UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

CITY OF DETROIT, Plaintiff, v. COMCAST OF DETROIT, INC. f/k/a Comcast Cablevision of Detroit, Inc., Defendant.	Case No.: 2:10-cv-12427-DML-VMM Hon. David M. Lawson

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW COMES Plaintiff, City of Detroit, by and through its counsel of record and hereby moves this Court for Partial Summary Judgment for the reasons set forth in the accompanying Brief in Support of this Motion, which is incorporated by reference herein.

Pursuant to Local Rule 7.1(a), counsel for Plaintiff certifies that there was a telephone conference between him and counsel for Comcast regarding the relief sought in this Motion and Comcast's counsel refused to concur.

WHEREFORE, the City of Detroit respectfully requests that this Court enter Summary Judgment in its favor and against Defendant, declaring that:

(a) the Michigan Uniform Video Services Local Franchise Act ("State Act") M.C.L. 484.3301, *et seq.*, is preempted by the Cable Communication's Policy Act of 1984, as amended, 47 U.S.C. § 4521, *et seq.*, as applied to the federally mandated cable franchise between the City of Detroit and Comcast;

(b) the State Act is unconstitutional under Article 7, Section 29 of the Michigan Constitution; and

(c) Comcast remains bound by the terms of its cable franchise with Detroit, which expired February 22, 2007, as a "holdover tenant."

Dated: April 17, 2011

VARNUM LLP
Attorneys for Plaintiff

/s/ Aaron M. Phelps
Aaron M. Phelps (P64790)
John W. Pestle (P25471)
Timothy J. Lundgren (P62807)
Stephen F. MacGuidwin (P72302)
Business Address & Telephone:
Bridgewater Place, PO Box 352
Grand Rapids, MI 49501-0352
Phone: (616) 336-6000
Fax: (616) 336-7000

- *And* -

CITY OF DETROIT LAW DEPARTMENT
Krystal A. Crittendon, Corporation Counsel (P49981)
Lewis Smith, Assistant Corporation Counsel (P69547)
Business Address & Telephone:
660 Woodward Avenue, Suite 1650
Detroit, MI 48226
Phone: (313) 224-4550
Fax: (313) 224-5505

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Michael S. Ashton (P40474)
Fraser Trebilcock Davis & Dunlap, P.C.
124 W. Allegan, Suite 1000
Lansing, Michigan 48933
mashton@fraserlawfirm.com
Counsel for Comcast of Detroit, Inc.

Robert G. Scott, Jr.
Davis Wright Tremaine, LLP
1919 Pennsylvania Avenue NW – Suite 800
Washington, D.C. 20006
bobscott@dwt.com
Counsel for Comcast of Detroit, Inc.

Michael G. Vartanian
Richard M. Apkarian, Jr.
Dickinson Wright PLLC
301 East Liberty Street – Suite 500
Ann Arbor, MI 48104
mvartanian@dickinsonwright.com
rapkarian@dickinsonwright.com
Counsel for AT&T Michigan

Robert W. Beach
Spencer A. Sattler
6545 Mercantile Way, Ste. 15
Lansing, MI 48909
beachrl@michigan.gov
sattlers@michigan.gov
Assistant Attorneys General

By: /s/Aaron M. Phelps
Aaron M. Phelps (P64790)
John W. Pestle (P25471)
Timothy J. Lundgren (P62807)
Stephen F. MacGuidwin (P72302)
Business Address & Telephone:

Varnum LLP
Bridgewater Place, PO Box 352
Grand Rapids, MI 49501-0352
Phone: (616) 336-6000
Fax: (616) 336-7000
amphelps@varnumlaw.com

4211419_1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

CITY OF DETROIT, Plaintiff, v. COMCAST OF DETROIT, INC. f/k/a Comcast Cablevision of Detroit, Inc., Defendant.	CASE NO.: 2:10-cv-12427-DML-VMM Hon. David M. Lawson

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

VARNUM LLP
Aaron M. Phelps (P64790)
John W. Pestle (P25471)
Timothy J. Lundgren (P62807)
Stephen F. MacGuidwin (P72302)
Bridgewater Place, PO Box 352
Grand Rapids, MI 49501-0352
Phone: (616) 336-6000
Fax: (616) 336-7000

- And -

CITY OF DETROIT LAW DEPARTMENT
Krystal A. Crittendon, Corporation Counsel (P49981)
Lewis Smith, Assistant Corporation Counsel (P69547)
660 Woodward Avenue, Suite 1650
Detroit, MI 48226
Phone: (313) 224-4550
Fax: (313) 224-5505

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Constitutional Provisions

CONCISE STATEMENT OF ISSUES INVOLVED

1. Whether the Michigan Uniform Video Services Local Franchise Act ("State Act"), MCL 484.3301, *et seq.*, is preempted by the Cable Communications Policy Act of 1984, 47 U.S.C. § 521, *et seq.*, as applied to the federally mandated cable franchise between the City of Detroit ("City") and Comcast of Detroit, Inc. ("Comcast")?

2. Whether the State Act is unconstitutional under Article 7, Section 29 of the Michigan Constitution, which grants the City (not the state legislature) the right to either grant or deny a franchise to Comcast?

3. Whether Comcast remains bound by the terms of its cable franchise with Detroit, which expired February 28, 2007, as a "holdover tenant"?

CONTROLLING AUTHORITIES

1. For the proposition that the State Act is expressly preempted by the Federal Act: 47 U.S.C. § 556(c); *Union CATV, Inc. v. City of Sturgis*, 107 F.3d 434, 438 (6th Cir. 1997).

2. For the proposition that the State Act is preempted by the Federal Act because it contradicts the purposes and objectives of the Federal Act: *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

3. For the proposition that the State Act is preempted by the Michigan Constitution: Mich. Const. 1963, art. VII, § 29; *City of Lansing v. State of Michigan*, 275 Mich. App. 423, 737 N.W.2d 818 (2007); *Charter Twp. of Meridian v. Roberts*, 114 Mich. App. 803, 319 N.W.2d 678 (1982).

4. For the proposition that Comcast remains bound by the terms of the 1985 Franchise as a holdover tenant: 47 U.S.C. § 541(b); *Charter Commc'n Inc. v. County of Santa Cruz*, 133 F. Supp. 2d 1184 (N.D. Cal. 2001); *Comcast of Ca. I, Inc. v. City of Walnut Creek*,

371 F. Supp. 2d 1147 (N.D. Cal. 2005); *Auto Parts, Inc. v. Jack Smith Beverages, Inc.*, 309 Mich. 735, 16 N.W.2d 141 (1944).

I. INTRODUCTION

Comcast is a holdover tenant under its federally mandated 1985 Franchise with the City. The City of Detroit filed this lawsuit to enforce the Franchise and reject Comcast's claim that it has a state franchise under Michigan's Uniform Video Services Local Franchise Act of 2006 ("State Act"). The State Act is invalid because it purports to nullify Detroit's federal franchise and replace the federally mandated rights, renewal procedures and modification procedures of the Federal Cable Communications Policy Act of 1984, 47 U.S.C. § 521, *et seq*., ("Federal Act") with conflicting state requirements.

