Case Nos. 13-2004, 13-2005, 13-2006

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CITY OF DETROIT,
Plaintiff-Appellee/Cross-Appellant

v.

COMCAST OF DETROIT, A Michigan General Partnership,
Defendant-Appellant/Cross-Appellee,

and

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN,
Intervenor-Defendant-Appellee/Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, CASE NO. 10-12427

BRIEF AMICUS CURIAE OF THE MICHIGAN MUNICIPAL LEAGUE, MICHIGAN TOWNSHIPS ASSOCIATION, PROTEC, AND THE STATE BAR OF MICHIGAN PUBLIC CORPORATION LAW SECTION IN SUPPORT OF APPEAL BY CITY OF DETROIT AND IN OPPOSITION TO CROSS-APPEAL BY COMCAST

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, each of the Amici makes the following disclosure:

1. *Is said corporate party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.*

   No.

2. *Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome of the litigation? If Yes, list the identity of such corporation and the nature of the financial interest.*

   No.

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INTEREST OF AMICI CURIAE

Pursuant to Fed. R. App. P. 29, Amici state: all parties through their respective counsel have consented to the filing of this brief. (1) Counsel for parties in this case did not author this brief in whole or in part; (2) none of the parties or their counsel contributed money intended to fund preparing or submitting the brief; and (3) no person other than Amici, their members, or their counsel contributed money intended to fund preparing or submitting the brief.

The Michigan Municipal League ("MML") is a non-profit Michigan corporation whose purpose is the improvement of municipal government. Its membership includes 524 Michigan local governments, of which 478 are members of the Michigan Municipal League Legal Defense Fund. The purpose of the Legal Defense Fund is to represent MML member local governments in litigation of statewide significance.[1]

The Michigan Townships Association ("MTA") 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

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[1] This brief was authorized by the Legal Defense Fund's Board of Directors, whose membership includes the president and executive director of the MML, and the officers and directors of the Michigan Association of Municipal Attorneys, all of whom are listed at http://www.mama-online.org/board.

of elected officials. Collectively, the MML and MTA represent all local government entities in Michigan.

The Michigan Coalition to Protect Public Rights-of-Way ("PROTEC") is an organization of Michigan cities that focuses on protection of their citizens' governance and control over public rights-of-way.

The State Bar of Michigan Public Corporation Law Section provides education, information and analysis about public corporation law issues of concern. The section is not the State Bar but rather a section whose membership is voluntary. The position expressed in this brief is that of the section only, and the State Bar has taken no position on the matter.[2]

Amici have an interest in this case because Comcast of Detroit ("Comcast") has urged the Court to interpret the Uniform Video Services Local Franchise Act of 2006, Mich. Comp. Laws § 484.3301 *et seq.* (the "Uniform Act"), in a manner that could impair local government rights under 47 U.S.C. §§ 521 *et seq.* ("Federal Cable Act"), and the Michigan Constitution. The State Bar of Michigan Public Corporation Law Section has a significant interest in encouraging an appropriate interpretation of constitutional provisions affecting local governments. Amici file

[2] The total membership of the section is 597. The Section Council members present voted unanimously at its scheduled meeting on September 21, 2013 to file this brief. Michael Watza abstained.

in support of the City of Detroit's appeal, and in opposition to the appeal filed by Comcast.

ARGUMENT

The central issue on appeal is whether the State of Michigan can require a municipality to issue a renewal franchise on terms it dictates, and require the municipality to do so without providing the public an opportunity to be heard on renewal issues.

The district court properly determined that under Michigan Constitution, Article 7, § 29, a local government can say "no" to a request for a uniform franchise submitted by an incumbent cable operator pursuant to the Uniform Act. That ruling is soundly founded in Michigan constitutional law. As Detroit explains, had the court determined that a local government *must* renew a cable franchise on state-specified terms, the Uniform Act would run afoul of not only the Michigan Constitution but also the Federal Cable Act, which requires at a bare minimum that the public be given an adequate opportunity to comment before any renewal franchise issues.[3]

But this Court need not find the Uniform Act wholly unconstitutional to resolve this case in Detroit's favor. Indeed, it can rule in Detroit's favor without

[3] Detroit correctly notes that there is a constitutional question as to whether the Legislature may deem a franchise granted based on local inaction on a complete application for a franchise. However, that issue is not raised directly by this case, as there is no question that Detroit did act to reject Comcast's application.

