

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Promoting the Availability of Diverse and Independent Programming)	MB Docket No. 16-41
)	

**COMMENTS OF THE
ALLIANCE FOR COMMUNITY MEDIA AND
THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY**

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The Alliance for Community Media (“ACM”) and the Alliance for Communications Democracy (“ACD”) hereby file their comments in response to the Notice of Inquiry (“NOI”) in this proceeding.¹

INTRODUCTION AND SUMMARY

ACM is a national nonprofit membership organization representing over 3,000 public, educational and governmental (“PEG”) access organizations, community media centers, and PEG channel programmers throughout the nation. Those PEG organizations and centers include more than 1.2 million volunteers and 250,000 community groups that provide PEG access cable television programming in local communities across the United States.

ACD is a national membership organization of nonprofit PEG organizations that supports efforts to protect the rights of the public to communicate via cable television and promotes the availability of the widest possible diversity of information sources and services to the public.² The organizations represented by ACD have helped thousands of members of the public, educational institutions, and local governments make use of PEG channels that have been established in their communities pursuant to franchise agreements and federal law, 47 U.S.C. § 531.

The Commission’s NOI seeks comments on the principal issues facing independent programmers in order to assist the Commission in assessing how it, or others, could foster greater consumer choice and enhance diversity in the evolving video marketplace. In particular, the FCC has sought information about MVPDs’ practices with respect to making PEG

¹ *Promoting the Availability of Diverse and Independent Programming*, MB Docket No. 16-41, Notice of Inquiry, FCC 16-19 (Feb. 18, 2016).

² ACD’s members are: Access Humboldt, Eureka, California; Capital Community Television, Salem, Oregon; Chicago Access Network Television, Chicago, Illinois; CreaTV San Jose, San Jose, California; Manhattan Neighborhood Network, New York City, New York; MetroEast Community Media, Gresham, Oregon; and Alliance for Community Media Western States Region.

programming information available to subscribers on electronic programming guides.³ More broadly, the Commission has sought comments on the source of its authority in addressing obstacles that prevent greater access by consumers to sources of diverse and independent programming.

The PEG channels made available by ACM and ACD members and thousands of other local PEG centers across the nation are a leading source of unique local public interest, cultural affairs, educational and news programming of interest to the public, including programming for the visually and hearing impaired. ACM and ACD have provided information on the various obstacles facing PEG channels as well as the Commission's authority to address these obstacles in previous proceeding.⁴ However, a number of these arguments have not been addressed or were dismissed on procedural grounds in several of those proceedings. The Commission has yet

³ Various proceedings and comments have referred to electronic programming guides, interactive programming guides, and video programming guides. For the purposes of these comments, these terms are used interchangeably.

⁴ *See, e.g.*, Reply of the Alliance for Community Media and the Alliance for Communications Democracy to Opposition to Petition to Deny, MB Docket No. 15-149 (filed Nov. 12, 2015), available at <http://apps.fcc.gov/ecfs/comment/view?id=60001308424>; Joint Petition to Deny of the Alliance for Community Media and the Alliance for Communications Democracy, MB Docket No. 15-149 (filed Oct. 13, 2015), available at <http://apps.fcc.gov/ecfs/comment/view?id=60001303513>; Reply Comments of the Alliance for Community Media, the Alliance for Communications Democracy, and Common Cause, MB Docket No. 14-90 (filed Jan. 7, 2015), available at <http://apps.fcc.gov/ecfs/comment/view?id=60001007420>; Reply Comments of the Alliance for Community Media and the Alliance for Communications Democracy, MB Docket No. 14-57 (filed Dec. 23, 2014), available at <http://apps.fcc.gov/ecfs/comment/view?id=60001006405>; Joint Petition to Deny of the Alliance for Community Media, the Alliance for Communications Democracy, and Common Cause, MB Docket No. 14-90 (filed Sept. 16, 2014), available at <http://apps.fcc.gov/ecfs/comment/view?id=6019241386>; Comments and Merger Conditions Proposed by the Alliance for Community Media and the Alliance for Communications Democracy, MB Docket No. 14-57 (filed Aug. 25, 2014), available at <http://apps.fcc.gov/ecfs/comment/view?id=6018317317>; Reply Comments of the Alliance for Communications Democracy, MB Docket Nos. 12-108 and 12-107 (filed Mar. 20, 2014), available at <http://apps.fcc.gov/ecfs/comment/view?id=6017608832>; Comments of the Alliance for Communications Democracy, MB Docket Nos. 12-108 and 12-107 (filed Feb. 18, 2014), available at <http://apps.fcc.gov/ecfs/comment/view?id=6017589353>; Reply Comments of the Alliance for Communications Democracy, MB Docket Nos. 12-108 (filed Aug. 7, 2013), available at <http://apps.fcc.gov/ecfs/comment/view?id=6017462222>; Comments of the Alliance for Communications Democracy, MB Docket Nos. 12-108 (filed July 15, 2013), available at <http://apps.fcc.gov/ecfs/comment/view?id=6017458716>; Comments of the Alliance for Community Media et al., MB Docket No. 09-13, CSR-8128, CSR 8127 (filed Mar. 9, 2009), available at <http://apps.fcc.gov/ecfs/comment/view?id=5515345471>; Petition for Declaratory Ruling of Alliance for Community Media et al., MB Docket No. 09-13 (filed Jan. 30, 2009), available at <http://apps.fcc.gov/ecfs/comment/view?id=5515341655>.

