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 OF THE STATE OF HAWAII

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SUMMARY

The State of Hawaii (the "State" or "Hawaii") strongly opposes the Federal Communication Commission's (the "Commission") Second Further Notice of Proposed Rulemaking ("*Second FNPRM*") on the Commission's regulation of the local cable television franchising process. The *Second FNPRM*'s tentative conclusion that cable-related in-kind contributions constitute franchise fees would undermine legislative intent and upset local community reliance interests that have developed over the more than three decades since the Cable Communications Policy Act of 1984 (the "Act" or "Cable Act") was passed by Congress. The *Second FNPRM*'s additional proposal that any new rules be applied to state-level franchising authorities would similarly undercut the federalist principles codified in the Act.

The Commission should reject the *Second FNPRM*'s tentative conclusion that cable-related in-kind contributions—including most costs associated with public, educational, and governmental ("PEG") access and institutional networks ("INET")—are franchise fees for five independent reasons. *First*, this proposal cannot be squared with the clear legislative history of the Act, which explicitly states that cable-related in-kind contributions are not franchise fees. Regardless of the Sixth Circuit's holding that the term franchise fee *may* include non-monetary exactions, the congressional record makes clear that the term does not include *cable-related* in-kind contributions.

Second, this proposal would ignore one of the Cable Act's explicit goals of providing cable access to all Americans, regardless of their socio-economic status. The Cable Act authorizes state and local franchising authorities to require cable operators to provide system channel capacity for PEG access and INET capacity as a condition of franchise approval. In direct response to this congressional mandate, Hawaii has prioritized access to PEG channels,

and government agencies rely on INET capacity to extend educational, community and social services across its island communities. If the *Second FNPRM*'s tentative conclusion is adopted, these important services will be severely limited, if not eliminated entirely.

Third, the proposal gives arbitrary and unchecked discretion to cable operators to determine the "fair market value" of various cable-related in-kind contributions. Because the calculation of a given contribution's "fair market value" will inevitably be a point of disagreement between franchisees and franchising authorities, this proposal will impose substantial litigation costs on local and state franchising authorities, and by extension, the communities they serve.

Fourth, the proposal sets forth a definition of "contribution" and applies it in an inconsistent and arbitrary way. The *Second FNPRM* defines contribution as any franchise obligation that is "specifically for the use or benefit of the LFA or an entity designated the LFA."[1] But under this definition of "contribution," PEG- and INET-related costs should not be included. PEG programming exclusively serves the public, while the INET is primarily used by State and local government agencies (including for social service and public safety purposes) and the State's educational institutions, to the ultimate benefit of Hawaii's residents, and not specifically for the use and benefit of the State franchising authority. The *Second FNPRM*'s inconsistent application of the definition of "contribution" is arbitrary, and the Commission should abandon it.

Fifth, the proposal provides no evidentiary basis for concluding that franchising authorities—particularly those at the state-level—have abused their authority to impose cable-related in-kind contributions as conditions for franchise approval. On the contrary, more than

[1] *Second FNPRM* ¶ 21.

three decades of state regulatory history makes clear that state franchising authorities have not engaged in unreasonable rent-seeking.

For all of these reasons, Hawaii urges the Commission to reject the *Second FNPRM*'s tentative conclusion that cable-related in-kind contributions are franchise fees.

The State also opposes the *Second FNPRM*'s proposal that the rules adopted in this proceeding should apply to state-level franchising authorities. Congress expressly assigned to state governments the authority to develop and enforce PEG access requirements in their franchise agreements in order to benefit community interests, and the Commission should not upset this federalist structure, especially in the absence of any compelling reason to do so. Hawaii accordingly urges the Commission to reject the *Second FNPRM*'s attempt to further federalize the state franchising process.

TABLE OF CONTENTS

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THE STATE OF HAWAII

The State of Hawaii (the "State" or "Hawaii"),[2] by its attorneys and pursuant to Section 1.415 of the Federal Communications Commission's ("FCC" or "Commission") rules, 47 C.F.R. § 1.415, hereby submits the following comments in response to the Second Further Notice of Proposed Rulemaking ("*Second FNPRM*") on the Commission's regulation of the local cable television franchising process. For the reasons discussed herein, the State strongly opposes the tentative conclusion that cable-related in-kind contributions are franchise fees, and it urges the Commission to reject the proposal that the rules adopted in this proceeding apply to state-level franchising authorities.

The Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992 (the "Act" or the "Cable Act"), ratified local and state governmental authority to require cable operators to provide system channel capacity for public, educational, and governmental ("PEG") access as a condition for franchise approval.[3] For more than three decades since, Hawaii has prioritized access to PEG channels, and its current

[2] These Comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs ("DCCA"). In Hawaii, the cable franchising process is managed by the DCCA, rather than by a local or regional governmental body.

[3] *See* 47 U.S.C. § 531(b).

system is composed of critically important PEG channels and facilities that serve the needs of more than 1.4 million people in the State. Through its franchise agreements with cable operators, Hawaii has also expanded its on-island and statewide institutional network ("INET") in order to maximize government and educational services to insular communities across its island chain. Residents of Hawaii have come to rely on this PEG programming and INET interconnectivity to provide them with critical information and to allow them to participate more fully in their communities.

The *Second FNPRM*'s tentative conclusion that cable-related in-kind contributions—including most PEG- and INET-related costs[4]—are franchise fees is fatally flawed for five independent reasons. *First*, this tentative conclusion undermines Congress's clear intent to exclude cable-related in-kind costs from the five percent franchise fee cap. *Second*, this conclusion also threatens to undermine the Cable Act's goal of providing PEG access and INET capacity to serve the needs of all American communities. *Third*, the proposal gives cable operators unchecked discretion to determine the "fair market value"[5] of various cable-related in-kind contributions and to deduct them from franchise fees. *Fourth*, the *Second FNPRM* applies an inconsistent definition of "contribution" and thus would not survive arbitrary and capricious review. *Fifth*, the proposal lacks a sufficient evidentiary basis to support the conclusion that local franchising authorities ("LFAs") or state equivalents have engaged in abusive practices with respect to imposing cable-related in-kind contributions as conditions for franchise approval.

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[4] The *Second FNPRM* tentatively concludes that PEG *capital* costs and INET build-out obligations are not cable-related, in-kind contributions. *See Second FNPRM* ¶¶ 19, 21. Hawaii agrees with this conclusion, but—for the reasons discussed herein—disagrees that other PEG- and INET-related costs imposed on cable operators as conditions for franchise approval qualify as franchise fees.

[5] The *Second FNPRM* proposes that cable-related in-kind contributions be valued "at their fair market value" for purposes of the franchise fee cap. *Id.* ¶ 24.

The State also opposes the proposal that the rules adopted in this proceeding be applied to state-level franchising authorities because doing so would violate important principles of federalism that are foundational to the Cable Act and our constitutional system.

I. THE LEGISLATIVE HISTORY OF THE ACT MAKES CLEAR THAT CABLE-RELATED IN-KIND CONTRIBUTIONS ARE NOT FRANCHISE FEES

The Commission should acknowledge that the *Second FNPRM* is incorrect in tentatively concluding that there is no legislative basis for distinguishing between non-cable-related in-kind contributions and cable-related in-kind contributions for the purpose of applying the five percent franchise fee cap.[6] In *Montgomery County v. Federal Communications Commission*,[7] the Sixth Circuit held that, while the term "franchise fee" *can* include noncash exactions, it does not necessarily include every one of them.[8] And the legislative history of the Act confirms that, whatever noncash exactions the term "franchise fee" may include, the term does not include *cable-related* in-kind contributions.[9]

The *Second FNPRM* summarily concludes that the only statutory exception for cable-related in-kind contributions is the "narrow" exclusion in Subsection 622(g)(2)(C), which covers PEG capital costs.[10] But the legislative history of Subsection 622(g)(2)(C) explicitly contradicts the *Second FNPRM*'s narrow reading of this statutory exclusion. In fact, the very same House

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[6] *Second FNPRM* ¶ 17 ("We 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.").

[7] 863 F.3d 485 (6th Cir. 2017).

[8] *Id.* at 491.

