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Mr. Earl Taylor, Executive Director
Tennessee Regulatory Authority
460 James Robertson Parkway
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filed electronically in docket office on 10/01/12

Re: Complaint of the City of Knoxville
Docket No. 1200082

Dear Mr. Chairman:

We are writing in support of the complaint of the City of Knoxville, Docket No. 12-00082, and in opposition to the response filed by AT&T Tennessee. It is our position that AT&T, as a provider under the Competitive Cable and Video Services Act (the Act), has an ongoing obligation to provide, at its own sole expense, transmission of PEG services including the cost of any equipment necessary to transmit such signals.

AT&T Tennessee argues its sole obligation under the Act is to provide the City with an initial encoder. To accept the position of AT&T on this question would be to ignore the plain and unambiguous language of the statute and award AT&T a victory through regulatory regimen that it was unable to achieve in the legislative arena.

While municipalities and counties believe the language of the statute is clear and requires no further examination, they are adamant that any further inquiry should begin with a careful analysis of the Act's legislative history to determine the crafter's approach and intentions. It is also instructive to look at the disputed provision in the context of changes made to related provisions addressing the treatment of PEG channels in their entirety. Moreover, local government contends that a reading of the law in the manner supported by AT&T is inconsistent with the attitude and thoughts of the authors of the changes adopted, as evidenced in the evolution of the legislative language of the Act.

In asserting its claim that its sole requirement is to provide an initial encoder, AT&T's response notes the absence of terms such as "repair," "maintain," or "replace" and concludes the absence of these terms in the provision in question means the PEG programmer, not the holder, is responsible for the repair, maintenance or replacement of an encoder. In noting the absence of these terms, the response offers a classic logical fallacy. Without any nod to contradiction, the response asserts the absence of these terms is conclusive proof of the limitation of its obligation concerning an encoder, while conveniently failing to acknowledge that the word "initial" also does not appear in the statute.

So what is to be made of the absence of these words? Nothing. The language of the provision in question is straightforward. It is a long-standing rule of statutory construction that where language is unambiguous judicial inquiry is complete. As such, one needs look no further than the provision, itself, to discern its meaning.

The Act clearly requires the holder to provide, at its expense, "any equipment necessary for the holder to transmit the signal." The Act further provides that, in the event that alteration of a PEG channel signal is required to transmit a system-compatible signal, then the holder either alter the signal or provide the PEG programmer "the equipment needed to accomplish such alteration," at the holder's expense.

As AT&T is not able to transmit PEG content absent use of an encoder, the encoder is clearly a piece of equipment that is both "necessary for the holder to transmit the signal from PEG channels" and "needed to accomplish such alteration." Therefore, AT&T must either alter the signal or provide an encoder, at its expense.

While the applicability of the requirement to provide equipment necessary to accomplish the alteration of a signal is restricted to only those PEG channels in operation at the time of enactment, the requirement, itself, is not limited in form or fashion.

To arrive at the conclusion suggested in the response, one would have to accept the faulty logic that the complete absence of the slightest indication of a limitation of a holder's statutory obligation to provide an encoder is proof positive of the existence of such a limitation. Such are the rhetorical contortions required to conform the plain language of the statute to AT&T's reading of the law.

The clarity of this obligation is further amplified when one examines the provision in the context of related provisions. The legislation, as enacted, clearly delineates the areas of responsibility of a municipality or county operating a PEG channel (PEG programmer) and a cable or video service provider.

TCA 7-59-309(f)(1) provides that a PEG programmer is responsible for the operation and content and that cable or video providers are responsible for the transmission of the channel. The statute provides for two options by which the provider can fulfill its duty of transmission. The first option, found in subsection (f)(1)(A), is via interconnection whereby the holder of the state franchise pays all reasonable costs. Under this option the provider's duty is ongoing and there is no suggestion that the local government would bear any repair costs. The second option, found in subsection (f)(1)(B), is via transmission from the programmer's local origination point. Again, the duty of transmission is ongoing and "at the holder's expense, such expense to include any equipment necessary..." It defies logic that the legislative intent here was to create two options for fulfilling a legal duty where one requires ongoing repair costs and the other shifts that financial burden to the local government.