upending the state law (contrary to the argument of Comcast and its supporting amici). As the Attorney General noted,[4] some local governments may find, after public hearing, that franchise terms specified by the Uniform Act meet their particular community's needs. Others may find otherwise, but a renewal can still be agreed to consistent with the Uniform Act: 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."[5] Protecting local authority to consent to or deny a franchise application vindicates a basic principle of Michigan law, and prevents an abuse of public processes. Comcast and other operators continue to send written notice to municipalities pursuant to 47 U.S.C. § 546(a)-(g), activating the Federal Cable Act's "formal" renewal process. Sections 546(a)-(g) impose an immediate obligation on a locality to commence a public proceeding to review past performance and to identify future, cable-related needs and interests. Comcast implicitly would require local governments to engage in that inquiry while declaring that inquiry pointless. That cannot be the law.

The secondary issue on appeal is whether the Legislature could modify the provisions of the franchise that Detroit issued prior to the adoption of the Uniform

[4] Brief of Intervenor-Appellant Attorney General at 49-50.

[5] Mich. Comp. Laws § 484.3313.

Act, so that it includes only the terms permitted under the Uniform Act. The Attorney General argues that the City has no standing to raise the issue, because it has suffered no injury. But Comcast argues that it has had a right to continue to operate under that franchise *as modified*, and given that claim, the modification issue is properly before this Court. While amici would decide the modification issue on slightly different grounds, the district court's conclusion—that a modification was not permitted—was correct under both the Michigan Constitution and the Federal Cable Act.

I. UNDER MICHIGAN'S CONSTITUTION, A LOCAL GOVERNMENT MUST BE ABLE TO SAY "NO" TO A UNIFORM FRANCHISE APPLICATION.

Article 7, § 29 states that "[n]o person" shall have the right either to (a) the use of the streets "of any county, township, city or village" "without the consent of the duly constituted authority of the county, township, city or village; or (b) to transact local business therein "without first obtaining a franchise from the township, city or village."[6] This power must be "liberally construed in [the local government's] favor."[7] Nonetheless, Comcast's view is that the Legislature may effectively exercise franchising authority with a puppeteer's trick: if the "duly

[6] Mich. Const. Art. 7, § 29.

[7] Mich. Const. Art. 7, § 34.

constituted" local authority would say "no," the Legislature may deem that it said "yes." This would reduce § 29 reduce to a nullity.

A. Article 7, § 29 Preserves Local Authority To Consent.

Comcast and amici argue that the state as sovereign and ultimate franchising authority must necessarily have the authority to dictate what its subdivisions do, without limit. But that assertion ignores the differences between the two basic strands of municipal law in this country. Former Michigan Supreme Court Justice Thomas Cooley and former Iowa Supreme Court Chief Justice John Dillon led two different schools of thought. In Justice Dillon's view, a local government is purely an instrument of the state: "the [municipal] corporation is made, by the State, one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the State rather than for itself."[8] Justice Cooley disagreed, insisting "that the people had intended a certain core of local sovereignty to remain inviolate."[9] In his view, 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

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[8] *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)).

[9] 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).

view to being easily, cheaply, and intelligently exercised, and as far as possible *by the persons more immediately interested*."[10] 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."[11]

The framers of the Michigan Constitution, including § 29, embraced Justice Cooley's view.[12] Describing a "substantially similar" provision at Article 8, Section 28, of the 1908 constitution,[13] Professor John A. Fairlie, a delegate, wrote that it "serve[s] to prevent the legislature from granting rights in the public streets of a local district."[14] Of course, local consent cannot "be refused arbitrarily and

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[10] 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).

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

[12] 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).

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

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

unreasonably."[15] And some courts have concluded that the Legislature can even "limit[ ] a local government's authority to grant or withhold consent to the use of a narrow class of public property by a specific type of utility."[16] But even so, the Michigan courts have consistently stated that the Legislature may not deprive localities of all control over matters the Constitution has entrusted to them.[17]

B. Comcast's Reading Renders The Provision A Nullity.

Yet that is precisely how Comcast and supporting amici ask the Court to read the Uniform Act: a local government's sole task (they claim) is to minister the Legislature's determination on franchising:

> [The local franchising entity] must ensure that the franchise application is complete… But after making that determination, its role is largely ministerial: It can either affirmatively approve the franchise, or do nothing and let it become approved by operation of law; rejection is not an option.[18]

Considering that a cable franchise in Michigan is inherently local—and generally limited to one community—it is difficult to imagine a regime more at odds with Justice Cooley's local home-rule principles, or with § 29's plain language. The reading is particularly troubling because it means that no entity in the State is in a

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

[16] *City of Lansing v. Michigan*, 275 Mich. App. at 433.

