting investments and removing burdensome barriers.

With that said, according to a preliminary analysis, which was released on Monday by USTelecom, U.S. broadband provider investments increased by approximately $3 billion to total roughly $75 billion in 2018.

Given the ongoing growth in private investments, what are the FCC's priorities moving forward to ensure U.S. broadband providers have the resources they need in the free market for continued investments in rural America? Additionally, how will the FCC continue to update its mapping to provide an accurate account of high-speed service?

Answer. While there is no doubt that rapid and robust progress in broadband deployment continues, approximately nine million Americans still lack access to even 10/1 Mbps service, and connecting those households should be our foremost priority. In turn, I have urged the Commission to implement the Remote Areas Fund (RAF) auction, in some form or function, and I look forward to swift action on that front. Further, it is crucial that the Commission take steps to prevent USF-funded overbuilding. Unfortunately, insufficient guardrails in the Commission's USF rules have led to E-Rate-funded overbuilds of CAF-funded networks. This has undermined the Commission's own investments, and jeopardized broadband deployment in rural communities. The Commission must act to eliminate this perverse waste and ensure that USF support flows only to where it is truly needed.

As part of the Commission's rural broadband efforts, it is furthermore essential that we fix our broken mapping process. As such, I look forward to reviewing the item scheduled for our August Open Meeting, which is focused on improving the Commission's Form 477 data and achieving an appropriate level of granularity, while being mindful of costs and our statutory mandate.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. EDWARD MARKEY TO HON. MICHAEL O'RIELLY

IP–CTS and Automated Speech Recognition. Automated speech recognition (ASR) has great promise for Internet Protocol Captioned Telephone Service (IP–CTS). However, I understand that current ASR engines vary in quality and accuracy, and I am concerned that nascent technologies might be certified for IP–CTS use without adequate testing. I believe that we need to be careful about implementing this service before it is fully ready.

Question 1. Do you agree that we need to ensure ASR-only providers can handle 911 and related public safety calls before such technology is FCC approved? In your view, has the FCC done enough adequate testing of all types of ASR engines?

Answer. The Commission has made clear that providers using ASR must meet the Commission's mandatory minimum TRS standards, including the requirement to demonstrate that their services support 911 emergency calling and meet the applicable emergency call handling requirements. Should a draft Order to certify an ASR-only provider be circulated to the Commission, I will fully examine the applicable record prior to voting to grant the certification to ensure all requirements are met, including the provider's ability to meet the applicable 911 requirements.

Protecting the C-Band for Public Radio. The Public Radio Satellite System relies on C-Band frequencies to distribute news, programming, and public safety information to nearly 1,300 interconnected local public radio stations and millions of Americans across the country.

Question 2. Can you assure me that any plans to transition C-Band spectrum for new wirelesses services will not impair the vital role that public radio plays in our news, educational programming, and emergency services?

Answer. Yes. From the beginning, I set forth certain principles that must be met in order to support the market-based plan to repurpose some of the C-Band spectrum for next-generation wireless services. These principles included providing a transparent process; reallocating more than 200 megahertz; and ensuring that the incumbents would be accommodated and held harmless. After the many conversations that I have had with interested parties, I believe it is possible to provide upwards of 300 or more megahertz for 5G, while still fully protecting those that currently utilize C-Band satellite services, including local public radio, in the remaining satellite portion of the band.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO HON. MICHAEL O'RIELLY

Question 1. Tribal communities continue to lag behind the rest of the country in the deployment of broadband. The GAO found that inaccuracies in FCC broadband data have led to underestimates of the magnitude of the digital divide on tribal lands. So we may not even have a clear picture as to how wide that gap really is given the current data collection regime. What changes is the FCC considering as part of its efforts to modernize FCC form 477 in order to specifically address the under-reporting in Tribal communities? What are some ways that the FCC can look outside the beltway to engage on this issue?

Answer. I fully agree that many Tribal communities face major obstacles in obtaining access to broadband, and the Commission must prioritize those unserved areas, as well as non-Tribal areas facing equally poor or even worse broadband availability. Therefore, in the Commission's recent Notice of Proposed Rulemaking seeking comment on creating a framework for the upcoming Rural Digital Opportunity Fund auction, I asked the Chairman to seek comment on directing added financial support, via a reserve price bonus or targeted bidding credits, to areas that are completely unserved. Targeting additional support to these most disadvantaged areas will ensure that scarce Universal Service funding is allocated efficiently and based on true need.

