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VIA ELECTRONIC FILING

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

Re: MB Docket No. 05-311
Second Further Notice of Proposed Rulemaking
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

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

The City of Newton, Massachusetts, acting by and through its Mayor Ruthanne Fuller, as the Issuing Authority of cable franchise agreements ("Newton" or the "City of Newton"), submits these Comments regarding the Commission's Second Further Notice of Proposed Rulemaking ("Second FNPR") in the above matter.

SUMMARY

Cable-Related In-Kind Contributions And The Federal Franchise Fee Cap

The City of Newton strongly opposes the tentative proposal of the Commission to reduce the percentage of gross revenues from cable service franchise fees by the value of cable-related in-kind contributions, as proposed in the Second FNPR.¹

The Commission should leave the issue of cable-related in-kind contributions to the franchising process. Franchise agreements are the product of bilateral negotiations between a cable operator (often a large MSO) and a local franchising authority (“LFA”). The Commission’s proposal unreasonably interferes with existing, long-term franchise agreements which were negotiated and entered into by municipalities and cable operators on a consensual basis.

The Second FNPR completely ignores the material impact of its proposal upon existing franchise agreements, LFAs, the continued viability of non-profit PEG Access service providers and the loss of public benefits created by PEG Access service providers. In its current form, it would cause material franchise fee offsets for cable operator obligations that are not services or facilities provided to an LFA or an entity designated by an LFA.

Since the Commission is acting in response to the remand order in *Montgomery County, MD v. Federal Communications Commission*, 863 F.3d 485 (6th Cir. 2017), it may decide to proceed with this

¹ The City of Newton supports the November 2, 2018 Comments filed by the Massachusetts Municipal Association regarding the Commission’s proposals which affect cable franchise fees and offers its own Comments on the Second FNPR.

rulemaking. In the event that the Commission decides to adopt cable-related in kind contribution regulations, the City of Newton makes the following recommendations:

- Defer the date when the regulations will apply to all parties for a period of at least 6 years
- Grandfather cable franchise agreements in effect as of September 25, 2018 (the date the FCC released this Second FNPR) for the duration of their remaining terms or the above deferral period, whichever is longer
- The value of PEG Access equipment should not be offset against the 5% franchise fee cap
- The value of PEG Access channel capacity should not be offset against the 5% franchise fee cap
- In-kind contributions which offset capital obligations under an existing franchise agreement cannot be double counted as a franchise fee offset
- Cable operator obligations required by state law which are outside the Commission's definition of a cable-related in-kind contribution should not be treated as franchise fee offsets
- The value of cable-related in-kind contributions should be left for the cable operator and local franchising authority to decide in the first instance, but absent agreement, should be the lesser of fair market value or cost

- The value of cable-related in-kind contributions which are depreciable assets should be spread over the per books useful life of the asset or remaining term of a franchise agreement, whichever is longer
- The Initial Regulatory Flexibility Analysis is inadequate

DISCUSSION

I. Cable TV In Newton, Massachusetts

The provision of cable television service in Massachusetts is regulated by federal and Massachusetts law. Cable television companies must be licensed by the city or town in which they operate and are under the general supervision of the Massachusetts Department of Telecommunications and Cable (“MDTC”). Massachusetts General Laws, Chapter 166A is the primary state law governing the provision of cable service. The MDTC has adopted regulations which operate in tandem with federal laws (granting of initial and renewal licenses; notice, billing and termination rules; procedures for the transfer of a license; procedures for the regulation of rates). 207 CMR 1.00 *et seq.* The licensing authority is the Mayor of Newton, in accordance Section 3 of Chapter 166A. By statute, certain cable operator obligations are required in every cable franchise agreement. Chapter 166A, Section 5.

Newton is served by three cable operators - Comcast, RCN and Verizon (together “the Cable Operators”). A predecessor of Comcast was the first cable operator in Newton and began providing cable service in the 1970s, followed by RCN (2001) (originally an OVS provider) and Verizon (2006).

