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SENATE BILL NO. 530

Offered January 13, 2016

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A BILL to amend and reenact § 15.2-2108.22 of the Code of Virginia, relating to cable franchises.

Patron—Stuart

Referred to Committee on Local Government

Be it enacted by the General Assembly of Virginia:**1. That § 15.2-2108.22 of the Code of Virginia is amended and reenacted as follows:****§ 15.2-2108.22. Regulation of fees, rates and services; penalties.**

Upon receiving a notice requesting an ordinance cable franchise pursuant to § 15.2-2108.21, a locality shall adopt or maintain one or more ordinances that govern a cable operator who provides cable service under an ordinance cable franchise. The requirements of any specific provision in any such ordinance shall not exceed the requirements imposed in the same provision, if any, in any existing cable franchise within the locality. Such ordinance or ordinances, which shall be adopted after a public hearing, shall:

1. Require a cable operator to provide the locality with access to a number of public, educational, and governmental access channels, equal to the lowest number of such channels provided by any other cable operator in the same franchise area of the locality. If the existing cable operator provides less than three such public, educational, and governmental access channels pursuant to a franchise agreement, the locality may require each cable operator to provide up to three such channels. Any additional channels provided subject to this provision shall be subject to the reclamation formula set forth below. In addition, a locality may, by ordinance adopted after a public hearing, require a cable operator to interconnect with any other cable operator to ensure the carriage of required public, educational, and governmental access channels; if the new cable operator and all existing cable operators cannot agree to an interconnection agreement within 180 days of a request to interconnect by the new cable operator, then the locality is authorized to determine an interconnection point. The locality or its designee shall assume responsibility for management, operation, and programming of such channels. A locality that substantially utilizes its existing public, educational, and governmental access channels may require a reasonable number of additional public, educational, and governmental access channels by the enactment of an ordinance, after a public hearing, so long as (i) the ordinance applies equally to all providers of cable service within a franchise area, (ii) the total number of additional public, educational, and governmental access channels does not exceed three channels in the basic service tier, and (iii) the total number of public, educational, and governmental access channels shall not exceed seven channels in the aggregate. Notwithstanding the foregoing, but consistent with federal law, the locality and a cable operator may enter into written agreements for the carriage of additional public, educational, and governmental access channels, including other arrangements for the carriage of such programming. Any additional public, educational, and governmental access channel provided pursuant to this article that is not utilized by the locality for at least eight hours a day shall no longer be made available to the locality, but may be programmed at the cable operator's discretion. At such time as the locality can certify to the cable operator a schedule for at least eight hours of daily programming for a period of three months, the cable operator shall restore the previously re-allocated channel. For purposes of this subdivision, a public, educational, and governmental access channel shall be considered to be substantially utilized when 12 hours are programmed on that channel each calendar day; in addition, at least 33% of the 12 hours of programming for each business day on average over each calendar quarter must be nonrepeat programming. For purposes of this subdivision, nonrepeat programming shall include the first three videocastings of a program and shall include programming on other public, educational, and governmental access channels in that locality. Programming for purposes of determining substantial utilization shall not include an alphanumeric scroll, except that for purposes of requiring one or more additional public, educational, and governmental access channels, an alphanumeric scroll shall be included as programming on not more than one channel;

2. Require a cable operator to pay a franchise fee, remitted on the same schedule as the least frequent schedule of an existing cable operator, but no more frequently than quarterly, calculated by multiplying a franchise fee percentage rate by the cable operator's gross revenues in such franchise area for the remittance period; however, the franchise fee rate shall (i) not exceed 5% of such gross revenues and (ii) not exceed the lowest franchise fee rate paid or provided by an existing cable operator in the locality. The locality may further require that the cable operator make the franchise fee payments to the

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59 locality no later than 45 days following the end of the remittance period and require that the franchise
60 fee payment be submitted with a brief report prepared by a duly authorized representative of the cable
61 operator showing the basis for the computation. The locality shall have the right to reasonably require
62 further supporting information that does not exceed the information required to be provided by existing
63 cable operators in the locality;

