No. 19-4161

(consolidated with Nos. 19-4162, 19-4163, 19-4164, 19-4165, 19-4166, and 19-4183)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CITY OF EUGENE, OREGON,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR PANEL REHEARING AND REHEARING *EN BANC* OF PETITIONER CITY OF EUGENE, OREGON

Tillman L. Lay
Jeffrey M. Bayne
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

Attorneys for Petitioner City of Eugene, Oregon

July 12, 2021

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STATEMENT IN SUPPORT OF PANEL REHEARING AND REHEARING *EN BANC*

The City of Eugene, Oregon's ("Eugene" or the "City"), telecommunications ordinance (the "Ordinance," codified at EC §§ 3.400-.430) imposes a seven-percent fee on companies providing "telecommunications services" (which is defined to include broadband service but to exclude cable service) over facilities located on the City's public rights-of-way.[1] This petition seeks rehearing with respect to the part of the panel decision[2] which upheld a Federal Communication Commission ("FCC" or "Commission") ruling that preempts Eugene's fee as applied to "broadband services . . . provided by a cable operator there." Decision at 12.

In reaching this result, the panel decision does not mention, let alone address, the Supreme Court of Oregon's decision in *City of Eugene v. Comcast*, 375 P.3d 446 (Or. 2016) ("*Eugene*").[3] *Eugene* shows that the panel's decision

[1] Eugene Code ("EC") §§ 3.005, 3.410(1), 3.415(2).

[2] *City of Eugene, Oregon v. FCC*, 998 F.3d 701 (6th Cir. 2021). A copy of the slip opinion is attached to this petition as Appendix A and cited herein as "Decision."

[3] The omission is noteworthy in that the FCC specifically referred to, and "repudiated" *Eugene* in the order under review (*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, 34 FCC Rcd. 6844 (2019), ECF No. 57-1, ¶ 105, JA-57-58), and Eugene petitioners cited to it no fewer than seven times in their opening brief (Eugene Br., ECF No. 61, 9, 11, 16, 20, 42, 44, 46) and again in their reply brief (Eugene Reply Br., ECF No. 62, 20).

misstates several critical aspects of the Ordinance, as well as the facts relating to Eugene's separate cable franchise with Comcast, the cable operator in question. These facts are central to evaluating the validity of the Ordinance under federal law. *Eugene* addressed virtually identical federal Cable Act[4] issues relating to the Ordinance as the panel, and reached the opposite conclusion on whether application of the Ordinance's fee to cable operators is contrary to that Act.[5] Specifically, the Oregon Supreme Court rejected a cable operator's argument that, by operation of the Cable Act, its cable franchise with the City provided it a federal right to provide broadband service over Eugene's rights-of-way.

Rehearing is needed to address (1) the conflict between the panel's decision and a decision of a state court of last resort (*Eugene*) on an important question of federal law, *cf.* U.S. Supreme Court R. 10(b) (conflict between a state court of last resort and a federal court of appeals on an important question of federal law is a ground for certiorari); and (2) the panel's conclusion that the Cable Act impliedly preempts state or local fees that are not a "franchise fee" within the meaning of that Act, a ruling that overlooks the statute's tax savings clause and inverts the

[4] Cable Communications Policy Act of 1984, as amended, 47 U.S.C. §§ 521 et seq. ("Cable Act").

[5] The panel decision, like the *Eugene* court, correctly held that the Ordinance's fee on broadband service, as applied to a cable operator, is not a franchise fee under the Cable Act's franchise provision, 47 U.S.C. § 542. Decision at 13-15; *Eugene* at 462-63.

longstanding presumption against implied federal preemption of state and local taxing authority.

I. THE PANEL IGNORED THE OREGON SUPREME COURT'S CONTRARY DECISION AND, AS A RESULT, RESTED ITS DECISION ABOUT EUGENE'S FEE ON AN INACCURATE UNDERSTANDING OF EUGENE'S ORDINANCE AND RELATED FACTS.

The fee on broadband services described in, and ultimately preempted by, the panel's decision is not the one set forth in Eugene's Ordinance or addressed by the *Eugene* court. The panel decision conflates the Ordinance's fee on broadband internet service with the City's separate cable franchise agreement with Comcast, a franchise that does not authorize, regulate, or impose a fee on broadband service. At minimum, the panel should grant rehearing to correct its description of the Ordinance and cable franchise at issue and to reconsider its ruling based on those corrections.

The panel decision states that Eugene "impose[s] on a cable operator a seven-percent broadband fee *as a condition for a cable franchise*." Decision at 16 (emphasis added). This statement was the foundation for the panel's ultimate ruling that the seven-percent fee on broadband services under Eugene's Ordinance, as applied to a cable operator, violates 47 U.S.C. § 544(b)(1) because, in the panel's view, that provision prohibits "a franchising authority [from] requir[ing]

payment of an information-services fee as a condition of obtaining a [cable] franchise under § 541(b)(1)." Decision at 16.[6]

The panel's description of the Ordinance's fee "as a condition for obtaining a franchise" is incorrect. As the *Eugene* court found, "[s]ince 1991, Comcast has operated a cable system within the city under the terms of a franchise that remains in effect today." *Eugene* at 449. But the City Ordinance in question was not adopted until 1997, and Comcast did not begin to offer cable modem service—*i.e.*, broadband service—until 1999. *Id.* at 450. The panel's assumption that Comcast's cable franchise was conditioned on Comcast agreeing to pay a seven-percent fee to provide broadband service is therefore inaccurate.

As the *Eugene* court explained, the City's renewal of Comcast's cable franchise in 2007 also was not conditioned on Comcast paying the Ordinance's seven-percent broadband fee. To the contrary, in 2007 the parties "renewed the terms *of the 1991 agreement*." *Id.* at 449 n.1 (emphasis added). Those terms, which predate Comcast's provision of any cable modem service, do not include a fee or any other requirements on cable modem service. Nor did the City's 2007 renewal

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[6] Broadband service is considered an information service under the federal Communications Act, 47 U.S.C. § 153(24). *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (upholding FCC's classification of broadband internet access service as an information service). Under Eugene's Ordinance, however, broadband service is included in the definition of telecommunications service and subject to the seven-percent fee on telecommunications services. *Eugene* at 451.

of Comcast's cable franchise condition that franchise renewal on Comcast's paying any fee on cable modem or any other non-cable service. Indeed, the *Eugene* court explained that it was not until "*after* renewing the [cable] franchise agreement" that Eugene sought to enforce the Ordinance's telecommunication fee on Comcast's cable modem service by filing a lawsuit against Comcast seeking recovery of unpaid telecommunications fees under the Ordinance. *Id*. at 450 (emphasis added).[7] Notably, the City did not seek to revoke Comcast's cable franchise or in any other way prevent Comcast from continuing to operate its system or provide any service. These facts show that the Ordinance's telecommunications fee requirement is distinct from, not a condition of, Comcast's cable franchise with the City.

