

# Protecting PEG for the Next 15 Years

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## **NEGOTIATING PEG CHANNEL CARRIAGE LESSONS FROM RETRANSMISSION CONSENT**

For over 25 years municipalities across the country have been negotiating cable television franchise agreements which contain extensive provisions governing the requirements for public, educational and governmental (“PEG”) local access programming. Typically these franchise provisions address the four “Cs” of PEG programming:

1. Channel Capacity;
2. Connectivity;
3. Content; and
4. Compensation.

Over the past five years, as the cable industry has evolved from strictly analog carriage to digital, high definition, multicast and other carriage options, the complexity regarding PEG access negotiations has increased dramatically. The purpose of this paper is to offer an alternate prospective on the typical language that cities often start with when negotiating PEG obligations.

In certain cities around the country municipalities have taken on the burden of operating their own cable system trying to compete directly with their incumbent cable operators. In these cases the cities become the “cable operator” and are required to negotiate for programming carriage with a variety of commercial providers, including local broadcast operators. Our experience in negotiating retransmission consent agreements with local broadcast stations has exposed us to a variety of new provisions related to programming carriage. This paper will attempt to highlight some of the key provisions of different commercial programming agreements, particularly retransmission consent agreements in the broadcast industry, and offer some alternative language for city consideration. The intent is to provide a new perspective to consider when negotiating PEG programming provisions.

While it is certainly clear that a local broadcaster has far more leverage negotiating programming agreements with a cable operator, the language that can be found in these commercial agreements is, in many ways, comparable to provisions which cities should be including in their PEG access negotiations. While the below language is not drafted in a way that will allow a city to simply cut and paste it into a new cable franchise agreement, our hope is that it will provide ideas and examples of provisions which a city may wish to include in a new cable television franchise agreement or at least introduce into renewal negotiations.

The below provisions have been substantially modified from the original format found in various retransmission consent agreements and commercial programming agreements. In many cases we have combined provisions from different contracts and the intent is not to offer a cohesive set of requirements that will work with one another but rather examples of key provisions for your review and consideration. Many of the defined terms contained within these model provisions may not be clearly outlined although we have attempted to provide some key definitions where appropriate.

If you have specific questions regarding any of the provisions or would like to discuss further the rationale for including such provisions in a PEG programming agreement please feel free to contact Brian Grogan at Moss & Barnett.

### **Sample Provisions from Retransmission and Commercial Programming Agreements**

*Note: language altered to reference "City" and "PEG" among other revisions.*

A. **Carriage.** Operator hereby agrees, during the Term of this Agreement, to retransmit the PEG channels on the Cable System in forms entirely unaltered from that provided by the City with no discernible degradation or other interference by Operator, including with respect to Standard Definition Digital ("SD") signals, High Definition Digital ("HD") signals, closed captioning and other Program Related Data (as defined below) provided by the City. To the extent subscribers cannot receive HD programming on their home equipment, City agrees that Operator must down convert all program transport streams carried into an appropriate SD or analog format without any other material degradation.

Operator shall transmit, on the level of service received by all subscribers to the System in question (that is, its "broadcast basic" tier), City's Primary Digital Program Stream (as defined below) as a standard definition program stream (the "SD Stream"). On the SD Stream, programs broadcast by the City in standard definition format ("SD Format") will be retransmitted in that format, and programs broadcast by City in high definition format ("HDTV Format") will be down-converted to an SD Format having a standard definition resolution of 720x480 picture elements, and an aspect ratio of 4:3 that is derived from the "center-cut" of the 16:9 HDTV Format image. Operator shall transmit the SD Stream in such format or formats as may be necessary to ensure that all programming included in such SD Stream is viewable by all of its subscribers (e.g., by means of a down-converted analog transmission to the subscriber or by providing to the subscriber a set top box as necessary to convert a digital transmission ). The SD Stream shall (i) include all Program Related Data and (ii) shall appear to the viewer on its current channel placement which is outlined in Exhibit \_\_; further, where the

transmission to the subscriber is in digital format, it shall be transmitted at a data rate between four mbps and six mbps, with an average of five mbps. Without limitation of the foregoing, Operator's transmission of the SD Stream will comply with all FCC rules as to signal delivery to subscribers applicable to must carry stations.

