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

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In the Matter of )  
)  
Petition for Declaratory Ruling on )  
Requirements for a Basic Service Tier )  
and for PEG Channel Capacity Under )  
Sections 543(b)(7), 531(a) and the )  
Commission's Ancillary Jurisdiction )  
Under Title I )

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To: The Commission

PETITION FOR DECLARATORY RULING

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## SUMMARY

The City of Lansing, Michigan (the "City") petitions the Federal Communications Commission ("FCC" or "Commission") to issue a declaratory ruling that public, educational and governmental ("PEG") channels must be carried on the basic service tier by franchised providers of video services, and treated equally with other basic service tier channels in order to comply with the Communications Act of 1934, as amended. This petition is prompted by the actions of AT&T, which is a franchised video provider in the City.

The City requires franchised cable and video providers to provide seven (7) PEG channels. Instead of providing seven channels, AT&T provides a web portal on a single channel number, over which it proposes to deliver the City's PEG programming by means of webcast streams: a video delivery system that in format, quality, accessibility and functionality is inferior to the delivery system used for other basic service tier channels.

In this regard, AT&T's U-verse system is composed of two separate and very different video delivery systems. The main one carries basic service tier and other commercial channels (but no PEG channels). From the consumer's perspective, it is like viewing channels on a conventional cable system.

The second, and distinctly inferior, video delivery system is used solely for PEG programming. It is a webcast system which from the consumer's perspective is much like watching video over the internet on a home computer.

On the webcast system multiple PEG programs are accessed via web pages from one channel number (Channel 99). The programming is provided in lower quality and has decreased accessibility and functionality as compared to commercial channels. For consumers this means that PEG channels are inferior to other basic service tier channels in the following respects:

- They are hard to select
- They can take 60 seconds to appear
- They cannot be "surfed" to or from instantly
- They have impaired emergency alert functionality
- They do not have closed captioning or secondary audio programming (such as audio in a different language) capability
- They raise barriers to access for the visually impaired
- They are incompatible with digital video recorders (such that viewers who work during the times City Council meets cannot record meetings to view later).

AT&T's webcast system is so different and difficult to use that the California Public Utility Commission's Division of Ratepayer Advocates has issued a "Consumer Alert" which states in part (see **Exhibit G**, emphasis supplied):

**CONSUMER ALERT! AT&T's U-verse Public, Education, & Government (PEG) Viewing Experience**

Before you switch from traditional cable TV service to AT&T's U-verse service, you should be aware that finding your city council meeting or a high school football game on your local PEG (Public, Education, & Government ) channels will be *much more difficult* than finding a regular, commercial station.

Providing PEG channels on this separate, inferior system violates the requirement in the Communications Act that PEG channels be carried on the basic service tier. It also violates Congressional policy that such local channels not be discriminated against. As to PEG channels Congress has said:

Public access provides ordinary citizens, non-profit organizations, and traditionally underserved minority communities an opportunity to provide programming for distribution to all cable subscribers. Educational access allows local schools to supplement classroom learning and to reach those students who are beyond school age or unable to attend classes. Governmental channels allow the public to see its local government at work, thus contributing to an informed electorate, which is essential to the proper functioning of our democratic form of

government. PEG channels serve a *substantial and compelling government interest* in diversity, a free market of ideas, and an informed and well-educated citizenry.

H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 85 (1992) ("H.R. Rep. 102-628") (emphasis supplied). Congress has emphasized how PEG channels serve the "fundamental goal of the First Amendment" by providing "a wide diversity of information sources for the public" including "an environment of 'many tongues speaking many voices.'" H.R. Rep. No. 98-934, 1984 U.S.C.C.A.N. 4655, 4667.

To serve these goals, and ensure the widespread availability of PEG channels to cable subscribers, Congress adopted the requirement for "cable operators to offer a basic service tier, consisting, at a minimum, of all broadcast signals carried on the cable system and public, educational, and governmental (PEG) access channels." H.R. Rep. 102-628 at 26. The Communications Act accordingly provides that every cable operator must "provide its subscribers a separately available basic service tier" that contains, at a minimum, any PEG programming "required by the franchise of the cable system to be provided to subscribers." 47 U.S.C. § 543(b)(7)(A). A tier is defined as "*a category of cable services 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) (emphasis supplied).

