



**Testimony of Angie Kronenberg
On behalf of INCOMPAS
Before The Joint Committee on Joint Committee on
Telecommunications, Utilities and Energy
SB 2200 Opposition**

December 14, 2021

Thank you Chair Barrett, Vice Chair Pacheco and members of the Committee. My name is Angie Kronenberg, and I am the Chief Advocate and General Counsel of INCOMPAS. INCOMPAS is the internet and competitive networks association—the preeminent national industry association advocating for streaming, internet content, and the deployment of new high-speed broadband networks. INCOMPAS represents competitive broadband companies that provide residential broadband internet access service, as well as other mass-market services, such as video programming and voice services in urban, suburban, and rural areas. We also represent companies that are providing business broadband and other communications services to schools, libraries, hospitals and clinics, and businesses of all sizes; transit and backbone providers that carry broadband and internet traffic; online streamers that offer video content over the internet to consumers; and satellite providers. You can find a list of our service provider members in Appendix A.

Since its inception in 1981, INCOMPAS has been a fierce advocate for a competitive communications marketplace and pro-competitive policies in the U.S., asserting that consumers and businesses will be better off and more investment and innovation will result. In particular, INCOMPAS advocates for laws and policies that will enable broadband deployment and competition for residential and business customers. This ensures that customers are allowed to use the competitive services and applications of their choice for their broadband provider and their online services.

INCOMPAS hereby submits to the committee this testimony in opposition to SB 2200. The proposed legislation is contrary to federal law, as well as public policy to promote fair competition. Further, it may harm the demand for alternative video choices for Massachusetts consumers and impede the deployment of high-speed broadband throughout the Commonwealth as it proposes to impose upon consumers a double taxation—once for their network operator, and again for their streaming service to use the network. Asking consumers to pay twice for the same thing is inequitable and unjust, and INCOMPAS urges the committee to reject SB 2200.

Franchise authorizations and the requisite franchise fees that apply are requested by cable providers so their physical networks may access and occupy the public rights-of-way. SB 2200's proposal to extend franchise fees to entities that are not accessing and occupying the public rights-of-way is inconsistent with federal law, and if passed, will face significant legal uncertainty.

The Communications Act of 1934, as amended, makes clear that franchises must be construed to

authorize a cable system over public rights-of-way and through easements,¹ and Section 624 limits the franchising authority as consistent with the Communications Act.² The FCC has determined that state and local franchising authorities do not have jurisdiction over non-cable services, and therefore franchise fees may not be charged for non-cable services.³ Moreover, Section 663(c), 47 U.S.C. § 556(c), preempts conflicting state law. Accordingly, the proposed imposition of franchise fees on streaming entertainment services is in conflict with Section 621 of the Communications Act which provides that franchises are only required for facilities of a cable service that will be occupying public rights-of-way or easements. Streaming services do not burden these limited public resources. Furthermore, streaming entertainment services do not meet the definition of cable service or cable system pursuant to the Communications Act which contemplates a closed one-way transmission system whose infrastructure occupies the public rights-of-way.⁴

INCOMPAS also is concerned the rationale for expanding cable franchise fees to streaming entertainment services is contrary to the policy reasons for such a fee. The franchise authorization is a right that has significant value to network operators for their infrastructure to be deployed and occupy the public rights-of-way. They may enter into and build their networks on public rights-of-way, occupying public space. Access to and occupancy of the rights-of-way imposes costs on localities for which the fee is intended to compensate. Streaming services, however, do not access or occupy public rights-of-way. There is no additional burden on state and local interests whether a consumer watches one video streaming service, or ten, or twenty such services. A plan to require fees to be paid by companies whose networks do not access or occupy public rights-of-way therefore is not only disconnected from the cost causation rationale for the franchise fee, but also inconsistent with the policy rationale for imposing a franchise fee on those networks that do access and occupy the public rights-of-way. It would be analogous to charging a franchise fee to local broadcast stations that deliver their programming via radio spectrum.

Some parties have argued it is not fair some companies pay a franchise fee for delivering video services, while others who offer a supposedly similar service do not pay. However, it is important to recognize that today the franchise fee is paid as part of the authorization for a provider's network to access and occupy the public rights-of-way. It is not fair to ask companies (and their customers) to pay a fee for an authorization they do not use. In fact, each company ultimately bears its own costs in the marketplace for access to and use of their own equipment and delivery of their service. For example, broadcasters must pay for their antenna and studios. Satellite providers must pay for satellites and earth stations, and streamers must cover the costs of transport service and content

¹ See 47 U.S.C. § 541(a)(2) provides that any franchise shall be construed to authorize construction “over public rights-of-way, and through easements, which is within the area to be served.....”

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³ *Id.* § 544 states that “any franchising authority may not regulate the services, facilities, and equipment except to the extent consistent with this title.”

⁴ See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, ¶¶ 98 & 121-22 (2007), *aff'd sub nom. Alliance for Community Media et al. v. FCC*, 529 F.3d 763 (6th Cir. 2008), cert. denied, 557 U.S. 904 (2009).

delivery networks. All providers also must pay for their own programming. Programming costs are dependent upon the number of viewers, whether the distributor creates any of their own content, and quality of the content. Imposing a franchise fee based solely on the rationale that streaming entertainment services should pay a cost because a certain type of provider (cable, in this case) must incur it for their different technology is illogical and inequitable.

