

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

In the Matter of

Petitions for Declaratory Ruling Regarding Public,
Educational, and Governmental Programming

MB Docket No. 09-13
CSR-8126, CSR-8127, CSR-8128

**REPLY COMMENTS OF
THE CITY OF DEARBORN, MICHIGAN; THE CHARTER TOWNSHIP OF
MERIDIAN, MICHIGAN; THE CHARTER TOWNSHIP OF BLOOMFIELD,
MICHIGAN; MONTGOMERY COUNTY, MARYLAND; THE CITY OF DUBUQUE,
IOWA; THE CITY OF LOS ANGELES, CALIFORNIA; LOUDOUN COUNTY,
VIRGINIA; THE CITY OF HOUSTON, TEXAS; THE MICHIGAN MUNICIPAL
LEAGUE; THE MICHIGAN TOWNSHIPS ASSOCIATION; AND THE MICHIGAN
COALITION TO PROTECT PUBLIC RIGHTS OF WAY**

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SUMMARY

I.

The industry's response to the petitions filed in this proceeding rests heavily on the assumption that cable operators (and by that term, we include AT&T) have a right under federal law to deliver PEG programming in virtually any format, and at any price, even if that means that the programming will not be delivered to every subscriber. Indeed, according to commenters, federal law establishes virtually no conditions on the provision of PEG channels.

That is not the case. While Congress did not specifically define what it meant when it states that franchising authorities may "designate" channels for public, educational and government use, the legislative history makes Congress's intent perfectly clear: when a channel is "designated" the operator has a duty to act as a conduit, and deliver the channel from end to end to all subscribers – unless a valid franchise agreement specifically provides otherwise. These obligations are cemented by provisions of the Act, including Section 611(e), which prevent an operator from exercising editorial control over a channel. The industry commenters, including NCTA and AT&T, admit (through their First Amendment arguments) that the formatting and placement of the PEG channels does involve an exercise of editorial control.

By definition, this means that the industry does not have the rights asserted in the comments. An operator cannot condition or hamper the delivery of PEG channels unilaterally by placing the channels in a format that requires a subscriber to request and obtain equipment in order to receive the channels. It cannot devise a system that requires consumers to make a request to receive the channels. It cannot place the channels in locations, or in a format so that they cannot be easily accessed. Taken together, the PEG provisions of the Act establish a baseline obligation with respect to PEG channels that an operator must satisfy, absent a franchise

provision that clearly and expressly allows the operator to depart from those obligations. These obligations require operators to provide PEG on a non-discriminatory basis. And, because on every system the primary broadcast signal is the signal most easily accessible to subscribers, the PEG channels should be available without any charges in addition to those that must be incurred to receive the primary broadcast signals.

The digitization of PEG channels by Comcast and by other operators violates these federal principles for reasons explained in the Petition filed in CSR-8128; AT&T's Channel 99 platform also violates these principles for reasons suggested by the Alliance for Community Media.

II.

Once these basic principles are understood, it is much simpler to review the industry's claims with respect to Section 623(b)(7), (which requires that PEG be provided as part of the basic service tier.

The industry claims, first, that Section 623(b)(7) is only a rate regulation provision, and therefore is not applicable in communities where there is no rate regulation. In fact, however, viewed in the context of the other PEG provisions of the Act, it is clear that Section 543(b)(7) was a means through which Congress intended to secure its goals of having PEG programming provided to "all subscribers," and ensuring the PEG channels would be a "complement" to local broadcast signals. It did this by requiring operators to provide PEG channels as part of the same "category" of service that included local broadcast signals. The requirement is thus intended to serve purposes beyond rate regulation, and thus is enforceable in all communities whether or not the cable operator is subject to effective competition. Commission authority has not always been consistent on this point; but in light of the legislative history, the Commission should so find.

Whether AT&T's Channel 99 platform is part of the basic service tier is addressed in other filings. With respect to CSR-8128, Comcast (supported by NCTA and others) claims that it is providing PEG as part of basic service, even where (as in the case of Comcast) it will be necessary for consumers to lease equipment in order to view the channels where Comcast plans to place them (the 900-series of channels), and even if no equipment is necessary to view broadcast channels. This is so even though the record shows that Comcast is requiring consumers to jump through several hoops to obtain the channels, and is marketing its service tiers claiming that no converter is required to receive service. Ultimately, the industry claims that all that is required for PEG channels to be part of the basic service tier is that an operator deliver PEG signals to a subscriber's set without an additional service fee – other burdens, it claims, can be ignored. But the statute requires more than delivery of PEG signals for the same “service fee.” It requires delivery of the PEG programming as part of the same “category” of service that includes broadcast channels. And to determine whether the “programming” is part of the same “category,” one must view matters from a consumer perspective. Here, the burdens that Comcast has imposed on the receipt of PEG makes it clear that PEG is not being provided as part of the basic service tier.

III.

The arguments addressed in Parts I and II lead to the conclusion that both AT&T and Comcast are violating their respective obligations under the Cable Act. Industry commenters raise a series of red herrings to deter the Commission from reaching that conclusion.

1. Both AT&T and Comcast argue that their approach to PEG is beneficial and cause little harm; the record is otherwise. It shows that the actions do harm consumers, and are targeted in a way that will harm PEG viewers and users.

2. Both AT&T and NCTA claim that requiring carriage of PEG on a non-discriminatory basis violates the first amendment. The courts have already concluded that the PEG provisions of the Cable Act survive a facial First Amendment challenge, and the FCC has rejected claims very similar to those raised here. But in any case, the Cable Act's PEG obligations easily pass muster under standard First Amendment analysis, as they are content neutral, serve important governmental interests, and burden no more speech than is necessary to serve those interests.

3. Comcast claims that granting the petitions will somehow interfere with state sovereignty. Nonsense. The Commission is being asked to interpret federal law. The mere interpretation of federal requirements does not in any way interfere with state sovereignty. The Commission can ignore Comcast's claims in this regard.

IV.

Once the basic principles regarding PEG are established, and the red herrings are disposed of, the Commission will be in a position to answer the seven questions raised by the *Dearborn* district judge. Those questions may be answered as originally proposed in the Petition filed in CSR-8128. Nothing in the comments filed requires a different result.

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COALITION TO PROTECT PUBLIC RIGHTS OF WAY**

The City of Dearborn, Michigan; the Charter Township of Meridian, Michigan; the Charter Township of Bloomfield, Michigan (collectively, the “Michigan Petitioners”); Montgomery County, Maryland; the City of Dubuque, Iowa; the City of Los Angeles, California; Loudoun County, Virginia; the City of Houston, Texas; the Michigan Municipal League, the Michigan Townships Association; and the Michigan Coalition to Protect Public Rights of Way (“PROTEC”) respectfully submit these reply comments.

INTRODUCTION

These reply comments focus primarily on the issues raised in response to the Petition filed by the Michigan Petitioners.¹ However, AT&T, as well as the NCTA, Cablevision, Bright House Networks, and Comcast raised broad and overlapping claims regarding the nature of

¹ Petition for Declaratory Ruling of the City of Dearborn, MI *et al.* (“Michigan Petition”).

public, educational, or governmental (“PEG”) obligations under the Cable Act that the Commission must now resolve prior to addressing the specific questions raised in CSR-8128 or certain of the issues raised in the petitions filed by the Alliance for Community Media, *et al*, or the City of Lansing.² Thus, for example, NCTA (at 11-12) argues that PEG channels can be carried in a digital format *inter alia* because, under the Cable Act, cable operators have no obligation to deliver PEG channels in a “viewable” format or on a non-discriminatory basis. Comcast makes much the same arguments, Comcast Comments at 15, 29, 31. AT&T and Cablevision argue that federal law establishes only a single obligation on operators – the obligation to carry PEG on the basic service tier in communities subject to rate regulation. AT&T Comments at 33; Cablevision Comments at 7.

This view of the Act leads the industry to treat Section 623(b)(7), 47 U.S.C. § 543(b)(7) as a section solely concerned with rate regulation, and hence leads all industry respondents to argue that there is no obligation to provide PEG channels on a basic service tier that includes the standard definition broadcast channels in communities where there is no rate regulation. It also is critical to the related conclusion that an operator is therefore free to provide PEG channels in virtually any format, and at any price that the operator may care to charge in communities that do

² Michigan Petitioners pointed out in their initial comments that the issues raised by the district court did not on their face require the Commission to address broad issues regarding the nature of PEG channels. Comments of the City of Dearborn, MI., *et al.* at 7. Indeed, the district court specifically refused to refer the question of the meaning of Section 611(e) (the anti-editorial control provision of the Cable Act) to the Commission, concluding that the provision was solely concerned with the content of PEG programming. *See* Michigan Petition, Exh. M. Nonetheless, the ACM petition did raise those issues, and the comments of the industry clearly raise issues as to the nature of PEG obligations. Indeed, Comcast’s position with respect to district court questions 3 and 7 depends on its claim that there is no federal obligation to deliver PEG channels in a non-discriminatory manner. Comcast Comments at 29, 31. The general questions regarding the nature of PEG cannot be avoided.

not face effective competition – a claim underlying both the comments of AT&T and the comments of Comcast, Cablevision, Bright House and the NCTA.

Part I rebuts these arguments, and shows that the Cable Act does establish important requirements with respect to the provision of PEG channels. The obligation to provide a PEG channel – to designate channel capacity for PEG use – includes the obligation to deliver the signal to every subscriber unless that obligation is expressly waived in a franchise agreement. To put it another way, unless a franchise agreement provides otherwise, every subscriber who can receive any video signal via a cable system should also be able to receive the PEG channels, without additional burden or expense. The operator is not free to charge whatever it wishes for this channel capacity designated for community use, because the PEG channels are not under its editorial control, or otherwise assign PEG channels a second-class status.

The industry attempts to muddy the resolution of the petitions by raising a series of red herrings: NCTA and AT&T raise First Amendment issues that actually support the claims of petitioners; Comcast raises state law issues that were never raised by any of the petitioners, and need not be addressed to resolve any of the petitions, in a patent attempt to ask the Commission to weigh in on an issue that it lost before the Michigan district court; Comcast, Cablevision, and NCTA attribute to petitioners claims that they never made; and Comcast and AT&T both argue that their actions are actually beneficial to consumers and can be justified on that account. We rebut these points in Part II, although with respect to the AT&T comments, we generally rely on the response filed by the Alliance for Community Media *et al.*, except to rebut specific claims that AT&T made with respect to its provision of service in Houston and in the Los Angeles DMAs.

But once those arguments are disposed of, it becomes a fairly simple matter to resolve the specific issues raised by the district judge and the petitions concerning AT&T. One of the central issues is whether Section 623(b)(7) applies in communities that are subject to effective competition, and whether the actions taken by Comcast (as well as companies like Cablevision) violate Section 623(b)(7). As explained in Part III, Section 623(b)(7) – which obligates operators to provide PEG as part of a basic service tier – does not disappear with rate regulation; and providing PEG channels in a manner that significantly burdens access to them is inconsistent with the specific obligations imposed by Section 623(b)(7) (as well as the other PEG provisions of the Cable Act).

Part IV addresses specific issues raised by the industry with respect to the questions posed by the district judge in the Petition filed by the Michigan Petitioners.

I. THE CABLE ACT DOES NOT PERMIT OPERATORS, AT THEIR DISCRETION, TO CONTROL THE FORMATTING, PRICING, OR THE MANNER IN WHICH PEG CHANNELS ARE PROVIDED.

A. The Cable Act Requires Cable Operators To Act As A Conduit With Respect to Channel Capacity Designated for PEG Use, and Establishes A General Duty To Deliver PEG Programming To All Subscribers in a Community.

Contrary to the claims made by industry commenters, the Cable Act does establish requirements with respect to PEG channels even beyond the requirements established by Section 623(b)(7), 47 U.S.C. § 543(b)(7). Congress did not intend channel capacity designated for PEG use to be subject to the cable operator’s control.

As Montgomery County pointed out in its initial comments at 6, the Cable Act’s PEG requirements begin with Section 611(a), 47 U.S.C. § 531(a), which permits localities to “designate” channel capacity for “public, educational and government use.” Those terms are not specifically defined in the Act, but as the courts have recognized, the terms establish a

“framework for these franchise agreements: that the channels be set aside for public, educational, and governmental use.” *Time Warner Cable of New York City v. City of New York*, 943 F. Supp. 1357, 1367 (S.D.N.Y. 1996), *aff’d* on other grounds, 118 F.3d 917 (2d Cir. 1997). “Congress’s meaning and intent” with respect to PEG channels “is apparent from the legislative history of the Cable Act.” *Id.* at 1367. As Justice Kennedy explained, PEG channels must “comport in some sense with the industry practice to which Congress referred in the statute.” *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 790 (1996). That “industry practice,” as reflected in the legislative history, places the operator in a position of acting as a mere conduit, with a duty (in the absence of an express franchise provision to the contrary) to deliver programming to all subscribers. Montgomery County Comments at 6-8.

