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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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SACRAMENTO METROPOLITAN CABLE
TELEVISION COMMISSION,

 Plaintiff,

 v.

COMCAST CABLE COMMUNICATIONS
MANAGEMENT, LLC,

 Defendant.

No. 2:18-CV-00500 WBS EFB

No. 2:18-cv-01212 WBS EFB

MEMORANDUM AND ORDER RE:
CROSS MOTIONS FOR SUMMARY
JUDGMENT

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Plaintiff Sacramento Metropolitan Cable Television
Commission ("SMCTC" or "plaintiff") brought this action against
Defendant Comcast Cable Communications Management, LLC ("Comcast"
or "defendant") claiming that (1) Comcast violated California
Public Utility Code §§ 5840, 5860, and 5870; (2) Comcast breached
its contract with plaintiff; (3) Comcast unjustly enriched itself
at plaintiff's expense; and (4) that it is entitled to

1 declaratory relief. (Compl. (Docket No. 1).)¹ This court has
2 jurisdiction of this action pursuant to 28 U.S.C. § 1332 because
3 there is complete diversity of citizenship between the parties
4 and the amount in controversy exceeds \$75,000, exclusive of
5 interest and costs.

6 Each claim of the Complaint is predicated on the theory
7 that Comcast underpaid annual cable "franchise fees" and Public,
8 Educational, and Governmental ("PEG") fees owed to plaintiff
9 under California's Digital Infrastructure and Video Competition
10 Act of 2006 ("DIVCA"), Cal. Pub. Util. Code § 5800, et seq. The
11 claims involve six forms of alleged underpayments based on two
12 audits covering the periods of 2013-2014 and 2015-2016. Comcast
13 moves for summary judgment on each of the six forms of alleged
14 underpayments. (Def.'s Mot. for Summ. J.) (Docket No. 42; Docket
15 No. 34.) SMCTC moves for partial summary judgment on three of the
16 six forms of alleged underpayments and as to whether Comcast's
17 unilateral deductions prior to paying SMCTC are permitted under
18 DIVCA and applicable federal law.² (Pl.'s Mot. for Partial Summ.
19 J. ("Pl.'s Mot. for Summ. J.") (Docket No. 49; Docket No. 41.)

20 ¹ All docket references refer to the docket entries in
21 Case No. 2:18-cv-00500. These two cases were consolidated
22 pursuant to Federal Rule of Civil Procedure 42(a)(2) for all
23 purposes and the parties agreed that the main case number would
24 be 2:18-cv-500 WBS EFB. (Docket No. 20.)

25 ² SMCTC does not move for summary judgment as to launch
26 incentives, multi-service fees, and customer credits for missed
27 installation/activation appointments. (See generally Pl.'s Mot.
28 for Summ. J.) Although SMCTC did not initially move for summary
judgment on tower rental fees, they agree that there are no
material issues of disputed facts on this claim and that it is
appropriate for disposition on summary judgment. (Pl.'s Opp'n to
Def's Mot. for Summ. J. at 1, 17.) (Docket No. 54.)

1 I. Facts & Procedural Background

2 Plaintiff SMCTC is a joint powers agency with certain
3 regulatory authority over cable services in Sacramento County.
4 (Def.'s Statement of Undisputed Facts at ¶ 1 ("Def.'s SUF")
5 (Docket No. 44).) The members of SMCTC are the County of
6 Sacramento and the cities of Sacramento, Galt, Folsom, Citrus
7 Heights, Rancho Cordova and Elk Grove. (Pl.'s Statement of
8 Undisputed Facts at ¶ 4 ("Pl.'s SUF")) (Docket No. 49-1.) In
9 California, cable franchises were historically issued by local
10 government entities, such as SMCTC, to cable operators. (Id. at
11 ¶ 4.) DIVCA replaced that regime with a statewide franchising
12 system managed by the California Public Utilities Commission
13 ("CPUC"). (Id. at ¶ 6.) As of 2011, Comcast has operated its
14 cable systems in California pursuant to a CPUC-issued franchise.
15 (Id. at ¶ 7.) Comcast, either directly or through its
16 affiliates, provides video service under a state-issued video
17 franchise within SMCTC's jurisdiction. (Id. at ¶ 8.)

18 Under the 1984 Federal Cable Act, ("Cable Act"), 47
19 U.S.C. § 521, et seq., franchising authorities may require a
20 cable operator to pay franchise fees up to five percent of its
21 annual "gross revenues from the operation of the cable
22 system to provide cable service." 47 U.S.C. § 542(b). Franchise
23 fees are "passed through" and paid by cable subscribers as part
24 of their monthly cable bills. 47 U.S.C. § 542(c). Any fees
25 assessed by franchising authorities for PEG channels and capital
26 support are also "passed through" to cable subscribers. (Id.)

27 DIVCA imposes an annual "User Fee" on cable operators
28 as a condition to obtaining a franchise ("CPUC User Fee"). See

1 Cal. Pub. Util. Code § 441. DIVCA additionally imposes the
2 payment of franchise fees, which are paid to municipalities for
3 the use of the public rights-of-way in their jurisdictions. See
4 Cal. Pub. Util. Code § 5860(a). Unless a locality specifically
5 adopts a lower fee, California Public Utilities Code section
6 5840(q)(1) requires all DIVCA franchisees to pay a franchise fee
7 equal to the applicable local agency equal to five percent of its
8 "gross revenues." (Pl.'s SUF at ¶ 14.) Neither SMCTC nor its
9 member agencies have adopted a lower fee. (Id.) DIVCA
10 authorizes franchising authorities to implement a PEG fee of up
11 to one percent of cable service revenues, which is also paid to
12 localities. See Cal. Pub. Util. Code § 5870(n). SMCTC and its
13 member agencies have adopted ordinances to activate a one percent
14 PEG fee on DIVCA franchisees, such as Comcast. (Pl.'s SUF at ¶
15 18.) State franchise holders are authorized to identify and
16 collect both the franchise fees and PEG fees as separate line
17 items on a subscriber's bill. See Cal. Pub. Util. Code. §§
18 5860(j); 5870(o).

19 A state franchise holder is required to remit franchise
20 and PEG fees to a local entity on a quarterly basis. See Cal.
21 Pub. Util. Code §§ 5860(h), 5870(m). A local entity may examine
22 a franchise holder's business records once a year to ensure
23 payment of franchise fees in accordance with Section 5860 of
24 DIVCA. See Cal. Pub. Util. Code § 5860(i). In 2016 and 2017,
25 SMCTC retained Ashpaugh & Sculco, CPAs, PLC ("Ashpaugh & Sculco")
26 to perform an audit of franchise fees and PEG fees Comcast paid
27 for the 2013-2014 and 2015-2016 periods. (Pl.'s SUF at ¶¶ 23-
28 28.) These audits reported that Comcast had underpaid franchise

1 fees and PEG fees to SMCTC in both audit periods in the amounts
2 of \$682,911 for 2013-14 and \$828,590 for 2015-16. (Id. at ¶¶ 25,
3 28.)

