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Municipal Broadband Fees Are Bad Law and Bad Policy

by

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I. Introduction and Summary

Few outside the telecommunications arena realize the significant financial benefits that city governments received from the cable television revolution. To offer services, cable companies must receive a franchise from the local franchising authority, typically a municipality.[1] These franchises often come with a five percent surcharge on cable television operators' revenue collected within the city – a windfall that former New York Mayor John Lindsay once likened to discovering oil beneath the streets of Manhattan. As late as 2016, consumers were paying cities $3.5 billion annually in franchise fees.[2]

But just as the cord-cutting phenomenon has significantly impacted cable operators, the shift from cable to streaming media has begun to strain city budgets. In response to dwindling revenues from cable television, cities have begun pressuring the Federal Communications Commission to expand their authority to assess a percentage of *broadband* revenue collected within their jurisdictions, ostensibly to compensate for use of city rights-of-way by broadband networks.

The Commission should reject these attempts to apply the cable franchise model to the broadband sector. Such municipal proposals are contrary to the 1996 Telecommunications Act and case law distinguishing franchise fees from rights-of-way fees. They also contradict at least the spirit of the Internet Tax Freedom Act, which prevents state and local government from taxing Internet access.

They also represent bad policy: municipal broadband fees are likely to be passed on to consumers, resulting in higher monthly broadband costs. While this foreseeable result adversely impacts all consumers, it impacts lower-income consumers the most, undermining bipartisan efforts to narrow the digital divide.

II. Analysis

A. Franchise Fees and the Cable Mixed-Use Rule

Municipal governments have quietly but significantly benefited from the cable television revolution. The Cable Act mandates that companies obtain a franchise from the local franchising authority to offer cable services.[3] These authorities, often part of the local government, grant franchises over specific geographic areas subject to a franchise fee, which the Act caps at five percent of gross cable revenues collected by the franchisee.[4] Typically, this fee is passed along to consumers and itemized on their bills.

But cord-cutting has adversely impacted these municipal revenue streams. According to the NCTA, cable television subscriptions have plummeted from a peak of 105 million in 2010 to just 68.7 million in 2024 – and this decline is accelerating.[5] As broadband increasingly supplants cable as the primary conduit of video communication, cable franchise fees have diminished, leaving municipalities scrambling to find new revenue sources to avoid budget cuts.

Several cities are now targeting broadband fees as a potential solution. Section 253 of the Communications Act allows state and local governments to charge “fair and reasonable compensation” from telecommunications providers for use of public rights-of-way.[6] Particularly in light of the Commission’s April 2024 decision to reclassify broadband as a Title II telecommunications service, some municipalities have started imposing percentage-of-revenue fees on broadband providers akin to those levied on cable companies.

However, the Cable Mixed-Use Rule prohibits cities from charging such fees on the broadband revenue of cable providers. The rule states that “a franchising authority may not regulate the provision of any services other than cable services offered over the cable system of a cable operator.”[7] The current version of this rule was adopted in 2019, though the prohibition dates back to 2007, when the Commission determined that using the cable franchising power to regulate other services constituted an unreasonable barrier to market entry for new cable providers.[8]

Earlier this year, the U.S. Conference of Mayors and cities such as Portland, Oregon, began pressuring the Commission to repeal this rule, arguing that it creates an unlevel playing field for broadband providers.[9] Portland argues that the Cable Mixed-Use Rule creates an unlevel playing field for broadband providers: standalone broadband providers must pay right-of-way fees on their broadband revenue, while cable providers are charged only on their declining cable revenues. These municipalities likely hope such arguments are received favorably by the Commission's new Democratic majority, given that then-Commissioner Jessica Rosenworcel and Commissioner Geoffrey Starks both voted against the 2019 order that adopted the current rule.

But the Commission should reject these arguments. If cities like Portland were genuinely concerned about competitive parity, they could resolve the issue by simply reducing the fees they charge standalone broadband providers. In reality, their primary concern appears to be revenue. Portland estimates that allowing cities to impose the five-percent cable franchise fee on broadband revenue would add $3.75 billion annually to municipal coffers.[10] But this would effectively allow the city to collect twice for use of the right-of-way – once as a cable franchise fee and again as a broadband right-of-way fee – even though both services operate over the same network. The Cable Mixed-Use Rule serves as a critical safeguard against such municipal double-billing, especially considering that these costs are ultimately passed along to consumers.

B. Distinguishing Franchise Fees From Right-of-Way Fees

More generally, the push to impose the franchise model on broadband overlooks crucial distinctions between cable franchise fees and telecommunications right-of-way fees. Under the Cable Act, municipalities act as gatekeepers for the cable industry, regulating market entry through their authority to reasonably deny franchise applications. Conversely, the Telecommunications Act of 1996 *prohibits* state and local gatekeeping for telecommunications services. Section 253(a) removed the franchising power that state government had during the Bell era by preempting any state or local regulation that creates barriers to entry for telecommunications providers as a means to foster greater competition in the telecommunications sector.

