

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

DATE: 02/22/10

DEPT. NCBB

HONORABLE Donna Fields Goldstein JUDGE

L. MCDONALD

DEPUTY CLERK

HONORABLE A. SLOCUM, COURTROOM ASSISTANT JUDGE PRO TEM  
Deputy Sheriff

NONE

ELECTRONIC RECORDING MONITOR

Reporter

8:30 am

EC051903

Plaintiff  
Counsel

CITY OF GLENDALE  
VS  
MARCUS CABLE ASSOCIATES, LLC

Defendant  
Counsel

FILED JANUARY 14, 2010

\*\*NON-APPEARANCE\*\*

**NATURE OF PROCEEDINGS:**

**COURT'S RULING ON SUBMITTED MATTER**

The Court rules on the Order to Show Cause regarding Preliminary Injunction this date, as further reflected in the Court's Order on Plaintiff's Order to Show Cause for Preliminary Injunction, which is signed and filed this date.

In summary, Preliminary Injunction shall issue.

A true and correct copy of said Order and this minute order are mailed to counsel as indicated below.

**CLERK'S CERTIFICATE OF MAILING/  
NOTICE OF ENTRY OF ORDER**

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 02-22-10 upon each party or counsel named below by depositing in the United States mail at the courthouse in Burbank, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: February 22, 2010

<b>MINUTES ENTERED</b> 02/22/10 COUNTY CLERK
--

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\*\*NON-APPEARANCE\*\*

NATURE OF PROCEEDINGS:

John A. Clarke, Executive Officer/Clerk

By:   
Lindsey McDonald

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Superior Court of the State of California  
for the County of Los Angeles

**FILED**

LOS ANGELES SUPERIOR COURT

FEB 22 2010

JOHN A. CLARKE, CLERK  
*L. McDonald*  
BY L. McDONALD, DEPUTY

CITY OF GLENDALE  
Plaintiff,  
vs.  
MARCUS CABLE ASSOCIATES, LLC  
dba CHARTER COMMUNICATES, and  
DOES 1-50 inclusive  
Defendant

) Case No. EC 051903  
)  
)  
)  
) Order on Plaintiff's Order to  
) Show Cause for Preliminary  
) Injunction  
)  
)  
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)

In this matter taken under submission on February 5, 2010, the Court hereby Grants the requested preliminary injunction and enjoins the defendant, its agents, insurance carriers, successors and assigns and those acting in concert or participation with them, until the conclusion of this action or further order of the Court, from changing the channel assignment on Charter's cable television system in Glendale (the "Cable System") for what is currently Channels 6, 15, 16, and 21 in the City unless and until any such changes are agreed to by the City. The Court bases its order on the following reasoning and determinations.

1                                    Background

2            The Federal Communications Act authorizes franchising  
3 authorities to require cable operators to set aside channels for  
4 public, educational, or governmental use. See 47 USC 531 (also  
5 known as section 611 of the Communications Act). Public access  
6 channels are available for use by the general public.

7 Educational access channels are used by educational institutions  
8 for educational programming. Governmental access channels are  
9 used for programming by local government entities. The  
10 franchising authorities are local or state governments.

11  
12            California law now provides that the state government is  
13 the franchising authority. This is enacted at Public Utility  
14 Code sections 5800 to 5970, which is known as the Digital  
15 Infrastructure and Video Competition Act of 2006 ("DIVCA").  
16 Section 5810 identifies the Legislative intent for the act.  
17 Previously, local governments had allocated franchises to cable  
18 providers. When it passed DIVCA, the Legislature found that  
19 state-level regulation was necessary because of the increase in  
20 competition for video and broadband services, i.e., satellite  
21 and internet providers were competing with cable providers to  
22 provide video and broadband services and the Legislature found  
23 that a state-issued franchise would ensure that they were all  
24 competing on a "level playing field".

25  
26            This dispute arises because the Defendant franchisee seeks  
27 to change the channel assignment of the Plaintiff City of  
28 Glendale's ("The City") government and educational channels. The

1 City has sued for declaratory and injunctive relief to prevent  
2 such a change without its permission as required by Section 5870  
3 of the Public Utilities Code, and seeks this Preliminary  
4 Injunction during the pendency of the litigation.<sup>1</sup>

