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The Cable Telecommunications Association of New York, Inc.

Comments to the Senate Select Committee on Budget and Tax Reform Regarding Modernizing New York State's Telecommunications Tax System Submitted By Eric S. Tresh on behalf of the Cable Telecommunications Association of New York

I. Introduction

The following comments are respectfully submitted by the Cable Telecommunications Association of New York ("CTANY") to the Senate Select Committee on Budget and Tax Reform to assist the Committee in its evaluation of issues surrounding the modernization of New York State's telecommunications tax system. We appreciate the opportunity to work with the Committee to evaluate these important issues and look forward to the opportunity to meet with Committee members later this month.

II. About CTANY

CTANY is the principal trade association for the cable industry in New York, representing over 55 member companies including cable television providers, their affiliates, cable programmers, and cable vendors.

Two of the nation's largest video service providers, Cablevision Systems Corporation and Time Warner Cable, are headquartered in New York State. Collectively, they employ over 21,000 New Yorkers, have a combined annual New York State payroll of approximately $2,000,000,000, and serve over 4,900,000 New Yorkers.

Cable operators' spending in New York includes substantial continuing investment in broadband infrastructure. In the past three years (2006 through 2008), cable companies have invested approximately $3.39 billion in improving and expanding the state's cable infrastructure. As of the end of 2007, approximately 95 percent of all households in New York State had access to cable television and broadband service. By investing in the rapid deployment of cable modem technology, cable operators have played a central role in the rapid growth of New York's Internet economy.

As the demand for more advanced services continues to grow, cable operators have begun to deploy the next generation of cable Internet technology, offering speeds ranging from 30 to more than 100 Mbps – five to ten times faster than those available from today's cable modem technology. As they did in the 1990's, cable companies' investments in this new technology will help ensure that New York remains at the leading edge of America's Internet economy.

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III. Guiding Principles of Tax Reform

A. Functionally Equivalent Services Should Be Taxed The Same

A fundamental tenant of sound tax policy is that consumers should be provided with a tax neutral choice. This requires that functionally equivalent services be taxed the same. For example, video programming services should be subject to the same taxes whether provided by a cable company, a direct broadcast satellite ("DBS") company or a company that primarily provides telecommunications services. Taxes should not differ based on a customer's choice of service provider. Exemplifying this principal, Massachusetts recently adopted a new five percent excise tax on DBS service providers to equalize taxes imposed on cable and DBS video service providers.

B. Efforts to Modernization New York State's Telecommunications Taxes Must Take Into Account Taxes and Fees Imposed on The Consumer

New York State and its local governments impose a variety of taxes on video and telecommunications service providers. Notwithstanding the label affixed to an exaction (e.g., "tax", "fee", "surcharge"), the impact of these taxes are the same on consumers. For example, New York State consumers that purchase video programming service from a cable provider or a traditional land-line telecommunications company pay franchise fees to local governments throughout New York State at the rate of approximately five percent of their service charges. From the customer's perspective, the label attached to the charge is of little consequence, the customer only knows that their bill is five percent higher. Thus, to the extent that one video service provider is required to pay franchise fees while another is not, consumers are deprived of a tax neutral choice.

C. Video Service, Telecommunications Service and Internet Service Are Not Functionally Equivalent and In Some Cases May be Taxed Differently

Video service, telecommunications service and internet service are very different services. Consumers do not replace their cable or satellite video service with a telecommunications service. Cable service provides consumers with video programming and other forms of entertainment, while telecommunications services allow consumers to engage in voice communications.

In fact, New York courts have long recognized the distinction between, cable, telecommunications and internet services. Sound tax policy does not dictate that these services be taxed the same. To the contrary, there may be sound policy reasons why services which are not functionally equivalent should be taxed differently. For example, the Federal Internet Tax Freedom Act prohibits state and local governments from imposing multiple or discriminatory taxes on electronic commerce and new taxes on internet access services. This prohibition was put in place to facilitate the provision of affordable internet access service and to ensure that the growth and innovation resulting from the proliferation of electronic commerce was not stifled by new taxes and fees. As a result of this policy, internet services are subject to a different taxes than video and telecommunications services.

D. Tax Reform Should Consider Simplification of New York State's Telecommunication Tax Regime

New York State consumers and the telecommunications industry would benefit from simplifying State and local taxes imposed on telecommunications services. Simplification would result in better compliance, lower transaction costs, and a more inviting business climate. New York State has one of the most complex telecommunications tax regimes in the country. Telecommunications service providers are subject to a myriad of state and local taxes and fees including scores of differing gross receipts taxes imposed by local governments throughout the state. According to a study by the Counsel on State Taxation (COST), a telecommunication service provider serving customers across the state is required to pay several different taxes and file up to 5,632 annual tax returns.

The costs associated with tax compliance in New York State are among the highest in the Nation. These costs diminish capital available for investment and may be borne by consumers. Simplifying the number of taxes, centralizing the tax filing process and reducing the number of tax rates should be among the goals for this Commission as it considers modernizing New York State's telecommunications tax regime.

IV. Responses to Senate Select Committee's Questions

- *How should New York modernize its telecom taxes to make them better reflect industry practices and technology in the 21st century?*

Any modernization of New York State's telecommunications taxes should incorporate the guiding principles of tax reform discussed above. These principles provide for tax neutral consumer choice and encourage additional investment in next generation broadband technology, thereby providing benefits to New York State consumers.

