

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

FILED/ACCEPTED

DEC - 9 2008

**Federal Communications Commission
Office of the Secretary**

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

**EXHIBITS 1 of 2 TO
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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December 9, 2008

List of Exhibits

- Exhibit A Complaint (1/11/08)
- Exhibit B Opinion and Order on Motion for TRO and Motion for Preliminary Injunction (1/14/08)
- Exhibit C Transcript of Oral Argument on Plaintiffs' Motion for Preliminary Injunction (1/23/08)
- Exhibit D Motion to Dismiss (4/30/08)
- Exhibit E Response to Motion to Dismiss (6/30/08)
- Exhibit F Comcast's Motion for Leave to File Supplemental Memorandum on Primary Jurisdiction (9/11/08)
- Exhibit G Plaintiffs' Response to Comcast's Supplemental Memorandum (9/19/08)
- Exhibit H Order on Motion to Dismiss (10/03/08)
- Exhibit I Order Clarifying the Court's October 3, 2008 Order (10/08/08)
- Exhibit J Order Denying Defendants' Motion for Reconsideration (11/24/08)
- Exhibit K Order Denying Motion to Certify Order for Interlocutory Appeal (11/24/08)
- Exhibit L Amended Order (11/25/08)
- Exhibit M Order Denying in Part Plaintiffs' Motion for Partial Reconsideration (11/25/08)
- Exhibit N Order Referring Seven Questions to the Federal Communications Commission Pursuant to the Primary Jurisdiction Doctrine (11/26/08)
- Exhibit O Docket (12/08/08)
- Exhibit P Comcast Webpage ("Get Ready for the Digital Transition on February 17, 2009 With Comcast")

Receipt Number
566249 *140*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CITY OF DEARBORN, a Municipal corporation,
and CHARTER TOWNSHIP OF MERIDIAN,
a Municipal corporation, and
SHARON GILLETTE, an individual,

Plaintiffs,

vs.

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

Defendants.

Case: 2:08-cv-10156
Judge: Roberts, Victoria A
Referral MJ: Scheer, Donald A
Filed: 01-11-2008 At 12:32 PM
CMP CITY OF DEARBORN, ET AL V. COMC
AST OF MI, ET AL (TAM)

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**VERIFIED COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF AND TEMPORARY RESTRAINING ORDER**

A. JURISDICTION AND PARTIES

1. Plaintiff Charter Township of Meridian ("Township") is and was at all times mentioned below a municipal corporation and charter township created under the constitution and laws of the State of Michigan, with its primary place of business at 5151 Marsh Road, Okemos, MI 48864.

2. Plaintiff City of Dearborn ("Dearborn") is and was at all times mentioned below a municipal corporation created under the constitution and laws of the State of Michigan, with its primary place of business at 13615 Michigan Avenue, Dearborn, Michigan, 48126-3586..

3. Sharon Gillette is a citizen of the state of Michigan, residing at 1375 Haslett Road, Haslett, Michigan, 48840, and receives cable service from Defendant.

4. Defendant Comcast of Michigan, III, Inc. ("Comcast III") is a Delaware corporation, authorized to do business and operating a business in Michigan, with offices at 1070 Trowbridge Road, East Lansing, Michigan 48823.

5. Defendant Comcast of the South, Inc. ("Comcast South") is a Colorado corporation, authorized to do business and operating a business in Michigan, with offices at 30600 Telegraph Road, Suite 2345, Bingham Farms, Michigan, 48025.

6. This is a civil action for declaratory and injunctive relief involving a dispute regarding channels for public, educational and government use that Comcast is required to provide under its cable franchise with the Township. The value of those channels is in excess of

Seventy-Five Thousand Dollars (\$75,000). Every issue of law and fact in this action is wholly between citizens of different states.

7. As further alleged below, Defendants intend to take actions on January 15, 2008 that violate the federal Cable Communications Policy Act of 1984, 47 U.S.C. § 521 et seq. (the "Cable Act") and associated regulations, including specifically, 47 U.S.C. § 541; 47 U.S.C. § 543(b)(7); and 47 C.F.R. § 76.630 and 47 U.S.C. § 544a (c)(2)(B)(ii).