With respect to mapping the availability of broadband, I fully agree that the Commission's 477 data is deeply flawed in presenting an adequately granular picture of where service exists. I am hopeful, however, that the Commission's new Digital Opportunity Data Collection effort, which will require fixed providers to submit broadband service polygons, will significantly improve the Commission's mapping process, and enable the Commission to better focus on those millions of Americans without service, including those living on Tribal lands.

Question 2. President Trump is trying to use existing emergency authorities in an unprecedented way when he cannot get Congress or our allies and trading partners to do what he wants them to do. He has also been very clear that he sees the media as "the enemy of the people" and levies daily attacks on a variety of FCC-regulated media organizations and other media owners, threatening them with retaliation.

Existing law gives the president the ability to declare an emergency and close down parts of the Internet and take over broadcast networks to transmit messages. We expect that this would only occur in the direst circumstances such as war or extreme natural disasters. But there is no guarantee that is the case with this—or any other President.

Would the commission work with Congress and provide technical assistance to better reform our emergency laws regarding communications technology to ensure that emergency authority is not abused by any President for political or personal purposes?

Answer. I have always tried to maintain an open line of communication with Congress on any and all issues for which technical assistance is requested, and this remains true in the context of emergency communications. I am happy to provide feedback on any legislative proposals regarding this issue and others.

Question 3. Millions of Americans rely on their local public radio station for news, educational and cultural programming, emergency alerts and public safety information—including in rural, remote and tribal areas. Many public radio stations are the only local news organizations in their communities, and provide unique programming and information tailored to their communities' needs and tastes. The public radio satellite system relies on C-Band spectrum to distribute national and regional programming to and among the local stations. In parts of New Mexico and other rural and tribal areas, there are few alternative sources of news, public safety information, and regional programming—and no workable alternatives to satellite as a means to distribute public radio programming.

As the FCC considers plans to transition C-Band spectrum for 5G and commercial wireless services, please detail how the agency will ensure the C-Band spectrum and satellite service necessary for local public radio stations to continue to provide vital news, programming, and public safety services to America's rural and tribal communities.

Answer. Yes. From the beginning, I set forth certain principles that must be met in order to support the market-based plan to repurpose some of the C-Band spectrum for next-generation wireless services. These principles included providing a transparent process; reallocating more than 200 megahertz; and ensuring that the incumbents would be accommodated and held harmless. After the many conversations that I have had with interested parties, I believe it is possible to provide upwards of 300 or more megahertz for 5G, while still fully protecting those that currently utilize C-Band satellite services, including local public radio, in the remaining satellite portion of the band.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JON TESTER TO HON. MICHAEL O'RIELLY

Question 1. The FCC's Captioned Telephone Services gives folks independence to connect with the world. I support the FCC's intention to ensure this program can handle the influx in participates, however I am concerned about using an automatic speech recognition to replace humans. What is the Commission doing to ensure this technology is adequate and the quality of this service does not decrease?

Answer. I am fully committed to fulfilling our statutory mandate to provide functionally equivalent service to Americans with disabilities while minimizing burdens on TRS ratepayers. Thus, I have supported experimentation with alternative technologies, including ASR. While not perfect for all IP CTS consumers in all instances, ASR can undoubtedly be a helpful tool for certain users, and this technology has improved in recent years. The Commission has made clear that providers opting to use fully automated ASR must meet the Commission's minimum TRS standards. Further, the Commission continues to support IP CTS providers that do not use fully-automated ASR, thus ensuring that non-ASR options continue to be available to consumers.

Question 2. I am also concerned that reforms to this program would require candidates to travel to their State equipment distributor to receive certification instead of from their physician. As you move forward, will you take into consideration what impact this will have on folks in rural America?

Answer. While I am committed to preventing the waste of TRS fund resources and ensuring that IP CTS is only delivered to those who objectively need it, any changes to certification requirements must be supported by a fulsome record and ought to be balanced against potentially disparate burdens on individuals in rural areas. Should a draft Order requiring a new method of user certification be circulated to the Commission, I will fully examine the applicable record prior to voting to approve such a change.

Question 3. According to your Report on Broadband Deployment in Indian Country, less than half of homes on rural reservations have access to that same level of broadband service. What are your recommendations for Congress on how to help?

Answer. Despite a positive overall trend in deploying broadband across our country, many Tribal and non-Tribal communities continue to lack access to any form of broadband whatsoever, and I have urged the Commission to prioritize those unserved areas in awarding Universal Service support. Similarly, in allocating any new funding for broadband infrastructure, I would urge Congress to direct that support to unserved areas—including unserved Tribal communities—rather than areas where broadband already exists. To appropriately target those areas, and to prevent wasteful and duplicative funding, I have encouraged Congress to provide clear directives regarding coordination to the various agencies and departments that distribute broadband funding and to maintain oversight over their coordination. Further, I have recommended that Congress consider the FCC's Universal Service Fund as a primary means to distribute new funding, given the cost-effectiveness of the Commission's reverse auction mechanism for distributing support.

