

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

City of Dearborn, a Municipal Corp.
Township of Meridian, a Municipal Corp.
Sharon Gillette

PLAINTIFFS,

v.

Comcast of Michigan III, Inc.,
Comcast of the South, Inc.

DEFENDANTS.

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Case No. 08-10156

Hon. Victoria A. Roberts

**DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

CONCISE STATEMENT OF ISSUES

1. Whether the Court should deny Plaintiffs' effort to block Comcast's ongoing transition of its cable television programming from analog to digital transmission, where Comcast's transition preserves the ability of all customers to receive public, educational and governmental ("PEG") channels and is necessary for Comcast to meet customer demand and respond to its direct competitors?
2. Whether the Court should deny Plaintiffs' effort to interfere with Congress' establishment of a competitive market for cable television reception equipment that allows consumers to purchase their own equipment and thereby opt out of the channel management services provided by cable operators, including Comcast.

CONTROLLING AUTHORITY

1. For preliminary injunctions: *Workman v. Bredsen*, 468 F.3d 896, 905 (6th Cir. 2007).
2. For state law limitations on local government PEG channel requirements and rate regulation: The Uniform Video Services Local Franchise Act, Act 480 of 2006, MCL § 484.3301 *et seq.*
3. For Comcast's right to control PEG channel placement: M.C.L. § 484.3304 (PEG channel obligations); M.C.L. § 484.3305(2)(b)(franchises) MCL § 484.3303(8); 47 U.S.C. §§ 543(b)(7), 545(d), 544(a), (e), (f)(1); U.S. Const. amend. I.
4. For the ability of consumers to purchase retail cable converters and opt out of Comcast's channel management services: 47 U.S.C. § 549; 47 U.S.C. § 76.640.
5. For the transition to all-digital television: 47 U.S.C. §§ 309(j)(14) and 337(e).

INTRODUCTION

Defendants Comcast of Michigan III, Inc. and Comcast of the South, Inc. (together, “Comcast”) oppose the Motion for Preliminary Injunction (“Motion”) filed January 11, 2008, by Plaintiffs City of Dearborn, Township of Meridian, and Sharon Gillette (“Plaintiffs”) because they have no legal authority to interfere with the orderly and ongoing transition of Comcast’s analog cable channels to digital transmission. Comcast has undertaken the transition as part of the wholesale transformation of the entire television industry from analog to digital, and has done so at the same time as it faces intense competition for customers who are demanding more digital and high definition video services as well as faster Internet speeds. Nor do Plaintiffs have any legal right to insist that all purchasers of new digital television sets use Comcast’s channel navigation equipment, when the law specifically requires Comcast’s systems to be open to third party navigation equipment available at retail outlets. Indeed, federal and state laws – including Michigan’s recent Uniform Video Services Local Franchise Act – specifically restrict the ability of local governments to dictate cable technology and channel placement.

All of the PEG channels in these communities will continue to be available on basic service. Comcast has made, and will make, substantial efforts to assure that all of its customers know how to find PEG channels after the transition, including the investment of hundreds of thousands of dollars in value for Public Service Announcements (over 30,000 announcements to date in Michigan, hundreds in these communities) to publicize the pending PEG digitization. Although the majority of Comcast customers already have digital service using Comcast’s navigation equipment, Comcast will provide free equipment to those who do not (including Plaintiff Gillette) as a bridge to the all-digital future of television. This offer stands, even though

Michigan has deregulated all service and equipment rates for all of Comcast's Michigan cable systems. Consistent with Michigan's rate deregulation, federal law specifically declares that "a cable operator may take such actions to rearrange a particular service from one service tier to another, or otherwise offer the services, if the rates for all of the service tiers involved . . . are not subject to regulation. . . ." 47 U.S.C. § 545(d).