Chairman Ajit Pai
Commissioner Brendan Carr
Commissioner Michael O'Rielly
Commissioner Jessica Rosenworcel
Federal Communications Commission
November 14, 2018

5 | Page

Franchise renewal agreements were negotiated with each of the Cable Operators for effect between late 2016 and July 1, 2017. The Verizon renewal license has a 5-year term and the Comcast and RCN renewal licenses each have a 10-year term.²

Under its renewal licenses with each of the Cable Operators, Newton receives a franchise fee based on 5% of gross revenues from the provision of cable service. Cable operators have the right to net against their franchise fees two statutory annual assessments: \$0.80 per subscriber per year payable to the State and \$0.50 per subscriber per year payable to Newton. Pursuant to their franchise agreements, each Cable Operator makes capital payments or their in-kind equivalent.

Newton has enabled the provision of public, educational and government access (“PEG Access”) services by entering into a grant agreement with a non-profit corporation, Newton Communications Access Center, Inc. (“NEWTV”) (“PEG Access Agreement”). NEWTV provides public access programming created by a diverse variety of individuals and is a vital channel for free speech. It uses a government channel to cover numerous public meetings and provides the public with access to important deliberations and decision-making by elected and appointed local officials. NEWTV provides video production and editing training to residents and provides student volunteers with valuable vocational skills. It offers internships for news, the government channel, the education

² The City’s current cable franchise agreements may be found at the MDTC’s website:
<https://www.mass.gov/files/documents/2017/07/zv/NewtonComcastLicense-7.2017.pdf>
<https://www.mass.gov/files/documents/2016/08/py/h-cable-license-rcn-newtonrcnlicense-9-2016.pdf>
<https://www.mass.gov/files/documents/2017/07/zv/h-cable-license-verizon-newtonverizonlicense-7-2017.pdf>

channel, the community channel and production services. NEWTV has been a perennial recipient of Emmy awards and is among the top PEG Access service providers in the country. NEWTV operates its studio in a building which it recently acquired using a tax-exempt financing program of Mass. Development taking on debt rather than paying escalating rent.³ NEWTV has used franchise fee grant funds primarily to cover its annual operating budget. During the fiscal year ended June 30, 2015, NEWTV reported \$1,417,268 in PEG access fees (franchise fees), total support and revenues of \$1,590,795 and total expenses of \$1,768,359.⁴ It has 12 full-time staff. It operates 7 days a week. Its studio consists of 10,000 square feet of creative space including multiple edit suites, open edit stations, a fully equipped studio and control room and a state-of-the-art training center and screening room. Its capital needs include cameras, lighting, editing computers, digital archiving, tripods, microphones, booms, jibs, a box van, studio flooring, HVAC and furniture.

During the most recent ascertainment proceeding in 2017, the Cable Operators did not contest the Issuing Authority's cable-related interests and needs. Rather, the franchise renewal agreements were the product of negotiation. In addition to paying a 5% of gross revenues franchise fee, each of the Cable Operators agreed to make capital payments and in one case, a combination of in-kind contributions and a reduced capital payment obligation expressly taking into account the agreed upon

³ <https://www.massdevelopment.com/news/newton-communications-access-center-expands-with-massdevelopment-bond/>

⁴ NEWTV audited financial statement for the year ended June 30, 2015.

value of the in-kind contributions. The franchise renewal agreements spread out capital payments over the terms of the agreements.

The Cable Operators pass through to their subscribers the 5% franchise fee as well as other franchise-related costs.

II. Newton Opposes The Commission's Adoption Of The Proposed Cable-Related In-Kind Contribution Rules

Newton strongly opposes the tentative proposal of the Commission to reduce the percentage of gross revenues from cable service franchise fees by the value of cable-related in-kind contributions, as defined by the Commission. The Commission's franchise fee proposal ignores many years of cable operator and municipal franchising practices and the material impact of its proposal upon providers of PEG Access service and members of the public, if not the survival of PEG Access. The Commission's proposal would unreasonably interfere with existing franchise agreements which were negotiated and entered into by municipalities and cable operators on a consensual basis. They reflect the give and take of negotiations and interfering with a single term or condition upsets the benefits of the bargain achieved by the parties and threatens to disrupt the City's efforts to allocate capital cost obligations based on the relative market shares of the Cable Operators. The Commission should not interfere with existing cable franchise agreements. It should leave the issue of cable-related in-kind contributions to the franchise agreement negotiation process, which, in the case of Newton, has effectively preserved a vibrant PEG Access service that benefits all members of the public. Prescriptive federal regulations are

neither necessary nor desirable. They create additional burdens for cable operators and LFAs and jeopardize the viability of PEG Access service providers.

