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

BRIEF IN SUPPORT OF PLAINTIFF OF AMICI CURIAE THE MICHIGAN MUNICIPAL LEAGUE, MICHIGAN TOWNSHIPS ASSOCIATION, PROTEC, AND THE STATE BAR OF MICHIGAN PUBLIC CORPORATION LAW SECTION

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Amici curiae, the Michigan Municipal League,[1] Michigan Townships Association,[2] PROTEC,[3] and the State Bar of Michigan Public Corporation Law Section,[4] file this brief in support of the Motion for Partial Summary Judgment filed by the City of Detroit (the "City") on April 17, 2011. Amici curiae agree with the City that, as applied here, the Uniform Video

[1] The Michigan Municipal League is a non-profit Michigan corporation whose purpose is to improve local government and administration through cooperative effort. Its membership is comprised of some 521 Michigan local governments.

[2] The Michigan Townships Association promotes the interests of 1,242 townships by fostering strong, vibrant communities; advocating legislation to meet 21st century challenges; developing knowledgeable township officials and enthusiastic supporters of township government; and encouraging ethical practices of elected officials who uphold the traditions and unique characteristics of township government and the values of the people of Michigan. Collectively, the Michigan Municipal League and the Michigan Townships Association represent all local government entities in Michigan.

[3] PROTEC is an organization of Michigan cities interested in protecting their citizens' governance and control over public rights-of-way, and their right to receive reasonable compensation from the utilities that use public property.

[4] The State Bar of Michigan Public Corporation Law Section provides education, information and analysis about public corporation law issues of concern. Membership in the section is open to all members of the State Bar of Michigan, but statements made on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan.

Services Local Franchise Act of 2006 (the "State Act") is both preempted by federal law and inconsistent with Article 7, Section 29 of the Michigan Constitution.

The State Act is inconsistent with Title VI of the federal Communications Act of 1934 (the "Cable Act")[5] in a number of important respects, many of which the City's brief discusses.[6] Amici curiae focus here on three areas where the conflict is express. First, the State Act is inconsistent with the renewal processes prescribed by the Cable Act: among other things, it denies the public opportunities to participate in, and prevents franchising authorities from complying with, the Cable Act's franchise renewal procedures. Second, while the Cable Act mandates that the City "assure" that cable service is not denied to any area based on the income of the residents of that area, the State Act prohibits franchising authorities from responding to even proven instances of "redlining." Third, the State Act directly defies the Cable Act by denying the City the ability to enforce public, educational and governmental ("PEG") access requirements.

The State Act also runs afoul of the Michigan Constitution. Article 7, Section 29 of the Michigan Constitution explicitly preserves *local* governance of rights of way and also provides that companies seeking to use rights of way must obtain *local consent*. The State Act prohibits denials and compels consent on terms dictated by the State, effectively rendering meaningless the constitutional protection of local authority.

[5] 47 U.S.C. §§ 521 *et seq.*

[6] Plaintiff's Brief in Support of Motion for Partial Summary Judgment, filed April 17, 2011 ("City Brief").

ARGUMENT

I. THE STATE ACT AS APPLIED HERE IS INCONSISTENT WITH—AND IS THEREFORE PREEMPTED BY—THE FEDERAL CABLE ACT.

Under the Supremacy Clause of the United States Constitution, "the Laws of the United States . . . shall be the supreme Law of the Land."[7] The Cable Act expressly preempts "any provision of law of any State . . . which is inconsistent with this Act."[8] In this case, applying the State Act would be inconsistent with the Cable Act because the State Act prevents the City—and other state agencies—from complying with the Cable Act in a number of important respects.[9]

A. *The State Act Makes the City the Franchising Authority.*

Before we address the obligations and rights that the Cable Act bestows upon a franchising authority, we highlight an important point that Comcast has disputed in the past: that the "franchising authority" under the State Act and for purposes of federal law is the local government. Under the Cable Act, a "franchising authority" is "any governmental entity empowered by Federal, State, or local law to grant a franchise.[10] The State Act empowers only a local unit of government—not the State or any other agency of the State—to grant a cable franchise.[11] It further provides that "[b]efore offering video services within the boundaries of a local unit of government the video provider shall enter into or possess a franchise agreement

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[7] U.S. Const. art. VI, cl.2.

