

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

In the Matter of)	
)	
Petition for Declaratory Ruling Regarding Primary)	MB Docket No. 09-13
Jurisdiction Referral in <i>City of Dearborn et al. v.</i>)	
<i>Comcast of Michigan III, Inc. et al.</i>)	CSR-8128
)	
Petition for Declaratory Ruling of the City of)	CSR-8127
Lansing Michigan)	
)	
Petition for Declaratory Ruling of The Alliance)	CSR-8126
For Community Media, <i>et al.</i>)	

**COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”) hereby submits its comments on the three above-captioned petitions for declaratory ruling. NCTA is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90% of the nation’s cable television subscribers, as well as more than 200 cable programming networks and services. NCTA’s members also include suppliers of equipment and services to the cable industry. The cable industry is also the nation’s largest broadband provider of high-speed Internet access after investing \$100 billion over ten years to build out a two-way interactive network with fiber optic technology.

INTRODUCTION AND SUMMARY

At issue in each of the three petitions for declaratory ruling is the scope and meaning of Section 623(b)(7) of the Communications Act of 1934, as amended, which specifies the “Components of [the] Basic Tier Subject to Rate Regulation.” Section 623(b)(7) (A) sets forth the “minimum contents” of this basic tier, specifically providing that a cable operator “provide its subscribers a separately available basic service tier to which subscription is required for

access to any other tier of service,” and that such basic tier shall, at a minimum, consist of the following:

- (i) All signals carried in fulfillment of the requirements of sections 614 and 615.
- (ii) Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers.
- (iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such a station.

Nobody disputes that where a cable operator is subject to this provision, it must require all its customers to purchase an entry-level package of services that includes all the specified broadcast and public, educational and governmental (“PEG”) access channels. But petitioners seek rulings from the Commission that exceed what the statute authorizes. They argue, first, that the provisions of Section 623(b)(7) apply even to systems that, because they face “effective competition,” are *not* subject to rate regulation. Second, they maintain that where the system’s mandatory entry-level tier of service includes some programming in analog format and other programming in digital format, which requires some viewers to obtain additional equipment to view it, it must transmit *all* the required PEG channels in analog format.

This is not what the law requires. It’s not what Congress intended. And it is completely at odds with the interests of consumers.

Congress understood, in enacting and amending Title VI, that the technology used to deliver cable programming was constantly evolving, and it specifically sought to ensure that its regulatory provisions would not suppress or interfere with that technological evolution. In its earliest days, cable television provided only 12 channels of programming, using the 12 VHF channel frequencies that could be tuned by the generally available over-the-air television receivers. To offer more channels, cable systems upgraded the capacity of their systems and

began delivering channels over additional frequencies that could not be received by the typical over-the-air television set. To receive them, cable subscribers could acquire a set-top converter box, which enabled them to watch any available cable channel on their existing sets over channel 3 or channel 4. Or they could replace their set with a “cable ready” television set that was capable of tuning the additional cable channels. Most new sets on the market soon incorporated such capability.

Eventually, almost all households acquired cable ready sets and were able to watch the greatly expanded number of channels available in their basic and expanded basic tiers without the need for a converter box. In some cases, where a system used physical “traps” outside the home to control access to additional premium movie channels, they could even watch such channels without a converter box. But as premium channels proliferated, systems increasingly controlled access by “scrambling” such channels and requiring subscribers to acquire a set-top box to descramble them.

Today, the cable industry is in the midst of another technological transition – from analog to digital – that is, again, greatly expanding the quantity, quality and diversity of services available on cable systems. One of the most compelling new capabilities afforded by digital transmission is high definition television, and the number of cable households acquiring HDTV sets is steadily and rapidly increasing. Moreover, even most new television sets being manufactured today without HD capability are equipped to receive and display digital cable signals.

Nevertheless, as was the case with the previous technological transition, many of the television sets in place in cable customers’ homes are not capable of receiving digital cable channels without a set-top digital-to-analog converter box. While some cable systems have

chosen to convert all their signals to digital so that all those households would need to replace their sets or obtain digital converter boxes in order to receive *any* programming, most systems are implementing a more gradual transition. Those systems are generally continuing to provide *some* channels of analog programming, which subscribers can continue to view without a converter box on their analog sets, while providing more and more programming digitally.

