

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544**

In the Matter of
Petition for Declaratory Ruling of the City of
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

CSR-8127
MB Docket No. 09-13

In the Matter of
Petition for Declaratory Ruling of Alliance for
Community Media, et al., 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

CSR-8126
MB Docket No. 09-13

In the Matter of
Petition for Declaratory Ruling Regarding
Primary Jurisdiction Referral in *City of Dearborn
et al. v. Comcast of Michigan III, Inc. et al.*

CSR-8128
MB Docket No. 09-13

**REPLY COMMENTS OF AT&T OPPOSING
PETITIONS FOR DECLARATORY RULING**

Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini
AT&T
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-3058

Geoffrey M. Klineberg
Kelly P. Dunbar
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for AT&T

April 1, 2009

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION AND SUMMARY	1
DISCUSSION	4
CONCLUSION.....	19

TABLE OF AUTHORITIES

	Page
CASES	
<i>City of Dearborn v. Comcast of Michigan III, Inc.</i> , No. 08-10156, 2008 WL 5000039 (E.D. Mich. Nov. 25, 2008)	18
<i>City of St. Petersburg v. Bright House Networks, LLC</i> , Nos. 8:07-cv-02105-T-24-MSS et al., 2008 WL 5231861 (M.D. Fla. Dec. 12, 2008).....	14
<i>Time Warner Cable v. Bloomberg L.P.</i> , 118 F.3d 917 (2d Cir. 1997).....	18
<i>Time Warner Entm’t Co. v. FCC</i> , 56 F.3d 151 (D.C. Cir. 1995).....	14
<i>Turner Broad. Sys., Inc. v. FCC</i> , 512 U.S. 622 (1994).....	13
ADMINISTRATIVE DECISIONS	
Order, <i>Petition for Declaratory Ruling That Any Interstate Non-Access Service Provided By Southern New England Telecommunications Corp. Be Subject to Non- Dominant Carrier Regulation</i> , 11 FCC Rcd 9051 (1996)	15
Memorandum Opinion and Order, <i>AT&T Inc. and BellSouth Corporation Application for Transfer of Control</i> , 22 FCC Rcd 5662 (2007).....	1
Report and Order, <i>Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992</i> , 13 FCC Rcd 23254, <i>modified by Erratum</i> , 13 FCC Rcd 24279 (1998)	10, 18
Report and Order and Further Notice of Proposed Rulemaking, <i>Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments</i> , 22 FCC Rcd 20235, <i>modified by Erratum</i> , 22 FCC Rcd 21828 (2007) <i>petition for review pending</i> , <i>National Cable & Telecomms. Ass’n v. FCC</i> , No. 08-1016 (D.C. Cir. filed Jan. 16, 2008).....	10, 12
Report and Order and Further Notice of Proposed Rulemaking, <i>Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992</i> , 22 FCC Rcd 5101 (2007), <i>petitions for review denied</i> , <i>Alliance for Community Media v. FCC</i> , 529 F.3d 763 (6th Cir. 2008), <i>petition for cert. filed</i> , No. 08- 1027 (U.S. Feb. 10, 2009).....	9, 11, 17
Second Report and Order, <i>Implementation of Section 302 of the Telecommunications Act of 1996 – Open Video Systems</i> , 11 FCC Rcd 18223 (1996).....	10

Second Report and Order, <i>Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992</i> , 22 FCC Rcd 19633 (2007)	17
Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, <i>Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58</i> , 7 FCC Rcd 5781 (1992)	10

STATUTES AND REGULATIONS

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992)	11
47 U.S.C. § 521(4)	11
47 U.S.C. § 522(13)	16
47 U.S.C. § 536	17
47 U.S.C. § 543(b)(7)(A)	14
47 U.S.C. § 548(a), (c)	11
47 U.S.C. § 549	17
47 U.S.C. § 561	17
47 U.S.C. § 571(a)(3)(A)	16
47 C.F.R. § 76.920	14

INTRODUCTION AND SUMMARY

AT&T is engaged in a significant effort to upgrade its legacy telephone network to bring needed competition to the video marketplace and offer advanced broadband Internet access and VoIP services to its customers. AT&T's all-IP video product — U-verse TV service — now has more than one million customers in 19 of its 22 in-region states.¹ AT&T is also committed to providing PEG programming to *all* of its U-verse video subscribers. Because AT&T's PEG programming is provided over a new IP-based video network, AT&T will be able to offer its subscribers *more* PEG programming and to afford municipalities and PEG programmers *greater* opportunities to reach new and broader audiences than traditional cable systems. In that way, as AT&T has described in its comments, AT&T's PEG product directly and substantially advances the objective of disseminating information from a wide variety of sources that underlies the PEG provisions of the Cable Act.

