

**Fast Facts:**

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# A New Era of Video Competition in Michigan

By John M. Dempsey and Michael A. Holmes

With a stroke of her pen on December 21, 2006, Governor Jennifer Granholm signed into law 2006 PA 480, the Uniform Video Services Local Franchise Act<sup>1</sup> (the act), legislation affecting economic development, video competition, and the interplay between federal, state, and local regulation. The act touches on issues pertaining to state and local control of rights-of-way, local control over providers that offer services not confined to state boundaries, and competing notions of consumer welfare. Coming a year after revision and reenactment of the Michigan Telecommunications Act,<sup>2</sup> passage signaled more dramatic changes in the legal framework for state and local regulation of communication services provided to Michigan consumers. One main reason the governor decided to sign the bill, according to her spokesperson, was that "it's good for consumers and good for Michigan jobs."<sup>3</sup>

## Background and History

Traditionally in Michigan, video franchises were awarded at the local, municipal level. Under a provision in the federal Communications Act,<sup>4</sup> a "franchising authority" is authorized to award franchises for the construction of a cable system and provisioning of cable services within the franchising authority.<sup>5</sup> The Communications Act defines the term "franchising authority" as "any governmental entity empowered by federal, state, or local law to grant a franchise."<sup>6</sup> Before 2006 PA 480, Michigan had not legislated how franchises would be granted; thus, under the Michigan Constitution,<sup>7</sup> cable franchises were awarded by a township, city, or village.

Concerns arose nationally over the timeframes involved in negotiating such franchises, the terms required by local franchising authorities, and costs involved in this process. Congress, the Federal Communications Commission (FCC), and several states began to consider changing the process to encourage the spread of video services, foster competition in the provision of such services, and provide incentives for the accelerated deployment of high-speed broadband networks. The United States House of Representatives passed the Communications Opportunity, Promotion and Enhancement Act (COPE) on June 8, 2006, containing provisions dealing with national video franchises, elimination of franchise agreements with local governments, and funding for public access programming.<sup>8</sup> The FCC initiated an inquiry in 2006 into whether it had authority to reform the franchising process. Texas and Indiana, among several states, enacted legislation to provide for statewide franchises rather than local community-by-community negotiations.

In Michigan, such concerns over access to public rights-of-way were reflected in legislation establishing statewide rules governing telecommunications providers and municipalities, such as the Metropolitan Extension Telecommunications Rights-Of-Way Oversight Act (METRO Act).<sup>9</sup> Under the METRO Act, telecommunications providers pay a fee to the state's "METRO Authority," which disburses the funds to municipalities as compensation for

use of public rights-of-way. In return, providers receive rapid issuance of permits for access and unchallenged ability to deploy telecommunications facilities and services. The Michigan Public Service Commission (MPSC), the state's communications regulator, acts to resolve disputes between providers and municipalities.

In Michigan, video reform action began in earnest on September 12, 2006, when Representative Mike Nofs introduced HB 6456, the bill that ultimately became the act.

### Subsequent Federal Action

On December 20, 2006, the day before the governor signed the act into law, the FCC met to adopt an order establishing federal requirements on local video franchising (the FCC order).<sup>10</sup> Significant aspects of the FCC order, which was released on March 5, 2007, are:

- New national rules governing franchise negotiations. The FCC also initiated a further inquiry into its authority over existing cable franchises.
- The rules preempt local laws, regulations, and requirements, including local level-playing field provisions (sometimes called “most favored nations” provisions), to the extent that those laws, regulations, and requirements impose greater restrictions than the new FCC rules.
- The rules address only decisions made by county- or municipal-level franchising authorities; franchising decisions made at the state level or in compliance with state statutes are not preempted. Indeed, the FCC recognized and lauded the actions of states that have reformed their franchise rules and left such frameworks intact.
- The rules are also designed to encourage investment in broadband facilities.
- The FCC order confirmed that application-processing, consultant, and attorney fees charged by local franchising authorities must be applied toward the statutory franchise fee cap of 5 percent of gross revenues under 47 USC 542(b).
- The rules seek to eliminate barriers to entry into the cable market by establishing that the following franchising situations violate federal law:
  - Negotiations that extend beyond certain timeframes (thus creating a federal “shot clock”). The order grants interim or temporary authority to allow more time for negotiations on a permanent agreement.
  - Requiring an applicant to agree to unreasonable requirements to extend its network, thus preserving local flexibility to implement important public policy objectives while prohibiting requirements to serve everybody before serving anybody.
  - Denying applications on the basis of unreasonable obligations related to public, education, and government (PEG) access channels and I-Net (institutional network).