Question 4. Consultations plays such an important role, is the FCC's office of Native Affairs and Policy adequately staffed?

Answer. Issues related to human resources in the Commission's bureaus and offices are handled by the Office of Managing Director; therefore, I must defer to the Commission's Managing Director on this question. However, I am not aware of specific concerns being raised regarding the staffing levels for the Office of Native Affairs and Policy.

Question 5. Do you have any updates on the progress of the Native Nations Communications Task Force?

Answer. The work of the Native Nations Communications Task Force is overseen by the Office of Native Affairs and Policy; therefore, I must defer to the Commission's Office of Native Affairs and Policy on this question.

Question 6. Do you believe we need to remove existing Huawei equipment from our telecommunications infrastructure?

Answer. I have spoken at length about attempts by the Chinese government to monopolize the development of 5G technologies. From using government-sponsored loans and capital to gain market share in the wireless manufacturing market and to promote their providers in China and abroad, to manipulating the international standard-setting process to favor their companies and technologies, the Chinese government is trying to establish its global dominance in wireless technologies for generations to come. As Chinese equipment manufacturers and wireless providers become more pervasive in global communications systems due to these unfair advantages, the Chinese government will have access to any information that touches their equipment or networks. Until we know how to contain this threat, we must consider ways to limit, and, if necessary, remove, such equipment from our telecommunications infrastructure.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. AMY KLOBUCHAR TO HON. GEOFFREY STARKS

Question. The FCC's elimination of net neutrality rules—which went into effect last year—threatens the way we communicate with each other, how companies do business, how consumers buy goods, and even how our kids learn. I cosponsored the Save the Internet Act—which passed the House in April—to restore these rules to ensure a free and open Internet. Can you explain how the repeal of net neutrality has impacted connectivity in rural America?

Answer. Internet openness is one of the most critical communications issues facing policy-makers and consumers today and I believe that consumers need strong legal protections to ensure they have the access to the Internet they expect, and that providers need clear and binding rules of the road. The FCC is the only agency with comprehensive expertise on these communications issues. It needs to be empowered to make rules and take actions to ensure Internet openness.

I'm in favor of returning to the FCC's 2015 Open Internet framework to put the FCC and consumers back in the driver's seat. I think that the FCC's 2015 order established the rules singling out the types of harmful practices that we want to avoid while providing sufficient forward-looking flexibility to both the Commission and providers. I am concerned that the current framework may undermine consumer protections and may threaten the Internet openness on which our economy and our democracy, and Americans, both rural and urban, have come to rely.

Slowed or throttled Internet traffic and applications can be particularity harmful to rural America, which is already faced broadband connectivity challenges. The FCC reports that over 26 percent of rural Americans do not have access to high quality fixed broadband. Provider blocking or throttling of applications and Internet traffic would stand to make a bad situation worse, making service less reliable and available in rural areas, and deepening the growing state of Internet inequality that is leaving many parts of rural America behind.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. EDWARD MARKEY TO HON. GEOFFREY STARKS

IP-CTS and Automated Speech Recognition. Automated speech recognition (ASR) has great promise for Internet Protocol Captioned Telephone Service (IP–CTS). However, I understand that current ASR engines vary in quality and accuracy, and I am concerned that nascent technologies might be certified for IP–CTS use without adequate testing. I believe that we need to be careful about implementing this service before it is fully ready.

Question 1. Do you agree that we need to ensure ASR-only providers can handle 911 and related public safety calls before such technology is FCC approved? In your view, has the FCC done enough adequate testing of all types of ASR engines?

Answer. Yes. I agree that we need to ensure that all IP–CTS providers, to include potential automatic speech recognition (ASR) providers, can handle 911 and related public safety calls. A call to 911 is often the most important call of a person's life, and being able to quickly and accurately convey and receive information during an emergency call is critical. It is important that the Commission have a full and complete understanding of the quality and performance of services offered by ASR-only providers, and particularly how they compare to human Communication Assistants, prior to certification.

As I've previously noted, we need to ensure that technology is seeking to close gaps and level the playing field, and not leaving folks behind. For many, ASR is life changing. It is cost-effective, easy to use, and lets folks talk on the phone in their own voice. But we must ensure that the quality of service is comparable to a live human being. We need to follow the science, and make our decisions based on solid studies and good data. We need to ensure that these services work for everybody before deploying them widely.

