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 OF THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY; THE ALLIANCE FOR COMMUNITY MEDIA; AND THE CITIES OF BOWIE, MARYLAND; EUGENE, OREGON; PALO ALTO, CALIFORNIA; AND PORTLAND, MAINE

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The Alliance for Communications Democracy ("ACD"); the Alliance for Community Media ("ACM"); and the Cities of Bowie, Maryland; Eugene, Oregon; Palo Alto, California; and Portland, Maine (collectively, Cable Act Preservation Alliance ("CAPA")), submit these comments in response to the Commission's Second Further Notice of Proposed Rulemaking ("*Second FNPRM*") in this docket.[1]

ACD is a national membership organization of nonprofit public, educational, and governmental ("PEG") organizations that supports efforts to protect the rights of the public to communicate via cable television, and promotes the availability of the widest possible diversity of information sources and services to the public. The organizations represented by ACD have helped thousands of members of the public, educational institutions, and local governments make use of PEG channels that have been established in their communities pursuant to franchise agreements and federal law, 47 U.S.C. § 531.

ACM is a national nonprofit membership organization representing over 3,000 PEG access organizations, community media centers and PEG channel programmers throughout the nation. Those PEG organizations and centers include more than 1.2 million volunteers and 250,000 community groups that provide PEG access cable television programming in local communities across the United States.

The City of Bowie, Maryland, located in Prince George's County, is Maryland's fifth largest city, with approximately 58,000 residents. Numerous institutions of higher education and government facilities are located near Bowie. Bowie's cable franchise agreements provide for

[1] *In re 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, Second Further Notice of Proposed Rulemaking, FCC 18-131 (2018) ("*Second FNPRM*").

(among other things) PEG access channel capacity, institutional network ("I-Net") capacity, and courtesy service to public buildings.

The City of Eugene, Oregon, is Oregon's second largest city, and home to over 160,000 residents. It is also home to several colleges and universities, including the University of Oregon. Eugene's cable franchise agreement provides for (among other things) PEG access channel capacity and courtesy service to public buildings.

The City of Palo Alto, California, is a community of approximately 67,000 residents located in the heart of Silicon Valley, thirty-five miles south of San Francisco and fourteen miles north of San Jose. Palo Alto's cable operators provide PEG access channel capacity pursuant to state law. Cal. Pub. Util. Code §§ 5800, *et seq.* Palo Alto also acts as the administrator of a six-agency joint powers authority in lower San Mateo and upper Santa Clara Counties, California, that oversees the management and operation of the PEG access channel capacity that cable operators provide to the joint powers' members.

The City of Portland, Maine, is Maine's largest city, with a population of approximately 67,000. It is the economic center of northern New England, with an economy that relies on the service sector, shipping, and tourism, and the home of several colleges and universities. Portland's cable franchise agreement provides for (among other things) PEG access channel capacity, I-Net capacity, and courtesy service to public buildings.

I. INTRODUCTION AND SUMMARY

The *Second FNPRM* seeks comment on two tentative conclusions: (1) that cable-related, "in-kind" obligations required by franchise agreements are subject to the Cable Act's five percent cap on franchise fees, with limited exceptions; and (2) that the Commission should apply its prior mixed-use network ruling to incumbent cable operators. CAPA members oppose both of the *Second FNPRM*'s proposals. The *Second FNPRM*'s proposed treatment of cable-related, nonmonetary franchise requirements as "franchise fees" would upend decades of consistent treatment of what counts toward the franchise fee cap. Subjecting these franchise requirements—particularly those authorized by the provisions of the Act, such as PEG and I-Net requirements—to the five percent franchise fee cap would have devastating fiscal impacts on local communities and their residents and would undermine the Cable Act's goal of promoting localism and diverse sources of information at a time when these goals are in most need of support.