to directly address the arguments on the merits. ACM and ACD incorporate these previous filings⁵ into its comments in response to this NOI and welcome the opportunity to provide further information about the source of the Commission's authority to address the regular inequitable treatment of PEG channels, their programming, and their viewers.

I. PEG PROGRAMMING IS AN ESSENTIAL SOURCE OF DIVERSE AND INDEPENDENT PROGRAMMING, YET IT FACES SUBSTANTIAL OBSTACLES

PEG access advances Congress' Cable Act goal of providing a wide diversity of information and services by responding to the unique needs and interests of each local community. The role of PEG access in developing technological and media literacy has never been more important than today. PEG access centers provide constructive outlets for community youth to learn media skills. Seniors actively create programming on a range of issues. PEG channels give nonprofit organizations an outlet to reach clients in need of assistance. PEG channels provide an outlet for small, and otherwise unserved or underserved, segments of a community (such as foreign-language speakers, the visually impaired, and those with other disabilities) to produce and watch programming responsive to their unique needs and interests.

Thousands of hours of diverse, original programming appear on PEG channels every day throughout the country, bringing diverse and local information into the home that would not otherwise be seen. PEG channels welcome community members, politicians, preachers, experts, educators, and artists. PEG channels also offer uniquely independent programming. PEG participants are not screened or selected by corporate management or advertising interests; they participate because it is their community, and PEG channels are their channels, and because they have something to say.

⁵ *Id.*

PEG channels play a vital role in providing diverse programming, including in particular on local affairs. This is critically important at a time when less than 0.5% of programming on commercial television media is devoted to local public affairs. The commitment of PEG programmers to promoting social services, election information, arts and civic events, public safety, and other issues close to home, demonstrates what is possible when local individuals and community groups, rather than just larger commercial media outlets, are given the opportunity to participate in the television medium.

The quantity of uniquely local original programming that PEG provides to communities is substantial. A 2010 sampling performed by the ACM showed an average PEG Access provider ran 1,867 hours annually of first-run local programming on its PEG channel(s) per year, or 35 hours per week.⁶ This offers a vital platform for civic debate about local political issues, and, as ACM and ACD have noted in other proceedings, PEG channels are an irreplaceable source of local election coverage.⁷ Whether in an urban area, suburb or small town, PEG channels are focused on the local community they serve, cablecasting local events, town hall and council meetings and school activities that rarely receive full coverage on commercial media or public broadcasting.

PEG channels are a singular source of diverse and independent programming, and any meaningful effort to promote diverse and independent programming must address the particular obstacles facing PEG channels. PEG channels are regularly excluded from access to interactive programming guides (also referred to as electronic programming guides or video programming

⁶ *Examination of the Future of Media & Info. Needs of Cmty. in a Dig. Age*, GN Docket No. 10-25, Comments of ACM 15-17 (May 21, 2010).

