



Town of Apple Valley

Get a Slice of the Apple.

December 10, 2015

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

re: *Ex Parte* Letter: MB Docket No. 15-149

Dear Secretary Dortch:

The Town of Apple Valley, California, files this *ex parte* letter in support of the filings made by the Alliance for Community Media and the Alliance for Communications Democracy (“ACM/ACD”) urging the Commission to deny the above-captioned petition or alternatively to impose conditions in any approval which protect the right of local communities to benefit from the availability of public, educational and governmental (PEG) channels. A central point of the ACM/ACD filings is that Charter has engaged in a pattern of behavior (including taking extreme “self-help” measures) that allow it to limit carriage of PEG channels. That pattern creates a barrier to preservation and development of local programming in Charter systems, and goes beyond mere localized disagreements that can be effectively addressed at the local level.

In its Opposition to Petitions to Deny, filed on November 2, 2015, Charter claims on page 85 that, “Charter meets all PEG programming commitments contained in its local and state franchise agreements.” As ACM/ACD points out its Reply to Charter’s Opposition, filed on November 12, 2015, Charter does not respond to, much less attempt to refute, any evidence of violations made in ACM/ACD’s filings. The Commission should infer from this failure to respond that the allegations are true. Moreover, the Town’s own recent experience with Charter indicates that Charter *does* ignore its obligations, and confirms that its representation to the Commission was disingenuous.

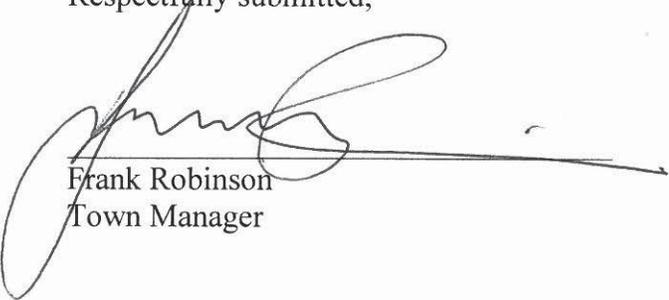
By way of background, since 2007 cable/video franchises in California have been issued exclusively by the State. State law requires holders of these franchises to provide PEG channels, including the connections that allow PEG programming to be transmitted from the point of origination to subscribers. Charter currently serves Apple Valley under a state franchise while its competitor Verizon will continue to serve the Town under a local franchise until its expiration. The Town requested a PEG channel from Charter, as it is permitted to do under State

law, but Charter has ignored the plain language of the State law and refused to provide the full PEG channel because it will not interconnect with Verizon or interconnect with the Town's point of PEG origination, contending, among other things, that provision of the necessary interconnection would violate federal law and Commission orders. The correspondence we have exchanged with the company on this issue is attached. As we explain there, the Commission has never suggested that it is a violation of federal law to require a cable operator to provide connections necessary to carry PEG programming. But by taking that position, Charter is able to avoid PEG and other obligations until and unless a locality takes costly legal action to file a petition at the Commission or to file a court action. Meanwhile, Charter is able to enjoy the benefits and profits associated with the Commission- and state-issued licenses, without fulfilling the public interest obligations the company swore it would provide in exchange for their issuance. Charter's behavior stands in stark contrast to competitors like Verizon, which *do* provide PEG channels including PEG programming connections to their systems at no charge.

Charter's recent behavior in Apple Valley suggests that the concerns raised by ACM/ACD are real and ongoing. Charter's disregard for its obligations under the law and its tendency to self-help solutions is particularly troubling in light of the proposed merger being considered by the Commission – a merger that will increase Charter's market power, place financial stresses on the company, and increase its incentives and ability to ignore franchise obligations. That behavior also has competitive implications. More broadly, it suggests that the Commission cannot assume the company will honor merger conditions without stringent enforcement provisions. For these reasons, it will be important for the Commission, should it approve the transaction, to impose conditions that prevent the sort of activities the Town has experienced, and that ACM/ACD reports.

We may supplement this ex parte to the extent there is additional information or developments of importance to this proceeding.

