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Testimony in Support of S.1857 & H.2682
"An Act Supporting Community Access Television"
Before the Joint Committee on Telecommunications, Utilities and Energy
May 30, 2017

My name is James N. Horwood. I am a partner at the law firm of Spiegel & McDiarmid LLP and am providing testimony on behalf of MassAccess in support of S.1857 and H.2682. I have over thirty 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 serve on the Board of Directors of the Alliance for Community Media as Special Appointee — Legal Affairs, and provide 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 a myriad of 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. S.1857 and H.2682 address two of these obstacles: cable operators' refusal to allow PEG channels to be transmitted in high definition ("HD") and cable companies' exclusion of PEG channel programming information from electronic programming guides.

S.1857 and H.2682 address these obstacles by requiring that cable television operators allow PEG channels access to HD transmission and electronic programming guides in the same manner as those capabilities are provided to local broadcast channels. While Massachusetts law already gives the Department of Telecommunications and Cable ("DTC") the authority to prescribe signal quality standards for cable systems,[1] S.1857 and H.2682 directly address the

[1] Mass. Gen. Laws Ann. ch. 166A, § 8.

current discriminatory treatment of PEG channels. These bills state that if PEG channels furnish to cable operators program-specific information and/or HD programming on the same terms and conditions as local broadcast channels do, then cable operators must treat PEG channels the same as they would local broadcast channels.

New England Cable & Telecommunications Association, Inc. ("NECTA"), RCN, and Verizon oppose H.2682 and S.1857, incorrectly arguing that this legislation: (1) is preempted by federal law and the First Amendment, (2) unconstitutionally changes the terms of existing contracts between municipalizes and cable operators, and (3) ignores technological realities and will cause disruption to consumers. The first two of these arguments involve legal issues, which I address below. However, it is worth clarifying at the outset that although NECTA, RCN, and Verizon state that H.2682 and S.1857 require cable companies to move the locations of PEG channels, the bills require no such thing. To the extent that NECTA, RCN, and Verizon base their arguments on a non-existent channel location requirement, these arguments must be ignored.

NECTA, RCN, and Verizon argue that H.2682 and S.1857 would conflict with federal law; this is incorrect. Although federal law prohibits franchising authorities from "prohibit[ing], condition[ing], or restrict[ing] a cable system's use of any type of . . . transmission technology,"[2] requiring cable television operators to carry PEG access channels in both HD and standard formats in the same manner as local broadcast channels are provided does not "prohibit, condition, or restrict" their use of any type of transmission technology. The same is true of the requirement to allow PEG channels equal access to the electronic programming guides. S.1857 and H.2682 do not dictate cable operators' use of specific types of transmission technology; they merely require that cable operators treat PEG channels and broadcast channels the same.

NECTA, RCN, and Verizon also claim that these bills would change existing contracts between municipalities and cable operators in violation of the U.S. Constitution. This, too, is incorrect. Any violation of the Contract Clause must involve a substantial impairment of a contract in light of the reasonable expectations of the parties, and courts recognize that parties' contracts in regulated industries necessarily anticipate future regulatory changes. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413-14 (1983). Here, H.2682 and S.1857 would not involve any substantial impairment of existing contracts, and because municipalities and cable operators are well aware of the possibility of regulatory changes in the cable industry, such changes in state law do not violate the Contracts Clause. Moreover, even if this legislation were to substantially impair a contract (which it would not), it would still be constitutionally valid because it addresses a significant and legitimate public purpose through means that are reasonable and necessary to achieve this purpose. *Id.* at 411-12 (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)).

[2] 47 U.S.C. § 544(e).

Finally, NECTA, RCN, and Verizon assert that requiring HD transmission of PEG channels would be a preference for government speech in violation of the First Amendment. Again, they are incorrect. As an initial matter, because cable operators already carry local broadcast channels and all major cable satellite channels in HD, the bills' requirement for HD delivery of PEG channels does not give PEG channels any preference over private commercial channels. To the contrary, the requirement merely prohibits operators from discriminating against PEG channels carried on a cable operator's system. In *Time Warner Entertainment Co., LP v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), the D.C. Circuit rejected a facial challenge that the PEG access provision of the 1984 Cable Act violated Time Warner's First Amendment right to freedom of speech. The court explained that in order to succeed in its facial challenge, Time Warner would have to "establish that no set of circumstances exists under which the Act would be valid."[3] But because franchising authorities could exercise authority under this provision in a manner that would be content neutral, unrelated to the suppression of free expression, and narrowly tailored to this purpose, the PEG access provision passes "intermediate scrutiny" and is constitutionally valid.[4] Similarly, S.1857 and H.2682 do not run afoul of a cable operator's First Amendment rights. Their provisions serve the important government interest, unrelated to the suppression of free expression, of assuring that the public has meaningful access to diverse and independent sources of information.[5]

Contrary to the allegations of NECTA, RCN, and Verizon, S.1857 and H.2682 are consistent with federal law and would advance the federal Cable Act's goal of providing "the widest possible diversity of information sources and services to the public."[6] Cable operators' current discriminatory and inequitable treatment of PEG programming is in direct conflict with this congressional intent. S.1857 and H.2682 merely prevent cable operators from continuing discriminatory tactics aimed at reducing the circulation and accessibility of PEG programming.

I appreciate the opportunity to testify on behalf of MassAccess in support of S.1857 and H.2682. MassAccess requests that the Committee pass this legislation.

Respectfully submitted,

James N. Horwood

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[3] *Id.* at 972 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).
[4] *Id.* at 974, 979.
[5] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.").
[6] 47 U.S.C. § 521(4).