

**BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.**

In the Matter of	)	
	)	
Petition for Declaratory Ruling Regarding Primary	)	MB Docket No. 09-13
Jurisdiction Referral in <i>City of Dearborn et al. v.</i>	)	
<i>Comcast of Michigan III, Inc. et al.</i>	)	CSR-8128
	)	
Petition for Declaratory Ruling of the City of	)	CSR-8127
Lansing Michigan	)	
	)	
Petition for Declaratory Ruling of The Alliance	)	CSR-8126
For Community Media, <i>et al.</i>	)	

**REPLY COMMENTS OF COMCAST CORPORATION**

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## SUMMARY

In its initial Comments, Comcast Corporation established that the Petitions for Declaratory Ruling must be considered in the broader context of the competitive marketplace for multichannel video and other advanced services, and demonstrated that our proposed digitization of PEG channels in Michigan was part of the larger transition of our cable systems to digital technology. The comments filed by parties supporting the Petitions agree that there is a competitive marketplace and that they would have no issue with Comcast's digitization efforts if Comcast were to transition immediately to an all-digital network. Thus, fundamentally, their disagreement is with Comcast's decision to pursue a gradual, as opposed to a flash-cut, transition of channels from analog to digital. But our more gradual approach is more practical and more consumer-friendly than to force every customer to obtain a set-top box for each and every TV (as our major competitors do). And our approach is fully consistent with the law.

The comments confirm that the answers to the Dearborn Petition's questions are found in the Communications Act. No commenter offers a viable or persuasive legal theory to support the Petitioners' efforts to block or control Comcast's conversion of analog PEG channels to digital. No commenter offers any lawful theory for how the Commission may disregard the statutory definition of the basic service tier, which is tied to the program channels delivered to a customer for a set rate, and adopt the Dearborn Petition's reading, which hinges on the equipment needs of the particular customer. Neither Section 623(b)(7) of the Communications Act nor Section 611 say, or even suggest, that it is impermissible for a cable system to include channels within the basic service tier that may require customers to obtain supplementary equipment.

Some comments repeat, but offer no legal support for, the Petitioners' claim that Congress gave PEG channels the same carriage rights (such as "viewability") that it expressly

gave *only* to commercial broadcasters under Section 614 of the Act. Likewise, commenters mistakenly claim there is a PEG non-discrimination carriage rule by misreading the legislative history to Section 623(b)(7) of the Act. Such legislative history speaks only of non-discriminatory access by *programmers* for *use* of PEG channels, but says nothing about the manner of transmitting PEG channels over the cable system.

Most notably, the comments supporting the Petitions fail to address the restriction in Section 624(e) that “[n]o State or franchising authority may prohibit, condition, or restrict a cable system’s use of any type of subscriber equipment or any transmission technology,” or the Commission’s confirmation that this provision of the Act prohibits local governments from interfering with a cable operator’s use of digital technology. Nor does any commenter attempt to reconcile this clear statutory directive with Petitioners’ claim that it is for them – and not Comcast – to decide when and how Comcast may use digital technology to transmit PEG channels.

To the extent the comments even mention state law, they confirm Comcast’s concern that a grant of the Dearborn Petition would interfere with the efforts of various states to govern their political subdivisions through the enactment of state franchising legislation. There is no credible reading of Section 611 that suggests Congress intended to insulate localities from applicable state law. The Commission should continue its longstanding respect for the power of states to define the scope of a local government’s cable franchising authority, and avoid undermining state laws that constrain local regulation of PEG channels.

Finally, as to comments that echo the Dearborn Petition’s claim that Comcast’s proposed PEG digitization was implemented with less than perfect execution, we acknowledge that technological advancements in cable services are never seamless. Comcast had a detailed plan to

minimize customer disruption and confusion in Michigan, and in fact sought to promote awareness of PEG channels in the process. Examples of isolated instances of customer concerns do not represent the broad experience of our customers. The overwhelming preponderance of our customers have the option of choosing from among multiple alternative all-digital service providers, and the imperatives of such a competitive marketplace provide powerful incentives for us to make the digital transition as seamless as possible for our customers.

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**REPLY COMMENTS OF COMCAST CORPORATION**

Comcast Corporation (“Comcast”)<sup>1</sup> hereby replies to comments filed in response to the captioned Petitions for Declaratory Ruling (“Petitions”).<sup>2</sup> Each of the Petitions seeks Commission clarification of issues relating to cable’s delivery of Public, Educational, and Governmental (“PEG”) programming.<sup>3</sup> A significant portion of the comments filed in this proceeding focus on the accessibility, technical quality, and functionality problems ascribed to AT&T’s U-verse PEG product. Because no commenter contends that these problems relate to Comcast’s provision of digital PEG channels, we do not reply to these AT&T-specific

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<sup>1</sup> As with our Comments of Comcast Corporation filed March 9, 2009 (“Comcast Comments”), we file these reply comments on behalf of its operating subsidiaries.

<sup>2</sup> The Commission sought comments on these petitions and established the comment cycle in two public notices. *Entities File Petitions for Declaratory Ruling Regarding Public, Educational, and Governmental Programming*, Public Notice, MB Dkt. No. 09-13, DA 09-203 (rel. Feb. 6, 2009); *Extension of Time and Waiver of Reply and Service Rules Concerning Petitions for Declaratory Ruling Regarding Public, Educational, and Governmental Programming*, Public Notice, MB Dkt. No. 09-13, DA 09-531 (rel. Mar. 13, 2009).

