

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

In the Matter of)
)
Petition for Declaratory Ruling on)
Requirements for a Basic Service Tier)
and for PEG Channel Capacity Under)
Sections 543(b)(7), 531(a) and the)
Commission's Ancillary Jurisdiction)
Under Title I)

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**Federal Communications Commission
Office of the Secretary**

To: The Commission

PETITION FOR DECLARATORY RULING

Teresa S. Decker (P-32114)
John W. Pestle (P-25471)
Kevin C. O'Malley (P-43621)
Timothy J. Lundgren (P-62807)
VARNUM
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

Brig Smith (P-63037)
City Attorney – City of Lansing, Michigan
124 W. Michigan Avenue
Lansing, MI 48933
(517) 483-4320

Attorneys for the City of Lansing, Michigan

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SUMMARY

The City of Lansing, Michigan (the "City") petitions the Federal Communications Commission ("FCC" or "Commission") to issue a declaratory ruling that public, educational and governmental ("PEG") channels must be carried on the basic service tier by franchised providers of video services, and treated equally with other basic service tier channels in order to comply with the Communications Act of 1934, as amended. This petition is prompted by the actions of AT&T, which is a franchised video provider in the City.

The City requires franchised cable and video providers to provide seven (7) PEG channels. Instead of providing seven channels, AT&T provides a web portal on a single channel number, over which it proposes to deliver the City's PEG programming by means of webcast streams: a video delivery system that in format, quality, accessibility and functionality is inferior to the delivery system used for other basic service tier channels.

In this regard, AT&T's U-verse system is composed of two separate and very different video delivery systems. The main one carries basic service tier and other commercial channels (but no PEG channels). From the consumer's perspective, it is like viewing channels on a conventional cable system.

The second, and distinctly inferior, video delivery system is used solely for PEG programming. It is a webcast system which from the consumer's perspective is much like watching video over the internet on a home computer.

On the webcast system multiple PEG programs are accessed via web pages from one channel number (Channel 99). The programming is provided in lower quality and has decreased accessibility and functionality as compared to commercial channels. For consumers this means that PEG channels are inferior to other basic service tier channels in the following respects:

- They are hard to select
- They can take 60 seconds to appear
- They cannot be "surfed" to or from instantly
- They have impaired emergency alert functionality
- They do not have closed captioning or secondary audio programming (such as audio in a different language) capability
- They raise barriers to access for the visually impaired
- They are incompatible with digital video recorders (such that viewers who work during the times City Council meets cannot record meetings to view later).

AT&T's webcast system is so different and difficult to use that the California Public Utility Commission's Division of Ratepayer Advocates has issued a "Consumer Alert" which states in part (see **Exhibit G**, emphasis supplied):

CONSUMER ALERT! AT&T's U-verse Public, Education, & Government (PEG) Viewing Experience

Before you switch from traditional cable TV service to AT&T's U-verse service, you should be aware that finding your city council meeting or a high school football game on your local PEG (Public, Education, & Government) channels will be *much more difficult* than finding a regular, commercial station.

Providing PEG channels on this separate, inferior system violates the requirement in the Communications Act that PEG channels be carried on the basic service tier. It also violates Congressional policy that such local channels not be discriminated against. As to PEG channels Congress has said:

Public access provides ordinary citizens, non-profit organizations, and traditionally underserved minority communities an opportunity to provide programming for distribution to all cable subscribers. Educational access allows local schools to supplement classroom learning and to reach those students who are beyond school age or unable to attend classes. Governmental channels allow the public to see its local government at work, thus contributing to an informed electorate, which is essential to the proper functioning of our democratic form of

government. PEG channels serve a *substantial and compelling government interest* in diversity, a free market of ideas, and an informed and well-educated citizenry.

H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 85 (1992) ("H.R. Rep. 102-628") (emphasis supplied). Congress has emphasized how PEG channels serve the "fundamental goal of the First Amendment" by providing "a wide diversity of information sources for the public" including "an environment of 'many tongues speaking many voices.'" H.R. Rep. No. 98-934, 1984 U.S.C.C.A.N. 4655, 4667.

To serve these goals, and ensure the widespread availability of PEG channels to cable subscribers, Congress adopted the requirement for "cable operators to offer a basic service tier, consisting, at a minimum, of all broadcast signals carried on the cable system and public, educational, and governmental (PEG) access channels." H.R. Rep. 102-628 at 26. The Communications Act accordingly provides that every cable operator must "provide its subscribers a separately available basic service tier" that contains, at a minimum, any PEG programming "required by the franchise of the cable system to be provided to subscribers." 47 U.S.C. § 543(b)(7)(A). A tier is defined as "*a category of cable services or other services provided by a cable operator and for which a separate rate is charged by the cable operator.*" 47 U.S.C. § 522(17) (emphasis supplied).

Congress also prohibited discrimination against PEG channels, stating that they should be provided on the service tier containing the broadcast channels so as to make them "available to all community members on a *nondiscriminatory* basis." H.R. Rep. 102-628 at 85 (emphasis supplied). In order to achieve this goal, PEG channels must be as accessible and available to consumers as broadcast channels. To do otherwise is to allow PEG channels to be "assigned a

second class status outside of the basic service tier," in the words of a House Appropriations Subcommittee. **Exhibit E.**

The test for determining whether channels are part of the same tier is whether they *appear to the consumer* to be in the same "category of cable services." 47 U.S.C. § 522(17). This Commission has utilized this "consumer viewpoint" principle as a basis for its rulings in a number of contexts, including Internet service, cable service, telephone service, and most notably "wireline video provider service" including the U-verse service provided by AT&T.¹ As this Commission has said repeatedly, "the reasonable expectations of viewers should guide our efforts." *Review of EAS: Second Order*, 22 FCC Rcd. at 13298, ¶ 49.

PEG channels are not in the same "category of services" as other basic service tier channels and are being discriminated against when they, and they alone, are relegated to a separate and inferior video delivery system.

The preceding requirements apply to cable operators. AT&T contends that it is not a cable operator. That contention is incorrect. Specifically, the only federal court to consider the matter has held, as a matter of law, and overturning an opposite determination by a state utility commission, that AT&T's U-verse video service is a "cable service" being offered over a "cable system" by a "cable operator" for purposes of the Federal Cable Act. *See Office of Consumer Counsel v. Southern New England Telephone Company d/b/a AT&T Connecticut, Inc.* 515 F.Supp. 2d 269, 282 (D. Conn. 2007), *reconsideration denied* by 514 F.Supp. 2d 345, 351 (D. Conn. 2008), *motion to amend entry of final judgment denied* by 565 F. Supp. 2d 384 (D. Conn.

¹ *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005) (internet service); *Oceanic Time Warner Cable, a Subsidiary of Time Warner Cable, Inc.*, 23 FCC Rcd. 12804, DA 08-1960 (2008) (cable service); *VoIP TRS Order, Report and Order*, 22 FCC Rcd. 11275, FCC 07-110 (2007) (telephone service); *Review of EAS: Second Order*, 22 FCC Rcd. 13275, FCC 07-109 (2007) (wireline video provider service).

2008). This decision should be given great weight by this Commission, because it resulted from hard-fought litigation between the cable industry and AT&T, where both sides had a full opportunity to present their arguments and rebut those of their adversaries.

