

Responses, Replies and Supplemental Briefs

2:08-cv-10156-VAR-DAS Dearborn, City of et al v. Comcast of Michigan III, Incorporated et al
CONSOL

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**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

CITY OF DEARBORN, et al.

PLAINTIFFS,

v.

COMCAST OF MICHIGAN III, INC.
COMCAST OF THE SOUTH, INC.

DEFENDANTS.

Case Number: 08-10156
Hon. Victoria A. Roberts

**MEMORANDUM OF LAW OF *AMICUS CURIAE*
ALLIANCE FOR COMMUNITY MEDIA AND ALLIANCE
FOR COMMUNICATIONS DEMOCRACY IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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Randy Falco, *The Three C's of the Digital Age*, Broadcasting & Cable (Mar. 20, 2006), available at <http://www.broadcastingcable.com/article/CA6317045.html>5

Danny King, *Splitting Channels Crops Viewership*, TV Week (May 29, 2008), available at http://www.tvweek.com/news/2008/05/splitting_channels_crops_viewership.php5

CONCISE STATEMENT OF ISSUE PRESENTED

Amici adopt Plaintiff's statement of the issue presented.

CONTROLLING AUTHORITY

1. For the federal Cable Act requiring that PEG channels be made available to all residents on a non-discriminatory basis and on the basic service tier at the lowest reasonable rate: 47 U.S.C. §§ 531, 543(b)(7); H.R. Rep. No. 102-628, at 85 (1992).
2. For the Michigan Uniform Video Services Local Franchise Act's preservation of the status quo with respect to PEG channel carriage and support: M.C.L. §§ 484.3304(1), 484.3306(8).
3. For the federal Cable Act's preemption of any provision of the Michigan Uniform Video Services Local Franchise Act that prohibits local franchise PEG obligations: *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 972-73 (D.C. Cir. 1996).
4. For Comcast's PEG channel shift placing PEG channels on a separate service tier: 47 U.S.C. § 522(17).

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

Amicus curiae, the Alliance for Community Media (“ACM”) and Alliance for Communications Democracy (“ACD”), submit this Memorandum of Law in support of Plaintiffs City of Dearborn, *et al.* (collectively, “Municipalities”) and in opposition to the Motion to Dismiss filed by Defendants Comcast of Michigan III, Inc., and Comcast of the South, Inc. (collectively, “Comcast”).¹

At issue in this case is the legality of Comcast’s plan to convert the Municipalities’ PEG channels from analog to digital format and to move those channels to the channel-900 range on Comcast’s cable systems in each of the Municipalities’ communities. The shift would leave the Municipalities’ PEG Channels far removed from the bulk of the other channels, especially the local broadcast stations, on Comcast’s basic service tier and, indeed, far removed from most other popularly-viewed satellite cable programming channels that are part of Comcast’s expanded basic or digital programming tiers. Moreover, in order to continue to receive the PEG channels, subscribers would need to rent a converter box from Comcast, effectively and substantially increasing the price that basic service subscribers would have to pay to view the PEG channels, but not most other channels on the basic tier.

Comcast is the nation’s largest cable operator. If the Court were to dismiss the Municipalities’ complaint and allow Comcast’s planned move of PEG channels to “channel Siberia,” there is every reason to believe that Comcast would pursue similar “PEG-to-Siberia”

¹ The amici, as this Court directed on June 25, 2008, are contemporaneously filing with the Court an Ex Parte Order Granting Leave to Participate a Amicus Curiae and to file Memorandum of Law in Opposition to Defendants’ Motion to Dismiss.

channel shifts in many, if not most, of its other cable systems, both in Michigan and elsewhere across the country.

As the primary national membership organizations representing PEG supervising boards, PEG access managers, PEG programmers and PEG viewers, the interests of *amici* ACM and ACD and their members are directly implicated by the issues raised in this case, and would be substantially harmed if Comcast were to prevail.