III. In The Event That The Commission Adopts Cable-Related In-Kind Contribution Rules, It Should Modify And Clarify Its Tentative Findings And Conclusions

A. The Commission Should Defer The Effect Of Any Cable-Related In-Kind Contribution Rules And Grandfather Existing Cable Licenses From The Application Of These Rules

Newton recommends that the Commission defer the effect of any new rules for a period of at least 6 years from the date of adoption. At the same time, the Commission should grandfather cable franchising agreements which were in effect as of September 25, 2018, when the Second FNPR was released. Grandfathering should cover the longer of the remaining terms of the grandfathered franchise agreements or at least 6 years.

1. Grandfathering Existing Cable Franchise Agreements Is Consistent With Commission Policy

Grandfathering franchise agreements in effect as of September 25, 2018 in the case of the proposed regulations is consistent with the Commission's past statements:

We believe that public policy requires that we avoid unnecessary regulatory interference regarding contracts, such as franchise agreements, entered into by consenting parties..... We recognize that the regulatory environment has changed, but we are unwilling to tamper with the terms of a local franchise agreement mutually consented to by the parties.” *In the Matter of: City of Antioch, California*, 14 FCC Rcd. 2285, 2292 (Cable Services Bureau, Feb. 2, 1999.)

Compare, *Lone Star Television Service, Inc., Long-View, Tex. For Certificate of Compliance*, 38 FCC 2d 51 (Dec. 15, 1972) (cable system which made sufficient financial investments and binding contractual agreements in reliance on an existing franchise agreement granted prior to a specified date to justify grandfathering the franchise agreement). See also, *Reconsideration of Cable Television Report and Order*, 36 FCC2d 326 (1979) at ¶115.

2. A Transition Period Is Necessary

Cable licenses are long-term agreements (renewal license terms are typically 5-10 years, original licenses 10-15 years) which are the product of negotiation. The various terms and conditions are intertwined as the parties make concessions to one another. *Montgomery County, MD v. Federal Communications Commission*, 863 F.3d 485 (2017) at 487, 488. Applying in-kind contribution regulations mid-stream would have an extremely disruptive effect upon municipalities such as Newton and PEG Access providers such as NEWTV. It is reasonable to expect that there would be disputes over what constitutes a cable-related in-kind contribution, whether such a noncash exaction falls under the franchise fee definition⁵ and the value of each claimed contribution. These regulations would greatly complicate not only the operation of existing franchise agreements, but also ascertainment

⁵ The *Montgomery County* decision makes clear “[t]hat the term ‘franchise fee’ can include noncash exactions, of course, does not mean that it necessarily *does* include every one of them.” (original emphasis). *Id.* at 491. The remand from the United States Court of Appeals for the Sixth Circuit further directed the Commission to determine and explain “...whether and *to what extent*, cable-related exactions are ‘franchise fees’ under the Communications Act.” *Id.* at 492. (emphasis added).

proceedings, the negotiation of successor franchise agreements and dealing with multiple franchise agreements with different terms.⁶

PEG Access providers also would be disrupted by the proposed regulations. NEWTV has grant agreement obligations and its ability to perform these obligations is predicated upon funding by the LFA. PEG Access providers such as NEWTV have financial commitments related to the operation of a studio facility, equipment purchases, staffing levels, insurance, utilities and long-term lease or debt financing commitments. A sudden, significant decrease in their funding levels could cripple their ability to perform their obligations and meet existing financial commitments.⁷ Where a community itself provides PEG Access services, it, too, would suffer a loss of funds which would materially and negatively affect its ability to carry out PEG Access and other municipal services. The Commission's proposed rules fail to take into account these material adverse impacts upon the provision of PEG Access services, the viability of PEG Access providers and the financial condition of municipalities. Grandfathering would afford some limited protection of PEG Access providers which have incurred, in some cases, long term financial obligations based upon a somewhat predictable level of franchise fees.

