

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

In the Matter of
Petition for Declaratory Ruling of Alliance for) CSR-8126
Community Media, et al., that AT&T's Method of) MB Docket No. 09-13
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
Petition for Declaratory Ruling of the City of) CSR-8127
Lansing, Michigan, on Requirements for a Basic) MB Docket No. 09-13
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
Petition for Declaratory Ruling Regarding Primary) CSR-8128
Jurisdiction Referral in *City of Dearborn*) MB Docket No. 09-13
et al. v. Comcast of Michigan III, Inc. et al.)

**REPLY COMMENTS OF 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 NATOA,
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 SEATOA**

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SUMMARY

ACM's Petition received widespread support in the comments. The record confirms what common sense already tells any video programming subscriber or programmer: Degraded accessibility, functionality and signal quality of PEG will result in decreased viewership of local PEG programming by subscribers, and commensurately reduced audiences for PEG programmers' uniquely local, public interest programming. If AT&T is permitted to move PEG to a less accessible, less functional, and lower quality application on its multichannel video platform, that would be an open invitation to other cable operators to follow suit.

AT&T, the largest telecommunications company in the world, asserts that it is somehow technically unable, or not able to afford, to treat PEG like the broadcast and other non-commercial channels on its U-verse system. That assertion is inherently improbable, and AT&T comes nowhere close to presenting evidence to support it. Equally facile are AT&T's repeated claims that its PEG product is "nascent," "innovative" and "new," and that it should not be burdened with "legacy regulations" Labels such as "nascent," "innovative" or "new" do not make AT&T's PEG product better, nor do they exempt AT&T from the requirements of the Cable Act and FCC rules and policies. Repeatedly calling those laws and rules "legacy regulation" does not alter that conclusion.

1. The "Cable Service" Issue. By urging the Commission not to address the "cable service" issue here but instead to await the outcome of some separate proceeding, AT&T is effectively demanding that notwithstanding ACM Petitioners' petition in this proceeding, they, and indeed all PEG programmers in AT&T's U-verse footprint, must live indefinitely in AT&T's "non-cable operator" world, even if it is ultimately determined that AT&T has all along been providing "cable service" and thus is subject to the Cable Act and applicable FCC rules. The "cable service" issue, however, has been placed before the Commission in this proceeding, and the Petitions addressing AT&T's PEG product have been placed on public notice for comments and reply comments by any interested party and made subject to the FCC's permit-but-disclose *ex parte* rules. That makes this proceeding an informal interpretive rulemaking proceeding under the Administrative Procedure Act, and the "cable service" issue ripe for decision.

AT&T's U-verse video service is undoubtedly a "cable service," and AT&T is therefore a "cable operator." Its repeated efforts to analogize itself to DBS and OVS are therefore irrelevant. Nothing AT&T has or could present alters the fundamental nature of its U-verse video service: A proprietary package of video programming, of AT&T's own choosing, that AT&T transmits to subscribers over its landline system, with which subscribers may interact for the purpose of "selecting" or "using" that video programming.

Four conclusions are apparent from the plain language of the "cable service" definition that are fatal to AT&T's argument that its service is not a "cable service." First, the "cable service" definition is transmission protocol agnostic; thus the fact that AT&T delivers video programming in Internet protocol is irrelevant. Second, the definition does not distinguish in any way between whether "the one-way transmission to subscribers of . . . video programming" is accomplished by transmitting all of the video channels to the subscribers at once or only as the

subscriber selects a particular channel; thus, it is irrelevant that AT&T's system delivers channels one at a time as the subscriber requests. Third, "cable service" includes "subscriber interaction . . . which is required for the selection or use of such video programming;" that is precisely how AT&T's U-verse subscribers "interact" with AT&T's video service package – to select or use that programming. And fourth, there can be no dispute that AT&T's proprietary multichannel video package constitutes "video programming;" AT&T admits as much, referring to itself as a multichannel video programming distributor.

2. The First Amendment Issue. AT&T erroneously asserts that imposition of the PEG requirements that Petitioners seek – the "imposition" only really being that AT&T comply with the PEG and related requirements of the Cable Act and FCC rules – would "infringe upon AT&T's free-speech rights." All the ACM Petition seeks is to have AT&T come into compliance with Section 611 and FCC rules and decisions. AT&T's First Amendment claim is therefore that the "channel capacity" and "editorial control" provisions of § 611, as well as the FCC's PEG signal quality rulings and its closed captioning rules, violate the First Amendment. That is a position that AT&T does not, and cannot, defend.

AT&T essentially claims that anything that requires AT&T to depart from its chosen PEG product scheme violates the First Amendment because, according to AT&T, that would require restructuring that would cost millions of dollars. This assertion of technological and financial impotence, from the world's largest telecommunications company, no less, fails at several levels. AT&T's conclusory dollar figures are wholly undocumented and unsupported, and they are likely substantially overstated. AT&T's described methods for curing the problems with its PEG product overlook a software-based solution that would likely cost less. But even taking AT&T's imprecise cost estimates at face value, its unwillingness to spend a few million dollars to come into compliance with its federal PEG obligations, when compared to the billions it is investing on its U-verse project, is more emblematic of AT&T's disdain for PEG than it is of any real burden on AT&T.

3. AT&T Fails to Provide PEG "Channel" Capacity. AT&T has no response to ACM Petitioners' § 611 PEG "channel capacity" argument. The Cable Act empowers franchising authorities to require cable operators to set aside "channel" capacity for PEG use, just as it requires cable operators to devote "channel" capacity to local broadcast stations, and to designate "channel" capacity for commercial leased access. The Act nowhere suggests that the "channel" capacity given to PEG can be systematically inferior to the "channel" capacity given to broadcasters and others. AT&T admittedly strips out, or fails to pass through, closed captioning, SAP, VBI and other program-related information out of PEG programming signals, even though such information and functionality is part and parcel of the "channel" that AT&T gives to broadcasters and other commercial cable programmers on its U-verse system. AT&T cannot amend the Cable Act's "channel" definition. What Sections 602(4) and 611 mean is that AT&T must furnish PEG with the same type of "channel" capacity as it furnishes broadcasters and other commercial cable video programmers. And that, by AT&T's own admission, is what AT&T's PEG product does *not* do.

4. Signal Quality. AT&T never addresses ACM Petitioners' argument concerning FCC decisions requiring uniform signal quality standards for broadcast, PEG and other cable channels. That argument refutes AT&T's assertion that nothing prevents it from discriminating

against PEG. Moreover, there can be no question that AT&T's PEG product does in fact subject PEG programming to inferior signal quality, accessibility and functionality. And contrary to AT&T's assertion, the record provides evidence that these deficiencies have in fact undermined PEG viewership and undermined municipalities' ability to make their PEG programming available to subscribers.

5. AT&T Exercises Impermissible Editorial Control. AT&T exercises editorial control over PEG content in violation of § 611(e) by stripping out PEG programming content such as closed captioning, SAP, VBI, and other program-related information, and by subjecting PEG programming to inferior signal quality, accessibility and functionality. Furthermore, § 611(e) is *not* limited to prohibiting cable operators from exercising editorial control over PEG "content" (although it certainly includes that). Rather, § 611(e) provides that "a cable operator shall not exercise any editorial control *over any [PEG] use of channel capacity provided pursuant to [§ 611].*" Section 611(e) bars a cable operator from deciding, in order to devote more true § 602(4) "channels" to other programming of its choosing, to relegate PEG to an inferior, and completely different, "application" than the operator's preferred video programming. That constitutes the prohibited exercise of editorial control over PEG "use of channel capacity."

6. Closed Captioning. AT&T does not deny that it fails to pass through closed captioning in PEG programming but believes that the open captioning language in § 79.1(c) entitles it to strip out, or refuse to pass through, that closed captioning and compel open captioning instead. Because AT&T is a cable operator, it is subject to the pass-through obligation of § 76.606 of the Commission's rules, which unlike the Part 79 VPD closed captioning rules, contains no open captioning option at all. But even assuming that Part 79 rather than Part 76 applies, AT&T's open captioning defense fails. AT&T asserts that the open captioning option is "unqualified," but a more accurate characterization of § 79.1(e)(2) is that it is in an ambiguous passive voice. What *is* "unqualified," however, is § 79.1(c)'s pass-through obligation.

Apparently recognizing its weakness on the closed captioning issue, AT&T also asks the Commission in its Comments for a waiver of the closed captioning pass-through requirement. If AT&T wishes to seek a waiver, it must seek that in a separate pleading, not in the body of its comments in this proceeding. But AT&T's belated, off-handed waiver request is undeserving of the Commission's consideration.

7. AT&T PEG Product's Accessibility, Functionality and Quality Deficits. ACM Petitioners have no complaint about the IP-based manner in which the U-verse system delivers local broadcast and other commercial video programming channels. It is AT&T's relegation of PEG, and essentially only PEG, to the inferior PEG product platform that ACM Petitioners contest, not the IP-based nature of AT&T's U-verse video service. In fact, the IP nature of AT&T's video platform actually should make it more flexible and better able to accommodate delivering a local community's particular PEG channels to residents of that community, with full accessibility, functionality and signal quality.

Regardless whether the PEG product application load time is 2, 6 or 30 seconds, that is an eternity compared to the "lighting fast channel change" AT&T promises for its other U-verse

video programming, and, of course, to what any multichannel video subscriber has come to demand and expect. AT&T also glosses over the additional time and frustration that a subscriber wanting to watch PEG must endure to sift through AT&T's PEG product menus and submenus to reach a particular PEG channel's programming. AT&T likewise ignores the additional time and frustration for the subscriber wishing to channel surf between PEG and commercial channels, or making a futile effort to find a particular PEG channel or program on AT&T's program grade.

If the accessibility and functionality shortcomings of AT&T's PEG product did not depress viewership, to conserve system capacity AT&T also would place local broadcasters and other commercial programmers in a similar "product," and those programmers should have no objection to that. But that, of course, is not how AT&T treats these other programmers.

AT&T has not provided sufficient information to draw the conclusion it urges about PEG product signal quality. To the extent the information AT&T has provided suggests anything, however it contradicts AT&T's claim:

- *AT&T's PEG product provides inferior accessibility & functionality to PEG than to other linear video channels on its U-verse system.

- *AT&T's supporting declarations do not provide information adequate to support its claim that its PEG product provides similar signal quality to non-PEG channels.

- *AT&T would have to provide far more information than its supporting declarations furnish to determine whether the quality of its PEG product video streams is similar to, rather than inferior to, that of non-PEG video channels.

- *What limited information AT&T's supporting declarants have provided suggests that PEG is in fact received *inferior* quality to non-PEG channels on AT&T's system.

- *AT&T's declarant Professor de Veciana is wrong in suggesting that subjectivity in evaluating video signal quality is irrelevant.

- *AT&T's claims concerning the burden of providing linear channel treatment to PEG programming are overstated.

Accordingly, the Commission should either (a) compel AT&T to provide the additional technical information needed to determine the true differences in how it treats PEG programming versus how it treats broadcast and other commercial video programming channels, or (b) dismiss AT&T claims of similar quality and conclude that AT&T's U-verse system does in fact deliver inferior signal quality, accessibility and functionality to PEG programming.

8. PEG Product's Supposed "Advantages". AT&T alleges that its PEG product has "many advantages" over other cable operators' PEG carriage. But all of these alleged "advantages" actually devolve into only one: AT&T's PEG product distributes each local jurisdiction's PEG programming throughout the DMA, with all DMA PEG programming being retrievable through the "channel 99" platform.

AT&T's supposed DMA-wide PEG advantage boils down to this: AT&T's PEG product offers residents in each locality, in return for degraded accessibility, functionality and quality with respect to their own local PEG programming, equally degraded accessibility, functionality and quality with respect to all other PEG programming in the surrounding DMA.

Moreover, AT&T presents a false choice. If AT&T wishes to place DMA-wide PEG programming on its cumbersome channel 99 platform, ACM Petitioners by and large have no objection to that. But that is *not* a substitute for delivering an individual local jurisdiction's PEG programming to its local residents on true § 602(4) "channels" in compliance with the Cable Act and Commission rules and policies that are the subject of this Petition.

AT&T tries to frame the matter as a "either/or" choice, but that it is not so. Even if it were, it is one of AT&T's own business-decision making, *not* one that its technology dictates.

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et al. v. Comcast of Michigan III, Inc. et al.)

The Alliance for Community Media (“ACM”), the Alliance for Communications Democracy (“ACD”), the Sacramento (California) Metropolitan Cable Television Commission (“SMCTC”), the Foothill-De Anza Community College District, California (“De Anza”), Chicago Access Network Television (“CAN TV”), the Illinois Chapter of the National Association of Telecommunications Officers and Advisors (“Illinois NATOA”), the Manhattan (New York) Neighborhood Network (“MNN”), BronxNet (New York), Brooklyn (New York) Community Access Television (“BCAT”), the City of Raleigh, North Carolina (“Raleigh”), the ACM Western Region, the ACM Central States Region, the ACM Midwest Region, the ACM Northwest Region, the ACM Northeast Region, and the SouthEast Association of Telecommunications Officers and Advisors (“SEATOA”) (collectively, “ACM Petitioners”), file

these reply comments in response to the opening comments filed in this proceeding.¹ While we address some of the comments filed by other parties, our reply comments will focus primarily on the Comments of AT&T Opposing Petitions for Declaratory Ruling (“AT&T Comments”), as those comments, like the ACM Petition, are directed at AT&T’s so-called PEG product.

INTRODUCTION

ACM’s Petition, as well as the Dearborn and Lansing Petitions, received widespread support in the comments. Indeed, of the approximately 630 comments filed, approximately 561 supported granting the Petitions, while only 32 opposed. The record amply supports the valuable public interests served by public, educational and governmental (“PEG”) access channels, both for viewers and PEG programmers.² And it also clearly demonstrated the threat to PEG posed by AT&T’s PEG product.³ The record confirms what common sense already tells any video programming subscriber or programmer: Degraded accessibility, functionality and signal quality of PEG will result in decreased viewership of local PEG programming by subscribers, and commensurately reduced audiences for PEG programmers’ uniquely local, public interest

¹ Public Notice, “Entities File Petitions for Declaratory Ruling Regarding Public, Educational, and Governmental Programming,” DA 09-203 (Feb. 6, 2009) (“PEG Declaratory Ruling PN”); Public Notice, “Extension of Time and Waiver of Reply and Service Rules Concerning Petitions for Declaratory Ruling Regarding Public, Educational, and Governmental Programming,” DA 09-531 (Mar. 13, 2009) (“March 13 Notice”). This proceeding involves three petitions for declaratory ruling, the Petition for Declaratory Rule of ACM *et al.*, CSR-8126 (filed Jan. 30, 2009) (“ACM Petition”), the Petition for Declaratory Ruling of the City of Lansing *et al.*, CSR-8127 (filed Jan. 27, 2009) (“Lansing Petition”), and the Petition for Declaratory Ruling of the City of Dearborn, *et al.*, CSR-8128 (filed Dec. 9, 2009) (“Dearborn Petition”).

² *See, e.g.*, Comments of the City of New York, at 2,3; Comments of Montgomery County, Maryland, at 2-3; Comments of SCAN NATOA, Inc., City of Irvine, California, City of San Clemente, California, City of Santa Cruz, California, County of Santa Cruz, California and Public Cable Television Authority in Support of Petitions for Declaratory Ruling, at 6-7; Comments Submitted by Certain Florida Municipalities, at 2, 6-9; Comments of the City of Warren, Michigan, at 3.

³ *See, e.g.*, Comments of the City of Houston, Texas, at 2-3; Comments of Michigan Municipal League and Michigan Townships Association, at 3, 4; Comments of Montgomery County, Maryland, at 3-4; Comments of SCAN NATOA, Inc., City of Irvine, California, City of San Clemente, California, City of Santa Cruz, California, County of Santa Cruz, California and Public Cable Television Authority in Support of Petitions for Declaratory Ruling, at 8.

programming.⁴ That, of course, would frustrate the “substantial and compelling government[al]” interests that Congress intended PEG to serve,⁵ depriving the public of ready access to public, educational and governmental information not available on any other channels.

If AT&T were permitted to move PEG to a less accessible, less functional, and lower quality application on its multichannel video platform, that would be an open invitation to other cable operators to follow suit.⁶

Stripped of rhetoric, AT&T’s extensive effort to defend its PEG product falls flat. AT&T’s claims that it does not provide “cable service” and is therefore not a “cable operator,” and that the Commission is powerless to resolve that question here, border on the frivolous. Rather than responding to ACM Petitioners’ argument as to why AT&T’s PEG product does not comply with the Cable Act and FCC rules, AT&T erects a series of straw men and proceeds to attack them. AT&T also spends much energy addressing the Lansing Petition, but largely ignores the ACM Petitioners’ arguments, apparently hoping the Commission will forget about them.

AT&T is the incumbent local exchange carrier (“ILEC”) in every market where it is introducing its U-verse service. And it is the *largest telecommunications company in the world*⁷ and *dwarfs all incumbent cable operators in size*.⁸ Despite these facts, AT&T asserts that it is

⁴ Comments of Detroit and Other Municipal Entities and Associations, at 5, 11; Comments Submitted by Certain Florida Municipalities, at 2; Comments of the City of Warren Michigan, at 6; Comments of the National Association of Telecommunications Officers and Advisors, the National Association of Counties, the National League of Cities, and the U.S. Conference of Mayors, in Response to the Consolidated Petitions for Declaratory Ruling, at 10-11.

⁵ H.R. Rep. No. 628, 102nd Cong., 2d Sess. 85 (1992), 1992 WL 166238.

⁶ See, e.g., Comments of the City of White Plains and the Town/Village of Harrison, New York, at 2; Comments Submitted by Certain Florida Municipalities, at 11.

⁷ Fortune Global 500, available at <http://money.cnn.com/magazines/fortune/global500/2008/industries/157/index.html> (last visited Mar. 24, 2009).

