

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
Implementation of Section 621(a)(1) of the Cable ) MB Docket No. 05-311  
Communications Policy Act of 1984 as Amended )  
by the Cable Television Consumer Protection and )  
Competition Act of 1992 )

**COMMENTS OF ‘ŌLELO COMMUNITY MEDIA**

To the Honorable Chair Ajit V. Pai:

‘Ōlelo Community Media (“‘Ōlelo”) — located on the island of Oah‘u, State of Hawai‘i, and the designated operator of the City and County of Honolulu’s Public, Education, Government (PEG) Access station and channels appreciates the opportunity to express our serious concerns about the FCC’s Second Further Notice of Proposed Rulemaking (“FNPRM”) in the above-referenced docket; specifically as it relates to the FCC proposing that certain in-kind contributions in a franchise agreement other than PEG capital costs, build-out requirements, and other items enumerated in 47 USC Section 542(g)(2) are subject to the franchise fee cap under the Cable Act.

As a PEG access provider that has served our community for nearly 30 years, we strongly oppose the Commission’s overly broad and ambiguous definition of cable-related, in-kind contributions. The proposed definition is as follows:

cable related in-kind contributions is to include “any non-monetary contributions related to the provision of cable services provided by the cable operators as a condition or requirement of a local franchise agreement, including but not to limited free or discounted cable services and the use of cable facilities or equipment.” The Commission further states that “this proposed definition, cable-related, in-kind contributions would not have to be provided directly to the LFA to be subject to the statutory five percent cap; rather any cable related, in-kind contributions provided to the LFA or any other entity designated by the LFA as a condition or requirement of a franchise agreement would be subject to the cap, if not expressly exempt under Section 622(g)(2). FCC 18-131 at page 13.

The FCC's broad definition of "In-Kind" contributions will allow cable operators to circumvent their negotiated obligations such as accommodating hearing impaired subscribers, cable services to schools and public buildings, transmission of PEG programming and PEG channel capacity. These negotiated items are what make cable providers good corporate citizens within their communities, and are critical to the exercise of free speech through noncommercial programming produced by local community members whose programs are aired on PEG access channels. Moreover, these diverse noncommercial programs provide value and benefit to cable subscribers and cable operators as such programs are not available on their competitors' systems such as broadcast, satellite and wireless video providers.

The Commission at the outset in introducing its proposed rules states that "we seek to faithfully interpret the statutory provisions at issue in a way that preserves incentives for all cable operators to deploy infrastructure that can be used to provide numerous services, including video, voice, and broadband Internet access service to consumers." FCC 18-131 at page 9. However, it is not clear as to why the Commission considers what it refers to as cable related in-kind contributions furthers its stated objective. PEG access channel capacity, connections to access programming origination points, cable service to schools and libraries, etc., have been part of negotiated franchise agreements for decades without being considered subject to the franchise fee cap. To suddenly declare that they should now be considered and included as franchise fees is contrary to decades-long history of such items being part of the negotiated franchise agreements that do not include in-kind contributions as a fee.

The consequences of the proposed rules will be devastating as PEG access programming as we know it today will be significantly diminished or eliminated if the Commission's proposed

rules were to take effect. For ‘Ōlelo, the impact of the Commission’s proposed rules will be no different, essentially silencing the diversity of community voices and eliminating a vital platform for the exercise of free speech in a safe environment.<sup>1</sup>

It is not clear how the Commission’s proposed rules and conclusions relating to the broad expansion of the statutory definition of “franchise fee” advances its desire to incentivize cable operators to deploy infrastructure. It appears that the Commission may be legislating instead of implementing statutory provisions. If any change to the definition of “franchise fees” under the Cable Act is to be made, we respectfully submit it should be made by Congress.

In addition, the Cable Act provides that PEG access channel capacity is not subject to the five percent franchise fee cap. As former Commissioner Adelstein stated in his dissent in “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: “the Communications Act defines “PEG access facilities” to mean channel capacity, facilities and equipment. 47 USC Section 522(16)<sup>2</sup>. Moreover, the legislative history of 1984 Cable Act clearly indicates that any franchise requirement for the provision of services, facilities or equipment is not included as a fee.”