The FCC has implicitly recognized that Section 611 establishes a duty to deliver PEG programming to all subscribers, in a case relied upon by AT&T. *In re Implementation of Section 302 of the Telecommunications Act of 1996*, 11 FCC Rcd. 18223 (1996); *recon. In re Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems*, 11 FCC Rcd. 20227 (1996). Open video system providers are not directly obligated to provide PEG channels as part of the basic service tier (only one provision of Section 623 applies to them), but they *are* subject to the PEG provisions of the Act contained in Section 611. Section 653(c)(2)(A), 47 U.S.C. § 573(c)(2)(A), requires the Commission to impose PEG access obligations that are, to the extent possible, “no greater or lesser” than the obligations imposed on cable operators under Section 611. If the industry were correct, and cable operators are free to offer PEG on any tier of service, at any price and in any format, then OVS providers should also have been able to make PEG available to a select group of subscribers. However, the Commission *did not* find that an OVS operator was free to provide the channels in a way that

made them accessible only to some subscribers, or in any format, or on any tier. Rather, the Commission found that the OVS operator had an “inescapable” duty to provide PEG access channels “to all subscribers.” 11 FCC Rcd. at 18304.

AT&T cites this decision, and others, to support a claim that it should be allowed to deliver PEG signals via a channel 99 platform because of technological limitations within its system. They do not. While the Commission has been willing to provide new entrants some flexibility in satisfying public interest obligations, it has not been willing to allow new entrants to avoid those obligations. The OVS provisions are a case in point. The OVS provisions of the Cable Act assume that video service may be provided by several different entities via the same open video system. The OVS orders recognized that PEG channels could be delivered in one of two ways that would have no impact on the subscribers: the owner of the open video system might deliver all PEG channels to every person receiving service via the system (regardless of the service provider used); or the OVS owner could require each video service provider using the system to provide its own subscribers all the PEG channels: that is, the OVS owner could require each video service provider “to offer at their expense mandatory services such as PEG access channels.” *Id.* at 18305. In either case, however, every subscriber receiving service via the OVS would be able to view the PEG channels without additional cost or burden. That the OVS operator was given some flexibility in deciding *how* PEG was to be provided does not mean that the OVS operator could deliver signals with reduced functionality, or provide PEG only for additional fees, or impose additional burdens on the receipt of PEG. Rather, the Commission emphasized that the operator had flexibility so long as it was “not diminishing the provision of the PEG access channels to the community.” *Id.* Interestingly, on reconsideration, the Commission made it clear that it expected telephone companies operating OVS systems to

configure their systems “to comply with the PEG access obligations for each franchise area with which each system overlaps.” 11 FCC Rcd. at 20288. AT&T does not contend it made any serious efforts to do so (while AT&T on the one hand contends that it cannot provide PEG in the same manner as it provides commercial channels, its own declarations are to contrary, as the reply comments of the Alliance for Community Media *et al.* explain). In short, the Commission has recognized precisely the duty industry commenters deny exists: an “inescapable” duty to act as a conduit and to deliver the PEG channels to subscribers as part of any service offering.

As Montgomery County also explained, the operator’s duty to act as a conduit is cemented by Section 611(e), 47 U.S.C. § 531(e), which prohibits a cable operator from exercising “editorial control” over PEG channels. Montgomery County Comments at 9-12. Comcast (at n. 87) argues that Section 611(e) only prohibits control over the *content* of PEG programming, but neither the language of the provision or its legislative history supports this claim. Rather, the legislative history of the Cable Act emphasizes that it is “integral to the concept of the use of the PEG channels that such use be free from *any* editorial control or supervision by the cable operator” H.R. Rep. No. 98-934 at 47 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4684 (emphasis supplied). Any doubt that decisions as to the manner in which the PEG channels are provided involve “editorial control” is removed by the industry’s own comments: the NCTA, AT&T and Cablevision (at n.54) all raise First Amendment arguments that rest squarely on the assumption that requiring operators to provide PEG channels to all subscribers in a nondiscriminatory manner interferes with the editorial discretion of the operator. But it is precisely this editorial discretion that Section 611(e) was meant to limit so that PEG channels would be available to all subscribers, without additional burden.

The special status of PEG channels is further confirmed by other provisions of the Act. For example, Section 621(b)(3)(D) of the Cable Act, 47 U.S.C. § 541(b)(3)(D), prohibits localities from imposing any telecommunications service obligations on cable operators, other than as permitted by Sections 611 and 612, or in connection with institutional network obligations. That provision makes little sense unless one recognizes that PEG obligations require an operator to deliver PEG programming end to end. This is not to say that a franchising authority is prohibited from entering into a franchise agreement that permits the operator to provide PEG programming to only certain groups of subscribers. As the Michigan Petitioners pointed out, the Commission has long recognized that if a franchise *expressly* so provides, an operator may carry a PEG channel on a tier other than the basic service tier. Michigan Petition at 16. But this is precisely the opposite of the position asserted by industry commenters, who claim that they may format and deliver PEG channels in any way that they choose, absent an express provision in a franchise prohibiting them from doing so.³

B. No Provision of the Act Permits Operators To Exercise the Sorts of Control Over the Provision of PEG That They Claim.

In addition to misunderstanding the fundamental nature of channel capacity designated for PEG use, the industry fails to identify any provision of the Cable Act that permits an operator to treat PEG channels differently, and to provide them in any format, on any tier, in any manner or at any price desired.

1. Cablevision claims that Section 625(d), 47 U.S.C. § 545, makes it clear that an operator is free to place video programming on any tier desired if a community is subject to effective competition, and argues that this means that it is free to format and offer PEG as it

³ Of course, as industry commenters read the Act, a franchise provision requiring them to provide PEG channels on a particular tier or in particular format would be preempted by federal law.

desires.⁴ Section 625(d) only authorizes a cable operator that faces effective competition to rearrange its non-broadcast commercial services from one tier to another. Section 625(e) explicitly forbids an operator from exercising Section 625(d) authority with respect to PEG channels by providing that nothing in Section 625 applies to any requirement for “service relating to public, educational or governmental access.” Far from supporting the industry arguments, Section 625 confirms that an operator is not permitted to treat PEG in any way it chooses, even in a community where there is effective competition. Similarly, Bright House (at p. 3) claims that Section 623 allows it to price PEG channels in any way it chooses if it faces effective competition. Not so. “A finding of effective competition permits a cable operator to price and market *its services* according to market forces.” *In re Flinn Broadcasting Corp. v. Knology Cable*, 18 FCC Rcd. 1680, 1682 (2003) (emphasis added). It does not empower a cable operator to market and freely deliver channel capacity that has been “designated” for community “use,” and which is removed from its control.

2. Comcast and NCTA argue that the requiring them to deliver the channels to subscribers without additional charges or burden would be inconsistent with Section 624(e), 47 U.S.C. § 544(e), which states that “no State or franchising authority” may “prohibit, condition or restrict” a cable system’s use of “any type of subscriber equipment or any transmission technology.” Comcast raised this same issue before the *Dearborn* district court, and the court properly rejected it. *See* Michigan Petition, Exhibit J. In the first place, the obligations to deliver PEG described above, and required by Section 623(b)(7) (discussed in Part III), are federal law requirements. Section 624(e) at most reaches only state and local requirements. Moreover, this Commission has made it clear that Section 624(e) is not as broad as industry

⁴ Cablevision Comments at 10.

commenters contend. Rather, it is a narrow provision that at most prevents a locality from specifying precisely what technology – fiber or copper, analog or digital – an operator may use in providing its own cable services. However, as this Commission has found:

While the 1996 Act imposes some specific limits of the role LFAs play with respect to subscriber equipment and transmission technology, it does not diminish the LFAs' important responsibilities in determining local cable-related needs and interests and seeing that those needs are met through the franchising and renewal process. Although local authorities are limited in dictating the use of transmission technologies, other facility and equipment requirements can still be enforced under Section 624(b). In addition, Section 611 of the Communications Act affirms the ability of an LFA to establish and enforce franchise provisions concerning facilities and equipment related to PEG channels and for educational and governmental use of channel capacity on institutional networks.

In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Report and Order, 14 FCC Rcd. 5296 ¶ 142 (1999). This reading reconciles Section 624(e) (localities may not dictate transmission technology) with Sections 611 and 624(A)-(B). To put it another way, Section 624(e) is not a lever that somehow can be used to undo every other provision of the Act, nor does it somehow allow an operator to evade franchise obligations. The fact that a locality may not dictate a transmission technology does not mean that an operator is free to choose a transmission technology that would prevent it from providing PEG channels, complying with other PEG obligations, complying with customer service obligations, or satisfying any of the other obligations that may be included in a franchise under federal law.

Finally, perhaps as significantly, and contrary to the repeated suggestion of the industry commenters, none of the Petitions dictates what transmission technology an operator may use. Michigan Petitioners do not claim that PEG channels must be provided in an analog format – their contention is that PEG channels cannot be provided in a discriminatory manner that

effectively requires subscribers to jump through special hoops to receive them.⁵ The Alliance for Community Media *et al.* never argues that AT&T is prohibited from using IPTV technology – it simply argues that AT&T cannot use technologies in a discriminatory manner that burdens access to and use of PEG channels.

3. NCTA, Comcast, and Cablevision each argue that operators have no obligation to deliver PEG channels in a format so that they are “viewable” by subscribers. The “must-carry” provisions of the Cable Act, they point out, contain very detailed requirements with respect to operator carriage of broadcast channels. The *absence* of similar requirements in the PEG sections of the Cable Act, they argue, means that Congress did not require operators to deliver PEG in a viewable format. Hence, the operator is free to deliver PEG in virtually any manner, and to charge subscribers for equipment required to access the channels. However, that argument does not follow. The obligation to provide PEG channels in a viewable format follows *inter alia*, from the obligation to deliver those channels end to end. The obligation to provide those channels on a non-discriminatory basis follows from the duty to deliver the programming to all subscribers and from the obligation to act as a conduit: the operator therefore cannot subject PEG programming to any greater burden than applies to the most accessible channels carried on the system (which are, of course, the standard broadcast channels). Given these obligations, there was no reason to provide any more detailed requirements in Section 611. Section 614, by contrast, sets out very detailed requirements because Congress was regulating and balancing what was fundamentally a much more complex commercial relationship between

⁵ The Michigan Petitioners consistently argued, for example, that PEG could be provided in a digital format when standard broadcast channels are provided in a digital format, and also argued that there might be ways to provide PEG channels only in a digital format that was not discriminatory and would not have adverse effects on consumers. The industry has proposed no such methods, however, as the comments filed in this proceeding make clear.

broadcasters and cable operators. But the fact that more detail is required to describe must-carry does not somehow imply that the operator has lesser obligations with respect to PEG.

4. Industry commenters argue that requiring them to deliver PEG channels in a non-discriminatory manner, or so that customers are not required to pay additional charges to receive them, violates Section 624(f), 47 U.S.C. § 544(f), which provides that federal agencies, states and franchising authorities may “not impose requirements regarding the provision or content of cable services, except as expressly provided in this chapter.” NCTA Comments at 10; Cablevision Comments at 17. This misses the point in two respects: first, the act expressly authorizes the “designation” of channel capacity for public educational and government use; expressly provides that the operator may not exercise editorial control over the channels; and expressly requires the provision of PEG channels as part of the basic tier. The Act, *inter alia*, defines what a “channel” is, and permits the FCC to establish technical standards. A significant part of the ACM petition is based on these express provisions.⁶ The dispute is not whether the Act includes those “express” provisions, but what those provisions mean with respect to the duty of cable operators to provide PEG. Section 624(f), even if read very broadly, creates no bar to granting the relief requested in the petitions before the Commission.

However, Section 624(f) is read narrowly, reaching only regulations that forbid or require an operator to carry particular programs, outside of PEG requirements. *United Video, Inc. v. FCC*, 890 F.2d 1173, 1187-1189 (D.C. Cir. 1989); *Storer Cable Communications v. City of Montgomery*, 806 F. Supp. 1518, 1545-1547 (M.D. Ala. 1992); *Chicago Cable Communications*

⁶ As ACM points out, additional obligations are inherent in the definition of the term “channel” under federal law.

v. Chicago Cable Com'n, 678 F. Supp. 734, 746-747 (N.D. Ill. 1988). It has no applicability here.⁷

* * *

Under the Commission's rulings, and under the Cable Act, a cable operator that has been required to "designate channel capacity for [PEG] use" must provide PEG programming to *every* subscriber in a community – not every subscriber who buys access to a particular type of service. To put it another way, as a general matter, because of the nature of channel capacity designated for this PEG use, a subscriber who can receive any video signals provided by an operator should also receive the PEG channels without the need to incur any additional expense or to install any extra equipment; and certainly, the operator may not format or offer PEG programming so that a television that is capable of receiving the PEG channels ceases to receive those channels, but not others.⁸ The Commission should so find, reject the industry's arguments to the contrary, and resolve the petitions in light of this basic principle.