Congress also prohibited discrimination against PEG channels, stating that they should be provided on the service tier containing the broadcast channels so as to make them "available to all community members on a *nondiscriminatory* basis." H.R. Rep. 102-628 at 85 (emphasis supplied). In order to achieve this goal, PEG channels must be as accessible and available to consumers as broadcast channels. To do otherwise is to allow PEG channels to be "assigned a

second class status outside of the basic service tier," in the words of a House Appropriations Subcommittee. **Exhibit E.**

The test for determining whether channels are part of the same tier is whether they *appear to the consumer* to be in the same "category of cable services." 47 U.S.C. § 522(17). This Commission has utilized this "consumer viewpoint" principle as a basis for its rulings in a number of contexts, including Internet service, cable service, telephone service, and most notably "wireline video provider service" including the U-verse service provided by AT&T.<sup>1</sup> As this Commission has said repeatedly, "the reasonable expectations of viewers should guide our efforts." *Review of EAS: Second Order*, 22 FCC Rcd. at 13298, ¶ 49.

PEG channels are not in the same "category of services" as other basic service tier channels and are being discriminated against when they, and they alone, are relegated to a separate and inferior video delivery system.

The preceding requirements apply to cable operators. AT&T contends that it is not a cable operator. That contention is incorrect. Specifically, the only federal court to consider the matter has held, as a matter of law, and overturning an opposite determination by a state utility commission, that AT&T's U-verse video service is a "cable service" being offered over a "cable system" by a "cable operator" for purposes of the Federal Cable Act. *See Office of Consumer Counsel v. Southern New England Telephone Company d/b/a AT&T Connecticut, Inc.* 515 F.Supp. 2d 269, 282 (D. Conn. 2007), *reconsideration denied* by 514 F.Supp. 2d 345, 351 (D. Conn. 2008), *motion to amend entry of final judgment denied* by 565 F. Supp. 2d 384 (D. Conn.

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<sup>1</sup> *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005) (internet service); *Oceanic Time Warner Cable, a Subsidiary of Time Warner Cable, Inc.*, 23 FCC Rcd. 12804, DA 08-1960 (2008) (cable service); *VoIP TRS Order, Report and Order*, 22 FCC Rcd. 11275, FCC 07-110 (2007) (telephone service); *Review of EAS: Second Order*, 22 FCC Rcd. 13275, FCC 07-109 (2007) (wireline video provider service).

2008). This decision should be given great weight by this Commission, because it resulted from *hard-fought litigation between the cable industry and AT&T*, where both sides had a full opportunity to present their arguments and rebut those of their adversaries.

However, even if AT&T is not a cable operator, the same result should occur. The Commission has repeatedly used its Title I ancillary jurisdiction to ensure that Congressional intent, the goals of the Communications Act and the "reasonable expectations of viewers" are met as new technologies emerge. It has done so by making sure such services as 911, telecommunications relay service, and emergency alert systems are widely available to consumers by applying such requirements to all types of providers, including AT&T and other wireline video providers. *See, e.g. Review of EAS: Second Order*, 22 FCC Rcd. 13275, FCC 07-109 (2007). The same result should occur here, where AT&T's U-verse system is promoted as a substitute for conventional cable and to the consumer functions like a conventional cable system. The Commission should exercise its ancillary jurisdiction to ensure that wireline video providers comply with the same PEG channel requirements as cable companies.

Finally, for the same policy reasons and to effectuate the "reasonable expectation of viewers," the Commission should use its ancillary jurisdiction to ensure that the preceding PEG requirements apply to AT&T's video system, even if it is a cable operator subject to "effective competition" and the Commission finds that the basic service tier requirements of 47 U.S.C. Section 543 do not otherwise apply.

Therefore, in brief, the Commission should require AT&T to treat PEG channels the same as other basic service tier channels by placing each of the City's PEG channels on a separately numbered channel and not allow AT&T to impair the signal quality, accessibility or functionality of PEG channels, as compared to other basic service tier channels.

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To: The Commission

**PETITION FOR DECLARATORY RULING**

The City of Lansing, Michigan (the "City") hereby petitions the Federal Communications Commission ("FCC" or "Commission") to issue a declaratory ruling that public, educational and governmental ("PEG") channels must be carried on the basic service tier and treated equally with other basic service tier channels in order to comply with provisions of the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (the "Communications Act") regarding the provision of PEG channels by a franchised cable operator or other provider (collectively, "provider") of video services.

