

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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| In the Matter of |) | MB Docket No. 09-13 |
| |) | |
| Petition for Declaratory Ruling Regarding Public, Educational, and Governmental Programming |) | CSR-8126 |
| |) | |
| |) | CSR-8127 |

**RESPONSE OF TIME WARNER CABLE
TO THE MCALLEN INDEPENDENT SCHOOL DISTRICT'S EMERGENCY
PETITION FOR TEMPORARY STANDSTILL**

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EXECUTIVE SUMMARY

The “Emergency Petition for Temporary Standstill” filed in this docket by the McAllen Independent School District (“MISD”) lacks merit as a matter of policy, ignores key facts, is deficient on procedural and substantive legal grounds, and should be rejected by the Commission. MISD asks the Commission to step into the path of the digital transition and stop cable operators everywhere, including Time Warner Cable (“TWC”), from providing Public, Educational, and Governmental access (“PEG”) programming on digital channels until all other channels have been digitized. This overly broad request for a change in the law ignores the policy imperatives recognized by the Commission and the service improvements demanded by consumers. The purpose of TWC’s long-planned and well-publicized migration of PEG channels to digital format across its Texas cable systems is to enhance TWC’s bandwidth efficiency, so that it can provide enhanced services to its customers, specifically faster Internet access speeds and increased programming options. Through the National Broadband Plan and numerous other initiatives, the Commission has encouraged operators to provide faster broadband speeds and more advanced services. ^{1/} Moving to all-digital systems is necessary to accomplish these important policy objectives.

MISD also ignores key facts, including the following:

- TWC has taken comprehensive steps to ensure that its customers (approximately half of the residents of McAllen) can continue to view PEG programming after the transition.
- TWC has given more than 90 days notice to McAllen of its commitment to provide free analog-to-digital converter boxes to any customers who do not have one, so that no one who wishes to view the PEG channels will be unable to do so.

^{1/} See generally *Omnibus Broadband Plan Initiative*, Federal Communications Commission, *Connecting America: The National Broadband Plan* 109 (2010) (“Broadband Plan”).

- TWC is “channel mapping” PEG programming, so that customers with TWC converters or CableCard Equipped Unidirectional Digital Cable Products (“UDCPs”) will be able to locate PEG channels at their current channel positions even after the transition.
- TWC contacted MISD three times, beginning in July, to offer MISD free converter boxes where necessary in McAllen’s schools. Yet, MISD did not even respond to TWC’s offer until last week, after MISD had made its request to the Commission for emergency relief.

As a procedural matter, MISD’s petition attempts to broaden this docket – which concerns only the legality of AT&T’s webcasting of PEG programming and in which the MISD had not previously filed – into an immediate and plenary review of cable operators’ transmission of PEG programming in digital format. ^{2/} This docket provides no basis for the sweeping injunction sought by MISD.

As a legal matter, the trouble with MISD’s petition does not end there. While MISD’s petition ostensibly seeks relief against all cable operators, it targets TWC’s transition of PEG programming to digital format in McAllen as the basis for its request. TWC’s migration of PEG channels to digital, however, is entirely consistent with the law and MISD has not alleged otherwise. TWC’s franchise in McAllen *expressly* permits it to provide PEG programming in digital format. The Commission, moreover, has ruled that TWC faces effective competition in McAllen, and has thus removed regulation of the contents of the basic service tier under Section 543(b)(7) of the Cable Act. Although TWC will continue to carry PEG programming on its basic service tier in digital format, it is not legally required to do so.

Rather than demonstrating that TWC’s digitization of PEG programming is unlawful, MISD attempts to convince the Commission to take immediate action in this docket by changing

^{2/} Indeed, one of the petitioners in this docket, the Alliance for Community Media, has recognized that the issues raised by MISD “are different from those raised by the Alliance Petitioners and by the City of Lansing.” See Letter from J. Horwood, Counsel for Alliance Petitioners, to Marlene Dortch, Secretary of the Federal Communications Commission, dated Sept. 23, 2010, at 1.

the existing law. TWC is unaware of any precedent where the Commission has issued a standstill order in a rulemaking proceeding based on generic assertions of an entity that has not even filed comments in the docket. Such an injunction clearly would not serve the public interest.

MISD's arguments on the requirements that it must satisfy to obtain a standstill order are also inadequate to support the broad and immediate injunctive relief it requests. In making these arguments, MISD presents a misleading portrait of TWC's efforts in its Texas systems. With this submission, TWC seeks to ensure that the Commission has a complete and accurate understanding of TWC's actions – which are responsive to competition and its customers' demands for faster Internet speeds and increased High Definition (“HD”) television offerings – and to dispel the misimpressions created by MISD's emergency petition. MISD's claims of irreparable harm if TWC is not prevented from moving forward with its digitization of PEG programming in Texas are speculative and unsupported by any evidence.

At the same time that MISD invokes hypothetical injuries, the harms a standstill order would cause TWC, its customers, and the public interest are real and concrete. Far from serving the public interest, a standstill order indefinitely blocking all cable operators, including TWC, from providing PEG programming in digital format would clearly subvert it.

The bottom line is this: MISD's emergency petition fails to acknowledge the true factual or legal situation in McAllen; and it seeks action that is neither necessary nor consistent with the Cable Act. It provides no grounds to enjoin TWC from transitioning PEG programming to digital format in McAllen or to effectively stop all cable operators everywhere from transitioning PEG programming to digital format. Accordingly, the Commission should decline to issue a

sweeping injunction that would countermand the Commission's core pro-consumer policy of promoting the deployment of advanced communications services.

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Time Warner Cable (“TWC”) hereby responds to the Emergency Petition for Temporary Standstill filed by the McAllen Independent School District (“MISD”) in the above-captioned docket on September 20, 2010. [3/](#)

BACKGROUND

MISD’s “Emergency Petition” is part of a concerted, eleventh-hour effort by MISD to obtain FCC or judicial relief from a long-noticed and well-publicized plan by TWC to take its next step in the digital transition in Texas. That step involves digitizing PEG channels on TWC’s basic service tier. Despite more than 90 days’ notice of TWC’s planned transition, MISD waited until about 10 days before the transition date to file its petition. [4/](#)

[3/](#) MISD’s request for an indefinite “standstill order” constitutes an informal request for Commission action and TWC’s response is timely filed within 10 days of its filing on September 20th. *See* 47 C.F.R. §§ 1.41 & 1.45(b).

[4/](#) And last Friday, a week before the transition was scheduled to take place, a group of Texas cities, including the City of McAllen, represented by the same counsel who filed MISD’s emergency petition with the Commission, sued TWC in Texas state court, requesting a temporary restraining order and a preliminary injunction against the transition. The case, which TWC has removed to federal court, is styled *McAllen v. Time Warner Entertainment*, Case No. M-10-393. There are three plaintiffs – the cities of McAllen, San Juan, and Laredo – and four intervenors – the cities of Brownsville, Corpus Christi, Edinburg, and San Marcos. The cities’ assorted arguments are baseless, but to ensure that their claims are resolved in a federal forum TWC agreed to delay the digital PEG transition until October 15 while it removed the case to federal court. Thus, all of the schools within MISD that current receive the analog PEG signal will continue to do so after October 1st.

TWC's plan to transition its PEG channels in Texas to digital delivery is part of the inevitable digital transition of cable systems. ^{5/} More than a year ago, in June of 2009, broadcast stations completed their digital transition. TWC's Multichannel Video Distribution Provider ("MVPD") competitors – the national DBS companies and incumbent telephone providers – already provide all video programming in digital format. Notably, these digital video providers, who serve large and growing percentages of the MVPD marketplace, do not provide any PEG programming. ^{6/} Consequently, preventing TWC (or other cable operators, for that matter) from offering PEG programming in digital format would artificially limit the programming that it can carry, which, in turn would impair its competitive position and lead to TWC's customers defecting to providers that do not offer any PEG programming. That result, of course, would harm the very interest MISD claims to be advancing.

TWC has already transitioned some of its analog channels to digital in Texas. As the next – though by no means last – step in its digital transition, TWC is moving PEG channels to digital format. In its effort to block all cable operators in the country from relocating PEG programming to digital channels, MISD specifically targets TWC's digitization of PEG programming on its Texas systems as the basis for its emergency petition. Yet it presents a highly selective and incomplete picture of that long-planned and pro-consumer effort.

^{5/} See *Transmissions of Digital Television Broadcast Stations*, 13 F.C.C.R. 15,092, 15,093, ¶ 1 (1998) (noting "the evolution toward digital broadcast television"); *City of St. Petersburg, Florida v. Bright House Networks, LLC*, Nos. 8:07-cv-02105-T-24-MSS and 8:07-cv-02106-T-23-TBM, 2008 WL 5231861, at *5 (M.D. Fla. Dec. 12, 2008) ("The Court notes that BHN's realignment of the PEG channels is an inevitable step in the transition from video signals delivered in analog form to ones delivered in digital form.").

^{6/} In fact, AT&T's digital webcasting of PEG programming on its U-verse system is at issue in this docket. See *Media Bureau Action Entities File Petitions for Declaratory Ruling Regarding Public, Educational, and Governmental Programming*, 24 F.C.C.R. 1340, 1340 (2009).

A. TWC's Digitization Of PEG Programming Is Part Of A Long-Planned Effort To Maximize Its Available Bandwidth To Remain Competitive While Meeting Its Customers' Expectations.

Like other communications providers, TWC, one of the nation's largest cable operators, has also been participating in the digital transition. TWC has used digital signals to provide advanced communications services since the mid to late 1990s, including digital video services on its Texas systems. In 2009, TWC initiated a broad-based initiative to reclaim and reallocate bandwidth across all of its Texas cable systems in order to provide enhanced services to its customers, including additional HD programming, enhanced programming options, and faster Internet access speeds.

Using the limited bandwidth on its systems more efficiently is a competitive imperative for TWC. TWC's customers demand and expect increased HD programming options and faster Internet speeds and TWC must meet its customers' expectations to remain competitive with other MVPDs such as DirecTV and the DISH Network. In fact, one of the principal marketing claims made by TWC's competitors is that they offer their subscribers more HD programming than TWC. DISH Network, for example, advertises more than 200 HD channels in TWC's service territory. Yet, at the same time that these competitors offer extensive HD programming, they offer *no* PEG programming to McAllen residents. Vigorous competition from competitors who do not have any PEG obligations has reduced its customer base in McAllen and elsewhere in Texas. At present, nearly half of McAllen's residents do not take cable service from TWC.

TWC's hybrid fiber-coax systems in Texas, however, do not have unlimited capacity for responding to competition and customer desires. TWC's systems have a maximum bandwidth of either 750 or 870 MHz of spectrum to use for delivering communications services. TWC uses this finite bandwidth to provide a variety of different services, including traditional cable video

and video on demand (“VOD”) services, broadband Internet access, and Voice over Internet Protocol (“VoIP”) Digital Home Phone service. Given the range of communications services that TWC offers, it must carefully manage its limited bandwidth to ensure that it is used efficiently and effectively to meet its customers’ needs.

Consequently, the recovery of analog spectrum on TWC’s systems is crucial for the efficient use of its available bandwidth, especially as consumers increasingly expect more bandwidth-intensive services, such as HD programming and faster Internet speeds. Transmitting signals in digital format is far more efficient than transmitting signals in analog format. Each 6 Megahertz (“MHz”) analog channel that TWC reformats as a digital channel, through a process known as multiplexing (or “muxing”), can be used to deliver the programming carried on up to 15 analog channels, or it can be used to deliver 2 to 3 HD channels.

Once TWC has reclaimed analog bandwidth on its Texas systems, that bandwidth will be used to enhance all of the services that it offers to its subscribers. Specifically, TWC intends to increase its number of HD channels and to offer subscribers faster Internet service. TWC also intends to expand its “Start Over” offering, which allows subscribers to jump to the beginning of a program that is already in progress without the need for any pre-programming or recording device.

B. TWC Is Authorized To Provide PEG Programming In Digital Format In McAllen And Has Made Every Effort To Ensure A Smooth Transition For Its Customers.

In McAllen, TWC operates pursuant to a local franchise executed on November 27, 2001. The franchise agreement requires TWC to provide PEG channels, but expressly allows TWC to transmit any PEG programming in digital format. Section 6.1.1 of the franchise provides that

“[t]he EG channels can be in *either analog (6 MHz NTSC) or digital format* and shall be utilized for non-commercial purposes only.” ^{7/}

Additionally, the Commission has found that TWC faces effective competition in McAllen, and has therefore relieved TWC of any regulation of the make up of the basic tier pursuant to Section 543. ^{8/} In its ruling, the Commission expressly revoked McAllen’s certification to regulate TWC’s basic cable service.^{9/}

Consistent with its plan to maximize the efficient use of finite spectrum on its Texas cable systems, last year TWC moved three channels – Country Music Television, ABC Family, and Oxygen – from analog to digital format in McAllen. As its next step toward full digitization of its system in McAllen, on October 1, 2010, TWC planned to transition McAllen Government Access channel 12 (MCN 12), which McAllen also streams online, and Educational Access channel 17 (MITV 17) from analog to digital channels on its basic service tier. Transitioning this programming to digital format will free up approximately 12 MHz of bandwidth for other uses. ^{10/}

TWC’s plan to transition PEG channels to digital format has been well-known in McAllen for many months now. TWC initially provided notice to McAllen of the PEG relocation on June 28, 2010. TWC’s notice detailed several key steps that TWC was taking to ensure a smooth transition of PEG programming to digital channels:

- TWC offered to provide all basic and standard service tier customers with a digital-to-analog converter box with a remote control and access to an enhanced interactive navigation guide, Music Choice, and free On Demand programming free of charge. Basic service only customers would be provided a converter, upon

^{7/} Ex. A (emphasis added).

^{8/} See *Texas Cable Partners, L.P.; Petition for Determination of Effective Competition in Harlingen, Alice, & Certain Other Texas Communities*, 17 F.C.C.R. 6,373, 6,374, ¶ 5 (2002).

^{9/} See *id.* at 6,376, ¶ 8.

^{10/} TWC has since extended this date voluntarily to October 15, 2010, in light of litigation initiated by several Texas local governments, including the city of McAllen.

request, free of any monthly charge through December 31, 2015, and standard service tier customers who request a converter box within 60 days from the date of the transition would be provided one free of charge for one year. [11/](#)

- TWC would “channel map” PEG channels so they would remain visible on their pre-existing channel numbers when accessed through a converter box or a UDCP.
- TWC informed McAllen where customers with QAM tuners could find the PEG channels.
- No customer would be required to subscribe to a tier higher than the basic service tier to continue receiving the PEG channels. Thus, the customer’s tier of service and the price of that tier do not change as a result of the digitization of PEG channels.
- Customers would receive at least 30 days advanced notice of the digitization of the PEG channels.

Although MISD asserts that TWC’s digital transition imposes “special hurdles” on PEG channels, Pet. at 9, PEG advocates elsewhere have noted favorably the extent of TWC’s steps to ensure a smooth transition of PEG channels to digital format in Texas. In comments filed with the Missouri Public Service Commission, American Community Television and the Missouri Municipal League applauded TWC’s effort to channel map PEG programming in Texas so that customers can continue to locate the channels on their current channel position following the transition. [12/](#)

Beyond these efforts, it is important for the Commission to understand that all of the digital channels on TWC’s basic service tier are transmitted “in the clear” – *i.e.*, unencrypted – so that any viewer with digital reception equipment can view them. Of course, in order to view any digital programming, including PEG programming as well as the other channels noted above, a TWC customer must have some equipment capable of receiving digital programming. This

[11/](#) TWC also explained that any existing digital customers who requested additional converters to continue to access PEG channels would be provided converters at TWC’s normal rates.

[12/](#) See Ex. B, pp. 6-7.

would include a digital converter box provided by TWC, a digital-capable television set, a retail converter box with a QAM tuner, or a UDCP. (All televisions made since 2007 contain a QAM tuner.) ^{13/} Thus, TWC has offered to provide free analog-to-digital converter boxes to any customers who do not have one (through December 31, 2015 for basic-only subscribers), so that anyone who wishes to view the PEG channels will be more easily able to do so. TWC's customers who already have digital equipment, however, do not need to obtain additional equipment to view digital programming – including PEG programming – transmitted in the clear on the basic cable tier.

In addition to failing to inform the Commission of TWC's steps to ease the transition for its customers, MISD overlooks that TWC has every incentive to ensure that its customers can continue to view any desired programming. TWC does not want this transition to result in customer confusion, customer complaints or loss of customers, and the efforts that other PEG advocates applaud were taken with the best interest of TWC's customers in mind. After all, the very purpose of TWC's transition is to respond to its customers' needs.

McAllen responded to TWC's notice on July 16, 2010, requesting, among other things, TWC to delay transitioning its PEG channels for 60 days. TWC subsequently decided to delay the digitization of PEG channels until October 1, 2010 – more than 60 days after its initial notice to McAllen – to ensure the transition occurred seamlessly across the state. Accordingly, on July 22, 2010, TWC updated its notice to McAllen, reiterating the steps that it was taking to ensure a smooth transition for its subscribers. At that time, TWC also advised McAllen that it planned to provide individual notice of the new transition date to its customers via a letter in their next

^{13/} See 47 C.F.R. § 15.117(i); *Retailer Advisory on Mandatory Labeling of Consumer Electronics Products With Only Analog Broadcast TV Tuners (Regulation Effective May 25, 2007)*, 2007 WL 1685842, at 1 (May 25, 2007) (“As of March 1, 2007, FCC rules prohibit manufacturers and other responsible parties (as defined in the FCC rules) from manufacturing, importing or distributing devices with broadcast television equipment that have only an analog tuner and do not have a digital tuner.”).

billing statement. And TWC recommended that McAllen and PEG channel programmers work to ensure that their viewers were informed of the transition.

TWC also provided three notices of the PEG relocation directly to MISD, in July, on the eighth and the twenty-second, and again after MISD filed its petition. In its notices, TWC requested MISD to contact it if it wished to receive “a digital converter, free of charge, for each city location where we provide free service.” MISD did not follow up on TWC’s offer until several days after filing its emergency petition – almost two and a half months after TWC first offered free converters to MISD. Nevertheless, TWC remains committed to providing free digital converter boxes to courtesy service locations throughout McAllen to ensure that government offices and educational institutions can access digital PEG programming.

McAllen and TWC continued to exchange correspondence regarding the PEG transition throughout July, August, and into September. On September 17, 2010, TWC updated the City regarding additional steps it was taking to ensure that customers were prepared for the October 1, 2010 transition. These steps included:

- Displaying for 15 days following the transition an on-screen message on each PEG channel stating: “Public, Educational and Government Access Channels are no longer available in this format. Please call (866) 203-9163 to see if you are eligible for a free converter to view this and the other Access Channels.”
- Establishing a toll-free number that directed customers immediately to customer care agents specially trained to handle calls about the transition, without requiring customers to navigate through an automated menu.
- Implementing a process to address the concerns of special needs customers – including certain elderly customers, handicapped customers, and others – where dedicated customer care agents may waive liberally any installation fees if the customer needs a TWC representative to install a free converter box.
- Offering to run a Public Service Announcement produced by McAllen to inform its residents of the transition.

- Advising producers of PEG programming to use channel messages, programs, or online postings to inform customers of the change prior to October 1, 2010, and suggesting sample language to be used for such messages.

There is no reason why any subscriber who wishes to view MISD's programming after the digital transition of the channel should not be able to do so – and at no additional expense. TWC has provided multiple forms of advance notice to its subscribers of the planned PEG transition, including the free box offers. TWC published formal notice of the digitization in the McAllen Monitor on July 5, 2010. Beginning in July and August, TWC also notified its subscribers of the transition through bill inserts that described why TWC was transitioning PEG channels to digital format and how the transition would affect them. TWC's letters provided specific information about the free converter box program tailored to the service tier to which each customer subscribed and also indicated where a customer with a QAM tuner could locate PEG channels after the transition. Most recently, TWC published an advertisement in the McAllen Monitor reminding its customers of the change and the availability of free converter boxes. ^{14/} Although the PEG programming in McAllen is English-language programming, TWC has slated similar newspaper advertisements to be published in Spanish to further raise awareness of the transition.

