

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

In the Matter of)	
Petitions for Declaratory Ruling Regarding)	
Public, Educational and Governmental	)	MB Docket No. 09-13
Programming)	
)	
Petition for Declaratory Ruling on)	
Requirements for a Basic Service Tier and for	)	City of Lansing, Michigan
PEG Channel Capacity Under Sections	)	CSR-8127
543(b)(7), 531(a) and the Commission's)	
Ancillary Jurisdiction Under Title I)	
)	
Petition for a Declaratory Ruling That)	
AT&T's Method of Delivering Public,	)	Alliance for Community Media <i>et al.</i>
Educational and Government Access	)	CSR-8126
Channels Over Its U-verse System Is Contrary)	
to the Communications Act of 1934, as)	
amended, and Applicable Commission Rules)	
)	
Petition for Declaratory Ruling Regarding)	
Primary Jurisdiction Referral in City of	)	City of Dearborn, Michigan <i>et al.</i>
Dearborn et al. v. Comcast of Michigan III,	)	CSR 8128
Inc. et al.)	
)	

REPLY COMMENTS OF CITY OF LANSING, MICHIGAN

Teresa S. Decker (P-32114)
John W. Pestle (P-25471)
Kevin C. O'Malley (P-43621)
Timothy J. Lundgren (P-62807)
VARNUM
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

Brig Smith (P-63037)
City Attorney – City of Lansing, Michigan
124 W. Michigan Avenue
Lansing, MI 48933
(517) 483-4320
Attorneys for the City of Lansing, Michigan

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SUMMARY

This Commission should act quickly to avoid harm from the actions of AT&T to the public, education and government ("PEG") channels of municipalities such as the City of Lansing, Michigan ("City"). AT&T's manner of providing its "PEG product" endangers the continued vitality of PEG channels and risks initiating a race to the bottom in terms of PEG channel availability and functionality nationwide by all cable providers. To the extent that AT&T escapes from its obligation to provide fully functional PEG channels, other cable operators may raise First Amendment and other similar arguments to likewise escape such regulation. The effect on PEG channels nationwide could be devastating.

AT&T attempts to avoid its Federal obligations by denying that it is a cable operator. However, several provisions of Federal law contradict AT&T's position, including Section 651 of the Communications Act which provides only four regulatory categories in which phone companies may provide video service. This Commission has repeatedly held that telephone providers who are providing video service must fall into one of the four statutory categories. Of the four categories, AT&T is clearly not a radio-based service nor is it a common carrier of video traffic. If a provider does not fall into these first two categories, then they *must* fall into one of the other two categories set forth in Section 651(a)(3), namely, either a certified open video system (which AT&T is not) or a cable operator under Title VI. Therefore, under the unequivocal language of the Communications Act, AT&T's U-verse system has to be operated as a cable system subject to Title VI.

In addition, AT&T must also satisfy the requirements of Title VI of the Communications Act because AT&T's U-verse system meets the definitions of both a cable operator and a cable system under Title VI. The degree of interaction required for a subscriber to select channels on

the U-verse system is entirely consistent with the definition of "cable service" in the Communications Act. This was the finding of the only Federal court that has examined this issue. See, *Office of Consumer Counsel v. Southern New England Telephone Company, d/b/a AT&T Connecticut, Inc.*, 515 F. Supp. 2d 269 (D. Conn. 2007). While AT&T argues that its system has changed since that court decision, it has offered no description of what changes have occurred or why such changes would be legally significant in altering the classification of AT&T's cable service.

AT&T has violated its Title VI obligations in several ways. By repackaging PEG channels on its system as its own "PEG product," AT&T is both exerting unlawful editorial control over and also systematically discriminating against those PEG channels in violation of Title VI of the Communications Act. AT&T's editorial changes and discriminatory actions involved in repackaging include: (i) combining multiple program streams onto a single channel, (ii) providing on the system's program guide only a caption generated by AT&T about the channels rather than the actual programming, and (iii) failing to provide the functionality of ordinary channels – such as closed captioning and time shifting capability. The editorial control over PEG channels involved in taking these steps violates Section 611(e) of the Communications Act.

AT&T has also violated Federal requirements by treating municipal PEG channels as its own "PEG product." Such conduct constitutes discrimination against PEG channels in violation of the Communications Act. By assembling the programming from discrete channels and providing it through a single channel with limited functionality and lower quality, AT&T effectively segregates and devalues PEG programming. Contrary to AT&T's assertions, the differences in AT&T's technology from that of traditional cable providers do not make AT&T's

proposed treatment of the City's PEG channels acceptable. AT&T does not treat its broadcast channels in this manner, and there is nothing inherent in PEG channels that requires that they be treated any differently than broadcast channels in terms of how they are carried and displayed. Therefore, it appears that AT&T's systematic discrimination against PEG channels is motivated by simple convenience and not driven by technological necessity.

AT&T attempts to derail the City's Petition by claiming that the Commission actions the City requests can only be accomplished in a rulemaking proceeding. However, AT&T misunderstands the relief that the City is seeking. The City does not seek new rules, but rather an order from this Commission that AT&T cease to discriminate against PEG and provide the PEG *channels* as required by Federal law.

AT&T has attempted to dissuade this Commission from taking action on the City's Petition by asserting that such action would violate AT&T's First Amendment rights. In point of fact, any burden on AT&T is both miniscule and self-inflicted, because AT&T designed its system in such a way as to make compliance with Federal law more challenging. AT&T cannot rely on deficiencies *it* designed into its system as an excuse for failing to comply with Federal law and franchise requirements. AT&T's protests that it lacks available channel space certainly do not apply in the City of Lansing, where AT&T's online channel lineup shows ninety-two open channels not being used in the 1-100 range. In any event, AT&T can use the standard industry practice of "channel reuse" to provide multiple PEG channels to multiple communities if there is a real channel availability problem.

There is thus no impediment to the Commission acting to protect PEG channels by requiring AT&T to cease its discriminatory and unlawful treatment of them as its own "PEG

product." The City respectfully requests this Commission to order AT&T to carry the City's PEG channels as separate and fully functional channels on its cable system.

"Communications Act"). For these reasons, it is essential that the Petitions in this docket are granted.

Compared to the incumbent cable companies, AT&T is currently carrying a minuscule number of PEG channels on its systems. Comments filed in this docket by the Michigan Municipal League and Michigan Townships Association (on behalf of all local franchising authorities ("LFAs") in Michigan) demonstrate that in Michigan AT&T is carrying PEG channels from only *seven (7) percent* of the LFAs that it serves.¹

AT&T's Comments in this docket demonstrate that the 7 percent figure is representative of AT&T's carriage of PEG channels nationwide. Thus, AT&T stated in its Comments that it provides "approximately 248 streams of PEG programming from 132 cities." AT&T Comments at 12. Given that AT&T provides local phone service in 22 states² (including such large states as California, Ohio, Texas and Florida), providing PEG channels from only 132 cities is a dismal showing - - the equivalent of AT&T carrying PEG channels from only six (6) cities in each of the States where it provides local phone service!

It is also worth noting that AT&T has elected to provide its U-verse service primarily in urban areas, which are the communities where PEG channels are most heavily programmed and highly watched. Many of these communities do not have their PEG channels on AT&T's system because of the discriminatory treatment of PEG channels by AT&T. *See* Comments referenced in footnote 16 in Section VI below. Thus, by discriminating against PEG programming on its

¹ Comments of Michigan Municipal League and Michigan Townships Association at 3-4. Michigan's municipalities report that starting shortly after the Comments were filed, AT&T began contacting municipalities to pressure them to add PEG channels to AT&T's U-verse system.

² California, Nevada, Kansas, Oklahoma, Texas, Wisconsin, Missouri, Arkansas, Louisiana, Michigan, Indiana, Ohio, Illinois, Kentucky, Tennessee, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina and Connecticut.

system, AT&T's actions have the potential to harm many of the most heavily watched and vibrant PEG channels in the country.

Unless AT&T's systematic discrimination against PEG channels is stopped by this Commission, AT&T's actions create a risk of harm beyond viewers not being able to find PEG channels on AT&T's system or encountering the barriers to viewing the channels erected by AT&T. The additional harm may arise from incumbent cable operators if they begin to claim that because AT&T is not carrying PEG channels, or is not carrying them as conventional channels, then they likewise cannot be required to carry PEG channels or provide them as conventional channels. Such potential claims may be based on non-discrimination provisions in state statutes or local franchises, or on Constitutional (e.g., First Amendment) grounds, but presumably would make the same basic point – incumbent cable companies need not carry PEG channels if AT&T is not carrying them – nor devote more resources to them than AT&T does. Allowing AT&T to provide less than the incumbent cable operators creates a "race to the bottom" effect that will threaten the continued existence of PEG channels.

More is at stake in these proceedings than a series of technical rulings. In many respects, these cases implicate the continued viability and carriage of PEG channels on cable systems nationwide. It is therefore important that the Commission promptly grant the City's Petition in order to preserve PEG channels, enforce Title VI of the Communications Act and uphold Congressional intent regarding PEG channels.

II. SECTION 651 OF THE COMMUNICATIONS ACT REQUIRES THAT AT&T'S U-VERSE SYSTEM BE SUBJECT TO TITLE VI

In 1996, Congress specified that there are four methods – and only four – by which a phone company can provide video service. This Commission has repeatedly recognized this

Congressional directive. Under that Congressional directive, AT&T's U-verse system is a cable system.

A. Congress Provided Four Ways for Phone Companies to Provide Video Service.

In 1996 Congress significantly amended the Communications Act with the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("Telecommunications Act of 1996"). In the video area, Congress made two changes that are pertinent here. First, it repealed both a ban on phone companies entering the cable business and the Commission's video dial tone rules (which attempted to provide a method for phone company participation in the video business).

Second, Congress enacted Section 651 of the Communications Act, which sets forth a comprehensive and exclusive regulatory scheme with four exclusive means for telephone companies to provide video programming. The first means is as a radio-based system, which U-verse is clearly not. The second means is as a common carrier of video traffic, which AT&T has not contended that it is. If a provider does not fall into these first two categories, then it *must* fall into one of the other two categories set forth in Section 651(a)(3):

(3) CABLE SYSTEMS AND OPEN VIDEO SYSTEMS.--To the extent that a common carrier is providing video programming to its subscribers *in any manner other than that described in paragraphs (1) and (2)*--

(A) such carrier *shall be subject to the requirements of this title*, unless such programming is provided by means of an open video system for which the Commission has approved a certification under section 653; . . .

47 U.S.C. Section 571(a)(3) (emphasis supplied). The provisions of Section 651 are clear, direct and unambiguous. As set forth in subsection 651(a)(3), if a common carrier is providing video programming to subscribers in any manner other than as a radio service or as a common carrier,

then the carrier is subject to the requirements of Title VI, unless the programming is provided as an open video system.

There is no question that AT&T's U-verse system is not a radio-based system or a common carriage system. There is no question that AT&T has not sought certification as, nor does it desire to be, an open video system. Therefore, under the unequivocal language of the Communications Act, AT&T's U-verse system has to be operated as a cable system subject to Title VI.

B. The Commission has Confirmed That There are Only Four Methods for a Phone Company to Provide Video Service. .

This Commission has repeatedly affirmed that phone companies providing video services are limited solely to the four methods described by Congress in Section 651. For example, immediately following the passage of the Telecommunications Act of 1996, this Commission instituted its open video system rulemaking proceeding to set forth rules implementing that option. In its second order in that proceeding, this Commission reviewed the legislative history and emphatically stated that phone companies now have four options (but only four) for the delivery of video programming:

The alternatives for the delivery of video programming services by telephone companies are set forth in Section 302 of the 1996 Act, which establishes a new Part V (Sections 651 through 653) of Title VI of the Communications Act. *The specific entry options for telephone companies entering the video programming marketplace are set forth in Section 651.*

Implementation of Section 302 of the Telecommunications Act of 1996, Second Report and Order, 11 FCC Rcd. 18223, 18229 (1996) (citations omitted) (emphasis added) ("OVS Second Report and Order"), *aff'd in part, sub nom., Dallas v. FCC*, 165 F. 3d 341 (5th Cir. 1999).

Three years later, in the *Entertainment Connections* case, this Commission reiterated the point that phone companies are Congressionally limited to four options for providing multichannel video service: "Section 651 of the Communications Act sets out *four options* for the provision of video programming services provided by common carriers." *Entertainment Connections, Inc.* 13 FCC Rcd 14277, 14298 (1998) (citations omitted) (emphasis added), *aff'd sub nom City of Chicago v. FCC*, 1999 F. 3d 424 (7th Cir. 1999), *petition for rehearing denied*.

The statutory directive is clear: There are only four options for a telephone company to provide multichannel video service. On these facts, AT&T's U-verse system *has to be a cable system*.

C. To Comply with Section 651, AT&T's Cable System Must be Regulated as a Cable System under Title VI .

In order to be in compliance with Section 651, AT&T's U-verse system must be regulated as a cable system under Title VI. Such conclusion is reinforced by three additional points.

First, there is AT&T's historical course of conduct in Michigan with respect to providing video service. Subsequent to the passage of the Telecommunications Act of 1996, AT&T Michigan began providing video service in Michigan. However, AT&T Michigan did not avail itself of a "fifth" regulatory category, such as it now effectively claims exists. Instead, its sister company, Ameritech New Media, obtained conventional cable franchises in compliance with Title VI – ultimately obtaining cable franchises from over forty (40) suburban Detroit communities and an approximately equal number from communities in the Chicago area and others in adjacent States.³ Thus, AT&T's own past actions belie its current claim that it is not a cable system.

³ In 2001 AT&T sold its cable systems in Michigan and elsewhere to Wide Open West. Now it is trying to get back into the video business.

Second, in the Telecommunications Act of 1996, Congress created a "less regulatory" or "cable lite" video delivery system for phone companies, termed an "open video system." See Communications Act, Section 653. This Commission spent significant effort implementing this Congressional directive in its 1996 Open Video System rulemaking. See, e.g., the OVS Second Report and Order. That rulemaking was largely wasted effort if, in fact, Congress had created a "no regulation" video delivery option for phone companies, as AT&T now apparently claims.

Third, in its Comments, AT&T notes the possibility of Constitutional challenges if its self-created regulatory category is not upheld.⁴ However, as noted below, if AT&T is permitted to continue operating a no-regulation means for video delivery, while cable companies must continue complying with Title VI of the Communications Act (the "Federal Cable Act" or "Cable Act"), there is a significant likelihood of Constitutional challenges by cable companies and others. Therefore, far more serious Constitutional objections are likely to arise if AT&T is permitted to continue operating in violation of the Communications Act – and in a manner that incumbent cable operators believe unduly favors AT&T – than if this Commission enforces the Communications Act as requested by the City of Lansing and Alliance for Community Media.⁵

In summary, Congress unequivocally specified that there are only four ways for telephone companies to provide video service. This Commission has repeatedly affirmed these four available options. Since U-verse it is not radio-based, a common carrier, or an open video system, AT&T must comply with Title VI and be regulated as a cable system. In actual fact, as discussed below, U-verse is a cable system as defined in Title VI.

⁴ There is no basis for such challenges, as discussed below.

⁵ And given Congress's strong statements in favor of PEG and Title VI, it would not have taken steps to circumvent Title VI and its PEG protections without explicitly saying so.

III. AT&T MEETS THE DEFINITIONS OF CABLE OPERATOR AND CABLE SYSTEM UNDER TITLE VI

As the Petitions in this docket set forth, AT&T's U-verse system clearly meets the definitions of cable operator and cable system under Title VI. AT&T has utterly failed to respond in a meaningful way – which leaves this Commission with a solid record on which it can and must find that AT&T's U-verse system is a cable system.

A. AT&T Did Not Substantively Refute That it is a Cable Operator Offering Cable Service Over a Cable System.

Interestingly, AT&T devotes just seven (7) of the 68 pages of its Comments to the threshold question of whether it is a "cable operator." Even more remarkable is the fact that AT&T devotes its entire seven-page effort on this topic, not to persuade the Commission that it is not a cable operator, but attempting to convince the Commission to ignore the issue altogether. The issue, however, cannot be ignored. As set forth below, AT&T's U-verse service is a cable service within the definitions of Title VI, and therefore AT&T is a cable operator and must comply with the Federal Cable Act and related regulations, including PEG obligations.

1. AT&T's U-verse Service is a "Cable Service" as Defined by the Federal Cable Act.

The Cable Act defines "cable service" as "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and ... 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). The Cable Act then defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." *Id.* at § 522(20).

First, AT&T does not dispute that its U-verse programming is generally considered comparable to programming provided by a television broadcast station. Indeed, AT&T will

provide its customers the same prescheduled video programming provided by television broadcast networks (ABC, CBS, NBC, Fox, etc.). These programs are transmitted to AT&T's customers at the same time and on the same schedule as the programming is being transmitted from the programming provider.

Second, AT&T's U-verse service is a "one-way transmission to subscribers" of its video programming. AT&T transmits its video programming from its equipment into the subscriber's home or business. The only distinction between AT&T's U-verse service and what traditional cable operators have offered for decades is that when an AT&T customer makes a channel selection, that selection is transmitted upstream from the subscriber's home to AT&T's video hub office. AT&T responds to the subscriber's channel selection by transmitting the video selected. Effectively, customers change channels at the video hub office rather than the set-top box. This distinction, however, makes no legal difference, because it simply constitutes the "subscriber interaction . . . required for the selection or use of such video programming." 47 U.S.C. § 522(6).

The Cable Act has always anticipated that cable systems would require a certain level of subscriber interaction. The 1984 House Report on the Cable Act noted that the key is the *nature of the service* provided:

Th[e] distinction between cable services and other services offered over cable systems is based upon the *nature of the service provided*, not upon a technological evaluation of the two-way transmission capabilities of cable systems.

HR Rep. No. 98-934 at 43 (1984) U.S.C.C.A.N. at 4680 (emphasis added). It is therefore the nature of the service, and *not* the "technological evaluation of the two-way transmission capabilities of the cable systems" that is the key to identifying a "cable service."

In fact, in 1984 Congress knew that subscribers would, in some cases, make video selection requests by transmitting a signal from their location to the cable provider's location:

Subscribers to video programming offered over cable systems have the capacity to select which programs they want to receive. Sometimes – as in some ways of providing pay-per-view service – *the selection involves sending a signal from the subscriber premises to the cable operator over the cable system. Such interaction to select video programming is permitted in a cable service.* The Committee also intends to permit a cable service to include interaction between the subscriber and the cable operator or a third party for the limited purpose of selecting information provided in other non-video programming services.

Id. (emphasis added). Thus, interaction between a subscriber and the provider is not dispositive for identifying a cable service.

What the legislative history demonstrates is that while AT&T tries to draw a meaningful distinction between its service and traditional cable services, none exists.

In the Telecommunications Act of 1996, Congress amended the definition of "cable service" in the Federal Cable Act to include the words "or use." The definition of cable service now reads "subscriber interaction, if any, which is required for the selection *or use* of such video programming...." 47 U.S.C. § 522(6)(b) (emphasis added). According to the legislative history, the phrase "or use" was inserted "to reflect the evolution of cable to include interactive services...." HR Rep. No. 104-458 at 169 (1996). Congress thereby took note of the evolving nature of cable service and broadened the definition of cable service to ensure that services such as AT&T's U-verse service, requiring subscriber interaction with the operator to use them, were included.

2. A Federal Court has Recognized that AT&T's Claims to be Something Other than a Cable Service are Meritless.

The only Federal court to have considered whether AT&T's U-verse service constitutes a "cable service" is the United States District Court for Connecticut in a case captioned *Office of Consumer Counsel v. Southern New England Telephone Company, d/b/a AT&T Connecticut, Inc.*, 515 F. Supp. 2d 269, 282 (D. Conn. 2007).⁶ In that case, the United States District Court analyzed the text of the Federal Cable Act, the related legislative history and prior FCC Orders, and concluded that the "statutory language [of the Federal Cable Act] itself appears to require the conclusion that AT&T's video programming service does constitute a 'cable service,' as defined by the Cable Act." *Id.* at 276. The District Court acknowledged AT&T's argument that U-verse subscribers are able to communicate upstream to AT&T, but noted that this interaction is "only as is required to turn the set top box 'on and off,' change channels on the remote, and select pay-per-view/VOD programming." *Id.* at 278. According to the District Court, "this level of required subscriber interaction does not 'enable a particular subscriber to engage in the off premises creation and retrieval of a category of information.'" *Id.* Accordingly, the District Court found that:

the subscriber interaction involved in AT&T's video programming service *is the same as that involved in traditional CATV programming*, and does not exceed the scope of that degree of interaction "required by the selection or use" of the programming, as contemplated by the Cable Act's definition of "cable service."

⁶ AT&T argues vociferously that the *Office of Consumer Counsel* case is not binding on this Commission, as if the precedential value of that case somehow proves AT&T is not a cable operator. Petitioner, however, never argued that the *Consumer Counsel* case was binding on the Commission. Rather, Petitioner argued that the clear, express and unambiguous terms of the Cable Act apply to AT&T's U-verse service. The *Consumer Counsel* case is the only case in which a Federal court has ruled on the issue, and the detailed and thoughtful analysis of the District Court in that case is certainly persuasive authority and ought to be given due consideration by the Commission.

Id. (emphasis added).

While AT&T urges the Commission to ignore the United States District Court's ruling, it offers only two unpersuasive rationales for taking that action.⁷ First, AT&T argues that the District Court "unlawfully failed to adhere to this Commission's interpretation of 'cable service' in the *Cable Modem Declaratory Ruling*." See AT&T's Comments at 16. This is patently false. In fact, the District Court specifically cited the *Cable Modem Declaratory Ruling* in which this Commission ruled that cable modem service does not constitute a cable service under the Cable Act.

