March 5, 2019 **VIA ELECTRONIC FILING**

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Ex Parte Presentation, 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

Dear Ms. Dortch:

The Minnesota Association of Community Telecommunications Administrators ("MACTA") is a statewide professional organization of city representatives and staff, as well as a state chapter of the National Association of Telecommunications Officers and Advisors ("NATOA"). Upon review of the Comments and Reply Comments filed in response to the Federal Communications Commission's Second Further Notice of Proposed Rulemaking ("FNRPM") in the above-referenced docket, we note the overwhelming opposition to the Federal Communications Commission's proposed actions.[1] We join in support of the Comments and Reply Comments submitted by Minnesota local governmental entities, all of which soundly oppose the FNPRM.[2]

The primary purpose of this letter is to respond to statements made by a cable industry trade association's Reply Comments alleging inappropriate actions by local franchising authorities in Minnesota.[3] The premise of the NCTA Comments and Reply Comments that non-monetary franchise

[1] Second Further Notice of Proposed Rulemaking, MB Docket No. 05-311 (Rel. Sep. 25, 2018).
[2] *See* Initial Comments of the City of Philadelphia, Pennsylvania *et al*., MB Docket No. 05-311 (Nov. 14, 2018) ("Philadelphia Comments"); Reply Comments of the City of Philadelphia, Pennsylvania *et al*., MB Docket No. 05-311 (Dec. 14, 2018) ("Philadelphia Reply Comments"); Comments of Anne Arundel County, Maryland *et al*., MB Docket No. 05-311 (Nov. 14, 2018) ("Anne Arundel County Comments"); Reply Comments of Anne Arundel County, Maryland *et al*., MB Docket No. 05-311 (Dec. 14, 2018) ("Anne Arundel County Reply Comments"); Comments of the City of Chicago *et al.*, MB Docket No. 05-311 (Nov. 14, 2018) ("Chicago Comments"); Reply Comments of the Northern Dakota County Cable Communications Commission, MB Docket No. 05-311 (Dec. 14, 2018); Comments of the League of Minnesota Cities, MB Docket No. 05-311 (Nov. 14, 2018); Comments of the North Suburban Access Corporation, MB Docket No. 05-311 (Nov. 14, 2018).
[3] *See* Reply Comments of NCTA – The Internet and Television Association at Report of Jonathan Orszag at p. 7 and Appendix at pp. 3-6 & 10-12, MB Docket No. 05-311 (Dec. 14, 2018) ("NCTA Reply Comments").

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provisions are "in-kind exactions,"[4] is wrong. There is no evidence in the record that would support such a classification. To the contrary, the Minnesota LFAs in their Comments and Reply Comments showed that the Cable Act franchising process and the past practices of cable operators and local franchising authorities are based on cable operator proposals and contract negotiations between cable operators and local franchising authorities.[5] Because these non-monetary franchise provisions are not exacted, they are not franchise fees, because such provisions are not assessments imposed on a cable operator.[6]

The complaints of the NCTA fall into two categories: (1) terms mutually negotiated and agreed upon by a cable operator and a local franchising authority; or (2) terms that a local franchising authority identified as a cable-related need and interest as required by the Cable Act. In no instance, did any local government cited by the NCTA mandate (or exact) the payment of any non-monetary franchise provision, and there is certainly nothing remotely similar to the civil forfeiture assessment case cited by the *Montgomery County* court.[7] We address every instance in which a Minnesota local governmental entity was mentioned below.

PEG Channels – Negotiated and Identified

NCTA complains that one of its member cable operators previously agreed to provide a number of high definition ("HD") and standard definition ("SD") PEG Channels to the Ramsey Washington Counties Suburban Cable Communications Commission II ("Ramsey/Washington") and that Ramsey/Washington identified certain PEG Channel and video-on-demand needs in its needs assessment report as part of the cable franchise renewal process.[8] NCTA fails to inform the Federal Communications Commission ("FCC") that Ramsey/Washington is required by the Cable Act to identify its needs and interests for a cable operator as part of the franchise renewal process.[9] In essence, NCTA is complaining that Ramsey/Washington is following the process prescribed by the Cable Act.[10] The identification of needs is not a "requirement" or an "exaction." The cable operator may now decide what it will propose to meet the identified needs taking cost into consideration. It is completely up to the cable operator to decide what it will propose.[11]

