

June 12, 2019

The Honorable Ajit V. Pai  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> St. SW  
Washington, DC 20554

Dear Chairman Pai:

I write to express my concern regarding the Federal Communications Commission's (FCC) proceeding "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) in which the FCC proposes allowing cable companies to determine the fair market value of franchise obligations such as public, educational, or governmental (PEG) channels and then deducting that amount from franchise fees. This proposal will be detrimental to the health of PEG channels in Maryland and throughout our country.

The Cable Act permits local franchising authorities (LFAs) to include in their franchise agreements with cable companies clauses that require cable companies to meet certain community needs, including creating spectrum space for PEG channels. Federal law further specifies that state and local governments cannot require fees that exceed more than five percent of a local franchisee's gross revenue from cable television services provided over their cable system.

However, the FCC's proposal would permit cable companies to assign a value to PEG channels and other franchise obligations, deem them in-kind contributions, and subtract that amount and the value they place on any other in-kind contributions, from the franchise fee the cable company pays to LFAs. These in-kind contributions could include the backhaul of signals, free or reduced cable connections to town halls, interactive program guides, or even the channel capacity allotted to PEGs.

PEG channels provide essential local programming not provided by other media and reflect the special interests and character of their specific communities. The entire state of Maryland is served by a limited number of broadcast stations. Local community events in the other 12,000 square miles of Maryland are often overlooked by commercial and public broadcasters because larger media entities have little time or incentive to cover them. Our local PEG channels are also invaluable and essential.

On October 29, 2018, my colleagues sent you a letter concerning this very issue.<sup>1</sup> In response to their letter, you noted that the FCC concluded that Congress had broadly defined franchise fees in 1984.

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<sup>1</sup> See, e.g., Letter from the Honorable Edward Markey, Tammy Baldwin, Margaret Wood Hassan, Benjamin L. Cardin, Jeffrey A. Merkley, Bernard Sanders, Gary C. Peters, Ron Wyden, Patrick Leahy, Richard Blumenthal, and Elizabeth Warren to the Honorable Ajit Pai, October 29, 2018 (regarding Franchise Fee Cap on PEG Funding).

[...] indeed, with respect to PEG channels, it only excluded support payments with respect to franchises granted prior to October 30, 1984 as well as capital costs required by franchises granted after that date.<sup>2</sup>

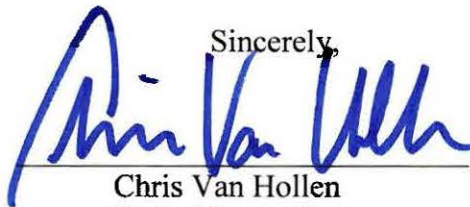
Unfortunately, your response seems to demonstrate a deliberate attempt by the FCC to ignore legislative history and circumvent Congressional intent. Senator Wirth's response to a colleague's question about the relationship between permissible franchise fees and PEG channels is unequivocal and makes clear that the fees are not the same as franchise obligations. He stated:

[...] a franchise fee [is] 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<sup>3</sup>."

Additionally, a leading FCC order involving the City of Bowie in Maryland made clear that contractual franchise obligations cannot be counted as franchise fees.<sup>4</sup>

The legislative history is clear and the Commission should take care to follow the plain meaning of the statute. Additionally, I urge the Commission to undertake a cost-benefit analysis that weighs the impact this rulemaking will have on local communities versus the marginal benefit to cable providers and their shareholders.

Thank you for your attention to this matter.

Sincerely,  
  
Chris Van Hollen  
United States Senator

CC: The Honorable Michael O'Rielly, Commissioner  
The Honorable Brendan Carr, Commissioner  
The Honorable Jessica Rosenworcel, Commissioner  
The Honorable Geoffrey Starks, Commissioner

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<sup>2</sup> See, e.g., Letter from the Honorable Ajit Pai, Chairman, Federal Communications Commission, November 27, 2018 to the Honorable Edward Markey, Tammy Baldwin, Margaret Wood Hassan, Benjamin L. Cardin, Jeffrey A. Merkley, Bernard Sanders, Gary C. Peters, Ron Wyden, Patrick Leahy, Richard Blumenthal, and Elizabeth Warren (regarding Franchise Fee Cap on PEG Funding).

