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November 20, 2012

Hon. James Allison, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Complaint of Community Television of Knoxville*
Docket No. 12-00082

Dear Chairman Allison:

Enclosed please find AT&T Tennessee's Reply Brief in the above-referenced matter. At its core, this case is about which party is responsible for paying repair costs for certain equipment.

The City of Knoxville and Knox County (the Local Governments) argue that the TRA should interpret the language of the statute to mean something different than the meaning that not only AT&T but also the two primary sponsors of the statute have urged the TRA to accept.

As explained in AT&T's briefs, and Answers, the interpretation urged by AT&T Tennessee (and by the primary legislative sponsors of the Act) reasonably places repair costs with the party that actually possesses and controls the equipment (giving an appropriate incentive to handle the equipment with due care). This interpretation offers the most rational interpretation of the statute, placing the initial, "up-front" costs with the provider but placing the longer term maintenance responsibility with the party who can best take care of the equipment and who has been paid franchise fees far in excess of the repair costs at issue.

Service of this Brief and letter on Knox County and Knox County of Knoxville is confirmed in the attached Certificate of Service.

Very truly yours,

Joelle Phillips

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Complaint of Community Television of Knoxville*

Docket No. 12-00082

AT&T TENNESSEE REPLY BRIEF

This case is about which party is responsible for paying repair costs for certain equipment. The answer to the question is governed by the state statute governing video franchises (the Competitive Cable and Video Services Act or "the Act"), and the TRA must interpret the language of the statute in a manner that is consistent with the language legislators used and that avoids an illogical interpretation.[1]

The City of Knoxville and Knox County (the Local Governments) argue that the TRA should interpret the language of the statute to mean something different than the meaning that not only AT&T but also the two primary sponsors of the statute have urged the TRA to accept.[2]

The Local Governments fail to explain why they believe that legislators would have adopted a statutory provision that requires video providers to pay the cost of repairing equipment in the exclusive control and possession of the Local Governments, leaving them with no incentive to take due care of the equipment – even though the Act requires the providers to

[1] *See*, for example, *Wachovia Bank v. Johnson,* 26 S.W.3d 621, 627 (Tenn. App. 2000) ("Courts must presume that the legislature did not intend an absurdity and adopt, if possible, a reasonable construction which provides for a harmonious operation of the law.")

[2] See Letter from Senator Bill Ketron and Representative Steve McDaniel, filed in this docket on August 10, 2012 ("Ketron/McDaniel letter").

pay regular franchise fees adequate to cover these costs. In fact, such a reading would be exactly the type of illogical construction of the statute that Tennessee courts warn against.

In contrast, the interpretation urged by AT&T Tennessee (and by the primary legislative sponsors of the Act) reasonably places repair costs with the party that actually possesses and controls the equipment (giving an appropriate incentive to handle the equipment with due care). This interpretation offers the most rational interpretation of the statute, placing the initial, "up-front" costs with the provider but placing the longer term maintenance responsibility with the party who can best take care of the equipment and who has been paid franchise fees far in excess of the repair costs at issue.

DISCUSSION AND AUTHORITY

I. Contrary to What The City and County Argue, Tennessee Law Permits The Commission To Give Evidentiary Weight to the Letter from the Primary Co-Sponsors of the Law at Issue.

In both their brief and in their letter dated August 20, 2012, the Local Governments argue at length about the letter filed in this docket by the primary co-sponsors of the Act. The Local Governments argue that the TRA should disregard what Senator Bill Ketron and Representative Steve McDaniel say about the meaning of the Act and assert that the letter is in some way unreliable – describing it as "unverified" and complaining that the letters are written "long after the fact." Of course, none of these arguments address the fact that what the letter says is compelling or the fact that Tennessee law allows the TRA to consider evidence without strict adherence to evidentiary rules.[3]

[3] TCA 65-2-109.

As discussed in Section II below, the statutory interpretation advanced in the letter is well-reasoned and rational, avoiding an illogical result - consistent with the point of statutory interpretation as Tennessee courts have instructed.[4] Thus, it is not surprising that the City and County focus instead on their claims about the letter's admissibility rather than addressing the letter's substantive content.

It should go without saying that the TRA may reasonably consider a letter from two sitting legislators. In fact, the TRA often includes such materials in the record of dockets on issues that are governed by state law, and does not ask that such letters be "verified" in any fashion to deem the letters as authentic and reliable.[5] Moreover, while the Local Governments refer to the letter dismissively as merely a letter from "two Tennessee legislators," the letter is authored by the two legislators who were most involved in the enactment of the law at issue, as Senator Ketron and Representative McDaniel were the two primary sponsors of the bill that became the Act. These "two Tennessee legislators" remain in the Tennessee General Assembly today as distinguished members of the House and Senate – Senator Ketron as Senate Majority Caucus Chair, and Representative McDaniel as the Deputy Speaker of the House. Moreover, while the Local Governments characterize the letter as "long after the fact," there is no reason to expect that these two distinguished legislators do not recall the legislative debate and negotiations in which they were so intimately involved regarding such high profile legislation.

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[4] The guiding principle of statutory construction is to give effect to legislative intent without unduly restricting or expanding the statute's coverage beyond its intended scope. *Lyons v. Rasar*, 872 S.W.2d 895, 897 (Tenn. 1994). Such legislative intent is generally gleaned from the plain language of the statute without any forced or subtle construction that would extend or limit its meaning. *Id.; Wilson v. Johnson County*, 879 S.W.2d 807, 809 (Tenn. 1994).