Some of the programming being provided digitally is available on separately priced “digital tiers,” or as premium services. But other digital channels are available along with analog channels on the entry-level basic tier that is provided to all customers at a single package price. For example, some systems carry broadcasters’ digital multicast signals solely in digital format (as they are permitted by law to do). Some systems also include digitally transmitted non-broadcast cable program networks in their basic offering. And some may, in addition, provide the PEG channels required by their franchises in digital format and include such channels in the price of basic service, pursuant to agreements with their franchising authority, or as specifically permitted by applicable state laws.¹

These agreements often result in the provision of *more* PEG channels in than were previously in analog format. Also, provision of PEG channels in digital format is responsive to the desire of some franchising authorities to use such channels for “closed circuit” transmissions to provide, for example, training or other information to city employees, particularly public safety and first responders. Unlike analog channels, digital channels can be completely scrambled so that potentially confidential security and other information is not disseminated to the general public.

¹ See, e.g., *City of St. Petersburg v. Bright House Networks, LLC*, 2008 U.S. Dist. LEXIS 100576 (Dec. 12, 2008).

As more and more quality services are offered digitally – including cable programming networks offered on the basic tier or on optional digital tiers, premium movie channels offered in standard and/or high definition, video-on-demand programming, digital video recording, digital music services, and electronic program guides – more and more cable customers are opting to obtain the television sets or the digital set-top boxes to watch and purchase such services. In this manner, cable’s digital transition is occurring steadily, seamlessly and effectively, allowing operators to gradually recapture and make more efficient use of system bandwidth with minimal disruption to customers.

The ruling that the petitioners in this proceeding seek would impede and frustrate this orderly transition. In their view, Section 623(b)(7) not only mandates that PEG access channels be included in the basic tier provided to all customers but also requires that such channels continue to be provided *in analog format* until every other service on the basic tier has been migrated to digital. Nothing in the Act was meant to interfere in this manner with the cable operator’s ability to manage the transition to digital – and with its First Amendment right to determine the format of, and the manner in which it packages, the programming on its system.

The Act requires that systems not subject to effective competition (and only those systems)² continue to provide PEG and broadcast channels to all customers in the entry-level basic package at the regulated rates (including equipment rates) mandated by the Act and the Commission’s rules. But the Act does not require that those channels be frozen in place on analog channels while cable operators gradually migrate their channels and their customers to digital.

² *See id.*

I. SECTION 623(b)(7) APPLIES ONLY TO SYSTEMS THAT ARE SUBJECT TO BASIC RATE REGULATION.

As a threshold matter, Section 623(b)(7) applies only to cable systems that have not yet been found by the Commission to be subject to “effective competition.” Section 623(a)(2) provides that “[i]f the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section.”³ Section 623 is captioned “Regulation of rates,” and subsection 623(b) is captioned “Establishment of basic service tier rate regulations.” It follows and is self-evident that Section 623(b)(7), which establishes the “components of [the] basic tier *subject to rate regulation*,”⁴ is itself a rate regulation provision, which does not apply to cable systems and basic tiers that are *not* subject to rate regulation.

This is exactly what the United States Court of Appeals for the District of Columbia Circuit recognized in *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995). In that case, the Court held that the provisions of Section 623(b)(8) – which prohibit systems from requiring customers to “buy through” an intermediate tier of programming in order to purchase standalone premium movie channels – applied only to systems not subject to effective competition. The Court pointed, first, to the general caption of Section 623, which suggested that *all* the provisions of that section involved the regulation of rates and were therefore applicable only in the absence of effective competition. But more specifically, the Court found that the buy-through provisions of Section 623(b)(8) were “inextricably intertwined with [Section 623(b)(7)], entitled ‘Components of the basic tier subject to rate regulation,’ which

³ 47 U.S.C. § 543(a)(2).

⁴ 47 U.S.C. § 543(b)(7) (emphasis added).

clearly applies only to systems not subject to effective competition.” *Id.* at 192 (emphasis added).

The Commission, too, has already determined that Section 623(b)(7) – which requires the inclusion of broadcast signals as well as PEG channels in the rate-regulated basic tier – does not apply to systems that are subject to effective competition. In 2001, in its First Report and Order on the carriage of digital television broadcast signals, the Commission specifically noted that

if a cable system faces effective competition under one of the four statutory tests, and is deregulated pursuant to a Commission order, the cable operator is free to place a broadcaster's digital signal on upper tiers of service or on a separate digital service tier. *This finding is based upon the belief that Section 623(b)(7) is one of those rate regulation requirements that sunsets once competition is present in a given franchise area.* We believe that the decision in *Time Warner v. FCC* supports this interpretation.⁵

Petitioner City of Lansing portrays these Commission statements as “*dicta* rather than a *finding* that might be binding on further Commissions.”⁶ To the contrary, the Commission specifically made clear that its conclusion was a “finding,” directly related to the subject of the proceeding – *i.e.*, the manner of carriage of digital signals. The finding was set forth conclusively in the Report and Order – not as a tentative conclusion in the Further Notice of Proposed Rulemaking.