As is set forth in more detail below, the City asks the Commission to declare that providing programming from multiple PEG channels on a single channel number<sup>1</sup> in a webcast format with limited functionality (while other basic service tier channels are each given their own discrete channel and provided in a conventional, non-webcast, easily accessible and fully

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<sup>1</sup> AT&T is proposing to provide the City's PEG programming on "Channel 99" which is not a real "channel" from a consumer's perspective. Instead, Channel 99 is a web portal, and as is discussed in detail below, the experience of using and viewing programming via Channel 99 is markedly different from and inferior to that of using and viewing other basic service tier channels.

functional manner), does not satisfy the basic service tier requirements applicable to cable providers found in 47 U.S.C. § 543(b)(7)(A). Further, the City asks the Commission to declare that if a provider requires that PEG programming be provided to it in a lower-quality format than other basic service tier programming (such that PEG programming video and/or audio is of lower quality than other basic service tier channels), then PEG programming is not being placed on the basic service tier and treated equally with other basic service tier channels, as required by the Communications Act. Finally, the City asks the Commission to declare that under the Communications Act the preceding requirements apply to franchised video providers offering services that appear to consumers to be functionally equivalent to cable services, whether or not the provider is a "cable operator," or subject to effective competition under Title VI of the Communications Act.

## INTRODUCTION

AT&T<sup>2</sup> is a franchised video provider offering its U-verse system in the City. Pursuant to Federal and state law, the City requires cable and video providers to deliver seven (7) channels of PEG access programming. Instead of providing seven channels, AT&T is providing a single channel number, over which it proposes to deliver the City's PEG programming by means of webcast streams. The webcast delivery system is inferior to that used by AT&T for other basic service tier channels in format, quality, accessibility and functionality.

In this regard, AT&T's U-verse system is composed of two separate and very different video delivery systems. The main delivery system carries commercial channels and functions for the consumer like a conventional cable system. For example, each channel has a separate

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<sup>2</sup> Michigan Bell Telephone Company d/b/a AT&T Michigan, hereinafter "AT&T."

number, images are provided full screen in high quality, consumers can "surf" from one channel to another, and requirements for emergency alerts and closed captioning are ostensibly met.<sup>3</sup>

A second and inferior video delivery system is used by AT&T solely for PEG programming. That system is a webcast system similar to that found on a home computer. On the webcast system, multiple PEG programs are accessed via web pages from a single channel number (Channel 99) which acts as a web portal. The programming is provided in low quality compared to that of the main system and has decreased functionality and accessibility compared to that of the main system. For example, channels are difficult to select, requiring multiple selections through various menus, they do not appear immediately, consumers cannot "surf" from channel to channel, there is no closed captioning or secondary audio programming, and capabilities for emergency alerts are diminished.

It is AT&T's use of two very different video delivery systems, with only PEG programming confined to the inferior delivery system, which prompts this Petition. The differences between these two systems are set out in more detail below. However, AT&T's use of a separate and inferior delivery system for PEG programming raises a number of problems that can be summarized as follows:

- **AT&T is violating the requirements of the Communications Act and the Commission's regulations with respect to basic service tier requirements by discriminating against PEG programming;**
- **AT&T's webcast format raises barriers to access to PEG programming for consumers, particularly for the hearing and visually impaired, and also impedes the use of PEG channels in local emergency situations;**
- **AT&T is violating Congressional policy under the Communications Act which strongly supports PEG channels.**

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<sup>3</sup> By "surf" we mean that the consumer can scroll directly from one channel to another by using the channel up or down buttons on the remote control.

## I. BACKGROUND

### A. AT&T is a Cable Operator Subject to the Federal Cable Act

AT&T is a cable operator under the terms of the Cable Communications Policy Act of 1984, as amended, (the "Federal Cable Act"), and is providing cable service over a cable system. *See* 47 U.S.C. §§ 522(5), (6) and (7). Under the Federal Cable Act, a "cable operator" is a person who "provides cable service over a cable system." 47 U.S.C. § 522(5). "Cable service" is defined as "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service" and "subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6). The term "cable system" is defined as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. § 522(7). "Video programming" is defined as, "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). AT&T's programming is "generally considered comparable to" programming provided by television broadcast stations and that provided by other cable providers. To subscribers, AT&T's video service is simply another cable service and so should be subject to the same legal and regulatory requirements as any other cable service.

A federal court has held, as a matter of law, that AT&T's U-verse video service is a "cable service" being offered over a "cable system" by a "cable operator" for purposes of the Federal Cable Act. *See Office of Consumer Counsel v. Southern New England Telephone Company d/b/a AT&T Connecticut, Inc.* 515 F.Supp. 2d 269, 282 (D. Conn. 2007) (overturning an opposite determination by a state utility commission), *reconsideration denied* by 514 F.Supp.