⁷ *See, e.g.*, Joint Petition to Deny of the Alliance for Community Media and the Alliance for Communications Democracy, MB Docket No. 15-149 (filed Oct. 13, 2015), available at <http://apps.fcc.gov/ecfs/comment/view?id=60001303513> (detailing ACM's fall 2012 survey of over 200 of its member PEG centers' 2012 election coverage and programming).

guides), HD transmission, last channel capabilities, and DVR capabilities. Viewer surveys indicate that a major factor for channel viewership on a cable system is subscribers' ability to find a channel, and to record the channel's programs to view at their convenience.⁸ By denying viewers the ability to find and record PEG channels, MVPDs create an uneven playing field for PEG channels. PEG channels are also subject to channel slamming.⁹ These tactics has two primary effects, both of which suppress diverse and independent programming. First, it allows MVPDs to manipulate viewership in order to drive down viewership numbers in community needs assessments in franchise negotiations with local authorities, thus freeing up potential channels, which the operator can use for advertising—supporting sales to benefit its own economic interests. This eliminates the unique programming provided by PEG channels. Second, in the case of MVPDs with ownership or other affiliation interests with program content providers, there is an incentive to manipulate the viewership of competitors, such as PEG channels, in order to drive up the viewership of affiliated programmers. In these circumstances, PEG channel interests are similar to those that have been expressed by independent programmers. In particular, by moving PEG channels to less desirable and more difficult to locate positions, MVPDs can provide more desirable positions to affiliated programmers and the many nonaffiliated programmers with which MVPDs have commercial agreements.

⁸ See, e.g., DigitalSmiths "Q1 2014 Video Trends Report" page 18, where the Tivo subsidiary found that 44% of all pay television viewers use program specific searches to find programs they want to view. The same survey of over 3000 subscribers reports that only 7.5% of viewers never use a DVR, while significant numbers of viewers use the device to watch content. The report indicates over forty percent of all viewers use the DVR at to view short amounts of content daily, and another forty percent watch between one and three hours of content each day via DVR use (page 6). Available at http://www.digitalsmiths.com/downloads/Digitalsmiths_Q1_2014_Video_Discovery_Trends_Report.pdf. See also Nielsen, "More of What We Want, Cross Platform Report Q1 2014", June 2014, page 4. The Nielsen analysis reports that 29% of all television viewers watch time-shifted programs, comprising on average a half-hour of content per week for all viewers.

⁹ Channel slamming refers to the practice of relocating PEG channel locations from lower-numbered positions to little-viewed, high-numbered locations.

Attached as Appendix A is a compilation of letters from PEG channel operators describing some of the impediments from MVPDs they currently face. In particular, these letters show that PEG channels routinely face resistance from MVPDs in allowing PEG channel access to interactive program guides and HD transmission. These PEG channel operators are willing and able to provide whatever is necessary for electronic programming guide information and HD programming, yet MVPDs have been unwilling to allow PEG access to these as they do for other channels. In fact, a number of PEG channels currently shoot, edit, and produce their programming in HD, as is industry standard, but have to then convert it to Standard Definition for the MVPD systems.

PEG channels are also hindered by MVPDs in more basic ways. Danvers Community Access Television, Inc. describes the problems it routinely faces:

I submit tickets twice a month for poor signal, channels switched, and poor audio. The average amount of time before the ticket is acknowledged is two days. I call the MVPDs every four hours once a ticket has been issued. They have the technical ability to handle the problems, but in my opinion, they discriminate [against] us based on being a PEG station. The customer service is poor.

Appendix A at 24. Even aside from having their individual programs' information on electronic guides, many PEG channels cannot get their channels identified on these guides. Waycross Community Media, which provides PEG programming in several communities in suburban Cincinnati, states that "Time Warner has never properly identified our channels on the EPG. They are either listed as 'Customer Information', or in the case of two of our channels, they list the program guide for other programmers." Appendix A at 26. Capital Community Television ("CCTV"), which operates in Salem, OR and the surrounding area, has its channel (but not individual programming) listed in the interactive program guide, but it is misspelled as "CVTV." Appendix A at 12.