5  
6 Public Utilities Code section 5870 regulates public,  
7 educational, and governmental channels ("PEG"). Section 5870(a)  
8 requires the holder of a state franchise to designate a  
9 sufficient amount of capacity on its network to carry the same  
10 amount of PEG channels as were carried under the terms of any  
11 franchise with a local entity. Defendant does not challenge that  
12 Section 5870 sets forth this requirement to which it is bound.  
13 Indeed, it can not argue with the state's authority to require  
14 public access channels in exchange for a public franchise.  
15 Franchise authorities may require PEG channels under federal  
16 law. 47 USC Section 531(a). Congress has stated that public  
17 access programming serves the vital interest of "providing the  
18 widest possible diversity of information sources and services to  
19 the public. Goldberg v. Cablevision Sys. Corp. (2001) 261 F.3d  
20 318, 328 (citing 47 U.S.C. § 521(4)). Further, the Second  
21 Circuit Federal Court of Appeals found that "[p]ublic access  
22 channels are often the video equivalent of the speaker's soap  
23 box or the electronic parallel to the printed leaflet. They  
24 provide groups and individuals who generally have not had access  
25 to electronic media with the opportunity to become sources of  
26  
27

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28 <sup>1</sup> A Temporary Restraining Order was issued by the Court on January 15, 2010

1 information in the electronic marketplace of ideas. . . .  
2 [These] channels also contribute to an informed citizenry."  
3

4 This dispute therefore concerns subdivision (b) of Section  
5 5870, which provides:

6 "(b) The PEG channels shall be for the exclusive use of the  
7 local entity or its designee to provide public,  
8 educational, and governmental channels. The PEG channels  
9 shall be used only for noncommercial purposes. However,  
10 advertising, underwriting, or sponsorship recognition may  
11 be carried on the channels for the purpose of funding PEG-  
12 related activities. The PEG channels shall all be carried  
13 on the basic service tier. To the extent feasible, the PEG  
14 channels shall not be separated numerically from other  
15 channels carried on the basic service tier and the channel  
16 numbers for the PEG channels shall be the same channel  
17 numbers used by the incumbent cable operator unless  
18 prohibited by federal law. *After the initial designation*  
19 *of PEG channel numbers, the channel numbers shall not be*  
20 *changed without the agreement of the local entity unless*  
21 *the change is required by federal law.* Each channel shall  
22 be capable of carrying a National Television System  
23 Committee (NTSC) television signal."  
24

25 The Defendant notified the City of its intention to change  
26 the designation of the PEG channel numbers 6, 15, 16, and 21 to  
27 3,32,95 and 97. The City did not agree to the change. In  
28 response, the defendant notified the City that notwithstanding

1 the City's objection it would proceed with such changes on  
2 January 19, 2010. This lawsuit, filed on January 14, 2010, in  
3 which the City seeks an injunction to bar the Defendant from  
4 changing the designation of these channels, is the result of  
5 this notification.

6 Section 5870(p) provides that a court of competent  
7 jurisdiction shall have exclusive jurisdiction to enforce any  
8 requirement under section 5870 or to resolve any dispute  
9 regarding the requirements set forth in this section.

10 Further, the Public Utilities Commission in 2006 adopted  
11 Rulemaking for a General Order to implement the structure of  
12 DIVCA. In that General Order, the PUC gives the authority to  
13 regulate and enforce section 5870 and other consumer protection  
14 provisions of the Act to the local authorities.

15  
16 The City's complaint alleges the following:

17  
18 1. That the Defendant is violating section 5870 by seeking  
19 to change the channel designation without the consent of the  
20 Plaintiff and that this will cause the Plaintiff irreparable  
21 damages because it has expended money over more than a decade to  
22 create an identity and a channel association with these channel  
23 designations;

24 2) A judicial determination of whether the City of Glendale  
25 may or may not unreasonably refuse to consent to the change in  
26 channel designations under section 5870 is necessary; and

27 3) An injunction to bar the Defendant from making any  
28 changes to the channel designations is necessary.

1  
2 On January 22, 2010, the Defendant filed a Cross-Complaint  
3 against the Plaintiff to seek declaratory relief with the  
4 following two causes of action:  
5

6 1) a judicial determination whether the Defendant has a  
7 duty to provide free I-Net service to the Plaintiff in  
8 perpetuity, whether the Plaintiff has an ownership interest in  
9 I-Net, and whether the Defendant is obligated to provide cable  
10 modem service at no charge to certain public buildings; and

11 2) whether the Plaintiff may unreasonably refuse to permit  
12 the Defendant to change the channel designations.  
13

14 Plaintiff's Request for Preliminary Injunction  
15

16 Under CCP section 526(a), a preliminary injunction may be  
17 issued in the following cases:  
18

19 1) When it appears by the complaint that the plaintiff is  
20 entitled to the relief demanded, and the relief, or any part  
21 thereof, consists in restraining the commission or continuance  
22 of the act complained of, either for a limited period or  
23 perpetually.

