Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Petition for Declaratory Ruling Regarding Primary Jurisdiction Referral in *City of Dearborn et al. v. Comcast of Michigan III, Inc. et al.*

To: The Commission

PETITION FOR DECLARATORY RULING REGARDING PRIMARY JURISDICTION REFERRAL IN *CITY OF DEARBORN ET AL. v. COMCAST OF MICHIGAN III, INC. ET AL.* OF THE CITY OF DEARBORN, MICHIGAN; THE CHARTER TOWNSHIP OF MERIDIAN, MICHIGAN; THE CHARTER TOWNSHIP OF BLOOMFIELD, MICHIGAN; AND THE CITY OF WARREN, MICHIGAN

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SUMMARY

By Order dated November 26, 2008 in *City of Dearborn v. Comcast of Michigan III, Inc.*, No. 08-10156, the United States District Court for the Eastern District of Michigan directed Petitioners to file a Petition for a Declaratory Ruling asking the Commission to address seven questions.

Petitioners sued Comcast in January, 2008, after Comcast announced that it intended to convert all PEG channels in Michigan to a digital format, and that the channels would no longer be viewable in homes subscribing only to analog service tiers – unless the approximately 400,000 subscribers to those tiers called Comcast and specifically requested a converter to view the PEG channels. Comcast was singling out the PEG channels: it planned to continue to market the basic service tier and expanded basic tiers as analog tiers, and to deliver primary broadcast signals in an analog format. The effect was that many subscribers would be forced to choose between receiving the PEG channels, or incurring the burden and the ongoing expense of obtaining a converter for each analog set connected to the cable system.

Petitioners claimed that Comcast's actions violated local franchise agreements, state law, and federal law. Among other things, Petitioners argued that Comcast violated 47 U.S.C. § 543(b)(7)(A) and associated FCC regulations, which require Comcast to carry PEG channels on the basic service tier. Petitioners also argued that the discriminatory treatment of PEG channels violated federal laws and regulations. Finally, Petitioners argued that Comcast's actions violated provisions of state law and the local franchises, which incorporated the federal requirements. Rather than resolve all the federal-related claims on the merits, the court referred certain questions to the FCC under the doctrine of primary jurisdiction.

The referral of the questions was proper, given the nature of the issues before the court. The court found that resolving the issues requires an interpretation of FCC regulations and

provisions of the Cable Act in light of "distinctions between analog and digital formats," where "[t]he FCC's technological expertise would be especially helpful."

The FCC should grant the Petition and respond to each of the court's questions.

In responding to the court, the Commission should find that Comcast's proposed actions violate federal laws and regulations. More specifically:

1. The court asked whether discriminatory treatment of PEG channels is an unlawful evasion of federal laws and regulations. The "anti-evasion" provisions of the Cable Act and the Commission's rules prohibit an operator from engaging in activities inconsistent with the language and the *intent* of the Cable Act. The Act and its legislative history indicate that Congress intended PEG channels to be available to all subscribers on a non-discriminatory basis; the FCC should therefore find that Comcast's actions are an unlawful evasion. Indeed, the Commission should properly find that Comcast's actions are inconsistent with several provisions of the Act and associated regulations, including Sections 542, 543, and 544A.

2. The court asked whether the federal obligation to provide PEG on the basic service tier applies in communities where an operator faces effective competition. The FCC should find that it does apply. Section 543 provides that where a community faces effective competition, the community may no longer regulate rates. But obligations that are not solely concerned with the regulation of rates are not affected by the presence or absence of effective competition. The legislative history of Section 543(b)(7)(A) makes it clear that the obligation to carry PEG channels on the basic service tier serves ends that go far beyond rate regulation.

3. The court asked whether one should determine whether channels are part of a tier, or are being treated discriminatorily, based on the consumer's point of view. Consistent with its approach in other areas, the Commission should answer that the issues should be examined from

the consumer's point of view (recognizing that consumers are both viewers and programmers of PEG channels).

4. The court asked the Commission to identify criteria that can be used to determine whether a service is part of the basic service tier. As suggested by the response to question 3, the Commission should adopt criteria that look to whether a consumer would consider a channel to be part of the same "category" of service, or different in material respects.

5. The court asked the Commission whether operators may charge for equipment used only to receive PEG channels. The answer to this question is tied to the facts of this case: Comcast is digitizing PEG channels not to benefit basic service subscribers, but as a substitute for capital investment in its network, so that it can offer additional non-cable services (telephony and Internet) and non-basic cable services. Under these circumstances, the Commission should find that Comcast may not charge separately for equipment used only to receive PEG channels, at least in communities that are not subject to effective competition.

6. In a question related to question 4, the court asked whether PEG channels are part of the basic service tier if digitized, and subject to special equipment requirements and other burdens, as in this case. The Commission should find that the PEG channels are not part of the basic service tier in light of the additional burdens and costs associated with receiving and using the PEG channels, as compared to standard broadcast signals carried on the basic service tier.

7. Finally, the court asked whether Comcast's proposed digitalization of PEG channels is discriminatory. The FCC should find that it is, and is a violation of Comcast's obligations under the Cable Act and associated regulations.

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The City of Dearborn, Michigan; the Charter Township of Meridian, Michigan; the Charter Township of Bloomfield, Michigan; and the City of Warren, Michigan (collectively, the "Michigan Communities") hereby petition the Federal Communications Commission ("FCC" or "Commission") to issue a declaratory ruling addressing the seven questions referred to this agency by the United States District Court for the Eastern District of Michigan in *City of Dearborn v. Comcast of Michigan III, Inc.,* No. 08-10156.