⁶ For example, the City of Newton's 5-year renewal agreement with Verizon expires in mid-2022 and the 36-30 month renewal window opens July 1, 2019. The execution of that agreement could impact the 10-year renewal agreements with Comcast and RCN which will not expire until late 2026 and mid-2027.

⁷ NEWTV's financial obligations are described in these Comments.

They, too, have made “sufficient financial investments and binding contractual agreements in reliance on an existing franchise agreement....”

3. A Transition Period Is Consistent With The Commission’s Obligation To Minimize Significant Financial Impacts On Small Entities And Represents A Significant Alternative That The Commission Must Consider

Adoption of a transition period is needed to satisfy the Commission’s Regulatory Flexibility Act obligation to minimize significant financial impacts on small communities and non-profit organizations. It also represents a significant alternative to the proposed rules. 47 U.S.C. §§603, 604 (Initial and Final Regulatory Flexibility Analysis requirements).

The Commission can mitigate any significant financial impacts by creating a transition period. It can defer the effective date of its new rules for a period of years in order to enable a more orderly transition period. Newton recommends at least 6 years. This transition period is needed to allow time for affected parties to: (1) identify cable-related in kind contributions which count against the franchise fee cap; (2) reach agreement on the valuation of cable-related in-kind contributions; (3) resolve any disputes with respect to those issues; and (4) adjust their contractual commitments in light of any prospective reduction in franchise fee revenues (and the timing of those reductions).

A transition period gives LFAs and cable operators time to negotiate the terms of new or amended franchise agreements. It gives LFAs and PEG Access service providers time to amend their contract and grant agreements. Once LFAs and PEG Access service providers know the financial impact of the Commission’s rules upon their operations, they can begin the steps required to revise

their financial commitments and approve new budgets taking into account any reductions in franchise fee revenues.

B. The Commission Should Determine The Treatment Of Specific In-Kind Contributions On A Case-By-Case Basis

It would be overly simplistic for the Commission to treat nearly every cable-related in-kind contribution as subject to the 5% franchise fee cap where the parties to a franchise agreement weighed and balanced each term of the franchise agreement as part of the give and take of their negotiations. The Commission should allow for additional exceptions to its proposed in-kind contribution rule on a case by case basis. This approach is necessary for the further reason that not every noncash exaction falls under the term “franchise fee.” *Montgomery County, supra*, at 491. The Commission’s proposed definition of cable-related in-kind contributions which count against the franchise fee cap does not and should not cover all noncash obligations of cable operators.

For example, the Commission should allow an exception to the treatment of an in-kind contribution as subject to the 5% franchise fee cap where the LFA can demonstrate that the parties treated an in-kind contribution in another manner. For example, when RCN entered the video market in Newton as an OVS provider, it agreed to provide a Municipal Fiber Information System (“MFIS”) akin to an I-Net in exchange for a reduced capital payment obligation. The MFIS has remained in service and as RCN transitioned to cable operator status, as a franchise agreement obligation which is expressly referenced in its current renewal license as part of the consideration for a reduced capital payment obligation. In the same renewal license, RCN agreed to make in-kind contributions in lieu of

making higher capital payments. These specific contributions are stated in its renewal license and the values assigned to these contributions also are provided.

It would constitute double-counting if the Commission treated these in-kind contributions as subject to the 5% franchise fee cap. It would make little sense for the Commission to rewrite the RCN renewal license agreed upon by the parties through negotiation. The failure to allow for this exception also would undercut the recent ascertainment proceeding conducted by Newton with respect to the Cable Operators. The amount of capital determined as a result of the ascertainment proceeding was allocated to each cable operator on the basis of its market share. After negotiations, the agreed upon capital contributions were based upon their relative market shares. If RCN's in-kind contributions were (1) reclassified as franchise fee payments, (2) used to reduce RCN's 5% cash franchise fee payments and (3) removed as credits against its capital payment obligations, the delicate balance achieved by Newton and the Cable Operators would be unnecessarily disrupted.

C. The Definition Of In-Kind Contributions Should Exclude License Requirements Which Are Not Services Or Equipment Provided To A LFA Or Entity Designated By A LFA

As discussed below, and consistent with the *Montgomery County* case, not all noncash obligations of cable operators fall under the definition applied by the Commission to franchise fee offsets.