Similarly, the text of the Ordinance is explicit in separating (1) the requirement that a cable operator must obtain a cable franchise to provide cable services, from (2) the requirement that a telecommunications service provider must pay a fee on its telecommunications services. The requirement to receive a license to "provide telecommunication service" over facilities in the rights-of-way, EC § 3.410(1)(b), and pay a seven-percent fee associated with that license, EC § 3.415(2), does not apply to the provision of cable service. The Ordinance's

[7] Although the City's Ordinance was enacted in 1997, it was not enforced on cable modem service until a decade later. *Id.*

definition of "telecommunication service" explicitly excludes "cable service." EC § 3.005. The Ordinance also expressly confirms that two separate licenses are required for the provision of these different services. EC § 3.410(3) ("[A] cable operator of a cable system must obtain a license to construct, install or locate a cable system to provide cable services, and, should it intend to provide telecommunications services over the same facilities, must also obtain a separate license."); *see also Eugene* at 451 (explaining that the Ordinance anticipates that a "telecommunications provider *already has a franchise to provide cable service over the cable system*") (citing EC § 3.410(3)) (emphasis added).

Accordingly, the Ordinance's requirements regarding telecommunications service in no way limit or condition a cable operator's ability to obtain or continue to hold a separate cable franchise or to continue to operate its cable system. Moreover, the Ordinance certainly cannot be described as a "request for proposals (including requests for renewal proposals, subject to section 546 of this title)" within the meaning of Section 544(b)(1). To be sure, if a cable operator like Comcast wishes to provide telecommunications services (as defined by the Ordinance), then it must pay the same telecommunications fee as all other telecommunications providers.[8] But its failure to do so does not affect or condition

[8] *See Eugene* at 463 (explaining that all providers of broadband service must pay the Ordinance's fee and that "[w]hether a company is a cable operator is therefore

the continuing validity of its cable franchise, and the City never included any requirement to pay the fee in any request for proposals relating to Comcast's cable franchise.

The panel decision's finding that Eugene's fee on broadband service was a condition of Comcast's cable franchise and therefore violated Section 544(b)(1) was central to its conclusion that this fee is preempted by federal law. Yet the panel decision does not address the Ordinance's express separation of the cable franchising process from its broadband service fee requirement, and offers no explanation as to how the Ordinance can be characterized as a "request for proposal" within the meaning of Section 544(b)(1). Similarly, the panel decision overlooked that, based on the actual language of the City's cable franchise with Comcast, the *Eugene* court held that franchise "does not confer on Comcast the right to provide cable modem service." *Id*. at 455.

Rehearing is needed to correct the panel decision's factual inaccuracies regarding Eugene's fee and, based on that correction, to revisit the panel's ruling that the fee is preempted by Section 544(b)(1).

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neither necessary nor sufficient to trigger the license-fee requirement").

II. THE PANEL DECISION IMPROPERLY STRAYS BEYOND THE CABLE ACT'S TEXT TO CONCLUDE THAT IT PREEMPTS BY IMPLICATION FEES THAT ARE NOT A "FRANCHISE FEE" UNDER THE ACT.

A. Because a Cable Act franchise is not required to provide non-cable services, imposing fees on all providers of such services is not a condition of a Cable Act franchise.

The panel decision concluded that the cable franchise Eugene granted Comcast "grant[s] the cable operator the right to use its cable system, including—as Congress plainly anticipated—*the right to use that system to provide information service*." Decision at 16-17 (emphasis added). Accordingly, it reasoned that Eugene's fee on broadband services, as applied to a cable operator, "is merely the exercise of its [Cable Act] franchise power by another name. And § 544(b)(1) expressly barred the City from exercising its franchise power to that end." *Id.* at 17.

This analysis is not only contrary to the facts about Comcast's franchise and Eugene's Ordinance, as set forth above; it is also inconsistent with the text of the Cable Act. The panel decision cites no language in Section 544 or anywhere else in the Act providing that a Cable Act franchise confers on a cable operator a federal right to provide non-cable services.[9] Its reasoning instead draws on incorrect

[9] As discussed above, the *Eugene* court held that, as a matter of Oregon law, the specific language of Comcast's cable franchise in Eugene does *not* grant it the right to provide non-cable services.

assumptions and inferences about what it perceived to be Congress's unwritten intent. Moreover, the panel decision does not mention, much less seek to defend its reasoning against, the directly contrary rulings of *Eugene* on precisely the same issue.

Rather than pointing to specific statutory language, the panel decision emphasizes that "Congress undisputedly contemplated that cable operators would use their facilities to provide both cable and non-cable services." *Id.* at 16. As an initial matter, the panel decision cites no statutory language supporting that conclusion. To be sure, the legislative history indicates Congress was aware that cable systems may be capable of providing non-cable service, but that does not, without more, say anything about the scope of the non-cable service rights that a Cable Act franchise confers under the statute.

Indeed, the *Eugene* court addressed this precise point when holding that the Cable Act does not authorize the provision of non-cable services. It explained that the "legislative history establishes, at most, that the Cable Act does not prohibit a cable operator from providing noncable services." *Eugene* at 457. "But the legislative history does not establish . . . that the Cable Act grants cable operators an affirmative right to provide non-cable services, prohibiting state or local authorities from regulating noncable services or charging fees for the right to provide noncable services over the cable system that occupies public rights of

way." *Id.* Although the Cable Act ensures a cable operator's right to construct a cable system, 47 U.S.C. § 541(a)(2), and authorizes the provision of "cable service," 47 U.S.C. § 541(b)(1), "the scope of [the operator's] right to use the cable system—including the right to provide cable modem service—is determined by other applicable laws." *Id.* at 458.

The panel decision nevertheless suggests that "Section 541(b)(1) also makes clear, *albeit by implication*, that a franchise shall be construed to allow the cable operator to operate the cable system." Decision at 16 (emphasis added). But Section 541(b)(1) cannot support the weight the panel decision would have it bear. The relevant issue here is whether a Cable Act franchise affirmatively authorizes a cable operator to provide non-cable services. As the panel decision's statement concedes, Section 541(b)(1)'s actual language does not say that. To the contrary, the plain text of Section 541(b)(1) refers specifically, and exclusively, to cable service: "a cable operator may not provide *cable service* without a franchise." 47 U.S.C. § 541(b)(1) (emphasis added).[10]

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[10] The reference to "services" in Section 544 also does not provide that a Cable Act franchise grants authority to provide such service. *See* Decision at 16. Section 544 merely states that a "franchising authority"—i.e., the entity that grants a *cable* franchise—"may not regulate the services . . . provided by a cable operator except to the extent consistent with this subchapter." 47 U.S.C. § 544(a). Because, as the panel held, Eugene's fee is not a "franchise fee" under the Cable Act, its imposition on a cable operator is not "inconsistent with this subchapter."