ARGUMENT

I. COMCAST'S TRANSITION OF PEG CHANNELS TO DIGITAL SPECTRUM IS PART OF A WHOLESALE TRANSFORMATION OF TELEVISION AND IS ESSENTIAL TO MEET CUSTOMER DEMAND IN A HIGHLY COMPETITIVE MARKET

The Plaintiff's Complaint and Motion must be placed in context to fully appreciate why the Motion must be denied. If Plaintiffs' are to be believed, Comcast has targeted PEG channels in Meridian Township and Dearborn for special discriminatory treatment, moving them to digital Siberia with no life support. The facts, to be supported by witnesses at hearing, will prove that Comcast's planned digitization of PEG channels is just the next step in an ongoing transition of television as a whole, and cable television in particular, from its inception as an analog medium to the a digital medium driven by technological development, consumer demand, and the directive of the federal government. *See*, 47 U.S.C. 309(j)(14)(Feb. 17, 2009 termination of all analog broadcast television stations); 47 U.S.C. 337(e)(relocation of broadcast television stations).

The whole point of the digital transition is to make more efficient use of available spectrum, whether over the air or within a cable system's wires. It is hard to think of any comparable revolution in technology that cuts across as many interest groups (consumers, government, service providers, program providers) and industries (cable, telephone, Internet, computer,

consumer electronics).¹ Televisions that could receive broadcast television a half century ago will simply not work in a matter of months without some additional conversion equipment. Likewise, cable operators have constantly upgraded their networks and consumer equipment so that systems which just a few years ago delivered only fifty or sixty video channels now deliver hundreds of channels of programming in various formats, *and* provide robust Internet service and digital voice service to customers. At the same time as customers demand more video programming, HD programming, and faster Internet speeds, cable systems must remain compatible with whatever television sets, video recorders, DVD players, and computers that customers might own or purchase from retailers. These are just some of the forces at work.

Comcast has already moved numerous popular programs from analog to digital in Michigan. For example, it moved channels including ESPN Classic, Game Show Network, and C-SPAN 2 from analog to digital in 2007. The company has firm plans to move several more in the coming months, although it is hesitant to disclose the identity of those channels in public for competitive reasons. Consumers are buying new digital television sets, as well as High Definition (“HD”) television sets and demanding more HD programming, like the many HD channels offered by Comcast’s satellite competitors who advertise their greater volume of HD programming as a reason to leave Comcast. Further, over 50% of Comcast’s Michigan customers already have digital service and will not be affected by the PEG transition.

Plaintiffs seem to assume that Comcast is a ubiquitous monopolist -- the customers’ only option for multichannel video and Internet services. Yet the technological changes described above are happening while Comcast competes directly with up to four other companies vying for these customers. All of the affected households can choose DirecTV or Dish Network. Many

¹ The FCC recently called the transition “a complex undertaking, affecting virtually every segment of the television industry and every American who watches television.” *Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Report & Order, MB Docket No. 07-91 ¶ 15 (rel. December 31, 2007).

more can also obtain cable service from WideOpenWest. And AT&T now offers video service in over 80 Michigan communities.

In Dearborn, for example, the proof will show that Comcast serves approximately 15,000 households out of the 40,000 homes its system passes there – just 38%. Nearly two-thirds of Dearborn homes choose not to be Comcast customers. Further, the majority of these 15,000 Comcast customers already have digital service, and will not be affected by the PEG transition. Thus, while Comcast is not going to deprive any customer of PEG channels, the Plaintiffs’ claims that Comcast’s digital transition of PEG channels threatens public safety (Pl.’s Mem. at 7) are simply untrue.² In fact, many communities, including both Dearborn and Meridian, now offer some local government programming on their web sites in recognition of the large number of customers who subscribe to satellite service, use broadcast, or otherwise do not have cable.

Against this technological and competitive landscape, the lack of merit of Plaintiffs’ efforts to block this phase of the digital television transition in these communities becomes apparent.

II. LEGAL STANDARD

“A preliminary injunction is an extraordinary remedy,” *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 573 (6th Cir. 2002), “not a matter of right . . . even if irreparable injury might otherwise result to the complainant.” *Huard-Steinheiser v. Henry*, 280 F.2d 79, 84 (6th Cir. 1960). The exercise of judicial discretion balances four factors: (1) the movant’s likelihood of success on the merits of his or her claims; (2) the risk of immediate irreparable harm in the absence of an injunction; (3) the possibility of substantial harm to others if the injunction is granted; and (4) whether granting the injunction would be in the public