The *Second FNPRM* (¶ 20) tentatively concludes that its interpretation is consistent with the statute's purpose. But it can reach that conclusion only by contorting the Act's purpose and language almost beyond recognition. For instance, the *Second FNPRM* selectively cites to only certain of the purposes Congress mentioned, while completely ignoring Congress's goals of "assur[ing] that cable systems are responsive to the needs and interests of the local communities they serve" and "assur[ing] that cable systems provide the widest possible diversity of information services and sources to the public, consistent with the First Amendment's goal of a robust marketplace of ideas—an environment of 'many tongues speaking many voices.'"[2] Cable-related, nonmonetary franchise requirements are a vital way in which these goals are achieved.

The *Second FNPRM*'s proposal would jeopardize the ability of local and, in some cases, state franchising authorities ("LFAs") to establish the very franchise requirements expressly authorized by the Cable Act to promote these goals, including 47 U.S.C. Section 531's explicit authorization of franchise requirements that channel capacity be designated for PEG use and that channel capacity on I-Nets be designated for educational and governmental use. Treating these statutorily-recognized requirements as subject to 47 U.S.C. Section 542's five percent franchise

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[2] H.R. Rep. No. 98-934 at 19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4656 ("H.R. Rep. No. 98-934").

fee cap would allow Section 542 to swallow Section 531, among other Act provisions, and it would force LFAs to choose between local PEG access and I-Nets, and the important other public services supported by franchise fees. In any LFA jurisdiction where the value or cost of PEG and I-Net franchise requirements were determined to exceed five percent of the cable operators' gross revenue, the LFA would be prohibited from including, or continuing to enforce, these requirements in its franchise at all.

This outcome simply cannot be squared with the provisions of the Cable Act. The *Second FNPRM* asserts that cable-related, nonmonetary franchise requirements must be subject to the five percent franchise fee cap in order to prevent unconstrained abuse of cable operators by LFAs, claiming (¶ 17) that LFAs could otherwise "easily evade the five percent cap by requiring any manner of in-kind contributions, rather than a monetary fee" or "circumvent the five percent cap by requiring, for example, unlimited free or discounted cable service and facilities for LFAs, in addition to a five percent franchise fee." The *Second FNPRM* cites no examples of such alleged abuses. Perhaps more to the point, it overlooks other provisions of the Cable Act that protect against such abuse.[3] Interpreting the Cable Act's definition of "franchise fee" to include all nonmonetary franchise requirements would render the Act's cable franchise renewal provisions meaningless. In addition, various other sections of the Cable Act, as well as the FCC's own rules, consistently distinguish between franchise fees and the costs of franchise requirements, further demonstrating Congress's intention, as well as the FCC's prior

[3] 47 U.S.C. § 546(c)(1)(D) (specifying that one of the four factors LFAs can consider when considering a cable operator's renewal proposal is whether the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests"); *Union CATV v. City of Sturgis*, 107 F.3d 434, 440 (6th Cir. 1997) (explaining that 47 U.S.C. § 546(c)(1)(D) requires LFAs to "balance the community's need for a certain cable service against the cost of providing that service").

understanding, that these franchise requirements are independent from, and not subject to, the franchise fee cap.

If the Commission nevertheless were to conclude (improperly) that cable-related, nonmonetary franchise requirements count toward the five percent franchise fee cap, these contributions must be valued at a cable operator's actual, incremental cost of complying with the requirement, not its fair market value. Allowing cable operators to displace all or part of their franchise fee obligations by more than the amount it actually costs them to comply with these franchise requirements would provide cable operators and their shareholders with a complete windfall, at the expense of local communities and their taxpaying residents. In addition, to the extent that cable operators have already recovered the costs of cable-related, nonmonetary franchise requirements from the rates they have charged subscribers, they should not be allowed to double-recover these costs again through an offset to franchise fees.

Finally, to the extent that the *Second FNPRM*'s proposed revision to the "mixed-use" rule applies only to LFAs' exercise of their Title VI cable franchise authority, then the revision, while troubling and legally inaccurate, might at least be somewhat limited in its impact. But to the extent that the *Second FNPRM*'s "mixed-use" proposal is intended to go beyond that and limit local governments' non-Title VI police power, right-of-way compensation or management authority, or taxing authority, it is contrary to the Cable Act and a dangerous federal intrusion on local authority that must be rejected.

