

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

In the matter of)	
)	
Comments regarding Petitions for)	MB Docket No. 09-13
Declaratory Ruling Regarding Public,)	
Educational, and Governmental)	
Programming Channels)	

COMMENTS OF THE CITY OF NEW YORK

I. City Supports Petitioners Arguments

The City of New York (“City”) appreciates the opportunity to comment on the petitions for declaratory ruling submitted by the City of Lansing, Michigan (“Lansing Petition”), the City of Dearborn, Michigan and other Michigan communities (“Dearborn Petition”) and the Alliance for Community Media (“ACM Petition”) regarding the treatment of public, educational and governmental cable television (“PEG”) channels consolidated in this proceeding under MB Docket No. 09-13.

When communities in the United States decide how land within their jurisdictions is to be used, such land is generally set aside predominantly for private, marketplace development. After all, the American tradition recognizes that the free market tends generally to motivate the most efficient uses of property to maximize benefits for the largest numbers of a community’s residents and citizens. But American communities also recognize that free market development does not effectively serve every land use need necessary to allow local citizens to enjoy full lives. Thus, for example, many communities set aside land within their boundaries for public parks that are not subject to marketplace development, but rather are set aside for free and open use to allow one and all to enjoy the benefits of open space, recreation, diverse cultural activities, public performances, etc.. Indeed, less than two weeks ago, the U.S. Supreme Court extensively cited the important values that the City’s Central Park, and similar spaces around the country, serve in their communities. See *Pleasant Grove City v. Sumnum* 172 L. Ed. 2d 853; 2009 U.S. LEXIS 1636 (Feb. 25, 2009).

The relationship between American communities and the resources offered by cable television technology is comparable in this sense to such communities and land use resources. The primary emphasis is on allowing the marketplace to efficiently serve many needs, but with an important recognition that some needs are not fully and entirely served by market forces and thus that, among things, certain resources are appropriately set aside for use for other than purely market-based purposes. One key way of

accomplishing these latter purposes is through setting aside cable television system capacity for public, educational and governmental (PEG) channels as contemplated by 47 USC Section 531. Whether in the context of land use planning or in the context of cable television franchising, achieving the right balance between resources dedicated to market-based use and those set aside for a diversity of uses that might not otherwise be effectively fulfilled by market-based decisions is always delicate matter requiring nuanced attention to the varied needs of different communities. Decisions as to how much land to dedicate to park space in one community may be very from another, based on each community's unique combination of size, demography, culture, history, economics and physical plant. Similarly, decisions as to the appropriate allocation of cable television capacity resources between market-based uses and PEG uses must be made, as federal law has long recognized, taking into account the specific context of each franchising authority's community.

In New York City, PEG channels provide vital local programming to cable viewers serving the needs of New York City's extraordinarily diverse population with information from and about community-based organizations, programming produced from and about a vast range of ethnic and cultural perspectives, and articulating an enormous range of views that might not otherwise have an opportunity to reach the sort of platform that PEG can provide. In negotiating our cable franchise negotiations, therefore, the City aggressively pursues adequate channel capacity for PEG programmers in order that they may continue to serve the essential needs and interests of the communities they represent over the course of the franchise agreements – particularly as such needs and interests evolve, along with the underlying cable technologies used to deliver the programming.

The Commission is likely to receive numerous comments in this proceeding from cable operators arguing that certain methodologies for the transmission of PEG programming compromise the ability of such operators to maximize the resources they can dedicate to market-demand programming and services. In reviewing such arguments, the City urges the Commission to remember that such arguments are both self-evident and besides the point. Of course the dedication of capacity to PEG use involves limitations on the use of such capacity for other, market-based programming and services. That is the nature of PEG, just as setting aside property for parks reduces the amount of property in a community available for market-based development. But that fact does not eliminate the importance of setting aside appropriate capacity for PEG any more than it eliminates the importance of setting aside appropriate space for park land. The appropriate context, as recognized by federal law, for determining how much and in what form capacity is to be set aside for PEG use is in the context of state and local franchising, not Commission fiat. The City urges the Commission to support Petitioners' requests as appropriately reflective of the long-standing federal mandate that local determinations of the allocation of capacity for PEG be allowed to prevail.