² In fact, the cable systems will continue to participate in the joint federal –state Emergency Alert Service program. *See, e.g.*, 47 C.F.R. §§ 11.1-11.6 (FCC Emergency Alert Service rules).

interest. *McCoy v. Meridian Automotive Systems, Inc.*, 390 F.3d 417, 421 (6th Cir. 2004); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1227-28 (6th Cir. 1985). The court must make specific findings with regard to each four factor to issue a preliminary injunction unless the court specifically determines that fewer factors are dispositive of the issue. *Id.* at 1228; *Six Clinics Holding Corp. v. Cafcomp*, 119 F.3d 393, 399 (6th Cir. 1997); Federal Rule of Civil Procedure (“FRCP”) 52(a). Moreover, “[t]o demonstrate irreparable harm, the plaintiffs must show . . . [that] they will suffer ‘actual and imminent’ harm rather than harm that is speculative or unsubstantiated.” *Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006) (emphasis added).

To establish a likelihood of success on the merits of a claim, “a plaintiff must show more than a *mere possibility* of success,” *Six Clinics Holding Corp.*, 119 F.3d at 402 (emphasis added), but instead, a strong likelihood of success. *Workman v. Bredsen*, 468 F.3d 896, 905 (6th Cir. 2007); *Abney v. Amgen, Inc.*, 443 F.3d 540, 546, 549 (6th Cir. 2006).

III. COMCAST HAS THE LEGAL RIGHT TO MOVE PEG CHANNELS TO A DIGITAL FORMAT AND IS LIKELY TO SUCCEED ON THE MERITS

Plaintiffs’ are not likely to succeed on the merits because Comcast has the right under federal law, including the First Amendment, to control where it places PEG channels on its cable system and to use digital transmission technology. But that right is even stronger in Michigan, where the Legislature has preempted the ability of local governments to impose cable requirements, including PEG channel requirements, that are inconsistent with or in addition to provisions allowed by the state franchise law.

A. Michigan Has Preempted Any Local Government Authority to Control PEG Channel Placement on a Cable System

On January 1, 2007, Michigan’s “Uniform Video Services Local Franchise Act of 2006” (“Local Franchise Act”) became effective. M.C.L. § 484.3301 *et seq.* This new Michigan franchising law is controlling on the issues raised by the Plaintiffs and eliminates any likelihood

of success on the merits of their claims. Not surprisingly, Plaintiffs fail to even mention this controlling state statute until the very end of their Memorandum of Law, and only then in a half-hearted and baseless attempt to argue the state law is not applicable. In passing the Local Franchise Act, the Michigan legislature established uniform local franchise provisions for all video service providers. M.C.L. § 484.3302. Pursuant to the Local Franchise Act, the Michigan Public Service Commission adopted a “Uniform Video Service Local Franchise Agreement,” which sets forth the limited franchise requirements that may be contained in any franchise agreement in the State of Michigan.³

Regarding PEG channels, the Local Franchise Act contains no requirement for the placement of PEG channels on any specific tier nor any specific channel location. M.C.L. § 484.3304. As recognized by the Michigan Public Service Commission, the only requirement relating to the number or placement of PEG channels is that new video service providers provide the same number of PEG channels as provided by the incumbent cable operator. M.C.L. § 484.3304(1). There is no requirement for new video service providers or incumbent cable operators to locate such PEG channels on the basic service tier, nor to offer them under any uniform rate structure.

The Local Franchise Act specifically allows incumbent cable operators, such as Comcast, to choose either to obtain a new uniform video service agreement or to continue to operate under an existing franchise agreement. M.C.L. § 484.3305(2). Specifically, the Local Franchise Act provides that Comcast can “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)(b)(emphasis added). Just to be certain no one would misconstrue the preemptive effect of the Local Franchise Act, the Act goes on to specify that: “On 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

³ MPSC Order U-15169 (adopted January 30, 2007).

unenforceable by the franchising entity. M.C.L. § 484.3305(3)(emphasis added). Recognizing that the Local Franchise Act clearly restricts the provisions that can lawfully be contained in any Michigan franchise, the Michigan Public Service Commission noted that the uniform video service local franchise agreement must be used “without substantive or procedural changes for all video service local franchise agreements in the State of Michigan”.⁴