However, even if AT&T is not a cable operator, the same result should occur. The Commission has repeatedly used its Title I ancillary jurisdiction to ensure that Congressional intent, the goals of the Communications Act and the "reasonable expectations of viewers" are met as new technologies emerge. It has done so by making sure such services as 911, telecommunications relay service, and emergency alert systems are widely available to consumers by applying such requirements to all types of providers, including AT&T and other wireline video providers. *See, e.g. Review of EAS: Second Order*, 22 FCC Rcd. 13275, FCC 07-109 (2007). The same result should occur here, where AT&T's U-verse system is promoted as a substitute for conventional cable and to the consumer functions like a conventional cable system. The Commission should exercise its ancillary jurisdiction to ensure that wireline video providers comply with the same PEG channel requirements as cable companies.

Finally, for the same policy reasons and to effectuate the "reasonable expectation of viewers," the Commission should use its ancillary jurisdiction to ensure that the preceding PEG requirements apply to AT&T's video system, even if it is a cable operator subject to "effective competition" and the Commission finds that the basic service tier requirements of 47 U.S.C. Section 543 do not otherwise apply.

Therefore, in brief, the Commission should require AT&T to treat PEG channels the same as other basic service tier channels by placing each of the City's PEG channels on a separately numbered channel and not allow AT&T to impair the signal quality, accessibility or functionality of PEG channels, as compared to other basic service tier channels.

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PETITION FOR DECLARATORY RULING

The City of Lansing, Michigan (the "City") hereby petitions the Federal Communications Commission ("FCC" or "Commission") to issue a declaratory ruling that public, educational and governmental ("PEG") channels must be carried on the basic service tier and treated equally with other basic service tier channels in order to comply with provisions of the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (the "Communications Act") regarding the provision of PEG channels by a franchised cable operator or other provider (collectively, "provider") of video services.

As is set forth in more detail below, the City asks the Commission to declare that providing programming from multiple PEG channels on a single channel number¹ in a webcast format with limited functionality (while other basic service tier channels are each given their own discrete channel and provided in a conventional, non-webcast, easily accessible and fully

¹ AT&T is proposing to provide the City's PEG programming on "Channel 99" which is not a real "channel" from a consumer's perspective. Instead, Channel 99 is a web portal, and as is discussed in detail below, the experience of using and viewing programming via Channel 99 is markedly different from and inferior to that of using and viewing other basic service tier channels.

functional manner), does not satisfy the basic service tier requirements applicable to cable providers found in 47 U.S.C. § 543(b)(7)(A). Further, the City asks the Commission to declare that if a provider requires that PEG programming be provided to it in a lower-quality format than other basic service tier programming (such that PEG programming video, and/or audio is of lower quality than other basic service tier channels), then PEG programming is not being placed on the basic service tier and treated equally with other basic service tier channels, as required by the Communications Act. Finally, the City asks the Commission to declare that under the Communications Act the preceding requirements apply to franchised video providers offering services that appear to consumers to be functionally equivalent to cable services, whether or not the provider is a "cable operator," or subject to effective competition under Title VI of the Communications Act.

INTRODUCTION

AT&T² is a franchised video provider offering its U-verse system in the City. Pursuant to Federal and state law, the City requires cable and video providers to deliver seven (7) channels of PEG access programming. Instead of providing seven channels, AT&T is providing a single channel number, over which it proposes to deliver the City's PEG programming by means of webcast streams. The webcast delivery system is inferior to that used by AT&T for other basic service tier channels in format, quality, accessibility and functionality.

In this regard, AT&T's U-verse system is composed of two separate and very different video delivery systems. The main delivery system carries commercial channels and functions for the consumer like a conventional cable system. For example, each channel has a separate

² Michigan Bell Telephone Company d/b/a AT&T Michigan, hereinafter "AT&T."

number, images are provided full screen in high quality, consumers can "surf" from one channel to another, and requirements for emergency alerts and closed captioning are ostensibly met.³

A second and inferior video delivery system is used by AT&T solely for PEG programming. That system is a webcast system similar to that found on a home computer. On the webcast system, multiple PEG programs are accessed via web pages from a single channel number (Channel 99) which acts as a web portal. The programming is provided in low quality compared to that of the main system and has decreased functionality and accessibility compared to that of the main system. For example, channels are difficult to select, requiring multiple selections through various menus, they do not appear immediately, consumers cannot "surf" from channel to channel, there is no closed captioning or secondary audio programming, and capabilities for emergency alerts are diminished.

It is AT&T's use of two very different video delivery systems, with only PEG programming confined to the inferior delivery system, which prompts this Petition. The differences between these two systems are set out in more detail below. However, AT&T's use of a separate and inferior delivery system for PEG programming raises a number of problems that can be summarized as follows:

- **AT&T is violating the requirements of the Communications Act and the Commission's regulations with respect to basic service tier requirements by discriminating against PEG programming;**
- **AT&T's webcast format raises barriers to access to PEG programming for consumers, particularly for the hearing and visually impaired, and also impedes the use of PEG channels in local emergency situations;**
- **AT&T is violating Congressional policy under the Communications Act which strongly supports PEG channels.**

³ By "surf" we mean that the consumer can scroll directly from one channel to another by using the channel up or down buttons on the remote control.

I. BACKGROUND

A. AT&T is a Cable Operator Subject to the Federal Cable Act

AT&T is a cable operator under the terms of the Cable Communications Policy Act of 1984, as amended, (the "Federal Cable Act"), and is providing cable service over a cable system. *See* 47 U.S.C. §§ 522(5), (6) and (7). Under the Federal Cable Act, a "cable operator" is a person who "provides cable service over a cable system." 47 U.S.C. § 522(5). "Cable service" is defined as "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service" and "subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6). The term "cable system" is defined as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. § 522(7). "Video programming" is defined as, "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). AT&T's programming is "generally considered comparable to" programming provided by television broadcast stations and that provided by other cable providers. To subscribers, AT&T's video service is simply another cable service and so should be subject to the same legal and regulatory requirements as any other cable service.

A federal court has held, as a matter of law, that AT&T's U-verse video service is a "cable service" being offered over a "cable system" by a "cable operator" for purposes of the Federal Cable Act. *See Office of Consumer Counsel v. Southern New England Telephone Company d/b/a AT&T Connecticut, Inc.* 515 F.Supp. 2d 269, 282 (D. Conn. 2007) (overturning an opposite determination by a state utility commission), *reconsideration denied by* 514 F.Supp.

2d 345, 351 (D. Conn. 2008), *motion to amend entry of final judgment denied by* 565 F. Supp. 2d 384 (D. Conn. 2008). That decision should be given great weight by this Commission because it resulted from hard-fought litigation between the cable industry and AT&T on this point and is the only reported case where both sides (with their panoplies of experts and lawyers) had a full opportunity to present their arguments and rebut those of their adversaries.

