

Testimony  
of the  
**Honorable John B. O'Reilly, Jr.,**  
Mayor of Dearborn, Michigan.

on behalf of



Before the  
Subcommittee on  
Telecommunications and the Internet  
Energy and Commerce Committee  
United States House of  
Representatives

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Washington, DC

## **I. INTRODUCTION**

Good afternoon, Chairman Markey and members of the Subcommittee, I am John B. O'Reilly, Jr., the Mayor of Dearborn, Michigan. While I will be providing details on what is happening in my city with respect to Comcast's provision of public, education and government ("PEG") channels, the same challenges are, or will be, faced by my local government colleagues across the nation.<sup>1</sup> For that reason, I am pleased to offer my comments today for Dearborn, but also on behalf of local governments across the nation, as I have been asked to speak on behalf of the United States Conference of Mayors<sup>2</sup>, the National League of Cities<sup>3</sup>, the National Association of Telecommunications Officers and Advisors<sup>4</sup>, the National Association of Counties<sup>5</sup>, TeleCommUnity<sup>6</sup> and the Michigan Coalition to Protect Public Rights of Way ("PROTEC")<sup>7</sup>.

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<sup>1</sup> For example, it is my understanding that Bright House Communications is digitizing and moving PEG channels in Florida in much the same way that Comcast plans in Michigan.

<sup>2</sup> The U.S. Conference of Mayors (USCM) is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,139 such cities in the country today. Each city is represented in the Conference by its chief elected official, the mayor.

<sup>3</sup> NLC is the nation's oldest and largest organization devoted to strengthening and promoting cities as centers of opportunity, leadership and governance. NLC is a resource and advocate for more than 1,600 member cities and the 49 state municipal leagues, representing 19,000 cities and towns and more than 218 million Americans.

<sup>4</sup> NATOA's membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer communications policy and the provision of services for the nation's local governments.

<sup>5</sup> "The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,066 counties. NACo advances issues with a unified voice before the federal government, improves the public's understanding of county government, assists counties in finding and sharing innovative solutions through education and research, and provides value-added services to save counties and taxpayers money." For more information about NACo, visit [www.naco.org](http://www.naco.org).

<sup>6</sup> **TeleCommUnity** is an alliance of local governments and their associations which are attempting to refocus attention in Washington on the principles of federalism and comity for local government interests in telecommunications.

<sup>7</sup> The Michigan Coalition To Protect Public Rights-Of-Way was formed in 1996 by several Michigan cities interested in protecting their citizens' control over public rights-of-way, and their right to receive fair compensation from the telecommunications companies that use public property.

I would also like to acknowledge the leadership of Meridian Township, Michigan on these issues. Meridian is our co-plaintiff in our federal litigation against Comcast. It was also Meridian Township that traveled to Washington in late December to brief your staff and the FCC on this issue.

My message today is simple. When it comes to PEG, Congress got it right in 1984, and again in 1992. And I am not saying that only because I worked for the Committee at that time. On both occasions you concluded that PEG channels serve substantial and compelling government interests in fostering diversity, promoting a free marketplace of ideas, and creating an informed and well-educated citizenry.<sup>8</sup> For these reasons you mandated that PEG channels *be available to all cable subscribers on the basic service tier and at the lowest reasonable rate.* Today, Comcast and AT&T, and other video service providers, cloaked in the guise of "digital advancement," seek to rid themselves of these congressionally-mandated public interest obligations. I am here today to ask Congress to reiterate its commitment to PEG and ensure that the telephone and cable industries are not permitted to undercut these congressional mandates, which have given the nation an explosion in vital local programming.

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<sup>8</sup> The basis for these claims may be found in detail in the successful Dearborn and Meridian Township brief filed in support of a preliminary injunction that has been attached as Appendix A.

## **II. LOCAL GOVERNMENTS WANT BROADBAND COMPETITION AND WELCOME THE DIGITAL AGE**

Before addressing the PEG challenges we face today in Michigan, allow me to make two points very clear.

