

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

In the Matter of	)	MB Docket No. 09-13
	)	
Petition for Declaratory Ruling of The Alliance For	)	CSR-8126
Community Media, Alliance for Communications	)	
Democracy, Sacramento (California) Metropolitan Cable	)	
Television Commission, Foothill-De Anza Community	)	
College District California, Chicago Access Network	)	
Television, Illinois Chapter of the National Association of	)	
Telecommunications Officers and Advisors, Manhattan	)	
(New York) Neighborhood Network, BronxNet (NY),	)	
Brooklyn (NY) Community Access Television, City of	)	
Raleigh, North Carolina, ACM Western Region, ACM	)	
Central States Region, ACM Midwest Region, ACM	)	
Northwest Region, ACM Northeast Region, and the South	)	
East Association of Telecommunications Officers and	)	
Advisors	)	
	)	
Petition for Declaratory Ruling of the City of Lansing,	)	CSR-8127
Michigan	)	
	)	
Petition for Declaratory Ruling Regarding Primary	)	CSR-8128
Jurisdiction Referral in City of Dearborn et al. v. Comcast	)	
of Michigan III, Inc. et al. of the City of Dearborn,	)	
Michigan; the Charter Township of Meridian, Michigan;	)	
the Charter Township of Bloomfield, Michigan; and the	)	
City of Warren, Michigan	)	

**COMMENTS OF FREE PRESS**

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March 9, 2009

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City of Warren, Michigan	)	

**COMMENTS OF FREE PRESS**

**I. INTRODUCTION**

On January 27, 2009, the city of Lansing, Michigan filed a petition for declaratory rulemaking, asking the Commission to declare that public, educational, and governmental (PEG) channels must be treated the same as commercial basic television channels, and in particular to declare that the actions of AT&T U-Verse violate the Communications Act and Commission

rules regarding PEG content.<sup>1</sup> On January 30, 2009, Alliance for Community Media and many other organizations filed a petition for declaratory ruling based on the same basic facts as the Lansing petition and requesting similar relief.<sup>2</sup> Similarly, though based on separate circumstances, on December 9, 2008, four communities in the state of Michigan filed a petition, pursuant to a referral from the United States District Court for the Eastern District of Michigan, asking the Commission to resolve some questions concerning Comcast's recent decision to move PEG channels into the digital tier.<sup>3</sup> The Lansing and ACM petitions raise one set of facts and legal violations; the Michigan petition, a different set. The tale of harms presented in these petitions is long and detailed, and each is worth independent individual evaluation. But on another level, all three of these petitions are based on similar underlying problems – multichannel video programming distributors discriminating against PEG content, by forcing the content to be offered through a different interface, by creating additional hurdles or costs for those who wish to view the content, by taking steps that will reduce the viewership of the content, and, in the case of AT&T, by carrying the content at a lower quality. Discrimination against PEG is harmful to the public on many levels, but in particular because PEG content

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<sup>1</sup> *Petition for Declaratory Ruling*, MB Docket 09-13, CSR-8127, filed Jan. 27, 2009 (“Lansing Petition”).

<sup>2</sup> *Petition for Declaratory Ruling of Alliance for Community Media, Alliance for Communications Democracy, Sacramento (California) Metropolitan Cable Television Commission, Foothill-De Anza Community College District, California, Chicago Access Network Television, Illinois NATOA, Manhattan (New York) Neighborhood Network, BronxNet (NY), Brooklyn (NY) Community Access Television, City of Raleigh, North Carolina, ACM Western Region, ACM Central States Region, ACM Midwest Region, ACM Northwest Region, ACM Northeast Region, and SEATOA*, MB Docket 09-13, CSR-8126, filed Jan. 30, 2009 (“ACM Petition”).

<sup>3</sup> *Petition for Declaratory Ruling Regarding Primary Jurisdiction Referral in City of Dearborn et al. v. Comcast of Michigan III, Inc. et al. of the City of Dearborn, Michigan; the Charter Township of Meridian, Michigan; the Charter Township of Bloomfield, Michigan; and the City of Warren, Michigan*, MB Docket 09-13, CSR-8128, filed Dec. 9, 2008 (“Michigan Petition”).

promotes public participation in, and through, the media. Moreover, as each of the petitions and these comments demonstrate, the actions at issue here are not only harmful, but also illegal.

