

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

CITY OF DEARBORN, ET AL,

Plaintiff(s),

CASE NUMBER: 08-10156  
HONORABLE VICTORIA A. ROBERTS

v.

COMCAST OF MICHIGAN III, Inc., ET AL,

Defendant(s).

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ORDER

I. INTRODUCTION

Before the Court is Defendants Comcast of Michigan III, Inc.; Comcast of the South, Inc.; Comcast of Warren; and Comcast of Macomb's (collectively "Comcast") "Motion to Dismiss." (Doc. #19). Comcast says Plaintiffs' claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).

Oral argument was heard on August 19, 2008.

After the hearing, Comcast filed a "Motion for Leave to File Supplemental Memorandum on Primary Jurisdiction." (Doc. #39). Plaintiffs responded on September 19, 2008. Comcast's motion is **GRANTED**.

Comcast's motion to dismiss is **GRANTED IN PART AND DENIED IN PART**.

For the reasons more fully discussed below, the Court holds: (1) federal law preempts state law as it pertains to public, educational and governmental channel ("PEG channel") requirements; (2) Plaintiffs do not have a cause of action under 47 U.S.C. §531(e); (3) the Federal Communications Commission ("FCC") has the special

competence to resolve questions regarding Plaintiffs' 47 U.S.C. §543(b)(7) claim; (4) Plaintiffs' 47 C.F.R. §76.1603(b) claim is unripe; (5) Plaintiffs' 47 C.F.R. §76.630 claim is abandoned; and (6) Plaintiffs' 47 U.S.C. §§ 541 and 544a claims are dismissed.

## **II. HISTORY OF FEDERAL CABLE LEGISLATION AND PEG CHANNELS**

The Communications Act of 1934 ("Communications Act") gave the FCC broad authority to regulate interstate communication by wire and radio, but it did not address the regulation of cable television. *ACLU v. FCC*, 823 F.2d 1554, 1557-58 (D.C. Cir. 1987). The rise in cable television technology initially created legislative and regulatory uncertainty. *See Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 767 (6th Cir. 2008).

In the 1960s, however, the FCC began to regulate cable franchises. *Id.* Municipalities assisted in the regulation by refusing to grant franchise agreements which did not contain provisions regarding PEG channel access. *See Time Warner Cable of New York City v. City of New York*, 943 F.Supp. 1357, 1368 (S.D.N.Y. 1996) (citing Daniel L. Brenner et al., *Cable Television and Other Nonbroadcast Video: Law and Policy* § 6.04[1], at 6-34 (1996)); *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 972 (D.C. Cir. 1996) (citing H.R. Rep. No. 934, 98th Cong., 2d Sess. 20-21, 30 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4667).

In 1972, the FCC passed cable regulations, apparently a precursor to PEG channel requirements, which required cable operators in the 100 largest markets to set aside three channels for use by public, educational and governmental bodies at no cost. *Time Warner Cable of New York City*, 943 F.Supp. at 1368 (citing *Cable Television Report and Order*, 36 F.C.C.2d 143, 190-91, *aff'd on recon.*, 36 F.C.C.2d 326 (1972)). "In introducing the regulations, the FCC stated the 'fundamental goals of a national

communications structure' would be furthered with the 'opening of new outlets for local expression, the promotion of diversity in television programming, the advancement of educational and instructional television, and increased informational services of local governments.'" *Id.*

In 1984, Congress amended the Communications Act when it passed the Cable Communications Policy Act of 1984 ("1984 Act"). The 1984 Act: (1) preserved the municipalities' role in the franchise process; and (2) affirmed the FCC's exclusive jurisdiction over cable service. *City of New York v. FCC*, 814 F.2d 720, 723 (D.C. Cir. 1987); see also *Alliance for Cmty. Media*, 529 F.3d at 767-78 (the 1984 Act allowed municipalities to continue regulating cable franchises, but imposed regulatory guidelines).

