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

In the Matter of 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

COMMENTS ON SECOND FURTHER NOTICE OF PROPOSED RULEMAKING
BY

THE CITY COALITION

THE CITY OF BLOOMINGTON, MINNESOTA
THE CITY OF CHICAGO, ILLINOIS
THE CITY OF EAGAN, MINNESOTA
THE CITY OF FRIDLEY, MINNESOTA
THE CITY OF GRANITE FALLS, MINNESOTA
THE CITY OF MONTEVIDEO, MINNESOTA
THE CITY OF NORTHFIELD, MINNESOTA
THE CITY OF NORTH MANKATO, MINNESOTA
THE CITY OF PIPESTONE, MINNESOTA
THE CITY OF RED WING, MINNESOTA
THE CITY OF ROCHESTER, MINNESOTA
THE CITY OF SEATTLE, WASHINGTON
THE CITY OF SPOKANE, WASHINGTON
THE CITY OF ST. LOUIS PARK, MINNESOTA
THE CITY OF ST. PAUL, MINNESOTA
THE CITY OF TACOMA, WASHINGTON
THE CITY OF WAITE PARK, MINNESOTA
THE CITY OF WINONA, MINNESOTA
THE CITY OF WORTHINGTON, MINNESOTA
THE NORTHERN DAKOTA COUNTY CABLE COMMUNICATIONS COMMISSION
THE SOUTHWEST SUBURBAN CABLE COMMISSION

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These Comments are submitted in response to the Federal Communications Commission's (the "Commission") September 25, 2018 Second Further Notice of Proposed Rulemaking ("*Second FNPRM*") in MB Docket No. 05-311.[1]

The City Coalition (defined below) supports the Commission reconsidering its prior rulings regarding non-monetary consideration and mixed-use networks in light of the decision of the Sixth Circuit Court of Appeals in *Montgomery County*.[2] The City Coalition is concerned, however, that the conclusions in the *Second FNPRM* are inconsistent with Congressional intent and the text of the Communications Act of 1934, as amended (the "Act"). Ultimately, the *Second FNPRM* does not adequately recognize the authority vested by Congress in the members of the City Coalition (and other local franchising authorities (LFAs)). The *Second FNPRM*, in direct contrast to Congressional intent, would upend a long-standing system that allows LFAs to protect the interests of their constituents, provides the public with compensation for the use of its

[1] *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*, Second Further Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC-18-131 (Sept. 25, 2018) [*hereinafter Second FNPRM*].
[2] *Montgomery County, Md. et al. v. FCC*, 869 F.3d 485 (6th Cir. 2017).

property, allows access to vital public, educational and governmental information and supports the fundamental goals of our democracy.[3]

I. Introduction

These comments are submitted on behalf of: the City of Bloomington;[4] the City of Chicago;[5] the City of Eagan;[6] the City of Fridley;[7] the City of Granite Falls;[8] the City of Montevideo;[9] the City of Northfield;[10] the City of North Mankato;[11] the City of Pipestone;[12] the City of Red Wing;[13] the City of Rochester;[14] the City of Seattle;[15] the City of Spokane;[16] the City of St. Louis Park;[17] the City of St. Paul;[18] the City of Tacoma;[19] the City of Waite Park;[20] the City of Winona;[21] the City of Worthington, Minnesota;[22] the Northern Dakota County Cable Communications Commission;[23] and the Southwest Suburban Cable Commission[24] (collectively the "City Coalition"). The population of the local governments comprising the City Coalition

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[3] H.R. Rep. No. 934, 98th Cong., 2nd Sess. 1984 at 23, 26, 30, *preprinted in* 1984 U.S.C.C.A.N. 4655, 4660-661, 4663, 4667 [*hereinafter* H.R. Rep. 98-934].
[4] The City of Bloomington, Minnesota consists of 38 square miles, 39,273 housing units and 88,885 residents.
[5] The City of Chicago, Illinois consists of 234 square miles, 1,212,932 housing units and 2,716,450 residents.
[6] The City of Eagan, Minnesota consists of 34.5 square miles, 27,600 housing units and 66,484 residents.
[7] The City of Fridley, Minnesota consists of 10.17 square miles, 11,025 housing units and 27,853 residents.
[8] The City of Granite Falls, Minnesota consists of 3.82 square miles, 1,282 housing units and 2,897 residents.
[9] The City of Montevideo, Minnesota consists of 4.85 square miles, 2,329 housing units and 5,308 residents.
[10] The City of Northfield, Minnesota consists of 8.56 square miles, 6,361 housing units and 20,007 residents.
[11] The City of North Mankato, Minnesota consists of 5.87 square miles, 5,742 housing units and 13,394 residents.
[12] The City of Pipestone, Minnesota consists of 4.18 square miles, 1,923 housing units and 4,317 residents.
[13] The City of Red Wing, Minnesota consists of 34.60 square miles, 7,033 housing units and 16,459 residents.
[14] The City of Rochester, Minnesota consists of 55.66 square miles, 46,861 housing units and 115,733 residents.
[15] The City of Seattle, Washington consists of 143 square miles, 341,809 housing units and 730,400 residents.
[16] The City of Spokane, Washington consists of 59.25 square miles, 87,239 housing units and 208,916 residents.
[17] The City of St. Louis Park, Minnesota consists of 10.64 square miles, 22,514 housing units and 45,250 residents.
[18] The City of St. Paul, Minnesota consists of 51.98 square miles, 112,571 housing units and 285,068 residents.
[19] The City of Tacoma, Washington consists of 49.72 square miles, 80,333 housing units and198,397 residents.
[20] The City of Waite Park, Minnesota consists of 8.91 square miles, 3,491 housing units and 6,715 residents.
[21] The City of Winona, Minnesota consists of 24 square miles, 11,287 housing units and 27,213 residents.
[22] The City of Worthington, Minnesota consists of 7.34 square miles, 4,358 housing units and 12,764 residents.
[23] The Northern Dakota County Cable Communications Commission ("NDC4") is a municipal joint powers cooperative formed in 1982 by the seven cities of Inver Grove Heights, Lilydale, Mendota, Mendota Heights, South St. Paul, Sunfish Lake, and West St. Paul, Minnesota consisting of a combined total of 50.92 square miles, 35,813 housing units and 85,993 residents.
[24] The Southwest Suburban Cable Commission ("SWSCC") is a municipal joint powers cooperative comprised of the cities of Eden Prairie, Edina, Hopkins, Minnetonka and Richfield, Minnesota consisting of a combined total of 87.2 square miles, 93,740 housing units and 215,564 residents.

totals 4,894,067[25] from cities throughout the States of Illinois, Minnesota and Washington, including the third largest city in the country (Chicago), one of the leading technology hubs (Seattle), the capital of Minnesota (St. Paul), a large concentration of cities from the Twin Cities Metropolitan Area and regional communities outside the Twin Cities in Greater Minnesota.

