



**New England Cable & Telecommunications Association, Inc.**  
**Ten Forbes Road • Suite 440W • Braintree, MA 02184**  
**TEL: 781.843.3418 • FAX 781.849.6267**

*New England Cable & Telecommunications Association, Inc.*

**POSITION AND OPPOSITION OF THE NEW ENGLAND CABLE &  
TELECOMMUNICATIONS ASSOCIATION, INC. TO  
RAISED BILL NO. 104  
(AN ACT ESTABLISHING THE STATE CIVIC NETWORK)**

**Testimony of Paul R. Cianelli**

I am Paul Cianelli, President and CEO of the New England Cable & Telecommunications Association, Inc. ("NECTA"). NECTA is a regional trade association that represents substantially all cable operators in Connecticut, Massachusetts, Rhode Island, New Hampshire, and Vermont. This is my written testimony stating NECTA's position and opposition to Senate Bill No. 104.

***I. Executive Summary***

The cable telecommunications industry has always supported civic and political programming. We have been on the forefront of such programming with organizations like C-SPAN. In Connecticut, our member cable operators have provided a channel on their systems for the Connecticut Television Network ("CT-N") since it began. We cannot, however, support Senate Bill No. 104 – which I will refer to as the "Cable Customer Tax Bill" – for a number of reasons.

CT-N shifts the burden of funding CT-N or a similar entity from all taxpayers to only those residents who have cable service. It requires all cable consumers, and no one else, to pay a monthly sum to fund the State Civic Network. This new assessment constitutes yet another tax on cable service and cable consumers. Although the bill avoids using the word "tax" to describe the new assessment, it is clearly a tax. Moreover, the tax unlawfully discriminates against cable consumers by taxing only them and not others who will enjoy the benefit of watching the network. The bill requires the network to be made available on the Internet, so that anyone with an Internet connection will be able to watch the programming. Yet consumers who view the programming through the Internet – delivered via telecommunications instead of a cable system – will not pay the tax.

The bill also violates provisions of the federal Communications Act. That Act preempts States and franchising authorities from mandating the carriage of any particular program or network. Instead, the Act gives cable operators power to decide which channels, if any, to carry other than the minimum contents established by Congress. The bill would therefore be preempted. The proposed legislation additionally violates the First Amendment rights of cable operators to choose which programs and networks to distribute to their customers.

## II. Discussion

### *The Cable Customer Tax Bill Increases the Already Steep Tax Burden on Cable Consumers*

The distinction between what constitutes a tax and what constitutes a fee does not depend on the label chosen by the legislature. The Supreme Court of the United States has stated that a tax provides "revenue for the general support of the government," while a fee imposes "a *specific* charge for the use of publicly-owned or publicly-provided facilities or services."<sup>1</sup> Connecticut courts make a similar distinction.<sup>2</sup>

It is clear that the funds generated under Senate Bill No. 104 will be used to support an organization that runs the State Civic Network for the benefit of all levels of state and local government as well as all residents of the State. In setting the amount of the charge, PURA is to consider several criteria including: "the level of state government need for coverage of state government proceedings"; "the level of community need for coverage of state government proceedings"; and "any other factors determined to be relevant."<sup>3</sup> There is no limit on the amount of the surcharge that cable consumers must pay. Regardless of the bill's failure to call this surcharge a tax, it is indeed a tax on cable consumers.

Moreover, the proposed tax irrationally discriminates against cable consumers, in violation of equal protection. "[F]or purposes of taxation, the legislature does not have an unlimited power to create classifications. The classifications that it selects cannot be arbitrary but 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'"<sup>4</sup> The bill creates an irrational distinction for the tax because it requires the State Civic Network to be made available on the Internet to all consumers, without regard to whether they obtain Internet service from a cable system or a telecommunications service provider. Yet only cable consumers pay the tax. Customers of telecommunications and satellite television providers are free from the tax. This forces cable consumers subsidize all residents of the State, in violation of equal protection.