Protecting the C-Band for Public Radio. The Public Radio Satellite System relies on C-Band frequencies to distribute news, programming, and public safety information to nearly 1,300 interconnected local public radio stations and millions of Americans across the country.

Question 2. Can you assure me that any plans to transition C-Band spectrum for new wirelesses services will not impair the vital role that public radio plays in our news, educational programming, and emergency services?

Answer. Public radio is one of our most valuable news sources, and the Public Radio Satellite System provides critical distribution services for more than 1,200 public radio stations. While the Commission should make available as much mid-band spectrum as possible for wireless use, any plan for doing so in the C-Band must protect incumbent users like public broadcasters.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO HON. GEOFFREY STARKS

Question 1. Has the FCC has done enough to push companies into building resilient networks or even publishing best practices to help prevent future outages?

Answer. No. The FCC "urges" and "encourages" carriers to follow best practices for network resiliency, but it has fallen short of requiring that companies act. Accordingly, carriers are not subject to enforcement measure or penalties for not taking steps, even basic, well known and accepted steps, to ensure that networks stay operational or are able to be restored quickly following. Furthermore, these limited FCC actions are often reactive, coming in the wake of a storm-related or other outages, rather than proactive efforts designed to prevent outages from occurring in the first place.

The FCC's report released this spring on its actions related to Hurricane Michael finds that carriers fell short of their own commitments when Hurricane Michael slammed into the Florida Panhandle last year, and we saw significant communications challenges in Puerto Rico after Hurricanes Irma and Maria made landfall. This report confirms that voluntary standards aren't sufficient to ensure that carriers invest in preparing their networks to be resilient in the face of hurricanes, which, while devasting, are neither unprecedented nor unpredictable.

And, just this month, the FCC released a report on the massive nationwide 911 outage that took place at the end or 2018. Rather than taking specific actions, this report noted that the FCC would once again remind carriers of industry best practices and their importance.

The FCC has a duty, codified in the Communications Act, to ensure that networks are available for purposes of promoting safety of life and property and for national defense. These are statutory obligations—they can't be met by encouraging carriers to follow voluntary standards.

Question 2. Tribal communities continue to lag behind the rest of the country in the deployment of broadband. The GAO found that inaccuracies in FCC broadband data have led to underestimates of the magnitude of the digital divide on tribal lands. So we may not even have a clear picture as to how wide that gap really is given the current data collection regime. What changes is the FCC considering as part of its efforts to modernize FCC form 477 in order to specifically address the under-reporting in Tribal communities? What are some ways that the FCC can look outside the beltway to engage on this issue?

Answer. I visited several tribal communities in New Mexico in August 2019 and had the opportunity to see, first hand, the connectivity challenges that these communities face. The FCC recently adopted an order and related rulemaking notice starting the process of considering changes to its form 477 data collection. The rulemaking notice asked questions about incorporating information from Tribal lands in the data collection and about including Tribal input in a challenge process related to the data collection but did not propose specific ways that the FCC could take action to address under-reporting in Tribal communities. I dissented from portions of this order because it leaves in place some of the most glaring problems with this data collection at a time when the FCC is proposing to continue using Form 477 data as the basis for Universal Service policymaking.

I believe that the FCC needs to step up its efforts to ensure that all of its data, including data about Tribal communities, is accurate in order to make effective, data-driven policies. With regard to ways the FCC can look outside the beltway to engage on these issues, I believe constant engagement with Tribes is necessary (and is also required by law) and I believe that there are opportunities for the FCC to ensure that the various Federal agencies involved with making broadband available on Tribal Lands are acting in a streamlined and coordinated manner.

Question 3. President Trump is trying to use existing emergency authorities in an unprecedented way when he cannot get Congress or our allies and trading partners to do what he wants them to do. He has also been very clear that he sees the media as "the enemy of the people" and levies daily attacks on a variety of FCC-regulated media organizations and other media owners, threatening them with retaliation.

Existing law gives the president the ability to declare an emergency and close down parts of the Internet and take over broadcast networks to transmit messages. We expect that this would only occur in the direst circumstances such as war or extreme natural disasters. But there is no guarantee that is the case with this—or any other President.

Would the commission work with Congress and provide technical assistance to better reform our emergency laws regarding communications technology to ensure that emergency authority is not abused by any President for political or personal purposes?

Answer. I can't speak for the willingness of the Commission to work with Congress to provide technical assistance to reform our emergency laws in this manner, but I would certainly work with Congress to provide technical assistance on efforts to reform our emergency laws or on any other topic for which my assistance is requested.

