

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

CITY OF DEARBORN, ET AL,  
Plaintiff,

vs.

COMCAST OF MICHIGAN, ET AL,  
Defendants.

Case No: 08-10156  
Honorable Victoria A. Roberts

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**PLAINTIFFS' RESPONSE TO COMCAST'S SUPPLEMENTAL MEMORANDUM**

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Plaintiffs, City of Dearborn, Township of Meridian, City of Warren and Township of Bloomfield, offer the following Response to Comcast's Supplemental Memorandum filed September 11, 2008.

Defendants' Supplemental Memorandum purports to address primary jurisdiction. The Memorandum actually constitutes a second bite at a lead issue in Comcast's Motion to Dismiss that has already been extensively briefed by the parties: that being whether the Plaintiffs may pursue their challenges to Comcast's decision to digitize the PEG channels, and in particular, Plaintiffs' claims that the manner in which Comcast is implementing that decision violates its contractual, state and federal obligations to provide PEG channels as part of the basic service tier. We first emphasize that this latest effort adds nothing to the earlier briefing, and that the Court may resolve the Plaintiffs' claims. We next turn to the primary jurisdiction issue and show that, while the Court could refer issues to the FCC, testimony provided by the agency to Congress on September 17, combined with the authority cited in Plaintiffs' briefs, may make this unnecessary.

**I. Comcast's Failure To Provide PEG on the Basic Tier Is Properly Before This Court.**

Comcast's "primary jurisdiction" argument depends entirely on its assertion that Plaintiffs have no implied right of action to enforce Comcast's obligation under 47 U.S.C. § 543(b)(7) to carry PEG on the basic service tier.<sup>1</sup> In responding to Comcast's Motion to Dismiss, Plaintiffs showed that this argument failed in several respects. Plaintiffs' claims do not depend on an *implied* right of action – although Plaintiffs did show that one exists. Pl.'s Resp. to

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<sup>1</sup> Of course, Plaintiffs' claim that the proposed change in treatment of PEG channels violated Comcast's obligation to carry PEG on the basic service tier was only one of several claims raised by Plaintiffs. Presumably, Comcast's supplemental brief was limited to the basic tier issue because the court asked in oral argument whether that issue could be referred to the FCC.

Defs.’ Mot. To Dismiss at Section I(C). Rather, Plaintiffs have *direct* rights to enforce Comcast’s obligation to carry PEG on basic. The local franchise agreements each require carriage of PEG on basic, and that *contractual* obligation is directly enforceable. Pl.’s Resp. to Defs.’ Mot. To Dismiss 6. The Michigan state law independently requires compliance with all federal law requirements, including the basic service tier requirement in 47 U.S.C. § 543(b)(7). The communities have authority to enforce that obligation under state law. Pl.’s Resp. to Defs.’ Mot. To Dismiss 7. Plaintiffs showed that 47 U.S.C. § 401(b) authorizes “any party injured” by the failure to comply with FCC regulations to bring a claim in federal court, including the regulations requiring carriage of PEG on basic. Pl.’s Resp. to Defs.’ Mot. to Dismiss 22. Finally, Plaintiffs showed that the Cable Act does permit localities to enforce requirements in Section 543, including the “basic tier” requirement in 47 U.S.C. § 543(b)(7).<sup>2</sup> Pl.’s Resp. to Defs.’ Mot. to Dismiss 21. Comcast did not even respond to these arguments in earlier briefs. Thus, the claims raised by Plaintiffs are cognizable in this Court.