The petitioners and their supporting commenters, however, seek to saddle AT&T with legacy cable PEG requirements forged in a different technological, economic, and regulatory era, in which the technologies for the delivery of video programming were limited and when competition in the video marketplace did not exist. The justification for this call for regulatory intervention, moreover, is based on little more than the fact that AT&T does not provide PEG

¹ AT&T has launched U-verse TV service in each of its 13 legacy SBC states, and, consistent with its intentions as expressed to the Commission in connection with the AT&T/BellSouth merger, AT&T has brought competitive video service to the former BellSouth region as well. See "Statement of Video Roll-Out Intentions" in Appendix F to Memorandum Opinion and Order, *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, 22 FCC Rcd 5662 (2007) ("Subject to obtaining all necessary authorizations to do so, AT&T/BellSouth intends to bring [advanced video] services to the BellSouth in-region territory in a manner reasonably consistent with AT&T's roll-out of such services within the AT&T in-region territory."). AT&T has now launched U-verse TV service in all of its former BellSouth states except Kentucky, Louisiana, and Mississippi, and is engaged in planning to launch the service in those states as well.

programming to its subscribers in the same manner as do incumbent cable companies. As AT&T has explained, and no commenter contests, the historical PEG model reflects the fact that cable systems (or *community* antenna television systems) evolved on a municipality-by-municipality basis and that cable systems offered each municipality certain benefits (such as PEG programming) in exchange for a local monopoly cable franchise.

That historical model, AT&T has explained, simply does not fit AT&T's new IP-based network. AT&T's network, unlike traditional cable systems, is a national system consisting of video hub offices ("VHOs") that aggregate programming content at a regional level. A single VHO serves subscribers throughout an entire Designated Market Area ("DMA"), an area typically served by distinct cable systems. PEG programming is thus available to U-verse TV subscribers on a regional (DMA-wide) basis. As a result, AT&T's subscribers will have access to more PEG programming (from more PEG programmers) than cable subscribers, and PEG programmers can reach far broader audiences than they reach today on cable. In these circumstances, it would make no sense to compel AT&T fundamentally to restructure its network simply to resemble more closely the limited offerings of incumbent cable providers.

That AT&T's PEG product is different from cable should not be a cause for regulatory concern. On the contrary, AT&T's product reflects what this Commission has long hoped competition would bring: innovation in the provision of video services and meaningful choice for consumers. As a new entrant, AT&T will simply fail to win subscribers if it does not offer a video service and PEG product that meets the demands and expectations of consumers. It is therefore unsurprising that many of the alleged problems identified in the petitions are, in fact, technical issues that AT&T has already addressed or will soon be addressing. The support for

AT&T from many municipalities and consumer groups in this proceeding is a testament to AT&T's commitment to providing a valuable and useful PEG product.

On the basis of those facts alone, petitioners' call for sweeping regulation of AT&T's PEG programming can and should be rejected. But the petitions should be denied for a number of additional reasons as well. As AT&T has explained, no legal authority supports the imposition of the regulations petitioners seek. Setting aside that AT&T is not a cable operator subject to PEG regulations at all (an issue not properly presented for resolution in this proceeding) and that Title I cannot be used in this adjudicatory proceeding to apply new rules to AT&T, federal law imposes only a modest requirement that PEG programming be provided as part of the basic package of programming offered by a cable operator. AT&T fully complies with that obligation because its PEG product is available to all subscribers as part of its most basic package of video programming. In any case, the petitions should be rejected in light of a long line of Commission precedent allowing new video entrants flexibility and discretion in providing PEG programming and refusing to impose on them legacy PEG regulations. Finally, the record in this proceeding only confirms AT&T's legal argument that the basic-service-tier PEG requirement is inextricably intertwined with the rate regulation of incumbent cable operators and that any such requirement sunsets even for the incumbent cable operators with the onset of effective competition. This means simply that the basic-service-tier PEG requirement can have no application to a brand-new competitive entrant like AT&T.

For these reasons and those discussed in AT&T's opening comments, this Commission should deny the petitions for declaratory ruling.

DISCUSSION

The comments submitted in this proceeding establish three overarching reasons for denying the petitions. First, the record confirms that AT&T's U-verse TV service is bringing enormous benefits to consumers in the form of a new competitive video alternative, which includes an innovative PEG product that transforms the way that PEG programming is provided for the better, giving consumers a real choice with respect to PEG programming. The support for AT&T from a variety of municipalities and community groups emphasizes that point. Second, the comments establish that petitioners' request for sweeping regulation of AT&T's PEG product would impose enormous costs on AT&T. By impairing both AT&T's ability to compete as a new entrant in the video marketplace and its incentive and ability to expand its deployment of the broadband infrastructure over which it offers U-verse TV service, such regulation would contravene the stated objectives of both the Cable Act and the Telecommunications Act of 1996. The comments offer no justification for compelling AT&T to redesign its national IP-based network simply to accommodate an anachronistic model of providing PEG programming. Finally, as AT&T explained in full in its opening comments, there is no legal foundation for the PEG rules that petitioners seek. Federal law at most imposes only a modest basic-service-tier PEG requirement, not a sweeping non-discrimination principle. AT&T is fully complying with that requirement, even assuming that such a requirement applies to U-verse TV service. Nothing in the comments submitted in this proceeding calls these legal conclusions into doubt.