The questions referred by the court are set forth in an Order issued on November 26, 2008, which is attached hereto as Exhibit N. The referral is appropriate, and Petitioners respectfully request that the Commission respond to the petition as indicated below.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts in this case are reflected in the pleadings filed by the parties, transcripts of hearings where testimony was taken under oath and subject to cross-examination, and in the orders of the district court. For the agency's convenience, we have included all

pleadings referenced in this Petition, all substantive orders of the district court, and the transcript of the Hearing on Plaintiffs' Motion for a Preliminary Injunction. *See* Exhibits A-N. We also include the docket sheet as of December 8, 2008 in the matter. *See* Exhibit O. Petitioners are prepared to provide a complete electronic or hard copy of the docket if that is helpful.

As explained in the pleadings, the Michigan Communities are local franchising authorities in the state of Michigan. Each community has a Title VI, Cable Act franchise agreement with Comcast, which remains in force.

A. PEG Channels in the Michigan Communities.

In its franchise agreements with each of the Michigan Communities, Comcast pledged to provide PEG channels. For example, in Meridian Township, Comcast has agreed to provide without additional charges at least eight PEG channels on the basic service tier: one for governmental use, one for public use, four for use by public school districts and community colleges serving the Township, and two for use by the state university system.[1] The Township actively programs the government channel, HOM-TV. In Dearborn, Comcast provides six PEG channels, including the award winning government channel, CDTV.[2] In Dearborn, the company also agreed to provide the channels as part of basic service, and indeed, agreed to carry the channels at particular channel locations.[3]

Comcast provided the PEG channels on the basic service tier, as was required by the franchises. Comcast distributed the channels in the same format it distributed the primary signal for local "must-carry" broadcast stations. The PEG channels could be received by a subscriber without any special equipment or additional charges, other than the equipment or charges the

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[1] Complaint at ¶ 24, Exh. A.

[2] *Id.* at ¶ 26.

[3] *Id.* at Exh. B to the Complaint (Meridian Township Franchise, ¶¶ 14-17); *id.* at Exh. C to the Complaint (Dearborn Franchise, §§ 4.12-4.30).

subscriber would use to receive the primary broadcast signals that Comcast was obligated to carry on the basic service tier. Comcast also placed the PEG channels at channel locations where they could be easily found by most subscribers.[4]

B. Comcast's Proposed Actions

On or about November 15, 2007, Comcast advised the Michigan Communities that on January 15, 2008 it intended to provide the PEG channels only in a digital format, and to shift such channels from their current placement to the 900-range of channels. Comcast advised that subscribers would only continue to receive PEG programming "by acquiring a digital converter, digital service, or compatible equipment." Comcast did not propose comparable changes with respect to the standard broadcast channels, which it intended to provide in an analog format.[5]

As a result, in order to view PEG channels, an existing subscriber with analog sets had to take a series of actions: he had to *request* a converter box (one was not automatically provided); arrange for its delivery and installation; and pay a fee to receive the channels, either on a monthly basis, or by purchasing an appropriate converter box.[6] There was no reduction in the basic service rate. A new subscriber had to specifically request a converter box to receive the PEG channels; a box was not automatically provided as part of service installation, even if Comcast knew that the subscriber could not receive the PEG channels without a converter box.

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[4] In Meridian Township, Comcast currently designates Channels 21-24 and 27-31 for PEG channels. Complaint ¶ 30. In Dearborn, Comcast designates Channels 12, 15, 16, 18, 19, and 24 for PEG channels. *Id.* at ¶ 31.

[5] Exh. A, Complaint at Exhs. E-F.

[6] The subscriber would need to do this for each television at which he sought to have his PEG channels restored alongside the other basic service tier channels.

At the same time, Comcast was emphasizing to subscribers that basic services could be received without a converter.[7]

Comcast's own data, presented at hearing in January, indicated that approximately 400,000 Comcast subscribers statewide took only non-digital services.[8] This meant that about 40% of Comcast's subscribers statewide would see PEG signals go dark on the eve of the Michigan Presidential Primary unless they took affirmative steps to request a converter box. More subscribers would be affected than noted above, because Comcast did not count households that took digital service at one outlet as "affected," even if the household had more than one television and received analog-only service at additional outlets.[9]

A subscriber who could bear this new expense would face a second problem: finding the PEG channels. After Comcast's Proposed Actions, subscribers could continue to surf to other basic service tier channels, which would remain at their current, well-known locations. In contrast, subscribers would find surfing to PEG channels considerably more difficult, as the channels would be shifted to new locations in the 900-series.[10]

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[7] It still is doing so, *see* Exh. P and http://www.comcast.com/dtv/homepage.html, which emphasize that a subscriber receiving basic service (which Comcast calls "limited basic service") incurs no equipment costs.

[8] Transcript of Hearing on Plaintiffs' Motion for Preliminary Injunction, January 14, 2008, Exh. C, at 125 (Testimony of Comcast Witness Buhl)).

[9] *Id.* at 124.

[10] "Channel surfing" may be particularly important to PEG programmers as PEG programmers lack advertising resources available to traditional broadcasters. Even subscribers with advanced TVs with QAM tuners would face significant issues, finding PEG channels as the channels would not show up in the 900-series designated on the converter. Transcript of Hearing, Exh. C, at 136-137, 142-143 (Testimony of McNichol). Comcast has not provided notice as to where or how PEG channels may be found on QAM tuners.