TWC also suggested to McAllen that it provide additional publicity of the PEG transition on its access channels. But to the best of TWC's knowledge, neither the City nor MISD has done so. Nevertheless, press reports of the opposition by McAllen and MISD have included references to both the planned transition and to TWC's free converter box policy.

^{14/} See Ex. C.

C. MISD’s Requested Standstill Order Would Cause TWC, Its Customers, And The Public Interest Substantial Harm.

The interests of TWC, its subscribers, and the public generally would be seriously harmed by issuance of the standstill order that MISD requests. TWC intends to use the bandwidth that it recovers to respond to competition and provide its customers with more services that they want. But TWC’s effort to provide its planned new service offerings would be impaired if it cannot transition PEG channels to digital format as planned. And if TWC cannot move forward, it will confuse and frustrate its customers, because they will not be able to receive many of the advanced services they demand and expect – and that TWC has endeavored to provide to them. TWC will also be less able to meet the service offerings of its competitors, which would not only disadvantage it in the marketplace but would lead to a less competitive environment.

DISCUSSION

I. MISD’S PETITION PROVIDES NO BASIS FOR THE BUREAU TO ISSUE A “STANDSTILL” ORDER IN THIS PROCEEDING.

MISD asserts that the relief it seeks “would not be highly disruptive or far-reaching.” Pet. at 15. That could not be further from the truth. MISD is asking the Bureau to issue a broad “standstill order” that “protects all PEG providers, throughout the nation, from changes in the status quo that existed at the time the petitions in this matter were originally filed.” Pet. at 13. That startling request would not only “require[] any cable operator that had been carrying PEG channels in the same manner as local public broadcast stations to continue to do so” – incredibly “far reaching” and “highly disruptive” relief in its own right – but also apparently would require all providers across the country that have already transitioned PEG channels to digital format to return that programming to analog format. *See* Pet. at iv. It is doubtful that the Bureau has

authority to issue such a sweeping injunction in this rulemaking proceeding, but MISD is not entitled to any such relief in any event. ^{15/}

In evaluating a request for a standstill order, the Commission considers four factors: “(1) likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is granted; and (4) that the issuance of the order will further the public interest.” ^{16/} While “no single factor is necessarily dispositive,” ^{17/} none of them weighs in favor of granting MISD any injunctive relief here. The Bureau should therefore deny its request.

A. MISD Has No Likelihood Of Success On The Merits Of Its Emergency Petition.

1. TWC’s Digitization Of PEG Programming In McAllen Is Lawful, And MISD Does Not Even Argue Otherwise.

Although MISD targets TWC’s digitization of PEG programming in McAllen as the basis for its emergency petition, it does not actually argue that anything TWC is doing is unlawful. The reason for that is clear – TWC’s digitization of PEG programming in McAllen is entirely legitimate.

First, TWC’s franchise agreement with McAllen expressly allows it to provide PEG programming in digital format. Section 6.1.1 of the franchise explicitly provides that “[t]he EG channels can be in *either analog (6 MHz NTSC) or digital format* and shall be utilized for non-

^{15/} While we recognize that the Bureau is vested with delegated authority to issue standstill orders under certain circumstances, we do not believe that this is one of them. MISD has not filed any complaint against TWC over its PEG digitization with the Commission, but instead seeks the Commission to issue a standstill order in a broad-based rulemaking that has been ongoing for more than 19 months. We are unaware of any situation where the Bureau has issued a standstill order in a broad-based rulemaking proceeding based on the request of an entity that has not even filed comments in the docket. As discussed below, MISD’s filing does not even come close to meeting the Commission’s requirements for injunctive relief in any case.

^{16/} See *AT&T Corp. v. Ameritech Corp.*, 13 F.C.C.R. 14,508, 14,515, ¶ 13 (1998).

^{17/} *Id.* at ¶ 14.

commercial purposes only.” ^{18/} TWC is therefore expressly permitted to do the very thing that MISD complains about.

Second, while TWC has decided voluntarily to keep PEG programming on digital channels on the basic service tier, it is under no legal obligation to do so. Section 543 of the Cable Act provides for a “separately available basic tier . . . [that includes] [a]ny public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers,” but that requirement applies only to rate-regulated cable operators. ^{19/} In other words, the requirement that PEG programming reside on the basic service tier “cannot apply to systems that face effective competition.” ^{20/} Consequently, as the Commission itself has recognized, “[i]f a cable system faces effective competition and is deregulated pursuant to a Commission order, the cable operator is free to place a broadcaster’s digital signal on upper tiers of service or on a separate digital tier.” ^{21/} The same applies to PEG channels because Section 543(b)(7) “is one of those rate regulation requirements that sunsets once competition is present in a given franchise area.” ^{22/}

The Commission determined that TWC faces effective competition in McAllen nearly a decade ago. As a result, TWC is not subject to any regulation of the make-up of its basic tier or its rates. At the same time, the Commission revoked McAllen’s certification to regulate TWC

^{18/} Ex. A (emphasis added).

^{19/} 47 U.S.C. § 543(b)(7)(A).

^{20/} *Time Warner Entm’t Co. L.P. v. FCC*, 56 F.3d 151, 192 (D.C. Cir. 1995); *see also Morrison v. Viacom, Inc.*, 52 Cal. App. 4th 1514, 1520, 61 Cal. Rptr. 2d 544, 548 (1st Dis. 1997) (holding Section 543(b)(7)(A) “applies only to those cable companies that are regulated under the Cable Act”).

^{21/} *See Carriage of Digital Television Broad. Signals*, 16 F.C.C.R. 2598, 2643, ¶ 102 (2001).

^{22/} *Id.*

under that statute. Accordingly, although PEG programming in McAllen remains on digital channels on TWC's basic service tier, TWC is not legally required to carry them on that tier. ^{23/} In fact, in light of the Commission's effective competition holding, even while TWC is keeping PEG programming on its basic tier, TWC could not be required to place PEG programming on its basic service tier at all.^{24/} Neither the Commission nor McAllen has authority to regulate the contents of TWC's basic service tier, or to control where it places PEG programming. ^{25/}

Indeed, even where a cable operator is required to provide PEG channels, there is no statutory requirement that they be transmitted in analog format. Rather than requiring cable operators to transmit signals in any particular format, Congress prohibited regulation of a cable operator's transmission technology. ^{26/} As such, as MISD seems to recognize, a cable operator may provide all of its basic cable tier in digital format. Requiring a cable operator to transmit in analog format would preclude a cable operator's ability to manage its progressive transition to digital format.

Given that TWC is not required to carry PEG programming on its basic service tier, and its franchise with McAllen expressly authorizes it to carry such programming in digital format,

^{23/} See *City of St. Petersburg, Florida v. Bright House Networks, LLC*, Nos. 8:07-cv-02105-T-24-MSS and 8:07-cv-02106-T-23-TBM, 2008 WL 5231861, at *3 (M.D. Fla. Dec. 12, 2008) ("Under the plain terms of the statute, § 543(b)(7)(A) does not apply to BHN in St. Petersburg and Tampa because the FCC has found that BHN is subject to effective competition in those areas."); see also *Flinn Broad. Corp. v. Knology Cable*, 18 F.C.C.R. 1680, 1682, ¶ 6 (Media Bur. 2003) ("A finding of effective competition permits a cable operator to price and market its services according to market forces, rather than pursuant to the provisions of Section [543] of the Act.").

^{24/} See 47 U.S.C. § 543(a)(1) ("No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section . . .").

^{25/} See 47 U.S.C. § 543(a)(2) ("If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system *shall not be subject to regulation by the Commission or by a State or franchising authority under this section.*") (emphasis added); see also 47 C.F.R. § 76.905(a) ("Only the rates of cable systems that are not subject to effective competition may be regulated."); *Carriage of Digital Television Broad. Signals*, 16 F.C.C.R. 2598, 2642-43, ¶¶ 102 (2001) ("If a cable system faces effective competition . . . and is deregulated pursuant to a Commission order, the cable operator is free to place a broadcaster's digital signal on upper tiers of service or on a separate digital tier.").

^{26/} See 47 U.S.C. § 544(e) ("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.*") (emphasis added).

MISD has no likelihood of success on any complaint about TWC’s digitization of PEG channels. With no likelihood of success on any complaint against TWC, MISD would have to make a very strong showing on the equities, which it cannot do, as explained below. [27/](#)

2. *TWC’s Digitization Of PEG Programming Does Not Run Afoul Of The Restriction On Editorial Control.*

MISD asserts that, in resolving the petitions before it, the Commission “may” determine that providing PEG programming in digital format constitutes improper editorial control. Pet. at 18. But that argument is unavailing. The restriction in Section 531 of the Cable Act that “a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section,” 47 U.S.C. § 531(e), does not extend to the *format* of PEG channels on a cable system. According to one court that expressly rejected the argument that MISD advances here: “courts interpret ‘editorial control’ under section 531(e) to mean cable operators are prohibited only from controlling the content of PEG channels. Courts hold that section 531(e) ‘bars the operator from attempting to determine the *content of programming* that is within the PEG [channel] categories.’ ” [28/](#)

Moreover, forcing cable operators to put all of their PEG channels in analog format would infringe their First Amendment rights, as such a requirement would consume scarce bandwidth and thus interfere with cable operators’ editorial discretion to choose programming for their subscribers (including to choose a mix of analog and digital programming that will

[27/](#) See *AT&T Corp.*, 13 F.C.C.R. at 14,515-16, ¶ 14.

[28/](#) *City of Dearborn v. Comcast of Michigan III, Inc.*, No. 08-10156, 2008 WL 4534167, at *6 (E.D. Mich. Oct. 3, 2008, as amended Nov. 25, 2008) (quoting *Time Warner Cable of New York City v. Bloomberg L.P.*, 118 F.3d 917, 928 (2d Cir. 1997) & citing *Morrone v. CSC Holdings Corp.*, 404 F.Supp.2d 450, 455 (E.D.N.Y. 2005) & *Glendora v. Brading*, No. 02-091-BR, 2002 WL 31971936 at *2 (D. Or. July 10, 2002)) (emphasis added in *Dearborn*); see also *Glendora v. Levin*, No. 01-1776, 2001 WL 1587415 (6th Cir. Dec.11, 2001) (cable operator’s requirement that a programmer have a local sponsor does not constitute editorial control in violation of § 531(e)).

appeal to consumers). ^{29/} MISD cannot show that analog transmission of PEG channels would further any governmental interest and, in any event, the burdens on cable operators' speech would far outweigh any asserted benefits. And, as these burdens would not be imposed on cable operators' competitors, such as DBS operators, any decision to require cable operators to deliver PEG in analog only would be arbitrary and capricious. Accordingly, MISD is unlikely to succeed on its claim that a cable operator exercises improper editorial control by digitally formatting PEG programming. ^{30/} To the contrary, TWC's own editorial rights would be infringed by any such requirement because it would inappropriately limit the programming that it can provide.

3. TWC Is Not Discriminating Against PEG Programming.

MISD also argues that the “when the Commission rules on the pending petitions, the Commission is likely to clarify that the designation of PEG channels is defined by federal law, which imposes a fundamental duty to transmit on the operator, and necessarily prohibits discrimination.” Pet. at 21-22. MISD does not allege that TWC's digitization of PEG programming discriminates against MISD's PEG programming. And it does not. TWC has recently transitioned other programming from analog to digital format in McAllen, and choosing to transition PEG programming to digital in this phase of TWC's digital transition is certainly not “discriminatory.” To the contrary, what MISD is seeking here is discrimination in its favor – something that Congress never envisioned.

As noted above, TWC has been fully deregulated under Section 543, and it is under no obligation to carry PEG programming on its basic tier of cable service. Nevertheless, following

^{29/} See Comments of the National Cable & Telecommunications Association (“NCTA”) at 17-22 (filed Mar. 9, 2009). Today, PEG obligations themselves could violate TWC's First Amendment, Due Process and Equal Protection rights. It is not necessary, however, to reach that issue if MISD's claims are rejected.

^{30/} Furthermore, when Congress intends to restrict channel positions by cable distributors, it does so expressly. See 47 U.S.C. §§ 534 & 535.

its transition, TWC will continue to carry PEG programming in digital format on its basic service tier, as it is expressly authorized to do under its McAllen franchise, and in full compliance with federal law. Indeed, the Act affirmatively prohibits a franchising authority from imposing restrictions on the transmission technology a cable operator uses. “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.*” [31/](#) And MISD’s argument has, once again, been expressly rejected. In *Dearborn v. Comcast of Michigan*, the Court held that “[n]othing in the statute or legislative history prohibits a cable provider from including both digital and analog channels on the basic service tier.” [32/](#)

That fundamentally correct conclusion is not altered by the fact that some cable customers may not have digital television reception equipment. Congress recognized at the time it passed the Cable Act in 1984 that some customers might need converter boxes to receive even the basic tier and contemplated that they would pay a separate fee for rental of equipment needed to view basic cable programming. [33/](#) Thus, the Cable Act treats charges for equipment separately from charges for programming, [34/](#) and permits the “installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box.” [35/](#) Congress also vested the Commission with authority to regulate rates for “equipment used by

[31/](#) 47 U.S.C. § 544(e) (emphasis added).

[32/](#) 558 F. Supp. 2d 750, 756-57 (E.D. Mich. 2008).

[33/](#) See 47 U.S.C. § 543(b)(3).

[34/](#) See *id.* § 543(b)(1)-(2); *In the Matter of Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, 8 F.C.C.R. 5631, 5810, ¶ 287 (1993) (“Congress discussed rates for equipment used to receive basic tier service and related installation in a subsection separate from those dealing with cable service rates.”).

[35/](#) See *id.* § 543(b)(3)(A).

subscribers to receive the basic service tier, including a converter box.” ^{36/} And the Commission itself has recognized that cable operators may charge for equipment used to receive digital programming on a cable system’s basic tier. ^{37/} Therefore, regardless whether customers choose to obtain such equipment, the PEG channels are available in the basic tier, which is all that the statute requires (for cable operators not subject to effective competition). In fact, in some locations served by TWC, all of its services are scrambled, which requires all subscribers to have converter boxes. Moreover, all other MVPDs – DBS operators and telcos – require set top boxes for reception of their video services. Accordingly, MISD does not have a likelihood of success on any claim that TWC or another cable operator discriminates against PEG programming by transmitting it in digital format.

4. *Transmitting PEG in Digital Format Does Not Violate Any Technical Standards.*

MISD further alleges that the Commission may accept the Alliance for Community Media’s argument that, by webcasting PEG programming, AT&T is violating the Commission’s technical requirement that PEG programming must be delivered at the same quality level as other programming. *See* Pet. at 21-22. But this has nothing to do with TWC’s digitization of PEG programming. TWC is not proposing to webcast MISD’s PEG programming, but instead will deliver it in digital format in the clear on its basic cable tier. As the court in *Dearborn* noted, there is nothing unlawful with “including both digital and analog channels on the basic service tier.” 558 F. Supp. 2d at 756-57. MISD does not – because it cannot – allege that digital programming is of a lower quality than analog programming. There is no merit to MISD’s

^{36/} *Id.* § 543(b)(3); *see id.* § 543(b)(3)(A) (“The regulations prescribed . . . under this subsection shall include standards to establish, *on the basis of actual cost, the price or rate for* – (A) installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box . . .”) (emphasis added).

^{37/} *See In re Carriage of Digital Television Broadcast Signals Amendments to Part 76 of Commission's Rules*, 16 F.C.C.R. 2598, 2647, ¶ 111 (2001) (“[W]e note that regulated cable systems may charge subscribers for customer premises equipment, such as the set-top box, that may likely be necessary for digital subscribers.”).

argument, and it has no likelihood of succeeding on it – even if it were pending before the Commission in this docket, which of course it is not.

B. MISD’s Claimed Irreparable Harms Are Purely Speculative And Do Not Support Sweeping Injunctive Relief.

MISD asserts that there is a “substantial” threat of irreparable harm to it, its viewers, students, other school districts, “at-risk populations,” and other providers of PEG programming around the country if the Bureau does not immediately issue a broad standstill order in this proceeding. Pet. at 22-23. Yet, MISD does not further elaborate on how its viewers, students, other school districts, “at-risk populations” or other providers of PEG programmers would be injured by digitization of PEG programming, or provide any evidence whatsoever to support its allegation. A bare allegation cannot possibly demonstrate irreparable injury supporting broad injunctive relief.

For its own part, MISD claims that it will be irreparably harmed by TWC’s digitization of its PEG programming in the following ways:

- Its audience “will be immediately and significantly reduced.”
- It will not be able to communicate as effectively with parents, children, and at-risk populations.
- Its ability to disseminate public safety messages to subscribers, students, teachers, parents, and the general public will be placed at risk.
- Interest in MITV’s curriculum program will wane.

All of these assertions are based on wholly unsubstantiated and incorrect suppositions that the digitization of its PEG programming will somehow negatively impact its viewership. As an initial matter, MISD apparently would have the Commission believe that all McAllen PEG viewers are subscribers of TWC, which is in fact untrue. Nearly half of McAllen’s residents do not take cable service from TWC, so they already are unable to view MISD’s programming over

TWC's network. These PEG viewers can access MCN 12 online through McAllen's streaming, or MCN 12 and MITV 17 over-the-air. TWC's MVPD competitors in McAllen are not required to carry PEG channels, and do not carry them. With respect to these non-TWC subscribers, MISD cannot be harmed by TWC's digitization of PEG channels.

Furthermore, MISD has other available distribution channels to communicate with its viewers. Among other things, MISD could stream MITV 17 over the Internet just as McAllen does with MCN 12. This method of communicating with its viewers carries the salutary benefit of not interfering with TWC's editorial control over its programming and thereby infringing on TWC's First Amendment speech rights. It also would be at least as – if not more – effective as using TWC's cable system to communicate with McAllen residents because it would enable MISD to reach residents who are not TWC customers.

Even more fundamentally, however, MISD's assertion that providing PEG programming in digital format will cause a loss of viewership is wholly unfounded. As noted above, TWC has extensively publicized to its customers the availability of free converter boxes for those basic and standard cable subscribers who do not have either converters of their own or television reception equipment with a QAM tuner. Thus, TWC has ensured that its basic and standard cable subscribers can continue to view MISD's PEG programming after the transition, if they desire to do so.

In light of TWC's offer of free digital converter boxes to its customers, it is not surprising that MISD presents no evidence that it will lose even a single viewer after its programming is transmitted in digital format. MISD does not submit the declaration of a single TWC customer who will no longer be able to watch MISD's PEG programming once it is transmitted in digital format. Instead, MISD submits the declaration of James Ponce, the Superintendent for MISD,

who speculates that some subscribers may not obtain converters from TWC. *See* Ponce Decl. ¶¶ 10-11. Such bare speculation is insufficient to demonstrate irreparable harm. ^{38/} Customers can obtain free converters from TWC and have been doing so since TWC issued its bill inserts months ago. Furthermore, to the extent that some customers may be confused about whether the PEG digitization is going forward and thus have yet to procure a free box, MISD must share the blame. Rather than helping to publicize the free box program on its channels, MISD and the City have instead publicized its efforts to halt the digital transition. Regardless of the reasons why some customers have yet to obtain boxes, TWC remains committed to providing them before, during and after the transition.

MISD additionally alleges that, if TWC does not provide the schools with converters before PEG programming is transitioned to digital format, it will lose the ability to view MITV within its classrooms. Yet, as MISD acknowledges, TWC has promised to provide it with free converters. The only reason that MISD has not received any converters to date is because it did not respond to TWC's first two letters requesting information on how many converters it needs before filing its emergency petition. After the petition was filed, TWC contacted MISD a third time, upon which MISD took the opportunity to request converter boxes. MISD's own inaction is, of course, no reason for the Commission to enjoin TWC – let alone all cable operators around the country – from digitizing PEG programming. ^{39/}

^{38/} *See Earthlink, Inc. v. SBC Communications, Inc.*, 19 F.C.C.R. 17,804, 17,805, ¶ 2 (2004).