It is important to note that delineated responsibilities are not limited or qualified in any way and; therefore, it is incumbent upon programmers and providers to perform these responsibilities as long as any franchise is in effect.

In summary, the law provides that the holder is responsible for the transmission of the PEG programmer's signal and all costs, including but not limited to any equipment necessary to allow for the transmission of the PEG signal. Similarly, the law requires the holder to alter the signal or to provide the equipment needed to accomplish such alteration, at the holder's expense.

A holder's responsibility to alter the transmission signal to render it compatible with the technology or protocol the holder uses to deliver its service is derived from the holder's obligation to transmit the signal. Similarly, a holder's obligation to provide any equipment needed to alter a signal for transmission on its system is derived from a holder's responsibility for paying the costs of any equipment necessary for the transmission of the signal. Therefore, a holder's obligation to provide any equipment needed to alter the signal is not severable from its overarching responsibility for transmission of a PEG channel signal and remains in effect so long as the state franchise remains in effect.

Moreover, municipalities and counties believe the flaws inherent in the conclusion presented in the response are further evidenced upon an examination of the evolution of the provision in question as the deliberations and legislative process advanced.

AT&T's broadcast system utilizes a technology or protocol that differs from that of any other cable or video provider serving the state. As such, any PEG channel intended for transmission over AT&T's broadcast system would have to be altered or converted into a format that differed from that offered every other provider in the state.

As originally introduced, the legislation, which AT&T presented to the General Assembly, sought to require PEG programmers to provide PEG channel content to a cable or video service provider in a format that was compatible with a cable or video provider's system and that could be transmitted over the system without the need for the cable or video provider to further alter the signal.

> "The municipality or the county must ensure that all transmissions of content and programming provided by or arranged by them to be transmitted over a PEG channel by a video service provider are provided and submitted to the video service provider in a manner or form that is capable of being accepted and transmitted by such provider over its cable system or video service system without further alteration or change in the content or transmission signal, and which is compatible with the technology or protocol utilized by the cable or video service provider to deliver its cable or video services…"
>
> SB1933/HB1421– Section 10(f)

In other words, AT&T believed PEG programmers should bear the responsibility for any alteration necessary to ensure that AT&T received a system-compatible signal. The effect of this provision, if enacted in the form favored by AT&T, would have been to assign a PEG programmer responsibility for altering its signal to accommodate the unique needs of a single provider (AT&T), and to require local government to pay all costs associated with any equipment, technology or processes necessary to alter its signal.

Simply put, AT&T never intended to be responsible for altering a PEG signal or for paying the costs associated with such alteration. Rather, AT&T prefers that local government accommodate its unique and specific needs and bear the burden of any costs associated with making such accommodation. There is no disputing the fact that the argument detailed in AT&T's response to the complaint is consistent with its stated preferences as evidenced in the legislation, as introduced, and the debate preceding passage of the Act. As such, it is fair to say that the claim presented in the response more accurately reflects the provision as AT&T intended it to be written.

However, current law was arrived at only after lengthy discussions and a deliberative process spanning many months. In the course of those deliberations, the legislation was amended, and the question concerning alteration of PEG signals was decided in a manner that is inconsistent with both AT&T's preferences and proposed legislative language.

As enacted, the law rejects the notion that a PEG programmer should incur costs associated with the alteration of its signal to accommodate differing protocols or technology. Instead, the law explicitly provides that the holder, not the programmer, is responsible for any alteration of a PEG channel's signal required to make it compatible with the technology or protocol the holder uses to deliver its service. The law further requires the holder either to perform the alteration, itself, or to provide the PEG programmer with the equipment needed to accomplish such alteration, at the holder's expense.

