

# MYTHS

cable companies  
dish out about  
satellite TV.

## **"Cable has just as many HD channels as DIRECTV."**

**Not even close.** Right now, DIRECTV has over 85 of your favorite national HD channels.\* Try finding that on cable.

## **"I can't get local channels with satellite."**

**Yes, you can.** DIRECTV® service includes local channels in 94% of the country! You can also get access to **your local channels in HD!**

## **"The equipment is too expensive."**

**No.** There's no equipment to buy and no start-up costs. You get **FREE** standard installation on a DIRECTV® System in up to 4 rooms!

## **"It's too difficult to install!"**

**No.** Our professional installer will set it all up for you and show you how to use it. Plus, you get top-ranking customer service, 24/7.

## **"My signal will go out in bad weather."**

**Wrong.** DIRECTV delivers a digital signal 99.9% of the time, rain or shine. If there is a problem it will likely be fixed in a matter of minutes, not days or weeks.

**Call 1-866-558-6754 now**

See enclosed letter for details.

\*To access DIRECTV HD programming, HD Access fee (\$9.99/mo.), a DIRECTV HD Receiver and television equipment are required. Number of HD channels varies by package selection. Base-approved credit. Credit card required. New customers only. Lease fee of \$4.99/mo. and 8 ea. sat'l receiver. Complex/custom installation extra. Handling & delivery fee of \$19.95 may apply. Call for details. †Eligibility for local channels based on service address. Local channels are available 94% of U.S. markets. \*Programs not delivered in HD in all markets. ‡Eligibility for local channels by service address. Five-LNB Dish required in some markets to receive HD local networks delivered by DIRECTV. H24 or H100 model DIRECTV HD Receiver and HD or HD-ready television set required to display HD programming.

Direct TV 60 Second TV Spot

Stay focused for the next sixty seconds. That's all the time I have to tell you the truth about HD television, the truth your cable company doesn't want you to hear.

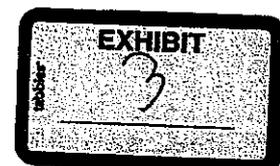
Cable wants you to believe they're keeping up with HD capacity. They are not, but Direct TV is. Get the best entertainment and the most HD channels with Direct TV. That includes exclusive sports with games and match ups you won't see on cable.

So call now for all your favorite sports, movies and shows. And you always get your local channels.

Do you know what else? Packages start at only \$29.99 per month. Plus, call now and ask how you can get 32 premium channels free for 3 months.

There are no start up costs, no equipment to buy and professional installation is free. Call now.

You also get a free HD receiver or Direct TV DVR upgrade, from America's number one HD provider. Time's up make the call.



Typical 750 bandwidth usage.xls



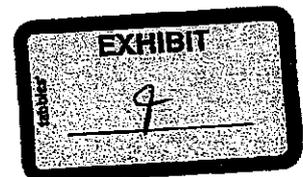
**This page is intended to graphically show how bandwidth is currently distributed in typical 750 MHz systems.**

Analog Space currently carries appx 65% of Bandwidth

33 HD currently uses appx 10% Bandwidth

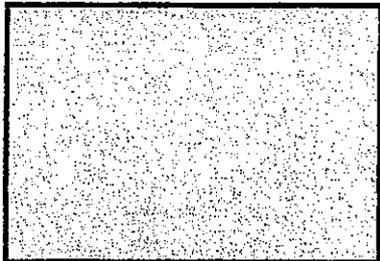
Internet, Phone & VOD uses appx 6.5% of Bandwidth

48 Digital Music channels and over 250 Standard Definition Digital channels uses appx 18.5% of Bandwidth



6 MHz of Bandwidth.xls

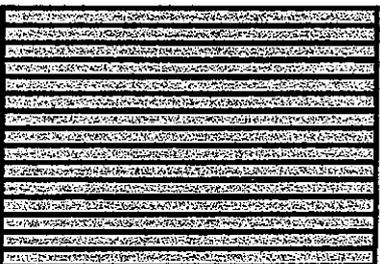
## Each 6 MHz of Bandwidth



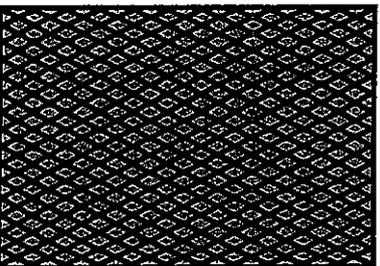
= 1 Analog



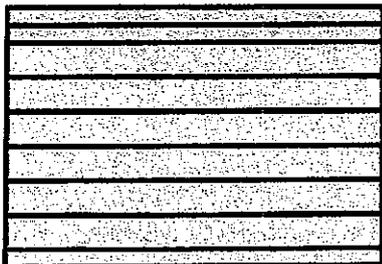
= 3 HD



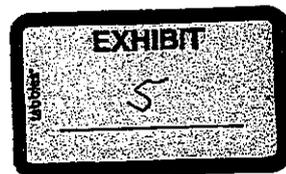
= 15 Standard  
Definition (SD)  
digital channels