Plaintiffs’ lone argument as to why this Court should ignore the plain language of the Local Franchise Act is without merit. Plaintiffs note that the Local Franchise Act requires video service providers to agree to comply with all “valid and enforceable federal and state statutes and regulations.” M.C.L. § 484.3302(3)(h). This standard compliance provision does not, of course, in any way affect the specific franchise limitations contained in the Local Franchise Act. Pursuant to the Local Franchise Act, any provisions in existing franchises that attempted to dictate the location of PEG channels, have been preempted. Because local entities such as Dearborn and Meridian Township are legal entities of the state, the terms of their franchises are dictated and limited by the state Local Franchise Act. Yet the Plaintiffs advance a circular argument that the federal law allows a franchising authority to enforce any requirements in a local franchise regarding the provision of PEG channels. 47 U.S.C. § 531(c). Obviously, however, there are no longer any valid franchise requirements in Michigan franchises for the channel placement or tier location of PEG channels. These provisions were preempted as a matter of state law on January 1, 2007, when the Local Franchise Act became effective.⁵ Plaintiffs have had well over a year to challenge the Local Franchise Act and no such challenge has been forthcoming. Unless and until such a legal challenge to the Local Franchise Act is successfully made, this Court is bound by that Michigan statute.

⁴ MPSC Order U-15169.

⁵ Of course, Plaintiffs are also wrong because federal law cannot override state law to give local governments powers that the state denies them. *Nixon v. Missouri Municipal League*, 124 S. Ct. 1555 (2004).

B. Rights Under Federal Law to Choose Where to Place PEG Channels On the Basic Tier of Service

1. The Plaintiffs Err In Asserting That The Communications Act Requires That Comcast Offer PEG Channels As Part Of Its Basic Service.

The Plaintiffs are entirely wrong in their description of the controlling federal law. They make a critical error in asserting that Section 543(b) of the Communications Act requires that the PEG channels at issue in this proceeding must be offered as part of the basic service tier. Comcast does not dispute that Section 543(b)(7) establishes certain “minimum contents” for the basic service tier in some circumstances, but those circumstances simply do not apply in this case. The critical point the Plaintiffs overlook is that Section 543(b)(7) is a “rate regulation” provision. It expressly applies *only* to those cable systems subject to rate regulation. Because the cable systems at issue here have been rate deregulated under Michigan state law, the “minimum contents” specifications set forth in Section 543(b)(7) no longer apply.

The Plaintiffs cannot credibly deny that the basic service provision they cite is a rate regulation provision. Section 543 of the Communications Act is simply captioned “Regulation of Rates.” 47 U.S.C. § 543. Section 543(b) is entitled, “Establishment of Basic Service Tier Rate Regulation,” and subsection (7) is entitled “Components of Basic Tier Subject to Rate regulation.” Where the basic service tier is *not* “subject to rate regulation,” it necessarily follows that the federal specifications regarding the content of a rate regulated basic service tier have no application. In these circumstances, the operator, has complete discretion as to the tiering of particular programming services, including PEG channels.

The marketing flexibility afforded deregulated cable operators under Section 543(b) is reiterated in Section 545(d). That provision specifically authorizes a rate deregulated cable

operator to unilaterally re-tier its programming services. It states, “[A] cable operator may take such actions to rearrange a particular service from one service tier to another, or otherwise offer the service, if the rates for all of the service tiers involved in such actions are not subject to regulation under section 623.” 47 U.S.C. § 545(d). This marketing flexibility is entirely logical. As a deregulated cable operator clearly has discretion to price its various service tiers as it chooses, it follows that the operator should have discretion to establish the components of those deregulated service tiers.⁶

The cable systems at issue have been deregulated under M.C.L. § 484.3303(8). The Local Franchise Act preempts franchise requirements exceeding those specified under the new uniform franchise agreement, including “a provision regulating rates charged by video service providers.”⁷ *Id.* Based on this rate deregulation, the PEG basic service component requirement set forth under Section 545(b)(7) of the Communications Act no longer applies and the affirmative re-tiering rights set forth under Section 545(d) govern. The Plaintiffs’ assumption that Comcast must maintain PEG channels as part of the basic service tier is simply incorrect. Contrary to the Plaintiffs’ allegations, Comcast is not trying to penalize PEG channels. To the contrary, Comcast is voluntarily maintaining PEG channels as part of the basic service tier and voluntarily refraining from imposing an additional service fee to secure PEG programming.

