

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

**CITY OF DEARBORN, et al,  
PLAINTIFFS,**

**v.**

**COMCAST OF MICHIGAN III, INC., et al,  
DEFENDANTS.**

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

**COMCAST’S MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL MEMORANDUM ON PRIMARY JURISDICTION**

1. Defendants Comcast of Michigan III, Inc., *et al* (“Comcast”) submit this Motion to Leave to File Supplemental Memorandum on Primary Jurisdiction to be considered along with the prior briefs and argument before the Court on August 19, 2008 on Comcast’s Motion to Dismiss.<sup>1</sup>

2. At the hearing before this Court on Comcast’s Motion to Dismiss, it became apparent that the issue of primary jurisdiction as it might apply to Plaintiffs’ claim under 47 U.S.C. § 543(b)(7) is of interest to the Court. Neither party briefed the question of whether this Court may or should invoke that doctrine, although counsel agreed at argument that the Court need not refer the matter to the FCC. The only reference to primary jurisdiction in the briefing is two sentences in the Plaintiffs’ “Response to Defendant’s Motion to Dismiss,” which assert that

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<sup>1</sup> Pursuant to L.R. 7.1, on September 11, 2008, Defendants' counsel conferred with Plaintiffs' counsel explaining the nature of the motion and its legal basis and counsel for the Plaintiffs were unable at that time to state either their concurrence or opposition to the relief sought.

“the issue here is at most one of primary jurisdiction,” with no citation or analysis of the applicability of that doctrine. *See* Pl.’s Response (June 30, 2008) at p. 22.

3. Comcast therefore seeks leave to file a supplemental Memorandum of four pages addressing the applicability of the doctrine of primary jurisdiction to this matter. The proposed supplemental memorandum is included as Attachment A to this motion. This limited additional briefing could assist the Court in its review of the pending motion, and aid in the efficient resolution of this matter.

4. The attached proposed memorandum explains that the doctrine of primary jurisdiction has no application where, as here, Plaintiffs’ claim is not properly before the court. Instead, primary jurisdiction “applies where a claim is *originally cognizable* in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues, which, under a regulatory scheme have been placed within the special competence of an administrative body.” *United States v. Western Pacific Railroad*, 352 U.S. 59, 64 (1956)(emphasis added).

5. Conversely, where a Plaintiff asserts a claim under a statute for which Congress has not provided a private right of action, the claim is not “*originally cognizable* in the courts,” and under Rule 12, the proper remedy is dismissal of that claim. *See, e.g., American Fed’n of State, County and Mun. Employe’s Local 506 v. Private Indus. Council of Trumbull County*, 942 F.2d 376, 380-81 (6<sup>th</sup> Cir. 1991)(reversing district court order on grounds that no private right of action existed, and remanding with instructions to dissolve injunction and dismiss case).

**WHEREFORE**, for the foregoing reasons, Comcast respectfully requests that the Court grant this motion and accept Comcast's proposed Supplemental Memorandum on Primary Jurisdiction, submitted herewith as Attachment A.

Respectfully submitted,

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Date: September 11, 2008

# Attachment A

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**IN THE UNITED STATES DISTRICT COURT  
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**DEFENDANTS.**

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

**SUPPLEMENTAL MEMORANDUM ON PRIMARY JURISDICTION**

Defendants Comcast of Michigan III, et al (“Comcast”) submit this Supplemental Memorandum on Primary Jurisdiction in support of their Motion to Dismiss Plaintiffs’ Complaints.

Comcast’s Motion to Dismiss (“Motion”) rests on Rules 12(b)(1) (lack of subject-matter jurisdiction) and 12(b)(6) (failure to state a claim upon which relief can be granted) of the Federal Rules of Civil Procedure, grounds that are well known to the courts. Defs.’ Mot. Dismiss (April 30, 2008) ¶ 1. At the argument on Comcast’s Motion held on August 19, 2008, the Court explored whether the Court should invoke the doctrine of primary jurisdiction and refer to the Federal Communications Commission the question of whether Comcast may transmit public, educational and governmental (PEG) access channels in digital format consistent with the requirement under 47 U.S.C. § 543(b)(7) to carry those PEG channels on the basic service tier. Although counsel for each party suggested that the Court ought not to refer the issue to the FCC, there has been no briefing of that question.