The City of Lansing, whose petition is generally directed at AT&T’s provision of PEG channels via web portals, also contends that “independently of whether or not AT&T’s U-verse system is subject to Title VI regulation or to effective competition, the Commission has the authority and the responsibility to implement Congressional intent” by regulating the manner in

⁵ *Carriage of Digital Television Broadcast Signals*, First Report and Order and Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2643 (2001) (emphasis added). Most recently, the United States District Court for the Middle District of Florida relied on and agreed with this finding in specifically holding that the PEG basic tier requirements of Section 623(b)(7) do not apply to systems that have been found subject to effective competition. *City of St. Petersburg v. Bright House Networks, LLC*, 2008 U.S. Dist. LEXIS 100576 (Dec. 12, 2008).

⁶ Petition of City of Lansing at 9 n.5 (emphasis added).

which that system carries PEG channels.⁷ We agree with the City that if AT&T were not a cable operator subject to Title VI, it should, according to the sound principles of regulatory parity, “be held to the same standards regarding PEG channels as other cable providers.”⁸ This is, however, a moot point, since, as we have previously demonstrated to the Commission (in filings that we incorporate here by reference), AT&T, when it provides its U-verse multichannel video service, *is* a cable operator subject to Title VI.⁹

But the City’s assertion that the Commission has “ancillary” jurisdiction to regulate PEG placement whether or not a cable operator is subject to effective competition is *not* a moot point – and it is wrong. Section 624(f) of the Communications Act specifically provides that “[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the

⁷ *Id.* at 23.

⁸ *Id.*

⁹ *See, e.g.*, Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, WC Docket No. 04-36 (filed July 27, 2007); Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, WC Docket No. 04-36 (filed Sept. 1, 2005) (attaching Legal Memorandum on the “Applicability of Title VI to Telco Provision of Video over IP); Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, FCC, WC Docket No. 04-36 (filed Nov. 1, 2005) (transmitting “Response of the National Cable & Telecommunications Association” to SBC September 14, 2005 *ex parte* filing).

Moreover, the only federal court that has addressed the issue has three times rejected AT&T’s assertion that its video service is not a “cable service.” *See Office of Consumer Counsel and New England Cable and Telecommunications Association v. Southern New England Telephone Company d/b/a AT&T Connecticut, Inc., and Department of Public Utility Control of the State of Connecticut*, 515 F. Supp. 2d 269, 282 (D. Conn. 2007), *recon. denied* 514 F. Supp. 2d 345 (D. Conn. 2007). Just recently, the same District Court rejected AT&T’s assertion that Connecticut video franchising legislation had made its earlier rulings moot. *See Office of Consumer Counsel and New England Cable and Telecommunications Association v. Southern New England Telephone Company d/b/a AT&T Connecticut, Inc., and Department of Public Utility Control of the State of Connecticut*, 565 F. Supp. 2d 384 (2008).

Congress has demonstrated that it concurs in this assessment. For example, in connection with legislation to amend Title VI, both the House of Representatives and the Senate Commerce Committee rejected the suggestion that use of IP technology is relevant to the definition of “cable service” under the Act. *See* H. Rep. 109-740, 109th Cong., 2d Sess. (2006) at 25; S. Rep. 109-354, 109th Cong., 2d Sess. (2006) at 23-24; *see also* House Telecom Bill Passes 27-4, Following Lively Debate, *Comm. Daily*, Apr. 6, 2006 at 4 (quoting then Committee Chairman Barton as saying, “our friends at AT&T have sent this silly letter [to Congressman Dingell] saying they’re not a cable service, which they shouldn’t have done.... We explicitly say they’re a cable service.” (emphasis added); *id.* (quoting then Chairman Barton as saying with respect to AT&T argument: “This is stupid.”).

provision or content of cable services, *except as expressly provided in this subchapter.*”¹⁰ In other words, with respect to such regulation, there is no ancillary jurisdiction. The Commission, as well as state and local regulators, are limited to the authority specifically set forth within the four corners of Title VI.¹¹

II. SECTION 623(b)(7) REQUIRES ONLY THAT PEG CHANNELS – WHETHER ANALOG OR DIGITAL – BE CARRIED IN THE SINGLE PACKAGE OF SERVICES THAT IS PROVIDED TO ALL CUSTOMERS SUBJECT TO BASIC RATE REGULATION

The petitioners in this case seek to read into Section 623(b)(7) a requirement that is not there – specifically, a requirement that the mandatory components of the rate-regulated basic tier must be delivered in analog format so that they may be viewed by customers who have not acquired a television set or a set-top box capable of receiving digital signals. There no such mandate anywhere in the language of Section 623(b)(7). Moreover, although the Commission has not previously addressed whether Section 623(b)(7) permits digital carriage of PEG channels, it has recognized that nothing in that section precludes operators from carrying some *broadcast* stations in digital format, even while continuing to carry other basic tier programming in analog. The only requirement is that all the mandatory components of the regulated basic tier – analog and digital – be offered in a *single* basic tier.