1. Customer Service Requirements Should Not Be Included As An Offset Against The Franchise Fee Cap

Under federal and state law, cable operators are required to comply with customer service standards. 47 C.F.R. §76.309. 207 C.M.R. §10.00 *et seq.* Cable franchise agreements include an obligation to comply with these customer service standards. Compliance with types of consumer-facing standards should not be treated as cable-related in-kind contributions. They are not services or facilities. They benefit cable subscribers, not Newton or any entity designated by Newton.

In essence, if the value of these requirements were treated as cable-related in-kind contributions which offset the franchise fee, a franchise agreement requirement that a cable operator comply with “all applicable state and federal laws” would be treated as an in-kind contribution related and unrelated to cable.

2. A Franchise Requirement To Comply With FCC Technical Standards Cannot Be Considered A Cable-Related In-Kind Contribution

Similarly, the cost of complying with FCC technical standards should not be treated as an in-kind contribution merely because a cable franchise agreement recites that the cable operator will comply with the FCC’s technical standards. LFAs lack the authority to impose technical standards on cable operators. Again, this type of requirement is neither a service nor a facility provided to the LFA or any entity designated by the LFA. It is a network-related obligation under federal law. It should be excluded from classification as an in-kind contribution offset against the franchise fee cap.

3. Many Franchise Requirements Imposed By State Law Should Not Be Deemed Cable-Related In-Kind Contributions That Count Against The Franchise Fee Cap

The Commission has requested comments on whether to apply its proposal and tentative conclusions to state regulations that impose requirements on local franchising. Second FNPR at ¶32. Under Massachusetts General Laws Chapter 166A, Section 5, each cable license must include terms and conditions on the following:

- (a) Avoidance of unnecessary damage to trees, structures and improvements in and along routes in installing, operating and maintaining equipment;
- (b) Indemnification of the town or city;
- (c) Carrying of insurance for damage to persons or property;
- (d) Prohibition on engaging directly or indirectly in the business of selling or repairing television or radio sets;
- (e) Provision of a cable drop and outlet along cable route at no cost to public schools, police and fire stations, public libraries and other public buildings designated in writing by the issuing authority;
- (f) Removal of facilities and restoration of the areas where facilities were located upon termination of a license;
- (g) Restoration or replacement of pavement or sidewalk if disturbed;

- (h) Prohibition against removal of any television antenna of any subscriber, but cable operator shall, at no cost, offer to him and maintain an adequate switching device to allow the subscriber to choose between cable and noncable reception;
- (i) Notify subscribers at least 1 month before transposing a television signal from the original channel to another channel and provide them with a marker suitable for mounting on television receivers;
- (j) Afford equal opportunity to candidates if it permits any candidate to employ the facilities of its system or originate and disseminate political campaign material;
- (k) Provide a bond with corporate surety before commencing construction;
- (l) Grant subscribers a pro rata credit in the event its service to any subscriber is interrupted for 24 or more consecutive hours;
- (m) Buildout requirement;
- (n) Completion of construction within 6 years after license is granted; and
- (o) Maintenance of local offices or local telephone connections in the communities served

Some of the above requirements already are exempt from the federal definition of franchise fee (Section 622(g)(2) (D) excludes “requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, ...insurance, indemnification....” Second FNPR at ¶4). The only requirement above presently identified by the Commission as a cable-related in-kind contribution franchise fee offset is the provision of a cable drop and outlet along a cable route at no

cost to public schools, police and fire stations, public libraries and other public buildings designated in writing by the LFA. The Commission should find that the remaining requirements do not constitute a cable-related in-kind contribution that counts against the franchise fee cap. None of these other requirements constitute a service or facility provided to the LFA or an entity designated by the LFA.

4. Capital Payments For PEG Access Facilities And Equipment Should Be Excluded From The 5% Franchise Fee Cap

The Commission has requested comment on whether the cost of studio equipment should be treated as a capital cost for purposes of Section 622(g)(2)(C) and excluded from the 5% franchise fee cap. Second FNPR at note 95. For decades, many LFAs and cable operators have treated capital payments for PEG Access facilities and equipment as separate and apart from the 5% franchise fee cap. Many franchise agreements, including Newton's renewal licenses with the Cable Operators, expressly provide that the capital payments for PEG Access purposes are not offsets against the franchise fee cap.⁸ The Commission should not disturb this custom and usage in the cable industry and the terms of existing franchise agreements, which reflect the exclusion of PEG access equipment funding from the 5% franchise fee cap.

