

**Before the Federal Communications Commission
Washington, D.C. 20554**

In the Matter of :)
)
Implementation of Section 621(a)(1) of the Cable) MB Docket No. 05-311
Communications Policy Act of 1984 as Amended)
by the Cable Television Consumer Protection and)
Competition Act of 1992)

Comments on behalf of: the Association of Washington Cities; the Washington State Association of Counties; the Colorado Communications and Utility Alliance; the Cities of Everett, Kent, Lacey, Olympia and Tumwater, Washington; Thurston County, Washington; and the Jersey Access Group.

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On behalf of the Association of Washington Cities (“AWC”); the Washington State Association of Counties (“WSAC”); the Colorado Communications and Utility Alliance (“CCUA”); the Cities of Everett, Kent, Lacey, Olympia and Tumwater, Washington; Thurston County, Washington; and the Jersey Access Group (“JAG”) we submit these comments in opposition to the Federal Communications Commission’s (“Commission’s”) Second Further Notice of Proposed Rulemaking (“FNPRM”) regarding cable-related franchise considerations.

I. INTRODUCTION

1. The Parties.

Founded in 1933, AWC is a private, nonprofit, nonpartisan corporation that represents Washington's cities and towns before the state legislature, the state executive branch and with state and federal regulatory agencies. Membership is voluntary. However, AWC consistently maintains 100% participation from Washington's 281 cities and towns. AWC is governed by a 25-member Board of Directors of elected and appointed officials, and for over 80 years has kept the interests of cities, towns, and their citizens at the forefront of local authority and decision-making relating to a wide variety of public policy issues.

Created in 1906, WSAC is a voluntary, non-profit association serving all of Washington's 39 counties. WSAC members include elected county commissioners, council members and executives from all of Washington's 39 counties.

CCUA was formed as a Colorado non-profit corporation in 2012 and is the successor entity to the Greater Metro Telecommunications Consortium. Its members have been working together since 1992 to protect the interests of their communities in all matters related to local telecommunications issues. The CCUA undertakes education and advocacy in areas such as telecommunications law and policy, cable franchising and regulation, zoning of wireless communications facilities, broadband network deployment, public safety communications, rights-of-way management, and operation of government access channels. CCUA is the Colorado chapter of the National Association of Telecommunications Officers and Advisors (“NATOA”) and an affiliate of the Colorado Municipal League.

JAG is a professional advisory organization of New Jersey local governments and school districts that informs, educates, and recommends in the areas of technology, legislation, and regulation that shape and direct the use of multi-communication platforms for content creators and distributors on behalf of municipalities, educational institutions, and other public media facilities. JAG was formed in March of 2000 and has played a dominant role in the development of New Jersey’s public, educational, and government (“PEG”) television stations. As the New Jersey state chapter of NATOA and an affiliate of the New Jersey State League of Municipalities, JAG also educates and advocates on behalf of its members on broadband and communications issues related to consumer protection, broadband access and funding, public safety spectrum, public rights-of-way management and policies and local government networks.

As the largest city in Snohomish County, Washington, Everett serves a diverse community of nearly 110,000 residents. Located 25 miles north of Seattle, the city is nestled between Port Gardner Bay and the Snohomish River. Residents and visitors to Everett enjoy a vibrant arts, culture and music scene, delicious dining, pubs and breweries, and family-oriented festivals year-round. Everett is also home to Boeing, Funko, Angel of the Winds Arena, and Naval Station Everett.

Kent is a city located in King County and is the sixth largest city in Washington with a population of approximately 129,000. It is in the heart of the Seattle–Tacoma metropolitan area, located 19 miles south of Seattle and 19 miles northeast of Tacoma. Kent boasts a widely diverse population with over 130 languages spoken in its public schools.

Situated on the southern tip of Puget Sound in the shadow of magnificent Mount Rainier, the City of Lacey lies in the center of a natural paradise. Five freshwater lakes within the city, miles of hiking and biking paths, several championship golf courses, more than 1,200 acres of public parkland, and the adjoining 3,700-acre Nisqually National Wildlife Refuge provide residents with virtually unlimited opportunities for outdoor recreation. Clean air, clean water, outstanding schools, a low crime rate, a healthy economy, and close proximity to major metropolitan areas make Lacey one of the most desirable places in the country to live and conduct business.