For example, during the transition, the Commission provided that new digital-only must-carry broadcast stations may choose whether they wish to have their signals retransmitted in analog or digital by local cable operators.¹² Moreover, the Commission, while refusing to

¹⁰ 47 U.S.C. § 544(f) (emphasis added).

¹¹ If the Commission correctly confirms that the provisions of Section 623(b)(7) are inapplicable to systems that face effective competition, it need not address whether the particular manner in which AT&T’s cable systems carry PEG channels is consistent with those provisions – since virtually all those systems compete in areas served by incumbent cable operators.

¹² See, e.g., *In the Matter of: WHDT-DT, Channel 59, Stuart, Florida*, 16 FCC Rcd 2692, 2699 (2001).

mandate carriage of broadcasters' digital multicast streams, noted approvingly that operators were voluntarily choosing to provide broadcasters' multicast digital signals in digital format on their systems.¹³

The Commission's determination that cable systems (other than "all-digital systems) must carry the primary digital signal of must-carry broadcast stations in analog format for a three-year period after the transition was based solely on the must-carry provisions of Section 614 and had nothing to do with the basic tier requirements of Section 623(b)(7).¹⁴ Section 614(b)(7) requires not only that must-carry broadcast signals "shall be provided to every subscriber of a cable system" (whether or not the system is subject to effective competition), but also that "[s]uch signals shall be *viewable* via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection."¹⁵ That viewability requirement was the basis of the Commission's requirement that digital must-carry signals be carried in analog. Section 623(b)(7) contains no such requirement.¹⁶

Nor do the PEG access provisions of Section 611 contain a viewability requirement. Section 611 permits franchising authorities to require that "channel capacity be designated for public, educational, or governmental use" and to require "rules and procedures for the *use* of the channel capacity designated pursuant to this section."¹⁷ But far from requiring – or authorizing

¹³ See *Carriage of Digital Television Broadcast Signals*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516, 4534-35 (2005).

¹⁴ See *Carriage of Digital Television Broadcast Signals*, Third Report and Order and Third Further Notice of Proposed Rule Making, 22 FCC Rcd 21064, 21069-82 (2007) ("Third Report and Order").

¹⁵ 47 U.S.C. § 534(b)(7) (emphasis added).

¹⁶ Indeed, if Section 623(b)(7) prohibited cable operators from carrying any digital broadcast signals solely in digital format while carrying other basic-tier programming in analog format, the three-year sunset provision would have made no sense.

¹⁷ 47 U.S.C. § 531.

franchising authorities to require – that access channels be provided in analog format, Congress, in Section 624, specifically forbade states and franchising authorities from “prohibit[ing], condition[ing], or restrict[ing] a cable system’s use of any type of subscriber equipment or *any transmission technology*.”¹⁸

In addition to attempting to import into Section 623(b)(7) a non-existent “viewability” requirement, the petitioners also rely on a “nondiscrimination” requirement that is nowhere to be found in the Act. They cite language in the House Report accompanying the 1992 Cable Act, which states that “PEG programming is delivered on channels set aside for community use in many cable systems, and these channels are available to all community members on a nondiscriminatory basis, usually without charge.”¹⁹ And they claim that this language shows that “Congress specifically intended to *prevent* operators from discriminating against PEG channels” by, for example, carrying them in digital format while other programming is available in analog.²⁰

That House Report language, however, means no such thing. Notably, the language states that PEG channels are available “to all community members” on a nondiscriminatory basis – not that they are available to all *cable subscribers* on such a basis. What the legislative history was describing was the requirement, once embodied in the Commission’s rules and often imposed by local ordinances and franchises, that community members seeking to present programming on PEG channels have access to those channels on a nondiscriminatory basis.²¹ It

¹⁸ 47 U.S.C. § 544(e) (emphasis added).

¹⁹ Report of Committee on Energy and Commerce, H.R. Rep. 102-628, 102d Cong., 2d Sess. 85 (1992) (“House Report”).

²⁰ Petition of City of Dearborn *et al.* at 10. *See also* Petition of City of Lansing at 12; Petition of Alliance for Community Media *et al.* at 25.

²¹ *See, e.g., Cable Television Report and Order*, 36 F.C.C. 2d 143, 240-41 (1972).

was because of this requirement – which, according to the next sentence in the House Report, “provides ordinary citizens, non-profit organizations, and traditionally underserved minority communities an opportunity to provide programming” – that Congress decided that PEG channels should be provided, along with broadcast channels, in the entry-level rate-regulated basic tier.

