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April 21, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41

Dear Secretary Dortch:

Enclosed please find a corrected version of the Reply Comments filed by the Mt. Hood Cable Regulatory Commission, Montgomery and Anne Arundel Counties, Maryland, and the Boston Neighborhood Network in the above-captioned matter. This corrected version corrects a typographical error (Mt. rather than Mount) in the caption and then corrects that error in the remainder of the filing. We would respectfully request that this version of the pleading be substituted for that version filed on April 19, 2016 and posted on ECFS on April 20, 2016.

Respectfully,

Gerard Lavery Lederer
of BEST BEST & KRIEGER LLP

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of
Promoting the Availability of Diverse and
Independent Sources of Video Programming

MB Docket No. 16-41

**REPLY COMMENTS OF MT. HOOD CABLE REGULATORY COMMISSION,
MONTGOMERY AND ANNE ARUNDEL COUNTIES, MARYLAND,
AND BOSTON NEIGHBORHOOD NETWORK**

I. INTRODUCTION

The Mt. Hood Cable Regulatory Commission,¹ Montgomery² and Anne Arundel³ Counties, Maryland, and the Boston Neighborhood Network⁴ (collectively “Local Coalition”)

¹ The Mt. Hood Cable Regulatory Commission (“MHCRC”) was created in 1992 when the City of Portland, Oregon, and Multnomah County and the cities of Gresham, Troutdale, Fairview, and Wood Village, Oregon, agreed to consolidate two already-existent (since 1982) cable regulatory programs and staffing. The MHCRC advocates for and protects the public interest in the regulation and development of cable communications systems, provides consumer protection, and facilitates the planning and implementation of community uses of cable communications technologies that make use of the public rights-of-way. The MHCRC comprises the majority of the Portland media market and oversees and supports two not-for-profit PEG organizations in Multnomah County, Oregon.

² Montgomery County acts as the franchise administrator for over a quarter of million cable subscribers served by three wireline cable service providers within Montgomery County – Comcast, RCN and Verizon. In addition to serving as the Local Franchising Authority for the County, pursuant to contracts between the County and 18 municipalities, the County has also been designated by these municipalities to administer and manage each of their cable franchises on their behalf. These municipalities are Chevy Chase Village, Chevy Chase Village Section 3, Chevy Chase Village Section 5, City of Rockville, City of Takoma Park, Town of Barnesville, Town of Brookeville, Town of Chevy Chase, Town of Chevy Chase View, Town of Garrett Park, Town of Glen Echo, Town of Kensington, Town of Laytonsville, Town of Poolesville, Town of Somerset, Village of Martin's Addition, Village of North Chevy Chase, and Washington Grove.

³ Anne Arundel County believes itself to be the most connected county in the US. The County acts as the franchise administrator for over a one-half million people served by three wireline cable service providers within Anne Arundel County – Comcast, Verizon FiOS and Anne Arundel Cable d.b.a. Broadstripe.

⁴ Boston Neighborhood Network consists of two channels: “News and Information” (Comcast 9, RCN 15) and “Community TV” (Comcast 23, RCN 83). Boston Neighborhood Network Television is a nationally recognized, award-winning community media center and 501(c)(3) nonprofit, that acts as a public forum for all Boston residents, nonprofit and community-based organizations, and governmental and educational institutions and provides them with affordable training and access to emerging media technologies. Information about the channels is available here: <http://www.bnntv.org/>. BNN is been managed by the Boston Community Access and Programming Foundation, Inc. (BCAPF) since Boston's first cable franchise agreement in 1983. BCAPF is a 501(c)(3) non-profit to “ensure access to channels and facilities for all Boston residents, groups and institutions and to provide public education and training regarding the use of access facilities and channels.” Its founding document, crafted by Attorney Charles J. Beard and others, reflected a far-sighted vision. In Boston, BNN and city residents are fortunate

submit these reply comments in response to the Notice of Inquiry (“NOI”), released February 19, 2016 in the above-entitled proceeding.⁵

The Commission’s opening conclusion that the nation “...has seen significant changes in the media landscape that have fundamentally altered the way in which Americans access and consume video programming”⁶ since passage of the Cable Act of 1984 is correct. The Local Coalition files these reply comments to remind the Commission that what has not changed is the congressional mandate to the Commission⁷ to prohibit cable operators from unlawfully making PEG programming⁸ less accessible⁹ than the broadcast programming carried on the basic service tier.¹⁰ Moreover, the Congressional mandate to protect the accessibility of PEG applies not only

to have strong support from city government for community access to media. The franchising agreements between the city of Boston and its willing partners, the cable providers and BNN, have resulted in over 30 years of tremendous benefits that have become ingrained in the civic, social and cultural fabric of the city.

