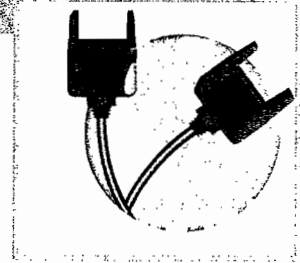
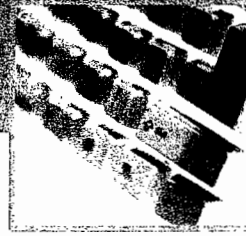


**SPIEGEL &  
MCDIARMID**



**NEW JERSEY STATE  
LEAGUE OF MUNICIPALITIES**

**93rd ANNUAL CONFERENCE  
CHALLENGES & CHANGES**

**ACCESS STATIONS – THE EFFECT OF  
STATEWIDE FRANCHISING AND THE  
IMPACT OF FCC REGULATIONS AND  
ACTIVITIES**

**Jim Horwood  
Gloria Tristani**

**Atlantic City, New Jersey**

**November 20, 2008**



**I. BEGINNING IN 2005 TELEPHONE COMPANIES AGGRESSIVELY SOUGHT LEGISLATIVE AND/OR REGULATORY RELIEF FROM CABLE FRANCHISING REQUIREMENTS**

**A. *Proposed Federal Legislation***

1. House Bill: COPE (Communications Opportunity, Promotion, and Enhancement Act of 2006) provided for national franchises to be issued by the FCC – passed the House in June 2006.
2. Senate Bill: ATOR (Advanced Telecommunications and Opportunities Reform Act) provided for local (or state) franchising, but imposed limitations on franchise requirements and deadlines for acting – passed Senate Commerce Committee at the end of June 2006, but did not make it onto the floor of the Senate.

**B. *FCC Video Franchising Orders***

1. Notice of proposed rulemaking issued in November 2005.
2. On December 20, 2006 (after it was clear that there would be no federal legislation), FCC adopted a rule applicable to new entrants imposing a 90-day shot clock on local franchising authorities to act on franchise requests by telephone companies (180 days for other new entrants) and limiting what could be required in franchises. The order was not released until March 5, 2007.
3. On November 6, 2007, the FCC issued a second order extending most of the rules in the first order to incumbent cable operators, but not the shot clock provision.
4. The first order was upheld on appeal by the U.S. Court of Appeals for the 6th Circuit on June 27, 2008, and on rehearing on October 29, 2008. Petitions for reconsideration of the second order are still pending before the FCC.

**C. *State Legislation***

1. Some states have long had statewide franchising or state oversight laws that were generally favorable for PEG (Connecticut, Hawaii, Massachusetts, New York and Vermont).
2. The first new telco-inspired statewide franchising law was enacted in Texas in 2005, followed by Virginia, Indiana, Kansas, South Carolina,

North Carolina, New Jersey, California and Michigan in 2006, prior to release of the FCC's first order.

3. Subsequent legislation was enacted in Missouri, Georgia, Florida, Iowa, Nevada, Ohio, Illinois, Wisconsin, Tennessee and California.
4. Only two of the new state laws are positive for PEG and local governments – Illinois and ~~Louisiana~~. CA
5. Those most detrimental to PEG are Indiana, Kansas, South Carolina, North Carolina, Missouri, Georgia, Florida, Ohio, Tennessee and Louisiana.
6. The New Jersey legislature enacted Act No. 804 in the summer of 2006, providing an option to obtain a system-wide franchise.
  - System-wide franchisees pay a franchise fee of 3.5% of gross revenues to municipality (and .5% into a CATV Universal Access Fund) in contrast to 2% paid by holders of municipal franchises.
  - System-wide franchisees must provide 2 PEG channels and can be required to provide more channels; PEG channels shall be managed and operated by municipalities or their designees; franchisees must provide equipment and training for access users without charge; and franchisee must provide a return feed for PEG use to its headend without charge if requested in writing by the municipality.
  - System-wide franchisees must provide without charge Internet service and service outlets activated for basic service “to any and all fire stations, public schools, police stations, public libraries, and other such buildings used for municipal purposes.”
  - Experience under the system-wide franchise provisions reveals the need for amendments: better language for line extensions; a requirement for delivery of PEG programming on the date video programming service begins; a requirement for direct connection of PEG channels; a requirement that PEG channels be delivered in a way that subscribers do not need equipment in addition to that required to receive basic programming; requirement for closed circuit network; requirements for PEG channels to have equivalent quality and functionality of commercial channels on basic tier, be carried on the basic tier with the same channel designations as on municipal franchise systems, and be listed on channels cards and menus; requirements for equipment, facilities and start-up fees; a requirement for return fees; and a requirement for 24/7 support for PEG channels.

**D. *Franchising Where There Is No State Legislation***

1. Verizon has obtained a number of franchises in municipalities where there is no statewide franchising, such as New York City – PEG provisions are normally the same as in the incumbent operator’s franchise.
2. AT&T is only willing to provide video service where there is statewide franchising.
3. Other ILECs (incumbent local exchange carriers) have by and large not yet offered video service.

**II. PEG CHANNELS ARE INCREASINGLY THREATENED BY CHANNEL SLAMMING – BEING BANISHED FROM THE BASIC ANALOG TIER, OFTEN TIMES TO THE 900 DIGITAL SIBERIA; AND BY AT&T’S U-VERSE INFERIOR PEG PRODUCT DELIVERY**

**A. *Channels Slamming Challenged In City Of Dearborn Et Al. v. Comcast Of Michigan***

1. On January 14, 2008, the U.S. District Court for the Eastern District of Michigan issued a temporary restraining order preventing Comcast from dropping analog PEG channels and providing them only as a digital service.
2. On October 3, 2008, the federal court ruled that the Michigan cities could bring the channel slamming lawsuit; held that federal law preempts state laws that invalidate PEG obligations in existing franchises; and stated it intended to refer various questions to the FCC including:
  - Can a locality act to prevent an “evasion” of the duty to provide service at reasonable rates when cable operators shift costs to consumers;
  - Does the requirement to provide PEG on basic service tier apply to communities where rates are subject to effective competition;
  - Should the court look from a consumer’s point of view to determine whether a programming service is part of the basic service tier; and whether digitalization of PEG is discriminatory;
  - Are cable operators precluded from charging for equipment needed to receive PEG channels on basic service tier; and
  - Can PEG channels be digitized requiring special equipment to be leased, and still be considered available on the basic tier.

***B. AT&T's U-verse PEG Product is Inferior to AT&T's Delivery of Other Programming –Deficiencies Which Include:***

- Channel placement (channel 99) and submenus;
- Channel latency;
- Reduced size, degraded resolution and degraded motion;
- No closed-captioning;
- No SAP (secondary audio programming) capability;
- No TIVO or DVR recording capability;
- No last channel/favorite channel capability; and
- No emergency override.

***C. Channel Slamming And AT&T's U-Verse Have Been The Subject Of Congressional Hearings And Oversight***

1. On January 29, 2008, the U.S. House Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce, Science and Transportation held a hearing on PEG Access Services in the Digital Age, with testimony on:
  - Comcast channel slamming plans in Michigan which, if put in place, might affect up to 40% of Comcast's 1.3 million customers and force customers to pay an additional charge for a digital set-top box to receive PEG channels; and
  - DVD recordings illustrating the striking differences between AT&T's PEG product and other programming.
2. On September 17, 2008, the U.S. House Subcommittee on Financial Services and General Government of the Appropriations Committee held a hearing on PEG Access for Cable Television.
  - Michael Max Knobbe, on behalf of Bronxnet, testified about channel slamming in New York, New Jersey, Michigan, Connecticut, and other states; and customers having to pay between \$4.50 and \$6.50 per month more to receive PEG;
  - Barbara Popovic, on behalf of the Alliance for Community Media and the Alliance for Communications Democracy, testified about continued problems with AT&T's U-Verse product and overall harms to PEG;
  - Monica Desai, FCC Media Bureau Chief, testified that placing PEG channels on any tier other than the basic service tier may be a violation of the statute;
  - Howard Symons testified on behalf of the cable industry; and

- AT&T declined an invitation to appear and instead submitted a letter.
3. Following the September 17th hearing, Subcommittee Chairman Jose Serrano, Ranking Member Ralph Regula, Appropriations Committee Chairman David Obey and five other members of Congress sent a letter to the FCC asking that it assess the various concerns related to PEG raised at the hearing. The members asked that the FCC determine whether “the situations described are contrary to federal laws and regulations and, if so, take expeditious enforcement action.”

