

authority to enforce such obligations (*see, e.g.*, 47 U.S.C. § 531(c) and provisions cited *supra*). And even if federal and state law did not otherwise do so, Plaintiff municipalities can bring an enforcement action under 47 U.S.C. § 401(b) where the requirements are reflected in FCC regulations or other orders – as they are in this case. Plaintiff Gillette, as a customer of Comcast and a viewer of PEG channels likewise has authority to challenge failures to provide PEG channels in a manner contemplated by federal law, as well as authority under Michigan consumer protection laws to challenge and to enjoin deceptive and unfair trade practices – which the proposed change certainly involves.

The other procedural argument raised is with respect to the claim that Comcast violated the notice provisions of federal law, a point where the Court noted that the Municipalities are likely to prevail. Comcast argues that the notice claim is moot, but it is not. Comcast plans to move the channels as soon as the injunction is lifted. Unless Comcast is conceding judgment on the issue, the Plaintiffs have the right to have the Court determine the company's obligations with respect to notice.

STANDARD OF REVIEW AND FACTS

“A motion to dismiss for failure to state a claim is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual allegations.” *Golden v. City of Columbus*, 404 F.3d 950, 958-59 (6th Cir. 2005), *cert. denied*, 546 U.S. 1032 (2005). The Court must construe the complaint in a light most favorable to Plaintiffs and must accept all factual allegations as true. *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008). In this case, the Court must decide the matter assuming:

(a) Comcast is subject to the obligation in 47 U.S.C. § 543(b)(7) to provide PEG channels as part of basic service. Likewise, unless this Court determines that whether the

channels are part of basic service depends solely on what Comcast says (we show below it does not), the Court must also assume that the PEG channels will *not* be offered as part of basic service under the proposed Comcast plan. (Complaint, ¶ 41).

(b) Comcast is treating the PEG channels in a discriminatory manner compared to other channels offered by the company, and different from channels carried on the basic service tier. (Complaint, ¶67).

(c) The changes made by Comcast will directly affect the ability of PEG users to speak, and PEG channel viewers to receive information via the PEG channels. As the Complaint states, the effect of the proposed change is to directly “decrease” PEG channel “viewership and accessibility” and to limit the ability of speakers “to communicate with the public” and viewers to “lose access to important public information.” (*Id.*, ¶¶ 60, 67).

ARGUMENT

I. THE LAW ESTABLISHES DUTIES WITH RESPECT TO PEG CHANNELS THAT COMCAST’S ACTIONS VIOLATE, AND THAT PLAINTIFFS ARE ENTITLED TO ENFORCE.

Comcast plans to change the PEG channels to a digital format and move them to 900-level channels, so that hundreds of thousands of subscribers² will not be able to see them without special equipment and without paying additional charges that are not required for other channels carried on the basic service tier. Comcast does not plan to provide required equipment unless it is specifically requested; and it has no plans either to advise subscribers that they will have to pay extra in order to be able to view channels supposedly already included in the basic service rate, or to reduce the rates for service.

² (Complaint, ¶ 37).

A. Comcast's Actions Violate Specific Obligations in the Franchises That Remain Enforceable Under The Uniform Act.

Federal law, 47 U.S.C. § 531(c), authorizes a local franchising authority to enforce requirements in any franchise regarding the "providing or use" of PEG channels. In each of the Plaintiff communities, Comcast is operating pursuant to a franchise contract entered into prior to the passage of the Uniform Video Services Local Franchise Act, M.C.L. 3301 *et seq.* (2006) ("Uniform Franchise Act"). The franchises here prohibit the actions taken by Comcast. All the franchises require carriage of channels on the basic service tier. *See, e.g., Meridian Franchise* ¶14. As the Court recognized in its January Order, the Dearborn franchise prevents the relocation of the PEG channels without the City's consent. (*Order*, p. 12). Both the Meridian and Bloomfield Township franchises incorporate ordinance requirements that PEG channels be provided without additional charge to subscribers. *Meridian Franchise*, p. 1, and ¶(9)(g); Ord. 70-91 (PEG channels provided without charge); *Bloomfield Franchise*, Art. V., Code of Ord. § 34-116 (c) (*all residential subscribers...shall also receive all access channels at no additional charge*). The franchise in Warren contains several bargained-for provisions regarding PEG channel capacity, including Section 7.1, which prohibits the company from relocating the channels as planned. For purposes of the Motion to Dismiss, the Court may assume that Comcast's actions violate the franchises.³ Comcast does not argue that Plaintiff Municipalities lack authority to bring a claim under their own franchises.⁴

³ Comcast's statement at n. 2 of its brief, that the Meridian and Bloomfield Township franchises do not prohibit relocation of the channels is only partially correct – the channels must *inter alia*, remain part of basic and must be available to all subscribers, without additional charge. Under the Comcast plan, the channels would not be available to all subscribers without additional charge.

⁴ This Court would have diversity jurisdiction based on the allegations in the Complaint.

Comcast's motion to dismiss claims based on the franchise provisions turns on its argument that any PEG carriage obligations in local franchises have been invalidated by state law. (D. Mem. 4-10). This argument merely repeats the points made in Comcast's response to the motion for a temporary restraining order, and rather than repeat all those arguments here, it is worth emphasizing the key flaws in it.

Michigan law only arguably preempts local PEG requirements "that are inconsistent with" "or in addition to" the requirements of a uniform franchise. M.C.L. 484.3305(3). But state law (at M.C.L. 484.3302(3)(h)) requires a company holding a uniform franchise to comply with federal laws and regulations; that obligation is incorporated into existing franchises, M.C.L. 484.3305(2)(b); and federal law at 47 U.S.C. § 531(c) provides for enforcement of franchise requirements regarding the use of PEG channels. It follows that franchise provisions governing use of PEG channels are consistent with the Uniform Franchise Act, and not in addition to it, as Comcast claims – and are thus enforceable.