^{39/} A party cannot claim irreparable harm based on its failure to mitigate its damages. *See IP Communications Application to Discontinue Telecommunications Services*, 18 F.C.C.R. 1890, 1892, at ¶ 8 (2003) (declining to address an end-user's request that the FCC require a dissolving entity to continue providing service, stating that "[a]lthough our requirements are designed to protect end-users, these end-users are under a corresponding obligation to act expeditiously in order to mitigate potential damage"); *see also American Brands, Inc. v. Playgirl, Inc.*, 498 F.2d 947, 950 (2d Cir. 1974) (denying a preliminary injunction requested by the plaintiff, reasoning that it "would appear to be basic that [the plaintiff] is obligated to mitigate its damages"); *Gianni Cereda Fabrics, Inc. v. Bazaar Fabrics, Inc.*, 335 F.Supp. 278, 280 (S.D.N.Y. 1971) (finding that plaintiff cannot claim irreparable harm when its delay is the cause of the harm it alleges); *Lanvin Inc. v. Colonia, Inc.*, 739 F.Supp. 182, 192-93 (S.D.N.Y. 1990) ("A

In view of MISD's failure to make any credible showing that it will suffer irreparable harm as a result of TWC's digitization of PEG programming, there is simply no basis for the Commission to grant it the far reaching injunctive relief that it seeks.

C. TWC Will Suffer Substantial Injury If The Commission Bars It From Placing PEG Programming On Digital Channels On Its Basic Service Tier.

Unlike the speculative harms that MISD invokes in support of its emergency petition, TWC will suffer real, concrete and irreparable harm to its competitive position and good will if it cannot move forward with its long-planned, and entirely lawful, digitization of PEG programming in McAllen and elsewhere in Texas. [40/](#) TWC has already expended considerable time and resources to plan for its digitization of PEG programming, and to promote and advertise new HD programming and faster Internet speeds that it will offer its customers using the vacated analog channels.

But TWC cannot implement its plans to add the HD channels and faster Internet speeds without freeing up capacity by moving analog channels to digital format on its system. If TWC is barred by a broad standstill order from digitizing PEG programming in McAllen, it will frustrate its customers' expectations because they will not receive the new HD programming or faster Internet speeds that they demand and expect. The resulting confusion and frustration will irreparably harm TWC's reputation and good will. [41/](#)

movant for extraordinary relief cannot mask an ongoing failure on its part to mitigate its damages as an ongoing instance of irreparable harm.”).

[40/](#) See, e.g., *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) (“[T]he threat of a permanent loss of customers and the potential loss of goodwill also support a finding of irreparable harm.”).

[41/](#) See *Multi-Channel TV Cable Co.*, 22 F.3d 546 at 552. Furthermore, as the NCTA pointed out in this proceeding, restricting cable operators' ability to transmit PEG programming in digital format raises substantial First Amendment concerns. See Comments of NCTA at 17-22 (filed Mar. 9, 2009). An injunction that infringed TWC's and other cable operators' ability to speak would necessarily cause irreparable harm. See *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

Furthermore, as the Commission itself has recognized, TWC faces intense competition for customers in McAllen. In order to maintain its competitive position, TWC must provide its customers the services that they demand and expect. But, if TWC cannot roll out new HD channels and faster Internet speeds as planned to meet the offerings of its competitors, it will be disadvantaged in the marketplace. This harm is also irreparable. [42/](#)

In view of the injuries that TWC will suffer if it cannot move forward with its planned digitization of PEG channels, the balance of harms is sharply against issuing any standstill order in this proceeding. [43/](#)

D. TWC’s Planned PEG Digitization – Not A Standstill Order – Advances The Public Interest.

MISD argues that “[t]he public interest would clearly be served” by the standstill order that it seeks, but its explanation of how is unconvincing. Pet. at 25. It contends that the *status quo* must be maintained to ensure that TWC subscribers will continue to receive PEG programming, but, as noted above, TWC has already taken steps to ensure that they will by offering free converter boxes. MISD does not identify a single TWC subscriber who will be unable to view PEG programming in digital format following the transition. See Pet. at 25.

MISD further offers that a standstill order will protect the Commission’s jurisdiction to issue a meaningful order, but that argument ignores the fact that the issues pending in this docket are factually and legally distinct from the PEG digitization in McAllen. See Pet. at 26. As such, a standstill order itself could inappropriately have an effect on the merits of an unrelated petition for declaratory ruling. Under the MISD’s logic, a standstill order would be appropriate in every

[42/](#) See *Multi-Channel TV Cable Co.*, 22 F.3d 546 at 552.

[43/](#) See *In re Sky Angel U.S., LLC*, 25 F.C.C.R. 3,879, 3,883, ¶¶ 8-9 (2010).

Commission proceeding. But grinding the communications industry to a halt every time the Commission is asked to consider an issue could not possibly serve the public interest.

A standstill order that effectively prevents all cable operators around the nation from relocating PEG programming from analog to digital channels would affirmatively harm the public interest. In TWC's case, its planned digitization of PEG channels will allow it to use its limited bandwidth more effectively to deliver customers enhanced services, such as additional HD programming and faster Internet speeds, and enable TWC to better compete against other providers. As such, TWC's planned migration of PEG channels serves the core objective, enshrined in the Cable Act and advanced by the Commission, of encouraging competition and deployment of new and innovative communications services that benefit consumers. ^{44/} By contrast, a standstill order in this proceeding, which would stop cable operators everywhere from using their limited bandwidth efficiently to provide their customers with additional advanced communications services that they demand and expect, would directly undermine that important objective.

CONCLUSION

For all of the foregoing reasons, the Commission should promptly deny MISD's emergency petition for a standstill order. Because MISD's emergency petition raises issues that are not presented in this docket, this docket is not an appropriate basis for awarding MISD breathtaking injunctive relief against all cable operators across the country, including TWC. Nor do the merits of MISD's petition warrant any injunctive relief. TWC's digitization of PEG

^{44/} See 47 USC § 521(2), (4) & (6) ("The purposes of [the Cable Act] are to . . . establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community; . . . assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public; [and] promote competition in cable communications . . .").

programming is lawful, and MISD has no likelihood of succeeding on any of its generalized arguments that the Commission will issue a favorable order in this docket. And while MISD presents only speculative and insubstantial harms as the basis for its requested relief, TWC, its customers, and the public interest would be directly and concretely harmed by a sweeping standstill order.

Respectfully submitted,



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EXHIBIT A

Southwest

ORDINANCE NO. 2001- 77

AN ORDINANCE GRANTING TO TEXAS CABLE PARTNERS, L.P., D/B/A TIME WARNER COMMUNICATIONS, A NON-EXCLUSIVE CABLE TELEVISION FRANCHISE AGREEMENT; PROVIDING FOR THE RIGHT, PRIVILEGE, AND FRANCHISE TO USE STREETS, ALLEYS, AND OTHER RIGHTS OF WAY TO PROVIDE CABLE TELEVISION SERVICE IN THE CITY OF McALLEN; PROVIDING FOR THE FEES AND PAYMENTS TO BE PAID TO THE CITY OF McALLEN BY THE FRANCHISEE; PROVIDING OTHER REGULATIONS FOR THE CONDUCT OF SAID SYSTEM BY THE GRANTEE; PROVIDING FOR SEVERABILITY; AND ORDAINING OTHER PROVISIONS RELATING TO THE SUBJECT MATTER THEREOF.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF McALLEN, TEXAS, THAT:

SECTION I: Ordinance Number 2001- 77 approved by the City of McAllen, Texas on the 26th day of November, 2001, granting Texas Cable Partners, L.P. d/b/a Time Warner Communications, the non-exclusive right, privilege and franchise to use streets, alleys and thoroughfares to provide cable television services in the City of McAllen, Hidalgo County, Texas; regulating said system; and ordaining other provisions related to the subject matter thereof, the complete franchise being attached hereto and incorporated herein by reference as Exhibit "A."

SECTION II: This Ordinance shall be come effective immediately upon its passage and execution in accordance with the law.

SECTION III: The City Secretary is hereby authorized and directed to cause the caption of this ordinance to be published in a newspaper having general circulation in McAllen, Texas in accordance with the provisions of the Code of Ordinances of the City of McAllen, Section 2-56. Publication of ordinances.

SECTION V: If any part or parts of this Ordinance are found to be invalid or unconstitutional by a court having competent jurisdiction, then such invalidity or unconstitutionality shall not affect the remaining parts hereof and such remaining parts shall remain in full force and effect, and to that extent this Ordinance is considered severable.

SECTION VI: The city Secretary is hereby authorized and directed not to publish this Ordinance in the Code of Ordinances of the City of McAllen as it is not amendatory thereof, however, it shall be cited in the appropriate appendix in the Code of Ordinances of the City of McAllen, Texas.

CONSIDERED, PASSED and APPROVED this 21st day of November, 2001, at a regular meeting of the Board of Commissioners of the City of McAllen, Texas at which a quorum was present and which was held in accordance with Chapter 552 of the Texas Government Code.

SIGNED this 21st day of November, 2001.

CITY OF McALLEN

By: Leo Montalvo
Leo Montalvo, Mayor

By: Leticia M. Vacek
Leticia M. Vacek, City Secretary

APPROVED AS TO FORM:

James E. Darling
James E. Darling, City Attorney

EXHIBIT A - ORDINANCE NO. 2001-77

Southwest

CITY OF McALLEN, TEXAS
NONEXCLUSIVE
CABLE TELEVISION FRANCHISE AGREEMENT
WITH
TEXAS CABLE PARTNERS, L.P.
dba TIME WARNER COMMUNICATIONS

November 7, 2001

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THIS FRANCHISE AGREEMENT made and entered into as of the ____ day of _____, 2001 by and between the CITY of McALLEN, a municipal corporation duly organized under the laws of the State of TEXAS (hereinafter called "Municipality") and TEXAS CABLE PARTNERS, L.P., dba TIME WARNER CABLE, (hereinafter called "Company") a Delaware Limited Partnership with its principal place of business at Stamford, Connecticut.

WITNESSETH

WHEREAS, Company wishes to continue to provide cable service in Municipality and has requested a franchise agreement in order to do same, and

WHEREAS, Municipality is authorized to grant one or more non-exclusive franchises for the provision of cable service within Municipality by means of a cable system, and

WHEREAS, Municipality has reviewed Company's request and has considered the terms and conditions of Municipality's current cable franchise dated July 1, 1963.

WHEREAS, Municipality has determined that the granting of this franchise will meet the cable related needs and interests of the community.

WHEREAS, Municipality has determined that granting of a franchise on the terms set forth herein is in the public interest and in the interest of the Municipality and its residents.

NOW, THEREFORE, in consideration of the mutual covenants and promises herein contained, the parties hereto agree as follows:

1. DEFINITIONS

1.1 In General For the purposes of this Franchise Agreement, the following words, terms, phrases, and their derivations shall have the meanings given herein. When not inconsistent with the context in which they are used, words used in the present tense include the future tense; words in the plural number include the singular number; and words in the singular number include the plural number. The word "shall" is always mandatory and not merely directory. The word "may" is not mandatory and is merely permissive.

1.2 Additional Insureds shall have the meaning defined in Part 7.

1.3 Affiliate and Affiliated shall mean any entity Controlling, Controlled by or under common Control with the entity in question.

1.4 Authorized Area shall mean the entire area from time to time within the corporate limits of Municipality.

1.5 Basic Tier shall mean that service tier which includes the retransmission of local television broadcast signals and EG channels.

1.6 Cable Gross Revenues shall mean all amounts derived directly or indirectly by Company which are in connection with or attributable to the operation of the Cable System within Municipality for Company's provision of Cable Services.

1.6.1 Cable Gross Revenues shall include, without limitation, subscriber and customer revenues (including those for basic cable services; additional tiers; premium services; pay per view; services included under either or both Section 1.7.1 and 1.7.2; program guides; forfeited deposits; installation, disconnection or service call fees; fees for the provision, sale, rental or lease of converters, remote controls, additional outlets and other customer premises equipment); revenues from the use of leased access channels; advertising revenues (national, regional or local); leased access rentals; commissions received from home shopping services or the like.

1.6.2 Cable Gross Revenues shall include all amounts received during a period regardless of whether the amounts are to be paid in cash, in trade, or by means of some other benefit to Company (excluding *de minimus* amounts, the value of free service to employees and municipality, and the like).

Cable Gross Revenues shall exclude sales tax and uncollected accounts during the period, computed on a fair basis consistently applied.

Cable Gross Revenues shall not include the revenue of any entity affiliated with Company, including, without limitation, a supplier of programming of the company, to the extent that said Revenue is also included in Cable Gross Revenue of Company.

1.6.3 Revenues from subscribers shall be allocated to Municipality based upon whether or not the location being provided Cable Service is located in Municipality or not, and not by any other allocation method.

1.6.4 Advertising revenues, home shopping network revenues or other revenues whose source cannot be specifically identified with a particular subscriber shall be allocated among the units of government served by Company from the Cable System "headend" serving Municipality in proportion to the number of subscribers in each.

1.6.5 Cable Gross Revenues shall include amounts collected from subscribers for Franchise Fees unless otherwise prohibited by applicable law.

1.6.6 If and to the extent any State sales or use tax or local sales tax is extended to Cable Services, then amounts collected by Company due to the application of such tax(es) to Cable Services shall not be included in Cable Gross Revenues.

1.6.7 Cable Gross Revenues shall include internet access service unless the same is determined not to be a Cable Service under applicable law.

1.7 Cable Services shall mean only:

1.7.1 the one-way transmission to all subscribers of (i) Video Programming, or (ii) other programming services,

1.7.2 subscriber interaction, if any, including but not limited to that which is used for the selection or use of such Video Programming or other programming services.

1.8 **Cable System or System** shall mean Company's system:

1.8.1 Consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed and used solely to provide Cable Services which includes Video Programming to multiple subscribers within the Authorized Area, but such term does not include (i) a facility that serves only to re-transmit the television signals of one or more television broadcast stations; (ii) a facility that serves subscribers without using any public right of way, (iii) a facility of a common carrier which is subject in whole or in part to the provisions of Title II of the Communications Act of 1934, as amended, except that such a facility shall be considered a Cable System (other than for purposes of Section 621(c)) to the extent such facility is used in the transmission of Video Programming directly to subscribers, except if the extent of such use is solely to provide interactive on-demand services. For the purpose of the preceding, the term "interactive on-demand services" means a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include service providing video programming prescheduled by the programming provider.

1.9 **Cable Television Business** shall mean the provision by the Company of Cable Services solely by means of the Cable System.

1.10 **Commission** shall mean the legislative body of Municipality, or its designee. This subsection does not authorize delegation of any decision or function that is required by law to be made by the Commission. In any case in which a hearing is held pursuant to this Franchise Agreement, the Commission may conduct the hearing or, in its sole discretion, may by resolution appoint a committee or subcommittee of the Commission or a hearing officer to conduct the hearing and submit a proposal for decision to it, pursuant to procedures established by resolution.

1.11 **Company** shall mean Texas Cable Partners, L.P., as the grantee of this Franchise.

1.12 **Control** (and its variants) shall mean effective control, by whatever means exercised, such as those described in *Report and Order and Further Notice of Proposed Rule Making* in MM Docket 92-264, 8 FCC Rcd 6828 (1993) at paragraphs 22-28 (adopting broadcast transfer of control standards as then in effect), and in Part 11 hereof.

1.13 **Drop** shall mean the cable or wire that connects the distribution portion of a Cable System to a customer's premises.

1.14 **Effective Date** shall be the date described as the effective date in Part 15.

1.15 **Emergency Alert System** shall have the meaning defined in Part 4.

1.16 **Event of Default** shall have the meaning defined in Part 12.

1.17 **Facilities** means cables, conduits, converters, splice boxes, cabinets, hand holes, manholes, vaults, equipment, drains surface location markers, appurtenances and related facilities owned

by Company and to be installed in the Public Right-of-Way and used by it in the provision of Cable services.

1.18 **FCC** shall mean the Federal Communications Commission.

1.19 **Franchise or Franchise Agreement** shall mean this document.

1.20 **Indemnitees** shall have the meaning defined in Part 7.

1.21 **Local Off Air Channels** shall mean full power "local commercial television stations" and "qualified non-commercial educational television stations" as such terms are defined in sections 614 and 615 of the Federal Communications Act of 1934 (as in effect on October 1, 1997)

1.22 **Manager** shall mean the Municipality's City Manager or his or her designee.

1.23 **Municipality** shall mean the City of McAllen.

1.24 **Municipal Charter** shall mean Municipality's charter.

1.25 **Municipal Code** means the ordinances of Municipality.

1.26 **Normal business hours** shall mean those hours during which most similar businesses in the community are open to serve customers and, in any event, not less than 9:00 a.m. to 5:00 p.m. Monday through Friday, excluding holidays. In addition, "normal business hours" must include some evening hours (up to 7 p.m.) at least one night per week and/or some weekend hours.

1.27 **Normal Operating Conditions** shall mean those service conditions which are within the control of Company. Those conditions which are *not* within the control of Company include, but are not limited to, natural disasters, civil disturbances, power outages, telephone network outages, and severe or unusual weather conditions. Those conditions which *are* within the control of Company include, but are not limited to, special promotions, pay-per-view events, rate increases, regular or seasonal demand periods, changes in the billing cycle, changes in channel lineups that are within Company's control, and repairs, or maintenance of the Cable System.

1.28 **EG Channels** means the educational channels and government channels provided by Company on the Cable System under Part 6, for locally produced programming that is noncommercial, not-for-profit and non-competitive.

1.29 **Public Right-of-Way and Public Ways** means the surface, the air space above the surface and the area below the surface of the particular public streets, road, sidewalks, alleys, and the ways, which may now or hereafter exist, that are held by and/or under the control of the Municipality for use for utilities, excluding easements not intended for public works and further excluding property of City which is not a dedicated public right-of-way. This term shall not include any property owned by any person or agency other than the Municipality, except as provided by applicable law or pursuant to an agreement between the Municipality and any person permitting the Municipality to authorize third parties to use such property.

1.30 **School Systems** shall mean McAllen Independent School System.

1.31 **Service Interruption** shall mean the loss of picture or sound on one or more cable channels.

1.32 **Uncured Event of Default** shall have the meaning defined in Part 12.

1.33 **User** shall mean a person authorized to operate or use a EG Channel and shall include Municipality. If several persons share the operation of a EG Channel each person shall be a separate User.

1.34 **Video Programming** shall mean programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

2. GRANT OF RIGHTS

2.1 **Permission/Franchise Agreement** : Subject to all the terms and conditions contained herein, the Texas Constitution, the Municipal Charter, the Municipal Code and generally applicable Municipal ordinances as from time to time in effect, Municipality hereby grants Company non-exclusive permission to erect, construct, install and maintain a Cable System in, over, under, along and across the Public Ways in the Authorized Area and to transact a Cable Television Business in such area.

2.1.1 Company accepts the grant set forth above and agrees as set forth herein to erect, construct, install and maintain the Cable System (including the Emergency Alert System) and, during the Term of this Franchise Agreement, to transact a Cable Television Business in Municipality in conformance with the provisions of this Franchise Agreement.

2.1.2 Municipality reserves the right to grant one or more additional franchises for a Cable System in accordance with State and federal law; provided, however, and to the extent not prohibited by applicable federal or state law or regulation, Municipality agrees that any grant of additional franchises by Municipality to any other entity shall cover the entire territorial area of Municipality and shall not be on terms and conditions (including, without limitation, the franchise fee) more favorable or less burdensome to the grantee of any such additional franchise than those which are set forth herein.

2.2 **Additional Services** : This Franchise Agreement may be amended by mutual agreement to allow the provision of such additional services as may be agreed to by Company and Municipality, or permission for the provision of additional services may be granted by a separate document.

2.3 **Municipality's Rights In Public Ways** : Company acknowledges that by this Franchise Agreement it obtains no rights to or further use of the Public Ways other than those expressly granted herein.

2.4 **Emergencies** : Municipality may remove or damage portions of the Cable System in the case of fire, disaster, or other emergencies, as determined by Municipality. In such event neither Municipality nor any agent, contractor or employee thereof shall be liable to Company or its customers or third parties for any damages caused them or the Cable System, such as for, or in connection with, protecting, breaking through, moving, removal, altering, tearing down, or relocating any part of the

Cable System. Where possible prior notice shall be given to Company. In any event notice of such action shall be given to Company after such removal or damage within two business days.

2.5 Backup Power : Company shall install an electric generator which starts automatically in the event of loss of conventional power to provide electric service to the Cable System head-end and associated equipment in the event of a power failure. Company shall provide battery backup power (or an electric generator) at key locations on the Cable System in the Public Ways where the loss of electric power might disrupt the provision of service within Municipality such that the Cable System shall operate for at least two (2) hours even if electric service from conventional utility lines is interrupted.