4 The court previously dealt with certain aspects of this
5 dispute in Comcast of Sacramento I, LLC v. Sacramento
6 Metropolitan Cable Television Commission, Case No. 2:16-cv-01264
7 WBS EFB, 250 F. Supp.3d 616, 618-27 (E.D. Cal. 2017) ("SMCTC I").
8 In that case, Comcast sued SMCTC and alleged causes of action for
9 conversion and "common count" after SMCTC withheld Comcast's
10 franchise security deposit following a dispute over the amount of
11 fees Comcast was required to pay SMCTC under DIVCA. Id. at 619.
12 SMCTC raised a defense of offset, claiming that an audit for the
13 period of 2011-2012 established underpayments of franchise and
14 PEG fees. Id. at 620. The court ruled that PEG fees did not
15 fall within the definition of "gross revenue" for purposes of
16 calculating franchise fees because it fell within an exception
17 stated in Cal. Pub. Util. Code § 5860(e). Id. at 628. The court
18 also found that the CPUC User Fee was a "fee of general
19 applicability" excluded from franchise fees under the Federal
20 Cable Act. Id. at 626.

21 Both SMCTC and Comcast appealed from the judgment in
22 SMCT I. See Comcast of Sacramento I, LLC v. Sacramento
23 Metropolitan Cable Television Commission, 923 F.3d 1163, 1165-
24 1172 (9th Cir. 2019) ("SMCTC II"). The Ninth Circuit held that
25 Comcast's attempt to recover its security deposit was barred by
26 Section 555a(a) of the Federal Cable Act, which limits relief in
27 suits against franchising authorities to injunctive and
28 declaratory relief. See id. at 1171. While the case was on

1 appeal, SMCTC initiated the present consolidated lawsuits against
2 Comcast based on the two more recent audits referenced in the
3 Complaints.³

4
5 ³ The court takes judicial notice of the provisions of
6 the SMCTC members city/county codes and the SMCTC Resolution
7 provided in plaintiff's request for judicial notice. (Request for
8 Judicial Notice 1-8 ("Pl.'s RJN") (Docket No. 50).) See Tollis,
9 Inc. v. Cty. of San Diego, 505 F.3d 935, 938 n. 1 (9th Cir. 2007)
10 ("Municipal ordinances are proper subjects for judicial
11 notice."). Defendant has not objected to items listed in
12 plaintiff's Request for Judicial Notice 9-11, 13-15, 17, 19, and
13 21. These requests consist of defendant's franchise application,
14 franchise certificates, the parties' engagement agreements for
15 analysis of franchise and PEG fees, deposition excerpts by
16 defendant's witness Lee-Ann Peling, and defendant's audit
17 responses. Accordingly, the court will take judicial notice of
18 these documents. Defendant objects to the items listed in
19 plaintiff's Request for Judicial Notice 12, 16, 18, 20, and 21 on
20 the grounds that the contents are hearsay and not subject to
21 judicial notice under Federal Rule of Evidence 201. These
22 documents consist of deposition excerpts from the deposition of
23 Robert Allen Davison and Steven M. Detrick, the 2013-2014 audit
24 report, the 2015-2016 audit report, and the corrected 2015-2016
25 audit report. Because the court did not rely on these documents
26 for the truth of the matter asserted, the court will take
27 judicial notice of these documents as well.

28
29 Defendant requests that the court take judicial notice of
30 five documents. (Request for Judicial Notice ("Def.'s RJN"))
31 (Docket No. 46).) These documents are: (1) this court's April 5,
32 2017 order on the cross-motions for summary judgment in Case No.
33 2:16-cv-01264 titled Comcast of Sacramento I, LLC v. Sacramento
34 Metropolitan Cable Television Commission, 250 F. Supp. 3d 616,
35 626 (E.D. Cal. 2017) ("SMCTC-I"); (2) the Ninth Circuit Court of
36 Appeal's Opinion filed on May 8, 2019 in SMCTC-II, 923 F.3d 1163
37 (9th Cir. 2019); (3) this court's October 1, 2019 judgment in
38 Case No. 2:16-cv-01264 entered pursuant to the Ninth Circuit's
39 decision; (4) the operative complaint in the instant case (Case
40 No. 2:18-cv-00500), which contains SMCTC's 2013-2014 audit
41 reports as attachments, and (5) the operative first amended
42 complaint in the instant case (Case No. 2:18-cv-01212), which
43 contains SMCTC's 2015-2016 audit report. Plaintiff has not
44 objected. Accordingly, the court will take judicial notice of
45 the items listed in defendant's Request for Judicial Notice in
46 its entirety.

1 II. Discussion

2 Summary judgment is proper "if the movant shows that
3 there is no genuine dispute as to any material fact and the
4 movant is entitled to judgment as a matter of law." Fed. R. Civ.
5 P. 56(a). A material fact is one that could affect the outcome
6 of the suit, and a genuine issue is one that could permit a
7 reasonable jury to enter a verdict in the non-moving party's
8 favor. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986).

9 The party moving for summary judgment bears the initial
10 burden of establishing the absence of a genuine issue of material
11 fact and can satisfy this burden by presenting evidence that
12 negates an essential element of the non-moving party's case.
13 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

14 Alternatively, the movant can demonstrate that the non-moving
15 party cannot provide evidence to support an essential element
16 upon which it will bear the burden of proof at trial. Id. Where
17 "the case turns on a mixed question of fact and law and the only
18 disputes relate to the legal significance of undisputed facts,
19 the controversy collapses into a question of law suitable to
20 disposition on summary judgment." Thrifty Oil Co. v. Bank of Am.
21 Nat'l Tr. & Sav. Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003).