Question 4. Millions of Americans rely on their local public radio station for news, educational and cultural programming, emergency alerts and public safety information—including in rural, remote and tribal areas. Many public radio stations are the only local news organizations in their communities, and provide unique programming and information tailored to their communities' needs and tastes. The public radio satellite system relies on C-Band spectrum to distribute national and regional programming to and among the local stations. In parts of New Mexico and other rural and tribal areas, there are few alternative sources of news, public safety information, and regional programming—and no workable alternatives to satellite as a means to distribute public radio programming.

As the FCC considers plans to transition C-Band spectrum for 5G and commercial wireless services, please detail how the agency will ensure the C-Band spectrum and satellite service necessary for local public radio stations to continue to provide vital news, programming, and public safety services to America's rural and tribal communities.

Answer. Public radio is one of our most valuable news sources, and the Public Radio Satellite System provides critical distribution services for more than 1,200 public radio stations. While I want to make available as much mid-band spectrum as possible for wireless use, I will work with my colleagues to ensure that any plan for doing so in the C-Band protects incumbent users like public broadcasters.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JON TESTER TO HON. GEOFFREY STARKS

Question 1. The FCC's Captioned Telephone Services gives folks independence to connect with the world. I support the FCC's intention to ensure this program can handle the influx in participates, however I am concerned about using an automatic speech recognition to replace humans. What is the Commission doing to ensure this technology is adequate and the quality of this service does not decrease?

Answer. The Chairman of the FCC directs the work of the Commission's Bureaus and Offices and is in the best position to offer insight into the ongoing review of requests for certification from certain IP–CTS providers. The Chairman is also best positioned to speak to efforts to ensure that automatic speech recognition (ASR) is adequate and does not represent a decrease in quality from services that utilize human Communication Assistants (CAs). That being said, I fully believe that the Commission must have a full and complete understanding of the quality and performance of ASR providers prior to granting certification. We need to ensure that technology closes gaps and levels the playing field, and does not leave folks behind. As technology improves, ASR has promise to offer high-quality, cost-effective, and easy to use alternatives to services using CAs. But we need to ensure that these services work for everybody before deploying them widely.

Question 2. I am also concerned that reforms to this program would require candidates to travel to their State equipment distributor to receive certification instead of from their physician. As you move forward, will you take into consideration what impact this will have on folks in rural America?

Answer. The administration of Commission programs designed to bring communications services to unserved or underserved communities is among our most mission-critical and important responsibilities. The TRS Fund, and related programs serving persons who are deaf, hard of hearing, deaf-blind, or have speech disabilities, are certainly in this category. While I believe that the integrity of these programs must be preserved, I don't support setting up needless barriers to participation for otherwise eligible users. While I am aware of the proposals mentioned here, I do not have insight into any direction of Commission staff. I would look very carefully at any final rules that would negatively impact the ability of any eligible user, including rural users, to take advantage of these programs and services.

Question 3. According to your Report on Broadband Deployment in Indian Country, less than half of homes on rural reservations have access to that same level of broadband service. What are your recommendations for Congress on how to help?

Answer. The Tribal Broadband Report that the Commission issued in May of this year noted, as you point out, that Tribal areas of the U.S. are way behind other areas of the U.S. in terms of broadband availability and that rural Tribal areas are even farther behind. And, this report was created using the Commission's frequently-criticized broadband data, data that has been shown to overstate coverage.

I support measures to help Tribes and Tribal areas with broadband and other connectivity needs. I think that Tribal bidding credits in auctions and creative ideas for allowing tribal use of spectrum will be part of the solution to Tribal connectivity issues. But, the Commission needs to do better, both in understanding shortcomings in broadband availability on Tribal lands and in taking steps to make improvements.

Question 4. Consultations plays such an important role, is the FCC's office of Native Affairs and Policy adequately staffed?

Answer. The Chairman of the FCC is responsible for determinations regarding the staffing levels of Commission's Bureaus and Offices and is in the best position to offer insight as to whether the Office of Native American Policy is adequately staffed to meet requirements that the Commission consult with Tribal Governments.

Question 5. Do you have any updates on the progress of the Native Nations Communications Task Force?

Answer. The Chairman of the FCC directs the work of the Commission's Bureaus and Offices and is in the best position to offer insight into progress of the Native Nations Communications Task force.

Question 6. Do you believe we need to remove existing Huawei equipment from our telecommunications infrastructure?