## **II. AT&T U-VERSE IS SUBJECT TO PEG REQUIREMENTS**

The text of the Communications Act demonstrates that U-Verse is subject to PEG requirements either as a “cable service” or, in the alternative, through the Commission’s rules on video programming offered by common carriers. This reading is supported by statements from a federal court, members of Congress, the Commission, and (in other contexts) even AT&T itself.

### ***A. Section 602 of the Communications Act defines U-Verse as a cable service.***

A plain reading of the definition of a cable service includes AT&T’s U-Verse.<sup>4</sup> Section 602 of the Communications Act defines a “cable service” broadly as “the one-way transmission to subscribers” of video content or other programming services.<sup>5</sup> Similarly, section 602 defines a “cable system” as “a facility, consisting of a set of closed transmission paths... that is designed to provide cable service which includes video programming....”<sup>6</sup> Although this definition includes a carveout for facilities of common carriers that are subject to Title II, that exception itself has an exception to re-include such facilities to the extent they are being used for video programming.<sup>7</sup> U-Verse delivers video programming to subscribers in a manner that meets the

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<sup>4</sup> See Lansing Petition at p. 4; ACM Petition at 38.

<sup>5</sup> 47 U.S.C. § 522(6).

<sup>6</sup> 47 U.S.C. § 522(7).

<sup>7</sup> *Id.* This exception applies unless the only video programming being offered takes the form of “interactive on-demand services.” Through U-Verse, AT&T offers video programming content essentially identical to video programming offered by coaxial cable television distributors, including carriage of local broadcast stations. This comparable programming cannot be transformed into “on-demand services” because of technological differences in the transmission.

definition of cable service, and AT&T controls and operates the facilities used to provide U-Verse, including a logically closed transmission path for video programming, and therefore AT&T operates a cable system and offers a cable service under the Act and is subject to the regulations of Title VI.

***B. Section 651 of the Communications Act applies PEG requirements to U-Verse.***

Additionally, section 651 of the Communications Act directly addresses the provision of video programming services by common carriers. Section (a)(3) subjects common carrier offerings of video programming services to all of the cable requirements of the Communications Act, including in particular the requirements related to PEG content.<sup>8</sup> The statute gives three exemptions to this, one of which does not apply as a technological matter.<sup>9</sup> A second, the provision of lesser regulations for common carriers operating open video systems,<sup>10</sup> is irrelevant because these lesser regulations still subject such service providers to PEG requirements.<sup>11</sup> And, although AT&T might be able to elect to offer its video programming as a common carrier service,<sup>12</sup> such a choice would saddle AT&T with a separate class of nondiscriminatory obligations that would also certainly render discrimination of PEG content illegal.

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<sup>8</sup> 47 U.S.C. § 571(a)(3).

<sup>9</sup> The statute exempts common carriers providing video programming using radio communication, 47 U.S.C. § 571(a)(1).

<sup>10</sup> 47 U.S.C. § 571(a)(3)(B).

<sup>11</sup> 47 U.S.C. § 573(c)(1)(B).

<sup>12</sup> See 47 U.S.C. § 571(a)(2).

***C. A Federal Court has held U-Verse to be a cable service.***

As both the Lansing and ACM petitions note, the United States District Court of Connecticut faced this statutory interpretation question head-on, in the context of U-Verse.<sup>13</sup> The Connecticut Department of Public Utility found that U-Verse was not a “cable service” under the Communications Act because the underlying architecture of the service was a switched, two-way, IP-based system.<sup>14</sup> The department used this determination to exempt AT&T from the franchising requirement of section 621 of the Communications Act.<sup>15</sup> The District Court overruled the department’s decision, using a detailed technical analysis of the nature of U-Verse service operation<sup>16</sup> and a substantial examination of legislative history behind the Cable Act of 1984<sup>17</sup> to hold that U-Verse is a “cable service” offered over a “cable system.”<sup>18</sup> Although this decision is under review in the United States Court of Appeals for the Second Circuit, the sound reasoning behind it should be applied by the Commission to declare that U-Verse is a “cable service” operated over a “cable system” and subject to Title VI.