In the *Cable Modem Declaratory Ruling*, the Commission ruled that the phrase "one-way transmission to subscribers" in the definition reflects a traditional view of cable as primarily a medium of mass communication, with the same package or packages of video programming transmitted from the cable operator and available to all subscribers.⁸ As the District Court correctly observed, "notwithstanding the differences in the way the technology of U-verse works, including the request signal sent from the subscriber's set top box to the network to retrieve the selected programming, U-verse still falls within the scope of 'a medium of mass communication, with the same package or packages of video programming transmitted from the cable operator and available to all subscribers.'" *Id.* at 278-279. The District Court went on to hold that this level of "interactivity is not of the 'high degree' contemplated by the Cable Modem Ruling for

⁷ AT&T also argues that the District Court's ruling should be disregarded because the issue being addressed by the court was moot due to a new state video franchising law. AT&T misses the point. The decision of the District Court is not binding on the Commission in any event; it is persuasive authority. Its persuasive value is unaffected by any changes in state franchise laws, which themselves have nothing to do with the Federal Cable Act definition of cable service.

⁸ *In Re Inquiry Concerning High Speed Access to Internet Over Cable and Other Facilities*, 17 FCCR 4798 (FCC 2002).

exempting a service from the definition as it requires no more interactivity on the part of the subscriber than that involved in traditional CATV service." *Id.*

Second, AT&T insists that this Commission should ignore the District Court's ruling because "the facts underlying the decision have changed" and AT&T's U-verse service is "now substantially different." *See* AT&T's Comments at 17. According to AT&T, its "IP-based architecture has continued to evolve and so, too, has the interactive nature of AT&T's U-verse TV service." *Id.* at 17 and 18. Yet, AT&T *does not identify a single substantive change* that would have resulted in a different decision by the District Court, or which should lead to a different decision by this Commission. In fact, while AT&T submitted over 50 pages worth of declarations from three different witnesses, including AT&T's own outside expert, AT&T offered no testimony to support its broad assertion that its system is now "substantially different." In fact, its essential nature today is that of a cable system, unchanged from that addressed by the *Consumer Counsel* Court.

Even more striking is that AT&T's witnesses' descriptions of how its U-verse system currently operates are not materially different than how it described the U-verse system in 2006 for the District Court. In 2006, AT&T stated:

An AT&T IP video service subscriber will receive video programming only if the subscriber first communicates with AT&T's server to request that an individual video program be switched and transmitted to the subscriber.

See AT&T's Statement of Facts in the *Consumer Counsel* case, attached as Exhibit A. In this proceeding, AT&T says:

AT&T's IP video is a switched, two-way service.... AT&T's U-verse TV customers can request an individual video selection, which is then switched (routed) to the requesting customer using the Internet-based IP addressing scheme.

See Declaration of Paul Whitehead at ¶ 22, attached as Exhibit A to AT&T's Comments Opposing Petitions for Declaratory Ruling.

In reality, nothing of substance has changed – AT&T's video programming is a one-way transmission to subscribers and subscriber activity is nothing more than is necessary for them to select channels. This very interaction was anticipated by Congress in 1984 as demonstrated by the legislative history of Title VI and does not exempt AT&T from Title VI regulation.

From the subscriber's perspective, there is no meaningful difference between the nature of the video programming service offered by AT&T and that offered by its competitors in the traditional cable business. The Cable Act fully intended that there would be technological evolution in the way video programming services are provided to subscribers throughout the country. However, whether those services fall within the scope of the Federal Cable Act is to be determined by the *nature of the service provided*. AT&T has failed to show that the nature of its service is different from that of providers regulated under Title VI. Thus, this Commission must find, as the District Court did, that AT&T's U-verse service is a cable service.⁹

3. AT&T's U-verse Service is Provided Over a Cable System as Defined by the Federal Cable Act.

The term "cable system" is defined by the Federal Cable Act 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). As set forth above, it is clear that AT&T's U-verse service is a "cable service." Thus, there is no dispute that to the extent AT&T uses its wireline network to provide that video service, which will

⁹ Documents filed by NCTA with this Commission in WC Docket No. 04-36 ("IP-Enabled Services") set forth in more detail the reasons why AT&T's U-verse is a cable system. One of these documents is attached hereto as Exhibit B.

consist of closed transmission paths and associated signal generation, reception, and control equipment, that it will be operating over a cable system.

4. When Providing U-verse Over its Network, AT&T is a Cable Operator as Defined by the Federal Cable Act.

The Cable Act defines a "cable operator" 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). Thus, a cable operator is simply any person who provides "cable service" over a "cable system." As set forth above, AT&T's U-verse service is clearly a cable service provided over a cable system. Therefore, AT&T is a cable operator and must comply with the Cable Act, including its franchising and PEG obligations.

B. AT&T has Offered no Legitimate Rationale for Dismissing This Petition.

AT&T seeks to avoid the inescapable ruling that it is a cable operator by arguing that this proceeding "is the wrong forum to resolve those questions." In support, AT&T points out that the Commission has sought comment on whether and how to regulate a range of IP-enabled services as part of its *IP-Enabled Services* docket, which remains pending. AT&T's reasoning makes little sense.

Petitioner has requested a declaratory ruling that PEG channels must be carried on the basic service tier and treated equally with other basic service tier channels. Resolution of that issue requires the Commission to answer the threshold question of whether AT&T is a cable operator and its U-verse service is a cable service. The fact that this issue may be related to issues within the larger *IP-Enabled Services* docket, however, is no reason to dismiss this Petition. Indeed, the Commission will presumably answer these questions consistently in both

proceedings. Therefore, it is inconsequential whether the Commission first reaches its conclusion in this proceeding or in the *IP-Enabled Services* proceeding.

Further, while there are issues in common between this Petition and the *IP-Enabled Services* proceeding, this Petition raises *many different issues*, including whether AT&T is violating its obligation to provide PEG channels. Dismissal of this Petition would thus improperly prevent those issues from being addressed by the Commission.

Moreover, AT&T offers no legal support for its extraordinary request, other than a 1996 Order of the Commission. See *In re. Petition for Declaratory Ruling that Any Interstate Non-Access Service Provided by Southern New England Telecommunications Corp. be Subject to Non-Dominant Carrier Regulation*, 11 FCC Rcd. 9051, ¶ 4 (1996). AT&T's reliance is misplaced. In that case, the petitioner sought a declaratory ruling regarding whether it was necessary to comply with existing competitive carrier separation requirements "due to regulatory and marketplace changes." *Id.* Because the company was asking to escape from existing applicable rules, the Commission dismissed the petition holding that it was "more properly addressed in the context of either a petition for rulemaking or a petition for waiver." *Id.* at ¶ 3. The facts contained in that order are vastly different than the issues raised in this matter, where the City is seeking to have the Commission order AT&T to abide by clear statutory requirements in the existing Federal Cable Act. By contrast, the issue before the Commission in this docket is a matter of statutory interpretation and application, not a matter of rulemaking or waiver.

AT&T has offered absolutely no legal or factual justification for the dismissal of this Petition. Further, AT&T has failed to offer any substantive legal analysis disputing the conclusion that it is a cable operator offering cable service, and therefore the Commission should grant City of Lansing's Petition.

IV. AT&T'S DISCRIMINATORY TREATMENT OF PEG VIOLATES SECTION 611 OF THE COMMUNICATIONS ACT AND THE PURPOSES OF THE FEDERAL CABLE ACT

Section 611(a) of the Communications Act, 47 U.S.C. § 531(a), provides the local franchising authority (in this case the City of Lansing, Michigan) the authority to "establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use" As the City explained in its Petition, a franchise requirement has been duly established for AT&T to provide seven (7) PEG "channels" to subscribers in the City.

The Federal Cable Act defines a "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). AT&T's system is clearly capable of delivering a television channel, because it delivers literally hundreds of them. What it does not currently do is deliver PEG channels as channels, that is, in the same way that it delivers other television channels. Instead, PEG is provided as some other kind of separate service accessed in a different way than ordinary television channels.

That this is the case is shown by AT&T's channel listing, which does not even list "Channel 99". See AT&T's channel listing for the Lansing area, attached as Exhibit C.¹⁰

This is even more clear from AT&T's Comments, where the company consistently throughout its Comments refers to its "PEG product" and not to PEG channels. This word choice is both deliberate and significant. By turning the City's PEG channels into its own "PEG

¹⁰ Instead, in text at the bottom of the web page, AT&T notes that "Public Education and Governmental (PEG) programming, where available, can be found on channel 99."

product," AT&T has both exerted unlawful editorial control over the City's channels and discriminated against those channels in violation of Section 611 of the Communications Act.

The Commission should be aware that there are strong economic motives for such discrimination. Increasingly, cable companies are finding that cable company-owned and operated "local origination" channels with local news which they create and program are effective, desirable and lucrative. The *Wall Street Journal* recently reported that both incumbent cable companies and the new entrant phone companies are finding that local origination channels featuring local news and events help to boost customer loyalty and retention. See "Local TV Is New Weapon: Cable, Phone Giants Use Community News to Lure Customers", *Wall Street Journal*, March 25, 2009, Page B-8, attached as Exhibit D.

Such cable company-provided local origination channels compete with PEG channels for some of the local content, such as the local municipal, school, community events and high school sporting events that are staples of PEG programming. To the extent that customers watch PEG channels rather than local origination channels, it cuts into the advertising revenues that local origination channels can generate. The fact that cable companies may see themselves as competing with local PEG channels reinforces the need for strict enforcement of the statutory prohibition on cable companies exercising editorial control over PEG channels. Here AT&T's "success" in greatly reducing the number of PEG channels it carries on its systems, as compared to the incumbent cable operators, creates the opportunity for AT&T to replace the missing local programming with revenue-generating local origination channels.

A. By Re-packaging the City's PEG Channels as its "PEG Product," AT&T is Exerting Unlawful Editorial Control.

By failing to provide the City's PEG channels as "television channels" and instead by providing them as a "PEG product," AT&T violates Section 611(e) of the Communications Act, which states in relevant part:

a cable operator shall not exercise any editorial control over any public, education, or governmental use of channel capacity provided pursuant to this section

47 U.S.C. § 531(e). By choosing not to provide PEG channels as "television channels" but rather to repackage them as a "PEG product," AT&T is exercising editorial control over the City's channels. What the City provides as discrete channels, each with its own identity and programming, AT&T combines into a new "PEG product" that it presents to consumers as a unit – together with all the other PEG programming in the region. This unlawful editorial control is demonstrated by the fact that the individual PEG channels lose the ability on the AT&T system to display their own menu of programming on the channel guide, as other channels can, and instead are all buried under the common label of "Local Government Education and Public Access." See AT&T Comments, Exhibit B: Declaration of Mary McCarthy, p. 5.¹¹ When consumers select Channel 99 they do not receive a single PEG channel, a listing of programming available on a PEG channel, or even a listing of all the City's available PEG channels. Instead consumers receive a screen with the AT&T logo and the words "Local Government Education and Public Access: Watch, Listen and Learn." See *Id.* at p. 6. This packaging and presentation of the "PEG product" is entirely AT&T's creation and design.

¹¹ And as noted above, on the channels listings on AT&T's web site, "Channel 99" is not even listed as a channel.

By refusing to put PEG channels on the program guide so that they can characterize themselves through their program offerings, and instead placing them all behind a screen with an image and message created by AT&T, the company has exercised editorial control over the "PEG product" and how it is perceived by consumers. There is a concomitant loss of editorial control by the City and other PEG programmers. AT&T has therefore violated Section 611(e) of the Federal Cable Act by its refusal to place the City's PEG channels each on its own channel, and instead re-grouping and repackaging them as its own PEG product on a single channel.

B. By Turning the City's PEG Channels into its own "PEG Product" AT&T Unlawfully Discriminates Against PEG Channels.

It is clear from Congressional statements surrounding the 1984 Federal Cable Act and the 1992 amendments to that Act that Congress intended PEG channels to be made as widely available as possible. *See* City's Petition, Section I. By treating PEG channels differently from other channels and by delivering them in a fashion that effectively segregates them from the rest of the channel lineup, AT&T has violated that intent. One of the purposes of the Federal Cable Act is to "assure that cable systems are responsive to the needs and interests of the local community," and to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521(2) & (4). AT&T asserts that by providing all the regional PEG channels on Channel 99 as a "PEG product" it is providing numerically more PEG channels than a conventional cable system.¹² However, in this instance, having more channels available does not promote the

¹² It is noteworthy that when Ms. McCarthy, in her Declaration, attempts to enumerate the "significant advantages" the U-verse system offers PEG, she can find only one: that the channels are available outside municipal boundaries. *See* Declaration of Mary McCarthy, AT&T Comments, Exhibit B. While this may be of some limited benefit, it by no means compensates for the serious and counter-productive disadvantages that the U-verse system presents for PEG. *See, e.g.,* the Comments of the Michigan Municipal League and Michigan Township Association

purposes of the Federal Cable Act, because by segregating and devaluing PEG channels on Channel 99, AT&T in fact makes them less available to the public than if PEG programming were provided on ordinary channels like AT&T's other programming. The details of how AT&T's treatment of PEG programming adversely affects its quality and accessibility are provided in the Petitions filed in this docket by the City of Lansing and Alliance for Community Media, *et al.* ("Alliance for Community Media").

In its Comments, AT&T asserts that its treatment of PEG channels as a "PEG product" is dictated by the technological approach it has taken to providing video service, and that the Commission should not discourage new technologies. However, the differences between how AT&T is providing its broadcast channels and how it is providing its "PEG product" makes clear that the substandard provision of PEG is driven by its business model and not by the technology. If AT&T were treating all its channels in the manner that it treats its "PEG product," then there might be some merit to its arguments. Or, if the PEG channels AT&T receives for transmittal were somehow technologically different than other channels and could not be provided to consumers using the same technologies and methods that AT&T employs for its broadcast channels, then its arguments might have merit. However, AT&T does not assert that PEG channels are technologically different than its other channels. In fact, AT&T fails to provide any reason – other than convenience – why PEG channels must be converted into a substandard "PEG product" in order to be carried on its system.

The Declaration of Mary McCarthy attached to AT&T's Comments as Exhibit B provides (albeit unintentionally) a litany of the deficiencies in AT&T's PEG product, and highlights the contrast in its carriage of broadcast channels. In her discussion of "PEG product" functionality,

at 6-7. Nor does it absolve AT&T from having to comply with the requirements of Federal law.

particularly from paragraphs 25 through 30, Ms. McCarthy's declarations are riddled with the following phrases: "does not support," "working to enable," "exploring changes," and a similar cascade of promises that someday the "PEG product" on U-verse will have equivalent quality to and be as functional as commercial broadcast channels. Declaration of Mary McCarthy at pages 13-16 and *passim*. Ms. McCarthy thereby makes our point.

It is clear from the following that AT&T is systematically and deliberately discriminating against PEG channels: (i) AT&T is manifestly capable of delivering all channels in a high-quality and fully functional manner, (ii) there is nothing inherent in PEG channels that would prevent them from being carried in the same way as broadcast channels, yet (iii) AT&T provides PEG channels as a "PEG product" in a lower quality, grouped format with lessened functionality. Such discrimination violates the purposes of the Federal Cable Act as expressed in 47 U.S.C. §521(2) & (4) and the legislative history cited in the City's Petition, see pp. 7-9, as well as the provisions of Section 611 of the Communications Act.

V. THE COMMISSION HAS ANCILLARY JURISDICTION TO ORDER AT&T TO COMPLY WITH THE OBLIGATIONS IMPOSED ON CABLE OPERATORS

In its Comments, AT&T asserts that City of Lansing is seeking an additional rulemaking in the guise of a declaratory ruling. AT&T is wrong. The City of Lansing does not seek new rules or to change any existing FCC rules. The relevant obligations of cable operators with respect to PEG channels are already set forth in Title VI of the Communications Act. The City of Lansing seeks nothing more than a declaratory ruling from this Commission, pursuant to the Commission's Title VI jurisdiction and Title I ancillary jurisdiction, that AT&T must comply with the same obligations imposed on cable operators with respect to PEG channels and may not systematically discriminate against PEG channels, regardless of whether the Commission concludes in this proceeding that AT&T is a cable operator. The Declaration sought by the City

is a matter of interpreting the applicability of existing statutory provisions, and does not require the creation of new rules.

The relief that the City of Lansing seeks is not extraordinary. In 2007, the Commission issued its Report and Order in the *VoIP TRS* matter which analyzed the disability access requirements applicable to telecommunication service providers and equipment manufacturers under Section 255 of the Communications Act and then extended them to providers of VoIP Services pursuant to Title I. *See VoIP TRS Order*, 22 FCC Rcd 11275 (2007). According to the Commission, it adopted that measure "under ... [its] Title I ancillary jurisdiction in order to give full effect to the accessibility policies embodied in section 255, and to further ... [its] statutory mandate to make available a nationwide communications system that promotes the safety and welfare of all Americans." *Id.* at ¶ 1. The Commission began its analysis in that case by identifying the obligations imposed by the Communications Act and rules previously promulgated by the Commission. The Commission then noted that it had extended Title II obligations to VoIP providers on three prior occasions pursuant to its Title I ancillary jurisdiction. *Id.* at ¶ 15. The Commission then ordered that "providers of 'interconnected VoIP service,' as defined by the Commission, and manufacturers of equipment or customer premises equipment that is specially designed to provide the service, to comply with disability access requirements mirroring those in section 255 and in the Commission's section 255 rules." *Id.* at ¶ 16. According to the Commission, its actions were "necessary to give full effect to the accessibility objectives embodied in sections 255 and 225, and to fulfill ... [its] statutory mandate to make available a nationwide communications system that promotes the safety and welfare of all Americans." *Id.*

The result here should be no different. Congress has previously emphasized that PEG channels serve "a substantial and compelling government interest in diversity, a free market of ideas, and an informed and well educated citizenry." HR Rep. 102-628 at 85 (emphasis added). Congressional policy requires that PEG channels be "available to all community members on a nondiscriminatory basis." *Id.* (emphasis added). Indeed, the Cable Act itself sets forth as a central purpose of this Commission:

[T]o make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges.

47 U.S. C. § 151.

AT&T's U-verse service, as it currently exists, does not fulfill that Congressional intent; in fact, the U-verse system is a step backwards. It actually discriminates against both the hearing and visually impaired and is not "available" to "all the people" who subscribe to it. Thus, just as the Commission did in its *VoIP TRS* Order, it should now order AT&T to comply with the PEG obligations imposed on cable operators, and fulfill both the congressional intent of the Cable Act and the reasonable expectations of AT&T's U-verse customers.

VI. AT&T'S FIRST AMENDMENT CLAIMS ARE SPECIOUS

As noted above, AT&T attempts to forestall action by the Commission with respect to its handling of the City's PEG channels by asserting specious First Amendment claims. Assuming *arguendo* that the description AT&T provides in its Comments of the legal standards necessary for it to sustain First Amendment claims is correct (which it is not), AT&T's First Amendment claims fail on several factual grounds and can be disregarded by this Commission.

By way of example only (and without being exhaustive) AT&T argues that the Petitions do not "further[] an important or substantial governmental interest."¹³ To the contrary, as has been set forth extensively in this proceeding, Congress has stressed the importance of PEG channels for, among other uses, allowing citizens to participate in local government and providing a means of communication in local media for those who would otherwise not have it. Specifically, Congress said:

PEG channels serve a *substantial and compelling government interest* in diversity, a free market of ideas, and an informed and well-educated citizenry.

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

In portions of the Report immediately preceding the statement quoted above, Congress described the important functions served by each type of PEG channel:

Public access provides ordinary citizens, non-profit organizations, and traditionally underserved minority communities an opportunity to provide programming for distribution to all cable subscribers. Educational access allows local schools to supplement classroom learning and to reach those students who are beyond school age or unable to attend classes. Governmental channels allow the public to see its local government at work, thus contributing to an informed electorate, which is essential to the proper functioning of our democratic form of government.

Id. Thus Congress has expressly stated how PEG channels serve the "important or substantial governmental interest" that AT&T believes is required.

AT&T then argues that, "Absent concrete evidence of impairment of a governmental interest, the sweeping PEG regulations that petitioners propose could not pass constitutional

¹³ AT&T Comments at 27.

muster."¹⁴ As discussed in Section II above, statements by AT&T Michigan's President and other AT&T officials, corroborated by facts set forth in AT&T's Comments in this proceeding, provide the "concrete evidence" that AT&T believes is necessary to demonstrate the impairment of governmental interest.

Specifically, AT&T carries fewer PEG channels, as compared to other cable systems, *by a factor of fourteen (14)*.¹⁵ As noted above, AT&T is carrying PEG programming from only 7% of the communities it serves, even though most or all of such communities have PEG channels. Comments filed in this docket show that the low representation of PEG channels on the U-verse systems is overwhelmingly due to the deficiencies in AT&T's "PEG product" that are the subject of the City of Lansing and Alliance for Community Media Petitions.¹⁶ This shows the

¹⁴ AT&T Comments at 31.

¹⁵ Fourteen is the reciprocal of the 7% figure described in the next sentence.

¹⁶ Solely by way of example, the City of Houston, which due to its size has far more resources than most cities, said it had:

[S]pent months . . . making multiple attempts to correct problems . . . the result of which confirmed the City's concerns . . . The quality [of AT&T's platform] . . . never did match the quality of the PEG programming as carried by other video service providers . . . The City's experience . . . is that AT&T encodes, transmits and delivers PEG signals that are subject to degraded video and audio sync problems.

City of Houston Comments, at 5-6.

Many other municipalities, after seeing AT&T's demonstration of PEG on U-verse, were so disappointed with the quality and other aspects of the programming that they decided to pass on putting their PEG channels on the AT&T system. The Comments of Independence Township at 3 in this regard are representative of those of many communities:

I have viewed PEG programming on AT&T U-Verse and have noted the deficiency in quality of the signal. The picture is blocky and does not air in full resolution. I compare it to watching video on 'You-Tube' on the internet.

Or see the comments of a PEG consortium serving twelve communities:

"demonstrated harm arising from AT&T's PEG product"¹⁷ which AT&T admits justifies any First Amendment intrusion. As set forth elsewhere in these Reply Comments, figures from AT&T's initial Comments in this proceeding show that the Michigan 7% figure/fourteen-fold lesser rate of PEG carriage is representative of AT&T's U-verse system with respect to PEG channels nationwide.

I have personally seen the AT&T platform demonstrations both as provided by AT&T technicians and in the home of a resident in the Southern Oakland Count [sic] area. In short the process to finding PEG channels is discriminatory and marginalizes the ability of anyone but a savvy web surfer to connect. Our 55-80 year old residents will never effectively ever see their cherished programs provided by local PEG channels again when AT&T comes to our town. The program quality is too horrid. The shows pixel, freeze up and have the look of a U-Tube download on a commercial television set.

