



STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 05-09-07

DPUC REVIEW OF REGULATIONS REGARDING
THE REQUIRED NUMBER OF COMMUNITY
ACCESS CHANNELS

February 22, 2006

By the following Commissioners:

Anne C. George
Donald W. Downes
John W. Betkoski, III

DECISION

DECISION

I. INTRODUCTION

A. SUMMARY

The Department of Public Utility Control (Department) initiated the instant proceeding to interpret Section 16-331a-2(b) of the Regulations of Connecticut State Agencies. In this Decision, the Department concludes that the existing regulatory scheme is sufficient for the Department to address the need and required justification for the case-by-case addition of community access channel capacity.

B. BACKGROUND OF THE PROCEEDING

The Department initiated the instant proceeding on September 16, 2005, pursuant to § 4-176 of the General Statutes of Connecticut (Conn. Gen. Stat.). The purpose of the proceeding is to review, interpret and clarify § 16-331a-2(b) of the Regulations of Connecticut State Agencies (Conn. Agencies Regs.), the state regulation defining conditions that would require a cable operator to add community access¹ channel capacity to its programming lineup.

Conn. Agencies Regs. § 16-331a-2(b) states:

When the activated access channel capacity is in use for community access purposes during 80 percent of any consecutive five hour period Monday-Friday, for six consecutive weeks, the franchise holder shall, within six months, activate an additional channel for access use, provided, however, that this requirement shall not necessitate the rebuilding of a system or elimination of any existing services, and further provided that in no case shall the number of mandated access channels exceed ten percent of the total channel capacity.

Pursuant to a Notice of Request for Comments (Notice) dated October 7, 2005, the Department invited interested persons to provide written comments and respond to eleven questions regarding Conn. Agencies Regs. § 16-331a-2. The questions posed in the Notice, and a summary of the comments received, are discussed in Section I.E.

The Department received comments from cable operators Adelphia Communications Corporation,² Comcast of Connecticut,³ and Cox Communications,⁴

¹ Conn. Gen. Stat. § 16-331a provides for “meaningful community access” as a component of CATV service. Community access is defined as non-commercial programming produced or sponsored by members of the community and made available to all subscribers in a cable operator’s service area as part of the operator’s basic service tier. Community access encompasses public, educational and governmental (PEG) access. Cable operators are required to provide technical, managerial and financial support, channel(s) and equipment that meet the specifications under State regulations.

² Adelphia Communications Corporation holds four Connecticut cable franchises: Adelphia Company of Western Connecticut/Seymour; Adelphia Company of Western Connecticut/Waterbury; Adelphia Cable Communications/Norwich; and Adelphia Cable Communications/Lyme. In all but the Waterbury franchise area, Adelphia manages community access in its Connecticut franchise areas.

collectively representing 17 of Connecticut's 24 cable television franchises. Seven local non-profit groups providing community access in various parts of Connecticut also submitted comments, as did one local advisory council, and the Office of Consumer Counsel (OCC). Comcast also submitted supplemental comments.

C. CONDUCT OF THE PROCEEDING

The Department determined that a hearing in the instant case was not required and none was held. Participants were provided the opportunity to submit written exceptions and to present oral arguments on a draft Decision issued January 10, 2006.

D. PARTICIPANTS

All of Connecticut's cable advisory councils and community access operators were designated as participants to this proceeding, as were all Connecticut cable system operators, and the OCC.

E. COMMENT SUMMARY

The following lists the questions posed by the Department in the Notice, and summarizes the responses submitted by participants.⁵

1. Does the term "capacity," as used in Conn. Agencies Regs. § 16-331a-2, apply to a single community access channel, or all access channels combined?
2. What weight, if any, should be ascribed to repeat programming in terms of meeting the 80% threshold?
3. Should the term "in use," as used in Conn. Agencies Regs. § 16-331a-2, apply to community calendar-type programming (e.g., scroll or "crawl")?
4. Should programming that is not locally produced (e.g., "sponsored" or "imported" programming) be given less weight than programming produced within the franchise area or local community? If so, how should the source of the programming (native vs. import) be considered?

³ Comcast holds ten Connecticut cable franchises: Comcast of Connecticut I, LLC (Branford); Comcast of Clinton CT, Inc.; Comcast of Danbury, Inc.; Comcast of Groton, Inc.; Comcast of Connecticut, Inc. (Hartford); Comcast of California/Connecticut/Michigan (Lakeville); Comcast of Middletown, Inc.; Comcast of New Haven, Inc.; Comcast of Connecticut, Inc. (Plainville); and Comcast of Eastern Connecticut (Vernon). Non-profit community access providers operate in six of Comcast's ten Connecticut franchise areas.

⁴ Cox Communications controls three Connecticut franchise areas: Cox Meriden, Cox Manchester, and Cox Enfield. Cox serves as the manager of community access in each of the three franchise areas it serves, although town-specific groups also operate in Cox's Manchester franchise area.

⁵ Rather than respond to the Department's questions individually, the OCC referred to recent dockets in which the issue of additional community access channels arose. The OCC urges the Department to reevaluate its interpretation of Conn. Agencies Regs. § 16-331a-2 and indicate its commitment to community access by properly allocating spectrum to allow subscribers to greatly benefit from additional programming of the caliber already provided on many existing community access channels.

5. Is the 80%/five hour/weekday/six consecutive week window adequate? What changes, if any are warranted to these criteria?
6. If the five hour block is adequate, is it appropriate to designate what time of day the five hour block should fall within?
7. What qualitative assessments, if any, of the programming content are appropriate in terms of meeting the 80% threshold?
8. If no qualitative assessments of programming content area are appropriate, comment on the possibility for abuse (e.g., "live" camera pointed out a window) in attempt to reach the 80% threshold.
9. Is it appropriate to include CT-N programming⁶ in consideration of the 80% threshold?
10. What changes, if any, are warranted to Conn. Agencies Regs. § 16-331a-2?
11. Comment on any other aspect of Conn. Agencies Regs. § 16-331a-2 which may be useful to the Department in its review.

