

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CITY OF DEARBORN, a Municipal corporation,
CHARTER TWP. OF MERIDIAN,
a Municipal corporation, and SHARON GILLETTE,

Case No. 08-10156

Hon. Victoria A. Roberts _____

Plaintiffs,

vs.

COMCAST OF MICHIGAN III, INC.,
a Delaware corporation, and COMCAST OF
THE SOUTH, INC., a Colorado corporation,

Defendants.

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**REPLY MEMORANDUM IN SUPPORT OF MOTIONS FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

TABLE OF AUTHORITIES

Federal Cases

Time Warner Entertainment v. F.C.C., 93 F.3d 957 (D.C. Cir. 1995)..... 4-F 4, 5

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Nixon v. Missouri Municipal League, 541 U.S. 125 (2004).....7

Rushton v. Schram, 143 F.2d 554, 559 (6th Cir. 1944)..... 7-FN6

Federal Statutes

47 U.S.C. § 521 *et. seq.*.....*passim*

47 U.S.C. § 531.....3, 6-FN6

47 U.S.C. § 543.....3, 5, 6

47 U.S.C. § 545.....4, 4-FN3

State Statutes

M.C.L § 484.3304(1).....4

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M.C.L § 445.901-902.....6

Other Authorities

Report and Order and Further Notice of Proposed Rule Making, 8 F.C.C.R. 5631....3,4,5

Third Report and Order and Further Notice of Proposed Rule Making, 2007 WL 4237199, FCC

07-170 (FCC), ¶ 20.....3-FN1
7 Thompson on Real Property § 60.04(a) at 451 (1944).....3-FN2
Comcast of Dallas, L.P., CSB-A-0719, Order, DA 05-681 at ¶ 10 (Media Bur. 2005)....6

Comcast's response focuses on those who will be served: the wealthy who can and choose to buy digital service, equipment and high speed Internet (Comcast's apparent alternative for PEG). But showing that some subscribers have easy access to PEG does not satisfy Comcast's federal duty to deliver PEG to ALL subscribers without imposing equipment charges or burdens that do not apply for other channels. Defendants' efforts to avoid that duty depends on several red herrings. Requiring PEG channels to be provided non-discriminatorily is inconsistent with ending analog broadcasting and moving to digital. "Congress did decide to end analog broadcasting, but declined to turn its backs on the millions of Americans with analog sets."¹ Comcast asserts it may charge for equipment, a claim that misses the point: the issue is whether Comcast may provide PEG in a way that requires special equipment, when other basic channels do not. As shown below, it is the discrimination and segregation that violates the law.

1. Comcast ignores Plaintiffs' central argument, that the federal Cable Act, particularly 47 USC §531, requires Comcast to deliver the PEG channels to all subscribers regardless of the level of service taken, without interference or special burden as compared to other services. This obligation (which is in addition to obligations under 47 U.S.C. § 543, *see infra*) was supported by *unrebutted* citation to statute, legislative history and Supreme Court decision, establishing that a PEG requirement is analogous to an easement, creating special rights of access which Comcast cannot disturb absent express authorization.² Report and Order and

¹ Third Report and Order and Third Further Notice of Proposed Rule Making, 2007 WL 4237199, FCC 07-170 (FCC 2007), ¶ 20.

² Similarly, silence does not permit a landowner to interfere with easement rights; ambiguities are resolved in favor of grantees. 7 Thompson on Real Property § 60.04(a), at 451 (1994). As Defendants note, the Cable Act contains provisions with respect to television broadcast channels that address carriage obligations in greater detail. But this specification simply reflects the complexity associated with balancing the rights cable operators and broadcasters and does not imply operators have unlimited authority with respect to PEG, as Comcast contends.

Further Notice of Proposed Rulemaking, 8 F.C.C.R. 5631, 5737-38 (1993) Comcast's claim that it can sell PEG as it sees fit is unsupported and turns the PEG requirement on its head.

The distinction between PEG channels and other channels is emphasized by 47 USC § 545(d), cited by Comcast. 545(d) permits a company facing effective competition to move most services to any tier notwithstanding franchise obligations, but 545(e) emphasizes that 545(d) does not apply to PEG. PEG is removed from operator control.³ Michigan law is not contrary. It requires the provision of PEG channels. M.C.L. 484.3304(1), and (at M.C.L. 484.3302(3)(h)), incorporates federal law and regulation. Thus, Michigan law does not change the character of PEG channels, and preserves the federal obligation of delivery. When Comcast states that Michigan law "contains no requirement for the placement of PEG channels," Comcast Br. at 7, it is repeating its mistake that if the law is silent, Comcast may provide PEG as it pleases.⁴

The interference here is substantial. Comcast admits PEG channels will go black for almost half its subscribers without special equipment. Comcast suggests this is inconsequential and can be ignored, because the subscribers could obtain equipment. But if the burdens associated with the equipment were inconsequential, Comcast would go all digital. That it is not doing so indicates it knows there is a significant difference between providing a service as part of the analog basic tier and as part of digital services only. Comcast's discussion of its "one free box offer," underlines that the offer (a) does not solve problems for schools or for subscribers with multiple sets and (b) is a matter of grace, that can end any time. That is no substitute for delivery of PEG to all subscribers on the same basis as other channels as the law requires.

³ 545(d) has no impact on federal carriage obligations associated with PEG.