The conflict renders the State Act (and Comcast's claim of a franchise under that Act) invalid. In fact, this Court has already held that to the extent the State Act makes PEG-related franchise requirements unenforceable, it is preempted by the Federal Act "[b]ecause the [State] Act makes unenforceable what federal law explicitly makes enforceable. . . ." *City of Dearborn v Comcast of Mich., III,* Case No. 08-10156 at *5 (E.D. Mich., Nov. 25, 2008), (Hon. Victoria Roberts)("*Dearborn*").

The State Act is also invalid under the Michigan Constitution, which expressly grants to local municipalities, not the state legislature, the discretion to grant or deny cable franchises.

Detroit now moves for summary judgment that the State Act is (1) preempted by the Federal Act and (2) invalid under the Michigan Constitution, and thus Comcast is a holdover tenant under its prior federal franchise until it complies with the mandatory renewal procedures and substantive requirements of the Federal Act.

II. STATEMENT OF FACTS

A. COMCAST OBTAINS A CABLE FRANCHISE FROM DETROIT

In 1983, the City entered into a "Cable Communications Service Franchise Agreement" with Barden Cablevision of Detroit, Inc., which in 1985 was amended and restated to be compliant with the Federal Act (the "1985 Franchise" or "Franchise Agreement"). *See* **Exhibit A** (schedules and technical specifications omitted).

The 1985 Franchise was subsequently transferred to, and assumed by, Comcast pursuant to a 1994 Assumption Agreement. *See* **Exhibit B**. The current Franchise is the result of extensive work and negotiations by the City and has been tailored to meet the unique cable-related needs of Detroit residents. Among other things, Comcast's Franchise requires it to: (a) offer service to all City residents, regardless of income or race, (b) provide channels for city, school and public use (so-called public, educational and governmental access channels, or "PEG channels")[1] and the facilities, equipment, and technical support necessary to operate those channels, (c) pay a fee and other support for PEG facilities and operations, (d) provide a communications network ("institutional network" or "I-Net") that connects many City buildings, and (e) comply with both the consumer protection and customer service standards of the City and those set by the Federal Communications Commission ("FCC"). *See* generally, Exhibit A.

B. COMCAST INVOKES THE FEDERAL RENEWAL PROCESS FOR THE FRANCHISE

On June 23, 1997, Comcast invoked the Federal Act's process to renew its Franchise. *See* **Exhibit C**. As described below, the Act mandates either a detailed "formal renewal" process or

[1] PEG channels "are channels that over the years, local governments have required cable system operators to set aside for public, educational, or governmental purposes as part of the consideration an operator gives in return for permission to install cables under the city streets and to use public rights-of-way." *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 734 (1996) (citations omitted).

(if the parties reach a negotiated agreement on renewal terms) an "informal" process. Thereafter, the City and Comcast commenced negotiations for renewal of the Franchise. *See* Comcast Answer at ¶ 43. As part of the federal "formal renewal" process, which emphasizes meeting each city's unique needs, the City conducted studies which identified the community's cable-related needs in "An Ascertainment of Needs and Interests Related to Cable Television and An Institutional Network Among Identified Communities of Interest," issued by the City in 2000, as well as in the updated "Supplemental Community Needs Assessment" issued in 2007 (collectively "Needs Assessments"). *See* **Exhibit D**. The City and Comcast repeatedly extended the term of the Franchise to accommodate the slow process of franchise negotiations. *See* **Exhibit E**. The last such extension expired on February 28, 2007. *Id.* At that time, the City was awaiting Comcast's formal proposal for renewal, which Comcast had not yet submitted. *See* Declarations of Celeste McDermott and Carolyn Ghant, attached as **Exhibits F & G**, respectively.

C. MICHIGAN ADOPTS THE STATE ACT, WHICH PURPORTS TO REPLACE THE FEDERAL ACT

The City and Comcast were in the midst of the federal franchise renewal process when, in 2006, Michigan adopted the State Act. The State Act purports to replace cable franchises tailored under the Federal process by each municipality to meet its unique needs with a "one-size-fits-all" franchise that applies statewide. Pursuant to the State Act, the Michigan Public Service Commission ("MPSC") issued the "one-size-fits-all" Uniform Franchise on January 30, 2007. *In re the Commission's own motion, to establish a standardized form for the uniform video service local franchise agreement pursuant to Section 2(1) of 2006 PA 480,* MPSC Order U-15169 (adopted January 30, 2007) ("MPSC Order U-15169"), attached as **Exhibit H**. The State

Act does not allow municipalities to deny a uniform franchise application. *See* MCL 484.3303(3).

D. COMCAST IGNORES THE FEDERAL PROCESS AND CLAIMS TO BE OPERATING UNDER A UNIFORM STATE FRANCHISE

Upon passage of the State Act, Comcast refused to abide by the 1985 Franchise or proceed with a renewal in accordance with the federally mandated processes. *See* McDermott Decl. at ¶ 8 (Exhibit F). Instead, Comcast submitted an application for a Uniform Franchise to the City on February 28, 2007, the same day that its federal Franchise expired. *See* **Exhibit I**; McDermott Decl. at ¶ 8. Comcast had unlawfully and incorrectly filled in two of the three blanks on its Uniform Franchise form where the City was supposed to insert the PEG Fee.[2] *See* Exhibit I at § VIII A. 1. & 2; McDermott Decl. at ¶ 9. On March 16, 2007, the City completed the uniform franchise and included a two-percent PEG fee in Section VIII A. 3, as allowed by the State Act.[3] *See* **Exhibit J**; McDermott Decl. at ¶ 10. The 2-percent fee was based on the PEG fees and services that the City was receiving under the 1985 Franchise and Comcast's 1994 Assumption Agreement, as well as community needs documented in the City's Needs Assessments. *See* Exhibit A, §§ 6 and 8 generally; Exhibits B and D; and McDermott Decl. at ¶ 11.

On April 23, 2007, Comcast sent a letter to the City rejecting the City's approved franchise and asserting that Comcast's uniform franchise as originally submitted to the City was effective without the City's approval. *See* **Exhibit K**; Comcast Answer at ¶ 33. In protest of Comcast's unilateral actions, the City filed a complaint at the MPSC on June 19, 2007, seeking to

[2] *In re AT&T*, MPSC Case No. U-15281, at 3 (2007) (PEG and franchise fee blanks "are the responsibility of the franchising entity to complete.").

[3] Where a franchise has expired, communities can include a PEG fee of up to two percent pursuant to a community needs assessment. MCL 484.3306(8)(c).

have the MPSC uphold the franchise that the City approved on March 16, 2007. *See* **Exhibit L**. The City's complaint languished at the MPSC for over two years and was eventually dismissed without prejudice on the Commission's own motion in July 2009. *See* **Exhibit M**.

