

**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

**DEFENDANTS' MOTION TO DISMISS**

1. Defendants Comcast of Michigan III, Inc., *et al* (referred to collectively herein as “Comcast”) through their undersigned attorneys, submit this Motion to Dismiss Plaintiffs’ Complaints pursuant to Federal Rule of Civil Procedure (“FRCP”) 12(b)(1) and 12(b)(6).<sup>1</sup> The Complaints do not present any legally cognizable claim for relief.

2. None of the statutes, regulations or authorities relied upon by Plaintiffs create enforceable obligations that would be violated by Comcast’s conversion of PEG channels to a digital format and new channel locations.

3. Plaintiffs' argument that 47 U.S.C. § 531 creates an obligation for Comcast to provide PEG channels to subscribers in some prescribed manner is untenable because that statute does not impose any obligations of any kind. Courts have recognized that “any rights regarding the use of public access channels are not created by § 531, but stem from franchise agreements

---

<sup>1</sup> Pursuant to L.R. 7.1, Defendants' counsel conferred with counsel for the Plaintiffs explaining the nature the motion and its legal basis and counsel for the Plaintiffs did not concur in the relief sought.

between cable operators and franchising authorities.” *Leach v. Mediacom*, 240 F. Supp. 2d 994, 997-98 (S.D. Iowa 2003), *aff’d*, 373 F.3d 895 (8<sup>th</sup> Cir. 2004). This statute merely permits local franchise authorities to require PEG channel capacity in franchises.

4. Nor are Plaintiffs’ claims under 47 U.S.C. § 531 and their local franchises saved by Subsection (c) of the statute, which provides, in relevant part, that “[a] franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity.” As explained in detail in Defendants’ memorandum of law supporting this motion, any rights the Plaintiffs might claim under their local cable franchises to prevent Comcast’s PEG digitization have been preempted by the enactment of Michigan’s Uniform Video Services Local Franchise Act of 2006 M.C.L. §§ 484.3301 *et seq.* (“Uniform Franchise Act”). And under M.C.L. § 484.3305(2)(b), Comcast’s existing franchise agreements have been automatically amended by operation of state law to exclude any PEG obligations beyond those contained in M.C.L. § 484.3304(1) and the Uniform Franchise, including any that require specific locations or processes for the relocation of PEG channels.

5. Michigan clearly intended to amend PEG franchise requirements, and federal law does not preempt that decision. Michigan has the absolute discretion to define municipal power as it deems to be in the State’s interest. *See, e.g., People v. Llewellyn*, 257 N.W. 2d 902 (Mi. 1977)(state preemption of local obscenity law); *Hudson Motor Co v. City of Detroit*, 275 N.W. 770 (Mi. 1937)(home rule city ordinances controlled by State Constitution and laws). The municipal (local franchise authority or "LFA") Plaintiffs do not have powers beyond those allowed (or disallowed) by the State. Congress has not disrupted that sovereign relationship of the State and its subdivisions with respect to cable franchising in general, and PEG channels in

particular. Indeed, in passing Section 531 Congress stated that the provision “does not give the franchising authority the power to override the application of state law.” H.R. Rep. No. 934, 98th Cong., 2nd Sess. *reprinted at* 1984 U.S.C.C.A.N. 4655, 4683.

6. Plaintiffs allege that Comcast’s digitization of PEG channels violates 47 U.S.C. § 541 because, they claim, “the control of the channels is left to the locality.” (Dearborn Compl. ¶ 17.) There is no such language in the statute, and Plaintiffs have not cited to a provision in Section 541 that supports their argument. The subsection has nothing to do with the regulation of PEG channels or programming, and affords Plaintiffs no relief.

7. Plaintiffs cite 47 U.S.C. § 544a(c)(2)(B)(ii) for the proposition that “federal law . . . require[s] a cable operator to provide all channels on the basic service tier ‘in the clear.’” The allegation grossly misrepresents the statute, which imposes no obligation on cable operators. More importantly, it gives no rights to local governments. Plaintiffs have no right of action under this provision.

8. Plaintiffs claim that Comcast’s proposed PEG channel digitization violates Section 543(b)(7), titled “Components of the Basic Tier Subject to Rate Regulation.” The Court need not reach the merits of this claim, however, because Section 543(b) does not create a private right of action. *See, e.g., Aventura Cable Corp. v. Rifkin/Narragansett South Florida CATV, L.P.*, 941 F. Supp. 1189, 1195 (S.D. Fla. 1996); *Broder v. Cablevision Systems Corp.*, 329 F. Supp. 2d 551, 559 (S.D.N.Y. 2004). Even if Plaintiffs had a right to be in court under Section 543, these claims should be dismissed under Rule 12(b)(6) for failure to state a claim because nothing in the Communications Act precludes a cable operator from providing, and charging for, equipment used to receive its basic service tier.

9. Plaintiffs' allegation that Comcast's proposed placement of PEG channels on a digital tier violates 47 C.F.R. § 76.630 cannot be the basis of any relief. That FCC rule does not create a private right of action, and is ultimately irrelevant to this case.

10. The Court need not, and should not, consider the merits of Plaintiffs' challenge to Comcast's notice to customers of its planned relocation of PEG channels because there is no live issue to decide. Any challenges to the technical details of the notices Comcast provided in 2007 are moot. Likewise, there is no justiciable claim as to any customer notice Comcast might provide in the future because the contents of any future notice is unknown at this time. There is simply no customer notice before the Court for decision, and the Court has no jurisdiction to render advisory opinions.

11. Finally, Plaintiff Gillette has no greater right to maintain this action than the LFA Plaintiffs. She has no right of action under any of the sources of law mentioned in the Complaints. Her claims should be dismissed.

**WHEREFORE**, for all of the foregoing reasons, Comcast respectfully requests that the Court dismiss Plaintiffs' Complaints with prejudice.