⁸ AT&T has nearly four times the revenue, more than five times the profit, and well over twice the assets of Comcast, the largest cable operator. Compare 2008 Fortune 500, AT&T, available at

(Footnote continued ...)

somehow technically unable, or not able to afford, to treat PEG like the broadcast and other non-commercial channels on its U-verse system the way that not only incumbent cable operators, but also AT&T's fellow large ILEC, Verizon, somehow manage to do. AT&T Comments at 28-29 & 53-54. As we show below, that assertion is inherently improbable, and AT&T comes nowhere close to presenting evidence to support it.

Equally facile and transparent are AT&T's repeated claims that its PEG product is "nascent," "innovative" and "new" (*e.g.*, AT&T Comments at 61), and that it should not be burdened with "legacy regulations" (*id.*). Labels such as "nascent," "innovative" or "new" do not make AT&T's PEG product better,⁹ nor do they magically exempt AT&T from the requirements of the Cable Act and FCC rules and policies. If AT&T is indeed providing "cable service" and thus is a "cable operator" (and as we show below, it clearly is), then it must comply with the Cable Act and FCC rules imposed on cable operators. And try as AT&T might, repeatedly calling those laws and rules "legacy regulation" does not alter that conclusion. "Legacy regulation" is nothing more than AT&T's euphemism for having to comply with the law.

In fact, what the record, and even AT&T's own comments and supporting declarations, strongly suggest is that AT&T made a deliberate business decision to demote PEG to second class status, and is now trying to exempt itself from the Act and the rules to accommodate its business decision, rather than designing its system to comply with the law in the first place. That is a business strategy that the Commission cannot afford to tolerate, as it would open the door to

(...continued)

<http://money.cnn.com/magazines/fortune/fortune500/2008/snapshots/2756.html> (last visited Mar. 24, 2009) *with* Fortune 500, Comcast *available at* <http://money.cnn.com/magazines/fortune/fortune500/2008/snapshots/5035.html> (last visited Mar. 24, 2009).

⁹ Collateralized debt obligations and credit default swaps were "innovative" and "new," but we have learned that does not necessarily make them better, or even desirable. So it is, we believe, with AT&T's PEG product.

other Commission licensees and regulatees circumventing their legal obligations by ignoring those obligations in designing their facilities, and then urging the Commission to accept that non-compliance by complaining that compliance is too burdensome.

The Commission should grant the ACM Petition. As we now show, AT&T's arguments to the contrary do not withstand scrutiny.

I. AT&T'S U-VERSE MULTICHANNEL VIDEO SERVICE IS A "CABLE SERVICE" AND THUS AT&T IS A "CABLE OPERATOR."

AT&T claims that it is not a "cable operator" and thus not subject to PEG requirements at all and that, in any event, that issue cannot be resolved in this proceeding. AT&T Comments at 14-21. Neither claim has merit.

A. Determining Whether AT&T's U-verse Video Service Is A "Cable Service" Is Fully Appropriate To Be Determined in this Proceeding.

AT&T first claims that, because the question whether it is providing "cable service" "turn[s] on questions of fact" and "important issues of law," and because the issue has been raised in another long-pending rulemaking proceeding, *IP Enabled Services*, WC Docket No. 04-36, it would be "inappropriate to address" those questions in this declaratory ruling proceeding. *Id.* at 19-20.

This is a shell game. The Commission should be under no illusions about AT&T's aim: It believes that until or unless the Commission rules otherwise, it is entitled to decide for itself that what it is providing is not a "cable service" (even though the only court to address the issue, and to which AT&T is bound, has ruled that AT&T's service is in fact providing cable service¹⁰) and to proceed as if it were not. By urging the Commission not to address the issue here but

¹⁰ *Office of Consumer Counsel v. S. New England Tel. Co.*, 515 F. Supp. 2d 269 (D. Conn.) ("*SNET I*"), *recon. denied*, 514 F. Supp. 2d 345 (D. Conn. 2007) ("*SNET II*"), *appeal docketed* No. 09-0116 (2d Cir. Jan. 9, 2009).

instead to await the outcome of some separate proceeding that would of course delay matters further, AT&T is effectively demanding that notwithstanding ACM Petitioners' petition in this proceeding, they, and indeed all PEG programmers in AT&T's U-verse footprint, must live indefinitely in AT&T's dictated, "non-cable operator" world, even if it is ultimately determined at some unknown future point in another proceeding to which ACM Petitioners are not a party that AT&T has all along been providing "cable service" and thus is subject to the Cable Act and applicable FCC rules.

AT&T's position is unsupported by law or precedent. As AT&T itself concedes, both the ACM Petition and the Lansing Petition place the "cable service" issue before the Commission in this proceeding. AT&T Comments at 14 & n.34 (citing ACM Petition at 37-38 & Lansing Petition at 4).¹¹ Moreover, AT&T's proffered "declaratory ruling" versus "rulemaking" distinction (AT&T Comments at 19-21) simply does not wash given the procedural posture of this proceeding. The ACM and Lansing Petitions addressing AT&T's PEG product have been placed on public notice for comments and reply comments by any interested party and made subject to the FCC's permit-but-disclose *ex parte* rules.¹² That makes this proceeding an informal interpretive rulemaking proceeding under the Administrative Procedure Act.¹³ Any doubt on this point is dispelled by AT&T's own reliance elsewhere in its Comments on the Commission's *Cable Modem Ruling*.¹⁴ That Ruling was also a declaratory ruling, not a formal

¹¹ Other commenters have likewise raised the issue. See, e.g., NATOA Comments at 3-7; NCTA Comments at 8 & n.9.

¹² See March 13 Notice.

¹³ *U.S. Telecom Assn. v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005); *American Airlines v. Dept. of Transportation*, 202 F.3d 788, 797 (5th Cir. 2000); *State Corp. Commission v. FCC*, 787 F.2d 1421, 1428 (10th Cir. 1986).

¹⁴ Declaratory Ruling, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Ruling*"), *aff'd in part, vacated in part, sub nom. Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd & remanded sub nom. Nat'l Cable Television Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

rulemaking, and yet unquestionably had far broader “ramifications” (AT&T Comments at 19) – the classification of cable modem service as an “information service,” (AT&T Comments at 15) which in turn led to the classification of all broadband Internet access services as an “information service” – than any determination here about whether AT&T is offering is a “cable service.”

Finally, AT&T’s claim that more facts are needed to resolve the question whether it is providing a “cable service” (AT&T Comments at 19) is wishful thinking. As we explain in Part I(B) below, the relevant facts are straightforward and not in dispute, and the law is clear as well: AT&T’s U-verse video service is in fact a “cable service.”¹⁵ The Commission should put an end to AT&T’s never-ending shell game and so rule in this proceeding.

B. AT&T’s U-verse Video Service Is A “Cable Service” and Thus AT&T Is A “Cable Operator” Subject to Title VI and Applicable FCC Rules.

AT&T’s argument that its U-verse video service is not a “cable service” borders on the frivolous. We begin with the definition of “cable service,” which AT&T fails to recite in full:

the term “cable service” means–

- (A) the one-way transmission of subscribers of (i) video programming, or (ii) other programming service, and
- (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service;

47 U.S.C. § 522(6). “Video programming,” in turn, is defined as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”

47 U.S.C. § 522(20).

¹⁵ As for AT&T’s argument that the U-verse “cable service” issue is before the Commission in another proceeding, *IP-Enabled Services*, WC Docket No. 04-36 (AT&T Comments at 19), the record there has been incorporated here, *see id.* at 19 n.55 & NCTA Comments at 8 & n.9, and sitting for three years; nothing prevents the Commission from acting now, and it should.

Four conclusions are apparent from the plain language of these definitions that are fatal to AT&T's argument that its service is not a "cable service." First, the "cable service" definition is transmission protocol agnostic; thus the fact that AT&T delivers video programming in Internet protocol is irrelevant. Second, the definition does not distinguish in any way between whether "the one-way transmission to subscribers of . . . video programming" is accomplished by transmitting all of the video channels to the subscribers at once or only as the subscriber selects a particular channel; thus, it is irrelevant that AT&T's system delivers channels one at a time as the subscriber requests. Third, "cable service" includes "subscriber interaction . . . which is required for the selection or use of such video programming;" that is precisely how AT&T's U-verse subscribers "interact" with AT&T's video service package – to select or use that programming. And fourth, there can be no dispute that AT&T's proprietary multichannel video package constitutes "video programming;" AT&T admits as much, referring to itself as a "multichannel video programming distributor[]."¹⁶

AT&T's protestations to the contrary notwithstanding, the district court in *SNET I* and *SNET II* dealt with each and every argument, factual or legal, that AT&T presents here as to why it is supposedly not providing "cable service." And the *SNET* court roundly rejected every one of them, finding that "[t]he statutory language itself appears to require the conclusion that AT&T's video programming service does constitute a 'cable service,' as defined by the Cable Act." *SNET I*, 515 F. Supp. 2d at 276.

¹⁶ AT&T Comments at 14. *Accord id.* at 28-29 (referring to the supposedly adverse effects on AT&T of having to change its video programming lineup). *See also* Comments of AT&T Services, Inc., *In the Matter of Section 109 Report to Congress*, Docket No. 2007-1 at 18-19 (Copyright Office, Library of Congress, July 1, 2007) ("U-verse TV consists of a wired, closed transmission path service that carries broadcast signals" and is thus a "cable system" under 17 U.S.C. § 111(f)) (attached as Exh. B).

Not surprisingly, AT&T struggles to steer the Commission away from the *SNET* decision, asserting that the Commission is not bound by the decision, that the *SNET* decision did not explicitly state that its reading of the “cable service” decision was unambiguous, that the facts concerning AT&T’s U-verse video service have changed since *SNET*, and that AT&T believes the *SNET* decisions are moot and is appealing them on that ground. AT&T Comments at 15-18. But these are all strawmen.

We do not contend that *SNET* is binding on the Commission (although it may be binding on AT&T’s subsidiary, SNET), and we do not believe it necessary to try to decide whether the *SNET* court thought the “cable service” definition was unambiguous as applied to AT&T’s video service. Rather, we simply invite the Commission to review the *SNET* decisions for itself and decide whether their reasoning and legal analysis are persuasive.

We are confident that the Commission will find that *SNET* cogently and comprehensively addressed and rebutted every argument AT&T raises here, relying not only on the statutory language, but also the Cable Act’s legislative history, and carefully analyzing and distinguishing each Commission decision that AT&T tries to twist into supporting its position. *See SNET I*, 515 F. Supp. 2d at 272-73 & 276-281; *SNET II*, 514 F. Supp. 2d at 348-351. And whether or not the *SNET* decision is ultimately found to be moot, that would not make that court’s reasoning on the merits any less cogent.

AT&T also asserts that its U-verse video service is now “substantially different from the service addressed by [*SNET*].” AT&T Comments at 17. But there is nothing in the record supporting that assertion.¹⁷ Indeed, a comparison of AT&T’s supporting Declarations here and

¹⁷ The link to AT&T’s website cite that it cites for that proposition – http://www.att.com/Common/merger/files/pdf/total_home_dvr/Evolution_of_U-verse.pdf (last visited Mar. 27, 2009) – yields nothing illuminating. In any event, nothing AT&T has or could present alters the fundamental nature (Footnote continued ...)

the issues addressed in *SNET* reveals the salient issues to be precisely the same. Thus, AT&T's declarants spend much time describing how AT&T's U-verse system differs technically from traditional cable systems, pointing to U-verse's use of IP to deliver video programming, and how U-verse, unlike traditional cable systems, "only provides to subscribers those video programs that are specifically requested by the viewer,"(¶ 13)¹⁸ and how U-verse is interactive and two-way because subscribers can select and use individual video programming channels.¹⁹

The problem for AT&T is that these are exactly the same arguments it unsuccessfully made in *SNET*. Again, we will not repeat the *SNET* decision *in toto* here but do point out that, in response to AT&T's arguments about these technical differences between U-verse and traditional cable systems, *SNET I* held:

[N]otwithstanding the differences in the way the technology of U-verse works, including the request signal sent from the subscriber's set-top box back to the network to retrieve the selected programming, U-verse still falls within the scope of "a medium of mass communication, with the same package or packages of video programming transmitted from the cable operator and available to all subscribers": the video programming (both prescheduled broadcast programming and VOD) is generally available to all subscribers within a particular tier, and the fact that the programming is not transmitted to a particular subscriber from the network until that subscriber tunes to that channel or selects that particular VOD program does not change this fact. This interactivity is not of the "high degree" contemplated by the Cable Modem Ruling for exempting a service from the definition as it requires no more interactivity on the part of a subscriber than that involved in traditional CATV service. In fact, the level of interactivity required exactly fits into the FCC's own characterization of what Congress intended by its "cable service"

(...continued)

of its U-verse video service: A proprietary package of video programming, of AT&T's own choosing, that AT&T transmits to subscribers over its landline system, with which subscribers may interact for the purpose of "selecting" or "using" that video programming.

¹⁸ AT&T Comments, Whitehead Decl. at ¶¶ 10-22. *Accord*, McCarthy Decl. ¶¶ 2-8; de Veciana Decl. ¶¶ 4-6.

¹⁹ Whitehead Decl. ¶¶ 13-15; McCarthy Decl. ¶¶ 3-4; de Veciana Decl. ¶ 5.

definition: “[t]he legislative history states that Congress intended ‘simple menu-selection’ or searches of pre-sorted information from an index of keywords that would not activate a sorting program and ‘would not produce a subset of data individually tailored to the subscriber’s request’ to be cable services.”

515 F. Supp. 2d at 279-80 (citations & footnotes omitted).

To the extent that matters have changed or require further amplification beyond the reasoning of *SNET*, they all point in favor of *SNET*’s “cable service” conclusion and against AT&T’s position.

First, the *SNET* court relied exclusively on the legislative history of the 1984 Cable Act, which discussed § 602(6)(B), 47 U.S.C. § 522(6)(B), as originally enacted. The *SNET* court did not even cite to, much less discuss, the addition of the phrase “*or use*” to § 602(6)(B) in 1996 or the accompanying legislative history explaining the purpose behind the 1996 expansion of the “cable service” definition.²⁰ As a result, the *SNET* court focused only on “subscriber interaction” for the “selection” of video programming, overlooking that “subscriber interaction” for the “*use*” of video programming is “cable service” as well. “Use,” of course, would include most, if not all, of AT&T’s speculative “future capabilities” of its U-verse video product (AT&T Comments at 17 (quoting *SNET II*, 514 F. Supp. 2d at 351)), even though, as we have noted, none of those capabilities is evident either here or in the *SNET* record.

Second, the *SNET* court seemed to be laboring under the misimpression that the terms “information service” and “cable service” are mutually exclusive, and thus felt the need to distinguish the two. *See SNET I*, 515 F. Supp. 2d at 280-81. While the *SNET* court’s distinction certainly suffices for purposes of determining that AT&T’s U-verse product is a “cable service,” the *SNET* court was apparently unaware that “cable service” is in fact one form of “information

²⁰ See H.R. Conf. Rept. No. 458, 104th Cong., 2d Sess. (1996) at 169, *reprinted in* 1996 U.S.C.C.A.N. 124, 182.

service.” The “information service” definition in § 153(20) is derived from the AT&T Consent Decree’s “information service” definition, and under that Decree, “[t]he provision of cable television service . . . clearly involves the generation, transformation and conveyance of information and is thus an information service,”²¹ a conclusion with which the FCC has agreed.²² Thus, whether AT&T’s U-verse video service is also an “information service” is of no help to its position that the service is not a “cable service.”

Third, AT&T completely misapprehends the meaning of the phrase, “one-way transmission,” in § 602(6)(A). When that meaning is properly understood, AT&T essentially admits in its First Amendment argument (at 28-29) that it is engaging in “one-way transmission to subscribers of . . . video programming,” and is thus providing a “cable service.” AT&T apparently believes that “one-way transmission” refers exclusively to information moving in only one direction, so that if information in its U-verse video service is “two-way,” it is not a “cable service.”

Aside from the fact that, as the *SNET* court pointed out, AT&T’s video service meets this test because all of the video programming does in fact go in one direction, and the two-way aspects of the service are limited to “subscriber interaction . . . for the selection or use” of that programming, 515 F. Supp. 2d at 278-79, AT&T ignores what the Commission has ruled “one-way transmission” means in § 602(6)(A). In the Telephone Company-Cable Television Cross-Ownership Rules, 7 FCC Rcd 5069, 5071 (1992), (“*Video Dialtone Reconsideration Order*”), the FCC construed “one-way transmission” in § 602(6)(A) as requiring a cable operator

²¹ U.S. Department of Justice, Response to Public Comments on Proposed Modification of Final Judgment in *United States v. Western Electric Co.*, 47 Fed. Reg. 23320, 23335 (May 27, 1982).

²² *Telephone Company-Cable Television Cross-Ownership Rules*, Notice of Inquiry, 2 FCC Rcd 5092, 5096 n.26 (1987).

to exercise “control over the selection of content offered to subscribers.” *Cable Modem Ruling*, 17 FCC Rcd at 4834 (¶ 62). This interpretation of the term “one-way transmission” as involving the exercise of editorial control was upheld on appeal by the D.C. Circuit. *Nat’l Cable Television Assn. v. FCC*, 33 F.3d 66, 71 (D.C. Cir. 1994). Thereafter, in the very *Cable Modem Ruling* on which AT&T relies here, the Commission concluded that cable modem service does not satisfy the “one-way transmission” requirement of the “cable service” definition in § 602(6)(A) because “cable operators do not control the majority of information accessible by cable modem subscribers.” *Cable Modem Ruling*, 17 FCC Rcd at 4834 (¶ 62).

