

1 MS. BELLER: This is a new range of channels being  
2 launched in the digital format.

3 MR. VAN EATON: Excuse me, Your Honor.

4 THE COURT: Yes, Mr. Van Eaton?

5 MR. VAN EATON: Because I'm interrupting only because  
6 these are your questions. The 900 channels are available  
7 today. The channels are being simulcast, but they are not  
8 available as part -- you cannot get them with a converter  
9 that you would buy -- when we tested this early in January,  
10 you could not get those channels with a standard -- with a  
11 digital TV set and you could not get them with a -- with a  
12 converter that you would buy from a Best Buy. We tested that  
13 out.

14 THE COURT: So if they exist, they're not accessible  
15 anyway right now today?

16 MR. VAN EATON: They weren't accessible via the basic  
17 service, but by hooking up a cable modem from Comcast --  
18 converter -- converter, not a cable modem, you could receive  
19 those channels on 900. We know they're there.

20 THE COURT: Is that the same converter box we're  
21 talking about or is that a different converter?

22 MR. VAN EATON: It should be the same. It should be  
23 the digital converter box, but the subscription that -- but  
24 what the Plaintiffs are authorized to receive on that box is  
25 not just basic service. They're authorized to receive Basic

1 and sort of a Basic Plus Service, an additional service. So  
2 we know using the box you can get the channels; they're being  
3 simulcast. We do not believe they were available on limited  
4 Basic until at best the last couple days.

5 THE COURT: All right. I may have to come back to  
6 that one. I'm a little confused. If a person already has a  
7 high definition television, that customer will not be affected  
8 by the change in the PEG channels if they go into effect  
9 tomorrow? Is that true?

10 MR. SCOTT: I can't answer that either. Maybe we  
11 should have Mr. McNichol stand up. He's the engineering  
12 expert for Comcast.

13 THE COURT: Mr. McNichol, you affirm the information  
14 you'll give the Court today is true?

15 MR. MC NICHOL: Yes.

16 THE COURT: Okay. If a person already has a high  
17 definition television, will that customer be affected at all  
18 by the changes in the PEG channels you want to make tomorrow?

19 MR. MC NICHOL: If that television is equipped with a  
20 QAM capable tuner, then it will receive channels as they're  
21 transmitted on the system.

22 THE COURT: If it doesn't have a QAM capable tuner,  
23 they have to get the converter box?

24 MR. MC NICHOL: Or a similar type box that will be  
25 capable of picking up the QAM cable channel.

1 MR. VAN EATON: Excuse me, one more. We have actually  
2 also tested this and our witnesses, based on reception, with a  
3 QAM capable TV you will never receive these channels on  
4 Channel 900. We've tested that; that doesn't happen. They  
5 will -- they may show up somewhere else, but when we tested  
6 this early in January, you could not receive any of the  
7 channels with a high definition TV. When we tested it  
8 yesterday with a QAM capable tuner, you could receive some but  
9 not all the channels. You could receive -- and they showed up  
10 -- one of the channels showed up at Channel 80.1.

11 So the high definition consumer will be affected.  
12 These channels will not show up where they've traditionally  
13 shown up and they will also not show up on the 900 series of  
14 channels.

15 MR. SCOTT: Your Honor, I'd like to object to you  
16 asking my witness questions and having the answer from the  
17 other lawyer.

18 MR. VAN EATON: I'm happy to have --

19 THE COURT: (Interjecting) Excuse me. I don't want  
20 this to breakdown so early -- I hope not at all.

21 MR. SCOTT: We have conflicting testimony.

22 THE COURT: Excuse me.

23 MR. SCOTT: Sorry.

24 THE COURT: The blanks you can fill in during the  
25 course of your argument. Thank you.

1           For the Defendant, will your Basic Service customers  
2 who only have analog televisions be required to pay the same  
3 rate tomorrow for channels they can't access if they elect not  
4 to get the converter box?

