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June 26, 2009

**Electronic Submission**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: Ex parte**

**Petition for Declaratory Ruling Regarding Primary Jurisdiction Referral in *City of Dearborn et al. v. Comcast of Michigan III, Inc. et al.*, File No. CSR-8128; Petition for Declaratory Ruling of the City of Lansing Michigan, File No. CSR-8127; Petition for Declaratory Ruling of the Alliance for Community Media, et al., File No. CSR-8126; MB Docket No. 09-13.**

Dear Ms. Dortch:

Yesterday, June 25, 2009, Bob Quinn, Gary Phillips, Christopher Heimann and I met with Michelle Ellison, Ajit Pai, Joel Kaufman, Susan Aaron and Christopher Killion of the Office of General Counsel to discuss issues relating to the Commission's authority to grant the above-referenced petitions for declaratory ruling. After briefly describing how AT&T's service operates and how it differs from cable services, AT&T explained that the Cable Act narrowly circumscribes Commission authority over PEG. AT&T noted, in this regard, that the Act does not require that PEG programming be made available; rather, it simply *permits* franchising authorities to require cable operators to set aside capacity on their cable systems for PEG. And, to the extent a franchise authority does require channel capacity for PEG; the Cable Act specifies one – and only one – federal obligation with respect to how that programming is provided. Specifically, it requires that each cable operator of a cable system subject to rate regulation and that is required by a franchising authority to provide PEG must include that programming on the basic tier, which is the “tier to which subscription is required for access to any other programming.”<sup>1</sup> AT&T maintained that the substance and scope of any PEG carriage obligation, apart from this lone federal requirement, are matters of state law or local regulation.

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<sup>1</sup> 47 U.S.C. § 543(b)(7)(A)(i). AT&T noted that even this sole requirement is not absolute. As the Commission previously has held, a franchise authority and cable operator may in a franchise agreement provide for PEG to be carried on another tier. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Rate Regulation*. 8 FCC Rcd 5631, ¶ 160 (1993). AT&T further observed that, even if it were a cable operator and U-verse was a cable service (which they are not), this requirement would not apply because AT&T, as a new entrant, plainly is subject to effective competition. As a consequence, the basic tier requirement does not apply to U-verse. But, even if it did, AT&T's PEG product complies fully because PEG programming is made available with every package of programming (or tier) that AT&T offers on U-verse.

AT&T further explained that, with respect to PEG, the Commission has no ancillary authority to adopt any federal requirements other than those specifically set forth in Title VI of the Act. AT&T noted that section 624(f) of the Act specifically provides that “[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, *except as expressly provided in this subchapter.*” 47 U.S.C. § 544(f) (emphasis added). Likewise, section 611(a) of the Act authorizes a franchising authority to establish requirements “with respect to the designation or use of channel capacity for public, education, or governmental use” but “only to the extent provided in this section.” 47 U.S.C. § 532(a). Thus, with respect to PEG, the Commission has no ancillary authority and is limited only to that specifically set forth in Title VI.

Finally, AT&T observed that, consistent with Congress’s view that the substance and scope of any PEG requirement is a matter of state and local law, state governmental authorities have adopted a variety of provisions relating to PEG. In particular, over the past four years, 20 states have enacted state cable franchising statutes designed to modernize and streamline anachronistic local franchising processes and authorities, and transferred the power to franchise cable and other providers to the states from local authorities and/or established statewide requirements relating to PEG.<sup>2</sup> AT&T explained that, as the State Government Commenters have argued, granting the petitions here would overturn these laws by establishing through a declaratory ruling a host of new, federally mandated PEG requirements that have no basis in the statute. These requirements would preempt any state or local law, regulation or agreement that permits a cable operator to provide PEG programming in a different manner. AT&T observed that this preemption would be inconsistent with President Obama’s recent policy pronouncement that preemption of state law should be “undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption,”<sup>3</sup> both of which conditions are lacking here.

The attached materials were used in the meeting.

Pursuant to section 1.1206 of the Commission’s Rules, this letter is being filed electronically with the Commission. If you have any questions, please contact me at (202) 457-3821.

