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March 12, 2009

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re: COMMENTS OF DETROIT AND OTHER MUNICIPAL ENTITIES AND ASSOCIATIONS - MB 09-13: SR-8126, CSR-8128**

Dear Ms. Dortch:

For your information and records, attached is an amended version of "Comments of Detroit and Other Municipal Entities and Associations" which was previously filed with the FCC on March 9, 2009. The Comments have been amended to add an additional municipality, the Charter Township of Oshtemo.

If you have any questions concerning this filing, please contact me.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP

Timothy J. Lundgren

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

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

**COMMENTS OF DETROIT AND OTHER MUNICIPAL ENTITIES AND ASSOCIATIONS**

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March 12, 2009

**COMMENTS OF DETROIT AND OTHER MUNICIPAL  
ENTITIES AND ASSOCIATIONS**

These comments are submitted on behalf of the City of Detroit, Michigan; the City of Grand Rapids, Michigan; the City of Kalamazoo, Michigan; the City of Battle Creek, Michigan; the City of Cadillac, Michigan; the City of Flint, Michigan; the City of Garden City, Michigan; the City of Grand Haven, Michigan; the City of Lathrup Village, Michigan; the City of Parchment, Michigan; the Charter Township of Kalamazoo, Michigan; the Charter Township of Comstock, Michigan; the Charter Township of Oshtemo, Michigan; the Michigan Townships Association (as to CSR-8128 only);<sup>1</sup> the Town of Lake Park, Florida; Martin County, Florida; the City of Batavia, Illinois; the West Central Cable Agency (representing the Villages of Indian Head Park, LaGrange, LaGrange Park, Riverside, and Western Springs, Illinois); and the Ohio Chapter of NATOA (collectively, the "Municipalities"). The communities represented in this filing collectively serve a combined population roughly in excess of 6 million and submit these comments in support of the Petition of the Alliance for Community Media, *et al.* (CSR-8126), the Petition of the City of Lansing, Michigan (CSR-8127), and the Petition of the City of Dearborn *et al.* (CSR-8128) filed in this docket.

**I. COMMENTS OF THE MUNICIPALITIES IN SUPPORT OF THE CITY OF LANSING AND THE ACM PETITIONERS**

The Municipalities support the requests for relief sought by the City of Lansing, Michigan in its Petition in case CSR-8127 (the "Lansing Petition") and by the Alliance for Community Media *et al.* (the "ACM") in its Petition in case CSR-8126 (the "ACM Petition").

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<sup>1</sup> The Michigan Townships Association is separately submitting comments with the Michigan Municipal League in the City of Lansing and Alliance for Community Media, *et al.*, cases.

**A. PEG Channels Should Meet Community Needs**

As the Commission is aware, a key determinant of franchises renewed under the uniform national process prescribed by the Federal Cable Act is that they meet community needs - - specifically that they meet "future cable-related community needs and interests". See Cable Act § 626(a)(1)(A), (c)(1)(D), 47 U.S.C. § 546(a)(1)(A), (c)(1)(D).

Pursuant to this requirement, municipalities across this country, including the Municipalities making this filing, have established the many PEG channels which now exist. As a result, they have a strong interest in seeing that "community needs and interests" are met both in older franchises and in ones issued to new providers, such as AT&T. Among other things, this includes making sure such channels are provided to all their residents in a high quality, easily accessible and fully functional manner which conforms to consumer expectations. The Municipalities want this Commission to know that AT&T's method of providing PEG programming fails this test.

The Commission should give deference to the views of local franchising authorities (LFA's) on questions of PEG channel position and use, as LFAs have decades of experience with these channels. The Municipalities create, operate and provide programming on PEG channels and have direct interaction with consumers who view them. The local knowledge and experience with PEG channels represented by the Municipalities should be given deference.

Based on their experience with PEG channels and cable franchising, the Municipalities support the relief requested by the City of Lansing and ACM. Therefore, the Municipalities respectfully request that this Commission use both its Title VI and Title I authority to grant the relief requested by the City of Lansing and ACM and (in essence) require AT&T to treat PEG channels in the same manner as other channels.