In sum, Section 623(b)(7) requires only that the rate regulated basic tier available to all customers in systems not subject to effective competition must include all the broadcast and PEG channels carried by the system. This requirement did not prevent systems from carrying some basic services on channels 2-13, which could be viewed on all television sets, and others on mid-band and super-band channels that could only be viewed with a “cable ready” set or a set-top converter box. And it similarly does not prevent systems from carrying some basic services in analog and others in digital – even if viewers with analog sets may need to acquire a digital set-top box (at a regulated rate) to view the digital signals.

III. CARRYING PEG CHANNELS IN DIGITAL FORMAT IS NOT AN “EVASION” OF THE RATE REGULATION RULES

Section 623(h) directs the Commission to promulgate regulations establishing “standards, guidelines and procedures to prevent evasions” of the requirements of Section 623. While nothing in Section 623(b)(7) prohibits the carriage of some or all PEG channels in digital format, the City of Dearborn et al. contend that it should be deemed an unlawful “evasion” of the requirements of that section to do so. There is no basis for such a determination.

The Cities argue, first, that switching some basic tier channels from analog to digital is an evasion because it forces subscribers who do not already have a digital set or a digital set-top box to incur additional charges in order to receive those channels.²²

This argument proves too much. It would not only prohibit a cable operator from gradually transitioning a basic tier from analog to digital, but would also prohibit an operator from switching *all* its channels to digital. Going “all digital” would reduce to zero the number of channels actually viewable on an analog set without incurring the additional charges of a digital set-top box or a digital television set. Yet the Commission has nowhere suggested that converting all programming to digital should be deemed unlawful.

To the contrary, the Commission has, if anything, encouraged systems to become all digital. It has relieved such systems from the obligation to carry analog versions of digital must carry stations so that they can be received by subscribers without digital receiving equipment.²³ And it has waived, for such systems, the prohibition on the use of integrated set-top boxes in lieu of CableCARD-equipped boxes.²⁴ It would completely frustrate cable operators’ transition to digital technology to freeze in place analog services on the misguided basis that any migration of analog channels to digital effects an implicit and evasive rate increase.

The cities also argue that it is somehow an evasion to line itemize amounts provided to support PEG on customers’ bills as if “all subscribers received PEG channels as part of the basic tier”²⁵ when, in fact, some subscribers have to obtain additional equipment to receive the digital channels. This is a frivolous argument. In fact, all subscribers in rate regulated systems *do*

²² Petition of City of Dearborn *et al.* at 10-11.

²³ See Third Report and Order, *supra*. See also 47 C.F.R. § 76.56(d)(3)(ii).

²⁴ See, e.g., *Omnibus Waiver Order*, 22 FCC Rcd 11780 (2007); *Bend Broadband Waiver Order*, 22 FCC Rcd 209 (2007).

²⁵ Petition of City of Dearborn *et al.* at 11.

receive PEG channels as part of their rate regulated basic tier, whether or not they choose to acquire equipment – or already have digital televisions – to view it, or to view any other digital broadcast channels and other digital services that operators may choose to include in that tier.

In any event, neither operators nor regulators have any way of knowing how many of their subscribers have television sets capable of receiving PEG channels *without* the need for additional set-top equipment – although they know that the number is growing rapidly, since virtually all newly purchased sets will have QAM tuners. Itemization of the costs of PEG channels can only be based on the fact that PEG is included in the package of services delivered to all cable customers.

Finally, the cities maintain that providing PEG channels in digital format is somehow at odds with, and should be deemed an “evasion” of, Section 624A of the Act.²⁶ That provision directs the Commission to adopt rules that, among other things, “require cable operators offering channels whose reception requires a converter box . . . to the extent technically and economically feasible, to offer subscribers the option of having all other channels delivered directly to the subscribers’ television receivers or video cassette recorders without passing through the converter box.”²⁷ It was intended to *promote* advanced technologies and features – not to impede their use in the manner suggested by petitioners.

As the statute and legislative history make clear, the purpose of Section 624A was to “increase compatibility between television receivers equipped *with premium functions and features*, video cassette recorders, and cable systems.”²⁸ Specifically, Congress sought to ensure that consumers with “cable ready” television sets and video cassette recorders were not

²⁶ *Id.* at 12.

²⁷ 47 U.S.C. §544A(c)(2)(B)(ii).

