

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

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

**REPLY COMMENTS OF  
THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTelecom)<sup>1</sup> is pleased to submit these reply comments in the above referenced proceeding. The Commission seeks comment on petitions for declaratory ruling that seek to apply legacy cable rules and regulations to video providers deploying advanced networks. On January 27, 2009, the City of Lansing filed a petition with this Commission seeking a declaration that 47 U.S.C. § 543(b) imposes a broad, non-discrimination obligation with respect to all programming and networks provided on the basic

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<sup>1</sup> USTelecom is the nation's leading trade association representing communications service providers and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

service tier.<sup>2</sup> It also seeks a broad declaration that companies deploying advanced video networks are bound by a series of PEG signal and functionality requirements. Three days later, the Alliance for Community Media (ACM) filed a similar petition asserting – among other things – that certain video providers do not provide PEG programmers “channels” as contemplated by the Cable Act.<sup>3</sup> On February 6, 2009, the Media Bureau issued a public notice seeking comments on the petitions, and setting a March 9 deadline for comments and oppositions.<sup>4</sup>

Network providers continue to deploy advanced networks throughout the country at a remarkable pace. According to industry statistics, companies in the United States committed \$64.2 billion in 2008 in capital expenditures towards increased network deployment.<sup>5</sup> As telecom providers continue to deploy competitive video networks across the nation, consumers are reaping the increased benefits in the form of lower prices, more advanced service and increased access to programming, including public, educational, and governmental (PEG) programming.

Each of USTelecom’s member companies that are deploying video networks are strongly committed to providing PEG programming to their subscribers, motivated by both competition and the interests of their subscribers. What is perhaps most exciting for both consumers and

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<sup>2</sup> Petition for Declaratory Ruling of the City of Lansing, Michigan (filed January 27, 2009); *See also* Petition for Declaratory Ruling Regarding Primary Jurisdiction Referral in City of Dearborn et al. v. Comcast of Michigan III, Inc. et al. of the City of Dearborn, Michigan; the Charter Township of Meridian, Michigan; the Charter Township of Bloomfield, Michigan; and the City of Warren, Michigan (filed December 9, 2008).

<sup>3</sup> *See* Petition for Declaratory Ruling of The Alliance for Community Media, Alliance for Communications Democracy, Sacramento (California) Metropolitan Cable Television Commission, Foothill-De Anza Community College District California, Chicago Access Network Television, Illinois Chapter of the National Association of Telecommunications Officers and Advisors, Manhattan (New York) Neighborhood Network, BronxNet (NY), Brooklyn (NY) Community Access Television, City of Raleigh, North Carolina, ACM Western Region, ACM Central States Region, ACM Midwest Region, ACM Northwest Region, ACM Northeast Region, and the South East Association of Telecommunications Officers and Advisors (filed January 30, 2009).

<sup>4</sup> *Entities File Petitions for Declaratory Ruling Regarding Public, Educational, and Governmental Programming*, DA 09-203 (MB rel. February 6, 2009).

<sup>5</sup> Yankee Group Research, Inc. © Copyright 1997-2008. All rights reserved.

providers of PEG programming are the unique ways in which many companies are providing this important programming.

For example, due to the advanced nature of AT&T's video network, its PEG product is deployed on a designated market area (DMA) basis, as opposed to a more narrow franchise area basis. As a result, AT&T's PEG product enables programmers and municipalities to reach audiences across an entire DMA. In addition, AT&T provides a universal portal whereby subscribers to its service can more easily and readily access *all* PEG programming in their area.<sup>6</sup> Moreover, the advances in the delivery of PEG programming by new entrants is forcing cable incumbents to react in kind with advances in the deployment of their PEG programming. Comcast, for example, is converting its PEG channels to a digital format as "part of a comprehensive plan to migrate analog services to digital so that the reclaimed spectrum can be used in a more efficient fashion to provide not only PEG content, but also additional ethnic and international programming, video-on-demand options, HD channels, and faster Internet speeds."<sup>7</sup> These innovations are creating a more dynamic and competitive marketplace where consumers benefit through increased and unique access to all forms of content, including PEG programming.