64 3. Require a cable operator to pay a recurring fee, hereafter referred to as the PEG Capital Fee, to
65 support the capital costs of public, educational, and governmental channel facilities, including
66 institutional networks, provided that the PEG Capital Fee is equal to the lowest recurring fee imposed on
67 a per subscriber or a percentage of gross revenue basis and paid by any existing cable operator in the
68 locality to support the capital costs of such facilities. The PEG Capital Fee shall only be imposed on a
69 per subscriber or a percentage of gross revenue basis. If the existing cable operator has paid a lump sum
70 capital grant at award or renewal of its current franchise, or is providing in-kind equipment in lieu of
71 such a capital grant, to support public, educational, and governmental channel facilities, including
72 institutional networks, the locality, by ordinance adopted after a public hearing, shall also impose an
73 additional monthly recurring fee to be known as the PEG Capital Grant Surcharge Fee on the new cable
74 operator equal to the lower of (i) 1.5% of the new cable operator's gross revenues derived from the
75 operation of its cable system in that locality or (ii) the lowest amount of capital contribution paid or
76 provided in-kind, as shown on the books of the cable operator, by an existing cable operator in the
77 locality (a) when such capital contribution is amortized over the term of the existing cable operator's
78 franchise and (b) divided by the number of subscribers or annual gross revenue of the existing cable
79 operator as shown on its most recent report to the locality, depending on recovery methodology chosen
80 by the locality. Both the PEG Capital Fee and the PEG Capital Grant Surcharge Fee may only be
81 collected by the locality for the remainder of the shortest remaining franchise term of any existing cable
82 operator in the locality; however, at the end of such term the locality may negotiate with all cable
83 operators to set a new, recurring fee to support the reasonable and necessary capital costs of public,
84 educational, and governmental channel facilities, including institutional networks, that shall be imposed
85 on all cable operators such that the fee applies equally to all of the customers of all cable operators in
86 the locality. At the end of such term, no cable operator shall be required to provide any further in-kind
87 public, educational, and governmental access channels, including institutional network, support. If the
88 cable operators and the locality cannot agree on such a recurring capital cost fee, the locality, by
89 ordinance adopted after a public hearing, may impose a recurring fee, calculated on a per subscriber or
90 percentage of gross revenue basis, to support the reasonable and necessary capital costs of public,
91 educational, and governmental channel facilities, including institutional networks; however, such fee may
92 not exceed the PEG Capital Fee previously imposed on cable operators by the locality. Any and all fees
93 permitted under this subdivision shall be paid by the cable operator to the locality on the same schedule
94 as franchise fees are paid. Nothing in this subdivision shall be construed to permit a locality to require
95 cable operators to pay capital grants at the time of the grant or renewal of a franchise or otherwise
96 except for the PEG Capital Grant Surcharge Fee specifically provided in this subdivision;

97 4. Require a cable operator to comply with the customer service requirements imposed by the
98 locality pursuant to 47 U.S.C. § 552(a) (1) and this article through the adoption of an ordinance after a
99 public hearing. Any customer service requirements imposed by the locality that exceed the requirements
100 established by the Federal Communications Commission under 47 U.S.C. § 552(b) shall (i) not be
101 designed so that the cable operator cannot also comply with any other customer service requirements
102 under state or federal law or regulation applicable to the cable operator in its provision of other services
103 over the same network used to provide cable service, (ii) be no more stringent than the customer service
104 requirements applied to other cable operators in the franchise area, and (iii) be reasonably tailored to
105 achieve appropriate customer service goals based on the technology used by the cable operator to
106 provide cable service;

