No. 08-3023 (L) (Cons. No. 15-3578)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MONTGOMERY COUNTY, MARYLAND *ET AL.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

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

BRIEF *AMICUS CURIAE* OF THE ALLIANCE FOR COMMUNITY MEDIA AND THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY IN SUPPORT OF PETITIONERS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amici curiae the Alliance for Community Media and the Alliance for Communications Democracy are each non-profit organizations with no corporate parents and no publicly held stock.

/s/ James N. Horwood
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STATEMENT OF *AMICI'S* IDENTITY, INTEREST, AND AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a) and 29(c)(4), the parties to this appeal have been informed of the intended filing of this *amicus* brief and have consented to its filing.

Pursuant to Fed. R. App. P. 29(c)(5): (A) this *amicus* brief was not authored, either in whole or in part, by a party's counsel; (B) neither a party nor a party's counsel contributed money to fund the preparation or submission of this brief; and (C) no person, other than *amici*, their members or their counsel, contributed money to fund the preparation or submission of this brief.

Amicus the Alliance for Community Media ("ACM") is a national nonprofit membership organization representing over 3,000 public, educational and governmental ("PEG") access organizations, community media centers and PEG channel programmers throughout the nation. Those PEG organizations and centers include more than 1.2 million volunteers and 250,000 community groups that provide PEG access cable television programming in local communities across the United States. The ACM was the lead petitioner in the *Alliance* case,[1] in which this Court upheld the Federal Communications Commission's ("FCC") *First Order*

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[1] *All. for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008) ("*Alliance*").

in the *Section 621* rulemaking proceeding out of which the orders under review here arose as well.[2]

Amicus the Alliance for Communications Democracy ("ACD") is a national membership organization of nonprofit PEG organizations that supports efforts to protect the rights of the public to communicate via cable television, and promotes the availability of the widest possible diversity of information sources and services to the public.[3] The organizations represented by ACD have helped thousands of members of the public, educational institutions and local governments make use of PEG channels that have been established in their communities pursuant to franchise agreements and federal law, 47 U.S.C. § 531. Like ACM, ACD was a petitioner in the *Alliance* case, challenging the FCC's *First Order*. *Alliance*, 529 F.3d at 772.

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[2] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992* ("*Section 621*"), Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007) ("*First Order*") (App. 1-106).

[3] ACD's members are: Access Humboldt, Eureka, California; Capital Community Television, Salem, Oregon; Chicago Access Network Television, Chicago, Illinois; CreaTV San Jose, San Jose, California; Manhattan Neighborhood Network, New York City, New York; MetroEast Community Media, Gresham, Oregon; and Alliance for Community Media Western Region.

Amici ACM and ACD both participated in the FCC proceedings that led to the two orders that are the subject of review in this appeal.[4] *Amici* filed comments and reply comments with the FCC in response to the further notice that led to the *Second Order*,[5] and they also participated in a petition for reconsideration that the FCC denied in the *Recon Order*. [6]

ACM and ACD participated in the FCC proceedings below, and are participating as *amici* here, because if allowed to stand, the FCC's rulings under review—and, in particular, those rulings' overly broad interpretation of what constitutes a "franchise fee" under the Cable Act—threaten the ability of *amici*'s members and other PEG organizations and programmers to continue to provide PEG programming to cable subscribers in their local communities.

ARGUMENT

Amici fully support the position and arguments of the Petitioners. Petitioners' brief points out the many legal infirmities of the *Second Order* and the *Recon Order*. We supplement the discussion of those infirmities below in Part II. But first, in Part I, we inform the Court about the ways in which the FCC orders

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[4] *See* App. at 114-137, 222-236, 288-303.
[5] *Section 621*, Second Report and Order, 22 FCC Rcd 19633 (2007) ("*Second Order*") (App. 237-66).
[6] *Section 621*, Order on Reconsideration, 30 FCC Rcd 810 (2015) ("*Recon Order*") (App. 344-60).

under review, if allowed to stand, would harm PEG access and the important public interests it serves.

