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12 **UNITED STATES DISTRICT COURT**  
13 **NORTHERN DISTRICT OF CALIFORNIA**  
14 **SAN JOSE DIVISION**

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16 **COMCAST OF CALIFORNIA II, L.L.C.** ) Case No. C03-02532 RS  
17 Plaintiff, )  
18 v. ) **DECLARATION OF SCOTT BINDER IN**  
19 **CITY OF SAN JOSE, CALIFORNIA,** ) **SUPPORT OF PLAINTIFF'S MOTION FOR**  
20 Defendant. ) **A PRELIMINARY INJUNCTION**  
21 ) **Date: August 13, 2003**  
22 ) **Time: 9:30 a.m.**  
23 ) **Judge: The Hon. Richard Seeborg**  
24 ) **Courtroom: 4**  
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1 I, Scott Binder, pursuant to 28 U.S.C. § 1746, hereby declare and state:

2 1. I am over the age of 18. I make this declaration in support of the Motion for a  
3 Preliminary Injunction brought by Plaintiff Comcast of California II, L.L.C. (“Comcast”). Unless  
4 otherwise stated, I have personal knowledge of the matters stated herein and, if called as a witness,  
5 could and would testify competently thereto.  
6

7 2. I am Regional Senior Vice President of Comcast Cable for the West Bay and South  
8 Bay areas of California, including the City of San Jose. In that position, I am responsible for,  
9 among other things, programming related issues affecting the City of San Jose. I have been  
10 involved in the cable industry for fifteen years, during which time I have served in a variety of  
11 capacities. I joined Comcast Cable in 1999. Prior to joining Comcast Cable, I worked for Time  
12 Warner for eleven years.  
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14 3. Channel capacity on a cable system is not unlimited, even with modern digital  
15 technology. Traditional cable systems have required approximately 6 MHz of capacity for each  
16 analog channel carried. Those systems tended to have a maximum capacity between a total of 350  
17 to 450 MHz, thereby allowing for 60 to 70 analog channels. Modern cable systems may implement  
18 digital technology allowing for multiple digital channels to be carried over the same 6 MHz that  
19 previously carried one. Due to technological and regulatory constraints, however, modern cable  
20 systems are not entirely digital, so that much of the available capacity is still consumed by analog  
21 channels. Moreover, even with digital technology, capacity is still finite. In San Jose, Comcast  
22 provides 71 analog channels in its rebuilt areas.  
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24 4. A cable operator has broad editorial discretion to determine the selection, channel  
25 location and packaging of programming offered over its cable system. Comcast makes those  
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1 decisions based on its business judgment of what its customers want and what makes economic  
2 sense.

3 5. The limitations on a cable operator's discretion as to programming are narrowly  
4 tailored by federal law into three categories: (1) must-carry and retransmission consent  
5 requirements; (2) leased access requirements; and (3) public, educational, and governmental  
6 ("PEG") access requirements. All three of these categories of programming must be carried on  
7 analog channels.

8 6. The Cable Act, 47 U.S.C. § 534, requires cable operators to carry the signal of  
9 qualifying local broadcast stations and regulates the relationship between the cable operator and  
10 those broadcasters and defines their channel position rights. In San Jose, Comcast is required to  
11 carry 21 such analog channels.

12 7. The Cable Act, 47 U.S.C. §532, requires cable operators to make available leased  
13 access channels for commercial use by persons unaffiliated with the cable operator. Leased access  
14 channels may consume as much as 15 percent of the analog capacity on the cable system. In San  
15 Jose, Comcast is carrying 1 leased access analog channel.

16 8. Comcast's obligation to dedicate analog capacity for PEG programming arises from  
17 47 U.S.C. §531. In San Jose, Comcast has historically set aside 5 analog channels for PEG  
18 purposes pursuant to its local franchise requirements.

19 9. Altogether then, federal and local franchise requirements consume 27 out of 71  
20 analog channels on the San Jose cable system.