22 "Where the record taken as a whole could not lead a rational
23 trier of fact to find for the non-moving party, there is no
24 genuine issue for trial." Matsuhita Elec. Indus. Co. v. Zenith
25 Radio Corp., 475 U.S. 574, 587 (1986). Any inferences drawn from
26 the underlying facts must, however, be viewed in the light most
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1 favorable to the party opposing the motion. See id.⁴

2 A. PEG Fees

3 Section 5870(n) of the California Public Utilities Code
4 states that "a local entity may, by ordinance, establish a fee to
5 support PEG channel facilities." Cal. Pub. Util. Code § 5870(n).
6 Each SMCTC member locality has imposed a PEG fee.⁵ Comcast, in
7 turn, passes the PEG fee on to its subscribers, who pay the fee
8 "as a separate line item on [their] regular bill." Cal. Pub.
9 Util. Code § 5870(o). Comcast does not keep any portion of the
10 PEG fees that it bills to subscribers and forwards those PEG
11 payments to SMCTC. (Pl.'s Resp. to Def.'s SUF at ¶ 15 (Docket
12 No. 54-2).) The parties dispute whether Comcast must include PEG
13 fees in its "gross revenue" for purposes of calculating its state
14 franchise fees. The dispute centers over the interpretation of

15 _____
16 ⁴ Comcast makes several evidentiary objections to the
17 Declaration of Robert Davison and its attachments, the deposition
18 excerpts of Garth Ashpaugh, and the expert report prepared by Mr.
19 Ashpaugh attached to the Declaration of Mark Velasquez (Docket
20 No. 54-1) on the grounds that the statements by Mr. Davison and
21 Mr. Ashpaugh lack foundation, are hearsay, speculative, and
22 irrelevant. (See Docket No. 53-1; Docket No. 56-1.) The Ninth
23 Circuit has established that "to survive summary judgment, a
24 party does not necessarily have to produce evidence in a form
25 that would be admissible at trial, as long as the party satisfies
26 the requirements of Federal Rule of Civil Procedure 56." Fraser
27 v. Goodale, 342 F.3d 1032, 1036-37 (9th Cir. 2003.) Moreover,
28 "[a]s a practical matter, the court finds this entire exercise of
considering evidentiary objections on a motion for summary
judgment to be futile and counterproductive." Burch v. Regents
of University of California, 433 F.Supp.2d 1110, 1122 (E.D. Cal.
2006.) Accordingly, if Comcast wishes to raise these evidentiary
objections, it may do so at trial.

26 ⁵ See, e.g., Sacramento Cty. Code § 5.50.977; Citrus
27 Heights Mun. Code § 90-183; Elk Grove Mun. Code § 5.50.010;
Folsom Mun. Code § 5.50.010; Galt Mun. Code § 5.55.030; Rancho
28 Cordova Mun. Code § 5.75.800; Sacramento City Code § 5.28.2670.

1 California Public Utilities Code § 5860 ("section 5860").

2 Section 5860(d) defines "gross revenue" for purposes of
3 state franchise fees as:

4 [A]ll revenues actually received by the holder of
5 a state franchise, as determined in accordance
6 with generally accepted accounting principles,
7 that is derived from the operation of the
8 holder's network to provide cable or video
9 service within the jurisdiction of the local
10 entity, including . . . [a]ll charges billed to
11 subscribers for any and all cable service or
12 video service provided by the holder of a state
13 franchise, including all revenue related to
14 programming provided to the subscriber, equipment
15 rentals, late fees, and insufficient fund fees.

11 Cal. Pub. Util. Code § 5860(d)-(d)(1).

12 Section 5860(e)(6) contains an exception to the above
13 provision for "[a]mounts billed to, and collected from,
14 subscribers to recover any tax, fee, or surcharge imposed by any
15 governmental entity on the holder of a state franchise,
16 including, but not limited to, sales and use taxes, gross
17 receipts taxes, excise taxes, utility users taxes, public service
18 taxes, communications taxes, and any other fee not imposed by
19 this section." See Cal. Pub. Util. Code § 5860(e)(6).

20 Comcast argues that the payments it collects from
21 subscribers to pay PEG fees fit within this exception because
22 they are imposed by section 5870 and thus are not part of "gross
23 revenue" as defined in Section 5860(d). (Def.'s Mot. for Summ.
24 J. at 7.) SMCTC contends that section 5860(e)'s exception does
25 not apply because PEG fees are imposed pursuant to section
26 5860(c). (Pl.'s Mot. for Summ. J. at 13.) Section 5860(c)
27 states that no local entity may demand any additional fees or
28 charges from the holder of a state franchise "based solely on its

1 status as a provider of video or cable services other than as set
2 forth in this division. . .” See Cal. Pub. Util. Code § 5860(c).
3 SMCTC argues that “this division” means Division 2.5 of the
4 California Public Utilities Code (i.e. all of DIVCA), and that
5 5860(c), through its incorporation of all of DIVCA, is the
6 section that effectively authorizes PEG fees. (Pl.’s Mot. for
7 Summ. J. at 13.)

8 Comcast’s position is more persuasive. Under the plain
9 language of Section 5860(e)(6), “gross revenue” does not include
10 revenues from “any. . . fee not imposed by [Section 5860].” Cal.
11 Pub. Util. Code § 5860(e)(6). PEG fees are authorized under
12 California Public Utilities Code section 5870 (“section 5870”).
13 The use of the term “this division” in Section 5860(c) does not
14 displace the legislature’s use of the term “this section” in
15 5860(e)(6), which specifically addresses which fees should be
16 included and excluded from “gross revenue” when calculating
17 franchise fees. If the legislature had meant “this division” in
18 Section 5860(e)(6), it would not have said “this section.” It is
19 improper to “assume that our Legislature chose. . . an indirect
20 route to convey an important and easily expressed message.”
21 Debbie Reynolds Prof. Rehearsal Studios v. Superior Court, 25
22 Cal. App. 4th 222, 232 (2nd Dist. 1994).

23 SMCTC also points out that PEG fees were not
24 specifically enumerated in the exception for “gross revenue” laid
25 out in 5860(e). (Pl.’s Mot. for Summ. J. at 13-14.) They
26 contend that the canon of *esjusedem generis* (meaning “of the same
27 kind”) dictates that the PEG fees should be not be included
28 because the list of items enumerated are all generally applicable

1 taxes and the PEG fee is not a generally applicable tax. (Id. at
2 14.) However, Section 5860(e)(6) treats "fees", "taxes", and
3 "surcharges" the same in enumerating the exclusions from "gross
4 revenue." See Cal. Pub. Util. Code § 5860(e)(6) (excluding from
5 revenues "amounts billed to, and collected from, subscribers to
6 recover any tax, fee, or surcharge, imposed by any governmental
7 entity on the holder of a state franchise. . ."). Most
8 critically, the legislature chose to use the broad catch-all "any
9 other fee not imposed by this section", and made no limitations
10 as to the type of fees that would be encompassed. Therefore, the
11 doctrine of *esjusedem generis* appears to confirm that the
12 exclusion from "gross revenue" applies broadly to "any other
13 fees" not imposed by Section 5860, regardless of whether they are
14 styled as a "fee" or a "tax."

15 SMCTC additionally argues that PEG fees do not fall
16 within the exception in section 5860(e) because the PEG fees are
17 imposed by DIVCA, not local government entities. (Pl.'s Mot. for
18 Summ. J. at 10.) However, while section 5870(n) authorizes
19 localities to establish a fee to support PEG channel facilities,
20 it does not mandate that localities do so. See Cal. Pub. Util.
21 Code § 5870(n). Instead, localities may decide whether they wish
22 to pass an ordinance to recover a PEG fee and determine the
23 amount of the fee (not to exceed 1 percent of the holder's "gross
24 revenue" if no fee existed before the implementation of DIVCA or
25 not to exceed 3 percent of the holder's "gross revenue" if a PEG
26 fee in excess of 1 percent was already being charged before
27 DIVCA.) See id.