⁶ Section 545(e) states, “A cable operator may not obtain modification under this section of any requirements for services relating to public, educational, or governmental access.” 47 U.S.C. § 545(e). Critically, however, Comcast is not seeking any franchise modification under Section 545. As explained in Section A above, any local franchise provisions regarding PEG tiering and channel placement have been preempted under the Local Franchise Act.

⁷ The Michigan Public Service Commission has excluded rate regulation from the new uniform franchise agreement. MPSC Order U-15169.

2. The Plaintiffs Err In Asserting That The Potential Deployment Of Additional Equipment To Receive Digitized PEG Channels Removes Those Channels From The Basic Service Tier.

Even if Comcast were legally obligated to maintain PEG programming as part of the basic service tier, which it is not, there is nothing in Comcast's pending digitization that is inconsistent with that "obligation." PEG channels will remain part of Comcast's lowest monthly service offering after the contested digitization is complete. Comcast is not imposing any additional *service* fee to obtain digitized PEG channels.

To lawfully receive a particular cable service, a cable customer must pay the associated service fee. In contrast, a cable customer may or may not need special equipment to view that service. In many instances, a cable customer will have the capability of viewing cable programming, whether it is transmitted in analog or digital ,without additional equipment. That capability will vary customer to customer, television set to television set. That capability will also vary over time as the customer purchases new television equipment.

Significantly, Congress and the FCC have established "equipment compatibility" rules, 47 U.S.C. § 544(a) , and 47 C.F.R. § 76.630, to promote third party provision of cable equipment. Under these rules, a cable customer is under no obligation to lease any equipment from the cable operator. Such leasing is entirely optional, as the customer can secure necessary equipment from third party suppliers. This is particularly simple in the case of an unencrypted service (like the basic service at issue here), where no customer decoding is necessary. It is, therefore, wrong to assume the digitization of PEG programming affects the rate Comcast charges for the basic service. That service rate will remain unchanged. There may be some subscribers who require additional digital equipment, but they will not necessarily obtain that equipment from Comcast.

Historically, it was not at all uncommon for cable subscribers to need converters to receive portions of the analog basic service tier, because cable systems transmitted on certain frequencies that were not receivable on conventional television sets. These channels were still treated as part of the basic service tier, even when some subscribers (due to the technical limitations of their own television sets) needed special equipment to receive these analog channels. As the cable television industry now transitions to digital, there is once again likely to be an increased reliance on cable converters to access the basic service tier. This phenomenon is likely to be temporary, as customers will gradually acquire digital television sets, just as they previously acquired “cable ready” analog television sets.

Congress clearly recognized that cable equipment will sometimes be necessary to obtain portions of the basic service tier. Indeed, Congress affirmatively authorized cable operators to provide, and charge for, this equipment. The Communications Act requires the FCC to prescribe rate regulations applicable to “equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit. 47 U.S.C. § 543(B)(3). *See also* 543(a)(7). The FCC’s implementing rate regulations, in fact, call for an “unbundling” of service and equipment rates and establishes different rate forms to establish basic service rates and basic equipment rates. *See* 47 C.F.R. Sections 76.922(“Rates for the basic service tier”); and Section 76.923 (“Rates for equipment and installation”)(“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). The federal regulatory scheme clearly assume that additional equipment may be necessary to receive the basic service tier.

That additional equipment may be necessary to view some of the programming offered on the basic service tier does not change the fact that all of the programming contained on that service level (and available for a uniform service fee) is a legitimate part of the basic service tier. Varying equipment needs of individual customers (based on the limitations of their television equipment) does not determine whether a programming service is, or is not, part of the basic service tier. PEG digitization is not “discriminatory” simply because some customers may need additional equipment to view certain channels; nor does the possibility of additional equipment being deployed automatically “bifurcate” the basic service tier. The digitized PEG channels will remain part of the basic service tier for Comcast customers that already have digital equipment, as they will for the minority of Comcast customers that currently lack that equipment.⁸

3. Cable Operators Have Special Carriage Obligations Regarding Local Broadcast Signals That Do Not Apply To PEG Channels.

