

**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 v. Comcast of Michigan III, Inc.*

CSR-8128 MB  
Docket No. 09-13

**REPLY COMMENTS OF THE NEW ENGLAND CABLE AND  
TELECOMMUNICATIONS ASSOCIATION, INC.**

The New England Cable and Telecommunications Association, Inc. ("NECTA") submits this reply to address the claim by AT&T that "U-verse" is "now substantially different from the service addressed by the Connecticut decision"<sup>1</sup> that held that AT&T's offering met all applicable federal definitions of cable.<sup>2</sup> Contrary to AT&T's claims, the U-verse offering today

<sup>1</sup> Comments of AT&T Opposing Petitions For Declaratory Ruling ("AT&T Comments") at 17.

<sup>2</sup> *Office of Consumer Counsel v. Southern New England Tel. Co.*, 515 F. Supp.2d 269 (D. Conn. 2007), *recon. denied*, 514 F. Supp.2d 345 (D. Conn. 2007).

is every bit as much “cable” as the federal court twice held it to be in 2007, and AT&T has not appealed the merits of those decisions.<sup>3</sup>

**AT&T provides Tiers of Video Programming.** As before, AT&T markets its “U-verse” video programming service as groups of video programming channels that have been selected and packaged into tiers by AT&T.<sup>4</sup> AT&T’s U-verse packages are “available to all subscribers.” Indeed, they are available to all subscribers, all the time. Subscribers can watch any channel available in the package to which they subscribe.<sup>5</sup>

**AT&T Provides Linear video programming prescheduled by the programming provider.** As before, U-verse tiers include local broadcast networks, like ABC, CBS, and NBC, cable channels like ESPN and CNN, “premium” cable channels like HBO, and video on demand or “pay-per-view” video programming. As before, the programming carried on U-verse channels is “linear” – that is, it is prescheduled by the programming provider, transmitted by AT&T on the schedule set by the programmer, and made available to all subscribers.<sup>6</sup>

---

<sup>3</sup> On appeal to the Second Circuit, AT&T has not challenged the merits of the district court’s holding that it is a cable operator, but rather, attacks the decision only on the procedural issue of whether the claims were mooted when the Connecticut legislature created an expedited franchising path for AT&T. *Office of Consumer Counsel, et al. v. Southern New England Tel. Co.*, No. 09-0116-cv, Page-Proof Brief for Defendant-Appellant AT&T Connecticut, Inc. at 1.

<sup>4</sup> Compare AT&T Comments at 6-7 with *Office of Consumer Counsel*, 515 F. Supp.2d at 273.

<sup>5</sup> AT&T Comments at 6-7; AT&T Comments Declaration of Paul Whitehead ¶ 10; *Office of Consumer Counsel*, 515 F. Supp.2d at 273.

<sup>6</sup> Compare AT&T Comments Declaration of Paul Whitehead at ¶¶ 37-38 (discussing AT&T’s current linear channels, including 483 linear channels in Los Angeles), Declaration of Gustavo de Veciana ¶ 16 (AT&T receives commercial programming via fiber or satellite at the “super hub office and/or VHO”) with *Office of Consumer Counsel*, 515 F. Supp.2d at 272-73 (“With the exception of VOD/pay-per-view, the programming on U-verse is linear - it is prescheduled by the programming provider, transmitted to AT&T on a schedule set by the provider, and made available to all subscribers on the tier”).

**AT&T Provides one-way video programming to multiple subscribers.** As before, AT&T subscribers, like other cable subscribers, will use their remote controls to watch TV. AT&T's video service delivers the ABC, NBC, and CBS broadcasts one-way to subscribers when they select those stations. It does not matter whether the subscriber's "channel change" on the remote is effectuated by switching channels at the set top box or at the "node" in AT&T's Network. To watch ABC in Dearborn, for example, an U-verse subscriber would push the "CHANNEL" button on the remote to change channels to 7 (or 1007 in HD),<sup>7</sup> and ABC will show until he tunes away. As before, unique streams are not sent to every subscriber. If more than one AT&T video subscriber served by the same node (*i.e.*, in the same basic neighborhood) is watching the same channel, AT&T's network will take the single channel stream going into that node and join those multiple subscribers to the single stream.<sup>8</sup> If a new subscriber served by the same node wishes to watch that same channel, he/she is joined to the already existing stream going from the node to multiple subscribers.<sup>9</sup>