[9] *See* H.R. Rep. No. 98-934, 65, 1984 U.S.C.C.A.N. 4655 ("*House Report*").

[10] *Second FNPRM* ¶ 19.

Report that the *Second FNPRM* cites in support of its tentative conclusion explicitly states that "Subsection 622(g)(2)(c) . . . defines as a franchise fee only monetary payments made by the cable operator and *does not* include as a 'fee' any franchise requirements for the provision of services, facilities or equipment."[11] And this explicit legislative history makes logical sense: LFAs should not be required to choose between collecting a statutorily-authorized franchise fee and exercising their statutory right to require PEG access and INET capacity from franchisees. The *Second FNPRM*'s proposal in this regard is therefore contrary to congressional intent and the Commission should abandon it.

II. THE PROPOSAL WOULD THREATEN THE CABLE ACT'S GOAL OF PROVIDING ALL AMERICANS WITH ACCESS TO CABLE TECHNOLOGY THROUGH PEG ACCESS

By forcing state and local franchising authorities to choose between franchise fees and PEG access, the *Second FNPRM* undermines the goal of providing nondiscriminatory cable access to all Americans, which was a significant motivating factor behind the Cable Act.[12] To further the goal of providing "the widest possible diversity of information sources and services to the public,"[13] the Cable Act codified state and local government authority to require cable operators to provide system channel capacity for PEG access as a condition for franchise

[11] *House Report* at 4702 (*emphasis added*); *See, e.g.*, *Second FNPRM* ¶ 20 (citing the *House Report* for the conclusion that "treating all cable-related, in-kind contributions as 'franchise fees,' unless expressly excluded by the statute, would best effectuate the statutory purpose").

[12] *See House Report* at 18-20 (listing as goals of the Cable Act "providing all Americans with access to a technology that will become an increasingly important part of our national communications network" and "assur[ing] that cable systems are responsive to the needs and interests of the local communities they service.").

[13] 47 U.S.C. § 521(4).

approval.[14] In so doing, the Act affirmed the need for PEG access to "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."[15]

In response to this congressional policy, Hawaii has prioritized PEG access as a means of ensuring that cable subscribers receive informational, cultural and educational programming that reflect the communities in which they reside. The four PEG access organizations throughout the State—'Ōlelo Community Media (on Oahu), Nā Leo 'O Hawai'i, Inc. (on Hawaii Island), Ho'ike: Kaua'i Community Television, Inc. (on Kauai), and Akakū: Maui Community Television (in Maui County, consisting of the tri-islands of Maui, Molokai and Lanai)—have been providing PEG access for more than twenty years and have a long-established place as an important voice in the communities that they serve.[16]

Public access programming is especially important in Hawaii because the State enjoys an extremely diverse population of both indigenous and transplanted residents from many different countries and backgrounds. Public access programming provides the ability to share and explore the different viewpoints and cultures that are represented locally, helping to achieve a high level of understanding and empathy across heterogeneous communities on each island, and is considered by users to be the embodiment of the right to free speech under the First Amendment.

Hawaii also maintains an extensive INET, which uses fiber optics and submarine cables to connect State and county government offices and accredited public learning institutions throughout all of the major islands. Using submarine cable, government offices and selected

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[14] *Id.* § 531(b).

[15] *House Report* at 30.

[16] *See In re Oceanic Time Warner Cable LLC*, Decision and Order No. 372, Cable Television Division of the Dep't of Commerce & Consumer Affairs, at 3 (Mar. 23, 2018).

educational institutions on all the major islands—including Hawaii, Kauai, Maui, Molokai, Lanai, and Oahu—are interconnected in a seamless fiber infrastructure. The level of connectivity provided by the State's INET matches, and in most cases exceeds, the capacity available from competitive telecommunications carriers in Hawaii.

The combination of intra-island and inter-island submarine interconnections delivers irreplaceable, mission-critical telecommunications capabilities and benefits. The State's INET, which is the backbone of the State's communications infrastructure, enables statewide videoconferencing and collaboration, which results in dramatic increases in productivity and efficiency, and enables the State and county government agencies to provide services to the general public over great distances. The INET also provides connections to the global Internet and high-performance research and education networks such as Internet2.