**D. *Recent FCC Related Actions***

1. On October 30, 2008, in *TCR Sports Broadcasting Holdings, LLP d/b/a MidAtlantic Sports Network v. Time Warner Cable, Inc.*, involving a longtime carriage dispute, the FCC ruled that Time Warner discriminated unlawfully against Mid-Atlantic’s Sports Network by refusing carriage on an analog tier, while Time Warner was carrying sports programming by its affiliates on the analog tier.
2. Responding to consumer complaints and concerns raised by Consumers Union, the FCC’s Enforcement Bureau sent a letter of inquiry to several cable operators and Verizon regarding the companies possible violations of federal law – by changing channel line-ups without notice, migrating programming off of the basic tier without warning, and/or charging for additional tiers to get channels that previously had been on the basic tier.
3. NCTA, the cable trade association, responded by calling such letters of inquiry unlawful and asking the FCC to rescind its investigation.

**III. THE FCC AND THE CONGRESS IN TRANSITION**

**A. *The Composition Of The FCC Will Change With The New Administration:***

1. Short-term changes – first and second quarter 2009.
  - After January 20, 2009, the FCC will be likely down to three members;
  - President-Elect Obama will likely “designate” either Commissioner Michael Copps or Jonathan Adelstein as acting chair;
  - A three-member commission constitutes a quorum; Commissioners Copps and Adelstein may want to move a progressive public interest agenda forward; and
  - Possibilities for PEG issues.

2. Long-term changes – new permanent chair and/or new Commission members unlikely to be in place at FCC before 3rd or 4th quarter 2009.
  - Presidential appointment subject to Senate confirmation process is cumbersome - from FBI investigation to heightened scrutiny by the Obama administration transition process;
  - Many stakeholders will advocate for their particular candidate – the post of FCC Chair is receiving inordinate attention;
  - Senate leadership will play a part; and
  - Obama transition team and campaign has many top advisors on telecommunications policy, including former FCC Chairmen Reed Hundt and Bill Kennard.

***B. The Direction Of The FCC Will Likely Change With The New Administration***

1. Obama campaign platform strong on telecommunications and technology policy and stressed:
  - Ensuring the full and free exchange of information among Americans through an open Internet and diverse outlets;
  - Creating a transparent and connected democracy; and
  - Encouraging the deployment of a modern communications infrastructure.
2. The new FCC will likely support network neutrality; encourage diversity of media ownership and a diverse media environment; and deployment of next generation broadband.
3. The new FCC may be more proactive in its review of mergers; overseeing the public interest obligations of broadcasters and other industries; protecting consumers and Americans with disabilities.
4. The Obama campaign's promise to appoint the country's first Chief Technology Officer (CTO) may be a factor in shaping and influencing telecommunications policy.
  - CTO will oversee all communications used by the federal government;
  - CTO will focus on using new technologies to improve government functions; and
  - Unclear what the interaction will be between CTO and the FCC.

**C. *The New Congress (111th Congress)***

1. Changes in the Senate Commerce Committee.
  - Senate Committee on Commerce, Science and Transportation Leadership change – Senator Jay Rockefeller (D-WV) likely to replace outgoing chair Senator Daniel Inouye (D-HI);
  - Two Republican members of the Committee – Senator John Sununu (NH) and Senator Gordon Smith (OR) – were defeated;
  - Some of the incoming freshman Democratic senators may be appointed to the Committee (*e.g.*, Kay Hagen (NC), Jeff Merkley (OR), Mark Warner (VA) and others); and
  - Impact for PEG communities and local governments?
2. Changes in the House Energy and Commerce Committee.
  - Rep. Henry Waxman (D-CA) is challenging long-time Chair, Rep. John Dingell (D-MI) for Committee Chair; Rep. Dingell has been a supporter of PEG;
  - Uncertain whether Rep. Edward Markey (D-MA) will remain as chair of the Subcommittee on Telecommunications and the Internet; Rep. Markey is also a supporter of PEG; and
  - New incoming House members.

**IV. WITH 89 DAYS TO GO BEFORE THE COMPLETION OF THE DTV TRANSITION, THE ADMINISTRATION, CONGRESS, THE FCC AND THE NTIA WILL BE FOCUSED ON FEBRUARY 17, 2009 – THE DATE FULL POWER TV STATIONS TURN OFF THEIR ANALOG SIGNALS**

1. PEG communities are affected by the DTV transition to the extent cable companies may be using the confusion surrounding the transition to move PEG and other channels off of basic tiers and to require customers to pay more to receive PEG.
2. Many cable/PEG households possess additional over-the-air only TV analog sets that will need a converted box to receive the digital signals and down-convert them to analog.
3. Many of the 19-21 million U.S. over-the-air only TV households are elderly, minority, and low-income.

4. How is the DTV transition faring?
  - Most Americans are aware of the transition;
  - Fewer Americans are aware of what they have to do to transition or have taken action (*i.e.*, ordered converter box coupons and bought the converter boxes); and
  - Over-the-air only TV households are most at risk.
  
5. NTIA converter box coupon program.
  - Each household can ask for two coupons to purchase DTV converter boxes;
  - Coupons are valid for 90 days only – if not redeemed by then, household cannot order new coupons;
  - Estimates that as of 11-14-08 between three and four million over-the-air only households did not redeem coupons and cannot reorder;
  - Coupons are delivered by second class mail; if households do not order soon many may not receive coupons by transition date; and
  - Coupon funding is limited.
  
6. Technical Problems.
  - Many Americans challenged by the mechanics of how to hook up converted boxes;
  - May require new and/or different placement of antennas; and
  - Digital signals typically do not have the exact same coverage as analog signals.

## V. OTHER ISSUES

### A. *CTIA FCC Cell Tower Zoning Preemption Proceeding*

CTIA, the cellular industry's trade association, filed a Petition for Declaratory Ruling on July 11, asking the FCC to interpret 47 USC § 332(c)(7), the wireless siting/zoning provision of the Communications Act, added in 1996, to clarify, and make a uniform interpretation of, the supposedly "ambiguous" provisions of § 332(c)(7)(B). Specifically, CTIA asked the FCC to rule as follows:

1. To set a 45-day shot clock on local action on those wireless facility applications that involve collocation, and a 75-day shot clock on those applications that don't involve collocation. If the deadline isn't met, the local authority will have violated § 332(c)(7)'s requirement that a locality act on the application within a reasonable period of time.

2. If a locality fails to act within the shot-clock deadline, the wireless carrier's application will be deemed granted. Alternatively, failure to meet the shot-clock deadline would establish a presumption in any § 332(c)(7)(B) litigation that the wireless carrier is entitled to an injunction ordering the locality to grant the application unless the locality can justify the delay.
3. To clarify that § 332(c)(7)(B) bars any local zoning decision that prevents a wireless carrier from offering service in an area where another wireless carrier is already providing service. (The courts are currently split on the issue of whether a "prohibition" under § 332(c)(7)(B) occurs only where denial of a wireless siting application results in no wireless service from any provider in an area.)
4. To rule that 47 USC § 253, the general "barrier to entry" provision of the Communications Act (also added in 1996), preempts any local zoning or state laws that impose unique requirements on wireless applicants vis-à-vis other kinds of land use applicants, such as local or state laws that require all wireless siting applicants to seek a variance.

Local governments have opposed the petition, making (among others) the following arguments:

- Except for matters relating to RF emissions under § 332(c)(7)(B)(iv), the courts, not the FCC, have exclusive jurisdiction over § 332(c)(7)(B);
- What constitutes “a reasonable period of time” within the meaning of § 332(c)(7)(B)(ii) is to be measured by the amount of time each particular local zoning authority takes to act on similar non-wireless siting applications, *not* a uniform nationwide “shot clock” as CTIA proposes;
- Section 332(c)(7)(A) provides that other than § 332(c)(7)(B), “nothing in this Act” – *including* §§ 201(b) and 253 – “limit[s],” or even “affect[s],” local authority over the placement, construction and modification of wireless facilities;
- The Sixth Circuit’s reasoning in *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008) (“*ACM*”), has no application to § 332(c)(7) because § 332(c)(7) differs radically from §§ 621(a)(1) and 635(a), the statutes at issue in *ACM*;
- The scope of the “prohibition” language in § 332(c)(7)(B)(i)(II) differs from, and is narrower than, the scope of the “prohibition” language in § 253(a); and
- Even if § 253 applied (which it does not due to § 332(c)(7)(A)), the § 253 relief sought in the Petition is flatly inconsistent with court precedent construing § 253(a), *see Sprint Telephony PCS, L.P. v.*

*County of San Diego*, \_\_\_ F.3d \_\_\_, 2008 WL 4166657 (9th Cir. Sept. 11, 2008) (*en banc*) (“*San Diego II*”); *Level 3 Communications v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007).