Answer. Yes. I believe that this equipment poses a threat to national security and that we need to find the equipment, fix the problems it presents, and, working with Congress, find ways to provide funding to affected carriers to help them replace the equipment. To that end, I have proposed that we "Find it; Fix it; Fund it." In June of this year, I held a "Find it—Fix it—Fund it" Workshop at the FCC to look into these legacy threats which are currently in our networks. This workshop was the largest and most comprehensive gathering to date to consider these issues and gave me an opportunity hear directly from stakeholders and experts. The workshop's "find" panel focused on the scope of the problem—the amounts and types of equipment that pose threats. The "fix" panel looked at proposed solutions, including mitigation and "rip and replace." And the "fund" panel considered mechanisms of funding a proposed solution. I came away understanding that we need a clear and definitive approach to solving these problems.

I'm hopeful that Congress will appropriate funding to help carriers replace insecure equipment already in their networks. Legislation like the bipartisan 5G Leadership Act, which would allocate $700 million from spectrum auctions to fund removal of insecure equipment from communications networks, is a necessary step toward removing the insecure equipment already in our networks. This is a national problem that requires a national solution.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JACKY ROSEN TO HON. GEOFFREY STARKS

TELEHEALTH. Commissioner Starks, I understand you recently visited a health clinic in my home state of Nevada, the Amargosa Valley Medical Center in Nye County. Amargosa Valley has a population of about 1,500 and is in one of the most geographically remote parts of the state, so my constituents living in this rural town depend on the local clinic for most of their medical needs. Telehealth is a major aspect of this service. However, I know that during your visit you took part in a telehealth demonstration, and the Internet connection deteriorated significantly at times over the course of that demonstration, and when the video connection was in use, the rest of the clinic's Internet services became unavailable. In your recent testimony before the House Energy & Commerce Committee, you said in reference to your visit, "we must do better", and I completely agree. The uneven deployment of broadband services in this country can be a matter of life and death when it comes to telehealth, and we need to do better.

One place we can begin is ensuring that broadband speeds are adequate to support telemedicine. Nevada's state broadband office has expressed their concern with the lack of alignment of broadband speeds across Federal agencies. While the FCC uses a benchmark speed of 25/3, other agencies, including USDA, use a lower 10/1 benchmark that can make it seem as if communities are *technically* being served by broadband service, even when they do not actually have access to high-speed Internet sufficient for services like telemedicine.

Question 1. Commissioner Starks, what is the minimum speed needed to provide adequate telehealth service, including video conferencing and the sharing of large data files?

Answer. When I saw health care providers in rural Nevada using telehealth, they were, as you mention in your question, using a connection that deteriorated over the course of the demonstration, and use of it slowed down or stopped other Internet services in the clinic. To me, this connection is not "adequate"—it barely allowed for a video connection and I don't think it would have allowed the clinic to share large data files in a timely manner.

Applications like video conferencing and sharing large data files require dedicated, high-capacity, symmetrical connections. While various technologies can support such connections, I believe that a fiber connection, with its nearly limitless bandwidth and upgradability, combined with low latency and potential to provide symmetrical service, is best suited for telehealth applications.

Question 2. To your knowledge, do most rural clinics have access to the speeds needed to connect patients with doctors in order to provide services that would otherwise be unavailable without a two or three hour car trip?

Answer. As you mentioned in your question, some of the clinics I visited in Nevada have only enough bandwidth to carry a video conference, and when a video conference is ongoing, other uses of broadband in the clinic either slow or stop. Unfortunately, I don't think the demonstration I saw in Nevada was unique or unusual. I heard a similar story during my recent visit to the San Felipe Pueblo in

New Mexico. On a national scale, the FCC's most recent broadband deployment report shows that 26.4 percent of people in rural areas of the U.S do not have access to a broadband connection capable of a 25 Mbps download, 3Mbps download speed. I expect that the percentage of rural clinics without sufficient broadband access is even higher because clinics need higher download and, especially, upload speeds in order to provide the types of health services that would enable patients to receive care locally without requiring them to drive to a distant urban hospital.

Question 3. Should we be investing more in fiber deployment to our rural communities? And how quickly can this be rolled out?

Answer. Yes. Investments in fiber are investments in the future of connectivity. Fiber provides extremely fast service and has virtually limitless capacity—which would future-proof broadband investments, ensuring that they aren't obsolete in the next decade. Using fiber will also ensure that broadband infrastructure is able to support multiple current or future bandwidth intensive applications without causing connections to slow down. Additionally, fiber can be upgraded without the need to dig it up or remove it from wherever it is installed.

Several Federal government initiatives, including the FCC's Universal Service Program and USDA's ReConnect program are already working to provide support for broadband deployment. But, a significant Federal investment in broadband infrastructure will be needed to truly ensure that rural areas are connected with high-capacity, future-proof fiber, and this investment can't come quickly enough.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. EDWARD MARKEY TO HON. BRENDAN CARR

IP–CTS and Automated Speech Recognition. Automated speech recognition (ASR) has great promise for Internet Protocol Captioned Telephone Service (IP–CTS). However, I understand that current ASR engines vary in quality and accuracy, and I am concerned that nascent technologies might be certified for IP–CTS use without adequate testing. I believe that we need to be careful about implementing this service before it is fully ready.