= 42 Mb/s Data



= 10 VOD Streams



**The following channel changes will be made to the Comcast lineup in the following communities:**

Allen Park, Auburn Hills, Augusta, Berkley, Berlin, Beverly Hills, Bingham Farms, Birmingham, Bloomfield, Bloomfield Hills, Brownstown, Canton, Centerline, Clarkston, Clawson, Clinton, Clinton Twp., Commerce, Dearborn, Dearborn Heights, Detroit, Eastpointe, Ecorse, Exeter, Ferndale, Flat Rock, Franklin, Fraser, Garden City, Gibraltar, Grosse Ile, Grosse Pointe, Grosse Pointe Farms, Grosse Pointe Park, Grosse Pointe Shores, Grosse Pointe Woods, Groveland, Hamtramck, Harper Woods, Hazel Park, Highland, Huntington Woods, Independence Twp., Inkster, Keego Harbor, Lake Angelus, Lake Orion, Lathrup Village, Lincoln Park, London, Lyon Twp., Macomb Twp., Madison Heights, Melvindale, Milford, Milford Village, Mount Clemens, New Boston, Northville, Northville Twp., Oakland Twp., Oak Park, Orchard Lake, Orion Twp., Pleasant Ridge, Plymouth, Plymouth Twp., Pontiac, Ray Twp., River Rouge, Riverview, Rochester, Rochester Hills, Rockwood, Rose Twp., Roseville, Royal Oak, Royal Oak Twp., Shelby Twp., Southfield, Southgate, South Rockwood, Springfield, St. Clair Shores, Sterling Heights, Sumpter, Sylvan Lake Twp., Taylor, Trenton, Troy, Ulica, Walled Lake, Warren, Waterford, Wayne, West Bloomfield Twp., Westland, White Lake, Whitaker, Willis, Wixom, Wolverine Lake Village, Woodhaven, York

Effective January 10, 2008, Fox Business Network will be added to Digital Channel 106 and Bloomberg TV will be moving to Digital Channel 178.

Effective January 15, 2008, the following channel changes will be made:

Discovery HD will be added to Digital Channel 191.

TLC HD will be added to Digital Channel 192.

Animal Planet HD will be added to Digital Channel 193.

Sci-Fi HD will be added to Digital Channel 194.

CNN HD will be added to Digital Channel 213.

Encore Multiplex East Coast feeds will be moving from Digital Preferred to Digital Classic.

Encore West Coast feeds will no longer be available.

NHL Network will be added to Digital Channel 276 on the Sports & Entertainment Package.

Effective January 15, 2008, the following channel change will be made to the Comcast lineup in the following communities:

Allen Park, Auburn Hills, Berkley, Berlin, Beverly Hills, Bingham Farms, Birmingham, Bloomfield, Bloomfield Hills, Brownstown, Canton, Centerline, Clarkston, Clawson, Clinton, Clinton Twp., Commerce, Dearborn, Dearborn Heights, Detroit, Eastpointe, Ecorse, Ferndale, Flat Rock, Franklin, Fraser, Garden City, Grosse Ile, Grosse Pointe, Grosse Pointe Farms, Grosse Pointe Park, Grosse Pointe Shores, Grosse Pointe Woods, Groveland, Hamtramck, Harper Woods, Hazel Park, Highland, Huntington Woods, Independence Twp., Inkster, Keego Harbor, Lake Angelus, Lake Orion, Lathrup Village, Lyon Twp., Macomb Twp., Madison Heights, Melvindale, Milford, Milford Village, Mount Clemens, Northville, Northville Twp., Oakland Twp., Oak Park, Orchard Lake, Orion Twp., Pleasant Ridge, Plymouth, Plymouth Twp., Pontiac, Ray Twp., River Rouge, Rochester, Rochester Hills, Rockwood, Rose Twp., Roseville, Royal Oak, Royal Oak Twp., Shelby Twp., Southfield, Southgate, South Rockwood, Springfield, St. Clair Shores, Sterling Heights, Sylvan Lake Twp., Taylor, Troy, Ulica, Walled Lake, Warren, Waterford, Wayne, West Bloomfield Twp., Westland, White Lake, Wixom, Wolverine Lake Village

Government Access will be moving to Digital Channel 915, not Channel 911 as previously noticed.

Effective January 15, 2008, the Africa Channel will be moving from Digital Channel 194 to Digital Channel 184 in Detroit.

Effective January 15, 2008, the following channel change will be made to the Comcast lineup in the following communities:

Beverly Hills, Bingham Farms, Birmingham, Bloomfield, Bloomfield Hills, Canton, Clinton, Commerce, Dearborn, Detroit, Franklin, Hamtramck, Hazel Park, Highland, Keego Harbor, Lyon Twp., Madison Heights, Milford, Milford Village, Northville, Northville Twp., Oak Park, Orchard Lake, Plymouth, Plymouth Twp., Roseville, Royal Oak, Royal Oak Twp., Sylvan Lake Twp., Walled Lake, Wayne, West Bloomfield Twp., Westland, White Lake, Wixom, Wolverine Lake Village

ESPN will be moving from Limited Basic to Preferred Basic Channel 35.

