BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	**DOCKET NO.**
COMPLAINT OF CITY OF KNOXVILLE, ET AL.	)	**12-00082**
AGAINST AT&T TENNESSEE	)	

INITIAL BRIEF OF COMPLAINANT CITY OF KNOXVILLE, TENNESSEE

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Pursuant to the Hearing Officer's October 1, 2012 Order Entering Revised Procedural Schedule, complainant City of Knoxville, Tennessee ("City"), hereby submits its Initial Brief concerning the City's complaint against AT&T Tennessee ("AT&T").

INTRODUCTION AND SUMMARY

This proceeding presents a straightforward question of statutory interpretation concerning a provision of the Competitive Cable and Video Services Act, TENN. CODE ANN. §§ 7-59-301 *et seq.* ("CCVSA"). Specifically, the question presented is whether the obligation of a holder of a state-issued certificate of franchise authority such as AT&T to provide, at its expense, any "equipment" needed to fulfill the holder's ongoing duties to provide transmission and any necessary signal alteration of public, educational and governmental access ("PEG") signals pursuant to TENN. CODE ANN. § 7-59-309(f)(1)(B) & (f)(2)(B), ceases on delivery of such equipment or is ongoing, just like the PEG transmission and signal alteration duties that the equipment obligation is meant to serve.

The City submits that, to ask the question is to answer it. The "equipment" obligations of TENN. CODE ANN. § 7-59-309(f)(1)(B) & (f)(2)(B) are merely a clarification and specification, respectively, of a holder like AT&T's unquestionably *ongoing* obligation to provide PEG signal

transmission and alteration. To contend otherwise, as AT&T does here, would permit a holder to transform its ongoing PEG signal transmission and alteration duties into a one-time obligation, shifting the costs and risk of ongoing PEG signal transmission and signal alteration to municipalities like the City.

The City's reading of the statute is the only one that squares with its plain language. It is also consistent with the available legislative history and supported by the contrast between the CCVSA's language on this topic and the different language on this topic enacted in state video franchising laws backed by AT&T in other states. The City's reading also promotes the purposes and policies of the CCVSA.

The Authority should therefore rule that AT&T's failure to replace or repair the non-functioning encoders it originally provided to the City and to Community Television of Knoxville ("CTV"), the City's authorized PEG manager, is a violation of the CCVSA, § 7-59-309(f), and order AT&T to replace or repair, at its cost, those encoders throughout the term of AT&T's state video franchise.

STATEMENT OF FACTS

The material facts of this proceeding are not in dispute. CTV is the authorized manager of PEG access channels in the City and in Knox County.[1] Knoxville's three PEG channels were all activated as of July 1, 2008. Pursuant to the CCVSA, TENN. CODE ANN. § 7-59-309(a)(1), notice was provided to the Authority that CTV had activated the PEG channels, and soon thereafter, AT&T, like the other two cable and video service providers in the City (Comcast and Knology) began transmitting the City's PEG channels to their subscribers.[2] Because AT&T's system requires the alteration of the PEG signal from standard federal national television system

[1] Letter from Ronald E. Mills, Deputy Law Director, City of Knoxville, to Kenneth C. Hill, Chairman, Tennessee Regulatory Authority (July 19, 2012; filed July 24, 2012), at 1 ("Complaint").
[2] *Id.*

committee ("NTSC") standards and the advanced television committee ("ATC") standards, AT&T accomplished PEG transmission by, among other things, providing CTV, at AT&T's expense, with three encoders (one for each PEG channel) needed to alter the City's PEG signals to be compatible with AT&T's system technology.[3]

On or about May 2012, one of the encoders that AT&T had provided ceased to function properly, and as a result, AT&T subscribers were no longer able to receive CTV's channel.[4] On June 1, the City notified AT&T of the problem and demanded that, pursuant to the CCVSA, TENN. CODE ANN. 7-59-309(f), AT&T replace or repair the faulty encoder.[5] On June 29, AT&T responded to the City, stating that AT&T was looking into the problem but arguing that under TENN. CODE ANN. § 7-59-309(f)(2)(B), AT&T had no "ongoing obligation . . . to repair or maintain" the encoder.[6] AT&T's technician subsequently determined that the encoder "was not operating and needed to be replaced."[7] The "estimated cost to replace the encoder is $10,000, including installation."[8]

The City filed its Complaint with the Authority on July 24, claiming that AT&T's failure to replace the encoder, at its expense, violated the CCVSA, TENN. CODE ANN. § 7-59-309(f). On September 12, AT&T filed its Answer, denying the City's claim and arguing that its TENN. CODE ANN. § 7-59-309(f)(2)(B) duty to provide PEG signal alteration equipment is not an ongoing obligation.

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[3] Answer of AT&T Tennessee, at 1 (filed Aug. 24, 2012) ("Answer").
[4] Complaint at 1 and letter from Ronald E. Mills, Deputy Law Director, City of Knoxville, to Valerie Montalvo, CTV Liaison, AT&T (June 1, 2012) (Exhibit 1).
[5] *Id.*
[6] Letter from Joelle Phillips, General Attorney-TN, AT&T, to Ronald E. Mills, City of Knoxville Law Dept. (June 29, 2012) (Exhibit 2).
[7] Answer of AT&T Tennessee, at 7 (filed Sept. 12, 2012) ("Answer").
[8] *Id.*

At the end of August, 2012, the second of the three encoders that AT&T had provided to the City and CTV failed.[9] As a result, AT&T subscribers can no longer receive two of the City's three PEG channels, including not only CTV, but also the government access channel that carries, among other things, City Council and County Commission meetings.[10]

Several municipal interests have filed letters in support of the City's complaint, arguing that the equipment obligations of § 7-59-309(f) are ongoing, not one-time as AT&T claims.[11] The City incorporates those arguments by reference here.

