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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 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; Howard Symons of Jenner & Block LLP, on behalf of Charter; and Jennifer Prime of Cox met with Michelle Carey, Holly Saurer, Martha Heller, Raelynn Remy, Brendan Murray, Maria Mullarkey, and Bryce Janne of the Media Bureau and Susan Aaron, Maureen Flood, and Michael Carlson of the Office of General Counsel to discuss the above-referenced proceeding.[1]

We discussed the recently released *Draft Order* in this proceeding,[2] which would reaffirm the clear limits Congress established on state and local government authority over cable operators and cable systems. Consistent with prior filings in this proceeding, we sought clarification of the Commission's proposed findings on in-kind assessments and the mixed-use rule,[3] highlighting in particular the *Draft Order*'s discussion of the issues below.

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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*").

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*, Draft Third Report and Order, FCC-CIRC1908-08 (rel. Jul. 11, 2019) ("*Draft Order*").

3 *See, e.g.,* Comments of NCTA – The Internet & Television Association, MB Dkt. No. 05-311, at 6-19, 46-48, 51-59 (filed Nov. 14, 2018) ("NCTA Comments"); Reply Comments of NCTA – The Internet & Television Association, MB Dkt. No. 05-311, 21-22, 24-31, 34-35 (filed Dec. 14, 2018); NCTA – The Internet & Television Association *Ex Parte*, MB Dkt. No. 05-311, at 5-7 (filed Apr. 18, 2019); NCTA – The Internet &

PEG Transport Lines

We discussed the *Draft Order*'s treatment of PEG transport return lines as capital costs.[4] We explained that under the definition of capital costs in the *Draft Order*,[5] a single PEG transport return line could be considered a capital cost to the extent it is dedicated to connecting the PEG studio to the cable network or head-end if it is treated as a "long-term asset" of the PEG operator. The provision of a single dedicated line is "adequate" under Section 621(a)(4)(B)[6] because it enables the PEG entity to produce and transmit its programming to cable subscribers. By contrast, we noted that the costs for using this facility—and the costs for using capacity over shared facilities to transmit PEG programming—and not just the costs of maintenance of such facility, would be considered operating costs under the statute and the *Draft Order*.[7] The fair market value of the use of such capacity, therefore, are costs that count against the franchise fee cap.[8]

Facilities and Equipment Used to Provide Broadband and Other Non-Cable Services

Consistent with the Cable Act, we noted that the *Draft Order* makes clear that state or local authorities may not impose fees and conditions on non-cable services, such as broadband, including the facilities and equipment used to provide such services.[9] Congress understood that there would be no point in restricting franchising authority over non-cable "services" if states or localities could evade that limitation simply by purporting to require fees and authorizations for associated "facilities and equipment."

This conclusion is bolstered by multiple provisions of the Cable Act. Section 624(a) provides that "[a]ny franchising authority may not regulate the *services, facilities, and equipment* provided by a cable operator *except to the extent consistent with this subchapter*".[10] Section 624(b)(1) then specifies that a franchising authority "may establish requirements for facilities and equipment, but may not . . . establish requirements for video programming or other

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Television Association *Ex Parte*, MB Dkt. No. 05-311, at 1-3 (filed Apr. 19, 2019); NCTA – The Internet & Television Association *Ex Parte*, MB Dkt. No. 05-311, at 2-3 (filed Jul. 3, 2019).

4 *Draft Order* ¶ 49.

5 *Id.* ¶ 38.

6 47 U.S.C § 541(a)(4)(B).

7 *Compare Draft Order* ¶ 49 *with id.* ¶ 36 (distinguishing "between costs incurred in *building* of PEG facilities, which are capital costs, and costs incurred in *using* those facilities, which are not").

8 *See id.* ¶ 55.

9 *See id.* ¶ 67 ("Congress in Title VI intended, among other things, to circumscribe the ability of franchising authorities to use their Title VI authority to regulate non-cable services provided over the cable systems of cable operators and the facilities and equipment used to provide those services."); *id.* ¶ 68 ("The Mixed-Use Rule Prohibits LFAs From Regulating Under Title VI the Non-Cable *Services, Facilities, and Equipment* of Incumbent Cable Operators That Are Also Common Carriers.") (emphasis added); *id.* ¶ 74 ("The Mixed-Use Rule Prohibits LFAs From Regulating Under Title VI the Non-Cable *Services, Facilities, and Equipment* of Incumbent Cable Operators That Are Not Common Carriers.") (emphasis added).