1. AT&T's IP-based video system is bringing substantial benefits to consumers, and its PEG product is transforming the manner in which PEG programming is provided. Of particular relevance, AT&T has pioneered an innovative PEG product that makes PEG programming available on a DMA-wide basis, thereby enabling AT&T's subscribers to have

access to more PEG programming and allowing PEG programmers to reach much broader audiences than they reach today on cable.² These advantages make clear why the Commission should decline petitioners' request to force AT&T's new, innovative, and evolving IP-based system to provide PEG programming in the same manner as legacy cable operators based on little more than some parties' concern that things are not being done like they have always been done before.³

Nothing in the record calls into question those conclusions. In fact, the record reflects widespread recognition of the benefits of AT&T's PEG product. For example, as described by the Ministerial Alliance Against the Digital Divide ("MAADD") — a civil rights organization with more than 20,000 members — AT&T's model for providing PEG programming allows for "expanded local viewing of traditional PEG programming" and will "revolutionize the old outdated cable TV PEG platform" by offering "a forum for organizations and community groups to reach a larger audience."⁴ Along those same lines, Michigan Citizen Action — the largest consumer group in Michigan — strongly opposes the petitions, explaining that the old cable PEG model "artificially segregated programming and PEG audiences based on municipal boundaries," while AT&T's PEG product will enable "PEG programmers to reach a wider audience" and "allow[] audiences to view programs of interest from neighboring communities."⁵ Other

² See AT&T Comments at 60-61; Whitehead Decl. ¶¶ 28-29.

³ See AT&T Comments at 60-62.

⁴ MAADD Comments at 1 (Mar. 23, 2009). Commenters supporting the petitions recognize that "PEG gives citizens the opportunity to become content creators themselves" and that PEG programming is important for the "dissemination of information," Free Press Comments at 16-17, yet they fail to acknowledge that AT&T's PEG product advances those interests more directly than cable companies by allowing wider distribution of PEG and more PEG programming. See AT&T Comments at 31.

⁵ Michigan Citizen Action Comments at 1 (Mar. 6, 2009).

commenters confirm the commonsense conclusion that expanding the audiences for PEG programming is an undeniable social good.⁶

In light of the advantages of AT&T's innovative approach to providing PEG programming, it should not be surprising that many municipalities have come out in strong support for AT&T in this proceeding. For example, the City of Columbus has stated that, although some city officials were originally skeptical about AT&T's different product,⁷ upon actually viewing it, they learned that the picture quality is "comparable to that of other [AT&T U-verse] channels," that any delay associated with accessing PEG programming is modest, and that AT&T's PEG "channels were easy to find."⁸ In addition, the City of Columbus stated that, in its experience, "AT&T has worked to improve its PEG delivery system," and that the City "trust[s] [AT&T to] continue to do so."⁹ These comments from the City of Columbus are particularly noteworthy because, again, they are based on the City's actual experience with and

⁶ See, e.g., Comments of Plainfield Charter Township (Michigan) at 1 (Mar. 5, 2009) ("The are many reasons our residents have a desire to view governments in action in surrounding communities, they send their children to schools in other communities, their business may be located in multiple communities and they may have elderly parents that they care for in those communities."); MAAD Comments at 2 (expanded local viewing of PEG "permits churches to broadcast their sermons and stay connected with lifelong members who have been forced to move out of the city and into the suburbs because of the gentrification of the neighborhood that they lived in their entire life"; "gives social justice groups a stage to activate more people to participate in an important cause"; and "allows organizations to serve more people, cultivate new members and recruit a larger number of volunteers and donors, which is critical for an organization's survival in the current economy"); Comments of United Way of Will County (Illinois) at 1 (Mar. 26, 2009) ("Having local channels available on AT&T U-verse is an important asset for our organization which allows us the opportunity to inform our residents of the wonderful programs and services we support. Many people work here, but live elsewhere, which meant PEG programming was previously out of reach for them. That is no longer an issue for which we are so grateful."); Comments of West Bloomfield (Michigan) at 1-2 (Mar. 4, 2009).

⁷ See City of Columbus Comments at 1 (Mar. 9, 2009) (noting "at least some" city officials originally "had misgivings over the quality" of AT&T's PEG product "as well as the means by which a viewer was to access the channels").

⁸ *Id.* at 2.

⁹ *Id.*

viewing of AT&T's new video offering. Moreover, the City of Columbus's comments are far from isolated; many comments from other municipalities and community groups across AT&T's footprint echo those themes, offering support for AT&T's competitive entry, for AT&T's U-verse TV service, and for AT&T's PEG product in particular.¹⁰