2.6 Compliance With Law : Company shall be subject to and comply with all generally applicable and controlling local, State and Federal laws, including the rules and regulations of any and all agencies thereof, whether presently in force or whether enacted or adopted at any time in the future. In constructing, maintaining and operating the Cable System, Company shall act in a good and workmanlike manner, observing high standards of engineering and workmanship and using materials of good and durable quality. Company shall comply in all respects with the National Electrical Safety Code; the National Electric Code; the Bellcore Code of Pole Line Construction; all rules, standards, practices, procedures and the like of the FCC; and the pole-attachment and conduit requirements in its agreements with other utilities whose poles and conduits it uses.

2.7 Maintenance and Repair : Company shall keep and maintain a proper and adequate inventory of maintenance and repair parts for the Cable System. Company shall maintain or otherwise have available a work force of skilled technicians for Cable System repair and maintenance.

2.8 Permits : This Franchise Agreement does not relieve Company of the obligation to obtain generally applicable permits, licenses and other approvals from Municipality or other units of government, which are required for the construction, repair or maintenance of the Cable System or provision of Cable Services; or from compliance with generally applicable municipal codes and ordinances such as zoning and land use ordinances, pavement cut ordinances, subdivision and project improvement ordinances, curb cut permits, building permits and the like. Notwithstanding the foregoing, Company shall not pay fees to obtain applicable local licenses, permits, and authorizations required for the construction, installation, maintenance, or operation of its Cable System.

2.9 Right of Condemnation Reserved : Nothing in this Franchise Agreement shall limit any right the Municipality may have to acquire by eminent domain any property of Company.

2.10 Fees : Except as otherwise provided herein, nothing in this Franchise Agreement shall be construed to limit the authority of Municipality to impose a generally applicable, non-discriminatory tax, fee, or other assessment of any kind on any person.

2.11 Identification : All field employees and service personnel of Company shall wear on their clothing a clearly visible identification card bearing their name and photograph. Every service vehicle of Company shall be clearly identified as such to the public with, for example, the Company logo, phone number, or the like plainly visible.

3. **PUBLIC WAYS AND CONSTRUCTION**

In the event that subsequent to the effective date of this Agreement the Municipality adopts an ordinance governing use of the Public Rights of Way by utilities and other users, Company's utilization of the Public Rights of Way shall continue to be governed and controlled in all respects by this Section 3 and other provisions of this Agreement notwithstanding the later adoption of any such ordinance or anything to the contrary contained in such ordinance or this Agreement.

3.1 **Easement Usage** : To the extent allowed by applicable State and Federal law, this Franchise Agreement authorizes the construction of the Cable System over Public Ways, and through easements, within the Authorized Area and which have been dedicated for compatible uses, subject to the requirements in the balance of this Section and of this Franchise Agreement. In using all easements, Company shall comply with all Federal, State, and generally applicable local laws and regulations governing the construction, installation, operation, and maintenance of a Cable System. Without limitation, Company shall ensure that:

3.1.1 The safety, functioning and appearance of the property and the convenience and the safety of other persons not be adversely affected by the installation or construction of facilities necessary for the Cable System;

3.1.2 The cost of the installation, construction, operation, or removal of such facilities be borne by Company; and

3.1.3 The owner of the property be justly compensated by Company for any damages caused by the installation, construction, operation, or removal of such facilities by Company.

3.2 **No Adverse Impact Upon Other Authorized Users**. Except as permitted by applicable law or this Agreement, Company shall not damage, or impair the use of, any Public Right-of-Way or any other authorized facilities therein, including without limitation, streets, sidewalks, sanitary sewers, storm drains, water mains, gas mains, poles, overhead or underground wires or conduits without the prior written approval of the Municipality which approval shall not be unreasonably withheld or delayed.

3.3 **Safe Condition**. Company shall construct and keep its Facilities in good and safe condition and free from any nuisance. Without limiting the generality of the foregoing, Company shall comply with: the construction, maintenance and other standards contained in the Municipality's general construction permitting requirements.

3.4 **Weather**. No underground installation or other work activities may be initiated when weather conditions prohibit proper restoration of disturbed areas in a timely manner. The Manager may waive the preceding requirement on a case by case basis, with conditions appropriate to the circumstances.

3.5 **Barriers**. While any portion of the streets or Public Ways are open, Company shall maintain reasonable barriers, lights at night and other warnings to the users of the streets or Public Ways in compliance with applicable government regulations requiring and pertaining to such barriers or as reasonably requested by the Manager.

3.6 Traffic Control. For all work in the streets or Public Ways which may disturb the normal flow of vehicular or pedestrian traffic, Company shall employ roadway closure or partial closure practices, as delineated in the Texas Manual of Uniform Traffic Control Devices or comparable manual.

3.7 Repair of Any Damage. Company shall be responsible for any damage to Municipality streets, existing utilities, curbs and sidewalks that is caused by its installation, maintenance, repair or removal of its Facilities in Public Right-of-Way, and shall repair, replace and restore in kind any such damage at its sole expense. In addition, Company shall restore property affected by construction and/or repair of facilities to a condition that is, to the extent possible, substantially similar to or better than the condition of the property prior to the performance of said work.

3.8 Tree Trimming. Company may trim trees upon and overhanging the streets and Public Ways so as to prevent the branches of such trees from coming into contact with the Cable System. No trimming shall be performed in the streets or Public Ways without previously informing Municipality. Except in emergencies all trimming of trees on public property shall have the advance approval of Municipality and all trimming of trees on private property shall require notice to the property owner.

3.9 Trees and Landscaping. The following applies to trees or shrubs within the streets or Public Ways.

- a. All damaged trees or shrubs shall be replaced or restored in a mutually agreeable fashion.
- b. Replacement sod and seeded areas shall be maintained until the lawns are established.

3.10 Emergency Notification. Company shall provide the Manager with a twenty-four (24) hour emergency telephone number at which a named responsible adult representative of Company (not voice mail or a recording) can be accessed in the event of an emergency.

3.11 Right of Inspection. Municipality shall have the right to inspect all reconstruction or installation work and to make such tests as it deems necessary to ensure compliance with the terms of the Franchise Agreement, Municipal Code, or other pertinent provisions of law.

3.12 Notice of Construction to Municipality. Throughout the period of construction or reconstruction, Company shall give Municipality written notice, a reasonable time before the commencement of construction or reconstruction in any block (meaning an area typically bounded by four streets) but in no event shall said notice be given less than seven (7) business days before such commencement.

3.13 Notice of Construction to Residents. Company shall provide advance notice, appropriate to the circumstances, prior to entry whenever desiring to enter or cross any private property within Municipality or work in abutting streets or Public Ways. During construction, maintenance work, installation work, and outage repair, Company shall attempt to notify affected residences prior to entering private property. Work performed in an emergency in easements, streets or Public Ways to repair the system is exempted from this section.

3.14 Utility Crowding. In areas of Municipality where the Manager finds that the streets or Public Ways will not readily accommodate further underground facilities, Company shall meet with the

Manager in conjunction with other right-of-way users to devise a plan to manage future undergrounding.

3.15 Removal of Obsolete Facilities/Cooperation. When Company opens a trench, accesses a conduit or boring, or is working on aerial locations, it shall remove all unusable and inactive Cable System facilities (excluding those held for future use) from such locations.

- a. When Company opens a trench or access to borings, it shall notify Municipality, which may notify all other recipients of franchise agreements, franchisees and permittees in advance of such work, so that they may remove their obsolete facilities from such locations or add new facilities. Company shall cooperate with such persons in such activities provided such persons proceed in an expeditious manner.
- b. When Company receives notification that another entity is opening a trench or access to borings, Company shall remove all of its obsolete facilities from such location while they are open.

3.16 New Developments. Provided Company receives reasonable advance notice from the developer and is able to obtain access to rights of way on terms and conditions acceptable to Company, Company shall install conduit (excluding only Drops to individual dwelling units) in all new subdivisions and developments on the earlier of the date on which the installation of electric facilities or the date on which and telephone facilities are installed in such subdivision or development, such that Company shall make service available in accordance with the requirements of Subsection 4.4.

3.17 Preventive Maintenance. Upon completion of reconstruction, Company shall institute and adhere to a preventive maintenance program at least as rigorous and stringent as those established from time to time by the FCC.

3.18 Parallel Installation. All cables and wires or other work shall be installed parallel with existing telephone and electric utility wires whenever reasonably possible. Multiple cable configurations shall whenever reasonably possible be in parallel arrangement and bundled in accordance with engineering and safety considerations and all applicable codes.

3.19 Identification. Company shall identify its Cable System and cable Drops (by color code, stamping, engraving, tags, stickers, or other appropriate method selected by Company) so as to distinguish Company's cables from that of all other cable operators, utilities, and service providers in the Authorized Area.

3.20 Ownership of Installed Cable. Ownership of cable home wiring shall accord with federal law.

3.21 Easements. Any easements over or under private property necessary for the construction or operation of the Cable System shall be arranged by Company. Any easements over or under property owned by Municipality other than the Public Ways shall be separately negotiated with Municipality, except that Company may use general utility easements that are dedicated for compatible uses on property owned by Municipality as set forth in Section 3.1.

3.22 Joint Use by Municipality. Company shall permit, with negotiated, reasonable

compensation and conditions, the joint use of excess height, space and capacity in its poles, conduits and facilities located in the streets or Public Ways by Municipality or other governmental entities.

3.23 Compliance with Law. Company shall be subject to all generally applicable laws, ordinances or regulations of Municipality in the course of constructing, installing, operating or maintaining the Cable System in Municipality. Company shall comply with all generally applicable zoning and land use restrictions as may exist or may hereafter be amended.

3.24 Poles. Company shall not erect any utility poles without the advance written permission of Municipality for the pole(s) in question, which permission shall not be unreasonably withheld.

3.25 Underground Facilities. Company's cable, wires and other equipment shall be placed underground wherever existing utilities are underground. If Municipality in the future so requires, for all or any portion of Municipality, that all the utilities in such area place their lines underground, then Company shall in concert with other utilities and in a reasonable period of time place its existing and its future cable, wires, or other equipment in such area underground without charge, expense or liability therefor to Municipality. If municipality reimburses any right-of-way user for such undergrounding, Company shall be similarly reimbursed.

3.26 Underground Street Crossing. Whenever Company must place the Cable System or other facilities beneath the traveled or paved portion of the streets or Public Ways, unless otherwise approved in advance by the Manager, Company shall do so by directional boring and not by excavation of a trench in which to place cable conduit. Directional boring shall be done wherever technically and economically possible so that the excavations necessary for it are not in the paved portion of the right-of-way. On a case-by-case basis, the Manager may request, and Company agrees to consider, placement of such facilities by directional boring and not by excavation of a trench in which to place cable conduit.

3.27 Temporary Relocation. Upon ten (10) business days notice, Company shall either temporarily raise or lower its wires or other equipment upon the request of any person, including without limitation, a person holding a building moving permit issued by Municipality. Company may charge a reasonable rate for this service, not to exceed its actual costs with an advance deposit of the estimated cost.

3.28 Pavement Cut Coordination. Company shall coordinate its construction program and all other work in the streets and Public Ways with Municipality's program for street construction, rebuilding and resurfacing (collectively, "Street Resurfacing"). Company shall meet with the Manager at Manager's request to this end.

- a. The goals of such coordination shall be to require Company to conduct all work in the streets and Public Ways in conjunction with or immediately prior to any Street Resurfacing planned by Municipality.
- b. Without express permission from Municipality, Company shall not cut or otherwise breach or damage the surface of any paved street or Public Way within ninety-six (96) months after such Public Way has been resurfaced.

3.29 Vacation. If a street or Public Way where Company has facilities is vacated, eliminated,

discontinued or closed, Company shall be notified of same and all rights of Company under this Franchise Agreement to use same shall terminate and Company shall immediately remove the Cable System from such street or Public Way unless Company obtains any necessary easements from the affected property owners to use the former street or Public Way or a court orders the provision of such easements. Where reasonably possible and to the extent consistent with the treatment of other utility facilities in the former street or Public Way, Municipality shall reserve easements for Company to continue to use the former street or Public Way. Company shall bear the cost of any removal or relocation of the Cable System unless Municipality reimburses other right-of-way users or the vacation is primarily for the benefit of a private party, in which case the private party shall bear such costs. Company shall be provided thirty (30) days notice of any proposed vacation proceedings involving its facilities.

3.30 As-Builts /Location of Facilities. Company shall keep accurate, complete and current maps and records of the Cable System and its facilities and shall provide copies to Municipality as set forth below. Such maps and records shall be available for inspection by Municipality only. Municipality acknowledges that such maps contain proprietary information and Municipality shall not disclose to, or share the same with, any third party.

- a. Company shall furnish one (1) complete set of "as-built" maps and records to Municipality and Company shall provide Municipality copies of any new or revised "as-built" or comparable drawings as and if they are generated for portions of Company's facilities located within Municipality (and in no event later than ninety (90) days after construction and activation of any portion of the Cable System). Upon request by Municipality in an emergency, Company as soon as possible (but no more than one (1) business day from the request) shall inform Municipality of any known or documented changes from such maps and records previously supplied and shall mark up any maps provided by Municipality so as to show the location of the Cable System.
- b. The "as built" maps shall include at a minimum all system and facility routings and the location of appurtenant structures, such as nodes, amplifiers, power supplies and system monitor test points, and shall be drawn to a scale and upon such media as mutually agreed by Company and the Manager.
- c. Company agrees to provide, if one is available, such records in a form compatible with the Municipality's Geographical Information System (GIS), using a program and format which accurately displays its "as built" Cable System. In addition, Company shall provide information and assistance on the GIS program it is using and its implementation so as to aid Municipality in converting the layer into a form easily used by Municipality and in using the layer.

3.31 Utility Notification Program. Company shall participate in and be a member of the State's utility notification program, whether provided for by statute or otherwise.

3.32 No Cost to Municipality. The construction, installation, operation, maintenance and removal of Facilities shall be accomplished without cost or expense to the Municipality, and in accord with such construction and other standards as the Municipality may from time-to-time apply generally to all users of the Public Right-of-Way, and shall be accomplished in such manner as not to endanger

persons or property, or unreasonably obstruct access to, travel upon or other use of the specified Public Right-of-Way.

3.33 Removal. Company shall remove or relocate, without cost or expense to Municipality, only if such removal or relocation is at the request of the Municipality, the Facilities it installs under this Agreement if and when made necessary by (i) any change of grade, alignment or width of any street; (ii) any changes to the Municipality's water system, storm sewers or sanitary sewers; (iii) construction, maintenance or operation of any other Municipality underground or aboveground facilities, and/or (iv) relocation of roadway needed to improve traffic conditions. If such removal or relocation is at the request of or for the convenience of a third party, then such third party shall be obligated for any costs or expenses incurred by Company, which shall be prepaid at any time before construction commences. Said removal or relocation may be completed within sixty (60) days following written notification by Municipality, or such shorter period as the Municipality may reasonably direct in the event of an emergency. In the event Company fails to remove or relocate its Facilities within such period, Municipality may cause the same to be done at the sole expense of Company. The Municipality for its own and on behalf of any third party, will cooperate and issue, on an expedited basis, all Permits necessary to enable Company to relocate its Facilities without disruption to its service. If Municipality reimburses any right of way user for such removal or relocation, Company shall be similarly reimbursed

3.34 Submission of Plan of complete System to Municipality. Company shall, within sixty (60) days following a written request from Municipality, but no more often than annually, provide the City Engineer with a map showing the location of all Facilities which Company may plan to construct in any Public Right-of-Way within the Municipality at any time during the next year, provided, however, that Company may change any such plans in the future.

3.35 Discontinuance and Removal of the System. In accordance with applicable law, upon the revocation, or expiration and non-renewal of this Franchise Agreement, either (a) by mutual agreement of Municipality and Company, (b) by Company's acquiescence or failure to challenge same, or (c) by a final order of a court which Company either does not appeal or from which there is no further right of appeal, then the following shall occur: Company shall immediately discontinue the provision of Cable Services and all rights of Company to use the streets and Public Ways shall cease. Company, at the direction of Municipality, shall remove its Cable System, including all supporting structures, poles, transmission and distribution portions of the system and other appurtenances, fixtures or property from the streets and Public Ways, in, over, under, along, or through which they are installed within six (6) months of the revocation, or expiration and non-renewal except that (a) Company may abandon its facilities in place with Municipality's consent, and (b) Company cannot remove underground facilities without Municipality's consent in advance, which shall not be unreasonably withheld. Prior to any removal Company shall notify Municipality and persons owning property abutting Public Ways where removal will occur. Company shall also restore any property, public or private, to the condition in which it existed prior the installation, erection or construction of its Cable System, including any improvements made to such property subsequent to the construction of its Cable System. Restoration of streets and Municipal property, including, but not limited to, the Public Ways, shall be in accordance with the directions and specifications of Municipality, and all generally applicable laws, ordinances and generally applicable regulations, at Company's sole expense. If such removal and restoration is not completed within six (6) months after the revocation, or expiration and non-renewal, all of Company's property remaining in the affected streets and Public Ways shall, at the option of Municipality, be deemed abandoned and shall, at the option of Municipality, become its property or Municipality may obtain a court order compelling Company to remove same. In the event Company fails or refuses to

remove its Cable System or to satisfactorily restore all areas to the condition in which they existed prior to the original construction of the Cable System, Municipality, at its option, may perform such work and if such work is performed within one (1) year of the revocation, or expiration and non-renewal of this Franchise Agreement collect the costs thereof from Company. No surety on any performance bond shall be discharged until Municipality has certified to Company in writing that the Cable System has been dismantled, removed, and all other property restored, to the satisfaction of Municipality.

3.36 Failure to Discontinue Service. In the event that Company fails to discontinue the provision of Cable Services pursuant to the terms set forth in Section 3.39 then Company shall continue to pay franchise fees as herein provided.

3.37 Removal or Relocation of Facilities. Company shall, after the removal or relocation of its facilities, at either its own cost or the cost of third persons, repair and return the public Right-of-Way on which the Facilities had been located to a safe and satisfactory condition in accordance with the generally applicable construction standards and specifications established by Municipality. Should Company remove or relocate its Facilities in the Public Right-of-Way, it shall give Municipality not less than ten (10) days' prior written notice of its intent to do so. Before proceeding with removal or relocation work, Company shall obtain such additional generally applicable Permits as may be required by the Municipality.

4. CABLE SERVICE

4.1 Programming Services : Company shall include in the video programming it offers subscribers the following:

4.1.1 Company agrees to complete an upgrade of the system to 750 MHz in accordance with the specifications in Exhibit A.

4.1.2 For each of the following broad categories of programming, at least one (1) channel twenty (20) hours or more of whose daily programming is in the category in question:

4.1.2.1 Weather programming.

4.1.2.2 News programming.

4.1.2.3 Public affairs programming.

4.1.2.4 Sports programming.

4.1.2.5 Children and family entertainment programming.

4.2 Service Provided: Cable Service shall at all times include at least sixty-four (64) activated channels of programming.

4.3 Access to Service: Except as otherwise provided by applicable law, Company shall not deny service, deny access, or otherwise discriminate on the availability or rates, terms or conditions of Cable Services provided to actual or potential subscribers on the basis of race, color, religion, national

origin, sex, age, location within Municipality, or difficulty in constructing Drops, provided such subscribers' obligations to Company are fulfilled, including but not limited to the timely payment of bills. Company shall comply at all times with all applicable Federal, State and generally applicable local laws and regulations relating to nondiscrimination.

4.4 Service: No line extension charge or comparable charge shall be imposed on any current or potential subscriber for extensions of the Cable Television System whenever the Company receives requests for service by a potential subscriber and there are at least five (5) dwelling units within One thousand, three hundred twenty (1,320) cable bearing strand feet (one quarter mile) of Company trunk or distribution cable and Company shall extend its Cable System to such potential subscriber(s) at no cost to said potential subscriber(s). The one thousand, three hundred twenty (1,320) feet distance or any multiple thereof shall be measured in extension length from trunk and feeder cable which is located within the Public Ways or an existing available easement. Service to subscribers not meeting the foregoing line extension formula shall be prorated between Company and the subscribers requesting service.