2d 345, 351 (D. Conn. 2008), *motion to amend entry of final judgment denied by* 565 F. Supp. 2d 384 (D. Conn. 2008). That decision should be given great weight by this Commission because it resulted from hard-fought litigation between the cable industry and AT&T on this point and is the only reported case where both sides (with their panoplies of experts and lawyers) had a full opportunity to present their arguments and rebut those of their adversaries.

In the above-cited decision, the Federal District Court in Connecticut examined both the nature and function of AT&T's U-verse system in great depth and detail, and concluded that there was nothing to significantly distinguish it from what the Federal Cable Act defines as a "cable service." The Court thus concluded that as a matter of law, "[t]he statutory language itself appears to require the conclusion that AT&T's video programming service does constitute a 'cable service,' as defined by the Cable Act" and summarily reversed the decision of the Connecticut utility commission on this point. *Id.* at 276. No courts have found to the contrary. Therefore AT&T is a cable operator subject to the Federal Cable Act.

**B. Requirements for and Use of PEG Channels in the City**

**1. AT&T's Franchise with the City Requires Seven PEG Channels**

The Federal Cable Act specifies that a city "may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use." 47 U.S.C. § 531(a). Effective October 27, 2008, the City and AT&T entered into a franchise (hereinafter, the "Franchise"), attached as **Exhibit A**. The Franchise between the City and AT&T provides that AT&T shall designate a sufficient amount of capacity on its system to provide for the same number of PEG access channels that are in actual use on the incumbent video provider's system. See **Exhibit A, Section VII. A**. Seven PEG channels are in actual use on the system of the incumbent video provider (Comcast), and the City has asked

AT&T to provide the same seven PEG channels on its U-verse video system. See **Exhibit B**. Therefore, pursuant to the Federal Cable Act, AT&T is required to provide seven PEG channels in the City.

## **2. Use of PEG Channels in the City**

The City's seven PEG channels are allocated and used as follows:<sup>4</sup>

- Channel 12: Government - City of Lansing
- Channel 15: Educational - Lansing Community College
- Channel 16: Public Access #1
- Channel 18: Educational - Michigan State University
- Channel 19: Public Access #2
- Channel 20: Educational - Michigan State University
- Channel 21: Educational - Lansing Public Schools.

The government access channel functions somewhat like a local version of C-SPAN, and the City uses its channel to broadcast City Council meetings and other City events and messages of interest and importance to the public. The educational channels are used to provide the public with access to school board and other school governance meetings and other uses related to local educational institutions. The public access channels are used to provide a variety of members of the public with access to a media outlet so that they may have an effective means to communicate with others in the community. These channels thus fulfill the purposes Congress envisioned when it passed the Federal Cable Act in 1984 and the amendments to it under the

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<sup>4</sup> Channel number references are to the channel number where the PEG channels appear on the Comcast cable system in the City.

Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385, as discussed below.

The Federal Cable Act guarantees the City authority to enforce the PEG-related requirements in its Franchise: "A franchising authority may enforce any requirement in any franchise regarding *the providing or use of such channel capacity.*" 47 U.S.C. § 531(c) (emphasis supplied).

### C. Role and Importance of PEG Channels Under the Federal Cable Act

The Federal Cable Act permits local governments to establish requirements in a cable franchise for the designation or use of channel capacity for PEG. See 47 U.S.C. § 531. Congress intended PEG channels to foster important First Amendment values by serving as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." H.R. Rep. No. 98-934, 98th Cong., 2nd Sess. at 30 (1984) ("H.R. Rep. 98-934"). The legislative history to the Federal Cable Act explains that PEG channels are intended to serve the democratic principles of our government:

[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, and by showing the public local government at work.

H.R. Rep. 98-934 at 30.

Congress emphasized the importance of PEG channels to the advancement of basic First Amendment principles when it adopted the Federal Cable Act in 1984:

The development of cable television, with its abundance of channels, can provide the public and program providers the meaningful access that, up until now, has been difficult to obtain. *A requirement of reasonable third-party access to cable systems will mean a wide diversity of information sources for the public – the fundamental goal of the First Amendment – without the need to regulate the content of programming provided over cable.*

*Id.* (emphasis supplied). Accordingly, the 1984 Report stressed that the Federal Cable Act:

contains provisions to assure that cable systems provide the widest possible diversity of information services and sources to the public, consistent with the First Amendment's goal of a robust marketplace of ideas - - an environment of "many tongues speaking many voices." . . . Local governments, school systems, and community groups, for instance, will have ample opportunity to reach the public under H.R. 4103's grant of authority to cities to require public, educational, and governmental (PEG) access channels.