24 2) When it appears by the complaint or affidavits that the  
25 commission or continuance of some act during the litigation  
26 would produce waste, or great or irreparable injury, to a party  
27 to the action.  
28



1           3) When it appears, during the litigation, that a party to  
2 the action is doing, or threatens, or is about to do, or is  
3 procuring or suffering to be done, some act in violation of the  
4 rights of another party to the action respecting the subject of  
5 the action, and tending to render the judgment ineffectual.

6           4) When pecuniary compensation would not afford adequate  
7 relief.

8           5) Where it would be extremely difficult to ascertain the  
9 amount of compensation that would afford adequate relief.

10          6) Where the restraint is necessary to prevent a  
11 multiplicity of judicial proceedings.

12          7) Where the obligation arises from a trust.

13  
14          The Plaintiff has the burden of establishing grounds exist  
15 for the injunction with evidence offered under oath. Ancora-  
16 Citronelle Corp. v. Green (1974) 41 Cal. App. 3d 146, 148. The  
17 granting or denial of a preliminary injunction rests in the  
18 sound discretion of the Court and is based upon a consideration  
19 of all the particular circumstances of each individual case.  
20 Froemer v. Drollinger (1960) 183 Cal. App. 2d 787, 788-789. If  
21 granted, the preliminary injunction does nothing more than to  
22 preserve the status quo until the merits of plaintiffs' claim  
23 can be adjudicated. Id.

24  
25          Plaintiff alleges that there are grounds for issuing the  
26 preliminary injunction because it is likely that it will prevail  
27 on the merits as it did not agree to a change in the PEG  
28 channels as required by Section 5870 (b) and that any change to

1 the channels while this suit is pending will cause irreparable  
2 injury to the public interest and the community that relies on  
3 the existing channels. The City has submitted proof of these  
4 claims in the declarations of Ritch Wells, Jonathon Kramer and  
5 Sue Miller.

6 Defendant primarily makes two claims: 1) that the statutory  
7 authority provided to the city in 5870(b) must impliedly contain  
8 a provision that the city's permission may not be unreasonably  
9 withheld, and 2) that its Franchise Agreement is a "contract"  
10 that contains a covenant of good faith and fair dealing which  
11 the city is breaching by unreasonably withholding its approval  
12 to the defendant's financial detriment.

13  
14 The Court agrees with the City that the clear statutory  
15 interpretation leads to the conclusion that it will likely  
16 prevail in this matter and that it will suffer irreparable  
17 injury.

18  
19  
20 Defendant argues that it has not violated Section 5870(b)  
21 because the city has unreasonably withheld its permission and  
22 has violated the covenant of good faith and fair dealing  
23 contained in all contracts by refusing arbitrarily to agree to  
24 the requested changes. The defendant argues, therefore, that the  
25 City must exercise its statutory right reasonably or it somehow  
26 deprives the defendant of rights under its Franchise Agreement.

1           Regarding the interpretation of Section 5870, defendant  
2 agrees that the objective is to ascertain and effectuate  
3 legislative intent. Burden v. Snowden (1992) 2 Cal. 4th 556,  
4 562. When determining intent, Courts look first to the language  
5 of the statute, giving effect to its "plain meaning." Id.  
6 Although Courts may properly rely on extrinsic aids, Courts  
7 should first turn to the words of the statute to determine the  
8 intent of the Legislature. Id. "Where the words of the statute  
9 are clear, we may not add to or alter them to accomplish a  
10 purpose that does not appear on the face of the statute or from  
11 its legislative history." Id. Further, while every word of a  
12 statute must be presumed to have been used for a purpose, it is  
13 also the case that every word excluded from a statute must be  
14 presumed to have been excluded for a purpose. Arden Carmichael  
15 v. County of Sacramento (2001) 93 Cal. App. 4th 507, 515-516.

16           Here, the plain meaning of section 5870(b) is that the  
17 cable provider must keep the PEG channels on the same channel  
18 numbers that they were before and that the cable provider shall  
19 not change the channel numbers without the agreement of the  
20 local entity. The only condition is in the clause beginning  
21 with "unless", which is that when a channel realignment is  
22 required by federal law, then there is no need for the agreement  
23 of the local entity. There is no other language restricting the  
24 local entity's ability to refuse a change in the channel  
25 numbers.