⁵ *In the Matter of Promoting the Availability of Diverse Programming and Independent Sources of Video Programming*, Notice of Inquiry, MB Docket No. 16- 41 (rel. Feb. 18, 2016) (“NOI”). The Local Coalition gratefully accept the invitation of Commissioner Mignon to “...launch a fact-finding exercise that will start a conversation on how best to promote the availability of diverse and independent sources of video programming, including Public, Educational and Governmental Programming.” (Statement of Commissioner Mignon L. Clyburn to accompany NOI. See also NOI, ¶2.

⁶ *Id.* at ¶ 1.

⁷ The Local Coalition agrees with former New Orleans mayor and President of the U.S. Conference of Mayors Marc H. Morial that the Commission has an obligation to protect the diversity of voices in the television ecosystem: “Advancing diversity and inclusion in the television ecosystem will not only help underserved communities gain access to new content and viewpoints, but also allow minority and independent programmers the opportunity to increase their customer base. However, the record lacks necessary data on this critical issue. The obligation to assess and address the lack of minority ownership and participation in this ecosystem statutorily falls on the regulatory agency—the Commission—not on affected communities that have traditionally been denied access to the marketplace.” Comments of National Urban League et. al filed March 21, 2016 at p. 1

⁸ PEG programming market is a national treasure. Its value is reflected in the thousands of PEG channels, hundreds of PEG organizations and access centers and more than 1.2 million volunteers and 250,000 community groups. Collectively, these individuals provide community programming in local communities across the United States. (See Comments of the Alliance for Community Media (filed Mar. 30, 2016) (“ACM Comments”) at 1.) AT&T alone reflects that it AT&T carries “800 unique channels of public, educational, and governmental (“PEG”) channels that U-verse carries.” Comments of AT&T filed March 30, 2016 at p.9 (AT&T Comments”)

⁹ Accessible means not just carried, but carried in the same format as broadcasters, including HD, accessibility if the consumer chooses to navigate by guide such that the PEG programming descriptions are on the electronic guide, and accessible by means of time delayed viewing on system provided digital video records.

¹⁰ The specific mandate that the Commission protect PEG is in addition to the Commission’s overall mandate that requires protection of PEG as a means for the Commission “ To make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid,

today, but on an ongoing basis, as the media landscape continues to fundamentally alter the way in which Americans access and consume video programming.

More specifically, Local Coalition members file to support the Commission’s and commenters’ articulation that:¹¹

- PEG enjoys a congressionally protected status;¹²
- There are significant “...challenges faced by ... public, educational, and governmental (PEG) channels...”¹³ among which include:
 - PEG programming information not being included in electronic guides;
 - PEG programming not uniformly being offered carriage in HD format; and
 - PEG programming not being accessible to digital video recorders on some cable systems.
- Finally, the Commission’s test for determining programming availability must be at the consumer level.¹⁴

II. THE CABLE ACT ENSURES THE EXISTENCE OF PEG CHANNELS ON THE BASIC TIER.

The Federal Cable Act, 47 U.S.C. § 521 *et seq.*, permits local governments to require cable operators to set aside channel capacity for public, educational and governmental (“PEG”) use.¹⁵ Congress intended PEG channels to foster important First Amendment values by serving

efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” 47 U.S.C. § 151.

¹¹ See e.g. ACM Comments; Comments of National Association of Telecommunications Officers and Advisors (filed Mar. 30, 2016) (“NATOA Comments”)

¹² Local Coalition members would point out that when it comes to PEG channels and programming that AT&T is wrong when it asserts “Commission Intervention in Private Contractual Matters Is Unwarranted Given the Robust and Healthy Video Programming and Distribution Ecosystem.” (AT&T Comments at 10) PEG channels enjoy the Congressional protections of 47 U.S.C. §§531, and 541(a)(4).

¹³ NOI at ¶ 2.

