proposed SNURs for 145 chemical substances, the Agency also issued direct final SNURs for these chemical substances (83 FR 37702) (FRL–9970–23); that action was withdrawn on September 26, 2018 (83 FR 48546) (FRL–9983–72) before it became effective because of the receipt of negative comments. EPA will address all adverse public comments in a subsequent final rule based on the proposed rule.

To submit comments, or access the docket, please follow the detailed instructions provided under **ADDRESSES** in the **Federal Register** document of August 1, 2018. If you have questions, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

**List of Subjects**

*40 CFR Part 9*

Environmental protection, Reporting and recordkeeping requirements.

*40 CFR Part 721*

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: October 5, 2018.

**Tala R. Henry,**

*Acting Director, Office of Pollution Prevention and Toxics.*

[FR Doc. 2018–22399 Filed 10–12–18; 8:45 am]

**BILLING CODE 6560–50–P**

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 9 and 721

**[EPA–HQ–OPPT–2017–0414; FRL–9984–69]**

**RIN 2070–AB27**

### Significant New Use Rules on Certain Chemical Substances; Reopening of Comment Period

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** EPA issued a proposed rule in the **Federal Register** of August 17, 2018 for significant new use rules (SNURs) for 27 chemical substances. EPA is reopening the comment period because it received a request to extend the comment period but the request was received too late to publish an extension of the comment period before the comment period expired.

**DATES:** This document reopens the comment period for the proposed rule until October 30, 2018. Comments, identified by docket identification (ID) number EPA–HQ–OPPT–2017–0414 must be received on or before October 30, 2018.

**ADDRESSES:** Follow the detailed instructions provided under **ADDRESSES** in the **Federal Register** document of August 17, 2018 (83 FR 41039) (FRL–9981–82).

**FOR FURTHER INFORMATION CONTACT:**

*For technical information contact:* Kenneth Moss, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–9232; email address: *moss.kenneth@epa.gov.*

*For general information contact:* The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

**SUPPLEMENTARY INFORMATION:** This document reopens the public comment period established in the **Federal Register** document of August 17, 2018 (83 FR 41039) (FRL–9981–82). That document proposed SNURs for 27 chemical substances. EPA received a request to extend the comment period for 15 days but the request was received too late to publish an extension of the comment period before the comment period expired. EPA is hereby reopening the comment period for 15 days.

Note that in the August 17, 2018 issue of the **Federal Register** including the proposed SNURs for 27 chemical substances, the Agency also issued direct final SNURs for these chemical substances (83 FR 40986) (FRL–9971–37). As of the date of signature of this action to reopen the comment period on the proposed rule, that direct final rule was in the process of being withdrawn because of the receipt of negative comments. EPA will address all adverse public comments in a subsequent final rule based on the proposed rule.

To submit comments, or access the docket, please follow the detailed instructions provided under **ADDRESSES** in the **Federal Register** document of August 17, 2018 (83 FR 41039) (FRL–9981–82). If you have questions, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

**List of Subjects**

*40 CFR Part 9*

Environmental protection, Reporting and recordkeeping requirements.

*40 CFR Part 721*

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: October 5, 2018.

**Tala R. Henry,**

*Acting Director, Office of Pollution Prevention and Toxics.*

[FR Doc. 2018–22400 Filed 10–12–18; 8:45 am]

**BILLING CODE 6560–50–P**

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 76

**[MB Docket No. 05–311; FCC 18–131]**

### Implementation of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Commission seeks comment on two cable franchising issues raised by the remand from the U.S. Court of Appeals for the Sixth Circuit in *Montgomery County, Md. et al.* v. *FCC*. The Commission tentatively concludes that, with limited exceptions, ''cable-related, in-kind contributions'' required by a franchising agreement should be treated as ''franchise fees'' subject to the statutory five percent cap on franchise fees set forth in Communications Act. It also tentatively concludes that the mixed-use network ruling should be applied to incumbent cable operators to prohibit LFAs from using their video franchising authority to regulate the provision of most non-cable services, including telecommunications services and information services such as broadband internet access service, offered over a cable system by an incumbent cable operator. These tentative conclusions are intended to promote competition by fostering parity between incumbents and new entrants and helping to ensure that local franchising requirements do not discourage cable operators from investing in new facilities and services.

**DATES:** Comments for this proceeding are due on or before November 14, 2018; reply comments are due on or before December 14, 2018.

**ADDRESSES:** You may submit comments, identified by MB Docket No. 05–311, by any of the following methods:

▪ *Federal Communications Commission's Website: http://*

*www.fcc.gov/cgb/ecfs/*. Follow the instructions for submitting comments.

▪ *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

▪ *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: (202) 418–0530 or TTY: (202) 418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** For additional information, contact Kathy Berthot, *Kathy.Berthot@fcc.gov,* of the Media Bureau, Policy Division, (202) 418–7454.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Second Further Notice of Proposed Rulemaking,* FCC 18–131, adopted on September 24, 2018 and released on September 25, 2018. The full text is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW, CY–A257, Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

This *Second Further Notice of Proposed Rulemaking* does not contain any proposed information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002.