<sup>3</sup> Petitions filed by the City of Dearborn (“Dearborn”) *et al.* (CSR-8128), Alliance for Community Media (“ACM”) *et al.* (CSR-8126) and the City of Lansing (CSR-8127) (“Lansing”). Comcast refers to these Petitions individually as “Dearborn,” “ACM,” and “Lansing” as needed for clarification within this Reply.

comments. Nor do we discuss at any length those allegations and predictions that have been made regarding the migration of PEG channels in individual communities other than those of the Petitioners. We do respond to, and refute, the claims of those who persist in trying to prevent PEG channels from being included in the digital migration that is essential to enable Comcast and other cable operators to deliver the new and improved services that consumers expect.

Numerous comments submitted in support of the Petitions describe the PEG programming carried in various communities, and emphasize the value and quality of that programming. Comcast recognizes the value in PEG programming.<sup>4</sup> We have carried and funded PEG channels across the country for many years, and we will continue to do so. The questions raised in the Dearborn Petition do not address the value of PEG programming. Rather, they present the issue of whether PEG channels are legally entitled to preferential carriage that can constrain the ability of cable operators to provide PEG channels in a digital format.

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<sup>4</sup> Many commenters describe the important local information provided by some government access channels, and suggest that PEG channels are a primary source of emergency information within their communities. Comcast does not dispute that many communities put important local information on their government channels. But the facts do not support comments suggesting that PEG channels play a primary role in the dissemination of emergency information. First, a portion of homes in every community do not subscribe to cable television service. For example, in Dearborn, Comcast customers account for less than 40% of households, and in Detroit, Comcast serves less than 25% of homes. *See* Dearborn Petition at Ex. C (Transcript of Hearing on Pl.s' Motion for Prelim. Inj., Case No. 08-10156 (E.D. Mich. January 14, 2008) at 102-103 (Dearborn), 108 (Detroit)). Second, as compared to local broadcast status, PEG channels are lightly viewed. Third, the Emergency Alert Service provides the primary means of government dissemination of emergency information, including, when activated, information alerts over *all* channels on cable systems. *See* 47 C.F.R. § 11.11(a) (EAS capabilities for various services, including cable systems); 47 C.F.R. § 11.11(d) (LFAs may use any EAS codes authorized by the FCC). Besides, for the 70% of Comcast's customers who have a digital service, PEG channels are already fully viewable in digital. The notion that digitizing PEG channels will fatally undermine a ubiquitous means of communicating public safety information does not comport with reality.

## I. CABLE OPERATORS DELIVER PEG PROGRAMMING IN A HIGHLY COMPETITIVE DIGITAL MARKETPLACE.

As explained in our comments, Comcast's plan to digitize PEG channels on the basic tier on Michigan cable systems was part of our general transition to digital technology in a dynamic and competitive market.<sup>5</sup> No commenter disputes that Comcast and other cable operators now face an increasingly competitive marketplace of all-digital competitors that includes DirecTV, Dish Network, Verizon FiOS, and AT&T U-verse.<sup>6</sup> Commenters supporting the Petitions largely disregard Comcast's need to transition our systems to digital — a competitive imperative if we are to deliver the quantity, quality, and type of services that today's consumers demand.

The comments confirm that the concerns raised by the Dearborn Petition represent a disagreement with Comcast over *how* to best navigate the digital transition of its cable systems. The Dearborn Petition, after all, concedes, “[i]t is obviously the case that a cable operator may provide all of its signals in a digital format.”<sup>7</sup> Other commenters agree that the Dearborn Petition would be moot if, instead of gradually converting PEG and other programming to

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<sup>5</sup> See Comcast Comments at 2-3, 9.

<sup>6</sup> Comments demonstrate the underlying facts of the competitive marketplace. See, e.g., Comments of the City of Warren, Michigan (“City of Warren”) at 1 (“Warren is served by three cable operators — Comcast [ ], Wide Open West, and ... AT&T” and, like the rest of the continental United States, DBS providers); Comments of Montgomery County (Md.) Television, Access Montgomery Awareness and Image Study at 28 (Montgomery County is served by Comcast, Verizon FiOS, and RCN in addition to satellite services); Comments of the Charter Township of Clinton (Mich.), *et al.* at 1 (filing by “Michigan communities, most of which are served by both Comcast and AT&T, [many of them] also served by WOW and satellite”); Comments of City of Waukegan, Michigan at 1 (lauding cable competitor AT&T U-verse as an “innovation that increases choice and competition”); Comments of Michigan Cable Action at 1 (lauding “U-verse’s more flexible, IP-based technology to respond to customer demands” and noting extent to which “all companies [are forced] to listen [ ] carefully to customer demands and respond if they want customers to choose them as their provider”); Comments of Joliet Jackhammers Professional Baseball Club at 1 (games uniquely available to Chicago market over AT&T U-verse); Comments of Plainfield Charter Township, Michigan at 2 (“new technologies being deployed by companies like AT&T, Comcast and Charter [ ] only improve the expansion of IP based networks through competition and benefit citizens”).

<sup>7</sup> Dearborn Petition at 21.

digital, Comcast converted all analog programming to digital in a single step.<sup>8</sup> However, instead of the “flash-cut” option that everyone concedes is clearly permitted, Comcast (like other operators) has chosen a more gradual migration of analog programming to digital, which improves our opportunity to make the transition as customer-friendly as possible. Some commenters (and the Petitioners) may disagree with that strategy, but it is a reasonable choice for Comcast to make, and one that reflects our own customers’ gradual transition from analog to digital television receiving equipment.

