

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

In the matter of)	
)	
Petition for a Declaratory Ruling Regarding)	MB Docket No. 09-13
Primary Jurisdiction Referral in the <i>City of</i>)	
<i>Dearborn et al. v. Comcast of Michigan III, Inc.</i>)	CSR-8128
<i>et al.</i>)	
Petition for Declaratory Ruling on Requirements)	
for a Basic Service Tier and for PEG Channel)	CRS - 8127
Capacity Under Sections 543(b)(7), 531(a) and the)	
Commission's Ancillary Jurisdiction Under Title 1)	

**COMMENTS OF ALLIANCE FOR COMMUNITY MEDIA,
ALLIANCE FOR COMMUNICATIONS DEMOCRACY,
SACRAMENTO (CALIFORNIA) METROPOLITAN CABLE TELEVISION
COMMISSION,
FOOTHILL-DE ANZA COMMUNITY COLLEGE DISTRICT, CALIFORNIA,
CHICAGO ACCESS NETWORK TELEVISION,
ILLINOIS NATOA,
MANHATTAN (NEW YORK) NEIGHBORHOOD NETWORK,
BRONXNET (NY), BROOKLYN (NY) COMMUNITY ACCESS TELEVISION,
CITY OF RALEIGH, NORTH CAROLINA,
ACM WESTERN REGION,
ACM CENTRAL STATES REGION,
ACM MIDWEST REGION,
ACM NORTHWEST REGION,
ACM NORTHEAST REGION,
AND SEATOA**

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March 9, 2009

INTRODUCTION

The Alliance for Community Media (“ACM”), the Alliance for Communications Democracy (“ACD”), the Sacramento (California) Metropolitan Cable Television Commission (“SMCTC”), the Foothill-De Anza Community College District, California (“De Anza”), Chicago Access Network Television (“CAN TV”), the Illinois Chapter of the National Association of Telecommunications Officers and Advisors (“Illinois NATOA”), the Manhattan (New York) Neighborhood Network (“MNN”), BronxNet (New York), Brooklyn (New York) Community Access Television (“BCAT”), the City of Raleigh, North Carolina (“Raleigh”), the ACM Western Region, the ACM Central States Region, the ACM Midwest Region, the ACM Northwest Region, the ACM Northeast Region, and the SouthEast Association of Telecommunications Officers and Advisors (“SEATOA”) (collectively, “PEG Commenters”), file these comments in response to the part of the Commission’s February 6, 2009 Public Notice¹ seeking comment on the Petition for Declaratory Ruling filed by the City of Lansing, Michigan, CSR-8127 (“Lansing Petition”), and the Petition for Declaratory Ruling Regarding Primary Jurisdiction Referral in *City of Dearborn et al. v. Comcast of Michigan III, Inc., et al.*, filed by the City of Dearborn, Michigan, *et al.*, CSR-8128 (“Dearborn Petition”).

PEG Commenters support the Petitions and urge the Commission to grant both. At stake in the Petitions, as well as our own Petition for Declaratory Ruling, CSR-8126,² which was also included in the PEG Declaratory Ruling PN, is nothing short of the continued ability of public, educational and governmental (“PEG”) access programming

¹ Public Notice, “Entities File Petitions for Declaratory Ruling Regarding Public, Educational, and Governmental Programming,” DA 09-203 (Feb. 6, 2009) (“PEG Declaratory Ruling PN”).

² Petition for Declaratory Ruling of ACM *et al.*, CSR-8126 (filed Jan. 30, 2009) (“ACM Petition”).

to fulfill the vital public purpose it serves under the Cable Act: To provide a readily available means for residents in a community to view civic, governmental, educational and other valuable informational local programming about their own individual community, and to provide local residents, local governments, and local educational institutions with a means to reach and inform residents in their community through the television medium. Unless PEG channel programming is as accessible and functional for viewers on a cable system as local commercial channels are, those goals cannot be attained.

I. The Lansing Petition, CSR-8127.

PEG Commenters support the Lansing Petition for the reasons stated in the ACM Petition, CSR-8126. Because, like the ACM Petition, the Lansing Petition challenges AT&T's PEG product, we do not repeat the ACM Petition's arguments here.

II. The Dearborn Petition, CSR-8128.

PEG Commenters support the Dearborn Petition and urge the Commission to grant it. The practices of Comcast at issue in that Petition – digitalizing PEG channels, effectively increasing the price of obtaining PEG channels, and thus removing them from the basic analog tier that Comcast continues to provide (a/k/a “PEG digital channel slamming”) – are contrary to the Cable Act and FCC rules.

