

Legislative Analysis



STATE VIDEO SERVICE AUTHORIZATION

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House Bill 6456

Sponsor: Rep. Mike Nofs

Committee: Energy and Technology

Complete to 9-13-06

A SUMMARY OF HOUSE BILL 6456 AS INTRODUCED 9-12-06

The bill would create a state video service authorization system to replace the current system of local franchising.

"Video services" in the bill means any of the following services: cable services; video programming (as defined in 47 U.S.C. § 522(2)); Internet protocol television or IPT; or open video system or OVS (as defined in 47 U.S.C. § 573) "provided through facilities located at least in part in the public rights-of-way without regard to delivery technology, including Internet protocol technology." The definition of "video services" does not include any video programming provided by a commercial mobile service provider as defined in 47 U.S.C. § 332(d).

General provisions.

- Incumbent video service providers would have to obtain state video service authorization after their current franchises expire to continue providing video service.
- A state video service authorization under the bill would constitute a franchise for purposes of federal law, and the state would constitute the exclusive franchising authority for video service providers in this state to the extent required for purposes of federal law.
- Local units of government would not be allowed to impose any separate franchise or fee requirements other than what is in the bill, e.g., local units may not impose any provision regulating rates, imposing build-out requirements, or requiring the deployment of any facilities or equipment.
- Except as provided in Section 5 of the bill, an incumbent video provider is not eligible for and may not use a state video service authorization in a local unit of government where it has a franchise until the franchise expires.

Applications for state video service authorization. Beginning 60 days after the bill goes into effect, an entity seeking to provide video service in Michigan would have to file an application for a state video service authorization with the PSC, on an approved form. The application must contain an affidavit signed by an officer or general partner of the applicant affirming all of the following:

- The applicant has filed or will timely file all forms required by the Federal Communications Commission (FCC) before offering video service in this state.

- The applicant will comply with all applicable federal and state statutes and regulations.
- The applicant will comply with all valid and enforceable local regulations regarding the use of public rights-of-way in the delivery of video service, including the police powers of the local units of government where the service is delivered.
- An exact description of the video service area footprint "as identified by a geographic information system digital boundary meeting or exceeding national map accuracy standards."
- The address and telephone number of the applicant's principal place of business.
- The names of the applicant's principal executive officers and any other persons authorized to represent the applicant before the PSC.
- The date on which the applicant expects to provide video services within the footprint described in the application.

Within 15 days after the application is filed, the PSC would have to notify the applicant whether the application and affidavit are complete. If not, the PSC would have to notify the applicant why the application or affidavit, or both, are incomplete. If the applicant and affidavit are complete, the PSC must issue a state video service authorization within 60 days after the submission date of a complete application. If the PSC misses the deadline for notifying the applicant regarding the completeness of its submission or the deadline for issuing the video service authorization, the application and affidavit will be considered complete and the state service authorization issued.

State video service authorizations. State video service authorizations will be issued in a form approved by the PSC and must contain all of the following:

- A grant of authority to provide video service in the service area footprint as provided in the application.
- A grant of authority to use and occupy the public rights-of way in the delivery of the video service, subject to the laws of this state, including the police powers of the relevant local unit of government.
- A statement that the grant of authority is subject to the lawful operation of the video service by the applicant or its successor in interest.

Authorizations are fully transferable to any successor in interest. Within 15 days of any transfer, notice must be provided to the PSC and the relevant local unit of government.

The state video service authorization issued by the PSC may be terminated or its footprint modified by the provider by submitting notice to the PSC and the relevant local unit of government. If any of the information in the application changes, the provider must notify the PSC and the relevant local unit of government within 30 days from the date the change occurs.

Authorizations will be for a period of 10 years from issuance and are renewable.

The PSC's authority to administer the law is limited to the powers and duties explicitly provided for in the law.

Public, Educational, and Governmental Access Channels. A video service provider must designate a sufficient amount of capacity on its network to provide for the same number of public, educational, and governmental access channels as are activated and provided within a local unit of government by any incumbent video provider under the terms of a franchise in effect as of the effective date of the bill. So long as a channel is used for public, educational, or governmental programming for at least eight hours a day, it is considered "activated." If there are no existing public, educational, or governmental channels in effect in a local unit of government on the effective date of the bill, a new video service provider must designate a sufficient amount of capacity on its network to provide for one or more of this type of channel.

Any public, educational, or governmental channel that is not used by the local unit of government for at least eight hours a day for three consecutive months can be taken away from the local unit of government and programmed at the provider's discretion. If the local unit can certify a schedule for at least eight hours of daily programming for a period of three consecutive months, the provider must restore the channel.

The public, educational, and governmental channels must be carried on the basic or lowest service tier. To the extent possible, these channels must not be separated numerically from other channels carried on the basic or lowest tiers and should be the same as those used by the incumbent video provider unless prohibited by federal law.

The local unit of government is responsible for ensuring that all transmissions, content, or programming to be retransmitted by a video service provider is in a form that can be accepted and retransmitted, without alteration, over the particular network of the provider, which is compatible with the technology or protocol used by the provider to deliver services. The local unit of government is solely responsible for all content to be provided over the public, educational, and governmental channels. A video service provider may not exercise any editorial control over any public, educational, or governmental channel or any other channel required by law or agreement with the local unit of government. A video service provider is not subject to any civil or criminal liability for any program carried on any channel designated for public, educational, or governmental use or on any other channel.

Interconnection. Where technically feasible, a video service provider and an incumbent video provider would have to interconnect their video systems for the purpose of providing applicable programming for the respective services areas. Interconnection may be made by any reasonable method of connection, including direct cable, microwave link, or satellite. Authorized providers and incumbents must negotiate interconnection issues in good faith, and incumbents cannot withhold interconnection.

Local broadcast channels. Except as otherwise provided, a provider would be required to provide its subscribers access to the signals of the local broadcast television licensed by

the FCC to serve those subscribers over the air. This requirement does not apply to a low power station except for a qualified low power station as defined under 47 U.S.C. § 534(h)(2). A provider is required to carry digital broadcast signals to the extent that the broadcast television station has the right under federal law or regulation to demand carriage of the digital broadcast signals by a cable operator on a cable system. To facilitate access by subscribers of a video service provider to the signals of local broadcast stations under this section, a station would either be granted mandatory carriage or may request retransmission consent with the provider.

A provider must transmit, without degradation, the signals a local broadcast station delivers to the provider, and may not be required to provide valuable consideration for the signals. A provider must not discriminate between broadcast stations and programming providers with respect to transmission of their signals, taking into account any consideration afforded the provider by the programming provider or broadcast station. The signal quality as retransmitted by the provider is not required to be superior to the quality as received from the broadcast television station. A provider also may not delete, change, or alter a copyright identification transmitted as part of a broadcast station's signal. A provider is not required to use the same or similar reception technology as the broadcast stations or programming providers. A provider that delivers audio or video programming to its subscribers would have to include all programming providers in a subscriber programming guide, if any, that lists program schedules.

Emergency messages. A video service provider must comply with all FCC requirements, including the distribution of emergency messages over the emergency alert system.

Franchises cannot be renewed after the law takes effect. Once the law takes effect, no existing franchise agreements may be renewed or extended. An incumbent video provider would be entitled to seek a state video service authorization in the area designated in the existing franchise (1) when the existing franchise expires, or (2) if the incumbent video provider and the franchising entity both agree to early termination of the franchise.

Notice to local units of government before construction or placement of equipment. At least 30 days before construction or placement of equipment or the infrastructure necessary to provide video services to a local unit of government under a state video service authorization, the provider would have to notify the relevant local unit of government in writing that the provider would be offering video services within the footprint previously submitted to the PSC.

Annual video service fees. Except as otherwise provided, a video service provider would have to calculate and pay an annual video service fee to each local unit of government. The fee would be equal to the lesser of:

- Up to five percent of gross revenues, as established by the local unit of government and filed with the PSC.

- The lowest percentage of gross revenues paid to the local unit of government by any incumbent video provider.

All fees due under this section would be due on a quarterly basis and paid within 45 days after the close of the quarter. Each payment would have to include a statement explaining the basis for the calculation of the fee. The PSC would request an annual statement from each local unit of government as to the percentage of gross revenues the unit seeks for fee. For jurisdictions not responding, the amount would be set at five percent. No fee would be due, however, until the local unit of government provides supporting documentation to the PSC of the percentages paid by each incumbent video provider. A local unit of government cannot demand any additional fees or demand the use of any other calculation method other than what is allowed under the bill.

If an incumbent video provider continues to provide video services after its existing franchise expires, it would be subject to the fees described above (the lower of the lowest percentage of gross revenues paid by an incumbent video provider or the amount established by the local unit of government, not to exceed five percent). If an incumbent video provider requests to be let out early from its franchise and the local unit of government refuses, after the expiration of the franchise the provider will pay the following fee if it continues to provide video services under a state authorization:

- The first three percent of gross revenues payable to the PSC to be deposited in the general fund to be credited to the PSC to offset the cost of administering the law.
- Any additional percentage not to exceed two percent payable to the local unit of government. Together, the fee payable to the PSC and the fee payable to the local unit of government may not exceed the percentage established in Section 6(4) of the bill (the annual statement by each local unit of government to the PSC of the percentage of gross fees sought from video service providers).

The support fee for public, educational, and governmental channels required under Section 6(13), discussed below, is payable to the local unit of government.

Definition of gross revenues for purpose of calculating applicable fees.

"Gross revenues" means "all consideration of any kind or nature, including, without limitation, cash, credits, property, and in-kind contributions received by the provider from subscribers for the provision of video service by the video service provider within the jurisdiction of the local unit of government." Gross revenues specifically include:

- All charges and fees paid by subscribers for video service, including equipment rental, late fees, and insufficient funds fees. Fees for video service are included in gross revenue regardless of whether the service was sold individually, as part of a package or bundle, or was functionally integrated with services other than video services.
- Any franchise fee imposed on the provider that is passed on to subscribers.

- Compensation received by the provider for promotion or exhibition of any products or services over the video service.
- Revenue received by the provider as compensation for carriage of video programming on that provider's video service.
- All revenue derived from compensation arrangements for advertising attributable to the local franchise area.
- Any advertising PSC paid to an affiliated third party for video service advertising.

Gross revenues specifically exclude:

- Any revenue not actually received, such as bad debt (net of any recoveries).
- Refunds, rebates, credits, or discounts to subscribers or a municipality to the extent not already offset, attributable to the video service.
- Any revenues received by the provider or its affiliates from the provision of services other than video services, including telecommunications services, and other non-video services bundled or functionally integrated with video services.
- Any revenues received by the provider or its affiliates for the provision of directory or Internet advertising.
- Any amounts attributable to the provision of video services at no charge, including the provision of services at no charge to public institutions.
- Any tax, fee, or assessment of general applicability imposed on the customer or the transaction, collected by the provider, and required to be remitted to the taxing entity, including sales and use taxes.
- Any forgone revenue from the provision of video services at no charge to any person, except that any forgone revenue exchanged for trades, barter, services, or other items of value.
- Sales of capital assets or surplus equipment.
- Reimbursement by programmers of marketing costs actually incurred by the provider for the introduction of new programming.
- The sale of video service for resale to the extent the purchaser certifies in writing that it will resell the service and pay a franchise fee with respect to the service.

In the case of video services bundled or functionally integrated with other services, the revenue for all of the services is included unless the provider can reasonably identify the division or exclusion of the non-video service revenue from books and records kept in the regular course of business. Revenue of an affiliate would have to be included in gross revenues "to the extent the treatment of the revenue as revenue of the affiliate has the effect of evading the payment of franchise fees which would otherwise be paid for video service."

Public, educational, and governmental programming support fee. A video service provider would have to pay a support fee, on a quarterly basis, to the local unit of government for public, educational and governmental programming. The fee would be "equal to the lesser of one percent of gross revenues, the percentage of gross revenues required of an incumbent video provider by a local unit of government, or the amount paid on a cash basis per subscriber for support of public, education, and government

programming to the local unit of government by the incumbent video provider with the largest number of cable service subscribers in the local unit of government." The local unit of government would have to provide data to the video service provider necessary to calculate the fees due under this section at least 30 days before payments are due.

Credits. A video service is entitled to a credit applied toward its annual video service provider fees for all funds allocated to the local unit of government from annual maintenance fees paid by the provider for use of public rights-of-way under the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act. The credits are applied on a monthly pro rata basis.

Audits. A local unit of government may perform reasonable audits of the video service provider's calculation of the fees paid to the local unit of government during the preceding 24-month period only, not more than once every 24 months. The provider must make all records reasonably necessary for the audits available at the location where the records are kept in the ordinary course of business. If the audit shows that an additional amount is due to the local unit of government, that amount would have to be paid within 30 days of local unit of government's submission of an invoice for the sum. If the underpayment exceeds five percent of the total fees that should have been paid during the 24-month period, the provider would have to pay the local unit of government's auditing costs. If the audit shows that the provider has not underpaid the appropriate fees, the local unit of government would have to pay the provider's reasonable auditing costs.

Limitations period. Any claims by a local unit of government that fees have not been paid as required, and any claims for refunds or other corrections to the remittance of the provider, would have to be made within three years from the date the money is remitted.

Identification of fees on subscribers' bills. A provider may identify and collect the amount of the video service provider fee and the public, educational, and governmental programming support fee as separate line items on the regular bill of each subscriber.

Use of rights-of-way. A local unit of government would have to allow a state video service provider to install, construct, and maintain a communications network within a public right-of-way and would have to provide the provider with "open, comparable, nondiscriminatory, and competitively neutral access to the public right-of-way."

A local unit of government may not discriminate against a video service provider to provide service for any of the following:

- The authorization or placement of a communications network in public rights-of-way.
- Access to a building.
- A municipal utility pole attachment.

A local unit of government may only impose a permit fee on a video service provider to the extent it imposes the same fee on incumbent video providers. Further, any permit fee

must not exceed the actual, direct costs incurred by the local unit of government for issuing the relevant permit. A permit fee may not be levied if the video service provider has already paid a permit fee in connection with the same activity or if the video service provider is otherwise authorized by law or contract to place the facilities used by the video service providers in the public right-of-way. Permit fees may not be levied for general revenue purposes.

Non-discrimination in access against low-income persons. A video service provider that has been granted a state authorization may not deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which the group resides.

A provider is deemed to have complied with this provision if the following conditions are met:

- (1) Within 3 years of the date it began providing video service, at least 25 percent of the households with access to the provider's video service are low-income households (as defined in the bill, a household with an average annual household income of less than \$35,000.00).
- (2) Within 5 years of the date it began providing video service under the law and subsequently, at least 30 percent of the households with access to the provider's video service are low-income households.

Access timetables. A video service provider granted authorization under the law must provide access to its video service to at least 35 percent of the households in its service area within 3 years and to at least 50 percent of those households within 5 years. No later than 5 years after it began providing video service, the provider must file a report with the PSC demonstrating compliance with this section and the provision pertaining to low-income persons.

A video service provider may satisfy the requirements of this section through the use of alternative technology offering "service, functionality, and content" that is similar to that provided through the provider's video service system and may include a technology that does not require the use of any public right-of-way. Any alternative technology used must include the local public, educational, and governmental channels and emergency alert system messages.

A video service provider may apply to the PSC for a waiver from these requirements or for an extension of time if one or more of the following apply:

- (1) It was unable to obtain access to public and private rights-of-way under reasonable conditions.
- (2) Developments or buildings were not subject to competition because of existing exclusive service arrangements.
- (3) Developments or buildings were inaccessible using reasonable technical solutions under commercially reasonable terms and conditions.

- (4) Natural disasters.
- (5) Factors beyond control of the authorization holder.

The PSC may grant the waiver or extension only if the provider has made "substantial and continuous" effort to meet the requirements of bill. If an extension is granted, a new deadline will be established; if a waiver is granted, the PSC would have to specify the requirements waived.

Notwithstanding any other provision, no video service provider using telephone facilities to provide video service is obligated to provide service outside its existing telephone exchange boundaries.

Notwithstanding any other provision, a video service provider would not be required to comply with, and a local unit of government would not be permitted to impose or enforce, any mandatory build-out or deployment requirements or schedules.

Dispute resolution. Video service providers would have to establish a dispute resolution process for its customers and maintain a local or toll-free telephone number for customer service. The PSC would have to establish a process to review disputes not resolved under the provider's own process, disputes between a provider and a local unit of government, and disputes between providers. Each provider must notify its customers of the resolution dispute process.

Freedom of Information Act exemptions. Except under the terms of a mandatory protective order, trade secrets and commercial and financial information submitted to the PSC or a local unit of government would be exempt from the Freedom of Information Act. If disclosed under a mandatory protective order, the PSC or the local unit may use the information for the purpose for which it is required, but otherwise the information would remain confidential. Cost studies, customer usage data, marketing studies/plans, and contracts would be rebuttably presumed exempt from FOIA disclosure. The party seeking disclosure of the information would have the burden of rebutting the presumption.

Annual report by the PSC. The PSC would have to file an annual report with the Governor and Legislature by February 1 on video service competition in the state; recommendations for legislation, if any; PSC actions to implement the law; and information about all state video authorizations granted under the law.

Remedies for violations. If, after notice and hearing, the PSC finds that a person has violated the law, it would order remedies and penalties designed to protect and make whole persons who have suffered damages, including, but not limited to:

- A fine for a first offense of not less than \$20,000 or more than \$30,000. For a second or subsequent offense, the PSC would order a fine of not less than \$30,000 or more than \$50,000.
- Revocation of a person's state video service authorization.
- Cease and desist orders.

No fines would be imposed on providers who have otherwise fully complied with the law who can show that the violation was due to an "unintentional and bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error." The bill cites possible examples of bona fide errors as clerical, calculation, computer malfunction, programming, or printing errors. Errors in legal judgment with respect to a person's obligations under the law do not qualify as bona fide errors. The burden of proving that a violation was an unintentional and bona fide error is on the provider.

If the PSC finds that a party's complaint or defense is frivolous, the PSC would be required to award costs to the prevailing party, including reasonable attorney fees.

FISCAL IMPACT:

This bill increases State of Michigan revenue by an indeterminate amount. In limited cases, where an incumbent video service requests to be let out early from its franchise, and the local government refuses, the Public Service Commission will receive a 3 per cent fee on the gross receipts of that video service provider. This 3 per cent is to be used by the Public Service Commission to minimally offset the cost of administering the granting of franchises to video service providers. Public Service Commission expenditures will rise to staff and administer this new regulatory function, but the amount of increase is not determinable at this time. However, the cost is expected to far exceed any revenue.

Local government revenue will also be impacted, but the results may vary. The bill provides for local governments to receive the lesser of up to 5 per cent of gross receipts from franchises within their jurisdiction or the lowest percentage of gross revenues paid to the local unit of government by any incumbent video provider. Therefore, some municipalities may receive an increase in franchise revenues, and others a decline. In addition, multiple franchises may be granted by the PSC within a single local jurisdiction, which should result in an increase in these franchise fees. Local government expenditures should not be significantly impact as a result of this bill, and could potentially decrease as some of their regulatory function is transferred to PSC.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.