[17] *People v. McGraw*, 184 Mich. 233 (1915).

[18] Comcast Br. 27-28 (internal citation omitted).

position to actually undertake the investigations and analyses central to the Federal Cable Act's renewal provisions. Municipal governments (in Comcast's view) are prohibited from even requiring cable operators to comply with mandated federal anti-redlining standards.

C. The District Court Properly Rejected Comcast's Approach.

Based on the Attorney General's position (repeated on appeal), the district court properly rejected Comcast's position and concluded that a plausible reading of the Uniform Act is that a locality may deny a franchise application, and then "would be permitted to work toward achieving a voluntary agreement under the Michigan Act."[19]

Comcast argues that the court stretched the meaning of the Uniform Act beyond recognition,[20] but that is not the case. Section 480.3303 reads like a "shot clock" for action on an application: it establishes a 30-day deadline for approval of a complete and pending application and then defines what happens if that 30-day deadline passes (the application is deemed approved). The Federal Cable Act and associated rules contain similar provisions under which a failure to act may be

[19] Contrary to Comcast's suggestion, given the presence of the Attorney General and the absence of any suggestion that this case raises a controversial interpretation of § 29, there is and was no need to refer the constitutional issues to the Michigan courts.

[20] Comcast Br. 34.

deemed an approval.[21] The Uniform Act *does not* expressly prevent a locality from denying an application, and a denial by definition leaves no application pending before a locality – hence there is nothing to be approved either by action or inaction. The court's interpretation does no violence to the statute, and is consistent with § 480.3302, which states that a franchise may be granted pursuant to the process contemplated by § 480.3303 (the shot clock provision) or through § 480.3313 (permitting negotiated agreement between locality and provider).[22]

But even if Comcast were correct, the result in this case would not change. This Court would then be required to find that § 480.3303 violates the Michigan Constitution, and that Detroit has the constitutional right to say "no" to Comcast's franchise application. That is what the City did when it responded to the Comcast application for a franchise contract with a counterproposal.[23]

D. Comcast's Argument That the State Is Free To Modify Franchises Underscores the Constitutional Deficiencies of Its Arguments.

Comcast suggests that the State is free to modify the terms of any franchise agreement, and it did so here. That is not the case. To suggest that a locality may grant its consent to a franchise under terms permissible under State and federal

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[21] 47 U.S.C. § 537; 47 C.F.R. § 76.41(e)-(f).

[22] Mich. Comp. Laws § 484.3313.

[23] *Harper Bldg. Co. v. Kaplan*, 332 Mich. 651 (1952) (counterproposal is a rejection of the offer).

law, and that the State may then unilaterally alter franchise terms as it chooses, is just another way of arguing that the State can compel a locality to consent to a franchise on terms dictated by the State. The decision to consent, or deny consent, necessarily presumes that the locality can make an informed decision. Moreover, Comcast's argument would create a conflict with another provision of the State Constitution, Art 9. § 18. That provision has been interpreted to mean that neither the State nor a political subdivision can "give anything away without consideration."[24] Comcast identifies no consideration it gave in return for relief from existing and lawful franchise obligations, and none can be imagined. Rather than supporting its arguments, Comcast's modification argument merely underlines the constitutional problems created by its reading of the Uniform Act.

II. COMCAST'S READING OF THE UNIFORM ACT CANNOT BE SQUARED WITH THE FEDERAL CABLE ACT.

Under the district court's reading of the Uniform Act, Detroit can say "no" to Comcast's renewal application, and proceed to work with Comcast to negotiate a franchise agreement that will satisfy the City's future, cable-related needs and interests. So understood, the Uniform Act can be squared with the Federal Cable Act. By contrast, Comcast's reading of the Uniform Act—that it requires ministerial approval of a complete application—cannot.

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[24] *Alan v. County of Wayne*, 388 Mich. 210, 325, 200 N.W. 2d 628, 684 (Mich. 1972) (quoting *Detroit Museum of Art v. Engel*, 1987 Mich. 432 (1915)).

A. No Franchise Renewal Falls Outside the Federal Cable Act's Protections, And Every Renewal Requires Meaningful Public Input.