28 The California Attorney General Opinion that SMCTC

1 relies on for its position is inapposite. The Attorney General
2 Opinion relates to whether PEG fees were taxes requiring voter
3 approval under California law. See 99 Cal. Op. Att’y Gen. 1
4 (2016) at *5. Although Attorney General Opinions are entitled to
5 “great weight”, Napa Valley Educators’ Association v. Napa Valley
6 Unified School District, 194 Cal. App. 3d 243, 251 (1st Dist.
7 1987), the Opinion cited by SMCTC focused on whether a local
8 entity which passed an ordinance to collect the public access fee
9 was imposing a charge on an individual or entity that would not
10 be otherwise obligated to pay such a fee. See 99 Cal. Op. Att’y
11 Gen. 1 at *5. Because DIVCA mandates that franchise applicants
12 must provide both public access channels and any required funding
13 under Cal. Pub. Util. Code § 5870, the Attorney General concluded
14 that the PEG fees were not a tax. Id. However, the Attorney
15 General did not analyze or mention whether PEG fees are excluded
16 from “gross revenues” under Section 5860(e)(6), and did not
17 address the flexibility that municipalities have in determining
18 whether to impose a PEG fee and in what amount. Accordingly, the
19 court finds that the opinion is not instructive here. The court
20 finds as a matter of law that it is the municipalities who impose
21 a PEG fee, not DIVCA itself.

22 SMCTC finally argues that the PEG fees must be included
23 in calculating franchise fees because the legislature stated that
24 it was their intent that “the definition of gross revenues in
25 this division shall result in local entities maintaining their
26 existing level of revenue from franchise fees.” Cal. Pub. Util.
27 Code § 5810(a)(4)(d). [“S]tatements of the intent of the
28 enacting body contained in a preamble, while not conclusive, are

1 entitled to consideration.” People v. Canty, 32 Cal. 4th 1266,
2 1280 (2004). However, California Code of Civil Procedure § 1859
3 provides that “when a general and a particular provision are
4 inconsistent, the latter is paramount to the former” and “a
5 particular intent will control a general one that is inconsistent
6 with it.” Cal. Code. Civ. P. § 1859. As such, the generalized
7 intent of the legislature set forth in the preamble cannot
8 override the specific exclusions from “gross revenue” set forth
9 in section 5860(e)(6).

10 Accordingly, the court finds as a matter of law that
11 PEG fees do not constitute “gross revenue” under section 5860(d)
12 and will grant summary judgment in Comcast’s favor on this claim.

13 B. CPUC User Fee

14 Comcast argues that it must reduce the state franchise
15 fee it is obligated to pay to SMCTC to stay within the five
16 percent cap on franchise fees imposed by the Federal Cable Act,
17 47 U.S.C. § 541, et seq., because the CPUC User Fee is a
18 “franchise fee” under the Act. (Def.’s Mot. for Summ. J. at 10.)
19 SMCTC disagrees, contending that the CPUC user fee does not count
20 toward the Act’s five percent cap because it is not a “franchise
21 fee.” (Pl.’s Mot. for Summ. J. at 6.)

22 47 U.S.C. § 542(b) of the Federal Cable Act states that
23 “[f]or any twelve-month period, the franchise fees paid by a
24 cable operator with respect to any cable system shall not exceed
25 5 percent of such cable operator’s gross revenues derived in such
26 period from the operation of the cable system to provide cable
27 services.” 47 U.S.C. § 542(g)(1) defines “franchise fee” as
28 including “any tax, fee, or assessment of any kind imposed by a

1 franchising authority or other governmental entity on a cable
2 operator . . . solely because of [its] status as such." 47
3 U.S.C. § 542(g) (1). Section § 542(g) (2) excludes from this
4 definition "any tax, fee, or assessment of general applicability
5 (including any such tax, fee, or assessment imposed on both
6 utilities and cable operators or their services but not including
7 a tax, fee, or assessment which is unduly discriminatory against
8 cable operators)." DIVCA separately imposes annual franchise
9 fees of five percent of a cable operator's cable service
10 revenues, which are paid to each locality where it operates its
11 cable system pursuant to a state franchise. See Cal. Pub. Util.
12 Code § 5860(a) (requiring the "holder of a state franchise" to
13 "remit to the local entity a state franchise fee" where it
14 "offers video service").

15 The CPUC also imposes an annual User Fee "to be paid by
16 an applicant or holder of a state franchise pursuant to [DIVCA]
17 (commencing with Section 5800)." Cal. Pub. Util. Code § 441.
18 "The annual fee shall be established to produce a total amount
19 equal to that amount established in the authorized commission
20 budget for the same year, including adjustments for increases in
21 employee compensation, other increases appropriated by the
22 Legislature, and an appropriate reserve to carry out the
23 provisions of [DIVCA]." Id. The CPUC User Fee applies not only
24 to cable operators, but to all "holders of a state franchise"
25 that authorizes the "operation of any network in the right-of-way
26 capable of providing video service to subscribers" ("video
27 franchise holders"). See id. at § 441, 5830(f)-(h). "[I]t is
28 possible to qualify for the [CPUC User Fee] without being a cable

1 operator.” Cty. of Los Angeles v. Time Warner NY Cable LLC, No.
2 CV-12-06655 SJO (JCx), 2013 WL 12126774, at *2 (C.D. Cal. July 3,
3 2013).

4 This court previously ruled that the CPUC User Fee is
5 not a franchise fee within the meaning of 47 U.S.C. § 542 for two
6 reasons. See SMCTC-I, 250 F. Supp. 3d at 624-25. First, because
7 the CPUC User Fee also applies to non-cable operating video
8 franchise holders, it is not imposed on cable operators “solely
9 because of their status as such” under 47 U.S.C. 542(g)(1). See
10 id. Second, because the User Fee is also imposed on non-cable
11 operators, the court found that it is a fee of “general
12 applicability” under 47 U.S.C. § 542(g)(2). See id. However,
13 Comcast contends that a recent order by the Federal
14 Communications Commission (“FCC”) clarifies the proper scope of
15 franchise fees under 47 U.S.C. § 542 and confirms that the CPUC
16 user fee is a “franchise fee” subject to the federal 5% cap. See
17 In the Matter of Implementation of Section 621(a)(1) of the Cable
18 Commc’ns Policy Act of 1984 As Amended by the Cable Television
19 Consumer Prot. & Competition Act of 1992 (“Section 621 Order”),
20 34 FCC Rcd. 6844, at ¶¶ 80-94 (Aug. 2, 2019).