Respectfully submitted,



Frank Robinson
Town Manager

Attachments

ATTACHMENTS



Town of Apple Valley

A Better Way of Life

BY EMAIL AND REGULAR MAIL

July 30, 2015

Susie Evans
Government Relations – California
Charter Communications
3525 Riverview Drive
Redding, CA 96001
Susie.evans@chartercom.com

Town of Apple Valley, CA: Request for PEG Channel

Dear Ms. Evans:

Pursuant to Pub. Util. Code Section 5870(c)(1), the Town of Apple Valley, CA hereby requests Charter to designate capacity for one PEG channel on its network for the Town's use. According to the information on file at the California Public Utilities Commission, the Town of Apple Valley is within Charter's authorized service area under two state video franchises issued pursuant to the Digital Infrastructure and Video Competition Act of 2006 (DIVCA): CCO SoCal I, LLC is the holder of California Video Franchise Number 0007, and CCO SoCal II, LLC (Dalton Cablevision) is the holder of California Video Franchise Number 0027. As you are no doubt aware, under Pub. Util. Code Section 5870(c)(2), Charter has three months from the date of this request to designate the PEG channel capacity.

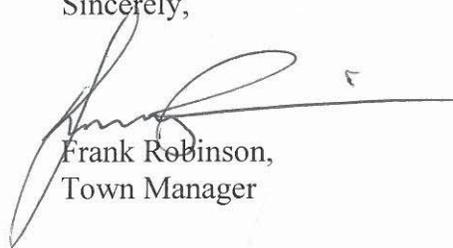
The Town intends initially to use the PEG channel for governmental programming, including live and repeat coverage of Town Council meetings and other commission/committee meetings held at Town Hall, as well as for related non-commercial programming and information of interest to our community.

As you may know, both Charter and Verizon were operating under local cable franchises serving the Town when DIVCA came into force. Although Charter has since converted to a state video franchise, Verizon continues today to operate under its local franchise, and the Town is also requesting Verizon to carry the Town's PEG channel on its system under that franchise. The Town does not currently have any PEG channels carried on either network, and under both DIVCA and Verizon's local franchise, the companies are required to negotiate interconnection

for the purpose of providing the PEG channel on both networks. For these reason, the Town believes it would be most efficient for all involved to set up a meeting between Town staff, and the representatives of Charter and Verizon sometime in the next two to three weeks to discuss the technical requirements related to establishing carriage of the PEG channel on both networks.

Please call Mallory Snyder at (760) 240-7000 ext. 7051 to let us know your company's availability for such a meeting. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Frank Robinson', with a long horizontal line extending to the right.

Frank Robinson,
Town Manager



November 6, 2015

VIA EMAIL & FEDEX

Marc Puckett
Assistant Town Manager – Finance & Administration
Town of Apple Valley
14955 Dale Evans Parkway
Apple Valley, CA 92307

RE: Town of Apple Valley, CA Request for PEG Channel

Dear Mr. Puckett:

I am following up on our telephone conversation from Thursday, October 23 regarding the Town of Apple Valley's request for a PEG Channel. I am providing updates and additional details on the obligations Charter Communications has with regard to PEG transport under the Digital Infrastructure and Video Competition Act of 2006 (DIVCA) and provide you with a cost-efficient estimate on PEG transport from Apple Valley to the Charter headend.

We are ready to launch the PEG channel requested by the Town on our local Charter lineup as soon as the Town confirms how it will deliver the signal to our headend. As you may know, DIVCA does not require the holder of a state franchise to provide PEG transport facilities and maintenance for free to local governments. Not only would such requirement violate the limits imposed by Section 621 of the federal Cable Act and exceed the 5% franchise fee cap, but under DIVCA Charter is only obligated to "transmit" the Town's PEG programming content on the PEG channel over Charter's cable system. DIVCA does not obligate Charter to absorb any costs associated with the "transport" of PEG signals. Specifically, DIVCA Section 5870(f) provides, "...the holder of a state franchise bears only the responsibility for the transmission of the content". Accordingly, the Town of Apple Valley may not require PEG transport for free or at a reduced cost.

Channel 187 has been set aside for the Town's PEG channel on our lineup and Charter Communications has fulfilled its obligations under State law to designate a sufficient amount of capacity on its network for your channel. Based on the assessment conducted by our headend engineer and the Charter Business engineers, we can provide a 10M Ethernet connection to transport the PEG channel. The installation cost is \$1,000 and the monthly rate would be \$1,476 per month on a 24 month term contract. Once we have a signed contract it will take up to 60 days to complete the work.

