BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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

REPLY 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 ("the City") hereby submits its Reply Brief in response to the AT&T Tennessee Initial Brief on the Merits (filed Oct. 30, 2012) ("AT&T Brief").

INTRODUCTION

In its brief, AT&T Tennessee ("AT&T") for the most part repeats, with only slight modification, the arguments and largely unsupported and unverified factual assertions contained in its Answer.[1] The City's opening brief has already refuted those arguments and assertions, and the City refers the Authority to that brief and will not repeat those refutations here.[2]

AT&T's Brief does expand and modify a few of the arguments presented in its Answer, but as the City now shows, these variations on AT&T's central arguments do not cure the fundamental defects in AT&T's position. TENN. CODE ANN. § 7-59-309(f) simply does not say what AT&T wants it to say, and no amount of counter-textual argument or unsupported and unverified factual embellishment by AT&T can alter that conclusion.

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[1] Answer of AT&T Tennessee (filed Aug. 24, 2012) ("Answer").
[2] Initial Brief of Complainant City of Knoxville, Tennessee (filed October 30, 2012) ("City Brief").

ARGUMENT

I. THE CITY AND AT&T AGREE THAT TENN. CODE ANN. § 7-59-309(F)'S LANGUAGE IS PLAIN AND UNAMBIGUOUS, BUT THAT DOOMS AT&T'S POSITION.

The City agrees with AT&T that "in construing a statute under its jurisdiction, the Authority must look first to the language of the statute itself," and that in the case of TENN. CODE ANN. § 7-59-309(f), "that language is plain and unambiguous."[3] But § 7-59-309(f)'s language points unambiguously in the City's favor, not AT&T's.

As pointed out in the City's opening brief,[4] the structure and language of § 7-59-309(f)'s twin obligations on providers like AT&T- subsection (f)(1)'s public, educational, and governmental "PEG" access channel transmission obligation and subsection (f)(2)'s PEG signal alteration obligation- lead inexorably to three conclusions.

First, the parallel "equipment," "at the holder's expense," phraseology in §§309(f)(1)(B) and 309(f)(2)(B) must be construed consistently with one another.[5] Since AT&T has conceded that §309(f)(1)(B)'s PEG transmission "equipment," "at the holder's expense," language includes the obligation to replace, repair or maintain that equipment,[6] § 309(f)(2)(B)'s PEG signal alteration "equipment," "at the holder's expense," language must be construed the same way. Put a little differently, to demand, as AT&T does, that the absence of the words, "repair,"

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[3] AT&T Brief at 9. *Accord* City Brief at 4-11.

[4] *Id.*

[5] *See, e.g., P.Darby's Lessee v. James M'Carrol*, 6 Tenn. 286, 1818 WL 427 at *2 (Tenn. Err. & App. 1818) ("wherever a term is used in one part of a law, and also in another part of the same law, if the meaning in one case can be ascertained, the same meaning ought to be affixed to it in others"); *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479, 501 (1998) (it is an "established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning"); *Gustafson v. Alloyd Company, Inc.*, 513 U.S. 561, 573 (1995) ("we cannot accept the conclusion that this single operative word means one thing in one section of the Act and something quite different in another"); 2A Sutherland Statutory Construction § 46:6, at 249 (7th ed. 2007) ("The same words used twice in the same act are presumed to have the same meaning").

[6] Answer at 9. *See* City Brief at 7-8.

"maintain," or "replace" in § 309(f)(2)(B) is somehow significant,[7] while the absence of those same words in § 309(f)(1)(B) is not, stands all notions of consistent statutory construction on their head. [8] It is no answer to say, as AT&T does (AT&T Brief at 10 n.17), that it "would have been easy enough for the General Assembly to have included the words 'maintain,' 'repair,' or 'replace' in § 309(f)(2)(B)." The General Assembly also chose not to include those words in § 309(f)(1)(B), yet AT&T concedes that the "equipment" referred to there encompasses the obligation to maintain, repair or replace the "equipment" that AT&T provides "at [its] expense."[9]

Second, AT&T also ignores the obvious parallelism in the two options given in § 309(f)(2) for a provider to fulfill its signal alteration obligation. Where, as here, a local government provides PEG signals in federal national television system committee ("NTSC") standards or the advanced television committee ("ATC") standards, AT&T must either "[a]lter the transmission signal to make it compatible with" AT&T's system (§309(f)(2)(A)), or it must "[p]rovide to the municipality, at [AT&T's] expense, . . . the equipment needed to accomplish such alteration" (§309(f)(2)(B)). Thus, § 309(f)(2) provides two options for fulfilling the PEG signal alteration obligation that it imposes on video service providers. Under subsection 309(f)(2)(A), the provider may perform the signal alteration within its network. Under the other option, subsection 309(f)(2)(B), the provider may fulfill its signal alteration obligation by providing, at its expense, the locality with equipment that performs that function at the premises of the PEG origination point.