ARGUMENT

I. THE PLAIN LANGUAGE OF TENN. CODE ANN. § 7-59-309(f) IMPOSES ON AT&T THE ONGOING OBLIGATIONS TO PROVIDE PEG TRANSMISSION AND PEG SIGNAL ALTERATION, AND ITS REFERENCES TO "EQUIPMENT" ARE INTENDED TO CLARIFY THAT PROVISION OF "NECESSARY" OR "NEEDED" EQUIPMENT IS PART OF THOSE ONGOING OBLIGATIONS.

The positions of the parties to this proceeding are clear: The City believes that AT&T's obligations to provide PEG signal transmission and alteration in § 7-59-309(f)(1) and (f)(2), respectively, are ongoing, and thus AT&T's obligation to provide encoder equipment ***that works*** is ongoing as well. AT&T, on the other hand, believes that, by choosing the option provided by § 7-59-309(f)(2)(B), it can escape its ongoing obligation to provide the necessary signal alteration equipment and instead shift the cost of replacing failed encoders to the City.

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[9] Letter from Madeline Rogero, Mayor of Knoxville, to Earl Taylor, Executive Director, TRA (Sept. 27, 2012; filed Oct. 4, 2012) ("September 27 Mayor's Letter").

[10] *See id.*

[11] Letter from Keith Durbin, CIO/Director of IT Services, Metropolitan Government of Nashville and Davidson County, to Kenneth C. Hill, Chairman, TRA (Aug. 28, 2012; filed Aug, 29, 2012); letter from Alan Bozeman, Communications Director, City of Murfreesboro, to Kenneth C. Hill, Chairman, TRA (Aug. 30, 2012; filed Aug, 30, 2012); letter from John Lanza, Media Services Manager, Town of Smyrna, to Kenneth C. Hill, Chairman, TRA (Sept. 6, 2012; filed Sept. 6, 2012); letter from Patrick Lawton, City Administrator, City of Germantown, to Kenneth C. Hill, Chairman, TRA (Sept. 12, 2012; filed Sept. 18, 2012); letter from Margaret Mahery, Executive Director, Tennessee Municipal League ("TML") and David Seivers, Executive Director, Tennessee County Service Association ("TCSA"), to Earl Taylor, Director, TRA (Sept. 25, 2012; filed Oct. 1, 2012) ("TML/TCSA Letter").

The City submits that § 7-59-309(f) provides a clear and unambiguous answer to this dispute, and it is that the City's, not AT&T's, position is correct.

We begin, of course, with the relevant statutory language. TENN. CODE ANN. § 5-79-309(f) provides in pertinent part:

> (f) (1) The operation and content of any PEG channel provided pursuant to this section shall be the responsibility of the municipality or the county receiving the benefit of the channel and the *cable or video service provider bears only the responsibility for the transmission of the channel. A holder of a state-issued certificate of franchise authority must transmit a PEG channel by one (1) of the following methods*:
>
> > (A) *Interconnection*, which may be accomplished by direct cable, microwave link, satellite or other method of connection. Upon request, if technically feasible, an incumbent cable service provider must interconnect its network for the provision of PEG programming with a holder of a state-issued certificate of franchise authority. The terms of the interconnection shall be as mutually agreed and shall require the requesting holder to pay the reasonable costs of establishing the interconnection. 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). In the event a holder of a state-issued certificate of franchise authority and the incumbent cable service provider cannot agree upon the terms under which the interconnection is to be made or the costs of the interconnection, either party may request the department to determine the terms under which the interconnection shall be made and the costs of the interconnection. The determination of the department shall be final. Upon notice to the governing authority of the county or municipality, the time for the holder of a state-issued certificate of franchise authority to begin providing PEG programming as required in this section shall be tolled during the time the department is making its determination; or
>
> > (B) *Transmission of the signal from each PEG channel programmer's local origination point, at the holder's expense, such expense to include any equipment necessary for the holder to transmit the signal from PEG channels*

> activated as of July 1, 2008, if the origination point is in the holder's service area.
>
> (2) All PEG channel programming provided to a cable or video service provider for transmission must meet the federal national television system committee standards or the advanced television committee standards. *If a PEG channel programmer complies with these standards and the holder does not provide transmission of the programming without altering the transmission signal, then the holder must do one (1) of the following*:
>
> > (A) *Alter the transmission signal to make it compatible* with the technology or protocol the holder uses to deliver its service; or
> >
> > (B) *Provide to the municipality or county, at the holder's expense,* in the case of PEG channels activated as of July 1, 2008, *the equipment needed to accomplish such alteration.*

TENN. CODE ANN. § 7-59-309(f) (emphasis added).