⁸ Newton-Verizon Renewal License Agreement dated July 1, 2017, at Section 6.2 (“...such five percent (5%) Cap shall not include (A) PEG Access Capital Funding (Section 5.2.1). . . .”); Newton-RCN Renewal License Agreement dated July 21, 2016, at Section 7.7(b) (stating that “In no case shall the [PEG access] equipment/facilities funding payments herein be counted against...any License Fee payment. . . .”); Newton-Comcast Renewal License Agreement effective July 1, 2017, Section 6.4(b) (to the same effect as the RCN provision).

As a practical matter, PEG Access facilities are not limited to a building. In many cases, a PEG Access studio is located within a municipal building such as a school or town hall. In addition, in many communities PEG Access studios already exist and the principal need for capital is the replacement and upgrading of equipment and intra-building upgrades.

5. The Cost Or Market Value Of PEG Access Channel Capacity Should Be Excluded From The 5% Franchise Fee Cap

PEG Access channel capacity should not be treated as a cable-related in-kind contribution under the Commission's tentative definition. It is not a service or facility provided to the LFA or an entity designated by the LFA. This channel capacity is part of a cable operator's network. Unlike service drops and basic cable service to public buildings provided to the LFA at no cost to the LFA, PEG Access channel capacity is not a service or facility dedicated and provided to the LFA or an entity designated by the LFA. It benefits the public in the same way that other parts of the cable network benefit the public. It involves no transfer of an object of value, such as cable-related equipment, to the LFA or an entity designated by the LFA.

Moreover, unused PEG Access channel capacity may be used by the cable operator for commercial programming. 47 U.S.C. §531(d)(1). For example, the Comcast renewal license with the City of Lynn, Massachusetts effective from September 17, 2005-September 16, 2025 provides at page 25: "(c) In the event that the Issuing Authority or other PEG Access User elects not to fully program its Channel(s) with original PEG Access Programming, License may reclaim any unused time on those channels."

Removing PEG Access channel capacity from classification as a cable-related in-kind contribution offset against the franchise fee cap is not only proper, but also will reduce the negative impact of the Commission's proposed regulations upon municipalities and PEG Access service providers and help maintain the existence of PEG Access services, which provide substantial benefits to the public.

6. Voluntary Contributions Should Not Be Treated As Cable-Related In-Kind Contributions

Where a cable operator offers an in-kind contribution on a voluntary basis and not as a result of a requirement under a franchise agreement, the cost or value should not count against the 5% franchise fee cap. Examples include the voluntary offering of a needs-based senior discount off of basic cable service. Another example is the provision of service drops at no cost which are in addition to what is required under the franchise agreement. In Newton, for example, Comcast has voluntarily provided for many years a larger number of service drops at no cost to the City than what is required under its renewal license or state law.

7. If A Cable Operator's Capital Payment Obligation Has Been Reduced To Reflect In-Kind Contributions, The Value Of Those In-Kind Contributions Should Not Reduce Franchise Fee Payments

If a cable operator has received financial credit toward its capital payment obligation for an in-kind contribution under the terms of its franchise agreement, it should not be able to reduce its franchise fee payments for the value of that same in-kind contribution. For example, under Section 7.7(c) of RCN's renewal license dated July 21, 2016, in-kind contributions such as equipment used for

PEG Access purposes were credited against its capital payment obligation. Section 7.7(c) enumerated the value of two of these in-kind contributions (\$168,000, almost equal to its cash capital obligation of \$200,000 spread out equally over 10 years). This same example was discussed above in order to show that there should be additional exceptions to the proposed in-kind contribution rule.

D. The Value Of In-Kind Contributions Should Be Based Upon The Lesser Of Fair Market Value And Cost

As a general proposition, the value of an in-kind contribution should be based upon the lesser of fair market value or cost. Given the variable nature of in-kind contributions and the need for objective evidence of value, it may not be practical to base value solely on one or the other method.