With the entry of USTelecom member companies into countless video markets across the country, American consumers are seeing the benefits of head-to-head wireline video competition.<sup>8</sup> This competitive development represents a paradigm change for consumers.

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<sup>6</sup> AT&T Comments, pp. 9 – 11.

<sup>7</sup> Comcast Comments, p. 2.

<sup>8</sup> *See e.g.*; Implementation of Section 3 of the Cable Television Consumer Protection & Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, Report on Cable Industry Prices, 21 FCC Rcd 15087, ¶ 2 (2006) ("Prices are 17 percent lower where wireline cable competition is present."), 20 FCC Rcd 2718, 2721, ¶ 12 (2005) (the degree by which cable rates (monthly rates and price per channel) were lower in competitive areas compared to non-competitive areas was greatest where there was

Today's consumers are benefitting from the deployment of advanced technology that is rapidly changing how, when and where they consume all forms of content – from music, to movies to PEG programming. Many LFAs are embracing the advancements these technological changes are bringing.<sup>9</sup> The City of Joliet, for example, concludes that “[w]hile change means sometimes doing things differently, our 21st century economy demands this innovation that increases choice and competition.”<sup>10</sup> Yet despite these revolutionary 21<sup>st</sup> century advancements, some LFAs continue to proceed as if the same 20<sup>th</sup> century rules apply in today's competitive video environment.

USTelecom is particularly concerned about many of the arguments raised in the various petitions that are the subject of this proceeding. Rather than ensure the delivery of PEG programming as Petitioners suggest, their demands – based on erroneous interpretation of the

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“wireline overbuild competition”), 18 FCC Rcd 13284, 13286-87, ¶ 5 (2003) (areas with competition from a wireline, overbuild, or municipal cable system had a lower average rate per channel than areas that had no competition or only DBS competition); *See also*, GAO, *Report to the Subcomm. on Antitrust, Competition Policy, and Consumer Rights, Comm. on the Judiciary, U.S. Senate: Telecommunications, Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241, at 12 (Feb. 2004) (finding that “the monthly rate for cable television service was 41% lower compared with the matched market, and in 2 other [broadband service provider] locations, cable rates were more than 30% lower when compared with their matched markets”). *See also*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 03-172, Tenth Annual Report, 19 FCC Rcd 1606 ¶ 11 (2004) (noting that in certain locales “cable operators’ pricing decisions may be affected by direct competition,” and that “when an incumbent cable operator faces ‘effective competition,’ . . . it responds in a variety of ways, including lowering prices or adding channels without changing the monthly rate, as well as improving customer service and adding new services such as interactive programming.”

<sup>9</sup> *See e.g.*, Comments of the City of Westlake (referring to AT&T's PEG service as “the public access technology of the future.”); Comments of the City of Palos Heights (noting that “[t]his easily accessible technology is helping us reach many more people than ever before, which should be the number one goal of every PEG programmer.”); Comments of City of River Rouge (concluding that access to advanced technology for delivering PEG content “means very positive benefits for our community and residents.”); Comments of City Wayne (stating that its city leaders are “thrilled” that “that we have the ability of knowing that viewers from across the region can tune into our local broadcasts to see what it is that makes the City of Wayne a truly special place to live, work and play.”); Comments of Woodhaven (encouraging the Commission to “help us keep moving forward by helping advance technologies like this.”); City of Livonia (noting that advanced technologies for PEG delivery provide residents with “access to programming that just a few years ago was unthinkable.”). Even local, niche programming providers are applauding this innovation in PEG content delivery. *See e.g.*; Comments of the Joliet Jackhammers (noting that due to advances and innovations in PEG delivery, “more viewers throughout metropolitan Chicago will be able to watch the Joliet Jackhammers through the innovative programming U-verse provides, which is great news for our fans and our city.”).