With a population of just over 52,000, and an economic engine fueled to a great extent by state government, Olympia, Washington enjoys the benefits of a stable work force, engaged and educated community, and well-supported school system. Olympia maintains 40 public parks and its public trails lead to saltwater beaches where native tribes once met for potlatches through woods thick with big-leaf maples and towering Douglas firs. The City is home to three top-notch K-12 school districts and several levels of higher education in the greater Thurston County area.

Tumwater, Washington is the southern gateway to Puget Sound's mega-metropolitan region located on Interstate 5, between Seattle and Portland, just south of the State capitol. The City's business sector is comprised of Port of Olympia properties, state offices and a mix of industrial, manufacturing, and commercial properties which provide over 20,000 jobs. Tumwater is a growing city, serving a population of 23,000 residents living in an 18-square mile area, at the base of the Deschutes River where the water cascades to its final destination at the southern tip of Puget Sound.

Thurston County, Washington, is located at the southern end of Puget Sound in the beautiful Pacific Northwest. Majestic Mount Rainier and the rugged Cascade Mountains are nearby to the east, while Washington's Pacific Ocean coast is just an hour's drive to the west. Thurston County is 60 miles south of Seattle, Washington and is 100 miles north of Portland, Oregon. Thurston County is 727 square miles in area and is home to more than 220,000 residents. Thurston County's largest cities are Lacey, Olympia, and Tumwater.

2. Summary of Arguments.

The Commission does not have authority under the Cable Act to constrain the entire franchise negotiation process by reinterpreting a key section of the Cable Act in the manner proposed. The Commission's interpretations are not only an impermissible construction of the statute, but also result in rendering moot the Local Franchise Authorities' ("LFAs'") statutory authority. Moreover, a plain language reading of the non-ambiguous statutory term provides no evidence that franchise considerations should be considered franchise fees. While the Commission uses the term "in-kind" contributions to include all noncash requirements associated with a franchise agreement, the Commission has not actually defined the term. Given that the language of the Cable Act does not include the term, we suggest that the use of the term "in-kind" is a misnomer in the context of cable franchising. Thus, we use the term "franchise considerations" to collectively refer to financial and non-financial contributions made by the cable operators within the franchise agreements.¹ The following analysis outlines the reasons we strongly believe the Commission has exceeded its authority and why the proposed rules should not be adopted.

II. ARGUMENT

1. The Commission's interpretation of §542(g) is an impermissible construction of the statute.

The Commission has proposed an unlawful alteration of the Cable Act's regulatory scheme through an alleged "minor" modification in the Commission's interpretation of §542(g).² The Commission proposes to revise the definition of "franchise fees" to include all negotiated franchise considerations that are specifically authorized by the Cable Act, except for PEG capital costs incurred in or associated with construction of PEG access facilities and build-out requirements.³ The Commission relies upon §542(g) as support for its proposed definition.⁴ In essence, the Commission is adding these franchise considerations to the definition of what is included in the

¹ The Commission's *First* and *Second Orders* and *Reconsideration Order* proposing to include in-kind considerations as franchise fees were remanded back to the Commission from the Sixth Circuit court in *Montgomery County, Md et al. v. FCC*, for a failing to define "in-kind consideration." *Montgomery Cty., Maryland v. Fed. Comm'n's Comm'n*, 863 F.3d 485, 491 (6th Cir. 2017). These Comments argue why we believe the franchise considerations cannot be included within the statutory definition of franchise fees.

² *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, FCC 18-131, at ¶ 1 (Sept. 25, 2018) ("FNPRM"). See also, *MCI Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (FCC's decision to make tariff filing optional for all nondominant long distance telephone carriers was not a valid exercise of its power to 'modify' any requirements of 47 U.S.C §203).

³ *Id.* at ¶ 20.

⁴ *Id.* at ¶ 17, 18, and 19.

definition of franchise fees under §542(g)(1) and limiting the exclusions from franchise fees under §542(g)(2). Yet, the Commission does not have the authority to expand the interpretation of a non-ambiguous statute beyond a plain language meaning,⁵ which is exactly what it attempts to do with these proposed rules.