¹⁴ On this point Local Coalition members agree with the National Association of Broadcasters that propose the test for accessibility must be the “...consumers’ ability to access video programming.” Comments of the National Associations of Broadcasters (filed Mar. 30, 2016) at 2. Local Coalition members would point out that if broadcasters find they are vulnerable to the practices of MVPDs, how much more vulnerable must PEG programmers feel?

¹⁵ 47 U.S.C. §531.

as “the video equivalent of the speaker’s soap box or the electronic parallel to the printed leaflet.”¹⁶ The operator has no right to package and bundle these channels as it sees fit, much less design its system so that the channels are less accessible. Moreover, the Cable Act and federal regulations are designed to ensure that the channels can be received and viewed by all subscribers, even those that take the lowest levels of service, without additional charge.

Therefore, as a given, in any discussion regarding PEG programming, it must be acknowledged that Congress in adopting the Cable Act in 1984 and amending the law in 1992, required that a cable operator provide its subscribers a separately available basic service tier (47 U.S.C. §543(b)(7))¹⁷ and that a part of that tier are public, educational and governmental channels.¹⁸

¹⁶ H.R. Rep. No. 98-934, as reprinted in 1984 U.S.C.C.A.N. 4655, 4667 (1984).

¹⁷ A “service tier” is defined by the Cable Act as a “category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator.” 47 U.S.C. § 522(17). *See also, In The Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 F.C.C. Rcd. 2503, MB Docket No. 05-255 (2006)(operator required to provide basic service tier including PEG); *In the Matter of Social Contract for Comcast Cable Communications, Inc.*, 13 F.C.C. Rcd. 3612 (1997) (unnecessary to protect against movement of PEG channels from basic because rules and statute require maintenance of PEG on basic tier).

The entire section reads as follows:

(7) Components of basic tier subject to rate regulation

(A) Minimum contents Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. Such basic service tier shall, at a minimum, consist of the following:

- (i) All signals carried in fulfillment of the requirements of sections 534 and 535 of this title.
- (ii) Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers.
- (iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.

¹⁸ Under the Cable Act, capacity designated for PEG use is not the same as any other channel subject to an operator’s control. Nor is the character of such designated channel capacity established solely by the terms of franchise agreements. The courts have recognized that a franchise agreement “gives life to Section 531(a), but Section 531(a) also establishes a framework for these franchise agreements: that the channels be set aside for public, educational, and governmental use.” *Time Warner Cable of New York City v. City of New York*, 943 F. Supp.1357, 1367 (S.D.N.Y. 1996), *aff’d on other grounds*, 118 F.3d 917 (2d Cir. 1997).

In 1984, Congress made clear that it intended that PEG channels to aid in fulfilling its vision of wide-spread access to media:

[PEG channels] provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, any by showing the public local government at work.¹⁹

This principle was reiterated when Congress passed amendments to the Federal Cable Act in 1992. The House Report accompanying the Federal Cable Act stated: “PEG channels serve a substantial and compelling government interest in diversity, a free market of [ideas], and an informed and well educated citizenry.”²⁰ H.R. Rep. 102-628 at 85. And Congress explained its motives for such a protective status:

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-educated citizenry. . . . Because of the interests served by PEG channels ...[must be available] to all cable subscribers on the basic service tier and at the lowest reasonable rate.²¹

The Local Coalition therefore agrees with the Alliance for Community Media that the legislative history of the 1984 and 1992 Cable Acts makes clear that Congress bestowed on PEG programming a protected status based on the role it would play to ensure communities had diverse and independent programming.²² This is much the same goal that the Commission seeks to achieve in this NOI.

¹⁹ H.R Rep. No. 98-934, 98th Cong. 2d Sess. at 30 (1984); 1984 U.S.C.C.A.N. 4655, 4667.

²⁰ H.R. Rep. No. 102-628 102d Cong., 2d Sess. at 85 (1992).

²¹ *Id.*

²² ACM Comments at 2.