Comments of Mid Michigan Area Cable Consortium at 3.

The City of Fort Worth, which like Houston is located in the State where AT&T first rolled out U-verse, might be expected to have fewer problems, because AT&T would have had more time to resolve them. But that is not the case:

Fort Worth Community Cable Television has voiced concerns about the quality of PEG channel 99 for several years with no apparent results. The quality of the City's PEG broadcasts on the AT&T Uverse system are simply inferior to any other commercial program. The PEG video programming is presented in a small on-screen box that can be enlarged to a fuzzy focused full screen image, making it hard to watch for any period of time.

City of Forth Worth Comments at 3.

The commenters note that the signal quality and other problems continue, despite AT&T's statements to the contrary: See, for example, Comments of Diablo Valley Video Arts at 3. And the commenters state that it is these types of problems which cause communities not to put their PEG channels on the AT&T system: The Michigan Municipal League and Michigan Townships Association (which between them represent all LFAs in Michigan) state that this is the case in Michigan. Comments of the Michigan Municipal League and Michigan Townships Association at 4. Commenters from other states agree - - see, e.g., Comments of City of Carmel, CA at 2.

¹⁷ AT&T Comments at 27.

By contrast, any burden imposed on AT&T is either (1) miniscule or (2) self-inflicted due to poor system design. The burden is in all likelihood miniscule because AT&T has stated that the maximum number of PEG channels from any community it serves is seven¹⁸ – the same as the number of PEG channels present in the City of Lansing. Seven channels is, as noted above, less than 1 1/2% of the minimum number of channels which AT&T can carry. The impact on AT&T, if it is significant, is due not to the law but to deficiencies (such as those discussed below) in AT&T's design of its system so as not to be able to accommodate "channel reuse," where when subscribers click on a government or school channel they get the channel corresponding to the municipality in which they live.

VII. AT&T CAN CONTINUE TO PROVIDE "CHANNEL 99"

AT&T in its Comments suggests or implies that Petitioners seek to prevent it from providing "Channel 99" and attempts to highlight the supposed benefits of its "PEG product" on Channel 99. The suggestion that the City of Lansing is seeking to prevent AT&T from using Channel 99 for webcasts is incorrect. As the City of Lansing expressly stated in its Petition:

The City does not object to the carriage of PEG programming from other communities on AT&T's Channel 99. However, the City's seven PEG channels must be on separate, individually numbered and fully accessible and functional channels, as described herein.

City of Lansing *Petition for Declaratory Ruling*, footnote 12. AT&T's claims about Channel 99 going away or being taken away thus can be disregarded.

However, while the City does not object to AT&T carrying its regional "PEG product" on Channel 99, it does not believe that this is a significant benefit to either the City or its residents.

¹⁸ AT&T Comments at 28. Montgomery County, Maryland in its Comments said that it had eleven PEG channels. However, Maryland is not a state where AT&T provides local service.

Many other communities agree, see, e.g. Comments of Michigan Municipal League and Michigan Townships Association at 6-7.

AT&T repeatedly asserts that it provides a "PEG product that is in many respects superior to the traditional PEG programming offered by cable companies." AT&T Comments, 26. These "many respects," upon examination, rapidly diminish to the bare fact that AT&T offers subscribers access to PEG programming from communities outside their own. If the relative superiority of PEG offerings were measured simply by the number of channels whose programming is carried on the system, then AT&T might have a point. Unfortunately for AT&T, this is not a reasonable measure. More reasonable measures of superiority in handling of PEG channels would include ease of access to the channels, quality of the signal relative to other channels on the system, and level of functionality (closed captioning, presence on the program guide, ability to time shift, etc.) compared to other channels on the system. As the Petitions in this docket attest, AT&T has fallen far short on all these measures. Further, as a number of commenters note, subscribers are interested in the city commission, zoning commission, school board meetings and the like of their own communities, and not those of other communities. While the programming of other communities may hold some mild interest for a small handful of residents, this is not an advantage significant enough to counterbalance the deficiencies in AT&T's method of handling PEG programming.

VIII. AT&T CANNOT RELY ON DEFICIENCIES IT CREATED IN DESIGNING ITS SYSTEM TO AVOID THE REQUIREMENTS OF FEDERAL LAW

AT&T also argues in effect that it need not comply with the Cable Act due to deficiencies it created in designing its cable system. Thus it argues that the Petitions should not be granted, because if they were it would have to carry large numbers of PEG channels in each designated market area ("DMA"), and this would be difficult on its existing system. In effect, AT&T is

arguing that (1) because it designed its cable system so that all customers within a DMA (a region that may include several municipalities) get the same programming, and (2) if the City's Petition is granted many of its available channels will be occupied by PEG programming, therefore (3) the Petition should not be granted.

The first and simplest response is that errors made by AT&T in designing its system are its responsibility and do not excuse it from complying with the Communications Act. There would be little point in Congress passing the Act or in this Commission enforcing it if a provider could escape the law's mandates simply by designing a noncompliant system.

AT&T, as a sophisticated operator, should have known for several years that it might not prevail when it asserts that it is not a cable operator pursuant to Title VI, and should have prepared appropriate contingency plans accordingly. The need for plans to comply with Title VI has been apparent for several years, given the rather scathing reception that AT&T's claim that U-verse is not a cable service received in both Congress and the courts. For example, when three years ago the House Telecommunications Subcommittee reviewed the "Communications Opportunities Promotion Enhancement Act" on creating a national cable franchising structure, important legislators were critical of AT&T's position, and were quoted in news accounts as making remarks such as the following:

"This is stupido," [House Commerce Committee Chairman] Barton said, scolding AT&T for sending a letter to [Commerce Committee Ranking Member] Dingell -- in response to questions he posed -- that said its IP-enabled service isn't a cable service. "Our friends at AT&T have sent this silly letter saying they're not a cable service, which they shouldn't have done," Barton said.

"House Telecom Bill Passes 27-4, Following Lively Debate", Communications Daily, Thursday, April 6, 2006. A year later, in the *Consumer Counsel* case, a Federal District Court emphatically rejected AT&T's claim. AT&T has certainly been put on notice that it might likely be expected

to comply with Title VI of the Communications Act. Any difficulties AT&T may have in complying with Title VI are thus self-created and its responsibility.

Second, the City of Lansing is not asking that a large number of channels be devoted to PEG programming. Instead, it is asking that less than 1 1/2% of the channels which AT&T says are currently available on its system be used to carry the City's PEG channels. To be specific, the City is asking that its seven¹⁹ PEG channels be carried on AT&T's system. AT&T has said that, at minimum, it can carry approximately 500 video channels.²⁰ The City's seven channels constitute less than one and one half percent (1 1/2%) of AT&T's channel capacity, and the actual percentage may be much less if the number of channels AT&T can carry is greater than 500.

Third, in its Comments, AT&T said that channel numbers below 100 are reserved for local channels. AT&T Comments at 55. Currently ninety-two channels in that range in the Lansing area are open and not being used. *See*, March 26, 2009 AT&T U-verse channel listing for the Lansing area, attached as Exhibit C.²¹ Granting the City's Petition would require using only seven of the ninety-two apparently available channels.

¹⁹ Seven channels appears to be the maximum number of PEG channels in use by a community in Michigan. As noted above, in its Comments, seven is also the maximum number of PEG channels AT&T identifies as being used by any one community in states where it provides local service. AT&T Comments at 28.

²⁰ *See*, AT&T March 9 Comments, Exhibit A at page 16, which in the redacted version (which is the only version available to the City of Lansing as of the filing of these Reply Comments) states that the number of PEG channels currently being provided in the Los Angeles area is 483 channels. The actual maximum capacity of the system has been redacted, is apparently somewhat larger than 483, and for convenience is simply referred to here as 500 channels.

²¹ Giving AT&T the benefit of the doubt, this calculation counts "Channel 99" as being used.

Fourth, at least fifty channels are currently available and unused on AT&T's system in the Lansing area: As noted above, AT&T has at least 500 channels available on its system. According to AT&T's current Lansing channel lineup, Exhibit C, only 450 of these channels are in use (and only 375 video channels are in use, once music channels are excluded).

Fifth and finally, an obvious way to reduce the total number of channels allocated to PEG on any cable system is by "channel reuse" where the PEG channel received by a customer depends on the municipality in which the customer is located. Thus, if Channel 12 was a government channel for a DMA, then when a City of Lansing resident requests Channel 12 he or she would get the government channel for the City of Lansing. But when a resident of the City of East Lansing (an adjacent municipality) requests Channel 12, he or she would get the government channel for the City of East Lansing, and similarly for other municipalities in the DMA. This method of channel reuse is commonly applied by incumbent cable companies, as is discussed more below, and in the Declaration of Jonathan Kramer, attached as Exhibit E.

AT&T has all the data necessary for channel reuse on U-verse. As AT&T discusses in its Comments, it uses so-called "switched video" technology, where AT&T's equipment directs the specific channel selected by the customer to the customer's premises. As set forth in earlier portions of these Reply Comments, in effect, the channel change is not made at the TV set, but on the AT&T system upstream of the customer's residence.

AT&T knows which customer is requesting the channel – it has to know this in order to know to whose residence to send the requested programming. It also knows the municipality in which the customer is located – it has to know this for purposes of the franchise fee, PEG fee and any local utility tax. To illustrate, AT&T's franchise with the City of Lansing has a 5% franchise fee and a 2% fee to support PEG channels. See Exhibit A to the City's Petition, Sections VI.A.ii

and VIII.A.3. The amount of these fees (or whether there is any fee at all) varies by municipality, so AT&T has that data for each customer. In some states (although not in Michigan), utility taxes are assessed or computed on a municipality-by-municipality basis as well. So AT&T knows in which municipality each customer is located.

Thus, AT&T currently has all the information necessary for channel reuse, so that when a customer requests a PEG channel, AT&T could send the customer the channel for the municipality in which the customer resides. So if customer Jones in the City of Lansing requests the government channel, AT&T would send him or her the City of Lansing's government channel. But, when a resident of the City of East Lansing requests the government channel, AT&T would send that customer the City of East Lansing's government channel, and so on.

Such channel reuse on the AT&T system is a simple concept using information which AT&T already has. AT&T has the technical capability to implement it. AT&T acknowledges this in its comments, where it calls it "channel mapping", and says that U-verse can do it. However, AT&T says that it has elected not to do "channel mapping" because it instead devoted its current (but limited) channel mapping capability to hiding adult channels. AT&T Comments, Exhibit A, page 19. However desirable "hiding adult channels" may be, it is not a legal requirement of the Cable Act – it is an elective business decision by AT&T. So AT&T in fact does have the capability at this time to use channel reuse/channel mapping for PEG channels. It has simply chosen not to do so.

In any event, the most AT&T has said is that for unstated reasons "today" it is not "feasible" to implement channel reuse, due to self-created limitations in its system. *Id.* The clear inference is that "tomorrow" it may well become feasible, especially if AT&T has to carry PEG channels in the same manner as other channels – AT&T was careful not to slam the door on that

option, should the Commission rule that it has to carry PEG channels as separate channels, as the City of Lansing's Petition requests. In this regard, AT&T is presumably aware that any blanket statement that it is not feasible for it to implement channel reuse would lack credibility, given (1) its technological capabilities, and (2) its portrayal of its cable system as far more advanced than traditional cable systems, which routinely use channel reuse.

And in fact, modern cable systems support multiple channel maps, far more than the one or two which AT&T says its U-verse system is capable of "today". These maps are used for "channel reuse", among other things. Declaration of Jonathan Kramer, Exhibit E, at p. 3. As Mr. Kramer notes, Time-Warner's Los Angeles-area cable system is similar to AT&T's DMA-based system in terms of its geographic area (eighty-seven (87) communities in the Los Angeles basin and Southern California) and is larger than AT&T's in terms of the number of customers served from one location. That Time-Warner system supports approximately 100 channel maps. *Id.*

For the preceding reasons, the Commission must disregard AT&T's claim that deficiencies in its system make it difficult to carry the numbers of PEG channels required by the City of Lansing, Michigan and Alliance for Community Media Petitions.

CONCLUSION

The Commission should reject the claims made by AT&T in its Comments, and should grant the City of Lansing and Alliance for Community Media Petitions, for the reasons stated herein and in the Petitions.

Respectfully submitted,



Brig Smith (P-63037)
City Attorney – City of Lansing, Michigan
124 W. Michigan Avenue
Lansing, MI 48933
(517) 483-4320

Teresa S. Decker (P-32114)
John W. Pestle (P-25471)
Kevin C. O'Malley (P-43621)
Timothy J. Lundgren (P-62807)
VARNUM
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

Attorneys for the **City of Lansing, Michigan**

CERTIFICATION

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,

A handwritten signature in cursive script, appearing to read "Teresa S. Decker", written in black ink.

Teresa S. Decker (P-32114)
VARNUM
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

CERTIFICATE OF SERVICE

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

James N. Horwood
Spiegel & McDiarmid LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Joseph Van Eaton
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036-4306

Holly Saurer
Media Bureau
Room 4-A734
445 12th Street, S.W.
Washington, D.C. 20554



Carole A. Wood
Varnum, Riddering, Schmidt & Howlett LLP
Post Office Box 352
Grand Rapids, Michigan 49501-0352
(616) 336-6000

EXHIBITS

EXHIBIT A

Statement of Facts, in
Office of Consumer Counsel v Southern New England Telephone Co.,
515 F. Supp. 2d 269 (D. Conn. 2007)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

OFFICE OF CONSUMER COUNSEL and NEW ENGLAND)	
CABLE AND TELECOMMUNICATIONS ASSOCIATION,)	
INC.,)	
)	
<i>Plaintiffs,</i>)	
)	
v.	)	No. 3:06-cv-01106 (JBA)
	)	(consolidated with
SOUTHERN NEW ENGLAND TELEPHONE COMPANY	)	No. 3:06-cv-01107 (JBA))
D/B/A AT&T CONNECTICUT, INC. and DEPARTMENT)	
OF PUBLIC UTILITY CONTROL OF THE STATE OF)	
CONNECTICUT,)	
)	
<i>Defendants.</i>)	
)	

LOCAL RULE 56(a)1 STATEMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56(a)1, Defendant Southern New England Telephone Company d/b/a AT&T Connecticut ("AT&T") submits the following statement of materials facts as to which there is no genuine dispute in support of its simultaneously filed motion for partial summary judgment.

1. The Connecticut Department of Public Utility Control ("DPUC") is the exclusive franchising authority over cable systems in Connecticut, and as the exclusive franchising authority the DPUC is authorized to enforce the state and federal provisions governing cable services offered in Connecticut. The DPUC also has general authority to regulate public service companies in Connecticut. Decision, *DPUC Investigation of the Terms and Conditions Under Which Video Products May Be Offered by Connecticut's Incumbent Local Exchange Companies*, Docket No. 05-06-12, at 33 (Conn. DPUC June 7, 2006) ("*Decision*").
2. Project Lightspeed is AT&T Inc.'s \$4 billion capital project initiative to enhance the broadband capabilities of the existing telecommunications networks of AT&T Inc.'s incumbent local exchange carrier subsidiaries, including AT&T's network in Connecticut. *Decision* at 34-35; *see also* Boyer Direct at 4, 10-11 (AT&T App. Tab 1); AT&T July 14, 2005 Letter at 1 (NECTA App. Tab 6).
3. As a result of Project Lightspeed, AT&T will be able to provide bandwidth and connection speeds not available over its existing network; the Project Lightspeed initiative is intended

to enhance AT&T's existing network by increasing bandwidth and connection speeds from 6 Mbps up to a 20-25 Mbps line rate. *Decision* at 34-35, 48; *see also* Boyer Direct at 3, 4, 10 (AT&T App. Tab 1); Whitehead Direct at 4 (AT&T App. Tab 2).

4. AT&T's upgraded network will support and allow integration of a wide array of voice, data, video and other applications, including a suite of Internet Protocol ("IP")-based services such as high speed Internet access, voice over Internet Protocol ("VoIP") service, and an IP-based video service. *Decision* at 34-35; *see also* Boyer Direct at 3, 11 (AT&T App. Tab 1).
5. Project Lightspeed involves the deployment of fiber optic cables in AT&T's telecommunications network to increase the bandwidth available to subscribers. *Decision* at 35; *see also* Boyer Direct at 3-5, 8-9 (AT&T App. Tab 1).
6. IP is a form of "packet switching" that permits the two-way transmission of data from one computer to another, such as the data exchanged over the Internet. *Decision* at 35; *see also* Boyer Direct at 12 (AT&T App. Tab 1).
7. Packet switching is a method of routing information by first dividing messages – whether comprised of voice, pictures, video, or other information – into discrete "packets" of data, transmitting each packet individually, and reassembling the packets once they have arrived at their destination. *Decision* at 35; *see also* Boyer Direct at 12-13 (AT&T App. Tab 1).
8. In an IP-based, packet-switched network, data are segmented into packets that are individually addressed and then transmitted over a series of physical networks which may be comprised of copper, fiber, coaxial cable or wireless facilities. *Decision* at 35; *see also* Boyer Direct at 12-13 (AT&T App. Tab 1).
9. In an IP-based, packet-switched network, network routers examine the address of each passing IP packet, and determine to which other router in the network the IP packet should be sent. *Decision* at 35; *see also* de Veciana Direct at 11 (AT&T App. Tab 3).
10. When IP packets reach their final destination over an IP-based, packet-switched network, they are "unwrapped" and the data inside is used for an application. *Decision* at 35; *see also* Boyer Direct at 13 (AT&T App. Tab 1).
11. The data packets transmitted across an IP-based, packet-switched network may contain voice information (e.g., a VoIP "phone" call), video information (e.g., a video clip of a family reunion sent via e-mail), data information (e.g., a fax, NASDAQ information, a purchase transaction), or a combination thereof, encoded (and sometimes encrypted) into bits, packetized, transmitted, received, de-packetized, de-encrypted, and de-encoded. *Decision* at 35; *see also* Boyer Direct at 13 (AT&T App. Tab 1); Whitehead Direct at 23 (AT&T App. Tab 2).
12. In order to provide new IP-based services, as part of Project Lightspeed AT&T will install software-driven, IP-based electronic equipment at various AT&T locations, such as servers, routers, and encoders that are typically found in an Internet network, to serve up

and route web pages and other information to personal computers. *Decision* at 36; *see also* Boyer Direct at 5 (AT&T App. Tab 1); Whitehead Direct at 22 (AT&T App. Tab 2).

13. The provision of AT&T's new IP-based services, including its IP video service, will involve the placement at customers' homes of IP-based electronic equipment, including a Network Address Translator ("NAT") that accepts IP data transmissions, disaggregates those transmissions, and routes them to the various devices within each customer's premises. *Decision* at 36; *see also* Whitehead Direct at 4, 22 (AT&T App. Tab 2).
14. AT&T currently uses packet switching in its telecommunications network in the provision of broadband Digital Subscriber Line ("DSL") and other switched services. *Decision* at 35; *see also* Boyer Direct at 13 (AT&T App. Tab 1).
15. AT&T's upgraded network will be a two-way, point-to-point, switched network architecture. *Decision* at 44; *see also* Boyer Direct at 16 (AT&T App. Tab 1); Whitehead Direct at 9 (AT&T App. Tab 2).
16. Cable networks generally employ a tree and branch topology in which all households within a franchise area share video programming signals transmitted concurrently on shared coaxial cable trees. *Decision* at 36; *see also* Whitehead Direct at 7-8 (AT&T App. Tab 2); de Veciana Direct at 4, 6, 9 (AT&T App. Tab 3).
17. In general, coaxial cable has a much higher bandwidth or communications capacity over longer distances than a twisted copper wire pair, such as the twisted copper wire pairs that currently exist in AT&T's network. *Decision* at 36; *see also* Whitehead Direct at 21 (AT&T App. Tab 2); de Veciana Direct at 8-9 (AT&T App. Tab 3).
18. Cable systems were designed based on analog broadcast TV standards such that each radio frequency signal was confined within a 6 MHz bandwidth channel, and most cable systems now operate at a 750 MHz bandwidth capable of delivering simultaneously 75 analog channels, while reserving some bandwidth for other applications. *Decision* at 36; *see also* Whitehead Direct at 7-8, 13-14 (AT&T App. Tab 2).
19. A typical cable system uses a one-to-all network design to deliver a package of numerous channels of video programming simultaneously to multiple subscribers. *Decision* at 36; *see also* Boyer Direct at 16 (AT&T App. Tab 1); Tr. at 413-14 (Krauss) (AT&T App. Tab 4); Tr. at 226 (AT&T App. Tab 4).
20. Since the advent of fiber optic technology, many cable operators have deployed Hybrid Fiber Coaxial ("HFC"), or a network of both fiber optic cable and coaxial cables, which allows for improved signal and picture quality and reduces the need for signal amplification devices to boost the cable signal to distant points in the network. *Decision* at 36-37; *see also* Whitehead Direct at 19, 21 (AT&T App. Tab 2); de Veciana Direct at 8 (AT&T App. Tab 3).
21. Video programming transmission by cable operators is achieved through frequency division to carry traditional analog video signals, each of which is broadcast on a different

- frequency band. *Decision* at 37; *see also* Whitehead Direct at 5 (AT&T App. Tab 2); de Veciana Direct at 3, 4, 10 (AT&T App. Tab 3).
22. Cable operators also use frequency division multiplexing to separate 6 MHz channels from one another, and use statistical multiplexing to carry multiple video programs within each 6 MHz channel slot. *Decision* at 37; *see also* Whitehead Direct at 7-8, 20 (AT&T App. Tab 2); de Veciana Direct at 3, 4, 10; Tr. at 362-65 (AT&T App. Tab 3).
 23. AT&T, when providing video programming through packet-switched IP transmission technology, will employ statistical multiplexing only. *Decision* at 37; *see also* de Veciana Direct at 3 (AT&T App. Tab 3); Tr. at 160-61 (AT&T App. Tab 4).
 24. Statistical multiplexing of IP-based transmissions involves the queuing of packets associated with different users and traffic types (*i.e.*, voice, data or video), the scheduling of the packets for transmission over the optical fiber or copper wire, and the routing of each IP packet to the appropriate end user by packet switching routers within the network. *Decision* at 37; *see also* de Veciana Direct at 4, 10-11 (AT&T App. Tab 3).
 25. Since AT&T's IP-based video service does not utilize frequency division multiplexing, it will not be subject to signal leakage. *Decision* at 37 n.30; *see also* Tr. at 748, 766 (AT&T App. Tab 4).
 26. Cable systems offer both analog video signals occupying 6 MHz frequency bands and multiple digital video signals compressed into a single 6 MHz band. *Decision* at 37; *see also* Whitehead Direct at 8, 19 (AT&T App. Tab 2); de Veciana Direct at 9 (AT&T App. Tab 3); Tr. at 415 (Krauss) (AT&T App. Tab 4).
 27. AT&T's IP video architecture is altogether incapable of carrying analog video, but instead offers digital video signals only. *Decision* at 37; *see also* de Veciana Direct at 3, 9 (AT&T App. Tab 3).
 28. By delivering digital video signals rather than analog video signals, AT&T will utilize network bandwidth more efficiently than cable operators, because digital video can be more easily compressed than analog video, reducing the amount of resources required to transport the digital video while delivering equivalent or better quality. *Decision* at 37; *see also* de Veciana Direct at 9-10 & Att. B at 4 (AT&T App. Tab 3).
 29. Cable networks currently use the MPEG2 compression standard while AT&T will employ the next generation MPEG4 standard. *Decision* at 37; *see also* Whitehead Direct at 6 (AT&T App. Tab 2); de Veciana Direct at 9 (AT&T App. Tab 3).
 30. Cable operators deliver most or all video programming via one-way transmission to a multitude of subscribers with no two-way or upstream communication from a subscriber to the cable system. *Decision* at 38, 39 n.34; *see also* Whitehead Direct at 13 (AT&T App. Tab 2); de Veciana Direct at 2 (AT&T App. Tab 3); Tr. at 380-81, 406-09, 413-14 (Krauss) (AT&T App. Tab 4).