I. THE FCC'S RULINGS THREATEN THE CABLE ACT GOALS SERVED BY PEG ACCESS.

A. PEG Access is Critical to the Cable Act's Goals of Promoting Diversity and Localism.

In 1984, Congress enacted the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, *codified as amended*, at Title VI of the Communications Act of 1934, 47 U.S.C. §§ 521 *et seq.* (the "Cable Act"). To further the goal of providing "the widest possible diversity of information sources and services to the public," 47 U.S.C. § 521(4), the Cable Act ratified local governments' authority to require cable operators to provide system channel capacity for PEG access as a condition for franchise approval, 47 U.S.C. § 531(b). The Act also prohibited operators from "exercise[ing] any editorial control over any" constitutionally protected expression appearing on access channels, 47 U.S.C. § 531(e). The Cable Act thus affirmed the role of public access channels to "provide groups and individuals who generally have not had access to the

electronic media with the opportunity to become sources of information in the electronic marketplace of ideas."[7]

Consistent with the purpose of public access channels as open forums for speech, franchises or local regulations traditionally provide that public access channels may be used by the general public on a nondiscriminatory basis for any non-commercial, constitutionally protected programming. Local franchises also typically require operators to set aside channel capacity for governmental and educational channels, which provide local residents with the ability to view their local government councils and commissions in action and to receive local educational and school-related programming.[8]

PEG access advances Congress' Cable Act goal of providing a wide diversity of information and services by responding to the unique needs and interests of each local community. The role of PEG access in developing technological and media literacy has never been more important than it is today. PEG access centers provide constructive outlets for community youth to learn media skills. Seniors actively create programming on a range of issues. PEG channels provide an outlet for otherwise unserved or underserved segments of a

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[7] H.R. Rep. No. 98-934, at 30 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 ("*1984 House Report*").
[8] *Id.*

community (such as foreign-language speakers) to produce and watch programming responsive to their unique needs and interests. PEG channels give nonprofit organizations an outlet to reach clients and other community members in need of assistance.

PEG channels also furnish a platform for civic debate about local political issues. During local elections, PEG channels provide opportunities for candidates to address the public directly and fully, without being limited to a 30-second sound bite. Thus, PEG channels are a vital platform for causes and organizations that would otherwise not be part of public discourse. Viewpoint diversity is a long-established public interest goal of the Cable Act.

The role of PEG channels is particularly important today, when the amount of programming on commercial television channels that is devoted to local public affairs is small and shrinking. The commitment of PEG programmers to promoting social services, election information, arts and civic events, public safety and other issues close to home demonstrates what is possible when local individuals and community groups, rather than just larger commercial media outlets, are given the opportunity to participate in the television medium.

The quantity of uniquely local original programming that PEG provides to communities is substantial. A 2010 sampling performed by *amicus* ACM revealed that an average PEG access center ran 1,867 hours of first-run local programming

on its PEG channel(s) each year. That translates into an average of 35 hours of first-run local programming per week—an impressive number that clearly reflects the robust amount of community involvement with, and the value that communities place on, PEG. Whether they are in an urban area, suburb or small town, PEG channels are focused on the local communities they serve, cablecasting town hall and council meetings, local election coverage, school activities and other local events that rarely receive full coverage on local broadcast or other commercial media. Because of the variables in the number of PEG channels operated in any specific jurisdiction, it is difficult to extrapolate nationwide, but *amicus* ACM has estimated that PEG access channels generate over 2.5 million hours of original local programming per year.[9]

Due to their uniquely local nature, PEG channels are an irreplaceable source of local election coverage. Indeed, PEG content often serves as the only source of local community news and information, so limiting its reach harms the local electorate. *Amicus* ACM conducted a fall 2012 survey of over 200 of its member PEG centers' 2012 election coverage and programming. The survey revealed that 85% of PEG centers produced and/or aired 2012 election programming, and that

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[9] *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, GN Docket No. 10-25, Comments of ACM 15-17 (FCC filed May 21, 2010).

more than 75% of PEG centers collaborated with other organizations to offer election programming, with the League of Women Voters, the Local Chambers of Commerce, local community colleges and universities most often cited as key partners.[10] PEG centers participating in the survey represented a mix of public, educational and governmental non-commercial cable channels from around the country, including urban and rural centers.

In sum, PEG channels are a critical and irreplaceable source of truly local programming. Any harm—or even merely an increased risk of such harm—to PEG arising from the FCC's *Second Order* or *Recon Order* would therefore be inimical to localism and local democratic participation, and therefore to the goals of the Cable Act.

B. The FCC's Rulings that Institutional Networks and Other In-Kind Cable-Related Franchise Requirements are a "Franchise Fee" Threaten the Ability of PEG Centers to Fulfill the Cable Act's Goals.