**AT&T's "Interactivity" is Traditional.** Despite AT&T's attempt to characterize its service as "two-way" and "interactive,"<sup>10</sup> AT&T's video service will involve the "one-way transmission to subscribers of [] video programming . . . and [the] subscriber interaction, if any,

---

<sup>7</sup>See

[https://uma.att.com/uma/RetrieveChannelLineup?ZIP=48120&packgeList\\_select=0&channelList\\_select=abc&APPID=UMA&actionType=GETCHANNELSBYSEARCH&FORMAT=POPUP](https://uma.att.com/uma/RetrieveChannelLineup?ZIP=48120&packgeList_select=0&channelList_select=abc&APPID=UMA&actionType=GETCHANNELSBYSEARCH&FORMAT=POPUP)

<sup>8</sup> Compare AT&T Comments de Veciana Decl. ¶¶ 19-21 with Transcript of Hearings in Connecticut Department of Public Util. Control Docket No. 05-06-12, Dec. 7, 2005 ("Hearing Tr. "), at 77:15-22 (describing that if a second end-user selects programming that is already being transmitted to a subscriber, the request "goes up to the video hub office in that particular market area . . . and from the video hub office it sends a communication back out to the node, and it tells the node to join that multicast stream that's . . . already there, that was sent out for the first customer.") (hearing testimony of Boyer), 113:18 -114:5 (hearing testimony of Whitehead).

<sup>9</sup> *Id.*

<sup>10</sup> AT&T Comments at 8 & Whitehead Decl. at 10.

which is required for the selection or use of such video programming. . . .”<sup>11</sup> AT&T viewers cannot change the sad ending into a happy one. AT&T viewers cannot alter the linear schedule, other than by recording it on a VCR tape or on a Digital Video Recorder. When it gets to 8:30, the next ABC program comes on the air for the viewer watching ABC. If they change a channel, they push the “CHANNEL” button on their remote. The subscriber “interactivity” is changing channels, browsing the on-screen channel guides, and perhaps choosing “on-demand” movies from an on-screen menu of programs that are stored at a central computer server at an AT&T headend.<sup>12</sup> “Traditional” cable subscribers have done this for years, and are doing so even more with “switched digital video.”

**AT&T operates a cable system.** As before, AT&T provides its service over a network of fiber optic and copper lines that cross public rights-of-way using a closed transmission path, like traditional cable systems. AT&T owns and controls its network of lines over which it will provide the service. Like traditional cable systems, AT&T’s video network will use “headends,” which are buildings housing various equipment for the operation of a cable system, including video programming reception equipment (for example satellite dishes and over-the-air antennas), and equipment that transmits the video programming downstream to subscribers. AT&T’s

---

<sup>11</sup> Now, just as before the District Court in Connecticut, the “two way” nature of AT&T’s system is purely between the set top box and the AT&T headend. *See, e.g.,* AT&T Comments at 9 (“a message is sent from the set top box through AT&T’s IP-based network to the VHO. . . .”). Video programming is not sent back upstream by the AT&T subscriber. *Office of Consumer Counsel*, 515 F. Supp.2d at 272.

<sup>12</sup> The “two way” “interactivity” described by AT&T in its Comments is precisely the same as was presented to the District Court in Connecticut. *See, e.g., Office of Consumer Counsel*, 515 F. Supp.2d at 272-73 (“Notwithstanding the internal signaling occurring between the subscriber’s set-top box, triggered by a subscriber changing the channel or making a VOD selection on his or her remote, the result (the requested channel change/delivery of selected video programming) is the same as a subscriber to traditional CATV changing a channel on his or her remote - that is, the push of the button changes the video programming displayed on the screen”).

network will use a combination of national and/or regional “super” headends, combined with local headends that AT&T calls “video hub offices.” Video content will be acquired, processed and then distributed from the super headends out to the local video hub offices, where local video content (e.g., local television broadcast networks) will be inserted. From the local hub office, the video programming will then be transmitted to “intermediate offices,” local “central offices,” or “nodes” that serve customers in a particular neighborhood or area, typically over “twisted pair” copper lines.<sup>13</sup>

**AT&T’s IP Messaging is basic network operation.** As before, AT&T uses “Internet Protocol ” (or “IP”) as the method for transmitting the video programming through its network and to subscribers, but this does not mean that AT&T will use the public Internet.<sup>14</sup> Rather, Internet Protocol in this situation simply refers to a particular protocol for transmitting video signals via “packets” of data over digital networks, with back and forth signaling between the set top box and equipment at other parts of AT&T’s network for error correction.<sup>15</sup> Such regular

---

<sup>13</sup> See, e.g., AT&T Comments at 8; *Office of Consumer Counsel*, 515 F. Supp.2d at 272.

