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March 22, 2017

Mrs. Judith Whitney, Clerk
Vermont Public Service Board
112 State Street
Montpelier, VT 05620-2701

Re: PSB Docket 8301 – Comcast CPG Renewal
VAN's Opposition to Comcast's Motion to Alter or Amend Judgment

Dear Mrs. Whitney:

Enclosed for filing in connection with the above referenced Docket, please find one (1) original and six (6) copies of VAN's Opposition to Comcast's Motion to Alter or Amend Judgment.

Copies of this filing are being served today on the parties listed on the attached service list by first class mail and electronically.

Thank you for your assistance. If you should have any questions, please do not hesitate to contact this office.

Very truly yours,

/DRM/

Douglas R. Marden

DRM/hs
Encl.
Cc. VAN (electronically)
8301 Service List (electronically and by mail/delivery)

STATE OF VERMONT

PUBLIC SERVICE BOARD

In Re: Renewal of the Certificate of Public Good of Comcast of Connecticut/Georgia/ Massachusetts/New Hampshire/New York/ North Carolina/Virginia/Vermont, LLC, d/b/a Comcast, expiring on December 29, 2016, to provide cable television service	))))))	Docket No. 8301

VERMONT ACCESS NETWORK'S OPPOSITION TO COMCAST'S MOTION TO ALTER OR AMEND JUDGMENT

Law Offices of Douglas R. Marden, PLLC
Attorney for Vermont Access Network

March 22, 2017

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VERMONT ACCESS NETWORK'S OPPOSITION TO COMCAST'S MOTION TO ALTER OR AMEND JUDGMENT

NOW COMES Vermont Access Network ("VAN"), by and through its attorney, Douglas R. Marden of the Law Offices of Douglas R. Marden, P.L.L.C., and hereby responds to the motion made by Connecticut/Georgia/Massachusetts/New Hampshire/New York/North Carolina/Virginia/ Vermont, LLC, d/b/a Comcast ("Comcast") pursuant to Rule 59(e) of the Vermont Rules of Civil Procedure to alter or amend the order entered in this docket on January 13, 2017 ("Order") and the renewed certificate of public good ("CPG") of the Public Service Board ("Board" or "PSB") issued to Comcast renewing its franchise for a period of eleven years.

Comcast's Rule 59(e) motion to alter or amend judgment (the "Motion") requests, *inter alia,* the Board to alter or amend it decision in Docket 8301 with respect to three PEG-related conditions in Comcast's renewed Certificate of Public Good ("CPG"). Specifically, Comcast's motion seeks to:

- Eliminate CPG Condition 22(3) which requires Comcast's Interactive Programming Guide ("IPG") be made available for each Vermont Access Management Organizations' ("AMOs") program listings;

- Modify conditions 21(b) and (c) to conform with Comcast's proposed condition 18 regarding remote origination service; and

- Eliminate conditions 52 and 53 which require Comcast to respond to an RFP for an institutional network and impose arbitrary limits on Comcast's ability to charge for such institutional networks.

Overarching Comcast's argument is its contention that "the Board should have granted Comcast's CPG Renewal Proposal without the imposition of any additional conditions." Comcast Motion at 2. Comcast argues that the Board overstepped its authority in modifying CPG conditions proposed by the Company. Comcast further contends that the Board is discriminatory in its treatment of the Company and that Board ordered conditions will place Comcast at a competitive disadvantage. Comcast Motion at 3-4. As discussed in detail below, the Board should reject these arguments.

VAN contends that the Board's additions and modifications to Comcast's proposal are necessary and appropriate, and are consistent with the Board's authority under 47 U.S.C. § 546(c)(1)(A) and (D), and BR 8.230(D). Indeed, the Order and CPG strike the right balance

between meeting demonstrated community needs and interests taking into account the cost of meeting such needs and interests; providing PEG with the reasonable opportunity to gain access to current and future technological features of Comcast's cable system; and incorporating sufficient assurances that Comcast will provide PEG with adequate capacity, facilities and financial support. Most importantly, the Board's Order allows Vermonters to meet stated PEG-related priorities at a reasonable cost over the course of the 11 year CPG, unless, of course, Comcast acts irresponsibly by making a single surcharge against its subscribers.

Furthermore, the Board has qualified Comcast's CPG proposal as reasonable "subject to the modifications and additional conditions approved by the Board." Board Order at 25 (Finding 44). The Board can reject or appropriately modify an operator's proposal if the operator failed to comply with material terms of an existing franchise, 47 U.S.C. 546(c)(1)(A); BR 8.230(A), and can require adequate assurance that an operator will provide adequate PEG facilities, capacity and support. 47 U.S.C. § 541(a)(4)(B).

The Board has a clear understanding of the significant areas of disagreement between Comcast and VAN (Board CPG p. 15) The Order properly recognizes both Comcast's multi-year refusal to meet existing CPG conditions and its willingness to further erode reasonable PEG access to emerging commercial features of the cable system over the next 11 years. For example, the Board Order found that Comcast upgraded the navigational menu of its cable system without regard to providing PEG access to the Interactive Programming Guide ("IPG") (as required by existing Docket 7077 CPG condition 23(3)). The Board also found that the company did not provide reasonable notice to AMOs affected by changes to the cable system (as required by existing Docket 7077 CPG condition 69) or to the Board as required by Docket 7077 CPG Condition 73.[1] The Board also held that Comcast should consider PEG Access remote origination sites when siting their fiber optic cable upgrades. Finally, the Board acknowledged the germane

[1] Docket 7077 CPG Condition 73 (emphasis added) states:

> **Comcast shall discuss major changes in the delivery of customer service and other aspects of operations, such as installation and repair and system architecture, with the Board and Department prior to finalizing plans and in sufficient time for meaningful input from regulators.** Comcast shall inform the Board and Department in writing of major changes in the delivery of customer service and other aspects of operations at least 30 days prior to implementation.

fact that PEG channel space or bandwidth has significantly been reduced by Comcast over the past 30 years. *See* Crawford PFT at 21-27.

Comcast benefits from its noncompliance and shortcuts. Contrary to the Board's intent, Comcast's actions leave subscribers limited in their ability be informed about public affairs affecting their communities, express their First Amendment rights, create original programming or have "effective local outlets for individual expression," H.R. Rep. 98-934 at 34. As the Board believes that PEG Access serves a vital democratic function and believes: "the public purposes of a cable system should expand as the cable operator expands the commercial capacity and applications of its network." Board Order at 78. The Board also found that "As Comcast introduces and expands the use of new technology in Vermont for commercial objectives; there is a reasonable expectation that community needs and interests related to PEG Access should also be served." Davitian reb. pf at 13; Campitelli pf. at 9, 13, 24, 33; Crawford pf. at 5, 10-11, 33-34. The Board's order takes a step in this direction. *See* Board Order at 33 (Finding 72).

In this opposition, VAN contends that the Board has proper jurisdiction to enforce the Order and that the Order and CPG are supported by the evidence presented in this Docket and federal and state law. In fact, the Order and CPG are supported by and consistent with Federal and Vermont law as well as the Federal Communication Commission's decision in FCC 11-4 Memorandum Opinion and Order, MB Docket No. 10-56 issued in connection with Comcast's 2011 acquisition of NBC-Universal. The Order and CPG are also supported by community needs and interests in light of costs. The Board properly considered costs where applicable. The Board's decision will not create a burden on subscribers even notwithstanding Comcast's deliberate threat to pass-thru any costs related to the provision of such conditions in a manner which will have the greatest impact on subscribers.

In support of VAN's opposition to Comcast's motion, VAN offers the following response.

ARGUMENT

The Board does not need to correct manifest errors of law and fact nor does it need to prevent manifest injustice that would result if the Docket 8301 Order stands unchanged. The Board acted consistently with the authority granted to it under the Cable Act and other federal law, as well as Vermont law and regulations. The specific CPG conditions challenged by Comcast are

supported by the record and are reasonable in light of costs associated with meeting those community needs and interests. Moreover, the conditions adequately ensure that Comcast will provide adequate PEG Access over the term of the new CPG. These issues and other raised by Comcast in its motion are addressed below.