Effective January 15, 2008, the following channel changes will be made to the Comcast lineup in the following communities:

Allen Park, Augusta, Berlin, Beverly Hills, Bingham Farms, Birmingham, Bloomfield, Bloomfield Hills, Brownstown, Canton, Clinton, Commerce, Dearborn, Dearborn Heights, Detroit, Ecorse, Exeter, Flat Rock, Franklin, Garden City, Gibraltar, Grosse Ile, Hamtramck, Highland, Inkster, Keego Harbor, Lathrup Village, Lincoln Park, London, Lyon Twp., Melvindale, Milford, Milford Village, New Boston, Northville, Northville Twp., Oak Park, Orchard Lake, Plymouth, Plymouth Twp., River Rouge, Riverview, Rockwood, Royal Oak, Royal Oak Twp., Southfield, Southgate, South Rockwood, Sumpter, Sylvan Lake Twp., Taylor, Trenton, Walled Lake, Wayne, West Bloomfield Twp., Westland, White Lake, Whitaker, Willis, Wixom, Wolverine Lake Village, Woodhaven, York

Zee TV will be added to Digital Channel 666.

TV Asia will be added to Digital Channel 665.

Effective January 15, 2008, the following channel change will be made to the Comcast lineup in the following communities:

Augusta, Clarkston, Exeter, Gibraltar, Independence Twp., Inkster, Lake Orion, Lathrup Village, Lincoln Park, London, New Boston, Orion Twp., Riverview, Southfield, Sumpter, Trenton, Whitaker, Willis, Woodhaven, York

ESPN will be moving from Limited Basic to Preferred Basic Channel 28.

Effective January 15, 2008, the following channel change will be made to the Comcast lineup in the following communities:

Allen Park, Auburn Hills, Augusta, Berkley, Berlin, Beverly Hills, Bingham Farms, Birmingham, Bloomfield, Bloomfield Hills, Brownstown, Canton, Centerline, Clarkston, Clawson, Clinton, Clinton Twp., Commerce, Dearborn, Dearborn Heights, Detroit, Eastpointe, Ecorse, Exeter, Ferndale, Flat Rock, Franklin, Fraser, Garden City, Gibraltar, Grosse Ile, Grosse Pointe, Grosse Pointe Farms, Grosse Pointe Park, Grosse Pointe Shores, Grosse Pointe Woods, Groveland, Hamtramck, Harper Woods, Hazel Park, Highland, Huntington Woods, Independence Twp., Inkster, Keego Harbor, Lake Angelus, Lake Orion, Lathrup Village, Lincoln Park, London, Lyon Twp., Macomb Twp., Madison Heights, Melvindale, Milford, Milford Village, Mount Clemens, New Boston, Northville, Northville Twp., Oakland Twp., Oak Park, Orchard Lake, Orion Twp., Pleasant Ridge, Plymouth, Plymouth Twp., Pontiac, Ray Twp., River Rouge, Riverview, Rochester, Rochester Hills, Rockwood, Rose Twp., Roseville, Royal Oak, Royal Oak Twp., Shelby Twp., Southfield, Southgate, South Rockwood, Springfield, St. Clair Shores, Sterling Heights, Sumpter, Sylvan Lake Twp., Taylor, Trenton, Troy, Ulica, Walled Lake, Warren, Waterford, Wayne, West Bloomfield Twp., Westland, White Lake, Whitaker, Willis, Wixom, Wolverine Lake Village, Woodhaven, York

CTND will be moving from Basic Service to Digital Starter Channel 296.

Call 1-888-COMCAST for more details.

To receive HD channels, an HD television (not provided) and HDTV equipment are required. \*Premium pricing applies.

Comcast.





November 15, 2007

Deborah Guthrie, Cable Coordinator  
Meridian Township  
5151 Marsh Road  
Okemos, MI 48864

Dear Ms. Guthrie:

At Comcast, we are committed to making public, education and government (PEG) programming readily available to all of our customers. By January 15, 2008, Comcast will deliver PEG programming in a high quality digital format and place these channels in consecutive channel positions largely uniform across the state. Customers will be notified of these channel changes beginning November 15, 2007 by a bill insert, a copy of which is enclosed, reflecting the transition of the current PEG channel to its new channel position.

Comcast will continue to offer PEG channels on our basic tier; however, we will deliver these channels in a digital format. Comcast is offering a special promotion of a free converter box to analog customers. Customers who use CableCard or have a QAM TV set will not need the additional digital converter box to receive these channels.

To support these efforts and reinforce the importance of this programming, Comcast plans to partner with our communities in a public service announcement (PSA) campaign that will create awareness of the value of community programming and inform customers of the new channel locations. Comcast will simultaneously consolidate existing Comcast-created Local Origination (LO) channels to a single digital LO channel, bolstering the image and value of the Comcast Community Network statewide.

Comcast recognizes the investments communities have made in their PEG programming offering, so in addition to the PSA campaign, Comcast will provide conversion at no cost and continue to maintain existing free transmission lines of PEG channels. Comcast will continue to partner with communities to ensure there is a smooth transition.

If you have any questions, please feel free to call me at 517-333-6028.

Sincerely,

John P. Gardner  
Government Affairs Manager  
Comcast, Michigan Region  
1070 Trowbridge Road  
East Lansing, MI 48823



At Comcast, we are committed to offering superior community programming to our subscribers. Therefore we are pleased to announce that Comcast is now able to provide public, education and government (PEG) programming in a high-quality digital format on consistent channels in uniform locations statewide.

To deliver these benefits to you, all PEG programming will be transitioned to a digital format by January 15, 2008.