<sup>14</sup> AT&T Comments at 58 (programming on AT&T’s system does not traverse the public Internet).

<sup>15</sup> Compare AT&T Comments at 8 & Whitehead Decl. ¶ 13, with Hearing Tr. at 188:16 -189:5 (hearing testimony of AT&T witness Gustavo de Veciana), 227:10-228:2 (“switched video” involves “interaction between the set-top box and the Network infrastructure”), 230:5-7 (“Q: Is the customer interacting in any way directly with the Network? A. (de Veciana) No, he’s not.”); *Office of Consumer Counsel*, 515 F. Supp.2d at 272 (“Thus, when an AT&T subscriber wishes to watch a particular program on a particular channel, there will be a flow of information in both directions, including the request sent upstream from the set-top box to the network, IP packets carrying the requested video information sent downstream from the network to the set-top box, and IP packets carrying error correction and other information concerning authentication (*i.e.*, making sure the particular subscriber is entitled to view the requested programming) traveling in both directions. When an AT&T subscriber wants to switch to a different channel, he or she will push a button on the remote control and, after the intermediate communications/signaling described above, the video programming received by the subscriber on his or her television monitor will change. Thus, while communication/signaling takes place upstream from the subscriber’s set-top box to the network, the actual video programming runs in only one direction

internal, two-way network management is also a fundamental part of *current* cable systems, which similarly use two-way, internal signaling for matters such as authenticating a subscriber's right to receive or record a particular program. Even if AT&T also offers a subscription to high-speed Internet access via DSL, the presence of Internet access on a shared network does not convert linear cable channels into non-cable interactive web sites, any more than the presence of cable modem service on existing cable systems turns the entire network and service offering into non-cable.

**Congress defines this as cable.** All of this has also been anticipated by Congress. In 1984, Congress addressed the type of “interactivity” and two-way transmissions involved in AT&T’s system: “[s]ometimes – as in some ways of providing pay-per-view service– the selection [of video programming] 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.” H.R. Rep. No. 98-934 at 43 (1984); *see also Office of Consumer Counsel*, 515 F. Supp.2d at 276. The term “interactive on-demand services” is explicitly defined by the Cable Act to mean “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.*” 47 U.S.C. § 522(12) (emphasis added). In 1996, Congress set forth four specific methods by which telephone companies may provide video programming: (1) using wireless radio communication under Title III, (2) on a common carrier basis under Title II, (3) via a cable system under Title VI, or (4) via “Open Video System.” AT&T is not using radio, common carriage, or OVS. That leaves only the cable system option.

---

- downstream from the network to the customer premises”).

**The seminal federal court decision defines this as cable.** All of this has also been ruled upon in *Office of Consumer Counsel*.<sup>16</sup> The federal district court ruled that AT&T had structured its offering to include prescheduled “linear” channels (e.g., ABC) and other channels offered to all subscribers in tiers selected by AT&T, which met applicable federal definitions of cable.<sup>17</sup> It rejected claims that AT&T’s offering was akin to video streaming over the public Internet, individually tailored programming, “interactive on-demand” services, or information services.<sup>18</sup> The court ruled: “the subscriber interaction involved in AT&T’s video programming service is the same as that involved in traditional CATV programming.”<sup>19</sup> AT&T has not appealed the merits of that order.

**AT&T’s “new” plan for widgets is still cable.** AT&T nonetheless suggests that there has been a fundamental “change” since then. But the only change seems to be its plan to offer