In the above-cited decision, the Federal District Court in Connecticut examined both the nature and function of AT&T's U-verse system in great depth and detail, and concluded that there was nothing to significantly distinguish it from what the Federal Cable Act defines as a "cable service." The Court thus concluded that as a matter of law, "[t]he statutory language itself appears to require the conclusion that AT&T's video programming service does constitute a 'cable service,' as defined by the Cable Act" and summarily reversed the decision of the Connecticut utility commission on this point. *Id.* at 276. No courts have found to the contrary. Therefore AT&T is a cable operator subject to the Federal Cable Act.

B. Requirements for and Use of PEG Channels in the City

1. AT&T's Franchise with the City Requires Seven PEG Channels

The Federal Cable Act specifies that a city "may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use." 47 U.S.C. § 531(a). Effective October 27, 2008, the City and AT&T entered into a franchise (hereinafter, the "Franchise"), attached as **Exhibit A**. The Franchise between the City and AT&T provides that AT&T shall designate a sufficient amount of capacity on its system to provide for the same number of PEG access channels that are in actual use on the incumbent video provider's system. See **Exhibit A, Section VII. A**. Seven PEG channels are in actual use on the system of the incumbent video provider (Comcast), and the City has asked

AT&T to provide the same seven PEG channels on its U-verse video system. See **Exhibit B**. Therefore, pursuant to the Federal Cable Act, AT&T is required to provide seven PEG channels in the City.

2. Use of PEG Channels in the City

The City's seven PEG channels are allocated and used as follows:⁴

- Channel 12: Government - City of Lansing
- Channel 15: Educational - Lansing Community College
- Channel 16: Public Access #1
- Channel 18: Educational - Michigan State University
- Channel 19: Public Access #2
- Channel 20: Educational - Michigan State University
- Channel 21: Educational - Lansing Public Schools.

The government access channel functions somewhat like a local version of C-SPAN, and the City uses its channel to broadcast City Council meetings and other City events and messages of interest and importance to the public. The educational channels are used to provide the public with access to school board and other school governance meetings and other uses related to local educational institutions. The public access channels are used to provide a variety of members of the public with access to a media outlet so that they may have an effective means to communicate with others in the community. These channels thus fulfill the purposes Congress envisioned when it passed the Federal Cable Act in 1984 and the amendments to it under the

⁴ Channel number references are to the channel number where the PEG channels appear on the Comcast cable system in the City.

Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385, as discussed below.

The Federal Cable Act guarantees the City authority to enforce the PEG-related requirements in its Franchise: "A franchising authority may enforce any requirement in any franchise regarding *the providing or use of such channel capacity.*" 47 U.S.C. § 531(c) (emphasis supplied).

C. Role and Importance of PEG Channels Under the Federal Cable Act

The Federal Cable Act permits local governments to establish requirements in a cable franchise for the designation or use of channel capacity for PEG. *See* 47 U.S.C. § 531. Congress intended PEG channels to foster important First Amendment values by serving as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." H.R. Rep. No. 98-934, 98th Cong., 2nd Sess. at 30 (1984) ("H.R. Rep. 98-934"). The legislative history to the Federal Cable Act explains that PEG channels are intended to serve the democratic principles of our government:

[PEG channels] provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work.

H.R. Rep. 98-934 at 30.

Congress emphasized the importance of PEG channels to the advancement of basic First Amendment principles when it adopted the Federal Cable Act in 1984:

The development of cable television, with its abundance of channels, can provide the public and program providers the meaningful access that, up until now, has been difficult to obtain. *A requirement of reasonable third-party access to cable systems will mean a wide diversity of information sources for the public* – the fundamental goal of the First Amendment – without the need to regulate the content of programming provided over cable.

Id. (emphasis supplied). Accordingly, the 1984 Report stressed that the Federal Cable Act:

contains provisions to assure that cable systems provide the widest possible diversity of information services and sources to the public, consistent with the First Amendment's goal of a robust marketplace of ideas - - an environment of "many tongues speaking many voices." . . . Local governments, school systems, and community groups, for instance, will have ample opportunity to reach the public under H.R. 4103's grant of authority to cities to require public, educational, and governmental (PEG) access channels.

Id. at 19 (quotation marks in original). The Report further stressed that "[p]ublic access channels available under H.R. 4103 *would be available to all, poor and wealthy alike...*" *Id.* at 36 (emphasis supplied). Thus, because of the important role they play in providing a forum for local voices, PEG channels are intended to be available to all persons who receive cable service, without restrictions, impediments or diminution in quality.

When Congress amended the Federal Cable Act in 1992, it paid particular attention to the role and function of PEG channels, and the House emphasized Congress's intent that PEG channels be easily viewable throughout a community:

PEG programming is delivered on channels set aside for community use in many cable systems, and *these channels are available to all community members on a nondiscriminatory basis*, usually without charge.

H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 85 (1992) ("H.R. Rep. 102-628") (emphasis supplied). The House went on to describe the important functions it saw continuing to be served by each type of PEG channel:

Public access provides ordinary citizens, non-profit organizations, and traditionally underserved minority communities an opportunity to provide programming for distribution to all cable subscribers. Educational access allows local schools to supplement classroom learning and to reach those students who are beyond school age or unable to attend classes. Governmental channels allow the public to see its local government at work, thus contributing to an informed electorate, which is essential to the proper functioning of our democratic form of government. PEG channels serve a *substantial and compelling government*

interest in diversity, a free market of ideas, and an informed and well-educated citizenry.

Id. (emphasis supplied). Congress has repeatedly emphasized the importance and value of PEG channels on local cable systems and highlighted the need for them to be available to all on a nondiscriminatory basis.

D. Federal Law Requires PEG Channels to be Carried on the Basic Service Tier

At the same time that the House was emphasizing the important roles that PEG channels play in local communities and the need for them to be available on a nondiscriminatory basis, it noted in particular that it was requiring the PEG channels to be on the basic service tier:

Because of the interests served by PEG channels, the Committee believes that it is appropriate that such channels be available to all cable subscribers on the basic service tier and at the lowest reasonable rate.

H.R. Rep. 102-628 at 85 (emphasis supplied). The resulting Section 623 of the Federal Cable Act, 47 U.S.C. § 543, addressed the dual concerns of Congress that basic cable services be available at reasonable rates, and that the basic tier channels be accessible to all. To ensure the greatest availability of PEG channels to cable subscribers, the House adopted language that "requires cable operators to offer a basic service tier, consisting, at a minimum, of all broadcast signals carried on the cable system and public, educational, and governmental (PEG) access channels." H.R. Rep. 102-628 at 26.⁵

⁵ The Commission's statements in *Carriage of Digital Television Broadcast Signals*, First Report and Order, 16 FCC Rcd. 2598, at 2643, ¶ 102 (2001), that basic service tier requirements may go away once a system faces effective competition, are dicta rather than a finding that might be binding on future Commissions, as that determination was not central to the matter addressed in that Report and Order, and was not subject to briefing and analysis in that proceeding. Upon due consideration the Commission will find that it is in keeping with both the letter of the Federal Cable Act and Congressional intent, as described above, for the basic service tier requirements to apply even where there is effective competition. The reasons can be summarized as follows.

The statute accordingly provides that every cable operator must "provide its subscribers a separately available basic service tier" that contains, at a minimum, any PEG programming "required by the franchise of the cable system to be provided to subscribers." 47 U.S.C. § 543(b)(7)(A). A tier is defined in the Federal Cable Act as "a category of cable services or other services provided by a cable operator and for which a separate rate is charged by the cable operator." 47 U.S.C. § 522(17) (emphasis supplied).