II. THE CURRENT SYSTEM DOES NOT INHIBIT INVESTMENT OR COMPETITION.

The *Second FNPRM* asserts that the Commission's tentative conclusions will "help[] … ensure that local franchising requirements do not discourage cable operators from investing in new facilities and services."[26] The *Second FNPRM* also contends that the Commission's tentative conclusions "will promote competition by fostering parity between incumbents and new entrants."[27] Data shows, however, that existing franchising requirements do not discourage investment or inhibit competition. In fact, data supports the opposite conclusion.

The data regarding industry investment is clear. Over the last 20 years the cable industry has invested over *$275 billion* "to deploy broadband networks that reach nearly every corner of the U.S."[28]

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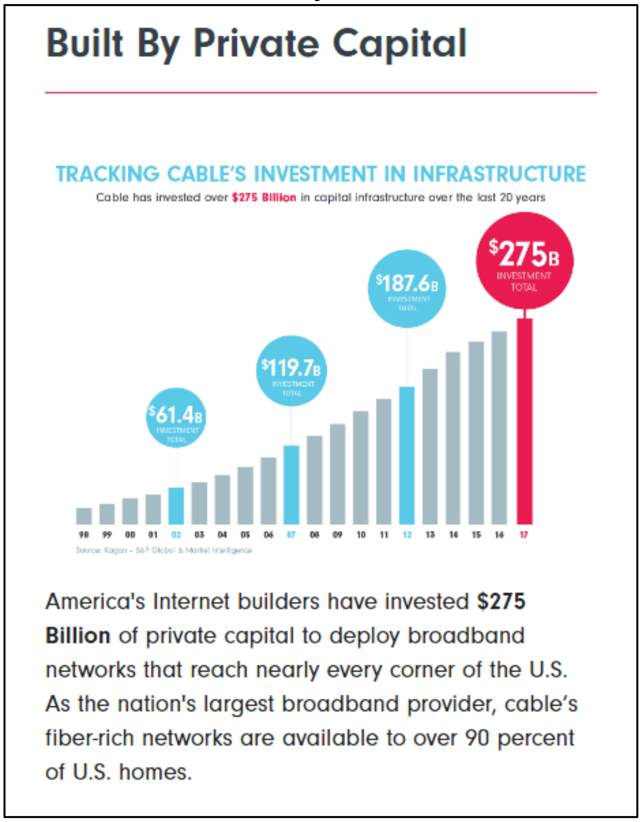
[25] Based on 2010 census data.
[26] *Second FNPRM* at ¶ 1.
[27] *Second FNPRM* at ¶ 1.
[28] *NCTA*, Broadband by the Numbers, https://www.ncta.com/broadband-by-the-numbers (last accessed Oct. 19, 2018).

Figure 1
Cable Industry Investment[29]



Company-specific data shows the same pattern. For example, Comcast increased its capital investments in each of 2016 and 2017, spending close to *$8 billion* in 2017 alone.

Figure 2
Comcast Capital Expenditures[30]

Capital Expenditures

Our most significant recurring investing activity has been capital expenditures in our Cable Communications segment, and we expect that this will continue in the future. The table below summarizes the capital expenditures we incurred in our Cable Communications segment in 2017, 2016 and 2015.

Year ended December 31 (in millions)	2017	2016	2015
Customer premise equipment	**$ 3,337**	$ 3,665	$ 3,698
Scalable infrastructure	**2,369**	1,827	1,539
Line extensions	**1,367**	1,208	886
Support capital	**879**	896	917
Total	**$ 7,952**	$ 7,596	$ 7,040

Cable Communications capital expenditures increased 4.7% and 7.9% in 2017 and 2016, respectively, primarily due to continued investment in scalable infrastructure to increase network capacity and increased investment in line extensions primarily for the expansion of business services. The increase in 2017 was partially offset by a decrease in spending on customer premise equipment and support capital.

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[29] *NCTA*, Broadband by the Numbers, https://www.ncta.com/broadband-by-the-numbers (last accessed Oct. 19, 2018).

[30] Comcast Corporation 2017 Form 10-K, p. 52, *available at* https://www.cmcsa.com/static-files/111ba611-eb85-4edc-9000-3907c84697d8 [*hereinafter* Comcast 2017 10-K].

These capital investments have allowed Comcast to increase its homes and businesses passed each year since 2015.[31] Charter's capital expenditures surpassed *$8.5 billion* in 2017 and, like Comcast, have increased steadily since 2015.

Figure 3
Charter Capital Expenditures[32]

	Year ended December 31, 2017	2016	2015
	Actual		
Customer premise equipment [a]	$ 3,385	$ 1,864	$ 582
Scalable infrastructure [b]	2,007	1,390	523
Line extensions [c]	1,176	721	194
Upgrade/rebuild [d]	572	456	128
Support capital [e]	1,541	894	413
Total capital expenditures	$ 8,681	$ 5,325	$ 1,840
Capital expenditures included in total related to:			
Commercial services	$ 1,298	$ 824	$ 260
Transition [f]	$ 489	$ 460	$ 115

	Year ended December 31, 2016	2015
	Pro Forma	
Customer premise equipment [a]	$ 2,761	$ 2,650
Scalable infrastructure [b]	2,009	1,702
Line extensions [c]	1,005	977
Upgrade/rebuild [d]	610	594
Support capital [e]	1,160	1,046
Total capital expenditures	$ 7,545	$ 6,969

Thus, the data is unequivocal that existing cable franchises do not inhibit investments "in new facilities and services" by incumbent cable operators.[33]

Nor does the existing system inhibit competition. For example, the following members of the City Coalition have affirmatively taken steps to promote competition by awarding competitive cable franchises:

- Bloomington: competitive cable franchise to CenturyLink in late 2015;
- Chicago: competitive cable franchises to RCN in 1996 and 2000 and renewed in 2012 and 2015;
- Eagan: competitive cable franchise to CenturyLink in early 2016;
- NDC4: competitive cable franchise to CenturyLink in early 2016;

[31] Comcast 2017 10-K at 2.
[32] Charter Communications, Inc. 2017 Form 10-K, p. 48, *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9Njg3NTk4fENoaWxkSUQ9Mzk3ODQ3fFR5cGU9MQ==&t=1.
[33] *Second FNPRM* at ¶ 23.