This conceptual distinction underscores the fundamental difference between these two types of fees. Because local franchise authorities generally control cable market entry, they can tax the revenue generated as a condition of that entry. The Cable Act blesses this arrangement but caps the fee at five percent. In contrast, Section 253(c) allows state and local government to recover only "fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way."[11] This provision does not protect a broad municipal assessment power. Instead Section 253(c) protects only a narrow regulatory fee that is premised on the need for cooperation between local governments and telecommunications providers on network deployment and maintenance.

Although the statute leaves some room for interpretation, the best reading of Section 253(c) seems to preclude share-of-revenue rights-of-way fees. The word "compensation" could be read broadly to imply something like a wage or narrowly to imply reimbursement for some harm caused by rights-of-way use. Share-of-revenue fees are not compensatory in this narrower legal sense. Nor do such fees relate directly to "use of rights-of-way." They do not vary based on the number of wires or amount of space used by the network or whether a network is strung on poles or requires a more intensive undergrounding effort. Finally, revenue-based fees are arguably not charged "on a competitively neutral and nondiscriminatory basis": although all providers may be charged the same percentage, the total amount paid by each provider for the same use can vary significantly.

The Commission has recognized this distinction in the context of wireless deployment. The 2018 Small Cell Order limited municipal right-of-way fees on 5G deployment: for one-time application fees over $500 or recurring fees over $270 per year, right-of-way fees are presumptively lawful only if reasonably based on the government's costs.[12] The Commission explained that above-cost fees, in the aggregate, inhibit network deployment in violation of Section 253(a).[13] Among other effects, the Commission explained that high rights-of-way fees in "must serve" heavily-populated areas could consume capital that would otherwise support deployment in less profitable rural areas. The Ninth Circuit upheld this order in *City of Portland v. United States*, finding that the decision to base rights-of-way fees primarily on a cost basis was a reasonable interpretation of the statute.[14]

The Small Cell Order's cost-focused approach reflects traditional judicial reasoning concerning utility rights-of-way fees. Although courts have not been entirely consistent, communications lawyer Gardner Gillespie has shown that since the 1880s, when municipalities first began leveraging rights-of-way access to raise revenue, they have largely struck such fees as unreasonable and generally limited municipal fees to recovery of regulatory costs.[15] Municipalities may regulate rights-of-way under their police powers, but such fees ordinarily "cannot camouflage a revenue measure."[16] The 1994 *New York Telephone Co. v. City of Amsterdam* case illustrates this point.[17] The court found that a municipal fee for a street excavation was disproportionate to the city's costs and "exacted for revenue purposes."[18] The court explained that this was not a fee – defined as "the visitation of the costs of special services upon the one who derives a benefit from them" – but rather a tax – "burdens of a pecuniary nature imposed for the purpose of defraying the costs of government services generally."[19] As a result, the court enjoined the charge as exceeding the city's authority to regulate rights-of-way.

Municipalities often justify revenue-based fees as the fair market value of renting space in the city streets. As Gillespie notes, the Supreme Court briefly endorsed a "rental" theory of regulatory fees in 1893, but it issued a second opinion on rehearing two months later that relied on other grounds.[20] While some courts have since used this reasoning to explain cable or pre-1996 telecommunications franchise fees,[21] this shorthand is misleading. The franchise fee reflects the price of permission to enter a market, not the price of rights-of-way use. Even assuming 253(c) allows for rental fair market value, it's unlikely that it correlates to a share of revenue. Cities argue that the willingness of providers to enter revenue-sharing

agreements to use rights-of-way is evidence of its fair market value. But this is incorrect. It is evidence of monopolistic pricing, as cities have a monopoly over supply and there is no competitor to discipline price. As the Second Circuit has noted, "Section 253(c) requires compensation to be reasonable essentially to prevent monopolistic pricing by towns."[22] Determining fair market value is difficult but likely much less. Indeed, Thomas Snyder and William Fitzsimmons argue that due to lack of economic scarcity, "the [public right of way] generally has little or no fair market value."[23]

C. Franchise Fees as Taxes

City of Amsterdam demonstrates that some courts have rejected share-of-revenue fees and similar above-cost right-of-way fees as taxes in disguise. The rationale can be persuasive: the purpose of these fees is revenue generation, with proceeds typically deposited into general funds. On the other hand, they are transactional rather than mandatory, as most takes are: they apply only to a narrow class in exchange for the benefit of right-of-way access. If the fee is too high, the provider can pursue alternatives.[24]