"Program Related Data" means:

1. closed-captioning data;
2. program and source identification codes and ratings information and watermarks (including, but not limited to, Nielsen NAVE audio watermark encoding);
3. content advisory (e.g., "V-Chip") information;
4. any material necessary for the retransmission of the Signal in accordance with this Agreement;
5. any other information or material associated with specific programming or sponsorships transmitted in the Signal;
6. any scheduling, descriptive, or other data concerning or implementing any program guide or navigational device;
7. all Program and System Information Protocol (PSIP) information and/or data, and
8. any other material required by Law to be transmitted by Operator; in each case included in the Signal in accordance with FCC Rules and industry standards.

**B. Retransmission.** Consistent with the terms of this Agreement, Operator will retransmit the PEG channel in its entirety in a digital form compliant with all relevant Advanced Television Systems Committee ("ATSC") standards (or any successors or replacements thereto), including but not limited to all Program and System Information Protocols ("PSIP") and all Program Related Data, as set forth herein. The retransmission of the PEG channels shall consist of a 19.4 megabits/second data stream, which may include more than one "Program Transport Stream" including, without limitation, the Program Transport Stream carrying the primary content stream of the PEG channels ("Primary Stream"). Operator will carry the PEG channels without alteration, except for alterations expressly permitted herein. Operator will carry the

PEG channels in their original form, except as re-modulated expressly in accordance with the provisions herein.

C. **Channel Positions.** Operator will retransmit the PEG channel, including, as applicable, SD and HD Program Transport Streams, in conformance with Exhibit \_\_\_\_\_. Operator will comply with all relevant ATSC standards (or the respective successors or replacements thereto), relating to channel mapping, and any other standards required of Operator by the FCC. Operator will notify timely all System subscribers of the channel location(s) on which the PEG channel is being carried, including SD and HD channels. Operator will retransmit the PEG channel of the City consistent with its carriage of every other commercial television channel carried on the System, and without prejudice to the City in terms of channel positioning, and carriage quality, including, without limitation: (i) in the event that Operator maintains an "analog" tier of channels for any of its subscribers during the term of this Agreement, Operator will carry the PEG channels of the City in that analog tier, including by conversion from City's PEG channel, if necessary, without degradation of signal quality; (ii) Operator will carry the PEG channel(s) in its tier of digital channels of SD format; (iii) Operator will carry the PEG channel(s) in its tier of channels of HD format; and (iv) Operator will carry the PEG channel(s) in any and all tiers, packages or groups of channels in which any other broadcast television channel is carried. Channel position and technical carriage of the PEG channel(s) in all such tiers will be consistent with the terms of this Agreement, including, without limitation, viewability. At all times, Operator's channel guides and channel mapping will accurately reflect the analog, SD and HD channel placements of the PEG channels.

D. **Channel Placement.** The Primary Digital Channel (and the Downconverted Primary Channel and/or the SDTV Primary Channel, as applicable) shall be carried on a basic tier of service that is available to and viewable by all subscribers of the System(s). Operator shall carry the Primary Digital Channel contiguous with the primary PEG channels of Fox, NBC, ABC or CBS Television Networks ("Big 4 Affiliates") that include programming in an HDTV format in the same channel neighborhood that includes the digital television signals (including the primary digital channels and any HDTV-formatted programming) of all other television stations located on the System that are affiliated with the Big 4 Affiliates carried on the System. Operator shall carry (i) the Downconverted Primary Channel on each applicable System on the channel used immediately prior to the Operator's cessation of analog broadcasting for carriage of the City's analog signal, and (ii) the SDTV Primary Channel on a channel contiguous with the SDTV versions of the primary digital channels of Big 4 Affiliates carried on the Systems.