Question No. 1: Does the term "capacity," as used in Conn. Agencies Regs. § 16-331a-2, apply to a single community access channel, or all access channels combined?

Adelphia, Comcast and Cox state that the term "capacity" applies to all access channels combined, and to infer otherwise would contradict the plain meaning of the words.⁷ According to Adelphia, such an interpretation supports the laudable goal common to both the public and the cable operator of fully utilizing the available capacity before requesting more capacity. Otherwise, as noted by Adelphia and Comcast, if a cable system contains two community access channels, one of which meets the threshold and the other which is utilized at 0% capacity, application of a single channel standard would require the addition of a third community access channel. In this example, Adelphia states that two under-utilized community access channels and a corresponding waste of system bandwidth would likely result.⁸

Citizens Television, Inc. (Citizens),⁹ Community Voice Channel (CVC),¹⁰ Wallingford Government Access Television (Wallingford),¹¹ and West Hartford

⁶ CT-N began as a service of Connecticut Public Television, the Connecticut Public Affairs Network, Connecticut Community Colleges and the New England Cable Television Association. CT-N provides video coverage of state government deliberations and public policy events. Its programming is aired on the Internet, cable channels, and cable community access channels throughout Connecticut.

⁷ Adelphia Comments, p. 1; Comcast Comments, p. 1; Cox Comments, p. 3.

⁸ Id.

⁹ Citizens is the non-profit community access manager in the Comcast/New Haven franchise area.

¹⁰ Non-profit CVC operates community access in the Comcast/Vernon franchise area.

¹¹ Wallingford operates the "G" channel in the Town of Wallingford.

Community Television, Inc. (WHCT)¹² advocate a channel-by-channel approach, while Nutmeg Public Access Television, Inc. (Nutmeg)¹³ and the Cable Advisory Council of South Central Connecticut (CACSCC)¹⁴ suggest review in terms of total access channel capacity.¹⁵

Skye Cable XIII (Skye)¹⁶ suggests that the Department initiate a proceeding to adopt regulations specifying requirements for each franchise holder's narrowcasting capabilities. Skye believes that the inclusion of mandatory narrowcasting capabilities within the individual communities in a franchise areas would substantially reduce the need to develop a formula for channel expansion, especially with regard to E and G programming.¹⁷ Sound View Community Media, Inc. (Sound View)¹⁸ suggests that Conn. Agencies Regs. § 16-331a should be rewritten so that for each cable system at least three access channels would be required, one each for public, education and government.¹⁹

Question No. 2: What weight, if any, should be ascribed to repeat programming in terms of meeting the 80% threshold?

Adelphia maintains that it is not appropriate to give any weight to repeat programming in calculating what constitutes the 80% threshold of programming to qualify for an additional channel.²⁰ Adelphia states that locally produced, first run programming should be the focus of any standard. According to Adelphia, the current per diem threshold is already low, as it requires only four hours (80% out of any consecutive five hour period) of programming. Adelphia states that any credit given to repeat programming would virtually remove any meaning from the standard, noting that four consecutive hours out of a twelve hour schedule, for example, constitutes a use rate of only 33%.²¹

Cox and Comcast also believe that repeat programming should be afforded no weight in determining whether the 80% threshold has been met.²² For example, Comcast states that programming could be repeated 24 hours a day, seven days a week, thus seeming to meet the threshold, but violating the spirit of the requirement and resulting in the waste of valuable bandwidth.²³

¹² WHCT is the town-specific access provider in the Comcast/Hartford franchise area town of West Hartford.

¹³ Nutmeg operates community access in the Comcast/Plainville franchise area.

¹⁴ CACSCC is the advisory council serving the seven town Comcast/Branford franchise area.

¹⁵ Citizens Comments, p. 1; CVC Comments, p. 1; Wallingford Comments, p. 1; WHCT Comments, p. 1; Nutmeg Comments, p. 1; Wallingford Comments, p. 1; CACSCC Comments, p. 2.

¹⁶ Skye is the non-profit community access manager in the Adelphia/Waterbury franchise area.

¹⁷ Skye Comments, pp. 5-9.

¹⁸ Sound View manages community access in the Cablevision of Southern Connecticut franchise area.

¹⁹ Sound View Comments, p. 4.

²⁰ Adelphia Comments, p. 2.

²¹ Id.

²² Cox Comments, p. 3; Comcast Comments, p. 2.

²³ Id.

Citizens advocates an approach that would weigh repeat programming the same as first run programming for up to several repeats depending upon whether the show was a half hour or a full hour in length.²⁴ Citizens states that its producers of live shows expend significant time and resources lining up guests, doing pre- and post-production, and advertising their programs, so repeat programming is necessary to provide a wide range of residents opportunity to view those programs.²⁵ CVC offers similar concerns and states that on its P channel in October 2005 alone, it aired just under forty hours of first run, facility-produced programming.²⁶

Nutmeg states that repeat programs should be included in the 80% threshold calculation, but should not be counted more than twice in the same week.²⁷ Skye states that repeat programming occupies airtime that would be better used for first time productions, and so limits the number of program repeats.²⁸

Sound View notes that one of the main reasons for not ascribing a diminished value to repeated programming is to give adequate regard to the efforts of the local producer, who for his or her substantial efforts in creating programming, ought to be afforded more than a one-time, fleeting exposure on the access channel.²⁹ Sound View goes on to state that repeating telecasts of local government meetings and other proceedings are also in the public interest.³⁰

WHCT states that repeat programming should be ascribed weight. According to WHCT, repetition of programming on a community access channel is done intentionally as a service to producers and viewers.³¹ WHCT also states that, unlike commercial stations, it promotes the community, not television, and so does not promote ratings and does not sell advertising time. In WHCT's view, each program should be repeated three times at different hours of the day when possible.³²

Wallingford and CACSCC each acknowledge the value of repeat access programming, but offer no opinion on what weight its should be given in comparison to first run native programming.³³

²⁴ Citizens Comments, p. 1.

