Case No. 17-16923, 17-16847

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COMCAST OF SACRAMENTO I, LLC, *ET AL.*,

Plaintiffs/Appellants,

v.

SACRAMENTO METROPOLITAN CABLE TELEVISION COMMISSION,

Defendant/Appellee.

Appeal from the United States District Court
for the Eastern District of California, Case No. CV-16-1264-WBS
The Honorable William B. Shubb, United States District Judge

AMICUS BRIEF BY LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND SCAN NATOA, INC., IN SUPPORT OF APPELLEE AND AFFIRMANCE AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO FED. R. APP. P. 26.1

The League of California Cities has no parent corporation, nor is it owned in any part by any publicly held corporation.

The California State Association of Counties has no parent corporation, nor is it owned in any part by any publicly held corporation.

The States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors has no parent corporation, nor is it owned in any part by any publicly held corporation.

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I. INTEREST OF *AMICI*.

Amicus curiae the League of California Cities ("League") is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance.

Amicus curiae California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this is a matter affecting all counties.

SCAN NATOA, Inc. (The States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors) has a history spanning over 20 years representing the interests of over 300 members consisting primarily of local government telecommunications officials and advisors located in California. SCAN NATOA has identified this case as a matter of significance to

its members.

Members of the League, CSAC, and SCAN NATOA have a fundamental interest in protecting the ability of their local agency members to collect franchise fees, and to collect fees imposed to ensure that their members can provide public, educational, and governmental programming for the benefit of the public.

II. STATEMENT REGARDING FED. R. APP. P. 29(a)(4)(E).

This brief has been authored solely by counsel for amici curiae the League, CSAC, and SCAN NATOA. No counsel for any party authored the brief in whole or in part. Neither the parties nor their counsel, nor any other person, besides the *Amici* and their counsel, contributed money that was intended to fund the preparation or submission of this brief.

III. POINTS TO BE ARGUED BY *AMICI*.

The Court should reverse the District Court's ruling that fees to support public, education, and governmental ("PEG") programming may be deducted from a cable operator's gross revenues for the purpose of calculating the cable provider's mandated franchise fees.

Further, the Court should affirm that the fee paid pursuant to California Public Utilities Code sections 401 and 441 (the "CPUC Fee"), should not be considered a "franchise fee" under 47 U.S.C. section 542(b), and thus must not be deducted from the overall franchise fee paid by a franchise holder under

California's Digital Infrastructure and Video Competition Act of 2006, California Public Utilities Code section 5800, *et seq.* ("DIVCA").

IV. FACTUAL BACKGROUND.

Amici adopt the factual Statement of the Case section in the Second Cross-Appeal Brief filed by the Sacramento Metropolitan Cable Commission ("SMCTC").

V. DIVCA WAS INTENDED TO MAINTAIN FRANCHISE FUNDING LEVELS FOR LOCAL AGENCIES AT THE SAME LEVEL AS EXISTED PRIOR TO DIVCA'S ADOPTION.

Under federal law, PEG fees may ***not*** be deducted from gross revenues for purposes of calculating franchise fees. That issue was resolved in *City of Dallas, Tex. v. F.C.C.*, 118 F.3d 393, 396 (5th Cir. 1997), where the court held that "gross revenues" under the Cable Act includes "all revenues or receipts of a business, ***without deduction***." (Emphasis added.)

The fees charged by the cable provider to its customers represent its ***revenues***. In contrast, PEG fees and franchise fees are ***expenses*** of the cable operator. *City of Glendale v. Marcus Cable Assocs.*, LLC, 231 Cal. App. 4th 1359, 1387 (Cal. Ct. App. 2014) ("Although Charter passed the PEG fees through to its customers, it was nevertheless primarily liable under the ordinance for the calculation and payment of the fees."); *see also Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 994 (9th Cir. 2007) (on questions of state law, federal courts must

follow relevant precedent from state appellate courts when there is no relevant precedent from the state's highest court). Under *Dallas* those expenses (*i.e.*, PEG fees) may not be deducted from "gross revenues" for purposes of calculating franchise fees. *City of Dallas*, *supra*, 118 F.3d at p. 396. Were it otherwise, both the Cable Act and DIVCA would use the term "net revenues," not "gross revenues." *See* Cal. Pub. Util. Code § 5860(d) (defining "gross revenue"); 47 U.S.C. § 542(b) (stating that the franchise fees shall not exceed 5 percent of a cable operator's "gross revenues").

DIVCA was not intended to change the fee structure authorized under federal law. Yet that is precisely what Plaintiff/Appellant Comcast of Sacramento I, LLC ("Comcast") attempted by deducting PEG fees from "gross revenues" before calculating its franchise fee obligation. Contrary to Comcast's approach, DIVCA's plain text and legislative history repeatedly emphasize the California Legislature's intent to maintain historic funding levels for both PEG fees and franchise fees.