Sincerely,

/s/ Henry Hultquist

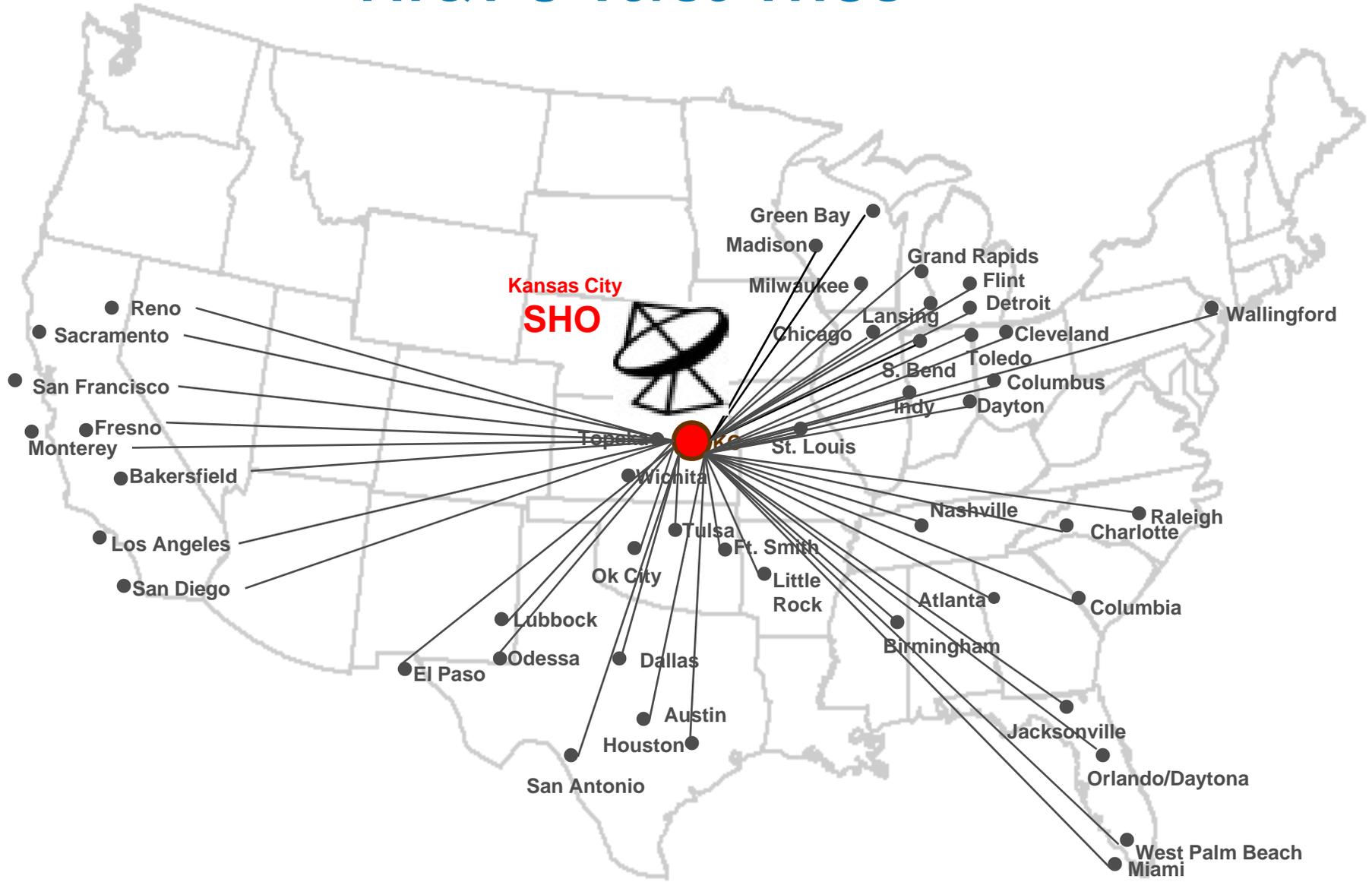
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<sup>2</sup> Nat’l Governors Ass’n Letter to Michael J. Copps, Acting Chairman, FCC (Apr. 1, 2009); Nat’l Conf. of State Legislatures Letter to Marlene H. Dortch at 1 (Apr. 1, 2009); Nat’l Ass’n of Attorneys General Letter to Michael J. Copps, Acting Chairman, FCC (Apr. 1, 2009) – collectively, State Government Commenters.

<sup>3</sup> The White House, Office of the Press Secretary, Memorandum for the Heads of Executive Departments and Agencies, Subject: Preemption (rel. May 20, 2009).

# AT&T U-Verse VHOs



# AT&T Video Network in Dallas-Ft. Worth