Thus, under the statute, a cable operator does not even need a Cable Act franchise to provide non-cable service. A Cable Act franchise cannot logically be construed to federally authorize the provision of a service for which, as a matter of federal law, that franchise is not needed. Authority to use the right-of-way to provide that other service must be found elsewhere, and that elsewhere is state law. *Eugene* at 458; *see also City of Dallas v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999) (explaining that although the Cable Act "may have expressly *recognized* the power of localities to impose franchise requirements, it did not *create* that power, and elimination of [the Cable Act's franchising provision in 47 U.S.C. § 541] for [open video system] operators does not eliminate local franchising authority").

The notion that a Cable Act franchise authorizes the provision of non-cable services also cannot be squared with the statute's limiting of the "franchise fee" revenue base to five percent of an operator's gross revenue from providing "cable services." 47 U.S.C. § 542(b). The panel's construction of the Act would give cable operators—and *only* cable operators—a free ride with respect to their use of the rights-of-way to provide non-cable services, while their non-cable operator competitors would have to pay the Ordinance's fee on their non-cable services. Construing the Cable Act as granting cable operators a discriminatory cost

advantage over their competitors with respect to fees on non-cable services directly conflicts with Congress's goal of establishing a level playing field.[11]

Because a Cable Act franchise does not grant cable operators the right to provide broadband service, Eugene's fee on that service is not an exercise of its Cable Act franchising authority and does not violate Section 544's limitation on the exercise of that authority.

B. Section 542 is the Cable Act's only fee preemption provision, and the panel erred in finding additional implied fee preemption provisions hidden elsewhere in the Act.

The panel correctly held that Eugene's Ordinance fee is not a Cable Act franchise fee under 47 U.S.C. § 542, the specific, and only, provision of the Act that imposes a federal limit on the fees a state of locality may impose on a cable operator. Decision at 13-15. But it overlooked the logical consequence of that holding: If a fee is *consistent* with the Cable Act's limitation on fees on cable operators, it cannot be preempted by implication as inconsistent with other, non-fee-related provisions of the Act.

[11] *See* H.R. Rep. No. 104-458, at 180 (1996) (Conf. Rep.) (explaining that the 1996 amendment limiting Cable Act franchise fees to five percent of *cable service revenues* is "intend[ed] . . . to the extent permissible under State and local law, telecommunications services, *including those provided by a cable company*, shall be subject to the authority of a local government to, *in a non-discriminatory and competitively neutral way*, manage its public rights-of-way and charge fair and reasonable fees") (emphasis added).

"[I]t is a commonplace of statutory construction that the specific governs the general," and "[t]hat is particularly true where . . . Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (internal quotation marks and citations omitted). *Accord United States v. Riccardi*, 989 F.3d 476, 482 (6th Cir. 2021) ("The specific governs the general in the interpretation of a legal text").

In Section 542, Congress addressed, and enacted a comprehensive scheme with respect to, the specific issue of state and local fees imposed on cable operators. As both the panel decision and *Eugene* held, Eugene's fee on broadband internet service "is not a 'franchise fee' under § 542(g)(1); the fee does not count towards the § 542(b) cap; and its imposition is not, on that ground, 'inconsistent with' [the Cable Act]." Decision at 15 (quoting 47 U.S.C. § 556(c)); *accord Eugene* at 462-63.

Congress did not hide additional (but non-textual) limits on state and local fees in other provisions of the Cable Act that do not mention fees. If a "tax, fee, or assessment" is not a "franchise fee" under Section 542, it is not preempted by the Cable Act. By definition, a fee that is not a Cable Act "franchise fee" cannot "circumvent" the Act's limitation on fees imposed on cable operators, and the panel (Decision at 16-17) was simply wrong in concluding otherwise.

Section 544 is not to the contrary. Section 544(a) says that a cable operator's services may be regulated only "to the extent consistent with this subchapter"; because Eugene's fee is not a "franchise fee" under Section 542, imposing it is "consistent with this subchapter." Section 544(b)(1) likewise does not prohibit fees that are permissible under Section 542. As an initial matter, by its terms Section 544(b)(1) only applies to "requests for proposals," and the Ordinance is no request for proposals. Moreover, imposing a fee on a cable operator that is not a "franchise fee" cannot be inconsistent with Section 544(b)(1)'s prohibition on "establish[ing] requirements for video programming or other information services." If it were, then another fee that Section 542 allows—a five percent fee on "cable service"—would also be a "requirement" inconsistent with Section 544(b)(1), because it would be an impermissible "requirement[] for video programming," and "video programming" is part of the Act's "cable service" definition. 47 U.S.C. § 522(6)(A)(i). The only way to read Section 542 and 544(b)(1) together is that the fees and taxes addressed under Section 542 are not the "requirements" referred to in Section 544(b)(1)—in other words, the specific fee and tax provisions of Section 542 control over the general reference to "requirements" in Section 544(b)(1).

It does not matter whether that non-franchise fee is imposed for use of the right-of-way to provide non-cable service, or as a tax on such services, or for any other reason. If it is not a "franchise fee," it's not preempted by the Cable Act. Any

other reading strays far beyond the Act's text. And in the case of determining whether a federal statute preempts state or local tax authority, that is something the Court cannot do. *Self-Insurance Inst. of Am., Inc. v. Snyder*, 827 F.3d 549, 555 (6th Cir. 2016) ("the presumption that Congress does not intend to preempt state laws applies with special force" in the case of state tax laws). *Accord Thiokol Corp. v. Roberts*, 76 F.3d 751, 755 (6th Cir. 1996).

Finally, if there were any doubt regarding whether any other provision of the Cable Act beyond Section 542 can be construed to preempt fees, it is removed by the Telecommunication Act of 1996's tax savings clause. Pub. L. No. 104-104, § 601(c)(2), 110 Stat. 56, 143 (codified as Note to 47 U.S.C § 152). The Telecommunications Act of 1996 is the same law that narrowed Section 542's franchise fee revenue base to five percent of an operator's gross revenue derived from operating its system "to *provide cable services*". Pub. L. No. 104-104, § 303(b), 110 Stat. 56, 125 (amending 47 U.S.C § 542(b)) (emphasis added). At the same time Congress limited Cable Act franchise fees to a percentage of an operator's cable service revenue, it specifically clarified that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, *except as provided in sections 622 [47 U.S.C. § 542]* and 653(c) [47 U.S.C. § 573(c)] of the Communications Act of 1934 and

section 602 of this Act." Pub. L. No. 104-104, § 601(c)(2), 110 Stat. 56, 143 (emphasis added). This confirms Congress's intent that, other than Section 573 (which is not applicable here), Section 542 is the *only* Cable Act provision that limits state and local tax and fee authority, and that Section 544, relied on by the panel, cannot be construed to preempt taxes or fees. Because Eugene's fee is consistent with Section 542, it is not inconsistent with Section 544 or any of the Cable Act's other limitations.

CONCLUSION

The Court should grant rehearing and rule that application of Eugene's Ordinance fee to a cable operator's non-cable services is not preempted by the Cable Act.