## Synopsis

## I. Introduction

1. In this *Second Further Notice of Proposed Rulemaking (Second FNPRM),* we address two issues raised by the remand from the United States Court of Appeals for the Sixth Circuit in *Montgomery County, Md. et al.* v. *FCC,* which addressed challenges to rules and guidance adopted by the Commission governing how local franchising authorities (LFAs) may regulate incumbent cable operators and cable television services. Specifically, we tentatively conclude that we should treat cable-related, ''in-kind'' contributions required by a franchising agreement as ''franchise fees'' subject to the statutory five percent cap on franchise fees set forth in section 622 of the Communications Act of 1934, as amended (the Act), with limited exceptions. We also tentatively conclude that we should apply our prior mixed-use network ruling to incumbent cable operators, thus prohibiting LFAs from using their video franchising authority to regulate the provision of most non-cable services, such as broadband internet access service, offered over a cable system by an incumbent cable operator. We seek comment on these tentative conclusions, which we believe faithfully interpret relevant statutory provisions and will promote competition by fostering parity between incumbents and new entrants and helping to ensure that local franchising requirements do not discourage cable operators from investing in new facilities and services. We also seek comment on whether the proposals and tentative conclusions discussed in this *Second FNPRM,* as well as prior Commission decisions in this proceeding addressing LFA regulation of cable operators, should be applied to state-level franchising actions and state regulations that impose requirements on local franchising.

## II. Background

2. Any entity seeking to offer ''cable service'' as a ''cable operator'' must comply with the cable franchising provisions of Title VI of the Communications Act. Section 621(b)(1) of the Act prohibits a cable operator from providing cable service without first obtaining a cable franchise. Section 621(a)(1) circumscribes the power of LFAs to award or deny such franchises. As originally enacted by Congress as part of the 1984 Cable Act, section 621(a)(1) simply stated that ''[a] franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction.'' In a 1990 Report to Congress, however, the Commission concluded that in order ''[t]o encourage more robust competition in the local video marketplace, the Congress should . . . forbid local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service.'' In response to this Report, Congress revised section 621(a)(1) in 1992 to provide that ''[a] franchising authority may award, in accordance with the provisions of this title, 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.''

3. In 2007, finding that the 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, the Commission issued the *First Report and Order,* which adopted new rules and guidance to implement section 621(a)(1). The Commission concluded that section 621(a)(1) prohibits not only the ultimate unreasonable denial of a competitive franchise application, but also the establishment by LFAs of procedures and other requirements that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise. To eliminate unreasonable barriers to entry into the marketplace for cable services and to encourage investment by new video entrants in broadband facilities, the Commission adopted rules and guidance construing the meaning of ''unreasonable'' for purposes of section 621(a)(1), including rules and guidance governing the treatment of certain costs and fees charged to new entrants into the marketplace for cable services and the regulation of new entrants' ''mixed-use'' networks (*i.e.,* facilities used to provide both cable services and non-cable services).

4. With respect to costs and fees, the Commission determined that unless certain specified costs, fees, and other compensation required by LFAs are counted toward the statutory five percent cap on franchise fees, an LFA's demand for such fees could result in an unreasonable refusal to award a competitive franchise to a new entrant. Under section 622(b) of the Act, the amount of franchise fees that an LFA may collect from a cable operator for any twelve-month period is limited to five percent of the cable operator's gross revenues derived in such period from the operation of the cable system to

provide cable services. Section 622(g)(2) sets forth certain exclusions from the term ''franchise fee.'' In particular, section 622(g)(2)(D) excludes ''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.'' Such ''incidental'' requirements or charges may be assessed by an LFA without counting toward the five percent cap. The Commission concluded that, with respect to franchise agreements for new entrants, non-incidental franchise-related costs required by LFAs must count toward the five percent franchise fee cap and provided guidance as to what constitutes such non-incidental franchise-related costs. The Commission found that non-incidental costs include 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, any requirement to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments.

5. The Commission further found that in the context of some franchise negotiations, LFAs have required from new entrants ''in-kind'' payments or contributions that are unrelated to the provision of cable services. The Commission clarified that any requests for in-kind contributions made by LFAs unrelated to the provision of cable services by a new competitive entrant are subject to the statutory five percent franchise fee cap.

6. Additionally, the Commission clarified that a cable operator may not be required to pay franchise fees on revenues from non-cable services. As noted above, section 622(b) provides 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.'' The Commission noted that it had determined in the *Cable Modem Declaratory Ruling* that an LFA may not assess franchise fees on non-cable services, such as cable modem service, stating that ''revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined.'' Although that decision related specifically to internet access service revenues, the Commission concluded that the same would be true for other ''non-cable'' service revenues.

7. Regarding mixed-use networks (*i.e.,* networks that provide broadband, voice services, and other non-cable services in addition to video programming services), the Commission clarified that LFAs' jurisdiction applies only to the provision of video programming services over new entrants' cable systems. To the extent that a new entrant provides non-cable services and/or operates facilities that do not qualify as a cable system, the Commission concluded that it is unreasonable for an LFA to refuse to award a franchise based on issues related to such services or facilities. The Commission further clarified that an LFA may not use its video franchising authority to attempt to regulate a new entrant's entire network beyond the provision of cable services. The Commission found that ''the provision of video services pursuant to a cable franchise does not provide a basis for customer service regulation by local law or franchise agreement of a cable operator's entire network, or any services beyond cable services.'' The Commission based its decision on the common carrier exception to the definition of ''cable system'' in section 602(7)(C) of the Act, which explicitly states that a common carrier facility subject to Title II is considered a cable system only ''to the extent such facility is used in the transmission of video programming. . . .'' The Commission preempted local regulations that attempt to regulate any non-cable services offered by new entrants, finding that such regulations are beyond the scope of LFAs' authority and inconsistent with section 602(7)(C).