The parallel suggests that regardless of their formal classification, broadband share-of-revenue fees violate at least the spirit of the Internet Tax Freedom Act. As relevant here, the Act states that "no state or political subdivision thereof may impose…taxes on internet access."[25] The Act was first enacted in 1998, two years after the Telecommunications Act was adopted, and therefore sheds some light on how the Congress that adopted Section 253 would have thought about charges on broadband service. After repeated extensions, the Act was made permanent in 2016. Representative Larry Bucshon, a co-sponsor of the 2016 bill, explained that the ban was necessary to "ensure the Internet remains accessible for all Americans" by "preventing state and local tax policies from creating barriers to access."[26] Another sponsor, Bob Goodlatte, argued that subjecting Internet access to the taxes paid on other communications services could put broadband out of reach for low-income households, which "pay 10 times as much in communications taxes as high-income households as a share of income."[27] Share-of-revenue fees on broadband raise much the same concerns. They fill government coffers by increasing the provider's cost of service – and, when passed along to consumers in the form of a surcharge, they increase the household cost of broadband access in ways that harm low-income consumers the most.

III. Conclusion

Policymakers should resist the municipal lobby's efforts to impose the cable franchise fee system on the broadband ecosystem. The Telecommunications Act differentiates between cable franchise fees and telecommunications rights-of-way fees, and collapsing this distinction contradicts congressional intent.

Beyond these legal concerns, such proposals reflect poor policy. A five percent surcharge on broadband access would ultimately be passed along to consumers. Congress and the Commission have long been concerned that affordability is a potential barrier to low-income broadband adoption. For this reason, Congress has focused on making broadband more

affordable, first through the pandemic-era Emergency Broadband Benefit and then its successor, the Affordable Connectivity Program. Especially now, with those efforts in jeopardy, policymakers should not permit cities to shore up budgets by surcharging broadband, which would only exacerbate the digital divide.

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[1] 47 U.S.C. § 541(b).
[2] NCTA, "US Cable Industry Contributes More Than 2.9 Million Jobs and $421 Billion to the Economy, New Study Shows" (April 24, 2017), available at; https://www.ncta.com/media/media-room/us-cable-industry-contributes-more-29-million-jobs-and-421-billion-the-economy-new-study-reports.
[3] 47 U.S.C. § 541(b).
[4] *Id*. § 542(b).
[5] IBISWorld, "Number of Cable TV Subscriptions" (August 22, 2024), available at: https://www.ibisworld.com/us/bed/number-of-cable-tv-subscriptions/4625/.
[6] 47 U.S.C. § 254(c).
[7] 47 C.F.R. § 76.43.
[8] Implementation of Section 621(A)(1) of the Cable Communications Act, 34 FCC Rcd. 6844.
[9] *See* Northern Dakota County Cable Communications Commission, letter to Federal Communications Commission, June 5, 2024, available at https://www.fcc.gov/ecfs/document/107030491421994/1; Comments of City of Portland, Oregon, GN Docket 24-119 (June 6, 2024), available at https://www.fcc.gov/ecfs/document/10606842510286/1; see also Restoring Local Authority to Receive Fair and Reasonable Compensation for Use of Public Rights-of-Way by Cable Operators and other Communications Service Providers, Resolution 66, U.S. Conference of Mayors 92nd Annual Meeting (2024), available at https://legacy.usmayors.org/resolutions/92nd_Conference/proposed-review-list-full-print-committee-individual.php?resid=a0FKY000000sZ762AE.
[10] *See* Comments of City of Portland, supra note 9.
[11] 47 U.S.C. § 253(c).
[12] *See* City of Portland v. United States, 969 F.3d 1020, 1037 (2020).
[13] *Id*. at 1037-38.
[14] *Id*. at 1038.
[15] Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 DICKINSON L REV. 209 (2002).
[16] Alstadt v. Arkansas-Missouri Power Co., 215 Ark. 212, 215 (1949); *see generally* Gillespie (collecting cases).
[17] 200 A.D.2d 315 (1994).
[18] *Id*. at 318.
[19] *Id.*
[20] City of St. Louis v. Western Union Telegraph Co.,148 U.S. 92 (1893).
[21] *See, e.g.,* City of Dallas v. FCC, 118 F.3d 393, 397 (5th Cir. 1997); City of Little Rock v. AT&T Communications of the Southwest, Inc., 888 S.W.2d 290, 292 (Ark. 1994).
[22] TCG New York, Inc. v. City of White Plains, 305 F.3d 67, 79 (2002).
[23] Thomas W. Snyder and William Fitzsimmons, *Putting a Price on Dirt: The Need for Better-Defined Limits on Government Fees for Use of the Public Right-of-Way under Section 253 of the Telecommunications Act of 1996*, 64 FED. COMM. L.J. 137, 167 (2011).

[24] For a more detailed discussion of fees versus taxes, *see* Gillespie at 229.
[25] PL 105-277, codified in 47 U.S.C. § 151 note.
[26] 160 Cong. Rec. H6228-05 (statement of Rep. Bucshon).
[27] *Id*. (statement of Rep. Goodlatte).