

TESTIMONY  
OF  
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**Introduction:**

My name is Bill Durand and I am the Executive Vice President and Chief Legal Counsel for the New England Cable & Telecommunications Association, Inc., otherwise known as NECTA. NECTA represents substantially all cable television operating and programming companies that serve Connecticut and the other five states in the region. NECTA respectfully submits testimony in opposition to Raised Bill 5814.

HB 5814 seeks to make significant changes to comprehensive video franchise reform legislation passed by this committee in the last session, and which has been in effect for barely 5 months. NECTA respectfully suggests that the new law that took effect on October 1, 2007 be allowed to work, and that any changes to the legislation be based on actual problems that exist, rather than theoretical concerns that may never materialize.

**Existing PEG Rules Still Apply**

The cable industry in Connecticut has a good story to tell. We provide a 24/7 dedicated television channels for carriage of public, education and government access programming. For cable customers, those linear channels aren't difficult to find and are carried in a manner consistent with local broadcast stations and national cable networks. We have provided financial support, facilities and equipment for public access since the concept emerged in the seventies. Yet many of the provisions of HB 5814 seek to place

the burden of maintaining the viability of PEG access programming solely on the backs of cable companies and their customers. For example, many provisions of HB 5814 imposes new or continue old requirements on cable television companies while allowing AT&T to provide PEG access in the manner it considers to be least burdensome. Even with new certificates of cable franchise authority obtained over the past several months by many cable companies under PA 07-253, Connecticut law continues to impose extensive requirements on cable. Those requirements that remain in place for NECTA members include:

- Funding on a per subscriber level for PEG access, subject to an annual CPI adjustment;
- Establishment and maintenance of a fixed production studio, along with equipment, editing capabilities and related production facilities;
- An annual review of access rules, regulations, policies and procedures, subject to public comment and advisory council consultation;
- Promotion of PEG access services, including cross channel promos, distribution of information, character generated text messages or video announcements, public speaking engagements and open house receptions;
- Promotion of programming diversity;
- Prohibitions on exercise of editorial control over PEG access programming;
- Annual reporting requirements, which involve submission of detailed information to the DPUC and to the advisory councils;
- Statutory obligation prohibition against refusing to engage in good faith negotiations over interconnection of access facilities

## **The Bill Creates an Unfair Competitive Advantage**

A particularly egregious provision of this bill is found in section 5 (c) which requires the Department of Public Utility Control to adopt regulations requiring each community antenna television company to maintain at least the number of specially designated, noncommercial community access channels available to the public that existed as of January 1, 2008 and establishing minimum standards for the equipment supplied by such company for the community access programming and requirements concerning the availability and operation of such channel or channels. If AT&T determines it is more “economical”<sup>1</sup> to provide PEG on-demand and cable is forced to continue carrying both services on traditional channels, AT&T will be given a major competitive advantage. For each linear channel we are required to carry, we lose the ability to add two or three High Definition channels in that space. If AT&T is allowed to provide PEG without using dedicated channels, then they can offer up to 6 more HD channels than the incumbent cable operator. Preserving bandwidth for deployment of higher speed broadband and competitive telephone is critical in a competitive market. With that said no cable operator has threatened to cut back on any PEG access channel capacity; yet, Section 5 requires cable companies to maintain in perpetuity the exact same number of access channels that existed as of Jan. 1, 2008.

There may be emerging technologies that could actually enhance the delivery process that could allow us to reclaim linear channels while continuing to provide the same quality PEG channels. If this bill passes AT&T is free to operate as it pleases and

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<sup>1</sup> Section 8 (a) If the competitive video service provider is required to change the form of the transmission, the provider of community access programming shall permit the competitive video service provider to do so in a manner that is most economical to the competitive video service provider

cable is stuck with 2008 technology. HB 5814 appears focused on punishing cable operators for sins that have not been committed. As discussed above, Sections 5 and 10 seek to preserve in perpetuity obligations that cable operators may have had under former DPUC franchises but have no applicability to AT&T's video service. Current law allows the DPUC to adjust the number of access channels based on usage and channel capacity. Section 10, which would appear to affect only Cox in three towns (Rocky Hill, Wethersfield and Newington), would require Cox to continue to divert money designed to support PEG throughout its franchise area and instead provide "grants" to local town studios, notwithstanding their ability to seek funding from the multimillion dollar PEGPETIA fund established under 07-253. (Notably, Cox, without any such franchise requirement, has voluntarily pledged to provide the grants for these 3 towns in 2008. It should be noted that these town "user group" studios are not designated PEG access managers, and are not available for use by Cox customers throughout its franchise area.) Both of these provisions are solutions to problems that don't exist.