This inferior treatment of PEG channels is not due to technical barriers. The letters in Appendix A note that some PEG channels are able to have their programming information provided in electronic programming guides and are transmitted in HD. Moreover, some PEG channel operators have been directly informed that the issue is not technological. Waycross Community Media notes that “[w]e have asked both systems to list our programs on the electronic guide. Cincinnati Bell has been working on the issue. Time Warner advises that *while it would be technically possible, our subscriber base is too small to expend the necessary resources* to make it happen.” Appendix A at 26 (emphasis added). The Mid Michigan Area Cable Consortium was told by Charter that it would be able to add its channels to the program guides in local area over a year ago, yet there has been no progress. The Mid Michigan Area Cable Consortium explains that “[i]n October of 2015, a Charter representative contacted us seeking a letter of support to the FCC regarding their planned merger. Once we filed our support Charter no longer responds to us via mail, phone or e-mail.” Appendix A at 22.

On the issue of HD transmission, LMCTV explains that:

Our ability to stream HD programming is being hindered by the fact that neither of our providers (Cablevision and Verizon) will allow us to broadcast in HD. Our system is ready to go and looking great. We are fully capable of delivering a great viewing experience to the residents of our community. However, the cable providers are the only ones stopping us from doing so. I believe our community deserves more. HD is standard now and the fact that cable providers are limiting our abilities is disgraceful.

Appendix A at 31-32. Midpeninsula Community Media Center similarly notes that “we have not received any indication from AT&T that they have any intention of carrying our PEG channels on their U-Verse system in High Definition.” Appendix A at 40. Moreover, Midpeninsula Community Media Center identifies a number of other deficiencies in the way that AT&E’s U-Verse system handles PEG channels in comparison to other channels:

These include the provision of PEG channels by a segregated application accessed by navigating to channel 99 and then searching through a complicated menu structure to find the local PEG channels. Customers are unable to record programming from a PEG channel. This is not just because the Electronic Program Guide is not provided to schedule a future recording, but the DVR functionality of the set top box is completely disabled when viewing a PEG channel, so there is actually no provision for recording a PEG channel whatsoever, even by manually pressing a record button. It is also not possible to pause/rewind as there is with all other TV channels. AT&T have not indicated any intention of addressing any of these existing deficiencies.

Appendix A at 40. Midpeninsula Community Media Center had been uploading programming information for many years, without charge, for its Public Access channels. However, it describes that:

We recently requested that this service be extended to include our 2 Government Access channels. We initially discussed this with Rovi, who advised us that there would be no charge from them to provide this service, as these channels are non-commercial in nature. Comcast, however, has advised us that in order to activate and provide this service we will be required to pay \$1,600 in fees annually to “compensate and reimburse them for the cost of providing this Listing service”. This seems like a disproportionate charge, for what amounts to a non-recurring activity of associating a unique Rovi Source ID code with our channels and then allowing the computer systems to exchange this data in an entirely automated fashion.

Appendix A at 39-40.

In addition, Appendix A also includes a letter from an advisor to the local Cable Advisory Board in Framingham, MA, who worked in the interactive programming guide industry for 18 years. He notes that “while there have been some technical details to solve, there is nothing extraordinarily difficult.” Appendix A at 16. Even in the more technologically challenging circumstances, the roadblock actually “happens in the Marketing department which recently responded that ‘there is no appetite to work on this issue’. So we’re beyond technical

barriers.” *Id.* Similarly, Appendix B¹⁰ is a report on video programming guides by Lee Afflerbach, a telecommunications system engineer with over 40 years of experience. This report concludes that “content information for PEG channels can be entered through a third-party VPG content provider in the same way that it is entered for other channels carried on a cable system” without the need for modification of existing hardware or software and without any measurably adverse performance impact on the cable system. Appendix B at 4.