31. Cable operators broadcast a package of video programming to every subscriber within a service area. *Decision* at 38, 43; *see also* Boyer Direct at 16 (AT&T App. Tab 1); Whitehead Direct at 12 (AT&T App. Tab 2); de Veciana Direct at 2 (AT&T App. Tab 3); Tr. at 413-14 (Krauss) (AT&T App. Tab 4); Tr. at 226, 232-33, 326 (AT&T App. Tab 4).
32. Cable service subscribers use a tuner in their set top box to tune in a particular frequency and select a particular video program from the package of video programming that is broadcast to the set top box. *Decision* at 38, 39 n.34, 43; *see also* Whitehead Direct at 8 (AT&T App. Tab 2); de Veciana Direct at 2, 11 (AT&T App. Tab 3); Tr. at 413-16 (Krauss) (AT&T App. Tab 4); Tr. at 226 (AT&T App. Tab 4).
33. Unlike cable operators, AT&T will not broadcast an entire package of video programming to the home of every subscriber within a service area, but instead AT&T will utilize IP-based packet switching technology to switch and deliver to each customer IP packets containing only the video programming information requested by each customer. *Decision* at 38, 43; *see also* Boyer Direct at 16-17 (AT&T App. Tab 1); Whitehead Direct at 9-10 (AT&T App. Tab 2); de Veciana Direct at 12 (AT&T App. Tab 3).
34. For an IP packet stream containing video information associated with a specific program (such as an episode of a TV network series) to reach the home of an AT&T IP video service subscriber, the subscriber must interact with AT&T network servers and routers through a set top box to ensure that the appropriate packetized video stream, and only that video stream, reaches the customer premises from a remote point in the network. *Decision* at 38; *see also* Boyer Direct at 16-17 (AT&T App. Tab 1); de Veciana Direct at 12 (AT&T App. Tab 3).
35. All video content offered by AT&T will be fundamentally “on demand” and two-way in nature. *Decision* at 38; *see also* Whitehead Direct at 13 (AT&T App. Tab 2); Boyer Rebuttal at 9, 10 (AT&T App. Tab 5); Tr. at 319 (AT&T App. Tab 4).
36. Cable service involves the independent one-way transmission of video programming, such that cable service subscribers passively receive a package of multiple channels of video programming independent of any subscriber communication, interaction or use. *Decision* at 31, 39, 39 n.34; *see also* Whitehead Direct at 12, 13 (AT&T App. Tab 2); Tr. at 413-14 (Krauss) (AT&T App. Tab 4).
37. A cable service subscriber generally does not send any upstream communication to a cable operator to request a particular video program; instead, the subscriber merely tunes in a new frequency from the package of video programming continually transmitted to the subscriber’s premises. *Decision* at 38, 39 n.34, 43; *see also* Whitehead Direct at 12, 13 (AT&T App. Tab 2); Tr. at 380-81, 406-09 (Krauss) (AT&T App. Tab 4).
38. AT&T’s IP video service does not involve any independent transmission of video programming, but instead transmits video programming only in response to communications from a subscriber. *Decision* at 38, 39 n.34; *see also* Whitehead Direct at 9-10, 12 (AT&T App. Tab 2); Tr. at 188, 192, 229 (AT&T App. Tab 4).

39. AT&T's IP video service delivers video programming to customers only in response to a number of "upstream" communications from the subscriber and/or subscriber's set top box to AT&T's network (including AT&T servers). *Decision* at 38, 39; *see also* Boyer Direct at 18 (AT&T App. Tab 1); Boyer Rebuttal at 11 (AT&T App. Tab 5); Tr. at 188-89 (AT&T App. Tab 4).
40. AT&T's IP video service is fundamentally two-way in nature, and requires regular upstream and downstream communication. *Decision* at 40, 43; *see also* Boyer Direct at 18 (AT&T App. Tab 1); Whitehead Direct at 12, 13 (AT&T App. Tab 2); de Veciana Direct at 12 (AT&T App. Tab 3); Tr. at 188-89, 190-91 (AT&T App. Tab 4).
41. Without continuous upstream communications, AT&T's IP video service would not function. *Decision* at 38; *see also* Boyer Direct at 18 (AT&T App. Tab 1); de Veciana Direct at 12 (AT&T App. Tab 3); Tr. at 190-91, 325-26 (AT&T App. Tab 4).
42. Subscribers to AT&T's IP video service will acquire content (*i.e.*, video programming) from AT&T's server. *Decision* at 42-43; *see also* Boyer Direct at 17 (AT&T App. Tab 1); Boyer Rebuttal at 11 (AT&T App. Tab 5).
43. AT&T's IP video service includes upstream error correction and information authentication communications that allow AT&T's distribution server to monitor the data exchanged between an end user and AT&T. *Decision* at 38 n.33; *see also* Whitehead Direct at 17, 18 (AT&T App. Tab 2).
44. AT&T's IP video service will depend on constant communication between AT&T's servers and customers' set top boxes to ensure that they are authorized to receive the video programming. *Decision* at 43; *see also* Whitehead Direct at 16-17 (AT&T App. Tab 2).
45. As part of the video signal verification and authorization process, AT&T servers acknowledge receipt of upstream requests for a particular video program and send IP authorization keys back to the consumers' set-top boxes, which then utilize those keys for security purposes so that only a set-top box with the stored correct authorization keys can decrypt and retrieve the secure IP video stream stored at the server. *Decision* at 43; *see also* Whitehead Direct at 16-17 (AT&T App. Tab 2).
46. Only after proper verification is made do AT&T's servers make available the requested video data stream. *Decision* at 43; *see also* Whitehead Direct at 16-17 (AT&T App. Tab 2).
47. With AT&T's IP video service, in the event of an apparent loss or damage to data, AT&T's network will read the upstream report of corruption and correct the situation by sending a "unicast" or point-to-point burst of corrected IP packets to the customer. *Decision* at 38 n.33; *see also* Whitehead Direct at 17-20 (AT&T App. Tab 2); de Veciana Direct at 13 (AT&T App. Tab 3).
48. Cable networks do not support the retransmission from video servers of signal errors because the typical cable company set top box cannot request that the data be resent.

Decision at 38 n.33; *see also* Whitehead Direct at 18-20 (AT&T App. Tab 2); de Veciana Direct at 13 & Att. B at 6-7 (AT&T App. Tab 3).

49. Unlike traditional cable systems, AT&T's network continually tracks customers' individualized video streams to ensure that the proper video packets are received by the appropriate customers. *Decision* at 39; *see also* Whitehead Direct at 18-19 (AT&T App. Tab 2); de Veciana Direct at 5, 11-13 (AT&T App. Tab 3).
50. When a AT&T IP video service customer's set-top box is turned off, that customer ceases to receive any video programming into his home. *Decision* at 39 n.34; *see also* Whitehead Direct at 9-10 (AT&T App. Tab 2); Tr. at 192 (AT&T App. Tab 4).
51. Cable operators providing cable service continuously provide a slate of programming to multiple subscribers regardless of whether each set top box in each home is "off." *Decision* at 39 n.34; *see also* Whitehead Direct at 8 (AT&T App. Tab 2).
52. An AT&T IP video service subscriber will receive video programming only if the subscriber first communicates with AT&T's server to request that an individual video program be switched and transmitted to the subscriber. *Decision* at 39 n.34, 44; *see also* Boyer Direct at 16-17 (AT&T App. Tab 1); Tr. at 192 (AT&T App. Tab 4).
53. AT&T's IP video service subscribers will also have the ability to request and view more than one video data stream at the same time using an application commonly known as picture-in-picture ("PIP") viewing, which will deliver to subscribers multiple data streams transmitted from AT&T's server and offer requesting consumers multiple video signals on a concurrent basis. *Decision* at 43; *see also* Whitehead Direct at 17-18 (AT&T App. Tab 2); Tr. at 181-82 (AT&T App. Tab 4).
54. Cable operators do not provide PIP by allowing customers to communicate with the network and establish multiple data streams, but instead may offer a PIP functionality by providing set top boxes with two tuners so that cable service customers may simultaneously tune in two channels from the package of video programming broadcast to every subscriber's home. *Decision* at 43; *see also* Whitehead Direct at 17-18 (AT&T App. Tab 2); Tr. at 181-82 (AT&T App. Tab 4).
55. The individualized and constant downstream and upstream communications, including error correction and network management communications, between AT&T and its IP video service subscriber is necessary in order for a subscriber to receive any video programming from AT&T. *Decision* at 38; *see also* Boyer Direct at 16-17 (AT&T App. Tab 1).
56. AT&T video customer interaction is nearly identical to that which is normally associated with typical telecommunications carrier activities (e.g., the transmission of voice and data over the Internet). *Decision* at 39; *see also* Boyer Direct at 6, 18 (AT&T App. Tab 1); Boyer Rebuttal at 11 (AT&T App. Tab 5).
57. AT&T IP video service subscribers communicate individual, customer-specific instructions to AT&T's servers, and the servers provide a customer-specific response by fulfilling the

customer's specific request for data. *Decision* at 44; *see also* Boyer Direct at 16-17 (AT&T App. Tab 1); de Veciana Direct at 12 (AT&T App. Tab 3); Tr. at 184-85 (AT&T App. Tab 4).

58. If AT&T were to use its upgraded network solely for the provision of voice and data services, it would not be considered a cable system; rather, it would be considered a high-speed broadband network. *Decision* at 39.
59. In AT&T's IP video service architecture, two-way capability and interaction will be ever-present, always requiring a dynamic interaction between the customer and/or the customer's set top box and AT&T's network (including AT&T's servers). *Decision* at 39; *see also* Whitehead Direct at 16 (AT&T App. Tab 2); Boyer Rebuttal at 11 (AT&T App. Tab 5); Tr. at 188-91 (AT&T App. Tab 4).
60. AT&T's IP video service architecture will be unique compared to a cable system because AT&T's architecture a switched, two-way client server IP-based architecture designed to send each subscriber only the programming the subscriber chooses to view and entails a high level of subscriber interaction so that the subscriber will be able to tailor and integrate several different offerings over the network. *Decision* at 41; *see also* Whitehead Direct at 9-10 (AT&T App. Tab 2); Boyer Direct at 16-19 (AT&T App. Tab 1).
61. AT&T will use multicast IP technology, which allows a packet stream to be distributed to all subscribers who demand access to the stream, without duplicating the stream on the common paths between the server and the customer. *Decision* at 43; *see also* Late Filed Exh. 13 (*IPTV: The Need for Standards*), at 4 (AT&T App. Tab 6); Late Filed Exh. 17 (AT&T App. Tab 7) (definitions of "broadcast" and "multicast"); Late Filed Exh. 18, at 4-5 (AT&T App. Tab 8); de Veciana Direct at 13 (AT&T App. Tab 3).
62. In the case of AT&T's IP video service, customers will request a unique data packet stream consisting of an individual video program that will be transmitted to that subscriber's unique IP address. *Decision* at 43-44; *see also* de Veciana Direct at 2 (AT&T App. Tab 3).

November 3, 2006

George M. Moreira
ct15234
SOUTHERN NEW ENGLAND TELEPHONE CO.
310 Orange Street, 8th Floor
New Haven, CT 06510
(203) 771-0902 (Telephone)
(203) 771-6577 (Facsimile)
gm9651@att.com

Respectfully submitted,

/s/ Geoffrey M. Klineberg

Timothy P. Jensen
ct18888
TYLER COOPER & ALCORN, LLP
205 Church Street
P.O. Box 1936
New Haven, CT 06509-1910
(203) 784-8200 (Telephone)
(203) 777-1181 (Facsimile)
jensen@tylercooper.com

Geoffrey M. Klineberg
Pro Hac Vice No. ct22893
David L. Schwarz
Pro Hac Vice No. ct23224
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, PLLC
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900 (Telephone)
(202) 326-7999 (Facsimile)
gklineberg@khhte.com
dschwarz@khhte.com

Counsel for Southern New England Telephone Company d/b/a AT&T Connecticut

NOTICE OF FILING AND SERVICE

I hereby certify that, on November 3, 2006, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Geoffrey M. Klineberg

Geoffrey M. Klineberg
Pro Hac Vice No. ct22893
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, PLLC
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900 (Telephone)
(202) 326-7999 (Facsimile)
gklineberg@khhte.com

EXHIBIT B

**NCTA Memo: Applicability of Title VI to Telco Provision
of Video Over IP**

September 1, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WC Docket No. 04-36 ("IP-Enabled Services")

Dear Ms. Dortch:

On August 31, 2005, Daniel Brenner, Senior Vice President, Law and Regulatory Policy of the National Cable & Telecommunications Association ("NCTA"), Howard Symons, of the law firm Mintz Levin, Cohn, Ferris, Glovsky & Popeo, and I met with Jordan Goldstein, Legal Advisor to Commissioner Michael J. Copps, to discuss issues related to the above-referenced docket.

In that meeting we discussed the Petition for Declaratory Ruling filed by SBC Communications, Inc. ("SBC") on February 5, 2004. We reiterated the views in our comments filed in the above-referenced docket that (1) the Commission should focus on IP voice services in that docket; (2) there is virtually no record in that docket on which to base a decision on the regulatory framework for IP video services; and (3) the IP video services proposed by SBC fall squarely within existing definitions of Title VI.

With respect to the last point, we briefly discussed a memorandum detailing the reasons why the IP video services proposed by SBC and other telephone companies are subject to Title VI which we previously filed in this docket. Attached is a copy of that Memorandum, which demonstrates that IP video services proposed by those companies are Title VI-defined "cable services" and the facilities they propose to use are "cable systems," making them "cable operators" subject to Title VI's regulatory scheme.

APPLICABILITY OF TITLE VI TO TELCO PROVISION OF VIDEO OVER IP

INTRODUCTION AND SUMMARY

Several Regional Bell telephone companies have announced plans to provide residential customers video programming services in their service areas using fiber to the premises (Verizon) or fiber to the node (SBC). SBC has said it will use Video-over-Internet Protocol technology, while Verizon's current plans call for an "RF overlay strategy for video as opposed to converting those signals to an IP format."¹ Both of these companies – along with BellSouth – have suggested they are not – or should not be – subject to the requirements of Title VI² that apply to cable television providers.

This memorandum demonstrates that IP video services proposed by these companies are clearly "cable services" and the facilities they use are "cable systems," making them "cable operators" subject to the regulatory scheme of Title VI. It also shows that *nothing* the Bell companies have proposed – video offerings, IP transmission, switching technology, interactive applications – is any different from what cable companies now provide or will provide in the near future. Cable operators provide video-on-demand services *now*. They employ IP technology in their systems *now* and are planning for more widespread deployment. They are testing switched digital video technology *now* and intend to deploy it as soon as possible. All of these "IPTV" features that the Bells tout – and which they argue exempt their video offerings

¹ "Verizon Confirms RF Video Choice with Motorola Deal," TELEPHONY ONLINE, Oct. 26, 2004, at http://telephonyonline.com/access/web/telecom_verizon_confirms_rf/. BellSouth has suggested that it too is exploring delivery of video services. See "Three RBOCs Peel Back Covers Slightly on IP Video Plans," TELEPHONY ONLINE, Oct. 12, 2004, at http://telephonyonline.com/access/web/telecom_three_rboCs_peel/ ("BellSouth is setting up an aggressive plan and is in the midst of testing various technologies"); "Phone Giant Aims For Speed," ATLANTA JOURNAL-CONSTITUTION, Dec. 7, 2004, at F1 (BellSouth "announced field trials next year to deliver standard- and high-definition TV signals using Microsoft technology...."); KAGAN BROADBAND TECHNOLOGY, June 7, 2005, at 9 ("BellSouth . . . believes if it offers video exclusively via [Fiber to the Node] it is under no obligation to secure franchise rights.").

² 47 U.S.C. § 521 et seq.

from Title VI regulation – cable companies provide today or will provide in the near future.³

And since those services are regulated under Title VI, the telephone companies' video offerings should be too. As NCTA has repeatedly argued, like services should be treated alike.⁴

Notably, in other contexts, regulatory “parity” is the Bells’ theme. BellSouth, for example, has argued that “both law and policy require that competing providers be subject to the same obligations regardless of the technologies they use.”⁵ Verizon has struck the same theme, observing that “it would be irrational to impose disparate regulatory treatment on identical services which are offered in an identical manner, based solely on the identity of the service provider.”⁶ As Verizon’s Tom Tauke has said: “It’s not logical to treat different sectors of the communications marketplace differently based on what technology they use, when we’re all

³ See “Cable Operators Rush Services To Keep Edge,” WALL STREET JOURNAL, July 21, 2005, at B1.

⁴ See e.g., Letter from Neal M. Goldberg, NCTA General Counsel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-36, Attachment (“Working Toward A Deregulated Video Marketplace”), filed June 23, 2005.

⁵ Petition of BellSouth Telecommunications, Inc., For Forbearance Under 47 U.S.C. § 1609(c) From Application of Computer Inquiry and Title II Common Carriage Requirements, WC Docket No. 04-405, Petition for Forbearance, filed Oct. 27, 2004, at 21. See also, Press Release, BellSouth Telecommunications, “BellSouth Says FCC Data Proves It Is Time for Regulatory Parity,” (June 12, 2003), at <http://bellsouthcorp.policy.net/proactive/newsroom/release.vtml?id=43228>; Press Release, BellSouth Telecommunications, “BellSouth Supports Broadband Parity Bill Just Announced in Senate,” (Apr. 30, 2002), at <http://bellsouthcorp.policy.net/proactive/newsroom/release.vtml?id=40143>. (“BellSouth today announced its support for legislation designed to bring parity to regulation governing cable and telephone company offerings of broadband service.”).

⁶ Petition of the Verizon Telephone Companies for Declaratory Ruling, or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises, WC Docket No. 04-242, Consolidated Reply of Verizon to Oppositions to and Comments on Petitions with Respect to Broadband Services Provided Via Fiber to the Premises, filed Aug. 2, 2004, at 5 (quoting WC Docket No. 04-242, Comments of Corning Incorporated, filed July 22, 2004. See also, John Thorne, Senior Vice President and Deputy General Counsel, Verizon, “The 1996 Telecom Act: What Went Wrong and Protecting the Broadband Buildout,” at 39 (2001), at http://newscenter.verizon.com/policy/broadband/primer_e.pdf (“Congress, the courts, and even the Commission have consistently affirmed that it is the nature of a service, not its history or the character of the entity providing it, that determines the regulatory regime that should apply. . . . By regulating broadband differently depending on the wires used to deliver it, the Commission has again lost sight of this principle, despite its recognition that the 1996 Act is ‘technologically neutral and is designed to ensure competition in all telecommunications markets.’”; “As a policy matter, this regulatory disparity is unjustifiable. Eliminating regulatory distinctions between incumbent telephone carriers, cable operators, and others – as the 1996 Act was intended to do – allows these providers not only to challenge one another in their traditional strongholds, but also to compete on equal terms in the creation and development of new markets, regardless of the technology they might use.”).

delivering the same services.”⁷ SBC has perhaps said it most simply: “Companies that provide similar services should be regulated the same. There is no reason for treating them any differently.”⁸

Verizon is seeking local franchises for such video deployments in a number of markets nationwide. It has successfully negotiated franchise agreements with a number of communities, in California, Florida, Texas and Virginia.⁹ Nevertheless, Tom Tauke, Verizon’s Executive Vice President of Public Affairs, has said: “Frankly, we don’t believe that we should be having to seek franchises in order to offer video services to consumers.”¹⁰ As Brian Blevins, Verizon’s director of external communications, said: “We feel we already have rights-of-way to construct networks.”¹¹ Verizon has lobbied state legislatures in California, New Jersey, Texas, and

⁷ Remarks of Tom Tauke, to the U.S. Conference of Mayors, Washington, DC, Jan. 18, 2005, at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=88898>.