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[7] AT&T Brief at 10.

[8] *See, e.g., Sallee v. Barrett*, 171 S.W.2d 822, 829 (Tenn. 2005) ("statutory term should be construed with reference to their associated words and phrases"); *Freeman v. Quicken Loans, Inc.*, __ U.S. __, 132 S. Ct. 2034, 2042 (*quoting United States v. Williams*, 553 U.S. 285, 294 (2008)) ("a word is given more precise content by the neighboring words with which it is associated").

[9] As shown in Part 2 below, AT&T's only explanation for this inconsistency- that the local government "own[s] and control[s]" the signal alteration equipment (AT&T Brief at 11-12 & 13-15)- is itself based on a false assumption about what § 309(f)(2)(B) says and is also factually inconsistent with how AT&T treats other kinds of equipment that it does choose to own on customer premises.

While these two options are technologically different, the functionality provided to the local government under each is the same: As long as PEG signals are delivered in the NTSC or ATC standards required by § 309(f)(2), the video service provider is responsible, at its expense, for any PEG signal alteration needed to make the PEG signal compatible with its system. Thus, while § 309(f)(2) gives a video service provider two different technological options to perform signal alteration, the provider's obligation under either option is the same: to provide PEG signal alteration.

AT&T's construction, in contrast, would mean that §309(f)(2)(A) and (B) are not "options" for achieving the same result at all, but are instead two different and unequal obligations from which a provider may select, with one (§309(f)(2)(B)) being a far lesser obligation on the provider, *and* a greater burden on the local government, than the other obligation (§309(f)(2)(A)). And since AT&T, not the local government, chooses which of these two markedly unbalanced obligations it has to fulfill, the lesser one or the greater one, § 309(f)(2)(B) is, under AT&T's reading, fundamentally different than §§ 309(f)(1)(A), (f)(1)(B) *and* (f)(2)(A). According to AT&T, § 309(f)(2)(B), alone among these provisions, is asymmetric and non-competitively neutral.[10] Yet there is nothing in the language of § 309(f)(2)(B) that suggests that it, unlike § 309(f)(1)(A), (f)(1)(B) or (f)(2)(A), is anything other than an alternative means of fulfilling the general and ongoing PEG transmission and signal alteration obligations set forth in § 309(f)(1) and (f)(2), respectively.

Third, AT&T's assertion (AT&T Brief at 10 & n.13) that the signal alteration obligation is an "exception" defies the text of § 309(f)(2)(B). Again, there is nothing in § 309(f)'s language suggesting that § 309(f)(2)(B), unlike §§ 309(f)(1)(A), (f)(1)(B) and (f)(2)(A), is an "exception." In fact, there is nothing in § 309(f)(2)(B) to suggest that it is any different than what AT&T

[10] *See* City Brief at 9-10.

concedes § 309(f)(1)(B) to be- an explication and specification of one alternative a provider may choose to fulfill its ongoing PEG signal transmission (§ 309(f)(1)), and signal alteration (§ 309(f)(2)) duties through the provision of "equipment," "at the holder's expense."

This also explains why AT&T is wrong in saying (AT&T Brief at 6 n.6 & 9 n.11) that the PEG transmission obligation in § 309(f)(1) and the PEG signal alteration obligation in § 309(f)(2) are unrelated. Structurally, §§ 309(f)(1) and (f)(2) are subdivisions of § 309(f), which generally assigns, on the one hand, all PEG channel content and operation obligations to the local government, and on the other hand, all PEG transmission-related obligations to the video service provider. If the locality delivers PEG signals to the provider at the PEG origination point in NTSC or ATC format (as the City does), it is the provider's responsibility to take those NTSC or ATC signals and perform all transmission and signal alteration functions necessary to deliver those signals to the provider's subscribers. Since the provider, not the locality, decides what transmission protocol or technology its system uses, any common-sense and fair reading of § 7-59-309(f)(2) is that the provider may not, by its choice of transmission protocol, unilaterally shift signal alteration costs to the locality, which has no say over the provider's transmission protocol decision.[11] Put a little differently, what § 309(f)(2) says is that if PEG signals are delivered to the provider in NTSC or ATC format, the provider's PEG signal alteration obligation is part-and-parcel of its ongoing PEG transmission obligation.