²⁵ Id.

²⁶ CVC Comments, pp. 1 and 2.

²⁷ Nutmeg Comments, p. 1.

²⁸ Skye Comments, p. 10.

²⁹ Sound View Comments, pp. 4 and 5.

³⁰ Id.

³¹ WHCT Comments, p. 1.

³² Id.

³³ Wallingford Comments, p. 1; CACSCC Comments, p. 2.

Question No. 3: Should the term "in use," as used in Conn. Agencies Regs. § 16-331a-2, apply to community calendar-type programming (e.g., scroll or "crawl")?

Cable industry respondents unanimously reject community calendar-type programming as "in use" vis-a-vis Conn. Agencies Regs. § 16-331a-2, while all other respondents support the inclusion of this type of programming in "in use" calculations.

Adelphia states that the function of a scroll/crawl line (or bulletin board) is distinguishable from programming as it is deployed when the channel is not in use and typically runs when there is no locally created video programming available to air.³⁴ Comcast and Cox concur, noting that community calendar messages do serve a function, but should not be considered as access programming.³⁵

Citizens, CVC, Nutmeg, Wallingford, WHCT and CACSCC view community calendar-type programming as a vital community service to viewers and entities such as local schools, libraries, and other branches of nonprofit and government agencies such as senior services, parks departments, public works, and others.³⁶

Skye believes that community calendar-type programming should be included in "in use" calculations as such programming is consistent with Conn. Gen. Stat. § 16-331a(d).³⁷ Sound View also supports inclusion of community calendar-type programming in usage calculations.³⁸ Sound View states that advances in computer-generated programming have brought this medium to the point of providing full-motion video and audio, enabling it to grow as an important tool for nonprofit organizations to communicate their messages to the local community in addition to or in lieu of creating a full-blown television program. According to Sound View, the importance of this type of programming will continue to grow in terms of sophistication and value, and any proposed regulation should not relegate it to a lesser degree of protection and regard than traditional television programming.³⁹

Question No. 4: Should programming that is not locally produced (e.g., "sponsored" or "imported" programming) be given less weight than programming produced within the franchise area or local community? If so, how should the source of the programming (native vs. import) be considered?

Comcast and Adelphia assert that imported programming may be of interest to subscribers, but should not be given any weight in this determination as it is contrary to

³⁴ Adelphia Comments, p. 2.

³⁵ Comcast Comments, p. 3; Cox Comments, p. 3.

³⁶ Citizens Comments, pp. 1 and 2; CVC Comments, p. 2; Nutmeg Comments, p. 1; Wallingford Comments, p. 2; WHCT Comments, p. 2; CACSCC Comments, p. 2.

³⁷ Conn. Gen. Stat. § 16-331a(d) states, in relevant part, "Each company or organization shall conduct outreach programs and promote its community access services. Such outreach and promotion may include, but not be limited to . . . (4) broadcasting character-generated text messages or video announcements on barker or access channels . . ." Skye Comments, pp. 10 and 11.

³⁸ Sound View Comments, p. 5.

³⁹ Id.

the "local" nature of PEG access.⁴⁰ Cox adds that the programming should be locally produced, and be produced by different access users, to be considered pursuant to Conn. Agencies Regs. § 16-331a-2.⁴¹ To do otherwise would subject the regulation to manipulation by a single or small number of access users, according to Cox.⁴²

Citizens, CVC, Nutmeg, Wallingford, WHCT and CACSCC all believe that imported programming can add value to the mix of access programming, but locally originated or native programming should always take precedence.⁴³ In the absence of obscenity or other lawful grounds concerning objectionable content, Skye maintains that all community access programming is entitled to the same weight.⁴⁴ Sound View states that schools in particular request and use programming that Sound View brings in through its satellite dishes.⁴⁵ For example, local school sports programming also might feature a high school team local to the franchise area, but the program may have been produced outside the area by the opposing team's school. Correspondingly, it would be unfair to require a cable operator to add channel access capacity for the sake of additional programming that has no locally-based connection, demonstrated desire or benefit, according to Sound View. The source of the programming should be a factor in that local productions should receive preferential treatment in terms of the time slots made available for cablecasting. But if the imported program is in response to a documented request or desire by a local resident, school or government, or if such programming can be documented to directly benefit a local entity or group, Sound View believes that it should be accorded the same importance as locally produced programming for the purposes of determining channel usage and capacity.⁴⁶

Question No. 5: Is the 80%/five hour/weekday/six consecutive week window adequate? What changes, if any are warranted to these criteria?

Question No. 6: If the five hour block is adequate, is it appropriate to designate what time of day the five hour block should fall within?

According to Adelphia, the "window" should be revised to reflect current subscriber viewing habits, which Adelphia believes have changed with the advent of technology such as VCRs and Digital Video Recorders (DVR).⁴⁷ In tandem with its (Question No. 4) point regarding the low extant threshold, Adelphia suggests widening the window from 80% of "any consecutive five hour period" for weekdays to 80% of the time for weekdays between the hours of 8 a.m. and 8 p.m.⁴⁸ Cox expressed similar views, but suggested widening the window to at least 17 hours (7 a.m. to midnight) of locally programmed non-repeat programming, produced by at least five different access

⁴⁰ Comcast Comments, p. 3; Adelphia Comments, pp. 2 and 3.

⁴¹ Cox Comments, p. 4.

⁴² Id.

⁴³ Citizens Comments, p. 2; CVC Comments, p. 2; Nutmeg Comments, p. 1; Wallingford Comments, p. 2; WHCT Comments, p. 2; CACSCC Comments, p. 2.

⁴⁴ Skye Comments, p. 11.

⁴⁵ Sound View Comments, pp. 5 and 6.

⁴⁶ Id.

⁴⁷ Adelphia Comments, p. 3.