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[4] *See e.g.*, Comments of NCTA – The Internet and Television Association at pp. 41, 43, 47, 51, 52 & 55, MB Docket No. 05-311 (Nov. 14, 2018) ("NCTA Comments"); NCTA Reply Comments at pp. 4-12.
[5] *See e.g.*, Philadelphia Comments at pp. 21-26; Philadelphia Reply Comments at pp. 6-11; Anne Arundel County Comments at pp. 6-10; Anne Arundel County Reply Comments at pp. 17-19.
[6] Cable Communications Policy Act of 1984 § 622(g), Pub. L. 98-549, 98 Stat. 2779, 2787 (1984) ("Cable Act") (including any "tax, fee, or assessment . . . imposed by a franchising authority" as within the statutory definition of a "franchise fee"). *See e.g.*, City of Philadelphia Comments at pp. 21-26; Philadelphia Reply Comments at pp. 6-10.
[7] *See Montgomery Cty., Maryland v. Fed. Commc'ns Comm'n*, 863 F.3d 485, 491 (6th Cir. 2017) (citing *Austin v. United States*, 509 U.S. 602, 623-24 (1993)).
[8] NCTA Reply Comments, Appendix at p. 10. *See* Cable Act § 626(a)(1).
[9] *See* Cable Act § 626(a)(1).
[10] *See* Anne Arundel County Reply Comments at pp. 44-48; Philadelphia Reply Comments at pp. 6-9.
[11] *See* Cable Act § 626(b)(1) ("A cable operator may . . . submit a proposal for renewal."); Cable Act § 626(h) ("A cable operator may submit a proposal for the renewal of a franchise pursuant to this subsection at any time.").

PEG Financial Support - Negotiated

NCTA complains in its Reply Comments of certain PEG funding commitments made by a member cable operator.[12] What NCTA fails to explain is that this cable operator agreed to provide PEG funding through a Memorandum of Understanding ("MOU") negotiated between the cable operator and Ramsey/Washington.[13] NCTA also failed to explain that this same cable operator has agreed to extend the term of its cable franchise and the MOU on multiple occasions.[14] Again, this shows that non-monetary franchise provisions are not exacted; they are negotiated, bargained-for contract terms.[15]

Institutional Network Commitments – Negotiated and Identified

NCTA complains of Institutional Network ("I-Net") commitments in cable franchises that a member cable operator willingly negotiated and entered into with Ramsey/Washington.[16] NCTA further complains that Ramsey/Washington and the Northern Dakota County Cable Communications Commission ("NDC4")[17] have identified I-Net needs in the context of cable franchise renewal. I-Net commitments are entirely appropriate in cable franchises and have long been so recognized.[18] In the case of the current cable franchise agreement with Ramsey/Washington, the cable operator negotiated and agreed to the terms of an I-Net commitment.[19] Likewise, in the case of the current cable franchise agreement with NDC4, the cable operator negotiated and agreed to the terms of an I-Net commitment.[20] Furthermore, the NCTA omitted important details regarding the terms that were negotiated and agreed between the cable operator and NDC4. In this unique and mutually beneficial arrangement, I-Net locations were built during a time (about 20 years ago) that the cable operator was already constructing a system-wide fiber upgrade to its plant. The cable operator was fully reimbursed by the I-Net users (schools, libraries, cities, state and county sites) for not only the cost of construction including labor and materials but also a 12% profit markup and for some sites an 8% finance rate. Under no circumstance should a cable operator be allowed to deduct the fair market value of any item where an LFA is paying or has paid for the costs of that item.[21]

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[12] *See* NCTA Reply Comments, Appendix at pp. 6-7.
[13] *See* Memorandum of Understanding dated March 9, 1995; Anne Arundel County Reply Comments at pp. 45-46.
[14] *See, e.g.*, Ramsey/Washington, *Extension Agreement Between and Among the Members of the Ramsey Washington Suburban Cable Commission and Comcast of Minnesota* (2018), *available at* https://drive.google.com/file/d/128fjof4_LFE1fryyIudaFv7hxQaFOakI/view?usp=sharing.
[15] *See also* Anne Arundel County Reply Comments at pp. 44-48; Philadelphia Reply Comments at pp. 6-10.
[16] *See* NCTA Reply Comments, Appendix pp. 11-12.
[17] *See* Reply Comments of Northern Dakota County Cable Communications Commission at pp. 15-16.
[18] Cable Act § 611(b).
[19] *See e.g.* Ramsey/Washington Cable Franchise, at Section 7, http://www.rwcable.com/RamseyPages/section7.html.
[20] *See e.g.* NDC4 Cable Franchise, at Section 7, pp 21-26, https://www.townsquare.tv/sites/default/files/documents/2016/FranchiseOrdinanceComcast.pdf
[21] *See* Reply Comments of Northern Dakota County Cable Communications Commission at pp. 15-16.

