City of Cambridge
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November 14, 2018

Chairman Ajit Pai
Commissioner Michael O'Rielly
Commissioner Brendan Carr
Commissioner Jessica Rosenworcel
Federal Communications Commission
445 12th Street, SW
Washington, District of Columbia 20554

RE: Second Further Notice of Proposed Rulemaking. Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311.

Honorable Chairman Pai and Commissioners O'Rielly, Carr, and Rosenworcel:

The City of Cambridge, Massachusetts appreciates the opportunity to file comments on the Second Further Notice of Proposed Rulemaking ("FNPRM"). I am writing to formally express the City's concerns regarding the Federal Communication Commission's ("FCC") proposal to allow cable companies to deduct the fair market value for a wide range of public benefits from their franchise fee obligations, namely public, educational, and government ("PEG") channel capacity and transmission. This proposal would upset the longstanding understanding of the meaning of the term "franchise fee", reduce local revenues, and strip power from local governments to control cable operators' use of the rights of way when providing non-cable services.

For decades, franchise fees have been understood to be limited to monetary payments and would thus not include any in-kind franchise requirements such as services, facilities or equipment related to the establishment or operation of a cable system. In-kind considerations can vary from municipality to municipality, but some examples include: institutional network ("I-Net") requirements, complementary cable service to government buildings, and public, educational and governmental ("PEG") channels.

The FCC's FNPRM purports to include all in-kind contributions, other than PEG capital costs and build out requirements, within the meaning of a franchise fee and subject to the 5%

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cap. This would allow cable operators to deduct from their cable franchise fee payments the "value" of franchise requirements such as PEG channel capacity. The FCC is further suggesting that this "value" should reflect the fair market value of these services. If this line of thinking is adopted, this would directly harm PEG access facilities and the communities they serve.

PEG channels provide a variety of benefits to communities, including public access channels, educational access channels, and government access channels. Local franchise agreements commonly require cable operators to set aside capacity for PEG channels, which provide local residents with the ability to view their local governments in action and receive local educational and school-related programming. During local elections, PEG channels provide opportunities for candidates to address the public and are a good source for local election coverage. In short, PEG programming is an irreplaceable source of local programming for the public that is not otherwise available through cable services.

The fair market value assessments of these invaluable programs as part of a cable operator's franchise fee would lead to significant and potentially arbitrary deductions from franchise fees by cable operators, opening the door to legal challenges. Further, this loss of revenue and support would force municipalities to either divert resources away from core municipal and school services to maintain existing PEG programming, suffer a dramatic reduction in the scope of PEG channels, or lose them altogether. Additionally, some costs such as I-Net capacity costs and access channel costs are already passed along to subscribers by the cable operators. Allowing these companies to then deduct their fair market value from the franchise fee would create a windfall for these companies, essentially allowing them to double-recover.

Equally as concerning, this FNPRM would allow certain cable operators to construct and install facilities and equipment for non-cable services, such as small cells or other wireless deployments, in the rights of way without any local regulation or compensation. Most franchise agreements do not include provisions related to the installation of non-cable facilities, and consequently, under this FNPRM, local franchising authorities would be preempted from regulating these installations, raising aesthetic and public safety concerns. This preemption would also extend to fees for the use of the rights of way, meaning cable companies would not have to compensate local franchising authorities for the additional use of the rights of way. This would be another unwarranted windfall to private cable companies, this time at the expense of the general public and local taxpayers.

Compounding the effect of this preemption, the FCC's recent Declaratory Ruling and Third Report and Order states that municipalities cannot impose fees or aesthetic requirements related to small wireless facilities that would exceed fees or aesthetics requirements for other wireless telecommunications infrastructure for the similar use of the right-of-way, essentially creating a federally-set race to the bottom between telecommunications providers and cable companies that provide wireless services. The City strongly believes that this is not in the public interest.

In its Second Further Notice of Proposed Rulemaking, the FCC requested comments on certain parts of its proposed new rules. In response to that request, the City offers its responsive comments to the following paragraph, with page citation:

(a) Paragraph 19, p. 11: In this paragraph the FCC states its intention, for franchises granted after 1984, to permit "capital costs" to be considered as "in kind payment" and therefore to be included within the total franchise fee cap of 5%. Footnote 95 to that paragraph states:

> "We understand that costs for studio equipment are treated as capital costs for purposes of section 622 (g) (2) (C) [47 USC sec. 542 (g) (2) (C)] by both cable operators and LFAs given that most PEG facilities are already constructed. We seek comment on this practice."

In response to that request, the City observes that the practice of treating capital obligations as excluded from the 5% franchise fee cap is widespread, and probably nearly universal in Massachusetts. The typical practice in Massachusetts has been to treat annual operating expenses of a PEG provider as within the 5% "franchise fee" cap, and to treat capital fund requests, for equipment and studio upgrades, as excluded, in reliance of the language in Section 622(g)(2)(C). This is a custom and practice which has developed over a long period of time, and over several generations of franchise agreements, which in Massachusetts may have terms for up to ten years. See M.G.L. c. 166A, § 13. The City's current cable television franchise with Comcast [a ten-year franchise granted in 2011] provides for over $1,500,000 in capital costs for equipment and studio upgrades during the ten-year term, and 5% of gross annual revenues, as an annual PEG operations grant. The City's PEG access provider is a Massachusetts non-profit corporation which operates a large studio, programs 6 channels, serves over 33,000 subscribers, and is a viable business enterprise, with salaries, insurance and many other annual business costs, all of which must be budgeted, managed and projected out over the franchise term, as prudent business practice would require. Crediting Comcast's capital cost obligations under the 2011 franchise agreement against the 5% Gross Revenue annual operating grants under the current franchise would work an immediate and inordinate hardship on the City's PEG access provider, and on PEG access consumers, and would grant an unearned windfall to Comcast. Moreover, although it is not the case in Cambridge, a municipality which would have its capital grant near or equal to the amount of the annual funding totals would see the two amounts cancel out each other, erasing any PEG access support obligation whatsoever. Neither result advances the expressed intent of Congress to make cable systems "responsive to the needs of the public." See Alliance for Community Media v. FCC, 529 F. 3d, 763, 765 (6th Cir. 2008). The City urges the

FCC not to implement a rule which would permit cable operators to include capital costs as "in kind payment" under Section 622 (g)(2)(C), permitting them to be included within the 5% franchise fee cap.

Additionally, City Councilors have expressed concerns about the impact the proposed rule would have on the ability of the City to fund community media centers and local cable channels such as Cambridge Community Television (CCTV) and 22 CityView. This new fee structure would pose a great threat to CCTV and 22 CityView, which have been pillars of the community, and again are integral to the City's ability to keep the public informed about municipal government, City events and local news.

For decades, the City has worked with cable access providers to successfully negotiate franchise agreements that are beneficial to both parties. The City strongly opposes any efforts that would strip municipalities from receiving in-kind contributions outside of the 5% franchise fee cap and preempt local authority, especially in their rights-of-way. We strenuously oppose the FNPRM, and we urge you to reconsider and then reject these proposals. We ask you to safeguard the public interest by maintaining the current franchise fee structure and honoring the authority of cities and towns to control the public rights of way.

Sincerely,

Louis A. DePasquale
City Manager

cc: The Honorable Elizabeth Warren
The Honorable Edward Markey
The Honorable Richard Neal
The Honorable James McGovern
The Honorable Niki Tsongas
The Honorable Joseph Kennedy III
The Honorable Katherine Clark
The Honorable Seth Moulton
The Honorable Michael Capuano
The Honorable Stephen Lynch
The Honorable William Keating