The proceeding is pending at the FCC. When the FCC will act on it remains unknown, but it could occur as early as December.

**B. *Cell Tax Moratorium Legislation***

1. Last year, bills were introduced in both houses of Congress that would place a moratorium on all new state and local taxes on wireless service other than taxes that are generally applicable to all businesses. (Existing taxes would be grandfathered.)
2. On September 18, the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee held a hearing on the House version of the bill, H.R. 5793.
3. Tim Lay, of Spiegel & McDiarmid, testified against the bill on behalf of the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, the National Association of Telecommunications Officers and Advisors, and the Government Finance Officers Association. Among the points made were:
  - The bill would unlawfully intrude on the long-recognized authority of state and local governments to make tax classifications and would open the door to similar requests by other industries for federal protection from state and local taxes.
  - By preventing localities from extending their utility or telephone taxes to wireless services, the moratorium would put upward pressure on local utility and telephone taxes, or force cuts in local government services.
  - There is no evidence the state or local taxes have inhibited wireless service growth. To the contrary, wireless service has grown by leaps and bounds, even in jurisdictions with supposedly “high” wireless taxes.
  - By allowing Congress to take credit for freezing wireless taxes while leaving to local governments to deal with the resulting need to raise other taxes or cut services, the bill violates basic notions of political accountability.

For copies of the testimony, contact Tim Lay at [tim.lay@spiegelmc.com](mailto:tim.lay@spiegelmc.com) or (202) 879-4022.



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Jim Horwood is a partner at Spiegel & McDiarmid, a Washington, DC, law firm which represents local and state governments and consumers in infrastructure issues, in particular in energy, telecom, environmental, and transportation matters. Jim heads the firm's communications practice and is active in its energy practice as well.

With respect to communications issues, Jim advises local governments on all aspects of communications law. These include work for cities considering municipal ownership and operation of communications systems, construction and ownership of infrastructure, including fiber optic systems, and issues that arise under cable television franchises, including those in connection with renewal, transfer, and enforcement. This work often concerns questions involving interpretation and application of federal telecommunications law, the U.S. Constitution (particularly the First Amendment), and federal and state antitrust laws and utility regulatory laws.

In addition to representation of cities, Jim serves on the Board of Directors of the Alliance for Community Media as Special Appointee, Legal Affairs, and provides advice to organizations that manage public, educational and governmental ("PEG") access and to others interested in promoting the use of PEG access.

Jim has spoken at numerous conferences and symposia and has authored a number of articles on communications issues.



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Gloria Tristani is Of Counsel at the Washington, DC-based law firm of Spiegel & McDiarmid LLP. Ms. Tristani is a former FCC Commissioner and was most recently President of the Benton Foundation.

While an FCC Commissioner (1997-2001), Ms. Tristani worked to accelerate broadband deployment to rural and other underserved areas and advocated for the "E-Rate" program, which provides discounted Internet access to schools and libraries. She also advocated for minority ownership of broadcast properties and public interest obligations. In addition, Ms. Tristani served for several years on the New Mexico State Corporation Commission, the first woman elected to that commission and its Chair in 1996. In 2002, she was the Democratic candidate for the US Senate in New Mexico.

At Spiegel, Ms. Tristani represents and counsels clients regarding broadcasting, cable, wireless and other telecommunications-related issues. She currently serves on the FCC's Consumer Advisory Committee, which is focusing on the digital television transition and ensuring that all consumers, especially the elderly, low-income, non-English speaking consumers and people with disabilities, are aware of the transition.

Ms. Tristani was born and raised in San Juan, Puerto Rico, with Spanish as her first language. She holds a JD from the University of New Mexico School of Law, and she received her BA from Barnard College of Columbia University. She is licensed to practice law in the District of Columbia, Colorado and New Mexico, as well as in the US Court of Appeals for the 10th Circuit.

Ms. Tristani's honors have included: twice being named among "100 Influential Hispanics" by *Hispanic Business* magazine; receiving the Edward R. Roybal Outstanding Public Service Award from the National Association of Latino Elected and Appointed Officials (NALEO); being named to the Minority Media and Television Council's Hall of Fame; and twice receiving the Presidential Award from the Association of Public Safety Communications Officials International (APCO).





BEFORE  
UNITED STATES HOUSE OF REPRESENTATIVES  
**APPROPRIATIONS COMMITTEE**  
SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT

**Hearing on Public, Educational, and Governmental (PEG)  
Access for Cable Television**

*Testimony of*

*MICHAEL MAX KNOBBE*

Executive Director

THE BRONX COMMUNITY CABLE PROGRAMMING CORPORATION

(BRONXNET),

BRONX, NEW YORK

***BRONXNET***

SEPTEMBER 17, 2008, 10:00 A.M.

ROOM 2220, RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, D.C.

Good Day. I'm Michael Max Knobbe, Executive Director of The Bronx Community Cable Corporation ("BronxNet"), and a member of the Alliance for Community Media ("ACM"). Thank you Chairman Serrano and distinguished members of the Subcommittee on Financial Services and General Government of the House Appropriations Committee for focusing on important issues that impact communities across this nation in terms of democracy, education, diversity, locally generated content, and access to technology. Chairman Serrano, you consistently and effectively demonstrate tremendous leadership and courage in representing the people of the Bronx and the nation. Your commitment through what will, in the coming year, be 40 years of public service, along with your diligence and keen insights benefit the people in every part of this great country and help connect the people of the United States with people from all over the world.

Public, Educational, and Governmental Access ("PEG") is an important commitment to the people of the United States. PEG channels support community development and provide an important means of civic participation. Cable providers have responsibility for providing this public benefit, in exchange for using the public rights of way. The cable and fiber running over and under land belonging to the people are integral to a cable provider's business. Congress adopted the Cable Acts of 1984 and 1992 and set forth principles and guidelines for communities to benefit from providers using the public rights of way.

At BronxNet, and in public access facilities across this great nation, a voice is given to those who have no access to traditional media. Through public access facilities we train the public in media production by providing television studio and field production workshops and enabling access to technology. At BronxNet and throughout New York City ("NYC"), people completing the training can utilize media production equipment at no cost to produce content to share with their neighbors through the communities' media channels. This is part of democracy in a digital age. Public access media production training and studio and field production usage by the public have

increased tremendously across NYC and in other parts of the nation. NYC PEG access centers have flourished to become an integral part and vital asset to the communities in which we operate.

Brooklyn Community Access Television (“BCAT”), BronxNet [in our Borough of Universities and Parks], Manhattan Neighborhood Network (“MNN”), Queens Public Television (“QPTV”), and Staten Island Community Television (“SICT”) provide public access and locally produced content on the public’s channels that reflect the diversity of NYC. Together NYC’s public access centers have provided media production training to more than 20,000 people. The public access channels of NYC cablecast programs 24 hours a day, 7 days a week, airing over 80,000 hours of non-repeat local programming a year. There are four distinct public access channels for each borough, with new channels coming online next year including one with content developed by and for youth. Additionally CUNY TV, the educational channel, provides valuable and important programming through the City University of New York, and NYC TV, the governmental channel, provides government programs and shows about the whole city. The robust PEG environment in NYC and other parts of New York State is fostered by state regulations on franchising which encourage and allow for local authority and in fact require PEG programming.

New York City’s vibrant diversity is reflected on BronxNet and all of the city’s public access channels. Public access producers on BronxNet produce programs featuring news and information about Bronx residents who come from Puerto Rico, Mexico, Honduras, Jamaica, the Dominican Republic, Guyana, Ghana, Albania, Italy, Ireland, Thailand and many more countries. In addition to Spanish and English, BronxNet producers share programs in many languages, including Garifuna, a Central American language rooted in African culture, Thai, Albanian, Hindi, and more. On QPTV you will find programming in Russian, Greek, Romanian, French, and Urdu. Many languages including Arabic, Hebrew, Turkish, Portuguese, Japanese, and Korean can be heard and American Sign Language can be seen on MNN. Italian, Armenian, German, and several Chinese dialects are spoken on BCAT, which has a broad spectrum

of cultures featured, and a strong amount of West Indian Patois and Creole programs. In a city where 170 languages are spoken, residents can find important information in their native languages, and on their community channels.