[8] 47 U.S.C. § 556(c).

[9] *City of Dearborn v. Comcast of Mich. III, Inc.*, 2008 U.S. Dist. LEXIS 108053 (E.D. Mich. Nov. 25, 2008). Although this brief focuses on express preemption, Amici curiae agree with the City that the State Act is impliedly preempted in this case, as well. City Brief 19-22.

[10] 47 U.S.C. § 522(10).

[11] The State Act defines a "[f]ranchising entity" as "the *local* unit of government in which a provider offers video service through a franchise." MCL § 484.3301(2)(e) (emphasis added). While the authority to grant the franchise rests with the locality, the State Act unlawfully interferes with a local government's exercise of this franchising authority in conflict with Michigan Constitution Art. 7, § 29 as explained *infra,* at Part II.

with *the local unit of government* as required by this act."[12] This differs from the models in many other states, where the State or a State-level agency is "empowered . . . to grant a franchise."[13]

Despite this, Comcast has suggested that this Court must read the Cable Act's legislative history to expand the Cable Act's definition of "franchising authority" to also include an entity—the State of Michigan—that is not "empowered . . . to grant a franchise" at all.[14] The Court should decline the invitation to expand the definition's plain language. It is well-established that legislative history cannot displace clear statutory language.[15]

The point of Comcast's claim is to suggest that even if localities cannot carry out obligations of the franchising authority under the Cable Act, it does not matter, because the State can also be a franchising authority. As shown above, that claim fails on two grounds: first (as shown above), Michigan *did not* choose to make itself, or any other agency, a franchising authority for purposes of cable franchising. Second, even if one *implied* a franchising authority for the State, the Cable Act makes it clear that the authority would have to be exercised and exercisable in a manner consistent with the federal law.[16] That is not the case here. The State Act failed to authorize any entity—be it the State itself, the Public Service Commission, or the

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[12] MCL § 484.3303(1) (emphasis added).

[13] *See, e.g*, Ind. Code Ann. § 8-1-34-16(a)(1) ("the commission is the sole franchising authority"); Mo. Rev. Stat. § 67.2679 (4) ("The public service commission shall have the exclusive authority to authorize any person to construct or operate a video service network or offer video service in any area of this state."); Ohio Rev. Code Ann. § 1332.24(A)(1) ("director of commerce may issue to any person, or renew, a video service authorization, which authorization confers on the person the authority . . . to provide video service in its video service area").

[14] Answer at ¶ 20 (Apr. 1, 2011); Defendant's Motion to Dismiss at 7 (July 15, 2010).

[15] *United States v. Winters*, 33 F.3d 720, 721 (6th Cir. 1994) ("Only if the language of the statute is unclear do we look beyond the statutory language to the intent of the legislature.")

[16] 47 U.S.C. § 556(b). H.R. Rep. No. 98-934 at 94, 1984 U.S.C.C.A.N. 4655, 4731 (1984) (indicating a state has authority to regulate only "as long as the exercise of that authority is consistent with [the Cable Act]").

City—to satisfy the Cable Act "franchising authority" obligations in the City that we discuss in Parts I.B-I.D. Indeed, the State Act expressly confines the State's agency, the Michigan Public Service Commission, to "the powers and duties provided for under this act."[17] The State PSC, among other things, cannot timely consider and update "cable-related community needs and interests,"[18] lacks the power "to assure" that income discrimination does not occur,[19] and lacks the authority to enforce community channel requirements, all of which are critical to the federal scheme.[20] Since the State Act authorizes no entity to fulfill these important federal duties regarding cable service in the City, "it matters not whether the franchising authority is the state and/or a municipality; the law is preempted."[21]

B. *The State Act Undermines the City's Timely Consideration of Community Needs and Interests Under the Cable Act's Renewal Process.*

The Cable Act establishes a renewal process through which franchising authorities establish cable franchise requirements based on their updated review of community needs and public input. The State Act undermines this federally-prescribed process.