The Commission should, in the first instance, allow LFAs and cable operators to pursue an agreement on the valuation of an in-kind contribution. The valuation process may occur during a period of time before new rules are applied, during the term of grandfathered franchise agreements and during the negotiation of a successor franchise agreement. Coupled with Newton's proposal that the application of new rules be deferred for the longer of at least 6 years or the remaining terms of franchise agreements in existence as of September 25, 2018, this approach would reduce the burdens and expenses of attempting to alter existing franchise agreements and limit disputes regarding the valuation of that contribution.⁹

⁹ There are many issues which the Commission needs to address. What information on market value and cost should a cable operator be required to produce? What if the information is considered confidential? How would a dispute about the adequacy of this information be resolved? Should the

1. Cable Operators Should Bear The Burden Of Proving The Value Of An In-Kind Contribution Of Equipment Or Services

Cable operators are in the best position to submit information on the cost and/or fair market value of an in-kind contribution of equipment or services. For this reason, a cable operator seeking to apply against a 5% franchise fee obligation the value of an in-kind contribution for equipment or services should bear the burden of submitting to the LFA information such as invoices, objective evidence of a market value and accounting record. This requirement should not preclude parties from agreeing on a value based upon their discussions. Cable operators should also have an obligation to provide back-up information to support any claimed cost or market value in order to enable evaluation by the LFA.

2. Where An In-Kind Contribution Is A Depreciable Asset, Its Value Should Be Spread Over The Per Books Useful Life Of The Asset Or The Remaining Term Of The Cable Franchise, Whichever Is Longer

Where an in-kind contribution is in the form of a depreciable asset, the value should be spread out over the longer of the per books useful life of the asset or the remaining term of the cable franchise. Use of the longer period of time is reasonable because most cable franchise agreements are renewed and the cable operator would have the opportunity to recover the value of an asset which was not fully depreciated during the term of a license in which the contribution was made. A longer period of time smooths out the impact of the franchise fee revenue offset and affords greater stability for LFAs and

Commission prescribe a specific valuation methodology for a specific type in-kind contribution? How would “cost” be determined? What method would be used to determine fair market value?

PEG Access service providers. In the first instance, the parties should be allowed to negotiate the netting of in-kind value against the payment of franchise fee revenues and the period over which the offset against the 5% franchise fee cap occurs.

E. The Initial Regulatory Flexibility Act Analysis Is Inadequate

The Commission has requested comments on its Initial Regulatory Flexibility Analysis (“IRFA”) (Appendix A to Second FNPR, para. 1). The IRFA is inadequate when it comes to describing the Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered. It does not represent a “...reasonable, good faith effort” to comply with the requirements of the Regulatory Flexibility Act.¹⁰ The IFRA fails to demonstrate that any steps have been taken to minimize significant economic impact on municipalities and non-profit PEG Access service providers. There is no factual support for the IFRA statement that “...the proposed rules are expected to have only a *de minimus* effect on small governmental jurisdictions.” The number and type of cable-related in-kind contributions that will count against the franchise fee cap are not yet known and no valuations have been determined. Nowhere does the IFRA consider the impact of the proposed rules on “small organizations” like non-profit PEG Access corporations. The proposed rules would not “streamline the local franchising process by providing additional guidance to LFAs.” Just the opposite would occur as stakeholders become embroiled in disputes caused by the proposed rules

¹⁰ *Montgomery County, supra*, at 495.

as to the identification and valuation of cable-related in-kind contributions that count against the franchise fee cap. These real burdens have not been recognized by the Commission.

Adoption of Newton's recommendations would not eliminate but would help reduce the significant economic harm likely to be caused by the proposed rules. The City of Newton's suggested modifications and clarifications of the proposed rules, coupled with the deferral of implementation and grandfathering of existing franchise agreements recommended herein, must be considered by the Commission in light of the Regulatory Flexibility Act.

IV. Mixed-Use Networks

The Commission proposes "...to prohibit LFAs from using their *video franchising authority* to regulate most non-cable services offered over cable systems by incumbent cable operators." Second FNPR at ¶25 (emphasis added). The Second FNPR appears to go further and may prohibit all municipal authority to regulate non-cable services offered over cable systems by incumbent cable operators that are common carriers:

We tentatively conclude that the mixed-use network ruling prohibits LFAs from regulating 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 facilities and 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.... Second FNPR at ¶26.