Like AT&T's PEG product, Comcast's PEG digital channel slamming inherently renders PEG less accessible to cable system subscribers than virtually all other basic tier and cable programming service tier commercial and non-commercial video programming on its system. It is important to note, however, that the manner in which Comcast's PEG digital channel slamming and AT&T's PEG product accomplish their respective

diminutions of PEG are quite different, creating different kinds of obstacles to PEG viewership and therefore presenting somewhat different legal issues for the Commission.

Stripped to its essentials, Comcast's PEG digital channel slamming is simply an effort to move PEG off of the basic analog tier and increase the price that subscribers must pay to receive PEG channels. The scheme also has the practical effect of increasing the price of Comcast's basic analog tier, since subscribers would still pay the same price for that tier, yet receive fewer channels (the PEG channels) for that price.

However, while the differences between AT&T's and Comcast's PEG schemes do not exonerate Comcast's scheme, it is worth emphasizing that those Comcast subscribers who jump through the hurdles, and pay the extra charges to Comcast, at least get a genuine PEG "channel" for their trouble (albeit one located in channel 900 "Siberia"), and that channel appears to be similar, in terms of retrievability and functionality, to other digital channels offered by Comcast. While the Comcast 900-level channel location impairs channel surfing using the "channel" button, a Comcast subscriber can at least go from commercial channels to PEG channels simply by punching in channel numbers or using the "last channel" function. To reach and watch PEG programming, a Comcast subscriber, unlike a U-verse subscriber, need not go through cumbersome menus or to wait for applications to load. Closed captioning works on Comcast's PEG channels, as does secondary audio program ("SAP") content. As pointed out in our Petition, PEG programming on AT&T's PEG product lacks *all* of these essential traits.

PEG Commenters turn now to the specific questions raised in the *Dearborn* petition.

Question 1: We agree with Dearborn that the Commission’s anti-evasion authority under Section 623(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(h), is not limited to rate regulation and includes Section 623(b)(7)(A), which requires carriage of PEG channels on the basic tier. Dearborn is also correct that Congress intended that PEG channels be available on a non-discriminatory basis and to all cable subscribers. Any other result would fly directly into the face of Congress’ purpose in enacting the PEG channels provisions of the Cable Act. PEG channels cannot “assur[e] access to the electronic media by people other than licensees or owners of those media,”³ nor can they “contribute to an informed citizenry”⁴ or serve “the time-honored principle of localism,”⁵ if they are relegated to a more expensive premium tier or are buried in channel Siberia.

Question 2: PEG Commenters agree with Dearborn that a cable operator’s obligation to provide PEG channels on the basic tier applies to all communities, regardless whether effective competition exists. As Dearborn notes, the presence of effective competition may end rate regulation, but requiring PEG to be on basic is not a form of rate regulation.

Question 3: Dearborn is clearly correct that determining whether PEG is part of a particular tier of service or being treated discriminatorily, should be analyzed from the consumer’s point of view. Any other approach would exalt form over substance and frustrate any meaningful consumer protection.

³ H.R. Conf. Rep. No. 934, 98th Cong., 2nd Sess. at 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 5667.

⁴ *Id.*

⁵ H.R. Rep. No. 628, 102^d Cong., 2nd Sess. at 183 (1992), 1992 WL 166238.

From the point of view of a customer who wishes to continue to subscribe only to analog basic service because he or she is only interested in receiving local broadcast and PEG channels, Comcast's PEG digital channel slamming has effectively made the PEG channels a new, more expensive offering. The issue is not whether the rate Comcast charges for the converter box is reasonable. Whether or not the rate is reasonable, it is a new addition to the price that analog-only subscribers must pay to continue to receive the PEG channels, a price increase that those subscribers do not have to pay to receive all other channels on Comcast's analog basic tier.

The Cable Act defines a "service tier" as "a category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator." 47 U.S.C. § 522(17). For Comcast's analog-only subscribers, "a separate rate" is in fact being "charged" for receipt of PEG channels. Thus, for them, PEG channels would now be available only at a "separate," and higher, rate than all analog channels on the basic tier. That Comcast chooses to assess that higher rate via a lease charge for the converter box rather than a nominally separate tier rate is a distinction without a difference from a PEG-watching, analog-only basic subscriber's point of view. The result is the same: The subscriber must pay more to receive PEG channels than for other channels on the basic tier. If that does not make the PEG channels a separate "service tier," the term blinks reality.

