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THE FREE STATE FOUNDATION

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Media Advisory

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FSF URGES FCC TO PREVENT LOCAL FRANCHISING AUTHORITIES FROM REGULATING AND EXTRACTING REVENUES FROM INFORMATION AND OTHER NON- CABLE SERVICES

Free State Foundation President Randolph May and Senior Fellow Seth Cooper submitted comments to the FCC in the agency's proposed rulemaking on Local Franchising Authorities (LFAs). FSF's comments focus on the Commission's authority for its proposed "mixed-use" network rules and also for its in-kind contribution rules, particularly as they relate to preventing abuses connected with the extractions of fees and revenues from non-cable broadband Internet services and other information services.

The complete set of Free State Foundation comments, with footnotes, is [here](#). Immediately below is the "**Introduction and Summary**" to the comments, without the footnotes.

Introduction and Summary

These reply comments are filed in response to the Commission's request for comments on its proposed rulemaking to prohibit local cable franchising authorities (LFAs) from regulating non-cable services offered by cable operators and from requiring in-kind exactions above the 5% franchise fee cap imposed by Congress. These reply comments focus on the Commission's authority for its proposed "mixed-use" network rules and also for its in-kind contribution rules, particularly as they are connected with broadband Internet access services and other information services. Also, these reply comments recommend the Commission apply its proposed rules to state-level franchising actions. Further, these reply comments rebut arguments made in comments opposed to the Commission's cable LFA proposal.

Some local governments have leveraged their cable franchising authority to regulate and impose additional costs on broadband Internet access services. The Commission's cable LFA proposal would prevent such overreach. In particular, its proposed mixed use network rules would prohibit local governments from abusing their cable franchising authority to regulate "information services" such as broadband Internet services. If adopted, LFAs would be expressly preempted "from requiring incumbent cable operators to obtain franchises to provide broadband Internet access service."

Additionally, the Commission's proposal would, subject to certain exceptions, limit in-kind payments from new entrants and cable incumbents in local markets by including such payments within the 5% statutory cap on franchise fees. The 5% cap is measured against a cable operator's gross revenues for the provision of cable services over a 12-month period. In adopting its proposal, the Commission should expressly affirm the provision of broadband Internet access and other information services by cable operators are not included in gross revenue figures by which the 5% cap is measured.

Under the Commission's proposal, the 5% cap would apply to in-kind contribution requirements regardless of whether they are cable related or non-cable related, thereby keeping LFAs from abusing and overextending their authority. Accepting an LFA's costly in-kind demands can result in significant barriers to broadband deployment in local markets. Adoption of the proposed in-kind contribution rules would promote entry and competitive neutrality in the video services market.

The Commission's worthy cable LFA proposal is backed by statutory authority under Title VI of the Communications Act, including Section 624(b)'s provision that LFAs "may not ... establish requirements for video programming or other information services." Also, Section 621(a)(1) provides "a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." In *Alliance for Community Media v. FCC* (2008), the Sixth Circuit concluded Section 201(b) of the Communications Act grants the Commission authority to issue rules interpreting Section 621(a)(1). Other circuit court decisions agree.

In addition to Title VI limits on LFA power, the Commission's cable LFA proposal is supported by federal preemptive authority. The Commission's proposal is consistent with the 2017 Restoring Internet Freedom Order's "conclu[sion] that regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements." The RIF Order recognized that broadband Internet access services are jurisdictionally interstate "information services" subject to federal deregulatory policy. Thus, the RIF Order expressly preempted any "economic" or "public utility-type" regulation of those services by state and local governments. Similarly, varied regulatory burdens on broadband Internet services by cable LFAs would conflict with the federal free market-oriented deregulatory policy regarding these services.

Importantly, the Commission should apply its proposal to franchising actions taken at the state level. This makes for consistent federal policy. Restrictions and burdens on broadband Internet services and other information services create harm and conflict with federal policy, and thereby harm, regardless of whether they are imposed at the state or local level. Further, according to structural federalism principles, the authority LFAs exercise is delegated by their respective states. It would create an unusual if not absurd result to allow state governments to evade restrictions imposed on their LFAs.

State level franchising laws intended to reduce regulation and spur competition may be less likely than LFA actions to impose restrictions or added costs on non-cable services. However, applying the Commission's proposal at the state level would preclude states from responding to restrictions on LFAs by directly exercising statewide authority over non-cable services similar to the way some states responded to the RIF Order by imposing restrictions similar to repealed Title II rules on broadband Internet services.

By keeping state and local regulators in check, the Commission can help ensure a market-oriented environment favorable to the deployment of next-generation broadband services. The ultimate beneficiaries of such an environment are the nation's consumers.

A PDF of the complete FSF comments, with footnotes, is [here](#).

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Randolph J. May, President of the Free State Foundation, is a former FCC Associate General Counsel and a former Chairman of the American Bar Association's Section of Administrative Law and Regulatory Practice. Mr. May is a past Public Member and a current Senior Fellow of the Administrative Conference of the United States, and a Fellow

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Mr. May is a nationally recognized expert in communications law, Internet law and policy, and administrative law and regulatory practice. He is the author of more than 200 scholarly articles and essays on communications law and policy, administrative law, and constitutional law. Most recently, Mr. May is the co-author, with FSF Senior Fellow Seth Cooper, of the recently released [A Reader on Net Neutrality and Restoring Internet Freedom](#) and [#CommActUpdate - A Communications Law Fit for the Digital Age](#) as well as [The Constitutional Foundations of Intellectual Property](#), and is the editor of the book [Communications Law and Policy in the Digital Age: The Next Five Years](#). He is the author of *A Call for a Radical New Communications Policy: Proposals for Free Market Reform*. And he is the editor of the book, *New Directions in Communications Policy* and co-editor of other two books on communications law and policy: *Net Neutrality or Net Neutering: Should Broadband Internet Services Be Regulated* and *Communications Deregulation and FCC Reform*.

Seth L. Cooper is a Senior Fellow at The Free State Foundation. He previously served as the Telecommunications and Information Technology Task Force Director at the American Legislative Exchange Council (ALEC), as a Washington State Supreme Court judicial clerk and as a state senate caucus staff counsel. He is an attorney, and he graduated from Seattle University School of Law with honors. Mr. Cooper's work has appeared in such publications as *CommLaw Conspectus*, the *Gonzaga Law Review*, the *San Jose Mercury News*, *Forbes.com*, the *Des Moines Register*, the *Baltimore Sun*, the *Washington Examiner*, the *Washington Times*, and *The Hill*.

The Free State Foundation's newest book, [A Reader on Net Neutrality and Restoring Internet Freedom](#), by Randolph May and Seth Cooper, is available from Amazon [here](#) in paperback for \$9.95 or for your Kindle [here](#) for \$2.99. And it is available [here](#) from Apple and other booksellers in various e-book formats for \$2.99 or less. Read more about the book [here](#).

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