## **II. The Court Has Discretion To Refer Issues To The FCC Under the Primary Jurisdiction Doctrine.**

Because the claims are cognizable, the primary jurisdiction doctrine may be relevant here. The primary jurisdiction doctrine does not address whether a court *may* resolve a claim, but only *how* it should do so. The doctrine allows a court to exercise its discretion by referring a

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<sup>2</sup> Comcast is also wrong to the extent it claims that Section 543(b)(7) requires Plaintiffs to exhaust particular administrative remedies. Supplemental Memorandum at 3. The doctrine of administrative exhaustion is only applicable in cases where Congress has specifically mandated such a process. “Where Congress specifically mandates, exhaustion is required...[b]ut where Congress has not clearly required exhaustion, sound judicial discretion governs.” *Arctic Express, Inc. v. United States DOT*, 194 F.3d 767, 769 (6th Cir. 1999) (citing *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (negative treatment on unrelated grounds)). The Cable Act mandates an administrative process for the regulation of unreasonable rates, 47 U.S.C. § 543(c). It does not mandate any such process for the enforcement of the required components of the basic tier. 47 U.S.C. § 543(b)(7). *See also* Pl.’s Response to Defs.’ Mot. to Dismiss at 25.

particular question to an administrative agency. *Southern Railway Co. v. Combs*, 484 F.2d 145, 149 (6th Cir. 1973). While no fixed formula exists for applying the doctrine, *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956), the Court's primary inquiry should be whether there is a "desire for uniformity in adjudication and [a] belief that the decision maker with the most expertise and broadest perspective regarding a statutory or regulatory scheme will be most likely to resolve the issue correctly." *United States v. Any and All Radio Station Transmission Equipment*, 204 F.3d 658, 664 (6th Cir. 2000). The decision to refer is made on a case-by-case basis. *In re Long Distance Telecomms. Litigation*, 831 F.2d 627, 630 (6th Cir. 1987). Such a referral does not terminate the court's jurisdiction, and the court may retain jurisdiction while awaiting a decision by the agency. *Ashland Oil & Refining Co. v. Federal Power Com.*, 421 F.2d 17 (6th Cir. 1970).

The doctrine generally applies only to questions of fact, and courts typically decide claims without referral to an agency unless the claims raise "issues of fact not within the conventional experience of judges." *Morris Crain v. Blue Grass Stockyards Co.*, 399 F.2d at 868, 873 (quoting *Far East Conf. v. United States*, 342 U.S. 570, 574 (1952)). There is no need to refer where guidance provided by the agency itself renders referral unnecessary. See II Richard J. Pierce, Jr., *Administrative Law Treatise* at § 14.2 (4th ed. 2002); see also Pl.'s Response to Defs.' Mot. to Dismiss at 19.

The Court may reject Comcast's Motion to Dismiss without referral to the agency given the plain language in the local franchises, statutes and regulations at issue, and given the guidance provided by the FCC. The obligation to carry PEG on basic is clear: "[e]ach cable operator of a cable system shall provide its subscribers a separately available basic service tier...and such service tier "shall . . . consist of . . . [a]ny public, educational, and governmental

access programming required by the franchise of the cable system to be provided to subscribers.” 47 U.S.C. § 543(b)(7). PEG channels must be carried on the basic service tier, “unless the franchising agreement explicitly permits carriage on another tier.” *In the Matter of Implementation of Section of the Cable Television Consumer Protection Act of 1992 Rate Regulation, Report and Order and Further Notice of Proposed Rule Making*, 8 F.C.C.R. 5631, 5737-38, MM Docket No. 92-266 (1993) (emphasis supplied). A “service tier” is defined 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), and the FCC orders indicate that in determining whether a program is part of a “category” of services, the issue is examined from the perspective of the subscriber.<sup>3</sup> Plaintiffs have alleged and shown that the manner in which Comcast proposed to digitize PEG takes those channels out of the basic service category, and is therefore inconsistent with federal statutory and regulatory obligations (as well as local franchise and state statutory obligations).

To the extent that there was any question on this point, recent testimony provided by the FCC should resolve it. In testimony delivered on September 17, 2008, to a House of Representatives Subcommittee, the Chief of the FCC’s Media Bureau stated the following:

Under Section 623, the basic service tier must include “PEG access programming required by the franchisee to be provided to subscribers.” The Commission’s regulations state that the basic service tier shall include at a minimum all local broadcast signals and any PEG programming required by the franchise to be carried on the basic tier. It has come to our attention that some programmers are moving PEG channels to a digital tier, or are treating them as on-demand channels. We are concerned by these practices. We believe that placing PEG channels on any tier other than the basic service tier may be a violation of the statute, which requires that PEG access programming be placed on the basic service tier. *Subjecting consumers to additional burdens to watch their PEG channels defeats the purpose of the basic service tier.* We believe it is important

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<sup>3</sup> *In re Oceanic Time Warner Cable*, Notice of Apparent Liability for Forfeiture, DA 08-1960, at ¶ 8 (August 22, 2008).

to ensure that consumers are able to get access equally to all channels belonging on the basic service tier, and that this should be the case regardless of what type of system the channels are being carried on. (Emphasis added.)