4.5 Drops: Company's standard installation charge shall include a one hundred fifty (150) foot aerial Drop from the existing distribution system, such that current or potential subscribers shall only be charged for a Drop to the extent the Drop serving them requires underground installation or exceeds one hundred fifty (150) aerial feet, measured from the tap on the distribution portion of the Cable System to the subscriber's premises.

4.5.1 Upon the termination of service, Company shall either entirely remove its Drop or secure the Drop in a method reasonably acceptable to Municipality.

4.6 Free Service: Company shall provide without any installation charge or monthly charge one free Cable System video outlet connection in each Municipal building or facility located within 150 aerial feet of Company's existing distribution system; on each campus of a public, private, charter and parochial school serving no less than 100 students between grades Kindergarten through 12, and shall allow Municipality at its cost and each such school at its cost without additional charge, to extend such service to some or all rooms, classrooms and auditoriums. Company shall, at cost borne by Municipality or school, extend service to buildings beyond 150 feet of Company's existing distribution system.

4.6.1 In addition, one (1) service outlet (which shall be at a location designated by Municipality within 150 aerial feet of Company's existing distribution system) shall receive without charge all Basic, Expanded Basic, Digital and Premium programming provided by Company, not to include pay-per-view. Such service shall be provided in such a manner that Municipality may monitor the programming and use of the Cable System for compliance with this Franchise Agreement, FCC Technical Standards, and other applicable law. The services provided according to the preceding sentence shall be in an office location and not in a location conducive to public viewing.

4.6.2 Company shall not provide free or discounted service to elected or appointed officials of Municipality or to Municipality's employees, agents or officers. The term "free or discounted service" shall mean any service on terms and conditions other than those available to residents of Municipality generally.

4.7 Continuity of Service: Company shall operate the Cable System and provide Cable Service twenty-four (24) hours per day, seven (7) days per week. Company shall voluntarily interrupt the provision of Cable Service only with good cause and for the shortest time possible and, except in emergency situations (or as otherwise provided herein), only after periodic cablecasting notice of service interruption, including at the same time of day as the anticipated interruption. Service may be interrupted between 12:00 midnight and 6:00 A.M. for routine testing, maintenance and repair, without notification, any night except Friday, Saturday, or Sunday, or the night preceding a holiday.

4.8 Interconnection: Upon written request by Municipality, Company shall promptly enter into negotiations with other cable operators regarding the process of interconnecting the Cable System with other cable systems serving Municipality or any portion thereof, so as to transmit, receive, and exchange EG programming with such systems or the entities operating EG channels on such systems. The cost of interconnecting the EG channels of such other systems with Company's system shall be borne by the operator of such other system(s).

4.8.1 Company shall cooperate with any interconnection corporation, regional interconnection authority or local, State or Federal governmental entity which regulates or provides for the interconnection of cable systems affecting Municipality.

4.9 Emergency Alert System: Company shall provide without charge to Municipality an emergency alert system ("Emergency Alert System") consistent with applicable federal and state law.

4.9.1 Company shall install as a part of its Cable System, and shall operate throughout the term hereof, an Emergency Alert System ("EAS") or successor to that system in accordance with all requirements imposed from time to time by the FCC including without limitation the requirement currently set forth in the FCC regulations that a cable television system transmit a visual EAS message on at least one channel and that a cable system also provide video interruption and audio EAS message on all channels with the video further stating which channel is carrying the visual message. In establishing its EAS system, Company shall, in accordance with FCC regulations, cooperate with Municipality and duly authorized regional emergency management officials on the use and operation by area governmental authorities of the Emergency Alert System.

5. CABLE CUSTOMER SERVICE:

5.1 Customer Service Standards : Company shall at all times comply with the provisions of the customer service, consumer protection and technical standard provisions of Exhibit E of this Franchise Agreement.

6. CABLE SYSTEM ACCESS

6.1 EG Channels Generally: Company shall provide on the Cable System educational channels and government channels as specified herein at no charge to the User. All EG Channels shall be placed on the basic tier of service (and in the lowest tier of service, if different) and shall be available to all subscribers. Such channels shall be available twenty-four (24) hours per day throughout the term of this Franchise Agreement

6.1.1 The EG Channels can be in either analog (6 MHz NTSC) or digital format and shall be utilized for non-commercial purposes only.

6.1.2 Company shall not exercise any editorial control over any educational or governmental use of channel capacity.

6.1.3 A given EG Channel shall not be moved from one channel number to another number more often than once every 36 months. Company must give Municipality and each User at least ninety (90) days notice of any change in the channel number on which a EG Channel will be distributed on Company's Cable System. The preceding sentences shall not apply to changes that are beyond Company's control, such as a television station under Federal law being able to require carriage on a channel currently used by a EG Channel. Company shall reimburse Users of such channel for their reasonable costs (not to exceed Two Hundred Fifty Dollars (\$250) per Channel location change, and not to exceed a total of three (3) users) in connection with the change such as changing stationery, changing logos, changing advertising materials and generally notifying subscribers and potential subscribers of the change.

6.1.4 Every User of an EG Channel (other than Municipality) shall have in full force and effect a contract with Municipality relating to the EG Channel it uses prior to providing programming on such channel.

6.2 Number of EG Channels :

6.2.1 Company shall provide two (2) channels for EG usage ("EG Channels").

6.3 Allocation of EG Channels : EG Channels are and shall be allocated by Municipality.

6.3.1 The initial allocation of EG Channels amongst and between various uses and users is as set forth below.

6.3.2 One (1) government channel for use by Municipality.

6.3.3 One (1) educational channel to be administered and utilized by the School Systems as determined by Municipality.

6.3.4 Company may use the EG Channels for the provision of video programming if the EG Channels are not being used.

6.4 Signal Input Points :

6.4.1 Company shall provide, without charge to Municipality, transmission capability for one video signal from each of the locations set forth on Exhibit C to City Hall, 1300 Houston, McAllen, Texas, for purposes of receiving programming for the Government Access Channel. Municipality may change such locations from time to time, upon reasonable notice to Company. Costs for such relocations shall be borne by the Municipality.

6.4.2 Company shall provide return feed capability from City Hall, 1300 Houston McAllen, Texas and from McAllen Public Safety Building, Pecan Boulevard, McAllen, Texas, to Company's headend for purposes of transmitting government access programming on the Government Access channel transmitted to subscribers. In addition, Company shall provide return feed capability from McAllen Independent School District, 2000 N. 23rd Street to Company's headend for purposes of transmitting educational access programming on the Educational Access channel transmitted to subscribers.

6.4.3 Company shall provide the modulators and demodulators necessary to transport the signal. All other equipment shall be the responsibility of the Municipality.

6.5 **EG Access Assistance:** Company shall provide to Municipality equipment grants for the EG Channels equal to \$1 for each \$5 spent by the Municipality on EG programming in years 1, 2 and 3 of the Franchise, up to a total of \$1.00 per paying customer per year. Municipality shall allocate such grants among the entities administering the EG Channels as it determines is in the public interest. Prior to Company's obligation to provide the funding herein, Municipality shall give Company an accounting and any reasonably requested backup documentation of monies spent by Municipality. Within 60 days of the execution of this Agreement, Municipality shall provide such an accounting of monies spent for the 12-month period prior to the effective date of this Franchise. Upon receipt and approval of Municipality's documented expenses, Company shall provide the initial equipment grant. Grants for Year 2 and Year 3 shall be made on or near the anniversary of the initial grant following the same procedure. Company shall list all educational and governmental access channels on all print and cablecast electronic program guides, with descriptions on each channel, such as "Government Channel," "Education Channel."

6.5.1 Company shall include written information about educational and governmental access programming and activities in its customer handbook, and in materials given to new subscribers, provided such materials are provided by the entities operating those channels, at those entities' cost.

6.6 **Educational Services :** For as long as they are available to Company, Company shall offer Cable in the Classroom guides to the schools in the Municipality served by Company, free of charge.

6.7 **Leased Access :** Company shall make available suitable channel capacity for leased access by third parties not Affiliated with Company to the extent from time to time required by Federal law and regulations. Company shall have the sole responsibility for all operating aspects and for the fixing of rates and conditions for leased access use.

7. INDEMNITY AND INSURANCE

Except in connection with the use of EG channels and the Emergency Alert System, and instances involving negligence on the part of the hereinafter mentioned parties, Company shall indemnify Municipality as set out in this section

7.1 Disclaimer of Liability: Municipality shall not at any time be liable for injury or damage occurring to any person or property from any cause whatsoever arising out of Company's construction, maintenance, repair, use, operation, condition or dismantling of Company's Cable System or Company's provision of Cable Service, unless said injury or damage results from the negligence or misconduct of municipality.

7.2 Indemnification: Company shall, at its sole cost and expense, indemnify, defend and hold harmless Municipality and all associated, Affiliated, allied and subsidiary entities of Municipality, now existing or hereinafter created, and their respective officers, boards, commissions, employees, agents, and attorneys, (hereinafter referred to as "Indemnitees"), from and against:

7.2.1 Any and all liability, obligation, damages, penalties, claims, liens, out-of-pocket costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and consultants), which may be imposed upon, incurred by or be asserted against the Indemnitees by reason of any act or omission of Company, its personnel, employees, agents, contractors or subcontractors, resulting in personal injury, bodily injury, sickness, disease or death to any person or damage to, loss of or destruction of tangible or intangible property, libel, slander, invasion of privacy and unauthorized use of any trademark, trade name, copyright, patent, service mark or any other right of any person, firm or corporation, which may arise out of or be in any way connected with the construction, reconstruction, installation, operation, maintenance or condition of the Cable System (including those arising from any matter contained in or resulting from the transmission of programming over the Cable System but excluding any programming provided by the Indemnitees which is transmitted over the Cable System), the provision of Cable Services or Company's failure to comply with any Federal, State or generally applicable local statute, ordinance or regulation.

7.2.2 Any and all liabilities, obligations, damages, penalties, claims, liens, out-of-pocket costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and other consultants), which are imposed upon, incurred by or asserted against the Indemnitees by reason of any claim or lien arising out of work, labor, materials or supplies provided or supplied to Company, its contractors or subcontractors, for the installation, construction, reconstruction, operation or maintenance of the Cable System or provision of Cable Services, and, upon the written request of Municipality, Company shall cause such claim or lien covering Municipality's property to be discharged or bonded within thirty (30) days following such request.

7.2.3 Any and all liability, obligation, damages, penalties, claims, liens, costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and consultants), which may be imposed upon, incurred by or be asserted against the Indemnitees by reason of any financing or securities offering by Company or its Affiliates for violations of the common law or any generally applicable

laws, statutes, or regulations of the State of Texas or the United States, including those of the Federal Securities and Exchange Commission, by Company.

7.2.4 Company's obligation to indemnify Indemnitees under this Franchise Agreement shall extend to claims, losses, and other matters covered hereunder that are caused or contributed to by the negligence of one or more Indemnitees. However, in such case the obligation to indemnify shall be reduced in proportion to the negligence of the Indemnitees. An example of such a reduction is set forth on Exhibit D.

7.3 **Assumption of Risk:** Company undertakes and assumes for its officers, agents, contractors and subcontractors and employees (collectively "Company" for the purpose of this Section), all risk of dangerous conditions, if any, on or about any Municipality-owned or controlled property, the streets and Public Ways caused by Company, and Company hereby agrees to indemnify and hold harmless the Indemnitees against and from any claim asserted or liability imposed upon the Indemnitees for personal injury or property damage to any person (other than from Indemnity's negligence) arising out of Company's installation, operation, maintenance or condition of the Cable System or Company's failure to comply with any Federal, State or local statute, ordinance or regulation.

7.4 **Defense of Indemnitees :** In the event any action or proceeding shall be brought against the Indemnitees by reason of any matter for which the Indemnitees are indemnified hereunder, Company shall, upon notice from any of the Indemnitees, at Company's sole cost and expense, resist and defend the same with legal counsel selected by Company; provided, however, that Company shall not admit liability in any such matter on behalf of the Indemnitees without the written consent of such Indemnitees, which consent shall not be unreasonably withheld; and provided that Indemnitees shall not admit liability for, nor enter into any compromise or settlement of, any claim for which they are indemnified hereunder, without the prior written consent of Company. In the event the Indemnitees fail to abide by their obligations hereunder, Company shall have the right to withdraw its indemnification hereunder.

7.5 **Notice, Cooperation and Expenses :** The Indemnitees shall give Company prompt notice of the making of any claim or the commencement of any action, suit or other proceeding covered by the provisions of Part 7. Nothing herein shall be deemed to prevent the Indemnitees from cooperating with Company and participating in the defense of any litigation by their own counsel.

7.6 **Insurance :** Company shall obtain and maintain in full force and effect throughout the term of this Franchise insurance with an insurance company licensed to do business in the State of Texas and acceptable to the Municipality. All companies will be required to be rated A-VII or better by A.M. Best or A-minus or better by Standard and Poors. Company shall provide Municipality with proof of such insurance so required at the time of filing the acceptance of franchise.

7.6.1 Worker's compensation insurance meeting Texas statutory requirements and employer's liability insurance with minimum limits of One Hundred Thousand Dollars (\$100,000) for each accident.

7.6.2 Comprehensive commercial general liability insurance with minimum limits of Two Million Dollars (\$2,000,000) as the combined single limit for each occurrence of bodily injury, personal injury and property damage.

7.6.3 Comprehensive automobile insurance with minimum limits of One Million (\$1,000,000) for owned/leased, non-owned and hired automobiles.

7.6.4 Coverage for programming on channels that are directly or indirectly controlled by grantee with minimum limits of Two Million (\$2,000,000) for libel, slander and copyright violations.

7.6.5 The coverage amounts set forth above may be met by a combination of underlying and umbrella policies so long as in combination the limits equal or exceed those stated. Notwithstanding the foregoing, at any time during the term of this agreement if the "caps" to which municipalities are subject pursuant to the Texas Civil Practice and Remedies Code exceed the amounts indicated herein, then the required insurance shall be the greater of the amount indicated herein or such "caps." Municipality agrees to provide Company with notice and documentation of any revised "caps."

7.7 **Named Insured:** All policies, except for business interruption and worker's compensation policies, shall name the "City of McAllen, a municipal corporation of the State of Texas and all associated, affiliated, allied and subsidiary entities of the Municipality, now existing or hereafter created, and their respective officers, boards, commission, employees, and agents, as their respective interests may appear" as additional insureds (herein referred to as the "Additional Insureds"). Each policy which is to be endorsed to add Additional Insureds hereunder, shall contain cross-liability wording, as follows:

"In the event of a claim being made hereunder by one insured for which another insured is or may be liable, then this policy shall cover such insured against whom a claim is or may be made in the same manner as if separate policies had been issued to each insured hereunder."

7.8 **Evidence of Insurance:** Certificates of insurance for each insurance policy required to be obtained by Company in compliance with this Part, shall be filed and maintained with Municipality annually during the term of the Franchise Agreement. Company shall immediately advise the Indemnitees of any claim or litigation that may result in liability to them.

7.9 **Cancellation of Policies of Insurance:** All insurance policies maintained pursuant to this Franchise Agreement shall contain the following endorsement:

"At least sixty (60) days prior written notice shall be given to the City of McAllen by the insurer of any intention not to renew such policy or to cancel, replace or materially alter same, such notice to be given by registered mail to the parties named in Part 7 of the Franchise Agreement."

7.10 **Deductibles :** Company agrees to indemnify and save harmless the Indemnitees and Additional Insureds from and against the payment of any retainage or deductible and from the payment of any premium on any insurance policy required to be furnished by this Franchise Agreement.

8. FEES AND PAYMENTS

8.1 Franchise Fee : Company shall pay Municipality throughout the term of this Franchise Agreement a franchise fee in an amount equal to five percent (5%) of Company's actual Cable Gross Revenues received on a quarterly basis, as follows:

8.1.1 Company shall pay franchise fees on a quarterly basis as provided below:

| <u>Due Date</u> | <u>Quarter</u> |
|-----------------|----------------------------------|
| May 15 | First (January 1 - March 31) |
| August 15 | Second (April 1 - June 30) |
| November 15 | Third (July 1 - September 30) |
| February 15 | Fourth (October 1 - December 31) |

8.1.2 Company shall file with the Cable Administrator with each quarterly Franchise Fee payment a written report, in a form consistent with that set forth in Exhibit B containing an accurate statement of Company's Cable Gross Revenues and the computation of the payment amount.

8.2 Audit: Within four years of the date of submission of any franchise fee payment, Municipality may audit Company to verify the accuracy of franchise fees paid Municipality. All records reasonably necessary for such audit shall be made available by Company at a location in Municipality, or if outside Municipality at Company's expense. Any undisputed additional amount due Municipality shall be paid within thirty (30) days of Municipality's submitting an invoice for such sum, and if such sum shall exceed five percent (5%) of the total franchise fee which the audit determines should have been paid for any calendar year, Company shall pay Municipality's cost of auditing that calendar year as well.

8.3 Permit Fees: For as long as Company pays Franchise Fees outlined in Section 8.1 hereof, Company shall have no obligation to pay municipality any other fees in connection with its utilization of the Public Rights of Way.

8.4 Interest: All sums not paid when due shall bear interest at a rate which is one percent (1%) over the prime rate then being charged by Chase Bank (or its successors), and computed monthly.

8.5 Prior Fees: Company shall pay the balance of its final franchise fee payment due under any prior franchise between Company and Municipality in conjunction with its first Franchise Fee payment obligation in accordance with the payment schedule established in Section 8.1.1. It is understood that Company will pay Franchise Fees during any expired term of the previous Franchise.

9. CABLE RATES AND REGULATION

9.1 Rates: Company's rates and charges for the provision of Cable Services (and for related services, such as equipment rental, deposits, disconnect fees and downgrade fees) shall be subject to regulation by Municipality to the full extent from time to time authorized by Federal law. Municipality may from time to time elect not to regulate Company's rates and charges, and any such election shall not waive Municipality's rights to regulate in the future.

9.2 Regulation: Municipality reserves the right to regulate Company, the Cable System, and the provision of Cable Services to the extent from time to time permitted by Federal law.

9.3 Uniformity: Company's rates and charges for its Cable Services shall be uniform throughout the Authorized Area, except as otherwise allowed by Federal law.

9.4 Notice of Certain Costs: If Company's rates are regulated, then in accordance with applicable FCC rules, Company shall notify Municipality in writing at least annually of the identity of all costs which Company claims are external costs potentially entitled to pass through to Cable Service subscribers under the FCC Rate Regulation Rules in effect on the Effective Date or subsequent law with a similar effect.

10. TERM

10.1 Term: This Franchise Agreement shall expire 15 years after the effective date outlined in Section 15.20, plus any extensions.

10.2 Termination: Subject to applicable law, this Franchise Agreement and all rights of Company hereunder shall automatically terminate on the expiration of the term of this Franchise Agreement.

10.2.1 Municipality acknowledges that as of the date of this Franchise Agreement its ability to enforce the preceding sentence is limited by the Cable Communications Policy Act of 1984, as amended, and applicable FCC regulations.

10.3 Performance Evaluation Sessions : Municipality and Company may hold scheduled performance evaluation sessions every three (3) years from the anniversary date of Company's award of this Franchise Agreement and as may be required by Federal and State law.

10.3.1 Special evaluation sessions may be held at any time during the term of this Franchise Agreement at the request of Municipality or Company, and upon ninety (90) days written notice.

10.3.2 All evaluation sessions shall be open to the public and shall be advertised in a newspaper of general circulation within Municipality at least ten (10) days prior to each session. If Municipality makes a 30-second spot available at least seven days in advance in a mutually agreeable format, Company shall notify its subscribers of all evaluation sessions by announcement displayed prominently on at least two (2) channels of its Cable System during prime time, for five (5) consecutive days preceding each session.

10.3.3 Topics which may be discussed at any scheduled or special evaluation session may include, but not be limited to, service rate structures; Franchise Agreement fees, liquidated damages; application of new technologies; system performance; services provided; customer complaints; privacy; amendments to this Franchise; judicial and FCC rulings; line extension policies; and Municipal or Company rules.