<sup>10</sup> Comments of the City of Joliet, p.1.

law – would stifle innovation, particularly with respect to how this programming is delivered to consumers. Specifically, USTelecom supports the view raised in numerous comments that providers are not required to maintain a basic tier if they are not subject to rate regulation.<sup>11</sup> In addition, USTelecom maintains that local franchising authorities (LFAs) have a limited role in setting requirements concerning placement or delivery technology of PEG channels. Finally, there is no general non-discrimination criteria that mandates PEG channels be treated the same as broadcast channels.

**I. VIDEO PROVIDERS MUST MAINTAIN A BASIC TIER ONLY IF THEY ARE SUBJECT TO RATE REGULATION.**

LFAs ask the Commission to declare that the obligation to carry PEG channels on a basic tier applies whether or not a cable operator is subject to effective competition for the delivery of its commercial services. LFAs incorrectly assert that the Commission has authority over the provision of PEG channels under Section 623 of the Communications Act. Specifically, they argue that Section 623(b)(7), which governs the delivery of PEG channels, provides authority for the Commission to assert jurisdiction over carriage of PEG programming channels by video providers, including new entrants.

But contrary to their assertions, Section 623 of the Act applies only to cable systems that have not yet been found by the Commission to be subject to “effective competition.” Section 623(a)(2) provides that “[i]f the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to

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<sup>11</sup> AT&T Comments, pp. 44 – 48; Comcast Corporation Comments, pp. 26 – 27; Cablevision Systems Corporation Comments, pp. 9 – 10; Bright House Networks Comments, pp. 2 – 4.

regulation by the Commission or by a State or franchising authority under this section.”<sup>12</sup> In essence, LFAs seek to avail themselves of a statutory tool that is simply not available.

This is exactly the conclusion that was reached by the United States Court of Appeals for the District of Columbia Circuit when it examined the provisions of Section 623 of the Communications Act.<sup>13</sup> In that instance, the Court held that the provisions of Section 623(b)(8) – which prohibit systems from requiring customers to “buy through” an intermediate tier of programming in order to purchase standalone premium movie channels – applied only to systems *not* subject to effective competition.<sup>14</sup>

In reaching its conclusion, however, the Court noted that *all* provisions of Section 623 involved the regulation of rates and were therefore applicable only in the absence of effective competition. Specifically, the Court concluded that the buy-through provisions of Section 623(b)(8) were “inextricably intertwined with [Section 623(b)(7)] . . . *which clearly applies only to systems not subject to effective competition.*”<sup>15</sup>

The Court of Appeals’ conclusion is consistent with subsequent Commission determinations as well. As early as 2001 the Commission determined that Section 623(b)(7) does not apply to systems that are subject to effective competition.<sup>16</sup> In its First Report and

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<sup>12</sup> 47 U.S.C. § 523(a)(2).

<sup>13</sup> *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995).

<sup>14</sup> The Court first noted that the general caption of Section 623 suggested that all the provisions of that section were only applicable in the absence of effective competition. More importantly, however, the Court concluded that the buy-through provisions of Section 623(b)(8) were “inextricably intertwined with [Section 623(b)(7)] . . . which clearly applies only to systems not subject to effective competition.” *Id.*; at 192.

<sup>15</sup> *Id.* at 192 (emphasis added).

<sup>16</sup> In its 2001 First Report and Order on the carriage of digital television broadcast signals, the Commission specifically noted that “if a cable system faces effective competition . . . and is deregulated pursuant to a Commission order, the cable operator is free to place a broadcaster’s digital signal on upper tiers of service or on a separate digital service tier. This finding is based upon the belief that Section 623(b)(7) is one of those rate regulation requirements that sunsets once competition is present in a given franchise area. We believe that the decision in *Time Warner v. FCC* supports this interpretation.” *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, ¶102 (2001)

Order, the Commission noted that where cable systems face effective competition under one of four statutory tests, “the cable operator is free to place a broadcaster’s digital signal on upper tiers of service or on a separate digital service tier. This finding is based upon the belief that Section 623(b)(7) is one of those rate regulation requirements that sunsets once competition is present in a given franchise area.” In support of its finding, the Commission specifically referred to the Court of Appeals decision in *Time Warner v. FCC*.<sup>17</sup>

Despite the Commission’s conclusions, LFAs also assert that the Commission has “ancillary” jurisdiction to regulate PEG placement whether or not a cable operator is subject to effective competition.<sup>18</sup> Petitioner’s assertion, however, flatly contradicts Section 624(f) of the Communications Act which provides that “[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter.” In other words, the ancillary jurisdiction authority alleged by Petitioners is expressly excluded by the Communications Act.

