

**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

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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TABLE OF CONTENTS

INDEX OF AUTHORITIES..... ii

INTRODUCTION 1

I. PLAINTIFFS HAVE NO FEDERAL RIGHT TO CONTROL PEG CHANNEL DIGITIZATION, CONVERTERS, OR CHANNEL LOCATION..... 1

II. PEG REQUIREMENTS OTHER THAN THOSE IN SECTIONS VII & VIII OF THE UNIFORM FRANCHISE ARE VOID..... 5

III. MICHIGAN’S PREEMPTION OF FRANCHISE PEG REQUIREMENTS WAS A VALID EXERCISE OF ITS SOVEREIGN POWER. 6

CONCLUSION..... 10

INDEX OF AUTHORITIES

Cases

Assoc. of Cleveland Fire Fighters v. City of Cleveland,
502 F.3d 545, 548 (6th Cir. 2007) 4

Bell Atlantic Corp. v. Twombly,
127 S. Ct. 1955, 1964-65 (2007)..... 4

Bivens v. Grand Rapids,
505 N.W.2d 239, 241 (Mich. 1993)..... 6

Carriage of Digital Television Broadcast Signals,
Third Report & Order, 2007 WL 4237199, 22 FCCR 21064 at ¶¶ 15, 18, 22 (Nov. 30, 2007). 3

City of New Orleans v. New Orleans Water-Works Co.,
142 U.S. 79 (1891)..... 7

City of Niles v. Michigan Gas & Elec. Co.,
262 N.W. 900, 903 (Mich. 1935)..... 6

City of St. Petersburg v. Bright House Networks, LLC,
Nos. 8:07-cv-02105 (M.D. Fla. 2008) 7

City of Taylor v. Detroit Edison Co.,
715 N.W. 2d 28, 31 (Mich. 2006)..... 6, 7

East Jackson Public Schools v. State,
348 N.W. 2d 303, 307 (Mich. App. 1984)..... 8

FCC v. Midwest Video, Inc.,
440 U.S. 689 (1979)..... 2

Gregory v. Ashcroft,
501 U.S. 452, 460 (1991)..... 8

In re McLeod USA Telecomm. Servs., Inc.,
2008 WL 192199, * 8-9 (Mich. App. Jan. 22, 2008)..... 7

Lawrence County v. Lead-Deadwood School District No. 40-1,
469 U.S. 256 (1985)..... 8

Leach v. Mediacom,
240 F. Supp. 2d 994, 997-98 (S.D. Iowa 2003) 2

McClellan v. Cablevision, Inc.,
149 F. 3d 161 (2d Cir. 1998)..... 2

National Sat. Sports, Inc. v. Eliadis, Inc.,
253 F.3d 900, 913 (6th Cir. 2001) 9

Nixon v. Missouri Municipal League,
541 U.S. 125, 140 (2004)..... 8, 9

Sailors v. Bd. of Education,
387 U.S. 105 (1967)..... 9

South McComb Disposal Auth. v. Twp. of Washington,
790 F.2d 500, 504-505 (6th Cir. 1986) 7

TCG v. City of Dearborn,
680 N.W.2d 24, 35 (Mich. App. 2004)..... 6, 7

Time Warner Ent. v. FCC,
93 F.3d 957, 972-73 (D.C. Cir. 1996)..... 9

Statutes

47 C.F.R. § 76.922(c)(2)..... 4
47 CFR § 76.944(a)..... 4
47 U.S.C. § 531..... 2
47 U.S.C. § 531(a) 2
47 U.S.C. § 531(c) 3
47 U.S.C. § 534(b)(6)-(7) 3
47 U.S.C. § 535(h) 3
47 U.S.C. § 541(c) 2
47 U.S.C. § 543(b)(7) 3
47 U.S.C. § 544(e) 1
47 U.S.C. § 556(b)..... 8
M.C.L. § 484.3301 *et seq.*..... 5
M.C.L. § 484.3305(2)(a)..... 5