Connecticut already imposes heavy taxes on cable consumers. Cable operators pay a 5% gross receipts tax,<sup>5</sup> which federal law allows them to pass on to customers and list as a separate line item on the bill.<sup>6</sup> On top of that, cable is subject to a separate tax specifically established to pay for access programming.<sup>7</sup> Under these existing taxes,

<sup>1</sup> *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-22 (1981)(emphasis added).

<sup>2</sup> *E.g. City of New London v. Howe*, 94 Conn. 26, 108 A. 529 (Conn. 1920) (and cases cited therein).

<sup>3</sup> Cable Customer Tax Bill § 4(b).

<sup>4</sup> *Circuit-Wise, Inc. v. Comm'r of Revenue Services*, 215 Conn. 292, 301, 576 A.2d 1259 (1990).

<sup>5</sup> Conn. Gen. Stat. §§ 12-256, 12-258.

<sup>6</sup> *See, e.g.*, 47 C.F.R. §§ 76.922(f)(State and local taxes are "external costs" outside any regulated cable rate), 76.922(e)(2)(ii)(cable rates may be adjusted to reflect changes in external costs); 47 U.S.C. § 542(c)(3) (operator may itemize taxes).

<sup>7</sup> Conn. Gen. Stat. § 16-331cc (tax set initially at one-half of one per cent of gross earnings, later to one-quarter of one per cent).

cable customers in Connecticut paid over \$140 million in State and local taxes in 2015 alone.<sup>8</sup> The average cable customer in Connecticut already pays over \$7 per month in State and local taxes. Despite the existing heavy taxation of cable service, the Cable Customer Tax Bill would give PURA the power to impose an additional, *unlimited* tax on the bills of Connecticut cable consumers to fund the new State Civic Network and the organization that will be paid to run it.

### ***Federal Law Prohibits State Imposition of Cable Program Requirements***

Congress protected the programming choices of cable operators, and assured that cable operators remain free from government directives to carry specific channels on the basic tier. The bill ignores these protections, and is preempted by the federal Communications Act.

Section 624(f) of the Communications Act declares that no federal agency, State or local franchising authority may “impose requirements regarding the provision or content of cable services except as expressly provided in this title.”<sup>9</sup> Unless the Communications Act expressly allows the State government to require a cable system to carry a particular channel like the State Civic Network, a requirement for mandatory carriage of the channel violates the Act. No provision of the Communications Act expressly authorizes State or local governments to require cable systems to carry any specific channel or network. Several expressly prohibit this program carriage mandate.

Section 624(b) of the federal Communications Act states that a “franchising authority *may not ... establish franchise requirements for video programming* or other information services.”<sup>10</sup> The legislative history of this provision clarifies that “[t]he cable operator may not be required, either directly or indirectly, as part of the franchise renewal or for a new franchise to provide particular video or other information services, or even a broad category of video or other information service.”<sup>11</sup> The proposed legislation violates this provision.

Section 623 of the Communications Act also explicitly addresses franchise requirements for video services, and does not allow the State to mandate carriage of a specific channel. Section 623(b)(7)(A) requires a cable operator’s basic service tier to include at least all local broadcast signals provided by the operator, plus “any public, educational and governmental access programming required by the franchise...”<sup>12</sup> Building on this, Section 623(b)(7)(B) explicitly declares that in addition to the minimum content, the “*cable operator may add* video programming signals or services to the basic

---

<sup>8</sup> Source: major NECTA members (includes customer-paid taxes).

<sup>9</sup> 47 U.S.C. § 544(f).

<sup>10</sup> 47 U.S.C. § 544(b) (emphasis added). In Connecticut, PURA is the franchising authority. Conn. Gen. Stat. §16-331(a).