AT&T here admits what should already be obvious: It exercises just such editorial control over the package of video programming delivered to subscribers in its U-verse video service. AT&T Comments at 28-29 (AT&T’s U-verse video programming lineup is composed of “programming that consumers desire and that AT&T would prefer to carry,” and AT&T “choose[s] what programming to provide”). AT&T is therefore unquestionably engaging in “one-way transmission to subscribers . . . of video programming” under § 602(6)(A). While, as shown above, the alleged “two-way interactive” capabilities of AT&T’s service also clearly fall within § 602(6)(B)’s “interaction . . . for selection or use” language, even if they did not, the “one-way transmission” aspect of AT&T’s video service would still be a “cable service,” and thus AT&T would still be a “cable operator.” That AT&T may mix with its “cable service” some non-cable services is irrelevant. As Congress has made clear, if any part of a service offering is “cable service,” it remains a “cable service,” regardless whether it is also mixed with non-cable services;

While cable operators are permitted under the provision of Title VI to provide any mixture of cable and non-cable service they chose, the manner in which a cable service is marketed would not alter its status as a cable service. For instance, the combined offering of a

non-cable shop-at-home service with service that by itself met all the conditions for being a cable service would not transform the shop-at-home service into a cable service, or transform the cable service into a non-cable communications service.”²³

Because it does offer “one-way transmission to subscribers of . . . video programming,” AT&T provides a “cable service.” Everything else in AT&T’s Comments to the contrary is mere distraction.

Fourth, as pointed out by Free Press, AT&T’s claim that its U-verse video service is not a “cable service” is also inconsistent with § 651 of the Act. Free Press Comments at 6. Section 651, added in 1996, gave telecommunications common carriers like AT&T only four routes to enter the video programming market: (1) through a “radio-based system,” (2) through video common carriage, (3) as an open video system (“OVS”) operator, or (4) as a cable operator subject to Title VI. AT&T does not, and cannot, claim that its U-verse video service is a “radio-based system,” nor can it, or does it, claim that its U-verse system is common carrier video or OVS. The only route left for AT&T consistent with § 651 is that of a “cable operator” providing “cable service.” If AT&T were actually correct that it is not a “cable operator” (which it is not), it would be confessing to a violation of § 651.

In sum, AT&T’s U-verse video service is undoubtedly a “cable service,” and it is therefore a “cable operator.” Its repeated efforts to analogize itself to DBS and OVS are therefore irrelevant.²⁴ We urge the Commission to put a prompt and definite end to AT&T’s claims otherwise.²⁵

²³ H.R. Rep. No. 934, 98th Cong., 2d Sess. (1984) at 44, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4681.

²⁴ *See, e.g.*, AT&T Comments at 25, 36-39.

²⁵ Because we believe it clear beyond doubt that AT&T is providing “cable service,” the Commission need not reach the Title I ancillary jurisdiction argument raised in the Lansing Petition (at 23-26). To the extent the Commission concludes otherwise, however, we support Lansing’s ancillary jurisdiction argument.

II. AT&T'S FIRST AMENDMENT ARGUMENT FAILS ON THE MERITS BUT SUCCEEDS IN PROVING ACM PETITIONERS' POINTS ABOUT AT&T'S PEG PRODUCT'S FAILURE TO COMPLY WITH SECTION 611.

AT&T asserts that imposition of the PEG requirements that Petitioners seek – the “imposition” only really being that AT&T comply with the PEG and related requirements of the Cable Act and FCC rules – would “infringe upon AT&T’s free-speech rights.” AT&T’s Comments at 26. While AT&T’s First Amendment claim misses the mark, it does serve to confirm many of our arguments about the deficiencies of AT&T’s PEG product.

A. All That Petitioners Ask Is That AT&T Comply with the Cable Act and FCC Rules, Which Are Themselves Constitutional, and Which the Commission Cannot Find Otherwise, and Thus AT&T’s First Amendment Claim Is Without Merit.

AT&T claims that “[i]t would violate the First Amendment . . . for the Commission to impose the PEG requirements that petitioners seek.” AT&T Comments at 26. It is therefore logical to begin the analysis with what the ACM Petitioners actually seek. What we seek are declarations that (1) AT&T’s PEG product discriminates against PEG in violation of Commission rules and policies concerning PEG signal quality; (2) AT&T’s PEG product exercises editorial control over PEG in violation of § 611(e); (3) AT&T’s PEG product fails to provide “channel capacity” for PEG use in violation of § 611; and (4) the Commission’s closed captioning rules require both cable operators and all other MVPDs to pass through all closed captioning in programming intact and do not authorize them to strip out closed captioning in programming received and turn it into open captioning. ACM Petition at 23-42.

In other words, all the ACM Petition seeks is to have AT&T come into compliance with Section 611 and FCC rules and decisions. Thus, unless the determinations that the ACM Petition seeks are themselves inconsistent with § 611 or the FCC rules and decisions cited (which they

are not and which AT&T really cannot seriously claim they are, *see* Parts III-V *infra*),²⁶ then AT&T's First Amendment claim is really a claim that the "channel capacity" and "editorial control" provisions of § 611, as well as the FCC's PEG signal quality rulings and its closed captioning rules, violate the First Amendment. For instance, if AT&T's PEG product fails to provide "channel capacity" for PEG use or exercises editorial control over PEG, its only First Amendment claim can be that § 611's "channel capacity" and "editorial control" requirements violate the First Amendment.

That is a position that AT&T does not, and cannot, defend. Section 611 is clearly constitutional and has been so held.²⁷ Moreover, the Commission generally declines authority to find any provision of the Communications Act unconstitutional.²⁸ AT&T also mounts no serious or articulated challenge to the constitutionality of the Commission's cable signal quality or closed captioning rules.

Instead, AT&T attempts to camouflage this obvious weakness by blurring together the different Cable Act, FCC rules and FCC decisions at issue – and, indeed, blurring the ACM Petition and the Lansing Petition together – and essentially claiming that anything that requires AT&T to depart from its chosen PEG product scheme violates the First Amendment because, according to AT&T, actually providing PEG with "channel" capacity as defined in the Cable Act would be too burdensome. According to AT&T, it would require "restructuring that would cost

²⁶ If they were, then AT&T's First Amendment argument would be moot.

²⁷ *Time Warner Entm't v. FCC*, 93 F.3d 957, 983 (D.C. Cir. 1996). *See also Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 747 (1996)

²⁸ *See, e.g., Johnson v. Robinson*, 415 U.S. 361, 368 (1974); *Oestereich v. Selective Service Board*, 393 U.S. 233, 242 (Harlan, J., concurring) (1968); *Branch v. FCC*, 824 F.2d 37, 39 (D.C. Cir. 1987).

hundreds of millions of dollars . . . and that could undermine the economic justification for providing U-verse TV service at all.”²⁹

This remarkable assertion of technological and financial impotence, from the world’s largest telecommunications company, no less,³⁰ fails at several levels. As an initial matter, even AT&T’s own declarations do not support these sweeping assertions. Ms. McCarthy’s Declaration does not say anything about what it would cost AT&T to fix the problem, and she merely refers to Mr. Whitehead’s Declaration.³¹ And Mr. Whitehead’s Declaration says nothing about “hundreds of millions of dollars,” and he nowhere suggests that, if AT&T had to fix the problem, that could “undermine the economic justification for providing U-verse TV service at all.” AT&T Comments at 29. Instead, all that Mr. Whitehead says is that “it is hard to put a precise cost figure without knowing the specifics of each city,” but that “in a large city like Chicago the costs would be in the millions of dollars and could rise as high as ten million dollars.” Whitehead Decl. ¶ 42.

These conclusory dollar figures are wholly undocumented and unsupported. And they are likely substantially overstated. As pointed out in the Declaration of Peter Steenkiste ¶¶ 22-29 (attached as Exh. A), AT&T’s described methods for curing the problems with its PEG product overlook a software-based solution that would likely cost less.

But even taking what Mr. Whitehead admits are imprecise cost estimates at face value, they do not prove what AT&T claims concerning the supposed burdens of complying with the PEG requirements of the Cable Act and FCC rules. “Millions,” “tens of millions” and even the out-of-whole cloth “hundreds of millions” may sound like a lot of money, until one places the

²⁹ AT&T Comments at 29 & n.95 (citing McCarthy Decl. ¶ 14 & Whitehead Decl. ¶ 42.).

³⁰ See note 7 *supra*.

³¹ See McCarthy Decl. ¶ 14.

figures into the context of AT&T, the largest telecommunications company in the world.³² Mr. Whitehead states that “AT&T expects to spend more than 8 *billion* dollars from 2005-2011 building the infrastructure . . . to enable U-verse TV service.” Whitehead Decl. ¶ 11 (emphasis added). And AT&T’s planned capital investment in broadband and wireless is expected to exceed \$17 *billion* in 2009 alone.³³

Placed in perspective, then, AT&T’s assertion about the supposed burden of complying with the Act and applicable FCC rules and decisions regarding PEG carriage rings hollow. Incumbent cable operators have for decades provided PEG programmers with channels possessing the same accessibility, functionality and quality as other channels.³⁴ And so does Verizon, an ILEC that is smaller than AT&T.³⁵ AT&T’s apparent inability, or unwillingness, to spend a few million dollars to come into compliance with its federal PEG obligations, when compared to the billions it will invest on its U-verse project, and the billions its fellow ILEC Verizon is investing in its FiOS network, is far more emblematic of AT&T’s disdain for PEG than it is of any real burden on AT&T.³⁶

³² AT&T’s undocumented cost pleas do, however, reveal the true reason for its PEG product: To save a few dollars. AT&T’s claims about the supposed benefit of DMA-wide PEG distribution are just after-the-fact spin. See Part VII *infra*.

³³ New Release, AT&T, “AT&T to Invest More than \$17 Billion in 2009 to Drive Economic Growth; Wireless and Wired Broadband Investment Will Expand Service Coverage, Capacity, Quality” (Mar. 10, 2009), *available at* <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26597>.

³⁴ AT&T’s assertion that cable operators did so under “monopoly conditions” (AT&T Comments at 30) is not true, see 47 U.S.C. § 541(a)(1), and in any event seems a bit hypocritical coming from an ILEC like AT&T, which itself enjoyed a monopoly for a far longer period.

³⁵ See ACM Petition at 21.

³⁶ Spending money to come into compliance with federal PEG requirements would also, of course, stimulate the economy by providing for more jobs.

B. AT&T's First Amendment Argument Confirms That It Is Providing a "Cable Service" and That It Is Failing to Provide PEG "Channel Capacity" and Exercising Editorial Control Over PEG in Violation of Section 611.

Although unsuccessful in its aim, AT&T's First Amendment argument does succeed (albeit inadvertently) in confirming the key arguments in the ACM Petition. AT&T claims, for example, that it "exercise[es] editorial discretion," over the proprietary video programming package in its U-verse service.³⁷ That, in turn, means that AT&T, is engaging in "one-way transmission to subscribers of . . . video programming" and therefore is providing "cable service" within the meaning of § 602(6)(A). *See* Part I(B) *supra*.

But that is only the beginning, not the end, of AT&T's critical, but unacknowledged, concessions. AT&T complains that it should not be forced to provide separate "channels" for PEG but instead should be allowed to lump all PEG programming together on a "central platform on Channel 99," and that requiring AT&T to provide PEG with separate "channels" would force AT&T to drop other programming to which (unlike PEG) it has dedicated a "channel." AT&T Comments at 28. In other words, AT&T admits that, unlike the case with the other video programmers on its system, it is *not* providing "channel capacity" for PEG use, in clear violation of 611. *See* ACM Petition at 31-33.

AT&T's "editorial discretion" argument (AT&T Comments at 28) also lays bare that it is indeed exercising editorial control over PEG in violation of § 611(e). AT&T claims the editorial right to relegate PEG programming to its PEG product platform so that it would not have to drop other video programming channels or relegate other video programming to the same inferior

³⁷ AT&T Comments at 28 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994)).

platform. Singling out PEG programming for substandard treatment vis-à-vis other commercial programming is thus, by AT&T's own logic, exercising editorial control over PEG.

III. AT&T'S MISPERCEIVES THE NATURE OF ACM PETITIONERS' CHALLENGE AND THE OBLIGATIONS OF SECTION 611 AND FCC RULES.

AT&T tries to sidestep the Petitions with the claim that the Cable Act, and more specifically, § 611, does not impose any obligations on cable operators other than the basic tier requirement and is "agnostic with respect to whether cable franchises contain PEG obligations at all." *See* AT&T Comments at 32-33. AT&T's attempted escape fails because it misperceives § 611 and the nature of the ACM Petition.

It is true that § 611 does not mandate that franchising authorities impose PEG requirements. But if they do (and all ACM Petitioners that are franchising authorities or PEG organizations have franchises that do impose PEG obligations³⁸), § 611 kicks in and, as a matter of federal law, empowers franchising authorities to require a cable operator (among other things) to set aside "channel capacity" for PEG use on its system, and forbids a cable operator from exercising "any editorial control" over PEG channel capacity.

Thus, where triggered, as it clearly has been here, the "channel capacity" and editorial control provisions of § 611 on which the ACM Petition are indeed federal statutory obligations of AT&T and all other cable operators as well. AT&T's assertion to the contrary are simply wrong.

³⁸ *See* ACM Petition at 3-7. The same is true with respect to the multitude of franchising authorities, PEG organizations and PEG programmers that filed comments in this proceeding. *See, e.g.*, Montgomery Community Television, Inc.; Vallejo Community Access Television; TV Access 21 – Charlotte Mecklenburg Public Access Corporation; Anderson Community Television; Orion Community Cable Communications Commission; Cadillac, Wexford County, TV 2 & 98 PEG Center Marin Telecommunications Agency.

Moreover, AT&T does not, and cannot, claim that the FCC rule and policy requirements concerning signal quality and closed captioning are not federal obligations with which it must comply.

IV. AT&T IS WRONG IN ASSERTING THAT FEDERAL LAW DOES NOT PROHIBIT IT FROM RELEGATING PEG PROGRAMMING TO DISCRIMINATORILY INFERIOR ACCESSIBILITY, FUNCTIONALITY AND SIGNAL QUALITY.

AT&T makes the blunt claim that nothing in the Cable Act prevents it from discriminating against PEG vis-à-vis other basic channel programming in terms of accessibility, functionality or signal quality. AT&T Comments at 41-44. But its claim is built on quicksand. It rests on the strawman that unless the Act explicitly uses the magic words of “non-discrimination,” other language in the Act and in FCC rules and decisions can be ignored. When other provisions of the Act and FCC rules and decisions are considered, however, AT&T’s argument collapses.

A. The Cable Act Requires That PEG Be Given “Channel Capacity,” Just As It Requires Broadcasters To Be Given “Channel Capacity,” and AT&T’s PEG Product Therefore Violates § 611.

As we noted in our Petition, the Cable Act empowers franchising authorities to require cable operators to set aside “channel” capacity for PEG use, 47 U.S.C. § 531, just as it requires cable operators to devote “channel” capacity to local broadcast stations, 47 U.S.C. §§ 534(b) & 535(b), and to designate “channel” capacity for commercial leased access, 47 U.S.C. § 532(a).³⁹ The Act nowhere suggests that the “channel” capacity given to PEG can be systematically inferior to the “channel” capacity given to broadcasters and others. On the contrary, the Cable Act’s use of the same “channel” capacity terms, and the Act’s single definition of “cable

³⁹ ACM Petition at 23-24.

channel,” 47 U.S.C. § 522(4), lead to the inevitable conclusion that “channel” capacity means the same thing in each context. That, of course, is another way of saying that PEG is not to be discriminated against in terms of the type of “channel” capacity a cable operator furnishes.

Not surprisingly, AT&T does not even mention, much less respond, to this textual argument at all. The reason is obvious: AT&T admittedly strips out, or fails to pass through, closed captioning, SAP, VBI and other program-related information out of PEG programming signals, even though such information and functionality is part and parcel of the “channel” that AT&T gives to broadcasters and other commercial cable programmers on its U-verse system.⁴⁰ And AT&T’s PEG product also fails to provide PEG programming with anything approaching the accessibility and functionality that it provides to the “channels” that it allocates to local broadcasters and other commercial cable programming channels.⁴¹

AT&T likewise simply fails to come to grips with ACM Petitioners’ argument that it fails to provide PEG with “channel capacity” and therefore violates § 611(e). ACM Petition at 31-33. AT&T first attempts to distract attention by again arguing it does not provide “cable service” and in any event, § 611 places no obligations on cable operators (AT&T Comments at 51-52), arguments that we have already rebutted (*see* Parts I & III *supra*).

It is easy to see, however, why AT&T resorts to distraction: It has no response to ACM Petitioners’ § 611 PEG “channel capacity” argument other than railing against the Cable Act as outmoded. It surreptitiously admits that, unlike the case with broadcasters and other programmers, it does not furnish “channel” capacity to PEG, instead exercising its “editorial

⁴⁰ ACM Petition at 14-16, 18-19 & 32. AT&T acknowledges as much, in a backhanded sort of way, by asserting that it is working on its PEG product to permit closed captioning and SAP. AT&T Comments at 63-67. Whitehead Decl. ¶¶ 23-27; McCarthy Decl. ¶¶ 8-30.

⁴¹ ACM Petition at 8-22. *See also* Comments cited in note 42 *infra*. Again, AT&T backhandedly admits as much. AT&T Comments at 63-67, Whitehead Decl. ¶¶ 23-27; McCarthy Decl. ¶¶ 8-30.

discretion” to relegate PEG programming to its “channel 99” platform (AT&T Comments at 28; *see* Part II(B) *supra*). And it complains about what it feels is the “outmoded, inapplicable definition of what constitutes a ‘channel’” under the Cable Act. AT&T Comments at 52.

But AT&T cannot amend the Cable Act’s “channel” definition, which is in any event not outmoded as AT&T claims, *see* 47 U.S.C. § 522(4). What Sections 602(4) and 611 mean is that AT&T must furnish PEG with the same type of “channel” capacity as it furnishes broadcasters and other commercial cable video programmers. And that, by AT&T’s own admission, is what AT&T’s PEG product does *not* do. *See* Part I(B) *supra*.