¹⁰ See Michigan Citizen Action Comments at 1 (noting AT&T has strong incentives to “respond to customer demands as they arise for new PEG-programming features” because of competition); Comments of Macomb Cable Network at 1 (Mar. 5, 2009) (“I am . . . excited about our future potential to utilize new distribution channels like the AT&T system or the Internet to develop programming which may reach beyond the Mount Clemens city limits. Put simply, what PEG programmer wouldn't want more distribution outlets and more potential viewers for their programming?”); Village of Elmwood Park (Illinois) Comments at 1 (Mar. 2, 2009) (noting that AT&T's “easily accessible technology is helping us reach many more people than ever before, which should be the number one goal of every PEG programmer”); City of Gary (Indiana) Comments at 1 (Mar. 3, 2009) (noting AT&T's PEG product has allowed Gary “to expand [its] viewing audience . . . into a broader area of the metropolitan Chicago area”; noting this “ability to showcase our community and our local government to such a wide viewing audience is huge” and the city is “excited to leverage this new opportunity”); Comments of City of Wayne (Michigan) at 1-2 (Mar. 2, 2009) (noting the city is “thrilled” with the opportunity to provide PEG programming on a region-wide basis and that AT&T's PEG product “will result in positive benefits for our community and our residents”); Comments of City of Westlake (Ohio) at 1 (Mar. 4, 2009) (“AT&T's PEG offering is easily accessible, affords exposure across our region and allows our residents the opportunity to view it from a variety of sources. We fully embrace the opportunities this type of service will permit.”); Comments of City of Woodhaven (Michigan) at 1 (Mar. 3, 2009) (noting that AT&T's PEG product will allow the city “to market our community in ways we never dreamed, without the cost of an advertising budget”); Comments of City of Joliet (Illinois) at 1 (Mar. 2, 2009) (noting the traditional PEG model had “halted [the city's] ability to deliver [PEG] programming to communities right next door and miles away” and that, by expanding PEG audiences, AT&T's PEG product is allowing the city to “attract new visitors, residents and business, while still fulfilling our main mission to local taxpayers”); Comments of City of McHenry (Illinois) at 1-2 (Mar. 6, 2009); Comments of City of North Chicago (Illinois) at 1-2 (Feb. 26, 2009); Comments of City of Palos Heights (Illinois) at 1-2 (Mar. 5, 2009); Comments of Palos Heights Public Library (Illinois) at 1 (Mar. 17, 2009); Comments of City of Waukegan at 1-2 (Feb. 25, 2009); Comments of DuPage Convention & Visitors Bureau (Illinois) at 1-2 (Mar. 4, 2009); Comments of Elgin Area Chamber (Illinois) at 1-2 (Feb. 27, 2009); Comments of Elmhurst College (Illinois) at 1-2 (Mar. 17, 2009); Comments of Evanston Chamber of Commerce (Illinois) at 1-2 (Mar. 6, 2009); Comments of Family Alliance, Inc. (Illinois) at 1-2 (Mar. 12, 2009); Comments of Greater Ohare Association (Illinois) at 1-2 (Mar. 6, 2009); Comments of Village of Richton Park (Illinois) at 1-2 (Mar. 3, 2009); Comments of the Associated Colleges of Illinois at 1 (Mar. 17, 2009); Comments of Village of Island Lake (Illinois) at 1 (Mar. 5, 2009).

The comments of those municipalities supporting the petitioners reflect, at most, a debate about the best path for the future of PEG programming and a differing assessment of the costs and benefits of the traditional PEG model.¹¹ This is entirely to be expected when a new and innovative product is introduced into a marketplace dominated for years by a single way of doing things. But this difference of opinion and fear of change provide no support for the broad regulatory intervention that petitioners seek. In fact, tellingly, many of the comments critical of AT&T's PEG product are from municipalities in areas where AT&T does not even provide U-verse TV service, suggesting that much of the criticism is based on nothing but hearsay, exaggeration, and misinformation.¹² By contrast, the vast majority of AT&T's support comes from municipalities in which AT&T *is* currently providing U-verse TV service.¹³ The broad support from a cross-section of municipalities and community groups demonstrates why it would make little sense for this Commission to take sides in this debate over the future of PEG

¹¹ *See, e.g.*, MAADD Comments at 3 (explaining that expanded local viewing opportunities are “the wave of the future” for PEG programming). In addition, the principal concerns of many commenters in support of the petitioners are with respect to technical issues that have already been addressed, or that will be addressed soon. *Compare, e.g.*, Comments of the City of Arlington, Texas, at 5 (Mar. 6, 2009) (“AT&T’s Internet based Channel 99 does not have the capability of passing through the closed captioning in the PEG programming provided by the local community.”) *with* AT&T Comments at 50 (noting that closed-captioning issues will be resolved this year); McCarthy Decl. ¶ 27.

¹² *See, e.g.*, Comments of Montgomery County, Maryland at 1 (Mar. 9, 2009) (noting no cable operator or other video programming provider in that county — in which AT&T does not compete — has carried PEG programming in a manner similar to AT&T); Comments of Access Tucson (Arizona) at 2 (Mar. 9, 2009) (noting that AT&T does not provide U-verse TV service in Tucson but speculating that “the operator serving our community would adopt” a similar “approach[]” if the petitions were denied); City of Duluth (Minnesota) Comments at 2 (Mar. 5, 2009) (same); City of Miami (Florida) Comments at 2 (Mar. 6, 2009) (same).