To date, Comcast has paid no fees in support of PEG channels to the City since 2006, has refused to continue providing the in-kind support in terms of facilities, personnel, and equipment that it was required to provide under its Franchise, and has ceased living up to a number of its other obligations under its federal Franchise. McDermott Decl. at ¶¶ 13–14 (Exhibit F); Ghant Decl. at ¶¶ 8–9 (Exhibit G).

III. LAW AND ARGUMENT

The City moves for summary judgment on three legal issues. First, Comcast's claimed uniform franchise is preempted because the State Act directly conflicts with the terms of the Federal Act and otherwise stands as an obstacle to the accomplishment of the full purposes and objectives of the Federal Act. Second, the State Act violates the Michigan Constitution, which vests franchising authority to individual cities, not the state legislature. Finally, because the State Act is preempted by the Federal Act and/or invalid under the Michigan Constitution, Comcast's claimed "uniform franchise" with the City under the State Act is invalid and Comcast remains bound by the terms of the 1985 Franchise as a "holdover tenant."

A. THE STATE ACT IS EXPRESSLY PREEMPTED BY THE FEDERAL ACT

The Federal Act requires that "any provision of law of any State … which is inconsistent with this chapter shall be deemed to be preempted and superseded." 47 U.S.C. § 556(c). The State Act is clearly inconsistent with the Federal Act in that, (1) it prohibits Detroit from following the franchise renewal and modification procedures mandated by the Federal Act; (2) it prohibits Detroit from establishing and enforcing its customer service standards and enforcing the customer service standards of the FCC, as allowed by the Federal Act; (3) it prohibits Detroit

from requiring PEG channel support from Comcast based on community needs; and (4) it prohibits Detroit from taking any action to prevent discrimination by Comcast on the basis of income.

1. The State Act Expressly Conflicts with the Renewal and Modification Procedures of the Federal Act

a. The Federal Act Prescribes a National Franchise Renewal Process to Ensure that Local Cable-Related Needs are Met.

"Section 546 of the [Federal] Act sets forth the procedural requirements when a cable operator and a franchising authority[4] cannot agree to renewal of a franchise." *Union CATV, Inc. v. City of Sturgis*, 107 F.3d 434, 438 (6th Cir. 1997) ("*Sturgis*") (Footnote added). The *Sturgis* court summarized these requirements as follows:

> Between thirty and thirty-six months prior to the expiration of the franchise, the franchising authority may commence a proceeding to review the cable operator's past performance and to identify the future cable-related community needs and interests. 47 U.S.C. § 546(a). The public must be given appropriate notice of the proceeding and afforded an opportunity to participate. Upon the completion of this identification stage, the operator may submit a proposal for franchise renewal. 47 U.S.C. § 546(b). Within four months following the operator's submission of its renewal proposal, the franchising authority must renew the franchise or issue a "preliminary assessment" that the franchise should not be reviewed [sic, renewed]. 47 U.S.C. § 546(c)(1). If the franchising authority decides not to renew the cable franchise, the operator may demand an administrative proceeding to consider whether the denial was justified. 47 U.S.C. § 546(c)(1). The public must be given notice of the administrative proceeding, and a transcript must be made of the proceeding. 47 U.S.C. § 546(c)(1)-(2). The cable operator may introduce evidence regarding both the franchising authority's needs and its proposal. At the completion of the administrative proceeding, the franchising authority must issue a written decision, based on the record of the administrative proceeding, granting or denying the renewal proposal. 47 U.S.C. § 546(c)(3).

[4] "Franchising authority" under the Federal Act "means any governmental entity empowered by federal, state or local law to grant a franchise." 47 U.S.C. § 522(9). As discussed in section II.C, *infra*, under the Michigan Constitution, art. 7 sec. 29, the State Act, MCL 484.3301(2)(e) and this Court's prior *Dearborn* decision, the City is the franchising authority.

Id. (emphasis added).[5]

This highly structured process balances the twin goals of the federal act – to "assure that cable systems are responsive to the needs and interests of the local community" and to "establish an orderly process for franchise renewal." 47 U.S.C. § 521(2) & (5). As the authors of the House Report put it, the Federal Act "contains procedures and standards designed to give some stability and certainty to the renewal process, while continuing to provide the franchising authority with the ability to assure that renewal proposals are reasonable to meet community needs and interests. . . . " H.R. Rep. No. 98-934 at 23-24 (1984), as reprinted in 1984 U.S.C.C.A.N. 4655, 4656 ("1984 House Report").

In *Sturgis*, the city denied the cable operator's renewal proposal on the sole basis that it failed to meet the city's cable-related needs and interests in compliance with 47 U.S.C. § 546(c)(1)(D). *See Sturgis*, 107 F.3d at 439. In upholding that city's actions, the Sixth Circuit noted that "[w]hile the Cable Act establishes federal standards governing the renewal of cable franchises, Congress made clear that the Act 'preserves the critical role of municipal governments in the franchise process.'" *Id*. at 441 (citing the 1984 House Report at 4656). In support of its holding, the court relied, in part, on the legislative history of the Federal Act:

> It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs. However, if that process is to further the purposes of this legislation, the provisions of these franchises, and the authority of the municipal governments to enforce these provisions, must be based on certain important uniform Federal standards that are not continually altered by Federal, state or local regulation.

[5] An alternative, "informal" renewal process is set forth in Section 546(h) of the Federal Act, where the parties reach agreement on franchise terms. 47 U.S.C. § 546(h). Obviously, there was no agreement between Comcast and the City regarding franchise renewal terms, so this process does not apply in the present dispute.

Id. (quoting the 1984 House Report at 4661, emphasis supplied). Local municipalities, according to the court, "are best able to determine a community's cable-related needs and interests." *Id.*

Congress established a clear renewal process and did so for the express purpose of allowing local municipalities to tailor their cable franchises to meet their unique community needs. Indeed, the Federal Act requires that the public be given notice of the renewal proceedings and be afforded an opportunity to participate. By contrast, the State Act completely eliminates the federal renewal procedures and their emphasis on meeting community needs by directing the MPSC to create the Uniform Franchise and then mandating that the Uniform Franchise be accepted – as is – by municipalities. *See* MCL 484.3302(1) and 484.3303(3); MPSC Order U-15169 at 2 (ordering that the Uniform Franchise "is adopted for use without procedural or substantive changes for all video services franchise agreements in the state of Michigan")(Exhibit H)(emphasis added).

Simply put, the Federal Act mandates a comprehensive cable renewal process with mandatory public input, substantive standards and procedural requirements, and the State Act invalidates that process. Therefore, the State Act is preempted.

b. The Federal Act's Franchise Modification Process Protects Franchise Requirements Designed to Meet Local Needs from Unilateral Change by Cable Operators.

The Federal Act also establishes a formal process for the modification of existing cable franchises:

> (A) in the case of any such requirement for facilities or equipment, … the operator [must] demonstrate that (i) it is commercially impracticable for the operator to comply with the requirement, and (ii) that the proposal by the cable operator for modification of such requirement is appropriate because of commercial impracticability;

> (B) in the case of any such requirement … the cable operator [must] demonstrate that the mix, quality, and level of services required by the franchise at the time it was granted will be maintained after such modification.