The Commission's interpretation of §542(g) will destroy the intent and purpose of the congressionally created franchising scheme. The underlying premise of the requirement for a cable franchise is that the cable operator must agree to provide consideration to the LFA sufficient to meet the future cable-related needs of the community, taking into account the cost of meeting those needs.⁶ The costs of these requirements to meet future needs is separate and distinct from the franchise fee itself, which is the rental payment the cable operators must pay to rent space in the public rights-of-way.⁷ Importantly, nowhere in the Cable Act does it say that the value of any one of these methods to meet future needs must be set off against the franchise fee obligation.

The Cable Act includes several requirements, in addition to establishing franchise fees in §542, that create the framework for franchises including, but not limited to, the ability for LFAs to require PEG channel capacity,⁸ construction standards, schedules and performance requirements,⁹ and imposition of customer services standards which may differ from the Commission's standards.¹⁰ Though the Commission notes in the FNPRM that certain costs related to franchise considerations may be excluded because they benefit the entire community rather than an individual LFA,¹¹ the Commission wrongly argues that the Act permits the majority of these franchise considerations to be offset against the franchise fee simply because they are not listed as exclusions in §541(g)(2).¹² The Commission's argument is wrong because the Cable Act is clear that when LFAs award franchises, they are permitted to require additional franchise considerations above and beyond what is listed in §541(g)(2).¹³ Moreover,

⁵ *Whitman v. American Trucking*, 531 U.S. 547, 468 (2001) finding that the fundamental "engine" driving a statute cannot be modified without a "clear textual commitment".

⁶ 47 U.S.C. §531(b) and §546(c)(1)(D).

⁷ See e.g., *City of Dallas v. FCC*, 118 F.3d 393, 397 (1997); *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893); and *Erie Telecommunications v. Erie*, 659 F.Supp. 580, 595 (W.D.Pa.1987).

⁸ 47 U.S.C. §541(a)(4).

⁹ 47 U.S.C. §552(a)(2).

¹⁰ 47 U.S.C. §552(a)(1).

¹¹ *FNPRM* at ¶ 21.

¹² *FNPRM* at ¶ 20.

¹³ 47 U.S.C. §541(a)(4)(B) and §531(a)-(b).

the Commission also wrong incorrectly concludes that all of these franchise considerations only benefit the individual LFA.

These statutorily authorized requirements indicate clearly that Congress enacted these provisions with the intent to allow some cash and franchise considerations to be required separate from and in addition to the five percent franchise fee cap. The franchise fees are designed to compensate the LFAs for the usage of the public rights-of-way,¹⁴ but the Commission is impermissibly proposing to expand this definition of franchise fees to include additional statutorily permitted obligations and therefore decreasing the Congressional authorized rental payments paid to the LFA. The Commission's unreasonable interpretation of the statute should be withdrawn.¹⁵

2. The Commission's interpretation conflicts with over thirty years of history of negotiating franchise agreements with cable operators.

The Commission has acknowledged local authority to include additional franchise considerations within the franchise, such as discounted services to seniors.¹⁶ Requiring LFAs to pay for these negotiated franchise considerations as a credit against the rent for the use of the rights-of-way is inconsistent with thirty-four years of past precedent and decades of franchise agreements. The history of franchise negotiations is directly contrary to the Commission's argument in the FNPRM that if cable-related in-kind contributions were not counted as franchise fees, LFAs could circumvent the five percent cap by requiring unlimited free or discounted cable services and facilities for LFAs in addition to a five percent franchise fee.¹⁷ Discounted services, complimentary services and the provision of PEG channels have always been considered franchise considerations consistent with the Cable Act, provided in order to meet a community's cable related needs, and separate and distinct from rental payments for the cable operator's usage of the rights-of-way. Moreover, the Commission does not provide any proof nor cite to any evidence that LFAs have abused this authority. The Commission is trying to solve a problem that does not exist and creating an impermissible conflict with the Cable Act's framework in the process.

¹⁴ See e.g., *City of Dallas v. FCC*, 118 F.3d 393, 397 (1997); *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 13 S.Ct. 485, 37 L.Ed. 380 (1893); and *Erie Telecommunications v. Erie*, 659 F.Supp. 580, 595 (W.D.Pa.1987).