Other Authorities

H.R. Rep. No. 98-934 6

INTRODUCTION

Plaintiffs' Response to Defendants' Motion to Dismiss ("Opp.") and the Memorandum of Law of *Amici Curiae* fail to rebut the legal precepts underlying the Motion to Dismiss of Defendants Comcast of Michigan, Inc., et al. ("Comcast"). They misstate Comcast's arguments, debate issues not raised by Comcast, rely on assertions and theories outside the Complaints, and wrongly characterize legal conclusions as factual allegations. Most importantly, they fail to identify any lawful obligation that would be violated by Comcast's plan to convert PEG channels from an analog to a digital format.

Plaintiffs' Response hinges on a single aspiration: that this Court will elevate Plaintiffs' policy arguments over law. Plaintiffs' rhetoric cannot create a legally cognizable claim where, as established by Comcast's April 30, 2008 memorandum ("Mem.") supporting its Motion to Dismiss, there is none. Comcast replies to the dominant issues below.

I. PLAINTIFFS HAVE NO FEDERAL RIGHT TO CONTROL PEG CHANNEL DIGITIZATION, CONVERTERS, OR CHANNEL LOCATION.

Plaintiffs do not deny that federal law allows Comcast to control digital technology and subscriber equipment. The Communications Act provides: "No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology." 47 U.S.C. § 544(e). Yet the Complaint seeks to "prohibit, condition, or restrict" Comcast's use of both "transmission technology" and "subscriber equipment." Plaintiffs have not explained how their interference with Comcast's plans for digital PEG transmissions is permitted under this broad and clear federal preemption.

Neither Plaintiffs nor Amici have identified any source in federal law for the legal obligation they claim Comcast would violate. They characterize this obligation in ever-shifting terms. They now claim that Comcast somehow has "common carrier" PEG obligations (Opp. at

10-14), despite the unambiguous command of Congress that “[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.” 47 U.S.C. § 541(c).¹ They invoke an obligation “for PEG channels to be available to all without additional charges, expenses or burdens,” (Opp. at 12), without regard for the comprehensive federal ratemaking scheme delineating permissible prices for both cable services and cable equipment. 47 U.S.C. § 543; 47 C.F.R. §§ 76.901 - 76.990.

Plaintiffs and Amici claim that 47 U.S.C. § 531 *creates* a right for local franchising authorities (“LFAs”) to control a cable operator’s delivery of PEG channels to customers. No such right is to be found in this statute. Under section 531, the LFAs authority is explicitly limited. The first subsection establishes the controlling premise: LFAs have authority “to establish requirements in a franchise with respect to the designation or use of channel capacity for [PEG] use *only to the extent provided in this section.*” 47 U.S.C. § 531(a) (emphasis added); *see also Leach v. Mediacom*, 240 F. Supp. 2d 994, 997-98 (S.D. Iowa 2003) (“[A]ny rights regarding the use of public access channels are not created by § 531, **but stem from franchise agreements**”) (emphasis added); Mem. at 7-10.² This provision leaves no room for Plaintiffs’ claims that they have unlimited control over PEG channels. If the power they claim over PEG channels is not found “in this section,” it does not exist.

Subsection (b) gives meaning to the limited grant of (a) by authorizing an LFA “to require as part of a cable operator’s proposal for a franchise renewal . . . that channel capacity be designated for [PEG] use, . . . and may require rules and procedures for the use of the channel

¹ *FCC v. Midwest Video, Inc.*, 440 U.S. 689 (1979) actually *struck down* an FCC rule that treated cable operators as common carriers.