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<sup>13</sup> Office of Consumer Counsel v. S. New Eng. Tel. Co., 515 F.Supp.2d 269, *recon. denied*, 514 F.Supp.2d 345 (D. Conn. 2007), *appeal pending* No. 09-0116 (2d Cir. filed Jan. 9, 2009). Briefs of the appeal will be filed in March and April of 2009.

<sup>14</sup> *See, e.g.*, Eric Bangeman, *Federal judge: AT&T U-Verse == cable TV*, ARS TECHNICA (July 27, 2007), at <http://arstechnica.com/tech-policy/news/2007/07/federal-judge-att-u-verse-cable-tv.ars>.

<sup>15</sup> *Id.*; *see generally* 47 U.S.C. § 541.

<sup>16</sup> Office of Consumer Counsel, 515 F.Supp.2d at 276-81 (“Here, as discussed above, AT&T acknowledges that the flow of its video programming will be one-way.... The way AT&T's technology works, involving the two-way transmission of data/signals between the subscribers' set-top boxes and the network, is not excluded by the statutory definition.”).

<sup>17</sup> *Id.* at 277-78.

<sup>18</sup> *Id.* at 271.

***D. Members of Congress have said that U-Verse is a cable service.***

Following a September 17, 2008, hearing by the Subcommittee on Financial Services and General Government of the House of Representatives, members of the subcommittee, including Chairman José Serrano, Ranking Member Ralph Regula, and Chairman Obey of the House Committee on Appropriations, sent a letter to the Federal Communications Commission to ask the Commission to investigate the very actions of AT&T and Comcast at issue in this proceeding.<sup>19</sup> This bipartisan collection of members expressed clearly the belief that the treatment of PEG channels by AT&T and Comcast constituted a “second class status.”<sup>20</sup> And, even beyond the direct implication that AT&T U-Verse is subject to PEG requirements, the letter refers specifically to AT&T’s “U-verse cable service.”<sup>21</sup>

***E. The Commission recognized U-Verse as a multichannel video programming distributor, and thus covered by section 651, in its most recent MVPD Report.***

In January of 2009, the Commission released its Thirteenth Annual Report on the status of competition among multichannel video programming distributors (“Thirteenth Report”).<sup>22</sup> The Commission concluded in the Thirteenth Report that competition among MVPDs has resulted in increased choice, better quality, and technological innovation, although service prices have outpaced general inflation.<sup>23</sup> The Thirteenth Report indicated good trends towards greater

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<sup>19</sup> Letter from Chairman José Serrano, Ranking Member Ralph Regula, Carolyn C. Kilpatrick, Mark Steven Kirk, Peter J. Visclosky, Maurice D. Hinchey, and Adam Schiff of the House Appropriations Financial Services and General Government Subcommittee, and Chairman Obey of the House Committee on Appropriations to Chairman Kevin J. Martin, Sept. 30, 2008, available at <http://serrano.house.gov/NewsDetail.aspx?ID=493> (Serrano Letter).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, FCC 07-206 (rel. Jan. 16, 2009).

<sup>23</sup> *Id.* at para. 4.



competition in the MVPD market, including reduced HHI levels.<sup>24</sup> The Thirteenth Report classifies AT&T U-Verse and Verizon's FiOS video programming offerings as "other wireline MVPD services" for the purposes of evaluating MVPD competition,<sup>25</sup> defining U-Verse as an MVPD for purposes of these annual reports to Congress. As a MVPD and a common carrier, AT&T is therefore subject to PEG requirements under section 651.

If the Commission chooses not to attach MVPD status and the adherent duties under 651, including PEG requirements, to AT&T's U-Verse service in this context, then perhaps the Commission should reexamine the findings in its Thirteenth Report to determine whether there is still adequate and improving competition in the market for MVPD services.

***F. AT&T has contended that U-Verse is a multichannel video programming distributor and thus subject to Title VI.***

In September of 2008, AT&T filed a program access complaint against Cox Communications, alleging that Cox engaged in unfair competition by denying AT&T access to its affiliated sports programming network.<sup>26</sup> Complaint processes at the Commission are kept under seal, and thus AT&T's precise arguments are uncertain. The Commission has recently released an order denying AT&T's petition, and its legal status is now moot.<sup>27</sup> However, to have sought the benefits of the Commission's program access rules, AT&T must admit to being a

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<sup>24</sup> *Id.* at para. 179.