On its face, section 7-59-309(f) imposes two related obligations on state franchise holders such as AT&T with respect to PEG signal carriage:

First, under § 7-59-309(f)(1), AT&T bears "the responsibility for the transmission of the [PEG] channel." This responsibility may be fulfilled either by AT&T's interconnection with the incumbent cable operator (§ 7-59-309(f)(1)(A)), or by AT&T transmitting the PEG signal from its origination point to AT&T's system, including AT&T's provision of any "necessary" equipment (§ 7-59-309(f)(1)(B)). AT&T has chosen the latter option—transmitting the City's PEG channels from those channels' origination points to AT&T's system and providing any "necessary" equipment, "at [AT&T's] expense."

Second, under § 7-59-309(f)(2), where the PEG programming provided to the holder meets NTSC or ATC standards (as the City's PEG channels do), and where the holder choses to alter the PEG programing signal to be compatible with the holder's chosen system technology (as AT&T has chosen to do), AT&T bears the responsibility for altering the PEG signal to be

compatible with its system. AT&T may fulfill this obligation in one of two ways, either by altering the PEG signal within its network, and thus at its cost (§ 7-59-309(f)(2)(A)), or by providing the City with the "needed" equipment required to alter the PEG signal, "at [AT&T's] expense" (§ 7-59-309(f)(2)(B)), which is the option AT&T has chosen.

Read in context, there can be no question that AT&T's twin duties to provide PEG signal transmission (§ 7-59-309(f)(1)) and PEG signal alteration (§ 7-59-309(f)(2)) are ongoing. That is, they are duties that AT&T must continue to fulfill throughout the term of the video franchise issued to it by the Authority. The parallel references in §§ 7-59-309(f)(1)(B) and 7-59-309(f)(2)(B) to the provision of "equipment," "at the holder's expense," merely clarify that a holder's duties to provide PEG transmission and signal alteration include the obligation to provide any equipment that is "necessary" or "needed" to fulfill those duties.

It is difficult to believe that AT&T would be considered compliant with its twin § 7-59-309(f) duties if it were to cease providing PEG signal transmission or signal alteration after, say, 90 days, and informed municipalities that henceforth it was their responsibility, not AT&T's, to provide PEG transmission and signal alteration. Yet, although obscured by its rhetoric, that is precisely what AT&T's position here appears to be.

AT&T concedes that its PEG signal transmission obligation in § 7-59-309(f)(1)(B) is an "ongoing" one,[12] even though that obligation includes bearing the cost of any "equipment necessary" to transmit the PEG signal, without any textual reference whatsoever to a corollary obligation to "'repair,' 'maintain,' or 'replace'" the "equipment necessary" for PEG signal transmission.[13] AT&T also concedes that, were it to choose to perform the § 7-59-309(f)(2) signal alteration obligation through "Option A" (*i.e.*, pursuant to § 7-59-309(f)(2)(A)) by "using

[12] Answer at 5.
[13] *Id.* at 9.

its own network to perform the alteration," that obligation, too, would be ongoing, as it would require AT&T "to perform the same repairs, maintenance, and/or replacement of its own equipment that would ordinarily be required to keep it operating."[14]

According to AT&T, however, by choosing to fulfill its signal alteration obligation by furnishing, "at [AT&T's] expense," the "equipment needed" for the alteration via "Option B" (*i.e.*, § 7-59-309(f)(2)(B)), AT&T can transform its signal alteration obligation from an ongoing obligation to a one-time-only obligation, shifting all of the costs and risks of failure of the "needed" equipment from itself to the municipality.[15] This is so, claims AT&T, because the magic words "repair, maintain, and/or replace" are not in § 7-59-309(f)(2)(B).[16]

AT&T overlooks, however, that those magic words are also not in § 7-59-309(f)(1)(B), either, yet AT&T concedes the "equipment" reference there concerning its PEG transmission obligation is an ongoing one.[17] The magic words likewise do not appear in § 7-59-309(f)(2)(A), the in-network signal alteration option, yet AT&T concedes that equipment "repairs, maintenance and/or replacements" are part and parcel of that signal alteration "Option A".[18]

AT&T nevertheless believes that the omission of the magic words "repair, maintain, and/or replace" from § 7-59-309(f)(2)(B)—even though those words are also missing from § 7-59-309(f)(1)(A), (f)(1)(B) and (f)(2)(A)—has a completely different meaning in the context of (f)(2)(B). The only textual reason AT&T offers for this inconsistent construction of remarkably parallel "equipment" obligation language in §§ 7-59-309(f)(1)(B) and (f)(2)(B) is that otherwise, "Option A [§ 7-59-309(f)(2)(A)] and Option B [§ 7-59-309(f)(2)(B)]" would be "substantively

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 5.
[18] *Id.* at 9.

identical—both would require [AT&T] to repair, maintain, and/or replace the equipment that accomplishes the [signal] alteration."[19]

AT&T is correct that, under the City's reading, both "Option A" and "Option B" require AT&T to repair, maintain, and/or replace any equipment "needed" to perform the PEG signal alteration that § 7-59-309(f)(2) requires it to perform. But AT&T is incorrect that the City's reading would render either option "superfluous."[20] On the contrary, as AT&T (perhaps inadvertently) recognizes in referring to them as "Option A" and "Option B," §§ 7-59-309(f)(2)(A) and 7-59-309(f)(2)(B) are just that—technological options to achieve the same result: fulfilling AT&T's ongoing PEG signal alteration obligation set forth in § 7-59-309(f)(2). Subparagraphs (f)(2)(A) and (B) are alternative technological means that a video service provider like AT&T may choose to satisfy its overarching (f)(2) duty: to provide, at its expense, any PEG signal alteration necessary for a PEG signal to be compatible with its system. "Option A" allows the provider to fulfill the signal alteration obligation "in-network," and "Option B" gives the provider the alternative of fulfilling the same signal alteration obligation by providing, "at [its] expense," the "needed" equipment located at the local PEG origination premises.