As Petitioners' note, in the *Second Order* and *Recon Order* the FCC appears to have ruled that certain in-kind cable-related franchise requirements—such as institutional network ("I-Net") requirements and complimentary cable service to

[10] *See* ACM, *Alliance for Community Media Survey Results Demonstrate Impact of Community Media Centers* (Jan. 10, 2013), http://www.allcommunitymedia.org/latest-news/alliance-for-community-media-survey-results-demonstrate-impact-of-community-media-centers (last visited Mar. 3, 2016).

educational and governmental locations—are a "franchise fee" within the meaning of the Cable Act, 47 U.S.C. § 542(g), and thus the "value" of these sorts of in-kind franchise requirements may be offset against the Act's 5% franchise fee cap.[11]

If allowed to stand, the FCC's rulings under review would directly harm PEG access and the communities it serves in several ways.

First, in some communities, PEG centers rely on I-Net capacity to deliver PEG programming from its origination points (which could be city hall, a school or a PEG studio) to the cable operator's system. Also, in some communities, the local school system relies on I-Net capacity to deliver information, programming and training to each school. If the cost or "value" of franchise I-Net requirements were a "franchise fee," the programming and data transport functions that I-Nets perform for PEG centers, schools and local governments would be lost and could only be replaced at considerable cost to those institutions. As a practical matter, many PEG centers, schools and localities simply could not afford the replacement

[11] *See* Pet. Br. at 22 (citing *Recon Order* ¶ 10 (App. 348)), 24-25. We say the FCC "appears to have [so] ruled" because, although the FCC clearly stated in the *Recon Order* (at ¶¶ 11-13) (App. 348-50) that "'in-kind' payments—non-cash payments, such as goods and services—count toward the five percent franchise fee cap," even if they are cable-related, the FCC nowhere clearly stated in the *Second Order* or the *Recon Order* that the costs or value of franchise I-Net requirements are a "franchise fee."

cost and thus would lose the transport capacity currently provided by the local I-Net.

Second, in some communities with multiple competitive cable operators, the I-Net enables PEG programming to be delivered to the competitive cable operators without the need for the competitive providers to negotiate interconnection arrangements with the incumbent cable operator. In other words, by facilitating competitive cable operators' ability to carry PEG programming, I-Nets can promote the very kind of cable operator competition that the FCC claims is the primary goal of the *Section 621* proceeding.[12] Yet if, as the FCC suggested in its rulings below, I-Net requirements are a "franchise fee," competitive cable operators would be unable to obtain PEG programming through I-Nets. They would instead be able to obtain PEG programming only through negotiating interconnection arrangements with the incumbent cable operator, which has little or no incentive to cooperate or negotiate in good faith with its new competitor. In some cases, the result is that PEG programming may not be available to subscribers of competitive cable operators.

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[12] *E.g. First Order*, 22 FCC Rcd at 5102 (App. 2); *Second Order*, 22 FCC Rcd at 19634-35 (App. 238-39).

Third, many PEG centers rely on the complimentary cable service provisions in the local franchise to monitor the quality of the PEG programming signals that subscribers are receiving. If courtesy service provisions in franchises became a "franchise fee," PEG centers would have to incur substantial additional costs just to be able to monitor the quality of the PEG programming they deliver to the community.

Fourth, some cable operators have taken the position that the *Second Order* and the *Recon Order* not only preempt franchise I-Net requirements, but also that those orders free the operator of any franchise obligation to pick up PEG programming at its origination points and to deliver that programming over the operator's system to subscribers. The result is that PEG programming is not delivered to subscribers.[13]

Fifth, some cable operators have taken the position that the *Second Order* and *Recon Order* absolve them of the obligation to comply with franchise provisions requiring them to provide free basic fee cable service to schools. For example, cable operators in various communities in Wisconsin, California and

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[13] *See Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of FCC Licenses and Authorizations*, MB Docket No. 15-149, Joint Petition to Deny of ACM and ACD 16-17 & App. 4 (FCC filed Oct. 13, 2015).

Montana have ceased complying with franchise provisions requiring the operator to provide complimentary service to local schools.[14]

In short, the FCC orders under review are having substantial adverse financial impacts on PEG centers and their viewers, and on local school systems and their students.

II. TREATING THE VALUE OF IN-KIND CABLE-RELATED FRANCHISE REQUIREMENTS AS A "FRANCHISE FEE" IS DIRECTLY CONTRARY TO THE CABLE ACT'S PLAIN LANGUAGE.

Amici fully agree with all of the legal arguments in Petitioners' brief and believe that those arguments compel the Court to vacate the *Second Order* and the *Recon Order*. Here, we expand upon two of Petitioners' arguments.

A. In-Kind Cable-Related Franchise Requirements Are Not a "Tax, Fee or Assessment," and Therefore Cannot Be A "Franchise Fee."