Comcast argues that the Michigan law provisions regarding PEG are more specific than those requiring compliance with federal law, so only the former define Comcast's obligation with respect to PEG. (D. Mem. at 6-7). The "specific controls the general" rule may be a useful guide to interpretation where there is an apparent conflict between provisions, but if the law is read as Plaintiffs contend, there is no conflict. Far more relevant are two other principles of statutory interpretation that support Plaintiffs' view of the law. Where there is any doubt as to what franchise provisions mean, the provisions are interpreted in favor of public, *City of Benton Harbor v. Mich. Fuel & Light Co.*, 250 Mich. 614 (1930). Moreover, state law provisions are to be read to avoid conflict with federal law, *Rushton v. Schram*, 143 F.2d 554, 559 (6th Cir. 1944). To read state law, as Comcast does, to declare unenforceable provisions that section 531(c) says

are enforceable creates conflict between state and federal law that is both unnecessary and non-existent on the face of the law.

As the Court found in its *Order* at p. 6, if Michigan law is read so that there is a conflict between the state and federal law, the federal law prevails, and the franchise provisions remain enforceable. Comcast's contrary notion that the federal requirements are preempted by state law is inconsistent with the Supremacy Clause. Comcast's case is not helped by citing legislative history provisions that recognize that state subdivisions are subject to state law control, and that the Cable Act did not upset that relationship.⁵ In the first place, state control over subdivisions cannot be applied to frustrate federal rights, *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256 (1985); *Sailors v. Bd. of Educ.*, 387 U.S. 105, 108-9 (1967). In the second, the legislative history does not actually support Comcast. The passages cited, dealing with institutional networks required under Section 531(b), simply recognize that those networks (which may function like telephone systems) could remain subject to state tariffing and similar requirements. Elsewhere, however, the legislative history emphasizes that one of the purposes of the Act was to develop "important uniform standards" that are not "continually altered by Federal, state or local regulation." H. Rep. No. 98-934 at 24 (1984) *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4661 ("House Report"). Accordingly, the courts have recognized that Section 531 was intended to "preempt states from prohibiting local PEG requirements. . . ."

⁵ Comcast is wrong when it claims that local franchising authority is wholly dependent on the state legislature. In Michigan, the state Constitution squarely places franchising authority with local governments, *see* MI. Const. Art. VII. §§ 29-30, and so the exercise of that authority is not dependent on specific grants from the legislature. Art. VII. § 29, for example, separately protects proprietary interests (by ensuring that no one may use the rights-of-way without local permission, and subject to such conditions as the locality may establish); regulatory interests (by protecting the right to franchise utility services, without regard to use of the rights-of-way); and authority to manage the rights-of-way. Hence, silence in state franchising legislation does not leave localities powerless. Rather, unless lawfully prohibited from acting, localities may act pursuant to these constitutional provisions.

Time Warner Entertainment Co. v. F.C.C., 93 F.3d 957 (D.C. Cir. 1996).⁶ That distinguishes this case from *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), a case involving the interpretation of an entirely different provision of law. Preemption would apply if the Uniform Franchise Act prohibited enforcement of provisions that the Cable Act states *are* enforceable.⁷

It is far from clear that a local enforcement of requirements for use of the channels even implicates the Michigan law. Michigan law, like federal law, explicitly provides that a “video service provider shall not exercise any editorial control over any programming on any channel designed for public, education, or government use.” M.C.L. 484.3304(5). That provision, like the federal provision, discussed below, requires the operator to act as a pure conduit with respect to the PEG channels. Control of the channels is solely with users and the local franchising authorities. It imposes no “new” or “additional” requirements on the operator to prevent it from taking actions inconsistent with this duty; rather, it is simply the exercise by local governments of a control over channel capacity specifically contemplated by the state law.

⁶ That conclusion is supported by the legislative history which emphasizes that state control over localities can only be exercised in a manner “consistent with Title VI,” House Report at 94, 1984 U.S.C.C.A.N. at 4731. The history goes on to indicate that even when a state imposes conditions on local franchising authority that are consistent with the Cable Act, those conditions may only be applied after “expiration of the current franchise.” *Id.*

⁷ *United States v. Little Lake Misere Land Co.*, 412 U.S. 480 (1973) is instructive. The U.S. Supreme Court held that a Louisiana statute did not render inoperative terms in a land conveyance contract the federal government entered into pursuant to the Migratory Bird Conservation Act. Where a contract is one “arising from and bearing heavily upon a federal regulatory program” the state has limited authority to alter the terms of an existing contract. Here, likewise, the Michigan law cannot be read to abrogate specific franchise provisions with respect to PEG, particularly in light of the language of Section 531 (preserving PEG); Section 541 (requiring a franchise); and the legislative history of the Act with respect to PEG – and in light of the fact that the bargain struck represents a delicate balance that the parties agreed was appropriate to meet community needs and interests as contemplated by the Cable Act.

B. "Public Educational and Government Use" Has A Meaning Under Federal Law That Precludes the Changes Proposed By Comcast, Absent Explicit Permission from the Franchising Authority.