<sup>25</sup> *Id.* at paras. 13-14 (discussing U-Verse deployment under a subsection titled "Other wireline MVPD services").

<sup>26</sup> *See, e.g.,* John Eggerton, *AT&T Files Program-Access Complaint vs. Cox*, BROADCASTING & CABLE (Sept. 11, 2008), available at [http://www.broadcastingcable.com/article/115360-AT\\_T\\_Files\\_Program\\_Access\\_Complaint\\_vs\\_Cox.php](http://www.broadcastingcable.com/article/115360-AT_T_Files_Program_Access_Complaint_vs_Cox.php).

<sup>27</sup> *In the Matter of AT&T Services Inc. and Pacific Bell Telephone Company d/b/a SBC California d/b/a AT&T California v. CoxCom, Inc.*, CSR-8066-P, Memorandum Opinion and Order, DA 09-530 (rel. Mar. 9, 2009).

multichannel video programming distributor under the meaning of the statute.<sup>28</sup> Although some MVPDs able to avail themselves of program access rules are not subject to PEG requirements, multi-channel video programming distributors who are also common carriers are subject to PEG requirements under 651. In other words, AT&T has itself argued that it is a MVPD – at least when such an interpretation can generate some benefit for AT&T – and AT&T must therefore be subject to PEG requirements and the other duties adherent to its claimed status.

### **III. AT&T AND COMCAST ILLEGALLY DISCRIMINATE AGAINST PEG CONTENT**

The duty of cable service providers under the Communications Act is simple and straightforward: treat PEG content like other channels. Offering PEG content through a different interface, at a lower quality than other channels that must be carried on the basic service tier, and in a manner that creates significant hurdles for viewers violates both the letter and the spirit of the Communications Act. Through their actions, AT&T and Comcast are illegally discriminating against PEG content.

#### ***A. AT&T U-Verse and Comcast's cable service discriminate against PEG content by forcing it into an effectively separate tier, in violation of the Communications Act.***

Both AT&T and Comcast force PEG content onto a non-basic tier, by hiding it behind a separate interface from the basic tier of commercial channels and by creating substantial hurdles for viewers who wish to access the channels through that interface. In the case of Comcast, those hurdles take the form of additional costs and special requests needed to receive the

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<sup>28</sup> See 47 U.S.C. § 548(b). Additionally, AT&T has conceded as much in its comments in the docket for the Thirteenth Annual Report: “One of those MVPDs is AT&T; Cox has directly rebuffed AT&T’s requests to license Cox’s Channel Four in San Diego.” Comments of AT&T, MB Docket No. 06-189, at 15 (Nov. 29, 2006).

channels. With AT&T U-Verse, the difficulty arises from the “platform” that, among other issues, is slow to load, prevents channel surfing and DVR usage, and strips programming of content. The Communications Act and the FCC’s implementing orders require MVPD operators to offer PEG channels on the basic service tier, unless the local franchising agreement specifically permits them to be offered on a separate tier.<sup>29</sup>

As the petitions indicate, Comcast has relocated PEG content to a “digital tier” of channels, requiring customers to use a digital cable box (even if the customer subscribes to no other digital channels) and to switch to channels in the 900’s to view PEG content, although commercial basic channels remain viewable without a cable box on an analog set, and located in premium places on the channel dial.<sup>30</sup> AT&T U-Verse places PEG content into a “PEG Product” located at channel 99 of the channel lineup, rather than giving each PEG source a separate place in the lineup, as commercial basic channels are treated.<sup>31</sup> A consumer wishing to view PEG content on U-Verse must first switch to channel 99, and then must go through an entirely separate menu of PEG content, very much unlike traditional channel selection processes.<sup>32</sup>

The initial question facing the Commission concerns the definition of the “basic tier.” The petitions request that the Commission view the concept of “basic tier” through the lens of the consumer.<sup>33</sup> We agree. At a minimum, the term must be interpreted to place PEG content on an equal footing to commercial channels that the cable operator offers in the basic service tier.

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<sup>29</sup> See, e.g., Lansing Petition at 10-11 (citing 47 U.S.C. § 543(b)(7)(A) and *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, 8 FCC Rcd. 5631 (1993)).