*Public, Educational, and Governmental (PEG) Access to Cable Television Before the House Subcomm. on Financial Services and General Government, September 17, 2008* (statement of Monica Shah Desai, Chief of the Media Bureau Federal Communications Commission).<sup>4</sup>

Based on the pleadings, for purposes of disposing of the Motion to Dismiss, the Court may assume that: (1) a subscriber has to make a special request for equipment to receive PEG channels, and the equipment is not provided automatically as part of the service; (2) A special installation would be required; (3) There would be additional charges to receive the PEG channels, as compared to other channels on the basic tier; (4) The PEG channels are only provided in digital format, while other “basic” broadcast channels are provided in analog format; and (5) PEG channels are treated discriminatorily. Under these circumstances, the task of applying the law to the facts should not require any further specialized, technical knowledge from the FCC requiring referral. The Court is well-suited to find that these facts show a violation of the PEG-on-basic requirement, and justify rejection of Comcast’s motion.<sup>5</sup>

However, referral is to a large degree a matter of discretion. If the Court concludes that it should refer issues to the FCC, Plaintiffs believe that it should at least ask the agency whether, in light of the five facts identified above, Comcast’s actions violate an obligation to provide PEG as

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<sup>4</sup> A copy of the entire testimony is included at Exhibit A. The testimony also supports the Plaintiffs’ claims that Comcast’s discriminatory treatment of the PEG channels is itself inconsistent with the Cable Act. The Supreme Court has found that even informal agency action interpreting ambiguous agency regulations is entitled to considerable deference from a reviewing court. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2349 (2007); *Chao v. Occupational Safety and Health Review Comm’n*, 2008 WL 3981430, 5-6 (6th Cir. 2008).

<sup>5</sup> Plaintiffs will be prepared to proof up these facts, to the extent any of them are contest, at an appropriate stage of the proceeding.

part of the basic service tier.<sup>6</sup> In the event that the Court were to choose to refer one or more questions to the FCC, Plaintiffs believe the Court should and must retain jurisdiction over the ultimate determination of the case to preserve the temporary restraining order and preliminary injunction while the question is pending before the agency. This is particularly appropriate given the recent testimony of the agency to Congress as to the importance of preserving PEG.

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<sup>6</sup> Plaintiffs are prepared to provide more specific questions if the Court concludes that there are particular issues that should be referred to the FCC.

**CONCLUSION**

Plaintiffs' claims are cognizable in this Court, and therefore the Court may consider whether it should refer one or more questions to the FCC. The Court certainly has the discretion to do so. However, the Court may also decide the issues before it without referring them to the FCC, particularly in light of the FCC's recent testimony. Should the Court decide to refer any of the issues, it should and must retain jurisdiction over the case in order to maintain the TRO and current injunction pending a decision from the FCC, and ultimate conclusion of the case before this Court.

Respectfully Submitted,

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September 19, 2008

**EXHIBIT A**

**Statement  
Of**

**Monica Shah Desai  
Chief of the Media Bureau  
Federal Communications Commission**

**Before the Subcommittee on Financial Services and  
General Government, Committee on Appropriations  
U.S. House of Representatives**

**September 17, 2008**

Good morning Chairman Serrano and Members of the Subcommittee. Thank you for inviting me here today to discuss public, educational, and governmental (“PEG”) access to cable television.

## **INTRODUCTION**

Promoting localism and diversity are two fundamental goals underlying the Commission’s media policies. PEG access promotes both. PEG programming is a vital medium for local communities. The Commission recognizes the importance of PEG access in fostering choices for local and diverse programming in communities. The Commission annually seeks information about the pervasiveness and use of PEG channels.