These letters, and the experiences of PEG channels and their viewers across the county, show that the obstacles facing PEG channels are not due to technical limitations. Rather, they are the result of indifference or hostility from MVPDs. This discriminatory treatment renders PEG channels inferior in terms of viewer accessibility, functionality, and signal quality, all of which suppresses the diverse and independent programming provided by PEG channels to their local communities. As explained below, it is well within the FCC’s authority to address these issues.

II. THE FCC HAS AUTHORITY TO PREVENT THE INEQUITABLE TREATMENT OF PEG CHANNELS THAT IS STIFFLING DIVERSE AND INDEPENDENT PROGRAMING

In 1984, Congress enacted the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, codified as amended, at Title VI of the Communications Act of 1934, 47 U.S.C. §§ 521 et seq. (the “Cable Act”). To further the goal of providing “the widest possible diversity of information sources and services to the public,” 47 U.S.C. § 521(4), the Cable Act ratified local governments’ authority to require cable operators to provide system channel capacity for PEG access as a condition for franchise approval, 47 U.S.C. § 531(b). The

¹⁰ Appendix B is a copy of Exhibit 2 to ACD’s comments in the CVAA proceeding. Comments of the Alliance for Communications Democracy, MB Docket Nos. 12-108 and 12-107 (filed Feb. 18, 2014), available at <http://apps.fcc.gov/ecfs/comment/view?id=6017589353>.

discriminatory and inequitable treatment of PEG programming is directly contrary to Congress’s express intent in enacting the 1984 and 1992 Cable Acts, as well as longstanding Commission policy concerning PEG signal quality requirements.

Section 611 of the Communications Act, 47 U.S.C. § 531 establishes the PEG provision of the 1984 Cable Act. Section 611(a) allows a franchising authority to “establish requirements in a franchise with respect to the designation or use of *channel capacity* for [PEG] use,” and to “require” as part of a request for proposals for a franchise renewal, that “*channel capacity* be designated for [PEG] use,” and that a franchising authority “may enforce” any franchise requirement concerning “*channel capacity*...designated for [PEG] use.” 47 U.S.C. § 531(a)-(c) (emphasis added). The balance of Section 611, and specifically subsections 611(d)-(e), also specifically refer to “channel capacity” for PEG use.

Other provisions of the Cable Act dealing with television broadcasters and commercial cable programmers likewise refer to “channel” capacity.¹¹ The Act’s parallel treatment of “channel” capacity for PEG and other programming is, of course, powerful evidence that Congress intended PEG to receive the same type of “channel” capacity as commercial channels, *not* discriminatorily inferior treatment.

The legislative history of the 1984 Cable Act makes equally clear what Congress intended such PEG “channel capacity” to be. In discussing the PEG provisions of Section 611, the *1984 House Report* noted that “cable television, with its abundance of channels, can provide the public and [PEG] program providers [with] meaningful access” to “people other than

¹¹ See, e.g., 47 U.S.C. § 532 (commercial leased access), 47 U.S.C. § 534(b) (carriage of local commercial TV signals), & 47 U.S.C. § 535(b) (carriage of non-commercial educational TV stations).

[television] licensees or owners of those media.”¹² That “meaningful access” was in the form of “channels.”¹³ And with respect to those PEG channels, “cable operators act as a [sic] conduits.”¹⁴ The term “conduit,” of course, connotes nondiscriminatory delivery without change in form or content.¹⁵ Thus, at the heart of Section 611 is Congress’ understanding that PEG programmers were to be provided the same type of “channel capacity” as broadcast and commercial cable programmers, *not* discriminatorily inferior capacity in terms of viewer accessibility, functionality and signal quality. Yet, as shown by the routine refusal by MVPDs to allow PEG channels access to standard elements, such as electronic programming guides and HD transmission, discriminatorily inferior capacity is what MVPDs are providing to PEG programmers and viewers.

The Cable Act principle that PEG is not to be discriminated against vis-à-vis commercial channels was reaffirmed by Congress when it enacted the 1992 Cable Act. In the related context of discussing Section 623(b)(7)(A)’s requirement that PEG channels must be placed on the basic tier, Congress made explicitly clear its intent that cable operators may *not* discriminate against PEG channels:

PEG programming is delivered on channels set aside for community use in many cable systems, and *these channels are available to all community members on a nondiscriminatory basis*, usually without charge PEG channels serve a substantial and compelling government interest in diversity, a free market of [ideas,] and an informed and well-education citizenry.¹⁶

¹² H. Rep. No. 934, 98th Cong., 2d Sess. at 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 (“1984 House Report”).