8. The rules adopted in the *First Report and Order* applied only to new entrants applying for cable franchises. Concurrently with its adoption of those rules, the Commission issued a *Further Notice of Proposed Rulemaking* seeking comment on whether to apply the findings in the *First Report and Order* to incumbent cable operators as they negotiate renewal of their existing franchise agreements, noting that many of these findings also appeared germane to existing franchisees.

9. In the *Second Report and Order,* the Commission extended a number of the rules adopted in the *First Report and Order* to incumbent cable operators. The Commission concluded that the findings in the *First Report and Order* interpreting section 622 should apply equally to incumbents and new entrants because Section 622 ''does not distinguish between incumbent providers and new entrants.'' Thus, the Commission found that in-kind contributions are not to be regarded as ''incidental'' and therefore must count toward the five percent franchise fee cap for incumbent cable operators. The Commission further found that the clarification that a cable operator is not required to pay franchise fees on revenues from non-cable services applies to incumbent cable operators. The Commission also determined that its findings on mixed-use networks provided in the *First Report and Order* should apply equally to incumbents and new entrants, noting that these findings relied on its statutory interpretation of ''cable system'' in section 602(7)(C), which ''does not distinguish between incumbent providers and new entrants.'' The Commission thus clarified that LFAs' jurisdiction over incumbent cable operators applies only to the provision of cable services over cable systems and that an LFA may not use its franchising authority to regulate non-cable services offered by incumbent cable operators.

10. The Sixth Circuit Court of Appeals subsequently issued a decision rejecting LFA challenges to the *First Report and Order*. With respect to franchise fees charged to new entrants, the court upheld the Commission's listing of the non-incidental charges that fall within the purview of the statutory five percent franchise fee cap, which includes in-kind payments. The court found that the Commission's interpretation of the phrase ''incidental to'' in section 622(g)(2)(D) of the Act was reasonable and therefore was entitled to deference under *Chevron*.

11. In 2015, the Commission issued an order responding to several LFA petitions for reconsideration of the *Second Report and Order*. LFAs challenged the inclusion of in-kind payments in calculating the franchise fee cap for incumbent cable operators, arguing that the Commission's findings in the *Second Report and Order* give an overly expansive scope to section 622(g)(2)(D) and expanded the definition of in-kind payments set forth in the *First Report and Order*. The Commission disagreed, finding that the *Second Report and Order* merely extended the *First Report and Order's* conclusions regarding application of the term ''incidental'' in section 622(g)(2)(D) to incumbent cable operators. The Commission also rejected LFAs' arguments that the *First Report and Order* included in the franchise fee cap only in-kind payments that are unrelated to cable service, not in-kind payments that are related to cable service. The Commission observed that in a section entitled ''Charges incidental to the awarding or enforcing of a franchise,'' the *First Report and Order* identified ''free or discounted services provided to an LFA'' as one type of

''non-incidental'' cost that counted toward the franchise fee cap. The Commission explained that in that context, the *First Report and Order* was referring to free or discounted cable services. The Commission further found that consistent with the *First Report and Order,* the *Second Report and Order* noted that non-incidental in-kind payments must count toward the five percent franchise fee cap for incumbent cable operators and did not expressly limit this requirement to in-kind payments that are unrelated to cable service.

12. The *Order on Reconsideration* also declined to modify the conclusions in the *Second Report and Order* regarding mixed-use networks. The Commission observed that the *Second Report and Order* extended the Commission's findings on mixed-use networks to incumbent cable operators, clarifying that LFAs' jurisdiction over incumbent cable operators is limited to the provision of cable services over cable systems and that LFAs may not use their franchising authority to regulate non-cable services provided by incumbent cable operators. The Commission rejected the LFAs' argument that the legislative history of the 1984 Cable Act indicates that they have authority over cable systems in their provision of non-cable services, explaining that while the legislative history discusses what constitutes a cable service, it does not address whether localities may regulate non-cable services provided over cable systems.

13. In *Montgomery County,* the Sixth Circuit Court of Appeals addressed challenges by LFAs to the *Second Report and Order* and the *Order on Reconsideration.* The court rejected LFA arguments that non-cash exactions are not ''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. 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.'' 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 as franchise fees. LFAs had claimed that the Commission's interpretation would limit their ability to enforce statutory requirements for PEG channel capacity and for build-out obligations in low-income areas, and the court noted that the Commission's orders did not reflect any consideration of this LFA concern. The court also stated that the FCC failed to define what ''in-kind'' means. 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'' under section 622(g)(1). 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.

14. The court in *Montgomery County* also agreed with LFAs that neither the *Second Report and Order* nor the *Order on Reconsideration* offer a valid statutory basis for the application of the mixed-use ruling to bar LFAs from regulating the provision of non-telecommunications services by incumbent cable operators. (The court noted that the LFAs' primary concern with the mixed-use ruling is that it would prevent them from regulating ''institutional networks'' or ''I-Nets''—communication networks which are constructed or operated by the cable operator and which are generally available only to subscribers who are not residential customers—even though the Act makes clear that LFAs may regulate I-Nets. The court observed, however, that the Commission acknowledged that its mixed-use ruling was not meant to prevent LFAs from regulating I-Nets.) The court stated that the Commission's decision in the *First Report and Order* to apply the mixed-use ruling 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. The court observed that in extending the mixed-use ruling 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.'' 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 ruling 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.'' The court further found that the *Order on Reconsideration* did not offer any statutory explanation for the Commission's decision to extend the mixed-use ruling to incumbent cable operators. Accordingly, the court concluded that the Commission's extension of the mixed-use ruling to incumbent cable operators that are not common carriers was arbitrary and capricious. The court vacated the mixed-use ruling 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.''