II. THE *SECOND FNPRM*'S FRANCHISE FEE PROPOSAL IS CONTRARY TO THE CABLE ACT AND MUST BE REJECTED.

A. The costs of complying with cable-related franchise requirements do not count toward the five percent franchise fee cap.

The language, structure, and legislative history of the Cable Act treat franchise fees and nonmonetary cable-related franchise requirements as separate and distinct. This is consistent with the longstanding understanding that the costs of complying with these franchise requirements are not subject to, and do not count toward, the five percent franchise fee cap. In explaining the Cable Act's definition of franchise fee, Congress stated that "[i]n general, this section [Section 622] defines as franchise fee *only monetary payments made by the cable operator, and does not include as a 'fee' any franchise requirements* for the provision of [PEG] services, facilities, or equipment."[4] While an "assessment" may include nonmonetary obligations in some contexts, Congress did not intend that franchise fees include the costs cable operators incur to comply with cable-related franchise requirements that the Act permits LFAs to impose.

The language and structure of the Cable Act reflects Congress's intent to limit franchise fees to monetary payments. Although the language used in defining franchise fee in 47 U.S.C. Section 546(g)(1) appears broad when read in isolation, statutory interpretation "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[5] The Cable Act explicitly differentiates between franchise fees on the one hand, and the costs of franchise requirements on the other.[6] At minimum, those cable-related, nonmonetary franchise requirements that are authorized by other provisions of the Cable Act are distinct from the franchise fee defined in Section 542(g) and not subject to the five percent cap. While the Sixth Circuit in *Montgomery County v. FCC* concluded that franchise fees can include noncash exactions in the context of *non*-cable-related obligations imposed in a franchise, it based this conclusion on the general meaning of the terms "tax" and "assessment,"

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[4] H.R. Rep. No. 98-934, at 65 (emphasis added).

[5] *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 51 (1987) (quoting *Kelly v. Robison*, 479 U.S. 36, 43 (1986)) (internal quotation marks omitted).

[6] *Compare* 47 U.S.C. § 542(c)(1) *with* 47 U.S.C. § 542(c)(2); 47 U.S.C. § 543(b)(2)(v) *with* 47 U.S.C. § 543(b)(2)(vi).

and on the non-cable-related nature of the obligations at issue.[7] The court explicitly did not address how the structure of the Cable Act may affect how these terms should be interpreted in the context of *cable*-related franchise requirements because the Commission had failed to do so below.[8]

B. Franchise requirements authorized by the Cable Act cannot count toward the five percent franchise fee cap.

The *Second FNPRM* interprets the definition of franchise fee in Section 542 to allow all cable-related, in-kind contributions (with limited exceptions for PEG capital costs and build-out requirements) to be subject to the five percent franchise fee cap. Such a construction would permit Section 542 and its franchise fee cap to swallow various franchise requirements that other provisions of the Cable Act explicitly authorize LFAs to impose, such as PEG and I-Net requirements in Section 531. There is nothing in the Cable Act or its legislative history remotely suggesting that Congress intended for the franchise fee to trump all of the Act's other provisions and to subject these nonmonetary franchise requirements to the franchise fee cap. In both the statute and legislative history, Congress treated franchise fees and the costs of meeting cable-related franchise requirements as distinct obligations that LFAs could impose separately from and independently of the franchise fee. Thus, the Cable Act requires that franchise requirements specifically authorized under the Act—such as PEG, I-Net, and build-out requirements—must not be subject to the five percent franchise fee cap.

The *Second FNPRM* recognizes (as it must) that the Cable Act "authorizes LFAs to require that channel capacity be designated for PEG use and that channel capacity on I-Nets be

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[7] *Montgomery Cty. v. FCC*, 863 F.3d 485, 490-91 (6th Cir. 2017) (citing *The Random House College Dictionary* 1347 (rev. ed. 1982); *Black's Law Dictionary* 106-07 (5th ed. 1979); *Austin v. United States*, 509 U.S. 602, 623-24 (1993) (Scalia, J., concurring) (addressing whether the 8th Amendment of the U.S. Constitution applies to civil forfeitures)).