## **II. LFAs LACK AUTHORITY TO REGULATE THE PLACEMENT AND DELIVERY TECHNOLOGY FOR PEG CHANNELS.**

As is plainly evident in many of the comments in this proceeding, several LFAs seek to expand the limited role of local regulation in the delivery of PEG content. Rather than focus on the areas in which they have authority to oversee the deployment of video services in their

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<sup>17</sup> *Id.* The Commission further clarified this issue when it recently issued a public notice clarifying LFA authority in this realm. See; Public Notice, *Media Bureau Clarifies Issues Concerning Franchise Authority Certification to Regulate Rates*, DA 09-68 (rel. Jan. 16, 2009). In that notice, the Commission reminded LFAs that they could acquire “actual knowledge” of effective competition in several ways, including “if a local exchange carrier or its affiliate . . . offers comparable video programming services directly to subscribers by any means . . . to an area that substantially overlaps the franchise area of an incumbent.” *Id.*, p. 2.

<sup>18</sup> Regarding AT&T’s U-Verse system, the City of Lansing states that “the Commission has the authority and the responsibility to implement Congressional intent” by regulating the manner in which AT&T carries PEG channels. Petition of City of Lansing at 9 n.5.

respective areas, they seek to interfere with the organized progression of cable system technology and consumer equipment.<sup>19</sup>

For example, the City of Lansing, which acknowledges the *increase* in the number of available PEG channels to certain video subscribers,<sup>20</sup> alleges that AT&T's use of a single portal for all PEG programming "violates" the City's authority under the Communications Act.<sup>21</sup> Similarly, the City of Dearborn asserts that a video provider's decision to convert PEG channel delivery from analog to digital also was in violation of the Communications Act, since subscribers would be required to obtain a digital converter box.<sup>22</sup> The Communications Act, however, specifically prohibits LFAs from controlling the equipment configuration in customers' homes and the transmission technology employed by USTelecom members that offer video services to consumers.

Section 624(e) of the Act states that "[n]o State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology." Congress enacted this provision to avoid "the patchwork of regulations that would result from a locality-by-locality-approach," which it thought to be "particularly inappropriate in today's intensely dynamic technological environment."<sup>23</sup> In examining the role of LFAs in the approval process, the Commission concluded that it was "clear" that subscriber equipment could "no longer be 'prohibited, conditioned, or restricted' by

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<sup>19</sup> See e.g.; NATOA Comments, pp. 7 – 10.

<sup>20</sup> City of Lansing Comments, p. 13 (noting that AT&T plans to provide the 7 seven PEG channels from that municipality "along with other PEG programming.").

<sup>21</sup> City of Lansing Comments, p. 13.

<sup>22</sup> City of Dearborn Petition, p. 3.

<sup>23</sup> Communications Act of 1996, H. R. Rep. No. 104-204 at 110.

[LFAs] under Section 624,” and that “[t]ransmission technology’ may also not be ‘prohibited, conditioned, or restricted,’ by LFAs.<sup>24</sup>

Nevertheless Petitioners seek to assert authority which they simply do not have, absent any franchise agreement with individual franchisees. Their respective petitions are riddled with alleged shortfalls regarding the ways in which various providers choose to transmit PEG.<sup>25</sup>

Petitioners essentially seek to “prohibit, condition, or restrict” video providers’ use of both “transmission technology” to deliver PEG, and the “subscriber equipment” that some customers may use to receive those transmissions. Despite their protestations, Petitioners cannot reconcile their legal analysis with the clear implications of Section 624(e).