15. As we address the court's remand in this proceeding, we view the proposals discussed below as part of the Commission's larger, ongoing effort to reduce regulatory barriers to infrastructure investment. For example, the Commission's open wireline and wireless infrastructure proceedings have advanced a number of regulatory reforms to spur wireline and wireless service deployment, and additional reforms remain under consideration for future Commission action. In the wireline proceeding, the Commission has already enacted numerous reforms to our rules and procedures regarding pole attachments, copper retirement, and discontinuances of legacy services that will better enable providers to invest in next-generation networks. In the wireless proceeding, to enable and to speed the deployment of advanced wireless services throughout the United States, we revised the rules and procedures for deployments subject to the National Historic Preservation Act and National Environmental Policy Act. We also made changes to the historic preservation review requirement for replacement utility poles, and have sought comment on a proposal that would make existing infrastructure available for additional wireless deployments on towers that previously have been unavailable. Similarly, with this item, we seek to faithfully interpret the statutory provisions at issue in a way that preserves incentives for all cable operators to deploy infrastructure that can be used to provide numerous services, including video, voice, and broadband internet access service, to consumers.

## III. Discussion

### *A. Cable-Related, In-Kind Contributions*

16. We tentatively conclude that we 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 franchise fee cap set forth in section 622 of the Act, with limited exceptions as described below. We tentatively conclude that this

interpretation is most consistent with the statutory language and legislative history and seek comment on our analysis.

17. Section 622(b) directs that ''the franchise fees paid by a cable operator'' for any 12-month period ''shall not exceed 5 percent of such cable operator's gross revenues.'' Section 622(g)(1) defines ''franchise fee'' broadly to include ''any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator . . . solely because of their status as such.'' The court in *Montgomery County* acknowledged that the term ''franchise fee'' can include in-kind contributions, but stated that further explanation was necessary in order for the Commission to conclude that cable-related, in-kind contributions are covered within the definition. We note that the broad definition of ''franchise fee'' in the statute covers ''any kind'' of tax, fee, or assessment, without distinguishing between whether it is related or unrelated to the provision of cable service. The legislative history, in discussing the definition of ''franchise fee,'' likewise suggests no such distinction was intended by Congress. The court's decision in *Montgomery County* did not disturb the Commission's treatment of in-kind contributions unrelated to the provision of cable services as franchise fees subject to the statutory five percent cap. We see no basis in the statute or 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. If in-kind contributions unrelated to the provision of cable services were not treated as franchise fees, LFAs could easily evade the five percent cap by requiring any manner of in-kind contributions, rather than a monetary fee. Likewise, if cable-related, in-kind contributions are not counted as franchise fees, LFAs could circumvent the five percent cap by requiring, for example, unlimited free or discounted cable services and facilities for LFAs, in addition to a five percent franchise fee. We believe this result would be contrary to Congress's intent as reflected in the broad definition of ''franchise fee'' in the statute. We seek comment on this analysis.

18. Section 622(g)(2) sets forth five exclusions from the term ''franchise fee.'' To begin with, section 622(g)(2)(A) excludes ''any tax, fee, or assessment of general applicability.'' The legislative history explains that a tax, fee, or assessment of general applicability includes ''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.'' By definition, a tax, fee, or assessment of general applicability does not cover cable-related, in-kind contributions. Thus, we tentatively conclude the exclusion set forth in subsection (A) is not applicable here. Additionally, section 622(g)(2)(E) excludes 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. Furthermore, section 622(g)(2)(D) excludes ''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.'' Although the statute does not define the term ''incidental,'' based on the interpretive canon of *noscitur a sociis,* the exemplary list delineated within the text of the provision—*i.e.,* ''bonds,'' ''security funds,'' ''letters of credit, ''insurance,'' ''indemnification,'' ''penalties,'' and ''liquidated damages''—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. The legislative history similarly explains that a ''franchise fee is defined so as not to include any bonds, security funds, or other incidental requirements for costs necessary to the enforcement of the franchise.'' The court in *Alliance* upheld the Commission's determination that under section 622(g)(2)(D), the term ''incidental'' is ''limited to the list of incidentals in the statutory provision, as well as other minor expenses.'' The Commission has determined that non-incidental costs required by LFAs must count toward the five percent franchise fee cap. The *First Report and Order* listed various examples of non-incidental costs, including in-kind payments unrelated to provision of cable service. For the reasons stated above, we tentatively conclude that cable-related, in-kind contributions, such as free or discounted cable services demanded by an LFA, likewise do not qualify as ''incidental'' charges under the exclusion in subsection (D). We seek comment on this analysis.

19. Additionally, section 622(g)(2)(B) contains an exclusion for PEG support payments, but only with respect to franchises granted prior to 1984. To the extent that any such franchises are still in effect, we tentatively conclude that under section 622(g)(2)(B), PEG support payments made pursuant to such franchises are cable-related, in-kind contributions excluded from the five percent franchise fee cap. We seek comment on this tentative conclusion. Finally, for any franchise granted after 1984, section 622(g)(2)(C) contains a narrow exclusion covering PEG ''capital costs which are required by the franchise.'' The legislative history explains that with ''regard[ ] [to] PEG access in new franchises, payments for capital costs required by the franchise to be made by the cable operator are not defined as fees under this provision.'' The court in *Alliance* affirmed the Commission's interpretation of the exemption in section 622(g)(2)(C) as being limited to ''those costs incurred in or associated with the construction of PEG access facilities.'' Accordingly, under the statute, for purposes of franchises granted after 1984, we tentatively conclude that PEG capital costs required by the franchise are in-kind, cable-related contributions excluded from the five percent cap. We seek comment on the above analysis. We also understand that costs for studio equipment are treated as capital costs for purposes of section 622(g)(2)(C) by both cable operators and LFAs given that most PEG facilities are already constructed. We seek comment on this practice.