⁷ Industry commenters, including Comcast, go further and suggest that Section 544(f) and other provisions cited above prohibit a locality from establishing or enforcing requirements with respect to the placement of PEG signals or their quality in a franchise. The issue of what requirements may be enforced in a local (or state-issued) franchise is not before the Commission. However, the arguments are meritless: not only are the arguments based on an overbroad reading of the relevant sections, the Act itself expressly provides that "[a] franchising authority may enforce any requirement in any franchise regarding the providing or use" of channel capacity designated for PEG use. 47 U.S.C. § 531(c). The breadth of this section is emphasized by the following sentence, which emphasizes that the authority to enforce PEG requirements includes the authority to enforce "any provisions" for "services, facilities or equipment" proposed by the operator. *Id.* Hence, the Act expressly permits the enforcement of PEG obligations in a franchise, contrary to industry claims.

⁸ The industry commenters repeatedly point out that a subscriber with an older television set that is not cable ready, or that can receive a limited number of signals, requires a converter to receive services that can be received by other subscribers without a converter. That may be so; but in this case, we are not dealing with a limitation that flows from the number of channels a television can receive, or that reflects the inability of the set to receive any signals from the operator. We are dealing with subscribers who *were* receiving the PEG channels, and who will be prevented from continuing to do so because of the unilateral actions of the operator.

II. THE INDUSTRY ARGUMENTS THAT COMMISSION VINDICATION OF PEG OBLIGATIONS WOULD VIOLATE THE FIRST AMENDMENT, DENY CONSUMERS BENEFITS, OR VIOLATE BASIC PRINCIPLES OF SOVEREIGNTY CANNOT JUSTIFY THE DISPARATE TREATMENT OF PEG.

A. The Claimed “Benefits” of Comcast’s Digitization, or of AT&T’s Channel 99 Cannot Justify Violations of the Cable Act.

Perhaps not surprisingly, each of the industry commenters suggests that its proposed treatment of PEG offers enormous benefits, and that it has implemented its PEG solution in a manner consistent with the public interest. The record shows otherwise.

1. The digitization of the PEG channels by cable operators.

NCTA, Comcast, and Cablevision argue that the digitization of the PEG channels is simply part of an orderly transition from analog to all-digital service, that did not in any way target PEG channels, and that provides enormous benefits to consumers by freeing capacity for additional commercial services. Comcast goes so far to boast that its method for converting PEG to digital was consumer-friendly, and more than adequate, and argues that there is little harm to consumers.⁹

The facts are to the contrary. First, this is not part of some “orderly plan” to convert cable systems to an all-digital format. In the *Dearborn* court proceeding, Comcast admitted that it *had* no timetable for converting its analog broadcast channels to digital. As far as the record shows, it intends to provide these channels in one way, while offering PEG in another. Nor does Cablevision claim that it will be converting all channels to digital by a date certain. Second, the actions were targeted at PEG channels. The record shows that Comcast only planned to convert one other channel (its own local programming channel) to digital at the time it converted the PEG channels to digital. And Comcast identifies no other set of services where it created the sort

⁹ Comcast Comments at 19.

of barriers to service reception that it created here. For services on the digital tier, for example, Comcast does not claim that it connects subscribers to the system, and then leaves it to subscribers to separately request and install a converter that permits the subscriber to view the service. Hence, Comcast's claim (at 4) that its approach to PEG is not "unique" is at best disingenuous.

Second, the hundreds of comments filed in this proceeding, including the initial comments filed by the communities on this pleading, show that the proposed digitization of PEG channels creates significant problems for consumers and programmers, including, as explained *supra*, consumers with televisions with QAM tuners. The Michigan Petitioners, in their initial comments, showed that the proposed digitization was anything but consumer friendly. Montgomery County and Dearborn both showed that digitization could interfere with emergency communications. And of course, the ultimate rebuttals to Comcast's claims come from two sources: the court, which found that the change would result in irreparable harm to subscribers and to local governments;¹⁰ and Comcast itself, which appeared before Congress and testified that it had managed the digitization poorly.¹¹

2. The AT&T PEG platform.

AT&T claims regarding the benefits of its PEG platform are likewise overblown, and certainly cannot justify its failure to comply with its obligations under federal law, including the failure to pass through closed captioning.

¹⁰ See Michigan Petition, Exh. B.

¹¹ Testimony of David Cohen before the House of Representatives Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, Hearing on Public, Educational, and Governmental Services in the Digital TV Age at 2, 18 (January 29, 2008), *available at*: <http://www.ourchannels.org/wp-content/uploads/2008/01/david-cohen-written-testimony.pdf>

First, AT&T exaggerates the reach of its platform. It claims to be providing services in the Houston DMA, but until a few days ago, it was not doing so. Instead, its efforts to provide service had been characterized by a repeated inability to encode and deliver a signal to subscribers. Comments of the City of Houston. In just the last few days, AT&T has installed new encoding equipment, and (without the permission of the City) begun to carry the City's government access channel. Reply Declaration of Dwight Tyrone Williams Sr. at ¶ 2-3, attached hereto as Exhibit A.¹² However, this hardly supports a claim that AT&T is providing PEG in a manner that satisfies requirements of federal law – or in a manner that the Commission should tolerate. Tests done at the encoder showed some anomalies. For example, sharp transition of light to dark program material exhibited extreme pixelation, most easily noted on the HISD logo 'bug' which consisted of a sharp vertical transition from black to white. Program material with a rapidly transitioning nature exhibited a loss of resolution or "softening" of the image. Also noted was distortion of linearity of circular content, typified by a "jaggedness" of circles. *Id.* at ¶4. Those problems appeared at an early stage in the process that results in delivery of programming to subscribers. AT&T has not yet set up a test or provided the return feeds that would allow the City to determine the adequacy of the signal received by subscribers. Yet, many problems the City observed in the past occurred because of transcoding between the encoder and the subscriber. *Id.* at ¶ 6-7. Hence, even after significant effort, the City of Houston is unable to conclude that AT&T can provide PEG signals comparable in quality to the signals provided by other operators. Of course, the signals suffer from admitted differences in functionality as compared to other commercial channels offered by AT&T.

¹² Exh. A hereto.

Likewise, the City of Los Angeles has refused to permit AT&T to pick up its PEG signals because of the manner in which the Channel 99 platform functions (AT&T has refused to provide the City PEG channels despite repeated requests that it do so), and has formally concluded that the AT&T platform is inadequate and unacceptable. Declaration of William Imperial, ¶ 4, attached hereto as Exhibit B. Among other things, the City devotes substantial resources to close caption City Council meetings and to deliver signals with a Spanish secondary audio track. The provision of a secondary audio track and closed captioning serve significant public purposes. U.S. Census Bureau data indicates that 46.5 % of the population of Los Angeles is persons of Hispanic or Latino origin. According to the 2009 figures from The Nielsen Company, 32.8 % of Los Angeles households are Hispanic, and 38.1 % of those households speak only or mostly Spanish. For that reason, the City has endeavored to ensure that all its citizens are able to participate meaningfully in municipal government, and in particular are able to watch and understand the City Council at work. Since 2003, the City has produced all its City Council meetings carried on Channel 35 with a secondary audio signal; all other operators in the City, including new entrants who are competing with traditional operators, carry this signal. *Id.* at ¶ 6.

Approximately 12% of the population is comprised of individuals who are deaf, hard of hearing or have a hearing disability. Since 1998, to ensure that these citizens are able to participate meaningfully in municipal government, and in particular are able to watch and understand the City Council at work, the City has produced all its City Council meetings carried on Channel 35 with closed captioning. The City spends \$125,000 per year to produce closed captioning. Thus, the failure of AT&T to pass through these signals affects not only the City as a speaker, but also affects viewers. The impact is not limited to AT&T customers. If AT&T is

permitted to strip information from PEG signals, other operators will be able to seek the same right to save bandwidth, and critical public information will be lost. It is clear from the comments of Comcast and NCTA that traditional cable operators are trying to recapture bandwidth, so this risk is far from speculative. Rather than run that risk – and rather than permit AT&T to discriminate against PEG in a manner that would be unacceptable if other companies adopted the same course – the City decided it could not provide PEG programming to AT&T on AT&T’s terms. *Id.* at ¶ 4, attached hereto as Exhibit B. This is far from a case where the AT&T PEG platform has been widely accepted. Rather, the record indicates it is widely, if not universally, viewed as both inadequate and, in the case of the City of Los Angeles, “unacceptable.” *Id.*

Second, AT&T claims with regard to the benefits of its platform are, to say the least, suspect. The first claim is that by providing the channels on a regional basis, it advances First Amendment interests by allowing users to reach an audience that they could not reach previously. In fact, communities in Los Angeles and elsewhere have always been free to exchange PEG programming on a regional basis, and many did so through traditional cable systems and interconnections. Providing a similar functionality through a menu that requires users to scroll through hundreds of channels to access programming is hardly a significant improvement. As importantly, the model prevents a speaker from targeting programming to particular audiences in a limited geographic area, and thus may actually limit speech, by making it more difficult or expensive for a speaker to obtain rights needed to distribute programming over a broader area.¹³ And perhaps most importantly, AT&T is not offering communities a

¹³ This is not to say that franchising authorities and channel users would object to carriage on a Channel 99-type platform if that is offered as an *additional* outlet for programming, in addition

choice of traditional channels, or of a Channel 99 platform. This is a case where AT&T is demanding that communities accept the “benefits” in return for a reduced system that cannot even satisfy federal closed captioning requirements. This is utterly inconsistent with the basic structure of the Act, which leaves control of the channels to localities, not to operators.

Perhaps recognizing the problems with its platform, AT&T argues that its non-compliance with federal law should be excused because it is using a new technology. According to it, the Commission should allow consumers to choose whether its PEG model or traditional PEG models are preferable. A consumer who dislikes the AT&T model, the argument goes, can simply choose to purchase service from a traditional operator. The problem, of course, is that if the Commission finds that the Cable Act permits AT&T to provide a stripped down version of PEG, other operators are likely to go to a similar model, or an even more draconian version of the PEG digitization proposed by Comcast. AT&T’s notion – that “[i]n a competitive marketplace, market discipline, not regulatory intervention, will ensure that video providers offer PEG programming that consumers demand”¹⁴ – has no support in the record, and defies a basic understanding of public interest obligations. Certain things are required *precisely because* the competitive marketplace will not provide them on its own, PEG channels included. Moreover, Congress provided no indication that it expected cable operators to compete in the delivery of PEG programming to protect the interests discussed above. Indeed, Comcast’s claims underscore this point. It claims that competitive pressure forces it to “*reclaim* the bandwidth” currently occupied by PEG, and to use it for “new and improved video services, additional high

to the traditional PEG channels, and if programmers have the ability to include or withhold programming from a wider distribution.

¹⁴ AT&T Comments at 47.

definition (HD) channels, greater video-on-demand (VOD) content, more ethnic programming, and faster Internet speeds.”¹⁵

B. Requiring Operators To Provide PEG On a Non-Discriminatory Basis Does Not Violate the First Amendment.

NCTA and AT&T both wrongly contend that it would run afoul of the First Amendment if the Cable Act were read to require a cable operator to provide PEG programming in the same format as it provides other required components of the basic service tier.¹⁶ The FCC has rejected similar claims recently, *In re TCR Sports Broadcasting Holding, L.L.P. D/B/A Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 46 Communications Reg. (P&F) 301(2008), and it should likewise reject the claims of the industry here.

In the first place, the claim is not properly before the Commission, and need not be entertained. In *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 973 (D.C. Cir. 1996), the D.C. Circuit specifically ruled that the PEG requirements of the Act survive a First Amendment challenge, and indicated that the sort of claims made by AT&T and Comcast must be raised in a forum where the First Amendment can be applied to specific franchise requirements as applied. NCTA’s claim – that restrictions on digitization would follow from granting the Michigan Petition – is particularly odd in that Comcast *is* in a forum where it could have claimed that the PEG obligations asserted by Michigan Petitioners, as applied, violated its First Amendment rights. Comcast has answered, but raised no First Amendment claim. That

¹⁵ Comcast Comments at i (emphasis added); *see id.* (citing the “competitive imperative” to take these actions).