21 The Section 621 Order emphasizes that Congress defined
22 the term “franchise fee” broadly to “limit the imposition of any
23 tax, fee, or assessment of any kind – including fees purportedly
24 for provision of non-cable services for access to, use of, or the
25 value of the rights of way – to five percent of the cable
26 operator’s revenue from cable services.” Id. at ¶ 90. A local
27 government entity cannot “end-run the cap by imposing fees for
28 access to any public right of way within the franchise area or in

1 instances of overlapping jurisdiction.” Id. The FCC states that
2 47 U.S.C. § 622 envisions that fees imposed on cable operators
3 for access to the rights of way in their capacity as franchisees
4 is a fee imposed on a cable operator “solely because of their
5 status as such.” Id. at ¶ 92. Understood in this manner, the
6 FCC states that “any assessment on a cable operator for
7 constructing, managing, or operating its cable system in the
8 rights-of-way is subject to the five percent cap” even if “other
9 non-cable providers. . . are subject to the same or similar
10 access fees.” Id. at ¶ 92. This is because the definition of
11 “franchise fee” in section 622(g)(1) centers on why the fee is
12 imposed on a cable operator, i.e. “solely because of [its]
13 status” as a franchisee, and not to whom the fee is imposed.
14 (Id.) The FCC states that generally-applicable taxes are
15 distinct and their “validity must be shown, at least in part, by
16 their application to broader classes of entities or citizens
17 beyond providers of cable and non-cable communications services.”
18 (Id.)

19 Comcast contends that, although the CPUC User Fee at
20 issue in this case has a different name and is imposed under a
21 different section of DIVCA from the fees expressly labeled as
22 “franchise fees”, both are “monetary assessments for Comcast’s
23 right to operate its cable system in California and therefore
24 constitute franchise fees subject to the federal 5% cap.”

25 (Def.’s Mot. for Summ. J. at 14.) Comcast likewise argues that
26 the FCC’s order precludes any argument that the CPUC User Fee is
27 a “fee of general applicability” because the CPUC User Fee
28 “applies only to video franchise holders pursuant to a specific

1 enabling statute, as a condition to use of the public right of
2 way under a state franchise.” (Id.)

3 The court is not convinced by Comcast’s argument. The
4 Section 621 Order was addressing the issue of whether Comcast
5 should have to obtain a second franchise and pay the franchise
6 fee again due to its status as a telecommunications provider
7 after already paying one based on its status as a cable operator
8 in City of Eugene v. Comcast of Oregon II, Inc., 359 Or. 528
9 (2016). The Section 621 Order also mentioned in a footnote that
10 many commenters had specifically asked about DIVCA and its annual
11 “administrative fee” in addition to the five percent franchise
12 fees imposed, and cited this court’s previous opinion where it
13 found that the CPUC User Fee was a fee of “general
14 applicability.” See Section 621 Order, 34 FCC Rcd. 6844 at ¶ 117
15 n. 431. Despite being given this opportunity to weigh in on
16 whether the various fees in DIVCA violated the Federal Cable
17 Act’s five percent franchise fee cap, the FCC “decline[d]. . . to
18 opine on the application of the Cable Act to specific state laws”
19 and noted that these concerns are “largely settled by section
20 622, which excludes any tax, fee, or assessment of general
21 applicability from the definition of franchise fees.” Id. at ¶
22 117.

23 Notwithstanding the Section 621 Order, the court
24 concludes that the CPUC User Fee is a fee of general
25 applicability.⁶ The CPUC User Fee is not a fee imposed solely on

26 ⁶ Comcast has not contended that the CPUC fee is unduly
27 discriminatory toward cable operators, nor can it do so, because
28 it does not apply solely to cable operators. See Time Warner,
2013 WL 12126774 at *2.

1 cable companies or other video franchise holders "in exchange for
2 the cable operator's right to access and use the rights-of-way."
3 Id. at ¶ 89. Rather, the CPUC User Fee is a way for the CPUC to
4 recover its regulatory costs associated with DIVCA. See Cal.
5 Pub. Util. Code § 441. The CPUC imposes similar annual user fees
6 on "every electrical, gas, telephone, telegraph, water, sewer
7 system, and heat corporation." See Cal. Pub. Util. Code § 431.⁷
8 Although the court recognizes that Comcast is not a public
9 utility, the fact that the CPUC charges these annual user fees to
10 virtually all the utilities and cable franchise holders within
11 its jurisdiction lends further credence to the argument that the
12 CPUC User Fee is a "fee of general applicability" under section
13 542(g)(2). Indeed, the fact that these CPUC annual user fees are
14 assessed against virtually all public utilities in California
15 seems to satisfy the FCC's admonition in the Section 621 Order
16 that the validity of generally applicable taxes "must be shown,
17 at least in part, by their application to broader classes of
18 entities or citizens beyond providers of cable and non-cable
19 communications services." See Section 621 Order, 34 FCC Rcd.
20 6844 at ¶ 92.

21 For the reasons stated above, the court finds as a
22 matter of law that the CPUC User Fee is a "fee. . . of general
23

24 ⁷ At oral argument, Comcast argued at length that the
25 CPUC fee imposed on utility companies, see Cal. Pub. Util. Code §
26 431, is distinguishable from the CPUC User Fee at issue here
27 because they were promulgated by different statutes, historically
28 calculated differently, and pay for different expenses within the
CPUC. Although the court recognizes these distinctions, they do
not change the court's analysis.

1 applicability", and is not a "franchise fee" within the meaning
2 of 47 U.S.C. § 542.⁸ Accordingly, the court will grant SMCTC
3 summary judgment on this claim.

4 C. Tower Rental Fees

5 Under Cal. Pub. Util. Code § 5860, "gross revenue"
6 means "all revenue actually received by the holder of a state
7 franchise. . . that is derived from the operation of the holder's
8 network to provide cable or video service within the jurisdiction
9 of the local entity. . ." See Cal. Pub. Util. Code § 5860(d).
10 Comcast leases available space on its communications towers to
11 third parties, such as wireless carriers. (Pl.'s Resp. to Def.'s
12 SUF at ¶ 28.) The parties disagree as to whether, as a matter of
13 law, these tower rental fees should be included in "gross
14 revenue" for the purpose of calculating franchise and PEG fees.
15 (Def.'s Mot. for Summ. J. at 23.)

16 Comcast contends that tower rental fees are not part of
17 its cable or video service within the jurisdiction of SMCTC
18 because the lessees are third parties who do not use the towers
19 to provide any cable or video service to subscribers. (Def.'s
20 Reply in Supp. of Mot. for Summ. J. at 13.) (Docket No. 56.)
21 SMCTC argues that the tower rental fees should be included in the
22 calculation of Comcast's "gross revenue" because, in addition to
23 leasing space on the tower, Comcast uses the towers to provide
24 video services to its subscribers and is "obtaining additional
25 revenues by virtue of that operation." (Pl.'s Opp'n to Def's
26

27 ⁸ Because the court finds that the CPUC User Fee is a fee
28 of general applicability, the court need not decide whether the
Section 621 order applies retroactively or not.