⁸ Press Release, SBC Communications, Inc., “SBC Urges FCC To Enact Regulatory Parity For Broadband,” Aug. 6, 2002, available at <http://www.pressi.com/int/release/51170.html> (Statement of SBC Senior Vice President-FCC Priscilla Hill-Ardoin). See also, Richard C. Notebaert, Chairman and CEO, Qwest Communications, Address to the Practising Law Institute, Dec. 2, 2004, at http://www.qwest.com/about/company/management/speeches/Practising_Law_Institute.pdf (“[T]he discrepancy of regulation between cable and telephony offers a clear example of what happens when government agencies persist in focusing their efforts on individual technologies. It is way past time for them to acknowledge that the world has changed, that there is no way they can keep pace with technology advances, and so it is far more appropriate for them to consistently regulate like services”; “Wouldn’t it make more sense to treat cable modem and DSL as the competing services they are and regulate consistently across that category?”); “Round Table,” PHONE+MAGAZINE, Apr. 2002, at <http://www.phoneplusmag.com/articles/241round.html>, (hosting a discussion of the FCC’s NPRM reclassifying broadband services as information services and exempting them from common carriage regulation that included the following observation by Tom Amontree, USTA spokesman: “If they’re able to pull this off, able to promote competitive and regulatory parity across all modes of broadband service delivery, we’ll be pleased. We’re looking for regulatory parity so that we can compete fairly with cable.”).

⁹ “Herndon Lets Verizon Offer Cable,” WASHINGTON POST, July 20, 2005, at D5; “Verizon Seeks Break from Cable’s Rules; Lobbying in Calif., N.J.” INVESTORS BUSINESS DAILY, Mar. 11, 2005, at A4; “Verizon Gets Florida Franchise,” MULTICHANNEL NEWS, May 23, 2005, at 12.

¹⁰ “Verizon to FCC: No Franchise Required: Telco Argues That Its Video Offering Shouldn’t Entail Local Regulation,” MULTICHANNEL NEWS, Aug. 9, 2004, at 30.

¹¹ “Telco Franchise Issue Lingers,” MULTICHANNEL NEWS, Nov. 1, 2004, at 6.

Virginia for changes in their laws that would replace city-by-city franchise agreements with one state-wide application.¹²

SBC has also suggested that it does not need to seek local franchises – and that it is not bound by other Title VI requirements – because of the nature of its deployment (*i.e.*, using IP technology, switched broadcast video, etc) and for other reasons as well. As SBC spokesman Dave Pacholczyk has said: “The basic premise here is that this is different from cable. This is an IP-based service.”¹³ In testimony before Congress, Lea Ann Champion, SBC Senior Executive Vice President of IP Operations and Services, stated: “In short, we are not building a cable network, nor do we have any interest in being a cable company offering traditional cable service. Instead, we intend to offer customers a new total communications experience”¹⁴ And Dorothy Atwood, SBC’s Senior Vice President of Regulatory Policy, has argued: “A franchise obligation is right for the first provider But when you are talking about competitive alternatives, you want to encourage that investment.”¹⁵

In fact, the video services that phone companies plan to provide, including those employing IP technology (hereinafter “IPCable”),¹⁶ are subject to all of the requirements of Title

¹² “Telcos Are Timed Out in Texas,” MULTICHANNEL NEWS, June 6, 2005, at 6.

¹³ “Telco Franchise Issue Lingers,” *supra*, note 5, at 6.

¹⁴ Testimony of Lea Ann Champion, Senior Executive Vice President of IP Operations and Services, SBC, before the U.S. House Energy & Commerce Committee, Apr. 20, 2005, as quoted in Press Release, SBC, IP-Based TV Will Revolutionize Entertainment (Apr. 20, 2005) at <http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21649>. Of course, that same month, she told Business Week Online that: “in our initial launch, we will include *the basic [TV] content that customers expect*, in addition to offering genre-specific tiers that customers can bolt on to their primary channel lineup. There will also be access to video-on-demand options and three tiers of Internet access. “SBC’s Interactive TV Roadmap,” BUSINESSWEEK ONLINE, Apr. 6, 2005, at http://www.businessweek.com/technology/content/apr2005/tc2005046_2979_tc206.htm (emphasis added).

¹⁵ “The Fiber Optic Quagmire: The Baby Bells Want to Enter Cable’s Market – Without Paying the Same Fees,” BUSINESS WEEK, Dec. 6, 2004, at 42.

¹⁶ While Verizon has said IP is not in its current plans, we include it in this analysis as an IPCable provider because of the prospect it will eventually employ IP in its delivery of video, as press reports suggest. See “Air Battle:

VI of the Communications Act. IPcable programming is predominantly a one-way transmission of “*video programming*” and therefore is a “*cable service*.” Likewise, the IPcable delivery system is a “*cable system*,” and the IPcable provider is a “*cable operator*.” *The bottom line:* As proposed by various phone companies, the use of IP in the delivery of video programming does not change the regulatory status of the provider, its services, or its facilities. They are all properly subject to Title VI¹⁷ and, among other things, must comply with Title VI franchising requirements.¹⁸

**TELEPHONE COMPANIES ARE FREE TO COMPETE
WITH CABLE ON A LEVEL REGULATORY PLAYING FIELD**

At the outset it is important to note that telephone companies have the statutory choice to provide video to customers in ways that carry none of the obligations of cable operators if they do not want to comply with those obligations. Some history on this development is instructive.

Prior to the enactment of the Telecommunications Act of 1996, telephone companies, with limited exceptions, were generally prohibited from providing video programming directly to subscribers within their telephone service areas. The general prohibition was adopted by the

SBC vs. Verizon: The War of The TV Wannabes,” WALL STREET JOURNAL, July 18, 2005, at R8, R11 (“Verizon plans to switch over to the Internet technology in the future.”); “Motorola Nabs Verizon Contract,” CED BROADBAND DIRECT, Oct. 26, 2004, at <http://www.cedmagazine.com/cedailydirect/2004/1004/cedaily041026.htm>. (“[I]t’s expected that [Verizon] initially will use an RF overlay to deliver video over fiber, and then migrate later to an IP-based service”).

¹⁷ In another context, the Bells have argued that adding some IP to telephone service that is functionally no different from traditional interexchange service is an irrelevant distinction for purposes of regulation. See Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt From Access Charges, WC Docket No. 02-361, Opposition of SBC Communications, Inc., at 3, 7 filed Dec. 18, 2002 (“The use of an IP backbone, without more, cannot justify an exemption from access charges.” “[T]he configuration of AT&T’s phone-to-phone IP telephony services is virtually identical to the configuration of other IXC services that use the circuit-switched network.”); Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt From Access Charges, WC Docket No. 02-361, Opposition of Verizon at 5, filed Dec. 18, 2002 (“There is no justification for favoring IP technology over every other phone-to-phone voice telephony technology in the way AT&T suggests.”)

¹⁸ Of course, as a new entrant, a telco video provider will face a lighter regulatory regime than will the incumbent cable operator.

FCC in 1970,¹⁹ following findings that telcos had engaged in anticompetitive practices with respect to providing access to their utility poles. The general prohibition was codified by Congress as part of the 1984 Cable Act.²⁰

However, even under the telco-cable prohibition, telcos were never prohibited from offering "channel service," an arrangement under which they provided video facilities as common carriers to unaffiliated entities that dealt directly with subscribers in the offering of cable services. In addition, while generally prohibiting telco/cable cross-ownership, the 1984 Cable Act provided an exception to the rule in underpopulated areas.

In 1992, the Commission established Video Dialtone service, under which telcos were authorized, subject to Title II regulation, to offer a basic common carrier platform capable of accommodating multiple video programmers. Phone companies were also allowed to offer enhanced and other non-regulated services subject to regulatory safeguards. Consistent with the 1984 Cable Act, the Commission prohibited companies offering Video Dialtone from providing video programming to subscribers, either directly or through an affiliate. But the telcos were permitted to enter into relationships with programmers on their platforms on a contractual, non-common carrier basis, which had not been permissible before.

The 1996 Act repealed the 1984 Act's telco/cable cross-ownership prohibition, the Video Dialtone framework, and the requirement that a phone company obtain authority under Section 214 prior to constructing cable facilities. The 1996 Act offered phone companies four ways in which to enter the cable business.

¹⁹ Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 F.C.C.2d 307, *modified*, 22 F.C.C. 2d 746 (1970), *aff'd*. General Tel. Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971).

²⁰ 47 U.S.C.A. § 533(b).

-- Telcos may provide transmission of video programming on a common carrier basis (subject to Title II requirements as with channel service).

-- Telcos may undertake radio-based video operations, such as MMDS (subject to Title III requirements).

-- Telcos may operate Open Video Systems ("OVS"), effectively avoiding the federal requirement to obtain a local cable franchise, so long as they offered up to two-thirds of the available video channels to unaffiliated entities. (A federal appellate court subsequently held that the federal statute did not bar cities from requiring an OVS operator to obtain a local franchise pursuant to state statute.)²¹

-- Finally, the statute made clear, by adding Section 651(a)(3)(A) to the Communications Act, that "[t]o the extent that a common carrier is providing video programming to its subscribers in any manner other than [via radio, as a common carrier or OVS provider]... such carrier shall be subject to the requirements of [Title VI]." ²² That is, the telcos' only other option was to provide video programming as a cable operator subject to Title VI.²³

Given this history and current law, it is clear that today telcos may offer video programming in multiple ways to their customers, and many have or do. For example, Ameritech, SNET and others have all operated under Title VI franchises, as do most other wireline providers. All options carry some regulatory obligations; all are more advantageous than those which apply to all incumbent cable operators under Title VI. Indeed, even when telcos provide video programming as cable operators under Title VI, in most if not all instances, they are the fourth or fifth multichannel video provider in a market and will therefore be able to meet the "effective competition" test under the statute and FCC rules. As a result, they are not subject to basic tier rate regulation, uniform pricing of services and associated requirements.

²¹ City of Dallas v. FCC, 165 F.3d 341 (5th Cir. 1999).

²² 47 U.S.C. §571(a)(3)(A)(emphasis added).

²³ A common carrier facility used to provide solely "interactive on-demand" service is not a "cable system" and therefore a telco provider of such services is not a "cable operator" under Title VI.

**IP VIDEO CONTENT AND FACILITIES ARE MATERIALLY
THE SAME AS CABLE SERVICES AND CABLE SYSTEMS**

To understand why the video services and facilities the telcos have proposed subject them to Title VI regulation, it is important to describe those services and facilities in some detail. In its simplest form, IPCable service is a video service delivered via broadband facilities using Internet Protocol. It can be provided over cable modems, DSL or other broadband facilities and it can be provided by the facilities-based provider (cable operator, phone company) or a third-party (or “over the top”) provider making use of another’s broadband facilities.

The video service provided can be called (1) “*IPCable Basic Service*” (equivalent to today’s expanded basic service of broadcast stations and cable networks that deliver between 25-100 cable channels) or (2) “*IPCable Video on Demand (VOD) Services*.” The latter include VOD services similar to those provided over cable systems today as well as (a) a “*Cached Internet Movie Service*” (such as MovieBeam) where new movies are downloaded to a storage device periodically and customers can watch only movies preloaded to that device, or (b) “*Streaming Video on Demand Service*” (such as MovieLink) where the subscriber downloads movies on-demand from a list of titles, and must wait a (relatively) short period of time before viewing. In this paper, we use the term *IPCable VOD* to refer to the VOD services proposed by SBC and Verizon. Both *IPCable Basic Service* and *IPCable Video on Demand Service* are, from the customer’s perspective, just like the cable programming delivered by cable operators today. For purposes of this memorandum, we will use the term “IPCable” to describe the telephone companies’ video efforts; it encompasses the two categories described above.

Both Verizon and SBC have consistently described the *content* of their services in terms of traditional cable services, regardless of the “bells and whistles” surrounding that content. For

example, a November, 2004 UBS conference panel concluded, “[w]hile fiber deployments will enable telcos to offer wireless applications and a host of interactive features, it’ll be simple video service that draws subs away from cable and DBS over the next 5 years.”²⁴ Bob Ingalls, President of Verizon’s retail markets group, told the conference, “the reality here is that for the next several years the focus is still going to be video The core market is the TV market, not people trying to integrate several devices.”²⁵ Similarly, Microsoft TV group marketing manager Ed Graczyk “conceded that the most crucial factor for the telcos will be to offer a video service comparable to cable. ‘The telcos have a great opportunity to leapfrog cable and satellite,’ he said.”²⁶

These offerings are functionally equivalent to cable services offered by cable operators.²⁷ Since December, Verizon has negotiated numerous carriage agreements with a variety of familiar cable networks, including A&E Television, Discovery Networks, Showtime, NBC Universal Cable, NFL Network, and Starz Entertainment.²⁸ It has also announced the launch of several newer networks, including Varsity TV, the Gospel Music Channel, the Soundtrack Channel, and Spanish-language soccer channel GoTV.²⁹

²⁴ “Brave New World? Bells & Whistles Won’t Trump Video,” CABLEFAX, Vol. 15, Issue 225, Nov. 19, 2004.

²⁵ *Id.*

²⁶ *Id.* In the same vein, SureWest Vice President and CTO Bill DeMuth told the gathering that the “real game” will be played out between cable and telcos. *Id.*

²⁷ In at least some markets, Verizon is seeking local franchises and has had to reveal some information about its offering in its franchise applications. SBC, by contrast, has apparently not decided whether to seek local franchises for its IP Cable offering. See “Comcast Asks to Set Rates,” DALLAS MORNING NEWS, Dec. 9, 2004, at 1D (quoting an SBC spokesman as saying, “We are not building a broadcast cable network, and it should not be subject to traditional cable franchise requirements.”).

²⁸ Press Release, Verizon, “Verizon Signs Additional Programming Deals for FiOS TV,” (Apr. 29, 2005), at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=90898>.

²⁹ *Id.*

In addition to carrying familiar cable program networks, Verizon has indicated it will carry local broadcast channels. The application for a cable franchise that Verizon submitted in Beaumont, California, contained a tentative channel lineup that included the most popular cable programming services as well as local broadcast channels.³⁰ It appears that local broadcast stations will be available in all communities Verizon intends to serve, since a Verizon spokesman reported that “the company’s video offering will be basically the same in all markets.”³¹ In this regard, the *Wall Street Journal* reported that Verizon “plans to sell a package that includes most of the local TV stations and their news shows, just like cable TV offer”³²

SBC has announced that it will aggregate content at two national “super headends” and forty regional hubs, which will store and distribute video-on-demand “and other content.”³³ At least one analyst has pointed out, however, that the Bells’ video offerings cannot be financially viable unless they offer local broadcast television and other standard cable programming, “such as The History Channel and CNN, the many movie channels, and the premium movie services.”³⁴

To the extent SBC and Verizon are planning to distinguish themselves from cable operators’ service offerings, it is mainly in packaging. The companies have also claimed that they will provide greater interactivity, although traditional cable operators have also begun to offer such capability to their digital subscribers.

³⁰ “Verizon has Pay-TV Pacts in Place Elsewhere,” *ST. PETERSBURG TIMES*, Dec. 13, 2004, at 3D (“The lineup [in the tentative list of channels for the Beaumont franchise] looked similar to a cable company’s channel menu, including local broadcast channels; standard cable TV channels such as CNN, ESPN and MTV; premium movie channels like HBO and Cinemax; foreign-language programming; and high-definition TV channels.”).

³¹ “Verizon to Offer Package for TV,” *SARASOTA HERALD-TRIBUNE*, Dec. 11, 2004, at A1.

³² “Showdown of the Giants,” *WALL STREET JOURNAL*, Nov. 8, 2004, at B1.

³³ “SBC Takes a Hybrid Path Toward Video; Telco’s Approach to Account for Multiple Formats,” *MULTICHANNEL NEWS*, June 6, 2005, at 43.

³⁴ “With Respect to Content, Part 2,” *TELEPHONY ONLINE*, Aug. 21, 2002, at http://analystscorner.telephonyonline.com/ar/telecom_respect_content_part_2/.

SBC Chief Technology Officer Christopher Rice explained that “[t]here are a lot of things – customized channel lineups, multiple camera angles for sporting events, instant channel change, picture-in-picture that will enable you to quickly switch among [windows], video-on-demand from a virtually unlimited library of content . . . , niche things like European soccer, Argentine soccer, things from around the globe that you cannot get otherwise.”³⁵ And SBC’s Chairman and CEO Edward Whitacre had similar thoughts: “The little I know about it, there really is a mass array of content that you’ll be able to see. Pretty much whatever you want to look for.”³⁶ In fact, some reports say that “[a]ll [SBC] IP-TV programs will be delivered as video-on-demand – consumers request a program from a central server and it is delivered immediately.”³⁷

However, “SBC has been saying different things about its Internet-protocol television (IPTV) to different audiences. As the company has suffered policy and public-relations setbacks, it has changed its message to suit its needs.”³⁸ In particular, “[a]t the June SuperComm telecommunications conference in Chicago, a company executive dismissed the *a la carte* approach to a content-centered audience while a higher-level group president promoted that model for a group of policy officials.”³⁹

³⁵ “SBC Aims for ‘Disruptive’ Model for Delivering Video Over Fiber,” TELECOMMUNICATIONS REPORTS, Dec. 1, 2004 (second brackets and ellipses in original).

³⁶ “Meet the New TV Guy,” WALL STREET JOURNAL, Nov. 23, 2004, at B1, B5.

³⁷ “SBC to Start Project to Send TV Over Lines,” N. Y. TIMES, Nov. 17, 2004, at C1, C3.

³⁸ “SBC Voices Two Approaches to Web-Based Video,” THE NATIONAL JOURNAL’S TECHNOLOGY DAILY, PM EDITION, June 20, 2005, at <http://www.nationaljournal.com/pubs/techdaily/pmedition/tp050620.htm>.

³⁹ *Id.* (quoting SBC Vice President Jeff Weber as describing SBC’s proposed HD and DVR services and concluding “[w]hich is different than saying we are going to do something crazy like a la carte or something that is completely and totally disruptive in the marketplace.... We can’t because our content providers won’t allow it, and I’m not sure it would make sense even if they did.”)

Similarly, Verizon's chief executive Ivan Seidenberg explained his video aspirations: "Platforms that will make a big difference to the customer will be interactive Customizing it, so that you're not requiring people to buy 50 channels or 500 channels, I think we can add a degree of control for the customer. We think we can be one of the only ones to do all the things the customer wants and do them well."⁴⁰ Therefore, while the telcos propose to add a number of interactive features to traditional cable programming, at bottom, the content is familiar cable content.

The physical platforms used by the telcos to provide IPCable also mimic traditional cable platforms. As noted above, Verizon intends to run fiber all the way to the premises to deliver its services, while SBC has a fiber to the node (or neighborhood) plan, using copper wire for the last mile to the customer's home. Both approaches are virtually identical to the way traditional cable delivers its signals to the home, *i.e.*, by running a combination of fiber optic and coaxial cable plant pursuant to local rights-of-way regulation. Indeed, Bruce Swail, general manager of the telecom access group of Motorola which has contracted to sell video headend equipment and set-top boxes to Verizon, has said that "what Verizon will install will look a lot like what's seen in a typical cable system."⁴¹ Other vendors have said that Verizon "is looking at creating one national super headend, which will send signals from national networks like [CNN] and ESPN to Verizon headends in local markets [although] [s]ome satellite receiving capability might still be necessary in local markets"⁴² Swail also said that "[w]hile the forward path will be very similar to

⁴⁰ "Taking on No. 1," BOSTON GLOBE, Nov. 22, 2004, at F1, F5.

⁴¹ "Motorola Confirms Verizon Video Buy," MULTICHANNEL NEWS, Nov. 1, 2004, at 6.

⁴² *Id.*

cable's, the return path will be all-digital That will give Verizon switched digital video capabilities."⁴³

The switched nature of its IPCable service is also touted by SBC as a characteristic distinguishing the service from traditional cable. The telco describes its "IP Switched Video" service as one where a "[set-top box] only receives a single video channel at a time and displays it on the TV. The data stream for this single video channel is requested by the [set-top box] to the network. Channel changes are performed by the network at the request of the [set-top box]."⁴⁴

As reported in a trade publication:

Content will be shipped over SBC's national fiber backbone to 40 video hub offices across the country, where VOD content will be stored, local content inserted and interactive applications launched. The local plant will include 140 video-serving offices to distribute the service. SBC will run fiber to nodes that are within 3,000 feet of consumers' homes.

Video will be switched from those node locations across traditional copper wire to the home, where SBC will install home gateways and set-top boxes. The fiber build will pass 17 million homes, and SBC plans another 1 million homes using fiber-to-the-premise technology in new housing developments and certain multiple-dwelling-unit areas.

That strategy differs sharply from that of Verizon Communications Inc., which has launched a FTTP build in many markets, although at a slower pace than SBC envisions.⁴⁵

But neither IP nor switching makes a difference on the regulatory character of the service.

A video service need not be IP-based to employ switched video, and cable operators are

⁴³ *Id.*

⁴⁴ SBC *ex parte* presentation, Letter from James K. Smith, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-29, 04-36, and 03-211, Attachment at 7, filed Oct. 8, 2004. *See also*, "Microsoft Lands 'Lightspeed' Berth," MULTICHANNEL NEWS, Nov. 22, 2004, at 3 ("The switched-video nature of the architecture would allow subscribers to assign their own program lineup....").

⁴⁵ "SBC's Coming at Lightspeed," MULTICHANNEL NEWS, Nov. 15, 2004, at 1.

themselves exploring the use of switched video to conserve bandwidth.⁴⁶ And IP is increasingly common in the cable industry transmission platform.⁴⁷

Thus, SBC's claim that "IPTV far exceeds what's delivered in the market today"⁴⁸ merely emphasizes more rather than less use of IP technology and switched broadcast video. It says nothing about underlying fiber (or hybrid fiber) facilities, and those facilities are little different from the infrastructure long supporting traditional cable system operations.⁴⁹ And, as we show below, those facilities are "cable systems" under the relevant Title VI definitions, making them subject to Title VI "cable" regulation.⁵⁰

⁴⁶ See "Cable Operators Rush Services To Keep Edge," WALL STREET JOURNAL, July 21, 2005, at B1 (Comcast, Time Warner, and Cox "are all moving quickly to develop a new 'switched' way of transmitting signals to customers' sets that greatly increases the selection of channels and other features they can offer."); "Inside Time Warner's SBV Trial," MULTICHANNEL NEWS, June 27, 2005 at 53; "Time Warner Cable is Switching Up" MULTICHANNEL NEWS, May 30, 2005, at 41 ("Time Warner Cable says it plans to roll out switched broadcast video technology in several markets this year, and eyes a potential 2006 national roll out."). "Time Warner Cable Boosting Capacity of Network," AUSTIN AMERICAN-STATESMAN, July 7, 2005 at C1. ("The cable operator will install the new system over the next nine months to enable rapid switching among many program streams...")