The Second FNPR requests comment on "...LFAs' authority to regulate the provision of non-cable services by incumbent cable operators that are *not* also common carriers." Second FNPR at ¶27. These latter statements by the Commission are not expressly limited to a prohibition against municipal use of video franchising authority. They are unduly vague as to what the Commission considers regulation of non-cable services or regulation of any facilities and equipment used in the provision of any services other than cable services offered over the cable systems of incumbent cable operators.

No prohibition of franchise style of regulation of non-cable services provided by a cable operator and facilities and equipment used to provide these non-cable services should impact the exercise of municipal authority under laws of general applicability to regulate the placement of facilities in the public ways by cable operators, common carrier telecommunications service providers or wireless service providers. Newton vigorously opposes any effort in this proceeding to erode this municipal authority, which is separate and apart from its video franchising authority and does not constitute the exercise of any other form of franchising authority.

The Commission should clarify that: (1) it is not prohibiting municipal regulation of the use of public ways by cable operators under laws of general applicability such as Massachusetts General Laws, Chapter 166, Sections 21-22; and (2) any order *in this proceeding* does not affect municipal authority under laws of general applicability with regard to the placement of wireless facilities in the public ways. These laws also include, but are not limited to, noise ordinances, building, electrical and

street opening permit requirements, zoning requirements and historic district commission requirements.

In response to the Second FNPR's request for input (at ¶¶28, 29), Newton does not:

- require an incumbent cable operator to obtain a separate franchise or pay separate franchise fees in connection with its provision of non-cable services (e.g., VoIP, Internet access)
- impose any economic or public utility-type regulations, including entry or exit restrictions with regard to the provision of non-cable services by an incumbent cable operator or impose any other franchise-type requirements on the provision of non-cable services or assess fees on these services provided by an incumbent cable operator¹¹

Newton does not use video franchising authority under Massachusetts General Laws, Chapter 166A to regulate Title II services provided by Verizon or non-cable services, such as VoIP services offered by cable operator Comcast. It does regulate Verizon's and Comcast's placement of facilities in public ways under the separate authority of Massachusetts General Laws, Chapter 166, Sections 21-22.

The existing franchise agreements of these cable operators recognize the distinction between franchising law and laws of general applicability. Section 2.2 of the Verizon cable franchise renewal

¹¹ Massachusetts law prohibits the regulation of VoIP services. Massachusetts General Laws, Chapter 25C, Section 6A. Under state law, common carrier providers of telecommunications services are regulated to a limited degree by a state agency, the MDTC. Massachusetts General Laws, Chapters 25, 159, 166.

agreement acknowledges that Verizon's "...FTTP Network is constructed and operated and maintained as an upgrade to and/or extension of the Licensee's existing Telecommunications Facilities under Title II and M.G.L.c.166." The same section states that "Nothing in this Renewal License shall be construed to prohibit the Licensee from offering any service over the Cable System that is not prohibited by federal or state law provided that any requirements for City authorization or permitting not inconsistent with federal and state law are satisfied."

Section 2.4 of the Comcast franchise renewal agreement expressly states in part, "The Licensee shall comply with all applicable State and City laws, ordinances of general applicability, and not specific to this Renewal License, the Cable System or the Licensee...."

Both Verizon's Title II network and Comcast cable network are subject to the same state and local laws that apply to common carrier and wireless service providers which attach their equipment to utility poles located in the public ways. These laws are not video or any other type of franchising laws and the exercise of municipal authority under such laws should not be affected by the Commission's actions in this proceeding.

Chairman Ajit Pai
Commissioner Brendan Carr
Commissioner Michael O'Rielly
Commissioner Jessica Rosenworcel
Federal Communications Commission
November 14, 2018

27 | Page

V. CONCLUSION

The City of Newton thanks the Commission for its consideration of these Comments.

Respectfully submitted,

City of Newton, Massachusetts

By: _____
Ruthanne Fuller, Mayor and Issuing Authority

and

By: _____
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