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**VIA ECFS**

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

**Re: 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 16, 2019, Rick Chessen and Radhika Bhat 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 ("the parties") met with Michelle Carey, Holly Saurer, Brendan Murray, Maria Mullarkey, and Olivia Avery of the Media Bureau and Michael Carlson of the Office of General Counsel to discuss the above-referenced proceeding.[1] In particular, the parties discussed how the value of in-kind contributions for public, educational, or governmental ("PEG") use, including equipment and channel capacity, should be included in the five percent franchise fee cap Congress established.

The parties noted that the Commission has already determined that, under Section 622(g)(2)(C), "[c]apital costs refer to those costs incurred in or associated with the *construction*

[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 (2018) ("*Second FNPRM*").

of PEG access facilities."[2] This interpretation is compelled by the statutory language,[3] draws directly on the legislative history,[4] and has been upheld by the Sixth Circuit as "an eminently reasonable construction of Section 622(g)(2)(C)."[5] It is thus settled law and should not be an issue before the Commission on remand.

The parties explained that, therefore, under Section 622(g)(2)(C), only the cost of equipment (*e.g.*, cameras) that is purchased in connection with "the construction of actual [PEG] facilities" would be "capital costs."[6] By contrast, additional or replacement equipment unconnected to the actual construction of PEG facilities must be purchased with non-capital PEG support paid by a cable operator, which is subject to the five percent cap. To ensure that PEG capital contributions are used appropriately, the parties discussed the need for Commission guidance that makes clear that franchising authorities may only accrue PEG capital funds in connection with specific, agreed-to construction projects, and that cable operators have audit rights to confirm that PEG capital payments are in fact being used for such construction-related purposes.[7]

The parties also expressed their agreement with the Commission's tentative conclusion that channel capacity designated for PEG use is a non-capital PEG-related expense that counts toward the statutory five percent cap on franchise fees.[8] Because PEG providers utilize channel capacity that already exists on the cable system owned and operated by the cable operator, PEG channel capacity cannot satisfy the required statutory nexus to the construction of PEG access facilities and is therefore not a "capital cost" under the statute.

In response to a question about the definition of "capital costs" under Generally Accepted Accounting Principles ("GAAP"), the parties explained that substituting the established interpretation of PEG capital costs with other definitions would frustrate the statutory objective of the exemption. Under Section 622(g)(2)(C), Congress excluded only PEG "capital costs . . . *incurred by the cable operator*" from the "franchise fee" definition.[9] Substituting GAAP for the

[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*, First Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 ¶ 109 (2007) ("*First Order*") (emphasis added).

[3] *Compare* 47 U.S.C. § 542(g)(2)(B) (for franchises in effect before the 1984 Cable Act, excluding all "payments . . . for or in support of the use of [PEG] facilities"), *with id.* § 542(g)(2)(C) (for franchises after the Act, excluding only "capital costs . . . for [PEG] facilities").

[4] H.R. Rep. 98-934 at *9 (1984) ("House Report") (stating that only "[t]axes of general applicability and the capital costs associated with the *construction* of [PEG] access facilities are excluded from the definition of a franchise fee") (emphasis added).

[5] *Alliance for Community Media v. FCC*, 529 F.3d 763, 784-86 (6th Cir. 2008).

[6] NCTA Comments at 48 n.143; *see Alliance for Community Media*, 529 F.3d at 784 (observing that the Commission's definition of PEG capital costs "could potentially encompass the cost of purchasing equipment, *as long as that equipment relates to the construction of actual facilities*") (emphasis added).

[7] *See* NCTA Comments at 49.

[8] *See Second FNPRM* ¶ 20; *see also* NCTA Comments at 54; NCTA Reply Comments at 7-8, 14, 16-17.

[9] 47 U.S.C. § 542(g)(2)(C) (excluding from the "franchise fee" definition the "capital costs which are required by the franchise to be *incurred by the cable operator* for [PEG] access facilities") (emphasis added).

statutory definition established by Congress would largely nullify the exemption and so cannot be the correct approach.[10] From the cable operator's perspective, monetary payments for PEG are not treated as capital costs under GAAP or other definitions, since the cable operator retains no ownership over the funds or any assets purchased from them. Cable operators generally do not even know how PEG funding is being spent by LFAs or PEG providers. Nor is PEG channel capacity recognized by cable operators as a capital cost under such standards.