47 U.S.C. § 545(a)(1). The Federal Act prohibits, however, any modifications for requirements related to PEG channel access. *Id*. at § 545(e).

The franchising authority's decision regarding modifications must be made in a public proceeding and within 120 days after receipt of the request. 47 U.S.C. § 545(a)(2). If the operator is not able to obtain the sought-after modification by means of the process in 47 U.S.C. § 545(a), then the Federal Act provides for judicial proceedings under §§ 545(b) and 555. The court reviews the request for modification applying the same standards to be applied by the franchising authority. 47 U.S.C. § 545(b)(2).

Despite the Federal Ac's clear process and established standards for accomplishing a franchise modification, the State Act purports to modify existing cable franchises by making unenforceable all terms and conditions of Detroit's federal franchise that differ from the state's Uniform Franchise. ("[A]ny provisions of an existing franchise that are inconsistent with or in addition to the provisions of a uniform . . . franchise agreement are unreasonable and unenforceable . . . ."). MCL 484.3305(3). By virtue of the State Act, whole sections (and indeed whole pages) of the 1985 Franchise are modified and eliminated. This includes customer service standards and enforcement procedures, anti-discrimination provisions, I-Net obligations and many others. Indeed, although § 545(e) of the Federal Act states that a cable operator may not obtain a modification of any requirement "for services relating to public, educational, or governmental access," the State Act purports to do exactly that. MCL 484.3305(3).

To the extent that Comcast is operating under its 1985 Franchise with modified terms pursuant to MCL 484.3305(2)(b), its unilateral modification of its 1985 Franchise violates the

process set forth in § 545 of the Federal Act. 47 U.S.C. § 545. Because the State Act purports to allow Comcast to modify its cable franchise without regard to the federally mandated modification procedures, it is preempted by the Federal Act.

2. The State Act Expressly Conflicts with the PEG Channel, Customer Service and Anti-Discrimination Rights and Obligations Created by the Federal Act

a. PEG Channel Support

The Federal Act grants the City, as franchising authority, the right in a franchise to "require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support." 47 U.S.C. § 541(a)(4)(B). The legislative history of the Federal Act explains the importance Congress placed on PEG programming:

> Public access provides ordinary citizens, non-profit organizations, and traditionally underserved minority communities an opportunity to provide programming for distribution to all cable subscribers. Educational access allows local schools to supplement classroom learning and to reach those students who are beyond school age or unable to attend classes. Governmental channels allow the public to see its local government at work, thus contributing to an informed electorate, which is essential to the proper functioning of our democratic form of government. PEG channels serve a substantial and compelling government interest in diversity, a free market of ideas, and an informed and well-educated citizenry.

H.R. Rep. No. 102-628 at 85 (1992) ("1992 House Report") (emphasis added).

The City implemented the federal authority to require adequate PEG channel capacity, facilities and financial support in a number of franchise provisions. For instance, the 1985 Franchise requires that Comcast provide multiple channels for PEG programming, with three to be initially activated, and the rest to be made available as the need arose. *See* 1985 Franchise at §§ 6.10 and 6.11 (Exhibit A). Under the 1985 Franchise, Comcast is required to construct, equip, staff, and maintain studios, mobile vans, and portable recording equipment for use in

producing local programming for the PEG channels. *Id.* at §§ 6.2 – 6.5, 6.14, and 12.22. The 1985 Franchise further requires that the capacity of two channels be reserved for government and education I-Net use. *Id.* at § 5.1.b. Minimum payments in support of PEG channels are also required by the 1985 Franchise. *Id.* at §§ 8.2 and 8.3.

Contrary to the Federal Act, the State Act limits Detroit's PEG channel rights. According to the State Act, a "video service provider shall designate a sufficient amount of capacity on its network to provide the same number of public, education, and government access channels that are in actual use on the incumbent video provider system on the effective date of this Act." MCL 484.3304(1)(emphasis added). Thus, while the Federal Act grants municipalities the right to determine their own PEG channel requirements so as to meet community needs, the State Act places an arbitrary and inflexible limit on the number of PEG channels and the nature and amount of PEG support a franchising authority may obtain.

The State Act then provides that if a PEG channel "is not utilized by the franchising entity for at least 8 hours per day for 3 consecutive months" it may be removed by the cable provider. *Id.* at 484.3304(2). This violates the Federal Act,which makes clear that it is the "franchising authority" that shall prescribe "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, and … rules and procedures under which such permitted use shall cease." 47 U.S.C. § 531(d).

In fact, this Court has already held that to the extent the State Act purports to invalidate PEG channel requirements in franchise agreements, or otherwise limits the franchising authority's ability to negotiate such requirements, it is preempted by the Federal Act. *Dearborn*, at *5. In that case, the City of Dearborn filed suit to protect its federally granted PEG channel

rights, and Comcast moved to dismiss. In denying Comcast's motion, this Court noted that "Section 531 expressly permits 'a franchising authority' to enforce PEG channel requirements in franchise agreements" and that the State Act "purports to restrict a franchising authority's ability to enforce PEG channel requirements in existing franchise agreements." *Id.* This Court then held that Section 531 is "unmistakably clear" and that because "the . . . [State] Act makes unenforceable what federal law explicitly makes enforceable, the . . . [State] Act is preempted by" the Federal Act. *Id.*

This Court had it exactly right in 2008, and this Court's decision in the present case should be no different. The State Act is in clear conflict with the Federal Act and is preempted.

b. Customer Service Standards

The Federal Act gives franchising authorities, such as Detroit, the general authority to establish and enforce cable customer service requirements. *See* 47 U.S.C. § 552(a) ("A franchising authority may establish and enforce (1) customer service requirements of the cable operator….").[6] In addition, FCC rules explicitly give local franchising authorities, such as Detroit, the authority to enforce the FCC's national minimum cable customer service standards. *See* 47 CFR 76.309(a) ("A cable franchise authority may enforce the [FCC] customer service standards set forth in [47 CFR 76.309(c)] . . . .")

The City initially implemented this federal authority to establish customer service requirements by incorporating a number of such requirements in the 1985 Franchise. For instance, Section 6 contains requirements for service to the hearing impaired and requirements related to responding to customer requests for service and requests for termination of service.

[6] Section 552 was amended in 1992. Before then it stated, *inter alia,* that "(b) A franchising authority may enforce any provision, contained in any franchise, relating to [customer service]." PL 98–549, October 30, 1984, 98 Stat. 2779, Section 632.

Section 14 contains provisions addressing notification of residents when their property is to be accessed, identification requirements for Comcast agents entering private property, and bonding requirements. This same section also contains subscriber notification requirements, as well as protections for subscriber information and privacy. Section 15 of the 1985 Franchise contains a customer complaint process and complaint response requirements, including maintenance of a complaint log and summary reporting of complaints to the City.

Section 22 of the 1985 Franchise contains enforcement mechanisms for the City, including specified liquidated damages for certain customer-service violations.