Some commenters echo the Dearborn Petition claim that it is “discrimination” for Comcast to convert PEG channels to digital if the system retains any analog channels on the basic tier.<sup>9</sup> As explained in our initial comments, however, Comcast’s proposal to convert PEG channels to digital format in Michigan does not discriminate against PEG channels. Rather, Comcast has been converting a variety of non-PEG basic tier analog signals to digital format and adding new digital programming to its basic service tiers over the past three years.<sup>10</sup> A recent example is Comcast’s Washington, D.C. system, where as part of a larger change in its channel lineup, Comcast is now converting two analog channels on its basic tier to digital, including

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<sup>8</sup> *See, e.g.*, Comments of Free Press at 13 (“When done on a universal basis, moving basic cable channels into a digital tier is neither illegal nor necessarily bad policy .... However, the selective shift of only PEG content to digital transmission ... runs afoul of federal law and good public policy.”). *Cf.* Comments of City of Fitchburg, Wisconsin at 1; Comments of the City of Houston, Texas at 4-5; Comments of School Board of Palm Beach County, Florida at 1; City of Warren at 4; Comments of Wayland (Mass.) Community Access and Media, Inc. at 1. In contrast, Verizon provides PEG programming in an all-digital format, and the comments reveal no outcry from local governments or the PEG community against Verizon’s digital carriage of PEG channels.

<sup>9</sup> *See, e.g.*, Comments of Alliance for Community Media *et al* (“ACM”) at 4; Comments of Free Press at 10-13.

<sup>10</sup> *See* Comcast Comments at 5-7.

“The Comcast Network.”<sup>11</sup> Comcast similarly has converted analog programming to digital in other parts of the country, including a number of channels that remained on the basic service tier in digital format.<sup>12</sup> Similar changes are occurring with the channels delivered in the “expanded basic” tier, on which we have converted numerous channels from analog to digital delivery. Comcast now delivers far more channels overall in digital than it delivers in analog. Claims of discrimination in Comcast’s digital carriage of PEG channels simply do not comport with Comcast’s record of a gradual conversion of analog channels to digital, and its addition of new digital channels to its basic service tier. Further, such charges of discrimination entirely ignore the ongoing shift in consumer viewing habits away from analog channel selections and toward greater use of digital program neighborhoods.<sup>13</sup>

## **II. THE COMMENTS MAKE CLEAR THAT DIGITIZATION OF PEG CHANNELS IS LAWFUL UNDER THE COMMUNICATIONS ACT, EVEN IF BROADCAST CHANNELS CONTINUE TO BE DELIVERED IN ANALOG.**

The specific questions presented in the Dearborn Petition all center on whether PEG programming may lawfully be carried in a digital format on basic service while analog

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<sup>11</sup> Washington Post, March 13, 2009 (p. A-12) (advertisement showing that the Comcast Network (Channel 8) “will now require a digital box”; WMPT-SD will be “Available to Limited Service customers with a digital box.”). See Attachment A hereto.

<sup>12</sup> Comcast’s proposal to digitize Michigan PEG channels was similar to the manner in which Comcast has digitized many other program services, including ones owned by Comcast. This has been the case both in Michigan and elsewhere. For example, since January 2006, Comcast has converted two networks it owns — The Comcast Network and New England Cable News — from analog to digital, and given them new channel assignments above channel 100, while keeping them on the basic tier, on at least eleven cable systems serving dozens of communities in Comcast’s New England region alone (Connecticut, Massachusetts, New Hampshire, Rhode Island, and Vermont). In addition to channels it owns, Comcast converted nine other analog program channels to digital, assigned them new channel locations above channel 100, and kept them on the basic service tier in dozens of cable systems serving communities in its New England and Midwest regions (Illinois, Indiana, Michigan, Ohio, and Wisconsin).

<sup>13</sup> Comcast Comments at 10-11.

programming continues to be carried on that tier. *None* of the comments supporting the Dearborn Petition offer *any viable legal theory* to prohibit such digital carriage of PEG channels.

Comcast's initial Comments demonstrated that both the Communications Act and the Commission's rules clearly permit digitizing PEG channels on the basic tier.<sup>14</sup> Comcast, and other commenters opposing the Petitions, established the following: (1) there can be only one basic service tier, and it is defined not by the type of consumer equipment in a given household, but by the program channels delivered to the home for the basic service rate; (2) PEG channels do *not* have the same cable carriage rights as broadcast channels; (3) the Communications Act and its legislative history do *not* establish a requirement that PEG channels be carried in a manner that is "nondiscriminatory" as compared to broadcast channels; and (4) Congress clearly directed in Section 624(e) of the Act that no "franchising authority may prohibit, condition, or restrict" a cable system's use of digital equipment or transmission technology. Few of the comments supporting the Petitions offer any legal analysis or argument on these issues, and none directly addresses the Communications Act provisions that allow for Comcast to offer digital PEG channels on the basic service tier.

**A. There Is a Single Basic Service Tier That Is Not Dependent Upon Subscriber Equipment.**

The Act defines a "service tier" solely in terms of services delivered for a given rate.<sup>15</sup> Further, the requirement for a single tier of basic service means that the definition of the tier

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<sup>14</sup> See Comcast Comments at 12-15.

<sup>15</sup> 47 U.S.C. § 522(17).

cannot vary based on individual subscriber equipment needs.<sup>16</sup> The legal frailty of the Dearborn Petition's core premise — that the basic service tier is defined by varying customer equipment needs — is underscored by the Commission's existing requirement that cable operators carry digital broadcast signals in digital on the basic service tier.<sup>17</sup> In other words, the Commission *already* requires (and has for years) cable systems to deliver some broadcast signals in digital on the basic tier, so that analog-only homes need a converter to view certain basic tier channels; the fact that these analog-only homes need such a converter does not mean those channels suddenly are no longer on the basic tier.