Even if one ignores the provisions of the franchises, cited above, Plaintiffs have a claim against Comcast that cannot be dismissed. Comcast claims that its PEG obligations are solely the creation of franchise agreements, and so unless a franchise agreement explicitly requires it to do more, its obligation to provide a PEG channel only empowers individuals to *create* programming on its network, not to have that programming *distributed* "in a particular manner." (D. Mem. 3). As Comcast puts it, "Unless cable franchise agreements specify obligations for PEG channel carriage, none exist." (D. Mem. 4). Under this view, Comcast *controls* the PEG channels: it could bundle the sale of PEG channels with any of its equipment or other products, and distribute PEG as it pleases, at any price, even if the result was to make the channels inaccessible to every subscriber. Instead, federal law creates a duty to transmit PEG programming to every subscriber in a non-discriminatory manner. Unless the franchising authority agrees otherwise, PEG channels must be available and viewable to every subscriber without special charges or equipment.

1. A Requirement That an Operator Designate Channel Capacity for Public, Educational and Governmental Use Creates a Duty To Transmit That Is Akin to a Common Carrier Obligation.

Comcast's argument depends on the assumption that the only duty that is imposed upon it by a requirement that it "designate" capacity for public, educational and government use is that it let others create programming on its network. As a result, according to Comcast, *if* PEG channels are provided, the channels may be controlled by the operator as it pleases, unless the franchise specifies otherwise. To the contrary, once an operator is required to designate capacity

for public, educational and government use, a duty is imposed on the operator that is defined by federal law and requires far more than Comcast concedes.

As courts have recognized, while a franchise agreement “gives life to Section 531(a), [] Section 531(a) also establishes a framework for these franchise agreements: that the channels be set aside for public, educational, and governmental use.” *Time Warner Cable of New York City v. City of New York*, 943 F. Supp. 1357, 1367 (S.D.N.Y. 1996), *aff’d on other grounds*, 118 F.3d 917 (2d Cir. 1997). While this phrase -- “public, educational, or governmental use” -- appears repeatedly in the Cable Act,⁸ the phrase itself is not defined. *Goldberg v. Cablevision Systems Corp.*, 261 F.3d 318, 321 (2d Cir. 2001). However, although Section 531 “does not further explain this [public, educational, or governmental] use . . . Congress’s meaning and intent is apparent from the legislative history of the Cable Act,” *City of New York*, 943 F. Supp. at 1367; *see also Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 790 (1996) (Kennedy, J., concurring) (“Congress has not, in the 1984 Act or since, defined what public, educational, or governmental access means or placed substantive limits on the types of programming on those channels. Those tasks are left to franchise agreements, *so long as the channels comport in some sense with the industry practice to which Congress referred in the statute.*”) (Emphasis added). That is, federal law establishes duties with which an operator must comply. Moreover, the duties imposed by a requirement to designate channels for PEG use can only be understood “in light of Congress’s general purposes in authorizing PEG channels.” *City of New York*, 118 F.3d at 927.

⁸ *See, e.g.*, 47 U.S.C. § 522(1) (defining “activated channels” as those “designated for public, educational, or governmental use”); 47 U.S.C. § 522(16) (defining “public, educational, or governmental access facilities” as “channel capacity designated for public, educational, or governmental use” and associated facilities and equipment).

That purpose is strikingly clear. Even before the Cable Act was adopted, it was recognized that PEG channel requirements divest the operator of control of a number of channels and create a duty to deliver programming produced by others to all subscribers; as the Supreme Court put it, with respect to PEG, cable systems are relegated “*pro tanto*, to common carrier status.” *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 700-701 (1979). The Cable Act endorsed this practice, and the legislative history made it clear that Congress intended for PEG channels to be available to all without additional charges, expense or burden. The Cable Act “continues the policy of allowing cities to specify in cable franchises that channel capacity and other facilities be devoted to such use.” H.R. Rep. No. 98-934, at 30 (1984), as reprinted in 1984 U.S.C.C.A.N. 4655, 4667 (emphasis added). The preceding paragraph in the legislative history explains what Congress meant by this “use”:

A requirement of reasonable third-party access to cable systems will mean a wide diversity of information sources *for the public* -- the fundamental goal of the First Amendment -- without the need to regulate the content of program provided over cable....Public access channels are often the *video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet*. They 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.

House Report at 30 (1984), 1984 U.S.C.C.A.N. at 4667 (emphasis added). As this passage makes clear, the particular “public, educational, or governmental use” Congress had in mind was one designed to serve the broadest possible audience of cable subscribers in a community. In Congress’s view, PEG channels allow for “ample opportunity to reach *the public*.” H.R. Rep. No. 98-934, at 19 (1984), as reprinted in 1984 U.S.C.C.A.N. 4655, 4656 (emphasis added). Most vividly, Congress portrayed this “public, educational, or governmental use” as akin to a

“speaker’s soap box” and to a “printed leaflet.”⁹ This is, of course, consistent with a common carrier obligation to distribute programming to all subscribers, and is utterly inconsistent with the notion that the operator is free to bundle, sell, format and package the channels as it sees fit.

In 1992, Congress underlined the nature of the PEG obligation when it adopted 47 U.S.C. § 541(b)(3), which generally prohibits franchising authorities from requiring an operator to provide any telecommunications services (which are by definition common carrier services, 47 U.S.C. § 153(46)). The law makes a specific exception where PEG channels are concerned, precisely because of the nature of the obligations created by virtue of the designation of PEG channels.¹⁰ The legislative history makes it clear that, consistent with this obligation, the channels must be viewable throughout a community:

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.*

⁹ Congress’s view of the inherently democratic underpinnings of this “public, educational, or governmental use” is reflected not just in how broadly Congress intended the material to be disseminated, but also in who Congress envisioned would be creating it: “Public access channels available under [the Cable Act] would be available to all, poor and wealthy alike. . .”. House Report at 36 (1984), 1984 U.S.C.C.A.N. at 4673. It would be an odd result indeed if, through a cable operator’s sales bundling, already disenfranchised members of a community would not be able to view the very content they created.

