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## SENATE BILL NO. 1458

Offered January 27, 2015

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

Patron—Stuart

Unanimous consent to introduce

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

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

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

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

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

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

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