² Plaintiffs state that Comcast relies on *Leach* to challenge the LFAs’ right of action under Section 531, a claim Comcast did not make. Plaintiffs’ distinction of *Leach* with *McClellan v. Cablevision, Inc.*, 149 F. 3d 161 (2d Cir. 1998) is thus irrelevant. Plaintiffs also state that the *McClellan* decision held “that subscribers (and PEG channel users) do have a private right of action under Section 531,” (Opp. at 18), but the Court specifically declined to decide whether a right of action existed for PEG viewers, like Plaintiff Gillette. *Id.* at n.5. It does not.

capacity designated pursuant to this section.” Subsection (c), the source of Plaintiffs’ “central argument,” simply confirms that, once a franchise is granted establishing requirements consistent with (a) and (b), LFAs “may enforce any requirements in any franchise regarding the providing or use of such channel capacity...” 47 U.S.C. § 531(c). These provisions speak to PEG capacity, but do not mention LFA control of channel location, transmission technology, subscriber equipment, or associated rates. They do not confer a federal power for LFAs to control channel location or format, and as shown in Comcast’s prior Memorandum and below, Michigan has now unequivocally denied such control to LFAs.

The limits of PEG channel obligations under Section 531 are underscored by the differing treatment Congress gave to *broadcast channels* in Sections 534 and 535, enacted with Section 531, in Part II (“Use of Cable Channels...”) of Title VI (“Cable Communications”). Congress gave broadcast channels (but not PEG channels) special rights to be carried on certain channels in a detailed manner, and required that broadcast signals be “viewable via cable on all television receivers of a subscriber which are connected to a cable system,” 47 U.S.C. § 534(b)(6)-(7)(commercial broadcast signals); 47 U.S.C. § 535(h)(noncommercial broadcast signals). The statute, read in context, thus considers precisely the issues Plaintiffs’ Complaints raise, but does *not* give PEG channels the same status as broadcast signals.³

Congress did establish that PEG channels should be part of the “basic service tier” in rate regulated systems. 47 U.S.C. § 543(b)(7). Yet Plaintiffs do not allege, either in their Complaints

³ The FCC relied *entirely* upon Section 534 to establish a universal “availability” standard, which requires cable operators to deliver broadcast signals in analog format to subscribers who do not have the capability of viewing digital signals on all of their television receivers. *Carriage of Digital Television Broadcast Signals*, Third Report & Order, 2007 WL 4237199, 22 FCCR 21064 at ¶¶ 15, 18, 22 (Nov. 30, 2007). Plaintiffs claim that PEG channels must be “as accessible” as broadcast channels, (Opp. at n. 14), and invoked the same FCC “viewability” decision in their Jan. 13, 2007 memorandum. (Dkt. No. 5 at p. 1 & n 1). Yet Congress did not address PEG channels in Section 534(b)(7)(“Signal Availability”) as it did in Sections 531 (PEG channels) and 543(b)(7) (“Components of Basic Tier”). The limit of this requirement to broadcast stations shows that it is not the cable operator’s obligation to assure that every digital channel on the basic tier is “available” on every television receiver.

or elsewhere, that Comcast will charge a *service* fee for PEG programming beyond the sole basic service tier rate, and do not identify any provision of the cable rate laws that the digitization plan would violate. If, at some point, some customers might pay for equipment used to receive basic service, Plaintiffs acknowledge that federal law not only allows, but requires, a separate rate for equipment used by customers to receive the basic tier of cable service in addition to the rate for the basic service itself. (Opp. at 25.) Various rate-related arguments of Amici and Plaintiffs merely confirm that if Plaintiffs have a concern over Comcast's prices, the FCC's rate regulations provide the exclusive standards *and procedures* for the resolution of those allegations. *Compare, e.g.,* Amici at 1 (digitization of PEG channels will "substantially increase the price that basic subscribers will have to pay"), Opp. at 25 (digitization is "an evasion of the duty to provide service at reasonable rates"), and Opp. at 25 n. 24 (request for a declaration "that Comcast must comply with its obligations to justify rates") *with* Mem. at 9 (explaining FCC process and the absence of a private right of action for rates.) Courts do not have concurrent jurisdiction with the FCC to consider such claims, and if an LFA disagrees with Comcast's rates, "the Commission shall be the sole forum for appeals." 47 CFR § 76.944(a).⁴ If the LFAs believe that Comcast's channel relocations somehow change service rates, the FCC's rate rules specifically govern the potential price impact of channel relocations. *See, e.g.,* 47 C.F.R. § 76.922(c)(2) (FCC "price cap requirements allow a system to adjust its permitted charges for inflation, changes in the number of regulated channels on a tier...")