The only mention of primary jurisdiction in any brief was the Plaintiffs' argument that "because enforcement of § 543 is not left solely to the FCC, the issue here is at most one of primary jurisdiction. . ."<sup>1</sup> Comcast challenged the premise of this argument – that the FCC and courts have concurrent jurisdiction – in both its initial and reply briefs.<sup>2</sup> But neither Plaintiffs nor Comcast squarely addressed primary jurisdiction, or the related doctrine of exhaustion of administrative remedies.

The Supreme Court has explained the relationship between primary jurisdiction and the rule requiring exhaustion of remedies:

"Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; . . . "Primary jurisdiction," on the other hand, applies where a claim is *originally cognizable in the courts*, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial proceeding is suspended pending referral of such issues to the administrative body for its views.<sup>3</sup>

More recently, the Supreme Court confirmed that primary jurisdiction "is a doctrine specifically applicable to claims *properly cognizable in court* that contain some issue within the special competence of an administrative agency."<sup>4</sup> Thus, primary jurisdiction has no application to a claim unless it is properly cognizable in court as a threshold requirement.

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<sup>1</sup> Pl.'s Response to Defs.' Mot. Dismiss at 22 (June 30, 2008).

<sup>2</sup> Mem. in Support of Defs.' Mot. Dismiss at 12-13, 15 (April 30, 2008) ("Defs.' Mem.") ("[T]his Court does not have concurrent jurisdiction with the FCC to consider any claims by Plaintiffs under the cable rate laws."); Reply in Support of Defs.' Mot. Dismiss at 3-4 (July 14, 2008) ("Defs.' Reply") ("[T]he FCC's rate regulations provide the exclusive standards *and procedures* for the resolution of those allegations....Courts do not have concurrent jurisdiction with the FCC to consider such claims ...") (emphasis original).

<sup>3</sup> *United States v. Western Pacific R.*, 352 U.S. 59, 64 (1956)(emphasis added; citation omitted).

<sup>4</sup> *Reiter v. Cooper*, 507 U.S. 258, 268 (1993).

Comcast's briefs provided ample authority for the proposition that Plaintiffs have no right of action under the statute that requires the carriage of PEG channels as part of the basic tier.<sup>5</sup> Claims that Comcast is violating 47 U.S.C. § 543(b)(7) could only be pursued under the exclusive processes that Congress and the FCC have established through a comprehensive regulatory scheme. Where Congress has provided an exclusive administrative process, "the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that course is exhausted, *suit is premature and must be dismissed.*"<sup>6</sup>

Where, as here, a party has no private right of action under a statute, there is no cognizable claim for the court to refer to an agency. The proper remedy where no right of action exists is dismissal, not suspension of the process while a party pursues an administrative process.<sup>7</sup> "If Congress intended no right of immediate access to a federal court under the [statute invoked], then the ...claim should have been dismissed, not adjudicated on the merits..."<sup>8</sup> The proper remedy under Rule 12 is for the Court to dismiss Plaintiffs' claims for which they have no private rights of action, including their claims that Comcast's plan to digitize PEG channels

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<sup>5</sup> Defs.' Mem. at 12-15.

<sup>6</sup> *Reiter v. Cooper*, 507 U.S. at 269 (citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); *Heckler v. Ringer*, 466 U.S. 602, 617, 619, and n. 12 (1984)).

<sup>7</sup> Plaintiffs could have pursued the exclusive federal processes but chose instead to assert a claim under 47 U.S.C. 547(b)(7).

<sup>8</sup> *Northwest Airlines v. Kent County*, 127 L. Ed. 2d 183, 193 (1994). See also *American Fed'n of State, County and Mun. Employees Local 506 v. Private Indus. Council of Trumbull County*, 942 F.2d 376, 381 n. 4 (6<sup>th</sup> Cir. 1991) ("Having determined that there is neither an express nor an implied right of action [under a statute] . . . we need not reach the other issues raised in this appeal."); *Care Choices HMO v. Engstrom*, 170 F. Supp. 2d 741 (finding no private right of action under 42 U.S.C. § 1395mm(e)(4) and granting motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1))(Hon. Victoria Roberts, D.J.).

violates 47 U.S.C. § 543(b)(7). Those claims are not cognizable in court as a threshold matter, and the doctrine of primary jurisdiction does not apply.

**WHEREFORE**, for the reasons set forth in Comcast's Motion and its briefs, Comcast respectfully requests that the Court dismiss Plaintiffs' Complaints.

Respectfully submitted,

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September 11, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on September 11, 2008, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Mary Michaels, Michael J. Watza, William H. Irving, Cheryl Verran, William P. Hampton and Joseph Van Eaton. I have also served a copy of the foregoing document by first class mail upon the following:

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