Statewide distance learning initiatives also rely on the State's INET to interconnect educational facilities on each of the major islands, permitting faculty and students at remote campuses to have access to all of the State instructional resources. The use of INET for educational purposes also assists the State in overcoming the shortage of expert teaching staff in remote and rural areas.

Hawaii is home to many low income and minority residents, with 100 percent of the students at some public schools qualifying of free or reduced lunch under the National School Lunch Program. Many of these residents reside in geographically insular communities and thus the existence of INET connections and PEG programming is vital to ensure nondiscriminatory access to electronic media throughout the State. For example, residents of Hawaii rely on PEG channels for critical safety information, like emergency alerts and directives.[17] In addition, these

[17] *See id.*

channels are necessary for distance learning provided by Hawaii's lower and higher educational institutions. These channels also facilitate civic participation through government cablecasts, which are particularly important in Hawaii, where the large bodies of water—up to 75 miles in distance[18]—separating its island communities prevent the public from attending public hearings and other government functions as the only reliable commercial form of travel between the islands is by air.[19]

The actual cost for the carriage of these channels by cable franchisees in Hawaii is arguably minimal because these channels represent just a few of the literally hundreds of programming channels that each cable franchisee makes available to its subscribers in Hawaii. Nevertheless, any attempt to quantify the monetary value of these channels in terms of the cost to purchase channel capacity in a commercial transaction would almost certainly result in prices that would greatly exceed the five percent franchise fee limit and would be prohibitive for the State, its public access organizations, or its educational institutions to pay through other means. Therefore, the *Second FNPRM*'s proposal that PEG- and INET-related costs count toward the five percent franchise fee cap would severely limit—if not eliminate entirely—Hawaii's ability to provide PEG access to these communities.

Treating PEG channel capacity as a franchise fee would also result in an impossible choice for the State because the majority of the franchise fees that are currently collected are allocated to the PEG access organizations for their operating expenses. The *Second FNPRM*'s tentative conclusion, if adopted, would accordingly force the State to choose between using

[18] *See* Hawaii Broadband Strategic Plan, Dep't of Commerce & Consumer Affairs, at 71 (Dec. 2012).

[19] *See In re Oceanic Time Warner Cable LLC*, Decision and Order No. 372, Cable Television Division of the Dep't of Commerce & Consumer Affairs, at 3 (Mar. 23, 2018).

franchise fees to secure channel capacity for PEG programming, funding the production of the PEG programming that is carried on those channels, or supporting key government programs and other important services for the public. Having to choose between these would be devastating to the important public service capabilities of PEG programming and other government supported programs in Hawaii.

Similarly, if the State were forced to purchase INET capacity at retail rates, the costs would greatly exceed what the State would be able to pay. The *Second FNPRM* proposal therefore creates a lose-lose situation for Hawaii and its more than 1.4 million residents who rely on PEG programming and INET capacity for important community services. The Commission should accordingly abandon the *Second FNPRM*'s proposal because it would render impossible the Act's explicit statutory allowance for PEG access and INET capacity.

III. THE PROPOSAL GIVES UNCHECKED DISCRETION TO CABLE OPERATORS TO DETERMINE THE "FAIR MARKET VALUE" OF VARIOUS CABLE-RELATED, IN-KIND CONTRIBUTIONS

The *Second FNPRM*'s proposal would impose an additional financial burden on local and state franchising authorities—and, by extension, the communities they serve—because it would almost certainly create nationwide litigation regarding the value of various cable-related in-kind contributions. The *Second FNPRM* proposes that cable-related in-kind contributions be valued "at their fair market value" for purposes of the franchise fee cap.[20] But the "fair market value" of PEG services and INET capacity would be impossible to discern and would give cable operators broad discretion to make arbitrary deductions from franchise fees. The "fair market value" of various cable-related in-kind contributions thus would likely be a subject of costly litigation between cable operators and franchising authorities for years to come. Not only would this

[20] *Second FNPRM* ¶ 24.

litigation impose additional costs on franchising authorities and the public, but it would also decrease the profitability of cable operators who will likewise be required to expend significant resources defending their calculation of "fair market value."