¹⁰ It is this section, which is one of the provisions that defines the PEG obligation, that is relevant to Plaintiffs’ claims. 47 U.S.C. § 541(c) (prohibiting regulation of cable operators as common carriers by reason of providing cable services) simply prevents the regulation of a cable services under Title II of the Communications Act or corresponding provisions of state law aimed at common carriers. It obviously does not prevent the regulation of PEG channels as contemplated by the Cable Act itself.

H.R. Rep. No. 102-628 at 85 (1992) (emphasis added).¹¹

2. The Discriminatory Manner in Which Comcast Plans To Treat PEG Channels Is Inconsistent with Its Cable Act Obligations.

Having defined the PEG obligation to create a common carrier type obligation to transmit,¹² it was unnecessary for Congress (or local franchising authorities) to do more, as that obligation by its nature prevents Comcast from engaging in the sort of tactics in which it has engaged here. For more than a century, it has been understood that the common carrier duty to transmit prevents a carrier from discriminating against the messages that it is obligated to carry, in favor of those that it would prefer to carry. Thus, for example, the duty to transmit ascribed to telegraph operators included not merely the duty to transmit a message accurately, but also a duty to do so impartially, and with “reasonable care and diligence according to the request of the sender.” *Candee v. W. Union Tel. Co.*, 34 Wis. 471, 477-78 (1874); *Atl. Coast Line R.R. Co. v. Mazursky*, 216 U.S. 122, 133 (1910) (duty of good faith and impartiality). At common law, the

¹¹ Even members of the Committee who objected to the bill as reported agreed that it was essential that PEG access channels be available to all subscribers: “Making over-the-air broadcast and PEG access channels available on a separate [basic service] tier promotes the time-honored principle of localism.” *Id.* at 183.

¹² The Supreme Court has characterized that the rights obtained through the designation of PEG channels are “akin to an easement.” *Denver Area Educ. Telecomms Consortium v. F.C.C.*, 518 U.S. 727, 760-61 (1996); *see also* 518 U.S. at 734 (referring to PEG channels as “special channels” available to those to whom the Cable Act gives “special cable system access rights”). Silence does not permit a landowner to interfere with easement rights; ambiguities are resolved in favor of grantees. 7 *Thompson on Real Property* § 60.04(a), at 451 (Thomas ed.1994). We recognize that in its initial Order, the Court was not convinced that the “easement” prevented the operator from changing PEG channels from analog to digital. Plaintiff’s case does not depend on a contention that it does. The “easement” is another way to view the duty to transmit, and the objection is not so much to the form of the transmission. It is that the Comcast plan to digitalize PEG channel imposes additional costs and burdens on those who wish to take advantage of the PEG easement. Viewers must pay more to receive programming and users will no longer be able to reach as many viewers. Comcast delivers other channels without these additional costs. The “easement” thus has been burdened in a way that makes it inferior to other channels carried on the basic tier. It is the fact that the company is placing a new, discriminatory, and unauthorized burden on the “easement” that creates the problem under the Cable Act.

duty to deliver a message from the sender to the *intended recipients* gave rise to tort liability for negligent transmission, *W. Union Tel. Co. v. Taylor*, 114 So. 529, 531 (Fla. 1927). Moreover these duties derived from the nature of the business, and were independent of contractual obligations with the sender. *Mentzer v. W. Union Tel. Co.*, 62 N.W. 1 (Iowa 1895). Here, likewise, the duty to transmit in a non-discriminatory manner arises from the very designation of the PEG channels, and cannot be dismissed by pointing to the absence of more specific obligations under the Uniform Franchise Act, or for that matter, local franchises. No more specific obligations are required. Rather, specific authorizations would be required in order to enable the operator to depart in any respect from its duty to transmit. Accordingly, the FCC has ruled that given the clear congressional direction and the evidence of the importance attached to PEG channels, “we require a cable operator to carry PEG channels on the basic tier **unless the franchising agreement explicitly permits carriage on another tier.**” *In the Matter of Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd. 5631, 5737-38, MM Docket No. 92-266 (1993) (emphasis supplied). What is notable about Michigan law and the franchises at issue is the absolute absence of any provision giving Comcast the right to control PEG channels as it proposes to do here. Control of the channels rests with the franchising authority. *See* 47 U.S.C. § 531(a).

3. The Operator’s Duty Is Cemented by a Specific and Non-waivable Barrier Prohibiting Operator Editorial Control of PEG Channels.

The nature of PEG channels is thus defined by federal law, and the designation of PEG channels imposes a duty to transmit on the operator. But if that were not enough, 47 U.S.C. § 531(e) contains a clear and non-waivable requirement that a cable operator “shall not exercise any editorial control over any public, educational, or governmental use of channel capacity

provided pursuant to [the Cable Act]....” This provision by its terms is not limited to content control, but is broader, encompassing any of the activities that constitute “editorial control.” This prohibition was central to the PEG scheme. “The Committee believes that it is integral to the concept of the use of PEG channels that such use be free from any editorial control or supervision by the cable operator.” House Report at 47, 1984 U.S.C.C.A.N. at 4684 (emphasis added). “With regard to the access requirement, cable operators act as [] conduits.” *Id.* at 35; 1984 U.S.C.C.A.N. at 4672. This channel capacity is “controlled by a person other than the cable operator.” *Id.* at 31; 1984 U.S.C.C.A.N. at 4668. The basic predicate for Comcast’s argument – that federal law imposes no obligations with respect to PEG – is thus mistaken. The operator is not free to package and sell PEG channels as it sees fit, as Comcast claims it may do here. It is specifically prohibited from engaging in such activities. That is particularly so when for purposes of the motion to dismiss, it must be assumed that the discrimination against PEG channels will directly affect the speech of the users and viewers, by *inter alia*, reducing the utility of the channels to users and the accessibility of the channels to viewers. It is surely the ultimate in “editorial control” for the operator to package PEG channels in a manner that effectively restricts their use or availability.¹³ Consistent with Section 531(e), the operator’s duty is to transmit in a non-discriminatory manner.

