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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 April 2, 2019, Rick Chessen of NCTA – The Internet & Television Association; Tara Corvo of Mintz, on behalf of NCTA; Jordan Goldstein of Comcast; David Murray of Willkie Farr & Gallagher LLP, on behalf of Comcast; Maureen O'Connell of Charter; and Barry Ohlson of Cox met with Michelle Carey, Holly Saurer, Brendan Murray, Maria Mullarkey, and Martha Heller of the Media Bureau and Michael Carlson of the Office of General Counsel to discuss the above-referenced proceeding.

We reiterated support for the Commission's tentative conclusion that cable-related in-kind contributions are "franchise fees" subject to the statutory cap of five percent of gross cable service revenues.[1] Drawing from NCTA's prior comments, we discussed a straightforward process for providing franchising authorities with fair market valuations of cable-related, in-kind contributions required under any affected franchise agreement, and for resolving any disputes that may arise.[2] This one-time "reset" would be consistent with existing franchise agreement provisions and practices, under which cable operators regularly report on, adjust, and pay

[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*").

[2] *See* Comments of NCTA – The Internet & Television Association, MB Docket No. 05-311, at 51-55 (Nov. 14, 2018) ("*NCTA Comments*") (proposing a chart of fair and reasonable methods for assessing the value of common in-kind exactions); Reply Comments of NCTA – The Internet & Television Association, MB Docket No. 05-311, at 19 (Dec. 14, 2018) ("*NCTA Reply Comments*") (explaining how a fair market value standard "ensures that the valuation of in-kind obligations imposed on cable operators and, ultimately, cable subscribers reflects their full costs and best effectuates Congress's intent to limit the overall taxation of cable operators and subscribers").

required franchise fees based on fluctuations in cable service revenues and other factors.[3] It would apply on a going-forward basis only and would *not* affect past franchise fee payments or in-kind contributions provided by cable operators. It would also preserve the discretion of franchising authorities to determine how any required adjustments to franchise fee payments should be made.

- Step One: *Valuation.* Each cable operator will identify the fair market value of in-kind contributions based on existing marketplace metrics and provide that information to the responsible franchising authority.[4] NCTA has outlined the valuation components of each category of in-kind contribution in its prior comments.[5] Until the cable operator provides this information, there would be no change in franchise fee payments or in-kind services provided to the franchising authority.

- Step Two: *Election.* Within a reasonable time after receipt of such information (e.g., 60-90 days), the responsible franchising authority will (a) choose whether to keep, reduce, or forgo its in-kind contributions and (b) notify the cable operator of that election.[6]

- Step Three: *Future Franchise Fee Payments.* The cable operator will implement the franchising authority's election pursuant to the relevant franchise agreement provisions and practices, bringing the total amount of monetary payments and any in-kind contributions into compliance with the statutory five percent cap. Should a franchising authority fail to provide notice of its election within the timeframe established by the Commission, the cable operator would reduce its franchise fee payments (without

[3] These franchise fee adjustments and payments are typically made on a quarterly basis, although some franchise agreements provide for different periods (e.g., semi-annual or annual).

[4] The responsible franchising authority would be the governmental authority that awards and oversees the franchise. In states where those functions are shared by multiple government entities, e.g., a state commission and a local government, those government entities would identify which of them will serve as the responsible franchising authority for these purposes.

[5] *See* NCTA Comments at 51-55.

[6] The Commission has adopted reasonable timeframes to ensure compliance with analogous statutes where, as here, the record demonstrates that a lack of clear guidance could result in delay and a failure to adhere to statutory requirements. Cf. 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, ¶¶ 66-67 (2007) (finding it "necessary to establish reasonable time limits for LFAs to render a decision on a competitive applicant's franchise application" where the record was "replete with examples of unreasonable delays in the franchising process"); Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al., Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 ¶ 89 (2018) (affording local governments an additional 180 days to comply with a declaratory ruling regarding permissible aesthetic standards for small wireless facilities based on commenters' concerns that "at least some localities will require some time to establish and publish standards consistent with" the ruling). Establishing a reasonable time period for franchising authorities to elect whether to retain or adjust in-kind contributions is especially appropriate since the statutory five percent franchise fee cap may not be waived. See Cable TV Fund 14-A, Ltd. v. City of Naperville, No. 96 C 5962, 1997 U.S. Dist. LEXIS 11511, at *86 (N.D. Ill. July 25, 1997). See also Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, Report and Order, 58 R.R.2d 35, n.91 (1985) (ruling that "neither a cable operator nor a franchising authority may waive mandatory sections of the Cable Act in reaching franchise agreements").

recoupment) based on its valuation information until the franchising authority provides its election notice.