Respectfully submitted,

Robert G. Scott, Jr.  
Wesley R. Heppler  
**Davis Wright Tremaine, LLP**  
1919 Pennsylvania Avenue, N.W.  
Suite 200  
Washington, D.C. 20006  
(202) 973-4200

s/Michael S. Ashton  
Michael S. Ashton (P40474)  
Anita G. Fox (P47818)  
**Fraser Trebilock Davis & Dunlap P.C.**  
124 West Allegan, Suite 1000  
Lansing, MI 48933  
(517) 482-5800

*Attorneys for Defendants*

Date: April 30, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on April 30, 2008, I electronically filed the foregoing 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. Watza, Cheryl A. Verran, Joseph Leonard Van Eaton, William H. Irving, William P. Hampton, Thomas D. Esordi, and Mary Michaels, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participant:

David L. Richards  
Richards & DeWitt  
3250 W. Big Beaver Rd., Suite 342  
Troy, MI 48084

s/Michael S. Ashton  
Michael S. Ashton

**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 IN SUPPORT  
OF DEFENDANTS' MOTION TO DISMISS**

Robert G. Scott, Jr.  
Wesley R. Heppler  
**Davis Wright Tremaine, LLP**  
1919 Pennsylvania Avenue, N.W.  
Suite 200  
Washington, D.C. 20006  
(202) 973-4200

Michael S. Ashton (P40474)  
Anita G. Fox (P47818)  
**Fraser Trebilock Davis & Dunlap P.C.**  
124 West Allegan, Suite 1000  
Lansing, MI 48933  
(517) 482-5800

*Attorneys for Defendants*

April 30, 2008

**TABLE OF CONTENTS**

CONCISE STATEMENT OF ISSUE PRESENTED..... 1

CONTROLLING AUTHORITY ..... 1

INTRODUCTION ..... 1

STANDARD OF REVIEW ..... 2

ARGUMENT..... 3

I. PLAINTIFFS HAVE NO RIGHT TO BLOCK COMCAST’S DIGITIZATION OF PEG CHANNELS UNDER 47 U.S.C. § 531 OR LOCAL FRANCHISES ..... 3

    A. Section 531 Contains No Affirmative PEG Carriage Obligation ..... 3

    B. PEG Obligations Relied Upon By Plaintiffs In Franchise Agreements Have Been Invalidated By State Law ..... 4

    C. Michigan Has Sovereign Power to Invalidate Franchise Provisions ..... 6

II. 47 U.S.C. §§ 541 AND 544a DO NOT PROVIDE AUTHORITY FOR PLAINTIFFS TO PREVENT COMCAST’S PROPOSED DIGITIZATION OF PEG CHANNELS ..... 10

III. PLAINTIFFS CANNOT STATE A CLAIM UNDER 47 U.S.C. § 543(b)(7)..... 12

    A. Section 543 Does Not Create A Private Right of Action..... 12

    B. Section 543(b)(7) Does Not Preclude Comcast From Offering PEG Channels in Digital Format or Requiring Consumers to Obtain Equipment to Receive the Programming on the Basic Tier ..... 15

IV. FCC RULES FOR CABLE EQUIPMENT ARE IRRELEVANT AND DO NOT CREATE RIGHTS OF ACTION..... 17

V. THERE IS NO RIPE QUESTION AS TO CUSTOMER NOTICE..... 18

VI. PLAINTIFF GILLETTE HAS NO COGNIZABLE CLAIM ..... 20

CONCLUSION..... 20

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Adell Broadcasting Corp. v. Cablevision Industries</i> , 854 F. Supp. 1280 (E.D. Mich. 1994).....	12
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	1, 14, 15, 17
<i>Ass’n of Cleveland Fire Fighters v. City of Cleveland</i> , 502 F.3d 545 (6 <sup>th</sup> Cir. 2007) .....	3
<i>Aventura Cable Corp. v. Rifkin/Narragansett South Florida CATV, L.P.</i> , 941 F. Supp. 1189 (S.D. Fla. 1996) .....	13, 14
<i>Bigelow v. Michigan Dep’t of Natural Resources</i> , 970 F.2d 154 (6 <sup>th</sup> Cir. 1992) .....	19
<i>Broder v. Cablevision Systems Corp.</i> , 329 F. Supp. 2d 551 (S.D.N.Y. 2004), <i>aff’d</i> , 418 F.3d 187 (2d Cir. 2005) .....	14
<i>Brown v. Ferro Corp.</i> , 763 F.2d 798 (6 <sup>th</sup> Cir. 1985) .....	19
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	19
<i>Carras v. Williams</i> , 807 F.2d 1286 (6 <sup>th</sup> Cir. 1986) .....	18
<i>City of Dearborn v. Comcast of Michigan</i> , No. 08-10156, 2008 WL 126605 (E.D. Mich. Jan. 14, 2008) .....	16
<i>Chirco v. Gateway Oaks, L.L.C.</i> , 384 F.3d 307 (6 <sup>th</sup> Cir. 2004) .....	18
<i>Gottfried v. Medical Planning Services, Inc.</i> , 280 F.3d 684 (6 <sup>th</sup> Cir. 2002) .....	18
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	1, 8, 10

*Hudson Motor Co v. City of Detroit*,  
 275 N.W. 770 (Mich. 1937).....1, 9

*In re Comcast Corp. Cable TV Rate Regulation*,  
 No. 93-6628, 1994 U.S. Dist. LEXIS 16044 (E.D. Pa. Nov. 10, 1994) .....13, 14

*In re Haley*,  
 476 Mich. 180, 720 N.W.2d 246 (2006).....7

*Insight Comms. Co. v. Telecomm. Bd.*,  
 No. 05-142-DLB, 2006 WL 208828 (E.D.Ky. Jan. 25, 2006).....12

*International Union v. Dana Corp.*,  
 697 F.2d 718 (6<sup>th</sup> Cir. 1983) .....18

*Kentucky Press Ass’n v. Commonwealth of Kentucky Press Ass’n*,  
 454 F.3d 505 (6<sup>th</sup> Cir. 2006) .....19

*Lambert v. Hartman*,  
 517 F.3d 433 (6<sup>th</sup> Cir. 2008) .....1, 3

*Leach v. Mediacom*,  
 240 F. Supp. 2d 994 (S.D. Iowa 2003), *aff’d*, 373 F.3d 895 (8<sup>th</sup> Cir. 2004) .....4, 7

*Mallenbaum v. Adelpia Comms. Corp.*,  
 No. 93-7027, 1994 WL 724981 (E.D. Pa. Dec. 29, 1994) .....12, 13, 14

*Nat’l Rifle Ass’n of Am. v. Magaw*,  
 132 F.3d 272 (6<sup>th</sup> Cir.1997) .....19

*Nixon v. Missouri Municipal League*,  
 541 U.S. 125 (2004).....8, 9

*Parry v. Mohawk Motors of Michigan, Inc.*,  
 236 F.3d 299 (6<sup>th</sup> Cir. 2000) .....15