*Id.* at 19 (quotation marks in original). The Report further stressed that "[p]ublic access channels available under H.R. 4103 *would be available to all, poor and wealthy alike... .*" *Id.* at 36 (emphasis supplied). Thus, because of the important role they play in providing a forum for local voices, PEG channels are intended to be available to all persons who receive cable service, without restrictions, impediments or diminution in quality.

When Congress amended the Federal Cable Act in 1992, it paid particular attention to the role and function of PEG channels, and the House emphasized Congress's intent that PEG channels be easily viewable throughout a community:

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.

H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 85 (1992) ("H.R. Rep. 102-628") (emphasis supplied). The House went on to describe the important functions it saw continuing to be served by each type of PEG channel:

Public access provides ordinary citizens, non-profit organizations, and traditionally underserved minority communities an opportunity to provide programming for distribution to all cable subscribers. Educational access allows local schools to supplement classroom learning and to reach those students who are beyond school age or unable to attend classes. Governmental channels allow the public to see its local government at work, thus contributing to an informed electorate, which is essential to the proper functioning of our democratic form of government. PEG channels serve a *substantial and compelling government*

*interest in diversity, a free market of ideas, and an informed and well-educated citizenry.*

*Id. (emphasis supplied). Congress has repeatedly emphasized the importance and value of PEG channels on local cable systems and highlighted the need for them to be available to all on a nondiscriminatory basis.*

**D. Federal Law Requires PEG Channels to be Carried on the Basic Service Tier**

At the same time that the House was emphasizing the important roles that PEG channels play in local communities and the need for them to be available on a nondiscriminatory basis, it noted in particular that it was requiring the PEG channels to be on the basic service tier:

*Because of the interests served by PEG channels, the Committee believes that it is appropriate that such channels be available to all cable subscribers on the basic service tier and at the lowest reasonable rate.*

H.R. Rep. 102-628 at 85 (emphasis supplied). The resulting Section 623 of the Federal Cable Act, 47 U.S.C. § 543, addressed the dual concerns of Congress that basic cable services be available at reasonable rates, and that the basic tier channels be accessible to all. To ensure the greatest availability of PEG channels to cable subscribers, the House adopted language that "requires cable operators to offer a basic service tier, consisting, at a minimum, of all broadcast signals carried on the cable system and public, educational, and governmental (PEG) access channels." H.R. Rep. 102-628 at 26.<sup>5</sup>

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<sup>5</sup> The Commission's statements in *Carriage of Digital Television Broadcast Signals*, First Report and Order, 16 FCC Rcd. 2598, at 2643, ¶ 102 (2001), that basic service tier requirements may go away once a system faces effective competition, are dicta rather than a finding that might be binding on future Commissions, as that determination was not central to the matter addressed in that Report and Order, and was not subject to briefing and analysis in that proceeding. Upon due consideration the Commission will find that it is in keeping with both the letter of the Federal Cable Act and Congressional intent, as described above, for the basic service tier requirements to apply even where there is effective competition. The reasons can be summarized as follows.

The statute accordingly provides that every cable operator must "provide its subscribers a separately available basic service tier" that contains, at a minimum, any PEG programming "required by the franchise of the cable system to be provided to subscribers." 47 U.S.C. § 543(b)(7)(A). A tier is defined in the Federal Cable Act as "a category of cable services 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) (emphasis supplied).

The Commission has previously recognized the statutory requirement that PEG channels be carried on the basic service tier. Thus the FCC's *Report and Order and Further Notice of Proposed Rulemaking* issued to implement the 1992 amendments to the Federal Cable Act, surveyed the statute, the legislative history of the Federal Cable Act, and the arguments put

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The basic service tier requirement is set forth in Section 543(b)(7)(A) of the Communications Act, 47 U.S.C. § 543(b)(7)(A). Communications Act Section 543(a)(1) provides that a state, federal or local government may only regulate *rates* as provided in Section 543. Section 543(b)(2) says that "[i]f the Commission finds that a cable system is subject to effective competition, *the rates for the provision of cable service* by such system shall not be subject to regulation...." 47 U.S.C. § 543(b)(2) (emphasis supplied).