8. This Court has jurisdiction over this civil action pursuant to 28 U.S.C. §§ 1331 and 1332.

B. VENUE

9. This civil action is brought in the United States District Court for the Eastern District of Michigan, where the claim arose, in accordance with 28 U.S.C. § 1391(a)(2).

C. BACKGROUND

10. In order to provide cable service to subscribers, cable operators must place wires and cabinets extensively under and over public rights-of-way owned or controlled by local governments.

11. Under state and federal law, cable operators require a franchise to use and occupy the rights of way to provide cable service. 47 U.S.C. § 541(b)(1).

12. In Michigan, franchises are issued by local governments. The Township is the cable franchising authority for operators providing service within the Township's boundaries. Dearborn is the cable franchising authority for operators providing service within the city of Dearborn's boundaries.

13. Comcast III holds a franchise issued by the Township in 2005 (Exh. A - Cable Television Franchise Renewal Agreement).

14. Comcast South holds a franchise issued by Dearborn in 1997.

a. Cable franchising and PEG under federal law

15. Federal law provides that, as one of the conditions of a franchise, localities may require an operator to designate channel capacity on its cable system for public, educational and government ("PEG") use. 47 U.S.C. § 531.

16. The legislative history to the Cable Act explains that those channels are intended, *inter alia*, to "provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work." H.Rep. No. 98-934, 98th Cong 2d Sess. at 30; 1984 U.S.C.C.A.N. 4655, 4667 (1984).

17. Given the local public interest importance of these channels under the Congressionally-established franchising scheme, the control of the channels is left to the locality, and not to the cable operator. 47 U.S.C. § 531(d)-(e); 47 U.S.C. § 541. An operator has no authority under the Cable Act to take any action to interfere with the delivery or availability of those channels. Defendants have no right to sell or bundle the channels as it sees fit, as it may do with respect to channels it has no duty to carry on its cable system.

The legislative history to 1992 amendments to the Cable Act explains that "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, 102nd Cong., 2nd Sess. 1992 at 85.

18. Based on the dual concerns of ensuring that basic services be available at reasonable rates, and that the channels be accessible to all, the House adopted language (included in the 1992 amendments) that "requires cable operators to offer a basic service tier, consisting, at a minimum, of all broadcast signals carried on the cable system and public, educational, and governmental (PEG) access channels." *Id.* at 26-27.

19. The Cable Act thus requires a cable operator to provide the channels as part of the basic tier of service unless it has the express permission of the local franchising authority to do otherwise. 47 U.S.C. § 543(b)(7).

20. The basic service tier is the lowest level of service provided to all subscribers. A tier is defined in the Cable Act as "a category of cable services or other services and for which a separate rate is charged by the cable operator." 47 U.S.C. § 522(17).

21. In addition, federal law and regulations require a cable operator to provide all channels on the basic service tier "in the clear." The regulations are designed in part to prevent an operator from requiring subscribers to obtain unnecessary equipment. 47 C.F.R. § 76.630 and 47 U.S.C. § 544a (c)(2)(B)(ii).

22. Accordingly Comcast III, Comcast South, and affiliated companies operating across the country, have traditionally provided PEG channels as part of the basic service tiers, and in a manner such that there is no special charge, expense or equipment required to receive them.

b. PEG Channels in the Township and Dearborn

23. The same is true in the Township and Dearborn.

24. Under its franchise with the Township, Comcast III is required to provide at least eight PEG channels on the basic service tier: one for governmental use; one for public use; four for use by the public school districts and community colleges serving the Township; and two for use by the state university system. Franchise, 14-16.

25. In addition, the Township Code requires Comcast III to comply with federal law and FCC regulations applicable to the carriage of the channels. Township Code § 70-91 (**Exh. B** -Code of Ordinances Charter Township of Meridian).