⁴⁸ Id.

users, before the regulation is triggered.⁴⁹ Cox also recommends that the regulation not be self-enacting but rather the Department conduct a review of the circumstances and afford interested persons, including the cable company, an opportunity to participate in the review.⁵⁰ Comcast states that the current threshold continues to be viable and fairly balances the need for community access against the practical realities associated with system bandwidth capacity, provided that the threshold for PEG channel addition applies to all access channels combined, and hours of 6-11 p.m., weeknights.⁵¹

Citizens states that the window is generally adequate, but noted some review of the remainder of the schedule may be warranted, as well.⁵² Citizens also suggested consideration of factors such as satellite programming, non-calendar programming, and time of day.⁵³ CVC, Nutmeg, Wallingford, and WHCT believe the window and criteria are adequate.⁵⁴ Sound View suggests consideration of such data in preparation for a showing before the Department pursuant to Sound View's proposed revisions to Conn. Agencies Regs. § 16-331a-2.⁵⁵

⁴⁹ Cox Comments, p. 4.

⁵⁰ Id.

⁵¹ Comcast Comments, p. 4.

⁵² Citizens Comments, p. 2.

⁵³ Id.

⁵⁴ CVC Comments, pp. 2 and 3; Nutmeg Comments, p. 1; Wallingford Comments, p. 2; WHCT Comments, p. 2.

⁵⁵ The following is Sound View's proposed draft regulation with proposed deletions in brackets [] and proposed additions underlined.

16-331a-2. Number of community access channels required.

(a) Each franchise holder shall maintain at least [one] three specially designated channels to be used for community access, one each for public (local residents and non-profit organizations), educational (local schools), and government (municipal) use. The franchise holder may use any such public, educational or government access channel for any other purpose whenever that channel's time has not been [contracted] scheduled for use for [public] community access purposes. Any conflict in time for use between community access or other use shall be resolved in favor of community access. The franchise holder that manages any community access channel shall keep a record, available for public inspection, of the requests for and use of community access channel time. Such records must be retained for not less than two years. If community access is managed by a community based nonprofit organization as provided for in § 16-331a of the Connecticut General Statutes, such organization may schedule any type of community access programming on the public, educational or government access channels, provided that any conflict in time for use between the public, educational or government channels shall be resolved in favor of the use primarily designated for each channel.

(b) When any one of the activated access channels [capacity] is in use for community access purposes during 80 percent of any consecutive five hour period Monday-Friday, for six consecutive weeks, the advisory council or community based nonprofit organization designated as the community access provider may petition the Department to require the franchise holder [shall, within six months,] to activate an additional channel for community access use[.]. The Department shall order the franchise holder to provide an additional channel based upon a finding of need after considering the following factors, provided, however, that this requirement shall not necessitate the rebuilding of a system or elimination of any existing services, and further provided that in no case shall the number of mandated access channels exceed ten per cent of the total channel capacity of the system.

(c) Upon receipt of a petition as provided for in this section, the Department, in its sole discretion, shall determine if a proceeding to increase the number of community access channels shall be held. To assist the Department in determining whether good cause exists to initiate a proceeding pursuant to this section of the regulations, the petitioner requesting an increase shall provide to the Department a clear statement of need and good cause why the request should be granted.

Most of the access responders recommend allowing the local PEG operator to designate the five hour period, as a reflection of the local community's demonstrated needs and preferences.⁵⁶ Sound View added that the nature of the PEG channel must also be considered. As an example, Sound View stated that it might be illogical to establish a five hour block beginning after 5 p.m. for educational access when the heaviest use and need for educational access programming might be during the time of day schools are in session.⁵⁷ Skye states that the formula appears adequate with regard to "P" programming, but suggests that specific hours of day might be specified.⁵⁸

Question No. 7: What qualitative assessments, if any, of the programming content are appropriate in terms of meeting the 80% threshold?

Question No. 8: If no qualitative assessments of programming content area are appropriate, comment on the possibility for abuse (e.g., "live" camera pointed out a window) in attempt to reach the 80% threshold.

Adelphia states that qualitative assessments made within federal guidelines are appropriate and necessary.⁵⁹ Both Adelphia and Comcast suggest a common sense review of content, along with consideration of technical standards to ensure quality.⁶⁰ Adelphia notes that "qualitative assessments of this nature can be seen as akin to the obscenity rule of thumb: you know when you see it, but it is difficult to define."⁶¹ Cox

(d) Before increasing the number of community access channels, the Department shall hold a hearing and accept evidence from the cable advisory council, residents of the franchise area, and franchise holder, and the community based nonprofit access provider, if any.

(e) In determining whether the number of community access channels shall be increased the Department shall take into consideration:

(1) The number of requests made by local producers and providers of programming for substantially the same cablecasting time slots.

(2) The nature of the programming requests (i.e., locally produced versus non-locally produced), with less weight given to non-locally produced programming unless the program has a corresponding, documented request by or demonstrated direct benefit for a local person, group or entity, and whether addition of a channel would result in channel usage by different persons or entities likely to lead to a greater diversity of views.

(3) The present use of the other access channels, and whether programming from one type of community access channel (i.e. public, educational or government) could be shifted to another type of community access channel without adversely affecting the producers and providers using the community access channel receiving the additional programming.

(4) The technical functionality of the system to allow the archival of community access programming for later retrieval by viewers, with such capability serving to mitigate the need for an additional channel.

(5) The technical functionality of the system to allow the dissemination of programming to limited areas within the franchise area, provided the access manager has the ability to control and monitor such programming at all times, with such capability serving to mitigate the need for an additional channel. Sound View Comments, pp. 6 and 7, 9 and 10.

⁵⁶ Wallingford Comments, p. 3; CACSCC Comments, p. 3.

⁵⁷ *Id.*

⁵⁸ Skye Comments, p. 12.

⁵⁹ Adelphia Comments, pp. 3 and 4.

⁶⁰ *Id.*; Comcast Comments, pp. 4 and 5.

