



Town of Winchester

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VIA ELECTRONIC FILING

Chairman Ajit Pai;
Commissioner Brendan Carr;
Commissioner Michael O'Reilly; and
Commissioner Jessica Rosenworcel
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

RE: MB Docket No. 05-311. 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

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

The Select Board of the Town of Winchester, Massachusetts, acting as issuing (franchising) authority over cable licenses granted to Comcast and Verizon, and on behalf of the Town of Winchester, strongly opposes the tentative conclusion, contained in the proposed rulemaking of the Second Further Notice of Proposed Rulemaking ("FNPRM"), that "cable-related in-kind contributions" should be treated as "franchise fees" and subject to the statutory five percent cap on franchise fees set forth in the Cable Act.¹ If adopted, this rule will cause

¹ While these comments use the term "contributions" to describe what is provided "in-kind" for cable purposes by a cable operator, since that is the term used by the Commission in its proposed rulemaking and elsewhere, a more accurate term might be "commitments".

irreparable harm to a thriving community media presence in the Town, important to an understanding of and participation in public issues and matters, community and religious institutions, the local economy, and residents of all ages, including the many young people and senior citizens who actively participate in public, educational and government operations, training and programming.

Winchester currently licenses both Comcast and Verizon for cable services. (In Massachusetts, state law refers to a cable “franchise” as a cable “license”.) These licenses both expire in 2020, and the process of renewal has already begun in earnest. There are just under 7,000 cable subscribers in the Town of Winchester – that is nearly 90% of all households. The Town currently benefits from receiving a percentage of gross annual revenue from Comcast and Verizon. These funds are vital to the municipal goal of providing the general public with Public, Educational and Government (“PEG”) Access operation our Town.

The Town carries out the public purpose of providing PEG Access through Winchester Community Access & Media (“WinCAM”), a non-profit, membership-based organization founded in 2000 to provide cable related services, PEG Access Programming and access to technology in Winchester. The non-profit organization has trained hundreds of community members over the years in the art of video production and has fostered the production of hundreds of thousands of hours of local content. WinCAM is extremely active within the public school system, working closely with students, teachers and specialists across every grade level. The organization is also responsible for providing accessibility to government operation through coverage of Select Board, School Committee and many other municipal meetings, including Town Meetings, the Town’s legislative body and a unique New England institution. Reduction in franchise fees would

have a significant detrimental impact on the provision of PEG Access to the public, and potentially cripple the ability of the Town, through WinCAM, to provide important PEG Access operations and programming. The Town of Winchester views PEG Access television not as a luxury, but a necessity in the fabric of the town. Non-profits, schools, government departments and residents utilize the services of WinCAM on a daily basis. The dissemination of emergency information, access to local government meetings and hearings, helping students to prepare for future education and career opportunities – these are not frivolous activities in the opinion of this body. These are tasks performed every day by WinCAM for the public, including the Winchester Public Schools, and the Town can ill afford to lose a material portion of that service.

Respectfully, the Commission has concluded inaccurately that that “cable-related in-kind contributions” returned to the Town are for the benefit of the municipality when it is far more accurate to classify these as benefits or commitments to the community and public. As such, cable-related in-kind contributions are in the same category as cable franchise build-out requirements assuring access to cable services is not denied based on income (also addressed in this proposed rulemaking), since they are not for the benefit of the town or its PEG access provider, but rather for the benefit of the public.

The proposed rule would, contrary to the assertion in this proposed rulemaking, undermine the provisions in the Cable Act that authorize or require LFAs to impose cable-related obligations on franchisees, including PEG Access channels and PEG Access video return. By offsetting costs such as PEG Access channel and video return costs against the annual Franchise Fee, and thereby imposing such costs on the Town, the proposed rule will have a significant impact, both financial and otherwise, on the provision of PEG Access training, operations and

use, as well as on programming for the public. This was not, for instance, the understanding or intent of either party when Verizon negotiated and entered into a cable license with the Town of Winchester in 2009. The Verizon cable license in Winchester includes both a five percent (5%) franchise fee, as well as PEG Access Channels and PEG Access video return from origination sites within the Town, as has been, and remains, common in cable licenses throughout the Commonwealth of Massachusetts. Neither side ever expressed the position that the provision of the PEG Access Channels and/or PEG Access video return were part of the 5% franchise fee, nor has that been how the cable license has been implemented or worked, since entered into by both parties. Nor, regardless of the franchise fee amount, was it the understanding or practice under current or past cable licenses granted by the Town of Winchester, that in-kind cable-related contributions were part of the franchise fee. The longstanding and ubiquitous practice that so-called "cable-related in-kind contributions" did not count toward the franchise fee, provides clear evidence that such costs were not considered or deemed to part of the franchise fee. This understanding and practice by sophisticated and well represented cable/telecommunication companies, is a reflection of why the proposed interpretation of the Cable Act as evidenced by the proposed rule is both inaccurate and misguided. Thirty (30) or more years of cable franchising both in the Town of Winchester and elsewhere is reflective of what was understood by all parties, and the meaning and intent of the Cable Act.