¹³ The cable industry has long argued that controlling the conditions under which a service is provided, or limiting the audience to which a service can be provided is a species of editorial control. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994) (requirements for carriage impinge upon editorial discretion); *Time Warner Entm’t Co., L.P. v. F.C.C.*, 56 F.3d 151 (D.C. Cir. 1995) (where rates are regulated so as to favor some types of speech over others, content of speech is impacted). While not every regulation violates the First Amendment, the types of activities at issue are recognized to involve editorial control, and under 531(e), the operator may not exercise that control with respect to PEG channels.

4. None of Comcast's Other Arguments Support a Claim That It May Discriminate in the Transmission of PEG Channels.

None of Comcast's other arguments supports the claim that it is entitled to discriminate against PEG channels. 47 U.S.C. § 544(e), which provides that a state or franchising authority may not prohibit or condition the use of any transmission technology, is not relevant. By its terms, it does not apply to requirements imposed pursuant to *federal* law. As shown above, the obligation to deliver PEG channels on a non-discriminatory basis arises from federal law, and the authority to enforce that duty is protected by 47 U.S.C. § 531(c). In any case, Plaintiffs are not restricting Comcast's use of transmission technology. Comcast may choose its technology – but it must do so in a way that satisfies its duty to deliver the PEG channels on a non-discriminatory basis.¹⁴ Likewise, Comcast's argues that because the Cable Act does not require PEG channels, the section imposes no enforceable PEG obligations on operators. This is nothing more than a “greater includes the lesser” argument – a “discredited doctrine” where speech interests are at stake. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 762-769 (1988). The fact that a franchising authority may choose not to require PEG channels does not mean that if PEG channels are required, no federal obligations apply. Section 531(e) is proof to the contrary.

¹⁴ In its *Order*, the Court appeared to interpret the Plaintiff's position as claiming that there was an absolute prohibition against delivering the PEG channels in a digital format. That is not the case. What Plaintiffs believe the Cable Act creates is a duty to transmit in a manner so that the PEG channels are as accessible as the most accessible programming provided on the system. (For now, the most accessible programming is broadcast programming carried in an analog format.) If all programming were digital, PEG programming could be digital. It is even possible (depending on how it were done) that PEG channels could be provided in a digital format, while other channels were provided in analog, so long as the difference in format had no impact on the viewers or the users of the channels – as might be the case if all subscribers were automatically provided converter boxes at no charge. That is not the case here.

5. Plaintiffs Have Authority To Enforce PEG Obligations.

Contrary to Comcast's argument, municipalities, as the franchising authorities in Michigan, may seek to enforce the PEG obligations that arise under Section 531 (and of course, may seek to enforce the Michigan law and franchise requirements with respect to the designation of channels). The case primarily relied upon by Comcast to show that there is no private right of action under Section 531 actually (a) involves a subscriber action against a cable company; and (b) holds that the franchising authority has a right to enforce obligations under Section 531, including 531(e). *Leach v. Mediacom*, 240 F. Supp. 2d 994 (S.D. Iowa 2003), *aff'd per curiam*, 373 F.3d 895 (8th Cir. 2004). Moreover, *Leach* is inconsistent with the well-reasoned decision of the Second Circuit, concluding that subscribers (and PEG channels users) do have a private right of action under Section 531. *McClellan v. Cablevision of Conn., Inc.*, 149 F.3d 161 (2d Cir.1998).¹⁵ Under the reasoning of that decision, Plaintiff Gillette may also pursue an action for failure to provide the PEG channels in accordance with federal law.

C. Comcast's Failure to Provide PEG As Part of Basic Service, And its Imposition of Special Charges for the Channels, Are Actionable.

1. Plaintiffs May Maintain An Action Based on Comcast's Failure To Provide PEG on the Basic Service Tier.

Comcast recognizes that 47 U.S.C. § 543(b)(7) requires it to provide PEG channels as part of basic service, but argues that, even if the requirement were applicable, it cannot be

¹⁵ *Leach* rejected the Second Circuit's analysis based on *Alexander v. Sandoval*, 532 U.S. 275 (2001), which finds that there is generally no implied private right of action where a statute merely prohibits an entity from undertaking a particular activity, as opposed to focusing on the rights of the category of persons benefitted by the provision. In this case, however, the general rule does not apply. The Supreme Court, in the *Denver Area* passage quoted above, has recognized that Section 531, taken as a whole, creates "special cable system access rights." The Second Circuit's analysis is the correct one. For reasons suggested above, the overly broad statements in *Leach* – that PEG obligations spring solely from franchise agreements – are also incorrect.

enforced by the Plaintiffs. That argument is very narrowly shaped on this motion to dismiss. Comcast does not ask the court to determine whether the basic service requirement is applicable in Michigan communities.¹⁶ While Comcast makes some effort to argue that after its digitization of the PEG channels, the PEG channels will continue to be a part of the basic service tier, this, too, is an issue that cannot be disposed of on a motion to dismiss. The FCC has ruled, and the Supreme Court has affirmed, that the term “offer” under the Communications Act must be read from a user’s perspective. *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005) (“It is common usage to describe what a company ‘offers’ to a consumer as what the consumer

