

**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.:

Hon.

CLAIM OF UNCONSTITUTIONALITY

COMPLAINT

NOW COMES the City of Detroit, by and through its counsel of record, Varnum LLP, and in support of its Complaint states as follows:

STATEMENT OF THE CASE

1. The Plaintiff City of Detroit (the "City" or "Detroit") brings this suit to resolve disputes between the parties arising under the Federal Cable Communications Policy Act of 1984, 47 U.S.C. § 521, *et seq.* (the "Federal Act"). At the heart of this dispute is the validity of a Michigan statute that purports to regulate cable franchises in Michigan and which Comcast of Detroit, Inc. ("Comcast") contends allows it to disregard the federally mandated (and exclusive) procedures for renewing or modifying its franchise with the City and the terms of its franchise. Effective January 1, 2007, the State of Michigan enacted the Uniform Video Services Local Franchise Act, P.A. 480 of 2006 (the "Michigan Act"), which purports to replace the federal franchise procedures, including the federally mandated exclusive procedure for renewing cable franchises, with a new state process. The Michigan Act also purports to nullify key provisions of Detroit's current franchise with Comcast, including anti-discrimination, consumer protection, and

customer service provisions without regard to the federally mandated procedure for modifying cable franchises. The Michigan Act unconstitutionally infringes upon federal law, as well as the authority delegated to the City of Detroit by the Michigan Constitution, and where it does so, it is null and void.

JURISDICTION AND VENUE

2. The City of Detroit is a municipal corporation organized under the laws of the State of Michigan.

3. Comcast of Detroit, Inc. is a Michigan corporation.

4. Plaintiff asks this Court to determine that the Federal Act preempts the Michigan Act, and therefore, this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction pursuant to 28 U.S.C. § 1336.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(1) because Comcast resides in the Eastern District of Michigan.

COMMON ALLEGATIONS

A. Comcast is Required to Have an Approved Cable Franchise From the City in Order to Operate in the City

6. Cable franchises authorize a cable company to construct and operate a cable system in a city, village, or township, and authorize the use of the public streets and rights of way for the company's wires. Franchises also set forth the terms and conditions on which cable service is to be provided to residents of the community.

7. Under the Federal Act, franchises are to be individually tailored to the unique cable-related needs of each community. Accordingly, franchises typically include provisions governing the services to be provided; where service is to be provided; protections against

discrimination; grants of use of the public streets; support for city channels, school channels, and public channels; as well as liability, insurance and indemnification provisions.

8. Federal, state, and local law all require cable operators in Michigan to obtain and have franchises from the municipalities in which they operate.

9. In Michigan, the State Constitution delegates to the cities, townships and villages within the State, the exclusive authority to grant franchises. Const. 1963, Art. 7, § 29.

10. Consistent with this constitutional edict, the Michigan Act itself defines "franchising entity" as "the local unit of government in which a provider offers video services through a franchise." MCLA § 484.3301(2)(e).

11. Thus, under both the Michigan Constitution and the Michigan Act, the City of Detroit is the franchising authority with respect to any cable operations in Detroit.

12. The Federal Act requires the "franchising authority" and cable operator to follow the requirements of that Act regarding cable franchises, and expressly preempts all state laws to the contrary. 47 U.S.C. § 556.

B. The City of Detroit Approved a Franchise with Comcast

13. In the early 1980s, the City of Detroit issued a request for proposals for a cable system to serve all city residents. It reviewed the proposals received and recommended in a Final Report to the Mayor on June 17, 1983 that a non-exclusive cable franchise for the City be extended to Barden Cablevision of Detroit, Inc. ("Barden").

14. Following public hearings and deliberation, the City Council adopted Ordinance No. 560-H (currently Article III of Chapter 9.5 of the City Code), by which the City entered into a "Cable Communications Service Franchise Agreement" (the "1985 Franchise" or "Franchise

Agreement") with Barden, which was later amended and restated in 1985. *See Exhibit A* (schedules and technical specifications omitted).

15. The 1985 Franchise was subsequently transferred to, and assumed by, Comcast.

16. The current Franchise is the result of extensive work and negotiations by the City and has been tailored to meet the unique cable-related needs of the residents of Detroit. Among other things, Comcast's Franchise requires it to: (a) offer service to all residents in the City, regardless of income or race, (b) provide channels for city, school and public use (so-called public, educational and governmental access channels, or "PEG channels") and the facilities, equipment, and technical support necessary to operate those channels, (c) provide a communications network ("institutional network" or "I-Net") that connects the many units of City government, and (d) comply with consumer protection and customer service standards of the city and those set by the Federal Communications Commission ("FCC").