20. We tentatively conclude that treating cable-related, in-kind contributions as ''franchise fees'' would not undermine provisions in the Act that authorize or require LFAs to impose cable-related obligations on franchisees. We note, in this regard, that the Act authorizes 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. The fact that the Act authorizes LFAs to impose such obligations does not, however, mean that the value of these obligations should be excluded from the five percent cap on franchise fees. Indeed, the statute suggests otherwise. Section 622(g)(2) carves out only limited exclusions for PEG-related costs—*i.e.,* PEG support payments required by any franchise granted prior to 1984 and PEG capital costs required by any franchise granted after 1984. Section 622(g)(2) makes no mention of an I-Net-related exclusion, nor does it contain a general exclusion for all PEG related costs. Since Congress enacted the PEG and I-Net provisions at the same time it added the franchise fee provisions, it could have explicitly excluded those costs in addressing the scope of the PEG-related

costs in that subsection if it had intended they not count toward the cap. Based on this, we tentatively find that treating all cable-related, in-kind contributions as ''franchise fees,'' unless expressly excluded by the statute, would best effectuate the statutory purpose. To the extent that an LFA wishes to impose such obligations, the LFA can count the value of the services or facilities towards the cable operator's franchise fee payment, if the services or facilities are not exempt from the franchise fee cap in section 622(g)(2). In our view, an LFA should not be permitted to make an end run around the statutory cap by requiring a cable operator to pay franchise fees equal to five percent of its gross revenues for cable services and also assume the costs of cable-related, in-kind contributions. We seek comment on this view.

21. LFAs have previously suggested that our proposed interpretation would treat as franchise fees all costs related to franchise requirements, even those allowed under the Cable Act. We disagree. For example, the Act directs LFAs ''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,'' a mandate which may cause LFAs to impose build-out obligations on cable operators. Although these obligations are not free for cable operators, we do not propose to interpret build-out obligations as contributions to the LFA. Because build-out obligations (unlike I-Net facilities) involve the construction of facilities that are not specifically for the use or benefit of the LFA or any other entity designated by the LFA, but rather are part of the provision of cable service in the franchise area and the facilities ultimately may result in profit to the cable operator, we do not think they should be considered contributions to an LFA. Under this approach, the cost that these obligations impose on cable operators would not count toward the five-percent franchise fee cap. We seek comment on this proposed interpretation. We also seek comment on whether there are other requirements besides build-out obligations that are not specifically for the use or benefit of the LFA or an entity designated the LFA and therefore should not be considered contributions to an LFA.

22. Additionally, we tentatively conclude that this treatment of cable-related, in-kind contributions should be applied to both new entrants and incumbent cable operators. As discussed above, in adopting rules and guidance implementing section 621(a)(1), including rules governing the treatment of certain costs and fees charged by LFAs, the Commission found that the 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. Specifically, the Commission found that the local franchising process unreasonably delays new entrants from upgrading their networks to provide video services, which discourages investment in the fiber-based infrastructure necessary for the provision of broadband services by depriving new entrants of revenues needed to offset the costs of such deployment. We acknowledge that this distinguishes new entrants from incumbent cable operators, who have already deployed their infrastructure for both video and broadband. Nevertheless, we believe that applying the same treatment of cable-related, in-kind contributions to both new entrants and incumbent cable operators would 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. Moreover, as the Commission has previously observed, Section 622 ''does not distinguish between incumbent providers and new entrants.'' We seek comment on this proposal.

23. We seek comment on the effect, if any, that our statutory interpretation would have on LFAs' ability to impose cable-related, in-kind obligations on new entrants and incumbents consistent with the statutory provisions described above. To the extent that commenters assert that it would unreasonably hamper LFAs' ability to impose such obligations, we request that they provide specific cost data or other information to support their position. Conversely, what effect, if any, would excluding cable-related, in-kind contributions from ''franchise fees'' (*i.e.,* allowing LFAs to seek unlimited cable-related, in-kind contributions on top of the five percent franchise fee permitted by section 622) have on new entrants and incumbents? Would such exclusion likely delay or deter infrastructure investment by new competitors? Would it affect incumbent cable operators' ability to invest in new facilities and services, including improving broadband services? We also seek comment on the costs and benefits to consumers of our proposed treatment of cable-related, in-kind contributions.

24. We propose to define ''cable-related, in-kind 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 agreement, including but not limited to free or discounted cable services and the use of cable facilities or equipment. It does not include the cost of build-out requirements.'' Under this proposed definition, cable-related, in-kind contributions would not have to be provided directly to the LFA to be subject to the statutory five percent cap; rather, any cable-related, in-kind contributions provided to the LFA or any other entity designated by the LFA as a condition or requirement of a franchise agreement would be subject to the cap, if not expressly exempt under section 622(g)(2). We seek comment on this proposed definition. We request commenters to provide examples of the types of cable-related, ''in-kind'' contributions that have been or are being required by LFAs. We further propose that cable-related, in-kind contributions be valued for purposes of the franchise fee cap at their fair market value. We seek comment on this proposal, and how such a market valuation should be performed. Alternatively, we seek comment on whether cable-related, in-kind contributions should be valued at the cost to the cable operator.