Requiring there to be a basic service tier which includes (among other things) PEG channels is not a *rate* regulation requirement. As set forth above and *infra*, among other things "PEG channels serve a substantial and compelling government interest in *diversity, a free market of ideas, and an informed and well-educated citizenry.*" H.R. Rep. 102-628 at 85 (emphasis supplied).

The presence or absence of effective competition does not affect the obligation of cable operators to comply with the basic service tier requirements of the Act. The Commission agreed with this logic when it rejected "effective competition" arguments regarding another subsection of Section 543 that is similar to the basic service tier requirement of Section 543(b)(7)(A). The Commission ruled that the "negative option billing" prohibition of Section 543(f) is a self-implementing consumer protection measure, not something which goes to the "reasonableness of the actual rate charged", and thus applies whether or not there is effective competition. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 4316, 4361-62 ¶¶ 127-28 (1994), *aff'd Time Warner Entertainment Co., LP v. FCC*, 56 F.3d 151, 194 (D.C. Cir. 1995). Similarly, the basic service tier requirement is independent of rate regulation.

The issue of the impact, if any, of effective competition on aspects of the basic service tier requirement is, along with other issues, the subject of a Petition for Declaratory Ruling filed with this Commission by the City of Dearborn, Michigan, *et al.* on December 9, 2008.

forward in comments on its proposed rules with respect to the *basic service tier requirement*, and concluded:

Given this clear congressional direction and the evidence of the importance attached to PEG channels, we require a cable operator to carry PEG channels on the basic tier unless the franchising agreement explicitly permits carriage on another tier.

*Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, 8 FCC Rcd. 5631, 5738, ¶ 160 (1993).

**1. The Basic Service Tier Requirement is Determined from the Subscriber's Point of View**

The main factor in determining whether channels are part of the same tier is how the channels are viewed by consumers. This Commission has ruled, and the Supreme Court affirmed, that what it means to "offer" a service is to be determined by "what *the consumer perceives* to be the integrated finished product." *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005) (emphasis supplied). As applied to this context, that ruling means that whether PEG channels are being offered on the basic service tier should be determined by whether they appear to the consumer to be in the same "category of cable services." 47 U.S.C. § 522(17). In another cable-related matter, the Commission has affirmed this principle: "[I]t is the subscribers' perspective – not that of the cable operator – that is relevant in determining whether a change in programming services has occurred." *Oceanic Time Warner Cable, a Subsidiary of Time Warner Cable, Inc.*, 23 FCC Rcd. 12804, 12807, DA 08-1960, ¶ 8 (2008). See also the Commission's *Review of EAS: Second Order* and *VoIP TRS Order*, discussed in Section V, below, where in requiring VoIP providers and "Wireline Video Providers" to comply with telecommunications relay service and emergency alert requirements the Commission stressed the

consumer viewpoint - - "the reasonable expectations of viewers should guide our efforts."

*Review of EAS: Second Order*, 22 FCC Rcd. at 13298, ¶ 49.

Such a consumer-centric view of the basic service tier requirement is encouraged by the language of the Federal Cable Act, which states: "Each cable operator . . . shall *provide its subscribers* a separately available basic service tier." 47 U.S.C. § 543(b)(7)(A) (emphasis supplied). As Ms. Monica Desai, Chief of the Media Bureau, recently testified: "Subjecting consumers to additional burdens to watch their PEG channels defeats the purpose of the basic service tier." September 17, 2008 testimony of Ms. Monica Desai, Chief of the FCC Media Bureau, before the House Appropriations Subcommittee. See **Exhibit D**. Thus, the test is whether PEG channels are provided in such a manner that *the consumer* perceives them to be in the same category as other programming on the basic service tier. That test is not met if the consumer faces additional or different burdens in accessing PEG channels as compared to other basic service tier channels.

## **2. All Basic Service Tier Channels Must be Treated Equally**

It is Congress's intent that PEG channels be provided on the same tier as local broadcast channels so as to make them "available to all community members on a nondiscriminatory basis." H.R. Rep. 102-628 at 85. In order to achieve this goal, PEG channels must be as accessible and available to consumers as local broadcast channels. To do otherwise is to allow PEG channels to be "assigned a second class status outside of the basic service tier," in the words of a House Appropriations Subcommittee. Letter of the House Appropriations Subcommittee on Financial Services and General Government to the FCC, September 30, 2008. See **Exhibit E**.

As Ms. Desai testified recently: "We believe it is important to ensure that consumers are able to get access equally to all channels belonging on the basic service tier, and that this should be the case regardless of what type of system the channels are being carried on." Exhibit D, p.4.