¹⁶ Comcast has argued that the requirement to provide PEG on basic service does not apply in communities where rates are subject to effective competition. Plaintiffs disagree. Where effective competition exists, Section 543(b) preempts federal, state and local authority to set rates for the provision of service. As a result, the provisions of Section 543 that are solely related to setting service rates no longer apply where there is effective competition. But other provisions of Section 543 remain applicable, including, for example, the consumer protection provisions reflected in 47 U.S.C. § 543(f) (prohibiting negative option billing). While Section 543(b)(7) has obvious relevance for setting rates (by defining what is subject to basic service tier rate regulation) the specific command that “each operator” shall provide “its subscribers” with a basic service tier including PEG channels is not conditioned in any way on the presence or absence of effective competition. The Conference Report discussion of this section includes an extensive discussion of how the “basic service tier” requirement in 47 U.S.C. § 543(b)(7) also serves Congress’s interest in preserving localism; it is not simply a rate regulation provision:

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

H. Rep. No. 102-628 at 85 (emphasis supplied). At least some FCC decisions support this reading, see n.21, *infra*, although the issue is not settled. In any case, for purposes of the motion to dismiss, Comcast does not claim it is subject to effective competition in all the Plaintiff communities, so the court may assume that the requirements of 543(b)(7) apply.

perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product. . .”). Likewise, the requirement that a cable operator “*provide its subscribers a separately available basic service tier*” consisting of PEG programming should be read from the perspective of a local subscriber attempting to view a PEG channel. 47 U.S.C. § 543(b)(7)(A) (emphasis added).

Under the Cable Act, a “service tier” is a “category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator.” 47 U.S.C. § 522(17). From a subscriber’s perspective, the question is not whether Comcast *states* that the channel is on the basic service tier, but whether it is *provided* in a manner such that it can be considered in the same “category” from the perspective of the customer. Based on the Complaint, which alleges that the channels are being offered on a discriminatory basis, and that subscribers will have to make special efforts and pay special charges to obtain the equipment to receive the channels, it is impossible to make that determination. Publicly available information emphasizes that there are likely to be significant factual questions about Comcast’s “basic service” claims. On its web site, in order to encourage people to subscribe to cable, Comcast compares its basic service to the basic service offered by satellite. With respect to satellite service, Comcast represents that the service requires a converter box; with respect to its own basic service, Comcast states that the equipment required is “none.” This is either a deceptive and unfair trade practice, actionable under state law by Plaintiff Gillette, M.C.L. 484.3302(3)(1), 3310(1)(a) (*see discussion infra*), or a clear indication that the PEG signals fall within a different “category” of service. Either way, the claim that Comcast’s offering violates the law cannot be dismissed on the merits.¹⁷ That is what the only other court to have considered the issue

¹⁷ The claim, it bears emphasizing, does not turn on whether PEG is offered in a digital or analog

concluded. *St. Petersburg v. Bright House Networks*, 2008 U.S. Dist. LEXIS 34569 (April 28, 2008).¹⁸

The crux of the matter, therefore, is whether Plaintiffs can enforce Section 543(b)(7). They clearly can, at least *indirectly*. Michigan law and the local franchises require Comcast to comply with federal law, and so a violation of 47 U.S.C. § 543(b)(7) is a violation of the local franchise, enforceable by Plaintiffs. *Thomas M. Cooley Law School v. Amer. Bar Assoc.*, 459 F.3d 705 (6th Cir. 2006).¹⁹ Courts have long recognized that federal standards may be incorporated into local laws and contracts, and support a claim. *Guardian Nat. Acceptance Corp. v. Swartzlander Motors, Inc.*, 962 F. Supp. 1137, 1141-1143 (N.D. Ind. 1997). This obvious point is ignored by Comcast. This case is a much easier one than *Guardian*, where the court had to determine whether there was a *federal* claim. Here jurisdiction is based on diversity, so unless the state and localities are prohibited from incorporating the federal requirement into state law or franchises (Comcast does not argue that they are), there is plainly a basis for a claim.

Second, as is evident on the face of Section 543, the Cable Act envisions that its provisions will be largely enforced by local franchising authorities applying rules adopted by the Federal Communications Commission. That local governments have the authority to enforce the

format. The issue arises because of the way in which Comcast has chosen to provide the channels.

¹⁸ The Florida court did so even though the Florida law, unlike the law in Michigan, specifically authorized Bright House to digitize PEG channels and provide them as part of a digital service. The absence of any similar provision in Michigan law indicates that Comcast is not free to dispose of the channels as it chooses.

¹⁹ Comcast's franchise agreement with Meridian Township requires it to provide at least eight PEG channels on the basic tier. (Complaint ¶ 24). In addition, the Meridian Township Ordinance requires Comcast to comply with federal law applicable to the carriage of PEG channels. Township Code § 70-91. (Complaint ¶ 25). Comcast's franchise agreement with Dearborn requires it to comply with "all laws and regulations of the State and Federal government or any administrative agency." (Complaint ¶ 26).