ACM is a national non-profit member organization representing over 3,000 PEG access organizations and community media centers, and PEG programmers and viewers throughout the nation. Those PEG organizations and centers include the more than 1.2 million volunteers and 250,000 community groups that provide PEG access television programming in local communities across the United States. A number of Michigan PEG access organizations and community media centers are ACM members. ACD is a national membership organization of nonprofit PEG access corporations that supports efforts to protect the rights of the public to speak via cable television, and promotes the availability of the widest possible diversity of information sources and services to the public. The PEG organizations represented by *amici* have helped thousands of members of the public, educational institutions, and local governments make use of PEG channels that have been established in their communities pursuant to franchise agreements and federal law, 47 U.S.C. § 531.

Because of their substantial experience and interest in issues relating to PEG programming and PEG channels and their unique understanding of the potentially dangerous ramifications of Comcast's "PEG-to-channel Siberia" plan at issue here, *amici* ACM and ACD are particularly well situated to assist the Court in its consideration of this case.

ARGUMENT

I. COMCAST'S "PEG-TO-CHANNEL SIBERIA" PLAN WOULD SUBSTANTIALLY SHRINK SUBSCRIBER ACCESS TO AND VIEWERSHIP OF PEG CHANNELS, IN DIRECT CONFLICT WITH THE FEDERAL STATUTORY PURPOSE OF PEG CHANNELS.

A. Comcast's PEG Channel Shift Will Significantly Limit Local Residents' Access To and Ability To View PEG Channels.

The effect of Comcast's plan to move the PEG channels to the channel-900s and to require subscribers to obtain, and pay for, a converter box to view those channels should be obvious: For many subscribers, it would make the PEG channels more expensive to obtain, and for all subscribers, it would make those channels harder to find and watch. In other words, the effect of Comcast's "PEG-to-channel Siberia" plan would almost certainly be to reduce local residents' ability to watch PEG channels and thus a significant reduction in PEG channel viewership.

The record in this proceeding irrefutably supports this conclusion, and common sense does as well. As the Court noted in its January 14, 2008, Opinion and Order ("*January 14 Order*"), at 3, even Comcast admits that "50% of its statewide customers subscribe to the limited basic tier of service, and estimate[s] that [the move of PEG channels to channel-900] will . . . affect 15,000 households." The Municipalities contend that Comcast's PEG channel shift will affect substantially more households, *id.*, but either way, there can be no dispute that Comcast's PEG channel change will cut off PEG channels from thousands of subscribers unless they are willing to pay an extra \$4 per month just to receive those channels. And since limited basic-only subscribers are by definition those for whom the price of cable service is apparently a significant demand-inhibiting factor, the likelihood that those subscribers will, or will be able to, incur the effective \$4 per month rate increase just to receive the PEG channels is low.

Separate and apart from the loss of PEG viewership attributable to analog-only customers who cannot afford to lease the necessary convertor box, Comcast's PEG channel move will also decrease PEG viewership even among other customers who do lease the convertor box. Common sense about subscriber channel surfing habits teaches that cable programming located up at channel 900 is substantially less likely to be viewed than programming located at lower channel numbers, particularly channel numbers below 100 where the PEG channels at issue have been located.

That common-sense conclusion is confirmed by industry practice and experience. While subscribers may have hundreds of channels available to them, they actually watch only a few. "[O]ut of more than 100 channels, the average [cable] viewer tunes in to 15."² Moreover, channels placed on "far-away channels" on digital tiers receive significantly less viewership because viewers are accustomed to finding those channels on lower channel numbers and continue to navigate the lower channels despite the move of programming to much higher numbered digital channels.³ Research analyzing the effects of cable operator program carriage and placement decisions likewise rests on the premise that placing programming on digital tiers rather than analog tiers limits subscriber access to that programming and thus disadvantages programmers placed on digital tiers.⁴

² Randy Falco, *The Three C's of the Digital Age*, *Broadcasting & Cable* (Mar. 20, 2006), available at <http://www.broadcastingcable.com/article/CA6317045.html>.

