



Testimony of Nancy L. Werner Before the Vermont House Ways and Means Committee March 13, 2024

My name is Nancy Werner. I am a Partner at the law firm of Bradley Werner, LLC and am testifying on behalf of the Vermont Access Network (VAN). I am an attorney with nearly two decades of experience specializing in communications law. I advise local governments and community media organizations on issues ranging from cable and telecommunications franchising, rights-of-way ordinances, fees and taxing structures, and the application of federal communications laws, rules and regulations. I serve on the Board of Directors of the National Association of Telecommunications Officers and Advisors (NATOA), a national organization that advocates for government entities on communications issues at the federal level. Prior to joining Bradley Werner, I served as General Counsel of NATOA, where I led the policy and regulatory efforts, including advocacy before Congress and the Federal Communications Commission on a range of communications issues. I also served on the FCC's Broadband Deployment Advisory Committee from 2019-2021.

I appreciate the opportunity to testify today in support of VAN's effort to secure a stable source of funding for the essential services Access Management Organizations (AMOs) provide throughout the State. AMOs are community anchor institutions that operate public, educational, and governmental (PEG) access channels that provide critical community media services, including local and regional news and programming, and extensive public meeting coverage.

For decades, AMOs have received funding from cable television companies as provided in the federal Cable Act. But today, cable television is not the only, and may not be the primary, means by which people access content like PEG channels. This content is also available online for those that have internet access, even if they no longer subscribe to cable service. In this context, the reliance on cable companies as the primary source of funding for AMOs is outdated, and as cable subscriptions continue to decline across the country, this model will increasingly jeopardize stable funding for community media.

VAN has carefully considered possible means to address this outdated funding model and strongly supports a pole attachment tax (PAT) as the best solution for long-term funding for AMOs. The PAT is a simple, elegant solution that better meets the need for a more modern and equitable funding structure for AMOs' essential services than a tax on streaming services.

While VAN believes the PAT is the best option to fund community media, it supports the Committee's consideration of a streaming tax as another means of raising revenue in addition to the PAT. Streaming services are largely provided by companies that do not own the infrastructure used to provide their content and, as such, likely would not pay a PAT. A streaming tax is a potential means to include these providers in the State's communications tax and fee structure. However, there are legal considerations that may complicate the enactment of a streaming tax.

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Specifically, a streaming tax would need to be thoughtfully drafted to ensure it is not a “discriminatory tax on electronic commerce,” which is prohibited by the Internet Tax Freedom Act.¹ Generally speaking, in the context of this type of tax, it may be discriminatory if the State does not impose a tax on similar services or products that are not provided over the internet or if the streaming tax is not imposed at the same rate as a tax on services or products that are not provided over the internet.

Whether the streaming tax would be “discriminatory” will depend on the services to which it applies and what services that are not provided over the internet are found to be similar to those covered by the tax. While a narrower definition of streaming services seems less likely to be found “discriminatory”—a five percent tax on streaming video services seems analogous to the five percent franchise fee on cable service—implementation may be more complicated. For example, as technology and services change, a narrow definition of streaming services may become outdated and more ambiguous over time, leading to new legal challenges or significant reductions in revenue if new services do not clearly fit the definition.

This drawback, while not insurmountable, is one reason the VAN strongly believes the PAT is the better solution. The PAT is a legally sound and modern funding structure for AMOs. Though there has been testimony questioning the enforceability of the PAT under Sections 253(a) and 332(c)(7) of the Telecommunications Act of 1996,² the PAT is an excise tax that the State has authority to enact. The Telecom Act includes an express tax savings clause that protects the State’s authority to impose this excise tax and ensures it is not preempted by Sections 253 or 332 of the Act.³ In addition, it is not a tax on internet access or electronic commerce and thus it is not impacted by the Internet Tax Freedom Act.

The PAT also modernizes the funding structure by recognizing that many people watch PEG channels over the internet, not on cable television. To my knowledge, most paid streaming services do not include PEG channels in their content offerings, and thus when “cord-cutters” watch their local PEG channel, they do so over separate online video applications rather than as part of any streaming service to which they may subscribe. A system that relies solely on video providers to fund AMOs does not reflect the range of ways people now consume content, and thus remains less equitable than a truly modern funding mechanism that includes the range of infrastructure through which residents access video content.

In short, the PAT is a straightforward, equitable and modern addition to the current AMO funding structure. While a new streaming tax is a potential source of additional funding, VAN believes the PAT, by focusing on the tangible infrastructure used to provide modern communications services, best provides the clear and stable funding AMOs need to continue to protect and promote community media across the State.

¹ 47 U.S.C. § 151, note.

² 47 U.S.C. §§ 253(a), 332(c)(7).

³ Pub. L. 104–104, title VI, § 601(c)(2), 47 U.S.C. § 152, note.

Thank you for the opportunity to testify on behalf of VAN.

Respectfully submitted,

/s/ Nancy L. Werner
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