

**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 AKAKU MAUI COMMUNITY MEDIA

Maui County Community Television dba Akaku Maui Community Media (Akaku) appreciates the opportunity to file comments on the Second Further Notice and Proposed Rulemaking (“FNPRM”) in the above-referenced docket.

Akaku is a fully local, media non-profit organization offering Public, Educational and Government access television (PEG), local news, media education, broadband adoption and radio broadcasting. For more than twenty-five years, we have been the only television station in the nation serving a remote three island county in a location where the vast majority of electronic communication coming our way is dominated by nationally affiliated media originating from urban Honolulu on Oahu. It is important to point out that the Hawaiian Islands are incredibly diverse and that each island has unique characteristics, topography, cultural identities and demographics. Honolulu is a different county on a different island with marginal shared communities of interest with those of Maui, Molokai and Lanai. This makes Akaku a sole electronic source of regionally relevant information, most of it local, all of it non-discriminatory, non-commercial, uncensored and unfiltered. We program 3 cable channels reaching 53,000 homes; a low power radio station (KAKU 88.5 FM) and several websites. Akaku Maui Community Media is literally the place people turn to obtain essential information they can find nowhere else, a place they use to communicate with each other, and a reliable forum they rely on for democratic civic engagement. Our mission is to Empower the Community's Voice through Access to Media.

This FNPRM essentially allows cable companies to determine how their “rent” for use of public right of way (franchise fee revenue) will be spent and severely restricts LFA oversight. Since we rely on 3% of cable franchise fees for the majority of our funding, this rulemaking, if adopted, will have the unfortunate consequence of decimating these valuable community resources, diminish educational opportunities for our people, eliminate jobs, retard media literacy and adversely affect the fabric of a vibrant community.

The FCC is proposing to rule that all “In-Kind” cable franchise obligations other than PEG capital costs and build-out requirements are a “franchise fee” under the Cable Act and thus count

against the 5% franchise fee cap. The FCC would define “In-Kind” contributions so broadly as to undermine the Cable Act’s intent to provide franchise fees to communities for use of public rights of way. Any non-monetary benefit could conceivably be charged back against franchise fees – from backhaul services, to electronic program guides, to the value of PEG channel capacity itself. The charge backs would be at fair market value as determined by the cable industry, so we believe in many areas franchise fees might be eliminated in their entirety.

We strongly disagree with the tentative conclusion in the FNPRM that cable-related in-kind contributions, such as those that allow our programming to be viewed on the cable system, are franchise fees. For more than 48 years, PEG access has flourished in communities all across America precisely because we have enjoyed long-standing agreements from the cable operator that such obligations being contemplated in this rulemaking are not franchise fees. Using fair market value to determine the amount to be considered a franchise fee will lead to arbitrary deductions. We reject the implication in the FNPRM that PEG programming is for the benefit of the local franchising authority (LFA) or a third-party PEG provider, rather than for the public or the cable consumer. Akaku provides valuable local programming that is not otherwise available on the cable system or in other modes of video delivery such as satellite, IPTV, OTT, or social media. Yet the Commission tentatively concludes that non-capital PEG requirements should be considered franchise fees because they are, in essence, taxes imposed for the benefit of LFAs or their designated PEG providers. This conclusion has no basis in fact since as far back as 1972 the FCC concluded that franchise fees are not “taxes” but “rent” for use of public rights of way.

By contrast, the FNPRM tentatively concludes that build-out requirements are not franchise fees because they are not contributions to the franchising authority. The FNPRM 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 the LFA and therefore should not be considered contributions to an LFA.”¹ PEG programming fits squarely into the category of benefits that do not accrue to the LFA or its designated access provider, yet the Commission concludes *without any discussion of the public benefits* of local programming that non-capital PEG-related provisions benefit the LFA or its designee rather than the public at large.

We live in a corporate media ecosystem where local newspapers are failing and local voices are being shut down by special interests influenced by big telecommunications and cable dollars. In many communities, PEGs are the only non-commercial local voices left where real public discourse can occur. This is participatory people's media with brick and mortar convening space unfiltered by corporate spin. It is as fundamental to our republic as local newspapers once were, perhaps even more so, since the pervasiveness of this fully local resource allows participation and communication among and between all ethnicities. PEG Access allows diverse viewpoints, encourages critical thinking, and provides equal opportunity for every resident regardless of income, literacy and education levels. In its finest expression, in hundreds of communities, like ours in Hawaii, not only does it bring tolerance, cultural understanding and knowledge, but it brings government and life-long education closer to the people. Most importantly, it brings people closer to each other.

More so even than public broadcasting, local Public Access television, community radio and local community broadband efforts deserve the highest priority for funding and development from

¹ FNPRM ¶ 21.

federal and state governments. We have always known that marketplace forces are deficient in fully meeting community communications needs, just as they are in meeting mass transportation needs. It was the federal government after all, in the nineteen thirties, that made sure every American had access to electricity and telephone. A fundamental truth few are willing to acknowledge is that, in order to avoid a digital divide between haves and have nots, the exact same rubric needs to apply today so an informed citizenry can have equal, affordable access to all the new "information utilities" including next generation cable and the technological successors to cable. This means that as a matter of public policy, people still need and are entitled to, ubiquitous, non-commercial community communication delivered over the top and that fast, affordable, broadband should be available for every resident in rural areas too, not just delivery of 5G exclusively to the urban core.