For example, the vast majority of PEG and INET capacity in Hawaii is bundled within the fiber network that cable operators already use for the provision of "for-profit" cable television and related services. In those cases where an extension of Hawaii's INET has necessitated new construction, requests for such are limited to amounts agreed to between the State and the franchisee. In addition, when making such requests the State is contractually required to be cognizant of the franchisee's scheduling, manpower, resource limitations, and the costs of connections compared to the public benefits. For many of the requested new INET connections, the State reimburses the cable operators based on the franchisee's actual costs for construction. Any conversion of these actual costs to "fair market value," however, would make such new connections prohibitively expensive.

Further, the existing INET capacity that has long been bundled within the network of each cable operator. Thus, while the provision of this capacity is of negligible marginal cost to each cable operator, it would greatly exceed what the State could pay if assessed at fair market value. Given that the State has already paid for a great deal of the existing INET infrastructure based on reimbursement of actual costs, determining the deferential between "actual costs" and "fair market value" for the connections at this late date would be impossible and would likely lead to costly litigation. Such a process would also be inequitable to the State's consumers given that the cable operator also benefited from the construction of INET connections by, at minimum, extending the reach of the cable operator's infrastructure to additional locations throughout the State. The Commission should accordingly decline to adopt the *Second FNPRM*'s grant of unchecked discretion of cable operators.

IV. THE *SECOND FNPRM*'S OWN DEFINITION OF "CONTRIBUTION" LACKS INTERNAL CONSISTENCY

The *Second FNPRM* applies its own definition of "contribution" in an inconsistent and arbitrary manner, and the Commission should refrain from relying on it. The *Second FNPRM* tentatively concludes that cable system build-out obligations are not contributions to LFAs—and thus are excluded from the five percent franchise fee cap—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 . . . ."[21] Based on this flawed logic, the *Second FNPRM* further suggests that other franchise obligations "that are not specifically for the use or benefit of the LFA or an entity designated the LFA" should not be considered contributions to an LFA.[22] Thus, under the *Second FNPRM*'s own definition, a "contribution" is any franchise obligation that is "specifically for the use or benefit of the LFA or an entity designated the LFA."[23] No PEG- or INET-related costs, however, satisfy this definition.

PEG programming does not inure to the benefit of LFAs or state regulatory authorities; it directly benefits consumers by ensuring access to vital governmental information and community content and services. Similarly, franchise agreements requiring INET capacity do

[21] *Id.* ¶ 21. The *Second FNPRM* then requests comment on other kinds of requirements that "are not specifically for the use or benefit of the LFA or an entity designated by the LFA and therefore should not be considered contributions to an LFA." *Id.*

[22] *Id.*

[23] *Id.*

not provide appreciable benefits to LFAs. Instead, they help to extend the reach of government services across large and often insular geographic areas and are used to serve and benefit Hawaii's citizens. The INET operates as the primary communications infrastructure for all State and county government agencies in Hawaii. In short, all or most of the State and local governmental agencies use the INET is some form or manner on a daily basis including, but not limited to, the University of Hawaii, the Hawaii State legislature, the State Judiciary, the social service agencies, and local police and fire stations. Although DCCA, as a State agency, is on the INET, it is not intended to specifically or primarily benefit DCCA.

By the *Second FNPRM*'s very own definition, then, no PEG- or INET-related costs should qualify as a contribution for the purposes of calculating the five percent cap on franchise fees. The *Second FNPRM* is therefore incorrect in suggesting that PEG- and INET-related costs qualify as "contributions" that are subject to the franchise fee cap.[24] Any such conclusion by the Commission would lack internal consistency and violate the rule that '[a]n agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.'"[25] The Commission should therefore abandon the *Second FNPRM*'s inconsistent definition of "contribution," and it should accordingly exclude all PEG- and INET-related costs from the statutory franchise fee cap.

[24] *See id.*

[25] *Kreis v. Sec'y of Air Force*, 406 F.3d 684, 687 (D.C. Cir. 2005) (quoting *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996)).