The Commission has previously recognized the statutory requirement that PEG channels be carried on the basic service tier. Thus the FCC's *Report and Order and Further Notice of Proposed Rulemaking* issued to implement the 1992 amendments to the Federal Cable Act, surveyed the statute, the legislative history of the Federal Cable Act, and the arguments put

The basic service tier requirement is set forth in Section 543(b)(7)(A) of the Communications Act, 47 U.S.C. § 543(b)(7)(A). Communications Act Section 543(a)(1) provides that a state, federal or local government may only regulate *rates* as provided in Section 543. Section 543(b)(2) says that "[i]f 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..." 47 U.S.C. § 543(b)(2) (emphasis supplied).

Requiring there to be a basic service tier which includes (among other things) PEG channels is not a *rate* regulation requirement. As set forth above and *infra*, among other things "PEG channels serve a substantial and compelling government interest in *diversity, a free market of ideas, and an informed and well-educated citizenry.*" H.R. Rep. 102-628 at 85 (emphasis supplied).

The presence or absence of effective competition does not affect the obligation of cable operators to comply with the basic service tier requirements of the Act. The Commission agreed with this logic when it rejected "effective competition" arguments regarding another subsection of Section 543 that is similar to the basic service tier requirement of Section 543(b)(7)(A). The Commission ruled that the "negative option billing" prohibition of Section 543(f) is a self-implementing consumer protection measure, not something which goes to the "reasonableness of the actual rate charged", and thus applies whether or not there is effective competition. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 4316, 4361-62 ¶¶ 127-28 (1994), *aff'd Time Warner Entertainment Co., LP v. FCC*, 56 F.3d 151, 194 (D.C. Cir. 1995). Similarly, the basic service tier requirement is independent of rate regulation.

The issue of the impact, if any, of effective competition on aspects of the basic service tier requirement is, along with other issues, the subject of a Petition for Declaratory Ruling filed with this Commission by the City of Dearborn, Michigan, *et al.* on December 9, 2008.

forward in comments on its proposed rules with respect to the basic service tier requirement, and concluded:

Given this clear congressional direction and the evidence of the importance attached to PEG channels, we require a cable operator to carry PEG channels on the basic tier unless the franchising agreement explicitly permits carriage on another tier.

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation, 8 FCC Rcd. 5631, 5738, ¶ 160 (1993).

1. The Basic Service Tier Requirement is Determined from the Subscriber's Point of View

The main factor in determining whether channels are part of the same tier is how the channels are viewed by consumers. This Commission has ruled, and the Supreme Court affirmed, that what it means to "offer" a service is to be determined by "what *the consumer perceives* to be the integrated finished product." *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005) (emphasis supplied). As applied to this context, that ruling means that whether PEG channels are being offered on the basic service tier should be determined by whether they appear to the consumer to be in the same "category of cable services." 47 U.S.C. § 522(17). In another cable-related matter, the Commission has affirmed this principle: "[I]t is the subscribers' perspective – not that of the cable operator – that is relevant in determining whether a change in programming services has occurred." *Oceanic Time Warner Cable, a Subsidiary of Time Warner Cable, Inc.*, 23 FCC Rcd. 12804, 12807, DA 08-1960, ¶ 8 (2008). See also the Commission's *Review of EAS: Second Order and VoIP TRS Order*, discussed in Section V, below, where in requiring VoIP providers and "Wireline Video Providers" to comply with telecommunications relay service and emergency alert requirements the Commission stressed the

consumer viewpoint - - "the reasonable expectations of viewers should guide our efforts."
Review of EAS: Second Order, 22 FCC Rcd. at 13298, ¶ 49.

Such a consumer-centric view of the basic service tier requirement is encouraged by the language of the Federal Cable Act, which states: "Each cable operator . . . shall *provide its subscribers* a separately available basic service tier." 47 U.S.C. § 543(b)(7)(A) (emphasis supplied). As Ms. Monica Desai, Chief of the Media Bureau, recently testified: "Subjecting consumers to additional burdens to watch their PEG channels defeats the purpose of the basic service tier." September 17, 2008 testimony of Ms. Monica Desai, Chief of the FCC Media Bureau, before the House Appropriations Subcommittee. See **Exhibit D**. Thus, the test is whether PEG channels are provided in such a manner that *the consumer* perceives them to be in the same category as other programming on the basic service tier. That test is not met if the consumer faces additional or different burdens in accessing PEG channels as compared to other basic service tier channels.

2. All Basic Service Tier Channels Must be Treated Equally

It is Congress's intent that PEG channels be provided on the same tier as local broadcast channels so as to make them "available to all community members on a nondiscriminatory basis." H.R. Rep. 102-628 at 85. In order to achieve this goal, PEG channels must be as accessible and available to consumers as local broadcast channels. To do otherwise is to allow PEG channels to be "assigned a second class status outside of the basic service tier," in the words of a House Appropriations Subcommittee. Letter of the House Appropriations Subcommittee on Financial Services and General Government to the FCC, September 30, 2008. See **Exhibit E**.

As Ms. Desai testified recently: "We believe it is important to ensure that consumers are able to get access equally to all channels belonging on the basic service tier, and that this should be the case regardless of what type of system the channels are being carried on." **Exhibit D**, p.4.

II. IN VIOLATION OF THE FEDERAL CABLE ACT, AT&T PLANS TO WEBCAST THE CITY'S PEG PROGRAMMING

As set forth above, AT&T is required to provide seven PEG channels on its U-verse system in the City. *See Exhibits A and B*. Instead, AT&T has informed the City that rather than provide seven PEG *channels*, it intends to provide the programming from the City's seven PEG channels as low quality⁶ Internet *webcasts* available through web pages accessed by means of a series of click-through menus. All seven channels of programming (along with other PEG programming)⁷ would be accessed from a single channel number which acts as a web portal – Channel 99 on AT&T's U-verse system in the City. *See Exhibits C and D*. By placing the City's PEG programming on a separate and inferior video delivery system from other basic tier channels, AT&T violates both the City's authority under the Federal Cable Act, found in 47 U.S.C. § 531(a) and the basic service tier requirements found in 47 U.S.C. § 543(b)(7)(A). Specifically, AT&T's planned provision of the programming from the City's *seven* PEG channels as low-quality Internet webcasts on *one* channel on AT&T's system (with impaired functionality and accessibility, and the specific webcasts accessed via web page menus), means that the City's PEG channels will not be part of the basic service tier.

⁶ Compared to other basic service tier channels.

⁷ AT&T is proposing to place programming from throughout the region on Channel 99. AT&T's current plans appear to involve only carrying PEG programming on this channel. However, there is nothing to restrict AT&T from putting any programming it may view as unworthy of carriage on its main video system onto Channel 99 – such as leased access channels and the like. Channel 99 thus could rapidly become the ghetto for programming that AT&T would rather not provide on its main system.