1. Both Cable Technology and Community Needs Evolve.

Amici curiae have a significant interest in fostering the development of a robust, modern infrastructure for Michigan communities, and a key element of this infrastructure is a community's cable system. Cable systems provide critical community benefits including cable

[17] MCL § 484.3312(1).

[18] *See* Part I.B, *infra*.

[19] *See* Part I.C, *infra*.

[20] *See* Part I.D, *infra*.

[21] *City of Dearborn v. Comcast of Mich. III, Inc.*, 2008 U.S. Dist. LEXIS 108053 (E.D. Mich. Nov. 25, 2008)

programming, Internet service, and an opportunity to communicate across the community using public, educational, and governmental ("PEG") channels. One "essential" goal of the Cable Act, and of the franchising process, is to permit franchising authorities to "require particular facilities (and to enforce requirements in the franchise…)" so that cable systems are "tailored to the needs of each community."[22]

What the Cable Act recognizes (as we explain in the following section) and the State Act ignores is that this tailoring necessarily changes over time, because both communities and cable technology change over time. In 1987, over 90% of cable systems provided fewer than 54 channels.[23] Today, the average cable system provides nearly *five times* this many channels.[24] When the State Act was passed, most cable operators provided a substantial portion of their services in an analog format; now several operators, including Comcast, have shifted to digital formats. As cable systems go digital, many communities are likewise finding that new, expensive facilities and equipment are needed to produce and disseminate PEG programming in a digital format; to "tailor" the cable system to meet local needs, the franchise may need to address requirements for new facilities and equipment. As technology changes, there are new avenues for providing advanced services to local communities. Cable systems have now added interactive capability including "video on demand" options that could be used to deliver PEG programming such as local City council meetings to viewers whenever they request it.[25] In fact, a key FCC condition on Comcast's recent joint venture with NBC Universal is Comcast's commitment to

[22] H.R. Rep. 98-934 at 26, 1984 U.S.C.C.A.N. 4655, 4663 (1984).

[23] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 F.C.C.R. 7442 at Appendix C, Table 2 (1994).

[24] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 F.C.C.R. 542 at ¶ 44 (2007) (finding an average ranging between 226 and 234 channels per cable system).

[25] *Id.* at ¶ 237.

provide this PEG "on-demand" capability.[26] Comcast stressed the importance of updating PEG technology over time, telling the FCC that "recent technological advances have the potential to increase consumers' ability to access local content anywhere, anytime" and that without such advances "evolving technologies may quickly make today's solutions obsolete."[27] This innovative use of cable technology could not have been anticipated 10 years ago, let alone over 25 years ago (when the City executed the original franchise agreement at issue here); and there is no indication that it was anticipated by the State Act. Thus, as cable technology evolves, so, too, do cable-related community needs and interests.

2. The Cable Act's Renewal Process Is Designed To Accommodate These Technological and Community Changes.

To accommodate the inevitable evolution of cable technology and community needs, the Cable Act codifies a key requirement: the right and duty to renew a cable franchise based on an updated review of a cable operator's past performance, and of the community's future, cable-related needs and interests.

The Cable Act establishes a "national process governing the renewal of a cable franchise" containing "procedures and standards" designed to give stability and certainty to the renewal process,[28] while also ensuring that "cable systems are responsive to the needs and interests of the

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[26] *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.; For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, FCC 11-4, at ¶ 210 (Jan. 20, 2011).

[27] *In re Applications for Consent to the Control of Licenses General Electric Company, Transferor, to Comcast Corporation, Transferee*, Applications and Public Interest Statement, MB Docket No. 10-56, at 69 (Jan. 28, 2010), *available at*: http://www.comcast.com/nbcutransaction/pdfs/Public%20Interest%20Statement%20-%20FINAL.pdf

[28] H.R. Rep. 98-934 at 25, 1984 U.S.C.C.A.N. 4655, 4662 (1984).

local community."[29] The legislative history explains that Congress intended to ensure that cable regulation was based on "certain important uniform standards" that would not be "continually altered by Federal, state or local regulation."[30] The Cable Act's renewal process allows a franchising authority to renew a cable franchise using either formal or informal procedures—but both are built around a central concept: obtaining meaningful public input to ensure that the renewal franchise reasonably meets local needs and interests.[31]