¹⁶ NCTA Comments at 19. To a large degree, the First Amendment claims appear to be based on the false assumption that petitioners are requiring that cable operators provide PEG in a particular format. In fact, as discussed *infra*, petitioners are not asking that the Commission require operators to deliver PEG in any particular format.

suggests that granting the ruling requested by the Michigan Petitioners would not significantly implicate the operator's First Amendment rights.

Nor is this a case where it can be seriously claimed that Petitioners have failed to show that there are significant government interests at stake. The obligation to pass through closed captioning, for example, serves a significant interest in ensuring important information is available to those with disabilities. Government has a significant interest in ensuring PEG channels are easily accessible to all as a means of delivering emergency communications. The record is replete with data and declarations explaining the significant problems created by the Comcast digitization and the AT&T platform.¹⁷

Moreover, what is at stake here are conditions imposed upon operators not because they are speakers, but because they are constructing facilities that will permanently occupy important public resources and that will have important rights (including rights to obtain programming through a compulsory copyright system) that are simply not available to all. Under *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009), the operators can be subjected to conditions reflecting the benefits received.

But even assuming a more traditional First Amendment analysis is applied, the PEG provisions of the Act clearly survive. Contrary to NCTA's claim, PEG requirements are inherently content neutral and do not in any respect depend on the content of the cable operator's

¹⁷ NCTA at 18-19 complains that the initial petitions did not show what government interests would be served by granting the petitions. That is not the case with respect to the ACM Petition, and it was obviously unnecessary in the context of the Michigan Petition, as the *Dearborn* court had already found that digitization would result in irreparable harm. In any case, the comments filed in this proceeding leave no doubt as to the significance of the interests at stake.

speech, or the content of the speech of PEG users. .¹⁸ A content-neutral regulation will be sustained if:

[I]t furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377 (1968).

The requirement that a cable operator “provide” its subscribers with a “category” that includes PEG programming, *see infra*, Part III, furthers an important or substantial governmental interest, as discussed above, and as explained in great detail in the comments filed in this proceeding, and in the legislative history of the Act. *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1997). There is a “real threat” at issue. Even by Comcast’s count, if Comcast is allowed to proceed, nearly 30% of its subscribers would be “provide[d]” broadcast channels, but not PEG programming. These subscribers would lose access to these important information sources. If operators (including AT&T) are permitted to offer stripped down PEG channels, or to offer PEG channels in a manner that makes their viewership or use more burdensome, less accessible, a substantial portion of the public, including the disabilities community, will find themselves denied access to an important communication medium.

Requiring operators to provide PEG to all consumers on a non-discriminatory basis, without stripping the signal or diminishing it is directly related to these interests. Operators have a substantial monopoly interest in controlling access to their cable systems in order to maximize profits. By preventing operators from acting on that interest – by establishing a baseline standard

¹⁸ *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 973 (D.C. Cir. 1996). NCTA’s claim (at n. 31) that PEG requirements are content-based is unsupported.

for PEG – Congress clearly advanced its goal of ensuring that there would be widespread access to, and continued viability for, PEG programming.¹⁹

The PEG requirements that petitioners ACM, Lansing, and the Michigan Petitioners seek to vindicate do not burden more speech than necessary. First, if petitioners are correct as to what the Cable Act requires with respect to PEG, then the “burdens” imposed are exactly coincident with legitimate rights protected. For example, if Congress intended for PEG channels to be available to all subscribers without additional charge (a goal that serves important diversity interests), that goal cannot be served by allowing an operator to price and format PEG channels as it sees fit. That is enough to justify the requirements; but in any case NCTA’s and AT&T’s claims that the PEG requirements unduly burden their speech are much exaggerated. NCTA asserts that analog transmission is more burdensome to cable operators because it consumes more bandwidth.²⁰ However, nothing in the Michigan Petition requires any operator to provide PEG in an analog format – what is prevented is a discriminatory treatment of PEG. Each operator remains free to digitize all channels. Likewise, AT&T’s claim of “burden” seems to boil down to a claim that it would cost the company additional money to provide PEG channels

¹⁹ The Supreme Court has recognized the importance of protecting various forms of media, and ensuring that the public has access to information. The Court explained: “Although cable and other technologies have ushered in alternatives to broadcast television, nearly 40 percent of American households still rely on broadcast stations as their exclusive source of television programming.” *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 663 (1994). It added: “[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order.” *Id.*

²⁰ NCTA Comments at 21. NCTA contends that PEG imposes significant burdens on it, as compared to satellite provider that are required to set aside between 4 and 7% of channel capacity for educational uses. For an 860 MHz system, 7% of capacity is 60 MHz, which translates into roughly ten 6 MHz channels. As far as appears, the PEG obligations imposed upon operators are not significantly more burdensome than the set-asides imposed upon satellite providers. In any case, arguments about the impact on competition are not particularly relevant to a First Amendment claim, particularly as the position of cable operators and satellite providers is quite different: cable operators obtain access through the Cable Act franchises to a very important resource to which satellite providers do not have access, the public rights-of-way.

in a format other than the Channel 99 format. AT&T has not shown that the cost is excessive in light of its overall investment; but in any case, the First Amendment does not guarantee a speaker a right to use public property, or to other public benefits, without cost. *Gannett Satellite Info. Network, Inc. v. Metro. Transp. Auth.*, 745 F.2d 767, 773 (2d Cir. 1984). Finally, NCTA's claim that PEG channels are unnecessary in light of the existence of YouTube simply fails to recognize (a) the difference between a 24-hour, high-quality video channel, and an Internet feed; and (b) the legitimate need PEG users and programmers have to reach those who do not have access to a high-speed Internet connection. Indeed, if YouTube were a substitute for a PEG channel, imposition of PEG requirements would have no possible impact on AT&T or any other cable operator: they too can speak as much as they like through YouTube.²¹ In any case, courts "will not invalidate the preferred remedial scheme because some alternative solution is marginally less intrusive on a speaker's First Amendment interests." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 217-18 (1997).

²¹ NCTA Comments at 21. AT&T takes a similarly odd tack in the course of its First Amendment argument. It claims that if it were required to provide 90 PEG channels to all subscribers in a DMA, it would be required to drop 90 channels "that consumers desire and that AT&T would prefer to carry." AT&T Comments at 28-29. Oddly enough, however, if the Channel 99 platform were an adequate substitute for a real channel, AT&T could provide those 90 additional channels in the same way as it is providing PEG, and (by AT&T's logic) its speech interests would be enhanced. That it does not even consider that option for the channels "consumers desire and that AT&T would prefer to carry" is simply an admission that the Channel 99 platform is, in fact, deficient, as ACM claims. It is also an admission that AT&T is in fact targeting PEG channels, a claim it elsewhere denies. The AT&T argument is not convincing from a First Amendment standpoint, for reasons suggested above, and for another obvious reason: no one is requiring it to deliver every PEG channel within a DMA to every customer within that DMA. AT&T cannot base a First Amendment claim on alleged problems that flow from its own technical choices (and refusal to make additional investments).

C. This Proceeding Does Not Raise Significant Issues of State Sovereignty, As Claimed by Comcast.

Comcast (at 17-22) argues that granting the requested relief would conflict with state efforts to promote competition. The basis for this argument is never clear. As is evident on the face of the petitions before the Commission, *none* asks the Commission to interpret state law; *none* asks the Commission to preempt state law; and *each* only raises issues with respect to the interpretation of federal, Cable Act provisions.

The argument appears to be a red herring with four possible purposes.

First, Comcast argues (incorrectly, as it happens, see Part III) that the obligation to carry PEG on the basic service tier only applies where the operator is subject to rate regulation. What Comcast recognizes, but does not acknowledge, is that the Commission has not declared that all communities that Comcast serves are subject to effective competition (Meridian Township, for example, is not subject to effective competition). Hence, Comcast argues that by virtue of Michigan law, the state of Michigan has eliminated all rate regulation, and thus, the basic service obligations of the Act apply nowhere in Michigan. This argument misreads basic Cable Act requirements and Commission's rules with respect to rate regulation. Under the Cable Act, it is the "Commission Obligation To Subscribers" to "ensure that rates for the basic service tier are reasonable." 47 U.S.C. § 543(b). While qualified states or localities may be delegated the responsibility to review rates in the first instance, where a locality or a state cannot regulate rates, the Commission has responsibility for doing so, *see* 47 U.S.C. § 543(a)(6); 47 C.F.R. § 76.913(b)(2).²² It is an odd view of sovereignty to suggest that a state may by statute prevent a

²² While the Commission does not need to resolve the issue, it is worth noting that the Michigan law does not actually deprive local franchising authorities of the right to regulate rates. There are significant differences between the Michigan Petitioners' view of the meaning of state law and Comcast's view of it, but it is clear that at most Comcast is contending that provisions it cites prevent a locality from imposing franchise requirements in addition to those specified in

federal agency from exercising responsibilities assigned to it. Contrary to Comcast's arguments, absent a *Commission* finding of effective competition, 47 U.S.C. § 543(a)(2), basic service rates in Michigan remain subject to regulation – even if it is not entirely clear by whom.

The second reason Comcast may raise the issue is that (as it admits at 20-21) the district judge in the *Dearborn* case found that portions of the Michigan state law are preempted by the Cable Act. Comcast appears to be inviting the Commission to make sweeping statements regarding the preemptive reach of the Cable Act. But as no preemption issue is raised by any petition, the Commission should decline the invitation.²³

The third purpose of raising the issue appears to be to delay matters. Comcast suggests that the Commission should review every state law, and then render its decision in light of those state laws. Comcast never explains why this approach makes any sense: in the first place, many of the state laws, including Michigan's laws, expressly incorporate federal law requirements, so the determinations that the Commission makes with respect to the meaning of *federal* law in this proceeding could not possibly undermine the state law. Mich. Comp. Laws Ann. § 484.3302(h). More importantly, the federal law is what it is; its impact on state law can be evaluated in an appropriate forum, on a case by case basis, should any issues actually arise. The only purpose

Michigan law. Comcast Comments at 20. However, rate regulation under Section 623 has never been treated as an obligation that must be imposed through a franchise contract; rather, it is a federal *regulatory* requirement. A community is not imposing additional “franchise obligations” on an operator when it acts pursuant to that federal program. The Commission early on recognized that a community could regulate rates under Section 623 (if it was otherwise qualified to do so) even if the franchise expressly prohibited rate regulation. *In re Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, 8 FCC Rcd. 5631 ¶¶ 61-66 (1993).

²³ Comcast will have its opportunity to appeal the court's decision, and to present its best case in an appropriate forum. If its confidence is warranted, it will prevail. As it happens, its criticism of the district court leaves out broad portions of the legislative history and the statute that underlie the court's decision, and which show that Comcast's claims are meritless. There is certainly no reason for the Commission to embark on the sort of analysis invited by Comcast.

for engaging in the sort of *ad hoc* review suggested by Comcast is to delay resolution of important federal issues properly raised by the parties.

Finally, Comcast may be attempting to argue that where a state has adopted a law, and not explicitly required operators to carry PEG channels on the basic service tier, the Commission should assume that the state's silence means that it intended to allow operators to provide PEG in any way the operator sees fit.²⁴ In fact, however, there is no reason to make that assumption at all. There is every reason to suppose that state legislators wrote state laws understanding that there were applicable federal requirements that made it unnecessary to address certain matters through state laws or franchises. Any other view would effectively require each state to re-create the Cable Act in excruciating detail in order to avoid waiver of rights created by federal law.

The communities on this reply are acutely aware that preemption issues present sensitive questions. Los Angeles, for example, has authorized the City Attorney to file suit in California under state cable law, which *inter alia*, establishes an independent requirement that a video services company provide PEG channels with functionality and quality similar to that provided on commercial channels it carries. Los Angeles was therefore pleased to see that the petitions were limited to federal issues, and believes it is important that the Commission avoid the sort of expedition into state law urged by Comcast.

²⁴ This is presumably the point of Comcast's extended discussion of what Michigan law "requires" and allows it to do. The Michigan Act is silent with respect to the placement of PEG channels (except to incorporate the federal law requirements), and Comcast seeks to imply authority for it to act as it deems fit from this silence. This is evident from the fact that Comcast cites no provision that actually authorizes the placement of PEG on non-basic tiers, and certainly nothing that would allow Comcast to exercise prohibited "editorial control" over PEG by burdening the reception or use of PEG channels.

III. EACH OPERATOR MUST PROVIDE SUBSCRIBERS A BASIC SERVICE TIER THAT INCLUDES PEG CHANNELS; CONSISTENT WITH THAT OBLIGATION, AN OPERATOR MAY NOT IMPOSE SPECIAL BURDENS ON ACCESS TO PEG PROGRAMMING.

A. The Requirement that An Operator Provide Subscribers a Basic Service Tier That Includes PEG Programming Does Not Disappear Where An Operator Faces Effective Competition.