C. Procedural History

After numerous efforts to resolve this problem informally, the Charter Township of Meridian and the City of Dearborn filed a lawsuit in the United States District Court of the Eastern District of Michigan challenging Comcast's proposed digitization of PEG channels. *City of Dearborn et al. v. Comcast of Michigan III, et al.*, Case Number 08-10156. The City of Warren filed a parallel action in state court, which was removed to federal court and consolidated with the *Dearborn* case. Bloomfield Township subsequently joined in the federal litigation.

The Michigan Communities claimed that Comcast's proposed actions violated a variety of federal laws and regulations directly. Perhaps most significantly, for purposes of this pleading, Plaintiffs claimed that federal law required cable operators to deliver PEG channels to subscribers on the basic service tier, and to do so on a non-discriminatory basis. That is, Plaintiffs claimed that Comcast could not burden the receipt or provision of PEG channels. Plaintiffs argued, *inter alia*, that Comcast's actions violated 47 U.S.C. § 543(b)(7) and associated FCC regulations at 47 C.F.R. § 76.901(a), which require carriage of PEG channels on the basic service tier. Moreover, the same actions also violated state and local law because the federal laws and regulations were incorporated into the local franchises by the terms of those franchises and state law.[11] The Michigan Communities also claimed that the proposed actions violated other provisions of their local franchises.

Comcast did not primarily argue that its proposed actions were consistent with the local franchises. It claimed that there was no federal law or regulation that prohibited it from converting the PEG channels to digital, as it proposed.[12] It claimed that it was not violating any obligation it might have to carry PEG channels on the basic tier because (it claimed) the PEG

[11] *See, e.g.,* Complaint, Exh. A, ¶¶ 70-73.

[12] *See* Defendants' Motion to Dismiss, Exh. D, ¶ 2.

channels *were being provided* on the basic service tier, notwithstanding the steps that subscribers would have to go through to receive PEG channels as compared to commercial broadcast channels, and the additional charges that subscribers would have to pay to continue to receive those PEG channels.[13] Comcast also claimed that Michigan had largely preempted requirements contained in the local franchises when the state adopted the Uniform Video Services Local Franchise Act, 2006 PA 480, M.C.L. 484.3301 - 484.3314 (the "Video Services Act"), including requirements related to carriage of PEG channels.[14]

Plaintiffs moved for a temporary restraining order and motion for preliminary injunction. After an evidentiary hearing, the district court ruled for Plaintiffs, finding it likely they would prevail on claims that the Comcast actions violated the franchises and federal law requirements. Its order states that "Defendants are prohibited, without the permission from the court, from moving channels for public, educational and governmental use ('the PEG channels') from their current location or changing the format in which they are delivered to subscribers until further Order of the Court."[15] This injunction remains in effect.

On April 30, 2008, Comcast filed a Motion to Dismiss claiming (a) that state law preempted claims arising under local franchises; and (b) Plaintiffs had no actionable claims based on violations of federal laws and regulations.[16] On October 30, 2008, the district court granted Comcast's Motion in part and denied it in part.[17] The district court rejected Comcast's

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[13] *Id.* at ¶ 8.

[14] *Id.* at ¶ 4. The Michigan law did not move franchising to the state level. Franchises are still issued at the local level, subject to the provisions of the Act, to the extent it is valid.

[15] Exh. B, Order, *City of Dearborn v. Comcast of Michigan*, Case No. 08-10156 (Jan. 14, 2008), at 15.

[16] *See* Exh. D. Plaintiffs filed their response on June 30, 2008. *See* Exh. E.

[17] Order on Motion To Dismiss, *City of Dearborn v. Comcast of Michigan III, Inc.*, Case No. 08-10156 (Oct. 3, 2008), attached hereto as Exh. H, as corrected (Exh. I) and as amended (Exh. L). After this Order was issued, Comcast and the Michigan Communities filed a variety of motions

claim that state law preempted PEG terms in Comcast's franchise agreements. That issue is not raised in the court's questions and is not before this agency.

The court dismissed some of Plaintiffs' claims alleging Comcast had violated federal laws and regulations. For example, it dismissed as moot the Plaintiffs' claim that the notice provided by Comcast in connection with the digitalization of PEG channels was defective, as the court concluded that Comcast would be required to provide a new notice when and if it is permitted to digitize the PEG channels in the future. The court refused to dismiss Plaintiffs' claim that the discriminatory carriage of PEG channels violated federal law, including 47 U.S.C. § 543(b)(7) and associated regulations. *Id.* at 14. And it also concluded that because the state law and the local franchises incorporated federal requirements explicitly, the localities could bring a claim for violation of the federal requirements as a matter of contract.[18]

However, rather than resolving the federal-related issues on the merits, the court ruled that under the primary jurisdiction doctrine, it should refer certain questions to the FCC. Those questions will affect the resolution of both the franchise and federal law claims. For example, in order to determine whether Comcast's actions violated 47 U.S.C. § 543(b)(7), the court would have had to determine (a) whether that provision applies in communities that face effective competition; but it also had to determine (b) whether the PEG channels were being carried on the basic service tier, given the differences in the treatment of the PEG and broadcast channels. The court also would have had to answer the latter question to resolve certain franchise claims, given that the franchises independently require the carriage of the PEG channels on the basic service

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asking the court to reconsider its decision, or to certify questions for immediate appeal to the Sixth Circuit. The Court disposed of those motions in orders issued on November 24-25, attached hereto as Exhs. J, K, and M.