Section 623 of the Communications Act and the FCC's implementing rate regulations clearly distinguish between service and equipment rates, and *nowhere* do they suggest that it is impermissible (or "discriminatory") to include channels within a service tier that may require certain customers to obtain supplementary equipment.<sup>18</sup> Indeed, Commission precedent has long

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<sup>16</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, 8 FCC Rcd. 5631, 5744 ¶ 169 (1993) (concluding that "the plain language of . . . the Act contemplates the existence of only one basic tier").

<sup>17</sup> *See Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd. 2598 ¶ 102 (2001) ("In the context of analog must carry, it has been the Commission's view that the Act contemplates there be one basic service tier. We believe that in the context of the new digital carriage requirements, it is consistent with the statutory language to require that a broadcaster's digital signal must be available on a basic tier such that all broadcast signals are available to all cable subscribers at the lowest priced tier of service, as Congress envisioned.").

<sup>18</sup> A few comments support, but do not supply legal authority for, the Dearborn Petition's argument that Section 623(b)(7)'s PEG channel carriage requirement applies even in the absence of rate regulation. *See, e.g.*, Comments of ACM at 4; Comments of Detroit *et al.* at 9–11 (ancillary jurisdiction); Comments of New Jersey Board of Public Utilities at 3 (public forum); Comments of the City of New York at 2–3. The statute is unambiguous, and the comments supporting the Dearborn Petition on this point cannot avoid the statutory language or the binding precedent of the Commission and the D.C. Circuit which hold that Section 623(b)(7) applies only in rate-regulated systems. *See Comcast Comments* at 26–27; *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd. 2598 ¶ 102 ("Section 623(b)(7) is one of those rate regulation requirements that sunsets" upon the deregulation of rates) (citing *Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 192 (D.C. Cir. 1995)). Nor does the Commission have ancillary jurisdiction to impose on *rate deregulated* cable systems a statutory requirement that Congress imposed only on *rate regulated* systems. *See Digital Broadcast Content Protection*, 18 FCC Rcd. 23,550, 23,563 n. 70 (2003) (explaining that under *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), the Commission's ancillary jurisdiction for "cable television regulation cannot be antithetical to a basic regulatory parameter" set by Congress).

recognized that channels that are included in the basic service rate are still considered part of the basic service tier even if some customers cannot see the channels without converters. The Commission directly addressed this specific issue in the early days of the current rate regulation regime. In *TCI of Southeast Mississippi*, the Commission faced a rate appeal where the local franchising authority had denied rate recovery for two basic service channels because “some subscribers must use a converter to receive the channels carrying C-Span I and C-Span II ... due to the limited capacity of the television sets being used by those particular subscribers.”<sup>19</sup> The Commission did not question the varying equipment needs associated with particular basic service channels and unequivocally concluded that “[t]he City was unreasonable in reducing TCI’s maximum permitted level for the two channels carrying C-Span I and C-Span II on the basic service tier.”<sup>20</sup>

This 1995 decision confirmed that the Commission’s rate regulations allow cable operators to deliver channels on the basic service tier, even if the equipment used by some customers does not allow them to see every channel. The principle is a fundamental component of cable rate regulation from which the Commission has never strayed. Not a single commenter provides any credible legal support for the claim that the basic service tier cannot simultaneously include both analog and digital channels.

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<sup>19</sup> 10 FCC Rcd. 8728 at ¶ 12 (1995).

<sup>20</sup> *Id.* ¶ 15.

**B. There Is No “Viewability” Requirement Applicable to Cable Carriage of PEG Channels.**

Several commenters argue that PEG channels should be accorded the same carriage rights as television broadcast stations.<sup>21</sup> However, those seeking “broadcast equivalence” for PEG channels offer no legal basis for the Commission to ignore Congress’s clear decision to establish a “viewability” requirement *only* for broadcast channels, and *not* for PEG channels.<sup>22</sup> In Section 614 of the Act, Congress specifically required that *broadcast stations* invoking statutory must-carry rights be “viewable via cable on all television receivers of a subscriber which are connected to a cable system.”<sup>23</sup> No such viewability requirement exists in Section 611 for PEG channels. Nor does Section 623(b)(7) impose or imply such a condition in the requirement that rate-regulated cable systems include PEG channels on the basic service tier.

**C. There Is No PEG Channel “Non-Discriminatory Carriage” Requirement.**

A few commenters supporting the Petitions argue that Comcast’s digital carriage of PEG channels on a basic tier that contains any analog programming constitutes “discrimination”

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<sup>21</sup> Comments of ACM at 2 (PEG channels must be “accessible and functional . . . as local commercial channels”); Comments of Free Press at 11 (Commission must “place PEG content on an equal footing to commercial channels that the cable operator offers on the basic service tier.”); Comments of Houston, Texas at 4; Comments of Montgomery County, Maryland at 5 (arguing that because Congress required the carriage of broadcast and PEG channels on the basic tier, “[i]t follows that a cable operator may not somehow subdivide that tier” by delivering PEG programming in digital “as compared to signals carried in fulfillment of Sections 614 and 615.”); Comments of NATOA at 12 (Congress “drafted § 623(b)(7)(A) of the Act specifically to ensure that PEG channels received the same treatment as commercial broadcast channels . . .”); Comments of Warren at 4 (“PEG channels should be treated the same as all channels on the basic tier, including the broadcast channels.”).

<sup>22</sup> See Comcast Comments at 14-15; Cablevision Comments at 16-17; NCTA Comments at 10-11. See also *MPAA v. FCC*, 309 F.3d 796, 805-06 (D.C. Cir. 2002) (unless other doctrines of statutory interpretation require otherwise, Congress’ silence on a point in one provision of a statute must be given meaning and effect where it has spoken on the point elsewhere in the statute).