⁴ Comcast argues, vaguely, that this case implicates first amendment rights. PEG requirement have been upheld against first amendment challenge, *Time Warner Entertainment v. F.C.C.* 93 F.3d 957 (D.C. Cir. 1995). To the extent speech is at issue, it is viewers rights and the speech of PEG programmers that are the concern.

2. *The Defendants' actions violate the separate obligation to provide PEG on the basic tier.* Comcast claims basic tier carriage requirements only apply where rates are regulated, and rates are deregulated in Michigan. While the issue is not settled, Plaintiffs' initial brief, n.22 cited FCC orders indicating 543(b)(7) applies where rates are deregulated; *see also, Time Warner Entertainment Co., L.P. v. F.C.C.* 56 F.3d 151, 197 (D.C. Cir. 1995), (recognizing the section is related to rate regulation, but finding it establishes a federal basic service definition). The court need not resolve that issue, however, because rates are not deregulated in Michigan. The state provision cited by Comcast at most prevents localities from regulating rates. Under FCC rules, when that occurs, rates remain regulated, but by the FCC, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 at 5682-84, ¶¶ 66-68 & n.186, Appendix A ¶ 19 (1993). The basic tier obligation may continue to apply.⁵

Comcast claims it satisfies this obligation because PEG is available to *digital* subscribers without additional fees. However, digital service is separate from basic service, involving additional fees not paid by basic service customers. That the PEG service is available to digital service customers without additional equipment indicates PEG is part of the digital service, no matter how Comcast characterizes it. It certainly does not prove the channels will remain part of basic. That question requires consideration of whether the channels are available on the same terms and conditions *as a whole* compared to the standard broadcast channels that are on basic tier. The record shows they are not. Comcast tries to confuse the issue by arguing (a) it has a right to charge for basic equipment; and (b) the FCC treats equipment and service rates as distinct. Those issues are irrelevant to the question of whether PEG will remain part of basic.

⁵ States cannot deregulate rates. *Id.* In any case, even if the basic service definition did not apply, Comcast would have the continuing delivery obligation discussed at point 1.

The equipment here is not equipment required to all the basic channels– it is equipment necessary for PEG. Further, while the FCC’s rate-setting formulae use one formula for service another for equipment, *total* “rates for the basic service tier” (not just the service) must be reasonable, 47 U.S.C. § 543(b)(1) taking into account the cost of equipment, 47 U.S.C. § 543(b)(3). The FCC recognizes that service *and* equipment rates must be considered in determining whether basic service rates are reasonable. *See, e.g., Comcast of Dallas, L.P.*, CSB-A-0719, Order, DA 05-681 at ¶ 10 (Media Bur. 2005). Comcast has it wrong.

3. *Comcast did not satisfy its federal duty to notify subscribers of the proposed change*, and that in itself justifies an injunction. Comcast admits its notice does not accurately identify where PEG signals will be seen. A notice that says unqualifiedly that PEG signals will be on a channel number, when the company knows that is not true, is not legally sufficient. The Cable Act and Michigan law, including MCL 445.901-922, require the notice be accurate. The company can give accurate notice, Supp. Aff. of Afflerbach para. 5, and *must* do so.

4. *Comcast’s never responds to Plaintiffs’ claims that its actions unlawfully require a subscriber to obtain additional equipment*. It argues its signals are not encrypted. That is an open question, Supp. Aff. of Afflerbach, para. 2-4, and is not the point on which the motion rests.

5. *State law does not prevent Plaintiffs from pursuing this action*. Michigan law requires a company holding a uniform franchise to comply with federal laws and regulations. M.C.L. 484.3302(3)(h). For existing franchises as in Meridian and Dearborn, franchise provisions requiring compliance with and restating such laws and regulations are consistent with the Michigan Act, and not in addition to it, as Comcast claims – and thus enforceable.⁶ Comcast’s

⁶ Comcast focuses on the issue of whether 47 U.S.C. § 531(c) authorizes enforcement of PEG obligations in existing franchises beyond the federal PEG carriage and notice requirements

contrary notion that the federal requirements are preempted by state law is inconsistent with the Supremacy Clause. Moreover, state control over subdivisions cannot be applied to frustrate federal rights, *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256 (1985); *Sailors v. Board of Education*, 387 U.S. 105, 108-9 (1967). *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), a case of particular statutory interpretation, is not to the contrary.

6. *Neither the general move to digital, nor Comcast's competitive position cuts against an injunction or justifies Comcast's disparate treatment of PEG, compared to other channels on the basic tier.* The company can meet its alleged bandwidth needs in other ways than Peg discrimination. Supp. Aff. of Afflerbach. PEG channels have the "easement" that they do because Congress recognized that absent access rights, local needs would be given short shrift. Those local rights should now be vindicated.

Respectfully submitted,

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above. Plaintiffs' case does not depend on that issue. But, to read state law, as Comcast does, to declare unenforceable provisions that 531(c) says *are* enforceable creates a conflict between state and federal law that under the Supremacy Clause, is resolved in favor of federal law. The conflict is avoided by applying common statutory interpretation principles, *Rushton v. Schram*, 143 F.2d 554, 559 (6th Cir. 1944) to recognize that (a) the Michigan law incorporates federal law; and thus (b) existing PEG provisions are enforceable as provided by federal law.

Certificate of Service

I hereby certify that on January 13, 2008, I electronically filed the foregoing reply brief in support of motions for temporary restraining order and preliminary injunction with the Clerk of the Court using CM/ECF system which sent a Notice of Electronic Filing to the following person:

Michael Ashton (attorney for defendants)

/s/ Cheryl Verran

Cheryl Verran