**B. Access to Regional PEG Channels Not a Fair Trade for Impaired Quality and Functionality of Local PEG Channels**

It is important to municipalities and their residents that their own municipality's PEG channels be easy to access and retrieve, and be fully functional and of adequate quality in terms of picture and sound. AT&T has in effect offered to trade away the accessibility and functionality of the local PEG channels for access to a larger pool of regional PEG channels, presented in the same low-quality and with impaired functionality as the local channels. The ability to view PEG channels from other municipalities is of little interest to residents of the Municipalities, and certainly not worth the price of enduring the markedly inferior access and functionality with respect to the local PEG channels imposed by AT&T.

The lack of interest in regional PEG channels is demonstrated by the fact that although the Federal Cable Act makes "meeting community needs" the touchstone for determining what PEG channels are required by a franchise, it is unusual for a franchise renewal to require carriage of a channel that solely carries another municipality's school, government, or public access programming.<sup>2</sup>

Such a result makes sense from a local perspective: People are primarily interested in the programming from their school district: school board meetings, high school sporting events (especially for residents not able to get to a football or basketball game in person), homework

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<sup>2</sup> A franchise may require carriage of multiple educational channels if multiple schools serve the municipality in question. For instance, in Michigan school districts are units of local government separate from cities, villages and townships. School district boundaries often do not follow municipal boundaries, with the result that a municipality can be served by several school districts. In such situations, franchises often require the carriage of the educational channels of each school district. Often this is done by "channel reuse," and each resident receives only the educational channel for the school district in which s/he resides - - thus a west-side resident of City X gets the West Side School District channel on (say) channel 10, while on the same channel an east-side resident gets the East Side Schools channel.

information, instructional materials and menus. Parents and students want this information for their school, not for schools in other cities.

The situation is the same with respect to government channels. People are interested in the meetings of their local government: Council or Board meetings, Planning Commission meetings, Zoning Commission meetings or the like. Zoning issues or ordinance issues from other municipalities are of little or no interest - - people generally will not be familiar with or be interested in the issues or personalities involved in other communities.

**C. AT&T's Failure to Provide Closed Captioning and Secondary Audio Programming on PEG Channels Dilutes Their Usefulness and Limits Their Audience**

The Municipalities want the Commission to know that PEG channels in their communities carry programming with closed captioning and/or secondary audio programming. For instance, the City of Detroit's government channel regularly carries programming provided by the State of Michigan and other entities that contains closed captioning. Examples would include such award-winning public information shows as the Job Show, Job Show for Teens, Consumer's Corner, and House Michigan (on home ownership issues).<sup>3</sup> It is obvious how important job-related programs are in the current recession, and it is in the interest of local government that such programs be made available to as diverse an audience as possible. To the extent AT&T fails to provide closed captioning for these programs, it restricts their availability for certain consumers.

The lack of closed captioning and second audio programming also limits the utility of PEG channels for communities' future planning. For instance, the City of Grand Rapids,

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<sup>3</sup> For examples of the types of content on these programs, see the following: for the Job Show, see [www.dleg.state.mi.us/jobshow](http://www.dleg.state.mi.us/jobshow); for Job Show for Teens, see [www.dleg.state.mi.us/jobshowforteens](http://www.dleg.state.mi.us/jobshowforteens); for Consumer's Corner, see [www.dleg.state.mi.us/consumerscorner](http://www.dleg.state.mi.us/consumerscorner).

Michigan has been contemplating providing programming aimed at hearing impaired residents in the City. The usefulness of such programming on the AT&T system is clearly impaired by the lack of closed captioning service on that system.

As the ACM Petition points out, AT&T is required by the Commission's rules to pass through the closed captioning in programs that are provided to AT&T so that it is available to all viewers. See 47 C.F.R. § 76.606. AT&T's failure for over two years now to provide closed captioning for the PEG programming on its U-verse system - - while providing the service on regular channels - - is inexcusable and a violation of Federal regulations.

**D. The Commission Possesses Ancillary Jurisdiction Under Title I to Require Nondiscriminatory Treatment of PEG Channels by AT&T**

In a Federal court case in Connecticut, AT&T argued that it is not a cable provider as defined by Title VI, and so is not subject to the regulations and requirement of the Cable Act. *See Office of Consumer Counsel v. Southern New England Telephone Company d/b/a AT&T Connecticut, Inc.* 515 F. Supp. 2d 269, 282 (D. Conn. 2007), *reconsideration denied* by 514 F. Supp. 2d 345, 351 (D. Conn. 2008), *motion to amend entry of final judgment denied* by 565 F. Supp. 2d 384 (D. Conn. 2008). While the Federal court did not accept this argument, and this Commission should not either, for reasons set forth in the Lansing and ACM Petitions, the Commission should also assert jurisdiction to require that PEG channels be treated in a nondiscriminatory manner in order to satisfy the Congressional goals of the Cable Act. Thus, in addition to its authority under Title VI, the Commission possesses ancillary jurisdiction under Title I to require that AT&T treat the PEG channels on its system in a nondiscriminatory manner.