1 Mot. for Summ. J.) (Docket No. 54.)

2 In the court's view, the leasing of tower space to
3 third party users does not fall within the definition of "gross
4 revenue" under Cal. Pub. Util. Code § 5860(d). Comcast's tower
5 rental fees are not derived from the operation of the towers to
6 provide cable or video service within the jurisdiction; rather,
7 the tower rental fees are derived from the leasing of facilities
8 for third-party users. (Def.'s Mot. for Summ. J. at 23.) If
9 Comcast were to cease using its towers for the provision of cable
10 and video services to subscribers, it would presumably have no
11 effect on its ability to rent space on these towers to third
12 parties. The fees generated do not depend on Comcast's operation
13 of the towers to provide video and cable service to its
14 subscribers, but on the physical existence of the tower.

15 Moreover, the Federal Cable Act forecloses including
16 the tower rental fees in the calculation of "gross revenue" for
17 purposes of calculating franchise fees. Under the Federal Cable
18 Act, "the franchise fees paid by a cable operator with respect to
19 any cable system shall not exceed 5 percent of such cable
20 operator's gross revenues derived in such period from the
21 operation of the cable system to provide cable services." See 47
22 U.S.C. § 542(b). The FCC has clarified that the franchise fee
23 "only applies to revenue obtained from 'cable services,' not non-
24 cable services that Congress understood could provide additional
25 sources of revenue." See Section 621 Order, 34 FCC Rcd. 6844 at
26 ¶ 89.

27 Accordingly, the court concludes as a matter of law
28 that the tower rental fees should not be included as "gross

1 revenue" for cable services for the purpose of calculating
2 franchise and PEG fees under both California Public Utility Code
3 § 5860(d) and the Federal Cable Act. Comcast is therefore
4 entitled to summary judgment on this claim.

5 D. Multi-Service Fees

6 Section 542(b) of the Cable Act establishes a uniform
7 federal policy which limits franchise fees to five percent of a
8 cable operator's annual revenues from cable services only. See
9 47 U.S.C. § 542(b). DIVCA, in keeping with the Federal Cable
10 Act, likewise specifies that the state franchise fee shall be
11 applied only to the "gross revenue" attributable to video
12 service. See Cal. Pub. Util. Code § 5860(f). "Gross revenue" is
13 defined as "all revenue actually received by the holder of a
14 state franchise, as determined in accordance with generally
15 accepted accounting principles ("GAAP"). . ." See Cal. Pub.
16 Util. Code § 5860(d).

17 Comcast offers multiple services, such as cable,
18 internet, telephone, and home security monitoring, that customers
19 can purchase individually or in multi-product packages called
20 "bundles." (Pl.'s Resp. to Def.'s SUF at ¶ 20.) Bundles allow
21 customers to purchase multiple services at a discount compared to
22 the sum of the stand-alone prices for those services when
23 purchased individually. (Id. at 21.) Comcast has established
24 various additional "multi-service" fees that apply to its
25 bundles, including late fees, early termination fees, and whole
26 house maintenance fees. (Def.'s SUF at ¶ 21.) Comcast claims
27 that because of the federal mandate that franchise fees can only
28 be charged on a cable operator's cable service, it allocates

1 revenues from its multiservice fees to isolate the portion
2 attributable to cable service in calculating franchise fee
3 payments. (Def.'s Mot. for Summ. J. at 17.) Comcast argues that
4 it has correctly allocated the portion of multiservice fees
5 attributable to cable service revenues in calculating its
6 franchise and PEG fees pursuant to GAAP. (See Def.'s Mot. for
7 Summ. J. at 18.) SMCTC disagrees and argues that Comcast's
8 methodology regarding the allocation of multi-service fees is
9 inconsistent with GAAP and incorrectly allocated. (See Pl.'s
10 Opp'n to Def.'s Mot. for Summ. J. at 17-25.)

11 In its motion for summary judgment, Comcast addresses
12 many multi-service fees: specifically, late fees, not sufficient
13 fund fees, convenience fees (for payment over the telephone),
14 early termination fees, whole house maintenance fees, and video
15 activation/installation credits to customers. (Def.'s Mot. for
16 Summ. J. at 16-17.) However, although Comcast moves for summary
17 judgment on all multi-service fees, it failed to identify and
18 address each multi-service fee at issue in its initial motion for
19 summary judgment, such as billing and collection fees and write-
20 offs and recoveries, (See Pl.'s Opp'n to Def.'s Mot. for Summ. J.
21 at 18.), and addresses them only in a cursory manner in its
22 Reply. (Def.'s Reply in Supp. of Mot. for Summ. J. at 14, 18.)

23 Most critically, however, Comcast has not demonstrated
24 to the court that the methodology it uses in allocating the
25 revenues for each multi-service fee at issue actually complies
26 with DIVCA and GAAP. Deposition excerpts that Comcast cites for
27 the proposition that its allocations comply with GAAP merely show
28 that Comcast's Vice President of Finance and Accounting, Jeff

1 Aldi, believes "that GAAP . . . requires the allocation of the
2 late fee or the multi-service fees to the component units of
3 accounting." (See Decl. of Edward Seidel at Ex. 10, attaching
4 excerpts from the transcript of the August 26, 2020 Dep. of Jeff
5 Aldi at pp. 108:3-109:12; 110:11-111:13) (Docket No. 45).) A
6 simple belief by Comcast's executive is insufficient to prove
7 that Comcast's practices in allocating multi-service fees
8 actually comply with GAAP.

9 Moreover, other testimony casts doubt upon Mr. Aldi's
10 belief that Comcast's methodology in fact complies with GAAP.
11 Mr. Aldi stated that he does not review the calculations relative
12 to the determination of franchise fees to ensure that they were
13 performed in accordance with GAAP. (See Decl. of Mark Velasquez
14 at Ex. D, attaching excerpts from the transcript of the August
15 26, 2020 Dep. of Jeff Aldi at 96:2-15) (Docket No. 54-1).)
16 Additionally, SMCTC submits that the two other franchise holders
17 within SMCTC's jurisdiction, who are also required to apply GAAP,
18 allocate similar multi-service fees differently. (Pl.'s Opp'n.
19 to Def.'s Mot. for Summ. J. at 23.)

20 After reviewing all the evidence in the record, the
21 court concludes that there is a genuine issue of material fact as
22 to whether Comcast's allocation of multi-service fees is
23 appropriate and complies with GAAP and DIVCA. Accordingly, the
24 court will deny Comcast's motion for summary judgment on this
25 claim.