While the formal renewal procedure is not mandatory, the Cable Act empowers either the cable operator or the franchising authority to initiate it. As the City points out,[32] Comcast activated the process here, just as it has in other Michigan communities.[33] Once this process is commenced, the Cable Act vests certain rights in the public and in franchising authorities, and imposes certain obligations upon franchising authorities. Within six months, a franchising authority must commence "a proceeding which **affords the public** in the franchise area appropriate notice and participation for the purpose of (A) **identifying the future cable-related community needs and interests**, and (B) reviewing the performance of the cable operator under the franchise during the then current franchise term."[34] After this proceeding, the cable operator may submit a renewal proposal, which must be released for "**prompt public notice**."[35] The franchising authority must either grant the renewal or preliminarily decide the franchise should

[29] 47 U.S.C. § 521(2).

[30] H.R. Rep. 98-934 at 24, 1984 U.S.C.C.A.N. 4655, 4661 (1984).

[31] The formal process is outlined in 47 U.S.C. §§ 546 (a)-(g). The informal process is described in 47 U.S.C. § 546(h).

[32] City Brief at 3.

[33] *See* Exhibit A (Comcast letters to Ann Arbor, Southfield, and Waterford Township).

[34] 47 U.S.C. § 546(a) (emphasis added). This public proceeding is required regardless of whether a franchising authority or the cable operator invokes the formal renewal procedures.

[35] 47 U.S.C. §§ 546(b)(1), (c)(1) (emphasis added).

not be renewed. If the latter, the Act contemplates that a franchising authority will promptly commence an administrative proceeding for which it also must provide "**prompt public notice**."[36] At this proceeding, the franchising authority considers four matters: whether the operator has provided adequate service in the past; whether it has complied with its obligations under applicable law and the franchise, whether the operator is qualified to perform in the future, and whether the proposal for renewal "is reasonable to meet the future **cable-related community needs and interests**, taking into account the cost of meeting such needs and interests."[37]

A franchise can also be renewed informally, through negotiations. However, a franchising authority and a cable operator cannot simply agree to terms, and be done with it. Rather, even under the informal process, a franchising authority may only grant a renewal proposal "**after affording the public adequate notice and opportunity for comment**."[38]

Several points about the Cable Act's renewal procedures are worth emphasizing. First, timing matters. In light of the rapidly changing nature of cable technology, Congress devised a process that would ensure that a community's needs and interests would be periodically reviewed, and that franchise requirements could be adjusted accordingly. Second, the process is focused on *local* needs and interests.[39] As the legislative history puts it with respect to cable facilities, "[t]he ability of a local government entity to require particular cable facilities (and to enforce requirements in the franchise to provide those facilities) is essential if cable systems are to be tailored to the needs of each community, and [the Cable Act] explicitly grants this power to

[36] 47 U.S.C. § 546(c)(1).

[37] 47 U.S.C. § 546(c)(1)(D) (emphasis added).

[38] 47 U.S.C. § 546(h).

[39] 47 U.S.C. § 521(2).

the franchising authority."[40] Third, and critically, the Cable Act envisions a real and meaningful opportunity for the public to participate. And fourth, the Cable Act bestows important rights and imposes mandatory obligations upon franchising authorities.

3. The State Act Undermines the Cable Act's Franchise Renewal Process.

As the City has shown,[41] the State Act—at least as Comcast seeks to apply it—cannot be squared with the Cable Act's franchise renewal process.

First, there is no meaningful opportunity for the public to participate. As this case illustrates, Comcast submitted a renewal form; the City completed it in light of local requirements; and then Comcast ignored the City's actions and submitted its own proposal as the franchise. It disregarded the public's input and needs.