provisions of Section 543 is particularly clear in light of the amendments to 47 C.F.R. § 76.981 (negative option billing). The Commission added a sentence that prohibits states and localities from enforcing state and local laws that conflict with FCC regulations, a provision that would have been unnecessary if enforcement of Section 543 were left solely to the Commission. Instead, the FCC has recognized that there is concurrent state and local authority to enforce provisions of Section 543, *In The Matter Of Implementation Of Sections Of The Cable Television Consumer Protection And Competition Act Of 1992: Rate Regulation*, 10 FCC Rcd. 1226 (1994), and in other proceedings has specifically authorized localities to prevent “evasions” of Section 543, *In the Matter of Implementation Of Section Of The Cable Television Consumer Protection And Competition Act Of 1992 Rate Regulation*, 8 FCC Rcd. 5631, 5911 (1993).²⁰ Because jurisdiction is concurrent, and because enforcement of Section 543 is not left solely to the FCC, the issue here is at most one of primary jurisdiction – *who* should decide the question in the first instance. But the fact that there may be issues of primary jurisdiction over some parts of the claims raised by Plaintiffs does not justify dismissal of the action, or deprive the court of jurisdiction to maintain the status quo. *Boss v. Rockland Elec. Co.*, 468 A.2d 1055 (1983)

Finally, 47 U.S.C. § 401(b) authorizes “any party injured” by the failure of a company to comply with FCC regulations to bring a claim in court, and authorizes the court to enjoin the prohibited conduct. The Sixth Circuit has recognized that FCC rules and decisions in rulemakings are orders for purposes of Section 401(b), *Alltel Tenn., Inc. v. Tenn. Pub. Service Com’n.*, 913 F.2d 305, 308-309 (6th Cir. 1990). Here, as shown above, the FCC has specifically concluded that PEG channels must be provided as part of basic service absent a specific

²⁰ The FCC noted that prohibited evasions include “(1) implicit rate increases; (2) a significant decline in customer service without a similar decline in price; and (3) deceptive practices. 8 FCC Rcd. at 5917.

authorization from the franchising authority.²¹ All Plaintiffs may properly enforce the requirement.²²

Given the foregoing, Comcast's claim that there is no "implied private right of action" under Section 543 is beside the point. Plaintiffs' actions do not depend on any implied rights. But in addition to being irrelevant, Comcast's argument is wrong. Comcast claims, broadly, that there is no implied right of action under any provision of Section 543 (D. Mem. 13-14). The cases it cites, however, are all cases where *subscribers or competing operators* brought suit to challenge *specific rates* outside of the rate process prescribed in the Cable Act and the FCC's rules. Those rules envision a rate filing by the operator; a local review and decision; and an appeal to the FCC.²³ Such cases merely illustrate that where the law prescribes a specific process for review and relief, courts are reluctant to imply a right of action. No court has addressed whether *franchising authorities* have an implied right to enforce Section 543 (perhaps

²¹ The FCC has restated this obligation in many cases, including a case involving Comcast. *In the Matter of Social Contract for Comcast Cable Communications, Inc.*, 13 FCC Rcd. 3612 (1997) (unnecessary to protect against movement of PEG channels from basic because rules and statute require maintenance of PEG on basic tier); *In The Matter Of Annual Assessment Of The Status Of Competition In The Market For The Delivery of Video Programming*, 21 FCC Rcd. 2503, MB Docket No. 05-255 (2006) (operator required to provide basic service tier including PEG). The requirement is also specifically reflected in FCC regulations, 47 C.F.R. § 76.901(a) (basic service tier "shall" include PEG channels).

²² Anti-scrambling requirements, as embodied in the regulations at 47 C.F.R. § 76.630, are also enforceable under Section 401(b). However, facts that we have received since the complaint was filed indicate that the channels are no longer being scrambled. While those facts can technically be ignored on a motion to dismiss, there is no reason to burden the Court or the parties with an unnecessary claim. Because we are unable to see that Comcast would benefit from re-scrambling, if Comcast's counsel is willing to confirm that the company will not scramble the channels, the claim can be put to rest subject to that confirmation.

²³ *Mallenbaum v. Adelphia Communications Corp.*, 1994 WL 724981 at *6 (E.D. Penn. 1994) (concluding that "those subscribers residing in areas where no authority has sought FCC licensing are not intended to benefit from the 1992 Act, since rates in such municipalities are not regulated"); *Aventura Cable Corp. v. Rifkin/Narragansett South Florida CATV, L.P.*, 941 F. Supp. 1189, 1195 (S.D. Fla. 1996); *Insight Telecomms Co. v. Telecomms Bd. of Ky.*, 2006 WL 208828 (E.D. Ky. 2006) (competing cable operators).

because it is unnecessary given the other grounds for jurisdiction); and, more significantly, no court has decided whether franchising authorities or subscribers possess a right of action to challenge -- not rates -- but the placement of PEG programming on a tier other than the basic tier. The four-part test announced in *Cort v. Ash*, 422 U.S. 66 (1975) would require this court to imply a right of action, if the action were not directly available under the authority discussed *supra*. This is particularly so because the statute is written in terms of the obligation of the operator to "each subscriber," *Sandoval, supra*.

With respect to the first factor, the section was clearly intended to benefit subscribers such as Sharon Gillette. Plaintiffs, as franchise authorities, are tasked with protecting these subscribers, and have authority to act on their behalf.

With respect to the second and third factors, Congress made very clear that the purpose of this statutory section was to serve a particular benefitted class of the public: it was designed to ensure that "channels be available to all cable subscribers on the basis service tier and at the lowest reasonable rate." H. Rep. No. 102-628 at 85. Moreover, this case is unlike *Insight Telecomms Co. v. Telecomms Bd. of Ky.*, 2006 WL 208828 (E.D. Ky. 2006), where the court declined to find a private right of action (for a cable operator) after concluding that "the statute prescribes a specific administrative remedy for impermissible rate regulation." *Id.* at *8. This is not an instance where a subscriber is seeking to *bypass* administrative procedures. Comcast has essentially decided that the procedures do not apply at all. Here, the beneficiaries (Gillette) and typical administrative enforcers (Municipalities) of federal provisions are seeking to compel Comcast to comply with them. Surely the municipalities have the right to seek judicial support for their enforcement efforts. The fourth factor also cuts in favor of finding an implied right of

action because this is clearly not an area where enforcement would interfere with either state law or federal law.