Respectfully submitted,

/s/ Tillman L. Lay

Tillman L. Lay
Jeffrey M. Bayne

Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

Attorneys for Petitioner City of Eugene, Oregon

July 12, 2021

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/s/ Tillman L. Lay
Tillman L. Lay
Attorney for Petitioner City of Eugene, Oregon

Law Offices of:
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

July 12, 2021

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/s/ Tillman L. Lay
Tillman L. Lay

Law Offices of:
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

ATTACHMENT A

Panel Decision, *City of Eugene, Oregon, et al. v. FCC, et al.*, Nos. 19-4161, *et al.*, Opinion (6th Cir. filed May 26, 2021)

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0116p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CITY OF EUGENE, OREGON (19-4161); CITY OF PORTLAND, OREGON, et al. (19-4162); STATE OF HAWAII (19-4163); ALLIANCE FOR COMMUNICATIONS DEMOCRACY, et al. (19-4164); ANNE ARUNDEL COUNTY, MARYLAND, et al. (19-4165); CITY OF PITTSBURGH, PENNSYLVANIA (19-4166); CITY OF CHICAGO, ILLINOIS, et al. (19-4183),

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

Respondents,

NCTA - THE INTERNET & TELEVISION ASSOCIATION (19-4161–4166/4183); CITY OF NEW YORK, NEW YORK, et al. (19-4162); BLOOMFIELD TOWNSHIP, MICHIGAN, et al. (19-4165); CITY OF AURORA, COLORADO, et al. (19-4183),

Intervenors.

Nos. 19-4161/4162/4163
/4164/4165/4166/4183

On Petitions for Review from an Order of the Federal Communications Commission.
Nos. 05-311 and 19-80.

Argued: April 15, 2021

Decided and Filed: May 26, 2021

Before: McKEAGUE, GRIFFIN, and KETHLEDGE, Circuit Judges.

COUNSEL

ARGUED: Tillman L. Lay, SPIEGEL & MCDIARMID LLP, Washington, D.C., Cheryl A. Leanza, BEST BEST & KRIEGER LLP, Washington, D.C., for Petitioners. Maureen K. Flood,

FEDERAL COMMUNICATIONS COMMISSION, Washington, D.C., for Respondents. Jessica Ring Amunson, JENNER & BLOCK, LLP, Washington, D.C., for Intervenor NCTA. **ON BRIEF:** Tillman L. Lay, James N. Horwood, Jeffrey M. Bayne, SPIEGEL & MCDIARMID LLP, Washington, D.C., Cheryl A. Leanza, Joseph Van Eaton, Gerard Lavery Lederer, BEST BEST & KRIEGER LLP, Washington, D.C., Gail A. Karish, BEST BEST & KRIEGER LLP, Los Angeles, California, Michael R. Bradley, Vincent Rotty, Michael Clarke Athay, BRADLEY LAW, LLC, Woodbury, Minnesota, Michael J. Watza, KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK, Detroit, Michigan, Daniel S. Cohen, Joel S. Winston, COHEN LAW GROUP, Pittsburgh, Pennsylvania, Kenneth S. Fellman, KISSINGER & FELLMAN, P.C., Denver, Colorado, Brian T. Grogan, MOSS & BARNETT, Minneapolis, Minnesota, for Petitioners and Intervenors. Maureen K. Flood, Jacob M. Lewis, FEDERAL COMMUNICATIONS COMMISSION, Washington, D.C., Robert B. Nicholson, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents. Jessica Ring Amunson, Howard J. Symons, Ian Heath Gershengorn, Elizabeth B. Deutsch, JENNER & BLOCK, LLP, Washington, D.C., for Intervenor NCTA. Elina Druker, NEW YORK CITY OFFICE OF THE CORPORATION COUNSEL, New York, New York, for Intervenors City of New York, et al.

OPINION

KETHLEDGE, Circuit Judge. Over the past 15 years, the Federal Communications Commission has published a series of written orders that, together with Title VI of the Communications Act ("the Act"), 47 U.S.C. § 521 *et seq.*, set forth rules by which state and local governments may regulate cable providers. Numerous local governments have petitioned for review of the FCC's most recent order, arguing that the FCC misinterpreted the Act. We grant the petitions in part and deny them in part.

I.

Our opinion in *Alliance for Community Media v. F.C.C.*, 529 F.3d 763 (6th Cir. 2008), sets forth the relevant history of the Communications Act and cable regulation generally. In brief, a cable operator may provide cable services only if a franchising authority—usually a local body, but sometimes a unit of state government—grants the operator a franchise to do so. *See* 47 U.S.C. §§ 522(9), 541(b)(1). In exchange for a cable franchise, franchising authorities often require (among other things) that cable operators pay fees, provide free cable service for public

buildings, and set aside channel capacity for "public, educational, and governmental [referred to in the industry as 'PEG'] use[.]" *See, e.g.*, *id.* §§ 541(a)(4), 542(a). Some of those requirements count as "franchise fees," which the Act limits to five percent of a cable operator's gross revenues for cable services for any 12-month period. *See id.* § 542(b). The costs of franchise fees, of course, are passed on to cable subscribers. *See id.* § 542(c), (e).

In 2007, the FCC issued an order (the "First Order") in which it read narrowly one of five exceptions to the Act's definition of franchise fee. The First Order also announced the FCC's "mixed-use rule," under which franchisors could not regulate the non-cable services of cable operators who were "common carriers" under Title II of the Act. Various franchising authorities challenged that order, but we denied their petition. *See Alliance*, 529 F.3d at 775-87.

The FCC later issued another order (the "Second Order"), in which the FCC interpreted the term "franchise fee" to include all noncash (or "in kind") exactions required by a franchise agreement, with the exception of exactions falling within a statutory exception to the Act's definition of franchise fee. Historically some of those exactions were unrelated to cable services, such as a demand by St. Louis that a cable operator contribute 20 percent of its stock to the city. Other exactions were cable-related, such as requirements for free cable service to public buildings. Under the Second Order, the value of those exactions counted toward the franchise-fee cap. *See* Implementation of Section 621(a)(1) of the Cable Communications Policy Act, 22 FCC Rcd. 19633 (Nov. 6, 2007). The Second Order also extended the "mixed-use rule" to "incumbent" cable operators, who for the most part were not common carriers under Title II.

Again various franchising authorities petitioned for review of the FCC's conclusions. We agreed with the FCC that the term "'franchise fee' as defined by § 542(g)(1) can include noncash exactions." *Montgomery County. v. F.C.C.*, 863 F.3d 485, 491 (6th Cir. 2017). But we held that the FCC had not explained why, under the Act, *every* cable-related noncash exaction counted as a franchise fee. We likewise held that the FCC had not offered a statutory basis for its application of the mixed-use rule to incumbent cable operators. We therefore vacated those determinations and directed the FCC to set forth a statutory basis for them. *Id.* at 492-93.