Sections 611 and 621 of the Communications Act allow local franchising authorities (“LFAs”) to require cable operators to set aside channels for public, educational, or governmental use. PEG channels are permitted, but not mandated by federal law. Rather, the decision to require the carriage of PEG channels is one made solely by the LFA.

The Commission’s rules related to PEG access reflect the specific authority granted by the Communications Act. For example, Section 623 of the Communications Act requires cable systems to carry, on their basic service tier, any PEG channels required by the LFA. Section 76.901 of the Commission’s rules defines the basic service tier as including, among other signals, any PEG programming required by an LFA.

## **STATUTORY PEG ACCESS**

Under the Communications Act, LFAs may impose reasonable franchise obligations to support PEG. Under Section 611, an LFA may require that channel capacity be designated for public, educational, or governmental use, may require rules and procedures for the use of the PEG channels, and may enforce any franchise requirements regarding the providing or use of the channel capacity which relate to PEG.<sup>1</sup>

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<sup>1</sup> 47 U.S.C. 531.

The Communications Act provides that the franchise fees paid by a cable operator for any given system may not exceed five percent of gross revenues. In Section 622(g)(2)(C), Congress specifically excluded from the term “franchise fee” any “*capital costs* which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities.” Accordingly, capital cost payments, such as facilities and equipment, are not subject to the 5 percent franchise fee cap,<sup>2</sup> while non-capital costs, such as salaries and operating costs, must be included in calculating the fee.

The Communications Act permits LFAs to require “adequate” assurance that cable operators will provide “adequate” PEG access channel capacity, facilities, or financial support.<sup>3</sup> The Commission has concluded that completely duplicative PEG and I-NET requirements imposed by the LFA pursuant to this authority would be unreasonable. The Commission also has found it would be unreasonable for an LFA to require a new entrant to provide PEG support in excess of the incumbent cable operator’s obligations.

The Commission has not adopted standardized terms for PEG channels, agreeing with LFAs that they are free to establish their own requirements for PEG, as set forth in the Act.

## **UPDATES**

The Commission has continued to monitor cable franchising, and especially the increased adoption of franchising laws at the state level. The Communications Act requires cable operators to offer local broadcast channels and PEG channels on the basic service tier. Under Section 623, the basic service tier must include “PEG access programming required by the franchisee to be provided to subscribers.” The Commission’s regulations state that the basic service tier shall include at a minimum all local broadcast signals and any PEG programming required by the franchise to be carried on

<sup>2</sup> See, e.g., *City of Bowie, Maryland*, 14 FCC Rcd 9596 (CSB, 1999). See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2006), *aff’d Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008). See also *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, Second Report and Order, 22 FCC Rcd 19633 (2007).

<sup>3</sup> 47 U.S.C. 541(a)(4)(B).

the basic tier. It has come to our attention that some programmers are moving PEG channels to a digital tier, or are treating them as on-demand channels. We are concerned by these practices. We believe that placing PEG channels on any tier other than the basic service tier may be a violation of the statute, which requires that PEG access programming be placed on the basic service tier. Subjecting consumers to additional burdens to watch their PEG channels defeats the purpose of the basic service tier. We believe it is important to ensure that consumers are able to get access equally to all channels belonging on the basic service tier, and that this should be the case regardless of what type of system the channels are being carried on.

### **CONCLUSION**

In conclusion, the Commission recognizes the importance of PEG programming. We will continue to enforce the statutory scheme Congress enacted, to allow adequate PEG support without overburdening cable operators and their customers. We look forward to working with the PEG community to address any challenges to PEG access. I look forward to answering your questions.

**CERTIFICATE OF SERVICE**

I hereby certify that on September 19, 2008, I electronically filed the foregoing Response to Comcast's Supplemental Memorandum with the Clerk of the Court using the ECF system which will send notification of such filing to Michael S. Ashton and I hereby certify that I have mailed by U.S. Postal Service the paper to the following non-ECF participant:

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