AT&T's refusal to either repair or replace the encoder, to ignore the plain language of the statute, and to continue this argument amounts to nothing more than an attempt to revise history and is indicative of its desire to promote a reading of the law that is consistent with the way AT&T had hoped the statute would have been written rather than as it is written.

Finally, local government contends that AT&T's interpretation is inconsistent with the intent of the Act's architects. Even a cursory review of the history of the Act's formation shows a balance between consumer choice and protection for existing franchises, providers and local governments. By adopting a "hold-harmless" or "keep them whole" attitude toward local governments and existing franchises, legislators repeatedly demonstrated a commitment to avoiding both additional costs or obligations for local governments and competitive disadvantages for incumbent local franchise holders.

Therefore, legislators endeavored to re-write the proposed legislation to ensure that, to the extent practicable, the law achieved balance by protecting existing relationships and provided for the continuation of certain practices in existence under existing local franchises. This effort is evident not only in the changes made to the provisions concerning alteration of PEG signals but also in other PEG-related provisions of the bill.

For example, the "keep them whole" approach is demonstrated in the law's treatment of interconnection. The Act provided that such interconnection must be mutually agreed upon and that the holder must pay all reasonable costs of establishing the interconnection. To further make the point, the Act specifically states, "It is declared to be the legislative intent that an incumbent cable service provider should not incur any additional cost as a result of an interconnection required pursuant to this subdivision (f)(1)(A)."

This approach is also seen in the Act's position on connectivity between the programmer and the provider. The legislation, as introduced, provided that holders make connection at the point of entry of the PEG programmer's facility. PEG programmers wanted to avoid incurring costly expenses associated with being assigned the responsibility of relaying the signal from its origin to the point of entry. Programmers argued that holders should be required to make connection for transmission at the local point of origination, as other cable providers had done. The Act provides that connection must be made at the local point of origination, as programmers advocated.

Another area of the Act, which demonstrates this approach, is the provision of cable or video service to local government buildings or facilities. Under the Act, incumbent providers that provide free cable service to schools or government offices are required to continue to provide the free service until the termination date of a local franchise agreement. The Act further provides that, "Any other cable or video service provider or holder of a state-issued certificate of franchise authority that serves the same municipality or county as an incumbent cable service provider that is offering free cable service shall provide a comparable level of free cable or video service to the same locations as listed by the municipality or county until the natural termination date of the incumbent's local franchise agreement." These provisions both serve to protect and promote existing relationships and practices under local franchise agreements and to ensure that incumbents are not disadvantaged vis-à-vis a new entrant.

Lastly, the Act limits the applicability of several PEG provisions to those PEG programmers or channels in operation on July 1, 2008. For example, the requirement that the holder incur all costs associated with transmitting from the origination point applies only to those PEG programmers in operation on July 1, 2008. Another example is the requirement that holders provide the equipment needed to accomplish alteration only applies to those channels activated as of July 1, 2008. In addition, the law requires holders to make PEG access support payments that are equivalent to such payments made by the incumbent cable provider under a local franchise in effect on July 1, 2008, until the expiration of the local franchise. The law also provides dispensation with respect to determining the number of channels that must be transmitted by holders for PEG channels activated as of July 1. 2008.

The reason for this differentiation between PEG programmers and channels operating as of January 1, 2008, and those programmers or channels that were not in operation is simple—Any PEG channel placed into operation after the date of enactment would be starting anew and, as such, would be constructing and equipping its facilities with the foreknowledge of a potential need to accommodate differing provider transmission systems. In addition, any PEG channel not in operation at the time of enactment had no established relationships or practices and; therefore, there was no potential for a cable operator to be materially harmed by a new entrant. Thus, the designers of the amended legislation determined that any channels activated in the future would not be held in the same regard. Accordingly, the notion of a "hold-harmless" or "keep them whole" approach was not applicable.

Sincerely,

Margaret Mahery, Executive Director
Tennessee Municipal League

David Seivers, Executive Director
Tennessee County Service Association