*People v. Llewellyn*,  
 257 N.W. 2d 902 (Mich. 1977).....1, 9

*Pertuso v. Ford Motor Credit Co.*,  
 233 F.3d 417 (6<sup>th</sup> Cir. 2000)) .....13

*Preiser v. Newkirk*,  
 422 U.S. 395 (1975).....18

*Reno v. Catholic Soc. Servs., Inc.*,  
509 U.S. 43 (1993).....1

*Smith v. Dearborn Fin. Serv., Inc.*,  
982 F.2d 976 (6<sup>th</sup> Cir. 1993) .....15, 17

*Stocker v. Tri-Mount/Bay Harbor Building Co.*,  
268 Mich. App. 194, 706 N.W.2d 878 (2005).....7

*Thomas M. Cooley Law School v. American Bar Assoc.*,  
459 F.3d 705 (6<sup>th</sup> Cir. 2006) .....13

*Touche Ross & Co. v. Redington*,  
442 U.S. 560 (1979).....13

*United States v. Perry*,  
360 F.3d 519 (6<sup>th</sup> Cir. 2004) .....7

*Whitmore v. Arkansas*,  
495 U.S. 149 (1990).....19

*Young v. City of Detroit*,  
652 F.2d 617 (6<sup>th</sup> Cir. 1981) .....19

**FEDERAL STATUTES**

47 U.S.C. § 531..... passim

47 U.S.C. § 532..... 14

47 U.S.C. § 534..... 12

47 U.S.C. § 541.....1, 10, 11

47 U.S.C. § 543..... passim

47 U.S.C. § 544.....10, 11, 12

47 U.S.C. § 546.....14

47 U.S.C. § 551.....14

47 U.S.C. § 553.....14

**STATE STATUTES**

Michigan’s Uniform Video Services Local Franchise Act of 2006 M.C.L. §§ 484.3301  
*et seq.* .....1, 2, 4, 6

M.C.L. § 484.3302 .....6, 7

M.C.L. § 484.3304 .....5, 6

M.C.L. § 484.3305 .....1, 5, 6

**CODE OF FEDERAL REGULATIONS**

47 C.F.R. § 76.309 .....1, 18

47 C.F.R. § 76.630 .....1, 17, 18

47 C.F.R. § 76.922 .....1, 16

47 C.F.R. § 76.923 .....1, 16

**OTHER AUTHORITIES**

*In re Commissions: Own Motion, to Establish a Standardized Form for the Uniform  
Video Service Local Franchise Agreement Pursuant to Section 2(1) of 2006 PA40,  
Case No. U-15169, 2007 Mich. PSC LEXIS 38.*.....5

FRCP 12(b)(6) .....3, 15

H.R. Rep. No. 934, 98th Cong., 2nd Sess. 46 (1984) .....9

U.S. Const., Article III, cl. 2 .....1

### CONCISE STATEMENT OF ISSUE PRESENTED

1. Whether Plaintiffs' claims should be dismissed when none of the statutes or regulations on which they rely empower them to prevent Comcast's provision of PEG channels in digital format, when federal law prohibits such interference by Plaintiffs, and when the Michigan Legislature has invalidated any relevant local franchise provisions as a matter of state law.
2. Whether Plaintiffs' challenge to Comcast's customer notice is not ripe for decision.

### CONTROLLING AUTHORITY

1. For motions to dismiss: Federal Rule of Civil Procedure ("FRCP") 12(b)(6); *Lambert v. Hartman*, 517 F.3d 433, 439 (6<sup>th</sup> Cir. 2008).
2. For Plaintiffs not having a private right of action under the federal Communications Act and regulations upon which their claims rely: 47 U.S.C. §§ 531(a)-(c), 541, 543; 47 C.F.R. §§ 76.630(a), 76.309(c)(3)(i)(B); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).
3. For the preemption of local franchise PEG requirements of the Michigan Uniform Video Services Local Franchise Act, Act 480 of 2006: M.C.L. §§ 484.3305(3), 484.3305(2)(a)-(b); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *People v. Llewellyn*, 257 N.W. 2d 902 (Mich. 1977); *Hudson Motor Co v. City of Detroit*, 275 N.W. 770 (Mich. 1937).
4. For Comcast's ability to transmit programming on the basic service tier in a digital format: 47 U.S.C. §§ 543(b)(1) & (3), 544(e); 47 C.F.R. §§ 76.922, 76.923.
5. For the absence of ripeness for Plaintiffs' challenges to Comcast's customer notice: U.S. Const., Art III, cl. 2; *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n. 18 (1993).

### INTRODUCTION

Defendants Comcast of Michigan III, Inc., *et al* (together, "Comcast") submit this

Memorandum of Law in Support of their motion to dismiss Plaintiffs' Complaints pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(1) and 12(b)(6).<sup>1</sup>

The Complaints do not present any legally cognizable claim for relief. They first allege that Comcast's plan to provide PEG channels in digital format and reposition them in a unified PEG grouping on Comcast's cable systems violates obligations under the federal Communications Act and FCC regulations (First Claim for Relief). They also allege violations of Comcast's local franchises and ordinances (Second Claim for Relief; Warren's Third Claim for Relief). None of the statutes, regulations or authorities relied upon by Plaintiffs create enforceable obligations that would be violated by Comcast's provision of PEG channels in digital format and in new channel locations. In any event, any rights the municipal (local franchise authority or "LFA") Plaintiffs might claim under their local cable franchises to prevent Comcast's PEG digitization have been preempted by the enactment of Michigan's Uniform Video Services Local Franchise Act of 2006 M.C.L. §§ 484.3301 *et seq.* ("Uniform Franchise Act"). Finally, any challenges to whatever notice Comcast might give for any future relocation of PEG channels are not ripe for decision. Plaintiffs have no cognizable claim for relief under any of these provisions, and their Complaints should be dismissed with prejudice.

#### STANDARD OF REVIEW

A motion to dismiss pursuant to FRCP 12(b)(6) tests the sufficiency of a complaint and permits a district court to dismiss a complaint "for failure to state a claim upon which relief can be granted." *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6<sup>th</sup> Cir.

---

<sup>1</sup> The initial Plaintiffs in this case (Dearborn/Meridian/Gillette) have been joined by the City of Warren (through removal & consolidation) and the Township of Bloomfield (through intervention). The Warren complaint adds a Third Claim for relief, but all substantive claims of all Plaintiffs mirror those of the initial Dearborn Complaint.