- Requiring a franchise for upgrading of non-cable services networks; however, the FCC did not address whether carrying services over differing arrangements (e.g., Internet) avoids federal or local jurisdiction.

Of particular relevance to the act was the assurance from the text of the FCC order that the order affected only county- or municipal-level franchising authority decision-making. Franchise decisions made at the state level, or in compliance with state statutes, are not preempted.<sup>11</sup> The FCC applauded states like Michigan that had reformed their franchise process and, at least tacitly, encouraged all other states to take similar action.

A number of local franchising authorities and the cable industry national trade association filed various petitions for review in federal courts, appealing the FCC order. These appeals were consolidated and assigned to the United States Court of Appeals for the Sixth Circuit. On June 27, 2008, the court issued an opinion denying the petitions for review and upholding the FCC order and rules in their entirety.<sup>12</sup>

### Further State Action

On January 30, 2007, the MPSC issued an order, in compliance with MCL 484.3302(1), prescribing the standardized form for the uniform video-service franchise agreement to be used under the act (the MPSC order). The MPSC order stated that “[t]he adopted form shall be used without substantive or procedural changes for all video service local franchise agreements in the state of Michigan.”<sup>13</sup> Appended to the MPSC order was a set of instructions for use of the form, the form itself, and attachments.

The form contains 19 provisions to fulfill the statute.<sup>14</sup> A provider will complete this standardized form and submit it to the franchising entity. If the form is complete, the franchising entity has 30 days to approve it. If the franchising entity fails to act, the agreement takes effect as a matter of law.<sup>15</sup>

On May 3, 2007, the MPSC issued an additional order<sup>16</sup> that provided further guidance in the franchising process. The MPSC clarified that it is the responsibility of the franchising entity to fill in the fee provisions in the franchise agreement with the gross revenue percentages for franchise and PEG fees paid by the largest existing cable provider. The MPSC order also clarified the requirements regarding the designation of the video service area to be included with the franchise agreement and the date on which the provider expects to begin video services within the local franchising entity.

Only a sage could have accurately predicted the result from passage of the act. Media accounts of the legislative action were largely positive. The *Detroit Free Press* headline the day after passage summarized this favorable assessment: “New Era Arrives for Cable Customers; State Moves to Widen Competition.”<sup>17</sup>

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As one proponent sized it up, the legislation was intended to create “an environment free from regulation that allows companies coming in and investing in Michigan. This is not something we should fear.”<sup>18</sup>

When the MPSC issued its first order, AT&T Michigan’s president announced that the company was preparing to use the standardized form to introduce its video service to Michigan:

This streamlined application process puts millions of consumers one step closer to having real video competition. As we build our network, we are proud to repeat our promise to invest \$620 million and hire 2,000 new workers in Michigan. We stand ready to rollout our AT&T U-verse Internet protocol television (IPTV) service to Michigan consumers later this year.<sup>19</sup>

In March 2007, Comcast Corporation became the first to use the new process by submitting a new franchise agreement to the City of Detroit.

On February 1, 2008, the MPSC issued its first annual report, *Status of Competition for Video Services in Michigan*, in accordance with MCL 484.3312. The MPSC noted that “there are encouraging signs that competition is beginning to take hold. Of the new providers that entered the video services market in 2007, three of those providers did so as a result of [the act].”<sup>20</sup>

Video competition continues to develop in Michigan. On July 7, 2008, the *Detroit News* reported:

TV giant Comcast Corp. and telephone giant AT&T are battling for customers with bargain deals for their bundled Internet, TV and telephone services. Analysts predicted just such a consumer bonanza a year ago, when AT&T launched its U-verse technology after winning state approval to offer broadband services and compete head to head with Comcast. U-verse is now available in 160 Michigan communities, most of which are also served by Comcast. As a result, the market has become more customer-friendly as the companies ratchet up their sales pitches and expand their product offerings.<sup>21</sup>

## Conclusion

The main feature of the act was to adopt, as of January 2007, a new process for obtaining a local franchise to provide video service in Michigan. By the end of that month, the MPSC had met its statutory obligation to approve a “standardized form for the uniform video service local franchise agreement to be used by each franchising entity in this state.”<sup>22</sup>

Michigan’s action to reform the local video franchise process placed it among a growing number of states that have legislated in this area, including California, Indiana, Kansas, Missouri, New Jersey, North Carolina, Oklahoma, South Carolina, Texas, and Virginia.<sup>23</sup> The release of the FCC order in early 2007 sought to bring other states into the same fold through national requirements.