II. AT&T'S ENCODER "OWNERSHIP AND CONTROL" ARGUMENT IS FUNDAMENTALLY FLAWED, BOTH LEGALLY AND FACTUALLY.

In a vain attempt to defend its counter-textual and counterintuitive interpretation of § 7-59-309(f)(2)(B), AT&T argues that §309(f)(2)(B) "requires the provider to provide equipment

[11] *See* City Brief at 9-10.

that will be owned and controlled by the Local Governments."[12] According to AT&T, it "would be irrational to conclude that [AT&T], who lacks any control over the care of the equipment, would be responsible for repairs in the absence of explicit language stating that."[13] As an initial matter, the City notes the glaring inconsistency between AT&T's claim that it should not be responsible for the encoder equipment because it lacks control over that equipment, with its argument that the local government should be responsible for repair and replacement of that equipment, even though the local government lacks control over AT&T's election to choose the § 309(f)(2)(B) equipment option rather than the §309(f)(2)(A) "in-network" option.

But the problems with AT&T's equipment "ownership and control" argument go far deeper than that. The City pointed out these fallacies in the City's opening brief[14] but will amplify them here.

First, the premise of AT&T's argument- that § 309(f)(2)(B) prohibits AT&T from retaining ownership of the encoder and requires it to transfer ownership and control of the equipment to the local government- is fashioned out of whole cloth. Nothing in § 309(f)(2)(B) says that. It says that AT&T must "[p]rovide" to the local government signal alteration "equipment," "at [AT&T's] expense." AT&T certainly can- and as noted below, does- "provide" equipment to customers at their premises while retaining ownership and control of that equipment. And AT&T concedes that it retains ownership and control of the PEG transmission "equipment" that it must provide "at [its] expense" pursuant to § 309(f)(1)(B).[15] Again, AT&T points to nothing in the language of §§ 309(f)(1)(B) and (f)(2)(B) that draws the distinction it seeks to draw. AT&T's unilateral, and self-serving, written "material" delivered with the

[12] AT&T Brief at 11.
[13] *Id. See also id.* at 12 & 14.
[14] City Brief at 10-11 n.22.
[15] *See* AT&T Answer at 9.

equipment to the City and County about ownership of and responsibility for the equipment[16] cannot alter § 309(f)(1)(B)'s language. The simple truth is that AT&T, not § 309(f)(1)(B), made the decision to pass ownership of the encoders to the City, but AT&T cannot, through that unilateral decision, alter or eliminate the ongoing signal alteration obligation imposed on it by § 309(f)(2).

Second, another premise of AT&T's claim—that because equipment is located on a customer's (or in this case, the City's) premises, AT&T somehow cannot retain ownership or control of it—is equally false. As AT&T well knows (but chooses not to disclose to the Authority), it routinely retains ownership and control of equipment placed on its customers' premises. To cite but one example, AT&T's "U-verse Voice and TV Terms of Service" provide that AT&T may retain ownership of, and in most cases lease to the subscriber, all manner of equipment- from the AT&T U-verse TV Receiver (AT&T's set-top box), to its residential/wireless gateway, to Optical Network Terminals- that, like the encoders of issue here, is located at the customer's premises.[17]

That is not to say that § 309(f)(2)(B) requires AT&T to retain ownership of the encoders rather than transferring ownership to the locality. Either option would be consistent with the statute. But AT&T may not, by unilaterally choosing to pass ownership of the encoders to the City, reduce or change its ongoing signal alteration obligation under § 309(f)(2)(B).[18]

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[16] AT&T Brief at 7-8, 15 & Exhibit A.