I. LEGAL ISSUES

A. The Board's Review of Its Order Pursuant to V.R.C.P. 59(e) Is Limited

Rule 59(e) of the Vermont Rules of Civil Procedure, incorporated through Board Rule 2.105, permits the Board's to alter or amend its order. A Rule 59(e) motion allows the Board "to revise its initial judgment if necessary to relieve a party against the unjust operation of a record resulting from the mistake or inadvertence of the court and not the fault or neglect of a party." *Osborn v. Osborn*, 147 Vt. 432, 433, 519 A.2d 1161, 1163 (1986) (quotation omitted). However, a "'Rule 59(e) motion may not be used … to raise arguments … that could have been raised prior to the entry of judgment.'" *N. Sec. Ins. Co. v. Mitec Elecs., Ltd.*, 2008 VT 96, ¶ 44, 184 Vt. 303, 965 A.2d 447 (quoting 11 C. Wright et al., Federal Practice and Procedure § 28101.1, at 127-28 (2d ed. 1995)). Nor does Rule 59(e) "provide a vehicle for a party to undo its own procedural failures." In re SP Land Co., LLC, 2011 VT 104, ¶ 33, 190 Vt. 418, 435, 35 A.3d 1007, 1019 (Reiber, J., dissenting) (citations omitted). "In practice, because of the narrow purposes for which they are intended, Rule 59(e) motions typically are denied." Wright, Miller & Kane, *Federal Practice and Procedure:* Civil 2d § 2810.1 at 128; *see also Ruscavage v. Zuratt*, 831 F. Supp. 417, 418 (E.D. Pa. 1993) (noting Rule 59(e) motions "should be granted sparingly because of the interests in finality and conservation of judicial resources").

The Board, in this Docket, correctly applied the law and the facts in evidence and its decision will not result in manifest injustice as contended by Comcast.[2] Indeed, as further set

[2] Comcast only requests the Board alter or amend the Order "to correct manifest errors of law and fact, and to prevent manifest injustice that would result if the Order stands unchanged," Comcast Motion to Alter or Amend at 5, but do not make any other permissible arguments under Rule 59(e) including identification of "newly discovered or previously unavailable evidence," "intervening change in the controlling law" or any other reason.

out below, there are no manifest errors of law or fact that required the Board's correction nor will any manifest injustice result if the Board leaves its Order and CPG unchanged.

For these reasons, Comcast's motion must be denied. In addition, Comcast now presents evidence and arguments not previously in the record. *See, e.g.,* Comcast Motion at 39-42 (discussing costs related to providing remote origination service). Such practice is not permitted under Rule 59(e).

B. The Board Acted Consistently with Federal Law and State Law and Regulations in Issuing the Order and CPG

1. The Board's Authority Under the Federal Law

The contours for the procedures governing the renewal of cable franchises are established primarily by federal law. *See* 47 U.S.C. § 546. The 1984 Cable Act provides for both a formal and informal renewal process. Comcast opted for a formal procedure and the Board's January 13, 2017 order is the result of Comcast's request for this formal proceeding.

In the context of a formal proceeding, a franchising authority may consider four factors when evaluating an operator's renewal request including whether:

> (A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;
>
> (B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix or quality of cable services or other services provided over the system, has been reasonable in light of community needs;
>
> (C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and
>
> (D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

47 U.S.C. §§ 546(c)(1)(A)-(D). A franchising authority can deny a request for a franchise renewal if it makes an adverse finding with respect to any one of these four factors. 47 U.S.C. §

546(d).[3]

Comcast contends that "only one of [the § 546(c)(1)] grounds is at issue in this proceeding – whether Comcast's CPG Renewal Proposal was reasonable to meet the community's cable-related needs and interests taking into account the costs of meeting those needs and interests," Comcast Motion at 6. VAN disagrees with this and contends that the Board has basis to modify Comcast's CPG proposal pursuant to both § 546(c)(1)(D) and § 546(c)(1)(A) which requires Comcast to have "substantially complied with the material terms of the existing franchise and with applicable law."[4] In short, and as detailed below, *see, e.g., infra* at 11-13, the evidence entered on the record is replete with examples of Comcast's noncompliance with material terms of its existing, Docket 7077 PEG-related obligations and this evidence was recognized by the Board. VAN's argument in connection with Comcast's failures to meet the requirements of § 546(c)(1)(D) and (A) follow.

a. Under 546(c)(1)(D), the Board has Authority to Determine Whether Comcast's Proposal Is Reasonable to Meet Future Cable-Related Community Needs and Interests, Taking Into Account the Cost of Meeting Such Needs and Interests, and Properly Exercised This Authority

The Board is acting within authority granted to it by the 1984 Cable Act. The Board operated within its legal limits to impose certain conditions and met renewal standards outlined in the Act.

According to § 546(c)(1)(D), the Board may evaluate whether Comcast's CPG proposal

[3] Comcast contends that "The Board rules restate the governing federal criteria. *See* PSB Rule 8.230. To the extent Comcast challenges the Board's Order as violating the federal renewal criteria, that challenge also applies to the corresponding state renewal criteria." Comcast Motion at fn 11. VAN only partly agrees with this assessment. First, Vermont laws and regulations that apply to this Docket are more extensive than cited to by Comcast. *See, e.g.*, 30 V.S.A. §§ 504 and 506, the "EMCO" criteria set out in BR 8.214, and BR 8.405. Second, the EMCO criteria sets out nine (9) specific factors an operator must meet in order to have a franchise request approved. Although each factor can be broadly subsumed under one of the four federal factors identified in 47 U.S.C. § 546, Comcast did recognized in its application and testimony its obligation to meet each of the EMCO criteria. Nonetheless, for purposes of VAN's opposition, it will address Comcast's Federal arguments only. Each of VAN's arguments applies equally to the corresponding state renewal criteria.

[4] Both VAN and Comcast agree that Comcast did meet the requirements spelled out in factors § 546(c)(1)(B) and (C).

"is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests." At the heart of Comcast's motion is its contention that its "CPG Renewal Proposal was reasonable to meet the community's cable-related needs and interests taking into account the costs of meeting those needs and interests." Comcast Motion at 2. In making this argument, however, Comcast places itself as the final arbiter and decision maker with regard to what is "reasonable" and what the "community needs and interests" of Vermonters are. In so doing, Comcast is usurping the authority of the Board.

The Cable Act of 1984's Legislative History provides the policy framework for PEG Access and empowers the Board with the discretion to order specific PEG Access conditions. House Report No. 98-934 memorializes the Congressional "Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs." H.R. Rep. 98-934 at 24.

Congress was very clear that the authority of a local government entity to require particular cable facilities (and enforce requirements in the franchise to provide those facilities) is essential if cable systems are to be tailored to the needs of each community, and H.R. 4103 explicitly grants this power to the franchising authority. *Id*. at 19. The Cable Act specifically establishes "the authority of local governments to regulate cable television through the franchise process." *Id*.; and seeks to "[P]reserve the critical role of [the franchising authority] in the franchise process." *Id*.; which is able, among other powers, to "Continue[] the policy of allowing cities to specify in cable franchises that channel capacity and other facilities be devoted to [PEG] use." *Id*. at 14.

Congress explicitly views franchising authorities as a way to "[A]ssure that cable systems are responsive to the needs and interests of the local communities they serve." *Id*. at 19; and that "cable systems provide the widest possible diversity of information services and sources to the public consistent with the First Amendment's goal of a robust marketplace of ideas—an environment of 'many tongues speaking many voices.'" *Id*. The Vermont Public Service Board is fully within its rights to prescribe PEG Access conditions in order to fulfill the federal policy objective to: "Offer the public an abundance of channels, with the potential to present a wide variety of perspectives from many different types of program providers. Local governments, school systems, and community groups, for instance, will have ample opportunity to reach the

public under [the Act's] grant of authority to [franchising authorities] to require Public, Educational and Governmental (PEG) access channels." *Id.*

The Cable Act preserves the franchising authority's role in the franchise process. Also *See, e.g.*, Alliance for Community Media v. FCC, 529 F.3d 763, 767-78 (6th Cir. 2008). The Board's authority is also supported by federal court precedent, that relies upon the Cable Act, and which views local franchisers as "best able to determine a community's cable-related needs and interests." *Union CATV, Inc. v. City of Sturgis, Ky.*, 107 F.3d 434, 441 (6th Cir. 1997) ("Sturgis"). The Sturgis Court further held that it "would be inappropriate for a federal court to second-guess the [franchising authority] in its identification of such needs and interests." *Id.* Consequently, the Sturgis Court concluded that

> judicial review of a [franchising authority's] identification of its cable-related needs and interests is very limited. A court should defer to the franchising authority's identification of the community's needs and interests except to the extent necessary to weigh the needs and interests against the cost of implementing them.