The FCC did that in its Third Order, which it entered in 2019. *See* 84 Fed. Reg. 44,725-01 (Aug. 27, 2019). In that Order, the FCC analyzed various sections of the Act, and concluded that most—though not all—cable-related noncash exactions are franchise fees. *See id.* ¶ 8. The FCC likewise explained its reasoning as to why the Act does not allow franchising authorities to regulate the non-cable services of cable operators who are not common carriers. *See id.* ¶¶ 64-70, 73-77. Finally, the FCC extended its rulings to state (rather than just local) franchising authorities, reasoning that the Act makes no distinction between them. *See id.* ¶ 114.

Various franchising authorities petitioned for review of the Third Order in various circuit courts, which in turn transferred those petitions to this circuit. The petitioners moved for a stay of the Third Order during the pendency of this appeal, which we denied. We now adjudicate the petitions themselves.

II.

The petitioners challenge the Third Order on multiple grounds. In most of those challenges, the petitioners argue that the FCC interpreted the relevant statutory provisions incorrectly; in others, the petitioners argue that the orders were entered in violation of the Administrative Procedure Act. As to the interpretive challenges, absent some insuperable ambiguity, "we give effect to Congress's answer without regard to any divergent answers offered by the agency or anyone else." *Montgomery County*, 863 F.3d at 489 (cleaned up). There is no such ambiguity here. As for the APA challenges, we determine whether the agency rules at issue are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A).

A.

1.

Several of the petitioners' challenges concern the FCC's interpretation of the term "franchise fee" as defined by 47 U.S.C. § 542(g). The first is directed at the FCC's conclusion that most (though not all) noncash cable-related exactions count as franchise fees subject to the five-percent cap. Those exactions are often substantial. Prior to the FCC's ruling, for example,

a franchise agreement in Montgomery County, Maryland required the cable operator there to provide "courtesy Basic and Expanded service" to an ever-growing number of public buildings—totaling, in 2018, "898 complimentary accounts with an estimated value of $949,000 annually[.]" A franchise agreement in another locality required the cable operator to provide free cable service to "three golf courses, an ice arena, a municipal pool, an airport, a park activity center, a historical society and museum, a community college, and a water treatment plant." (The petitioners respond that, in both cases, the provision of these free services was negotiated.)

Section 542(g)(1) provides in full: "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[.]" That this definition comprises "'*any* tax, fee, or assessment of *any* kind[,]'" we held in *Montgomery County*, "requires us to give those terms maximum breadth." 863 F.3d at 490. Moreover, this language makes no distinction between noncash exactions that are not cable-related (which in *Montgomery County* we held can be franchise fees) and noncash exactions that are. Hence the question here is why noncash cable-related exactions should be categorically excluded, as Petitioners argue, from the definition of franchise fee.

In *Montgomery County*, we observed, the petitioners had made a serious argument as to why noncash cable-related exactions should be excluded from that definition—namely, that doing so "would undermine various provisions of the Act that allow or even require [franchising authorities] to impose cable-related obligations as part of their cable franchises." *Id.* at 491. In the Third Order, however, the FCC offered a nuanced response to that argument. The Act itself imposes (or requires that franchising authorities impose) certain cable-related obligations upon cable operators. For example, § 541(a)(3) provides that "a franchising authority *shall 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" (emphasis added)—a mandate, as we noted in *Montgomery County*, "that often brings with it expensive 'build-out' obligations for cable operators." 863 F.3d at 491. Section 541(a)(2)—which provides that "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements"—likewise makes clear that those costs of

construction shall "be borne by the cable operator" (or by its subscribers). And § 552(b) provides that "[t]he Commission shall . . . establish standards by which cable operators may fulfill their customer service requirements." (In our view those standards are not a "tax, fee, or assessment" in the first place, and hence fall outside the franchise-fee definition altogether.) The Act itself, rather than a franchise agreement, imposes these obligations on cable operators. The FCC therefore concluded that network "build-out costs" and costs related to FCC-imposed "customer service requirements"—along with PEG "capital costs[,]" which the Act expressly excludes from the franchise fee definition, *see id.* § 542(g)(2)(C)—are not franchise fees. Hence they do not count toward the five-percent cap. *See Third Order* ¶¶ 38-40, 57-58.

But other noncash cable-related exactions are not mandated by the Act. For example, § 531(b) provides that "[a] franchising authority *may* in its request for proposals require as part of a franchise . . . that channel capacity be designated for [PEG] use[.]" (Emphasis added.) That same subsection likewise provides that a franchising authority "*may* require" that "channel capacity on institutional networks"—or "I-Nets," which provide various services to non-residential subscribers, *see id.* § 531(f)—"be designated for educational or governmental use." Relatedly, § 541(b)(3)(D) provides that a franchising authority "*may*" require a cable operator to provide "institutional networks" as a condition of a cable franchise. And nobody disputes that a franchising authority may—but need not—require the cable operator to provide free cable service to government or other public buildings. But whether to require any of these things—or to require free service to a handful of buildings, or 898—is up to the franchising authority.

Thus, the Act makes a distinction between obligations that the Act itself imposes and obligations that a franchising authority may choose to include in a franchise agreement as a matter of negotiating discretion. Only the latter count as franchise fees. We therefore agree with the FCC that, under the statutory text and structure, noncash (or "in-kind") cable-related obligations mandated by the Act are not franchise fees. But noncash cable-related exactions (including I-Net exactions) that the Act merely permits a franchising authority to impose are franchise fees under § 542(g) and thus count toward the five-percent cap.

Petitioners' remaining arguments on this point are insubstantial. Petitioners invoke § 542(c), which allows cable operators to identify as separate line items on subscriber bills "the amount of the total bill assessed as a franchise fee" and the amount of the bill assessed "to satisfy any requirements imposed on the cable operator . . . to support [PEG][.]" Those separate line items, Petitioners contend, would amount to a "deceptive billing practice" if PEG costs were already included in the amount of the franchise fee. But PEG "capital costs" are expressly excluded from the definition of franchise fee, *see id.* § 542(g)(2)(C), which means that some PEG costs are not franchise fees. True, there is some overlap between the two items; but Congress could have wanted subscribers to know the amount of their bills that is attributable to public, educational, and governmental channels as a stand-alone expense. The inference that Petitioners seek to draw from § 542(c) is therefore weak. (For substantially the same reasons, we reject Petitioners' nearly identical contention with regard to § 543(b)(2)(C).) Moreover, § 542(c) allows a cable operator to identify franchise fees and PEG costs as separate line items only to the extent consistent with "regulations prescribed by the Commission[,]" which is protection enough against deceptive billing practices.

Petitioners also invoke § 546(c)(1)(D), which directs franchising authorities—when reviewing a cable operator's proposal to renew a franchise—"to consider" whether the proposal "is reasonable" to meet the community's cable-related needs, "taking into account the cost of meeting such needs and interests." Petitioners say they would have no need to "consider" the costs of noncash cable-related exactions if they already needed to tally up those costs as part of the five-percent cap. As an initial matter, this provision is practically hortatory, and hence a flimsy basis for structural inferences. Moreover, as shown above, some noncash cable-related exactions are not franchise fees, which means this provision is not surplusage. Nor, as the Petitioners seem to assume, is the five-percent figure a floor on the costs that local franchisors may impose under a franchise agreement. Instead it is a ceiling, below which franchisors should "consider" the utility of each cost they choose to impose on cable operators and (by extension) subscribers.