For these reasons, the City supports Petitioners' arguments. The City agrees with Petitioners that the basic tier composition requirements of 47 USC 543(b)(7)(A) continue in force even in communities where "effective competition" has been found. The statute

does not expressly mandate that the tier composition requirement sunset with effective competition, only that the rate regulations that set a maximum rate for such tier are sunsetted. For the Commission to find an implied effective competition sunset on the tier composition provisions of 543(b)(7)(A) would be to find an implied Congressional intent to undermine the very foundations of PEG expressed in federal law. For example, 47 USC Section 531(e) provides that "...a cable operator shall not exercise any editorial control over any public, educational or governmental use of channel capacity provided pursuant to this section". But this section of federal law could be essentially nullified if a cable operator bothered by the editorial content of a PEG channel could simply peel such channel off of its place on a basic tier packaged with the broadcast channels and charge, say, a separate \$200 per month fee to receive such editorially bothersome PEG channel. 543(b)(7) articulates an important feature going to the very nature of PEG channels regardless of whether "effective competition" is in place or not.

The City also agrees with Petitioners that providing PEG in a digital format while broadcast channels are in analog, or otherwise providing PEG programming in a different format from the one in which broadcast channels are provided, is not compliant with 543(b)(7)(A) even if no additional programming charge is imposed for the PEG programming. Requiring different types of equipment, or imposing different types of formats for transmission, are not providing PEG channels "in a separately available basic tier" comprised of both broadcast and PEG channels as required by 543(b)(7)(A).

Additionally, the City would also like to take the opportunity to emphasize a further important, indeed critical, point that is referred to only briefly in the three Petitions but that goes to the heart of the nature of PEG as described above in the beginning of the City's comments; namely, that federal law must be read as granting local franchising authorities ("LFA") by way of negotiated franchise agreements primary authority regarding the PEG tiering and transmission methodology issues raised by the Petitions. This point is entirely consistent with the City's support for the arguments articulated in the Petitions themselves, indeed it serves as an important conceptual element in rebutting the arguments likely to be made against the Petitions by cable operators. This point is fleshed out in the next section of these comments.

II. Local Franchising Authorities Have The Authority to Negotiate, as an Element in Franchise Agreements, PEG Tiering and Transmission Methodology Issues.

As noted above, New York City's PEG channels provide important programming and resources that might not otherwise be available on a cable television platform, including an enormous diversity of community generated and community interest programming, as well as government, educational and public safety-related services to City residents and tourists. Accordingly, the City has a strong interest in ensuring that this information is widely available and easily accessible to the maximum number of cable subscribers. The City is also interested in assuring that PEG channel capacity is sufficient to fully offer a

wide diversity of PEG programming. At the same time, the City as it negotiates cable franchise agreements with cable operators, also represents the interests of cable subscribers and potential cable subscribers who seek access to a deep and wide selection of market-based programming and services that cable operators seek to offer on their systems. The City believes that the local franchising authority has as a legal matter been designated by Congress and is as a policy matter best situated to negotiate as part of its franchise agreements, if and when it is appropriate to transmit PEG channels in tiers other than in basic and/or in formats other than analog in New York City where doing so would advance other competing interests of cable subscribers and potential subscribers .

Reference to this critical local franchising authority role can be found in the last lines on page 17 going over to page 18 of the Dearborn Petition. Petitioners importantly summarize their argument, stating that Commission should reaffirm "that operators have any obligation to carry PEG channels on basic -- absent any explicit provision to the contrary in an existing franchise agreement." The last part of this sentence is crucial to keep in mind both as a legal and policy matter.