AT&T's reading, in contrast, would transform "Option A" and "Option B" not into technologically alternative methods of fulfilling the same ongoing obligation (signal alteration), but instead into a tilted playing field favoring one signal alteration technology (which conveniently happens to be AT&T's) over another. AT&T's interpretation also would monetarily penalize municipalities like the City, and reward providers like AT&T, for a provider's choice of Option B over Option A—a choice over which the municipality has no say or control. Where in the statutory language of § 7-59-309(f) this technologically *non*-neutral

[19] *Id.* at 9.
[20] Answer at 10.

option can be found in § 7-59-309(f)(2), when AT&T concedes it cannot be found in the technologically neutral equipment option for PEG signal transmission in § 7-59-309(f)(1)(A) & (B), AT&T does not, and cannot, say.

In fact, the only plausible and logical reading of § 7-59-309(f) is that it imposes two *ongoing* obligations on AT&T with respect to PEG signals: transmission ((f)(1)) and signal alteration ((f)(2)), and that with respect to each obligation, subparagraph (f) provides two alternative means at fulfilling those ongoing obligations. For PEG transmission, the options given are interconnection ((f)(1)(A)) or direct connection, including "necessary" equipment ((f)(1)(B)), and for signal alteration, they are in-network ((f)(2)(A)) and at the PEG premises, including "needed" equipment ((f)(2)(B)). Both "equipment" references, in (f)(1)(B) and (f)(2)(B), are within the description of one of two alternatives for fulfilling each of these *ongoing* obligations. There is simply nothing in (f)(2)(B) remotely suggesting that it, unlike, (f)(1)(A), (f)(1)(B) and (f)(2)(A), is a one-time, rather than an ongoing obligation.

Even AT&T tacitly admits that its effort to construe the § 7-59-309(f)(2)(B) signal alteration equipment obligation as one-time, while the obligations of (f)(1)(A), (f)(1)(B) and (f)(2)(A) are ongoing, is untenable. Under AT&T's reading of (f)(2)(B), its signal alteration equipment obligation would have been fulfilled on delivery of the equipment. If the equipment failed the day after delivery, it would be the City's problem. Sensing the unpalatability of that result, AT&T points to the 90-day warranty it provided with the signal alteration equipment.[21] But no 90-day obligation can be found in the text of (f)(2)(B). The obligation is either ongoing or it is not. And the only reasonable reading is that it is ongoing. [22]

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[21] *E.g.*, Answer at 6.

[22] It is AT&T, not the City, which resorts to "absurd results" in a vain attempt to defend its position. Answer at 11. AT&T hypothesizes that, under the City's reading, it would have the obligation to replace the encoder if "the City simply tossed the equipment out the window." *Id.* As an initial matter, AT&T's hypothesis is not this case: there is

Thus, the plain language of § 7-59-309(f) points to but one conclusion: AT&T's (f)(2)(B) signal alteration equipment obligation is ongoing, because it is an option for fulfilling the ongoing PEG signal alteration obligation of (f)(2), just as the (f)(1)(B) "equipment" provision is an option for fulfilling the ongoing PEG transmission obligation of (f)(1). Because the plain language controls, that should end the matter. But even if resort is made to other sources outside the statutory language, as AT&T urges, those sources favor the City's, not AT&T's position, as we now show.

II. WHAT LEGISLATIVE HISTORY THAT EXISTS SUPPORTS THE CITY'S, NOT AT&T'S, POSITION.

AT&T[23] and two members of the Tennessee Legislature[24] seek to go beyond the text of § 7-59-309(f) and weave a story about supposed, but uncodified and unrecorded, "negotiation[s]"[25] and "compromise"[26] that occurred in the Legislature leading up to the enactment of the CCVSA. These unverified, long after-the-fact characterizations of what AT&T and two Tennessee legislators believe is the meaning of the CCVSA in general, and of § 7-59-309(f) in particular, are not legislative history at all and are irrelevant to the meaning of the statutory language at hand.[27] What genuine legislative history that does exist supports the City's, not AT&T's position.

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no suggestion here of any fault by the City at all; the encoder simply failed. Moreover, AT&T's logic would suggest that AT&T's § 7-59-309(f)(1)(B) obligation to provide PEG transmission "equipment" is likewise not ongoing, yet AT&T concedes that it is. Answer at 5. AT&T's claim that the signal alteration equipment is "outside [its] control" (Answer at 11) is likewise wrong. Nothing in (f)(2)(B) prevents AT&T from retaining ownership of signal alteration equipment, just as it does for transmission equipment provided pursuant to (f)(1)(B). AT&T cannot, by its unilateral decision to pass ownership of the encoder to the municipality, rewrite its (f)(2)(B) equipment obligation to suit its own interests.

[23] Answer at 2-6, 10-11.

[24] Letter from Sen. Bill Ketron, Tenn. Senate Majority Caucus Chairman and Rep. Steve McDaniel, Tenn. Deputy Speaker of the House, to Kenneth C. Hill, Chairman, TRA (Aug. 2, 2012; filed Aug. 10, 2010) ("Ketron Letter").