Id. As the Sturgis Court explains, franchising authorities' conclusions regarding community needs and interests are afforded deference.

It is clear that under federal case law and the Cable Act, the Board has authority and is the ultimate arbiter to determine whether an operator's proposal is reasonable to meet community needs and interest, taking into account the cost of meeting such needs and interests.

To address issues raised by Comcast, Comcast references certain policies underlying the Cable Act which are "intended to: (1) protect cable operators from governmental overreach in the franchise renewal process; (2) protect the cable operator's substantial investment of private capital; and (3) protect the cable operator's expectancy of renewal." These statements are grossly misleading. First, as referenced in VAN's Opposition, the legislative history makes clear that there are multiple purposes being served by the Cable Act some of which cannot be readily reconciled.

Second, the cases cited to by Comcast in support of these policies are not applicable. The sentence Comcast cites to in the Third Circuit Court's decision in *Eastern Telecom Corp v. Borough of E. Conemaugh*, 872 F.2d 30 (3rd Cir. 1989) is pure dicta, is unsupported by any citation, and is not binding on the Board. The *Teleprompter of Erie, Inc. v. City of Erie*, 537 F.

Supp. 6 (W.D. Pa. 1981) decision is based on interpretation of a Pennsylvania state law requiring that state contracts involving the exchange of personal property exceeding $200 in value be subject and awarded to the lowest responsible bidder and is in no way related to creating a property interest for a cable operator. Nor does the reach of creating a property interest coincide with protecting investment of capital or expectancy of renewal.

Third, renewal of a franchise is not automatic and is subject to conditions. Contrary to Comcast's assertions, there is no free pass to renewal on the basis that Comcast invested capital or is an existing operator. There is no entitlement here. Comcast must meet renewal criteria. That criteria permits a franchising authority to require that Comcast: meet community needs and interests, taking cost into consideration pursuant to § 546(c)(1)(D); provide adequate assurance that it will provide adequate PEG Access pursuant to § 541(a)(4)(B); not discriminate against PEG Access pursuant to the Comcast NBC-Universal at ¶ 214; and have the ability to provide meaningful public access pursuant to BR 8.214(B)(2).

Fourth, regarding protecting Comcast's "substantial investment of private capital" and "expectancy of renewal," the Board did, in fact, renew Comcast's CPG. There is no serious risk of Comcast losing the franchise. Nor is there serious risk that Comcast will fail to earn a reasonable rate of return on its investment. The Board did not order rate limits nor improperly interfere with Comcast's ability to pass-through costs to subscribers. Moreover, as the Board recognized,

> Since Comcast's acquisition of the cable systems of affiliates of Adelphia Communications Corporation ("Adelphia"), the number of subscribers for Comcast's cable television services in Vermont has increased slightly from approximately 110,000 prior to the acquisition to almost 112,000 subscribers, the total operating income derived from such services has grown from $101 million for 2006 to $200 million for 2015, and the net income related to such services has increased from $19 million for 2006 to $63 million for 2015.

Board Order at 3.

Finally, VAN believes the term "subscriber" has never been defined. Is it a single individual or households with 2, 4, 6 or 8 household members? The point being that the term subscribers does not reflect the percentage of the population that subscribes to Comcast.

b. The Board Can Modify Comcast's Proposed CPG Under 546(c)(1)(A) Because Comcast Failed to Substantially Comply with Material Terms of the Existing Franchise and with Applicable Law

The Board has a second basis to upon which to modify Comcast's CPG proposal. Section 546(c)(1)(A) permits a franchising authority to deny or condition an operator's proposal if the operator failed to substantially comply with material terms of an existing franchise. Comcast contends that it either did comply with Docket 7077 CPG conditions or, if there was a failure to comply, such failure was *de minimis*. These arguments are belied by the record in this case. Documented failures include noncompliance with Existing CPG conditions related to providing PEG-related access to the IPG (Docket 7077 Condition 23(3)),[5] providing AMOs with remote origination service (Docket 7077 Condition 22),[6] notification to AMOs regarding upgrades to the cable system (Docket 7077 Condition 69),[7] the ability of AMOs to control upstream signal (Docket 7077 CPG Condition 31),[8] failure to provide the ability for AMOs to simultaneously

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[5] Finding 110 provides:

> The unavailability of program schedules for PEG channels on an electronic programming guide is the result of Comcast's system design choices related to programming guides. Since Comcast began its digital network enhancement project, Vermont AMOs have sought access to the IPG in contract negotiations without success. Comcast representatives have stated that this issue cannot be solved in contract negotiations and would have to be resolved at the state level. Mobley pf. at 9-11 and reb. pf. at 10; Davitian pf. at 8 & 11; Campitelli pf. at 25; exh. LGD-13 at 2.

Board Order at 51 (Finding 110).

[6] The Board stated:

> The evidence presented in this proceeding does at least suggest that Comcast may be making determinations as to whether a remote origination site installation qualifies for standard or non-standard installation based on the constraints of its current technology and its business practices as to what constitutes a standard versus a non-standard installation rather than pursuant to the requirements of condition 22 of the Existing CPG.

Board Order at 45.

[7] *See, e.g.*, Board Order at 53 stating:

> At the time Comcast decided to replace the existing electronic programming guide with the IPG, it appears that Comcast did not give adequate consideration to the effects this would have on a material PEG outreach service requirement of its existing CPGs and on how such effects might be ameliorated.

[8] Finding 151 provides:

> Comcast has not universally deployed this capacity at activated remote origination sites. At the majority of these sites, the remote origination signal goes directly to the cable operator to go live on the PEG Access channel. Chapman pf. at 16; exh. LGD-2 at 12 & 22.

broadcast more than one live programming (Docket 7077 CPG Condition 25).[9] It is also clear that Comcast failed to provide the Department and the Board notice of changes to its architecture related to the effects of upgrades on the ability of PEG channels to access the IPG as required by Docket 7077 CPG Condition 73. Each of these issues is substantive and substantial. Collectively they show a fundamental disregard of PEG provisions which subscribers have identified as important and valuable community needs and interests; and demonstrate a pattern of discrimination against PEG Access in terms of providing PEG meaningful parity with commercial features of the cable system.

The Board agrees with VAN that when a cable operator implements technological changes or undertakes technology upgrades to its system, applicable law requires it to take account of the effect on PEG capabilities, services, and signal quality, to consider how it can effectively meet its obligations for PEG Access in light of such technological changes, and to take appropriate action to ensure that it will remain in compliance with its applicable obligations after implementing the technological change. Board Order at 78. The Board also points out that it has previously had the opportunity to confirm the meaning and intent of condition 22 in favor of VAN in the Existing CPG. Board Order at 45.

Comcast also contends that that the Cable Act requires the franchising authority to provide "notice and the opportunity to cure" to the operator. 47 U.S.C. § 546(D). There is no dispute that the Board did not provide actual notice to Comcast of any noncompliance with existing CPG conditions. This, however, does not mean that Comcast was not fully aware of its deficiencies. Indeed, the record unequivocally establishes that Comcast had *de facto* notice of its noncompliance on multiple issues including remote origination service and the interactive programming guide. Individual AMO members raised concerns in contract negotiations and VAN held meetings starting in 2008 with the Comcast and the Department to discuss noncompliance issues.[10] Moreover, Comcast indicated in its testimony that it was aware of the

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Board Order at 67.

