



April 22, 2019

VIA ELECTRONIC FILING

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

RE: Notice of Ex Parte Letter

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

The Southern Colorado Educational Television Consortium (“SCETC”) which is based in Colorado Springs, Colorado is filing this Ex Parte Letter to support, build upon, follow up upon and thereby link its import to the filing which was made by the City of Hagerstown, Maryland in Reply Comments which were filed at the FCC.¹ Through its “Second Further Notice of Proposed Rulemaking” 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 (“Cable Act”), which Rulemaking was adopted September 24, 2018 and published in the Federal Register on October 14, 2018 (hereinafter “FNPRM”), the FCC has proposed issuing new rules interpreting relevant statutory provisions of the Cable Act.² The SCETC has, for 19 years, operated 5 Educational Access Channels which produce thousands of hours of Educational Programming each year.

The City of Colorado Springs (“City”) has a Cable Television Franchise dated December 14, 2017 with Comcast of Colorado/Pennsylvania/West Virginia, LLC (“Comcast”) and a Cable Television Franchise which was approved by the City on February 13, 2018 with Falcon Broadband, Inc. (“Falcon”) as well as a Cable Television Franchise signed by the City August 3, 2012 between the City and Qwest Broadband Services, Inc. D/B/A/ CenturyLink (“CenturyLink”). The City and SCETC entered into an Intergovernmental Agreement which was dated November 7, 2000 and subsequently amended on October 23, 2007. Additionally, the City

¹ See Reply Comments of the City of Hagerstown, Maryland filed December 13, 2018

² “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”.

and the SCETC entered into a Memorandum of Understanding dated August 16, 2004. The Intergovernmental Agreement and Memorandum of Understanding were updated, amended and restated and signed between the City and the SCETC in the Restated and Amended Joint and Cooperative Intergovernmental Agreement and Restated and Amended Memorandum of Understanding dated November 29, 2017 (the “IGA”). The SCETC relies on the City for the Educational Access Channels and receives funding for those Channels from the City which is essential for Channel support. An integral part of the IGA is the provision of 5 Educational Access Channels for the SCETC.

CONSORTIUM MEMBERS

The work of the Consortium continues to have a significant impact upon the Colorado Springs community at large including adults and children- approximately 82,994 K-12 students in Elementary Schools, Middle Schools, High Schools, Charter Schools and Alternative Schools, almost 18,000 adults furthering their education, diverse members of our community including the international and military population, the elderly and those with physical, mental and literacy challenges. **Its Member institutions include Harrison School District 2, Colorado Springs School District 11, Cheyenne Mountain School District 12, Academy School District 20, Colorado School District 49, the University of Colorado at Colorado Springs, Pikes Peak Library District, Pikes Peak Community College and The Colorado School for the Deaf and The Blind.** Reaching out to the community with Educational Programming continues to be essential to our City’s vitality, health, safety, welfare and opportunities in the region.

THE CHANNELS

The Consortium Channels, programming and shows from our SCETC Members are carried on the Comcast, Falcon Broadband and CenturyLink systems respectively as follows:

Channels 16, 73, 8004-Colorado Springs School District 11

Channels 17, 75, 8003-Pikes Peak Library District

Channels 19, 74, 8005-(Shared) Academy School District 20/Colorado School District 49/ Cheyenne Mountain School District 12, Harrison School District 2

Channels 20, 77, 8001-(Shared) University of Colorado at Colorado Springs and The Colorado School for The Deaf and The Blind

Channels 21, 78, 8002-Pikes Peak Community College

There would be a significant detriment to community stakeholders and the Public, Educational and Government (PEG) Access Channels should the Commission adopt an interpretation of the Cable Act proposed in the Second FNPRM. The FCC’s tentative conclusions are contrary to the mutual understandings of cable operators and educational institutions.

To our knowledge, no cable operator in the City has previously asserted to the SCETC that PEG channel capacity is somehow related to “franchise fees”. There would be a significant impact on existing cable franchises and key stakeholders if material terms of the Franchises that have been mutually agreed upon were to be modified by the Commission in the middle of the Franchise terms.