<sup>11</sup> H.R. Rep. No. 934, 98<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 19, 68-69, reprinted in 1984 U.S. Code Cong. & Admin. News 4655, 4705-06. Franchising authorities may enforce negotiated provisions for “broad categories of video programming,” but that authority only applies to “commitments made in an arms-length situation.” *Id.*

<sup>12</sup> 47 U.S.C. § 543(b)(7)(A).

service tier...”<sup>13</sup> The statute thus explicitly grants to *cable operators* the discretion to carry services on the basic tier other than the required minimum contents. The State does not have the power to mandate that any other programming service be included in or excluded from the basic service tier. As one court explained, “[t]he language of the statute leaves little doubt that, apart from the programming requirements enumerated [in the statute], the cable operators themselves have *exclusive control* over the programming on the basic service tier.”<sup>14</sup>

Finally, Congress protected the right of cable operators to be free from government control of their programming choices during the process for franchise renewal. Section 626 of the Act specifies that “the mix or quality of cable services” provided over the system may not be considered by the government in making the decision of whether to renew the operator’s franchise.<sup>15</sup> The legislative history to this provision emphasizes that the renewal decision may not consider “particular programming services or other cable services which the operator has provided.”<sup>16</sup> The proposed legislation violates Section 626 by depriving cable operators of protected franchise rights to renewal without regard to the carriage of any particular programming.

Congress made clear that “[a]ny provision of law of any State, political subdivision, or agency thereof, or franchising authority . . . which is inconsistent with this Act shall be deemed to be preempted and superseded.”<sup>17</sup> The proposed legislation violates Sections 624(b), 623(b), and 626 of the Communications Act, and is therefore preempted.

Congress has assured cable operators retain exclusive control over the programming they carry on the basic tier, and expressly prohibited any State or local government from dictating which channels or networks a cable system must carry.

### ***The Bill Violates the First Amendment***

In addition to not passing muster under the federal Communications Act, because the bill requires cable operators to carry a specific channel on the basic service tier it would violate the First Amendment.

As an initial matter, “cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”<sup>18</sup> The Supreme Court held that this is so because through “original programming or by exercising editorial discretion over which stations or

---

<sup>13</sup> 47 U.S.C. § 543(b)(7)(B) (emphasis added).

<sup>14</sup> *Time Warner Ent. Co. v. FCC*, 56 F.3d 151, 197 (D.C. Cir. 1995) (emphasis added).

<sup>15</sup> 47 U.S.C. § 546(c)(B).

<sup>16</sup> H.R. Rep. No. 98-934, at 74 (1984).

<sup>17</sup> 47 U.S.C. § 556(c).

<sup>18</sup> *Turner Broadcasting System v. FCC*, 512 U.S. 622, 636 (1994).

programs to include in its repertoire,” cable programmers and operators “seek to communicate messages on a wide variety of topics and in a wide variety of formats.”<sup>19</sup>

Moreover, speakers have a First Amendment right not to be compelled to speak by the government.<sup>20</sup> In *Miami Herald Pub. Co. v. Tornillo*, the Court held that where the government forces a newspaper to carry speech that it otherwise would not want to carry, the First Amendment is violated to the same extent as when the government directly prohibits speech.<sup>21</sup>

Government regulation of speech based on its content is subject to strict scrutiny. In *Turner Broadcasting*, the Supreme Court held that strict scrutiny – termed by the Court “exacting” or “rigorous” scrutiny – applies to content-based cable regulations: “Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny.”<sup>22</sup> The Supreme Court described the strict scrutiny standard as follows:

The Government may ... regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. ... The Government may serve this legitimate interest, but to withstand constitutional scrutiny, “it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.” It is not enough to show that the Government’s ends are compelling; the means must be carefully tailored to achieve those ends.<sup>23</sup>

Essentially, there must be: (1) a compelling governmental interest; and (2) the means chosen to accomplish that interest must be narrowly tailored to that end. In undertaking this analysis, the Court may consider the alternative means available to the government of accomplishing the same goals. As a practical matter, governmental regulations rarely survive the “strict scrutiny” test.