V. THERE IS NO EVIDENTIARY BASIS TO SUPPORT THE CONCLUSION THAT FRANCHISING AUTHORITIES, PARTICULARLY STATEWIDE AUTHORITIES, ARE ABUSING THEIR RIGHT TO REQUEST CABLE-RELATED IN-KIND CONTRIBUTIONS

The *Second FNPRM*'s tentative conclusion that cable-related in-kind contributions must count as franchise fees is a solution searching for a problem. The *Second FNPRM* expresses the concern that, "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 service and facilities for LFAs, in addition to a five percent franchise fee."[26] The *Second FNPRM*, however, has provided no factual basis whatsoever to support its assumption that unreasonable rent-seeking has occurred under the decades-old regulatory scheme, particularly by franchising authorities that operate state-wide. The *Second FNPRM* also fails to support a conclusion that, but for the Commission's action in this proceeding, such rent-seeking is likely to occur in the future.

On the contrary, the fear of such abusive practices by LFAs is unsupported by more than three decades of state and local regulatory history, and thus the *Second FNPRM*'s "assumption based on no evidence would rank as arbitrary and capricious under the Administrative Procedure Act."[27] In short, the *Second FNPRM* imagines a problem where none exists, and then attempts to expand the Commission's federal regulatory authority to fix it, but the Commission should reject this invitation to upset a decades-old regulatory framework without any evidentiary basis for doing so.

[26] *Second FNPRM* ¶ 17. The *Second FNPRM* further states that, if cable-related, in-kind contributions are excluded from the statutory cap on franchise fees, franchising authorities would be permitted to "make an end run around the statutory cap" by requiring cable operators to pay unnecessary and exorbitant cable-related, in-kind contributions. *Id.* ¶ 20.

[27] *Am. Trading Transp. Co. v. United States*, 791 F.2d 942, 950 (D.C. Cir. 1986).

In Hawaii, DCCA, as the statewide franchise authority, has served since 1971 to minimize regulatory costs for cable franchisees, while rationalizing the provision of important services to consumers on a statewide basis. A statewide franchise authority allows cable operators serving multiple cities and counties to work with just one LFA in each state, reducing the cable operator's administrative costs and also reducing the franchise fees that are needed to cover the administrative costs of multiple LFAs. In Hawaii, a franchise fee of less than one percent of gross revenues from the provision of cable television services is used to cover the administrative costs of DCCA's Cable Television Division.[28] Most of the remainder of the cable franchise fee is made available to the PEG access organizations on each major island for their operational costs. Portions of the franchise fee are also paid to the Hawaii Public Television Foundation, the ʻUluʻulu: Henry Kuʻualoha Giugni Moving Image Archive at the University of Hawaii at West Oahu, and the promotion of Hawaiian language in media by the non-profit organization, Makauila, Inc.[29]

Statewide franchise authorities are also able to prioritize and consolidate the various channel capacity requests of PEG access organizations and other relevant interests groups. Thus, the number of public access channels in the most populated island of Oahu remains at just four channels, while the number of public access channels in Maui County and on the big island of Hawaii remains at three, and the number on Kauai remains at just two channels.

The use of a statewide franchising authority has also facilitated the creation of statewide programming channels for educational and government purposes in Hawaii. Thus, the

[28] *See, e.g.*, *In re Oceanic Time Warner Cable LLC*, Decision and Order No. 364, Cable Television Division of the Dep't of Commerce and Consumer Affairs, at 1 (Jan. 5, 2015) (requiring Oceanic Time Warner Cable LLC to pay .64 percent in franchise fees to the DCCA).

[29] *See, e.g.*, *In re Oceanic Time Warner Cable LLC*, Decision and Order No. 369, Cable Television Division of the Dep't of Commerce and Consumer Affairs, at 2 (Jan. 3, 2017).

University of Hawaii programs three statewide educational access channels, and a fourth statewide educational access channel is programmed by the Hawaii Department of Education along with the Hawaii Association of Independent Schools.[30] A statewide government access channel is available for use by the State legislature and other State agencies. In addition, a statewide video-on-demand channel exists for use by county governments and State agencies.[31]

All of these channels provide critically important educational and informative programming across the multiple islands and remote geographies that encompass the State. These channels enable residents to monitor and participate in the State's governance and its development of public policies. These programming tools are therefore necessary for the preservation of the democratic process in Hawaii.

