



October 8, 2008

MEMORANDUM TO CLIENTS

Re: Federal Court to Refer Questions About Digital Carriage of PEG Channels to FCC

The United States District Court for the Eastern District of Michigan has issued an order in a case brought against Comcast by several Michigan communities opposing Comcast's plan to convert PEG channels from analog to digital. The court, which had previously issued a preliminary injunction blocking Comcast from altering the way in which the PEG channels were transmitted, denied, in part, Comcast's motion to dismiss the local franchising authorities' complaint. In addition, the court announced that it was going to refer six specific questions relating to the communities' complaint to the FCC and was holding any further action in the case in abeyance pending receipt of answers to those questions from the FCC.

Background. Earlier this year, Comcast announced that it was going to convert its analog PEG channels to digital on its systems in several Michigan communities. Under Comcast's conversion plan, these signals, which had been part of the analog basic tier, would still be delivered in the clear and would be available as part of basic service to customers who either had a digital ready television or a digital set-top box. Comcast also indicated that it would provide each household with a digital converter box at no cost for one year.

Several of the affected communities then brought suit to block Comcast from implementing its PEG channel conversion proposal. These communities alleged that Comcast's plan would violate franchise provisions requiring basic tier carriage of the PEG channels as well as various provisions of the Cable Act, including the provision requiring that the basic service tier subject to local rate regulation contain any PEG channels provided pursuant to the local franchise agreement. The court granted a preliminary injunction requiring Comcast to continue to provide the PEG channels in their current analog format and channel location. Shortly thereafter, House Energy and Commerce Committee Chairman John Dingell (D-MI) held a hearing at which he lambasted Comcast for proposing to "discriminate" against PEG channels by carrying them in a manner that made them less easily accessible than analog broadcast signals. While Comcast conceded that it had not handled the situation as well as it could have, it nonetheless defended the legality of its proposal, a position that was reflected in the motion to dismiss that it filed with respect to the communities' lawsuit.

In its motion to dismiss, Comcast argued that the local franchise provisions that allegedly mandated basic tier carriage of PEG channels had been superseded and rendered unenforceable by the enactment of a state franchising law by the Michigan legislature. Comcast also argued that Section 611 of the Cable Act, which grants local franchising authorities the right to establish and enforce franchise requirements regarding the provision or use of PEG capacity, did not give the local authorities any greater rights with respect to Comcast's provision of PEG channels than the statewide franchise law. And Comcast contended that its conversion of the PEG channels from analog delivery to digital delivery did not violate the minimum basic tier provision in

Section 623(b)(7) and that, in any event, because that requirement is part of the Cable Act's rate regulation provisions, disputes over the content of the basic tier fall within the FCC's exclusive authority to resolve.

Court Decision. The court first addressed Comcast's assertion that the local franchising provisions cited as the basis for Comcast's alleged obligation to carry PEG channels on the basic tier were inconsistent with, and thus unenforceable under, the Michigan state franchising law. According to the court, the state law was itself in conflict with, and thus preempted by, federal law – namely, the authority granted to local franchising authorities by Section 611 of the Cable Act to establish and enforce PEG requirements. The court was not persuaded by Comcast's argument that the state was the ultimate source of franchising authority and that Section 611 permits, but does not require franchising authorities to require PEG obligations. Rather, the court concluded that because the state law restricts PEG channel requirements, it was preempted by federal law whether the franchising authority is a state or a municipality. Notably, in addressing the preemption issue, the court cited legislative history from the Cable Act indicating that Congress intended PEG channels be “available to all community members on a nondiscriminatory basis.”

Turning to the communities' Section 623(b)(7) claim, the court rejected Comcast's claim that disputes over the content of the basic tier were within the FCC's exclusive jurisdiction. According to the court, Section 401(b) of the Communications Act gave the communities an “express right of action in federal court to enforce an order from the FCC.” The court found that this provision encompassed claims based on an alleged failure to comply with “an order resulting from a rulemaking proceeding.” Thus, citing the Commission's orders adopting rules implementing Section 623(b)(7), the court concluded that it had the requisite jurisdiction to consider the communities complaint that Comcast's proposed conversion of PEG channels from analog to digital would violate its obligation to carry those channels on the basic tier.

Having concluded that the communities had stated a cognizable claim for relief under the Communications Act, the court considered whether it should apply the doctrine of “primary jurisdiction” and allow the FCC the initial opportunity to resolve the issues raised by the communities. The court found that the complaint raised issues that Congress simply could not have foreseen when it enacted Section 623(b)(7) since digital technology was essentially unknown at that time. In particular, the court stated that Comcast was correct in arguing that, under a literal interpretation of the definition of a “basic service tier,” its proposals may not be “in technical violation” of the requirement that PEG channels be available on basic, but that the communities also are correct that, from the consumer's point-of-view, Comcast's proposed changes may circumvent the substantive intent of the basic tier carriage requirement.

The court's solution was to turn to the FCC for its “special expertise.” Specifically, the court announced that it was going to refer six questions to the FCC and stay action in the case pending a ruling from the Commission. The six questions that the court intends to submit to the FCC are as follows:

- 1) When cable operators shift costs to consumers, can a locality act to prevent an “evasion” of the duty to provide service at reasonable rates?

- 2) Does the requirement to provide PEG channels on the basic service tier apply in communities where rates are subject to “effective competition”?
- 3) Does the court look from the consumer’s point-of-view to determine whether: (a) a programming service is part of the basic service tier; and (b) digitization of the PEG channels is “discriminatory” because some customers may be required to obtain additional equipment to view the channels?
- 4) Are cable operators precluded from charging for equipment used in connection with the reception of PEG channels on the basic service tier?
- 5) Can PEG channels be digitized, require special equipment to be accessed, and still be considered available on the basic service tier?
- 6) Is digitization of PEG channels “discriminatory” because some customers may be required to obtain additional equipment to view the channels?

The court gave Comcast and the communities until October 17, 2008 to submit input on the above questions; after considering any input received from the parties, the court will submit the questions to the FCC.

The court’s decision, and the questions it has formulated for presentation to the FCC, are problematic insofar as they could lead to a ruling that digital signals (including not only PEG channels, but digital broadcast television signals) that are provided “in the clear” for no additional service charge are not part of basic if additional equipment is needed by some subscribers to receive such channels. Not only is this currently the case for most systems, it likely will continue to be the case for systems that do not convert to “all-digital” operations. In addition, the court does not appear to have identified all of the issues that its decision may raise, such as whether a franchise provision that expressly requires basic tier carriage of PEG channels is still enforceable even if an operator is not required by federal law to maintain a basic tier containing PEG channels.

Please call us with any questions regarding this matter.

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