[25] *Id.* at 1.

[26] *Id.*; Answer at 2 & 11.

[27] Letter from David L. Buuck, Knox County Chief Deputy Law Director, to Kenneth C. Hill, Chairman, TRA (Aug. 20, 2012; filed Aug. 22, 2012) ("Knox County Letter").

A. Neither AT&T's Characterizations Nor Those of Two Legislators Concerning the Meaning of the CCVSA Have Any Bearing on the Meaning of Section 7-59-309(f).

AT&T's Answer goes on at some length, without citation or verification, reciting what AT&T asserts are supposed facts about the history and purpose of the CCVSA.[28] The Ketron Letter, in turn, sets forth the views of two legislators about what they recall was their intent concerning § 7-59-309(f).[29] The CCVSA was of course enacted in 2008, four years *before* the legislators' letter was written.

Neither AT&T's recitation nor the Ketron Letter warrants any consideration at all by the Authority. It is hornbook law[30] and the unanimous holding of both Tennessee and other courts that have considered the question that

> Although statutory ambiguity sometimes requires that we resort to legislative history in order to ferret out legislative intent, . . . the letters, testimony or other evidence rendered by a legislator retrospectively is not admissible on such issues.[31]

To paraphrase the U.S. Supreme Court in a directly analogous context, "Needless to say, [the Ketron Letter] does not qualify as legislative 'history' given that it was written [4] years after the [CCVSA was] enacted."[32] And if the Ketron Letter does not qualify as legislative history, AT&T's self-interested and unverified recitation of what it believes the Legislature intended certainly does not.

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[28] Answer at 2-6 & 10-12.
[29] Ketron Letter at 1-2.
[30] 2A Sutherland Statutory Construction § 48:20, at 628 (7th ed. 2007).
[31] *Levy v. State Board of Examiners*, 553 S.W. 2d 909, 912 (Tenn. 1977). *Accord BellSouth Telecommunications v. Greer*, 972 S.W. 2d 663, 672-74 (Tenn. App. 1997); *James Cable Partners v. City of Jamestown*, 818 S.W. 2d 338, 341 (Tenn. App. 1991).
[32] *Graham County Soil and Water Conservation District v. U.S.*, ___ U.S. ___, 130 S. Ct. 1396, 1409 (2010). *Accord Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 & n.13, 100 S. Ct. 2051, 2061 & n.13 (1980).

AT&T nevertheless contends that the Ketron Letter is admissible under TENN. CODE ANN. § 65-2-109, which states that the Authority is not "bound by the rules of evidence applicable in a court."[33] But AT&T misses the point: Rules of evidence relate to issues of fact, not issues of law. In resolving the many complex factual disputes that arise before it, TENN. CODE ANN. § 65-2-109 merely gives the Authority relief from the strict rules of evidence in considering and weighing those facts. The meaning of § 7-59-309(f), however, is *not* a question of fact, but of law.[34] The after-the-fact statements by legislators of what they recall they thought a statute enacted years ago was intended to mean, is simply not germaine to that issue of law. Whether or not the Authority decides formally to exclude the Ketron Letter or AT&T's unverified musings on what the Legislature intended, they are not at all relevant to ascertaining the meaning of § 7-59-309(f).

B. What Genuine Legislative History That Does Exist Supports the City's, Not AT&T's, Position.

Although we believe that resort to legislative history is unnecessary because the meaning of § 7-59-309(f) is clear from its text (*see* Part I above), what genuine legislative history that does exist confirms the statute's text: The equipment obligation in § 7-59-309(f)(2)(B), like signal transmission and alteration duties of § 7-59-309(f)(1) and (2) of which it is a part, is an ongoing duty of state-franchised video service providers such as AT&T.

In fact, the legislature considered, and ultimately rejected, statutory language that would have said what AT&T wishes § 7-59-309(f)(2)(B) had said. As TML and TCSA point out, the bill that ultimately became the CCVSA, as originally introduced, provided that municipalities,

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[33] Letter from Joelle Phillips, General Attorney-TN, AT&T to Kenneth C. Hill, Chairman, TRA, and Kelly Cashman-Grams, Hearing Officer, TRA (Sept. 14, 2012).

[34] *Winter v. Smith*, 914 S.W.7d 527, 538 (Tenn. Ct. App. 1995) ("statutory construction is not a question of fact ... but rather a question of law"); *Dempsey v. Correct Manufacturing Corp.*, 755 S.W.2d 798, 806 (Tenn. Ct. App. 1988) ("content meaning and application of statutes are not a matter of fact ... but are a matter of law").

rather than the video service provider, were responsible for altering PEG signals to be compatible with the provider's system:

> 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 . . . [35]

That, of course, is the opposite of what § 7-59-309(f)(2), as ultimately enacted, says about the PEG signal alteration obligation. It instead assigns that obligation to the video service provider. *See* Part I above.

The substantial change in language concerning the PEG signal alteration obligation from the bill's introduction to the CCVSA's enactment is telling. It confirms the City's reading of § 7-59-309(f)(2)'s plain language. It also reveals that AT&T is essentially asking the Authority to rewrite the statute to conform to how it was originally introduced in the Legislature, rather than to how it was enacted by the Legislature.