¹⁵ *MCI Corp v. AT&T*, 512 U.S. 218, 299 (1994) finding that an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear.

¹⁶ See *In re City of Antioch, CA*, CSR-5239-R (1999).

¹⁷ FNPRM ¶¶ 17 and 20.

3. The Cable Act must be read to harmonize all provisions.

47 U.S.C. §531(b) and §541(b)(3)(D) authorize LFAs to require cable operators to designate channel capacity for PEG use and for I-Nets. Historically, LFAs and cable operators included channel capacity for PEG uses within franchise agreements because this was a fulfillment of the statutory authorization based upon what was necessary to meet the future cable-related needs of the community.¹⁸ Each of the individual LFAs that are parties to these Comments have for many years and through multiple franchise agreements, been provided with PEG channels by the franchised cable operator, as a recognition of a particular type of cable service necessary to meet the future cable-related needs of the community. Never has there been a suggestion that the value of these channels must be considered part of the franchise fee. Offsetting the cost of channel capacity against franchise fees goes beyond the statutory authorization given to the Commission, and in many communities, will have the effect of eliminating the LFAs' ability to require PEG channels under §531(b) and §541(b)(3)(D).

The Commission's proposal leaves LFAs with the impossible choice of maintaining the PEG channels, which provides valuable services of transparency, open government, and local programming not otherwise available through the cable operator to the community or discontinuing those services in favor of maintaining the franchise fee contribution to the general operation fund. This is a difficult decision in light of the reduction of franchise fee payments due to over the top streaming services, and the continued need for funding to maintain important infrastructure within the rights-of-way.

Many local governments place all of the franchise fee revenue – the rent for the use of the public rights-of-way – in the general fund to be spent for general government expenditures. These revenues are significant, and contribute to maintenance of the rights-of-way, public safety, transportation, parks, libraries, PEG channel operations, and other important government services.

Some communities allocate a part of their franchise fees directly to PEG operations. For example, Longmont, Colorado, just east of Boulder, has an independent, citizen-run, cable trust board that is given 25% of the City's franchise fee revenues to provide government and community programming through their PEG station.

¹⁸ 47 U.S.C. §546(c)(1)(D).

Through a consortium comprised of Thurston County, Olympia, Lacey and Tumwater, Washington, the jurisdictions contract with a nonprofit entity to provide programming for local PEG channels. While most of the franchise fee revenue is kept by the LFAs and utilized for general government operations, significant percentages of both franchise fee and PEG fee revenue is contributed by the LFAs to the consortium to acquire equipment and provide these local programming content and services.

These are just a few examples. If LFAs are required to provide a credit against franchise fees for the value of the PEG channels provided to each community, it is likely that the loss of franchise fee revenue will force a decision that could effectively end PEG channel operations. A decision to discontinue PEG services could also have downstream effects of employee reductions both for local government operated government channels and community colleges or other collaboratives that support public and educational channels.

Furthermore, local governments are statutorily authorized to require PEG channel capacity under §531(b) of the Act. That section indicates that it is only limited by §546 of the Act. There is no limitation that the provision of channel capacity is only permitted so long as the value of that channel capacity does not exceed five percent of the cable operator's gross revenues. Congress could have included that limitation in §531 if that were its intent, but it did not do so. The Commission proposed rules directly conflict with an LFA's authority under §531.

The Cable Act, like every act of Congress, may not be read as a series of unrelated and isolated provisions.¹⁹ The Commission does not have authority to render moot one provision of the Cable Act through a revised interpretation of a different provision of the Cable Act. The Commission is not free to circumvent an LFA's statutory obligations in this manner. The Commission's interpretation to the contrary directly conflicts with caselaw and the canons of statutory interpretation that require statutory provisions to be harmonized to effectuate the intent and purpose of each provision.²⁰

4. Franchise considerations are not a tax, fee or assessment, and thus cannot be a franchise fee.

a. Franchise considerations are negotiated, not imposed or assessed.

¹⁹ *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995).

²⁰ *Id.* at 570.

