

A detailed technical comparison of how AT&T treats PEG programming, on the one hand, and broadcast and commercial cable video programming, on the other, is not possible unless AT&T is compelled to provide the necessary information on both, which we believe the Commission should do. Among the relevant parameters for comparison between AT&T's treatment of PEG and of other programming would be frame rate, resolution, compression techniques and the resulting data rate, along with functionality and integrity of the various components of the signal, including how metadata contained in the Vertical Blanking Interval ("VBI") and Program and System Information Protocol ("PSIP") are treated. What AT&T has supplied to date is some, but only some, information about the resolution and data rate for PEG (but only PEG).

PEG programming on AT&T's U-verse's system appears to be encoded at a substantially lower bit rate than broadcast and commercial cable channels and, indeed, at a rate lower than is required to produce a standard quality TV signal. PEG programming on AT&T's U-verse system, is "encoded at a rate of 1.25 Mbps per stream."¹⁷ Yet an encoding rate of between 2.5 and 4 Mbps is generally required for a standard definition signal, and 8 Mbps for a high-definition signal.¹⁸ Thus, PEG programming will be inferior to other programming on AT&T's system, as it is encoded at a rate that delivers substantially less data than what is required for standard quality television signals.

¹⁷ Exhibit F at 1.

¹⁸ Merrill Lynch, "Everything over IP," at 30 (Mar. 12, 2004), available at http://www.vonage.com/media/pdf/res_03_02_04.pdf.

AT&T has stated that it has recently increased its PEG product pixel resolution from 320 x 240 to 480 x 480.¹⁹ But this is still less than standard broadcast television pixel resolution of 720 x 480. For PEG programming produced and delivered in standard TV resolution, AT&T's 480 x 480 PEG product pixel resolution will necessarily result in some loss of horizontal resolution. While we doubt AT&T imposes this resolution loss on television broadcast and commercial cable programmers on its U-verse system, it is impossible to tell with confidence, because AT&T has not publicly disclosed the technical parameters for its delivery of such other channels' programming.

As noted above, AT&T's PEG product cannot pass through to subscribers any closed captioning, SAP, and possibly the reference clock contained in the analog signal VBI and its digital signal equivalent in PEG programming.²⁰ This, too, indicates a technical distortion of PEG programming vis-à-vis other programming on AT&T's U-verse system.

Overall, PEG programming on AT&T's U-verse system appears to be subject to significant transmission, data and content constraints that broadcast and commercial cable programming channels on its system are not. While the Commission should require full disclosure from AT&T to understand the scope of technical differences between how AT&T treats PEG programming and how it treats other video programming channels, one conclusion is clear: From the subscriber's, and the PEG programmer's, standpoints, AT&T's PEG product

¹⁹ *Public, Educational, and Governmental (PEG) Access to Cable Television; Hearing Before the H. Subcomm. on Fin. Servs. and Gen. Gov't of the H. Comm. on Appropriations, 110th Cong. at 6 (statement of AT&T Inc.) (2008) ("AT&T Statement");* L.A. Letter at 2; AT&T's Letter to CPUC at 2.

²⁰ There may be additional ways that AT&T's PEG product adversely affects PEG signal quality and functionality beyond those issues discussed above. Closed captioning, SAP and possibly the reference clock contained in the VBI are video channel functions that in normal practice are passed through without interference, but are not passed through – at least not fully intact – by AT&T's PEG product. Other video channel functions may be similarly affected, such as reference signals for color correction and alignment (VITS, VIR) or other reference information for automated recording by host or third party systems, such as AT&T's own DVR features or TiVo.

singles out PEG programming, and only PEG programming, for disparate treatment, rendering PEG programming inherently inferior, in terms of accessibility, functionality and signal quality, to commercial video channels on the U-verse system.

AT&T has claimed that this discrimination against PEG is necessary due to the nature of its system,²¹ but it is far from clear that is true. If PEG programming were treated like broadcast and commercial cable programming on AT&T's system, the independent addressability of all of AT&T's set-top boxes ("STBs") would enable it to direct the specific PEG channels of the community where each individual subscriber resides to that subscriber's STB, and thus to provide the PEG programming of that particular subscriber's community to that subscriber in the same format and functionality as broadcast and commercial cable channels on AT&T's system.²² SureWest, a cable operator in Sacramento, operates an all-IPTV system, but unlike AT&T, delivers PEG channels in the same way as other channels on its system.