BronxNet produces award-winning programming by, for, and about the Bronx. Locally produced programs concerning health, education, public affairs, arts, and culture inform the public and help connect the Bronx to the world. We bring great people and organizations into our studios and send our cameras out into the neighborhoods for BronxNet's regularly produced magazine programs and interactive call-in shows. Local elected leaders often appear on a broad array of programs to discuss topics important to the community, and many officials update viewers with programs they host.

BronxNet has worked with hundreds of non-profit organizations to produce videos and programs that help the organizations build support and audiences, while contributing to community development. Examples of the projects produced and facilitated by BronxNet include: Bronx Chamber of Commerce forums that contribute to the economic vitality of the Bronx; multi-cultural artistic presentations at Hostos Center for Arts & Culture and Pregones Theater that provide a way for local artists to showcase their work and build audiences; NY Blood Center blood drive announcements that help save lives; health questions that are answered on "HealthBeat" produced with Bronx-Lebanon Hospital; programming that informs on and is by and about the differently-abled special needs communities, along with internships through partnerships with the JFK Institute for Worker Education & the CUNY Youth Transition Project; a documentary on the Hunts Point Economic Development Corporation that showcases the world's largest food distribution center while dispelling myths about Hunts Point and the South Bronx; programs that showcase the borough's cultural institutions – both small and large – from the intimate En Foco Gallery to the world renowned New York Botanical Garden. In sharing the stories of the people of the Bronx, BronxNet teamed up with Centro de Estudios Puertorriqueños of Hunter College, and the Bronx Historical Society to produce "Migration: The Puerto Rican Experience" the first in a series of documentaries about the history, culture, and spirit of the Puerto Rican people in NYC.

Since its inception, BronxNet has collaborated closely with high schools and colleges – most notably – Lehman College where BronxNet is based. Students from the High School for Community Research & Learning produced a program about a scientific study of the Bronx River. John F. Kennedy High School students produce the program the Knight Network on BronxNet. The BronxNet Training Program for Future Media Professionals has provided hands-on training, through internships, to over a thousand high school and college students in shooting, postproduction, writing, and producing. Approximately five-hundred Lehman College students have completed BronxNet internships. And, over five-hundred more from other colleges and high schools have also received hands-on experience through the unique program, which has helped many students build valuable skills and fast-track their careers, including those pursuing opportunities in media. BronxNet interns have acquired key positions behind and in front of the camera at major media outlets including CBS-TV, ESPN, ABC-TV, Univision, and CNN as a result of the training and experience they received. Anchors and reporters including Darlene Rodriguez at NBC-TV, Dean Memminger at NY1, and Nicole Johnson at FOX 5, started their careers in television at BronxNet.

Lehman College, Hostos Community College and their Center for Arts and Culture – along with several other colleges and educational facilities – are among the institutions that have embarked on jointly-produced projects with BronxNet. Lehman College students and faculty, in partnership with and/or under the guidance of BronxNet professionals, have produced dozens of regularly featured public affairs programs. One such program is “The Bronx Journal on BronxNet”, a model program based on the school’s multilingual newspaper and produced by students under the guidance of Lehman College distinguished professor Miguel Perez and BronxNet professional staff. BronxNet’s relationship with Hostos Community College’s Center for Arts and Culture and Lehman College’s arts programs have generated award-winning, wide-ranging arts programming as well as documentaries on the history of the people of the Bronx.

The very tangible benefits derived from the public access envisioned by Congress are ironically being eroded by recent FCC orders on video franchising and legislation in at least nineteen states aimed at preempting local government control over the rights of way. It is local government, not the FCC in Washington, D.C. that has the best sense of a local community's needs and interests. The training, services, local content, and media access that PEG provides are needed now, more than ever, as communities across the nation are being left behind in a rapidly changing media environment. Media consolidation diminishes the local voice and leads to homogenous, centralized programming. A 2008 Kaiser Family Foundation report entitled "Shouting to be Heard" found that cable television donated, on average, only 15 seconds per hour for public service announcements ("PSAs"). This represents half of one percent of all airtime on cable systems. Furthermore, only 6% of cable donated PSAs addressed a local issue, cause or event. PEG content and services emphasize and promote everything local from public safety to local culture and arts and college and high school sports. You won't see City University of New York basketball and other local athletics events on ESPN. You will see them on PEG channels. So now, more than ever, we have to strengthen the commitment to our communities.

It is extremely disconcerting then to see how many PEG centers in smaller communities have been shut down while others are about to be lost because of flawed state legislation and the FCC's action in preempting local franchising decisions. PEG Access is in jeopardy in many parts of the country because of efforts to undo the progress that Congress achieved through the Cable Acts of 1984 and 1992. Telecommunications giants entering the market lobbied heavily for the FCC's orders on video franchising and for state laws that have in many cases undermined the public good that comes from PEG access. This crisis is amplified by some cable and telecommunications providers not living up to their commitments in different areas of the country while taking actions that undermine public access' ability to serve its constituencies.

In too many places across the country, telecommunications and cable providers deprive citizen's access to the PEG capabilities possible with digital upgrades to the

providers' video delivery systems. Cable franchisees are required by federal law, in New York State by state regulations, and in New York City by the franchise agreement, to carry PEG programming on the basic tier of services. Often times, as in parts of Connecticut, Florida, Michigan, Nevada, and Wisconsin, a provider will banish PEG channels to a digital Siberia not anywhere near the basic cable tier. This practice is known as channel slamming.

Cable operator Charter Communications announced it will move PEG channels into the 900-channel block in Wisconsin. Charter is also seeking to move the PEG channels in Reno, Nevada from channels 13, 15, 16, and 17 to the 200's.

At the same time, some telecommunications providers, such as AT&T, degrade the signal quality with substandard resolution, not on par with commercial stations, and create a wait time for PEG channels to be accessed by a customer

Comcast is also moving PEG channels from their traditional channel locations on the basic service tier to channel assignments in the 900's. The fact that in many places where this is occurring there is no non-premium video programming from the upper 300's to the 900's will further isolate the public's channels. When Comcast notified the City of Dearborn, Michigan that the government channel would be moved from Channel 12 to 915, and analog customers would have to pay an extra fee for equipment to receive PEG, Meridian Township filed a lawsuit. Comcast argued that Michigan's new state video franchising law negated the requirements of the federal Cable Act. The courts found the Comcast argument flawed and issued a temporary restraining order while the matter is further litigated.

Communities where channel slamming is occurring are left vulnerable and defenseless without opportunities to contest these unilateral actions. In many cases this is because it can be expensive and problematic to obtain injunctive relief. There needs to be a federal ban on channel slamming. Cable and telecommunications entities are committing acts of channel slamming across the country and it must stop!

Also, digital functionality, interactivity, video on demand, and high definition are ideally suited for 21<sup>st</sup> century PEG access services, while fulfilling the needs of communities in a digital age. It is ironic that while cable and telecommunications companies advertise the availability of hundreds of video on demand (“VOD”) channels for pay they cannot provide a single VOD channel for PEG access to serve the public good. As enhanced technologies become available, it is natural and vital that PEG programs, services and media production training be part of any system upgrade. The public and PEG channels must not be left behind!

In addition to channel slamming, signal degradation and inferior deployment for PEG channels, some cable providers are pricing PEG out of reach for many viewers by requiring the purchase or rental of additional equipment to view PEG channels. In New York, New Jersey, Michigan, Connecticut and other states, cable providers have indicated to municipalities that analog cable customers will have to pay an extra monthly fee ranging from \$4.50 - \$ 6.50 per month to receive PEG channels in addition to the regular cable bill. This discriminatory practice pushes what is intended to be open, accessible and inexpensive programming outside the reach of many consumers. The PEG channels are required to be on the basic cable tier of service available to the subscriber. PEG is meant to be a resource for all regardless of economic status and that is why PEG services are free to the public.