Contrary to the repeated assertions and insinuations of Plaintiffs and Amici, Comcast understands its obligations to comply with the many complex federal laws and rules governing

⁴ Plaintiffs' characterizations under Section 543 of Comcast's plan to digitize PEG channels fail to satisfy the fundamental pleading requirements of Rule 8. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007); *Assoc. of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007) (*Twombly* applied). The Complaints make purely speculative, conclusory assertions that Comcast *plans* to remove PEG channels from basic service, but do not offer any factual basis for those claims.

its operations, rates, and its service to customers. The controlling point here is that Plaintiffs have not identified any legal obligation, other than franchise clauses, that Comcast's digitization plan might violate. The Complaints should be dismissed because those franchise provisions are unenforceable.

II. PEG REQUIREMENTS OTHER THAN THOSE IN SECTIONS VII & VIII OF THE UNIFORM FRANCHISE ARE VOID.

Plaintiffs' acknowledge that the Uniform Video Services Franchise Act of 2006, M.C.L. § 484.3301 *et seq.* ("UVSF") "arguably preempts local PEG requirements 'that are inconsistent with' 'or in addition to' the requirements of a uniform franchise." (Opp. at 7.) They do not contest Comcast's eligibility for the statutory right to "continue under the existing franchise agreement amended to include only those provisions required under" a Uniform Franchise. M.C.L. § 484.3305(2)(a). Plaintiffs' arguments nullify this statute's explicit directive amending old franchises "to include only" the required provisions. They also give no meaning to the Legislative declaration that "any provisions of an existing franchise that are inconsistent with or in addition to the provisions of a [Uniform Franchise] are unreasonable and unenforceable by the franchising authority," *Id.* at (3).

Indeed, Plaintiffs ignore, and invite the Court to disregard, Section 4 of the USVF, which comprehensively addresses permissible PEG channel obligations in 14 subsections. These 14 provisions specify the Legislature's detailed intent as to PEG obligations and limitations. But no provision allows LFAs to control PEG channel locations or digitization.

As a matter of law, Comcast's preexisting franchises in Michigan have been modified by these statutory provisions to include *only* those PEG obligations set forth in Sections VII and VIII of the Uniform Video Services Franchise ("Uniform Franchise") (Ex. A to Mem. at 5-6). Plaintiffs might argue that the franchise provisions they rely upon are "not inconsistent" with the

Uniform Franchise, but they cannot credibly maintain that these provisions are not “in addition to” those in the Uniform Franchise. The Legislature limited enforceable requirements to those in the Uniform Franchise, and used unequivocal preemptive language to do so. Plaintiffs may avoid dismissal only if Michigan’s statutory amendments to Comcast’s cable franchise are deemed ineffective. Michigan’s recent legislative action, however, is dispositive.

III. MICHIGAN’S PREEMPTION OF FRANCHISE PEG REQUIREMENTS WAS A VALID EXERCISE OF ITS SOVEREIGN POWER.

The LFA Plaintiffs “derive their authority from the Legislature.” Mem. at 8-10; *see also City of Taylor v. Detroit Edison Co.*, 715 N.W. 2d 28, 31 (Mich. 2006); *Bivens v. Grand Rapids*, 505 N.W.2d 239, 241 (Mich. 1993). “The grant of a franchise is an exercise of the sovereign power of the state, vested in the Legislature. The power may be delegated to municipalities, but, when so delegated, the municipality exercises it as agent of the state and upon the conditions prescribed by law.” *City of Niles v. Michigan Gas & Elec. Co.*, 262 N.W. 900, 903 (Mich. 1935). A municipality cannot expand the powers delegated to it by the Legislature through contract. *Id.* With respect to cable franchising in Title VI of the Communications Act, Congress specified that it did *not* “intend Title VI to upset the traditional relationship between state and local governments, under which a local government is a political subdivision of the state and derives its authority from the state.” H.R. Rep. No. 98-934 at 94 (included in Ex. A) (explaining 47 U.S.C. § 556, “Coordination of Federal, State, and Local Authority”).