⁶¹ Adelphia Comments, p. 4.

suggests the use of various non-content based qualitative assessments such as excluding text messages from threshold calculations, and excluding looping (copying a shorter segment onto a tape numerous times to make a longer program) for purposes of the regulation.⁶²

Citizens insists that non-content assessment by access providers must be held sacrosanct.⁶³ CVC and Wallingford suggest that a program should meet minimum technical quality standards as set by the PEG access operation.⁶⁴ Nutmeg states that any qualitative assessment should include some judgment about the variety of programs to meet the community needs, and that a monopoly of any given genre or category by an organization or individual should be avoided.⁶⁵

CVC⁶⁶ and Sound View⁶⁷ state that any qualitative assessment of programming content is not appropriate, given that the content of community access cannot be regulated or limited unless it is obscene, indecent, or presents advertising material designed to promote the sale of commercial products or services, including advertising by or on behalf of candidates for public office.⁶⁸ Skye expressed similar concerns stating that any attempt to review programming content is open to challenge as an exercise of prohibited editorial control.⁶⁹

Sound View states that abuses can be limited if the evaluation of any request for increased channel capacity includes whether such expansion is needed to encourage access channel usage by as many different persons or entities as practical, and whether it would likely lead to enhancing First Amendment rights, which include the dissemination of diverse views and for a marketplace of ideas and information; capitalizing on the possibilities inherent in "narrowcasting," as contrasted with broadcasting; providing for viable alternatives to commercial programming, and enhancing a sense of community among residents of the town and franchise area.⁷⁰ Sound View presumes that programming comprised primarily of a live camera pointed out the window would fail under an analysis of these criteria, without having to resort to a qualitative analysis of the actual content of the programming.⁷¹

CACSCC posits that a live camera pointing out a window can be effective programming.⁷² Wallingford uses a similar capacity to show local activity downtown, and reports favorable feedback.⁷³ WHCT states that the technical quality of a program should meet basic technical quality standards, and adds that it seems unlikely that a

⁶² Cox Comments, pp. 4 and 5.

⁶³ Citizens Comments, p. 3.

⁶⁴ CVC Comments, p. 3; Wallingford Comments, p. 3.

⁶⁵ Nutmeg Comments, p. 2.

⁶⁶ CVC Comments, p. 3.

⁶⁷ Sound View Comments, pp. 7 and 8.

⁶⁸ Referencing Conn. Agencies Regs. § 16-331a-4(a)(4) and 47 U.S.C. § 531(e).

⁶⁹ Skye Comments, p. 14

⁷⁰ Sound View Comments, pp. 7 and 8, referencing Conn. Agencies Regs. §§ 16-331a-4(b) and 16-331a-12(9).

⁷¹ *Id.*

⁷² CACSCC Comments, p. 3.

⁷³ Wallingford Comments, p. 2.

station having trouble filling the 80% threshold would want the burden of another channel.⁷⁴

Question No. 9: Is it appropriate to include CT-N programming in consideration of the 80% threshold?

Adelphia, Cox and Comcast maintain that CT-N is a separate issue and should not be counted as PEG programming for purposes of justifying additional PEG channels.⁷⁵ They note that CT-N is or will soon be carried on separate channels by most operators.⁷⁶ Adelphia states that it is not appropriate to count CT-N as local programming in determining the need for an additional community access channel, otherwise each community would automatically be entitled to an additional community access channel by virtue of potential around-the-clock CT-N broadcast.⁷⁷ Cox states that CT-N programming is not community access programming, but instead is separate, albeit government-sponsored, programming service.⁷⁸

Citizens and Skye state that CT-N programming should be considered local origination programming.⁷⁹ CVC agrees, but only if CT-N is not offered by the cable operator in its most basic service tier.⁸⁰ Nutmeg believes that CT-N programming should be on a channel separate from community access.⁸¹ Soundview believes that it is appropriate to consider CT-N programming in fulfillment of the threshold only in the context of whether there is a demonstrated desire for or derived benefit from this non-locally produced programming to a local entity or group.⁸²

Wallingford, WHCT and CACSCC state that until CT-N is available as an independent channel, its sponsorship as government access programming should be considered as all other sponsored programs.⁸³

Question 10: What changes, if any, are warranted to Conn. Agencies Regs. § 16-331a-2?

Adelphia suggests that, since cable operators can now offer over 400 channels, the 10% ceiling mentioned in the regulation is unrealistic and would theoretically entitle a community to over 40 PEG channels.⁸⁴ Comcast suggests no specific changes, but states that if some consideration of repeat programming is appropriate, there should be some clarification of the threshold parameters with regard to non-repeat programming and the addition of a reasonableness test for considered programming.⁸⁵

⁷⁴ WHCT Comments, p. 2.

⁷⁵ Adelphia Comments, p. 4; Cox Comments, p. 5; Comcast Comments, p. 5.

⁷⁶ *Id.*

⁷⁷ Adelphia Comments, p. 4.

⁷⁸ Cox Comments, p. 5.

⁷⁹ Citizens Comments, p. 3; Skye Comments, p. 14.

⁸⁰ CVC Comments, p. 3.

⁸¹ Nutmeg Comments, p. 3.

⁸² Sound View Comments, p. 8.

⁸³ Wallingford Comments, p. 3; WHCT Comments, p. 3; CACSCC Comments, p. 3.

⁸⁴ Adelphia Comments, pp. 4 and 5.

⁸⁵ Comcast Comments, p. 5.

Cox states that under any circumstance, the regulation should be revamped so that it is not self-enacting.⁸⁶ Cox adds that satellite delivered programming (e.g., Dish Network or DirecTV) is not encumbered by PEG access programming requirements, and those customers are not subjected to annual inflation increases in franchise-related costs. According to Cox, the "draconian remedy of taking an additional access channel during an extant franchise term should be eliminated or significantly pared back." Cox notes that to do otherwise would reward a cable operator for fostering a successful access program by requiring activation of an additional access channel as a result.⁸⁷

Wallingford, Sound View and CVC express a preference that each cable system have as a minimum a separate channel for public, educational and government access, and that upon a showing that certain criteria have been met the community access provider be permitted to petition the Department for additional resources, including additional channel capacity.⁸⁸

Question No. 11: Comment on any other aspect of Conn. Agencies Regs. § 16-331a-2 which may be useful to the Department in its review.