- North Mankato: competitive cable franchise to HickoryTech in late 2006;
- Pipestone: competitive cable franchise to DTI (now Clarity Telecom) in 1998 and renewed in 2016;
- Red Wing: competitive cable franchise to Hiawatha Broadband Communications in 2011;
- Seattle: competitive cable franchise to Wave in 2007 (renewed in 2017) and CenturyLink in 2015;
- St. Louis Park: competitive cable franchise to CenturyLink in late 2015;
- St. Paul: competitive cable franchise to CenturyLink in late 2015;
- SWSCC: competitive cable franchise to CenturyLink in early 2016;
- Tacoma: competitive cable franchise to Click! in 2009; and
- Winona: competitive cable franchise to Hiawatha Broadband Communications in 2000

One additional member (Rochester) has a competitive franchise application pending to MetroNet.

The competitive environment fostered by the members of the City Coalition is consistent with the Commission's own findings regarding competition in the video market. According to the Commission, "most consumers have access to three competing MVPDs [multichannel video programing distributors],"[34] with some consumers having access to four MVPDs.

Figure 4
Table III.A.2 from 18th Annual video Competition Report[35]

	Housing Units 2014	Percent of Housing Units 2014	Housing Units 2015	Percent of Housing Units 2015
Two MVPDs (DBS)	134.2 million	100%	135.0 million	100%
Three MVPDs (DBS and Cable)	132.9 million	99%	133.7 million	99%
Four MVPDs (DBS, Cable, and competing Telephone)	51.1 million	38.1%	24.2 million	17.9%

[34] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programing*, Eighteenth Report, MB Docket No. 16-247, DA 17-71, at ¶ 3 (Jan. 17, 2017) [*hereinafter 18th Annual Video Competition Report*].
[35] *18th Annual Video Competition Report* at ¶ 21.

The decline in households with access to four MVPDs was due to industry consolidation, not actions of LFAs.[36]

While the MVPD industry may be consolidating, consumers retain significant options due to the continued growth of online video distributors ("OVDs").[37] The Commission has expressly acknowledged that increasing competition from OVDs "may provide numerous benefits to consumers."[38] Thus, consumers find themselves in a vastly different place than existed in 1992 when Congress passed the 1992 Cable Television Consumer Protection and Competition Act.[39] That these changes have occurred under the existing regulatory framework undermines the conclusion that the radical changes proposed in the *Second FNPRM* are necessary to "promote competition."[40] The fact is that competition among cable providers and among all MVPDs is thriving under the existing regulatory framework.

Unfortunately, the Second FNPRM ignored the data regarding investment and competition, focusing instead on hypotheticals.[41] Yet, even those hypotheticals – grounded in anecdotal evidence that is more than a decade old[42]– do not accurately describe the current situation. For example, franchises granted by the members of the City Coalition covering both

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[36] *18th Annual Video Competition Report* at ¶ 3. ("At the end of 2015, we estimate that 17.9 percent of homes had access to four competing MVPDs, down from 38.1 percent in 2014. The change is due to the acquisition of DIRECTV by AT&T in July 2015.").

[37] *See 18th Annual Video Competition Report* at ¶ 8 ("The most significant change in the status of competition in the market for the delivery of video services has been the introduction of Sling TV by DISH Network and DIRECTV NOW by AT&T."). *See also 18th Annual Video Competition Report* at ¶ 131 (noting that by the end of 2016, it is estimated that 65 million homes subscribed to an OVD service).

[38] *18th Annual Video Competition Report* at ¶ 64.

[39] H.R. Conf. Rep. No. 862. 102nd Cong., 2nd Sess. 1992 at 2, *reprinted in* 1992 U.S.C.C.A.N. 1231 (noting customers had "no opportunity to select between competing cable systems.").

[40] *Second FNPRM* at ¶ 1.

[41] *Second FNPRM* at ¶ 17 (stating "If in-kind contributions unrelated to the provision of cable services were not treated as franchise fees, LFAs could easily evade the five percent cap by requiring any manner of in-kind contributions, rather than a monetary fee. Likewise, if cable-related in-kind contributions are not counted as franchise fees, LFAs could circumvent 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."). *See also Second FNPRM* at ¶ 23. The *Second FNPRM* provides no data or evidence that LFAs are taking or would take such an approach.

[42] *Second FNPRM* at ¶ 5, n. 20.

incumbent cable operators and competitive cable operators contain only cable-related non-monetary consideration. Cable operators have routinely included such provisions in their franchise documents for over 30 years since the adoption of the 1984 Cable Communications Policy Act, often as part of the franchise negotiation process. Ultimately, the factual basis for the *Second FNPRM* is suspect and should cause the Commission to reconsider its conclusions.

III. CABLE-RELATED NON-MONETARY CONSIDERATION

After more than 30 years of contrary practice by industry and LFAs (and at times, the Commission),[43] the *Second FNPRM* now asserts that cable-related non-monetary consideration[44] should be considered a part of the franchise fee and therefore counted towards the statutory five percent franchise fee cap.[45] In doing so, the *Second FNPRM* fails to grasp the distinction between payment of a franchise fee as compensation for use of public property and cable operator obligations agreed to by parties as part of a bargained-for-exchange. The *Second FNPRM* ultimately adopts a faulty premise that *any* exchange of value under a franchise – unless expressly exempted – is a franchise fee,[46] even though the Sixth Circuit rejected that premise when it remanded this case back to the Commission.[47] The faulty premise and the conclusion it yields is further undermined by the legislative history of the 1984 Cable Communications Policy Act and over 30 years of practice. Finally, the *Second FNPRM* gives no consideration to the practical implications of its interpretation, which would be severe and undermine Congress' goal

[43] *Alliance for Community Media v. FCC*, Opposition of Federal Communications Commission to Joint Motion for Stay Pending Judicial Review, 2007 WL 2041325 at *14, n. 16 (stating the Commission's analysis of in-kind payments in *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*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 (2007) "was expressly limited to payments that do *not* involve the provision of cable service."). *See also Montgomery County*, 863 F.3d at 490.

[44] The *Second FNPRM* uses the phrase "cable related, in-kind contributions."

[45] *Second FNPRM* at ¶ 16.

[46] *Second FNPRM* at ¶ 17, 24.

[47] *Montgomery County*, 863 F.3d. at 491.

of achieving "important uniform federal standards that are not continually altered by federal, state and local regulation."[48]

A. The proposed definition of cable-related, in-kind contributions is overly-broad and would cover all non-franchise fee value exchanged as part of the franchise.