It appears that AT&T has made a number of engineering choices with respect to its network design and software designed to reduce the cost of upgrading its U-verse system versus the cost of building the fiber-to-the-premises system being incurred by other major providers. (Press reports suggest that Verizon's FiOS plant upgrade will cost approximately \$23 billion nationwide, while AT&T initially estimated its upgrade costs at approximately \$4.6 billion, and has since suggested it will spend more than \$6 billion nationwide.) While it may now cost AT&T money to bring its system into compliance with relevant law, the alternative – to allow a large provider like AT&T to implement a design that systematically discriminates against PEG

²¹ AT&T's Letter to FCC at 4 n.5.

²² See Exhibit G.

and thus fails to comply with legal requirements – would simply encourage all other providers to follow suit and discriminate against PEG as well.

AT&T claims that it has “worked with” local communities in designing its PEG product.²³ None of the Petitioners was ever contacted, nor are we aware of any national association or group representing PEG programmers that was ever contacted for input on AT&T’s PEG product *before* its basic design was in place. As far as it appears, AT&T made business decisions before it ever rolled out its U-verse multichannel video service to relegate PEG programming, alone among broadcast and commercial basic video programmers, to an Internet streaming video application with reduced accessibility, functionality and quality. AT&T’s claimed discussions with local communities about its PEG product occurred *after* AT&T’s basic design of that product, and were intended only to persuade local communities to accept that product, and perhaps to make minor improvements to it, *not* to change the basic, and inferior, software and system architecture of AT&T’s PEG product vis-à-vis broadcast and commercial cable channels carried on AT&T’s U-verse system.

AT&T has boasted that its PEG product represents a new technology that should be encouraged.²⁴ Petitioners support technological advances that result in improved functionality and quality for all video programming services. That is not the case with AT&T’s PEG product, however. It singles out community-based PEG channels and consigns them to functionality, accessibility and quality that is inferior to all other channels.

²³ AT&T’s Letter to FCC at 1; AT&T Statement at 4.

²⁴ AT&T’s Letter to FCC at 6; U-verse PEG Paper at 1.

II. AT&T'S PEG PRODUCT UNLAWFULLY DISCRIMINATES AGAINST, AND EXERCISES EDITORIAL CONTROL OVER, PEG PROGRAMMING IN VIOLATION OF THE CABLE ACT AND COMMISSION POLICIES CONCERNING PEG SIGNALS.

There can be no serious dispute that AT&T's PEG product discriminates markedly against PEG programming, in terms of accessibility, functionality and viewability, vis-à-vis broadcast and commercial cable channels on AT&T's U-verse system. This outright discrimination against PEG programming and PEG channels is directly contrary to Congress' expressed intent in enacting the 1984 and 1992 Cable Acts,²⁵ as well as longstanding Commission policy concerning PEG signal quality requirements.

We begin with Section 611 of the Communications Act, 47 U.S.C. § 531, 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. (PEG Petitioners' franchises, whether state or local, contain provisions requiring a cable operator to set aside such channel capacity for PEG use.²⁶)

²⁵ Cable Communications Policy Act of 1984, as amended, 47 U.S.C. §§ 521, *et seq.* ("1984 Cable Act"); Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 325, *et seq.* ("1992 Cable Act").

²⁶ See pp. 3-7 *supra*.

Other provisions of the Cable Act dealing with television broadcasters and commercial cable programmers likewise refer to "channel" capacity.²⁷ 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.²⁸

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 § 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 [television] licensees or owners of those media."²⁹ That "meaningful access" was in the form of "channels."³⁰ And with respect to those PEG channels, "cable operators act as a [sic] conduits."³¹ The term "conduit," of course, connotes non-discriminatory delivery without change in form or content.³² At the heart of § 611, then, 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 that is precisely what AT&T's PEG product provides to PEG programmers *and* viewers.

²⁷ 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).

²⁸ The Cable Act's frequent use of "channel" capacity for PEG use also raises a related, but separate Cable Act question: Whether AT&T's PEG product even delivers to PEG users a "channel" within the meaning of the Cable Act. 47 U.S.C. § 522(4). As we show in Part III below, it does not, and for that reason violates the Cable Act on the independent ground as well.

²⁹ 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").

³⁰ *Id.*

³¹ *Id.* at 35, *reprinted in* 1984 U.S.C.C.A.N. at 4672.

³² *Cf.* 47 U.S.C. § 153(43).

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 § 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.³³

The roots of this non-discrimination 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,³⁴ *i.e.*, retransmitted local broadcast channels.³⁵ 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.”³⁶ (PEG channels are Class II cable channels, as

³³ H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 85 (1992).

³⁴ See *1992 Cable Technical Standards Order*, 7 FCC Rcd. at 2021-22.

³⁵ See 47 C.F.R. § 76.5(r).