[18] *See* Order Denying Defendants' Motion for Reconsideration, Exh. J, at 4; Order Denying Defendants' Motion To Certify Order for Interlocutory Appeal, Exh. K, at 8.

tier. The court noted that while under a "literal interpretation" Comcast may not be in "technical violation" of any basic tier obligation, Comcast's actions "may circumvent the substantive intent of that obligation" in light of its effect "from the consumer's point of view." Order on Motion To Dismiss, Exh. L, at 18. The court recognized that the resolution of these issues was hardly unique to the Plaintiffs, and involved issues that the FCC might be in a better position to address. Under these circumstances, the court recognized that deferring the questions was especially appropriate:

> The FCC has 'special competence' in matters of cable technology. Not only would its expertise assist in the resolution of the distinctions and similarities of analog and digital service, the FCC's perch atop the technological progression of the cable industry from its inceptions allows it to apply its institutional knowledge to a new and emerging technology. The issues before the Court turn on the technological nature of the distinctions between analog and digital formats, a question not within the expertise of judges. The FCC's technological expertise would be especially helpful.

Id. at 18.

The court then proceeded to receive comments from both parties on its proposed questions for referral and, on November 26, issued its final referral Order.[19] This Petition followed.

ARGUMENT

I. THE REFERRAL IS APPROPRIATE FOR REASONS STATED BY THE COURT.

While the court certainly had jurisdiction to resolve the issues before it, the court correctly recognized that the application of the statute's provisions and the Commission's rules to a digital environment raises particularly knotty issues that it may be best to have the agency resolve in the first instance. Referral was appropriate under the circumstances, *United States v.*

[19] *See* Exh. N.

Any and All Radio Station Transmission Equipment, 204 F.3d 658, 664 (6th Cir. 2000); *see also* Exhs. F-G, esp. Exh. G, *Plaintiffs' Response to Comcast's Supplemental Memorandum*, at 2-3 .

II. THE FCC SHOULD DECLARE THAT COMCAST'S PROPOSED ACTIONS VIOLATE FEDERAL LAW AND REGULATIONS.

In responding to the district court's questions, the FCC should find that Comcast's proposed actions violate federal laws and regulations, as described below. We list each question and Plaintiffs' view of the appropriate response.

A. In Response to Question 1, the FCC Should Rule That Discriminatory Treatment of PEG Channels Is an Unlawful Evasion of Federal Law and Regulations.

Question 1 reads:

> *Does it constitute an "evasion" of applicable rate regulations (or any other regulation) when cable operators: (a) require some subscribers to purchase/lease converter boxes to view public, educational and governmental channels ("PEG channels"); and (b) provide PEG channels in digital format on the basic-service tier while non-PEG channels on the basic-service tier are provided in analog format? (See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation, 8 FCC Rcd 5631, 5915- 5917 (F.C.C. 1993): We define a prohibited evasion as any practice or action which avoids the rate regulation provisions of the Act or our rules contrary to the intent of the Act or its underlying policies. We also believe that . . .: (1) implicit rate increases; (2) a significant decline in customer service without a similar decline in price; and (3) deceptive practices such as improper cost shifting or intentionally misstating revenues [are evasions].*

The question directly implicates 47 U.S.C. § 543(h), which required the FCC to adopt regulations prohibiting evasions of any "requirements of this section." By its terms, Section 543(h) is not limited to rate regulation but prohibits evasions of any requirements arising under Section 543, including the requirements of 47 U.S.C. § 543(b)(7)(A), which requires carriage of PEG channels on basic. As the language quoted by the court shows, the FCC defined a "prohibited evasion" to include any practice or action which avoids "our rules contrary to the intent of the Act or its underlying policies." *In re Implementation of Section of the Cable*

Television Consumer Protection and Competition Act of 1992 Rate Regulation, 8 FCC Rcd. 5631, 5915 ¶ 451 (1993) (emphasis supplied). With respect to PEG, the legislative history of Section 543(b)(7)(A) shows that Congress specifically intended to *prevent* operators from discriminating against PEG channels:

> PEG programming is delivered on channels set aside for community use in many cable systems, and these channels are available to all community members *on a nondiscriminatory basis, usually without charge*....PEG channels serve a substantial and compelling government interest in diversity, a free market of [ideas,] and an informed and well-educated citizenry....Because of the interests served by PEG channels, the Committee believes that *it is appropriate that such channels be available to all cable subscribers on the basic service tier and at the lowest reasonable rate.*

H.R. Rep. No. 102-628 at 85 (1992) (emphasis added). Even members of the Committee who objected to the bill as reported agreed that it was essential that PEG access channels be available to all subscribers: "Making over-the-air broadcast and PEG access channels available on a separate [basic service] tier promotes the time-honored principle of localism." *Id.* at 183. Hence, the FCC should respond that providing the PEG channels in a manner that makes them more difficult to view, less accessible, or more expensive – or that requires subscribers to make special requests to continue to receive them – is an evasion of the clear Congressional intent underlying Section 543(b)(7)(A), and therefore a violation of the FCC's rules implementing that provision.[20]

In addition, Comcast's actions are evasions in at least three other respects. First, where rates are subject to regulation, rates are set based on the number of channels provided to a