³ Danny King, *Splitting Channels Crops Viewership*, *TV Week* (May 29, 2008), available at http://www.tvweek.com/news/2008/05/splitting_channels_crops_viewership.php.

⁴ See Dong Chen & David Waterman, *Vertical Ownership, Program Network Carriage, and Tier Positioning in Cable Television: An Empirical Study*, 30 *Rev. Ind. Organ.* 227, 232, 249-50 (2007).

In short, Comcast's proposed move of the Municipalities' PEG channels to the "channel Siberia" of the 900-number channels will unquestionably limit the ability of the Municipalities' residents to retrieve and watch these inherently local channels, both generally and vis-à-vis almost all other channels on Comcast's basic tier. And it would concomitantly adversely affect programmers on PEG channels by limiting the reach of their programming. These results are directly contrary to the nature and purpose of PEG channels as defined by Congress.

B. Congress Required That PEG Channels Be Available to All Subscribers on a Non-Discriminatory Basis and on the Basic Tier at the Lowest Reasonable Rate.

As this Court recognized in its *January 14 Order* (at 8), the legislative history of the 1992 Cable Act⁵ makes plain that, in adding the new basic tier definition in 47 U.S.C. § 543(b)(7) that includes PEG channels, Congress intended that PEG channels be "available to all community members on a nondiscriminatory basis" and "available to all cable subscribers on the basic service tier and at the lowest reasonable rate."⁶

Shuttling PEG channels off to channel-900 Siberia where they are less likely to be viewed, and requiring subscribers to pay for converter boxes just to access PEG channels (but not most other basic channels), cannot plausibly be consistent with Congress' intent that PEG channels be "available to *all* community members on a non-discriminatory basis" and "on the basic tier at the *lowest* reasonable rate." *Id.* (emphasis added). It is one thing to say, as the *January 14 Order* does, that the federal Cable Act does not prohibit a cable operator "from including both digital and analog channels on the basic service tier, or from providing PEGs in one format and broadcast channels in a different format." *Id.* It is quite another, however, to

⁵ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in various sections of Title 47) ("1992 Cable Act").

contend as Comcast does here that a cable operator may shift PEG channels to a region of its network that it well knows is less likely to be viewed, which is not even easily locatable on digital TV sets with a QAM tuner, and which costs more for subscribers to access than virtually all of the other channels on the basic tier. If accepted, that would render Congress' express intent that PEG channels be non-discriminatorily available to all at the lowest reasonable rate a dead letter.

II. COMCAST IS WRONG IN ASSERTING THAT MICHIGAN AND FEDERAL LAW ALLOW IT TO MOVE PEG CHANNELS TO CHANNEL SIBERIA.

Comcast raises several legal arguments in support of its Motion to Dismiss. We agree with the Municipalities' arguments opposing Comcast's Motion and add the following arguments.

A. The Municipalities' Franchise PEG Channel Placement Limitations Are Not Inconsistent with or in Addition to the Michigan Franchise Act's Requirements.

The linchpin of Comcast's Motion to Dismiss is its claim that the PEG channel placement limitations in the Municipalities' local franchises are preempted by Michigan's Uniform Video Services Local Franchise Act of 2006, M.C.L. §§ 484.3301 *et seq.* ("Michigan Franchise Act"). This is so, according to Comcast, because the Municipalities' existing franchise PEG channel placement limitations are "inconsistent with or in addition to" the requirements of that Act within the meaning of M.C.L. § 484.3305(3).⁷ If this claim fails, so does the balance of Comcast's Motion to Dismiss.

⁶ *January 14 Order* at 8 (quoting H.R. Rep. No. 102-628, at 85 (1992)).

⁷ Memorandum of Law in Support of Defendants' Motion to Dismiss, at 2, 4-6 (Apr. 30, 2008) ("Comcast Memo").

