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Testimony of James N. Horwood Before the Vermont House Ways and Means Committee March 13, 2024

My name is James N. Horwood. I am a Senior Counsel at the law firm of Spiegel & McDiarmid LLP and am providing testimony at the request of the Vermont Access Network to discuss the Community Media Reinvestment Act, legislation pending before the New York legislature. I have over thirty-five years of practice covering a range of communications law. During this time, I have advised local governments and community media organizations on all aspects of federal communications law, including the negotiation of cable franchises, franchise enforcement, and municipal ownership and operation of infrastructure, as well as the application of constitutional law to cable television and other communications issues. In addition to representing local governments and community media organizations, I served from 1990 to 2022 on the Board of Directors of the Alliance for Community Media as Special Appointee — Legal Affairs, and provided advice to organizations that manage access centers. I have written and spoken about these topics, including at the Alliance for Community Media and the National Association of Telecommunications Officers and Advisors conferences.

Public, educational, and governmental (“PEG”) access channels provide a leading source of local news and government affairs, educational programming, cultural affairs, and myriad other programming uniquely tailored to their local communities. These channels offer a platform for a diverse range of voices to participate in and engage with their community, independent from corporate management or advertising interests. However, PEG channels face serious obstacles that hinder their ability to operate in the twenty-first century media landscape on equal footing with other programming. In particular, they are faced with a loss of franchise fee revenues from cable operators, as video has been increasingly provided over direct broadcast satellite or video streaming service platforms (which do not pay franchise fees).

In 2021, Spiegel & McDiarmid was retained by the New York chapter of the Alliance for Community Media (www.acmny.org) and some of its members to draft legislation to provide for revenues for community media centers to enable them to continue to be able to operate in the changed and changing environment. I would note that, unlike Vermont where cable franchising is at the State level through certificates of public good issued by the Vermont PUC, franchises in New York are issued by individual local governments — cities, towns and villages. In drafting the Community Media Reinvestment Act, we devised a competitively neutral excise tax on

entities providing (1) direct broadcast satellite service or (2) video streaming services other than cable service (as defined by the federal Cable Act) to customers or subscribers in New York State. This excise tax—which mirrors the 5% franchise fee imposed on cable television operators—consists of a 5% tax on the gross receipts that direct broadcast satellite service providers or video streaming service providers derive from providing video programming to New Yorkers.

The Act also creates a Community Media Reinvestment Fund, in the joint custody of the Commissioner of Taxation and Finance and the Comptroller, where the revenue collected from the tax will be deposited. The Commissioner may retain up to 10% of the money in the fund, each year, for operating expenses.

The legislation is intended to ensure that, as video programming viewership expands and migrates from traditional cable services to satellite and video streaming services, that migration does not result in reduced support for and investment in local video programming responsive to the unique needs and interests of New Yorkers, including public, educational, or governmental access television programming.

Entities providing direct broadcast satellite services or video streaming services (such as Netflix and Hulu) will be subject to the taxes, but governmental entities and non-profit entities which are exempt from paying New York sales and use tax will be exempt. New York does not now tax video streaming services.

The money collected in the Community Media Reinvestment Fund will be disbursed as follows:

- **NEW YORK STATE:** 20% of revenues collected—less operating expenses—will be disbursed to the State General Fund.
- **MUNICIPALITIES:** 40% of revenues collected will be disbursed to municipalities in the state, allocated among them proportionally based on population.
- **COMMUNITY MEDIA CENTERS:** 40% of revenues collected will be disbursed to entities responsible for operating and administering public, educational, and/or governmental access channels in the state (“community media centers”), or, if no community media center has been identified in a given municipality, to the organization or organizations serving that municipality identified by the New York State Council on the Arts to receive distributions from the Community Media Reinvestment Fund, allocated among them proportionally based on the population of the municipality or municipalities served by each such identified organization.
- In low population density areas where cable is not mandated, such funds may be used to build out the infrastructure needed for video or audio connectivity, which may include broadband, cellular, satellite, or any other means of connectivity appropriate

to facilitate the establishment of the community media operations desired in each low population density area.

An important provision in the Community Media Reinvestment Act is in Section 330(d) which provides: “Under no circumstances shall direct broadcast satellite providers or video streaming service providers subject to the tax imposed pursuant to this Article include the amount of such tax on bills as a pass-through to customers. It shall be the responsibility of each direct broadcast satellite service provider and each video streaming service provider subject to the tax imposed pursuant to this Article to pay its required taxes to the State and providers shall not mislead the customer to think otherwise.”

