SPIEGEL & MCDIARMID LLP

GEORGE SPIEGEL (1919-1997)
ROBERT C. McDIARMID
ROBERT A. JABLON
JAMES N. HORWOOD
FRANCES E. FRANCIS
DANIEL I. DAVIDSON
THOMAS C. TRAUGER
JOHN J. CORBETT
CYNTHIA S. BOGORAD
SCOTT H. STRAUSS
LISA G. DOWDEN
PETER J. HOPKINS
DAVID E. POMPER
WILLIAM S. HUANG
PABLO O. NÜESCH
TILLMAN L. LAY
LARISSA A. SHAMRAJ

1333 NEW HAMPSHIRE AVENUE, NW
WASHINGTON, DC 20036

WWW.SPIEGELMCD.COM

Telephone 202.879.4000
Facsimile 202.393.2866
E-mail INFO@SPIEGELMCD.COM

Direct Dial 202.879.4045
EMAIL GLORIA.TRISTANI@SPIEGELMCD.COM

ASSOCIATES
STEPHEN C. PEARSON
ELAINE C. LIPPMANN
J.S. GEBHART
REBECCA J. BALDWIN
SHARON COLEMAN
WENDY M. WATSON*
*MEMBER OF THE CA BAR ONLY

OF COUNSEL
MARGARET A. McGOLDRICK
MARGARET A. MEISER
JEFFREY A. SCHWARZ
BARRY M. SMOLER
GLORIA TRISTANI
LEE C. WHITE

March 5, 2009

VIA ELECTRONIC FILING SYSTEM (ECFS)

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

Re: Petitions For Declaratory Ruling Regarding Public, Educational, and Governmental Programming, CSR-8126, CSR-8127, CSR-8128, MB Docket No. 09-13

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules this *ex parte* notice is filed on behalf of the Alliance for Community Media ("ACM"). On March 4, Matt Schuster, ACM Board Chair, Metro TV-Louisville Metro Gov., Louisville, KY; Rich Desimone, ACM Board Member, METV, Metuchen, NJ; Frank Jamison, ACM Board Member, Kalamazoo, MI; Erik Mollberg, Indiana Chair, Allen County Public Library, Fort Wayne, IN; Hap Haasch, ACM Central States Region Chair, Community Access Center, Kalamazoo, MI; Jan Howard, ACM Central States Region, Mid Michigan Area Cable Consortium, Mount Pleasant, MI; Nantz Rickard, Public Access Corporation of the District of Columbia, Washington, DC; Jim Horwood, ACM Board Member, Spiegel & McDiarmid LLP, Washington, DC; and Gloria Tristani, Spiegel & McDiarmid LLP, Washington, DC, met with Commissioner Jonathan Adelstein and Rudy Brioche, Legal Advisor to Commissioner Adelstein to discuss the above-referenced petitions. The parties discussed concerns regarding the treatment of PEG channels and other issues raised in the petitions and the attached materials. The parties also described some of the programming that is on PEG channels.

A copy of this letter and materials presented during the meeting are being filed via ECFS with your office. Please do not hesitate to contact me if you have any questions.

Sincerely,

Gloria Tristani

Attachments

cc: Commissioner Jonathan Adelstein
Rudy Brioche

Alliance For
Community Media

NATIONAL OFFICE
1100 G Street, NW
Suite 740
Washington, DC
20005
Voice: 202.393.2650
Fax: 202.393.2653
www.alliancecm.org

ALLIANCE FOR COMMUNITY MEDIA

Unlawful and Inferior Treatment of Public, Education, and Government Channels

PRESENTATION TO THE FEDERAL COMMUNICATIONS COMMISSION

Petitions for Declaratory Ruling Regarding Public, Educational
and Governmental Access Channels
MB Docket No. 09-13, CSR-8126 (ACM *et al.*),
CRS-8127 (City of Lansing, MI),
and CSR-8128 (City of Dearborn, MI *et al.*)