⁴⁷ "Selling IP Video," CED MAGAZINE, June 28, 2005, at <http://www.cedmagazine.com/ced/2005/0605/06b.htm>. ("While IP video delivered all the way out to the subscriber may be a daunting task, many cable operators are looking to the technology for core transport."); KAGAN BROADBAND TECHNOLOGY, June 7, 2005, at 1 ("The advantages of having hybrid fiber-coax plan upgraded to 750 MHz or higher are clear, providing greater flexibility of high-def content, on-demand menus and simulcast delivery as well as IP-based services"). See also, KAGAN BROADBAND TECHNOLOGY, Dec. 6, 2004, at 6 (estimating 30 million cable homes passed by IP-enabled phone service by the end of 2004).

⁴⁸ "SBC's Coming at Lightspeed," *supra* note 39, at 1.

⁴⁹ Time Warner Cable recently announced the launch of an IPTV trial in its San Diego division. As described in an FCC filing, the service, called "TWC Broadband TV," "will enable existing video customers to view video programming on a broadband connected Windows PC within their home." Letter from Susan Mort, Counsel, Time Warner Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-36, filed July 7, 2005. ("*Time Warner ex parte*"); "TV Goes to PC in San Diego," MULTICHANNEL NEWS, July 18, 2005, at 8.

⁵⁰ As the *Time Warner ex parte* made clear: "The fact that TWC Broadband TV is an IP-enabled simulcast of TWC's traditional video service underscores the importance of like services being regulated in a similar manner. It would make little sense for a consumer to receive traditional cable service in one room of their house and IP-enabled video service in another, and have those two outlets be subject to different terms of regulation."

AS A MATTER OF LAW, TELCO IPCABLE IS SUBJECT TO TITLE VI

A. Title VI Definitions Are Critical in Determining IPCable's Regulatory Status

The Communications Act and FCC regulations determine the regulatory treatment of IPCable. In particular, the key definitions are (1) "cable operator,"⁵¹ (2) "cable system,"⁵² (3) "cable service"⁵³ and (4) "video programming."⁵⁴ Those terms trigger most of the regulatory responsibilities of cable operators. In particular, because an IPCable provider is a "cable operator," certain statutory or regulatory requirements apply to it, including the requirements that it obtain a local franchise, avoid "redlining," and pay franchise fees.

The starting point for analysis is Section 651(a)(3)(A) of the Communications Act, which establishes the way telcos may provide video. It states "[t]o the extent that a common carrier is providing video programming to its subscribers in any manner other than [via radio under Title III or as a common carrier under Title II] . . . , *such carrier shall be subject to the requirements of [Title VI], unless such programming is provided by means of an open video system . . .*" This

⁵¹ "[T]he term 'cable operator' means 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).

⁵² "[T]he term 'cable system' means 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, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 653 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility systems." 47 U.S.C. § 522(7).

⁵³ "[T]he term 'cable service' means – (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).

⁵⁴ "[T]he term 'video programming' means programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20).

provision makes clear that the Bells' delivery of video programming via IPCable is and *must be* subject to Title VI – since it is video delivery that is not covered by the other three entry means, namely radio, common carrier, or OVS. An examination of the terms of the Act and the nature of the IPCable service and facilities shows that the critical Title VI definitions and requirements are met and therefore subject telco-provided IPCable to Title VI requirements, including franchising. Even if the phone companies claimed that they were not subject to Title VI, that would still mean that they have to provide video programming pursuant to one of the other options under Section 621. There is no “fifth” option under that provision.

B. “IPCable Content is “Video Programming”

First, the content delivered by a phone company IPCable provider is “video programming” under the Act. This is critical to concluding that the companies’ video service is a “cable service.” While SBC seems to have conceded as much, an examination of the relevant terms and precedent confirms this view.⁵⁵

“Cable service” is defined in the Act as “the one-way transmission to subscribers of (i) video programming, or (ii) other programming service,” and “subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” IPCable content meets the first prong (i), namely “video programming.”

⁵⁵ In seeking relief from a Texas PUC separate corporate affiliate requirement applicable to certain telephone companies providing “video programming services,” SBC conceded that (1) the definition of the term “video programming” under the relevant Texas statute “is identical to the definition in the Cable Act,” and (2) “SBC Texas plans to provide video programming as [the Texas statute] defines the term.” PUC of Texas, Docket No. 31282, SBC Texas’ Petition for Waiver of Separate Video Programming Affiliate Requirements at 3, (June 24, 2005) (“*SBC Texas’ Waiver Petition*”). Verizon made a similar concession in filing a similar petition. See note 89, *infra*.

The term “video programming” is defined as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”⁵⁶ A number of FCC Orders have addressed the meaning of “video programming” and lead to the conclusion that IPcable – including *IPcable Video on Demand* – constitutes “video programming.”

Video Dialtone Orders. In its *Video Dialtone Order*,⁵⁷ the Commission clarified the definition of “video programming” for purposes of the then existing cable-telco cross-ownership prohibition which used identical language. It interpreted the phrase “programming provided by, or generally considered comparable to programming provided by, a television broadcast station” to mean “programming comparable to that provided by broadcast television stations in 1984 [when the Cable Act was passed].”⁵⁸ It also opined that “to the extent a service contains severable video images capable of being provided as independent video programs comparable to those provided by broadcast stations in 1984, that portion of the programming service will be deemed to constitute ‘video programming’ for purposes of the statutory [cross-ownership] prohibition.”⁵⁹ The key to the FCC’s severability analysis is whether the video service involves “complex viewer interaction.” If it does, then it is not within the definition of video programming. If it does not, then it is within the definition.

Under this approach, “IPcable Basic Services” plainly are “video programming.” They entail no viewer interaction, and, as the “equivalent to today’s broadcast and premium cable

⁵⁶ Whether IPcable content is “video programming” has consequences separate and apart from whether IPcable content may constitute a “cable service.” For example, the term video programming dictates whether the terms of Section 651 (which, as noted above, limits a telco’s options in providing “video programming”) apply, and the term is also used to describe the type of programming to which the leased access and program access rules apply.

⁵⁷ Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 – 63.58, *Second Report and Order, Recommendation to Congress, and Second Further Notice of Rulemaking*, 7 FCC Rcd 5781 (1992)(“VDT Order”).

⁵⁸ *Id.* at 5820-21, ¶ 74.

⁵⁹ *Id.* (emphasis added).

services,” they constitute “programming comparable to programming provided by a television broadcast station [in 1984],” in the words of the *Video Dialtone* order.

The same holds true for “on demand” services the Bells have said would be provided over their IPcable platforms – the types of services we have designated “*IPcable Video On-Demand Services*.” In its *Video Dialtone Reconsideration Order*,⁶⁰ the Commission addressed whether on-demand programming constituted prohibited “video programming” for purposes of the cable-telco cross-ownership prohibition. In its initial *Order*, the Commission had recognized that “many of the video services that could be provided over a video dialtone network involve a high degree of interactivity that would enable the subscriber to tailor the video images to his or her specific requests.” It noted that “Congress intended for video services involving such complex viewer interaction generally to fall outside the scope of ‘video programming,’ since they would not be comparable to the programming provided by broadcast stations and others in 1984.”⁶¹

However, the Commission went on to “stress . . . that some elements of an interactive video service may be deemed to be ‘video programming’ if these elements can be readily separated from the interactive service and provided as independent video programming comparable to that carried in 1984.”⁶²

The Commission then observed:

Thus under our interpretation, the offering of a shopping service comparable to a “video catalogue” whereby the consumer can electronically request specific information and order goods and services would not constitute prohibited video programming, even if the service incorporated video images. In such a case, the video images would not be severable from the interactivity. On the other hand,

⁶⁰ Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 – 63.58, *Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 10 FCC Rcd 244 (1994) (“*VDT Recon. Order*”).

⁶¹ *VDT Order* at 5821, ¶ 75.

⁶² *Id.*

simply enabling the consumer to order a product electronically would not alter the nature of the underlying video programming, such as the home shopping programs carried by cable and broadcast stations in 1984. We also conclude that programming that includes multimedia graphics and information services that incorporate video images generally would not be video programming because the video images are not severable from the program service.⁶³

In a footnote, the Commission further explained:

Similarly, the mere inclusion of some interactive capability would not be sufficient to transform other video programming into non-video programming and thereby escape the statutory cross-ownership ban.... *For example, the inclusion of capability to choose among several camera angles of a video sporting event would not permit the telephone company to also provide the underlying video programming. Similarly, offering the consumer the capability to replay portions of a video program in slow motion or to fast forward will also not alter the conclusion that the underlying material constitutes prohibited video programming.* The telephone company could, however, provide the functionality that would allow the customer to engage in such manipulation of and interaction with the video programming.⁶⁴

On reconsideration, NYNEX and BellSouth argued that video-on-demand services should not constitute “video programming” and took issue with the Commission’s severability analysis. The Commission, however, reaffirmed its previous holding that video-on-demand programming could be separated from the functionality used to assess the programming and that VOD was “video programming.”⁶⁵ Observing that “offering a consumer the ability to choose among several camera angles in viewing a sporting event, or to replay or fast-forward portions of a video

⁶³ *Id.* at 5822 ¶ 76.

⁶⁴ *Id.* at 5822, n.195 (emphasis added).

⁶⁵ The Commission made clear that a video service can constitute “video programming” without also being a “cable service.” In other words, while VOD might be considered “video programming,” the interactive functionality in VOD may take it out of the definition of cable service since that definition requires, among other things, the “one-way transmission to subscribers of video programming.” As the Commission noted (albeit before the 1996 “or use” amendment), “Congress emphasized that services enabling subscribers to interact with or manipulate information typically would not be considered cable service.” It emphasized that its decision “does not address whether a program service with sufficient interactivity to remove it from the scope of cable service nonetheless could have a severable programming component comparable to the programming offered by broadcast stations in 1984.” *VDT Order* at 5821-22, n.194.

program, does not change the nature of the underlying material,” it concluded: “[W]e do not believe that the level of subscriber control over video-on-demand images is such as to render the service more comparable to a gateway service than a traditional video programming service.”⁶⁶

Based on the FCC’s VOD analysis, content the telcos propose to provide on demand constitutes “video programming” for purposes of the “cable service” definition. And the fact that that content is delivered using IP technology does not change that result.

On the occasions the Commission has addressed the question of IP video, it has limited its analysis to whether “Internet-delivered” video to computers constitutes “video programming.” “IP” in these contexts is all about the technical *quality* of the video being provided over a traditional Internet connection, *i.e.*, whether it was comparable to (or better than) the quality of the video delivered over television stations in 1984. In each instance below the FCC determined that “video provided over the Internet” was not comparable to 1984 broadcasts. But the key point for regulatory classification purposes is that telco use of IP technology will result in video comparable to (or better than) that provided by broadcast stations in 1984. Suffice it to say that the IPCable content to be offered by telcos will certainly be of “broadcast quality.” A telephone company’s video offerings could not be competitive if the quality of its IPCable services is less than “broadcast quality.” Accordingly, the cases below should be limited to their facts – video delivered over the Internet to computers, not the type of IP-based video proposed by the Bell companies.

Video Competition Reports. Since at least 1998, the Commission has sought comment about the status of “video provided over the Internet” in its Annual Video Competition Inquiries.

⁶⁶ *VDT Recon. Order* at 296-97, ¶¶ 110-11. In response to the BellSouth and NYNEX VOD arguments on reconsideration, NCTA argued that VOD should be deemed “video programming” since “subscriber interaction,

In each report to date, the Commission has concluded that “video provided over the Internet has largely been of less-than-broadcast quality.”⁶⁷ For purposes of this analysis, the FCC has focused on “frame-per-second delivered, the size of the viewing area, the relative ease of use by the consumer, consumer habit, the type of programming offered and the relative availability of the programming.”⁶⁸ As noted above, if the Bells were delivering their content over the Internet to PCs or even to TVs, this conclusion might raise the question whether the *quality* of their IP-delivered video is such that it cannot be considered to be “video programming” within the meaning of the statute. However, from the descriptions of the services to be provided over IPCable, the Bells are not planning to deliver the type of Internet, Web-based video which was the subject of the FCC Annual Video Competition Reports. Rather, it is clear that the quality of the services the Bells plan to deliver over their fiber networks is at least comparable to broadcast quality video.

OTARD Order. In 1998, the Commission was asked to rule that devices that receive “video programming viewable on a computer screen” were subject to Section 207 of the 1996 Telecommunications Act dealing with “Over-the-Air Reception Devices (OTARD).” In the course of that rulemaking, commenters argued that “video programming includes all information (*e.g.*, information received over the internet) that is commonly viewed on the video screen (including computer monitors).”⁶⁹ The FCC rejected that view, holding that the record did not

such as the ability to fast-forward or rewind a program *or choose the time in which to view it*, does not transform the underlying nature of that program.” *Id.* at 296, ¶ 108 (emphasis added).

⁶⁷ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Notice of Inquiry*, 19 FCC Rcd 10909, 10932, ¶ 74 (2004).

⁶⁸ *Id.* at 10932-33, ¶ 75.

⁶⁹ Implementation of Section 207 of the Telecommunications Act of 1996: Restrictions on Over-the-Air Reception Devices, Television Broadcast Service and Multichannel Multipoint Distribution Service, *Order on Reconsideration*, 13 FCC Rcd 18962, 18987, ¶ 55 (1998).

show that the described video-related services were comparable to those provided by a television broadcast station. Again, this conclusion has little bearing on the types of services the Bells indicate they intend to offer which do not include the types of Internet-based information that was the subject of the OTARD proceeding.

Closed Captioning, V-Chip, EAS Orders. The Commission reached similar conclusions in orders dealing with closed captioning, the V-Chip and the Emergency Alert System. In its closed captioning order, the Commission conspicuously omitted reference to Internet-delivered video (“streaming media”) as being “video programming” subject to the closed captioning rules, although it noted the growth of “video like programming” on the Internet.⁷⁰ Similarly, when applying its V-Chip rules, the Commission has said that its rules “were not intended to apply to computers receiving video transmissions over the Internet or via computer networks.”⁷¹ Finally, the Commission distinguished Internet-delivered programming from video programming for purposes of applying EAS requirements, albeit because most of the Internet-delivered material was data as opposed to video programming of any sort.⁷²

None of the factors the Commission relied upon to exclude Internet-based video from the definition of video programming applies to *IP Cable Basic Services* or *IP Cable VOD Services* as

⁷⁰ Closed Captioning and Video Description of Programming, *Report and Order*, 13 FCC Rcd 3272, 3385, ¶ 249 (1997).

⁷¹ Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings, *Report and Order*, 13 FCC Rcd 11248, 11260, ¶ 34 (1998).

⁷² Amendment of Part 73, Subpart G, of the Commission’s Rules Regarding the Emergency Broadcast System, *Second Report and Order*, 12 FCC Rcd 15503, 15522, ¶ 38 (1997). In a related decision, the Commission concluded that ISP Internet access service (including streaming video) does *not* constitute “video programming” for purposes of the leased access rules. Rather than premising that decision on the “quality” of the video being provided, however, it focused on the array of services, including data services, provided by ISPs, most of which were not contemplated by the leased access rules and were not encompassed by the term “video programming.” Indeed, the Commission cautioned that “we might face a different set of issues if IVI or another ISP proposed to utilize leased access capacity for the provision of a service comprised wholly of video programming available via the Internet.” Internet Ventures, Inc., Internet On-Ramp, Inc., Petition for Declaratory Ruling that Internet

proposed by SBC over its IPCable facilities and by Verizon over its RF-based fiber plant. To the contrary, both of these services will be “video programming” services because they constitute “programming comparable to that provided by a broadcast television station in 1984.”

Consistent with the holding of the *Video Dialtone Order*, such programming includes on demand programming which, as proposed by the Bells, seems plainly severable from any interactive functionality (e.g., different camera angles). And, as noted below, the use of IP technology does not change this result because the relevant factors in identifying video programming are the nature and picture quality of the programming, not the means of delivery.

Not only does SBC’s and Verizon’s content constitute “video programming,” but also the IPCable content – particularly on-demand services – also constitutes “cable services.” In particular, IPCable video on demand services’ interactivity does not take it out of the “cable service” definition requirement of “one-way” transmission of video programming.

C. IPCable Content is a “Cable Service”

As noted above, “Cable Service” is defined in the Act as “the one-way transmission to subscribers of (i) video programming, or (ii) other programming service,” and “subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” Since IPCable content is “video programming,” it is also likely to be classified as a “cable service” in so far as “one-way transmission to subscribers” characterizes the service.

Service Providers are Entitled to Leased Access to Cable Facilities Under Section 612 of the Communications Act, *Memorandum Opinion and Order*, 15 FCC Rcd 3247, 3253-54, ¶ 13 (2000).

Some may argue that some IPCable on-demand programming includes sufficient interactivity to take it out of the definition of “cable service,” even if it does not take it out of the definition of “video programming.”⁷³ This is not the case.

First, the 1996 addition of “or use” to the statutory “cable service” definition supports the view that some interactivity, even in VOD programming, is part of the definition of “cable service.” As the legislative history of that provision makes clear, the “or use” language was added “to reflect the evolution of cable to include interactive services”⁷⁴ The minimal interactivity for VOD service as currently constituted or as proposed by the Bells is subsumed by the “or use” language. In fact, VOD likely met the pre-1996 “cable service” definition since it involved “subscriber interaction . . . required for the selection of such video programming.” Under either reading, the subscriber interaction involved in VOD is consistent with the definition of “cable service.”

Second, in its 2002 *Cable Modem Declaratory Ruling*, the Commission made clear that the critical element in determining whether a service is a cable service despite some two-way elements is (1) whether the operator maintains control in selecting and distributing content to the subscriber and (2) the content be made available to all subscribers generally.⁷⁵ That description tightly fits the proposed IPCable services to be provided by the Bells – even the VOD services.⁷⁶

⁷³ As the Commission observed in its *Video Dialtone Orders*, a service can constitute “video programming” without being a “cable service,” since “cable service” requires (at least predominantly) the “one way transmission to subscribers.”

⁷⁴ H.R. REP. NO. 104-458, at 169 (1996).

⁷⁵ Inquiry Concerning HighSpeed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, 4836-37, ¶ 67 (2002) (declaring that even with the addition of the term “or use” to the definition of cable service, the FCC “believe[s] that the one-way transmission requirement in that definition continues to require that the cable operator continue to be in control of selecting and distributing content to subscribers and that the content be available to all subscribers generally”).

⁷⁶ If IPCable is not “video programming,” it might be an “other programming service,” which is defined as “information that a cable operator makes available to all subscribers generally.” Recall that the term “cable

Contrary to some suggestions, IPCable is not an “interstate *information service*.”⁷⁷ That characterization misstates the 2004 *Vonage* ruling.⁷⁸ There the Commission declared that the Vonage Voice over Internet Protocol (“VoIP”) *voice* service was an interstate service and thus would preempt any inconsistent state or local regulation.⁷⁹ In that decision, the Commission enumerated a number of characteristics of other VoIP services that would be similarly subject to federal, rather than state or local, jurisdiction. One key characteristic was that a service “includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including enabling them to originate and receive voice communications and access other features and capabilities, *even video*.”⁸⁰

service” means – “(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.” But in its *Cable Modem Declaratory Ruling*, the Commission noted that “other programming service” is described in the legislative history of the 1984 Act as “non-video information” having the characteristics of traditional video programming. *Id.* at 4834-35, ¶ 63. Under that reading, video provided over IP would not be “other programming” and hence potentially a cable service under that prong of the definition, since it is video and not “non-video information.”

⁷⁷ “Bells’ Strategy of Video Services May Run Into Local Roadblocks,” *INVESTOR’S BUSINESS DAILY*, Nov. 16, 2004, at A1 (“SBC claims ‘IP video’ services should be defined as an ‘information service’...”). See Petition of SBC Communications, Inc. For a Declaratory Ruling Regarding IP Platform Services, WC Docket No. 04-36, Petition of SBC Communications, Inc., For a Declaratory Ruling, filed Feb. 5, 2004. The Commission has encouraged interested parties to file any comments related to this petition in its IP-Enabled Services docket (WC Docket No. 04-36). See *Public Notice*, WC Docket No. 04-29, DA 04-899 at 1, n.2 (Mar. 30, 2004).

⁷⁸ Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, *Memorandum Opinion and Order*, 19 FCC Rcd 22404 (2004) (“*Vonage Order*”), *appeal pending*, Nat’l Ass’n of State Util. Consumer Advocates v. FCC, No. 05-71238 (9th Cir. filed Feb. 22, 2005).

⁷⁹ “IPTV’s in Vonage Order: FCC Ready to Block State Regulation,” *MULTICHANNEL NEWS*, Nov. 22, 2004, at 48 (“The FCC order...stated clearly that IP video is a service that the agency was prepared to shield from non-federal regulation”).

⁸⁰ *Vonage Order*, at 22424, ¶ 32 (emphasis added).

Read in context, the reference to “video” in the *Vonage* decision can only mean possible ancillary video features of Vonage-like services like video email or video teleconferencing. The reference can not be taken as a Commission decision to declare all IP video services to be interstate information services. In any event, even the *Vonage* decision did not address the regulatory classification for Voice over Internet Protocol services – let alone Video over Internet Protocol services. The *Vonage* order addressed who has jurisdiction over the IP voice services, *i.e.*, who decides the nature of the regulation for such services, regardless of how they are classified. It is erroneous to read the reference any other way, particularly since the existing “cable services” definition accounts for the type of video services proposed by the Bells as Congress recognized in adding “or use” to that definition.

In summary, it is clear that (1) IPCable programming is “video programming”; (2) the interactivity required for accessing IPCable is merely “subscriber interaction” required for the selection or use of such video programming; and therefore, (3) the service would remain essentially a “one-way transmission to subscribers” over which the provider retains control and, as a result, (4) would be a “cable service.”

Not only is IPCable service “video programming” and a “cable service;” an IPCable provider meets the definition of a “cable operator,” because it provides “cable service” over a “cable system.”