Cox maintains that the Department must confront two legal hurdles when it reviews the regulation.⁸⁹ According to Cox, Conn. Agencies Regs. § 16-331a-2 has not been expressly authorized in Connecticut law because Conn. Gen. Stat. § 16-331a does not delegate authority to the Department to order a cable company to provide an additional "channel" for community access purposes.⁹⁰ Cox adds that the regulation, if enforced during the term of a renewed franchise agreement, would effect a unilateral franchise modification that would be violation of the Federal Communications Act,⁹¹ noting that modification of franchise obligations must be by mutual agreement between the Department, in its capacity as franchising authority, and the franchised cable operator. Sound View referred to its proposed regulation rewrite offered in response to Question No. 6.⁹²

II. DEPARTMENT ANALYSIS

47 U.S.C. § 531 addresses the authority of local franchising authorities, such as the Department, to establish requirements with respect to the designation and use of channel capacity for PEG use.⁹³ Consistent with 47 U.S.C. § 531, Conn. Agencies

⁸⁶ Cox Comments, pp. 5 and 6.

⁸⁷ *Id.*

⁸⁸ Wallingford Comments, p. 3; Sound View Comments, p. 8; CVC Comments, p. 4.

⁸⁹ Cox Comments, p. 6.

⁹⁰ Cox asserts that Conn. Gen. Stat. § 16-331a(e) does not provide the Department with any such express authority.

⁹¹ Referencing 47 U.S.C. § 545.

⁹² *Id.*

⁹³ 47 U.S.C. § 531 states, in part: (a) A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.

(b) A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to § 626 of this title, that

Regs. § 16-331a-2 requires each Connecticut cable franchise holder to maintain at least one specially designated channel to be used for community access. The purpose of Conn. Agencies Regs. § 16-331a-2(b), which dates to the early days of cable regulation, is to establish a minimum threshold at which point a cable franchise holder would be required to add community access channel capacity in recognition of a demonstrated need.

The Department first notes that the term “capacity,” as used in this review and interpretation of Conn. Agencies Regs. § 16-331a-2, must generally apply to all access channels combined. Such an interpretation is consistent with prior Department Decisions,⁹⁴ is consistent with the plain meaning of the regulation, and is practical from a bandwidth sensitive approach. As the example offered by two participants illustrates, if a cable system has two community access channels, it would be inefficient and counterintuitive to require an additional access channel if one of the existing channels was used 100% of the time (therefore far exceeding the 80% threshold) while the other existing access channel was unused at all. In such an instance, the Department would likely find that some consideration must be given to reorganizing and rescheduling programming from the saturated channel to the fallow channel prior to requiring additional channel capacity. Reasonable exceptions to such a finding might include a PEG arrangement whereby each channel: P, E, and G, are under the substantial control of different entities or switching capabilities are limited, to name a few such exceptions.⁹⁵

channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

(c) A franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity. Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of channel capacity, whether or not required by the franchising authority pursuant to subsection (b) of this section.

(d) In the case of any franchise under which channel capacity is designated under subsection (b) of this section, the franchising authority shall prescribe--

(1) rules and procedures under which the cable operator is permitted to use such channel capacity for the provision of other services if such channel capacity is not being used for the purposes designated, and

(2) rules and procedures under which such permitted use shall cease.

⁹⁴ See Decision dated May 19, 1999, in Docket No. 97-12-02, Application of Comcast Cablevision of Danbury, Inc. for Franchise Renewal, pp. 17-19; Decision dated June 12, 2002, in Docket No. 99-11-30, Application of Comcast Cablevision of New Haven for Franchise Renewal, pp. 21 and 22; Decision dated July 28, 2005, in Docket No. 03-06-07, Application of Comcast/Lakeville for Franchise Renewal, pp. 23-25; and Decision dated October 26, 2005, in Docket No. 03-06-13, Application of CoxCom, Inc., d/b/a Cox Communications New England/Enfield for Franchise Renewal, p. 23.

⁹⁵ Skye notes that 47 U.S.C. § 531(d) contains provisions authorizing local franchising authorities to establish rules regarding a cable operator's right to reclaim channel capacity designated for community access use in the event that the channel was unutilized or under-utilized. Skye Exceptions, p. 7. The same federal provision authorizes local franchising authorities to establish rules and procedures under which such permitted use shall cease. Skye asserts that the Department has not enacted such rules and procedures under which such permitted use shall cease. Id., p. 8. The Department is aware of no instance in which a Connecticut cable operator has sought to "reclaim" a PEG channel because said channel was underutilized or unutilized. In the case of underutilization, Conn. Agencies Regs. § 16-331a-2 allows a franchise holder to use any community access channel for any other purpose whenever that channel's time has not been contracted for use for public access, and that "[a]ny conflict in time for use between community access or other use shall be resolved in

The term "in use," as applicable to Conn. Agencies Regs. § 16-331a-2, drew a wide array of comments from participants. Some suggest that "in use" should not include community calendar/scroll-type programming, which they note is usually aired when the channel is not being used for conventional community access video programming. Other participants argue that community calendar-type programming is a valuable community service and as such should be afforded full weight for "in use" calculations.

As Sound View stated, community calendar-type programming has evolved in sophistication. While some community calendar-type or scroll programming remains "plain," some related programming is rich in video and audio attributes. Community calendar-type programming can offer value to, and serve, the local community in many ways. However, the Department primarily interprets "in use" to describe conventional community access video programming, as distinguishable from scroll-type announcements. Nevertheless, the Department recognizes that "conventional community video access programming" may evolve from "traditional" camera-recorded video to a video product enhanced, manipulated, and or processed with computer-assisted or computer-generated images and sounds. Sound View Exceptions, pp. 1 and 2. The Department believes that the case-by-case analysis approach endorsed herein addresses Sound View's concern adequately without binding the Department to a programming definition that may become obsolete as video technology advances.