[20] Comcast has repeatedly argued that the fact that some subscribers may require converters, while others do not, simply reflects the fact that some subscribers have older televisions than others. That misses the point in two respects. This is not a case where each individual subscriber must either obtain or not obtain a converter in order to receive ALL service, based on the nature of the subscriber's television. In this case, an individual subscriber with an analog set who *can* receive broadcast basic service channels without a converter must obtain a converter to receive the PEG channels. Michigan Communities believe that the legislative history makes it clear that PEG channels should be available without additional equipment or charges.

subscriber. In this case, the effect of the change is to reduce the number of channels actually viewable by the subscriber without special additional charges. The subscriber must either incur those additional charges or effectively pay for channels that cannot be viewed. Either way, there is an implicit rate increase that the evasion regulation prohibits. Nor can the increase be justified by arguing that the only "increase" is the increase in equipment charges to the subscriber. While equipment and service costs are generally calculated separately, the Commission has recognized that in some cases, the charges are so intertwined that the relationship cannot be ignored. *Comcast of Dallas, L.P.*, CSB-A-0719, Order, DA 05-681, 20 FCC Rcd. 5892, 5895 (Media Bur. 2005). In some cases, equipment that is installed for the benefit of the operator's system operations must be treated as part of the system costs, and not subscriber equipment for which the subscriber may be charged. *In re TCI Cablevision of Oregon, Inc. d.b.a TCI of Tulatin Valley, Inc.*, CSB-A-0476, Memorandum Opinion and Order, DA 99-2227, ¶ 17 (Cable Serv. Bur. 1999). Comcast has admitted that it is converting the PEG channels to digital solely so that it may be able to offer additional non-basic and even non-cable services.[21] Under these circumstances, charging subscribers for equipment that is for Comcast's benefit, and that the basic service subscriber should not need may be treated as an evasion of the Commission's rate rules.

Second, 47 U.S.C. § 542(c) permits an operator to line itemize amounts provided to support PEG in accordance with regulations established by the FCC under Section 543. The basic predicate for the allocation of PEG fees to all subscribers under section 543 is that all subscribers received the PEG channels as part of the basic tier. The decision of Comcast to provide them in a way so that subscribers must obtain additional equipment and make a special

[21] Exh. C at 87 (Testimony of McNichol); and at 112 (Testimony of Buhl).

request for that equipment undermines the entire predicate for the line itemization. Comcast cannot both itemize and digitize as it proposes consistent with the Commission's rules.

Third, while Section 544A of the Cable Act may not be directly implicated by the Commission's evasion rules, it has its own "evasion" language that may be relevant here (and which is certainly related to the question of whether Comcast should be permitted to charge for unnecessary consumer equipment that benefits its operations, and not the subscriber). The Act is intended to ensure "to the extent technically and economically feasible" that subscribers may bypass converter boxes and receive service signals. While the Commission's rules focus on scrambling signals, the activity here has much the same effect as scrambling, as Comcast is well aware, and has much the same negative effects on consumer electronic equipment. The situation here is analogous to *In re Cox Communications, Inc., Fairfax County, Virginia Cable System*, DA 08-2299, EB-07-SE-351 (October 15, 2008). There, the Commission found that Cox violated 47 C.F.R. § 76.640(b)(1) by moving certain channels to a Switched Digital Video Platform in its Fairfax County, Virginia, cable system. As the Commission explained:

> After Cox's movement of linear programming to an SDV platform, customers who use CableCARD-equipped UDCPs can no longer receive that programming without leasing a set-top box from the company. Those customers who choose to lease a set-top box not only must bear the additional cost, but also lose many features of their UDCPs, such as picture-in-picture viewing and the ability to record one channel while watching another. Accordingly, Cox is preventing its customers from using their UDCPs and undermining the policy goals of Congress and the Commission to ensure the commercial availability and use of navigation devices.[22]

B. In Response to Question 2, The FCC Should Find That the Obligation To Provide PEG on the Basic Service Tier Applies in All Communities.

Question 2 states:

[22] *Id.* at ¶ 23.

Does the requirement to provide PEG channels on the basic-service tier apply to all cable operators or are cable operators in communities where rates are subject to "effective competition" (or otherwise deregulated) excluded from this requirement? (See Pl. Response Br. p.19 n.16 "Comcast has argued that the requirement to provide PEG [channels] on [the] basic service tier does not apply in communities where rates are subject to effective competition. Plaintiffs disagree"; see also H.R. Rep. No. 102-628 at 85 (1992) (PEG channels must be "available to all community members on a nondiscriminatory basis")).

The FCC should declare that the obligation to carry PEG channels on basic service applies whether or not a cable operator is subject to effective competition for the delivery of its commercial services.

The obligation to carry PEG as part of basic service was added to the Cable Act as a federal requirement in 1992. This does not mean that, prior to 1992, Congress thought that access channels should be provided on tiers other than basic service at the operator's option. Rather, it reflected the fact that prior to 1992, PEG channels were sometimes provided as part of a lifeline tier that was available at no charge, or a lower charge than the tier of service that included local broadcast signals. There was certainly no indication that Congress thought that the operator was free to provide the channels to a subset of subscribers, or that the operator could charge extra for the channels. To the contrary, the 1984 Act emphasized that "cable access regulations are 'content neutral, yet substantially increase( ) the number of voices that can reach the home." H. Rep. No. 98-934 at 33-34 (1984), 1984 U.S.C.C.A.N. 4655, 4670-71 (emphasis added). "With regard to the access requirement, cable operators act as conduits." *Id.* at 35, 1984 U.S.C.C.A.N. at 4672.