2007). In considering a motion to dismiss, the Court must determine whether the plaintiff is entitled to legal relief if all of the allegations in the complaint are accepted as true and the complaint is construed in a light most favorable to the plaintiff. *Lambert v. Hartman*, 517 F.3d 433, 439 (6<sup>th</sup> Cir. 2008). However, the Court need not “accept as true legal conclusions or unwarranted factual inferences.” *Ass’n of Cleveland Fire Fighters*, 502 F.3d at 548.

## ARGUMENT

### I. **PLAINTIFFS HAVE NO RIGHT TO BLOCK COMCAST’S DIGITIZATION OF PEG CHANNELS UNDER 47 U.S.C. § 531 OR LOCAL FRANCHISES**

#### A. **Section 531 Contains No Affirmative PEG Carriage Obligation**

Plaintiffs’ “central argument” is their allegation that 47 U.S.C. § 531 creates an obligation for Comcast to provide PEG channels to subscribers in a particular manner. (Dearborn Compl. ¶ 70)(Pl’s Reply Mem. Supp. Mot. T.R.O, Jan. 13, 2008 at 1.) The plain text of this statute renders Plaintiffs’ claims untenable. Section 531(a) states 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 only to the extent provided in this section.” 47 U.S.C. § 531(a) (emphasis added). Likewise, Section 531(b) states that “[a] franchising authority *may* in its request for proposals require as part of a franchise, and *may* require as part of a cable operators proposal for a franchise renewal . . . that channel capacity be designated for public, educational, or governmental use . . . and *may* require rules and procedures for the use of channel capacity designated pursuant to this section.” 47 U.S.C. § 531(b) (emphasis added).

Courts have recognized that Section 531 “does not itself mandate the establishment of public access channels,” but instead “merely recognize[d] ‘the preexisting practice of local franchise authorities conditioning the cable franchises on the granting of [public access]

channels.”” *Leach v. Mediacom*, 240 F. Supp. 2d 994, 997-98 (S.D. Iowa 2003), *aff’d*, 373 F.3d 895 (8<sup>th</sup> Cir. 2004). “Consequently, *any rights regarding the use of public access channels are not created by § 531*, but stem from franchise agreements between cable operators and franchising authorities.” *Id.* (emphasis added). Unless cable franchise agreements specify obligations for PEG channel carriage, none exist.

Congress did not create any obligation in Section 531 that Comcast would violate by providing PEG channels in digital format. Rather than *requiring* PEG channel capacity or any specific rules for the location or format of PEG channels, this statute merely *permits* franchise authorities to require PEG channels in franchises. Any obligation Comcast may have to make PEG channels available arises only through a cable franchise agreement. Because Section 531 does not create any obligation that Comcast could violate, Plaintiffs’ claims that Comcast violated that statute must be dismissed.

**B. PEG Obligations Relied Upon By Plaintiffs In Franchise Agreements Have Been Invalidated By State Law**

Plaintiffs’ claims under 47 U.S.C. § 531 and their local franchises are not saved by Subsection (c) of the statute, which provides, in relevant part, that “[a] franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity.” By its terms, this provision only authorizes “a franchising authority” to enforce PEG requirements established under franchise agreements. As explained below, PEG channel requirements contained in Comcast’s Michigan franchise agreements inconsistent with or in addition to those set forth in the Uniform Franchise Act have been invalidated by the decision of the ultimate authority in Michigan – the State -- to impose uniform statewide franchise standards. Therefore, there are no legally cognizable franchise terms relating to the channel or tier

placement of PEG channels for Plaintiffs to enforce pursuant to 47 U.S.C. § 531(c).

Michigan's Uniform Franchise Act, effective January 1, 2007, makes clear that “[o]n the effective date of this act, any provisions of an existing franchise that are inconsistent with *or in addition to* the provisions of a uniform video service local franchise agreement are *unreasonable and unenforceable* by the franchising entity.” M.C.L. § 484.3305(3)(emphasis added). The Uniform Franchise Act does not contain any requirements concerning channel PEG channel placement, or delivery format, or the process for changing the PEG channel locations. Instead, the Act (and the Uniform Video Service Local Franchise Agreement (“Uniform Franchise”)) requires only that a “video service provider shall designate a sufficient amount of capacity on its network 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 the act . . . .” M.C.L. § 484.3304(1); *In re Commissions: Own Motion, to Establish a Standardized Form for the Uniform Video Service Local Franchise Agreement Pursuant to Section 2(1) of 2006 PA40*, Case No. U-15169, 2007 Mich. PSC LEXIS 38 § VII (Jan. 30, 2007) (Attachment A hereto).

As a result, any cable franchise PEG provision that requires more than the same number of PEG channels in actual use as of the effective date of the Uniform Franchise Act is “in addition to” the Uniform Franchise and is necessarily precluded by state law. The requirement under Dearborn's franchise that PEG channel location “be determined by mutual agreement,” (Dearborn Compl. ¶ 26), and the requirement under Warren's franchise that Comcast carry certain PEG programming on specific cable channels, (Warren Compl. ¶ 27), are “*in addition to*” the limited, permissible franchise requirement to maintain the existing number of PEG channels

on the system.<sup>2</sup> As required by the Michigan Legislature, the provisions of those franchise agreements must now conform to the Uniform Franchise by operation of state law.

The Uniform Franchise Act gave cable operators the option to either terminate existing franchise agreements and enter into a new Uniform Video Service Local Franchise Agreement (“Uniform Franchise”), *or* to “continue under the existing franchise agreement amended to include *only those provisions required under a uniform video service local franchise.*” M.C.L. § 484.3305(2)(a)-(b) (emphasis added). The Complaints allege that Comcast is violating its existing franchise agreements (appended to the Complaints), but under the Act, the existing franchise agreements were automatically modified by operation of state law to *exclude* any PEG obligations beyond those contained in M.C.L. § 484.3304(1) and the Uniform Franchise, including any that require specific locations or processes for the relocation of PEG channels.

### **C. Michigan Has Sovereign Power to Invalidate Franchise Provisions**

In order to provide for uniform franchises and promote competition, Michigan clearly intended to amend PEG franchise requirements, and federal law does not preempt that decision. The Uniform Franchise Act requires compliance “with all valid and enforceable federal and state statutes and regulations,” M.C.L. § 484.3302(3)(h). This general “compliance with laws” provision cannot be read to nullify the statute’s *specific* declaration that existing franchises are automatically “amended to include only those provisions required under” a Uniform Franchise, which requires that “the provider comply with the public, education, and government programming requirements of section 4.” MCL 484.3302(3)(k).<sup>3</sup> *In re Haley*, 476 Mich. 180,

---

<sup>2</sup> Neither Meridian nor Bloomfield’s franchises restrict Comcast’s designation of PEG channel locations.