5           MR. SCOTT: If they elect not to get the converter  
6 box, the rate for the service for the lowest price tier will  
7 not go up, but they won't be seeing those public access  
8 channels unless they find some other method of locating them,  
9 as if getting a QAM capable TV and finding their way to  
10 Channel 80.2 or wherever it is --

11           THE COURT: (Interjecting) Okay. Their rate for  
12 service won't go down, I guess that was my point. Would their  
13 rate for service go down if they elect not to access the PEG  
14 channels by investing in this QAM or a converter box?

15           MR. SCOTT: I don't believe so.

16           THE COURT: The rate will stay the same?

17           MR. SCOTT: I believe so.

18           THE COURT: Okay. That's enough of my preliminary  
19 questions for now. I'll hear from Plaintiff.

20           MR. WATZA: Your Honor, as I indicated earlier, we  
21 would offer the briefs, affidavits and exhibits that we've  
22 filed with this court to date as our case-in-chief offering  
23 the witnesses that we have --

24           THE COURT: (Interjecting) I understand that. Do you  
25 want to make any argument or are you -- you want to rely on

1 your briefs?

2 MR. WATZA: I can provide a short opening statement,  
3 but I think we put --

4 THE COURT: (Interjecting) Counsel, it's really up to  
5 you. My only question is do you want to take this podium and  
6 give me anymore information than I have from your briefs and  
7 affidavits and other submissions? It's totally up to you.

8 MR. WATZA: I believe we are going to submit an  
9 argument and Mr. Van Eaton will present that.

10 THE COURT: Thank you.

11 MR. VAN EATON: And, Your Honor, we are prepared if  
12 there's really a factual dispute and I actually don't think  
13 there's as much as might have appeared during the questions, a  
14 factual dispute as to what's going to happen in this as a  
15 result of this change over.

16 I'm going to present our view of the case and  
17 obviously I will try to avoid the technical jargon and talk  
18 too much, but from our standpoint this ends up being a  
19 relatively simple case which depends on understanding what a  
20 PEG channel is.

21 From our position, the requirement for a PEG channel  
22 is equivalent to an easement. It's some time referred to as  
23 an easement in Supreme Court cases. Some Courts referred to it  
24 as like a public space requirement, which is a dedication of  
25 capacity that is not meant to be under the control of the

1 operator. The channels are meant to be available throughout  
2 and to the whole community.

3 What creates the problem in the PEG area is that if  
4 you begin to look at the legislation, you'll see the term  
5 public, educational, governmental isn't defined in the Federal  
6 Cable Act and it isn't defined in the Michigan law or indeed  
7 in many state laws. What you will find is that the reason for  
8 that is that there's actually a long history defining what  
9 those channels is going back to 1972 when the Federal  
10 Communications Commission adopted a Report and Order  
11 establishing requirements for public, educational,  
12 governmental channels on cable systems. That's when -- that's  
13 the period during which the requirement first developed and  
14 through the 1984 legislative history to the Cable Act, which  
15 we have cited in our brief to the Court and essentially what  
16 those documents show is that everybody understood that these  
17 channels were to be available to everyone unless there was a  
18 specific and explicit authorization given by the local  
19 franchising authority to the cable operator to provide them in  
20 some other way. The reason the exception was granted was that  
21 in some cases, municipalities took one or two of these  
22 channels and actually scrambled them and used them for closed  
23 circuit communications to Police or Fire Departments,  
24 something that they didn't want the public to view. But that  
25 had to be explicit and in one of the FCC Orders that we've

1 cited in the brief, the FCC made it very clear that as far as  
2 they were concerned, absent an explicit authorization, the  
3 duty of the operator was to provide these channels.