²⁸ House Report, *supra*, at 107 (emphasis added).

precluded from using the cable ready features (such as watching a program on one channel while simultaneously recording another, or setting the VCR to tape two consecutive programs on two different channels) by the scrambling or encryption of channels by cable operators, except to the extent that such scrambling or encryption was necessary to control access to some tiers or channels and to prevent theft.²⁹

The transmission of PEG and other basic tier programming in digital format – unscrambled, unencrypted and in the clear – is fully compatible with a new generation of “cable ready” television receivers and recording devices that are fully capable of receiving digital signals transmitted by cable operators. Congress was concerned in 1996 that if scrambled cable signals interfered with the functions of “cable ready” equipment, “consumers [would] be less likely to purchase, and electronics equipment manufacturers [would] be less likely to develop, manufacture, or offer for sale, television receivers and video cassette recorders with new and innovative features and functions.”³⁰ Today, it is the offering of more and more services in digital format that is likely to promote the purchase and development of television receivers with new and innovative features. Forcing operators to continue to provide basic tier services in analog will, if anything, *deter* such developments. Section 624a in no way supports – and is directly at odds with – the petitioners’ attempt to freeze existing technology in place.

IV. THE COMMISSION SHOULD PRESERVE CABLE OPERATORS’ FLEXIBILITY TO TRANSMIT PEG PROGRAMMING IN A DIGITAL FORMAT TO AVOID A SERIOUS FIRST AMENDMENT QUESTION

In today’s media environment, where programmers have a multiplicity of outlets to distribute their content, there is a serious question whether the compulsory carriage of PEG programming on cable systems can withstand scrutiny under the First Amendment. At a bare

²⁹ *Id.* at 107-08. See 47 U.S.C. § 544a(c)(1)(B).

³⁰ 47 U.S.C. § 544a(a)(2).

minimum, to avoid an unconstitutional result, the Commission should preserve cable operators' flexibility to transmit PEG programming in whatever format they deem appropriate.

Shortly after the Supreme Court's divided must-carry decision in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), the D.C. Circuit denied a facial challenge to Section 611(b) of the Act, which permits (but does not require) local franchise authorities to mandate carriage of PEG programming.³¹ That decision rested heavily on the permissive nature of Section 611(b) and did not speak to the validity of the statutory provision at issue here, Section 623(b)(7)(A). And while the appellants were unable to "establish that no set of circumstances exists under which the Act would be valid," the court had no difficulty "imagin[ing] PEG franchise conditions that would raise serious constitutional issues."³²

In any event, the dramatic changes in the media industry in the ensuing decade-plus undermine the rationale for upholding any PEG mandates. Whereas just 13 years ago cable was essentially the only non-broadcast distribution option for PEG programming, there are now a multitude of video pathways to consumers³³ Indeed, PEG programmers now can bypass cable operators (and other MVPDs) altogether by streaming their content directly to consumers via the Internet.³⁴ Accordingly, whether Sections 611(b) and 623(b)(7)(A) could survive First

³¹ See *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 972-74 (D.C. Cir. 1996). The D.C. Circuit in *Time Warner* applied intermediate scrutiny, citing to *Turner I* without any additional analysis. See *Time Warner*, 93 F.3d at 972-73. Yet *Turner I* teaches that strict scrutiny would be the correct standard if the criteria for carriage were defined by content of the programming. Cf. *Turner I*, 512 U.S. at 644 ("must carry" provisions are content-neutral only because "the extent of the interference does not depend on the content of the cable operators' programming"); *id.* at 645 ("The rules benefit all full power broadcasters who request carriage—be they commercial or noncommercial, independent or network affiliated, English or Spanish language, religious or secular."). There can be little question that the Act's PEG provisions require carriage precisely because of the particular content of public, educational, and governmental programming. In any event, Petitioners' proposed analog-carriage mandate would plainly fail under intermediate scrutiny as well.

³² *Time Warner*, 93 F.3d at 972, 974 (internal quotation marks and citation omitted).

³³ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, at ¶ 3 (rel. Jan. 16 2009) ("*Thirteenth Annual Report*").

³⁴ See *id.* ¶ 273.

Amendment scrutiny today is at best an open question—and there is a substantial likelihood that they would not.

Even assuming intermediate scrutiny would apply, the Commission should interpret the PEG requirements at issue here in a manner that avoids raising a serious First Amendment question.³⁵ If the Commission construed Section 623(b)(7)(A) as requiring cable operators to transmit PEG programming in an analog format whenever they transmit broadcast programming in analog, such a requirement would impose significant burdens on cable operators’ speech. And such burdens could not be justified under intermediate scrutiny for two independent reasons. First, Petitioners have failed to demonstrate that transmitting PEG programming in an analog format would “in fact” promote localism, diversity, and education “in a direct and material way.”³⁶ Second, even assuming such a requirement would further the government’s interests, the requirement would “burden substantially more speech than is necessary.”³⁷ Indeed, compelling carriage of PEG programming in an analog format—the *most restrictive* manner available—would turn the First Amendment standard on its head.