The *Second FNPRM* proposes a broad, all-encompassing definition of "cable-related, in-kind contributions." Except for the cost of build-out requirements, *any* non-monetary consideration related to the provision of cable service by a cable operator as a condition or requirement of a franchise would be included.[49] Presumably, this includes all of the following, which are required under one or more of the franchises executed by members of the City Coalition:

- Emergency Alert Capability, including an Emergency Alert System;
- Cable service to schools and public buildings;
- Public, educational and governmental ("PEG") access channel capacity (including standard definition ("SD") and high definition ("HD") format);
- Institutional Networks ("I-Nets") serving governmental and educational facilities;
- Fiber return lines used to transmit PEG programming from educational and governmental buildings to an operator's head end facility;
- Interconnections between LFAs to promote sharing of local content;
- PEG channel equipment at operator's head end;
- Ability to promote PEG channels (*i.e.* advertising inserts on channels; bill stuffers, etc.);
- Maintenance of local offices for customer service;
- Customer service standards that may exceed the Commission's customer service obligations; and
- Undergrounding of cable/fiber.

As discussed below, these items are provided consistent with federal or state laws. Since the members of the City Coalition receive no non-cable related, in kind consideration as part of their franchises, the cable-related non-monetary consideration represent the entirety of the value given

[48] H.R. Rep. 98-934, 1984 U.S.C.C.A.N. at 4461.
[49] *Second FNPRM* at ¶ 24.

for the right to provide cable service within the applicable jurisdiction. At a minimum, the definition of cable-related, in-kind contributions should be amended to exclude from the definition any consideration that is permitted or required under state or federal law.

B. The *Second FNPRM* fails to distinguish between franchise fees and obligations of the franchise.

In adopting such a broad definition of cable-related, in-kind contributions, the *Second FNPRM* fails to recognize the different roles of franchise fees and franchise obligations in the overall franchise contract. A franchise is a contract between the LFA and the cable operator.[50] As part of that contract, the cable operator gains two things: 1) the ability to provide cable service within the applicable jurisdiction;[51] and 2) access to the public rights-of-way.[52] In exchange for these benefits, cable operators agree to undertake certain obligations *and* agree to pay franchise fees. Importantly, however, these parts of the bargain (obligations and franchise fees) are separate: franchise fees are the compensation for use of public property (*i.e.* public rights-of-way). The remaining part of the bargain – franchise obligations – is the consideration for the right to provide cable service within the jurisdiction. The *Second FNPRM* expressly destroys the distinction between the two components of franchise compensation.[53]

It is clear under both legal precedent and legislative history that franchise fees are compensation for the use of public rights-of-way. "Franchise fees are not a tax …, but essentially a form of rent: the price paid to rent use of public right-of-ways."[54] Congress has

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[50] *Denver Area Ed. Tele. Consortium, Inc. v. FCC*, 518 U.S. 727, 794 (1996) (Kennedy, J., concurring in part, concurring in judgment in part and dissenting in part) ("A franchise agreement is a contract….").
[51] 47 U.S.C. § 541(b)(1).
[52] 47 U.S.C. § 541(a)(2).
[53] *Second FNPRM* at ¶ 20 ("The fact the Act authorizes LFAs to impose such obligations does not, however, mean that the value of these obligation should be excluded from the five percent cap on franchise fees.").
[54] *City of Dallas v. FCC*, 118 F.3d 393, 398 (5th Cir. 1997). *See also TCD Detroit v. City of Dearborn*, 16 F.Supp.2d 785, 789 (E.D. Mich. 1998) ("Moreover, the Supreme Court, in an opinion dealing with the placement of telegraph poles over a hundred years ago, recognized the general right of a city to seek compensation from a user of the city's land/right-of-way."), *aff'd*, 206 F.3d 618 (6th Cir. 2000).

stated the same: "Each local franchising authority may assess the cable operator a fee for the operator's use of public ways."[55] Such compensation is necessary and appropriate, as LFAs cannot "abdicate [their] trust over property in which the whole people are interested . . . so as to leave them entirely under the use and control of private parties…."[56] The Commission has a similar obligation for public property under its control.[57]

Conversely, franchise obligations relate to the core regulatory function reserved to LFAs by the Act.[58] Congress was explicit that "the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs."[59] Having the ability to impose those requirements "is essential if cable systems are to be tailored to the needs of each community…."[60] These obligations are the consideration paid by operators for the award of a franchise.[61]

The *Second FNPRM* attempts to convert the entire exchange of value that occurs in the franchise into a franchise fee. According to the *Second FNPRM*, "[t]he fact the Act authorizes LFAs to impose such obligations does not, however, mean that the value of these obligations should be excluded from the five percent cap on franchise fees. Indeed, the statute suggests

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[55] H.R. Rep. 98-934, 1984 U.S.C.C.A.N. at 4663.

[56] *Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 453 (1892).

[57] *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269 *et al.*, Statement of Commissioner Michael O'Rielly ("Clearly, the unnecessary and improper interference of reserve spectrum will unfairly skew the auction outcome, thereby producing less revenue for the American people who entrust the Commission to protect and maximize the value of their spectrum assets."); *Promoting Investment in the 3550-3700 MHz Band*, GN Docket No. 17-258, Statement of Commissioner Michael O'Rielly ("They seem to be forgetting that spectrum belongs to the people and that it is the Commission's obligation to manage it in the public interest for *all* Americans." (emphasis original)).

[58] 47 U.S.C. §§ 544(b)(facilities requirements), 531(a)-(b) (PEG capacity), 552 (customer service and build-out), 541(a)(3) (anti-redlining), 556 (preservation of local authority).

[59] H.R. Rep. 98-934, 1984 U.S.C.C.A.N. at 4461.

[60] H.R. Rep. 98-934, 1984 U.S.C.C.A.N. at 4464.

[61] *See Denver Area Ed.*, 518 U.S. at 761 ("[C]able operators have traditionally agreed to reserve channel capacity for public, governmental, and educational channels as part of the consideration they give municipalities that award them cable franchises.").

otherwise."[62] As discussed below, the suggestion relied upon in the *Second FNPRM* is disproven by both the legislative history and over 30 years of industry practice. Other than a single conclusory statement,[63] the *Second FNPRM* does not address or explain how its approach of collapsing the different components of franchise compensation into the franchise fee remains consistent with Congressional intent that franchise fees compensate for use of rights-of-way, while franchise obligations are the value provided for the right to provide cable service. Ultimately, collapsing the different components of franchise compensation into the franchise fee means that the public will receive lesser compensation for both sets of rights granted under a franchise (*i.e.* the right to provide service and the right to use public rights-of-way), in direct contrast to the structure of the Act and the intent of Congress.

The negative consequences of the *Second FNPRM* for the public are clear. As noted above, the public is entitled to compensation for the use of public rights-of-way. Congress also expressly intended for *the public* to benefit from public, educational and governmental access ("PEG") channels:

> The development of cable television, with its abundance of channels, can provide the public and program providers the meaningful access that, up until now, has been difficult to obtain. A requirement of reasonable third-party access to cable systems will mean a wide diversity of information sources for the public – the fundamental goal of the First Amendment – without the need to regulate the content of programing provided over cable.
>
> Almost all recent franchise agreements provide for access by local governments, schools, and non-profit and community groups over so-called 'PEG' (public, educational, and governmental) channels. Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the pubic local government at work. H.R. 4103 continues the policy of allowing cities to specify

[62] *Second FNPRM* at ¶ 20.
[63] *Second FNPRM* at ¶ 20.