<sup>3</sup> Instead, the Uniform Franchise Act’s requirement for operators to comply with valid and enforceable state and federal laws would, for example, preserve the application of federal antitrust and employment laws.

720 N.W.2d 246 (2006) ("[I]t is a settled rule of statutory construction that where a statute contains a specific statutory provision and a related, but more general provision, the specific one controls"); *accord Stocker v. Tri-Mount/Bay Harbor Bld. Co.*, 268 Mich. App. 194, 706 N.W.2d 878 (2005) ("[S]pecific statutory provisions control general ones"); *United States v. Perry*, 360 F.3d 519, 535 (6th Cir. 2004) ("One of the most basic canons of statutory interpretation is that a more specific provision takes precedence over a more general one").

The State's declaration that cities and townships may not enforce PEG channel obligations other than those set forth in the Uniform Franchise Act is entirely consistent with the federal law. That is because Section 531 *does not contain any PEG channel carriage requirements*, but instead simply allows *franchising authorities* to impose such requirements. Here, the State of Michigan – the ultimate source of franchising authority for all Michigan communities – has specifically established the lawful level of PEG channel carriage requirements for all Michigan communities by passage of the Uniform Franchise Act. As explained above, “*any rights regarding the use of public access channels are not created by § 531, but stem from franchise agreements between cable operators and franchising authorities.*” *Leach v. Mediacom*, 240 F. Supp. 2d 994, 997-98 (S.D. Iowa 2003), *aff'd*, 373 F.3d 895 (8<sup>th</sup> Cir. 2004). A state – as the ultimate source of franchising authority for all its communities – that decides, as a matter of state law, to alter or even eliminate PEG carriage obligations from local franchises violates no requirement of Section 531.

In seeking preliminary relief, Plaintiffs argued that if the Uniform Franchise Act altered local franchise provisions concerning PEG channel placement, then federal law would preempt the Michigan law because 47 U.S.C. § 531(c) specifies that franchise authorities may enforce

PEG requirements in franchises. (Pl. Reply to Opp. to Mot. for Prelim. Inj. at 4-5.) This proposition turns federalism on its head, and disregards the respect that the federal government must have for state sovereignty. “[I]f Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quotations omitted). “This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.” *Gregory*, 501 U.S. at 461. Thus, “federal legislation threatening to trench on the state’s arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a state’s chosen disposition of its own power.” *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004).

In *Nixon*, the U.S. Supreme Court applied these principles of state sovereignty to preemption under the Communications Act. The Court held that the provision of the Act that preempt state laws prohibiting “any entity” from providing telecommunications service did not preempt a Missouri law which prohibited its municipalities from providing telecommunications service. The Court observed that “municipal subdivisions . . . are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.” The Court thus held that “neither statutory structure nor legislative history points unequivocally to a commitment by Congress” to override state power. *Id.*

Like Missouri, Michigan has “absolute discretion” to define municipal power as it deems to be in the State’s interest. There is a long line of state cases reinforcing Michigan’s power to control its units of local government. *See, e.g., People v. Llewellyn*, 257 N.W. 2d 902 (Mi.

1977)(state preemption of local obscenity law); *Hudson Motor Co. v. City of Detroit*, 275 N.W. 770 (Mi. 1937)(home rule city ordinances controlled by State Constitution and laws). The State may prohibit localities from enforcing cable franchise requirements beyond those specified in the Uniform Franchise Act and the Uniform Franchise. The LFA Plaintiffs do not have powers beyond those granted (or taken away) by the State, and Congress has not disrupted state sovereignty with respect to cable franchising in general, and PEG channels in particular.

The legislative history of Section 531 removes any doubt about Congressional intent with respect to state power over PEG requirements in local franchises. In passing Section 531 Congress stated that “Subsection 611(b) [codified as 47 U.S.C. § 531(b)] ***does not give the franchising authority the power to override the application of state law.***” H.R. Rep. No. 934, 98th Cong., 2nd Sess. 46 (1984), *reprinted at* 1984 U.S.C.C.A.N. 4655, 4683 (emphasis added). By way of example, Congress explained that “any rules and procedures established by a franchising authority for the use of [PEG] channel capacity on an institutional network ***must be consistent with rules established by state regulatory agencies and applicable state laws.***” *Id.* (emphasis added). Likewise, Congress recognized that the meaning of the term “franchising authority” as used in the statute might be further defined by state law, such as where “the franchising process includes approval by a state agency as well as by a local government.” *Id.* at 45. Congress thus fully preserved the power of states to control the authority of local governments with respect to PEG channel obligations. By specifying the permissible PEG channel requirements that any Michigan city or township may enforce, Michigan has exercised precisely the kind of state sovereignty preserved by the rule of *Gregory v. Ashcroft* and Congress’ explicit understanding of Section 531.

Section 531 does not interfere with the State of Michigan's sovereign power to preempt local franchise terms and regulation of PEG channels. Nor can the requirement of the Uniform Franchise Act for cable operators to comply with "valid and enforceable" federal laws be read to eviscerate the more specific provisions of the same law which amend existing franchises. Under the Uniform Franchise Act, local subdivisions are no longer permitted to create a patchwork of differing regulations, including regulations controlling PEG channel placement, equipment, pricing or notice, where such regulations are inconsistent with, or in addition to, the limited requirements allowed by the Uniform Franchise Act. Plaintiffs' claims against Comcast for purported violations of invalidated franchise provisions should be dismissed.

**II. 47 U.S.C. §§ 541 AND 544a DO NOT PROVIDE AUTHORITY FOR PLAINTIFFS TO PREVENT COMCAST'S PROPOSED DIGITIZATION OF PEG CHANNELS**

Plaintiffs allege that Comcast's planned digitization of PEG channels violates 47 U.S.C. §§ 541 & 544a(c)(2)(B)(ii). (Dearborn Compl. ¶ 70, 72). Neither of these statutes establishes a right in favor of Plaintiffs that Comcast can possibly have violated or a remedy Plaintiffs may obtain.