The parties also addressed a particular passage identified by the Bureau from the Cable Act's legislative history,[11] and explained that the passage further reinforces that only PEG "capital costs" are excluded from the definition of "franchise fee." Section 624(b)(1) authorizes franchising authorities to establish and enforce "requirements for facilities and equipment," as well as certain services, in their "requests for proposal for a franchise (including requests for renewal proposals, subject to section 626)," with certain statutory limitations.[12] Earlier in the legislative history, the Cable Act's sponsors explained that Section 624(b)(1) was intended to address prior instances where certain cable operators had promised various cable services and system commitments in applying for franchises but then attempted to rescind or reduce those commitments once awarded a franchise.[13] The requirements for services, facilities, and equipment that Congress authorized franchising authorities to impose under Section 624(b)(1) relate to the cable system generally, to ensure that the reasonable expectations of a local community for the provision of cable services are met.[14]

Within this larger legislative context, the passage at issue clarifies that, "*[i]n general*," monetary payments by a cable operator to meet system-wide requirements for services, facilities, and equipment – *i.e.*, requirements which are authorized under Section 624(b)(1) – are not franchise fees under Section 622(g). Instead, such requirements are part of the provision of cable

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[10] *See, e.g., Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 260-61 (D.C. Cir. 2005) (terms in a regulation should be interpreted consistently with its regulatory objective); *K Mart Corp.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.") (emphasis added).

[11] The passage states: "[Section 622(g)(2)(C)] establishes a specific provision for PEG access in new franchises. *In general*, this *section* [§ 622] 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. *As regards PEG access in new franchises*, payments for *capital costs* required by the franchise to be made by the cable operator are not defined as fees under this *provision* [(g)(2)(C)]. These requirements may be established by the franchising authority under Section 611(b) or Section 624(b)(1)." House Report at *65 (emphasis added).

[12] 47 U.S.C. § 544(b)(1).

[13] House Report at *21.

[14] *Id.* at *21 (stating that the 1984 Cable Act "grants cities affirmative authority to require upgrading of facilities and channel capacity during the renewal process"); *22 (discussing expected rebuilding and upgrading of existing systems and services, where some cable systems originally franchised in the 1960s "provide as few as 12 channels to subscribers" and "the character of cable television has changed so dramatically in the last decade"); *25 (noting that LFAs "will commonly require an 'upgrade' of the existing system as a condition of the new franchise" requiring additional investment); *26 (stating that "[t]he ability of a local government entity to require particular cable facilities (and to enforce requirements in the franchise to provide those facilities) is essential if cable systems are to be tailored to the needs of each community").

services, just like reasonable cable line extension requirements.[15] Congress further clarified that, notwithstanding this general rule for Section 624(b)(1) requirements, "[a]s regards PEG access in new franchises" *in particular*, a specific provision provides that only "capital costs" for such requirements – which are separately authorized under Section 611(b)[16] – are exempted from the definition of "franchise fee." Established canons of statutory interpretation make clear that the more specific treatment of PEG capital costs governs the general reference to other cable services, facilities, and equipment.[17] And, as explained above, Congress intended for that exemption to be limited to actual construction-related costs.

The parties then discussed the proper valuation of these non-capital, PEG-related in-kind obligations. As NCTA has explained in its comments, in-kind obligations should be valued – and offset against the franchise fee – according to their fair market value. While fair market value can be easily ascertained when the cable operator offers a comparable service to third parties, determining an appropriate method to ascertain the value of PEG channel capacity can be difficult, and the parties are aware of concerns in the record over the potential costs of PEG channel capacity and its effect on PEG operating support.[18]

Given the complexities of determining the valuation of PEG channel capacity, the parties suggested that if the Commission decides to continue to consider how to value and offset PEG channel capacity against the franchise fee (*i.e.*, how to determine its fair market value using leased access rates or other pricing models), perhaps in a later proceeding, it should also include consideration of the value of standard-definition vs. high-definition capacity and linear vs. on-demand capacity; whether new technologies, such as IP-based or online distribution, offer ways for cable operators and PEG operators to agree to fulfill the Cable Act's PEG objectives through more efficient and less costly means;[19] the extent to which franchising authorities must utilize PEG capacity before it is either temporarily or permanently returned to the control of the cable operator;[20] and other issues. Pending a Commission determination regarding the valuation of PEG channel capacity, such costs would not be offset against the franchise fee cap.