In 1992, Congress passed the Cable Television Consumer Protection and Competition Act ("1992 Act"). *Alliance for Cmty. Media*, 529 F.3d at 768. The 1992 Act: (1) clarified the role of local franchising authorities ("LFAs"); (2) codified restraints on the licensing activities of LFAs, including prohibitions on an exclusive franchise and the unreasonable refusal to award a competitive franchise; (3) provided cable providers the right to begin an action in a federal or state court within 120 days after it received a final and adverse decision from an LFA; (4) granted the FCC and local authorities the power to regulate prices; (5) imposed rate regulations on the cable industry; (6) required cable operators to carry television broadcast stations; (7) required cable operators to provide a basic tier of service that included PEG channels; (8) allowed franchising authorities to require cable operators to provide assurance that it will provide adequate PEG channel access; (9) enacted censorship provisions for indecent programs on PEG channels

(ultimately struck down on First Amendment grounds); (10) required the FCC to adopt regulations to ensure the rates cable operators charge for their “basic service tier” are reasonable; (11) directed the FCC to establish criteria to determine when the rates charged for other cable services are unreasonable; and (12) required cable operators to maintain a uniform rate structure throughout their service areas. *Id.*; *Time Warner Cable of New York City*, 943 F.Supp. at 1370-71 (citations omitted); *Time Warner Entm’t Co., L.P.*, 93 F.3d at 966 (citations omitted).

Most recently, Congress enacted the Telecommunications Act of 1996 (“Telecommunications Act”), which phased out the rate requirements imposed by the 1992 Act. *Time Warner Cable of New York City*, 943 F.Supp. at 1371 (citing 47 U.S.C. §543(c)(3)).

### **III. OVERVIEW OF CASE AND PROCEDURAL HISTORY**

In each of the Plaintiffs’ municipalities, Comcast is operating pursuant to a franchise agreement. The City of Dearborn’s franchise agreement prevents Comcast from relocating PEG channels without the City’s consent. *Dearborn Franchise* §3.12. Both the Charter Township of Meridian and the Charter Township of Bloomfield’s franchise agreements incorporate ordinance requirements that PEG channels be provided without additional charge to subscribers. *Meridian Franchise*, p.1 and ¶9(g); Ord. 70-91 (PEG channels provided without charge); *Bloomfield Franchise*, Art. V., Code of Ord. §34-116(c) (*all residential subscribers . . . shall also receive all access channels at no additional charge*). The franchise agreement in the City of Warren contains several bargained-for provisions regarding PEG channel capacity, including

Section 7.1, which prohibits Comcast from relocating the channels.

Comcast wants to: (1) convert PEG channels from analog to digital; and (2) maintain PEG channels on the basic service tier, but move them to the 900-channel range. PEG channels have historically been below the 100-channel range and available to cable subscribers without additional equipment.

If Comcast makes the proposed changes, cable subscribers could only access PEG channels if they: (1) have a television equipped with a QAM tuner; (2) have a digital television; or (3) lease/purchase converter boxes from Comcast. Comcast is prepared to provide one converter box per household, for one year, but a converter box would be needed for each television to access PEG channels.

Plaintiffs contend that to view PEG channels, subscribers would incur expenses over and above what they pay for other basic service tier channels; the rate increase amounts to \$4.00 per month. Plaintiffs also contend the move will significantly limit PEG channel viewership and access because PEG channels would be difficult to find.

The estimates of how many households in Michigan will be affected if Comcast is allowed to make the proposed changes ranges from 15,000 to 50,000.

The City of Dearborn, the Charter Township of Meridian, and Sharon Gillette, a Comcast cable subscriber in Meridian Township (collectively "Dearborn"), filed a Complaint against Comcast of Michigan III, Inc. and Comcast of the South, Inc. on January 11, 2008 (Doc. #1). The Complaint alleges Comcast's proposed actions are contrary to the nature and purpose of PEG channels as defined by federal law. Specifically, Dearborn alleges the changes will violate: (1) franchise agreements/ordinances; (2) 47 U.S.C. §§ 531, 541, 543(b)(7), and 544a; and (3) 47

C.F.R. §§ 76.630 and 76.1603 (incorrectly cited as 47 C.F.R. §76.309).

On that same date, Dearborn filed a “Motion for Preliminary Injunction.” (Doc. #2). Dearborn asked the Court to issue a preliminary injunction that required Comcast to provide PEG channels in their current format and channel location pending final disposition of the case. The Court granted the motion on January 14, 2008. (Doc. #7).

On February 5, 2008, the City of Warren’s case against Comcast of Warren and Comcast of Macomb was consolidated with this litigation. (Doc. #13). The Charter Township of Bloomfield intervened on March 5, 2008. (Doc. #16).

The substantive claims of all Plaintiffs are the same.

On April 30, 2008, Comcast filed this motion to dismiss. The Alliance for Community Media and Alliance for Communications Democracy filed an *amicus curiae* brief opposing Comcast’s motion on June 30, 2008. (Doc. #31).