AT&T’s PEG product, and its discriminatorily inferior treatment of PEG programming, therefore violates § 611 of the Act by failing to furnish “channel” capacity to PEG.

B. AT&T Overlooks That FCC Signal Quality Requirements Prohibit Cable Operators From Discriminating Against PEG.

AT&T never addresses ACM Petitioners’ argument that cable operators may not discriminate against PEG channels in terms of signal quality. ACM Petition at 25-27. *See also Cable Television Technical and Operational Requirements*, Report and Order, 7 FCC Rcd 2021, 2024 (1992). That argument refutes AT&T’s assertion that nothing prevents it from discriminating against PEG. But ignoring ACM Petitioners’ argument, or the underlying FCC obligations, does not make them go away, and it is fatal to AT&T’s position.

Moreover, there can be no question that AT&T’s PEG product does in fact subject PEG programming to inferior signal quality, accessibility and functionality. AT&T concedes as much, almost off-handedly remarking that “consumers might notice variations in signal quality

or functionality between PEG programming and other programming provided on the basic service tier.”⁴²

The record, however, reveals that AT&T’s effort to belittle these “variations” is unwarranted. Numerous commenters pointed out the noticeable deficiencies of AT&T’s PEG product in terms of poorer PEG programming signal quality, accessibility and functionality vis-à-vis other programming on AT&T’s U-verse system.⁴³ And contrary to AT&T’s assertion (AT&T Comments at 31), the record does indeed provide evidence that these deficiencies have in fact undermined PEG viewership and undermined municipalities’ ability to make their PEG programming available to subscribers. The City of Mentor, for example, provides direct evidence of what common sense should tell you: Former PEG viewers on the incumbent cable operator’s system are less likely to watch that same PEG programming when it is buried in AT&T’s user-unfriendly PEG product.⁴⁴ Similarly, the City of Houston, among others, noted that the loss of closed captioning and SAP functionality in AT&T’s PEG product deprives it of the ability to reach effectively the disabled, elderly and Spanish-language communities, a significant segment of its residents.⁴⁵

⁴² AT&T Comments at 40. *See also id.* at 62-67; McCarthy Decl. ¶¶ 5-22. Even AT&T’s own declarant, Professor de Veciana, can only bring himself to the heavily qualified conclusion that as between PEG programming funneled through AT&T’s PEG product and other video programming on AT&T’s system, “one might expect *roughly* the same user perceived video quality, but this would perforce be a subjective comparison.” de Veciana Decl. at 13 (¶ 25). Other commenters, who have experienced AT&T’s PEG product, are not so charitable. *See, e.g.*, Initial Comments of the People of the State of Illinois, at 5; Comments of the National Association of Telecommunications Officers and Advisors, the National Association of Counties, the National League of Cities, and the U.S. Conference of Mayors, in Response to the Consolidated Petitions for Declaratory Ruling, at 8, 10-11; Comments of the City of Warren, Michigan, at 6; Comments of SCAN NATOA, Inc., City of Irvine, California, City of San Clemente, California, City of Santa Cruz, California, County of Santa Cruz, California and Public Cable Television Authority in Support of Petitions for Declaratory Ruling, at 4-6; Comments Submitted by Certain Florida Municipalities, at 10-11.

⁴³ *See, e.g.*, Comments cited in note 53 *infra*.

⁴⁴ Mentor Reply Comments at 2. *Accord* SCAN NATOA Comments at 8; Arlington Comments at 4; Montgomery County, Maryland Comments at 5.

⁴⁵ Houston Comments at 2-3. *Accord* Cooperating Raleigh Colleges Comments at 1.

Problems such as these are among the many reasons that the Commission has long prohibited discrimination against PEG in signal quality. And they are also why the Commission must find that AT&T's PEG product violates that policy.

C. By Its Own Admission, AT&T Exercises Editorial Control Over PEG Use of Channel Capacity in Violation of § 611(e).

AT&T claims that ACM Petitioners' § 611(e) argument is "frivolous" because § 611(e) only prohibits operators from exercising editorial control over PEG "content" and, according to AT&T, its PEG product does not do that. AT&T Comments at 48. But it is AT&T's argument, not ours, that is frivolous, and in two different ways.

As an initial matter, AT&T does in fact exercise editorial control over PEG content by stripping out PEG programming content such as closed captioning, SAP, other VBI, and other program-related information, and by subjecting PEG programming to inferior signal quality, accessibility and functionality.⁴⁶ That AT&T, now faced with this clear violation, claims that it is working on "address[ing]" and "resolv[ing]" these problems, even assuming that is true,⁴⁷ is no answer. It is tantamount to admitting a violation of § 611(e) but promising to try not to do so as egregiously in the future.

Furthermore, AT&T understates, and thus misperceives, the scope of its § 611(e) obligation. Contrary to AT&T's assertion, § 611(e) is *not* limited to prohibiting cable operators from exercising editorial control over PEG "content" (although it certainly includes that). Rather, § 611(e) provides that, subject to some exceptions not relevant here, "a cable operator

⁴⁶ ACM Petition at 8-22.

⁴⁷ Actually, at best it only appears to be true with respect to closed captioning and perhaps SAP. AT&T Comments at 63, McCarthy Decl. ¶¶ 27-29. It appears to be less true, if at all, with respect to the other basic accessibility and functionality shortcomings of AT&T's PEG product. See AT&T Comments at 64; McCarthy Decl. ¶¶ 30.

shall not exercise any editorial control *over any [PEG] use of channel capacity provided pursuant to [§ 611].*” (Emphasis added.)

AT&T’s PEG product unquestionably does precisely that. One need look no further than AT&T’s own argument about what AT&T claims is its “editorial” right to relegate PEG to its “channel 99” platform so that it has room to give full, genuine “channels” to other programmers of its own choosing. AT&T Comments at 28-29.

That is tantamount to an admission that AT&T has made the editorial decision to relegate PEG to its channel 99 platform, with its attendant inferior accessibility, functionality and quality, and resultant audience suppression. And that can only be described as an exercise by AT&T of “editorial control over [PEG] use of channel capacity” in violation of § 611(e).

It is important to note what we are not arguing, and what the Commission need not reach, in finding AT&T in violation of § 611(e). We are not arguing that § 611(e) entitles PEG programming to specific channel locations on a cable system (unless an operator’s franchise agreement or applicable state law so provides). What we are saying, however, is that § 611(e) does bar a cable operator from deciding, in order to devote more true § 602(4) “channels” to other programming of its choosing, to relegate PEG to an inferior, and completely different, “application” than the operator’s preferred video programming. That constitutes the prohibited exercise of editorial control over PEG “use of channel capacity.”

V. AT&T'S PEG PRODUCT VIOLATES THE COMMISSION'S CLOSED CAPTIONING RULES, AND ITS PROCEDURALLY IMPROPER AND BELATED PLEA FOR A WAIVER IS NO CURE.

A. Commission Rules Do Not Authorize Cable Operators or Other VPDs To Rely on Open Captioning as a Basis for Refusing To Pass Through Closed Captioning in Programming Delivered To Them.

AT&T's defense on the closed captioning issue is predictable: It does not deny that it fails to pass through closed captioning in PEG programming but believes that the open captioning language in § 79.1(c) entitles it to strip out, or refuse to pass through, that closed captioning and compel open captioning instead. AT&T Comments at 49-50.

AT&T is wrong on multiple levels. First of all, it all but ignores ACM Petitioners' argument that if AT&T is a cable operator (and indeed it is, *see* Part I(B) *supra*), it is subject to the pass-through obligation of § 76.606 of the Commission's rules, which unlike the Part 79 VPD closed captioning rules, contains no open captioning option at all. ACM Petition at 34-38. For this reason alone, AT&T's defense of its failure to pass through closed captioning in PEG programming fails.

But even assuming *arguendo* that Part 79 rather than Part 76 applies, AT&T's open captioning defense fails. In essence, AT&T's argument is that § 79.1(e)(2)'s allowance of the "use" of open captioning absolves it of its separate § 79.1(c) obligation to "*deliver all programming received . . . containing closed captioning to receiving television households with the original closed captioning data intact.*" (Emphasis added.)

To recite the differing language in the two subsections is to refute AT&T's argument.⁴⁸ Section 79.1(c) sets forth a "deliver[y]," or pass-through, obligation that is independent of the

⁴⁸ AT&T asserts (at 50) that the open captioning option is "unqualified," but a more accurate characterization of § 79.1(e)(2) is that it is in an ambiguous passive voice. What *is* "unqualified," however, is § 79.1(c)'s pass-through obligation.

option given in § 79.1(e)(2) to “use[]” open captioning in programming itself. In case there were any doubt, the Commission’s *Closed Captioning and Video Description of Video Programming*, Report and Order, 13 FCC Rcd 3272, 3311, 3312 (1997) (“*1997 Closed Captioning Order*”), dispels it: “[W]e will require *distributors to pass through existing captions* where the programming they distribute is received with captions,” and “we also will permit *video programmers* to count towards compliance with our rules *any program that is open*, rather than closed captioned.” (Emphasis added.) Were the rules instead to mean what AT&T claims, cable operators and MVPDs would be free under Part 79 to strip out closed captioning in local broadcast programming and popular cable programming like CNN and ESPN and open caption that programming instead. That cannot be true.

AT&T also points to the *1997 Closed Captioning Order*’s statement that “all distributors have the technical ability to pass through closed captioning,” 13 FCC Rcd at 3312 (¶ 85), and claims that that assumption does not apply to AT&T because it does not yet have the “technical ability” to pass through closed captioning in PEG signals. But that is absurd. Of course AT&T has the “technical ability” to pass through closed captioning in PEG programming, just as it already does pass through closed captioning in other programming. AT&T has simply chosen *not* to do so by relegating PEG, unlike other video programming, to its inferior PEG product. To suggest, twelve years after the *1997 Closed Captioning Order*, that AT&T – the largest telecommunications company in the world – lacks the “technical ability” to pass through close-captioning is at once arrogant and preposterous.

B. AT&T’s Belated Closed Captioning Waiver Plea Is Misplaced and Undeserving.

Apparently recognizing its weakness on the closed captioning issue, AT&T resorts to asking the Commission in its Comments to “waive any applicable [closed captioning]

pass-through requirement” until AT&T’s U-verse system is able to pass-through closed captioning in PEG programming. AT&T Comments at 51.

As an initial matter, if AT&T wishes to seek a waiver, it must seek that in a separate pleading, not in the body of its comments in this proceeding. *See* 47 C.F.R. § 1.44; *Amendment to Parts 2, 25 and 87 of the Commission’s Rules*, 21 FCC Rcd 5492, 5497 (¶ 9) (2006); *Bell Atlantic Telephone Companies*, 3 FCC Rcd 6697, 6698 n.3 (1988). But AT&T’s belated, off-handed waiver request is undeserving of the Commission’s consideration.

The Commission has made clear the importance of compliance with its closed captioning rules and has exhibited no sympathy for allowing large, sophisticated providers like AT&T to escape those rules.⁴⁹ Moreover, the record establishes that many franchising authorities and PEG programmers have made substantial expenditures of their limited resources to close caption PEG programming for their residents, only to see those efforts and expenditures frustrated by AT&T’s PEG product.⁵⁰ To give a corporate giant like AT&T a waiver of such an important public interest obligation, and one on which precious taxpayer and non-profit revenues have been spent to make PEG closed captioning possible, would be unjust and contrary to the public interest.

⁴⁹ *See Closed Captioning Order*, 13 FCC Rcd at 3286 (“We believe that we should craft our captioning rules in a manner that will increase the availability of video programming with closed captions most expeditiously as well as focus compliance responsibility. In order to accomplish these goals, we believe it desirable to hold video programming distributors ... regardless of the distribution technologies employed by such entities, responsible for compliance with our closed captioning rules,” and *id.* at 3342 (“In order to make sure that the exemption process does not undermine the broad goals of Section 713, we believe exemptions should be limited to only those situations where captioning truly is an economic burden”); *see also* Order on Reconsideration, 13 FCC Rcd 19973, 19983 (“We do not believe that Congress intended for persons with hearing disabilities to have access to less closed captioned programming following enactment of Section 713); *id.* at 19992 (“As a general rule, large networks are more likely to be able to bear the costs of captioning”).

⁵⁰ *See, e.g.*, Houston Comments at 5 Exh. A, William Decl.; Michigan Municipal League & Michigan Township Assoc. Comments (“MML”) Comments at 8 & Exh. C; Montgomery County, Maryland Comments at n.14 & Herrera Decl.; Access Sacramento Comments at 1; City of Miami Comments at 1; City of San Jose Comments at 2; City of Milwaukee Comments at 2; ADAPT of Chicago Productions Comments at 1; Charlotte-Mecklenburg Public Access Corp. Comments at 2. *See also* ACM Petition at 4 (Foothill-DeAnza Community College District’s educational access channel cannot be carried on AT&T’s U-verse system due to that system’s inability to pass-through closed captioning).

The Commission also should keep in mind that AT&T's PEG product closed captioning problem is not an isolated event, but is instead part of a larger pattern with respect to its U-verse video service. As the Commission is aware, when originally launched, AT&T's U-verse system lacked the ability to provide EAS as required by FCC rules, and AT&T had to seek and obtain a waiver.⁵¹ Although AT&T's PEG product is over two years old, AT&T is only now belatedly admitting its closed captioning problem and seeking a waiver, and apparently only because formal action has been taken against it. Indeed, although AT&T now claims it hopes to have the PEG closed captioning problem resolved this year, that is only due a recent change in course by AT&T. Before being called on the carpet about the matter, AT&T's original position with franchising authorities was that closed captioning and SAP problems with its PEG product would be addressed, if at all, only in the "Long Term." Houston Comments at 3 & Exh. B.

The pattern is obvious. AT&T designed its U-verse video system, and its PEG product in particular, without regard to federal law PEG obligations. This disregard of basic federal law requirements by the largest telecommunications company in the world subverts important public interest considerations, and is a direct challenge to the integrity of the Act and the rules that the Commission enforces.

VI. IN VIRTUALLY EVERY WAY THAT MATTERS TO VIEWERS AND PROGRAMMERS, AT&T'S PEG PRODUCT IS INFERIOR TO ALL OTHER CABLE OPERATORS' PEG CHANNEL CARRIAGE, AND AT&T'S CONTRARY ASSERTIONS ARE BOTH WRONG AND MISLEADING.

AT&T spends considerable energy asserting that its PEG product has advantages over other cable operators' PEG carriage and (somewhat inconsistently) that it is in the process of improving some (but not all) of the undisputed shortcomings of its PEG product. AT&T

⁵¹ *Review of the Emergency Alert System, AT&T Petition for Limited Waiver*, Order, 23 FCC Rcd 5086 (2008).

Comments at 52-67. But those assertions crumble under the weight of both other parties' comments and the highly selective, and consequently misleading, nature of AT&T's own evidence.

AT&T asserts that ACM Petitioners' complaints stem from the fact that AT&T has an IP-based platform to deliver video channels, that Petitioners want AT&T to be locked anachronistically into incumbent cable operators' technology, and that AT&T's IP-based platform is ill-suited to that. AT&T Comments at 52-54. Whitehead Decl. ¶¶ 22-27 & 35-40; de Veciana Decl. ¶¶ 5-12.

That is nonsense. ACM Petitioners have no complaint about the manner in which the U-verse system delivers local broadcast and other commercial video programming channels, *all* of which are delivered via IP.⁵² It is the relegation of PEG, and essentially only PEG, to the inferior PEG product platform that ACM Petitioners contest, not the IP-based nature of AT&T's U-verse video service. In fact, as set forth in the attached Declaration of Peter Steenkiste (Exh. A) ¶ 28, the IP nature of AT&T's video platform actually should make it more flexible and better able to accommodate delivering a local community's particular PEG channels to residents of that community, with full accessibility, functionality and signal quality.

There can be no serious dispute that AT&T's PEG product gives markedly inferior treatment, in terms of accessibility, functionality and signal quality, to PEG programming vis-à-vis the U-verse system's treatment of local broadcast and other commercial video programming channels. The record overwhelmingly supports that conclusion.⁵³ Although

⁵² We do, however, note that the "cable service" definition in § 602(6) is transmission protocol agnostic, so the IP-based nature of the U-verse system is irrelevant to whether it is a "cable system." *See* Part I(B) *supra*.

⁵³ *See, e.g.*, Comments of the National Association of Telecommunications Officers and Advisors, the National Association of Counties, the National League of Cities, and the U.S. Conference of Mayors, in Response to the Consolidated Petitions for Declaratory Ruling, at 8, 10-11, 12-13; Comments of the City of Warren, Michigan, at 6; (Footnote continued ...)

AT&T tries to persuade the Commission to ignore what a simple demonstration of its PEG product reveals, the effort fails, and indeed, when carefully analyzed, even AT&T's own evidence and supporting declarations support the conclusion that its PEG product delivers inferior accessibility, functionality and signal quality.

A. PEG Product Accessibility and Functionality.

AT&T provides its own textual description of the steps required to access individual local PEG channel programming in its PEG product, but that description largely confirms the AT&T PEG product description set forth in the ACM Petition.⁵⁴ AT&T admits that it takes “7 to 9 seconds” (McCarthy Decl. ¶ 9) for the PEG product application to load, but it also conveniently selects the Columbus, Ohio, DMA for its demonstration, a DMA where AT&T carries only one locality's PEG channels, and that has only three PEG channels. AT&T Comments at McCarthy Decl. at 6-10.

Regardless whether the PEG product application load time is 2, 6 or 30 seconds, however, that is an eternity compared to the “lighting fast channel change” AT&T promises for its other U-verse video programming (ACM Petition at Exh. E), and, of course, to what any multichannel video subscriber has come to demand and expect. And while AT&T mentions its PEG product application load times, it glosses over the additional time and frustration that a subscriber wanting to watch PEG must endure to sift through AT&T's PEG product menus and submenus to reach a particular PEG channel's programming. AT&T likewise ignores the additional time and frustration for the subscriber wishing to channel surf between PEG and

(...continued)

Comments of SCAN NATOA, Inc., City of Irvine, California, City of San Clemente, California, City of Santa Cruz, California, County of Santa Cruz, California and Public Cable Television Authority in Support of Petitions for Declaratory Ruling, at 4-6, 8; Comments of Montgomery County, Maryland, at 3-5; Comments Submitted by Certain Florida Municipalities, at 6-7, 10-11.