PEG plays a vital role in public safety, providing emergency management information and alerts on a highly local level. Weather emergencies, amber alerts, road closings, and information about school closings are communicated through PEG channels across America. The Jersey Access Group member stations are particularly adept at communicating important local and relevant information through bulletin boards, programs, text crawls, and PSA’s. PEG centers in New Jersey and elsewhere provide access to the local municipalities, police departments, and the Office of Emergency Management to post crisis management and other information on the channels. What happens to access to this vital local information when the cable providers in New Jersey banish the PEG channels to a digital Siberia and start to charge analog basic cable

customers a rental fee for an extra box to experience PEG? Channel slamming in New Jersey, New York and elsewhere is occurring now and must be corrected. We need to work together to protect this valuable resource -- the people's channels.

PEG access television provides a vital forum for local independent media, media literacy and education. PEG serves as a bridge between constituents and our leaders, contributes to community development, and is a manifestation of our democracy in a digital age. There are vast numbers of passionate people committed to enhancing the way PEG serves our communities across the nation. But we cannot provide service if our hands are tied by state legislatures, the FCC and service providers. We need the help of this committee to protect the future of PEG access and to ensure that PEG access continues to be a place for local community based media.

Before issuing its video franchising orders, the FCC did not study the possible impact on PEG. The FCC also relied on a flimsy record. As my colleague Barbara Popovic of CAN TV, testifying on behalf of the ACM and the Alliance for Communications Democracy, requests, this Subcommittee and Committee should have the Government Accountability Office conduct a study of the impact of the FCC's video franchising orders and the new state video franchising laws on PEG access centers across the country. We fully support this recommendation. We also fully support her recommendations that the Subcommittee and Committee (1) prohibit funds from being used by the FCC to implement or enforce its video franchising orders, and (2) compel the FCC to reconsider those orders in light of their adverse impact on PEG access.

We also urge Congress to take concrete actions to ensure the vitality and viability of PEG.

- The FCC's video franchising orders incorrectly limit the definition of capital costs that franchising authorities can request that do not count against the 5% franchise fee cap. We ask that you correct this misreading.

- The Cable Act requires that PEG be on the basic service tier and be treated like broadcast channels. We ask you to provide protections for PEG against ‘channel slamming’ and ensure that the quality and functionality of PEG channels is no less than any other channel on a cable system.
- Digital functionality, interactivity, video on demand, high definition, and other upcoming technological advances are ideally suited and integral for 21<sup>st</sup> century PEG access services for our nation. We ask that you direct the FCC to conduct a study on technological needs for 21<sup>st</sup> Century PEG services.

We thank you for your commitment and important work on behalf of the people of the United States.





BEFORE  
UNITED STATES HOUSE OF REPRESENTATIVES  
**APPROPRIATIONS COMMITTEE**  
SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT

**Hearing on Public, Educational, and Governmental (PEG) Access  
for Cable Television**

*Testimony of*

*BARBARA POPOVIC*

Executive Director

CHICAGO ACCESS NETWORK TELEVISION (CAN TV),

CHICAGO, ILLINOIS

*on behalf of*

*The Alliance for Community Media &  
Alliance for Communications Democracy*

SEPTEMBER 17, 2008, 10:00 A.M.

ROOM 2220, RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, D.C.

## INTRODUCTION

Good morning, Chairman Serrano and Members of the Committee. I am Barbara Popovic, Executive Director of Chicago Access Network Television (“CAN TV”) in Chicago, Illinois. Through CAN TV, government officials, educators, and thousands of local nonprofit groups and residents connect with residents in need of jobs and educational opportunities, legal advice, immigration information, health assistance, and housing through five local, noncommercial cable channels.

Thank you for the opportunity to testify on behalf of two national organizations, Alliance for Community Media (“ACM”) and Alliance for Communications Democracy (“ACD”). These organizations are devoted to promoting, advancing and protecting the interests of public, educational and government (“PEG”) access centers across the nation. ACM is a national membership organization representing 3,000 PEG centers that carry 20,000 hours each week of new programs from local governments, schools, health and jobs organizations, social service agencies, and local residents. ACD preserves and strengthens community access to media through participation in FCC and court proceedings affecting PEG access. Colleagues from Michigan, Ohio, Florida, New York, Maryland, Virginia and Washington State, are joining me at the hearing today. DCTV, Washington DC’s local PEG center, is taping today’s proceedings for distribution around the country.

I’ve been privileged to work through the years with public officials with the vision to recognize the importance of giving voice to the local community. I’m particularly honored to accept this invitation from Chairman Serrano, who upheld that vision in the Bronx through the creation of BronxNet. Representative Serrano, people throughout the country appreciate your support for PEG access, and your vigilance on this issue.

The right to free speech and free expression, the inclusion of a diversity of viewpoints and ideas, and the focus on the local community have been the hallmark of PEG access for over 30 years. But government and industry actions over the past three years are rapidly eroding protections for PEG, putting community stations at risk and threatening the public’s participation in and use of PEG training, facilities and channels. I am here today to brief you on the threats that PEG access currently faces and to urge you to take a stand on behalf of the public to use any

means available to you to stop this harm and to protect the future health and viability of PEG access now and in the future.

### **PEG Access Advances Congressional Goals to Foster Localism and Diversity**

PEG access, as defined in the 1984 Cable Act (“the Cable Act”), advances Congress’ goal of providing a wide diversity of information and services by responding to the needs and interests of the local community. The Cable Act places PEG Access under the stewardship of local franchising authorities, with mechanisms for financial support and channel capacity for the public. Most successful PEG operations have resulted from local ordinances and agreements, forging partnerships among local government, local cable companies, and the local community.

The role of PEG access in developing technological and media literacy has never been more important than today. PEG centers provide constructive outlets for community youth to learn media skills. Seniors actively create programming on a range of issues. Nonprofits are given an outlet to reach clients in need of assistance. PEG channels provide a platform for civic debate to resolve local conflicts. And during local elections, PEG channels provide opportunities for candidates to address the public directly and fully, without being limited to a 30-second sound bite.

Thousands of hours of new, original content flow through PEG channels every day throughout the country, bringing local information into the home that would not otherwise be seen. PEG channels welcome community members, politicians, preachers, experts, educators, and artists. Participants aren’t screened and selected by management or advertising interests; they participate because it’s their community and their channels.

The role of PEG channels is particularly important at a time when research shows that less than ½ of 1% of programming on commercial media is devoted to local public affairs. The commitment of PEG programmers to promoting social services, arts and civic events, public safety, and other issues close to home, demonstrates what is possible when the community is given the opportunity to participate in television media. The democratic values that form the foundation of the PEG access mission merit preservation by government, industry, and individuals alike.

## Legislative Changes Harming PEG Access

Since 2005, state video franchise laws advanced by telecommunications companies entering the video business have passed in 19 states. After federal video franchise legislation stalled in the Senate in 2006, telecommunications giant AT&T combined its lobbying forces and a major advertising blitz to roll out a strategy in the states designed to cut local governments out of cable franchising, erode consumer protections, limit build-out requirements and undermine PEG access. Already entrenched in many state legislatures, AT&T dangled the “carrot” of increased competition and lower rates while wielding the “stick” of legislation that gutted local public interest obligations and cleared the way for AT&T to gain a fast track into the market.

While AT&T and Verizon were pushing for a new regulatory scheme based on one-stop-shopping at the federal or state level, Verizon nonetheless continued negotiating local franchises. Over a year ago, Verizon already had more than 800 local franchises and growing, and it got them the same way that incumbent cable operators did -- by sitting down with the local community. Verizon’s agreements with the City of New York and the access centers in its boroughs show how a company can partner with the city and community to serve the public interest, while, at the same time, providing the benefits of increased competition with incumbent cable operators.

That represents a stark contrast to the outcome in the majority of states served by AT&T. In Illinois, AT&T put an army of lobbyists on the ground, saturated television with anti-cable ads, and funded astro turf groups to push for state legislation. The pattern was similar in many other states. The resulting legislation in most of those states were state video franchise laws that strip away local authority, weaken consumer protections and enforcement, and harm PEG access in a variety of ways. While determined to avoid local franchising by seeking legislation at the state level, AT&T, with 549,000 subscribers, lags far behind Verizon’s 1.4 million subscribers, obtained largely through the local franchising process.