We likewise reject Petitioners' argument that the Third Order in any way contradicts § 542(i), which provides that a federal agency may not regulate the manner in which a

franchising authority uses funds collected as franchise fees. The Third Order does not do that: it clarifies what counts as a franchise fee under § 542(g), and otherwise allows franchisors to use as they wish the monies they lawfully collect. Petitioners' interpretive arguments with respect to noncash cable-related exactions are without merit.

Finally, we reject summarily Petitioners' various arguments that the FCC was arbitrary and capricious as to the manner in which it issued its determination that noncash cable-related exactions are franchise fees. For the reasons already stated, the FCC amply explained the statutory bases for that interpretation. Moreover, we have no authority to set aside a correct interpretation of the statutory text in favor of the "reliance interests" invoked by Intervenor New York City. And as far back as 2007—when the FCC issued the Second Order—the FCC advanced largely the same interpretation of franchise fee (with respect to noncash cable-related exactions) that it advances now. Fourteen years later, nobody can claim unfair surprise. Nor do we see any basis for Petitioners' complaint that the FCC disregarded public safety in the Third Order. To the contrary, the FCC expressly addressed public safety in the Order, *see Third Order* ¶ 107, and acknowledged that PEG and I-Nets facilitate "reporting on local issues," like public emergencies. *Id.* ¶¶ 50, 55. But the FCC properly concluded that those public-safety benefits cannot "override" the Act's text. *Id.* ¶ 55.

In sum, we reject Petitioners' challenge to the FCC's determination that noncash cable-related exactions are franchise fees under § 542(g).

2.

Petitioners have a point, however, as to the standard by which noncash cable-related exactions should be assigned a monetary value for purposes of counting them toward the five-percent cap on franchise fees. In the Third Order, the FCC provided an administrative answer to that question but not an interpretive one. Specifically, in a single paragraph of analysis—and without any reference to the Act's text—the FCC said that noncash cable-related exactions should be assigned their "market value" for purposes of the five-percent cap. The reason, in the FCC's view, was that the market value of these exactions "is easy to ascertain[,]" because "operators have rate cards to set the rates that they charge customers[.]" *Third Order*

¶ 61. The FCC also observed that, absent these exactions, the franchising authority "would have no choice but to pay the market rate for services it needs from the cable operator or another provider." *Id.*

But the FCC has its payors mixed up. Franchisors do not "pay" franchise fees; cable operators do. *See* 47 U.S.C. § 542(a). A franchisor's replacement cost is therefore beside the point. And a cable operator does not "pay" the hypothetical profit that it would have obtained had it sold its services to a paying customer (as opposed to providing those services gratis to a franchisor). Nor, presumably, could a cable operator pass through to subscribers—as a "franchise fee"—its hypothetical profit on services it provides to franchisors. *See id.* § 542(c), (e). Not a word in § 542 supports the notion that franchise fees can be a source of profit for cable operators.

Meanwhile, § 542 does refer to the "costs of the franchise fees" paid by cable operators. *Id.* § 542(d). And a cable operator does, in a meaningful sense, "pay" the out-of-pocket costs it incurs when providing noncash cable-related services pursuant to a franchise agreement. Those costs affect the operator's bottom line precisely as a monetary exaction would. And—as the FCC itself made clear in its Third Order—the Act provides no reason to treat cash and noncash exactions differently. On this point, therefore, we grant the petitions and hold that, for purposes of § 542(b), noncash cable-related exactions should be assigned a value equal to the cable operator's marginal cost in providing them.

B.

1.

Petitioners next challenge the so-called "mixed-use rule," which concerns the extent to which the Act bars franchising authorities from regulating non-cable services provided by cable operators. The "rule" itself is not set forth in the Act; instead, the rule is the FCC's synthesis of the Act's preemption clause and various limitations that Title VI places upon franchisors' regulatory authority. Under the mixed-use rule, as described by the FCC, a franchising authority may not regulate the non-cable services of a cable operator "except as expressly permitted in the Act." *Third Order* ¶ 64. And that express permission, the FCC believes, is something the Act

almost never grants. *See* 47 C.F.R. § 76.43 ("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.").

Petitioners argue that the mixed-use rule does not follow from the Act's terms. To a significant extent we agree with them: the Act nowhere states or implies that franchisors may regulate cable operators only as "expressly permitted in the Act." *Accord City of Dallas v. F.C.C.*, 165 F.3d 341, 348 (5th Cir. 1999). What the Act does say, in § 544(a), is that 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.) And the Act's preemption clause recites, not coincidentally, 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." 47 U.S.C. § 556(c) (emphasis added). (Although Petitioners suggest otherwise, the "subchapter" referenced in § 544(a) is obviously part of the "chapter" referenced in § 556(c).)

The relevant question as to preemption, therefore, is not whether the Act itself authorized a franchisor's action. Indeed, the awkward, negative formulation of § 544(a)—that the franchisor "may not" regulate cable operators "except to the extent consistent with" Title VI, as opposed to saying simply that franchisors "may regulate" cable operators to that extent—suggests that Congress went out of its way *not* to suggest that federal law is the fountainhead of all franchisor regulatory authority. What we know from §§ 544(a) and 556(c), rather, is that federal law circumscribes the franchisors' authority as to cable operators. The relevant "rules" as to the preemption of state or local actions are the rules stated in those provisions. The FCC's formulation, respectfully, only gets in the way.

The question presented, therefore, is simply one of preemption; and §§ 544(a) and 556(c) tether the preemption analysis to the terms of the Act itself. Vague references to a "bargain" between cable operators and franchisors, *Third Order* ¶ 84, are thus beside the point. Instead, the test for preemption under those provisions is whether state or local action is "inconsistent with" a

specific provision of the Act. "Inconsistent" means, most concisely, "incompatible." *Am. Heritage Dictionary* at 914-15 (3d ed. 1992). The Act therefore preempts actions that violate or circumvent any of its provisions. *See Verizon North, Inc. v. Strand*, 309 F.3d 935, 941 (6th Cir. 2002) (affirming preemption of a state order that "completely bypasses and ignores the detailed process for interconnection set out by Congress in the [Act]"); *Verizon North, Inc. v. Strand*, 367 F.3d 577, 585 (6th Cir. 2004) (affirming preemption of a state order that "eliminates all incentive to adhere to the federal statutory process"). Thus, on this point, we agree with the FCC's conclusion that "states and localities [may] 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." *Third Order* ¶ 81.

2.

a.