*B. Mixed-Use Networks*

25. We tentatively conclude that the mixed-use network ruling should be applied to incumbent cable operators to the extent that they offer or begin offering non-cable services. Thus, we propose to prohibit LFAs from using their video franchising authority to regulate most non-cable services offered over cable systems by incumbent cable operators. Non-cable services offered by incumbent cable operators include telecommunications services and non-telecommunications services. Telecommunications services offered by incumbent cable operators may include, for example, some business data services. Non-telecommunications services offered by incumbent cable operators may include information services, such as broadband internet access services, and private carrier services, such as certain types of business data services. Incumbent cable operators may also offer facilities-based interconnected Voice over internet Protocol (VoIP) service, which has not been classified by the Commission as either a telecommunications service or an information service but is clearly not a cable service. We seek comment on whether there are other services offered by incumbent cable operators that are

not listed above that are relevant to our analysis.

26. As an initial matter, we note that the court in *Montgomery County* vacated the mixed-use rule only as applied to incumbent cable operators that are not common carriers. The court, however, appears to have left undisturbed application of the mixed-use ruling to incumbent cable operators that are also common carriers. As explained above, some incumbent cable operators provide telecommunications services over their facilities. 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.'' Thus, an incumbent cable operator, to the extent it offers telecommunications service, would be treated as a common carrier subject to Title II of the Act. Section 602(7)(C) of the Act, in turn, 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, except that such facility shall be considered a cable system . . . to the extent such facility is used in the transmission of [cable service].'' Accordingly, to the extent that any incumbent cable operators offer any telecommunications services, we tentatively conclude that they are covered under the common carrier exception in section 602(7)(C), and thus can be regulated by LFAs only to the extent they provide cable service. Although we recognize that there are distinctions between the obstacles faced by new entrants and incumbent cable operators, we see no basis in the statute to treat differently incumbent cable operators that are common carriers and new entrants that are common carriers for purposes of application of the common carrier exception. We thus tentatively conclude that the mixed-use network ruling 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 (with the exception of I-Nets, as noted above). We seek comment on this analysis and the tentative conclusions.

27. In addition, we seek comment on LFAs' authority to regulate the provision of non-cable services by incumbent cable operators that are not also common carriers. We also seek comment on LFAs' authority to regulate a non-common carrier new entrant's provision of information services. We request information on the extent to which incumbent cable operators are not also common carriers. Are the incumbent cable operators that are also common carriers mostly the largest incumbent cable operators? Regarding non-cable services provided by incumbent cable operators that are not common carriers, we tentatively conclude that section 624(b) of the Act prohibits LFAs from using their franchising authority to regulate the provision of information services, including broadband internet access service. Under section 624(b), LFAs ''may not . . . establish requirements for video programming or other information services.'' Section 624 does not define the term ''information services,'' but the ''definitions'' section of the legislative history distinguishes ''information service'' from ''cable service.'' The House Report states 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 allow transactions between subscribers and cable operators or third parties.'' We also find significant that the description of ''information services'' contained in the 1984 Cable Act's 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''—corresponds closely to the 1996 Telecommunications Act's definition of ''information service'' contained 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.'' For all the reasons stated above, we believe that for purposes of section 624(b), interpreting ''information services'' to have the meaning set forth in section 3(24) of the Act would best reflect Congressional intent. We further note that the Commission recently reinstated the ''information service'' classification of broadband internet access service. We seek comment on this analysis.

28. Based on the above analysis, we tentatively conclude that the statute also bars LFAs from regulating the provision of broadband internet access and other information services by incumbent cable operators that are not common carriers. Although section 624(b)(2)(B) allows franchising authorities to enforce requirements for ''broad categories of video programming or other services,'' when read in light of Section 624(b)(1) and the legislative history, we believe that Congress intended to bar LFAs from regulating information services. We further note that under section 624(b), ''the franchising authority, to the extent related to the establishment or operation of a cable system . . . may establish requirements for facilities and equipment.'' In light of our tentative finding that section 624(b)(1) bars LFAs from regulating information services, we do not believe this provision authorizes LFAs to regulate facilities or equipment to the extent they are used to provide such services, including broadband internet access service. We seek comment on this interpretation and our tentative conclusion. Would such an interpretation best effectuate the statutory purpose? We also seek comment on the extent to which LFAs currently attempt to regulate the provision of information services by incumbent cable operators or the facilities and equipment used in the provision of such services. Do LFAs require incumbent cable operators to obtain a separate franchise or pay franchise fees in connection with their provision of broadband internet access or other information services, and if so, what are the circumstances and rationale for such requirements? What other franchise requirements do LFAs impose on information services provided by incumbent cable operators? What effect, if any, do such franchise requirements have on the deployment of new information services, including broadband internet access service?

29. In any event, we believe that LFA regulation of such services would be inconsistent with longstanding federal policy. The Commission has previously concluded that broadband internet access service is ''a jurisdictionally interstate service because 'a substantial portion of internet traffic involves accessing interstate or foreign websites.''' Therefore, we tentatively conclude that LFAs may not regulate such interstate services and that doing so would frustrate the light-touch information service framework established by Congress that the Commission has previously found necessary to promote investment and innovation. In the *Restoring internet Freedom Order,* the Commission concluded that ''regulation of broadband internet access service

should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements.'' The Commission found that allowing state and local governments to regulate broadband internet access service could disrupt the procompetitive, deregulatory goals of the federal regulatory regime and impair the provision of broadband internet access service by requiring each provider to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates. The Commission therefore preempted any state or local measures that would impose rules or requirements that it had repealed or decided to refrain from imposing in that order or that would impose more stringent requirements for any aspect of broadband service addressed in that order. Among other things, the Commission expressly preempted any ''economic'' or ''public utility-type'' regulations, including entry and exit restrictions. For similar reasons, we tentatively conclude that entry and exit restrictions include a requirement that an incumbent cable operator obtain a franchise to provide broadband internet access service and that LFAs therefore are expressly preempted from requiring incumbent cable operators to obtain franchises to provide broadband internet access service. We seek comment on this tentative conclusion. We also seek comment 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.