There is of course, another obligation with respect to PEG channels recognized by all commenters: that is, the obligation to provide PEG channels as part of a basic service tier under Section 623(b)(7), 47 U.S.C. § 543(b)(7). The comments seem to agree on one point: if Section 623(b)(7) is solely a rate regulation provision, it does not apply where a cable operator faces effective competition; if it goes beyond rate regulation, the provision applies even where an operator faces effective competition. This is because (as the Michigan Petition showed at 14-15), the only right that disappears where there is effective competition is the right to regulate the rates the operator charges for the provision of cable service; by the terms of the statute, other aspects of Section 623 remain in force.

The Michigan Petitioners showed that even if Section 623(b)(7) is viewed in isolation, the legislative history indicates that it was intended to serve purposes in addition to rate regulation, and to secure the provision of PEG channels to all subscribers, on a nondiscriminatory basis as compared to standard broadcast channels that the operator is required to carry. Petition at 10. Industry commenters raise two broad arguments to the contrary.

First, commenters including NCTA, Comcast, and AT&T argue that the legislative history does not support the Michigan Petitioners' claims because it only suggests that Congress intended for persons seeking to place programming on PEG channels to have "nondiscriminatory" access to them. Comcast Comments 30; NCTA Comments 11; AT&T Comments at 43. The relevant portion of the legislative history is to the contrary:

[Section 543(b)(7)] sets forth the minimum programming that is to be offered on the regulated basic service tier. Cable systems will be required to offer on this tier all commercial and noncommercial must carry stations, any PEG access programming required by the franchise authority to be provided to subscribers, and any other broadcast signals retransmitted by the cable operator. With respect to PEG access channels, it is not the Committee's intent to modify the terms of any franchise provision either requiring or permitting the carriage of such programming on a tier of service other than the basic service tier.

The Committee believes that PEG access programming *is an important complement to local commercial and noncommercial broadcasting* to ensure that the government's compelling interests in fostering diversity and localism, providing educational and informational programming, and promoting the basic, underlying values of the First Amendment, are advanced by cable television. It has been demonstrated that where PEG channels exist, these interests have been well served.

PEG programming is delivered on channels set aside for community use in many cable systems, and *these channels are available to all community members on a nondiscriminatory basis*, usually without charge. Public access provides ordinary citizens, non-profit organizations, and traditionally underserved minority communities *an opportunity to provide programming for distribution to all cable subscribers*. Educational access allows local schools to supplement classroom learning and to reach those students who are beyond school age or unable to attend classes. Governmental channels allow the public to see its local government at work, thus contributing to an informed electorate, which is essential to the proper functioning of our democratic form of government. PEG channels serve a substantial and compelling government interest in diversity, a free market of deans, and an informed and well-educated citizenry. PEG access provides an effective opportunity for *all citizens* to contribute to, *and benefit from the information age*, and enables communities *to take advantage of cable's broadband capabilities*. *Because of the interests served by PEG channels, the Committee believes that it is appropriate that such channels be available to all cable subscribers on the basic service tier and at the lowest reasonable rate.*

H.R. Rep. No. 102-628 at 85 (1992) (emphasis added). Contrary to the claims of industry commenters, the italicized portions show that Congress was not simply concerned with “nondiscriminatory” access by potential programmers of the channels. It also wished to ensure that the channels themselves were provided on a nondiscriminatory basis, a point emphasized by

the repeated emphasis on providing the programming to “*all subscribers*” and the reference to PEG channels as a “complement” to local broadcast channels. While Section 623(b)(7) clearly is significant for purposes of rate regulation, it is not solely concerned with rate regulation, and thus continues to apply whether a system does or does not face effective competition.²⁵ The repeated claim by industry commenters that there is no indication that Congress intended for PEG to be provided in the same manner as standard broadcast channels is obviously incorrect.

Any doubt as to the point disappears when one considers Section 623(b)(7) not in isolation, but in light of the other PEG obligations established by the Cable Act, discussed in Part I. The result urged by industry commenters – that the obligation to provide PEG channels as part of basic disappears with effective competition, and leaves the operator free to format PEG channels and provide them in any way it desires – would mean that PEG channels could be priced and marketed at any level, and in a manner that made the channels virtually useless to programmers and inaccessible to most subscribers. That is not what Congress intended.²⁶

Industry commenters also argue that a finding that Section 623(b)(7) continues to apply where an operator faces effective competition is inconsistent with the Commission’s own decisions, and with court decisions. It is certainly true that the Commission has, in some cases, assumed that the obligation to provide a basic service tier disappears with effective competition. Michigan Petitioners acknowledged as much in their Petition at 17. However, as Michigan

²⁵ Indeed, the Cable Act expressly envisions that a “basic service tier” continues to exist as a regulatory classification even after the rates for that tier are not subject to regulation. 47 U.S.C. § 543(b)(1) (referring to “rates that would be charged for the basic service tier if such cable system were subject to effective competition”).

²⁶ There is an alternative reading of the Act that is consistent with Congressional goals, but it does not help industry commenters. Under that reading, an operator that faces effective competition would not be obligated to provide a basic service tier, but would be required (under the points described in Part I.A.), to provide PEG channels to every subscriber, whether that subscriber buys something that fits the definition of basic service or not.

Petitioners also showed, the Commission has issued decisions to the contrary as well. *Id.* Industry commenters ignore these decisions. This case will certainly require the Commission to square different strands of authority, but the issue has hardly been resolved at the Commission level, as AT&T, Comcast, NCTA, Cablevision and Bright House claim.

Likewise, the issue has not been resolved at the court level. The industry commenters argue that *Time Warner Entertainment v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), dispositively concluded that Section 543(b)(7) does not apply in communities where there is effective competition. Michigan Petitioners were well aware of that decision, but as their Petition pointed out, *Time Warner* itself points in two directions, and actually assumes that Section 623(b)(7) continues to require provision of a single basic service tier, regardless of whether a community does or does face effective competition. *See* Michigan Petition 15-16. The issue before the Commission with respect to PEG channels was never addressed directly by the court.

Even if the decision were on point, the D.C. Circuit itself has recognized that an administrative agency is not bound to follow the ruling of a single federal circuit court when the issue has not been tested in various circuits:

Although the decision of one circuit deserves respect, we have recognized that “it need not be taken by the Board as the law of the land.” *Givens v. United States R.R. Retirement Bd.*, 720 F.2d 196, 200 (D.C.Cir.1983). When the Board’s position is rejected in one circuit, after all, it should have a reasonable opportunity to persuade other circuits to reach a contrary conclusion.

Johnson v. U.S. R.R. Retirement Bd., 969 F.2d 1082, 1093 (D.C. Cir. 1992). This is especially true when the agency’s decision is subject to review in various circuits, as it is under the Hobbs Act.²⁷ In these petitions, where the issue is squarely raised, the Commission can and should

²⁷ *See, generally*, Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 Minn. L. Rev. 1339, 1348 (1991) (explaining that “[n]onacquiescence in

find that the requirements of Section 623(b)(7) apply even where a system is subject to effective competition.

Other cases cited by the industry are of even less moment. *City of St. Petersburg v. Bright House Networks, LLC*, Nos. 8:07-cv-01205-T-24-MSS, 8:07-cv-01206-T-23TBM, 2008 WL 5231861 (M.D. Fla. Dec. 12, 2008) engages in very little analysis of the issues relevant to this proceeding, and is neither binding nor persuasive. It appears to rest primarily on the assumption that the operator's Florida state franchise specifically authorized carriage of PEG channels on a digital tier. What state law provides, however, is of no concern in resolving the federal law issues raised in the petitions. The Connecticut DPUC letter on PEG digitization, cited by Comcast at n.46, is a one-page letter issued by the DPUC's Executive Secretary. The letter refuses to commence a hearing to review a plan by Cablevision to deliver PEG channels in a digital format. At most, it simply concludes that in the Department's view "digital transmission of community access channels is permissible." Not only is the basis for this conclusion unstated; it is not at all clear what facts were before the agency. In any case, the letter indicates that one state agency thought the issue did not justify an investigation, while another agency (the Attorney General) thought it did. That is hardly compelling authority for the industry's claims.

B. The Obligation To Provide Subscribers a Basic Tier That Includes PEG Programming Precludes the Digitization of PEG Channels as Implemented by Comcast and Other Operators.

Each of the individual industry commenters argued that, even if Section 623(b)(7) did apply, it was satisfying the basic service tier requirement, as each contended that it was

the face of venue choice occurs when an agency fails to follow a circuit court decision in a setting where judicial review lies *both* to the decision-issuing circuit court *and* to other, different courts of appeals.”).

providing PEG as part of the basic service tier (although AT&T did suggest that in its view, the manner in which Comcast was providing PEG might violate the basic service obligations of the Act).²⁸ In particular, Comcast, Cablevision, and Bright House (each with the support of NCTA) claimed that the Commission's rules permit operators to provide channels on the basic service tier in different formats, and subject to differing fees for equipment.²⁹ As Comcast and the cable industry would have it, whether a channel is "provided" as part of the basic service tier is determined by a single characteristic: subscriber access, for a single fee, to *signals* that carry the PEG programming and the broadcast channels, whether those signals are viewable or not.³⁰ It is *unimportant* under this theory, for example, as to how the operator markets its services; what burdens the operator imposes on subscribers who wish to receive channels that require equipment to view; and whether the conditions imposed on the receipt of a particular group of services is consistent with the law. This view is inconsistent with Section 623(b)(7), as well as Commission decisions that indicate that whether a service is being "provided" to subscribers is determined from the consumer's point of view. It omits consideration of virtually all characteristics that would be important to a subscriber who, for a basic service fee, seeks to be provided a similarly-classified grouping of service that includes PEG programming.

²⁸ AT&T Comments at 40.

²⁹ We understand that the City of Lansing will address the question of whether AT&T's Channel 99 platform is properly considered part of the basic service tier.

³⁰ Comcast Comments at 12 ("payment of the basic service tier rate entitles the consumer to access all of the channels that comprise the basic service tier"); *id.* at 30 ("[t]he *only* criterion for defining whether a channel is part of the basic service tier is whether the channel is included in the package of services at the rate charged for basic service on rate-regulated systems.") (emphasis added); Cablevision Comments at 7 ("All such channels are transmitted to every Basic service subscriber for a single tier price."), *id.* at 11 ("A channel is part of the Basic service tier if it is made available to a subscriber as part of the price for that tier.").

1. The Cable Act Requires “Each” Cable Operator To “Provide Its Subscribers” With a “Category” That Includes “PEG Programming.”

Section 623(b)(7) provides: “[E]ach cable operator of a cable system shall provide its subscribers” a “basic service tier” that consists of:

- (i) All signals carried in fulfillment of the requirements of sections 614 and 615.
- (ii) Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers.
- (iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.

47 U.S.C. § 543(b)(7). A “service tier” is “a category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator.” 47 U.S.C. § 522(17). Thus, reading Section 623(b)(7) in light of the definition of service tier, it is apparent that Section 623(b)(7) establishes a two prong requirement: the operator must provide (a) a basic “category”³¹ of cable service or other service provided by a cable operator (b) *and* for which a separate rate is charged by the cable operator.” 47 U.S.C. § 522(17) (emphasis added). The cable industry’s argument compresses these two characteristics and assumes that the “category” is fully defined by the rate charged. But if a category’s sole defining feature were its separate rate, the word “and” would serve no purpose in the statute.

³¹ The Cable Act does not define the term “category” or describe its relevant characteristics, but its normal meaning is a “specifically defined division in a system of classification.” American Heritage Dictionary (4th ed. 2006).

2. Under Comcast’s Proposed Digitization Plan, the Company Would Not Be Providing PEG Programming As Part of the Basic Service “Category.”

The Michigan Petitioners, by contrast, argued that the FCC should determine whether the operator is providing a “category” of service by looking at the issue from a consumer point of view. While the industry criticizes that approach, it never actually rebuts the claim that this is the approach compelled by the Commission’s precedents, much less support its own proposed approach which, as shown above, cannot be squared with the Act itself. As we explain in more detail in Part IV, a consumer point of view focuses in part on the way in which the “category” is being touted to consumers. While Comcast argues that there are many different types of consumers, its own pleading shows that the company understands that there was a significant class of consumers affected by the PEG digitization, and to whom the change in the treatment of PEG had to be explained. The question is whether the company’s own actions (and the similar actions of companies like Cablevision) would be reasonably understood by those consumers to treat PEG as a separate category of service.³²

The first and most obvious result of the change is that for many customers, a service that the industry was providing would no longer be accessible unless an additional fee is paid for it. Comcast admits that at least 30% of its subscribers do not have digital service.³³ Unless these

³² The statute requires a cable operator to “provide its subscribers” with the required category. 47 U.S.C. § 543(b)(7)(A) (emphasis added). Comcast could distribute PEG programming so that all of its subscribers, after paying a basic service fee, would be “provide[d]” with PEG programming without the need to endure extra costs vis-à-vis other required content in the “category.” This would not lead to “more than one basic service tier for each system,” Cablevision Comments 12, n.32, but to a single basic “category” – including PEG programming – available to all subscribers for a single fee.