I am available to answer your questions via email at sandra.cuellar@charter.com or by phone at 951-453-8064. I look forward to hearing from you to discuss next steps.

Thank you for your time,

A handwritten signature in black ink that reads 'Sandra Magaña Cuellar'.

Sandra MagañaCuellar
Senior Manager of Government Affairs



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ATTORNEYS AT LAW

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Gail A. Karish
(213) 617-7491
gail.karish@bbklaw.com
File No. 28314.00265

November 24, 2015

VIA EXPRESS MAIL & E-MAIL

Sandra MagañaCuellar
Senior Manager of Government Affairs
7337 Central Avenue
Riverside, CA 92504
sandra.cuellar@charter.com

RE: Town of Apple Valley, CA Request for PEG Channel

Dear Ms. MagañaCuellar,

Our firm represents the Town of Apple Valley, California and we have been asked to provide, on the Town's behalf a response to your letter dated November 6, 2015 to Marc Puckett, Assistant Town Manager.

As you know, the Town made its request for a PEG channel by letter dated July 30, 2015. Under DIVCA Section 5870(c)(2), Charter had three months to comply with the Town's request. Instead of actually providing the channel, Charter has submitted a claim that the Town must pay for the connection required from the point of origin of the PEG signal to Charter's headend. Charter argues that it has fulfilled its obligations under the state law (DIVCA) simply by setting aside Channel 187 for the Town's PEG channel and designating capacity for that channel on the portion of Charter's network from its headend to its video service subscribers. That is not correct, and the claim for payment is not permissible. In order to fulfill its DIVCA responsibilities, Charter was obligated either to interconnect with Verizon or, if interconnection was not technically feasible, Charter was required to provide its own connection at its own cost to transmit the Town's PEG programming from Town Hall to Charter's subscribers. Charter has obviously failed to do so, and we believe that omission is serious.

DIVCA divides responsibilities for PEG channels between the local entity and the state video franchise holders but not in the way suggested in your letter. The whole cost of providing the PEG channel capacity is your cost, absent an agreement to the contrary, and there is no such agreement. We would have thought it clear enough that your obligation to provide a PEG channel begins at the point where the Town's PEG channel content originates and involves all the facilities and equipment required to ensure that the signal is received by your subscribers in the Town. As you note, DIVCA Section 5870(f) puts the burden of providing the facilities and



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equipment required for the “*transmission* of the content” on the state franchise holder (emphasis added). By contrast, according to the same DIVCA Section 5870(f) “the *content* to be provided over the PEG channel capacity provided pursuant to this section shall be the responsibility of the local entity or its designee receiving the benefit of that capacity...” (emphasis added). The rest of DIVCA Section 5870 likewise supports this division of responsibilities, with the state franchise holder providing the facilities and equipment required for receipt and delivery of the signals, and the local entity responsible for producing PEG content in the appropriate form.

If Charter’s narrow interpretation of its responsibilities were correct, there would have been no need to have any interconnection provisions in DIVCA. Yet, DIVCA Section 5870(h) requires good faith negotiations between any holder of the state video franchise and any incumbent cable operator “to interconnect their networks for the purpose of providing PEG programming. Interconnection may be accomplished by direct cable, microwave link, satellite, or other reasonable method of connection.” As you know, Verizon is an incumbent cable operator under DIVCA having served the Town under a local franchise since July 2006. In the Town’s letter requesting its PEG channel, the Town advised of the requirement to interconnect and urged the companies to cooperate. Your letter suggests no such efforts were undertaken.

Further, DIVCA Section 5870(h) also provides that where no “incumbent cable operator” is able to provide a connection to the point of signal origination, “the holder of a state franchise shall make an interconnection available to the channel originator and shall provide the facilities necessary for the interconnection.” As we understand it, you want to read DIVCA as requiring the local entity to pay for the connection. But that is not what the section says. In the absence of an existing interconnection, *every* “holder of a state franchise” must connect, and there is no provision that allows any charge on the local entity for that connection.