4 Now what that means as far as we are concerned is  
5 that if you take any level of service, you should be able to  
6 get the PEG channels without any additional burden. There  
7 shouldn't be converters or anything else that isn't required  
8 to receive any set of services offered by the cable operator.  
9 Essentially what's happening under this system is that a  
10 subscriber to Basic will be able to get standard broadcast  
11 channels as part of Basic, which is one component of basic  
12 service that's required by law, but they will not be able to  
13 get the other component that is required by law; which is the  
14 public, educational and governmental access channels on the  
15 same basis as the standard broadcast channels, and it's that  
16 discrimination that is the reason -- the central reason why we  
17 think they're violating the law by this move.

18 Now they can move -- there actually is a FCC Order  
19 that says the company has the option of providing all  
20 broadcast channels in digital and if they did that, we can  
21 concede they can provide the PEG channels in digital as well.  
22 There wouldn't be any discrimination. It would be available  
23 to everybody on the same basis. But what's happening here is  
24 that we're being -- is that there's a segregation of the PEG  
25 channels from the required broadcast channels and that creates

1 a number of problems.

2 What's also interesting is while there's lots of  
3 arguments about the advantages of digital which we'd be happy  
4 to address, and all sorts of arguments about the world is  
5 going digital, in the rest of the country this is not what  
6 Comcast is doing.

7 In Chicago, for example, they are moving lots of  
8 channels to digital, including many that they're providing in  
9 analog here, but they're not moving broadcast channels to  
10 digital and they are not moving the PEG channels to digital.  
11 This is something that's different and unique to Michigan and  
12 it's happening state-wide here.

13 THE COURT: Mr. Van Eaton, next -- come next  
14 February, all of the broadcast stations are going digital and  
15 Comcast will be required then -- or customers who want to get  
16 these stations after next February, you will have to get  
17 converter boxes, correct? Or have the right QAM television,  
18 whatever it is.

19 MR. VAN EATON: No. Well, let me say. A customer  
20 that is not a subscriber to cable after February of next year  
21 --

22 THE COURT: (Interjecting) I'm talking only about  
23 customers who are subscribing to Comcast. After next  
24 February, they must get a converter box or the tuner or  
25 whatever?

1 MR. VAN EATON: No, that's not correct. You may have  
2 seen an advertisement that Comcast is running saying don't  
3 worry about this conversion to digital; we're taking care of  
4 it and they and a number of cable operators are deciding  
5 whether to carry the broadcast channels in analog or whether  
6 to carry them in digital and they have the right to do  
7 either.

8 Now the interesting thing which I think underlines  
9 the discrimination that's going on here is that the FCC has  
10 made it clear that operators have the option of carrying these  
11 things, the broadcast channels, converting them when they --  
12 excuse me. The operators will receive the channels in a  
13 digital format, but they can convert them back to analog and  
14 send them to subscribers in the analog format and in the  
15 Report and Order we've cited in our second brief, the third  
16 Report and Order, the FCC said here's your option. Through  
17 2000 -- we're going to adopt an Order that will be into effect  
18 through 2012 and under that option, you have -- under that  
19 Order you have two options. You can convert these channels  
20 from digital back to analog and deliver them to subscribers  
21 that way, or --

22 THE COURT: (Interjecting) And if they elect that  
23 approach, a Comcast subscriber won't even know the difference  
24 after March 1st next year?

25 MR. VAN EATON: That's correct, and they will not

1 require a converter.

2 THE COURT: Go head.

3 MR. VAN EATON: And Mr. Afflerbach did submit an  
4 Affidavit on that point. The other option is to convert to  
5 digital, and if Comcast converts to digital it is required to  
6 provide a converter box to every subscriber who has an analog  
7 TV set at every connection that the company provided; not just  
8 one box, but at every connection the Company provided.

9 THE COURT: Free of charge?

10 MR. VAN EATON: I believe that that is a -- that  
11 that's the obligation; that it's an obligation to provide  
12 those boxes and one of the things --

13 THE COURT: (Interjecting) So can we just -- if we  
14 fast forward then -- forget this litigation -- fast forward to  
15 next February, you're saying that if Comcast opts to convert  
16 from digital back to analog on the broadcast stations, that's  
17 what it would have to do with the PEG channels?