The Commission’s proposals with regard to what constitutes a franchise fee disregards the threshold requirement that a franchise fee must be a “tax, fee or assessment.”²¹ The problem with the Commission’s proposals is that franchise considerations are negotiated; they are not imposed or assessed. A franchise fee is “any tax, fee, or assessment of any kind *imposed* by a franchising authority.”²² Unless defined in the statute, words are given their ordinary meaning.²³ “Imposed” is defined as “established as if by force.”²⁴ This definition does not include or imply terms that have been negotiated in an arms-length transaction between parties. Franchise considerations are negotiated between cable franchisees and the LFAs and are not established by force. Indeed, the extent of what can be negotiated is limited by the Cable Act to provisions that meet the future cable-related needs of the community.²⁵ Since these franchise considerations are not imposed by the LFA, the Commission may not consider them part of the franchise fee.

b. Franchise considerations are benefits to the subscribers of the cable industry and the citizens of the local franchise authorities.

The Commission notes that franchise requirements that are not imposed for the sole benefit of the LFA or a designee of the LFA should not be considered as part of the franchise fee cap.²⁶ However, there are many franchise considerations, including those that the Commission suggests should be considered as part of franchise fees, that do not directly benefit the LFA. Franchise considerations can be benefits to the citizens of the LFAs and subscribers of the cable operators. This separation is clearly identified in the purpose of the Cable Act, which states in part that the purpose of the Cable Act is to “establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community.”²⁷ Both cable operators and LFAs have interpreted this section as a platform on which the parties negotiate certain community needs and interests that arise under the Cable Act and are formalized in a

²¹ 47 U.S.C §542(g).

²² *Id.*

²³ *FCC v. AT&T Inc.*, 562 U.S. 397, 397 (2011) (“When a statute does not define a term, we typically give the phrase its ordinary meaning”).

²⁴ *Merriam-Webster Online Dictionary*, www.merriam-webster.com/dictionary/impose (last visited Oct. 24, 2018).

²⁵ 47 U.S.C. §546(c)(1)(D).

²⁶ *FNPRM* at ¶ 21.

²⁷ 47 U.S.C §546(c)(1)(D).

franchise agreement. Constraining the franchise process with rules that inhibit the LFAs' role in ensuring cable related needs and interests²⁸ are met is not a permissible interpretation of the Cable Act.

The Commission clearly understands the distinction between contributions to the government and contributions to the community at large because it uses that rationale to exclude capital costs associated with the operation of PEG channels. The Commission reasoned that this franchise consideration is specifically for the use or benefit of the whole community, so it did not need to be included within the franchise fee cap.²⁹ The Commission tentatively concludes that all other franchise considerations should be considered franchise fees because, in essence, these considerations are taxes imposed for the benefit of LFAs. This reasoning is flawed though, because in addition to the fact that they are not *imposed*, as described above, it blatantly ignores the fact that the majority of franchise considerations are benefits to the cable subscribers and the entire community. Franchise considerations including PEG programming, complimentary cable services to schools, libraries, fire departments, discounts for low-income residents all fit squarely into the category of benefits to the community as a whole. Because the majority of franchise considerations benefit the broader community, they do not fit within the definition of franchise fees as a "tax, fee or assessment" and should not be considered franchise fees.

PEG channels provide a wide variety of community information and contribute to transparency in government. Below a few examples are listed:

- Durango, Colorado, located in southwest Colorado, is in an "orphan" county, located in a market area that is not covered by Colorado television stations. As a result, its City PEG operations have stepped up to provide a wide variety of local news and other programming which are not shown in the limited coverage Durango may receive from Albuquerque broadcast channels. Its signal is carried by the Southwest Colorado Television Translator Association which expands coverage from Durango to neighboring Montezuma and Dolores Counties. In this way, Durango has been able to expand its local coverage and service to very rural and unserved parts of Colorado. This local coverage and service was crucial this past June and July during the 416 Fire, which burned 54,000 acres just outside Durango. The City's PEG channel

²⁸ See e.g., 47 U.S.C §541(a)(4), 544(b), 546(c)(A)-(D).