Second, as Comcast apparently reads it, the State Act establishes a standardized and static "uniform franchise": it cannot vary with a franchising authority's updated consideration of community needs and public input. The State Act directs the Michigan Public Service Commission to develop a "standardized form for the uniform video service local franchise agreement to be used by each franchising entity."[42] It then mandates that the City "approve the agreement" or it will be considered "approved" as a matter of law.[43] Under the State Act, "no existing franchise agreement with a franchising entity shall be renewed," a franchising entity cannot impose "any other franchise requirement,"[44] and it may not modify the uniform video

[40] H.R. Rep. 98-934 at 26, 1984 U.S.C.C.A.N. 4655, 4663 (1984).

[41] City Brief at 7-9.

[42] MCL § 484.3302(1).

[43] MCL § 484.3303(3).

[44] MCL § 484.3303(8).

service local franchise agreement based on its community's needs.[45] Here, the City considered its community's needs, and found (among other things) a need for a 2% PEG fee.[46] Yet Comcast maintains that it need not honor these needs and interests. Thus, as Comcast would apply it, the State Act is not only inconsistent with, but also eliminates, a fundamental element of the federal renewal process: the timely review and update of franchise requirements based on local needs and interests, with public input.[47]

Third, as noted, a number of Amici curiae member communities have received notices from Comcast triggering the Cable Act's formal renewal process. These communities now have a federal law obligation to incur the cost of commencing a proceeding and to consider public input during the renewal process,[48] and a State Law obligation (according to Comcast) to ignore the results. To the extent that the State Act effectively prohibits a locality from commencing a meaningful proceeding to review needs, it is inconsistent with federal law.

This is not to say that the State Act would be preempted in all cases. It may be that in some localities, the uniform franchise and local needs match. Further, the State Act itself contemplates that a locality and a cable operator can agree to terms that are different from those in the State Act.[49] Though the State Act provides no incentive for an operator to do so (and

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[45] MPSC Order U-15169 at 2.

[46] City Brief at 5.

[47] Under the federal renewal process, a local government might also find that the community has a future need for an additional governmental or educational channel. But under the PSC's mandatory franchise, it is not the *current* need that matters, but the PEG requirement in place on January 1, 2007. MCL § 484.3304(1). Those requirements were in many cases based on local needs assessments that had been conducted more than a decade previously. Nonetheless, the requirements of the past determine the requirements for the future under the Michigan model – a model inconsistent with the forward-looking federal model. MCL § 484.3303(7).

[48] 47 U.S.C. § 546(a)(1).

[49] MCL § 484.3313.

examples of such agreements are hard to find), if an operator submitted a reasonable renewal proposal that satisfied a community's future, cable-related needs and interests, and agreed to comply with that proposal, there would be little difficulty.[50] But here, Comcast has not done so. Instead, it has applied the State Act to avoid the Cable Act's renewal process altogether.

C. *The State Act Undermines the City's Cable Act Obligation To Assure That Service Is Not Denied to Any Group Based on Income.*

As the City has also shown,[51] the State Act undermines the City's mandatory obligation to assure that cable service is not denied to any group based on income. The State Act would allow Comcast to deny service to potential subscribers in the City based on the income of residents where the potential subscribers reside, and—in direct defiance of the Cable Act—it would render the City powerless to remedy this practice.

The Cable Act instructs that 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."[52] The House Report explains:

> [C]able systems will not be permitted to "redline" (the practice of denying service to lower income areas). Under this provision, a franchising

[50] As noted above, a locality may not impose "any other franchise requirement" beyond those in the uniform act. MCL § 484.3303(8). But the State Act also provides that the act "does not prohibit a local unit of government and a video service provider from entering into a voluntary franchise agreement that includes terms and conditions different than those required under this act." MCL § 484.3313. The Cable Act's legislative history makes clear that it is the operator's responsibility to submit a proposal for "equipment facilities and services . . . reasonable in light of future, cable-related needs and interests." H.R. Rep. 98-934 at 74, 1984 U.S.C.C.A.N. 4655, 4711 (1984). Hence, an operator who submits an adequate proposal for a franchise could comply with both the Cable Act and the State Act. The problem arises where the State Act is applied to allow an operator to avoid or ignore local needs and interests, and timely public participation.

[51] City Brief 16-19.

[52] 47 U.S.C. § 541(a)(3).