26  
27           A review of the purpose of section 5870 reveals no purpose  
28 to impose such a restriction on the local entity. The purpose

1 can be determined first by examining Public Utilities Code  
2 section 5810(a)(2) After finding that state-level regulation is  
3 preferable in section 5810(a)(1), the Legislature stated in  
4 section 5810(a)(2) that legislation regarding this new process  
5 should adhere to certain principles. Section 5810(a)(2)(F)  
6 identifies one of these principles as to "[c]ontinue access to  
7 and maintenance of the public, education, and government (PEG)  
8 channels".<sup>2</sup>

9  
10 Section 5870 implements this Legislative intent. A brief  
11 review of its subsections reveals that this code section creates  
12 a comprehensive set of regulations for PEG channels. Subsection  
13 (a) requires the holder of a state franchise to offer the same  
14 number of PEG channels that had been provided before.  
15 Subsection (b) imposes the following requirements:

16  
17 1) PEG channels are for the exclusive use of the local  
18 entity or its designee to provide public, educational, and  
19 governmental channels.  
20  
21

22  
23 <sup>2</sup> And to ensure that the local municipalities had the  
24 authority to enforce the PEG provisions of DIVCA the PUC in its  
25 Rulemaking passed a General Order endows the localities with  
26 such authority. See *Rulemaking or Adoption of a General Order,*  
27 *Procedure to Implement Digital Infrastructure, Video Competition*  
28 *Act of 2006. D0703014.*

1           2) The PEG channels shall be used only for noncommercial  
2 purposes with advertising for the purpose of funding PEG-related  
3 activities.

4           3) The PEG channels shall all be carried on the basic  
5 service tier.

6           4) To the extent feasible, the PEG channels shall not be  
7 separated numerically from other channels carried on the basic  
8 service tier and the channel numbers for the PEG channels shall  
9 be the same channel numbers used by the incumbent cable operator  
10 unless prohibited by federal law.

11           5) After the initial designation of PEG channel numbers,  
12 the channel numbers shall not be changed without the agreement  
13 of the local entity unless the change is required by federal  
14 law.

15           6) Each channel shall be capable of carrying a National  
16 Television System Committee (NTSC) television signal.

17  
18           Subsections (c) and (d) permit local entities to request  
19 additional PEG channels when there are less than three PEG  
20 channels or when the PEG local programming on a given channel  
21 exceeds 56 hours per week.

22           Subsection (e) permits the holder of a state franchise to  
23 use a PEG channel for its own programming when the local entity  
24 does not use it for at least eight hours per day.

25           Subsection (f) provides that the content on a PEG channel  
26 is the responsibility of the local entity and the holder of the  
27 state franchise bears responsibility only for the transmission  
28 of the content.

1           Subsection (g) requires the local entity to ensure that  
2 its programming is submitted in a manner that is compatible with  
3 the cable network.

4           Subsection (h) provides for interconnection by means of  
5 cable, microwave links, satellite, or other reasonable means of  
6 connection between the holder of the state franchise and a cable  
7 provider.

8           Subsection (i) provides that a holder of a state  
9 franchise is not required to interconnect when the PEG content  
10 is branded with the logo, name, or mark of another cable  
11 operator or video service provider.

12           Subsection (j) provides that, in addition to the PEG  
13 channels, the holder of the state franchise must hold and  
14 provide a channel to carry state public affairs programming.

15           Subsection (k) identifies the expiration date for any  
16 obligations to provide and support PEG channel facilities and  
17 institutional networks and to provide cable services to  
18 community buildings.

19           Subsection (l) concerns obligations to make cash payments  
20 to local entities for the ongoing costs of PEG channel  
21 facilities or institutional networks.

22           Subsection (m) imposes a requirement that the cable and  
23 video service providers report the number of subscribers to help  
24 determine any payments due from the cable provider to the local  
25 entity.

26           Subsection (n) provides that a local entity may establish  
27 a fee to support PEG channel facilities.

1            Subsection (o) provides that the holder of a state  
2 franchise may recover the amount of any fee remitted to a local  
3 entity under this section by billing a recovery fee as a  
4 separate line item on the regular bill of each subscriber.

5 Subsection

6            (p) *provides that a Court of competent jurisdiction shall*  
7 *have exclusive jurisdiction to enforce any requirement under*  
8 *this section or resolve any dispute regarding the requirements*  
9 *set forth in this section, and no provider may be barred from*  
10 *the provision of service or be required to terminate service as*  
11 *a result of that dispute or enforcement action. (italics added.)*  
12

13            These requirements reveal that the legislature had created  
14 a specific, particular and complex statutory scheme for the PEG  
15 channels. Since the Legislature created such a specific and  
16 particular statutory scheme, it could have readily added  
17 language requiring a local entity to accept a channel re-  
18 alignment unless it had reasonable grounds to refuse the re-  
19 alignment. However, it did not enact such language.