E. **Full Time, Simultaneous Carriage.** The PEG channels shall be retransmitted on a full-time basis (*i.e.*, 24x7) without interruption, superimposition, acceleration, deletion, or alteration (except for any technical processing and/or downconversion in accordance with Section \_\_\_), and in its entirety, including all Program Related Data. Operator shall not superimpose any material onto the screen image of any PEG channel, including without limitation, any “shrinking” or “squeezeback” of a PEG channel so as to juxtapose any material. Notwithstanding the foregoing, Operator may utilize a Subscriber-activated electronic programming guide (“EPG”) that causes the screen image of a PEG channel to temporarily shrink; provided that the EPG exclusively provides program scheduling, descriptions and access, appears identically on all channels on a System and does not contain any advertising or promotional material. Operator shall have no right to distribute all or any portion of the programming contained in any PEG channel on an interactive, time-delayed, video-on-demand or similar basis without the express advance written consent of the City.

F. **Program Guides.** To the extent technically feasible, each EPG utilized by a System shall identify the PEG channels by the logo, the City’s call letters (if any), and channel position number. Without limiting the foregoing, the EPG placement of identification information and programming descriptions for each PEG channel shall be at least as favorable as that afforded by the System to each other commercial channel carried on the System.

G. **Set-top Boxes.** Operator agrees that its practice of supplying Set-top Boxes (as defined below) and Operator-Authorized DVRs (as defined below) to its Subscribers shall be governed by the relevant provisions hereof. Copies of the PEG channel signals made by an Operator-Authorized DVR shall be securely encrypted or bound to the Operator-Authorized DVR by AES 128, Triple DES or an industry accepted encryption technology. This Section does not prohibit Operator from connecting at a Subscriber’s request in-home recording devices owned by the Subscriber (and not provided or controlled by Operator) that are intended only for personal use in the Subscriber’s residence, it being agreed that City is granting no license or authorization for Operator to engage in the foregoing.

An “Operator-Authorized DVR” means a recording device or media integrated into the Set-top Box or a recording device provided by or authorized by Operator for use by Subscribers for the recording of video programming. An Operator-Authorized DVR shall be an in-home recorder (*i.e.*, make and store recordings solely at the Subscriber’s home premises) and shall not be a removable media recorder, nor provide the ability to make removable media copies of video programming.

A "Set-top Box" means any device connected by wire that is authorized by Operator for use by a Subscriber to (i) enable the reception or decoding of signals for video programming and/or (ii) store or copy video programming. Set-top Boxes shall be designed to display video programming solely on a consumer television set located in the same local environment as a Set-top Box located within such Subscriber's residence and solely for use by such Subscriber therein. Set-top Boxes shall employ an industry-standard conditional access system and shall contain an operating software system that is executed by an embedded processor in such a way that the user cannot access, change or replace the operating software. "Set-top Box" includes CableLabs-certified compliant host devices with set-top-box like functionality to which an Operator is required by Law to retransmit programming signals (such a device, a "CableLabs-Certified Device").

No Operator-Authorized DVR or Set-top Box shall be a portable device (e.g. cellular phone) or a personal computer or game console (other than a personal computer or game console when functioning as a CableLabs-Certified Device) or have wireless functionality. A Set-top Box may include an Operator-Authorized DVR.

- H. **High Definition:** Operator shall also transmit to subscribers the City's Primary Digital Program Stream as a high definition program stream (the "HD Stream"). On the HD Stream, programs broadcast by the City in HDTV Format will be retransmitted in the same HDTV Format (e.g., 1080i (1920 x 1080 interlaced)), and programs broadcast by the City in SD Format will be retransmitted in that format. Operator shall transmit the HD Stream in the technical format (including 1080i where applicable) and with the data rate broadcast by the City, it being understood that System(s) will in no circumstance be obligated to transmit, for purposes of this grammatical paragraph (i.e., for transmission of the HD Stream) and Paragraph \_\_ hereof (i.e., transmission of any Multicast Stream), a data stream greater than 19.4 megabits per second within a 6 MHz band. Operator shall carry the HD Stream in the same Electronic Program Guide (EPG) channel "neighborhood" (or, where applicable, the same cable RF channel neighborhood) as the Digital Signals in high definition format of local full power television stations affiliated with the Big Four Affiliates that are retransmitted by such System.
- I. **Video-on-Demand ("VOD"):** For the term of the Agreement, Operator shall have the non-exclusive right to real-time encode programs carried on the City's PEG channels (the "VOD Content") for exhibition to subscribers on a VOD basis, provided that Operator makes such VOD content available without a distinct, separate or incremental charge to subscribers. Programs that air daily may be made available for VOD exhibition by Operator immediately after they air, and may remain available until the next day's show airs. Similarly, programs that air on a weekly basis may be made

available by Operator after the program airs until it airs the following week. To the extent determined by City, System shall exhibit the VOD Content with any sponsorships, promotions and PSAs shown during the original broadcast of such content by the City in question. Operator may not insert any advertisements, promotions or sponsorships or other material in or adjacent to the VOD Content.