Then, in 1993, pursuant to a statutory directive, the FCC issued the national minimum cable customer service standards set forth at 47 CFR 76.309(c). FCC rules explicitly place the authority for enforcement of those standards on the local franchising authority. *See* 47 CFR 76.309(a), quoted above. The FCC explained the reasons for local enforcement as follows:

> Section 632(b) [47 U.S.C. § 552(b)], in delineating the FCC's involvement in establishing customer service standards, provides this Commission [the FCC] with no specific enforcement role. . . . [W]e believe that as a practical matter, customer service requirements can be enforced most efficiently and appropriately on a local level where such enforcement historically has occurred. Accordingly, we conclude that the customer service standards we adopt today should be enforced by local franchise authorities.

In re Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order, FCC 93-145 (Apr. 7, 1993), ¶ 19 ("Customer Service Order"), attached as **Exhibit N**. (emphasis added).[7] As to the means of enforcement, the FCC also left those to the local franchising authority: "[a]s a general principle, specific customer service

[7] The FCC noted that local franchising authorities have the ability under federal law to establish requirements additional to those in 47 CFR 309(c): "If there are other areas of concern, such as employee identification, the statute and our rules allow the franchising authority to address those issues." Customer Service Order at ¶ 69 (Exhibit N). The FCC thus left the franchising authority "free to craft additional requirements which best meet the unique needs of the particular community." *Id.*

requirement enforcement mechanisms and processes are to be determined by the franchise authorities." *Id.* at ¶ 20 (emphasis added). The FCC expressly allowed for enforcement by bilateral agreement, local laws (*e.g.*, ordinances) or, where necessary, unilateral amendment to a franchise. *Id.* at ¶ 20.

The City used this enforcement authority in the 1994 Assumption Agreement where the City and Comcast agreed that Comcast would comply with the FCC's customer service standards, tailored the standards to the specifics of the City (*e.g.*, defining what "normal business hours" in the City are for purposes of the FCC standards), required detailed reports by Comcast on its compliance with the standards, and specified liquidated damages for violations. *See* 1994 Assumption Agreement, Section VI "Customer Service" (Exhibit B).

The State Act violates the Federal Act by expressly prohibiting franchising authorities from imposing any customer service requirements beyond those set forth in the State Act. MCL 484.3303(8) ("A franchising entity shall not … impose any other franchise requirement than is allowed under this Act."). It thus conflicts with the federal grant of authority under 47 U.S.C. § 552(a) for franchising authorities to establish customer service standards.

Moreover, the State Act purports to take away the enforcement authority given the City by 47 U.S.C. § 552(a), 47 CFR 76.309(a) and FCC orders by requiring customer complaints to be resolved by the MPSC rather than the local franchising authority. *See* MCL 484.3310(4) and (5) and MPSC letter dated May 12, 2009, asserting jurisdiction over customer complaints, attached as **Exhibit O**.

The State Act prohibits the City from implementing and enforcing customer service standards as authorized by the Federal Act, FCC Rules and FCC orders, and is thus preempted.

c. Anti-Discrimination Obligations

In addition to the above express rights, the Federal Act requires franchising authorities to prevent discrimination:

> In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

47 U.S.C. § 541(a)(3) (emphasis added). As Congress stated:

> Subsection (a)(3) provides that in awarding the franchise, the financing [*sic* franchising] authority shall assure that no class of potential residential cable subscribers is denied cable service due to income or economic status. In other words, cable systems will not be permitted to 'redline' (the practice of denying service to lower income areas). Under this provision, a franchising authority in the franchise process shall require the wiring of all areas of the franchise area to avoid this type of practice.

1984 House Report at 4696 (emphasis added).

The City implemented the anti-redlining authority mandate from Congress in the 1985 Franchise in several places. For instance, the "Franchise Area" is defined as "the entire area of the City of Detroit." *See* 1985 Franchise at § 1.1.ii. Further, the 1985 Franchise requires Comcast's cable system to be constructed so that it would "pass by every residential structure in the Franchise Area." *Id.* at § 5.1.b. The cable system is required to "be available to all residents in the Franchise Area" and to "be designed to ensure that all citizens of Detroit, regardless of race, sex, creed or economic condition, have equal access to Cable Communications Services." *Id.* at § 6.1. In fact, a schedule for wiring of upper and lower income areas was specifically incorporated into the 1985 Franchise pursuant to Section 6.1. *See* Wiring Schedule, attached as **Exhibit P**.

Finally, Section 14.1 of the 1985 Franchise provides a clear prohibition on redlining:

> The Company shall not deny service, deny access, or otherwise discriminate against Subscribers, Users, or general citizens on the basis of race, color, creed,

> religion, ancestry, national origin, sex, affectional preference, disability, age, marital status, or status with regard to public assistance. The Company shall comply at all times with all other applicable federal, state and local laws and regulations relating to nondiscrimination. The Company shall not deny any group of potential residential cable subscribers in the Franchise Area access to the system because of the income level of the residents of the local area in which such group may reside.

Through the above provisions, the City has complied with its Federal anti-discrimination obligations.

In violation of the Federal Act, the State Act actually allows income-based discrimination. While the State Act initially states that a video service provider "shall not deny access to service to any group of potential residential subscriber because of the race or income of the residents in the local area in which the group resides" (MCL 484.3309(1)), it then grants gaping exceptions and safe harbors that swallow the rule and actually allow discrimination:

> (2) It is a defense to an alleged violation of subsection (1) if the provider has met either of the following conditions:
>
> (a) Within 3 years of the date it began providing video service under this act, at least 25% of households with access to the provider's video service are low-income households.
>
> (b) Within 5 years of the date it began providing video service under this act and from that point forward, at least 30% of the households with access to the provider's video service are low-income households.
>
> (3) If a video service provider is using telecommunication facilities to provide video services and has more than 1,000,000 telecommunication access lines in this state, the provider shall provide access to its video service to a number of households equal to at least 25% of the households in the provider's telecommunication service are in the state within 3 years of the date it began providing video service under this act and to a number not less than 50% of these households within 6 years. A video service provider is not required to meet the 50% requirement in this subsection until 2 years after at least 30% of the households with access to the provider's video service subscribe to the service for 6 consecutive months.

MCL 484.3309(2) and (3). These exceptions create several conflicts with the Federal Act.

First, the State Act allows discrimination in the City's franchise area, so long as Comcast serves an arbitrary percentage of "low-income" households in the State. *Id.* Thus, Comcast could actually discriminate against every low income resident in the City, as long as 30% of households anywhere in Michigan with access to its service are "low-income." MCL 484.3309(2)(b). This application of a state-wide standard, in place of a franchise-area one, clearly conflicts with the Federal Act's prohibition on income-based discrimination "of the residents of the local area in which such group resides." 47 U.S.C. § 541(a)(3).