Because marketplace alternatives exist for virtually all cable-related in-kind contributions, there should be few material disputes over their fair market value. Franchising authorities can also choose from among available goods and services in lieu of continuing in-kind contributions. And franchising authorities have audit rights under most franchise agreements, further ensuring accountability for any necessary adjustments to franchise fee payments.

As an additional backstop, Section 622(d) of the Cable Act provides an express cause of action for franchise fee disputes.[7] Congress enacted Section 622(d) "because it anticipated that disputes would arise between franchise authorities and cable operators" over the proper calculation and pass through of franchise fees.[8] In such cases, the Commission shares concurrent jurisdiction with the courts and, as the federal agency with "*ultimate* responsibility for ensuring a 'national policy' with respect to franchise fees, . . . enjoys discretion in setting its enforcement priorities and identifying those franchise fee disputes that require Commission action."[9] Thus, the Commission may decide to entertain any valuation dispute that "implicates the agency's expertise," and to refer other cases to the courts "to take evidence and delve into matters" of a more local nature.[10] While we expect that most disputes would be resolved without resort to

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[7] 47 U.S.C. § 542(d) ("In any court action under subsection (c) of this section [authorizing the allocation and pass-through of franchise fees and other costs to subscribers], the franchising authority shall demonstrate that the rate structure reflects all costs of the franchise fees."). An action could be brought in the federal or state court(s) specified in the franchise agreement for dispute resolution or, in the absence of such a provision, a federal or state court of competent jurisdiction. The franchising authority would bear the burden of proving that its alternate valuation more closely approximates the fair market value of the in-kind contribution than the cable operator's valuation. *See* H.R. Rep. 98-934 (Aug. 1, 1984) ("Subsection (d) allows the pass through unless *the franchise authority demonstrates* that the existing rate structure already reflects all costs of the higher franchise fee payment.") (emphasis added); *In re Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984,* 60 Rad.Reg.2d (P & F) 514, 104 F.C.C.2d 386 ¶ 10 (1986) ("*Reconsideration Order*") (discussing that "Section 622(d) allocates the burden of proof in court actions" to the franchising authority).

[8] *Bova v. Cox Communications, Inc.*, 2002 WL 1575738, *3 (W.D.Va. July 10, 2002).

[9] *ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) (emphasis in original).

[10] *Id.* at 1573. This allocation of concurrent jurisdiction under Section 622(d) fully aligns with the FCC's authority to (a) issue the statutory guidance on franchise fees proposed in the Section 621 proceeding, and (b) entertain or refer for judicial determination any dispute between a franchising authority and a cable operator over the fair market valuation of an in-kind contribution. As the FCC explained in its 1986 *Reconsideration Order*, 104 F.C.C.2d 386 ¶ 19 (footnotes omitted):

> [T]he Commission will entertain fee disputes concerning matters that arise directly under specific provisions of the Cable Act and that may call upon the expertise of the Commission for their interpretation. For example, we will entertain interpretations of the Cable Act involving whether costs incurred in connection with public, educational or governmental access facilities (id., § 542(g)(2)(C)-(D)) should count toward the statutory five percent fee limit. However, we recognize that concurrent jurisdiction would apply, and the particular facts of any given dispute might indicate that local courts would be the more suitable forum. We find that this division of authority, in addition to comporting with the legislative history of the Act, also will serve the goals of administrative convenience and economy. [Most relevant here,] many of the matters that may arise under disputes involving Section 622 will call for evidentiary showings that involve testimony from individuals or the production of exhibits that are located in the

litigation, if any case is filed, the cable operator's valuation would continue to apply for purposes of complying with the statutory five percent cap (absent a judicial stay or similar injunctive order) pending a final decision and subject to any necessary "true up."[11]

We noted that this one-time process for existing franchise agreements will establish market-based valuation metrics for in-kind contributions that help guide future initial and renewal franchise proceedings. It should also further minimize any valuation disputes going forward, with the Section 622(d) remedy as a continuing backstop. Finally, given the availability of this express statutory process for resolving franchise fee disputes, the Commission should make clear that any disagreement over the value of an in-kind contribution is not a valid basis for a franchising authority to deny or delay the award of a new or renewal franchise agreement.

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
Martha Heller
Maria Mullarkey
Michael Carlson

franchise community. These considerations make local courts the most convenient forum except when particular Commission expertise is called into play.

[11] This will ensure compliance with the statutory five percent cap pending the litigation, and is consistent with Congress's assignment of the burden of proof in such cases on the franchising authority.