**Basic Cable Customers:**

As noted above, the PEG channels will be delivered digitally on the Basic service level for all subscribers by January 15, 2008. Current Basic and Preferred Basic customers can continue to receive PEG programming by acquiring a digital converter, digital service or compatible equipment. For more information on how to continue receiving PEG programming, call 1-877-824-2984. We'll provide information on the easiest way for you to view these channels on your service.

**Digital Cable Customers:**

At the bottom of this letter, you will find a list of channel changes that will be effective January 15, 2008. These channels will provide convenient access to local information of interest.

**Stay Connected to Community Programming:**

In addition to the benefit of viewing PEG programming in digital-quality, customers will enjoy greater viewing flexibility. For example, customers enjoying the advantages of a Comcast Digital Video Recorder (DVR) will be able to record PEG programming so they never miss a city council meeting, school program or community event.

If you have any questions about the upcoming channel changes, please feel free to call 1-877-824-2984.

Channel Name	Current Channel	New Channel (by Jan. 15)
East Lansing Educational Access	24	902
Educational Access	27	903
Educational Access	28	904
Educational Access	29	905
Educational Access	31	906
Government Access HOM TV	21	911
E. Lansing Govt. Access/Educ. Access Haslett*	22	912
E. Lansing Govt. Access/Educ. Access Okemos*	23	913
Public Access	30	916

\*Meridian Township  
Certain services are available separately or as a part of other levels of service. A converter/remote control is required to receive Digital Cable. Fees apply to DVR subscription. Services are subject to the terms and conditions of applicable Comcast subscriber agreements. Call Comcast for service details and restrictions. © Comcast Cable Communications, LLC. All rights reserved.

CS79

**Comcast.**



November 15, 2007

Bill Irving  
Law Department  
City of Dearborn  
13615 Michigan Avenue  
Dearborn, MI 48126

Dear Mr. Irving:

At Comcast, we are committed to making public, education and government (PEG) programming readily available to all of our customers. By January 15, 2008, Comcast will deliver PEG programming in a high quality digital format and place these channels in consecutive channel positions largely uniform across the state. Customers will be notified of these channel changes beginning November 15, 2007 by a bill insert, a copy of which is enclosed, reflecting the transition of the current PEG channel to its new channel position.

Comcast will continue to offer PEG channels on our basic tier; however, we will deliver these channels in a digital format. Comcast is offering a special promotion of a free converter box to analog customers. Customers who use CableCard or have a QAM TV set will not need the additional digital converter box to receive these channels.

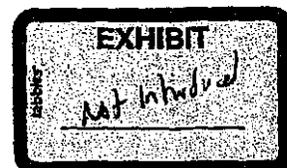
To support these efforts and reinforce the importance of this programming, Comcast plans to partner with our communities in a public service announcement (PSA) campaign that will create awareness of the value of community programming and inform customers of the new channel locations. Comcast will simultaneously consolidate existing Comcast-created Local Origination (LO) channels to a single digital LO channel, bolstering the image and value of the Comcast Community Network statewide.

Comcast recognizes the investments communities have made in their PEG programming offering, so in addition to the PSA campaign, Comcast will provide conversion at no cost and continue to maintain existing free transmission lines of PEG channels. Comcast will continue to partner with communities to ensure there is a smooth transition.

If you have any questions, please feel free to call me at 734-254-1888.

Sincerely,

Frederick G. Eaton  
Government Affairs Manager  
Comcast, Midwest Region  
41112 Concept Drive  
Plymouth, MI 48170



At Comcast, we are committed to offering superior community programming to our subscribers. Therefore we are pleased to announce that Comcast is now able to provide public, education and government (PEG) programming in a high-quality digital format on consistent channels in uniform locations statewide.

To deliver these benefits to you, all PEG programming will be transitioned to a digital format by January 15, 2008.

**Basic Cable Customers:**

As noted above, the PEG channels will be delivered digitally on the Basic service level for all subscribers by January 15, 2008. Current Basic and Preferred Basic customers can continue to receive PEG programming by acquiring a digital converter, digital service or compatible equipment. For more information on how to continue receiving PEG programming, call 1-877-824-2984. We'll provide information on the easiest way for you to view these channels on your service.

**Digital Cable Customers:**

At the bottom of this letter, you will find a list of channel changes that will be effective January 15, 2008. These channels will provide convenient access to local information of interest.

**Stay Connected to Community Programming:**

In addition to the benefit of viewing PEG programming in digital-quality, customers will enjoy greater viewing flexibility. For example, customers enjoying the advantages of a Comcast Digital Video Recorder (DVR) will be able to record PEG programming so they never miss a city council meeting, school program or community event.

If you have any questions about the upcoming channel changes, please feel free to call 1-877-824-2984.

Channel Name	Current Channel	New Channel (by Jan. 15)
Comcast Television	25	900
Dearborn Educational Access	19	902
Educational Access	24	903
CDTV	12	911
Public Ethnic Access	15	916
Public Access	18	917
Dearborn Public Access	16	918

Certain services are available separately or as a part of other levels of service. A converter/remote control is required to receive Digital Cable. Fees apply to DVR subscription. Services are subject to the terms and conditions of applicable Comcast subscriber agreements. Call Comcast for service details and restrictions. © Comcast Cable Communications, LLC. All rights reserved.