30. Moreover, we tentatively conclude that it would be contrary to the goals of the Communications Act to permit LFAs to treat incumbent cable operators that are not also common carriers differently than incumbent cable operators and new entrants that are also common carriers in their provision of information services, including broadband internet access services. Incumbent cable operators and new entrants (whether they are common carriers or non-common carriers) often compete against each other in the same markets, and often provide nearly identical services to consumers. Thus, to regulate incumbent cable operators that are not also common carriers more strictly, by permitting LFAs to place franchise requirements on their non-cable services and assess fees on these services, could put these incumbents at a competitive disadvantage that section 621 was intended to avoid. This competitive disadvantage could impact not only the incumbents' provision of broadband internet access and other information services, but also their provision of cable services. Such a result could ultimately have a negative impact on consumers, thereby undermining the goal of the Telecommunications Act of 1996 Act to ''promote competition'' across communications providers and ''to secure lower prices and higher quality services for American telecommunications consumers'' by reducing regulation. We seek comment on this analysis. We believe these same concerns would apply to new entrants that are not common carriers and seek comment on this analysis with respect to such entities.

31. Finally, we seek comment on whether there are any other statutory provisions that relate to the authority of LFAs to regulate the provision of non-cable services offered over a cable system by an incumbent cable operator or the facilities and equipment used in the provision of such services. For example, NCTA cites several additional provisions in support of its assertion that the Commission should apply the mixed-use network ruling to incumbent cable operators: Section 621(a)(2) of the Act; Section 622 of the Act; Section 624(e) of the Act; Section 230(b) of the Act; and Section 253 of the Act. We seek comment on the extent to which these and any other relevant statutory provisions relate to the authority of LFAs to regulate the provision of non-cable services offered over a cable system by an incumbent cable operator.

### *C. State Franchising Regulations*

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. 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. 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. As explained above, the Commission limited its decisions in the *First Report and Order* and *Second Report and Order* to actions or inactions at the local level where a state has not specifically circumscribed the LFA's authority, finding that many of the state franchising laws had been in effect for only a short period of time and that it did not have a sufficient record to apply these decisions to franchising decisions where a state is involved. The Commission, however, indicated that it would revisit this issue in the future if it received evidence that the findings in the *First Report and Order* and/or the *Second Report and Order* were of practical relevance to the franchising process at the state level. More than ten years has passed since the Commission first considered whether to apply its decisions interpreting section 621(a)(1) to state-level franchising actions and state regulations that impose requirements on local franchising. Accordingly, we invite comment on whether we should apply the proposals and tentative conclusions discussed above, as well as any or all aspects of the Commission's decisions in the *First Report and Order* and *Second Report and Order,* to state level franchising actions and state regulations that impose requirements on local franchising. Is there any statutory basis to maintain the distinction between state-level franchising actions and local franchising actions? Do state level franchising actions or state regulations governing the local franchise process today impede competition or discourage investment in infrastructure that can be

used to provide services, including video, voice, and broadband internet access service, to consumers?

## IV. Procedural Matters

### *A. Initial Regulatory Flexibility Act Analysis*

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Act Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Second Further Notice of Proposed Rulemaking* (*Second FNPRM*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the *Second FNPRM.* The Commission will send a copy of the *Second FNPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *Second FNPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

### *B. Need for, and Objectives of, the Proposed Rules*

2. Section 621(a)(1) of the Communications Act of 1934, as amended, (Act) prohibits local franchising authorities (LFAs) from unreasonably refusing to award competitive franchises for the provision of cable television services. The Commission has 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 (*i.e.,* facilities used to provide both cable services and non-cable services). In *Montgomery County, Md. et al.* v. *FCC,* the United States Court of Appeals for the Sixth Circuit addressed challenges to these rules. 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 franchise fees set forth in section 622(g) of the Act. 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.

3. The *Second FNPRM* tentatively concludes that cable-related, in-kind contributions required by LFAs from cable operators as a condition or requirement of a franchise agreement should be treated as ''franchise fees'' subject to the statutory five percent franchise fee cap set forth in section 622 of the Act, with limited exceptions. For any franchise granted prior to 1984, section 622(g)(2)(B) contains an exclusion for PEG support payments. For any franchise granted after 1984, section 622(g)(2)(C) contains a narrow exclusion covering in-kind, cable related payments for ''capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental [PEG] access facilities.'' Accordingly, the *Second FNPRM* tentatively concludes that PEG support payments required by franchises granted prior to 1984 and PEG capital costs required by franchises granted after 1984 are cable-related, in-kind contributions excluded from the five percent cap. The *Second FNPRM* also tentatively concludes that this treatment of cable-related, in-kind contributions should be applied to both new entrants and incumbent cable operators. The *Second FNPRM* tentatively concludes that doing so would ensure a more level playing field and that the FCC should not place its thumb on the scale to give a regulatory advantage to any competitor.

4. The *Second FNPRM* proposes to define ''cable-related, in-kind 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 agreement, such as free or discounted cable services, and the use of cable facilities or equipment. It does not include the cost of franchise obligations that do not directly benefit the LFA, including, but not limited to, build-out requirements.'' The *Second FNPRM* further proposes that cable-related, in-kind contributions be valued for purposes of the franchise fee cap at their fair market value.