18 MR. VAN EATON: That's right. That it should continue  
19 to deliver the PEG channels in analog format.

20 THE COURT: If they convert to digital and if the law  
21 says they have to give this converter box for every connection  
22 free of charge, you're saying that's what they would have to  
23 do for the PEG channels as well?

24 MR. VAN EATON: That's right. Once the subscriber has  
25 a converter -- and frankly, whether it's free of charge or

1 not free of charge, what happens under that circumstance is  
2 every subscriber would have a converter box at every  
3 connection and they would be receiving the PEG channels and  
4 the broadcast channels on the same basis. So the -- either  
5 way, the discrimination would disappear.

6 What's -- what Comcast has indicated and again in  
7 the papers we filed you'll see this is an exhibit. As far as  
8 we understand, Comcast has elected to continue to provide the  
9 channels in an analog format for the foreseeable future.

10 Now you might ask why if digital is so great would  
11 anyone want to continue to provide it in analog and object to  
12 getting these boxes. Well, the boxes interfere with functions  
13 like TVO, digital home video recording functions, picture in  
14 picture functions, the ability to watch one channel and tape  
15 another. You obviously have a problem if you have multiple  
16 sets because you need a box for each set given the technology  
17 the company uses, and of course the other problem that occurs  
18 with the change over is that in the viewer's experience.  
19 Right now if I want to watch PEG channels, I can surf through  
20 it fairly easily. They're Channel 21, so it's in the range of  
21 channels that the Company provides as part of its central  
22 Basic. Now to get to the PEG channels, I will have to -- the  
23 scrolling will effectively be impossible. That change in  
24 location is pretty significant from a viewer's prospective.

25 So what happens, the reason I wouldn't want a box,

1 the reason I would want it on analog basis is it's easy to get  
2 to, it doesn't interfere with my other consumer electronic  
3 equipment and then on top of that, I don't have to pay for  
4 it. Now obviously the Company is providing one free box and  
5 one free installation, or at least so they say. Though -- but  
6 that doesn't solve the problem for multiple sets and as a  
7 practical matter as our affidavits indicate, that's not what  
8 they've been telling subscribers. Subscribers who have been  
9 calling -- you'll see in the Notice they sent out about these  
10 channels, they didn't mention a free box or a free converter  
11 or free installation and when customers actually called up,  
12 some of them were told in fact -- or one of the Plaintiffs  
13 here was told she had to pay for installation and she had to  
14 pay for boxes.

15 So there is a real cost issue here in the way this  
16 has been rolled out and there is a reason why the PEG channels  
17 are being moved to digital and not all the channels are being  
18 moved to digital, because that was always and has always been  
19 an option for digital. If this was such a great thing with no  
20 impact on customers, the Company would move everything to  
21 digital and could. That would give it more than enough  
22 capacity to do what it wants, but it is discriminating and  
23 it's discriminating on the broadcast channels even though it  
24 does have an option to deliver those in digital formats under  
25 the FCC's orders.

1 THE COURT: You said there's a reason why they  
2 selected the PEGs and not other channels?

3 MR. VAN EATON: Yes. I think there's a reason why  
4 they selected the PEGs and not other channels, that's correct.

5 THE COURT: Why? Do you know why?

6 MR. VAN EATON: Well, I obviously don't know the  
7 interior thinking of them, but one of the problems and one of  
8 the reasons I believe the best reading of the law is that you  
9 require them to deliver it along with broadcast without  
10 discrimination is that these aren't channels that the operator  
11 chooses to carry as a matter of commercial choice. This is  
12 not a -- this is not like ESPN where they have made a  
13 commercial decision, we want to carry it. This is something  
14 that they're required to carry and that Congress thought had  
15 to be required because in the absence of the requirement, the  
16 market would not lead them to provide it.