²⁹ *FNPRM* at ¶ 21.

aired constant information for the public, including daily briefings from the United States Forest Service, information on evacuations and pre-evacuations, where people could assist and/or donate for those displaced, as well as weather watches and warnings that preceded significant post-fire flooding. There was no other way to get this information to the public in a timely fashion other than through Durango's PEG channel. Durango's information was continuous, and the City received many comments from the public regarding how helpful it was. A loss of a PEG channel such as the one operated by Durango would have a significant safety impact on the public and a loss for at least the three counties it serves.

- The PEG channels operated by Thurston Community Media under contract to Olympia, Lacey, Tumwater and Thurston County offer programming that is not seen elsewhere. There is *no* broadcast affiliate in greater Thurston County that focuses on local news, and locally produced programming on the PEG channels fills a communication need that no other outlet can offer. Programming examples include military veterans' issues, live arts performances around the community, coverage of local community events, candidate forums and local election coverage to feature democracy in action, informational programming for seniors, local history, religious diversity in the region, and programming of interest to the education community. Each year the local PEG channels managed by TCMedia schedule more than 16,000 hours of programming produced by, for and about the community. It is the only local television/video outlet in greater Thurston County.
- Outside of Thurston Community Media, Washington State has over 50 cities and counties that have at least one active PEG channel. These PEG channels promote civic engagement and hold local governments accountable across Washington State, but in particular the rural communities within Washington State many of which do not have local broadcast affiliates.
- In New Jersey, the Township of East Brunswick, with a population of just under 50,000, is situated in between New York and Philadelphia, and its local issues are not adequately covered by channels from either major city. Its PEG operation, EBTV, produces about 200 original shows a year, all focused on East Brunswick and its immediate neighbors. It also televises programs produced by the East Brunswick Board of Education, the Middlesex County Board of Chosen Freeholders, the Middlesex County Department on

Aging, and Rutgers University. *This Week in East Brunswick*, a weekly news magazine show running consistently since May 1981, received a grant from The NJ Historical Commission in 2010 to preserve the programs that are now on-demand on its website and serve as the local history of the township.

- Wheat Ridge, Colorado, a small suburban community west of Denver, in addition to producing live City Council meetings to promote community involvement and government transparency, also produces PEG programming content of local interest such as healthy eating, healthy living, and recently, programming on Halloween safety.
- The City of Golden, Colorado, located at the base of the Rocky Mountains west of Denver, produces PEG programming of local interest including the Mayor's Awards for Excellence, health related programs for seniors, education related programs and updates on its local school district, local concerts to promote local talent, City produced Safety PSAs, and stories to promote city events, programs, history, health and lifestyles.
- One of the largest communities in the Denver metro area, the City of Lakewood, produces a wide variety of PEG programming not otherwise available to its community. Its programs cover education of the public on a new regional E911 center, recruitment for women in policing, descriptions of how city government works including information on each city department, and news stories local to Lakewood and the surrounding area not covered by local media outlets.
- Woodbridge Township, New Jersey's PEG channel covers every major high school sport in a township of over 100,000 people. It is important to note that in past years, this kind of programming was covered and shown by the local cable company. Cable companies have cut these services back and, in many cases, ended this kind of local community-specific programming. It has fallen to the PEG channel operators to replace it. Woodbridge also airs a senior exercise program that airs in municipalities all over the New Jersey giving access to a health regiment to people who have trouble getting out of their homes.
- Eagle County, Colorado, located in the heart of the Rocky Mountains, has PEG programming that like many other localities, airs live local candidate forums, which is critical information for local communities

not available from other sources. Perhaps the most beneficial community program in Eagle County is a series of talks put on by the Eagle River Youth Coalition titled "Eat, Chat, Parent," which is developed in partnership with Vail Health. Topics have included teen suicide, bullying prevention, sexting, and other difficult subjects for parents of teens. The County has received quite a bit of positive feedback from viewers who were unable to attend the talks and appreciate the ability to view it, both over the air and on demand.

These examples demonstrate that PEG channels facilitate benefits to the community, as opposed to a requirement imposed to benefit only the LFA. Requiring the offset of the channel capacity against franchise fees would potentially deprive these communities of valuable local news sources, and general programming of broad community interest.

