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VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of Ex Parte, *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,

On March 7, 2019, Rick Chessen and Rob Rubinovitz of NCTA – The Internet & Television Association; Tara Corvo and Radhika Bhat of Mintz Levin, on behalf of NCTA; Jordan Goldstein of Comcast; David Murray of Willkie Farr & Gallagher LLP, on behalf of Comcast; and Maureen O'Connell of Charter met with Michelle Carey, Holly Saurer, Brendan Murray, Kathy Berthot, Martha Heller, and Olivia Avery of the Media Bureau; Andrew Wise, Eugene Kiselev, Dan Bring, and Irene Wu of the Office of Economics and Analytics; and David Konczal and Susan Aaron of the Office of General Counsel.

Consistent with its prior comments in this proceeding, NCTA expressed support for the Commission's tentative conclusion that cable-related, in-kind contributions required under a franchise agreement must count as "franchise fees" subject to the statutory cap of five percent of gross cable service revenues.[1] NCTA discussed statutory interpretations and economic

[1] *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*, Second Further Notice of Proposed Rulemaking, 33 FCC Rcd. 8952 ¶ 1 (2018) ("*Notice*").

principles detailed in its prior submissions[2] and reiterated that in-kind contributions should be assessed at their fair market value, as proposed in the *Notice*.[3]

In response to questions about public, educational, and governmental ("PEG") access channels, we addressed the claim that the Cable Act definition of "[PEG] access facilities" under Section 602(16) requires that channel capacity be treated as a capital cost excluded from franchise fees under Section 622(g).[4] NCTA explained that this interpretation would conflate two different statutory provisions. Section 602(16) defines PEG access facilities as "channel capacity . . . and facilities and equipment for the use of such channel capacity." Cable operator support for such facilities may involve capital costs (e.g., construction of PEG studios) *and* operating costs (e.g., capacity on an existing cable system). Congress *separately* identified when PEG-related costs count as franchise fees in Section 622(g)(2)(C), which excludes only a particular subset of PEG access facility costs – capital costs – from the definition of franchise fees subject to the five percent cap.

We further explained that, as the Commission has already determined, and as the Sixth Circuit has affirmed, "[c]apital costs refer to those costs incurred in or associated with the construction of PEG access facilities."[5] Many different costs may be associated in some way with the operation and use of the PEG access facilities described in Section 602(16), but only those costs associated with *construction* of such facilities are capital costs excluded from the franchise fee cap. Here, rather than constructing new facilities, the cable operator provides bandwidth on an existing cable system for PEG channels to distribute their content to subscribers over facilities previously constructed by the cable operator.

We also noted that the structure of Section 622(g)(2)(B)-(C) makes clear that not all costs related to PEG access facilities are capital costs. For franchises in effect before October 30, 1984, subsection (g)(2)(B) provides that franchise fees do not include "payments . . . for, or in support of the use of, [PEG] access facilities." PEG channel capacity would be among the operating costs excluded from franchise fees under this provision. But for franchises granted after October 30, 1984, subsection (g)(2)(C) provides that *only* "capital costs . . . for [PEG] access facilities" are excluded from the definition of franchise fees. The legislative history similarly reflects Congress's intent to "grandfather" PEG support obligations in franchise agreements predating the 1984 Cable Act, including requirements for "vans, studios, cameras, or

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[2] *See* Comments of NCTA – The Internet & Television Association, MB Docket No. 05-311, at 38-42 (Nov. 14, 2018) ("*NCTA Comments*"); Reply Comments of NCTA – The Internet & Television Association, MB Docket No. 05-311, at 6-11 (Dec. 14, 2018) ("*NCTA Reply Comments*").

[3] *See Notice* ¶ 24; *NCTA Reply Comments*, Orszag/Shampine Economic Analysis at 8-9 (finding that fair market value is the best proxy for the significant opportunity costs that in-kind exactions impose on cable operators).

[4] *See* 47 U.S.C. §§ 522(16), 542(g).

[5] *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*, First Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 ¶ 109 (2007) *aff'd Alliance for Community Media v. FCC*, 529 F.3d 763, 784 (6th Cir. 2008); *see also* H.R. Rep. 98-934 at *26 (1984) (likewise stating Congress's intent that "the capital costs *associated with the construction* of [PEG] access facilities are excluded from the definition of a franchise fee") (emphasis added).

other equipment relating to the use of [PEG] channel capacity."[6] There would have been no reason for Congress to grandfather these different kinds of PEG access equipment obligations if it intended for them to be treated as "capital costs" subject to the permanent exception from franchise fees under Section 622(g)(2)(C). Rather, Congress's clear expectation was that the costs of this PEG access equipment would be treated as PEG operating support (just like the operating costs of any other business) for franchises granted after enactment of the 1984 Cable Act (i.e., all or nearly all franchises in effect today) and be subject to the statutory cap.

This letter is being filed electronically pursuant to section 1.1206 of the Commission's rules. Please direct any questions to the undersigned.

Respectfully submitted,

/s/ Rick Chessen

Rick Chessen

CC: Michelle Carey
Holly Saurer
Brendan Murray
Kathy Berthot
Martha Heller
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Andrew Wise
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David Konczal
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[6] H.R. Rep. 98-934 at *45 (1984); *see also id.* at *46 ("[P]rovisions of existing franchises covering PEG channel capacity and its use as well as services, facilities and equipment (such as studios, cameras, and vans) related thereto, are fully grandfathered.").