Similarly, the reasonableness of the cable license terms of both the Comcast and Verizon licenses in Winchester, are reflective of cable licensing/franchising in general. The terms of each of these licenses, including cable-related in-kind contributions, are the product of diligent, thoughtful, reasonable and fair cable license negotiations by both parties, which carefully

consider “future cable-related needs and interests, taking in account the cost of meeting such needs and interests”. We respectfully submit that there is no basis in or from the Comcast or Verizon cable licenses in the Town of Winchester, for the Commission’s conclusion or conjecture, that “[i]f cable-related in-kind contributions are not counted as franchise fees, LFAs could easily evade the five percent cap by requiring, for example, unlimited free or discounted cable services and facilities for LFAs, in addition to a five percent franchise fee.” Rather, quite the opposite is true, the provision of PEG Access video return and cable service for public buildings, including schools, are not only financially reasonable, they are integral to (part and parcel of) the provision of the cable system and cable service, including the provision of PEG Access funding and PEG Access channels. As noted above, the Cable Act itself requires that any such obligations, including cable-related in-kind contributions, be reasonable in light of the cost thereof.

Over thirty (30) years of cable licensing in the Town of Winchester, which for the last ten (10) years has included two (2) cable licenses/operators, illustrates the unique strength of the Cable Act. The Cable Act encourages and incentivizes both sides to carefully consider their needs and interests and to sit down together and workout a cable franchise agreement. That has consistently been the practice and experience in Winchester, and elsewhere. The results of that cooperative and thoughtful process can be seen right here in Winchester, Massachusetts and in other cities and towns across the Commonwealth of Massachusetts.

The proposed rule, which is contrary to that past practice of both sides involved in cable licensing in Winchester, will severely, negatively and retroactively impact the existing cable licenses and the agreed upon intent, and will interfere with the parties’ ability to continue to

reasonably negotiate and reach franchise agreements going forward.² This will be even more so if, as proposed by the Commission, a cable operator is able to value the in-kind contribution at "fair market value", in an area where there is little basis for market value comparison. Such a rule would create significant matters of contention and dispute regarding value, causing delay and great expense for all parties. It would take a process that works well for both cable operators and franchising authorities, and upend it, creating uncertainty, costs, disputes, and inevitable and unfortunate legal disputes, not present under current and longstanding practice between the Town and its cable licensees. Looking forward, given such cost uncertainties and the burden of the costs themselves, cities and towns, including Winchester, may well be forced to forgo fundamental cable services, such as the provision of cable service to schools, used for educational purposes in areas including science, history, art, music and public affairs, because of these cost uncertainties and impacts. The loss of such public benefits is all the more disappointing and wrong, because these are the very services that were from the beginning voluntarily offered by cable operators, in good faith, to cities and towns, separate and apart from, and in addition to, the franchise fee by cable companies seeking the use of the public rights of way for their businesses. It was not only the right thing to do for these companies, it was good business sense, since the cost of providing these in-kind cable related benefits, such as cable service (non-premium channels), was only incrementally more than the cost of providing such service to

² The unfair retroactive aspect of this rule results from the fact that the franchising authority and the respective cable operators negotiated for the provision of cable-related in-kind contributions in the context of a longstanding and undisputed practice of not including such in-kind contributions as franchise fees. To now change that by rule making, even quite apart from the legal issues, denies the franchising authority the opportunity of having made decisions regarding such in-kind contributions as part of the earlier cable franchising process. This is particularly egregious if cable operators are allowed to value such in-kind cable-related contributions at a "so-called" market value.

subscribers. Serving the public good, was a good business decision by cable companies, as one look at their success demonstrates. A “win-win” for all, most importantly for the public, with cable-related in-kind contributions allowing greater access to and participation for and among residents, businesses, local community groups, places of worship, youth sports, senior citizens and local government.³

In an age where local media is rapidly disappearing, the local community media center provides irreplaceable service to the city or town it serves. The proposed “cable-related in-kind contribution” rule in this Second Further Notice of Proposed Rulemaking by the Commission would, if promulgated, result in great loss to the Town of Winchester and its residents.

We respectfully suggest that change for change sake is not a conservative principle, much less a good one, in this matter.

The Town also opposes the additional tentative conclusion contained in the FNPRM that the Commission should apply its prior “mixed-use network ruling to incumbent cable operators, thus prohibiting LFAs [Local Franchise Authorities] from using their video franchising authority to regulate the provision of most non-cable services, such as broadband Internet access service, offered over a cable system by an incumbent cable operator” to the extent that the proposed rule would by virtue of the cable system status of the company, pre-empt or limit the authority of the Town of Winchester (or any city or town) to regulate (whether based on public safety, aesthetic or other public policy concerns) and/or obtain compensation for the use of the public

³ The Board of Selectmen strongly encourages the Commissioners to view the wide range of public, educational and government programming available for viewing (livestreams, podcasts and on-demand) at the WinCAM website: www.wincam.org.

rights-of-way or other municipal infrastructure by a cable operator for wireless deployments, including small cells.

As the cable issuing/franchising authority, we officially submit this statement of opposition to the proposed "cable-related in-kind contributions" rule, in the sincere hope that this rule will not be enacted and the harm to the public and community be avoided.

We also oppose the proposed "mixed-use network rule for the reasons set out above.

Thank you for your consideration of these comments.

Respectfully,
Select Board of the Town of Winchester

A handwritten signature in black ink, reading "Lance R. Grenzback". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Lance R. Grenzback, Chairman