A copy of the New York State Community Media Reinvestment Act is attached and may also found at <https://nysenate.gov/legislation/bills/2023/S2581/amendment/A>. The Assembly version of the bill in New York is A5900. There have not yet been legislative hearings on the bill.

I appreciate the opportunity to testify on behalf of the Vermont Access Network.

Respectfully submitted,

/s/ James N. Horwood

James N. Horwood

STATE OF NEW YORK

2581--A

2023-2024 Regular Sessions

IN SENATE

January 23, 2023

Introduced by Sens. PARKER, BORRELLO, CLEARE, COMRIE, FERNANDEZ, JACKSON, LIU, MAYER, SANDERS, SEPULVEDA -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations -- recommitted to the Committee on Investigations and Government Operations in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the tax law, in relation to establishing a tax on direct broadcast satellite services and video streaming services; and to amend the state finance law, in relation to establishing the community media reinvestment fund

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Short title. This act shall be known and may be cited as
2 the "community media reinvestment act".

3 § 2. The tax law is amended by adding a new article 15 to read as
4 follows:

ARTICLE 15

COMMUNITY MEDIA REINVESTMENT ACT

Section 330. Definitions.

8 331. Imposition and collection of an assessment on direct broad-
9 cast satellite services and video streaming services.

10 § 330. Definitions. For the purposes of this article, the following
11 terms shall have the following meanings:

12 1. "municipality" means any village, town, city, or county not wholly
13 contained within a city in the state of New York;

14 2. "person" means an individual, partnership, limited liability compa-
15 ny, trust or association, with or without transferable shares, joint-
16 stock company, corporation, society, club, organization, institution,
17 estate, receiver, trustee, assignee or referee and any other person
18 acting in a fiduciary or representative capacity, whether appointed by a

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD06297-03-3

1 court or otherwise, and any combination of individuals acting as a unit.
2 The term "person", unless expressly provided otherwise, does not
3 include:

4 (a) a governmental entity or a unit or instrumentality of a govern-
5 mental entity; or

6 (b) any entity exempt from sales and compensating use taxes pursuant
7 to paragraph four of subdivision (a) of section eleven hundred sixteen
8 of this chapter;

9 3. "community media organization" means an entity that is responsible
10 for:

11 (a) operating and administering a public access channel, as defined in
12 16 NYCRR 895.4; and/or

13 (b) operating and administering educational and/or governmental access
14 channels, as defined in 16 NYCRR 895.4;

15 4. "subscriber" or "customer" means any person or member of the gener-
16 al public who receives direct broadcast satellite service or video
17 streaming service from a direct broadcast satellite service provider or
18 video streaming service provider and does not further distribute such
19 service in the ordinary course of business;

20 5. "direct broadcast satellite service" means the distribution or
21 broadcasting by satellite of video programming or services directly to
22 receiving equipment located at an end user subscriber's or an end user
23 customer's premises, including, but not limited to, the provision of
24 premium channels, the provision of music or other audio services or
25 channels, and any other service received in connection with the
26 provision of direct broadcast satellite service;

27 6. "direct broadcast satellite service provider" means a person who
28 transmits, broadcasts or otherwise provides direct broadcast satellite
29 service to subscribers or customers in the state;

30 7. "video streaming service" means the distribution or broadcasting of
31 video programming displayed by the viewer for a fee on a subscription
32 basis. The term video streaming service, unless expressly provided
33 otherwise, does not include cable service as defined by 47 U.S.C. §
34 522(6);

35 8. "video streaming service provider" means a person who transmits,
36 broadcasts or otherwise provides video streaming service to subscribers
37 or customers in the state;

38 9. "video programming" means programming provided by, or comparable to
39 programming provided by, a television broadcast station including, but
40 not limited to, video programming provided by local networks, national
41 broadcast networks, cable television networks and all forms of pay-per-
42 view or on-demand video entertainment; and

43 10. "gross receipts" means all consideration of any kind or nature
44 received by a direct broadcast satellite service provider or video
45 streaming service provider, or an affiliate of such person, in
46 connection with the provision, delivery, or furnishing of direct broad-
47 cast satellite service or video streaming service to subscribers or
48 customers within the state, determined according to the hierarchy
49 described in section three hundred thirty-one of this article. "Gross
50 receipts" shall not include:

51 (a) revenue not actually received, regardless of whether it is billed,
52 including, but not limited to, bad debts;

