MILLER & VAN EATON
P. L. L. C.

MATTHEW C. AMES
KENNETH A. BRUNETTI*
MARCI L. FRISCHKORN
GAIL A. KARISH*
NICHOLAS P. MILLER
MATTHEW K. SCHETTENHELM
JOSEPH VAN EATON
*Admitted to Practice in California Only

1155 CONNECTICUT AVENUE, N.W.
SUITE 1000
WASHINGTON, D.C. 20036-4320
TELEPHONE (202) 785-0600
FAX (202) 785-1234

MILLER & VAN EATON, L.L.P.
580 CALIFORNIA STREET
SUITE 1600
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE (415) 477-3650
FAX (415) 738-2466

WWW.MILLERVANEATON.COM

OF COUNSEL:
JAMES R. HOBSON
GERARD L. LEDERER
WILLIAM R. MALONE

October 29, 2009

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

Re: 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

Dear Madam Secretary:

On October 28, 2009, the Honorable John O'Reilly, Mayor of Dearborn, Michigan accompanied by his city attorney William Irving, and the Honorable David Payne, Supervisor of Bloomfield Township, Michigan accompanied by Leslie Helwig, the Township's Cable Administrator, as well as the undersigned, conducted an *ex parte* meeting with Rosemary C. Harold, Legal Advisor to Commissioner McDowell with respect to the above captioned matters ("PEG Petitions"). The subject matter of our conversation was consistent with the representations outlined in the attached document which we shared with Ms. Harold.

This *ex parte* notice is filed pursuant to Section 1.206 of the Commission's rules.

Sincerely,

Miller & Van Eaton, P.L.L.C.

By Gerry Lederer

Gerard L. Lederer

cc: Rosemary Harold, Esq.
2029\12\00150433.DOC

PROTECTION OF PEG CHANNELS' CARRIAGE ON THE BASIC TIER

BACKGROUND

In November of 2007, Comcast notified Michigan communities that as of January 15, 2008, it would convert all PEG channels to digital, and move the channels from their current location in the normal run of basic service channels to the 900-series of channels. The effect was that many – perhaps half a million or more subscribers in Michigan, including schools – would be required to obtain a converter to receive the PEG channels.

The Communities sued Comcast in January, 2008. The United States District Court for the Eastern District of Michigan first issued a Preliminary Injunction halting Comcast from converting the channels and then by Order dated November 26, 2008 in *City of Dearborn v. Comcast of Michigan III, Inc.,* No. 08-10156, the court directed us to file a Petition for a Declaratory Ruling asking the FCC to address seven questions. Reply Comments were due in that docket on April 1.[1]

PEG ACCESS REQUIREMENTS UNDER FEDERAL LAW

PEG Channels are ***not*** like other channels on the cable system. The channels are under the control of the community, not the cable operator. 47 U.S.C. §541 (franchising authority may require cable operator to designate capacity for public, educational or government use). The channels are designed to assure "access to the electronic media by people other than licensees or owners of those media." H. R. Rep. No. 98-934, 98th Cong. 2d Sess. 1984 at 30. When Congress amended the Cable Act in 1992, the House emphasized the importance of the channels, and emphasized that Congress intended for the channels to be viewable by every cable subscriber, absent an explicit agreement in the franchise to the contrary.[2]

THE FCC SHOULD DECLARE THAT COMCAST'S PROPOSED ACTIONS VIOLATE FEDERAL LAW AND REGULATIONS.

Specifically, in response to the seven questions posed by the court, the FCC should:

- Rule that discriminatory treatment of PEG channels is an unlawful evasion of Federal law and regulations.
- Find that the obligation to provide PEG on the basic service tier applies in all communities.
- Confirm that in determining whether PEG is part of a tier, or is being treated discriminatorily, the analysis should proceed from the point-of-view of the consumer – who may be a viewer or programmer.
- Establish basic service tier criteria that look from the consumer's point-of-view.
- Find that operators may not charge for equipment required only to receive PEG channels.

---

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

[2] "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 non discriminatory basis…." H.R. Rep. No. 102-628, 102nd Cong., 2nd Sess. 1992 at 85.

- Find that PEG channels are not being provided on the basic service tier if digitized and subject to special equipment requirements, and other burdens (in this case, for example, Comcast requires customers to make a special request to receive PEG channels, and to make a special appointment to have the converter installed; it will not automatically bring a box to the home of subscribers at the time of installation).
- Find that the digitization of PEG channels as proposed by Comcast is discriminatory.

THE FCC'S DELAY HURTS THE PEG COMMUNITY AND ADVANTAGES COMMUNICATIONS COMPANIES

The FCC's delay in acting on this petition has and continues to result in very real damage to the PEG community.

- While the court's order bars Comcast from taking its planned actions in Michigan; Comcast is not barred in other states nor are other cable operators in Michigan barred from taking such actions. We are told that Charter plans to move channels in Michigan on December 1 to a very high channel number and to channels that are inferior in quality to the channels currently dedicated to PEG use. .
- Comcast told the court that it should certify the matter for direct appeal to the 6th Circuit rather than seek guidance as the Commission will never act in a timely manner. Petitioners, on the other hand, represented that the Commission could act in a reasonable period.
- The non-profit organizations, educational institutions and local governments that program PEG channels have very limited resources. The FCC's delay disadvantages those who do not have the sort of resources available to a Comcast or an AT&T. It requires repeated efforts at the FCC, and requires localities to pursue actions in other fora. At the same time the FCC is questioning whether deadlines need to be imposed on local government activities, it needs to recognize that its inaction results in the unsustainable and unfair imposition on local communities and PEG users.