<sup>23</sup> 47 U.S.C. § 534(b)(6)-(7).

against PEG.<sup>24</sup> As explained in our initial comments, and supported by several other commenters, the Communications Act does not contain a “nondiscrimination” provision applicable to the manner in which cable operators transmit PEG channels.<sup>25</sup> Commenters supporting the Petitions, however, repeat the Petitioners’ mistaken claim that the legislative history of Section 623(b)(7) of the Act shows that Congress intended to impose a “nondiscriminatory carriage” requirement for PEG channels but simply failed to do so.<sup>26</sup>

These commenters wrongly argue that Congress specified in legislative history the manner in which a cable operator could transmit PEG channels, citing the following passage: “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.”<sup>27</sup> Read in context, the full discussion in the House Report makes clear that this passage has *nothing* to do with the manner in which a cable system *transmits* PEG channels. To the contrary, the text explains how PEG channels “provide[ ] ordinary citizens, non-profit organizations, and traditionally underserved minority communities an opportunity *to provide programming*” over the cable system.<sup>28</sup> “Nondiscriminatory use” in this context means no discrimination in deciding *who gets to use* the channels for programming purposes. It does not

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<sup>24</sup> See, e.g., Comments of ACM at 4; Comments of Detroit at 11; Comments of Free Press at 10-13; Comments of Lansing at 7; Comments of NATOA at 11-13.

<sup>25</sup> See Comcast Comments at 29-30; Cablevision Comments at 16-17; NCTA Comments at 11-12.

<sup>26</sup> Comments of ACM at 4; Comments of Detroit at 10-11; Comments of Free Press at 10-13; Comments of Lansing at 7-8; Comments of NATOA at 12-13. In any event, as explained in Comcast’s Comments at 5-11, and in these Reply Comments, we have not singled out PEG channels for digital carriage on the basic tier.

<sup>27</sup> H.R. Rep. No. 102-628 at 85 (1992) (emphasis added).

<sup>28</sup> *Id.* (emphasis added).

refer to the technical manner in which the cable operator delivers the PEG channels to subscribers.

There is no nondiscrimination requirement related to PEG transmission specified in the statute or supported by the legislative history. The only reference in legislative history to the availability of PEG channels on a “nondiscriminatory” basis was describing the ability of different access programmers to put content on PEG channels, not the technical transmission of PEG channels over the cable system.

**D. Section 624(e) of the Act Prohibits LFAs From Dictating the Manner of PEG Carriage on Cable Systems.**

Section 624(e) of the Act states that “[n]o State or franchising authority may prohibit, condition, or restrict a cable system’s use of any type of subscriber equipment or any transmission technology.”<sup>29</sup> The Commission has held that the provision means that “local franchising authorities may not control whether a cable operator uses digital or analog transmissions.”<sup>30</sup> Our initial comments explained that the relief requested in the Dearborn Petition cannot be reconciled with the broad statutory directive of Section 624(e), because to grant the relief requested would validate the ongoing effort of the Dearborn Petitioners to “prohibit, condition, [and] restrict” Comcast’s use of digital transmission technology.<sup>31</sup> Given the breadth of Section 624(e)’s prohibition on LFA control of cable system technology choices, certain additional arguments found in the comments are particularly at odds with the law.

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<sup>29</sup> 47 U.S.C. § 544(e).

<sup>30</sup> *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd. 5296, 5356 ¶ 141 (1999).

<sup>31</sup> Comcast Comments at 16–17, 30–32.

For example, Montgomery County, Maryland suggests, with no mention of Section 624(e), that cable operators have “a common carrier-like obligation to distribute programming.”<sup>32</sup> This argument appears to confuse a cable operator’s obligation not to censor the *content* of PEG channels<sup>33</sup> with an undefined, unwritten common carriage “nondiscrimination” requirement applicable to the manner of carriage of PEG channels. But that notion simply cannot be reconciled with Congress’s unambiguous command that “[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.”<sup>34</sup>

The statutory prohibition on cable operator control of PEG channel *content* in Section 611(e) does not in any way support arguments that cable operators may not control the *manner* in which cable systems transmit PEG channels. Nothing in either the text of the Act or its legislative history suggests that Congress intended to do any more than keep PEG channels free from cable operator censorship.<sup>35</sup> The plain language of Section 611(e) states that “a cable operator shall not exercise editorial control over any public, educational, or governmental use of channel capacity,” thus limiting the prohibition to editorial control over the *use* of the channel by

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<sup>32</sup> Comments of Montgomery County, Maryland at 5-8. The “common carriage” claim rests on a novel amalgamation of: (1) pre-1984 Communications Act law; (2) cases describing the law of common carriers before there was a Communications Act; and (3) Congress’ intent that public access channels contribute to “a wide diversity of information sources.”

<sup>33</sup> 47 U.S.C. § 531(e).

<sup>34</sup> 47 U.S.C. § 541(c).

<sup>35</sup> The legislative history to Section 531 demonstrates an overriding Congressional intent that respected both the right of third parties to deliver PEG programming free of the cable operator’s ability to control that content, *as well as* a concern that PEG programming be provided “in a manner least restrictive on the cable operators’ First Amendment rights” to select and arrange program content. H.R. Rep. No. 98-934 at 35, 1984 U.S.C.C.A.N. 4655, 4672.

PEG programmers.<sup>36</sup> It does not mention or suggest any limits on a cable operator's control over the technology it uses for the *transmission* of the programming over the cable system: operator discretion over that aspect of its system technology is expressly protected by Section 624(e).