D. An IPCable Provider Provides Cable Service over a “Cable System”

The term “cable operator” means “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.” Because, as already

shown, an IPCable provider is providing “cable service,” the critical issue in determining whether he is a “cable operator” is whether he is providing that service over a “cable system.”

The definition, in relevant part, reads:

The term “cable system” means 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, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services

Telephone companies intend to provide their video services over the fiber networks or hybrid fiber-copper networks that they propose to build for video and other broadband services or even over existing broadband facilities, which can – and likely will – provide traditional video services before migrating to IP-delivered services. Such facilities – like comparable cable broadband facilities which deliver cable modem service and traditional video services – constitute the key feature of a “cable system,” *i.e.*, “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.” The addition of IP as a transmission technology does not alter the nature of the “closed transmission paths” over which IPCable content will be delivered and is not relevant to the classification of a network as a “cable system” to the extent it is used to transmit video programming directly to subscribers.

Indeed, in a related context, the Bell companies argued – and the FCC held – that when AT&T provides telephone service that is functionally no different from traditional interexchange service, the fact that a portion of the call is routed in IP format over AT&T’s Internet backbone is an irrelevant distinction for purposes of regulation. In that case, the use of IP in the middle of the transmission does not affect the functional characteristics of the service in any way that warrants different regulatory treatment.⁸¹

Furthermore, the two potentially relevant exceptions in the “cable system” definition do not apply to IPcable. The first (the so-called “private cable” exemption in subsection (B)) exempts from the definition of a “cable system” a facility that serves subscribers without using the public rights-of-way. Based on all public reports to date, telco facilities-based IPcable providers will use public rights-of-way to deliver their services since they will use either their existing broadband networks or newly built “wired” networks for such delivery. Indeed, as one industry participant said of SBC’s plan: “It’s going to be tough Cutting through the streets and getting right of access to the street can be complicated.”⁸² Verizon’s build-out has already provoked some controversy over its construction and use (or misuse) of the public rights of way.⁸³ Therefore, the “private cable” exception does not apply.

⁸¹ Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt From Access Charges, *Order*, 19 FCC Rcd 7457, 7465, ¶ 12 (2004).

⁸² “SBC Plans a Network Overhaul,” *BROADCASTING & CABLE*, Nov. 29, 2004, at 23 (“SBC . . . will spend nearly \$4 billion digging up roads to lay ADSL2 fiber. . .”).

⁸³ “Fiber Optimism: Verizon Embarks on an Ambitious Cable Network, But What Does It Mean For You?,” *SARASOTA HERALD-TRIBUNE*, Feb. 16, 2005, at A1 (“Verizon workers and contractors have hit things before. They ran into dozens of utility lines in Hillsborough County, raising the ire of residents and slowing down the installation process.”).

If phone companies were to disaggregate ownership and control of the facilities used to provide IPcable, as SBVS did in Austin⁸⁴ and ECI did in Michigan,⁸⁵ and another entity provided the only facilities that “used” the public right-of-way, the private cable exception might be relevant as it was in the *City of Austin* and *ECI* cases. However, there are a number of reasons why that result is unlikely. First, public reports to date do not suggest that the telcos intend to employ such an arrangement. Second, in Texas both SBC and Verizon petitioned the state PUC to *eliminate* an existing rule that would subject their video services to a separate corporate affiliate requirement, arguing, among other things, that providing video services through a single entity will be more efficient and economical, and permit them to compete more effectively with cable operators.⁸⁶ Third, the announced strategy of the telcos is to compete with a self-provided bundle and not depend, as they do now with DBS providers, on a separate entity furnishing video service. Finally, and most important, in the *ECI* case, the FCC tightly circumscribed the use of the “private cable” exemption and warned Multichannel Video Program Distributors (“MVPDs”) of the limits of its decision.

[W]e caution other MVPDs that the instant decision is expressly limited to the facts before the Commission as presented by ECI. In this regard, we note that: (i) there is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between them; (ii) ECI’s facilities are located entirely on private property; (iii) Ameritech provides service to ECI pursuant to a tariffed common carrier service; (iv) Ameritech has no editorial control over the content of ECI’s programming; (v) the facilities primarily used by Ameritech to provide service to ECI were not constructed at ECI’s request; (vi)

⁸⁴ *City of Austin v. Southwestern Bell Video Servs., Inc.*, 193 F.3d 309 (5th Cir. 1999) (“*City of Austin*”) (deciding case in which video provider SBVS leases SWBT video trunk lines which are on public rights-of-way).

⁸⁵ *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999) (“*ECT*”) (deciding case in which video provider ECI leases Ameritech video trunk lines which are on public rights-of-way).

⁸⁶ Petition for Waiver of Separate Video Programming Requirements, PUC of Texas, Docket No. 29879, *Final Order* (Oct. 18, 2004) (granting Verizon petition); *SBC Texas’ Waiver Petition*, *supra*, note 55.

there is capacity to serve several other programming providers; and (vii) ECI has committed to make its drops available to other programming providers.⁸⁷

As a result, the “private cable” exception would not apply to facilities-based telco IPCable providers.

The second relevant exception from the definition of “cable system,” subsection (C), is also inapplicable. It covers “a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services.”

Even if telco facilities delivering IPCable are “common carrier” facilities in part, they would also likely be “used in the transmission of video programming directly to subscribers,” thus bringing them back within the definition of a cable system “*unless the extent of such use is solely to provide interactive on-demand services.*” The term “interactive on-demand service” means “a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, *but does not include services providing video programming prescheduled by the programming provider.*” This phrase was added to the definition of “cable system” by the 1996 Telecommunications Act and has virtually no legislative history explaining its intent or meaning.

The Bells, particularly SBC, tout their systems as being capable of using switched video but that type of service does not fit the 1996 “interactive on-demand” exception to the cable system definition. First, that exemption requires that a common carrier provider use video

⁸⁷ Entertainment Connections, Inc., Motion for Declaratory Ruling, *Memorandum Opinion and Order*, 13 FCC Rcd 14277, 14311, ¶ 73 (1998).

facilities “solely” for interactive on-demand services. It is unlikely that all of the Bells’ video offerings will be of an on-demand nature, particularly carriage of local broadcast signals that a video provider needs to provide in order to be competitive. “[T]o be competitive with cable, SBC will want to offer a service that for most viewers is a traditional video service.... Viewers may want interactivity in watching sports but they will likely watch sit-coms, dramas, news and other programming as the broadcasters and cable channels present it.”⁸⁸

More fundamentally, the exemption requires that the services cannot include “video programming prescheduled by the programming provider.” At least some of the “on-demand” line-up described by the Bells – even if delivered over a switched network – appears to be the type inevitably “prescheduled by the programming provider,” such as ESPN sports or CNN news. The Bells may offer an on-demand scenario where a customer may choose from a menu of programming on a per channel or per program basis. Such a regime, in and of itself, does not eliminate “prescheduling” by such programming providers. Therefore, the Bell’s video offerings would be ineligible for the “interactive on demand” exemption in the cable system definition. In any event, the Bell companies would still be offering “video programming” (since that is part of the definition of “interactive on-demand service”) which would have to be offered via one of Section 651’s options.

Because neither exception applies, the telco facilities over which are delivered telco-provided IPCable services meet the definition of “cable system” in the Act.

⁸⁸ “Differing SBC, Verizon Fiber Video Plans Face Unbundling, Franchise Issues,” LEGG MASON RESEARCH REPORT, Nov. 23, 2004, at 3.

E. An IP Cable Provider is a “Cable Operator”

Not only is an IP Cable provider providing “video programming” and “cable service” over a “cable system,” but the provider is also a “cable operator” because it “directly or through one or more affiliates owns a significant interest in such cable system, or . . . otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.” As noted above, all public reports suggest that the telcos do not plan to disaggregate ownership and control of component elements of the facilities used to provide IP video service (as was the case with SVBS and SWBT in the *City of Austin* case and ECI and Ameritech in the *ECI* case). Thus, the “significant ownership interest” requirement in the cable operator definition seems easily met.⁸⁹

F. IP Cable Providers Are Subject to Title VI

The analysis above has demonstrated the following:

- *IP Cable Basic Service* is both “video programming” and a “cable service.” Its technical quality – particularly as proposed to be delivered by the Bells – will be comparable to that of broadcast television in 1984.
- *IP Cable VOD Service* is “video programming” as well as a “cable service.” To the extent there is interactivity involved in this service, it will not take the offering out of the definition of “cable service.”
- Telephone company facilities used to provide IP Cable are “cable systems” and they do not qualify under the exception for facilities used solely for “interactive on-demand services.”
- Telco IP Cable providers who use their own facilities to deliver IP Cable services are “cable operators.”

⁸⁹ Verizon has conceded that it is a “cable operator” since it intends to provide video programming over a cable system. See PUC of Texas, Docket No. 29879, Verizon Petition For Waiver at 2 (June 22, 2004) (“In its provision of cable service, Verizon will be a ‘cable operator’ under the Cable Act.... [It] will provide video programming over a cable system”).

Consequently, as a matter of law, phone companies providing IPCable are subject to Title VI requirements.

CONCLUSION

Telephone companies already have four options if they want to provide video programming. Section 651 of the Communications Act makes clear that if they choose not to provide video programming via radio, as a common carrier, or OVS provider, then the fourth category applies and they are subject to the provisions of Title VI as cable operators. And as demonstrated above, telcos providing IPCable services meet the critical definitions of Title VI. Their program offerings are “*video programming*” as well as “*cable services*,” those services would be provided over a “*cable system*,” and they would be “*cable operators*,” – all subject to Title VI requirements. If there are to be changes to the regulatory structure for multichannel video, they must occur in Congress and they should treat like services alike.

National Cable & Telecommunications Association
July 2005

EXHIBIT C

**U-verse Channel Lineup for Lansing, Michigan
from
<https://uversecentral1.att.com/uvp/home/explore>
accessed on March 26, 2009**

U-verse Channel Line-up

[Print This Page](#) 

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
6	WLNS-6 (CBS)	Local		✓	✓	✓	✓	✓
8	WHTV-18 (MY NETWORK TV)	Local		✓	✓	✓	✓	✓
9	QVC	General		✓	✓	✓	✓	✓
10	WILX-10 (NBC)	Local		✓	✓	✓	✓	✓
23	WKAR-23 (PBS)	Local		✓	✓	✓	✓	✓
47	WSYM-47 (FOX)	Local		✓	✓	✓	✓	✓
53	WLAJ-53 (ABC)	Local		✓	✓	✓	✓	✓
100	AT&T U-verse Front Row	Private Access		✓	✓	✓	✓	✓
108	TNT (Turner Network Television)	General		✓	✓	✓	✓	
109	TNT (Turner Network Television) - West	General		✓	✓	✓	✓	
112	TBS	General		✓	✓	✓	✓	
113	TBS - West	General		✓	✓	✓	✓	
120	Discovery Channel	Educational		✓	✓	✓	✓	
124	USA Network	General		✓	✓	✓	✓	
128	FX Network	General		✓	✓	✓	✓	
130	Fox Reality	General		✓	✓	✓		
134	E! Entertainment Television	General		✓	✓	✓	✓	
138	TV Land	General		✓	✓	✓	✓	
140	Comedy Central	General		✓	✓	✓	✓	
145	Spike TV	General		✓	✓	✓	✓	
149	G4	General		✓	✓	✓		
151	Sci Fi Channel	General		✓	✓	✓	✓	
153	Chiller	General		✓	✓	✓		
155	BET (Black Entertainment Television)	General		✓	✓	✓	✓	
157	TV One	General		✓	✓	✓		
161	Sleuth	General		✓	✓	✓		
163	Crime & Investigation Network	General		✓	✓	✓		
164	truTV	General		✓	✓	✓	✓	

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
165	truTV - West	General		✓	✓	✓	✓	
166	A&E	General		✓	✓	✓	✓	
173	GSN - The Network for Games	General		✓	✓	✓		
174	GSN - The Network for Games - West	General		✓	✓	✓		
176	Hallmark Channel	General		✓	✓	✓	✓	✓
178	ABC Family Channel	General		✓	✓	✓	✓	
180	WGN America	General		✓	✓	✓	✓	
181	Bravo	General		✓	✓	✓	✓	
183	LOGO	General		✓	✓	✓		
188	BBC America	General		✓	✓	✓		
189	Current TV	General		✓	✓	✓		
192	mun2	General		✓	✓	✓		
194	Si TV	General		✓	✓	✓		
195	ION	General		✓	✓	✓	✓	✓
197	Jewelry Television	General		✓	✓	✓	✓	✓
202	CNN (Cable News Network)	News		✓	✓	✓	✓	
203	CNN Headline News	News		✓	✓	✓	✓	
205	CNNI (CNN International)	News		✓	✓			
210	FOX News Channel	News		✓	✓	✓	✓	
211	Fox Business Network	News		✓	✓			
215	MSNBC	News		✓	✓	✓	✓	
216	CNBC	News		✓	✓	✓	✓	✓
217	CNBC World	News		✓	✓			
222	Bloomberg Television	News		✓	✓	✓		✓
225	The Weather Channel	News		✓	✓	✓	✓	✓
230	C-SPAN	General		✓	✓	✓	✓	✓
231	C-SPAN2	General		✓	✓	✓	✓	✓
232	C-SPAN3	General		✓	✓	✓		✓
243	ABC News Now	News		✓	✓	✓	✓	

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
250	The Learning Channel (TLC)	Educational		✓	✓	✓	✓	
252	Animal Planet	Educational		✓	✓	✓	✓	✓
254	Travel Channel	Educational		✓	✓	✓	✓	
256	Discovery Health	Educational		✓	✓	✓		
258	The Science Channel	General		✓	✓	✓	✓	✓
259	Military Channel	Educational		✓	✓	✓		
260	Investigation Discovery	General		✓	✓			
264	NASA TV	Educational		✓	✓			
265	National Geographic Channel	Educational		✓	✓	✓	✓	✓
270	History	Educational		✓	✓	✓	✓	✓
272	BIO	Educational		✓	✓	✓		
274	History International	Educational		✓	✓	✓		
276	Military History Channel	Educational		✓	✓	✓		
300	AT&T U-verse Buzz	Private Access		✓	✓	✓	✓	✓
302	Disney Channel	General		✓	✓	✓	✓	✓
304	Disney XD	General		✓	✓	✓	✓	✓
314	Nickelodeon	General		✓	✓	✓	✓	✓
315	Nick2	General		✓	✓	✓	✓	✓
316	Nicktoons	General		✓	✓	✓		✓
320	Noggin	General		✓	✓	✓	✓	✓
322	The N	General		✓	✓	✓	✓	✓
325	Cartoon Network	General		✓	✓	✓	✓	
326	Cartoon Network - West	General		✓	✓	✓	✓	
327	Boomerang	General		✓	✓	✓		✓
328	qubo	General		✓	✓			✓
335	Discovery Kids	Educational		✓	✓	✓		✓
337	PBS Kids Sprout	Educational		✓	✓			✓
340	Smile of a Child TV	General		✓	✓	✓	✓	✓
360	Lifetime Television	General		✓	✓	✓	✓	

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Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
362	Lifetime Movie Network	Movies		✓	✓	✓	✓	
364	Lifetime Real Women	General		✓	✓	✓		
365	SOAPnet	General		✓	✓	✓	✓	
368	Oxygen	General		✓	✓	✓		
372	We (Womens Entertainment)	General		✓	✓	✓		
380	Style Network	General		✓	✓	✓		
400	Customer Notification	Private Access		✓	✓	✓	✓	✓
420	QVC	General		✓	✓	✓	✓	✓
422	Home Shopping Network (HSN)	General		✓	✓	✓	✓	✓
424	ShopNBC	General		✓	✓	✓	✓	✓
428	Jewelry Television	General		✓	✓	✓	✓	✓
450	Home & Garden Television (HGTV)	General		✓	✓	✓	✓	✓
452	Food Network	General		✓	✓	✓	✓	✓
454	DIY Network (Do-It-Yourself Network)	General		✓	✓	✓		✓
456	Fine Living	General		✓	✓	✓		
465	Planet Green	General		✓	✓			
466	FitTV	General		✓	✓			✓
468	ION Life	General		✓	✓			
470	Wealth TV	General		✓	✓	✓		
502	MTV (Music Television)	General		✓	✓	✓	✓	
504	MTV2	General		✓	✓	✓	✓	
506	MTV Tr3s	General		✓	✓			
508	MTV Jams	General		✓	✓			
509	MTV Hits	General		✓	✓	✓		
510	mtvU	General		✓	✓			
515	BET J	General		✓	✓			
516	BET Gospel	General		✓	✓			
518	VH1	General		✓	✓	✓	✓	
520	VH1 Classic	General		✓	✓	✓		

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Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
521	VH1 Soul	General		✓	✓			
525	CMT (Country Music Television)	General		✓	✓	✓	✓	
527	CMT Pure Country	General		✓	✓			
529	Great American Country (GAC)	General		✓	✓	✓		
535	fuse	General		✓	✓	✓		
536	FUEL TV	General		✓	✓	✓		
538	Soundtrack Channel (STC)	General		✓	✓	✓		
560	TBN - Trinity Broadcasting Network	Local		✓	✓	✓	✓	✓
562	Eternal Word Television Network (EWTN)	General		✓	✓	✓	✓	✓
563	Daystar	General		✓	✓	✓	✓	✓
564	INSP (Inspiration Network)	General		✓	✓	✓	✓	✓
565	The Church Channel	General		✓	✓	✓	✓	✓
566	FamilyNet	General		✓	✓	✓	✓	✓
567	BYU	General		✓	✓	✓	✓	✓
570	JCTV	General		✓	✓	✓	✓	✓
575	The Word Network	General		✓	✓	✓	✓	✓
578	World Harvest Television	General		✓	✓	✓	✓	✓
602	ESPN	Sports		✓	✓	✓	✓	
603	ESPN Classic	Sports		✓	✓	✓	✓	
604	ESPNEWS	News		✓	✓	✓	✓	
605	ESPNU	Sports		✓	✓	✓	✓	
606	ESPN2	Sports		✓	✓	✓	✓	
610	ESPN Alternate 1	General		✓	✓	✓	✓	
611	ESPN Alternate 2	General		✓	✓	✓	✓	
612	ESPN Alternate 3	Sports		✓	✓	✓	✓	
613	ESPN Alternate 4	General		✓	✓	✓	✓	
614	ESPN2 Alternate 1	General		✓	✓	✓	✓	
615	ESPN2 Alternate 2	General		✓	✓	✓	✓	
630	NFL Network	Sports		✓	✓	✓		

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Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
638	NHL Network	Sports		✓				
640	VERSUS	Sports		✓	✓	✓		
641	Golf Channel	General		✓	✓	✓		
642	The Sportsman Channel (TSC)	Sports		✓				
647	Fox College Sports - Atlantic	Sports		✓				
648	Fox College Sports - Central	Sports		✓				
649	Fox College Sports - Pacific	Sports		✓				
650	Big Ten Network	Sports		✓	✓	✓	✓	
652	Speed Channel	Sports		✓	✓	✓	✓	
654	Fox Soccer Channel	Sports		✓	✓			
655	Fox Sports en Espanol	Sports		✓				
656	GolTV	Sports		✓				
657	Setanta Sports	Sports						
670	TVG Network	Sports		✓				
672	HorseRacing TV	Sports		✓				
680	Outdoor Channel	Sports		✓				
700	Sports Overflow Channel 1	Sports		✓	✓	✓	✓	
701	Sports Overflow Channel 2	General		✓	✓	✓	✓	
702	YES Network	Sports		✓				
704	SportsNet New York	Sports		✓				
720	FSN Florida	Sports		✓				
722	Sun Sports	Sports		✓				
724	FSN South	Sports		✓				
729	SportSouth	Sports		✓				
730	FSN Pittsburgh	Sports		✓				
732	FSN Ohio-Cincinnati	Sports		✓				
734	FSN Ohio-Cleveland	Sports		✓				
737	FSN Detroit	Sports		✓	✓	✓	✓	
738	FSN Detroit Alternate	Sports		✓	✓	✓	✓	

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Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
744	FSN North	Sports		✓				
748	FSN Midwest - St Louis	Sports		✓				
753	FSN Southwest - Dallas	Sports		✓				
760	FSN Rocky Mountain	Sports		✓				
762	FSN Arizona	Sports		✓				
764	FSN Northwest	Sports		✓				
767	Comcast SportsNet California	Sports		✓				
772	FSN West	Sports		✓				
774	FSN Prime Ticket	Sports		✓				
790	Turner Classic Movies (TCM)	Movies		✓	✓	✓		
792	Fox Movie Channel	Movies		✓	✓	✓		
794	Hallmark Movie Channel	Movies		✓	✓			✓
795	AMC	Movies		✓	✓	✓	✓	
797	IFC	Movies		✓	✓	✓		
798	Sundance Channel	Movies		✓	✓	✓		
802	HBO (Home Box Office)	Premium		✓				
803	HBO (Home Box Office) - West	Premium		✓				
804	HBO2	Premium		✓				
805	HBO2 - West	Premium		✓				
806	HBO Family	Premium		✓				
808	HBO Signature	Premium		✓				
810	HBO Comedy	Premium		✓				
812	HBO Zone	Premium		✓				
814	HBO Latino	Premium		✓				
832	Cinemax	Premium		✓				
833	Cinemax - West	Premium		✓				
834	MoreMAX	Premium		✓				
836	ActionMAX	Premium		✓				
838	ThrillerMAX	Premium		✓				

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Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
840	5StarMAX	Premium		✓				
842	WMAX	Premium		✓				
844	OuterMAX	Premium		✓				
846	ATMAX	Premium		✓				
852	Showtime	Premium		✓	✓			
853	Showtime - West	Premium		✓	✓			
854	Showtime Too	Premium		✓	✓			
855	Showtime Too - West	Premium		✓	✓			
856	Showtime Showcase	Premium		✓	✓			
858	Showtime Extreme	Premium		✓	✓			
860	Showtime Beyond	Premium		✓	✓			
862	Showtime Family Zone	Premium		✓	✓			
864	Showtime Next	Premium		✓	✓			
866	Showtime Women	Premium		✓	✓			
882	The Movie Channel (TMC)	Premium		✓	✓			
883	The Movie Channel (TMC) - West	Premium		✓	✓			
884	TMC Xtra	Premium		✓	✓			
890	FLIX	Premium		✓	✓			
902	Starz	Premium		✓	✓			
903	Starz - West	Premium		✓	✓			
904	Starz Edge	Premium		✓	✓			
906	Starz inBlack	Premium		✓	✓			
908	Starz Cinema	Premium		✓	✓			
910	Starz Comedy	Premium		✓	✓			
912	Starz Kids & Family	Premium		✓	✓			
914	IndiePlex	Premium		✓	✓			
916	RetroPlex	Premium		✓	✓			
932	Encore	Premium		✓	✓			
933	Encore - West	Premium		✓	✓			