¹³ *Id.*

¹⁴ *Id.* at 35, *reprinted in* 1984 U.S.C.C.A.N. at 4672.

¹⁵ *Cf.* 47 U.S.C. § 153(43).

¹⁶ H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 85 (1992).

The roots of this nondiscrimination principle with respect to PEG extends beyond the language and legislative history of the 1984 and 1992 Cable Acts to the longstanding decisions and policies of the Commission itself. Indeed, for over twenty years, the Commission has made clear its view that cable operators may *not* discriminate against PEG (or for the matter, between any classes of downstream video programming) in terms of signal quality.

Prior to 1988, the Commission set cable system technical signal standards—and only “guidelines” at that—only for Class I cable channels,¹⁷ *i.e.*, retransmitted local broadcast channels.¹⁸ In 1988, however, the FCC proposed to extend “the signal quality guidelines that now apply to Class I channels for television signals or Class II, III and IV cable channels that are intended to be displayed on NTSC receivers.”¹⁹ (PEG channels are Class II cable channels, as well as most popular advertiser-supported cable programming channels.²⁰) The Commission’s rationale for extending the technical signal quality guidelines to (among others) PEG channels is one grounded on the principle of assuring uniform signal quality for viewers:

We believe the same “broadcast quality” approach used in developing the Class I channel standards is also appropriate for these other classes of channels. *These standards would define a level of television service on Class II, III, and IV cable channels that is of the same quality as that which cable subscribers have been accustomed to in viewing broadcast services on Class I channels. . . .* We believe that any well maintained cable system should be able to meet or exceed our signal quality guidelines on Class II, III, and IV channels as well as Class I. We also believe that since all these classes of cable channels share the same physical facility or *conduit* (*i.e.*, must be transmitted through the same “wire” and processing equipment), the quality of one class of

¹⁷ See 1992 Cable Technical Standards Order, 7 FCC Rcd. 2021, 2021-22, *modified* 7 FCC Rcd. 8676 (1992).

¹⁸ See 47 C.F.R. § 76.5(r).

¹⁹ *Review of the Technical and Operational Requirements of Part 76, Cable Television*, Further Notice of Proposed Rule Making, 3 FCC Rcd. 5966 (1988) (“1988 Cable Technical Standards FNPRM”).

²⁰ See, *e.g.*, 1992 Cable Technical Standards Order, 7 FCC Rcd. at 2022 n.5; 47 C.F.R § 76.5(s).

channel can potentially affect the quality of the other channel classes.²¹

In 1991, the Commission reaffirmed its policy that all downstream video channels, both broadcast and non-broadcast (including PEG), on a cable system should be of uniform quality, and further amplified this principle by proposing that cable operators should not discriminate among such channels in terms of signal quality:

We propose to extend our [cable system] technical standards to all analog NTSC video downstream signals – that is, signals transmitted from the cable headend to subscriber terminals – on all cable channels. *This comports with our objective to ensure that cable systems meeting these standards provide an acceptable quality of service to their subscribers, and that signal quality be uniform for all video channels in the cable system. . . . We do not propose, therefore, to discriminate among video cable channels as to the quality of signal expected.*²²

Less than a year later, the Commission adopted new cable system technical standards to replace the former guidelines, and extended those new standards to (among others) PEG channels. In doing so, the Commission once again reiterated the driving force behind the application of the standards to all video channels: Cable signal quality should be uniform across cable channels, and there should be no discrimination among video channels in terms of the quality of the signal received by the subscriber:

The [cable system] technical standards in our new rules will be applicable . . . to all NTSC video (or similar video channel) downstream signals – that is, video signals transmitted from the cable headend to subscriber terminals – on all cable channels. . . . We believe that extending the standards in this fashion comports with our objectives of ensuring that cable systems provide an acceptable level of quality of service to their subscribers, and that signal quality is uniform for all video

²¹ 1988 *Cable Technical Standards FNPRM*, 3 FCC Rcd. at 5969 (¶ 16) (emphasis added).