Nor can Charter’s failure to comply with DIVCA, or its submission of a claim for payment be justified under federal law. Your claim is essentially that you cannot provide the connection and pay the DIVCA-required franchise fee, because federal law requires the connection’s value to be treated as a franchise fee. The FCC has never suggested that the provision of the connection required in order to receive a signal from a PEG channel origination point and to deliver that signal to the cable operator’s subscribers must be treated as a franchise fee. In fact, the FCC has specifically indicated that connections can be required, and that the costs fall on operators, and not on the community. There is an extended discussion of the connections required to receive PEG signals in the FCC’s decision, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 and amended by the Cable Television Consumer Protection Act of 1992, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 5101, 5151-5155 (2006), particularly at note 395, and nothing in that decision remotely suggests that connections can be charged to the local entity either because they are actually transmission services, or because the connections are



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not part of the cable system. If your argument had any foundation in federal law, the FCC's discussion referenced above would make little sense.

With all due respect, we believe that the points raised in your letter are not credible but rather part of a tactic to force Apple Valley to forego one of the basic public benefits critical to the grant of video franchises under state and federal law – benefits you specifically swore to provide, but have decided to ignore. We are particularly concerned about your response in light of the proposed merger which will increase Charter's market power in California – and which will only increase the company's incentive to ignore its franchise obligations. The Town therefore needs an immediate resolution of this issue that provides the Town the required PEG channel. If we do not hear from you within three (3) business days, the Town may be required to take appropriate steps to protect its interests before the relevant agencies or in the courts.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Gail A. Karish'.

Gail A. Karish
of BEST BEST & KRIEGER LLP

GAK:emg

cc: Frank Robinson, Town Manager
Marc Puckett, Assistant Town Manager
John Brown, Town Attorney

28314.00265\21755908.4

December 4, 2015

File Number: 0XNT-178818

VIA FEDEX and ELECTRONIC MAIL

Gail A. Karish
Best Best & Krieger LLP
300 South Grand Ave., 25th Floor
Los Angeles, CA 90071

Re: Town of Apple Valley, CA Request for PEG Transport

Dear Ms. Karish:

We are responding to your letter dated November 24, 2015, to Sandra MagañaCueller at Charter. Your letter asserts that, under California's Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"), Charter's "obligation to provide a [public, educational and government access ("PEG")] channel begins at the point where the Town's PEG channel content originates and involves all the facilities and equipment required to ensure that the PEG signal is received by" Charter's subscribers in the Town of Apple Valley, California. Your interpretation overstates the requirements of DIVCA. While Charter does not dispute that it must provide designated channel capacity for the one-way carriage of the Town's PEG programming from Charter's headend to its subscribers, DIVCA nowhere obligates Charter to provide the entirely separate service of transporting PEG programming from the Town's studio to Charter's headend.

Your letter conflates Charter's provision of one-way cable service with its entirely separate commercial broadband transport service. Charter's obligations under DIVCA, including with respect to PEG channel capacity, apply almost exclusively to its cable service. Those obligations do not extend to its commercial transport service.

Charter's cable service, as defined under DIVCA, involves "the **one-way transmission to subscribers** of either video programming, or other programming service." Cal. Pub. Util. Code

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§ 5830(c) (defining “[c]able service”) (emphasis added). Charter accomplishes this one-way, point-to-multipoint transmission of video programming from its headend to its subscribers using channel capacity on its cable system. See 47 U.S.C. § 522(4) (defining “channel” as “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel”).

DIVCA’s PEG requirements extend only to this cable service. They specify that Charter “bears **only** the responsibility for the **transmission** of [PEG] content” “over the PEG channel capacity” Charter designates pursuant to Section 5870. See Cal. Pub. Util. Code § 5870(f) (emphasis added). In other words, DIVCA obligates Charter only to provide one-way transmission of PEG content from its headend to subscribers over designated PEG channel capacity. And Charter has satisfied this obligation by setting aside Channel 187 for the Town’s PEG channel and designating capacity for the one-way transmission of PEG programming to its subscribers over that channel.

DIVCA’s PEG requirements do not touch Charter’s separate point-to-point commercial broadband transport service. This service allows Charter’s commercial customers to send and receive data and other content between fixed points on Charter’s network. You appear to contend that DIVCA requires Charter to provide this transport service for the Town’s PEG programming for free, in perpetuity and irrespective of actual cost, from any location designated by the Town. DIVCA grants the Town no such authority. Rather, it is the Town, not Charter, that must “provide[] or submit[]” the PEG programming “to be transmitted by” Charter to its subscribers, in a manner or form that is compatible with Charter’s network. *Id.* § 5870(g)(1). The Town could provide or submit that PEG programming to Charter any number of ways: for example, by hand delivering a tape, by sending a disc by courier, or by purchasing a point-to-point broadband transport service from Charter.