11. TRANSFERS, OWNERSHIP AND CONTROL

11.1 Operation of Cable System : Only Company and its Affiliates shall operate, manage and maintain the Cable System and the provision of Cable Services by use of the Cable System. Company shall not otherwise directly or indirectly assign, in whole or in part, the operation, management or maintenance of the Cable System or the provision of Cable Services by use of the Cable System.

11.1.1 Any deviation from this Section 11.1 shall only be pursuant to the prior consent of Municipality.

11.1.2 This section shall not apply to Company's employment contracts and other personnel decisions, nor shall it prohibit Company from contracting for or subcontracting, in whole or in part, any operational, management or maintenance functions in connection with the Cable System, so long as Company does not relinquish its decision making authority over or its responsibilities hereunder for any particular function.

11.2 Franchise Agreement Transfers: This Franchise Agreement, the Cable System and any portion of the Cable System shall not be transferred, leased, subleased, or assigned, by operation of law or otherwise, without the prior consent of Municipality which consent shall not be unreasonably withheld.

11.2.1 For the purpose of this Section 11.2 "transfer" and "transferred" shall not include a transfer solely for security purposes (such as the grant of a mortgage or security interest) but shall include any realization on the security by the recipient, such as a foreclosure on a mortgage or security interest.

11.2.2 For the purpose of this Section 11.2 "transfer" and "transferred" shall not include the replacement of components of the Cable System in the course of ordinary maintenance and day-to-day operation.

11.2.3 Company may, without approval by Municipality, transfer or assign this Franchise Agreement to any entity controlling, controlled by or which is under the same common control as Company provided the entity: assumes all of Company's obligations and liabilities under this Franchise Agreement; agrees to comply with all provisions of this Franchise Agreement. Municipality shall be advised in writing of such transfer and of the entity's qualifications at least sixty (60) days before such transfer occurs.

11.3 Applications for Consent/Procedure/Restrictions : If Company seeks to obtain the consent of Municipality to any transactions or matters described in Section 11.1 or 11.2, (collectively "transfer"), Company shall submit an application for such consent to Municipality and shall submit or cause to be submitted to Municipality such documents and information as required by federal law. The approval process shall be conducted consistent with federal laws and regulations governing such franchise transfers.

11.3.1 Municipality shall have one hundred twenty (120) days from the date of submission of an FCC Form 394 to act upon any such application for consent. If Municipality fails to act upon such application for consent within one hundred twenty (120) days, such application shall be deemed consented to unless Municipality and Company otherwise agree to an extension of time.

11.3.2 Municipality shall not unreasonably withhold its consent to any proposed transfer.

11.3.3 Nothing in any approval by Municipality of an authorization of any transfer shall be construed to waive or release any rights of Municipality in and to the streets, Public Ways and public places of Municipality, property owned by Municipality or as a release of any of Municipality's police powers, or as an exercise of eminent domain.

11.3.4 Municipality's granting of consent in any one instance shall not require it to grant consent in other instances.

12. DEFAULTS

12.1 **Events of Default:** The occurrence, at any time during the term of the Franchise Agreement, of any one or more of the following events, shall constitute an Event of Default by the Company under this Franchise Agreement.

12.1.1 The failure of Company to pay the Franchise fee, Part 6 EG support fees or liquidated damages assessed pursuant to Parts 3, 5 or 13 hereof on or before the due dates specified herein.

12.1.2 Company's breach or violation of any of the material terms, covenants, representations or warranties contained herein or Company's failure to perform any material obligation contained herein.

12.1.3 Company's failure to pay or cause to be paid any generally applicable and non-discriminatory governmentally imposed taxes of any kind whatsoever, including but not limited to real estate taxes, income taxes and personal property taxes on or before the due date for same; provided, however, Company shall not be in default hereunder with respect to the non-payment of taxes which are being disputed in good faith in accordance with applicable law.

12.1.4 Excepting a transaction that is permissible under Section 11, the dissolution or termination, as a matter of law, of Company or any general partner of Company without the prior approval of Municipality, which shall not unreasonably be withheld.

12.1.5 If Company files a voluntary petition in bankruptcy; is adjudicated insolvent; obtains an order for relief under Section 301 of the Bankruptcy Code (11 U.S.C. §301); files any petition or fails to contest any petition filed against it seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief for itself under any laws relating to bankruptcy, insolvency or other relief for debtors; seeks or consents to or acquiesces in the appointment of any bankruptcy

trustee, receiver, master, custodian or liquidator of Company, or any of Company's property and/or this Franchise Agreement and/or of any and all of the revenues, issues, earnings, profits or income thereof; makes an assignment for the benefit of creditors; or fails to pay Company's debts generally as they become due.

12.2 Uncured Events of Default: Upon the occurrence of an Event of Default which can be cured by the immediate payment of undisputed money to Municipality or a third party, Company shall have thirty (30) days from written notice from Municipality to Company of an occurrence of such Event of Default to cure same before Municipality may exercise any of its rights or remedies provided for in Part 13. Upon the occurrence of an Event of Default by Company which cannot be cured by the immediate payment of undisputed money to Municipality or a third party, Company shall have ninety (90) days from written notice from Municipality to Company of an occurrence of such Event of Default to cure same before Municipality may exercise any of its rights or remedies provided for in Part 13.

12.2.1 If any Event of Default is not cured within the time period allowed for curing the Event of Default, as provided for herein, such Event of Default shall, without additional notice, become an Uncured Event of Default, which shall entitle Municipality to exercise the remedies provided for in Part 13.

13. REMEDIES

13.1 Remedies: Upon the occurrence of any Uncured Event of Default as described in Part 12, Municipality shall be entitled to exercise any and all of the following remedies:

13.1.1 The commencement of an action against Company at law for monetary damages.

13.1.2 The commencement of an action in equity seeking injunctive relief or the specific performance of any of the provisions which, as a matter of equity, are specifically enforceable.

13.1.3 For a violation of a material provision of this Franchise Agreement, Municipality shall have the right to forfeit and terminate the Franchise Agreement in accordance with the procedures outlined in 13.1.4 and upon the forfeiture and termination thereof this Franchise Agreement shall be automatically deemed null and void and have no force or effect, Company shall remove the Cable System from Municipality (as set forth in Section 3.37) as and when requested by Municipality and Municipality shall retain any portion of the Franchise Agreement fee and other fees or payments paid to it, or which are due and payable to it, to the date of the forfeiture and termination.

13.1.4 Municipality shall notify the Company of its intention to revoke, terminate or cancel this Franchise. The written notice shall describe in reasonable detail the specific violation so as to afford Company an opportunity to remedy the violation. Company shall have ninety (90) days or such additional period of time as may be reasonably necessary subsequent to the receipt of the notice in which to correct the violation before Municipality may formally revoke, terminate or cancel this Franchise. Company may, within thirty (30) days of receipt of the notice, notify Municipality that there is a dispute as to whether the violation has, in fact, occurred. Such notice by Company to

Municipality shall stay the ninety (90) day period described above. Municipality shall hear Company's dispute and shall determine whether a default or violation by Company has occurred. In the event that Municipality shall determine that a default or violation has occurred Municipality shall supplement the decision with written findings of fact. If after hearing the dispute Company has been found to be in default, Company shall then have ninety (90) days from such a determination to remedy the violation or failure. At any time after that ninety (90) day period Municipality may, by formal action at a public hearing affording reasonable notice and opportunity for Company to be heard, revoke, terminate or cancel this Franchise.

13.2 Security Fund:

13.2.1 Company shall furnish Municipality, no later than thirty (30) days after the Effective Date, as security for the faithful performance by Company of the provisions of this Franchise Agreement and compliance with all generally applicable orders, permits, and directions of any agency of Municipality and the payment of all claims, liens, generally applicable fees, penalties and generally applicable taxes to Municipality, a performance bond in the amount of Ten Thousand Dollars (\$10,000.00). Failure to furnish or maintain said performance bond in a timely fashion, in the full amount required hereby, in effect during the entire term of this Franchise Agreement, and of any renewal or extension thereof, or (if later) Company's fulfillment of its obligations under Section 3.37, shall constitute a material breach of this Franchise Agreement.

13.2.2 If Company fails to make timely payment to Municipality or its designee of any amount due as a result of this Franchise Agreement, or of other agreements between Company and Municipality; or fails to make timely payment to Municipality of any generally applicable taxes due; or fails to repay Municipality for damages and costs in accordance with the terms of this Agreement; or fails to comply with any material provision of this Franchise Agreement which Municipality reasonably determines can be remedied by an expenditure of monies, Municipality may draw upon the performance bond an amount sufficient to repay Municipality with interest and any penalties.

13.2.3 Prior to drawing upon the performance bond, Municipality shall follow the procedures outlines in Section 13.1.4 to provide company with due process. Thereafter, Municipality may send written notification of the amount, date and purpose of such drawing to Company by certified mail, return receipt requested

13.2.4 If at the time of a drawing by Municipality, the aggregate amount realized from the performance bond is insufficient to provide the total payment toward which the drawing is directed, the balance of such payment shall constitute an obligation of Company to Municipality until paid, at judgment rate.

13.2.5 No later than thirty (30) days after mailing of notification to Company of a drawing pursuant to Subsections 13.2.2 and 13.2.3 above, Company shall cause the performance bond to be restored to the full amount required hereby. Failure to timely restore the performance bond shall constitute a material breach of this Franchise Agreement.

13.2.6 The rights reserved to Municipality with respect to the Part 3 reconstruction bond and this performance bond are in addition to all other rights of Municipality, whether reserved by this Franchise Agreement or authorized by law, and no action, proceeding or exercise of a right with respect to such bond or letter of credit shall affect any other rights Municipality may have.

13.3 **Remedies Not Exclusive:** The rights and remedies of Municipality set forth in this Franchise Agreement shall be in addition to and not in limitation of, any other rights and remedies provided by law or in equity. Municipality and Company understand and intend that such remedies shall be cumulative to the maximum extent permitted by law and the exercise by Municipality of any one or more of such remedies shall not preclude the exercise by Municipality, at the same or different times, of any other such remedies for the same Uncured Event Of Default. However, notwithstanding this Section 13.3 or any other provision of this Franchise Agreement, Municipality shall not recover both liquidated damages and actual damages for the same violation, breach, non-compliance, or Uncured Event of Default, either under Part 13 or under any other provision of this Franchise Agreement.

13.4 **Liquidated Damages:** In addition to the remedies provided for in Sections 13.1.2 and 13.1.3, liquidated damages in the amounts set forth below may be awarded Municipality (individually and on behalf of subscribers) from Company. Company acknowledges that the amounts of actual damages for the violations and Uncured Events of Default set forth below will be difficult or impossible to ascertain; that the liquidated damages set forth below are a reasonable approximation of actual damages; that the actual damages are often incurred by Municipality and subscribers and, while cumulatively large, are too small to be worth while for individual subscribers to pursue; and that this Section 13.4 is intended to provide compensation to Municipality and its subscribers and is not a penalty.

13.4.1 For violations of Part 11 hereof, liquidated damages not to exceed Five Hundred (\$500) per day.

13.4.2 For violations of Parts 6 and 7 hereof, liquidated damages not to exceed Five Hundred (\$500) per day.

13.4.3 For Uncured Events of Default other than violations of Parts 6, 7, and 11 and Section 3.1, liquidated damages not to exceed Two Hundred (\$200) for each day that the Uncured Event of Default continues.

13.5 **Liquidated Damages Procedure:** Liquidated damages may be awarded in accordance with the following procedure.

13.5.1 Following notice from the Manager, which notice, at Manager's election, may be combined with the noticed described in Section 13.5.2, Company shall meet with Manager to attempt to resolve the issue of what liquidated damages shall be awarded. If there is no resolution of such issue within twenty (20) days of the mailing of the notice described in the first sentence then the Commission may assess liquidated damages as described below.

13.5.2 Municipality shall notify the Company of its intention to assess liquidated damages. The written notice shall describe in reasonable detail the specific violation so

as to afford Company an opportunity to remedy the violation. Company shall have ninety (90) days or such additional period of time as may be reasonably necessary subsequent to the receipt of the notice in which to correct the violation before Municipality may damages. Company may, within thirty (30) days of receipt of the notice, notify Municipality that there is a dispute as to whether the violation has, in fact, occurred. Such notice by Company to Municipality shall stay the ninety (90) day period described above. Municipality shall hear Company's dispute and shall determine whether a default or violation by Company has occurred. In the event that Municipality shall determine that a default or violation has occurred Municipality shall supplement the decision with written findings of fact. If after hearing the dispute Company has been found to be in default, Company shall then have ninety (90) days for such a determination to remedy the violation or failure. At any time after that ninety (90) day period Municipality may, by formal action at a public hearing affording reasonable notice and opportunity for Company to be heard assess liquidate.

14. PROVISION OF INFORMATION

14.1 Fillings: Upon reasonable request, Company shall provide Municipality or its attorneys with copies of (a) all documents specifically identified by Municipality which Company sends to the FCC or the State utilities or commerce commission (or similar successor agencies having jurisdiction over Company), and (b) all records specifically identified by Municipality and required by Company to be maintained under Section 76 of the FCC regulations (47 C.F.R. Part 76) or successor sections. Company's obligation herein shall be specifically limited to those documents and/or records pertaining to or including the City of McAllen franchise.

14.2 Books and Records: The Municipality may review such of Company's books and records, during normal business hours and on a non-disruptive basis, as are reasonably necessary to monitor compliance with the terms hereof. Such records shall include, but shall not be limited to, records required to be kept by the Company pursuant to the rules and regulations of the FCC, and financial information underlying the written report accompanying the Franchise Fee. Notwithstanding anything to the contrary set forth herein, Company is not required to disclose personally identifiable subscriber information without the subscriber's consent in violation of Section 631 of the Cable Communications Policy Act of 1984, as amended, 47 U.S.C. Section 551, regarding the protection of subscriber privacy. To the extent permitted by law, Municipality agrees to treat on a confidential basis any information disclosed by Company to it under this Section. In so according confidential treatment, disclosure of Company's records by Municipality shall be limited to only those of its employees, representatives and agents that have a need to know, and that are in a confidential relationship with Municipality. Subject to applicable law, Municipality agrees not to disclose such information to any competitor of Company.

15. GENERAL

15.1 Entire Agreement: This Franchise Agreement, including the Exhibits attached hereto, contain the entire agreement between the parties and all prior negotiations and agreements are merged herein and hereby superseded.

15.2 Recitals: The representations set forth in the recitals at the start of this Franchise Agreement are material and are hereby incorporated into and made a part of this Franchise Agreement as though they were fully set forth in this Part 15.

15.3 Taxes: Nothing contained herein shall be construed to except Company from any generally applicable tax, liability or assessment which may be authorized by law.

15.4 State of Art: Company shall make reasonable efforts to undertake construction and installation necessary to keep the System current with general developments in the cable industry in similarly sized and situated communities, as long as these developments are economically and technically feasible. For the purposes of this agreement, an improvement shall be economically feasible if Grantee will realize a reasonable return on investment to provide the improvement within the remaining term of the franchise.

15.5 Notices: Except as otherwise specified herein, all notices, consents, approvals, requests and other communications (herein collectively "Notices") required or permitted under this Franchise Agreement shall be given in writing and addressed as follows:

If to Municipality:

City of McAllen
Attn: City Manager's Office
1300 Houston
McAllen, Texas 78501

With a copy to:

James E. Darling
City Attorney
City of McAllen
1300 Houston
McAllen, Texas 78501

If to Company:

General Manager
Time Warner Communications
2921 South Expressway 83
Harlingen, TX 78551-2327

With a copy to:

Division President
Southwest Division
300 Parker Square, Suite 210
Flower Mound, TX 75028

Either party to this Franchise Agreement may change its address or personnel for the receipt of Notices at any time by giving notice thereof to the other as provided in this Section. Any notice given by a party hereunder must be signed by an authorized representative of such party.

15.5.1 Notices may be transmitted in any of the following four ways:

15.5.2 By personal delivery, in which case they are deemed given when delivered.

15.5.3 By delivery to Federal Express, United Parcel Service, or other nationally recognized overnight courier service, in which case they shall be deemed given when delivered to such service.

15.5.4 By being deposited in the U.S. Mail, by registered or certified mail, return receipt requested, postage prepaid, in which case notice shall be deemed given when so deposited in the U.S. Mail.

15.5.5 By facsimile transmission where the sender's transmittal log shows successful transmission to all the recipients (with any replacement transmission as a recipient shall request) and with a hard copy on the same date mailed to all by first class mail, postage prepaid, in which case notice shall be deemed given on the date of facsimile transmission.

15.6 Conferences: The parties hereby agree to meet at reasonable times to discuss any aspect of this Franchise Agreement or the services or facilities of Company. At all meetings Company shall make available personnel qualified for the issues to be discussed and such meetings shall be at Municipality's offices unless otherwise agreed.

15.7 Governing Law: This Franchise Agreement shall be construed pursuant to the laws of the State of Texas except where superseded by Federal law.

15.8 No Inducement: Company, by accepting this Franchise Agreement, acknowledges that it has not been induced to accept the Franchise Agreement by any promise, oral or written, by or on behalf of Municipality or by any third person regarding any term or condition of this Franchise Agreement not expressed herein. Company further pledges that no promise or inducement, oral or written, has been made to any Municipal employee or official regarding the grant, receipt or award of this Franchise.

15.9 Non-Discrimination: Company agrees not to discriminate against any employee or applicant for employment with respect to his or her hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment, because of his or her race, color, religion, national origin, age, or sex.

15.10 Franchise Agreement Accepted: Company further acknowledges by acceptance of this Franchise Agreement that it has carefully read the terms and conditions of the Franchise Agreement and accepts the obligations imposed by the terms and conditions herein.

15.11 Waiver Filings: Concurrent with any filing by Company or its Affiliates for any waivers, exceptions or declaratory rulings or other rulings with the same effect from the FCC or any other Federal or State regulatory agency which may affect Municipality or its residents, Company or its Affiliates shall provide Municipality with copies of such filings.

15.12 Waiver of Compliance: No failure by either party to insist upon the strict performance of any covenant, agreement, term or condition of this Franchise Agreement, or to exercise any right, term or remedy upon a breach thereof shall constitute a waiver of any such breach or such covenant,

agreement, term or condition. No waiver of any breach shall affect or alter this Franchise Agreement, but each and every covenant, agreement, term or condition of this Franchise Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach thereof.

15.12.1 Municipality may waive any provision of this Franchise Agreement, in whole or in part, at any time. Such waivers include but are not limited to instances of a claim or showing by Company that the costs associated with the provision being waived would increase the rates Company is legally allowed to charge subscribers, such as a claim that such costs are an "external cost" which allow Company to increase its cable rates under the FCC rules.

15.13 Independent Contractor Relationship: The relationship of Company to Municipality shall be an independent contractual relationship, and no liability or benefits, such as worker's compensation, pension rights or liabilities, insurance rights or liabilities or other provisions or liabilities, arising out of or related to a contract for hire or employer/employee relationship, shall arise or accrue to either party or to either party's agents or employees as a result of the performance of this Franchise Agreement, unless expressly stated in this Franchise Agreement.

15.14 Diligent Prosecution: Company agrees to use its best efforts, at its expense, to actively and diligently conduct the prosecution of all applications to the FCC or other governmental regulatory bodies necessary to permit construction and operation of its Cable System in accordance with this Franchise Agreement.

15.15 Severability: If any section, paragraph, or provision of this Franchise Agreement shall be held to be invalid or unenforceable for any reason, the invalidity or unenforceability of such section, paragraph, or provision shall not affect any of the remaining provisions of this Franchise Agreement.

15.16 General Reserved Rights: In addition to all rights provided in this Franchise Agreement, Municipality reserves all rights and powers conferred by Federal law, the Texas Constitution, State statutes and decisions, the Municipal Charter, Municipal Code, and Municipal ordinances which Municipality is allowed to exercise. Company similarly reserves all of its rights conferred by Federal and State laws, constitutions and legislation.

15.16.1 Company also recognizes Municipality's right to impose such other regulations of general applicability as shall be determined by Municipality to be conducive to the safety, welfare, and accommodation of the public.

15.17 Misleading Statements: If Company knowingly or willfully provides information to Municipality in connection with any matters under this Franchise Agreement which contains an untrue statement of a material fact or omits a material fact necessary to make the information not misleading, it shall constitute a violation of this Franchise Agreement and shall be subject to the remedies provided in Part 13.