17 I think one of the telling things about this sort of  
18 problem it's created is technically they're putting these in  
19 the 900 level series. What they're telling you -- and again  
20 this is addressed in Mr. Afflerbach's Supplemental Affidavit  
21 -- they could tell their converter to put those channels on  
22 any number they wanted to put it on. It's the way the  
23 converter is programmed. It doesn't have to be in the 900  
24 series. They could have it so that a customer with a digital  
25 TV and a digital converter continued to see this Channel 21 in

1 Meridian Township on Channel 21, but that's not the way  
2 they've chosen to do it.

3 THE COURT: So even if they did, assuming that they  
4 could continue on the channels that they are currently on,  
5 that's not your issue, is it? Your issue is that people have  
6 to incur additional expense. You don't care so long as your  
7 customers don't have to pay more money?

8 MR. VAN EATON: No, it's not that we don't care. We  
9 care about the discrimination. We just care about the  
10 discrimination that requires a customer to decide -- we care  
11 about the discrimination that puts the customer in the  
12 position of saying I have to get a converter or I don't have  
13 to get a converter, when without a converter they can get the  
14 broadcast channels and with a converter they can get some  
15 additional channels. We're saying you've got to deliver the  
16 public part, if you will, along with the lowest level of  
17 commercial product. You can't cut it out and make somebody go  
18 through an extra effort, schedule a service call and so on.

19 I mean one of the questions we've got for Comcast is  
20 -- we'll be happy to ask if they put a witness on the stand  
21 -- is do they have the converter boxes they would need to put  
22 these to everybody today? How long would it take to deliver  
23 them? What we know is that a substantial number of customers  
24 -- for a substantial number of customers this is going to go  
25 -- these channels will go blank tomorrow, and we know for the

1 schools that's particularly important. That's one of the  
2 reasons we brought someone from the Haslett School District  
3 and this is referred to in our papers, but the school  
4 districts rely on these channels extensively for academic  
5 work. They're used all the time in the schools and they have  
6 a TV in virtually every classroom. So when these go blank,  
7 it's going to seriously effect the ability of the schools to  
8 pursue their academic programs and it's going to effect what  
9 sort of programming is produced. That's the basic issue.

10 Now we've raised two other -- we've raised two  
11 separate issues that I think in some ways and I apologize for  
12 this; our brief has confused them. One is that our position  
13 is that in addition to violating this basic duty of carriage,  
14 they've also violated the specific obligation to carry the  
15 basic channels, the PEG channels on the Basic service tier.

16 Our argument there is pretty simple one, which is --  
17 and you can almost see it by looking at the channel lineup --  
18 that when you put a little asterisk on the channel lineup as  
19 they have or a little carrot and say these channels aren't  
20 available except under special equipment, what you're saying  
21 is that's a different category of service. It's not the same  
22 as the Basic service channel; you can call it that, but what  
23 they're telling subscribers is you don't get this without  
24 doing something extra and that difference to us means it's not  
25 part of the Basic service tier.

1 THE COURT: I know this isn't your issue, but the  
2 channels that they currently -- that currently are available  
3 only in digital format and that have the carrot or asterisk,  
4 you're saying that they shouldn't be at the Basic service  
5 tier?

6 MR. VAN EATON: Yes, and this is where I confused you  
7 initially. There is -- I think there's some questions and I  
8 actually don't have the answer to this -- as to whether --  
9 there's a category for high definition channels. You'll see  
10 they have a little asterisk on them. The content of those  
11 channels is identical to the content of the non-high  
12 definition channels and the Company is obligated to carry the  
13 entire signal that's offered by the broadcasters, which  
14 includes the high-definition component.

