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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 July 1, 2019, Rick Chessen and Radhika Bhat of NCTA – The Internet & Television Association; Tara Corvo of Mintz, on behalf of NCTA; Maureen O'Connell of Charter; Howard Symons of Jenner & Block LLP, on behalf of Charter; David Don of Comcast; David Murray of Willkie Farr & Gallagher LLP, on behalf of Comcast; and Barry Ohlson of Cox spoke by phone with Michelle Carey, Holly Saurer, Martha Heller, and Raelynn Remy of the Media Bureau and Thomas Johnson, Susan Aaron, and Maureen Flood of the Office of General Counsel to discuss the above-referenced proceeding.[1] On July 2, 2019, Ms. O'Connell and Messrs. Chessen, Symons, Don, and Ohlson met with Alexander Sanjenis of Chairman Pai's office regarding this proceeding. Also, on July 2, Mr. Symons spoke with Mr. Johnson regarding this proceeding.

During the calls and meeting, the cable representatives restated their position that the Commission should adopt its tentative conclusions in the *Second FNPRM*, including a reaffirmation that the mixed-use rule protects all cable operators from additional fees or franchise requirements for the provision of non-cable services over a franchised cable system. The cable representatives also reiterated their position that the Commission has ample authority under Sections 621, 622, 624, and 636 of the Cable Act to reaffirm this clear federal framework and to preempt state and local government actions that seek to impose fees and regulations on non-cable services offered over franchised cable systems as well as the equipment and facilities used to provide such services, even when states and localities claim not to be acting as franchising authorities. This includes affirming that a cable franchise should be construed,

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[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*").

pursuant to Section 621(a)(2) to authorize a cable operator to construct and operate a cable system for the provision of cable and non-cable services[2] in exchange for the franchise fee calculated in accordance with Section 622(b), and clarifying that Sections 624(a), (b), and (e) prohibit state and local governments from regulating such non-cable services and associated equipment and facilities.[3]

The cable representative also emphasized that the imposition of additional fees or franchise requirements on already-franchised cable operators is a growing problem. This includes the imposition of rights-of-way fees on cable operators by state governments for access to public rights-of-way located within the area covered by the operator's franchise, and for which the operator is already paying a franchise fee to the local franchising authority.[4] As another example, the state of Maryland recently froze numerous routine permit requests from cable operators to construct and use their cable systems in state-owned rights-of-way pursuant to their local franchises. In an abrupt departure from decades of cable franchising practice, Maryland is now demanding that the cable operators enter into separate "resource sharing agreements" with the State Department of Information Technology,[5] involving duplicative and conflicting regulatory requirements and millions of dollars in additional fees, to continue to have access to these same, already-franchised rights-of-way.

Such examples of additional, duplicative state and local regulatory requirements and fees underscore why it is essential for the Commission to clarify that Section 621 affords franchised cable operators an enforceable statutory right to access and use the public rights-of-way to

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2 47 U.S.C. § 541(a)(2) ("Any franchise *shall be construed* to authorize the construction of a cable system over public-rights-of-way, and through easements, which is within the area to be served by the cable system . . . .") (emphasis added). A franchise includes the authorization to construct or operate a cable system. See 47 U.S.C. § 522(9).

3 *See* Comments of NCTA – The Internet & Television Association, MB Dkt. No. 05-311, at 8-21 (Nov. 14, 2018); Reply Comments of NCTA – The Internet & Television Association, MB Dkt. No. 05-311, at 24-29 (Dec. 14, 2018); Letter from Rick Chessen, NCTA – The Internet & Television Association, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 05-311, at 10-14 (filed Mar. 13, 2019).

4 *See, e.g.,* Letter from Rick Chessen, NCTA – The Internet & Television Association, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 05-311 (filed Mar. 13, 2019) (describing new fees imposed by multiple communities in Oregon and by the City of Rochester, New York); Letter from Rick Chessen, NCTA – The Internet & Television Association, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 17-84, at 10 (filed June 11, 2018) (describing a proposed fee in West Virginia); *see also* Letter from Rick Chessen, NCTA – The Internet & Television Association, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 05-311, at 1-2 (filed Apr. 19, 2019) (arguing that such duplicative fees "cannot be squared with the five percent statutory franchise fee cap").

5 Notably, the underlying state law is part of Maryland's "State Finance and Procurement Code," which addresses state procurement issues and says nothing about management of the public rights-of-way. It has been on the books for over 20 years but was never before read to require cable operators to pay rights-of-way use fees to the state government on top of the comparable fee they already pay to local governments in Maryland. *See* Md. Code Ann., State Fin. & Proc. § 3A-307(c). To the contrary, consistent with federal law, the Maryland legislature long ago delegated the authority to issue franchises for cable system use of the public rights-of-way to local governments. Md. Local Gov't Code Ann. §10-312(e)(2) (authorizing counties); *Id*. 5-204(d)(2) (authorizing municipalities).

construct and operate their cable systems to provide cable, broadband, and other services,[6] in exchange for franchise fees up to the five-percent statutory cap[7] – and which the Cable Act makes clear may not be subject to additional fees or franchise requirements.[8]

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
Martha Heller
Raelynn Remy
Thomas Johnson
Susan Aaron
Maureen Flood
Alexander Sanjenis

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6 *See Cable TV Fund 14-A, Ltd. v. Property Owners Ass'n Chesapeake Ranch Estates, Inc.*, 706 F. Supp. 422, 434 (D. Md. 1989) (holding that Section 621(a)(2) creates "an enforceable statutory right to lay cable wires"); *Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169, 1173 (4th Cir. 1993) ("[T]he plain language of section 621(a)(2) shows that Congress intended . . . to authorize a franchisee . . . to use public lands, namely public rights-of-way.").

7 47 U.S.C. § 542(b).

8 *See Liberty Cablevision of P.R., Inc. v. Municipality of Caguas*, 417 F.3d 216, 223 (1st Cir. 2005) (holding that the Cable Act does not permit a locality to impose a right-of-way access fee where the cable operator had already paid for access to the same rights-of-way through the state-level franchising process).