⁵⁴ Compare AT&T Comments at 55-58 & McCarthy Decl. at 4-10, with ACM Petition at 9-22.

commercial channels, Steenkiste Decl. (Exh. A) ¶ 20, or making a futile effort to find a particular PEG channel or program on AT&T's program guide.⁵⁵

That this constitutes inferior accessibility and functionality cannot be seriously disputed.⁵⁶ Moreover, contrary to AT&T's claim (at 31), there is record evidence that AT&T's PEG product reduces viewership and PEG programmers' ability to make their programming available to subscribers.⁵⁷

Common sense, and AT&T's vaunted free market, would tell you that its PEG product would have an adverse effect on viewership. If the accessibility and functionality shortcomings of AT&T's PEG product did not depress viewership, to conserve system capacity AT&T also would place local broadcasters and other commercial programmers in a similar "product," and those programmers should have no objection to that. But that, of course, is not how AT&T treats these other programmers.

B. PEG Signal Quality.

AT&T claims that, "[w]ith respect to compression standards used to encode the signal, the resolution at which programming is presented, and the transport facilities and protocols used to deliver the programming, PEG and commercial programming are treated similarly on AT&T's network." AT&T Comments at 58 (citing de Veciana Decl. ¶¶ 22, 25).

⁵⁵ West Hartford Community Television Comments at 2 (even AT&T representative could not find PEG channels at a mall demonstration of U-verse video service).

⁵⁶ See Steenkiste Declaration ¶¶ 12-21 (attached hereto as Exh. A).

⁵⁷ City of Mentor Reply Comments at 2; Comments of Detroit and Other Municipal Entities and Associations, at 5, 11; Comments Submitted by Certain Florida Municipalities, at 2; Comments of the City of Warren Michigan, at 6; Comments of the National Association of Telecommunications Officers and Advisors, the National Association of Counties, the National League of Cities, and the U.S. Conference of Mayors, in Response to the Consolidated Petitions for Declaratory Ruling, at 10-11.

That is, at best, misleading and, at worst, simply untrue.⁵⁸ As set forth in the Steenkiste Declaration attached as Exhibit A, AT&T has not provided sufficient information to draw the conclusion it urges, and to the extent the information AT&T has provided suggests anything, it contradicts AT&T's claim. Specifically, on the basis of the limited information furnished by AT&T, only the following conclusions can be drawn:

*AT&T's PEG product provides inferior accessibility & functionality to PEG than to other linear video channels on its U-verse system.

*AT&T's supporting declarations do not provide information adequate to support its claim that its PEG product provides similar signal quality to non-PEG channels.

*AT&T would have to provide far more information than its supporting declarations furnish to determine whether the quality of its PEG product video streams is similar to, rather than inferior to, that of non-PEG video channels.

*What limited information AT&T's supporting declarants have provided suggests that PEG is in fact received *inferior* quality to non-PEG channels on AT&T's system.

*AT&T's declarant Professor de Veciana is wrong in suggesting that subjectivity in evaluating video signal quality is irrelevant.

*AT&T's claims concerning the burden of providing linear channel treatment to PEG programming are overstated.⁵⁹

To make a meaningful comparison of AT&T's treatment of PEG vis-à-vis commercial programming on its U-verse system, what would be needed is far more technical information than AT&T provides, not only about its PEG product, but also its delivery of broadcast and other commercial video programming channels (about which AT&T provides even less information

⁵⁸ We note that AT&T's Whitehead and de Veciana declarations contain redacted material to which we have not had access. The Commission should not consider that redacted material until or unless Petitioners have had a chance to review and analyze it. If Petitioners are subsequently given access to the redacted material, we reserve the right to supplement these reply comments based on the redacted material.

⁵⁹ Steenkiste Decl. (Exh. A) ¶¶ 3-29.

than the sketchy information it furnishes about its PEG product). But what little information AT&T does provide furnishes clues suggesting that PEG programming does indeed receive inferior treatment on AT&T's U-Verse system. Steenkiste Decl. (Exh. A) ¶¶ 3-21.

Accordingly, the Commission should either (a) compel AT&T to provide the additional technical information needed to determine the true differences in how it treats PEG programming versus how it treats broadcast and other commercial video programming channels, or (b) dismiss AT&T claims of similar quality and conclude that AT&T's U-verse system does in fact deliver inferior signal quality, accessibility and functionality to PEG programming.

C. Closed Captioning and Secondary Audio Programming.

AT&T admits that its PEG product does not pass through closed-captioning or SAP content in PEG programming. We have addressed closed captioning and what the record reveals about the adverse effect of that shortcoming in Part V above.

With respect to SAP, the record amply demonstrates the significant societal cost from AT&T's SAP deficiency. Our Petition set forth examples of vital public services delivered through SAP in PEG programming, from news reading services for the visually impaired to locally produced community radio programming. ACM Petition at 4, 12-13 & n.5. Commenters expanded on the point. The City of Houston, for instance, plans to spend \$50,000 per year to create a SAP signal in Spanish for its PEG channels, to reach the large percentage of Spanish-speaking households in that city. Houston Comments, Exh. A, Williams Decl. ¶ 10. Other commenters pointed to similar uses of SAP in PEG programming.⁶⁰

AT&T's only response to the glaring closed captioning and SAP deficiencies in its PEG product is to claim that it is "working on" the problem and, subject to several qualifications, may

⁶⁰ See, e.g., Fresno-Clovis Community Joint Powers Comments at 1; MML Comments at 8.

field a solution in “some markets” some time this year.⁶¹ But far from “undermining” our call for Commission action (AT&T Comments at 64), AT&T’s qualified and hedged claims about closed captioning and SAP prove our point: AT&T knowingly designed and deployed its PEG product with no closed captioning capability (in clear violation of FCC rules) and no SAP capability, while simultaneously accommodating those capabilities for broadcast and other commercial video programmers.

Only now, when its decision is coming to light, is AT&T claiming to be addressing a flaw that it originally built into its PEG product. Contrary to AT&T’s assertion (AT&T Comments at 64), that is hardly proof that the marketplace works, or that Commission action is not warranted. To the contrary, it is powerful evidence that AT&T has no intention to treat PEG programming like other video programming on its U-verse system until or unless it is faced with the prospect of being compelled to do so by the Commission.

D. DVR Capability.

AT&T admits the DVR shortcomings of its PEG product, but unlike the case with closed captioning and SAP capability, does not even make a token promise to fix the problem. Instead, AT&T sees no need to afford PEG programming the DVR capability that it affords other video programming until “AT&T’s subscribers demand the ability to record PEG programming with their DVRs the same way that they can record other programming.” AT&T Comments at 67.

As an initial matter, this statement is an admission that AT&T treats PEG programming differently than all other U-verse video programming, not only in terms of functionality and quality, but in the threshold demands that AT&T places only on PEG programming merely to justify being treated similarly to other video programming. We doubt, for instance, that AT&T

⁶¹ AT&T Comments at 63; McCarthy Decl. ¶¶ 28-29.

has awaited subscriber demands with respect to each individual commercial video programmer before extending to each such individual programmer the benefits of AT&T's DVR functionality and quality. This is an obvious admission of AT&T's discriminatory treatment of, and animus toward, PEG.

Furthermore, the importance of DVR capability to video programmers and the handicap placed on those programmers excluded from that functionality are indisputable. DVR capability has been shown to be an important functionality for video subscribers. *See* ACM Petition at 15-16 & n.9. And AT&T well knows that. Indeed, its own website touts the U-verse system's "Total Home DVR," which AT&T claims "No cable company comes close to matching."⁶² Unmentioned, of course, is that programming relegated to AT&T's PEG product has none of these touted benefits.

That AT&T does not offer its DVR service as part of its basic service (AT&T Comments at 66-67) misses the point. The issue is not whether AT&T's DVR capability is part of basic service. Rather, the point is that AT&T's PEG product is incompatible with DVR functionality, and that this is an important functionality that subscribers value and expect to apply to all channels when they do purchase AT&T's non-basic DVR service.

VII. THE SUPPOSED ADVANTAGES OF AT&T'S PEG PRODUCT ARE GROSSLY OVERSTATED AND ARE NO SUBSTITUTE FOR INFERIOR ACCESSIBILITY, FUNCTIONALITY AND SIGNAL QUALITY.

AT&T alleges that its PEG product has "many advantages" over other cable operators' PEG carriage. AT&T Comments at 52, 60-62 & Whitehead Decl. ¶¶ 28-32. But all of these alleged "advantages" actually devolve into only one: AT&T's PEG product distributes each

⁶² Exhibit C (attached hereto).

local jurisdiction's PEG programming throughout the DMA, with all DMA PEG programming being retrievable through the "channel 99" platform.

AT&T's "First" through "Fourth" advantages are just restatements of this one so-called "advantage." AT&T Comments at 60-61. The "Final" supposed advantage – PEG programming can be delivered over the Internet (*id.* at 62) – is nothing unique. PEG programmers have already discovered the Internet on their own without AT&T's help, and most PEG centers already have websites where PEG programming can be accessed on the Internet. Thus, most PEG programming is already available not merely DMA-wide, but worldwide, on the Internet.

AT&T's supposed DMA-wide PEG advantage boils down to this: AT&T's PEG product offers residents in each locality, in return for degraded accessibility, functionality and quality with respect to their own local PEG programming, equally degraded accessibility, functionality and quality with respect to all other PEG programming in the surrounding DMA.

That is far from a fair trade. As an initial matter, the degraded accessibility, functionality and quality affecting all PEG programming on AT&T's PEG product means decreased attractiveness of, and thus decreased audience for, all PEG programming in the DMA. We seriously doubt, for instance, that a Palo Alto resident would believe that making local Palo Alto PEG programming harder to retrieve, and with substandard functionality and poorer signal quality, is an acceptable price for having access to equally hard to retrieve, substandard and poor signal quality Walnut Creek PEG programming.

Moreover, AT&T presents a false choice. If AT&T wishes to place DMA-wide PEG programming on its cumbersome and substandard channel 99 platform, ACM Petitioners by and

large have no objection to that.⁶³ But that is *not* a substitute for delivering an individual local jurisdiction's PEG programming to its local residents on true "channels" in compliance with the Cable Act and Commission rules and policies that are the subject of this Petition. Put a little differently, DMA-wide PEG delivery is *not* a substitute for relegating each local jurisdiction's residents to discriminatorily inferior accessibility, functionality and signal quality with respect to their own local jurisdiction's PEG channels.

AT&T tries to frame the matter as a "either/or" choice, but it is not so. *See* Steenkiste Decl. (Exh. A) ¶¶ 22-29. But even if it were such a choice, it is one of AT&T's own business-decision making, *not* one that technology dictates. *See id.* AT&T cannot plausibly claim that it could not have designed and deployed its system so as to deliver PEG programming via Cable Act "channels" of equal accessibility and functionality to other video programming channels. Not only do incumbent cable operators do that; so does the other major ILEC, Verizon. AT&T apparently largely ignored PEG obligations in its original system design and deployment, and now hopes the Commission will reward it for trying to avoid public interest PEG requirements with which its competitors must and do comply. The Commission should reject AT&T's position and grant the ACM Petition.

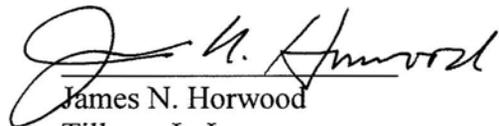
CONCLUSION

For the foregoing reasons and those set forth in our Petition, the Commission should grant the ACM Petition and issue a declaratory ruling that:

⁶³ The only exception would be for those PEG programmers with copyright licenses that are geographically restricted to an area smaller than the surrounding DMA. For those PEG programmers, AT&T's DMA-wide PEG product forces them into the unpalatable choice of declining carriage on AT&T's U-verse or violating their copyright license.

1. AT&T's PEG product unlawfully discriminates against PEG programming and exercises editorial control over PEG channel capacity, in violation of the Cable Act and Commission rulings and policies;
2. AT&T's PEG product fails to provide PEG programming with "channel" capacity within the meaning of Sections 611 and 602(4) of the Act; and
3. Sections 76.606 and 79.1(c)(1) of the FCC's regulations require a cable operator or VPD to pass through intact to subscribers all closed captioning in PEG programming, and Section 79.1(e)(2) does not allow a VPD to demand that, if a programmer wishes to caption its programming, the programmer must open caption rather than close caption its programming.

Respectfully submitted,



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April 1, 2009

EXHIBIT A

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

In the Matter of
Petition for Declaratory Ruling of Alliance for) CSR-8126
Community Media, et al., that AT&T's Method of) MB Docket No. 09-13
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
Petition for Declaratory Ruling of the City of) CSR-8127
Lansing, Michigan, on Requirements for a Basic) MB Docket No. 09-13
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
Petition for Declaratory Ruling Regarding Primary) CSR-8128
Jurisdiction Referral in *City of Dearborn*) MB Docket No. 09-13
et al. v. Comcast of Michigan III, Inc. et al.)

**DECLARATION OF PETER STEENKISTE IN SUPPORT OF
ACM'S PETITION FOR DECLARATORY RULING**

1. I am a Professor in the Department of Computer Science and the Department of Electrical and Computer Engineering at Carnegie Mellon University. My office is in Wean Hall 8202, Carnegie Mellon University, 5000 Forbes Avenue, Pittsburgh, PA 15213.

2. I received a BS in Electrical Engineering from the University of Gent, Belgium, in 1982, and an MS and PhD from Stanford University in 1983 and 1987, respectively. I have been on faculty at Carnegie Mellon University since 1987, initially as postdoc (until 1989), a research track faculty member (until 1999), and eventually tenure-track faculty member. I teach undergraduate and graduate courses in networking, covering topics such as the Internet

architecture, protocols at the datalink, IP, transport and higher layers, and common Internet applications such as the web, peer-to-peer, and multimedia. My research in the last 20 years has been in the broad areas of networking and distributed systems. Some of my projects have been in the areas of high performance networking, network quality of service, automatic configuration and optimization of network services, and video distribution over the Internet, all of which are relevant to the technical issues in the U-verse TV service.

3. This declaration comments on the document titled “Comments of AT&T Opposing Petitions for Declaratory Ruling” of March 9, 2009, referred to as “AT&T Comments,” including the declarations by Paul Whitehead, Mary McCarthy, and Professor Gustavo de Veciana. This declaration focuses on the degree to which AT&T in its Comments addresses or does not addresses the technical questions concerning how U-verse delivers PEG channels raised in the “Petition for Declaratory Ruling” dated January 30, 2009, referred to as “ACM Petition.” The technical questions fall into three categories:

- The video quality of the PEG channels compared with commercial channels in AT&T’s U-verse service.
- The functionality associated with PEG channels compared with commercial channels in AT&T’s U-verse service. This covers a range of topics, including supporting closed captioning, Secondary Audio Programming (SAP), DVR capture and time-shifting, and others.
- The accessibility of PEG channels compared with commercial channels in AT&T’s U-verse service, which covers visibility, ease and speed of channel selection, and ease and speed of channel switching and surfing. An important question is whether AT&T’s current way of providing access to PEG channels, which is very different from access to

commercial channels, is an unavoidable consequence of the network architecture underlying the U-verse service, or whether alternate access methods could be easily supported.

I. Video Quality of PEG channels.

4. The quality of the video delivered to viewers depends on many functions and properties of the video delivery system. The most important factors include the compression technique used, the frame size and frame rate of the video, the bit rate of the stream, the available network bandwidth, the links and the degree of isolation of bandwidth allocated to video channels, the protocols used for transport, the quality of the video playback application, and the features of the device playing back the video (set top box in this case).

5. The ACM Petition argued that the video quality for PEG channels is considerably inferior to that of commercial and broadcast channels on AT&T's U-verse system, especially for programming that involves considerable motion (page 13). This evaluation was based on observations by viewers since no information about the compression techniques used, frame rates, and video delivery infrastructure used for both PEG and commercial channels were known at that time. In contrast, AT&T claims that the PEG and commercial channels are treated similarly on AT&T's network (AT&T Comments at page 58); this statement in the AT&T Comments refers to paragraphs 22 and 25 in the de Veciana declaration.

6. The de Veciana declaration does state that the transport facilities and protocols used by AT&T's U-verse system for PEG and commercial channels are "substantially the same" (paragraph 22). The declaration does not, however, provide adequate support to back up this claim. It does not provide sufficient information to analyze possible difference in video quality

for PEG and commercial channels in detail. In fact, the de Veciana declaration identifies three differences in the video delivery mechanisms used for PEG and commercial channels that can affect video quality, namely the compression technique, transport protocol, and video playback application used for PEG, as opposed to commercial channels, on AT&T's system.

7. Compression technique: PEG channels are compressed using the Windows Media 9 standard, while commercial channels use the MPEG 4 standard. Both use a 480x480 frame size, but the difference in compression technique can easily result in differences in video quality, depending on how the standards are configured. The use of different video compression techniques for the two classes of channels is unexplained and somewhat surprising, since using different compression techniques for PEG and commercial channels could easily add complexity to the video delivery infrastructure compared with the use of a single compression technique for all channels. AT&T gives no reason for this design choice. The de Veciana declaration also mentions another compression-related difference, namely that AT&T uses fixed rate compression (at 1.25 Mbps) for PEG programming, while AT&T uses variable bit rate compression for commercial channels (top of page 7 in de Veciana declaration). Unfortunately, the bit rates used for commercial channels are not known (the information is redacted). Variable bit rate compression is more flexible than fixed-rate compression, making it possible, for example, to use a higher bit rate for frame sequences that require it, e.g., sequences that involve a lot of motion.