Sections 6 and 7 propose to eliminate the ban on cable company employees from serving on cable advisory councils. NECTA is concerned that AT&T will seek to establish significant representation on cable company advisory councils, which will certainly prevent full and open discussion of issues and plans. We recommend that employees of companies that hold a cable television franchise, a certificate of cable franchise authority or a certificate of video franchise authority be permitted to serve on local advisory councils only in an *ex officio* capacity.

Section 4 authorizes, in fact requires, "local cable access advisory boards" to mediate customer inquiries and complaints concerning public access. There is no reason

why the companies or independent organizations that manage access should be taken out of the complaint process. If a complaint is not resolved, then it can be escalated to the DPUC as always. (Complaints about obscene or indecent programming continue to be addressed to the advisory council.)

Section 9 of this bill would reverse the authority of the DPUC to grant franchises to competing cable operators on fair and equal terms, an option made available under the law passed last year. There is no reason to modify that option, as cable operators that have fair and level franchises continue their commitment to support Public, Educational and Government programming, community and public affairs (CTN) programming, and enjoy no special privileges over the new competitors -- to the contrary, this franchise option is a measure to ensure a level playing field under CT law. The law was the product of extensive negotiation and compromise, and should not be modified to introduce a measure of disparity to handicap one provider against another. Further, any measures that might be seen to abrogate existing licenses may be legally suspect.

**Several Sections Conflict with Federal Law:**

The requirement in Section 5 that existing operators lock in "the number of specially designated noncommercial community access channels available to the public" as of Jan 1, 2008 violates at least three provisions of the federal Communications Act. The Act declares both that "Any franchising authority [like Connecticut] may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title," and that "Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable

services, except as expressly provided in this title." The "Title" in these provisions means Title VI of the Act, also known as the Cable Act. These sections, which establish a strong presumption against state regulations for the services, facilities, provision or content of cable services, are at 47 U.S.C. § 544(a) and 544(f)(1).

There is no provision that authorizes a state to "lock in" PEG channels and/or funding for a period of time without regard to the franchise process. Without such clear authority, the federal Act preempts any effort to establish such requirements; they are expressly preempted by the Act as well as by the federal Constitution, under the Supremacy Clause. 47 U.S.C. § 556(c); U.S. Const. art. VI, para. 2.

Instead, the Act makes clear that a franchising authority, like Connecticut, may establish requirements for PEG channel capacity, funding, and support ONLY in the initial grant or renewal process for a cable franchise, using a detailed process that requires all such requirements to be justified by their cost and based on community needs. 47 U.S.C. § 531 (allowing the establishment of channel capacity "to the extent provided in this section"); 47 U.S.C. § 544(a)(recognizing that a franchising authority may "in its request for proposals . . . establish requirements for facilities and equipment..."); 47 U.S.C. § 546 (detailed process for the determination of community needs and interests in a cable system including PEG, proposals to meet those identified needs and interests, and the balancing of the costs of meeting them, with appeal process). Because the provision that locks in place existing PEG requirements exists in state legislation, and is not the product of the careful renewal process required by the federal law, the "lock in" requirement is inconsistent with these provisions of the federal Act, and preempted.

Separately, the freezing of cable PEG channel requirements prevents cable operators from making use of advances in technology and equipment, such as digital technology, that would allow them to make more efficient use of their networks by re-organizing or re-formatting PEG program content for delivery on a digital network. The requirement thus violates 47 U.S.C. § 544(e), which states: "No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology." Because the requirement interferes with a cable operator's use of the technology and subscriber equipment of its choosing, it is preempted by this provision.

**Conclusion:**

The ink is barely dry on raised bill 7182, the comprehensive franchise bill that this committee passed last session. We respectfully suggest that it is better to allow the law to work and then pass legislation to address problems that actually emerge, rather than make major changes in law that clearly favor one competitor and place more burdens on an industry that has served the state and this committee well.