> authority in the franchising process shall require the wiring of all areas of the franchise area to avoid this type of practice.[53]

While the FCC has ruled that the statute does not require "complete wiring" of a franchise area,[54] it unquestionably imposes a mandatory obligation on a franchising authority to assure that no redlining occurs.[55]

Under the State Act, however, the City cannot satisfy this basic Cable Act obligation. The State Act establishes what it calls "defense[s]" to a redlining claim that, if satisfied, preclude a franchising entity (or any other entity) from imposing any other requirements to satisfy the Cable Act anti-redlining provisions.[56] But these "defenses" present a basic problem: a video service provider may satisfy them, while redlining extensively.

This case illustrates the point. The State Act establishes a complete defense to a redlining claim if "[w]ithin 3 years . . . at least 25% of the households with access to the provider's video service are low-income households."[57] The State Act then defines a "low-income household" as "a household with an average annual household income of less than $35,000 as determined by the most recent decennial census," without regard to the number of people within the household. Because a household is considered "low income" whether the $35,000 income feeds one person or a dozen, the state test necessarily sweeps in substantial populations whose income is well

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[53] H.R. Rep. 98-934 at 59, 1984 U.S.C.C.A.N. 4655, 4696 (1984).

[54] *In re Implementation of the Provisions of the Cable Communications Policy Act of 1984*, 58 Rad. Reg. 2d 1 at ¶ 82 (April 11, 1985) (this section does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents of the unwired area).

[55] *ACLU v. FCC*, 823 F.2d 1554, 1580 (D.C. Cir. 1987) (finding wiring can be limited "if no redlining is in evidence").

[56] MCL § 484.3309(9).

[57] MCL § 484.3309(2)(a).

above national poverty guidelines. This allows a cable operator to engage in income-based redlining of areas that are home to the poorest and most vulnerable groups.

An example illustrates: the average Detroit household has 2.84 persons,[58] and the average 3-person household meets federal poverty guidelines if it has an annual income of $18,530.[59] Yet, under the State Act, Comcast can make an affirmative decision not to serve most portions of the City with households below the poverty line. According to a recent American community survey,[60] the City is comprised of the following income groups:

Household income	**Total Households**	**% of City**
Less than $10,000	60,857	19.2%
$10,000 to $14,999	29,797	9.4%
$15,000 to $24,999	47,828	15.1%
$25,000 to $34,999	43,570	13.7%
$35,000 to $49,999	46,011	14.5%
$50,000 to $74,999	46,109	14.5%
$75,000 to $99,999	22,572	7.1%
$100,000 to $149,999	15,745	5.0%
$150,000 to $199,999	3,069	1.0%
$200,000 or more	2,176	0.7%

If Comcast decided to serve all City areas except areas where the average household incomes was less than $15,000, it would leave more than one-quarter of the City's population—about 90,000 households—unserved. Of the remaining roughly 227,000 households "with access" to service, 40.2% (47,828 + 43,570 / 227,080)[61] would qualify under the State Act as "low-income

[58] 2005-2009 American Community Survey 5-Year Estimates, Fact Sheet, Detroit city, Michigan, *available at*: http://factfinder.census.gov/

[59] Department of Health and Human Services, Annual Update of the HHS Poverty Guidelines (Jan. 20, 2011), *available at*: http://aspe.hhs.gov/poverty/11fedreg.shtml

[60] 2005-2009 American Community Survey 5-Year Estimates, Fact Sheet, Detroit city, Michigan, *available at*: http://factfinder.census.gov/

[61] These are the households in the third and fourth rows of the chart, with incomes for $15,000-$24,999 and incomes of $25,000-$34,999.

households."[62] There would be no remedy under the State Act for even this substantial redlining because the "low income" service test would be met. In fact, as long as the arbitrary State Act "defenses" were satisfied, the City could not take any action even if it had direct evidence of intentional redlining. The State Act's inconsistency with the Cable Act is clear. Because the State Act bars the City from fulfilling its Cable Act obligation to assure that redlining does not occur (and because the State Act allows income-based discrimination), the State Act is preempted.

D. *The State Act Denies the City Its Authority Under the Cable Act To Enforce PEG Channel Requirements.*

As the City has also shown,[63] the State Act is preempted because the Cable Act authorizes the City to establish and enforce PEG channel requirements, yet the State Act denies the City this authority.