---

<sup>19</sup> *Id.*

<sup>20</sup> See *Turner*, 512 U.S. at 642 (“Laws that compel speakers to utter or distribute speech bearing a particular message are subject to ... rigorous scrutiny.”).

<sup>21</sup> 418 U.S. 241 (1974). See also *Riley v. National Fed. of the Blind*, 487 U.S. 781, 795 (1988) (holding that “mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech.”); *Pacific Gas & Elec. Co. v. Public Utilities Comm’n*, 475 U.S. 1, 15 (1986) (plurality opinion) (rejecting regulation in part because it “identified a favored speaker” based on the content of that speaker’s speech, “and forced the speaker’s opponent ... to assist in disseminating the speaker’s message. Such a requirement necessarily burdens the expression of the disfavored speaker.”).

<sup>22</sup> *Turner*, 512 U.S. at 642.

<sup>23</sup> *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989).

Applying these principles to the proposed Connecticut bill, it is clear that (1) Connecticut cable operators are speakers for First Amendment purposes who have a right not to be compelled to speak by the government; (2) because under the bill, the General Assembly would compel cable operators to carry a specific channel, this action is a form of content-based regulation; and (3) as a form of content-based regulation, a reviewing court would apply the “strict scrutiny” test – *i.e.*, the government would bear the burden of demonstrating that the mandatory carriage requirement serves a compelling governmental interest and is advancing that interest by the least restrictive means.

The legislation would fail that test. The State could not demonstrate that mandatory carriage of the State Civic Network advances a “compelling” governmental interest and employs the “least restrictive” means of advancing that interest. Indeed, a federal district court found that New York City violated Time Warner Cable’s First Amendment rights by forcing Time Warner Cable to carry Fox News and Bloomberg Television on PEG channels. The district court applied the strict scrutiny test and summarized its analysis as follows:

Time Warner has a right under the First Amendment to be free from government interference with its programming decisions. I find that the City, through its course of conduct, culminating in its decision to place Fox News and [Bloomberg Television] on [a PEG channel], has acted to compel Time Warner to add Fox News to its system of commercial channels and that these actions have had a direct, immediate, and chilling effect on Time Warner's exercise of its constitutionally-protected editorial discretion.<sup>24</sup>

The proposed bill, if enacted, would violate cable operators’ First Amendment rights.

### *III. Conclusion*

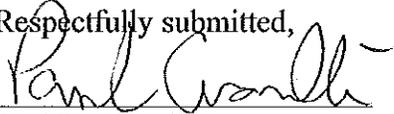
- Connecticut cable consumers already pay over seven percent of their bill in cable-specific State and local taxes. These taxes generate more than \$140 million in tax revenue for State and local governments in 2015. Although the State Civic Network will be made available to all Connecticut residents through the Internet, the new tax imposed by the Cable Customer Tax Bill will only be paid by cable customers. Consumers of satellite service and Internet service providers that are not cable operators will not pay the tax. Cable consumers will thus unfairly subsidize the creation, operation and distribution of the State Civic Network to all other residents. Moreover, the tax imposed on cable consumers violates equal protection by applying a tax only on cable consumers that benefits all consumers.
- The federal Communications Act expressly prohibits State and local governments from dictating which program channels cable systems carry, and allows cable operators to determine whether to carry additional services on the basic tier. The Cable Customer Tax Bill would be preempted by those federal laws.

---

<sup>24</sup> *Time Warner Cable of New York City v. City of New York*, 943 F. Supp. 1357, 1399 (S.D.N.Y. 1996), *aff’d on other grounds*, 118 F.3d 917 (2<sup>nd</sup> Cir. 1997).

- The Cable Customer Tax Bill violates the rights of cable operators under the First Amendment of the United States Constitution to be free of government interference with their editorial programming choices.

Respectfully submitted,



Paul R. Cianelli

President

February 22, 2016