³⁶ *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”).

well as most popular advertiser-supported cable programming channels.³⁷⁾ 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 channel can potentially affect the quality of the other channel classes.*³⁸

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.*³⁹

³⁷ See, e.g., 1992 Cable Technical Standards Order, 7 FCC Rcd at 2022 n.5; 47 C.F.R. § 76.5(s).

³⁸ 1988 Cable Technical Standards FNPRM, 3 FCC Rcd at 5969 (¶ 16) (emphasis added).

³⁹ 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).

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 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.*⁴⁰

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 recently reaffirmed this PEG non-discrimination principle in the analogous context of an incumbent cable operator's shift of PEG channels to the digital tier:

⁴⁰ 1992 Cable Television Technical Standards Order, 7 FCC Rcd at 2024 (¶ 13) (emphasis added).

Cable operators may not discriminate against PEG vis-à-vis other basic tier channels in terms of accessibility.⁴¹ Yet that, as we have shown, is precisely what AT&T's PEG product does.

In fact, AT&T's discriminatory treatment of PEG programming should be considered to be a *de facto* exclusion of PEG from the basic tier, contrary to the Cable Act. *See* Petition for Declaratory Ruling, *Petition for Declaratory Ruling Regarding Primary Jurisdiction Referenced in City of Dearborn et al. v. Comcast of Michigan III, Inc. et al.*, No. _____, at 20 & n.26 (FCC filed Dec. 9, 2008) (PEG is not on basic tier if it "is much more difficult to locate or find, or requires a consumer to take significant additional steps to view compared to other channels carried on basic"). In her prepared testimony on September 17 before the Subcommittee of the Committee on Appropriations of the U.S. House of Representatives, FCC Media Bureau Chief Monica Desai stated: "Section 623 of the Communications Act requires cable systems to carry, on their basic service tier, any PEG channels required by the LFA. Section 76.901 of the Commission's rules defines the basic service tier as including, among other signals, any PEG programming required by an LFA."⁴² She explained:

The Commission's regulations state that the basic service tier shall include at a minimum all local broadcast signals and any PEG programming required by the franchise to be carried on the basic tier. *It has come to our attention that some programmers are moving PEG channels to a digital tier, or are treating them as on-demand channels. We are concerned by these practices. We believe that placing PEG channels on any tier other than the basic service tier may be a violation of the statute, which requires that PEG access programming be placed on the basic service tier. Subjecting consumers to additional burdens to watch their PEG channels defeats the purpose of the basic service tier. We believe*

⁴¹ 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").*

⁴² Desai Testimony at 9.

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.⁴³

Specifically with respect to the issue of AT&T's PEG product, Congressman Schiff asked Ms. Desai whether in her opinion it violated the Cable Act for AT&T to put all PEG channels on a single channel and make people go through menus to find them, making PEG channels inaccessible. Ms. Desai responded: "Right. The statute requires PEG channels to be placed on the basic service tier along with your local broadcast channels. *So to place additional burdens on consumers to have to find their PEG channels seems to defeat the purpose of the basic service tier.*"⁴⁴

In a letter sent to then-Chairman Martin on September 30, 2008, shortly after the hearing, House Appropriations Committee Leadership set forth its agreement with Ms. Desai's statement that PEG channels should not receive second class treatment and requested that the Commission determine whether such treatment is inconsistent with the Act and Commission rules:

In its U-verse cable service, AT&T delivers PEG programming in a manner that is different from its delivery of commercial channels. The service offers PEG programming via an Internet-based video stream at a single channel location and requires the viewer to load PEG programming through a series of menus. Witnesses told the subcommittee that this method of PEG delivery is slow and technologically inferior to how commercial channels are delivered over U-verse service. They cited inferior picture quality, lack of closed captioning or second audio programming, incompatibility with programmable recording devices, and absence of program listing for PEG programs.

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⁴³ *Id.* at 10-11 (emphasis added).

⁴⁴ *Id.* at 77 (emphasis added).

We agree with [Ms. Desai's] statement and believe that the concerns we heard at the hearing represent evidence that PEG channels are being assigned a second class status outside of the basic service tier. We ask the Commission to assess these concerns to determine whether the situations described are contrary to federal laws and regulations and, if so, take expeditious enforcement actions.⁴⁵

AT&T's PEG product violates longstanding Commission principles: It singles out PEG programming for discriminatory and uniquely inferior treatment, in terms of accessibility, functionality and signal quality vis-à-vis other programming on the AT&T U-verse system's basic, and most non-basic, tiers. The Commission should therefore rule in no uncertain terms that AT&T's PEG product improperly discriminates against PEG programming in violation of the Act and Commission rules and policies.