Second, the State Act defines "low income" to be households of an income of $35,000 or less. MCL 484.3301(2)(j). According to census data, the median household income in Detroit for 2009 was $29,447. *See* Census Bureau Data, attached as **Exhibit Q**. Thus, Comcast could intentionally choose to serve very few (in any) truly low income households in the City, but nevertheless fall within the State Act's safe harbor defense to income discrimination. This is inapposite of the Federal Act's mandate that the City take action to prevent any and all income based discrimination

Third, the State Act prohibits the City from enforcing anti-discrimination provisions, while the Federal Act mandates that the City as franchising authority "shall assure that access to cable service is not denied [based on income]." 47 U.S.C. § 541(a)(3) (emphasis added).

Finally, the State Act prohibits the City (or for that matter, the MPSC) from enforcing the Congressionally approved remedy of requiring service to "all areas of the franchise area," *i.e.* service to the entire City, or to an area being discriminated against.[8] 1984 House Report at 4696.

[8] The last subsection of the "anti-discrimination" section of the State Act states "Notwithstanding any other provision of this act, a video service provider shall not be required to comply with, and a franchising entity may not impose or enforce, any mandatory build-out or deployment provisions, schedules, or requirements except as required by this section." MCL 484.3309(9). This prohibition is repeated in MCL 484.3303(8).

Thus, the State Act is preempted by the Federal Act.

B. THE STATE ACT CONTRADICTS THE PURPOSES AND OBJECTIVES OF THE FEDERAL ACT AND IS THEREFORE PREEMPTED

In addition to express conflict preemption, under recent U.S. Supreme Court precedent, courts "will find preemption . . . where 'under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). In *Crosby*, respondents challenged a Massachusetts act (which barred state entities from doing business with the nation of Burma) based on its implied conflicts with a similar federal law (which imposed sanctions on Burma and gave the President authority to alter the sanctions at his discretion).

The Supreme Court held that the state act "[w]as an obstacle to the accomplishment of Congress's full objectives under the federal Act" because it "undermine[d] the intended purpose and 'natural effect' of at least three provisions of the federal Act." *Id.* at 373. Importantly, the Court held that "[t]he conflicts are not rendered irrelevant by the State's argument that there is no real conflict between the statutes because the common ends of the State Act and Federal Act share the same goals and because some companies may comply with both sets of restrictions." *Id.* at 379. Indeed, "[t]he fact of a common end hardly neutralizes conflicting means, and the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ." *Id.* at 379-80.

This doctrine of implied conflict preemption has also been used to preempt local cable requirements that conflict with the Federal Act. In *Qwest Broadband Services, Inc. v. City of Boulder*, 151 F. Supp. 2d 1236 (D. Col. 2001), plaintiff challenged a provision of the Boulder

city charter (which required a city-wide vote to grant a franchise) based on its alleged conflicts with the Federal Act, particularly 47 U.S.C. § 541(a)(1) (which prevents cities from granting exclusive franchises or from unreasonably refusing to award additional competitive franchises). The court recognized the rule from *Crosby* and *Hines*, that "[c]onflict preemption is implicated . . . where the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id*. at 1240 (quoting *Hines*, 312 U.S. at 67-68).

Applying this standard, the court held that the local law "is preempted by § 541 because [it] conflicts with the clear congressional purpose of the [Federal] Act." *Id.* at 1243. In so doing, the court emphasized the legislative history of the 1992 amendments to the Federal Act, which "clearly supports the proposition that Congress was focused on fostering competition when passing the 1992 Act." *Id.* at 1244. Because the local law "serve[d] only to provide significant hindrance to the competition that Congress clearly intended to foster," it was in direct conflict with the purposes of the Federal Act. *Id.*

As was the case in *Crosby* and *Quest*, the State Act is simply incompatible with the purposes and objectives of the Federal Act. According to the Federal Act itself, its purpose is to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems." 47 U.S.C. § 521(3). As the D.C. Circuit Court of Appeals further explained, the Federal Act "established a national policy for the local, state, and federal regulation of cable; but it continued to rely on local franchising as the primary means of regulation." *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 963 (D.C. Cir. 1996). In approving the Federal Act, the House Energy and Commerce Committee emphasized the need for a uniform, national system of regulation that would not be subject to state or local changes:

> The Committee has determined a need for national standards which clarify the authority of Federal, state and local government to regulate cable through the

> franchise process. These standards and procedures are the heart of [the Federal Act]. Given the far-reaching impact which changing FCC regulations have had, and will continue to have, on municipal franchises . . . it is entirely appropriate that Federal legislation be enacted to firmly establish the authority at each level of government. It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs. However, if that process is to further the purposes of this legislation, the provisions of these franchises, and the authority of the municipal governments to enforce these provisions, must be based on certain important uniform Federal standards that are not continually altered by Federal, state or local regulation.

1984 House Report at 4660-61 (emphasis added).

While the primary purpose of the Federal Act is to establish a uniform, national franchising process, Congress was careful to preserve the role of municipal governments in determining the cable needs of their respective communities, as well as the terms and conditions under which cable providers would be allowed to operate:

> [The Federal Act] establishes a national policy that clarifies the current system of local, state and Federal regulation of cable television. . . The bill establishes franchise procedures and standards to encourage the growth and development of cable systems, and assure that cable systems are responsive to the needs and interests of the local communities they serve.
>
> Municipal authority to franchise and regulate cable television systems has been under an increasing number of challenges on three fronts: in the courts, at the Federal Communications Commission, and at the state public utility commissions. [The Federal Act] will preserve the critical role of municipal governments in the franchise process, while providing appropriate deregulation in certain respects to the provision of cable service.

1984 House Report at 4656 (emphasis added). Indeed, the Act itself states that one of its purposes was to "assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2). The Sixth Circuit has likewise concluded that "Congress . . . sought in the [Federal] Act to provide a balance between respecting the needs and interests of

communities and protecting cable operators against unreasonable demands." *Sturgis,* 107 F.3d at 442 (emphasis added).

In sum, the Federal Act establishes national uniformity in cable franchising that respects local community needs; the State Act replaces national uniformity with a process unique to Michigan. The Federal Act preserves local municipal control in order to serve the unique cable related needs of local communities; the State Act rejects local control in favor of a one-size-fits-all uniform franchise. The State Act stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Federal Act, and therefore, the State Act is preempted.

C. STATE ACT IS UNCONSTITUTIONAL UNDER THE MICHIGAN CONSTITUTION

Under the Michigan Constitution, the City – not the legislature – has the authority to require a franchise from video service providers operating a cable system in the City:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

Mich. Const. 1963, art. VII, § 29 (emphasis added).[9]

Article 7, Section 29 contains three clear, separate grants of authority:

> From a plain reading, it is clear that § 29 addresses three distinct areas. First, the "consent" clause of § 29 prohibits the use of "the highways, streets, alleys or other public places of any county, township, city or village" by utilities for their facilities without the consent of the county, township, city or village. Second, the "franchise" clause prohibits a utility from transacting local business without first obtaining a franchise from the township, city, or village. Third, the "reasonable

[9] In 1908, this Constitutional provision was enacted as Article 8, Section 28. In 1963, it was re-codified, with minor alterations, as Article 7, Section 29.