15.18 Authority: Company represents, and agrees to warrant and defend, that it has the corporate authority to enter into this Franchise Agreement and that the persons signing on its behalf have received all necessary authorizations and approvals to execute this Franchise Agreement on behalf of Company. Municipality represents that this Franchise Agreement was approved by its legislative body

EXHIBIT A – CABLE SYSTEM DESCRIPTION

The Cable System shall meet the requirements set forth below, in accordance with CFR, Section 76, Subpart K .

System Functional Requirements: The Cable System shall be designed, spaced, and constructed for system operation including analog capacity up to 550 MHz and digital capacity from 550 MHz to at least 750 MHz meeting or exceeding all FCC standards at full channel loading.

At a minimum the Cable System shall use a hybrid fiber optic/coaxial trunk and coaxial feeder/distribution network architecture as is set forth below. The fiber optic/coaxial transfer point ("nodes") shall be placed so that the signal meets or exceed FCC specifications at the subscriber terminal.

The Cable System will be fully interactive, two-way capable.

The Cable System shall be capable, without modification, of providing the continuous, one-way downstream transport of Cable service.

The video signal delivered to the subscriber shall meet or exceed the FCC standards for signal quality set forth at 47 CFR §76.601 and following as such standards are in effect on September 1, 1997.

Cable System Architecture: Subscribers shall be grouped in nodes that are arranged geographically. Node sizing shall average 500 homes served. From each node, coaxial cable shall be used to deliver all information to and from subscribers; optical cable shall be used to carry upstream and downstream communication from Company's headend/hub to the node.

All future upgraded coaxial cable drops and coaxial cable installed by Company on subscriber premises (to the outlets typically located on a subscriber's wall), shall allow the passage of 1 GHz of spectrum while meeting or exceeding the FCC standards for signal quality described above so as to allow for channel expansion without replacement of such coaxial cable.

EXHIBIT B - FRANCHISE FEE REPORTING FORM

| | <u>July</u> | <u>August</u> | <u>September</u> | <u>Totals</u> |
|--------------------------|-------------|---------------|------------------|---------------|
| Installation | | | | - |
| Basic Service | | | | - |
| Pay Services | | | | - |
| FM | | | | - |
| Guides | | | | - |
| Franchise Fees | | | | - |
| Pay-Per-View | | | | - |
| Late Fees | | | | - |
| Miscellaneous | | | | - |
| CPSM-300 Payments | <hr/> | | | <hr/> |
| Total | | | | |
| Other Cash Receipts | - | - | - | - |
| Advertising Total | - | - | - | - |
| Bad Debt Recovery | <hr/> | <hr/> | <hr/> | <hr/> |
| GRAND TOTAL | | | | <hr/> |
| FRANCHISE FEE @ | | | | <hr/> |
| 5% | | | | <hr/> |
| | <u>July</u> | <u>August</u> | <u>September</u> | <u>Total</u> |
| QVC, HSN & Valuevision | | | | - |
| Guides | | | | - |
| Misc (Bulk, Prod.) | <hr/> | <hr/> | <hr/> | <hr/> |

| | | | | |
|------------------------|-------|-------|-------|-------|
| | _____ | _____ | _____ | _____ |
| TOTAL | - | - | - | - |
| Total Ad Sales Account | | | | |
| McAllen Percentage | 5% | 5% | 5% | |
| Advertising Total | - | - | - | |

EXHIBIT C -- SIGNAL INPUT POINTS

The locations of the signal input points referred in to Part 6 are:

1. Lark Community center, 2601 Lark Avenue, McAllen, Texas.
2. Palmview community Center, 3401 Jordan Road, McAllen, Texas.

EXHIBIT D -- INDEMNIFICATION

Assume an incident occurs for which Company is 85% at fault and Indemnitees are 15% at fault. The total amount due and owing a third party from the resulting claim is \$100,000.

Company's obligation to indemnify Municipality is 85% of \$100,000, or \$85,000.

EXHIBIT E – CABLE CUSTOMER SERVICE PLAN

1. OFFICE AND PHONE REQUIREMENTS

1.1 Company will maintain a local, toll-free or collect call telephone access line which will be available to its subscribers 24 hours a day, seven days a week.

1.1.2 Trained company representatives will be available to respond to customer telephone inquiries during normal business hours.

1.1.3 After normal business hours, the access line may be answered by a service or an automated response system, including an answering machine. Inquiries received after normal business hours must be responded to by a trained company representative on the next business day.

1.2 Under normal operating conditions, telephone answer time by a customer representative, including wait time, shall not exceed thirty (30) seconds when the connection is made. If the call needs to be transferred, transfer time shall not exceed thirty (30) seconds. These standards shall be met no less than ninety (90) percent of the time under normal operating conditions, measured on a quarterly basis.

1.3 Under normal operating conditions, the customer will receive a busy signal less than three (3) percent of the time.

1.4 Customer service center or bill payment locations will be open at least during normal business hours.

2. INSTALLATIONS, OUTAGES AND SERVICE CALLS

2.1 Under normal operating conditions, each of the following four standards will be met no less than ninety-five (95) percent of the time measured on a quarterly basis:

2.1.1 Standard installations will be performed within seven (7) business days after an order has been placed. "Standard" installations are those that are located up to 125 feet from the existing distribution system. This requirement shall not apply to commercial subscribers, multiple dwellings served by a single Drop, or inside "wall fish" installations.

2.1.2 Excluding conditions beyond the control of the Company, Company will begin working on "service interruptions" promptly and in no event later than 24 hours after the interruption becomes known. Company must begin actions to correct other service problems the next business day after notification of the service problem.

2.1.3 The "appointment window" alternatives for installations, service calls, and other installation activities will be either a specific time or, at maximum, a four-hour time block during normal business hours. (Company may schedule service calls and other

installation activities outside of normal business hours for the express convenience of the customer.)

2.1.4 Company may not cancel an appointment with a customer after the close of business on the business day prior to the scheduled appointment.

2.2. If a Company representative is running late for an appointment with a customer and will not be able to keep the appointment as scheduled, the customer will be contacted. The appointment will be rescheduled, as necessary, at a time which is convenient for the customer.

3. CUSTOMER COMMUNICATIONS

3.1 Company shall provide written information on each of the following areas at the time of installation of service, at least annually to all subscribers, and at any time upon request:

3.1.1 Products and services offered;

3.1.2 Prices and options for programming services and conditions of subscription to programming and other services; prices shall include those for programming, equipment rental, program guides and installation,.

3.1.3 Installation and service maintenance policies;

3.1.4 Instructions on how to use the cable service;

3.1.5 Channel positions of programming carried on the system, including a listing specific to Municipality showing the channel names and numbers actually available to subscribers in Municipality; and,

3.1.6 Billing and complaint procedures, including the address and telephone number of the local franchise authority's cable office, but with a notice for the subscriber to initially contact Company with complaints and questions.

3.2 Customers will be notified of any changes in rates, programming services or channel positions as soon as possible in writing. Notice must be given to subscribers a minimum of thirty (30) days in advance of such changes if the change is within the control of the Company. In addition, the Company shall notify subscribers thirty (30) days in advance of any significant changes in the other information required by Section 3.1 Notwithstanding any other provision, Company shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, franchise fee, or any other fee, tax, assessment, or charge of any kind imposed by any Federal agency, State, or franchising authority on the transaction between the Company and the subscriber.

3.3 Bills will be clear, concise and understandable. Bills must be fully itemized, with itemizations including, but not limited to, basic and premium service charges and equipment

charges. Bills will also clearly delineate all activity during the billing period, including optional charges, rebates, credits and late charges.

3.3.1 In case of a billing dispute, the Company must respond to a written complaint from a subscriber within 30 days.

3.4 Refund checks will be issued promptly, but no later than either:

3.4.1 The customer's next billing cycle following resolution of the request or thirty (30) days, whichever is earlier.

3.4.2 The return of the equipment supplied by the Company if service is terminated.

3.5 Credits for service will be issued no later than the customer's next billing cycle following the determination that a credit is warranted.

4. REQUIRED SERVICES AND SERVICE POLICIES

4.1 Lockout device: Company may at a charge set in accordance with federal law provide all subscribers with the option of obtaining a device by which the subscriber can prohibit the viewing of a particular cable service during periods selected by the subscriber.

4.2 Program guide: Upon request and subject to its availability, Company shall provide subscribers with a periodic (e.g. --monthly) program guide listing the specific programs available, their times and (when applicable and available) ratings. Company may charge a fee for this service.

4.3 Office requirement: Company shall maintain within Municipality either (1) the physical office described in 4.3.1 or (2) a "virtual office" consisting of (a) a toll-free telephone number which all subscribers in Municipality can access during normal business hours to register complaints or ask questions concerning Cable Service, billing matters or the Cable System, (b) one or more conveniently located bill payment offices within Municipality where subscribers can pay their bills, and (c) delivery and pickup of converter boxes, remotes and similar Company-provided customer premises equipment at no charge to subscribers.

4.3.1 The physical office of Company shall be a place where subscribers may pay their bills, return converter boxes and comparable items and receive information on Company and its services. Any such office shall be open during normal business hours.

4.4 Late payments: Each bill shall specify on the face thereof the date on which a payment is due, and the number of days after that date on which a late payment charge (however denominated or described) shall be added to the subscriber's bill.

4.4.1 All late payment charges, however denominated, shall be separately stated on the subscriber's bill.

4.5 Disconnection: Company shall promptly disconnect any subscriber who so requests disconnection. No period of notice prior to requested termination of service can be required of subscribers by Company.

4.6 Complaints to Municipality: If Municipality refers a Cable Service complaint from a subscriber to Company for resolution, then within five (5) business days of Company's receipt of such referral it shall investigate (including attempting to contact the subscriber) and respond to Municipality in writing as to its resolution of same.

5. TECHNICAL STANDARDS

5.1 The Company shall comply with the rules and regulations relating to cable television technical standards for signal quality, currently set forth at 47 CFR § 76.601.

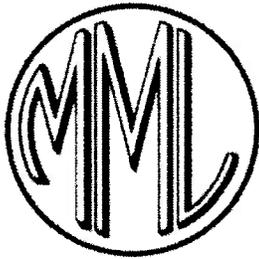
5.1.1 Company shall provide Municipality on an annual basis upon request the results of the FCC Proof of Performance Test.

EXHIBIT B

**Comments for the
Report to the General Assembly of
The State of Missouri
(A Report on Developments Resulting From the Implementation of the
2007 Video Services Providers Act)**



**Respectfully Submitted
By**



Missouri Municipal League



**AMERICAN COMMUNITY
TELEVISION**

American Community Television

August 10, 2010

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Introduction

The following are comments for the report on the developments resulting from the implementation of the 2007 Video Services Providers Act by the Missouri Municipal League and American Community Television.

The Missouri Municipal League is a statewide organization that was organized in 1934 and has as its purpose "to develop an agency for the cooperation of Missouri cities, towns and villages and to promote the interest, welfare and closer relations among them in order to improve municipal government and administration in the state." Thus, the League's basic goal is to strengthen cities through unity and cooperation.

American Community Television is a national nonprofit organization that is dedicated to the preservation of public, educational and government access television channels through the promotion and advocacy of positive federal legislation. ACT works, through communication with federal officials, for the passage and protection of federal statutes which establish and enhance the ability of local communities to use electronic media for the benefit of their citizens via public, educational and government access (PEG) television channels and to insure the accessibility for all citizens regardless of their socio-economic status.

Since the enactment of the Video Services Providers Act (SB 284) there have been unintended harms to Public, Educational and Government (PEG) access television in Missouri and generally to consumers in Missouri. It is these two areas in the report that we would like to comment on. First, the PEG access television section and secondly, the number of consumer complaints.

**Harms to PEG Access Television Since the Passage of SB 284, the
Video Services Providers Act**

Since the passage of the statewide franchising law in Missouri, 2007 Video Services Providers Act--SB 284, the treatment of Public, Educational and Government (PEG) access channels by video providers in Missouri has been contrary to the public's interest. Video service providers such as Charter and Mediacom singled out PEG channels for discriminatory treatment, frequently moving PEG channels to the highest ranges of the digital tier; providing inadequate or non-existent technical support; taking away channels without explanation; forcing customers to rent additional equipment to be able to view the PEG channels; etc.

SB 284 clearly states that all video providers must abide by state and federal laws.¹ The Telecommunications Act clearly defines PEG channels as being placed in the Basic Tier of service; it states that PEG channels are part of the "minimum contents" of the Basic Tier.²

(A) MINIMUM CONTENTS.--Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. Such basic service tier shall, at a minimum, consist of the following:

(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.

¹ Section 67.2679 (7)(1).

² Section 623 (47 U.S.C. 543)(b)(7)(A).

Both Charter and Mediacom have moved PEG channels out of the Basic Tier of service in several municipalities. We received testimony from Springfield, St. Peters and Cape Girardeau as follows:

Springfield (note, Springfield's PEG channels were not only moved out of the Basic Tier by Mediacom, but moved three times in eighteen months)

In the fall of 2008 Mediacom approached the City about moving our access channel. We met with them, expressed concerns and the outcome was they agreed to at least delay the switch. But they went ahead and moved all other access channels. At the time they said eventually ALL channels would move to the digital tier but they had no timetable for that "migration" (their word)

We asked then for our channel to be moved when the other local stations/affiliates were moved. They had no schedule for that and noted contractual issues etc.

Shortly after the digital migration our school system dropped using their channel. They commented that it was too difficult for people to find them on the new digital channel and they didn't have time to sort it all out. They now use the web only for the District things.

In Spring 2009, Mediacom came back with a planned migration date again. Once again we tried to stall using the facts that we were in the middle of some huge budget and pension issues with lots of public meetings on the channel and to switch in the middle of this would be bad timing. They agreed to postpone briefly once again.

But they wanted to make the switch in June 2009 which just so happened to be in the middle of the whole over-the-air fiasco with the FCC's digital thing so we begged again to NOT switch us in the midst of this. It would only confuse an already confused and frustrated public more.

After some protracted emailing back-and-forth they agreed to delay until mid-July. We did switch at that time and they simulcast us for 30 days on both the new channel and the old one.

But things did not go smoothly. Some subscribers needed or already had set-top boxes. For them the move was OK - except for those who needed to get boxes. Mediacom agreed to provide boxes free for one year BUT people had to pick them up within 30 days. After that, there would be a \$5 per month charge. (NOTE - the rental of a set-top box is now \$10/month.)

For folks with digital TVs - with QMA tuners - the saga went on for a month or so. Mediacom first put our digital channel at 80 for box users and 15.7 or something for digital TV people. But no one could get the channel. Mediacom's answer was always "tell people to auto-program their sets"

When our own technicians could not get the channel, Mediacom relented and moved us again to another "point - something" channel.

After a couple of tries and some frequency adjustments, people could finally find us at 15.1. So we were on 80 and 15.1. Try explaining that to grandma who just went to Wal Mart to buy her converter box with her coupon for \$40. How come she can't see the City Council meeting anymore?

Jump now to spring 2010. Mediacom again wanted to move us. They wanted to move our 15.1 channel to 80.1 to simplify things. Again we asked them to delay. Spring is a busy programming time for us. They agreed to wait until summer.

Mid-June I contacted Mediacom to confirm our agreed upon date of July 13 and was told they had some technical issues to work out and would not be moving our 15.1 channel after all. I left for vacation shortly after that.

While on vacation and checking my facebook page I noticed an update about "City's channel moving on Mediacom". Upon checking back with my office, Mediacom moved us anyway.

And somehow in that move they changed frequencies once again. We could not watch or receive the channels properly on any of our City Hall TVs.

This time the problem was splitters. Seems the new frequency was too high for some old splitters to pass. So TVs were getting a very weak (or no) signal and couldn't lock on - even those with set-top boxes. Mediacom came to us and swapped out all our old splitters and fixed the problem. When I pointed out to them about fixing everybody else's splitter problem, I got no answer. Which is typical - it often takes them weeks to respond to phone calls or emails. I typically use emails as I have to reach several Mediacom folks in different locations and email makes that easier.

We are still in the current mode of not knowing how many people still can't view our channel because of a "splitter problem." We are getting calls every week from citizens. In one case after I spoke with a gentlemen with a digital TV he informed me Mediacom sent him home with a \$10/month set-top box. Either Mediacom is trying to get every last dollar OR their Customer Service Representatives (CSR's) really don't have a clue.

We finally posted something on our website telling people to call Mediacom. I have no idea how many people just get fed up and say forget about it. We may never know about those people if they don't call us also.

St. Peters (note, Charter not only moved the PEG channels but also took St. Peters' Public access television channel and gave it to the county, without St. Peters' permission)

Under previous franchise agreement, St. Peters had Channel 10 (local government channel), Channel 18 (local public access channel) and Channel 26 (Lindenwood University Higher Education Channel).

November 1, 2007, Charter takes away Channel 18—the City of St. Peters' Public Access Channel and awards Channel 18 to St. Charles County for their government channel. (NOTE: This was the only public access channel in all of St. Charles County—there is currently no public access channel in St. Charles County.)

April 2008, Charter moves St. Peters government channel 10 to the new digital tier and Channel 992. Immediately, City of St. Peters receives dozens of calls from residents including many senior citizens and others regarding the issue. Elected officials are also questioned at City meetings and other public or neighborhood meetings about the channel move and the increased cost for people on fixed incomes. At that time, AT&T U-verse had little or no availability in St. Peters so there was no other option. There is still limited AT&T U-verse availability.³

St. Peters officials were told by Charter that Charter needed to take Channel 10 because they wanted to add more programming at that level and that they were moving St. Peters' government channel to 992 to a new "government neighborhood" with all other government channels in St. Charles County. We were told to direct any citizen complaints about this issue to Charter Cable, which we did.

Now, more than two years later, the spot for Channel 10 on the Charter line-up remains empty and we still get complaints about why there is no signal on Channel 10. Lindenwood University's old channel is also empty in the Charter line-up; the Lindenwood University channel has also been moved to the 990 "neighborhood" on the Charter digital line-up.

Cape Girardeau (note, Cape Girardeau's access television channel was moved from Channel 5 to 993. Our interview of Cape Girardeau provided us with information regarding the franchise agreement prior to passage of SB 284 and circumstances after the passage of the bill. Most disturbing is the loss of PEG support funds).

Pre-VSPA, our franchise agreement with our video service provider included:

A survey of cable subscribers every two years (we are unable to afford this process now)

³ See "Letter from Mayor of St. Peters

Two PEG channels: a government and education channel (they are now subject to the provider's requirements, but yes they have been lenient)

Production of twice-monthly council meetings (\$24,000/annually)

*Production of school board meetings (price now incurred by school district unknown)
A grant of \$30,000 annually to support public/education/government programming and equipment for both channels (we now must pay for our own)*

Production of "other Council meetings"

The provider gave free cable to +/- 20 offices within the City and schools (many of these are still free)

In summary, it is easy to say that Cape Girardeau lost at least \$55,000 annually.

St. Louis

In addition to this testimony, we have been tracking the situation of "channel slamming" in St. Louis and St. Louis County. Charter slammed the access channels (KDHX, HEC TV, STLTV), from the Basic Tier of service to the 900's.⁴ What is most noteworthy in this move by Charter is that they have not done this in any other state. They attempted to channel slam channels in Wisconsin to the 900's and when Madison threatened to sue, they continued to provide access channels at their position on the Basic Tier and also provided a channel in the 900's. We have been told by St. Louis County programmers that one of the consequences of this move is that the public schools can no longer receive the channels and in order to do so will have to spend hundreds of thousands of dollars on cable boxes.

In contrast to the practices of Charter and Mediacom, Time Warner, which is the operator in Kansas City, Missouri, has placed and kept the government access television channel on Channel

⁴ See St. Louis Post Dispatch, Charter Moves Public Access TV into Cable Stratosphere, Paul Hampel, 2/21/2010. See St. Louis Post Dispatch, St. Louis Aldermen fired up at Charter; Want cable co. to move public channels back, David Hunn, July 1, 2010.