> in cable franchises that channel capacity and other facilities be devoted to such use.[64]

Yet, under the *Second FNPRM* the public will get less compensation for the use of public rights-of-way (due to offsetting the value of non-monetary obligations against franchise fees), less PEG access (due to LFAs reducing PEG requirements in order to maintain franchise fees) or some combination of both. This is inconsistent with the entire structure of the Act and should be rejected.

C. Legislative history is clear that not all non-monetary obligations are franchise fees.

The *Second FNPRM* asserts "[w]e see no basis in the statute or legislative history for distinguishing between in-kind contributions unrelated to the provision of cable services and cable-related, in-kind contributions for purposes of the five percent franchise fee cap."[65] Yet, such a distinction is evident in the legislative history. Thus, in addition to incorrectly conflating the different types of compensation under a franchise, the *Second FNPRM* is in direct conflict with Congress' intent.

The legislative history of the 1984 Cable Communications Policy Act addresses which non-monetary items should and should not be considered franchise fees. For example, it appears that Congress intended for non-cable related in-kind items to be considered franchise fees: "lump sum grants not related to PEG access for municipal programs such as libraries, recreation departments, detention centers or other payments not related to PEG access would be subject to the 5 percent limitation."[66] Conversely, the legislative history provides "[subsection 622(g)(2)(c)] defines as a franchise fee only monetary payments made by the cable operator, and

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[64] H.R. Rep. 98-934, 1984 U.S.C.C.A.N. at 4667. As discussed in Section III.E., below. PEG access remains relevant and may be even more important now given changes in the local media.
[65] *Second FNPRM* at ¶ 17.
[66] H.R. Rep. 98-934, 1984 U.S.C.C.A.N. at 4702.

does not include as a 'fee' any franchise requirements for the provision of services, facilities or equipment."[67] That it was Congress' intent to include only non-cable related in-kind payments in the franchise fee is supported by the text of the Act itself, which limits franchise obligations to those "related to the establishment or operation of a cable system."[68] Obligations unrelated to the establishment or operation of a cable system (*i.e.* non-cable related in-kind payments) are therefore appropriately counted towards the franchise fee, as they are not obligations Congress reserved to the LFAs.

Given the legislative history and the structure of the Act, the Commission should not upset the status quo by sweeping the value of cable-related non-monetary obligations into the franchise fee. Rather, the Commission should follow the guidance of the Sixth Circuit, which has stated "That the term 'franchise fee' can include noncash extractions, of course, does not mean that it necessarily *does* include every one of them."[69] The court went on to state it has not "approve[d] the idea that every cost or expense that a cable operator bears in complying with the terms of its franchise is a 'franchise fee' under § 542(g)(1)."[70] The Commission should adhere to its position in the *First Report and Order*, which concluded that in-kind contributions unrelated to the provision of cable service should count toward the five percent franchise fee cap,[71] while cable-related non-monetary obligations do not.[72]

[67] H.R. Rep. 98-934, 1984 U.S.C.C.A.N. at 4702.
[68] 47 U.S.C. § 544(b). *See also* 47 U.S.C. § 544(a) ("Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.").
[69] *Montgomery County*, 863 F.3d at 491.
[70] *Montgomery County*, 863 F.3d at 490.
[71] *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*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 at ¶¶ 105-108 (2007) [*hereinafter First Report and Order*]. .
[72] *Alliance for Community Media v. FCC*, Opposition of Federal Communications Commission to Joint Motion for Stay Pending Judicial Review, 2007 WL 2041325 at *14, n. 16 (stating the *First Order* "analysis of in-kind payments was expressly limited to payments that do *not* involve the provision of cable service."). *See also Montgomery County*, 863 F.3d at 490.

D. The *Second FNPRM* relies upon an inference negated by over 30 years of industry practice.

The *Second FNPRM* draws a negative inference from the text of the Act and uses that as justification for counting all non-monetary consideration towards the franchise fee cap. As discussed above, that negative inference is not consistent with the legislative history, which draws a distinction between cable-related and non-cable related non-monetary consideration. And as discussed below, the inference is negated by over 30 years of industry practice.

The *Second FNPRM* asserts that unless a type of non-monetary consideration is expressly excluded from the definition of franchise fee, it must be counted towards the five percent cap.[73] The *Second FNPRM* reaches this conclusion based on the negative inference that Congress excluded some items from the definition of "franchise fee":

> Section 622(g)(2) carves out only limited exclusions for PEG-related costs—*i.e.*, PEG support payments required by any franchise granted prior to 1984 and PEG capital costs required by any franchise granted after 1984. Section 622(g)(2) makes no mention of an I-Net-related exclusion, nor does it contain a general exclusion for *all* PEG related costs. Since Congress enacted the PEG and I-Net provisions at the same time it added the franchise fee provisions, it could have explicitly excluded those costs in addressing the scope of the PEG-related costs in that subsection if it had intended they not count toward the cap. Based on this, we tentatively find that treating all cable-related, in-kind contributions as "franchise fees," unless expressly excluded by the statute, would best effectuate the statutory purpose.[74]

As noted above, the exclusions from the definition of "franchise fee" have been in place since 1984. Yet, during the intervening 34 years, franchises have included cable-related obligations and the value of those obligations have not been credited toward the franchise fee cap. This consistent practice by both LFAs and industry casts doubt on the *Second FNPRM*'s assessment of Congressional intent. The more plausible explanation, which is consistent with the structure of the Act, legislative history, and long-standing practice, is that cable-related, non-monetary

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[73] *Second FNPRM* at ¶ 20.
[74] *Second FNPRM* at ¶ 20.

obligations are consideration for the right to provide service in a jurisdiction and not part of the franchise fee.

More recent franchising actions cast further doubt on the interpretation contained in the *Second FNPRM*. For example, in 2015, both Comcast (incumbent) and CenturyLink (competitive) agreed to new long-term franchises with the City of Bloomington, Minnesota. In each franchise, Comcast and CenturyLink agreed to preserve existing PEG channels *and* improve PEG offerings by agreeing to carry PEG channels in HD format.[75] Neither cable operator asserted that these enhanced PEG services should be offset against the five percent franchise fee cap. Again, this practice by two different operators shows the inference drawn in the *Second FNPRM* is not correct.