III. DISCRIMINATORY TREATMENT OF PEG PROGRAMMING VIS-A-VIS OTHER BASIC TIER PROGRAMMING IS BARRED

Local Coalition members further support ACM's position that Congress made clear in the 1984 and 1992 Cable Acts that PEG programming is entitled to comparable treatment with other programming on the basic tier.²³ The Commission itself made these same assertions to Congress in 2009: "...[T]he purpose of the basic service tier would be defeated if consumers were "[s]ubject[] . . . to additional burdens to watch their PEG channels."²⁴

Five months after delivering this acknowledgment to the Congress of the Commission's obligation to bar discrimination by providers among the basic tier elements, Monica Shah Desai, Chief of the Media Bureau, outlined a rule of thumb for testing if actions were discriminatory and therefore illegal and unacceptable:

Congress contemplated only one basic service tier, to be provided on a non-discriminatory basis to all subscribers. . . . [I]f a provider chooses to convert PEG channels, it must convert the entire basic service tier, whether or not the system is subject to effective competition."²⁵

²³ ACM Comments at 3. Interestingly enough, even before the Cable Act was adopted, the Supreme Court recognized that, with respect to PEG, cable systems are relegated "pro tanto, to common carrier status." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-701 (1979). While the Court obviously was not somehow importing PEG channels into Title II of the Communications Act, the Court was recognizing that operator's authority over PEG channels is necessarily limited and certainly no greater than that a common carrier would have with respect to messages it had a duty to carry. It is well-established that a common carrier's duty to transmit prevents a carrier from discriminating against the messages that it is obligated to carry, in favor of those that it would prefer to carry. (See e.g., *Candee v. W. Union Tel. Co.*, 34 Wis. 471, 477-78 (1874); *Atl. Coast Line R.R. Co. v. Mazursky*, 216 U.S. 122, 133 (1910) (duty of good faith and impartiality).

²⁴ Statement of Monica Shah Desai, *Public, Educational, and Governmental (PEG) Access to Cable Television Before the House Subcomm. On Financial Services and General Government* (September 17, 2008)

²⁵ Letter of Monica Shah Desai, January 18, 2009. This is consistent with the testimony that Ms. Desai delivered to Congress the year before. See Statement of Monica Shah Desai, *Public, Educational, and Governmental (PEG) Access to Cable Television Before the House Subcomm. On Financial Services and General Government* (September 17, 2008). In the instant matter, Local Coalition members disagree with AT&T that the ACM petition filed seven years ago referenced in n.40 of the NOI is moot. AT&T Comments at 9, n.35. Moreover, AT&T's assertion that its programming distribution is superior in that it is distributed to larger audiences and is "not constrained by municipal boundaries" misses the point of PEG programming. Congress created PEG programming to speak to the interests of communities, which many times are contained within municipal boundaries. *Id.*

IV. PEG PROGRAMMING IS NOT BEING TREATED THE SAME AS OTHER PROGRAMMING ON THE BASIC TIER.

In the past, Local Coalition members have filed with the Commission to document:

- PEG programming information was not uniformly being carried in online guides,²⁶
- PEG programming was not being made available to customers in HD, despite the programming being produced in such a format,²⁷ and
- PEG programming in some instances was not available for recording on digital video recorders.²⁸

Local Coalition members incorporate by reference these previous filings²⁹ into this response and join ACM/ACD is encouraging the Commission “...to address the regular inequitable treatment of PEG channels, their programming, and their viewers.”³⁰

²⁶ See, e.g., *In the Matter of Accessibility of User Interfaces, and Video Programming Guides and Menus Accessible Emergency Information and Apparatus*, Reply of Montgomery County, Maryland, MB Docket No. 12-108 (filed Mar. 20, 2014), available at <http://apps.fcc.gov/ecfs/comment/view?id=6017608906>; Notice of Ex parte of Montgomery County, City of Boston et.al, MB Docket No. 12-108 (filed Sept. 13, 2013), available at <http://apps.fcc.gov/ecfs/comment/view?id=6017467089>; Reply of Montgomery County, Maryland, MB Docket No. 12-108 (filed Aug. 7, 2013), available at <http://apps.fcc.gov/ecfs/comment/view?id=6017462285>. In addition to PEG and local government community, Local Coalition members would also call to the Commission’s attention, the comments of the disability community members on the importance of on-line guide information inclusion. See, e.g., Ex parte letters, MB Docket No. 12-108, by Communications Service for the Deaf (filed Oct. 17, 2013) available at <http://apps.fcc.gov/ecfs/comment/view?id=6017470973> and the Deaf and Hard of Hearing Consumer Advocacy Network (filed Oct. 22, 2013) available at <http://apps.fcc.gov/ecfs/comment/view?id=6017471303> in which they stressed the importance to viewers with disabilities of program descriptions of PEG programming in guides.