[17] AT&T U-verse Voice and TV Terms of Service, *available at* http://www.att.com/u-verse/att-terms-of-service.jsp (last visited Nov. 9, 2012). *Accord* AT&T U-verse Offer Details, *available at* http://www.att.com/u-verse/explore/offer-details.jsp (last visited Nov. 9, 2012); AT&T U-verse IPTV Technology, *available at* http://www.att.com/u-verse/explore/iptv-techonology.jsp (last visited Nov. 12, 2012).

[18] As noted in the City's opening brief (at 10-11 n.22), it is AT&T's hypothetical- that the City might "toss[] the equipment out the window"- that is "absurd," not the City's argument. AT&T Brief at 13 & 14. No such facts are presented here. Moreover, had AT&T retained ownership of the encoder, as § 309(f)(2)(B) allows it to do, it would have a claim against the City for any intentional loss or destruction of AT&T's equipment caused by the City. Furthermore, where ownership of the encoder is passed to the locality, if the equipment is lost or damaged through

III. AT&T'S "FRANCHISE FEE" ARGUMENT AND ITS SELF-SERVING, UNVERIFIED AND UNSUPPORTED ASSERTIONS ABOUT THE SUPPOSED COMPROMISES THAT LED TO THE CCVSA ARE NOTHING MORE THAN A DIVERSION FROM THE STATUTORY CONSTRUCTION ISSUES AT HAND.

As it did in its Answer, AT&T goes on at some length in its brief about what it claims (without a shred of citation or verification) were the supposed motivations of the various interested parties and the General Assembly in enacting the CCVSA.[19] *See* AT&T Brief at 2-3, 3-7, 12-14 & 15. AT&T also places repeated emphasis on the 5% franchise fee that the CCVSA requires it to pay to local governments like the City. *Id.* at 1, 3, 4, 12, 13 & 14.

Like AT&T's other arguments, these arguments have already been addressed, and refuted, in the City's opening brief.[20] The City supplements with only a few additional points here.

While the City does not agree with many of AT&T's characterizations of the various alleged compromises and "balance[ing of] competing interests"[21] resulting from "weeks negotiating"[22] over the CCVSA, neither AT&T's nor the City's version of those events is at all relevant to the Authority's task at hand: construing the meaning of § 7-59-309(f) from the language that the General Assembly actually enacted.[23] AT&T's wholly unsupported story about what allegedly went through the minds of AT&T's representatives and some unknown number of General Assembly members before the CCVSA was enacted is sheer diversion.

AT&T's myopic fixation of the 5% franchise fee is sheer diversion as well. What is before the Authority is not an assessment of the respective parties' ability to pay for replacing or

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the fault of the locality, that might well affect the scope of AT&T's § 309(f)(2)(B) obligation with respect to that equipment. But that is not this case, and the Authority can address such a case when and if it were to arise.

[19] Competitive Cable and Video Services Act, TENN. CODE ANN. §§7-59-301 *et seq.* ("CCVSA").

[20] City Brief at 12-13 & 16-18.

[21] *E.g.*, AT&T Brief at 5.

[22] *E.g.*, *id.* at 3.

[23] City Brief at 12-13.

repairing the encoder; what is before the Authority is what § 7-59-309(f) says about AT&T's PEG signal alteration obligations. But even if AT&T were correct that ability to pay is relevant, that would point unequivocally in the City's favor, not AT&T's.[24]

Moreover, it is worth noting that Comcast, the City's incumbent cable operator, pays the City far more in franchise fees than AT&T, performs all PEG transmission and signal alteration functions at its own expense, *and* pays the City far more in PEG support fees than AT&T. Yet AT&T claims that § 309(f)(2)(B) somehow provides it, and only it, with a built-in statutory advantage over Comcast and all of its other video service competitors in terms of being able to shift signal alteration costs to the locality. What AT&T does not, and cannot, rationally explain is where such special statutory favoritism for AT&T can be found in the language of § 7-59-309(f)(2).

CONCLUSION

For the foregoing reasons and those set forth in the City's initial brief, 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 CCVSA franchise.

[24] *Id.* at 16-18.

Respectfully submitted this 20th day of November, 2012.

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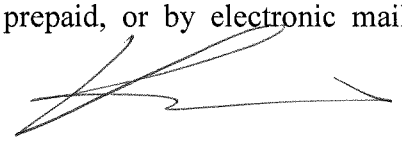
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Reply 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 20th day of November, 2012.



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