With that framework, we turn to the preemption question here. That question itself requires some definition. In *Montgomery County*, we held that "franchising authorities may regulate Title II carriers only to the extent they provide cable services." 863 F.3d at 492 (citing 47 U.S.C. § 522(7)(C)). For practical purposes that proposition was common ground in that case: the petitioners there, to their credit, did not dispute that, "to the extent the Title II common carrier facility is *not* used to provide cable services, the facility is *not* a cable system." Pet'r Br. at 47, *Montgomery County*. *v. F.C.C.* (No. 15-3578). That proposition follows inescapably from § 522(7)(C), which provides in relevant part that "[t]he term 'cable system' . . . does not include . . . a facility of a common carrier which is subject, in whole or in part, to the provisions of [Title II], except that such facility shall be considered a cable system . . . to the extent such facility is used to" provide cable services.[1]

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[1]We reject the argument by certain petitioners here that § 522(7)(C) excludes from the definition of a "cable system" only "the *portion*" of a common carrier's facility that is used to provide telecommunications services. Portland Br. at 51. The "extent" to which a facility is a "cable system" under § 522(7)(C) does not depend on which *wires* are used to provide cable service; instead it "depend[s] on the service [the facility is] providing *at a given time*." *MediaOne Grp., Inc. v. County of Henrico*, 257 F.3d 356, 364 (4th Cir. 2001) (emphasis added).

But in *Montgomery County* we remanded to the FCC the question whether the Act bars franchisors from regulating the non-cable services of cable operators "who[] are not Title II carriers." 863 F.3d at 493. Here, that question is part of a concrete dispute regarding the validity of a fee that the City of Eugene, Oregon imposes on broadband services (which the FCC classifies as an "information service" under the Act, *see* 33 FCC Rcd. 311, 321 (Jan. 4, 2018)) provided by a cable operator there. Hence we answer that question to the extent it is part of that dispute here.[2]

b.

The Eugene Code states that any "operator"—cable or not—that provides "telecommunications services" over the city's rights-of-way must pay "a fee in the amount of 7% of the licensee's gross revenues derived from telecommunications activities within the city, to compensate the City for the use of the rights-of-way." Eugene City Code §§ 3.410, 3.415(2). The Eugene Code defines "telecommunication activities" to include three different kinds of services under the Communications Act: cable services, telecommunications services, and information services. *See id.* § 3.005; 47 U.S.C. § 153(24), (53).

Here, nobody disputes that, as applied to cable operators, Eugene's seven-percent fee on cable revenues is capped at five percent by operation of the Act's cap on franchise fees. *See* 47 U.S.C. § 542(b); Eugene City Code § 3.415(4). The question, instead, is whether Eugene's fee on broadband services is "consistent with" Title VI as applied to a cable operator that is not a common carrier. 47 U.S.C. § 544(a). In the Third Order, the FCC concluded that such a fee, so applied, was inconsistent with Title VI on two grounds: first, the FCC determined, the fee is a franchise fee that (when added to the five-percent fee on cable revenues) is imposed in violation of the franchise-fee cap in § 542(b); and second, the FCC determined, the fee amounts to regulation of a cable operator's provision of information services, which is proscribed by § 541(b). We address those determinations in turn.

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[2]We do not address, however, the question whether a state or local government (as opposed to a franchising authority) may impose a fee on *telecommunications* services provided by cable operators. The question whether a fee of that sort would circumvent Title VI's limits on franchisor regulation of a cable operator's telecommunications services is neither fully briefed nor clearly presented on the facts here.

(i)

Section 542(g)(1) provides: "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*[.]" (Emphasis added.) Thus, if the Eugene fee is imposed on a cable operator "solely because of [its] status" as a cable operator, then the fee is a "franchise fee" and hence invalid under § 542(b) (assuming that the operator has already paid a fee equal to five percent of its gross revenue from cable services).

Section 522(5) defines "cable operator" and provides in full:

> 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[.]

Of all the words in this definition, the FCC's argument focuses relentlessly on two: "management" and "operation." By way of background, everyone agrees that "Congress was well aware that 'cable systems' would be used to carry a variety of cable and non-cable services." *Third Order* ¶ 88. The "management or operation of a cable system[,]" *id.*, thus includes the operation of a cable system to provide broadband services. Thus, in the FCC's view, the conduct giving rise to the imposition of Eugene's fee—namely, an operator's use of the right of way to provide broadband services—falls within the § 522(5) definition of "cable operator." Hence, the FCC concludes, the Eugene fee on broadband services is imposed on a cable operator "solely because of [its] status as such." *See id.* ¶ 91.

But the FCC reads "management and operation" woefully out of context. Indeed, all the contextual indicators cut against the FCC's interpretation. As an initial matter, the franchise-fee cap itself is based only on revenues from "cable services." 47 U.S.C. § 542(b). True, Congress can define however it wants the fees that count toward that cap. But one would normally expect that the fees that count towards a revenue-based cap would be fees on the same kind of revenue used to set the cap itself—here, revenue from "cable services."

Section 522(5)(A) bears out that expectation, given that it defines a "cable operator" to be a person who "provides cable service over a cable system" and "owns a significant interest in such cable system." A fee imposed on such a cable operator "based on [its] status as such[,]" *id.* § 542(g)(1), would be a fee based on the provision of "*cable service* over a cable system," *id.* § 522(5)(A). Thus, so far as § 522(5)(A) is concerned, the fees that count toward the § 542(b) cap are fees on the same revenues used to set the cap itself—namely, revenue from "cable services." *Id.* §§ 522(5)(A), 542(b). The City of Eugene's fee on broadband services, of course, is not such a fee.

Yet the FCC's interpretation would yield a radically different result if a cable operator "otherwise controls" the cable system rather than "owns" it. For the FCC overlooks a host of words that Congress "careful[ly] cho[se]" to include in § 522(5). *Third Order* ¶ 89. The first is "owns": as noted above, if the cable operator "owns" the cable system over which it "provides cable service[,]" the only fees that are imposed "based on [its] status as such"—and thus the only fees that count as franchise fees under § 542(g)(1)—are fees on revenues from the operator's provision of "cable service[.]" 47 U.S.C. § 522(5)(A). Again, the City of Eugene's fee on the provision of broadband services is not such a fee. Even under the FCC's interpretation, therefore, Eugene's fee on broadband services—as imposed on a cable operator that owns its cable system, which is presumably most of them—is *not* a "franchise fee" that counts toward the § 522(b) cap.

But the same is not true, under the FCC's interpretation, if the cable operator "*otherwise* controls" the cable system. *Id.* § 522(5)(B). (Emphasis added.) "[O]therwise[,]" as used in § 522(5)(B), plainly distinguishes control of the cable system by "own[ership]"—which is governed by § 522(5)(A)—from control by some *other* "arrangement"—which is governed by § 522(5)(B). And only § 522(5)(B) references an operator's "management and operation" of a cable system. Under the FCC's interpretation, therefore, only under § 522(5)(B) does a person's "operation" of a cable system—which can include the provision of broadband services—give rise to the person's status as a "cable operator." Only as to cable operators as defined under § 522(5)(B), therefore, would the City of Eugene's fee on broadband services be imposed on the operator "based on [its] status as such." *Id.* § 542(g)(1). Only as to those operators, therefore,

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would Eugene's fee on broadband services be a "franchise fee" that counts toward the § 542(b) cap.