CS05

**Comcast.**

FILED/ACCEPTED

DEC - 9 2008

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

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 2 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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whampton@secrestwardle.com  
kkolb@secrestwardle.com

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")



IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

CITY OF DEARBORN, et al,

PLAINTIFFS,

v.

COMCAST OF MICHIGAN III, INC.  
COMCAST OF THE SOUTH, INC.

DEFENDANTS.

Case Number: 08-10156  
Hon. Victoria A. Roberts

DEFENDANTS' MOTION TO DISMISS

1. Defendants Comcast of Michigan III, Inc., *et al* (referred to collectively herein as "Comcast") through their undersigned attorneys, submit this Motion to Dismiss Plaintiffs' Complaints pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(1) and 12(b)(6).<sup>1</sup> The Complaints do not present any legally cognizable claim for relief.

2. None of the statutes, regulations or authorities relied upon by Plaintiffs create enforceable obligations that would be violated by Comcast's conversion of PEG channels to a digital format and new channel locations.

3. Plaintiffs' argument that 47 U.S.C. § 531 creates an obligation for Comcast to provide PEG channels to subscribers in some prescribed manner is untenable because that statute does not impose any obligations of any kind. Courts have recognized that "any rights regarding the use of public access channels are not created by § 531, but stem from franchise agreements

<sup>1</sup> Pursuant to L.R. 7.1, Defendants' counsel conferred with counsel for the Plaintiffs explaining the nature the motion and its legal basis and counsel for the Plaintiffs did not concur in the relief sought.

between cable operators and franchising authorities.” *Leach v. Mediacom*, 240 F. Supp. 2d 994, 997-98 (S.D. Iowa 2003), *aff’d*, 373 F.3d 895 (8<sup>th</sup> Cir. 2004). This statute merely permits local franchise authorities to require PEG channel capacity in franchises.

4. Nor are Plaintiffs’ claims under 47 U.S.C. § 531 and their local franchises saved by Subsection (c) of the statute, which provides, in relevant part, that “[a] franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity.” As explained in detail in Defendants’ memorandum of law supporting this motion, any rights the Plaintiffs might claim under their local cable franchises to prevent Comcast’s PEG digitization have been preempted by the enactment of Michigan’s Uniform Video Services Local Franchise Act of 2006 M.C.L. §§ 484.3301 *et seq.* (“Uniform Franchise Act”). And under M.C.L. § 484.3305(2)(b), Comcast’s existing franchise agreements have been automatically amended by operation of state law to exclude any PEG obligations beyond those contained in M.C.L. § 484.3304(1) and the Uniform Franchise, including any that require specific locations or processes for the relocation of PEG channels.

5. Michigan clearly intended to amend PEG franchise requirements, and federal law does not preempt that decision. Michigan has the absolute discretion to define municipal power as it deems to be in the State’s interest. *See, e.g., People v. Llewellyn*, 257 N.W. 2d 902 (Mi. 1977)(state preemption of local obscenity law); *Hudson Motor Co v. City of Detroit*, 275 N.W. 770 (Mi. 1937)(home rule city ordinances controlled by State Constitution and laws). The municipal (local franchise authority or “LFA”) Plaintiffs do not have powers beyond those allowed (or disallowed) by the State. Congress has not disrupted that sovereign relationship of the State and its subdivisions with respect to cable franchising in general, and PEG channels in

particular. Indeed, in passing Section 531 Congress stated that the provision “does not give the franchising authority the power to override the application of state law.” H.R. Rep. No. 934, 98th Cong., 2nd Sess. *reprinted at* 1984 U.S.C.C.A.N. 4655, 4683.

6. Plaintiffs allege that Comcast’s digitization of PEG channels violates 47 U.S.C. § 541 because, they claim, “the control of the channels is left to the locality.” (Dearborn Compl. ¶ 17.) There is no such language in the statute, and Plaintiffs have not cited to a provision in Section 541 that supports their argument. The subsection has nothing to do with the regulation of PEG channels or programming, and affords Plaintiffs no relief.

7. Plaintiffs cite 47 U.S.C. § 544a(c)(2)(B)(ii) for the proposition that “federal law . . . require[s] a cable operator to provide all channels on the basic service tier ‘in the clear.’” The allegation grossly misrepresents the statute, which imposes no obligation on cable operators. More importantly, it gives no rights to local governments. Plaintiffs have no right of action under this provision.

8. Plaintiffs claim that Comcast’s proposed PEG channel digitization violates Section 543(b)(7), titled “Components of the Basic Tier Subject to Rate Regulation.” The Court need not reach the merits of this claim, however, because Section 543(b) does not create a private right of action. *See, e.g., Aventura Cable Corp. v. Rifkin/Narragansett South Florida CATV, L.P.*, 941 F. Supp. 1189, 1195 (S.D. Fla. 1996); *Broder v. Cablevision Systems Corp.*, 329 F. Supp. 2d 551, 559 (S.D.N.Y. 2004). Even if Plaintiffs had a right to be in court under Section 543, these claims should be dismissed under Rule 12(b)(6) for failure to state a claim because nothing in the Communications Act precludes a cable operator from providing, and charging for, equipment used to receive its basic service tier.

9. Plaintiffs' allegation that Comcast's proposed placement of PEG channels on a digital tier violates 47 C.F.R. § 76.630 cannot be the basis of any relief. That FCC rule does not create a private right of action, and is ultimately irrelevant to this case.