26. Likewise, the Dearborn franchise at Section 3.4 requires Comcast South to comply with "all laws and regulations of the State and Federal government or any administrative agency." The franchise requires Comcast South to provide six channels for PEG use, and makes it clear that once the channels capacity was assigned, it was not to be changed. Section 3.12 provides, for example, that channel locations "shall be by mutual agreement of the City" and the franchisee. (**Exh. C** - Franchise Agreement between Dearborn and Comcast South).

27. The Township actively programs the government channel, Channel 21, HOM-TV. HOM-TV is an award-winning government access station that cablecasts out of the Meridian Township Municipal Building. Among other things, it cablecasts gavel to gavel coverage of township meetings and also produces programs about the community.

28. Dearborn Comcast subscribers currently have access to six (6) PEG channels. Dearborn actively programs an award winning government channel, CDTV - Channel 12 on Comcast South, that cablecasts city council meetings, produces news shows highlighting issues affecting residents, produces shows provided by the mayor and city council, a recreational events

show, and shows designed specifically for senior citizens. Dearborn also uses CDTV to transmit time-sensitive information, such as snow emergency declarations, information about other emergencies, and voting results on election night. The other Dearborn PEG channels are public access and educational access channels. The educational access channels provide, among other things, school board meetings and broadcasts of school events such as concerts and plays.

29. The PEG channel requirements contained in the Meridian Township and City of Dearborn's franchise agreements, and the Township's code of ordinances for compliance with federal laws and regulations related to those channels, are fully enforceable as those requirements are consistent with the Michigan Act and with federal laws and regulations with which Defendants must comply. MCL 484.3305

c. Defendants' proposed actions

30. Comcast III complied with its obligations under its franchise, and corresponding obligations under federal law by designating Channels 21-24 and 27-31 for PEG Channels for the Township. (Exh. D – Channel Line-up for Meridian Township).

31. Comcast South designated Channels 12, 15, 16, 18, 19, and 24 for Dearborn's PEG Channels.

32. These channels were provided as part of the basic service tier, and are receivable in the same way standard broadcast channels and Defendants' own local programming service are receivable by subscribers. No extra equipment has been required to receive the PEG channels, as compared to other channels carried on the basic service tier. There is no additional charge to view the PEG channels.

33. Some channels on the cable system can only be received if the subscriber leases a converter box. For example, a "premium" service, such as HBO, can only be viewed if a

subscriber has a converter box. Comcast's interactive programming guide and many of its digital services can only be used if a subscriber leases a box from Comcast, at a substantial additional monthly charge per television set.

34. The converter boxes may interfere with a subscriber's ability to use various functions of the subscriber's television set, or other consumer electronic equipment.

35. A separate box is required for each set where the subscriber wishes to receive service, and there is a corresponding increase in the monthly charges owed to Defendants for the boxes.

36. By contrast, standard broadcast channels and PEG channels as carried on the basic service tier have traditionally been viewable by subscribers without the expense or inconvenience of renting a converter box.

37. On information and belief, approximately fifty per cent of Defendants' subscribers in Michigan receive service without a converter. On information and belief, approximately 500,000 Defendants' customers receive service without a box, and would be directly affected by the proposed change. Plaintiff Sharon Gillette is among those subscribers.

38. On or about November 15, 2007, Comcast III advised the Township that on January 15, 2008 it intends to carry the PEG channels now being provided in the Township only on what it calls "channels" 902-906, 911-913, and 916 and to provide those "channels" only in a digital format. (Exh. E - Comcast III Letter to Deborah Guthrie dated November 15, 2007, attaching Exh. F - Comcast III Letter to Subscribers). The subscriber notice advised Comcast III customers that they could only continue to receive PEG programming "by acquiring a digital converter, digital service, or compatible equipment."

39. Also on or about November 15, 2007, Comcast South similarly advised Dearborn that on January 15, 2008, it intends to carry the PEG channels now being provided in Dearborn only on what it calls "channels" 900, 902-903, 911, and 916-918, and to provide those "channels" only in a digital format. The subscriber notice advised Comcast South customers that they could only continue to receive PEG programming "by acquiring a digital converter, digital service, or compatible equipment." (Exh. G - Comcast South Letter to City of Dearborn, with Attached Notice to Subscribers).