The Cable Act specifically empowers a franchising authority to require "that channel capacity be designated for public, educational, or governmental use."[64] The Cable Act further allows a franchising authority to "enforce any requirement in any franchise regarding the providing or use of such channel capacity. . . . includ[ing] . . . provisions . . . for services, facilities, or equipment . . . ."[65] As this Court has recognized, a state law that deprives a franchising authority of such powers is preempted.[66] The Cable Act "preempt[s] states from prohibiting local PEG requirements (if any states were to choose to do so)."[67]

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[62] MCL § 484.3309(2)(a).

[63] City Br. 11-13.

[64] 47 U.S.C. § 531(b).

[65] 47 U.S.C. § 531(c).

[66] *City of Dearborn v. Comcast of Mich. III, Inc.*, 2008 U.S. Dist. LEXIS 108053 (E.D. Mich. Nov. 25, 2008).

[67] *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 972-973 (D.C. Cir. 1996) (internal citation omitted).

II. THE STATE ACT VIOLATES THE MICHIGAN CONSTITUTION.

As the City has shown,[68] the State Act also runs afoul of the Michigan Constitution. Article 7, Section 29 of the Michigan Constitution requires every utility to obtain consent to use the streets, and requires every utility to obtain a franchise before conducting business in a locality. It assigns the critical powers of granting that consent and issuing the franchise to local governments, not to the State legislature.[69] While the City remains the franchising authority under the State Act,[70] the State Act—at least as it has been applied here—effectively reduces the City to the role of minister of the *State's* consent and franchising decisions. This turns Article 7, Section 29 on its head.

A. *Article 7, Section 29 Preserves Local Authority To Consent and Franchise.*

Rooted in former Michigan Supreme Court Justice Thomas Cooley's view about the proper role of local governments, Article 7, Section 29 of the Michigan Constitution deliberately preserves local authority to consent and franchise utility use of local property.

Justice Cooley and former Iowa Supreme Court Chief Justice John Dillon led two different schools of thought about local governments' proper constitutional role. In Justice Dillon's view, the local government is purely an instrument of the state: "the [municipal] corporation is made, by the state, one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself."[71] But Justice Cooley disagreed. "The crucial difference between Dillon and

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[68] City Br. 22-26.

[69] *Id*.

[70] *See, supra*, at Part I.A; MCL § 484.3301(2)(e); MCL § 484.3303(1) (requiring "a franchise agreement with the local unit of government").

[71] *City of Kalamazoo v. Kalamazoo Circuit Judge*, 200 Mich. 146, 155, 166 N.W. 998, 1001 (1918), *quoting* Dillon on Municipal Corporations, § 109 (5th Ed. 1911).

Cooley was Cooley's insistence that the people had intended a certain core of local sovereignty to remain inviolate."[72] In his seminal work, Justice Cooley wrote that the American constitutional framework was intended to ensure "that the powers of government are not concentrated in any one body of men, but are carefully distributed, with a view to being easily, cheaply, and intelligently exercised, and as far as possible *by the persons more immediately interested*."[73] Justice Cooley interpreted the Constitution to safeguard the independence of local governments: "The state may mold local institutions according to its views of policy and expediency; but local government is a matter of absolute right; and the state cannot take it away."[74] As he later put it, "The management of purely local affairs belong to the people concerned, not only because of being their own affairs, but because they will best understand, and be most competent to manage them."[75] (Justice Cooley would no doubt have looked with approval upon the words of the Cable Act's drafters: "[I]t 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 a cable operator to tailor the cable system to meet those needs.")[76]

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[72] Joan C. Williams, *The Constitutional Vulnerability of American Local Government: the Politics of City Status in American Law*, 1986 Wis. L. Rev. 83, 88-90 (1986).

[73] Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 3-4*, 190-91 n. 77 (Boston, Little, Brown & Co. 1868) (emphasis added).

[74] *People ex rel. Leroy v. Hurlbut,* 24 Mich. 44, 108 (1871).