By failing to pass through closed captioning, SAP and other video-related information in PEG programming that it receives, AT&T's PEG product also violates the Act in yet another separate and independent way.⁴⁶ Section 611(e) prohibits a cable operator's "exercise [of] any editorial control over any [PEG] use of channel capacity." Yet, by removing or disabling these content-related function capabilities of the PEG signal it received, AT&T is doing just that: It is impermissibly exercising editorial control over PEG channel capacity by "editing out" part of the content of PEG programming.⁴⁷

⁴⁵ Letter from Jose E. Serrano, Chairman H. Subcomm. on Fin. Servs. and Gen. Gov't of the Comm. on Appropriations, *et al.* to Kevin J. Martin, Chairman, FCC (Sept. 30, 2008), available at <http://Serrano-house.gov/NewsDetail.aspx?ID=493>.

⁴⁶ As explained in Part I(B) above, in the encoding or decoding process AT&T removes much, if not all, of the video channel-related information in a PEG signal's VBI or digital PSIP.

⁴⁷ We note that AT&T has claimed that its U-verse video service is not a "cable service" and thus is not subject to Cable Act requirements. While we disagree (*see Part IV infra.*), even if AT&T were correct and its IPTV video offering is a non-cable "information service," then the Commission would have to consider whether AT&T's discrimination against PEG violates the Commission's *Policy Statement*, 20 FCC Red 14986 (2005), as we believe it would. *See Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, 23 FCC Red. 13028, 13050-51, at ¶ 41 (2008) (Internet provider's "network management practices [improperly] discriminate among applications and

(Continued . . .)

III. AT&T'S PEG PRODUCT FAILS TO PROVIDE "CHANNEL CAPACITY" FOR PEG USE WITHIN THE MEANING OF SECTION 611 OF THE ACT BECAUSE IT DOES NOT DELIVER "CHANNELS" WITHIN THE MEANING OF SECTION 602(4) OF THE ACT.

As noted above in Part II, Section 611 of the Cable Act enables franchising authorities to impose and to enforce requirements that cable operators provide "channel capacity" on their systems for PEG use. And as noted on pages 3-6 above, the franchising authority PEG Petitioners require cable operators to provide PEG channel capacity.

AT&T's PEG product, however, fails to provide such "channel capacity." The reason is that AT&T's PEG product does not provide PEG users with a "channel" within the meaning of the Act. Section 602(4) defines "cable channel" or "channel" as

A portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation).

47 U.S.C. § 522(4) (emphasis added). Commission regulations, in turn, define a "television channel" as

A band of frequencies 6 MHz wide in the television broadcast band and designated either by number or by the extreme lower and upper frequencies.

47 C.F.R. § 73.681. Included in a "television channel" are data signals in the VBI, or its metadata digital equivalent, that provide video-related information like closed captioning, timing and signal alignment information, and SAP. See 47 C.F.R. §§ 73.681 and 73.682(a)(22).

Unlike the case with broadcast and commercial cable video programming on its U-verse system, AT&T's PEG product does not deliver "channel" capacity within the meaning of

(... continued)

protocols rather than treating all equally," & provider improperly "determines how it will route some connections based not on their destinations but on their contents").

Section 602(4). Because Section 602(4) requires provision of capacity that “*is capable of delivering a television channel,*” it could be argued that, in a digital world or in an IPTV world, an operator may not need to provide 6 MHz for each channel. But even if that is true,⁴⁸ to provide the PEG “channel capacity” required by Section 611, AT&T’s PEG product must still provide for each PEG channel it is required to carry the IPTV equivalent of a “channel” – in other words, what AT&T provides to local broadcast stations and commercial cable programming channels on its U-verse system.

AT&T’s PEG product does not do that. As noted in Part I(A) above, PEG programming delivered over AT&T’s U-verse system lacks the accessibility, functionality, viewability and signal quality of the “channels” that its U-verse system provides to broadcast stations and commercial cable programmers. And as noted in Part I(B) above, the reason that is so stems entirely from the fact that AT&T’s PEG product delivers PEG video programming in a different, and technically inferior, way than it does other video programming.