[9] The Board stated that "Evidence in the record indicates that some AMOs still do not have the ability to originate simultaneous live programming." Board Order at 62.

[10] According to the undisputed testimony of Lauren-Glenn Davitian:

concerns raised by VAN but that, at least in relation to the IPG, "Comcast representatives have stated that [the IPG] issue cannot be solved in contract negotiations and would have to be resolved at the state level." Board Order at 51 (finding 110) (citing Mobley pf. at 9-11 and reb. pf. at 10; Davitian pf. at 8 & 11; Campitelli pf. at 25; exh. LGD-13at 2). It is clear, therefore that Comcast had *de facto* notice of its deficiencies.

Comcast cites to *Rolla Cable Sys., Inc. v. City of Rolla*, 761 F. Supp. 1398 (E.D. Mo. 1991) in support of the proposition that actual notice is required. The circumstances in this Docket are different and readily distinguishable from the circumstances present in *Rolla*. There is no doubt that the Board's Order confirms that Comcast did not comply with IPG and remote origination service conditions incorporated in Docket 7077 and, therefore, includes specific conditions, rather than leaving it to the contract negotiation process. In addition, in this case, Comcast was fully aware of its noncompliance, refused to take any action to correct it, and advised VAN and the Department that disputed issues could only be resolved by the Board in a contested matter. In addition, because the *Rolla* decision was made by the district judge out of the Eastern District of Michigan, it is not controlling.

Even if the Board were to find that Comcast was not given notice in strict conformance with § 546(D), Comcast's noncompliance is still an important factor that underpins the Board's decision.

The Board's authority to evaluate noncompliance issues and incorporate specific CPG conditions to address the noncompliance is further supported by the Cable Act and the Board's

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> VAN began to raise compliance issues with the Company very soon after Comcast received its CPG in Vermont in 2006. In 2008, VAN formally raised a series of now familiar compliance concerns related to (i) the Company's practice of charging for access to remote origination sites (including AMO studios), (ii) lack of access to the electronic program guides, and (iii) the imbalance of power in the AMO contract renewal process. VAN was discouraged by both Comcast and the Department from bringing these issues to the Board, opting for informal "discussions". Several meetings were scheduled and attended by VAN with Comcast and the Department but we have not reached agreement on the outstanding compliance issues. Comcast have not agreed to VAN's requests and the Department has not compelled the Company to comply with its Docket 7077 CPG conditions. *See* LGD PFT at p.12, lines 15-30. Comcast's unwillingness to consider VAN's requests, the Department's unwillingness to enforce the Company's CPG requirements, and the prohibitive cost of bringing a case before the Board, has had a chilling effect upon Vermont AMO pursuit of these compliance issues in 2008 and subsequent years.

Davitian Supplemental Testimony at P.30. Line 26 to P.31, Line 12.

assessment of community needs. First, in accordance with 47 U.S.C 541(a)(4)(B), the Board is entitled to condition the CPG so that it has "adequate assurance that [Comcast] will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support." In its Docket 8301 Order, the Board determined that the operator has failed to meet specific CPG conditions, has a pattern of not responding or denying AMO requests for services, and that AMOs have been uniquely unsuccessful in negotiating contract terms which address technological parity issues through non-regulatory channels. The Board's specific CPG conditions, informed by Comcast's current noncompliance, are reasonably provide assurance to the Board that ongoing PEG obligations will be met during the term of the 8301 CPG.[11]

Second, irrespective of whether an existing CPG condition has been met or proper notice for deficiencies provided, if the Board determines that an existing CPG condition continues to be supported by community needs and interests taking costs into consideration, then it is permissible for the Board to incorporate the old CPG condition in the new CPG. 47 U.S.C. § 546(c)(1)(D). Here, as the Board's Order makes clear, the conditions contested by Comcast, which have been carried forward from the old docket to the new one, all meet this standard.

VAN also mentions here that 47 U.S.C. § 541(a)(4)(B) provides a third basis for the Board to incorporate CPG conditions on Comcast in order to so the Board has adequate assurance Comcast will provide adequate PEG capacity, facilities and support.

2. The Board's Authority Pursuant to the Decision of the FCC related to Comcast's Acquisition of NBC-Universal

It is VAN's belief that, in addition to the Cable Act, the FCC's decision in NBC/Universal reinforces the Board's authority to condition Comcast's CPG in this Docket. The FCC recognized that "Congress afforded PEG channels **special status** in order to promote localism and diversity, and we [the FCC] believe that this transaction requires us to ensure that these objectives are preserved." Comcast NBC-Universal, FCC Docket MB-1056 at ¶ 213 (January 18, 2011)

[11] In addition, based on the evidence entered into the record about VAN's track record over the past ten or more years of meaningful negotiations between AMOs and Comcast to incorporate new technological services, gain access to the IPG, add, repair or improve remote origination service, or gain access to video on demand services, VAN views the necessity of keeping PEG-related conditions in the CPG rather than leaving them to contract negotiations as critical.

(emphasis added). (Hereinafter referred to as "NBC-Universal".) Consequently, the FCC "impose[d] a condition that Comcast cannot discriminate against PEG with respect to the functionality, signal quality, and features from those of the broadcast stations that it carries." NBC/Universal at ¶ 214.

In VAN's opinion, the FCC's order includes specific and enforceable obligations for Comcast to provide PEG with access to commercial features of its cable system throughout the country. This includes Connecticut/Georgia/Massachusetts/New Hampshire/New York/North Carolina/Virginia/Vermont, LLC, d/b/a Comcast, the Cable System Comcast owns and operates in Vermont. NBC-Universal at Appendix D, p. 177.

3. The Board's Authority Under State Law and Regulations

While VAN agrees that the contours for the procedures governing the renewal of cable franchises are established primarily by federal law, *see* 47 U.S.C. § 546, Vermont law also plays a role. Under the Cable Act, a local franchising authority has the authority to identify local community needs and interests and set out specific requirements in a franchise to assure that the cable system properly serves those community needs and interests. Accordingly, 30 V.S.A. § 504(b)(1) requires the Board to ensure that an operator will designate "adequate channel capacity and appropriate facilities for public, educational, or governmental use." EMCO Criteria identified in BR 8.214(B) requires the Board to consider whether "the present proposed service offerings to customers, including the number of channels and the ability and capacity of the system to offer additional varied services in the future, and *the ability to provide public access.*" BR 8.214(B)(2) (emphasis added). The Board agrees with this position holding "that the EMCO criteria (which all parties addressed in their respective prefiled testimony) are applicable to this proceeding." Order at 12. The Board also noted that Comcast filed its application to include how it would satisfy all of the EMCO criteria, and addressed the EMCO criteria in its prefiled testimony and brief. *Id*. *See generally* Board Order at 10-12.

Comcast conflates meeting Vermont-based requirements with federal ones. *See* Motion at fn 11 ("[t]o the extent Comcast challenges the Board's Order as violating the federal renewal criteria, that challenge also applies to the corresponding state renewal criteria"). Comcast only addresses federal issues in its Motion. The fact is, except for a singular reference in a footnote,

Comcast makes no reference to meeting Vermont laws other than the one found in Footnote 11, stating "[t]o the extent Comcast challenges the Board's Order as violating the federal renewal criteria, that challenge also applies to the corresponding state renewal criteria," as a concession to and recognition of this portion of the Board's Order.

In its Motion, Comcast ignores State-based requirements. And, in practice, Comcast also ignores Vermont-based requirements. The record reflects that Comcast failed to meet the requirements set out in BR 8.363(C) requiring Comcast to design and build all systems "so that they may provide the PEG Access capabilities required by section 8.410 et seq. of this rule, or so that those capabilities may be later added without major reconstruction of the system." Comcast failed to comply with Docket 7077 CPG conditions 69[12] and 73[13] requiring Comcast to provide notice to AMOs, the Board and the Department about changes to its system architecture.

This cavalier attitude to Vermont-based requirements has significant consequences. One of the underlying intents of these conditions was to ensure that PEG Access was treated fairly vis-a-vis changes to the system architecture so that services could be provided at an economic price with as little impact to subscribers as possible. It is perhaps ironic that Comcast now contends that its architecture makes it more costly to provide local remote origination sites and that its architecture does not accommodate providing PEG channels with access to the IPG. Unfortunately, it is Comcast's noncompliance with notice requirements directed at changes made to its system architecture that are underpinning the principal issues Comcast raises its Motion.