As stewards and champions of free speech, especially at the local level, PEG access organizations like ‘Ōlelo are diligent in ensuring that members of our community, educational

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<sup>1</sup> The Commission proposes “that cable-related, in-kind contributions be valued for purposes of the franchise fee cap at their fair market value”, or “whether cable-related in-kind contributions should be valued at the cost to the cable operator.” FCC 18-131 at page 13. Whether its fair market value or at cost, the consequence will remain the same for Olelo –it will essentially significantly reduce or eliminate our operations and programs.

<sup>2</sup> 47 USC Section 522(16) states: “the term ‘public, educational, or governmental access facilities’ means (A) channel capacity designated for public, educational, or governmental use; and (B) facilities and equipment for the use of such channel capacity.”

institutions, and local government are able to communicate effectively using cable television to share messages and engage in discussions that shape the character of our communities, our society. For 30 years, 'Ōlelo has equipped and empowered tens of thousands of O'ahu residents, community organizations, educational institutions, and local and State government officials and agencies by providing basic and advanced video production resources, trainings and services necessary to conceive, design, execute, and share unbridled messages and community dialogue via PEG access channels. To date, 'Ōlelo has cablecast over 120,000 locally produced programs that represent Hawai'i's rich diversity in speech, culture, and community perspectives. Over 6,000 hours of original programming pour in annually. With gavel-to-gavel coverage of legislative hearings/meetings, city council hearings/meetings, and neighborhood board meetings, the community benefits from those government programs by being more informed of issues affecting their lives and communities as well as providing enhanced transparency for local and state government bodies and agencies.

'Ōlelo currently operates four (4) linear cable channels and two (2) VOD channels. Our channels have featured shows in Samoan, Tongan, Hawaiian, Filipino, Spanish, Okinawan, Marshallese and Vietnamese to name a few of the many languages represented on our channels. We have veterans producing shows to connect other veterans to services, teenagers producing student variety shows, seniors producing tai chi exercise programs, media coverage of various community events, meetings, and conferences every week. 'Ōlelo's access channels have become a vital service to our communities where the diverse programs noted above are aired and shared throughout our island.

In addition, our local media service centers are a gathering place for community members. 'Ōlelo operates six (6) media service centers located throughout the island and on school

campuses, key to supporting our youth training and afterschool programs. Our record-breaking youth initiatives touch thousands of students annually with some schools having incorporated our initiatives into their curriculum. Many, if not all of these services and outcomes would be greatly diminished or lost if the Commission's rules as proposed were to be adopted and implemented. We invite the Commission to view the important benefits provided to and by the community members who are trained and produce their noncommercial programs on our access channels. - visit [www.olelo.org/olelonet](http://www.olelo.org/olelonet) to view any of the 10,000+ community programs currently posted or <https://www.youtube.com/user/olelocm> to see videos on our various programs and services addressing the media needs of our youth, community leaders and policymakers.

The Commission tentatively concluded that build-out requirements are not franchise fees because they are not contributions to the franchising authority. The Commission then requests comment on "other requirements besides build-out obligations that are not specifically for the use or benefit of the LFA or an entity designated [by] the LFA and therefore should not be considered contributions to an LFA." FCC 18-181 at page 12. Use of PEG access channel capacity for PEG programming fits squarely into the category of benefits that do not accrue to the LFA or its designated access provider.

We believe the intent of the PEG provisions of the 1984 Cable Act was in part to strengthen local voices, enhance community engagement, and strengthen our local democracy using innovative media. By broadly defining "franchise fee" to include "in-kind" support, the Commission's proposal will unfairly shift the balance between cable franchising authorities and cable operators and inevitably force franchising authorities to minimize or eliminate the use of

PEG cable channels.<sup>3</sup> We respectfully reject the implication in the FNPRM that PEG access channel capacity is for the benefit of the local franchising authority (LFA) or the designated PEG provider. We submit that the benefit is to the public. It is truly the local community members including government, community organizations, students, teachers, veterans, and our senior citizens who utilize the resources, both programs and equipment provided by the PEG access organization, who benefit, as well as the consumers who are able to view the vast diversity of local programs.

