March 15, 2019

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: **Notice of *Ex Parte***
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

On March 13, 2018, the undersigned, along with the following individuals, met with Holly Saurer, Martha Heller, Brendan Murray and Kathy Berthot of the Media Bureau:

- Angelina Panettieri, National League of Cities
- Stephanie Piko, Mayor, City of Centennial, CO
- John Fogle, Councilmember, City of Loveland, CO
- Corina Lopez, Vice Mayor, City of San Leandro, CA
- Benny Lee, Councilmember, City of San Leandro, CA
- Victor Aguilar, Jr., Councilmember, City of San Leandro, CA
- Jeff Kay, City Manager, City of San Leandro, CA
- Andy Huckaba, Councilmember, City of Lenexa, KS
- Jesse Barlow, Councilmember, City of State College, PA
- Mike Lynch, NATOA's Board President and Director of the City of Boston's Broadband and Cable in the Department of Innovation and Technology
- Karen George, NATOA Board Member and Executive Director of the Quad Cities Cable Communications Commission
- Dan Cohen, NATOA Board Member and Attorney and Founder of the Cohen Law Group
- Gerard Lederer, Best Best & Krieger LLP, outside counsel for the City of Boston

During the meeting, we discussed the significant harms to local governments and Public, Educational and Government (PEG) access channels should the Commission adopt an interpretation of the Cable Act proposed in the Second FNPRM that is contrary to the mutual understanding of the Act that local governments and cable operators relied on in negotiating franchise agreements and settlement agreements to address franchise violations.

Specifically, we discussed that, to our knowledge, no cable operator had previously asserted that franchise requirements such as PEG channel capacity are "franchise fees" as defined in the Cable Act. We discussed the impact on existing cable franchises where material terms of

the agreement that have been mutually agreed upon are modified by the Commission in the middle of the franchise term. Further, we discussed the concern that the new rules will be considered retroactive and result in claims that local governments own cable operators for alleged "overpayments" of franchise fees.

We also discussed the argument that the exemption from franchise fees for certain PEG-related capital costs indicates that all other PEG-related franchise obligations must be "franchise fees." As noted above, we are not aware of cable operators interpreting the plain language of the statute in that manner prior to the Second FNPRM in this proceeding. The legislative history plainly states that this is *not* a proper interpretation of the Cable Act: "Subsection 622(g)(2)(C) establishes a specific provision for PEG access in new franchises. In general, this section 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."[1] In short, because PEG-related franchise provisions, such as dedicated channel capacity or PEG, are not monetary payments, they are not "franchise fees" in the first place, rendering any argument about the meaning of the "capital costs" exception in Section 622(g)(2)(C) irrelevant.

We discussed the proposed "mixed-use rule," which reinterprets the Cable Act to preempt local governments with respect to non-cable services and facilities, effectively exempting cable operators from local ordinances that apply to non-cable operators that compete with cable operators in providing the same non-cable services.

Local government pointed out that the mixed-use rule as stated in the Second FNPRM is vastly different from the rule articulated by the Commission in the original Order in this docket.[2] The Second FNPRM specifically asks whether the mixed-use rule from the *First Order* "should be applied to incumbent cable operators to the extent that they offer or begin offering non-cable services."[3] The statement of the mixed-use rule articulated in the *First Order does not preempt* local authority outside the context of cable franchising authority. Even Verizon's comments filed in response to the Second FNPRM acknowledge this new version of the rule is an unreasonable reinterpretation, stating that the mixed-use rule as previously articulated "does not affect the authority of local authorities to regulate non-cable services under other applicable regulatory regimes."[4]

There is no support in the Cable Act or legislative history for the proposition that once a cable franchise is granted, all regulatory authority over the cable operator's non-cable service evaporates. The Cable Act itself expressly cabins the limits on LFA authority to the authority exercised in the cable franchising process.[5] Further, the legislative history plainly states that the

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[1] H.R. REP. No. 98-934 (1984) at 65, reprinted in 1984 U.S.C.C.A.N. 4655, 4702 (emphasis added).

[2] *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 (2007) ("*First Order*").

[3] Second FNPRM ¶ 25.

[4] Verizon Comments at p. 6, n. 12 (filed Nov. 14, 2018).

[5] Comments of NATOA, NLC, *et al*. at p. 16-24 (filed Nov. 14, 2018).

Cable Act does not, and was not intended to, interfere with local authority over the then-emerging telecommunications services cable operators may opt to provide:

> Subsection (b) amends section 622(b) of the Communications Act by inserting the phrase "to provide cable services." This amendment makes clear that the franchise fee provision is not intended to reach revenues that a cable operator derives for providing new telecommunications services over its system, but only the operators cable-related revenues. … The conferees intend that, to the extent permissible under State and local law, *telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government* to, in a nondiscriminatory and competitively neutral way, manage its public rights-of-way and *charge fair and reasonable fees*."[6]

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this letter is being electronically submitted in the record of these proceedings and provided to the Bureau participants. Please do not hesitate to contact the undersigned with any questions.

Respectfully submitted,

Nancy Werner
General Counsel
NATOA

cc: Holly Saurer
Martha Heller
Brendan Murray
Kathy Berthot

[6] H.R. Conf. Rep. No. 104-458, at 209 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 223.