53 (b) revenue received by an affiliate or other person in exchange for
54 supplying goods and services to an affiliated direct broadcast satellite
55 service provider or affiliated video streaming service provider;

1 (c) refunds, rebates or discounts made to subscribers or customers, to
2 advertisers or to other persons;

3 (d) revenue from telecommunications service as defined in 47 U.S.C. §
4 153(53). Under no circumstances shall direct broadcast satellite provid-
5 ers or video streaming service providers subject to the tax imposed
6 pursuant to this article include the amount of such tax on bills as a
7 pass-through to customers. It shall be the responsibility of each direct
8 broadcast satellite service provider and each video streaming service
9 provider subject to the tax imposed pursuant to this article to pay its
10 required taxes to the state and providers shall not mislead the customer
11 to think otherwise;

12 (e) revenue from any service that is subject to tax under article
13 twenty-eight of this chapter;

14 (f) revenue from the sale of capital assets or surplus equipment not
15 used by the purchaser to receive direct broadcast satellite service or
16 video streaming service from the direct broadcast satellite service
17 provider or video streaming service provider;

18 (g) reimbursements made by programmers to the direct broadcast satel-
19 lite service provider or video streaming service provider for marketing
20 costs incurred by such service provider for the introduction of new
21 programming;

22 (h) late payment fees collected from subscribers or customers; or

23 (i) charges, other than charges for direct broadcast satellite
24 services or video streaming services, that are aggregated or bundled
25 with direct broadcast satellite services or video streaming services on
26 a subscriber's or customer's bill, if the direct broadcast satellite
27 service provider or video streaming service provider can reasonably and
28 separately identify the charges in its books and records kept in the
29 regular course of business.

30 § 331. Imposition and collection of an assessment on direct broadcast
31 satellite services and video streaming services. 1. There is hereby
32 imposed an excise tax on the provision, delivery, or furnishing of
33 direct broadcast satellite services or video streaming services by
34 direct broadcast satellite service providers or video streaming service
35 providers to subscribers or customers in the state.

36 2.(a) Direct broadcast satellite service providers and video streaming
37 service providers shall pay an assessment equal to five percent of such
38 provider's gross receipts derived in or from the provision, delivery, or
39 furnishing of direct broadcast satellite service or video streaming
40 service to subscribers or customers in the state.

41 (b) Gross receipts derived in or from the provision, delivery, or
42 furnishing of direct broadcast satellite service or video streaming
43 service by direct broadcast satellite service providers or video stream-
44 ing service providers to subscribers or customers in the state shall be
45 determined by the hierarchy of sourcing methods set forth in paragraph
46 (c) of this subdivision. The direct broadcast satellite service provider
47 or video streaming service provider shall exercise due diligence under
48 each method described in paragraph (c) of this subdivision before
49 rejecting it and proceeding to the next method in the hierarchy, and
50 shall base its determination on information known to it or information
51 that would be known to it upon reasonable inquiry.

52 (c) Hierarchy of sourcing methods:

53 (i) the customer's primary use location of the direct broadcast satel-
54 lite service or video streaming service; and

55 (ii) the customer's billing address.

1 3. The tax authorized in this section shall be for each year, or part
2 of each year, that such direct broadcast satellite service provider or
3 video streaming service provider is engaged in the sale of direct broad-
4 cast satellite or video streaming services to subscribers or customers
5 in the state.

6 4. (a) Every direct broadcast satellite service provider and/or video
7 streaming service provider subject to tax under this section shall (i)
8 file, on or before April fifteenth of each year, for taxable years
9 beginning on or after January first, two thousand twenty-four, a return
10 for the year ended on the preceding December thirty-first, and (ii) pay
11 the tax due, which return shall state the gross receipts for the period
12 covered by each such return.

13 (b) Returns shall be filed with the commissioner on a form to be
14 furnished by the commissioner for such purpose and shall contain such
15 other data, information or matter as the commissioner may require to be
16 included therein.

17 (c) Notwithstanding paragraphs (a) and (b) of this subdivision, the
18 commissioner may require any direct broadcast satellite service provider
19 and/or video streaming service provider to file an annual return, which
20 shall contain any data specified by the commissioner, regardless of
21 whether such provider is subject to tax under this section.

22 5. (a) A direct broadcast satellite service provider or video stream-
23 ing service provider who fails to file a return or to pay any tax within
24 thirty days of the time required pursuant to this article (determined
25 with regard to any extension of time for filing or paying) shall be
26 subject to a penalty of ten percent of the amount of the tax determined
27 to be due, plus five percent of such amount for each subsequent month or
28 fraction thereof during which such failure continues, not to exceed
29 thirty percent in the aggregate.