To be a “channel,” AT&T’s U-verse must provide the 2.5 to 4 Mbps encoding speed that is required to deliver a standard definition channel, and 8 Mbps for any HD PEG programming. AT&T’s PEG product, however, encodes PEG programming only at 1.25 Mbps, rather than the 2.5 to 4 Mbps required to deliver satisfactorily a standard definition TV channel. See Part I(B) *supra*. AT&T’s PEG product also fails to pass through closed captioning and SAP information in PEG programming. In addition, unlike broadcast and commercial cable programming on the U-verse system, AT&T demotes PEG programming to a separate and lesser Internet-based video streaming application that must be independently loaded on AT&T’s system, and thus, again

⁴⁸ *But see Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order, 11 FCC Rcd 18223, 18262 & n.163 (1996)* (“Because there is no meaningful definition of a ‘channel’ in a digital world, bandwidth remains the only reasonable measure of capacity on the digital portion of an open video system”).

unlike other programming, PEG programming must be reloaded for each viewing and enjoys virtually none of the STB program recording and control functions that other programming enjoys. *See Part I supra.*

Thus, in addition to discriminating unlawfully against PEG channel programming, AT&T's PEG product separate and independently violates Sections 611 and 602(4) of the Act by failing to provide and deliver PEG "channel capacity."

IV. COMMISSION RULES REQUIRE CABLE OPERATORS AND VIDEO PROGRAM DISTRIBUTORS TO PASS THROUGH ALL CLOSED CAPTIONING IN PROGRAMMING INTACT AND DO NOT AUTHORIZE VIDEO PROGRAM DISTRIBUTORS TO REQUIRE PROGRAMMERS TO DELIVER PROGRAMMING IN OPEN CAPTIONING RATHER THAN CLOSED CAPTIONING.

Although AT&T's U-verse system passes through closed captioning in television broadcast and commercial cable programming delivered to it, AT&T acknowledges that it cannot and does not provide any closed captioning via its PEG product, and that it is not able to pass through to viewers closed captioning in any PEG programming delivered to AT&T with closed captioning.⁴⁹ AT&T does claim, however, that its PEG product can pass through programming that is delivered to it with open captioning.⁵⁰

"Open captioning" is "always-on" captioning that constantly blocks a portion of the picture despite the viewers' needs or desires with respect to captioning. Open captioning therefore interferes with viewing by subscribers who are not hearing impaired, and even with viewing by hearing-impaired viewers who do not wish to have captioning obscuring their view

⁴⁹ AT&T Statement at 6.

⁵⁰ *Id.*

of a portion of the picture.⁵¹ For example, open captioning would obscure PEG programming that has important information on the bottom third of the screen, such as some educational programming provided by Petitioner De Anza.

The Commission should declare that the Act and Commission rules require cable operators and VPDs to deliver intact to viewers all closed captioning in PEG programs that such operators and VPDs receive in closed captioning from PEG programmers.⁵²

A. Section 76.606 of the Commission's Rules Requires Cable Operators to Pass Through Closed Captioning in Any PEG Programming Delivered to Them.

Section 76.606 of the Commission's rules requires all cable operators to pass through closed captioning of any programming they receive with closed captioning.⁵³ The plain language of Section 76.606 clearly requires cable systems to deliver fully intact to viewers all closed captioning data to viewers in programming they receive from programmers:

... the operator of each cable television system shall deliver intact closed captioning data contained on line 21 of the vertical blanking interval, as it arrives at the headend or from another origination source, to subscriber terminals and (when so delivered to the cable

⁵¹ House PEG Hearing, 110th Cong. at 25 (2008) (testimony of Barbara Popovic, Exec. Dir., Chicago Access Network Television).

⁵² We recognize that current FCC closed captioning complaint rules require complainants to first send the complaint to the responsible VPD before filing it with the FCC, 47 C.F.R. § 79.1(g)(1), although the Commission recently amended those rules to allow closed captioning complaints to be filed directly with the Commission, serving the responsible VPD, and those new rules will soon go into effect. *Closed Captioning of Video Programming*, Declaratory Ruling and Order, 74 Fed. Reg. 1594 (Jan. 13, 2009) (to be codified at 47 C.F.R. pt. 79). This Petition, however, is not a closed captioning complaint. It seeks no formal Commission forfeiture sanction or other remedy against AT&T's closed captioning practices; rather, it seeks a declaration from the Commission construing its closed captioning rules to make clear that cable operators and VPDs are required to pass through intact to viewers closed captioning in PEG programming they receive from programmers, and that the open-captioning provision of § 79.1(e)(2) does not alter or qualify the pass-through obligations of §§ 76.606 and 79.1(c). That such a declaration would necessarily mean that AT&T's PEG product currently violates those rules does not transform this Petition into a closed captioning complaint. On the contrary, the Petition's requested ruling on the Commission's closed captioning rules would apply to all cable operators and VPDs, not just AT&T.