<sup>30</sup> Michigan Petition at 3.

<sup>31</sup> Alliance Petition at 11-12.

<sup>32</sup> *Id.* The California Division of Ratepayer Advocates demonstrates the process of switching to local San Francisco PEG content on AT&T’s U-Verse service – which takes over a minute. <http://www.youtube.com/watch?v=SNEsmutJGls>.

<sup>33</sup> E.g. Michigan Petition at 19-21.

Under such a reading, AT&T and Comcast do not offer PEG content on the basic service tier because they place PEG content behind unusual and inconvenient interfaces that distinguish them from commercial channels, and because they create hurdles to view PEG content above and beyond viewing commercial channels.

This reading is supported by public statements from representatives of the Commission and members of Congress. Media Bureau Chief Monica Desai, in a hearing before the Subcommittee on Financial Services and General Government of the House of Representatives, stated in reference to the actions by Comcast and AT&T:

It has come to our attention that some programmers are moving PEG channels to a digital tier, or are treating them as on-demand channels. We are concerned by these practices. We believe that placing PEG channels on any tier other than the basic service tier may be a violation of the statute... Subjecting consumers to additional burdens to watch their PEG channels defeats the purpose of the basic service tier.<sup>34</sup>

Additionally, in the letter following the hearing, members of Congress expressed their belief that “PEG channels are being assigned a second class status outside of the basic service tier.”<sup>35</sup>

However, even if the Commission chooses to ignore the consumer’s perspective and consider a more limited financial perspective, Comcast’s conduct is still illegal under the Communications Act, as consumers must lease and operate a digital cable box to view PEG content, although other “basic” cable channels are available without the use of a digital cable box.<sup>36</sup> This represents an increased cost to the consumer, above and beyond the cost of true basic cable service.

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<sup>34</sup> Statement of Monica Desai before the Subcommittee on Financial Services and General Government, Committee on Appropriations, U.S. House of Representatives, at 4, *available at* <http://www.ourchannels.org/wp-content/uploads/2008/09/desai.pdf>.

<sup>35</sup> Serrano Letter, *supra*.

<sup>36</sup> Michigan Petition at 3.

One caveat is appropriate here. When done on a universal basis, moving basic cable channels into a digital tier is neither illegal nor necessarily bad policy. We are sensitive to capacity constraints in systems, and we are aware of the benefits that can be gained from shifting analog transmission signals to digital, including the allocation of additional capacity to broadband Internet access service to increase bandwidth and reduce congestion. However, the selective shift of only PEG content to digital transmission (or to AT&T U-Verse’s “PEG product”) creates a unique barrier between PEG and other basic channels, including broadcast and other commercial sources, and this differential and discriminatory treatment runs afoul of federal law and good public policy.

***B. AT&T U-Verse discriminates against PEG content by offering it at reduced quality and features, in violation of multiple obligations of the Communications Act.***

AT&T U-Verse discriminates against PEG content by provisioning PEG channels in a manner distinct from, and inferior to, other basic cable channels. AT&T U-Verse does not offer PEG content at the same video quality as other channels,<sup>37</sup> does not pass through closed captioning or secondary audio programs as required by the Communications Act,<sup>38</sup> and does not allow PEG content to be recorded and time-shifted through a personal Digital Video Recorder,<sup>39</sup> and therefore does not offer “channel capacity” for PEG as required by the Communications Act (and frustrates the consumer PEG viewing experience substantially).

The Communications Act confers to franchising authorities the ability to require operators to provision “channel capacity,” and unless a franchise agreement specifically provides

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<sup>37</sup> ACM Petition at 20.

<sup>38</sup> *Id.* at 33.

<sup>39</sup> Lansing Petition at 20.

for something else, that is what every franchise may be presumed to require.<sup>40</sup> The concept of “channel capacity” is equated with the concept of “channel,” defined in the Communications Act as “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel.”<sup>41</sup> AT&T’s “PEG product” is inferior to a television channel and is incapable of delivering a full and complete television channel, and thus does not meet the definition of providing “channel capacity” under the Act.<sup>42</sup>

Although franchising authorities could independently bring actions to enforce AT&T’s failure to provide channel capacity to PEG, by clarifying the meaning of the federal term – the term that applies as a default whenever capacity is designated for PEG – the Commission can ensure that PEG is preserved, consistent with Congressional intent. The Commission should declare that where AT&T U-Verse is obligated to provide a “channel,” it must provide a channel comparable to broadcast and other commercial basic channels.