15 THE COURT: Let me get this straight. So I'm looking  
16 at Table A.

17 MR. VAN EATON: May I go back and get --

18 THE COURT: Yes. I'm looking at the revised one you  
19 just gave us this morning. Do you have it?

20 MR. VAN EATON: Yes, I do.

21 THE COURT: You're saying that current Channel 7 that  
22 will remain Channel 7 is an analog channel?

23 MR. VAN EATON: That's correct.

24 THE COURT: Then as I look at 231 which says WXYZ,  
25 ABC HD, you're saying the content of 231 is identical to the

1 content of Seven?

2 MR. VAN EATON: That's correct.

3 THE COURT: It's just that it's available in high  
4 definition.

5 MR. VAN EATON: That's correct.

6 THE COURT: So I wouldn't need -- if I'm a Basic  
7 service tier subscriber and I don't mind looking at my analog  
8 Channel 7, I don't need additional equipment to access these  
9 channels?

10 MR. VAN EATON: Right, and that's correct. And  
11 presumably since I've got an analog TV I don't mind looking at  
12 my analog channel.

13 THE COURT: I don't mind looking at mine. And so the  
14 --

15 MR. VAN EATON: (Interjecting) And that's true I think  
16 -- I think it's fair to say -- they can correct me. There  
17 may be some minor exceptions, but that's true of all the ones  
18 they have an asterisk by.

19 THE COURT: So all the ones here that they say are  
20 available only in digital now at the Basic service tier,  
21 people don't have to invest in anything else to access them?  
22 They get the full range of channels?

23 MR. VAN EATON: With the exception the ones with the  
24 carrot, the little upside down V, that my understanding would  
25 be would have different content and that's where our access.

1 You see that's how they characterized our access channels.

2 THE COURT: So the ones that have the different  
3 content, you're saying that they should not be at the Basic  
4 Service tier because people have to get equipment?

5 MR. VAN EATON: I wouldn't count them as being part of  
6 the Basic Service tier, that's correct.

7 THE COURT: I got you. Thank you.

8 MR. VAN EATON: And obviously if they fail to do that,  
9 in our view they've violated the specific requirement of the  
10 Cable Act in Section 543. There's a debate obviously as to  
11 whether that requirement applies in communities that are not  
12 subject to rate regulation; our view is it does. As we put in  
13 our brief, it's not a settled issue. There's cases that  
14 support our view. There's cases that support the Company's  
15 view, but at the end of the day, it doesn't matter because at  
16 least for one of the Plaintiffs here, Meridian Township, rates  
17 are still subject to regulation. So it's that requirement  
18 continues -- clearly continues to apply or as far as we can  
19 tell they're subject to competition. We've seen nothing that  
20 would -- in order to be deregulated, one has to file a  
21 petition at the FCC and we don't think one was filed for that  
22 Township.

23 THE COURT: One was filed for Dearborn?

24 MR. VAN EATON: A Petition for Effective Competition  
25 was filed for Dearborn once they got a competitor in the

1 market, Wide Open West.

2 THE COURT: And what has happened with that?

3 MR. VAN EATON: That's been granted.

4 THE COURT: When was that granted?

5 MR. VAN EATON: I don't know. Someone from Comcast  
6 may have a better sense.

7 THE COURT: Tell me now what is the effect of the  
8 grant of that Petition for Effective Competition.

9 MR. VAN EATON: In our view it had no effect. In our  
10 view the 543 requirement that they continue to provide it on  
11 Basic continues to apply. But even if it didn't, the duty to  
12 carry that I discussed initially would continue to apply.

13 Let me go to sort of the final point that I think  
14 justifies. We think we've also discussed the issue with  
15 respect to scrambling and encryption and the duty to provide  
16 unnecessary equipment. Rather than go into that, I think I'll  
17 rest on the briefs on that argument, reserving some right to  
18 respond if Comcast raises the issue.