The FCC's interpretation thus leads to a distinction that makes no apparent sense: Eugene's fee on broadband services *is* a "franchise fee" as imposed on cable operators who do not own the cable system over which they provide broadband services; but is *not* a "franchise fee" as imposed on cable operators who do own the cable system over which they provide broadband services. Not even the FCC argues otherwise—because it simply elides the distinction between "owns" and "otherwise controls" in § 522(5).

In fact, however, the FCC's interpretation is mistaken altogether. For the FCC also overlooks some other words in § 522(5)—namely, "such cable system" and "such a cable system[.]" *Id.* § 522(5)(A), (B). Section 522(5)(A) refers to a cable operator "who provides cable service over a cable system" and who "owns a significant interest in such cable system." "[S]uch cable system[,]" as used there, refers to a particular cable system—namely, *the* cable system over which the operator "*provides cable service*[.]" Section 522(5)(B), in turn, refers to a cable operator who "otherwise controls . . . the management and operation of such a cable system." "[S]uch a cable system," as used there, refers to the same *type* of system described in § 522(5)(A)—namely, a cable system over which the operator *provides cable services*. *Cf. AES-Apex Employer Servs., Inc. v. Rotondo*, 924 F.3d 857, 864 (6th Cir. 2019). The two subsections therefore do not create radically different rules for operators who "own[]" a cable system and operators who "otherwise control[]" one. *Id.* § 522(5)(A), (B). Instead, read as a whole, the two subsections ensure that both kinds of cable operators are treated the same.

What gives a person the status of a cable operator under § 522(5), therefore, is the person's provision of cable services. And the City of Eugene's fee on broadband services, by definition, is not imposed based on the operator's provision of cable services. The fee is therefore not imposed "solely because" of a cable operator's "status as such[.]" Hence the fee is not a "franchise fee" under § 542(g)(1); the fee does not count toward the § 542(b) cap; and its imposition is not, on that ground, "inconsistent with" Title VI. *Id.* § 556(c).

(ii)

But the FCC also determined that the City of Eugene fee on broadband services—as applied to a cable operator that is not a common carrier under Title II—is inconsistent with § 544(b)(1) and thus preempted on that ground. By way of background, as noted above, Congress undisputedly contemplated that cable operators would use their facilities to provide both cable and non-cable services. For example, § 544(a) provides that "[a]ny 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.) That reference to "services" notably is not limited to cable services.

Section 544(b)(1) in turn provides that a franchising authority, "in its request for proposals for a franchise . . . may establish requirements for facilities and equipment, but may not . . . establish requirements for video programming or other information services[.]" Likewise undisputed here is that "information services," as used in § 544(b)(1), includes broadband services. Under § 544(b)(1), therefore, a franchising authority cannot require payment of an information-services fee as a condition of obtaining a franchise under § 541(b)(1). Meanwhile, § 541(a)(2) provides that "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way[.]" Section 541(b)(1) also makes clear, albeit by implication, that a franchise shall be construed to allow the cable operator to operate the cable system.

A franchising authority in the City of Eugene therefore could not, consistent with § 544(b)(1), impose on a cable operator a seven-percent broadband fee as a condition for a cable franchise. The question, then, is whether the City circumvented that limitation when it imposed the same fee on a cable operator by means of the City's police power.

We conclude that it did. The power of a franchisor *qua* franchisor, as explained above, is the power to grant (or deny) access to public rights-of-way to construct and operate a cable system. 47 U.S.C. § 541(a)(2), (b)(1). The City (or its franchisor) exercised that power when it granted a cable operator there a franchise under § 541(b)(1). In doing so, the City granted the cable operator the right to use its cable system, including—as Congress plainly anticipated—the

right to use that system to provide information services. The City also surrendered its right to exclude the cable operator from the City's rights-of-way. Yet the City imposes a seven-percent "license fee" upon the same cable operator to use the same cable system on the same "rights-of-way." Eugene City Code § 3.415(2).

As applied to the cable operator, therefore, the City's imposition of a "license fee" equal to seven percent of the operator's revenues from broadband services is merely the exercise of its franchise power by another name. And § 544(b)(1) expressly barred the City from exercising its franchise power to that end. *See Liberty Cablevision of P.R., Inc. v. Municipality of Caguas*, 417 F.3d 216, 221 (1st Cir. 2005) (holding that "the municipalities' attempts to assess fees for use of these same rights-of-way are inconsistent with the [Act] and are necessarily preempted"). The City's imposition of its broadband fee on the cable operator therefore circumvents "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." *Third Order* ¶ 81. Thus, the fee is not "consistent with" Title VI and is therefore preempted. 47 U.S.C. §§ 544(a), 556(c).

Petitioners respond that the fee is rescued by § 544(b)(2)(B), which provides that a franchisor "may enforce any requirements contained within the franchise . . . for broad categories of video programming or other services." But that provision refers only to provisions that a franchisor and cable operator agree upon as part of a franchise agreement. And a fee imposed by legislative fiat is hardly that. (Nor do we think it clear that the reference to "other services" in § 544(b)(2)(B) includes "information services." Although we need not decide the issue here, the "other" in "other services" might distinguish the services referenced in § 544(b)(2)(B) from the "information services" mentioned in § 544(b)(1).) The FCC is therefore correct that, as applied to a cable operator that is not a common carrier, the City of Eugene's fee on broadband services is preempted.

C.

We make shorter work of Petitioners' remaining two arguments.

1.

Petitioners argue that the FCC's extension of its determinations in the Third Order to state (as opposed to local) franchisors was arbitrary and capricious. With respect to that extension, the FCC reasoned that it saw "no statutory basis for distinguishing between state- and local-level franchising actions." *Third Order* ¶ 113. Neither do we: section 544(a) provides that "*[a]ny franchising authority*" may not regulate a cable operator "except to the extent consistent with this subchapter." (Emphasis added.) Section 556(c) likewise 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," is preempted. Petitioners thus argue in essence that the FCC was bound to adopt a distinction that Congress expressly rejected. Nor was the FCC obligated, as Petitioners suggest, to catalogue the effect of its entirely lawful extension upon particular state laws or provisions. Petitioners' arguments are without merit.

2.

Finally, Petitioners seek to challenge the FCC's determination that a cable operator may challenge in court any request for PEG support that is "more than adequate[,]" as the term "adequate" is used in § 541(a)(4)(B). *Third Order* ¶ 49. Suffice it to say, however, that no party has remotely presented this issue in a concrete form justiciable under Article III. *See Sierra Club v. E.P.A.*, 793 F.3d 656, 662 (6th Cir. 2015); *Sierra Club v. E.P.A.*, 292 F.3d 895, 899-900 (D.C. Cir. 2002).

* * *

For the reasons stated above, the petitions are granted in part and denied in part.