Furthermore, as the petition by Alliance for Community Media et al. makes clear, by not passing through closed caption information, AT&T also violates the Commission’s rules on closed captioning for all programming.<sup>43</sup> Specifically, section 76.606 of the Commission’s rules requires all cable operators to pass through closed captioning information affiliated with programming; section 79.1(c) imposes a similar obligation on VPDs that are not cable operators for the purposes of 76.606.<sup>44</sup> The petition correctly notes that these obligations apply to AT&T U-Verse as a video programming distributor (if not as a cable operator), and that section

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<sup>40</sup> 47 U.S.C. § 531(a). The Act does not prevent a cable operator and a franchising authority from agreeing to carriage of PEG audio services, for example, even though those would not involve a “channel” as generally defined in the Cable Act. Rather, Section 531(c) makes any PEG requirement in a franchise enforceable.

<sup>41</sup> 47 U.S.C. § 522(4).

<sup>42</sup> See Lansing Petition at 13-17, 21-23.

<sup>43</sup> ACM Petition at 33-42.

<sup>44</sup> *Id.* at 34-36.

79.1(e)(2)'s exception for "open captioning" as an alternative should not be read to trump the "pass-through" obligation of 79.1(c).<sup>45</sup>

#### **IV. GRANTING THE PETITIONS WOULD PROMOTE GOOD PUBLIC POLICY**

##### ***A. PEG programming fosters public participation in media.***

Public production of content offered through PEG programming ensures that ordinary citizens can play a role in media. Empowering the public encourages the participation of a wide range of voices, increasing the diversity of viewpoints substantially. Content on PEG channels is also overwhelmingly local, produced by schools, governments, and citizens of the community. Free Press has long advocated the values of diversity and localism in media, two guiding principles of the Commission's media policies.

Despite hundreds of channels, a dearth of local programming exists on cable systems. Broadcast TV has moved away from any focus on the local coverage central to democracy.<sup>46</sup> The broadcast industry has also experienced widespread consolidation over the past decade, resulting in even fewer independent local voices.<sup>47</sup> A quick scan of any program guide reveals that, even in the digital universe, PEG represents a substantial share of local cable content. For

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<sup>45</sup> *Id.* Regardless of one's interpretation of the "open captioning" exemption, the decision by AT&T to allow closed captioning for all of its non-PEG content but to offer only open captioning for PEG content surely goes against the spirit behind these rules, if not the letter.

<sup>46</sup> See, e.g., Martin Kaplan, Ken Goldstein, and Matthew Hale, *Local News Coverage of the 2004 Campaigns, An Analysis of Nightly Broadcasts in 11 Markets*, LEAR CENTER LOCAL NEWS ARCHIVE (Feb. 15, 2005), available at <http://www.localnewsarchive.org/pdf/LCLNAFinal2004.pdf>.

<sup>47</sup> 2006 *Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket 06-121, Report and Order and Order on Reconsideration, 23 FCC Rcd 21010 (2008) (statement of Michael J. Copps, Commissioner) ("First, the consolidation we have seen so far and the decision to treat broadcasting as just another business has not produced a media system that does a better job serving most Americans. Quite the opposite. Rather than reviving the news business, it has led to less localism, less diversity of opinion and ownership, less serious political coverage, fewer jobs for journalists, and the list goes on.").

example, the Community Programming Board of Forest Park, Greenhills, and Springfield Township, Ohio generated and cablecast 1,628 new and locally produced programs in 2008, content that was not available through any other broadcast or cable source.<sup>48</sup> Additionally, PEG content is the only local television programming free from advertising, a distinction of increasing importance given the prevalence of many forms of embedded advertising in other programming, even in local news segments.<sup>49</sup>

Even beyond the opportunity to view local content, PEG gives citizens the opportunity to become content creators themselves. Given the high costs of operating broadcast stations and negotiating for premier (or any) space on the TV dial, PEG channels offer local citizens the only feasible way to produce, distribute, and target programming relevant to their local audience, programming that greatly advances the Commission's goals of promoting localism and diversity in media. And, this valuable, citizen produced content is at risk if multichannel video programming distributors are allowed to bury PEG channels behind inconvenient and frustrating interfaces or digital cable boxes, and to offer them at lower than standard definition quality, even as those same distributors offer more and more channels of commercial content, and more and more high definition content in particular.<sup>50</sup>

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<sup>48</sup> Comment of Community Programming Board of Forest Park, Greenhills and Springfield Township, at 1 (Mar. 2, 2009) (CPB Comments).