10. The Court need not, and should not, consider the merits of Plaintiffs' challenge to Comcast's notice to customers of its planned relocation of PEG channels because there is no live issue to decide. Any challenges to the technical details of the notices Comcast provided in 2007 are moot. Likewise, there is no justiciable claim as to any customer notice Comcast might provide in the future because the contents of any future notice is unknown at this time. There is simply no customer notice before the Court for decision, and the Court has no jurisdiction to render advisory opinions.

11. Finally, Plaintiff Gillette has no greater right to maintain this action than the LFA Plaintiffs. She has no right of action under any of the sources of law mentioned in the Complaints. Her claims should be dismissed.

**WHEREFORE**, for all of the foregoing reasons, Comcast respectfully requests that the Court dismiss Plaintiffs' Complaints with prejudice.

Respectfully submitted,

Robert G. Scott, Jr.  
Wesley R. Heppler  
**Davis Wright Tremaine, LLP**  
1919 Pennsylvania Avenue, N.W.  
Suite 200  
Washington, D.C. 20006  
(202) 973-4200

s/Michael S. Ashton  
Michael S. Ashton (P40474)  
Anita G. Fox (P47818)  
**Fraser Trebilock Davis & Dunlap P.C.**  
124 West Allegan, Suite 1000  
Lansing, MI 48933  
(517) 482-5800

*Attorneys for Defendants*

Date: April 30, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on April 30, 2008, I electronically filed the foregoing Defendants' Motion to Dismiss with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Michael J. Watza, Cheryl A. Verran, Joseph Leonard Van Eaton, William H. Irving, William P. Hampton, Thomas D. Esordi, and Mary Michaels, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participant:

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

CITY OF DEARBORN, et al,

PLAINTIFFS,

v.

COMCAST OF MICHIGAN III, INC.  
COMCAST OF THE SOUTH, INC.

DEFENDANTS.

Case Number: 08-10156  
Hon. Victoria A. Roberts

**MEMORANDUM OF LAW IN SUPPORT  
OF DEFENDANTS' MOTION TO DISMISS**

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**TABLE OF CONTENTS**

CONCISE STATEMENT OF ISSUE PRESENTED ..... 1

CONTROLLING AUTHORITY ..... 1

INTRODUCTION ..... 1

STANDARD OF REVIEW ..... 2

ARGUMENT ..... 3

I. PLAINTIFFS HAVE NO RIGHT TO BLOCK COMCAST’S DIGITIZATION OF PEG CHANNELS UNDER 47 U.S.C. § 531 OR LOCAL FRANCHISES ..... 3

    A. Section 531 Contains No Affirmative PEG Carriage Obligation ..... 3

    B. PEG Obligations Relied Upon By Plaintiffs In Franchise Agreements Have Been Invalidated By State Law ..... 4

    C. Michigan Has Sovereign Power to Invalidate Franchise Provisions ..... 6

II. 47 U.S.C. §§ 541 AND 544a DO NOT PROVIDE AUTHORITY FOR PLAINTIFFS TO PREVENT COMCAST’S PROPOSED DIGITIZATION OF PEG CHANNELS ..... 10

III. PLAINTIFFS CANNOT STATE A CLAIM UNDER 47 U.S.C. § 543(b)(7)..... 12

    A. Section 543 Does Not Create A Private Right of Action..... 12

    B. Section 543(b)(7) Does Not Preclude Comcast From Offering PEG Channels in Digital Format or Requiring Consumers to Obtain Equipment to Receive the Programming on the Basic Tier ..... 15

IV. FCC RULES FOR CABLE EQUIPMENT ARE IRRELEVANT AND DO NOT CREATE RIGHTS OF ACTION ..... 17

V. THERE IS NO RIPE QUESTION AS TO CUSTOMER NOTICE..... 18

VI. PLAINTIFF GILLETTE HAS NO COGNIZABLE CLAIM ..... 20

CONCLUSION..... 20

TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Adell Broadcasting Corp. v. Cablevision Industries</i> , 854 F. Supp. 1280 (E.D. Mich. 1994).....	12
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	1, 14, 15, 17
<i>Ass'n of Cleveland Fire Fighters v. City of Cleveland</i> , 502 F.3d 545 (6 <sup>th</sup> Cir. 2007) .....	3
<i>Aventura Cable Corp. v. Rifkin/Narragansett South Florida CATV, L.P.</i> , 941 F. Supp. 1189 (S.D. Fla. 1996) .....	13, 14
<i>Bigelow v. Michigan Dep't of Natural Resources</i> , 970 F.2d 154 (6 <sup>th</sup> Cir. 1992) .....	19
<i>Broder v. Cablevision Systems Corp.</i> , 329 F. Supp. 2d 551 (S.D.N.Y. 2004), <i>aff'd</i> , 418 F.3d 187 (2d Cir. 2005) .....	14
<i>Brown v. Ferro Corp.</i> , 763 F.2d 798 (6 <sup>th</sup> Cir. 1985) .....	19
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	19
<i>Carras v. Williams</i> , 807 F.2d 1286 (6 <sup>th</sup> Cir. 1986) .....	18
<i>City of Dearborn v. Comcast of Michigan</i> , No. 08-10156, 2008 WL 126605 (E.D. Mich. Jan. 14, 2008) .....	16
<i>Chirco v. Gateway Oaks, L.L.C.</i> , 384 F.3d 307 (6 <sup>th</sup> Cir. 2004) .....	18
<i>Gottfried v. Medical Planning Services, Inc.</i> , 280 F.3d 684 (6 <sup>th</sup> Cir. 2002) .....	18
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	1, 8, 10