#### **IV. STANDARD OF REVIEW**

When reviewing a Fed. R. Civ. P. 12(b)(6) motion, the trial court “must construe the complaint liberally in the plaintiff’s favor and accept as true all factual allegations and permissible inferences therein.” *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994) (citing *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976)); see also *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). Because a Fed. R. Civ. P. 12(b)(6) motion rests upon the pleadings rather than the evidence, “[i]t is not the function of the court [in ruling on such a motion] to weigh evidence or evaluate the credibility of witnesses.”

*Miller*, 50 F.3d at 377 (citing *Cameron v. Seitz*, 38 F.3d 264, 270 (6th Cir. 1994)).

However, while this standard is decidedly liberal, it requires more than the bare assertion of legal conclusions. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir.

1993) (citing *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)). Rather, the complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory. *DeLorean*, 991 F.2d at 1240 (citations omitted).

When subject matter jurisdiction is challenged under Fed. R. Civ. P. 12(b)(1), the plaintiff has the burden to prove jurisdiction. *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125 (6th Cir. 1996). If the attack on jurisdiction is a facial attack on the complaint, the Court must accept the allegations in the complaint as true and construe them in a light most favorable to the non-moving party. *United States v. A.D. Roe Co., Inc.*, 186 F.3d 717, 721-22 (6th Cir. 1999). If the attack is factual, however, the Court may weigh evidence and resolve factual disputes. *Id.* Here, Comcast launches a facial attack on Plaintiffs' Complaint.

## **V. APPLICABLE LAW AND ANALYSIS**

### **A. 47 U.S.C. §531 and Franchise Agreements/Ordinances**

#### **1. Michigan's Uniform Video Services Local Franchise Act is Preempted by 47 U.S.C. §531**

Comcast contends that 47 U.S.C. §531 is not implicated. Rather, Comcast says any rights regarding the use of PEG channels stem from franchise agreements between cable operators and franchising authorities. See *Leach v. Mediacom*, 240 F.Supp.2d 994, 998 (S.D. Iowa 2003) ("any rights regarding the use of public access channels are not created by § 531, but stem from franchise agreements between cable operators and franchising authorities").

Further, Comcast says any terms in franchise agreements relating to PEG

channels and their placement that are “inconsistent with” or “in addition to” those set forth in Michigan’s Uniform Video Services Local Franchise Act (“Local Franchise Act”) became null and void when the Local Franchise Act went into effect in 2007. See *e.g.*, MCLA §484.3305(3) (“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 unenforceable by the franchising entity”); see also *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004) (“federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen disposition of its own power”).

Comcast says that because those franchise terms were rendered unreasonable and unenforceable under state law, and state law does not contain any requirements concerning PEG channel placement, delivery format or the process for changing PEG channel locations, its proposed changes comport with obligations imposed on them by state law.

Plaintiffs seek to enforce these so-called “inconsistent with” or “in addition to” terms under federal law. See 47 U.S.C. §531(c) (“[a] franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity”).

Incumbent on the Court is to interpret both federal and state law and to give meaning to Congress’s express intent that PEG channels be “available to all community members on a nondiscriminatory basis.” See H.R. Rep. No. 102-628 at 85 (1992).

Section 531 expressly permits “a franchising authority” to enforce PEG channel requirements in franchise agreements. See *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 789 (1996) (“[§ 531(b)] authorize[s] local franchise authorities to require cable operators to set aside channel capacity for PEG [channel] access when seeking new franchises or renewal of old ones”); *Goldberg v. Cablevision Sys. Corp.*, 261 F.3d 318, 320-21 (2nd Cir. 2001) (a franchising authority can “enforce any requirement in any franchise [agreement] regarding the providing or use of [PEG] channel capacity”) (citation omitted); *Time Warner Entm’t Co., L.P.*, 93 F.3d at 972 (franchising authorities may mandate PEG channel access as a franchise condition); *Time Warner Cable of New York*, 943 F.Supp. at 1367 (“The [1984 Act gave] . . . a franchising authority the power to require an operator to provide PEG channels”).

On the other hand, the Local Franchise Act purports to restrict a franchising authority’s ability to enforce PEG channel requirements in existing franchise agreements that are beyond the scope of the Local Franchise Act.

Because the Local Franchise Act makes unenforceable what federal law explicitly makes enforceable, the Local Franchise Act is preempted by 47 U.S.C. §531. See 47 U.S.C. §556(c) (“Except as provided in [47 U.S.C. §557], *any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded*”) (emphasis added).