20            Thus, when the principles for statutory interpretation are  
21 applied to the Legislature's statutory scheme for PEG channels,  
22 there are no grounds to imply any additional terms or provisions  
23 into section 5870(b). "Where the words of the statute are clear,  
24 we may not add to or alter them to accomplish a purpose that  
25 does not appear on the face of the statute or from its  
26 legislative history." Burden v. Snowden (1992) 2 Cal. 4th 556,  
27 562.  
28

1 Defendant has presented here no grounds to add or alter  
2 these words to accomplish the Defendant's purpose of limiting  
3 the Plaintiff's discretion other than its claim that its  
4 Franchise Agreement must contain a covenant of good faith and  
5 fair dealing which the City has violated by unreasonably  
6 withholding its agreement to the channel changes it proposes.  
7 Defendant, however, concedes that its Franchise Agreement is  
8 awarded pursuant to DIVCA and must be deemed to incorporate the  
9 terms of DIVCA. Accordingly, the court is not persuaded that if  
10 the statute under which the franchise agreement arises does not  
11 contain such a requirement, how such a requirement can be  
12 presumed in the Franchise Agreement. The cases on which the  
13 defendant relies are distinguishable as not arising under this  
14 statutory scheme. Defendant relies on *County of Tulare v. Dinuba*  
15 (1922) 188 Cal. 664. This case dates back to 1922, which was 20  
16 years before broadcast television or cable television began in  
17 the 1940's, and is of limited use to interpret the 2006 DIVCA.  
18 It also is inapposite. In the Tulare County case, the court  
19 based its decision on the fact that the franchisee had vested  
20 rights. DIVCA specifically provides that the franchisee under  
21 DIVCA has no vested rights whatever. In *County of Sacramento v.*  
22 *Pac. Gas & Elec. Co.* (1987) 193 Cal. App. 3d 300, 308 n5, also  
23 relied on by the defendant, the Court based its decision on the  
24 legislative intent, and specifically found that that the  
25 contract is required to contain the provisions dictated by the  
26 Legislature and that the parties are no more free to alter the  
27 legislative prescribed provisions through interpretation than  
28 they would be to expressly alter them.



1  
2 Finally, the decision to grant or deny a preliminary  
3 injunction is committed to the discretion of the trial court  
4 after the Court determines:

5 1) the likelihood that the plaintiff will prevail on the  
6 merits at trial, and

7 2) the harm to the plaintiff of denying the injunction  
8 relative to the harm to the defendant of granting the  
9 injunction.

10 Pleasant Hill Bayshore Disposal v. Chip-It Recycling (2001)  
11 91 Cal. App. 4th 678, 695.

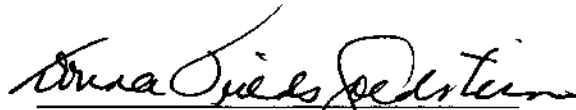
12  
13 Here, the Plaintiff has provided sufficient evidence that  
14 it will likely prevail on the merits at trial because, as noted  
15 above, it has offered evidence that it did not agree to the  
16 change in the channel numbers. With regard to the relative harm,  
17 the harm to the Plaintiff of denying the injunction is that the  
18 channel numbers for its PEG channels will be changed. If that  
19 occurs and its PEG numbers are changed during the litigation, it  
20 is difficult for the "bell to be unrung". Additionally, it will  
21 have to rebrand its programming with the new numbers and  
22 advertise to ensure that its viewers can find its programming.  
23 The court is convinced that there is a substantial risk of loss  
24 of viewership.

25  
26 With regards to the Defendant, the harm to the Defendant of  
27 granting the injunction is that it cannot proceed with its  
28 channel realignment in the City of Glendale, although it can

1 proceed in the other communities it serves that have granted it  
2 approval. However, it has no right to realign the Glendale  
3 channels and, if it realigns the channels, it will be violating  
4 a statute. Although it offers evidence to show that the channel  
5 realignment is in the best interests of the consumer, that  
6 Glendale and Burbank will be left behind because it is  
7 implementing this realignment throughout the other communities  
8 it serves, and that the channel realignment is necessary to be  
9 competitive, this evidence does not overcome the problem that  
10 the Legislature required the Defendant to obtain the Plaintiff's  
11 agreement to the change.

12  
13 Preliminary injunction shall issue.

14  
15  
16  
17 Dated this 19th day of February, 2010

18  
19   
20 Donna Fields Goldstein  
21 Superior Court Judge  
22  
23  
24  
25  
26  
27  
28