Petitioners' brief (at 38-39) ably points out that, in the *Second Order* and *Recon Order*, the FCC misread 47 U.S.C. § 542(g), the Cable Act's "franchise fee" definition in a fundamental way: it overlooked the Act's threshold requirement that a franchise fee must be a "tax, fee or assessment." 47 U.S.C. § 542(g)(1). In-kind, cable-related franchise requirements are clearly not a "tax" or "fee"; the only issue

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[14] *See id.* at 16 & App. 4.

is therefore whether in-kind franchise requirements could plausibly be construed to be an "assessment." *Id*.

They cannot. A "franchise fee" must be governmentally imposed. *Id.* The relevant dictionary definitions of "assessment"—that is, the only "assessment" definitions dealing with a governmentally-imposed requirement—uniformly refer to "amounts" or "payments"—in other words, to monetary payments.[15] Thus, the only reasonable reading of "assessment," when read, as it must be, as part of the phrase, "tax, fee or assessment," is that "assessment" refers to *monetary* obligations imposed on a cable operator by a franchising authority or other governmental entity.

If there were any doubt that the phraseology, "tax, fee or assessment," refers only to monetary payments, and *not* non-monetary in-kind facilities and services, the legislative history of the 1984 Cable Act removes it. The *1984 House Report* states that Section 542, the Act's franchise fee provision, "defines as a franchise

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[15] *See, e.g.*, *Webster's Third New International Dictionary* at 131 (2002) ("a specific charge or tax determined upon by assessing"); *Random House Dictionary of the English Language* at 90 (1967) ("an amount assessed as payable"); *Black's Law Dictionary* at 133 (9th ed. 2009) ("[d]etermination of the rate or amount of something, such as a tax or damages," "[i]mposition of something, such as a tax or fine, according to an established rate"); *Merriam-Webster's Collegiate Dictionary* at 69 (10th ed. 1999) ("the amount assessed"); *Merriam-Webster Online Dictionary*, www.merriam-webster.com/dictionary/assessment (last visited Mar. 3, 2016) ("an amount that a person is officially required to pay especially as a tax").

fee *only monetary payments . . . and does not include . . . any franchise requirements for the provision of services, facilities or equipment*."[16] Because in-kind franchise requirements are, by definition, non-monetary, they are not a "tax, fee or assessment," and there cannot be a "franchise fee" under the Cable Act.

B. Franchise I-Net Channel Capacity Requirements, Like PEG Video Channel Capacity Requirements, Cannot, Consistent with 47 U.S.C. § 531, be a "Franchise Fee."

In addition to the reasons given in Petitioners' brief, the FCC's suggestion that the value of I-Net franchise requirements can be a "franchise fee" is inconsistent with the Cable Act for another reason as well: it cannot be squared with the language of the Cable Act's PEG provision, 47 U.S.C. § 531. Section 531(b) provides:

> A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to [47 U.S.C. § 546], *that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use*, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

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[16] *1984 House Report* at 65 (emphasis added). The FCC is correct that the Cable Act forbids a franchising authority from requiring a cable operator to provide non-cable-related in-kind facilities and services, but the reason that is true is not found in § 542, but in 47 U.S.C. § 544(a) and (b), which restrict the services and facilities a franchising authority can require a cable operator to provide to those that are "related to the establishment or operation of a cable system."

47 U.S.C. § 531(b) (emphasis added).

This language draws no distinction between PEG channel capacity requirements and I-Net channel capacity requirements. Franchising authorities may impose franchise requirements that "channel capacity be designated for public, educational, or governmental use" (*i.e.*, PEG video channel requirements), and they may impose franchise requirements that "channel capacity on institutional networks be designated for educational or governmental use."

The FCC has never suggested, nor could it plausibly, that franchise provisions requiring a cable operator to set aside channel capacity for PEG use is a "franchise fee." Just as a franchise requirement to set aside PEG access capacity under Section 531(b) is not a "franchise fee," so a franchise requirement to set aside I-Net capacity under Section 531(b) cannot be a "franchise fee." Any suggestion to the contrary in the *Second Order* or the *Recon Order* simply cannot be squared with Section 531(b)'s plain language.

CONCLUSION

For the forgoing reasons and those set forth in Petitioners' brief, the Petition should be granted, and the *Second Order* and *Recon Order* should be vacated and remanded to the FCC.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 3,299 words of Times New Roman (14 point) proportional type. The Word processing software used to prepare this was Microsoft Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 4th day of March, 2016, caused the foregoing documents to be electronically served through the Court's CM/ECF system on:

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