To understand why this is so, it is important to understand that the Federal Cable Act establishes two very different renewal processes, but both establish important federal protections for the public and local communities. The first renewal process is defined by 47 U.S.C. § 546(a)-(g), and is often referred to as the "formal" process. This process is not mandatory, but can be activated by either the operator or a franchising authority. The second process is set out at 47 U.S.C. § 546(h), and permits a franchising authority and operator to agree on renewal terms at any time. However, a renewal may only be approved "after providing the public adequate notice and opportunity for comment." *Id.*

Because Congress intended that cable regulation would be based on "certain important uniform standards" that would not be "continually altered by Federal, state or local regulation,"[25] the choice that the Federal Cable Act offers cable operators and franchising authorities is not to follow or ignore its requirements. Rather, it is how to structure the process. The parties may follow the formal-process procedures; or they can select the "[a]lternative renewal procedure" in Section 546(h) ("the informal process"); or use both procedures. Indeed, it is precisely because the Federal Cable Act does establish uniform procedures that this

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

Court found that the FCC had authority to establish federal regulations governing certain aspects of the franchising process.[26]

Comcast asserts that the Federal Cable Act's renewal procedures are "entirely optional" and exist only to protect the cable operator.[27] Both positions are wrong. Comcast's argument on the first point is based on a 1984 House Report that is part of the Federal Cable Act's legislative history. That portion of the legislative history indeed states that the Federal Cable Act's renewal provisions are "not mandatory," but instead allow a renewal to be negotiated.[28] But at the time the House Report issued, the legislation that became the Federal Cable Act *only contained* the formal procedures in Section 47 U.S.C. § 546(a)-(g). Section 546(h) was added *after* the Report was issued, "to clarify that the franchising authority and incumbent may agree to renewal" without going through the formal process.[29] Taken together, Section 546(a)-(g) and Section 546(h) cover every renewal. Both processes include a federal requirement for meaningful public input.

The public-input requirement is consistent with the Federal Cable Act's basic purposes. Although one of the Act's goals is to "protect[ ] cable operators against unfair denials of renewal," Congress only extended this protection to an

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[26] *Alliance for Comty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008) ("ACM").

[27] Comcast Br. 8, 37

[28] 1984 U.S.C.C.A.N. 4709.

[29] 1984 U.S.C.C.A.N. 4743.

operator if its past performance and proposal for future performance "meet the standards established" under the Act.[30] These standards protect the public and the franchising authority, not just the operator. The Act's "national process governing the renewal of a cable franchise" contains "procedures and standards" designed to give stability and certainty to the renewal process,[31] while also ensuring that "cable systems are responsive to the needs and interests of the local community."[32] Three points about the process are critical:

First, the Federal Cable Act contemplates timely updates. Recognizing that cable technology changes quickly, Congress devised a process to ensure that a community's needs and interests would be periodically reviewed, so that franchise requirements can be updated and "tailored to the needs of each community."[33] 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.[34] Today the average cable system provides nearly five times the

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[30] 47 U.S.C. §521(5).

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

[32] 47 U.S.C. § 521(2).

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

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

channels.[35] When the Uniform 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, and deliver multiple channels in High-Definition ("HD") format. Cable systems have also added interactive capability including "video on demand" options. By structuring the renewal around *current* public input, the Act's renewal procedures ensure that a franchise's public benefits keep pace with technology.[36]

Second, the Act's renewal process is focused on *local* needs and interests.[37] Needs may differ from community to community: in a rural community, universal service may be the highest priority; in others having additional PEG channels for local news and information may be most important. As the Federal Cable Act's legislative history puts it, "[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

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

[36] *Id.* at ¶ 237.

[37] 47 U.S.C. § 521(2).

community, and [the Federal Cable Act] explicitly grants this power to the franchising authority."[38]

And *third*, as described above, the Federal Cable Act *always* requires a meaningful opportunity for the public to participate, whether renewal is pursuant to the formal or informal process.

B. Comcast's Position Makes the Uniform Act Inconsistent with the Federal Cable Act.

Because this Court has already ruled that the Federal Cable Act is preemptive in this setting,[39] the issue is not (as Comcast contends) whether the Federal Cable Act preempts State and local requirements, but only whether the State and local requirements can be squared with federal law. Comcast's reading of the Uniform Act as mandating ministerial approval of complete applications honors neither the Federal Cable Act's formal or informal processes, and creates insoluble conflicts with other mandatory Federal Cable Act provisions.