## II. IN VIOLATION OF THE FEDERAL CABLE ACT, AT&T PLANS TO WEBCAST THE CITY'S PEG PROGRAMMING

As set forth above, AT&T is required to provide seven PEG channels on its U-verse system in the City. See Exhibits A and B. Instead, AT&T has informed the City that rather than provide seven PEG *channels*, it intends to provide the programming from the City's seven PEG channels as low quality<sup>6</sup> Internet *webcasts* available through web pages accessed by means of a series of click-through menus. All seven channels of programming (along with other PEG programming)<sup>7</sup> would be accessed from a single channel number which acts as a web portal – Channel 99 on AT&T's U-verse system in the City. See Exhibits C and D. By placing the City's PEG programming on a separate and inferior video delivery system from other basic tier channels, AT&T violates both the City's authority under the Federal Cable Act, found in 47 U.S.C. § 531(a) and the basic service tier requirements found in 47 U.S.C. § 543(b)(7)(A). Specifically, AT&T's planned provision of the programming from the City's *seven* PEG channels as low-quality Internet webcasts on *one* channel on AT&T's system (with impaired functionality and accessibility, and the specific webcasts accessed via web page menus), means that the City's PEG channels will not be part of the basic service tier.

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<sup>6</sup> Compared to other basic service tier channels.

<sup>7</sup> AT&T is proposing to place programming from throughout the region on Channel 99. AT&T's current plans appear to involve only carrying PEG programming on this channel. However, there is nothing to restrict AT&T from putting any programming it may view as unworthy of carriage on its main video system onto Channel 99 – such as leased access channels and the like. Channel 99 thus could rapidly become the ghetto for programming that AT&T would rather not provide on its main system.

This is because AT&T fails to provide (from a consumer's point of view) the City's PEG channels in a manner that is equivalent to how other basic tier channels are provided.<sup>8</sup> The result is that PEG channels are treated not only differently from other channels, but as a distinctly inferior and second class of service. In doing so, AT&T sends the clear message that the City's PEG channels are not important enough to warrant seven separate channels, like every other basic service tier channel. AT&T's approach directly contravenes the important role Congress assigned to PEG channels (serving what is discussed above as "a substantial and compelling government interest in diversity, a free market of ideas, and an informed and well-educated citizenry") and its consequent ban on treating them discriminatorily. H.R. Rep. 102-628 at 85.

AT&T provides all other basic tier channels in what appears to the consumer as the conventional manner, as a high-quality signal with each channel having a unique channel number. Thus consumers can simply enter the channel number directly or go to the program menu, find the channel they desire, select it, and in either case the desired programming instantly appears on the screen.

In contrast, to access the Internet webcast programming version of one of the City's PEG channels, consumers cannot find the City's seven PEG channels listed by name on AT&T's main program menu. Instead, consumers must go to AT&T Channel 99 where they must wait for the web browser-like application to load before they can access a web page that lists in alphabetical order many (sometimes on the order of 100) municipalities in the region. The consumer must scroll down to the City of Lansing, and click a link that accesses another menu listing the City's seven PEG channels. Upon clicking the link for the desired PEG channel, the Internet webcast

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<sup>8</sup> As discussed in footnote 17 below, AT&T is requiring that PEG programming be provided to it as a square picture that either does not fit TV screens, which are rectangular, or has to be "stretched" or "cropped" (with resulting distortion or loss of part of the picture, respectively) to fit. AT&T does not do this with other basic service tier programming.

of its programming is not instantly or even promptly displayed, as it is for other basic service tier channels. Instead, once the consumer has completed the preceding steps and selected a webcast, s/he must wait for 30 to 60 seconds (while the AT&T set top box loads and launches Windows Media Player, or some comparable program, which must find and load the PEG programming web stream) before the consumer can finally view the webcast.

In order to return to a "conventional" channel from the PEG webcast, the consumer cannot directly enter a channel number and instantly view the programming, as he or she would do when switching between conventional channels. Instead, the consumer must "back out" of the web page menu system to Channel 99, reverse the steps described above, and return to the world of "regular" TV channels. In other words, once a person views a PEG webcast,<sup>9</sup> s/he cannot return to a basic service tier channel by entering its number, as may be done from any other basic service tier channel on U-verse. These barriers, and the lowered quality and delays that consumers experience in viewing PEG programming on U-verse all mark PEG as something different in kind on the AT&T system - as a different and distinctly inferior category of service.