\* \* \* \* \*

In short, none of the many comments supporting the Petitions offers any legal theory to sustain the relief requested by the Dearborn Petition, which would have the effect (and has already had the effect) of preventing Comcast from using digital technology to deliver PEG channels.

### **III. GRANT OF THE DEARBORN PETITION WOULD INTERFERE WITH THE STATES' ABILITY TO GOVERN THEIR POLITICAL SUBDIVISIONS.**

Commenters supporting the Petitions fail to address the significant impact the Dearborn Petition would have on state video franchising legislation and on a state's right to control the role of local governments in video franchising.<sup>37</sup> Unlike the jurisdictional issues presented in the Commission's *Section 621 Franchising Order*,<sup>38</sup> the issue presented in the Dearborn Petition is whether a political subdivision of a state can make use of Section 611(c) of the Act (which

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<sup>36</sup> 47 U.S.C. § 531(e). Although the statute does not explicitly define "PEG use of channel capacity," its text and history leave no doubt that it means "use of channel capacity" by programmers. The best example may be found in Section 611(d), which requires LFAs to have "rules and procedures under which the cable operator is permitted to use such channel capacity for the provision of other services if such channel capacity is not being used for the purposes designated." *Id.* (emphasis added). Likewise, the legislative history explains Congress's belief that "the needs and interests of cable subscribers would be better served by allowing unused PEG channel capacity to be used by the operator for the provision of other cable services, rather than those channels remaining 'dark' until use of this channel capacity for PEG purposes increases." H.R. Rep. No. 98-934 at 47 (emphasis added).

<sup>37</sup> See Comcast Comments at 17-22.

<sup>38</sup> *Implementation of 621(A) (1) of the Cable Communications Policy Act of 1984*, 22 FCC Rcd. 5101, 5109 ¶ 16 (2007) ("*Section 621 Franchising Order*").

recognizes the ability of a “franchising authority” to enforce PEG access commitments) to insulate itself from the sovereign franchising authority of the state.<sup>39</sup>

Where a state has enacted legislation to eliminate its local government’s cable franchising authority, or to specify the provisions of any local franchise, any references in Section 611 to a “franchising authority” must be read to include only the *lawful* extent of local government authority under applicable state law.<sup>40</sup> That is the only result that comports with Congress’s statement that it “did not intend to upset the traditional relationships between States and local governments, under which a local government . . . derives its authority from the State.”<sup>41</sup> Further, a federal district court in Florida has specifically rejected the concept that Section 611 insulates local government PEG requirements from changes in state law.<sup>42</sup> The Commission has recently acknowledged -- and respected -- the power of states to define the lawful extent of local franchising authority in the *Section 621 Franchising Order*, observing that the Commission did “not address any aspect of an LFA’s decision-making to the extent that such aspect is specifically addressed by state law.”<sup>43</sup> Here, there is *at least* as much reason for the Commission to respect the authority of the States over their political subdivisions. Accordingly, the

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<sup>39</sup> 47 U.S.C. § 531(c) states in relevant part that “A franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity.”

<sup>40</sup> As we noted in our initial comments, twenty states have recently passed franchising legislation. Comcast Comments at 18 n. 45.

<sup>41</sup> H.R. Rep. No. 98-934, at 40 (1984). *See also* Comcast Comments at 21 & n. 63 (additional authorities). Comments filed by the Michigan Municipal League demonstrate that some Michigan municipalities believe parts of that state’s Uniform Video Services Local Franchise Act are “invalid” under the Michigan Constitution. *See* Comments of Michigan Municipal League at 2-3 nn. 1-2. However, there has been no court challenge to the state franchising law.

<sup>42</sup> *City of St. Petersburg v. Bright House Networks, LLC*, Nos. 8:07-cv-01205-T-24-MSS, 8:07-cv-01206-T-23-TBM, 2008 WL 5231861 (M.D. Fla. Dec. 12, 2008).

<sup>43</sup> 22 FCC Rcd. 5101, 5102 ¶ 1 n. 2.

Commission's response to the Dearborn Petition should respect and leave unaltered those state laws that constrain local governments' regulation of PEG channels.

#### **IV. COMCAST HAS ATTEMPTED TO FACILITATE A SMOOTH TRANSITION TO DIGITAL SERVICE.**

To be sure, any technological change that affects the customer experience will result in some instances of customer dissatisfaction and imperfect execution. As one cable commenter noted, "the steady march of technological advancements in video communications ... have always worked to the ultimate benefit of consumers," even if "they have not always been seamless [or] without some inconvenience."<sup>44</sup> Knowing this, Comcast attempted to implement a detailed plan to minimize disruption in its Michigan communities. We provided each household with written notice of the planned transition, and ran over 30,000 public service announcements explaining that PEG programming was moving to channels 900-925.<sup>45</sup> Comcast also ran a number of newspaper ads explaining the change in channels. And, as with any channel re-alignment, we informed our customer service representatives of the planned changes, and explained to them the potential for various types of inquiries from customers, including the availability of a free converter.<sup>46</sup>

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<sup>44</sup> Comments of Bright House Networks ("Bright House") at 2.

<sup>45</sup> See Attachment B hereto (Declaration of Leslie Brogan) ("Brogan Decl.") at ¶¶ 4-6. As explained in our initial comments, the location of all PEG channels in a PEG program digital neighborhood would help to solidify the identity of PEG programming as large numbers of our customers adopt digital viewing habits (*i.e.*, less "channel surfing"). Comcast Comments at 9-11. As another example of creating a programming neighborhood in a higher range of digital channels, Comcast recently moved sports programming on its Washington, D.C. cable system from the 200 channel range to a new sports programming neighborhood in the 700 – 799 range. *See* Attachment A hereto (Washington Post, Mar. 13, 2009, at p. A12) (available at <http://www.washingtonpost.com/xxxxxx>).