As a legal matter, the proviso that PEG carriage on the basic tier is subject to express provision to the contrary in franchise agreements has long been recognized by the Commission. In its Report and Order adopting rules to implement the 1992 amendments to the 1984 Cable Act, the Commission found as follows:

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

The fact that the Congressional "PEG-on-basic" mandate is subject to potential local franchise provisions to the contrary derives as a legal matter from the interaction of two different statutory provisions, Section 543(b)(7)(A) (the PEG-on-basic provision), and Section 531 (which grants to local franchising authorities, in the first instance, the authority to negotiate for and reflect in franchise contracts the capacity that is to be dedicated to PEG and the methods for "providing and use of such channel capacity").

In essence, the PEG-on-basic mandate in Section 543(b)(7)(A) is a default position that applies *unless* franchise provisions agreed upon pursuant to Section 531 specify to the contrary. This relationship between the two provisions is inherent in the deference-to-localism nature of the PEG provisions of the Cable Act. The Cable Act enables franchise authorities to negotiate for a scope and use of PEG capacity but provides neither a minimum nor a maximum level of such capacity. If a franchising authority, for whatever local policy reasons, chooses not to include any PEG capacity at all in its local franchises, federal law does not preempt such decision with its own mandate to include a minimum of such capacity for PEG. By the same logic, if a franchise agreement expressly allocates PEG capacity to a certain amount of basic tier capacity and a certain amount of non-basic tier capacity, the default provisions of Section 543(b)(7)(A) give way to the PEG capacity-creating provisions of 531 without which

543(b)(7)(A) has no PEG-related substance. And, as a subset of that principle, if a franchise agreement expressly allocates PEG capacity, for example, to a certain amount of analog capacity and a certain amount of digital capacity, federal law enables the enforcement of those requirements without preempting (via 543(b)(7)(A)) the substantive compromise that such a franchise arrangement articulates.

Any other reading of the relationship of the two federal statutory provisions, 543(b)(7)(A) and 531, would lead to confusing and potentially counterproductive results. Were a franchise provision that establishes, say, six analog capacity PEG channels and four digital capacity PEG channels to be deemed preempted by Section 543(b)(7)(A), it would make an incoherent hash of the substantive agreement reached by the franchising authority and the cable operator. Would preemption result in the complete elimination of the four digital PEG channels that were agreed on, to the detriment of the interests of the local community in PEG service? Or, would preemption result in conversion of the agreed-upon digital capacity to analog (i.e., basic tier, in systems where broadcast is transmitted in analog format), with consequences, unintended and undesired by the franchising authority, for the capacity of the system to provide non-PEG services to subscribers? Neither result would be satisfactory, as they would each replace the considered judgment of the franchising authority, acting on behalf of the community as a whole, as articulated in the franchise agreement agreed to with the cable operator, regarding the capacity that is appropriate in the particular community to dedicate to PEG (a judgment the Cable Act specifically reserves to the franchising authority) with an unintended and counterproductive federal mandate. The only coherent understanding of the relationship between Sections 543(b)(7)(A) and 531 is that 543(b)(7)(A) is a default provision applicable where no contrary approach is expressly articulated in a franchise agreement.

This understanding is critical to the issues raised in the Petitions because recognizing the important role of local franchising undermines a key policy argument cable operators are likely to make in this proceeding. Cable operators are likely to argue that application of Section 543(b)(7)(A) in a manner that requires PEG channels to be offered in analog format will in some circumstances unduly limit the ability of the operator to offer valued non-PEG services to subscribers (more non-PEG channels for example, or more non-PEG channels in HD format, etc.). Indeed, some cable operators may argue that their ability to viably offer cable service at all in a particular community may depend on its ability to offer PEG services in one format rather than another. It is indeed possible, even likely, that in some communities the balance between the competing public interests in maximizing the availability of various types of non-PEG services and assuring that community needs for PEG services are appropriately met (a balancing that is one of the key matters reserved for franchise negotiations as described by the Cable Act) would weigh on the side of providing some or all PEG services in digital format even where broadcast channels are provided in analog, or in other ways providing at least some PEG services in a format different from the format used for broadcast or other channels. The crucial point here is that accomplishing that optimal policy balance between PEG and non-PEG capacity does not require the inaccurately and inappropriately cramped reading of Section 543(b)(7)(A) that some cable operators may propound.