Nor was the dramatic change in the CCVSA's language, shifting the PEG signal alteration obligation to the service provider, an accident or some mere rewording to accomplish the same objective as the originally-introduced version of the bill. At AT&T's urging, fourteen other states where AT&T is the primary local telephone company have enacted new statewide video franchising laws. The new laws of ten of those states mirror, almost word-for-word, the PEG signal alteration language set forth in the original Tennessee bill as introduced and set forth

[35] Tenn. SB 1933 & Tenn. HB 1421, § 10(f) (filed February 13, 2007) (quoted in TML/TCSA Letter at 3).

above, and which placed the signal alteration obligation on the municipality rather than the provider.[36]

As the Tennessee Legislature did in rewriting what became § 7-59-309(f)(2), other states took a different course, placing the signal alteration obligation on the provider rather than the municipality.[37] Indeed, the PEG signal alteration provision of North Carolina's state video franchising law is strikingly similar to § 7-59-309(f)(2); it assigns the PEG signal alteration obligation to the service provider, and allows the provider to fulfill that obligation in-network or by providing the local government with "the equipment needed to alter the [PEG] transmission signal to make it compatible with the technology or protocol the cable service provider uses to deliver its cable services."[38]

Therefore, an examination of the changes made to the PEG signal alteration provision in the bill that became the CCVSA, coupled with a comparison and contrast of the CCVSA provision as enacted with the PEG signal alteration provisions of other similar state video franchising laws enacted more or less contemporaneously with the CCVSA, point to the same conclusion. Section 7-59-309(f)(2) means what it says: The "equipment" option in § 7-59-309(f)(2)(B), just like the more general § 7-59-309(f)(2) signal alteration obligation of which it is but a part, is an ongoing one on video service providers such as AT&T.

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[36] *See* Fla. Stat. § 610.109(8) (2012); Ga. Code Ann. § 36-78-8(h)(2012); Ind. Code §8-1-34-27(b) (2012); Kan. Stat. Ann. § 67-2703(6) (2012); Mo. Rev. Stat. § 67-2703(6)(2012); Nev. Rev. Stat. § 711.820(2) (2012); S.C. Code Ann. § 58-12-370(F) (2011); Tex. Util. Code Ann. § 66.009(g) (West 2012); Wis. Stat. § 66-0420(c)(3)(a) (2012); 2006 Mich. Pub. Acts 48, §484.3304(3).

[37] Cal. Pub. Util. Code § 5870(g)(1) (West 2012); 200 Ill. Comp. Stat. 5/21-601, § 21-601(b) (2012); N.C. Gen. Stat. § 66-358(b) (2012); Ohio Rev. Code Ann. § 1332.30 (D) (West 2012).

[38] N.C. Gen. Stat. § 66-358(b) (2012).

III. AT&T'S OTHER ARGUMENTS ARE MISGUIDED OR OTHERWISE WITHOUT MERIT.

Apparently seeking to divert attention from the actual statutory language and the genuine legislative history, AT&T raises a smokescreen of other arguments that are either beside the point or fundamentally flawed.

AT&T expends considerable effort setting forth its own interpretation of the history of the CCVSA and the various compromises AT&T believes the CCVSA reflects, on a wide-range of issues such as system buildout, franchise fees, PEG channels, and other topics.[39] But aside from their self-interested, one-sided and verified nature, AT&T's ruminations about the CCVSA's general goals and alleged balancing of interests cannot trump the specific language that the Legislature chose in § 7-59-309(f)(1) and (2) to address service providers' PEG signal transmission and signal alteration obligations. The CCVSA's generalized policies and purposes cannot be read to overcome the plain language of § 7-59-309(f), for "every statute proposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be."[40] As the U.S. Supreme Court has observed, "no legislation pursues its purposes at all costs [, and] it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."[41]

AT&T also tries to make much of the 5% franchise fee that the CCVSA, § 7-59-306, imposes on video service providers. AT&T asserts that the "hefty" fee AT&T pays provides the City with more than enough money to pay for replacing or repairing the encoders.[42]

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[39] Answer at 2-6 & 10-13.
[40] *Director, Office of Worker's Compensation v. Newport News Shipbuilding*, 514 U.S. 122, 136 (1995).
[41] *Rodriguez v. U.S.*, 480 U.S. 522, 525-26 (1987). *See* also *NetCoalition v. SEC*, 615 F. 3d 525, 533-534 (D.C. Cir. 2010); *Colo. River Indian Tribes v. Nati'l Indian Gaming Comm'n.* 466 F.3d 134, 139 (D.C. Cir. 2006) (quoting *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 231 n.4 (1994)).
[42] Answer at 1, 3, 5, 10, 11 & n.20, & 12-13.

AT&T's assertion is misdirected at several levels. As an initial matter, the CCVSA's 5% franchise fee merely parallels what the federal Cable Act has allowed municipalities to impose on cable operators since 1984,[43] and which most municipalities, including Knoxville, already imposed on local franchised cable operators before the CCVSA was enacted. Moreover, AT&T neglects to mention that the 5% franchise fee is rent for the exceedingly valuable privilege of using the City's right-of-way to provide cable/video service,[44] and that the federal Cable Act makes clear that the City's use of franchise fee proceeds is not restricted in any way.[45] Further, AT&T overlooks that the federal Cable Act permits localities to require cable operators to pay the capital costs of PEG-related equipment and facilities *over and above* the 5% franchise fee.[46]

Beyond AT&T's fundamental mischaracterization of the 5% franchise fee, however, its fee-related claims are sheer hubris. AT&T claims, for instance, that it has paid the City $225,000 in 5% video service franchise fees since the fourth quarter of 2009,[47] which AT&T then says "is more than twenty-two times the cost of replacing the PEG equipment."[48] AT&T ignores the obvious corollary of this assertion: Since the franchise fee represents 5% of AT&T's video service revenues in Knoxville, that means that AT&T has earned $4.5 million, or twenty times the amount that the City has received, from providing video services in the City.[49] If, as AT&T contends, $225,000 provides ample funds to pay for replacing the encoders, then AT&T's more than $4.5 million in video service revenues in the City surely does as well.