²² *Cable Television Technical and Operational Requirements*, Notice of Proposed Rule Making, 6 FCC Rcd. 3673, 3675 (¶ 8) (1991) (“1991 *Cable Technical Standards NPRM*”) (emphasis added).

channels on the cable system. . . . *We do not believe, therefore, that we should discriminate among video cable channels as to the quality of signal received.*²³

Regardless of the underlying transmission protocol, the fundamental principles of the Commission’s decisions remain and are undeniable: Cable operators may not discriminate against PEG programming in the delivery of signals to subscribers. The Commission has required operators to deliver channels in Class II (like PEG) at the same level of quality as channels in Class I, and it has not authorized cable operators to deliver channels like PEG, which are outside the operator’s editorial control and which the operator is required by law to carry, at a lower quality than those video channels that the operator chooses to carry for its own commercial purposes.

The Media Bureau has reaffirmed this PEG nondiscrimination principle in the analogous context of an incumbent cable operator’s shift of PEG channels to the digital tier: Cable operators may not discriminate against PEG vis-à-vis other basic tier channels in terms of accessibility.²⁴ Yet PEG channels continue to face numerous obstacles to nondiscriminatory treatment. MVPDs routinely single out PEG programming for discriminatory and uniquely inferior treatment, in terms of accessibility, functionality and signal quality vis-à-vis other programming. This violates longstanding Commission principles, and the Commission therefore find in no uncertain terms that it has authority to prevent improper discrimination against PEG programming in violation of the Act and Commission rules and policies.

²³ *1992 Cable Television Technical Standards Order*, 7 FCC Rcd. at 2024 (¶ 13) (emphasis added).

²⁴ Letter to Joseph Van Eaton from Monica Shah Desai, Chief FCC Media Bureau, re: *City of Dearborn v. Comcast Heights III, Inc., and Comcast of the South*, dated Jan. 18, 2009. *See also Public, Educational and Governmental (PEG) Access to Cable Television: Hearing Before the H. Subcomm. on Fin. Servs. and Gen. Gov’t Appropriations of the H. Comm. on Appropriations (“House PEG Hearing”), 110th Cong. 10-11 (2008) (testimony of Monica Desai, Chief of the Media Bureau, FCC) (“Desai Testimony”).*

Finally, the Congressionally-imposed prohibition against editorial control of PEG channels offers another source of FCC authority to act on the obstacles facing PEG channels. Section 611(e) prohibits a cable operator’s “exercise [of] any editorial control over any [PEG] use of channel capacity.”²⁵

Consistent with FCC precedent, Section 611(e), 47 U.S.C. § 531(e), bars a cable operator from targeting PEG programming because of its content, and thereby making that content a less effective form of communication. Interpreting a similar “editorial control” statute applicable to DBS providers,²⁶ the FCC stressed the need for *even-handed* treatment in an operator’s imposition of technical requirements:

[W]e believe that a DBS provider can set technical quality standards for programming carried on its satellite system that can be applied to *all* programming, including that carried on the set-aside channels. We do not believe that *even-handed* application of technical quality standards amounts to “editorial control” of programming content.²⁷

Other FCC decisions also emphasize that prohibitions of editorial control should be interpreted broadly to effectuate Congressional intent. In the FCC’s decision *In re Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, 7 FCC Rcd. 5781

²⁵ 47 U.S.C. § 533(e) (“[A] cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section, except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity.”).

²⁶ 47 U.S.C. § 335(b)(3) (“A provider of direct broadcast satellite service shall meet the requirements of this subsection by making channel capacity available to national educational programming suppliers, upon reasonable prices, terms, and conditions, as determined by the Commission under paragraph (4). The provider of direct broadcast satellite service shall not exercise any editorial control over any video programming provided pursuant to this subsection.”).