It also is unfair to demand consumers pay franchise fees multiple times—once from their network provider whose infrastructure occupies the public rights-of-way, and again from the streamers who deliver their video over that same network. The various broadband network providers that occupy the public rights-of-way in order to allow consumers to receive video options over their broadband Internet connection already are paying the requisite franchise and/or permitting fees to state and local governments—whether it is a mobile broadband connection, a residential broadband connection, or a public access Wi-Fi connection. Consumers of pay internet access services reimburse their broadband provider on their monthly bill. Requiring them to pay these fees multiple times is unjust.

With the availability of broadband, consumers can now access all types of video online—video produced by broadcasters, cable programmers, Hollywood studios, independents studios, social media influencers, and amateurs. Yet, the legislation proposes to discriminate against certain types of streaming entertainment services by imposing a fee that other streaming video services would not incur.⁵ Moreover, the legislation also proposes that only some streaming services will owe new franchise fees (those with gross annual revenues of \$250,000), also unfairly skewing the marketplace by adding a cost on some streamers and not others.

Finally, the imposition of franchise fees on streaming video may impact the demand for such services. An additional five percent cost to consumers for each streaming entertainment service they subscribe to very well could discourage them from using the service, thereby deterring consumer use of broadband. Moreover, such deterrence may inadvertently hurt the business case for building broadband networks as it is the demand for video and other over-the-top services that is helping drive the business case for deploying broadband networks to all U.S. households⁶—a harm that cannot be easily rectified and in conflict with our nation’s goals to connect every household to broadband. Indeed, INCOMPAS’ competitive broadband providers that are serving residential consumers have found that the availability of streaming services has been a boon for their deployment plans. Video programming costs for small companies are much higher on a per-customer basis than what the large, incumbent cable operators pay for the same programming content. Thanks to streaming options, small competitors can now offer broadband-only service to consumers who can then access streaming services to the extent they want video. This allows the small operators to deploy higher-speed broadband and compete against incumbent cable operators

⁵ It appears that the definition of streaming entertainment service intends to exclude those services that are bundled with cable or mobile service. Thus, if a consumer obtains their streaming service as part of their mobile broadband service (e.g., T-Mobile with Hulu), then the new franchise fee would not apply. However, if the consumer uses their T-Mobile service to access Hulu and subscribes to it separately, then the new franchise fee potentially would apply. The arbitrariness of such an approach is unadvisable and will unfairly skew the marketplace against streamers independently offering their services to consumers separate from their broadband internet access service.

⁶ In Appendix B, INCOMPAS offers a chart from its Broadband campaign that shows how Internet content and services are driving the demand for new, faster broadband networks. Our campaign is focused on bringing high-speed, broadband internet access service to every consumer.

that are the dominant residential broadband internet access service providers in the U.S. (with about 70% of the residential broadband market). In turn, broadband competition is lowering prices for consumers, delivering higher speed broadband networks, and improving customer service. INCOMPAS urges the Massachusetts Legislature to refrain from deterring broadband use which is driving more broadband network deployment and competition.

Thank you for considering INCOMPAS' testimony in opposition to SB 2200. For all the reasons stated above, please reject SB 2200. Should you have any questions concerning the foregoing, please do not hesitate to contact me.

Appendix A
INCOMPAS Service Provider Members

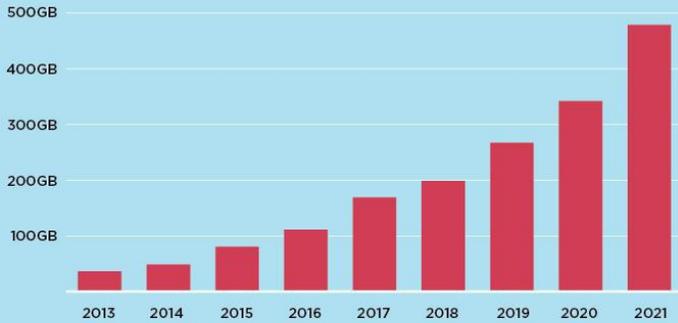
Allied Telecom Group, LLC	Spectrotel Holding Company LLC
Allstream	Starry Inc.
Amazon	Televergence
Bandwidth	TelNet Worldwide
Bridge Internet LLC	Telnyx LLC
BT Americas Inc.	Tilson
C Spire	Tristar License Group, LLC
Consolidated Communications	Twitter
Conterra Ultra Broadband, LLC	Unite Private Networks
Crown Castle	Uniti
DISH	Wide Open West (WOW!)
Dobson Fiber	Windstream
Easton Telecom Services, LLC	Zayo
Education Networks of America Inc.	ZenFi Networks
Facebook	
Fatbeam, LLC	
FiberComm	
FirstLight Fiber	
Fuse.Cloud	
Fusion Connect Inc.	
Google	
Gorge Networks, Inc.	
Granite Telecommunications LLC	
GW I	
Hilliary Communications, LLC	
IdeaTek Telcom, LLC	
Impulse Advanced Communications	
InnerCity FiberNet	
Inteliquent	
Intrado Communications, LLC	
Ligado Networks	
Local Linx	
LS Networks	
Mammoth Networks	
MetTel	
Microsoft	
Netflix Inc.	
OPTK Networks	
RS Access, LLC	
Smartcom Telephone, LLC	
Socket Telecom, LLC	
Sonic	
South Valley Internet Inc.	

Appendix B

MORE BANDWIDTH MEANS MORE BROADBAND

Average broadband consumption per household.

Gigabytes consumed, downstream and upstream.



Data: OpenVault; Chart: Will Chase/Axios

LOW COST
STREAMING,
CLOUD AND
INTERNET DEMAND
DRIVES
THE NEED
FOR NEW FASTER
NETWORKS.

INTERNET FOR ALL
Broadland