Plaintiffs allege that Comcast's digitization of PEG channels violates 47 U.S.C. § 541 because, they claim, "the control of the channels is left to the locality." (Dearborn Compl. ¶ 17.) There is no such language in the statute, and Plaintiffs have not cited to a provision in Section 541 that supports their argument. The only subsection of the statute specifically referenced in the Complaints is Section 541(b)(1), (*Id.* ¶ 11.), which states only that "a cable operator may not provide cable service without a franchise." The subsection has nothing to do with the regulation of PEG channels or programming. The only part of Section 541 that even mentions PEG is Section 541(a)(4)(B), which states that "[i]n awarding a franchise, the franchising authority . . .

may require adequate assurance that the cable operator will provide adequate public, education and governmental access channel capacity, facilities, or financial support . . . .” 47 U.S.C. § 541(a)(4)(B). As a preliminary matter, this is exactly the type of statute that federal courts have recognized does not create a private right of action. (*See* Section III below). Moreover, and dispositive, as explained above, Michigan’s Uniform Franchise Act has eliminated the power of local franchise authorities to impose or “require adequate assurance” of PEG carriage obligations “in addition to” those contained in the Uniform Franchise. (*See* Section I.B-C above.) Thus, Plaintiffs cannot state a claim under Section 541 for which relief may be granted.

Plaintiffs cite 47 U.S.C. § 544a(c)(2)(B)(ii) for the proposition that “federal law . . . require[s] a cable operator to provide all channels on the basic service tier ‘in the clear.’” (Dearborn Compl. ¶ 21.) The allegation grossly misrepresents the statute, which directs the FCC to conduct a rulemaking, consider various factors, and adopt national regulations for consumer electronics equipment. The statute itself imposes no obligation on cable operators. More importantly, it gives no rights to local governments, and nothing in the statute, its history, or its purpose suggests that Congress intended to give local governments a right of action in court to enforce their individual assessments of national consumer electronics policy. Plaintiffs have no right of action under this provision. Moreover, nothing in the Communications Act precludes the use of a converter box for the receipt of programming offered on the basic service tier. Instead, Congress expressly prohibited LFAs from interfering with a cable operator’s use of transmission technology (like digital) and subscriber equipment (like converters). 47 U.S.C. § 544(e). Accordingly, Plaintiffs cannot state a claim under Section 544a(c)(2)(B)(ii).

### III. PLAINTIFFS CANNOT STATE A CLAIM UNDER 47 U.S.C. § 543(b)(7)

#### A. Section 543 Does Not Create A Private Right of Action

Plaintiffs claim that Comcast's proposed PEG channel digitization violates Section 543(b)(7), which is titled "Components of the Basic Tier Subject to Rate Regulation." That subsection requires a cable operator to have a separate basic service tier that includes any public, educational, and government access programming required by a local franchise. 47 U.S.C. § 543(b)(7)(A)(ii). The Court need not reach the merits of this claim, however, because Section 543(b) does not create a private right of action.

Section 543 provides no express right for any action in court against a cable operator. The federal Communications Act "provides the FCC with exclusive jurisdiction to regulate cable service rates." *Mallenbaum v. Adelphia Comms. Corp.*, No. 93-7027, 1994 WL 724981, \* 2 (E.D. Pa. Dec. 29, 1994). "Such jurisdiction includes the authority to impose regulations ensuring the reasonableness of rates charged by cable operators for basic cable service." *Id.* Pursuant to 47 U.S.C. § 543(a)(5), it is the sole province of the FCC to determine the appropriate relief under these circumstances. *See Insight Comms. Co. v. Telecomm. Bd.*, No. 05-142-DLB, 2006 WL 208828, \* 8 (E.D.Ky. Jan. 25, 2006) (FCC, not courts, had jurisdiction under Section 543(a)(5) when a franchise authority attempted to control cable operator's treatment of PEG fees); *cf. Adell Broadcasting Corp. v. Cablevision Inds.*, 854 F. Supp. 1280 (E.D. Mich. 1994) (administrative remedy established by 47 U.S.C. § 534(d) precluded a private right of action).<sup>4</sup> Accordingly, this Court does not have concurrent jurisdiction with the FCC to consider any

---

<sup>4</sup> Thus, to the extent this Court's Jan. 14, 2008 Opinion and Order rested on the perceived likelihood of Plaintiffs' success on a claim that Comcast's rates "may be unreasonable," Order at 9, resolution of that issue would be beyond the Court's jurisdiction.

claims by Plaintiffs under the cable rate laws, and Plaintiffs' claims under 47 U.S.C. § 543 should be dismissed.

In the absence of an express right of action, courts are not to “infer the existence of private rights of action haphazardly.” *Thomas M. Cooley Law School v. American Bar Assoc.*, 459 F.3d 705, 711 (6<sup>th</sup> Cir. 2006) (hereinafter “*Cooley Law School*”) (quoting *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 421 (6<sup>th</sup> Cir. 2000)); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979). The Sixth Circuit in *Cooley* listed four factors that a court must consider in evaluating whether a private right of action is implied:

In determining whether to imply a private right of action, a court looks to four factors. First, we consider whether the plaintiff is one of the class for whose especial benefit the statute was enacted. Second, we examine legislative history to see if we can discern any intent either to create or deny a right of action under the statute. Third, we weigh whether implying a right of action would be consistent with the purposes of the legislative scheme. Finally, we determine whether the cause of action is one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law.

*Cooley Law School*, 459 F.3d at 711.

Applying these principles, federal courts have agreed “that no implied right of action exists under Section 543 of the [federal Communications Act].” *Aventura Cable Corp. v. Rifkin/Narragansett South Florida CATV, L.P.*, 941 F. Supp. 1189, 1195 (S.D. Fla. 1996). First, the statute does not suggest congressional intent to confer rights on those who may benefit from the provision. *Mallenbaum*, 1994 WL 724981 at \* 6 (Section 543(d), which employs similar command language to Section 543(b)(7) (*i.e.*, “[a] cable operator shall have a rate structure . . . that is uniform”), did not create a private right of action); *see also In re Comcast Corp. Cable TV Rate Regulation*, No. 93-6628, 1994 U.S. Dist. LEXIS 16044, \* 15 (E.D. Pa. Nov. 10, 1994) (“The text and structure of [Section 543] do not demonstrate that Congress intended to create a

private right to enforce the statutory standard or FCC regulations” enacted thereunder); *see also Broder v. Cablevision Systems Corp.*, 329 F. Supp. 2d 551, 559 (S.D.N.Y. 2004) (“courts have uniformly ruled that § 543(d) does not create an implied private right of action . . . allowing [the plaintiff] to sue Cablevision based on th[e] statute would interfere with legislative intent. It would let [the plaintiff] make an impermissible ‘end run’ around the limitations the legislature set for § 543(d) . . .”), *aff’d*, 418 F.3d 187 (2d Cir. 2005).