In fact, when read in the context of the Michigan Franchise Act's treatment of PEG channel capacity and support requirements, the PEG channel placement limitations in the Municipalities' franchises are not "inconsistent with or in addition to" the Michigan Franchise Act's PEG requirements. As Comcast concedes, M.C.L. § 484.3304(1) requires a video service provider "to provide for the same number of [PEG] channels that are in actual use on the incumbent video provider system on the effective date of this [A]ct." With regard to PEG facilities and services support, M.C.L. § 484.3306(8) similarly provides that a video service provider may be required to pay the local franchising authority a PEG support fee equal to the PEG support fee paid by the largest incumbent video provider under its existing franchise, or 2% of the video service provider's gross revenues, whichever is greater.

Read together, these provisions point to but one conclusion: The intent of the Michigan Franchise Act was to preserve the status quo with respect to PEG channel carriage and support. To be sure, the Act's goal (with the exception of the 2% PEG support fee) was not to increase incumbent cable operators' PEG carriage and support obligations, but it was equally clearly the Act's goal to *not* reduce those obligations.

Yet Comcast's position, if accepted, would do just that. Requiring Comcast to preserve the status quo with respect to carriage of the Municipalities' PEG channels – which is all that the Municipalities have asked that Comcast do – is neither "inconsistent with" nor "in addition to" the PEG carriage requirements of the Michigan Franchise Act. It is Comcast, not the Municipalities, that seeks to alter radically the PEG status quo by shipping the PEG channels to "channel Siberia" where many subscribers will no longer be able to receive the PEG channels unless they lease a converter box, and others will have difficulty locating them and will be less likely to watch them. If the Michigan Franchise Act's obvious intent to preserve the status quo

with respect to incumbent operators' PEG channel carriage obligations is to be honored, the Municipalities' existing franchise PEG channel placement limitations must be found to be consistent with, and not in addition to, the Act's franchise requirements.

Comcast nevertheless asserts (Comcast Memo at 10) that under the Michigan Franchise Act, local franchising authorities "are no longer permitted to create a patchwork of differing [PEG channel] regulations" But that proves too much. With regard to PEG channel carriage, M.C.L. § 484.3304(1) clearly permits – indeed requires – video service providers to carry different numbers of PEG channels in each local franchising authority's jurisdiction depending on the number of PEG channels activated and in use in each such jurisdiction. M.C.L. § 484.3306(8) clearly contemplates the same potential locality-by-locality variation in PEG support fees. Comcast is simply wrong in suggesting that the Michigan Franchise Act eliminates the "patchwork" of varying local franchise requirements with respect to PEG channel carriage and support. To the contrary, it preserves the status quo with respect to existing local franchise PEG channel carriage and support, and thus is consistent with the federal Cable Act's goal of assuring "that cable systems are responsive to the needs and interests of the *local* community." 47 U.S.C. § 521(2) (emphasis added).

B. If the Michigan Franchise Act Were Construed To Preempt the Municipalities' PEG Channel Placement Limitations, It Would Be Preempted by 47 U.S.C. § 531.

Even if M.C.L. § 484.3305(3) were construed to preempt the Municipalities existing local franchise PEG channel placement limitations (which we believe it should not), the provision would then in turn be preempted by the federal Cable Act, 47 U.S.C. § 531. Contrary to Comcast's contention (Comcast Memo at 7-8), Section 531 is in fact intended to preempt states from prohibiting local PEG requirements. As the D.C. Circuit has held:

In passing the PEG provision [Section 531], Congress thus merely recognized and endorsed the preexisting practice of local franchise authorities conditioning their cable franchises on the granting of PEG channel access. ... *All [Section 531] does, then, is preempt states from prohibiting local PEG requirements (if any states were to choose to do so) and preclude federal preemption challenges to such [local PEG] requirements*"

Time Warner Entertainment Co. v. FCC, 93 F.3d 957, 972-73 (D.C. Cir. 1996) (emphasis added) (citations omitted).