> control" clause reserves the right of reasonable control of highways, streets, alleys, and public places to counties, townships, cities, and villages.

City of Lansing v. State of Michigan, 275 Mich. App. 423, 431; 737 N.W.2d 818 (2007)(emphasis added). The first and second grants of authority explicitly make the City the franchising entity with full authority to grant or deny a franchise.[10]

These constitutional rights cannot be, and have not been, construed narrowly. Indeed, the Michigan Constitution instructs that "[t]he provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution." Mich. Const. 1963, art. VII, § 34 (emphasis added).

Michigan courts have repeatedly reaffirmed a local government's broad authority to regulate public utilities under Article 7, Section 29. In *People. v McGraw*, 184 Mich. 233, 238,

---

[10] Comcast has previously cited this Court to *City of Taylor v. Detroit Edison Co.*, 475 Mich. 109, 715 N.W.2d 28 (2006), where the court held that "a municipality's exercise of 'reasonable control' over its streets cannot impinge on matters of statewide concern nor can a municipality regulate in a manner inconsistent with state law." *Id.* at 112. *Taylor*, however, dealt exclusively with the third, or "reasonable control" clause of the grants under Section 29, and did not implicate the franchise authority or "consent" grants. The *Taylor* court itself noted that the case addressed only the third of the grants of authority under Section 29, stating that the case was about "the scope of a city's power over utilities under its constitutional authority to exercise reasonable control over its streets." *Id.* at 114 (emphasis added). This limitation has been explicitly acknowledged by Michigan courts:

> These grants of authority [in Section 29] are distinct, and the limitations applicable to the reservation of authority to regulate highways, alleys, and other public places do not necessarily apply to the other clauses. For this reason, we find the authorities discussing the general reservation of reasonable control over highways, streets, alleys, and other public places inapposite.

City of Lansing, 235 Mich. App. at 431, (citing *City of Taylor*, 475 Mich. at 116 as an example of such authority (emphasis added)). Therefore, the limits on municipal authority under Section 29 discussed in the *Taylor* decision do not apply in the present case, where the City is relying on the grants of authority under the "franchise" and "consent" clauses of Section 29.

150 N.W. 836 (1915), the Michigan Supreme Court noted: "By giving the language of the whole section [of Article 8, Section 28, the predecessor to Article 7, Section 29] its ordinary and natural meaning, public utilities were placed under the control of the local authorities . . . " (emphasis added). *See also Union Twp. v. City of Mt. Pleasant*, 381 Mich. 82, 86, 158 NW2d 905 (1968) ("The township reads Article VII, section 29 as a reservation of such regulatory power to the townships in all such matters except as otherwise provided by the Constitution itself. . . . It is our judgment that the township's interpretation of the Constitution is correct . . . "). Similarly, in *City of South Haven v. South Haven Charter Township*, 204 Mich. App. 49, 51, 514 N.W.2d 176 (1994), the Michigan Court of Appeals recognized that "the granting or withholding of consent by the [local unit of government] is a discretionary legislative function, and the [local unit of government] has the right to grant or withhold consent under Const. 1963, art. 7, § 29 . . . " (emphasis added).

Further, the Michigan Court of Appeals has held that a "cable television system is a public utility within the meaning of Article 7, Section 29, . . . [and] is subject to regulation by the plaintiff township and cannot operate without a franchise." *Charter Twp of Meridian v. Roberts*, 114 Mich. App. 803, 810, 319 N.W.2d 678 (1982), *reh'g granted*, 324 N.W.2d 339 (1982). The Court of Appeals relied, in part, on a "perceptive opinion issued in 1974 [by] the State Attorney General [that] found that local governmental units did have authority to grant cable television franchises despite the absence of specific legislation on the subject." *Id*. at 807-11 (citing OAG 1973-1974 No. 4808, p. 130 (April 25, 1974)). The *Meridian* court also relied on the Michigan Supreme Court's analysis of "public utilities" under Article 7, Section 25 of the 1963 constitution in *White v. City of Ann Arbor*, 406 Mich. 554, 281 N.W.2d 283 (1979). Although the *White* court analyzed the use of "public utilities" under a different constitutional provision, the court in

Meridian concluded that "the language used by the *White* Court strongly suggests that cable television systems may not operate in this state without having been granted a franchise. . . ." *Meridian*, 114 Mich. App. at 810.

Contrary to Article 29, the State Act attempts to revoke the authority of municipalities to grant or withhold consent for video service franchises. First, the State Act requires that the MPSC establish a standardized franchise and that video service providers may not provide services without first obtaining the state's uniform franchise:

> (1) No later than 30 days from the effective date of this act, the commission shall issue an order establishing the standardized form for the uniform video service local franchise agreement to be used by each franchising entity in this state.
>
> (2) Except as otherwise provided by this act, a person shall not provide video services in any local unit of government without first obtaining a uniform video service local franchise as provided under section 3.

MCL 484.3302(1) & (2).

The State Act then mandates that "[a] franchising entity shall allow a video service provider to install, construct, and maintain a video service or communications network within a public right-of-way and shall provide the provider with open, comparable, nondiscriminatory, and competitively neutral access to the public right-of-way." MCL 484.3308(1) (emphasis added). If the City does not actively approve a uniform franchise application, the State Act grants the franchise without the City's approval. MCL 484.3303(3)("If the franchising entity does not . . . approve the franchise agreement within the time periods required under this subsection, the franchise agreement shall be considered complete and the franchise agreement approved").

Finally, the State Act prohibits deviation from the Uniform Franchise. *See* MCL 484.3303(8) and the *MPSC Order* quoted above. Furthermore, any existing (pre-2007) franchise

terms different from or additional to those specified by the State Act are made null and void: "[o]n the effective date of this act, any provisions of an existing franchise that are inconsistent with or in addition to the provisions of a uniform video service local franchise agreement are unreasonable and unenforceable by the franchising entity." MCL 484.3305(3).

Taken together, these provisions of the State Act have the effect of removing entirely from the City its ability to "consent" to a franchise, as is its right under Article 29. Because the State Act conflicts with the Michigan Constitution, it is invalid.

D. THE 1985 FRANCHISE REMAINS IN EFFECT BECAUSE THE STATE ACT IS PREEMPTED AND THE FEDERAL ACT REQUIRES COMCAST TO HAVE A FRANCHISE.

While Comcast's Franchise with the City expired by its own terms on February 28, 2007, Comcast remains bound by its franchise obligations because it has continued to provide cable service in the City without following the federal franchise renewal procedures. Under federal law, Comcast may not "provide cable service without a franchise." 47 U.S.C. § 541(b). A cable operator that continues to operate after the expiration of the franchise agreement is a "holdover tenant." *Charter Commc'ns, Inc. v. County of Santa Cruz*, 133 F. Supp. 2d 1184, 1188 (N.D. Cal. 2001), *rev'd on other grounds*, 304 F.3d 927 (9th Cir. 2002). When a franchise agreement expires, the cable operator and the franchising authority may either enter into a temporary written extension, or they "may continue operations without a formal agreement, *i.e.*, pursuant to a holdover tenancy subject to termination by either side at will." *Comcast of Ca. , Inc. v. City of Walnut Creek,* 371 F. Supp. 2d 1147, 1155 (N.D. Cal. 2005). Comcast and the City have not entered into a temporary written extension, so Comcast is operating as a holdover tenant.