³³ Comcast Comments at 6, 28. Comcast understates the effect on subscribers. In the hearing on the temporary restraining order, for example, the company admitted that even consumers subscribers who receive digital service would be affected by the change, if those subscribers have one set with a converter and another analog set that is used to watch analog services. In fact, those subscribers would not be able to watch the full basic service to which they subscribe

subscribers have or obtain equipment that can view digital signals, these subscribers will continue to pay a fee for basic service, and then be provided with the local broadcast channels but not the PEG programming. Indeed, unless a subscriber leases a box from Comcast, it will not be able to find the channels where Comcast says that they are – because 900-series channels are not actually viewable on a television with a QAM tuner (or through a box that duplicates the functions of a QAM tuner).³⁴ Comcast admits as much in its comments at 6-7, n.12; as a result, the proposed change inhibits access for all subscribers who do not lease a converter from Comcast.³⁵

Moreover, Comcast does not dispute that subscribers are required to make special requests and take special steps to receive PEG channels. This is not a case where Comcast is proposing to provide the equipment a subscriber requires to receive the “category” of service. Instead, to receive “PEG programming” a subscriber must either:

- Obtain a television with a QAM tuner (and then find the channels, which will not be located where Comcast says that they are located), or;
- Request a converter box;
- Arrange for the converter boxes’ delivery and installation; and

on a second analog set. Michigan Petition, Exh. C at 123-125. Comcast testified that a customer receiving digital service who wished to lease a converter for a second set would have to subscribe to digital services for that set. *Id.*

³⁴ Comments of the City of Dearborn, *et al.* at 5.

³⁵ The record shows that the location of the PEG channels on a QAM tuner has changed without notice. Thus, Comcast’s claims at 10 that it is placing PEG channels in an easily found neighborhood are not accurate – for many subscribers, the locations are different (and shifting). Likewise, its claim that subscribers will readily surf from Channel 1 to the 900 series of channels (incredible by itself), is plain wrong for subscribers without a Comcast-supplied box. Comcast argues subscribers can always reach the PEG channels through an interactive program guide so location is of no import. Comcast Comments at 10-11. But the interactive program guide is only available to digital subscribers. These impacts are significant and serve to distinguish PEG from the standard broadcast programming provided on the basic service tier.

- If a converter box is leased from the cable operator, pay an additional monthly fee.³⁶

To top this off, when Comcast announced that it was digitizing PEG channels, it required customers who desired to continue to receive PEG programming to call for a box – and then subjected those customers who did so to additional sales pitches as a condition of receiving the box. This might be what one would expect if subscribing to a new service, but hardly what one would expect as a condition of receiving the *same* service. While Comcast was subjecting existing customers to these burdens, it was advising new customers that no converter was required to receive basic service. The record shows that Comcast was contrasting the actions a non-Comcast customer must take – “connect a converter for each TV” and “choose and purchase new TV(s)” – with the actions one must take as a Comcast customer:

- “Comcast customers: If all the TVs in your home are connected to Comcast, you’re ready already. You don’t need to do a thing.
- With one phone call to 1-800-COMCAST, we’ll take care of every TV in your home. . . .
- Just need cable? Get Limited Basic Cable for \$10/month for 12 months.”³⁷

Other operators, including Cablevision, have taken the same approach. Taken collectively, it is hard to see how the PEG channels can be treated as being part of the basic service from a consumer point of view.

3. The Industry’s View of the Provision of the Basic Tier Requirement Is at Odds With the Cable Act.

The comments of Comcast, Cablevision, NCTA and Bright House rest on another error: they assume that a cable operator’s duty to “provide its subscribers” with the components of the

³⁶ See Michigan Petition at 3-4.

³⁷ See Michigan Petition, Exh. P, <http://www.comcast.com/dtv/homepage.html>.

required basic service tier is satisfied by merely making *signals* carrying PEG channels available to all subscribers for a fee, even if the programming is not viewable by a particular subscriber. As we show in Part I.A, this argument rests on a basic misunderstanding of the Cable Act obligations with respect to PEG. It also rests on a misreading of the requirements of Section 623(b)(7). In listing the required components of the basic service “category,” Congress drew an explicit distinction between “signals” and “programming.” *Compare* 47 U.S.C. § 543(b)(7)(A)(i), (iii) with 47 U.S.C. § 543(b)(7)(ii) (emphasis added). With respect to PEG, a cable operator must “provide its subscribers” not simply “signals,” but “PEG *programming*.” The cable industry never explains how its approach provides all subscribers with PEG “programming.”³⁸ It does not.

Nor can the industry’s treatment of PEG be justified based on the distinction between service rates and equipment rates in the FCC’s regulations.³⁹ First, the distinction is overblown. As the Michigan Petitioners showed, while the Cable Act generally draws a distinction between equipment and service, the FCC has also recognized in some cases that the charges for equipment and services are so intertwined that the relationship between the two cannot be ignored. Petition at 11. Indeed, as the Dearborn Petition explains, the Commission has not allowed operators to recover equipment costs from basic service subscribers where those additional costs are really for the benefit of the operator, as is the case here.⁴⁰ Certainly, nothing

³⁸ The approach is also inconsistent with the ordinary understanding of a service tier. *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 963 (D.C. Cir. 1996) (“Cable subscribers select the stations they wish to receive by choosing among various plans (‘tiers’) of cable service.”).

³⁹ Comcast Comments at 13; Cablevision Comments at 11, 15.

⁴⁰ Industry commenters attempt to compare the consumers affected by the digitization of PEG channels with the consumer of the 70’s or 80’s who required a converter to receive any signals. But in this case, the PEG channels are receivable by the consumer *now*. What Comcast is doing is making them less viewable so that (as it admits) it can provide more services to advance its

in the Act suggests that a cable operator is free to burden the provision of PEG programming with expensive converter boxes or other equipment, while providing other required content in the same category without such an obligation.⁴¹

4. The Treatment of PEG Is Not Justified By the Fact That Comcast's Program Guide Identifies Other Digital Programming As Part of the Basic Tier.

Comcast and other industry commenters argue that the FCC has recognized that the basic tier may include both analog and digital signals, and therefore necessarily recognizes that PEG programming could be provided in a digital format, with a fee charged to subscribers who require a converter to view the service. This argument, in the first place, ignores the unique status of PEG channels, discussed *supra*, as well as the other burdens Comcast (and companies like Cablevision) are placing on consumers who wish to view PEG channels.

But in any case, the FCC has not given the industry carte blanche to offer signals as they please, so long as a single service fee is charged for basic service. For example, *In re Complaint*

own commercial interests. This may be a reasonable thing to do, but it is not clear why basic subscribers should be required to pay for Comcast to do it in order to continue to receive PEG programming.

⁴¹ Cablevision's citation of *TCI of Southeast Mississippi*, 10 FCC Rcd. 8728, ¶¶ 11-12, 15 (1995), does not change this analysis. Cablevision Comments at 11 n.28. The case concerned a dispute about basic service tier rate regulation – specifically, an attempt by the city to reduce rates for certain basic service equipment and channels below permitted amounts. The Commission ruled that “neither signal quality issues nor concerns about equipment may be remedied through application of the Commission’s rate regulations.” *Id.* at ¶ 14. This dispute, in contrast, does not involve rate regulation. Moreover, in that case, the city never claimed that the channels at issue, C-SPAN I and C-SPAN II, were not being properly “provided” as part of the basic service tier. Cablevision's citation of *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, 8 FCC Rcd. 2965 ¶ 13 (1993), is equally inapposite. The matter concerned the question of whether “premium or pay-per-view” channels are considered “usable activated channels” under the Cable Act. The Michigan Petitioners have never contended that Comcast would not be providing PEG “channels” – only that, among other things, the company would be failing to provide PEG programming as part of the basic service “category.”

of *WLIB-TV, Inc.*, 74 R.R. 2d 208 (1993), cited by Cablevision, supports the petitioners. In that case Cablevision, in the midst of a rebuild of its system, had placed a channel required to be on the basic service tier, WLIB-TV, on channel 37. However, many of Cablevision’s subscribers only had 36-channel converter boxes and thus could not actually receive channel 37 without bearing other costs not necessary to receive other basic service tier channels. The Media Bureau ruled that “the public interest would be best served in this instance by requiring Cablevision to switch WLIB to a channel currently receivable by all subscribers without the necessity of an additional converter box during the rebuilding of its system.” *Id.* at ¶ 6. Importantly, the order did not rely on Section 614 alone. Instead, the Media Bureau stressed that “§ 623(b)(7) of the Communications Act requires that all cable operators provide their subscribers with a separately available basic service tier containing all must-carry signals to which subscription is required for access to any other tier of service.” *Id.* at ¶ 5.⁴²

In a 1995 case, the Cable Services Bureau affirmed this reading of the basic service tier requirement. It declared:

Paragon is required to carry KRCA on a mutually acceptable channel, *on the basic tier*, that is *available to all subscribers in its system*, which in this case is any channel between 2 and 46, pending the completion of rebuilding its system. By doing so, *KRCA will be provided to all of Paragon’s subscribers on the same basis as other signals entitled to mandatory carriage on the basic tier*. Once the system is fully rebuilt, Paragon may move KRCA to its over-the-air channel (Channel 62), or any other mutually agreed upon channel.

In re Complaint of Fouse Amusement Enterprises, Inc., 10 FCC Rcd. 668 ¶ 25 (1995) (emphasis added) (internal footnotes removed).

⁴² Presumably, as a technical matter, the subscribers were being provided with a signal carrying the channel, much as Comcast contends that subscribers are being provided now. But without a converter, the subscribers were not “provided” with WLIB-TV.

The FCC has thus read the basic tier obligation to prevent an operator from taking steps that require subscribers to pay additional fees – including equipment fees – to receive services that they are currently receiving. And it has made these determinations in situations where the operator is transitioning from one technology to another – as the industry commenters claim here.

Moreover, the industry’s arguments with respect to digitization mix and match circumstances that are not remotely comparable. Comcast argues that it has converted many channels that were formerly on the basic service tier to a digital format. This is certainly true, but as far as appears, those channels are now being provided as part of the company’s digital service tiers, not as part of basic.⁴³ Comcast also argues that it is providing 13 digital channels as part of “basic service.”⁴⁴ The record shows that many of those channels are simply digital versions of channels also being provided in an analog format. A subscriber without a converter receives the same content as one who has a converter. Other channels appear to be new digital signals provided by broadcasters; the addition of those channels does not raise the same concerns as is created by removing access to channels currently receivable. Moreover, Comcast’s identification of those channels as part of the basic service tier does not suggest that the industry has the discretion to provide PEG in digital that it claims.⁴⁵ A case cited by NCTA,⁴⁶ *In re*

⁴³ If anything, the company’s digitization and movement of signals from the basic or expanded basic tier to digital tiers would suggest to a consumer that PEG is now being provided as part of a different tier.

⁴⁴ Comcast Comments at 4, 6.

⁴⁵ Of course, the fact that Comcast claims that particular digitized channels are part of basic service does not prove that they are. It may be that this classification could be challenged with respect to other services. Notably, Comcast lists its leased access channel as part of basic, even though the leased access channel is only available in a digital format. Michigan Petition, Exh. C (channel listing). Commission rules clearly allow an operator to offer leased access channels in a digital format, but limit the operator to charging a fee based on the number of subscribers to the digital tier. If Comcast is charging leased access providers in Michigan a fee based on the

WHDT-DT Channel 59, 16 FCC Rcd. 2692 (2001) shows why. In *WHDT*, a broadcaster sought carriage under Section 614, and was voluntarily converting its digital signal to analog to avoid “concerns regarding compatibility with digital set-top boxes, signal strength standards, and channel positioning.” *Id.* at ¶ 13. The decision did not address the basic tier requirement. However, as NCTA notes, the Commission did recognize that “the election as to whether the cable operator provides the signal to consumers in analog or digital format is solely that of the broadcaster.” *Id.* at ¶ 14. That a provider may *elect* to have a signal carried in a digital format is far different than this situation, where the operator is *unilaterally* claiming a right to make programming less accessible. In other contexts, the Commission has found that operator proposals to offer a service only in digital, where that hampers a programmer’s ability to reach subscribers, is unlawfully discriminatory. *TCR Sports, supra*.