In 1992, Congress decided that the public would be best served by an explicit provision ensuring that there was a tier offered to every subscriber that included the PEG channels and broadcast signals. *See, supra,* p. 10. Hence Congress required that "each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which

subscription is required for access to any other tier of service." 47 U.S.C. § 543(b)(7)(A). Such basic service tier shall, at a minimum, consist of the following:

> (i) All signals carried in fulfillment of the requirements of sections 614 and 615.
>
> (ii) Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers. [and]
>
> (iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.

47 U.S.C. § 543(b)(7)(A)(i).

Comcast has argued that the basic tier requirement in Section 543(b)(7) does not apply if it faces effective competition in a community. However, that is not what the Act says. Section 543(a)(1) provides that a state, federal or local government may only regulate *rates* as provided in Section 543. Section 543(b)(2) provides that "[i]f the Commission finds that a cable system is subject to effective competition, the *rates* for the provision of cable service by such system shall not be subject to regulation..." 47 U.S.C. § 543(b)(2) (emphasis added). The presence or absence of effective competition does not affect the authority of the federal government or localities to enforce provisions that go beyond mere rate regulation. Hence, the Commission ruled that Section 543(f), the provision barring "negative option billing," does not depend on the presence or absence of effective competition, since it is not solely concerned with rate regulation:

> [U]nlike many other provisions of the 1992 Cable Act, the negative option billing provision does not specifically direct the Commission to adopt implementing rules, nor does it specifically vest jurisdiction in the Commission to enforce the provision to the exclusion of state and local governments. While the negative option billing provision is codified in Section 3 governing rate regulation, it appears that it is more in the nature of a consumer protection measure rather than a rate regulation provision *per se*. In this regard, the negative option billing provision governs the circumstances under which a cable operator may bill a subscriber for a

> particular service, rather than the reasonableness of the actual rate charged a subscriber for that service.

In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, 9 FCC Rcd. 4316, 4361-62 ¶¶ 127-28 (1994), *aff'd Time Warner Entertainment Co., LP v. FCC*, 56 F.3d 151, 194 (D.C. Cir. 1995).

Likewise, the basic tier requirement in Section 543(b)(7)(A) is self-implementing and enforceable by the FCC as well as by local governments. It contains an explicit command that "each operator" shall provide "its subscribers" with a basic service tier including PEG channels. The legislative history does not contain any hint that would suggest Congress intended for the requirement to disappear along with rate regulation. Rather, the Conference Report discussion of this section explains that this "basic service tier" requirement was inserted not just for purposes of rate regulation, but for other, equally important purposes:

> The Committee believes that PEG access programming is an important complement to local commercial and noncommercial broadcasting to ensure that the government's compelling interest in fostering diversity and localism. . . . It has been demonstrated that where PEG channels exist, these interests have been well served. PEG programming is delivered on channels set aside for community use in many systems, and these channels are available to all community members on a nondiscriminatory basis, usually without charge. Public access provides ordinary citizens, non-profit organizations, and traditionally underserved minority communities an opportunity to provide programming *for distribution to all cable subscribers* . . . .

H. Rep. No. 102-628 at 85 (emphasis added). *See also,* p. 9, *supra.*

Comcast has pointed out, and the Michigan Communities recognize, that one court has suggested the contrary. *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 192 (D.C. Cir. 1995). In that case, the D.C. Circuit rejected the FCC's claim that the tier buy-through provision in Section 543(b)(8)(A) applied to both regulated systems and systems subject to effective competition. *Id.* The court noted that provision's proximity to Section 543(b)(7)

which, in the court's view, "clearly applies only to systems not subject to effective competition." *Id.* The court did not directly analyze Section 543(b)(7)(A) itself (requiring a basic service tier with PEG). Instead, the court based its decision primarily on the title of Section 543(b)(7) and the language of Section 543(b)(7)(B), which the court believed showed that the buy-through prohibition could not apply to systems that do not face effective competition. The court's rationale is not entirely clear. However, the court appears to have reasoned as follows: Section 543(b)(7)(B) permits the addition of any channel to the basic service tier, and it then states that the channels so added are subject to basic service rate regulation. By including an anti-buy-through provision, Congress prevented operators from avoiding rate regulation of the additional services through a simple stratagem of classifying the additional channels as a separate tier, and requiring subscribers to purchase that tier in addition to the basic tier. This led the court to conclude that once rate regulation disappeared, the purpose served by Section 543(b)(8) also disappeared. But that analysis has little to do with whether the requirement to provide PEG as part of the basic service tier serves purposes beyond rate regulation, and obviously the court did not rule on that issue.