2 on their system. In addition, Time Warner in a letter to municipalities in Texas, informed them that they would be migrating all channels to digital, however, they will “channel map” the PEG access channels to their current positions. In other words, the consumer will still be able to find Austin’s government access channel on channel 6 and the transition to digital will be seamless for the PEG channels.⁵

There is no apparent justification or need for the channel slamming engaged in by Charter and Mediacom. The PEG channels are not in the Basic Tier of service required by federal law. And, we believe that when they were moved after SB 284 was enacted, they were not in compliance with Missouri law which did not allow them to be moved until at least 50% of the subscribers were purchasing that tier. On further investigation, it is highly doubtful that 50% of subscribers are now purchasing the tier that Charter has slammed the PEG channels to.

We call on the Public Service Commission to investigate these complaints and we call on the Missouri state legislature to amend SB 284 to make the PEG channels whole again through placement on the Basic Tier of service and the reinstatement of PEG access television funding to at least the levels that were provided in local franchises when SB 284 was enacted.

Consumer Complaints

SB 284 removed the ability of the local municipalities to address cable related complaints or assist consumers in resolving issues. The Missouri PSC clearly states that they do not have the jurisdiction to address video service complaints and reports that only 4 complaints were received in the most recent 12 month period. Asking the cable operators to self-report does not help consumers, and it leaves open the possibility that video service providers will not report accurately the number of complaints they receive.

⁵ See Time Warner letter to Texas municipalities.

Missouri has approximately 1.5 million cable subscribers. In a recent query of cable administrators that receive and mitigate consumer complaints, we found an average of 1.2 complaints per thousand subscribers per month. If we apply that average to Missouri, statewide, there would be over 1,200 complaints per month.

That the PSC has no authority to address complaints and local governments' only option is to seek nonbinding mediation with the cost being born by both parties. Additionally, local government is expressly prohibited from establishing any kind of consumer standards. If repeated, willful and material violations continue, and a 60 day notice to cure has elapsed, the local government may file a complaint on behalf of the resident with the state's Administrative Hearing Commission for an order to revoke the video service provider's franchise for that political subdivision, however that decision may be appealed in court.

Before SB 284, local government had the authority to resolve complaints, fine video service providers for infractions, and guarantee that a minimum standard of consumer protection would be established. Since SB 284, consumers have been left out in the cold, they have nowhere to turn, local government is wary of entering into nonbinding mediation since the outcome is unsure and could be expensive. That almost 15,000 Missouri residents would have complaints each year, but have no place to turn, SB 284 is harming Missouri consumers.

That the PSC reports a total of 4 complaints in the most recent twelve months is telling. It's not that consumer complaints have all but disappeared, it is that consumers have no agency they can ask for assistance.

We urge the legislature to amend SB 284 and provide consumers protection in their dealings and transactions with video service providers.

Conclusion

SB 284 has harmed Public, Educational and Government (PEG) access television by eliminating the requirement for video service providers to provide PEG funding and by taking away local control of PEG requirements. This harm is especially evident in Charter and Mediacom systems which have shown a blatant disregard for local community desires and have slammed PEG channels out of the Basic Tier, a violation of federal law.

SB 284 has harmed consumers in Missouri because there is no enforcement mechanism for consumer standards and it harmed local governments' ability to ensure consumer standards and industry accountability.

We urge the state legislature to amend SB 284 to address both these areas.

August 10, 2010



Dan Ross
Executive Director
Missouri Municipal League
1727 Southridge Drive
Jefferson City, Missouri 65109



Bunnie Riedel
Executive Director
American Community Television
8775 Centre Park Dr. #255
Columbia, MD 21045

Attachment A

LEN PAGANO
MAYOR
636/477-6600, EXT. 1200

June 11, 2010

Congressman Todd Akin
117 Cannon House Office Building
Washington, D.C. 63301

Dear Congressman Akin:

I'm writing to you today about a problem you probably don't hear about very often. But here in St. Peters and in the other municipalities you represent in St. Charles County including St. Charles, O'Fallon and others, we've been dealing with a tough situation and we get lots of complaints—particularly from senior citizens. The issue is cable TV and our local government channels.

During the last two years, Charter Cable in St. Charles County has moved all of our local channels to very high numbers that require digital converters for people to view the channels. The only way to see these channels is to pay \$5.00 more a month on top of the (very) basic channel line-up. I still get calls from senior citizens who are upset about this. They're on fixed incomes. They're lucky if they can afford any cable, let alone have to pay \$5.00 more for what they were getting for free. I'm sure if you called St. Charles Mayor Patti York, O'Fallon Mayor Bill Hennessey or St. Charles County Executive Steve Ehlmann they'd probably tell you they've gotten the same calls.

I think Charter calls this new higher-tier of numbers for our channels the "Community Neighborhood." It seems to me that it's more like another way to get people to pay them more money for something that they used to get for free on basic cable. And, it's not just our senior citizens who are upset about this—and I can't blame them.

AT&T U-Verse is the new game in town, but they have all of our government channels lumped into Channel 99, then you have to try to find our different channels by following confusing computer menus. We get lots of complaints about this too.

I'm very proud of our City's cable channel. We provide our citizens with information they simply can't get anywhere else. We have our city meetings, traffic cameras, St. Peters weather forecasts and we are ready to go 24/7 with emergency information. Our residents need this information—especially if there's an emergency. They can't get it from the St. Louis channels. And, we've won many national awards for our high-quality original programming on city events and programs, health issues, and much more. It's all local-local-local!

Right now you have the opportunity to make a real difference on this issue and it won't raise taxes. We need you to co-sponsor H.R. 3745, the Community Access Preservation Act (CAP). It will guarantee our government channels are treated the same as all other local commercial stations or network affiliates and guarantees our channels are available to every subscriber including those with the basic tier cable service.

CAP will also give our local governments the power to choose how money should be spent. The money I'm talking about is PEG support fees collected from cable subscribers—our residents. The current part of the Telecommunications Act says we can only spend that money on buildings and equipment—not on operating expenses. We've got all the buildings we need, and we don't need to buy lots of fancy new equipment every year. We do need money to pay for running that equipment to bring television programming that gives residents a transparent look at how their government works.

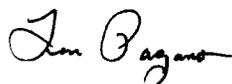
CAP provides that PEG channels will receive funding equal to the historical support we received prior to the damaging statewide/state issued franchising laws that have passed since 2005--**OR**--the amount that operators are required to pay under the new statewide/state issued franchising laws--**whichever is greater**. It returns the number of channels a community can have to the same number that was being provided as of May 31, 2005. St. Peters used to have a public access channel in addition to the government channel we now have, SPTV at Channel 992.

Many local groups used that public access channel like churches, high schools and others.

Congressman Akin, I really appreciate your consideration on this issue. By co-sponsoring H.R. 3745, you can make a positive difference in the lives of many of your constituents, especially our senior citizens on fixed incomes. It may not seem like an important issue in Washington, DC, but it will make a big difference here at home.

Please let me know if we can provide more information. I hope we can count on your help on H.R. 3745.

Sincerely,



Len Pagano
Mayor

/lb

Attachment B

Charter's station shift means people with older TVs need a digital reception box — which costs \$5 a month.

City council meetings get pushed off many screens

BY PAUL HAMPEL • phampel@post-dispatch.com > 314-727-6234 | Posted: Sunday, February 21, 2010 12:00 am |

The televised city council meetings that Charter Communications once guaranteed to municipalities are no longer free for all cable subscribers.

Charter recently moved those stations into the cable stratosphere — the 900-plus channel range. The move means that those with Charter's basic or expanded basic service and with televisions more than four years old now need a digital reception box to get local access channels. The box costs \$5 a month.

Critics here and across the nation have assailed such changes to public, education and government access television (PEG TV) as violations by cable companies of long-standing promises, if not federal law.

Charter said it made the move in response to shrinking analog bandwidth.

"Analog is old technology," said Neal Gilb, Charter's government relations manager. "The move to digital is upon us. This gives us the freedom to provide more high-definition programming."

Local PEG channels involved in the change include the local government channel, regional public access, the Higher Education Channel and three channels of the Cooperating School Districts. Their channel designations had been 10 and 17 through 22. They have been moved to what Gilb calls the "public affairs neighborhood" between channels 980 and 998.

The move does not affect people with newer digital TVs. And it also does not affect those who subscribe to satellite television or AT&T's cable service, U-verse, which already require digital boxes for all televisions.

Brentwood Mayor Pat Kelly said the move took his city by surprise. Kelly said he learned of the change from viewers who called to ask why Brentwood's channel 10 had gone dark.

"I'm just guessing, but I'd say a significant amount of our residents don't have these newer TVs — I would fall into that category — and as result they no longer get their city meetings," Kelly said.

Most cable companies guaranteed the local-access broadcasting as part of getting a franchise to operate in a municipality.

Cities lost any leverage they once had in such matters when the state took over regulating cable television franchises in 2007.

"We didn't have a say in this. And since we no longer have a franchise agreement with Charter, we really don't have any club to fight with," Kelly said.

a growing trend

A national nonprofit group that advocates on behalf of PEG TV says Charter's decision is part of a national trend.

Bunnie Riedel, executive director of the Maryland-based American Community Television, says cable companies have been violating a federal law requiring that they provide PEG TV as part of their basic service tiers.

"I never cease to be amazed at how brazenly cable companies like Charter will thumb their nose at federal law," Riedel said. "And they always trot out this nonsense about having to slam PEG into digital Siberia because of analog restrictions."

Riedel asserts that the real motivation for the change is that cable companies want to move lucrative home-shopping shows into the more-desirable lower-channel range.

"Charter gets a percentage of everything sold on home shopping channels. So you won't hear them talk about booting home shopping networks into the 900-range and charging for a digital box to see them," Riedel said.

Indeed, Charter recently plugged NBC's shopping network into Channel 16 after moving CSPAN2, which covers all live sessions of the U.S. Senate, to channel 997.

Gilb denies that profit was behind the change. "We're simply moving channels around to gain more efficiency on the network," he said.

Asked why the PEG channels could not have stayed put, and shopping channels sent to the 900s, Gilb said, "I suppose that's a corporate decision." He said he did not know what Charter's plans were for the now-vacant PEG channels.

residents' complaints

Local officials said they have received numerous complaints from residents over the changes.

"People are highly upset because they remember that Charter made an agreement and now they've broken it," said Florissant Mayor Robert Lowery. "They are now charging for what they said would always be included in a basic subscription."

Gilb insists that the change conforms to Charter's basic tier subscription. "We consider this part of our basic plan. It's just that people without digital TVs who want the PEG channels will have to pay an extra \$5 a month, which is only 16 cents a day."

Lowery said the change was especially hard on older adults and others on a fixed income. "It's just not right to keep hitting people up time and again for another fee," he said.

A longtime Florissant resident, Sandy Sheffer, said she fell into that category.

Sheffer, 67, had come to depend on watching City Council meetings on Channel 10 because health problems keep her from attending the meetings.

"I try to keep up and be a good citizen," Sheffer said. "Before my husband died (in 2006) we used to go to the meetings, but it's hard for me to drive by myself, especially at night."

After Sheffer complained to Florissant officials about losing the local channel, a Charter representative called her.

"He said they'd be glad to hook me up but as soon as he got to the part about how much more it would cost me, I said, 'Forget it, I'm on Social Security and I don't need another bill,'" Sheffer said.

In 2008, the city of Dearborn, Mich., filed suit against Comcast when the cable firm tried to move PEG channels to the 900s.

The suit claimed requiring a converter box would negatively affect the poor and elderly and violated local franchises and federal law.

In December, Comcast announced it would not move the PEG channels.

Last fall, after Charter moved PEG channels in Wisconsin, a U.S. representative there introduced legislation — the Community Access Preservation Act — that would require cable companies to give PEG TV equal footing with other stations.

"This legislation is the practical remedy," said Riedel, the PEG TV advocate. "Taking big cable companies to court is an option that most communities don't have the money or willpower to do."

St. Louis Aldermen fired up at Charter; Want cable co. to move public channels back

BY DAVID HUNN > dhunn@post-dispatch.com > 314-436-2239 | Posted: Thursday, July 1, 2010 1:05 pm |

St. Louis City aldermen held a lengthy hearing today lambasting Charter Communications for moving several public affairs television channels.

Some residents with basic cable services -- often the elderly or those on fixed-incomes -- can no longer get the stations, aldermen said.

At least six channels were affected: STL-TV (St. Louis government), SLPS-TV (St. Louis Public Schools), HEC-TV (higher education), KDHX (Double Helix), C-Span2, and EWTN-TV (Catholic).

The stations mostly moved from lower channels -- the city's STL TV was on Channel 10 -- to between 980 and 998.

Aldermen said the higher channels require \$5-per-month boxes, and that many residents have complained that they simply can't find the stations anymore.

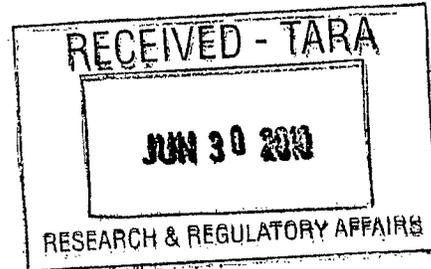
A Charter rep said the company just needed access to the bandwidth at the lower channels, and was responding to customers' interests for more high definition tv and high-speed internet access.

Charter, the rep said, has gone from 70,000 to 40,000 subscribers, and is trying to stay competitive.

Aldermen and public TV leaders said Charter was not listening to those residents who care about public programming.

Attachment C

Time Warner Cable
Department of Government Relations
750 Canyon Dr., Ste 500 E
Coppell, TX 75019
Ph: 469-464-4772 \ Fax: 469-464-4021



June 28, 2010

Ms. Rondella Hawkins
Manager, Telecom & Regulatory Affairs
City of Austin
PO Box 1088
Austin, TX 78767

Dear Ms. Hawkins:

Effective August 5, 2010, Time Warner Cable (TWC) will take another important step in adding additional programming and improving Internet speeds by reclaiming bandwidth through moving existing programming from analog to digital channels. In order to continue offering customers the advanced services they expect, we must continue our efforts to manage bandwidth utilization more efficiently. Since analog channels require up to 15 times more bandwidth than channels in the digital format, we began the process several years ago of converting analog channels to digital.

As part of this ongoing initiative, on August 5, 2010, Time Warner Cable will convert additional analog channels to digital format, including Public, Education, and Government (PEG) Access channels, which will now be carried on the digital portion of the Basic Service Tier ("BST"). At that time, the PEG channels will no longer be cablecast in analog format. We intend, however, to "channel map" the PEG channels so that they will remain visible on their pre-existing channel numbers when accessed through a TWC-supplied set top box or a CableCard equipped Unidirectional Digital Cable Product (UDCP).

Customers not subscribing to digital services will need digital equipment – for example, a digital television (or other device) equipped with a QAM tuner, a digital converter provided by TWC, or a CableCARD-equipped (UDCP) – to view the channels.

For those customers who do not already have digital equipment we will, upon request, offer one (1) standard digital box with remote control and access to the interactive program guide, Music Choice, and free On Demand programming in order that those customers may continue to have access to the PEG channels. BST-only customers will be provided such a converter, upon request, free of any monthly charge through December 31, 2015. Standard Service (BST plus the analog tier) customers who request a digital set top box in order to continue to have access to the PEG channels will not be charged a converter rental fee for the first year. Thereafter

normal rate card rates will apply to those converters. Standard Tier customers will have 60 days from the date of the offer to request a digital set top box. Finally digital customers who request additional converters in order to continue to access the PEG channels will be provided those converters under our normal rates. Perhaps most importantly, just as is the case today, no customer will be required to subscribe to a tier higher than the BST in order to continue to view the PEG channels

TWC will provide customers with at least 30 days advance notice using bill messaging, city channel messaging, and newspaper ads in order to make this change as seamless as possible. As noted above, TWC will "channel map" the PEG channels so that they will continue to be found on existing channel numbers when a TWC-supplied set box or a CableCARD-equipped (UDCP) is used. Customers using other devices to receive the digital channels, such as a cable-ready set with a QAM tuner, will find the PEG channels as follows:

| <u>Ch.</u> <u>Description</u> | <u>Analog</u> <u>Ch.#</u> | <u>Dig.</u> <u>Ch. #</u> | <u>QAM</u> <u>#</u> |
|----------------------------------|------------------------------|-----------------------------|------------------------|
| Gov. | 6 | 6 | 10.6 |
| Public | 10 | 10 | 10.10 |
| Public | 11 | 11 | 10.11 |
| Public | 16 | 16 | 10.16 |
| County | 17 | 17 | 10.17 |
| ACC | 19 | 19 | 10.19 |
| AISD Ed | 22 | 22 | 10.22 |

As always, I am available to discuss this matter at any time. You can reach me by emailing susan.patten@twcable.com or by calling 512-906-2111.

Sincerely,



Susan Patten, Vice President of Government Relations

EXHIBIT C

For Our Customers



TIME WARNER CABLE
THE POWER OF YOU™

To: Valued Time Warner Cable Customer
From: Time Warner Cable
Date: September 2010
Re: Public, Education, Government Access Channels Update

Dear valued Time Warner Cable customer,

Did you know that analog channels use up to fifteen times more bandwidth than digital channels? That's why Time Warner Cable has decided to free-up bandwidth by making select channels available in a digital format only. The good news is that this will allow us to continue to provide our customers with innovative services such as additional On Demand options and Start Over plus allowing us to add HD options and faster broadband speeds.

Recently we communicated to you our next steps to digitize the local Public, Education and Government (PEG) Access channels in your area. On October 15, 2010, the PEG channels will be delivered in a digital format only.

Rest assured, these channels will remain on the Basic Service Tier (BST) and for customers with a digital box the same channel number. They also will continue to be viewable on digital TVs (and other devices) that include a QAM tuner.

If you are a Basic or Standard only customer, we have a plan for you to ensure you can continue to view these PEG channels. We are offering a standard digital box and remote control at no cost to Basic Service Tier-only and Standard Service (BST plus the analog tier) customers who don't already have a digital box in their homes. Standard Tier customers will receive the set-top box and remote control at no cost for one year, and Basic Service Tier-only customers are eligible to receive the standard definition digital set-top box and remote control at no cost until December 31, 2015 as long as they maintain their BST-only television subscription. Basic and Standard subscribers who want to continue to enjoy PEG Access Channels, but don't have a digital box connected to any of their TVs should call us at (866) 203-9163 to get a digital box.

Thank you for being a Time Warner Cable customer. We look forward to sharing more exciting news with you in the future.

www.TimeWarnerCable.com

CABLE



HIGH-SPEED ONLINE



DIGITAL PHONE

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

| | | |
|--|---|---------------------|
| In the Matter of |) | MB Docket No. 09-13 |
| |) | |
| Petition for Declaratory Ruling Regarding Public, Educational, and Governmental Programming |) | CSR-8126 |
| |) | |
| |) | CSR-8127 |

VERIFICATION OF PAUL WERNER

I, Paul Werner, hereby declare under the penalty of perjury of the laws of the United States:

1. As counsel to Time Warner Cable, I am familiar with the factual matters included in the Response of Time Warner Cable to the McAllen Independent School District's Emergency Petition for Temporary Standstill.

2. I was responsible for and oversaw the preparation of the above-captioned Response of Time Warner Cable to the McAllen Independent School District's Emergency Petition for Temporary Standstill. I verify that the Response of Time Warner Cable to the McAllen Independent School District's Emergency Petition for Temporary Standstill and all exhibits thereto are true and accurate to the best of my knowledge, information and belief.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

| | | |
|---|---|---------------------|
| In the Matter of |) | MB Docket No. 09-13 |
| |) | |
| Petition for Declaratory Ruling Regarding Public, |) | CSR-8126 |
| Educational, and Governmental Programming |) | |
| |) | CSR-8127 |

VERIFICATION OF PAUL WERNER

I declare, under the penalty of perjury, that the foregoing verification is true and correct.

 dated: 9/29/2010

CERTIFICATE OF SERVICE

I, Paul Werner, hereby certify that on this 29th day of September, 2010, I have had hand-delivered, and/or placed in the United States mail, and/or sent via electronic mail, a copy or copies of the foregoing Response of Time Warner Cable to the McAllen Independent School District's Emergency Petition for Temporary Standstill, with sufficient postage (where necessary) affixed thereto, upon the following:

Nicholas P. Miller
Joseph Van Eaton
Matthew K. Schettenhelm
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue, N.W., Suite 1000
Washington, D.C. 20036-4306
(202) 785-0600


Paul Werner