*Hudson Motor Co v. City of Detroit*,  
275 N.W. 770 (Mich. 1937).....1, 9

*In re Comcast Corp. Cable TV Rate Regulation*,  
No. 93-6628, 1994 U.S. Dist. LEXIS 16044 (E.D. Pa. Nov. 10, 1994) .....13, 14

*In re Haley*,  
476 Mich. 180, 720 N.W.2d 246 (2006).....7

*Insight Comms. Co. v. Telecomm. Bd.*,  
No. 05-142-DLB, 2006 WL 208828 (E.D.Ky. Jan. 25, 2006).....12

*International Union v. Dana Corp.*,  
697 F.2d 713 (6<sup>th</sup> Cir. 1983) .....18

*Kentucky Press Ass'n v. Commonwealth of Kentucky Press Ass'n*,  
454 F.3d 505 (6<sup>th</sup> Cir. 2006) .....19

*Lambert v. Hartman*,  
517 F.3d 433 (6<sup>th</sup> Cir. 2008) .....1, 3

*Leach v. Mediacom*,  
240 F. Supp. 2d 994 (S.D. Iowa 2003), *aff'd*, 373 F.3d 895 (8<sup>th</sup> Cir. 2004) .....4, 7

*Mallenbaum v. Adelpia Comms. Corp.*,  
No. 93-7027, 1994 WL 724981 (E.D. Pa. Dec. 29, 1994) .....12, 13, 14

*Nat'l Rifle Ass'n of Am. v. Magaw*,  
132 F.3d 272 (6<sup>th</sup> Cir.1997) .....19

*Nixon v. Missouri Municipal League*,  
541 U.S. 125 (2004).....8, 9

*Parry v. Mohawk Motors of Michigan, Inc.*,  
236 F.3d 299 (6<sup>th</sup> Cir. 2000) .....15

*People v. Llewellyn*,  
257 N.W. 2d 902 (Mich. 1977).....1, 9

*Pertuso v. Ford Motor Credit Co.*,  
233 F.3d 417 (6<sup>th</sup> Cir. 2000).....13

*Preiser v. Newkirk*,  
422 U.S. 395 (1975).....18

*Reno v. Catholic Soc. Servs., Inc.*,  
509 U.S. 43 (1993).....1

*Smith v. Dearborn Fin. Serv., Inc.*,  
982 F.2d 976 (6<sup>th</sup> Cir. 1993) .....15, 17

*Stocker v. Tri-Mount/Bay Harbor Building Co.*,  
268 Mich. App. 194, 706 N.W.2d 878 (2005).....7

*Thomas M. Cooley Law School v. American Bar Assoc.*,  
459 F.3d 705 (6<sup>th</sup> Cir. 2006) .....13

*Touche Ross & Co. v. Redington*,  
442 U.S. 560 (1979).....13

*United States v. Perry*,  
360 F.3d 519 (6<sup>th</sup> Cir. 2004) .....7

*Whitmore v. Arkansas*,  
495 U.S. 149 (1990).....19

*Young v. City of Detroit*,  
652 F.2d 617 (6<sup>th</sup> Cir. 1981) .....19

**FEDERAL STATUTES**

47 U.S.C. § 531..... passim

47 U.S.C. § 532.....14

47 U.S.C. § 534.....12

47 U.S.C. § 541.....1, 10, 11

47 U.S.C. § 543..... passim

47 U.S.C. § 544.....10, 11, 12

47 U.S.C. § 546.....14

47 U.S.C. § 551.....14

47 U.S.C. § 553.....14

**STATE STATUTES**

Michigan's Uniform Video Services Local Franchise Act of 2006 M.C.L. §§ 484.3301  
*et seq.* .....1, 2, 4, 6

M.C.L. § 484.3302 .....6, 7

M.C.L. § 484.3304 .....5, 6

M.C.L. § 484.3305 .....1, 5, 6

**CODE OF FEDERAL REGULATIONS**

47 C.F.R. § 76.309 .....1, 18

47 C.F.R. § 76.630 .....1, 17, 18

47 C.F.R. § 76.922 .....1, 16

47 C.F.R. § 76.923 .....1, 16

**OTHER AUTHORITIES**

*In re Commissions: Own Motion, to Establish a Standardized Form for the Uniform  
Video Service Local Franchise Agreement Pursuant to Section 2(1) of 2006 PA40,  
Case No. U-15169, 2007 Mich. PSC LEXIS 38* .....5

FRCP 12(b)(6) .....3, 15

H.R. Rep. No. 934, 98th Cong., 2nd Sess. 46 (1984) .....9

U.S. Const., Article III, cl. 2 .....1

### CONCISE STATEMENT OF ISSUE PRESENTED

1. Whether Plaintiffs' claims should be dismissed when none of the statutes or regulations on which they rely empower them to prevent Comcast's provision of PEG channels in digital format, when federal law prohibits such interference by Plaintiffs, and when the Michigan Legislature has invalidated any relevant local franchise provisions as a matter of state law.
2. Whether Plaintiffs' challenge to Comcast's customer notice is not ripe for decision.