DIVCA's plain text states that it is designed to "adhere to the following principles," among others: (i) "protect local government revenues", (ii) "continue access to and maintenance of, public education, and government (PEG) channels"; and (iii) "create a fair and level playing field for all market competitors." Cal. Pub. Util. Code §§ 5810(a)(2), subdivisions (A), (C), and (F). Thus, far from intending

a reduction in revenues to local agencies (as proposed by Comcast), DIVCA is purposely structured to ***preserve*** those funding levels (and to preserve PEG programming), while taking significant steps to increase market competition. *Id.*

DIVCA's legislative history pointedly reinforces this conclusion. The Senate Rules Committee noted "a key dispute in this bill is the definition of gross revenues upon which the franchise fee is based." (ER076 [California Senate Rules Committee, Office of Senate Floor Analysis, Bill Analysis for Assembly Bill 2987 (Reg. Sess. 2005-2006) as amended on Aug. 28, 2006, p. 6].) Responding to this "key dispute," the legislative history indicates that it was the "***intent of the bill is to keep local government whole.***" *Id.* (emphasis added).

Likewise, responding to concerns that DIVCA would result in less monetary support of PEG programming, the authors noted that the "intent . . . of this language is to insure that the PEG obligations that are ***required today are maintained.***. . . . The bill tries to address this by requiring all companies to provide cash contributions in support of PEG and then allows the local governments to either produce the PEG programming themselves, or contract out for the services." (ER053 [California Assembly Committee on Utilities and Commerce, Bill Analysis for Assembly Bill 2987 (Reg. Sess. 2005-2006) as amended on April 6, 2006, p. J].)

Plainly, the DIVCA was intended to keep the local agencies fiscally

"whole," and to "continue" the preexisting PEG fee structure. If the Legislature intended to reduce the franchise fees, or the amount of PEG fees available to the local agencies, it would have specifically stated otherwise.

A. PEG Fees Are Imposed On Cable Providers, Not Their Subscribers.

The District Court's ruling is based on the premise that PEG fees are not "revenue" to the cable operator, but rather the bill itemization of a fee imposed on a subscriber by the government. (ER029 [Order, pp. 18-19 ("Because the payments plaintiffs collect from their subscribers to pay PEG fees are 'amounts billed to, and collected from, subscribers to recover . . . [a] fee . . . imposed by [a] governmental entity,' they are not part of 'gross revenue[s]' as defined in [Cal. Pub. Util. Code] section 5860(d).")].)

That premise, however, is demonstrably wrong: under California law, Comcast was required to pay the PEG fees to SMCTC ***even if*** it did not separately itemize PEG fees on its subscribers' bills. *City of Glendale*, *supra*, 231 Cal. App. 4th at p. 1387 ("Although Charter passed the PEG fees through to its customers, it was nevertheless primarily liable under the ordinance for the calculation and payment of the fees."); *see* Cal. Pub. Util. Code § 5870(n)-(o); *see also Ryman*, *supra*, 505 F.3d at p. 994. The option to itemize PEG fees on subscribers' bills was purely discretionary on the part of Comcast. Cal. Pub. Util. Code § 5870(o) ("the holder of a state franchise ***may recover*** the amount of any fee remitted to a

local entity under this section by billing a recovery fee as a separate line item on the regular bill of each subscriber") (emphasis added).

Because it is Comcast, not the subscriber, that is ultimately responsible for paying the PEG fees, those fees are expenses ***of Comcast***. Those expenses, in turn, cannot be deducted from "gross revenues." *City of Dallas*, *supra*, 118 F.3d at 396; *see also City of Glendale*, *supra*, 231 Cal. App. 4th at p. 1387; *cf. Ranck v. Mt. Hood Cable Regulatory Commission*, 2017 WL 3016032, at *2 (D. Or., July 7, 2017, No. 3:16-CV-02409-AA) ("It is unclear whether plaintiff correctly characterizes PEG fees as a tax. PEG fees are imposed by defendants on cable providers. The [Federal Cable Act] and franchise agreements allow cable providers to list the "PEG fee" as a line item on subscribers' bills, but this is not a tax directly imposed by municipal governments on citizens."). Because nothing in DIVCA changes the payor of PEG fees from video service providers to their subscribers, the result mandated in *Dallas*, and reinforced by *Glendale* and *Mt. Hood*, should have occurred here.