The language in 47 U.S.C. §531 is “unmistakably clear” and answers the skepticism discussed in *Nixon*. See *Nixon*, 541 U.S. at 140-41 (Congress must make

its intention to override a State's power "unmistakably clear") (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

The Court's holding is not changed by the argument Comcast made for the first time at oral argument. Comcast said then that 47 U.S.C. §531 only grants a "franchising authority" the ability to require a certain *number* of PEG channels in franchise agreements; Comcast contends the provision does not address placement. Importantly, Comcast does not cite any authority for this narrow reading of section 531.

Section 531(c) says a franchising authority "may enforce any requirement in any franchise *regarding* the providing or use of such channel capacity," which relates to PEG channels. (Emphasis added). "Such enforcement authority *includes the authority to enforce any* provisions of the franchise for services, facilities, or equipment proposed by the cable operator *which relate* to public, educational, or governmental use of channel capacity . . . ." *Id.* (Emphasis added).

The Court finds the statutory language to be broader than Comcast's narrow reading. See H.R. Rep. No. 98-934 at \*46 ("[§ 531(c)] authorizes franchising authorities to enforce any franchise provision related to the use of PEG channel capacity, or related to services, facilities or equipment to be provided for PEG use . . ."); see also *Alliance for Cmty. Media*, 529 F.3d at 785 ("[§ 531(a)] establishes the authority of LFAs to call for *franchise terms relating* to the 'use of channel capacity for public, educational, or governmental use' but 'only to the extent provided in this section'" (emphasis added) (citation omitted); *Denver Area Educ. Telecommunications Consortium, Inc.*, 518 U.S. at 789; *Goldberg*, 261 F.3d at 320-21; *Time Warner Entm't Co., L.P.*, 93 F.3d at 972-73; *Time Warner Cable of New York City*, 943 F.Supp. at 1367.

**2. Even if the State of Michigan is Deemed the “Franchising Authority” as Discussed in 47 U.S.C. §531, the Local Franchise Act is Still Preempted**

Comcast makes a more nuanced argument: that the State of Michigan - not local units of government - is the “ultimate source of franchising authority” for purposes of determining any inconsistency with §531; that §531 is permissible in its language: franchising authorities *may* enforce PEG channel requirements established under franchise agreements; that by enacting the Local Franchise Act, the State of Michigan has merely made the election permitted by §531 *not* to require PEG channel obligations in franchise agreements; and, therefore, there is nothing inconsistent between state law and §531.

However, the legislative history that Comcast relies on for this argument is not dispositive on preemption. As stated above, 47 U.S.C. §556(c) is clear in its language that any provision of law of any State is “preempted and superceded” if it is inconsistent with federal law regarding PEG channel requirements. Because the Local Franchise Act restricts PEG channel requirements, it matters not whether the franchising authority is the state and/or a municipality; the law is preempted.

**3. Plaintiffs’ Claims are not Subject to Dismissal**

The Court’s ruling that the Local Franchise Act is preempted by federal law simply means the Court concludes that Plaintiffs state a cause of action under their various franchise agreements. The strength of these factual allegations is not before the Court, and Plaintiffs’ claims cannot be dismissed at this stage of the proceedings.

**B. Editorial Control Pursuant to 47 U.S.C. §531(e)**

Under 47 U.S.C. §531(e), a cable operator “shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section . . . .”

Plaintiffs rely on legislative history to support their argument that this section prohibits Comcast from making its proposed changes. See H.R. Rep. No. 98-934 at \*47, \*35, \*31 (the prohibition of editorial control “is integral to the concept of the use of PEG channels that . . . [they] be free from any editorial control or supervision by the cable operator,” that “cable operators act as [] conduit[s]”, and “are controlled by a person other than the cable operator”).

However, this legislative history does not directly support their argument, and Plaintiffs do not cite any case law in support of their argument. Plaintiffs’ 47 U.S.C. §531(e) claim is dismissed.

**C. Plaintiffs’ 47 U.S.C. §543(b)(7) Claim**

Section 543 is the rate regulation statute. Under 47 U.S.C. §543(b)(7)(A)(ii):

[e]ach 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. Such basic service tier shall . . . consist of . . . [a]ny public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers.

Comcast says the FCC has the exclusive authority to regulate cable service rates, and, therefore, the Court lacks subject matter jurisdiction over Plaintiffs’ 47 U.S.C. §543(b)(7) claim. Further, Comcast says the primary jurisdiction doctrine does not apply. See *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956) (“Primary jurisdiction’ . . . applies where a claim is *originally cognizable* in the courts”) (emphasis