The Commission has in the past used its ancillary jurisdiction to ensure that reasonable consumer expectations and Congressional goals are met. *See Review of the Emergency Alert System, Second Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd.

13275, 13298; FCC 07-109, ¶ 48 (2007) (applying to wireline video providers certain requirements of the Federal Cable Act). The Supreme Court has approved of FCC rules derived under the Commission's ancillary jurisdiction that were intended to "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services." *United States v. Midwest Video Corporation*, 406 U.S. 649, 667-668 (1972).

One Congressional goal of the Federal Communications Act is to make available "to all the people of the United States, without discrimination, . . . a rapid, efficient, . . . wire and radio communication service with adequate facilities. . . ." 47 U.S.C. § 151. While AT&T touts its U-verse service as a technological step forward, the way it is implemented for PEG channels is a significant step backward because, in contrast to the Congressional goals, it is less "rapid," less "efficient," it "discriminates" against both the hearing and visually impaired by raising barriers to access for them and thus is not "available" to "all the people" taking U-verse service. In these ways, AT&T's handling of PEG on its U-verse system hinders the achievement of Congressional goals. It is therefore appropriate for the Commission to exercise its ancillary jurisdiction in this matter to fulfill Congressional goals and to affirm reasonable consumer expectations.

AT&T's U-verse service is marketed to consumers as a cable service in competition with traditional cable services. Congress and this Commission established a set of laws and regulations that both shape and uphold consumer expectations with respect to cable services.<sup>4</sup> When AT&T competes with providers of traditional cable services but is not bound to follow the same rules as them, then local consumers suffer because regulations designed to benefit them (such as those discussed in the Lansing and ACM Petitions) are set aside by AT&T as not

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<sup>4</sup> See below on viewing Federal requirements from the consumer's point of view.

applicable to their service. The Commission should affirm that when AT&T is competing for consumers of cable services in such a way that reasonable consumer expectations are that PEG channels will be found on the basic service tier, then AT&T is offering "cable services" and is bound by the requirements of the Federal Cable Act and its associated regulations - both directly under Title VI and pursuant to the Commission's Title I ancillary jurisdiction.

## **II. COMMENTS OF THE MUNICIPALITIES IN SUPPORT OF THE CITY OF DEARBORN PETITIONERS**

The Municipalities support the requests for relief of the Petitioners in the *Dearborn et al.* case (CSR-8128) (collectively, the "Dearborn Petitioners"). The Municipalities support the Dearborn Petitioners' positions in general, and would like to add specific comments with respect to the following issues raised by the District Court.

### **A. Comcast's Actions Violate the Basic Service Tier Requirements**

Comcast's actions violate the basic service tier requirements found in the Federal Cable Act. *See* 47 U.S.C. §543(b)(7)(A). Questions 2, 3 and 4 from the District Court sought clarification from the Commission on the following issues: (i) about the effect of rate deregulation on the basic service tier requirements; (ii) on whether the consumer's point-of-view should govern the determinations of when a channel is on the basic service tier and whether it is being treated discriminatorily; and (iii) on the criteria to be considered for determining when a channel is on the basic service tier. On all these questions the Municipalities support the positions taken by the Dearborn Petitioners, and respectfully request the Commission to grant the relief requested there for the reasons discussed below and in the Dearborn Petition.

**1. Basic service tier requirements should be held to apply independently of rate regulation because they serve compelling governmental interests.**

The Municipalities believe that while the basic service tier requirement is found in a section of the Cable Act addressing rate regulation, it in fact responds to Congressional concerns that are unrelated to rate regulation. These Congressional concerns were expressed in the legislative history to the 1992 amendments to the Cable Act, which noted that "[b]ecause of the interests served by PEG channels, the Committee believes that it is appropriate that such [PEG] channels be available to all cable subscribers . . . ." H.R. Rep. 102-628 102d Cong., 2d Sess. at 85 (1992). The basic service tier requirement is also a means to address the compelling interests of local government in localism, diversity and education. These are the very governmental interests that Congress explicitly recognized were served by PEG channels:

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.