We are also concerned about the argument that the exemption from franchise fees for

certain PEG-related capital costs somehow indicates that all other PEG-related franchise obligations then become “franchise fees.” 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.”³ In short, because PEG-related franchise provisions, such as dedicated PEG channel capacity, are not monetary payments, they are not “franchise fees”, rendering any argument about the meaning of the “capital costs” exception in Section 622(g) (2) (C) irrelevant.

During the course of the cable franchise negotiations, the City and SCETC have worked diligently to ensure that the benefits of Educational and Governmental Access programming reach all cable subscribers while ensuring, that the needs assessed would be balanced with taking into account the reasonableness of the costs related to Comcast, Falcon and CenturyLink and the cable subscribers within the City. The needs and interests were presented to the cable operators, and then detailed, lengthy negotiations ensued in order to provide those EG Access Channels to subscribers under terms and conditions where the impact (including the cost impact) on the providers was taken into account. ***At no time, did the City ever unilaterally impose PEG Access Channel and capacity obligations on Comcast, Falcon or CenturyLink. The Cable Act(s) specifically provide for the provision of Access Channels in the context of cable franchise renewal negotiations***⁴.

It is important to emphasize that in the City, EG Access capacity has substantial value, not only to the local government but to many third-party institutions, including Pikes Peak Community College, The University of Colorado at Colorado Springs and Pikes Peak Library District which were given Educational Access Channels and the Colorado School for the Deaf and the Blind which has a shared Educational Access Channel.

The intended reach of EG Access is far beyond individual residents and extends to a host of community and non-profit organizations, the Military and their families, economic development groups, ethnic and minority entities, arts and cultural entities, senior and youth organizations -- literally key stakeholders throughout the entire community. All of these entities would be disenfranchised, if this capacity were to be offset at fair market value against franchise fees. Monetizing the capacity at a fair market amount will result in an offset that would make the EG capacity virtually unaffordable.

Since EG Access capacity has no commercial value, the only cost to the operator for providing such capacity is the capital cost of provisioning EG Access Channels. Once they are implemented, such items require very little maintenance and continue to enable the full use of the capacity for the provision of EG Access programming.

EG Access Channel capacity is not a viable candidate as an offset against franchise fees. There is already an external pass-through, line item mechanism for PEG fees if the cable operator under Federal law does not desire to absorb that cost. Under no circumstances, based on a plain

³ 47 U.S.C. Section 521, et seq.

⁴ 47 U.S.C. Section 521, et seq.

reading of the United States Code, can EG Access Channel capacity be offset against franchise fees.

Furthermore, it is widely believed that cable operators receive a number of free drops from the programmers for the provision of cable service to City buildings, fire stations, police stations, libraries and schools. It is absolutely inequitable to allow cable operators to deduct the value of those services (whether the value is based on a free market or at-cost figure) from franchise fees. For over three decades, cable companies throughout the country have provided free cable service as a valuable public service to City departments, fire and police stations, libraries and schools. There is no compelling reason to reverse that practice.

In the FNPRM, the FCC tentatively concludes that, “we should treat cable-related ‘in-kind’ contributions required by a franchising agreement as ‘franchise fees’ subject to the statutory five percent cap on franchise fees set forth in Section 622 of the Communications Act of 1934, as amended (‘the Act’), with limited exceptions.”⁵ Since the inception of the Cable Communications Policy Act of 1984, as amended (“Cable Acts”), cable operators and local franchising authorities have freely negotiated cable franchises with explicit understandings of what are franchise fees. The United States Code specifically carves out matters that are not considered cable franchise fees (such as requirements or charges incidental to the awarding or enforcing of the franchise, including payment for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages).⁶ It would be up to Congress, not the FCC, to change the law to include new items (such as the value of an Access Channel or customer service center) in the definition of “franchise fees”.

The FCC’s proposed rule to treat cable-related “in-kind” contributions required by a franchising agreement as “franchise fees” subject to the statutory five percent cap on franchise fees is not necessary to carry out the provisions of the Act. There simply is no portion of the Act establishing “in-kind contributions” that may be offset against franchise fees.