[8] *Id.* at 491.

designated for educational and governmental use."[9] In authorizing LFAs to so require, 47 U.S.C. Section 531(b) makes no reference at all to the franchise fee cap. The *Second FNPRM* (¶ 20) notes that Congress enacted the PEG and I-Net provisions at the same time it enacted the franchise fee provision and suggests (¶ 20) that Congress "could have explicitly excluded those costs in addressing the scope of the PEG-related costs in [47 U.S.C. Section 542(g)(2)] if it had intended they not count towards the cap." But it is equally true that Congress could have explicitly noted the franchise fee limitation in 47 U.S.C. Section 531(b) if it had intended to *include* these PEG-related costs as franchise fees. Instead, Congress explicitly provided that LFAs' authority to impose PEG and I-Net requirements is subject to another section of the Cable Act; it is "subject to section 546 of this title,"[10] *not* Section 542.

Section 546 includes a requirement regarding a cable operator's costs of complying with cable-related franchise requirements, but this requirement is distinct from the five percent franchise fee cap (and 47 U.S.C. Section 546 makes no reference to the franchise fee cap). It specifies the factors that LFAs are to consider during the formal cable franchise renewal process, one of which is whether "the operator's [renewal] proposal is reasonable to meet the future cable-related community needs and interests, *taking into account the cost of meeting such needs and interests*."[11] This provision does not direct LFAs to consider whether these costs exceed the five percent franchise fee cap. Rather, it requires LFAs to compare the benefits of meeting cable-related community needs against cable operators' costs of meeting such needs.[12] But such

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[9] *Second FNPRM*, ¶ 21 (citing 47 U.S.C. §§ 531(b), 541(b)(3)(D)).

[10] 47 U.S.C. § 531(b).

[11] 47 U.S.C. § 546(c)(1)(D) (emphasis added).

[12] *See Union CATV*, 107 F.3d at 440 (explaining that this provision requires LFAs to "balance the community's need for a certain cable service against the cost of providing that service"); H.R. Rep. No. 98-934, at 74 ("[T]he operator's responsibility is to provide those facilities and services which can be shown to be in the interests of the

a balancing would be superfluous if the franchise requirements whose costs are to be weighed had to be offset against the five percent franchise fee cap, which Section 542 separately permits LFAs to impose.

The legislative history notes that under Section 546, "the cable operator's ability to earn a fair rate of return on its investment and the impact of such costs on subscriber rates are important considerations."[13] But again, these considerations of cost impact on the cable operator would not be important, or relevant at all, had Congress instead intended that the costs of complying with franchise requirements authorized by the Cable Act must be subject to the five percent franchise fee cap. Ultimately, there would be no reason for Congress to require LFAs to consider the benefits or costs of these franchise requirements at all if their costs simply counted toward the five percent franchise fee that Section 542 explicitly permits LFAs to assess. The Cable Act specifies that the only limitation on LFAs' ability to impose franchise fees is the five percent cap,[14] and Congress would not have required LFAs to consider the future costs of cable-related community needs and interests in Section 546 if LFAs were, as the *Second FNPRM* proposes, forbidden from imposing cable-related franchise requirements over and above the five percent fee cap. To the extent that the Commission is concerned about LFAs imposing excessive nonmonetary cable-related franchise requirements, the legislative history also specifies that Section 546's provisions—*not* Section 542's franchise fee cap—are "designed to assure that the renewal process does not impose unreasonable requirements on the operator."[15]

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community to receive in view of the costs thereof.").

[13] H.R. Rep. No. 98-934, at 74.

[14] 47 U.S.C. § 542(a), (b).

[15] H.R. Rep. No. 98-934, at 25-26.