10 47 U.S.C § 544(a) (emphasis added).

information services."[11] As the *Second FNPRM* concluded, "we do not believe [Section 624(b)(1)] provision authorizes LFAs to regulate facilities or equipment to the extent they are used to provide such services, including broadband Internet access service."[12] Any other reading of the statute would effectively negate the bar on the regulation of information services by LFAs. Section 624(b) must also be read in harmony with the broad prohibition on state and franchising authority regulation of cable transmission technology.[13]

Finally, as the *Draft Order* notes, the right under a franchise to construct, manage, and operate a cable system does not mean merely the right to provide cable service.[14] Rather, under Section 621(a)(2), "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way."[15] By its plain terms, the "construction of a cable system" encompasses installation of the facilities and equipment necessary to provide cable and non-cable services, not just the provision of such services.[16] Because an authorized franchise gives effect to this statutory right, the *Draft Order* correctly observes that "[s]o long as the cable operator pays its fees and complies with the other terms of its franchise, it has a license to operate and manage its cable system free from the specter of compliance with any new, additional, or unspecified conditions (by franchise or otherwise) for its use of the same rights of way."[17] Any attempt by states or localities to impose requirements on the facilities and equipment used to provide information services over a cable system would constitute the very end-run around the federal limits on their regulatory authority that Congress intended to foreclose.[18]

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[11] 47 U.S.C § 544(b)(1)

[12] *Second FNPRM* ¶ 28.

[13] *See* 47 U.S.C. § 544(e); *see also* NCTA Comments at 14 ("Although Section 624(b) refers to a franchising authority's ability to regulate equipment or facilities, that grant of authority must be read in context and in harmony with Section 624(e). Since franchising authorities cannot regulate non-cable services, the provision does not authorize franchising authorities to regulate facilities or equipment to the extent they are used to provide such non-cable services.").

[14] *Draft Order* ¶ 88.

[15] 47 U.S.C § 541(a)(2); *see also* Draft Order ¶ 86 ("Title VI establishes a framework that reflects the basic terms of a bargain—a cable operator may apply for and obtain a franchise to access and operate facilities in the local rights of way, and in exchange, a local franchising authority may impose fees and other requirements as set forth and circumscribed in the Act.").

[16] *See* 47 U.S.C. § 522(7) ("[T]he term 'cable system' means a facility . . . .").

[17] *Draft Order* ¶ 86.

[18] As the D.C. Circuit has observed, "[c]ourts have consistently held that when state regulation of [communications] equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulation must necessarily yield to the federal regulatory scheme." *Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982). The Commission has likewise recognized this fundamental point. *See, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 ¶ 102 (2002) ("Once a cable operator has obtained a franchise for [a cable system], our information service classification should not affect the right of cable operators to access rights-of-way as

Application of 621 Order to Existing Franchise Agreements

We also discussed bringing existing franchise agreements into compliance with the *Draft Order* regarding the treatment of cable-related in-kind contributions. In this regard, the *Draft Order* specifically directs that "LFAs will still have a choice: they can continue to receive monetary franchise payments up to the five percent cap, they can continue to receive their existing PEG support and reduce the monetary payments they receive, or they can negotiate for a reduction that fits within the bounds of the law that Congress adopted."[19] We noted that, in fact, in many if not most instances, these adjustments can be made by the cable operator once the operator identifies the fair market value of in-kind contributions, without any formal modification of existing franchise agreements, and we suggested that the Commission recognize this likelihood.

The *Draft Order* also discusses a process for the modification of cable franchises, to the extent such a process is necessary. In these instances, the *Draft Order* proposes that cable operators should follow the modification process outlined in Section 625, which allows LFAs 120 days to respond to a franchise modification request.[20] We pointed out that section 625 is unworkable for bringing existing franchises into compliance with the law because, among other things, it exempts PEG requirements from the modification process and includes a "commercial impracticability" standard that has no application here.[21]

For these reasons, we believe the *Draft Order* should be modified to eliminate the suggestion that any required modifications be undertaken under Section 625 but make clear that in the rare instances where a modification is required, LFAs must respond promptly to a request for such modification. In this regard, the 120-day period allowed under Section 625 provides useful guidance on a reasonable time period for both purposes and should therefore be adopted in the *Draft Order*. The *Draft Order* should also specify that continued demands for monetary and in-kind contributions in excess of the cap, and refusals to modify franchise provisions superseded by the Commission's guidance, are preempted under Section 636(c).

Other Issues

We also discussed the *Draft Order*'s treatment of "adequate" PEG capacity, the nature of obligations deemed essential to the provision of cable service that would be exempt from the franchise fee cap, duplicative fees and authorizations, and the scope of preemption under the *Draft Order*.

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necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service.").

19 *Draft Order* ¶ 54.

20 *See id.* ¶ 65.

21 *See* 47 U.S.C § 545.

Finally, we urged the Commission to clarify that the preemption of duplicative taxes, fees, assessments, or requirements[22] applies to any imposition of taxes, fees, assessments, or requirements on affiliates of the cable operator that utilize the cable system to provide non-cable services. Whether imposed on the cable operator or an affiliate, such taxes, fees, assessments, or requirements exceed state and local authority over the provision of non-cable services for the reasons set out in the *Draft Order*.

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
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[22] *See*, *e.g.*, *Draft Order* ¶ 82.