19 But I would like to focus on another basis on which  
20 we think an Injunction can be granted, which is the notice  
21 requirement and the notice requirement actually implicates a  
22 provision of Federal law that applies under the franchise in  
23 these communities and under Michigan law, which is that you  
24 have to provide subscribers at least 30 and in the Meridian  
25 Township 60 days' notice of any channel change. Provisions of

1 the Michigan Unfair Practices Act and provisions of the  
2 Uniform Franchise Law require that the Notices and any  
3 information sent to subscribers not be misleading. So  
4 essentially you've got a Federal and State requirement to  
5 provide accurate and complete notice of what's going on to  
6 subscribers.

7 The Notices here -- even if you thought this was  
8 permissible under law, this action isn't ready for prime  
9 time. The Notice that was sent out on November 15th to  
10 subscribers doesn't accurately, identify accurately the  
11 channels on which these things will appear. When we were  
12 talking about -- I think Comcast will agree with this and  
13 would agree with this and if they don't, obviously we can put  
14 Mr. Afflerbach on the stand and he'll explain it. He mentioned  
15 it in his Affidavit.

16 For a QAM capable TV, one without a converter or for  
17 a converter you buy from Best Buy, when you hook it up to a  
18 television you will never see these channels on Channel 901 or  
19 whatever -- wherever they're supposed to be moved. That's  
20 because those converters look at the frequency on which the  
21 signal is being delivered and they look at a standard table of  
22 assignments and say this goes on channel whatever. It assigns  
23 it a channel and I mentioned that for one of the tests we did  
24 for one of the channels, we found one of the PEG channels on  
25 Channel 80.1, I believe. We have the person who conducted the

1 test in the room. They're happy to testify as to what  
2 actually happened when they began to look through it.

3           So when Comcast told consumers with a compatible  
4 piece of equipment, the QAM capable TV or a converter you  
5 could acquire from someone else or from our converter, you'll  
6 see the channels on Channel 901, 902 and 903, whatever they  
7 said, that wasn't accurate. The only people who will see  
8 these channels at the 900 series are folks with a converter or  
9 a cable card from Comcast, and they will have to do that for  
10 every TV they have where they want to receive the PEG  
11 channels. The result is that if you work on that Notice, you  
12 aren't going to find those. You plug in -- the day this  
13 happens, you put in 901, you aren't going to see those  
14 channels with a QAM capable TV at that level; you just will  
15 not find them and the Company has done nothing to notify  
16 customers where they could find them and nothing to tell  
17 customers what they have to do to receive them, and we think  
18 that makes their Notice patently defective. Wrong location,  
19 didn't describe how to find them, didn't even describe what  
20 they have to do to get them and because that Notice is  
21 required and because it's essential in order for folks to even  
22 continue to receive the channel even if they go through the  
23 hoops that Comcast gets, we think that requires them -- that  
24 means that they violated the law and that justifies saying  
25 wait a minute. This isn't ready to roll out yet.

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1 THE COURT: Excuse me. Defendants, do you have  
2 someone who can address this notice issue?

3 MR. SCOTT: We certainly have a witness prepared to go  
4 over all the notice issues.

5 THE COURT: The ones specifically Mr. Van Eaton just  
6 spoke about; that the QAM or third-party converter doesn't  
7 work?

8 MR. SCOTT: I think that's a different issue that it  
9 doesn't work. We absolutely have a witness to explain how it  
10 does work and we do have witnesses to explain how the notice  
11 would be hard to figure out what every single QAM TV does or  
12 doesn't do. We have witnesses that have careful details about  
13 that rather than the lawyer testimony.