8. Transport protocol: On the path from the VHO to the customer, AT&T uses different transport protocols for PEG and commercial channels. For PEG channels, UDP (User Datagram Protocol) is used. UDP is a light-weight, unreliable protocol that simply transmits packets and does not offer error recovery. In contrast, AT&T uses Reliable UDP (RUDP) for commercial

channels, which allows receivers to request retransmission of packets that were not received correctly, e.g., packets that were corrupted or lost in the network. While the exact differences in performance between UDP and RUDP depend on the network conditions (e.g., the packet error rates), it is clear that the use of UDP for PEG channels can potentially reduce the quality of the video. Note that video streaming is quite sensitive to packet loss because of the use of aggressive inter-frame compression standards.

9. Video playback application: AT&T uses the Windows Media Player in a browser to play back the video stream for PEG programming, while it uses MPEG-4 for commercial channels. The Windows Media Player is likely to be a variant of the Microsoft's desktop application that is used for viewing video over the Internet. Getting that application to work well on a set top box was apparently challenging (see paragraph 22 in McCarthy declaration). No technical information is available about how commercial channels are played back, although one would expect that the set top box, which is a custom-built device, was specifically designed to optimize playback performance for commercial and broadcast channels. For example, while the decoding of the video stream is not described by AT&T, it is likely that AT&T uses hardware for the MPEG-4 format used by commercial and broadcast channels, while PEG channels are apparently decoded in software. The difference in playback solutions can easily affect video quality, although there is not enough information available to quantify the effect.

10. A more detailed comparison of video quality is not possible because there is insufficient information. For example, very little is known about how AT&T supports commercial channels, and nothing is known about how much bandwidth is allocated to PEG programming versus commercial video streams on the various network segments of AT&T's U-verse system (e.g., Video Hub Office to Serving Offices, Service Offices to Node, and Nodes to Customer; Exhibit

A of Whitehead declaration). Moreover, for PEG channels, there may be transport problems on the network path segment from the PEG provider to the VHO, depending on the technology used. AT&T will have to provide far more information than its declarations offer in order to determine whether the quality of the PEG product video streams is similar to, rather than inferior to, that of non-PEG video channels

11. A final point is that the evaluation of video quality is not just a comparison of numbers (e.g., frame size, bit rate, etc.), but it must consider the subjective evaluation of viewers. For this reason, researchers in video streaming and compression techniques routinely run user studies to evaluate new techniques. In that context, AT&T should not make little of the observations made by viewers regarding video quality, as is done in AT&T Comments at page 40.

II. Functionality of PEG Channels.

12. Besides the video and audio information that make up a video stream, video channels delivered by video services providers traditionally include additional content and information that is used to support services for the user. Examples include support for open and closed captioning, Secondary Audio Programming (SAP), and DVR/VCR recording and time shifting.

13. The ACM Petition argued that while AT&T supports all the above functions in its delivery of commercial and broadcast channels, that support is largely missing for PEG channels. Specifically, while open captioning is supported, closed captioning is not (it is converted to open captioning), SAP is not supported, DVR/VCR recording is only supported in a limited form on some platforms, while time shifted viewing is not supported all. AT&T does not dispute these claims and it in fact confirms that the U-verse service currently falls short with respect to support for the above functions. The reason for this different treatment is unexplained and somewhat

surprising, since Windows Media Player used on desktops and other computer systems supports both closed captioning and SAP. AT&T's response also states that AT&T is in the process of improving the U-verse service, and over time, it believes it will be able to add closed captioning and SAP functions through software upgrades on the set top box and VHO equipment (AT&T Comments at Section V.B.1 on page 63 and Section V.B.4 on pages 66-67).

14. Section V.B.1 of the AT&T Comments explains that AT&T and Microsoft are working on adding both close captioning and SAP support for PEG channels. The McCarthy declaration (paragraphs 27-29) also discusses the lack of support for closed captioning and SAP and the plans for upgrades. AT&T also offers a tentative time schedule that includes partial upgrades in Q2 2009 and full upgrades in some locations at a later time. If these plans are completed as described and extended to all localities, both functions will be available for all channels.

15. Neither AT&T's Comments (Section V.B.4) nor the McCarthy declaration (paragraph 30) discuss any plans for adding and improving DVR support. There are two separate issues here. First, AT&T's own DVR device does not support recording of PEG channels at all, although it does support recording of commercial and broadcast channels (AT&T Comments at page 67). Second, the DVR capabilities that are usable on the user's own home equipment for PEG channels are limited to recording only the channel that is being viewed. This means, for example, that it is not possible to watch one channel while recording another channel for later viewing. No information is provided that could help determine how difficult it would be for AT&T to add this support.

16. An important point is that the problems with supporting the above functions for PEG channels are not the result of any fundamental differences between PEG channel programming

and the programming of commercial and the programming of broadcast channels. Rather, they are the result of how AT&T's "PEG product" delivers programming to the customer, e.g., channels are selected using a browser interface accessed on channel 99 and they are displayed using Windows Media Player. If AT&T would deliver any PEG channels, e.g., the local PEG channels for a community, to the customer in the same way as it delivers commercial and broadcast channels, these functions would automatically work for those PEG channels.

III Accessibility of PEG Channels.

17. In AT&T's U-verse service, PEG channels and commercial and broadcast channels are selected by viewers in substantially different ways. Access to commercial and broadcast channels is provided using a "linear" channel guide that allows viewers to select a channel by typing in a channel number or by stepping the channel in a linear fashion (channel surfing). The process that is used to access PEG channel programming is described in detail in the McCarthy declaration (paragraphs 8-13). In a nutshell, viewers need to go channel 99, which offers them access to a browser interface. They can then use the remote control to scroll through a set of menus, which eventually leads to a page that lists the PEG channel of interest, initially with a reduced frame size, and, after clicking another button, on the full screen.

18. The ACM Petition identifies a number of problems that result from the different access techniques AT&T uses for PEG channels and broadcast and commercial channels (pages 11-13 and 16-17). Access to PEG is very slow (tens of seconds) and cumbersome (navigating menus), and is in fact very problematic for visually impaired users. Moreover, switching between PEG channels and commercial channels is also slow and cumbersome, very unlike the surfing experience on a linear channel guide.

19. AT&T does not explicitly dispute the claim that access to PEG channels is more cumbersome and slower than to commercial and broadcast channels. In fact, on page 60 of the AT&T Comments, it uses the term “different experience” for viewers of PEG programming. Instead, AT&T (1) discusses how its U-verse service differs from video delivery in a traditional (incumbent) cable company system (Section V.A, pages 53-59), (2) lists some purported benefit of the PEG Product (mostly that AT&T can support more channels than in a linear program guide alone - Section V.A, pages 60-61), and (3) identifies a number of recent changes in the PEG product that have improved access to PEG channels (Section V.B.3). The first two points are really orthogonal to the issue of slow and cumbersome access to PEG programming.

20. Recent changes in the PEG Product discussed in Section V.B.3 of the AT&T Comments include both changes targeted at reducing access time (e.g., making the browser resident on the set top box) and at reducing access complexity for certain types of access (e.g., for access to the last-viewed PEG channel). These changes are discussed in more detail in the McCarthy declaration (paragraphs 23-26). While these changes would undoubtedly improve access time, there is not enough information to tell by how much. Moreover, at least some of the changes to the PEG product were introduced before the ACM Petition was filed (McCarthy declaration, paragraph 25), so they may predate the slow access times identified in the ACM Petition. The McCarthy Declaration mentions a number delays (paragraphs 9, 12, 23), but it is important to note that all of the delays mentioned are for individual operation. To determine the total delay to get access to a PEG channel, one must add up the delays of individual operations, and then also add the time it will takes users to scroll through several menus, as described in the McCarthy Declaration, paragraphs 10-11.

21. The ACM Petition indicates that AT&T has installed a “last-viewed PEG channel” feature to its U-verse product that provides a shortcut. The ACM petition also raises some concerns about both the delay (e.g., does it need to load the Windows Media Player application?) and the functionality of this feature (e.g., does it in fact toggle between the video channels in both directions?). AT&T does not address these concerns in its Comments.

22. It should be noted that the differences in how PEG channels and broadcast and commercial channels are accessed on AT&T’s U-verse system are a result of differences between the interface offered by AT&T’s PEG product and by AT&T’s linear channel guide, rather than some fundamental properties of the different types of programming. The differences in access time and complexity of access would disappear for any PEG channel that is included in AT&T’s linear channel guide. Similarly, any PEG channel included in the linear channel guide would also benefit from the same functionality as commercial and broadcast channels (see paragraph 13 above), and assuming the same compression and transport mechanisms are used, differences in video quality would also be eliminated. This suggests a solution in which the local PEG channels for a particular community could be offered in the linear channel guide; this would only consume a small (5-10) number of channels, not the hundreds of channels the AT&T claims are needed. This solution was identified in the ACM Petition at page 21, and it is discussed in more detail in Exhibit G of the ACM Petition, “Delivery of PEG Programming at Commercial Quality,” prepared by the Illinois Chapter of the National Association of Telecommunications Officers and Advisors. Note that this solution does not preclude AT&T from separately offering all PEG channels of a Designated Market Area (DMA) using its channel 99 PEG product, the same way it does now.

23. AT&T, however, argues that offering access to PEG channels through its linear channel lineup is not feasible because of the unique architecture of the U-verse service. It specifically argues that adding any PEG channels to the linear channel guide would require substantial changes to its infrastructure and would either be prohibitive in terms of cost or would significantly reduce the number of commercial and broadcast channels it can offer (pages 28-29 in the AT&T's Comments). The same arguments are also presented in the Whitehead declaration. AT&T's argument has two elements.

24. The first argument presented (AT&T Comments at page 27) is that offering all PEG channels of the entire DMA through the linear channel guide would significantly reduce the number of commercial and broadcast channels it can offer. The same argument is made in the Whitehead declaration (paragraphs 36-38). Given that a DMA may have a few hundred PEG channels, this argument may be correct in some DMAs. Note, however, that the ACM Petition does not advocate, or even mention, this solution.

25. The second argument, starting page 29, argues that AT&T's only alternative solution to offering PEG channels through the linear channel lineup is to "... abandon that DMA-wide model and limit PEG programming to the municipality in which the subscriber lives" AT&T claims that "... this would require the fundamental restructuring of AT&T's network – restructuring that would cost hundreds of millions of dollars" There is no technical foundation for this argument. It is clear from the AT&T Comments, including the declarations by Whitehead, McCarthy, and de Veciana, that the network hardware and protocols that AT&T uses for its U-verse service already have the capability of delivering a specific locality's PEG channels to the set top box of a user in that locality. Clearly no further hardware investment is needed.

26. The reason for the functionality and accessibility shortcomings of PEG channels versus commercial and broadcast channels is not that local PEG channels cannot be transmitted to the customer, but that viewers can only select PEG channels for viewing through the PEG product, rather than the linear channel guide. Which channels are selected through the PEG product and which are selected through the linear channel guide is completely controlled through software. Depending on how the U-verse service is designed, the relevant software could be running on the set top box, on a VHO server, or both. To put it a different way, despite AT&T's claim on page 8 of its Comments, its U-verse programming guide and channel offerings do not have to be the same for all subscribers within a single DMA.

27. The fact that it is possible to provide access to an individual locality's PEG channels using the linear channel guide (independent of whether all PEG channels of the DMA are available through the PEG product) is confirmed in the Whitehead declaration. Paragraph 43 discusses a solution that would use different channel maps for each community to give subscribers in each access to their own local community's PEG channels through the linear channel guide. As described in the Whitehead declaration, channel maps are an existing mechanism that AT&T already uses to block adult channels for certain subscribers. Other software solutions are certainly possible. For example, each set top box could locally remap a certain range of channels in the linear channel lineup to the subscriber's own local PEG channels. The mapping that is used would depend on the community that a subscriber resides in. The appropriate mapping, e.g., in the form of lookup table, could be downloaded to the subscriber's set top box from the VHO.

28. U-verse is implemented as an IP-based service, and as a result it is very flexible, since all functions are implemented in software. This is in fact one of the reasons why AT&T opted for

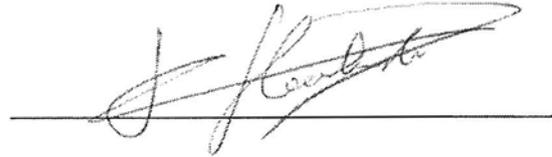
an all-IP approach, as discussed in paragraphs 14-15 of the Whitehead declaration. The AT&T Comments identify several examples where functional upgrades and changes have been or will be implemented via software upgrades. There is no reason why providing access to local PEG channels through the linear channel lineup cannot be achieved in the same way. There is not enough information in the AT&T Comments to determine the best way to make the changes.

29. The Whitehead declaration includes a discussion on the use of local signal insertion (paragraphs 40-42); a similar discussion can be found in the AT&T Comments on pages 53-54. It describes how incumbent cable operators provide local PEG programming in multiple municipalities by inserting the signal at the local headends. AT&T argues that adding additional local insertion points to AT&T's U-verse service would be a significant effort. This may be true, but it is irrelevant. Local insertion is not required to offer local PEG programming. While local insertion is a technically viable and widely used technique for offering local PEG programming, it is only one of many possible solutions. The DMA-wide model, combined with appropriate software controls, as described above, is an equally viable solution.

Declaration of Peter Steenkiste

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 31, 2009

A handwritten signature in black ink, appearing to read 'P. Steenkiste', is written over a solid horizontal line. The signature is cursive and somewhat stylized.

Peter Steenkiste

EXHIBIT B

COPY

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

DOCKET NO.
RM 2007 1
COMMENT NO. 5

_____)
In the Matter of)
Section 109 Report to Congress)
_____)

Docket No. 2007-1

COMMENTS OF AT&T SERVICES INC.

I. INTRODUCTION

AT&T Services Inc. ("AT&T") hereby submits its comments in response to the Notice of Inquiry ("NOI") issued by the Copyright Office on April 16, 2007.¹ The NOI seeks comment on, among other things, whether the Section 111 statutory license regime should be retained and, if so, whether new types of video services are eligible for the license.

It is unlikely that consumers would enjoy today's diversity of platforms for viewing broadcast television but for the statutory license. By striking a careful balance between the legitimate interests of copyright owners to be compensated for their works and those of distributors to have a practical means of obtaining licenses and paying royalties, the statutory license has enabled programmers and distributors alike to meet growing public demand for varied content and competitive choices. Indeed, in recognition of this unquestioned success, Congress has both renewed and expanded the statutory license several times since its inception in 1976.

In short, the statutory license is as relevant and necessary today as it was when enacted over 30 years ago. The transaction costs and logistical barriers associated with obtaining

¹ See Section 109 Report to Congress, 72 Fed. Reg. 19,039 (Lib. Cong. Apr. 16, 2007) ("NOI").

licenses through hundred or even thousands of separate negotiations with the multitude of copyright owners whose programs are shown on broadcast television would be enormous and insurmountable. That was true in 1976 and is true—perhaps even more so—today. In the absence of the statutory license, incumbent distributors would surely have to reconsider their commitment to offering broadcast programming and nascent competition from AT&T, Verizon and others would be squelched. The benefits of the statutory license have been enduring: in its various iterations, it has applied to many distinct technologies, including cable television, MMDS, satellite, and SMATV providers. And, now, the license will support the deployment of a new generation of distribution technologies, including AT&T's U-Verse TV video service. Against this backdrop, maintaining the statutory license is an easy, obvious choice.

II. EXECUTIVE SUMMARY

The Copyright Office issued the NOI to help it respond to a mandate contained in the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”) to examine and compare the statutory licensing systems for cable and satellite television (set forth in Sections 111, 119, and 122 of the Copyright Act of 1976) and recommend to Congress any necessary legislative changes.² The NOI seeks comments on a number of important issues, including “whether the [statutory] licenses should be eliminated rather than expanded”³ and, if retained, “whether new types of video retransmission services, such as IPTV-based services offered by AT&T, may avail themselves of any of the existing statutory licenses.”⁴

² See NOI, 72 Fed. Reg. at 19,040.

³ *Id.*, 72 Fed. Reg. at 19,054.

⁴ See *id.*

First, there is no question that the statutory copyright license scheme is the best solution to a difficult copyright problem that existed when Congress first imposed copyright liability on cable systems in 1976 and continues to exist today. That problem stems from the high transaction costs, including the nearly insurmountable difficulty of advance licensing, that would result from forcing multichannel video programming distributors to individually license each copyrighted work included in the broadcast signals they retransmit. Indeed, Congress found that “it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system.”⁵ Congress thus enacted the statutory license, which permits “cable systems” to retransmit broadcast signals containing copyrighted works in exchange for complying with the terms of the statutory license and paying royalties. Because the circumstances that required a statutory license in 1976 still exist today, and opponents of the statutory scheme consistently fail to offer a better solution, Congress’s continued reliance on statutory licensing is well justified.

Second, it is clear that AT&T’s U-Verse TV service is eligible for the statutory license because U-Verse TV fully meets the Section 111(f) definition of “cable system.” The Copyright Office has previously found it useful to divide the definition of “cable system” into five elements: the retransmission system must (1) be a facility; (2) that is located in any State, Territory, Trust Territory or Possession; (3) that receives the signals or programs from an FCC licensed broadcast station; (4) and then makes retransmissions of those signals via wires, cables, microwaves, or other communications channels; (5) to subscribing members of the public who

⁵ H.R. Rep. No. 94-1476, at 89 (1976).

pay for such service.⁶ As explained below, U-Verse TV meets every element of this definition, which is to be construed broadly to allow new technologies into the marketplace.