Section 541 likewise makes no reference to franchise fees in providing that LFAs "may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support."[16] Again, there would be no need for Congress to reference "adequate" PEG support if it had instead intended to allow LFAs to impose any PEG-related requirements only so long as the costs of meeting such requirements did not exceed the franchise fee cap.

Other sections of the Cable Act also treat franchise fees and the costs of complying with franchise requirements as separate and distinct. For instance, 47 U.S.C. Section 542(c) allows cable operators to itemize three expenses on regular subscriber bills: [17]

> (1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid.
>
> (2) The amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels.
>
> (3) The amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber.

This separate treatment of franchisee fees on the one hand, and the amounts cable operators itemize as a cost to subscribers to cover the cost of requirements to support the use of PEG channels on the other, is flatly inconsistent with the *Second FNPRM*'s proposal that the latter is subsumed within the former.

Congress again distinguished between franchise fees and the costs of franchise requirements in 47 U.S.C. Section 543(b)(2). In this subsection, Congress directed the

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[16] 47 U.S.C. § 541(a)(4)(B).

[17] 47 U.S.C. § 542(c).

Commission to prescribe regulations to ensure reasonable rates for the basic service tier. It listed a number of factors that the Commission must take into account, including: [18]

> (v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;
>
> (vi) any amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise.

If Congress had intended that the amounts required to satisfy franchise requirements be subject to, and included in, the five percent franchise fee cap, Congress's direction that the Commission consider these as separate factors makes no sense. In fact, the *Second FNPRM*'s interpretation would lead to the absurd result of Congress directing the Commission to double count the amounts required to satisfy franchise requirements; once as part of the franchise fee (47 U.S.C. § 543(b)(2)(v)), and again, separately, on their own (47 U.S.C. § 543(b)(2)(vi)).

Like the Act itself, the cable television regulations promulgated by the Commission under the Act consistently recognize the distinction between franchise fees on the one hand, and the costs of franchise requirements on the other. In defining "external costs" for the purposes of adjusting rates, the Commission lists "[f]ranchise fees" and the "[c]osts of complying with franchise requirements, including costs of providing public, educational, and governmental access channels as required by the franchising authority" as separate "categories."[19] In its regulation on the advertising of cable rates, the Commission allows cable operators to advertise a

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[18] 47 U.S.C. § 543(b)(2).

[19] 47 C.F.R. § 76.922(f).

range of rates where their systems "cover multiple franchise areas having differing franchise fees or *other franchise costs*."[20] And as instructed by Congress,[21] the Commission's cable rate regulations separately specify what costs are included as franchise requirement costs.[22] These may include "cost increases required by the franchising authority" for, among other things, the "[c]ost of providing PEG access channels," and the "[c]ost of PEG access programming," the "[c]osts of institutional networks and the provision of video services, voice transmissions and data transmissions to or from governmental institutions and educational institutions, including private schools, to the extent such services are required by the franchise agreement."[23] These regulations demonstrate the longstanding, common understanding that the costs of franchise requirements are not included as part of franchise fees.

Finally, the *Second FNPRM* correctly notes (¶ 21) that the cost of build-out franchise requirements should not count toward the five percent franchise fee cap. Build-out franchise requirements, just like PEG and I-Net franchise requirements, are expressly provided for under the Cable Act.[24] But that leads to the opposite conclusion from the one the *Second FNPRM* reaches: PEG and I-Net requirements, just like build-out requirements, do not count toward the five percent fee cap.

The *Second FNPRM* does not even recognize this clear inconsistency in its position. It instead makes up its own new distinction, stating (¶ 21) that build-out requirements warrant

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[20] 47 C.F.R. § 76.946 (emphasis added).

[21] 47 U.S.C. § 543(b)(4) (directing the Commission to include in its regulations "standards to identify costs attributable to satisfying franchise requirements to support public, educational, and governmental channels or the use of such channels or any other services required under the franchise").

[22] 47 C.F.R. § 76.925.

[23] 47 C.F.R. § 76.925(a)(1), (2), (4).