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[15] *See Second FNPRM* ¶ 21; NCTA Reply Comments at 17 (explaining how "[b]uild-out obligations are distinct from franchise fees because they are a basic requirement for service in a franchise area," whereas "PEG obligations, I-Nets, and other in-kind exactions serve no similar essential function for the provision of cable service to subscribers, but rather provide value to franchising authorities or particular third parties for purposes determined to be in the public interest by the franchising authority").

[16] *See* 47 U.S.C. § 531(b) (allowing franchising authorities to require "that channel capacity be designated for public, educational, or governmental use").

[17] *See, e.g.*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) ("[N]ormally, the specific governs the general."); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general.") (citing *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)).

[18] *See, e.g.*, Comments of the National Association of Telecommunications Officers and Advisors et al., MB Docket No. 05-311, at 12 (Nov. 14, 2018) (expressing concern that valuing PEG channel capacity at its fair market value for purposes of offsets against the franchise fee cap could "swallow the [cash] franchise fee").

[19] *See* 47 U.S.C. § 531(c) (authorizing franchising authorities to enforce any franchise requirement regarding the provision and use of PEG channel capacity "whether or not required by the franchising authority pursuant to subsection (b)").

[20] *See id*. § 531(d).

The parties urged that if the Commission determines it cannot establish a value for PEG channel capacity to offset against the franchise fee at this time, then it would be important for the Commission to at least provide guidance in the forthcoming order ("*Third Order*") as to what constitutes "adequate" PEG channel capacity under Section 621(a)(4)(B) to promote compliance with this statutory constraint.[21] In the *First Order* in this proceeding, the Commission determined that "we have the authority to interpret what Congress meant by 'adequate PEG access channel capacity, facilities, and financial support,' and to prohibit excessive LFA demands in this area, if necessary."[22] There, the Commission also determined that, in limiting franchising authority designations of PEG channel capacity to what is "adequate," that term "should be given its plain meaning: the term does not mean significant but rather 'satisfactory or sufficient.'"[23] In the *Second FNPRM*, the Commission again gave notice of its authority to implement limits on franchising authority demands for PEG channels, identifying PEG channel capacity as an in-kind contribution and seeking comment on the effects on cable operators and cable subscribers of "allowing LFAs to seek unlimited" PEG operating support and other cable-related in-kind contributions.[24] In response, NCTA submitted numerous examples of franchising authority demands for excessive numbers of PEG channels,[25] and franchising authorities filed comments defending such demands, as well as demands for associated PEG support.[26]

We then noted that many state laws already contain such limits on PEG channel capacity.[27] The parties proposed, in particular, that the Commission establish the following guidance regarding what constitutes "adequate" PEG channel capacity in the *Third Order*:

- The Commission should establish a rebuttable presumption that no more than three linear PEG channels is adequate in most markets. Where franchising authorities require that a

[21] As the *Second FNPRM* points out, the Commission declined to "adopt standard terms for PEG channels" in the *Second Order*, but only "so long as such support costs as applicable are subject to the franchise fee cap." *Second FNPRM* ¶ 32 n.153 (citing *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 Report and Order, 22 FCC Rcd. 19633 ¶ 10-17 (2007) ("*Second Order*")); *see also First Order* ¶ 113 (declining to adopt standard terms for PEG channels, "*provided that* the non-capital costs of such requirements are offset from the cable operator's franchise fee payments") (emphasis added).

[22] *First Order* ¶ 112.

[23] *First Order* ¶ 112 (quoting American Heritage Dictionary definition), *aff'd Alliance for Community Media v. FCC*, 529 F.3d 763, 785 (6th Cir. 2008).

[24] *See Second FNPRM* ¶¶ 20, 23.

[25] *See* NCTA Reply Comments, Appendix (*Examples of Franchising Authority Overreach*) at 10-11 (describing LFA demands ranging from seven to as many as 43 PEG channels).