Significantly, the issue here parallels that recently faced by the FCC in fashioning special *broadcast signal* rules for hybrid analog/digital cable systems, like the ones at issue here. The FCC feared that some basic service subscribers in these hybrid systems might not bother to obtain the equipment necessary to view broadcast signals that are only offered by the cable operator in digital. This fear is similar to the concern articulated by the Plaintiffs in this proceeding regarding digitized PEG channels. The Plaintiffs would like this Court to impose an analog carriage obligation for PEG channels similar to the transitional analog carriage obligation the FCC imposed for local broadcast signals. There is, however, a critical distinction. Congress established special carriage rights for broadcast signals that are **not** applicable to PEG channels.

⁸ Of course, this latter group has numerous options to obtain the necessary equipment, including taking advantage of Comcast’s offer of a free digital converter for the next year.

Section 534(b)(7) of the Communications Act was the sole and exclusive statutory provision the FCC relied upon to impose new carriage obligations on cable systems' retransmission of digital broadcast signals. That statutory provision, entitled, "Signal Availability," states that "Signals carried in fulfillment of the requirements of this [broadcast signal carriage] section shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection." 47 U.S.C. § 534(b)(7). This requirement certainly does not extend to PEG channels, which are clearly beyond the "broadcast signal" scope of Section 534(b)(7). As PEG channels lie outside of Section 534(b)(7), there is no existing statutory impediment to their digitization.

In short, even if Comcast had a statutory obligation to include certain PEG channels in its basic service tier, which it does, it certainly has no statutory obligation to ensure those PEG channels are actually viewed by each and every basic service subscriber. The special federal protection afforded local broadcast signals does not apply to PEG channels. If a customer elects not to acquire the equipment necessary to view all basic service channels, that is the customer's choice.

4. The Plaintiffs Err In Asserting That Comcast Intends To "Scramble" Digitized PEG Channels.

The Plaintiffs wrongly allege that Comcast's PEG digitization runs afoul of Section 76.630 of the FCC Rules. Pl. Mem. at 15. The allegation is frivolous. Section 76.630 plainly states, "Cable system operators shall not scramble or otherwise encrypt signals carried on the basic service tier." 47 C.F.R. § 76.630(a). Comcast is not proposing to "scramble or otherwise encrypt" PEG channels, and the Plaintiffs know it. After the digitization occurs, the PEG

channels will be transmitted over cable systems “in the clear.” In contrast to many other digital signals that are scrambled to prevent unauthorized reception, the digitized PEG channels will be available to all Comcast cable customers without any special decoding.

The fact that customers will need digital capability to view digitized PEG channels does *not* mean that they are “scrambled” or that Comcast is requiring the deployment of unnecessary equipment. The Plaintiffs’ assertion that “[p]roviding the PEG signals in a way that requires a converter box is inconsistent with the FCC’s rules,” (Pl. Mem. at 16), is absolutely wrong. If it were correct, cable operators would be precluded from operating in an entirely digital fashion. Yet, the FCC has actively encouraged cable systems to go “all digital.” Indeed, the FCC’s new broadcast signal carriage rules discussed above impose reduced carriage obligations where the operator offers all of its services (including all its basic service) in digital.

5. Plaintiffs Err In Alleging That Federal Law Requires More Extensive Subscriber Notice.

Plaintiffs wrongly assert that Comcast has failed to provide the required notice of the proposed change. In fact, Comcast generally provided sixty days prior notice, rather than the thirty day notice specified under the FCC's customer service standards. 47 C.F.R. Section 76.309(c)(3)(i)(B). Comcast also notified the various local franchising authorities of the pending change. Moreover, Comcast has repeatedly aired public service announcements to increase the likelihood that all affected customers are aware of the pending change and now how to proceed. The plaintiffs cannot seriously suggest that Comcast has proceeded in a covert manner. Plaintiffs Memorandum emphasizes, after all, the extensive attention the PEG digitization has received from various governmental officials. Pl. Mem. at 7-8.