Comcast invoked the formal process here—as it has done and continues to do in many Michigan communities. Within six months after the process is initiated, a franchising authority must commence "a proceeding which *affords the public* in the franchise area appropriate notice and participation for the purpose of

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

[39] *ACM, supra.*

(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."[40] After this proceeding, the cable operator may submit a renewal proposal, which must be released for "prompt public notice."[41] The franchising authority must either grant the renewal or preliminarily decide the franchise should not be renewed. If the latter, a franchising authority must commence an administrative proceeding for which it also must provide "prompt public notice."[42] At the conclusion of this proceeding, the franchising authority determines, *based on the factual record*, whether renewal is warranted based on past performance, qualifications, and whether the operator's renewal proposal "is reasonable to meet the future *cable-related community needs and interests*."[43] Nothing in the Act permits an operator to terminate this process once activated, or compels the franchising authority to accept a franchise that does not meet the standards of the Act.

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[40] 47 U.S.C. § 546(a)(1) (emphasis added). This public proceeding is required if either the franchising authority or the cable operator invokes the formal renewal procedures.

[41] 47 U.S.C. §§ 546(b)(1), (c)(1) (emphasis added).

[42] 47 U.S.C. § 546(c)(1).

[43] 47 U.S.C. § 546(c)(1)(D) (emphasis added).

Of course, the formal process could be terminated if there is an agreement on renewal terms pursuant to 47 U.S.C. § 546(h). But the conflict with the Federal Cable Act is not resolved by stating (as Comcast does) that the State has dictated the terms of the renewal. As noted above, under Section 546(h), a franchising authority and a cable operator cannot simply agree to terms. Rather, the franchising authority may only approve a renewal proposal "after affording the public adequate notice and opportunity for comment."[44] This phrase is closely tied to notions of due process. To be "adequate," there must be sufficient notice and time for participation, and an opportunity for a "genuine interchange."[45] The franchising authority certainly must do more than merely receive an application and check it for completeness. A meaningful opportunity to comment requires the chance to address the proposed franchise, and some avenue through which the comments can impact whether renewal should be granted, denied, or conditioned. Under Comcast's view of the Michigan law, therefore, the opportunity for comment

[44] 47 U.S.C. § 546(h).

[45] *See, e.g., Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236-237 (D.C. Cir. 2008); *see also Hollingsworth v. Perry*, 558 U.S. 183, 192-193 (2010) ("the District Court failed to 'giv[e] appropriate public notice and an opportunity for comment,' as required by federal law, 28 U.S.C. § 2071(b)[,]" when it gave five business day notice to comment on a rulemaking whereas agencies normally give at least 30 days); *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 287 F. Supp. 2d 1118, 1171-1172 (C.D. Cal. 2003).

mandated by federal law is foreclosed; the Act would be in unavoidable conflict with federal law.

None of Comcast's other subsidiary arguments avoid the conflict with the Federal Cable Act's renewal provisions. Comcast argues that under the Federal Cable Act, the state could act as the franchising authority. That is true, but it does not mean that the state can renew franchises without regard to the Federal Cable Act's requirements. Moreover, the state is not the franchising authority here, and the state cannot prohibit a locality that *is* the franchising authority from complying with the Cable Act's provisions.[46] It bears emphasizing that only the City of Detroit, not the state, qualifies as a "franchising authority" under the Federal Cable Act because only it is "empowered by . . . State . . . law to grant a franchise."[47]

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[46] 47 U.S.C. § 556 defines the Federal Cable Act's preemptive impact in three separate subsections. First, local and state police powers are broadly protected against implied preemption. §556(a). Second, a State can exercise jurisdiction over cable services "consistent with this title." § 556(b). But any provision of State law "which is inconsistent with this Act shall be deemed preempted and superseded." § 556(c). Preventing a locality from complying with Federal Cable Act processes would be "inconsistent" with the Act. Comcast and the Attorney General confuse subsection (a) with subsection (c).

[47] 47 U.S.C. § 522(9). Mich. Comp. Laws §§ 484.3301(2)(e) (defining "Franchising entity"), 484.3303(1) ("Before offering video services within the boundaries of a local unit of government the video provider shall enter into or possess a franchise agreement with the local unit of government as required by this act.").