This is because AT&T fails to provide (from a consumer's point of view) the City's PEG channels in a manner that is equivalent to how other basic tier channels are provided.⁸ The result is that PEG channels are treated not only differently from other channels, but as a distinctly inferior and second class of service. In doing so, AT&T sends the clear message that the City's PEG channels are not important enough to warrant seven separate channels, like every other basic service tier channel. AT&T's approach directly contravenes the important role Congress assigned to PEG channels (serving what is discussed above as "a substantial and compelling government interest in diversity, a free market of ideas, and an informed and well-educated citizenry") and its consequent ban on treating them discriminatorily. H.R. Rep. 102-628 at 85.

AT&T provides all other basic tier channels in what appears to the consumer as the conventional manner, as a high-quality signal with each channel having a unique channel number. Thus consumers can simply enter the channel number directly or go to the program menu, find the channel they desire, select it, and in either case the desired programming instantly appears on the screen.

In contrast, to access the Internet webcast programming version of one of the City's PEG channels, consumers cannot find the City's seven PEG channels listed by name on AT&T's main program menu. Instead, consumers must go to AT&T Channel 99 where they must wait for the web browser-like application to load before they can access a web page that lists in alphabetical order many (sometimes on the order of 100) municipalities in the region. The consumer must scroll down to the City of Lansing, and click a link that accesses another menu listing the City's seven PEG channels. Upon clicking the link for the desired PEG channel, the Internet webcast

⁸ As discussed in footnote 17 below, AT&T is requiring that PEG programming be provided to it as a square picture that either does not fit TV screens, which are rectangular, or has to be "stretched" or "cropped" (with resulting distortion or loss of part of the picture, respectively) to fit. AT&T does not do this with other basic service tier programming.

of its programming is not instantly or even promptly displayed, as it is for other basic service tier channels. Instead, once the consumer has completed the preceding steps and selected a webcast, s/he must wait for 30 to 60 seconds (while the AT&T set top box loads and launches Windows Media Player, or some comparable program, which must find and load the PEG programming web stream) before the consumer can finally view the webcast.

In order to return to a "conventional" channel from the PEG webcast, the consumer cannot directly enter a channel number and instantly view the programming, as he or she would do when switching between conventional channels. Instead, the consumer must "back out" of the web page menu system to Channel 99, reverse the steps described above, and return to the world of "regular" TV channels. In other words, once a person views a PEG webcast,⁹ s/he cannot return to a basic service tier channel by entering its number, as may be done from any other basic service tier channel on U-verse. These barriers, and the lowered quality and delays that consumers experience in viewing PEG programming on U-verse all mark PEG as something different in kind on the AT&T system - as a different and distinctly inferior category of service.

In fact, the differences in PEG delivery on the AT&T U-verse system are so dramatic that the California Public Utility Commission's Division of Ratepayer Advocates ("CPUC-DRA") has issued a "Consumer Alert" on their website (see Exhibits G and H) which states in part as follows:

CONSUMER ALERT! AT&T's U-verse Public, Education, & Government (PEG) Viewing Experience

Before you switch from traditional cable TV service to AT&T's U-verse service, you should be aware that finding your city council meeting or a high school football game on your local PEG (Public, Education, &

⁹ Technically, this problem occurs as soon as the customer exits AT&T's main video delivery system by entering the Channel 99 webcasting portal.

Government) channels will be *much more difficult* than finding a regular, commercial station.

<http://www.dra.ca.gov/DRA/telecom/hot> , attached as Exhibit G (emphasis supplied).¹⁰

The CPUC-DRA video linked to the Alert that demonstrates how, in the words of the video, "AT&T has segregated public, education, and government programming from commercial broadcast and made it less accessible." The video produced by the CPUC-DRA demonstrates the lengthy waiting time a consumer experiences when switching from a commercial channel to a PEG channel. See the video at <http://www.dra.ca.gov/DRA/Telecom/hot/ATTs+U-verse+PEG.htm>.¹¹

The requirement in the Communications Act for a basic service tier is substantive, and not just a category of labels (where all a cable provider has to do is "label" a channel as a "basic service"). As described above, in order to be on the same tier as other channels, a channel must not be treated differently from other channels on that tier *from a consumer's point of view*.

AT&T does not provide equal access to PEG channels when it carries programming from the City's *seven* PEG channels as low-quality Internet webcasts accessed from *one* channel number (99), when it imposes significant delays and other barriers to consumer access to PEG channels, or when it makes consumers select PEG programming from lengthy web page menus listing PEG channels from municipalities over a wide geographic area.¹²

¹⁰ As noted on the list of exhibits at the end of this Petition, the printouts of the web pages are without "frames," such that they display differently from the web pages as viewed online. The substance of the main portion of the pages is unchanged.

¹¹ Similar videos have been created, among others, by the Southwest Oakland Cable Commission (SWOCC) in Michigan, see: <http://www.youtube.com/watch?v=v6A-btugKdA>; the City of San José, California, see: <http://www.youtube.com/watch?v=YQIQHRLqz1o>; and the Media Center in the City of Palo Alto, California, see: <http://www.youtube.com/watch?v=vMZXPpOVkm9k> .

¹² The City does not object to the carriage of PEG programming from other communities

From a consumer's point of view, AT&T's planned method for carrying the City's PEG channels on its U-verse system does not treat the PEG channels in a manner equal to the other basic service tier channels. Therefore, the Commission must declare that AT&T is in violation of the Federal Cable Act and require AT&T to treat PEG channels the same as other basic service tier channels by providing each of the City's PEG channels in a high quality format¹³ on its own discrete channel with a unique channel number.

III. AT&T VIOLATES THE FEDERAL CABLE ACT BY WEBCASTING THE CITY'S PEG CHANNELS IN A MANNER THAT IMPAIRS THEIR FUNCTIONALITY

By webcasting the City's PEG programming, AT&T imposes a number of functional impairments on that programming that are not imposed on other basic tier broadcast channels. Namely, AT&T treats PEG channels unequally and in a discriminatory fashion in violation of the Federal Cable Act. Some specific examples follow.

A. By Webcasting PEG Channels, AT&T is Impairing Emergency Alert Capability

Sometimes emergency alert messages direct the viewer to a local government PEG channel for more information. However, the emergency alert capabilities of PEG channels are severely limited by the webcasting format that AT&T imposes. This shortfall was illustrated in recent testimony before the House Subcommittee on Financial Services. The Executive Director of Chicago Access Network Television testified to the difficulties local governments face when attempting to use PEG channels on AT&T's U-verse system for local emergency alerts:¹⁴

on AT&T's Channel 99. However, the City's seven PEG channels must be on separate, individually numbered and fully accessible and functional channels, as described herein.

¹³ I.e., not less than that for other basic service tier channels.

¹⁴ Local emergency alert systems, and Commission orders endorsing and supporting them against various legal challenges are discussed in more detail in Section V, below.

Currently, local governments can run a scroll on cable channels and broadcast channels directing viewers to a particular PEG channel for an emergency message like a chemical spill or boil [your drinking water] order. That cannot be done for several reasons with AT&T's PEG product. Emergency messages generated by municipalities will not override broadcast channels on AT&T's U-verse system and PEG channels are hard to find and retrieve. Viewers tuning to Channel 99 will see a list of dozens of community channels, slowing down the process of dissemination of emergency information. AT&T's design is creating a public safety issue in communities around the country. Given the potential confusion and slow response time caused by AT&T's approach, this is a disservice during a time of increased concern about public safety issues.