*Id.* To continue serving these compelling governmental interests, PEG programming must be available to all subscribers in a way that facilitates, not hinders, ready access by consumers.

**2. Basic service tier requirements should be held to apply under the Commission's Title I ancillary jurisdiction even under effective competition.**

Because the basic service tier requirements serve important Congressional purposes beyond the area of rate regulation, they should not be set aside when there is a finding of effective competition leading to rate deregulation. The Commission can and should exercise its ancillary jurisdiction to maintain the basic service tier requirements when rates are deregulated.

The assertion of such jurisdiction by the Commission is "reasonably ancillary to the effective performance of [its] various responsibilities." *VoIP TRS Order*, 22 FCC Rcd. 11275, 11287; FCC 07-110, ¶ 22 (2007). By exercising its ancillary jurisdiction in this matter, the Commission can assure that reasonable consumer expectations and Congressional goals related to nondiscriminatory access to PEG channels, diversity in local programming and important sources of local information relevant to public safety and welfare are met. Therefore, the Municipalities respectfully request that the Commission require that Comcast and other cable providers continue to meet the basic service tier requirements irrespective of whether there has been a finding of effective competition.

**3. Basic service tier requirements and discriminatory treatment of channels should be evaluated from the consumer's point of view.**

It is consistent with both the language of the statute and the Commission's past practice to view the basic service tier requirements from the consumer's point of view. See *Oceanic Time Warner Cable, a Subsidiary of Time Warner Cable, Inc.*, 23 FCC Rcd. 12804, 12807, DA 08-1960, ¶ 8 (2008) ("[I]t is the subscribers' perspective – not that of the cable operator - that is relevant in determining whether a change in programming services has occurred."); *Review of the Emergency Alert System, Second Report and order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 13275, 13298, FCC 07-109, ¶ 49 (2007) ("the reasonable expectations of viewers should guide our efforts").

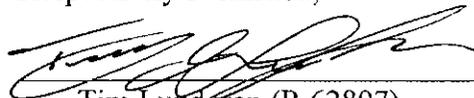
When one examines from the consumer's point of view how Comcast has proposed to treat PEG channels, it is clear that they are being marginalized and treated differently from other basic service tier channels. Alone among the basic service tier channels, the PEG channels under Comcast's plan are moved into the upper tier of channel numbers and provided only in digital format. This creates both a physical and technological separation of PEG from other basic

service tier channels, and the Commission should find that such treatment is in violation of the basic service tier requirements. The Municipalities support the Dearborn Petitioners' conclusion that Comcast has violated the basic service tier requirements by unilaterally moving the PEG channels, and only the PEG channels, off the basic service tier and onto a digital tier of service.

**B. By Treating PEG Channels Differently from Other Basic Service Tier Channels, Comcast Has Defeated the Congressional Purpose that PEG Channels Be Made Available on a Non-Discriminatory Basis**

As the Dearborn Petitioners have illustrated, digitizing the PEG channels makes it more difficult and costly for many viewers to both access and view them, thus negatively affecting viewership for important sources of local information. By digitally transmitting PEG channels while other basic service tier channels are left on analog, Comcast is treating PEG channels in a discriminatory fashion that conflicts with express Congressional goals. It is also discriminatory treatment for Comcast to remove the PEG channels from their current locations (typically in the lower channel numbers among or near other basic service tier channels), and to put them hundreds of channels away from the local broadcast channels. The Commission should find that such physical displacement of the PEG channels constitutes discriminatory treatment and conflicts with express Congressional goals. For these reasons, the Municipalities respectfully request that the Commission require Comcast to treat PEG channels similarly to other basic service tier channels, both in terms of format and channel placement.

Respectfully submitted,



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March 12, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 12th day of March, 2009, caused a copy of the foregoing Comments to be served on the following individuals via first class U.S. mail:

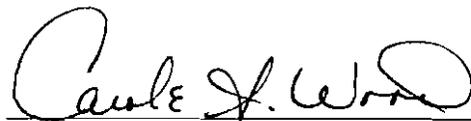
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