

## Telecommunications Alert: Municipal Advocates File FCC Petition Claiming AT&T Version of Streaming PEG Access Unlawful

2/6/2009

Late last week, several municipal public, educational and governmental access (“PEG”) advocates<sup>1</sup> filed a Petition for Declaratory Ruling asking the Federal Communications Commission (FCC) to determine that AT&T’s method of delivering PEG access over its U-verse system (1) systematically discriminates against PEG programming, (2) fails to properly provide PEG programmers with channel capacity for PEG use, and (3) violates the FCC’s closed captioning rules. Today, the FCC called for comments on the Petition by March 9, 2009, with replies due March 24.<sup>2</sup>

AT&T delivers its “PEG product” for several communities through a single channel location where PEG access programs for each community and topic are found by a viewer search through a menu using web-based technology. In contrast, AT&T uses traditional dedicated channel delivery for broadcast and commercial cable channels on U-verse.

The Petition follows a letter sent to the FCC last September by House Appropriations Committee members asking the FCC to investigate similar discrimination concerns raised in a subcommittee hearing. The Petition filing appears designed to place this issue in the forefront of the agenda of the new Obama FCC.

### AT&T PEG Access System Claimed to Violate Act Whether Or Not AT&T Is a “Cable Operator” or U-verse Is a “Cable Service”

PEG Advocates argue that AT&T is a “cable operator” and that its U-verse service is a “cable service”. But even if AT&T’s IPTV video offering were found to be a non-cable “information service”, PEG Advocates argue that its “discrimination against PEG” violates the FCC’s 2005 *Internet Policy Statement*. PEG Advocates further note the FCC’s explicit application of the obligation to pass-through closed captioning to all “video programming distributors,” rather than only to cable operators.

### Discrimination Claims

PEG Advocates claim AT&T’s version of PEG access streaming systematically discriminates against PEG access programming through diminished accessibility, functionality and signal quality.

### Accessibility

AT&T’s U-verse carriage of broadcast or commercial cable programming channels, PEG Advocates claim, is virtually indistinguishable from their carriage on a traditional cable system. Each are assigned a distinct U-verse channel. But all PEG access programming is assigned to Channel 99 on the U-verse lineup, which “is not a video channel at all.” Once a viewer chooses Channel 99, an Internet-mediated application is downloaded. Once the download is complete, the viewer must first scroll through the list of communities served by U-verse and then through a menu of PEG channels for the selected community (load times can vary depending upon the number of local PEG channels). Channel surfing is limited because a viewer must first back out of the PEG channel he or she is viewing rather than moving between channels.

### Functionality

Secondary audio program (SAP) capability is not available in the AT&T PEG product, since SAP provided by PEG programmers is not passed through to viewers. AT&T’s PEG product cannot use the U-verse’s own DVR function and viewers are limited in their ability to use other recording devices to record PEG programming.

### Signal Quality

Signal quality is allegedly distorted for AT&T’s PEG access programming due to “unknown differences” between the compression techniques, frame rate, and downstream delivery mechanisms used for PEG access programming and those used by AT&T for broadcast or commercial cable channels. PEG Advocates claim the result is inferior PEG access video and audio quality, which runs counter to longstanding FCC policy that all downstream video channels on cable enjoy uniform quality, and may also violate section 623 of the Communications Act as a *de facto* exclusion of PEG programming from the basic tier.

### PEG Channel Capacity

PEG Advocates claim AT&T’s PEG product fails to provide PEG “channel capacity,” as required by section 611 of the Communications Act (the “Act”), because the mere access to an Internet-delivered on-demand type menu of streamed PEG program channels does not conform to the meaning of the term “channel” in the Act. Since AT&T’s PEG access product does not give the same channel bandwidth and treatment to PEG access that it provides to broadcasters and commercial cable programming, it is not providing the legally required “channel capacity.”

### Closed Captioning

AT&T passes through closed captioning on broadcast and commercial cable channels, but it only open captions PEG access programming. PEG Advocates complain that this “always-on” display of open captioning constantly blocks a portion of the picture. While one section of the FCC’s rules permits open captioning (Section 79.1(e)(2)); another section (Section 79.1(c)) requires any video program distributor to pass-through all closed captioning that it receives embedded in programming. PEG Advocates contend that the Act’s permissive open caption provision does not trump the pass-through requirement when closed captions are provided.

Let us know if you wish us to provide a copy of the petition, or inform you of any future FCC actions in this area.

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### Endnotes

<sup>1</sup> The Petition was filed on January 30, 2009 by the Alliance for Community Media and its regional offices; Alliance for Communications Democracy; Sacramento Metropolitan Cable Television Commission; Foothill-De Anza Community College District; Chicago Access Network Television; Illinois NATOA; Manhattan Neighborhood Network; Bronxnet; Brooklyn Community Access Television; City of Raleigh, North Carolina; and SEATOA (“PEG Advocates”). It has been assigned the CSR-8126-28 file numbers by the FCC. See Public Notice DA 09-203 (February 6, 2009).

<sup>2</sup> MB Docket No. 09-13.

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Please contact your Mintz Levin telecommunications attorney, or any attorney listed below, for more information as we continue to follow these developments.

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