Testimony of Barbara Popovic, Executive Director, Chicago Access Network Television, before the House Financial Services Subcommittee, September 17, 2008 (attached as Exhibit F). This concern was also highlighted by House Financial Services Subcommittee Chairman Serrano in his letter to the Commission:

U-verse's emergency alert system procedures were described in testimony as "cumbersome and inefficient"... . If an emergency alert message directing viewers to a PEG channel for more information cannot be displayed, and if a viewer cannot immediately access a PEG channel with emergency information, we question whether emergency communications are being delivered effectively.

Exhibit E. The usefulness of PEG channels as an emergency messaging tool for local governments is significantly impaired by the difficulties consumers face when trying to quickly access a PEG webcast via a series of menus, and the length of time it takes (up to a minute, as described above, for programs to load, etc.) before the PEG programming finally appears. AT&T's impairment of emergency alert functioning is discussed further below in Section V.

B. No Closed Captioning or Secondary Audio Programming is Available on AT&T's Webcasts of PEG Programming

AT&T's Internet webcasts of PEG programming are incapable of providing closed captioning. This shortfall imposes an unacceptable burden on the hearing impaired that is not present for basic service tier channels where all channels have closed captioning.

Likewise, AT&T's U-verse system does not support "secondary audio programming", where there is an additional audio feed for a channel, often in a second language (much the way a person viewing a DVD can select from several languages for the audio). As Ms. Barbara Popovic noted in her testimony before the House Financial Services Subcommittee, secondary audio programming is, "used by PEG centers to convey programming in both English and Spanish." Testimony of Barbara Popovic, Executive Director, Chicago Access Network Television, before the House Financial Services Subcommittee, September 17, 2008.

The ability to provide secondary audio programming is of increasing importance to communities with large populations for whom English is a second language.

C. AT&T's Webcasts Provide Poor Access for the Visually Impaired

As mentioned above, AT&T's method for accessing PEG programming via multiple web page menus creates barriers to access to these channels for the visually impaired, who may find reading and accessing such menus difficult or impossible to do.¹⁵ Such persons use PEG channels to listen to city council or school board meetings, or use one or more of the City's educational channels. By contrast, "regular" channels on the AT&T system can be accessed simply by channel number and so raise no such barriers to access.

In addition, the visually impaired don't have "descriptive audio", sometimes called "video description",¹⁶ available to assist them with their use of PEG programming on the AT&T U-

¹⁵ By comparison, home computers usually have special software for easy use of web pages by the visually impaired.

¹⁶ Video description is an audio description of a program's key visual elements that is inserted during natural pauses in program dialogue. It generally describes actions that are not otherwise reflected in the dialogue, such as the movement of a person in a scene.

verse system. This is because descriptive audio is commonly provided on the secondary audio channel, which as just noted, AT&T does not provide for webcast PEG programming.

D. AT&T's Webcasts are not Compatible with DVR's

The PEG webcasts that AT&T has proposed are not compatible with digital video recorders ("DVR's") such as Tivo, or other programmable recording devices that are not listed on AT&T's main program guides. This shortfall makes it difficult or impossible for viewers to "time shift" PEG programs, *i.e.*, record them for later viewing. See Letter of the House Appropriations Subcommittee on Financial Services and General Government to the FCC, September 30, 2008. This shortfall is of particular concern to the City, many of whose residents work second or third shifts, or who often work two jobs to make ends meet and rely on programmable recording devices to be able to view important programming.

In either case, City residents who are at work in the late afternoon and early evening when City Council meetings, School Board meetings and similar events occur, will not be able to view them live. Because AT&T has deprived the consumer of the ability to record PEG channels for later viewing, such residents are harmed (and the public interest is harmed) due to their inability to observe and participate in the proceedings of their units of local government. The same rationale applies to educational courses on PEG channels. This shortfall flies in the face of the importance attached by Congress to PEG channels, and is in direct contrast to the consumer's ability to record/time-shift other basic service tier channels.

These functional impairments imposed by AT&T on PEG programming are a direct result of AT&T's choice to provide Internet webcasts of PEG programming, rather than carry PEG programming on channels in the same manner as other basic service tier channels. The effect of these impairments is that the PEG channels are being treated in a manner unequal to

that of the broadcast channels. Hence, those channels are effectively removed from the basic service tier, from the consumer's point of view. For these reasons, the Commission should declare that AT&T is in violation of the Federal Cable Act when it singles out PEG channels for discriminatory treatment and impairs the functionality of those channels. The Commission should require AT&T to provide PEG channels with the same accessibility and functionality as other basic service tier channels.

IV. IN VIOLATION OF FEDERAL LAW, AT&T REQUIRES THAT PEG PROGRAMMING BE DOWNGRADED TO A LOW-QUALITY SIGNAL IN ORDER TO BE CARRIED ON U-VERSE

AT&T violates the basic service tier requirement of the Federal Cable Act by providing PEG programming in a "You-Tube" Internet format with quality that is inferior to that of other basic service tier channel signals. AT&T requires PEG programmers — but only PEG programmers — to downgrade their high-quality TV signals into low-quality Internet webcasts, thereby degrading picture quality, format¹⁷, sound quality and the synchronization of audio and video (and imposing the impairments discussed above on the functionality of PEG channels). Such treatment by AT&T is unique to PEG channels and constitutes clear discriminatory treatment of such channels.

While the City's PEG equipment and facilities are capable of producing a high-quality signal for cable casting (comparable to that of commercial basic service tier channels), AT&T

¹⁷ For instance, the "PEG Equipment Information" sheet which AT&T gave the City (**Exhibit C**) specifies that PEG video signals must be encoded and provided to AT&T with a "480 x 480" resolution. The resulting picture is thus a square, with an "aspect ratio" (ratio of picture width to height) of 1 x 1. By contrast, the aspect ratio for NTSC standard programming is 4 x 3, and for high definition programs is 16 x 9. TV screens correspondingly have one or the other of these two shapes - - older ones are 4 x 3, newer ones are 16 x 9.

AT&T is therefore requiring that PEG programming be provided to it as a square picture that does not fit TV screens, or has to be "stretched" or "cropped" (with resulting distortion or loss of part of the picture, respectively) to fit. AT&T does not do this with other basic service tier programming.

has informed the City that the City must convert its high-quality PEG signals into a low-quality Internet webcast format for them to be carried on the AT&T U-verse system. See Exhibit C and footnote 8 above.

There is no compelling technological reason why AT&T must carry PEG channels in an Internet webcast format. AT&T has chosen to do so as a matter of business convenience and cost savings to itself.¹⁸ The resultant diminished visual and sound quality of the PEG webcasts (as compared to that of other basic service tier channels) sets PEG programming apart from other channels and gives the impression to consumers that PEG programming is of lower quality and lesser importance. There is simply no comparison between a high-quality TV signal, often in a high definition format, and an Internet-type webcast.