It becomes clear that the court's analysis of Section 543(b)(8) must be read narrowly when one examines the FCC Order that was before the *Time Warner* panel. As part of that Order, the FCC, after reviewing the 1992 legislative history, ruled that "[g]iven this clear congressional direction and the evidence of the importance attached to PEG channels, we require a cable operator to carry PEG channels on the basic tier unless the franchising agreement explicitly permits carriage on another tier." *In re Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd. 5631, 5737-38, MM Docket No. 92–266 (1993) (emphasis supplied). That holding makes no distinction between systems

that do and do not face effective competition, and remains the law. Nothing in *Time Warner* suggests that this aspect of the Order was overturned.[23]

Aside from that Commission ruling on PEG carriage, which clearly supports Plaintiffs, the FCC has had little reason to address the issue that is now raised by the court's order. Some of the Commission's decisions on digital must-carry cite to the *Time Warner* case, and assume that the basic service requirement does not apply where there is effective competition. *In re Local Broadcast Signal Carriage Issues*, 16 FCC Rcd. 2598, 2643 ¶ 102 (2001); *In re Flinn Broadcasting v. Knology Cable*, 18 FCC Rcd. 1680, 1682 n.18 (2003). Of course, in those cases, the meaning of Section 543(b)(7) did not have to be analyzed closely given other provisions in the statute regarding broadcasters. *In re Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, 22 FCC Rcd. 21064, 21078 ¶ 29 (2007). There is no analysis of PEG in those decisions. In other cases directly involving PEG, the Commission has made explicit or implicit findings that PEG must be carried as part of basic service, as a general matter, albeit with little or no analysis of *Time Warner*. *In re Social Contract for Comcast Cable Communications, Inc.*, 13 FCC Rcd. 3612, 3635 ¶ 63, n.123 (1997) (unnecessary to protect against movement of PEG channels from basic because rules and statute require maintenance of PEG on basic tier); *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd. 2503, 2614 n.17, MB Docket No. 05-255 (2006) (operator required to provide basic service tier including PEG). The Commission is thus in a position to address the matter in this proceeding, and should do so by reaffirming that operators have an obligation to carry PEG channels on basic – absent an explicit

[23] To the contrary, the Commission concluded that Section 543(b)(7)(A)(i)-(iii) together "effectively amend the general 'basic tier' definition that remains in the Communications Act from the 1984 Cable Act," to include both PEG and broadcast signals in the definition of basic service. 8 FCC Rcd. 5631, at ¶ 167. This portion of the Order was specifically upheld in *Time Warner*. 56 F.3d at 199.

provision to the contrary in an existing franchise agreement. "A finding of effective competition permits a cable operator to price and market *its services* according to market forces," *In re Flinn Broadcasting Corp. v. Knology Cable*, 18 FCC Rcd. 1680, 1682 (2003) (emphasis added). It does not empower a cable operator to market and freely deliver channel capacity that has been "designated" for community "use." 47 U.S.C. § 531.

C. In Response to Question 3, the FCC Should Confirm That In Determining Whether PEG Is Part of a Tier, or is Being Treated Discriminatorily, the Analysis Should Proceed from the Point-of-View of the Consumer – Who May Be a Viewer or Programmer.

Question 3 states:

> *Does the Court look from the consumer's point-of-view to determine whether: (a) a programming service is part of the basic-service tier; and (b) the proposed digitization of PEG channels but not other channels is "discriminatory" (because e.g., some customers may be required to obtain additional equipment or make special requests for additional equipment to view PEG channels)? (See H.R. Rep. No. 102-628 at 85 (1992) (PEG channels must be "available to all community members on a nondiscriminatory basis")).*

In another context, the FCC has ruled, and the Supreme Court has affirmed, that the term "offer" under the Communications Act must be read from a user's perspective. *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005) ("It is common usage to describe what a company 'offers' to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product. . ."). The same principle should apply here. The requirement that a cable operator "*provide* its subscribers" a basic service tier consisting of PEG programming should be read from the perspective of a local consumer attempting to view a PEG channel. 47 U.S.C. § 543(b)(7)(A) (emphasis added). Under the Cable Act, a "service tier" is 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). From a consumer's perspective, the question is not whether Comcast *states* that the

channel is on the basic service tier, but whether it is *provided* in a manner such that the consumer perceives it to be in the same "category" as other basic service tier programming. If Comcast takes its proposed actions, subscribers will have to make special efforts and pay special charges to obtain the equipment to receive PEG such that, from the consumer standpoint, it is a separate category of service.

The same is true in determining whether an operator's actions are discriminatory. But where discrimination is concerned, there is another important point to remember. In the case of PEG channels, consumers are "users" in two senses. Congress was concerned both with the public's ability to receive PEG content, and the public's ability to use the PEG channels to disseminate information of their choosing, free from operator control. Hence, in determining whether a service is being treated discriminatorily, the Commission should view the consumer as recipient and as programmer. A scheme that burdens either function – as does the Comcast scheme, by making the channels less accessible – is problematic.

D. In Response to Question 4, the FCC Should Establish Basic Service Tier Criteria That Look From the Consumer's Point of View.

Question 4 states:

> *What is the criteria for a channel to be considered part of the basic-service tier? If cable operators require customers to purchase/lease digital receiving equipment to view PEG channels, are those channels per se a separate "service tier" within the meaning of 47 U.S.C. §522(17)?*

Looking from the consumer point of view, the FCC should declare that a number of criteria impact whether a channel is part of the basic service tier.

First, and perhaps most obviously, the reference to a "category of cable service or other services" suggests that comparable channels provided in a tier should be available without any

special actions by any particular subscriber.[24] If an individual subscriber is required to make additional affirmative requests in order to receive the PEG channels, as opposed to primary broadcast signals carried on the basic service tier, the PEG channels are properly treated as being on a different tier.[25] That is the case here.[26]

Second, if a signal is marketed or provided in a way so that additional financial or other burdens are placed on its receipt, as compared to similar signals, it should not be treated as part of the basic service tier. Where a service is provided subject to such distinct terms and conditions it should be treated as being provided at a "separate rate" within the meaning of the Act, and hence should be treated as part of a distinct service tier.[27] That is the case here.