Charter’s position that the Town must bear the cost of delivering PEG programming to Charter’s headend comports with the Cable Act’s carriage requirements. Where the Cable Act requires that an operator carry a channel, the channel programmer must bear the costs of delivering its programming to the cable operator’s headend.¹ Nothing in DIVCA or the Cable Act suggests a different rule for PEG programmers.

¹ See 47 U.S.C. § 534(b)(10)(A) (requiring local commercial stations “to bear the costs associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system”); *id.* § 535(i)(1) (requiring noncommercial educational programmers “to bear the cost associated with delivering a good quality signal or a baseband video signal to the principal

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Nor does Section 5870(h) require Charter to bear the costs of transporting the Town's PEG programming to the headend. That section addresses the interconnection problems the state anticipated to arise between incumbent cable operators and new entrant holders of state-issued franchises, such as Verizon and AT&T. When you review the language in Section 5870(h), you will see that it clearly applies only to the relationship between the incumbent (Charter) and the new competitor (Verizon or AT&T). There is no suggestion in the section that the City stands in the same shoes vis-à-vis Charter for interconnection purposes as do the new video competitors. In other words, nothing in DIVCA suggests that Charter, as an incumbent cable operator in the Town under 5830(i), has any obligation to bear the operational costs of providing transport to deliver the Town's PEG programming to Charter's headend.

Even if DIVCA were susceptible to your interpretation, it would run afoul of the federal franchise fee cap of 5% of gross revenues, and would be preempted. *See* 47 U.S.C. § 542(b). Because the Town already collects the statutory maximum franchise fee, and because PEG transport plainly is not a capital cost, the Town could not require Charter to provide that additional PEG support for free. And, frankly, the FCC Order you cite directly contradicts your assertion that the FCC "has never suggested" that PEG transport costs must be treated as a franchise fee. The FCC clarified in that Order "that LFAs are free to establish their own requirements for PEG to the extent discussed herein, *provided that the non-capital costs of such requirements are offset from the cable operator's franchise fee payments.*" *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection Act of 1992*, Report & Order & Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5152 ¶ 113 (2006), *aff'd*, *Alliance For Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008) (emphasis added).²

headend of the cable system"); *StogMedia v. Cable One, Inc.*, Memorandum Opinion & Order, 24 FCC Rcd 2947, 2949 (2009) (requiring commercial leased access programmers to pay "for the delivery of video programming to [the cable operator's] headends").

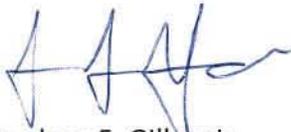
² *See also id.* 5153, ¶ 116 ("We note, however, that any ongoing LFA-required PEG support costs are subject to the franchise fee cap, as discussed above."); *id.* 5154, ¶ 119 n.395 (stating that any PEG support requirements imposed on new entrants would be "subject to the limitations discussed herein," including the requirement that non-capital PEG support be treated as a franchise fee); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 22 FCC Rcd 19633, 19638 ¶ 11 (2007) (same, with respect to existing cable operators); *City of Bowie, Maryland*, 14 FCC Rcd 7675, 7677 (Cable Service Bureau, 1999) ("Any

SheppardMullin

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We understand there is some urgency in this matter for the Town. As explained above, Charter has complied with DIVCA's requirements to designate sufficient capacity for the Town's PEG channel, and stands ready to transmit that channel from its headend to its subscribers. If the Town would like Charter to resubmit its business proposal for the transport costs, it should contact Sandra MagañaCueller, who will work with the Town to reach a mutually satisfactory business solution that meets the Town's needs.

Sincerely,



Gardner F. Gillespie
J. Aaron George
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

cc: Sandra MagañaCueller
Suzanne Curtis
Frank Robinson
Marc Puckett
John Brown

payments made by [the cable operator] in support of PEG access facilities are includable as franchise fees under Section 542 for purposes of determining the 5% cap."); *Cable TV Fund 14-A v. City of Naperville*, No. 96 C 5962, 1997 WL 433628, at *13 (N.D. Ill. July 29, 1997) (same).