It might be illustrative for the Honorable Commissioners to note that 2019 marks the 50th anniversary of the U.S. Supreme Court landmark "Red Lion" decision which stated: *THE RIGHT OF VIEWERS AND LISTENERS CANNOT BE ABRIDGED BY CONGRESS OR THE FCC.*

Although U.S. Supreme Court Justice Byron White's majority opinion in the landmark 1969 *Red Lion Broadcasting v. FCC* ruling pertained to broadcasting alone, his words still stand as a call for best practice regulation of the cable/broadband convergence in a free society. Justice White wrote the following:

" It is the right of the viewers and listeners not the right of the broadcasters which is paramount...it is the purpose of the First Amendment to preserve the uninhibited marketplace of ideas in which truth will ultimately prevail, rather than countenance monopolization of that market, whether it be by the government itself.....or a private licensee.....it is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or the FCC."

Three years after Red Lion, in 1972, cable television behemoths were about to wire the nation, and Federal Communications Commissioner, Nicholas Johnson recognized that according to U.S. law, *"the airwaves belong to the people."* This led to proceedings at the FCC, in the courts and in Congress which proscribed the federal government's intent to protect localism and diversity of viewpoint by requiring cable television companies to pay "rent" for using our public rights of way. They would do this by providing Public, Educational and Government Access channels, production equipment and facilities for public use on cable systems. The Feds left implementation and regulation of the Public Access concept up to LFA's or local franchise authorities. Not everyone followed this "best practice" model, but Hawaii did. In 1987, PEG Access was incorporated into state law (HRS 440G) and cable regulation was assigned to a Cable Television Division within the Department of Commerce and Consumer Affairs (DCCA)

Community Television, also known as PEG Access, began to proliferate in local jurisdictions. The more successful stations were independent nonprofits established at arms length from government and financed from up to 5% of cable revenues. These stations were set up in local communities for no other purpose but to create public access to cable and provide free or low cost media training for any and all comers. The big idea was not to benefit any one institution or

special interest but to serve the general public from all walks of life including the unaffiliated, the disenfranchised, the popular as well as the unpopular - people who would otherwise not have a voice. When it came to education, the idea was not originally envisioned to benefit the institutional agenda of one or two schools but to help teachers and students involved in all aspects of formal and informal education get access to media. The other main goal was not to create Government TV, but to encourage local democratic discourse by televising gavel to gavel coverage of government meetings making government more accessible to the masses - a lot like what we now see on public service networks like CSPAN.

The analogy that fits best is the public commons or electronic park. For more than thirty years in Hawaii, Community Access Television is the place where everyone, rich or poor, old or young, educated or not, can come to learn how to create media, foster ideas and showcase the diverse talent and ability vital to a living democracy. This is a place that honors localism, free expression and diversity of viewpoint - even points of view that may be unpopular or controversial. This is the one place left in a media universe dominated by corporate media that provides everyone a free speech venue and non-discriminatory access to one another's living rooms. A place to talk, to show, to tell, to discuss, to create, to innovate, to play.

The idea worked famously well in a lot of places until the Federal government under President Reagan, began to deliberately ignore the principles of diversity, localism and public ownership of the airwaves embedded in the Communications Act of 1934. This abdication of the public interest has allowed five or six telecommunications giants to reap obscene profits and monopolize both the content and delivery of radio, TV, cable, telephone and now the Internet. For more than twenty years, companies like Time-Warner (now Spectrum), Viacom, General Electric, Disney, Fox, Comcast and brash new players like Google and Facebook now run the table on virtually all we see, hear and read in America.

With the astounding media convergence currently underway, there are still billions of dollars to be made in cable and in wireline and wireless broadband. This is why Spectrum, Verizon, AT&T, Comcast and others have joined the fray. In their TV Everywhere world, there is simply no room for uniquely local community media, community broadband, net neutrality, non-commercial speech or innovative ideas that challenge the corporate viewpoint. No room for the people's voice. This is why these companies have spent millions of dollars to convince lawmakers to open the market, bulldoze the electronic park and replace our public commons with another government building, or another commercial channel.

Despite this sophisticated and well-financed onslaught from industry, there are places where community media and PEG access centers thrive with the backing of the local population. One of these places has traditionally been Hawaii primarily because the programs here are generally responsive to the needs of the local community on each island. The long-term future for non-commercial public interest PEG media is not good, however, if this FNPRM is allowed to go into effect. The powerful cable lobby and related vested interests have already succeeded in substantially reduced public benefits in most modern franchise renewals. This FNPRM essentially gives valuable electronic real estate and money back to the cable company, takes away local PEG access jobs, reduces media literacy and education opportunities, squanders INET development and benefits the incumbent franchise holder while rendering the local public benefit sector ineffective or eliminating it entirely.

Akaku Maui Community Media vigorously opposes this FNPRM and respectfully urges that it be withdrawn.

Sincerely,

Jay April, President and CEO

Akaku Maui Community Media