⁵³ 47 C.F.R. § 76.606.

system) in a format that can be recovered and displayed by decoders meeting Sec. 15.119 of this chapter.⁵⁴

The intent of this rule is to guarantee that closed captioning provided to cable operators by programmers is passed through fully intact to viewers. In adopting this rule, the Commission expressed its belief that "the transmission and preservation of closed captioning data serves an important public interest and that cable systems should work with other interested parties to ensure that such data is neither degraded nor removed from a system's channels."⁵⁵ The Commission further noted that Congress intended, when adopting the Television Decoder Circuitry Act of 1990 (Pub. L. 101-431), codified at 47 U.S.C. §§ 303(u) & 330(b), to guarantee delivery of closed captioning data while allowing cable systems to use existing security techniques.⁵⁶

As a cable operator, AT&T is required to pass through to viewers the closed captioning of any programming, including PEG programming, received with closed captioning. Section 76.606 of the Commission's rules contains *no* exceptions or exemptions, for open captioning or otherwise. Therefore, AT&T's PEG product violates Section 76.606 of the Commission's rules by failing to pass through to viewers closed captioning in PEG programming that it receives with closed captioning.

⁵⁴ 47 C.F.R. § 76.606(b).

⁵⁵ 1992 *Cable Technical Standards Order*, 7 FCC Rcd. at 2031.

⁵⁶ *Id.* at 2031-32, n 26 (citing House Report on the Television Decoder Circuitry Act of 1990 (Pub. L. 101-431), H.R. Rep. No. 767, 101st Cong., 2d Sess. (1990)).

B. Section 79.1(c) of the Commission Rules Requires All Video Program Distributors to Pass Through Closed Captioning in PEG Programming Delivered Them, and Section 79.1(e)(2) Does Not Authorize Video Program Distributors to Fail To Pass Through Closed Captioning.

Section 79.1(c) of the Commission's rules imposes obligations similar to those contained in Section 76.606 on all video programming distributors ("VPDs") rather than only cable operators:

All video programming distributors shall deliver all programming received from the video programming owner or other origination source containing closed captioning to receiving television households with the original closed captioning data intact in a format that can be recovered and displayed by decoders meeting the standards of part 15 of this chapter. . . .⁵⁷

AT&T, however, has claimed that its failure to pass through closed captioning in PEG programming does not violate Part 79 of the Commission's rules because it can pass through open captioning in PEG programming that PEG programmers deliver to it in open captioning and thus is protected by Section 79.1(e)(2).⁵⁸ Section 79.1(e)(2) provides that "[o]pen captioning or subtitles in the language of the target audience may be used in lieu of closed captioning."⁵⁹

AT&T's reliance on Section 79.1(e)(2), however, is misplaced for at least three reasons:

(1) AT&T is a "cable operator" and is therefore subject to Part 76 of the Commission's rules, which has no "open captioning" exception; (2) even if AT&T were not a "cable operator," the Section 79.1(e)(2) "open captioning" exception does not trump VPDs' absolute pass-through

⁵⁷ 47 C.F.R. § 79.1(c). VPDs are defined as entities who provide video programming directly to a customer's home, regardless of the distribution technologies employed by such entities. Accordingly, broadcasters, cable operators, wireless cable operators, instructional television fixed service or local multipoint distribution service operators, satellite master antenna television service operators, direct broadcast satellite providers, direct-to-home satellite service providers, home satellite dish providers and open video system operators must comply with this rule. *Closed Captioning and Video Description of Video Programming*, Report and Order, 13 FCC Red. 3272, 3286 (1997) ("1997 Closed Captioning Order").

⁵⁸ AT&T's L.A. Letter at 3.

⁵⁹ 47 C.F.R. § 79.1(e)(2).

obligation under Section 79.1(c); and (3) Section 79.1(e)(2) cannot be read to permit a VPD to require programmers to suffer open captioning of their programming even though those programmers have closed captioned their programming.

1. **AT&T is a Cable Operator, and Thus Section 76.606 of the Commission's Rules, Which Has No Open Captioning Exception, is Controlling with Respect to AT&T's Closed Captioning Pass Through Obligations.**

AT&T is required, as a cable operator, to pass through all closed captioning received with programming. Part 76 of the Commission's rules, which includes the Section 76.606 closed captioning pass through requirement, applies specifically to cable operators and, unlike Part 79, contains no "open captioning" exception. While cable operators are also VPDs within the meaning of Part 79, the more generally applicable rules of Part 79, which apply to all VPDs, extend, but do *not* replace, the more specific captioning requirements of Section 76.606, which are directly applicable to cable operators. The Commission made clear its intent to extend, *not* replace, the requirements of Section 76.606 when adopting Part 79:

*Thus, we will adopt and enforce a rule to ensure that captioned programming is always delivered to viewers complete and intact. This rule, Section 79.1(c), is an extension of the existing provision of the cable rules [Section 76.606] that requires cable operators to deliver existing captions intact. Accordingly, video programming providers must pass through any captioning they receive that is included with the video programming they distribute . . .*⁶⁰

Section 76.606 applies to cable operators, independently of and in addition to, Part 79, and unlike Part 79, Part 76 contains no "open captioning" exception. Thus, unlike other VPDs, cable operators do not have the benefit of an "open captioning" exception under the Commission's rules. As a cable operator, AT&T must adhere to Part 76, including the closed

⁶⁰ 1997 Closed Captioned Order, 13 FCC Rcd. at 3369.

captioning pass-through requirements. And AT&T's PEG product fails to do that with respect to PEG programming.

AT&T has argued elsewhere, however, that it does not provide cable service.⁶¹ We presume it will therefore contend that it is a non-cable operator VPD subject only to Part 79, and not Part 76, of the Commission's rules.

AT&T is wrong: It does provide cable service and thus is a "cable operator."⁶² The only court to address AT&T's argument that it is not a cable operator rejected it and ruled that, specifically with respect to U-verse, AT&T is a "cable operator" within the meaning of the Cable Act.⁶³ The court held that AT&T is a "cable operator" providing a "cable service" over a "cable system," as those terms are defined in the Cable Act.⁶⁴ Thus, AT&T's argument to the contrary is not only without merit but has been specifically rejected in a well-reasoned opinion by the only court to address it. AT&T is a "cable operator" and thus subject to the provisions of Section 76.606 of the Commission's rules. Therefore, even if § 79.1(e)(2)'s "open captioning" exception otherwise sanctioned AT&T's practice (and as we show below, it does not), as a cable operator AT&T cannot take advantage of that exception and must pass through all closed captioning received.

⁶¹ AT&T's Letter to FCC at 5-6.

⁶² 47 U.S.C. § 521 et seq. "Cable Operator" is defined as "any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system. 47 U.S.C. § 522(5). "Cable Service" is defined as: "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) 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). "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).

⁶³ *Office of Consumer Counsel v. S. New Eng. Tel. Co.*, 515 F. Supp. 2d 269, *recon. denied*, 514 F. Supp. 2d 345 (D. Conn. 2007), *appeal pending* No. 09-0116 (2d Cir. filed Jan. 9, 2009).

⁶⁴ *Id.* at 282.

2. **Even if AT&T Were Not a Cable Operator and Thus Not Subject to Part 76, the Part 79 "Open Captioning" Exception Does Not Absolve a Video Program Distributor of its Obligations under Section 79.1(c) to Pass Through Intact Closed Captioning It Receives from Programmers to Viewers.**

Even if AT&T were not a "cable operator" but a VPD subject solely to Part 79 rather than Part 76, the Section 79.1(e)(2) "open captioning" exception does *not* exempt AT&T from its obligation under Section 79.1(c) to pass through intact to subscribers all closed captioning received from programmers. As the Commission is aware, its captioning rules impose obligations on most video programmers to close caption their programming, but also imposes an *independent* obligation on VPDs that are exercising editorial control to pass through closed captioning contained in programming that they choose to carry. The pass-through obligation of Section 79(c), read in context, applies to the latter situation.

The "open captioning" exception in Section 79(e)(2), in contrast, allows a programmer to "use" open captioning rather than closed captioning in its programming, and it also allows a VPD like AT&T to pass through in open captioning programming *that it receives* in open captioning. It does *not*, however, give a VPD like AT&T license to disable, or fail to pass through, closed captioning in programming that is delivered to the VPD with closed captioning. That is, Section 79.1(e)(2) does not absolve a VPD from its absolute Section 79.1(c) obligation to deliver "all programming received from the video programmer, owner or other origination source containing closed captioning to receiving television households with the original closed captioning data intact . . ." In its *1997 Closed Captioning Order*, the Commission stated:

[W]e will require distributors to pass through existing captions where the programming they distribute is received with captions This requirement will not impose a burden on distributors, as all distributors have the technical ability to pass through captioning and it simply requires them to ensure that their technical facilities are in proper working order to pass through the

captioning data. Thus, *all* video programming distributors will be required to deliver *all* programming they receive that contains closed captioning, regardless of the programming source, to consumers *with the captions intact*.⁶⁵

The Commission went on to stress that “it [is] unacceptable that existing captions might fail to be transmitted in a complete and intact manner to consumers.”⁶⁶ Thus, the closed captioning pass-through obligation of Section 79.1(c) is absolute; it is not trumped by § 79.1(e)(2).