14 THE COURT: Thank you.

15 MR. VAN EATON: So that creates -- what I've outlined  
16 is essentially I think the basis, a system that requires an  
17 Injunction. One is the duty of carriage is being violated and  
18 we think the harm is pretty clear given the immediate effect  
19 this will have on the schools and consumers, and the fact that  
20 even Comcast admits that a substantial portion of their  
21 customer base will not be able to receive these channels after  
22 tomorrow. We think the offer of the free box and the free  
23 installation while nice doesn't solve the problem and  
24 certainly doesn't solve the problem tomorrow, and it doesn't  
25 solve the problem for multiple boxes and I think the fact that

1 they did not deliver these boxes to people, that they haven't  
2 made a more -- that I think the problem will persist. I think  
3 folks are not going to know -- we are actually going to see a  
4 case where the way the Notices work, people actually wouldn't  
5 have quite been aware what this need to do to get these  
6 channels on 901 or that without this free box and the free  
7 install it's not going to show up there. So it doesn't -- and  
8 ultimately, ultimately we don't think the PEG folks should be  
9 charged, whether now or 12 months from now for a service that  
10 doesn't -- they're paying but they won't be receiving on the  
11 same basis as the standard broadcast channels.

12 What makes it particularly troubling, and Your Honor  
13 raised a question and I didn't want to go into it in the  
14 brief; we only have five pages and too much detail, but under  
15 the Federal Communications Commissions rules, service rates  
16 are set by looking at the number of channels that are carried  
17 on a service tier. So when we rolled out -- when we set the  
18 Basic Service rate, it was set by counting all these channels  
19 that were delivered in analog and what should happen is when  
20 they're no longer receivable, there should be a drop in  
21 rates. What's essentially --

22 THE COURT: (Interjecting) You said the service rates  
23 are set by the number of channels delivered in analog?

24 MR. VAN EATON: That's right. That's how they were  
25 set. At the time the formula was developed, the channels --

1 there were no digital channels on Basic. This is sort of a --  
2 this move of PEG I suggest to you is somewhat unique. The PEG  
3 channels have been carried in analog, so when you went through  
4 the process of setting rates which initially happened back in  
5 1992, you counted the number of analog channels and the FCC  
6 had a formula that based the rates on what channels you  
7 received. So there is a real problem I think with setting up  
8 a system that essentially requires -- sets a charge that was  
9 initially based on a per channel idea.

10 THE COURT: Well, the FCC knows that some cable  
11 providers are moving to digital, correct?

12 MR. VAN EATON: That's correct.

13 THE COURT: And so -- and the rates that have been  
14 reviewed and changed since 1992 or not?

15 MR. VAN EATON: The formula has not changed since --  
16 well, the formula has gone through a lot of little changes,  
17 but it has not gone through a change to accommodate this sort  
18 of activity.

19 THE COURT: May I get back to this Table A? The  
20 channels at the bottom of Table A that do -- that don't have  
21 their content available in analog form on another channel, you  
22 -- do you agree that Defendants are within their right to  
23 have an additional equipment charge to access these channels?

24 MR. VAN EATON: I think yes. For those channels I  
25 think yes, they could have an additional equipment charge for

1 those channels. They wouldn't be -- yes.

2 THE COURT: Because these channels are not covered by  
3 the Federal statute?

4 MR. VAN EATON: I'm not certain what all these  
5 channels are. There are some unique rules that apply to  
6 broadcasters because in addition to going in high-definition,  
7 some broadcasters are also providing service -- instead of  
8 providing a high definition channel, they're providing six or  
9 seven other channels that are now new and when I look at for  
10 example what is listed as Channel 240, I suspect what you're  
11 seeing there is a PBS channel which shows up at Channel 6  
12 which is providing new content and I suspect because it's done  
13 elsewhere, that's true that the arrangement here is one of  
14 contract between Comcast and the broadcast station. So I  
15 think to try -- it's not as simple answer as I'd like to be  
16 able to give you, but essentially I don't have a problem with  
17 them calling -- equipment. I don't know that I'd call it part  
18 of the Basic Service tier, but it's certainly not a problem  
19 for them charging for equipment for those channels.

20 THE COURT: Wouldn't these channels be counted in --  
21 would these channels be counted in setting the Basic tier  
22 rate?

23 MR. VAN EATON: I don't think so. Mr. Scott may have  
24 a different view. I don't think so. These are sent out on the  
25 same -- these essentially what the broadcaster -- essentially