IV. THE FCC SHOULD ANSWER THE COURT’S QUESTIONS IN ACCORDANCE WITH THE PROPOSED ANSWERS IN THE DEARBORN PETITION.

The Commission should reject the industry’s view, and answer the court’s questions in accordance with the Petition for Declaratory Ruling filed by the City of Dearborn *et al.* (“Dearborn Petition”).

Question 1: *Does it constitute an “evasion” of applicable rate regulations (or any other regulation) when cable operators: (a) require some subscribers to purchase/lease converter boxes to view public, educational and governmental channels (“PEG channels”); and (b) provide PEG channels in digital format on the basic-service tier while non-PEG channels on the basic-service tier are provided in analog format? (See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation, 8 FCC Rcd 5631, 5915- 5917 (F.C.C. 1993): We define a prohibited evasion as any practice or action which avoids the rate regulation provisions of the Act or our rules contrary to*

number of subscribers as if it were on the basic service tier and available to all subscribers (even though 30% cannot actually view it), that would present serious problems under the Commission’s rules. While the Commission is obviously not in a position to decide the issue, it illustrates the difficulty presented if the arguments of the industry are accepted.

⁴⁶ NCTA Comments at 9 n.12.

the intent of the Act or its underlying policies. We also believe that . . . : (1) implicit rate increases; (2) a significant decline in customer service without a similar decline in price; and (3) deceptive practices such as improper cost shifting or intentionally misstating revenues [are evasions].

Answer: As explained in the Michigan Petition, the answer to the question is “yes.” Comcast and Cablevision contend that they are free to evade the requirements of Section 623, 47 U.S.C. § 543, because the statute only bars evasions with respect to the regulation of rates. But the plain language of Section 623(h) is not limited to evasions with respect to the rates an operator charges: it speaks of “evasions . . . of this section.” 47 U.S.C. 543(h). The basic service tier requirement is in the same section of the Act, 47 U.S.C. § 543(b)(7).⁴⁷ As we have shown, the basic service tier requirement serves purposes broader than rate regulation, and is intended, *inter alia*, to ensure that PEG programming is provided to all subscribers (except where a franchise expressly permits an operator provide the channels on a tier other than the basic tier); and to ensure that it serves its function as a “complement” to local broadcast stations. If Comcast is permitted to impose undue burdens on access to or use of PEG channels, or to treat them in a way that is vastly different than its treatment of primary broadcast signals, it will evade obligations Congress intended to impose through Section 623(b)(7).

Comcast’s claim that a practice is not an “evasion” if it is undertaken for legitimate business purposes should also be rejected.⁴⁸ Business purposes, legitimate in the abstract, cannot justify noncompliance with Commission regulations that implement the Cable Act, or justify actions whose goals cannot be squared with the language, structure or purpose of the Act. There are many business reasons why an operator would want to censor, diminish, or provide low-quality PEG programming – for example, it permits the operator to offer more commercial

⁴⁷ Comcast’s argument at 23 about the regulation of rates under the Michigan Uniform Video Services Local Franchise Act is thus misplaced.

⁴⁸ Comcast Comments at 23.

channels. But the Cable Act prevents an operator from exercising this sort of control over PEG precisely so that an operator does not subvert public benefits to its own commercial interests. By making the PEG channels less accessible in order to increase its other commercial offerings, Comcast makes precisely the choice that Congress sought to eliminate. That is the essence of an evasion.

NCTA wrongly claims that the Michigan Petitioners' argument proves too much because it would "prohibit an operator from switching *all* its channels to digital."⁴⁹ As the Michigan Petitioners made clear, a cable operator is not barred from switching all of its channels to digital, but it is prohibited from providing PEG programming in a way that makes that programming less accessible to subscribers than other content on the system.⁵⁰

Comcast's claim that there is no "implicit rate increase" through its proposed treatment of PEG should also be rejected.⁵¹ Comcast recognizes what the Michigan Communities have shown:⁵² that many subscribers would continue to pay the same rate for the basic service tier, and yet, they would not receive a key element of that tier, PEG programming. To remedy this, Comcast proposes to provide a single free digital converter per household for one year.⁵³ However, Comcast would not compensate subscribers for many of the other costs arising out of

⁴⁹ NCTA Comments at 13.

⁵⁰ Michigan Petition at 10, n.20; *id.* at 21. NCTA also contends that there is no evasion of Section 624A of the Act, 47 U.S.C. § 544a(c)(2)(B)(ii). NCTA Comments at 14-15. But Comcast's proposed approach would not "offer subscribers the option of having all other channels delivered directly to the subscribers' television receivers or video cassette recorders without passing through the converter box." Its position is difficult to square with the Commission's recent decision in *In re Cox Communications, Inc., Fairfax County, Virginia Cable System*, DA 08-2299, EB-07-SE-351 (October 15, 2008).

⁵¹ Comcast Comments at 25.

⁵² Michigan Petition at 10.

⁵³ Comcast Comments at 25.

the proposed treatment of PEG channels; nor is Comcast's proposal anything close to complete relief for subscribers with more than one television. The proposed change amounts to an implicit rate increase. Likewise, and contrary to commenters' claims, Comcast's actions are an evasion of the line itemization provisions of the Act. The line itemization rules are intended to allocate PEG costs to all subscribers, on the theory that all subscribers receive the benefits of PEG. But under the Comcast digitization, that is not the case. The claim (by NCTA at 13) that the subscriber is receiving the service even if it cannot be viewed simply emphasizes that to receive the service, an additional fee must be paid.

Question 2: *Does the requirement to provide PEG channels on the basic-service tier apply to all cable operators or are cable operators in communities where rates are subject to "effective competition" (or otherwise deregulated) excluded from this requirement? (See Pl. Response Br. p.19 n.16 "Comcast has argued that the requirement to provide PEG [channels] on [the] basic service tier does not apply in communities where rates are subject to effective competition. Plaintiffs disagree"; see also H.R. Rep. No. 102-628 at 85 (1992) (PEG channels must be "available to all community members on a nondiscriminatory basis"))).*

Answer: As discussed, under Section 623(b)(7), a cable operator's duty to provide PEG programming on the basic service tier applies to "each" cable operator regardless of whether that operator is subject to commercial competition. In addition, under Section 611, a local franchising authority may require a cable operator to provide "channel capacity . . . designated for public, educational, or governmental use." 47 U.S.C. § 531. The "use" of this channel capacity may not be diminished because a cable operator seeks to compete in the delivery of HD channels or other commercial content.

Question 3. *Does the Court look from the consumer's point-of-view to determine whether: (a) a programming service is part of the basic-service tier; and (b) the proposed digitization of PEG channels but not other channels is "discriminatory" (because e.g., some customers may be required to obtain additional equipment or make special requests for additional equipment to view PEG channels)? (See H.R. Rep. No. 102-628 at 85 (1992) (PEG channels must be "available to all community members on a nondiscriminatory basis"))).*

Answer: The industry’s primary response to the question is to agree that there is no duty to deliver PEG on a nondiscriminatory basis. That is wrong, as shown in Part I. Commenters go on to contend that the court should not look from the consumer’s point-of-view because it claims that there is “no single ‘consumer’s point of view.’”⁵⁴ But there was no single consumer’s perspective in other contexts where the Commission has adopted such a consumer-based approach. For example, with respect to 911 service over VoIP service, the Commission found:

[C]onsumers expect that VoIP services that are interconnected with the PSTN will function in some ways like a “regular telephone” service. At least regarding the ability to provide access to emergency services by dialing 911, we find these expectations to be reasonable. If a VoIP service subscriber is able to receive calls from other VoIP service users *and* from telephones connected to the PSTN, and is able to place calls to other VoIP service users *and* to telephones connected to the PSTN, a customer reasonably could expect to be able to dial 911 using that service to access appropriate emergency services. Thus, we believe that a service that enables a customer to do everything (or nearly everything) the customer could do using an analog telephone, and more, can at least reasonably be expected and required to route 911 calls to the appropriate destination.

In re IP-Enabled Services, 20 FCC Rcd. 10245 ¶ 23 (2005) (footnotes omitted). Of course, many informed consumers were surely aware that no such 911 service was available over VoIP service; while others were not; some consumers were undoubtedly not even aware that there is such a thing as VoIP, and had no expectations with respect to the service, one way or the other. That did not prevent the Commission from focusing on the reasonable expectations of the consumer group affected by the 911 requirement – consumers using VoIP services connected to the PSTN.

Likewise, there was no single consumer perspective with respect to what it means to “offer” telecommunications to an end-user, yet the Supreme Court endorsed the FCC’s view that the term “offer” should be interpreted from a consumer perspective in determining whether cable

⁵⁴ Comcast Comments at 28.

modem service includes a telecommunications component. *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 988 (2005). What is meant by taking a consumer perspective is only that one bases decisions on what a reasonable affected consumer might conclude – as opposed to relying on an operator’s characterization of a service or function. It also follows that one looks not just at what an operators says, but at what it does. In this case, as Michigan Petitioners showed, Comcast took several actions that clearly distinguished the PEG programming from other services offered on the basic tier. It follows that in this context, the Commission may rule that if Comcast were to take its proposed action, it would violate its duty to “provide its subscribers” with a basic service tier that includes “PEG programming,” as the Michigan Petition contends.⁵⁵

Indeed, even if the FCC were to ignore these basic tier subscribers’ subjective perspectives and view this simply as an objective question under the Act, Comcast cannot prevail. Under Comcast’s approach, many subscribers would, quite literally and objectively, receive only a “signal” carrying PEG programming, but not “PEG programming” itself. However, Section 623(b)(7) plainly requires a cable operator to “provide its subscribers” a category that contains “PEG programming” not just a “PEG signal.”

Question 4. *What is the criteria for a channel to be considered part of the basic-service tier? If cable operators require customers to purchase/lease digital receiving equipment to view PEG channels, are those channels per se a separate “service tier” within the meaning of 47 U.S.C. §522(17)?*

⁵⁵ Industry commenters attempt to ridicule the consumer viewpoint test by pointing to consumers with television sets that are not cable ready and arguing that these consumers would view most services as a category other than basic, because additional equipment would be required to receive most services. Comcast Comments at 14; Cablevision Comments at 3 n.4, 8. In fact, subscribers would have no reason to suppose, for example, that the fact that their television received only 12 channels would indicate that any particular set of channels was part of a separate service tier. Here by contrast, Comcast has taken a set of channels that a subscriber can *now* receive, and proposes to offer them in a completely different manner, requiring additional consumer actions and expense. As the Michigan Petition explains, pp. 19-20, it is not merely the fact that a subscriber must purchase equipment that it is relevant here.

Answer: Comcast and the cable industry define the required “category” in a manner that allows them to assume control over PEG channels and to deliver these channels to subscribers however they please. As Comcast and the cable industry would have it, the “category” is defined by a single characteristic: subscriber access, for a single fee, to signals that carry the PEG programming and the broadcast channels.⁵⁶ As we have shown, this reading is inconsistent with the Act and would empower a cable operator to make PEG programming less accessible to subscribers than other components on the basic service tier. The Commission should reject this view and look to the criteria relevant to a basic subscriber that hopes to receive PEG programming as part of a “category” with local broadcast channels, *see* Michigan Petition 19-21, and to the objective criterion of whether a cable operator has actually “provide[d] its subscribers” with “PEG programming” alongside the required “signals.”

Question 5. *Are cable operators precluded from charging for equipment used in connection with the reception of PEG channels on the basic-service tier when equipment is not needed to receive non-PEG channels on the basic service tier?*

Answer: The cable industry argues that for rate regulation purposes, rates for equipment and service are generally separate. But as explained in the initial petition and in this reply, that separation is far from absolute, and it does not follow that a cable operator may place equipment requirements on the receipt of PEG programming, but not the standard local broadcast channels in order to advance its own commercial intent in selling other products. The answer to the question is as stated in the Michigan Petition.

⁵⁶ Comcast Comments at 12 (“payment of the basic service tier rate entitles the consumer to access all of the channels that comprise the basic service tier”); *id.* at 30 (“[t]he *only* criterion for defining whether a channel is part of the basic service tier is whether the channel is included in the package of services at the rate charged for basic service on rate-regulated systems.”) (emphasis added); Cablevision Comments at 7 (“All such channels are transmitted to every Basic service subscriber for a single tier price.”), *id.* at 11 (“A channel is part of the Basic service tier if it is made available to a subscriber as part of the price for that tier.”)

Question 6. *Can PEG channels be digitized, require special equipment to be accessed (or be subject to other burdens with respect to the need to make a special request to receive equipment and the placement of channels), and still be considered carried on the basic-service tier when non-PEG channels on the basic-service tier are not digitized and do not require special equipment to be accessed?*

Answer: For reasons suggested above, the answer remains as proposed initially by the Michigan Petitioners.