Having seen the problems with legislation in other states, the Illinois Attorney General and public interest advocates got involved early in Illinois, and the General Assembly ultimately passed a bill that prevents AT&T from usurping consumer rights and includes protections for

PEG access. But AT&T is defying Illinois law by segregating PEG access into a video application with inferior signal quality and functionality compared to other channels.<sup>1</sup>

New state laws in Florida, Wisconsin, Ohio, Missouri, Tennessee and other states cause damage to PEG through funding reductions, substandard channel quality and functionality, channel capacity cut backs, channel slamming to a less accessible location, new costs for carriage of PEG channels, and PEG studio closures that deprive the local community of its only production resource. In many states, incumbent cable operators have quickly taken advantage of these new state laws, opting out of their local franchises and reducing their pre-existing PEG obligations.

### **Assessing the Damage**

In May 2008, the Alliance for Community Media (ACM) initiated an online survey regarding the impact of new state video franchise laws on PEG operations.<sup>2</sup> Members of ACM and the National Association of Telecommunications Officers and Advisors (NATOA) from around the country participated in this survey.

The survey reveals that within a year or less of passage of state video franchise laws, many PEG centers have seen a negative impact on funding and operations, and a decrease in related services and benefits. In a number of those states, PEG funding completely sunsets after 3-5 years.

California has one of the more PEG “friendly” state laws. The language in that law was intended to “do no harm” to PEG access, including language that makes it clear that pre-existing PEG funding is to be continued. That didn’t prevent Comcast from recently sending the City of Monterey a notification that will result in drastic funding reductions. For 10 years residents of the Monterey Peninsula have had the opportunity to learn about what is happening with local government agencies ranging from the Monterey City Council to the local water district. Local opinion leaders and nonprofits like Seaside Boys and Girls Club serving latchkey kids have been

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<sup>1</sup> ILCS 21-601(c), Illinois Cable and Video Competition Act of 2007: The holder shall provide to subscribers public, education and government access channel capacity at equivalent visual and audio quality and equivalent functionality, from the viewing perspective of the subscriber, to that of commercial channels carried on the holder's basic cable or video service offerings or tiers without the need for any equipment other than the equipment necessary to receive the holder's basic cable or video service offerings or tiers.

<sup>2</sup> See Appendix A: *Assessing the Damage: Survey shows that state video franchise laws bring no rate relief while harming public benefits.*

able to reach viewers with local information. And the local “Your Town” program features hundreds of local nonprofit organizations. But this local community programming may be gone by the end of 2008.

According to the ACM survey results, there was a reduction in benefits to more than a quarter of respondents that had public cable drops in locations like libraries, schools and other public centers, and close to half of respondents in communities that had an Institutional Network connecting government facilities, educational institutions, and PEG facilities. Jan Berger of Miami Valley Communications Council in Centerville, Ohio, says, “We went from 62 cable drops in our cities’ government and community center, schools, and fire and police stations to 9 cable drops. We are told that even these 9 cable drops will be taken from us soon.”

Since the passage of state video franchise laws, PEG centers report reductions and threats to existing channels. Operating under recently enacted state laws, many new entrants and incumbents quickly took steps to limit PEG channel capacity and placement. Cable operators in a number of states are moving PEG channels to “digital only” tiers, decreasing accessibility and visibility and increasing costs for subscribers. And, in AT&T states, many laws not only reduce PEG funding support; they also impose new financial obligations on PEG centers and local governments by requiring that local governments and PEG centers purchase special hardware and pay significant monthly fees to deliver PEG channels to new state franchise service providers.

In a number of states, rigid nonrepeat programming requirements are applied to PEG channels. If a community cannot meet the imposed standard, the channels are taken back by the franchise holder. Notably, commercial channels are not held to this standard. Under Georgia state law, a PEG channel can be taken back if it doesn’t have 9 hours each calendar day of nonrepeat programs. Commercial channels can regularly repeat old movies, commercials, sitcoms and reality shows but PEG programs on HIV/AIDS prevention, housing assistance, or job opportunities can only play once or put a PEG channel at risk. The nonrepeat programming requirement has shown up in states where AT&T has backed the introduction of state laws, and can also be found in cable refranchising negotiations.

For 21 years, Tampa Educational Cable Consortium (TECC) has offered programs on The Education Channel and The Explorer Channel. Original programming such as *Mathematics Homework Hotline* reached 2,000 students each year with 25,000 annually downloading the web tutorials. *The Mini-Med School* program provides accurate and timely information to adults

about pressing medical concerns including the 12-part series, *Taking Control of Cancer*, which was seen by 28% of the audience, or 31,000 households. After passage of Florida state law in 2007, TECC lost \$500,000 in funding, or 60% of its annual budget, and both educational channels were moved from Channels 18 and 21 to Channels 614 and 620, which required a digital box at an additional cost to the subscriber. While previous surveys had shown that 41% of the 285,000 subscribers in Hillsborough County watched the Education Channel, many people are now unable to access or find the channel. The public access channel, Tampa Bay Community Network, lost a third of its funding. The significant loss of PEG funding in Hillsborough County, Florida, will result in a significant loss of local programming.

The adverse impacts on PEG have been amplified where incumbent cable operators have interpreted the passage of state franchise law as ending their existing franchise PEG obligations. Comcast closed all of its PEG studios in southwestern Michigan after state video franchise law passed in 2006. In Indiana, within six months after state franchise law advanced by AT&T had been enacted, Comcast notified residents that all of its northern Indiana PEG studios were closing. Sheriff David Lain, of the Porter County Indiana Sheriff's Department in Rep. Visclosky's home district, was one of the residents whose use of a PEG channel ended unceremoniously after producing his show every week for eight years. Sheriff Lain's program highlighted officers and programs of the Sheriff's Department, such as ice rescue, crime stoppers, preventing child abuse, and animal control. The program reached beyond law enforcement to partner with the local community. Rep. Visclosky was a past guest on Sheriff Lain's PEG show, as were the Red Cross, Salvation Army, Valpo YMCA, United Way, and Boys and Girls Club.

Eight years of community programming about Valparaiso, Chesterton, Portage, LaPorte and Lake Counties ended. And nothing will replace it. Says Sheriff Lain; "We provided access to so many terrific organizations that didn't have the wherewithal to do a program like this ... Our program helped with the public's buy-in regarding public safety issues. I've always thought that the organizations with whom we partnered – the nonprofits that are out there every day trying to improve the quality of life in Northern Indiana - lost the most when we lost our program. We were the only game in town and the only opportunity for them to promote their good works through our network."

Even in the early stages of adoption and implementation, the negative fallout from the new state video franchise laws has been substantial and will continue to mount. As incumbents and new entrants apply to operate under these new state franchises, more communities will experience the cutbacks and degradation of PEG services reported in this survey, leaving many communities in the nation without the diverse, local programming provided through PEG channels. This outcome directly contradicts one of the stated goals of the 1984 Cable Act: that franchises be responsive to the needs and interests of the local community.

### **FCC Actions**

In December of 2006, the FCC's Report and Order in the *Video Franchising* proceeding (the "Order") replaced local franchising with FCC authority to determine what is best for the local community. A Second Report and Order followed on October 31, 2007, extending many of the provisions of the first ruling to incumbent cable operators.

PEG is harmed in multiple ways by the FCC's actions. The erosion of local franchising authority undermines the provision of PEG. The establishment of an unreasonably short shot clock with a deemed granted provision negates Congress' intention that community needs and interests are fully considered as part of the video franchising process. Relaxing build-out requirements will deprive customers from seeing PEG channels. The Order poses new risks to future growth in PEG capacity, and ambiguous language in the Order raises unanswered questions about the future of PEG funding.

Commissioners Copps and Adelstein strongly objected to both the First and Second *Video Franchising* Orders. Following the 3-2 votes on the Second Report and Order on *Video Franchising*, Commissioner Copps commented:

My concern about today's decision is not just philosophical. As the record indicates, one possible consequence of this new set of regulations may be to deprive American consumers of access to PEG channels that serve important community needs. Another effect may be to deprive local governments of access to I-Net facilities that support public safety and other important government operations ... Why incur such results when Congress provided a workable process for incumbent video providers and LFAs to negotiate with each other for franchises, with recourse to federal district courts if disagreements arose?

Commissioner Adelstein pointed out that the Second Order will further exacerbate the negative fallout from the First Report and Order on *Video Franchising*:

As I predicted, the First Report and Order, which purported to provide clarification with respect to which franchise fees are permissible under the Communications Act, has in fact muddled the regime and left communities, incumbent cable operators and new entrants with conflicting views about funding and support for public, education and government (PEG) facilities, including local institutional networks (I-Nets).