In sum, DIVCA is designed to protect local agencies' revenues, while also ensuring the public's continued access to PEG programming facilities. Allowing franchise holders to deduct PEG fees from their "gross revenues" would directly contravene that goal.[1]

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[1] The Federal Cable Act recognizes that the PEG fees are necessary to "assure

VI. THE CPUC FEE IS A FEE OF GENERAL APPLICABILITY AND IS THUS NOT A FRANCHISE FEE UNDER 47 U.S.C. § 542.

Comcast claims the CPUC Fee imposed on it is, in effect, a part of its franchise fee obligation. Comcast therefore argues the CPUC Fee must be deducted from the amount of franchise fees paid to SMCTC, such that the total fees paid to the CPUC and SMCTC total 5 percent of Comcast's gross revenues.

Comcast's argument is based on a faulty interpretation of the term "franchise fee." Under the Federal Cable Act, that term 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***." 47 U.S.C. § 542(g)(1) (emphasis added). A franchise fee "does not include any tax, fee, or ***assessment of general applicability*** (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers)." 47 U.S.C. § 542(g)(2)(A) (emphasis added).

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that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521(4). Similarly, DIVCA recognizes that it should be employed to "[c]ontinue access to and maintenance of the public, education, and government (PEG) channels." Cal. Pub. Util. Code § 5810(a)(2)(F). By pushing local agencies to forsake these PEG fees, Comcast's and the District Court's interpretation threaten the "substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." *WLNY-TV, Inc. v. F.C.C.*, 163 F.3d 137, 143 (2d Cir. 1998) (quoting the findings in support of the Federal Cable Television Consumer Protection and Competition Act of 1992).

The CPUC Fee does not qualify as a "franchise fee" under federal law because it is a fee of general applicability, imposed upon a variety of different entities, including utilities, common carriers, and even non-franchise holders. Specifically, California Public Utilities Code section 401(a) generally authorizes the collection of a "reasonable fee" by the CPUC to be imposed on all of the entities that the CPUC regulates, including "each common carrier," each "public utility," and "each applicant for, or holder of, a state franchise pursuant to [DIVCA] . . . ." These fees are intended to "produce enough, and only enough, revenues to fund the commission with (1) its authorized expenditures for each fiscal year to regulate common carriers and businesses related thereto, public utilities, and applicants and holders of a state franchise to be a video service provider, less the amount to be paid from special accounts except those established by this article, reimbursements, federal funds, and the unencumbered balance from the preceding year; (2) an appropriate reserve; and (3) any adjustment appropriated by the Legislature." Cal. Pub. Util. Code § 401(b). Plainly, the CPUC Fee is a cost recovery measure (not a revenue generator) imposed on all entitles regulated by the CPUC, not just "Cable Operators." *See* 47 U.S.C. 522(5).

To be sure, DIVCA provided for a subaccount to be funded by the CPUC Fees imposed on applicants for, and holders of, DIVCA franchises. Cal. Pub. Util. Code § 441. Proceeding in this manner ensures that the CPUC Fees are

appropriately calibrated to the specific demands and costs created in the regulation of DIVCA franchisees and DIVCA franchise applicants. Thus, the fee applied to Comcast is fair and proportional to the costs of administering Comcast's franchise application and franchise, in the same way that the fees applicable to other regulated entities (*e.g.*, PG&E for electrical services, Southern California Gas for gas services) are fairly calculated.

Moreover, even if the analysis were somehow limited to CPUC Fees deposited in the DIVCA subaccount, those fees would not be solely imposed on DIVCA franchise holders (much less "Cable Operators"). *See* Cal. Pub. Util. Code § 5830(t) (defining "Video service provider"); 47 U.S.C. 522(5) (defining "cable operator"). Rather, the fees would also be imposed on entities that are ***applying*** for a DIVCA franchise. Cal. Pub. Util. Code §§ 401, 441 ("The commission shall annually determine a fee to be paid by ***an applicant*** or holder of a state franchise pursuant to [DIVCA].") (emphasis added). Applicants are not "cable operators" because they cannot, and do not, provide "cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system," or "otherwise control[] or [] responsible for, through any arrangement, the management and operation of such a cable system," because they are simply applying to deploy such a service. 47 U.S.C. § 522(5).

Thus, even if one were to only focus review on California Public Utilities

Code section 441, and ignore the authorization found in California Public Utilities Code section 401, one would still find that the fee is one of general applicability because it applies to entities that are ***trying*** to become a video service provider, even if they never succeed.

VII. CONCLUSION.

For the foregoing reasons, *Amici* urge the Court to (1) reverse the Court's determination that the PEG fees collected from Comcast's subscribers can be deducted from "gross revenues" as defined in California Public Utilities Code section 5860, and (2) affirm the decision of the District Court finding that the CPUC Fee is not a franchise fee for the purposes of imposing the 5 percent federal maximum requirement under 47 U.S.C. section 542.

Dated: April 13, 2018

Respectfully submitted,

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I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 2558 words up to and including the signature lines that follow the brief's conclusion.

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Dated: April 13, 2018

Respectfully submitted,

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