[26] *See, e.g.*, Comments of the Minnesota Association of Community Telecommunications Administrators at 2-3; *see also N.E. Md. Waste v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) ("A rule is deemed a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.").

[27] *See*, *e.g.*, Kan. Stat. § 12-2023(5)(B)(h)(1) (establishing limit of two PEG channels); N.R.S § 711.810 (Nevada) (establishing limit of three PEG channels); Mo. Rev. Stat § 67.2703 (same); O.C.G.A § 36-76-8 (Georgia) (same); LA. RS 45:1369 (Louisiana) (same); Ohio Rev. Code. § 1332.30 (same); S.C. Code Ann. § 58-12-370 (same); Tenn. Code Ann. § 7-59-309(e) (same); Tex. Util. Code § 66.009(c) (same); Wisc. Stat. § 66.0420(5)(a) (same). Many of these state laws include "grandfathering" provisions for existing franchises and/or PEG channels, with mechanisms

channel be simulcast in multiple formats (*e.g.*, standard-definition *and* high-definition), each simulcast should count as a separate channel.

- A franchising authority could rebut the presumption that three channels is adequate by demonstrating that local community needs justify a higher number of channels. Conversely, a cable operator could rebut the presumption by showing that fewer than three channels are adequate for a particular community.
- Relevant factors for determining the adequate number of channels should include: (1) the amount of new, original, and locally originated programming on PEG channels, as well as limits on repeat and "filler" content, as numerous states already require;[28] (2) the number of channels relative to the population served;[29] (3) a demonstration that the

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for the cable operator to reclaim underutilized channels, consistent with the Cable Act's channel reclamation requirements. *See* 47 U.S.C. § 531(d).

[28] *See, e.g.,* Fla. Stat. § 610.109(5) (PEG channels must be "activated and substantially used" for "at least 10 hours per day on average, of which at least 5 hours must be non-repeat programming as measured on a quarterly basis," excluding "[s]tatic information screens or bulletin-board programming"; and requiring the return of PEG capacity if these criteria are not met); Cal. Pub. Util. Code § 5780(e) (requiring the return of PEG capacity to the cable operator where the channel "is not utilized by the local entity for at least eight hours per day as measured on a quarterly basis"); Wis. Stat. § 66.0420(5)(b)(1)(a)-(b) (requiring the return of PEG capacity that is not "substantially utilized by the municipality," defined as providing "40 hours or more of programming on the PEG channel each week and at least 60 percent of that programming is locally produced"); Nev. Rev. Stat §§ 711.760, 711.810 (requiring the return of PEG capacity when a channel beyond one in each community is not "substantially utilized," defined as when "at least 12 hours of PEG access programming, excluding any alpha-numeric programming, is videocast on the PEG access channel each calendar day and at least 80 percent of the PEG access programming on each calendar day is nonrepeat locally produced video programming"); Mich. Comp. Laws § 484.3304(2) (requiring the return of PEG capacity where a PEG channel "is not utilized by the franchising entity for at least 8 hours per day for 3 consecutive months"); Mo. Rev. Stat. § 67.2703(3)-(4) (requiring the return of PEG capacity not "substantially utilized," defined as 40 hours per week of local programming for three consecutive months, where any one program may not be counted more than four times per week); Ohio Rev. Code § 1332.30 (requiring the return of PEG capacity where the channel is not "substantially utilized," defined as "when fewer than forty hours of noncharacter-generated content are programmed on that channel each week and less than sixty percent of the programming is nonrepeat and locally produced"); Tenn. Code Ann. § 7-59-309(c)(1) (defining substantial utilization of the first PEG channel as eight hours per day on average for each calendar quarter, "which programming may include character-generated programming that is not outdated and is of interest to the local community," and of any additional PEG channels as "ten hours of PEG programming per business day, other than character-generated programming"); Tex. Code Ann. § 66.009(d) (requiring the return of PEG capacity for channels not used at least eight hours per day by the municipality); La. Rev. Stat. § 45:1369(C) (authorizing "one PEG access programming stream or channel without restrictions relating to repeat programming" but specifying that "[i]f a local governmental subdivision fails to utilize any additional PEG access programming stream or channel for at least eight continuous hours of non-repeating content per day, such PEG access programming stream or channel shall no longer be made available to the local governmental subdivision and may be programmed at the discretion of the cable service provider"); S.C. Code § 58-12-370(C) (requiring the return of PEG capacity is "not utilized by the municipality or county for at least eight hours a day"); N.C. Gen. Stat. § 66-357(d)(1)-(3) (permitting municipalities to request additional PEG channels only when "(1) [a]ll of the PEG channels must have scheduled programming for at least eight hours a day, (2) [t]he programming content of each of the PEG channels must not repeat more than fifteen percent of the programming content on any of the other PEG channels, and (3) [n]o more than fifteen percent of the programming content on any of the PEG channels may be character-generated programming"); *see also id.* § 66-357(e) ("If a county or city no longer provides any programming for transmission over a PEG channel it has activated, the channel may be reprogrammed at the cable service provider's discretion.").