III. THE STATUTORY LICENSE REMAINS NECESSARY FOR RETRANSMISSION OF BROADCAST SIGNALS BY MVPDS

The enactment of the Section 111 statutory license was the result of a thorough debate over a complex question of federal policy and has proved to be an ideal solution that permits Congress to achieve two important copyright goals.⁷ First, because it dramatically reduces transaction costs, the statutory license increases public access to copyrighted works by creating the conditions in which different and improved distribution technologies can meet the public demand for broadcast television.⁸ Increasing public access to creative works is a central purpose of copyright law generally,⁹ and Congress has specifically found that the public has a strong interest in access to broadcast signals via cable and other technologies.¹⁰ Second, the statutory license ensures that copyright owners who license works for primary transmission are compensated when these works are retransmitted by multichannel video programming

⁶ See Notice of Proposed Rulemaking, In re Cable Compulsory License; Definition of Cable Systems, 56 Fed. Reg. 31,580, 31,592 (Lib. Cong. July 11, 1991) (“Compulsory License NPRM”).

⁷ See NOI, 72 Fed. Reg. at 19,040. In these comments, AT&T does not address issues related to satellite licenses.

⁸ Barbara Ringer, *Copyright in the 1980s*, 5 BULL. OF THE COPYRIGHT SOCIETY 299, 303 (1976) (explaining that statutory licenses are often used “where technology has made old licensing methods for established rights ponderous or inefficient”); Robert J. Morrison, *Deriver’s Licenses: An Argument for Establishing a Statutory License for Derivative Works*, 6 CHI.-KENT J. INTELL. PROP. 87, 95 (2006) (“Existing statutory licenses are designed to remove or reduce the transaction cost to licenses.”). In short, “[t]he idea behind a statutory license . . . is to reduce the transaction costs needed to license out the work. Sans statutory license, the potential lessee must determine the current owner, or owners, of a copyright, determine which rights she will need, and then negotiate a fee for the use.” *Id.* at 94.

⁹ See, e.g., *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) (explaining that “copyright law ultimately serves the purpose of enriching the general public through access to creative works”).

¹⁰ See NOI, 72 Fed. at 19,049 (explaining that “the FCC, the courts, and Congress, recognized the public benefits inherent in the delivery of distant signals by cable systems”).

distributors. That is, by ensuring compensation, the license enhances the economic incentives to create, another key aim of copyright law.¹¹

Until Congress enacted the Copyright Act in 1976, American copyright law imposed no obligation on operators of cable systems to obtain licenses and pay royalties for the copyrighted works included in broadcast programs they retransmitted.¹² The challenge Congress faced in imposing copyright liability on secondary transmissions by cable systems was incorporating cable systems into the traditional copyright scheme, which grants authors exclusive rights in their works, including control over both access and price.¹³ Cable television, as a “new method[] for the reproduction and dissemination of copyrighted works,”¹⁴ “strain[ed] [] [the traditional] []scheme . . . [by] alter[ing] the *degree* in which the author [could] control access” to her works.¹⁵ That strain arose from developments in cable television technology that enabled cable systems to carry “multiple broadcast signals containing

¹¹ See, e.g., *Fogerty*, 510 U.S. at 527-28 (explaining that copyright encourages the production of creative works by ensuring a fair return for creative labor).

¹² See H.R. Rep. No. 94-1476, at 89, 1976 U.S.C.C.A.N. at 5703 (recognizing that the cable television industry had been under no obligation to “pay[] copyright royalties for its retransmission of over-the-air broadcast signals”). Though copyright owners had argued that operators of cable systems were subject to the copyright laws then existing, the Supreme Court concluded, in two landmark opinions, that the retransmission of certain broadcasts was not a “performance” under the existing copyright law and therefore was not an “infringement.” See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395-402 (1968); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 405 (1974); NOI, 72 Fed. Reg. at 19,040 (“The years leading up to the enactment of the Copyright Act of 1976 were marked by controversy over the issue of cable television. Through a series of court decisions, cable systems were allowed under the Copyright Act of 1909 to retransmit the signals of broadcast television stations without incurring any copyright liability for the copyrighted programs carried on those signals.”).

¹³ Seltzer, *Exemptions and Fair Use in Copyright* at 50 (Harvard University Press) (1978).

¹⁴ H.R. Rep. No. 94-1476, at 47, 1976 U.S.C.C.A.N. at 5660.

¹⁵ Seltzer, *supra* note 13, at 50; see H.R. Rep. No. 94-1476, at 47, 1976 U.S.C.C.A.N. at 5660 (explaining that “technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works”).

programming owned by dozens of copyright owners”¹⁶ without seeking actual or legal¹⁷ access to those programs, combined with the fact that it would be very expensive and “[un]realistic for hundreds of cable operators to negotiate individual licenses with dozens of copyright owners.”¹⁸ Congress thus was forced to evaluate whether “ordinary market-place economics [could] any longer be relied upon to reward [authors] properly without undue costs to society.”¹⁹

Congress’s answer to that question was a resounding “no.”²⁰ Congress recognized that cable retransmissions simply could not be incorporated into a privately negotiated copyright scheme because of the prohibitive transaction costs associated with full copyright liability for those retransmissions.²¹ The “basic retransmission operations [of cable systems] are based on the carriage of copyrighted [works]” embedded in programs carried in primary transmissions by broadcast television.²² Because broadcast television stations generally do not own the copyrights to works embedded in programs they transmit and generally are not authorized to sublicense those works, operators of cable systems would be forced, under a scheme of full

¹⁶ NOI, 72 Fed. Reg. at 19,045.

¹⁷ *See supra* note 12.

¹⁸ NOI, 72 Fed. Reg. at 19,045.

¹⁹ Seltzer, *supra* note 13, at 52.

²⁰ “[T]he legislative history of the Act clearly discloses that Congress had considered and rejected full copyright liability for cable retransmission.” Lawrence Eigel, *The Cable-Copyright Controversy Continues—But Not in the Courts*, 48 BROOK. L. REV. 661, 678 (1982).

²¹ As the Copyright Office has recognized, “[a]t the time, it was not realistic for hundreds of cable operators to negotiate individual licenses with dozens of copyright owners, so a practical mechanism for clearing rights was needed. As a result, Congress created the Section 111 statutory license for cable systems to retransmit broadcast signals.” NOI, 72 Fed. Reg. at 19,045.

²² H.R. Rep. No. 94-1476, at 89, 1976 U.S.C.C.A.N. at 5704.

copyright liability, to identify the existence of a copyright, identify and locate the copyright owner, negotiate the terms and conditions of a license, and pay specified royalties for *each* copyrighted work embedded in *each* qualifying program retransmitted on *each* broadcast channel. “[T]he prospect of thousands of cable systems having to negotiate with thousands of copyright owners over retransmission rights, to all the programming carried in a broadcast day, never mind a broadcast week, or month or year, was correctly perceived as impossible.”²³

Worse still, cable systems would have to overcome “the obvious difficulty . . . of obtaining *advance* clearances for all of the copyrighted material contained in a broadcast.”²⁴ That difficulty creates more than a mere transactional cost—it creates a near guaranteed market failure because a cable system “cannot know in advance every copyrighted work that will be on [a primary broadcast signal].”²⁵ In the light of these inherent difficulties, Congress concluded “it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system”²⁶ and promptly rejected such a scheme.

Instead, Congress enacted a statutory license that required operators of cable systems to pay royalties for the retransmission of broadcast signals based on an established royalty formula.²⁷

²³ Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 265 (1985) (testimony of James P. Mooney, President, National Cable Television Association).

²⁴ House Comm. on the Judiciary, 89th Cong., 1st Sess., Supplementary Register’s Report on the General Revision of the U.S. Copyright Law at 42 (Comm. Print 1965) (emphasis added) (“Supplementary Register’s Report”).

²⁵ U.S. Copyright Office, A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, A Report of the Register of Copyrights at 27 (Aug. 1997), *available at* www.copyright.gov/reports (“Retransmission Report”).

²⁶ H.R. Rep. No. 94-1476, at 89, 1976 U.S.C.C.A.N. at 5704.

²⁷ *See* 17 U.S.C. § 111(c) (2000).

Congress chose a time-honored system that allows copyright holders to be compensated for their works, while at the same time ensures that this new technology would be allowed to flourish.²⁸ In short, the Section 111 statutory license was a sophisticated solution to the “difficult problem of determining the copyright liability of cable television systems.”²⁹

All of the practical and economic imperatives that led to the creation of the license are present and undiluted today. The NOI seeks comment on whether the statutory license has “served its purpose and is no longer necessary” because “the cable industry has grown significantly since 1976, in terms of horizontal ownership as well as subscribership, and generally has the market power to negotiate favorable program carriage agreements.”³⁰ The market power of the cable industry is not, however, a relevant analytical touchstone because there is no evidence that the size or bargaining power of cable systems would resolve the underlying problems that led Congress to enact the statutory license. Even if there was any such evidence, there certainly is nothing to suggest that the increased size of a few incumbent MVPDs would have any impact on the ability of new entrants to the video marketplace, who need broadcast programming to

²⁸ In 1976, Congress also expanded the use of the statutory licenses into other areas, including public broadcasting. See 17 U.S.C. § 118. Indeed, Congress has recognized the need for a statutory copyright license, in a number of different contexts, for nearly one hundred years. The Copyright Act of 1909 included a statutory license for mechanical sound reproductions that was, “as far as statutory, across-the-board, arrangements are concerned,” the first statutory license “in the world.” Ringer, *Copyright in the 1980s*, *supra* note 8, at 304. “The mechanical license was created in response to the fear that exclusive licenses with a company named Aeolian who made player-piano rolls would give them a ‘great music monopoly.’ Congress did not want a company’s vast intellectual property holdings to dictate the artistic direction of the country.” Morrison, *supra* note 8, at 97.

²⁹ H.R. Rep. No. 94-1476, at 89, 1976 U.S.C.C.A.N. at 5703. The Register of Copyrights at the time the copyright law was revised explained that the “cable issue, in particular, has been the reef on which the copyright law revision foundered for seven years.” Ringer, *Copyright in the 1980s*, *supra* note 8, at 304; H.R. Rep. No. 94-1476, at 48, 1976 U.S.C.C.A.N. at 5661 (“[I]t was not possible to complete action on copyright revision in the 90th Congress because of the emergence of certain major problems, notably that of cable television.”).

³⁰ *Id.* at 19,054.

compete, to surmount the exceedingly high hurdle of seeking—in advance—a separate license for each copyrighted work embedded in each broadcast signal.

The need for the statutory license stems in large part from the “difficulty and expense of clearing the rights to [] program content,” which the Copyright Office has recognized as the “special circumstance” that “warranted creation of [the] Section 111 [license]” in 1976.³¹ That “special circumstance” still very much exists.³² “[W]hether [the cable industry is] an ‘infant’ or ‘mature,’ ‘mom and pop’ or a ‘multimedia conglomerate’ has nothing to do with the universally recognized impossibility of individual negotiations for the rights to retransmit programming directly from the copyright owners. Congress recognized the need for a mechanism to deal with this problem in 1976, and that need has only increased since then.”³³ Indeed, since its adoption in 1976, Congress has expanded the use of the statutory license. In 1988, Congress designed a statutory license (the Section 119 license) that allows satellite providers to retransmit “superstation” and “network station” broadcast signals to their subscribers.³⁴ This statutory license has been renewed several times.³⁵ Congress also designed a statutory license (the Section 122 license) that allows satellite carriers to retransmit the signal of a television broadcast station into that station’s local market.³⁶ Satellite carriers who qualify

³¹ *Id.* at 19,050.

³² *Id.* (seeking comment on whether the original justification for the statutory license “still exist[s]”).

³³ Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 454-55 (1985) (statement of Stephen R. Effros, President, Cable Telecommunications Association).

³⁴ *See* 17 U.S.C. § 119.

³⁵ *See* Pub. L. No. 103-369, 108 Stat. 3477 (1994); Pub. L. No. 106-113, 113 Stat. 1501 (1999) (“SHVIA”); Pub. L. No. 108-447, 118 Stat. 3394 (2004) (“SHVERA”).

³⁶ *See* 17 U.S.C. § 122.

for this license are not required to pay any copyright royalties.³⁷ As the Copyright Office has explained, “Section 122 is a relatively noncontroversial provision that has served satellite carriers, broadcasters, and consumers well.”³⁸ The Section 122 license reflects the reality that local retransmissions of local signals add no extra burden on copyright owners “because [a retransmitted] signal is already available to the public for free through over-the-air broadcasting”³⁹ and owners are compensated by the broadcast station.

In addition, in 1994, Congress overturned a Copyright Office determination that denied the statutory license to MMDS providers. As Congress explained, the purpose of this amendment to Section 111 was to “overturn an erroneous interpretation of the definition of ‘cable system’ by the Copyright Office, an interpretation which denied the license to microwave carriers.”⁴⁰ Congress further explained that the amendments were necessary to reflect the realities of the marketplace: “It is necessary and appropriate to make several technical changes to the current law to improve its operation and effectiveness. Included in these changes are two amendments to the section 111 cable compulsory license designed to broaden the scope of that license and adapt it to the realities of the current marketplace.”⁴¹

³⁷ See *id.*

³⁸ NOI, 72 Fed. Reg. at 19,039; see also *id.* (“The [Section 122] license is permanent and its history is relatively non-controversial. In fact, satellite carriers have increasingly relied upon the license in the last seven years to provide local television signals to their subscribers in over 150 markets.”).

³⁹ *Id.* at 19,045. For the same reason, in the cable context, “the cable statutory license permits cable systems to retransmit local television signals without a significant royalty obligation.” *Id.*

⁴⁰ H.R. Rep. No. 103-703, at 7 (1994).

⁴¹ S. Rep. No. 103-407, at 7 (1994). These amendments suggest that Congress’s recognizes the utility of a statutory licenses “in the case of . . . cable television transmissions” Ringer, *Copyright in the 1980s*, *supra* note 8, at 304. Indeed, “[i]t would seem, on the basis of a great deal of experience, that [the statutory] license is as firmly rooted in our copyright law as anything can be.” *Id.* Even critics must admit that the statutory license is “a firmly established part of . . . the . . . cable television industr[y]” and

Despite the evident benefits of this regime, the Section 111 statutory license has been the target of ill-advised objections. Consider, for example, what some describe as the “most sympathetic argument[]” against the statutory license, that authors do not control access to their works after they grant a license for its use by a broadcaster.⁴² This argument fails to acknowledge that, as discussed above, the local retransmission of broadcast signals imposes no burden on authors’ control of access to their works because they have already licensed those works for local distribution.⁴³ But, more fundamentally, even with respect to the retransmission of distant signals, critics of the statutory license fail to consider that authors would sacrifice just as much control over their works under a completely private licensing system as they do under the statutory licensing system. Because “mass use” makes individually-negotiated licenses “impracticable,” if not impossible, authors are faced with a choice “between a . . . [statutory] license administered by the government and some type of blanket license administered by a private collective.”⁴⁴ As a practical matter, copyright holders would have no more control over access to their works in a system of collectivized bargaining than they currently have under the Section 111 statutory license.⁴⁵

hope merely that “the concept [is] not [] expanded to other areas.” Robert Stephen Lee, *An Economic Analysis of Compulsory Licensing in Copyright Law*, 5 W. NEW ENG. L. REV. 203, 226 (1982).

⁴² Morrison, *supra* note 8, at 99.

⁴³ See NOI, 72 Fed. Reg. at 19,045 (explaining that retransmitted signals are “already available to the public for free through over-the-air broadcasting”). For this reason, “the cable statutory license permits cable systems to retransmit local television signals without a significant royalty obligation.” *Id.*

⁴⁴ Fara Daun, *The Content Shop: Toward an Economic Legal Structure for Clearing and Licensing Multimedia Content*, 30 LOY. L.A. L. REV. 215, 265-66 (1996).

⁴⁵ Examples of private licensing collectives include the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Incorporated (BMI), which themselves have been the subject of criticism. See Stephanie Haun, *Musical Words Performance and the Internet: A Discordance of Old and New Copyright Rules*, 6 RICH. J.L. & TECH. 3, 16-17, 19 (1999) (referring to criticisms of private licensing collectives for, among other things, violations of antitrust laws, employing unfair

Statutory license schemes also “are sometimes criticized for their administrative costs and other regulatory inefficiencies.”⁴⁶ Critics ignore, however, that most if not all of these administrative costs and organizational “inefficiencies” would exist to the same, if not greater, degree in the collective bargaining institutions that the market would inevitably spawn to solve the transaction costs problem in a strict liability system. More fundamentally, narrow criticism about the manner in which the statutory license is administered fall far short of anything approaching a principled argument for undoing the statutory license and replacing it with an entirely new and unworkable system. Congress’s long-studied determination that the statutory license achieved the appropriate balance of important public values should not be so easily undone.

Critics also fail to explain how a system of private negotiations and licensing agreements would solve the fundamental problem “of obtaining *advance* clearances for all of the copyrighted material contained in a broadcast.”⁴⁷ Even assuming, as proponents of a private system argue, that the market would form private bargaining collectives and that “a cable system [would be able to successfully] negotiate[] with all the major collectives,”⁴⁸ it would remain impossible for a cable system to “be assured that it has cleared all rights” necessary to insulate it from liability. For example, “[w]hat if there were an individual copyright owner who was not represented by any collective, and he or she decided to sue when his or her work

enforcement practices, employing royalty distribution systems that unfairly favors mainstream authors, and for the perception that they “are run by a select few who cater to already successful, or politically powerful writers and publishers within the organization”).

⁴⁶ Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARVARD J.L. & TECH. 1, 5 (2003).

⁴⁷ Supplementary Register’s Report, *supra* note 24, at 42 (emphasis added).