[5] *See,* for example, transcript of Authority Conference on February 7, 2011, at p. 3-90, wherein Chairman Freeman notes the TRA's consideration of legislator input regarding access reform issues.

Senator Ketron and Representative McDaniel are entitled to have their interpretation considered – and that interpretation should be accepted not only because it is offered by them as a compelling indication of the legislative intent – but also because it is the most logical and reasonable interpretation of the Act they co-sponsored.

II. The Interpretation Advanced by AT&T is more reasonable in light of the language of the statute and avoids an illogical result.

The parties have explained the basis of their different interpretations of the statute. AT&T will not restate that argument here. Instead, AT&T here will focus on the unreasonableness of the practical impact of several of the arguments advance by the County and City.

- **A Reading that Shields a Local Government from Any Consequence for Failing to Care for Equipment in its Control is Illogical and Unsupportable.**

Nowhere in their brief do the City and County respond to the argument (clearly articulated in AT&T's brief and Answers) that their interpretation would absolve the City or County of any responsibility to take reasonable care of the PEG equipment installed in their PEG studios and operated under their exclusive control. When the Local Governments argue that AT&T could retain *ownership* of the PEG equipment, they are missing the point. The critically important fact here – and the fact that should inform the TRA's decision – is that the City and County house, operate and control the equipment at issue. Under those circumstances, it is beyond reasonable argument that those entities should be responsible for the taking appropriate care of the equipment, and replacing it if it fails. Simply put, if those entities house, operate and control the equipment, they should be responsible for its replacement if it fails.

There appears to be no dispute that the encoders worked when AT&T provided them.[6] If the TRA were to accept the argument advanced by the City and County, then the statute would provide no incentive for the party in the best position to take care of the equipment to do so. This is exactly the sort of illogical result that is to be avoided in statutory construction.[7]

In fact, this is one of the specific reasons articulated by the co-sponsors of the legislation in their August 2 letter. As they explain, "Municipalities are in the best position to maintain that equipment. In fact, we decided it would be unreasonable to require video providers to maintain equipment outside of their possession."[8] That interpretation is both sensible and sound, and should be adopted by the TRA.

- **The Suggestion that Other Smaller Communities would be Less Able to Pay Repair Costs from Franchise Fees Ignores the Fact that Those Communities Do Not Have PEG Channels and that the CCVSA Caps the Number of PEG Channels at the Number in Existence at the Time of Enactment.**

The County and City begrudgingly concede they have each been paid franchise fees in amounts many times over the cost of repairs at issue – but argue that is irrelevant because the precedent established here will not only apply to larger communities like their own but also to smaller communities such as "Hohenwald" and "Mountain City." That is an apples-to-oranges comparison. Neither of these communities has PEG channels today, and, thus, has no need for a PEG encoder. Nor will they need an encoder from AT&T in the future. The terms of the Act

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[6] In fact, AT&T Tennessee's choice to provide a 90-day warranty was a practical manner in which to ensure that there would be no dispute about whether the equipment had satisfied the requirement of the Act when installed. The suggestion that the provision of that warranty can be twisted into a basis to reject AT&T Tennessee's interpretation of the statute does not make common sense and is the type of "no good deed goes unpunished" argument that should be ignored.

[7] *See State v. Phoenix Insurance Co.*, 92 Tenn. 420*; 21 S.W. 893, 1892 Tenn. LEXIS 89 (All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reasons of the law, in such cases, should prevail over its letter. (citing *United States v. Kirby, 74 U.S. 482, 7 Wall. 482, 19 L.Ed. 278)*)

[8] Ketron/McDaniel letter at 1.

limit the number of PEG channels to which a municipality or county has access "to the number, if any, provided for in any local franchise agreement in effect as of January 1, 2008..." [9] The TRA has information indicating where there are PEG channels activated within the service areas of providers with state-issued video franchises, and, thus, where resolution of this issue could have precedential affect. Any suggestion that the statute should be construed to consider the potential impact on small communities with no PEG channels is misplaced.[10]

- **The Local Governments Base Their Arguments On Terms That are Noticeably Absent From the Act.**

The gravamen of the Local Governments' argument is that the statute requires AT&T Tennessee to "maintain" or "repair" the PEG equipment that it provided – yet the Local Governments, AT&T Tennessee, and the legislative co-sponsors all appear to agree that those terms do not appear anywhere in the statute. While the Local Governments argue that their position is supported by the "plain language" of the Act on the one hand, they dismiss the fact that these words are not contained in that language – referring to the terms as "magic words" that need not appear in the statute. The TRA should have none of that. If the Legislature had wanted to impose "maintenance" and "repair" obligations on statewide video franchise providers, it could have included those terms in the Act. It did not, and not amount of arm waving from the City and County changes that fact.

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[9] TCA 7-59-309(d)

[10] While the Local Governments' argument addresses the precedential impact on cities that do not and will not have PEG channels, the converse of their point is more compelling. The precedent established here will not only apply to large companies like AT&T who choose to enter the video market as new competitors and take on incumbents, this precedent will also apply to smaller start-up video providers who should not be required to fund maintenance and repair costs not included in the statute.

CONCLUSION

The City and County offer an interpretation of the Act that is at odds with the plain language of the statute, the explanation offered by the law's co-sponsors, and the common-sense reality that the Local Governments should have responsibility to maintain and replace equipment housed and operated within their exclusive control, particularly when they are receiving substantial franchise fees that can be used for repairs and replacement when needed.

Respectfully submitted,

AT&T TENNESSEE

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2012, a copy of the foregoing document was served on the following, via the method indicated:

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