[29] *See, e.g.*, O.C.G.A § 36-76-8 (maximum of two PEG channels where the population is less than 50,000, and maximum of three PEG channels elsewhere); Wisc. Stat. § 66.0420(5) (same); N.R.S § 711.810 (same, but using

franchising authority has the resources necessary to support operating the number or format of channels requested; and (4) the bandwidth requirements and other costs to the cable operator of additional channels and high-resolution formats.

- Any disputes over the adequacy of PEG channel designations that are not resolved through negotiation could be heard by the Commission or brought in federal or state court if this option is specified in the applicable franchise agreement.[30]

The parties noted that establishing this guidance in the form of a rebuttable presumption is well within the Commission's authority[31] and should help to deter unreasonable PEG channel capacity demands while still maintaining flexibility to address the needs and interests of each local community, including those that may justify more than three PEG channels. It would also benefit franchising authorities, PEG providers, and cable operators in future negotiations by helping to minimize disputes.

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55,000 population as the inflection point); Tenn. Code Ann. § 7-59-309 (maximum of one PEG channel where the population is less than 25,000, maximum of two PEG channels where the population is greater than 25,000 but less than 50,000, and maximum of three PEG channels where the population exceeds 50,000).

[30] It is reasonable to expect that most franchising authorities would adhere to these criteria in negotiating adequate PEG channel and funding requirements. To account for the rare instance where this is not the case, the *Third Order* should state that a cable operator could challenge the relevant franchise condition(s) as, in the case of initial grants, excessive under Section 621(a)(4)(b), or, for renewals, unreasonable to meet future cable-related community needs and interests, taking into account the costs, under Section 626(c)(1)(D). *See* 47 U.S.C. §§ 541(a)(4)(B); 546(c)(1)(D). (For this purpose, the cost-benefit principle in Section 626(c)(1)(D) can reasonably be read as roughly equivalent to the adequacy standard in Section 621(a)(4)(b). *See Second Order* ¶ 15 ("Sections 611 and 626 provide a process for requiring PEG carriage and determining a community's future cable-related needs and interests.").) The *Third Order* should also state that the cable operator can alternatively challenge such conditions as inconsistent with the statutory requirements and objectives of Section 611, or under the franchise modification procedures specified in Section 625.

[31] *See, e.g., Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 ¶ 109 (2018) (addressing concerns that shortening shot clocks applicable to local review of small wireless facilities would fail to take into account the particular circumstances of each community by determining that "siting agencies may rebut the presumptive reasonableness of the shot clocks based on the actual circumstances they face"); *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802 ¶¶ 81-82 (2017) (in lieu of strict application of the Top-Four Prohibition on ownership of local broadcast stations, adopting "a hybrid approach that will allow applicants to request a case-by-case examination" based on a flexible set of criteria including ratings, revenue share data, and other market characteristics); *Consent to Transfer Control of Certain License Subsidiaries of Raycom Media, Inc. to Gray Television, Inc.*, Memorandum Opinion and Order, DA-18-1286 ¶ 19 (2018) (noting that "[u]pon request . . . the Commission considers showings that the application of this Top-Four Prohibition is not in the public interest due to specific circumstances in a local market or with respect to a specific transaction on a case-by-case basis").

Respectfully submitted,

**/s/ Rick Chessen**

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