In the case of I-Net needs identified by Ramsey/Washington and NDC4, the cable operator will determine what it will propose to meet each franchising authority's needs.[22] Merely identifying a need is not a "demand" or "exaction." There is nothing compulsory about identifying a community's cable-related needs and interests. Rather, this is required by the Cable Act.[23] Again relating to the NDC4 I-Net, the NCTA failed to accurately describe NDC4's approach to renewing its I-Net provision. Quite contrary to the NCTA's description of a "demand," the NDC4 model franchise modernized the I-Net language to reflect the current status as an existing network rather than new construction. In fact, the model franchise contemplates a review of which sites are still being actively used, returning unused fiber capacity back to the operator despite the fact that the users had fully paid for the construction, and paying the operator a reasonable maintenance fee for fiber that remains in use by I-Net users. The NCTA also left out that both the current NDC4 franchise and the model renewal franchise allow the operator to avail itself of any unused capacity on this I-Net for the operator's own commercial use. This mutually beneficial (and mutually agreed upon) arrangement should not be unfairly altered by allowing the cable operator to deduct what it determines to be the I-Net's fair market value from franchise fees. As NDC4 stated in its Reply Comments, "The NCTA's use of this example in its Comments is inaccurate and should not be considered as part of the record in this proceeding."[24]

Universal PEG Service Commitments - Negotiated

The NCTA complained of "six LFAs in Minnesota" as requiring what is commonly known as Universal PEG Service. The public policy behind Universal Service is that all citizens of a local franchising authority should receive the important information provided over the public, educational, and governmental ("PEG") channels, regardless of whether a citizen can afford the regulated basic service, because the cable operator is providing cable service through the public rights-of-way entrusted to the City for the benefit of all of its citizens.

This is another example of NCTA complaining of non-monetary franchise provisions that its cable operator member agreed to provide. The provision of PEG channels at no charge to all citizens were terms agreed to in Memoranda of Understanding as part of rate settlements in the mid-1990s. As part of those settlements, the cable operator agreed to provide Universal PEG Service for a period of time. This commitment was incorporated into cable franchises in the mid to late 1990s. While a handful of Universal PEG Service commitments may still exist today, the cable operator has negotiated for the removal of these provisions as these MOUs have expired and franchises have been renewed. This again shows how these provisions are in no way exactions or assessments imposed on a cable operator but, rather, are negotiated contract provisions. Because these provisions are not assessments imposed on a cable operator, they cannot, under a plain reading of the Cable Act, be a franchise fee.

Complimentary Service - Negotiated

The NCTA complains in its Appendix to its Reply Comments that its cable operator members agreed to provide complimentary cable service to Ramsey/Washington, the Cities of St. Cloud, Red

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[22] Cable Act § 626(b)(1).
[23] *Id*.
[24] Reply Comments of Northern Dakota County Cable Communications Commission at pp. 15-16.

Wing, and Buffalo.[25] In the cities of Apple Valley, Farmington, and Rosemount the NCTA cable operator member refused to provide complimentary service to certain locations.[26] NCTA further complains that NDC4 requested complimentary service to certain locations.[27] NDC4 identified its cable-related needs and interests to include the same complimentary cable service drop locations that have been served by the incumbent cable operator under its existing franchise for the past 19 years.

All of the examples cited by the NCTA prove the fact that these cable franchise terms are not exacted, but rather negotiated.[28] At times a cable operator agrees to provide complimentary cable service and at other times it does not. In the context of the Cable Act, these local franchising authorities have merely identified their cable-related community needs and interests as part of a formal or informal cable franchise renewal process, precisely as Congress intended when it passed the Cable Act.[29] In the City of Red Wing, the two cable operators serving the city negotiated a division of complimentary service locations and both enthusiastically supported the approval of the cable franchises in 2011. The City of St. Cloud is another good example of how local franchising authorities and cable operators negotiate these provisions. In 2015, the City of St. Cloud and its cable operator entered into a renewed cable franchise agreement in which the operator and the City agreed to continue to provide service to certain sites that were in the previous cable franchise agreement and to eliminate or add certain other sites.[30] Once again, all these examples in Minnesota show that these provisions are in no way forced or exacted, but are the product of good faith negotiations.