- Dearborn, like every other local government, welcomes broadband competition. The GAO and FCC have both documented that only wireline competition leads to lower cable rates. Before AT&T even entered the market, Dearborn had wire to wire competition and substantial satellite penetration.<sup>9</sup>
- Dearborn, like other communities across the country, wants more broadband competition as well - a feature that seems to go hand in hand with video these days. We want faster speeds and better services; and we want as many new providers as the market will support.
- And, Dearborn and its citizens want to be active participants in the Digital Age. You may hear from witnesses today that local government is seeking to hold back progress. Nothing could be further from the truth. We just refuse to allow the conversion to the digital age to serve as an excuse for treating local PEG channels in a way that burdens both subscribers and PEG programmers, while breaching existing obligations.

So while you will hear me question Comcast's and AT&T's commitment to providing PEG services to my community, please do not mistake that message for any

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<sup>9</sup> In my community, we have approximately 40,000 homes passed by video providers -- 15,000 homes are served by Comcast, 7,500 homes are served by WOW. The remaining homes are served by satellite or choose to limit their video entertainment to over-the-air broadcast signals.

lack of commitment by my community to the broadband digital competition we seek. Dearborn, just like local communities across the country, welcomes and encourages broadband providers that might like to make Dearborn their home.

### **III. THE DEARBORN STORY**

PEG programming has been an unqualified success in Dearborn.

Cable, with its promise of clear transmission of local broadcast television and local PEG programming, arrived in Dearborn in the early 1980s. Cable offered consumers not only local broadcast stations, but also community-based PEG programming. Our schools, community colleges, service clubs, and the City itself have produced over 25 years of original local programming, including public access programming in Arabic, to serve Dearborn's large Arab-American population.<sup>10</sup>

Comcast's franchise with the City of Dearborn today requires the operator to carry six PEG channels. The franchise also requires that the channel locations "shall be by mutual agreement of the City" and the franchisee. The federal law requirement for PEG to be placed on the basic service tier with other broadcast channels, as well as the specific terms of the city's franchise agreement, has ensured that the PEG channels were kept on the lower numbers of the dial near their network broadcast peers. This placement has resulted in the widest possible audience, a result vitally important to us because we employ our PEG channels as part of our emergency response plan. The city also provides public safety alerts and appropriate related directions on our PEG channel. We believe

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<sup>10</sup> One example of this local diverse programming is "Bible Time Quiz," a show in which young people of all faiths are tested on their knowledge of the Bible. The show has thrived on local cable for over twenty years.

that channel placement on the lower channels aids in citizens' discovering our programming through their viewing habits, and consequently allows us to reach more members within our community with this vital information. As importantly, because the channels are provided in the same format as the broadcast channels, subscribers to the lowest level of service can view these channels without the need for any special equipment, on any standard television set, and without any special charges. This means that we are able to communicate with people in our community who cannot afford the best available televisions, or the highest levels of service. This is the "lifeline" video service that cable offers to the community.

Against this backdrop of success, you can well imagine how shocked we were to receive a notice from Comcast last Thanksgiving advising us of their plan to digitize the format of our PEG channels, move them to the 900 tier, and require all consumers who wished to continue to view PEG programming to obtain a digital converter.<sup>11</sup> Under the Comcast proposal, other basic tier channels, including standard broadcast channels, would continue to be provided in analog format and would continue to reside on their present channel number.

Comcast did offer each basic subscriber household that was not already subscribing to digital service a digital converter rent-free for one year. But it never

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<sup>11</sup> During court testimony, we learned that there are over 400,000 Comcast subscribers in Michigan who take only analog services. These subscribers would have been required to obtain converters at additional cost in order to continue to watch PEG channels. We also learned that many homes receive digital service at one set, but analog services at other sets in the home. In these homes, the subscriber would be restricted to watching the PEG channels on one set in the home, or incur substantial additional costs. The result is that most, if not all, Comcast subscribers would have been adversely affected.

conveyed this message clearly to subscribers, and the offer had several limitations. Perhaps most importantly, the proposal was only for one year, and for one converter box per home, meaning that homes with multiple televisions would receive PEG signals on only that one set. All other televisions would require a converter box with a monthly charge of \$4.20. For many households, especially those on fixed incomes, such charges are not insignificant. Additionally, the plan made no accommodations for our schools where PEG programming is employed for educational purposes. Most schools have a television in every classroom, as cable can attest as a result of their “Cable in the Classroom” initiative that is now many years old. However, in Dearborn, in order to receive PEG programming under Comcast’s proposal, schools would have been required to rent a converter for each classroom. I need not tell you that Michigan is facing some fiscal challenges and it is not safe to assume that cash-strapped school systems will have the money to obtain digital converters so that their students might watch the very programming they themselves crafted.