- J. **No Retransmission via Internet, Portable and Wireless Devices:** Operator shall have no right to retransmit or distribute any portion of the PEG channels of the City (i) via the public network known as the Internet (i.e., the World Wide Web or other publicly available online service), (ii) via any wireless or cellular technology (except as necessary as part of Operator’s infrastructure (such as wireless “hops”)), or (iii) to any portable electronic devices, such as cell phones, any devices outside of the Subscriber’s immediate location, or any computers or tablet devices.
- K. **Compensation:** Operator shall pay cash compensation to Operator each month during the term (prorated for partial months) in an amount (the “Retransmission Fee”) on a monthly basis during the Term equal to the number of viewing subscribers of each City for such month multiplied by the applicable fee set forth on Schedule \_\_\_ hereto. For the avoidance of doubt, Operator shall pay the fees set forth on Schedule \_\_\_ for each PEG channel.

A viewing subscriber is defined to mean any customer authorized by Operator to receive a City’s cable service (the “Programming Service”) on the System. A viewing subscriber may include, but shall not be limited to, hotel and motel guest rooms, private offices, and patients’ rooms in hospitals. A viewing subscriber shall not include public viewing areas of locations or public places where an admission fee is required. For residential viewing subscribers, each single residential dwelling unit regardless of the number of televisions or integrated receiver-decoders (“IRDs”) within the unit that are authorized to receive the Programming Service shall be deemed to be a single viewing subscriber. Operator shall be entitled to determine, in its reasonable, good faith judgment, whether a particular viewing subscriber is a residential or bulk-billed viewing subscriber. The number of bulk-billed viewing subscribers shall be determined in accordance with the following formula:

$$\begin{aligned} &\text{Number of bulk-billed viewing subscribers (per complex or business) =} \\ &\text{Total monthly bulk-rate charged by Operator to the pertinent complex or} \\ &\text{business for the level of service containing the Programming Service.} \\ &\qquad\qquad\qquad \text{divided by} \\ &\text{The predominant monthly rate charged by Operator to non-bulk rate} \\ &\text{residential viewing subscribers for the comparable level of service.} \end{aligned}$$



For calculating the Retransmission Fee, the number of viewing subscribers as of the last day of the previous monthly reporting period shall be added to the number of viewing subscribers as of the last day of the monthly reporting period for which the Retransmission Fee is being calculated, and that sum shall be divided by two. For example, if (i) there are 30,000 viewing subscribers as of June 30; (ii) 20,000 viewing subscribers as of May 31; then there would be 25,000 viewing subscribers for the June reporting period (the average of the sum of number of viewing subscribers as of the last day of the current reporting period, plus the number of viewing subscribers as of the last day of the immediately preceding reporting period (30,000 + 20,000) divided by 2. Payment hereunder shall be made to Operator to \_\_\_\_\_ not later than twenty (20) days after the end of the month for which any such payment is due and each payment shall be accompanied by a statement setting forth the basis for the calculation of such payment, certified by an officer of Operator. Such statement shall also indicate the number of subscribers of the System which would be able to view a DTV Multiplexed Signal transmitted by the City. City shall not be obligated to provide reminders or invoices to Operator when such payment is due. Timely payment is the responsibility of the Operator. Past due payments owed will bear interest at a rate equal to the lesser of: (i) one percent (1%) per month; or (ii) the maximum interest rate permitted under prevailing law. Operator will be liable for all reasonable costs and expenses (including, without limitation, reasonable court costs and attorney's fees) incurred by City in collecting any past due payments.

Each payment by Operator shall be accompanied by a true and complete report for the month for which such payment was due, signed by an authorized agent of Operator, specifying for each City as of the last day of the prior month the following information:

1. the total number of subscribers receiving the signal of such City;
2. the number of subscribers receiving any DTV Multiplexed Signal of such City; and
3. current contact information for the authorized agent of the Operator, including such person's phone number, address, fax number and email address.