### CONTROLLING AUTHORITY

1. For motions to dismiss: Federal Rule of Civil Procedure ("FRCP") 12(b)(6); *Lambert v. Hartman*, 517 F.3d 433, 439 (6<sup>th</sup> Cir. 2008).
2. For Plaintiffs not having a private right of action under the federal Communications Act and regulations upon which their claims rely: 47 U.S.C. §§ 531(a)-(c), 541, 543; 47 C.F.R. §§ 76.630(a), 76.309(c)(3)(i)(B); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).
3. For the preemption of local franchise PEG requirements of the Michigan Uniform Video Services Local Franchise Act, Act 480 of 2006: M.C.L. §§ 484.3305(3), 484.3305(2)(a)-(b); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *People v. Llewellyn*, 257 N.W. 2d 902 (Mich. 1977); *Hudson Motor Co v. City of Detroit*, 275 N.W. 770 (Mich. 1937).
4. For Comcast's ability to transmit programming on the basic service tier in a digital format: 47 U.S.C. §§ 543(b)(1) & (3), 544(e); 47 C.F.R. §§ 76.922, 76.923.
5. For the absence of ripeness for Plaintiffs' challenges to Comcast's customer notice: U.S. Const., Art III, cl. 2; *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n. 18 (1993).

### INTRODUCTION

Defendants Comcast of Michigan III, Inc., *et al* (together, "Comcast") submit this

Memorandum of Law in Support of their motion to dismiss Plaintiffs' Complaints pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(1) and 12(b)(6).<sup>1</sup>

The Complaints do not present any legally cognizable claim for relief. They first allege that Comcast's plan to provide PEG channels in digital format and reposition them in a unified PEG grouping on Comcast's cable systems violates obligations under the federal Communications Act and FCC regulations (First Claim for Relief). They also allege violations of Comcast's local franchises and ordinances (Second Claim for Relief; Warren's Third Claim for Relief). None of the statutes, regulations or authorities relied upon by Plaintiffs create enforceable obligations that would be violated by Comcast's provision of PEG channels in digital format and in new channel locations. In any event, any rights the municipal (local franchise authority or "LFA") Plaintiffs might claim under their local cable franchises to prevent Comcast's PEG digitization have been preempted by the enactment of Michigan's Uniform Video Services Local Franchise Act of 2006 M.C.L. §§ 484.3301 *et seq.* ("Uniform Franchise Act"). Finally, any challenges to whatever notice Comcast might give for any future relocation of PEG channels are not ripe for decision. Plaintiffs have no cognizable claim for relief under any of these provisions, and their Complaints should be dismissed with prejudice.

#### STANDARD OF REVIEW

A motion to dismiss pursuant to FRCP 12(b)(6) tests the sufficiency of a complaint and permits a district court to dismiss a complaint "for failure to state a claim upon which relief can be granted." *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6<sup>th</sup> Cir.

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<sup>1</sup> The initial Plaintiffs in this case (Dearborn/Meridian/Gillette) have been joined by the City of Warren (through removal & consolidation) and the Township of Bloomfield (through intervention). The Warren complaint adds a Third Claim for relief, but all substantive claims of all Plaintiffs mirror those of the initial Dearborn Complaint.

2007). In considering a motion to dismiss, the Court must determine whether the plaintiff is entitled to legal relief if all of the allegations in the complaint are accepted as true and the complaint is construed in a light most favorable to the plaintiff. *Lambert v. Hartman*, 517 F.3d 433, 439 (6<sup>th</sup> Cir. 2008). However, the Court need not “accept as true legal conclusions or unwarranted factual inferences.” *Ass’n of Cleveland Fire Fighters*, 502 F.3d at 548.

### ARGUMENT

#### I. PLAINTIFFS HAVE NO RIGHT TO BLOCK COMCAST’S DIGITIZATION OF PEG CHANNELS UNDER 47 U.S.C. § 531 OR LOCAL FRANCHISES

##### A. Section 531 Contains No Affirmative PEG Carriage Obligation

Plaintiffs’ “central argument” is their allegation that 47 U.S.C. § 531 creates an obligation for Comcast to provide PEG channels to subscribers in a particular manner. (Dearborn Compl. ¶ 70)(Pl’s Reply Mem. Supp. Mot. T.R.O, Jan. 13, 2008 at 1.) The plain text of this statute renders Plaintiffs’ claims untenable. Section 531(a) states that “[a] franchising authority *may* establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.” 47 U.S.C. § 531(a) (emphasis added). Likewise, Section 531(b) states that “[a] franchising authority *may* in its request for proposals require as part of a franchise, and *may* require as part of a cable operators proposal for a franchise renewal . . . that channel capacity be designated for public, educational, or governmental use . . . and *may* require rules and procedures for the use of channel capacity designated pursuant to this section.” 47 U.S.C. § 531(b) (emphasis added).

Courts have recognized that Section 531 “does not itself mandate the establishment of public access channels,” but instead “merely recognize[d] ‘the preexisting practice of local franchise authorities conditioning the cable franchises on the granting of [public access]