²⁷ See, e.g., *In the Matter of Application of Comcast Corporation, Time Warner Cable, Inc., Charter Communications, Inc. and Spinco to Assign and Transfer Control of FCC Licenses and Other Authorizations*, Petition to Deny of Los Angeles County, California; Montgomery County et. al, MB Docket No. 14-57 (filed Aug. 25, 2014), at 14-15, 20-21, 26 available at <http://apps.fcc.gov/ecfs/comment/view?id=6018320712>; Comments of Martin J. Walsh, Mayor of Boston, Massachusetts; MB Docket No. 14-57 (filed Aug. 25, 2014) available at <http://apps.fcc.gov/ecfs/comment/view?id=6018320311>.

²⁸ The Local Coalition here would refer the exhaustive list of filings on this subject outlined in the Comments of the Alliance for Community Media in this proceeding. (ACM Comments at 2, n.4). See also, *In the Matter of Petitions for Declaratory Ruling Regarding Public, Educational, and Government Programming*, Comments of Montgomery County, MB Docket No. 09-13 (filed Mar. 3, 2009) available at <http://apps.fcc.gov/ecfs/comment/view?id=5515345664>

²⁹ *Id.*

³⁰ ACM Comments at 3.

Moreover, Local Coalition members believe that an application of the “Desai Test” outlined to Congress in 2008 should provide the Commission with a guiding light in determining whether operators are subjecting PEG programming to discriminatory treatment. For instance,

- Congress contemplated only one basic service tier, to be provided on a non-discriminatory basis to all subscribers. If a provider chooses to “place programming descriptions of some of the basic tier programming on their on-line guide, it must offer inclusion of programming descriptions to the PEG programming components of the basic service tier, whether or not the system is subject to effective competition.³¹
- Congress contemplated only one basic service tier, to be provided on a non-discriminatory basis to all subscribers. If a provider chooses to “make some of the basic tier channels available in an HD format, it must make PEG programming available in HD, whether or not the system is subject to effective competition.³²
- Congress contemplated only one basic service tier, to be provided on a non-discriminatory basis to all subscribers. If a provider chooses “make programming of some of the basic tier channels recordable on DVRs, it must ensure PEG programming is recordable, whether or not the system is subject to effective competition.³³

Furthermore, in order for the Commission to honor its obligations to ensure the non-discriminatory treatment of PEG programming, as new innovations and technologies are developed, PEG channels must be included on cable operator’s and MVPDs new and future

³¹ Local Coalition members further believe that in addition to the 1984 and 1992 Cable Acts, there is ample authority under the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”) to establish the base level of information that should appear on the on-screen program guide for all channels, meaning that if any programmer provides that base level of information to the multichannel video programming distributor (“MVPD”), the on-screen guide should include that information.

³² Local Coalition members are aware that not all PEG programming has the resources to make its programming available in HD. But it is very troubling when a PEG programmer produces it programming in HD, and then the operator downgrades the programming to an less than HD transmission format.

³³The transmission of some PEG broadcasts have not been compatible with digital video recorders (“DVRs”) such as Tivo, or other programmable recording devices. This shortfall makes it difficult or impossible for viewers to “time shift” PEG programs, *i.e.*, record them for later viewing. *See* Letter of the House Appropriations Subcommittee on Financial Services and General Government to the FCC (September 30, 2008).

platforms.³⁴ PEG programmers seeks only what other programming parties seek; to be seen by its viewers, “... whenever they want, using whatever device they want.”³⁵

Finally, despite AT&T’s assertion that the Commission must be mindful of the limits on authority,³⁶ Local Coalition members file here to clarify that there are no such limitations with protecting PEG programming. As documented above, Congress went to great lengths to protect the special status of PEG programming. The FCC must honor those mandates.

V. CONCLUSION

The Local Coalition is grateful to the Commission for commencing this proceeding and the Commission can rely upon our constructive participation as this proceeding moves forward. Congress said it best: “PEG channels serve a substantial and compelling government interest in diversity, a free market of [ideas,] and an informed and well-education citizenry.”³⁷ That vision cannot be undermined by private parties motivated more by profit than inclusion.

Respectfully submitted,



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April 19, 2016

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³⁴ See AT&T’s comments about seeking to offer its customers identical choices. AT&T Comments at 8.

³⁵ *Id.* at 18.

³⁶ *Id.* at 15

³⁷ H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 85 (1992).