Plaintiffs ultimately focus on the fact that Comcast's notices alerted all customers of the pending change, but only provided the revised channel designation for those customers using Comcast provided equipment. Pl. Mem. at 14. Comcast respectfully submits that it has met its notice obligation by advising all customers using Comcast-provided equipment (whether it be a Comcast converter or simply a Comcast "cable card" that facilitates the integration of third party equipment with Comcast's system operations) of the new channel designation. This group constitutes the entire group for which Comcast can control channel reception. If a customer voluntarily chooses third party equipment, Comcast cannot be held responsible for variations in that particular customers' reception.⁹

IV. PLAINTIFFS WILL NOT BE IRREPARABLY HARMED BY THE DIGITAL TRANSMISSION

The effects of the digital television transition which Plaintiffs claim support an injunction are neither imminent nor irreparable, and ignore the countervailing facts which demonstrate that any claimed disruption will be at most incidental and transient.

As a preliminary matter, the behavior of the Municipalities to date is not that of entities with serious concern that they will be forever harmed by a realignment of channels. Although Comcast first informed customers and all of its Michigan communities of its intent to digitize PEG channels on November 15, 2007, Plaintiffs waited fifty-five days to seek relief. In the interim, no Michigan municipality took Comcast's offer to work together for a smooth transition and to minimize potential confusion and disruption. That the Municipalities waited until two business days before this phase of Comcast's digital transition plan is to go into effect does not create an emergency or a threat to the public good, as they suggest.

⁹ Assuming there really is a customer experiencing the confusion posited by Plaintiffs, there are numerous means available to remedy that situation that are far less burdensome than enjoining Comcast's pending digitization and the concomitant launch of new programming services. Indeed, Comcast has offered to provide a digital converter at no charge to those customers currently lacking Comcast-provided equipment.

The proof will show that Comcast on its own has taken substantial and costly steps to ensure that those who want to watch PEG programming will be able to find the channels in their new location. As Plaintiffs admit, on November 15, 2007 Comcast mailed a notice to every customer announcing the changes. Comcast followed that initial mailing with over 32,000 Public Service Announcements on its cable systems statewide, with hundreds of those in the systems serving the Municipalities. It has run notices in newspapers in Detroit, Flint, Grand Rapids, and Lansing. Of course, customers who contact Comcast directly will receive an explanation.

Over 50% of Comcast's customers already have digital services. Those who opt not to have a Comcast converter, as Congress intended to allow, are typically early adaptors. These early adaptors might have a QAM compliant digital television but not Comcast's navigation equipment. They will be able to find the PEG channels on the true digital frequency they are transmitted, which for technical reasons is ordinarily a different number than the channel display locations which Comcast sends them with its converter boxes. The fact that the PEG channels are not where Comcast advertises them, however, is not unique to the PEG channels: many other channels transmitted by Comcast would be seen on a channel other than Comcast's channel placement unless the customer uses Comcast's equipment and channel navigation system. It is an open market for third party vendors to create their own navigation systems and equipment, and consumers may or may not like that. But if they want Comcast's channel lineup, they can obtain Comcast equipment and the benefit of its channel management system.

Meridian Township argues that "its ability to use" its government channel, HOM-TV, "would be substantially and adversely affected on an immediate basis," that it would immediately lose viewers, and will not "be as easily accessible to subscribers" through a channel guide or surfing. Pl.'s Mem. at 17. Comcast will not stop these communities from using their channels. Comcast will not prevent customers from seeing those channels. And Comcast, unlike the Municipalities, has made and will continue to make substantial efforts to educate consumers, which is in

Comcast's interest as much as Plaintiffs'. Any disruption in the ability to find the channels is little different than customers have experienced, and will experience, for other channels that move from analog to digital. Perhaps the Plaintiffs underestimate the ability of viewers, particularly those enthusiastic about PEG programming, to find the channels they want to watch.