Separate and apart from the loss of PEG viewership attributable to analog-only subscribers who cannot afford or otherwise do not lease the necessary converter box, Comcast's PEG digital channel slamming will also decrease PEG viewership even among those subscribers who do lease the converter box. Common sense about subscriber

channel surfing habits teaches that cable programming located up at channel 900 “Siberia” is substantially less likely to be viewed than programming located at lower channel numbers, particularly channel numbers below 100 where PEG channels have almost always been located.

That common-sense conclusion is confirmed by industry practice and experience. While subscribers may have hundreds of channels available to them, they actually watch only a few. “[O]ut of more than 100 channels, the average [cable] viewer tunes in to 15.”⁶ Moreover, channels placed on “far-away channels” on digital tiers receive significantly less viewership because viewers are accustomed to finding those channels on lower channel numbers and continue to navigate the lower channels despite the move of programming to much higher numbered digital channels.⁷ Research analyzing the effects of cable operator program carriage and placement decisions likewise rests on the premise that placing programming on higher-numbered digital tier channels limits subscriber access to that programming and thus also disadvantages programmers placed at those locations.⁸

In short, Comcast’s proposed move of PEG channels to the “channel Siberia” of the 900-number channels will unquestionably limit the ability of a municipality’s residents to retrieve and watch these inherently local channels, both generally and

⁶ Randy Falco, *The Three C’s of the Digital Age*, Broadcasting & Cable (Mar. 19, 2006), available at http://www.broadcastingcable.com/article/103314-The_Three_C_s_of_the_Digital_Age.php.

⁷ Danny King, *Splitting Channels Crops Viewership*, TV Week (May 29, 2008), available at http://www.tvweek.com/news/2008/05/splitting_channels_crops_viewership.php.

⁸ See Dong Chen & David Waterman, *Vertical Ownership, Program Network Carriage, and Tier Positioning in Cable Television: An Empirical Study*, 30 Rev. Ind. Organ. 227, 232, 249-50 (2007).

PEG Commenters have little doubt that cable operators and programmers have studies quantifying the adverse effect on viewership of placing programming on the channel-900 level or other similarly remote locations. To the extent that cable industry or cable programmer commenters in this proceeding claim that placement on such remote channel locations does not adversely affect viewership, the Commission should require them to produce all studies in their possession that either confirm or contradict that claim.

vis-à-vis all other channels on Comcast's basic tier (and its most popular cable programming service tier as well). And it would concomitantly adversely affect PEG programmers by limiting the audiences for their programming. As noted above, these results are directly contrary to the nature and purpose of PEG channels as defined by Congress.⁹

Question 4. PEG Commenters fully agree with Dearborn's analysis of Question 4. We comment only to emphasize Dearborn's cogent argument that "if a set of channels is much more difficult to locate or find, or requires a consumer to take significant additional steps to view as compared to other channels carried on basic service, it is not the same 'category' of cable service." Dearborn Petition at 20 n.26. Under this standard, which we endorse, PEG programming imprisoned in AT&T's PEG product also would not qualify as being part of the basic service tier.

Question 5. Again, PEG Commenters agree with Dearborn on this question.

Question 6. We agree with Dearborn on this question as well. It is important to stress that it is not the digitalization of PEG, *per se*, that creates the problem. Rather, it is the digitalization of PEG when all other channels on the basic tier remain analog, thereby necessitating basic subscribers' need to obtain a converter and pay extra just to receive PEG channels.

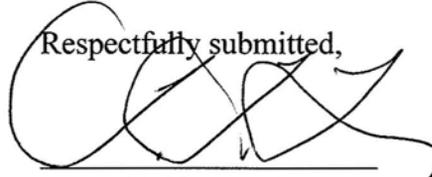
Question 7. Again, PEG Commenters agree with Dearborn.

⁹ See text at nn. 3-5 *supra*.

CONCLUSION

The Commission should grant the Dearborn and Lansing Petitions.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to be 'J. Horwood', written over a horizontal line.

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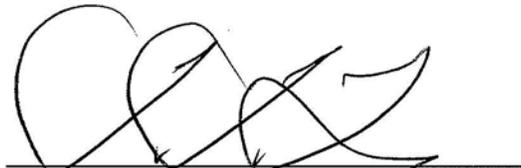
March 9, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have on this 9th day of March, 2009, caused a copy of the foregoing **COMMENTS ALLIANCE FOR COMMUNITY MEDIA, et al.** to be sent via first-class mail, postage prepaid, addressed as follows:

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