E. Federal and State laws require certain obligations that should not be considered franchise fees.

The Act tasks LFAs with the responsibility of managing the franchising process because LFAs "have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs."[76] This assignment from Congress comes with certain LFA responsibilities. State law may also impose requirements for certain LFAs. Under the definition of cable-related, in-kind contributions proposed in the *Second FNPRM*, most, if not all, all of these obligations would be considered franchise fees.

The Act requires LFAs to include certain items in franchises. For example, a franchise must "assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of residents of the local area in which such group resides,"[77]

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[75] The Comcast franchise requires Comcast to convert two standard definition PEG channels to high definition upon request from Bloomington and to carry all PEG channels in high definition format when 90% of Comcast's video programing content is available in high definition. CenturyLink agreed to carry all PEG channels in high definition format so long as the entity originating the PEG signal provides CenturyLink a high definition signal.

[76] H.R. Rep. 98-934, 1984 U.S.C.C.A.N. at 4461.

[77] 47 U.S.C. § 541(a)(3).

establish standards for facilities,[78] provide for PEG capacity,[79] maintain buildout and customer service requirements,[80] and include other requirements.[81] Many of the members of the City Coalition are subject to additional state requirements.[82] To the extent any of these federal or state requirements result in the LFA or any entity designated by the LFA (as may be required by statute) receiving value, the *Second FNPRM* would require that value be counted against permitted franchise fees.[83] The *Second FNPRM* therefore has the effect of using federal or state franchise requirements to erode the compensation paid to the public for use of public rights-of-way. And because these are federal or state requirements over which the LFA has no control, the LFA has no ability to reduce or eliminate franchise obligations should the LFA determine that maintaining compensation for use of public rights-of-way is in the best interests of its constituents.

The requirement to provide for PEG capacity deserves special comment. As discussed above, Congress expressly identified the importance of PEG channels to the public and our democracy.[84] As such, the members of the City Coalition spend significant funds each year generating content for PEG channels, including bearing the cost of production and employing staff. This local programming is becoming increasingly important as local newspapers and other media continue to experience resource constraints and industry consolidation,[85] resulting in news coverage becoming more national. The benefits of PEG programming accrue to the public

[78] 47 U.S.C. § 544(b)(2)(A).
[79] 47 U.S.C. § 531(a) and (b).
[80] 47 U.S.C. § 552(a).
[81] 47 U.S.C. § 556.
[82] *See e.g.*, Minn. Stat. § 238.084 (requiring over 30 provisions to be included in every franchise granted by a LFA).
[83] *Second FNPRM* at ¶ 24.
[84] *Supra* note 64.
[85] *See, e.g.*, The Week, *The Death of Local News* (Sept. 3, 2018), https://theweek.com/articles/793309/death-local-news; Pew Research Center, *Buying Spree Brings More Local TV Stations to Fewer Big Companies* (May 11, 2017), http://www.pewresearch.org/fact-tank/2017/05/11/buying-spree-brings-more-local-tv-stations-to-fewer-big-companies/; *Newsroom Employment Dropped Nearly a Quarter in Less than 10 Years, with Greatest Decline at Newspapers* (July 30, 2018), http://www.pewresearch.org/fact-tank/2018/07/30/newsroom-employment-dropped-nearly-a-quarter-in-less-than-10-years-with-greatest-decline-at-newspapers/.

(including cable subscribers), not the LFAs, and fill an important need not being satisfied elsewhere. The Commission should not adopt an approach that erects an impediment to this valuable community resource.[86]

F. If adopted, the radical change proposed in the *Second FNPRM* should not apply to existing franchises.

The *Second FNPRM* represents a departure from long-standing practice. As discussed above, the proposed treatment of cable-related in-kind consideration should not be adopted. If the Commission disagrees, however, it is imperative that the changes reflected in the *Second FNPRM* not be applied to existing franchise agreements.

As discussed above, existing franchises are contracts that were negotiated and agreed to on the basis that the franchise fee was compensation for use of public property (*i.e.* public rights-of-way), while the undertaking of cable-related obligations was consideration for the right to provide cable service. The *Second FNPRM* would allow cable operators to avoid their contractual obligations while retaining the benefits of their bargain with LFAs. This is antithetical to the law of contracts.[87] And the Commission would not be able to demonstrate that the benefits of applying its cable-related in-kind ruling to existing agreements outweigh the associated harms, especially since those harms accrue to the public and the current system is not harming industry investment or competition.[88] Thus, the Commission should only apply its in-

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[86] While less important, taking actions that hinder PEG access could cause significant waste in the form of stranded investments by LFAs to make PEG programing possible, including production facilities, studios and other equipment. These investments have been made over the 30 plus years since passage of the 1984 Cable Communications Policy Act and reflect meaningful investments by LFAs for the benefits of the broader public. These benefits have come to be relied upon and the *Second FNPRM* provides no basis – in law or policy – to undermine these benefits.

[87] *E.g.*, *Erie Telecommunications v. City of Erie*, 853 F.2d 1084, 1097 (3rd Cir. 1988)

[88] *Nat. Cable & Telecommunications Assoc. v. FCC*, 567 F.3d 659, 670-71 (D.C. Cir. 2009) ("Our case law does require that agencies balance the harmful secondary retroactivity of upsetting prior expectations or existing investments against the benefits of applying their rules to those preexisting interests." (internal quotes omitted)). For the same reason, the Commission could not conclude that cable operators could offset the value of past cable-related non-monetary obligations against future franchise obligations.

kind, cable-related ruling on a prospective basis to new or re-negotiated franchises after the date of final adoption. There is precedent for this approach.[89]

In addition to facing legal barriers, application of the *Second FNPRM* to existing franchises would devastate LFA budgets. According to NCTA, franchise fees totaled $3.5 billion in 2016.[90] The franchise agreements requiring these fees have long horizons, allowing LFAs to plan and account for franchise fee revenues in the budgeting process. It is unclear how much value can be ascribed to cable-related non-monetary obligations, but it is entirely possible that the *Second FNPRM* would introduce an immediate LFA fiscal shortfall of $300 million to $1 billion, especially since cable operators apparently can unilaterally deduct what they consider to be fair market value of their non-monetary obligations.[91] In certain cases, LFAs are without the power to modify existing agreements[92] or state-mandates, meaning LFAs could not seek to forego cable-related, non-monetary obligations if they so choose.[93] Further, LFAs budget at least 12 months in advance and have already adopted 2019 budgets. Those 2019 budgets anticipate franchise fee revenue consistent with historical payments and franchise obligations. The *Second FNPRM* could introduce an immediate and significant fiscal crisis for LFAs, with little to no benefit for the public. The only reasonable approach is to implement any of the conclusions of the *Second FNPRM* to new or re-negotiated franchises.