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[12] Docket 7077 CPG Condition 69 states:

> Comcast shall provide the Board, the Department, affected municipalities, and affected AMOs with complete descriptions of all rebuilds and upgrades at least 90 days prior to the commencement of construction, and in all cases sufficiently in advance to allow time for meaningful comments and possible integration of those comments into the construction project.

[13] Docket 7077 CPG Condition 73 states:

> Comcast shall discuss major changes in the delivery of customer service and other aspects of operations, such as installation and repair and system architecture, with the Board and Department prior to finalizing plans and in sufficient time for meaningful input from regulators. Comcast shall inform the Board and Department in writing of major changes in the delivery of customer service and other aspects of operations at least 30 days prior to implementation.

C. Comcast's Additional Arguments Are Without Merit

Comcast contests the Board's Order and CPG on a number of additional bases arguing that the Board failed to (1) make findings required by federal law regarding the reasonableness of Comcast's CPG proposal, (2) apply a cost/benefit analysis, and (3) consider the impact of the CPG conditions on customer rates. None of these arguments have merit and each is addressed below.

1. The Board Made Findings Based on the Record and Correctly Determined that Comcast's CPG Proposal Is Not Reasonable To Meet and Will Not Meet Community Needs and Interests Taking Costs Into Consideration

The parties agree that, in the words of Comcast, "[a] cable operator's renewal proposal must be granted if it is 'reasonable'." Comcast Motion at 8.

Who Decides? First Comcast is not the final arbiter of community needs and interests in light of costs? As indicated above, the Board's discretion and decision making authority with respect to this specific issue is broad. In this Docket, each of the parties entered documentation in support of community needs and interests. *See, e.g.*, DPS Exhibit DPS-CP-1 (Community Needs Assessment Report) and Attachments A-E; VAN Exhibit LGD-2 (Vermont PEG Access Related Community Needs and Interests); and Comcast Exhibit DMG-12 (2015 Community Ascertainment Survey), as well as prefiled and rebuttal testimony. While Comcast may disagree with how the Board balanced community needs and interests with costs, the Board's Order is readily defensible under federal and Vermont law.

What is Reasonable? The second principal issue of disagreement between the parties is whether Comcast's PEG proposal is "reasonable". Comcast's entire argument is predicated upon the presumption that its CPG proposal is *per se* reasonable. There has never been agreement on this between the parties. VAN raised many specific concerns about whether Comcast's CPG proposal was reasonable to meet future cable-related community needs and interests, taking costs into consideration. *See, e.g.*, Lauren-Glenn Davitian ("Davitian") for VAN pf. at 8, 11, 17, & 32-33 and reb. pf. at 4-7, 30-31; Scott Campitelli ("Campitelli") for VAN pf. at 5-6 and, generally; Robert Chapman ("Chapman") for VAN pf. at 12-13, 15 &16 and reb, pf. at 21; Seth Mobley ("Mobley") for VAN pf. at 13 and reb. pf. at 3-6; Andy Crawford ("Crawford") for VAN reb. pf.

generally; Lisa Byer ("Byer") for VAN pf. at 7, 9, & 29; exhs.LGD-2, LGD-5, LGD-6, LGD-12, LGD-14, LGD-15, and LGD-16. The Board adopted many of VAN findings, in particular those related to IPG, ROS and I-Net. And while Comcast may disagree with how the Board identified reasonable community needs, the Board's decision is supported by the record and is, again, readily defensible under federal and Vermont law.

Not Unduly Burdensome - The Board in this Docket did exactly what it was intended to do under the Cable Act—evaluate whether Comcast's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests. In undertaking this analysis, the Board evaluated the Company's financial health while applying a PEG cost-benefit analysis. The Board concluded that, in relation to the IPG, the cost was not unduly burdensome for Comcast under the circumstances. Board Order at 54. With regard to remote origination service, the Board could not support Comcast's proposed remote origination service condition because, in part it would materially modify the circumstances under which Comcast had agreed to provide a remote origination site connection at no cost. Board Order at 46.

The Board is Final Arbiter (Not Comcast) - Comcast contends that the Act prohibits the Board "from denying a reasonable renewal proposal based on the franchising authority's belief that one or more aspects of the proposal could be better or improved upon in some way." Comcast Motion at 8. However, the Board found that many aspects of Comcast's proposal were not reasonable. And when Comcast states that it is impermissible under the Cable Act for the Board to adopt conditions "pressed" upon it by VAN or the Department that "would 'better' suit a perceived community need or interest," Comcast Motion at 8, Comcast contends that the Board cannot exercise its judgment independent of Comcast's proposal. Clearly, however, the converse is true: Comcast cannot substitute its judgment for the Board's. Both VAN and the Department entered evidence on the record addressing community needs and interests. DPS has a statutory requirement to provide evidence on the statutory questions and VAN was recognized by the Board as a party to the Docket with attendant rights to provide evidence related to Comcast's proposed CPG.

Fair Assessment of Community Needs and Interests - Comcast contends that it is "impermissible for the Board to deny Comcast's proposal on grounds that it does not meet every

need or interest identified in the process." Comcast Motion at 8. However, VAN's representation of community needs and interests worthy of the Board's attention in this Docket is not based on "every need and interest" but only on those needs and interests that were identified by VAN as the result of multiple negotiations between individual AMOs and Comcast since 2008 and further reinforced during the public processes and community needs assessments presented as evidence in this Docket. Moreover, it is important for the Board to recognize that many of the CPG conditions sought by VAN were ultimately not accepted by the Board including issues critical to VAN such as: channel reassignment (the Board renewed Docket 7077 language (Condition 18)); remote origination service (the Department's proposal was accepted (Condition 21)); and access to high definition channels (an assessment will be undertaken upon request after at least two years have passed (Condition 31)).

The Comparative Process - Once the parties and the Board recognize that Comcast's CPG proposal is not reasonable to meet community needs and interests in light of cost, many of Comcast's "side" arguments appear as they are—unpersuasive. For example, Comcast contends that a franchising authority cannot evaluate "the reasonableness of the operator's proposal for future services [] based on a *comparative process.*" Comcast Motion at 8 (emphasis added) (citing H.R. Rep. No. 98-934 at 74). Comcast's contention is erroneous for a number of reasons. First, as the plain language of the House Report makes clear, the "comparative process" refers to a proposal made by a competing cable operator and not a PEG-related entity or a State agency neither of which are seeking to operate a cable system. Moreover, in this Docket, the PEG-related entity and the State Agency, rather than making a competitive offer, are merely commenting on the (un)reasonableness of Comcast's proposal vis-à-vis community needs and interests. In short, there is not a "comparative process" undertaken in this Docket.

Preponderance of Evidence - Comcast also contends that the "preponderance of evidence standard is not the deferential standard used in traditional court review of local and state administrative decisions." Comcast Motion at 9 (citing 47 U.S.C. § 546(e); H.R. Rep. No. 98-934 at 75). This is incorrect. The *Sturgis* court explained that "Congress intended that courts would give a franchising authority a degree of deference comparable to that owed a jury." *Union CATV, Inc. v. City of Sturgis, Ky.*, 107 F.3d 434, 441 (6th Cir. 1997). This means that the court is to view evidence in light most favorable to the nonmoving party (here the franchising authority), giving

that party the benefit of all reasonable inferences, and reversing only if reasonable minds could not come to a conclusion other than the one in favor of the movant (here the cable operator).

In addition, the Cable Act Legislative History is clear in identifying how the "preponderance of evidence" standard is to be applied:

> To overturn the franchising authority's final decision, the operator must show that a preponderance of the evidence introduced into the record of the administrative proceeding does not support the franchising authority's decision.

H.R. Report No. 98-934 at 75. The Legislative History also states:

> This does not mean that the operator must demonstrate that each factual element which led the franchise authority to make an adverse finding with regarding to one of the considerations (A) through (D) is not supported by a preponderance of the evidence, but the operator must make such a demonstration with regard to an adverse finding on each of the standards asserted by the franchising authority as a basis for denial, in order for the court to grant relief.