¹³ *See, e.g.*, City of Columbus Comments at 1-2; City of Westlake Comments at 1 (noting that, “[a]s Mayor of Westlake, I have had the opportunity to see firsthand the value of an Internet-Protocol based offering” and that “AT&T’s PEG service is the public access technology of the future.”); City of North Chicago Comments at 1 (noting the city’s “public access programming is now available on AT&T’s U-verse video service”); City of Waukegan Comments at 1 (same); *see supra* p. 7 & n.10 (collecting other comments of municipalities).

programming and to mandate that AT&T re-engineer its network to replace its innovative PEG product with the legacy PEG model. In the competitive video marketplace that is taking shape, the choice between innovation and the status quo is better left to consumers free to make such choices themselves.

2. The record developed in this proceeding also establishes the significant costs that would result from imposing the sweeping regulations sought by petitioners. AT&T is a new entrant in the video marketplace seeking to compete against entrenched and established incumbents by providing advanced Internet and video services. Petitioners are, in effect, seeking the fundamental redesign of AT&T's network to accommodate an old model for providing PEG programming — one that reflects the different historical evolution of cable systems. The regulation that petitioners seek would entail substantial economic and competitive costs that could slow, deter, and potentially preclude altogether AT&T's competitive entry.¹⁴

On the record before the Commission, there is no plausible basis for imposing such costs. *First*, this Commission's past treatment of new video entrants makes clear that there is no basis for saddling AT&T with the enormous costs that would arise from requiring AT&T to provide PEG programming using the legacy PEG distribution model, especially in the now emerging competitive market. This Commission has been careful to ensure that legacy PEG requirements not be allowed to impair competitive entry in the video marketplace¹⁵ or the ability of new

¹⁴ See AT&T Comments at 29; McCarthy Decl. ¶ 14; Whitehead Decl. ¶ 42.

¹⁵ See Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101, ¶ 110 (2007) (“Section 621 Order”), *petitions for review denied, Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *petition for cert. filed*, No. 08-1027 (U.S. Feb. 10, 2009).

entrants — such as video dialtone providers, OVS providers, and DBS operators — to compete in that marketplace.¹⁶

The rationale underlying those decisions — namely, that applying monopoly-era regulation to new video entrants could impair competitive entry — applies fully here. Any reduction in AT&T’s ability to compete in the video marketplace would directly harm competition and consumers.¹⁷ Furthermore, undermining AT&T’s competitive entry by applying a regulatory straight-jacket that compels adoption of a legacy PEG distribution model would mean that consumers could lose out on the benefits of and choice provided by AT&T’s innovative approach to PEG. As MAADD has explained in its comments, granting the petitions “would provide a disincentive for new technology to flourish and bring new opportunities for the

¹⁶ See Report and Order, *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 23254, ¶ 60 (declining to impose certain regulatory obligations on DBS providers because, among other things, “DBS is a relatively new entrant attempting to compete with an established, financially stable cable industry” and “[a]dditional obligations on DBS providers might hinder the development of DBS as a viable competitor to cable”) (“*Section 25 Order*”), modified by *Erratum*, 13 FCC Rcd 24279 (1998); Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, 7 FCC Rcd 5781, ¶¶ 44-45 (1992) (not imposing PEG requirements on video dialtone providers); Second Report and Order, *Implementation of Section 302 of the Telecommunications Act of 1996 – Open Video Systems*, 11 FCC Rcd 18223, ¶ 153 (1996) (finding that OVS PEG requirements — which were statutorily required — should be implemented so as to give providers “flexibility” and “discretion”).

¹⁷ See Report and Order and Further Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, ¶ 17 (“Congress and the Commission have repeatedly found . . . that entry by [local exchange carriers such as AT&T] and other providers of wire-based video service into various segments of the multichannel video marketplace will produce *major benefits* for consumers. A significant increase in multichannel competition usually results in *lower prices, more channels, and a greater diversity of information and entertainment from more sources.*”) (“*MDU Order*”), modified by *Erratum*, 22 FCC Rcd 21828 (2007), petition for review pending, *National Cable & Telecomms. Ass’n v. FCC*, No. 08-1016 (D.C. Cir. filed Jan. 16, 2008) (emphases added).

public to provide pertinent local education and information to viewers.”¹⁸ In light of the support for AT&T’s PEG product, the fact that the product is continuing to evolve in response to community and subscriber needs, and the enormous costs of regulatory intervention (which would inflict damage on competition and consumers, as well as on AT&T), this Commission should decline to impose the regulations that petitioners seek.

Second, this Commission is under the express statutory obligations to “promote competition in cable communications” and “assure . . . the widest possible diversity of information and services to the public,”¹⁹ as well as to encourage, not hinder, the development of advanced communications services.²⁰ Of particular relevance, Congress required the Commission to adopt policies and rules “to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market” and to spur “continuing development of communications technologies.”²¹ Likewise, this Commission has previously recognized that section 706 of the Telecommunications Act of 1996 creates a “statutory responsibilit[y]” to “accelerate broadband deployment.”²² Furthermore, the Commission has found that “[c]ompetitive entrants in the video market are, in large part, deploying new fiber-based facilities that allow companies to offer the ‘triple play’ of voice, data, and video services” and that “video offerings . . . directly affect [new entrants’] roll-out of new

¹⁸ MAADD Comments at 1.