In a related preliminary issue, the Department turns to the issue of repeat programming. The cable participants unanimously suggest rejecting repeat programming in calculation of the 80% threshold. Most of the access community respondents suggest some form of weighting for repeat programs, or fully including repeat programming for the first few times a program is aired. The Department acknowledges that repeat programming is practical for a variety of reasons. Given differences among the viewing habits of households, repeating a program at different times of day on different days is reasonable and practical in terms of making that programming available to as wide a local audience as possible. It is also appropriate in recognition of the substantial resources some producers devote to programming.

Nevertheless, the Department is not inclined to give one-for-one consideration to repeat community access programming in terms of achieving the 80% threshold. While acknowledging the value of repeat programming, its full inclusion in usage calculations may distort results. The Department is also disinclined to unilaterally set forth a blanket weighting scheme as overly complicated, prejudicial and unnecessary.

Another examined attribute of community access programming is the concept of local programming contrasted with imported programming. In determining whether programming that is not locally produced (e.g., "sponsored" or "imported" programming)

favor of community access." In the case of an unutilized channel, any operator who sought to "reclaim" a public access channel could be required to "return" that channel for PEG purposes (or so designate another channel) for a variety of reasons including, but not limited to, a franchise agreement commitment to do so, the "80%" rule being met on another access channel, or as a result of negotiations with the access provider.

should be given less weight than programming produced within the franchise area or local community, the Department is drawn toward local programming for several reasons. Imported programming can be of significant interest to subscribers, but is difficult to endorse on an equal footing with locally produced programming. The very nature of community access programming has a strong local bias. On the other hand, imported programming can add significant value to the composition of local community access. From a community access perspective, a local community of interest does not necessarily correspond to cable franchise boundaries, but will also likely be influenced by other overlapping local communities of interest comprising school districts, regional, county, political, and geographic boundaries.

CT-N programming partially illustrates the point. The cable operators do not support inclusion of CT-N programming in fulfillment of the 80% threshold; the community access respondents generally support its inclusion. Given that most operators have dedicated or committed to dedicate channel space to CT-N, the issue of CT-N's programming status - from a community access perspective - is not ripe for review in this proceeding.

The cable and access respondents split on the issue of what qualitative assessments, if any, of programming content are appropriate in terms of the 80% threshold. The cable respondents find such analysis is necessary, while the access respondents indicate that such qualitative assessments are generally inappropriate and unadvisable, other than requiring that community access programming meet certain technical standards. Participants offered several examples in support of their contrasting views.

The Department finds that qualitative analysis of community access programming is readily distinguishable from the exercise of editorial control, but can lead to a judgmental slope slickened by issues of protected free speech, obscenity and indecency limits, debate over artistic merit, and personal preference.⁹⁶ Nevertheless, some consideration, albeit cautious, must be given by the Department to the content of programming submitted in support of a request for additional community access channel capacity. Without such a review, the potential exists for "gaming" the regulatory process.

Community access has grown, and in many cases thrived, in Connecticut since the introduction of cable television services in the early 1970's. Community access is offered in many forms throughout the State, in some instances town-specific, in some instances franchise-wide. Some cable franchisees actively manage and operate community access operations, while some community access operations are overseen by third party non-profit corporations or local municipal and educational interests. Other distinguishing characteristics have also developed over the years. For example, some

⁹⁶ Federal and state law explicitly forbid access providers from exercising editorial control over programming. For the purposes of this proceeding, a qualitative analysis would be undertaken by the Department in response to a valid request for a review to determine whether the 80% rule has been satisfied. The analysis might include consideration of numerous factors discussed herein, including but not limited to repeat vs. non-repeat, import vs. native, and bulletin board scroll vs. programming. See *Skye Exceptions*, pp. 12 and 13.

cable franchises have small subscriber counts, while some include over one hundred thousand subscribers.

These differences accentuate the need for flexible interpretation of Conn. Agencies Regs. § 16-331a-2(b). Sound View submitted draft regulations for the Department's consideration in this proceeding that identify aspects that might be considered in determining the need for an additional access channel in a franchise area. The Sound View draft regulations also underscore the Department's belief that a flexible approach, and not expanded rulemakings or regulations, will best suit the community access channel needs of a franchise.

For example, Sound View's suggestion that each franchise have minimum of three access channels has appeal from a standardization perspective. In Sound View's example, one channel would be designated "P," for local residents and non-profit organizations. Another channel would be "E," for local schools, while a third channel would be "G," for municipal use. However, there are franchise areas in which local municipalities and educational communities⁹⁷ have not expressed interest in dedicating resources to community access programming, so requiring channel allocation for their use, in the absence of demonstrated need, would be improvident. In some current access arrangements, community access has been successfully provided with less than, and in some cases more than, three access channels.⁹⁸

The Sound View-proposed regulation revisions commendably identify and augment many of the factors the Department has utilized in determining the need for community access channel additions. They include a clear statement of need; public hearing (involving the franchise holder, the local advisory council, the access provider, and other interested parties); demand by local producers and programming providers for substantially the same time slots; the nature of programming requests (i.e., locally produced versus non-locally produced); opportunity for presentation of a diversity of views; present use of the other access channels; technical functionality of the system; and town-specific programming options.

⁹⁷ The entities capable of making use of an "E" or "G" access channel are not limited to the examples provided (i.e., local municipalities and educational communities). See Skye Exceptions, pp. 6 and 7.