107 5. Adopt procedures by which it will enforce the provisions of this article and the applicable
108 mandatory requirements of 47 U.S.C. §§ 521-573 and the regulations promulgated thereunder. Such
109 procedures shall require the locality to: (i) informally discuss the matter with the cable operator in the
110 event that the locality believes that a cable operator has not complied with this article or the applicable
111 mandatory requirements of 47 U.S.C. §§ 521-573 and (ii) notify the cable operator in writing of the
112 exact nature of the alleged noncompliance if the discussions described in the foregoing clause (i) do not
113 lead to resolution of the alleged noncompliance. The cable operator shall have 15 days from receipt of
114 this written notice to: (a) respond to the locality, if the cable operator contests, in whole or in part, the
115 assertion of noncompliance; (b) cure such default; or (c) in the event that, by the nature of default, such
116 default cannot be cured within the 15-day period, initiate reasonable steps to remedy such default and
117 notify the locality of the steps being taken and the projected date that they will be completed. The
118 locality shall schedule a public hearing in the event that the cable operator fails to respond to the written
119 notice pursuant to these procedures or in the event that the alleged default is not remedied within 30
120 days of the date projected above if the locality intends to continue its investigation into the default. The

locality shall provide the cable operator at least 30 business days prior written notice of such hearing, which will specify the time, place, and purpose of such hearing, and provide the cable operator the opportunity to be heard;

6. Adopt a schedule of uniform penalties or liquidated damages that it may impose upon any cable operator with an ordinance cable franchise when the locality determines that the cable operator has failed to materially comply with (i) customer service standards; (ii) carriage of public, educational, and governmental channels; (iii) reporting requirements; or (iv) timely and full payment of the franchise fee or the fee assessed for the provision of public, educational, or governmental access channels, including institutional networks. Any penalty or liquidated damage for any of the foregoing violations shall be the same penalty or liquidated damage already established for a cable operator in the same franchise area, if any. In addition, a locality shall not impose any penalty or liquidated damage adopted pursuant to this subdivision until the cable operator has been afforded a reasonable cure period between the time the cable operator is notified of the violation and the penalty or liquidated damage is imposed. A separate violation for purposes of this article and the ordinances passed to implement this article as it pertains to customer service standards shall be deemed to occur whenever the locality reasonably determines that a separate customer service standard violation has occurred on one day; however, the cable operator shall not be charged with multiple violations for a single act or event affecting one or more subscribers on the same day. The locality may charge interest at the legal rate as set forth in § 6.2-301 for any amounts due the locality by the cable operator in clause (iv) of this subdivision that remain unpaid and undisputed;

7. Adopt procedures under which the locality may inspect and audit, upon 30 days prior written notice, the books and records of the cable operator and recompute any amounts determined to be payable under the ordinances adopted pursuant to this article. The procedures adopted by the locality shall not exceed the following requirements: (i) the locality may require the cable operator to make available to the locality all records reasonably necessary to confirm the accurate payment of fees; (ii) the locality may require the cable operator to bear the locality's reasonable out-of-pocket audit expenses if the audit discloses an underpayment of more than 3% of any quarterly payment, but not less than \$5,000; (iii) the locality may require the cable operator to pay any additional undisputed amounts due to the locality as a result of the audit within 30 days following written notice by the locality to the cable operator; (iv) in the event the cable operator disputes any underpayment discovered as the result of an audit conducted by the locality, the locality shall work together with the cable operator in good faith to promptly resolve such dispute; (v) the locality shall provide that the cable operator and the locality maintain all rights and remedies available at law regarding any disputed amounts; (vi) the locality shall have no more than three years from the time the cable operator delivers a payment to provide a written, detailed objection to or dispute of that payment, and if the locality fails to object to or dispute the payment within that time period, the locality shall be barred from objecting to or disputing it after that time period; and (vii) the locality shall not audit a cable operator more frequently than every 24 months;

8. Adopt reasonable reporting requirements for annual financial information and quarterly customer service information that must be provided by a cable operator to the locality so long as such information does not exceed the reporting requirements for any existing cable operator in that locality;

9. Require cable operators to provide, without charge, within the area actually served by the cable operator, one cable service outlet activated for basic cable service to each fire station, public school, police station, public library, and any other local government building. The ordinance shall apply equally to all providers of cable services in the locality, but shall not apply in cases where it is not technically feasible for a cable operator to comply;