5. Placing a value on franchise considerations will hamper franchise negotiations.

As explained above, the Commission lacks authority to proceed with offsetting franchise considerations against franchise fees. In addition, the proposal to utilize fair market value³⁰ to determine the value of the franchise considerations is equally troubling, is inconsistent with recent Commission precedent, and is arbitrary and capricious. Using a fair market value standard places LFAs in a clear disadvantage, will prolong franchise negotiations, and will increase costs to all parties involved.

Any valuation used to assess the value of channel capacity and other franchise considerations needs to be objective and with sufficient guidelines for all cable operators and LFAs to follow. This is essential, especially in areas that have multiple cable operators. A valuation of fair market value may vary by cable operator, placing LFAs with multiple cable franchises in the untenable position of determining which value is accurate and ensuring that the franchises are competitively equitable.

There is a significant financial risk for LFAs if forced to determine the value of franchise considerations that could potentially cause a large reduction in franchise fees. Furthermore, requiring a valuation on franchise considerations suggests that LFAs have the ability to calculate what the value is for items such as channel capacity. This puts LFAs at a distinct disadvantage. For example, LFAs do not have the internal business expertise to

³⁰ *FNPRM* at ¶ 24.

determine the cost or fair market value of channel capacity – this rests primarily with the cable operators. There is nothing to prevent cable operators from varying the assessments of fair market value of their franchise contributions from LFA to LFA and determining what is considered fair market value and which data elements are incorporated into this analysis may prolong negotiations. Using a valuation standard without any guidelines may also require LFAs to contract with third-party consultants who are familiar with setting value for the franchise considerations, specifically channel capacity, again increasing the costs to the LFA. Smaller LFAs and any LFA with financial challenges will likely forego the cost of obtaining the specialized expert valuation information they need to negotiate on a level playing field. Lastly, the proposal to utilize any form of valuation will also require that cable operators provide detailed information about how they derive this calculation, information that they may not be willing to disclose considering open public records requirements in many states.

It is questionable if any offset against franchise fees is even worth the time and money to determine what that offset amount should be. For example, for complimentary services to public buildings, once the infrastructure is in place the cost to the cable operator is negligible. The cable operators' financial obligations to programmers generally do not require the cable operator to count subscribers who receive free service in determining what they owe for the programming content.³¹ Thus, the cable operators should not benefit from LFAs having to offset franchise considerations from franchise fees when their own costs are likely insignificant.

Offsetting franchise considerations against franchise fees further disincentivizes LFAs from providing PEG channels and complimentary services that benefit the public. This is unfortunate because the cable operators derive benefits from partnering in the community to facilitate the provision of these services. In Washington, Colorado and New Jersey, and we presume many other states, local cable operators often point to their community partnerships at city council meetings, including the provision of these complimentary services which enable citizens to watch council and commission meetings in comparison to competitors such as satellite services and over the top streaming services. This is in stark contrast to streaming services such as Netflix and Hulu, which make no

³¹ 37 C.F.R. 201.17(e)(6), which requires cable operators to report who is charged for the retransmission service. 17 U.S.C. §111(f) defines “subscriber” as a person or entity that receives a secondary transmission service from a cable system and pays a fee for the service, directly or indirectly to the cable system.

community investment. Any valuation would also need to include the good will that the cable operators generate from providing these franchise considerations, an element that is difficult to quantify. Because of the impossibility of adequately quantifying the value of these franchise requirements, no Commission in the thirty-four years since the passage of the Cable Act has ever made this suggestion. This Commission would be wise to continue following that precedent.

III. Conclusion

As demonstrated above, the Commission does not have the authority to alter the plain language of the Cable Act and Congressional intent by creating an expansive interpretation of §542(g)(1) and a limited interpretation of §542(g)(2). Further, the Commission's proposal dismisses over three decades of past precedent. The Commission's interpretation illegally impacts LFAs' statutory ability to adequately and appropriately manage the relationships between themselves, the cable operators that use public property to generate profits for their shareholders, and the public. Adoption of the proposed rules will put LFAs in the untenable position of having to choose between keeping the rent for the private use of public property or giving up that revenue in order to continue to make available services contemplated by the Cable Act as negotiated through the cable franchise process. For these reasons, we strongly recommend the Commission reject the proposed rules.

Respectfully submitted,



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