### **III. FEDERAL LAW DOES NOT IMPOSE NON-DISCRIMINATION OBLIGATIONS WITH RESPECT TO PEG PROGRAMMING.**

Finally, Petitioners’ assert that federal law imposes a strict non-discrimination obligation with respect to all programming – including PEG programming – that is offered on a basic service tier. They claim that delivery of PEG channels by various providers violates this nondiscrimination obligation because it does not necessarily mirror the manner in which other programming is delivered (*e.g.*; broadcast channels). But federal law simply does not require – or even suggest – that all programming on any basic tier be provided in an identical manner.

There are no provisions in the Cable Act that support Petitioners’ arguments. Rather, the Cable Act merely requires that cable operators provide PEG programming on their most widely subscribed package of programming at no additional charge.<sup>26</sup> In addition, rate regulated cable

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<sup>24</sup> Report and Order, *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, ¶140 (1999).

<sup>25</sup> See Lansing Petition, pp. 17 – 22; Dearborn Petition, pp. 3 – 5, pp. 21 – 23; ACM Petition, pp. 8 – 22.

<sup>26</sup> 47 U.S.C. § 523(b)(7).

operators are only obligated to provide “channel capacity” for PEG related programming.<sup>27</sup>

USTelecom members deploying competitive video services sufficiently meet each of these criteria. There is nothing else in the Cable Act to suggest that all video programming carried as part of the basic service tier must be provided in the same manner as all other programming.

The Commission recognized this when it concluded that new video providers should have “discretion” and “flexibility” in how to provide PEG programming in light of the technical configuration of their video distribution systems.<sup>28</sup> Contrary to petitioners’ argument, the Cable Act only refers to providing PEG “channel capacity,” and does not support a conclusion that the Cable Act embodies a non-discrimination rule as between programming provided on a basic service tier. So long as company offering a video service provides “channel capacity” for PEG programming, there is no basis in law to interpret that to mean that companies must provide all programming on the basic service tier in exactly the same manner. Absent statutory support for their arguments, Petitioners place substantial reliance on the legislative history of the Cable Act.<sup>29</sup> But the legislative history offers no support for petitioners’ theory, as demonstrated by several other commenters in this proceeding.<sup>30</sup>

#### **IV. CONCLUSION.**

Consumers in today’s video marketplace are reaping substantial benefits from the deployment of advanced video and broadband networks throughout the country. After spending \$64.2 billion in 2008 on capital expenditures towards deployment of these networks, consumers today are benefitting from the deployment of advanced technology that is rapidly changing how,

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<sup>27</sup> 47 U.S.C. § 531(a).

<sup>28</sup> Second Report and Order, *Implementation of Section 302 of the Telecommunications Act of 1996 – Open Video Systems*, 11 FCC Rcd 18223, ¶153 (1996).

<sup>29</sup> Dearborn Petition, ¶¶ 1-2; pp. 10, 15; Lansing Petition, pp. 10, 22, n. 5.

<sup>30</sup> *AT&T Comments*, pp. 42 – 44; Comcast Comments, pp. 28 – 30 ; NCTA Comments, pp. 11, 14, 19 - 20.

when and where they consume all forms of content – from music, to movies to PEG programming. Petitioners in the current proceeding lack any basis in existing law regarding the placement and delivery of PEG channels to consumers. For the foregoing reasons, the petitions should be denied.

Respectfully Submitted,



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April 1, 2009

**CERTIFICATE OF SERVICE**

I, hereby certify that, on this 1<sup>st</sup> day of April 2009, I caused copies of the foregoing Reply Comments of the United States Telecom Association Opposing Petitions for Declaratory Ruling to be served upon each of the following by first-class mail, postage prepaid:

**ACM et al.**

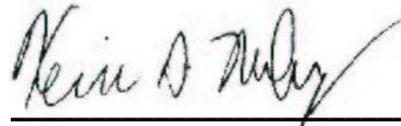
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