<sup>46</sup> See Brogan Decl. at ¶ 8.

The comments of Dearborn and the Michigan Municipal League raise specific, isolated instances of consumer concern over Comcast's planned digital conversion of PEG channels in Michigan, but this is not a complaint proceeding designed to resolve individual factual disputes.<sup>47</sup> Instead, this docket was triggered (as to Comcast at least) by a petition seeking clarification of the legal issues implicated by digital PEG carriage on the basic service tier. To the extent commenters raise instances of customer dissatisfaction, or isolated examples of Comcast employees handling customer interactions, it is unfair and inaccurate to suggest that these descriptions represent the broad experience of our customers.

Comcast has acknowledged that the customer communications for the Michigan digitization plan could have been improved. As we expand our digital video offerings and reconfigure our channel lineups to meet customer demand, we gain valuable insight from our interactions with our customers and with federal, state, and local governments. Comcast uses this input to improve our processes and our communications with customers and government entities, and to attempt to make the digital transformation of our systems as smooth as possible. The presence of alternative providers of multichannel video, broadband Internet access, and telephone services ensures we have a compelling and growing competitive motive to make this transition as painless as possible for our customers.

Ultimately, none of the isolated factual allegations changes the fundamental law and policy supporting Comcast's plan to convert Michigan PEG channels to digital carriage on the

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<sup>47</sup> The presentation of such detailed facts seems inappropriate in this docket, where the Petitions seek clarification of legal issues, and where we have limited ability to verify or test the various anonymous statements and opinions submitted by Dearborn and others. For example, unqualified statements such as one alleging what "[m]ost people were told" by Comcast obviously represent impressions, and not measured facts. We attempt, however, to respond generally to some of the factual allegations in the attached Declaration of Leslie Brogan (Attachment B).

basic service tier. Nor do they warrant any broad assumption that Comcast's manner of educating customers and government officials about the digital evolution of its cable systems was unreasonable.

## V. CONCLUSION.

For the foregoing reasons, Comcast respectfully requests that the Commission deny the Dearborn Petition, respond to the seven questions posed in the Dearborn Petition consistent with the suggested responses in Comcast's initial Comments, and rule on the other Petitions in a manner that preserves the ability of cable operators to transmit PEG channels in a digital format.

Respectfully submitted,

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*Counsel for Comcast Corporation*

April 1, 2009

# **Attachment A**

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# Great news: Comcast is improving your channel lineup!

Check out these channel changes coming in April 2009 for Washington, D.C.

The following channels will be added on:

**NEW!**

Wednesday, April 1

 Channel 247†

Tuesday, April 14

MPT-HD Channel 219†

SI TV Channel 635†

WNVC-CHIN Channel 278†

WNVT-BVN Channel 277†

WNVT-EURO Channel 280†

WNVT-VTV Channel 279†

MPT-Select Channel 268†

MPT V-me Channel 269†

If you currently subscribe to Digital Starter, you will receive these channels at no additional cost beginning Tuesday, April 14!

 ShopNBC

Channel 283

 TBN

Channel 290

 WORD

Channel 294

 INSPIRATION

Channel 295

 C-SPAN3

Channel 105

 jewelry television

Channel 184†

 Bloomberg TELEVISION

Channel 103

 IMN  
Home & Health Network

Channel 119

 DAYSTAR TELEVISION NETWORK

Channel 287

 EWTN

Channel 291

To help make room for these and future channel additions, the following channels, including the sports neighborhood, will be moving on Tuesday, April 14.

Channel:	Moving From:	Channel:	Moving From:
WNVC-SABC	192 to 272	FOX College Sports Pacific	264 to 722
WNVT-FRCH	193 to 273	ESPN Classic	265 to 723
WNVT-NIG	194 to 274	FOX Soccer Channel	267 to 725
WNVC-RUS	195 to 275	GOL TV English	268 to 726
WNVC-NHK	196 to 276	Speed	271 to 729
WNVC-WORLD	197 to 271	NBA TV	273 to 749
WETA-Create	200 to 265	CBS College Sports	274 to 732
WETA-Kids	201 to 266	NFL Network	275 to 733
Big Ten Network	257 to 715	NHL Network	276 to 734
Horse Racing TV	259 to 717	The Tennis Channel	277 to 735
TV Games	260 to 718	MLB Network	280 to 738
FOX College Sports Atlantic	262 to 720		
FOX College Sports Central	263 to 721		

The following channels will now require a digital box on:

Wednesday, April 1  
The Comcast Network\*  
Channel 8

Tuesday, April 14  
WMPT-SD†  
Channel 22

These channel migrations are not related to the federally-mandated Digital Broadcast Transition, which is currently under way and will be completed by June 12, 2009.

### Music Choice is changing its lineup to offer you more choices!

On Wednesday, April 15, Music Choice plans to change its lineup on Comcast Digital Cable. Most channels will move to new locations, and some will be replaced by more popular listening options.