Such optimal policy balance has always been intended by federal statute to be implemented at the franchising authority level, pursuant to franchise negotiations. If a cable operator has any argument that subscribers as a whole will be ill-served by 543(b)(7)(A)'s mandate to offer all PEG channel on the basic tier in the same manner as broadcast channels are provided, it need not look to a wholesale narrowing of the scope of 543(b)(7)(A). Such a cable operator need only make its argument to the particular franchising authority with jurisdiction in the particular community in question. The franchising authority is not merely a conduit for maximizing PEG capacity. To the contrary, a franchising authority's constituency is the entire community of cable subscribers and potential subscribers, the protection of whose interests require a balancing of important interests in assuring that appropriate capacity is available for both PEG and non-PEG services. The Cable Act from its first enactment has always recognized that cable operators left to their own devices will not sufficiently value the importance policies reflected by the setting aside sufficient *capacity* for PEG channels. Just so, if left to their own devices with respect to the *manner* in which PEG services are provided, cable operators will not reflect a balance between PEG and non-PEG interests; to the contrary it will often be in the economic interest of cable operators to *underestimate* the importance of PEG and the capacity that should be devoted to it.

On the other hand, the interest in PEG capacity should not simply trump as a matter of federal law potential interests in expansive and expanding non-PEG capacity. The best arbiter, as well as the Cable Act's intended arbiter, of these balancing issues, is the franchising authority, in franchise negotiations with the cable operator. A cable operator seeking relief from the mandate of Section 543(b)(7)(A) need merely approach its franchising authority, whether in a franchise adoption or renewal negotiation, or in the context of seeking any amendment to an existing franchise agreement, to make the argument that a particular new format for some or all PEG services would, based on its benefits for the provision to subscribers generally, including those seeking access to additional non-PEG services, be on balance in the best interests of the franchising authority's community as a whole. If as representative of its community, the franchise authority is persuaded that a change from the default presumption in Section 543(b)(7)(A) is in the best interests of all, balancing PEG values and the interests served by expansively available non-PEG services, such a change will be reflected by a provision in or amendment to the applicable franchise agreement. It is this franchise-based solution to the ostensible problems cable operators are likely to identify in their comments, and not any insupportably narrow reading of Section 543(b)(7)(A) itself, that the Commission can, should and must embrace as a response to the Petitions.

III. Conclusion

As discussed in these comments, therefore, federal law can and should, indeed in the City's view must, be interpreted as providing, in the words of the Dearborn Petition: "that operators have any obligation to carry [regardless of the applicability of 'effective competition'] PEG channels on basic -- absent any explicit provision to the contrary in

any existing franchise agreement." . The same concept is applicable to the understanding of what it means to thus provide PEG channels "on basic" – it means in the same format as that in which broadcast channels are provided, again "absent any explicit provision to the contrary in an existing franchise agreement." Any reading of the statute which requires all PEG channels to be on analog even despite a local franchising agreement to the contrary may inhibit the growth of PEG channels because it make it more difficult for cable companies to agree to add additional channels if every added channel were required to be analog. But at the same time any reading of the statute that fails to acknowledge the default assumption in federal law of a connection for PEG in both pricing and format to a broadcast basic tier, regardless of "effective competition status" would be inconsistent with the intent of federal law to assure that the availability of PEG access accurately reflects its importance both in the federal scheme and to the communities negotiate for such PEG access. Indeed, the City urges that it's reading is entire consistent with, and the City therefore endorses, the view of the FCC's Media Bureau Chief, in her letter dated January 18, 2009, expressing her views on the matters raised in the Petitions.

Respectfully submitted,

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