The City is not alone in its belief that AT&T's proposed actions constitute a violation of the Federal Cable Act. In his letter to this Commission, Chairman Serrano of the House Financial Services Subcommittee referred to the testimony of Ms. Desai noted above on page 12, and stated in part: "We agree with this statement [of Ms. Desai] and believe that the concerns we heard at the hearing represent evidence that PEG channels are being assigned a second class status outside of the basic service tier." AT&T's discriminatory treatment of the City's PEG channels violates the intent of the Federal Cable Act, as noted in the legislative history described above. The House made clear its intent for PEG that, "these channels are available to all community members on a nondiscriminatory basis." H.R. Rep. 102-628 at 85.

For these reasons, the Commission should declare that AT&T is in violation of the Federal Cable Act because AT&T has created an inferior delivery system that will only accept

¹⁸ AT&T has emphasized the large channel capacity of its system, as compared to that of more conventional cable operators. The City is only requiring AT&T to carry the same number of PEG channels as the incumbent provider, Comcast.

lower quality signals than those on the basic service tier. The Commission should further require AT&T to both accept and transmit PEG programming in the same format and quality as it accepts and transmits programming on other basic service tier channels.

V. THE COMMISSION SHOULD USE ITS ANCILLARY JURISDICTION TO PROHIBIT AT&T FROM ENDANGERING PUBLIC SAFETY AND FROM TREATING PEG CHANNELS IN A DISCRIMINATORY MANNER THAT RESTRICTS THEIR AVAILABILITY

Independently of whether or not AT&T's U-verse system is subject to Title VI regulation or to effective competition, the Commission has the authority and the responsibility to implement Congressional intent by ensuring that PEG channels are treated the same as other channels, are not discriminated against and are made as widely available as possible. The Commission should assert its ancillary jurisdiction as it has in recent years in analogous situations, where new technologies threatened to upset established consumer expectations regarding regulatory requirements safeguarding public safety and welfare or to conflict with Congressional intent.¹⁹

A. The Commission Has Used Its Ancillary Jurisdiction to Ensure That Reasonable Consumer Expectations and Congressional Goals are Met

¹⁹ See, e.g., *Review of the Emergency Alert System, Second Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 13275, FCC 07-109 (2007) ("Review of EAS: Second Order"); *IP-Enabled Services: Implementation of Sections 255 and 251(a)(2) of The Communications Act of 1934, as Enacted by The Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements. Report and Order*, 22 FCC Rcd. 11275, FCC 07-110 (2007) ("VoIP TRS Order"); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, Report and Order and Further Notice of Inquiry*, 16 FCC Rcd. 6417, FCC 99-181 (1999) ("Section 255 Order"); *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 10245, FCC 05-116 (2005) ("VoIP 911 Order").

In the *VoIP TRS Order* (relating to the provision of telecommunications relay service ("TRS") by the new voice over Internet-protocol telecommunications providers), the Commission concluded that: "Because consumers have a reasonable expectation that interconnected VoIP services are replacements for traditional phone service, the same disability access protections that currently apply to telephony must apply to interconnected VoIP." 20 FCC Rcd. at 11284, ¶ 17. The Commission applied the same logic specifically to wireline video providers such as AT&T in its *Review of EAS: Second Order*, where the Commission concluded that: "To the extent that Wireline Video Providers do not qualify as 'cable operators' under the [Communications] Act, we require that they participate in EAS pursuant to our Title I ancillary jurisdiction and in connection with our specific responsibilities under section 624(g) and 706." 22 FCC Rcd. at 13298, ¶ 48. In so applying its ancillary jurisdiction to wireline video providers who may not be cable operators, the Commission explicitly looked to and relied upon manifest Congressional intent in section 624(g) of the Federal Cable Act, 47 U.S.C. Section 544(g). The same reasoning applies here. Namely, consumers expect to receive PEG channels with the same quality, accessibility and functionality (including closed captioning and emergency alerts) as commercial channels, but AT&T's U-verse system defeats those settled expectations.

Relatedly, in the *VoIP TRS Order*, the Commission enunciated a principle that applies as much to the video context as the telephony context, namely that, "services that are perceived and used as a substitute for traditional telephony [or video] are subject to the same obligations that apply to traditional telephony [or video]." 20 FCC Rcd. at 11285, ¶ 19. The Commission has recently applied this principle in the video context, specifically in applying cable system emergency alert requirements to AT&T and other wireline video providers in an order where it stated that, "[a]s a policy matter, we believe that the reasonable expectations of viewers should

guide our efforts to encourage the development of a more comprehensive EAS system." *Review of EAS: Second Order*, 22 FCC Rcd. at 13298, ¶ 49.

B. PEG Programming on AT&T's U-verse System is an Appropriate Subject for Exercise of Ancillary Jurisdiction

AT&T markets its U-verse video service as an alternative to and (to the consumer) functionally equivalent to the services offered by traditional cable providers. It should therefore be held to the same standards regarding PEG channels as other cable providers, regardless of whether it is a "cable operator" subject to Title VI of the Communications Act.

Congress has emphasized that PEG channels serve "a *substantial and compelling government interest* in diversity, a free market of ideas, and an informed and well-educated citizenry." H.R. Rep. 102-628 at 85 (emphasis supplied). These important functions are threatened by AT&T's treatment of PEG programming on its U-verse system. Therefore, it is necessary and appropriate for the Commission to exercise its ancillary jurisdiction to ensure that the Congressional intent is fulfilled. As the Commission noted in the *Review of EAS: Second Order*,

Wireline Video Providers' participation in the EAS will advance the animating purpose of section 624(g) by ensuring that their video subscribers have access to the same emergency information as broadcast and cable television viewers. Indeed, we believe that their EAS participation is necessary to preserve and advance the goals of section 624(g), as Wireline Video Providers offer competitive alternatives to the video programming available through broadcast and cable television, and are likely to reach increasingly large portions of the American public as they deploy their services. ... Accordingly, we conclude that we have ancillary jurisdiction to require even those Wireline Video Providers that may not be cable operators under the Act to participate in EAS.

Review of EAS: Second Order, 22 FCC Rcd. 13298, ¶ 48. In the case of PEG channels, Congressional policy requires that the channels be "available to all community members on a *nondiscriminatory* basis." H.R. Rep. 102-628 at 85 (emphasis supplied). AT&T's practice of

webcasting PEG programming, rather than placing it on discrete channels as traditional cable operators do, discriminates against PEG channels and creates barriers for consumers who wish to view PEG programming.

The Commission explained the basis for ancillary jurisdiction in its *VoIP TRS Order*: "Ancillary jurisdiction may be employed, in the Commission's discretion, when Title I of the Act gives the agency subject matter jurisdiction over the service to be regulated and the assertion of jurisdiction is 'reasonably ancillary to the effective performance of [its] various responsibilities.'" 20 FCC Rcd. at 11287, ¶ 22, citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968) ("*Southwestern Cable*"). *Southwestern Cable* confirmed that the Commission had subject matter jurisdiction over cable television even in the absence of Title VI, and that the Commission may therefore, "issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.'" 392 U.S. at 178, citing 47 U.S.C. § 303(r). In a later case, the Supreme Court approved of FCC rules derived under the Commission's ancillary jurisdiction that were intended to "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services." *United States v. Midwest Video Corporation*, 406 U.S. 649, 667-668 (1972).