⁹⁸ According to Skye, subsequent to 1984, the U.S. Congress sought provision of and regulation of a three channel spectrum of access channel use: Public, Educational, and Governmental. Skye Exceptions, p. 5. Skye cites Time Warner Cable of NYC v. Bloomberg L.P., 118 F3d 917 (1997), to support its opinion that the 1984 Cable Act established standards requiring a minimum of three distinct access channels (P, E, and G) to comport with the intent of Congress, and that the "E" and "G" channels are to be regulated differently than "P" channel use. Id., pp. 8 and 10. Skye also states that use of the term "community" in community access, in lieu of the term "public," cannot be used as a legal means to restrict the national standard of access spectrum designation or use from a minimum of three channels to less than three channels. Id., p. 11. The Department notes that federal law (47 U.S.C. § 531) does not require a minimum of three channels (P, E, and G) as Skye asserts, nor does it limit the spectrum of PEG channels to a maximum of three channels. 47 U.S.C. § 531(a) states in part that a "franchising authority *may* establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, *or* governmental use . . ." and (b) "A franchising authority *may* . . . require as part of a cable operator's proposal for a franchise renewal . . . that channel capacity be designated for public, educational, *or* governmental use . . ." (*emphasis added*). The introductory subsection of Conn. Agencies Regs. § 16-331a-2 ("[e]ach franchise holder shall maintain at least one specially designated channel to be used for community access") can be read in harmony with 47 U.S.C. § 531.

A fair-minded review would avoid rigid analysis of "capacity" as a mandatory channel-by-channel issue, or as a mandatory blended issue, although in some instances one approach may be more advisable than the other. The potential for gaming the process has to be considered, as well. For example, it might be unfair to undertake a blended review if independent entities control separate community access channels "in the mix." Similarly, it might be unfair to require addition of a community access channel in an instance where "in use" includes a static image from a "live" camera simply pointed out a window, or incorporates a significant amount of airtime devoted to scrolled text or community calendar announcements. The key issue is demonstrated need.

The same open-minded case-by-case type of analysis is called for in review of the weight to be ascribed to repeat programming. As noted in the Department's July 28, 2005 Decision in Docket No. 03-06-07, Application of Comcast/Lakeville for Franchise Renewal, "There is merit in determining the percentage of community access programming aired on an access channel that is repeat programming compared to first run programming. The Department is not suggesting that 100% of programming cablecast on an access channel must be original, first run programming to be counted when determining if the threshold has been met. However, the Department is not convinced of the necessity of adding an access channel if a significant percentage of the programming being aired on an existing access channel is repeat in nature, notwithstanding the appropriateness of airing some access programs more than once." July 28, 2005 Decision, p. 25. A similar approach is called for in reviewing local vs. imported programming. An attempt to pack a lineup with imported or sponsored programming should not trigger channel capacity addition, but at the same time, access programming of demonstrated regional or broad interest should not be dismissed out of hand because it was not produced by a local resident at the local community access facility.

Lastly, Cox has misinterpreted Conn. Agencies Regs. § 16-331a-2(b) in its questioning of the Department's authority to require additional community access channel capacity because of a lack of enabling law. According to Cox, if the regulation were enforced during the term of a renewed franchise it would effect a unilateral franchise modification pursuant to 47 U.S.C. § 545. Cox Exceptions, pp. 2-4. As a franchised cable operator, Cox has committed to abide by governing law and regulations. Conn. Agencies Regs. § 16-331a-2(b) does not specify a time period in which a request or petition for additional community access channel capacity must be made. Cox may avail itself of appropriate remedies if it believes the regulation is legally deficient. Moreover, 47 U.S.C. § 545e precludes a cable operator from obtaining franchise agreement modification of any requirement for services relating to public, educational, or governmental access. Thus it would appear that a cable operator would be required to seek a specific waiver of Conn. Agencies Regs. § 16-331a-2(b) applicability prior to entering a renewed franchise term, rather than making the subsequent claim that compliance would amount to a unilateral franchise modification by the local franchising authority.

III. FINDINGS OF FACT

1. Conn. Agencies Regs. § 16-331a-2(b) defines conditions that would require a cable operator to add community access channel capacity.
2. 47 U.S.C. § 531 addresses the authority of local franchising authorities, such as the Department, to establish requirements with respect to the designation and use of channel capacity for PEG use.
3. Conn. Agencies Regs. § 16-331a-2(b) "capacity" must generally apply to all access channels combined.
4. It would be inefficient and counterintuitive to require an additional access channel if one of the existing channels was used 100% of the time (therefore far exceeding the 80% threshold) while the other existing access channel was unused.
5. Community calendar-type programming can offer value to and serve the local community in many ways.
6. Given differences among the viewing habits of households, repeating a program at different times of day on different days is reasonable and practical in terms of making that programming available to as wide a local audience as possible.
7. Full inclusion of repeat programming in Conn. Agencies Regs. § 16-331a-2(b) threshold analysis can lead to pejorative results.
8. The nature of community access programming has a strong local bias.
9. Imported programming can add significant value to the composition of local community access.
10. Local communities of interest are not established solely by cable franchise boundaries.
11. Qualitative analysis of community access programming is readily distinguishable from the exercise of editorial control.
12. Community access is offered in a variety of ways throughout Connecticut.
13. There are Connecticut franchise areas in which local municipalities and educational communities have not expressed interest in dedicating resources to community access programming.

IV. CONCLUSION

The Department concludes that no changes are warranted to Conn. Agencies Regs. § 16-331a-2 at this time. As written, Conn. Agencies Regs. § 16-331a-2 provides the Department with the authority and discretion to require that a cable provider add community access channel capacity, on a case-by-case basis, upon a demonstrated showing of need, and after providing all stakeholders full opportunity to express their views on any such proposal.

**DOCKET NO. 05-09-07 DPUC REVIEW OF REGULATIONS REGARDING THE
REQUIRED NUMBER OF COMMUNITY ACCESS
CHANNELS**

This Decision is adopted by the following Commissioners:

Anne C. George

Donald W. Downes

John W. Betkoski, III

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

Louise E. Rickard

Feb. 22, 2006

Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control

Date