The FCC justified its intervention as being needed to remove barriers to entry and to open the door to more competition. The Order relied heavily on telephone industry comments that asserted that local franchise negotiations for public benefits such as PEG access obligations acted as a barrier to entry. But the record in front of the FCC did not support that contention.

The spring issue of *NATOA Journal* includes a report by Sefanie Meyers & Connie Ledoux Book, Ph.D., that examines the FCC's use of anecdotal evidence in the Order.<sup>3</sup> This article notes that of the 4424 comments filed, 3771 were from individuals. Many of those comments focused on the importance of protecting PEG funding and carriage. Meyers and Book report that, "None of the filed individuals' comments about public access are cited in the Report and Order." *Not one*. The article notes, "Of the remaining 653 comments filed, the majority were from local franchising authorities (430). Telephone companies filed 23 comments and cable companies filed 26 comments." But the FCC primarily relied on industry comments - 77% of the comments cited in the Report and Order were filed by telephone companies, and 23% of the comments the FCC cited were by cities.

Meyers and Book then drilled down deeper and found that despite the fact that telephone company comments were heavily relied on by the FCC in reaching its decision, the examples provided by industry of supposedly "unreasonable" local franchising demands causing a barrier to telco entry boiled down to 15 examples. Eight of those were broad generalizations with no specific facts; municipal commenters refuted the majority of the remaining seven. The FCC's *Video Franchising* Order thus relied on largely unsubstantiated claims by the industry to conclude that FCC intervention in the cable franchise process is needed. But the record doesn't

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<sup>3</sup> NATOA Journal, Spring 2008 *An Examination of the Use of Anecdotal Evidence in the FCC's Report and Order on Video Franchising* by Stefanie Meyers & Connie Ledoux Book, Ph.D.

support that contention. The FCC's precipitous action represents a "solution" in search of a problem.

Whether intended or not, the FCC in the *Video Franchising Order* sent a signal to telephone companies that reducing public benefits like PEG access is an acceptable price to be paid for speeding telephone company entry into the cable market. The FCC ignored the fact that the incumbent cable industry, which has historically supported PEG access, has thrived under local franchising, with annual cable gross revenues (excluding Internet and telephony) growing at a healthy average rate of 5% per subscriber during the past 10 years, expanding into a robust 75.2 billion dollar industry today.<sup>4</sup> As Meyers and Book note, "not only does virtually every household have at least one cable provider option, but communities have also now gained a broadband provider, landline telephone competition, PEG programming, enhanced democratic process with live broadcasts of city council meetings, and all through a local [franchise] negotiation to meet community needs and interests."

### **Accessibility of PEG**

Congressional intent is clear that PEG channels are to "...be available to all cable subscribers on the basic service tier and at the lowest reasonable rate."<sup>5</sup> As noted by Mayor John B. O'Reilly, Jr., of Dearborn, Michigan, in his testimony this past January before the US House Energy and Commerce Subcommittee on Telecommunications and the Internet, "Today, Comcast and AT&T, and other video service providers, cloaked in the guise of digital advancement, seek to rid themselves of these congressionally-mandated public interest obligations."

A recent disturbing trend has been seen with Comcast in Michigan, Brighthouse in Florida, Charter in Wisconsin and Nevada, and Cablevision in Connecticut, New York and New Jersey. Each of those companies has sought to remove PEG channels from accessible basic analog tier channel locations available to all customers, and to relocate them to high digital

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<sup>4</sup> [www.ncta.com](http://www.ncta.com), 8-29-08

<sup>5</sup> "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....PEG channels serve a substantial and compelling government interest in diversity, a free market of ideas, and an informed and well-educated citizenry....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. No. 102-628 at 85 (1992).

channel number locations accessible only to customers that pay for a digital box. My colleague from BronxNet will detail issues that have resulted from these actions, many taken far in advance of cable digital transition requirements. Those companies are attempting to free up analog capacity for other uses while depriving viewers of convenient access to local information that is only available on PEG channels.

AT&T has gone even further in making PEG more inaccessible to viewers. It has made the business decision to remove PEG channels from the traditional television channel “line-up” entirely, burying all local PEG channels behind a “Channel 99” designation that is an internet-like “application” with substandard functionality and inferior quality compared to commercial channels. This is a direct affront to the PEG accessibility goals of Congress and to state laws that clearly require that PEG channels be treated in a manner “similar” or “equivalent to” commercial channels.

The deficiencies of AT&T’s “PEG product” are obvious when attempting to find and watch a PEG channel. Residents are forced to search through a series of menus for the PEG program of their choice while waiting for each page to “load,” a process that is not required to retrieve commercial channels. PEG channels cannot be saved as a “favorite and viewers can’t channel surf between PEG and other channels. All PEG channel identity is stripped away, so that an individual community’s PEG channel will be invisible to anyone looking at the channel guide or programming listings. PEG signal quality and functionality are also inferior to broadcast channels.

To summarize, AT&T’s “U-verse” PEG product:

- Is cumbersome to find and slower to load than commercial channels;
- Has inferior picture and audio quality compared to commercial channels;
- Cannot support closed captioning;
- Cannot support second audio programming;
- Prevents channel surfing between broadcast and PEG channels;
- Is incompatible with programmed recording devices like DVRs and TiVo; and
- Excludes individual PEG channel and program listings.

AT&T imposed its Channel 99 PEG product without consideration for community needs and interests, and without consultation with PEG centers, instead making the business decision that it was no longer necessary to present PEG channels in a manner equivalent to other channels. AT&T insists it has introduced an innovation by presenting all PEG channels in a region to all viewers in its region. PEG centers already can, and do use the Internet in the same way broadcasters do, to stream content or selectively place programs that require a broader reach. Not only does Channel 99 *not* replace having PEG treated equally to commercial channels, in many instances, it is not even a desirable outcome when information on those channels is directly targeted to the local community, not an entire region.

AT&T's PEG system represents a step backward for community television stations, including the fact that its PEG product does not support basic functions like closed captioning. In a recent demonstration of its PEG product in Illinois, an AT&T representative asked whether any PEG centers use closed captioning, and a number of hands went up. In a demonstration in a neighboring suburb later that week, the same representative stated that PEG centers do not use closed captioning. Presumably, the AT&T representative determined that it was better to mislead than to respond to the expressed need for closed captioning.

AT&T claims its lack of support for closed captioning is satisfied by its offer of open captioning. Disability rights activist Gloria Nichols of American Disabled for Attendant Programs Today (ADAPT), disagrees: "Open captioning is not a solution. AT&T is taking the choice out of viewer's hands and imposing its choice. Whether people want the captioning open or not, the viewer isn't given a choice." Another service available to commercial channels, but denied to PEG by AT&T, is second audio programming (SAP audio), used by PEG centers to convey programming in both English and Spanish.

In addition to the multiple deficits in AT&T's PEG product, local governments are grappling with AT&T's cumbersome and inefficient emergency alert system procedures. 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 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.

When challenged about the deficiencies of its PEG product, AT&T employs a number of different tactics. One is to deny the facts and state that there is no problem and the company is in compliance with relevant laws. AT&T Illinois President Paul La Schiazza recently claimed in a letter to *The Chicago Tribune*, "All PEG content is easily found on U-verse's Channel 99, which is absolutely acceptable under state law...." This ignores the requirement in Illinois law that PEG channels must be provided at equivalent quality and functionality as commercial channels.

While AT&T Illinois President La Schiazza publicly dismisses criticisms of its PEG product, other AT&T representatives have repeatedly acknowledged deficiencies in that product, both in local and national demonstrations of AT&T's PEG product, referring to its treatment of PEG as "a work in progress," one representative even adding, "you can either fight it or embrace it."

The foundation of AT&T's defense of its PEG product is to claim that it is not technically feasible with its IPTV architecture to carry PEG channels in a manner equivalent to broadcast channels. A recent study prepared by Maryland-based, independent engineering firm, Columbia Telecommunications Corporation, for Illinois NATOA,<sup>6</sup> directly addresses whether, in fact, there are technical obstacles to AT&T treating PEG channels at equivalent signal quality and functionality with other video channels. The conclusion is not only that AT&T can treat PEG channels equally, but also that AT&T's IPTV system has even more flexibility to localize channel line-ups than traditional cable systems.