Metro Channel 6 and Local Access Channels – No Detriment

The State of Minnesota enacted the Minnesota Cable Act nearly 35 years ago.[31] At that time, the State created a regional Channel 6 to "facilitate the activation of a metropolitan area interconnected regional channel" to be uniformly carried on channel 6 on cable systems operating in the Twin Cities metropolitan area.[32] "The regional channel will provide a broad range of informational, educational, and public service programs and materials to metropolitan area cable subscribers." The Minnesota Cable Act also provides the provision for at least one Access Channel for each cable franchise. The provision of at least two channels in a large metropolitan area for the public's benefit has had no economic deterrent

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[25] *See* NCTA Reply Comments at Appendix at pp. 3-4; NCTA also complained about commitments to provide internet service in Ramsey/Washington but failed to tell the FCC that none of these are in use today. *See* Anne Arundel Reply Comments at p. 48.
[26] *Id*.
[27] *Id*.
[28] *See e.g.,* Reply Comments of Northern Dakota County Cable Communications Commission at pp. 10-11.
[29] *See* Cable Act § 626(a)(1).
[30] For example, the Southside Park and Heritage Nature Center were served under a prior franchise agreement, but not under the 2015 renewal. There is no provision to service a history center or regional airport in the 2015 renewal or in the previous cable franchise agreement contrary to the complaints of the NCTA. The cable operator agreed to serve the other locations identified by NCTA without objection.
[31] S.F. No. 646, 73d Minn. Leg., 1983 Sess.; H.F. No. 690, 73d Minn. Leg., 1983 Sess.; Minn. Stat. Ch. 238.
[32] *See* Minn. Stat. § 238.43, subdivs. 2 & 4 ("The regional channel will provide a broad range of informational, educational, and public service programs and materials to metropolitan area cable subscribers.").

effect in Minnesota. The primary provider of cable service in the Twin Cities metropolitan area has the most robust broadband service and has helped force its only competitor out of the cable service market.[33]

The Oszarg Report Lacks Credibility

The NCTA Reply Comments relied upon a report by Jonathan Oszarg and Allan Shampine (the "Oszarg Report"). The Oszarg Report argued that franchising authorities are currently receiving consideration in excess of the 5% franchise fees. In support of this argument, the Oszarg Report claimed that "St. Paul, Minnesota required the franchisee to rebuild Union Station."[34] There is no "Union Station" in the City of Saint Paul. The Union Depot, which is a historic railroad station and intermodal transit hub, was originally built in 1923 and placed on the National Register of Historic Properties in 1974. It was occupied by the United States Postal Service and other businesses from the 1970s to the early 2000s, and the City's designated non-profit public access organization, Saint Paul Neighborhood Network, had its offices in part of the facility for a few years, but no rebuilding took place and SPNN left the premises in 2006. The Union Depot was completely renovated to become a light rail station and transit hub in 2012 at a cost of $243 million, but there are no cable franchises or agreements, past or present, that required any cable operator to rebuild the Union Depot, whether financially or otherwise.[35] This statement in the Oszarg Report is unfounded and lacks any credibility.

Thank you for the opportunity to submit comments on these issues. MACTA, NATOA, and local government entities across the nation have worked hard to respond to each individual example that has been presented by the NCTA. The NCTA's use of false, inaccurate, or vague and undocumented examples should never be accepted by the FCC and should not be considered as part of the record in this proceeding.

[33] *See* CenturyLink, Inc., Form 10-Q (Nov. 9, 2017) ("The costs of purchasing video programming have risen significantly in recent years and continue to rise. Moreover, an increasing number of consumers are receiving access to video content through video streaming or other services pursuant to new technologies for a nominal or no fee, which will likely reduce demand for more traditional video products, such as the satellite TV services that we resell and our Prism TV services."). *See also* Daniel Frankel, *CenturyLink is no longer working to expand Prism TV service*, FierceCable (Apr. 10, 2018), https://www.fiercecable.com/cable/centurylink-no-longer-working-to-expand-prism-tv-service; Bernie Arnason, *Will CenturyLink Ditch IPTV Too? OTT's Appeal May Sink Prism TV*, Telecompetitor (Feb. 9, 2017), http://www.telecompetitor.com/will-centurylink-ditch-iptv-otts-appeal-may-sink-prism-tv/.

[34] *See* Oszarg Report at para. 16, page 7.

[35] *See e.g.*, *Green Building and Historic Preservation Case Studies for Moline Multi-Modal Station Project (2 of 5): Union Depot Multi-Modal Transit and Transportation Hub – St. Paul, Minnesota*, United States Environmental Protection Agency, EPA 560-F-11-071 (December 2011), *available at* https://archive.epa.gov/region5/sustainable/web/pdf/union-depot-case-study.pdf.

We urge the FCC to refrain from acting on this docket. Thank you.

Sincerely,

MINNESOTA ASSOCIATION OF COMMUNITY TELECOMMUNICATIONS ADMINISTRATORS

Jacque A. Smith

Jacque A. Smith, President