Operator shall keep accurate and complete records and accounts of billings, Subscribers and all matters which pertain to viewing subscribers and are relevant to or required by this Agreement. City shall have the right, from time to time and during normal business hours, to audit and analyze the relevant records of the Operator to verify compliance with this Agreement during the term of this agreement and for a period extending \_\_\_ years beyond the date final payment is received from Operator. City must give fifteen days' notice of their intent to audit. The Operator agrees that the audit will commence

no later than forty-five days after receiving notice of intent to audit. All audits will be conducted during the Operator's normal business hours. The audit of the City will either verify or deny compliance with this agreement. The audit shall be conducted at Operator's expense.

L. **Copyright and Trademark Licenses.** It will be Operator's sole obligation, not City's, to secure copyright license rights, and pay applicable copyright fees, through individual agreements with copyright owners or through the perfection of compulsory licenses, with respect to all programming content of the City retransmitted on the System. With respect to all programming content for which City has the right to grant copyright licenses, City hereby grants to Operator a non-exclusive, paid-up, no cost (*i.e.*, royalty-free) copyright license for carriage as provided in this Agreement. Operator acknowledges and understands that City may not have the right to grant a copyright license to Operator with respect to all of the programming content of the City, and that City makes no representations as to the portion of the programming content of the City for which City can grant a copyright license. City hereby also grants to Operator a non-exclusive, paid-up, no cost (*i.e.*, royalty-free) trademark, service mark, service name and trade name license permitting Operator to reproduce the logos of the City for marketing and advertising purposes. Except as provided herein, Operator shall not record, copy, duplicate, retransmit and/or authorize the recording, copying, duplication or retransmission of any portion of the Digital Signal without the prior written permission of City or otherwise distribute any programming of City in any way except in compliance with the terms of this Agreement. In addition, Operator agrees to provide City with network programming, and syndicated programming, non-duplication protections for the content of the Digital Signal consistent with the provisions and considerations described in the FCC's rules and regulations, including, without limitation, Sections 76.92 through 76.111.

M. **Unauthorized Use.** Except as expressly authorized herein, Operator shall not, for pay or otherwise, record, copy, duplicate, transmit, retransmit and/or authorize the recording, copying, duplication, transmission or retransmission of any portion of the Digital Signal without prior written permission of City. For clarity, this Agreement concerns retransmission of the Digital Signal(s) as video programming streams over the System's wired infrastructure solely to television sets and set-top boxes directly connected to such wired infrastructure in Subscribers' homes Operator is not authorized to, and shall not, retransmit the Digital Signal(s) over the public system known as the Internet, via IP distribution over any broadband service operated by Operator, or through any wireless means to mobile or other devices.

## **Conclusion**

As described in the introduction to this paper, the sample provisions set forth above are not intended to be used word for word in a cable franchise agreement. These provisions are taken in part from commercial programming agreements where the relationship between programmer and operator is far different from the City/cable operator relationship and the PEG programming offered in most communities. However, there are several lessons one may take from these sample provisions including how best to value bulk subscribers, how to address SD, HD and digital programming streams and protection of content from widespread IP or mobile distribution without the city's consent.

For those that carefully study these sample provisions and desire clarification regarding defined terms and related information that may have been excluded from attached schedules or exhibits, please feel free to contact Brian Grogan.

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**Brian T. Grogan** is a shareholder and director with the Minneapolis law firm of Moss & Barnett practicing in the firm's communications and business law practice groups. Since 1988 Brian has worked with entities throughout the country on a variety of cable, telecom, wireless and broadband communications issues. Brian has represented cities on communications issues for over 25 years and is currently working with Chicago, Seattle, Beaverton, and Norfolk, VA. Mr. Grogan is a frequent presenter at state and national conferences regarding communications law and he is a member of the American Bar Association (Forum Committee on Communications Law), National Association of Telecommunications Officers and Advisors, International Municipal Lawyers Association (Contracts, Franchises and Technology Section), and is past chair of the Communications Law Section of the Minnesota State Bar Association.

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