The “open captioning” exception under § 79.1(e)(2) is intended primarily to provide relief for programmers, allowing them to use open captioning rather than closed captioning in producing programming. The rule then, out of necessity, also allows VPDs such as AT&T to pass programming *that they receive in open captioning* on to viewers in open captioning without having to convert it to closed captioning. Section 79.1(e)(2) is *not*, however, a license for VPDs to fail to pass through closed captioning in programming that *they receive in closed captioning*. In discussing the open captioning exception in § 79.1(e)(2), the Commission stressed that it was primarily for video programmers, and that it entitled video programmers and VPDs to *use* open captioning, *not* to replace pre-existing closed captioning with open captioning:

We also will permit *video programmers* to count towards compliance with our rules any program that is open, rather than closed captioned. . . . Because this technique ensures the same accessibility as closed captioning, we will permit video programming providers and distributors to use open captioning.⁶⁷

The Commission thus made clear its intention to allow distributors, such as AT&T, to count the pass-through in open captioning of the programming that they receive in open

⁶⁵ 1997 Closed Captioning Order, 13 FCC Rcd at 3312 (emphasis added).

⁶⁶ *Id.* at 3368.

⁶⁷ *Id.* at 3311 (emphasis added).

captioning from programmers toward meeting their quantitative captioning obligations under the rules.⁶⁸ The Commission did not, however, provide VPDs like AT&T the right to fail to pass through intact to subscribers closed captioning already contained in programming that they receive and replace it with open captioning instead. We do not believe, for instance, that the Commission would construe § 79.1(e)(2) as permitting VPDs to fail to deliver intact to subscribers closed captioning received in programming from local broadcast stations or commercial cable programmers and instead to deliver such programming to subscribers only in open captioning. The result can be no different with respect to PEG programming, as § 79.1(e)(2) draws no distinction between PEG and other programming.

Therefore, even if AT&T were not a “cable operator,” § 79.1(c) requires it to pass through closed captioning received with PEG programming intact. Section 79.1(e)(2) does not permit AT&T to circumvent its obligations under § 79.1(c) to pass through *all* closed captioning received fully intact.

3. Section 79.1(e)(2) Does Not Allow a Video Program Distributor to Demand That If A Programmer Wishes to Caption Its Programming, It Must Open Caption and Not Close Caption That Programming.

The § 79.1(e)(2) open captioning provision permits “use[]” of open captioning in lieu of closed captioning. It says nothing about a VPD’s pass-through obligation for programming that it receives in closed captioning. The § 79.1(e)(2) open-captioning provision cannot mean that a VPD may compel its supplying programmers, if those programmers wish their captioning to be delivered to viewers, to endure delivery of their closed captioned programming only in open captioning and *not* closed captioning. Yet that appears to be precisely what AT&T requires with

⁶⁸ See 47 C.F.R. § 79.1(b).

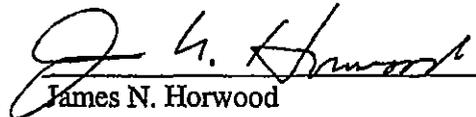
respect to captioned PEG programming. Permitting a VPD to compel programmers that have chosen to "use" closed captioning to provide open rather than closed captioning would fly directly into the face of the § 79.1(c) closed captioning pass-through obligation.

CONCLUSION

For the foregoing reasons, the Commission should grant this Petition and issue a declaratory ruling that:

1. AT&T's PEG product unlawfully discriminates against PEG programming and exercises editorial control over PEG channel capacity, in violation of the Cable Act and Commission rulings and policies;
2. AT&T's PEG product fails to provide PEG programming with "channel" capacity within the meaning of Sections 611 and 602(4) of the Act; and
3. Sections 76.606 and 79.1(c)(1) require a cable operator or VPD to pass through intact to subscribers all closed captioning in PEG programming, and Section 79.1(e)(2) does not allow a VPD to demand that, in order to caption its programming, a programmer must endure open captioning rather than closed captioning.

Respectfully submitted,



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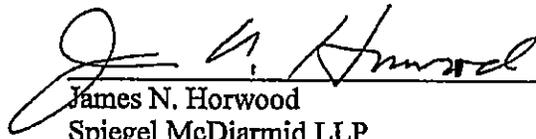
January 30, 2009

CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)

The below-signed signatory has read the foregoing Petition for Declaratory Ruling, and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for any improper purpose.

Respectfully submitted,

January 30, 2009


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