5. Additionally, the *Second FNPRM* tentatively concludes that the mixed-use network ruling should be applied to incumbent cable operators to the extent that they offer or begin offering non-cable services, prohibiting LFAs from using their video franchising authority to regulate certain non-cable services offered over cable systems by incumbent cable operators. The *Second FNPRM* tentatively concludes that the mixed-use network ruling 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. Further, the *Second FNPRM* tentatively concludes that LFAs may not use their franchising authority to regulate incumbent cable operators' provision of information services, including broadband internet access service. The *Second FNPRM* also tentatively concludes that consistent with the Commission's decision in the *Restoring internet Freedom Order,* which preempted any state or local measures that would impose rules or requirements that the Commission repealed or decided to refrain from imposing in that order or that would impose more stringent requirements for any aspect of broadband service addressed in that order, LFAs are expressly preempted from requiring incumbent cable operators to obtain franchises to provide broadband internet access service.

6. The *Second FNPRM* also seeks comment on whether to apply the proposals and tentative conclusions discussed in the instant proceeding, 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 imposing requirements on local franchising.

### *C. Legal Basis*

7. The proposed action is authorized pursuant to sections 1, 4(i), 303. 602, 621, 622, and 624 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 303, 522, 541, 542, and 544.

### *D. Description and Estimates of the Number of Small Entities to Which the Proposed Rules Will Apply*

8. 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 proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. 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. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

9. *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 here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used 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. These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.

10. 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.'' Nationwide, as of Aug 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).

11. 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.'' U.S. Census Bureau data from the 2012 Census of Governments indicates that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 37,132 General purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,184 Special purpose governments (independent school districts and special districts) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category shows that the majority of these governments have populations of less than 50,000. Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of ''small governmental jurisdictions.''

12. *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.'' 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. U.S. Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small.

13. *Cable Companies and Systems (Rate Regulation Standard).* The Commission has developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide. Industry data indicate that, of 4,600 cable operators nationwide, all but 9 are small under this size standard. In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. Industry data indicate that, of 4,600 systems nationwide, 3,900 have fewer than 15,000 subscribers, based on the same records. Thus, under this second size standard, the Commission believes that most cable systems are small.

14. *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 1 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 $250,000,000.'' There are approximately 52,403,705 cable subscribers in the United States today. 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. 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. 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, 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.

15. *Open Video Services.* Open Video Service (OVS) systems provide subscription services. The open video system framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers. 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, which is ''Wired Telecommunications Carriers.'' The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for the OVS service, the Commission relies on data currently available from the U.S. Census for the year 2012. According to that source, there were 3,117 firms that in 2012 were Wired Telecommunications Carriers. Of these, 3,083 operated with less than 1,000 employees. Based on this data, the majority of these firms can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises. The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities. The Commission further notes that it has certified approximately 45 OVS operators to serve 116 areas, and some of these are currently providing service. Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, DC, and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not

yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 44 OVS operators (those remaining) might 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*

16. The rules proposed in the *Second FNPRM* would not impose any additional reporting or recordkeeping requirements and any compliance requirements imposed by the proposed rules are expected to have only a de minimis effect on small governmental jurisdictions. LFAs would continue to perform their role of reviewing and making decisions on applications for cable franchises and any modifications to the local franchising process resulting from the proposed rules would further streamline that process. The proposed rules would 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. In addition, the proposed rules would 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.

*F. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered*

1. The RFA requires an agency to describe any significant, specifically small business, alternatives that 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.

2. To the extent that the proposed rules are matters of statutory interpretation, we tentatively find that the proposed rules are statutorily mandated and therefore no meaningful alternatives exist. Moreover, as noted above, the proposed rules are expected to have only a de minimis effect on small governmental jurisdictions. The proposed rules would streamline the local franchising process by providing additional guidance to LFAs.

3. In addition, the proposal to treat cable-related, in-kind contributions as ''franchise fees'' subject the statutory five percent franchise fee cap, with one limited exception, would benefit small cable operators by ensuring that LFAs do not circumvent the statutory five percent cap by demanding, for example, unlimited free or discounted services. This in turn would help to ensure that local franchising requirements do not deter small cable operators from investing in new services and facilities.

*G. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule*

4. None.

*H. Initial Paperwork Reduction Act of 1995 Analysis*

5. This document does not contain any proposed information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002.

*I. Ex Parte Rules*

6. *Permit-But-Disclose.* This proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's ex parte rules. Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with section 1.1206(b) of the rules. In proceedings governed by section 1.49(f) of the rules or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

*J. Filing Procedures*

7. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).

▪ Electronic Filers: Comments may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs/.*

▪ Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

▪ Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

▪ All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street SW, TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.

▪ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050

Junction Drive, Annapolis Junction, MD 20701.

▪ U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW, Washington, DC 20554.

8. *Availability of Documents.* Comments, reply comments, and ex parte submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW, CY–A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

9. *People with Disabilities.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

10. *Additional Information.* For additional information on this proceeding, contact Kathy Berthot, *Kathy.Berthot@fcc.gov,* of the Media Bureau, Policy Division, (202) 418–7454.

## V. Ordering Clauses

11. Accordingly, *It is ordered* that, pursuant to the authority found in Sections 1, 4(i), 303, 602, 621, 622, and 624 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 303, 522, 541, 542, and 544, this *Second Further Notice of Proposed Rulemaking* is adopted.

12. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Second Further Notice of Proposed Rulemaking,* including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary.*

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