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Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
934	Encore Love	Premium		✓	✓			
936	Encore Mystery	Premium		✓	✓			
938	Encore Action	Premium		✓	✓			
940	Encore Westerns	Premium		✓	✓			
942	Encore Drama	Premium		✓	✓			
944	Encore Wam	Premium		✓	✓			
1000	Customer Notification	Private Access		✓	✓	✓	✓	✓
1006	WLNS-HD-6 (CBS)	Local	✓	✓	✓	✓	✓	✓
1008	WHTV-HD-18 (MY NETWORK TV)	Local	✓	✓	✓	✓	✓	✓
1009	QVC HD	General	✓	✓	✓	✓	✓	✓
1010	WILX-HD-10 (NBC)	Local	✓	✓	✓	✓	✓	✓
1023	WKAR-HD-23 (PBS)	Local	✓	✓	✓	✓	✓	✓
1047	WSYM-HD-47 (FOX)	Local	✓	✓	✓	✓	✓	✓
1053	WLAJ-HD-53 (ABC)	Local	✓	✓	✓	✓	✓	✓
1100	Customer Notification	Private Access		✓	✓	✓	✓	✓
1102	HD Theater	Educational	✓	✓	✓	✓	✓	
1104	Universal HD	Movies	✓					
1105	HDNet	Movies	✓	✓	✓	✓	✓	✓
1106	HDNet Movies	General	✓	✓	✓	✓	✓	✓
1108	TNT HD	Movies	✓	✓	✓	✓	✓	
1112	TBS HD	Movies	✓	✓	✓	✓	✓	
1116	MGM HD	Movies	✓					
1118	Smithsonian Channel HD	Educational	✓					
1120	Discovery Channel HD	Educational	✓	✓	✓	✓	✓	
1124	USA Network HD	General	✓	✓	✓	✓	✓	
1128	FX Network HD	Sports	✓	✓	✓	✓	✓	
1134	E! Entertainment HD	General	✓	✓	✓	✓	✓	
1149	G4 HD	General	✓	✓	✓	✓		
1151	Sci Fi Channel HD	General	✓	✓	✓	✓	✓	

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
1166	A&E HD	General	✓	✓	✓	✓	✓	
1178	ABC Family Channel HD	General	✓	✓	✓	✓	✓	
1180	WGN America HD	General	✓	✓	✓	✓	✓	
1181	Bravo HD	General	✓	✓	✓	✓	✓	
1202	CNN HD	News	✓	✓	✓	✓	✓	
1210	Fox News Channel HD	News	✓	✓	✓	✓	✓	
1211	Fox Business Network HD	News	✓	✓	✓			
1216	CNBC HD	News	✓	✓	✓	✓	✓	✓
1225	The Weather Channel HD	General	✓	✓	✓	✓	✓	✓
1250	The Learning Channel HD	Educational	✓	✓	✓	✓	✓	
1252	Animal Planet HD	Educational	✓	✓	✓	✓	✓	✓
1254	Travel Channel HD	Educational	✓	✓	✓	✓	✓	
1258	Science Channel HD	Educational	✓	✓	✓	✓	✓	✓
1265	National Geographic Channel HD	Educational	✓	✓	✓	✓	✓	✓
1270	History HD	Educational	✓	✓	✓	✓	✓	✓
1302	Disney Channel HD	General	✓	✓	✓	✓	✓	✓
1304	Disney XD HD	General	✓	✓	✓	✓	✓	✓
1360	Lifetime Television HD	General	✓	✓	✓	✓	✓	
1362	Lifetime Movie Network HD	Movies	✓	✓	✓	✓	✓	
1380	Style Network HD	General	✓	✓	✓	✓		
1420	QVC HD	General	✓	✓	✓	✓	✓	✓
1450	HGTV HD	General	✓	✓	✓	✓	✓	✓
1452	Food Network HD	General	✓	✓	✓	✓	✓	✓
1465	Planet Green HD	Educational	✓	✓	✓			
1470	Wealth TV HD	General	✓	✓	✓	✓		
1505	Palladia	Premium	✓					
1602	ESPN HD	Sports	✓	✓	✓	✓	✓	
1604	ESPNews HD	News	✓	✓	✓	✓	✓	
1605	ESPNU HD	Sports	✓	✓	✓	✓	✓	

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
1606	ESPN2 HD	Sports	✓	✓	✓	✓	✓	
1630	NFL Network HD	Sports	✓	✓	✓	✓		
1638	NHL Network HD	Sports	✓	✓				
1640	VERSUS HD	Sports	✓	✓	✓	✓		
1641	Golf HD	Sports	✓	✓	✓	✓		
1650	Big Ten Network HD	Sports	✓	✓	✓	✓	✓	
1652	Speed HD	Sports	✓	✓	✓	✓	✓	
1680	Outdoor Channel HD	Sports	✓	✓				
1701	Sports HD Alternate	General		✓	✓	✓	✓	
1737	FSN Detroit HD	Sports	✓	✓	✓	✓	✓	
1794	Hallmark Movie Channel HD	Movies	✓	✓	✓			✓
1802	HBO HD	Premium	✓	✓				
1803	HBO HD - West	Premium	✓	✓				
1804	HBO2 HD	General	✓	✓				
1805	HBO2 HD - West	Premium	✓	✓				
1806	HBO Family HD	General	✓	✓				
1807	HBO Family HD - West	Premium	✓	✓				
1808	HBO Signature HD	Premium	✓	✓				
1809	HBO Signature HD - West	Premium	✓	✓				
1810	HBO Comedy HD	General	✓	✓				
1811	HBO Comedy HD - West	Premium	✓	✓				
1812	HBO Zone HD	Premium	✓	✓				
1813	HBO Zone HD - West	Premium	✓	✓				
1814	HBO Latino HD	Premium	✓	✓				
1815	HBO Latino HD - West	Premium	✓	✓				
1832	Cinemax HD	Premium	✓	✓				
1833	Cinemax HD - West	Premium	✓	✓				
1834	MoreMax HD	Premium	✓	✓				
1835	MoreMAX HD - West	Premium	✓	✓				

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Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
1836	ActionMax HD	Premium	✓	✓				
1837	ActionMAX HD - West	Premium	✓	✓				
1838	ThrillerMax HD	Premium	✓	✓				
1839	ThrillerMAX HD - West	Premium	✓	✓				
1840	5StarMax HD	Premium	✓	✓				
1842	WMAX HD	Premium	✓	✓				
1844	OuterMax HD	Premium	✓	✓				
1846	ATMax HD	Premium	✓	✓				
1852	Showtime HD	Premium	✓	✓	✓			
1853	Showtime HD - West	Premium	✓	✓	✓			
1854	Showtime Too HD	Premium	✓	✓	✓			
1855	Showtime Too HD - West	Premium	✓	✓	✓			
1856	Showtime Showcase HD	Premium	✓	✓	✓			
1857	Showtime Showcase HD - West	Premium	✓	✓	✓			
1858	Showtime Extreme HD	Premium	✓	✓	✓			
1859	Showtime Extreme HD - West	Premium	✓	✓	✓			
1882	The Movie Channel HD	Premium	✓	✓	✓			
1883	The Movie Channel (TMC) HD - West	Premium	✓	✓	✓			
1884	TMC Xtra HD	Premium	✓	✓	✓			
1902	Starz HD	Premium	✓	✓	✓			
1903	Starz HD - West	Premium	✓	✓	✓			
1904	Starz Edge HD	Premium	✓	✓	✓			
1910	Starz Comedy HD	Premium	✓	✓	✓			
1912	Starz Kids & Family HD	Premium	✓	✓	✓			
1932	Encore HD	Premium	✓	✓	✓			
2500	AT&T U-verse Buzz	Private Access		✓	✓	✓	✓	✓
3002	Univision	General		✓	✓	✓	✓	
3003	Galavision	General		✓	✓	✓		
3005	Telefutura	General		✓	✓	✓		

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Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
3007	Telemundo	General		✓	✓	✓	✓	
3009	mun2	General		✓	✓	✓		
3013	WAPA America	General						
3015	V-me	General						
3017	Latele Novela	General						
3052	Disney XD en Espanol	General						
3053	Boomerang en Espanol	General						
3055	HITN	General						
3056	La Familia Cosmovision	General						
3077	EWTN Espanol	General		✓	✓	✓	✓	✓
3078	TBN Enlace USA	General						
3102	Discovery en Espanol	Educational						
3103	Discovery Familia	Educational						
3104	History en Espanol	Educational						
3202	CNN en Espanol	News						
3203	SUR	General						
3302	ESPN Deportes	Sports						
3303	Fox Sports en Espanol	Sports		✓				
3304	Go!TV	Sports		✓				
3402	Cinelatino	General						
3404	De Pelicula	General						
3405	De Pelicula Clasico	General						
3505	MTV Tr3s	General		✓	✓			
3506	Telehit	General						
3602	CCTV-9	General		✓	✓	✓		
3603	CCTV-4	General						
3604	CTI-Zhong Tian	General						
3605	Phoenix InfoNews	Local						
3606	Phoenix North America Chinese Channel	Local						

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
3631	ET-News	General						
3632	ET-Global	General						
3643	MBC America	General						
3662	Saigon Broadcasting Television Network	News						
3664	TVB-V	General						
3680	TV Japan	General						
3682	The Filipino Channel	General						
3683	GMA Pinoy	General						
3702	Zee TV	General						
3703	TV Asia	General						
3704	Sony Entertainment Television Asia (SET Asia)	General						
3706	STAR India PLUS	General						
3832	TV5MONDE	General						
3862	TV Polonia	General						
3863	TVP Info	General						
3882	Channel One Russia	Premium						
3883	RTR Planeta	Premium						
3952	Playboy TV	Adults						
3954	Playboy TV en Espanol	Adults						
4501	ESPN Full Court 1	Sports						
4502	ESPN Full Court 2	Sports						
4503	ESPN Full Court 3	Sports						
4504	ESPN Full Court 4	Sports						
4505	ESPN Full Court 5	Sports						
4506	ESPN Full Court 6	Sports						
5101	URGE 1 - TRL	General		✓	✓	✓		
5102	URGE 2 - Todays Top 40	General		✓	✓	✓		
5103	URGE 3 - Urban POP	General		✓	✓	✓		
5104	URGE 4 - Modern POP	General		✓	✓	✓		

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
5105	URGE 5 - Cover to Cover	General		✓	✓	✓		
5106	URGE 6 - Soft POP	General		✓	✓	✓		
5107	URGE 7 - I Love the 70s	General		✓	✓	✓		
5108	URGE 8 - I Love the 80s	General		✓	✓	✓		
5109	URGE 9 - I Love the 90s	General		✓	✓	✓		
5110	URGE 10 - Solid Gold Oldies	General		✓	✓	✓		
5111	URGE 11 - Discotech	General		✓	✓	✓		
5112	URGE 12 - Dance Club	General		✓	✓	✓		
5113	URGE 13 - Electronica	General		✓	✓	✓		
5114	URGE 14 - MTV2	General		✓	✓	✓		
5115	URGE 15 - Rock Legends	General		✓	✓	✓		
5116	URGE 16 - Arena Rock	General		✓	✓	✓		
5117	URGE 17 - Alternative Rock	General		✓	✓	✓		
5118	URGE 18 - Adult Rock	General		✓	✓	✓		
5119	URGE 19 - MTV2 HB	General		✓	✓	✓		
5120	URGE 20 - R&B Hits	General		✓	✓	✓		
5121	URGE 21 - Classic R&B	General		✓	✓	✓		
5122	URGE 22 - Classic Rap	General		✓	✓	✓		
5123	URGE 23 - Modern Rap	General		✓	✓	✓		
5124	URGE 24 - Modern Soul	General		✓	✓	✓		
5125	URGE 25 - CMT Radio	General		✓	✓	✓		
5126	URGE 26 - Bluegrass	General		✓	✓	✓		
5127	URGE 27 - Classic Country	General		✓	✓	✓		
5128	URGE 28 - Wide Open Ctry	General		✓	✓	✓		
5129	URGE 29 - Reggae	General		✓	✓	✓		
5130	URGE 30 - Latin Jazz	General		✓	✓	✓		
5131	URGE 31 - Radio Alterna	General		✓	✓	✓		
5132	URGE 32 - Tejano	General		✓	✓	✓		
5133	URGE 33 - Smooth Jazz	General		✓	✓	✓		

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Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
5134	URGE 34 - Classic Jazz	General		✓	✓	✓		
5135	URGE 35 - Blues	General		✓	✓	✓		
5136	URGE 36 - Easy Listening	General		✓	✓	✓		
5137	URGE 37 - Classical	General		✓	✓	✓		
5138	URGE 38 - Christian	General		✓	✓	✓		
5139	URGE 39 - Gospel	General		✓	✓	✓		
5140	URGE 40 - POP Standards	General		✓	✓	✓		
5141	URGE 41 - Jazzup Broadway	General		✓	✓	✓		
5142	URGE 42 - Cinema	General		✓	✓	✓		
5143	URGE 43 - Noggin	General		✓	✓	✓		
5144	URGE 44 - Nick Kids	General		✓	✓	✓		
5145	URGE 45 - Dream Sequence	General		✓	✓	✓		
5146	URGE 46 - Swing	General		✓	✓	✓		
5147	URGE 47 - Showcase	General		✓	✓	✓		
5148	URGE 48 - Comedy	General		✓	✓	✓		
9000	Retail Barker	Private Access		✓	✓	✓		

EXHIBIT D

"Local TV is New Weapon"
Wall Street Journal
March 25, 2009



1 of 98 DOCUMENTS

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THE WALL STREET JOURNAL

The Wall Street Journal

March 25, 2009 Wednesday

SECTION: MEDIA & MARKETING; Pg. B8

LENGTH: 655 words

HEADLINE: Local TV Is New Weapon --- Cable, Phone Giants Use Community News to Lure Customers

BYLINE: By Vishesh Kumar and Amol Sharma

BODY:

In the marketing battle between telephone and cable companies, both sides have found a surprisingly simple weapon: local-television offerings such as community news, traffic alerts and weather.

This summer, Verizon Communications Inc. plans to launch its own local TV channel in New York City, according to people familiar with the matter. The move is a response to Cablevision Systems Corp. and Time Warner Cable. Their round-the-clock local news channels, News 12 and New York One, have helped the companies keep some customers in Long Island and New York City from bolting for Verizon.

"Local-interest stories are the ones that people cling to and watch," said John Harrobin, vice president of digital media at Verizon.

Mr. Harrobin said a version of the Verizon local channel available in Maryland and Northern Virginia ranks in the top 20% by viewers of the 350 channels the company offers, despite Verizon's ample menu of high-definition programming.

Both cable and phone companies are vigorously marketing features such as super-fast Web access and on-demand movies. But investing in local-TV programming, replete with news of school closings and community politics, helps distinguish the companies from rivals to boost customer loyalty -- or steal away subscribers.

"Hyperlocal content is a big draw because people really care about what happens right around them," said Neal Polachek, chief executive of research firm Kelsey Group, adding that it is "a great retention tool."

Verizon's channel, FiOS1, features traffic on the 1s and weather on the 5s. It also has items such as "Push-Pause,"

Local TV Is New Weapon --- Cable, Phone Giants Use Community News to Lure Customers The Wall Street Journal
March 25, 2009 Wednesday

an original production that includes community news shot by so-called citizen journalists.

Verizon said it is considering rolling out the channel in other markets. So far, though, it hasn't produced a professional newscast or hired local reporters as Time Warner and Cablevision have.

The industry's fresh zeal for things local reflects media companies' own recent hyperlocal push, such as Web sites from New York Times Co. and Washington Post Co. that take a regional tack. Some broadcasters are also beefing up local coverage. NBC Local Media, part of General Electric Co.'s NBC Universal, recently launched a 24-hour channel in New York City.

While local broadcast affiliates of the big networks produce polished newscasts, they typically broadcast local content just a few hours a day. The channels from phone and cable companies often offer 24 hours of content that can drill down to the neighborhood level.

"One of the only tried and tested reasons people keep their service is because of New York One," said Steve Paulus, regional vice president of local news at Time Warner Cable, which is being spun off from Time Warner Inc. Time Warner Cable says New York One is profitable but won't disclose figures.

Emboldened by its success in New York, Time Warner Cable this week will roll out a 24-hour station in Buffalo, N.Y., where the operator faces mounting competition from Verizon's FiOS television service. The channel will emphasize local sports and weather, given the city's severe winters.

Cablevision, which faces competition from Verizon across a greater share of its footprint than any other cable operator, has a local-content strategy that goes beyond TV programming.

Last year, the company paid \$650 million to acquire Newsday, a newspaper on Long Island, where many of Cablevision's customers live. The company has said it plans to cut off free access to Newsday's Web site and possibly offer it as a service for Cablevision and Newsday customers.

"Along with serving as differentiators for the operators, these networks are also filling a growing void in the local [media] market," said Alan Mutter, a media analyst at Tapit Partners.

In turn, Mr. Mutter said, cable and phone companies may grab a bigger share of the local ad dollars that currently flow to declining papers.

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EXHIBIT E

Declaration of Jonathan Kramer

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	)	City of Lansing, Michigan
PEG Channel Capacity Under Sections	)	CSR-8127
543(b)(7), 531 (a) and the Commission's)	
Ancillary Jurisdiction Under Title I)	
)	
Petition for a Declaratory Ruling That)	
AT&T's Method of Delivering Public,	)	ACM <i>et al.</i>
Educational and Government Access	)	CSR-8126
Channels Over Its U-verse System Is Contrary)	
to the Communications Act of 1934, as)	
amended, and Applicable Commission Rules)	
)	
Petition for Declaratory Ruling Regarding)	
Primary Jurisdiction Referral in City of	)	City of Dearborn, Michigan <i>et al.</i>
Dearborn et al. v. Comcast of Michigan III,	)	CSR8128
Inc. et al.)	

DECLARATION OF JONATHAN KRAMER
IN SUPPORT OF CITY OF LANSING, MICHIGAN'S REPLY COMMENTS

I, Jonathan Kramer, declare as follows:

1. I am an engineering consultant with over thirty (30) years experience with cable television and telecommunications related matters. I am the principal consultant with the Kramer.Firm, Inc. Since 1984, Kramer.Firm, Inc. has advised over 600 federal, state, and local government agencies, as well as private institutions, on cable and telecommunications technology matters.

2. I have an AS Degree with honors in Radio Communications from Los Angeles Trade Technical College. In the cable industry I have been:

- A System Engineer with Warner Cable of Malibu, California.

- An Engineering Manager with Western Cable Services, Inc. in Ventura, California.
- A Technical Manager, and later Regional Technical Manager for the Southern California Region of Storer Cable Communications.
- Since 1984 an engineering consultant on cable matters for local franchising authorities (LFAs).

3. I was the Co-chair of the Joint Task Force on Technical Standards Committee, appointed by the National Association of Telecommunications Officers and Advisors (NATOA), the National League of Cities, the US Conference of Mayors, and the National Association of Counties, to work jointly with the cable industry to develop technical standards for cable television systems. I was the principal technical person working for municipalities on these standards, which were adopted by the Commission with only minor changes from those recommended by the joint municipality/industry group and appear as Subpart K—Technical Standards of Part 76 of the Commission's rules.

4. I was named "Member of the Year" by NATOA in 1991 for my work on these standards, and have twice served on the National Board of Directors of NATOA.

5. I was appointed by the Commission to serve as its cable technology expert witness in the matter of *Playboy Entertainment Group v. United States*, 30 F.Supp. 2d 702 (1998).

6. I was the principal technology advisor to this Commission's State and Local Government Advisory Committee.

7. I am an elected Senior Member of the Society of Cable Telecommunications Engineers (SCTE) and am a member of the SCTE's Loyal Order of

the 704, whose membership is restricted to recognized cable engineers with a minimum of 30 years in cable television engineering experience. By the SCTE, I am certified as a:

- Broadband Transpiration Specialist; and
- Broadband Distribution Specialist; and
- Broadband Premises Specialist.

8. I am also a member of the Society of Broadcast Engineers. I am designated by that organization as a Certified Broadcast Technologist.

9. My engineering work for LFAs for the last twenty-five (25) years has involved detailed work with, examination of and knowledge about the cable systems serving LFAs, so as to provide advice to LFAs on the capabilities and limitations of such systems. I thereby assist LFAs in obtaining accurate knowledge about what may or may not be technically achievable by cable systems so that they can set appropriate technical standards in cable franchise renewals, ordinances or other local laws, as well as conduct appropriate testing, inspection and enforcement activities.

10. From this work with cable systems and cable equipment manufacturers I know and can state that modern cable systems support multiple channel maps, far more than the one or two which AT&T has said its U-verse system is capable of "today". These maps are used for "channel reuse", among other things.

11. A good example of the use of multiple channel maps is Time-Warner's Los Angeles regional cable system. That firm serves over one million customers in greater Los Angeles County, Ventura County, and Orange County, California from its master head-end in Los Angeles County. I believe that Time Warner's Los Angeles regional system is similar to AT&T's system in the geographic area it serves, and that Time Warner far exceeds the number of customers served by AT&T in the same region.

From my extensive work with this Time Warner system and its personnel I have learned that the Time Warner Los Angeles area system supports approximately one hundred (100) separate channel maps, compared to the two (2) AT&T says its system is capable of "today". In this respect, Time Warner's Los Angeles area cable system is fairly typical of modern, large cable systems.

12. I have personal knowledge of the matters stated herein, except where stated otherwise, in which case they are on information and belief and I believe them to be true.

This concludes my declaration.

I declare under penalty of perjury that the preceding is true and correct, and that I have executed this verification this 31st day of March, 2009 in Los Angeles, California.


Jonathan Kramer