A. Requiring Cable Operators to Transmit PEG Programming in an Analog Format Would Impose a Significant Burden on the Cable Operators’ Speech

Petitioners’ interpretation of Section 623(b)(7)(A) would impose a substantial burden on cable operators’ speech by requiring transmission of PEG programming in an analog format as long as broadcast programming is transmitted in analog. This analog transmission requirement would consume significant bandwidth, however. Using the same bandwidth required to transmit one analog channel, cable operators can transmit 12 standard-definition digital channels (or two

³⁵ See *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

³⁶ *Turner I*, 512 U.S. at 664-65 (Kennedy, J., plurality opinion); *accord id.* at 682-83 (O’Connor, J., concurring in part and dissenting in part).

³⁷ *Id.* at 662 (majority opinion) (internal quotation marks omitted).

to three HDTV channels). With consumers demanding ever-increasing quantities of HD content and other diverse programming options, bandwidth has become increasingly scarce and operators must choose selectively which programs to carry.³⁸ An analog transmission requirement for PEG programming thus would “interfere with cable operators’ editorial discretion” substantially more than a requirement permitting digital transmission.³⁹

An analog transmission requirement would not only impose a significant burden on speech, but would also exacerbate cable operators’ competitive disadvantage vis-à-vis DBS operators and other competitors that are not subject to the PEG carriage requirements.⁴⁰ Indeed, cable operators have already seen a marked decline in their market share in recent years.⁴¹ Petitioners’ preferred construction of the Act would maximize the amount of bandwidth set aside for PEG programming at a time when cable operators are “expanding their channel line-ups” to compete with DBS operators.⁴² Such a competitive disadvantage can hardly pass muster as an “incidental burden on speech.”⁴³

B. Petitioners Have Proffered No Evidence That Only Analog Transmission Would Promote the Government’s Interests in Localism, Diversity, and Education

The Commission should not adopt Petitioners’ construction because they have failed to proffer the substantial evidence required under intermediate scrutiny. Petitioners cannot show that a requirement to transmit PEG programming *in an analog format* would “directly and

³⁸ See *Thirteenth Annual Report* ¶ 59.

³⁹ See *Turner I*, 512 U.S. at 643-44.

⁴⁰ See 47 U.S.C. § 543(b)(7)(A) (requiring only cable operators, not DBS operators, to carry PEG programming).

⁴¹ See *Thirteenth Annual Report* ¶ 8.

⁴² *Id.* ¶ 6.

⁴³ *Turner I*, 512 U.S. at 662.

materially” advance the government’s interest in promoting localism, diversity, and education.⁴⁴ Petitioners wrongly assume that if Congress can require cable operators to carry PEG channels on the basic service tier, the Commission without any further evidence or analysis can compel cable operators to transmit PEG programs in an analog format. But to pass constitutional muster, even a content-neutral regulation must be supported by “either empirical support or at least sound reasoning on behalf of its measures,” not mere speculation or conjecture.⁴⁵

Petitioners have provided neither empirical support nor sound reasoning in support of an analog transmission requirement. They have not shown, for example, that the need for cable subscribers to have digital-compatible equipment would undermine the purposes of the PEG provisions. Even assuming that some analog cable subscribers are unwilling or unable to obtain such equipment, Petitioners make no effort to show that there would be a material impact on government’s goal of ensuring appropriate distribution channels for PEG programming. Nor is there anything in the congressional record that could support Petitioners’ preferred construction. The legislative history of Section 623(b)(7)(A) does not contain any basis to conclude that only analog transmission would further the government’s interest “in fostering diversity and localism, providing educational and informational programming, and promoting the . . . values of the First Amendment.”⁴⁶ And Petitioners provide nothing to supplement that record. To the contrary, Petitioners admit that if a cable operator transmitted PEG channels in a digital format along with all other programming, it would be fully compliant with Section

⁴⁴ *Id.* at 664-65 (Kennedy, J., plurality opinion).

⁴⁵ *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987).

⁴⁶ H.R. Rep. No. 102-628 at 85 (1992).

623(b)(7)(A) and the Commission's rules.⁴⁷ That concession alone undercuts the constitutional basis for an analog transmission requirement.

Rather than rely on empirical support, Petitioners simply assert that when Congress established the PEG carriage requirement, it never intended cable operators to transmit PEG programming in a digital format while still providing other programming in an analog format.⁴⁸ In fact, neither the statutory text nor the legislative history limits cable operators' discretion to comply with the PEG provisions in whatever manner they find most efficient. Congress has demonstrated that it is perfectly capable of determining when programming must be delivered in a particular format,⁴⁹ yet Congress has made no similar findings with respect to PEG programming. Moreover, while Congress required cable operators to ensure that subscribers can view local broadcast stations carried under the must-carry provisions,⁵⁰ it did not enact any comparable "viewability" mandate for PEG programming. In short, the utter lack of evidentiary support for Petitioners' arguments dooms their proposal.⁵¹

Far from contravening the Act, permitting digital transmissions of PEG programming would *better* advance the government's goals than requiring analog. Because standard-definition digital transmissions consume far less bandwidth than analog transmissions, while delivering superior picture quality, maintaining cable operators' flexibility to choose the appropriate delivery format will best enable them to compete with DBS operators and other providers that

⁴⁷ Petition for Declaratory Ruling at 21.