- *What taxes are applied to some telecom companies but not to others, even when they offer similar services? From a historical standpoint, why were these service providers taxed differently?*

Tax disparity exists with regard to the taxation of functionally equivalent video services provided by cable and DBS companies. Traditionally, cable companies are subject to a franchise fees imposed at the rate of approximately five percent of video services, whereas DBS companies do not pay franchise fees. From a historical perspective, video services are subject to different taxes and fees as a result of the Federal preemption granted to DBS providers by the Telecommunications Act of 1996 (the "Act"). Section 602(a) of the Act prohibits local governments from imposing local taxes or fees on DBS providers. This prohibition was put in place so the then fledgling satellite industry would not have to file tax returns for thousands of local taxes and fees across the country. The Act, however, contains a savings clause which permits states to impose taxes on DBS providers and distribute some or all of the tax revenue to local jurisdictions. In practice, what Congress intended as merely administrative relief has translated into a substantial competitive advantage for DBS providers, effectively denying consumers a tax neutral choice of video service providers.

- *What states have modern telecom tax systems that can serve as models for New York?*

Massachusetts

Recognizing that only cable service was subject to a franchise fee, Massachusetts recently enacted a new five percent excise tax on DBS video service in order equalize the tax and fee burden borne by cable and satellite video consumers.

Ohio

In 2005, Ohio enacted parity legislation to afford consumers a tax neutral choice between competing video service providers. Ohio imposed a new five percent tax on DBS video services approximately equal to the franchise fees imposed on cable video service.

Virginia

In 2007, Virginia modernized its communications tax scheme. It repealed several taxes including the local consumer utility tax on landline and wireless telecommunications, a local utility tax on cable video programming service, the local E-911 tax on landline telephone service, the Virginia Relay Center surcharge, a portion of the local business, professional occupation license (BPOL) tax imposed on all businesses, and the local video programming excise tax.

Virginia replaced these taxes and fees, many of which were locally administered, with a five percent communications sales tax imposed on telecommunications and video services, a state level landline telephone E-911 tax, and a nominal, cost based cable rights-of-way fee. Each of these taxes is administered by the state. In consideration of extending the communications sales tax to video service providers, Virginia eliminated cable franchise fees. Virginia also kept in place the state E-911 surcharge on wireless service, the state and local public right-of-way use fee on landline telephone service, and the remaining portion of the local BPOL tax.

North Carolina

In 2006, North Carolina simplified the taxes and fees imposed on video service providers by eliminating franchise fees and requiring all video service providers to pay a uniform state tax.

Tennessee

Tennessee significantly narrowed the gap between taxes and fees imposed on cable service providers and direct broadcast satellite providers by enacting a state privilege tax at the rate of eight and one quarter percent on cable service providers and a state privilege tax imposed at the rate of nine percent on direct broadcast satellite providers. Cable franchise fees were eliminated as part of Tennessee's tax reform effort. Eighteen percent of the new cable tax is distributed to localities in consideration of their loss of franchise fee revenue.

- *What federal laws or local government concerns should the state take into consideration when looking to modernize its telecom taxes?*

New York State should take into consideration the following Federal laws when looking to modernize it telecommunications taxes:

The Federal Internet Tax Freedom Act, 47 U.S.C.A. § 151. This Act prohibits states from enacting multiple or discriminatory taxes on electronic commerce and new taxes on internet access service.

The Cable Act of 1984, 47 U.S.C.A. § 521, et seq. The Cable Act contains a number of provisions that regulate what state and local taxes may be imposed on cable service providers. These provisions include restrictions on multiple and discriminatory local taxes and fees imposed on cable service providers.

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996). The Telecommunications Act of 1996 imposes a number of provisions related to state and local taxes on communications and video services. These provisions include a prohibition against the imposition of local taxes and fees on direct broadcast satellite providers and a savings clause allowing states to impose taxes on direct broadcast service providers and distribute the proceeds to local jurisdictions.

The Federal Mobile Telecommunications Sourcing Act ("MTSA"), Pub. L. 106-252, 114 Stat. 626 (2000). The MTSA provides that mobile telecommunications are taxed (sourced) to a customer's primary place of use. For example, if a user's primary place of use is in Buffalo, New York, Buffalo taxes and fees apply to the user's charges even though calls were made while the user was traveling to New York City. New York State law conforms with the provisions of the MTSA.

New York State should also consider the following local concerns:

Any modernization of the telecommunications tax structure in New York will undoubtedly include a review of the numerous local taxes and fees imposed on voice, video and internet service providers operating in New York State. To the extent that these taxes and fees are repealed or modified, the State will need to consider the revenue impact on local governments.

- *How have differing tax treatments for telecom companies offering similar services influenced behavior in the market?*

Consumers may choose one functionally equivalent service over another based on the aggregate taxes and fees on their invoice. For example, consumers may choose to purchase video service from a DBS provider rather than from a cable provider or telecommunications provider because the DBS providers and their customer are not required to pay state or local franchise fees.

VI. Conclusion

We believe that any effort to reform taxes in New York State should carefully consider the impacts on service providers and consumers alike and ensure that functionally equivalent services are taxed equally. In particular, the lack of tax and fee parity in many states has denied consumers a tax neutral choice of video service providers and afforded DBS a substantial, competitive advantage. We appreciate the opportunity to provide comments to this Committee and look forward to working with the Committee members as they consider proposals to reform the taxation of New York State's telecommunications industry.