[75] Thomas M. Cooley, *The General Principles of Constitutional Law in America*, at 343 (Boston Little Brown & Co. 1880).

[76] H.R. Rep. 98-934 at 24, 1984 U.S.C.C.A.N. 4655, 4661 (1984).

With respect to the right to consent to the use of local property and to franchise for the transaction of local business, the Michigan Constitution's framers sided with Justice Cooley.[77] Article 7, Section 29 provides:

> **Highways, streets, alleys, public places; control, use by public utilities.** No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of 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.

A "substantially similar" provision first appeared at Article VIII, Section 28, of the 1908 constitution.[78] Of it, Professor John A. Fairlie, a delegate, wrote that it "serves to prevent the legislature from granting rights in the public streets of a local district.[79] Article 7, Section 29 has long preserved this power locally.

To be sure, local authority under Article 7, Section 29 is not unlimited. The Michigan Supreme Court has ruled that local consent cannot "be refused arbitrarily and unreasonably."[80] Amici curiae recognize that some courts have concluded that the Legislature can go so far as to "limit a local government's authority to grant or withhold consent *to the use of a narrow class of*

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[77] To be fair to Justice Dillon, even he agreed that local government authority protected in the state constitution may not be limited. As he put it, "Over all its civil, political, or governmental powers, the authority of the Legislature is, in the nature of things, supreme and without limitation, *unless the limitation is found in the Constitution of the particular state*." *City of Kalamazoo v. Kalamazoo Circuit Judge*, 200 Mich. 146, 155, 166 N.W. 998, 1001 (1918), *quoting* Dillon on Municipal Corporations, § 109 (5th Ed. 1911) (emphasis added).

[78] *City of Lansing v. Michigan*, 275 Mich. App. 423, 430 n.2 (2007).

[79] John A. Fairlie, *The Michigan Constitutional Convention* 10 (May 1908).

[80] *Union Twp. v. Mt. Pleasant*, 381 Mich. 82, 90 (Mich. 1968)

public property by a specific type of utility."[81] But this Court need not find that the power preserved by Article 7, Section 29 is absolute to find that the State Act as applied here is unconstitutional; it merely must conclude that the power exists. As described in the following section, the State Act undermines the most elemental exercise of these constitutionally protected powers.

B. *The State Act Defies the Constitution by Reducing Local Governments To Ministers of the State's Franchise and Consent Decisions.*

The State Act undermines local governments' basic rights under Article 7, Section 29 by effectively relegating local governments to ministers of *the State's* franchise and consent decisions.

The State Act commandeers local "consent" and "franchise" procedures. Under the State Act, the Public Service Commission crafts the franchise agreement "to be used by each franchising entity."[82] The *only* action that a local government may take is to "approve the agreement."[83] But even this power—the quintessential "consent" and "franchising" authority—is superseded. If the local government fails to approve the Public Service Commission's uniform agreement (perhaps because it is completely inadequate to satisfy the local community's needs and interests), the State Act decrees "the franchise agreement approved"[84] and a local government may not "impose any other franchise requirement."[85]

It is difficult to imagine a regime more inconsistent with Justice Cooley's principles of localism, or with the principles enshrined in the state constitution. Local governments, the

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[81] *City of Lansing v. Michigan*, 275 Mich. App. at 433 (emphasis added).

[82] MCL § 484.3302(1).

[83] MCL § 484.3303(3).

[84] *Id.*

[85] MCL § 484.3303(8).

political entities most "immediately interested" in use of local property, are reduced to puppets in the hands of the State. The State Act even goes so far as to decree that a local government has "approved" a franchise, even when it has made no such decision. The State Act effectively allows local action to be taken not by an elective body by ordinance or resolution, but by the State Legislature, without any local vote or opportunity for meaningful public participation. Under Article 7, Section 29, local consent cannot be so controlled and compelled by the State.

CONCLUSION

The Court should grant the City's motion. The State Act is inconsistent with and therefore preempted by the Cable Act. In addition, the State Act defies the requirements of Article 7, Section 29 of the Michigan Constitution.

Respectfully Submitted,

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EXHIBIT A

CERTIFICATE OF SERVICE

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