March 4, 2009

1. Problems with AT&T U-Verse PEG Product

- AT&T has aggregated all PEG programming from "channels" into a single application that is not easily accessible, and lacks the basic retrievability, functionality and viewability of noncommercial and commercial broadcast channels, defeating the purpose of PEG channels under the Cable Act.
    - A multi-step and time-consuming process is required to find and locate PEG programming.
    - The process for finding PEG programming is cumbersome, especially as compared to the ease with which viewers find programming on ordinary channels on U-verse.
    - AT&T's PEG product denies PEG programming the most basic function (available to viewers since the inception of multichannel video service) of effortlessly and almost-instantaneously switching back and forth between PEG programming and other channels.
    - AT&T's PEG product does not allow time-shifted viewing of PEG programming, an increasingly important feature of a every multichannel video programming platform responsive to viewer habits and expectations, because it does not allow the viewer to automate recording with a DVR—a feature available for other channels on U-verse.
    - AT&T's PEG product strips away all closed captioning functionality.
    - AT&T's PEG product strips away programming information or services contained in the Secondary Audio Programming ("SAP") portion of the program. SAP is used in PEG programming to, among other things, to carry Spanish language audio and provide reading services for the visually impaired.
- AT&T's U-verse PEG product fails to provide "channels" in accordance with the Cable Act.
- AT&T's PEG product fails to pass through closed captioning of PEG programming in violation of Commission rules.
- AT&T's PEG product exercises impermissible editorial control over PEG programming content in violation of section 531(e) the Act when it:
    - strips closed captioning (as it is doing to the Foothill-De Anza Community College District's (Palo Alto) programming for example) ; or

1. **Problems with AT&T U-Verse PEG Product** (continued)

    - strips SAP (as it is doing to Access Sacramento's and Raleigh's programming, for example), directly interfering with PEG producers' message and ability to communicate with their audiences when producers have translated their programs into another language, or are providing video description services as part of their program content, or who provide reading services for the visually impaired; or
    - when AT&T's PEG product provides only open captioning and thus blocks portions of the video program when neither the producer nor the viewer has opted for the obstruction of program content.

- AT&T is impermissibly discriminating against PEG channels, making them inferior to all other channels on the U-verse system –
    - in violation of the Act and Commission rules;
    - from the perspective of the viewer; and
    - from the perspective of the program producer who is effectively restricted from reaching his or her audience.
- AT&T is a "cable operator" providing "cable service" over a "cable system" and is subject to the requirements of the Cable Act.
    - The only court that has addressed AT&T's argument that it is not a cable operator rejected it (specifically addressing the U-Verse platform). *Office of Consumer Counsel v. S. New Eng. Tel. Co.*, 515 F. Supp. 2d 269, *recon denied*, (D. Conn. 2007), *appeal pending* No. 09-0116 (2nd Cir. Filed Jan. 9, 2009).
    - As defined by the Act.
        - "Cable Service" definition is transmission protocol agnostic.
        - "Cable Service" definition includes "subscriber interaction" for the "selection or use" of video programming or other programming service.
        - "Cable Service" is an "information service" under the Act.
        - Unlike the case with other information services, Cable Act draws jurisdictional boundaries by statute.
    - Competitive neutrality dictates that AT&T's landline mulitichannel video service be considered a "cable service," and that AT&T be considered a "cable operator" of a "cable system."