⁴⁸ See Retransmission Report, *supra* note 25, at 27 (summarizing comments submitted by various parties).

was retransmitted?”⁴⁹ Indeed, as the Copyright Office has recognized, there can be no question that this difficulty “represents a real problem that cannot be brushed under the rug, and it behooves the copyright owners to come forward with practical suggestions for solving it.”⁵⁰ As Congress has explained, “there is no simple answer”⁵¹ to these incredibly complex regulatory issues. Furthermore, there should be a presumption for maintaining the statutory license because it is so “firmly rooted in our copyright law,”⁵² it has “become an integral part of the way that broadcast signals are brought to the public . . . [, and] business arrangements and investments have been made in reliance upon the [statutory] license[.]”⁵³ Thus, the standard of proof demanded of those who would abolish the statutory license should be very high.⁵⁴ In the end, the consuming public would suffer the most from eliminating the statutory license. The dramatically higher transaction costs associated with traditional copyright liability would inevitably be passed through to consumers.⁵⁵ This would not only deter viewers from

⁴⁹ *Id.* at 27 (summarizing comments).

⁵⁰ Supplementary Register’s Report, *supra* note 24, at 42.

⁵¹ H.R. Rep. No. 94-1476, at 89, 1976 U.S.C.C.A.N. at 5703.

⁵² Ringer, *Copyright in the 1980s*, *supra* note 8, at 304.

⁵³ Retransmission Report, *supra* note 25, at iv. Indeed, “[t]o abolish [the statutory license] would dramatically alter the relationships between the parties and the circumstances under which the current system functions.” Ralph Oman, *The Compulsory License Redux: Will It Survive in a Changing Marketplace?*, 5 CARDOZO ARTS & ENT. L. REV. 37, 48 (1986).

⁵⁴ This is especially evident when considered in the light of the effort Congress expended to determine the best solution to the cable-copyright dilemma. “Once the statutory drafts were issued for comment and congressional consideration, an extraordinary process of open compromise and barter began.” Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 481 (1976). During extensive hearings the House Judiciary Subcommittee conducted, for example, “nearly 100 witnesses were heard.” H.R. Rep. No. 94-1476, at 49 (1976). “This process continued for nearly fifteen years, down to the very day the bill was finally passed by both Houses of Congress.” Ringer, *supra*, at 481-82.

⁵⁵ “To a significant extent the cost of [imposing traditional] copyright liability [on cable operators] will be borne by cable subscribers.” Copyright Law Revision: Hearings on H.R. 2223 Before the

accessing copyrighted works by cable television, but would also substantially undermine a key source of pro-consumer competition at the distribution level.⁵⁶

IV. AT&T'S IP-BASED U-VERSE TV IS ELIGIBLE FOR THE STATUTORY LICENSE.

In the NOI, the Copyright Office recognized that recent technological advances have allowed “video programming distribution systems that use Internet Protocol technology (IPTV) to deliver video content through a closed system available only to subscribers for a monthly fee.”⁵⁷ The Office specifically referenced the AT&T “U-Verse TV” service, which “currently uses IPTV to provide multichannel video service in competition with incumbent cable operators and satellite carriers.”⁵⁸ The Office has asked whether “new types of video retransmission services, such as IPTV-based services offered by AT&T, may avail themselves

Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 503 (1975) (testimony of Rex Bradley, Chairman, National Cable Television Association), in 14 GEORGE S. GROSSMAN OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 503 (2001).

⁵⁶ See H.R. Rep. No. 103-703, at 29 (“The compulsory license mechanism has been essential for the development of the cable and satellite broadcast industry by facilitating the clearance of the thousands of copyrights related to television programming thereby ensuring access to that programming by cable system operators and satellite broadcasters.” (statement of Rep. Synar)). Congress has recognized that it is “important to encourage . . . new technologies because they will become real competitors of cable TV in the marketplace. Competition is an important factor in keeping cable TV rates at a reasonable price. The consumer will be the ultimate benefactor of this increase in competition.” Satellite Home Viewer Act of 1994, 140 Cong. Rec. 9268-02, at 9270 (statement of Rep. Moorhead); see also *id.* at 9272 (“There is little question that Congress would like to ensure that there is vigorous competition and diversity in the distribution of video programming and the determination of fair market value fees should reflect that intent.” (statement of Rep. Synar)); *id.* at 9271 (“The compulsory license mechanism has been critical for the development of the cable and satellite broadcast industry by facilitating the clearance of the thousands of copyrights related to television programming. This clearance process has been essential for providing access to retransmitted programming by cable system operators and satellite broadcasters which in turn is provided to consumers who may otherwise have to forgo a wide range of diverse video programming.”).

⁵⁷ See NOI, 72 Fed. Reg. at 19,054.

⁵⁸ *Id.*

of any of the existing statutory licenses.”⁵⁹ For the reasons explained below, AT&T’s U-Verse TV service fits squarely with the Section 111 definition of a “cable system” and therefore is eligible for the statutory license.⁶⁰

AT&T offers video to subscribers through an enhancement of the broadband capabilities of AT&T’s existing communications network. This IP-based service, branded AT&T U-Verse TV, provides a menu of video and interactive functionalities to subscribing customers. The AT&T IP data network involves Fiber-to-the-Node (FTTN) and Fiber-to-the-Premises (FTTP) technologies that employ a switched, two-way architecture designed to send each subscriber only the programming the subscriber chooses to view at a particular time.

The video delivery system has three major architectural components: a super hub office (SHO); multiple video hub offices (VHOs), currently located in 12 designated market areas across AT&T’s service territory; and dedicated terrestrial transport facilities and associated equipment. Under this structure, national video content is acquired, processed, encoded and encrypted at the SHO and then distributed via a national, managed IP data network to the VHO. Local broadcast signals are acquired, processed, encoded and encrypted at the VHOs. Transmissions from a VHO to a subscriber’s premises are routed through intermediate offices to a local IP serving office. From there, video content and other IP-based services are delivered to subscribers via dedicated facilities. Transmissions from the subscriber premises to a VHO or the SHO travel via the same closed network. When a subscriber sends a request for

⁵⁹ *Id.*

⁶⁰ There are differences between U-Verse TV and the retransmission of broadcast signals over the public Internet. As the Copyright Office noted in the NOI, for example, “Internet video providers do not own any transmission facilities.” NOI, 72 Fed. Reg. at 19,039, 19,053. AT&T does not address whether such offerings should be deemed eligible for the statutory license.

a specific channel, the content is delivered to the subscriber through the FTTP/FTTN closed transmission system described above.

As discussed above, section 111(c) of the Copyright Act provides “cable systems” with a statutory copyright license to retransmit broadcast signals.⁶¹ For purposes of the statutory license, a “cable system” is defined as:

a facility located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the FCC, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.⁶²

In prior situations involving eligibility for the statutory license, the Copyright Office has found it useful to divide the definition of “cable system” into five discrete elements.⁶³ The retransmission system must: (1) be a facility; (2) that is located in any State, Territory, Trust

⁶¹ See 17 U.S.C. § 111(c) (“[S]econdary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the FCC . . . shall be subject to statutory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmissions is permissible under the rules, regulations, or authorizations of the [FCC].”).

⁶² *Id.* at § 111(f); see also H.R. Rep. No. 94-1476, at 88, 1976 U.S.C.C.A.N. at 5702-5703 (“Cable television systems are commercial subscription services that pick up broadcasts of programs originated by others and retransmit them to paying subscribers. A typical system consists of a central antenna which receives and amplifies television signals and a network of cables through which the signals are transmitted to the receiving sets of individual subscribers. In addition to an installation charge, the subscribers pay a monthly charge for the basic service.”). Of course, the definition of “cable system” contained in the Copyright Act, which talks about a “facility used to transmit one or more television broadcast stations,” is very different from the definition contained in the Communications Act of 1934, as amended, which discusses a facility “designed to provide cable service.” Compare 17 U.S.C. § 111(f) with 47 U.S.C. § 602(7).

⁶³ See Compulsory License NPRM, 56 Fed. Reg. at 31,592.

Territory or Possession; (3) that receives the signals or programs from an FCC licensed broadcast station; (4) and then makes retransmissions of those signals via wires, cables, microwaves, or other communications channels; (5) to subscribing members of the public who pay for such service.⁶⁴ As explained below, U-Verse TV fits easily within this definition.

First, AT&T uses “facilities” to retransmit its IP-based video service.⁶⁵ As explained above, AT&T uses a SHO and a number of VHOs in its service territory. From the VHOs, the video content is distributed to intermediate offices, then to the subscriber’s local central office, and ultimately to subscribers over “wires” and “cables” owned or controlled by AT&T.⁶⁶ AT&T thus uses “facilities”—as required by the statute—to deliver its service to paying customers.⁶⁷

Second, and relatedly, AT&T’s IP data facilities are “located in any State.”⁶⁸ Indeed, like other video services eligible for the Section 111 license, AT&T’s facilities are terrestrial and closed. The fact that AT&T’s systems, like other systems eligible for the statutory license, may cross state lines does not change this result. As one court explained, if “‘located in any State’ means located entirely within a single state” then “many of the concededly traditional local systems serving communities that cross a state border would lose their cable system status.”⁶⁹

⁶⁴ See *id.* at 31,592.

⁶⁵ 17 U.S.C. § 111(f).

⁶⁶ See Final Regulation, *In re Cable Compulsory License; Definition of Cable Systems*, 57 Fed. Reg. 3284, 3290 (Lib. Cong. Jan. 29, 1992) (“Compulsory License Final Rule”) (describing a “facility” as a place that “(1) receives broadcast signals, and (2) makes secondary transmissions of those signals”).

⁶⁷ See *id.*

⁶⁸ 17 U.S.C. § 111(f).

⁶⁹ *Nat’l Broad. Co. v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467, 1470 (11th Cir. 1991). Although this decision was later overtaken by subsequent Copyright Office action with respect to DBS eligibility, the Office did not base its ultimate denial of DBS eligibility on the fact that its service crossed state lines. Rather, the Office found that DBS was ineligible because “[w]hile satellite carriers arguably receive signals in one or more states . . . , the secondary transmissions are not likewise made in any state,

Third, AT&T “receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the FCC.”⁷⁰ This requirement simply means that any primary transmission that AT&T receives and then retransmits must have been made by a broadcast station that is licensed by the FCC (or an appropriate governmental authority of Canada or Mexico).⁷¹ AT&T only carries broadcast stations properly licensed in this fashion.

Fourth, AT&T makes “secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels.”⁷² The Copyright Office has explained that the statutory license should be afforded to “video delivery systems that employ cable, wire, or other physically closed or shielded transmission paths” to provide service to their subscribers.⁷³

That is, to the Copyright Office it has always been without question that, whatever a “cable system” is, it is at least “a wired, closed transmission path service that carried broadcast signals.”⁷⁴ As described above, U-Verse TV consists of a wired, closed transmission path service that carries broadcast signals.⁷⁵

but rather from geostationary orbit above the earth.” Compulsory License Final Rule, 57 Fed. Reg. at 3290.

⁷⁰ 17 U.S.C. § 111(f).

⁷¹ *See id.* at § 111(c)(1).

⁷² 17 U.S.C. § 111(f).

⁷³ Compulsory License NPRM, 56 Fed. Reg. at 31,591.

⁷⁴ Compulsory License Final Rule, 57 Fed. Reg. at 3294.

⁷⁵ Even if AT&T did not retransmit its video service via “wires” or “cables”— which it does—it certainly retransmits broadcast signals through “other communications channels.” Although the Copyright Office has, in the past, taken the view that “the phrase ‘other communications channels’ appearing in the statutory definition was not intended to include open transmission path services such as MMDS,” this assertion was rebuked by Congress, which criticized the Copyright Office for adopting an “unnecessarily restrictive interpretation . . . of the phrase ‘or other communications channels.’” H.R. Rep. No. 103-703, at 17; *see also* S. Rep. No. 103-407, at 7 (recognizing that “as long as cable enjoyed a permanent statutory license to copyrighted programming that competing delivery systems like MMDS (wireless), HSD, and other satellite technologies should also have the benefit of a statutory license to

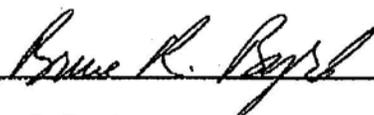
Last, AT&T offers its product "to subscribing members of the public who pay for [the] service."⁷⁶ This element of the statutory definition is satisfied so long as the MVPD charges subscribers for the receipt of television broadcast signals.⁷⁷ U-Verse TV provides retransmission of broadcast signals to customers who pay for the service. Accordingly, for the reasons outlined above, AT&T's video service meets the Section 111(f) "cable system" definition and therefore is eligible for the Section 111(c) statutory license.

V. CONCLUSION

For reasons discussed above, AT&T respectfully urges the Copyright Office to recommend that Congress maintain the statutory license.

Respectfully submitted,

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retransmit copyrighted programming"). This "unnecessarily restrictive interpretation" of "other communications channels" prompted the 1994 amendments to Section 111, H.R. Rep. No. 103-703, at 7 (explaining that the 1994 amendments to Section 111 were necessary because of "an erroneous interpretation of the definition of 'cable system' by the Copyright Office, an interpretation which denied the license to microwave carriers"), which were "designed to broaden the scope of th[e] license and adapt it to the realities of the current marketplace," S. Rep. No. 103-407, at 7-8. In any event, the Copyright Office has never doubted that a closed transmission path, such as that utilized by AT&T, would qualify under the "other communications channels" provision. Such an interpretation would render this aspect of the "cable system" definition meaningless. See *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)(internal citations omitted))).

⁷⁶ 17 U.S.C. § 111(f).

⁷⁷ See Compulsory License Final Rule, 57 Fed. Reg. at 3294 (finding that MMDS providers meet this requirement because they "charge[] subscribers for their receipt" of "television broadcast signals").

EXHIBIT C

Close Wi



Total Home DVR

AT&T U-verse

**Record on 1 DVR.
Watch on any TV in
your home.**

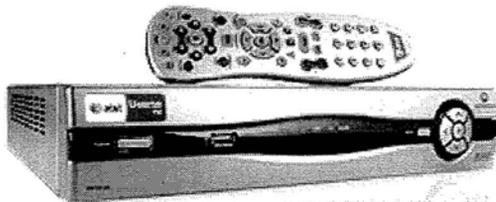
**No cable company comes close
to matching Total Home DVR*.**

Watch up to 4 different recorded shows at the same time. Up to 3 of these can be in HD!

Access, playback and control the same recorded show independently on up to 4 TVs.

Pause the recorded show you're watching from any receiver and watch it from where you left off in any other room.

Record up to 133 hours/SD or 37 hours/HD of programming.



One DVR is all you need
to enjoy your recorded
programs throughout
your home.

Can I get AT&T U-verse?



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The U-verse Total Home DVR can also:

Automatically extend the recording time at the beginning and end of your programs you get more of what you want to see.

Group recordings by series to simplify your search - and it does this automatically!

Access your DVR from any device with an Internet connection to schedule and manage your recordings.

No new equipment needed. No additional charges.

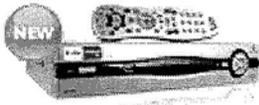
*Geographic and service restrictions apply. Total Home DVR feature requires a DVR receiver and a receiver at \$7 per month for each additional TV, up to 8 total TVs.

Access to over 100 HD programming channels and growing! [Learn More](#)
 All receivers are digital and ready for high definition TV (HDTV) programming that will deliver a brilliant picture [Learn More](#)
 All packages include 1 receiver at no additional charge
 Most packages, the included receiver is a Digital Video Recorder (DVR) with Total Home DVR Service
 No contract term required
 Professional installation of your TV and wireless home networking included. Note: Installations may take up to 4-6 hours
 Extensive home theatre, TV, and speaker installation options available through AT&T ConnectTech(SM) service. [Learn more](#)

*A monthly \$10 HD Technology Fee applies for access to HD service. HD Premium Tier available for an additional \$5 per month and requires subscription to HD service for \$10 per month.

The AT&T U-verse Receiver

Determine your own instant replays, pause your TV show to refill your popcorn, or go out to dinner with your family while your favorite movie is being recorded. Then watch it in any room you choose.



Be one of the first to experience Total Home DVR! It's the only DVR of its kind and is included at no extra cost in most packages – Record up to four shows at once on a single DVR and play back on any TV in your home*. Plus, pause your recorded show in one room and pick it up in another. No cable company comes close to matching Total Home DVR! [Learn More](#)

More Receiver Features:

- Program your Digital Video Recorder (DVR) remotely from any PC and most wireless phones with internet access. ¹
- Store up to 233 hours of SD or 65 hours of HD shows
- Access to your Video on Demand library anytime and in any room
- On-screen program guide with 14-day look ahead
- On-screen parental control

*Four channels can be recorded to the DVR or viewed simultaneously, up to 2 can be HD based on geographic restrictions. Full Total Home DVR functionality requires a receiver for each additional TV at \$7 each per month. ² Remote access requires AT&T High Speed Internet account. Wireless remote access requires WAP 2.0-compliant cell phone or other handheld device.

Learn more:

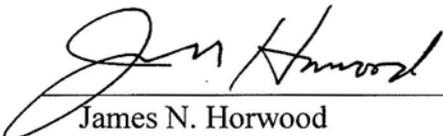
- Digital TV transition
- View a U-verse demo
- Learn how U-verse works
- U-verse Hardware
- Upgrade to the U-verse A10 Remote Control
- User Guides
- Parental Controls (PDF format*)
- AT&T U-verse TV User Guide (PDF format*)

 PDF format requires Adobe® Acrobat Reader, available free.

Statement Regarding Service

Pursuant to the Public Notice *Extension Of Time And Waiver Of Reply And Service Rules Concerning Petitions For Declaratory Ruling Regarding Public, Educational, And Governmental Programming* (DA 09-531, Mar. 13, 2009) (“March 13 Notice”), the Media Bureau has waived the service requirement of 47 C.F.R. 76.7(c)(1), which states, in part, that a petitioner’s reply to a responsive pleading is to be “served on all persons who have filed pleadings.” Accordingly, I am electronically filing the foregoing Reply Comments on behalf of ACM Petitioners and will not serve paper or electronic copies on the other petitioners in this proceeding or on any of the parties that have filed comments. As stated in the March 13 Notice, “[a]ll parties will be able to retrieve reply comments from the Electronic Comment Filing System (ECFS), once the comments are uploaded to the System.” *Id.* at 2.

April 1, 2009


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