[24] 47 U.S.C. § 541(a)(3).

distinct treatment because they "involve the construction of facilities that are not specifically for the use or benefit of the LFA or any other entity designated by the LFA, but rather are part of the provision of cable service in the franchise area and the facilities ultimately may result in profit for the cable operator." But this distinction is untethered from the text and structure of the Cable Act, apparently resting on nothing more than the Commission's subjective assessment that franchise build-out requirements are good policy while PEG and I-Net franchise requirements are not. But the Act does not empower the FCC to substitute its views of how best to meet local cable-related community needs and interests for those of LFAs. Under the statute, those cable-related, nonmonetary franchise requirements authorized by the Cable Act—such as build-out requirements, PEG and I-Net requirements—cannot be subject to the five percent franchise fee cap.

In any event, the test suggested in the *Second FNPRM* would be satisfied equally by PEG and I-Net requirements as by build-out requirements. The *Second FNPRM* implies that PEG and I-Net requirements benefit only the LFA or certain entities designated by LFAs. But that is not true. The Cable Act recognizes the broader public interests that PEG access serve. Not only do PEG channels "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," but they also "contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work."[25] I-Nets likewise benefit the public at large by supporting critical government institutions that are responsible for public safety, education, and health. PEG and I-Net requirements serve the public interest just as

[25] H.R. Rep. No. 98-934, at 30.

build-out requirements do. The Cable Act draws no distinction among them in terms of their worthiness. The Commission therefore cannot invent such distinctions.

C. In the event that the Commission nevertheless concludes that the cost of franchise requirements count toward the franchise fee cap, the proper way to value these cable-related, nonmonetary franchise requirements is their actual, incremental cost to the operators, not their fair market value.

The *Second FNPRM* (¶ 24) proposes to value the cost of cable-related, in-kind contributions at their fair market value for purposes of counting them toward the five percent franchise fee cap. It seeks comment on this proposal and, alternatively, whether cable-related, in-kind contributions should be valued at the cost to the cable operator. For the reasons discussed above, cable-related, nonmonetary franchise requirements authorized under the Cable Act should not count toward the franchise fee cap at all. But, if the Commission were (improperly) to conclude otherwise, these franchise requirements should be valued at no more than their actual, incremental cost to the cable operator, not their fair market value.

To the extent cable-related franchise requirements can be considered a "tax, fee, or assessment" and therefore fall under the franchise fee cap, the amount the cable operator can be deemed to be "taxed" or "assessed" is the actual cost of satisfying such requirements, not their fair market value. Otherwise, cable operators and their shareholders would receive a windfall, at the public's expense, if they were able to offset their franchise fee payments by amounts greater than their actual costs of complying with nonmonetary franchise requirements. In addition, the use of fair market value would be inconsistent with other provisions of the Cable Act. Cable operators are allowed to itemize on subscribers' bills the costs of requirements to support the use of PEG channels, but Congress explained that "[a] cable operator [may] include in such itemized costs only direct and verifiable costs. . . . [A] cable operator shall not include in the [amount] itemized [to subscribers as the] cost[s] of providing PEG channels the value of such channels if they were used for commercial purposes."[26] Since cable operators must use actual costs when itemizing these costs to subscribers, they should likewise be required to do so if the Commission (improperly) allows them to offset these costs against franchise fees.

Moreover, the *Second FPRM*'s purported policy justification for subjecting cable-related, nonmonetary franchise requirements to the franchise fee cap—to encourage cable operators to invest in new services and facilities[27]—would support the use of actual costs, not fair market value. To the extent that cable-related, nonmonetary franchise requirements deter additional investment, it is because those requirements cost the operator an amount of money that otherwise could be used elsewhere. That amount is the actual cost to the cable operator. Thus, actual costs are the most that should be used to determine the value of these cable-related, nonmonetary franchise requirements for the purposes of the franchise fee.