40. Defendants' proposed to take similar actions everywhere in Michigan. In other parts of the country, Defendants' or its affiliated companies are continuing to provide PEG channels as they have in the past.

41. As a result of the changes, the PEG channels will no longer be part of the basic service tier, as required by the franchise and by federal law.

42. Among other things, many subscribers who now receive basic service without a converter box will need to obtain a converter box for each television set in order to view the PEG channels.

43. A converter box will not be required to receive standard broadcast channels on the basic service tier, or other basic service channels such as TBS.

44. The impact of the change is particularly significant for subscribers who cannot afford to purchase anything but the basic service tier, and for entities like schools, which cablecast the service to many different classrooms. A converter will be required in each classroom in order for the service to be useable with traditional television equipment.

45. Moreover, the PEG channels will no longer be as easily accessible either through the standard program guide or by "channel surfing." This is particularly important as PEG

programmers do not have the resources available to traditional broadcasters to advertise the content of the programming being carried at any particular time.

46. As a result, what is now a single, basic tier that includes standard broadcast channels and PEG channels will be two tiers, one consisting of channels that can be received on any cable-ready television set without additional expense beyond the basic service fee, and easily accessible to all; and another including the PEG channels, available only if an additional equipment fee is paid, and inaccessible to many customers.

47. Defendants are required to provide accurate notice to subscribers of the proposed change in channel location to subscribers at least thirty days prior to the change under the FCC's minimum customer service standards, 47 C.F.R. § 76.309(c)(3)(i)(B). Under FCC rules, the Township is responsible for enforcing the regulation. The notice provided to subscribers was deficient. Among other things, it did not completely or accurately identify the channel numbers for the PEG programming, and as a result it may be difficult if not impossible for some subscribers to even find the PEG channels.

d. The response to the proposed action.

48. Plaintiffs the Township and Dearborn, as the franchising authorities, are the entities primarily responsible for ensuring franchise compliance.

49. Municipalities took immediate action to notify Defendants that they objected to the planned changes, including an objection on behalf of the National Association of Telecommunication Officers and Advisors (NATOA), Michigan Chapter. (Exh. H - NATOA Letter to Comcast Michigan Region with Attached Comcast Michigan Region's Response).

50. The Township also took immediate steps in response to the Comcast III announcement. It, along with other Michigan cities, notified Comcast III that it objected to the

change, (**Exh. I**- Township's Letter to John P. Gardner dated November 29, 2007) and asked Comcast III to alter its plans. Comcast III responded, but refused to change its course. (**Exh. J**- Comcast III Letter to Susan McGillicuddy dated December 4, 2007)

51. The Township then gave Comcast III formal notice that it considered the proposed action to be a violation of Comcast III's state, federal and local law and franchise obligations, and gave Comcast III a notice and opportunity to cure its performance. (**Exh. K** - Township's Letter dated December 18, 2007). Comcast III responded to that notice by letter dated January 8, 2008 provided to the city after the close of business on that date. (**Exh. L** - Comcast letter dated January 8, 2008).

52. At the request of the City of Dearborn and others, U.S. Rep. John D. Dingell of Dearborn, Chairman of the House Committee on Energy and Commerce, and, one of the drafters of the Cable Act and its amendments, likewise notified Comcast that the proposed action was inconsistent with the Act and gave the company until January 7, 2008 to take steps to protect the public. (**Exh. M**- News Release dated December 21, 2007).

53. Comcast Corporation responded with a January 7, 2008 letter stating that they intended to proceed as planned. (**Exh. N** - Comcast Corporation Letter to Congressman Dingell, dated January 7, 2008).

54. Defendants have nonetheless persisted in their course, and unless prevented from doing so, are expected to move the PEG channels as described above on January 15, 2008.

e. The effect of the action.

55. Plaintiff Sharon Gillette is a Township resident, a viewer of PEG channels, and a subscriber to Comcast III's basic service tier. She would have to pay more in order to continue to receive the PEG channels, and the PEG channels would be less accessible to her. The actions

described above harm Plaintiff Sharon Gillette, who has an interest in viewing the programming as part of basic service, and without obtaining additional equipment, or paying additional expenses. As a result of the actions described above, viewers, including Plaintiff Sharon Gillette will be immediately, irreparably, substantially and adversely affected.