The report reached that conclusion based on the following:

- PEG channels can be encoded at the same quality as commercial channels;

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<sup>6</sup> See Appendix B, *Delivery of PEG Programming at Commercial Quality*. This study was prepared by CTC, an independent engineering firm with 25 years experience working with existing and emerging technologies to provide services in technology planning, communications network assessment and implementation, and project management. Illinois National Association of Telecommunications Officers and Advisors is a regional association of government telecommunications officers and experts who work in communications.

- Technology to preserve the quality of PEG audio and video signals while in transit to the AT&T network is readily available;
- PEG channels need not be inserted into the program lineup in a manner different from commercial channels; and
- IP-based video technologies offer greater, not less, flexibility to localize channel line-ups.

Clearly, the technology exists *now* for AT&T to treat PEG in an equivalent manner. This is not a technical issue; it is a business decision.

### **What Needs to be Done?**

I speak to this Subcommittee as appropriators. You fuel the engine that keeps our government running. And when it comes to PEG access, we are headed in the wrong direction.

In the Subcommittee markup of the 2009 Financial Services and General Government Appropriations Bill, this Subcommittee prohibited funds from being used to implement or enforce the FCC's changes to the newspaper-broadcast cross-ownership rules. Chairman Serrano noted his belief that the "loosening of media consolidation rules is detrimental to the goals of diversity in ownership and viewpoints, as well as to localism and independence in the news media."

The dismantling of protections for PEG access is a similarly direct affront to localism and diversity goals. We need leaders in Congress ready and willing to step back in front and steer this process back to a meaningful realization of those Congressional goals. PEG access will not survive absent fundamental and irrevocable requirements regarding PEG funding and channel carriage.

### **We urge the Appropriations Committee and this Subcommittee to:**

- (1) Prohibit funds from being used to implement or enforce the FCC's *Video Franchising Orders*.
- (2) Compel the FCC to reconsider its *Video Franchising Orders* in light of its adverse impact on PEG; and

- (3) Have the Government Accountability Office conduct a study about the impact of the FCC's *Video Franchising* Orders and new state video franchising laws on PEG centers across the nation.

**We urge Congress to assure the future economic viability and accessibility of PEG channels with:**

- A federal requirement that funding for PEG required from video service providers, over and above the 5% cable franchise fee, may be used for any PEG-related purpose, without the outdated and unnecessary restriction of PEG funding to only capital costs.
- A federally mandated requirement that video franchise holders provide PEG channels at equivalent signal quality and functionality to that provided to local broadcast channels, with the capability of supporting closed captioning, SAP audio, channel surfing, DVR recording and other functions available to broadcast channels.
- A federally mandated requirement that PEG channels be located on the lowest cost, most accessible tier of service adjacent to broadcast channels, without the need of additional equipment to view all programming on that tier.
- A definition of the basic service tier that is not limited to rate regulated communities, but is an obligation of every video provider utilizing public property for the delivery of its services.
- A federal requirement that any violations of these PEG requirements be subject to substantial monetary penalties under the Communications Act.
- A federal requirement that PEG capacity and funding be determined at the local, not the federal or state, level based on local community needs and interests.

Thank you for the opportunity to testify. I look forward to your questions.

# APPENDIX A



## Assessing the Damage:

### Survey shows that state video franchise laws bring no rate relief while harming public benefits

#### About the Survey

In May 2008, the Alliance for Community Media (ACM) initiated an online survey regarding the impact of state video franchise laws. Members of ACM and the National Association of Telecommunications Officers and Advisors (NATOA) from around the country participated in this survey.

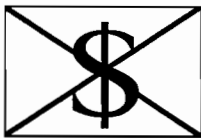
There were 204 respondents from 33 states, representing public, educational and governmental (PEG) access television centers. Of those respondents, 140 (from 18 states) now have a state video franchise law in effect. *This summary focuses on the responses from those with state video franchise laws.*

#### Companies applying to operate under new state laws

- 68% of survey respondents report that new entrants (AT&T and Verizon) have applied for state franchises.
- 52% report that their incumbent cable providers have applied for state franchises.

#### Impact on PEG Facilities and Services

Since the recent passage of state video franchise laws, many PEG centers already see a negative impact on their funding and operations, and a decrease in related services or benefits.



- *About 20% of respondents report PEG funding decreases since the advent of statewide franchising (including communities in CA, FL, IA, IN, KS, MI, MO, NC, OH, TX and WI), while cable operators report record earnings. In many communities, PEG funding that had been available for all PEG-related costs is now restricted to capital purchases.*

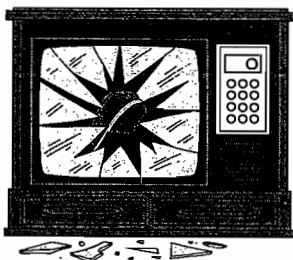


- *Respondents from 17 communities in 8 different states report loss of access to PEG facilities managed by cable operators soon after state video franchise laws removed local obligations from those companies. In addition, Comcast used state franchise law as the excuse to close all of its PEG facilities in northern Indiana and southwestern Michigan in September of 2007, prior to distribution of this survey.*



- *26% of respondents that had public cable drops in locations like libraries, schools and other public centers, and 41% of respondents in communities that had an Institutional Network connecting government facilities, educational institutions, and PEG facilities report the loss or reduction of those benefits (including communities in CA, CT, FL, GA, IN, MI, MO, NC, OH, TX and WI).*

#### Impact on Quality and Functionality of PEG Channels



About two-thirds of affected survey respondents from 13 states report that new state franchise service providers deliver PEG channels with impaired signal quality and functionality. For example, AT&T's "U-verse" system:

- *takes up to a minute or more to tune in a PEG channel*
- *presents PEG at inferior quality compared to commercial channels*
- *cannot support closed captioning or second audio programming*
- *does not support DVR recording (like "TiVo") of PEG channels*
- *strips away PEG channel number identity*
- *prevents viewers from channel surfing to and from PEG channels*

## Impact on PEG Channels Carriage

Since the passage of state video franchise laws, PEG centers report reductions and threats to their existing channels. Operating under recently-adopted state rules, many new entrants and incumbents quickly took steps to limit PEG channel capacity and placement.



- Nearly 25% of respondents said they lost or expect to lose channels since the advent of statewide franchising (including communities in CA, FL, GA, IN, KS, MI, MO, NC, OH, TX and WI).



- Respondents from 29 communities in 12 states report PEG channels being moved by incumbent cable operators to "digital only" channels, decreasing accessibility & visibility and increasing costs for subscribers
- Respondents from 8 states report that they must purchase special hardware and pay significant monthly fees to deliver PEG channels to new state franchise service providers. Such carriage fees were never required previously under local franchises, and are not paid by local commercial and public broadcast stations.

## Impact on Cable Rates

Survey respondents confirm what has been widely reported elsewhere: relief to the consumer from skyrocketing cable rates -- the major reason for adopting state video franchise laws -- has not occurred.



- Two-thirds of respondents said basic cable rates have increased in their communities after a state video franchise law was adopted and a new competitor arrived.
- Only 1% said that rates have gone down.

## Preliminary Conclusions

Even in the early stages of adoption and implementation, the negative fallout from the state video franchise laws has been substantial and will continue to mount. As incumbents and new entrants apply to operate under these new franchises, more communities will experience the cutbacks and degradation of PEG services reported in this survey, leaving many communities in the nation without the diverse, local programming provided through PEG channels. This outcome directly contradicts the purpose stated in the Cable Act of 1984, that franchises be responsive to the needs and interests of the local community.

It's important to note that where PEG Access has greater protection in the state video franchise laws, AT&T is ignoring requirements to provide PEG at "similar" (CA law) or "equivalent" (IL law) signal quality and functionality as commercial channels. This disadvantages, rather than serves local communities.

It is our hope that the information drawn from this initial survey of communities affected by state video franchise laws will inform proactive legislative and regulatory action to preserve the localism and diversity of programming that emerges from PEG channels nationwide.

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*The Alliance for Community Media is a national membership organization representing more than 3,000 PEG access centers across the nation. Local PEG programmers produce 20,000 hours of new programs per week, and serve more than 250,000 organizations annually through the efforts of an estimated 1.2 million volunteers.*

For survey information, contact ACM Public Policy Committee member, Barbara Popovic  
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