My City was alarmed by Comcast’s proposal. We asked Chairman Dingell for assistance and he contacted Comcast on behalf of Dearborn and others. When Comcast declined Chairman Dingell’s request to modify its proposal, we were left with no choice but to initiate litigation. On January 14, 2008, hours before Comcast’s plan was to take effect, the Honorable Victoria A. Roberts, United States District Judge for the Eastern District of Michigan, issued a Temporary Restraining Order and Preliminary Injunction

blocking Comcast's plan.<sup>12</sup> In her decision, Judge Roberts specifically referred to this committee's conference report when it passed the 1992 Cable Act.

#### **IV. CONGRESS GOT IT RIGHT IN 1984 AND AGAIN IN 1992**

Under Chairman Dingell, and your leadership Mr. Markey, Congress got it right in 1984 and again in 1992. The Federal Cable Act, 47 U.S.C. § 521 *et seq.*, permits local governments to require cable operators to set aside channel capacity for PEG use. 47 U.S.C. § 531. Congress intended PEG channels to be “the video equivalent of the speaker's soap box or the electronic PEG access channels [and that they] belong on the basic service tier, alongside broadcast channels.” H.R. Rep. No. 98-934, *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 (1984).

In 1992, the House again emphasized the importance of the PEG channels, and reiterated that Congress intended that PEG channels “...be available to all cable subscribers on the basic service tier and at the lowest reasonable rate.”<sup>13</sup> Relying in part on the statute and its legislative history, in 1996, the Supreme Court affirmed, among other things, that PEG channels are subject to the exclusive control of the local community.<sup>14</sup>

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<sup>12</sup> A copy of the Order is attached hereto as Appendix B.

<sup>13</sup> PEG programming is delivered on channels set aside for community use in many cable systems, and these channels are available to all community members on a nondiscriminatory basis, usually without charge....PEG channels serve a substantial and compelling government interest in diversity, a free market of ideas, and an informed and well-educated citizenry....Because of the interests served by PEG channels, the Committee believes that it is appropriate that such channels be available to all cable subscribers on the basic service tier and at the lowest reasonable rate. H.R. Rep. No. 102-628 at 85 (1992) (emphasis added).

<sup>14</sup> The Supreme Court in *Denver Area Educational Telecommunications Consortium v. F.C.C.*, 518 U.S. 727, 760-61 (1996) concluded:

...the requirement to reserve capacity for public access channels is similar to the reservation of a public easement, or a dedication of land for streets and parks, as part of a municipality's approval



While the Cable Act and its legislative history clearly demonstrate Congress's intent to protect PEG programming, this has not stopped the industry from undercutting Congress's vision. In our case, Comcast asserted that it has the right under the Cable Act: to format the PEG channels however it wanted; charge whatever it wanted for them; and place them wherever it chooses to place them, because the Act does not specifically state that an operator is prohibited from doing so.

Comcast was blunt on this point in oral argument before the Court. As a technical matter, Comcast argues that it is only required to provide PEG as part of basic service in the communities where rates remain subject to rate regulation (because the basic service requirement appears in the rate regulation section of the Act). We think that Comcast's treatment of PEG is unlawful under the Act given the legislative history and given the nature of PEG channels, but we are now facing significant litigation and litigation costs in order to protect PEG.

But at least of Comcast, it can be said that they were simply acting in accord with their view of federal law, however mistaken that might be. In other cases, companies are asking state legislatures to undercut PEG commitments and allow operators to ignore local needs. In other cases, providers such as AT&T refuse to acknowledge that they are a cable operator subject to the terms of the Cable Act – so that no federal PEG

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of a subdivision of land. Cf. post, at 2410 (opinion of KENNEDY, J.). Significantly, these are channels over which cable operators have not historically exercised editorial control. *See also* 518 U.S. at 734 (referring to PEG channels as “special channels” available to those to whom the Cable Act gives “special cable system access rights”).

obligations apply to them. And yet, AT&T relies on the Cable Act to assert that no state or local government may dictate the form of transmission technology they use.