56. The utility of the PEG channels as a means of communication by those who program the channels, including Dearborn and the Township, will be immediately, irreparably, substantially, and adversely affected.

57. The proposed change over the objections of Dearborn and the Township is inconsistent with purposes for which the channels were to be set aside under the Cable Act -- including making the channels available as a basic outlet for community communications.

58. In addition, the actions described above harm Plaintiffs Dearborn and the Township as speakers who use the channels to communicate, and as viewers who receive such programming.

59. The proposed change will alter the long-standing treatment of PEG channels in the Township and elsewhere.

60. Even the temporary loss of access to the channels means that Dearborn and the Township (as speakers) will lose opportunities to communicate with the public, and viewers will lose access to important public information. In addition, the loss of access to viewers will immediately affect the educational opportunities of a class of students, and that loss can never be restored. These losses are irreparable.

61. The failure to preserve the status quo while the broader remedies are explored will result in the irreparable harm of the loss of channel location identity and the loss of this invaluable resource to thousands of viewers across the State and in Dearborn and the Township.

62. Those particularly affected will be the poor, the elderly and others who can only afford to obtain the most basic cable service level which is where PEG channels in Dearborn and the Township are currently located. These are also groups who may heavily depend on Dearborn and the Township's services, and the Dearborn and the Township have a particular interest in being able to reach these groups via the cable system.

63. Maintaining the status quo will serve the public by maintaining access to vital public information, by ensuring subscribers are not unjustly charged for equipment that is not necessary to receive PEG channels provided as part of the basic service tier, and by avoiding the burden required to obtain and configure a box for each television.

64. There is no significant harm to Defendants from maintaining the status quo. Defendants, or their parent, continues to provide the PEG channels as part of the basic service tier in most of the country, and the maintenance of the status quo merely continues that predominant practice.

D. FIRST CLAIM FOR RELIEF

(Violation of Cable Act and Associated Regulations)

65. Plaintiffs reallege and incorporate by reference each of the allegations set forth in all of the previous paragraphs in this Complaint.

66. Defendants are required to comply with federal laws and regulations directly by virtue of the federal law, and as a condition of their franchises and State law.

67. Defendants intend to provide the PEG channels on a segregated and discriminatory basis as compared to other standard broadcast channels on the basic service tier, and in a manner that will decrease their viewership and accessibility, and that will require many

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subscribers who wish to view PEG channels to incur additional cost and expense, and to obtain additional equipment that may interfere with the use of other consumer electronic equipment.

68. Defendants have no authority under the federal Cable Act to sell or otherwise impose any charge for the PEG channels, which it neither controls nor operates.

69. Defendants' actions violate the federal Cable Act and associated regulations, including those described in paragraphs 70-73.

70. Defendants' actions violate their obligations to provide PEG channels to subscribers under 47 U.S.C. §§531 and 541, and amount to an unlawful exercise of control over the sale of those channels.

71. Defendants' actions violate their obligation to provide the PEG channels as part of the basic service tier under 47 U.S.C. § 543(b)(7).

72. Defendants' actions violate their obligation to ensure that all basic service channels are available without the need for unnecessary equipment, as required by 47 C.F.R. § 76.630 and 47 U.S.C. § 544a.

73. Defendants' action violates their obligation to provide notice to subscribers under the FCC's minimum customer service standards, 47 C.F.R. . § 76.309.

E. SECOND CLAIM FOR RELIEF

(Violation of Franchises and Code of Ordinances)

74. Plaintiffs reallege and incorporate by reference each of the allegations set forth in all of the previous paragraphs in this Complaint.

75. The actions above violate the obligations of Defendants under their franchises with Dearborn and the Township, and the failures to comply with federal laws and regulations

violate the obligations of Defendants under the Code of Ordinances and franchises in each community.