---

<sup>16</sup> AT&T argues that “this Commission” is not bound by the *Office of Consumer Counsel* decision. AT&T Comments at 15 n.36. What AT&T fails to recognize, however, is that under well-established principles of issue preclusion, *AT&T is bound* by the holding of the federal court. The doctrine of collateral estoppel (or issue preclusion) prevents a defendant from raising as a defense an issue that the defendant has already litigated unsuccessfully, even against another party. *United States v. Mendoza*, 464 U.S. 154, 158 (1984). There are four specific elements to the collateral estoppel doctrine: (1) the issue is the same as one involved in a prior action; (2) the issue was actually litigated; (3) the determination of the issue was necessary to the prior judgment; and (4) the party against whom preclusion is invoked was fully represented in the prior action. *Wash. Group Int’l, Inc. v. Bell, Boyd, & Lloyd LLC*, 383 F.3d 633, 636 (7th Cir. 2004). Each of these elements is present here. In fact, courts have sanctioned defendants for seeking to re-litigate issues that are clearly barred by collateral estoppel. *See, e.g., Zahran v. Cleary Bldg. Corp.*, No. 97-3813, 98-2122, 1999 WL 439402, \*4 (7th Cir. 1999) (affirming district court’s imposition of sanctions where litigant’s arguments were barred by collateral estoppel and stating “[a]ny reasonably inquiry into the matter prior to filing would surely have revealed the impediment to relitigation of this issue”). The Commission has long applied issue preclusion and recognized that it need not relitigate the same issue involving the same party in multiple proceedings. *Application of Barry Sidelski, et al.*, 7 F.C.C.R. 1392, ¶ 8 (1992) (citing *RKO General, Inc.*, 94 FCC2d 890 (1983)).

<sup>17</sup> *Office of Consumer Counsel*, 515 F. Supp.2d at 272-73.

<sup>18</sup> *Office of Consumer Counsel*, 515 F. Supp.2d at 277-81.

<sup>19</sup> *Office of Consumer Counsel*, 515 F. Supp.2d at 278.

“widgets” as well as linear programming. Widgets are small applications that, as AT&T notes, “allows subscribers to check stock quotes, traffic, and sports scores all without interrupting their current video program, AT&T Weather on Demand, AT&T Yahoo! Games, and AT&T Online Photos from Flickr.” The same plan is underway at Verizon and Comcast.<sup>20</sup> If widgets converted cable into non-cable, then in short order there will be little left of cable regulation.

**What is at risk for consumers.** Carving AT&T out as a “non-cable” would have significant consequences. Political candidates would lose a right to equal opportunities and “lowest unit rate.” There would be no limit on the amount of advertising carried in programming directed to children. Parents would have no right to block channels they consider offensive. Requirements for closed captioning would disappear. Subscribers would have no right to the privacy of their video records and other personally identifiable information. Minimum customer service regulations and procedures for the resolution of consumer complaints would end. There would be no prohibition against AT&T denying service to residents of a particular area based on income (*i.e.*, “red lining”).

## **Conclusion**

Contrary to AT&T’s assertions, AT&T’s U-verse service today is materially identical to the U-verse service that was the basis for the Connecticut District Court’s holding that U-verse is “cable service” and AT&T is a “cable operator” under the definitions of the Cable Act. The facts underlying that decision have not changed. On every relevant point, AT&T’s network and

---

<sup>20</sup> See Brian Santo, *Verizon Heads Toward iPhone Model*, Cedmagazine.com (Mar. 13, 2009) (available at <http://www.cedmagazine.com/News-Verizon-iPhone-model-031309.aspx>) (comparing Verizon plans with consumer electronics makers’ embedded widgets, Apple’s iPhone, tru2way, and EBIF (Enhanced TV Binary Interchange Format)). Miguel Helft, *Yahoo and Intel Bring Interactive Applications To TV Sets*, New York Times (Mar. 27, 2009) (available at <http://bits.blogs.nytimes.com/2008/08/20/yahoo-and-intel-to-bring-interactive-applications-to-tv-sets/>).



**CERTIFICATE OF SERVICE**

I, Paulette Humphries, do hereby certify on this 1st day of April, 2009 that a true and correct copy of the foregoing Reply Comments of New England Cable and Telecommunications Association, Inc. has been sent via U.S. mail, postage prepaid to the following:

City of Lansing, Michigan  
Teresa S. Decker  
Varnum  
Bridgewater Place, P.O. Box 352  
Grand Rapids, MI 49501-0352

ACM *et al.*  
James N. Horwood  
Spiegel & McDiarmid  
1333 New Hampshire Avenue, N.W.  
Suite 200  
Washington, DC 20036

City of Dearborn, Michigan *et al.*  
Joseph Van Eaton  
Miller & Van Eaton P.L.L.C.  
1155 Connecticut Avenue, N.W.  
Suite 1000  
Washington, DC 20036

Holly Saurer (\*via e-mail)  
Media Bureau  
Room 4-A734  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554  
Holly.Saurer@fcc.gov

\_\_\_\_\_  
/s/ Paulette Humphries  
Paulette Humphries