¹⁹ 47 U.S.C. § 521(4), (6); *see also* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (requiring the Commission to “promote increased competition in the cable television and related markets” and thereby “increase[] consumer protection”).

²⁰ *See* AT&T Comments at 24-25.

²¹ 47 U.S.C. § 548(a), (c).

²² *Section 621 Order* ¶ 1.

broadband services.”²³ The Commission has already concluded that “broadband deployment and video entry are inextricably linked” and that “barrier[s] to entry” for video services would “necessarily hamper[] deployment of broadband services,” contrary to Congress’s mandate.²⁴

Those same principles apply here. As AT&T has explained, AT&T’s rollout of fiber facilities will enable AT&T to provide high-speed Internet access services as well as U-verse TV service over the same network facilities.²⁵ Furthermore, requiring AT&T to re-engineer its network through sweeping PEG requirements will hinder AT&T’s roll-out of fiber and accordingly its ability to provide both competitive video and broadband Internet access services.²⁶ The federal policies reflected in the Cable Act and section 706 preclude the Commission from creating such barriers to video competition and broadband deployment.

Third, the First Amendment forbids the Commission from imposing substantial costs on AT&T through the application of legacy PEG rules. AT&T explained in its opening comments that petitioners adduced no evidence that would support a finding by this Commission that *any* governmental interest would be advanced by the PEG rules that petitioners seek sufficient to survive intermediate scrutiny, much less the important or substantial interest sufficient to warrant inflicting enormous costs on AT&T, competition, and consumers.²⁷ Nothing in the record developed since then changes that analysis. On the contrary, the record confirms the absence of any impairment of a governmental interest. The City of Columbus, for example, noted it has not received any “complaints regarding the method and manner by which the Columbus PEG

²³ *Id.* ¶ 13.

²⁴ *Id.* ¶ 51; *see also MDU Order* ¶¶ 46-47.

²⁵ *See* AT&T Comments at 5-6.

²⁶ *See id.* at 29-30; McCarthy Decl. ¶ 14; Whitehead Decl. ¶ 42.

²⁷ *See* AT&T Comments at 30-32.

channels are provided” by AT&T.²⁸ In addition, comments from MAADD explain that “PEG programming will continue to lose its significance” and attract “few viewers” *unless* there is an expansion of PEG audiences through models like AT&T’s.²⁹ And although some commenters assert that AT&T’s PEG product “will reduce the viewership of [PEG] content,”³⁰ such comments are noticeable for the absence of any support for that claim. In the First Amendment context, such speculation and conjecture cannot justify restricting speech.³¹

3. Finally, beyond the compelling policy arguments against the PEG regulations that petitioners seek to impose, there remains the fact that no legal basis supports the relief sought by either petition. That is so for several reasons, as AT&T set forth in detail in its opening comments. First, the underlying question of whether AT&T is a cable operator is not appropriately resolved in this proceeding; even if it were, AT&T is not a cable operator, as AT&T has previously explained.³² Moreover, Title I provides no basis (either procedurally or substantively) for applying legacy PEG rules to AT&T.³³

Second, AT&T is in full compliance with the basic-service-tier PEG requirement. Federal law requires only that cable operators subject to rate regulation include PEG programming on “a separately available basic service tier to which subscription is required for

²⁸ *See, e.g.*, City of Columbus Comments at 2.

²⁹ MAADD Comments at 1-2.

³⁰ Free Press Comments at 4.

³¹ *See* AT&T Comments at 31-32; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (“[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural[.]”) (citation and internal quotation marks omitted).

³² *See* AT&T Comments at 19-21 & n.55.

³³ *See id.* at 21-26.

access to any other tier of service.”³⁴ AT&T’s PEG product satisfies that requirement: AT&T’s PEG programming is available to all U-verse TV service subscribers on Channel 99,³⁵ and AT&T offers Channel 99, in turn, with and as part of AT&T’s basic package of programming.³⁶

Third, whatever the scope of the basic-service-tier PEG requirement, that regulation — which is fundamental to the Cable Act’s rate-regulation regime — sunsets with the onset of effective competition. AT&T, as the new entrant in every market in which it competes, is undeniably subject to effective competition in all franchise areas in which it provides U-verse TV service in competition with an incumbent.³⁷

The comments that have been filed in response to the petitions strengthen these legal conclusions. The comments, for example, support the key legal proposition that the basic-service-tier PEG requirement sunsets with the onset of effective competition.³⁸ The comments also support the conclusion that the basic-service-tier PEG requirement is modest and does not contain a non-discrimination principle.³⁹ In addition, although NCTA asserts that AT&T “is a

³⁴ 47 U.S.C. § 543(b)(7)(A); 47 C.F.R. § 76.920 (“Every subscriber of a cable system must subscribe to the basic tier in order to subscribe to any other tier of video programming or to purchase any other video programming.”).