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[43] 47 U.S.C. §542.
[44] *See, e.g., City of Dallas v. FCC*, 118 F.3d 393, 397 (5th Cir. 1997).
[45] 47 U.S.C. § 542(i). *See* H.R. Rep. No. 934, 98th Cong., 2d Sess. At 26&65 (1984), *reprinted in* 1984 U.S.C. C.A.N. 4655, 4663 & 4702 ("1984 House Report") (use of franchise fee not restricted to cable-related uses).
[46] 47 U.S.C. § 542(g)(2)(C). *See also* 1984 House Report at 26, 1984 U.S.C.C.A.N. at 4663.
[47] Answer at 11 n.20.
[48] *Id.* at 12. Because yet another encoder has ceased to function since AT&T filed its Answer, the encoder replacement cost tab has now doubled, and thus AT&T's "twenty-two times" claim has been halved to "eleven times", even if one were to accept AT&T's misguided logic.
[49] And that $4.5 million figure does not, of course, include all of the non-cable/video service revenues (from telecommunications and broadband) that AT&T has earned in the City during the same period.

More generally, AT&T's effort to hide behind the label of a "new provider" and to shift the encoder replacement cost from itself to the City ignores two larger points. *First*, if it were accepted by the Authority, AT&T's tilted interpretation of § 7-59-309(f)(2) would apply to all Tennessee cities, from Hohenwald to Mountain City, not just larger ones like Knoxville. For many smaller communities, of course, the cost of replacing an encoder would far exceed franchise fee revenues.

Second, far from being some small struggling new entrant, AT&T is the incumbent local telephone company in every market where it chooses to provide cable/video service, and its parent is *the nation's largest telecommunications company and the second-largest telecommunications company in the world.*[50] AT&T's size and revenues dwarf not only any city or county in size, but also Comcast and Charter, the two incumbent cable operators with which AT&T claims it competes.[51] The notion that fulfilling its ongoing § 7-59-309(f)(2) signal alteration equipment obligation would impose any discernible financial hardship on AT&T strains credulity.

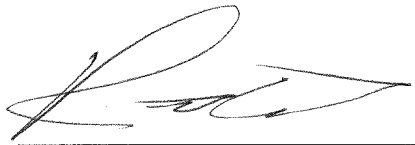
CONCLUSION

For the foregoing reasons, the City's complaint should be granted, and AT&T should be found in violation of TENN. CODE ANN. § 7-59-309(f). The Authority should order AT&T to replace, at its expense, the faulty encoders it has provided to the City, and to replace any encoder that fails over the remaining term of AT&T's state video franchise.

[50] Fortune Global 500, *available at* http://money.cnn.com/magazines/fortune/global500/2011/full_list/index.html.
[51] Answer at 2.

Respectfully submitted this 30th day of October, 2012.

CITY OF KNOXVILLE

By: 

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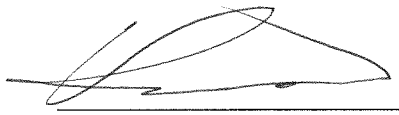
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief has been served upon Joelle Phillips, AT&T Tennessee, 333 Commerce Street, Suite 2101, Nashville, Tennessee, 37201-1800 (jp3881@att.com) and David Buuck, Knox County Chief Deputy Law Director, 400 Main Street, Suite 612, Knoxville, Tennessee, 37902 (david.buuck@knoxcounty.org) by placing the same in the United States mail, postage prepaid, or by electronic mail on this the 30th day of October, 2012.



Ronald E. Mills

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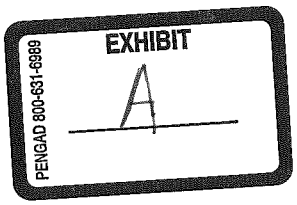

CITY OF KNOXVILLE

Law Department
Charles W. Swanson
Law Director

Ronald E. Mills
Deputy Law Director

June 1, 2012

Ms. Valerie H. Montalvo
CTV Liaison
AT&T
208 S. Akard Street
Dallas, TX 75202
vj0436@att.com

Dear Ms. Montalvo:

David Vogel of Community Television of Knoxville has advised me that AT&T is no longer providing access to public, educational and government (PEG) channels for its U-verse customers in the City of Knoxville and Knox County. This is apparently because the encoder that delivers the PEG signals to AT&T is no longer functioning. Your e-mail communications with Mr. Vogel of May 30, 2012 demonstrate that AT&T is aware of this issue.