On the other hand, local units of government had exercised authority to negotiate and approve video franchises in Michigan for several decades. During the legislature’s consideration of the act, a number of local units of government expressed their concerns about possible loss of revenue and loss of control over rights-of-way. Apparently, these fears have not been realized.<sup>24</sup> ■



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## FOOTNOTES

1. MCL 484.3301 *et seq.*
2. MCL 484.2101 *et seq.*, as amended by 2005 PA 235.
3. Christoff, *New Era Arrives for Cable Customers*, *Detroit Free Press*, December 13, 2006.
4. 47 USC 151 *et seq.*
5. 47 USC 541.
6. 47 USC 522(10).
7. Const 1963, art 7, § 29.
8. 2006 HR 5252.
9. MCL 484.3101 *et seq.*
10. Report and Order and Further Notice of Proposed Rulemaking, *In re Implementation of 621(A)(1) of the Cable Communications Policy Act of 1984*, 2007 WL 654264 (FCC March 5, 2007), also available at <[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-06-180A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-180A1.pdf)> (accessed July 23, 2008) (the FCC order). The FCC acted under 47 USC 541, which concerns cable-franchising requirements, and applicable caselaw.
11. *Id.* at n 2.
12. *Alliance Community Media v FCC*, 529 F3d 763 (CA 6, 2008).
13. *In re Commission’s Own Motion to Establish Standardized Form for Uniform Video Service*, order of the Public Service Commission, entered January 30, 2007 (Case No. U-15169); 2007 WL 608330 at \*1; available at <[http://www.cis.state.mi.us/mpsc/orders/comm/2007/u-15169\\_01-30-2007.pdf](http://www.cis.state.mi.us/mpsc/orders/comm/2007/u-15169_01-30-2007.pdf)> (accessed July 23, 2008).
14. MCL 484.3302(3).
15. MCL 484.3303(3).
16. *In re complaint of AT&T Michigan for resolution of a dispute with the City of Southfield under the Uniform Video Services Local Franchise Act*, order of the Public Service Commission, entered May 3, 2007 (Case No. U-15281), available at <<http://efile.mpsc.cis.state.mi.us/efile/docs/15281/0004.pdf>> (accessed July 23, 2008).
17. Christoff, *supra*.
18. Heinlein, *Senate Clears Way for Cable TV Reform*, *Detroit News*, December 13, 2006.
19. AT&T Press Release, *AT&T Promises \$620M Investment, New Jobs in Michigan*, November 30, 2006.
20. *Status of Competition for Video Services in Michigan*, Michigan Public Service Commission (February 1, 2008). Report also available at <[http://www.michigan.gov/documents/mpsc/vf2007\\_223468\\_7.pdf](http://www.michigan.gov/documents/mpsc/vf2007_223468_7.pdf)> (accessed July 23, 2008).
21. Rogers, *Cable giants’ competition benefits users: Comcast, AT&T battle each other by offering bargain deals for TV, Internet, phone services*, *The Detroit News*, July 7, 2008, available at <<http://www.detroitnews.com/apps/pbcs.dll/article?AID=/20080707/BIZ/807070370>> (accessed July 23, 2008).
22. MCL 484.3302(1).
23. FCC order, *supra* at \*16.
24. Kreucher, *Still Broken: Michigan’s Video Franchising Law 18 Months Later*, *Michigan Township News*, July 2008, available at <[http://www.a2gov.org/government/city\\_administration/communicationsoffice/ctn/educationstation/Documents/MiCableLaw.pdf](http://www.a2gov.org/government/city_administration/communicationsoffice/ctn/educationstation/Documents/MiCableLaw.pdf)> (accessed July 23, 2008).