The FCC’s tentative conclusions would impair the Franchises between the City and Comcast, Falcon and CenturyLink by forcing the “treatment” of non-franchise fee payments as “franchise fees,” subject to the five percent statutory cap. The proposed rules could effectively eviscerate the franchise fees currently received by the City. Accordingly, the SCETC respectfully urges the FCC to change its tentative conclusions.

In the FNPRM, the FCC stated, “we tentatively conclude that we should treat cable-related, in-kind contributions required by LFAs from cable operators as a condition or requirement of a franchise agreement as ‘franchise fees’ subject to the statutory five percent franchise fee cap set forth in Section 622 of the Act... We tentatively conclude that this interpretation is most consistent with the statutory language and legislative history and seek comment on our analysis.”⁷ The FCC’s tentative conclusions are in error and would be severely damaging to one hundred thousand students in Colorado Springs along with other key stakeholders who will be adversely affected.

⁵ 83 FR 51911, 51913

⁶ 47 U.S.C. Section 542(g)(2)(D)

⁷ 83 FR 51911, 51914-51915

47 U.S.C. Section 542(g) of the Act (Section 622(g) (2)) clearly and unambiguously defines “franchise fees.” It was for Congress to decide what constitutes “franchise fees”, not the FCC. If the FCC’s tentative conclusions are adopted, it will have, in fact, overruled Congress which allows local franchising authorities to collect in a twelve-month period up to five percent of the cable operator’s gross revenues derived in such period from the operation of the cable system to provide cable services.⁸ Put another way, the suggested offsets are so damaging that the five percent franchise fee which has been in existence in innumerable communities around the country for over three decades will be negated in whole or in part.

There are other fundamental problems with the FCC’s tentative conclusions. For example, there is no meaningful delineation of what constitutes “cable-related in-kind” contributions. In fact, if the tentative conclusions are accepted at face value, there is no reason to have franchise fees because they could be completely negated by the offsets. Additionally, what would be the purpose of conducting a Community Needs Assessment if the resulting findings and implementation (such as the provision of EG Access Channels or free cable service for City buildings and schools) could be deducted from cable franchise fees? The SCETC worked closely with the City to identify that 5 Educational Channels are necessary to meet the needs and interests of the community.

Franchise fees are an integral part of the City’s General Fund. The franchise fees in the Cable Act and in the Comcast, Falcon and CenturyLink Franchises are an essential part of the compensation to the City by Comcast, Falcon and CenturyLink for the use of the public right-of-way. Through the IGA, a portion of the franchise fees are given as a grant each year from the City to the SCETC. Additionally, given the terms of the IGA, the City has given a grant to connect SCETC Members to the Fiber Rings and has contractually agreed to give another grant to the SCETC to be utilized to construct or lease fiber or trench and run fiber to further connect SCETC Members to the Fiber Rings and to facilitate HD upgrades by the SCETC Members at their respective institutions. The financial and EG Channel ramifications of the FCC’s tentative conclusions are far-reaching. The loss of all or a portion of franchise fees to the City in itself would be devastating. The 9 Members of the SCETC rely on the funding from the City in order to be able to obtain equipment, transport their Educational content over the Fiber Rings and then broadcast on the 5 Educational Channels on the Comcast, Falcon and CenturyLink cable systems.

Further, if EG Access Channel capacity is treated as a “cable-related in-kind” contribution, then there will be little or no incentive for the City to carry the EG Access Channels. This will affect not only the transparency of local government (i.e., the Governmental Access Channel), but also the viability of the Educational Access Channels and could impact public safety as well. Children, parents, teachers, other faculty and adult education will all be severely disadvantaged if EG Access Channel capacity is treated as an offset against franchise fees.

CONCLUSION

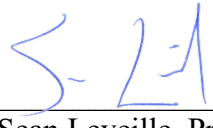
For the reasons set forth herein, the SCETC strongly urges the FCC to reconsider its tentative conclusions. The SCETC thanks the FCC and its Commissioners for the opportunity to submit this Ex Parte filing in this proceeding.

⁸ 47 U.S.C. Section 542(b).

Pursuant to the Commission's rules, a copy of this Letter is being electronically submitted in the record of this proceeding.

Respectfully submitted,

Southern Colorado Educational
Television Consortium

By: 
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