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Michigan's Cable Franchising System By Julie Cassidy, Legislative Analyst

Introduction

In December 2006, Governor Jennifer Granholm signed into law House Bill 6456, creating the "Uniform Video Services Local Franchise Act". The Act revises the system for the provision of cable television services, in response to concerns that in many communities, residents do not have a choice of cable providers, and have experienced steadily increasing cable rates over the last several decades. Until now, a cable provider had to negotiate a separate franchise agreement with each municipality (i.e., franchising entity) in which it desired to offer service. The franchise agreement typically prescribed the fee the provider would pay to the local unit for right-of-way use; a minimum number of households to which the provider had to provide service (build-out provisions); any public, education, and government (PEG) channels that had to be provided; and enforcement procedures for the local unit. Under the Act, which took effect on January 1, 2007, the Public Service Commission (PSC) must design a uniform franchise agreement to be used statewide. A local unit may not require a cable provider to obtain any other franchise, and may not assess any fee or impose any franchise requirement other than as allowed under the Act.

This article contains an overview of the legislation and the debate surrounding the cable franchising system. The article also touches on the unresolved issue of net neutrality. (For a detailed description of the Act and an analysis of its fiscal impact, please see the Senate Fiscal Agency's Enrolled Summary of House Bill 6456, available at www.legislature.michigan.gov.)

Uniform Video Services Local Franchise Act

Uniform Franchise. The Act prohibits a person from providing video services in any local unit of government without first obtaining a uniform video service local franchise, as established by the PSC, except as otherwise provided. The uniform franchise is to be issued by the local unit. It will be effective for 10 years, and may be renewed in 10-year increments. As noted above, a franchising entity may not require a video service provider to obtain any other franchise, and may not assess any fee or charge or impose any franchise requirement other than that allowed under the Act, as a condition to obtaining or holding a franchise. The Act specifies that any provisions of a franchise agreement existing on the Act's effective date that are inconsistent with or in addition to the provisions of the uniform agreement are unreasonable and unenforceable.

An incumbent video provider (a cable operator providing services on the Act's effective date) may continue to provide video services to the franchising entity by electing to do one of the following:

- Terminate the existing franchise agreement before its expiration date and enter into a new franchise under a uniform agreement.
- Continue under the existing agreement, amended to include only those provisions required under a uniform local franchise.

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- Continue to operate under the terms of an expired franchise until a uniform agreement takes effect.

If a franchising entity authorizes two or more providers, the franchising entity may not enforce any term, condition, or requirement of any franchise agreement that is more burdensome than the terms, conditions, or requirements contained in another franchise agreement.

Voluntary Franchise Agreement. The Act states that it does not prohibit a local unit of government and a provider from entering into a voluntary franchise agreement that contains terms and conditions different than those required under the Act, including a reduction in the franchise fee in return for the provider's making available to the franchising entity services, equipment, capabilities, or other valuable consideration.

PEG Channels. A video service provider must designate a sufficient amount of capacity on its network to provide for the same number of PEG access channels that were in actual use on the incumbent video provider system on the Act's effective date. Any PEG channel that the franchising entity does not use for at least eight hours per day for three consecutive months may no longer be made available to the franchising entity and may be programmed at the provider's discretion. When the franchising entity can certify a schedule for at least eight hours of daily programming for three consecutive months, the provider must restore the previously reallocated channel.

Fees. The Act requires a video service provider to calculate and pay an annual video service provider fee to the franchising entity. If there is an existing franchise agreement, the fee must be an amount equal to the percentage of gross revenue paid to the franchising entity by the incumbent provider with the most subscribers in the franchising entity. At the expiration of an existing agreement, or, if there is no existing agreement, the fee must be an amount equal to the percentage of gross revenue as established by the franchising entity, up to 5%.

Additionally, a provider must pay to the franchising entity as support for the cost of PEG access facilities and services an annual fee equal to one of the following:

- If there is an existing franchise agreement, the fee paid to the franchising entity by the incumbent provider with the most cable service subscribers in the franchising entity under that agreement.
- Upon expiration of the existing agreement, the amount described above, not to exceed 2% of gross revenue.
- If there is no existing agreement, a percentage of gross revenue as established by the franchising entity not to exceed 2%, to be determined by a community need assessment.

The required fees must apply to all providers.

Video Service Provider Fee Credit. A provider is entitled to a credit applied toward the video service provider fees for all funds allocated to the franchising entity from annual maintenance fees paid by the provider for use of public rights-of-way, minus any property tax credit allowed under the Metropolitan Extension Telecommunication Rights-of-Way Oversight (METRO) Act. The credit must be calculated by multiplying the number of linear feet the

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provider occupies in the public rights-of-way by the lesser of five cents or the amount assessed under the METRO Act. A provider is not eligible for this credit unless it has taken all property tax credits allowed under the METRO Act.

PSC Costs. Within 30 days after the enactment of any appropriation to the PSC, the Commission must ascertain the amount of the appropriation attributable to its actual costs in exercising its duties under the new Act, and that amount must be assessed against each provider doing business in the State, based on its share of the total number of video service subscribers in the State. The total assessment may not exceed \$1.0 million. This requirement does not apply after December 31, 2009.

Right-of-Way Access. A franchising entity must allow a provider to install, construct, and maintain a video service or communications network within a public right-of-way, and to allow the provider open, comparable, nondiscriminatory, and competitively neutral access to the right-of-way. A franchising entity may not discriminate against a provider for the authorization or placement of a video service or communications network in public rights-of-way; access to a building owned by a governmental entity; or a municipal utility pole attachment.

Build-Out Provisions. The Act prohibits a provider from denying access to service to any group of potential residential subscribers due to the race or income of the residents in the local area. It is a defense to an alleged violation of the prohibition that the provider has met either of the following conditions:

- Within three years of the date it began providing video service under the Act, at least 25% of households with access to the provider's service are low-income households (i.e., households with an average annual income of less than \$35,000).
- Within five years of the date it began providing service under the Act and from that point forward, at least 30% of the households with access to the provider's service are low-income households.

If a provider is using telecommunication facilities to provide video services and has more than 1.0 million telecommunication access lines in Michigan, the provider must provide access to its service to at least 25% of the households in its telecommunication service area within three years of the date it began providing video service under the Act, and to at least 50% of those households within six years. A provider is not required to meet the 50% requirement until two years after at least 30% of the households with access to its service subscribe to the service for six consecutive months.

A provider may apply to the franchising entity, and, in the case of a provider with more than 1.0 million telecommunication access lines, to the PSC, for a waiver of or an extension to meet the service requirements if any of the following apply:

- The inability to obtain access to public and private rights-of-way under reasonable terms and conditions.
- Developments or buildings not being subject to competition because of existing exclusive service arrangements.



- Developments and buildings being inaccessible using reasonable technical solutions under commercial reasonable terms and conditions.
- Natural disasters.
- Factors beyond the provider's control.

A provider may 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 the Act.

Dispute Resolution Process. Each provider must establish a dispute resolution process for its customers. Additionally, by June 1, 2007, the PSC must submit to the Legislature a proposed process to be added to the Act that would allow the Commission to review disputes that are not resolved under the customer dispute resolution process, as well as disputes between a provider and a franchising entity and disputes between providers.

Violations & Penalties. After notice and hearing, if the PSC finds that a person has violated the Act, it must order remedies and penalties to protect and make whole anyone who has suffered damages as a result of the violation. The PSC may do one or more of the following:

- Except as provided below, order the person to pay a fine of not less than \$1,000 or more than \$20,000 for a first offense, or at least \$2,000 but not more than \$40,000 for a subsequent offense.
- If the provider has fewer than 250,000 telecommunication access lines in Michigan, order the person to pay a fine of not less than \$200 or more than \$500 for a first offense, or at least \$500 but not more than \$1,000 for a second or subsequent offense.
- Revoke a uniform video service local franchise.
- Issue cease and desist orders.

Arguments Supporting & Opposing the Legislation

According to proponents of the Act, in creating one set of rules by which all providers must abide, the Act eliminates the need for cable providers to negotiate separate contracts with hundreds of local units and will facilitate an earlier entry to the market by new competitors. The increased competition, in turn, should help drive down prices and encourage technological innovation and the deployment of new services. Additionally, according to supporters, the Act will result in the creation of thousands of new jobs and the investment of millions of dollars in Michigan.

Local units of government are concerned that the Act permits an incumbent cable provider to break its existing franchise agreement and choose to operate under the new, uniform agreement. The municipalities argue that existing agreements were negotiated in good faith, and that local units and consumers are relying on the original terms for the duration of the contract. If an incumbent provider may break its contract, municipalities could lose valuable in-kind services or simply be left without service. Incumbent providers, however, claim that they need the ability to abrogate their current contracts so that incoming competitors do not have an unfair advantage under the terms of the uniform agreement.



Local governments also are concerned that a statewide franchise system will not be as responsive as the locally based system is to customer questions and complaints. Additionally, local units are troubled that the legislation allows a provider to obtain an extension for compliance with, or a waiver from, the prescribed build-out requirements. They worry that providers might target their service only to the most profitable customers, negating the benefits that increased competition is supposed to bring. Opponents of the legislation also point out that there was nothing under the local franchise system prohibiting new providers from entering the market.

Net Neutrality

A point of contention in discussions about the legislation was the issue of net neutrality, a concept some people assert is critical to maintaining free speech and an open internet. Advocates of net neutrality protections believe that the statute should contain provisions that would prevent large cable and internet providers from interfering with access to the websites of their competitors, or creating a tiered system by charging website owners exorbitant fees to provide site visitors with a better connection.

Those who oppose including net neutrality provisions in State law argue that they are unnecessary absent a significant documented history of providers' engaging in such activities. These parties also assert that Federal law supersedes state law, and, since the Federal Telecommunications Act does not include net neutrality provisions, the State is precluded from enacting them. Some net neutrality advocates have claimed that a net neutrality requirement would fall within the realm of consumer protection measures, which the Federal law does grant states the right to enact. Since the Federal statute does not specifically address net neutrality, however, there is ambiguity regarding the State's authority over the matter. Additionally, some contend that, if net neutrality requirements are to be enacted, they should be enacted at the Federal level, rather than the state level, because the internet is not limited by state boundaries.

The recently enacted legislation does not include net neutrality provisions, but the Governor has urged the Legislature to address the issue. Thus, it is possible that the subject will be revisited in the 2007-2008 session.