The Tennessee Competitive Cable and Video Services Act of 2008, TENN. CODE ANN. § 7-59-301, *et seq.*, requires the holder of a state-issued certificate of franchise authority such as AT&T to be responsible for transmission of PEG signals from the local programmer. TENN. CODE ANN. § 7-59-309(f)(1)(B) makes it clear that this is to be done at the sole expense of the certificate holder, including the cost of any equipment necessary to transmit such signals ("A holder of a state-issued certificate of franchise authority must transmit a PEG channel by one (1) of the following methods:...(B) Transmission of the signal from each PEG channel programmer's local origination point, at the holder's expense, such expense to include any equipment necessary for the holder to transmit the signal from PEG channels activated as of July 1, 2008, if the origination point is in the holder's service area.").

This letter is to make demand on AT&T to take the necessary steps to resume carrying Community Television of Knoxville's PEG channels immediately. Failure to do so will result in a complaint filed with the Tennessee Regulatory Authority pursuant to TENN. CODE ANN. § 7-59-312.

Your e-mail message to Mr. Vogel of May 30, 2012 (12:03:09 p.m. E.D.T) indicates that the malfunctioning encoder "is now owned by City of Knoxville". If this is the case, please advise whether AT&T would like an opportunity to repair rather than replace this equipment, so as to minimize its expense. If not, I will advise Mr. Vogel to dispose of the malfunctioning equipment pending replacement by AT&T, as required by the statute.

Sincerely,

Ronald E. Mills

REM:bc

cc: David Vogel, Community Television of Knoxville ✓
Janet Wright, Director of Information Systems, City of Knoxville
Joseph G. Jarret, Knox County Law Director

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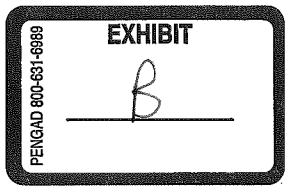

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June 29, 2012

Ronald E. Mills, Esquire
City of Knoxville
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Re: Community Television of Knoxville

Dear Mr. Mills:

Thank you for your June 13, 2012 letter to Paul Stinson. AT&T regrets that the Knoxville PEG channel has experienced an equipment problem that appears to be related to the encoder device used to convert the PEG signal to the format required for transmission by AT&T and viewing on U-Verse™ TV service.

AT&T personnel have had several discussions with City personnel to attempt to resolve this issue, including attempting to remotely diagnose the equipment. Unfortunately, the remote diagnosis was unable to determine the cause of the problem. AT&T has requested that its vendor, Telamon Corp., make contact with the City to attempt additional remote diagnostics, and dispatch a technician (at AT&T's cost) on July 3 at 8:30 a.m. This schedule has been confirmed with the PEG station General Manager. The technician may be able to check the equipment to identify the source of the problem, and offer solutions for repair or replacement if necessary.

While we hope these efforts will be successful, we do not agree with the City's position about AT&T's obligations pursuant to TCA § 7-59-301, *et seq.* for the reasons discussed below.

In compliance with the Competitive Cable and Video Services Act, AT&T carries local public, educational, and government (PEG) channels on its U-Verse™ TV service. As required by T.C.A. § 7-59-309(f), AT&T transmits PEG channels using the process described in subsection (f)(1)(B), which provides that transmission may be accomplished by:

> Transmission of the signal from each PEG Channel programmer's local origination point, at the holder's expense, such expense to include any equipment necessary for the holder to transmit the signal from PEG channels activated as of July 1, 2008, if the origination point is in the holder's service area.

Pursuant to § 309(f)(2)(B), AT&T must

> Provide to the municipality or county, at the holder's expense, in the case of PEG channels activated as of July 1, 2008, the equipment needed to accomplish such alteration.

Consistent with these obligations, in addition to providing the transport facility at no cost, AT&T also provided and installed, at no cost to the city, the equipment necessary to convert its PEG programming signal to the Internet Protocol (IP) format compatible for transmission over AT&T U-verse™ TV. This equipment included an encoder, router, Ethernet switch and connection patch panel, which is the only equipment necessary for AT&T to receive, convert and transmit the city's PEG signal.

No provision of the Competitive Cable and Video Services Act, however, refers to or imposes any ongoing obligation for AT&T to ***maintain or repair*** the encoder equipment.

Nonetheless, in order to ensure that the equipment was in working order when provided, AT&T supplied the Knoxville PEG station with a 90-day warranty for all equipment provided by AT&T. AT&T provided the city with the enclosed information in October 2009 prior to providing the equipment, and the information stated that AT&T would not be responsible for maintenance after the 90-day warranty period.

AT&T fulfilled its equipment obligations by providing a working encoder and other equipment, and it would not be a reasonable construction of the statute to conclude that any failure of the equipment – whatever the cause – is AT&T's responsibility. In fact, as a member of the team that negotiated this language, I recall that this language was intended to be a compromise between placing all the costs for encoding and transmitting on either the PEG stations or on the provider (in this case, AT&T). Had the intent been for providers such as AT&T to replace equipment on an ongoing basis, then the language in § 309(f)(2)(B) would have said "provide ***and maintain,***" rather than "provide."

AT&T hopes that the Telamon technician will be able to identify and resolve the equipment issue and restore the equipment to working condition. However, AT&T does not believe it is required to provide this dispatch at its own expense, nor to replace/repair the equipment beyond the 90-day warranty period. While AT&T does not believe a complaint to the TRA is warranted, AT&T will respond to such a complaint as discussed above.

Cordially,

Joelle Phillips

Joelle Phillips

by Alamaserita w/permission