Id.[14]

2. The Board Applied a Cost/Benefit Analysis Required by the Cable Act

Rate of Return - Comcast contends that the Board impermissibly substituted Comcast's profitability for the "'cost' element of the Cable Act renewal standard," Comcast Motion at 10, and that profitability is an irrelevant factor. Neither argument is persuasive.

"[I]n assessing the costs [under § 546(c)(1)(D)], the cable operator's ability to earn a fair rate of return on its investment and the impact of such costs on subscriber rates are important considerations." H.R. Rep. No. 98-934 at 74. A "rate of return" is typically a measure of profit as a percentage of investment over a specified time period. *See, e.g.,* Investopedia, http://www.investopedia.com/terms/r/rateofreturn.asp. Rate of return is a legitimate measure of profitability. The information presented in this Docket shows Comcast is profitable and that, despite increases in cable rates, has increased the number of subscribers since it acquired Adelphia.

> Since Comcast's acquisition of the cable systems of affiliates of Adelphia Communications Corporation ("Adelphia"), the number of subscribers for Comcast's cable television services in Vermont has increased slightly from approximately 110,000 prior to the acquisition to almost 112,000 subscribers, the total operating income derived from such

[14] Comcast contends that "[t]he Cable Act requires the Board to prove the community needs and interests that support each of the conditions imposed in the new CPG, and to show that the resulting costs to both Comcast and its customers were properly considered." This position is directly conflicts with the legislative history and *Sturgis* cited above.

> services has grown from $101 million for 2006 to $200 million for 2015, and the net income related to such services has increased from $19 million for 2006 to $63 million for 2015.

Board Order at 3. While not a true measure of rate of return in that Comcast did not enter on the record any evidence about its investment in the cable system, it is difficult to conceive that Comcast could argue that its rate of return on its Vermont cable investment is not reasonable.

Absence of Reliable Cost Data - Moreover, Comcast must be held accountable for its own failure to submit either any evidence or reliable evidence in this Docket on the costs of meeting PEG conditions such as the IPG upgrade, remote origination service or INet. As VAN stated in its Reply Brief in connection with the IPG:

> Comcast's cost estimate found in ¶ 67 of its Brief, is undetailed and unsubstantiated. Even the Department questioned the validity of the estimate. Chase DPFT at P. 15, L. 14-16 ("Comcast did not specify the equipment that would be needed to upgrade the IPGs or otherwise outline the calculations that led to the $3.2 million estimate."). Indeed, Mr. Chase concluded "I believe that Comcast's response to the Department's discovery requests and Comcast's petition materials lack sufficient information to thoroughly evaluate the cost allowing of AMOs access to Comcast's IPG. Comcast has provided a rough estimate of the cost, but inadequate information for the Department and the Board to verify that estimate." *Id*. at P. 15, L. 19-23.

VAN Reply Brief at 9. The Board agreed with this assessment stating:

> The testimony about the total costs that would be incurred during the term of a new CPG to allow program schedule listings for all PEG channels on the IPG is somewhat confusing and difficult to fully reconcile, except for the fact that such cost is expected to exceed $3.0 million over the term of such CPG. Beyond that, it is not completely clear from the record what the total amounts of upfront costs and continuing operating costs over the term of CPG would be to enable the listing of program schedules for the PEG channels on the IPG.

In connection with the cost to provide **remote origination service**, Comcast failed to present any evidence in its prefiled testimony, rebuttal testimony or live questioning regarding cost of VAN's proposed conditions. Indeed, Comcast did not argue that it should not provide such service within a reasonable distance of the cable system. Nor did the company argue against the Board's prior ruling (Docket 6101, Order of 4/28/00 at 157) that live origination of programs, such as local governmental, school, and community meetings, is one of the most significant community

benefits provided by PEG channels, *see* Board Order at 47. In short, providing remote origination service within 500 feet of the cable plant was not subject to a cost/benefit analysis. Rather, following Comcast's practice during the Existing CPG, Comcast's proposed conditions simply attempted to change the point of ROS attachment to the cable plant in a manner that limits the potential number of standard installations, and therefore, would increase and sift the cost of ROS installation to community based organizations.

In connection with the cost to provide **I-Nets,** Comcast failed to present any specific evidence regarding cost for the Board to consider, nor has it in prior dockets where the same conditions were required.

> It is also worth noting that the Department identified several options about how to list PEG channels on the IPG. See generally Chase DPFT at P. 10-16. Comcast failed to identify costs related to any of these options. Simply stated, therefore, Comcast's proposed findings related to insufficient cost/benefit analysis of the IPG by the Board based on the evidence presented is without basis.

Van Reply Brief at 9.

Comcast's failure to enter cost-related evidence is significant. In *Sturgis*, cited above, the cable operator, Union CATV ("Union"), neglected to file cost evidence. Accordingly, the court held:

> Union failed to introduce into the record any evidence of the cost -- either in diminished profits or in increased subscriber rates -- of limiting the term for franchise renewal to five years. **Without such evidence, a court cannot conclude that the City's need for a five-year term is outweighed by the high cost of a five-year term.** Union argues that the evidence does not support the City's need for a five-year term, but **in the absence of evidence that the cost would be excessive, the issue is not reviewable.** A court's task is to weigh the value of an identified need against its cost. Where, as here, the operator fails to present evidence of the cost of meeting a need, the operator cannot successfully argue on judicial review that balance weighs against meeting the need.

Union CATV v. City of Sturgis, 107 F.3d 434, 442 (6th Cir. 1997) (emphasis added).

In Vermont, Comcast presented unreliable information about costs related to the IPG and no information on the cost of providing remote origination service or INet. Its argument that the Board must now consider the cost factor must fail. Nonetheless, it is clear that the Board did consider costs. *See* Board Order at 51-52 (Findings 109-112) (IPG); Board Order at 42-43 (Findings 95-100) (ROS); and Board Order at 90-91 including Finding 200, Discussion and

Footnotes 125-6 (I-Net).

3. The Board Properly Considered the Impact of CPG Conditions on Subscriber Rates

Comcast contends that the Board failed to adequately consider the impact of PEG-related CPG conditions on subscriber rates. This simply is not the case. First, it is important to point out that Comcast failed to raise this concern in its testimony, live examination and briefs in relation to remote origination service and the INet. But where Comcast did raise this concern, the Board addressed it. This is true most notably in regard to the IPG. *See generally* Board Order at 52 - 56 including Findings 112-115 and Discussion. The Board concluded that Comcast can absorb IPG upgrades at its expense, stating that "the imposition of this cost...is reasonable and will not impair Comcast's ability to provide cable services, to fulfill its obligations under its CPG and applicable law, or to operate profitably in Vermont." Board Order at 55.

VAN agrees with the Board's decision and believes it is supported by the Cable Act and Vermont-based law. The Cable Act excludes the following from the definition of "franchise fee":

> requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages

47 U.S.C. § 542(g)(2)(D). This is consistent with the legislative history which provides that "franchise fee" "is defined so as not to include any bonds, security funds, or other incidental requirements or costs necessary to the enforcement of the franchise." H.R. Rep. No. 98-934 at 64. Under Vermont law, the Board is permitted to assess a penalty if an operator "has violated any material provision of its certificate or [Chapter 13 of Title 30 of the Vermont Statutes Annotated]." 30 V.S.A. § 509(c). The Docket 7077 CPG issued to Comcast certainly contemplated the possibility that penalties could be imposed. *See* Docket 7077 CPG Condition 12 ("Comcast shall at all times comply with Vermont law and all applicable regulations, as they may be amended from time to time") and Condition 15 ("This Certificate shall be subject to revocation upon good cause, including a substantial or continuous failure to abide by its material terms"). It is clear, therefore, that the Board has authority to assess a penalty against Comcast for noncompliance. Requiring Comcast to pay the cost for PEG channel access to the

IPG is permitted.

