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

In the Matter of	)	
	)	
Petitions for Declaratory Ruling Regarding Public, Educational and Governmental Programming	)	**MB Docket No. 09-13**
	)	
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	)	City of Lansing, Michigan CSR-8127
	)	
Petition for a Declaratory Ruling That AT&T's Method of Delivering Public, Educational and Government Access Channels Over Its U-verse System Is Contrary to the Communications Act of 1934, as amended, and Applicable Commission Rules	)	ACM *et al.* CSR-8126
	)	
Petition for Declaratory Ruling Regarding Primary Jurisdiction Referral in City of Dearborn et al. v. Comcast of Michigan III, Inc. *et al.*	)	City of Dearborn, Michigan *et al.* CSR 8128

COMMENTS OF CITY OF LANSING, MICHIGAN

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March 9, 2009

COMMENTS OF THE CITY OF LANSING, MICHIGAN

These comments are submitted on behalf of the City of Lansing, Michigan (the "City" or "Lansing") in support of the Petition of the Alliance for Community Media *et al.* (CSR-8126) and the Petition of the City of Dearborn *et al.* (CSR-8128) filed in this docket.

I. COMMENTS OF THE CITY OF LANSING IN SUPPORT OF THE PETITION FOR DECLARATORY RULING FILED BY ALLIANCE FOR COMMUNITY MEDIA *ET AL.* IN CSR-8126

The City supports the requests for relief of the Petitioners in the Alliance for Community Media *et al.* case (CSR-8126) (collectively, the "ACM Petitioners") and adds the following comments.

A. The Commission Possesses Title I Ancillary Jurisdiction over AT&T to Require Nondiscriminatory Treatment of PEG Channels

If AT&T contends that it is not a "cable operator" and is therefore not subject to some or all the requirements of the Federal Cable Act, the Commission may impose basic service tier and non-discrimination requirements on AT&T's handling of PEG channels on the basis of the Commission's Title I ancillary jurisdiction.[1]

The Commission has in the past used its ancillary jurisdiction to ensure that reasonable consumer expectations and Congressional goals are met. *See Review of the Emergency Alert System, Second Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 13275, 13298; FCC 07-109, ¶ 48 (2007) (applying to wireline video providers certain requirements of the Federal Cable Act). The Supreme Court has approved of FCC rules derived under the Commission's ancillary jurisdiction that were intended to "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number

[1] This issue is explored more fully in Section V of the City's Petition in case CSR-8127.

of outlets for community self-expression and augmenting the public's choice of programs and types of services." *United States v. Midwest Video Corporation*, 406 U.S. 649, 667-668 (1972).

One of the Congressional goals of the Federal Communications Act is to make available "to all the people of the United States, without discrimination, . . . a rapid, efficient, . . . wire and radio communication service with adequate facilities. . . ." 47 U.S.C. § 151. While AT&T touts its U-verse service as a technological step forward, the way it is implemented for PEG channels is a significant step backward because, in contrast to the Congressional goals, it is less "rapid," less "efficient," it "discriminates" against both the hearing and visually impaired by raising barriers to access for them and thus is not "available" to "all the people" taking U-verse service. Thus, AT&T's handling of PEG on its U-verse system hinders the achievement of Congressional goals. It is therefore appropriate for the Commission to exercise its ancillary jurisdiction in this matter to fulfill Congressional goals and to affirm reasonable consumer expectations.

AT&T's service is clearly marketed to consumers as a cable service in competition with traditional cable services. Congress and this Commission established a set of laws and regulations that both shape and uphold consumer expectations with respect to cable services.[2] When AT&T competes with providers of traditional cable services but is not bound to follow the same rules as them, then local consumers suffer because regulations designed to benefit them (such as those discussed in the Lansing and ACM Petitions) are set aside by AT&T as not applicable to their service. The Commission should take this opportunity to affirm that when AT&T is competing for consumers of cable services, it is offering "cable services" and is bound by the requirements of the Federal Cable Act and its associated regulations - both directly under Title VI and pursuant to the Commission's ancillary jurisdiction under Title I.

[2] See discussion below in Section II. A-3 and in the City's Petition on the subject of viewing the Federal requirements from the consumer's point of view.

II. COMMENTS OF THE CITY OF LANSING IN SUPPORT OF THE PETITION FOR DECLARATORY RULING FILED BY *CITY OF DEARBORN ET AL.* IN CSR-8128

The City supports the requests for relief of the Petitioners in the *Dearborn et al.* case (CSR-8128) (collectively, the "Dearborn Petitioners"). Lansing wishes to emphasize that Comcast has a cable franchise with the City and the City has been affected by Comcast's plans to unilaterally move and digitize the City's PEG channels. Lansing has therefore benefitted from the injunction ordered by the U.S. District Court in Detroit in the case leading to Dearborn's Petition. For this reason, the City takes more than a passing interest in the Commission's deliberations on the questions posed by the District Court in CSR-8128. Lansing supports the Dearborn Petitioners' positions in general, and would like to add specific comments with respect to the following issues raised by the District Court.