2. Comcast's Digital "Channel Slamming" of PEG channels

- The Act requires cable operators to carry PEG channels on the basic tier, along with broadcast channels, and regardless of whether effective competition exists.
- Comcast retains an analog basic tier on which local broadcasters continue to be located. But for an injunction in the *City of Dearborn* case, however, Comcast, would have digitized PEG channels, requiring subscribers to lease equipment to receive those channels and thereby effectively removing them from the basic tier.
    - Comcast would require subscribers to lease additional equipment to continue to receive PEG channels, a requirement that would apply to no other channels on the basic tier.
    - The additional charges for the equipment would effectively increase the cost of PEG channels, above and beyond the cost of basic tier programming, thereby placing PEG on another non-basic "tier of service" as defined by the Cable Act.
    - The proper perspective to determine whether any channel is in fact located on the basic tier is the subscriber's point of view.
        - The presence of additional consumer burdens to view a channel, whether equipment or cost, effectively separates such channels from the basic tier.
        - The need for the consumer to take affirmative steps to request and schedule separate installation of equipment to receive PEG channels, in addition to subscribing to basic cable service, is a requirement not imposed on any other basic tier channels.
        - Moving the dial location of the PEG channels to a separate location far removed from all other channels available on the basic tier hampers the subscriber's ability to locate, navigate and surf among all basic tier channels.
- Digitization of PEG, when coupled with requiring additional equipment and fees, discriminates against PEG channels, and is an evasion of the Cable Act and FCC rules that prohibit discriminatory treatment of PEG channels.
- Cable operators may not charge for equipment required to receive PEG channels unless the same charge is also imposed on subscribers for receiving all other basic tier channels.

3. Implications

- If the Commission were to tolerate AT&T's and Comcast's disparate treatment of PEG channels, all cable operators and other multichannel video providers would have a license to --
    - relegate PEG channels to viewer oblivion;
    - edit content on PEG channels; and
    - effectively defeat the entire purpose of PEG channels under the federal Cable Act.
- The FCC can expect that the operator(s) serving other communities would follow the same anti-PEG approaches taken by AT&T and Comcast, and either marginalize or effectively eliminate PEG access.

4. Request of the Commission

- The Commission should grant all three petitions concerning PEG access channels, to rectify current harms and protect PEG access in the future.

Alliance For
Community Media

Mission Statement

In order for democracy to flourish, people must be active participants in their government, educated to think critically and free to express themselves.

The Mission of the Alliance for Community Media is to advance democratic ideals by ensuring that people have access to electronic media and by promoting effective communication through community uses of media.

About the Alliance for Community Media

Since 1976, The Alliance for Community Media, a national nonprofit membership organization, has been dedicated to advancing democratic ideals by ensuring that all people have access to electronic media and by promoting effective communication through community uses of media.

Alliance members are committed to our Founding Fathers' principles that people must be active participants in their government, educated to think critically and free to express themselves in order for democracy to flourish.

The Alliance advances these principles through leadership, public education, a progressive legislative and regulatory agenda, technical assistance, coalition building and grassroots organization.

The Alliance represents the interests of over 3,000 Public, Educational and Governmental (PEG) access organizations and community media centers throughout the country and the millions of people who use them to communicate with their local religious, community and charity groups.

Local community groups, public schools, religious institutions, colleges and universities, government officials, the disabled, and second language communities, as well as national institutions such as NASA, the US Department of Education, and the US Army, to name a few, all use PEG access facilities and equipment to advance their causes through cable television. Local PEG access programmers produce over 20,000 hours of new programs per week, and serve more than 250,000 organizations annually through the efforts of an estimated 1.2 million volunteers.

The Alliance provides critical support services for its member community media centers and for the primarily volunteer staff that keep these electronic outposts of democracy in operation. By working with Congress, the Federal Communications Commission, state legislatures, state public utilities commissions, county and municipal officials, and coalition partners, the Alliance promotes favorable public policy legislation and regulation that supports PEG access.

For more information about the Alliance for Community Media, visit www.alliancecm.org.

Assessing the Damage:

Survey shows that state video franchise laws bring no rate relief while harming public benefits

About the Survey

In May 2008, the Alliance for Community Media (ACM) initiated an online survey regarding the impact of state video franchise laws. Members of ACM and the National Association of Telecommunications Officers and Advisors (NATOA) from around the country participated in this survey.

There were 204 respondents from 33 states, representing public, educational and governmental (PEG) access television centers. Of those respondents, 140 (from 18 states) now have a state video franchise law in effect. *This summary focuses on the responses from those with state video franchise laws.*

Companies applying to operate under new state laws

- 68% of survey respondents report that new entrants (AT&T and Verizon) have applied for state franchises.
- 52% report that their incumbent cable providers have applied for state franchises.