26 E. Launch Incentives

27 The court next addresses the parties' contentions as to
28 whether "launch incentives" constitute "gross revenue" pursuant

1 to Cal. Pub. Util. Code § 5860(d).⁹ Comcast and other cable
2 operators typically pay programmers for content and then package
3 and distribute that content to subscribers. (Pl.'s Resp. to
4 Def.'s SUF at ¶ 24.) However, in order to sell their content to
5 a cable operator, programmers will sometimes pay certain "launch
6 incentives" to the operator. (Id.) "Launch incentives" are
7 typically paid up front to the cable operator as part of a
8 content agreement. (Id.) Comcast amortizes these "launch
9 incentives" over the life of its contract with the programmer and
10 contends that this effectively lowers the negotiated price a
11 cable operator pays for the content. (Def.'s Mot. for Summ. J.
12 at 20.)

13 Comcast argues that because "launch incentives" reduce
14 Comcast's costs for programming, they do not constitute "gross
15 revenue" for the purpose of calculating franchise and PEG fees.
16 (Id.) SMCTC disagrees, and argues that under DIVCA, "gross
17 revenue" is all revenue unless excluded. (Pl.'s Opp'n. to Def.'s
18 Mot. for Summ. J. at 34.) Cal. Pub. Util. Code § 5680(e)(9)
19 provides an exclusion from gross revenue for "revenue received as
20 reimbursement by programmers of a specific, identifiable
21 marketing costs incurred by the holder of a state franchise for
22 the introduction of new programming." SMCTC contends that
23 "launch incentives" count as "gross revenue" unless they
24 specifically fall into this exception under §5680(e)(9). (Pl.'s
25 Opp'n. to Def.'s Mot. for Summ. J. at 34.)

26 ⁹ As defined supra at p.20, "gross revenue" under DIVCA
27 means all revenue actually received by the holder of a state
28 franchise, as determined in accordance with GAAP. See Cal. Pub.
Util. Code § 5860(d).

1 A provision of GAAP, Accounting Standards Codification
2 ("A.S.C.") 605-50-45-12, provides that "cash consideration
3 received by a customer from a vendor is presumed to be a
4 reduction of the prices of the vendor's products or services . .
5 . [and] shall be characterized as a reduction of cost of sales
6 when recognized in the customer's income statement." See
7 Financial Accounting Standards Board, A.S.C. at 605-50-45-12.
8 Comcast cites this provision, and argues that this signifies that
9 "launch incentives" received from the programmer (the "vendor")
10 constitute a reduction of the purchase price of the programming
11 for cable operators (the "customer"), and therefore do not
12 constitute "gross revenue" under DIVCA. (Def.'s Mot. for Summ.
13 J. at 21.)

14 SMCTC disagrees and points to a different provision of
15 GAAP that details when certain activities that Comcast may
16 classify as "launch incentives" would actually constitute "gross
17 revenue" under DIVCA. (Pl.'s Opp'n. to Def.'s Mot. for Summ. J.
18 at 35.) A.S.C. 607-50-45-13 states that the presumption that
19 cash consideration received by a customer (i.e. Comcast) from a
20 vendor (i.e. the programmer) constitutes a reduction of the
21 prices of the vendor's products or services is overcome, and the
22 consideration should be considered revenue, when "[the
23 consideration represents] a payment for assets or services
24 delivered to the vendor. . ." See A.S.C. at 605-50-45-13. SMCTC
25 contends that activities like television ads, bill inserts,
26 channel position, or local media ads are all examples of
27 activities that would constitute revenue if cash consideration
28 were received from the programmer. (Decl. of Mark Velasquez at

1 Ex. F, attaching Garth Ashpaugh's Expert Report at 7.) (Docket
2 No. 54-1.)

3 The court has not been provided detailed information as
4 to what activities Comcast includes within the category of
5 "launch incentives." Moreover, it is clear that the parties have
6 dueling interpretations of which GAAP provisions are applicable
7 and which activities those GAAP provisions encompass.

8 Accordingly, there is a genuine issue of material fact as to
9 whether Comcast should exclude launch incentives from the
10 definition of "gross revenue" under Cal. Pub. Util. Code §
11 5860(d) and the court will deny Comcast's motion for summary
12 judgment on this claim.

13 F. Customer Credits for Missed Installations/Appointments

14 Under DIVCA, gross revenue is defined as "all revenue
15 actually received by the holder of a state franchise as
16 determined in accordance with generally accepted accounting
17 principles, that is derived from the operation of the holder's
18 network to provide cable or video service. . ." Cal. Pub. Util.
19 Code § 5860(d). Comcast subscribers receive credits on their
20 bills if a Comcast technician is late or fails to show up to an
21 activation or installation appointment. (Pl.'s Resp. to Def.'s
22 SUF at ¶ 26.) SMCTC contends that these credits should be
23 included as "gross revenue" in calculating franchise and PEG
24 fees. (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 28.) Comcast
25 argues that these customer credits do not count as "gross
26 revenue" under Section 5860(d) because Comcast does not actually
27 receive revenue from the credits it provides to customers;
28 rather, a customer credit is a reduction in the revenue received.

1 (Def.'s Mot. for Summ. J. at 22.)

2 SMCTC's argument is unpersuasive. SMCTC recognizes
3 that DIVCA excludes from gross revenue "[a]mounts not actually
4 received, even if billed, such as bad debt; refunds, rebates, or
5 discounts to subscribers or other third parties; or revenue
6 imputed from the provision of cable services for free or at
7 reduced rates." See Cal. Pub. Util. Code § 5860(e)(1). However,
8 SMCTC contends that if Comcast were allowed to exclude credits to
9 customers from the definition of "gross revenue", it would allow
10 Comcast to push a portion of its costs for untimely business
11 practices onto SMCTC. (Pl.'s Opp'n. to Def.'s Mot. for Summ. J.
12 at 28.) SMCTC's belief that such a practice would be unfair is
13 unavailing; the plain language of DIVCA limits "gross revenue" to
14 amounts actually received, and Comcast does not receive any
15 revenue for the customer credits that it provides to customers
16 for missed appointments or installations.

17 The court therefore concludes as a matter of law that
18 customer credits for missed installations or appointments do not
19 constitute "gross revenue" under DIVCA for purposes of
20 calculating franchise and PEG fees, and will grant Comcast
21 summary judgment on this claim.

22 G. Comcast's Unilateral Deductions Prior to Payment of
23 Franchise and PEG Fees to SMCTC

24 Section 555a(a) of the Federal Cable Act states that in
25 any court proceeding "involving a claim against a franchising
26 authority or other governmental entity. . . arising from the
27 regulation of cable service. . . any relief . . . shall be
28 limited to injunctive relief and declaratory relief." 47 U.S.C.