<sup>3</sup> See, e.g., Congressional Record, daily edition, Vol. 130, October 11, 1984, p.14285-97.

<sup>4</sup> City of Bowie, 14 FCC Rcd 9596 (Cable Services Bureau, 1999)



FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON

OFFICE OF  
THE CHAIRMAN

July 30, 2019

The Honorable Chris Van Hollen  
United States Senate  
110 Hart Senate Office Building  
Washington, DC 20510

Dear Senator Van Hollen:

Thank you for your letter regarding the impact that the statutory cap on franchise fees has on funding for public, educational, or governmental (PEG) channels. The Commission recently released the attached draft *Third Report and Order*, which the Commission plans to consider during its upcoming August meeting. While this draft may change in response to further input from stakeholders and Commissioners, you will see that it addresses in detail each of the concerns raised in your letter.

As you know, the Communications Act limits franchise fees to five percent of cable revenues and defines "franchise fee" to include "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such." 47 U.S.C. § 542(g)(1). In *Montgomery County, Md. et al. v. FCC*, the U.S. Court of Appeals for the Sixth Circuit held that the terms "tax" and "assessment" were broad enough to encompass nonmonetary exactions—such as cable-related, in-kind contributions. 863 F.3d 485, 490-91 (6th Cir. 2017). But the court held that just because the statutory definition of "franchise fee" *could* include such nonmonetary contributions did not necessarily mean that it *did* include them, and it remanded the issue to the Commission for further consideration. *See id.* at 491-92.

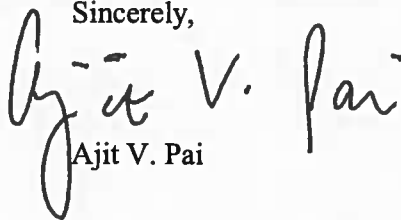
In response to this remand, the Commission unanimously issued its *Second Further Notice of Proposed Rulemaking* to consider the scope of the congressionally-mandated statutory limit on franchise fees. The Commission developed a voluminous record in response to this notice, including numerous submissions from local franchising authorities, providers of PEG programming, and cable operators.

The draft order is the product of our careful consideration of this record. The result, we believe, is both consistent with the Act and responsive to your concerns regarding PEG programming. Among other things, the Commission observed that Congress broadly defined franchise fees; indeed, with respect to PEG channels, it only excluded support payments with respect to franchises granted prior to October 30, 1984 as well as certain capital costs required by franchises granted after that date. 47 U.S.C. §§ 542(g)(2)(B) & (C). The draft order therefore concludes that cable-related, in-kind contributions—including PEG-related contributions—are "franchise fees" subject to the Act's five-percent cap unless otherwise expressly excluded.

At the same time, the order defers ruling on the complex issues raised by PEG channel capacity, and concludes that the costs of providing PEG channel capacity should not be offset against the franchise fee cap until the Commission can address the issue on a more complete record. The draft order also broadens the Commission's interpretation of an exclusion for certain PEG-related capital costs. These latter two conclusions directly address the concerns raised in your letter concerning the order's potential impact on PEG programming.

Again, thank you for your letter. Your views have been entered into the record of the proceeding and—as you can see in the draft *Third Report and Order*—have been considered as part of the Commission's review. See Draft Order at 12 n.82. Please let me know if I can be of any further assistance.

Sincerely,

A handwritten signature in black ink that reads "Ajit V. Pai". The signature is fluid and cursive, with the first name "Ajit" being the most prominent part.

Ajit V. Pai

Attachment