This differs from the models in many other states, where the State or a State-level agency is "empowered . . . to grant a franchise."[48]

Comcast also argues that the renewal provisions are irrelevant, because it is not seeking a renewal franchise.[49] There is no legal basis for this argument. The Federal Cable Act defines a "franchise" as "an initial authorization, or renewal thereof . . . issued by a franchising authority… which authorizes the construction or operation of a cable system."[50] Unlike a classic "renewal" in other contexts—where most of the terms remain the same—a Federal Cable Act "renewal" is often issued to the incumbent on very different terms than the initial authorization. Indeed, the Federal Cable Act's formal process does not ask whether the existing franchise terms are adequate, but whether the operator's new proposal is "reasonable to meet the future cable-related community needs and interests."[51] The true distinction is not between old and new franchises or franchise terms, but

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[48] *See, e.g.*, Tenn. Code Ann. § 7-59-303(10) ("With regard to the holder of a state-issued certificate of franchise authority within the areas covered by the certificate, the department is the sole franchising authority."); Ohio Rev. Code Ann. § 1332.24(A)(1) (director of commerce may issue franchise).

[49] Comcast Br. 36.

[50] 47 U.S.C. § 522(9).

[51] 47 U.S.C. § 546(c)(1)(D).

between incumbents and new entrants, as FCC rulings make clear.[52] As the district court correctly found, Comcast's claim "ignores the reality that Comcast is the incumbent cable operator and has no intention of withdrawing from that market."[53]

C. Comcast's Reading of the Uniform Act Is Inconsistent With the Federal Cable Act in Other Respects.

Reading the Uniform Act to prohibit a locality from saying "no" to a franchise application presents other significant issues as well.

The Federal 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."[54] 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 authority in the franchise process shall require the wiring of all areas of the franchise area to avoid this type of practice.[55]

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[52] *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 22 FCC Rcd. 5101 (2007) (new entrants); 22 FCC Rcd. 19633 (2007) (incumbents).

[53] *City of Detroit v. Michigan*, 879 F. Supp. 2d at 680, 695 (2012).

[54] 47 U.S.C. § 541(a)(3).

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

While the FCC has ruled that the statute does not require "complete wiring" of a franchise area,[56] it unquestionably imposes a mandatory obligation on a franchising authority to assure that no redlining occurs.[57] Under the Uniform Act, however, the City cannot satisfy this obligation. The Uniform 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 Federal Cable Act anti-redlining provisions.[58] But these "defenses" present a basic problem: a video service provider may satisfy them while redlining extensively. As the district court concluded, "because the Michigan Act's provision of a defense to a charge of discrimination in a franchise area would actually allow a cable operator to discriminate based on income in violation of the Cable Act, the safe harbor provisions are probably preempted by the Cable Act."[59]

The district court's conclusions are not subject to serious dispute. The Uniform 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

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[56] *In re Implementation of the Provisions of the Cable Communications Policy Act of 1984*, 58 Rad. Reg. 2d 1 at ¶ 82 (April 19, 1985).

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

[58] Mich. Comp. Laws § 484.3309(9).

[59] *City of Detroit*, 879 F. Supp. 2d at 702.

are low-income households."[60] The Uniform 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,"[61] 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 several, the state test necessarily sweeps in substantial populations whose income is well 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.

For example, the average Detroit household has 2.74 persons,[62] and the average 3-person household meets federal poverty guidelines if it has an annual income of $19,530.[63] Yet, the Uniform Act allows Comcast to refuse to serve major portions of Detroit with incomes below the poverty line. That is because, according to recent census data,[64] more than 29% of Detroit households have

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[60] Mich. Comp. Laws § 484.3309(2)(a).

[61] Mich. Comp. Laws § 484.3301(j).

[62] http://quickfacts.census.gov/qfd/states/26/2622000.html (reporting household size for period 2008-2012).

[63] Department of Health and Human Services, Annual Update of the HHS Poverty Guidelines (Jan. 24, 2013), *available at*: https://www.federalregister.gov/articles/2013/01/24/2013-01422/annual-update-of-the-hhs-poverty-guidelines#t-1.

[64] 2008-2012 American Community Survey 5-Year Estimates, Fact Sheet, Detroit, Michigan,

incomes between $15,000 and $35,000. If Comcast's system passed these households, it would satisfy the State test, and it would be free to redline neighborhoods containing the one-third of the City households with incomes below $15,000.[65] Comcast could ignore those households, without a remedy under the Uniform Act. In fact, as long as the arbitrary Uniform Act "defenses" were satisfied, the City could not take any action—even if it had direct evidence of intentional redlining.