Notwithstanding Comcast's noncompliance, VAN also believes that Comcast is free to set retail prices as it chooses so can effectively pass through whatever costs it chooses. *See In re Comcast Cable Commc'ns., LLC*, 25 FCC Rcd 5885 (2010). Comcast, in a veiled threat, also states that it would be "required" to pass the cost of the penalty on to subscribers during the first year of the new CPG. Comcast Motion at 15. There is no requirement or amortization schedule in federal law. 47 U.S. Code § 542 (c). If Comcast is so price sensitive and concerned about competitive pressures, VAN believes that it is unlikely that the company will follow through on its threat to pass on the costs "during the time the expenses are required." Comcast Motion at 16. Indeed, the shorter the time frame Comcast uses to pass the cost of providing IPG access to PEG channels to subscribers, then the greater impact the surcharge will have on subscribers. The converse of this is also true. If Comcast amortized the cost over a number of years, the impact on subscribers could be significantly less than the $2.30 monthly charge per subscriber alleged by Comcast. It seems, therefore, that Comcast would act more rationally than threatened.

II. THE CONTESTED PEG-RELATED CPG CONDITIONS ARE CONSISTENT WITH CABLE ACT RENEWAL STANDARDS

A. The Interactive Programming Guide (IPG) - The Board Correctly Applied the Federal Cable Franchise Renewal Standard and Vermont-Based Law In Adopting Condition 22(3) Requiring Comcast to Provide PEG Channel Listings on the Interactive Programming Guide ("IPG")

1. Cost/Benefit Analysis

There is a well demonstrated community need and interest that PEG channels have access to the IPG. Comcast focuses much of its Motion to Amend on the cost/benefit analysis of requiring PEG conditions.

Comcast's relies heavily on the cost/benefit analysis to argue against existing and future PEG access provisions. The Company is adamant that the Board's Order did not consider the costs of the IPG requirement and impact on cable subscribers. In fact, the Board did make several findings about what modifications to Comcast's system would be necessary to satisfy condition 22(3) and the costs associated with these modifications. Finding Nos. 109-

112. The Board also explained that it "does not view the cost of such a condition as unduly burdensome for Comcast under the circumstances," and thus satisfied the legal requirement that it take into account the costs of meeting the identified community need. Order at 54. Despite Comcast's suggestion in its motion, the Cable Act does not require franchising authorities to quantify community interest and needs and conduct a strict cost-benefit analysis. The Board's order makes clear that it was aware of the costs associated with the IPG requirement, and that it considered these costs in deciding to reject Comcast's proposal to omit the IPG requirement.

Comcast's second argument regarding the cost-benefit analysis is that the Board failed to **properly balance community needs and costs** pursuant to 47 U.S.C. § 546(c)(1)(D). While Comcast points to selective items in the record to argue a lack of community interest and need in the IPG condition, the Board's decision identifies other evidence in the record, such as the Department's CNA, that do show such community interest and need. Finding Nos. 114-115. The Board reasonably concluded that Comcast's omission of the IPG requirement is not reasonable to meet the future cable-related community needs and interests, and on appeal courts should defer to this conclusion by the franchising authority. *Sturgis*, 107 F.3d at 441.

Notice to Cure - It should be noted that the Board's decision on the IPG requirement is supportable. The Board appears to base its decision, in part, on the fact that it "is unable to conclude that Comcast has substantially complied with the requirements of condition 23(3) of the Existing CPG, which is a material term of its CPG." Order at 54. While the failure to substantially comply with material terms of existing franchises can be a valid basis for denying a proposal for renewal, it can only be a valid basis for the denial if "the franchising authority has provided the operator with notice and the opportunity to cure." 47 U.S.C. § 546(d). In its Order, the Board serves notice to Comcast with conditions designed to cure noncompliance with Existing CPG via the New CPG. This is not Comcast's first notification that something was wrong with their compliance with Existing PEG conditions.

Furthermore, as discussed above, *supra* at 11-12, the record establishing the fact that Comcast had *de facto* notice that it was in default of its IPG obligations under Docket 7077 is rich. Since 2008 and earlier, VAN and its members have petitioned for redress on outstanding issues of IPG and remote origination service. They have made a case for public access to the

changing commercial features of the network. The Department of Public Service was aware of VAN's petitions over the past decade (at least) and event served as facilitators of several rounds of these meetings. The Board also was aware of AMO PEG concerns vis-a-vis the VTel and Charter Communications dockets. In this Order, Board adopts many of VAN's findings and orders Comcast to cure its pattern of noncompliance if it wants to continued offer cable television services in Vermont.

2. Franchise Fee Caps

Because the Board determined that Comcast must absorb the cost of providing PEG channel access to the IPG, it did not discuss whether the Comcast has to pass these expenses on as either a PEG operating or capital cost. It is Comcast, not the Board, that warns about the Cable Act's 5% cap on franchise fees found in 47 U.S.C. § 542.[15] Comcast contends that the IPG upgrade condition should be classified as a PEG-related operating cost is subject to the 5% franchise fee cap and cannot be passed on to subscribers. Addressing this later argument first, as indicated above, Comcast is free to charge any retail rate it wants, and is therefore free to pass on any costs it incurs.

In its Motion to Amend (at 13) Comcast states that IPG upgrade costs would be considered "operating costs" and therefore the franchise fee would exceed the 5% cap. While VAN believes the Board is justified in requiring Comcast to absorb the cost of IPG upgrades in its bottom line based on the evidence cited, VAN also contends that Comcast misclassifies the cost of IPG upgrades and that these costs are appropriately classified as PEG related capital costs. VAN's position finds support in the Cable Act.

As the Board is well aware, under § 542, operational costs are capped at five percent (5%). This provision states that "[f]or any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services." 47 U.S.C. § 542(b). The term "franchise fee" is defined by statute as to "include[] any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable

[15] Comcast not only argues that the IPG activation will result in a $2.30 monthly surcharge to each subscriber, Comcast Motion at 15; *see also supra* at 23, it also argues that the cost is a franchise-related fee. This latter argument is now being addressed.

operator or cable subscriber, or both, solely because of their status as such." 47 U.S.C. § 542(g)(1).

The statute also sets forth explicit exclusions from the definition of "franchise fee." Among them are any tax, fee, or assessment of general applicability, "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities," and "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages." 47 U.S.C. § 542(g)(2)(A), (C) and (D).

While the statute does not define "capital costs," the FCC has addressed this question in a 2007 order.[16] The FCC interpreted capital costs as limited to those "incurred in or associated with the construction of PEG access facilities," which the Sixth Circuit held to be a reasonable construction of 47 U.S.C. § 542(g)(2)(C) based on the legislative history. *Alliance for Community Media v. FCC*, 529 F.3d 763, 784 (6th Cir. 2008). The Sixth Circuit also held that the FCC's interpretation is not limited to only facilities but may also include related equipment incurred in or associated with the construction of PEG access facilities. *Id.* at 785. The FCC order contrasted capital costs with "[s]alaries and training in support of the use of PEG access facilities . . . and so are counted toward the five percent [franchise fee] limit." *Id.* at 784.

Here, the costs associated with the IPG upgrade requirement of Condition 22(3) fall within the scope of capital costs. As the record indicates, "Comcast estimates that the upfront cost of equipment to make access to the IPG available to the PEG channels of the 22 designated AMOs would exceed $3.0 million and would also involve some increase in annual operating costs." Finding No. 112 (citing Glanville reb. Pf. at 40-41; tr. (7/18/16) at 54 (Glanville)). Comcast's own witness testified that the costs associated with the IPG requirement are "just upfront to get [the system] ready. The good news is once we get it up and ready the cost is *de minimis* after that." Tr. (7/18/2016) at 54 (Glanville).

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[16] *In re Implementation of Section 621(a)(1) of the Cable Commc'ns Pol'y Act of 1984 as amended by the Cable Television Consumer Protection & Competition Act of 1992*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007), *petition for review denied, All. for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

While the precise scope of the term capital costs is still uncertain, there is a strong argument that the IPG costs here should be considered capital costs. The FCC, in an order upheld by the Sixth Circuit in *Alliance for Community Media v. FCC*, has provided some guidance on this question by:

> differentiat[ing] between "costs incurred in or associated with the construction of PEG access facilities," which qualify as capital costs and therefore fall into the franchise fee exclusion, and "payments in support of the use of PEG access facilities," which do not qualify as capital costs and so are subject to the statutory cap on franchise fees. Salaries and training in support of the use of PEG access facilities fall into the latter category, for example, and so are counted toward the five percent limit.