Dearborn (represented by some of the same law firms and lawyers in this case) recently made strikingly similar, but unsuccessful, arguments that the State could not limit its power to impose certain franchise-related fees on telecommunications providers. In *TCG v. City of Dearborn*, 680 N.W.2d 24, 35 (Mich. App. 2004), Dearborn claimed that “the Legislature may not restrict [its] authority to charge any reasonable compensation for the use of those rights-of-

way” under telecommunications franchises, *id.* at 31, invoking Article 7, Section 29 of Michigan’s Constitution of 1963 – the same provision now cited in Plaintiffs’ Response. (Opp. at 8 n. 5). The Court of Appeals rejected this argument, and in doing so surveyed and summarized the law of municipal power in Michigan. As to Dearborn’s claim that it could impose fees regardless of the legislative enactment, the Court observed that “since the Constitution does not expressly grant that right to the cities, it remains with the state, and is subject to the state’s control if exercised.” *Id.* at 35. Likewise, in the absence of an explicit Constitutional right, “where the Legislature has occupied the field, a city retains only such power as is strictly referable to the reasonable control of its streets.” *Id.* at 39. More recently, the Michigan Supreme Court stated, “we hold that a municipality’s exercise of ‘reasonable control’ over its streets cannot impinge on matters of statewide concern nor can a municipality regulate in a manner inconsistent with state law.” *City of Taylor v. Detroit Edison Co.*, 715 N.W. 2d 28 (Mich. 2006); *In re McLeod USA Telecomm. Servs., Inc.*, 2008 WL 192199, * 8-9 (Mich. App. Jan. 22, 2008).

The analysis of the *TCG* and *Taylor* decisions, ignored by Plaintiffs and Amici, disposes of Plaintiffs’ vague claims contesting the Legislature’s power in this case.⁵ The state Constitution does not give Plaintiffs any explicit power to control PEG channel placement or digitization. Plaintiffs state that “silence in state franchising legislation does not leave localities powerless,” (Opp. at 8 n. 5), but the state law here is not at all silent. As detailed above and in

⁵ Plaintiffs cite *City of St. Petersburg v. Bright House Networks, LLC*, Nos. 8:07-cv-02105 (M.D. Fla. 2008), an opinion irrelevant to this case as it turns on the court’s refusal to consider facts outside of the complaint.

Comcast's Memorandum, the State has explicitly declared what is enforceable in a local cable franchise.⁶

This conclusion is unaltered by federal law. The Supreme Court agrees that LFAs "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." *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140 (2004); accord. *East Jackson Public Schools v. State*, 348 N.W. 2d 303, 307 (Mich. App. 1984). Thus, federal law may only disrupt a state's limits on local government power if Congress states its intention to do so in "unmistakably clear language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quotations omitted); *Nixon*, 541 U.S. at 140.

Congress did not include such "unmistakably clear language" when it enacted Section 531. Section 531 never mentions state law in the text, and its silence cannot constitute the "clear statement" required by *Ashcroft*, especially when the legislative history for Section 531 states that Congress did not intend "to override the application of state law." (Ex. A at 46.) Indeed, Congress recognized that in some states, "state statutes specify[] the terms on which a municipality may grant and enforce a franchise," (Ex. A at 23), and confirmed that it "*does not intend Title VI to upset the traditional relationship between state and local governments.*" (Ex. A at 94 (italics added).) The statute thus declares that "[n]othing in this title shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this title." 47 U.S.C. § 556(b). Congress plainly and explicitly maintained state control of LFAs.