Section 531's preemption of state prohibitions on local franchise PEG requirements is, of course, fully consistent with the federal Cable Act's goal of assuring that cable systems "are responsive to the needs and interests of the *local* community." 47 U.S.C. § 521(2) (emphasis added). Congress' intent that local PEG requirements were a critical ingredient to achieving this goal is made clear in the legislative history:

It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs. ... [circumscribed by] certain . . . Federal standards that are not continually altered by Federal, state or local regulation.⁸

⁸ H.R. Rep. No. 98-934, at 24 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4661 ("1984 House Report").

Comcast claims otherwise, pointing to passages in the *1984 House Report* and arguing that Congress did not intend Section 531 to limit “state power over PEG requirements in local franchises.”⁹ But Comcast’s argument misses the mark. When read in context, the *1984 House Report* passages on which it relies do not detract from the D.C. Circuit’s holding in *Time Warner Entertainment Co.* The “applicable state laws” referred to on page 46 of the *1984 House Report* relate only to Section 531(b)’s provisions concerning the “construction” and use of “an institutional [cable] network” (or “I-Net”), *not* placement or designation of PEG channel capacity outside the context of an I-Net. And the rules of “state regulatory agencies” referred to in the *1984 House Report* are state public service commission (“PSC”) rules and requirements concerning potentially applicable “certification from a state regulatory body” and “tariff approval” requirements arising from the fact that an I-Net might be subject, in some states, to state PSC regulation as an intrastate telecommunications network. *1984 House Report* at 46. The PEG channel placement limitations at issue here, however, have nothing to do with an I-Net or capacity on an I-Net.

Likewise misguided is Comcast’s reliance on the *1984 House Report*’s discussion (at 45) of the Cable Act’s definition of “franchising authority.” *See Comcast Memo* at 9. While it is true that a state may be a “franchising authority” within the meaning of 47 U.S.C. § 522(10), that is not the route Michigan took in the Michigan Franchise Act. Rather, local governments remain the Cable Act “franchising authority” under the Michigan Franchise Act. The Act provides that a video service provider must still obtain “a franchise agreement with the local unit of government,” and that the franchise agreement must be “issued by a franchising entity.” M.C.L.

⁹ Comcast Memo at 9 (citing *1984 House Report* at 45, 46, *reprinted in* 1984 U.S.C.C.A.N. at

§ 484.3303(1), (4). It then defines the “[f]ranchising entity” as a “local unit of government.” M.C.L. § 484.3301(2)(e). Michigan having chosen to preserve local governments as the “franchising authority” for federal Cable Act purposes, Section 531 “preempt[s] [Michigan] from prohibiting local PEG requirements.” *Time Warner Entertainment Co.*, 93 F.3d at 972-73.

C. Comcast’s Argument That It Has Not Effectively Segregated PEG Channels into a Separate Service Tier Elevates Form Over Substance.

Comcast asserts that it is free to shuttle the PEG channels to channel Siberia and require analog-only basic subscribers to have to pay for a converter box to view the PEG channels because “nothing in the Communications Act precludes a cable operator from providing, and charging for, equipment used to receive its basic service tier” (Comcast Memo at 15), and because the “varying equipment needs of individual customers . . . does *not* determine whether a particular programming service is, or is not, part of the basic service tier” (*id.* at 16) (emphasis in original). Comcast also claims that “digitalization of PEG channels is not ‘discriminatory’ because some customers may be required to obtain additional equipment to view the channels.” *Id.*

This is pure sophistry. From the point of view of a customer who wishes to continue to subscribe only to basic service because he or she is only interested in receiving local broadcast and PEG channels, Comcast’s PEG channel shift has effectively made the PEG channels a new, more expensive offering.¹⁰ The issue is not whether the rate Comcast charges for the converter

4682, 4683).

¹⁰ As Comcast itself all but concedes, its “plan” to make one converter box available for free to its analog-only customers is irrelevant. *See* Comcast Memo at 16 n.6. That “plan” is purely voluntary, and Comcast’s position is clear: It is free to discontinue the “plan” at any time and require its analog-only subscribers to pay for converter boxes in order to receive the PEG channels.

box is reasonable. Whether or not the rate is reasonable, it is a new addition to the price that analog-only subscribers must pay to receive the PEG channels, a price increase that those subscribers do not have to pay to receive most other channels on Comcast's basic tier.