Moreover, read as Comcast proposed, the Uniform Act would prevent a locality from protecting against other, more creative approaches to redlining. AT&T now requires persons with a bad credit record to pay a *non-refundable* fee in order to receive U-Verse service.[66] A *refundable* fee based on risk might be somewhat understandable, but an additional charge based solely on credit risk—and thus on income—is hard to square with the Federal Cable Act or local obligations to assure that redlining does not occur.[67] The deficiencies of the Uniform Act are particularly significant because compliance is measured statewide and not based on "local areas" as required by the Federal Cable Act.

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http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/12_5YR/DP03/1600000US2622000%7C400000US26.

[65] *Id*.

[66] http://www.att.com/u-verse/att-terms-of-service.jsp.

[67] This brief focuses on the redlining issues created by the Act, but as Detroit explains, there are other conflicts as well.

D. The Uniform Act Cannot Automatically Modify Detroit's 1985 Franchise Consistent with the Federal Cable Act.

The Uniform Act not only runs afoul of the Michigan Constitution, but also is preempted by the Federal Cable Act to the extent that it purports to modify all provisions of incumbent local franchises. The Uniform Act, for example, purports to prevent local franchising authorities from enforcing PEG provisions that the Federal Cable Act states directly they may enforce. PEG provisions are among the most critical public benefits afforded under any franchise, and a mid-term alteration—without the provision of any countervailing public benefits—materially alters the consideration that justified the grant of the franchise in the first instance. Accordingly, courts in this district have properly determined that PEG provisions of the Uniform Act are inconsistent with the Federal Cable Act to the extent that the provisions purport to preempt provisions of existing cable franchises.[68]

III. COMCAST CANNOT AVOID THE CONSEQUENCES OF ITS CHOICES.

Comcast resists the district court's conclusion that it was a trespasser. The issue arises in an odd factual context, as it is clear Detroit would have been perfectly happy to allow Comcast to continue operating under its pre-Uniform Act franchise or even under a Uniform Act franchise with a 2% PEG fee. But

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

Comcast's own actions here left the district court little choice but to rule as it did at this stage of the proceeding.

Comcast is obviously correct that a franchise agreement's mere expiration often does not reduce the franchisee to a trespasser. For example, a company whose franchise term has expired may operate as a holdover, on terms acceptable to the franchisor. Alternatively, the company may accept a franchisor's new franchise grant under protest, reserving the right to challenge it later.

Here, however, Comcast refuses to operate under the 1985 franchise as issued. It rejected the new franchise offered by Detroit, and will not comply with the Federal Cable Act's formal process, even though it activated that process. Comcast will only operate on the terms of its Uniform Act application, which the City rejected. Comcast was therefore in a legal position indistinguishable from the railway in *City of Detroit v. Detroit United Ry.*, 137 N.W. 645 (Mich. 1912). For a company that seeks to continue operating during the period before a new agreement is reached, the proper course—indeed, the essential course—is to comply and challenge, not to defy the terms of the only existing offer.

IV. COMCAST'S FRANCHISING APPROACH IS ALSO WRONG AS A MATTER OF POLICY.

Comcast and amici attempt to rehabilitate their flawed legal claims with a grab-bag of assertions and policy arguments. They argue that only a mandatory uniform franchising scheme will allow consumers to benefit from head-to-head

competition. They assert that ruling for Detroit would invalidate many state-law uniform franchising schemes. And they claim that a mandatory approach is lawful, because the FCC has endorsed statewide-franchising schemes. None of these claims have merit.

A. Uniform Franchising Has Little or No Impact on Cable Competition.

The Michigan Cable Telecommunications Association ("MCTA") suggests that only the mandatory franchising approach its prefers will produce head-to-head competition.[69] The historical record shows otherwise.

Although federal law once largely prevented it, the Telecommunications Act of 1996[70] freed telephone companies to enter the video-services market and cable companies to enter the telephone-services market. That happened—albeit slowly. As of 2002, no major phone company (including AT&T and Verizon) was in the video-services market, and most major cable companies were only "testing" telephone products.[71] By 2004, however, the cable industry was rolling out telephone products aggressively, threatening telephone companies' core business.[72]

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[69] MCTA Br. at 4-17.

[70] Pub. Law. No. 104-104, 110 Stat. 56 (1996).

[71] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd. 26901 ¶ 10 (2002).

[72] The FCC reported 2.8 million cable telephone subscribers. *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video*

Telephone companies responded by advising investors that they would be entering the video-services market, which affected cable stock prices.[73] And in 2005, SBC (now AT&T) and Verizon were both building out their networks.[74] Verizon reported that it was deploying an advanced fiber optic system to the home (brand-named FiOS) and had franchises from local communities in California, Florida, Virginia, Texas, Massachusetts, and Maryland,[75] *none of which* had, at the time, adopted uniform franchising laws of the sort adopted in Michigan. While AT&T sought state-franchising laws, Verizon continued to deploy its advanced fiber optic system in states like New York, Massachusetts, and Maryland, without seeking legislation to move to a statewide franchising system.