Id. at 784 (quoting FCC order).

Here, the system modifications required by the IPG condition are not similar to salaries, training, or other ongoing support for the use of PEG access facilities. The Board's order does not require Comcast to make ongoing payments to support AMOs' providing information about the PEG programming to appear on the IPG, and the record shows only *de minimis* ongoing costs associated with the IPG requirement. Thus, virtually all, if not all, of the cost associated with the IPG condition is a one-time capital expense associated with upgrading certain equipment. This should be considered a capital cost excluded from Comcast's franchise fee calculation.

The Cable Act gives Comcast the latitude to pass these PEG access capital expenses on to its subscribers and to choose its own time frame for amortization of these costs. Again, however, no matter how these IPG upgrade costs are classified, the Board has ordered Comcast to cover the IPG costs out of its bottom line. This is appropriate given Comcast's noncompliance with the existing Docket 7077 CPG.

3. The IPG condition is not an impermissible condition on transmission technology

Comcast asserts in a footnote that the IPG condition violates 47 U.S.C. § 544(e), which prohibits franchising authorities from prohibiting, conditioning, or restricting a cable system's use of any type of subscriber equipment or any transmission technology. However, the IPG condition does not prohibit, condition, or restrict Comcast's use of any transmission technology or impose any technical standards. It simply requires Comcast to allow AMOs to

access Comcast's IPG or any successor on-screen programming guides (as it does for all other channel programming).

B. Remote Origination Service - The Board Correctly Applied the Federal Cable Franchise Renewal Standard and State Law In Adopting Conditions 21(b) and (c) Requiring Comcast to Provide Remote Origination Service

Comcast's argument regarding conditions 21(b) and (c) boil down to whether the Board did properly evaluate whether "the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests." 47 U.S.C. § 546(c)(1)(D).

In its order, the Board explains that it "regards the live origination of programs, such as local governmental, school, and community meetings, as one of the most significant community benefits provided by PEG channels." Order at 47. Its findings of facts support this conclusion. *See* Findings No. 92, 93.

While Comcast argues that the Board failed to consider costs, its motion does not provide an estimate of the cost associated with meeting this community need. (Comcast simply states that the costs are potentially unlimited and cites to cost estimates for a variety of return line construction scenarios.) Without an estimate of costs established in the record, Comcast cannot argue that the Board failed to properly weigh costs against the identified, and significant, needs and interests of the community. *See Sturgis*, 107 F.3d at 442 ("Where, as here, the operator fails to present evidence of the cost of meeting a need, the operator cannot successfully argue on judicial review that that balance weighs against meeting the need").

Moreover, to the extent Comcast introduces cost arguments in its motion absent a showing that the evidence was previously unavailable or , or under V.R.C.P. 59(e) Comcast cannot now raise new arguments or present new evidence which it failed to present in the case in chief.

What Comcast argues for the first time is that, while a potential remote origination site may be within 500 feet of Comcast's "cable plant," it still may be many miles from the nearest INet/return line, and, therefore, it may be costly to install remote origination service. VAN has several additional concerns with this argument. First, it indicates that Comcast constructed,

improved and upgraded its cable system in a manner that appears to violate BR 8.363(C) as well as existing Docket 7077 CPG conditions 12 and 15. Second, the Board provides Comcast with the ability to avoid any such cost. Condition 21(b) provides (emphasis added):

> **Comcast may employ various alternative technologies of its choice to provide PEG Access origination capability** with adequate signal quality at any requested location, and will consult with the designated AMO concerning the technologies for such PEG Access programming origination drops.

Unfortunately, although Comcast has successfully applied alternative technologies to provide remote origination service in Rutland, it has no plans to continue to do so. Campitelli DPFT at P. 28, L. 1617; Transcript at P. 37, L. 18 P. 38, L. 9 (Glanville). Comcast has not provided any reasonable basis why it will not employ alternative technologies. In short, while Comcast did not present its arguments in its case in chief, by allowing for the use of alternative technologies in CPG condition 21(b), the Board has already accommodated Comcast's concerns.

C. INet - The Board Correctly Applied the Federal Cable Franchise Renewal Standard and Vermont-Based Law In Adopting Conditions 52 and 53 Allowing PEG-Related Access to INet Service

In its CPG proposal, Comcast omitted "all conditions in the Existing CPG related to institutional networks" and provides no evidence to explain this omission. Board Order at 90. In its Motion to Amend, the Company asserts that "[t]here is no record evidence that the I-Net conditions fulfill a community or cable-related need or interest identified in the Departments ascertainment process." Comcast Motion at 44. Comcast states that INet provision in its Existing CPG is legally irrelevant to the reasonableness of its current proposal. *Id*. And, Comcast complains that the Board failed to undertake any analysis of potential costs of (new) conditions 52-53 (Existing Docket 7077 CPG conditions 62-63). At minimum, Comcast seeks relief from conditions 52 and 53 because they cap the company's rate of return and ability to charge for construction. *Id*. at 45.

The Board has explicit federal authority to require and specify the conditions for issuing RFPs and INet construction.[17] According to the Board, Comcast failed to provide compelling reasons to omit these conditions from its proposed CPG while VAN made a convincing case for the Board to retain them. The Board's INet conditions are not put forward in a vacuum. They are to be understood within the larger social good of providing statewide PEG access connectivity. Board Order at 40. The Board agrees with VAN that the I-Net is one way to achieve the objectives of statewide programming which is supported by community needs assessed by the AMO and the Department's CNA. The Board's conditions identify the INet as a commercial arrangement between parties. The issue of cost/benefit is addressed, as it typically is, by negotiated INet terms of service, including "rates, tolls and charges under which it would make available the institutional network to the requesting entity." CPG Condition 52. Comcast registered no objection to these conditions in its Existing CPG.

The matter is clear. The Board simply adopted the language of the Existing Docket 7077 CPG and inserted it as conditions 50-55 in this CPG. The Board has the authority to bring forward INet conditions without amendment.

III. CONCLUSION

The bulk of Comcast arguments pertain to the requirement that the Board consider whether Comcast's proposal is reasonable to meet the future cable-related community needs and interests,

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[17] From the Legislative History of the Cable Communications Act of 1984, H.R. Rep. No. 98-934:

> Many franchise agreements in effect today specify in great detail the type of facilities that a cable operator must construct (e.g., channel capacity, two-way capability, and 'institutional loop' to link libraries and hospitals), as well as the services that the operator must provide (e.g., cable news network, HBO, the health channel). *Id*. at 9.
>
> Subsection 611(b) also permits franchising authorities to require that channel capacity or institutional networks be designated for educational or governmental use. The term 'institutional network' means a communication network which is constructed or operated by the cable operator and which is generally available only to non-residential subscribers. The committee intends that an institutional network which is designed to provide cable service which includes video programming would be a cable system. *Id*. at 30;
>
> Franchising authorities may require rules and procedures governing channel capacity designated for public, educational or governmental use, as well as rules and procedures for the educational and governmental use of channel capacity designated for use on institutional networks. *Id*. at 31.

taking into account the cost of meeting such needs and interests. As the *Sturgis* case explains, franchising authorities' conclusions regarding community needs and interests are afforded deference. While Comcast may disagree with how the Board balanced community needs and costs, the Board's decision is defensible under federal law and Vermont-based law. Moreover, there are no manifest errors of law or fact that required the Board's correction. Nor will any manifest injustice result if the Board leaves its Order and CPG unchanged. Comcast fails to meet its burden under V.R.C.P. 59(e). Accordingly, the Board should deny Comcast's Motion.

Dated at Shelburne, Vermont this 22nd day of March 2017.

VERMONT ACCESS NETWORK

By: _____/DRM/_____
Douglas R. Marden

cc: 8301 Service List

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