2. Comcast's Rate Argument Fails To Recognize The Nature of the Claims Raised By Plaintiffs.

Comcast claims that even if rate issues could be raised in court, the claims would have to be dismissed because Comcast has a right to provide and charge for equipment required to receive service. It claims that there is a complete separation between equipment and service rates.

There is no such line. While the FCC's rate-setting formulae use one formula for service another for equipment, *total* "rates for the basic service tier" (not just the service) must be reasonable, 47 U.S.C. § 543(b)(1) taking into account the cost of equipment, 47 U.S.C. § 543(b)(3). The FCC recognizes that service *and* equipment rates must be considered in determining whether basic service rates are reasonable. *See, e.g., Comcast of Dallas, L.P.*, CSB-A-0719, Order, DA 05-681, 20 FCC Rcd. 5892, 5895 (Media Bur. 2005). This is particularly so where an operator shifts costs to consumers that the consumer was not previously required to bear by fundamentally changing the way it offers services. In such cases, the FCC has recognized that a locality may act to prevent an evasion of the duty to provide service at reasonable rates. *See, n.20, supra.*

The argument is flawed for two other reasons. Even if one assumes that Comcast could *justify* its rates in an appropriate proceeding, it has not and has never sought to do so. If the rates *may* be unreasonable, then Comcast has an obligation to justify them before acting, not afterwards. Plaintiffs may seek the assistance of this Court to ensure that Comcast does so.²⁴

²⁴ This does not require the Court to set rates; it simply requires the Court to declare that Comcast must comply with its obligations to justify rates.

Second, the manner in which Comcast plans to offer its service raises issues that go beyond rate issues. As this Court recognized “customers similarly situated – whose subscription says they are receiving the same service – will have different equipment costs imposed on them,” and as importantly “will pay for channels they are not able to access.” *Order* at 9. There are thus elements of discrimination and deception in the offerings that raise issues under state consumer protection laws which are designed to prohibit unfair and deceptive practices. Section 543 does not preempt state or local authority to protect consumers or to address matters related to the way in which an operator offers services except where those actions are inconsistent with FCC rules, *see supra*, p. 21 (regulation of negative options); *Comcast Cablevision of Sterling Heights, Inc. v. City of Sterling Heights*, 178 Mich.App. 117, 443 N.W.2d 440 (Mich. App. 1989). Consumer protection laws, including M.C.L. 445.903, 445.911, continue to apply under the Uniform Franchise Act, M.C.L. 484.3302(3)(l). Plaintiff Gillette, as a subscriber, has authority under Michigan law to challenge practices that violate the consumer protection laws, and so do Plaintiff Municipalities, as compliance with those laws is a condition of the existing franchise contract (a condition absolutely consistent with the Uniform Franchise Act). For now, on the motion to dismiss, that is enough to sustain the action.

II. PLAINTIFFS’ CHALLENGE TO COMCAST’S SUBSCRIBER NOTICES IS NOT MOOT.

Comcast contends that the Plaintiffs’ challenge to its subscriber notices is moot because it “could not use those notices for any future channel relocation.” (D. Mem. 18-19). Apparently, Comcast claims this to be true because it did not relocate the channels by “the announced date” in the notices. (D. Mem. 18). However, the relevant FCC rule only requires a cable operator to give subscribers notice of a change “a *minimum* of thirty (30) days in advance of such changes.”

47 C.F.R. § 76.1603(b) (emphasis added).²⁵ Moreover, a case is not moot because Comcast voluntarily claims that it will cease to rely on the 2007 notices or similar notices in the future.

As the Supreme Court put it:

[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. A controversy may remain to be settled in such circumstances, e.g., a dispute over the legality of the challenged practices. . . . This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

United States v. W. T. Grant Co., 345 U.S. 629, 632-633 (1953) (internal citations omitted); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (city's "repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.").

Under these circumstances, Comcast has the "heavy" burden of demonstrating that "there is no reasonable expectation that the wrong will be repeated." *W.T. Grant*, 345 U.S. at 633. Comcast has wholly failed to meet that burden here. The company's vague promise that "it will take a fresh look" at its notice after this case is insufficient. (D. Mem. 20). If this Court's injunction is lifted, there is a very real possibility that Comcast will rely on either the 2007 notice or a notice that is similarly flawed. Thus, unless Comcast is conceding that the Plaintiffs' are entitled to judgment because Comcast's notices were in fact deficient, the Plaintiffs are entitled to this Court's determination of the notices' sufficiency, and appropriate injunctive relief to prevent recurrence of the harm.

²⁵ The reference to 47 C.F.R. § 76.309(c)(3)(i)(B) in the Plaintiffs' Complaint was in error. (Complaint, ¶ 47). The Court properly recognized that "the parties referenced additional bases for notice requirements in oral argument, and the expectation that notice be accurate is fundamental." (*Order*, 10). The Complaint should have referred to 47 C.F.R. § 76.1603(b). Comcast did not challenge this technicality in its Motion to Dismiss.

While that is enough to dispose of the motion to dismiss, it is important to emphasize that at this stage of the proceeding, Plaintiffs were only concerned with the notice that triggered the litigation – the notice of the intended channel move. However, Comcast is also providing other notices through its website and possibly elsewhere that appear likely to violate the company's obligation under state and federal law to provide accurate information and to avoid false and misleading information.