In Michigan, the Supreme Court has provided that "when a tenant under a valid lease for years holds over, the law implies a contract on his part to renew the tenancy on the same terms for another year; but the landlord may treat him as a trespasser or as a tenant holding upon the

terms of the original lease." *Auto Parts, Inc. v. Jack Smith Beverages, Inc.*, 309 Mich. 735, 743, 16 N.W.2d 141 (1944) (citing *Scott v. Beecher*, 91 Mich. 590, 592, 52 N.W. 20 (1892)). The Michigan Supreme Court affirmed this when it later stated, "it is a general rule that where a tenant under a valid lease for years holds over, the law implies a contract to renew the tenancy on the same terms for another year." *Kokalis v. Whitehurst*, 334 Mich. 477, 480, 54 N.W.2d 628 (1952). Additionally, the court found that:

> Where there is no express agreement for a renewal of an annual lease, and the tenant remains in possession after the term has expired, the landlord may treat him as a trespasser or may acquiesce in his continuing in possession, and in the latter event the law presumes that the tenant holds for another year subject to the terms of the previous lease.

Id. at 481.

Here, Comcast must be treated as a holdover tenant. There is no express agreement for a renewal of the Franchise, for a temporary agreement, or for a new franchise agreement, but Comcast has continued to have access to and provide cable services in the City. *See* Ghant Decl. at ¶ 7 (Exhibit G). To conclude otherwise would render Comcast a trespasser and would also put it in violation of the Federal Act, which requires it to have a franchise anywhere it provides cable service. 47 U.S.C. § 541(b).

Other jurisdictions have reached similar results when faced with franchise expirations. In *Florida Power Corp. v. City of Winter Park*, 887 So.2d 1237 (Fla. 2004), a franchise agreement between the parties expired by its terms. While negotiating a new franchise agreement, Florida Power Corp. (FPC) continued to use Winter Park's rights-of-way and be the sole provider of electricity but refused to remit the franchise fee. *Id*. at 1239. The city continued to maintain the rights-of-way and kept them safe and presentable for the public, and FPC continued to accept and enjoy the benefits of access to and use of the city's rights-of-way and its status as the area's

sole electricity provider. FPC asserted, however, that courts cannot extend the terms of otherwise expired franchise agreements, so it was not required to pay the former franchise fee. The court disagreed:

> [W]e disapprove *Belleair* to the extent it provides that courts cannot extend the terms of expired franchise agreements to cover an interim period during which a holdover utility and the local government resolve the status of their relationship going forward. As explained above, the conduct and interaction of the parties, and balance of equities involved, may render such action necessary and proper. To exclude such a remedy from the reach of the courts would upset the balance of franchise negotiations and renegotiations, and threaten to disrupt sustainable electric service to the citizens of this state.

Id. at 1242.

The court then specifically addressed FPC's status during the pendency of protracted contract negotiations and follow-on litigation:

> The district court applied a far more appropriate remedy by maintaining the parties' status quo, likening FPC to a holdover tenant, and subjecting the utility to the six percent franchise fee until the current impasses is broken through either execution of the contractual buy-back provision or a new franchise agreement.

Id. at 1242.

The Franchise Agreement between the City and Comcast has expired pursuant to its terms. The parties have not entered into a new franchise agreement, nor have the parties entered into a temporary written agreement to govern their relationship during the interim period. *See* Ghant Decl. at ¶ 7 (Exhibit G). However, despite having no formal agreement in place, Comcast has continued to operate in the City's rights-of-way, service the citizens of the City, and collect fees from consumers in the City but without abiding by all of its duties and obligations under the Franchise. *Id.* at ¶¶ 7–9. This has created a windfall for Comcast, and Comcast has been unjustly enriched to the detriment of the City.

As noted above, federal law requires that there be a franchise in place before Comcast may provide cable service to the citizens of the City. Because the Franchise Agreement has expired, and no new agreement is in place, this Court must imply a contract at law and require Comcast to fulfill all of its duties and obligations set forth in the Franchise. Otherwise, Comcast will continue to derive the benefits of the Franchise, while at the same time avoiding its obligations. This would be a wholly inequitable result.

IV. CONCLUSION

The State Act is in clear conflict with the Federal Act and the Michigan Constitution. As a result, the State Act is preempted and/or invalidated and of no further force or effect. Additionally, because Comcast has not obtained a new federal franchise from the City of Detroit, the terms of its original Franchise continue to control. Consequently, the City of Detroit's Motion for Partial Summary Judgment should be granted.

Dated: April 17, 2011

VARNUM LLP
Attorneys for Plaintiff

/s/ Aaron M. Phelps
Aaron M. Phelps (P64790)
John W. Pestle (P25471)
Timothy J. Lundgren (P62807)
Stephen F. MacGuidwin (P72302)
Business Address & Telephone:
Bridgewater Place, PO Box 352
Grand Rapids, MI 49501-0352
Phone: (616) 336-6000
Fax: (616) 336-7000

- *And* -

CITY OF DETROIT LAW DEPARTMENT
Krystal A. Crittendon, Corp. Counsel (P49981)
Lewis Smith, Assistant Corp. Counsel (P69547)
Business Address & Telephone:
660 Woodward Avenue, Suite 1650
Detroit, MI 48226
Phone: (313) 224-4550

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Michael S. Ashton (P40474)
Fraser Trebilcock Davis & Dunlap, P.C.
124 W. Allegan, Suite 1000
Lansing, Michigan 48933
mashton@fraserlawfirm.com
Counsel for Comcast of Detroit, Inc.

Robert G. Scott, Jr.
Davis Wright Tremaine, LLP
1919 Pennsylvania Avenue NW – Suite 800
Washington, D.C. 20006
bobscott@dwt.com
Counsel for Comcast of Detroit, Inc.

Michael G. Vartanian
Richard M. Apkarian, Jr.
Dickinson Wright PLLC
301 East Liberty Street – Suite 500
Ann Arbor, MI 48104
mvartanian@dickinsonwright.com
rapkarian@dickinsonwright.com
Counsel for AT&T Michigan

Robert W. Beach
Spencer A. Sattler
6545 Mercantile Way, Ste. 15
Lansing, MI 48909
beachrl@michigan.gov
sattlers@michigan.gov
Assistant Attorneys General

By: /s/Aaron M. Phelps
Aaron M. Phelps (P64790)
John W. Pestle (P25471)
Timothy J. Lundgren (P62807)
Stephen F. MacGuidwin (P72302)

Business Address & Telephone:
Varnum LLP
Bridgewater Place, PO Box 352
Grand Rapids, MI 49501-0352
Phone: (616) 336-6000
Fax: (616) 336-7000
amphelps@varnumlaw.com

4211985_2