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[89] 47 U.S.C. § 557. At a minimum, the *Second FNPRM* could only be incorporated into existing agreements through a Section 545 proceeding.

[90] *NCTA*, Unleashing Connectivity and Entertainment in America, https://www.ncta.com/impact (last accessed Oct. 31, 2018).

[91] This apparent unilateral right to deduct the value of non-monetary obligations invites expensive litigation as the only avenue for challenging the unilateral actions of cable operators, further increasing fiscal pressure on LFAs.

[92] 47 U.S.C. § 545 (granting operators the power to seek modification).

[93] Cable-related non-monetary obligations often stem from federal or state legal requirements, meaning LFAs could not eliminate these contributions even if they wanted to.

G. The valuation issues demonstrate the unreasonableness of the *Second FNPRM* proposal.

The *Second FNPRM* seeks comment on how cable-related, in-kind consideration is to be valued and the process for obtaining such a valuation.[94] The City Coalition has no special expertise in valuation issues. It seems, however, that cable-related, non-monetary obligations are not disposed to a fair and simple valuation process. For example, it is unclear what, if any, "fair market value" can be attributed to a PEG channel. Further, even if such value did exist, it seems unlikely that the value would necessarily be uniform across LFAs or cable systems. LFAs have no visibility into the equipment or other resources used by cable operators to fulfill their cable-related non-monetary obligations, meaning LFAs have no ability to question or assess valuations that may be attributed at future dates. Just as no two communities are the same, no two cable systems are the same, which inevitably will lead to numerous, incompatible estimates of value, with related disparate impacts on communities. All of this uncertainty is in direct contrast to the intent of Congress in passing the 1984 Cable Communications Policy Act and further supports not adopting the cable-related in-kind provisions of the *Second FNPRM*.[95]

IV. MIXED-USE NETWORKS

The *Second FNPRM* correctly concludes that LFA's are authorized under the Act to regulate I-Nets.[96] This important clarification must be adopted should the Commission move forward with any of the proposals in the *Second FNPRM*. Other aspects of the *Second FNPRM* addressing mixed-use networks should not be adopted, as discussed below.

[94] *Second FNPRM* at ¶ 24.
[95] H.R. Rep. 98-934, 1984 U.S.C.C.A.N. at 4661.
[96] *Second FNPRM* at ¶ 25, n. 107.

A. I-Nets must be excluded from the Commission's mixed-use network ruling.

The *Second FNPRM* proposes to apply the Commission's mixed-use network ruling to incumbent cable operators to the extent that they offer or begin offering non-cable services.[97] Importantly, as the Commission previously acknowledged, the mixed-use network ruling "[is] not meant to prevent LFAs from regulating I-Nets."[98] The *Second FNRPM* therefore will have no impact on the authority of LFAs to require dedicated capacity on I-Nets for governmental and educational use,[99] or the ability of LFAs to enforce this obligation.[100] Several franchises entered into by members of the City Coalition include I-Net obligations, which facilitate voice, video and data services to educational and governmental institutions. The clarification contained in footnote 107 of the *Second FNRPM* is important to the City Coalition (and their residents that rely on I-Nets) and should be adopted.

B. Other mixed-use network conclusions are contrary to the Act.

The *Second FNPRM* lacks precision when discussing other mixed-use network issues. For example, the *Second FNPRM* asserts that LFAs are prohibited from regulating non-cable services offered by cable operators.[101] This is not correct. The Act empowers LFAs to enact laws regarding customer privacy, including laws that cover the provision of cable service or "other service[s] provided by the cable operator."[102] And LFAs may establish and enforce "customer service requirements of the cable operator."[103] Nothing in this grant of authority regarding customer service requirements is limited to the cable operator's provision of cable

[97] *Second FNPRM* at ¶ 25.
[98] *Second FNPRM* at ¶ 25, n. 107.
[99] 47 U.S.C. § 531(b) ("A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to section 546 of this title, that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.").
[100] 47 U.S.C. § 531(c).
[101] *Second FNPRM* at ¶ 25.
[102] 47 U.S.C. § 551(g).
[103] 47 U.S.C. § 552(a).

service. Finally, the Act "shall [not] be construed to prevent the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under [47 U.S.C. § 552], *or that addresses matters not addressed by the standards set by the Commission under* [47 U.S.C. § 552]".[104] Each of these provisions authorizes regulation of non-cable services. The *Second FNPRM* should be clarified accordingly.

The Act does provide that LFAs may not include "requirements for … information services" in their requests for franchise proposals.[105] If, however, a cable operator agrees to undertake obligations regarding information services though arms-length negotiation – be they obligations regarding facilities that are not part of the cable system or obligations regarding non-cable services – then a LFA may enforce those obligations.[106] Ultimately, the mixed-use network provisions of the *Second FNPRM* require significant clarification to be lawful.

C. The mixed-use network conclusions inappropriately encroach on LFA regulation of public rights-of-way.

The *Second FNPRM* proposes to use the mixed-use network ruling to strip LFAs of any ability to regulate access to and use of public rights-of-way by cable operators providing information services.[107] This is contrary to both federal and state law, which empower LFAs to regulate access to and use of public rights-of-way.[108] That power is necessary to effectuate the

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[104] 47 U.S.C. § 552(d)(2) (emphasis added).
[105] 47 U.S.C. § 544(b)(1). *See also Second FNPRM* at ¶ 27.
[106] 47 U.S.C. § 544(b)(2)(A) and (B).
[107] *See Second FNPRM* at ¶ 26 (concluding LFAs may not regulate the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers, or from regulating any equipment used in the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers), and ¶ 28 (concluding LFAs may not regulate the provision of broadband Internet access and other information services by incumbent cable operators that are not common carriers, and may not regulate facilities or equipment to the extent they are used to provide information services, including broadband Internet access service).
[108] 47 U.S.C. §§ 253(c), 541(a)(2), 556(a); 220 ILCS 5/21-401(a)(2); Minn. Stat. §§ 222.37, 237.163, 238.086; Wash. Rev. Code § 35.99.030.

public trust given to governmental bodies over public property.[109] The conclusions in the *Second FNPRM* regarding mixed-use networks must be clarified or revised so as to not infringe on LFA authority over public rights-of-way.

A franchise grants a cable operator the right to access public rights-of-way for the construction of a cable system.[110] Small cell and other mobile broadband equipment is not part of a cable system,[111] meaning a cable operator has no right under the Act to place non-cable system equipment in the public rights-of-way pursuant to a franchise unless mutually agreed upon by the LFA and the cable operator.[112] The franchises granted by the members of the City Coalition make this clear by granting the right to occupy or use public rights-of-way for the construction, installation, and operation of a *cable system* to provide *cable service*. Those same franchises clarify that: (1) nothing in the franchise shall be construed to limit the cable operator's provision of non-cable services; *and* (2) the LFA retains all rights and authority to regulate such non-cable services as provided under applicable law.