**V. AT&T Pull Down Version of PEG**

While I object to Comcast shifting our PEG channels to the 900 level, at least Comcast is providing us with channels. AT&T offers the American public much less.<sup>15</sup>

AT&T's U-Verse "PEG solution" is to place all PEG channels from a given region in a single location on their system, on a single channel, number 99. Under AT&T's provision of service, consumers go to Channel 99, where they will find a submenu that lists various PEG channels. I am led to believe that list might well include over one hundred such submenu choices. So it is clear that finding Dearborn's PEG stations will not be easy.

Worse, there are technical, financial and signal shortcomings in their plan. PEG is delivered to AT&T's headends via a Windows media stream. In order to provide that stream, the local franchising authority must purchase new equipment required by AT&T, but paid for by the local community. The signal is inferior in strength compared to that of commercial broadcast; it does not pass through closed captioning contained within the programming; and the system does not pass through live public safety or emergency alerts that are sent out by the City. It is my understanding that my colleague from Palo

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<sup>15</sup> While AT&T has commenced marketing its U-Verse service in portions of Dearborn, they have not yet begun to provide PEG. This portion of my testimony relies upon the PEG issues we anticipate based upon AT&T's PEG performance in other communities.

Alto will address the shortcoming of the AT&T program in greater detail, so I will move on.

## **VI. WHAT CAN CONGRESS DO**

We believe that the law is clear that Comcast's proposed action in Michigan, and AT&T's current delivery of PEG programming with its pull down channel nationwide, are not consistent with the letter, let alone spirit, of the Cable Act. Nevertheless, it is plain that many in the industry are willing to treat PEG as a second-class service. As a result, unless Congress removes any doubt as to how PEG is to be carried, there could be years of expensive litigation during which the public and PEG access will suffer.

There is a need to reiterate the congressionally established national standard, so that the goals Congress intended to achieve by allowing channels to be set aside for PEG are realized and protected. Let me repeat what those goals are:

- Congress thought PEG could contribute to an informed citizenry, by bringing government and schools into the home. This remains a valid concern even in a digital age.
- Congress thought that it was important to ensure that every subscriber to cable have access to a basic level of local information, consisting of the PEG channels and the broadcast channels. This remains a valid concern even in a digital age.
- Congress understood that operators were not likely to produce local programming or provide the resources necessary to serve the needs of individual, local communities. This interest in promoting localism and locally tailored services remains important in the digital age.

Some operators argue that PEG is not needed in an Internet age. That is not the case, as the behavior of broadcasters and commercial programmers shows. The Internet is an additional and important way to communicate. It is not now, and may never be, a complete substitute for television. Certainly at this point, there are many Americans who

do not have and cannot afford both traditional cable and high-speed Internet. PEG channels provide an electronic and easily accessible forum for communications that we cannot easily duplicate.

Some operators argue that PEG channels prevent them from rolling out services that consumers want: high definition channels, for example. There are two answers to this claim: first, operators can provide more services and channels by investing to create additional broadband capacity. We should not be encouraging companies to limit investment by allowing them to take away PEG channels that are intended to benefit the public. Second, no operator asked us or our subscribers what we wanted. They did not give subscribers the option of receiving educational access in analog, rather than Spike TV. What Comcast did was to focus on its own narrow commercial interests. The Cable Act recognized that left to their devices operators would do just that, and that local governments had to be able to establish requirements to meet local needs. That was the right choice to make and it should be reaffirmed now.

Specifically, we believe this Committee should examine PEG in the digital age and clarify:

1. The existence of a basic service tier is not limited to rate regulated communities, but is an obligation of every video provider utilizing public property for the delivery of its services.
2. PEG channels must appear on the basic service tier or the same level of service as that of commercial broadcast channels.

3. PEG programming must be delivered with the same visual and audio quality and technical functionality (including closed captioning) as that provided for commercial broadcast channels, without the need for any equipment other than that necessary to receive the provider's basic cable or video service offering.
4. A single tier of service may not be technically divided such that the subscriber must employ any additional equipment to view all programming on that tier.

With the increase in consolidation of media interests, and the unprecedented attack on local interests in the provision of video services, it is critical that PEG programming -- this fundamental element of localism -- be protected and preserved. I am here today to ask you to do just that.

Thank you for the opportunity to testify and I look forward to your questions.