The argument that "state control over subdivisions cannot be applied to frustrate federal rights," (Opp. at 8.), fails because Section 531 does not create the PEG carriage requirements that Plaintiffs seek to enforce. This is in stark contrast to *Lawrence County v. Lead-Deadwood*

⁶ Municipalities have no rights under the Contract Clause, *City of New Orleans v. New Orleans Water-Works Co.*, 142 U.S. 79 (1891), and may not "attack[] the constitutionality of state legislation on the grounds that its own rights have been impaired." *South McComb Disposal Auth. v. Twp. of Washington*, 790 F.2d 500, 504-505 (6th Cir. 1986).

School District No. 40-1, 469 U.S. 256 (1985), where the question was “whether a State may regulate the distribution of funds that units of local government in that State *receive from the Federal Government in lieu of taxes under 31 U.S.C. § 6902.*” *Id.* at 257-58 (emphasis added). The federal statute expressly “compensate[d] local governments for the loss of tax revenue resulting from the tax-immune status of federal lands,” and expressly stated that the local governments may use the payments received “for any governmental purpose.” *Id.* 258-59. More importantly, the Court considered persuasive legislative history proving Congress’ “objective of ensuring local governments freedom to spend the federal money as they saw fit.” *Id.* at 263-64.⁷

More apt is *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), where the Court decided that Section 253 of the federal Communications Act, which preempts state laws that prohibit the “ability of any entity” to provide telecommunications services, 47 U.S.C. § 253, did not demonstrate a clear Congressional intent under *Ashcroft* to interfere with State control of its subordinate units of government. *Id.* at 141-42 (“[F]ederal legislation threatening to trench on the States’ arrangement 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”).

Plaintiffs and Amici rely on one sentence of *obiter dicta* where one court, in deciding that Section 531 did not violate the First Amendment rights of cable operators, said that “[a]ll the statute does, then, is preempt states from prohibiting local PEG requirements (if any states were to choose to do so) and precludes federal preemption challenges to such requirements, challenges that cable operators might have brought in the absence of the provision.” *Time Warner Ent. v. FCC*, 93 F.3d 957, 972-73 (D.C. Cir. 1996) (“*TWE*”). The comment was unnecessary to the court’s determination of any issue before it, and should be given no weight. *National Sat.*

⁷ Similarly, *Sailors v. Bd. of Education*, 387 U.S. 105 (1967) simply recognizes that a State cannot manipulate its political subdivisions “to defeat a federally protected right” held by citizens, such as the right to vote. *Id.* at 108-09.

Sports, Inc. v. Eliadis, Inc., 253 F.3d 900, 913 (6th Cir. 2001). More importantly, the Court failed to consider the other indicia of Congress' clear intent *not* to disrupt State control with respect to franchising. It did not mention the legislative history of Section 531 declaring Congress' intent *not* to interfere with state law with respect to PEG.⁸ It did not address Congress' understanding of "state statutes specifying the terms on which a municipality may grant and enforce a franchise," (Ex. A at 23), and the legislative history that Congress did not "intend Title VI to upset the traditional relationship between state and local governments, under which a local government is a political subdivision of the state and derives its authority from the state." (Ex. at 94) (explaining 47 U.S.C. § 556.) The *TWE dictum* fails to recognize the preference for state sovereignty under *Aschroft* in any way, and should be disregarded.

By enacting the UVSF, the State did not frustrate any federal rights held by Plaintiffs. The Court should fulfill Michigan's clear intent to legislate the permissible scope of enforceable PEG channel requirements.

CONCLUSION

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

Respectfully submitted,

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⁸ Contrary to Amici's arguments, this passage, read as part of the full discussion of 531, is not limited to the example of institutional networks, but instead governs any requirement established in a franchise under 531(b).

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2008, I submitted the foregoing document using the ECF system and I have caused a copy of the document to be emailed to Michael J. Watzka, William H. Irving, Joseph Van Eaton, Mary Michaels, Kristin Kolb and William Hampton and I have served a copy upon Leslie Morant via email.

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