³⁵ See Whitehead Decl. ¶¶ 10, 24.

³⁶ See *id.* ¶ 10; AT&T Comments at 36.

³⁷ See AT&T Comments at 44-47; *Time Warner Entm’t Co. v. FCC*, 56 F.3d 151, 192 (D.C. Cir. 1995) (holding the basic-service-tier requirement in section 543(b)(7) “clearly applies only to systems not subject to effective competition”).

³⁸ See Comments of Bright House Networks at 4 (Mar. 9, 2009) (citing *City of St. Petersburg v. Bright House Networks, LLC*, Nos. 8:07-cv-02105-T-24-MSS et al., 2008 WL 5231861 (M.D. Fla. Dec. 12, 2008), for the proposition that the basic-service-tier requirement does not apply to franchise areas subject to effective competition); Comments of Cablevision Systems Corp. at 10 & n.23 (Mar. 9, 2009) (citing 47 U.S.C. § 545(d) for the proposition that a cable operator may rearrange service tiers when not subject to effective competition); Comments of Comcast Corporation at 26-27 (Mar. 9, 2009).

³⁹ See, e.g., Comcast Comments at 29-30. Indeed, ACM effectively acknowledges that the basic service tier is defined by whether a separate rate is charged for receipt of PEG channels.

cable operator subject to Title VI,” for that proposition it relies only on comments it submitted in a separate, ongoing rulemaking proceeding,⁴⁰ confirming what AT&T has already stated — namely, that this declaratory ruling proceeding is not the appropriate occasion to resolve this issue.⁴¹

AT&T has already addressed in its comments virtually all of the legal arguments that commenters make in support of the petitions.⁴² Here, it is important to emphasize just a few points. First, the basic service tier is primarily an economic concept relating to the rates charged for programming and to whether a subscriber can access PEG programming as part of the basic package of programming offered by a cable operator.⁴³ AT&T’s PEG product satisfies those criteria: AT&T’s PEG programming is available as part of the most basic package of AT&T’s video programming (and thus on all of AT&T’s tiers of programming) at no extra charge to the subscriber.⁴⁴

Second, in comments supporting the petitions, Free Press incorrectly asserts that AT&T is automatically subject to all cable regulations regardless of whether AT&T’s U-verse TV

See Comments of ACM et al. at 5 (Mar. 9, 2009) (acknowledging the Cable Act defines the basic tier by reference to “separate rate[s]” “charged” for access).

⁴⁰ Comments of National Cable and Telecommunications Association at 8 & n.9 (Mar. 9, 2009) (citing letters filed in WC Docket No. 04-36); *see also* AT&T Comments at 20 (noting that AT&T has filed materials on this issue in WC Docket No. 04-36).

⁴¹ *See* Order, *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) (when issues raised in a “petition [for declaratory ruling] are currently being considered” in “ongoing rulemakings,” considerations of “procedure and administrative efficiency” counsel in favor of “resolv[ing]” the issues “in the context of the Commission’s existing rulemaking proceedings”); AT&T Comments at 20-21.

⁴² For example, certain comments continue to assert that there is a federal-law requirement to “treat PEG content like other channels,” Free Press Comments at 10, but those comments are noticeable for the absence of *any* legal authority in support of such a principle.

⁴³ *See* AT&T Comments at 40.

⁴⁴ *See supra* p. 14; AT&T Comments at 36; Whitehead Decl. ¶¶ 10, 24.

service satisfies the statutory definition of “cable service” or whether AT&T is a “cable operator.”⁴⁵ That is so, according to Free Press, because section 571(a)(3) subjects “common carrier offerings of video programming services to all of the cable requirements of the Communications Act, including . . . the requirements related to PEG content.”⁴⁶ Free Press purports to find support for this conclusion in AT&T statements that it is a multichannel video programming distributor.⁴⁷ Free Press is correct that AT&T is a multichannel video programming distributor but mistaken in its reading of section 571.

The relevant part of section 571 states that, if a telephone company is not providing “video programming” by means of either a radio-based system, common carriage, or an OVS, “such carrier shall be subject to the requirements of [Title VI].”⁴⁸ That section does *not* say that a telephone company’s only other option is to provide programming *as a cable operator*; rather, the option is to be subject to *Title VI* regulation. AT&T’s U-verse TV service *is* “subject to the requirements of [Title VI],” because AT&T is a “multichannel video programming distributor,” or “MVPD,” as that term is defined in the Cable Act.⁴⁹ Title VI is not limited to the regulation of cable operators but broadly applies to a range of video-programming services not provided over cable systems, including direct broadcast satellite services, “wireless” cable services, big-dish satellite services, etc. As an MVPD, AT&T is “subject to the requirements of [Title VI]” under section 571(a) — namely, those provisions and regulations under Title VI that are applicable to

⁴⁵ See Free Press Comments at 6.

⁴⁶ *Id.* at 6.

⁴⁷ See *id.* at 7-10.

⁴⁸ 47 U.S.C. § 571(a)(3)(A).