C. The Commission Should Act to Prevent Discriminatory Treatment of PEG and to Ensure Diversity in Local Programming

The assertion of jurisdiction related to PEG channels is ancillary to the effective performance of the Commission's various responsibilities. Title I of the Communications Act sets forth as a central purpose of the Commission:

[T]o make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.

47 U.S.C. § 151. The Federal Cable Act made these general goals specific to cable systems by seeking to, "assure that cable systems are responsive to the needs and interests of the *local community*" and further assuring, "that cable communications provide and are encouraged to provide the *widest possible diversity* of information sources and services to the public." 47 U.S.C. § 521(2) and (4) (emphasis supplied). In 1984, Congress made clear that it intended that PEG channels would aid in fulfilling this vision of wide-spread access to media:

[PEG channels] provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, any by showing the public local government at work.

H.Rep. No. 98-934, 98th Cong. 2d Sess. at 30; 1984 U.S.C.C.A.N. 4655, 4667. This principle was reiterated when Congress passed amendments to the Federal Cable Act in 1992. The House Report accompanying the Federal Cable Act stated that, "PEG channels serve a *substantial and compelling government interest* in diversity, a free market of ideas, and an informed and well-educated citizenry." H.R. Rep. 102-628 at 85 (emphasis supplied).

D. The Commission Should Act to Ensure Public Safety and Welfare

Diversity of programming and preventing discrimination are not the only bases for the Commission's ancillary jurisdiction in this matter. Relatively recently, in the E911 docket, the Commission affirmed its "broad authority" derived from 47 U.S.C. § 151 to act in order to implement Congressional goals. *See, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 18 FCC Rcd. 25340 at 25345-25346, ¶¶ 12-17 (2003). In that matter, the Commission looked to the Congressional goal of,

"promoting safety of life and property through the use of wire and radio communication[s]." *Id.*, citing 47 U.S.C. § 151. In addition to helping fulfill the Congressional goal of providing critical access to media, PEG channels also often serve vital public safety roles, and so also play a role in meeting the Congressional goal of promoting public safety.

PEG channels are often used in conjunction with local alert systems on cable systems to provide local emergency information for events that do not affect a large enough area to warrant carriage on either a regional or state alert system.²⁰ For instance, a localized evacuation due to a chemical spill, an order to boil water in certain areas due to problems with a local water system, or an emergency road closure could be facilitated by a scrolling notice on the cable system to turn to the government channel for local emergency information for those living in a certain area. On the government channel, more detailed information about avoiding closed roads and using alternate routes, an order to boil water, or a notice to evacuate a few blocks and avoid the area could be given. As discussed above, recent testimony before the House Financial Services Subcommittee has highlighted the problems that local governments face in using PEG channels

²⁰ The Commission has long upheld the value of local alert systems on cable systems: "We believe that franchising officials are most familiar with local conditions and threats to their communities as well as the types of emergency information needed to respond to such threats. They are also best suited to work within their communities to develop state and local emergency alerting plans." *Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System*, Second Report and Order, 12 FCC Rcd. 15503, 15520, FCC 97-338 ¶ 33 (1997). The Commission has recognized the unique role served by local emergency alert systems: "For instance, the record indicates that many local governments view cable television systems as a primary means of notifying residents about local emergencies since municipalities can control such emergency notifications through cable franchise agreements -- control they do not have over broadcasters. ... Additionally, many local governments consider cable television systems to be a primary means for alerting local residents of non-weather related emergencies, such as hazardous materials spills or local road restrictions, which tend to affect a more confined area than weather-related emergencies and therefore may not be covered by an area TV station." *Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System*, Third Report and Order, 14 FCC Rcd. 1273, 1282, FCC 98-329 ¶ 13 (1998) (footnotes omitted).

on the U-verse system for local emergency alerts because of the webcast format employed for PEG channels by AT&T.

In addition to being used in emergency situations, PEG channels serve other more prosaic community health and safety needs, as they are often the only reliable televised source of information about essential local community services. Those community services include hazardous waste disposal drop-off sites, beach closure advisories, and similar notices. In such ways, PEG channels serve a vital and unique public safety role in many local communities that is jeopardized when barriers to access to those channels are raised. For this reason also, the Commission has the authority to address the carriage of PEG channels even outside the purview of the Federal Cable Act.

As Chairman Serrano noted in his letter to this Commission quoted above, critical local government emergency and public safety functions are impaired when AT&T raises barriers to access and use of PEG channels. Furthermore, such actions by AT&T impair the fulfillment of the fundamental Congressional objective under the Communications Act of making available, "to all the people of the United States, without discrimination, ... a rapid, efficient, ... wire and radio communication service with adequate facilities... ." 47 U.S.C. § 151.

While AT&T may tout its U-verse service as a technological step forward, as implemented for PEG channels it is a marked step backward because, in contrast to 47 U.S.C. § 151, it is less "rapid", less "efficient", "discriminates" against both the hearing and visually impaired and thus is not "available" to "all the people" taking U-verse service.

By imposing on PEG programming a technologically deficient means of carriage, AT&T places public health and safety at risk, sacrifices important First Amendment values and does not achieve the Congressional objective of providing broad, nondiscriminatory media access for

PEG channels. For these reasons, in addition to those provided above, the Commission should exercise its ancillary jurisdiction to declare that regardless of whether AT&T is a "cable operator" under the Communications Act, it must comply with the same requirements for PEG channels as a cable operator.

Under the Commission's ancillary jurisdiction it should also impose the PEG channel requirements described above if it concludes that although AT&T is a cable operator, the presence of "effective competition" removes the basic service tier requirement under Section 543. The Commission has and can exercise its ancillary jurisdiction pursuant to the several statutory bases described above. It would thereby fulfill the Congressional goals of promoting localism and a diversity of voices, ensuring that the public safety is protected, and ensuring that reasonable consumer expectations are met. Such broad goals and statutory authority are separate from any limitations on Commission authority under Section 543.

CONCLUSION

Because AT&T has two separate video delivery systems and has relegated only PEG programming to the inferior system, the Commission should: (i) declare that the basic service tier requirement in 47 U.S.C. Section 543 requires that AT&T treat PEG channels the same as other basic service tier channels by providing separate and discrete channels for each of the City's PEG channels with functionality and accessibility not less than that of other basic service tier channels; (ii) declare that the Federal Cable Act does not allow AT&T to require a PEG programmer to diminish its signal quality in order to place its PEG channel on the U-verse system, and that AT&T must both accept and transmit PEG programming in the same format and quality as it accepts and transmits programming on other basic service tier channels; (iii) declare that the preceding requirements apply whether or not AT&T is a cable operator or subject to effective competition under the Federal Cable Act.

Respectfully submitted,



Brig Smith (P-63037)
City Attorney – City of Lansing, Michigan
124 W. Michigan Avenue
Lansing, MI 48933
(517) 483-4320

Teresa S. Decker (P-32114)
John W. Pestle (P-25471)
Kevin C. O'Malley (P-43621)
Timothy J. Lundgren (P-62807)
VARNUM
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

Attorneys for the **City of Lansing, Michigan**

CERTIFICATION

The below-signed signatory has read the foregoing Petition for Declaratory Ruling and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for any improper purpose.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Teresa S. Decker", written in black ink on a white background.

Teresa S. Decker (P-32114)
VARNUM
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000