Question 7. *Is digitization of PEG channels “discriminatory” because some customers may be required to make a special request to obtain additional equipment to view the channels, while customers are not required to obtain additional equipment to view non-PEG channels?*

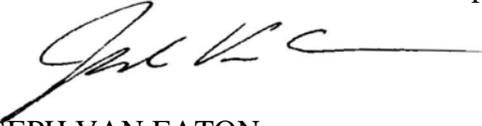
Answer: For reasons suggested above, the answer remains as proposed initially by the Michigan Petitioners. Among other things, as shown above, the cable industry is simply incorrect that the Cable Act’s legislative history only refers to non-discrimination principles with respect to who may *transmit* programming, but not who may *receive* it.⁵⁷ Section 623(b)(7) and its legislative history speak of a cable operator’s duty to provide “its subscribers” a category that contains “PEG programming” alongside the other required components of the basic service tier to all subscribers.

⁵⁷ Comcast Comments at 30; NCTA Comments at 11.

CONCLUSION

The relief requested by the Petitioners in this docket should be granted.

Respectfully submitted,



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April 1, 2009

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

In the Matter of:

Petitions for Declaratory Ruling
Regarding Public, Educational, and
Governmental Programming

MB Docket No. 09-13
CSR-8126, CSR-8127, CSR-8128

REPLY DECLARATION OF DWIGHT TYRONE WILLIAMS SR.

I, Dwight Tyrone Williams Sr., declare as follows:

1. I submit this declaration under penalty of perjury.
2. I currently serve as Division Manager of HTV Houston Television (“HTV”) for the City of Houston, Texas (the “City”). In the initial comments round of the above-captioned proceeding, I made a declaration in support of the City’s Comments in which I described the City’s experience with AT&T’s PEG platform in Houston. Among other things, I outlined the technical problems caused by AT&T’s PEG platform which were preventing the City’s four (4) PEG Channels from being viewable on the AT&T U-verse service. I also indicated that a replacement package of equipment and software that AT&T claimed would correct the technical problems was to be tested and evaluated beginning on 9 March 2009, and barring further technical problems, the City could expect to go-live on the AT&T PEG platform on 23 March 2009. This declaration provides an update on the current status regarding the viewability of the City’s PEG channels on AT&T’s PEG platform.

3. Before turning to the test results, it is helpful to summarize what happens with other cable and video providers who carry the City's PEG channels on their systems. The City produces PEG program material with video resolution of 720 pixels by 480 pixels, and a standard 4:3 video format. The PEG program material is inhouse encoded at an 8-megabit data rate to maintain the quality of the original material. The City plays out this material at an 8 megabit data rate, decoding it back to analog to transmit its PEG program material to video and cable service providers other than AT&T to minimize the effects of transcoding error on the program material. The cable and video service providers transmit the PEG program material to the final end-users (their customers) in differing methods, each other than AT&T however maintaining the resolution, format and quality as delivered by the City of Houston - HTV. Additionally, each of the other service providers carry all of the program material, i.e. including closed captioning, to the end viewer. The PEG program material (like commercial programming) is intended to meet certain technical standards in terms of audio and video quality as described by the Federal Communication Commission as codified in Part 76 of Title 47 of the Code of Federal Regulations. Master control operators on staff at the City's PEG operations center monitor compliance and adherence to FCC standards. First, they monitor the signal as it is being sent out by the PEG channel to each of the cable and video service providers. Second, they monitor a feed of the PEG signal as it is transmitted from each of the cable or video service providers to the ultimate end-users (their customers). Each of the video and cable service providers (other than AT&T) sends a separate feed back to the City's PEG channel premises expressly so that the PEG channel operators can

monitor the audio and video quality experienced at the end-user level on each provider's system to ensure ongoing compliance with these technical standards.

4. Now, turning to AT&T, the City had assumed that the new round of testing of its PEG channel signal using the new equipment would proceed in the same manner as it had in earlier tests with AT&T, and as is standard in the industry. This involved two stages of testing: first looking at the signal quality as it left the AT&T encoder at the PEG station premises ; the second, looking at the signal quality as provided to AT&T's U-verse subscribers that use the PEG platform to access the programming (which would take into account other steps involved as the PEG signal moves through the AT&T system).

5. Initially, the City and AT&T did proceed with the testing as we had done in the past. On 9 March 2009, the City (together with AT&T) performed the testing at the City's PEG channel premises. The PEG program material was transmitted to the new encoder provided by AT&T (on the City's PEG channel premises) and was converted to a non-standard 1:1 video format using the new Inlet Technologies Media encoder. The new encoders were initially configured to parameters established during the initial round of testing with the previous encoders at a scaling of 720 by 480 pixels. During this phase of testing it was discovered that AT&T had reverted back to 480 by 480 resolution. The encoders at the City of Houston were reconfigured to 480 by 480 pixel resolution to complete this phase of testing. The PEG program material was also compressed by the encoder to enable it to be sent to AT&T's point-of-presence at the 1.2 megabit data rate for transmission as required by AT&T. We viewed the PEG program material at this stage, and the City determined that it still had some anomalies. For example, Sharp

transition of light to dark program material exhibited extreme pixelation, most easily noted on the HISD logo 'bug' which consisted of a sharp vertical transition from black to white. Program material with a rapidly transitioning nature exhibited a loss of resolution or "softening" of the image. Also noted was distortion of linearity of circular content, typified by a "jaggedness" of circles. However, on balance the City decided that the output signal quality as leaving the City of Houston transition center meets minimal requirements, such that the City should move forward to the next stage of testing.

6. The next stage of the testing – from the viewer's perspective at AT&T's Bellaire facility – did not occur. I personally tried several times to contact the AT&T technical staff with whom I had been working to arrange for this stage of the testing but they did not return my calls or emails. Instead, and much to the City's surprise, on 25 March 2009, HTV - Operations Supervisor and the Administrative and Regulatory Affairs - Deputy Director received an email from AT&T informing the City that the City's PEG programming had gone live on AT&T's U-verse on 23 March 2009.

7. In some ways from my point of view the second stage of the testing is more important than the first, especially in AT&T's case. For one reason, AT&T employs transcoding software at its video distribution center which converts the 1:1 video format back to 4:3 video format, and decompresses the PEG program material to allow it to be transmitted by AT&T to subscribers at a 2 megabit data rate. In earlier testing with AT&T, it was at this second stage that the technical problems with viewing the City's PEG channels on the AT&T PEG platform were most apparent. This second stage of testing is also very important because it evaluates what the signal looks like to the ultimate viewer – the video service customer. Without having performed the second

stage of testing, the City has no way of determining whether there have been any improvements in the signal quality for the viewer at home.

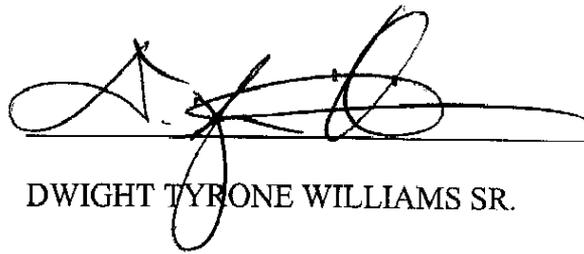
8. Furthermore, and despite repeated requests from the City, AT&T has not provided a separate feed of the PEG signal from AT&T back to the City's PEG channel premises so the master control operators can perform ongoing monitoring of the audio and video quality experienced at the end-user level. Without this feed, the PEG channel operator has no way of ensuring ongoing compliance with the technical standards for the signal on AT&T's system.

9. The city was willing to consider implementation of AT&T's PEG platform from the outset. However, based on my experience to date, I am unable to conclude that AT&T is able to deliver the same level of service as the cable operators in regard to PEG channels.

10. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge, information and belief.

April 01, 2009

DATE


DWIGHT TYRONE WILLIAMS SR.

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

In the Matter of:

Petitions for Declaratory Ruling Regarding
Public, Educational, and Governmental
Programming

MB Docket No. 09-13
CSR-8126, CSR-8127, CSR-8128

DECLARATION OF WILLIAM IMPERIAL

I, WILLIAM IMPERIAL, declare as follows:

1. I submit this declaration under penalty of perjury in response to the notice issued in the above-captioned proceeding.

2. I am a Telecommunications Regulatory Officer, III and Division Manager of the Information Technology Agency's Video Regulatory Services Division of the City of Los Angeles, California. I have served in the capacity of a Telecommunications Regulatory Officer for over six years and Division Manager for two years for the City of Los Angeles. The Information Technology Agency (ITA) of the City of Los Angeles (City) is charged with the responsibility of providing regulatory oversight of the operations of the City's cable and video service providers with the advice and counsel of the City Attorney's Office. On behalf of ITA in my capacity as Division Manager and Telecommunications Regulatory Officer, I receive regular reports on the operation of cable television systems within our jurisdiction, and through ITA's management, make recommendations with respect to communications policies established by the City Council and Mayor of Los Angeles. My work as a Telecommunications Regulatory Officer has focused on ensuring regulatory compliance of the City's cable and video TV

subscribers with local, state and federal laws that impact the City of Los Angeles and its cable and video subscribers, including protecting and helping develop communities that have been traditionally underserved. This has led me to conclude that it is important that information about public affairs be readily accessible to all members of the community. One important tool in this regard is the City's government channel, LA Cityview 35 ("Channel 35"), which carries live coverage of City Council and other meetings, as well as programming about issues of importance to the residents of the City of Los Angeles.

3. AT&T offers U-verse video service to residents in portions of the City pursuant to a state video service franchise issued to the company by the California Public Utilities Commission. It is one of several companies that provide video services in Los Angeles. Others include traditional cable companies, like Time Warner, as well as new entrants into the market, like Verizon.

4. Every one of these companies, except AT&T, has been willing to provide Channel 35 and the other PEG signals offered by the City of Los Angeles in the same manner as they provide other commercial channels. The City has just completed a detailed analysis of the Channel 99 platform, including on-site inspections to determine, among other things, how the Channel 99 platform compares to PEG channels provided by other operators. The City Council and Mayor have formally concluded that AT&T's Channel 99 platform is inadequate and unacceptable. Because of the deficiencies in the AT&T PEG platform, some of which are discussed below, the City has been unwilling to disadvantage other operators that do provide PEG in compliance with state and federal law by withholding the City's PEG signals to AT&T.

5. The City formally requested AT&T to provide the PEG channels in the same way it provides other commercial channels, but AT&T has repeatedly refused to do so. AT&T has

indicated it is only willing to carry the PEG channels via its Channel 99 platform. While I believe that there are many important problems with the Channel 99 platform (and the City has recently authorized litigation to vindicate rights protected by state law), understanding the impact of just two items – the failure of AT&T to pass through secondary audio signals, and the failure of AT&T to pass through closed captioning -- illustrates why it is also important that all operators be required to provide PEG channels that fully comply with *federal law* requirements, such as closed captioning requirements.

6. Los Angeles is an ethnically and linguistically diverse city, in which two languages are predominantly spoken – English and Spanish. U.S. Census Bureau data indicates that 46.5 % of the population of Los Angeles is persons of Hispanic or Latino origin. According to the 2009 figures from The Nielsen Company, 32.8 % of Los Angeles households are Hispanic, and 38.1 % of those households speak only or mostly Spanish. For that reason, the City has endeavored to ensure that all its citizens are able to participate meaningfully in municipal government, and in particular are able to watch and understand the City Council at work. Therefore, since 2003, the City has produced all its City Council meetings carried on Channel 35 with a secondary audio signal. In addition to the \$10,000 in initial start up costs to purchase and install equipment, the City spends about \$30,000 per year to create a secondary audio signal for the City Council meetings, and another approximately \$20,000 per year to add secondary audio to other PEG programming on Channel 35. Yet AT&T's PEG platform cannot pass through this secondary audio signal.

7. In Los Angeles, approximately 12% of the population is comprised of individuals who are deaf, hard of hearing or have a hearing disability. For that reason, the City has taken steps to ensure that these citizens are able to participate meaningfully in municipal government,

and in particular are able to watch and understand the City Council at work. Therefore, since 1998, the City has produced all its City Council meetings carried on Channel 35 with closed captioning. The City spends \$125,000 per year to produce closed captioning. Notwithstanding the City's 10+ year history of providing closed captioning programming, AT&T's PEG platform fails to pass through the City's closed captioning.

8. In recent communications with the City, AT&T has indicated it will test and begin to implement a solution to AT&T's secondary audio programming and closed caption problems by the end of the second quarter of 2009. However, the City has not been able to see or test any proposed fixes, so we have no certainty that they will work. It is important to note that it is clear, based on public testimony presented to the Los Angeles City Council by AT&T, that AT&T believes it is under no legal compulsion to pass through secondary audio or closed captioning on its Channel 99 PEG platform.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on the 1st day of April, 2009, in the City of Los Angeles, California.


William Imperial