Impact on PEG Facilities and Services

Since the recent passage of state video franchise laws, many PEG centers already see a negative impact on their funding and operations, and a decrease in related services or benefits.

- *About 20% of respondents report PEG funding decreases since the advent of statewide franchising (including communities in CA, FL, IA, IN, KS, MI, MO, NC, OH, TX and WI), while cable operators report record earnings. In many communities, PEG funding that had been available for all PEG-related costs is now restricted to capital purchases.*

- *Respondents from 17 communities in 8 different states report loss of access to PEG facilities managed by cable operators soon after state video franchise laws removed local obligations from those companies. In addition, Comcast used state franchise law as the excuse to close all of its PEG facilities in northern Indiana and southwestern Michigan in September of 2007, prior to distribution of this survey.*

- *26% of respondents that had public cable drops in locations like libraries, schools and other public centers, and 41% of respondents in communities that had an Institutional Network connecting government facilities, educational institutions, and PEG facilities report the loss or reduction of those benefits (including communities in CA, CT, FL, GA, IN, MI, MO, NC, OH, TX and WI).*

Impact on Quality and Functionality of PEG Channels

About two-thirds of affected survey respondents from 13 states report that new state franchise service providers deliver PEG channels with impaired signal quality and functionality. For example, AT&T's "U-verse" system:

- *takes up to a minute or more to tune in a PEG channel*
- *presents PEG at inferior quality compared to commercial channels*
- *cannot support closed captioning or second audio programming*
- *does not support DVR recording (like "TiVo") of PEG channels*
- *strips away PEG channel number identity*
- *prevents viewers from channel surfing to and from PEG channels*

Impact on PEG Channels Carriage

Since the passage of state video franchise laws, PEG centers report reductions and threats to their existing channels. Operating under recently-adopted state rules, many new entrants and incumbents quickly took steps to limit PEG channel capacity and placement.

- *Nearly 25% of respondents said they lost or expect to lose channels since the advent of statewide franchising (including communities in CA, FL, GA, IN, KS, MI, MO, NC, OH, TX and WI).*
- *Respondents from 29 communities in 12 states report PEG channels being moved by incumbent cable operators to "digital only" channels, decreasing accessibility & visibility and increasing costs for subscribers*

- *Respondents from 8 states report that they must purchase special hardware and pay significant monthly fees to deliver PEG channels to new state franchise service providers. Such carriage fees were never required previously under local franchises, and are not paid by local commercial and public broadcast stations.*

Impact on Cable Rates

Survey respondents confirm what has been widely reported elsewhere: relief to the consumer from skyrocketing cable rates -- the major reason for adopting state video franchise laws -- has not occurred.

- *Two-thirds of respondents said basic cable rates have increased in their communities after a state video franchise law was adopted and a new competitor arrived.*
- *Only 1% said that rates have gone down.*

Preliminary Conclusions

Even in the early stages of adoption and implementation, the negative fallout from the state video franchise laws has been substantial and will continue to mount. As incumbents and new entrants apply to operate under these new franchises, more communities will experience the cutbacks and degradation of PEG services reported in this survey, leaving many communities in the nation without the diverse, local programming provided through PEG channels. This outcome directly contradicts the purpose stated in the Cable Act of 1984, that franchises be responsive to the needs and interests of the local community.

It's important to note that where PEG Access has greater protection in the state video franchise laws, AT&T is ignoring requirements to provide PEG at "similar" (CA law) or "equivalent" (IL law) signal quality and functionality as commercial channels. This disadvantages, rather than serves local communities.

It is our hope that the information drawn from this initial survey of communities affected by state video franchise laws will inform proactive legislative and regulatory action to preserve the localism and diversity of programming that emerges from PEG channels nationwide.

The Alliance for Community Media is a national membership organization representing more than 3,000 PEG access centers across the nation. Local PEG programmers produce 20,000 hours of new programs per week, and serve more than 250,000 organizations annually through the efforts of an estimated 1.2 million volunteers.

For survey information, contact ACM Public Policy Committee member, Barbara Popovic
(312) 738-1400, bpopovic@cantv.org