DCCA's Cable Television Division also works closely with each cable franchisee to coordinate the maintenance and managed growth of the State's INET to minimize the costs for cable franchisees, while facilitating growth where appropriate. For example, each cable franchisee is required to submit a Technology Upgrade Plan to DCCA, which details the franchisee's plans for extending the reach of its cable system and introducing new technologies. Using these and other resources, DCCA works with franchisees to identify opportunities for targeted extensions of INET capabilities that match each franchisee's internal build out plans.

The Commission should therefore conclude that no need exists to restrict the provision of PEG access and INET channel capacity through cable franchise agreements. Franchising authorities, particularly those that operate state-wide, are not abusing their statutory authority to request channel and throughput capacity for such services, and the benefits that they provide to

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[30] *See, e.g.*, *In re Time Warner Entertainment Co., L.P.*, Decision and Order No. 346, Cable Division of the Dep't of Commerce and Consumer Affairs, at 19 (Jan. 14, 2010).

[31] *See, e.g.*, *id.* at 19.

local communities vastly exceed any incremental costs to cable network operators of making such services available for consumers.

VI. THE COMMISSION SHOULD NOT IMPOSE ITS RULES ON STATE-LEVEL FRANCHISE AUTHORITIES BECAUSE DOING SO WOULD VIOLATE THE PRINCIPLES OF FEDERALISM THAT UNDERGIRD THE CABLE ACT

Hawaii urges the Commission to refrain from applying the *Second FNPRM*'s proposals to state-level franchising authorities because doing so would undermine important principles of federalism. In Hawaii, State legislation establishing a statewide franchising authority was adopted in 1970 and implemented promptly. Thereafter, Congress expressly assigned to state governments the authority to develop and enforce PEG access requirements in their franchise agreements in order to benefit community interests.[32] In direct response to this congressional command, Hawaii law requires that cable television operators set aside channels for PEG use.[33] An increasing number of states have joined Hawaii in creating statewide franchising authorities because of the efficiencies that state-level regulation provides.[34] The Commission should continue to refrain from imposing its rules on statewide franchise authorities in order to encourage the continuation of this trend.

Under the federalist scheme of the Act, different jurisdictions can choose models that best suit their specific needs, which reduces inefficiencies nationwide. Because states are intimately aware of their residents' needs, and are conservative administrators of their own resources, state-

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[32] *See* 47 U.S.C. § 531(b).

[33] *See, e.g.*, Haw. Rev. Stat. Ann. § 440G-10.

[34] Many states that have taken similar legislative action to authorize statewide cable franchises. *See, e.g.,* La. Stat. Ann. § 45:1361 (Louisiana); 220 Ill. Comp. Stat. Ann. 5/21-101 (Illinois); Ga. Code Ann. § 36-76-3 (Georgia); Iowa Code Ann. § 477A.1 (Iowa); Kan. Stat. Ann. § 12-2023 (Kansas); Tenn. Code Ann. § 7-59-307 (Tennessee); and Wis. Stat. Ann. § 66.0420 (Wisconsin).

level franchising authorities have successfully implemented efficient and reasonable franchising procedures since the 1970s. History shows that these state-level regulators have consistently struck the appropriate balance between the Cable Act's dual statutory goals of expediting market entry for competitive cable operators and ensuring PEG access for all Americans.[35] Hawaii therefore urges the Commission to reject the *Second FNPRM*'s quasi-legislative attempt to federalize the state franchising process.

VII. CONCLUSION

For all of the foregoing reasons, the State of Hawaii respectfully requests that the Commission decline to adopt the *Second FNPRM*'s tentative conclusion that cable-related, in-kind contributions are franchise fees for the purposes of the five percent statutory cap. The State further urges the Commission to abandon the *Second FNPRM*'s proposal that this conclusion be applied to state-level franchising authorities.

Respectfully submitted,

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[35] *See House Report* at 20 ("In adopting this legislation, the Committee has endeavored to create an environment in which cable will flourish, providing all Americans with access to a technology that will become an increasingly important part of our national communications network.").