²⁷ *In re Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd. 23254, 23301 ¶ 112 (1998) (emphasis added). To be sure, as the FCC explained in the DBS Order, limitations on editorial control must be interpreted in light of “differences in the language of the . . . editorial control prohibitions . . . but also by differences in the distinct statutory schemes of which they are a part.” *Id.* at ¶¶ 102-103. However, if anything, the limitation in Section 531(e) erects a higher wall against operator interference than that erected by the DBS ruling.

(1992), *aff'd in part and modified in part*, 10 FCC Rcd. 244 (1994), *appeal dismissed as moot sub nom. Mankato Citizens Tel. Co. v. FCC*, No. 92-1404, 1996 WL 393512 (D.C. Cir. June 12, 1996), the agency adopted rules designed to ensure that telephone companies providing video programming operated as conduits, and did not exercise the sort of editorial control that cable operators typically exercise over their own commercial service offerings:

[W]e are very broadly proscribing telephone company activities that could be construed as their engaging in selection of video programming as traditional cable operators. Cable operators select video programming by making decisions concerning the price of video program offerings and by bundling, packaging, and creating tiers of video programming that affect the availability of video programming to consumers.²⁸

This FCC decision recognizes that decisions as to the manner in which programming is bundled, packaged, and sold involves the exercise of editorial control. It is consistent with long-standing First Amendment precedent. Editorial control encompasses not just control of content, but also control of the editorial process, through which decisions are made as to how information will be presented, and to whom it will be presented.²⁹ Certainly, “deliberate and calculated” devices “to limit the circulation of information to which the public is entitled” involve a prohibited interference with speech.³⁰

In the case of interactive programming guides, the programming guide provider sells access to the channel data to the MVPD. Channel data is created by the channels and is their speech, and MVPDs transmits channel’s speech through its system. By not allowing PEG channels to have their programming information available on programming guides, MVPDs

²⁸ *Id.* at 69; *see also*, n.180.

²⁹ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (broadcast carriage requirements interfere with cable operators’ editorial discretion); *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194 (2003) (restriction affecting kinds and amounts of material that can be presented is a kind of editing).

³⁰ *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004).

exercise control over the editorial process and restrict the circulation of this information created by the PEG channels.

The exclusion of PEG channels from interactive programming guides, HD transmission, last channel capabilities, and DVR capabilities, as well as channel slamming, all limit the circulation and accessibility of the programming offered by PEG channels. These decisions are not required by technological or cost barriers, as MVPDs routinely permit nearly all other channel programmers access to these features. These features are technologically and economically feasible, and the singular exclusion of PEG channels indicates that the reasons behind this exclusion are editorial in nature and/or motivated by revenue maximization. Whether out of hostility or indifference to PEG channels and their viewers, these decisions limit the viewership of PEG programming. For example, the refusal to make PEG programming information available on programming guides and the refusal to enable DVR comparability for PEG channels render the diverse array of PEG programming effectively inaccessible. As has been emphasized in previous proceedings,³¹ all that ACD and ACM ask is that if a PEG organization supplies program-specific information on the same terms and conditions as other programmers, MVPDs should be required to provide that information on their electronic programming guides.

Ultimately, MVPD's not allowing PEG channels to access electronic programming guides, DVR capabilities, last channel capabilities, and HD transmission on equal terms as other channels has the same effect for some viewers as if the programming was simply not aired at all. The same is true with channel slamming, which drives down viewership while freeing up

³¹ See, e.g., Comments of the Alliance for Communications Democracy, MB Docket Nos. 12-108 and 12-107 (filed Feb. 18, 2014), available at <http://apps.fcc.gov/ecfs/comment/view?id=6017589353>.

positions for affiliated programmers or programmers with whom MVPDs have commercial agreements. The inequitable treatment of PEG channels not only violates the prohibition on editorial control over PEG channels, it also stifles the diverse and independent programming that the FCC should be promoting.

CONCLUSION

As described above, the PEG channels provide a unique and significant source of independent programming. However, this programming is hindered by numerous obstacles imposed by MVPDs. The Commission has the authority to address these obstacles that prevent greater access by consumers to sources of independent and diverse programming.

Respectfully submitted,

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