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May 7, 2009

VIA ELECTRONIC FILING SYSTEM (ECFS)

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

**Re: Petition For Declaratory Ruling Regarding AT&T's U-verse
PEG Product, MB Docket No. 09-13, CSR-8126, and CSR-8127**

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules this *ex parte* notice is filed on behalf of the Alliance for Community Media ("ACM"). On May 7, 2009, James Horwood, Tillman L. Lay, and the undersigned, all with Spiegel & McDiarmid LLP, Washington, D.C.; and counsel for ACM, met with Rosemary C. Harold, legal advisor to Commissioner Robert M. McDowell to discuss the above-referenced petition and the matters described in the attached handout.

A copy of this letter and the handout presented during the meeting are being filed via ECFS with your office. Please do not hesitate to contact me if you have any questions.

Sincerely,


Gloria Tristani

Attachment

cc: Rosemary C. Harold

ALLIANCE FOR COMMUNITY MEDIA

FCC Docket MB 09-13 (CRS-8126 *et al.*)

I. AT&T's U-Verse Multichannel Video Service is a "Cable Service."

- A. AT&T's U-verse video programming is a proprietary package of video programming (*i.e.*, of AT&T's own choosing) that AT&T transmits to subscribers over its own landline system of closed transmission paths that crosses local ROW. AT&T is therefore delivering a "cable service" over a "cable system."
- B. AT&T admits it is an MVPD and thus that it delivers "video programming."
- C. AT&T admits that it chooses the contents of its video programming package. It therefore admits that it is engaging in "one-way transmission" of video programming within the meaning of § 602(6)(A). *NCTA v. FCC*, 33 F.3d 66, 71 (D.C. Cir. 1994); *Video Dialtone Reconsideration Order*, 7 FCC Rcd 5069, 5071 (1992); *Cable Modem Ruling*, 17 FCC Rcd 4798, 4834 (2002).
- D. All of the subscriber interaction involved in AT&T's multichannel video programming service fits comfortably within "subscriber interaction . . . which is required for the *selection or use* of such video programming" within the meaning of § 602(6)(B). *See SNET*, 515 F.Supp. 2d 269, 279-80 (D. Conn. 2007); H.R. Confer. Rep. No. 458, 104th Cong., 2d Sess. at 169 (1996).
- E. The "cable service" definition is transmission protocol agnostic. It also draws no distinction between whether the system delivers one channel at a time as the subscriber selects it (VOD), or delivers all channels on a tier at once. *See SNET, supra*.
- F. Since AT&T's multichannel video programming service is not delivered by a "radio-based system," through video common carriage, or through an OVS, § 651 dictates that AT&T must be providing the service as a "cable operator" under Title VI.

II. Finding That AT&T Is Providing a "Cable Service" Would Not Pre-Judge Any Larger Issues About Treatment of Internet Services or Broadband Networks.

- A. IP is a transmission protocol, not the Internet. AT&T's video programming service is *not* Internet-based; it just happens to be delivered from AT&T's VHO to the subscriber's set-top box in Internet protocol (where it is converted to digital or analog). But AT&T's multichannel video service remains a proprietary, "closed" package of video programming that is *not* delivered to subscribers over the Internet. It is therefore readily distinguishable from online video services such as Hulu and YouTube.

- B. As a closed, proprietary package of video programming not delivered over the Internet, AT&T's U-Verse video service is not Internet access and thus bears no resemblance to the service at issue in the *Cable Modem Ruling*.
- C. As a Title VI "cable service," AT&T's U-verse video service is subject to preemptively light regulation at all levels. See §§ 624(a) & (f)(1).

III. Even if AT&T Were Not Providing a "Cable Service" (but it clearly is), the FCC May Grant All of the Relief Requested in ACM's Petition Under Title I.

- A. In its January 12, 2006, *ex parte* letter (at p. 9) in WC Docket No. 04-36, AT&T conceded as much:

[I]f additional safeguards are necessary, *the Commission's Title I authority over video services is more than sufficient to address them*; AT&T and others have made clear that they are fully prepared to pay franchise fee equivalents, *to support PEG programming*, and to otherwise work with local governments and the Commission to protect the public interest.

(Emphasis added.)

- B. We believe, however, that the applicability of Title VI to AT&T's U-verse video offering is clear, and that Title VI presents a much cleaner, more competitively-neutral, and preferable, way to resolve the issue.

IV. The Commission Can and Should Act Promptly on the PEG Petitions.

- A. AT&T is forging ahead as if it were not subject to Title VI, to the detriment of PEG centers and their viewers.
- B. AT&T once believed prompt FCC action was required on the U-verse "cable service" issue. In the same January 12, 2006, *ex parte* letter (at 3-5), AT&T argued that "Commission action" on the U-verse "cable service" issue was "overdue," and that it was "imperative" that the Commission "do so quickly."