Additionally, the *Second FNPRM* notes (¶ 19 n.93) that "capital costs which are required by the franchise to be incurred by the cable operator for [PEG] access facilities" are excluded from the definition of franchise fee.[28] It seeks (¶ 19 n.95) comment on treating the costs of studio equipment as capital costs for the purpose of this exemption from the franchise fee cap. The costs of acquiring studio equipment clearly are capital costs. Studio equipment has a useful life of several years, and the cost of acquiring such equipment is capitalized. And these costs are equally clearly for PEG access facilities. The definition of "public, educational, or governmental access facilities" includes "facilities *and equipment* for the use of [PEG] channel capacity."[29] Congress further clarified the term PEG access facilities in H.R. Rep. 98-934, stating that it

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[26] H.R. Rep. No. 102-628, at 86 (1992).

[27] *See Second FNPRM*, ¶¶ 1, 15, 23.

[28] 47 U.S.C. § 542(g)(2)(C).

[29] 47 U.S.C. § 522(16) (emphasis added).

refers to "channel capacity (including any channel or portion of any channel) designated for public, educational, or governmental use, as well as facilities *and equipment* for the use of such channel capacity. *This may include vans, studios, cameras, or other equipment relating to the use of public, educational, or governmental channel capacity*."[30]

The *Second FNPRM*'s suggestion (¶ 19 n.95) that "most PEG facilities are already constructed" is doubly wrong. First, it improperly assumes that PEG capital facilities and equipment may only be constructed and not acquired. And second, it assumes that, unlike any other business or operation, PEG outlets have no need to periodically make new capital investments in facilities and equipment.

Finally, if the Commission were to conclude (improperly) that cable-related, in-kind obligations are subject to the five percent franchise fee cap, it must also ensure that cable operators are not allowed to double-recover those costs. The costs of all of these franchise requirements have already been recovered, and continue to be recovered, through cable operators' rates to subscribers. As discussed above, the Commission's rate regulation rules allow operators to recover those costs over and above the franchise fee.[31] And in the case of rate-deregulated cable operators, they are free to set their rates to recover those costs, and unless they are economically irrational, they no doubt do so. Allowing cable operators to both offset the costs of franchise requirements against the franchise fee *and* recover these same costs from subscribers in their retail rates would result in an unwarranted windfall to cable operators' shareholders at the expense of local governments and their taxpaying residents.

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[30] H.R. Rep. No. 98-934, at 45 (emphasis added).

[31] *See* 47 U.S.C. § 542(c)(2) (allowing cable operators to identify as a separate line item on subscribers' bills "[t]he amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels").

III. THE *SECOND FNPRM*'S "MIXED-USE" PROPOSAL IS AMBIGUOUS AND IMPROPER.

The *Second FNPRM*'s discussion of its proposed revisions to the "mixed-use" rule is ambiguous. At one point (¶ 1), it states its tentative conclusion as "prohibiting LFAs from *using their video franchising authority* to regulate the provision of most non-cable services, such as broadband Internet access service, offered over a cable system by an incumbent cable operator." *Accord* ¶¶ 7, *9*, *12* (emphasis added). At other points, the *Second FNPRM* is less clear. To the extent the *Second FNPRM* is proposing that its revised "mixed-use" ruling applies only to local governments' Title VI cable franchising authority but not to local governments' other police power, right-of-way compensation and management authority, or taxing authority, then it is a little less troubling, although still inaccurate.

If, however, the *Second FNPRM*'s "mixed-use" proposal is intended to intrude on local governments' non-Title VI authority, then it is wrong and should not be adopted. The reasons are set forth in prior filings in this docket, which we incorporate here by reference.[32] For the same reasons, the Commission should reject the arguments of NCTA set forth in paragraph 31 and notes 146–152 of the *Second FNPRM.*

IV. CONCLUSION

The Commission should abandon the *Second FNPRM*'s proposal to treat cable-related nonmonetary franchise requirements as a franchise fee. It also should abandon its proposal to modify and expand the "mixed-use" rule.

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[32] *See, e.g.*, *Ex Parte* Letter from Tillman L. Lay, Counsel to the City of Eugene, Oregon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311, at 2-4 and Exhibit A (filed Sept. 19, 2018).

Respectfully submitted,

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