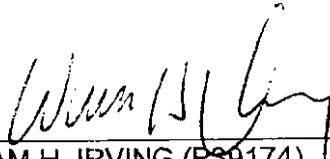
PRAYER FOR RELIEF

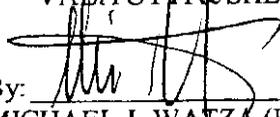
Wherefore, Plaintiffs respectfully request this Court grant the following relief:

1. A Temporary Restraining Order prohibiting Defendants from moving the PEG Channels from their current location or changing the format in which they are delivered to subscribers until a hearing on a preliminary injunction may be held.
2. A preliminary injunction prohibiting Defendants from moving the PEG Channels from their current location or changing the format in which they are delivered to subscribers until the final resolution of this matter.
3. A declaration that Defendants' actions violate the Federal Cable Act and associated regulations.
4. A declaration that Defendants' actions violate the Franchises issued by the Township and Dearborn.
5. A permanent injunction prohibiting Defendants from providing the PEG channels on any tier other than the basic service tier without the express permission of Dearborn and the Township.
6. A permanent injunction prohibiting Defendants from providing PEG channels on a discriminatory basis compared to standard broadcast channels, or relocating the channels from their current locations without the permission of Dearborn and the Township.
7. Costs and reasonable attorneys fees as permitted by law; and
8. Such other relief as the Court may find appropriate.

Respectfully submitted,

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Dated: January 10, 2008

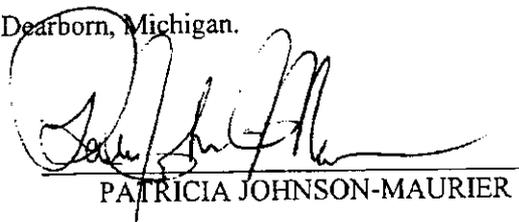
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VERIFICATION

PATRICIA JOHNSON-MAURIER, under penalty of perjury of the laws of the United States, states that she is the broadcast media supervisor for the city of Dearborn, a Municipal Corporation; that she has read, is familiar with, and has personal knowledge of the contents of the foregoing Verified Complaint; and that to the best of her knowledge, information and belief the allegations concerning the city of Dearborn are true and correct.

Executed this 10th day of January, 2008, in Dearborn, Michigan.

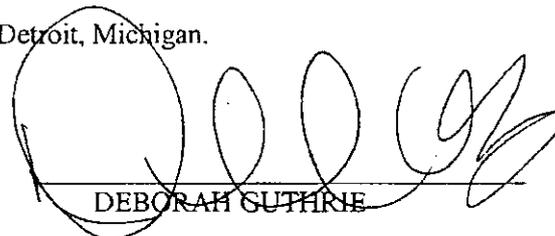

PATRICIA JOHNSON-MAURIER

DET02\1222358.01

VERIFICATION

DEBORAH GUTHRIE, under penalty of perjury of the laws of the United States, states that she is Cable Coordinator at HOM-TV in Meridian Charter Township, a Municipal Corporation; that she has read, is familiar with, and has personal knowledge of the contents of the foregoing Verified Complaint; and that to the best of her knowledge, information and belief the allegations concerning Meridian township and HOMTV are true and correct.

Executed this 10th day of January, 2008, in Detroit, Michigan.



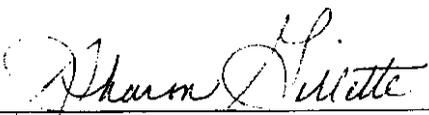
DEBORAH GUTHRIE

DET0211222301.01

VERIFICATION

SHARON GILLETTE, under penalty of perjury of the laws of the United States, states that she is a Basic Subscriber; that she has read, is familiar with, and has personal knowledge of the contents of the foregoing Verified Complaint pertaining to her role as a subscriber; and that to the best of her knowledge, information and belief the allegations thereof are true and correct.

Executed this 10th day of January, 2008, in Detroit, Michigan.


SHARON GILLETTE

DET0211222304.01

A

CABLE TELEVISION
FRANCHISE RENEWAL AGREEMENT

Meridian Charter Township

2005

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