30 (b) In the event of an underpayment of the tax owed, the commissioner
31 shall set the underpayment rate of interest to be paid, but the under-
32 payment rate shall not be less than seven and one-half percent per
33 annum, compounded daily. If no such rate of interest is set, such under-
34 payment rate shall be deemed to be set at seven and one-half percent per
35 annum, compounded daily. Any such rate set by the commissioner shall
36 apply to taxes, or any portion thereof, which remain or become due or
37 underpaid on or after the date on which such rates become effective and
38 shall apply only with respect to interest computed or computable for
39 periods or portions of periods occurring in the period during which such
40 rates are in effect.

41 6. Every direct broadcast satellite service provider and/or video
42 streaming service provider subject to tax under this section shall keep
43 such records of its business and in such form as the commissioner may
44 require, and such records shall be preserved for a period of three
45 years, except that the commissioner may consent to their destruction
46 within that period or may require that they be kept longer.

47 § 3. The state finance law is amended by adding a new section 99-m to
48 read as follows:

49 § 99-m. Community media reinvestment fund. 1. There is hereby estab-
50 lished in the joint custody of the comptroller and the commissioner of
51 taxation and finance a special fund to be known as the "community media
52 reinvestment fund".

53 2.(a) All monies received by the comptroller or the commissioner of
54 taxation and finance for the purpose of this fund shall be deposited
55 therein. No monies may be transferred from this account to any other
56 account except by authority of the commissioner of taxation and finance.

1 (b) Such fund shall consist of the revenue collected pursuant to arti-
2 cle fifteen of the tax law and any other revenues collected by or appro-
3 riated to the fund pursuant to any other law.

4 3.(a) The commissioner of taxation and finance is authorized to
5 utilize the monies in the community media reinvestment fund, for
6 distribution to the state, municipalities, and community media organiza-
7 tions in proportions as provided in paragraph (b) of this subdivision or
8 in accordance with paragraph (c) of this subdivision, provided however,
9 that the commissioner may retain up to ten percent of the monies in the
10 fund annually for operational expenditures.

11 (b) The commissioner of taxation and finance shall annually distrib-
12 ute, with no remainder left, all monies then held in the community media
13 reinvestment fund according to the following formula:

14 (i) one-fifth of the monies in the fund, less the monies retained by
15 the commissioner for operational expenditures, shall be distributed to
16 the state general fund;

17 (ii) two-fifths of the monies in the fund shall be distributed direct-
18 ly to municipalities in the state, and further allocated proportionally
19 based upon the population of such municipalities;

20 (iii) two-fifths of the monies in the fund shall be distributed
21 directly to identified community media organizations in the state, or,
22 if no community media organization has been identified in a given muni-
23 cipality, to the organization or organizations serving that municipality
24 identified by the New York state council on the arts to receive distrib-
25 utions from the fund, and further allocated proportionally based on the
26 population of the municipality or municipalities served by each such
27 identified organization.

28 (c) Notwithstanding paragraph (b) of this subdivision, in low popu-
29 lation density areas where cable is not mandated, such funds may be used
30 to build out the infrastructure needed for video or audio connectivity,
31 which may include broadband, cellular, satellite, or any other means of
32 connectivity appropriate to facilitate the establishment of the communi-
33 ty media operations desired in each low population density area.

34 4. The commissioner of taxation and finance shall promulgate regu-
35 lations by December thirty-first, two thousand twenty-three to establish
36 procedures for identifying, on an annual basis, (a) community media
37 organizations eligible to receive monies distributed pursuant to subpar-
38 agraph (iii) of paragraph (b) of subdivision three of this section; and
39 (b) in the event that no community media organization has been identi-
40 fied in a given municipality, the organizations serving that muni-
41 cipality identified by the New York state council on the arts, eligible to
42 receive monies distributed pursuant to subparagraph (iii) of paragraph
43 (b) of subdivision three of this section. Notwithstanding any other
44 provisions to the contrary in the New York state administrative proce-
45 dure act (SAPA), such rules and regulations may be adopted on an emer-
46 gency basis if necessary to meet such December thirty-first, two thou-
47 sand twenty-three deadline.

48 5. All payments of monies from the fund shall be made on the audit and
49 warrant of the comptroller.

50 § 4. This act shall take effect immediately and apply to taxable years
51 beginning on and after January 1, 2024.