<sup>49</sup> See e.g. Comments of Center for Media and Democracy, MB Docket No. 08-90 (Sept. 22, 2008).

<sup>50</sup> The Nielsen Media Research 2007 Survey indicates that the majority of consumers switching to HDTV did so to get a "better picture," despite still limited offerings of HD programming. Paul Lindstrom and David Chester, *Resolution Revolution*, NIELSEN – CONSUMER INSIGHT MAGAZINE, available at [http://www.nielsen.com/consumer\\_insight/issue5/ci\\_story3.html](http://www.nielsen.com/consumer_insight/issue5/ci_story3.html). In other words, the desire for more high resolution experiences drives consumer television growth. See, e.g., *AT&T U-Verse TV Lineup Expands to 100 or More High Definition Channels in Every U-Verse TV Market*, Press release (Mar. 2, 2009), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26580>; *Comcast Announces More Than 1,000 HD*



***B. PEG programming allows the media to foster public participation.***

In addition to allowing the public to assist in the generation of media, PEG programming allows the media to assist in public participation. Educational and governmental programming offered by the local community allows for easy and efficient dissemination of information valuable in keeping ordinary citizens informed.<sup>51</sup> PEG programming allows community governments to reach directly to their citizens, without requiring the facilitation of commercial news networks. For example, the Community Programming Board offers “live and replay coverage of our council and trustee meetings” as part of its PEG programming.<sup>52</sup> Flagler County, Florida’s PEG programming includes regular, local, and informed updates on tropical storms threatening the county.<sup>53</sup> PEG programming allows local governments to educate and connect with constituents.

By moving PEG programming off the basic services tier, AT&T and Comcast have placed barriers among citizens and between the government and its constituents. Thanks to the loss of public participation, the greater harm falls not on the producers of PEG, but on the entire community.

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*Choices Available – The Most HD Content Anytime, Anywhere*, Press release (Oct. 15, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=811>.

<sup>51</sup> This function of PEG channels is certainly of value to citizens. Similar to C-SPAN, it’s counterpart on the national level. See e.g. The Pew Research Center for the People & the Press, “The C-SPAN Audience,” March 2, 2004, available at <http://people-press.org/commentary/?analysisid=87>.

<sup>52</sup> CPB Comments at 2.

<sup>53</sup> Comments of Flagler County Board of County Commissioners, at 1 (Mar. 2, 2009).

## V. CONCLUSION

PEG content has been and will continue to be a valuable component of our media landscape, as a source of local and diverse content, as a means to allow the public to participate in media generation, and as a means to connect the government to its constituents. For these reasons, Congress and the Commission established strong protections for the promotion of PEG content in the systems of multichannel video programming distributors – PEG content must be placed on an equal footing to basic commercial channels. As the Lansing and ACM petitions demonstrate, AT&T is engaged in active discrimination against PEG content, in violation of the Communications Act and the Commission’s rules, by forcing PEG content to be distributed through a different interface and at a lower quality. Similarly, by moving PEG content into the digital tier and by erecting hurdles for subscribers who wish to view the content, Comcast is actively and illegally discriminating against PEG content. The FCC should clarify its existing rules and regulations, and the language of the Communications Act, and state clearly that PEG content must be placed on an equal footing in cable systems, from the user’s point of view. All cable systems must pass through closed captioning and secondary audio programs when provided by PEG content producers; must offer PEG content through the same interface and service tier as other basic cable channels, with no extra obstacles; and must deliver PEG content to the customer at the same video and audio quality as other basic cable channels.

Respectfully submitted,

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March 9, 2009

**CERTIFICATE OF SERVICE**

I, M. Chris Riley, certify that on this 9th day of March, 2009, the foregoing document, *Comments of Free Press*, was served by United States mail, postage prepaid, upon the following:

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