A. Comcast's Actions Violate the Basic Service Tier Requirements

Comcast's actions violate the basic service tier requirements found in the Federal Cable Act. *See* 47 U.S.C. §543(b)(7)(A). Questions 2, 3 and 4 from the District Court sought clarification from the Commission on the following issues: (i) about the effect of rate deregulation on the basic service tier requirements; (ii) on whether the consumer's point-of-view should govern the determinations of when a channel is on the basic service tier and whether it is being treated discriminatorily; and (iii) on the criteria to be considered for determining when a channel is on the basic service tier. On all these questions the City supports the positions taken by the Dearborn Petitioners, and respectfully requests the Commission to grant the relief requested there for the reasons discussed below and in the Dearborn Petition.

1. Basic service tier requirements should be held to apply independently of rate regulation because they serve compelling governmental interests.

In addition to the points raised by the Dearborn Petitioners, Lansing calls the Commission's attention to the discussion of the basic service tier requirement on pages 9 to 13 of the City's Petition in CSR-8127, including note 5. There, the City addresses in detail the issues raised by the District Court in its questions 2, 3 and 4.

The City believes that it is important to note that while the basic service tier requirement is found in a section of the Cable Act addressing rate regulation, it in fact responds to Congressional concerns that are unrelated to rate regulation. These Congressional concerns were expressed in the legislative history to the 1992 amendments to the Cable Act, which noted that "[b]ecause of the interests served by PEG channels, the Committee believes that it is appropriate that such [PEG] channels be available to all cable subscribers . . . ." H.R. Rep. 102-628 102d Cong., 2d Sess. at 85 (1992). The basic service tier requirement is also a means to address the compelling interests of local government in localism, diversity and education. These are the very governmental interests that Congress explicitly recognized were served by PEG channels:

> The Committee believes that PEG access programming is an important complement to local commercial and noncommercial broadcasting to ensure that the government's compelling interests in fostering diversity and localism, providing educational and informational programming, and promoting the basic, underlying values of the First Amendment, are advanced by cable television. It has been demonstrated that where PEG channels exist, these interests have been well served.

Id.. For these compelling governmental interests to continue to be served by PEG programming, it must be available to all subscribers and provided in a manner that facilitates, not hinders, ready access by consumers.

2. Basic service tier requirements should be held to apply under the Commission's Title I ancillary jurisdiction even under effective competition.

Because the basic service tier requirements serve important Congressional purposes beyond the area of rate regulation, they should not be set aside when there is a finding of effective competition leading to rate deregulation. As the City explains in detail in its Petition, the Commission can and should exercise its ancillary jurisdiction to maintain the basic service tier requirements when rates are deregulated. The assertion of such jurisdiction by the Commission is "reasonably ancillary to the effective performance of [its] various responsibilities." *VoIP TRS Order*, 22 FCC Rcd. 11275, 11287; FCC 07-110, ¶ 22 (2007). By exercising its ancillary jurisdiction in this matter, the Commission can assure that reasonable consumer expectations and Congressional goals related to nondiscriminatory access to PEG channels, diversity in local programming and important sources of local information relevant to public safety and welfare are met. Therefore, the City respectfully requests that the Commission require that Comcast and other cable providers continue to meet the basic service tier requirements irrespective of whether there has been a finding of effective competition.

3. Basic service tier requirements and whether channels are being treated discriminatorily should be evaluated from the consumer's point of view.

As the City amply illustrates in its Petition in CSR-8127, it is consistent with both the language of the statute and the Commission's past practice to view the basic service tier requirements from the consumer's point of view. See *Oceanic Time Warner Cable, a Subsidiary of Time Warner Cable, Inc.*, 23 FCC Rcd. 12804, 12807, DA 08-1960, ¶ 8 (2008) ("[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."); *Review of the Emergency Alert System, Second*

Report and order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 13275, 13298, FCC 07-109, ¶ 49 (2007) ("the reasonable expectations of viewers should guide our efforts").

When one takes the consumer's point of view and examines how Comcast has proposed to treat PEG channels, it is clear that PEG channels are being marginalized and treated differently from other basic service tier channels. Alone among the basic service tier channels, the PEG channels under Comcast's plan will be moved into the upper tier of channel numbers and provided only in digital format. This action constitutes both a physical and technological separation of PEG from other basic service tier channels and the Commission should find that such treatment is in violation of the basic service tier requirements. The City supports the Dearborn Petitioners' conclusion that Comcast has violated the basic service tier requirements by unilaterally moving the PEG channels, and only the PEG channels, off the basic service tier and onto a digital tier of service.

B. By Treating PEG Channels Differently from Other Basic Service Tier Channels, Comcast Has Defeated the Congressional Purpose that PEG Channels Be Made Available on a Non-Discriminatory Basis

As the Dearborn Petitioners have illustrated, digitizing the PEG channels makes it more difficult and costly for many viewers to both access and view them, thus negatively affecting viewership for important sources of local information. By digitally transmitting PEG channels while other basic service tier channels are left on analog, Comcast is treating PEG channels in a discriminatory fashion that conflicts with express Congressional goals. It is also discriminatory treatment for Comcast to remove the PEG channels from their current locations (typically in the lower channel numbers among or near other basic service tier channels), and to put them hundreds of channels away from the local broadcast channels. The Commission should find that such physical displacement of the PEG channels constitutes discriminatory treatment and

conflicts with express Congressional goals. For these reasons, the City respectfully requests that the Commission require Comcast to treat PEG channels similarly to other basic service tier channels, both in terms of format and channel placement.

Respectfully submitted,

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March 9, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have on this 9th day of March, 2009, caused a copy of the foregoing Comments to be served on the following individuals via first class U.S. mail:

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