Question 1. Do you agree that we need to ensure ASR-only providers can handle 911 and related public safety calls before such technology is FCC approved? In your view, has the FCC done enough adequate testing of all types of ASR engines?

Answer. The FCC has an obligation to ensure that telecommunications services are available to Americans with hearing loss. One way we do that is through the funding of IP CTS, which allows an individual who can speak but who has difficulty hearing over the phone to use an IP-enabled device simultaneously to listen and read captions of the conversation. In 2018, the FCC issued a declaratory ruling determining that the provision of CTS using automatic speech recognition (ASR) is eligible for Federal support. In doing so, the FCC made sure that such ASR meets certain quality standards to qualify for funding.

Protecting the C-Band for Public Radio. The Public Radio Satellite System relies on C-Band frequencies to distribute news, programming, and public safety information to nearly 1,300 interconnected local public radio stations and millions of Americans across the country.

Question 2. Can you assure me that any plans to transition C-Band spectrum for new wirelesses services will not impair the vital role that public radio plays in our news, educational programming, and emergency services?

Answer. I have not made a final decision on issues raised in the C-Band proceeding. In reaching a final decision, it is important to give due consideration to all stakeholders, including those that operate in the band.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO HON. BRENDAN CARR

Question 1. Commissioner Carr, to follow up with my discussion in Committee will you please list the tribal nations that you have been able to visit during your travels?

Answer. I have had the great privilege of meeting personally with dozens of tribal leaders and officials from across the country, spending time on tribal land to learn more about the challenges of building out broadband, and hearing firsthand about the opportunity that broadband can bring to those living in rural and remote communities. Those consultations and time on tribal land have helped inform my approach to FCC decisions and underscored the importance of working quickly to close the digital divide that persists on these lands.

To give a better sense of the FCC's engagement on these issues, I want to highlight the meetings and consultations the FCC engaged in for just one agency decision. In that one case, FCC Commissioners and staff visited at least nine different states, including Arizona, California, Connecticut, New Mexico, North Carolina, Oregon, South Dakota, Virginia, and Wisconsin. This is in addition to consultations at FCC headquarters and numerous, widely-attended conference calls. One of the in-person consultations was attended by over 70 representatives of more than 50 Tribal Nations and organizations. The FCC's work has benefited greatly from these types of consultations, and my own decisions have been informed by my time in the roughly 30 states I have visited in this job over the past two years.

Question 2. Tribal communities continue to lag behind the rest of the country in the deployment of broadband. The GAO found that inaccuracies in FCC broadband data have led to underestimates of the magnitude of the digital divide on tribal lands. So we may not even have a clear picture as to how wide that gap really is given the current data collection regime. What changes is the FCC considering as part of its efforts to modernize FCC form 477 in order to specifically address the under-reporting in Tribal communities? What are some ways that the FCC can look outside the beltway to engage on this issue?

Answer. At the FCC's August open meeting, we voted to adopt a fundamentally different and more granular approach to collecting broadband deployment information. It is one that does not simply look to modernize our existing Form 477; it starts an entirely new method of data collection that builds on feedback and information culled from outside the beltway. The item specifically directs the agency and USAC to develop a process to ensure Tribal governments may review and dispute the broadband coverage data. And due to an edit I made to the item, we now make clear that USAC should validate carrier submissions using commercial applications and resources.

Question 3. President Trump is trying to use existing emergency authorities in an unprecedented way when he cannot get Congress or our allies and trading partners to do what he wants them to do. He has also been very clear that he sees the media as "the enemy of the people" and levies daily attacks on a variety of FCC-regulated media organizations and other media owners, threatening them with retaliation.

Existing law gives the president the ability to declare an emergency and close down parts of the Internet and take over broadcast networks to transmit messages. We expect that this would only occur in the direst circumstances such as war or extreme natural disasters. But there is no guarantee that is the case with this—or any other President.

Would the commission work with Congress and provide technical assistance to better reform our emergency laws regarding communications technology to ensure that emergency authority is not abused by any President for political or personal purposes?

Answer. The FCC routinely provides technical assistance to Congress when it considers legislation, and the Commission will continue to provide that assistance.