17. The City of Detroit has also complied with its obligations under the Federal Act by including substantial anti-discrimination provisions in its Franchise, along with mechanisms for the enforcement of those provisions.

18. The Franchise was set to expire February 28, 2007.

C. **The Federal Act Dictates the Process that Comcast and the City Must Follow for Renewal of the Franchise**

19. One of the primary purposes of the Federal Act was to establish a uniform, national process for issuing, renewing, and modifying franchises, which replaced the prior cable regulatory regime where each of the fifty states or their thousands of local units of government had their own standards and processes. *See* 47 U.S.C. § 521(1) & (5).

20. As the "franchising authority" under the Federal Act, the City of Detroit is the key player in implementing the process for renewing a cable franchise and determining what terms are necessary to meet the needs of the City and its residents.

21. The federal renewal process under the Federal Act calls for either following a formal renewal procedure (47 U.S.C. § 546(a)–(g)) or an alternative informal renewal procedure (47 U.S.C. § 546(g)).

22. Under the Federal Act's formal renewal procedure, once a cable operator has requested that its Franchise be renewed, a "franchising authority" such as Detroit must hold public proceedings to, among other things, (1) identify the City's unique future cable-related community needs and interests, and (2) review the cable operator's past performance.

23. After conducting that proceeding, the formal renewal procedure requires that the City consider, and then approve or disapprove, a franchise proposal responsive to the identified community needs and interests as submitted by the cable operator for renewal.

24. Alternatively, the informal negotiation process allows a franchising authority to renew a franchise by approving a proposal from a cable operator after a period of public notice and comment.

D. While Comcast and the City Were Negotiating a Renewal Franchise, the State of Michigan Adopted The Michigan Act, Which Purports to Replace the Federal Act

25. Once a franchise has been approved, the Federal Act prevents it from being modified without complying with the specific modification procedures of 47 U.S.C. § 545, which require a showing of commercial impracticability, a public proceeding, and prevent the modification of obligations related to PEG channels and services.

26. The Michigan Act replaces cable franchises tailored under the federal process by each municipality to meet its unique needs with a uniform form of franchise that applies

statewide. Thus, rather than abiding by federal law, the Michigan Act directed the Michigan Public Service Commission to create a one-size-fits-all franchise agreement that municipalities, including the City of Detroit, must grant (a "Uniform Franchise"). MCL § 484.3302(1). The Michigan Public Service Commission issued the one-size-fits-all Uniform Franchise on January 30, 2007. It specifically forbid municipalities from altering the Uniform Franchise.

27. The Michigan Act specifies that if a municipality such as the City refuses to grant a cable operator's request for a Uniform Franchise within 30 days (or notify the cable operator within 15 business days that the Uniform Franchise as submitted is incomplete), the Uniform Franchise is nonetheless deemed granted by operation of the state law. MCL § 484.3303(3).

28. The Michigan Act purports to prohibit renewals and extensions under the Federal Act. MCL § 484.3305(1).

29. The Michigan Act also purports to abrogate and make unenforceable all terms and conditions of Detroit's current franchise that differ from the state's Uniform Franchise, including key provisions regarding PEG channels, anti-discrimination, consumer protection, and customer service, but without complying with the Federal Act's substantive and procedural provisions on franchise modification. MCL § 484.3305(2) & (3).

30. The Michigan Act forbids the City from requiring a cable operator to enter into any other agreement, from assessing any other fee, or from imposing any other requirements (including, but not limited to, build-out requirements and requirements for facilities or equipment) than those which are allowed under the Michigan Act. *See* MCL § 494.3303(8).

E. Comcast Refuses to Negotiate a New Franchise and Ignores the Federal Renewal Process

31. Following enactment of the Michigan Act, on February 28, 2007, Comcast submitted the Uniform Franchise form to the City for its approval. Comcast's proposed franchise

lacked most of the key provisions that were part of both the existing Franchise, and the renewal franchise which Comcast and the City had largely negotiated, such as consumer protection provisions, anti-discrimination provisions, or support for PEG channels – all of which are allowed or required by the Federal Act. Comcast's proposed franchise also lacked a fee in support of PEG channels.

32. On March 16, 2007, the Detroit City Council approved a franchise on the terms proposed by Comcast, except that the City added a fee in support of PEG channels to partly replace funding and in-kind services lost under the proposed Uniform Franchise.

33. On April 23, 2007, Comcast sent a letter to the City rejecting the franchise as approved by the City and asserting that the Uniform Franchise it had proposed in February was now in full force and effect. *See Exhibit B.* The February Uniform Franchise submitted by Comcast has never been approved by the City or issued pursuant to any of the procedures required by the Federal Act.

34. Although Comcast's 1985 Franchise expired by its own terms on February 28, 2007, Comcast has continued to provide cable services in the City and continues to use the City streets and other public rights of way for its facilities.

35. While Comcast has continued to enjoy the privileges of a franchise holder by continuing to provide cable service in the City, it has not abided by the requirements of its Franchise or complied with its obligations thereunder. Some of the ways in which Comcast has breached its Franchise include the following:

- a. Ceased providing free drops and service to municipal buildings
- b. Ceased to provide free drops and service to school buildings

- c. Failed to provide an institutional network ("I-Net") to facilitate communication among City buildings
- d. Failed to provide the additional PEG channel required under the terms of the 1985 Franchise
- e. Closed PEG studio facilities and ceased providing mobile units, equipment, staff, and maintenance
- f. Ceased providing payments in support of PEG to the Public Benefit Corporation, as required in the 1985 Franchise
- g. Ceased providing complimentary transmission lines for City's PEG channels from the studio to the cable operator's headend and maintenance on those lines.

COUNT I
PREEMPTION – THE FEDERAL ACT PROVIDES THE
EXCLUSIVE PROCEDURES FOR FRANCHISE RENEWAL,
THE PROVISIONS OF THE MICHIGAN ACT TO THE CONTRARY ARE PREEMPTED,
AND COMCAST'S 1985 FRANCHISE REMAINS IN EFFECT

36. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs.

37. The Federal Act sets forth a uniform national process for the issuance, renewal, and modification of cable franchises. 47 U.S.C. § 521(1) & (5).

38. Contrary to Federal law, the Michigan Act purports to prohibit Detroit from following the federally mandated process for the renewal of cable franchises. In fact, the Michigan Act expressly prohibits Detroit from renewing or extending Comcast's current federally authorized Franchise.

39. Pursuant to Article VI, Section 2 of the United States Constitution, federal law is the supreme law of the United States and preempts all contrary state law.

40. The Federal Act expressly states that any provision "of law of any State ... which is inconsistent with [the Federal Act] ... shall be deemed to be preempted and superseded." 47 U.S.C. § 556.

41. The Michigan Act, to the extent it directly contradicts and is otherwise inconsistent with the Federal Act, is preempted, void and otherwise unenforceable as a matter of law.

42. This Court has already ruled in *City of Dearborn v Comcast of Michigan*, Case No. 08-10156, E.D. Mich, (Judge Victoria A. Roberts) that to the extent the Michigan Act makes PEG-related franchise requirements unenforceable, it is preempted by the Federal Act: "[b]ecause the [Michigan] Act makes unenforceable what federal law explicitly makes enforceable, the [Michigan] Act is preempted by 47 U.S.C. §531." *City of Dearborn v. Comcast of Michigan III, Inc.*, Case No. 08-10156, E.D. Mich., October 3, 2008, slip opinion at 9.

43. Comcast initiated, but later abandoned the federal franchise renewal process, and instead unilaterally submitted a Uniform Franchise to the City pursuant to the Michigan Act. The terms of the proposed Uniform Franchise were not the result of any negotiation with the City, did not take into account the unique cable-related needs of City residents as required by the Federal Act, and in other ways did not comply with the requirements of the Federal Act.

44. The City did not accept Comcast's proposed Uniform Franchise and therefore the parties have not agreed to a new franchise.

45. Despite the fact that Comcast has not renewed its Franchise in accordance with the Federal Act, Comcast has continued to provide cable services in the City. Because the

Federal Act and Michigan law require Comcast to have a valid franchise from the City in order to provide cable services, Comcast is deemed a "holdover tenant" under state and federal law and remains bound by the terms of its 1985 Franchise, until renewed in compliance with the Federal Act or until Comcast ceases to provide cable service in the City.

WHEREFORE, City of Detroit respectfully requests that this Court enter judgment in its favor and against Comcast (a) declaring that Comcast has violated the Federal Act by failing to adhere to its mandatory renewal procedures, (b) declaring that all provisions of the Michigan Act inconsistent with such procedures are preempted by the Federal Act, (c) declaring that Comcast is a "holdover tenant" and continues to be bound by the terms of the 1985 Franchise, (d) requiring specific performance by Comcast of the Franchise, and (e) awarding all other relief to which the City may be entitled.

COUNT II
BREACHES OF FRANCHISE BY COMCAST,
MICHIGAN ACT FRANCHISE MODIFICATION PROVISIONS PREEMPTED

46. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs.

47. The Franchise Agreement is a valid and binding contract, and Comcast failed to fulfill a number of key provisions of that contract, including, but not limited to, the following:

- a. Provide free drops and service to municipal buildings. 1985 Franchise Section 7.7(c).
- b. Provide free drops and service to school buildings. *Id.* at Section 7.7(d)
- c. Provide an institutional network ("I-Net") to facilitate communication among City buildings. *Id.* at Section 7.

- d. Provide the additional PEG channel required by the Franchise. *Id.* at Sections 6.10 & 6.11.
- e. Maintain at least 3 PEG studio facilities and provide mobile units, equipment, staff, and maintenance. *Id.* at Section 6.3 – 6.5, 6.14, & 12.22.
- f. Provide payments in support of PEG to the Public Benefit Corporation, as required in the 1985 Franchise. *Id.* at Section 8.2.
- g. Provide complimentary transmission lines for City's PEG channels from the studio to the cable operator's headend and maintenance on those lines. *Id.* at Sections 7.7, 6.14 & 12.22.

48. Comcast has continued to refuse to fulfill these Franchise obligations and is therefore in material breach of its Franchise.

49. The Federal Act contains a mandatory franchise modification process to be followed for a cable operator to obtain a modification of its franchise. 47 U.S.C. § 545.

50. The franchise modification provisions of the Federal Act set forth a standard ("commercially impracticable") that must be met by the operator before a franchising authority (§ 545(a)) or a court (§ 545(b)) may grant relief from existing franchise obligations. Furthermore, PEG-related obligations are explicitly protected from modification. *See* § 545(e).

51. The provisions of the Michigan Act purporting to modify or eliminate those provisions of the Franchise not in accordance with or in addition to those in the Uniform Franchise are preempted for failure to comply with the franchise modification provisions of the Federal Act.

52. The City has suffered substantial damages as a direct result of the above breaches of the Franchise by Comcast.

WHEREFORE, City of Detroit respectfully requests that this Court enter judgment in its favor and against Comcast (a) declaring that the purported nullification of portions of the Franchise not complying with the Michigan Act is preempted by the Federal Act, (b) awarding it an amount sufficient to compensate the City for all of its losses and damages, including incidental and consequential damages, incurred as a result of Comcast's breach of the terms of its Franchise Agreement, (c) requiring specific performance by Comcast of the Franchise, and (d) awarding all other relief to which the City may be entitled.

Count III
PREEMPTION OF OTHER MICHIGAN ACT
PROVISIONS CONFLICTING WITH FEDERAL ACT

53. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs.

54. The Federal Act expressly authorizes the City of Detroit, as a franchising authority, to establish and enforce customer service requirements on the cable operator. 47 U.S.C. § 552(a). The Federal Act also authorizes the FCC to establish standards (which cities may enforce and supplement) by which cable operators may fulfill their customer service requirements. 47 U.S.C. § 552(b). In accordance with that authority, the City of Detroit has established extensive customer service standards and a detailed framework for enforcement of those standards in its current Franchise.

55. Contrary to federal law, the Michigan Act purports to abrogate the customer service and consumer protection provisions of Detroit's current Franchise and prohibits Detroit from imposing any customer service requirements other than those in the Michigan Act or from enforcing any customer service standards.

56. The Federal Act expressly authorizes the City, as a franchising authority, to require a cable operator to provide adequate channels for the city, schools and public to use, including channel capacity, facilities, and financial support. 47 U.S.C. §§ 531 & 541(a)(4)(B).

57. Contrary to federal law, the Michigan Act purports to prohibit the City from requiring Comcast to provide such channels beyond those that exist in the current Franchise, and further prohibits the City from requiring Comcast to provide facilities, financial or technical support to utilize the existing channel capacity. MCL §§ 484.3303(8) & 3306(8).

58. The Federal Act expressly authorizes the City, as a franchising authority, to require cable operators to provide cable services to the entire city, within a reasonable time. 47 U.S.C. § 541(a)(4)(A).

59. Contrary to federal law, the Michigan Act purports to prohibit Detroit from requiring Comcast to serve all residents within the City. MCL §§ 484.3303(8), 3305(3) & 3309(9).

60. The Federal Act mandates that the City of Detroit, as 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 the group resides. 47 U.S.C. § 541(a)(3).

61. Contrary to federal law, the Michigan Act purports to prohibit the City of Detroit from taking actions that "shall assure" that 47 U.S.C. § 541(a)(3) is complied with. For example, the Michigan Act would allow cable operators to redline and otherwise discriminate on the basis of income within the City so long as 25% of the cable operator's customers anywhere in Michigan are "low-income." MCL § 484.3309(2)(a).

WHEREFORE, City of Detroit respectfully requests that this Court enter judgment in its favor and against Comcast declaring that the preceding provisions of the Michigan Act, and all other provisions that are in conflict with the Federal Act, are preempted by the Federal Act and awarding all other relief to which the City may be entitled.

COUNT IV
VIOLATION OF MICHIGAN CONSTITUTION

62. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs.

63. Prior to 1908, both Michigan municipalities and the State of Michigan itself, had the authority to issue franchises.

64. In 1908, the People of the State of Michigan enacted a new Constitution, which declared that the sole authority to grant franchises rested exclusively with local units of government.

65. This delegation of authority by the People to local units of government, and limit on the powers of the State, was reaffirmed by Article 7, Section 29 of the 1963 Michigan Constitution, which provides:

No person, partnership, association, or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility, 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. (Emphasis added).

66. Pursuant to this provision, the City of Detroit, and only the City of Detroit, has the right to grant or deny franchises for cable operators within its jurisdiction, as well as to set the terms and conditions of those franchises.

67. The Michigan Act purports to usurp the authority granted to the City of Detroit by Article 7, Section 29 of the Michigan Constitution and otherwise contradicts the Michigan Constitution by, among other things, (a) specifying the terms of a cable franchise (the Uniform Franchise) and prohibiting the City from altering such terms, (b) automatically and immediately abrogating provisions of Detroit's existing Franchise that are contrary to the terms of the Uniform Franchise; (c) allowing Comcast to unilaterally abrogate its entire Franchise with Detroit; (d) prohibiting Detroit from renewing or extending its existing federally authorized Franchise with Comcast or granting a new franchise inconsistent with the Uniform Franchise mandated by the Michigan Act; (e) prohibiting Detroit from assessing any fees or charges to Comcast other than those allowed by the Michigan Act; (f) prohibiting Detroit from regulating and enforcing the level of service provided by Comcast to the residents of the City; (g) requiring Detroit to allow Comcast to install, construct and maintain a video service or communications network within the public rights-of-way; (h) prohibiting Detroit from taking any action to prevent discrimination or "redlining" by Comcast on the basis of race, income, or any other criteria or characteristic; and (i) prohibiting Detroit from enforcing Comcast's compliance with consumer protection laws or the terms of the Franchise.

68. The Michigan Act usurps the City's cable franchising authority by automatically deeming a Uniform Franchise approved unless the City notifies the applicant as to the Uniform Franchise's completeness within 15 business days of its being filed with the City. MCL § 484.3303(2), (3).

69. The Michigan Act usurps the City's cable franchising authority by automatically deeming a Uniform Franchise approved unless the City approves it within 30 days of its being filed with the City. MCL § 484.3303(3).

70. Because the Michigan Act directly contradicts the Michigan Constitution by usurping the cable franchising authority granted to Detroit, it is unconstitutional and of no force or effect.

WHEREFORE, the City of Detroit respectfully requests that this Court enter judgment in its favor and against Comcast, declaring that the Michigan Act is unconstitutional as to cable operators under Article 7, Section 29 of the Michigan Constitution and that the Franchise Agreement between the City of Detroit and Comcast remains in full force and effect, notwithstanding enactment of the Michigan Act and awarding all other relief to which the City may be entitled.

VARNUM LLP
Attorneys for Plaintiff

Dated: June 21, 2010

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

- And -

CITY OF DETROIT LAW DEPARTMENT

Krystal A. Crittendon, Corporation Counsel
(P49981)

Lewis Smith, Assistant Corporation Counsel
(P69547)

Business Address & Telephone:

660 Woodward Avenue, Suite 1650

Detroit, MI 48226

Phone: (313) 224-4550

Fax: (313) 224-5505

1346423_14.DOC