21 10. Once Comcast has selected the programming to be carried on its cable system, we  
22 determine how the programming will be packaged for sale to our customers. Federal law dictates  
23 some of our packaging decisions. For example, as a minimum level of service sold to every  
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1 customer, Comcast is required to offer a basic analog tier package containing the must carry, leased  
2 access, and PEG channels.

3 11. In addition to this basic tier of service, Comcast has placed the other programming it  
4 has chosen to offer customers into various tiers based upon factors such as our judgment of what  
5 programming customers are most likely to want together and, in some instances, the requirements  
6 of contracts with program suppliers. Other programming is offered on a pay-per-view or a la carte  
7 basis. Comcast occasionally modifies its packaging of programming to respond to market  
8 conditions, contractual obligations, and perceptions of customer interests.  
9

10 12. Analog channels in these tiers of service are particularly valuable to a cable operator  
11 because each analog channel represents capacity that could be used to offer several digital channels,  
12 thereby providing customers with greater choice and variety. Increased demands for PEG analog  
13 capacity by a franchising authority not only reduce the already limited number of analog channels  
14 available to the cable operator, but impair the cable operator's ability to select and provide new  
15 digital programming and services.  
16

17 13. Because the reception of digital programming is dependant upon the customer  
18 having a digital converter, whereas analog channels are generally viewable without a converter, the  
19 vast majority of programmers want to be located on a basic, analog tier in order to obtain access to  
20 the maximum number of customers, which translates into greater potential revenue from  
21 advertising.  
22

23 14. Comcast's analog capacity is fully utilized on the San Jose cable system. As a result,  
24 Comcast cannot add new programming that customers may want or that Comcast would like to  
25 offer without removing other programming. The demands in the City's RFRP would further restrict  
26 Comcast's use of its already limited analog capacity.  
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1           15.     Direct Broadcast Satellite (“DBS”) providers, the primary competitors for cable  
2 operators, are not subject to the mandatory requirements for use of channel capacity (PEG, leased  
3 access and must carry). DBS providers are therefore free to re-tier, package and market their  
4 programming line-ups as they see fit. The City’s demands for channel capacity further interfere  
5 with Comcast’s ability to effectively compete against DBS providers.

6           16.     Before Comcast dedicates another valuable analog channel to PEG purposes, we  
7 traditionally require the franchising authority to demonstrate that existing capacity is being fully  
8 utilized with original, non-repetitive PEG programming so as to justify the need for additional  
9 capacity. Under utilized PEG channels decrease the value of Comcast’s service to customers and  
10 make it less competitive with the offerings of DBS providers. The City’s present demand for  
11 additional PEG analog capacity is unreasonable in light of its present use. Moreover, the City’s  
12 proposed trigger for additional channel capacity provides inadequate assurances that existing PEG  
13 channels will be fully utilized.

14           17.     In addition, the City’s present capacity demands would further limit Comcast’s  
15 ability to expand programming choices available to customers and would require Comcast to  
16 eliminate some existing programming.

17           18.     The City’s decision to preliminarily deny Comcast a renewed franchise has already  
18 influenced our programming decisions. Due to the uncertain outcome of the administrative  
19 proceeding, Comcast has not modified its channel line-ups because of the possibility that any added  
20 or relocated programs would have to be dropped or moved yet again to accommodate the City’s  
21 demands for additional PEG capacity. In my experience, cable customers object to frequent  
22 changes in channel line-ups. Therefore, to avoid aggravation of customers with several waves of  
23 program changes, Comcast has done nothing to alter the programming status quo, even if to its  
24 competitive detriment.

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19. Comcast is further concerned that in light of the pending dispute with the City, it would be unduly risky to initiate any programming change that would involve relocating the PEG channels, regardless of our judgment as to what would better suit our customers and business objectives.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 20th day of May 2003 at San Ramone, California.

  
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Scott Binder