Question 4. Millions of Americans rely on their local public radio station for news, educational and cultural programming, emergency alerts and public safety information—including in rural, remote and tribal areas. Many public radio stations are the only local news organizations in their communities, and provide unique programming and information tailored to their communities' needs and tastes. The public radio satellite system relies on C-Band spectrum to distribute national and regional programming to and among the local stations. In parts of New Mexico and other rural and tribal areas, there are few alternative sources of news, public safety information, and regional programming—and no workable alternatives to satellite as a means to distribute public radio programming.

As the FCC considers plans to transition C-Band spectrum for 5G and commercial wireless services, please detail how the agency will ensure the C-Band spectrum and satellite service necessary for local public radio stations to continue to provide vital news, programming, and public safety services to America's rural and tribal communities.

Answer. I have not made a final decision on issues raised in the C-Band proceeding. In reaching a final decision, it is important to give due consideration to all stakeholders, including those that operate in the band.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JON TESTER TO HON. BRENDAN CARR

Question 1. The FCC's Captioned Telephone Services gives folks independence to connect with the world. I support the FCC's intention to ensure this program can handle the influx in participates, however I am concerned about using an automatic speech recognition to replace humans. What is the Commission doing to ensure this technology is adequate and the quality of this service does not decrease?

Answer. The FCC has an obligation to ensure that telecommunications services are available to Americans with hearing loss. One way we do that is through the funding of IP CTS, which allows an individual who can speak but who has difficulty hearing over the phone to use an IP-enabled device simultaneously to listen and read captions of the conversation. In 2018, the FCC issued a declaratory ruling determining that the provision of CTS using automatic speech recognition (ASR) is eligible for Federal support. In doing so, the FCC made sure that such ASR meets certain quality standards to qualify for funding.

Question 2. I am also concerned that reforms to this program would require candidates to travel to their State equipment distributor to receive certification instead of from their physician. As you move forward, will you take into consideration what impact this will have on folks in rural America?

Answer. Yes, the FCC should consider how any reforms to our program will impact consumers.

Question 3. According to your Report on Broadband Deployment in Indian Country, less than half of homes on rural reservations have access to that same level of broadband service. What are your recommendations for Congress on how to help?

Answer. Closing the digital divide is a top priority at the FCC, and we have a special concern for the divide that persists across Indian Country. One way Congress can encourage the deployment of broadband service is to continue efforts to drive down the regulatory costs of building infrastructure. At the FCC, we have cut more than $3 billion of red tape by modernizing our environmental and historic preservation reviews and by setting guardrails on local fees assessed for use of rights of way. Our partners across the Federal government could speed approvals for broadband across Federal lands, which disproportionately affect communities in the West, including Tribes, and there may be opportunities for Congress to update the relevant permitting rules in this area.

Question 4. Consultations plays such an important role, is the FCC's office of Native Affairs and Policy adequately staffed?

Answer. Over the past few years, the FCC has engaged in extensive consultations with Tribal Nations, especially on infrastructure matters. In fact, I am not aware of another period of time in which the FCC has engaged in this number and level of consultations. With respect to just one infrastructure decision we made last year, for instance, FCC leadership and staff participated in consultations in at least nine different states, including Oklahoma, South Dakota, California, New Mexico, and Arizona. FCC officials attended Tribal conferences, hosted Tribal representatives at the FCC, and conducted dozens of meetings and conference calls concerning the relevant subject matters. Those consultations resulted in significant changes to FCC decisions, and we are prepared to continue to engage with Tribal Nations with the help of all relevant staff.

Question 5. Do you have any updates on the progress of the Native Nations Communications Task Force?

Answer. In February of last year, the Commission issued a Public Notice announcing the renewal and renaming of the Task Force and seeking nominations for members from Tribal Nations. In October, Chairman Pai appointed 19 Tribal members and eight FCC members to the Task Force. Additional information about the Task Force's work can be found at this page: *https://www.fcc.gov/consumer-governmental-affairs/about-bureau/office-native-affairs-and-policy/native-nations*

Question 6. Do you believe we need to remove existing Huawei equipment from our telecommunications infrastructure?

Answer. Two months ago, I visited communities across Montana, including those served by providers that use Huawei equipment. I had the chance to see some of this equipment in the field and talk with both providers and public safety officials (including those working on a military base) about the use and presence of this equipment. Earlier, in 2018, the FCC sought comment on steps we should take to protect against national security threats to the communications supply chain. In voting to launch that proceeding, I asked my colleagues to expand our inquiry in a number of significant ways. For one, I urged my colleagues to put a broader set of options on the table for remedying any threats we identify, including the removal of existing equipment. I am glad that my colleagues agreed to expand our inquiry by including this option. That FCC proceeding remains open, and we have not made a final decision.