Notably, this competition occurred *before* the Uniform Act took effect in 2007. By that time, Verizon's competitive cable service was available to over 2 million households—all pursuant to local franchises. The Uniform Act has not

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Programming, 20 FCC Rcd. 2755 ¶ 50 (2005). In 2005, the New York Times reported "Comcast plans to offer Internet-based phone service in 20 of its markets by the end of the year as it works to catch up to its competitors, including Time Warner Cable and Cablevision, which already offer the service." http://www.nytimes.com/2005/01/11/business/media/11comcast.html?_r=0

[73] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd. 2755 ¶ 32 (2005).

[74] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd. 2503 ¶ 15 (2005).

[75] *Id.*

resulted in widespread competition in Michigan as compared to other states.[76] In fact, as of 2012, Michigan ranked well below average in advanced-network deployment (Michigan was 9th in population, but 31st in broadband deployment).[77] The top four broadband states (Washington, Massachusetts, Delaware and Maryland) rely on local cable franchising. Therefore, even if it were relevant to the legal analysis, the Court need not fear that leaving room for local franchising decisions would prevent competition.

B. Other States' Franchising Laws Are Irrelevant.

MCTA stresses that other states have adopted statewide laws.[78] That is irrelevant and misleading. It is certainly irrelevant to whether the State may effectively take over franchising consistent with the Michigan Constitution. Moreover, neither amici nor Detroit contends that a system under which a state issues franchises inherently violates the Federal Cable Act. Several states, including Hawaii, have statewide franchising processes that do accord the sort of opportunity for public comment and participation that the Federal Cable Act

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[76] *See* MI-NATOA, *The Ten Disappointments of Cable Deregulation in Michigan*, *available at*:

http://www.mi-natoa.org/pdfs/The_Ten_Disappointments_of_Cable.pdf.

[77] TechNet's 2012 State Broadband Index: Where States Rank as They Look to High Speed Connectivity to Grow Strong Economies and Vibrant Communities, Table 1 (December 2012), http://www.technet.org/wp-contents/uploads/2012/12/TechNet-StateBroadband3a.pdf.

[78] MCTA Br. at 22.

requires.[79] Reliance on statutes from other states is also misleading: we do not know how other states that adopted state franchising regimes concurrent with Michigan will ultimately handle franchise renewals. For example, California is in the middle of a rulemaking to consider how to construe its law to conform with the Federal Cable Act.[80]

C. The FCC's Passing Comment About State Laws Is of No Significance.

Comcast also attempts to bootstrap a passing FCC comment into a holding of legal significance.[81] The Commission noted only that such laws "appear to offer promise in assisting new entrants to more quickly begin offering consumers a competitive choice."[82] The FCC was discussing rules that might speed first entry of competitors into the market—not rules that apply to incumbents. The Commission did not assess the legality of the laws under the Federal Cable Act or its renewal provisions. However, in a later order, the Commission *did* distinguish between the renewal process and new entry—and also suggested that applying the same

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[79] Haw. Rev. Stat. § 440G-7.

[80] California Public Utilities Commission, *Order Instituting Rulemaking for Adoption of Amendments to a General Order and Procedures to Implement the Franchise Renewal Provisions of the Digital Infrastructure and Video Competition Act of 2006*, Rulemaking 13-05-007 (Filed May 23, 2013).

[81] Comcast Br. 11 (citing *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 22 FCC Rcd. 5101, 5109, 5156 (2007)).

[82] *Id.* at 5109.

franchise conditions to an incumbent as to a new entrant could actually "hinder the statutory goal of broadband deployment."[83] Comcast and amici would read the Uniform Act to have just this effect.

CONCLUSION

For reasons stated above, Comcast's appeal should be denied, and Detroit's appeal granted to the extent required to resolve this matter.

Respectfully submitted,

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[83] *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 22 FCC Rcd. 19633 ¶¶ 8-9 (2007).

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,971 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I, Joseph Van Eaton, hereby certify that I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF document filing system on December 30, 2013. The following participants in the case, who are registered CM/ECF users, will be served by the appellate CM/ECF system in accordance with 6th Cir. R. 25(f)(1)(A):

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