Third, because it was the Congressional intent that the PEG channels be provided on a tier containing the broadcast channels, the PEG channels should be as accessible and available as the comparable broadcast channels. In this case, the PEG channels will not be as accessible or available.

The foregoing standards will allow the FCC to answer the final part of the court's question. The court asked "[i]f cable operators require customers to purchase/lease digital receiving equipment to view PEG channels, are those channels *per se* a separate "service tier"

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[24] Here, Comcast has decided not to provide consumers automatically with the equipment required to view PEG channels, but instead connects the subscribers to "basic service" and requires the customers to request the converters. If a subscriber ordered a digital tier service, and required a box to receive the service, Comcast technicians would normally install or provide the box automatically as part of the service.

[25] Similarly, if an individual subscriber would incur additional fees to receive a standard definition PEG signal, as compared to what is paid to receive the primary standard definition broadcast signal, the PEG signal should be treated as being part of a different tier.

[26] There may be other criteria relevant in other circumstances – the guidepost being the consumer point of view. For example, if a set of channels is much more difficult to locate or find, or requires a consumer to take significant additional steps to view as compared to other channels carried on basic service, it is not the same "category" of cable service.

[27] For standard definition PEG channels, the relevant yardstick for comparison is the primary, standard definition broadcast signal.

within the meaning of 47 U.S.C. §522(17)?" It is obviously the case that a cable operator may provide all its signals in a digital format. This would require a customer to purchase/lease digital receiving equipment to view any signals, including PEG signals. Problems arise when the PEG channels are treated discriminatorily. The answer to the court's question is: requiring customers to purchase/lease equipment does not *per se* mean the PEG channels are on a separate tier. It depends, *inter alia,* on what is required to receive broadcast signals on the basic service tier.

E. In Response to Question 5, the FCC Should Find That Operators May Not Charge for Equipment Required Only To Receive PEG Channels.

Question 5 states:

> *Are cable operators precluded from charging for equipment used in connection with the reception of PEG channels on the basic-service tier when equipment is not needed to receive non-PEG channels on the basic service tier?*

For reasons suggested above, the FCC should declare that, at least in communities where there is no effective competition, an operator may not charge for equipment used to receive PEG channels when such equipment is not needed to receive non-PEG channels. This is consistent with rate regulation principles discussed above and with this Commission's ruling that there be a "single" basic service tier, *supra* n.23.

F. In Response to Question 6, the FCC Should Find That PEG Channels Are Not Being Provided on the Basic Service Tier If Digitized and Subject to Special Equipment Requirements, and Other Burdens.

Question 6 states:

> *Can PEG channels be digitized, require special equipment to be accessed (or be subject to other burdens with respect to the need to make a special request to receive equipment and the placement of channels), and still be considered carried on the basic-service tier when non-PEG channels on the basic-service tier are not digitized and do not require special equipment to be accessed?*

For reasons suggested above, the FCC should find that PEG channels are not being provided on the basic service tier if digitized and subject to special equipment requirements, and other burdens.

G. In Response to Question 7, the FCC Should Find That the Digitization of PEG Channels As Proposed by Comcast Is Discriminatory.

Question 7 states:

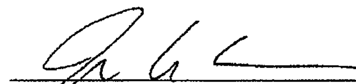
> *Is digitization of PEG channels "discriminatory" because some customers may be required to make a special request to obtain additional equipment to view the channels, while customers are not required to obtain additional equipment to view non-PEG channels?*

For reasons suggested above, the FCC should find that the digitization of PEG channels as proposed by Comcast is discriminatory. Indeed, the discrimination is patent at every level: Customers are required to make special requests in order to obtain the equipment necessary to receive PEG channels. There is no evidence that Comcast is telling its customers that in order to receive basic service, a box is required (although that is true, if, as Comcast claims, PEG is part of basic service); it is certainly not providing the boxes automatically. In fact, Comcast is telling customers a box is not needed. Customers have to incur additional costs to receive PEG channels – and must continue to pay basic service rates and PEG fees even if the signals are not accessible. Comcast plans to locate the channels so that they will be difficult to find and to view for customers with or without a digital TV. While one may debate whether particular actions, standing alone, are objectionable, taken together there is evidence here of a scheme to disadvantage PEG and to advantage Comcast's own commercial offerings. This sort of discrimination is inconsistent, *inter alia*, with the cable operator obligation to designate channel capacity for PEG use. 47 U.S.C. § 531.

CONCLUSION

The Commission should respond to the district court's questions, and do so by declaring that Comcast's proposed actions violate the Cable Act and the FCC's regulations.

Respectfully submitted,



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December 9, 2008

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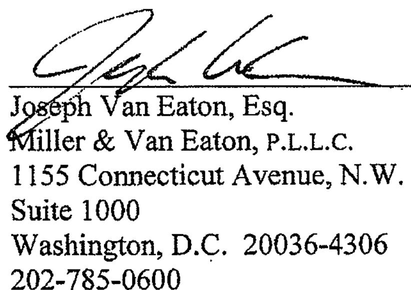
CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)

The below-signed signatory has read the foregoing Petition for Declaratory Ruling, and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for any improper purpose.

Respectfully submitted,

December 9, 2008



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