Likewise misleading is Comcast's attempt to blame the problem on "the varying equipment needs of individual customers." Comcast Memo at 16. The equipment of Comcast's analog-only subscribers has not changed. Rather, it is Comcast's decision to shuttle the PEG channels to digital channel Siberia that has forced upon analog-only subscribers a new "equipment need" – a new equipment need that, conveniently enough, would inure to Comcast's financial benefit.

The Cable Act defines a "service tier" as "a category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator." 47 U.S.C. § 522(17). For Comcast's analog-only subscribers, "a separate rate" is in fact being "charged" for receipt of PEG channels. Thus, for them, PEG channels would now be available only at a "separate," and higher, rate than all analog channels on the basic tier. That Comcast chooses to allocate that higher rate via a lease charge for the converter box is a distinction without a difference from PEG-watching analog-only basic subscribers' point of view. The result is the same: They must pay more to receive PEG channels than for most of the other channels on the basic tier. If that does not make the PEG channels a separate "service tier," the term blinks reality.

CONCLUSION

WHEREFORE, *amicus curiae* ACM and ACD respectfully request that the Court deny Comcast's Motion to Dismiss and rule that the Michigan Franchise Act or, alternatively, the federal Cable Act, prohibits Comcast's proposed PEG channel shift.

Dated: June 30, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2008, I electronically filed the foregoing Memorandum Of Law Of *Amicus Curiae* Alliance For Communications Democracy And Alliance For Community Media In Opposition To Defendants' Motion To Dismiss with the Clerk of the Court using the ECF system, which will send notification of such filing to the following: Michael J. Watzka, Cheryl A. Verran, Joseph Leonard Van Eaton, William H. Irving, William P. Hampton, Thomas D. Esordi, Mary Michaels, Michael S. Ashton and Robert Scott. I hereby further certify that I have served a copy of this document via United States Postal Service, first-class, postage prepaid, the to the following non-ECF participant:

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Subject: FW: PROPOSED ORDER: 2:08-10156
Attachments: LWR-#406924-v3-
Alliance_for_Communications_Dem_-_Proposed_Order_Allowing_Amicus_Brief.DOC



LWR-#4069
-Alliance_for

Subject: PROPOSED ORDER: 2:08-10156

*** ATTORNEY COPY ***

ExParte Order Granting Amicus Curiae Leave to File Memorandum of Law in Opposition to Defendants' Motion to Dismiss

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

CITY OF DEARBORN, et al.

PLAINTIFFS,

v.

COMCAST OF MICHIGAN III, INC.
COMCAST OF THE SOUTH, INC.

DEFENDANTS.

Case Number: 08-10156

Hon. Victoria A. Roberts
Mag. Donald A. Scheer

**EX PARTE ORDER GRANTING AMICUS CURIAE LEAVE TO FILE MEMORANDUM
OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

On June 25, 2008, counsel for the Alliance for Community Media and the Alliance for Communications Democracy contacted the court regarding the court's procedure for accepting a motion for leave to file, as *amicus curiae*, a brief in opposition to Defendants' Motion to Dismiss. The Court indicated its willingness to accept such a brief without requiring a separate motion for leave. Pursuant to the Court's inherent discretion to allow participation in the above-captioned matter by *amicus curiae*, and in lieu of requiring a separate motion for leave,

IT IS HEREBY ORDERED that:

1. Alliance for Community Media and Alliance for Communications Democracy shall be permitted to participate in the above-captioned matter as *amicus curiae*;

2. *Amici* shall be permitted to file their Memorandum of Law in Opposition to Defendant's Motion to Dismiss on or before June 30, 2008.

IT IS SO ORDERED.

Hon. Victoria A. Roberts
United States District Judge