Second, it is significant that “Congress created express causes of action for certain violations of the [federal Communications Act] . . . but notably did not do so for rate violations.” *Mallenbaum* 1994 WL 724981, \* 6. *See, e.g.*, 47 U.S.C. § 551(f) (privacy); 47 U.S.C. § 546(e)(franchise renewal); 47 U.S.C. § 532(d) (leased access to cable); and 47 U.S.C. § 553 (signal theft). The creation of such *express* rights of action within a statutory scheme “militates heavily against a finding” that Congress *impliedly* intended a private right of action under Section 543. *Aventura Cable Corp.*, 941 F. Supp. at 1195; *Mallenbaum* 1994 WL 724981, \* 6; *In re Comcast Corp. Cable TV Rate Regulation*, 1994 U.S. Dist. LEXIS 16044, \* 17.

Moreover, “[t]he judicial task is to interpret the statute Congress has passed to determine whether it displayed an intent to create *not* just a private right *but also a private remedy*.”<sup>5</sup> *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)(emphasis added). Without such a finding, “a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.” *Id.* at 286-87 (quotations omitted)). Statutes, like the rate regulation law on which Plaintiffs rely, that direct a federal agency to take

---

<sup>5</sup> The existence or nonexistence of a cause of action does not depend on the [type] of remedy requested.” *In re Comcast Corp. Cable TV Rate Regulation*, NO. 93-6628, 1994 U.S. Dist. LEXIS 16044, \* 19 (E.D. Pa. Nov. 10, 1994).

action, or which confer rulemaking power on the agency, provide “far less reason to infer a private remedy” and a federal cause of action. *Alexander*, 532 U.S. at 289; *Parry v. Mohawk Motors of Michigan, Inc.*, 236 F.3d 299, 308-09 (6<sup>th</sup> Cir. 2000) (a statutory scheme “framed as a general mandate to the Department of Transportation” did not create an implied right of action); *Smith v. Dearborn Fin. Serv., Inc.*, 982 F.2d 976, 979 (6<sup>th</sup> Cir. 1993) (stating “[a] grant of federal rulemaking power is not authority to create federal jurisdiction”).

Finally, the absence of a private right of action under Section 543 is underscored by the statute’s delegation to the FCC of authority to establish procedures and standards for enforcement of the cable rate law. *See, e.g.*, 47 U.S.C. §§ 543(b),(c),(d). Plaintiffs have no cognizable claim under Section 543, and their claims should be dismissed.

**B. Section 543(b)(7) Does Not Preclude Comcast From Offering PEG Channels in Digital Format or Requiring Consumers to Obtain Equipment to Receive the Programming on the Basic Tier**

Even if Plaintiffs had a right to be in court under Section 543, these claims should be dismissed under Rule 12(b)(6) for failure to state a claim. Plaintiffs argue that because some subscribers that currently receive basic service from Comcast without a converter box would be required to obtain a converter to receive PEG channels delivered in a digital format, the PEG channels will no longer be part of Comcast’s basic service tier. (Compl. ¶¶ 41-43.) Yet nothing in the Communications Act precludes a cable operator from providing, and charging for, equipment used to receive its basic service tier.

The federal Communications Act distinguishes a cable operator’s charges for basic service, 47 U.S.C. § 543(b)(1), from charges for equipment “used by subscribers to receive the basic service.” 47 U.S.C. § 543(b)(3) (requiring the Commission to prescribe rate regulations

applicable to equipment used to receive the basic service tier, “including a converter box and a remote control unit”). The FCC’s relevant regulations call for an “unbundling” of rates for services from rates for equipment, and create different rate forms to establish basic *service* rates and basic *equipment* rates. See 47 C.F.R. §§ 76.922 (“Rates for the basic service tier”); 76.923 (“Rates for equipment and installation”) (stating “a cable operator shall establish rates for remote control units, converter boxes, other customer equipment, installation, and additional connections *separate* from rates for basic tier service” (emphasis added)).

Although cable operators subject to regulation under Section 543 are obligated to include PEG programming in their basic service tier, and to charge a “reasonable” rate for that service, 47 U.S.C. §§ 543(b)(1), (b)(7), they are not precluded from charging for equipment used in connection with the reception of that service. Stated differently, the varying equipment needs of individual customers (based on the limitations of their televisions and other video equipment) does *not* determine whether a particular programming service is, or is not, part of the basic service tier, and digitization of PEG channels is not “discriminatory” because some customers may be required to obtain additional equipment to view the channels.<sup>6</sup> There is no authority to the contrary.

Congress, however, expressly prohibited local franchise authorities (including the LFA Plaintiffs) from interfering with a cable system’s change in transmission technology and subscriber equipment used to deliver programming. In 47 U.S.C. § 544(e) Congress declared that “[n]o State or franchising authority may prohibit, condition, or restrict a cable system’s use

---

<sup>6</sup> While not necessary to the resolution of Comcast’s Motion, Comcast notes that it has planned affirmative steps to minimize any viewer disruption associated with PEG digitization, including making one free digital converter available to its subscribers that lack digital reception capability. See *City of Dearborn v. Comcast of Michigan*, No. 08-10156, 2008 WL 126605, \* 1 (E.D. Mich. Jan. 14, 2008).

of any type of subscriber equipment or any transmission technology.” This statute expressly prohibits state and local authorities from taking any action that would restrict the use of digital technologies, or a combination of analog and digital technologies within a single tier. A determination that a cable system may not switch its transmission format if local franchise authorities object would be contrary to the plain terms of 47 U.S.C. § 544(e). Plaintiffs’ claim under Section 543(b)(7) should be dismissed.

#### **IV. FCC RULES FOR CABLE EQUIPMENT ARE IRRELEVANT AND DO NOT CREATE RIGHTS OF ACTION**

Plaintiffs allege that Comcast’s proposed placement of PEG channels on a digital tier violate 47 C.F.R. § 76.630, an FCC rule that requires Comcast to “ensure that all basic service channels are available without need for unnecessary equipment.” (Dearborn Compl. ¶ 72.) The rule does not create a private right of action, and is ultimately irrelevant to this case.

“Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.” *Alexander v. Sandoval*, 532 U.S. at 291. “Agencies may play the sorcerer’s apprentice but not the sorcerer himself.” *Id.* Thus, “no implied right of action can be found from regulations standing alone. Rather, the statute must be examined to determine if an implied private right of action can be found.” *Smith v. Dearborn Fin. Serv., Inc.*, 982 F.2d 976, 979 (6<sup>th</sup> Cir. 1993).

As detailed above, the federal Communications Act statutes relied upon by Plaintiffs does not establish a private right of action to sue Comcast in court based on a claim that some cable subscribers may be required to obtain additional equipment to receive PEG channels in a digital format. Therefore, the FCC regulation that Plaintiffs cite for the same proposition, 47 C.F.R. § 76.630, cannot create a private right of action for which relief may be granted under the

allegations of the Complaints.

Moreover, that regulation has nothing to do with the method of transmitting PEG channels or equipment requirements. Rather, it prohibits cable operators from scrambling or otherwise encrypting signals carried on the basic service tier. 47 C.F.R. § 76.630(a). The transmission of a cable signal in a digital format is not synonymous with scrambling the signal. The digital transmission will be sent “in the clear” and may be received by all cable subscribers with digital capabilities without any degree of decoding. Therefore, 47 C.F.R. § 76.630 has no relevance to this action and cannot serve as a basis for the relief sought by Complaints.

#### **V. THERE IS NO RIPE QUESTION AS TO CUSTOMER NOTICE**

Plaintiffs’ Complaints allege that Comcast’s notice to customers in 2007 of its plan to relocate PEG channels in January 2008 failed to satisfy requirements claimed under an FCC customer service rule, 47 C.F.R. § 76.309. The Court need not, and should not consider the merits of this claim because there is no live issue to decide.

First, any challenges to the technical details of the notices Comcast provided in 2007 are moot. A claim is moot “when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” *Carras v. Williams*, 807 F.2d 1286, 1289 (6<sup>th</sup> Cir. 1986) (quotations omitted). “An actual live controversy must be extant at all stages of review,” not just when the complaint is filed. *Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307, 309 (6<sup>th</sup> Cir. 2004) (quotations omitted); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). “Jurisdiction, even if once acquired, may abate if interim relief or events resolve all issues.” *International Union v. Dana Corp.*, 697 F.2d 718, 721 (6<sup>th</sup> Cir. 1983). Comcast did not make the changes to PEG channels disclosed in the 2007 notices by the announced date. That date is in the past. Comcast could not

use those notices for any future channel relocation. Any dispute about those notices is moot, and the Court should not consider them further. *See Gottfried v. Medical Planning Services, Inc.*, 280 F.3d 684, 693 (6<sup>th</sup> Cir. 2002) (“Whenever a case becomes moot, the underlying legal questions always remain unresolved . . . demonstrat[ing] the inevitable consequences of application of the mootness doctrine”).

Second, there is no justiciable claim as to any future customer notice Comcast might provide. “Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed.” *Bigelow v. Michigan Dep’t of Natural Resources*, 970 F.2d 154, 157 (6<sup>th</sup> Cir. 1992) (quotations omitted). Ripeness is a jurisdictional issue for the court “‘when a case is anchored in future events that may not occur as anticipated, or at all.’” *Kentucky Press Ass’n v. Commonwealth of Kentucky Press Ass’n*, 454 F.3d 505, 509 (6<sup>th</sup> Cir. 2006) (quoting *Nat’l Rifle Ass’n of Am. v. Magaw*, 132 F.3d 272, 284 (6<sup>th</sup> Cir.1997)). The Sixth Circuit explained:

The ripeness doctrine services the same general purposes as the other branches of justiciability theory. The central perception is that courts should not render decisions absent a genuine need to resolve a real dispute. Unnecessary decisions dissipate judicial energies better conserved for litigants who have a real need for official assistance . . . Perhaps more important, decisions involve law making. Courts worry that unnecessary lawmaking should be avoided, both as a matter of defining the proper role of the judiciary in society and as a matter of reducing the risk that premature litigation will lead to ill-advised adjudication.

*Brown v. Ferro Corp.*, 763 F.2d 798, 801 (6<sup>th</sup> Cir. 1985) (citation omitted). For these reasons, “problems of prematurity and abstractness . . . prevent adjudication in all but the exceptional case.” *Young v. City of Detroit*, 652 F.2d 617, 625 (6<sup>th</sup> Cir. 1981) (quoting *Buckley v. Valeo*, 424 U.S. 1, 114 (1976)). Mere “allegations of possible future injury do not satisfy the requirement” of ripeness. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). “A threatened injury must be

*'certainly impending'* to constitute injury in fact" and ripe for judicial review. *Id.*

The notice Comcast might provide to customers of a future change in PEG channel locations is purely hypothetical. There is no reason to assume that any notice Comcast might give in the future would be the same as it provided in the past (this dispute, with nothing more, assures that the company will take a fresh look at its notice). Whatever analysis the Court could provide would be purely advisory. Plaintiffs' challenges to Comcast's customer notice of PEG channel relocation are not ripe or otherwise justiciable, and should be dismissed.

#### **VI. PLAINTIFF GILLETTE HAS NO COGNIZABLE CLAIM**

Plaintiff Gillette has no greater right to maintain this action than the LFA Plaintiffs. She does not have any franchise rights, or statutory rights, of any kind to prevent Comcast's digitization of PEG channels. She has no right of action under any of the sources of law mentioned in the Complaints. Her claims should be dismissed.

#### **CONCLUSION**

**WHEREFORE**, for all of the foregoing reasons, Comcast respectfully requests that the Court dismiss Plaintiffs' Complaints with prejudice.

Respectfully submitted,

Robert G. Scott, Jr.  
Wesley R. Heppler  
**Davis Wright Tremaine, LLP**  
1919 Pennsylvania Avenue, N.W.  
Suite 200  
Washington, D.C. 20006  
(202) 973-4200

s/Michael S. Ashton  
Michael S. Ashton (P40474)  
Anita G. Fox (P47818)  
**Fraser Trebillock Davis & Dunlap P.C.**  
124 West Allegan, Suite 1000  
Lansing, MI 48933  
(517) 482-5800

*Attorneys for Defendants*

Date: April 30, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on April 30, 2008, I electronically filed the foregoing Memorandum of Law in Support of 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, and Mary Michaels, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participant:

David L. Richards  
Richards & DeWitt  
3250 W. Big Beaver Rd., Suite 342  
Troy, MI 48084

s/Michael S. Ashton  
Michael S. Ashton