⁴⁹ *Id.* § 522(13).

MVPDs in general.⁵⁰ But certain requirements under Title VI — such as those dealing with PEG programming — apply only to that subset of MVPDs which are also cable operators. Because AT&T is not a cable operator, the PEG requirements do not apply to it. Free Press has simply misread the statute.

Third, NCTA, although generally opposing petitioners’ interpretation of the PEG requirements, argues that, “if AT&T were not a cable operator subject to Title VI, it should, according to the sound principles of regulatory parity, be held to the same standards regarding PEG channels as other cable providers.”⁵¹ NCTA is wrong. Even among cable operators, this Commission has made clear that there is no requirement to regulate new entrants in the same way as incumbents; indeed, in the *Section 621 Order*, this Commission denounced such a principle, adopting regulations that subject new entrants and cable incumbents to *different* regulatory burdens and preempting as inconsistent with federal law so-called “level-playing-field” provisions that would require such parity.⁵² Of particular relevance, the Commission has noted that it may be reasonable for franchising authorities to impose “greater PEG carriage obligation[s]” on cable incumbents than on “a fledgling new entrant.”⁵³ Furthermore, as explained above, the Commission has long been reluctant to impose rigid PEG requirements on

⁵⁰ See, e.g., *id.* § 536 (regulations governing program carriage agreements and related practices between cable operators or other MVPDs and video-programming vendors); *id.* § 549 (regulations assuring commercial availability of converter boxes, interactive communications equipment, and other equipment used to access services of MVPDs); *id.* § 561 (requiring MVPDs to scramble or block sexually explicit adult programming for subscribers who do not wish to receive it).

⁵¹ NCTA Comments at 8 (internal quotation marks omitted).

⁵² See *Section 621 Order* ¶¶ 47-49, 87-88, 138.

⁵³ Second Report and Order, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 19633, ¶ 14 (2007).

new video entrants (such as DBS providers) in order to avoid undermining competitive entry.⁵⁴

Contrary to NCTA's claim, then, there is no "sound principle[] of regulatory parity" that requires the application of PEG rules to new entrants such as AT&T.

Finally, some commenters attempt to read a broad non-discrimination obligation into section 531(e), rather than the basic-service-tier PEG requirement.⁵⁵ Those commenters argue that the prohibition on editorial control of PEG channels in section 531 somehow carries with it a requirement of non-discrimination with respect to technical issues.⁵⁶ This argument, which is not presented by the petitioners, is wrong for multiple reasons. First, section 531(e), as courts have held, "bars [a cable] operator from attempting to determine the *content* of programming that is within the PEG categories."⁵⁷ As AT&T has explained, the technical limits of AT&T's network (including the third-party software that AT&T deploys) do not amount to editorial control of the *content* of underlying PEG programming; that AT&T cannot currently provide secondary-audio programming or closed captioning is accordingly not in any sense an editorial judgment about the content or value of PEG programming.⁵⁸ Second, the primary issue raised by

⁵⁴ See *supra* p. 9-11.

⁵⁵ See Montgomery County Comments at 9 ("The FCC should . . . recognize that Section 531(e) establishes a broad bar against operator actions that discriminate against PEG channels."); see also *Ex Parte* from Gloria Tristani on behalf of ACM, MB Docket No. 09-13 (Mar. 5, 2009).

⁵⁶ See Montgomery County Comments at 10-11 (citing *Section 25 Order*). That the Commission noted in that order that "even-handed application of technical quality standards" would not "amount[] to 'editorial control'," *Section 25 Order* ¶ 112, says nothing about whether the current technical limits of AT&T's PEG product constitute editorial control of PEG programming.

⁵⁷ *Time Warner Cable v. Bloomberg L.P.*, 118 F.3d 917, 928 (2d Cir. 1997).

⁵⁸ See AT&T Comments at 48; see also *City of Dearborn v. Comcast of Michigan III, Inc.*, No. 08-10156, 2008 WL 5000039, at *1-*2 (E.D. Mich. Nov. 25, 2008) (Comcast's migration of PEG channels to digital did not implicate section 531(e) because that provision means that "cable operators are prohibited only from controlling the content of PEG channels") (collecting cases).

these commenters is secondary-audio programming and closed-captioning capabilities,⁵⁹ but, as AT&T has explained, those issues will be resolved soon.⁶⁰ Section 531(e) therefore provides no basis for a declaratory ruling here.

CONCLUSION

For the foregoing reasons and those set forth in AT&T's comments in opposition, the petitions should be denied.

Respectfully submitted,

Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini
AT&T
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-3058

/s/ Geoffrey M. Klineberg
Geoffrey M. Klineberg
Kelly P. Dunbar
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for AT&T

April 1, 2009

⁵⁹ See Montgomery County Comments at 11.

⁶⁰ See AT&T Comments at 50, 62-63; McCarthy Decl. ¶ 27.

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of April 2009, I electronically filed the foregoing document by using the Commission's Electronic Comment Filing System (ECFS).

/s/ Geoffrey M. Klineberg

Geoffrey M. Klineberg