As for the cost of the equipment, Comcast has offered to make one converter box available to any home that does not already have one for free for one year. Comcast makes available for free "CableCARDS" which fit into televisions designed to work without a converter but with the cable system's channel navigation system. By the end of the year of free converter boxes, the digital television deadline will be imminent, and over the air analog television will be a thing of history. At this time, Comcast may in fact continue to deliver some channels in limited analog format for a period of time necessary to complete the digital transition of its cable systems, but no program service has the right to *prevent* Comcast from moving forward with the orderly transition to all-digital technology.

Moreover, Comcast's rates are deregulated in Michigan by state law, as detailed above. Comcast could charge customers whatever it thought the market would bear for equipment and basic service. Yet in moving the PEG channels to digital format, Comcast is easing customers to the February 2009 digital cut-over by giving a free converter box to households that do not have one but want to receive digital services as part of their basic service. That is not irreparable harm but a voluntary benefit to help consumers move ahead with technology.

V. COMCAST AND CONSUMERS WILL BE HARMED BY AN INJUNCTION

Comcast and its customers will be harmed by the injunction Plaintiffs seek. The proof will show that Comcast's customers are demanding for more digital video services and HD programming. In Dearborn during 2007, Comcast moved several channels, including ESPN Classic, Game Show Network, C-SPAN 2 (while adding eight HD channels and seven other digital channels). In Meridian in 2006, Comcast moved Country Music Television and CSPAN

2 from analog to digital format to launch more HD programming and video on demand service. The company has firm plans to launch numerous additional services in the coming months throughout Michigan, including these communities, and the injunction Plaintiffs seek would prevent Comcast from fulfilling its plan to meet its customers' interests.

The digital transition is also essential for Comcast to meet competition from DirecTV, Dish Network, WOW, and AT&T. For example, DirecTV has been running a television ad questioning the amount of HD programming on Comcast's systems. Those customers who have new HD television sets are eager for more content, and with this phase of the transition, Comcast will add HD versions of Discovery Channel, Animal Planet, The Learning Channel (all available now on Dish Network, DirecTV, and AT&T's U-Verse), plus the Sci Fi Channel.

The migration of analog services to digital is essential as well for non-video service improvements. No one anticipated how fast and how popular high-speed Internet would become, but an increasing number of customers want their service to be faster, and Comcast needs to find the system capacity for that growing service. Likewise, Comcast's competitive digital voice service is growing, presenting additional needs for capacity. Comcast will have a witness to explain the details of this bandwidth issue, but the point is that Comcast needs to manage its bandwidth to meet numerous competing demands, of which PEG channel delivery is just one. To allow Plaintiffs to block Comcast's plan to manage the digital transition as it determines in the best interests of its customers, and to deprive customers of the benefits of this migration, would not be compensable by any money damages (if they were available from the Plaintiff municipalities, which have statutory immunity for cable franchising, 47 U.S.C. 555a(a)).

VI. THE PUBLIC INTEREST FAVORS ALLOWING THE DIGITAL TRANSITION TO PROCEED BY DENYING PLAINTIFF'S REQUEST

The preceding section demonstrates that not only will Comcast and its customers be harmed by the requested injunction, but that the public interest is best served by denying Plaintiffs'

Motion. Comcast is simply taking one more step in the inexorable march to a digital television universe, as intended by Congress and desired now by its customers. The public interest, according to Congress and the FCC, lies in making the most efficient use of available technologies to deliver services to consumers, including digital video, HD, Internet, and voice. Plaintiffs prefer that PEG channels be delivered in analog, but their preference does not justify an injunction blocking Comcast's digital transition.

VII. CONCLUSION

There is no irreparable or imminent harm to Plaintiffs from Comcast's movement of PEG channels to digital format as intended by Congress and allowed by law. The balance of harms alone favors denial of the Motion. As for the merits, although the Plaintiffs allege that Comcast must be enjoined because its PEG digitization is "violating federal laws and regulations, and local franchise requirements, governing the carriage of public, educational and government ("PEG") channels" (Pl. Mem. at 1), Plaintiffs have failed to identify any actual violation. Comcast's PEG digitization is entirely consistent with applicable law. The Plaintiffs are simply asking the Court to fashion a remedy out of whole cloth, because they do not like the digitization. That dislike, of course, is an insufficient basis to grant the Plaintiffs the extraordinary remedy they seek. The Motion should be denied.

Dated: January 12, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2008, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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