10. Subject to § 15.2-2108.24, adopt requirements and procedures for (i) the management of the public rights-of-way that do not exceed the standards set forth in clauses (i) and (ii) of subsection C of § 56-462 and (ii) the construction of a cable system in the public rights-of-way;

11. Adopt the following allocation procedure if cable services subject to a franchise fee, or any other fee determined by a percentage of the cable operator's gross revenues in a locality, are provided to subscribers in conjunction with other services: the fee shall be applied only to the value of these cable services, as reflected on the books and records of the cable operator in accordance with rules, regulations, standards, or orders of the Federal Communications Commission or the State Corporation Commission, or generally accepted accounting principles. Any discounts resulting from purchasing the services as a bundle shall be reasonably allocated between the respective services that constitute the bundled transaction; and

12. Require cable operators to make cable service available to (i) up to all of the occupied residential dwelling units in the initial service area selected by cable operator within no less than three years of the date of the grant of the franchise and (ii) no more than 65% of the residential dwelling units in the area in the locality in which the cable operator has its telephone facilities, within no less than seven years of the date of the grant of the franchise. Notwithstanding the foregoing provision, a cable operator shall not

182 be required to make cable service available: (a) for periods of force majeure; (b) for periods of delay
183 caused by the locality; (c) for periods of delay resulting from the cable operator's inability to obtain
184 authority to access rights-of-way in the service area; (d) in areas where developments or buildings are
185 subject to claimed exclusive arrangements; (e) in developments or buildings that the cable operator
186 cannot access under industry standard terms and conditions after good faith negotiation; (f) in
187 developments or buildings that the cable operator is unable to provide cable service for technical reasons
188 or that require facilities that are not available or cannot be deployed on a commercially reasonable basis;
189 (g) in areas where it is not technically feasible to provide cable service due to the technology used by
190 the cable operator to provide cable service; (h) in areas where the average occupied residential
191 household density is less than 30 20 occupied residential dwelling units per mile as measured in strand
192 footage from the ~~nearest technically feasible point on the cable operator's active cable system~~ *physical*
193 *address of the nearest dwelling or building at which service from the provider is available* (or such
194 higher average density number as may be contained in an existing cable operator's cable franchise); and
195 (i) when the cable operator's prior service, payment, or theft of service history with a subscriber or
196 potential subscriber has been unfavorable. Should, through new construction, an area within the cable
197 operator's service area meet the density requirement, a cable operator shall, subject to the exclusions in
198 this subdivision, provide cable service to such area within six months of receiving notice from the
199 locality that the density requirements have been met. A locality may not require a cable operator using
200 its telephone facilities to provide cable service to provide any cable service outside of the area in the
201 locality in which the cable operator has its telephone facilities. During the 12-month period commencing
202 after the seventh-year anniversary date of the grant of the franchise, a locality may, by ordinance
203 adopted after a public hearing in which the locality specifically finds that such a requirement is
204 necessary to promote competition in cable services within the locality, require the cable operator to
205 make service available to no more than 80% of the residential dwelling units in the area in the locality
206 in which the cable operator has its telephone facilities within no less than 10 years of the date of the
207 grant of the franchise, subject to the exclusions in clauses (a) through (i) of this subdivision. If the cable
208 operator notifies the locality that it is unwilling to accept this additional service availability requirement,
209 the locality may, after notice and public hearing, terminate the cable operator's ordinance cable franchise.
210 The cable operator shall file a certificate at its third and seventh, and if applicable, tenth, anniversary
211 dates certifying its compliance with the foregoing service requirements. For purposes of an ordinance
212 cable franchise, the date of the grant of the franchise shall be the date the notice required by
213 § 15.2-2108.21 is filed with the locality. For purposes of a negotiated cable franchise, the date of the
214 grant of the franchise shall be the date the respective locality has granted a negotiated cable franchise
215 pursuant to § 15.2-2108.20.