‘Ōlelo provides valuable local programming and services that are unique, important to and valued by our community. The Commission asks “what effect, if any, would excluding cable-related, in-kind contributions from ‘franchise fees’ (i.e. allowing LFAs to seek unlimited cable-related in-kind contributions on top of the five percent franchise fee permitted by Section 622) have on the new entrants and incumbents? Would such exclusion likely delay or deter infrastructure investment by new competitors? Would it affect incumbent cable operators’ ability to invest in new facilities and services, including broadband services?” FCC 18-131 at page 13. As noted above, decades-long history of negotiated franchise agreements that include PEG channel capacity without being subject to the franchise fee cap does not appear to have had the effect of hindering or delaying incumbents or new entrants deployment of new infrastructure such as

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<sup>3</sup> The Commission in its discussion and ultimate conclusion that there is no basis to distinguish between in-kind contributions unrelated to cable services to in-kind contributions related to cable services for the purpose of the five percent cap on franchise fees, stated that the “LFAs could easily evade the five percent cap” by imposing in-kind contributions in addition to the five percent franchise fee. FCC 18-181 at pages 9 and 10. However, the franchise agreements are negotiated by the parties. If the cable operator and LFA agree to certain obligations in addition to the five percent franchise fee cap under current law, then it should be honored. The effect of the proposed rules will change how franchise agreements will be negotiated, and adversely impact PEG access operations for ‘Ōlelo and other similar organizations across our nation. Respectfully, again this is a solution looking for a problem.

upgrades of cable systems, expansion of cable service offerings including adding hundreds of cable digital channels including HD, or enhancing their broadband bandwidth capacity where some are offering download speeds of up to 1 Gig or more. Respectfully, this is a solution looking for a problem.

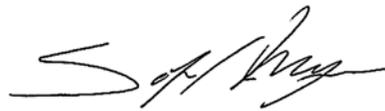
The Commission also invites comments on “whether we should apply the proposals and tentative conclusions discussed above, as well as any or all aspects of the Commission’s decisions in the First Report and Order and Second Report and Order, to state level franchising actions and state regulations that impose requirements on local franchising.” FCC 18-181 at page 21. We respectfully submit that the Commission should not. Hawai‘i is one of the few jurisdictions that regulates cable companies on a statewide basis and has done so since 1970. See Hawaii Revised Statutes Chapter 440G. From our perspective, regulation at the state level works. There is uniformity in regulatory requirements as well as to its application – one regulatory body instead of multiple LFAs with differing requirements within a state. Franchise agreements are negotiated between the state and the cable company. There are two companies with cable franchises issued by the State – Charter and Hawaiian Telcom. While there are two cable service providers, only one has franchises that cover each of the four counties in Hawai‘i. The other provider has a franchise for the City and County of Honolulu, island of Oah‘u.

As noted earlier, we do not believe that state franchising regulations impede competition or discourage investment in infrastructure. Again, we respectfully submit that this issue is a solution looking for a problem. We also respectfully ask that since Hawai‘i has been regulating cable companies since 1970 on a statewide basis and it continues to work for the State, the Commission exempt Hawai‘i from its proposed rules.

In closing, for reasons stated herein, 'Ōlelo strongly opposes the Commission's proposed rules and tentative conclusions in the FNPRM. We trust that the Commission will consider our comments and those of similar organizations across our nation, and will preserve and protect PEG access in the future for our communities and for future generations.

Thank you for the opportunity to submit our comments on this very important and significant matter.

Respectfully submitted,



Sanford Inouye  
President and CEO  
'Ōlelo Community Media

November 13, 2018

Cc: The Honorable Michael O'Rielly, Commissioner  
The Honorable Brendan Carr, Commissioner  
The Honorable Jessica Rosenworcel, Commissioner

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