Sounds of the Season	401 to 433	Party Favorites	423 to 425
Today's Country	402 to 429	90'S	425 to 421
Classic Country	403 to 431	80'S	426 to 422
Hip-Hop & R&B	408 to 402	70'S	427 to 423
Rap	409 to 405	Solid Gold Oldies	428 to 424
R&B Hits	408 to 407	Smooth Jazz	429 to 435
Classic R&B	406 to 408	Jazz	430 to 436
R&B Soul	407 to 409	Blues	431 to 437
Metal	410 to 415	Reggae	432 to 411
Rock	411 to 414	Soundscapes	433 to 434
Classic Rock	413 to 412	Easy Listening	434 to 439
Adult Alternative	414 to 418	Contemporary Christian	438 to 432
Alternative	415 to 416	Gospel	439 to 410
Hit List	421 to 401	Pop Latino	442 to 443
Kidz Only!	422 to 427	Musica Urbana	443 to 442

The following channels will be added:

MC Mixtape	403
Dance/Electonica	404
Hip-Hop Classic	406
Retro Rock	413
Classic Alternative	417
Stage & Screen	426
Toddler Tunes	428
True Country	430
Singers & Swing	436
Romances	446

The following channels will no longer be available:

Americana  
Arena Rock  
Big Band & Swing  
Bluegrass  
Dance  
Electonica  
Opera  
Rock 'En Español  
Retro-Active  
Singers & Standards  
Show Tunes  
Showcase

Don't have Comcast Digital Cable?  
Call 1.800.COMCAST today!

**Comcast.**

†HDTV equipment and/or an HDTV capable digital converter are required. ‡Available to Limited Service customers with a digital box. \*Available to Digital Starter customers or above. †Available to customers who subscribe to CableLatino. Subscription to Limited Basic Service (or, as applicable, the lowest level of service) is required to receive other levels of service. Viewing digital signals requires compatible equipment. Service is subject to terms and conditions of Comcast Cable Subscriber Agreement. Call 1.888.COMCAST for complete details about service, prices and equipment. Other restrictions apply. © 2009 Comcast. All rights reserved. © 2009 Eclipse Marketing Services, Inc. All Rights Reserved. S021048

# **Attachment B**

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**BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.**

In the Matter of	)	
	)	
Petition for Declaratory Ruling Regarding Primary	)	MB Docket No. 09-13
Jurisdiction Referral in <i>City of Dearborn et al. v.</i>	)	
<i>Comcast of Michigan III, Inc. et al.</i>	)	CSR-8128
	)	
Petition for Declaratory Ruling of the City of	)	CSR-8127
Lansing Michigan	)	
	)	
Petition for Declaratory Ruling of The Alliance	)	CSR-8126
For Community Media, <i>et al.</i>	)	

**DECLARATION OF LESLIE BROGAN**

I, Leslie Brogan, declare as follows:

1. I am Senior Director of Government Affairs for the Michigan Region of Comcast Cable Communications.
  
2. I have read the foregoing "Reply Comments of Comcast Corporation" in MB Docket No. 09-13 and verify that, to the best of my knowledge, information and belief formed after reasonable inquiry, the factual statements contained therein are true and correct, and attest in particular to the following. I am also submitting this declaration in response to some of the many factual allegations made in this proceeding by others concerning Comcast's plan to digitize PEG channels in Michigan, and our efforts to implement that plan.
  
3. Comcast has long supported PEG programming and works cooperatively with local governments and PEG providers to address the needs and interests of PEG

providers, franchising authorities, our communities, and customers. This is as true in Michigan as it is throughout all of Comcast's service territories.

4. In preparation of its planned conversion of PEG to digital, Comcast sought to implement a detailed plan to notify customers and local governments of the change, and to minimize customer disruptions in its Michigan communities, including notifying all Michigan local governments in the communities we serve 60 days in advance of the intended January 2008 date for our migration of PEG channels to digital in PEG channel neighborhood in the channel range of 900 – 925.

5. We also mailed to every customer household a written notice of the conversion of the PEG channels to digital. The notices advised basic customers that they could “continue to receive PEG programming by acquiring a digital converter, digital service, or compatible equipment” and invited them to call Comcast so it could “provide information on the easiest way for you to view these channels on your service.” The notices also informed digital customers about the channel lineup changes.

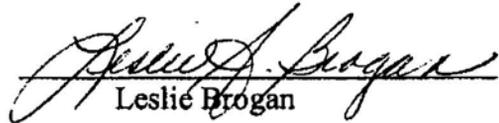
6. In addition to mailed notices, Comcast created public service announcements (“PSAs”) specific to PEG digitization and ran them on its Michigan cable systems, on a wide variety of channels, over 30,000 times between November 2007 and January 11, 2008. The PSAs explained that PEG programming was moving to channels 900-925 on the respective cable systems.

7. In hopes of ensuring a smooth transition after converting PEG channels to digital, Comcast made plans to give every household subscribed to analog service, and that wanted to continue to view PEG channels, the option of a free converter box for one year, to enable them to continue to receive the programming.

8. As with any channel re-alignment or service change, we informed our telephone customer representatives of the planned changes, and explained to them the potential for various types of inquiries from customers, including the availability of a free converter. Comcast instructed its representatives to be clear that the conversion of PEG to digital was not part of, or in any way caused by or a result of, the broadcast DTV transition.

9. Though the customer experience with the conversion of PEG channels to digital was not perfect notwithstanding our preparations and efforts, Comcast had no trouble providing customers who inquired with a free converter in December 2007 and January 2008, leading up to the planned PEG channel conversion. We were prepared to fulfill requests for free converters from as many of our analog-only customers who asked for one.

I declare under penalty of perjury that the foregoing is true and correct.

  
Leslie Brogan

Executed on March 31, 2009

**CERTIFICATE OF SERVICE**

I, Nichele Rice, do hereby certify on this 1st day of April, 2009 that a true and correct copy of the foregoing Reply Comments of Comcast Corporation has been sent via U.S. mail, postage prepaid to the following:

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*/s/ Nichele Rice*