⁴⁸ *See id.* at 10.

⁴⁹ *See, e.g.,* Digital Television Transition and Public Safety Act of 2005 § 3002(b), 47 U.S.C. § 309(j)(14)(A) (Supp. 2005) (setting a nationwide deadline for the end of analog transmissions by full-power stations).

⁵⁰ *See* 47 U.S.C. § 535(h); *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules, CS Docket No. 98-120*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064, at ¶ 15 (2007).

⁵¹ *See, e.g., Turner I*, 512 U.S. at 640 (majority opinion) ("[T]he mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media.").

are not subject to the PEG provisions. By contrast, if the Commission required analog transmissions and thereby subjected cable operators to competitive disadvantages, any ensuing declines in cable operators' market share would result in the narrower distribution of PEG programming.

C. Even Assuming It Would Advance the Government's Interests, an Analog Transmission Requirement Burdens Far More Speech Than Necessary

Petitioners' proposed analog transmission requirement would fail intermediate scrutiny for the additional reason that it "burden[s] substantially more speech than is necessary to further the government's legitimate interests."⁵² Analog transmission is more burdensome to cable operators than is necessary because it consumes more bandwidth than an alternative (digital transmission) that advances the government's interests to an equal or greater extent.

Where an obvious alternative "could advance the Government's asserted interest in a manner less intrusive to . . . First Amendment rights," the construction is likely "more extensive than necessary."⁵³ Digital transmission is just such an alternative. Just as the lack of empirical (or even logical) support for an analog transmission requirement calls into question the "direct advancement" of the governmental interests at stake, it prevents such a requirement from being narrowly tailored. Petitioners have not shown, and there is no reason to believe, that the public benefits expected from PEG programming will be realized only if it is delivered in an analog format. To the contrary, there is no longer any basis to conclude that compulsory cable carriage is necessary at all, when programmers can reach their audience by streaming content directly over the Internet. As YouTube and similar services powerfully illustrate, the costs and other burdens of distributing video content have been all but erased.

⁵² *Id.* at 662 (internal quotation marks omitted).

⁵³ *Rubin v. Coors Brewing Company*, 514 U.S. 476, 491 (1995).

Even if cable carriage remained necessary as a general matter, Petitioners do not come close to justifying a requirement that cable operators forego the substantial benefits of digital transmission, including signal modulation, compression, and grooming. And as the efficiencies associated with digital technology continue to increase over time, the relative opportunity costs of analog carriage – which consumes a fixed six MHz per channel – continue to rise. In other words, Petitioners seek to compel cable operators to transmit PEG programming in the *most* speech-restricting manner available, even though many cable subscribers already rely on digital set-top boxes (or CableCARD devices) to receive a wealth of digital cable services, and thus can receive digital transmissions of PEG programming. As cable operators continue their transition to digital programming – just as broadcasters are now doing, and DBS and IPTV providers already have done – the need for digital converters is rapidly increasing irrespective of how PEG programming is delivered. Indeed, a number of cable operators already have gone “all digital,” thus requiring all of their subscribers to use set-top boxes or CableCARD-equipped televisions.⁵⁴

Moreover, as noted above, there is no reason to presume that analog cable customers who value PEG programming will be unwilling or unable to obtain digital-compatible equipment. To the contrary, the fact that all other MVPD platforms require set-top boxes belies any suggestion that the need for such equipment is somehow fatal to a programmer’s ability to reach its audience.

In short, because digital transmission over a cable system at the very least represents an adequate outlet for PEG programming—and indeed is vastly superior in important respects—there can be no justification for requiring the far less efficient, and more restrictive, method of delivering PEG programming in an analog format.

⁵⁴ See *Thirteenth Annual Report* ¶ 55.

CONCLUSION

For the foregoing reasons, the Commission should make clear, first, that Section 623(b)(7) of the Act applies only to systems that do not face effective competition; and, second, that, in any event, nothing in Section 623(b)(7) – or any other provision of the Act – prevents cable operators, as they transition from analog to digital transmission, from providing PEG channels in digital format.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, do hereby certify that I caused one copy of the foregoing
Comments of the National Cable & Telecommunications Association to be served by postage
pre-paid, first class mail, this 9^h day of March 2009.

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