In fact, the differences in PEG delivery on the AT&T U-verse system are so dramatic that the California Public Utility Commission's Division of Ratepayer Advocates ("CPUC-DRA") has issued a "Consumer Alert" on their website (see Exhibits G and H) which states in part as follows:

**CONSUMER ALERT! AT&T's U-verse Public, Education, & Government (PEG) Viewing Experience**

Before you switch from traditional cable TV service to AT&T's U-verse service, you should be aware that finding your city council meeting or a high school football game on your local PEG (Public, Education, &

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<sup>9</sup> Technically, this problem occurs as soon as the customer exits AT&T's main video delivery system by entering the Channel 99 webcasting portal.

Government ) channels will be *much more difficult* than finding a regular, commercial station.

<http://www.dra.ca.gov/DRA/telecom/hot> , attached as Exhibit G (emphasis supplied).<sup>10</sup>

The CPUC-DRA video linked to the Alert that demonstrates how, in the words of the video, "AT&T has segregated public, education, and government programming from commercial broadcast and made it less accessible." The video produced by the CPUC-DRA demonstrates the lengthy waiting time a consumer experiences when switching from a commercial channel to a PEG channel. See the video at <http://www.dra.ca.gov/DRA/Telecom/hot/ATTs+U-verse+PEG.htm>.<sup>11</sup>

The requirement in the Communications Act for a basic service tier is substantive, and not just a category of labels (where all a cable provider has to do is "label" a channel as a "basic service"). As described above, in order to be on the same tier as other channels, a channel must not be treated differently from other channels on that tier *from a consumer's point of view*.

AT&T does not provide equal access to PEG channels when it carries programming from the City's *seven* PEG channels as low-quality Internet webcasts accessed from *one* channel number (99), when it imposes significant delays and other barriers to consumer access to PEG channels, or when it makes consumers select PEG programming from lengthy web page menus listing PEG channels from municipalities over a wide geographic area.<sup>12</sup>

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<sup>10</sup> As noted on the list of exhibits at the end of this Petition, the printouts of the web pages are without "frames," such that they display differently from the web pages as viewed online. The substance of the main portion of the pages is unchanged.

<sup>11</sup> Similar videos have been created, among others, by the Southwest Oakland Cable Commission (SWOCC) in Michigan, see: <http://www.youtube.com/watch?v=v6A-btugKdA>; the City of San José, California, see: <http://www.youtube.com/watch?v=YQIQHRLqz1o>; and the Media Center in the City of Palo Alto, California, see: <http://www.youtube.com/watch?v=vMZXP0Vkm9k> .

<sup>12</sup> The City does not object to the carriage of PEG programming from other communities

From a consumer's point of view, AT&T's planned method for carrying the City's PEG channels on its U-verse system does not treat the PEG channels in a manner equal to the other basic service tier channels. Therefore, the Commission must declare that AT&T is in violation of the Federal Cable Act and require AT&T to treat PEG channels the same as other basic service tier channels by providing each of the City's PEG channels in a high quality format<sup>13</sup> on its own discrete channel with a unique channel number.

### **III. AT&T VIOLATES THE FEDERAL CABLE ACT BY WEBCASTING THE CITY'S PEG CHANNELS IN A MANNER THAT IMPAIRS THEIR FUNCTIONALITY**

By webcasting the City's PEG programming, AT&T imposes a number of functional impairments on that programming that are not imposed on other basic tier broadcast channels. Namely, AT&T treats PEG channels unequally and in a discriminatory fashion in violation of the Federal Cable Act. Some specific examples follow.

#### **A. By Webcasting PEG Channels, AT&T is Impairing Emergency Alert Capability**

Sometimes emergency alert messages direct the viewer to a local government PEG channel for more information. However, the emergency alert capabilities of PEG channels are severely limited by the webcasting format that AT&T imposes. This shortfall was illustrated in recent testimony before the House Subcommittee on Financial Services. The Executive Director of Chicago Access Network Television testified to the difficulties local governments face when attempting to use PEG channels on AT&T's U-verse system for local emergency alerts.<sup>14</sup>

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on AT&T's Channel 99. However, the City's seven PEG channels must be on separate, individually numbered and fully accessible and functional channels, as described herein.

<sup>13</sup> I.e., not less than that for other basic service tier channels.

<sup>14</sup> Local emergency alert systems, and Commission orders endorsing and supporting them against various legal challenges are discussed in more detail in Section V, below.