Some LFAs may conclude that it is in the best interests of their constituents to authorize cable operators to place equipment that is not part of a cable system in the public rights-of-way. In exchange for such authorization, a LFA should be able to require certain standards for that equipment and the service to be provided therewith. As discussed above, this is the general approach taken by many members of the City Coalition.

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[109] *Ill. Cent.*, 146 U.S. at 453. The Commission similarly has an obligation to prudently manage public property over which it has control. *See supra* note 57.

[110] 47 U.S.C. § 541(a)(2).

[111] 47 U.S.C. § 522(7) ("the term 'cable system' means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment *that is designed to provide cable service* which includes video programming and which is provided to multiple subscribers within a community…" (emphasis added)).

[112] The City Coalition acknowledges there may be other provisions of federal or state law that allow for access to and use of public rights-of-way for the installation of such equipment.

The *Second FNPRM* also incorrectly asserts that LFAs cannot regulate non-cable services provided by cable operators that are common carriers or equipment used to provide such services.[113] Congress clearly intends for LFAs to regulate public rights-of-way access and use by common carrier cable operators:

> The conferees intend that, to the extent permissible under State and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a nondiscriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees.[114]

Again, the conclusions of the *Second FNPRM* must be significantly revised in order to comply with the public rights-of-way authority granted to LFAs under federal law.

The broad sweep of the *Second FNPRM* mixed-use networks conclusion presents significant practical concerns. Most franchises, including all of the franchises issued by the members of the City Coalition, grant cable operators access to and use of public rights-of-way for the provision of cable service. States that franchise cable operators statewide similarly restrict public rights-of-way access to the provision of cable service.[115] If the *Second FNPRM* mixed-use network ruling is applied as written, it appears these LFA and state authorizations automatically would be converted into a carte blanche right to use public rights-of-way for *any* purpose.[116] This disregard of state and local authority is in direct opposition to Congress' directive that states and LFAs retain control over public rights-of-way and the ability to protect

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[113] *Second FNPRM* at ¶ 26.

[114] S. Rept. No. 230, 104th Cong., 2nd Sess. 1996 at 180; H.R. Rept. No. 458, 104th Cong., 2nd Sess. 1996 at 180. *See also* S. Rept No. 23, 104th Cong., 1st Sess. 1995 at 36 ("However, the Committee intends that telecommunications services provided by a cable company shall be subject to the authority of a local government to manage its public rights of way in a non-discriminatory and competitively neutral manner and to charge fair and reasonable fees for its use. These changes do not affect existing federal or state authority with respect to telecommunications services.").

[115] *See, e.g.*, 220 ILCS 5/21-401(e)(2); O.C.G.A. § 36-76-4(d)(2).

[116] *See Second FNPRM* at ¶¶ 25-29 (concluding LFAs cannot regulate non-cable services or associated facilities).

the health, safety and welfare of their constituents.[117] The conclusions of the *Second FNPRM* must be significantly revised to recognize these state and local rights.

V. STATE FRANCHISING REGULATIONS

Only one member of the City Coalition (Chicago) is in a state with statewide cable franchising.[118] Under Illinois law, cable operators may choose between a state authorization in lieu of a franchise or individual franchises with LFAs.[119] The City of Chicago is currently served by three cable operators: Comcast, RCN and WideOpenWest.[120] That Chicago residents have so many options in the provision of cable services demonstrates the Illinois model does not "impede competition."[121] Further, the Illinois model promotes investment in infrastructure that can be used to provide services, including video, voice and broadband Internet[122] by expressly mandating broadband deployment for certain state franchisees.[123] At least for Illinois, there appears to be no basis to extend the in-kind and mixed-use rulings to statewide franchises.

Extension of the in-kind provisions of the *Second FNPRM* to statewide franchises could be especially problematic in Illinois. Under Illinois law, local governments are allowed to request PEG channel capacity from statewide franchisees.[124] If the *Second FNPRM* in-kind ruling is applied to Illinois statewide franchises, a local government could, in theory, assess and make a choice as to the relative value of PEG channel capacity and franchise fees – though, as discussed above, no LFA should be forced to make such a choice.

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[117] 47 U.S.C. §§ 253(b), 253(c), 541(a)(2), 556(a).
[118] *See* 220 ILCS 5/Art. XXI.
[119] 220 ILCS 5/21-301.
[120] *See* City of Chicago, Business Affairs and Consumer Protection, Cable Television, https://www.cityofchicago.org/city/en/depts/bacp/provdrs/cable_comm.html. Comcast and WideOpenWest have state authorizations; RCN has franchises with the City of Chicago.
[121] *Second FNPRM* at ¶ 32.
[122] *Second FNPRM* at ¶ 32.
[123] 220 ILCS 5/21-1101(e).
[124] 220 ILCS 5/21-601(a).

No similar choice is available regarding free cable service provided to public buildings. *Illinois law*, not any local government, *requires* cable operators to provide free service line drops and free basic service to public buildings.[125] Local governments have no ability to refuse these public benefits. If adopted, the *Second FNPRM* would require that these state-imposed obligations be used to reduce local franchise fees. There is no indication that the Illinois legislature contemplated such a result, and as discussed above, Congress never intended that cable-related obligations be considered franchise fees. For the Commission to make such a determination would be inappropriate and would cause damage to LFAs and the broader public.

Illinois is only one of several states with statewide franchising. Each state with such a system will have made its own policy decisions regarding franchising and each of these policy decisions will have different effects if the *Second FNPRM* is adopted. It is unreasonable to expect the Commission to be able to account for the various differences among these policies and craft a solution that is workable, especially when Congress never intended for the Commission's cable in-kind or mixed-use rulings to be applied as outlined in the *Second FNPRM*. Neither should be adopted and neither should be extended to statewide franchise laws.

VI. CONCLUSION

The City Coalition supports the Commission revisiting its prior decisions regarding the value of non-monetary obligations and mixed-use networks. Except the clarification that the Commission's mixed-use network ruling is not meant to prevent LFAs from regulating I-Nets, the conclusions of the *Second FNPRM* should not be adopted. The conclusions in the *Second FNPRM* are inconsistent with Congressional intent and the text of the Act. They do not adequately recognize the authority vested in the members of the City Coalition (and other LFAs) by Congress. The *Second FNPRM* would upend a long-standing system adopted by Congress

[125] 220 ILCS 5/22-501(f).

that allows LFAs to protect the interests of their constituents, provides the public with compensation for the use of its property, allows access to vital public, educational and governmental information and supports the fundamental goals of our democracy.

Respectfully submitted,

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