1 § 555a(a). SMCTC contends that this provision prevents Comcast
2 from engaging in self-help and adjusting its payments of
3 franchise fees and PEG fees before paying SMCTC. (Pl.'s Mot. for
4 Summ. J. at 16.) SMCTC argues that "because Comcast deducts (or
5 takes out the amount rightfully due to SMCTC in advance) before a
6 determination whether such actions are appropriate", SMCTC is
7 forced to resort to litigation to collect underpayments. (See
8 Pl.'s Reply in Supp. of Mot. for Summ. J. at 10.) (Docket No.
9 57.) Comcast contends that Section 555a(a) does not apply here
10 because SMCTC initiated this lawsuit against Comcast. (Def.'s
11 Mot. in Opp'n to Pl.'s Mot. for Summ. J. at 7.) Accordingly, the
12 court must address whether Comcast is barred from unilaterally
13 adjusting its payments of franchise fees and PEG fees before
14 paying SMCTC, notwithstanding the court's ruling on whether
15 certain categories of fees constitute "gross revenue" or are
16 "franchise fees". (Pl.'s Mot. for Summ. J. at 16.)

17 SMCTC relies on Glendale v. Marcus Cable Associates,
18 LLC, 231 Cal. App. 4th 1359, 1377 (2nd Dist. 2014), to support
19 its proposition that Section 555a(a) bars Comcast's deductions of
20 franchise and PEG fees prior to paying SMCTC. In Glendale, the
21 cable operator initially sought monetary damages and then,
22 confronted with the franchising authority's Section 555a(a)
23 defense, deleted its express request for damages and
24 reimbursements and replaced it with a request for a declaration
25 that it had a future right of offset based on past overcharges of
26 PEG fees. Glendale, 231 Cal. App. 4th at 1378. The court
27 declared that this was "merely a pleading artifice designed to
28 circumvent the damage prohibition in section 555a(a) of the

1 Federal Cable Act.” Id.

2 SMCTC argues that Comcast’s actions are likewise a
3 “ruse designed to obtain a monetary award in contravention of
4 Section 555a(a).” (Pl.’s Mot. for Summ. J. at 3.) However, the
5 thrust of the case in Glendale was that the cable operator sought
6 to recover money that it had already paid to the franchising
7 authority. Glendale is distinguishable because the procedural
8 posture here is the reverse; SMCTC is the party bringing suit
9 against Comcast and Comcast has not sought damages against SMCTC.

10 SMCTC II, 923 F.3d 1163, 1165 (9th Cir. 2019), likewise
11 offers little support for SMCTC’s position. In SMCTC II, Comcast
12 sought monetary damages for SMCTC’s alleged conversion of its
13 security deposit. See SMCTC II, 923 F.3d at 1167. The Ninth
14 Circuit held that this was barred by Section 555a(a). Id. at
15 1171. However, the Ninth Circuit emphasized that it had not
16 “considered whether [section 555a(a)] would apply were Comcast
17 defending a suit for underpayment of franchise fees brought by
18 SMCTC as would likely occur were Comcast to deduct the deposit as
19 an overpayment from its franchise fee payments. . . instead of
20 bringing suit for damages.” Id. at 1172 (emphasis added). It is
21 precisely this procedural posture, which the Ninth Circuit
22 expressly did not consider, which is at issue here.

23 Moreover, in the recent Section 621 Order, the FCC
24 seems to contemplate that cable providers should take certain
25 offsets or reductions to franchise fees to ensure compliance with
26 the federal 5% cap of franchise fees. See Section 621 Order, 34
27 FCC Rcd. 6844 at ¶ 111 n.416 (stating that “non-capital costs of
28 PEG requirements must be offset from the cable operator’s

1 franchise fee payments.”) This position by the FCC lends support
2 to Comcast’s argument that these offsets or reductions do not
3 violate 47 U.S.C. § 555a(a).

4 SMCTC additionally argues that Comcast’s unilateral
5 deductions from its franchise fees and PEG fees are barred under
6 DIVCA because they violate California Public Utilities Code §
7 5860(h). Under this provision, the state franchise fee shall be
8 remitted quarterly to the applicable local entity, with a summary
9 explaining the basis for the calculation of the state franchise
10 fee. See Cal. Pub. Util. Code § 5860(h). Section 5680(h)
11 further states that “[i]f the holder has overpaid the franchise
12 fee, it may deduct the overpayment from its next quarterly
13 payment.” Id. SMCTC contends that this provision stands for the
14 proposition that cable operators cannot make any deductions
15 except for past overpayments. (Pl.’s Mot. for Summ. J. at 17.)

16 The court disagrees. Cal. Pub. Util. Code § 5680(h)
17 does not address the adjustment of payments required to comply
18 with the Federal Cable Act’s 5% cap on franchise fee payments
19 whatsoever nor does it explicitly bar deductions by cable
20 operators except for past overpayments. Moreover, as addressed
21 above, the FCC contemplates that franchise authorities and cable
22 operators must make offsets or reductions to franchise fees in
23 order to comply with the federal 5% cap on franchise fees laid
24 out in 47 U.S.C. § 542 and relevant FCC requirements. See
25 Section 621 Order, 34 FCC Rcd. 6844 at ¶ 111 n. 416 (stating that
26 “non-capital costs of PEG requirements must be offset from the
27 cable operator’s franchise fee payments.”); id. at ¶ 63 n. 251
28 (holding that franchising authorities cannot ask cable operators

1 to "voluntarily waive the cap and accede to making payments or
2 contributions that are not offset against the statutory limit on
3 franchise fees.") Because California Public Utilities Code §
4 5860(h) does not state that the only deductions permitted by
5 cable operators are deductions for past overpayments of fees by
6 the provider, the court declines to read such a prohibition into
7 the statute.

8 Accordingly, the court does not find that SMCTC has met
9 its burden to demonstrate that Comcast's deductions and offsets
10 prior to its payment of franchise and PEG fees to SMCTC violates
11 either 47 U.S.C. § 555a(a) or Cal. Pub. Util. Code § 5680(h) and
12 will deny SMCTC summary judgment on this claim.

13 IT IS THEREFORE ORDERED that Comcast's motion for
14 summary judgment (Docket No. 42; Docket No. 34.) be, and the same
15 hereby is, GRANTED in part. Comcast is entitled to summary
16 judgment on its claim that PEG fees should not be included as
17 "gross revenue" for the purpose of calculating franchise fees,
18 and its claims that tower rental fees and customer credits for
19 missed installations or appointments should not be included as
20 "gross revenue" for the purpose of calculating franchise fees and
21 PEG fees. Comcast's motion for summary judgment is DENIED as to
22 all other claims.

23 IT IS FURTHER ORDERED that SMCTC's motion for partial
24 summary judgment (Docket No. 49; Docket No. 41.) be, and the same
25 hereby is, GRANTED in part. SMCTC is entitled to summary
26 judgment on its claim that CPUC fees are not "franchise fees"
27 under the Federal Cable Act. SMCTC's motion for summary judgment
28 is DENIED as to all other claims.

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Dated: December 18, 2020



WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE